Vipingo Ridge Limited v Kikenni Properties Limited & another (Civil Appeal E008 of 2022) [2023] KECA 1277 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1277 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E008 OF 2022

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

OCTOBER 27, 2023

BETWEEN

VIPINGO RIDGE LIMITED ..... APPELLANT

AND

KIKENNI PROPERTIES LIMITED ..... 1ST RESPONDENT

TAKAUNGU SPICE LIMITED ..... 2ND RESPONDENT

(An appeal from the ruling of the High Court of Kenya at Malindi (Githinji, J.) delivered on 17th November 2021inHigh Court Miscellaneous Application No. 65 of 2021)

JUDGMENT

1. In its a ruling dated and delivered on November 17, 2021, the High Court at Malindi (S.M. Githinji, J) allowed an application dated August 30, 2021 by the respondents, Kikenni Properties Limited and Takaungu Spice Limited, and set aside an interim arbitral award made by Allen Waiyaki Gichuhi, Arbitrator, on August 6, 2021 for which reasons were provided by the arbitrator on August 18, 2021.

2. The appellant, Vipingo Ridge Limited, has in this appeal challenged that ruling on the grounds, mainly, that the learned Judge erred in treating the respondents' said application under Section 35 of the *Arbitration Act* as an appeal and that the Judge set aside the interim arbitral award based on his opinion rather than determining it within the established parameters permissible under that provision.

3. The background in brief is that a dispute arose between the parties under sub-lease agreements relating to Land Reference Number 24880. That dispute, in which the respondents herein are the claimants, was referred to arbitration. The appellant (the respondent in the arbitral proceedings) also counterclaimed against the respondents.

4. The hearing commenced before the arbitrator, and after one of the respondents' witnesses had testified, the respondents applied before the arbitrator, by application dated July 28, 2021, for permission to

"call as a witness Damaris Karanja to give evidence on her witness statement dated July 21, 2021" and for orders that the testimonies of the respondents' witnesses Jackson Onyango, Anne Muraya and Nicholas Charles Allen, be taken virtually.

5. The application was based on grounds that Jackson Onyango (who was also referred to as Jackson Omondi) and Anne Muraya are senior practicing accountants based in Nairobi with very constrained schedules; that it would be disproportionate for them to travel to Vipingo, where the hearing was to take place; and that Nicholas Charles Allen had commitments overseas during the period when the hearing was scheduled to take place in Vipingo.

6. The application was strenuously opposed. The appellant contended that the application was an attempt to frustrate and delay the hearing; that considering the background to the matter, including default in compliance with the arbitrator's procedural directions, the application was not made in good faith, was calculated to wrongfully frustrate and delay expeditious resolution of the dispute given that the respondents were enjoying interim protection from demands for service charge and subscription fees; and that it would be unreasonable and unjust to allow the application.

7. Upon considering that application and submissions presented before him, the Arbitrator made the impugned order, ex tempore interim award dated 6th August 2021 which was followed up with reasons for ex tempore interim award dated 18th August 2021. In a nutshell, the Arbitrator found that the proposed evidence of Damaris Karanja lacked materiality, relevance and strength and would prolong and delay the fair and expeditious determination of the proceedings; and that all witnesses must be physically present to allow for a fair hearing.

8. Aggrieved, the respondents by application dated August 30, 2021, applied to the High Court at Malindi, under Section 35 of the *Arbitration Act*, among other provisions of the law, for orders to stay further proceedings before the arbitrator and for the interim award to be set aside. That application, which was opposed by the appellant, culminated in the ruling the subject of this appeal dated November 17, 2021.

9. In setting aside the arbitrator's interim award, the learned Judge considered the principles applicable in the exercise of the court's jurisdiction when dealing with an application to set aside an arbitral award under Section 35. The Judge expressed that a process by which an administrative body makes findings without affording persons affected by it a fair hearing violates rights under Article 50 of the *Constitution*; that considering only one witness had testified in the matter, the appellant would not suffer prejudice by introduction of additional witnesses; that the appellant would have an opportunity to test the credibility of the witnesses during cross examination; that as the appellant's case was yet to be heard before the arbitral tribunal, it would have an opportunity to rebut the evidence if need be.

10. The Judge further noted in his ruling that courts had resulted to virtual hearings following the Covid-19 pandemic and could not see the reason why the arbitral tribunal would be reluctant to accommodate virtual hearings.

11. The appellant has challenged that decision on ten grounds set out in its memorandum of appeal which learned counsel Mr. Sanjeev Khagram expounded on in his written and oral submissions during the hearing before us on May 2, 2023. It was submitted that the Judge ignored binding findings by the arbitrator and based his decision on his own opinion; that the Judge failed to heed the principle of party autonomy in arbitration; that the Judge failed to consider that no public policy issue arose warranting interference with the interim award.

12. Regarding the objection by the respondent's that the present appeal was instituted without leave, Mr. Khagram submitted that this Court has, on the strength of the Supreme Court decisions in *Nyutu*

Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR and *Synergy Industrial Credit Limited vs. Cape Holdings Limited* [2019] eKLR, the residual power to intervene to correct injustice in exceptional circumstances where the High Court has departed from the narrow grounds for setting aside awards under Section 35 of the *Arbitration Act*. That as long as Parliament is yet to make provision for applying for leave to appeal, the right of appeal exists and this Court can determine, in exceptional cases and in limine, to admit an appeal from a decision of the High Court under Section 35 of the *Arbitration Act*; that decisions of this Court pronouncing that leave to appeal is required are inconsistent with the decisions of the Supreme Court.

13. Opposing the appeal, learned counsel for the respondents Mr. Paul Ogunde similarly relied on his written and oral submissions. Counsel submitted that the appeal is incompetent and does not lie and should be struck out as leave to appeal was not sought or granted.

14. It was urged that the insistence by the arbitrator to hear matters physically in the context of Covid 19 pandemic and when it was demonstrated that one witness was undergoing cancer treatment is a public policy matter within the jurisdiction of the High Court under Section 35 of the Act and the impugned decision of the High Court is therefore well anchored on public policy and not, as submitted by the appellant, on the personal opinion of the Judge.

15. We have considered the appeal and the submissions and begin by addressing the question whether the appeal is properly before us. In *Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (interested party)* [2019] eKLR the Supreme Court stated that in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to consider appeals from decisions of the High Court under Section 35 of the *Arbitration Act* to inquire "into such unfairness" and that such jurisdiction should be carefully exercised so as not to open a floodgate of appeal undermining the very essence of arbitration.

16. At paragraph 78 of that judgment, the Supreme Court stated as follows:

> ... 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. A leave mechanism as suggested by Kimondo J and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end."

17. The Supreme Court reiterated the principle in *Synergy Industrial Credit Limited vs. Cape Holdings Limited* [2019] eKLR that it would be expected that the Court of Appeal would jealously guard the purpose and essence of arbitration so that floodgates are not opened for all and sundry to access the appellate mechanisms and that it would be expected that parliament would introduce a leave mechanism in our laws to sieve frivolous appeals and not create backlogs in determination of appeal from setting aside of award decisions by the High Court.

18. At paragraph 86 of that judgment, the Supreme Court expressed:

> "[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 Arbitral Award."

19. We are not aware, and our attention has not been drawn to any subsequent legislative intervention by Parliament to provide for such leave. Nonetheless, this Court has since the pronouncements by the Supreme Court determined that leave of the Court to institute an appeal such as the present is required. The case of *Narok County Government (Being the successor of the defunct County Council of Narok) v SEC & M Company Limited* [2020] eKLR, like the present one, involved an appeal from a decision of the High Court under Section 35 of the *Arbitration Act*. This Court was categorical in its pronouncement that:

> "...an appeal to this Court from a High Court decision made under section 35 of the *Arbitration Act* can only lie with leave of the Court. The appellant herein did not seek leave of this Court to institute this appeal. That was a serious procedural misstep."

The Court in that case nonetheless proceeded to examine whether the appeal therein met the threshold for granting leave.

20. In *Advertising Company Limited vs Kenya Post Office Savings Bank*, Civil Appeal No. 340 of 2017 [2022] KECA 85, this Court had no hesitation in striking out an appeal under Section 35 of the *Arbitration Act* that had been commenced without leave. The Court stated:

> "In this matter, it was not disputed that no leave was sought to institute this appeal from the High Court ruling which was made pursuant to an application brought under section 35 of the Arbitration. Without grant of leave, the appeal does not lie."

Similarly, we find that the present appeal does not lie having been instituted without leave.

21. Even if we were to interrogate the substance of the appeal, we have carefully reviewed the impugned ruling. The learned Judge was alive to the principles that an application under Section 35 of the *Arbitration Act* is not an appeal and ultimately determined the same on the basis that the interim award was tantamount to depriving the respondents a constitutional right to fair hearing, in our view, a public policy consideration.

22. Without demonstration that the learned Judge misdirected himself in law or that he misapprehended the facts or that he took account of considerations of which he should not have taken account or failed to take account of considerations of which he should have taken account or that his decision is plainly wrong, we would have no basis for interfering with his decision. See *United India Insurance Co Ltd Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co Ltd v East African Underwriters (Kenya) Ltd* [1985] eKLR.

23. In the result, this appeal fails and is dismissed with costs to the respondents.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2023

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J LESIIT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR