IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: OKWENGU, MAKHANDIA & SICHALE, JJ.A.)

CIVIL APPEAL NO. 38 OF 2013

BETWEEN

TANZANIA NATIONAL ROADS AGENCY ……. APPELLANT

AND

KUNDAN SINGH CONSTRUCTION LIMITED……. RESPONDENT

(An appeal from the whole of the Ruling of the High Court of Kenya at Mombasa (Muya, J.) dated 15th August, 2013

in

H.C. Misc. Civil Appl. No. 171 of 2012.)

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JUDGMENT OF THE COURT

[1] By an application dated 15th January, 2013, the appellant, ***Tanzania National Roads Agency,*** sought the following orders from the High Court at Mombasa:

1. That the international Arbitral Award from Stockholm Chamber of Commerce No. V:09/2009 between Kundan Singh Construction Limited (as claimant) and Tanzania National Roads Agency (Respondent) dated 25th January, 2012 together with interpretation and clarification of the same dated 8th March, 2012 be recognized and enforced as a decree of this court.

2. That the costs of this cause be provided for.

The application was supported by a supporting affidavits sworn by ***Simon Innocent Romani*** and a further affidavit sworn by ***Joseph Manzi Munyithya***. In opposing the application, the respondent, ***Kundan Singh Construction Limited,*** relied on a replying affidavit and a further affidavit sworn by ***Ripthuman Singh Ubhi.***

[3] The genesis of the dispute giving rise to this appeal can be traced back to a contract entered into between the appellant and the respondent on 1st August 2007, through which the respondent agreed to undertake upgrading works on the *Mbeya- chunya- Makongolosi Road Section 1: Lwanjilo* in Tanzania at a consideration of ***Tshs.27, 463,878,000***/. The contract provided for resolution of any dispute initially

through a reference to the Disputes Resolution Board, and thereafter a further reference for arbitration to the Stockholm Chamber of Commerce by any party still dissatisfied.

[4] As anticipated, a dispute arose between the parties and the dispute having been addressed by the Dispute Resolution Board, and the respondent being dissatisfied, referred the matter to the Arbitration Institute of the Stockholm Chamber of Commerce for arbitration. The arbitration proceedings were carried out by a panel of three arbitrators who determined the dispute through a majority award dated 25th January, 2012 signed by two arbitrators, one arbitrator dissenting. This is the award that the appellant moved to the High Court at Mombasa to enforce. Meanwhile, the respondent, being dissatisfied with the award, challenged the award through an appeal before the Stockholm Court of Appeal. Little has been said about this appeal in these proceedings and therefore the fate of the appeal remains unclear.

[5] The respondent had also filed an application dated 24th April, 2012 before the High Court in Nairobi seeking orders that part of the majority award which allowed the counterclaim of the appellant in the arbitration proceedings be set aside or alternatively, that part of the majority award be remitted to the majority arbitrators to decide the same, applying Tanzanian law which the parties to the arbitration specifically agreed would govern the arbitral proceedings. A preliminary objection was taken in regard to that application on the grounds that the Kenyan Courts had no jurisdiction to set aside an international arbitral award. That objection was upheld by ***Havelock, J.*** when he ruled on 18th December, 2012, that Sweden is the country of the primary jurisdiction in relation to the arbritration and that Kenya only had a secondary jurisdiction in terms of recognition and enforcement of the arbitral award.

[6] The application dated 15th January, 2013 proceeded by way of written submissions, upon which the learned Judge ***Muya, J.*** delivered a ruling dated 15th August, 2013, in which he dismissed the application with costs. In his ruling, ***Muya, J.*** held *inter alia* that under ***sections 36*** and ***37*** of the Arbitration Act, ***Chapter 49*** of the Laws of Kenya hereinafter referred to as the Arbitration Act, the Court in Kenyan had jurisdiction to recognize and enforce any arbitral award irrespective of the country in which it was made, save that the recognition or enforcement of the award could be refused where the court finds that the recognition or enforcement of the award would be contrary to the public policy of Kenya; that the arbitration award was arrived at in breach of the express terms of the agreement between the parties which provided that the arbitration shall be governed by the law of Tanzania; and that enforcing such a contract would be contrary to the public policy of Kenya.

[7] Being dissatisfied with the ruling of 15th August, 2013 the appellant filed a memorandum of appeal attacking the ruling on several grounds. The grounds include *inter alia*: that the learned Judge erred in failing to find that the issues concerning the arbitral award being in conflict with public policy of Kenya, and the interpretation of ***section 37 (1)(b)*** of the Arbitration Act, were issues which were *res judicata* having been raised and addressed in the ruling delivered by ***Havelock, J***. on 18th December, 2012 that the learned Judge erred in failing to find that, following the ruling of 18th December, 2012 the enforcement of the arbitral award became automatic as the jurisdiction of the court to decline enforcement and recognition of the arbitral award under ***section 37*** of the Arbitration Act was lost; that the Judge erred in relying on an expert opinion which was irregularly introduced in the proceedings, and that the learned judge erred in defining what amounts to public policy in Kenya with regard to recognition and enforcement of international arbitral awards.

The respondent filed two notices of preliminary objection to the appeal on the grounds of jurisdiction and the competence of the appeal. Directions were however given that the preliminary objection be argued within the substantive appeal and that the Court would first address the objection in the ruling.

[8] In support of the appeal, written submissions were duly filed and highlighted by ***Mr. Munyithya*** counsel for the appellant. In brief, Mr. Munyithya argued that where an application in regard to arbitration proceedings is filed in High Court under section ***37(1)(b)(ii)*** of the Arbitration Act, a successful ruling leads to a decree or final order which ushers in execution, and therefore the unsuccessful party who in this is case is the appellant, is entitled to a right of appeal as of right and no leave is required; that although the Act defines what amounts to an international arbitration (***section 3(3)***),

the Act is silent on the question of an appeal to the Court of Appeal in relation to an order failing to recognize and enforce an international arbitral award under ***section 37*** of the Act; that though ***section 39*** of the Arbitration Act provides for the process to be followed in lodging an appeal against a domestic arbitral award, neither the Arbitration Act nor the Arbitration Rules provide for the procedure to be followed in lodging an appeal against an International arbitral award; that ***Article 2*** of the United Nations International Trade Law (UNCITRAL) Model Law (*herein referred to as UNCITRAL Model Law)* to which Kenya became a signatory on the 2nd January, 1996, requires that any questions concerning matters governed UNCITRAL by the Model Law not expressly provided for in the Model Law, be settled in conformity with the general principles on which the law is based.

[9] Mr. Munyithya submitted that in light of ***Article 36*** of the Model Law, and the amendment to ***sections 37*** of the Act (*through legal notice No. 11 of 2009*), to conform to ***Article 36*** of the UNCITRAL Model Law by adopting international practice, ***sections 36*** & ***37*** of the Act are substantive and not procedural provisions; that the procedure for recognition and enforcement of the international arbitration, ought to have been in the rules; that since the rules have not been amended to reflect the international best practice, Kenya had not fully complied with the Model Law and there was therefore a vacuum; that the issue of enforcement and recognition of international arbitral award, was a constitutional issue under ***Article 2(5)*** & ***(6)*** of the Constitution which provides that the general rules of international law and any treaty or convention ratified by Kenya shall be part of the laws of Kenya; that an appeal emanating from a finding of the High Court under ***section 37(1)(b)(ii)*** of the Act being one involving the application of international treaty, should lie as of right to this Court, and therefore the Court had jurisdiction to deal with the matter under ***Article 163(3)(a)*** of the Constitution.

[10] Mr. Munyithya further contended that not only does the appeal raise a constitutional issue, but it also raises matters of general public importance. In this regard reliance was placed on the case of ***Anne Mumbi Hinga v Victoria NjokiGathara[2009] eKLR*** and ***Attorney General of Kenya v Anyang'Nyong'o & 10 Others [2010] eKLR*** in an effort to define public policy. It was submitted that public policy involves some elements of illegality or something that is injurious to the public good or an act which is reprehensible, unconscionable or injurious to the public, by being contrary to the Constitution, or Kenyan laws or being contrary to the interest of Kenya or being contrary to justice and morality. The Court's attention was also drawn to the following quotation as adopted in the case of ***Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR:***

" although public policy is a most broad concept, incapable of precise definition,…an award could be set aside under section 35(2)(b)(2) of the Arbitration Act as being inconsistent with the public policy of Kenya if it was shown that either it was:

> ***(i) Inconsistent with the Constitution or other laws of Kenya whether written or unwritten or***
>
> ***(ii) Inimical to the national interest of Kenya, or***
>
> ***(iii) Contrary to justice and morality".***

Mr. Munyithya faulted the learned Judge for adopting a narrow approach to the doctrine of public policy and failing to give effect to ***Article 259(1)*** of the Constitution.

[11] In opposing the appeal, ***Mr. Nyachoti*** counsel for the respondent filed written submissions. Mr. Nyachoti also filed further written submissions in support of the respondent's preliminary objections to the appeal. In regard to the preliminary objection, it was submitted that the appeal was misconceived, incurably defective and incompetent, firstly, as the court lacks jurisdiction to entertain, hear and determine the appeal by dint of ***section 37(1)(b)*** of the Act and ***Article 5(2)(b)*** of the New York Convention on Recognition and Enforcement of Foreign Arbitral Award (*New York Convention*); secondly, that no leave was obtained by the respondent to appeal against the ruling delivered on 15th August 2013, and the Court lacks jurisdiction to entertain the appeal by virtue of ***Article 36(1)(b)*** of the UNCITRAL Model Law.

[12] In regard to leave, it was pointed out that appeals only lie as a matter of right under ***section 75(1)(h)*** of the Civil Procedure Act and ***Order 43 Rule 1(1)*** of the Civil procedure Rules, and that the order subject of the appeal not being one listed under ***Order 43 Rule 1(1***) of the Civil Procedure Rules 2010 or ***section 75(1)(h)*** of the Civil Procedure Act, the order could only be appealable with the leave of the court, and that no leave having been sought or obtained, the appeal was incompetent. Relying on ***Ramji Devji Vekaria v Joseph Oyula [2011] eKLR***, it was submitted that the failure to obtain leave was an incurable defect as it goes to the root of the appeal.

[13] On the issue as to whether this Court has jurisdiction to hear and determine an appeal arising from a determination made by the High Court under ***section 37*** of the Act, it was pointed out that the award subject of the determination was an international arbitral award governed by international law. Specifically, the enforcement and recognition of such an award is governed by ***Article V(ii)(b)*** of the New York Convention; ***Article 36 (1)(b)*** of the UNCITRAL Model Law; and ***section 37(1)(b)*** of the Arbitration Act; that the competent authority with power to recognize and enforce an international arbitral award, is defined under ***section 37(1)(b)*** of the Act as the High Court, and that in accordance with the New York Convention there was only one such competent authority.

[14] It was argued that although the Court of Appeal has general jurisdiction to hear appeals in all matters emanating from the High Court, the jurisdiction must be prescribed by an Act of Parliament; that in the case of the international arbitral awards, the Act does not make any provision for an appeal to the Court of Appeal on recognition and enforcement of international arbitral awards; that ***sections 36*** & ***37*** of the Act only gives the High Court the power to recognize and enforce international arbitral awards and no jurisdiction has been given to the Court of Appeal to deal with decisions emanating from the High Court under ***section 37*** of the Act; and that the Court therefore lacks jurisdiction to entertain the appeal.

[15] In regard to the issue of public policy, it was pointed out that the respondent's major and formidable opposition to the appellant's application in the High Court, for recognition and enforcement of the international arbitral award, was that the award could not be recognized or enforced as it was contrary to public policy of Kenya. That although the respondent filed an affidavit which set out at length myriad fundamental issues on public policy, the same were not controverted or challenged by the appellant, nor did the appellant address the issue in its written submissions filed in the High Court. To the contrary, the appellant alleged that the issue of public policy had not been raised. It was therefore argued that in effect appellant conceded the contention that the arbitral award was contrary to public policy and that it could neither fault the ruling of the learned Judge nor challenge the ruling on an issue it had failed to raise in its pleadings or arguments in the High Court.

[16] It was maintained that the contract stated clearly at clause 5.1 that the law in interpretation of the contract is Tanzanian law and that in arriving at the majority decision, the two arbitrators applied English law and not Tanzanian law; that the majority arbitrators blatantly ignored the clear intention of the parties, and unfairly exposed the respondent to financial loss contrary to justice and morality; that the award was inconsistent with the Constitution of Kenya or other written law as ***section 29(1)*** of the Act requires the arbitral tribunal to determine a dispute in accordance with the rules of law chosen by the parties; and finally that the intervention of this Court was not warranted as the High Court exercised its discretion judiciously in determining whether or not the subject award was contrary to public policy.

[17] The issues for determination appear to be as follows: firstly whether this Court has jurisdiction to hear an appeal against the order of the High Court made in exercise of powers under ***section 37*** of the Act, if the answer is in the affirmative, whether the recognition and enforcement of the international arbitral award made in favour of the appellant by the majority would be against the public policy of Kenya.

[18] On the issue of jurisdiction, section 37 of the Act states as follows:

> ***"37. Grounds for refusal of recognition or enforcement***
>
> (1) *The recognition or enforcement of an arbitral award, irrespective of the state in which it*

was made, may be refused only—

(a) *at the request of the party against whom it is invoked, if that party furnishes to the* ***High Court*** *proof that—*

(i) *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, under the law of the state where the arbitral award was made;*

(iii) *the party against whom the arbitral award is invoked 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 it 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, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced; or*

(v) *the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or*

(vi) *the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; or*

(vii) *the making of the arbitral award was induced or affected by fraud, bribery, corruption or undue influence;*

(b)if 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 recognition or enforcement of the arbitral award would ***be contrary to the public policy of Kenya****.*

2. If an application for the setting aside or suspension of an arbitral Award has been made to a court referred to in subsection (1)(a)(vi), the ***High Court*** *may, if it considers it proper, adjourn its decision and may also, on the application of the party, claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security."*

[19] Thus it is evident that jurisdiction regarding recognition or enforcement of arbitral awards is vested in the High Court. It is worthy of note that ***Article 164(3)(a)*** of the Constitution gives the Court of Appeal jurisdiction or power to hear appeals from the High Court as follows:

"(3) The Court of Appeal has jurisdiction to hear appeals from –

(a) the High Court; and

(b) any other court or tribunal as prescribed by an Act of Parliament.

That provision does not confer an automatic right of appeal to litigants such that any judgment, order or decree made by the High Court is appealable to the Court of Appeal. Thus there is a clear distinction between jurisdiction or power to hear and determine an appeal which is vested in the court and a right to

appeal which is vested on a litigant. For instance a right of appeal in regard to civil proceedings from the High Court will be governed by the Civil Procedure Act and Rules as read with the Appellate Jurisdiction Act. Similarly a right of appeal in regard to criminal matters will be governed by the Criminal Procedure Code as read with the Appellate Jurisdiction Act.

[20] In this case the right of appeal from the order of the High Court is not automatic but must be vested on the appellant by the Arbitration Act and Rules which regulates the procedure in arbitration matters, or in the case of international arbitration, the general rules of International Law, treaty or convention ratified by Kenya which form part of the Law of Kenya under ***Article 2(5) & (6)*** of the Constitution. It is not disputed that although the Arbitration Act provides a right of appeal in the case of domestic arbitral award, it does not provide any right of appeal in the case of international awards. Therefore the appellant can only find respite if there is a right of appeal provided under UNCITRAL Model Law which govern International Commercial Arbitration and to which Kenya is a signatory.

[21] An examination of UNCITRAL Model Law shows that there was a clear and deliberate intention to limit court intervention in arbitration matters for the reason that

> ***"protecting the arbitral process from unpredictable or disruptive court interferences is essential to parties who choose arbitration in particular foreign parties".***

Article 5 of the UNCITRAL Model Law specifically states:

> ***"In matters governed by this law, no court shall intervene except where so provided in this law".***

[22] In regard to enforcement and recognition of international arbitral awards, UNCITRAL the Model Law, like the Arbitration Act has only provided a one-step intervention in a "*competent*" court. In this case "*the competent court*" is the High Court which is the one vested with powers under ***sections 36*** and ***37*** of the Arbitration Act to determine applications for recognition and enforcement of International Arbitral Awards. No further right of appeal has been provided for, thereby curtailing intervention by this Court.

[23] It was argued for the appellant that because of the application of principles of International Law and Treaty on Conventions signed by Kenya, the invocation of ***Article 2(5) & (6)*** of the Constitution raises constitutional issues and therefore the applicant has an automatic right of appeal. We have no hesitation in rejecting that argument as the invocation of a constitutional provision does not necessarily give rise to a constitutional issue, particularly where neither the application of the constitutional provision nor the interpretation of the constitutional provision is in dispute as was the case herein.

Further an attempt was made by the appellant to draw a right of appeal from the subject of the appeal where it raises matters of "*general public importance*". To our knowledge there is no right of appeal to this Court anchored on matters of "*general public importance*". Such a ground only arises under ***Article 163(4)(b)*** of the Constitution in regard to appeals from the Court of Appeal to the Supreme Court. Moreover a matter of general public importance is one whose determination transcends the circumstances of the particular case, and has a significant bearing on the public interest. (*Hermanus Ruscone [2012] eKLR*). It is distinguishable from public policy which has been described as an indeterminate principle which fluctuates with the circumstances of the time. (*see Kenya Shell Limited v Kobil Petroleum Limited [2006] eKLR)*. In the case of arbitral awards the following quotation by ***Ringera J***. in ***Christ for All Nations v Apollo Insurance Company Limited [2002] 2 EA 351*** which was adapted by the Court of Appeal in ***Kenya Shell Limited v Kobil Petroleum*** (supra) is instructive.

"although public policy is a most broad concept incapable of precise definition … an award could be set aside under section 35(2)(b)(2) of the Arbitration Act as belief inconsistent with the public policy of Kenya if it was shown that either it was:

> ***(i) Inconsistent with the Constitution or other Laws of Kenya whether written or***

unwritten, or

(ii) Inimical to the national interest of Kenya, or

(iii)Contrary to justice and morality.

We come to the conclusion that the appeal before us does not raise an issue of general public importance but raises an issue concerning the recognition and enforcement of an agreement between two individuals.

In the circumstances, we uphold the objection raised that the appeal before us is incompetent and that this Court lacks jurisdiction to entertain the appeal.

The following quotation from the celebrated case of the Lilian's case [1989] KLR 1 has been repeated time and again:

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

It being evident that the appellant before us has no right of appeal against the ruling and order of the High Court made on 15th August, 2013, we must at this juncture down our tools and therefore need not address the substantive issues which were raised in the appeal.

Accordingly, we uphold the preliminary objection and strike out the appeal for want of jurisdiction. We award costs to the respondent

Dated and delivered at Mombasa this 14th day of November, 2014.

H. M. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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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