IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, AZANGALALA & SICHALE, JJ.A.)

CIVIL APPLICATION SUP. 3 OF 2015

BETWEEN

NYUTU AGROVET LIMITED………..……….. APPLICANT

AND

AIRTEL NETWORK KENYA LIMITED……. RESPONDENT

(An application for grant of leave to appeal from the Court of Appeal t the Supreme Court of Kenya from the Judgment of the Court of Appeal at Nairobi, (Karanja, Mwera, Musinga, M'Inoti & J. Mohammed, JJ.A.) dated 6th March, 2015 in ***Civil Appeal (Application) No. 61 of 2012)***

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RULING OF THE COURT

[1] This is an application by ***Nyutu Agrovet Limited***, *(hereinafter "the applicant")*, for the principal relief, that a certificate under ***Article 163 (4), (b)*** of the ***Constitution - 2010,*** does issue on the main ground that its proposed appeal to the Supreme Court against the judgment and orders of this Court, ***(Karanja, Mwera, Musinga, M'Inoti and Mohammed, JJ.A.)***, dated 6th March, 2015, in ***Civil Appeal (Application) No. 61 of 2012***, raises matters of general public importance and that a substantial miscarriage of justice will occur if the intended appeal is not lodged.

[2] The application is by Notice of Motion which motion also invoked ***Sections 3A*** and ***3B*** of ***the Appellate Jurisdiction Act, Rule 24*** of the ***Supreme Court Rules***, ***2012***, ***Rule 43*** of this ***Court's Rules*** and any other enabling provisions of the law. In support of the Motion on Notice, the applicant filed an affidavit of ***Muchai Mathare*** one of the Directors of the applicant sworn on 20th March, 2015. The same Director also swore a further affidavit on 9th July, 2015, in response to the replying affidavit sworn by ***Linda Kaai Kiriko***, the ***Legal Affairs Manager of Airtel Networks Kenya Limited*** *("the respondent").*

[3] In our view, the grounds on the face of the Notice of Motion and the affidavits lodged by the applicant show that two central issues are raised as matters of general public importance, namely:

> ***The jurisdiction of the Court of Appeal to hear and determine appeals from the High Court in arbitral awards; the interpretation and scope of the law on court intervention in arbitration proceedings in Kenya given that alternative dispute resolution mechanisms now have Constitutional underpinning***.The Notice of Motion and the applicant's said affidavits, so far as relevant, indicate the following as the basis for signifying the reasons for importance:***There is***

> ***uncertainty with respect to the legal position as regards the issue of jurisdiction of the Court of Appeal to hear and determine appeals from the High Court in arbitral awards which certainty should be clarified by the Supreme Court. There are statutory provisions (Arbitration Act, 1995), which oust the right of appeal from the High Court to the Court of Appeal which right is Constitutional and cannot be ousted by statuteThe decisions of the Court of Appeal on the right of appeal from the High Court in arbitral proceedings are not consistent. The issue transcends the particular circumstances of this case as it affects a growing community in Kenya comprising commercial investors and entrepreneurs and has a significant bearing on the public interest. The respondent, indeed, acknowledged the importance of the issues raised and in that regard applied that a five judge bench be constituted to consider the applicant's appeal and it is from the decision of that bench that the intended appeal is to be lodged.***

The Notice of Motion was opposed and a replying affidavit as stated was sworn by ***Linda Kaai Kiriko***, the respondent's ***Legal Affairs Manager*** on 26th June, 2015. She also swore a further affidavit on 28th August, 2015. The gist of the opposition was that the dispute between the parties arose from a private commercial transaction in the domain of private law and the issue is limited to them which dispute was determined in accordance with the ***Arbitration Act*** modelled on the ***United Nations Commission on International Trade Law (UNCITRAL)***, model law. It was, therefore, the respondent's contention that the issue involved does not transcend the facts of the dispute between it and the applicant. It was also the respondent's further contention that there is no uncertainty in the law as the right of appeal from the High Court to the Court of Appeal is governed by statute as variously determined by numerous decisions of this Court.

Learned counsel for the applicant ***Mr. Reguru***, in support of the Notice of Motion adopted and expounded on the stand-point taken by the applicant in its affidavits and the written submissions of ***M/s Muthaura Mugambi Ayugi and Njonjo, Advocates*** had previously filed on behalf of the applicant. Learned counsel took us through the origin of the dispute between the parties, the application before the High Court and the appeal before this Court. Learned counsel then addressed us on the principles applicable and reiterated that the right of appeal from the High Court to this Court on arbitral awards was the focus of the intended appeal to the Supreme Court. In learned counsel's view, given the uncertain state of the authorities in that regard, it is crucial that the further input of the Supreme Court be obtained. Learned counsel cited several decisions of this Court which were not unanimous on the issue. We shall refer to some of the cases later on in this ruling.

Mr. Regeru contended that whether or not there is a right of appeal from a decision made by the High Court under ***Section 35*** of the ***Arbitration Act*** is of general public importance "*to an exponentially growing community comprising of (sic) commercial investors and entrepreneurs in so far as the case before the Court of Appeal and determination of the Court would affect the rights of all parties involved in arbitration either court mandated or through contracts*".

To buttress this point, learned counsel submitted that the ***Constitution, 2010*** provides for ***Alternative Dispute Resolution (ADR),*** mechanisms which includes arbitration and therefore, increased use of ADR is envisaged, hence, the need for clarity as to the correct position. Learned counsel expressed the further view that if the ***Arbitration Act*** bars appeals to this Court, then to that extent the provision violates the Constitution which allows appeals to this Court from the decisions of the High Court. Given the statutory provisions under the ***Arbitration Act*** and the right of appeal enshrined in the ***Constitution, 2010,*** learned counsel contended that the true position should be pronounced by the Supreme Court.

Mr. Regeru was rather surprised at the opposition to this application mounted by the respondent in view of its own application it made before this Court for a five (5) judge bench to consider the respondent's appeal. In that regard, learned counsel charged the respondent with double-speak.

Mr. Ngatia, learned counsel for the respondents in opposing the Notice of Motion, submitted that all the applicant seeks in the intended appeal is an opportunity to reinstate the financial award that had been decreed in its favour by the arbitrator which award was subsequently quashed by the High Court. In his view, there is nothing which transcends the particular circumstances of the case between the parties and

that there is nothing which has a significant bearing on the public interest. It was also learned counsel's further view that there was no uncertainty in the law which the Supreme Court should clarify. Learned counsel contended that the applicant merely seeks a correction of a matter it views as an error in law which is not sufficient for certification.

With regard to alleged Constitutional issue, learned counsel submitted that the same was not an issue before the High Court and before this Court and cannot consequently qualify as an issue for consideration by the Supreme Court. In any event, according to learned counsel, if a Constitutional dispute was involved, certification would be unnecessary. Several decisions of this Court and the Supreme Court were invoked to buttress the respondent's submissions some of which decisions we shall refer to in this ruling.

[11] We have anxiously considered the application, the affidavits filed, the submissions of learned counsel, the authorities cited and the applicable law. It is common ground that this Court has jurisdiction to grant the certificate sought by the applicant. The jurisdiction is given in ***Article 163 (4), (b)***, of the ***Constitution*** which reads as follows:

> ***"4 Appeals shall lie from the Court of Appeal to the Supreme Court -***
>
> a. **..**
>
> b. ***in any other case in which the Supreme Court or <u>Court of Appeal certifies that a matter of general public importance is involved</u>***.
>
> (Underlining ours).

And ***Rule 30 (2)*** of the ***Supreme Court Rules*** provides:

> ***"Where an appeal lies only with leave or on certificate that a point of law of general public importance is involved, it shall be necessary to obtain such leave or certificate before lodging the notice of appeal".***

Plainly, therefore, ***Article 163 (4), (b)*** requires us to determine whether the intended appeal to the Supreme Court raises a matter or matters of general public importance and if we are so satisfied to issue the requisite certificate. The onus to satisfy us that such matter or matters of general public importance indeed exist, rests on the applicant.

The Constitution does not define a matter of general public *"importance"* nor does the ***Supreme Court Act*** nor the rules made thereunder. We think the phrase is not defined for good reason as matters of general public importance will depend on particular circumstances which circumstances will vary from time to time. The Supreme Court has, however, set out principles which the court will consider in determining whether a matter is one of general public importance. Those principles were considered in ***<u>Hermanus Phillipus Steyn -v- Giovanni Gnecchi - Ruscone,</u> [2013] eKLR, <u>Malcolm Bell -v- Hon. Daniel Torotich arap Moi & Another,</u> [SC. Application No. 1 of 2013] (UR)*** and ***<u>Telcom Kenya Limited -v- John Ochanda,</u> [Motion No. 17 of 2014] (UR)***.

[14] The principles are:

> ***"(i) for a case to be certified as one involving a matter of general public importance, 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 most demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;***

iii. ***Such question or questions of law must have arisen in the Court or Courts below and must have been the subject of judicial determination;***

iv. ***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;***

v. ***mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court must still fall within the terms of Article 163 (4), (b) of the Constitution;***

vi. ***the intending applicant has an obligation to identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought;***

vii. ***determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court;***

viii. ***issues of law of repeated occurrence in general course of litigation may, in proper context, become matters of general public importance, so as to be a basis for appeal to the Supreme Court;***

ix. ***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;***

x. ***questions of law that are destined to continually engage the workings of the judicial organs may become matters of general public importance, justifying certification for final appeal in the Supreme Court;***

xi. ***questions with a bearing on the proper conduct of the administration of justice, may become matters of general public importance, justifying final appeal in the Supreme Court".***

As we stated in the case of ***Muiri Coffee Estate -vs- Kenya Commercial Bank Ltd. & Another, [2014] eKLR***, only one question of general public importance need be demonstrated for certification to be granted. In the application before us the applicant has, in our view, identified one primary issue as being of general public importance namely, the jurisdiction of the Court of Appeal to hear and determine appeals from the High Court on decisions made under ***Section 35*** of the ***Arbitration Act***. The section reads as follows:

> ***"35 (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under sub-sections (2) and (3).***
>
> ***(2) An arbitral award may be set aside by the High Court only if***
>
> ***(a) the party making the award 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 arbitration 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 Laws of Kenya: or***

ii. ***the award is in conflict with Public Policy of Kenya.***

3. ***An application for setting aside the arbitral award may not be made after 3 months have elapsed from the date on which the party making the application had received the arbitral award, or a request had been made under Section 34 from the date on which that request had been disposed of by the arbitral award.***

4. ***The High Court, when required to set aside the arbitral award, may, where appropriate and if so requested by a party suspend the proceedings to set aside the arbitral award for such period of time determined by it in order to give the arbitral proceedings or to take such other action as in the opinion of the arbitral tribunal will eliminate the grounds for setting aside the arbitral award".***

Given the above principles and the provisions of ***Section 35*** of the ***Arbitration Act***, we ask ourselves whether the issue which the applicant indentified in its Notice of Motion and submissions, qualify as raising a matter of general public importance. In the ***Hermanus Phillipus Steyn*** case (supra), the Supreme Court stated as follows on what may constitute *"a matter of general public importance"*:

> ***"In litigating on matters of General Public importance "an understanding, of what amounts to 'public' or 'public interest' is necessary. "Public is thus defined: concerning all members of the community; relating to or concerning people as a whole, or all members of a community of State; relating to or involving government and government agencies rather than private corporations or industry; belonging to the community as a whole and administered through its representatives in government".***

[17] To determine whether the issue identified by the applicant raises a matter of general public importance, some background of the case will suffice. The appellant entered into a written agreement with the respondent's predecessor, ***CELTEL*** on 20th December, 2007. Under the agreement, the applicant was to distribute Airtel's telephony products in Donholm Estate, Nairobi. The agreement contained an arbitration clause ***(Clause 18.1)*** which provided as follows:

> ***"...any dispute or claim arising out of or relating to the agreement and/or breach thereof shall be determined by a single Arbitrator to be appointed by agreement between the parties...".***

[18] A dispute arose and ***Senior Counsel Fred O. N. Ojiambo***, was appointed sole arbitrator. He heard the parties and made an award of Kshs.526,720,698/50 in favour of the applicant. Airtel was aggrieved and lodged a Notice of Motion dated 8th November, 2011 before the High Court under ***Section 35*** of the

Arbitration Act seeking to set aside the said award. The Notice of Motion was heard by ***Kimondo***, ***J.,*** who, on 1st December, 2011, set aside the arbitral award on the ground that "*the award contained decisions in matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties...*".

[19] It was now the turn of the applicant to grieve. It, therefore, lodged ***Civil Appeal No. 61 of 2012***, before this Court. Airtel challenged the said appeal on the main ground that no appeal lay from a decision of the High Court under ***Section 35*** of the ***Arbitration Act***. The motion was opposed by the applicant herein which argued, in the main, that the right of appeal from decisions of the High Court is enshrined in ***Article 164(3)*** of the ***Constitution*** and cannot be taken away by any statute or decision of any court. In any event, according to the applicant, ***Section 35*** of the ***Arbitration Act*** does not expressly bar appeals to this Court from decisions of the High Court made thereunder. The parties respective stand-points were supported by decisions of this Court and it was because of want of consistency in the decisions that a five (5) judge bench was constituted to hear the respondent's Notice of Motion.

It was the unanimous decision of the five (5) Judges of this Court, ***(Karanja, Mwera, Musinga, M'Inoti and J. Mohammed, JJ.A.)***, that no appeal lies to this Court from a decision of the High Court under ***Section 35*** of the ***Arbitration Act***.

The applicant is aggrieved by that decision hence this application for certification that a point of general public importance is involved is its intended appeal to the Supreme Court.

The right of appeal, *per se*, in any jurisdiction is a right jealously guarded. We are not, therefore, surprised that where the right has not been expressly denied some Judges of this Court have held that in such a case there is a right of appeal. That is the position taken by the majority in ***Kenya Shell Limited -vs- Kobil Petroleum Limited, [Civil Appeal No. 57 of 2006] (UR)***. There, ***Omolo, J.A.,***

stated:

> ***"For my part, I am satisfied that the provisions of Section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant a party leave to appeal from a decision of the High Court made under that section. If that was the intention, there was nothing to stop Parliament from specifically providing in Section 35 that there shall be no appeal from a decision made by the High Court under that section".***

[23] The same reluctance to limit the jurisdiction of the court was expressed in ***Davis & Another -v- Mistry, [1973], EA 463***. There, the appellants who were architects sued the respondent to recover their fees. The respondent successfully applied to strike out the suit on the ground that the claim could only be made in arbitration proceedings. On appeal, the predecessor of this Court held, *inter alia*, that there was no power to enact rules depriving any party of his access to the courts.

[24] Further, a field we have ***Pyx Granite Co. -v- Ministry of Housing, [1958] 1 All ER 625***. There, ***Section 17(1)*** of the ***Town and Country Planning Act 1947***,

provided:

> ***"If any person who proposes to carry out any operations on land.......wishes to have it determined ... whether an application for permission in respect thereof is required under this part of this Act having regard the provisions of the development order, he may...apply to local planning authority to determine that question".***

A question arose as to whether the remedy provided under that section was the only one. It was held:

> ***".....to be settled law that the jurisdiction of the High Court to grant a declaration is not to be taken away except by clear words".***

And that:

> ***"It is a fundamental rule that if a subject is to be deprived of a right of coming to these courts, it must be in clear words".***

[25] Closer home in ***Ndyanabo -v- Attorney General, [2001] 2 EA 485 (CAT)***, which involved an election petition, it was held, *inter alia*, that:

> ***"A person's right of access to justice was one of the most important in a democratic society and in Tanzania, that right could only be limited by legislation that was not only clear but which was also not violative of the Constitution. The fundamental right of access to justice was what linked together the three pillars of the Constitution, that is , the rule of law, fundamental rights and independent, impartial and accessible Judiciary".***

There are then decisions of this Court in which appeals have been entertained from the High Court in arbitral proceedings even though the provisions of the ***Arbitration Act*** under which those appeals arose did not provide for a right of appeal to this Court. (See ***Gitonga Warugongo -v- Total Kenya Ltd., [CA No. 113 of 1998]. Dr. Joseph Karanja and Another -v- Geoffrey Ngari Kuira, [C.A. No. 130 of 2002]*** and ***UAP Provincial Insurance Company Limited -v- Michael***

John Bedatt, [C.A. No. 26 of 2007].

As against those cases against limiting access to the courts, are those cases in favour of exclusion clauses in commercial disputes. The main argument being that the law recognizes contractual autonomy and the principal or concept of finality. This line of authorities advances the view that a right of appeal must be expressly given by law and that such a right cannot be implied or inferred. See ***Rafiki Enterprises -v- Kingsway Tyres Ltd. [C.A. No. Nai. 375 of 1995]. Harnam Singh Bhogal T/A Harnam Singh and Co. -v- Jadya [1953], 20 EACA 17, Anarita Karimi Njeru -v- The Republic, (No. 2) [1970-80], 1 KLR 1283, Munene -v- Republic, (No.2), [1978]? 105, Telcom Kenya Ltd., -v- KAM Consult Ltd., and Another, [C.A. No. Nai. 55 of 2002], Equity Bank Ltd., -v- West Link Mbo Ltd., [C.A. No. 78 of 2011*** and ***Kakuta Maimai Hamisi -v- Peris Pesi Tobiko & 2 Others, [C.A. No. 154 of 2013]***.

[28] Then, we have our most recent decision in ***Judicial Service Commission & Another, -v- Hon. Lady Justice Kalpana Rawal, [Civil Application No. Nai. 308 of 2015]***. The case did not involve ***Section 35*** of the ***Arbitration Act*** but the learned Judges had occasion to indicate their opinions on the right of appeal of the respondent as ***Article 164(3)*** of the ***Constitution*** fell for consideration. The applicant there had argued that there is no right of appeal from the High Court on a decision involving breach or enforcement of the ***Bill of Rights*** under the ***Constitution - 2010***.

[29] In a unanimous decision the Court held that there is a right of appeal from decisions of the High Court on the ***Bill of Rights***. In considering that application, the decision herein became the subject of comment by some of our brothers and sisters who felt that the court had somewhat elevated the status of provisions in the ***Arbitration Act*** over ***Article 164(3)*** of the ***Constitution*** which expressly allows all appeals from the High Court to this Court.

[30] Given our decision in the ***Rawal's case*** (supra), it is not altogether idle conjuncture to say that another bench of this Court could very well decide differently on the same facts which event will compound the issue and not clarify the law.

[31] Our above analysis no doubt shows that the issue raised by the applicant namely, the right of appeal from the High Court to this Court on a decision under ***Section 35*** of the ***Arbitration Act*** is important.

Arbitration is one of the alternative dispute resolution mechanisms now enshrined in the ***Constitution 2010***, ***(Article 159 (2) (c)).*** Arbitration is, therefore, going to gain currency as a mechanism for resolving disputes especially commercial ones. In that event, the issue raised by the applicant, in our view, transcends the interests of the parties to this dispute. It also bears direct impact on the lives of many

businessmen involved in commercial transactions and, therefore, certainly bears upon the public interest. Indeed, it is in the interests of not only the commercial community but also the courts that the issue be settled whether a right of appeal exists from decisions of the High Court in arbitral awards as the issue "*is destined to continually engage the workings of the judicial organs*".

We further find that in determining the issue raised herein interpretation and scope of ***Articles 164 (3)*** and ***48*** of the ***Constitution 2010*** will be inevitable.

The principles in Hermanus require that an issue for determination be one that arose in the courts below and was the subject of judicial determination in those courts. In the matter before us, the principal issue for determination at the High Court was whether the arbitral award could be set aside. The appeal from the setting aside order of the High Court provoked the Notice of Motion to strike out the appeal on the main ground that no right of appeal lay. ***Article 164 (3)*** of the ***Constitution*** is on the jurisdiction of this Court and was considered. That Article, in fact, is in consonance with the right to access to justice enshrined in ***Article 48*** of the ***Constitution***.

Given the key status of the Courts and the right to access to justice, it is our view that the issue raised is a cardinal issue of law and we may add it is of jurisprudential moment. As our analysis shows the issue has arisen in this Court several times before with varying results. In our view, the varying results have occasioned a state of uncertainty in the law which should be resolved by the Supreme Court. There is plainly therefore, a strong public policy consideration in favour of interpreting ***Article 164 (3)*** of the ***Constitution***.

This is not a case as the respondent argued, where the applicant's interest is mere reinstatement of the award the arbitrator made in its favour. We do not think that the applicant merely wants to have a second bite at the cherry. The application for certification in our view is made *bona fide* and with a genuine desire to settle the law. A whole regime of law screams for settlement: can the concept of finality override clear Constitutional provisions? What is the importance and scope of contractual autonomy? With respect to the limited window of intervention of the High Court provided by ***Section 35*** of the ***Arbitration Act***; a question is likely to arise where the High Court may flounder and not get it right. In that event is a party affected thereby with no remedy? Notwithstanding the principle of contractual autonomy, is it not plain that parties may regulate their own affairs to their own detriment especially when their respective strengths are not matched for example a giant financial corporation and its clients or a multinational enterprise *vis-a-vis* a developing State's emerging entrepreneurs? Is it not, in any event, elementary that the freedom of contract is not absolute?

Isn't it because of perpetuating an injustice that ***Article 164 (3)*** of the ***Constitution*** has no limitation on the right of appeal to this Court? Should an incorrect decision of the courts below become part of our jurisprudence purely because of the concept of finality and contractual autonomy?

The upshot of our above consideration is that, we find merit in the applicant's Notice of Motion dated 20th March, 2015. We allow it in the terms sought.

We order that each party shall bear its own costs in this application.

Dated and delivered at Nairobi this 17th day of June., 2016.

ALNASHIR VISRAM

...

JUDGE OF APPEAL

F. AZANGALALA

...

JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR