IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MUSINGA & SICHALE, JJ.A.)

CIVIL APPLICATION NO. 231 OF 2018

BETWEEN

KENYATTA INTERNATIONAL CONVENTION CENTER.....APPLICANT

AND

CONGRESS RENTAL SOUTH AFRICA.....RESPONDENT

(An application for leave, pursuant to Section 39(3) (b) of the Arbitration Act,

Rule 3 (1) of the Arbitration Rules [1997], Rules 39, 42 & 43 of the Court of Appeal Rules, 2010 and Articles 163 (4) of the Constitution of Kenya, 2010, to appeal to this Court on matters of law arising from the Ruling of the High Court Commercial and Tax Division at Milimani, Nairobi, (J. Makau, J.) delivered on 19th July 2018 ***in H.C. Misc. Appl. No. 453 of 2017 (C.S.)***

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RULING OF THE COURT

1. By an application dated 2nd August 2018, the applicant sought leave to appeal against the ruling of ***Makau, J.*** delivered on 19th July 2018 in ***Miscellaneous Civil Application No. 453 of 2017***. The application was primarily made under **section 39 (3) of the Arbitration Act**, among other provisions of the law.

2. The application was premised on grounds, *inter alia*, that the intended appeal raises cogent points of law the determination of which substantially affects the rights of the parties herein; that the intended appeal raises a paramount query as to the supremacy of the Constitution vis-a-vis the Arbitration Act; that the ruling and the arbitral award offend the provisions of ***Article 10 (2) (b)*** of the ***Constitution of Kenya***; that the learned judge in upholding the impugned award failed to appreciate that the sole arbitrator exceeded his jurisdiction by awarding an amount that was not comprised in the contract between the parties; that the learned judge erred in disregarding the provisions of the ***Public Procurement and Disposal Act, 2015***, and in admitting an alleged oral agreement that contradicted a written agreement.

3. The background to this application is that on 11th December 2015 the applicant and the respondent entered into a contract whereby the respondent was to carry out installation of a computerized conference management system at the Kenyatta International Conference Centre, (**KICC**), at an agreed cost of US$2, 638,175.68. It was further agreed that the respondent would hire an additional conference management equipment at the cost of US$ 640,542. A down payment of US$ 1.5 million was paid upon signing of the contract and the balance was payable upon installation and testing of the equipment. This was exclusive of the cost of hiring the said equipment.

4. The equipment had to be air freighted from South Africa to Nairobi and it was a term of the agreement that the applicant would be responsible for payment of the import duties and other charges levied on the equipment before delivery to its premises. Subsequently, upon delivery and installation of the equipment, a disagreement arose regarding the freight and forwarding charges. The respondent claimed a sum of US$ 158,000 under that heading, having forwarded to the applicant receipts evidencing payment of the said sum, but the applicant declined to pay, contending that the claim was unsubstantiated and unreasonable.

5. The dispute was referred to a sole Arbitrator, ***Mr. Calvin Nyachoti***, who on 18th September 2017 made an award in favour of the respondent. He awarded the sum of US$ 158,000 being the cost of unpaid freight and forwarding charges. The Arbitrator also awarded simple interest on the said sum at the rate of 14% per annum from 18th December 2015 until payment in full.

6. On 10thNovember 2017 the respondent filed an application in the High Court seeking, *inter alia*, leave to enforce the final award. On 27thNovember 2017 the applicant filed an application seeking, *inter alia*, an order to set aside the arbitral award. The application was made under **section 35 (2)** of the **Arbitration Act.** The application was based on grounds, inter alia, that the Arbitrator exceeded his jurisdiction by dealing with a dispute not contemplated by the parties and which did not fall within the terms of reference; the execution of the final award is against public interest and policy; the execution of the final award is likely to have a negative macro-economic effect on the applicant's budget; and that the applicant is under public duty and obligation, as a State corporation, to protect the interests of the public.

7. The two applications were heard by Makau, J. who allowed the respondent's application but dismissed that of the applicant, holding that the applicant had not established any of the grounds set out in its application. In dismissing the applicant's contention that the Arbitrator exceeded his jurisdiction, the learned judge held: -

"33. The parties called evidence before the Honourable Arbitrator. The parties by agreeing and filing of issues, that they wanted determined by the Honourable Arbitrator allowed the Honourable Arbitrator to deal with the issues they had themselves set for determination. He could not shut his eyes and fail to determine or consider matters already placed before him. The parties submitted themselves to the Honourable Arbitrator, gave authority and jurisdiction to the Arbitrator, hence his decision was within his mandate and jurisdiction and not out of the law."

8. The learned judge cited ***clause 9*** of the parties' agreement dated 11th December 2015 which provided that: -

"KICC shall be responsible for payment of the import duties and other charges levied on the equipment before delivery at KICC."

9. How did the Arbitrator interpret that clause" This is what he said:

"104. It is noteworthy that clause 9 of the contract tasked the Respondent with the responsibility of settling import duties and other charges levied on the equipment before delivery at KICC. The question then would be, do freight and forwarding charged qualify to be classified as such charges"

105. Although the contract does not make specific reference to freight and forwarding charges, it provides that the Respondent shall meet all import duties and all other charges incidental to the equipment being delivered to the Respondent. Based on the foregoing, the Tribunal is of the considered view that in as much as the contract does not prescribe the manner in which the Respondent would meet these costs, freight costs would naturally flow as part of the costs incidental to the delivery of the equipment to the Respondent."

10. The learned judge concurred with the learned Arbitrator. He arrived at the conclusion that the Arbitrator did not exceed his

jurisdiction by dealing with an issue that was not contemplated by the parties or dealing with an issue that was outside the terms of reference.

11. As regards the argument that the arbitral award disregarded public policy and the provisions of the ***Public Procurement and Disposal Act, 2005,*** particularly ***section 47*** thereof, the learned judge expressed himself as follows:

"52. In the instant matter, what would be contra-public policy would be to allow a party who admittedly did not comply with the procurement law in entering into a contract, to retain the benefit thereof without counter-performance. The Respondent urges that public policy should frown upon the Arbitral Award for giving the claimant award that is allegedly outside the terms of reference available to Arbitral Tribunal. The decision by the Arbitral Tribunal to award payment for costs incurred in freight and forwarding is not contrary to Public Policy of Kenya; rather it was a subject of exercise of Tribunal's discretion whereby it recognized that it would be unjust and inequitable for the Respondent to benefit from equipment installed and utilized at the W.T.O Conference without making restitution for the same. I am not satisfied by the Respondent's arguments that the Arbitrator acted out of the scope of his jurisdiction as the award was made within the jurisdiction of the Tribunal.

53. I have considered the Arbitral Award, and have found, the Arbitrator provided reasons as to why he came to the conclusion he reached; and for the awarded sum. The Respondent's challenge under section 35 of the Arbitration Act and other grounds, would therefore be untenable, granted that the Arbitrator is undoubtedly the master of the facts. In my view therefore, I find the impugned findings are neither an affront to the Constitution or the Laws of Kenya, nor are they inimical to justice and morality. The Arbitrator noted the Respondent had not countered the claimant's averments on the parties' agreement to leave out freight and forwarding charges pending clarification. The Arbitrator further noted under paragraph 105 of his award that there was active negotiations between the parties, the parties settled for USD 158,000 as claimed by the Claimant. The Respondent also concedes the works were done at its premises to its satisfaction and that was not an issue. I find therefore, the Arbitrator was perfectly in order, to consider the issues raised before him and made a determination, that would serve the ends of justice."

12. The applicant was dissatisfied with the aforesaid ruling and intends to prefer an appeal to this Court, subject to grant of leave as sought. A notice of appeal was filed on 30th July 2018.

13. When this application came up for hearing, ***Mr. Muyuri***, learned counsel for the applicant, relied on his written submissions and bundle of authorities, which he briefly highlighted. In a nutshell, the submissions are predicated on the provisions of ***section 39 (3) (b)*** of the ***Arbitration Act*** which provides for the circumstances under which this Court may grant leave to appeal. The section states as follows: -

"(b) The Court of Appeal, being of the opinion that a point of law of general importance is involved the determination of which substantially affects 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)."

14. Counsel further submitted that the arbitral award offended the provisions of ***Article 10(2) (b)*** of the ***Constitution***, especially adherence to the rule of law by reason that the determination was arrived at in contravention of numerous principles and tenets of law, namely: -

"(a) Discharge of burden and standard of proof required by law.

(b) Acceptance of alleged verbal contract/oral agreement to vitiate/qualify a written contract.

(c) The learned judge upheld an award that essentially re-wrote the contract between the parties.

(d) The learned judge upheld an award that offends public policy of Kenya."

15. The sum total of the applicant's submissions is that the learned judge ought not to have upheld the Arbitrator's holding that the amount of US$ 158,000 being the cost of freight and forwarding charges was payable to the respondent, because the claim amounted to variation of the written contract between the parties regarding the contract sum.

16. The applicant's counsel submitted that the intended appeal raises a point of law of general public importance. He cited the Supreme Court's decision in ***Hermanus Philipus Steyn V Giovanni Gnecchi Ruscone [2013] eKLR***, where the Court held as follows: -

i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest.

17. Counsel argued that the applicant is a State Corporation whose mandate and functions are financed by the public purse; and that the applicant is under public duty and obligation to protect the interest of the public.

18. Counsel further submitted that general public importance is demonstrable through operation of arbitration proceedings. Arbitration, which he said is an important tool of dispute resolution, ought to be strictly managed to ensure that its operations are within the confines of the law. More so, counsel added, sole Arbitrators and State officers are bound by the provisions of ***Article 10*** of the ***Constitution*** and therefore their actions ought to be observed and analyzed to ensure that they adhere to the guiding principles under the said Article.

19. Lastly, the applicant's counsel submitted that the applicant's right to a fair hearing under ***Article 50*** of the ***Constitution*** as well as its right to equality, equal protection and benefit before the law, as enshrined under ***Article 27 (1)*** and ***(2)*** of the Constitution have been curtailed by reason of the determination by the learned judge.

20. For those reasons, counsel urged this Court to grant leave to appeal as sought.

21. In reply, ***Mr. Limo***, who held brief for ***Mr. Kyalo Mbobu***, learned counsel for the respondent, relied on a replying affidavit sworn by ***Guilherme Polonia***, the respondent's Operations Director, and made brief oral submissions.

22. In the replying affidavit, the deponent, on the advice of the respondent's advocates, opposed the application on grounds that: the arbitration was an international arbitration, not a domestic one, and therefore ***section 39 (2) (b)*** is not applicable; that this Court has no jurisdiction to hear and determine the application as there was no right of appeal granted to either party in the agreement dated 11th December, 2015; that without such an agreement, no leave can be granted as that would contravene the provisions of ***section 39*** of the Act; and that the application has not set out the point of law that is outside the provisions of ***section 35*** of the Act, the determination of which will substantially affect the rights of one or more of the parties.

23. The respondent further argued that the application ***"is a brazen attempt to open up new vistas of judicial intervention in international arbitrations held within Kenya which, if allowed, will kill arbitration as we know it in Kenya and all economic benefits that accrue from it."***

24. The respondent further maintained that the application that was filed in the High Court under ***section 35*** of the ***Arbitration Act*** could only be brought within the grounds enumerated in the said provisions and not anything more.

25. The respondent added that the applicant is seeking to establish new grounds of challenging an arbitral award other than those set out in the Act; that the business of the High Court in an application under section 35 is to determine whether the applicant's case falls squarely within any of the stipulated grounds in that section and not to review the entire award; and that the application does not rise up to the threshold required by ***section 39 (3) (b)*** of the ***Arbitration Act***.

26. In a brief reply to the respondent's submissions, the applicant's counsel submitted that the arbitration that gave rise to the impugned award was a domestic one as defined under ***section 3 (2)*** of the ***Arbitration Act***. This is because clause 29 of the contract expressly stated that the Agreement will be construed and governed by the laws of the Republic of Kenya; and clause 30 stipulated that the seat of arbitration shall be in Nairobi, Kenya, and the arbitration shall be governed in accordance with the provisions of the

Arbitration Act (No. 4 of 1995) of the Laws of Kenya.

27. When the application came up for hearing, we granted leave to the applicant's counsel to file a supplementary authority, ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited & 2 Others*** ***[2019] eKLR***, (**the** ***Nyutu appeal***). This is a judgment of the Supreme Court of Kenya that was rendered on 6th December 2019, nearly a year after the filing of this application.

28. The two main issues, that were determined by the Supreme Court in the ***Nyutu appeal*** are: -

"(a) Whether sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50 (1) and 164 (3) of the Constitution to that extent; and

(b) 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."

29. It is this latter issue that is relevant in this application. The majority decision on the issue was as follows: -

"[71] We have in that context found that the Arbitration Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. We take the further view that from our analysis of the law and, the dictates of the Constitution 2010, 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. Thus our position is that, as is the law, once an arbitral award has been issued, an aggrieved party can only approach the High Court under Section 35 of the Act for Orders of setting aside of the award. 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 taint the process of arbitration. Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention, we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions.

[72] Furthermore, considering that there is no express bar to appeals under Section 35, we are of the opinion that an unfair determination by the High Court should not be absolutely immune from the appellate review. As such, in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. However, such jurisdiction should be carefully exercised so as not to open a floodgate of appeals thus undermining the very essence of arbitration. In stating so, we agree with the High Court of Singapore in *AKN and another (supra)* ***that circumscribed appeals may be allowed to address process failures as opposed to the merits of the arbitral award itself. We say so because we have no doubt that obvious injustices by the High Court should not be left to subsist because of the 'no Court intervention' principle."***

30. The Supreme Court held that alleged breaches of the Constitution cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of the Constitution are properly governed by ***Articles 165 (3***) and ***258*** of the said ***Constitution*** and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of section 35 of the Arbitration Act.

31. The learned judges then summed up their views on the issue of an appeal to this Court as follows:

"[77] In concluding on this issue, we agree with the Interested Party to the extent that the only instance that an appeal may lie from the High Court to the Court of Appeal on a determination made under Section 35 is where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said Section and thereby made a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties. This circumscribed and narrow jurisdiction should also be so sparingly exercised that only in the clearest of cases should the Court of Appeal assume jurisdiction."

32. Lastly, the Supreme Court reiterated that: ***"Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice."***

33. The Court suggested a leave mechanism to weed out "***frivolous, time wasting and opportunistic appeals***" to realize the objective of bringing arbitration proceedings to a swift end.

34. It is against that well laid out background that we shall consider this application for leave to appeal.

Section 35(2) of the ***Arbitration Act*** states as follows: -

"(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 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 decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; 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."

35. The applicant's application in the High Court was made under ***section 35 (2)*** of the ***Arbitration Act***, it did not include **section 39** (**2**) which is only applicable where in the case of a domestic arbitration the parties have agreed that an application may be made to a court to determine any question of law arising in the course of the arbitration; or an appeal by any party on any question of law arising out of the award.

36. The first issue for our determination is whether this Court has jurisdiction to hear and determine the application, based on whether the arbitration that gave rise to the impugned decision was an international or a domestic one, since ***section 39*** is only applicable in a domestic arbitration.

37. Having looked at the contract between the parties, taking into consideration the definition of a domestic arbitration as per ***section 3 (2) (d)*** of the ***Arbitration Act*** as opposed to the definition of an international arbitration under ***section 3 (3)*** of the ***Act***, we are satisfied that this was a domestic arbitration.

38. We now turn to consider the applicability of **section 39 (3)** of the **Act** in an application for leave to appeal where the provisions

of the section had not been invoked in the application that was before the High Court, as was the case in the matter before us. We deem it necessary to quote the relevant portions of the section.

“39. Questions of law arising in domestic arbitration

Where in the case of a domestic arbitration, the parties have agreed that—

(a) an application by any party may be made to a court to determine any question of law arising in the course of the 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 application or appeal, as the case may be, may be made to the High Court.

(2) On an application or appeal being made to it under subsection (1) the High Court shall—

(a) determine the question of law arising;

(b) confirm, vary or set aside the arbitral award or remit the matter to the arbitral tribunal for re-consideration or, where another arbitral tribunal has been appointed, to that arbitral tribunal for consideration.

(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).”

39. In this application, the applicant did not tell the Court that parties had agreed that an application arising in the course of arbitration or an appeal to this Court could be made by any party on any question of law arising out of the arbitral award. We therefore take it that such an agreement did not exist. That may also explain why the applicant did not invoke ***section 39*** in the application that was before the High Court. We perused the agreement that gave rise to the arbitral award and indeed it did not grant any party liberty to appeal against the award.

40. In the absence of such an agreement, where no application or appeal was made to the High Court under ***section 39 (1)*** and/or (2), can an application for leave to appeal to this Court be grounded on the provisions of ***section 39 (3) (b)*** of the ***Act***" We think that an appeal under this section can only lie to this Court from the decision of the High Court in the exercise of its jurisdiction under ***section 39 (2)*** if this Court is satisfied that a point of law of general importance is involved the determination of which will affect the rights of one or more of the parties and grants leave to appeal. But as earlier stated, in the ruling sought to be appealed from, the High Court was exercising its jurisdiction under ***section 35 (2)*** of the ***Act***, not ***section 39*** of the ***Act***.

41. In the recent Supreme Court decision, **Synergy Industrial Credit Limited v Cape Holdings Limited [2019]** eKLR, (**the Synergy Industrial Appeal**), the Court held:

*“**[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." [Emphasis supplied].

"[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 Respondents 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."

42. In view of the foregoing, we find and hold that no appeal lies to this Court because the High Court did not make any determination under ***section 39 (2).*** The application before us is therefore incompetent. But even if we are wrong in that finding, we would still have to determine whether the threshold for granting leave under ***section 39*** has been met by considering whether a point of law of general importance is involved in the intended appeal, the determination of which will substantially affect the rights of one or more of the parties, as held in both the **Nyutu appeal** and the **Synergy Industrial appeal** by the Supreme Court.

43. Did the learned judge in upholding the arbitral award under ***section 35*** make grave errors of law and step out of the court's jurisdiction or the parties' terms of the arbitration as alleged by the applicant" Does the application meet the threshold set by the Supreme Court at paragraph 77 of the majority decision in the Nyutu appeal as reflected in paragraph 31of this judgment"

44. The applicant contends that the intended appeal raises cogent points of law the determination of which substantially affects the rights of the parties; that the issues include paramount constitutional issues whose weight supersedes statutory considerations; that the impugned arbitral award is against the weight of evidence; that the sole Arbitrator exceeded his jurisdiction; that the arbitral award was against public policy; and that the learned judge erred in law in failing to find and hold that the sole Arbitrator had violated the parole evidence rule.

45. In the ***Nyutu appeal***, the Supreme Court held that alleged constitutional breaches ought to be challenged by way of an application under ***Articles 165(3***) and ***258*** of the ***Constitution*** and cannot be introduced in an application to set aside an arbitral award under section 35 of the Arbitration Act. Looking at the application to set aside the arbitral award that was filed by the applicant in the High Court, the applicant alleged breach of various constitutional issues. The same arguments were regurgitated before this Court. We cannot therefore consider any alleged breach of constitutional issues as a basis for grant of leave to appeal to this Court. To that extent, all the grounds that alleged that the sole Arbitrator and/or the learned judge violated various constitutional provisions cannot stand.

46. In the ***Nyutu appeal***, the Chartered Institute of Arbitrators – Kenya Branch, was an Interested party. In its submissions, the Interested Party urged the Supreme Court to strike a balance between ***"the principles and values which call for promotion of arbitration and its hallmark characteristics of finality of arbitral awards and minimal court intervention with the constitutional principles of correcting grave errors by the High Court."***

47. The Interested Party suggested various principles that should guide the Court in its consideration of an application for leave to appeal to this Court. It submitted that leave may be granted where:

"(a) The determination of the question will substantially affect the rights of one or more of the parties;

(b) The question is one of general public importance or the decision of the High Court is at least open to serious doubt;

(c) A substantial miscarriage of justice may have occurred or may occur unless the appeal is heard; and

(d) The decision of the High Court on the question is manifestly wrong."

48. Rejecting the suggestion that leave to appeal ought to be granted where the issue involved is one of general public importance, the Supreme Court held: -

"…we do not think as suggested by the Interested Party that an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underlying dynamics. To that extent we reject that proposal."

49. In the application for leave to appeal, the applicant contended that the intended appeal involves issues that are of general public importance, which it identified as follows: -

"(i) the applicant, being a State Corporation, if it is condemned to satisfy the arbitral award, the payment shall be to the detriment of the public.

(ii) execution of the arbitral award will have a negative macroeconomic effect on the applicant's budget and the public.

(iii) the applicant as a State Corporation is under a duty to protect the interest of the public.

(iv) Arbitration, as a tool of dispute resolution, its procedure, precedence and jurisprudence ought to be strictly monitored to ensure that its operations are within the confines of the law."

50. Further to the Supreme Court's pronouncement on the unsuitability of the issue of general public importance as a basis for grant of leave to appeal, we wish to add that the factors that were isolated by the applicant do not have a significant bearing on public interest and do not also raise substantial points of law the determination of which will have a significant bearing on public interest, as held by the Supreme Court in ***Hermanus Philipus Steyn v Giovanni Gnecchi Ruscone*** *(supra).* We therefore find and hold that to the extent that the intended appeal is premised on the argument that it raises a point of law of general public importance, leave to appeal ought not to be granted.

51. The applicant's further argument in seeking grant of leave to appeal was that the determination of the alleged points of law of general importance will substantially affect the rights of one or more of the parties.

52. On our part, we think that the above issue is best resolved by adopting the holding by the Supreme Court in the ***Nyutu appeal,*** that: -

"[75] With regard to the first proposal, the issue of 'substantially affecting one or more of the parties', we think that it is not a proposal that should stand on its own. Generally, a Court decision has the ultimate effect of affecting the parties and hence even though the 'substantial' element is important, it should be tied to something more --other than just 'affecting the parties'… We recall that the Interested Party had raised an important observation to the effect that arbitral awards are now being set aside because they allegedly do not comply with constitutional principles...

We are on our part persuaded that where an award is set aside on constitutional grounds, then that should be one of the exceptional grounds in which an appeal should be preferred against a decision made under Section 35 because Section 35 is clear as to the issues for which proof is required before setting aside of an arbitral award."

53. The last issue that merits our consideration is the ground that the learned judge ought to have found that the sole arbitrator dealt with a dispute not contemplated by the parties and which did not fall within the terms of reference, thereby exceeding his jurisdiction. That is a ground that can only fall under an appeal to this Court under section 35 of the Arbitration Act. As clarified by the Supreme Court in the already cited Nyutu Appeal, leave under that section can only be granted in exceptional circumstances and none has been demonstrated in regard to this ground.

54. In the **Synergy Industrial appeal**, our Supreme Court emphatically stated:

*"**[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.**"*

55. All in all, we are not satisfied that the threshold for granting leave to appeal has been attained by the applicant. In our view, it has not been demonstrated by the applicant that there was any process failure in the arbitration. Instead, the applicant seems to be questioning the merits of the arbitral award and is angling for one more opportunity to challenge it through the court process, which is against the very essence and objective of arbitration.

56. In **AKN & another v ALC and Others [2015] SGCA 18**, the Court of Appeal at Singapore held that **"…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."**

57. In conclusion, we find and hold that for reasons aforesaid, the application before us is incompetent. In addition, it does not disclose valid grounds for granting leave to appeal. The learned judge neither stepped outside the grounds set out in **s*ection 35*** of the ***Arbitration Act,*** and nor can it be said that he reached a decision that was **"so grave, so manifestly wrong and which has completely closed the door of justice"** for the applicant. Consequently, we decline to grant leave to appeal against the High Court decision dated 18th July 2018 and dismiss this application with costs to the respondent.

Dated and delivered at Nairobi this 24th day of July, 2020.

HANNAH OKWENGU

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JUDGE OF APPEAL

D.K. MUSINGA

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

I certify that this is a true

copy of the original.

Signed

DEPUTY REGISTRAR