Savings Tea Brokers Limited v Kenya Tea Development Agency & 7 others (Civil Application 46 of 2018) [2022] KECA 892 (KLR) (28 April 2022) (Ruling)

Neutral citation: [2022] KECA 892 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION 46 OF 2018

HM OKWENGU, MSA MAKHANDIA & J MOHAMMED, JJA

APRIL 28, 2022

BETWEEN

SAVINGS TEA BROKERS LIMITED ..... APPLICANT

AND

KENYA TEA DEVELOPMENT AGENCY ..... 1ST RESPONDENT

KIPKOROS TEA FACTORY LIMITED ..... 2ND RESPONDENT

NYANKOBA TEA FACTORY LIMITED ..... 3RD RESPONDENT

RUKURIRI TEA FACTORY LIMITED ..... 4TH RESPONDENT

GIACHORE TEA FACTORY LIMITED ..... 5TH RESPONDENT

MOGOGOSIEK TEA FACTORY ..... 6TH RESPONDENT

WERU TEA FACTORY ..... 7TH RESPONDENT

KAPSET TEA FACTORY ..... 8TH RESPONDENT

(Being an application for special leave to appeal against the Ruling of the High Court of Kenya at Nairobi (F. Gikonyo, J) delivered on 13th July 2015 in Misc. Civil Application No. 129 of 2014)

RULING

[1] By a notice of motion dated 22nd February, 2018 brought under section 39(3)(b) of the *Arbitration Act*, 1995 (the Act) and Rule 39 of the *Court of Appeal Rules 2010*, the applicant seeks special leave to file an appeal against the decision of Gikonyo, J. refusing it leave to appeal the said Judge's ruling of 13th July, 2015. In the said ruling, the learned Judge declined to grant leave to the applicant to appeal against the ruling delivered on 16th March, 2015, in which the learned Judge set aside part of an arbitral award made in favour of the applicant.

[2] The application is supported by an affidavit sworn by Ezekiel Machogu Ombaki, a director of the applicant. Annexed to the affidavit, is a copy of the arbitral award, the ruling of Gikonyo J. dated 16th March 2015, and a ruling by Kiage, JA, granting the applicant extension of time to apply to this Court for special leave to enable it file an appeal against the said decision of Gikonyo, J.

[3] The application is anchored on grounds stated on the face of the motion. The grounds can be paraphrased as follows: that the High Court has jurisdiction to overrule a finding of fact made by an arbitrator, where the facts in question were fully argued before the arbitrator; that the intended appeal will seek a determination by the Court of the meaning of the phrases, "terms of reference to arbitration" and "scope of reference to arbitration" as used in section 37 of the Act; that the intended appeal will seek a determination by the Court of the effect of sections 5 and 17 of the Act in an arbitration; that the determination of the points of law that have been raised will substantially affect the rights of the applicant, as the ruling of Gikonyo J. left the applicant without redress; and that it is in the interest of justice for the applicant to be granted leave to file an appeal against the Ruling of Gikonyo, J.

[4] The applicant has filed written submissions in support of the motion, wherein it argues that there is no provision that a determination by the High Court under section 35 of the *Act,* cannot be subject to appeal; that the High Court set aside the arbitral award on a misapprehension of the law, as that award was not anchored on section 39 of the *Act*; that there is nothing in section 35 of the Act that protects manifest errors of law by the learned Judge; and that issues of law are appealable under section 39(b) of the Act and section 75 of the *Civil Procedure Act* with leave of the Court.

[5] The applicant argued that Parliament not having expressly provided that there shall be no appeal from a decision made by the High Court under Section 35, it had no intention to bar appeals from drastic decisions of the High Court made under that section. The applicant relied on *Kenya Shell Limited vs Kobil Petroleum Limited* [2006] eKLR, in which Omolo, JA stated that the Court of Appeal has jurisdiction under section 75 of the *Civil Procedure Act*, to grant leave to appeal from the decision of the High Court made under Section 35 of the *Act.*

[6] The applicant pointed out that although the arbitrator had found that there was loss of goodwill, the learned Judge erred in holding that an award for loss of goodwill is synonymous with an award for defamation, and that under section 39(3)(b) of the *Act*, there is room for awards to be reviewed on errors of law. The applicant argued that the learned Judge gave the arbitration clause a very restrictive meaning, as the arbitration clause was wide enough to give jurisdiction to the Court; and that there were questions of law to be determined in the intended appeal and the Court should grant special leave for those issues to be resolved.

[7] The respondents also filed written submissions in which they argued that the Court lacks the jurisdiction to grant special leave to appeal under section 39 of the Act; that the application does not meet the threshold set under section 39 of the Act; and that the intended appeal does not raise issues of general public importance.

[8] The respondents argued that the underlying principle under sections 10, 32A and 35 of the Act, is that judicial interference in the arbitral process is greatly restricted; that the Act does not confer on the Court jurisdiction to grant special leave to appeal against the decision of the High Court under section 35 or 39(3) of the Act; and that in the absence of internal mechanisms, Rule 11 of the *Arbitration Rules* provides for the application of rules of general civil procedure, as long as such procedure is consistent with clear provisions of the Act; and that the applicant has not demonstrated any insufficiency in the Act to warrant the Court invoking the granting of special leave under the Civil Procedure Rules .

[9] The respondent pointed out that the threshold set under section 39 of the Act, has not been met as there was no agreement by the parties for provision of leave to appeal prior to the delivery of the Arbitral award; that the application dated 17th March, 2015 for setting aside the arbitral award was brought under section 35 and not 39 of the Act; and that the intended appeal does not raise any issues of general public importance.

[10] In addition, the respondent argued that the purported issues of general public importance were misconceived as the Court has no jurisdiction to grant any special leave; that the High Court had no jurisdiction to interfere with an arbitrator's findings on issues of fact; that the intended appeal raises no novel point; that the issue regarding whether a claim under loss of goodwill was sustainable under the terms of the arbitration clause, was a simple issue of interpretation of a contract not transcending the personal interest of the parties; that the award of damages for loss of goodwill was dependent on the arbitrator appreciating the terms of reference and acting within his jurisdiction; and that once it was found that the claim fell out of the purview of the arbitration clause, the Court was obliged to consider whether the arbitrator had committed a jurisdictional error. The Court was therefore urged to dismiss the application.

[11] The issue before us is whether the applicant should be granted leave to appeal and determination of that issue is dependent on whether this Court has jurisdiction to entertain an appeal from the High Court in an arbitration matter. The issue of the appellate court's jurisdiction in arbitration proceedings has now been settled by the Supreme Court in three recent decisions.

[12] In *Nyutu Agrovet Limited vs Airtel Networks (K) Limited; Chartered Institute of Arbitrators Kenya branch (Interested Party)* [2019] eKLR (Nyutu decision), the Supreme Court in its majority decision was emphatic that a right of appeal to this Court following a decision by the High Court under section 35 of the Act, should only be allowed in exceptional circumstances where the High Court in setting aside the award has stepped outside the grounds set out under section 35 of the Act and made a decision that is manifestly wrong.

[13] This is how the Supreme Court delivered itself in part, in the majority decision in the Nyutu decision:

> "(71) ....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.... 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.
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> 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.....

....

74. ... As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention. Thus, we do not think as suggested by the Interested Party that an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underling dynamics. To that extent we reject that proposal.

....

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." (emphasis added)

[14] In *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, (Synergy decision), which was delivered by the Supreme Court on the same day as the Nyutu decision, the Supreme Court having considered comparative jurisprudence stated:

"(59) Having analysed the law in the identified jurisdictions, we find that there is generally no express right of appeal against the decision of the High Court in setting aside or affirming an award. Leave to appeal would, however, only be granted in very limited circumstances. In that regard therefore, Courts have held that leave to appeal may be granted where there is unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process. In addition, leave would be granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue, leave would also be granted. A higher Court would also assume jurisdiction in order to bring clarity to the law where there are conflicting decisions on an issue. In all these instances, care must be taken not to delve into the merits of an arbitral award because that is not the purview of Courts.

....

[77]

... specifically provides intervention by the Court of Appeal where
39 parties to a domestic arbitration agree that an application should be made to the High Court for a determination of a question of law arising in the arbitration process or the award. Such a

> High Court decision is appealable to the Court of Appeal if the parties have agreed so or if the Court of Appeal finds that a point of law of general importance is involved. That Section is thus very particular on when it can be invoked. It is an independent provision separate from all others and particularly Section 35 which is our main concern.

78. While discussing Section 39, Omolo JA in the Kenya Shell (supra) decision stated thus:

> "It is not, therefore, surprising to me that Section 39(3) of the Act severely limits the right of appeal from decisions of the High Court made under Section 39(2) of the Act. The provisions of subsection (3) are, in my view restricted to the circumstances stated in subsection (2) and I do not understand them to mean that the right of appeal to the Court of Appeal, under all the provisions of the Act, can only be exercised in accordance with the provisions of Section 39(3) of the Act."
>
> ...

81. In the above context, we take the position that even though Section 39 is not the subject of our interpretation in the instant case, to the extent that the Respondent's rely on it to advance their argument, we are of the view that the jurisdiction of the Court of Appeal under Section 39 is very specific on when it can be invoked, that is, determination of questions of law arising in the cause of arbitration proceedings. Section 39, does not prescribe or affect the jurisdiction of any other Court as provided in any of the other provisions of the *Arbitration Act*. And as explained by the Attorney General, the purpose was to ensure that determination of a question of law particularly where issues of general public importance arise, are subject to appeals. And even though Section 35 provides that "recourse to the High Court against an award may be made only by an application for setting aside", Section 39 provides further circumstances when an award may be set aside either by the High Court or the Court of Appeal hence the use of the term "notwithstanding Section 10 and 35" as expressed above.

82. In our view therefore, contrary to what is proposed by the Respondent, Section 39 cannot be justifiably interpreted so as to oust the jurisdiction of the Court of Appeal, if at all, in any other section of the Act.

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 decisions 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.

.....

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. Similarly, it would be expected that a leave mechanism would be introduced into our laws by the Legislature to sieve frivolous appeals and not create backlogs in the determination of appeals from setting aside of award decisions by the High Court." (Emphasis added)

[15] In *GEO Chem Middle East v Kenya Bureau of Standards* [2020] eKLR, the Supreme Court, following the Nyutu decision, held that an appeal could lie to the Court of Appeal from the High Court decision under section 35 of the *Act* where in setting aside an arbitral award, the High Court stepped outside the grounds stated in section 35 of the *Act* and made a decision that was manifestly wrong and which had closed the doors of justice to either of the parties.

[16] From the above, we summarize the position to be that although section 35 of the *Act* is silent on the right of a party to appeal to this Court against an order of the High Court in an application made under section 35, the purpose of section 35 of the Act is to give the courts oppoturnity to correct specific errors of law, which if left alone, would taint the process of arbitration. Therefore, leave can be granted

to a party to invoke the residual appellate jurisdiction of this Court to enquire into such an unfair determination that would otherwise taint the integrity of the administration of justice.

[17] The residual jurisdiction of the Court is to be exercised sparingly and only in the clearest of cases and the intended appeal must be anchored on section 35 of the Act on the grounds that in arriving at its decision, the High Court went beyond the grounds set out in section 35 of the Act, and made a decision that is so grave or manifestly wrong. Thus, the issue that we must determine in this application is whether the applicant has met the threshold in establishing that its intended appeal is anchored on the learned Judge going outside section 35 of the *Act* in partially setting aside the arbitral award, and arriving at a decision that is manifestly wrong. In doing so, we are mindful that at this stage, the Court is not hearing the appeal, and must therefore not make any definitive findings on the merit of any grounds raised.

[18] We note that the respondent's chamber summons dated 17th March, 2014 that was subject of the ruling of 16th March, 2015 was brought under section 35(2)(a)(iv) and (b)(ii) of the Act seeking to have the award made by the arbitrator set aside under that section. It is as a result of that application that the learned Judge partially set aside part of the award.

[19] Section 35 of the *Act* under which the application was brought states as follows:

> " Section 35-Application for setting aside arbitral award
>
> (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
>
> (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..."

[20] As evident from the quoted provision, the grounds upon which an application to set aside an arbitral award can be relied upon under section 35 (2)(a)(iv) of the *Act* is that the arbitral award dealt with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contained decisions on matters beyond the scope of the reference to arbitration.

[21] In the motion before us, the applicant has applied for special leave to file an appeal to challenge the decision of Gikonyo J. delivered on 13th July, 2015 in which Gikonyo J. refused to grant the applicant leave to appeal his ruling of 16th March, 2015. There are no specific rules governing the granting of leave to appeal under section 35 of the Act in an intended appeal from the High Court to the Court of Appeal in an arbitration matter.

[22] Rule 39 of the *Court of Appeal rules* states as follows:

In Civil matters –

a. Where an appeal lies on certification by the superior court that the case is fit for such leave, may be made informally at the time when the decision against which it is desired to appeal is given, or by motion or chamber summons according to the practice of the superior court within 14 days of such decision.

b. Where an appeal lies with leave of the court, application for such leave shall be made in the manner laid down in Rules 42 and 43, within 14 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 14 days of such refusal."

[23] The applicant has moved the Court partly under Rule 39 of the *Court of Appeal Rules*. Rule 39(b) of the Court of Appeal Rules, provides for an application for leave to be made where the superior court has refused such leave to be granted to the applicant. What this means is that an applicant has a second bite of the cherry by having his application for leave considered by this Court. The provision does not grant the applicant to appeal against the order of the superior court refusing to grant him leave. To this extent, the applicant's motion seeking leave to appeal against the order of the High Court refusing him leave to appeal to this Court is misconceived and defective.

[24] Secondly, section 39(3)(b) of the Act under which the applicant's motion was partly brought, deals with questions of law arising in domestic arbitration, and states as follows:

... (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)."

[25] The applicant's intended appeal is anchored on section 39(3)(b) of the Act, which raises the ground that the intended appeal raises a point of law of general importance, the determination of which will substantially affect the rights of one or more of the parties. The applicant contends that the High Court set aside the arbitral award on a misapprehension of the law, to wit, that loss of reputation is defamation and awardable in a contract dispute, and this being an issue of law, it is appealable under section 39(3)(b) of the Act. In addition, the applicant contends that both section 75 of the *Civil Procedure Act* gives it a right of appeal and Article 164(3) of *the Constitution* gives the Court of Appeal jurisdiction to hear the appeal from the High Court.

[26] In the motion, the applicant has identified the points of law of general importance that it intends to raise in the appeal as including:

(a) Whether the High Court has jurisdiction to overrule a finding of fact by an arbitrator when the facts in question were fully argued by both sides before the arbitrator who duly ruled thereon.

(b) The intended appeal will seek a determination by this Honourable Court of the meaning of the phrases

'terms of reference to arbitration' and 'scope of reference to arbitration' as used in section 37 of the *Arbitration Act*, 1995.

(c) The intended appeal will seek a determination by this Honourable Court of the effect of section 5 and 17 of the *Arbitration Act* 1995 in an arbitration."

[27] The applicant urged that the determination of these points of law will substantially affect its rights in that the ruling of Gikonyo, J left it without redress since its claim for damages for loss of goodwill is now time barred. Although the applicant has tried to tailor his arguments to conform to section 35 of the Act, the intended appeal cannot lie under section 35 of the Act, as it is apparent that the intended appeal does not arise from any of the grounds stated in section 35, but is instead anchored on section 39 of the Act. On the other hand, the threshold of section 39 of the Act has not been met, as there is no demonstration that the parties had agreed to any party having a right of appeal to the court on any question of law arising out of the arbitral award as required under section 39(3) of the Act.

[28] Besides, assuming for the sake of argument that the applicant's intended appeal is brought under section 35 of the Act, the issue would be whether the applicant has demonstrated an exceptional case that would justify the exercise of our discretion in granting special leave. In this regard the grounds stated do not show that the learned Judge went outside the boundaries of section 35 of the Act. Nor has the applicant demonstrated any error of law that arises from the determination of meaning of the phrases: 'terms of reference to arbitration' and 'scope of reference to arbitration' as addressed by the learned Judge, or waiver of right to object under the arbitration agreement. Further, the applicant has not convinced us that there is a misapprehension of the law regarding the holding by the court on loss of reputation or any matter of public importance that arises therefrom.

[29] On the issue of jurisdiction of this Court to hear an appeal under section 35 of the *Arbitration Act*, as we have endeavored to show in the aforecited decisions, the Supreme Court has rendered itself on the matter and given clear guidance. It is therefore no longer a novel or exceptional matter deserving the attention of this Court.

[30] For these reasons, we do not find it appropriate to exercise our discretion in the applicant's favour. Accordingly, the notice of motion dated 22nd February, 2018 is dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL, 2022.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

ASIKE MAKHANDIA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR