



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, WARSAME & J. MOHAMMED, JJ.A)

CIVIL APPLICATION NO. 129 OF 2020

BETWEEN

UNIVERSITY OF NAIROBI.....APPLICANT

AND

MULTISCOPE CONSULTING ENGINEERS.....RESPONDENT

(Being an application for leave to appeal to the Court of Appeal against the Ruling and Order of the High Court at Nairobi (Hon. Justice F. Tuiyott) dated 13th May 2020 and stay offurther proceedings in High Court Misc. Cause No. E083 of 2019 and Misc Civil Suit No. E036 of 2019). *in Misc Cause No. E083 of 2019.*

RULING OF THE COURT

[1] By a notice of motion dated 22nd May, 2020, the applicant, University of Nairobi, seeks leave from this Court to lodge an appeal against the ruling and orders issued by the High Court (**Tuiyott, J**), on 13th May, 2020 striking out a motion that had been lodged by the applicant under Section 35 of the Arbitration Act.

[2] The background to the application before us is that the applicant and the respondent, Multiscope Consulting Engineers, entered into a contract for professional consulting services regarding building and civil engineering works that were being undertaken by the applicant. The applicant who was dissatisfied with the work that was being done involved the Engineers Board, who concurred that there were serious and substantial defects in the services rendered, whereupon the applicant terminated the respondent's appointment. This resulted in the respondent instituting arbitration proceedings which were determined in the respondent's favour. The respondent then filed HC, Misc Cause EO 36/2019 for recognition and enforcement of the award and the applicant in turn filed a motion in High Court Misc Cause No EO83 of 2019 seeking to have the arbitral award set aside on the grounds *inter alia*, that the arbitral tribunal determined a dispute not contemplated by the parties. The respondent filed a preliminary objection to the applicant's motion on the ground that the motion for setting aside the award was filed out of time, and the High Court upheld the objection and struck out the applicant's motion.

[3] The applicant is aggrieved by the order of the High Court striking out the motion contending that it was not given an opportunity to be heard; and that there was gross injustice as the court abdicated its judicial authority to render substantive justice. Furthermore, that the High Court struck out its motion without taking into account that it had not been informed of the delivery of the award nor had it received the award as required under section 35(3) of the Arbitration Act, and therefore time did not start to run.

[4] The applicant maintains that this Court has jurisdiction to hear its appeal against the order of the High Court for two reasons. First, to prevent the gross injustice perpetrated against it by the High Court through denial of its constitutional right to a fair hearing; and secondly, the intended appeal raises an important jurisprudential issue regarding the interpretation of Section 35(3) of the Arbitration Act, that requires determination by this Court.

[5] In a replying affidavit sworn by Samuel Muago, the respondent maintained that the applicant had not established any grounds to warrant the granting of the orders sought, nor had it demonstrated that there were exceptional circumstances to warrant an appeal against the orders of the High Court.

[6] Due to the COVID-19 pandemic, hearing of the motion proceeded by way of written submissions without the presence of parties. Both parties duly filed written submissions, as well as lists and digest of authorities which they relied upon.

[7] The applicant submitted that it was not made aware when the award was read or released, and its counsel only came to learn of it on 12th March, 2019, after which the applicant filed its motion to set aside the award on 3rd April, 2019. The applicant urged that the High Court did not properly apply Section 35(3) of the Arbitration Act, as the award could not be deemed to have been delivered or received on 24th November 2017, the date on which the tribunal by a letter informed the parties that the award was ready for delivery, subject to payment of the tribunal fees, which was Kshs. 12,495,941/= and which amount none of the parties was able to pay at that time.

[8] The appellant drew the Court's attention to Section 32(5) of the Arbitration Act which obligates the arbitral tribunal to deliver a signed copy of the award to each party, and also section 35(3) which provides for a limitation period of 3 months from the date on which the party making the application received the arbitral award, as the time within which an application for setting aside an arbitral award can be made. The applicant maintained that it had serious grievances concerning the award, which were not addressed by the High Court because of the striking out of the motion.

[9] The applicant urged that unless an order staying further proceedings in H.C. Misc Cause No E083 of 2019 and HC, Misc Cause EO 36/2019, is issued, its intended appeal which was meritorious would be rendered nugatory as the respondent would proceed with the recognition and enforcement of the award and the award made to the respondent which is substantial, will be executed. This may entail attachment of the applicant's assets, thereby causing substantial loss and damage to the applicant.

[10] In support of its submissions, the applicant relied on several authorities including three Supreme Court decisions Nyutu Agrovet Limited vs Airtel (K) Networks Limited & 2 others, [2019] eKLR (Petition No. 12 of 2016) (the Nyutu Supreme Court decision); Synergy

Industrial Credit Limited vs Cape Holdings Limited [2019] eKLR (Petition No 2 of 2019); and Narok County Government vs Livingston Kuninin Ntutu & two others [2018] eKLR as well as a Court of appeal decision in Kenya Bureau of Standards vs Geo-Chem Middle East, (Civil Application No 132 of 2017 UR).

[11] On its part, the respondent submitted on two main issues. First, was whether the applicant had a right of appeal to warrant the grant of leave to appeal, maintaining that there was no such right of appeal, the respondent relied on Section 10 of the Arbitration Act, which provides that **"no court shall intervene in matters governed by the Arbitration Act"**, and also Section 35 of the Arbitration Act which has **"no provision for a party to appeal a decision of the High Court made under that section"**. The respondent also cited the Nyutu Supreme Court decision maintaining that an appeal may only lie to this Court on very restricted circumstances, where the decision was so grave or manifestly wrong, and had completely closed the door of justice to either party. And where the same will result in substantial miscarriage of justice.

[12] In addition, the respondent submitted that Section 35(3) of the Arbitration Act has a strict timeline of three months within which an application to set aside an arbitral award can be made, and the learned Judge of the High Court carefully considered the matter, and correctly arrived at the conclusion that the applicant's motion was filed outside the required time.

[13] The second issue that the respondent addressed was whether the applicant had made out a case for granting of the orders of stay of proceedings. The respondent maintained that the applicant had neither demonstrated that it has an arguable appeal, nor had it shown that it would suffer any substantial loss if the order of stay is not granted. The respondent submitted that it will be prejudiced by an order of stay because if the applicant's appeal is unsuccessful, the respondent would not be in a position to recover the arbitral award from the applicant, as the applicant had shown that it was not even able to pay its share of the arbitrator's fees. The respondent urged that if the court was inclined to grant the orders sought the applicant should be ordered to deposit the entire arbitral award of Kshs. 113,594,205 in a joint interest earning account.

[14] We have considered the motion before us, the written submissions and the authorities cited. It is evident that the applicant's motion before the High Court was brought under section 35 of the Arbitration Act. Although this section does not specifically provide a right of appeal to this Court, the Supreme Court in the Nyutu Decision considered the following issues which are germane to the matter before us:

"(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 to that extent; and

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

[15] At paragraph 72 of the judgment the Supreme Court was clear

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"

[16] At paragraph 77 of the judgment the Supreme Court concluded

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.”

[17] The Supreme Court has therefore made it clear that this Court does have a right of appeal in a matter under section 35 of the Arbitration Act, where there are exceptional circumstances warranting the court’s intervention. It is common ground that the applicant’s motion to set aside the arbitral award was not heard on merit but was struck out on the ground that it was filed out of time contrary to section 35(3) of the Arbitration Act. This means that the substantive issues raised in the motion were not addressed or determined,

[18] An issue has been raised by the applicant regarding the interpretation of section 35(3) and this is a jurisprudential issue that ought to be addressed. The striking out of the applicant’s motion has also resulted in the applicant being shut out from the seat of justice, and there is an issue whether the learned Judge of the High Court properly directed himself in striking out the applicant’s motion or whether the learned judge made a decision that is so manifestly wrong and which has completely closed the door of justice to the applicant. We find that these are exceptional circumstances and it is appropriate that leave to appeal to this Court be granted so that these pertinent issues are fully ventilated and addressed by the Court.

[19] With regard to the prayer for stay of proceedings, it is apparent that the award made in favour of the respondent is a substantial amount of Kshs 113,594,205. While it is true that unless the order of stay of proceedings is granted, the respondent may proceed with the process of the enforcement of the award and this may not only embarrass and disrupt the operations of the applicant, but may also render the intended appeal, if successful, no more than a paper victory.

[20] On the flip side, the respondent’s contention that it may also be prejudiced if the orders are granted as the applicant had demonstrated inability to pay the arbitral fees which was a much lesser amount, is not without substance.

[21] In the circumstances, we find it necessary to protect the interests of both parties by issuing an order of stay of proceedings on condition that the applicant shall deposit half the amount awarded by the arbitrator into an interest earning account in the joint names of the parties’ advocates within 90 days from the date hereof. The upshot of the above is that we make orders as follows:

(i) That leave be and is hereby granted to the applicant to lodge an appeal against the ruling and orders issued by the High Court on 13th May, 2020 in H.C. Misc. Cause No E083 of 2019.

(ii) That pending the hearing and determination of the intended appeal, all further proceedings in H.C. Misc. Cause No E083 of 2019 and H.C. Misc. Cause No E36 of 2019 be and are hereby stayed on condition that the applicant shall deposit a sum of Kshs 56,797,102 being half the amount awarded to the respondent, into an interest earning account in the joint names of the parties’ counsel, within 90 days from the date hereof, failing which the order for stay of proceedings shall lapse.

(iii) That the applicant shall file and serve the intended appeal within 60 days from the date hereof.

(iv) That the costs of this application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 7th day of August, 2020.

HANNAH OKWENGU

JUDGE OF APPEAL

M. WARSAME

JUDGE OF APPEAL

J. MOHAMMED

JUDGE OF APPEAL

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

Signed

DEPUTY

REGISTRAR