Nairobi City Water and Sewerage Company Limited v Capture Solutions Limited (Civil Application E230 of 2021) [2022] KECA 398 (KLR) (4 March 2022) (Ruling)

Neutral citation: [2022] KECA 398 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E230 OF 2021

K M'INOTI, J MOHAMMED & S OLE KANTAI, JJA

MARCH 4, 2022

BETWEEN

NAIROBI CITY WATER AND SEWERAGE COMPANY LIMITED APPLICANT

AND

CAPTURE SOLUTIONS LIMITED .... RESPONDENT

(Being an application from the Ruling of the High Court of Kenya at Nairobi (Majanja, J.) dated 27th August, 2020 in Misc. Civil Application No. E679 of 2020)

RULING

1. The history of the dispute between the parties herein (Nairobi City Water and Sewerage Company Limited – the applicant" and Capture Solutions Limited – "the respondent") will be traced to the Award of a single arbitrator, Prof. Ike Ehiribe made on 27th December, 2019 where the arbitrator found that the applicant was indebted to the respondent for certain sums of money for services rendered but for which the applicant had not paid. Majanja, J., sitting at the High Court of Kenya, Nairobi, was moved by the respondent in an application made under the *Arbitration Act* to recognize the award. In a ruling delivered on 27th August, 2020 the learned Judge found that services had been rendered by the respondent to the applicant; that the Arbitral Tribunal had not exceeded the scope of the reference; that the respondent had not been unjustly enriched; that the respondent had delivered goods which had not been paid for. The learned Judge further found that the Final Award by the arbitrator was not contrary to public policy and that the arbitrator had not dealt with matters beyond the scope of the reference to arbitration. Accordingly, he recognized and enforced the award under Section 36 of the *Arbitration Act*.

2 The respondent moved this Court in an application to a Single Judge (Ouko, JA – as he then was) and applied for extension of time to file and serve the notice of appeal out of time in an intended appeal from the said orders. In a ruling delivered on 23rd April, 2021 the Judge found no merit in the application and he dismissed it.

3. The applicant has now moved us by Motion said to be brought pursuant to Articles 159(d), 164(3), 201(d), 227, 259 of the Constitution of Kenya, Sections 3, 3A, 3B of the *Appellate Jurisdiction Act*, Rule 5 (2) (b) and 103 of the *Court of Appeal Rules* and all enabling provisions of law praying in the main:

> "2. THAT this Honourable Court be pleased to hear and determine the Application simultaneously with the following application and appeal presently before this Honourable Court:
>
> a. Civil Application No. Nai E406 of 2020 Nairobi City Water and Sewerage Company Limited Vs Capture Solutions Limited.
>
> b. Civil Appeal No. Nai E514 of 2020 Nairobi City Water and Sewerage Company Limited Vs Capture Solutions Limited.
>
> 3. THAT this Honourable Court be pleased to grant the Applicant Leave to file an Appeal from the decision of Hon. Justice Majanja given on 27th August 2020 in Misc. Civil Application No. E679 of 2020 by which His Lordship allowed the Chamber Summons Application dated 18th July 2020 for the Recognition and Enforcement of an Arbitral Award by Prof. Ike Ehiribe dated 27th December 2019 in the Dispute between Capture Solutions Limited and Nairobi City Water and Sewerage Company Limited.
>
> 4. THAT pending the lodgment, hearing and determination of the Appeal pursuant to Prayer 3 above this Honourable Court be pleased to issue an Order of Stay of Execution of the Arbitral Award by Prof. Ike Ehiribe dated 27th December 2019 in the dispute between Capture Solutions Limited and Nairobi City Water and Sewerage Company Limited as recognized by Hon. Mr. Justice Majanja in his decision given on 27th August 2020 in Misc. Civil Application No. E679 of 2020."

4. It is explained in grounds in support of the Motion and in a supporting affidavit of Patrick Maina, the Legal Officer of the applicant, that the Judge had allowed the application for recognition and enforcement of the arbitral award; that the arbitral award was manifestly unjust, bad in law, contrary to public policy and underserving of recognition and enforcement; that the applicant faced imminent risk of execution; that the applicant is desirous of appealing the arbitral award where it applied for leave to appeal out of time which application was dismissed; that the applicant had not received the goods it had contracted to be supplied by the respondent; that enforcement of the award would lead to injustice; and that the intended appeal is merited.

5. When the application came up for hearing before us on 18th January, 2022 on a virtual platform, learned counsel Mr. Marete appeared for the applicant while learned counsel Mr. Gitonga appeared for the respondent. Mr. Marete informed us that he was applying for leave to appeal in this application (Civil Application No. E230 of 2021) while he abandoned the application in Civil Application No. E406 of 2021 for stay of execution. According to counsel parties to this application had entered into a contract which provided for arbitration in case a dispute arose; and that there was provision of a right to appeal to the High Court in case a dispute arose but the applicant had not exercised that right. Mr. Marete submitted that there were errors of law in the award of the arbitrator that went to issues of public policy in regard to procurement of public services. Counsel conceded that there was no threat of execution as parties had reached an agreement in that regard.

6. Mr. Gitonga, in response, submitted that the applicant had not challenged the award; the *Arbitration Act* gave time lines for challenging awards which the applicant had not met; counsel asked us to dismiss the application.

7. As we have seen the issue at hand arose from an award in arbitral proceedings where an award was made and was recognized by the High Court as provided by the *Arbitration Act*. The parties provided in the arbitration agreement for a right of appeal to the High Court against the decision of the arbitral tribunal, which the applicant did not exercise. Appeals to this Court from arbitral proceedings are rare and not automatic; they require leave; leave will be given in rare exceptional circumstances.

8. The Supreme Court of Kenya has had occasion to address the issue of appeals to this Court in proceedings arising from arbitral proceedings.

9. In *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators Kenya Branch* [2019] eKLR that court expressed:

> "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.
>
> 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.
>
> 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." (Emphasis added).

10. The same Court stated the following in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR:

> "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.

Such a finding is in consonance with practises 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." (Emphasis added).

10. Rule 4 of the Court of Appeal Rules provides for extension of time for doing any act by a party who has not done that act within the time provided. The practice of the Court is that such an application is made formally and is heard by a Single Judge.

Rule 55 of the said rules:

(1) Where under the proviso to section 5 of the Act, any person being dissatisfied with the decision of a single judge—

(a) ….; or

(b) in any civil matter wishes to have any order, direction or decision of a single judge varied, discharged or reversed by the Court, he may apply therefor informally to the judge at the time when the decision is given or by writing to the Registrar within seven days thereafter.

(2) At the hearing by the court of an application previously decided by a single judge, no additional evidence shall be adduced."

11. The applicant here was a victim of an arbitral award that it was not happy with. It did not apply to set the award aside as provided by the *Arbitration Act*. That award was recognized by the High Court as provided by the said Act. The applicant applied for leave to appeal the decision of the High Court to this Court but the Single Judge did not find merit in the application and dismissed it. The applicant did not apply for a reference under Rule 55 of the rules of this Court and the decision of the Single Judge stands.

12. In the present application the applicant is seeking leave to appeal the decision of the High Court dated 27th August, 2020 to this Court, after reaching a dead-end on the application for extension of time under rule 4 of the Court of Appeal Rules. Rule 39(b) of the same rules provides as follows regarding applications for leave to appeal to this Court in civil matters:

39. In civil matters –

(b) where an appeal lies with the leave of the Court, application for such leave shall be made in the manner laid down in rules 42 and 43 within fourteen days of the decision against which it is desired to appeal or, where application for leave to appeal has been made to the superior court and refused, within fourteen days of such refusal." (Emphasis added).

Under that rule, the applicant was obliged to make an application for leave to appeal within fourteen (14) days from 27th August, 2020. Instead, the application was made on 28th June, 2021, almost ten (10) months out of time. Having failed to apply for leave to appeal within the period stipulated in rule 39(b), the applicant was obliged to

seek extension of the time to apply for leave to appeal. Not only has the applicant failed to do so, it has not even attempted to explain the delay of ten months.

13. We have considered the Motion before us and considering all the material and all the issues we have addressed we find no merit in the application which we dismiss with costs to the respondent.

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

K. M'INOTI

....

JUDGE OF APPEAL

J. MOHAMMED

....

JUDGE OF APPEAL

S. ole KANTAI

....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR