IN THE COURT OF APPEAL

AT NAIROBI

CORAM: (NAMBUYE, KIAGE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 9 OF 2012

BETWEEN

NATIONAL CEREALS & PRODUCE BOARD.....APPELLANT

AND

ERAD SUPPLIERS & GENERAL CONTRACTS LIMITED.....RESPONDENT

(Appeal from the ruling and order of the High Court of Kenya at

Nairobi (Njagi, J) given on 28th June, 2011 in

MISC. CIV APPLICATION NO. 639 OF 2009)

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RULING OF THE COURT

1. The appellant/applicant, National Cereals and Produce Board, (hereafter referred to as "the Board") seeks leave of the Court under Rule 29(1)(b)(2) of the Rules of the Court to adduce further evidence in support of the appeal. It proposes, if leave is granted, to present the further evidence by filing and serving a supplementary record. The additional evidence that the Board proposes to adduce is a special report of the Public Investments Committee adopted by the National Assembly on 12th November 2013 ("the report") on the contract between the Board and the respondent, which is the basis of the relationship between the parties in this appeal. The Board says that the report contains new and important evidence that is necessary for the fair and just determination of the appeal.

Background

2. The Board is established under section 3 of the National Cereals and Produce Board Act, chapter 338 of the Laws of Kenya. It is mandated under that statute to buy, store, sell, import or otherwise acquire and dispose of maize and other cereals in order to fulfill the requirements of producers and consumers in Kenya.

3. Sometime in the year 2004 the Board invited tenders for the supply of imported white maize. The respondent successfully bid and was awarded the tender to supply 40,000 metric tons of white maize.

4. On 26th August 2004, the parties entered into a Maize Import Contract ("the contract") under which the respondent agreed to sell and ship to the Board, which agreed to purchase from the respondent

the 40, 000 metric tons of white maize on the terms and conditions set out in the contract.

5. A dispute arose between the parties under the contract.

Clause 12.0 of the contract provided that:

"All disputes arising out of or in connection with this Agreement or for breach hereof that cannot be settled amicably by the parties hereto, shall be settled by a sole arbitrator and such arbitration to be held in Nairobi, Kenya, under the Arbitration Act. The arbitrator shall be appointed by Agreement between the parties or in default of Agreement by the Chairman of the Kenya Chapter of Chartered Institute of Arbitrators."

6. In accordance with that clause, the dispute was referred to Mr. E. T. Gaturu advocate for arbitration. Based on the pleadings presented before the arbitrator, it was admitted that the parties entered into the contract under which the respondent was to supply the Board with 40, 000 metric tons of white maize at a price of USD 229 per metric ton; that the contract value was USD9, 160,000; that the Board was to make payment by an irrevocable/confirmed sight letter(s) of credit to be established by the Board.

7. The crux of the dispute as pleaded by the respondent before the arbitrator was that "*in breach of the above said contract, the respondent [the Board] failed to establish the letter of credit as stipulated. On account of this failure, the Claimant [the respondent] was unable to perform the contract as required*." As a result of that alleged breach on the part of the Board, the respondent claimed loss of profit and storage costs.

8. The Board in its pleading before the arbitrator averred that the respective obligations of the parties were clearly set out in the contract; that payment was independent of delivery of the consignment; that delivery should have been done within 4 weeks from the date of the contract; that payment was dependent on the respondent delivering the consignment which it failed to do; that the Board was not obliged to open a letter of credit before the shipment of the goods; that the respondent did not ship the goods and was therefore in breach of the contract. The Board contended that as a result of the respondent's breach of the contract it suffered loss and counterclaimed for commissions it would have earned but for the breach by the respondent from the Government of Kenya amounting to Kshs. 67,654,980.62. The respondent denied that it was in breach of the contract.

9. After hearing the parties, the arbitrator in an arbitral award dated 7th July 2009 found that the Board was "*in breach of the contract for failing to open a letter of credit for the claimant as agreed on 26th August 2004…*"and that the respondent was entitled to a claim for loss of profit of USD49 per ton of white maize. The arbitrator awarded the respondent USD1, 960,000. The arbitrator also awarded the respondent an amount of USD1, 146,000 for storage charges on the basis that the respondent's supplier's had already stored the 40,000 metric tons of maize. The total award in favour of the respondent was therefore USD 3,106,000 on which he also awarded interest at 12% p.a from 27th October 2004 "*being the date by which the claimant would have performed the contract had the respondent played its part of the deal*."

10. The arbitrator was not satisfied that the Board's counter claim had been proved. He dismissed it.

11. The Board was dissatisfied with the arbitrator's award. On 5th October 2009, it presented an application to the High Court at Nairobi under section 35 of the Arbitration Act, 1995 seeking to have the award set aside on grounds that the arbitrator dealt with a dispute not contemplated by the parties; that the award smacks of mischief, corruption and/or pure theft of public funds against public policy. Specifically the Board asserted that the respondent had no maize for delivery within the contract terms; that the respondent was importing the maize at USD 221 and selling it at USD 229 and the respondent could only have earned USD 8 per ton and not the amount of USD49 awarded.

12. Other complaints by the Board were that the arbitrator was openly biased and did not consider its case in the award; that the Board subsequently established that the company the respondent had contracted to supply it with maize, namely Ropack CC International does, not in fact deal in maize but is registered with the South African Department of Trade and Industry as offering financial intermediation, insurance, real estate and business services; that the company allegedly claiming the storage charges, namely Chelsea Freight, is registered for air transport; that the entire arbitral process was a circus; that the arbitrator admitted having been approached by the respondent's directors to Rule in its favour and ought to have resigned; that the amount awarded together with interest is to be borne by the tax payer when the respondent had no maize at all or the capacity to supply it and that the award is against public policy.

13. That application was opposed. After hearing the parties the learned Judge of the High Court, the Honourable Mr. Justice Njagi was not persuaded that a case for setting aside the award had been made out. In his ruling dated 28th October 2011 the learned Judge dismissed the application with costs. The learned Judge however set aside part of the award in which the arbitrator awarded the respondent interest on costs. That part of the award was setaside on the grounds that "*the arbitrator had no jurisdiction to tax the costs of the arbitration*."

14. Dissatisfied with the ruling of the learned Judge, the Board instituted the present appeal on 27th January 2012. The grounds of appeal are that the learned Judge did not comprehend the nature of the application; that the Judge failed to appreciate that the award involved public funds for which public policy demands proper accounting; that the learned Judge wrongly took the view that he could not revisit the evidence before the arbitrator; that the learned Judge should have reopened and re-evaluated the evidence as the award sanitizes theft of public money; that the learned Judge ignored or glossed over the facts presented that demonstrated that the award smacked of mischief, corruption and theft of public funds; that the learned Judge ignored a clear aberration of well known legal principles of law by the arbitrator which on grounds of public policy demanded an order for setting aside the award; that the learned Judge erred in upholding the arbitrator's award on storage charges that was remote to the contract and that the learned Judge took inordinately long to deliver the impugned ruling.

15. We have set out that background in considerable detail so that the context in which the present application is made may be appreciated. Against that background the Board says that the new and important evidence, namely the report should be admitted in evidence in this appeal in order that a fair and just determination of the appeal may be achieved. According to the Board, the report reveals that the respondent was not worthy to be awarded the tender for the supply of maize; that it presented an invalid and unenforceable bid bond; that the respondent did not have maize nor the capacity to supply the maize; that the entities the respondent cited as its business partners may be non-existent.

Submissions by learned counsel

16. During the hearing of the application before us, the parties were represented by learned counsel. Mr. Mohammed Nyaoga and Mr. Nyawara O.J appeared for the Board. Mr. Ahmednassir Abdullahi, SC and Mr. P. Saende appeared for the respondent.

17. In a bid to demonstrate that we should allow the application, learned counsel for the Board Mr. Nyaoga submitted that the appeal involves a public body; that the National Assembly conducted an investigation on account of the public interest in the dispute and prepared the report that was forwarded to several bodies; that the application meets the tests for adducing additional evidence as set out in **Mzee Wanjie vs. Saikwa (198288) 1 K A R 462**; **Joginder Auto Service Ltd vs. Mohammed Shaffique and Anor Civil Appeal No. Nai**

210 of 2000 among other authorities; that the report could not have been obtained when the application to set aside the award in the High Court was heard as it was not in existence; that the application in High Court sought to impugn the arbitral award on grounds of public policy and that had the report, which is credible, been available when the application for setting aside the award was heard, it

is likely it would have influenced the outcome. Mr. Nyaoga went on to say that the report is evidence for purposes of the Evidence Act and that the report confirms part of the grounds on which the Board sought to impugn the award.

18. Turning to the contention by the respondent that the application does not lie under Rule 29 of the Rules of the Court as the High Court was not exercising original jurisdiction when dealing with the application for setting aside the award, Mr. Nyaoga submitted that there is no right of appeal against the decision of an arbitrator unless parties to an arbitration agreement agree on the right of appeal; that the High Court was exercising original jurisdiction conferred by section 35 of the Arbitration Act; that in exercising jurisdiction under that provision, which is neither civil or criminal, the High Court does not sit on appeal over the decision of the arbitrator; and that the learned Judge of the High Court was mindful that he was not sitting on appeal. For those reasons Mr. Nyaoga submitted that the contention that this Court has no power to hear the matter on the basis that it did not emanate from original jurisdiction has no merit.

19. Opposing the application, Mr. Ahmednassir Abdullahi, SC submitted that the intention of the Board in seeking to introduce the report is to intimidate the Court and procure the setting aside of the arbitral award by scaring the Court; that intention, according to counsel, is borne out by the fact that one of the recommendations in the report is that members of the Judicial Service Commission should be investigated for bench fixing, corruption and abuse of office in connection with the handling of this case; that the report is designed to cast aspersions and scandalize the Court; that the application is not specific with regard to what evidence is intended to be admitted; that in any event there is nothing new in the report; there is nothing new to be introduced as the material that was placed before the National Assembly on the basis of which the report was compiled is the same material that was before the High Court; that the report is an attempt by the National Assembly to direct and interfere with the independence of the Court which is against Article 160 of the Constitution.

20. Regarding the competence of the application, Mr. Abdullahi submitted that under Rule 29 of the Rules of the Court, the power to take additional evidence or to order the taking of additional evidence exists when the Court is seized of an appeal from the decision of the High Court when acting in the exercise of its original jurisdiction; that in this case, the High Court, when dealing with an application under section 35 of the Arbitration Act was exercising appellate rather than original jurisdiction; that accordingly the application under Rule 29 cannot be entertained when the High Court was exercising appellate jurisdiction; that under Article 165(3)(e) of the Constitution the jurisdiction of the High Court includes "any other jurisdiction, original or appellate, conferred on it by legislation", and in this case the High Court could only have been exercising the appellate jurisdiction.

21. Referring us to the decision of this Court in **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR** Mr. Abdullahi submitted that the respondent has faced endless applications in court yet, there is no appeal pending against the decree; that the applicant is merely seeking to delay the execution of the decree when it has not appealed against it.

22. In reply Mr. Nyaoga stated that there is no intention on the part of the Board to either intimidate or scandalize the Court by introducing the report; that what the Board seeks is a fair decision; that the Board is not interested in the part of the report that deals with Judges and that paragraphs 4 to 8 of section 7.2 of the report containing conclusions reached by the Public Accounts Committee of the National Assembly contain the crux of evidence, which was not before the High Court.

23. On jurisdiction of this Court under Rule 29 of the Rules of the Court to take additional evidence, Mr. Nyaoga submitted that Article 165(3)(e) of the Constitution makes reference to "any *other jurisdiction"* and maintained that the High Court does not exercise appellate jurisdiction when dealing with an application under section 35 of the Arbitration Act. Referring to **Anne Mumbi Hinga v Victoria Njoki Gathara (supra)** Mr. Nyaoga stated that under section 39 of the Arbitration Act, appeals from an arbitral award lie only with the consent of the parties and even then, only on questions of law and that when dealing with an application under section 35 of the Arbitration Act the High Court exercises original as opposed to appellate jurisdiction.

Determination

24. We have considered the application, the affidavits in support and in reply, the submissions by learned counsel and the authorities cited. The relevant part of Rule 29 of the Court of Appeal Rulesprovides as follows:

"29. (1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power

(a) to reappraise the evidence and to draw inferences of fact; and

(b) in its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.

(2) When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the crossexamination of any deponent.

(3) When additional evidence is taken by the trial court, it shall certify such evidence to the Court, with a statement of its opinion on the credibility of the witness or witnesses giving the additional evidence; when evidence is taken by a commissioner, he shall certify the evidence to the Court, without any such statements of opinion.

(4) The parties to the appeal shall be entitled to be present when such additional evidence is taken."

25. Learned counsel are in agreement regarding the principles that guide this Court when exercising the discretionary power under Rule 29 of the Rules of the Court. Those principles are were well summarized by Chesoni Ag JA in **Mzee Wanjie and**

93 others v A K Saikwa and others (198288) 1 KAR 462 where he stated:

"The principles upon which an appellate court in Kenya in a civil case will exercise its discretion in deciding whether or not to receive further evidence are the same as those laid down by Lord Denning LJ, as he then was, in the case of Ladd v Marshall [1954] 1 WLR 1489 at 1491 and those principles are:

(a) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(b) The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;

(c) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible".

See also **Joginder Auto Services Ltd v Mohammed Shaffique and another Civil Appeal (Application) No. Nai 210 of 2000 (2001) eKLR** and also **Kuwinda Rurinja Co. Ltd v Kuwinda Holdings Ltd Civil Appeal No. 8 of 2003**

26. Before we consider whether the applicant's application is one befitting of favourable exercise of discretion, there is the question whether the appeal before this Court is an appeal from a decision of the High Court "*acting in the exercise of its original jurisdiction…*" within Rule 29 of the Rules of the Court. In other words, is the application before us competent on account of the fact that the appeal before the Court is an appeal from the decision of the High Court made under section 35 of the Arbitration Act? Or differently put, in exercising its power under section 35 of the Arbitration Act does the High Court exercise original jurisdiction so as to render an appeal from such

decision an "*appeal from a decision of superior court acting in the exercise of its original jurisdiction*" within the meaning of Rule 29 of the Rules of this Court?

27. The Arbitration Act, Act No. 4 of 1995 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 Arbitration Act is the severe restriction on the role of the court in the arbitral process. That principle finds expression in section 10 of the Act. Section 35 of the Arbitration Act is itself underpinned by that principle. Our courts have, since the coming into force of that statute, observed and given effect to that principle. In **Anne Mumbi Hinga v Victoria Njoki Gathara [2009] eKLR** for instance the Court, in reference to the right of appeal against an arbitral award under section 39 of the Arbitration Act stated:

"It is clear from the above provisions, that any intervention by the court against the arbitral proceedings or the award can only be valid with the prior consent of the parties to the arbitration pursuant to *Section 39 (2)* ***of the Arbitration Act 1995. In the matter before us there was no such advance consent by the parties. Even where such consent is in existence the consent can only be on questions of law and nothing else. Again an appeal to this Court can only be on matters set out in Section 39 (2) with leave of the High Court or with leave of this Court. All these requirements have not been complied with and therefore the appeal is improperly before us and is incompetent."***

28. The Court went on to say in that case that one of the principles underlying the Arbitration Act is the recognition of an important public policy in enforcement of awards and the principle of finality.

29. In **Kenya Shell Ltd vs. Kobil Petroleum Ltd [2006] 2 KLR 251** while declining leave to appeal the decision of the High Court emanating from arbitration proceedings, this Court underscored the principle of finality of arbitral awards and "*a severe limitation of access to the Courts*" as a pointer to the public policy the country takes.

30. Section 35 of the Arbitration Act permits the setting aside of an arbitral award. It does not permit an appeal. Setting aside is a narrower avenue for challenging an award than an appeal. The grounds for setting aside an award are restricted under the Act. Section 35 of the Arbitration Act was however not in its present form when the Act was first enacted. At the time, the grounds for applying to set aside an arbitral award were confined to incapacity of a party to arbitration agreement; invalidity of arbitration agreement; failure to give notice of appointment of an arbitrator or of the arbitral proceedings or failing to accord opportunity to a party to present his case; exceeding of the mandate by the arbitrator and composition of the tribunal not according with the agreement of the parties. In addition the High Court could set aside the award if it found that the dispute is not capable of settlement by arbitration under the law of Kenya or the award is in conflict with public policy of Kenya.

31. In the year 2009, under Act 11 of that year, the grounds for applying to set aside an arbitral award were expanded to include circumstances where the making of the arbitral award was induced or affected by fraud, bribery, undue influence or corruption. That amendment was done for a good reason: to enhance the credibility of the arbitration process. In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the High Court must, in our view, be guided by evidence. For that purpose, it is open for parties to present evidence before the High Court and for the High Court to take and consider such evidence. In doing so and to that extent, we consider for purposes of Rule 29 that the High Court is called upon to exercise original jurisdiction. That view of the matter accords with the definition of the phrase 'original jurisdiction' in **Black's Law Dictionary 4th Ed. Rev. 61971** where it is defined thus: "*Jurisdiction in the first instance; jurisdiction to take cognizance of a cause at its inception, try it, and pass judgment upon the law and facts*."

32. Section 35 as amended by Act 11 of 2009 clearly provides for the setting aside of an arbitral award on grounds of fraud, bribery, undue influence or corruption. As we have said whether an

award is tainted by any of those vices is a matter of fact, on which the High Court must be satisfied before passing 'judgment'. For that purpose, the High Court exercises original jurisdiction. In the same vein, it is also open for this Court, where a decision of the High Court emanating from such challenge is appealed, to take or order the taking of additional evidence should circumstances permit.

33. We think one object of restricting the operation of the powers of the Court under Rule 29 to circumstances where the court whose decision is appealed from was acting in the exercise of its original jurisdiction is to avoid a situation where, when this Court is dealing with a second appeal it is asked to take additional evidence which the first appellate court would not have had an opportunity to consider.

34. Indeed even before the amendment of section 35 of the Arbitration Act by Act No. 11 of 2009 the Court appreciated that there may be circumstances when it would be permissible to intervene and decline the enforcement of an arbitral award on grounds of violation of public policy. In **Anne Mumbi Hinga v Victoria Njoki Gathara** the Court stated:

"One of the grounds relied on to invite the superior court's intervention in not enforcing the award was that of alleged violation of the *public policy.* ***Again no intervention should have been tolerated firstly because of the underlying principles in the Arbitration Act is the recognition of an important public policy in enforcement of arbitral awards and the principle of finality of arbitral awards and secondly although public policy can never be defined exhaustively and should be approached with extreme caution failure of recognition on the ground of public policy would involve some element of illegality or that it would be injurious to the public good or would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the State's powers are exercised."***

35. We are for those reasons satisfied that the present application is properly before us.

36. The next issue for our consideration is whether the Board has satisfied the requirements necessary for us to exercise our discretion in its favour. The first question is whether the evidence could have, with the exercise of reasonable diligence, been obtained for use in the High Court. The report was not in existence at the time the application to set aside the award was heard in the High Court. It was made subsequent to the impugned decision of the High Court. It follows therefore that it could not have been produced at the time of hearing the application in the High Court.

37. However, the report includes summaries of testimonies of witnesses who appeared before the Parliamentary Committee, conclusions drawn by that Committee and recommendations made by that Committee and adopted by the National Assembly. Counsel for the applicant submitted that the critical portion of the report is paragraphs 4 to 8 of section 7.2 of the report that is titled "Conclusions." Those conclusions are drawn from testimonies of the 28 witnesses who testified before the Committee among other material presented before that Committee. It is not manifest that those witnesses were not available or would not have been available during the hearing before the arbitrator or subsequently during the hearing of the application before the High Court.

38. There is also the consideration that the parties themselves may not have had an opportunity to crossexamine those witnesses although the report says that the Committee closely examined them. We are alive to the provision under Rule 29(2) of the Rules of this Court to the effect that the Court may allow cross examination when additional evidence is taken and that the respondent may, should we allow the taking of additional evidence, avail itself of that right. The object of Rule 29 would not have been to convert an appeal into a fullblown trial whether the additional evidence is to be taken before this Court or before the High Court.

39. In **Mzee Wanjie and 93 others v A K Saikwa and others** the Court cautioned that the power to receive further evidence should be exercised very sparingly and great caution should be exercised in admitting fresh evidence. The Court said:

"This Rule is not intended to enable a party who has discovered fresh evidence to import it nor is it intended for a litigant who has been unsuccessful at the trial to patch up the weak points in his case and fill up omissions in the Court of Appeal. The Rule does not authorize the admission of additional evidence for the purpose of removing lacunae and filling in gaps in evidence. The appellate court must find the evidence needful. Additional evidence should not be admitted to enable a plaintiff to make out a fresh case in appeal. There would be no end to litigation if the Rule were used for the purpose of allowing parties to make out a fresh case or to improve their case by calling further evidence. It follows that the power given by the Rule should be exercised very sparingly and great caution should be exercised in admitting fresh evidence."

40. Given those considerations, and having regard to the matters that will require consideration during the hearing of the appeal as captured in the memorandum of appeal, we are not persuaded that the applicant has demonstrated that the report would probably have an important influence on the result of the appeal. To use the words of Chesoni Ag JA in **Mzee Wanjie and 93 others v A K Saikwa and others**, we do not find the report needful.

41. The application is therefore dismissed. Costs of the application shall abide the outcome of the appeal.

Dated and delivered at Nairobi this 11th day of July, 2014.

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

S. GATEMBU KAIRU

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JUDGE OF APPEAL

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

/ewm

DEPUTY REGISTRAR