REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga; CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 2 OF 2017

—BETWEEN—

SYNERGY INDUSTRIAL CREDIT LIMITED.....PETITIONER

—AND—

CAPE HOLDINGS LIMITED.....RESPONDENT

(Being an appeal from the Ruling of the Court of Appeal at Nairobi ***(Kariuki, Mwilu & Azangalala JJA)*** *in Civil Appeal* ***(Application) No. 81 of 2016*** *delivered on 20th December, 2016)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The Petition before us dated 13th February, 2017 is anchored on Article 163(4)(a) of the Constitution, Section 15(2) of the Supreme Court Act, 2011 and Rules 9 and 33 of the Supreme Court Rules, 2012. The Petitioner appeals the Ruling of the Court of Appeal delivered on 20th December, 2016, in which that Court held that it has no jurisdiction to hear appeals from decisions of the High Court arising from arbitration proceedings seeking to set aside an arbitral award under Section 35 of the Arbitration Act, No. 4 of 1995.

B. BACKGROUND

[2] Approximately 10 years ago, the parties before the Court entered into a partly oral and partly written sale agreement whereby the Petitioner offered to purchase office blocks and parking spaces from the Respondent. Later on, a dispute arose and according to the terms of the agreement, a sole arbitrator was to be appointed to resolve it. By the time the dispute arose, the Petitioner had disbursed a significant amount of money to the Respondent, even though the said office blocks and parking spaces were still undergoing construction.

[3] By an award dated 30th January 2015, the Arbitrator, Mr. James Ochieng Oduol, ordered the Respondent to pay the Petitioner a sum of Kshs.1,666,118,183.00, being the amount of money advanced to the Respondent, accruing interest, loss of income opportunity, exchange fluctuations and costs. Dissatisfied by the award, the Respondent filed an application at the High Court under Section 35(1), 5(2)(a)(iv) & (b)(i) & (ii) of the Arbitration Act seeking to set aside the award. The Petitioner on its part filed an application at the High Court seeking to enforce the award.

[4] Upon considering the matter, the High Court (*Kariuki J*) found that the Arbitrator had acted outside his scope of reference when he invoked the alleged oral agreements between the parties as opposed to confining himself to the 14 written agreements entered into by the parties. Further, that the Arbitrator had unlawfully attempted to re-write the 14 agreements between the parties. On the issue of advance payment, the Court found that the Arbitrator went outside his scope by determining the said issue since he had no authority to investigate the alleged pre-contract negotiations. That further, it was not within the scope of the Arbitrator to determine the issue of loss of income opportunity.

[5] With regard to the award on alleged exchange rate fluctuation loss, the High Court agreed with the Respondent that the Petitioner had decided on its own

volition to borrow money towards the purchase of the office blocks and parking spaces in foreign currency yet the issue was not a term of contract. As such, the Court held that the Arbitrator exceeded his scope and mandate by assessing the foreign exchange loss since the currency used in the agreement was Kenya shillings. The Court also made a finding that the alleged advance payment paid in US Dollars was against public policy since it was neither part of the contract nor was it contemplated by the parties and more so, it went contrary to the law of contract generally.

[6] Consequently, by a Ruling dated 11th March, 2016, the High Court found that all the issues addressed by the Arbitrator fell outside the scope of the reference of the Arbitrator and so it set aside the award in its entirety and dismissed the Petitioner's application for the enforcement of the award.

[7] Dissatisfied by the High Court decision, the Petitioner filed an appeal at the Court of Appeal. In response, the Respondent sought to strike out the Petitioner's Notice of Appeal as well as the Record of Appeal on the grounds that there was no right of appeal from a decision of the High Court arising under Sections 10, 35, 36 and 37 of the Arbitration Act, 1995.

[8] By Ruling delivered on 20th December, 2016, the Court of Appeal *(Kariuki, Mwilu & Azangalala JJA)* upheld the Respondent's application and struck out the Notice of Appeal and the Record of Appeal. It specifically held that save for what is provided in Section 39, there is no right of appeal from decisions of the High Court made pursuant to Section 35 of the Arbitration Act.

[9] Aggrieved by that finding, the Petitioner filed the present Petition of Appeal seeking the following orders:

(a) The appeal be allowed with costs.

(b) *The Ruling and order appealed against be set aside and this Court do make an order: dismissing the Respondent's Notice of Motion application dated 19th May 2016 with costs and reinstating the Notice of Appeal dated 15th March, 2016 together with the Record of Appeal dated 22nd April, 2016 in* ***Court of Appeal Civil Appeal No. 81 of 2016.***

(c) *This Honourable Court do direct for an expeditious hearing and determination of the Appeal in the Court of Appeal.*

(d) *In the alternative, this Honourable Court do determine the Appeal substantively.*

(e) *That the costs of this Appeal and costs of proceedings in the Court of Appeal be awarded to the Petitioner herein.*

(f) *This Court do make such order or orders that it may deem fit to meet the demands of justice of the case.*

[10] The appeal is premised on the following summarised grounds:

(a) *The learned Judges of the Court of Appeal wrongly interpreted Section 35 of the Arbitration Act as well as Article 164(3) of the Constitution when they held that the Petitioner has no right of appeal under either of the two provisions of the law.*

(b) *The learned Judges of the Court of Appeal erred in finding that the right of appeal subsumed in Article 164(3) from the decisions of the High Court does not extend to arbitration.*

(c) *The learned Judges of the Court of Appeal erred in interpreting Section 35 of the Arbitration Act in a manner that elevates the Arbitration Act over the Constitution notwithstanding Article 2(4) of the Constitution.*

(d) *The learned Judges of the Court of Appeal failed to appreciate that Section 35 of the Arbitration Act is silent on the question of appeal and does not bar appeals to the Court of Appeal.*

(e) *The learned Judges of the Court of Appeal failed to adhere to the set precedents and the doctrine of stare decisis.*

[11] Subsequent to the filing of the appeal, on 27th February, 2018, the Respondent filed a Notice of Preliminary Objection contesting this Court's jurisdiction to hear the appeal on the main ground that there are no constitutional issues arising from the appeal and that the Petitioner ought to have first obtained certification for leave to appeal under Article 163(4)(b) of the Constitution. By a Ruling delivered on 8th November, 2018, we dismissed the Preliminary Objection and held that the appeal was properly before us, as of right, and we then proceeded to hear the appeal on its merits.

C. PARTIES' SUBMISSIONS

(a) The Petitioner's

[12] It is the Petitioner's case that Article 164(3) confers on the Court of Appeal unlimited jurisdiction to hear appeals from the High Court. In urging so, the Petitioner relies on the case of the ***Judicial Service Commission and another v. Hon (Lady) Justice Kalpana Rawal*** Civil Appl. No. NAI 308 of 2015 (***Judicial Service Commission***) in which it was held that the right of appeal is subsumed in Article 164(3) of the Constitution which also confers jurisdiction to the Court of Appeal to hear appeals from decisions of the High

Court on alleged infringement of the Bill of Rights. As such, the Petitioner impugns the decision of the Court of Appeal to the effect that for a party to exercise the right of appeal in an arbitration matter, it had to point out a specific provision in the Arbitration Act that confers that right of appeal. It was urged that such an interpretation is not borne by the Constitution.

[13] Further, it was submitted that contrary to the Court of Appeal's interpretation, Section 35 of the Arbitration Act does not limit the right of appeal to the Court of Appeal. In that context, the Petitioner urges that unlike several other provisions in the Arbitration Act such as Sections 12(8), 14(6), 15(3), 16(a), 17(3) & (7) which expressly limit the right of appeal by providing that a decision of the High Court is final once those Sections are invoked, Section 35 neither expressly grants nor bars a right of appeal.

[14] Accordingly, the Petitioner urges that in the absence of an express bar, the Court of Appeal should have interpreted that provision in line with Articles 48 and 259(1) of the Constitution as well as Section 7(1) of the Sixth Schedule of the Constitution which provides that, ***"all law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."*** As such, the Petitioner urges that, had the Court of Appeal rightly interpreted Sections 35 and 39 of the Arbitration Act, it would have done so with the necessary modification and exceptions to ensure that it does not limit the right of appeal conferred under Article 164(3) of the Constitution.

[15] The Petitioner also faults the Court of Appeal's interpretation of Section 10 of the Arbitration Act. It was thus submitted that if Section 10 was meant to oust the jurisdiction of the Court of Appeal on all arbitration matters, then there would have been specific provisions in the Arbitration Act which provide that the decision of the High Court is final. In emphasis, Counsel referred us to the House

of Lords decision in ***Inco Europe Ltd & Others v. First Choice Distribution (A Firm) and Others (Inco Europe Ltd)*** [2000] l Lloyd's Rep. 467 where it was stated that *"where a section is silent about an appeal from a decision of the Court, no restriction was intended."*

[16] The Petitioner also urges that contrary to the Court of Appeal's finding, the law on whether there exists a right of appeal from High Court decisions arising under Section 35 of the Arbitration Act is not well settled. In urging so, Counsel referred us to the Court of Appeal decision of ***Nyutu Agrovet Limited v. Airtel Network Kenya Limited*** Civil Application Sup No. 3 of 2015 which recognised that there exists a state of uncertainty on this issue and recommended that there was a *"strong public policy consideration in favour of interpreting Article 164(3) of the Constitution"* in favour of an unrestricted right of appeal to the Court of Appeal.

[17] It was also submitted that the Ruling of the Court of Appeal in effect left the Petitioner without any remedy. In that regard, according to the Petitioner, by the Court of Appeal holding that it had no jurisdiction to determine its appeal then the Petitioner would not recover the money it had advanced to the Respondent neither would it have possession of the disputed property as the sale agreement had already been terminated.

[18] With regard to the appropriate remedy to issue, Counsel for the Petitioner urges that the Petitioner has for the past 9 years been pursuing justice. As such, it would be prudent if this Court were to not only find that the Court of Appeal had jurisdiction to hear its appeal but also to determine the appeal on merit as guided by Section 21 of the Supreme Court Act, 2011. In submitting so, Counsel referred to this Court's decision in ***Evans Odhiambo Kidero & Others v. Ferdinand Ndungu Waititu & Others*** Supreme Court Petition No. 18 & 20 of 2014 where *Njoki SCJ* in her concurral expressed the view that the Supreme Court can, in exceptional circumstances, remit a matter to itself and determine it with finality.

[19] With regard to the substantive determination of the dispute by the High Court, Counsel urged that the High Court Judge had in effect sat on appeal over the award made by the Arbitrator contrary to law. He urges in that context that the Learned Judge reviewed the evidence, made his own analysis, and replaced the arbitrator's findings with his own contrary to known arbitral procedures. Above all, that the High Court did not give any directions as to what would happen to the Petitioner's claim in substance. It is on that basis that the Petitioner submits that there is a glaring miscarriage of justice because the Respondent has not refunded the money advanced to it yet it continues to be in possession of the property for the past six years. As such, a finding that there is no recourse to any Court of law would unquestionably leave the Petitioner without any legal remedy.

[20] Further to the above, Counsel urged the Court to stay the proceedings in ***ELC Suit No. 440 of 2011***, concerning the property which is the subject matter of this dispute and in conclusion, Counsel beseeches this Court to set aside the decisions of both the High Court and the Court of Appeal and to confirm the arbitral award.

(b) The Respondent's

[21] In opposing the appeal, the Respondent's Counsel submits that arbitration law was created to deter Courts' intervention in arbitral proceedings. Counsel thus urged that the spirit of arbitration is further promoted by Article 159(2)(c) of the Constitution which enjoins all Courts to promote arbitration as a form of alternative dispute resolution. In particular, Counsel urged that Section 35 of the Arbitration Act does not contemplate further appeals from decisions of the High Court and contrasted that position with Section 39 of the Arbitration Act which specifically grants the Court of Appeal jurisdiction to intervene on decisions made thereunder.

[22] Further to the above, Counsel referred the Court to the debate in Parliament leading to the enactment of the Arbitration Act, 1995 when it was stated that Kenya wanted to adopt the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (***the UNCITRAL Model Law***) with regard to international best practises of arbitration and that there was specifically a need to insulate arbitration processes from interference by the Courts. In that context, Counsel relied on the explanatory notes by the UNCITRAL Secretariat which provides that, *"the first measure of improvement is to allow only one type of recourse, to the exclusion of any other means of recourse regulated in another procedural law of the state in question."*

[23] Counsel thus urged that by dint of Article 2(6) of the Constitution, any treaty or convention ratified by Kenya forms part of the law of Kenya under the Constitution and pursuant to the UNCITRAL model, there is no right of appeal to the Court of Appeal on decisions arising from Section 35 of the Arbitration Act. In further emphasis, he submitted that wherever the Arbitration Act envisaged a Court's intervention, it specifically provided for the Court to which the appeal would lie and the manner of intervention.

[24] Counsel also referred to Sections 59B and 59C of the Civil Procedure Act by way of comparison which provide that any Judgment entered pursuant to a mediation and other alternative means of dispute resolution, is not appealable.

[25] With regard to the alleged right of appeal under Article 164(3), it is the Respondent's case that once parties subject themselves to the Arbitration Act, they cannot claim entitlement to a constitutional claim under Article 164(3). That further, the Constitution promotes the use of alternative dispute resolution under Article 159(2)(c) and therefore the limiting of a right of appeal in arbitration does not amount to denial of access to justice. Above all, that there are very specific provisions in the Arbitration Act that allow a right of appeal. And that there is no

provision in the Arbitration Act which donates to the Court of Appeal jurisdiction to hear appeals generally from the Arbitration Act.

[26] The Respondent relies on the Court of Appeal decision in ***Equity Bank Limited v. West Link MBO Ltd (Equity Bank Ltd)*** Civil Appl. No. 78 of 2011; [2013] eKLR which questioned the contention that Article 164(3) conferred an unlimited right of appeal. The Respondent takes the view therefore that there has to be a statutory provision that gives such a right and as such, in the absence of an express right of appeal, decisions of the High Court emanating from Section 35 of the Arbitration Act are final.

[27] Counsel furthermore submitted that there are many other statutes such as the Cooperative Societies Act, the National Environment Management and Co-ordination Act and the Advocates Act, amongst others, which limit the right of appeal to the Court of Appeal. As such, he urged that the Arbitration Act is not exceptional and neither is such a limitation unconstitutional.

[28] With regard to the Petitioner's prayer that this Court should hear the appeal on merit, the Respondent urges that the substantive matter was never canvassed before the Court of Appeal. As such, this Court would have no jurisdiction whatsoever to consider matters that were never heard by the Court of Appeal. It is thus its position that the Court ought to dismiss the appeal with costs.

D. ISSUES FOR DETERMINATION

[29] From the above submissions, the following issues crystalize for determination:

(i) *Whether there is a right of Appeal to the Court of Appeal following a decision of the High Court under Section 35 of the Arbitration Act.*

(ii) Whether this Court should stay the proceedings at the High Court in ELC Case No. 440 of 2011.

(iii) What are the appropriate reliefs to give?

(iv) Who should bear the costs of the appeal?

E. ANALYSIS

(i) Whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act?

[30] At the heart of this dispute is the question of the proper relationship between arbitration and the Courts. The parties herein thus seek an interpretation of Section 35 of the Arbitration Act which expressly gives an aggrieved party the opportunity to approach the High Court to set aside an arbitral award. The contention before us is whether such a decision by the High Court is subject to the appellate jurisdiction of the Court of Appeal. In this case, the High Court set aside the arbitral award in its entirety primarily on grounds that the Arbitrator had acted in excess of his jurisdiction and that part of the award was against public policy. When the Petitioner sought to appeal that decision, the Court of Appeal struck out the Notice and Record of Appeal on the grounds that it had no jurisdiction on a matter arising from a decision of the High Court made under Section 35 of the Arbitration Act.

[31] With the above background in mind, the Petitioner urges and admits that Section 35 is silent on whether a decision of the High Court can be appealed to the Court of Appeal. However, the Petitioner also takes the position that in the absence of an express bar, such decisions should be appealable to the Court of Appeal because Article 164(3) of the Constitution confers upon the Court of

Appeal unlimited jurisdiction to hear all appeals from the High Court. It was further urged that where the Arbitration Act required a certain decision of the High Court to be final, it expressly stated so which language is not existent in Section 35 aforesaid. Thus, the Petitioner faults the Court of Appeal for finding that a right of appeal must always originate from a specific statutory provision. Such a finding, it was urged, is against the spirit and tenor of the Constitution and amounts to a denial of the right to access justice.

[32] The Respondent on its part, was emphatic that the Court of Appeal lacks jurisdiction to intervene in decisions arising from Section 35 of the Arbitration Act. In that regard, it was urged that where the arbitration law requires the Court of Appeal's intervention, it explicitly states so, a position not obtaining in Section 35. In urging so, the Respondent referred to Section 39 of the Arbitration Act which specifically provides that the Court of Appeal may determine appeals arising from a High Court decision made under that section. It was also urged that the nature of arbitration law is to minimize Courts' intervention in the settlement of commercial disputes where parties have willingly chosen to settle such disputes through arbitration.

[33] Further, citing the Hansard report of the National Assembly at the debate on the Arbitration Act, 1995 it was submitted that the purpose of the Arbitration Act was to provide only a limited avenue for Court's intervention. It was also urged that even the UNCITRAL Model Law which inspired the enactment of the Act discourages Court's intervention. Thus, in accordance with the Constitution, Kenya is bound by all international laws which it has ratified, and as such the UNCITRAL Model Law is now part of the Laws of Kenya and ought to be interpreted as such.

[34] With regard to the Petitioner's contention that there is an unlimited right of appeal under Article 164(3), it was submitted that the said provision must be read together with Article 159(2)(c) which requires all Courts and Tribunals to

promote alternative dispute resolution mechanisms such as arbitration. As such, it was urged that arbitration is a constitutionally recognised mechanism for solving disputes.

[35] In the above context, we shall now proceed to interrogate the jurisprudence of the Court of Appeal on the subject at hand.

(a) Relevant Decisions of the Court of Appeal

[36] We are aware that there are several conflicting decisions emanating from different benches of the Court of Appeal on this issue. Hence, for a proper determination of the same, it is important to analyse some of those decisions in order to have a proper understanding of the Court of Appeal's reasoning in each of those cases. To begin with, in the present case, the Court of Appeal held that save for what is provided in Section 39, there is no right of appeal from decisions of the High Court made pursuant to the Arbitration Act and specifically Section 35 thereof. In holding so, it reasoned that if Parliament had intended to confer the Court of Appeal with jurisdiction to entertain appeals under Section 35, it would have specifically stated so.

[37] Similarly, in the case of ***Anne Mumbi Hinga v. Victoria Njoki Gathara*** Civil Appeal No. 8 of 2009; [2009] eKLR, the Court of Appeal held that appeals would only lie to the Court of Appeal in accordance with the circumstances set out in Section 39. The same position was taken by the Appellate Court in the case of ***Micro-House Technologies Limited v. Co-operative College of Kenya*** Civil Appeal No. 228 of 2014; [2017] eKLR.

[38] Furthermore, in ***Nyutu Agrovet Limited v. Airtel Networks Limited*** Civil Appeal (Application) No.61 of 2012**;** [2015] eKLR, the Court of Appeal held that it had no jurisdiction to entertain any appeal arising from Section 35 aforesaid. In holding so, Mwera JA expressed himself thus:

"My view is that the principle on which arbitration is founded, namely that the parties agree on their own, to take disputes between or among them from the courts, for determination by a body put forth by themselves, and adding to all that as in this case, that the arbitrator's award shall be final, it can be taken that as long as the given award subsists it is theirs. But in the event it is set aside as was the case here, that decision of the High Court final remains their own (sic). ***None of the parties can take steps to go on appeal against the setting aside ruling. It is final and the parties who so agreed must live with it unless, of course, they agree to go for fresh arbitration. The High Court decision is final and must be considered and respected to be so because the parties voluntarily chose it to be so. They put that in their agreement. They desired limited participation by the courts in their affairs and that has been achieved."***

[39] He went on to state:

"I do not agree that Article 164(3) of the Constitution, Section 3(1) of the Appellate Jurisdiction Act and even Section 75 of the Civil Procedure Act, giving this Court jurisdiction to hear appeals from the High Court, should be read to mean that these provisions of law also confer the right of appeal on the litigants. ... This Court has jurisdiction to hear any matters coming on appeal from the High Court and any other court or tribunal prescribed by law. But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal before us. However, be it appreciated that such leave does not

constitute the right to appeal (sic). ***The right must precede leave."***

[40] Unlike in the above cases, in the earlier case of ***Kenya Shell Limited v. Kobil Petroleum Limited***, Civil Application No. 57 of 2006 (unreported), **(*Kenya Shell*)** Omolo JA had been of a different view. In holding that the Court of Appeal had jurisdiction, he noted thus:

"[T]he provisions of Section 35 of the Arbitration Act have not taken away the jurisdiction of either the High Court or the Court of Appeal to grant leave to appeal from a decision of the High Court made under that section. If that was the intention, there was nothing to stop Parliament from specifically providing in Section 35 that there shall be no appeal from a decision made by the High Court under that section."

[41] In the same case, Onyango Otieno JA while dissenting, expressed himself as follows:

"The use of the words " Notwithstanding Sections 10 and 35" to me means that this provision in Section 39(3) is meant by the legislature to provide an exception to the provision of Section 10 that no Court should interfere in matters governed by the Act and as to Section 35 the phrase is used to indicate that the decision of the superior court on application for setting aside can only be challenged in the Court of Appeal by way of an appeal if conditions in section 39(3) are satisfied...Thus in my view, other than as provided under section 39(3), this Court would have no direct jurisdiction donated by the Arbitration Act No. 4 of 1995 to

entertain an appeal from an award given under the Act."
[Emphasis added.]

[42] Just like the majority in ***Kenya Shell*** (supra), in the case of ***DHL Excel Supply Chain Kenya Limited v. Tilton Investments Limited*** Civil Application No. NAI. 302 of 2015; [2017] eKLR, the Court of Appeal held that it had jurisdiction to entertain an appeal under Section 35. In that case, the Applicant had made an application to the Court of Appeal under Section 39(3)(b) of the Arbitration Act seeking to appeal a decision of the High Court made under Section 35. The Respondent on its part contended that no appeal lay against decisions made under Section 35 and in resolving the controversy at paragraph 24, the Court of Appeal rendered itself thus:

> ***"In our view, the fact that section 35 of the Act is silent on whether such a decision is appealable to this Court by itself does not bar the right of appeal. The Section grants the High Court jurisdiction to intervene in arbitral proceedings wherein it is invoked. It follows therefore that the decision thereunder is appealable to this Court by virtue of the Constitution."***

[43] Further at paragraph 25, it pronounced thus:

> ***"However, this does not mean that wherever the Act allows the High Court's intervention such a decision is appealable to this Court. The scenario would obviously be different wherein the Act allows the High Court's intervention in a particular issue but expressly bars an appeal to this Court. By way of illustration, section 12 (6) of the Act empowers the High Court to set aside an arbitrator's appointment but***

expressly provides at subsection (8) that the decision of the High Court is final and is not subject to an appeal."

[44] Further to the above, we note that, in ***Kurji and another v. Shalimar Limited and Others*** Civil Appeal No. 197 of 2004; [2006] eKLR an application to enter Judgement on an award was not served on the Applicant. The High Court therefore entered an *ex parte* judgement against the Applicant. The Applicant's application to stay the judgment was dismissed and an application seeking to set aside the judgment was struck out. On appeal to the Court of Appeal, the Appellate Court in granting leave to appeal stated thus:

> ***"[The] Arbitration process as provided by the Arbitration Act is intended to facilitate a quicker method of settling disputes without undue regard to technicalities. This, however, does not mean that the courts will stand and watch helplessly where cardinal rules of natural justice are breached by the process of arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to step in and correct obvious errors."***

[45] Undoubtedly, it is evident from the analysed sample of the Court of Appeal's decisions that the question whether the Court of Appeal has jurisdiction to hear appeals arising from Section 35 of the Arbitration Act remains unsettled. As can also be deduced from those cases, where the Court of Appeal has stated that it has jurisdiction to hear and determine appeals under Section 35, it has reasoned that since Section 35 is silent on whether an appeal lies to the Court of Appeal, the provision should be interpreted to confer jurisdiction on the Court of Appeal. The Appellate Court has also expressed the view that if the Legislature had intended to limit the right of appeal, it would have specifically stated so like it has done in other specific provisions of the Arbitration Act. In addition, the Court of Appeal has also taken the view that in exceptional circumstances, it would assume

jurisdiction in order to redress violations of the rules of natural justice that may have occurred during the process of arbitration.

[46] On the other hand, in cases where the Court of Appeal has held that it has no jurisdiction, it has taken the view that the only provision which contemplates the Court of Appeal's intervention is Section 39 of the Arbitration Act. The Court of Appeal has also made a finding that, a right of appeal is conferred by a specific statute and not generally by Article 164(3) of the Constitution. Further, in refusing to assume jurisdiction, the Court of Appeal has emphasised on the purpose of arbitration which is to minimise a court's intervention and also the fact that parties voluntarily agree to settle their disputes through arbitration and should abide by the consequences of the said minimal Court's intervention. In the course of our determination of this issue, we will examine these varied reasons in order to determine their validity and relevance to the issue at hand.

(b) Comparative jurisprudence

[47] We are aware that the legal dilemma on the extent of a court's interference in an arbitration process is not peculiar to our Country and has been the subject of judicial determination in other jurisdictions. In United Kingdom for example, decisions on setting aside an award or confirming an award may be appealed to the Court of Appeal upon grant of leave to appeal. In that regard, the relevant provision is Section 67 of the UK Arbitration Act, 1996 which provides as follows:

> ***"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the Court—***
>
> ***(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or***
>
> ***(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.***

A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.

(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—

(a) confirm the award,

(b) vary the award, or

(c) set aside the award in whole or in part.

(4) <u>The leave of the court is required for any appeal from a decision of the court under this section".</u> (Emphasis added)

It follows therefore that under that Section, the grant of leave to appeal is not an automatic one but accrues only in exceptional cases.

[48] In applying the above provision, in the case of ***Amec Civil Engineering Ltd v. Secretary of State for Transport*** [2005] EWCA Civ 291, a technology and construction Court dismissed an appeal against the Arbitrator's decision filed under Section 67 of the 1996 Act for want of jurisdiction. Thereafter, the same Court gave the dissatisfied party leave to appeal to the Court of Appeal. In finding that leave to appeal should not have been granted, the Court of Appeal remarked thus:

"The policy of the 1996 Act does not encourage such further appeals which in general delay the resolution of disputes by the contractual machinery of arbitration."

[49] In explaining the said policy, Sutton D, Gill J & Gearing M, in their book "*Russell on Arbitration*", 23rd (Ed) (Sweet & Maxwell) 2010, at page 484(8-070) state that the said "*policy suggests that leave to appeal a decision rejecting a challenge under section 67 will very rarely be given*." Thus, there has to be a justification for grant of leave and even then, only in the rarest of circumstances.

[50] Further, in the case of ***AstraZeneca Insurance Co Ltd v. CGU International Insurance plc and others*** [2006] All ER (D) 176 (Oct) ***(CGU)*** the Court of Appeal held that it had jurisdiction to review a decision of a first instance Judge where there is evidence of unfairness or misconduct at the determination concerning the grant or refusal of leave to appeal. In holding so, it stated that:

> ***"A right of appeal, a residual jurisdiction, should nevertheless be granted, by virtue of the Human Rights Act itself, to deal with those cases which raised questions of misconduct or unfairness."***

[51] This position, the Court stated, was for purposes of protecting the integrity of the decision-making process or the decision maker which a Court should be vigilant to protect but not an attack on the decision itself. Particularly, at paragraph 72, the Court elaborated on the said principle as follows:

> ***"The truth of the matter is: there are all sorts of contexts in which, for good reason, Parliament has provided that there should be restrictions on the appeal process, and a limit to appellate jurisdiction. In such situations, ..., it is natural to conclude that, even in the absence of express language, the statute intended the lower court's discretion as to whether or not to give permission to appeal to a higher court to be exclusive and final. However, there is no similar rationality,***

it may be said, no good reason at all, for thinking that a court's unfairness is to be left incapable of appellate review. While bearing fully in mind the need for finality in litigation, and the injustice which may itself be created by losing sight of that need, this court … recognised the imperative need for an effective remedy, in a possible case of bias, to maintain confidence in the administration of justice…. It adopted the words of Lord Diplock in another case of the need for courts to have power "to maintain its character as a court of justice" … Although the context there might have been one where it was assumed that the court in question had an underlying or inherent jurisdiction, I cite the doctrine to highlight the unlikelihood that Parliament, a fortiori in a situation where an appeal jurisdiction was possible, intended the unfair process of a lower court to be immune from appellate review."

[52] Still on the grounds for grant of leave, in ***Antaios Compania Naviera SA v. Salen Rederierna AB (The Antaios)*** [1984] 3 All ER 229, the House of Lords held that leave to appeal may also be granted where there are conflicting decisions on an issue.

[53] In Canada, under the Arbitration Act, [RSBC 1996] applications for setting aside an award are by way of appeals which are limited to either questions of law where the parties' consent to the appeal or to questions of law where the parties do not consent but where leave to appeal is granted. Under Section 31(2) of the said Act, leave to appeal is granted if (*a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice; or (b) the point of law is of importance to some class or body of persons of which the*

applicant is a member, or (c) the point of law is of general or public importance. Such decisions are then appealable to a higher Court.

[54] With regard to the three named conditions for the grant of leave, the Supreme Court of Canada, in the case of ***Sattva Capital Corp. v. Creston Moly Corp.*** [2014] 2 SCR 633, explained that:

> ***"In order to rise to the level of a miscarriage of justice … an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the outcome of the appeal would cause a change in the final result of the case."***

[55] On the issue of the "importance of the results of the arbitration", the Court relied on the case of ***British Columbia Institute of Technology (Student Assn.) v. British Columbia Institute of Technology,*** 2000 BCCA 496, 192 D.L.R. (4th) 122 in which it was held that *"the result of the arbitration [must] be 'sufficiently important', in terms of principle or money, to the parties to justify the expense and time of court proceedings."*

[56] In Singapore, a decision to set aside an award made under Section 24 of the International Commercial Arbitration Act and Article 34 of the UNCITRAL Model Law is appealable to a higher Court even though the law is silent on whether the Court of Appeal should have such jurisdiction. In that regard, the decisions in ***AJU v. AJT*** [2011] SGCA 41 and ***AKN & another v. ALC and others and***

other appeals [2015] SGCA 18 (***AKN***) are instructive. The said Section 24 provides:

> ***"Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —***
>
> ***(a) the making of the award was induced or affected by fraud or corruption; or***
>
> ***(b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced."***

Article 34 of the UNCITRAL Model Law then provides:

> ***"34 (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.***
>
> ***(2) An arbitral award may be set aside by the court specified in Article 6 only if:***
>
> ***(a) the party making the application furnishes proof that:***
>
> ***(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing***

any indication thereon, under the law of this State; or

(ii) 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

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4)…".

[57] In the above context, in ***AKN*** (supra), the High Court had set aside an arbitral award pursuant to Section 24(b) as read with Article 34(2)(a)(ii) & (iii) of the UNCITRAL Model Law. On appeal, the Court of Appeal was categorical [paragraphs 38 & 39] that:

"In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, the parties to an arbitration do not have a right to a "correct" decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process. In the light of their limited role in arbitral proceedings, 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." [Emphasis added]

[58] Our understanding therefore is that in Singapore, a High Court's decision on whether or not to set aside an award may be challenged at a higher court, as long as such a higher court confines the determination to the narrowly prescribed grounds for setting aside an award and in the context stated above.

[59] Having analysed the law in the identified jurisdictions, we find that there is generally no express right of appeal against the decision of the High Court in setting aside or affirming an award. Leave to appeal would, however, only be granted in very limited circumstances. In that regard therefore, Courts have held that leave to appeal may be granted where there is unfairness or misconduct in the decision-making process and in order to protect the integrity of the judicial process. In addition, leave would be granted in order to prevent an injustice from occurring and to restore confidence in the process of administration of justice. In other cases, where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue, leave would also be granted. A higher Court would also assume jurisdiction in order to bring clarity to the law where there are conflicting decisions on an issue. In all these instances, care must be taken not to delve into the merits of an arbitral award because that is not the purview of Courts.

(c) The UNCITRAL Model Law

[60] The UNCITRAL Model Law in which our Arbitration Act is based also appreciates some of the difficulties which we are now confronted with. With regard to setting aside of an arbitral award, the Model Law provides that a party may approach the Court seeking to set aside an arbitral award on any of the specified grounds. That provision is similar to Section 35 of the Kenyan

Arbitration Act. The explanatory notes by the UNCITRAL Secretariat with regard to recourse to Court for setting aside an award state that the purpose of the provision was to provide only one way of attacking an award and that is through an application for setting aside. In addition, the explanatory notes also state that, "*a party is not precluded from appealing to an arbitral tribunal of second instance if the parties have agreed on such a possibility (as is common in certain commodity trades).*" To this extent it can be said therefore that the Model Law appreciates the possibility of a further appeal against a decision of setting aside an award but limited to a situation where the parties to it have so agreed. This is what Section 39 of the Kenyan Arbitration Act also provides.

[61] Of relevance also is Article 5 of the Model Law which is similar to Section 10 of the Kenyan Arbitration Act which is headed, *"extent of Court intervention."* It provides that:

"In matters governed by this Law, no court shall intervene except where so provided in this Law." [Emphasis added]

[62] In the same breadth, Section 10 of the Kenyan Arbitration Act provides:

> ***"Except as provided in this Act, no Court shall intervene in matters governed by this Act."***

[63] In explaining the meaning of Article 5, the explanatory notes state that, "*Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it.*" And in that spirit, the explanatory notes list circumstances where a Court may be involved in arbitration proceedings as follows:

> ***"[T]he Model Law envisages court involvement in the following instances. A first group comprises issues of appointment,***

challenge and termination of the mandate of an arbitrator (Articles 11, 13 and 14), jurisdiction of the arbitral tribunal (Article 16) and setting aside of the arbitral award (article 34). These instances are listed in Article 6 as functions that should be entrusted, for the sake of centralization, specialization and efficiency, to a specially designated court or, with respect to articles 11, 13 and 14, possibly to another authority (for example, an arbitral institution or a chamber of commerce). A second group comprises issues of court assistance in taking evidence (article 27), recognition of the arbitration agreement, including its compatibility with court-ordered interim measures (articles 8 and 9), court-ordered interim measures (Article 17 J), and recognition and enforcement of interim measures (Articles 17 H and 17 I) and of arbitral awards (Articles 35 and 36).”

[64] A reading of the above explanation read with Article 5 means that beyond the instances identified above, no Court shall intervene in matters governed by the Model Law. That further, Article 5 was enacted for purposes of *“protecting the arbitral process from unpredictable or disruptive Court interference”* against parties who choose arbitration *“especially foreign parties.”* We have no doubt in our minds that just like Article 5, Section 10 of our Arbitration Act is meant to ensure that the judicial process will only be resorted to where the Act so provides and only within the parameters provided. For example, once an arbitrator has made an award, the Act provides that the only way of challenging that award is through an application for setting it aside and only on the grounds narrowly subscribed. Having said so, we are of the further opinion that neither Article 5 of the Model Law indeed nor Section 10 of the Kenyan Act answers the question whether a further appeal can lie from a decision of the High Court under Section 35. As mentioned earlier, the explanatory notes on the UNICTRAL Model Law however acknowledge that such appeals may lie to a second instance tribunal on

limited circumstances as may be determined by each State within its legislative processes as has been done in Section 39 of the Kenyan Act.

(d) Interrogating Section 35 of the Arbitration Act

[65] With the above comparative jurisprudence in mind, we now embark on interrogating the proper interpretation of Section 35 of the Arbitration Act.

[66] During the debate in Parliament leading to the enactment of the Arbitration Act 1995, one of the questions raised by the then Assistant Minister for Commerce and Industry, Mr. James Charles Nakhwanga Osogo, was why some provisions of the Bill provided that the High Court decision would be final. In answering that question, the then Attorney General, Hon. Amos Wako, explained that, *"the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process."* That further, the limitation of the extent of the Courts' interference was to ensure an, *"expeditious and efficient way of handling commercial disputes."*

[67] In 2009, amendments were introduced to the 1995 Act and as explained by the then Attorney General, the purpose was to *"further strengthen and insulate the [arbitration] procedure from Courts."* And as such, the courts would only be required to interfere on serious matters and to ensure that there was no, *"constant interferences and misuse of arbitration by resorting to Court on a matter which ought to be heard through the arbitration procedure."* And with regard to Section 35, he explained that it was enacted to ensure that there were limited grounds for approaching the High Court or any other Court after an arbitral award had been rendered.

[68] In interpreting the arbitration law, therefore, one should never lose sight of the purpose of the enactment of the Arbitration Act 1995 and in addition, the fact

that the Constitution of Kenya, 2010 in Article 159(2)(c) enjoins Courts to be guided by the principles of alternative forms of dispute resolutions such as arbitration. There is also no doubt that arbitration is an attractive way of settling commercial disputes by virtue of the perceived advantages it brings beyond what is generally offered by the normal Court processes, which are often characterised by formalities and delays. In addition, while it is quite clear that the arbitration regime is meant to ensure that there is a process, distinct from the Courts, of effectively and efficiently solving commercial disputes, the law also recognises that such a process is not absolutely immune from Courts' intervention This is because, Courts of law remain the ultimate guardians and protectors of justice and hence, they cannot be completely shut off from any process of seeking justice.

[69] Our present quagmire in the above context is whether Section 35 of the Arbitration Act should be interpreted as ousting the jurisdiction of an appellate Court to review a decision of a High Court made under that Section. The said Section provides that recourse to the High Court against an arbitral award may be made by an application for setting aside the award. Where such an application is made, the High Court may set aside an arbitral award if the applicant furnishes proof that *(a) either party to an arbitration agreement was under some incapacity; (b) the agreement was invalid under the relevant laws; (c) there was failure to give proper notice of the appointment of an arbitrator or that a party was unable to present his case during the arbitral proceedings; (d) that the arbitrator went outside his jurisdiction (e) that the agreement was not in accordance with the Arbitration Act; or (f) that the making of the award was affected by fraud, bribery, undue influence or corruption.*

[70] The provision under interrogation is silent on whether a decision made by the High Court therein is appealable to the Court of Appeal. The Petitioner on its part urges that silence in this case should be interpreted in a way that sustains a right of appeal in view of Article 164(3) of the Constitution which gives the Court of Appeal power to hear appeals arising from decisions of the High Court. In

urging so, the Petitioner relies on the House of Lord decision in ***Inco Europe Ltd & Others*** (supra) where an appeal lay to the Court of Appeal against a decision made under Section 9 of the UK Arbitration Act, 1996 which was silent on that issue. Section 9 empowered the Court to stay legal proceedings. In that case, Lord Nicholls of Birkenhead expressed the view that:

> ***"[W]hen the draftsman wished to limit the right of appeal he said so...This style of drafting points strongly to the conclusion that where a section is silent about an appeal from a decision of the Court, no restriction was intended. The draftsman must have intended that, save to the extent that an appeal was expressly circumscribed, parties to Court decisions under the various sections would be able to exercise whatever rights of appeal were available to them from sources outside the Act itself."***

[71] For avoidance of doubt, Section 9 aforesaid provides thus:

> ***"(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.***
>
> ***(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.***
>
> ***(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.***

> ***(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.***
>
> ***(5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."***

[72] The above Section has no appeal mechanism and that is why the Petitioner also urges that where the Legislature had intended a decision of the High Court to be final, it expressly stated so. For example, Section 12(8) of the Arbitration Act provides that, *"a decision of the High Court in respect of a matter under this section shall be final and not be subject to appeal."* Hence, it is urged that since Section 35 does not provide that the decisions of the High Court are final, then the Court of Appeal should, as a matter of course, have jurisdiction to hear and determine appeals arising therefrom.

[73] On our part, and with respect, we find the argument by the Petitioner that the Court of Appeal has unlimited jurisdiction to hear appeals, arising from the decisions of the High Court, to be self-defeating. This is because, on one hand, the Petitioner urges that as long as an Act of Parliament does not expressly bar appeals to the Court of Appeal, like in the case of Section 12(8), then an unlimited right of appeal subsists. On the other hand, it also urges that *"the right of appeal under Article 164(3) of the Constitution has no restrictions and limitations."* The logical consequence of the Petitioner's argument would thus be that a provision of law that limits appeals from the High Court to the Court of Appeal such as Section 12(8) is inconsistent with Article 164(3). But this narrow argument is not before us and we shall say no more on it.

[74] In arguing a case for an unlimited right of appeal in any event, the Petitioner however relies on the case of the ***Judicial Service Commission*** (supra) in

which it was held that the right to appeal is subsumed in Article 164(3) of the Constitution which confers jurisdiction to the Court of Appeal to hear appeals from decisions of the High Court and in that case in a matter involving the Bill of Rights. In that Judgment, Ouko JA expressed himself as follows:

> ***"Based on the law and the decisions of this Court I hold the view that this Court is established and its jurisdiction expressly conferred by the Constitution; that jurisdiction is not a thoroughfare between it and the High Court for each and every decision of the High Court; that the requirement for a separate legislation to confer jurisdiction in addition to that already conferred by Article 164(3) (a) is no longer necessary, that requirement having been based on Section 64 (1) of the 1963 Constitution; and that reasonable regulation and limitation is appeals to this Court is permitted. I am also in agreement that the right of appeal can either be conferred by the Constitution or by statue ... Article 163(4) (a) was not intended to be a moribund and redundant provision in the constitution, particularly recalling the reasons that led to the introduction of sub-section (7) to Section 84 of the former Constitution.***
>
> ***... the Constitution having expressly vested in the Court under Article 164 the general appellate jurisdiction to hear appeals from the High Court and having explained how appeals relating to the interpretation and application of the Constitution are to be appealed from this Court to the Supreme Court under Article 163, that*** *per se* ***is sufficient conferment of appellate jurisdiction. There is no legal void. It would be a very serious travesty of justice and an absurdity if it was to be held that in the hierarchical scheme of the Court, from the Magistrate's Court to the Supreme Court, only the Court of Appeal would have no say in the interpretation and application of the Constitution and on matters to do with the Bill of Rights, and yet the Supreme***

Court is expected, indeed enjoined to hear appeals form the Court of Appeal by dint of Article 164(3) (a) (as of right)".

Kiage JA on his part had this to say:

"I state and hold, unhesitatingly, that both the jurisdiction and the right of appeal from the High Court of this Court are now founded, in the first instance, on the Constitution of Kenya 2010. The jurisdiction invested on this Court is not qualified by words such as; where a right of appeal arises. It provides both the right of approach from the High Court and the power to hear those who have so approached. That constitutional right to appeal can only be denied, limited or restricted by express statutory provision properly justified as required by the Constitution itself. The wording of Article 164(3) of the Constitution admits to no other interpretation. It would be inimical to the general tenor of the Constitution and the centrality of the Bill of Rights were this or any other Court to pronounce itself that in matters to do with the interpretation or application of the Constitution and the enforcement of fundamental rights and freedoms, this Court has no role to play. Here is neither rhyme nor reason; neither doctrine nor policy that can justify such a conclusion. If anything, the Constitution imposes under Article 21(1) a duty on the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. I am unable to fathom how this Court would perform that duty were it to shirk its judicial responsibility, as urged by the JSC".

...

"I am not, moreover, convinced that Section 35 and 39 of the Arbitration Act, separately or together, have the effect of denying a right of appeal from a decision of the High Court, it is

indeed perplexing that the Court construed Section 39 of that Act in exclusionary as opposed to inclusionary terms. I am also troubled that in professing to respect and uphold finality of the arbitral process, this Court inadvertently interested the High court and not the arbitrator, with finality – even where the High Court may have set aside or refused to set aside an award, or otherwise acted in plain error. Far from being a basis for the contention that even post-2010 this Court's jurisdiction and the right to appeal to it must still be donated or conferred by some statute in express terms, I would for my party treat the Nyutu decision with much caution. It denies a right of appeal absent express statutory exclusion and I find it quite confounding. At any rate, I am persuaded that the majority decision in Kenya Shell represents the correct position in law.

The upshot of my consideration of the motion is that it must fail. I am without a doubt that this Court is possessed of the jurisdiction flowing from the Constitution itself in plain and unambiguous terms, to hear and determine appeals from the High Court on matters touching on the interpretation and application of the Constitution, and of the enforcement of the fundamental rights and freedoms in the Bill of Rights. Moreover, there being no express denial limitation of it, there is an undeniable right of appeal form the High Court's final orders in those matters, to this Court. Any other view is inimical to the letter and spirit of the Constitution of Kenya, 2010".

[75] Without delving deeper into the analysis of the ***Judicial Service Commission case,*** we are of the view that allegations of violations of the Bill of Rights fall in a completely different legal regime separate from what is before us. By way of example, we find that Article 163(4)(a) of the Constitution provides that

the Supreme Court has jurisdiction to hear appeals as of right in any case involving the interpretation or application of the Constitution. And hence appeals involving violations of the Bill of Rights would obviously impact on the interpretation or application of the Constitution and such appeals would have arisen through the normal judicial hierarchy of Courts meaning that the Court of Appeal would have an unrestricted right of appeals for the Supreme Court to be able to exercise such an interpretative jurisdiction. Further, without stating more on this issue and since the decision of the ***Judicial Service Commission*** is not before us on appeal, we would only add that such an approach would have been the context within which Article 164(3) was interpreted. In a nutshell, we do not find favour in the argument that there is an unrestricted right of appeal under Article 164(3) of the Constitution in all instances.

[76] The above reasoning was indeed well captured by of *M'inoti* JA in the Court of Appeal decision in ***Equity Bank Ltd*** (supra) in the following words (and we agree):

> ***"This is not to suggest that, by dint of Article 164 (3) all and sundry decisions of the High Court are appealable to the Court of Appeal. A holistic and purposive reading of Constitution, particularly the right to access justice (in this context "appellate justice" (Article 48) the right to fair hearing (Article 50), judicial authority (Article 159) and Article 164 (3) itself would accommodate limitation of what is appealable, if the limitation satisfies the requirements of Article 24 of the Constitution."***

[77] In the above context, on behalf of the Respondent, it is urged that it is only Section 39 of the Arbitration Act which contemplates appeals against decisions of the High Court. On our part, we take the position that, unlike other provisions in the Act, Section 39 specifically provides intervention by the Court of Appeal where

parties to a domestic arbitration agree that an application should be made to the High Court for a determination of a question of law arising in the arbitration process or the award. Such a High Court decision is appealable to the Court of Appeal if the parties have agreed so or if the Court of Appeal finds that a point of law of general importance is involved. That Section is thus very particular on when it can be invoked. It is an independent provision separate from all others and particularly Section 35 which is our main concern.

[78] While discussing Section 39, Omolo JA in the ***Kenya Shell*** (supra) decision stated thus:

> ***"It is not, therefore, surprising to me that Section 39(3) of the Act severely limits the right of appeal from decisions of the High Court made under Section 39(2) of the Act. The provisions of subsection (3) are, in my view restricted to the circumstances stated in subsection (2) and I do not understand them to mean that the right of appeal to the Court of Appeal, under all the provisions of the Act, can only be exercised in accordance with the provisions of Section 39(3) of the Act."***

[79] For avoidance of doubt, the said Section 39(3) provides that:

> ***(3) Notwithstanding Sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2) —***
>
> ***(a) if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or***
>
> ***(b) the Court of Appeal, being of the opinion that a point of law of general importance is involved the***

determination of which will substantially affect the rights of one or more of the parties, grants leave to appeal, and on such appeal the Court of Appeal may exercise any of the powers which the High Court could have exercised under subsection (2).

[80] As regards the Court of Appeal's intervention under clause 39 (now Section 39) the Attorney General explained (Hansard Report of 20th July, 1995) that the courts of law are the ultimate authority on interpretation of the law and so any question of law that would arise in a domestic arbitration could be referred to the High Court for settlement with a further appeal to the Court of Appeal especially where the High Court has committed an error of law.

[81] In the above context, we take the position that even though Section 39 is not the subject of our interpretation in the instant case, to the extent that the Respondent's rely on it to advance their argument, we are of the view that the jurisdiction of the Court of Appeal under Section 39 is very specific on when it can be invoked, that is, determination of questions of law arising in the cause of arbitration proceedings. Section 39, does not prescribe or affect the jurisdiction of any other Court as provided in any of the other provisions of the Arbitration Act. And as explained by the Attorney General, the purpose was to ensure that determination of a question of law particularly where issues of general public importance arise, are subject to appeals. And even though Section 35 provides that *"recourse to the High Court against an award may be made only by an application for setting aside"*, Section 39 provides further circumstances when an award may be set aside either by the High Court or the Court of Appeal hence the use of the term *"notwithstanding Section 10 and 35"* as expressed above.

[82] In our view therefore, contrary to what is proposed by the Respondent, Section 39 cannot be justifiably interpreted so as to oust the jurisdiction of the Court of Appeal, if at all, in any other section of the Act.

[83] ***What therefore is the proper interpretation of Section 35 with regard to the right of appeal to the Court of Appeal?*** We have reviewed the decisions emanating from our Courts on this issue. We have found that this issue has not attained consensus. We have also analysed cases and laws from selected jurisdictions. In some jurisdictions, decisions from a High Court on setting aside are appealable to the Court of Appeal and even to the Supreme Court on limited circumstances. In others, appeals are generally allowed but only with leave. We do not have in our laws such a procedure for leave. The UNCITRAL Model Law on which our law is based does not necessarily bar further appeals. Taking all these matters into consideration, we are of the view that, Section 35 should be interpreted in a way that promotes its purpose, the objectives of the arbitration law and the purpose of an expeditious yet fair dispute resolution legal system. It must be noted that Section 35 was enacted prior to the promulgation of the Constitution 2010 and therefore Article 164(3)(a) and by dint of Section 7 of Schedule Six, to the Constitution, the said Section must be *"construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution."*

[84] 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.

[85] Such a finding is in consonance with practises from other jurisdictions and maintains fidelity to the law. Having said so, we are of the further opinion that a decision on whether the Court of Appeal should assume jurisdiction on appeals arising from Section 35 should be guided by the following consideration i.e. whether the High Court has overturned an award other than on the grounds in Section 35 of the Act. The grounds for setting aside an award under Section 35(2) are as follow;

2. *"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."

[86] For the avoidance of doubt, we hereby restate the principle that not every decision of the High Court under Section 35 is appealable to the Court of Appeal. It also follows therefore that an intended appeal, which is not anchored upon the four corners of Section 35 of the Arbitration Act, should not be admitted. In this regard, an intended appellant must demonstrate (or must be contending) that in arriving at its decision, the High Court went beyond the grounds set out in Section 35 of the Act for interfering with an Arbitral Award.

[87] In applying the above criteria, it would be expected that the Court of Appeal would jealously guard the purpose and essence of arbitration under Article 159(3)(d) so that floodgates are not opened for all and sundry to access the appellate mechanism. Similarly, it would be expected that a leave mechanism would be introduced into our laws by the Legislature to sieve frivolous appeals and not create backlogs in the determination of appeals from setting aside of award decisions by the High Court.

[88] In making the above finding, we are affirming the position taken by some benches of the Court of Appeal that Article 164(3) is a jurisdiction that is tied to a party's right to appeal to that Court and to completely deny that right would be inimical to the spirit and tenor of the Constitution, 2010.

[89] Applying therefore the above principles, does the case at hand justify the Court of Appeal's intervention? Is there anything possibly unfair or arbitrary in the High Court's decision? In answer to that question, we note that the dispute at hand can be traced to events that took place over 10 years ago. As can be deduced from the pleadings, whereas the parties started as friends, they have turned against each other and the existing conflict between them remains unsolved. It has thus been submitted that the High Court decision gave no further directions as to whether fresh arbitration proceedings should commence or not, and hence, it was urged that the Petitioner was left, so to speak, in limbo. This is after the High Court had set aside the award in its entirety. There seems to be a consensus, as can also be perceived from the pleadings, that some substantial amount of money had been advanced to the Respondent by the Petitioner. With the setting aside of the award, the fate of the said moneys advanced to the Respondent remains unknown.

[90] In the circumstances, various questions would necessarily arise; *would a Judgment that leaves a party in such a precarious position be said to create confidence in the administration of justice? Would the principle of minimal courts' intervention in arbitration matters supersede the need to correct an injustice?* Our position is that where allegations of such manifest unfairness have been made, they should not be left incapable of a higher Court's review. And it is on that basis that, we hold that in this case, the Court of Appeal should have assumed jurisdiction to hear the Petitioner's appeal arising from the decision of the High Court under Section 35 of the Arbitration Act limited to the relevant consideration expressed above.

[91] As we conclude on this issue, we affirm that arbitration should and ought to drastically reduce courts' intervention and in this regard, we find favour in the words of the Court of Appeal in ***CGU*** **(supra)** where it stated that: **"*the Courts will not permit the residual jurisdiction, which exists to ensure that injustice is avoided, to become itself an unfair instrument for subverting statute and undermining the process of arbitration.*"** These words ring true if we are to protect the integrity of the arbitration process. But in this case, as we have shown, justice must be done and that necessitates that the Court of Appeal ought to relook at the decision of the High Court in the manner we have explained above.

(ii) Whether the proceedings at the High Court in ELC Case No. 440 of 2011 should be stayed?

[92] During his oral submissions, the Petitioner's Counsel urged this Court to stay proceedings in a matter pending before the High Court, i.e. ***ELC No. 440 of 2011,*** concerning the property which is the subject matter of this dispute. He explained that, even though this was not a substantive prayer in the appeal before us it was not in the Petitioner's pleadings because it arose subsequent to the filing of the documents. Our position is that we do not have sufficient material before us, to enable us make any substantive determination on this issue. As such, we are unable to make any finding on this prayer.

(iii) Appropriate reliefs

[93] The Petitioner seeks various reliefs. With regard to prayer (2) seeking an order dismissing the Respondent's Notice of Motion application dated 19th May, 2016 and reinstatement of the Notice of Appeal dated 15th March, 2016 together with the Record of Appeal dated 22nd April, 2016, ***Civil Appeal No. 81 of 2016,*** having held that the Court of Appeal should have assumed jurisdiction in this case, it means that the Notice of Motion ought not to have been struck out. The Court

of Appeal by upholding the Respondent's Notice of Motion therefore erred. Having said so, as we have shown in this Judgment, there have been conflicting decisions on whether the Court of Appeal had jurisdiction to hear appeals arising from Section 35 of the Arbitration Act and the recent jurisprudence from the Court of Appeal on that issue barred appeals to the Court of Appeal. Hence the reason for striking out the Petitioner's appeal was well guided by the law at that time. However, in the interest of justice, and taking into consideration the time when this dispute first arose, we think that, subject to what we shall state later, the Petitioner's Notice of Appeal and Record of Appeal should be revived. Prayer (2) is therefore granted.

[94] With regard to prayers (3) and (4), the Petitioner urges the Court to direct an expeditious hearing and determination of the appeal at the Court of Appeal or in the alternative that this Court ought to determine the appeal substantively. At the outset we must state that the prayer for this Court to hear the appeal on merit cannot be conceivably granted as this Court's jurisdiction under the Constitution is limited to hearing appeals from the Court of Appeal, and even then, only in very limited cases. As such, in the absence of the Court of Appeal's decision on merit, our jurisdiction cannot even be invoked. For that reason, prayer (4) is denied. With regard to the other prayer, having held that this case meets the threshold for consideration by the Court of Appeal, and having granted prayer (2), we hold that the Court of Appeal should proceed to hear the appeal in ***Civil Appeal No. 81 of 2016*** expeditiously for reasons stated above. As such, prayer (3) is granted.

(iv) Who should bear the costs?

[95] As regards costs, in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*** SC Pet. No. 4 of 2014; [2014] eKLR, we held that we have discretion to award costs in order to ensure that the ends of justice are met. In this case, it is our considered opinion that this case is important for purposes of bringing to end the old age debate on the extent of the Court of Appeal's

jurisdiction in arbitration matters and in ensuring that there is clarity of law on that issue. As such, neither party can be faulted for this Court's determination. As a result, we find that the justice of the case demands that neither party should be condemned to bear the burden of costs. Consequently, each party will bear its own costs.

F. THE DISSENTING OPINION OF JUSTICE D.K. MARAGA, CJ & P

[96] The parties to this appeal seek from this Court the determination of one of the fundamental issues in arbitration as a dispute resolution mechanism: whether or not there is a right of appeal from decisions of the High Court made under Section 35 of the Kenyan Arbitration Act, No. 4 of 1995 (the Arbitration Act).

[97] I have had the advantage of reading in draft the majority Judgment in this appeal. I am unable to agree with it hence this dissent.

[98] The majority Judgment has beautifully captured the factual background and the summary of the submissions advanced by the parties in this appeal. It is therefore pointless for me to rehash them in this dissent save in limited aspects for purposes of clarity and to put any issue into perspective.

[99] Timelines in the performance of contracts and speed in the disposal of disputes are the hallmarks of the current competitive commercial environment. Rather than allow disputes to grow into protracted and expensive battles, sometimes in mid last century, the global business community sought to find mechanisms to remove delays and other impediments to the expeditious settlement of commercial disputes.

[100] In that endeavour, it was realised that there is no 'magic wand' for resolution of all commercial disputes. As Rogers J stated in ***Beveridge v.***

Dontan Pty Ltd[1], "*in the more enlightened climate of legal thinking today it should be accepted that there is not one exclusive method [of dispute] resolution that will lead to a just result*" for all. It all depends on the interests of the parties to a transaction. Some would opt for litigation in courts, some for arbitration, and others for other forms of alternative dispute resolution (ADR) mechanisms such as adjudication, conciliation, or mediation.

[101] Arbitration, which is our concern in this appeal, has existed as long as the English common law[2] and other forms of law in the Greek and Roman times have. Although originally Courts frowned on arbitration because it appeared to oust their jurisdiction, the English House of Lords dispelled that notion in ***Scott v. Avery***[3] and as Lord Denning later stated in ***Modern Engineering (Bristol) Ltd v. c Miskin & Sons Ltd***[4], arbitration "*is now one of the most important spheres of activity…*" in the administration of justice. It is the major ADR process appropriate for resolution of complex commercial disputes especially those involving technical issues. Prof. Sandra Rajoo underscored this point in his observation that:

> "***In the 21st century, the courts are seen as powerful allies of arbitration rather than jealous controllers of its power … [and] arbitration is now a generally accepted method of resolving disputes in a variety of commercial transactions, in particular those in specialised or technical industries such as shipping, construction, energy and financial services sector.***"[5]

[1] (1991) 23 NSWLR 13 at 24C—D.
[2] See Wilson Holdsworth, a History of English Law (1964) Vol XIV at p. 187
[3] [1856] HL Case 811; [1843-60] All ER Rep 1. See also Hayter v. Nelson and Home insurance Co. [1990] 2 Lloyd's Rep 265.
[4] [1981] 1 Lloyd's Rep 135 at 138.
[5] Datuk Professor Sandra Rajoo, Law, Practice and Procedure of Arbitration (Second Edition), LexisNexis Malaysia Sdn Bhd (Co. No. 7625-H), at p 6. In the 2013 Survey by PWC, *Corporate Choice in International Arbitration, 2013 PWC*, a majority of the respondents stated that arbitration was the preferred mode of resolution of their disputes.

[102] As stated, the main issue in this appeal is whether or not there is a right of appeal to the Court of Appeal and even to this Court against the decisions of the High Court on applications under Section 35 of the Arbitration Act. Making reference to the Court of Appeal decision in the case of ***Judicial Service Commission v. Hon. (Lady) Justice Kalpana Rawal & Others*** Civil Application No. NAI 308 of 2015, the appellant contends that the right of appeal to the Court of Appeal against decisions of the High Court and Courts of equal status is subsumed in the jurisdiction granted to the Court of Appeal by Article 164(3) of the Constitution to hear appeals from those Courts. In the circumstances, the appellant further contends, all decisions of the High Court, including the one under consideration in this appeal, are appealable to the Court of Appeal and no statute, including the Arbitration Act, can oust that right of appeal. In other words, any provision in the Arbitration Act that purports to oust the right of appeal to the Court of Appeal against any decision of a Superior Court is unconstitutional.

[103] The Respondent, on its part, argues that whereas Article 164(3) of the Constitution confers upon the Court of Appeal jurisdiction and the right of appeal to hear appeals from the High Court and Courts of equal status, in the light of Article 159(2)(c), such right of appeal does not apply to arbitral proceedings under the Arbitration Act save as stated in that Act. As such, the respondent concludes, there is no right of appeal to the Court of Appeal from a decision of the High Court rendered in an application made to it under Section 35 of the Arbitration Act.

[104] This rivalry calls for interpretation of Articles 159(2)(c) and 163(4) of the Constitution *vis-a-vis* Sections 10 and 35 of the Arbitration Act. And before embarking on that interpretation, it is important to keep in mind some cardinal principles of constitutional and statutory interpretation.

[105] In statutory construction, as was stated by the Canadian Supreme Court in the case of ***The Queen v. Big M. Drug Mart Ltd***[6]*,* one of the cardinal points to be always borne in mind is that;

> "***all legislation is animated by an object the legislature intends to achieve. This object is realized through the impact produced by the operation and application of the legislation. The purpose and effect respectively … are [therefore] clearly linked if, not indivisible***."

[106] In *Francis Bennion's "Statutory Interpretation",* the learned author adds his voice to the mischief rule:

> "***It is presumed that Parliament intended by the enactment [of a statute] to suppress … [some] mischief…. The court must [therefore] endeavour to insure that the remedy provided by Parliament does not set up other mischief…. [for] Parliament is unlikely to intend to abolish one mischief at the cost of establishing another which is just as bad, or even worse.***"[7]

In light of this principles, the question we need to answer here is: what was the objective of the enactment of the Kenyan Arbitration Act No. 4 of 1995?

[107] Having carefully considered this matter, I have no doubt in my mind that there is no right of appeal to the Court of Appeal or to this Court against decisions of the High Court on applications made to it under Section 35 of the Arbitration Act. To hold otherwise would ignore the historical background and the major objective of the enactment of the Arbitration Act No. 4 of 1995 as amended in 2009.

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[6] (1986) LRC, 332. See also CRAIES ON STATUTE LAW (6th Edn.) at p. 66
[7] Francis Bennion's *"Statutory Interpretation"*, 3rd Edition at p.725

(i) Historical Development of Arbitration in Kenya

[108] Kenya's legal framework on arbitration pre-dates its independence. The initial legislation on arbitration was the Arbitration Ordinance of 1914, which was a replica of the English Arbitration Act of 1889. The second legislation was the Arbitration Act of 1968 which was modelled along the English Arbitration Act of 1950. The essential feature of both Acts was the excessive leeway they allowed courts to have over arbitral proceedings. For instance, the Arbitration Act of 1968 gave the High Court supervisory jurisdiction and unfettered discretion over the appointment and removal of arbitrators and umpires; extension of the time for commencing arbitral proceedings and rendering awards; ordering discovery in the course of arbitral proceedings; and enforcement of arbitral awards. That fact rendered arbitration more of a court process than an independent proceeding thus robbing it of the main advantages of speed and effectiveness.

[109] With the globalization of commerce and the increasing popularity of arbitration as the major ADR mechanism of settling many commercial disputes, following the adoption of UNCITRAL Model Law in many jurisdictions, the court control over arbitral proceedings in Kenya led to the agitation by stakeholders, spearheaded by the Kenya Association of Manufacturers, for a complete overhaul of the law on arbitration culminating in the enactment of the Arbitration Act No. 4 of 1995 which repealed the Arbitration Act of 1968.

[110] The objective of the new Act, as is manifest from the Parliamentary Hansard report of 20th July 1995, was clear: to repeal the Arbitration Act of 1968, which was already outdated, and enact a new legislation that adapts the UNCITRAL Model Law and thus thrust the country into the current international arbitration practice. In his observations, while moving the motion for the passing of the Arbitration Bill, the then Attorney General stated that the proposed Act was intended to:

> ***"... insulate ... arbitration ...from the process of the courts....[in order] ... to deal with a dispute in a cost-effective manner and***

expeditiously as opposed to the courts where the procedures can be cumbersome and the dispute can go on for years. ... If the arbitration law is such that the courts can interfere at will or at any stage in the arbitration proceedings, then the whole purpose of arbitration is completely defeated."

He further urged that:

"***The arbitration process can only have advantage over the judicial process if ... [it] results in expeditious and efficient handling of commercial disputes.***"

[111] In answer to a question raised by Mr. Osogo, the then Assistant Minister for Commerce and Industry, the Attorney General explained that, *"the time limits and the finality of the High Court decision on some procedural matters [was] to ensure that neither party frustrates the arbitration process [thus] giving arbitration advantage over the usual judicial process."*

[112] The Arbitration Act No. 4 of 1995 was later amended in 2009. Explaining the purpose of the amendment, the Attorney General stated that it was to *"further strengthen and insulate [arbitration]... from courts ... [in particular the] 'constant interferences and misuse of arbitration by resorting to court on a matter which ought to be heard through the arbitration procedure.'*

[113] The Attorney General paid tribute to the Chartered Institute of Arbitrators of Kenya (CIAK) for having made useful proposals in line with UNCITRAL Model Law and concluded that the passing of the Arbitration Bill would also enable the legal fraternity to establish an arbitration centre in Nairobi. To my knowledge, two arbitration centres have indeed been established in Nairobi. The **Nairobi Centre for International Arbitration (NCIA)** and the **China-Africa Joint Arbitration Centre (CAJAC)** were established in 2013 and 2015 respectively. In its 2017 report, NCIA observed that:

"The Government of Kenya continues to provide support at policy level to advocate Kenya's position with respect to international agreements on arbitration and alternative dispute resolution ... [and] ensure Nairobi ... becomes the preferred regional and global Centre for resolution of international commercial disputes."

[114] The Arbitration Act No. 4 of 1995 borrowed heavily from the UNCITRAL Model Law and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Save for a few modifications which domesticated Kenya's obligations under the New York Convention which it had ratified on 10th February 1989, the Kenyan Arbitration Act of 1995 is a replica of the UNCITRAL Model Law. What is the UNCITRAL Model Law?

(ii) The UNCITRAL Model Law

[115] In the mid-Twentieth Century, challenges were experienced in the growing lack of uniformity in arbitration law and practice. Divergent and scattered arbitration legal frameworks of various nations became major impediments to international arbitrations, and in particular the enforceability of arbitral awards. Some jurisdictions had outdated arbitration provisions and others had pedantic mandatory provisions on the applicable laws and rules of procedure in arbitral proceedings.

[116] To overcome those challenges, the global community came together under the aegis of the United Nations to establish a model law that would address the needs of international commercial arbitration. Extensive discussions with broad stakeholder participation, including the involvement of seasoned arbitration experts highly experienced in international arbitration, were undertaken. The result was the harmonization of national laws into an excellent international

arbitration framework, the UNCITRAL Model Law[8], that was adopted in February 1985 and amended in 2006. This became a unified legal framework for a fair and efficient settlement, by way of arbitration, of disputes arising from international commercial contracts.[9]

[117] The establishment of the UNCITRAL model law was followed by clarion calls from legal commentators and academia on the importance of various jurisdictions adopting the instrument. With its adoption starting with the US and Australia, followed by the UK and the rest of Europe, over the last 20 years, the growth of arbitration as an alternative dispute resolution mechanism, and ADR in general, has been astronomical.

[118] With increased globalization of commerce, arbitration has therefore become one of the preferred ADR mechanisms for settling international disputes and has continued to grow in popularity among the business communities due to its many advantages over litigation. What are the advantages?

[119] As an important means of dispute resolution in many jurisdictions, besides fair trial by an independent party, arbitration offers numerous advantages over ordinary litigation. These include flexibility and party autonomy; confidentiality; finality; and speed.

[120] One of the key characteristics that sets arbitration apart from other alternative dispute resolution mechanisms is flexibility and party autonomy. Party autonomy "*is an intrinsic attribute... that gives the parties to arbitration proceedings the power and authority to decide within the confines of the law*

[8] Commonwealth Secretariat, *UNCITRAL Model Law on International Commercial Arbitration: Explanatory Documentation prepared for Commonwealth Jurisdictions*, London, United Kingdom, 1991, pp. 2, 3
[9] Githu Muigai (Prof.), Jacqueline Kamau (eds) *Arbitration Law and Practice in Kenya,* Law Africa, 2013, pp. 2.

who, where, when and how the arbitral proceedings will be conducted."[10] At the time of entering into a contract, parties enjoy broad flexibility and freedom to construct a dispute resolution mechanism of their choice. They choose the law to govern their dispute resolution, designate the number of arbitrators to resolve their disputes as well as their qualifications and the procedure they would like to be followed. They can also set timelines within which arbitral awards should be handed down.[11] In the words of Levi Onyeisi Wilson Odoe: *"The parties are free to [decide on] … almost everything related to the resolution of … [their] dispute."*[12]

[121] Confidentiality is also important in many commercial transactions. Some parties do not want their business secrets to be divulged to the entire public as is often the case with litigation. In this regard, one of the reasons why Arbitration is preferred as a means of dispute resolution is because it enhances confidentiality and creates a less tense atmosphere of dispute resolution. As Dr. Kariuki Muigua has observed:

> "***Unless parties agree otherwise in an Arbitration agreement … all the aspects of the case are confidential. … For parties who dread humiliation or condemnation or for those who simply do not want sensitive information to be disclosed, Arbitration allows settlement of disputes without exposure.***"[13]

Matters of principle, long term relationships of parties, culture and ego also often drive parties to prefer arbitration to litigation.

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[10] Ar. Gör, Şeyda Dursun, 'A Critical Examination of The Role of Party Autonomy in International Commercial Arbitration and an Assessment of its Role and Extent' *Yalova Üniversitesi Hukuk Fakültesi Dergisi*, 2012/1, pp. 163

[11] Michael Pryles, *Limits to Party Autonomy in Arbitral Procedure,* Australian Centre for International Commercial Arbitration, 2008, pp. 2

[12] Levi Onyeisi Wilson Odoe 'Party Autonomy and Enforceability Of Arbitration Agreements and Awards as The Basis Of Arbitration' *University of Leicester, School of Law, PhD Thesis,* 2014, pp. 18, 78

[13] Kariuki Muigua (Dr.), *Constitutional Supremacy over Arbitration in Kenya,* March, 2016, pp. 11

[122] Longevity is sometimes crucial in business transactions and relationship is another advantage of arbitration over ordinary litigation. Focusing on future business opportunities and maintaining long-term commercial relationships, in an effort to nip in the bud any disputes that may arise between them and get on with their businesses[14], most parties opt for arbitration as their preferred dispute resolution mechanism.

[123] The other key characteristic or advantage of arbitration is the binding nature of the outcome of the arbitral proceedings. Distinguishable from non-binding ADR mechanisms, parties to arbitration often require a final and enforceable outcome. This is encapsulated in the principle of finality associated with doctrine of res judicata that is deeply rooted in public international law. Ivan Cisár and Slavomír Halla posit that *"The ultimate aim of the international arbitration is to end the dispute absolutely. Therefore, the arbitral award should be [a] final determination of the rights and obligations of the disputants".*[15] Without a clear-cut rule on finality, there is the risk of re-litigation of claims or issues.

[124] It is common knowledge that there are huge backlogs in many jurisdictions which cause court litigation to drag on for years on end and at times turn parties into arch enemies. As such, the expeditious disposal of commercial disputes is another important feature, if not the primary concern that drives parties to arbitration.

[125] Having outlined some of the advantages arbitration has over litigation, I now wish to consider the issues in this appeal.

[14] Datuk Professor Sandra Rajoo, Law, Practice and Procedure of Arbitration (Second Edition), LexisNexis Malaysia Sdn Bhd (Co. No. 7625-H)
[15] Ivan Cisár, Slavomír Halla, 'The finality of Arbitral Awards in the Public International Law' *Conference Právní Rozpravy,* Grant Journal, 2012, pp. 1

[126] By adopting the UNCITRAL Model Law as stated above, Kenya did not only make a distinct shift away from judicial supervision of the arbitral processes but also infused into its legal system the above stated international arbitration principles of expedition; party autonomy; procedural flexibility; and more importantly, finality and the increased ease of recognition and enforceability of arbitral awards as well as other best practices. The interpretation of the Kenyan Arbitration Act must therefore never lose sight of these objectives.

[127] Given the departure from Section 64 of the retired Constitution that is evident in Article 164(3) of the current Constitution, save as otherwise provided in the same Constitution, it cannot have been the intention of the Committee of Experts, the final drafters of the Constitution, to grant the Court of Appeal jurisdiction to hear appeals from the High Court and courts of equal status and withhold the right of appeal. To that extent, I agree with the appellant and concur with the Court of Appeal decision in the ***Judicial Service Commission v. Rawal*** (supra) that generally, the right of appeal to the Court of Appeal from the decisions of the High Court and courts of equal status is subsumed in the appellate jurisdiction entrenched in Article 164(3) of the Constitution. However, in some situations stated in or authorized by the Constitution, the right of appeal can be limited. In ***Equity Bank Limited v. West Link Mbo Limited*** Civil Application 78 of 2011 (UR. 53/2011) [2013] eKLR, Kathurima M'Inoti JA succinctly captured some of these exceptions thus:

> ***"This is not to suggest that, by dint of Article 164 (3) all and sundry decisions of the High Court are appealable to the Court of Appeal. A holistic and purposive reading of the Constitution, particularly the right to access justice (in this context "appellate justice" (Article 48), the right to fair hearing (Article 50), judicial authority (Article 159) and Article 164 (3) itself would accommodate limitation of what is appealable, if the limitation satisfies the requirements of Article 24 of the Constitution."***

The issue in this appeal therefore is whether or not the general right of appeal implied in Article 164(3) of the Constitution is restricted in arbitration proceedings.

[128] As stated, the appellant contends that by dint of Article 164(3) of the Kenyan Constitution, 2010, all decisions of the High Court and court of equal status are appealable to the Court of Appeal. The respondent on the other hand contends that by dint of Article 159(2)(c), which entrenches arbitration in our legal system by requiring courts to promote "*alternative forms of dispute resolution including … arbitration*", such right of appeal does not apply to arbitral proceedings under the Arbitration Act save as stated in that Act.

[129] Besides discovery of the legislative intent, in any system of constitutional supremacy like ours, it should always be remembered that provisions of any constitution cannot contradict each other. The observation of the Ugandan Court of Appeal in the case of ***Olum v. Attorney General of Uganda***[16], a decision that has been cited with approval by our Court of Appeal in ***Nderitu Gachagua v. Thuo Mathenge & 2 others***[17], ***Dennis Mogambi Mong'are v. Attorney General & 3 others***[18] and in many other cases, succinctly captures harmonization of relevant provisions of a constitution as one of the canons of constitutional construction:

> "***The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other… [and] without subordination of any one provision to the other.***"

[130] In light of this principle, it follows that Articles 159(2)(c) and 164(3) of the Kenyan Constitution, 2010 do not contradict each other. While Articles 159(2)(c) entrenches arbitration in Kenya as an ADR mechanism, Article 164(3) on the

[16] [2002] 2 EA 508.
[17] [2013] eKLR
[18] [2014] eKLR

other hand provides for the appellate jurisdiction of the Court of Appeal. The two are thus harmonized.

[131] Section 7 of the Sixth Schedule to the Constitution provides that "*All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution*." One of the laws in force in this country prior to the effective date, that is on 27th August 2010 when the current Constitution came into force, is the Kenyan Arbitration Act No. 4 of 1995. I have already shown that the enactment of the Arbitration Act No. 4 of 1995 was prompted by the need to adapt the Kenyan arbitration framework to the UNCITRAL Model of Law and elevate Kenya to the international plane on arbitration.

[132] The explanatory notes on the Model Law acknowledge that appeals may lie to a higher Court against decisions on arbitral proceedings in limited circumstances as may be determined by each State in its adaptive legislation. Under the Kenyan Arbitration Act, appeals are allowed only under Section 39 of our Act and by the consent of the parties.

[133] I have perused the majority Judgment's reference to comparative jurisprudence on the matter. With respect, none of the arbitration legislations of the countries mentioned in their judgment is in exact *pari materia* with our Act. The English, Canadian and Singaporean Arbitration Acts permit appeals, albeit with leave, against High Court decisions setting or declining to set aside arbitral awards. For instance Section 67 of the English Arbitration Act which, like our Section 35, provides for the setting aside of an arbitral award if, *inter alia*, the arbitrator acted without jurisdiction, allows appeals from decisions made thereunder. (See sub-section (4) thereof). Section 69(1) & (2) of that Act provides that with the agreement of all the other parties to the proceedings, or with the leave of the court, a party to arbitral proceedings may appeal to the court on a

question of law arising out of an award made in the proceedings. Section 69(8) allows further appeals with leave of "*the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal.*"

[134] Section 49 of the Singaporean International Commercial Arbitration Act is more or less the same as Section 69 of the English Arbitration Act. It permits an appeal with leave against a High Court decision to set aside an award made under Section 24 of that Act and Article 34 of the UNCITRAL Model Law.

[135] Under the Canadian Arbitration Act of 1996, challenges to arbitral awards are by way of appeal. Like the English Act, the Canadian Arbitration Act of 1996 also permits further appeals (with leave granted under Section 31(2) of that Act) from the High Court decisions setting aside an award on, *inter alia,* points of law of public importance.

[136] In contrast, Section 10 of the Kenyan Arbitration Act, which is modelled on Article 5 of the UNCITRAL Model Law, is categorical: *"Except as provided in this Act, no court shall intervene in matters governed by this Act."* Article 5 of the UNCITRAL Model Law provides that *"In matters governed by this Law, no court shall intervene except where so provided in this Law."* The explanatory notes on this provision posit that its enactment was for purposes of *"protecting the arbitral process from unpredictable or disruptive Court interference"* especially in commercial disputes involving foreign parties. The notes conclude that "*Article 5 thus guarantees that all instances of possible court intervention are found in the piece of legislation enacting the Model Law, except for matters not regulated by it.*" [Emphasis supplied]

[137] Like Section 10, Section 32A of the Arbitration Act brought in by the 2009 amendment is equally categorical: "*Except as otherwise agreed by the parties, an*

arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."

[138] The Court intervention allowed after an award has been filed is by way of an application under Section 35 to set aside the award strictly on the grounds that either party to an arbitration agreement was under some incapacity; that the arbitration agreement was invalid under the relevant laws; that there was failure to give proper notice of the appointment of an arbitrator; that a party was unable to present his case during the arbitral proceedings; that the arbitrator went outside his mandate; that the agreement was not in accordance with the Arbitration Act; or that the rendering of the award was tainted by fraud, bribery, undue influence or corruption. The explanatory notes by the UNCITRAL Secretariat on Article 34, on which our Section 35 is based, state that "*the purpose of the provision was to provide only one way of attacking an award and that is through an application for setting aside*." [Emphasis supplied].

[139] The other intervention, premised on the parties' consent and only in domestic arbitrations, is by way of an appeal under Section 39 to challenge or confirm the award strictly as therein stated.

[140] The appellant made heavy weather of Section 39 of the Arbitration Act. It is indeed true that, the said Section allows interventions by the courts on points of law arising in domestic arbitrations. But that intervention is permitted if, and only if, the parties, by consent, provide for it in their arbitral agreement or at commencement of the arbitration proceedings. This is clear from the opening words of subsection (3) thereof: "*Notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal*...." Section 10, as we recall states that "*Except as provided in this Act, no court shall intervene in matters governed by this Act*" while Section 35 directs that "*Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).*" Clearly, this means that notwithstanding the limitation

imposed by the two sections on the court intervention permitted in arbitral proceedings, if the parties so consent, an appeal shall lie to the Court of Appeal against the decision of the High Court made under subsection (2) of Section 39. Clearly, the appeal under subsection (3) is restricted to the matters and the consent in subsection (2).

[141] It follows, in my respectful view, therefore, that in arbitral proceedings governed by the Arbitration Act, an appeal lies to the Court of Appeal only under Section 39(3). In this matter, the parties never consented on the issue of appeal. In this case we are dealing with the issue of whether there is a right of appeal, not against the High Court decision made under Section 39(2), but from the High Court decision on an application made under Section 35 of the Arbitration Act. So, contrary to the contention of counsel for the appellant, Section 39 of the Arbitration Act has no relevance to the issues at hand. What then do we make of Section 10 of the Arbitration Act?

[142] As the High Court stated in the case of ***Lall v. Jeypee Investments Ltd***[19] "*[e]very statute must be interpreted on the basis of its own language….*" Where the words or phrases of a provision are clear and un-ambiguous, they must be given their primary, ordinary and natural meaning irrespective of its consequences.[20] Lord Denning MR, warned in ***Ferrell v. Alexander***[21] that,

> "***No court is entitled to throw over [board] the plain words of a statute by referring to a judicial decision. When there is a conflict between a plain statute and a previous decision the statute must prevail.***"

[19] [1972] EA 512
[20] Tindal CJ in Warburton Vs Loveland(1831),2 Dow & Cl (HL) at p 489, quoted…from Odger's Construction of Deeds and Statutes (4th Edn) at p.187 *op cit*. See also Kammins Ballrooms Co Ltd Vs Zenith Investments(Torquay) Ltd,[1971]AC 850 at page 859.
[21] (1976) 1 All ER 129.

The words of Sections 10 and 32A of the Arbitration Act are plain and unambiguous. In my view, they leave no doubt whatsoever that court intervention in arbitral proceeding has to be as expressly stated in that Act.

[143] As stated, the intervention allowed by Section 35 is by an application to the High Court to challenge an arbitral award on grounds therein specified. The Section is silent on an appeal against the High Court decision thereunder. Opinion is divided even in comparative jurisprudence on the contention that the silence of a provision cannot oust the jurisdiction or right of appeal. In ***Re Downshire Settled Estates***[22] in which Section 57 of the English Settled Land Act 1925 that gave the Court certain powers to deal with the management or administration of trust property but did not confer on the Court any general jurisdiction to vary beneficial trusts was being considered, Evershed MR stated that;

> ***"... if Parliament, in enacting Section 57 had intended to confer this power on the court it is ... inconceivable that it would not have done so in express terms, having regard not only to the novelty but also to the width of the jurisdiction that it was creating."***

This is in contrast to the cases of ***National Telephone Co. v. Post Master General***[23] and ***Baku Raphael Obudra and Ors v. Attorney General***[24] cited in the parties' submissions in this matter on that silence which were, at any rate, not on arbitration. So those authorities are clearly distinguishable.

[144] In the English case of ***Inco Europe Ltd & Others v. First Choice Distribution (A Firm) and Others***[25] which was on arbitration, the House of Lords was concerned with Section 9 of the UK Arbitration Act of 1996 that

[22] [1953] Ch.218, at page 247.
[23] [1913] A.C 546
[24] (Constitutional Appeal No. 1 of 2005) [2006] UGSC 5.
[25] [2000] l Lloyd's Rep. 467

empowered the Court to stay legal proceedings in contracts with arbitration clauses but was silent on appeal from such decision. This is long before any arbitration is undertaken. And at any rate the English Arbitration Act, as stated above, allows appeals to the Court of Appeal with leave. Clearly, this authority is also distinguishable.

[145] Even in jurisdictions which allow appeals in arbitral proceedings, as the Singaporean Court of Appeal stated in ***AJU v. AJT*** [2011] SGCA 41 and ***AKN & Another v. ALC and Others and other appeals*** [2015] SGCA 18 (***AKN***), save for curial intervention and on narrowly circumscribed grounds of "*process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement*", in principle,

> "***there is no right of appeal from arbitral awards….the parties to an arbitration do not have a right to a "correct" decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process***."[26]

[146] Taking all these factors into account and given its wording, I find no warrant whatsoever to imply that the silence in Section 35 of the Kenyan Arbitration Act should be understood as a tacit right of appeal against a decision made thereunder.

[147] Following the shift it made with the repeal of Arbitration Act of 1968 and the enactment of the Arbitration Act of 1995, Kenya would backpedal if the appellant's argument that Article 164(3) *ipso facto* grants both the jurisdiction

[26] AKN & Another v. ALC and Others and other appeals [2015] SGCA 18 (AKN) at par. 38.

and right of appeal against all High Court decisions, including those made in arbitral proceedings, is accepted. That would also jettison out of the window the principle of finality in arbitral proceedings.

[148] The principle of finality in arbitral proceedings, and in particular the caution in the failure to uphold it, has attracted considerable scholarly comments. In his article, *'Finality' Bar News,* 2013, A. M Gleeson QC observes that "... *if an arbitral process is treated as if it merely adds one layer to the hierarchy of potential decision-making then the system is self-defeating*."[27] Another Scholar, Dr. Katherine A. Helm adds that *"If courts were free to intervene more liberally in the arbitration process, the advantage of a speedy and less costly resolution of disputes by private arbitration mechanisms would certainly disappear*."[28]

[149] Because the Kenyan Arbitration Act of 1995 puts emphasis on the concept of finality in arbitration and the above stated public policy to promote arbitration as encapsulated in Article 159(2)(c), save as stated in the Arbitration Act, awards should be impervious to court intervention as a matter of public policy. Unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act. The role of courts should therefore be merely facilitative otherwise excessive judicial interference with awards will not only be a paralyzing blow to the healthy functioning of arbitration in this country but will also be a clear negation of the legislative intent[29] of the Arbitration Act.

[150] In commercial transactions, disputes are often about money, and more often than not, large sums of money. "[A]*nd where money is concerned there are not many good losers*...."[30] In an adversarial system as ours, to open unwarranted

[27] A. M Gleeson (Hon., AC, QC,), 'Finality' *Bar News,* 2013, pp. 41.
[28] Katherine A. Helm (Dr.), 'The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop?' *Dispute Resolution Journal*, vol. 61, no. 4, Nov. 2006-Jan. 2007, pp. 6 (separate reprint)
[29] Kariuki Muigua (Dr.), *Alternative Dispute Resolution and Access to Justice in Kenya,* Glenwood Publishers Limited, 2015, pp. 116, 117.
[30] A. M Gleeson (Hon., AC, QC,), 'Finality' *Bar News,* 2013, pp. 41.

doors to court intervention in arbitral proceedings, as the Singaporean Court of Appeal observed in the said case of ***AKN & Another v. ALC and Others*** and other appeals (supra) "*through the ingenuity of counsel,"* we shall have appeals on literally all issues *"disguised and presented as ... challenge[s] to process failures during the arbitration*."[31] And we know what that means: arbitral awards or decisions on them shall be subject to court challenges on every issue. Arbitration will therefore be an extra cog in the gears of access to justice through litigation or "*a precursor to litigation*."[32] By the time the court determines the issue, the matter will have dragged in court for years. Arbitrations will thus prolong dispute resolution and be self-defeating. In such a scenario, it would be more efficacious to abandon arbitration altogether and litigate all disputes in courts of law.

[151] As stated, timelines in the performance of contracts and speed in the disposal of disputes are the hallmarks of the current competitive commercial environment. The importance of arbitration as an ADR mechanism cannot be over-emphasized. *"Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court."*[33] The common thread that runs through most arbitration statutes based on the UNCITRAL Model Law is the restriction of court intervention except where necessary and in line with the provisions of the Acts of various jurisdictions.

[152] Kenya's boasting as the arbitration centre in the East African region cannot hold if Kenyan courts do not reflect on the effect of their decisions in arbitral proceedings. The words of Andrew P. Tuck, in his treatise, *The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas*[34] are

[31] AKN & Another v. ALC and Others Appeals [2015] SGCA 18 (AKN) at par. 39
[32] Amy J. Schmitz, 'Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis' *Georgia Law Review,* Vol. 37, 2002, pp. 123.
[33] A. M Gleeson (Hon., AC, QC,), 'Finality' *Bar News,* 2013, pp. 41.
[34] Andrew P. Tuck, 'The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas' *Law and Business Review of the Americas,* Vol. 14, No. 3, 2008, pp. 569

particularly apposite with regard to the appellate jurisdiction in arbitral proceedings. He observes that in the selection of the seat of arbitration, parties often pay regard to, *inter alia*, the right of appeal and judicial review in that jurisdiction; and also finality of an arbitral award and whether the jurisdiction is a signatory to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This is because, in his view, which I share, the rights of appeal and review;

> "***can seriously frustrate the advantages of international arbitration … over the vicissitudes and uncertainties of international business litigation.***"[35]

[153] And as Christa Roodt, in her article titled *Reflections on finality in arbitration*[36], warned, "*If a state's judicial institutions fail to accord respect for rights established under international law, their judicial decisions cannot demand pluralist respect*." In other words if decisions of Kenyan courts disregard established principles of international arbitration law, Kenya will be shunned as both an investment destination and a seat of arbitration. In the words of *Nyamu J. (as he then was)* in ***Prof. Lawrence Gumbe & Anor v. Hon. Mwai Kibaki & Others***[37], that will reduce Kenya into *"a pariah state"* and cause it to *"be isolated internationally"*.

[154] In the circumstances, allowing appeals where the Arbitration Act states otherwise would in my view, as stated, turn arbitration into "*a precursor to litigation*."[38] The Kenyan courts must therefore, "*as a matter of public interest*"[39], interpret the provisions of the Arbitration Act in a manner that seeks to promote

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[35] Andrew P. Tuck, 'The Finality Question: Appellate Rights and Review of Arbitral Awards in the Americas' *Law and Business Review of the Americas,* Vol. 14, No. 3, 2008, pp. 569.
[36] Christa Roodt (Dr.) 'Reflections on finality in arbitration' *Works-in-Progress Conference of the University of Missouri, Columbia, 2011,* In De Jure, 2012, pp. 489, 503, 507
[37] High Court Misc. Application No. 1025/2004.
[38] Amy J. Schmitz, 'Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis' *Georgia Law Review,* Vol. 37, 2002, pp. 123.
[39] Francis Kariuki, 'Challenges facing the Recognition and Enforcement of International Arbitral Awards within the East African Community' *Conference on Commercial Private International Law in East and Southern Africa,* Johannesburg, 2015, pp. 15, 16, 26.

and embellish arbitration, rather than emasculate and thus render it redundant. As the United States' Second Circuit of the Court of Appeal stated in ***Parsons Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier (RAKTA)***,

> ***"By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights ... [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks"***[40]

[155] Regarded as a means of encouraging and facilitating international trade, arbitration is consensual. As Margaret Moses observes, *"Arbitration is a private system of justice, made possible by the parties' consent. ..."*[41] To quote A. M. Gleeson once again, "*Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court...."*[42] Once parties have submitted their dispute to arbitration, "*their arbitration agreement must be enforced according to its terms, just like any other contract*."[43] *"The remedy for any flaws in the system",* adds Dr. Katherine A. Helm "*is having the parties choose better arbitrators, not to appeal arbitration awards."*[44]

[156] The dispute in this matter has been raging for over 10 years. That alone is clear testimony of the danger we will be exposing arbitration to in this country if we allow unwarranted court intervention. Failure to adhere to the prescriptions in the Arbitration Act will hinder investment, as foreign firms and their agents will not be assured of an expeditious clear-cut dispute resolution mechanism in line with international standards.

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[40] 508 F2d. 969
[41] Margaret L. Moses, 'Can Parties Tell Court What to Do? Expanded Judicial Review of Arbitral Awards' *Loyola University Chicago, School of Law,* 2004, pp. 429.
[42] A. M Gleeson (Hon., AC, QC,), 'Finality' *Bar News,* 2013, pp. 41.
[43] Margaret L. Moses, 'Can Parties Tell Court What to Do? Expanded Judicial Review of Arbitral Awards' *Loyola University Chicago, School of Law,* 2004, pp. 429
[44] Dr. Katherine A. Helm in her article titled *The Expanding Scope of Judicial Review of Arbitration Awards: Where Does the Buck Stop? Pp 8,9.*

[157] Given the history of the practice of arbitration in this country and the clear and unambiguous wording of Section 10 of the Kenyan arbitration Act, we would, in my humble view be amending the Arbitration Act if we allow appeals from High Court decisions on Section 35 which, as the explanatory notes by the UNCITRAL Secretariat state was intended to be final.

[158] In the result, I would myself dismiss this appeal with no order as to costs. However, as the majority hold a contrary opinion, the final orders of the Court shall be as proposed in their judgment.

G. ORDERS

[159] Flowing from our findings above, we make the following orders:

(i) The Petition of Appeal dated 13th February, 2017 is hereby allowed in the following specific terms:

(a) The Ruling of the Court of Appeal dated 20th December, 2016 is hereby set aside.

(b) The Petitioner's Notice of Appeal dated 15th March, 2016, and the Record of Appeal dated 22nd April, 2016 filed in the Court of Appeal in Civil Appeal No. 81 of 2016 are hereby re-instated.

(c) An order is hereby issued directed at the Court of Appeal to expeditiously and on a priority basis proceed to determine on merits the Petitioner's appeal in Civil Appeal No. 81 of 2016.

(ii) Each party shall bear its own costs.

[160]Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **6th day** of December, **2019**

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D. K. MARAGA
CHIEF JUSTICE/PRESIDENT OF THE THE SUPREME COURT

.....

M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA