



**Baseline Architects Limited v National Hospital Insurance Fund (Civil Application 178 of 2017) [2022] KECA 1321 (KLR) (2 December 2022) (Ruling)**

Neutral citation: [2022] KECA 1321 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION 178 OF 2017  
HM OKWENGU, K M'INOTI & S OLE KANTAI, JJA  
DECEMBER 2, 2022**

**BETWEEN**

**BASELINE ARCHITECTS LIMITED ..... APPLICANT**

**AND**

**NATIONAL HOSPITAL INSURANCE FUND ..... RESPONDENT**

*(An application for leave to appeal to this Court against the Ruling of the High Court, Commercial and Tax Division—Milimani (F. Ochieng, J) delivered on 17th July 2017 in High Court Commercial & Tax Division Cause No. 504 of 2016)*

**RULING**

1. By a notice of motion dated July 28, 2017, the applicant Baseline Architects Limited moved this court under sections 39(3)(b) of the Arbitration Act, rule 3(1) of the Arbitration Rules 1997, rules 39, 42 and 43 of the Court of Appeal Rules, 2010 seeking orders that leave be granted to it to appeal against the ruling delivered on July 17, 2017, by the High Court (Ochieng, J) (as he then was), setting aside the arbitration award dated November 16, 2016, on grounds of public policy,
2. The motion before us stems from a contract in which the applicant was commissioned by the respondent, National Hospital Insurance Fund, to provide architectural and lead consultancy services for the establishment of a medical centre of excellence. The applicant rendered the services but later a dispute arose concerning the payment of a sum of Kshs 1.8 billion demanded by the applicant as professional services. The dispute was referred to an arbitrator in accordance with the Architects and Quantity Surveyors Act (Cap 525) Laws of Kenya. The arbitrator ruled in favour of the applicant, but the respondent successfully challenged the award in the High Court, resulting in the impugned ruling, in which the learned judge set aside the arbitral award under section 35(2)(b)(ii) of the Arbitration Act.



3. In approaching this court for leave to file an appeal, the application was in the main, anchored on section 39(3)(b) of the Arbitration Act, and rule 3(1) of the Arbitration Rules. The grounds upon which the application was anchored as stated on the face of the motion were as follows:
  - i. That the case involves points of law of general importance, the determination of which will substantially affect the rights of the applicant as enshrined in the Constitution;
  - ii. That the learned judge erred in finding that the arbitrator relied on By-law E9 of the Architects and Quantity Surveyors Act (Cap 525) to override the provisions of the Public Procurement and Disposal Act, 2005 as By-law E9 is not a procurement provision;
  - iii. That the learned judge erred in law in finding that the provisions of the Public Procurement & Disposal Act 2005 were applicable to the procurement of the applicant's services against the express finding and determination by the arbitrator, that the services were validly procured under the Exchequer and Audit (Public Procurement) Regulations 2001, and that the provision of the services by the applicant remained continuous as they have never been terminated;
  - iv. That the learned judge erred in law by introducing new issues that were not part of the evidence before the arbitrator, as there was no evidence that the amount being claimed was huge and that the project had stalled. By linking payment of the applicant's fees for consultancy services to the construction of the project, the learned judge was in contravention of the express provisions of the Architects & Quantity Surveyors Act governing payment of consultancy fees;
  - v. That the learned judge erred in law by failing to state and lay a basis for the public policy breach that shocked his conscience, because the fees assessed by the arbitrator was offered by the respondent to the applicant in writing, no public policy issue was raised before the arbitrator in respect of the amount of fees by relying on the quantum of fees awarded by the arbitrator and linking the same to the starting of construction of the project as matter of public policy that shocked his conscience, the learned judge was importing issues that were never canvassed before the arbitral tribunal, thereby opening up factual findings by the arbitrator against established arbitral jurisprudence in Kenya.
4. The application was supported by a 34 paragraph affidavit sworn by Morris Gitonga Njue (Mr Njue), who is a director in the applicant's company. Apart from reiterating the grounds stated on the motion, the affidavit gave a background of the contractual relations leading to the dispute, and stated that the full arbitral process was undertaken; that both the applicant and the respondent were represented during the arbitral process; that while the applicant availed a witness who testified, the respondent failed to avail any witness; and that the arbitral tribunal rendered an award in favour of the applicant in the sum of Kshs 1.486 billion which was the precise amount the respondent had offered to pay the applicant for the consultancy services that had been rendered up to that stage. In addition, there was interest to be added from the date the offer was given to the applicant.
5. Mr Njue deposed that the arbitrator made an express finding that the services of the applicant were validly procured under the 2001 Regulations and that provision of the services by the applicant remained continuous as they had never been terminated. The affidavit further provided many evidential details concerning the contract and faulted the learned judge for making a finding that the project had stalled, as there was no such evidence before the tribunal. Finally, Mr Njue concluded by faulting the learned judge for setting aside the arbitral award as 'shocking to his conscience' without laying a foundation for any specific ground of public policy issue.



6. The applicant has also filed written submissions in which it contends that the intended appeal raises substantial issues that involve points of law of general public importance. The applicant relies on section 39(3) of the *Arbitration Act*, and the Supreme Court Ruling in Petition No 12 of 2015, *Nyutu Agrovet Limited vs Airtel Networks Kenya Limited & Others* (the Nyutu Supreme Court decision), for the proposition that an appeal may lie from the High Court to the Court of Appeal on a determination made under section 35 of the *Arbitration Act*, where the High Court has stepped outside the grounds set out in the said section; or the decision of the High Court is manifestly wrong and completely shuts the door of justice to either of the parties.
7. The applicant argues that the ruling of the learned judge was based on facts that were not before the arbitrator, as the status of the construction of the proposed centre of excellence was not canvassed before the arbitrator. In addition, the learned judge erred by reviewing the merits of the arbitral award by linking payment of the applicant's professional fees to the state of construction of the project. The applicant contended that in some jurisdictions, public policy has been used as a convenient way of refusing recognition and enforcement of arbitral awards; that excessive use of public policy to set aside arbitral awards may erode the public policy set out in article 159 of the *Constitution*; and that excessive court intervention in arbitral proceedings, particularly on grounds of a judge's personal conscience as a ground for setting aside an arbitral award, may interfere with the efficacy of arbitration as a viable mode of dispute resolution. The applicant also referred to the Supreme Court decision in *Geo Chem Middle East vs Kenya Bureau of Standards [2020] eKLR*, and urged the court to grant it leave to appeal.
8. The application is opposed through a 39 paragraph replying affidavit sworn by Geoffrey Gitau Mwangi (Mr Mwangi), who is the chief executive officer of the respondent. Mr Mwangi swears on the advice of his counsel, that the intended appeal does not raise any point of law of general importance, and that the intended grounds of appeal do not merit serious judicial consideration as the issues which they seek to explore are well settled in law.
9. Mr Mwangi supports the ruling of the learned judge as a holistic interpretation of the law in considering the effect of non-compliance with procurement procedures in retaining the applicant's consultancy services, and adds that a holistic application of the law only leads to the conclusion that correct computation of fees cannot cure a breach of procurement laws.
10. In addition, Mr Mwangi deposes that the learned judge laid a basis for the conclusion that the arbitrator's award violated public policy for various reasons, including the breach of procurement law and the resulting illegal contract; and the ordering of payment of huge sums of public money for services rendered under illegal contracts. The affidavit also deposed to various evidentiary issues relating to the contract, and added that article 10, 201, 227 & 237 of the *Constitution* which emphasizes transparency, accountability and integrity, were violated; that there was no public participation in relation to the second project; that failure to comply with mandatory procurement processes and other procedural and substantive improprieties which underlay the inception of the two projects, rendered any contracts or agreements an illegality, hence null and void; and that there was no valid contract between the parties because of non-compliance with procurement processes, and there was therefore abundant grounds to lead to the conclusion that the arbitral award was inimical to public policy.
11. Mr Mwangi added that the respondent is a state corporation charged with the primary mandate of providing medical insurance cover to the Kenyan public, and therefore if the arbitral award was to be allowed, the public was bound to suffer the loss of billions of shillings as a result of baseless claims.
12. The respondent has also filed written submissions and list of authorities. In giving a background to the application, the respondent argued that the arbitral award was predicated on an illegality; that the



subject matter of the dispute was not capable of settlement by arbitration under the law of Kenya; and that the award was in conflict with the public policy of Kenya.

13. The respondent submitted that it opposed the applicant's claim before the arbitral tribunal as the claim was predicated on an illegality, the transaction not having adhered to procurement procedures, and the project not having taken off, and therefore it was offensive to public policy to claim under such circumstances; that the learned judge properly found under section 35(2) of the *Arbitration Act* that the award of Kshs 2.2 billion for a project that had not commenced or materialized shocked his conscience, and that it would be contrary to public policy to enforce such an award.
14. The respondent relied on *Synergy Industrial Credit Limited vs Cape Holdings Limited [2019] eKLR* (the Synergy, Supreme Court decision), where the Supreme Court stated that it is only section 39 of *Arbitration Act* that specifically provides for intervention by the Court of Appeal where 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. The respondent argued that the applicant had not demonstrated that the parties had agreed that a question of law arising in the arbitral process or the award, should be referred to the High Court, and by that reason the application should fail as an appeal cannot lie to this court.
15. The respondent argued that section 39 of the *Arbitration Act* which provides for intervention by the Court of Appeal in domestic arbitration, was not applicable as the parties had not agreed that a question of law arising from the arbitration process or a decision of the High Court on such process, could be referred to the Court of Appeal. For this proposition, the respondent relied on this court's decision in *Kenyatta International Convention Centre vs Congress Rental South Africa [2020] eKLR* and the Nyutu Supreme Court decision. The respondent urged that the applicant had not met the threshold set out in the Nyutu Supreme Court decision, and that the intended grounds of appeal show that the applicant is merely trying to revisit the meritorious elements of the High Court decision as opposed to procedural flaws.
16. The ruling of the High Court, subject of the intended appeal was a ruling setting aside the arbitral award on grounds of public policy under section 35(2)(b)(ii) of the *Arbitration Act*. The issue whether an appeal can lie to this court from a judgment of the High Court under that section, was interrogated extensively by the Supreme Court in the Nyutu decision. The following extract of the majority decision is instructive.

' (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. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. 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.



(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. 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.

[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)

17. The Supreme Court reiterated the majority position taken in the *Nyutu* decision by another majority decision in the *Synergy Industrial Credit Limited vs Cape Holdings Limited* [2019] eKLR, (the *Synergy* decision), where the Court stated as follows regarding section 35 of the *Arbitration Act*.

(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.



85. Such a finding is in consonance with practices 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.
85. 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.
85. 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.'
18. From the above we discern the following to be the position now established:
- i. That the Court of Appeal has residual jurisdiction in exceptional and limited circumstances to entertain appeals from the High Court on determinations made under section 35 of the *Arbitration Act* in circumscribed appeals where there is process failure as opposed to the merits of the award,
  - ii. That such appeal is limited to clear situations where the High Court acting under section 35 of the Act set aside an arbitral award for reasons that do not fall within the grounds provided in section 35 for interfering with an arbitral award, and made a decision that is so grave or manifestly wrong, and which decision has completely closed the door of justice to either party.
  - (iii) That leave to appeal to the Court of Appeal from a determination of the High Court under section 35 of the *Arbitration Act* should only be granted in exceptional circumstances to correct specific errors of law which if left alone would lead to miscarriage of justice.
  - iii. That an issue of general public importance is not necessarily one that would fall under section 35 of the Act.
19. Coming back to the circumstances herein, the learned judge made a determination under section 35 of the *Arbitration Act*, setting aside the arbitral award ostensibly on grounds of public policy. The applicant has indicated in the motion subject of this ruling, that one of the grounds they intend to raise is that the intended appeal involves points of law of general importance, the determination of which will substantially affect the rights of the applicant. Apart from the fact that the so called points of law of general importance have not been set out with precision, this is a ground of appeal that falls squarely under section 39(3)(b) of the *Arbitration Act* and not section 35 of the *Arbitration Act*. The other grounds sought to be raised in the intended appeal are errors supposedly committed by the



learned judge relating to matters of evidence and the applicable law. These are matters that relate to the merit of the arbitral award rather than process failures and would not be appropriate for this court's circumscribed residual appellate jurisdiction arising under section 35 of the [Arbitration Act](#).

20. The most pertinent ground that the applicant has raised in regard to an appeal arising from a determination of the High Court under section 35 of the Act is faulting the learned Judge in finding that the arbitral award was against public policy relying on the fact that the award of Kshs 2.2 billion shocked his conscious, because the construction of the proposed medical center had not even started, and it would be against public policy to pay money for a project that had failed to take off. This ground would raise an issue as to whether the award was really against public policy or whether it was set aside for a ground other than that provided for under section 35 of the [Arbitration Act](#). However, the applicant has not approached this court under section 35 of the [Arbitration Act](#), but has approached the court under section 39(3) of the [Arbitration Act](#).

21. Section 39 of the [Arbitration Act](#) states as follows:

- ' (1) Where in the case of domestic arbitration the parties have agreed that;
- a. An application by any party may be made to a court to determine any question of law arising in the course of the arbitration; or
  - b. 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, may be made to the High Court.
2. On an application or appeal being made to it under subsection (1) the High Court shall -
- a. Determine the question of law arising;
  - b. Confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for reconsideration or, where another tribunal has been appointed, to that arbitral tribunal for consideration
3. Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against the 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).'

22. The issue for consideration, is whether this court can grant leave to the applicant to appeal against the judgment of the High Court to this court under section 39(3) of the [Arbitration Act](#), where the intended appeal is actually anchored under section 35 of the Act. In answering this question, we revert



to the decision of the Supreme Court in the Synergy decision where the court rendered itself as follows in regard to section 39 of the *Arbitration Act*.

- ' (77) In the above context, on behalf of the respondent, it is urged that it is only section 39 of the *Arbitration Act* which contemplates appeals against decisions of the High Court. On our part, we take the position that, unlike other provisions in the Act, section 39 specifically provides intervention by the Court of Appeal where 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.
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.
81. 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.'
23. From the above, it is apparent that this court can indeed grant leave to an applicant under section 39(3) of the *Arbitration Act*, where an applicant meets the threshold provided in that section as elaborated by the Supreme Court. In our understanding the threshold is, first, that the matter relates to a domestic arbitration where the parties have agreed to refer to the High Court any question of law arising out of the arbitration proceedings or out of the award, to be determined by the High Court. Secondly, following the determination by the High Court, of the question of law arising, the matter may be escalated to the Court of Appeal if the parties have agreed prior to delivery of the arbitral award, that an appeal shall lie to the Court of Appeal or the Court of Appeal being satisfied 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 the applicant to appeal the ruling or judgment of the High Court.
24. It has not been alleged nor demonstrated that the dispute herein does not relate to a domestic arbitration. The contracted services were to be performed in Kenya and were apparently guided by the Kenya law. No evidence has been produced of any agreement for the court's involvement in the



dispute. Therefore, section 39(3)(b) can only be applicable if this court is satisfied that there is a point of law of general importance involved in the dispute. It is apparent from the two applications that were before the learned judge and the ruling subject of the intended appeal, that the learned judge set aside the award under section 35(2)(b) of the *Arbitration Act* for being contrary to public policy.

25. The pertinent excerpt of the ruling subject of the intended appeal states as follows:

' 36. This court is not sitting in its appellate capacity when it is called upon to determine whether or not to set aside an arbitral award.

37. However, as was stated by the Supreme Court of India in *Associate Builders vs Delhi Development Authority, [2014] ARBLR 307*,

'When it comes to setting aside an award under the public policy ground it? can only mean that an award shocks the conscience of the court. It cannot possibly? include what the court thinks is unjust or the facts of a case, for which it then seeks to substitute its view, for the arbitrator's and does what it considers to be just'

38. I am persuaded about the correctness of the pronouncement by the Supreme Court of India.

39. As the said pronouncement was made in a decision which the respondent sought to rely upon, it must be assumed that the respondent also believes that the said decision was correct.

40. In my considered view, the award of Kshs 2.2 billion shocks my conscience in this case, because the construction of the proposed medical centre of excellence has not even started. It would thus would be against the public policy of Kenya to spend a colossal amount of money paying for a project that has failed to take off. It would be a mockery of justice to sanction such payment. I therefore reject the invite by Baseline Architect Limited to adopt the arbitral award as a decision of this court.

41. Instead I allow the application by the National Insurance Fund and thus set aside the arbitral award.'

26. It is now clear from the Nyutu Supreme Court decision and the Synergy Supreme Court decision referred to above, that section 39(3) of the *Arbitration Act* allows the court to grant leave to appeal to this court against a decision of the High Court in arbitration matters, only in limited situations where the court is satisfied that the intended appeal raises a point of law of general importance, the determination of which will substantially affect the rights of the parties involved in the dispute. The issue therefore, is whether the applicant has satisfied this threshold.

27. It is the applicant's position that the learned judge of the High Court in making a finding relating to pre-construction consultation fee, linked the same to the state of construction of the project, citing the same as a public policy issue; that the conclusion that construction had not commenced was baseless, as this was a matter not canvassed before the arbitral tribunal and amounted to opening factual findings on issues never raised before it; that the learned judge erred as he went against the established arbitral jurisprudence in Kenya; and that the learned judge failed to lay a clear basis for the specific public policy breach relied upon in setting aside the arbitral award nor has the respondent addressed this in its submissions.



28. A look at the award shows that the issue of the legality of the contract between the applicant and the respondent was central in the dispute and the arbitrator came to the conclusion that there was a legally binding contract pursuant to which the applicant rendered the contracted services. The learned judge was alive to the fact that he was not sitting on appeal against the decision of the arbitrator and did not therefore delve into this issue.
29. Paragraph 30 of the affidavit that was sworn by Mr Mwangi in the High Court proceedings, in support of the respondent's motion to set aside the arbitral award, summarizes the basis upon which the respondent challenged the arbitral award. In that paragraph Mr Mwangi deposes:
- ' That I am further advised by the plaintiff's advocate on record which advise I verily believe to be sound that it is settled law that a contract entered into as a result of an illegal procurement process by a procuring entity or as a result of a procedurally improper, illegal or unreasonable decision cannot be allowed to stand. In the circumstances, by allowing the defendants claim as he did, the sole arbitrator clearly and wholly misunderstood, misinterpreted and misapplied the provisions of the law. The award herein is to this extent against the public policy as it is inconsistent with the laws of Kenya and inimical to the national interest of the country.'
30. From the excerpt of the ruling of the learned judge that we have produced at paragraph 25, the learned judge set aside the award under section 35 of the Arbitration Act for being against public policy. The question whether the ground upon which the learned judge concluded the award was in breach of public policy, falls outside section 35 of the Act, is one that can only be determined within that section and not as a matter of public importance under section 39 of the Arbitration Act.
31. The applicant having moved this court under section 39(3)(b) of the Arbitration Act, the intended appeal is not anchored on the four corners of section 35 of the Arbitration Act, but is anchored on section 39 (3)(b) of the Arbitration Act, and leave is sought to appeal against the ruling of the learned judge on grounds that the case involves points of law of general importance, the determination of which will substantially affect the rights of the applicant as enshrined in the Constitution.
32. There was no application before the learned judge under section 39 of the Arbitration Act, and the learned judge in setting aside the arbitral award, was not addressed on any point of law of general importance, the determination of which would affect the rights of the parties but was addressed specifically on whether or not the arbitral award ought to be set aside under section 35 of the Arbitration Act. In our view it would not be proper to grant leave to appeal to the applicant under section 39(3)(b) of the Arbitration Act on the ground that the intended appeal raises issues of public importance when the alleged issues were not canvassed in the High Court and the High Court has not rendered itself on the same.
33. For the above reasons we come to the conclusion that this is not a matter deserving leave to appeal under section 39 of the Arbitration Act as the applicant has not met the threshold for granting leave to appeal. Accordingly, the application is dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF DECEMBER, 2022.**

**HANNAH OKWENGU**

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**JUDGE OF APPEAL**

**K M'INOTI**



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**JUDGE OF APPEAL**

**S ole KANTAI**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

