IN THE COURT OF APPEAL

AT KISUMU

(CORAM: E. M. GITHINJI, HANNAH OKWENGU &

J. MOHAMMED, JJA.

CIVIL APPEAL NO. 3 OF 2015

BETWEEN

OKENO & SONS BUILDING CONTRACTORS.....APPELLANT

AND

BUKURA AGRICULTURAL COLLEGE.....RESPONDENT

(Being an Appeal from the Ruling and Orders of the High Court of Kenya at Kakamega, (Dulu, J.) dated the 3rd day of October, 2013 and Delivered by (A.C. Mrima, J.) on 23rd day of October, 2014

in

H.C. CIVIL SUIT NO 83 OF 2010 (O.S))

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JUDGMENT OF THE COURT

[1] This is an appeal from the Ruling of the High Court, **(George Dulu, J.)** dated 3rd October, 2014 and delivered by **Mrima, J.** on 23rd October, 2014 . By the impugned ruling, the High Court allowed an application to set aside an arbitral award to the extent that the award of Shs. 4,000,000/= as general damages was set aside.

The appellant appeals from that decision on several grounds.

[2] The appellant is a firm of building contractors. The respondent was before July, 2017, an educational institution under the Ministry of Agriculture. The respondent became a fully-fledged State Corporation in July, 2007 with power to enter into contracts, to sue and be sued in its corporate name.

[3] On 27th April, 2007, the appellant entered into a contract with the Permanent Secretary, Ministry of Agriculture for the election and completion of a Library block at the respondent's premises for a contractual sum of Shs. 26, 255, 347/=. The contract showed that the Permanent Secretary was the employer, the Principal of the respondent as the authorized representative of the Permanent Secretary and the Project Manager was the provincial works officer, Ministry of Roads and Public Works – Western Region.

However, the contract was executed by the appellant and the Principal as the respondent's employer.

The contract period was sixteen (16) weeks and the completion period was 30th August, 2007.

The conditions of the contract were contained in the standard form for procurement of works formulated by the Public Procurements Directorate, Ministry of Finance and Planning issued in November, 2010.

[4] The contract had an arbitration clause for settlement of disputes. **Clause 37(1)** provided in part:

"In case any dispute or difference shall arise between the employer and the Project Manager on his behalf and the contractor, either during the progress or after the completion or termination of the works, such dispute shall be notified in writing by either party to the other with a request to submit it to arbitration and to concur in the appointment of an Arbitrator within thirty days of the notice. The dispute shall be referred to arbitration and final decision of a person to be agreed between the parties. Failing agreement to concur in the appointment of an Arbitrator, the Arbitrator shall be appointed by the chairman or vice-chairman of any of the following professional institutions …"

The Chartered Institute of Arbitrators *(Kenya Branch)* is one of the enumerated institutions under that clause.

[5] The completion of the project was delayed for nearly three years. The appellant completed the construction of the library block on 5th August, 2010 and handed over the project on 8th August, 2010. A dispute arose after the completion of the project about the final payments due to the appellant.

Ultimately, on 27th February, 2012, the Chartered Institute of Arbitrators appointed **Tom Onyango Oketch**, a quantity surveyor as the sole Arbitrator.

The appellant filed a claim before the Arbitrator. He averred that he was paid Shs, 25, 512, 705/65 out of the contract sum of Shs. 26, 255, 347 leaving a balance of Shs 733, 641, 131/=; that the delay in completion was solely contributed by the respondent and that it had suffered financial loss and damages. The appellant claimed a total of Shs 85, 269, 981/90/= from the respondent.

[6] The respondent filed a defence and counter-claim. The respondent denied the averments in the statement of claim and averred, *inter alia*, that the claim was fraudulent; that the appellant was paid Shs. 26, 255, 347/= for all certificates issued on the work done; that the contract sum was never varied; that the appellant had failed to refund a sum of Shs. 562, 587/= which was advanced to him, and that the respondent incurred considerable losses attributable to delay by the appellant to complete the project. The respondent's counter-claimed for Shs 19, 650, 819/50/= comprising of Shs 11, 680,000/= as liquidated damages; Shs.

5, 600.000/= for loss of user of facility, Shs 32, 120/= for use of college facilities by the contractor, Shs. 827, 309 advances in cash and Shs. 1, 511, 390/50 for material and work not done.

[7] Upon hearing the parties, the Arbitrator partially allowed the appellant's claim under two heads viz:

(i) Shs. 4,158. 962.11/= as compensation.

(ii) Shs. 4,000,000/= as general damages.

Total – Shs. 8, 158, 962.11/=.

The Arbitrator also partially allowed the respondent's counter-claim under three heads:

Shs. 1, 674, 317.34/= as refund.

(i) Shs. 32, 120/= as water charges.

(ii) Shs. 393,000/= as advances

Total Shs. 2, 099, 437.37/=.

After subtracting the award to respondent from the award to the appellant, the Arbitrator reckoned the appellant's net award at Shs. 6, 059, 524.77/=. The Arbitrator then awarded interest to the appellant for the sum of Shs.6, 059, 524.77/= for the years 2010 – 2013 at varying annual interest rates which total interest amounted to Shs. 3, 796, 292.27/=.

In the end, the Arbitrator made a final award to the appellant of Shs.10, 251, 884 and directed the respondent to pay costs of arbitration and interest. The sum awarded was to carry interest at 22.72% p.a. if not paid within 14 days from the date of the award.

[8] The respondent being dissatisfied with the award filed an application dated 29th November, 2013 to set aside the award under **Section 35** of the Arbitration Amendment Act, 2009. The application was made on various grounds including a complaint that the general damages fell outside the scope of the appellant's claim and that the sums awarded under various heads were not part of the dispute referred to the Arbitrator for arbitration.

[9] Upon hearing the application, the High Court, (Dulu, J.) made findings, *inter alia*, that the Arbitrator erred in awarding Shs. 4,000,000/= as general damages as there was no issue of general damages for determination before him and that as conceded by the parties, the Arbitrator made arithmetical errors in calculating some heads of the award. Following the finding, the learned judge allowed the application partially, set aside the award of Shs. 4,000,000/= as general damages and directed the parties to correct the arithmetical errors with the assistance of the Arbitrator. The learned judge also awarded costs of the application to the respondent at 50%.

[10] This appeal is against specifically that of the decision which set aside the award of Shs. 4,000.000/= and awarded the respondent costs of the application. The appellant states in the memorandum of appeal that the finding that the general damages was not an issue for determination by the Arbitrator was erroneous and that the High Court had no jurisdiction to interfere with the finding of fact by the Arbitrator.

The orders sought in the appeal are that the decision of the High Court be set aside, and the respondent's application be dismissed with costs.

[11] This appeal was filed on 14th January, 2015. On 5th August, 2015, the respondent filed an application under **Rule 42** of the Court of Appeal Rules; **Sections 10, 32A** and **35** of the Arbitration Act for orders that the record of appeal be struck out on the grounds, *inter alia*, that, no appeal lies from the ruling; the appeal was filed prematurely without mandatory leave contrary to Section 39 of the Arbitration Act and that parties have not agreed nor consented amongst themselves that an appeal should lie.

The application was opposed on several grounds including the ground that the application was incompetent as it was filed outside the 30 days stipulated by Rule 84 of the Court of Appeal Rules and that the High Court granted leave to appeal on 23rd October, 2014.

The application was heard by a bench differently constituted and ruling reserved for 19th February, 2016.

[12] The ruling was ultimately delivered on 4th March, 2016. By the Ruling the Court made a finding that the application was incompetent for the reason that it was brought long after the 30 days stipulated by the proviso to **Rule 84** of the Court of Appeal Rules had elapsed. It is clear therefore that the application was not decided on the merits. The issue of jurisdiction has not been exhausted.

[13] Mr. Mose Orengo, learned counsel for the appellant made submissions on the merits of the appeal urging the Court to allow the appeal.

On his part, **Mr. Que** for the respondent submitted that the Court has to first decide whether it has jurisdiction to entertain the appeal. Counsel submitted that the Court has no jurisdiction and particularly relied on two decisions of this Court in **Anne Mumbi Hinga v. Victoria Njoki Gathara [2009] eKLR** and **Nyutu Agrovet Limited v. Airtel Networks Limited [2015] eKLR.**

The appellant's counsel in reply submitted that the issue of jurisdiction was raised in the application dated 10th July, 2015 which was dismissed and that by **Section 39(4)** of the Arbitration Act, an application for leave to appeal could be made either in the High Court or in the Court of Appeal.

[14] Whether or not an appeal lies to this Court from the impugned ruling of the High Court depends on the interpretation of the relevant provisions of the Arbitration Act *(Act).* **Section 32A** of the Arbitration Act provides:

"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".

Further, **Section 10** of the Act provides:

"Except as provided in this Act, no court shall intervene in matters governed by this Act."

The Act provides two avenues for recourse to High Court against an arbitral award.

[15] The first is under **Section 35** of the Act – by making an application to the High Court to set aside the arbitral award. The grounds upon which such an application may be made are stipulated in that Section.

This is the remedy that the respondent invoked and in relation to which the High Court made its decision.

In **Nyutu Agrovet Limited (supra)**, the High Court in exercise of its jurisdiction under **Section 35** of the Act set aside an arbitral award. The aggrieved party filed an appeal against the decision of the High Court. The respondent in the appeal filed an application to strike out the appeal on the ground that an appeal to this Court did not lie. After an extensive review of the provisions of the Act and relevant decided cases, a five Judge bench of this Court unanimously held that an appeal does not lie and the Court lacked jurisdiction to entertain the appeal.

[16] The second avenue of recourse to the High Court is through an appeal under **Section 39** of the Act. **Section 39** provides:

"Where in the case of domestic arbitration the parties have agreed that –

(a) an application by any party may be made to court to determine any question of law arising in the course of arbitration; or

(b) an appeal by any party may be made to a court on any question of law arising out of the award;

Such an application or appeal, as the case may be, may be made to the High Court."

Section 39(2) of the Act prescribes the powers of the High Court on such an application or appeal.

Section 39(3) of the Act provides:

"Notwithstanding Sections 10 and 35 an appeal shall lie to the Court of Appeal against the decision of the High Court under subject (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).”

[17] It is clear from **Section 39** of the Act that an appeal to the High Court is allowed on questions arising from the award and only if the parties have agreed that such an appeal could be made.

It is also clear from **Section 39(3)** of the Act an appeal lies to the Court of Appeal from the decision of the High Court exercising jurisdiction under **Section 39(2)** on a point of law of general importance and with the leave of the Court of Appeal.

The application of **Section 39** was considered by this Court in **Anne Mumbi Hinga** *(supra)* and in **Nyutu Agrovet Limited** *(supra).*

[18] This appeal relates to the exercising of the jurisdiction by the High Court to set aside the arbitral award under **Section 35** of the Act.

In setting aside part of the arbitral award, the High Court was not exercising appellate jurisdiction under **Section 39(2)** of the Act.

It follows that the jurisdiction of this Court under **Section 39(3)** cannot be invoked.

Furthermore, an appeal to this Court from the decision of the High Court in exercise of its appellate jurisdiction under **Section 39(2)** must be with the leave of the Court of Appeal. There is no evidence that the Court of Appeal has granted such leave.

[19] From the foregoing, it is clear that the Act does not confer a right of appeal from the decision of the High Court in exercise of its jurisdiction under **Section 35** of the Act. Thus the leave to appeal granted by the High Court was without jurisdiction and in vain.

Accordingly, this Court has no jurisdiction to entertain the appeal. Consequently, the appeal is struck out with costs to the respondent.

We so order.

DATED and Delivered at Kisumu this 7th day of December, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

HANNAH OKWENGU

……..…..….

JUDGE OF APPEAL

J. MOHAMMED

……..……..

JUDGE OF APPEAL

I certify that this is a true copy

of the original

DEPUTY REGISTRAR