Kibuwa Leasing & Management Limited v Jadala Investments Limited & another (Civil Appeal 464 of 2018) [2023] KECA 895 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KECA 895 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 464 OF 2018

HA OMONDI, KI LAIBUTA & A ALI-ARONI, JJA

JULY 24, 2023

BETWEEN

KIBUWA LEASING & MANAGEMENT LIMITED .... APPELLANT

AND

JADALA INVESTMENTS LIMITED .... 1ST RESPONDENT

NGONG LANE MANAGEMENT LIMITED .... 2ND RESPONDENT

(Being an appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (R. Ngetich, J.) dated 1st November 2018 in Misc. App. No. 227 of 2017)

JUDGMENT

1. The appellant, Kibuwa Leasing and Management Limited, and the respondents, Jadala Investments Limited (the 1st respondent) and Ngong Lane Management Limited (the 2nd respondent) entered into four lease agreements dated 21st June 2013 and registered on 1st June 2014 in respect of office units No. 1 and 2 situate on the ground floor as well as units 3 and 4 situate on the 4th floor of the building known as Jadala Place belonging to the 1st respondent and erected on LR No. 209/409/7, and located on Ngong Lane off Ngong Road within the city of Nairobi.

2. The leases aforesaid were for a term of 999 years commencing on 1st June 2014, and subject to express terms and conditions as to, inter alia, the rent payable, service charge and restrictions as to use Clause 2.10 of the leases provided as follows:

   > " 2.10 Not to use or permit to be used the said premises for any purpose other than as offices/showrooms and not for any purpose or in any manner which may at any time be or become a nuisance or annoyance to the owners or occupiers of any Office Units/Showrooms in the premises or be injurious or detrimental to

the reputation of the premises. No pet or animal of any kind will be permitted on the premises."

3. Subsequently, the appellant took possession of the four units aforesaid and entered into a lease agreement with Dou Xiangju Kenya Limited (the tenant) for a term of six (6) years with effect from 18th November 2015 in respect of units 1 and 2 (the suit property) situate on the ground floor of the building aforesaid.

4. The tenant proposed to use the suit property to operate a supermarket with a mini-market, deli and café, the use of which the 2nd respondent (the then management company in charge of the premises) disallowed on the grounds that the proposed use offended the provisions of clause 2.10 of the lease. Failing amicable settlement between the appellant and the respondents, the appellant refunded the sum of KShs. 2,303,642 paid to it by the tenant on account of rent.

5. A dispute having arisen over and concerning alleged loss of rental income and breach of contract, the appellant referred its claim against the respondents to arbitration pursuant to clause 5.2 of the lease agreements, which required all disputes and questions touching on the lease to be referred to the decision of a single arbitrator to be appointed by the Chairman for the time being of the Law Society of Kenya. That clause reads:

> " 5.2 Save as the Lessor's and/or the Manager's right of re-entry upon the said Premises contained in Clause 5.1 above, all disputes and questions whatsoever which shall arise between the parties hereto touching this Lease or the construction or application thereof of any clause or things herein contained or to the rights or liabilities of any part under this lease shall be referred to the decision of a single Arbitrator to be appointed by the Chairman of the Law Society of Kenya."

6. Pursuant to the arbitration agreement aforesaid, Mr. Colins Namachanja was appointed on 2nd December 2015 as sole arbitrator in the reference.

7. In its statement of claim dated 21st March 2016, the appellant prayed for:

> " a. A declaration that the leases' dated 21st June,2013, and entered into between the parties for the suit premises is for the use of the suit premises as either an office/showroom or retail space.
>
> b. A declaration that the user of the premises as a supermarket was not in breach of the specific terms of Leases' dated 21st June 2013.
>
> c. A declaration that the Respondent's wrongfully barred the tenant of the Claimant from its proposed business of running the business of a supermarket at the premises.
>
> d. A declaration that the Respondent condemned the Claimant for breach of terms of lease when no such beach had taken place.
>
> e. An award for Special Damages against the Respondent's jointly and severally for Damages on the Mesne Profits in respect of the lost rental income the particulars of which are provided hereinabove aforesaid together with interest at the compounded commercial banks mean rate of 21% per annum from the 18th day of November 2015 up to the date the suit premises are occupied by

a new tenant and computed on monthly rests, on such sum as assessed and found fair and awarded by the Honourable Tribunal until payment in full.

i) Loss of rental income,

ii) Interest on the lost rental income at 21% per annum

f. An award for General Damages for breach of contract by the Respondent's leading to the tarnishing of the Claimants' name with the Tenant and the other Sub- Tenants who were summoned to the Extraordinary General Meeting on 6th February 2016 for an anticipatory action which had not been effected.

i) Loss of the Tenant,

ii) Misunderstanding caused with the other Sub-Tenants.

g. That the 1st and 2nd Respondent's do jointly and severally meet the entire costs of this arbitral tribunal in respect of both the Claimant's costs and the arbitrator's costs;

h. A declaration that the Claimant shall not pay service Charge for the suit premises for the Period from 18th November 2015 up to the date a new tenant occupies either of the premises as the default has been occasioned by the actions of the Respondent's in turning away the Claimants' tenant who had a six (6) year lease.

i. Interest on (e), (f) and (g) above until the date of payment in full.

j. Any further or other relief deemed just by this Honourable Tribunal."

8. The appellant's case was that the respondents acted in breach of the contract of lease; that the leases were clear in terms as to the permitted use of the leased premises; that its tenant was by no means in breach of the terms of the lease; that the kind of business the tenant wished to operate was permissible under the leases; that the appellant and its tenant were condemned for an anticipatory event that had not taken place; that the respondents were not justified in barring the appellant's tenant from setting up their business; and that the respondents had deprived the appellant of its right to use the suit property for commercial gain thereby occasioning them loss and damage.

9. The respondents filed a joint statement of defence dated 15th April 2016 stating that the proposed use by the appellant's tenant of the premises offended the provisions of the lease; and that the appellant acted in breach of the lease agreement by relinquishing possession of the suit property to a third party before first obtaining written consent from the 2nd respondent as required under clause 2.22. They denied liability for the loss and damage allegedly suffered by the appellant.

10. In his Award dated 14th December 2016, Mr. Collins Namachanja dismissed the appellant's claim in its entirety with costs to the respondents having found that the proposed user was in breach of the terms of the lease; and that the respondents were entitled to withhold their consent to lease. According to the learned arbitrator, the appellant had failed to prove its claim, and was therefore not entitled to the relief sought.

11. Dissatisfied by the arbitral award dated 14th December 2016, the appellant moved to the High Court of Kenya at Nairobi in HC Misc. App. No. 227 of 2017 seeking to have the award set aside essentially on the grounds, inter alia: that the award was in conflict with the public policy of Kenya; that the award was an attempt to rewrite the contract between the parties; that the arbitrator adopted an inquisitorial

approach in the reference in favour of the respondents and reached an award on matters that were neither pleaded nor canvassed by either party; that the award was grounded on a marketing brochure not constituting the contract; that the award was speculative and dealt with matters outside the scope of the arbitration; and that the award adopted the respondents' submissions.

12. The appellant's application was supported by the affidavit of John Muriuki Kibuchi, the appellant's Managing Director, sworn on 15th May 2017 substantially deposing to the grounds on which the application was made.

13. The respondents opposed the appellant's application *vide* the replying affidavit of Isaac Muthere Macharia (the Chairman of the 1st respondent) sworn on 30th June 2017 and of Japheth Okoth Olende (the Chairman of the 2nd respondent) sworn on 11th July 2017. The respondents' case was that the appellant did not specify what public policy had been abused by the award; that the marketing brochure was never an issue to be determined, and was never mentioned in the appellant's statement of claim; that the arbitral tribunal addressed all the issues put to it; and that the dispute between the parties was the user of the retail space.

14. In addition to their reply to the appellant's application, the respondents moved the court to enforce the award *vide* their application dated 11th September 2017 in the same cause – Nairobi HC Misc. App. No. 227 of 2017 – seeking: adoption of the arbitral award; judgment in their favour in terms of the award; and leave to enforce the consequential decree against the appellant.

15. The respondents' Motion was supported by the affidavit of Antony Akelo Okulo, learned counsel for the respondents, sworn on 11th September 2017 generally deposing to the grounds on which the application was anchored, and setting out the steps taken in the appointment of the arbitrator; the arbitral process and the making of the impugned award; and the formal requirement for leave to have the arbitral award adopted as a judgment of the court

16. The appellant opposed the respondents' application *vide* the replying affidavit of Aldrin Ojiambo, learned counsel for the appellant, sworn on 6th April 2018. According to Mr. Ojiambo, the respondents' application was premature; that the appellant's earlier application could not be heard as the parties had been exploring out of court settlement, but that they had not reached settlement; and that the application for leave to enforce the award should be dismissed with costs.

17. The parties filed written submissions whereupon the two applications were heard together and determined *vide* a ruling dated 1st November 2018 by which Ngetich, J. dismissed the appellant's application with costs and allowed the respondents' Motion as prayed. Accordingly, the arbitral award was adopted as a judgment and decree of the court with costs to the respondents.

18. Aggrieved by the ruling and orders of Ngetich, J., the appellant moved to this Court on appeal on 11 grounds set out in its memorandum of appeal dated 20th December 2018 faulting the learned Judge for, among other things: misconstruing the appellant's application thereby reaching a wrong conclusion; failing to address the issues raised by the appellant; rubber-stamping and affirming the allegedly flawed arbitral award; upholding an award reached by a tribunal without jurisdiction and outside the scope of the reference; upholding the award based on a speculative selling point of a supermarket contained in a marketing brochure; and for disregarding the appellant's submissions.

19. Learned counsel for the appellant, M/s. Ojiambo & Company, filed written submissions, list and bundle of authorities, all dated 3rd May 2023 citing 8 judicial authorities to which we will shortly address ourselves. In rebuttal, learned counsel for the respondents, M/s. Okulo & Company, filed

written submissions and a list of authorities dated 8th May 2023 citing 4 judicial authorities, which we will shortly consider.

20. Having carefully considered the record of appeal, the grounds on which it is anchored, the impugned ruling and orders, the written and oral submissions of counsel for the appellant and counsel for the respondents, the cited judicial decisions and statute law, we form the view that the appeal before us stands or falls on our finding on four (4) broad issues, namely: whether the appellant has a right of appeal to this Court from the impugned ruling and orders of the High Court (Ngetich, J.); if the answer is in the affirmative, whether the learned Judge erred by upholding the award allegedly reached without jurisdiction and outside the scope of the reference; whether the learned Judge erred in holding that the award was not in conflict with the public policy of Kenya; and what orders ought we to make in determination of this appeal, including orders on costs.

21. On the 1st issue as to whether the appellant had a right of appeal to this Court, we wish to point out right at the outset that appeals against orders adopting an arbitration award as a judgment of the court (or dismissing an application to set aside the award, as the case may be) does not call for a merit review of the award by re-assessment or re-appraisal of points of law or fact, or re-evaluation of the evidence adduced in the arbitral proceedings leading to the award sought to be challenged. Put differently, rule 31(1) (a) of the *Court of Appeal Rules* does not apply to such appeals so as to mandate this Court to conduct a merit review of the award or undertake a retrial of the issues raised in the reference. Even though this is a first appeal, it must nonetheless pass the stringent test prescribed in sections 10, 35(2) and 39(3) of the *Arbitration Act* (Revised 2019), 1995 with regard to the constricted right of appeal.

22. The foregoing approach is founded on sound reason. The private, consensual and contractual nature of arbitral proceedings founded on the principle of party autonomy and the sanctity of the arbitral process necessarily narrow the grounds on which courts may intervene so as to disturb the outcome thereof. To hold otherwise would be tantamount to undermining the purposes of the *Arbitration Act*, which include limiting judicial involvement in the arbitral process and achieving consistency with international arbitration regimes. Accordingly, judicial interference by the High Court or by this Court, an appeal is guided by, among others, the provisions of sections 10 and 35(2) of the *Arbitration Act*, 2019 (the Act), which stipulate the grounds on which arbitral awards may be challenged or set aside on application to the High Court, whose decision is liable to appeal pursuant to section 39(3) of the *Act*.

23. Section 10 of the *Act* lays down the principle that guides the judicial process on the extent of intervention in proper cases. The section lends clarity to the limitation placed on domestic courts not to interfere with the arbitral process except, perhaps, in cases of procedural failures or defects. The section reads:

> 10. Extent of court intervention
>
> Except as provided in this *Act*, no court shall intervene in matters governed by this *Act*.

24. On the other hand, section 35(2) of the *Act* goes further and prescribes the grounds on which an arbitration award may be set aside on application by any party to the arbitral process. That section reads:

> 35. Application for setting aside arbitral award
>
> (1) ....
>
> (2) An arbitral award may be set aside by the High Court only if—
>
> a. the party making the application furnishes proof—

i. that a party to the arbitration agreement was under some incapacity; or

ii. the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or

v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this *Act* from which the parties cannot derogate; or failing such agreement, was not in accordance with this *Act*; or

vi. the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

b. the High Court finds that—

i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii. the award is in conflict with the public policy of Kenya.

25. Turning to the decisive issue as to whether the appellant had the right of appeal to the Court of Appeal, the first port of call is section 39(3) of the *Act*, which limits the jurisdiction of this Court and narrows the scope of the Court's intervention either with the agreement of the parties or with leave of the Court in special circumstances. Whatever the case, the appeal to this Court must be restricted to the matters contemplated in section 35(2) of the *Act*, namely the grounds on which an application may be made to set aside an arbitral award. Section 39(3) of the *Act* reads:

39. Questions of law arising in domestic arbitration

… …

3. Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—

a. if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or

b. the Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal

the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).

26. It is common ground that the parties had not reached any agreement with regard to appeal to this Court as contemplated in section 39(3) (a) of the *Act* pursuant to which the parties may, prior to the delivery of the arbitral award, agree that an appeal shall lie to this Court from a decision of the High Court in determination of an application under section 35(2). It is for this reason that the appellant sought and obtained leave to appeal pursuant to section 39(3) (b) of the *Act*. In conclusion, the appellant could not move this Court on appeal as of right but, rather, required leave that was duly granted.

27. We need not over-emphasise the fact that leave to appeal to this Court avails in the backdrop of sections 10, 35 and 39 of the Act, which substantially mirror the universal standards for safeguarding the sanctity of arbitral proceedings as enshrined in Article 5 of the *UNCITRAL Model Law on International Commercial Arbitration*, Revised 2006 (1985), which provides:

> " Article 5. Extent of court intervention
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law."

28. The explanatory note to this Article sheds more light on the circumstances in which court intervention may be permitted and reads:

> " Explanatory Note
>
> 7. Recourse against award
>
> a. Application for setting aside as exclusive recourse
>
> 45. The first measure of improvement is to allow only one type of recourse, to the exclusion of any other recourse regulated in any procedural law of the State in question. Article 34 (1) provides that the sole recourse against an arbitral award is by application for setting aside, which must be made within three months of receipt of the award (article 34 (3)). In regulating "recourse" (i.e., the means through which a party may actively "attack" the award), article 34 does not preclude a party from seeking court control by way of defence in enforcement proceedings (articles 35 and 36). Article 34 is limited to action before a court (i.e., an organ of the judicial system of a State). However, a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades)."

29. Judicial intervention invoked pursuant to a litigant's right of appeal from a decision of the High Court to uphold an arbitral award (or to dismiss an application to set aside an award) has for a long time been the subject of scholarly interrogation and judicial pronouncements by this Court and the Supreme Court. In the same vein, the learned author and scholar, Dr. Kariuki Muigua in his article titled "*Arbitration Law and the Right of Appeal in Kenya*" (A Paper Presented at the Law Society of Kenya Continuing Professional Development Webinar on Arbitration held at Nairobi on 13th November 2020) had this to say on the matter:

> " In interpreting the right of appeal under the arbitration law in Kenya, the point of departure is to note that the law envisages limitation of judicial intervention within the parameters

provided. This has been succinctly captured by the *Arbitration Act* which provides that 'except as provided by the *Act*, no court shall intervene in matters governed by the *Act*.' The concept of limitation of judicial intervention is generally accepted in arbitral practice across the world ....

Limitation of judicial intervention in arbitration is in line with the principle of finality of arbitration which is aimed at facilitating expeditious settlement of disputes. To this extent, it has been rightly observed that unwarranted judicial review of arbitral proceedings will simply defeat the object of the *Arbitration Act* and thus the role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration but will also be a clear negation of the legislative intent of the *Arbitration Act*."

30. In recognition of the private, consensual and contractual nature of arbitral proceedings, which are designed to guarantee expedition in dispute resolution, the Supreme Court had this to say in *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR:

> " 41. ... we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the *Act*. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in Nyutu and Synergy should not be taken as stating anything to the contrary."

31. Pronouncing itself on the residual jurisdiction of the Court of Appeal in the rarest of cases involving process failures, the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR took to mind (in what was essentially a comparative review of the position in other jurisdictions) the Singaporean case of *AKN & another v ALC and others and other appeals* [2015] SGCA 18 with approval and held as follows:

> " [71] We have in that context found that the *Arbitration Act* and the *UNCITRAL Model Law* do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the *Constitution* 2010, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under section 35 of the *Act* for Orders of setting aside of the award. And hence the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.

[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in *AKN and another* (*supra*) that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle ….

[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction.

[78] In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. The High Court and the Court of Appeal particularly have that onerous yet simple task."

32. In *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, the Supreme Court also held that:

" [84] Generally therefore, once parties agree to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. Once an award is issued, an aggrieved party can only approach the High Court for setting aside the award, only on the specified grounds. And hence, the purpose of Section 35 is to ensure that Courts are able to correct specific errors of law, which if left alone would lead to a miscarriage of justice.

Therefore, even in promoting the core tenet of arbitration which is a quicker and efficient way of settling commercial disputes, that should not be at the expense of real and substantive justice. In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in *Inco Europe Ltd & others* (supra) hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances.

[85] Such a finding is in consonance with practices from other jurisdictions and maintains fidelity to the law. Having said so, we are of the further opinion that a decision on whether the Court of Appeal should assume jurisdiction on appeals arising from Section 35 should be guided by the following consideration i.e. whether the High Court has overturned an award other than on the grounds in Section 35 of the Act ….

[86] For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the *Arbitration Act*, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the *Act* for interfering with an Arbitral Award.

[87] In applying the above criteria, it would be expected that the Court of Appeal would jealously guard the purpose and essence of arbitration under Article 159(3)(d) so that floodgates are not opened for all and sundry to access the appellate mechanism."

33. Thus far, we have extensively explored the relentless attempt to safeguard the sanctity of the arbitral process by means of statute law and treaty instruments that firmly restrict court intervention except, perhaps, in support of arbitral proceedings and enforcement of arbitral awards. As we have already observed, section 35(2) of the *Act* stipulates the only grounds on which a litigant may move the High Court to set aside an arbitral award, and to do so without engaging in merit review thereof. Section 39(3) goes further and sets out the circumstances under which this Court may be moved on appeal from a decision of the High Court made pursuant to section 35(2) of the *Act*. Indeed, we are guided by those strict provisions in identifying the real issues that fall to be determined in this appeal.

34. On the authority of *Geo Chem Middle East v Kenya Bureau of Standards*, *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* and *Synergy Industrial Credit Limited v Cape Holdings Limited* (*supra*), we form the view that, even though the appellant has made a case for appeal to this Court, its appeal stands or falls on our finding on only two main grounds, namely: whether the learned Judge erred in failing to find that the impugned award went beyond the scope of the reference; and whether the same was made in contravention of public policy. As for the remaining nine or so grounds advanced in support of the appeal, they constitute an invitation to engage in a merit review of the impugned ruling, which we cannot undertake. Accordingly, we shall confine ourselves to those grounds contemplated in section 35(2) read with section 39(3) of the *Act* pursuant to which we identify the 2nd and 3rd issues set out above as deserving of our consideration.

35. We reach this conclusive decision guided by the Supreme Court's decision In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* (*supra*) citing the Singaporean case of *AKN & another v ALC and others* (*supra*) where the Court of Appeal in Singapore held thus (at paragraphs 38 and 39):

"In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, the parties to an

arbitration do not have a right to a 'correct' decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process. In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration." (Emphasis ours) (*See also Inco Europe Ltd & Others v First Choice Distribution (A Firm) and Others(Inco Europe Ltd)*)[2000] l Lloyd's Rep. 467

36. Turning to the 2nd issue as to whether the learned Judge erred by upholding the award allegedly reached without jurisdiction and outside the scope of the reference, learned counsel for the appellant submitted that the Judge erroneously took an inquisitorial approach that led to findings that are speculative and extraneous, and that these speculative findings were made on matters not present in the Arbitral award; that, further, the Judge dwelt on matters not submitted by the parties; that the Judge proceeded unhinged to quote and misconstrue clause 2.10 in the lease agreement on rental spaces 1 and 2; and that, ultimately, the Judge assumed an appellate position when she analysed in depth the correctness of the Arbitral Award.

37. To buttress his submissions, counsel cited the Supreme Court decision in *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR in which the Court had this to say:

> " [I]t is not the function nor the mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the Court was called upon to determine whether or not to set aside an award...if the Court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the Court would be sitting on an appeal over the decision in issue."

38. In rebuttal, counsel for the respondents submitted that the arbitral award was based on the issues agreed upon, and did not in any way address matters outside the scope of the reference to arbitration.

39. On the issue as to whether the learned Judge erred in failing to find that the award exceeded the scope of the reference, the appellant contended that the Arbitrator based his decision on what was stated in the brochure advertising Jadala Place. Closely connected with the alleged excess of jurisdiction, counsel for the appellant submitted further that "when a court or arbitrator determines issues not pleaded, they deny parties a fair hearing."

40. In answer, counsel for the respondents submitted that the arbitrator dealt with all the issues agreed for determination. As the learned Judge correctly observed with regard to clause 2.10 of the lease and the alleged excess of jurisdiction on the part of the arbitrator:

> "... it is evident that the lease clearly gave limitations on use of the space leased. It is not therefore correct to say that the Arbitrator relied on what was indicated in the brochure. On the contrary, the determination is based on terms of the lease executed by the parties herein."

41. We find nothing to fault the learned Judge for reaching that conclusion. Neither do we find anything to suggest that the award fell fowl[sic] of the principle enunciated in *Teejay Estates Ltd v Vihar*

Construction Limited [2022] eKLR so as to find fault in the impugned judgment. In that case, Mabeya, J. correctly observed:

> " An arbitrator must conduct himself in a manner that does not destroy the confidence of the parties or either of them. None of the parties should leave the arbitration with a feeling that; 'I have not had a fair hearing'."

42. We find nothing to fault the learned Judge for concluding that the appellant's contention that the arbitrator exceeded his jurisdiction by considering the contents of the marketing brochure aforesaid was without basis. Neither is there anything to suggest that the appellant was not accorded a fair hearing on all issues agreed as falling to be determined in the arbitration. Moreover, the proposed use of the suit properties was not in contention, having been expressly pleaded in the appellant's statement of claim in the arbitral process. On page 27 of the Award, the arbitrator makes reference to clauses 2.10, 2.12,2.26.2 and 2.26.3 on the basis of which he concluded that the proposed use of the suit properties as a supermarket, deli and café would have resulted in breach of the lease.

43. In our considered view, the learned Judge could not be faulted for upholding the Award on that score, and for dismissing the appellant's claim that she failed to set aside the Award on the ground that it exceeded the scope of the reference allegedly on account of reference to the marketing brochure brought on record of the arbitral tribunal as part of the appellant's own list and bundle of evidential documents dated 21st March 2016. Moreover, if the appellant did not wish to bring the contents of the brochure in issue to the arbitrator's attention, nothing would have been easier than to exclude it from its bundle of evidential documents.

44. It is also noteworthy that the allegation of the arbitrator's excess of jurisdiction was raised for the first time in the submissions of counsel for the appellant dated 3rd May 2023 in support of the appellant's Motion to set aside the arbitral award. According to Mr. Ojiambo:

> " a. The arbitrator made his findings on extraneous matters not place before him;
>
> b. The arbitrator made findings on brochures that were neither part of the lease agreement nor submitted during arbitral proceedings.
>
> c. The arbitrator exceeded his mandate when he read the contents of the brochure into the lease, effectively rewriting the lease ...
>
> e. the arbitrator had no power to construe the lease in a manner that rewrites it."

45. We reach the foregoing conclusion mindful of, and affirming, the High Court's decision in *Equity Bank Ltd v Adopt a Light Limited* [2014] eKLR where the court correctly held that –

> " ... in order to succeed (in showing that the matters objected to are outside the scope of the reference to arbitration) the Applicant must show beyond doubt that the arbitrator has gone on a frolic of his own to deal with matters not related to the subject matter of the dispute..."

46. But for the mention of the contents of the marketing brochure, we are not told what fell outside the scope of the reference in respect of which the learned Judge is said to have failed to fault the arbitrator for. Our examination of the arbitral proceedings, the arbitral award, the impugned judgment, and the rival submissions of the parties, does not reveal what might have led to the contention that the arbitrator acted in excess of jurisdiction, or that he failed to accord the appellant a fair hearing. If that were the case, the appellant was mandated to raise such a plea at the earliest opportunity during the arbitral proceedings. It did not.

47. Section 17(3) of the *Act* provides that

> "a plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings."

48. As the High Court at Nairobi in *Joma Investments Limited v N. K. Brothers Limited* [2018] eKLR correctly observed when considering the effect of section 17(3) of the *Act* and the consequences of failure to raise an objection at the first instance:

> " Given the foregoing, my take is that since the arbitrator did not deal with any substantive aspect of whatever dispute that was before him, instead of filing the instant summons, the applicant ought to have followed the procedure stipulated under section 17 of the *Arbitration Act* and challenged the arbitrator's jurisdiction to determine those claims it felt went beyond the scope of his authority once the arbitral proceedings began."

49. In conclusion, we find that no jurisdictional issues or breach of the appellant's right to fair hearing were ever raised before the arbitrator pursuant to section 17(3) of the *Act*, raising such issues before the learned Judge pursuant to section 35(2) of the *Act* was an afterthought in vain and against the grain of clear statutory edicts from which the superior court cannot stray. Accordingly, that ground of appeal also fails.

50. Turning to the 3rd issue as to whether the learned Judge erred in holding that the award was not in conflict with the public policy of Kenya, the appellant's case is that:

> " ... (i) as a quasi-judicial body, it behooved the Arbitrator to afford disputants the right to a fair hearing, (ii) an award that divests a party of its property in an abundance of other solutions is not made in public interest, (iii) the award being inconsistent with articles 10, 50, 159 of the *Constitution*, ss.19, 35 & 29 of the *Arbitration Act*, and (having robbed the Appellant of his money and property – militates against public policy."

51. In brief rebuttal, learned counsel for the respondents submitted that the Appellant did not state in clear and precise terms what type or nature of public policy had been violated by the award, or ignored in the Court's ruling.

52. In her ruling, the learned Judge took to mind the appellant's contention that, "... by allowing the Respondent to keep the purchase price while denying the Applicant the right to use the premises, the award is manifestly unjust and against public policy of Kenya." In her finding, "... it is evident that the Applicant has not been denied use of the space for activities indicated in the lease agreement." She went on to conclude, as we hereby do, that the appellant had failed to demonstrate how the award was against public policy.

53. In *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366, Ringera, J. (as he then was) had this to say on the nature of public policy:

> " Public policy is a broad concept incapable of precise definition. An award can be set aside under Section 35 (2)(b) (ii) of the *Arbitration Act* as being inconsistent with the public policy of Kenya if it is shown that it was either (a) inconsistent with the Constitution or any other law of Kenya whether written or unwritten, or (b) inimical to the national interest of Kenya, or (c) contrary to justice and morality."

54. In the same vein, the High Court at Mombasa in *Glencore Grain Limited v TSS Grain Millers Limited* (2002) 1 KLR 606 correctly observed at 626:

> "A contract or arbitral award will be against the public policy of Kenya in my view if it is immoral or illegal or that it would violate in clearly unacceptable manner basic legal and/or moral principles or values in the Kenyan society. It has been held that the word "illegal" here would hold a wider meaning than just "against the law". It would include contracts or acts that are void. "Against public policy" would also include contracts or contractual acts or awards which would offend conceptions of our justice in such a manner that enforcement thereof would stand to be offensive."

55. We hasten to observe that none of the eventualities highlighted by Ringera, J. in the afore-cited case of *Christ for All Nations v Apollo Insurance Co. Ltd* (*supra*) or in *Glencore Grain Limited v TSS Grain Millers Limited* (ibid) were shown to be present in the arbitral award in issue to suggest that the award in issue was contrary to public policy.

56. That said, the term "public policy" must not be narrowly construed so as to place limitations in cases deserving of judicial intervention pursuant to section 35(2) of the Act. In *DST v National Oil Company* (1987) 2 All ER 769, Sir Johnson Donaldson M. R. observed;

> "consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J. remarked in *Richardson v Mellish* 'it is an element of illegality or that the enforcement of the award would be clearly injurious to the public good or possible that the enforcement would be wholly offensive to the ordinary reasonable and fully informed member of public on whose behalf the power of state are exercised.'"

57. In conclusion. The appellant's attack on the arbitral award and on the appeal before us on the ground that the learned Judge ought to have found that the award offended public policy is without basis. Having carefully examined the record of appeal, the rival submissions of learned counsel for the parties, the cited authorities and the law, we reach the reasoned conclusion that the appeal herein fails and is hereby dismissed with costs to the respondents.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

H.A. OMONDI

....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

....

JUDGE OF APPEAL

ALI-ARONI

....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR