Gachuhi & another v Evangelical Mission for Africa & another; Law Society of Kenya (Interested Party) (Civil Appeal 159 of 2015) [2023] KECA 51 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 51 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 159 OF 2015

HM OKWENGU, MSA MAKHANDIA & K M'INOTI, JJA

FEBRUARY 3, 2023

BETWEEN

KIMANI GACHUHI ..... 1ST APPELLANT

PETER MBUTHIA GACHUHI ..... 2ND APPELLANT

AND

EVANGELICAL MISSION FOR AFRICA ..... 1ST RESPONDENT

CINDY SANYU OKOVA ..... 2ND RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

(An Appeal from the Ruling and Orders of the High Court of Kenya (E. K. Ogola, J.) dated 19th May, 2015 in Nairobi HC Civil Application No. 479 of 2014)

JUDGMENT

1. This appeal arises from the ruling and orders of the High Court, (Ogola, J.) delivered on 19th May, 2015 in Nairobi Civil Application No 479 of 2014. There were two applications before the High Court that the trial court consolidated and determined through the said ruling that is the subject of the present appeal.

2. The respondents, pursuant to sections 35 and 39 of the *Arbitration Act*, filed the first application. The said application sought to secure a total of ten (10) orders whose sum total was that the trial court sets aside the Final Arbitration Award dated 19th August, 2014 rendered by the two arbitrators, Joe Okwach, S.C and Steven Gatembu Kairu, ("the Arbitrators"). The second application was by the appellants, filed pursuant to Orders 2 rule 15 (b), (d) and 50 rule 1 of the *Civil Procedure Rules*, which sought, inter alia, to strike out the respondents' aforesaid application in its entirety.

3. The genesis of the dispute was that in May 2005, the respondents expressed interest in purchasing a portion of all that piece or parcel of land known as LR No 2951/84 measuring approximately 16.65 acres "the suit property", which the appellants were offering to sale. The transaction was to be handled by the firm of Messrs. Kaplan & Stratton Advocates on behalf of all the parties. On 16th September, 2005 the respondents and the appellants entered into a formal agreement for the sale of the suit property at a consideration of KShs. 64 Million.

4. However, the subdivision was delayed, as plans were not readily approved by the City Council of Nairobi as required. On 4th June, 2007 the parties executed variation and licence agreements allowing the respondents to take possession, occupy and develop the suit property. This was after the respondents had paid to the appellants a sum of KShs. 32,000,000.00 as part payment of the consideration pursuant to the sale agreement. On 3rd April 2008, the respondents in accordance with the provisions of the third agreement, paid to the appellants the balance of the purchase price of KShs. 32,000,000. The respondents after taking possession of the suit property, commenced developments thereon to the tune of KShs. 30Million by establishing an International School, which was christened "School of Nations". However, the respondents became anxious due to the inordinate delay to secure the subdivision approvals occasioned by the appellants' failure to comply with the conditions attached to the application for approval, for the subdivision by the City Council of Nairobi which was that they surrender 10% of the suit property to the City Council of Nairobi for public use and or utilities.

5. At this point, Mrs. Nyaga, respondents' advocate, advised the respondents that it was evident that the appellants were unwilling to surrender 10% of the suit property to the City Council of Nairobi, and that any such surrender would have to be hived off from the respondents' suit property.

6. The stalemate was further compounded by surprise turn of events, notwithstanding, the respondents' beneficial ownership of the suit property as aforesaid and having been granted vacant possession thereof, the appellants personally wrote a letter dated 27th August, 2009 to the respondents stating, inter alia:

> " The vendors' application for change of user and subdivision dated 13" October 2005 has to date, four years later, not been approved by the Nairobi City Council with regard to the sub-division. To compound the matter, an approval not authorized by the vendors was allegedly obtained by your agents on 9th July 2009. In view of the delay by the authorities and the supervening illegality, the vendors hereby terminate the Agreement forthwith.

The License dated 4th June 2007 entered into between the Vendors and Evangelical Mission for Africa is also hereby terminated. The vendors require the part of the property occupied by the school to be handed back forthwith. The law requires the parties to be restored to the position they were in prior to the execution of the Agreement. To that end, the vendors will refund KShs. 30 Million immediately possession is delivered. The balance of the purchase price being KShs. 34,000,000/ will be refunded upon deduction of the costs of demolition of any buildings constructed and restoration of the main building to its residential status in the event that you do not comply with the same. Such costs can either be agreed between the parties or assessed by Architects of (sic) Quantity Surveyors elected by the parties."

7. This was followed by yet another letter by the appellants dated 2nd October, 2009 to the respondents stating as follows:

> " We refer to our letter dated 27th August, 2009 we have to date not received your response. Take notice that we require you to vacate the portion occupied on or before 30th November,

2009. We are taking possession of the unoccupied portion including the Manager's House (wooden building) immediately."

8. The murky events ended with a letter dated 27th October 2009, by the City Council of Nairobi cancelling its approval for sub-division dated 9th July, 2009 issued to the respondents. As a consequence of the said letter, the respondents realized that the retention of Messrs. Kaplan & Stratton Advocates as their advocates was no longer tenable in view of the nature of the dispute that had arisen and the position of the said law firm having acted for both parties in the transaction. The respondents then instructed the firm of Messrs. Kemboy & Company Advocates to lodge a suit against the appellants being Nairobi HC ELC No 569 of 2009 to secure their interests. The said suit was however, subsequently compromised following the consent orders recorded on 7th July 2010, in which the dispute was referred to arbitration. Parties thereafter appointed the arbitrators aforesaid, who heard the dispute and published their final award on 19th August, 2014 in which the arbitrators made final orders that:

    a. The Claimants claim for a declaration that the termination by the Respondents contained in their letters dated 27th August, 2009 and 2nd October, 2009 is unlawful, null and void fails and is dismissed.

    b. The Claimants claim for a declaration that the Respondents are in breach of their obligation under the Sale Agreement as varied in failing to procure all the requisite approvals for sub division and change of user necessary to timeously convey the property to the Claimants fails and is dismissed.

    c. The Claimants claim for an order for specific performance compelling the Respondents to comply with the sub division approval requirements by the Council as well as the Change of User conditions imposed by the Ministry of Lands and to thereafter complete the sale and transfer of the property fails and is dismissed.

    d. The Claimants alternative claim for damages equivalent to the current market value of the property fails and is dismissed.

    e. The Claimants claim for permanent injunction to restrain the Respondents from interfering with the 1st Claimant's occupation and use of the property fails and is dismissed.

    f. The Respondents claim by counterclaim for possession of the property succeeds and is allowed. The Claimants shall deliver possession of the property to the Respondents within 12 calendar months from the date of delivery of this Award.

    g. Subject to any other agreement the parties may enter into within 60 days from the date of delivery of this Award, the 1st Claimant shall on or before the expiry of the 12 calendar months referred to in F above restore, at its own cost, the property to the state in which it took possession.

    h. Immediately upon delivery of possession of the property to the respondents in accordance with F above, the respondents shall forthwith refund the full purchase price to the 1st Claimant.

    i. Interest earned on the deposit held by the advocates for the parties as at the date of delivery of this Award shall be paid to the 1st Claimant.

    j. In consideration of the 1st Claimant's continued possession of the property from the date of delivery of this Award until the date of delivery of possession, interest earned on the deposit

held by the advocates for the parties from the date of delivery of this Award until delivery of possession shall be paid to the respondents.

k. The Respondents claim by counterclaim for damages for trespass or alternatively damages for loss of use of land mesne profits fails and is dismissed.

l. Each party shall bear its own costs of the arbitration. The costs of the Arbitral Tribunal shall be borne by the parties in equal shares. Any party who has paid more than its share of the costs or Arbitral Tribunal shall be entitled to reimbursement/refund of the difference from the other party.

9. This is the award the respondents challenged and wanted set aside, whereas the appellants entreated the court to strike out the application.

10. The learned Judge considered the two applications and allowed the application by the respondents in terms:

> "a. The Claimant's application by way of Chamber Summons dated 26th September 2014 succeeds.
>
> b. The Arbitral Award herein dated 19th August 2014 cannot stand and is hereby set aside in toto under section 35 (2) (b) (ii) for being in conflict with the public policy of Kenya, and against *the Constitution* of Kenya.
>
> c. Save and except to the extent that it has succeeded in the foregoing paragraphs of this Ruling, the Notice of Motion application by the Respondents filed in court on 24th November 2014 fails.
>
> d. The matter is herewith referred to arbitration for the second time. The parties shall be at liberty to agree on the arbitrators, and the terms of arbitration, within 14 days. If they are not able to agree then the court will make appropriate orders for appointment of arbitrators and the terms for arbitration.
>
> e. Costs herein shall be for the Claimants/Applicants."

11. Aggrieved by the ruling and orders aforesaid, the appellants preferred this appeal, predicated on twenty-two (22) grounds. In summary, the appellants faulted the trial court for, inter alia, finding that an Arbitral Tribunal falls under the jurisdiction created by Article 165(6) of *the Constitution*; construing the provisions of Article 165(6) of *the Constitution* as expanding the grounds for setting aside an arbitration award beyond those set out in section 35 of the *Arbitration Act*; interpreting the provisions of Article 10 of *the Constitution* as vesting upon the High Court additional powers to set aside an arbitral award beyond those set out in section 35 of the Act; failing to uphold the rule of law as enshrined in Article 50(1) of *the Constitution* and the application of section 32A of the Act; violating the appellants' constitutional rights in finding that the Arbitral Tribunal had abdicated its duty by the application of the law to the facts; wrongly interpreting and applying Article 40 of *the Constitution* and re-writing the contract between the parties; and, violating the appellants' rights to property as protected by the provisions of Article 40 of *the Constitution* by making a finding that the suit property to be surrendered to the Nairobi City Council was available and should have come from the appellants' portion.

12. Further, grounds included the trial court having wrongly exercised its jurisdiction and exceeded its jurisdiction by entering into an enquiry regarding the arbitral proceedings; wrongly making findings

in connection with the issue of whether the sale agreement between the parties made provision for the land to be surrendered to the Nairobi City Council; entering into an inquiry as to whether frustration had occurred in the circumstances of the case; entering into an inquiry regarding and making findings on the issue of whether the children who attend the School of Nations come from poor families; and, enquiring into and making findings regarding the improvements allegedly carried out on the suit property and concluding that the property was currently valued at KShs. 800,000,000.00, which were all issues of evidence that were not before it and which it lacked jurisdiction to enquire into or make determinations on.

13. We wish to point out at this juncture that leave to appeal to this Court from that ruling and order was granted by this Court differently constituted on 17th December 2021.

14. When the appeal came up for hearing, Mr. Karori - SC, and Mr. Odari, learned counsel appeared for 1st appellant, Mr. Macharia appeared for 2nd appellants whereas Ahmednassir - SC, appeared for 1st and 2nd respondents and Mr. Kivindyo for Law Society of Kenya who had been joined in the proceedings as an interested party. The 1st and 2nd appellants and the respondents filed written submissions that they relied on with limited oral highlights. Oral submissions were also made on behalf of the interested Party.

15. The 1st appellant submitted that the ruling by the trial court was erroneous on the ground that it misconstrued the nature of the proceedings before the Arbitral Tribunal and the jurisdiction of the High Court with regard to an application for setting aside of an award under section 35 of the *Arbitration Act*. That the trial court exceeded its jurisdiction by delving into the merits of the dispute and, in particular, the factual and extraneous issues, for instance, the holding by the trial court that the 10% of the suit property was available and was to be hived from the appellants' remaining parcel of land and that the value of the suit property had escalated beyond comparison. That it was a clear error of law and misdirection for the trial court to accept new evidence at the stage of hearing of an application for setting aside of an award as it had no jurisdiction to accept, consider or determine any new matters of evidence or new facts. Indeed, it did not even have the jurisdiction at that stage to delve into matters of evidence, including those that were before the arbitrators as invocation of section 35 is not an appellate process. See the case of *Baseline Architects Limited & 2 Others v National Hospital Insurance Fund Board Management* [2008] eKLR.

16. Further, that the trial court wrongly construed its jurisdiction in an application for setting aside as going beyond grounds set out in section 35 of the *Arbitration Act*. This according to the appellant, was evident when the trial court held, inter alia, that the court in appraising the application before it was bound to accept that indeed it has a blank legal cheque and stands on an expansive legal plateau to see to it and ensure it subjects the decision of the Arbitral Tribunal to a certain test of conformity of all the laws of the land and especially *the Constitution* with reference to Articles 10(2) and 165 of *the Constitution*.

17. To this end, the trial court was exercising jurisdiction beyond what is granted to it under section 35 of the *Arbitration Act*, which lays down the circumstances under which an award can be set aside, which has been reiterated in several authorities of this Court including *Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR, *National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* [2014] eKLR and *Nyutu Agrovet Limited v Airtel Networks Kenya Limited, Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [2019] eKLR. These decisions reiterate the position that an arbitration award should strictly be faulted on the grounds set out under section 35 of the Act. It was the appellant's submission that the courts are restrained from interfering with the arbitration process as stated in section 10 of the *Arbitration Act* and merely play a supportive role, and that the decision of the trial court was not only in excess of its jurisdiction but was unconstitutional

by depriving the appellants a fair hearing and in the circumstances, was unjust and undermined the practice of arbitration in Kenya.

18. The 1st appellant further faulted the trial court for sitting as an appellate court over the decision of the arbitrators, rather than confining itself to the grounds of setting aside the award as evidenced when it accepted the argument advanced by the respondents that Article 165 (6) of *the Constitution*, gave the court the jurisdiction to set aside an award on grounds other than those set out in section 35 of the *Arbitration Act*.

19. The 1st appellant submitted further that the trial court fell into error and misdirected itself when it found that an Arbitral Tribunal falls under the class of tribunals referred to under Article 165(6) of *the Constitution*, meaning, those that are subordinate to the High Court, and therefore, subject to the supervisory jurisdiction conferred upon it by Article 165(7) of *the Constitution*. That the jurisdiction of the High Court in arbitral award was governed by the provisions of the *Arbitration Act* in terms of section 10 of the Act and not any other. There was a clear distinction in the two tribunals as whilst the inferior tribunals envisaged by or under Article 165(6) of *the Constitution* are public bodies, Arbitral Tribunals are initiated by the parties hence their operations, powers and scope is determined by private parties.

20. The 1st appellant went on to submit that the trial court in concluding that the contract was not frustrated had gone into the arena of litigation that was before the arbitrators and took away the appellants' defence although it still ordered that the parties go back for arbitration before different arbitrators. By this direction therefore, the appellants' right to be heard by an impartial arbiter had been tilted in favour of the respondents to the greater disadvantage of the appellants. The appellants' case was that the trial court had no power to remove the arbitrators appointed by the parties as such powers were controlled by the party's agreement. Relying on the case of *Kenya Shell Ltd v Kobil Petroleum Limited*, [2006] eKLR, it was submitted that the common thread throughout the decisions of various courts in this Country, is that our public policy is in favour of promoting the finality of arbitration awards and allows court intervention in only very limited circumstances as expressed in section 10 of the *Arbitration Act*.

21. The appellants further submitted that the finding of the trial court based on the provisions of *the Constitution* instead of limiting itself to the grounds set in section 35 of the *Arbitration Act* was erroneous. That though the respondents filed an application for setting aside the arbitral award based on section 35 of the *Arbitration Act*, and equally, relied on Chapter 6 and Article 10 of *the Constitution*, the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Limited* [2019] eKLR and *Synergy Industrial Credit Limited v Cape Holdings Limited* [2019] eKLR stated that, the High Court when considering an application under section 35, had no jurisdiction to delve into the merits of the award.

22. It was submitted that an alleged breach of *the Constitution* cannot be properly introduced by way of an application to set aside an arbitral award, and, an award is final unless the grounds set out in section 35 of the *Arbitration Act* are proved, which in this case were not by the respondents. That at some point the trial court indicated that the arbitrators had ignored the economic and social benefits of the school to the respondents, the students, the Government and the people of Kenya. That by so finding, the trial court was biased and abdicated its adjudication seat and instead argued the respondents' case. That the construction by the trial court of the relationship between the parties as requiring special consideration, amounted to introducing a clause or a term into the contract between the parties and therefore constituted rewriting of the terms of the contract between the parties. This was a fatal error on the part of the trial court that vitiated its ruling. Ultimately, the 1st appellant prayed that the appeal be allowed with costs.

23. The 2nd appellant's submissions were that the trial court misconstrued the nature of proceedings before the arbitrators and took arbitration as being equivalent to or in the nature of mediation or negotiation. It was submitted, that though the trial court referred to authorities from this Court such as *Nyutu Agrovet v Airtel Networks Limited* [*supra*] and *Anne Mumbi Hinga* [*supra*], all of which eschew the practice of intervention by the Courts in matters arbitration, it ended up doing exactly the opposite. Despite acknowledging the principles set out in those cases, the trial court nonetheless proceeded to espouse an interventionist policy and to issue orders that contradicted all the principles captured and set out in the decisions handed down by this Court on the subject. It was submitted that the findings and orders made by the trial court offended the principle of non- interference with arbitral process and that of stare decisis.

24. It was further submitted that the interpretation by the trial court that Arbitral Tribunals are subordinate to the High Court, and therefore, subject to the supervision of the High Court under Article 165(6) ignored and or violated the provisions of Article 159(2)(b) of *the Constitution*. By finding that the arbitration process is equivalent to the proceedings before an inferior subordinate court or tribunal, the trial court failed to give effect to the provisions of Article 159 (2) (b) of *the Constitution* and effectively rendered those provisions otiose or ineffective.

25. Counsel submitted that there were glaring inconsistencies in the said ruling that made the decision inconsistent within itself. For instance, the trial court observed that the jurisdiction and extent of intervention by the court is carefully circumscribed then proceeded to interfere with merit findings in the final arbitral award. Further, the court correctly observed that it could not fault the findings of the Arbitral Tribunal then in the same paragraph stated that the courts must question the validity of decisions, and, whether such decisions indeed renders justice to the parties. Lastly, the 2nd respondent submitted that the trial court had found that the Arbitral Tribunal failed to pass the mandatory test of Article 10 of *the Constitution*. However, in reaching this finding, the trial court completely ignored the fact that it had struck out a wholly malicious and unlawful statements made on oath against the Arbitrators' personal integrity. The arbitration was conducted in accordance with the provisions of the *Arbitration Act* and the trial court did not make any finding of non-compliance with the *Arbitration Act* on the part of the Arbitrators. This only meant that any action and decision rendered by the Arbitrators in compliance with the *Arbitration Act* could not be said to be in violation of Article 10 of *the Constitution* or in any way, be declared unconstitutional without declaring the *Arbitration Act* itself unconstitutional. In conclusion, the 2nd appellant equally prayed for the appeal to be allowed.

26. The 1st and 2nd respondents in their response submitted that most of the grounds of appeal that touch on the Articles of *the Constitution* are on peripheral issues that had very little relevance to appeal. That by raising such grounds, the appellants wanted to confuse the court and obfuscate simple issues that are before the court for determination. That contrary to the 1st appellant's assertions that the High Court had assumed jurisdiction under Article 165(6) of *the Constitution* and had in the process adopted an expansive approach to its jurisdiction in setting aside the arbitral award and that it is because of this assumption of jurisdiction, that the trial court set aside the arbitral award, Article 165(6) is mentioned just once in the entire ruling of the trial court where it is noted that once it assumes this jurisdiction under Article 165(6), it must also ensure that the decision of the arbitral award passes mandatory test of Article 10 of *the Constitution*. That Article 165(6) gives the High Court constitutional jurisdiction over inferior courts and tribunals and that is not an argument that this Court should waste a minute of its precious time.

27. Counsel for the respondent submitted that the appellants knew that they sold the suit property, got full purchase price and then simply got very greedy and opted to steal a match on the respondents by frustrating and finally, purporting to terminate the agreement. That this appeal is actually an attempt

on the part of the appellants to steal and expropriate private property in a manner that is inimical to Article 40 of *the Constitution*. That this appeal turns on one single issue of whether the court was right to make the determination it made pursuant to the application that was before it.

28. That further, counsel submitted that the application before the High Court was premised on section 35 of the *Arbitration Act* which allows the setting aside of an arbitral award if the same is in conflict with the public policy of Kenya. The High Court addressed this issue extensively in its ruling, on the case law of the subject, the facts that divided the parties and then reached the conclusion that the arbitral award was contrary to the public policy of Kenya and was in flagrant breach of *the Constitution*. That the main reason why the High Court set aside the arbitral award was that it offended the public policy of Kenya to the extent that it was that contrary to Article 10 of *the Constitution* which Article is a very important governance tool when it comes to interpretation and application of laws including *the Constitution*. According to the respondents' counsel, any decision of court, person or tribunal that contravenes Article 10 is invalid ab initio. Both this Court and the Supreme Court have held in very strong terms that compliance with Article 10 was mandatory.

29. Citing the cases of *Independent Electoral and Boundaries Commission (IEBC) v National Super Alliance (NASA) Kenya & 6 Others* [2017] eKLR; *Communication Commission of Kenya, Royal Media Services & 5 Others [2014] eKLR*; and *In the Matter of Peter Makau Musyoka and Award of Mining Concessionary Rights to the Mui Coal Basin Deposits* [2015] eKLR, the 1st and 2nd respondents submitted that the applicability and importance of Article 10 cannot be wished away as it is a constitutional tenet that applies in all spheres and when the appellants were held to the constitutional standard on the same, they failed. That the correct approach the High Court should take when entertaining an application challenging the arbitrators' award under section 35 of the *Arbitration Act* had been given by the Supreme Court in the Synergy and Agrovet cases (supra) to the effect that even though in promoting the core tenets of arbitration which is a quicker and efficient way of settling commercial disputes, it should never be at the expense of real and substantive justice.

30. The respondents' counsel further submitted that the appellants' contention that the trial court referred to judicial authorities and issued orders that did not capture principles set out in those decisions and as a consequence arrived at a decision that was not in accordance with the law had no factual or legal basis. The observations by the trial court in the ruling that the appellants refer to as serious errors and misdirections, were merely obiter dicta and not ratio decidendi, and, as such were not binding words of the trial court. The obsession by the appellants with every sentence of the ruling cannot be a reason to impeach the ratio decidendi of the case. The appellants failed to appreciate that an appeal lies only from the ratio decidendi of the case and not from every sentence of the ruling and or judgment.

31. To buttress this point, respondents' counsel quoted *Halsbury Laws of England* 4th Ed. Vol. 26 para 574, which distinguishes between what constitutes a ratio decidendi of a case and an obiter dictum. That the award was set aside based on public policy as it sought to destroy an entire school with hundreds of children being left without anywhere to call a school. This was not in consonance with the Government of Kenya policy on education and especially free primary education.

32. On its part, the interested party submitted orally that its interest in the matter was merely limited on the issues of law and that was, whether in an application under section 35 of the *Arbitration Act*, a party can invoke a constitutional provision. That when section 35 of the *Arbitration Act* is invoked, the court can only either set aside or maintain an award and the High Court, cannot introduce other grounds to set aside the award other than those set out under section 35. That even when dealing with public policy in reference to section 35 of the Act, the same should be interpreted narrowly and be limited to violation of rights as the *Arbitration Act* is a complete code on its own which guides arbitration awards and arbitration awards must have a sense of finality.

33. We have carefully considered the record of appeal, the rival submissions both written and oral, the authorities cited and the law and have come to the conclusion that the main issue for determination before us, is whether the trial court erred in setting aside the arbitral award under section 35 of the *Arbitration Act* as being against the policy.

34. Arbitration process is a free choice made by parties to a contract or agreement and in a situation where parties agree on the finality of the arbitral award, the court's intervention is circumscribed. The finality of an arbitral award is captured in no uncertain terms by the provisions of section 10 of the *Arbitration Act* which provides:-

> " Except as provided in this Act, no court shall intervene in matters governed by this Act."

35. Section 10 of the *Arbitration Act* contemplates that courts can only intervene in the arbitration process when permitted to do so under the Act. Section 32A of the *Arbitration Act* emphasizes finality of arbitral award and only permits the Court to intervene when "agreed by the parties" it provides:

> " Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it, and no recourse is available against the award otherwise than in the manner provided by this Act."

Section 35 (1) (2) (3) of the *Arbitration Act* provides:

> " (1) Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3).
>
> 2. An arbitral award may be set aside by the High Court only if-
>
> a. The party making the application furnishes proof-
>
> i. That a party to the arbitration agreement was under some incapacity; or
>
> ii. The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or
>
> iii. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
>
> iv. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside; or
>
> v. The composition of the Arbitral Tribunal or the arbitral procedure was not in accordance with the

agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or [Rev. 2017] Arbitration No 4 of 1995;

vi. The making of the award was induced or affected by fraud, bribery, undue influence or corruption;

b. The High Court finds that-

i. The subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

ii. The award is in conflict with the Public Policy of Kenya. (emphasis provided)

36. The main issue in this appeal is whether the arbitral award contravened the public policy of Kenya as it went against the Government policy on education and in particular, free primary education; and, whether the arbitral award was properly set aside under section 35 of the *Arbitration Act*. In a nutshell, the award, if implemented, would have destroyed an entire school with hundreds of children being rendered school less, a process which was not in consonance with the Government of Kenya policy on education.

37. The appellants' argument was that the ruling and order of the High Court was made in error as the trial court considered matters outside section 35 of the *Arbitration Act* and which were extraneous, like invocation of *the Constitution*, expansion of the grounds of setting aside an arbitration award, inquiring into the proceedings before the Arbitral Tribunal, the concept of frustration and sitting as an appellate court over the award. For us to answer those grounds, we must establish if the section mentions public policy of Kenya as among the grounds upon which an arbitration award can be set aside. There is no doubt at all that the High Court can set aside an arbitration award on that ground. See section 35(b)(ii) aforesaid.

38. In the case of Castle Investments Company Limited v Board of Governors Our Lady of Mercy Girls Secondary School [*supra*], the court adopted with approval the definition of public policy given by Ringera, J. (as he then was) in the case of Christ for *All Nations v Apollo insurance Company Limited* [2002] EA 366 where he expressed himself as follows:

> "... I take the view that although public policy is a most broad concept incapable of precise definition...an award will be set aside under section 35(2) (b) (ii) of the *Arbitration Act* as being inconsistent with the Public Policy of Kenya if it was shown that it was either (a) inconsistent with *the constitution* or other laws of Kenya, whether written or unwritten; or (b) inimical to the national interest of Kenya; or (c) contrary to justice and morality..." [emphasis added].

In the judgment of Sir Johnson Donaldson MR., in the case of *National oil Company* [1987] 2 ALL E R 769, at page 779; he stated that:

> "Consideration of public policy can never be exhaustively defined, but they should be approached with extreme caution. As Burrough J. remarked in Richardson v Mellish
>
> "it is never argued at all, but when other points fail, it has to be shown that there is an element of illegality or that enforcement of the award would be clearly injurious to the public good

or possibly that enforcement would be wholly offensive to the ordinary reasonable and fully informed member of the public on whose behalf the powers of the state are exercised".

39. It is trite that for an arbitral award to be against the public policy of Kenya, it must be shown that it is inconsistent with *the Constitution*, it is immoral, illegal, injurious to public good and offensive to the public or contrary to justice and violates in clearly unacceptable manner, the basic legal and/or moral principles or value in the Kenyan society. (See for instance *Glencore Grain Limited v TSS Grain Millers* [2002] I KLR 606.)

40. We have no doubt at all in our minds just like the trial court, that the award violated the basic national interests, values and ethos of this Country in matters education. It was immoral and contrary to justice. The fact that the purchase price for the particular land had been paid for several years back and the respondent proceeded to utilize the land and constructed a multi-million institution of learning, which was undertaken in full glare of the appellants, requiring the school be demolished and rendering the school going children without any option in unclear circumstances would ideally be against the public policy of the Country which invests so much in education and specifically basic. We hold this view because as it were, the award allowed the appellants to benefit from their own mischief.

41. Here is a situation where the appellants sold the suit property to the respondents and the purchase price was fully paid to them. They then granted full possession of the suit property to the respondents who went ahead to develop it by putting up an International School with numerous students. The appellants as a condition for approval of the subdivision were required to surrender 10% of their remaining portion to the City Council of Nairobi for public utilities. For reasons best known to themselves, they were unwilling to go along with the condition.

    Later, when the respondents were able to get the approvals through their own ways, efforts or means after a long struggle, the appellants deemed it an affront and set in motion the process of rescinding the contract. If this is not immoral, offensive and contrary to justice, we do not know what else can be!

42. The trial court had this to say on the issue:

> " In the matter at hand, it is my finding that the two parties entrusted the arbitrators with a job to do and they expected results. The parties had been in a contractual relationship for close to ten years. The Claimants had taken effective possession of the contract premises, and built on part thereof a world-class school for All Nations. When the parties approached the arbitrators, both parties expected a solution, a reasonable solution, which is realistic and is in tandem with the laws of the land, and its social-economic ethos. The imposition by the City Council of Nairobi of 10% land from the Respondents was not a factor to ever render the contract frustrated. Firstly, the land is available, and was to be taken from the land which was to be retained by the Respondents. However, for whatever reason the Respondents were reluctant to surrender the 10% of the land, the Claimants claim that they were willing to provide the same. However, if the Claimants were not willing to provide the same, it was the duty of the arbitrators to arbitrate the dispute with the intention of finding a solution. It seems to me that instead of the arbitrators finding a solution to the problem, they found comfort in rushing to declare the contract frustrated. I will not go into the issues of law on the doctrine of frustration because that is not my mandate. However, that does not stop me from stating that the finding that the contract was frustrated was itself not correct going by the known doctrine of frustration. In declaring the conflict frustrated, the Award completely violated the Claimants right to property under *the Constitution* of Kenya which guarantee everybody a right to property, and which declares that nobody's property would be taken away without due process. The arbitrators forgot that for close to

ten years the parties have acted upon the contracts, have acquired certain rights pursuant thereto, and that the Claimants had a thriving international school on the contract land. The arbitrators ignored the economic and social benefits of the school to the Claimants, the students, the Government and the people of Kenya.They forgot the public policy of the Republic towards schools and children, and towards social economic developments. The arbitrators were in a perfect position to find a solution to the parties before them, but they did not do this. Who was to benefit under frustration? Only the Respondents. This then amounted to economic sabotage. For the arbitrators to return the verdict that the said school be destroyed and the children rendered destitute, was a decision which cannot be justified. In finding solace in the concept of frustration of contract, the Arbitral Tribunal found an easy solution to a complex problem which they had the capacity to unravel and to sort out, nonetheless. Finding accommodation in the doctrine of frustration was an abdication of duty by the arbitrators. Such abdication of clear duty amounts to acting outside the norms and the laws of the land. The Award to the extent that it enriches the Respondents unjustly is against the social-economic ethos of the Republic of Kenya. The value of the land since the Agreement was entered into ten years ago has escalated beyond comparison. What was bought at KShs.64,000,000/= could as well be KShs.800,000,000/= now. In the case at hand, the injustice visited on the Claimants makes them justified to feel cheated out of their property, which they had paid for, and partly developed pursuant to effective possession.

..... I am satisfied that public policy concept will keep on changing, and as it does, we shall be guided by the values contained in our legal instruments being *the Constitution* and our laws, and also various policy documents emanating from various ministries in the country. Our Constitution at Article 10 thereof sets out national values which all decision makers in the country are obligated to observe while performing a public duty. Those values, when it comes to judicial officers and arbitrators must necessarily import the duty to do justice in deciding disputes. A decision which, on the face of the record, is so devoid of justice, and cannot be explained in any rational manner, can only be set aside on account of failure to satisfy public policy consideration. If an Award, like the one at hand, involves a contract executed under which parties had acquiesced, and secured certain rights; under which the Claimants had built and is running an international primary school, which is to be destroyed and the pupil made destitute; under which the value of the contract subject matter has escalated beyond ten times the contract value; under which the school infrastructure is to be destroyed, and under which one party stands to be unjustly enriched and the other correspondingly made poorer; if the Award pricks the conscience of the society, and the Award cannot rationally be explained, we have to go back to the values contained in our Constitution to see if the Award can stand the test given in *the Constitution*.

..... In light of this, this court in appraising the application before it, must accept that it indeed has a blank legal cheque and stands on an expansive and firm jurisprudential plateau to see to it and ensure that it subjects the decision of the Arbitral Tribunal to searching test of conformity to all the laws of the land and especially *the Constitution* itself. The court, once it assumes this jurisdiction under Article 165(6) of *the Constitution* must also ensure that the decision of the tribunal passes the mandatory test of Article 10 of *the Constitution*. This requirement is not unique to Arbitral Tribunals. Article 10(2) of *the Constitution* states, "all persons and institutions must observe the national values and principles of governance when they "apply or interpret any law". Since the Arbitral Tribunal applied the law and interpreted it, its award or the decisions it makes must be subjected to the requirements of Article 10 of *the Constitution*. In other words, the application and interpretation of the law in a given context is no longer left to the personal liking, dislikes or whimsical interpretation

of the person. He/she must apply the national ethos and values of the country, which are provided under Article 10(2) of *the Constitution*. These values include the rule of law, equity, social justice, integrity, transparency and accountability. In my finding, the decision of the tribunal failed to pass the mandatory tests under Article 10 of *the Constitution*, and is against public policy of Kenya."

43. It is plainly obvious that the learned Judge expressed himself rather broadly and expansively in the above extract, and to some extent lost sight of the character of the application before him. It is trite that in an application to set aside an arbitral award under section 35 of the *Arbitration Act*, the court is not sitting on appeal from the merits of the decision of the Arbitral Tribunal. The learned Judge was clearly in error in the manner in which he addressed the findings of the Arbitral Tribunal as regards the doctrine of frustration and the alleged violation of the respondent's constitutional right to property. He simply substituted his findings for those of the arbitral panel, which he was not entitled to do. Similarly, the learned Judge was not correct in his assertion that the court "has a blank legal cheque and stands on an expansive and firm jurisprudential plate" when it comes to setting aside Arbitral Tribunals. If that were so, arbitral awards would be impeached and set aside on all manner of grounds outside the confines of section 35 of the *Arbitration Act*. The decisions of the Supreme Court in *Nyutu Agrovet Ltd v Airtel Networks Kenya Ltd & Another* [2019] eKLR and *Synergy Industrial Credit Ltd v Cape Holdings Ltd* [2019] eKLR reaffirm the closed nature of the grounds for setting aside an arbitral award under section 35.

44. In the latter decision, the Supreme Court observed that "[84] Generally therefore, once parties agree to settle their disputes through arbitration, the Arbitral Tribunal should be the core determinant of their dispute. Once an award is issued, an aggrieved party can only approach the High Court for setting aside the award, only on the specified grounds." For that reason, we are satisfied that an Arbitral Tribunal is not a subordinate tribunal whose decisions may be impeached under Article 165(6) without any regard to the provisions of the *Arbitration Act* as the learned Judge suggested.

45. However, the above misdirections notwithstanding, the learned Judge also found that the award of the Arbitral Tribunal was contrary to public policy, a specific ground for which an arbitral award may be set aside under section 35 of the *Arbitration Act*. To that extent, we agree that the trial court did not err by taking into account provisions of *the Constitution* to determine what would constitute breach of public policy elements which when measured against the decision of the arbitrators, would provide a pass mark on the issues to be considered.

46. Breach of public policy here was easy to discern and did not entail a difficult task.

The trial court was overdramatic, boisterous and went overboard in the choice of the words in the ruling, but it never lost focus on the grounds of setting aside an arbitration award. The award, we are satisfied, was in breach of Kenya's public policy, was immoral and inimical to justice.

47. First, there was a school on the suit property hosting hundreds of students, the suit property had been bought and the whole purchase price paid, but the same had to be demolished and the school going children rendered school less not for their own fault but factors beyond their control. This indeed was a factor that went against the public policy of education as rightly pointed out put by the trial court. By so holding, it was not canvassing evidence not tendered before the arbitrators nor can it be accused of descending in the arena of conflict and advancing the case of the respondent. The appellants have also attacked the finding of the trial court on the ground that it went deeper into the merits of the award itself and also acted as an appellate court. We are unable to appreciate these arguments. How would the trial court have arrived at the decision that the award was against public policy unless it looked at

the proceedings before the arbitrators? By so doing it cannot be accused of going deeper into the merits of the award, nor can it be accused of sitting as an appellate court on the award.

48. We agree with Ahmednassir S.C, that, what is appealable is the ratio decidendi of a decision and not the obiter dictum. Most of the complaints raised against the ruling, by the appellants, are in the nature of obiter dicta as correctly observed by the senior counsel and are therefore peripheral, irrelevant and of no consequence. However, as already pointed out, we hasten to agree with counsel for the appellants that the trial court fell into error when it found that an Arbitral Tribunal falls under the class of tribunals referred to under Article 165(6) of *the Constitution*, meaning, therefore, that they are subject to the supervisory jurisdiction conferred upon the High Court under Article 165(6) of *the Constitution*.

49. We agree that the *Arbitration Act* is a complete code on matters arbitration which position has been affirmed in several decisions of this Court including *Nyutu Agrovet Limited v Airtel Networks Limited* [*supra*], *Kamconsult Ltd v Telkom Kenya Ltd and Another* [*supra*], and, *Ann Mumbi Hinga v Victoria Njoki Gathara* [*supra*]. In the latter decision, the Court of Appeal held as follows: "A careful look at all the provisions cited in the heading in

> the application and invoked by the appellant in the High Court clearly shows that all the provisions including the *Civil Procedure Act* and rules thereunder do not apply to arbitral proceedings because section 10 of the *Arbitration Act* makes the *Arbitration Act* a complete code and rule 11 of the *Arbitration Rules* cannot override section 10 of the *Arbitration Act* which states: "Except as provided in this Act no court shall intervene in matters governed by this Act"."

50. The reason for this approach is not difficult to discern and was summarized by the Supreme Court in *Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party)* [*supra*] as follows:

> "....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."

51. 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 Constitution in Article 159(2) (c) acknowledges the place of arbitration in dispute settlement and urges all courts to promote it.

52. Notwithstanding the misdirection by the trial court relating to its jurisdiction under Article 165(6) of *the Constitution* in relation to the Arbitral Tribunal, the trial court properly applied the requirements of section 35 of the *Arbitration Act* in its decision. Among the key considerations was the fact of public policy which is among the grounds for setting aside an arbitral award. This conclusion sufficiently

answers concerns raised by the interested party. But before we pen off on this aspect, we wish to reiterate what the Supreme Court stated on the same issue in Nyutu case (supra) thus: "…. 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 made under section 35 is where the High Court in setting aside the 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……". We discern no such indiscretions in the ruling and order of the High Court.

53. The respondents towards the tail end of their oral highlights, casually referred to a cross appeal. The said cross appeal was not available in our records, neither was it available in the registry. We also note that none of the parties in their substantive written submissions made any reference to or submitted on the same. That being the case, it will be futile for us to delve into the issue.

54. Accordingly, we dismiss the appeal with no order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.

HANNAH OKWENGU

……

JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

K. M'INOTI

……

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR