



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: MAKHANDIA, MURGOR & OTIENO-ODEK, J.J.A)**

**CIVIL APPLICATION NO. 282 OF 2016**

**BETWEEN**

**CENTURION ENGINEERS & BUILDERS LIMITED....APPLICANT**

**AND**

**KENYA BUREAU OF STANDARDS.....RESPONDENT**

*(Being an application for leave to appeal from the Ruling of the High Court of Kenya*

*at Nairobi (Tuiyot, J.), dated 9<sup>th</sup> December, 2016*

*In*

*H.C.C.C. No. 506 of 2012)*

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**RULING OF THE COURT**

1. On 27<sup>th</sup> April 2009, the parties hereto entered into a contract whereby the applicant was engaged by the respondent to carry out building works for alterations and extension of its Bio-Chemical Laboratories at its Headquarters in Nairobi for a sum of Ksh. Seventy-Nine Million Nine Hundred and Ten thousand, Four hundred and Forty only (Ksh.79,910,440/=).

2. On 17<sup>th</sup> December 2009, by way of a Supplementary Agreement, the parties varied the contract to include additional works. It was agreed that upon completion of the works, the building works would be measured and valued by consultants from the Ministry of Public Works and any necessary variations will be addressed. On completion, the works were valued at Ksh. Two Hundred and Twenty-Eight Million, Seven Hundred and Sixty- EightThousand, Six Hundred and Sixty and Cents Thirty-Two only (Ksh. 228,768,660.32). The applicant demanded payment of the said sum and the respondent declined to pay. The matter was referred to arbitration. The Arbitrator was Onesimus Mwangi Gichuiriri. By an Award dated 5<sup>th</sup> May 2015, the Arbitrator awarded the applicant the sum of Ksh. Three Hundred and Eighty-Four Million, Nine Hundred Sixty Thousand, Seven Seventy-Six Hundred and Cents Seventy-Five (Ksh. 384,960,776.75) in full and final settlement of the dispute between the parties.

3. By Notice of Motion dated 9<sup>th</sup> June 2015, the respondent moved the High Court to set aside the arbitration award. In a ruling delivered on 9<sup>th</sup> December 2016, the High Court (Tuiyot J.) set aside the Award citing non-compliance with **Section 47** of the Public Procurement and Asset Disposal Act as read with **Regulation 31** of the same Act. The learned judge observed that the variation of the contract exceeded the percentage limit set out in **Regulation 31(c)** of the Act.

4. **Section 47** of the Public Procurement and Asset Disposal Act provides:

***?47. An amendment to a contract resulting from the use of open tendering or an alternative procurement procedure under Part VI is effective only if:***

***(a) the amendment has been approved in writing by the tender committee of the procuring entity; and***

***(b) any contract variations are based on the prescribed price or***

*(c) quantitative variations for goods, works and services.*

5. **Regulation 31** of the Act provides:

**31. For purposes of Section 47 (b) of the Act, any variation of a contract shall be effective only if:**

*(a) the price variation is based on the prevailing consumer price index obtained from Central Bureau of Statistics or the monthly inflation rate issued by the Central Bank of Kenya;*

*(b) the quantity variation for goods and services does not exceed ten percent of the original contract quantity;*

*(c) the quantity variation of the works does not exceed fifteen per cent of the original quantity;*

*(d) the price or quantity variation is to be executed within the period of the contract and*

*(e) the cumulative value of all contract variations do not results in an increment of the total contract price by more than twenty-five per cent from the original contract sum.*

6. Aggrieved, the applicant has moved to this Court by way of Notice of Motion dated 23<sup>rd</sup> December 2016 seeking leave to appeal from the Ruling of the High Court dated on 9<sup>th</sup> December 2016 setting aside the arbitral award. The application is grounded on **Section 39** of the Arbitration Act.

7. The grounds in support of the application are that whereas the applicant is aggrieved by the Ruling of the court, the applicant has no express right of appeal except with leave of this Court; that the parties to this appeal had not prior to the delivery of the arbitral award agreed that an appeal shall lie on any question of law arising out of the arbitral award; that the point of law to be urged in the intended appeal is a point of general importance which will substantially affect the rights of the applicant as well as the respondent.

8. In the supporting affidavit deposed by Mr. Alfred Nyandieka dated 23<sup>rd</sup> December 2016, the applicant avers that there are several points of law of general importance that will be urged in the appeal if leave is granted. Some of the points of law to be urged include:

*(i) the trial court fundamentally erred in its decision setting aside the arbitrator's award on the basis that the award was in violation of **Section 47** of the Public Procurement and Disposal Act (2005) as read with **Regulation 31(c)** of the Act;*

*(ii) the learned judge's decision failed to take into account the purposes and objectives of the Public Procurement and Disposal Act;*

*(iii) the judge ignored the procedural mechanism in the Act and the wider public interest it is intended to serve;*

*(iv) the judge applied provisions of the Act unilaterally against the applicant;*

*(v) the judge erred in the application of three elements of public policy as defined in the decision in **Christ for all Nations -v- Apollo Insurance Company Limited (2002) 2 EA 351** which was adopted by this Court in **Kenya Shell Limited – v- Kobil Petroleum (2006) eKLR**.*

*(vi) the judge's decision is in conflict with another decision of the High Court namely **Kenya Sugar Research Foundation – v- Kenchuan Architects Limited (2013) eKLR**.*

9. At the hearing of the application, learned counsel Mr. Waweru Gatonye and Mr. Alfred Nyandieka appeared for the applicant, whereas learned counsel Mr. Jotham Orwa appeared for the respondent. Both parties filed list and digest of authorities and written submissions.

10. Counsel for the applicant urged that the instant application is for leave to appeal to this Court against the decision of the High Court setting aside an arbitration award. He submitted that the application revolves around **Sections 35** and **39** of the Arbitration Act; that it is now trite this Court has jurisdiction to grant leave to appeal under **Sections 35** and **39** of the Arbitration Act; that the preponderance of judicial opinion of this Court is that the Court can grant leave to appeal against a High Court decision emanating from an arbitration award. The applicant submitted that they are aware that there are contrary decisions of this Court where it has been held that there is no right of appeal from the High Court's decision on an arbitration award. The applicants further submitted that they are cognizant that there is a pending ruling/judgment by the Supreme Court in the case of **Nyutu Agrovet Limited- v- Airtel Networks Limited (2015) eKLR** which will have a bearing on the issue of the right to appeal to this Court under Section 35 of the Arbitration Act. Counsel submitted that pending the decision of the Supreme Court, this Court has jurisdiction to grant leave to appeal. Counsel urged us to endorse and adopt the decision of this Court in **Kenya Bureau of Standards – v- Geo-Chem Middle East, Nairobi Civil Application no. 132 of 2017**.

11. In reiteration, Counsel submitted that the present application is grounded on **Section 39(2)** and **(3)** of the Arbitration Act which provide as follows:

**39(1) 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 on any question of law arising out of the award, such application or appeal, as the case 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, to 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).*

*(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.*

*(5) When an arbitral award has been varied on appeal under this section, the award so varied shall have effect as if it were the award of the arbitral tribunal concerned.*

12. On the facts and applicable law in this matter, Counsel submitted that the intended appeal involves the public procurement law in Kenya; that issues of public procurement are matters of general importance; that the trial court in interpreting **Section 47** of the Public Procurement and Asset Disposal Act and **Regulation 31** thereof wrongly dealt with the question of variation of contract; that variation of contract in this matter was done upon request of the respondent; that it would be an unjust enrichment for the respondent to vary a building works contract, get the works done have the laboratories completed and decline to pay on the basis of non-compliance with **Section 47** of the Public Procurement and Asset Disposal Act as read with **Regulation 31(c)** thereof.

13. Counsel submitted that it would be unfair and an unjust enrichment for the respondent to have a building worth Ksh.384,960,776.75 for free; that the applicants took a bank loan to carry out the building works; that the decision of the learned judge is in conflict with the decision by Justice Havelock in *Kenya Sugar Research Foundation – v- Kenchuan Architects Limited (2013) eKLR*; that due to the conflicting decisions, leave to appeal should be granted to enable this Court settle the conflicting jurisprudence; that it is a matter of general importance that the conflicting jurisprudence in the interpretation and application of Section 47 of the Public Procurement and Asset Disposal Act and Regulation 31 thereof should be resolved. Counsel urged us to grant leave to appeal.

14. The respondent submitted that the instant application does not disclose a point of law of general importance that would justify leave to appeal under the provisions of **Section 39(3)** of the Arbitration Act. It was submitted that whereas there is no rule of law barring this Court from granting leave to appeal under **Section 39** of the Act, each case must however be considered on its own merit.

15. Counsel submitted that the issue in contention by the applicant is variation of the contract way above the 15% limit allowed by **Regulation 31(c)** of the Public Procurement and Asset Disposal Regulations; that **Section 47** of the Act as read with **Regulation 31** are clear on the effect of non-compliance with the provisions; that there is nothing that need to be interpreted with regard to **Section 47** of the Act and Regulation 31 that would justify the grant of leave to appeal; that the section and regulation are explicit that any variation in contract made in non-compliance with **Section 47** and **Regulation 31** do not take effect; that there is no need to waste precious judicial time in interpreting what has already been declared to be a nullity.

16. Counsel for the respondent cited decisions in *Niazons K. Limited -v- China Road and Bridge Corporation (K) Limited [2000] eKLR* and *Samuel K. Macharia – v- Kenya Commercial Bank Limited [2012] eKLR* in support. In citing the cases, the respondent submitted that jurisdiction of a court can neither be expanded through judicial craft or innovation nor by estoppel, consent, acquiescence or default.

17. On the issue that the impugned ruling is in conflict with the decision by Justice Havelock in *Kenya Sugar Research Foundation – v- Kenchuan Architects Limited (2013) eKLR*, Counsel submitted that a judge of coordinate jurisdiction does not bind another judge of coordinate jurisdiction. The respondent submitted that merely showing inconsistency in judicial precedents cannot by itself form a basis for granting leave to appeal. Inconsistency in earlier decisions merely casts doubt as to the proper position of the law for the questions in issue; that inconsistency in precedents do not dispense with the obligation on an applicant under **Section 39(3)** to demonstrate a meritorious case for granting leave to appeal.

18. On our part, we have considered both written and oral submissions by counsel and the authorities cited. This application is grounded on Section 39 of the Arbitration Act. The Section permits leave to be granted if this Court is 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. In *Micro-House Technologies Limited –v- Co-operative College of Kenya [2017] eKLR*, this Court observed that an appellant has no right of appeal to this Court to challenge an arbitral award if leave is not obtained under **section 39(3)(b)** of the Arbitration Act.

19. Our reading of **Section 39(3)** of the Arbitration Act reveals that there are two limbs to be demonstrated to the satisfaction of this Court for an application for leave to succeed. An applicant must satisfy this Court that:

**(a) there is a point of law of general importance and**

**(b) determination of the point of law will substantially affect the rights of one or more of the parties.**

20. As regards the two limbs, all that is required is prima facie demonstration that there is a point of law of general importance and determination of that point of law will substantially affect the rights of one or more of the parties. At the stage of seeking leave, the applicant is not expected to argue the merits of the intended appeal.

21. In the instant case, an arbitration award of Ksh.384,960,776.75 was set aside by the learned judge. It is not rocket science to appreciate that if leave is granted and the intended appeal is heard on merit, the rights of both the applicant and the respondent will substantially be affected by the outcome of the appeal. If the appeal succeeds, the respondent will have to pay Ksh.384,960,776/75. Conversely, if the appeal fails, the applicant will suffer loss of out of pocket of Ksh.384,960,776/75 and the respondent may well have obtained the laboratories for free. We are of the opinion that in this application, the second limb in **Section 39(3)** of the Arbitration Act has been demonstrated to our satisfaction. The determination of a point of law in the intended appeal will affect the rights of both parties.

22. On the first limb, the issue is whether the applicant has prima facie demonstrated to our satisfaction that there is a point of law of general importance that justify leave to appeal be granted. What is the criteria to determine if a point of law is of general importance? It goes without saying that the first criterion under **Section 39(3)** of the Act is that the issue in contention must be a point of law. The second criterion is that the point of law must be of general importance.

23. What is general importance? The categories of points of law that are of general importance are not closed. Whether a point of law is of general importance must be determined on a case by case and on its own merit. To determine what is a point of law of general importance for purposes of **Section 39(3)** of the Arbitration Act, we borrow a leaf from and are persuaded by dicta in the Supreme Court case of **Hermanus Philipus Steyn – v- Giovanni Gneccchi Ruscone, [2013] eKLR** where the Court in considering what entails a matter of general public importance expressed that in determining whether a matter is of general public importance:

*(i) 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 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) 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;*

*(iv) Questions of law that are, as a fact, or as appears from the very nature of things, set to affect considerable numbers of persons in general, or as litigants, may become “matters of general public importance”, justifying certification for final appeal in the Supreme Court.*

24. Persuaded by the criteria enunciated by the Supreme Court as stated above, we are of the view that a point of law is of general importance if it transcends the circumstances of the particular case and is a substantial one, the determination of which will have a significant bearing on public interest. We are cognizant that in principle, all points of law are of general importance - there can never be a point of law that is not of general importance. However, to come under the ambit of Section 39 (3) of the Arbitration Act, the point of law must be substantial and the jurisprudence on the interpretation and application of the specific point of law must be arguable, contentious, contradictory and unsettled and must affect a considerable number of persons.

25. Guided by the foregoing, the issue is whether in the instant application the applicant has been able to satisfy us that there is a point of law of general importance. In the affidavit in support of the instant application, the applicant has identified several points of law allegedly falling within the ambit of general importance. The respondent submitted that the applicant has not demonstrated any point of law of general importance.

26. We have considered submissions by the parties. In an application under **Section 39(3)** of the Arbitration Act, a single point of law of general importance suffices. An applicant need not demonstrate several points of law that are of general importance. The identified point of law need not succeed but must be debatable and arise from unsettled jurisprudence. In this matter, the contestation that there is conflicting jurisprudence from the High Court arising from the impugned ruling and the decision of Justice Havelocki in **Kenya Sugar Research Foundation – v- Kenchuan Architects Limited (2013) eKLR** is prima facie demonstration of a point of law of general importance. It is trite that whenever there is conflicting jurisprudence from the superior courts, the point of law becomes one of general importance and of public interest that warrants an appellate court to resolve the conflict.

27. In this application, both parties have argued that at the core of the intended appeal is interpretation and application of **Section 47** of the Public Procurement and Asset Disposal Act, 2005 and Regulation 31 thereof. The applicant contends that the learned judge erred in interpretation and application of the Section and the Regulation. Conversely, the respondent argued that the law on **Section 47** and **Regulation 31** is settled. This diametric contestation is indicator that a point of law has arisen from the impugned decision of the learned judge. Whether the point of law succeeds or not is not an issue for determination in an application under **Section 39(3)** of the Arbitration Act.

28. In **Kenya Bureau of Standards – v- Geo-Chem Middle East, Civil Application No. 132 of 2017**, in an application for leave to appeal to this Court arising from a High Court Ruling relating to an arbitration award, this Court expressed as follows in relation to **Sections 35** and **39** of the Arbitration Act:

*?Although unlike section 39, section 35 does not specifically provide that an appeal to this Court will lie from a decision of the High Court setting aside an arbitral award, we reiterate that it does not, in the same breadth, expressly bar a party aggrieved by the setting aside to come to this Court for redress....*

*We hold the view that the effect of the decision of the High Court under Section 35 is just as critical as that made under Section 39 because both sections deal with an award. An award is the final outcome of an arbitration and when it is confirmed, varied, set aside or remitted to the arbitral tribunal for re-consideration, parties are bound to be aggrieved. We do not believe it was intended that aggrieved parties be left without recourse to appeal.*

29. Convinced and guided by the dicta of the Supreme Court in *Hermanus Philipus Steyn – v- Giovanni Gneccchi Ruscone, [2013] eKLR* and further persuaded by the reasoning of this Court in *Kenya Bureau of Standards – v-Geo-Chem Middle East, Civil Application No. 132 of 2017* we are inclined to exercise our discretion, as we hereby do, to allow the prayer in the Notice of Motion dated 23rd December 2016.

30. For avoidance of doubt, the leave granted in this matter is pursuant to **Section 39** of the Arbitration Act and not **Section 35** of the Arbitration Act.

31. The final order is that leave to appeal to this Court be and is hereby granted to the applicant to appeal from the decision of the High Court (Tuiyot J.) delivered on 9<sup>th</sup> December 2016 in HCCC No. 506 of 2012. The applicant to file the Record of Appeal within 30 days from the date of this Ruling. Costs of this application shall abide the outcome of the intended appeal.

**Dated and delivered at Nairobi this 23<sup>rd</sup> day of Nov, 2018.**

**ASIKE MAKHANDIA**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

I certify that this is a

true copy of the original

**DEPUTY REGISTRAR**