Memphis Limited v Kenya Ports Authority (Civil Application 39 of 2021) [2022] KECA 105 (KLR) (21 January 2022) (Ruling)

Neutral citation: [2022] KECA 105 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPLICATION 39 OF 2021

SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA

JANUARY 21, 2022

BETWEEN

MEMPHIS LIMITED ..... APPLICANT

AND

KENYA PORTS AUTHORITY ..... RESPONDENT

(An application for leave to appeal to the Court of Appeal against the ruling of the Environment & Land Court at Mombasa (Munyao Sila, J.) delivered on 18th May 2021in ELCC Appeal No. 23 of 2020)

RULING

1. In its application dated 20th May 2021, the applicant Memphis Limited, has applied under Sections 32A and 39 of the Arbitration Act, among other provisions, for leave to file an appeal to this Court. It intends to challenge a ruling of the Environment and Land Court (ELC) (Munyao Sila, J.) delivered on 18th May 2021. In that ruling, the ELC dismissed the applicant's application to strike out the respondent's appeal to the ELC challenging an arbitral award. The applicant contended that there was no right of appeal from the award of the arbitrator.

2. The background, in brief, is that the parties entered into a Lease agreement dated 17th April 2009. The lease had provision that in the event of any dispute or difference arising, the same would be referred to a single arbitrator for resolution and that the decision of the arbitrator shall be final. A dispute having arisen between the parties, the applicant filed suit before the Environment & Land Court where the parties entered a consent order on 25th July 2018 to refer the matter to arbitration. Mr. Ambrose D.O. Rachier was subsequently appointed as the sole arbitrator in January 2019.

3. The advocates for the parties appeared before the arbitrator for a preliminary meeting on 25th January 2019 to map out the arbitration process based on which the arbitrator issued Order for Directions No. 1 dated 28th January 2019 setting out what "the Parties have BY CONSENT agreed". Of relevance to

the present application is paragraph 8 of those Directions under which it was provided that, "parties reserved their right to appeal on matters of law only as provided under Section 39 of the *Arbitration Act*."

4. The arbitration thereafter proceeded and on 15th June 2020, the arbitrator gave an award in favour of the applicant for

> "Kshs.715,000,000.00 as compensation for loss of its leasehold interest/property."

Aggrieved, the respondent lodged an appeal before the High Court "pursuant to Order for Directions No. 1 paragraph 8 dated 28th January 2019 and Section 39 of the Arbitration Act, 1995."

5. On 22nd September 2020, the applicant presented an application before the ELC, citing Sections 10, 32A and 39 of the Arbitration Act (the Act) seeking an order that the respondent's memorandum of appeal dated 25th August 2020 filed in court on 4th September 2020 together with the entire appeal filed by the respondent be struck out, or alternatively, be dismissed. The applicant contended that there was no right of appeal from the decision of the arbitrator and that the ELC did not therefore have jurisdiction to hear and determine the appeal; that paragraph 8 of the Arbitrator's Order for Directions could not alter or amend the provision in the dispute resolution clause in the Lease Agreement stipulating that the arbitrator's decision shall be final.

6. Having heard arguments from both sides, the learned Judge of the ELC was not persuaded that the applicant's application was merited. In dismissing it, the Judge expressed in his ruling delivered on 18th May 2021 that:

> "Nobody has raised issue that what the arbitrator recorded as consent was not the agreement of the parties. The net result is that this must be construed as a further agreement of the parties on the nature of arbitration. For all intents and purposes it was akin to a further arbitration agreement, and in this further or additional agreement, the right to appeal was reserved. A consent recorded in court or before the tribunal has the same import as if it was an agreement of the parties. To say otherwise would be to overturn the whole concept of consents recorded in court or before a tribunal."

7. The applicant is dissatisfied with that ruling, intends to appeal it and hence the present application for leave to appeal. We heard learned counsel Mr. Paul Buti and Mr. Georgiadis Khaseke for the applicant and for the respondent respectively when they appeared before us on 2nd November 2021. They relied on their respective written submissions which they orally highlighted. We have duly considered the same.

8. It was submitted for the applicant that, in light of the provision in the arbitration agreement (clause 3(g) of the Lease) that the decision of the arbitrator shall be final, the intended appeal raises the question of jurisdiction of the lower court to hear and determine an appeal preferred against an arbitration award under the Act; that having regard to Sections 3 and 4(2) of the Act, paragraph 8 of the Order of Directions, which were not signed by the parties, did not constitute a separate arbitration agreement and could not alter or amend clause 3(g) of the Lease; that the learned Judge erred in holding that the arbitrator, as an agent of the parties, could effectively, alter clause 3(g) of the Lease by providing for liberty to appeal contrary to agreement of the parties; and that Judge also erred in effect holding that the Order for Directions of the arbitrator have the effect of amending a contractual provision so as to impose upon the parties a right of appeal.

9. It was submitted further for the applicant that the ruling of the ELC contradicts the decision of another court of coordinate jurisdiction in the case of *Talewa Road Contractors vs. Kenya National Highways Authority* [2019] eKLR and that in lightof the Supreme Court of Kenya decision in *Synergy Industrial Credit Ltd vs. Cape Holdings Ltd [2019] eKLR*, this Courtshould grant the applicant leave to appeal to this Court in order to bring clarity to the law in view of the conflicting decisions. It was submitted that the guidance sought from this Court in the intended appeal is not only for the benefit of the present applicant.

10. Opposing the application, learned counsel for the respondent submitted that the scope of Section 39 of the Act is limited to circumstances where the parties have agreed that an application may be made to court to determine any question of law arising in the course of the arbitration or where the parties have agreed that an appeal may be made to court on any question arising out of the award; therefore, the intended appeal to this Court by the applicant has no basis in Section 39 of the Act; that the issues the applicant intends to raise on appeal are not matters arising from or contemplated under Section 39 of the Act; that under Section 39(3)(b) of the Act, this Court can only grant leave to appeal against a decision of the High Court with respect to matters falling under Section 39(1) and (2) of the Act.

11. Counsel for the respondent submitted that in urging that the parties could not, in the Order for Directions, agree to reserve the right to appeal having stipulated in the arbitration agreement that the decision of the arbitrator shall be final, the applicant is labouring under misconception that an agreement to appeal an award under Section 39(1) of the Act must necessarily be contained in the arbitration agreement; that the right of appeal need not be set out in the arbitration agreement and Section 4 of the Act does not apply to Section 39 of the Act; and that parties are at liberty to agree on matters outside of the arbitration agreement. Reference was made to the case of *Kenya Oil Company Limited vs. Kenya Pipeline Company [2014] eKLR* where the Court entertained an appeal even though the right to appeal was contained, not in the arbitration agreement, but in the agreement to appoint the arbitrator. The case of *Joseph W. Karanja & another vs. Geoffrey Ngari Kuira [2006] eKLR* was also cited for the argument that partiescan vary an arbitration agreement by consent recorded in minutes of a meeting.

12. It was submitted further that although under paragraph 22 of the Order for Directions parties were at liberty to apply to the arbitrator, no such application was made by the applicant to contest paragraph 8 of those Directions.

13. We have considered the application, the submissions and authorities cited. Section 39 of the Act on which the present application is primarily founded provides in Section 39(1) that where the parties have agreed that an application by any partymay be made to a court to determine any question of law arising in the course of the arbitration or, that an appeal by any party may be made to a court on any question of law arising out of the award such application or appeal, as the case may be, maybe made to the High Court. In any of those events, the High Court is required, under Section 39(2) to determine the question of law arising; or to confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration.

14. Under Section 39(3) of the Act, an appeal against a decision of the High Court made under Section 39(2) lies if the parties, prior to the delivery of the award, have agreed that an appeal shall lie or:

> "...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, grant leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court would have exercised under subsection (2)." [Emphasis]

15. Three things emerge from the foregoing. First, for Section 39 of the Act to become operative, it is a condition precedent that parties should have agreed, either that an application for determination of any question of law arising in the course of the arbitration may be made to the court or, that an appeal may be made for determination of any question arising out of the award. In other words, agreement of the parties is a sine qua non for any party to arbitration to invoke the court's jurisdiction under Section 39(1) of the Act.

16. Once the High Court has made a determination on such application or appeal, an appeal to this Court can only lie "if the parties have so agreed" prior to the delivery of the arbitral award, or this Court gives leave in accordance with Section 39(3)(b) of the Act. As this Court stated in Kenyatta

> I*nternational Conference Centre vs. Greenstar Systems Limited,* C.A. No. 262 of 2018 [2019] eKLR, Section 39(3)(a) of the Act is not applicable where "there was no agreement by the parties on the right of appeal...".

17. It seems to us, therefore, that if, as the applicant contends in this case, there is no agreement between the parties to arbitration that an appeal may be made on questions of law arising from the award, it follows that there can be no right of appeal to this Court under Section 39(3)(b) of the Act. It is somewhat contradictory therefore, for the applicant on the one hand, to contend that there was no agreement between the parties that an appeal may be made to the High Court on questions of law arising out of the award and at the same time maintain that this Court may grant leave to appeal under Section 39(3)(b) of the Act.

18. Secondly, and assuming an appeal can lie to this Court under Section 39(3)(b) despite the contention by the applicant that there was no agreement to appeal, a pre-requisite, as we have said under Section 39(1), the applicant is required to demonstrate 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. In that regard the applicant has urged that there are questions of law arising in this matter that warrant leave to appeal being granted. Such questions of law, counsel urged, include: whether an arbitrator's order for directions that are not signed by the parties satisfy the requirements of Sections 4(2) and 3(a) of the Act; whether such directions amount to a separate arbitration agreement to either alter or amend the arbitration agreement; and whether the arbitrator's directions in this case have the effect of amending the contractual provision that the decision of the arbitrator shall be final. We do not doubt that those issues of law proposed to be raised in the intended appeal as framed by the applicant are arguable. But that is not all. For leave to appeal to be granted, the applicant needs to demonstrate that the points of law are "of general importance" "the determination of which will substantially affect the rights of one or more of the parties"?

19. The Act does not however provide direction on what may be considered to be "of general importance". We think what the Supreme Court of Kenya stated in *Hermanus Phillipus Steyn vs. Giovanni Gnecchi-Ruscone [2013] eKLR* though in thecontext of certification under Article 163(4)(b) of the Constitution, does provide guidance in interpreting the words "of general importance" under Section Section 39(3)(b) of the Act. In that case, the Supreme Court stated thus:

> " Before this Court, "a matter of general public importance" warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the

matter in question carries specific elements of real public interest and concern. [Emphasis added]

20. In the same decision, the Supreme Court endorse the pronouncement by this Court in *Hermanus Phillipus Steyn vs.Giovanni Gnecchi-Ruscone,* Civil Appl. No. Sup.4 of 2012 (UR3/2012) that:

> "The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer the law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law".

21. The Supreme Court stressed that "that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest."

The Court went ahead to enunciate the guiding principles, including, for present purposes, the requirement that where it is contended that the matter is one of general public importance, an intending appellant must "satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest"; that where it is asserted that the intended appeal raises a point of law, "the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest"; and that "the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter." In our view, those principles pronounced by the Supreme Court, though in the context of certification under Article 163(4)(b) of the *Constitution* are equally applicable in the context of Section 39(3)(b) of the Act.

22. Indeed, in a bid to demonstrate that the intended appeal meets the criteria, the applicant submitted that there are conflicting decisions on the issues intended to be raised. Counsel for the applicant relied on the Supreme Court decision in *Synergy Industrial Credit Limited vs. Cape Holdings Limited* [2019] eKLR to urge that where there are conflicting decisions on an issue, then a higher court should assume jurisdiction and grant leave to appeal. According to counsel the impugned decision intended to be appealed contradicts another decision of the High Court in *Talewa Road Contractors vs. Kenya National Highways Authority [2019] eKLR* and also *KICC vs. Greenstar Systems Ltd [2018] eKLR*. Counsel for the applicant did not however demonstrate in what respect(s) the decision intended to be appealed contradicts those decisions.

23. With profound respect to counsel, we do not discern any such conflict between the decision intended to be appealed and the High Court decisions in T*alewa Road Contractors vs. Kenya National Highways Authority*. There are two separate rulingsof the High Court reported in 2019 eKLR *in the matter of Talewa Road Contractors vs. Kenya National Highways Authority.* One is a ruling delivered on 17th June 2019 by Muigai, J. relating to an application for joinder of a proposed respondent and for depositing of arbitral in a joint account. In as far as we can tell, it has no bearing on the matter of intended appeal. The second ruling in that matter was delivered by the same Judge (Muigai, J.) on 15th November 2019 and relates to an application for recognition and enforcement of an arbitral award under Section 36 of the Act. Again, that ruling has no bearing on the present matter. Neither do the two rulings address

the question whether a dispute resolution clause in a contract can subsequently be altered or amended by consent or otherwise through arbitrators' orders for directions.

24. The High Court decision in *Kenyatta International Conference Centre (KICC) vs. Greenstar Systems Ltd,* Misc. C. Applic. No. 278 of 2017 [2018] eKLR that was delivered by Olga Sewe J on 19th January 2018 emanated from two applications. One application by KICC was seeking orders to set aside an arbitration award under Section 35 of the Act. The second application was by Greenstar Systems Limited. It sought recognition and enforcement of the arbitral award under Section 36 and 37 of the Act. The High Court found the application under Section 35 of the Act to be incompetent having been filed out of time, and on the merits that the application could not succeed as there were no grounds for setting aside the arbitral award. The second application was found to be merited and the High Court (Olga Sewe, J.) granted orders recognising the arbitral award as binding and enforceable.

25. As a result of that decision, KICC applied before this Court for leave to appeal that decision. That culminated in the ruling of this Court in in *Kenyatta International Conference Centre vs. Greenstar Systems Limited,* C.A. No. 262 of 2018 [2019] eKLR to which we have already made reference. This Courtaddressed Section 39 of the Act in relation to the time limits for such an appeal which the Court held "must accord with the time limit set by the Court of Appeal Rules, 2010"; that such appeal must be instituted within sixty days in accordance with Rule 82 of the Court of Appeal Rules; that there was no compliance with Section 39(4) of the Act which requires filing of an appeal within sixty days of the date of lodging the notice of appeal; that there was no compliance with rule 39(b) of the Act which requires an application for leave to be made within 14 days of the decision desired to be appealed. The Court concluded that the application for leave to appeal was "a non-starter" as the applicant did not seek leave of the Court within 14 days as required under Rule 39 (b) of the Act. The Court was keenly aware, and expressed that an application under Section 39(b) of the Act would entail consideration as to whether "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."

26. In the result, there is no merit in the contention that the decision intended to be challenged contradicts the decisions of the courts in the matter of Talewa Road Contractors vs. Kenya National Highways Authority or in *Kenyatta International Conference Centre vs. Greenstar Systems Limited* (above). On the contrary, the decision intended to be appealed appears to accord with and is consistent with decisions of this Court to which counsel for the respondent drew our attention, for instance *Kenya Shell Limited vs. Kobil Petroleum Limited [2006] eKLR*.

27. There is in our view another consideration that we bear in mind. The power to grant or decline leave under Section 39(3)(b) is discretionary. As this Court stated in *Kenyatta International Conference Centre vs. Greenstar Systems Limited* (above) an application for leave to appeal "calls for the exercise of our discretion". In that regard the Court made reference to *Kenya Shell Limited vs. Kobil Petroleum Limited* [2006] eKLR and *Machira t/a Machira & Company Advocates vs. Mwangi & anor [200] 2 KLR 391*.

28. Even though it is cloaked in jurisdictional terms, the intended appeal is in the nature of an interlocutory appeal in the sense that the appeal against the award remains to be determined by the lower court. Although in *Synergy Industrial Credit Limited vs. Cape Holdings Limited [2019] eKLR, theSupreme Court was addressing itself to the right of appeal und*er Section 35 of the Act, its caution that "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 flood gates are not open for all and sundry to access the appellate mechanism" applies equally to applications for leave to appeal under Section 39 of the Act. To allow the application would in effect result in piecemeal adjudication and unduly protract the matter at the expense of substantive and expeditious disposal of the matter.

29. All in all, we are not persuaded that the intended appeal and the issues of law intended to be canvassed meet the threshold 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." A case has not been made out that warrants the exercise of the Court's discretion in favour of the applicant.

30. The application fails and is hereby dismissed. We think each party should bear its own costs of the application.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF JANUARY 2022.

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL