Thika Coffee Mills v Rwama Farmers Co-operative Society Limited (Application 11 of 2020) [2020] KESC 17 (KLR) (4 September 2020) (Ruling)

Thika Coffee Mills v Rwama Farmers Co-Operative Society Limited [2020] eKLR

Neutral citation: [2020] KESC 17 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

APPLICATION 11 OF 2020

DK MARAGA, CJ, PM MWILU, DCJ & V-P, MK IBRAHIM, SC WANJALA & I LENAOLA, SCJJ

SEPTEMBER 4, 2020

BETWEEN

THIKA COFFEE MILLS ..... APPLICANT

AND

RWAMA FARMERS CO-OPERATIVE SOCIETY LIMITED ..... RESPONDENT

(Application for leave to appeal to the Supreme Court against the judgment by the Court of Appeal at Nairobi (Makhandia, Kiage & M'Inoti, JJA) delivered on the 12th October 2018 in Nairobi Civil Appeal No.251 of 203 AND in the matter for application for certification being Court of Appeal Civil Application No.389 of 2018 (UR 316 of 2018))

A litigant could not introduce arguments specific to certification at the review stage before the Supreme Court devoid of any determinations made by the other superior courts

The applicant sought various orders including leave to file the application out of time and review of the refusal to grant certification by the Court of Appeal. The court held that a litigant could not introduce arguments specific to certification at the review stage before the Supreme Court devoid of any determinations made by the other superior courts.

Reported by Chelimo Eunice

Civil Practice and Procedure *– review – review of the Court of Appeal decision by the Supreme Court – time within which to file an application for review of certification at the Supreme Court – application to extend time within which to file an application for review – claim that the delay in filing the application was attributed to the challenges that arose due to outbreak of the covid-19 pandemic – whether the Supreme Court would extend time in the circumstances.*

Civil Practice and Procedure *– review – review of the Court of Appeal decision by the Supreme Court – application for review of certification at the Supreme Court- whether a litigant could introduce arguments specific*

to certification at the review stage before the Supreme Court devoid of any determinations made by the other superior courts – whether the court could review a claim that the arbitrator exceeded its mandate beyond the pleadings and that the decision was contrary to public policy – what was the difference between a matter being one of general public importance and addressing a specific litigant's disagreement with a decision of a court.

Brief facts

The applicant sought various orders including leave to file the application out of time and review of the refusal to grant certification by the Court of Appeal. The applicant explained that the delay in filing the application was attributed to the confusion that arose in the wake of the covid-19 pandemic which occasioned challenges. Such challenges related to the mode of delivery of rulings by the respective courts and the restriction in movements into and out of Nairobi City County which affected the deponent's ability to travel from Nyeri to the applicant's counsel's office in Nairobi.

On certification, the applicant argued that a patently wrong arbitral award conclusion warranted the Supreme Court's intervention. The respondent opposed the application arguing, among other arguments, that no matter of general public importance was involved to warrant the intended appeal.

Issues

i. Whether the Supreme Court could extend time for filing an application for review where the delay was attributed to challenges that arose due to outbreak of the covid-19 pandemic.
ii. Whether a litigant could introduce arguments specific to certification at the review stage before the Supreme Court devoid of any determinations made by the other superior courts.
iii. Whether the Supreme Court could review a claim that the arbitrator exceeded its mandate beyond the pleadings.
iv. What was the difference between a matter being one of general public importance and a matter that addressed a specific litigant's disagreement with a decision of a court?

Held

1. An application for review of certification ought to be filed within fourteen days under the Supreme Court Rules. The court was satisfied with the explanation given by the applicant and accordingly allowed the prayer for extension of time as sought.
2. The applicant had to demonstrate satisfactorily that there was, *inter alia,* a legal question, the subject matter of which transcended the litigants. There was no fault in the position adopted by the Court of Appeal in reducing the applicant's grounds of appeal into three and collapsing them into one, that involving the jurisdiction of the High Court and Court of Appeal under section 35 of the Arbitration Act. The Court of Appeal's reasoning was that those questions did not come through the court hierarchy and were therefore not subject to decisions, the basis upon which the intended appeal could lie.
3. At no point did the High Court or the Court of Appeal consider the jurisdiction or statutory provisions relating to the Co-operative Tribunal. That issue was not the basis of the application filed by the applicant to set aside the award during the hearing, as noted by the High Court in its ruling, the applicant clarified that it was not seeking to appeal the decision of the arbitrator on its merit but rather to set it aside within the parameters of section 35 of the Arbitration Act.
4. The applicant could not introduce arguments specific to certification at the instant stage devoid of any determinations made by the superior courts. Doing so would amount to the Supreme Court exercising original jurisdiction on the matter as opposed to settling a matter certified as being of general public importance in an appellate capacity contemplated under article 163(4)(b) of the Constitution.
5. The applicant's grievance largely revolved around the arbitrator having exceeded its mandate beyond the pleadings and the decision being contrary to public policy. Those were parameters well covered under section 35 of the Arbitration Act and were invoked by the applicant before the High Court at the first instance. To pursue the applicant's argument as proposed would result in an extension of the

scope of section 35 of the Arbitration Act to include perceived wrong inferences of fact made by the arbitrator. That could only be best captured if the arbitration award was to be considered on its merits, by way of appeal including that contemplated under section 39 of the Arbitration Act and not by way of setting aside proceedings.

6. The parameters of setting aside an arbitral award under section 35 of the Arbitration Act were very specific and offered sufficient recourse to be resorted to by any party aggrieved by the arbitral award where the grievance met the criteria.

7. There was a difference between a matter being one of general public importance and a matter that addressed a specific litigant's disagreement with a decision of a court. It was only the issues that were certified as being of great public importance that formed the basis for submissions and ultimately the decision of the court. To frame certain issues as being of great public importance at the point of certification under article 163(4)(b) of the Constitution and then submit on issues that were specific to the parties at hand with no public element exhibited was an abuse of court process and would lead to the dismissal of an appeal. Each case was to be determined on its own merit. The instant case did not merit the certification sought and the Court of Appeal position was affirmed.

Application dismissed with each party bearing own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

Introduction

1. By an Originating Motion application dated 21st May 2020, the applicant seeks the following prayers: -

   a) That this application be certified as urgent and heard ex parte in the first instance;

   b) That this Court extend time for filing of this application, having been filed 6 days beyond the 14 days, from the date of delivery of Court of Appeal ruling, stipulated under the Supreme Court Rules, 2020.

   c) That this Court do certify this matter as of utmost public importance under Section (sic) 163(4)(b) of the Constitution on the basis that a matter or matters of general public importance is /are involved in the intended appeal to the Supreme Court against the judgement and orders of 12th October 2018, by the Court of Appeal (Makhandia, Kiage & M'Inoti, JJ.A) in Civil Appeal No.251 of 2013.

   d) That upon grant of such leave and subsequent successful review, this Honourable Court be pleased to set aside the ruling of the Court of Appeal (Makhandia, Kiage & M'Inoti, JJ.A) delivered on the 24th April 2020 in Nairobi Court of Appeal Civil Application Number 389 of 2018 and substitute therefore with an order allowing the Notice of Motion dated 24th of December 2018.

   e) That consequently, the applicant be granted leave to appeal to the Supreme Court against the judgement and orders of the Court of Appeal of (Makhandia, Kiage & M'Inoti, JJ.A) delivered on the 12th October 2018.

f) That costs be in the cause.

2. The application is based on the grounds on the face of the application and supported by affidavits of Prof. Tom Ojienda SC, Advocate, and Pius Ngugi. The grounds are:

a) That the judgment of the Court of Appeal is wrong, erroneous and against the law under the relevant Statutes and Constitution of Kenya 2010.

b) That by this application, the applicant's inquiry which it seeks to have determined at the Supreme Court is whether the Arbitrator's award is insulated from inquiry even where in the facts proved before the arbitrator he fails to draw an inference which he ought to have drawn, or where he has drawn an inference which is on the face of it, untenable, resulting in miscarriage of justice.

c) That the Applicant is not advocating for widening of the scope for Court's intervention and review of awards made in Kenya which would make Kenya unattractive as a seat of arbitration and violate Kenya's international obligations under the Convention on the Recognition and Enforcement of Foreign Arbitration Awards, 1958 (the New York Convention), among others, for which Kenya is a party.

d) That the application has been filed six days past the fourteen days limitation period from the date of delivery of the ruling of the Court of Appeal for the following reasons;

i. Due to Covid 19, the course listing challenges created a confusion as to when the ruling by the Court of Appeal would be delivered, thus the ruling came to the Applicant's attention way after it was delivered occasioning delays in issuing instructions to apply for this review;

ii. The applicant's authorized signatory had been locked out of Nairobi by the movement restrictions and was not available to depone the affidavit until a transit permit was obtained from the relevant government department to enable him travel from Nyeri to hisCounsel's office at Nairobi.

e) That the applicant prays that a certificate under section 163(4)(b) of the Constitution does issue on the basis that matters of general public importance are involved in the intended appeal to the Supreme Court against the judgement and orders of the Court of Appeal;

f) That the Court of Appeal in its ruling dismissed the majority of the questions intended to be placed before Supreme Court because it rendered them those which should not rise to the Supreme Court;

g) That the main question as to whether the Arbitrator's award is insulated from inquiry even where in the facts proved before the arbitrator he fails to draw an inference which he ought to have drawn, or where he has drawn an inference which is on the face of it, untenable, resulting in miscarriage of justice was mischaracterized into a narrow jurisdictional question to which law is settled.

h) That courts in India and elsewhere have made a distinction on circumstances in which a court of law may delve into the merit of an arbitral award.

i) That the matter sought to be certified arose from determination of the Court of Appeal in the case and not out of the argument or discussions at the hearing.

j) The applicant is challenging the interpretation of Article 159 and Sections 35 and 37 of the Arbitration Act which the court of appeal used to dispose of the matter in that forum.

k) That the intended appeal is necessary as a substantial miscarriage of justice might have occurred or may occur unless the said appeal is heard the judgment in the Court of Appeal will not only gravely affect the applicant but could result to the collapse of the coffee farmers and coffee co-operative societies.

3. In effect, the applicant seeks leave to file the application out of time and to review of the refusal to grant certification by the Court of Appeal.

Applicant's case

4. The applicant filed its submissions on the 29th May 2020 and its supplementary submissions on 22nd June 2020, reiterating the grounds in support of the application. The application is made in line with the decision in Sum Model Industries Ltd V Industrial and Commercial Development Corporation , Sup. Ct. Civil Application No.1 of 2011 , as is now required under Rule No.33 (1) of the Supreme Court Rules, 2020 the applicant having first unsuccessfully sought certification from the Court of Appeal.

5. Among other questions, the applicant's aberrant question subject to certification is "whether the High Court, on an application under Section 35 of the Arbitration Act, 2009 Laws of Kenya, can examine the merits of an arbitral award, in deserving cases." The applicant contends that the Arbitrator acted outside his jurisdiction by adjudicating over issues not within his terms of reference. The applicant refers to the case of Safaricom Ltd v Ocean View Beach Ltd , Civil Case No.327 of 2009, where it was held that extraordinary wrongs call for extra ordinary remedies. Thus, there has to be remedy for patently wrong arbitral award conclusions. That this Court should grant the leave sought because a substantial miscarriage of justice will occur if the intended appeal is not heard.

6. The applicants submit that the intended appeal meets the criteria set in Hermanus Philipus Steyn v Giovanni Gnecci-Ruscone Sup. Ct Civil Application No. 4 of 2012 and Malcolm Bell v Hon. Daniel Toroitich arap Moi and Another Sup. Ct Appl. No.1 of 2013. The applicant argues that factually and pragmatically, the cardinal issues for certification can only arise when an application is made for certification and that it would be impracticable to canvass issues of certification at any other juncture. Further, that this Court's jurisdiction to review certification is not akin to entertaining a second appeal as contended by the respondent but rather an original jurisdiction under the Constitution.

7. The applicant concludes that indeed where the arbitration award is so manifestly wrong and has completely closed the door of justice to either of the parties then the Court must be able to interfere irrespective of the grounds set out in section 35 of the Arbitration Act.

Respondent's case

8. The respondent opposes the application through submissions filed on 9th June 2020 and further submissions filed on 24th June 2020 respectively and submits that the application should be dismissed with costs. It fully agree with the ruling of the Court of Appeal that no matter of general public importance is involved to warrant the intended appeal as sought by the applicant. That in any event, a matter of general public importance even when involved is not a direct ground of appeal to the Supreme Court in Arbitral litigation as held in the Nyutu Agrovet Limited v Airtel Networks Kenya Limited;Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR (Nyutu Decision) in which this Honorable Court extensively addressed its mind on the role of the High Court

and the Court of Appeal under section 35 of the Arbitration Act and settled the law on the matter. That the intended appeal would ideally be inviting the Court to rehash the decision which is barely six months old.

9. The respondent urges the Court to find that in the instant case, the High Court and the Court of Appeal in considering factual merits and demerits of the Arbitral Award violated the principle of finality of arbitral awards and amounts to the Courts assuming the seat of arbitration which conducted the proper trial. The respondent refers to the Singapore High Court case of AKN & Ano. v ALC & Others Appeals 2015 SGCA 18 , quoted with approval at paragraphs 68-72 of the Nyutu Decision (supra) , that an Arbitral Award cannot be challenged in Courts on its merits and that '.... the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award but which through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration.'

10. The respondent asserts that litigation must come to an end especially when it is arbitration related noting that this matter was a court referred arbitration after the High Court Civil Suit No.836 of 2003 was compromised vide the consent order made on 7th January, 2009. It has been more than twenty years since the dispute arose in 1996 when the Arbitration Act was barely a year old, more than seventeen years since the High Court case was filed, eleven years since arbitration commenced and more than seven years in the courts post Arbitral Award. The time involved does not support the objectives for which the Arbitration Act was enacted as a quicker way of settling commercial disputes. As a result, that the applicant has caused the respondent's members who are small scale coffee farmers a lot of anguish, anxiety and loss of money through protracted litigation spanning two decades over coffee deliveries they faithfully delivered to it collectively through the respondent and the respondent should be allowed to enjoy fruits of their partially successful litigation.

Issues for determination

11. We have considered the application and the respective submissions and distill the following issues for determination:

    a) whether to extend time within which to file this application

    b) whether to review the Court of Appeal ruling on certification of the matter as that involving great public importance.

Analysis

12. On perusing the record, we noted that the respondent, further to its submissions presented a document titled "Respondent's Further Submissions and Clarification" dated 24th June 2020 ostensibly in response to the applicant's supplementary submissions. This is much to the chagrin of the applicant who on its part authored, through its Advocates on record, a letter dated 26th June 2020 to this Court's Honourable Deputy Registrar urging that the document be purged from the record as it is filed without any basis under this Court's Rules.

13. As the letter has been placed in the record before us, we move to address the same at this juncture before delving into the issues as framed for determination.

    We are mindful of this Court's Rules and whether the applicant had written the letter or not, we see no basis to consider the said document. The record before us is on the basis of documents filed regularly within the Rules ending with the applicant's supplementary submissions. This is what we have considered for their full tenor and effect. The respondent need not be apprehensive and in

the process cast aspersions on the Court's ability to comprehend the record before it as to require clarification from the respondent or its counsel. We need not belabor this and leave it at that.

i) Extension of time

14. On the first issue, it is common ground that the application for review of certification such as this one before us ought to be filed within fourteen days under this Court's Rules. It is also not in contention that the ruling on certification was made on 24th April 2020 and that this application was filed on 21st May 2020. The respondent does not appear to object to this prayer as they have not addressed it in their submissions. The delay by the applicant is attributed to the confusion that arose in the wake of the COVID-19 pandemic which occasioned challenges. Such challenges related to the mode of delivery of the rulings by the respective courts and the restriction in movements into and out of Nairobi City County which affected the deponent's ability to travel from Nyeri to the applicant's Counsel's office in Nairobi. We are satisfied with the explanation given by the applicant and accordingly allow the prayer for extension of time as sought.

ii) Review of certification

15. As for certification, we reiterate that the applicant has to demonstrate satisfactorily that there is, inter alia, a legal question the subject matter of which transcends the present litigants. From the record before us, we note that while the applicant had initially framed eleven questions to be certified as involving great public importance, and the applicant seeks the substitution of the Court of Appeal with the granting of prayers sought in the said application for certification as presented before the Court of Appeal, the Court of Appeal reduced them into three and collapsed them into one – that involving the jurisdiction of the High Court and Court of Appeal under section 35 of the Arbitration Act. The Court of Appeal's reasoning was that those questions did not come through the Court hierarchy and were therefore not subject to decisions the basis upon which the intended appeal could lie.

16. We have followed the decisions of the High Court and Court of Appeal and find no fault in the position adopted by the Court of Appeal in that respect. At no point did the High Court or the Court of Appeal consider the jurisdiction or statutory provisions relating to the Co-operative Tribunal. That issue was not the basis of the application filed by the applicant to set aside the award during the hearing, as noted by the High Court in its ruling, the applicant clarified that it was not seeking to appeal the decision of the arbitrator on its merit but rather to set it aside within the parameters of section 35 of the Arbitration Act.

17. We do not also find merit in the applicant's arguments that it could introduce arguments specific to certification at this stage devoid of any determinations made by the superior courts. Doing so as submitted by the applicant would amount to our exercising original jurisdiction on the matter as opposed to settling a matter certified as general public importance in an appellate capacity contemplated under Article 163(4)(b) of the Constitution.

18. The applicant did not aggressively pursue the other questions framed before the Court of Appeal especially relating to the Co-operatives Tribunal or the applicable statutory provisions and instead focused on the power to set aside an Arbitration Award under section 35 of the Arbitration Act. However, if we understood the applicant correctly, its argument is that whereas the Nyutu Decision (supra) addressed itself to the right to appeal against an arbitral award under section 35 both to the High Court and to the Court of Appeal and the exercise of the Court's jurisdiction under those provisions, the present application is distinguishable in that it seeks to interrogate the extent to which the Court must be able to interfere with the arbitrator's award irrespective of the grounds set out in section 35 aforementioned.

19. While we get the applicant's distinction, we dealt with section 35 at length in the Nyutu Decision (supra). The applicant's grievance, as we perceive it, largely revolves around the arbitrator having exceeded its mandate beyond the pleadings and the decision being contrary to public policy. These in our view are parameters well covered under section 35 and were in fact invoked by the applicant before the High Court at the first instance. The said provisions are reproduced are as follows:

> 35. Application for setting aside arbitral award
>
> (2) An arbitral award may be set aside by the High Court only if—
>
> (a) the party making the application furnishes proof—
>
> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside
>
> (b) the High Court finds that –
>
> (ii) the award is in conflict with the public policy of Kenya" (Emphasis ours)

20. We note that the Court of Appeal stayed its decision until after the determination in the Nyutu Decision (supra) by this Court. Upon that determination, the Court of Appeal by majority decision, rightly so, admitted the appeal and considered the High Court's decision on its merit reviewing the High Court's findings on whether the arbitrator had gone beyond his scope and determined un-pleaded issues or whether there was any conflict with public policy.

21. We infer that the applicant is aggrieved by the specific finding as it relates to its case. This is separate from a claim that there are no sufficient parameters for redress as to warrant a further articulation by this Court. To pursue the applicant's argument as proposed would result in an extension of the scope of section 35 to include perceived wrong inferences of fact made by the arbitrator. This can only be best captured if the Arbitration Award were to be considered on its merits, by way of appeal including that contemplated under section 39 of the Arbitration Act and not by way of setting aside proceedings as presently invoked. The parameters of setting aside under section 35 are very specific and offer sufficient recourse to be resorted to by any party aggrieved by the arbitral award where the grievance meets the criteria. This is more so in the wake of our position in the Nyutu Decision (supra).

22. It becomes critical for us to draw the line between the matter being one of general public importance and addressing a specific litigant's disagreement with a decision of the Court, and in this case the Court of Appeal. We reiterate our caution in our judgment in Dhanjal Investments Limited v Kenindia Insurance Company Limited Sup Ct. Petition No.7 of 2016 thus:

> (67) Having so stated, we must at this point remind parties that it is only the issues that are certified as being of great public importance that must form the basis for submissions and ultimately the decision of this Court. To frame certain issues as being of great public importance at the point of certification under Article 163(4)(b) of the Constitution and then submit on issues that are specific to the parties at hand with no public element exhibited is an abuse of Court process and may lead to the dismissal of an appeal."

We further add that each case is to be determined on its own merit. The present case does not merit the certification sought and we affirm the Court of Appeal position.

23. In order to bring closure to these proceedings spanning over two decades and owing to our finding on certification, we see no reason to burden the applicant with meeting the costs of the respondent. Each party to bear its own costs.

24. In the end we make the following Orders:

    a) The originating motion dated 21st May 2020 is hereby disallowed.

    b) Each party to bear its own costs relating to this application.

    It is so ordered

DATED and DELIVERED at NAIROBI this 4th of September , 2020.

D. K. MARAGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

M.K. IBRAHIM

JUSTICE OF THE SUPEME COURT

S.C. WANJALA

JUSTICE OF THE SUPEME COURT

I. LENAOLA

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA