

Arbitration Law and the Right of Appeal in Kenya

Kariuki Muigua

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Kariuki Muigua*

Abstract

The paper critically discusses the right of appeal under the arbitration law in Kenya. One of the hallmarks of arbitral practice is limitation of court intervention in the process. However, the law envisages certain instances where parties to an arbitration may seek recourse to the High Court in instances such as enforcement or setting aside of an award. Section 35 of the Arbitration Act which provides the mechanism for setting aside of an award is silent on whether an appeal lies to the Court of Appeal pursuant to the High Court's decision. Consequently, conflicting decisions have emanated from the Court of Appeal on whether section 35 of the Arbitration Act confers a right of appeal. It was not until recently that the Supreme Court of Kenya sought to put the matter to rest. The paper seeks to critically analyse the foregoing provision and relevant decisions on the right of appeal under the arbitration law in Kenya. It will also suggest the best approach in interpreting the right of appeal in order to promote the purpose of arbitration while safeguarding the right of access to justice especially for the business community in the country.

1. Introduction

Arbitration is one of the forms of Alternative Dispute Resolution (ADR). ADR refers to a set of mechanisms that are applied in management of disputes without resort to adversarial litigation.¹ The legal basis for their application is provided under the Charter of the United Nations which is to the effect that the parties to a dispute shall first of all seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.² Arbitration has been defined as private

* PhD in Law (Nrb), FCI Arb (Chartered Arbitrator), LL. B (Hons) Nrb, LL.M (Environmental Law) Nrb; Dip. In Law (KSL); FCPS (K); Dip. In Arbitration (UK); MKIM; Mediator; Consultant: Lead expert EIA/EA NEMA; BSI ISO/IEC 27001:2005 ISMS Lead Auditor/ Implementer; Advocate of the High Court of Kenya; Senior Lecturer at the University of Nairobi, School of Law [Updated in January, 2021].

¹ Muigua, K., & Kariuki, F, *ADR, Access to Justice and Development in Kenya*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/ADR-access-to-justice-and-development-in-Kenya-Revised-version-of-20.10.14.pdf> (accessed on 04/11/2020)./

² United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XV1.

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and consensual process where parties to a dispute agree to present their grievances to a third party for resolution.³ It is an adversarial process and resembles litigation in many ways.⁴ Arbitration falls under the category of coercive ADR processes and parties are bound by the final award expect for limited grounds of appeal.⁵

Several benefits have been attributed to arbitration. It is a private and confidential⁶. Parties enjoy a lot of autonomy and considerable control over the proceedings including the appointment of an arbitrator and the process of arbitration.⁷ Further, it has the ability to promote expeditious and cost-effective management of disputes.⁸ Arbitration also ensures finality of dispute resolution due to the binding nature of an arbitral award.⁹

Due to its private and confidential nature, arbitration is characterised by limited court intervention in the process.¹⁰ Consequently, questions have emerged over the years on the extent of court intervention in arbitration and whether some of the decisions of an arbitral tribunal are subject to appeal. The paper thus seeks to critically discuss the right of appeal under the arbitration law in Kenya. In doing so, the paper will analyse salient provisions of the Arbitration Act which confer or deny court intervention in the arbitration process and judicial interpretation of the right of appeal under the arbitration law in Kenya. Of particular interest, the paper will focus on section 35 of the Arbitration Act and with the aid of relevant court decisions, it will critically analyse whether the section confers the right of appeal on decisions made under section 35. Notably, the right to appeal under the provisions of section 39 of the Arbitration Act in relation to any questions of

³ Khan, F., *Alternative Dispute Resolution*, A paper presented at the Chartered Institute of Arbitrators-Kenya Branch Advanced Arbitration Course held on 8-9th March 2007, at Nairobi.

⁴ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Glenwood Publishers Limited (2015).

⁵ Muigua, K., *Emerging Jurisprudence in the Law of Arbitration in Kenya: Challenges and Promises*, available at <http://kmco.co.ke/wp-content/uploads/2018/08/Emerging-Jurisprudence-in-the-Law-of-Arbitration-in-Kenya.pdf> (accessed on 22/10/2020).

⁶ Muigua, K., *Settling Disputes Through Arbitration in Kenya*, Glenwood Publishers, 3rd Edition, February 2017, P 3.

⁷ Ibid.

⁸ Gaakeri, J., 'Placing Kenya on the Global Platform: An Evaluation of the Legal Framework on Arbitration and ADR' *International Journal of Humanities and Social Science*, Volume 1, No. 6, June 2011.

⁹ See generally Valverde, G., 'Potential Advantages and Disadvantages of Arbitration v Litigation in Brazil: Costs and Duration of the Procedures' *Law and Business Review of the Americas*, Volume 12, No. 4.

¹⁰ Bachand, F., 'Court Intervention in International Arbitration: The Case for Compulsory Judicial Internationalism' *Dispute Resolution Journal* 83 (2012).

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law is only restricted to domestic arbitrations only. Section 39 is to the effect that ‘where in the case of a domestic arbitration, the parties have agreed that—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 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’.¹¹ Section 39(3) is also categorical that ‘notwithstanding sections 10 and 35 an appeal shall lie to the Court of Appeal against a decision of the High Court under subsection (2)—if the parties have so agreed that an appeal shall lie prior to the delivery of the arbitral award; or 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)’.¹² This was indeed affirmed by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*, where the Dissenting Opinion of Justice D.K. Maraga, CJ & P stated that:

*[102] It is indeed true that Section 35 is silent on appeals against High Court decisions thereunder. As a matter of fact, the explanatory notes on the UNCITRAL Model Law acknowledge that appeals may lie to a higher Court against the first instance Court decisions on arbitral proceedings but only in limited circumstances as may be determined by each State in its adaptive legislation. **The Kenyan Arbitration Act allows appeals under Section 39 thereof only in domestic arbitrations and by the consent of the parties.** In this case, parties never consented to any appeal. In the circumstances, given the clear, categorical and unambiguous wording of Sections 10 and 32A and, more importantly, the said overall objective of the enactment of the Arbitration Act No. 4 of 1995 as is manifest from the Parliamentary Hansard report of 20th July 1995, I find no warrant whatsoever to imply the silence in Section 35 as a tacit right of appeal against decisions made thereunder.*

It is worth pointing out that, while section 39 is quite clear, appeals on decisions rendered by the High Court under section 35 have not been as clearly provided for. Thus, while this paper will

¹¹ Sec. 39(1), Arbitration Act, No. 4 of 1999 (2009), Laws of Kenya.

¹² Sec. 39(3), Arbitration Act.

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comment on section 39, it will mainly focus on appeals under section 35 of the Act as these have been the most controversial.

2. Legal Framework on Arbitration in Kenya

The Arbitration Act is the primary legal instrument governing arbitration in Kenya. The Act defines arbitration as any arbitration whether or not administered by a permanent arbitral institution.¹³ The Arbitration Act also provides for both domestic and international arbitration.¹⁴ The Act governs certain aspects pertinent to the practice of arbitration including the composition and jurisdiction of the arbitral tribunal, conduct of arbitral proceedings, arbitral award and termination of arbitral proceedings, recourse to the High Court against an arbitral award and recognition and enforcement of awards.¹⁵

The Civil Procedure Act provides that all references to arbitration by an order in a suit, and all proceedings thereunder, shall be governed in such manner as may be prescribed by rules.¹⁶

Pursuant to this provision, Order 46 of the Civil Procedure Rules allows parties to a dispute who are not under disability at any time before judgment is pronounced to apply to court for referral of the dispute to arbitration.¹⁷

The Constitution of Kenya enshrines the fundamental right of access to justice and mandates the state to ensure access to justice for all persons.¹⁸ Article 159 of the Constitution provides that:

- “(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*
- (a) justice shall be done to all, irrespective of status;*
 - (b) justice shall not be delayed;*
 - (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);*

¹³ Arbitration Act, No. 4 of 1995, s. 3 (1), Government Printer, Nairobi.

¹⁴ Ibid, s. 3(2)(3).

¹⁵ Ibid.

¹⁶ Civil Procedure Act, Cap 21, Laws of Kenya, S 59, Government Printer, Nairobi; see also sections 59A, 59B and 59C.

¹⁷ Civil Procedure Rules, Order 46, Rule 1, Government Printer, Nairobi.

¹⁸ Constitution of Kenya 2010, Article 48, Government Printer, Nairobi.

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Previously, the idea of access to justice in Kenya had been equated to litigation which for a long time has been the predominant mechanism through which parties enforce their rights.¹⁹ However, there has been a paradigm shift under the Constitution of Kenya, 2010 which mandates courts and tribunals while exercising judicial authority to promote alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms.²⁰ Arbitration thus enjoys constitutional recognition in Kenya pursuant to this provision. Courts have slowly embraced this shift and acknowledged the different aspects of what constitutes access to justice as was captured by the High Court in the case of *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd*²¹ in the following words:

[110] “Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies; easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal services; provision of a conducive environment within the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay.”

While the High Court in the above case seemed to give prominence to the formal adjudicatory processes²², ADR has been embraced by the courts. In addition, while the effectiveness of ADR processes under the guidance and direction of courts may have its pros and cons (which are beyond the scope of the current discussion), it is indeed a step in the right direction in making access to justice accessible by the public.

3. Right of Appeal Under the Arbitration Law in Kenya

In interpreting the right of appeal under the arbitration law in Kenya, the point of departure is to note that the law envisages limitation of judicial intervention within the parameters provided. This

¹⁹ International Development Law Organization, ‘*Enhancing Access to Justice through Alternative Dispute Resolution in Kenya*’ available at <https://www.idlo.int/news/highlights/enhancing-access-justice-through-alternative-dispute-resolution-kenya> (accessed on 04/11/2020).

²⁰ Constitution of Kenya 2010, Article 159 (2) (c), Government Printer, Nairobi.

²¹ *Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd* High Court Constitutional Petition No.328 of 2011 [2012] eKLR.

²² See also *Kenya Bus Service Ltd & another v Minister for Transport & 2 others* [2012] eKLR, where the Court emphasized that “*the right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Courts.*”

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has been succinctly captured by the Arbitration Act which provides that ‘*except as provided by the Act, no court shall intervene in matters governed by the Act.*’²³ The concept of limitation of judicial intervention is generally accepted in arbitral practice across the world. The English Arbitration Act provides that ‘*in matters governed by this Act the court should not intervene except as provided by this Act.*’²⁴ Further, the UNCITRAL Model Law on International Commercial Arbitration provides that ‘*in matters governed by this law, no courts shall intervene except where so provided in this law.*’²⁵

Limitation of judicial intervention in arbitration is in line with the principle of finality of arbitration which is aimed at facilitating expeditious settlement of disputes. To this extent, it has been rightly observed that unwarranted judicial review of arbitral proceedings will simply defeat the object of the Arbitration Act and thus *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 but will also be a clear negation of the legislative intent of the Arbitration Act* (emphasis added).²⁶ The Supreme Court of Kenya, while commenting on the same in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR*, stated as follows:

[52] We note in the above context that, the Arbitration Act, was introduced into our legal system to provide a quicker way of settling disputes which is distinct from the Court process. The Act was also formulated in line with internationally accepted principles and specifically the Model Law. With regard to the reason why some provisions of the Act speak to the finality of High Court decisions, the Hansard of the National Assembly during the debate on the Arbitration Act indicates 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.*” It was also reiterated that the limitation of the extent of the Courts’ interference was to ensure an, “*expeditious and efficient way of handling commercial disputes.*”

[53] Similarly, the Model Law also advocates for “limiting and clearly defining Court involvement” in arbitration. This reasoning is informed by the fact that “*parties to an arbitration agreement make a conscious decision to exclude court jurisdiction and prefer the "finality and expediency of the arbitral process."*” Thus, arbitration was intended as an alternative way of solving disputes in a manner that is expeditious, efficient and devoid of procedural technicalities. Indeed, our

²³ Arbitration Act, No. 4 of 1995, S 10.

²⁴ Arbitration Act, 1996 (Chapter 23), United Kingdom, S 1 (c).

²⁵ UNCITRAL Model Law on International Commercial Arbitration (United Nations Document A/40/17, annex 1) Section 5.

²⁶ Muigua, K., *Alternative Dispute Resolution and Access to Justice in Kenya*, Op Cit.

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Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all Courts to promote it. However, the arbitration process is not absolutely immune from the Court process, hence the present conundrum.

The principle of finality of arbitration which is the basis of limitation of court's intervention in arbitral proceedings has been upheld in numerous court decisions. In *Kenya Shell Limited v Kobil Petroleum Limited*²⁷, the Court of Appeal in upholding the principle decided that as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act underscores that policy.²⁸

Further in *Mahan Limited v Villa Care*²⁹, the Court while giving effect to the principle of finality of arbitration decided as follows:

'It may well be that the conclusion reached by the Arbitrator is not sustainable in law yet by clause 13.2 (Dispute Resolution and Arbitration Clause) the parties made a covenant to each another that *the decision of the Arbitrator would be final and binding on them* (emphasis added). It must have been within the contemplation of the parties that the Arbitrator may sometimes get it wrong but they agreed to bind themselves to the risks involved in a final and binding clause and to live with the outcome absent the grounds in Section 35 of the Act'.

A similar position was also held in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)*³⁰ where the Court of Appeal decided that:

'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 arbitrators' award shall be final*, it can be taken that as long as the given award subsists, it is theirs (emphasis added). But in the event it is set aside as was the case here, that decision of the High Court is final and remains their own. 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.'

²⁷ Kenya Shell Limited v Kobil Petroleum Limited NRB CA Civil Appl. No. 57 of 2006 [2006] eKLR.

²⁸ Ibid.

²⁹ Mahan Limited v Villa Care, HC Misc. Civil App. No. 216 of 2018 [2019] eKLR.

³⁰ Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016 (2019) eKLR

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The above position in *Nyutu case* was the position taken by the Court of Appeal, and the Supreme Court, when it was called upon to pronounce itself on the same issue had the following to say:

[48] That same view of the finality of High Court decisions is evident in other Court of Appeal decisions such as *Anne Mumbi Hinga v Victoria Njoki Gathara* Civil Appeal No. 8 of 2009; [2009] eKLR, *Micro-House Technologies Limited v Co-operative College of Kenya* Civil Appeal No. 228 of 2014; [2017] eKLR and *Synergy Industrial Credit Ltd v Cape Holdings Ltd* Civil Appeal (Appl.) No. 81 of 2016.

[49] However, in other cases, the Court of Appeal has taken a different position. For example, in the earlier case of *Kenya Shell Limited v Kobil Petroleum Limited* Civil Application No. 57 of 2006 (unreported) Omolo JA expressed himself 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.”

[50] Similarly, in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited* Civil Application No. Nai. 302 of 2015; [2017] eKLR, the Court of Appeal rendered itself as follows:

“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.”

[51] Thus, it is evident that there is no consensus by the Court of Appeal both before and after 2010 on how Section 35 should be interpreted. There is need therefore to properly interrogate the matter and establish why, unlike other provisions in the Arbitration Act, Section 35 does not specifically state that decisions of the High Court are final, and unlike Section 39, it does not also state that an aggrieved litigant may appeal to the Court of Appeal. We shall also need to understand the import of Section 10 of the Act and its relevance, if at all to the interpretation before us. A proper interpretation would also require a broader understanding of the principles of arbitration vis-a-vis the lingering powers of the Courts to intervene in arbitral proceedings. And finally, any interpretation adopted should not negate the fundamental purpose for which the Arbitration Act was enacted.

While agreeing with the position adopted by the Court of Appeal in *Nyutu case*, the Supreme Court had the following to say:

[57] Thus, it is reasonable to conclude that just like Article 5 [of the Model Law], Section 10 of the Act was enacted, to ensure predictability and certainty of arbitration proceedings by specifically providing instances where a Court may intervene. Therefore, parties who resort to arbitration, must know with certainty instances when the jurisdiction of the Courts may be invoked. According to the Act, such instances include, applications for setting aside an award, determination of the question of the appointment of an arbitrator and recognition and enforcement of arbitral awards amongst other specified grounds.

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[58] Having stated as above therefore we reject Nyutu's argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court determined under Section 35 of the Act. We have shown that Section 10 is meant to ensure that a party will not invoke the jurisdiction of the Court unless the Act specifically provides for such intervention. With regard to Section 35, the kind of intervention contemplated is an application for setting aside an arbitral award only. However, Section 10 cannot be used to explain whether an appeal may lie against a decision of the High Court confirming or setting aside an award. This is because by the time an appeal is preferred, if at all, a Court (in this case the High Court) would have already assumed jurisdiction under Section 35 and made a determination therefore. Thus, by the High Court assuming jurisdiction under Section 35, it would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act and therefore predictability and certainty commended by Article 5 of the Model Law is assured. The question whether an appeal may lie against the decision of the High Court made under Section 35 thus still remains unanswered because, just like Section 35, Section 10 does not answer that question.

Notably, in *GEO Chem Middle East v Kenya Bureau of Standards [2020] eKLR*, the Supreme Court also commented on the status of appeals under section 35 in the following words:

48. In the premises, we have no option but to hold that the Judgment of the Court of Appeal, to the extent to which it purported to interrogate the merits of an arbitral award, in the absence of the High Court's pronouncement on the same, was rendered in excess of jurisdiction. This means that even if we had found that we had jurisdiction to decide the appeal on its merits, this jurisdictional conundrum would have stopped us in our tracks.

49. In conclusion, having declined to delve into the merits of the Court of Appeal Judgment for the reasons stated, and having also found that the Appellate Court prematurely, and in excess of its jurisdiction, sat on an appeal that was not ripe, instead of remitting the same to the High Court for determination, what course of action is open to us? To answer this question, we must first address the issue as to whether the leave that triggered these proceedings in the first place, ought to have been granted. Or put another way, had the application for leave to appeal been made after the delivery of Nyutu and Synergy, would such leave have been likely granted by the Court of Appeal? It is to this question that we must now turn.

50. Towards this end, we have already made two critical observations, firstly, that in granting leave on 31st May 2018, the Court of Appeal did not interrogate the substance of the intended appeal and whether it fell within the said Section (read, Section 35 of the Arbitration Act). Secondly, that in granting leave, the Court of Appeal appeared to suggest or must be taken to have been suggesting that such appeals were open-ended. At that time there were two divergent schools of thought at Court of Appeal; the one which argued that appeals lay to the Court from decisions of the High Court and the other which was categorical that no such appeals could lie to the Court. And then came our decisions in Nyutu and Synergy of which we shall say no more, save that the window to appeal is severely restricted.

51. The applicable law is now settled regarding the vexed question as to whether an appeal lies or not, under Section 35 of the Arbitration Act and if so, under what circumstances. We appreciate the fact that at the time leave was granted, the Supreme Court was yet to pronounce itself on the issue. However, the law as enunciated must now henceforth be the yardstick for granting or

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refusing to grant leave to appeal in such matters. After our pronouncements in Nyutu and Synergy, it is not possible that the Court of Appeal can grant leave to appeal from a Section 35 Judgment of the High Court without interrogating the substance of the intended appeal, to determine whether, on the basis of our pronouncement, such an appeal lies. A general grant of leave to appeal would not suffice. Yet this is exactly what happened in the instant case before us.

52. In conclusion, having declined to delve into the merits of the substantive Judgment of the Court of Appeal for the reasons stated, and having further determined that the said Judgment was nonetheless rendered in excess of jurisdiction, and finally having determined that the initial leave to appeal was granted without interrogating the substance of the intended appeal, the only course of action open to us is to maintain the Ruling of the High Court.

The precedent flowing from the above decisions is that arbitration being a private and confidential process is not subject to court intervention unless as provided under the Act in line with the principle of finality. Consequently, the Arbitration Act expressly bars certain matters from being subject of appeal. Under section 12 of the Act, *the decision by the High Court in relation to appointment of an arbitrator is final and not subject of appeal* (emphasis added).³¹ The Act also expressly bars appeals from the decision of the High Court on an application challenging an arbitrator (emphasis added).³² In addition, *the decision of the High Court on the termination of the mandate of the arbitrator is final and not subject to appeal* (emphasis added).³³ Further, the decision of the High Court upon an application for relief by an arbitrator who withdraws from his office is final and not subject to appeal.³⁴ Under section 17 of the Act, *the decision of the High Court on the jurisdiction of the Tribunal is final and cannot be appealed against* (emphasis added).

The Act, however, envisions certain instances that may warrant court intervention in the arbitral process in form of an application or appeal to the High Court. Under section 39 of the Act, where parties have agreed that an application by an party may be made to a court to determine any question of law arising in the course of the arbitration or an appeal by an party may be made to a court on any question of law arising out of the award, such application or appeal may be made to the High Court.³⁵ The High Court is granted power under this provision such an application or

³¹ Arbitration Act, No. 4 of 1995, S 12 (8).

³² Ibid, S 14 (6).

³³ Ibid, S 15 (3).

³⁴ Ibid, S 16A (2).

³⁵ Ibid, S 39.

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appeal to determine the question of law arising or confirm, vary or set aside the arbitral award.³⁶ *The section further grants the right of appeal to the Court of Appeal against a decision of the High Court if the parties have agreed so prior to the delivery of the arbitral award and if the Court of Appeal is 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 involved (emphasis added).*³⁷ The import of this provision is that *parties through an agreement can allow for the right of appeal against a High Court decision made pursuant to section 39 of the Arbitration Act (emphasis added).* This provision mirrors the English Arbitration Act which allows appeals on questions of law arising out of an award with the agreement of all parties to the proceedings and with the leave of the court.³⁸ However, it must be pointed out that the right to appeal to the Court of Appeal under section 39 is only restricted to domestic arbitration and can only be on questions of law.³⁹

4. Right of Appeal Under Section 35 of the Arbitration Act

One of the contentious issues in arbitral practice in Kenya has been whether a right of appeal accrues automatically from the decision of the High Court under section 35 of the Arbitration Act. The section provides for recourse to the High Court against an arbitral award through an application for setting aside an award. The High Court upon such an application may set aside the award if it is proved that: *a party to the arbitration agreement was under some incapacity; the arbitration agreement is not valid under the law to which the parties have subjected it or the laws of Kenya; the party making the application was not given proper notice of the appointment of an arbitrator or the arbitral proceedings; the arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration; the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or the*

³⁶ Ibid S 39 (2).

³⁷ Ibid, S 39 (3).

³⁸ Arbitration Act, 1996 (Chapter 23), United Kingdom, S 69 (2).

³⁹ See *Kenyatta International Convention Center v Congress Rental South Africa* [2020] eKLR, Civil Application 231 of 2018; *GEO Chem Middle East v Kenya Bureau of Standards* [2020] eKLR, Petition (Application) 47 of 2019.

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making of the award was induced or affected by fraud, bribery, undue influence or corruption (emphasis added).⁴⁰ The High Court may also set aside the award if it finds that *the subject matter of the dispute is not capable of settlement by arbitration under the law of Kenya or the award is in conflict with the public policy of Kenya* (emphasis added).⁴¹

The issue of the right of appeal under section 35 of the Arbitration was given prominence by the Supreme Court in the case *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited*⁴². The Supreme Court in the case decided *that an appeal may lie to the Court of Appeal against a decision of the High Court made pursuant to section 35 of the Arbitration Act upon grant of leave in exceptional cases* (emphasis added). Specifically, the majority of the Supreme Court judges had the following to say:

“[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.”

“[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

⁴⁰ Arbitration Act, S 35 (2) (a)

⁴¹ Ibid, S 35 (2) (b)

⁴² Nyutu Agrovet Limited -vs- Airtel Networks Kenya Ltd; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016, (2019) eKLR

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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." (emphasis added)

The issue also arose in the case of *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR⁴³ where the Supreme Court held that:

[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.

Prior to the Supreme Court decision in the above cases, conflicting decisions had emanated from the Court of Appeal on whether a party dissatisfied with the decision of the High Court under section 35 of the Arbitration Act can appeal against such a decision. One school of thought has been that since there is no express bar of the right of appeal under section 35 of the Act, such decisions should be appealable to the Court of Appeal under Article 164 (3) of the Constitution of Kenya, 2010. This provision gives the Court of Appeal unlimited jurisdiction to hear appeals from the High Court.⁴⁴ On the other hand, it has been contended that there is no right of appeal under section 35 of the Act and that where the Act requires the Court of Appeal's intervention, it explicitly states so with the example of section 39 of the Act.

In the Court of Appeal decision in *Nyutu Agrovet Limited -vs- Airtel Networks Limited*, the court dismissed an appeal emanating from a High Court decision under section 35 of the Arbitration Act and decided 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 arbitrators’ *award shall be final*, it can be taken that as long as the given award subsists it is theirs. But in the event that it is set aside as was the case here, that decision of the High Court is final remains their

⁴³ *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR, Petition No. 2 of 2017.

⁴⁴ Constitution of Kenya, 2010, Article 164 (3), Government Printer, Nairobi

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own. 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 choose 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. Despite the loss or gain either party may impute to, the setting aside remains where it falls. *The courts, including this Court, should respect the will and desire of the parties to arbitration* (emphasis added).⁴⁵

Further, the court rejected the notion that the right of appeal to the Court of Appeal automatically accrues under article 164 (3) of the Constitution and noted that the power or authority to hear an appeal is not synonymous with the right of appeal which a litigant should demonstrate that a given law gives him or her to come before the Court.⁴⁶

In, *Anne Mumbi Hinga -vs- Victoria Njoki Gathara*, the Court of Appeal also held that no right of appeal accrues under section 35 of the Arbitration Act and that appeals will only lie to the court in circumstances set out under section 39 of the Act.⁴⁷ The Court of Appeal in the case expressed itself as follows:

‘We therefore reiterate that there is no right for any court to intervene in the arbitral process or in the award except in the situations specifically set out in the Arbitration Act or as previously agreed in advance by the parties and similarly there is no right of appeal to the High Court or the Court of Appeal against an award except in the circumstances set out in Section 39 of the Arbitration Act’⁴⁸

Further, in *Micro-House Technologies Limited -vs- Co-Operative College of Kenya*, the Court of Appeal decided that there is no right of appeal from a High Court decision made pursuant to section 35 of the Arbitration Act.⁴⁹

⁴⁵ Nyutu Agrovat Limited -vs- Airtel Networks Limited, Civil Appeal No.61 of 2012 (2015) eKLR.

⁴⁶ Ibid.

⁴⁷ Anne Mumbi Hinga -vs- Victoria Njoki Gathara, Civil Appeal No. 8 of 2009; [2009] eKLR.

⁴⁸ Ibid.

⁴⁹ Micro-House Technologies Limited -vs- Co-Operative College of Kenya, Civil Appeal No. 228 of 2014, (2017) eKLR.

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However, the Court of Appeal has also held a different view on the issue of the right of appeal under section 35 of the Arbitration Act. In *Kenya Shell Limited -vs- Kobil Petroleum Limited*⁵⁰, the court decided that:

“The 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.”

A similar position was also held by the Court of Appeal in the case of *DHL Excel Supply Chain Kenya Limited -vs- Tilton Investments Limited*, where the court in its interpretation of section 35 of the Arbitration Act decided as follows:

“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.”⁵¹

An analysis of the foregoing Court of Appeal decisions shows that prior to the Supreme Court decisions in *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited* and *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR*, the question of whether the right of appeal accrues under section 35 of the Arbitration Act remained unsettled. Where the Court of Appeal decided that it has no jurisdiction, it has observed that the Court of Appeal’s intervention is only envisaged under section 39 of the Arbitration Act.⁵² Further, the court had also made the finding that the right of appeal is conferred by a specific statute and does not generally flow from article 164 (3) of the Constitution.⁵³ In other instances, where the court had decided that it had jurisdiction to entertain appeals under section 35 of the Act, it had taken the view that since the section is silent on the issue of appeal, it should be interpreted to confer jurisdiction to the Court of Appeal.⁵⁴ Further, in support of this view, the Court of Appeal had also decided that if the legislature had the

⁵⁰ *Kenya Shell Limited -vs- Kobil Petroleum Limited*, Civil Application No. 57 of 2006 (Unreported).

⁵¹ *DHL Excel Supply Chain Kenya Limited -vs- Tilton Investments Limited*, Civil Application No. NAI. 302 of 2015; [2017] eKLR.

⁵² See *Nyutu Agrovet Limited -vs- Airtel Networks Limited*, Civil Appeal No.61 of 2012.

⁵³ *Ibid.*

⁵⁴ See *Kenya Shell Limited -vs- Kobil Petroleum Limited*, Civil Application No. 57 of 2006.

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intention of limiting the right of appeal under section 35, it would have expressly done so similar to other specific provisions of the Arbitration Act.

Unlike section 35 of the Arbitration Act which does not expressly bar or allow an appeal from a High Court decision made pursuant to the section, the English Arbitration Act provides clarity on this issue. The Act provides that leave of the court is required for any appeal from a decision of the court on an application challenging an arbitral award.⁵⁵ Amidst the conflicting decisions that have emanated from the Court of Appeal in regard to the right of appeal under section 35 of the Arbitration Act, the Supreme Court has rendered some certainty on the issue in a number of cases it has decided dealing with the right of appeal under section 35 of the Arbitration Act.

5. The Import of Supreme Court's Decisions on The Right of Appeal Under Section 35 of the Arbitration Act

In its interpretation of the right of appeal under section 35 of the Arbitration Act, the Court has emphasized the need to balance between finality and limited court intervention and decided that *leave to appeal may be granted where the High Court decision is patently wrong* (emphasis added). This was succinctly captured in the case of *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Limited*.⁵⁶ The parties had entered into a distributorship agreement where Nyutu Agrovet Limited was contracted to distribute telephone handsets belonging to Airtel Networks Kenya Ltd. A dispute arose when an agent of Nyutu placed orders for Airtel's products totaling Kshs.11 million for which Airtel made payment. Upon delivery, Airtel realised that the orders were made fraudulently. Nyutu had also failed to pay the said amount and the agreement between the parties was thus terminated and a dispute in that regard arose. The dispute was referred to arbitration and upon conclusion of the arbitral proceedings, an award of Kshs.541, 005,922.81 was made in favour of Nyutu Agrovet Limited.

Being dissatisfied with the award, Airtel Networks Kenya Limited filed an application before the High Court under section 35 of the Arbitration Act seeking to set it aside. The entire arbitral award

⁵⁵ Arbitration Act, 1996 (Chapter 23), United Kingdom, S 67 (4).

⁵⁶ *Nyutu Agrovet Limited -vs- Airtel Networks Kenya Ltd*; Chartered Institute of Arbitrators-Kenya Branch (Interested Party), Supreme Court Petition No. 12 of 2016, (2019) eKLR.

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was then set aside purely on the ground that the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties. On appeal to the Court Appeal against the High Court decision setting aside the award, the court struck out the appeal and held that the decision by the High Court made under Section 35 of the Act was final and no appeal lay to the Court of Appeal. Aggrieved by the Court of Appeal decision, Nyutu Agrovet Limited filed an appeal to the Supreme Court. *The Supreme Court decided that an appeal can lie from the High Court to the Court of Appeal in very limited circumstances upon grant of leave* (emphasis added). The Court emphasized *the need to balance between finality and limited court intervention and decided that leave to appeal may be granted where the High Court decision is patently wrong* (emphasis added). The court noted that an unfair determination by the High Court should not be absolutely immune from appellate review. The court highlighted instances where leave to appeal may be granted including; *where there is unfairness or misconduct in decision making process, the need to protect integrity of the judicial process and prevent injustice and the importance of the subject matter including the economic value or legal principle at issue* (emphasis added).

A similar decision was made in the case of *Synergy Industrial Credit Limited -vs- Cape Holdings Limited*⁵⁷. The case emanated from a decision of the High Court which set aside an arbitral award under section 35 of the Arbitration Act on the grounds that the arbitrator acted outside the scope of reference. Dissatisfied with the ruling, the petitioner filed an appeal to the Court of Appeal. The Court of Appeal struck out the appeal and held that there was no right of appeal from decisions of the High Court made pursuant to section 35 of the Arbitration Act⁵⁸. Being aggrieved with the decision, the petitioner filed a petition before the Supreme Court.

The Supreme Court allowed the appeal and set aside the ruling of the Court of Appeal. It directed that the petitioner's appeal before the Court of Appeal be reinstated and heard on priority basis.⁵⁹

⁵⁷ Synergy Industrial Credit Limited -vs- Cape Holdings Limited, Supreme Court, Petition No. 2 of 2017.

⁵⁸ Synergy Industrial Credit Limited -vs- Cape Holdings Limited, Court of Appeal No. 81 of 2016.

⁵⁹ The Court of Appeal has since heard and determined the Appeal in *Synergy Industrial Credit Limited v Cape Holdings Limited* [2020] eKLR, Civil Appeal No. 81 of 2016. In determining the appeal, the Court of Appeal held as follows:

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However, it is worth pointing out that the Supreme Court in analysing the issues in dispute stated that *there is no express right of appeal against the decision of the High Court in setting aside or affirming an award and leave to appeal will only be granted in very limited circumstances* (emphasis added). The court held that *the intended appellant must demonstrate that in arriving at its decision, the High Court went beyond the grounds set out under section 35 of the Act* (emphasis ours). Further, it 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 and to prevent injustices* (emphasis added). In summary, the Supreme Court decided that *the Court of Appeal has residual jurisdiction to entertain an appeal under section 35 of the Arbitration Act in exceptional and limited circumstances where there is need to correct palpable injustice* (emphasis added).

The Court, however, cautioned that care must be taken not to delve into merits of the award. Consequently, the Court of Appeal upon hearing the matter on merits set aside the ruling of the High Court and decided that where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral

Where the terms of the arbitral agreement are clear and unrestricted, it is not open to the court to look for and impose its own strictures and restrictions on the arbitral agreement. If the parties wished to restrict the arbitration to only the written agreements, we would have expected them to state so expressly in the arbitral agreement itself. Furthermore, a look at how the learned judge dealt with the question leaves no doubt in our minds that he did not confine himself to the real question, namely the terms of the arbitral agreement, but instead went into a determination that amounts to saying the arbitral award was erroneous under the law of contract.

This was tantamount to undertaking a merit review of the arbitral award, based on consideration of provisions of the written agreements far removed from the arbitral agreement itself, so as to reach a different finding from the arbitral tribunal, which we think the learned judge was not entitled to do.

.....

If, as we have found, the learned judge was not entitled to set aside the arbitral award on the basis that it dealt with disputes not contemplated by or not falling within the terms of the reference or contained decisions on matters beyond the scope of the reference to arbitration, then all the respondent's arguments on award of interest, compound interest, income opportunity loss and foreign exchange loss, which are founded on the argument that written agreements were the sole basis of the reference, cannot be sustained and therefore do not merit further consideration.

.....

Ultimately we find merit in this appeal. The learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration, or had decided matters beyond the scope of the reference. The appellant will have the costs of the appeal. It is so ordered.

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agreement.⁶⁰ The Court of Appeal found that the *High Court decision was manifestly wrong* and that the learned judge was not justified in setting aside the arbitral award on the grounds that the arbitral tribunal had dealt with a dispute that was not contemplated by the parties, or one beyond the terms of the reference to arbitration, or had decided matters beyond the scope of the reference.⁶¹

The upshot of these decisions is that leave to appeal may be granted under section 35 of the Arbitration Act in very limited circumstances *in order to ensure fairness and integrity in the administration of justice* (emphasis ours). However, some have criticised the position of the Supreme Court in the above decisions arguing that it goes against the principle of finality in arbitration by allowing unwarranted court intervention.⁶² However, as correctly pointed out by the Supreme Court, *a balance ought to be struck between finality in arbitration proceedings and the need to promote the right of access to justice* (emphasis added).

6. Conclusion

The Supreme Court has rendered some certainty on the issue of the right of appeal under section 35 of the Arbitration Act. However, the decisions analysed in the foregoing discussion have not yet fully settled the issue of grant of leave under section 35 of the Arbitration Act and the grounds that will warrant the same. This necessitates *the need for legislative intervention that will see amendment of section 35 of the Arbitration Act in order to capture the Supreme Court's decision on the issue and provide certainty on instances that may warrant grant of leave to appeal* (emphasis added). Further, *section 35 of the Act ought to be interpreted in a way that promotes the purpose and objectives of arbitration law and limit court intervention while at the same time ensuring expeditious yet just resolution of disputes* (emphasis added). Thus, *there is need for a leave mechanism to ensure that frivolous appeals are sieved out and leave to appeal is only granted in matters raising substantive issues under section 35 of the Arbitration Act* (emphasis added).

⁶⁰ Synergy Industrial Credit Limited -vs- Cape Holdings Limited, Civil Appeal No. 81 of 2016.

⁶¹ Ibid.

⁶² See generally Mutubwa, M, 'Is Nairobi a Safe Seat for International Arbitration? A Review of the Latest Decision from the Supreme Court of Kenya and Its Possible Effects' *Alternative Dispute Resolution Journal*, Volume 8, No. 1.

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Through this, the sanctity of the arbitral process will be protected by ensuring that there is reduced court intervention yet at the same time safeguarding the right of access to justice.

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