Gachuhi & another v Evangelical Mission for Africa & another; Law Society of Kenya (Interested Party) (Civil Appeal 159 of 2015) [2021] KECA 339 (KLR) (17 December 2021) (Ruling)

Neutral citation: [2021] KECA 339 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 159 OF 2015

RN NAMBUYE, W KARANJA & HM OKWENGU, JJA

DECEMBER 17, 2021

BETWEEN

KIMANI GACHUHI ..... 1ST APPELLANT

PETER MBUTHIA GACHUHI ..... 2ND APPELLANT

AND

EVANGELICAL MISSION FOR AFRICA ..... 1ST RESPONDENT

CINDY SANYU OKOVA ..... 2ND RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

(An Appeal from the Ruling and Orders of the High Court of Kenya at Nairobi (E. K. Ogola, J.) delivered on 19th May 2015 in)

RULING

1. This appeal arises from the decision of Ogola J delivered on 19th May, 2015 at the High Court of Kenya at Nairobi in Civil Application No. 479 of 2014, which was filed in High Court Civil Case No. 569 of 2009. A brief background of this matter is necessary to place this application in context. On 16th September, 2005 Evangelical Mission for Africa and Cindy Sanyu Okova (the respondents) and Kimani Gachuhi and Peter Mbuthia Gachuhi (the appellants) entered into an agreement for the sale and purchase of part of L.R Number 2951/84 for Ksh. 64 million. Subsequently, an agreement for novation was executed being the second agreement between the parties. On 4th June, 2007 the parties executed a variation agreement and also executed a license agreement allowing the respondents to occupy and use the land.

2. The purchase price was paid and the respondents took possession of the suit property as they waited for the sub-division and the rest of the conveyance processes to go through. In the meantime, they built and started running a thriving primary school. For reasons that we do not wish to delve into at this stage, the agreement was not concluded as initially anticipated. This caused the respondents herein to move to the High Court where they filed the aforementioned suit.

3. By consent of the parties, the dispute was referred to arbitration whereby the parties appointed two arbitrators being Joe Okwach SC and Steven Gatembu Kairu. The arbitrators heard the dispute and published their final award on 19th August, 2014. This is the award the respondents challenged and wanted set aside by the High Court and which the appellants entreated the court to adopt.

4. Two applications were filed within the civil suit. The first application being a chamber summons dated 26th September 2014 and filed in court on 30th September, 2014 filed pursuant to Sections 35 and 39 of the *Arbitration Act*, Cap 49 of the laws of Kenya. The application sought several orders, but in the main the respondents prayed that the court be pleased to set aside in total the final Award dated 19th August, 2014 and that the court be pleased to issue any consequential orders that it deemed necessary to serve the cause of justice.

5. The second application was a notice of motion dated and filed pursuant to Order 2 rule 15 (b), (d) and Order 50 rule 1 of the Civil Procedure Rules, and *Civil Procedure Act* and was supported by an affidavit sworn by Peter Mbuthia Gachuhi (the 2nd appellant) on 24th November, 2014. It sought, inter alia, to secure orders striking out the respondents' first application in its entirety.

6. Having considered the two applications, the court allowed the application by the respondents herein and granted orders as follows:-

> "a. The Claimant's application by way of Chamber Summons dated 26th September 2014 succeeds.
>
> b. The Arbitral Award herein dated 19th August 2014 cannot stand and is hereby set aside in toto under Section 35 (2) (b) (ii) for being in conflict with the public policy of Kenya, and against the Constitution of Kenya.
>
> c. Save and except to the extent that it has succeeded in the foregoing paragraphs of this Ruling, the Notice of Motion application by the Respondents filed in court on 24th November 2014 fails.
>
> d. The matter is herewith referred to arbitration for the second time. The parties shall be at liberty to agree on the arbitrators, and the terms of arbitration, within 14 days. If they are not able to agree then the court will make appropriate orders for appointment of arbitrators and the terms for arbitration.
>
> e. Costs herein shall be for the Claimants/Applicants."

7. Aggrieved by the above findings, the appellants proffered the instant appeal which is predicated on some prolix twenty two (22) grounds which fault the learned Judge for, inter alia, finding that an Arbitral Tribunal falls under the jurisdiction created by Article 165(6) of the *Constitution*; construing the provisions of Article 165(6) of the Constitution as expanding the grounds for setting aside an arbitration award beyond those set out in Section 35 of the *Arbitration Act*; interpreting the provisions of Article 10 of the Constitution as vesting upon the High Court additional powers to set aside an arbitral award beyond those set out in Section 35 of the Act; failing to uphold the rule of law as

enshrined in Article 50(1) of the Constitution and the application of Section 32A of the Act, violating the appellants' constitutional rights in finding that the arbitral tribunal had abdicated its duty by the application of the law to the facts; wrongly interpreting and applying Article 40 of the Constitution and re-writing the contract between the parties; violating the appellants' rights to property as protected by the provisions of Article 40 of the Constitution by making a finding that the land to be surrendered to the Nairobi City Council was available and should have come from the appellants' portion.

8. Further that the learned Judge wrongly exercised his jurisdiction as follows;

   a) Exceeded his jurisdiction by entering into an enquiry regarding the arbitral proceedings and wrongly making findings in connection with the issue of whether the sale agreement between the parties made provision for the land to be surrendered to the Nairobi City Council. That is an evidentiary issue that was beyond the jurisdiction of the court.

   b) Exceeded his jurisdiction by entering into an enquiry as to whether frustration had occurred in the circumstances of the case which was an issue within the exclusive jurisdiction of the arbitral tribunal.

   c) Exceeded his jurisdiction by wrongly entering into an enquiry regarding and making findings on the issue of whether the children who attend the School of Nations come from poor families, an issue of evidence which was not placed before him and which he did not have jurisdiction to entertain.

   d) Exceeded his jurisdiction by enquiring into and making findings regarding the improvements allegedly carried out on the suit property and that the property was currently valued at Kshs. 800,000,000.00, an issue of evidence which was not before him and which he lacked jurisdiction to enquire into or make a determination on.

9. We have found it necessary to repeat the above grounds of appeal because they set the stage as to whether there are sufficient grounds to warrant this Court to grant leave to proceed with the substantive appeal.

10. All parties in this appeal filed the submissions as directed by the court and were ready to proceed on the hearing date. However, before the hearing of the appeal commenced, learned counsel in Court raised the issue of leave to appeal to this Court which issue, they submitted, needed to be disposed of first. We therefore invited learned Counsel to address the Court on the question of leave to appeal.

11. Mr. Kamau Karori, learned Counsel for the appellants referred the Court to the grounds of appeal which we have adverted to earlier and maintained that this appeal meets the threshold set by the Supreme Court in *Nyutu Agrovet vs Airtel Networks Limited [2019] eKLR* (Nyutu) andsubsequently in *Synergy Industrial Credit Limited vs Cape Holdings Limited vs Cape Holdings Limited [2019] eKLR* (Synergy).

    According to Mr. Karori the learned Judge of the High Court misinterpreted the Constitution and erred in relying on the provisions of the Constitution of Kenya 2010 more particularly Chapter 6 and Article 10 of the Constitution, while ignoring the provisions of Section 35 of the *Arbitration Act*. Counsel further submitted that where the court has misinterpreted the Constitution and Section 35 of the *Arbitration Act*, then that becomes a good case for this Court to entertain an appeal from the High Court. Counsel urged that the application has met the parameters set in the Nyutu and Synergy cases (supra) and asked the court to grant the leave sought.

12. His position was supported by Mr. Macharia, learned Counsel for the second appellant. Mr. Macharia summarised the test to be applied as set out by the Supreme Court in the Nyutu and Synergy cases (supra) as:-

i. is the decision unfair;

ii. was there misconduct in the decision making process;

iii. in order to protect the integrity of the judicial process;

iv. to restore confidence in administration of justice;

v. to prevent injustice from occurring; and

vi. to reconcile conflicting decisions.

According to Mr. Macharia, the High Court gave a decision that was manifestly wrong when it said that it had a blank cheque to interfere in the arbitral process. Further, that the court also erred in stating that Article 10 of the constitution would override the contract between the parties thus interfering with the autonomy of the parties to the arbitration agreement, saying that the court cannot rewrite the parties' contract.

13. On his part, Mr. Ochieng Oduol, learned counsel appearing for the Law Society of Kenya (The Interested Party) adopted the submissions by Mr. Karori and Mr. Macharia and asked the Court to grant leave for the substantive appeal to proceed to hearing.

14. The application for leave was opposed by Mr Ahmednassir (SC), learned counsel for both respondents. He narrated the facts of the case and the circumstances leading to the arbitration and also touched on the contents of the Arbitral Award that was set aside by the High Court. He submitted that gross injustice had been committed against the respondents and the High Court could not shut its eyes to the same. He reiterated the truism that leave to appeal should not be granted as a matter of course and this application does not meet the threshold set in the Nyutu and Synergy cases (supra). According to learned Senior Counsel, there was no gross injustice in the decision of the High Court; there was no error of law on the part of the learned Judge and the appellants were only being held to perform their contractual obligations.

15. Before the decision in "Nyutu" the position held by the courts was a party aggrieved by the decision of the High Court on an application seeking to set aside an award under Section 35 of the *Arbitration Act* had no right of appeal to the Court of Appeal. The Supreme Court upset this position in the Nyutu case (supra) which settled the issue by pronouncing that an appeal can lie from the High Court to the Court of Appeal on a determination made under Section 35 of the *Arbitration Act*.

16. The Supreme Court in a majority decision set the parameters to be met for an appeal to qualify for admission to this Court 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." [Emphasis ours].

17. Subsequently in the Synergy case (supra), the Supreme Court affirmed its decision in Nyutu and succinctly reiterated the requirements to be met by a party who wants to be heard by this Court on an

appeal from a decision of the High Court made under Section 35 of the *Arbitration Act*. The Supreme Court stated as follows:-

> " 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. The grounds for setting aside an award under Section 35(2) are as follow;
>
> '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 to 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 decision 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
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> 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.'"
>
> [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.

18. It is within the above guidelines that we must consider whether this appeal merits the leave of this Court to proceed to hearing. We have considered the issue as to whether or not to grant leave to appeal along with submissions by all counsel in Court as summarised above, and the applicable law particularly as set out under Section 35 of the *Arbitration Act* and the decisions of the Supreme Court in the Nyutu and Synergy cases (supra).

    Does the application meet the threshold set by the Supreme Court in the two cited cases?

19. To start with, we observe and appreciate the fact that both appellants and the interested parties both agree that the matter meets the threshold for leave to be granted for the substantive appeal to proceed to hearing before this Court. Both respondents are nonetheless of a contrary view. Our task is to apply the parameters set out above and determine whether this appeal passes muster.

20. In making our decision as to whether to grant leave or not, we must eschew delving into the details of the award or making any determinative conclusions that might touch on the grounds of appeal raised herein as that is the remit of the Bench that will hear the substantive appeal.

21. One of the grounds of appeal raised is that the learned Judge of the High Court erred in finding that once the court assumes its jurisdiction under Article 165(6) of the Constitution the court must also ensure that the decision of the tribunal passes the mandatory test of Article 10(2) of the constitution. The Supreme Court addressed this point and settled the law in the Nyutu decision (supra) by pronouncing itself as follows:-

    > " breaches of the Constitution are properly governed by Articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the *Arbitration Act*."

    The learned Judge, with respect, appeared to disregard the grounds of setting aside an Arbitral Award as circumscribed by Section 35 of the *Arbitration Act* and assumed his own standards/parameters. In our view, this application of the Constitution in an application for setting aside the award will require this Court to address its mind to, and that can only be done if the appeal proceeds to hearing.

22. As stated earlier, we must be circumspect not to make findings that might embarrass the bench that will be seized of the appeal. Our conclusion is that we are persuaded that this appeal passes through the narrow window opened by the Supreme Court in the Nyutu case (supra) to take its place before this Court and be determined on its merit.

Accordingly, we grant the leave sought and direct that the appeal be heard and determined by this Court. We order that costs of the application be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 17TH DAY OF DECEMBER, 2021.

R. N. NAMBUYE

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JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

HANNAH OKWENGU

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR