

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(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, (G. B. M. Kariuki, P. M. Mwilu, & Azangalala, JJ.A) dated 20th December, 2016 in Civil Appeal Application No. 81 of 2016)

RULING OF THE COURT

A. INTRODUCTION

[1] Before this Court, is the respondent's Notice of Preliminary Objection on points of law dated 27th February, 2018 and filed on even date. The points of law raised are that the Supreme Court lacks jurisdiction to entertain the appeal herein by virtue of the provisions of Article 163(4) of the Constitution; Sections 15 and 19 of the Supreme Court Act and Sections 10, 35, 36 and 39 of the Arbitration

Act. Consequently, the respondent contends that the petition of appeal herein is an abuse of court process and should be struck out with costs to the respondent.

B. BACKGROUND

[2] The appeal in which the Preliminary Objection has arisen stems from arbitration proceedings before a sole arbitrator following a dispute with respect to 14 agreements for sale of office space and parking spaces. The respondent, aggrieved with the award of the arbitrator proceeded to invoke Section 35 of the Arbitration Act to challenge the outcome. The High Court set aside the award in entirety for being in breach of Section 35 of the said Act. Dissatisfied with the Ruling of the High Court, the appellant appealed to the Court of Appeal. However, the respondent challenged the right to appeal before the Court of Appeal. In a Ruling delivered by the Court of Appeal, on 20th December, 2016, the Court dismissed the appeal, holding that there is no right of appeal to the Court of Appeal in a matter governed by the Arbitration Act. This dismissal by the Court of Appeal prompted the appellant to file the present appeal in this Court.

[3] The appeal is filed as of right under Article 163(4) (a) of the Constitution. The appellant faults the Appellate Court mainly because of its interpretation of Section 35 of the Arbitration Act, *vis a vis* Article 164(3) of the Constitution. The appellant therefore seeks to set aside the Ruling of the Court of Appeal and have the dispute remitted to this Court for full hearing. In the alternative, the appellant urges this Court to determine the matter substantively. The Court is also urged to determine whether a party aggrieved by a High Court decision pursuant to an appeal from arbitration proceedings under the Arbitration Act, more specifically, Section 35, thereof, has a right of appeal pursuant to the provisions of the Constitution.

C. PARTIES' SUBMISSIONS

(i) Applicant's Submissions

[4] To support the Preliminary Objection, the respondent filed its submissions on 27th March, 2017 wherein it contends that there are no constitutional questions arising from the Appellate Court's Ruling to warrant the further intervention of this Court. The respondent thus submits that the Supreme Court lacks jurisdiction to entertain an appeal based on a matter emanating from arbitration proceedings except if the matter was filed as a constitutional reference in the High Court for enforcement of the Bill of Rights. The respondent further argues that the appellant's reference to the Constitution is a mere divergence from the real issue in the dispute between the parties. It is their submission therefore, that the appellant ought to have sought certification and leave under Article 163(4) (b) of the Constitution as well as Sections 15 and 16 of the Supreme Court Act so as to properly invoke the Court's jurisdiction.

[5] The respondent furthermore contends that the matter at hand is a commercial dispute, which does not require interpretation of the Constitution and that the mere mention of Article 164 (3) of the Constitution in the petition of appeal, does not transmute the matter into a constitutional dispute. According to the respondent therefore, the primary concern of the Court of Appeal, was whether there existed a right of appeal from the High Court in arbitration cases.

[6] The respondent also argues that under the Arbitration Act, parties were bound by the Agreements for Sale (special conditions), to resolve their differences through arbitration. Towards this end, the specific clause states *that the decision of such arbitrator is final and binding on the parties thereto*. The respondent also submits that Sections 10, 35 and 39 of the Arbitration Act are clear and they limit intervention of Courts in matters of arbitration. Specifically, the respondent argues that only the High Court can intervene in matters specified

in the Act. Thus the intervention by the Court of Appeal is limited to the provisions of Section 39 of the Act and is inapplicable in the appellant's circumstances.

[7] The respondent further submits that, arbitration is recognized under Article 159(2) (c) of the Constitution as a form of dispute resolution and the finality of arbitration proceedings under the Arbitration Act cannot therefore be termed as unconstitutional. In addition, Article 2(6) of the Constitution domesticates the provisions of UNCITRAL Model Law of International Commercial Arbitration, which is applicable in disputes such as this one.

[8] The respondent also submits that the finality of the High Court's decisions in arbitration disputes is well settled by the courts in ***Nyutu Agrovat Limited v. Airtel Networks Limited*** [2015] eKLR; ***Tanzania National Roads Agency v. Kundan Singh Construction Limited*** [2014] eKLR, ***Kenya Oil Company Limited & Another v. Kenya Pipeline Company*** [2014] eKLR, ***Anne Mumbi Hinga v. Victoria Njoki Gathara*** [2009] eKLR, ***Aden Refinery Co. Ltd v. Ugland Management Co.*** (1986) 3 All ER 737. Accordingly, he states that it is settled that no right of appeal exists on an arbitration award except as provided for by the law.

[9] On this Court's jurisdiction, the respondent refers to the cases of ***Lawrence Nduttu & 6000 Others v. Kenya Breweries Ltd & Another*** [2012] eKLR, ***Malcolm Bell v. Daniel Toroitich Arap Moi & Another*** [2013] eKLR, ***Peter Oduor Ngoge v. Francis Ole Kaparo & 5 Others*** [2012] eKLR, ***Erad Suppliers & General Contractors Ltd. v. National Cereals & Produce Board*** [2012] eKLR where the issue was settled. The respondent urges that similar issues have arisen before the Supreme Court of India and the jurisprudence has been consistent with what is highlighted above. It also refers to the Indian cases of ***State of West Bengal & Others v. Associated Contractors*** [2015] 1SCC 32 where courts have declined to exercise

jurisdiction, *Arun Dev. Upadhyaya v. Integrated Sales Service Ltd. & Another* to the effect that jurisdiction is express under the Constitution and statute and cannot be implied therefrom.

(ii) Response to the Preliminary Objection

[10] In opposition to the Preliminary Objection, the appellant filed written submissions on 7th April, 2017. Regarding Section 35 of the Arbitration Act, the appellant submits that the said provision neither allows nor bars an appeal from the High Court to the Court of Appeal in arbitration proceedings. It is the appellant's other argument that contrary to the submission by the respondent, the question that was canvassed at the Court of Appeal by the former, was whether the provisions of the Arbitration Act, could oust the appellate jurisdiction of the Court of Appeal under Article 164 (3) of the Constitution. Indeed, submits the appellant, the issue before the Court of Appeal was whether the appellant had a constitutional right to appeal from an adverse decision of the High Court. The appellant adds that the Court of Appeal could not determine the existence of this right without considering the scope of the right to appeal under Article 164(3) of the Constitution. The appellant thus faults the respondent for failing to grasp the dichotomy of issues before the Court of Appeal – to wit, substance of the appeal itself arising from the Ruling of the High Court, and secondly, the appellant's right of appeal to challenge that Ruling. Accordingly, he argues that there was no need to apply for leave under Section 15 of the Supreme Court Act, to file an appeal to this Court.

[11] On jurisdiction under the Arbitration Act, the appellant submits that the key question in the matter is whether, in the absence of an express provision in the Arbitration Act outlawing appeals to the Court of Appeal, under Section 35 of the Arbitration Act, the right conferred by Article 164(3) (a) of the Constitution is

thereby ousted. The appellant faults the Court of Appeal's position in answer to this question in so far as its interpretation takes away the appellant's constitutional right of appeal.

[12] The respondent further argues that Section 10 of the Arbitration Act is silent on the question as to whether an appeal arises from a decision of the High Court, pursuant to Section 35 of the Arbitration Act.

[13] On the UNCITRAL Model Law to which Kenya is a signatory, the appellant contends that, the submission is misplaced as the Model Law was domesticated through the enactment of the Arbitration Act 1995. Indeed, Article 5 of the Model Law is a mirror image of Section 10 of the Arbitration Act and nothing helpful can be drawn from the Model Law beyond what is provided for in the Arbitration Act.

[14] The appellant reiterates that as this question has yet to be settled by the Court of Appeal, the Supreme Court ought to render an authoritative interpretation of the interplay between the Arbitration Act and the constitutional right to appeal under Article 164 (3 (a) of the Constitution.

(iii) Reply to the Response

[15] In reply to the response, the respondent filed supplementary submissions on 13th April, 2017. Therein the respondent adds that the law on the right to appeal *vis a vis* jurisdiction to hear appeals has been settled, arguing instead, that the right to appeal must be provided for in a statute. That several decisions of the Court of Appeal have been cited in that regard including ***Timamy Issa Abdalla v. Swaleh Salim Swaleh Imu & Others*** [2014] eKLR and ***Equity Bank Limited v. West Link Mbo Limited*** [2013] eKLR. The appellant also cites the decision of the Court of Appeal of England in ***Kyla Shipping Company Ltd v. BUNGE S.A.*** [2013] EWCA CIV 734 and the decision of the

Supreme Court of New Zealand in ***Ewan Robert Carr & Another v. Gallaway Cook Allan*** [2014] NZSC 75 to make the same point. In addition to legislative intent, the respondent submits that public policy curtails the intervention by Courts in arbitral proceedings.

D. ANALYSIS

[16] The main question for determination before us is whether the jurisdiction of this Court has properly been invoked under Article 163 (4) (a) of the Constitution. Towards this end, the appellant argues that this is an appeal as of right while the respondent contends that the appeal should have been brought under Article 163 (4) (b) of the Constitution pursuant to certification that a matter of general public importance is involved.

[17] This Court has already pronounced itself on when and how a party may invoke its jurisdiction pursuant to Article 163(4) (a) and 136(4) (b) of the Constitution. In ***Fahim Yasin Twaha v. Timamy Issa Abdalla & 2 Others*** [2015] eKLR the Court stated:

*“[41] Suffice it to say that the path that a litigant takes is determined on the basis of the subject matter, as has been held by the superior Courts. Once the Court of Appeal renders its decision, the litigant is able to elect which course to follow. This decision is taken in advance, as it is the basis of determination on whether to seek certification first, or proceed straight to the Supreme Court. Thus, the decision on how to proceed, rests on **the character of the issues involved in the subject matter.**”*

[18] The question as to whether there is a right of appeal to the Court of Appeal from a decision of the High Court, pursuant to arbitration proceedings under the Arbitration Act, was considered by a five Judge Bench of the Court of Appeal in

Nyutu Agrovat Limited v. Airtel Networks Limited. We note that following the Ruling by that Bench, the appeal was certified as one involving a matter of general public importance and therefore appealable to this Court. In so certifying, the Court of Appeal acknowledged the fact that the scope of Articles 48 and 164(3) of the Constitution and their interplay with Section 35 of the Arbitration Act was a question deserving a further and final authoritative input of this Court.

[19] Based on this certification, the parties filed Petition No. 12 of 2016 which is still pending hearing before this Court. Also pending is Application No. 15 of 2016 ***Airtel Networks Kenya Limited v. Nyutu Agrovat Limited*** seeking to review the grant of certification. We note that the issues raised by the appellant in this appeal are similar in material respects to those that have been certified as matters of general public importance and filed in Petition No. 12 of 2016.

[20] As we have stated earlier in this decision that; it is the subject matter of a case that determines the cause to follow. Suffice it to say that there will be instances where particular issues would qualify as raising constitutional questions while at the same time, qualifying as matters of general public importance. Thus a party should not be precluded from exercising his/her rights under Article 163(4) in the best way they deem fit.

[21] In this appeal, the petitioner/appellant has chosen to move the Court under Article 163(4) (a) as a matter of right. It is the appellant's contention in that regard, that Section 35 of the Arbitration Act, infringes on its right of appeal under Article 164(3) (a) of the Constitution. The issue as to whether Section 35 of the Arbitration Act can oust the appellant's right of appeal under Article 164(3) (a) of the Constitution was extensively canvassed at the Appellate Court. Indeed, the appellant herein is faulting the Appellate Court's interpretation of Section 35 *vis a vis* Article 164 (3) of the Constitution. This squarely brings the appeal

within the parameters we set in our decision in ***Lawrence Nduttu***. In that case, we stated as follows:

“The appeal must originate from a court of appeal case where issues of contestation revolved around the interpretation or application of the Constitution. In other words, an appellant must be challenging the interpretation or application of the Constitution which the Court of Appeal used to dispose of the matter in that forum.”

We reiterate the above holding and therefore find that the present appeal is properly before us, and that the Preliminary Objection is without merit.

The appeal is therefore properly before us.

E. ORDERS

- (i) The Preliminary Objection is hereby overruled.***
- (ii) The appeal herein shall be set down for hearing.***
- (iii) Costs shall abide the cause.***

Orders accordingly.

DATED and DELIVERED at NAIROBI this 8th Day of November, 2018.

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

.....
M.K. IBRAHIM
JUSTICE OF THE SUPREME

.....
S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....
S. N. 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