# REPUBLIC OF KENYA

## IN THE SUPREME COURT OF KENYA

*(Coram: Mwilu DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)*

**PETITION NO. 47 OF 2019**

**–BETWEEN–**

**GEO CHEM MIDDLE EAST.....PETITIONER**

**–AND–**

**KENYA BUREAU OF STANDARDS.....RESPONDENT**

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*(Being an Appeal from the Judgment and Orders of the Court of Appeal at Nairobi* ***(Lady Justice W. Karanja, Lady Justice F. Sichale & Lady Justice J. Mohammed, JJA)*** *dated* ***22nd November, 2019*** *in Civil Appeal No. 259 of 2018)*

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# JUDGMENT OF THE COURT

## A. INTRODUCTION

**[1]** The Petition of Appeal before the Court is dated 17th December, 2019 and lodged on the 18th December 2019. It is brought under the provisions of Article 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act, 2011 and Rules 9(1) and 33(2) of the Supreme Court Rules, 2012 (repealed). The Petitioners seek to challenge the Judgment of the Court of Appeal *(Karanja, Sichale & Mohammed, JJA)* in **Civil Appeal No. 259 of 2018** delivered on 22nd November 2019.

## B. BACKGROUND

**[2]** On 5th June 2009, the Petitioner and the Respondent entered into a three (3) year contract, wherein the Petitioner was contracted to provide qualitative and quantitative inspection and testing services of imported petroleum products with effect from 6th July 2009. Upon expiry of the contract, the parties had the option of renewing the contract for a further period of three (3) years. Pursuant to the contract, the Petitioner alleges that, it established a petroleum inspection facility at the Port of Mombasa which was launched on 27th August 2009 and subsequently commenced provision of the contracted services.

**[3]** Despite allegedly providing these services, the Petitioner did not receive any payments from the marketers. The Respondent, it is said, in a letter dated 7th January 2010 through the Minister for Industrialization then wrote to the Minister for Finance and Deputy Prime Minister seeking authority for the Kenya Revenue Authority (KRA), as the competent authority, to collect fees from the oil marketers on behalf of the Respondent. KRA accepted the appointment and confirmed so in a letter dated 24th February 2010. In a further letter dated 25th February 2010, KRA informed oil marketers that, with effect from 1st March 2010, it would be collecting the Petroleum Inspection Fees on behalf of the Respondent. In its letter dated 23rd March 2012 addressed to KRA, the Respondent sought to have the fees which had by then been collected on its behalf remitted to it to meet its obligation with the Petitioner, it is contended.

**[4]** On 23rd October 2012, the Permanent Secretary for Industrialization, by a letter addressed to the Permanent Secretary in the Ministry of Finance, acknowledged that KRA had remitted the amount collected on behalf of the Respondent to the National Treasury. In the letter, the Permanent Secretary requested the National Treasury to remit the monies collected to the Respondent

as monies due to the Petitioner for services rendered. The Respondent did not remit the funds to the Petitioner.

**[5]** By a letter dated 26th March 2012, the Respondent informed the Petitioner that the Government had "suspended" the contract until further notice. The contract only provided for termination under Clauses 7.1 – 7.3 thereof with a six (6) months' notice period. In the event of *force majeure*, the Respondent was obligated to issue a 14 days' notice declaring the occurrence of a *force majeure* event under Clause 6.6. No notices under any of those Clauses were issued to the Petitioner and on 25th June 2013, the Petitioner therefore made a claim from the Respondent for the outstanding fees for services rendered. In response thereto, the Respondent, on 15th July 2013, informed the Petitioner that the contract stood terminated upon the lapse of sixty (60) days from 26th March 2012 when the "suspension" notice was issued. Arbitration proceedings as envisaged by the contract were then commenced.

*i) Proceedings at the arbitral tribunal*

**[6]** The Petitioner, aggrieved by the turn of events, instituted a claim against the Respondent for, *inter alia*, breach of contract through a letter dated 4th February 2015, and in accordance with Clause I, Part 2 of the contract, which provided for dispute resolution through arbitration. In a letter dated 10th March 2015, the Petitioner then appointed Mr. John Ohaga as its arbitrator, whilst the Respondent appointed Ms. Njeri Kariuki as its arbitrator. Both arbitrators thereafter appointed Mr. Collins Namachanja, in accordance with Clause 3 of the contract, as the Chairperson of the arbitral tribunal.

**[7]** The Petitioner's claim before the arbitral tribunal was for the sum of USD 2,487,784.24 being unpaid invoices for services rendered, USD 468,629.12

incurred in equipping a laboratory, USD 1,207,150.91 in expenses incurred in setting-up operations at the Port of Mombasa, USD 16,989,356.76 in income lost as a result of suspension of the contract and interest on each of the claimed amounts from 1st April, 2010 until payment in full. The Respondent filed a counterclaim for Kshs. 947,640, 169.87 being unremitted royalties of Kshs. 699, 365, 439.2 plus interest at the rate of 5%.

**[8]** Upon considering the claim and counterclaim by the Petitioner and Respondent respectively, the arbitral tribunal in its award dated 29th July 2019 found that the alleged *"suspension"* of contract *"until further notice"* did not constitute termination as envisaged under the contract, and neither did the same constitute notice of occurrence of a *force majeure* event as stipulated in Clause 6.6 of the contract. The tribunal also found that the Respondent had unlawfully terminated the contract and was thus liable for the losses incurred by the Petitioner during the alleged suspension of the contract from 26th March 2012. The tribunal, in determining the dispute, awarded the Petitioner the sum of USD 8, 591, 139/- in respect of the remaining contract period of twenty-nine (29) months as well as USD 3,687,437.21 inclusive of interest and Valued Added Tax for services rendered, and upon deduction of royalties due and owing.

*ii) Proceedings at the High Court*

**[9]** Both parties thereafter filed applications at the High Court. The Petitioner, by **Nairobi High Court Misc. Application No. 501 of 2016** dated 17th October 2016 and filed on 7th November 2016, sought to have the Court recognize and enforce the arbitral award. The Respondent on its part, filed **Nairobi High Court Misc. Application No. 455 of 2016,** dated 30th September 2016 on 3rd October 2016, seeking orders to set aside the arbitral award pursuant to Section 35 of the Arbitration Act, 2012. The grounds relied upon by the Respondent were that the arbitral tribunal dealt with a dispute not contemplated by, nor falling within,

the terms of the reference to arbitration and further, that the arbitral award contained decisions on matters that were beyond the scope of the reference to arbitration. It also claimed that the award was in conflict with public policy.

**[10]** The two applications were consolidated and determined by *Ochieng, J.* on 30th May 2017. In his determination, the learned Judge held, *inter alia* that;

> ***"[I]t is not the function nor the mandate of the High Court to re-evaluate such decisions of an arbitral tribunal, when the Court was called upon to determine whether or not to set aside an award…if the Court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the Court would be sitting on an appeal over the decision in issue. In light of the public policy of Kenya, which loudly pronounces the intention of giving finality to arbitral awards, it would actually be against the said public policy to have the Court sit on an appeal over the decision of the arbitral tribunal."*** [Paras. 39-41].

**[11]** The learned Judge went on further to pronounce that the Court cannot set aside an award on the grounds that it was unfair, unreasonable or non-feasible, as these grounds are not contemplated by Section 35 of the Arbitration Act. With regard to the question of the jurisdiction of the arbitral tribunal, the learned Judge determined that pursuant to Section 17(5) of the Arbitration Act, a tribunal may choose to determine that question either as a preliminary issue, or at the award stage. The learned Judge then went on to determine that;

> ***"Regrettably, this Court does not have the authority to make an assessment on the merits of the arbitral award.***

***The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the Arbitration Act. Any other intervention by the Court is expressly prohibited by Section 10 of the Act. I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal. In the final analysis, I find no grounds to warrant the setting aside of the arbitral award dated 29th July 2016."*** [Paras. 54-56].

**[12]** The learned Judge thus dismissed the Respondent's application to set aside the arbitral award and instead allowed the Petitioner's application and adopted the arbitral award as a Judgment of the Court pursuant to the provisions of Section 36(1) of the Arbitration Act.

*iii) Proceedings at the Court of Appeal*

**[13]** Aggrieved by the ruling of the High Court, the Respondent filed an appeal to the Court of Appeal in **Civil Appeal No. 259 of 2018**. The substantive appeal was filed pursuant to leave of appeal granted by the appellate Court in **Civil Application No. NAI 132 of 2017** *(Ouko (P), Warsame & Murgor, JJA)* on 31st May 2018. The appellate Court having heard the appeal considered several grounds for appeal, *inter alia; (a) that the learned Judge erred in law in failing to set aside the award made by a tribunal without jurisdiction; (b) that exceeded the terms of reference to arbitration; (c) that conflicted with public policy; and (d) that violated the principles of justice and morality and that is inimical to the interests of Kenya.* [Paras. 20].

**[14]** The Court of Appeal then concluded that there were three (3) issues before it for its determination, namely; (i) *whether or not an appeal lay to the Court from the impugned ruling of the High Court; (ii) whether the arbitral tribunal had jurisdiction;* and *(iii) whether the award was against public policy, and was therefore one for setting aside*. [Para. 47]. With regard to the issue of whether the appellate Court had the jurisdiction to entertain the appeal, the Court reiterated that leave had been granted in **Civil Application No. NAI 132 of 2017**, and that the same had not been set aside and was therefore still valid.

**[15]** On the other two (2) issues considered for appeal, the Court of Appeal, in allowing the appeal and setting aside the ruling of the High Court in its judgment dated 22nd November 2019, held *inter alia*; that the reference and the subsequent constitution of the arbitral tribunal was done outside the time limits prescribed in the contract, specifically at Clause 10 which provided that any dispute regarding termination of the contract would be referred to arbitration within twenty-one (21) days. The appellate Court further held that the issues determined by the arbitral tribunal fell outside its scope pursuant to Section 35(2)(iv) of the Arbitration Act and that the award which imposed a liability on the Respondent, a state corporation, to pay from public funds over Kshs.1Billion without proof of liability was against public policy. That decision was received with dissatisfaction by the Petitioner hence the present appeal.

*iv) Proceedings at the Supreme Court*

**[16]** The Petitioner has come before this Court seeking to challenge the Judgment of the appellate Court on the grounds summarized as follows;

***(a) Whether the failure by the Court of Appeal to adjudicate on the constitutional issue of jurisdiction in*** *limine* ***amounts to a***

***violation of the Petitioner's right to a fair hearing enshrined in Articles 25(c) and 50(1) of the Constitution;***

**[17]** The Petitioner contends, on this issue, that the failure by the Court of Appeal to determine the jurisdiction question violated its non-derogable right to fair hearing. They further contend that the Court failed to protect and promote the tenets of limited intervention by judicial processes as decreed by Sections 10 & 35 of the Arbitration Act, as read with Article 5 of the United Nation Commission on International Trade Law, (UNCITRAL) Model Law as well as Article 159(2)(c) & (e) of the Constitution.

***(b) Whether the failure by the Court of Appeal to first satisfy itself that it was vested with the requisite jurisdiction to entertain the appeal is a dereliction of duty under Article 164(3) as read with Articles 25(c), 50 and 159(2)(c) & (e) of the Constitution;***

**[18]** The Petitioner contends that the Court of Appeal neglected its constitutional duty under Article 159(2)(c) & (e) and 164(3) of the Constitution by failing to determine the question of whether it was vested with the requisite jurisdiction to determine the appeal, and instead concluded that the determination on the issue lay elsewhere. Further, it was the Petitioner's averment that the said Court ought to have either made a determination on the issue, or deferred its decision to abide the outcome of the then pending determination on arbitration matters in this Court. (in reference to ***Nyutu Agrovet Limited v. Airtel Networks Kenya Ltd & Another*** SC Petition No.12 of 2016 [2019] eKLR and ***Synergy Industrial Credit Limited v. Cape Holdings Limited*** Petition No.2 of 2017 [2019] eKLR).

***(c) Whether the dispute taken on appeal from the decision under Section 35 of the Arbitration Act falls within the circumscribed and narrow jurisdiction of the Court of Appeal;***

**[19]** It is contended that the Court of Appeal erred in law in proceeding to hear and determine an appeal in respect of which it lacked the requisite jurisdiction in terms of Article 164(3) of the Constitution, as read with Articles 50 and 159(2)(c) & (e), as well as Sections 10 & 35 of the Arbitration Act and Article 5 UNCITRAL Model Law.

***(d) Whether a Court in determining a dispute within the context of an application under Section 35 of the Arbitration Act as read with Articles 50(1) and 159(2)(c) & (e) of the Constitution is vested with jurisdiction to revisit the factual findings of an arbitral award.***

**[20]** The Petitioner contends that the Court of Appeal erred in qualifying the arbitral tribunal findings of fact. They further argue that the decision by the appellate Court offends public policy of Kenya in so far as it aided the perpetuation of unjust enrichment in favour of the Respondent, and in so doing, acted in a manner that is inconsistent with the guiding principles for exercise of judicial authority in Article 159 of the Constitution.

**[21]** Conversely, the Respondent contended that this Court lacks jurisdiction to hear and determine the instant appeal brought under Article 163(4) of the Constitution as the Judgment by the appellate Court is a pure interpretation and application of a contract between two private parties. They thus argue that there was no determination on any constitutional issue, and therefore nothing can

ascend up the judicial hierarchy within the constraints of Article 163(4) of the Constitution.

**[22]** It also asserted that there was no cogent or justifiable issue brought before this Court within the constitutional limits of Article 163(4) of the Constitution to warrant an invocation of this Court's appellate jurisdiction. In contesting the jurisdiction of this Court to hear and determine this Petition therefore, the Respondent also filed a Preliminary Objection dated 23rd January 2020, in which it was argued that;

> ***(a) This honourable Court lacks the jurisdiction to hear and determine appeals from the Court of Appeal in a decision given under Section 35 of the Arbitration Act;***
>
> ***(b) That the instant appeal falls outside and does not meet the clearly defined threshold for invoking the Supreme Court's narrow appellate jurisdiction defined in Article 163(4) of the Constitution;*** and
>
> ***(c) That the Petition of Appeal raises purely factual issues dating back to the arbitral proceedings, which issues ordinarily have no place in a second appeal filed in the Supreme Court from the High Court decision and which specifically raises no question of constitutional interpretation or application to warrant the Supreme Court intervention in its appellate jurisdiction.***

## C. ANALYSIS AND DETERMINATION

**[23]** Upon consideration of the parties' respective pleadings and both written and oral submissions, we find that the issues arising for determination are; *i) whether this Court is vested with the requisite jurisdiction to hear and determine the instant Petition, ii) whether the Court of Appeal had the jurisdiction to determine the appeal before it. iii) what reliefs are available to the parties?* On the first issue, the Petitioner relied on the provisions of Article 163(4)(a) of the Constitution as well as Section 15(2) of the Supreme Court Act and Rule 33(2) of the repealed Supreme Court Rules, 2012 and argued that this Court was vested with the jurisdiction to hear and determine the question of violation of its rights under Articles 25(c), 50(1) and 159(2)(c) & (e) of the Constitution, and as such, as specifically pertains to the conduct of the appeal by the Court of Appeal.

**[24]** Conversely, the Respondent argues that this Court lacks the jurisdiction to determine the instant appeal as it has not attained constitutional muster. They aver that the issues raised by the Petitioner have not transmuted from issues that involve private arbitration proceedings and contractual obligations to an issue that involves the interpretation and application of the Constitution. They contend that the mere allegation of constitutional impropriety without proper justification and elucidation of the constitutional infringement would not necessitate the intervention of this Court. They thus argue that the Petition of appeal does not satisfy the provisions of Section 163(4) of the Constitution, as there is no constitutional issues underpinning the appeal.

**[25]** In determining the twin questions whether both the Court of Appeal and this Court are vested with the requisite jurisdiction to hear and determine the present dispute, we must refer to our earlier decision in ***Lawrence Nduttu & 6000***

***others v. Kenya Breweries Ltd & 2 others*** SC Petition No. 3 of 2012; [2012] eKRL where we held, *inter alia* as regards our jurisdiction:

> ***"Only those appeals arising from cases involving the interpretation or application of the Constitution can be entertained by the Supreme Court. It is not the mere allegation in pleadings by a party that clothes an appeal with attributes of constitutional interpretation or application…[The] he appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum. Such a party must be faulting the Court of Appeal on the basis of such interpretation. Where the case to be appealed from had nothing or little to do with the interpretation or application of the Constitution, it cannot support a further appeal to the Supreme Court under the provisions of Article 163 (4) (a) (emphasis ours). If an appeal is challenged at a preliminary level on grounds that it does not meet the threshold in Article 163 (4) (a), the Court must determine that challenge before deciding whether to entertain the substantive appeal or not. But the Court need not wait for a preliminary objection before applying the test of admissibility in article 163 (4) (a). It is the Court's duty as the ultimate custodian of the Constitution to satisfy itself that the intended appeal meets the constitutional threshold."*** [Paras. 27-28].

**[26]** Further, in ***S. K. Macharia*, *& another v. Kenya Commercial Bank limited & 2 others*** [2012] eKLR we pronounced ourselves as follows;

> ***"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law…Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."*** [Para. 68]

**[27]** Therefore, and with regard to the question of jurisdiction, we have to first evaluate whether the contested issues in the Petitioner's appeal were issues of constitutional controversy that had been determined by the High Court and later the Court of Appeal. The Petitioner has indeed, and in that context, specifically challenged the Court of Appeal's jurisdiction in hearing and determining the appeal from the High Court's decision with regard to the arbitral tribunal's award.

**[28]** On the question of its jurisdiction to hear and determine the appeal before it, the Court of Appeal in its Judgment in **Civil Appeal No. 259 of 2018** stated *inter alia*, that;

> ***"On the first issue, it is evident from the record that the Appellant herein sought leave of this Court in vide Nairobi Civil Application No. 132 of 2017 in which the Court granted leave to the appellant to lodge the present appeal. Whether the Court was right or wrong in granting the said leave, the same has not been set aside and is therefore still valid. In view of the foregoing, the issue of whether this Court has jurisdiction to entertain the instant appeal or not does not lies for our determination. The determination of that issues lies elsewhere. We acknowledge that it is an issue that has been pending before the Supreme Court for a while but we say no more."*** [Para. 48, Emphasis added].

**[29]** We note that the issue of the jurisdiction of the Court of Appeal was first brought before that Court through the submissions of the Petitioner at the hearing of the Appeal. In its submissions to this Court at paragraph 55, the Petitioner in that context stated thus:

> ***"As can be gleaned from Geo Chem's submissions in the Court of Appeal and the impugned Judgment, Geo Chem raised an issue regarding the jurisdiction of the Court of Appeal to entertain the appeal. Pursuant to the provisions of Article 50(1) as read with Article 25(c) of the Constitution, Geo Chem had a non-derogable right to have that issue resolved by the Court of Appeal."*** [Emphasis added].

**[30]** We further note, from a reading of the Judgment of the Court of Appeal and the submissions before us by the Petitioner that, it can be conclusively determined

that there was no objection to the decision in the application for leave in **Civil Application No. NAI 132 of 2018** by the Petitioner, and therefore, the jurisdiction of the appellate Court to determine the appeal was not initially challenged. It is only at the hearing of the substantive appeal that the Petitioner raised the issue of the jurisdiction of Court of Appeal. It is our view however that it matters not when an objection to jurisdiction is raised because jurisdiction is everything and without it, a Court acts but in vain.

**[31]** What did the Court of appeal then conclude as regards its jurisdiction to hear the appeal before it? At paragraph 48 of its Judgment the Court stated:

> "***Whether the Court was right or wrong in granting the said leave, the same has not been set aside and is therefore still valid. In view of the foregoing, the issue of whether this Court has jurisdiction to entertain the instant appeal or not does not lie for our determination. The determination of that issues lies elsewhere".***

**[32]** Having declined the invitation to determine whether the Court had the requisite jurisdiction to determine the appeal, leave having been granted by the same Court to file it, the *"elsewhere"* referred to above, must be this Court. In that regard, in the Ruling delivered on 31st May 2018, granting leave to file the appeal, the Court of appeal ***(Ouko, (P) Warsame and Murgor JJA)*** had this to say on jurisdiction:

> ***"Although unlike Section 39, Section 35 does not specifically provide that an appeal to this Court will lie from a decision of the High Court setting aside an arbitral award, we reiterate that it does not, in the same breadth,***

***expressly bar a party aggrieved by the setting aside to come to this Court for redress. If the intention was to circumscribe the right to appeal, nothing stopped the Legislature from expressly saying so. It is said in Section 12 (8) that a decision of the High Court to set aside appointment of arbitrator "shall be final and not be subject to appeal". In Section 15(3), that the decision of the High Court to terminate the mandate of an arbitrator "shall be final and shall not be subject to appeal", in Section 16A where the High Court sanctions the resignation of the arbitrator, that decision will be "final and shall not be subject to appeal", and in Section 17(7) that the decision of an arbitral tribunal regarding a question of its own jurisdiction may be challenged in the High Court whose decision "shall be final and shall not be subject to appeal". On the basis of the foregoing, we hold the view that the effect of the decision of the High Court under Section 35 is just as critical as that made under Section 39 because both Sections deal with an award. An award is the final outcome of an arbitration and when it is confirmed, varied, set aside, or remitted to the arbitral tribunal for re-consideration. Parties are bound to be aggrieved. We do not believe it was intended that aggrieved parties be left without recourse to appeal. With that conclusion, we join those who share the view that nothing stops this Court from granting leave to appeal from a decision of the High Court made under Section 35."***

**[33]** The Court of Appeal also made reference to the then existing division within that Court on the above issue and stated that *"as a result of this undesirable situation in law, three Petitions,* ***Nyutu Agrovet Limited*** *(supra),* ***Bia Tosha Distributors Ltd*** *(supra), and* ***Synergy Industrial Credit Ltd*** *(supra) … are pending the consideration and final determination of the Supreme Court".* This Court, on 6th December 2019 rendered Judgments in both ***Nyutu*** and ***Synergy*** thus settling the issue of jurisdiction of the Court of Appeal in Section 35 appeals.

**[34]** In ***Nyutu,*** this Court specifically rendered itself thus:

> ***"[77] 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."***

**[35]** We are aware that the decision in ***Nyutu*** was delivered two or so weeks after the Court of Appeal Judgment in the present matter and so that Court did not have the benefit of the guidance provided by this Court in respect of Section 35 appeals to it.

**[36]** In granting leave to appeal however, we note that the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said section. Later, in the Judgment, however, it stated thus:

> ***"On the issue of jurisdiction, it is a truism that jurisdiction is everything and if a Court or tribunal finds that it lacks jurisdiction to deal with a matter, then it must down its tools. This is why it makes sense for the Court or arbitrator to determine the question of jurisdiction*** *in limine,* ***where jurisdiction is challenged. See Owners of Motor Vessel Lillian S v. Caltex Oil (Kenya) Ltd (1989) KLR 1, and the Supreme Court decision in S. K. Macharia & Another v. Kenya Commercial Bank Limited & 2 others, Sup. Ct. Appl. 2 of 2011, [2012] eKLR. The learned Judge at page 8 of his Ruling stated that none of the parties had raised the issue of jurisdiction. On the contrary, we note from the award itself that the appellant (respondent in the arbitral proceedings) had raised a Preliminary Objection before the tribunal on grounds that the claim was lodged out of time and was therefore bad in law for being time barred".***
> [Emphasis added]

In determining the issue of time bar, the Court went on to state thus:

> ***"In order to determine if the tribunal's appointment/empanelment was time-barred, we need to have a close look at the relevant clauses in the Contract. As stated earlier, under the agreement, there was a requirement of a 14 days' notification of the occurrence of an event of*** *force majeure* ***which would prevent the performance of the Contract. In this case, following the***

***Government suspension of the performance of the Contract, the appellant wrote to the respondent on 26th March, 2010 and informed it of the said decision. There is no dispute that the suspension by the Government was unforeseeable and beyond the appellant's power to remedy. It was an event of*** *force majeure.* ***The appellant argues that pursuant to Clause 7.2 (vii) the contract stood terminated after 60 days of notification of the occurrence of the suspension of the contract by the Government".***

And;

***"That would actually appear to be the position but for one small problem; i.e. that the letter in question had said that the suspension was "until further notice". We do not therefore agree that the Contract stood terminated by 26th June, 2009. In our view, time was not running against the respondent until it was informed of the termination vide the letter dated 15th July, 2013. From the said date, the respondent, who was disputing termination, had to declare a dispute and refer the matter to arbitration within 21 days pursuant to clause 10 of the Contract. This of course did not happen and the dispute was declared and the matter referred to the tribunal almost two years later. We have no hesitation in finding that the reference and appointment of the tribunal was done outside the time limits prescribed in the Contract. Our finding therefore is that the reference was actually time-barred, and the tribunal had no jurisdiction to entertain it".***

**[37]** The Court of Appeal went further to find that:

> i) The arbitral tribunal, by determining the question of the alleged liability of the Respondent to pay 0.2% of fees levied on inspection to the Petitioner, acted outside its scope and contrary to Section 35(2)(iv) of the Arbitration Act.
>
> ii) An award that imposes liability on a State Corporation to pay from public funds over Kshs.1B without proof of liability to pay is clearly against public policy.

**[38]** The Court of Appeal having so held, faulted the High Court for not allowing the setting aside application and stated further, that, as no party had benefitted from the contract, each party should bear its costs.

**[39]** Do the above findings clothe this court with jurisdiction to determine the present appeal under Article 163(4) (a) of the Constitution? In ***Nyutu,*** we assumed jurisdiction to enable us properly interrogate the question whether a party dissatisfied with a Section 35 Ruling can appeal to the Court of Appeal. We settled that question in the manner expressed above. We also resolved the dichotomy of opinions prevalent at the Court of Appeal, at the time, on that issue. We finally remitted the matter back for determination by the Court of Appeal in line with our guidance. The same position obtained in ***Synergy***. Mr. Ngatia, learned Counsel for the Petitioner, strongly submitted that we should not follow those decisions and remit the matter back for consideration by the Court of Appeal. And that we should instead interrogate the Court of Appeal Judgment and make our own findings on it. The latter course of action presupposes that we have the jurisdiction to do so. Do we?

**[40]** We have read the Judgments of the High Court and the Court of Appeal in the context of Article 163(4) (a) of the Constitution. We have also restated the law on our jurisdiction elsewhere in this Judgment. With respect to the Petitioner, not

one issue of constitutional interpretation and application save the jurisdiction of the Court of Appeal to hear and determine the appeal has arisen for our determination. We shall shortly address that issue which we find is grave enough to warrant our assumption of jurisdiction in the present matter. On this basis, we decline the invitation by Mr. Ngatia to delve into the substantive merits of the Judgment of the Court of Appeal. Whether or not the High Court properly applied Section 35 of the Arbitration Act and its findings on the grounds on which setting aside of an arbitral award may be hinged, did not require any interrogation of any constitutional provision.

**[41]** Having so stated, we must reiterate that arbitration is meant to expeditiously resolve commercial and other disputes where parties have submitted themselves to that dispute resolution mechanism. The role of Courts has been greatly diminished notwithstanding the narrow window created by Sections 35 and 39 of the Act. To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in ***Nyutu*** and ***Synergy*** should not be taken as stating anything to the contrary. In this regard, one issue we did not pronounce ourselves on in the ***Nyutu*** and ***Synergy*** decisions, is whether a further appeal lies to this Court from a determination by the Court of Appeal. For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court.

**[42]** On the face of it, the foregoing conclusions ought to dispose of this matter were it not for the yet to be resolved issue as to whether, the Court of Appeal itself, in the present case, properly assumed and exercised jurisdiction in arriving at the

Judgment whose merits we have declined to delve into. This issue arises from the fact that, as opposed to ***Nyutu*** and ***Synergy,*** the High Court in the case leading to the present appeal, declined to interfere with the arbitral award. In fact, the learned Judge (*Ochieng J)* was categorical that the High Court lacked jurisdiction to upset the award, given the strictures of Section 35 of the Arbitration Act, pursuant to which applications before him had been filed. The learned Judge rendered himself thus:

> ***"Regrettably, this Court does not have the authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the Arbitration Act. Any other intervention by the Court is expressly prohibited by Section 10 of the Act. I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal. In the final analysis, I find no grounds to warrant the setting aside of the arbitral award dated 29th July 2016."*** [Paras. 54-56].

**[43]** In granting leave to appeal against this determination by the High Court, the learned Judges of Appeal stated as follows:

> ***"Although unlike Section 39, Section 35 does not specifically provide that an appeal to this Court will lie from a decision of the High Court setting aside an arbitral award, we reiterate that it does not, in the same breadth, expressly bar a party aggrieved by the setting aside to come to this Court for redress.*** [Emphasis added]

Further on, the learned Judges stated:

> "***With that conclusion, we join those who share the view that nothing stops this Court from granting leave to appeal from a decision of the High Court made under Section 35.***"

**[44]** We repeat that, this Ruling was made before the guidance provided by this Court in ***Nyutu*** and ***Synergy*** wherein, we pronounced ourselves as follows in ***Nyutu***:

> ***"[77] 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."***

**[45]** This principle as illuminated in the foregoing quote, is now the governing law regarding appeals from the High Court to the Court of Appeal in arbitration disputes, arising from Section 35 of the Arbitration Act. Our pronouncement in ***Nyutu*** and ***Synergy***, makes it abundantly clear that such appeals are not as open ended as the Court of Appeal appeared to suggest. We shall advert to this issue later. The critical question at this stage is: having granted leave to appeal from the

High Court's decision, what was the fundamental question to be substantively determined by the Court of Appeal?

**[46]** As we have already observed, in this instance, the intended appeal was premiered on the fact that the Petitioner, at that stage, was aggrieved by the refusal of the High Court to exercise jurisdiction and interfere with the arbitral award. In declining to upset the arbitral award, the learned Judge believed that the High Court lacked jurisdiction to do so. Therefore, the only question before the Court of Appeal ought to have been whether the High Court properly declined to exercise jurisdiction under Section 35 or not. In its Judgment, the Appellate Court was simply content to note that, as the leave to appeal granted on 31st May 2018 had not been set aside, the same was still valid. The Appellate Court also made an oblique reference to the pending decisions at the Supreme Court. The learned Judges stated as follows in that regard:

> ***"Whether the Court was right or wrong in granting the said leave, the same has not been set aside and is therefore still valid. In view of the foregoing, the issue of whether this Court has jurisdiction to entertain the instant appeal or not does not lies for our determination. The determination of that issues lies elsewhere. We acknowledge that it is an issue that has been pending before the Supreme Court for a while but we say no more."*** [Para. 48, Emphasis added].

**[47]** In the above context, it is our considered view that, the leave, whether rightly or wrongly granted (an issue to which we shall return) could only have empowered the Court of Appeal to determine whether the High Court ought to have interrogated the arbitral award or not. If it were to determine that the High Court had wrongly declined jurisdiction to so do, the proper and indeed only course of action open to the Court of Appeal, was to remit the matter back to the High Court

with directions that the latter, hears the substantive application for setting aside the arbitral award on its merits. Instead, the Court of Appeal stepped into the shoes of the High Court and proceeded to determine a matter that had not been substantively decided by the latter. In so doing, the Appellate Court usurped the jurisdiction of the High Court, as it was not open to it, to take over an arbitration dispute and determined it on its merits when the High Court had not done so. As is the practice in all other disputes, where an Appellate Court holds that a lower Court has wrongly declined to determine a matter in the *"mistaken"* belief that it lacks jurisdiction to do so, the Court has to remit that matter to the lower Court directing it to exercise its jurisdiction. Only after the lower Court has complied with such an order, would a substantive appeal lie to the Appellate Court.

**[48]** In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.

**[49]** In conclusion, having declined to delve into the merits of the Court of Appeal Judgment for the reasons stated, and having also found that the Appellate Court prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination, what course of action is open to us? To answer this question, we must first address the issue as to whether the leave that triggered these proceedings in the first place, ought to have been granted. Or put another way, had the application for leave to appeal been made after the delivery of ***Nyutu*** and ***Synergy***, would such leave have been likely granted by the Court of Appeal? It is to this question that we must now turn.

**[50]** Towards this end, we have already made two critical observations, firstly, that in granting leave on 31st May 2018, the Court of Appeal *did not interrogate the substance of the intended appeal and whether it fell within the said Section* (read, Section 35 of the Arbitration Act). Secondly, that in granting leave, the Court of Appeal appeared to suggest or must be taken to have been suggesting that such appeals were open-ended. At that time there were two divergent schools of thought at Court of Appeal; the one which argued that appeals lay to the Court from decisions of the High Court and the other which was categorical that no such appeals could lie to the Court. And then came our decisions in ***Nyutu*** and ***Synergy*** of which we shall say no more, save that the window to appeal is severely restricted.

**[51]** The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the Arbitration Act and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or refusing to grant leave to appeal in such matters. 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. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.

**[52]** In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was

granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court.

**[53]** Having so held, what is the appropriate relief to grant the parties? It is our view that the appeal is one for granting but what of costs? Like the Court of Appeal, we deem it fit that each party should bear its costs of the present appeal.

**D. DISPOSITION**

***i) The Appeal herein is allowed as prayed and the Judgment of the Court of Appeal dated 22nd November 2019 is hereby set aside.***

***ii) Each Party shall bear its costs thereof.***

**[54]** It is so ordered.

**DATED** and **DELIVERED** at **NAIROBI** this **18th day** of December, **2020**

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| **P. M. MWILU** | **M. K. IBRAHIM** |
| **DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |

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| ..... | ..... |
| **S. C. WANJALA** | **NJOKI NDUNGU** |
| **JUSTICE OF THE SUPREME COURT** | **JUSTICE OF THE SUPREME COURT** |

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**I. LENAOLA**

**JUSTICE OF THE SUPREME COURT**

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

**REGISTRAR,**

**SUPREME COURT OF KENYA**