IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: ASIKE-MAKHANDIA, MUSINGA, & GATEMBU, JJ.A.)

CIVIL APPEAL NO. 268 OF 2015

BETWEEN

NAROK COUNTY GOVERNMENT

(BEING THE LEGAL SUCCESSOR OF THE DEFUNCT

COUNTY COUNCIL OF NAROK).....APPELLANT

AND

SEC & M COMPANY LIMITED.....RESPONDENT

(Being an appeal against the Orders of the High Court of Kenya at Nairobi (Kamau, J.) delivered on 9th December 2014

in

***H.C. Misc. Civil Case No. 71 of 2014.*)**

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JUDGMENT OF THE COURT

1. The genesis of this appeal is ***High Court Miscellaneous Application No. 71 of 2014*** that was filed by the appellant to set aside the arbitral award by ***Mr. Arthur K. Igeria*** dated 29th November 2013. The High Court ***(J. Kamau, J.)*** declined to set aside the arbitral award. The appellant, being aggrieved by the learned judge's refusal to set aside the award, moved this Court by way of an appeal to set aside the aforesaid decision of the learned judge's decision.

2. The factual background to the appeal is that by an agreement entered into between the parties on 4th August 2005, the respondent, a valuation company, was contracted to conduct a valuation of the appellant's moveable and immoveable assets. The respondent performed the task and submitted a valuation report to the appellant. Thereafter the respondent billed the appellant a sum of **Kshs.89,101,215.** The said fees was in accordance with the parties' agreement which stated that the respondent's fees shall be as per the ***Valuers Act, Cap 532 Laws of Kenya***.

3. The appellant negotiated the fees and by an agreement dated 15th October 2009 it was mutually agreed that the fees would be discounted by 50%, on condition that the discounted fees amounting to **Kshs.44,550,680** would be paid within a period of two years. The agreement further provided for a 10% penalty should the appellant default in payment.

4. Prior to the execution of the agreement, the respondent's representative raised an issue that he said had been discussed and agreed upon by the parties the previous day but had not been captured in the agreement, that in the event of default on the part of the appellant to pay the discounted fees within the period of two years the respondent would be at liberty to revert to its original claim in the sum of Kshs.89,101,215.

5. Consequently, on the same day, 15th October 2009, **Mr. Joseph Mutua Malinda,** who was then the Clerk of the County Council of Narok, wrote an official "*Letter of Comfort*" to the respondent as follows: -

"Managing Partner 15th October, 2009.

Sec & M. Co. Ltd

P.O Box 3711-00100

NAIROBI.

"Letter of Comfort"

Dear Sir,

RE: VALUATION FEE

Refer to Tele Conversation with the undersigned and our letter Ref. NCC/VAL/C/A/Vol.1/12 sent to you earlier today, 15th October, 2009.

As explained during our conversation, the Council has no reason to exceed the payment period beyond the two (2) years stipulated in our above letter.

However, should the period be exceeded, which we do not contemplate, you will be at liberty to enforce the full terms of the contract signed on 4th August 2008. For clarity and avoidance of doubt, your fees will be pegged on the value of valued assets and as stipulated by the relevant statutes.

In view of the above, kindly signify your concurrence with the terms agreed on 14th October, 2009 and as communicated vide our above letter. The undersigned will be in the office tomorrow 16th October 2009.

(SIGNED)

J.M. MALINDA

CLERK,

COUNTY COUNCIL OF NAROK."

6. The appellant was unable to pay the discounted fees within the agreed period of two years. Up to March 2012 the appellant had paid a total of Kshs.39,500,000. The respondent's advocates wrote to the appellant demanding a total of Kshs.54,561,336.50 being unpaid balance of the original fees, (Kshs.49,601,215) and interest thereon at 10%, (Kshs.49,601,215).

7. The appellant did not agree with the respondent's claim. Mr. Arthur Igeria was appointed sole arbitrator, and having heard both parties and their respective witnesses, found that the respondent was entitled to revert to the original agreement because the appellant had failed to pay the negotiated fees within the two-year period agreed upon.

8. In the impugned ruling, the learned judge rejected the appellant's contention that the letter of comfort, which was the basis of the final arbitral award, was fraudulent and illegal, and in conflict with the public policy of Kenya.

9. In its memorandum of appeal, the appellant through ***M/S Kemboy & Company Advocates***, raised 13 grounds of appeal. The appellant's written submissions, which **Mr. Kemboy**, learned counsel, relied upon and supplemented with brief oral highlights, condensed the 13 grounds into three thematic ones namely: The learned judge erred in law and fact in finding that the arbitral award was not in contravention of the public policy of Kenya as contemplated under ***section 35(2) (b) (ii)*** of the ***Arbitration Act***; in failing to take into account the full breadth and scope of the issues that were presented before the arbitrator for determination being-

a)Whether the parties were bound by the terms of the negotiated settlement of 15th October 2009;

b)The import and legality of the subsequent letter of comfort dated 15th October 2009;

c)The credibility and legality of the actions of Mr. Malinda; and

d)Whether the respondents could resile from the renegotiated settlement and revert to the terms of the original contract.

10. The last tranche of grounds of appeal are to the effect that the learned judge failed to fully appreciate the principles of setting aside an arbitral award.

11. The respondent also filed submissions through its advocates, ***Gichure & Associates***. ***Mr. R. Mwenda***, learned counsel, orally highlighted

the submissions. Counsel submitted that the appellant's appeal had not met the threshold set by the Supreme Court in ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited [2019] eKLR*** and therefore the Court had no jurisdiction to hear the appeal; that the arbitral award neither contravened the public policy of Kenya nor did it deal with a dispute not contemplated by the parties, or an issue not falling within the terms of reference to the arbitration. He submitted that the arbitrator carefully considered and construed the letter of comfort by Mr. Malinda. He urged us to dismiss the appeal.

12. We shall start by considering the issue of jurisdiction. The application before the High Court was brought pursuant to the provisions of ***sections 35 (1)*** and ***(2) (b) (ii)*** and ***section 37*** of the ***Arbitration Act***. ***Section 39 (3)*** of the Act states as follows: -

> ***"(3) Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a 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***
>
> ***importanceisinvolvedthe 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)."***
>
> *[Emphasis supplied]*

13. Mr. Kemboy submitted that what had been a vexing question as to whether there is a right of appeal to this Court from a decision made under ***section 35*** of the ***Arbitration Act*** was finally settled by the recent decision of the Supreme Court in ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited*** (supra), which, in his view, affirmed such right. It is, however, important to interrogate what the Supreme Court held on the issue.

14. The Court held, *inter alia*, that ***"section 35 of the Arbitration Act is silent on whether an appeal should lie to the Court of Appeal following a decision of the High Court;"*** that there is no express bar to appeals to this Court under the said section; that there is no direct access to the Court of Appeal by all and sundry; that ***"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,"*** *that in "****exceptional circumstances, the Court of Appeal ought to have residual jurisdiction****"* to inquire into serious issues of unfair determination by the High Court which if left alone would taint the process of arbitration; that such jurisdiction should be carefully exercised so as not to open floodgate of appeals; and that circumscribed appeals may be allowed to address process failures as opposed to the merits of an arbitral award.

15. Having so stated, the Court held that a ***"leave mechanism"*** is necessary to guard against ***"frivolous, time wasting and opportunistic appeals"*** which may otherwise flood the court and unnecessarily delay finalization of arbitration proceedings. That, in our view, accords with the provisions of ***section 39 (3) (b)*** which requires this Court to grant leave to appeal. It cannot therefore be said that the Supreme Court flung open the door to all manner of appeals from decisions of the High Court in arbitral proceedings made under section 35 of the Arbitration Act.

16.We find and hold that an appeal to this Court from a High Court decision made under section 35 of the Arbitration Act can only lie with leave of the Court. The appellant herein did not seek leave of this Court to institute this appeal. That was a serious procedural misstep.

17. That notwithstanding, we shall exercise our discretion to consider whether the appeal meets the threshold as set out here above. In arguing that the learned judge as well as the arbitrator failed to take into account that the conduct of the County Clerk was contrary to Kenya's public policy, the appellant's counsel submitted that the clerk, in issuing the letter of comfort, contravened the principles of governance set out under ***Article 10*** of the ***Constitution of Kenya, 2010***. That per se cannot be a basis for grant of leave to appeal. In the ***Nyutu case***, the Supreme Court was emphatic that

> "***alleged breaches of the Constitution cannot be properly introduced by way of an application to set aside an arbitral award***."

18. Secondly, the appellant faulted the learned judge for failing to take into account the "***full breadth and scope***" of the negotiated settlement, the letter of comfort, and the credibility of Mr. Malinda. We do not agree. The arbitrator as well as the learned judge addressed themselves to all those issues. At paragraphs 15 and 16 of the impugned ruling, the learned judge stated: -

"15. In his Arbitral Award, the Arbitrator had the following to say: -

The Respondent asserts that the letter of comfort should be disregarded as it was not backed by any minutes, and consequently, Mr Malinda had no legal authority to vary the agreement reached at the meeting held on 14th October 2009 as captured in the letter of 15th October 2009 which contains the renegotiated contract. However, the Respondent asserts that this letter is valid and reliable. If there are no minutes in respect of both the letter of 15th October 2009 and the letter of comfort, what makes one letter more credible than the other? It appears to me that the credibility is selected to suit the Respondent's position which is to avoid having to revert to the original contract….I find the

letter of comfort reliable and credible because it was authored and signed by Mr Malinda, the Respondent's County Clerk, who had authority to do so and who also signed the letter dated 15th October 2009, and produced it personally and confirmed the reasons for the issuance of the letter of comfort…

I therefore find that the Claimant is entitled to revert to the original agreement as a basis for claiming its fees because the Respondent failed to pay this fee within the two year period agreed upon…"

16.The court found it prudent to set out in great detail what the Arbitrator's findings were to show to what extent he considered the validity and legality of the letter of comfort and the circumstances under which the same was issued. He heard the viva voce evidence from all the witnesses that appeared before him and made a finding of fact."

19. The learned judge held that the court had no jurisdiction to determine the legality or otherwise of the arbitrator's findings on the issue of the letter of comfort as that would have been tantamount to re-opening an issue that ought to have been canvassed before the arbitral tribunal. We entirely agree.

20. Lastly, we do not find any merit in the appellant's submission that the learned judge failed to fully appreciate the principles of setting aside an arbitral award. A perusal of the impugned ruling reveals that the learned judge considered all the relevant principles and arrived at the right decision.

21. Finally, and as earlier stated, the appellant did not seek leave of this Court to institute this appeal and therefore it does not lie. But even if leave had been sought, we are not persuaded that it would have been granted.

22. Consequently, this appeal is dismissed with costs to the respondent.

Dated and delivered at Nairobi this 4th day of December, 2020.

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR