



Goodison Sixty One School Ltd v Symbion Kenya Ltd; Ngotho (Intended Interested Party) (Petition (Application) E027 of 2023 & Application E042 of 2023 (Consolidated)) [2023] KESC 111 (KLR) (21 December 2023) (Ruling)

Neutral citation: [2023] KESC 111 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) E027 OF 2023 &
APPLICATION E042 OF 2023 (CONSOLIDATED)
PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ
DECEMBER 21, 2023**

BETWEEN

GOODISON SIXTY ONE SCHOOL LTD APPELLANT

AND

SYMBION KENYA LTD RESPONDENT

AND

PAUL NGOTHO INTENDED INTERESTED PARTY

(Being applications for joinder as an Interested Party, to strike out Petition No. E027 of 2023, and for leave to exceed the limit of pages for the appellant's written submissions)

Appellate jurisdiction of the Supreme Court as of right in cases involving interpretation of the Constitution to determine matters relating to the conduct of an arbitrator and arbitral proceedings

The matter related to three applications; the first application was by the intended interested party seeking to be joined in the petition as an interested party; the second application sought the striking out of a petition; while the third one sought leave to exceed the mandatory limit of 15 pages of written submissions in support of the petition. The court held that alleged breaches of the Constitution could not be properly introduced by way of an application to set aside an arbitral award. The court found that it did not have jurisdiction under article 163(4) (a) of the Constitution to hear and determine the appeal as the matters before the superior courts did not involve interpretation and application of the Constitution at all.

Reported by Kakai Toili

Jurisdiction – jurisdiction of the Supreme Court – appellate jurisdiction – appeals as of right in cases involving the interpretation or application of the Constitution - whether the Supreme Court had appellate jurisdiction as of right in cases involving interpretation of the Constitution to determine matters relating to the conduct of an



arbitrator and arbitral proceedings – whether alleged breaches of the Constitution could be introduced by way of an application to set aside an arbitral award - Constitution of Kenya, 2010, article 163 4(a).

Brief facts

Three separate applications were filed before the court. The first application was by the intended interested party seeking to be joined in the petition as an interested party. The intended interested party was the arbitrator who determined the dispute between the appellant and respondent. He contended that he had been mentioned in the pleadings before the instant court and was subject of the proceedings in High Court.

The second application was by the respondent seeking the striking out of Petition No E027 of 2023 -*Goodison Sixty-One School Ltd v Symbion Kenya Ltd* for want of jurisdiction. The respondent contended that the court lacked jurisdiction to hear and determine the petition under article 163(4)(a) of the Constitution of Kenya, 2010 (the Constitution) The respondent further contended that the appellant had not sought certification from the Court of Appeal that the matter raised issues of general public importance and that in any event, the petition did not fall within the ambit of matters contemplated by article 163(4)(b) and that there was no provision for a further appeal from the Court of Appeal on an arbitration matter.

The third application was by the appellant seeking leave to exceed the mandatory limit of 15 pages of written submissions in support of the petition. The appellant contended that; separate submissions were filed by the parties in the 3 substantive appeals at the Court of Appeal; and that it was not seeking to file 15 pages per appeal but 27 pages for the consolidated appeal. The appellant further contended that no prejudice would be caused to the respondent if the application was allowed.

Issues

- i. Whether the Supreme Court had appellate jurisdiction as of right in cases involving interpretation of the Constitution to determine matters relating to the conduct of an arbitrator and arbitral proceedings.
- ii. Whether alleged breaches of the Constitution could be introduced by way of an application to set aside an arbitral award.

Held

1. The Supreme Court had previously settled the twin questions of whether both the Court of Appeal and the Supreme Court were vested with the jurisdiction to hear and determine appeals arising out of arbitration disputes. In determining the above questions, the court had to first evaluate whether the contested issues in the petition were issues of constitutional controversy that had been substantively determined by the High Court and the Court of Appeal.
2. The issues before the superior courts did not involve the interrogation of any constitutional question(s) that rose through the normal appellate mechanism to enable the court exercise its jurisdiction on the interpretation and application of the Constitution under article 163(4)(a) of the Constitution.
3. Alleged breaches of the Constitution could not be properly introduced by way of an application to set aside an arbitral award. Breaches of the Constitution were properly governed by articles 165(3) and 258 of the Constitution and could not by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the Arbitration Act.
4. The court did not have jurisdiction under article 163(4)(a) of the Constitution to hear and determine the appeal as the matters before the superior courts did not involve interpretation and application of the Constitution at all. The issues relating to the conduct of the arbitrator and the arbitral proceedings which were at the core of the applications before the High Court could not by any shade of imagination translate into issues requiring the interpretation of the Constitution. Furthermore, the appellant's case had not met the criteria set in *Synergy Industrial Credit Limited v Cape Holdings Limited*, SC Petition No 2 of 2017 [2019] eKLR to have enabled either the Court of Appeal or the instant court to have jurisdiction to entertain the same. As a consequence, Petition No E027 of 2023 was struck out for want of jurisdiction.



5. Having struck out Petition No E027 of 2023, the applications seeking joinder of the intended interested party and leave to exceed the page limit of the appellant's submissions were rendered otiose.

Applications partly allowed.

Orders

- i. *The notice of motion dated October 9, 2023 was allowed.*
- ii. *Petition No E027 of 2023 was struck out.*
- iii. *The notice of motion dated October 6, 2023 was struck out.*
- iv. *The notice of motion dated October 12, 2023 was struck out.*
- v. *The court directed that the sum of Kshs 6000 deposited as security for costs in the appeal be refunded to the appellant.*
- vi. *The appellant shall bear the costs of the application dated October 9, 2023 and the same shall be paid to the respondent only. The intended interested party shall bear his costs.*

Citations

Cases

1. Geo Chem Middle East v Kenya Bureau of Standards (Petition 47 of 2019; [2020] KESC 1 (KLR)) — Explained
2. Muruatetu & another v Republic & 4 others (Petition 15 & 16 of 2015 (Consolidated); [2016] eKLR; [2016] 1 KLR 1099) — Explained
3. Nduttu, Lawrence & 6000 others v Kenya Breweries Ltd & another (Petition 3 of 2012; [2012] eKLR) — Explained
4. Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Petition 12 of 2016; [2019] KESC 11 (KLR)) — Explained
5. Rai & 3 others v Rai & 4 others (Petition 4 of 2012; [2013] eKLR; [2013] 1 KLR 685) — Applied
6. Synergy Industrial Credit Limited v Cape Holdings Limited (Petition 2 of 2017; [2019] KESC 12 (KLR)) — Applied

Statutes

1. Arbitration Act, 1995 (Act No 4 of 1995) — section 14, 35 — Interpreted
2. Civil Procedure Act (cap 21) — section 3A — Interpreted
3. Constitution of Kenya, 2010 — article 50 (1); 149; 159 (2); 163 (4) (a); 165 — Interpreted
4. Supreme Court Act, 2011 (Act No 7 of 2011) — section 3; 15; 15A; 15B; 23 (2B) (a) — Interpreted
5. Supreme Court Rules, 2020 (Act No 7 of 2011 Sub Leg) — rule 24, 31, 32, 33 — Interpreted

Advocates

Mr. S. Amin & Mr. Misaru for the Appellant

Dr. Kiplagat for the Appellant

Ms. Lumallas for the Intended Interested Party

RULING

1. Before this court are three separate motions brought by the parties for determination. Although not related, the motions are intertwined and therefore, to ensure prudent use of judicial time, we will dispose of them in this composite ruling. The first application is by Paul Ngotho (intended interested party) seeking to be joined in the petition as an interested party. The second application is by the respondent seeking the striking out of Petition No E027 of 2023 - *Goodison Sixty-One School Ltd vs Symbion Kenya Ltd* for want of jurisdiction and the third application is by the appellant seeking leave to exceed the mandatory limit of 15 pages of written submissions in support of the Petition; and



2. Upon perusing the motion by the intended interested party dated October 6, 2023 brought pursuant to section 23(2B)(a) of the Supreme Court Act, 2011 as well as rule 24 of the Supreme Court Rules, 2020 seeking leave to participate in the proceedings as indicated above; and
3. Upon considering the grounds in support of the application and the averments contained in the supporting affidavit and further affidavit sworn by Paul Ngotho, the Arbitrator who determined the dispute between the appellant and respondent, wherein he inter alia contends that; he has been mentioned in the pleadings before this court and was subject of the proceedings in High Court Misc Civil Cause No 131 of 2016 as well as Consolidated Appeal Nos 158, 159 and 160 of 2020; he rendered the final arbitral award on February 25, 2016 in favour of the Respondent; the appeal is premised on the proceedings before the Arbitral Tribunal and Award issued by him and therefore, it is necessary for him to be joined in the proceedings; the appellant alleges that the intended interested party was biased and that he denied it fair hearing causing it prejudice, hardship and injustice resulting into a defective, unfair and unlawful arbitral process; the appellant alleges breach of duty to disclose, lack of impartiality and independence on his part; the appellant owes him unpaid arbitration fees assessed at Kshs 2,500,000/- together with interest accrued from the date of the award until its payment in full; the appellant challenges the integrity of the arbitral process, making it necessary for him to be joined to the proceedings to shed light on the process and aid the court in making a fair and just determination; he has a clear, identifiable interest separate and distinct from those advanced by the parties herein; and he stands prejudiced should he not be joined as an interested party; and
4. Noting the intended interested party's submissions dated October 11, 2023, wherein he reiterates the contents of his supporting affidavit and further submits that; the appellant has alleged denial of his right to fair hearing, bias under article 50(1) and 159(2) of the Constitution and so he deserves an opportunity to respond to the allegations and should be joined as an interested party; issues of his alleged bias/incompetence cannot be settled unless he is a party; he has satisfied all the requirements for joinder as an interested party as outlined by this court in Francis K Muruatetu and another v Republic SC Petition No 15 of 2015 as consolidated with Petition No 16 of 2015; [2016] eKLR; and he stands to suffer prejudice if not joined as an interested party; and
5. Taking into account the motion dated October 9, 2023 by the respondent brought under article 163(4) (a) of the Constitution, sections 15, 15A, 15B of the Supreme Court Act, 2011 and rules 31, 32 & 33 of the Supreme Court Rules, 2020 seeking that Petition No E027 of 2023 be struck out for want of jurisdiction; and
6. Considering the grounds in support of the application and the averments contained in the supporting affidavit sworn by Oscar Ogunde, Director, Symbion Kenya Ltd wherein he contends that; this court lacks jurisdiction to hear and determine the petition under article 163(4) (a) of the Constitution; the appellant has not sought certification from the Court of Appeal that the matter raises issues of general public importance and that in any event, the petition does not fall within the ambit of matters contemplated by article 163(4)(b) of the Constitution as was held by this court in Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) SC Petition No 12 of 2016 [2019] eKLR (Nyutu Agrovet Ltd case); and that there is no provision for a further appeal from the Court of Appeal on an arbitration matter; and
7. Also considering the respondent's submissions dated October 9, 2023 and submissions in reply dated November 1, 2023 wherein it reiterates the contents in support of the application and submits that; this Court has in numerous decisions unequivocally set the principles governing the invocation of its jurisdiction under article 163(4)(a) of the Constitution; the initial test lies in determining the issues addressed at the High Court and whether the superior courts settled issues concerning interpretation



- and application of the Constitution; no issues of constitutional application or interpretation arose at the High Court and the Court of Appeal as the dispute was rooted on a contractual breach; this court in Geo Chem Middle East v Kenya Bureau of Standards SC Petition No 4 of 2019 [2020] eKLR (Geo Chem case) held that it lacks jurisdiction on arbitration appeals from the Court of Appeal; and
8. Cognizant of the appellant's motion dated October 12, 2023 brought under rule 31 of the Supreme Court Rules, 2020 seeking leave to exceed the limit of 15 pages for written submissions in support of the Petition of Appeal; and
 9. Noting the grounds in support of the application and the averments contained in the supporting affidavits sworn by Salah El-Din Amin, Advocate, wherein he contends that; the petition arises from the consolidated judgment of the Court of Appeal in respect of 3 substantive and distinct civil appeals based on diverse provisions of the Arbitration Act, 1996 and Constitution as well as other laws of Kenya; separate submissions were filed by the parties in the 3 substantive appeals at the Court of Appeal; it is not seeking to file 15 pages per appeal but 27 pages for the consolidated appeal; no prejudice will be caused to the respondent if the application is allowed; and
 10. Upon reading the submissions of the appellant dated October 12, 2023 wherein it reiterates the contents of its supporting affidavits and submits further that; article 159(2)(d) of the Constitution and section 3 of the Supreme Court Act, 2011 grants the Court inherent powers to give directions necessary for the due administration of justice; the 15 page limit prescribed in Direction No 17(a)(i) of the Supreme Court (General) Practice Directions is a mere technicality which ought not, in appropriate circumstances, be given due regard if that would result in an injustice to any party; and
 11. Bearing in mind the replying affidavit sworn on October 13, 2023 and October 25, 2023 by Zainab Jaffer, the Director of the appellant, in reply and opposition to the intended interested party's application for joinder and the respondent's application seeking to strike out the petition, wherein she contends that the intended interested party's application is made in bad faith and motivated by mischief as he waived his right to appear and respond to the appellant's application challenging his appointment at the High Court and also opted not to participate in any aspect of further proceedings at the High Court as well as the Court of Appeal; the application to strike out the appellant's petition is frivolous, vexatious and an abuse of the process and ought to be struck out; the petitioner has raised issues of interpretation and application of the Constitution in all proceedings before the superior courts and all the matters of law raised by the respondent in its application are duly and comprehensively addressed in the appellant's petition; the respondent has consistently sought to silence the appellant by erecting jurisdictional hurdles and procedural technicalities to avoid the determination of the substantive issues by courts; and
 12. Upon Further considering the appellant's submissions in reply to the intended interested party and the respondent's submissions in support of their motions wherein it reiterates the contents of its pleadings and submissions; and
 13. Having considered the applications, responses, and submissions before us,
We now opine as follows:
 - i. This court has previously settled the twin questions of whether both the Court of Appeal and the Supreme Court are vested with the jurisdiction to hear and determine appeals arising out of arbitration disputes. Particularly, in Geo Chem Middle East case (*supra*) we held that, in determining the above questions, the court has to first evaluate whether the contested issues in the petition were issues of constitutional controversy that had been substantively determined by the High Court and the Court of Appeal.



- ii. In applying the above finding to the present matter, we note that the appellant invoked the provisions of articles 50, 149, and 165 of the Constitution in its first application which sought to review the orders of Ochieng’ J. To contextualize matters, in his ruling, the learned judge declined the invitation by the appellant to remove the Arbitrator and annul the arbitration proceedings finding that the application had been made after the final award had been delivered and the Arbitrator could not be condemned unheard. Mwongo J in a decision delivered on 2nd May 2017- on review of Ochieng J’s orders - declined to interpret or apply any provisions of the Constitution and instead stated that reliance on articles 50, 149 and 165 aforesaid was untenable and that it was debatable whether, a decision of the court made under section 14 of the Arbitration Act could be reviewed, and whether section 3A of the Civil Procedure Act, as invoked by the appellant, was also applicable to proceedings under section 14. Therefore, the High Court specifically Mwongo J only tangentially touched on the constitutional issues raised but did not meaningfully interpret or apply the Constitution. In the original application before Ochieng J which triggered the one before Mwongo J, Ochieng J did not once refer to the Constitution in his ruling.
- iii. In disposing of the third and fourth applications, Tuiyott J (as he then was) delivered rulings on April 13, 2018 and December 7, 2018. In the said rulings, the learned judge found that the issues raised before him - on the alleged bias and partiality of the Arbitrator - ought to have been raised before Ochieng J and once they were not, then he was not minded to give them any consideration. He added that, in any event, the Arbitrator conducted the proceedings fairly and ought to be commended and not condemned. All these issues, which are the main subject of the appeal before us, did not involve the interpretation and application of the Constitution in the manner expected by article 163(4)(a) of the Constitution.
- iv. The record also shows that the Court of Appeal did not interrogate any issues involving the interpretation and application of the Constitution at all. In its judgment, the court delineated two issues for determination; whether failure by the appellant to seek leave to appeal rendered the appeal incompetent and whether the three appeals before it fell within the ambit of the exceptional circumstances contemplated by the Nyutu case (*supra*) in any appeal arising from an application to set aside an arbitral award under section 35 of the Arbitration Act. In disposing the above issues, the Court of Appeal held that the appellant never sought and obtained leave either from the High Court or the Court of Appeal before filing its appeal and therefore dismissed Civil Appeal No 159 of 2020. In doing so, it also observed that a decision not anchored on section 35 of the Arbitration Act is not appealable to the Court of Appeal thus dismissing Civil Appeal Nos 158 and 160 of 2020.
- v. Therefore, in line with the guiding principles set in Lawrence Nduttu & 6000 Others v Kenya Breweries Ltd & another SC Petition No 3 of 2012; [2012] eKLR the issues before the superior courts did not involve the interrogation of any constitutional question(s) that rose through the normal appellate mechanism to enable this court exercise its jurisdiction on the interpretation and application of the Constitution under article 163(4)(a) of the Constitution.
- vi. Furthermore, in Nyutu Agrovet Ltd case (*supra*) we stated as follows: “Reading each of the above provisions, alleged breaches of the Constitution cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of the Constitution are properly governed by Articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the Arbitration Act.”



- vii. In *Synergy Industrial Credit Limited v Cape Holdings Limited* SC Petition No 2 of 2017 [2019] eKLR (Synergy case) we also stated:

“Generally, therefore, once parties agree to settle their disputes through arbitration, the arbitral tribunal should be the core determinant of their dispute. Once an award is issued, an aggrieved party can only approach the High Court for setting aside the award, only on the specified grounds. And hence, the purpose of Section 35 is to ensure that courts are able to correct specific errors of law, which if left alone would lead to a miscarriage of justice. Therefore, even in promoting the core tenet of arbitration which is a quicker and efficient way of settling commercial disputes, that should not be at the expense of real and substantive justice. In the interest of safeguarding the integrity of the administration of justice and particularly in the absence of an express bar we, like the House of Lords in *Inco Europe Ltd & others (supra)*, hold that the Court of Appeal should have residual jurisdiction but only in exceptional and limited circumstances”.

- viii. The court, in addressing appeals arising from section 35 of the *Arbitration Act*, added as follows in the *Synergy* case (*supra*):

“An arbitral award may be set aside by the High Court only if-

- a. the party making the application furnishes proof-
 - i. that a party to the arbitration agreement was under some incapacity; or
 - ii. the arbitration agreement is not valid under the law to which the parties have subjected it to or, failing any indication of that law, the laws of Kenya; or
 - iii. the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
 - iv. the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decision on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
 - v. the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or



- vi. the making of the award was induced or affected by fraud, bribery, undue influence or corruption;
 - b. the High Court finds that-
 - i. the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or
 - ii. the award is in conflict with the public policy of Kenya.”
 - ix. In view of the above holding and our findings in this ruling, it is our considered opinion that this court does not have jurisdiction under article 163(4)(a) of the Constitution to hear and determine the present appeal as the matters before the superior courts did not involve interpretation and application of the Constitution at all. The issues relating to the conduct of the Arbitrator and the arbitral proceedings which were at the core of the applications before the High Court cannot by any shade of imagination translate into issues requiring the interpretation of the Constitution. Furthermore, the appellant’s case has not met the criteria set in the Synergy case (*supra*) to have enabled either the Court of Appeal or this court to have jurisdiction to entertain the same. As a consequence, Petition No E027 of 2023 is struck out for want of jurisdiction.
 - x. Having struck out Petition No E027 of 2023 it follows that the applications seeking joinder of the intended interested party and leave to exceed the page limit of the appellant’s submissions are rendered otiose.
 - xi. It is settled that costs follow the event, but the court may in appropriate cases exercise discretion and with good reason, decide otherwise as was held by this court in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others, SC Petition No 4 of 2012; [2013] eKLR. The respondent being the successful party, is entitled to costs. The appellant shall therefore bear the costs incurred by the respondent. The intended interested party shall bear the costs of his application.
14. Accordingly, we make the following orders:
- a. The notice of motion dated October 9, 2023 is hereby allowed.
 - b. Petition No E027 of 2023 is hereby struck out.
 - c. The notice of motion dated October 6, 2023 is hereby struck out.
 - d. The notice of motion dated October 12, 2023 is hereby struck out.
 - e. We hereby direct that the sum of Kshs 6000/- deposited as security for costs in the appeal herein be refunded to the appellant.
 - f. The appellant shall bear the costs of the application dated October 9, 2023 and the same shall be paid to the respondent only. The intended interested party shall bear his costs.

15. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF DECEMBER, 2023.

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P.M MWILU



DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

