



REPUBLIC OF KENYA



KENYA LAW
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Advertising Company Limited v Kenya Post Office Savings Bank (Civil Appeal 340 of 2017) [2022] KECA 85 (KLR) (4 February 2022) (Judgment)

Neutral citation: [2022] KECA 85 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 340 OF 2017
DK MUSINGA, RN NAMBUYE & W KARANJA, JJA
FEBRUARY 4, 2022**

BETWEEN

ADVERTISING COMPANY LIMITED APPELLANT

AND

KENYA POST OFFICE SAVINGS BANK RESPONDENT

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Farah S. M. Amin, J.) dated 29th June, 2017 in Miscellaneous Application No. 350 of 2015)

JUDGMENT

1. The genesis of this appeal is an arbitral award that was given by Mr. Kamau Karori, FCIArb, on 28th April 2015 in favour of the appellant, The Advertising Company Limited, in the sum of Kshs.10,336,567.06.00 plus costs and interest thereon at the rate of 17% per annum from 7th November, 2012 until payment in full.
2. On 29th July 2015 the respondent filed an application in the High Court of Kenya At Nairobi under section 35 (1) of the *Arbitration Act* and rule 7 of the *Arbitration Rules* seeking an order to set aside the arbitral award on grounds, inter alia, that the sole arbitrator dealt with matters otherwise not contemplated under the agreement that was the subject matter of the arbitration.
3. In a ruling by F. Amin, J. dated 29th June 2017, the learned judge set aside the award in its entirety. Being dissatisfied with the said order, the appellant preferred an appeal to this Court, stating, inter alia, that the learned judge erred in law and fact in finding that the arbitrator exceeded his mandate.
3. On 6th November 2017 the respondent filed an application before this Court for striking out the notice and record of appeal on grounds, inter alia, that under sections, 10, 35, 36 and 37 of the *Arbitration Act*, 1995 no appeals are allowed from the decision of the High Court.



4. The appeal and the application for its striking out were argued on the same. It is necessary that we first determine whether there is a right of appeal to this Court arising from a decision of the High Court in an arbitration application under section 35 of the *Arbitration Act* where the parties did not provide in their agreement a right of appeal to this Court.
5. The parties filed their respective submissions sometime in 2018 before the Supreme Court pronounced itself on the question whether there is a right of appeal to this Court following a decision made under section 35 of the *Arbitration Act*. This was in *Nyutu Agrovet Limited vs Airtel Networks Kenya Limited [2019] eKLR* and *Synergy Industrial Credit Limited vs Cape Holding Limited [2019] eKLR*.
7. In *Nyutu Agrovet case (supra)*, the Supreme Court held as follows:

“(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 short 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. We would expect the Legislature to heed this warning within its mandate.”

8. Similarly, in *Synergy Industrial Credit Limited (supra)*, the same Court held:

“(83) What therefore is the proper interpretation of Section 35 with regard to the right of appeal to the Court of Appeal”

We have reviewed the decision emanating from our Courts on this issue. We have found that this issue has not attained consensus. We have also analysed cases and laws from selected jurisdictions. In some jurisdictions, decisions from a High Court on setting aside are appealable to the Court of Appeal and even to the Supreme Court on limited circumstances. In others, appeals are generally allowed but only with leave. We do not have in our laws such a procedure for leave. The UNCITRAL Model Law on which our law is based does not necessarily bar further appeals. Taking all these matters into consideration, we are of the view that, 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. It must be noted that Section 35 was enacted prior to the promulgation of the Constitution 2010 and therefore Article 164(3)(a) and by dint of Section 7 of Schedule Six, to the Constitution, the said Section must be “construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution.”

(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.”

9. 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.
10. Consequently, we strike out the notice and record of appeal filed by the appellant. The appellant shall bear the costs of this appeal.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF FEBRUARY, 2022.

D. K. MUSINGA, (P)

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

