Kampala International University v Housing Finance Company Limited (Petition 34 (E035) of 2022) [2024] KESC 11 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KESC 11 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 34 (E035) OF 2022

PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA, N NDUNGU & I LENAOLA, SCJJ

APRIL 12, 2024

BETWEEN

KAMPALA INTERNATIONAL UNIVERSITY ..... APPELLANT

AND

HOUSING FINANCE COMPANY LIMITED ..... RESPONDENT

(Being an appeal from the Ruling of the Court of Appeal at Nairobi (Musinga (P), Murgor & Sichale, JJ.A) delivered on 21st October 2022 in Civil Application No. E343 of 2021)

Circumstances justifying the Supreme Court to grant exemptions for assumption of jurisdiction over a ruling by the Court of Appeal

Reported by John Ribia

Jurisdiction *– jurisdiction of the Supreme Court - appellate jurisdiction of the Supreme Court – appeal as of right in any case involving the interpretation or application of the Constitution - jurisdiction to entertain an interlocutory application challenging the Court of Appeal's orders issued by the latter in exercise of its discretionary authority - what were the exceptions which would justify the Supreme Court's assumption of jurisdiction over a ruling by the Court of Appeal - whether a claim by a party to the effect that its rights were violated by a superior court for whatever reason, brought the intended appeal within the purview of an appeal as of right involving the interpretation or application of the Constitution - Constitution of Kenya, article 163(4)(a); Court of Appeal Rules, rule 5(2)(a).*

Brief facts

The appeal challenged the ruling of the Court of Appeal delivered in Civil Application No. E343 of 2021, where the appellate court declined to grant the appellant leave to appeal against the High Court decision emanating from sections 35 and 39 of the Arbitration Act. The appellant contended that the respondent, Housing Finance Company Limited, breached the contract by delaying the disbursement of a loan for the construction of its Kitengela Campus. Following arbitration and subsequent legal proceedings, the High Court upheld the arbitral award favoring the respondent, a decision which the appellant unsuccessfully sought

to challenge at the Court of Appeal. The appellant sought redress from the Supreme Court, arguing violations of constitutional rights and errors in the application of the law by the lower courts.

Issues

i. What were the exceptions which would justify the Supreme Court's assumption of jurisdiction over a ruling by the Court of Appeal?

ii. Whether a claim by a party to the effect that its rights were violated by a superior court for whatever reason, brought the intended appeal within the purview of article 163(4)(a) of the Constitution.

Held

1. Without jurisdiction, a court of law was incapable of rendering any valid ruling, order or judgment. The Supreme Court lacked jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule 5(2)(b) of that Court's Rules, there being neither an appeal nor an intended appeal pending before the Supreme Court. There were some exemptions. The Supreme Court could assume jurisdiction notwithstanding the fact that, an appeal before it was against an interlocutory decision by the Court of Appeal. Where the Court of Appeal had made an interlocutory decision which in essence amounted to a substantive determination of a constitutional question that had been canvassed right from the High Court, the Supreme Court could rightly assume jurisdiction in an appeal arising therefrom.
2. There was an exception where the Supreme Court could assume jurisdiction notwithstanding the fact that the decision against which an appeal had been preferred was one which was delivered by the Court of Appeal in exercise of its powers under rule 5(2)(b) of the Court of Appeal Rules, arose if the appellate court went beyond the preservation of the substratum of the appeal and issued orders that were likely to occasion an injustice to one of the parties.
3. The intended appeal was against a judgment of the High Court affirming an arbitral award. On the face of it, the Supreme Court would ordinarily have no jurisdiction to determine the appeal, there being no pending appeal or an intended appeal before it. However, what was before the High Court and Court of Appeal was a question of constitutional interpretation, the determination of which was being appealed to the Supreme Court. Such a scenario would bring the intended appeal within the exception to the general rule.
4. The only instance that an appeal could lie from the High Court to the Court of Appeal on a determination made under section 35 of the Arbitration Act was where the High Court, in setting aside an arbitral award, had stepped outside the grounds set out in the section and made a decision so grave, so manifestly wrong and which had completely closed the door of justice to either of the parties. Leave would have to be sought from and granted by the Court of Appeal before an intending appellant filed the appeal. There was no constitutional issue that had been canvassed at the High Court, the determination of which, was substantively decided by the Court of Appeal.
5. The mere claim by a party to the effect that its rights were violated by a superior court for whatever reason, did not bring the intended appeal within the purview of article 163(4)(a) of the Constitution. The appeal did not fall within any of the exceptions which would justify the Supreme Court's assumption of jurisdiction over a ruling by the Court of Appeal, there being no pending or intended substantive appeal. The Court of Appeal had jurisdiction when leave was sought to appeal the decision of the High Court on the setting aside an arbitral award under section 35, to interrogate the substance of the intended appeal.
6. There was no basis upon which the Supreme Court could assume jurisdiction to overturn or otherwise deal with the Court of Appeal's decision declining to grant leave to appeal to the appellant.

Appeal dismissed.

Orders

Costs to be borne by the appellant.

Citations

Cases

Kenya

1. *Aramat & another v Lempaka & 3 others* Petition 5 of 2014; [2014] KESC 21 (KLR) - (Followed)
2. *Criticos v Independent Electoral and Boundaries Commission & 2 others* Petition 22 of 2014; [2015] KESC 25 (KLR) - (Explained)
3. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition 5 of 2012; [2012] KESC 6 (KLR) - (Followed)
4. *Geo Chem Middle East v Kenya Bureau of Standards* Petition 47 of 2019; [2020] KESC 1 (KLR) - (Followed)
5. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR); [2014] 1 KLR 111 - (Followed)
6. *Kampala International University v Housing Finance Company Limited* Petition (Application) 34 (E035) of 2022; [2023] KESC 5 (KLR) - (Followed)
7. *Kimani & 2 others v Kenya Airports Authority & 3 others* Petition 11 of 2019; [2021] KESC 43 (KLR) - (Explained)
8. *Kiragu v Mugambi & 2 others* Civil Application 10 of 2019; [2020] KESC 77 (KLR) - (Explained)
9. *Megvel Cartons Limited v Diesel Care Limited & 2 others* Application E008 of 2023; [2023] KESC 24 (KLR) - (Followed)
10. *Muriithi & 32 others v Law Society of Kenya & another* Civil Application 12 of 2015; [2016] KESC 13 (KLR) - (Explained)
11. *Narok County Government & another v Ntutu & 5 others* Petition 3 of 2015; [2018] KESC 11 (KLR) - (Followed)
12. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Followed)
13. *Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch* Petition 12 of 2016; [2019] KESC 11 (KLR) - (Followed)
14. *Owners of the Motor Vessel "Lillian S"' v Caltex Oil (Kenya) Ltd* Civil Appeal 50 of 1989; [1989] KECA 48 (KLR); [1989] KLR 1 - (Followed)
15. *R v Chengo* Petition 5 of 2015; [2017] KESC 15 (KLR) - (Followed)
16. *Synergy Industrial Credit Limited v Cape Holdings Limited* Petition 2 of 2017; [2019] KESC 12 (KLR) - (Followed)
17. *Teachers Service Commission v Kenya National Union of Teachers & 3 others* Application 16 of 2015; [2015] KESC 29 (KLR) - (Explained)

Statutes

Kenya

1. Appellate Jurisdiction Act (cap 9) sections 3, 3A, 3B - (Interpreted)
2. Arbitration Act (cap 49)sections 4, 5, 10, 13, 14, 17(2)(3); 24; 35(2)(3); 36; 39 - (Interpreted)
3. Civil Procedure Act (cap 21) section 63(E) - (Interpreted)
4. Civil Procedure Rules, 2010 (cap 21 Sub Leg)rule 1 - (Interpreted)
5. Constitution of Kenya articles 10, 25(c); 47; 48; 50(1); 159(3); 163(4)(a)(4)(b); 164; 259 - (Interpreted)
6. Court of Appeal Rules, 2010 (cap 9 Sub Leg) rules 5(2)(b); 39; 42; 43- (Interpreted)
7. Supreme Court Act (cap 9B) sections 15(2); 15A; 15B; 20; 21; 22- (Interpreted)
8. Supreme Court Rules, 2012 (cap 9B Sub Leg) In general - (Cited)

Advocates

Mr. Wilfred Nyamu for the appellant
Mr. John Ohaga Senior Counsel, for the respondent

JUDGMENT

Representation

Mr Wilfred Nyamu for the appellant (Nyamu & Nyamu Company Advocates)

Mr John Ohaga, SC for the respondent (TripleOK Law LLP)

A. Introduction

1. Before this court is an amended petition dated August 18, 2023 and lodged on August 22, 2023. It is brought pursuant to article 163(4)(a) of the *Constitution*, sections 15(2), 20, 21 and 22 of the *Supreme Court Act, 2011* and the enabling provisions of the *Supreme Court Rules, 2020*. The appeal challenges the ruling of the Court of Appeal (Musinga (P), Murgor & Sichale, JJA) delivered in Civil Application No E343 of 2021 on October 21, 2022, wherein the appellate court declined to grant the appellant leave to appeal against the High Court Decision emanating from sections 35 and 39 of the *Arbitration Act*.

B. Background

2. Following the success of its existing campuses, the appellant (Kampala International University) was desirous of expanding into the Kenyan market. It acquired land in Kitengela with an intention to construct its Kitengela Campus at an estimated cost of USD 15,000,000.00. Similarly, sometime in 2010, the appellant approached the respondent, (Housing Finance Company Limited), and the respondent accepted to advance to the appellant a loan facility of USD 15,000,000.00 on terms and conditions set out in the parties' correspondence and contract documents, including various Term Sheets.

3. In January 2014, the respondent disbursed a sum of USD 10,000,000.00. As for the balance of USD 5,000,000.00, it was contended by the appellant that there was inordinate delay in the release of the same, and that the respondent thereafter only disbursed USD 1,300,000.00, but failed to disburse the balance of USD 3,700,000.00. Various reasons for the delay in disbursement, non-payment of the balance or otherwise were advanced by the parties.

C. Litigation History

i. Proceedings before the Arbitral Tribunal

4. Aggrieved by the respondent's actions, the appellant instructed its advocate to file suit for damages for breach of contract, and overcharging of interest. However, the parties agreed to have the matter resolved through arbitration. Thereafter, the parties jointly appointed Mr Collins Namachanja as their sole arbitrator through a letter dated October 4, 2017 by M/S Ngatia & Associates, the firm then on record for the appellant. The arbitrator accepted the appointment by his letter dated October 10, 2017.

5. The appellant's claim before the arbitral tribunal was for:

    a. Recovery for the sum of USD 549,762.54 being the interest overcharged;

    b. Interest on (a) above at a rate of 9.5% from the dates when the various interest overcharged amounts were recovered from the appellant's account until payment in full;

c. Recovery of USD 3,333,606.40 being loss of profits from August 15, 2015 to December 2017 and any further interest from December 2017 to the date that the Tribunal would determine;

d. Interest at commercial rates on (c) above from December 2017 until payment in full;

e. Declaration that the respondent is not entitled to charge commercial interest on the disbursed amount of USD 11,300,000;

f. Declaration that the respondent is not entitled to charge default interest on the disbursed amount of USD 11,300,000;

g. Refund of a sum equivalent to the commercial and default interest charged and recovered by the respondent from the appellant on the disbursed sum of USD 11,300,000 by 15th August 2015;

h. General damages for breach of contract; and

i. Costs.

6. In response to the claim, the respondent filed a statement denying all allegations of breach, overcharging of interest, and all other claims made by the appellant. It also filed a counterclaim for;

a) A sum of USD 13,817,270.87;

b) Interest thereon at 9.5% per annum compounded from January 16, 2018 until payment in full; and

c) Costs of the claim and counterclaim with interest thereon at 14% per annum.

7. The Arbitral Tribunal heard the parties and in a Final Award dated September 17, 2019, partly allowed the appellant's claim and wholly allowed the respondent's counterclaim. It determined that, as per its letter dated November 11, 2013, in response to a loan application by the appellant dated October 28, 2013, the respondent only committed to advance USD 10,000,000.00. The Tribunal also determined that the respondent unequivocally stated that the balance of USD 5,000,000.00 would be advanced by syndication with another financing institution. It was on this basis and understanding that the appellant received without hesitation, the disbursement of the loan in the sum of USD 10,000,000.00. As a consequence, the arbitrator found that there was no false or inaccurate representation by the respondent.

8. The Tribunal dismissed the appellant's claim for loss of USD 3,333,606.40 but instead awarded a nominal sum of USD 500,000 payable as general damages. However, the appellant's claim of USD 549,762.54 being interest overcharged was successful. On the other hand, the respondent's counterclaim was successful on all counts. The appellant was ordered to pay the respondent a sum of USD 12,767,508.33 within 30 days of the publication of the award together with interest thereon at the rate of 9.5% per annum compounded from January 16, 2018 until payment in full.

ii. Proceedings before the High Court

9. Aggrieved by the final award, the appellant moved the High Court by a motion dated November 6, 2019 and amended on September 8, 2020. The amended application was anchored on articles 10, 25(c), 47, 50 and 159(3) of the *Constitution*, section 4, 13, 35(2) of the *Arbitration Act*, rule 1 of the *Civil Procedure Rules* and section 63(E) of the *Civil Procedure Act*, seeking:

a. To set aside the final award;

b. A declaration that the final award was unfair, unjust and contrary to the provisions of the *Constitution* and law;

c. A declaration that the award was illegal and void ab initio; and

d. Costs of the application.

10. The application was premised on grounds inter alia: that the arbitrator had failed to disclose circumstances likely to give rise to justifiable doubts as to his impartiality or independence contrary to section 13 of the *Arbitration Act*; to wit, that he had failed to disclose a close relationship between himself and the respondent's counsel and/or his law firm and as a result, denied the appellant a fair trial by an impartial arbitral tribunal; moreover, that the final award dealt with a dispute not contemplated by the terms of reference to the arbitrator; the award contained decisions on matters beyond the scope of the reference to arbitration; therefore, the arbitrator lacked jurisdiction; the arbitrator usurped the jurisdiction of the High Court; the respondent unlawfully passed itself off as the Housing Finance Company of Kenya, (HFCK) a different company/legal entity and as a result, there was no privity of contract between the appellant and the respondent; the award adversely affects independent third parties without their knowledge and consent; and the final arbitral award was obtained by fraudulent misrepresentation and deception.

11. The respondent on the other hand, filed a motion dated December 10, 2020, under section 36 of the *Arbitration Act*, seeking recognition and adoption of the final award as a Judgment of the court; and leave to enforce the same as a decree of the court. The respondent relied on grounds that, the award dealt with the dispute contemplated by the terms of reference and therefore was final; the appointment of the arbitrator was agreed on by both parties; the parties had also agreed on the preliminary issues, the applicable law and rules, and terms of engagement; and no preliminary objection was raised challenging the tribunal's impartiality and jurisdiction. The respondent argued that a challenge on jurisdiction under section 13 of the *Arbitration Act* can only be enforced under section 14 of the said Act; and having not been raised before the arbitrator in the first instance, the jurisdictional challenge on grounds of impartiality had been overtaken by events.

12. The two applications were consolidated and by a ruling delivered on September 16, 2021, the High Court (Muigai, J), dismissed the appellant's application and allowed the respondent's application. The trial court found that the issue of the arbitrator's jurisdiction ought to have been raised in the first instance before the arbitral tribunal under section 17 of the *Arbitration Act*, while allegations of conflict of interest against the arbitrator ought to have been raised in the first instance before the arbitral tribunal under section 14 of the *Arbitration Act*. Similarly, having considered the evidence before it, the trial court determined that there was insufficient evidence to suggest that the Award had been induced by fraud, bribery, undue influence or corruption. Ultimately, the court adopted the final award as an order of the court, on condition that the successful counterclaim be executed in terms of the Letters of Offer dated January 8, 2014 and November 4, 2014 and the securities and guarantees executed by the parties.

iii. Proceedings before the Court of Appeal

13. Aggrieved by the decision of the High Court, the appellant moved the Court of Appeal by way of an application dated September 29, 2021, filed under rules 5(2)(b), 39, 42 and 43 of the *Court of Appeal Rules, 2010* as well as sections 3A and 3B of the *Appellate Jurisdiction Act*.

14. The appellant sought the following orders:

i. Stay of the ruling of the High Court delivered on September 16, 2021 and all its consequential orders thereunder pending the hearing and determination of the application and the intended appeal;

ii. Conservatory order restraining the respondent from entering and taking possession of the charged property or in any way enforcing the charge and/or exercising statutory power to appoint a receiver or sell the charged property pending hearing and determination of the application and intended appeal;

iii. Leave to appeal the whole of the decision/ruling of Muigai, J. issued on September 16, 2021; and

iv. Costs of the application.

15. The application was premised on the following summarised grounds: that the appellant was denied a fair trial, particularly an opportunity to highlight its submissions to the applications for setting aside and for adoption and enforcement of the final award, contrary to the *Constitution*; that the trial judge erred in law in failing to apply the rule of *stare decisis*; that the intended appeal would have raised issues, of interpretation and application of articles 10, 50 and 159 of the *Constitution*; interpretation of sections 10, 13, 14, 24 and 35(3) of the *Arbitration Act* and the jurisdiction of an arbitral tribunal; that the intended appeal would have answered questions such as, what is the burden, extent or ambit of proof necessary to establish an arbitrator's misconduct; whether a dispute pertaining a charge over land was capable of disposition through arbitration; whether an affidavit sworn by an advocate in place of a litigant is admissible. The appellant urged that unless the application was allowed, it would suffer irreparable prejudice; and as such, it was in the interests of justice to grant the orders prayed.

16. In opposing the application, the respondent urged that the appellant had not satisfied the principles for grant of leave to appeal under section 35 of the *Arbitration Act* settled in the *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested party)* [2019] eKLR (the *Nyutu Agrovet* Case) to the effect that there is no express right of appeal against a decision of the High Court emanating from section 35 of the *Arbitration Act*; the grounds raised by the appellant were not recognized by the *Nyutu Agrovet* case and were not within the four corners of the aforementioned Section; the application was frivolous, timewasting and opportunistic; and in any event, the appellant was afforded a right to a fair hearing in line with the policy for expeditious determination of arbitration proceedings.

17. The Court of Appeal framed only one issue for its determination, whether the appellant had met the threshold for grant of leave to appeal to the Court of Appeal. In its ruling delivered on October 21, 2022, the appellate court dismissed the appellant's application. It determined that the arbitrator had been appointed by consent of both parties, through their respective advocates. Moreover, the appellate court upheld the High Court's finding that any challenge related to the appointment of an arbitrator, his jurisdiction or any alleged bias or prejudice ought to have been raised first before the arbitrator during the arbitral proceedings in accordance with sections 13, 14 and 17 of the *Arbitration Act*.

18. On the allegation of bias, the appellate court noted that even if the arbitrator and the respondent's advocate were both Directors of the National Centre for International Arbitration (NCIA) and might have served together in an arbitral tribunal, their prior interaction was not sufficient to infer bias or any form of prejudice. Furthermore, the court held that the mere fact that the law firm representing the respondent in the arbitral proceedings had represented the arbitrator's wife in divorce proceedings, was not sufficient to impute bias.

19. In the end, the Court of Appeal dismissed the application for reasons that the appellant neither demonstrated any of the circumstances envisaged under section 35(2)(a) and 39 of the *Arbitration Act* nor any issue of great public importance to warrant grant of leave. With this finding, the Court of Appeal did not deem it necessary to make any determination on the issue of Stay pending Appeal.

iv Proceedings before the Supreme Court

20. Aggrieved by the entire judgment, the appellant has filed the instant appeal challenging the decision of the Court of Appeal, citing ten (10) grounds summarized as follows, that the learned judges erred by:

    i. Failing to analyze and consider the fact that the High Court denied the appellant the opportunity to be heard by deferring the appellant's application upon only hearing the parties on a preliminary objection to an affidavit sworn by the advocate for the respondent.

    ii. Abandoning their duty to interpret and apply the *Constitution* as bestowed upon them by statute and the *Constitution* .

    iii. Failing to address cogent questions relating to the right to be heard as envisaged under article 25(c) and 50(i) denying the appellant the right to access to justice contrary to article 48 of the *Constitution*.

    iv. Failing to appreciate the arbitrator's constitutional and legal duty of full and honest disclosure to parties before it of any actual or perceived conflict of interest and/or bias.

    v. Abdicating their duty to entertain the appellant's intended appeal which was based on the consideration of the question as to whether there was a substantial miscarriage of justice both at the superior court and the tribunal.

    vi. Departing from the laid down principles in the case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited & another* [2019] eKLR (*Nyutu* Case) thereby violating the principles of *stare decisis*.

    vii. Disregarding the grounds of appeal set in the notice of motion seeking leave to appeal.

    viii. Failing to appreciate the ramifications of an arbitral award whose impartiality is questioned.

    ix. Prematurely embarking on the evaluation of material evidence which were matters falling within the realm of the appeal itself.

    x. Rendering themselves solely on the ruling without the benefit of the superior court record proceedings.

21. The appellant seeks the following reliefs:

    i. This court be pleased to allow this appeal and the ruling of the Court of Appeal in Civil Appeal No 343 of 2021 be set aside;

    ii. An order directing the Court of Appeal to admit and hear the appeal against the ruling of Muigai, J in HC Miscellaneous Cause No E564 of 2019.

    iii. The final award dated September 17, 2019 be set aside and the dispute be referred back to arbitration.

    iv. In the alternative:

a. An order declaring that the ruling of the High Court in Miscellaneous Cause No E564 of 2019 violated the appellant's rights under articles 10, 25(c), 47, 48, 50(1) and 159 of the *Constitution*; or

b. An order directing that the arbitral award subject to Miscellaneous Cause No. E564 of 2019 be quashed and Judgment be entered as prayed in the claim before the arbitrator; or

c. The court to invoke the powers under article 159 of the *Constitution of Kenya, 2010* and order the parties to hold in equal rights and shares the property subject of charge.

v. Costs be awarded to the appellant.

22. In response to the petition, the respondent filed a notice of preliminary objection dated December 2, 2022 and filed on December 14, 2022, urging that this court lacks jurisdiction to hear and determine the appeal by dint of articles 163(4)(a) and (b) of the *Constitution*, sections 15, 15A and 15B of the *Supreme Court Act* as well as the guiding principle on its jurisdiction to hear appeals emanating from section 35 of the *Arbitrations Act* settled in the decision in *Geo Chem Middle East v Kenya Bureau of Standards*, SC Petition No 47 of 2019; [2020] eKLR (*Geo Chem* case).

23. Moreover, the respondent argues that the appeal raises no issues of constitutional interpretation and application and the only issue for consideration by the Court of Appeal was whether the appellant had met the threshold settled by this court in Nyutu Agrovet case and *Synergy Industrial Credit v Cape Holdings Ltd*, SC Petition No 2 of 2017; [2019] eKLR. (Synergy case) with respect to leave to appeal against the decision of the High Court under section 35 of the *Arbitration Act*.

24. Similarly, in its replying affidavit sworn by Regina Kajuju Anyika (the respondent's Director Legal and Company Secretary) on September 11, 2023, the respondent essentially restates that this court lacks jurisdiction, and in any event, the appellant did not raise any objection to the arbitrator's appointment or impropriety before the arbitral tribunal as is the requirement under the *Arbitration Act*. The respondent also asserts that the appellant was afforded a fair hearing, but failed to comply with the trial court's directions on numerous occasions, necessitating delivery of the impugned High Court Judgment.

25. In response, the appellant filed a supplementary affidavit sworn by Hassan Basajjabalaba on November 3, 2023 reiterating the argument in the petition and the affidavit in support thereof. Both parties have filed their submissions, lists, case digests, and bundles of authorities in support of their rival arguments.

D. Parties' Respective Submissions

i. The appellant's case

26. The appellant's submissions in support of the appeal are dated November 17, 2023, and filed on November 21, 2023. The appellant addresses six issues and submits as follows: On the issue whether this court has jurisdiction to hear and determine the appeal, it submits that this court has jurisdiction to hear and determine the same for reasons that the issues in contestation before both superior courts below revolved around the interpretation of articles 10, 25(c), 47, 50, and 159 of the *Constitution*. More so, the legality and constitutionality of the arbitral process and the resulting award.

27. To support this argument, it cites *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others*, SC Petition No 10 of 2013 [2014] (*Hassan Ali Joho* case); *Narok County Government v Livingstone Ntutu & 2 others*, SC Petition No 3 of 2015; [2018] eKLR, *Lemanken Aramat v Harun Meitamei Lempaka*

& 2 others, SC Petition No 5 of 2014; [2014] eKLR and *R v Karisa Chengo*, SC Petition No 5 of 2025; [2017] eKLR to urge that this appeal falls within the court's jurisdiction under article 163(4)(a) of *the Constitution*.

28. The appellant maintains that the appeal revolves around the application of the *Constitution* on questions of bias of the arbitrator and violations of the right to a fair hearing. Particularly, it submits that the High Court ruling was delivered without giving parties an opportunity to highlight their submissions. The appellant also submits that it was denied a right to a fair hearing by the arbitral tribunal on grounds that the arbitrator breached his duty to disclose his interactions/relations with the respondent's counsel. The appellant explains that the respondent's counsel on record was the opposing counsel in the arbitrator's divorce proceedings, and that they both served as board members in NCIA.

29. In conclusion, counsel for the appellant in his oral submission urged that this court by its ruling delivered on January 27, 2023 in *Kampala International University v Housing Finance Company Limited* (Petition (Application) No 34 (E035) of 2022) [2023] KESC 5 (KLR), while granting conservatory orders, addressed the issue of its jurisdiction in the affirmative. It contends that as a result, this issue was *res judicata*.

30. Regarding the issue whether the arbitral proceedings violated articles 25(c), 48, 50(1) and 259 of the *Constitution*, the appellant contends that by failing to disclose his previous relationship and interactions with the respondent's counsel, the arbitrator contravened article 25(c). The appellant also submits that the arbitrator denied the appellant access to justice by an impartial tribunal contrary to article 48 of the *Constitution*. As a result of the foregoing, it is the appellant's case that the arbitral proceedings violated article 50(1) of the *Constitution*, and were in violation of values stipulated under article 259 of the *Constitution*.

31. On whether the arbitrator had a duty to disclose his relationship with the respondent's counsel to the parties in the arbitral proceedings and whether the arbitration was tainted with bias, the appellant reiterates that by dint of section 13 of the *Arbitration Act*, the arbitrator had a duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Therefore, it argues, by failing to disclose his relationship with the respondent's counsel, the arbitrator abdicated his fiduciary duty thereby raising a presumption of impropriety, misconduct and bias, in violation of articles 10, 50 and 159 of the *Constitution* and breach of the appellant's rights under article 25(c), 48 and 50(1) of the *Constitution*.

32. As to whether the Court of Appeal abdicated its constitutional duty in hearing and determining the issue arising under section 3 of the *Appellate Jurisdiction Act*, the appellant faults the Court of Appeal for failing to analyze and consider the question whether the learned Judge denied the appellant an opportunity to be heard. It posits that as a result, the Court of Appeal failed to address cogent issues relating to its right to be heard as envisaged under article 25(c) and 50(1), and justice contrary to article 48 of the *Constitution*, and as such, abdicated its duty under article 164 and section 3 of the *Appellate Jurisdiction Act*. Secondly, the appellant submits that the Court of Appeal failed to appreciate the arbitrator's constitutional and legal duty of disclosure to parties of any actual or perceived bias.

33. Finally, on the issue as to whether the High Court contravened articles 47 and 50 of the *Constitution*, the appellant answers in the affirmative. It argues that the trial court's actions denying it a chance to highlight its submissions to the applications for setting aside and for adoption and enforcement of the final award, contravened the *Constitution*. Likewise, it was the appellant's case that the learned Judge contravened both articles 47 and 50 of the *Constitution* by selectively evaluating evidence and failing to consider all of its affidavits in support of its application for setting aside. Particularly, the two affidavits sworn by Joseph Kyazze on October 23, 2020 and November 1, 2020, to the effect that the arbitrator

had been served with the application and that the respondent's advocate represented the arbitrator's former wife in a divorce case.

ii. The respondent's case

34. The respondent's submissions in opposition to the appeal are dated November 2, 2023, and filed on November 7, 2023. The submissions in support of the preliminary objection are dated December 13, 2022, and filed on December 14, 2022. The respondent condenses the six issues addressed by the appellant into two issues, namely, whether this court has jurisdiction to hear and determine the appeal; and whether the Court of Appeal erred in declining to grant leave to appeal the High Court Decision.

35. On the first issue of jurisdiction, the respondent submits that first, the court lacks jurisdiction as of right under article 163(4)(a) as the appeal is hinged on the appellant's amended motion dated September 8, 2020, wherein it had sought to set aside the arbitral award under sections 13 and 35 of the *Arbitration Act*. Mainly, on the appointment and disqualification of the Arbitrator. To this end, the respondent asserts that the grounds for appointment of an arbitrator under section 13 of the *Arbitration Act* are factual, while the High Court's determination against the challenge of appointment of the arbitrator did not involve application or interpretation of the *Constitution*.

36. It contends that no issues of constitutional interpretation and application were in contest before the High Court or the Court of Appeal (wherein the only issue was the simple question of leave to appeal). The respondent relies on the decisions in *Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012 [2012] eKLR; *Hassan Ali Joho* case; *Erad Suppliers & General Contractors Ltd v National Cereals & Produce Board*, SC Petition No 5 of 2012 [2012] eKLR and *Megvel Cartons Limited v Diesel Care Limited & 2 Others* [2023] KESC 24 (KLR), to argue that the mere allegation that a question of constitutional interpretation or application was involved without more does not automatically bring an appeal within article 163(4)(a) of the *Constitution*.

37. Moreover, the respondent submits that the determination by the High Court was limited to the grounds for setting aside an arbitral award under section 35 of the *Arbitration Act*, and did not require interrogation of any constitutional provision. By parity of reasoning, it was urged that once the Court of Appeal considered the appellant's application based on the principles established in the *Nyutu Agrovet* and *Synergy* cases and delivered its ruling declining to grant leave to appeal, no further appeal should ordinarily lie therefrom to this court as appreciated by this court in the *Geo Chem* case. Equally, it posits that the appellant has not demonstrated exceptional circumstances in this case to warrant the assumption of jurisdiction by this court.

38. On the second issue whether the Court of Appeal erred in declining to grant leave, the respondent submits that in line with the principle of finality of arbitral awards, generally there is no express right of appeal of a High Court decision setting aside or affirming an arbitral award, as leave is only granted in limited circumstances. It posits that the appellants application for leave failed to meet the threshold for grant of leave settled in the *Nyutu Agrovet* case.

39. To further urge its case, the respondent submits that in the intended appeal, the appellant had invited the Court of Appeal to delve into issues outside section 35 of the Act. More so, the respondent contends that an appeal would not lie on the grounds raised by the appellant for the reasons that section 17(2) of the *Arbitration Act* enjoins a party in an arbitration to object to the jurisdiction of the tribunal not later than the submission of the statement of defence. Furthermore, that section 17(3) provides that an objection that the arbitral tribunal is in excess of the scope of its authority, must be raised as soon as the matter alleged to be beyond scope arises during the proceedings.

40. Consequently, the respondent maintains that in failing to raise the objection under section 17 before the arbitrator, the appellant waived its right to object to the arbitrator's jurisdiction to hear and determine the counterclaim in terms of section 5 of the *Arbitration Act*. Be that as it may, the respondent posits that as per the list of agreed issues, the parties had specifically authorized the arbitrator to determine whether the respondent was entitled to the claims pleaded in the counterclaim.

41. In conclusion, the respondent submits that the appeal is opportunistic, whose sole purpose is to subvert the *Arbitration Act* and the process of arbitration. Accordingly, the respondent relies on the *locus classicus* case of *Owners of Motor Vessel "Lilian S" v Caltex Oil (K) Ltd* [1989] KLR 1, to urge the court to strike out the appeal for want of jurisdiction.

E. Issues for Determination

42. From our consideration of the pleadings, the findings of the superior courts below, and the submissions by counsel, we consider the following two issues, the determination of which should dispose of this Appeal.

    i. Whether this court has jurisdiction to hear and determine the appeal; and

    ii. Whether the appellant has met the threshold for grant of leave to appeal to the Court of Appeal.

F. Analysis

On Jurisdiction

43. It is the respondent's contention that this court lacks jurisdiction to determine the appeal herein. The reasons for this view are well illuminated in the foregoing paragraphs 36, 37 and 38 of this judgment. The crux of the respondent's argument in this regard, is that on the basis of the long line of authorities cited in support, there having been no contestation regarding an issue of the interpretation or application of the *Constitution*, at both the High Court and Court of Appeal, no further appeal can lie before this court under article 163(4)(a) of the *Constitution*.

44. The only issue before the superior courts, submits the respondent, was whether the arbitral tribunal had jurisdiction to determine the dispute, given his alleged failure to disclose his relationship with the respondent's counsel. At the end of the day, what was at stake was whether the High Court rightly declined to set aside the arbitrator's Award within the meaning and scope of section 35 of the *Arbitration Act*. As such, argues the respondent, no question turned on the interpretation and application of the *Constitution*.

45. The appellant on the other hand, submits that this court has jurisdiction to determine the appeal herein, on grounds stated in the foregoing paragraphs 26 to 28 of this Judgment. It is the appellant's submission that at the Court of Appeal, the main issue revolved around the interpretation of *inter alia* articles 25 and 50 of the *Constitution*. At any rate, argues the appellant, the question of jurisdiction is *res judicata*, the same having been determined in an earlier ruling by this court in *Kampala International University v Housing Finance* [*Supra*] (see paragraph 29).

46. Before addressing ourselves regarding the question whether this court has jurisdiction to determine the appeal herein, we consider it important to restate the principle that without jurisdiction, a court of law is incapable of rendering any valid ruling, order or judgment. In the ruling cited by the appellant as authority for its contention that the issue of jurisdiction is now res judicata, all that this court did, was to preserve the substratum of the appeal by holding that the same was arguable. The said ruling did

not foreclose future interrogation of whether, the court's jurisdiction has been validly invoked, either by the court suo motu, or by a party to these proceedings.

47. Having so stated, what then are we faced here with? What is before us is an appeal against a ruling of the Court of Appeal declining to grant leave to appeal against a High Court Judgment affirming an arbitral award under section 35 of the *Arbitration Act*. In *Teachers Service Commission v Kenya National Union of Teachers and 3 others*, SC Application No 16 of 2015; [2015] eKLR; the court observed thus:

> " In almost all cases where the Supreme Court has been called upon to invoke its jurisdiction under article 163(4)(a) of *the Constitution*, the court has almost invariably proceeded on the assumption that there exists a substantive determination of a legal/constitutional question by the Court of Appeal which the intending appellant seeks to impugn.
>
> Indeed, in general, this is the rational meaning to be ascribed to the word 'appeal', in an adversarial system where jurisdiction is assigned by the legal norms to a hierarchy of courts."

48. In this case, the issue was whether article 163(4)(a) of the *Constitution*, confers upon the Supreme Court jurisdiction to entertain an interlocutory application, challenging the Court of Appeal's orders issued by the latter in exercise of its discretionary authority under rule 5(2) (b) of that court's rules. In declining to assume jurisdiction, the court held:

> " In these circumstances, we find that this court lacks jurisdiction to entertain an application challenging the exercise of discretion by the Court of Appeal under rule 5(2)(b) of that court's rules, there being neither an appeal nor an intended appeal pending before the Supreme Court."

49. In *Basil Criticos v Independent Electoral and Boundaries Commission & 2 others*, SC Petition No 22 of 2014; [2015] eKLR; presented with an almost similar scenario, the court stated:

> " The application before us contests the exercise of discretion by the appellate court, where there is neither an appeal, nor an intended appeal pending before this court. Moreover, the appeal before the Court of Appeal is yet to be heard and determined. An application so tangential, cannot be predicated upon the terms of article 163(4)(a) of *the Constitution*. Any square involvement of this court, in such a context, would entail comments on the merits, being made prematurely on issues yet to be adjudged, at the Court of Appeal, ... Such an early involvement of this court, in our opinion, would expose one of the parties to prejudice, with the danger of leading to an unjust outcome.
>
> ...
>
> It is clear to us that an appeal against a Court of Appeal decision declining to extend time is not a matter falling under the purview of article 163(4)(a) of the *Constitution*. In the absence of a Judgment by the Court of Appeal, in which constitutional issues have been canvassed, what would this court be sitting on appeal over?"

50. The Supreme Court in latter decisions, tempered the foregoing principle with some exceptions, where it could assume jurisdiction notwithstanding the fact that, an appeal before it was against an interlocutory decision by the Court of Appeal. Thus, where the Court of Appeal had made an interlocutory decision which in essence amounted to a substantive determination of a constitutional question that had been canvassed right from the High Court, the Supreme Court could rightly assume jurisdiction in an appeal arising therefrom. Indeed, such had been the case in the Hassan Ali Joho case.

51. This principle has been variously restated in later decisions by the court. For example, in *Ananias N Kiragu v Eric Mugambi & 2 others* SC Application No 10 of 2019 [2020] eKLR, the court stated:

> " As a general rule, the Supreme Court does not entertain appeals on interlocutory decisions where the substantive matter is still pending before the superior courts save where the appeal is not only on a substantive determination by the Court of Appeal of a constitutional question, but also on an issue that has been canvassed right from the High Court to the Court of Appeal even though the substantive matter is still pending before the High Court..."

52. Similarly, in *Paul Mungai Kimani & 2 others v Kenya Airports Authority & 3 others* SC. Petition No 11 of 2019 [2021] eKLR; the Court reaffirmed this position as it stated:

> "We have severally held that this court has no jurisdiction to entertain appeals from interlocutory decisions save where the interlocutory decision in question is a substantive determination of a constitutional issue that has been canvassed through the superior courts below."

53. Another exception where the Supreme Court may assume jurisdiction notwithstanding the fact that the decision against which an appeal has been preferred is one which was delivered by the Court of Appeal in exercise of its powers under rule 5 (2)(b), arises if the appellate court goes beyond the preservation of the substratum of the appeal, and issues orders that are likely to occasion an injustice to one of the parties. Such was the case in *Deynes Muriithi & 32 others v Law Society of Kenya & anor;* SC Application No 12 of 2015 [2015] eKLR wherein, in issuing a Stay under rule (5)(2)(b), the appellate court went further to issue an ancillary order in the following terms:

> " That the monies due from the respondents towards the intended construction of the Law Society of Kenya International Arbitration Centre be deposited in an interest earning account in the joint names of learned counsel for all the parties herein to be opened in any sound financial institution to be mutually agreed upon by learned counsel for all the parties herein within thirty (30) days of the date of the reading of this ruling."

54. In setting aside, the above order, the Supreme Court observed thus:

> "We are concerned about the justice of the case. With the appellate court ordering that 'the monies due from the respondents (applicants herein) be deposited in an interest earning account." The effect of this order is to require the applicants to pay up the sums which are in contention and which form the subject-matter of the petitions before the High Court. It cannot be gainsaid, that the order of the Court of Appeal has a pre-emptive effect on the petitions pending before the High Court where the applicants hope to be accorded a fair hearing."

55. We now turn to the question before us, i.e. whether we have jurisdiction to determine this appeal. The arguments by both parties regarding this issue have already been elaborately set out in the foregoing paragraphs of the judgment. It is instructive to note that the impugned judgment by the Court of Appeal, is interlocutory in nature, and as such must be weighed against the established principles in the decisions by this court as discussed above. It is also important to restate the fact that, the appeal herein is against a decision by the Court of Appeal, declining to grant leave to appeal, not to this court, but to the appellate court itself. The intended appeal is against a judgment of the High Court affirming an Arbitral Award. On the face of it, and weighed against our decision in the Teachers Service Commission

case, [*supra*], this court would ordinarily have no jurisdiction to determine the appeal, there being no pending appeal or an intended appeal before us.

56. However, the appellant has strongly submitted that what was before the High Court and Court of Appeal was a question of constitutional interpretation, the determination of which is being appealed to this court. Such a scenario would bring the intended appeal within the exception to the general rule as enunciated in the Hassan Ali Joho, Ananias Kiragu, and Paul Mungai Kimani decisions (*Supra*). The respondent on the other hand, in its preliminary objection is categorical that the only issue before the Court of Appeal was whether in its application for leave to appeal, the applicant had met the threshold set out by this court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited & another* [2019] eKLR and *Synergy Industrial Credit v Cape Holdings Ltd* [2019] eKLR.

57. The question as to whether an appeal lies as of right to the Court of Appeal against a decision of the High Court decision under section 35 of the *Arbitration Act* was settled with finality by this court in the Nyutu Agrovet case (*supra*). The court stated;

> "In concluding on this issue, we agree with the interested party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction."

58. The court went on to state that leave would have to be sought from and granted by the Court of Appeal before an intending appellant files the appeal. This mechanism would in the words of the court:

> "be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end."

59. This principle was restated in the Synergy case wherein the court stated:

> "For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of section 35 of the *Arbitration Act*, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending that) in arriving at its decision, the High Court went out of section 35 of the Act for interfering with an arbitration award."

60. In determining whether to grant leave to appeal, the Court of Appeal framed one issue for determination, ie, whether the applicant had met the threshold for grant of such leave as set out by this courtin the *Nyutu Agrovet* case. The appellate court answered the question in the negative, having held that the applicant sought to challenge the jurisdiction of the Arbitral Tribunal notwithstanding the fact that, the arbitrator had been appointed by consent of the parties. At any rate, the court held, any challenge to the arbitrator's tribunal on grounds of bias, ought to have been made during the arbitral proceedings in accordance with sections 13, 14 and 17 of the *Arbitration Act*.

61. We are, in agreement with the respondent to the effect that indeed, the only issue that was before the Court of Appeal was whether the applicant had met the threshold for grant of leave as established by this court in the Nyutu and Synergy cases [*Supra*]. We see no constitutional issue that had been

canvassed at the High Court, the determination of which, was substantively decided by the Court of Appeal.

62. The appellant submits that by being denied the opportunity to make oral submissions in support of its argument challenging the jurisdiction of the Arbitrator, the High Court violated its right to a fair hearing under article 50 of the *Constitution*. This submission did not find favour, and rightly so in our view, with the Court of Appeal. It is this same argument that the appellant has advanced before us in a bid to bring the appeal within the ambit of article 163(4)(a) of the *Constitution*. This court has consistently held that the mere claim by a party to the effect that its rights were violated by a superior court for whatever reason, does not bring the intended appeal within the purview of article 163(4)(a) of the *Constitution*. The appeal herein does not fall within any of the exceptions which would justify this court's assumption of jurisdiction over a ruling by the Court of Appeal, there being no pending or intended substantive appeal therefrom. The Court of Appeal has jurisdiction when leave is sought to appeal the decision of the High Court on the setting aside an arbitral award under section 35, to interrogate the substance of the intended appeal. Thus, in *Geo Chem Middle East v Kenya Bureau of Standards* [2020] eKLR we elucidated the issue as follows:

> "After our pronouncements in *Nyutu* and *Synergy*, it is not possible that the Court of Appeal can grant leave to appeal from a section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies"

In fact, we are satisfied that, by declining to grant leave to appeal in the circumstances of this case, the Court of Appeal was correctly guided by our decisions in *Nyutu Agrovet* and *Synergy* [*supra*].

63. Consequently, there is no basis upon which this court can assume jurisdiction to overturn or otherwise deal with the Court of Appeal's decision declining to grant leave to appeal to the appellant herein. This conclusion also disposes of the second issue that we had framed for determination.

64. The following orders shall issue:

G. Orders

65.

i. The amended petition of appeal dated August 18, 2023is hereby dismissed;

ii. The costs of this appeal shall be borne by the appellant.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL 2024.

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P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE-PRESIDENT OF THE SUPREME COURT

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M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA