IN THE COURT OF APPEAL

AT NAIROBI

[CORAM: R.N. NAMBUYE, J.A] IN CHAMBERS

CIVIL APPLICATION NO. 192 OF 2018 (UR NO. 155/2018)

BETWEEN

KENYATTA INTERNATIONAL

CONVENTION CENTRE.....APPLICANT

=VERSUS=

GREENSTAR SYSTEMS LIMITED.....RESPONDENT

(An application for leave to appeal out of time from the Ruling and order of the

high Court of Kenya – Milimani Commercial Courts (Hon. Justice Olga Sewe)

dated the 19th January, 2018 In Miscellaneous Civil Application No. 278 of 2017

In the matter of the Arbitration act (1995)

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Between

KENYATTA INTERNATIONAL

CONVENTION CENTRE.....APPLICANT

=VERSUS=

GREENSTAR SYSTEMS LIMITED.....RESPONDENT

RULING

Before me is a Notice of Motion dated the 2nd day of July, 2018, and filed on the 3rd day of July 2018. It is premised on Rules 4 and 82 of the Court of Appeal Rules 2010; and Section 3A(1) of the Appellate Jurisdiction Act Cap 9 laws of Kenya. It seeks four (4) reliefs. Prayer one (1) is spent. Prayer 2 was withdrawn by consent of the learned Counsel for the respective parties. Prayer 3 is what remains for determination together with an attendant prayer that costs do abide the outcome of the intended appeal. Prayer 3 reads as follows:

> ***" 3. That the applicant be granted leave to file an appeal out of time with respect to the Ruling and order issued by the High Court (Justice Olga Sewe) on 19/01/2018 in Milimani Commercial Court, Miscellaneous Civil Application No. 278 of 2017 and that time for filing the appeal be extended".***

The application is based on the grounds on its body and a supporting affidavit. It has been opposed by a replying affidavit of **John Ibae,** deposed and filed on the 7th day of August, 2018. It was canvased by way of oral submissions and buttressed by case law cited by the respondent in opposition thereto.

The brief background to the application is that the respective parties herein entered into an agreement dated the 14th day of October, 2015 for the provision of services to the applicant by the respondent. The said agreement contained clause 28 which is an arbitration clause providing that in the event of any dispute arising with regard to the discharge of the respective parties' obligations under the said agreement, the parties would submit themselves to an arbitration process. A dispute did arise necessitating the parties to submit themselves to an arbitration process resulting in the Arbitral Award dated the 17th day of March, 2017, in favour of the respondent, notwithstanding the Arbitrator's observations that the agreement on which the arbitral process was anchored was illegal. The applicant was aggrieved and invoking the provisions of section 35 of the Arbitration Act No. 4, 1995 (The Act) filed before the High Court, an application dated the 14th day of June, 2017 seeking among others, an order to set aside the said Arbitral Award. The respondent on the other hand filed an opposing application seeking to enforce the Award. Both applications were heard simultaneously resulting in the ruling dated the 19th January, 2018, allowing the respondent's application for the enforcement of the award, and dismissing the applicant's application for setting aside of the Arbitral Award and also notwithstanding the Judge's observations that the agreement on which the Arbitral process was anchored was illegal.

Undeterred, the applicant timeously filed and served a Notice of Appeal dated the 30th day of January, 2018, intending to appeal against the entire ruling declining to set aside the Arbitral Award. Pending the lodging of the record of appeal, the applicant unsuccessfully filed an application dated the 23rd day of February, 2018 seeking stay of the execution of the Arbitral Award. In the meantime, the sixty (60) days' within which to file and serve a record of appeal, effective the 30th day of January, 2018, lapsed, prompting this application.

It is the applicant's contention that the intended appeal is arguable as the applicant intends to raise a point of law of public importance as to whether it will be proper for the applicant as a public Agency to spend a colossal amount of money in fulfillment of its obligation under an illegal contract; that the applicant sought and obtained a legal opinion from the office of the Attorney General to the effect that the sums allegedly due to the respondent as adjudged in the Arbitral Award are not due and payable by the applicant to the respondent; that the respondent has already commenced the execution process by attaching the applicant's property; that the applicant is apprehensive that if leave to appeal out of time sought is not granted, the intended appeal will be rendered nugatory.

Turning to the reasons for the delay, the applicant lays blame on the Advocates firm then on record for them, for their failure to timeously lodge and serve the record of appeal. It is this inaction on the part of the said firm of advocates that the applicant cites as the reason for their engaging the firm of advocates currently on record for them who according to the applicant moved with speed to file this application seeking to regularize their appellate process as soon as they obtained instructions to do so. In the light of all the above, the applicant contends that the explanation for the delay given above is therefore not only reasonable but also excusable.

The respondent has opposed the application principally on two grounds. The first ground is that the court has no jurisdiction to grant the relief sought by the applicant in this application for its failure to comply with the prerequisites in section 39 of the Act. In the respondent's view, an appeal can only lie to this Court as of right, first; where the parties by way of an agreement made provision for such a right in the arbitration clause. Secondly, with the leave of the High Court upon its refusal to set aside the Arbitral Award. Thirdly, upon such leave being sought and granted by the Court of Appeal. On account of the above, the respondent submits that the parties herein having failed to make provision for an automatic right of appeal to this Court in the arbitration clause embedded in the agreement of 14th October, 2015, on the one hand, and in the absence of such leave having been sought and granted by either the High Court or this Court, there is no automatic right of appeal to this Court on the basis of which the applicant can seek extension of time to lodge and serve the record of appeal out of time. There is therefore want of jurisdiction, and that I should therefore down my tools.

To buttress the above submission, the respondent cited **Nyutu Agrovet versus Airtel Networks Limited [2015] eKLR;** and **Micro-House Technologies Limited versus Co-operative college of Kenya [2017] eKLR** for the now crystalized principle of law that a Court of law can only intervene in an arbitral matter where the parties have either entrenched the right for the Courts intervention in the arbitral clause, or alternatively, where the leave to exercise such an appellate right has been granted either by the High Court or this Court itself.

Turning to the prerequisites under Rule 4 of the Rules of the Court Procedures, the respondent submitted that the applicant has not met the threshold on the prerequisites for granting the relief sought under Rule 4 of the Rules of the Court Procedures, as by law provided. In the respondent's view, the applicant's explanation that they had to wait for a response on the legal opinion they had sought from the office of the Attorney General carries no water as no explanation was given for the applicant's inaction from the date of 30th January, 2018, when the said legal opinion was given to the 3rd day of July, 2018, when this application was filed.

As for the alleged inaction on the part of the advocate then on record for them to file the record of appeal timeously, the respondent urged that there was nothing on the record to show that the applicant was keen on pursuing its former advocates for the timeous institution of its appellate process. This explanation too in the respondents' opinion does not hold. It was also the respondent's submission that the intended appeal is not arguable as the dispute arises from a contractual agreement for provision of services to the applicant by the respondent, and which services were duly rendered; that the applicant substantially paid for the said services, leaving the balance of the payment currently in dispute; that the issue of alleged existence of an illegal contract does not arise in the circumstances of this application as it will not only be unconscionable but also Equity cannot in law allow the applicant to enjoy services rendered by the respondent pursuant to the said same contract and fail to pay for the same as contracted. On that account, the respondent urged that the applicant should not be allowed to wriggle out of its obligations under the said contract. The respondent therefore urged me to discount the applicant's submission of the alleged existence of an illegal contract and affirm the position taken by both the Arbitrator and the High Court with regard to the said agreement.

In reply to the respondent's submissions, the applicant submitted that it is properly before this Court in terms of the provisions of section 39 (3) (b) of the Act as the intended appeal raises a matter of general public importance. As for the alleged failure to meet the threshold on the prerequisites under the Rule 4 of the Rules of the Court Procedures, the applicant reiterated the earlier submissions that I should not lose sight of the fact that the applicant is a public corporate body and the colossal amount of money involved is actually public funds; that the legal opinion from the Attorney General's office was received on the 23rd April, 2018, and not on the 30th January, 2018 as erroneously indicated in the supporting affidavit; that the applicant has *locus standi* before the court as it seeks both for leave to appeal to this Court and also for the extension of time within which to lodge the said appeal. Still maintained that the appeal is arguable because the Arbitrator and the High Court having categorically held that the contract intended to be enforced was illegal, they should not have allowed the respondent to benefit from such an illegal contract.

My invitation to intervene has been invoked under Rules 4 and 82 of the Court of Appeal Rules 2010; and Section 3 A (1) of the appellate Jurisdiction Act Cap 9, Laws of Kenya. The threshold for the exercise of the Court's jurisdiction under the rule 4 of the Rules of the Court procedures has been crystalized by case law. It is simply that the exercise of the Court's discretion under this rule is discretionary and which discretion is unfettered and does not require establishment of sufficient reasons, save for the Court to bear in mind that in the exercise of its discretion, the Courts' primary concern should be to do justice to the parties before it. The factors that the court has to bear in mind when deciding either way are not limited to the consideration of the reasons for the delay in lodging the notice and the record of the appeal, where applicable; the delay in lodging the application for extension of time, as well as the explanation thereof; whether or not the intended appeal is arguable; the prejudice to be suffered by the respondent if the application were to be granted; the public importance if any, of the matter; and generally, the requirements of the interests of justice. See **Githiaka versus Nduriri [2004] 2 KLR 67.**

Rule 82 of the Rules of the Court on the other hand is simply a rule that lays down guidelines on how a record of appeal ought to be prepared and lodged. It does not therefore need any further elaboration herein. Section 3A on the other hand enshrines the overriding objective principles of the Court. The exercise of jurisdiction under this provision has also been crystalized by case law. In summary, it is that this principle confers on the Court considerable latitude in the exercise of its discretion in the interpretation of the law and the rules made thereunder; that the aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, timely and speedy disposal of cases before it, but it does not operate to uproot established principles and procedures that guide the exercise of the Court's mandate, but to embolden the Court to be guided by a broad sense of justice and fairness. See

Abok James Odera t/a A.J. Odera & Associates versus John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR

I have considered the above principles in the light of the rival submissions herein and it is my view that it is prudent for me to determine the issue of want of jurisdiction or otherwise first before delving into the issue of the merits of the application in terms of the threshold the applicant is obligated to meet under the Rule 4 of the Rules of the Court Procedures before accessing the relief sought.

In order to succeed on its objection of want of jurisdiction, the respondent's objection has to meet two thresholds. The first threshold is that set by the predecessor of the Court in the case of **Mukisa Biscuits Manufacturing Company Ltd versus West End Distributors Ltd [1969] E.A 696,** namely, that the objection raised is a pure point of law. In the above **Mukisa Case (**Supra), at page 700, Pr D-F, **LAW.: J.A,** had this to say:

> ***"… a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".***

In the same decision, **SIR CHARLES NEWBOLD, P.:** added the following at page 701 Pr A-B

> ***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion".***

The second threshold that the respondent needs to satisfy is that set out in the case of **Owners of Motor Vessel "Lillian S" versus Caltex Oil (Kenya) Ltd [1989] KLRI,** on the principle that guide the Court on the determination as to what does or does not amount to want of jurisdiction. In the said case, **Nyarangi, J.A. (**as he was then) had this to say**:**

> "***Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.***

Further that:

> "***by jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exists. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgment is given".***

I have considered the above principles in the light of the rival submissions on the issue of want of jurisdiction or otherwise, in the exercise of my discretion to either grant or withhold the relief sought. It is my finding that the respondent's objection has met the threshold in terms of the principle set in the **Mukisa Biscuits case** (Supra), in that as enunciated therein, an issue of want of jurisdiction or otherwise is a pure point of law. The position in law which is now trite and which I have judicial notice of is that a point of law can be raised at any stage of the proceedings. The respondent was therefore in order to raise it in the replying affidavit.

As for the second threshold, it is not disputed that the respondent's objection is anchored on the provision of section 39 of the Act.

It provides:-

> **"Where in the case of a 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 of on any question of law arising out of the award.**
>
> **Such application or appeal, as the same 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 re-consideration or, where another arbitral tribunal has been appointed, t that arbitral tribunal for consideration.**
>
> (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 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).**
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> (4) **An application or appeal under this section shall be made within the time limit and in the manner prescribed by the Rules of Court applicable, as the case may be, in the High Court or the Court of Appeal.**

My construction of the above provision is that there are three ways in which a party can access the appellate jurisdiction of this court in a matter arising from an arbitral process. The first is by way of provision of an agreement to that effect in the arbitration clause contained in the agreement pursuant to which the arbitral process is anchored, that a right of appeal to the Court of Appeal exists. Secondly, through leave granted by the High Court under the same provision. Thirdly, through leave granted by the Court of Appeal under the same provision. In the light of the above reasoning, it is common ground that the arbitral clause 28 of the agreement dated the 14th day of October, 2015, which is the arbitration clause that triggered the arbitral process resulting in the Arbitral Award that the High Court declined to set aside, made no provision for an automatic right of appeal to this Court. Likewise, it is also common ground that the applicant herein did not seek and obtain leave of the High Court to appeal to this Court against the High Court's ruling declining to set aside the Arbitral Award.

As already highlighted above, the Court in the **Nyutu Agrovet case** (Supra) was categorical that this Court's right to intervene in matters arising from an arbitral process is limited to instances where the parties had either entrenched an automatic right of appeal to this Court in the arbitration clause or where necessary leave to that effect has either been granted by the High Court or this Court itself in the exercise of the respective Courts jurisdiction to do so under the provisions of section 39 of the Act.

The Court in **Micro-House Technologies Limited's case** (Supra), when confronted with a similar issue had this to say:

> **"8. We have considered the above submissions. There are several facts that are not in dispute:**
>
> **(a) that prior to the delivery of the arbitral award, the parties had not agreed that an appeal shall lie to this Court;**
>
> **(b) that no application was made to this Court for leave to appeal on grounds that a point of law of general importance is involved, the determination of which would substantially affect the rights of one or both of the parties; and**
>
> **(c) no leave to appeal was granted by this Court;**
>
> **(d) The question that we must answer is whether, in light of the above summarized position, this Court has jurisdiction to hear this appeal. Our simple answer is in the negative, that the Court lacks jurisdiction. The appellant had no right of appeal to this Court not having obtained leave under section 39(3) (b) of the Arbitration Act. This Court emphatically so held in Nyutu Agrovet Limited versus Airtel Networks Ltd. (Supra). Karanja, J.A stated inter alia-**
>
> **"I hold the view that no right of appeal is provided for in arbitral Awards save for matters pegged on section 39 of the Act. I am convinced that a right of appeal is conferred by statute and cannot be interfered."**

10. **In the same decision, the Court also held that where a right of appeal does not lie to this Court in terms of section 39 (3) (b) of the Arbitration Act, a party cannot rely on either section 75(1) of the Civil Procedure Act or Article 164(3) of the Constitution to found and appeal to this Court.**

11. **We have no reason to depart from the unanimous five Judges' decision in Nyutu Agrovet Limited versus Aritel Networks Limited. Consequently, this Court has no jurisdiction to entertain the appeal before it. Consequently, the appeal is struck out with costs to the respondent"**

When confronted with the Court's decisions both in the **Nyutu Agrovet case** (Supra) and that of the **Micro-House Technologies Limited case**, the applicant's response was that prayer 3 meets the threshold set by the above cases. I have considered the above applicant's response in the light of the principles laid out in the above cases. It is my finding that Prayer 3 as set out above is premised only on the provisions of law specified in the heading of the Notice of Motion under which it is sought. There is no mention of section 39((3) (b) which anchors the applicant's right of access to the Court of Appeal by way of an application for leave to appeal to the Court of Appeal in terms of section 39 (3) (b) of the Act. In my view, the wording of the said prayer betrays the applicant's submission. It simply seeks leave to appeal out of time. There is no mention of leave to appeal to this Court under section 39(3) (b) of the Act. The above being the position, there is no basis for me to depart from the position taken by the Court in both the **Nyutu Agrovet Limited** (supra) case and that of **Micro-House Technologies Limited** (Supra) case as they state the correct position in law on the interpretation of the intent, purport and application of section 39 of the Act. See Civil **Application No. 218 of 2015, Savings Tea Brokers Limited versus Kenya tea Development Agency Limited & seven (7) others.**

In line with the principle on jurisdiction as enunciated in the **Motor Vessel "Lillians' case,** (supra), that the moment a court of law is of the opinion that it has no jurisdiction, it has no option, but to down tools. Since I have come to the conclusion that I have no jurisdiction, I have no other option, but to down tools which I hereby do.

The above being the position, there is no need for me to belabor the 2nd limb of the application as that will in essence be an exercise in futility.

The appellant's application is therefore struck out for being incompetent with costs to the respondent.

Dated and delivered at Nairobi this 10th Day of August, 2018.

R.N. NAMBUYE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR