



Limited Right of Appeal under Section 35 of Arbitration Act

Introduction

The Supreme Court of Kenya has finally settled the question whether a party aggrieved by a decision of the High Court on a challenge to an arbitral award has recourse to the Court of Appeal.

This was settled in the judgments in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR* and *Synergy Industrial Credit Limited v Cape Holdings Limited [2019] eKLR*.

Our Analysis

The Supreme Court held that while the Constitution grants the Court of Appeal jurisdiction to hear appeals from the High Court, this does not mean an automatic right of appeal under Section 35 of the Arbitration Act ('the Act').

An appeal against the High Court's decision on a challenge to an arbitral award must demonstrate that in arriving at its decision, the High Court went beyond the grounds in Section 35 of the Act for interfering with an arbitral award. These grounds are incapacity, invalidity of the arbitration agreement, lack of proper notice of arbitral proceedings, award goes beyond scope of reference, composition of tribunal not in accordance with agreement, fraud, bribery, undue influence, or corruption.

The Supreme Court found that while there is need for litigation to have finality this should not be at the expense of real and substantive justice. The Supreme Court recognized that there could be legitimate reasons for seeking to appeal against the High Court's decision.

The Court of Appeal will therefore be expected to determine, on a case to case basis, whether an appeal arising from a decision under Section 35 of the Act meets the criteria for admission.

The Supreme Court proposed that the legislature should look into amending the Act to address how leave to appeal should be granted. This would resolve the expected onslaught of frivolous, time-wasting, and opportunistic appeals.

We expect this will increase the number of appeals filed against High Court decisions setting aside or declining to set aside arbitral awards. This will increase the time spent resolving disputes through arbitration and consequently the cost.

Parties cannot circumvent this through carefully crafting their arbitration agreement or clauses, as the decision on whether to admit will be made by the Court of Appeal on case by case basis.

Conclusion

The impact of this on business will be easier to determine once the Court of Appeal sets the threshold for admission of such appeals. A prolonged litigation process will increase the cost of dispute resolution and discourage parties from using arbitration.

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