



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 228 OF 2014

BETWEEN

MICRO-HOUSE TECHNOLOGIES LIMITED APPELLANT

AND

CO-OPERATIVE COLLEGE OF KENYA RESPONDENT

(An Appeal from the Ruling and Order of the High Court of Kenya at Nairobi, (Mutava, J.) dated 15th November, 2012

in

Misc. Application No. 220 of 2012

Consolidated with

Misc. Application No. 243 of 2012)

JUDGMENT OF THE COURT

1. On 23rd January, 2012 Mr. Dan. Ameyo published an arbitral award in favour of the appellant. On 4th April, 2012 the appellant sought to have the arbitral award adopted as a judgment of the High Court. On the other hand, the respondent moved the High Court to set aside the arbitral award.

2. After hearing the two applications, Mutava, J. set aside the award on 15th November, 2012. The appellant was aggrieved by the said decision and immediately after delivery of the ruling made an oral application for leave to appeal, which was granted, and he proceeded to file this appeal.

3. Both **Mr. Guantai**, learned counsel for the appellant and **Ms. Areri**, learned counsel who held brief for the respondent's counsel, **Mr. Waweru Gatonye**, made submissions, firstly on the issue of jurisdiction of this Court to hear the appeal and secondly, on the merits of the appeal. We shall first consider the issue of jurisdiction, without which a court has no power to make one more step, as was well put by Nyarangi, J.A. in **Owners of Motor Vessel "Lillian's" v Caltex Oil (KENYA) Ltd [1989] KLR 1**.

4. The respondent's counsel submitted that the appellant had no right of appeal as it had to first seek leave

from this Court; that **section 10** of the **Arbitration Act** limits the intervention of courts to the extent allowed by the Act; that **section 39(3)** of the **Act** stipulates the instances under which an appeal can lie to the Court of Appeal. The sub section provides as follows:

“(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).

5. The respondent’s counsel went on to state that the parties had not entered into any consent for any application to be made either in the High Court or this Court; that this Court had not made any finding that there is a point of law of general public importance which substantially affects the rights of the parties; and that no leave to appeal was granted by this Court and therefore the appeal did not lie.

6. Counsel cited this Court’s decision in **Nyutu Agrovet Limited v Airtel Networks Limited [2015] eKLR**, where a five judge bench unanimously held that a right of appeal from a decision of the High Court in setting aside an arbitral award cannot be invoked under **section 39(3)** of the **Arbitration Act**; and that leave to appeal had to be sought from this Court. He urged the Court to find that it had no jurisdiction to hear the appeal and proceed to strike it out.

7. In response, **Mr. Guantai**, learned counsel for the appellant, submitted that appeals from orders of the High Court are governed by **section 75** of the **Civil Procedure Act** and **Order 43** of the **Civil Procedure Rules**. In his view, the leave that was granted by the High Court was sufficient. Counsel did not comment on the position taken by this Court in **Nyutu Agrovet Limited v Airtel Networks Ltd. (supra)** appeal.

8. We have considered the above submissions. There are several facts that are not in dispute:

(a) that prior to the delivery of the arbitral award parties had not agreed that an shall lie to this appeal Court;

(b) that no application was made to this Court for leave to appeal on grounds that a point of law of general importance is involved, the determination of which would substantially affect the rights of one or both of the parties; and

(c) no leave to appeal was granted by this Court.

9. The question that we must answer is whether, in light of the above summarized position, this Court has jurisdiction to hear this appeal. Our simple answer is in the negative, that the Court lacks jurisdiction. The appellant had no right of appeal to this Court not having obtained leave under **section 39(3) (b)** of the **Arbitration Act**. This Court emphatically so held in **Nyutu Agrovet Limited v Airtel Networks Ltd. (supra)**. Karanja, J.A. stated *inter alia*:

“I hold the view that no right of appeal is provided for in arbitral awards save for matters pegged on section 39 of the Act. I am convinced that a right of appeal is conferred by statute and cannot be inferred.”

10. In the same decision, the Court also held that where a right of appeal does not lie to this Court in terms of **section 39(3)** of the **Arbitration Act**, a party cannot rely on either **section 75(1)** of the **Civil Procedure Act** or **Article 164(3)** of the **Constitution** to found an appeal to this Court.

11. We have no reason to depart from the unanimous five judges' decision in **Nyutu Agroviet Limited v Airtel Networks Limited**. Consequently, this Court has no jurisdiction to entertain the appeal before it. Consequently, the appeal is struck out with costs to the respondent.

Dated and Delivered at Nairobi this 10th day of March, 2017.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR.