**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: KIHARA KARIUKI (PCA), GITHINJI & VISRAM, JJ.A)**

**CIVIL APPLICATION NO. NAI. 302 OF 2015**

**BETWEEN**

**DHL EXCEL SUPPLY CHAIN KENYA LIMITED.....APPLICANT**

**AND**

**TILTON INVESTMENTS LIMITED.....RESPONDENT**

***(An application for leave to appeal against the Ruling of the High***

***Court of Kenya at Nairobi (Kamau, J.) dated 21st July, 2015***

***in***

***H. C. Misc. Appl. No. 507 of 2014*)**

***************************************

**RULING OF THE COURT**

1. DHL Excel Supply Chain Kenya Limited, the applicant, has brought an application anchored under ***Rules 39 (b), 40 (b), 42 (1), 43 (3)*** of the Court of Appeal Rules (the Rules) and ***section 39 (3) (b)*** of the Arbitration Act. It seeks leave to prefer an appeal to this Court against a ruling of the High Court which was made under the provisions of ***section 35*** of the Arbitration Act (the Act). In that regard, Tilton Investments Limited, the respondent, contends that no appeal lies to this Court against such a decision.

2. By a contract dated 1st April, 2011 the applicant appointed the respondent as a carrier charged with the responsibility of providing trucks for transportation of goods to the applicant's customers in Kenya and Uganda. However, on 12th February, 2012 the applicant terminated the contract on the ground that the respondent was unable to perform the contract. The respondent disputed this allegation. Pursuant to the terms of the contract, the dispute was referred to a sole arbitrator, Mr. Sammy O. Onyango, by agreement of the parties.

3. In its amended statement of claim, the respondent maintained that the applicant had breached the terms of the contract and sought, *inter alia*:

> ***"(a) A declaration that the respondent (applicant herein) is in breach of the terms and conditions of the agreement and addendum.***

*b.* ***An order of specific performance to compel the respondent, its agents, advocates or any other person acting for or on their behalf, to pay the claimant (the respondent herein) the amount of Kshs.67,695,494.02/= due and outstanding to the claimant together with further financial charges including interest at commercial bank rates from date of filing this claim until payment in full.***

*c.* ***In the alternative, an order as to (sic) damages at the rate of Kshs.1,000,000/= per month per truck in respect of 15 trucks for 14 months or such other relief as may be just and fit to grant."***

The applicant denied the respondent's claim and contended that the respondent had been paid for the services rendered.

4. Vide an award dated 13th October, 2014 the arbitrator found in favour of the respondent. In doing so, he held that the applicant had breached the terms of the contract by terminating it without cause. In his own words, the arbitrator stated:

***"Having found that the respondent is in breach of the agreement and addendum, the arbitrator finds that the claimant is entitled to compensation as follows:-***

*1.* ***Specific damages of Kenya Shillings Forty nine two million, two hundred and twenty eight thousand six hundred and fifty six, fifty five cents (Kshs.49,228,656.55), worked out as per the addendum attached herewith. The amount takes into account the 15% tolerance level and therefore gives the respondent the benefit of doubt on possible business downtime.***

*2.* ***Payment of damages for loss of business following termination/suspension of the contract.***

**……..**

***In the end the arbitrator assesses damages at Kshs. Thirty Six Million (Kshs.36,000,000/=) for the months of March 2012 (Kshs.10,000,000.00/=) April and May 2012 (Kshs. 13,000,000.00 each). The arbitrator has taken cognizance of the fact that as at the time of termination of the contract the claimant made available 13 trucks for utilization by the respondent."***

5. Aggrieved with the foregoing decision, the applicant called on the High Court's jurisdiction under ***section 35 (2) (a) (iv)*** and ***35 (2) (b) (ii)*** of the Act to set aside the award. The application was premised on the grounds that the arbitrator had granted an award that had not been prayed for in contravention of the law and had failed to adhere to the terms of the reference of arbitration. Accordingly, the award was in conflict with public policy.

6. The High Court (Kamau, J.) in a ruling dated 21st July, 2015 rejected the contention that the arbitral award dealt with a dispute not contemplated by, or not falling within, the terms of reference of arbitration or contained decisions on matters beyond the scope of the reference. It is that decision that the applicant seeks to challenge in this Court.

7. Turning back to the application at hand, it is based on the grounds that firstly, the intended appeal raises an integral point of law of general public importance, *to wit*, whether an arbitrator in arbitration proceedings could grant an order not prayed for. In the applicant's opinion, the arbitrator ought to have granted either the main or alternative prayer but not both. The arbitrator's actions were tantamount to granting orders which were not sought contrary to the settled principle that parties are bound by their pleadings. Secondly, the current application had been made within reasonable time; thirdly, that the respondent would not be prejudiced in the event the leave is granted. Fourthly, that the award amounted to double compensation which is in conflict with public policy. In response, the respondent's position was that there was no reason for this Court's intervention simply because the intended appeal did not raise any issue of general public importance.

8. At the hearing of the application, the applicant was represented by Mr. G.M Nyaanga while the

respondent was represented by Mr. Chacha Odera. Learned counsel relied on the written submissions which had been filed on behalf of the respective parties.

9. The applicant reiterated that the arbitrator, in granting the main prayer as well as the alternative prayer, not only breached the principle that a party is bound by its pleadings but also went outside his mandate as prescribed by the arbitration agreement. He exceeded his authority, giving rise to a point of law of general public importance given that arbitration was a popular dispute resolution mechanism in the public domain. According to the applicant, it is imperative for the issue to be determined by this Court. In support of this line of argument, the applicant cited **Hermanus Philipus Steyn vs. Giovanni Gnecchi Ruscone [2013] eKLR** wherein the Supreme Court in discussing what a matter of general public importance entailed held:

> ***"(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 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."***

10. The applicant also urged that the award, if not reviewed, would result in the unjust enrichment of the respondent. Finally, the applicant contended that the facts in ***Nyutu Agrovet Ltd. vs. Airtel Networks Kenya Ltd. [2015] eKLR*** (a decision of this Court which had held that no appeal lay to the Court of Appeal from the High Court in matters relating to arbitration) were distinguishable from the facts of this case.

11. In the respondent's view, two issues arise for determination by this Court namely: whether we can grant leave to appeal against a decision emanating from ***section 35*** of the Act; and whether there was an issue of general public importance to warrant the grant of leave. The respondent argued that it was settled that no appeal can lie against a decision made by the High Court under ***section 35*** of the Act. Besides, it was clear that before the jurisdiction of this Court to grant leave to appeal under ***section 39 (3) (b)*** of the Act could be invoked, a party ought to have invoked the High Court's jurisdiction under ***section 39 (1) & (2)*** in the first instance. The applicant had not called upon the High Court's jurisdiction as envisioned under the provisions of ***section 39*** thus, its application ought to fail. Towards that end, the respondent relied on the decision of this Court in ***Nyutu Agrovet Ltd. vs. Airtel Networks Kenya Ltd.***

***(supra)***.

12. Also citing the Supreme Court's decision in **Hermanus Philipus Steyn vs. Giovanni Gnecchi Ruscone** ***(supra),*** the respondent maintained that what was before the High Court was a straight forward dispute which was conclusively resolved; the applicant had not demonstrated that the intended appeal raised a point of law of general public importance. In the respondent's view, the current application offended the principle of finality of arbitral process.

13. In addition, the respondent opposed the application on the grounds that the applicant had not sought leave to appeal against the impugned decision at the High Court before approaching this Court contrary to ***Rule 40*** of the Court of Rules. The intended appeal had no realistic chances of success.

14. We have considered the application, submissions made on behalf of the parties, authorities adduced and the law. It is our view that the application turns on whether the leave sought can issue. In determining the same, we must address ourselves on the following issues:-

*a.* ***Whether the applicant has a right of appeal against the impugned decision and if so,***

*b.* ***Whether the circumstances justify the exercise of our discretion in favour of the applicant.***

15. ***Stroud?s Judicial Dictionary of Words and Phrases 3rd Edition*** defines a right of appeal as:

> ***"… the right of entering a superior court and invoking its aid and interposition to redress the error of the court below."***
>
> It is without doubt that prior to the current Constitution a right of appeal to this Court could only be conferred by statute. The predecessor of this Court in ***Mudavadi vs. Kibisu [1970] EA 585*** reaffirmed the law as it had been applied by the Court and its predecessors in the following terms:-
>
> ***"We were referred to various English authorities but with respect those authorities are not of much assistance as the question of our jurisdiction depends solely on the interpretation of the relevant section of the Constitution and of the Laws of Kenya and these in our view clearly define our jurisdiction to hear this appeal…. It is well established that there is no right of appeal apart from statute; either it is expressly granted by statute or not. There is no right of appeal by mere implication or by inference."*** Emphasis added.

16. Since then, the position has changed as was correctly observed by Ouko, J.A in ***Justice Kalpana H. Rawal vs. Judicial Service Commission & 3 Others [2016] eKLR***. He expressed that-

> ***"The historical context of these decisions must not be lost sight of.***
>
> ***At the time the Court of Appeal was created by section 64 of the former Constitution its jurisdiction and powers in relation to appeals from the High Court were to be conferred by law, which meant that a specific Act of Parliament or other statutes, as opposed to the Constitution, would contain the powers of the Court. But this, in my view has changed.***
>
> **…….**
>
> ***Like all institutional reforms that have a constitutional dimension, judicial reforms inaugurated by the Constitution of Kenya, 2010 introduced structural and functional changes to the Judiciary. Critical to this application is the establishment of new hierarchy of court system either with the jurisdiction constitutionally conferred or to be conferred by legislation. By Article 164(3), the Constitution, for instance, empowers the Court of Appeal to hear appeals from;***
>
> ***"(a) the High Court; and***
>
> *b.* ***any other court or tribunal as prescribed by an Act of***
>
> ***Parliament …."***
>
> ***This is a departure from section 64(1) of the former Constitution at least with regard to appeals from the High Court, where the Court?s jurisdiction depended on conferment by an Act of Parliament.***
>
> **……..**
>
> ***Whereas section 64 aforesaid only conferred jurisdiction to the Court in relation to appeals from the High Court "as may be conferred on it by law", Article 164 (3) (a) makes no such reference to any law because the Constitution is the supreme law of the Republic, the mother of all laws."***

17. Similarly, M'Inoti, J.A in the aforementioned case took cognizance of the change by stating:

> ***"In Anarita Karimi Njeru vs. Republic [1979] eKLR the Court of Appeal undertook a detailed review of the evolution of its jurisdiction, going back to 1902. The Court identified two approaches in the conferment of jurisdiction in the appellate court in the following terms:***

***„The conferment of jurisdiction of a Court of Appeal takes one of two forms. The first is where the legislature establishes a Court of Appeal and then confers on it jurisdiction to hear all appeals from the High Court. Here, where the Court of Appeal is to be deprived of jurisdiction that is done specifically in a particular enactment. The second is where the legislature establishes a Court of Appeal expressly without jurisdiction, and reserves the conferment of jurisdiction to other secondary legislation. This secondary legislation can take one of two forms: either by conferring on the Court of Appeal jurisdiction to hear all appeals from the High Court; or by conferring jurisdiction on the Court of Appeal in particular enactments, as considered appropriate.?***

***Section 64 (1) of the Constitution of Kenya, 1969 conferred jurisdiction in the second form identified above, that is, by establishing the Court of Appeal to hear appeals from the High Court, but leaving it to statute law to determine the precise jurisdiction and powers. That provision was introduced in 1977 to establish the Kenya Court of Appeal following the break-up of the former East African Community and the attendant demise of the East African Court of Appeal. Under that Constitution, the jurisdiction of the Court could be expanded or limited by legislation. To claim jurisdiction to hear a particular appeal one was required to identify specific legislation that granted the right of appeal to the Court of Appeal. It was in this context that it was always asserted that there was no right of appeal where none was created by statute."*** Emphasis added.

18. The effect of the evolution is that the jurisdiction of this Court now flows from the Constitution itself. Equally, we believe that the right of appeal to this Court flows from the Constitution. In ***Justice Kalpana H. Rawal vs. Judicial Service Commission & 3 Others (supra)*** Kiage, J.A aptly articulated thus,

***"I state and hold, unhesitatingly, that both the jurisdiction and the right of appeal from the High Court to this Court are now founded, in the first instance, on the Constitution of Kenya 2010. The jurisdiction invested on this Court is not qualified by words such as "where a right of appeal arises". It provides both the right of approach from the High Court and the power to hear those who have so approached. That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself."***

Emphasis added.

19. However, we are alive to the fact that not all decisions from the High Court are appealable to this Court. The right may be limited by statute as long as it conforms to ***Article 24*** of the Constitution. The same was succinctly put by this Court in ***Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR*** -

***"This is not to suggest that, by dint of Article 164 (3) all and sundry decisions of the High Court are appealable to the Court of Appeal. A holistic and purposive reading of Constitution, particularly the right to access justice (in this context "appellate justice" (Article 48) the right to fair hearing (Article 50), judicial authority (Article 159) and Article 164 (3) itself would accommodate limitation of what is appealable, if the limitation satisfies the requirements of Article 24 of the Constitution."***

20. We understand the respondent's argument to be that the right of appeal to this Court has been limited in arbitration proceedings by the Act. An appeal lies to this Court only in the circumstances outlined under ***section 39*** of the Act. We appreciate that the Act is based on a Model Law on international commercial arbitration adopted in 1985 by the United Nations Commission on International Law (UNCITRAL). One of the principles underlying the Model Law and in turn the Act is the restriction on the role of the court in the arbitral process. That principle finds expression in ***section 10*** of the Act which stipulates that:

***"Except as provided in this Act, no court shall intervene in matters governed by this Act."***

***Section 32 A*** also provides that:

> ***"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."***

21. Nevertheless, the Act provides for instances when a court may intervene. A case in point is ***section 35*** wherein the High Court may set aside an arbitral award. This is the provision under which the applicant approached the High Court. It provides in part that:

> ***"1. Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).***
>
> *2.* ***An arbitral award may be set aside by the High Court only if-***
>
> *a.* ***the party making the application furnishes proof -***
>
> *i.* ***that a party to the arbitration agreement was under some incapacity; or***
>
> *ii.* ***the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or***
>
> *iii.* ***the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or***
>
> *iv.* ***the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or***
>
> *v.* ***the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or***
>
> *vi.* ***the making of the award was induced or affected by fraud, bribery, undue influence or corruption;***
>
> *b.* ***the High Court finds that -***
>
> *i.* ***the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or***
>
> *ii.* ***the award is in conflict with the public policy of Kenya."***

*22.* ***Section 39*** also allows the court's intervention where a point of law is involved. The section provides in part that:

> ***"(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).”***

23. The respondent construes the above provisions to mean that an appeal to this Court can only lie under ***section 39*** and not under ***section 35*** which is silent on the issue. We disagree with the respondent. As we have illustrated hereinabove the right to appeal to this Court from a decision of the High Court can only be restricted by express statutory terms. Hence, the interpretation of the aforementioned sections ought to be made in the right context and in conformity with the Constitution. See the Supreme Court’s decision in **Hassan Ali Joho & Another vs. Suleiman Said Shahbal [2014] eKLR** and this Court’s decision in ***Narok County Government & Another vs. Richard Bwogo Birir & Another [2015] eKLR***.

24. In our view, the fact that ***section 35*** of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution. In ***National Telephone Co. vs. Post Master General [1913] A.C 546*** Viscount Simon at page 552 held:

***“When a question is stated to be referred to an established court without more, it imports that the ordinary incidents of the procedure of that court are to attach and also that any right of appeal from its decisions likewise attaches.”***

We are also persuaded by the sentiments of the Ugandan Supreme Court in **Baku Raphael Obudra and Ors vs. Attorney General (Constitutional Appeal No. 1 of 2005) [2006] UGSC 5 -**

***“Where, as is alleged in this case, Parliament intends to abolish or restrict a citizen?s right which is apparently granted or implied by the provisions of the Constitution which is a superior law, Parliament must do so expressly and its will must be clearly manifested in the words used in the Act. Such intentions or will cannot be breathed into the Act by mere judicial reasoning.”***

25. However, this does not mean that wherever the Act allows the High Court’s intervention such a decision is appealable to this Court. The scenario would obviously be different wherein the Act allows the High Court’s intervention in a particular issue but expressly bars an appeal to this Court. By way of illustration, ***section 12 (6)*** of the Act empowers the High Court to set aside an arbitrator’s appointment but expressly provides at ***subsection (8)*** that the decision of the High Court is final and is not subject to an appeal. See also ***sections 14, 16 A*** and ***17*** of the Act.

26. As far as ***section 39*** is concerned, we can do no better than set out the findings of Omolo, J.A, as he

then was, in ***Kenya Shell Limited vs. Kobil Petroleum Limited – Civil Application No. Nai. 57 of 2006*** *(unreported):*

> ***"The provisions of subsection (3) are, in my view, restricted to the circumstances stated in subsection (2) and I do not understand them to mean that the right of appeal to the Court of Appeal, under all the provisions of the Act, can only be exercised in accordance with the provisions of Section 39 (3) of the Act. I would myself reject any such construction."***

Based on the foregoing, we find that the applicant has a right of appeal to this Court.

27. Whether or not the court will grant leave to appeal is a matter for the discretion of the court. As in all powers of discretion exercisable by courts, however, it has to be judicially considered. Some guidance in that regard was given by this Court in ***Machira t/a Machira & Company Advocates vs. Mwangi & Anor. [2002] 2 KLR 391*** as follows: -

> ***"The Court will only refuse leave if satisfied that the applicant has no realistic prospects of succeeding on the appeal. The use of the word "realistic" makes it clear that fanciful prospect or an unrealistic argument is not sufficient. When leave is refused, the Court gives short reasons which are primarily intended to inform the applicant why leave is refused. The Court can grant the application even if it is not so satisfied. There can be many reasons for granting leave even if the Court is not satisfied that the appeal has no prospects of success. For example, the issue may be one which the Court considers should in the public interest be examined by this Court or, to be more specific, this Court may take the view that the case raises a novel point or an issue where the law requires clarifying. There must, however, almost always be a ground of appeal which merits serious judicial consideration."***

28. It is not in dispute that the arbitrator granted both the main and alternative prayer in the final award. Without delving into the merits of the intended appeal, we find that whether parties are bound by their pleadings in arbitral proceedings; whether an arbitrator could grant both the main prayer and the alternative prayer warrant the consideration of this Court.

29. The upshot of the foregoing is that the application herein has merit and is hereby allowed. Accordingly, we grant the applicant leave to appeal against the ruling of the High Court dated 21st July, 2015. Costs of this application shall abide by the outcome of the intended appeal.

**Dated and delivered at Nairobi this 12th day of May, 2017.**

**P. KIHARA KARIUKI, PCA**

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**JUDGE OF APPEAL**

**E. M. GITHINJI**

**.....**

**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

**.....**

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**