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**SETTLED: THE RIGHT OF
APPEAL FROM HIGH
COURT DECISIONS
UNDER SECTION 35 OF
THE ARBITRATION ACT**

LEGAL ALERT

JULY 2024

Settled: The Right of Appeal from High Court Decisions Under Section 35 of the Arbitration Act

Background

The case of *Nyutu Agrovet Limited v Airtel Networks Kenya Limited*; *Chartered Institute of Arbitrators Kenya Branch (Petition 12 of 2016) [2019] KESC 11 (KLR)* (“the Supreme Court decision”) was a groundbreaking decision that sought to establish certainty regarding appeals to the Court of Appeal under section 35 of the Arbitration Act. Following the Supreme Court decision, the Court of Appeal decision in *Nyutu Agrovet Limited vs Airtel Networks Kenya Limited, Civil Appeal (Application) No. 61 of 2012* delivered on 9th May 2024 (“the Court of Appeal decision”) has further settled the threshold test for granting leave to appeal against the setting aside of an arbitral award to the Court of Appeal.

Section 35 (2) of the Arbitration Act allows the High Court to set aside an Arbitral Award under specific conditions including instances in which it is shown that – a party involved in the arbitration agreement was incapacitated; the arbitration agreement is invalid under the relevant law; the party applying was not properly notified of the arbitrator’s appointment or the proceedings thereby preventing the party from presenting its case; the award addresses disputes not covered by the arbitration terms or includes decisions beyond its scope; the arbitral tribunal’s composition or procedures did not align with the parties’ agreement; the award was influenced by fraud, bribery, undue influence, or corruption; or the High Court determines that the subject matter cannot be settled by Arbitration under Kenyan law or the Award conflicts with public policy.

The decision of the Court of Appeal reinforced the finality of Arbitration Awards while underscoring the limited avenues for challenges, including constitutional challenges, to such Awards in Courts.

***Airtel Networks Kenya Limited v Nyutu Agrovet Limited (2011) eKLR* (“the High Court decision”)**

The genesis of this case emanated from an arbitral award issued in favour of *Nyutu Agrovet Limited (Nyutu)* against *Airtel Networks Kenya Limited (Airtel)* following

a contractual dispute between the parties. The award amounted to KES. 526,720,698 primarily for general damages due to negligence attributed to Airtel. Aggrieved by the award, Airtel filed an application at the High Court under section 35 of the Arbitration Act seeking its setting aside.

Airtel succeeded and the High Court (Kimondo J) set aside the award on the grounds that it addressed matters outside the distributorship agreement and the terms of reference to arbitration. Aggrieved by this decision, Nyutu sought leave to Appeal to the Court of Appeal, which was opposed by Airtel, arguing that no right of appeal exists under section 35 of the Arbitration Act.

The Supreme Court’s decision

Over time, the matter was presented before the Supreme Court to determine whether there is a right of appeal to the Court of Appeal under section 35 of the Arbitration Act. The Supreme Court affirmed this right but limited the circumstances under which it can be exercised. The Supreme Court noted that section 35 of the Arbitration Act does not expressly indicate whether the decision of the High Court made thereunder was final. After considering the interpretations made by Courts in other jurisdictions regarding their respective arbitration statutes, the Supreme Court found that the Arbitration Act does not expressly bar further appeals to the Court of Appeal.

The Supreme Court went on to hold that while there was a need to shield arbitral proceedings from unnecessary Court intervention, there might also be legitimate reasons for seeking to appeal High Court decisions. For instance, a manifestly unfair determination by the High Court should not be immune from appellate review. Consequently, the Court of Appeal ought to have residual jurisdiction to inquire into such unfairness.

The Supreme Court opined that there is a right of appeal from the High Court to the Court of Appeal under section 35 of the Arbitration Act. However, the Supreme Court was quick to circumscribe the circumstances under which the right of appeal could be exercised, i.e., where it is shown that in setting aside an arbitral award, the High

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Court went outside the grounds set out in section 35 of the Arbitration Act. For example, where an Award is set aside on Constitutional grounds. The Supreme Court emphasized that this circumscribed and narrow jurisdiction should be exercised sparingly, only in the clearest of cases.

Implementation of the guidelines of the Supreme Court decision by the Court of Appeal

Guided by the Supreme Court's decision, the Court of Appeal observed that its jurisdiction to grant leave under section 35 of the Arbitration Act is circumscribed, narrow, and should be sparingly exercised only in the clearest of cases. The purpose of section 35 is to correct specific errors of law that would otherwise lead to a miscarriage of justice while also promoting arbitration as a quicker and more efficient way of settling commercial disputes.

After examining the High Court's decision in line with the grounds set out in section 35 of the Arbitration Act, the Court of Appeal concluded that Nyutu did not demonstrate that the High Court's decision was so grave or manifestly wrong as to close the doors of justice to the parties. The Court further found that Nyutu had totally failed to bring its case within the Court's circumscribed and narrow jurisdiction for granting leave, which should be sparingly exercised and only in the clearest of cases. In its final orders, the Court of Appeal found that leave to appeal the High Court's decision ought not to have been granted and set aside the same.

Prior to the 2019 Supreme Court's decision, there had been a cloud of confusion regarding the interpretation of whether an aggrieved party to the setting aside of an arbitral award had the right to appeal to the Court of Appeal. The journey to clarity has now rested with the Supreme Court decision as amplified by the Court of Appeal.

Recent Developments

The Supreme Court decision in the Nyutu Agrovet case has been amplified by the Court of Appeal and echoed in *Kampala International University v. Housing Finance*

Company Limited - (Petition 34 (E035) of 2022) [2024] KESC 11 (KLR). In this case, the Appellant had appealed to the Supreme Court against a decision by the Court of Appeal declining to grant the Appellant leave to Appeal against a High Court decision emanating from sections 35 and 39 of the Arbitration Act.

The Supreme Court reiterated its holdings in the Nyutu Agrovet decision, that an appeal lies as of right to the Court of Appeal against a decision of the High Court under section 35 of the Arbitration Act only 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, and that the Court of Appeal must grant leave before such an Appeal is filed.

The Supreme Court further held that there was no constitutional issue arising from section 35 (setting aside of an arbitral award) that either the High Court or the Court of Appeal had decided on and that neither did the refusal of leave by the Court of Appeal entail a constitutional issue. The Supreme Court added that it would not assume jurisdiction based on a "mere claim by a party that its rights were violated by a superior court for whatever reason".

The Supreme Court decision in the Nyutu Agrovet case continues to guide the Court of Appeal when faced with an application for leave to Appeal the setting aside of an arbitral award decision by the High Court. The Court of Appeal on 24th November 2023, while delivering a Ruling on whether to grant leave to appeal in *County Government of Meru v Leopard Rock Mico Limited Civil Appeal No. E013 of 2023*, stated that for the Court to grant leave, it needs to satisfy itself that the High Court decision to dismiss the application to set aside the Award was "so grave, so manifestly wrong and has closed the door of justice to either of the parties." The Court held that an applicant has to demonstrate the existence of exceptional circumstances that would call for the intervention of the Court in an arena where Court intervention is discouraged. In that case, the bench held that it was clear the applicant only wanted to have a

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second bite at the cherry on appeal, and by attacking the High Court's failure to interrogate facts that were presented before the arbitrator, the applicant had stepped outside the jurisdiction conferred upon the High Court under section 35 of the Arbitration Act, as that went into a merit attack of the arbitral award. The Court thus held that the applicant had failed to place itself within the parameters set by the Supreme Court in the Nyutu Agrovet case. The application therefore failed and was dismissed accordingly with costs to the respondent.

Key Takeaways from the Court of Appeal Decision

- The Court of Appeal's jurisdiction to grant leave under section 35 of the Arbitration Act is narrow, sparingly exercised, and invoked only in the clearest cases.
- Arbitrators may not award damages in tort if the dispute is limited to those arising from a specific contract and. In this case, the arbitration agreement excluded liability for consequential loss, and awarding damages for negligence went beyond the scope of reference.
- The term "arising out of" is broad but not all-encompassing. To determine if a cause "arises out of" an agreement, the Court examines if the tort or breach was an immediate, foreseeable result of performing contractual duties.
- Arbitrators ought not to grant claims or relief that have not been pleaded. In this instance, awarding interest on all heads at 16% from 8th May 2009 was not pleaded or prayed for.

Conclusion

While there is a need to shield arbitral proceedings from unnecessary court intervention, there may also be legitimate reasons for seeking to appeal High Court decisions. A manifestly unfair determination by the High Court should not be immune from Appeal to the Court of Appeal. The Court of Appeal has reiterated the decision of the Supreme Court and held that there is a right of appeal from the High Court to the Court of Appeal under section 35 of the Arbitration Act. However, the Court of

Appeal has circumscribed the circumstances under which the right of appeal can be exercised, i.e., where it is shown that in setting aside an arbitral award, the High Court went outside the grounds set out in section 35 of the Arbitration Act. This jurisdiction is narrow and should be sparingly exercised only in the clearest of cases.

It is crucial for parties to ensure that appeals from arbitral awards fall within the scope of section 35 of the Arbitration Act to avoid defeating the purpose of arbitration with lengthy court cases. Arbitration aims to resolve disputes amicably, efficiently, and without the formalities of traditional litigation. It calls upon Advocates as the legal advisors to clients to advise clients properly as to what appeals under the Arbitration Act are merited, and which proper advice would save judicial time and parties' costs.

Disclaimer

This alert is for informational purposes only and should not be taken to be or construed as a legal opinion. If you have any queries or need clarifications, please do not hesitate to contact John Mbaluto, FCI Arb, Deputy Managing Partner, (john@oraro.co.ke) and Claire Mwangi, Senior Associate, (claire@oraro.co.ke) or your usual contact at our firm, for legal advice.



John Mbaluto, FCI Arb

Deputy Managing Partner



Claire Mwangi

Senior Associate



ORARO & COMPANY
ADVOCATES

An Affiliate Member of AB & DAVID AFRICA



ACK Garden Annex, 6th Floor, 1st Ngong Avenue

P. O. Box 51236-00200, Nairobi, Kenya.

T: +254 709 250 000

E: legal@oraro.co.ke



Oraro & Company Advocates