

MISC. CIVIL APPL. NO. 216 OF 2018

MAHAN LIMITED VS VILLA CARE LIMITED [2021] eKLR

Date of delivery of the Ruling: 19th March 2021

SUMMARY OF FACTS

The dispute between the Applicant and the Respondent was arbitrated upon by Ms. Kethi Kilonzo who delivered a final award in favour of the Respondent. The Applicant was aggrieved by the decision and filed an application under Section 35 of the Arbitration Act, 1995 seeking to set aside the award. The Respondent on the other hand filed an application seeking to enforce the award as a decree of the court.

The Applicant challenged the award on the grounds that it was a flagrant disregard of the law of contract; that it was oppressive and designed to unjustly enrich the Respondent and that the Arbitrator went beyond the scope of her jurisdiction and purported to rewrite the contract. Furthermore, that she acted contrary to the established principles of law and that she considered extraneous matters that were not pleaded. Lastly, she was accused of bias against the Applicant.

The High Court was of the view that the Applicant neither provided sufficient evidence to support their evidence nor did the arbitral tribunal deal with a dispute that went beyond the scope of the reference or not contemplated by the parties. In a ruling delivered by Tuiyott J., the Applicant's application was dismissed whereas the Respondent's application was allowed.

Dissatisfied by the ruling and the order, the Applicant filed a notice of appeal at the Court of Appeal that evidenced its intention to appeal the High Court ruling. Furthermore, the Applicant filed a Notice of Motion application pursuant to Rules 5(2)(b), 41 and 42 of the Court of Appeal Rules, 2010, and Sections 3A and 3B of the Appellate Jurisdiction Act, seeking the stay of execution of the said ruling and order pending the hearing and determination of the intended appeal.

The Respondent opposed the application by deposing that the Court of Appeal lacked the jurisdiction to entertain the application as there was no competent appeal arising out of the

invocation of Section 35 of the Act as the Applicant had not met the threshold set out by the Supreme Court in the case of *Nyutu Agrovet v Airtel Networks Ltd. & another [2019] eKLR* with regard to appeals to the Court of Appeal arising out of arbitration proceedings and in particular, Section 35 of the Arbitration Act and further, that the Applicant did not have an arguable appeal.

On the other hand, the Respondent urged the court to find that the Applicant had not met the threshold for admitting an appeal out of arbitration proceedings as laid out in the *Nyutu* case and that there was no competent appeal to sustain the present application having regard to the provisions of Section 35 of the Act.

ISSUES

Whether the Applicant's application and Notice of Appeal filed before the Court of Appeal are incompetent?

ANALYSIS/DETERMINATION

Placing reliance on the *Nyutu* case, the court determined that the Applicant failed to seek leave before filing their Notice of Appeal and the application at the Court of Appeal. The Court of Appeal was of the view that the Notice of Appeal and the application were based on quicksand because the Applicant failed to seek and obtain leave of the trial court or the Court of Appeal so as to file the Notice of Appeal and the application.

The court therefore held that in the absence of leave, the Applicant's application was incompetent.

RULING/HOLDING

The Court of Appeal held that the Applicant's application was incompetent and was accordingly struck out.

RATIONALE

The court adopted a strict interpretation of the Supreme Court decision in the *Nyutu* case in that, a party who desires to appeal against arbitration proceedings at the Court of Appeal ought to first obtain leave of either the trial court or the Court of Appeal.