**Tanzania National Roads Agency v Kundan Singh Construction Limited (Civil Application 52 of 2014) [2022] KECA 773 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KECA 773 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT MOMBASA**

**CIVIL APPLICATION 52 OF 2014**

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

**JUNE 10, 2022**

**BETWEEN**

**TANZANIA NATIONAL ROADS AGENCY ..... APPLICANT**

**AND**

**KUNDAN SINGH CONSTRUCTION LIMITED ..... RESPONDENT**

***(An application for leave to lodge an appeal to the Supreme Court against the whole of the judgment of the Court of Appeal at Mombasa (Okwengu, Makhandia & Sichale, JJ.A) dated 14th November 2014 in Court of Appeal Civil Appeal No. 38 of 2013)***

**RULING**

1. In a ruling delivered on 15th August 2013, the High Court (Muya, J.) held that under Sections 36 and 37 of the *Arbitration Act*, the court in Kenya had jurisdiction to recognize and enforce any arbitral award irrespective of the country in which it is made save that such recognition or enforcement of the award could be refused where the court finds that the recognition or enforcement would be contrary to public policy; that the award was arrived at in breach of the express terms of the agreement between the parties which provided that the arbitration shall be governed by the law of Tanzania; and that enforcing such a contract would be contrary to the public policy of Kenya.

2. Aggrieved, the applicant filed Civil Appeal No. 38 of 2013 before this Court. In that appeal, a preliminary objection was raised by the respondent in which it was contended that this Court lacked jurisdiction to entertain it by dint of Section 37(1)(b) of the *Arbitration Act* and Article 5(2)(b) of the *New York Convention on Recognition and Enforcement of Foreign Arbitral Awards* (New York Convention); and that no leave had been obtained to appeal. In its judgment delivered on 14th November 2014, this Court (Okwengu, Makhandia & Sichale, JJ.A) upheld the preliminary objection and struck out the appeal for want of jurisdiction.

3. Intent on challenging that judgment to the Supreme Court of Kenya, the applicant by its application dated 5th December 2014, the subject of this ruling, seeks an order for certification that the proposed appeal to the Supreme Court of Kenya raises matters of general public importance as contemplated by Article 163(4)(b) of *the Constitution*.

4. The record shows that when the application came up for hearing on past occasions, counsel had informed the Court that the respondent had been placed under receivership. When we heard the application on 7th March 2022, there was no mention of the status of the respondent. During the hearing, learned counsel Mr. Munyithia appeared for the applicant and relied entirely on his written submissions dated 15th February 2022 while Mr. Nyachoti, learned counsel, for the respondent briefly highlighted his written submissions dated 3rd March 2022.

5. It was submitted that the central issue before the Court was whether public policy is a matter of general public importance as envisaged under Article 163(4)(b) of *the Constitution*; that the proposed appeal to the Supreme Court is to interpret Article 2(5) and (6) of *the Constitution*, the *United Nations Commission International Trade Law* (UNICITRAL model law); and that the question is whether public policy is a matter of general public importance as provided for in Article 163(4)(b) of *the Constitution*. It was urged for the applicant that, while the issue before the Court in the appeal which was dismissed was whether it had jurisdiction to hear the appeal, the Court in its judgment of 14th November 2014, wrongly veered into addressing whether the matter is one of general public importance; and that in considering the present application, this Court should not therefore be influenced by those pronouncements in the judgment.

6. It was submitted that under Article 2 of the Model Law, the question of jurisdiction to recognize and enforce international commercial arbitration worldwide is contemplated and is a matter of public importance; that where, as here, enforcement of an arbitral award is declined by the High Court on public policy grounds, the matter, being a serious issue which may lead to law reform on enforcement of arbitral awards should not rest there; that the proposed appeal will give the Supreme Court an opportunity to intervene and give the country an opportunity to employ international best practices on determination of what amounts to public policy in commercial international arbitration; that other countries allow appeals up to the Supreme Court where the question of public policy in enforcement of commercial international arbitral awards is concerned.

7. In support, reference was made to, among other decisions, the decision of the Supreme Court in *Muiri Coffee Estate vs. Kenya Commercial Bank Ltd & another* [2014] eKLR for the proposition that issues of law of repeated occurrence in the general course of litigation, may become matters of general public importance as a basis for appeal to the Supreme Court; and the case of *Hermanus Phillipus Steyn vs. Giovanni Gnecchi- Ruscone, Supreme Court Application No. 4 of 2012* for the applicable principles in granting or refusing leave to appeal to the Supreme Court.

8. In opposition to the application, it was submitted for the respondent that no notice of appeal, either in this Court or in the Supreme Court, has been filed in respect of the judgment of this Court of 14th November 2014; that on the strength of this Court's decision in *Langata Development Co. Ltd vs. Mary Wanjiru Dames* [2019] eKLR, this Court does not therefore have jurisdiction to entertain this application.

9. It was submitted that the Court in the judgment intended to be challenged before the Supreme Court pronounced, at the invitation of the applicant, that the appeal did not raise an issue of general public importance; and that even if the issue is re-visited in this application, the intended appeal does not raise a matter of general public importance.

10. It was submitted further that certification should only be granted to allow the Supreme Court clarify issues of law where there is divergence in the courts below; that the issue regarding the right of appeal to the Court of Appeal from decisions of the High Court under the *Arbitration Act* has already been clarified by the Supreme Court in the case of *Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited*; Chartered Institute of Arbitrators- Kenya Branch (interested party) [2019] eKLR as well as in the case of *Synergy Industrial Credit Limited vs. Cape Holdings Limited [2019] eKLR*; that in those two cases, the Supreme Court dealt with Section 35 of the *Arbitration Act* which deals with setting aside of domestic awards which provision is the same as Section 37 dealing with recognition of international arbitral awards; and that there is no issue in this case that calls for input by the Supreme Court.

11. We have considered the application, the affidavits and the submissions. In *Hermanus Phillipus Steyn vs. Giovanni Gnecchi Ruscone* [2013] eKLR, the Supreme Court of Kenya pronounced the principles applicable in applications of this nature as follows:

> "i. For a case to be certified as one involving a matter of general public importance, the 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;
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> ii. where the matter in respect of which certification is sought 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;
>
> iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;
>
> iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;
>
> v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4) (b) of *the Constitution*;
>
> vi. 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 for which certification is sought;
>
> vii. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

12. As already indicated, the judgment of this Court which the applicant proposes to challenge before the Supreme Court arose from a preliminary objection taken regarding the competence of an appeal to the Court of Appeal from a decision of the High Court on recognition and enforcement of an arbitral award under Sections 36 and 37 of the *Arbitration Act* and the jurisdiction of the Court to entertain an appeal from the decision of the High Court.

13. In its impugned judgment, the Court framed the issues for determination thus: firstly, whether the Court of Appeal has jurisdiction to hear an appeal against an order of the High Court made in exercise of the powers under Section 37 of the *Arbitration Act*; and if so, whether recognition and enforcement

of the international arbitral award made in favour of the applicant would be against the public policy of Kenya. In the judgment, the Court concluded that

> "Section 37 of the *Arbitration Act* does not confer an automatic right of appeal to litigants such that any judgment, order or decree made by the High Court is appealable to the Court of Appeal"; that "in this case the right of appeal from the order of the High Court is not automatic but must be vested on the appellant by the *Arbitration Act* and Rules"; that "although the *Arbitration Act* provides a right of appeal in the case of domestic arbitral award, it does not provide any right of appeal in the case of international awards"; that it is the High Court "which is the one vested with powers under Sections 36 and 37 of the *Arbitration Act* to determine applications for recognition and enforcement of international arbitral awards" and "no further right of appeal has been provided for, thereby curtailing intervention by this Court." The Court was not impressed by the attempt made by the applicant to support a right of appeal on what the applicant claimed to be matters of "general public importance". In that regard the Court expressed that "there is no right of appeal to this Court anchored on matters of general public importance."

14. In effect, and despite efforts to embellish the nature of the matter, the issue the applicant proposes to take to the Supreme Court for determination is whether there is a right of appeal from the decision of the High Court under Sections 36 and 37 of the *Arbitration Act*. In that regard, the Supreme Court in *Hermanus Phillipus Steyn v. Giovanni Gnecchi-Ruscone* (above) guided that:

> " 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.".

15. In that regard, we agree with counsel for the respondent that the Supreme Court has provided guidance on appeals to the Court of Appeal under the *Arbitration Act* in *Nyutu Agrovet Limited vs. Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch* (interested party) (above) and in *Synergy Industrial Credit Limited vs. Cape Holdings Limited* [2019] eKLR (above) and there is therefore no uncertainty on the matter. In the Nyutu Agrovet Limited case for instance, the Supreme Court in rejecting a proposal that questions of general public importance should be a basis for granting leave to appeal, albeit in the context of Section 35 of the *Arbitration Act*, stated:

> " 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."

16. We are not persuaded that this matter meets the criteria for certification as raising matters of general public importance under Article 163(4)(b) of *the Constitution*. Accordingly, the application dated 5th December 2014 fails and is dismissed with costs to the respondent.

**DATED AND DELIVERED AT MOMBASA THIS 10TH DAY OF JUNE 2022.**

**S. GATEMBU KAIRU, FCIArb**

**.....**

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

**.....**

**JUDGE OF APPEAL**

**P. NYAMWEYA**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**