



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MUSINGA & SICHALE, JJ.A.)

CIVIL APPLICATION NO. 389 OF 2018 (UR 316 of 2018)

BETWEEN

THIKA COFFEE MILLS.....APPLICANT

AND

RWAMA FARMERS CO-OPERATIVE SOCIETY LIMITED....RESPONDENT

(Being an application by the appellant for a certificate that a matter of General Public Importance is involved pursuant to Article 163(4) of the Constitution arising from the Judgment of the Court of Appeal (Makhandia, Kiage, & M'Inoti, JJ.A) delivered on 12th October 2018 in Civil Appeal No. 251 of 2013

RULING OF THE COURT

[1] On 12th October 2018, this Court (Makhandia, Kiage & M'Inoti, JJ.A.), having heard **CA No. 251 of 2013** delivered a majority judgment, in which it dismissed the appeal. The appeal had arisen from a judgment of the High Court, **Mabeya, J.** in which the High Court dismissed an application that had been lodged by Thika Coffee Mills. The applicant had sought to set aside an arbitral award made against it and in which **Rwama Farmers' Co-operative Society Limited**, (the respondent herein), was awarded *inter alia*, a sum of Ksh5,422,160.25. The learned Judge ordered that the arbitral award be adopted as a judgment of the court, and also awarded costs to the respondent.

[2] The applicant, who was aggrieved by the judgment of the High Court, lodged an appeal in this Court which culminated in the judgment of 12th October, 2018. By a notice of motion dated 24th December, 2018, the applicant who found no solace in that judgment, moved this Court for an order of stay of execution of the judgment of as well as the judgment of the High Court delivered on 28th September, 2012, pending the hearing and determination of an intended appeal to the Supreme Court against the Court's judgment of 12th October 2018. The applicant also sought leave to appeal to the Supreme Court against the said judgment, and also to have his intended appeal certified as raising a matter of general public importance under **Article 163(4)(b)** of the Constitution.

[3] The application was supported by an affidavit sworn by **Pius Mbugua Ngugi**, who is one of the directors of the applicant company. According to the grounds on the face of the motion and the supporting affidavit, the main issues intended to be raised before the Supreme Court in the intended appeal are:

“(a) Whether parties are bound by their pleadings, and circumstances under which a judge or an arbitrator can deviate from the pleadings and adjudicate over issues not pleaded.

(b) The jurisdiction of the Co-operatives Tribunal and the courts in light of section 76 of the Co-operative Societies Act.

(c) Under what circumstances can the High Court or the Arbitrator usurp the powers of the co-operative tribunal?

(d) The legality of co-operative societies that operated prior to the enactment of the Co-operative Societies Act No. 12 of 1997 taking into cognizance that prior to the legislative framework of the co-operative societies; co-operative societies have operated in Kenya from 1908.

(e) Whether contracts entered into with co-operative societies prior to the legislative framework of the Co-operative Societies Act, No.12 of 1997 are legal.

(f) Whether a bank statement reflecting a debit from one's account is cogent proof of payment.

(g) The importance of pleadings in Arbitration matters.

(h) The essential difference between an adversarial system of justice such as we have in which the judge is or ought to be more of an impartial umpire and the inquisitorial system where the judge is an active investigator after evidence and truth.

(i) whether a judge or arbitrator is overstepping his/her mandate in crafting a new issue not brought by the parties and basing it to prejudice another party thereby essentially assisting the other party in an impermissible manner.

(j) Whether sections 35 and 37 of Arbitration Act impede access to justice as enshrined in our Constitution.

(k) The principles for a re-trial and additional evidence after judgment has been rendered for the purpose of dispensing justice.

(l) Whether the execution of the said judgment dated 12th October 2018 would lead to unjust enrichment of the respondent to the detriment of the appellant.”

[4] The applicant filed written submissions in which it urged the Court to grant it leave to appeal and certify the intended appeal under Article 163(4)(b) of the Constitution as one raising questions of general public importance, deserving a determination in the Supreme Court. Of the questions identified for determination the applicant posited that Section 35 to 39 of the Arbitration Act should be interpreted as allowing expanded judicial review of an arbitral award on both law and facts, as limiting the grounds for review of arbitral award at High Court is inimical to the purpose of arbitration of ensuring that private agreements are enforced according to their terms.

[5] In addition the applicant pleaded that it was in the interest of equity and justice to grant it the orders of stay of execution, as there was a miscarriage of justice; that the issues intended to be raised by the applicant were not frivolous; that substantial loss would ensue from a refusal to grant a stay; and that the applicant had already furnished security and had made his application without undue delay.

[6] Prof. Ojienda SC, who was appearing for the applicant duly highlighted the written submissions. Senior counsel reiterated that the learned Judge went outside the scope of the pleadings, and that in considering the appeal, the learned Judges of the Court of Appeal were agreed on the issue of finality of arbitration proceedings under Section 35 of the Arbitration Act. Prof. Ojienda urged the Court to certify the matter as appropriate to be heard in the Supreme Court so that the issue of finality could be re-argued. He maintained that there was an issue of public interest with regard to whether the arms of the court could be tied when there was an erroneous application of the law. Senior counsel relied on several authorities that were quoted and availed to the Court.

[7] In opposing the application, the respondent filed written submissions that were also duly highlighted by Mr. Gitonga Muiruri, their counsel. Referring to Article 163(4)(b) of the Constitution, the respondent urged that in order to succeed in his application, the applicant had to demonstrate that the issues intended to be raised in the intended appeal involve matters of general public importance, the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest. In addition, that the applicant has to demonstrate that the point of law intended to be raised is a substantial one, the determination of which will have significance on the public interest.

[8] The respondent submitted that the intended appeal would be against public interest as it would go against the interest of four thousand members of the respondent society. In addition, that the applicant is a private company pursuing private illegitimate interest; that the merits or lack thereof, of the applicant's case was not a relevant consideration contemplated under Article 163(4)(b) of the Constitution; that appeals to the Supreme Court regarding the interpretation of the Constitution were provided for under Article 163(4)(a) of the Constitution as a matter of right; that the applicant was not denied a fair hearing before the Arbitrator, or the High Court or the Court of Appeal, but was heard before rulings were made. In addition, the respondent posited that there must be an end to litigation, hence the limitation of the High Court's jurisdiction under the Arbitration Act to setting aside under Section 35, recognition and enforcement under Section 36 and grounds for refusal of recognition or enforcement under Section 37.

[9] Learned counsel Mr. Gitonga, in highlighting the submissions pointed out that the applicant had already paid the judgment amount except for a portion of the interest, and therefore there was nothing remaining to be stayed. Mr. Gitonga urged the Court to distinguish the Nyutu Agrovet Limited vs Airtel Networks Kenya Limited & Anor [2019] eKLR (Nyutu Agrovet decision), because unlike the Nyutu Agrovet decision where the applicant was not heard on merit both in the High Court and the Court of Appeal, the applicant herein was heard and the Court having considered the appeal on merit, found nothing wrong with the award and judgment of the High Court.

[10] We have considered the applicant's motion and deem it appropriate to start with the applicant's prayer for leave to appeal to the Supreme Court, and certification that its intended appeal raises a matter of general public importance under Article 163 (4)(b) of the Constitution. In Hermanus Phillipus Steyn vs Giovanni Gneccchi-Ruscone [2013] eKLR, (Hermanus Phillipus decision), the Supreme Court stated that its jurisdiction under Article 163(4)(b) turns on the intended appeal being one raising a matter of general public importance. After considering several authorities, the Supreme Court rendered itself as follows:

“In this context, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Courts below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. In summary, we would state the governing principles 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;

(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) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court.” (underlining added)

[11] As set out in paragraph 3 of this judgment, the applicant has identified in its motion the main issues to be addressed in the Supreme Court in the intended appeal. The question that we must address is whether the applicant’s intended appeal passes the test set out in the Hermanus Phillipus decision. Specifically, whether the questions intended to be raised arose before this Court and were subject of determination in the judgment of the Court, and whether the questions raise substantial point of law of public interest the determination of which transcends the circumstances of the particular case and will have a significant bearing on the public interest.

[12] A perusal of the leading judgment of this Court (**Makhandia, JA.**) dated 12th October 2018 reveals the substance of the application, subject of the appeal before this Court as follows:

“The premise of the appellant’s application to set aside the award was that the same was fundamentally flawed as it was determined outside the scope of the arbitrator’s terms of reference; that the arbitrator’s findings were based on unpleaded claims and could not have been contemplated by the terms of reference; that the appellant was not afforded an opportunity to respond to the claim and was thus denied a fair hearing contrary to Article 50 of the Constitution; that in any event, the refund constituted unjust enrichment of the respondent which offended public policy.”

[13] The Court noted that the application was brought pursuant to Section 35 of the Arbitration Act and rule 7 of the Arbitration Rules 1997, and therefore the jurisdiction of the learned Judge of the High Court was limited, and he could not delve into the merits of the award as the application was not an appeal against the award of the arbitrator but a bid to set it aside. The Court found that:

“The learned Judge upon hearing the two applications i.e. to set aside the award and the adoption of the award as a judgment of the court, found that though the claims for Kshs. 7,500,000/-and Kshs. 1,623,245.65 had not been pleaded the parties introduced the same in the course of the arbitral proceedings and therefore refund of the same could not constitute unjust enrichment which is against public policy. He further rejected the appellant’s claim that it was not accorded a fair hearing in the proceedings. He therefore dismissed the appellant’s application with costs but allowed the respondent’s application with costs meaning therefore that he upheld the award and adopted it as a judgment of the court.”

[14] The above are the findings that the applicant challenged when he lodged his appeal on the grounds that the learned Judge erred: in finding that the parties had submitted to the arbitrator for adjudication the issue of whether Kshs. 7,500,000/- and Kshs.1,623,245.65 had been refunded or paid to the respondent; and in failing to find that the issues had not been pleaded and could not lawfully constitute issues for adjudication. The Court identified three issues for determination in the appeal. First, whether the appellant had the right to appeal to the Court in view of the fact that the ruling, subject of the appeal, emanated from an application made under Section 35 of the Arbitration Act. Secondly, whether the issue of refund of Kshs.7,500,000/- and Kshs.1,623,245/65 was beyond the terms of the reference and constituted unjust enrichment contrary to public policy; and thirdly, whether the appellant was denied a fair hearing by the arbitrator contrary to Article 50 of the Constitution.

[15] The judgment shows that all these three issues were addressed by the Court. First, the Court appreciated that the issue of the Court’s jurisdiction to hear an appeal emanating from the High Court under Section 35 of the Arbitration Act was unresolved because there were conflicting decisions of the Court, and that the matter was pending before the Supreme Court. The Court therefore deemed it prudent to uphold the parties’ rights to an appeal pending resolution of the matter before the Supreme Court. In other words, notwithstanding its reservation on its jurisdiction, the Court did not down its tools but proceeded to consider the substantive appeal on merit.

[16] The Court ruled on the two substantive issues in the appeal, holding first, that the question whether or not payments were allegedly made by the appellant to the respondent, was actually raised as an issue before the arbitrator, and was not an issue outside the arbitrator’s scope of reference. Secondly, that there was no evidence in support of the appellant’s contention that it was denied a fair hearing before the arbitrator contrary to Article 50 of the Constitution.

[17] We have deliberately gone to great lengths in giving the highlights of the judgment of this Court as that is necessary to draw out the precise issues that the applicant brought before this Court in its appeal, and the question that the Court determined. This is important because the intended appeal being one under Article 163 (4)(b) of the Constitution, the applicant can only raise issues that have been subject of determination in the appeal that was before this Court.

[18] As evident, issues reflected at paragraph 3(b) to (e, and (k) of this judgment that raise questions to do with the jurisdiction of the courts and arbitral tribunals over the Co-operatives Tribunal, the legality of contracts entered into and the co-operative societies that operated prior to the enactment of the Cooperative Societies Act No. 12 of 1997, and principles for retrial and additional evidence after judgment has been rendered, were not issues raised before this Court, nor were they addressed by the Court in the judgment subject of the intended appeal. These questions are not therefore open for consideration by the Supreme Court in an appeal under Article 163(4)(b) of the Constitution.

[19] This leaves the issues set out at paragraph 3(a), (f) to (j), and (l) as the issues that arise from the judgment of the Court. The issues can be compressed into three as follows:

(1) The importance of pleadings in arbitration matters and circumstances in which an arbitrator can adjudicate on an un-pleaded issue.

(2) whether an arbitrator overstepping his/her mandate in crafting a new issue not brought by the parties acts to the prejudice of one or both the parties, and whether this can provide a basis for setting aside an award.

(3) whether sections 35 and 37 of the Arbitration Act impedes access to justice.

[20] In our view, the three questions revolve around the issue of jurisdiction, that is, jurisdiction of the arbitral tribunal to determine the reference, the jurisdiction of the High Court in hearing an application under Section 35 of the Arbitration Act, and the jurisdiction of this Court in dealing with an appeal from the ruling of the High Court made under Section 35 of the Arbitration Act. In a nutshell the three boil down to the issue of the extent of the jurisdiction of the High Court and the jurisdiction of this Court, if any, under Section 35 of the Arbitration Act.

[21] The issue of jurisdiction of this Court under Section 35 of the Arbitration Act has recently been addressed by the Supreme Court in the **Nyutu Agrovet decision**. The matter was an appeal emanating from a ruling of this Court in which a five-judge bench dismissed an appeal from the High Court holding that there was no right of appeal to the Court from a decision of the High Court made under Section 35 of the Arbitration Act. The Supreme Court identified the issues before it for determination as follows:

“(a) Whether Sections 10 and 35 of the Act contravene a party’s right to access justice under Articles 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent.

(b) Whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act.

(c) What are the appropriate reliefs?

(d) Who should bear the costs of the Appeal?”

[22] In regard to the issue of Section 35 of the Arbitration Act and access to justice under Article 48 of the Constitution, the Supreme Court rendered its lf as follows:

“While we appreciate that unhindered access to courts is one of the key components of access to justice, we do not think that statutory limitations on appeals necessarily infringe on that right. Each case must be evaluated on its own circumstances.

That is why even where a right of appeal exists, depending on the circumstances of the case, Courts may still exercise their discretion by refusing to assume jurisdiction. In this case, Nyutu started on the wrong footing by assuming that there exists an unhindered right of appeal. We have shown why that is not so. Indeed, this matter was first heard by a Sole Arbitrator and later by the High Court in exercise of its jurisdiction under Section 35. The conduct of proceedings therein has not been impugned. We have also not been informed of any difficulties experienced by either of the parties in pursuing justice. Nyutu’s claim of denial of a right to access justice solely rests on its desire to prefer a further appeal which matter is the fulcrum of the present appeal. In the circumstances, we do not find a proper basis for finding that there is denial of access to justice and thus we reject the plea to declare Sections 10 and 35 of the Arbitration Act unconstitutional.”

[23] On whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act, the Supreme Court stated:

“46. We begin our analysis by setting out what Section 35 entails. This section provides that recourse to the High Court against an arbitral award may be made by an application for setting aside the award only. It then goes on to provide circumstances which may guide the High Court in setting aside an award. It also provides the time limit within which the application for setting aside should be made. Finally, it provides some of the possible reliefs which the High Court may issue upon granting an application for setting aside. As we have already indicated, Section 35 does not expressly indicate whether the decision of the High Court in

that regard is final, hence, the crux of this case.”

[24] We pause here to observe that the issue before the Supreme Court on jurisdiction in the **Nyutu Agrovvet decision** was exactly the same as that before this Court in dealing with the appeal lodged before it by the applicant. The Supreme Court appreciated the purpose of arbitration proceedings and the need to shield the arbitral proceedings from unnecessary court intrusion, but nevertheless found that in some situations court intervention may be necessary to maintain the integrity of the process.

[25] The Supreme Court specifically addressed **Section 35** of the Arbitration Act stating:

“72. 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.”

[26] The Supreme Court went on to circumscribe the exceptional circumstances in which such jurisdiction may be exercised cautioning that:

[76] “.....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.

[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.

[78] In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. The High Court and the Court of Appeal particularly have that onerous yet simple task. A leave mechanism as suggested by Kimondo J. and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end.

[27] Thus in the **Nyutu Agrovvet decision** the Supreme Court exhaustively considered and laid to rest the question of the jurisdiction of this Court in hearing appeals emanating from the exercise of section 35 of the Arbitration Act by the High Court. It is therefore no longer a novel question requiring determination by the Supreme Court.

[28] Unlike the **Nyutu Agrovvet decision** where this Court, having ruled that it had no jurisdiction downed its tools and struck out the appeal, this Court actually considered the applicant’s appeal on merit and found no substance in the appeal. Moreover, as stated by the Supreme Court in the **Nyutu Agrovvet decision**, an appeal from the High Court to this Court emanating from Section 35 of the Arbitration Act ought to be focused on process infractions and not merit.

[29] We come to the conclusion that the applicant has not satisfied the requirement for certification as it has failed to demonstrate any matter of public importance that requires determination in the intended appeal. It is apparent that the purpose of the intended appeal is merely to enable the applicant to have a second bite of the cherry by raising issues that have either already been dealt with or ought to, but were not raised in the Court of Appeal.

[30] Consequently, we decline to certify the intended appeal as involving a matter of general public importance as required under **Article 163(4)(b)** of the Constitution and reject the applicant’s motion for leave to appeal. We award the respondents costs of the motion.

Dated and delivered at Nairobi this 24th day April, 2020.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR