REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Maraga; CJ & P, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)

PETITION NO. 12 OF 2016

—BETWEEN—

NYUTU AGROVET LIMITED .....PETITIONER

—AND—

AIRTEL NETWORKS KENYA LIMITED.....RESPONDENT

CHARTERED INSTITUTE OF

ARBITRATORS-KENYA BRANCH.....INTERESTED PARTY

(Being an appeal from the Ruling of the Court of Appeal at Nairobi ***(Karanja, M'Inoti, Mwera, Mohamed & Musinga JJ.A)*** *in Civil Appeal (Application) No. 61 of 2012 delivered on 6th March, 2015)*

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] The present appeal arises from a Ruling of the Court of Appeal (*Karanja, M'inoti, Mwera, Mohamed and Musinga JJ.A*) which had dismissed an appeal against the decision of the High Court in ***Nyutu Agrovet Ltd v Airtel Network Kenya Ltd*** Nairobi H.C.C.C. No.350 of 2009**.** The Court of Appeal in its Ruling had found that there is no right of appeal to that Court following a decision made under Section 35 of the Arbitration Act 1995 (the Act), and so struck out the entire appeal to it. Certification of leave to appeal to this Court was thereafter granted in terms of Article 163(4)(b) of the Constitution. A Petition of

appeal dated 15th July 2016 was thereafter filed seeking to overturn the decision of the Court of Appeal.

B. BACKGROUND

[2] This matter concerns the setting aside by the High Court (Kimondo J) of an arbitration award granted in favour of the Respondent, Airtel Networks Kenya Ltd (Airtel), following a commercial dispute between it and the Petitioner, Nyutu Agrovet Limited (Nyutu). The parties had entered into a distribution agreement on 20th December 2007 in terms of which Nyutu was contracted to distribute various telephone handsets on behalf of Airtel. The dispute arose when an agent of Nyutu, one George Chunga, placed orders for Airtel's products totalling 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.

[3] By agreement, on 24th August 2009, the parties appointed Mr. Fred O. N. Ojiambo, SC, as the Sole Arbitrator in their dispute. It was expressly stated in the letter of appointment of the Arbitrator that the Arbitrator was to adjudicate on *"any dispute or claim arising out of or relating to the contract and/or alleged breach thereof."* Upon conclusion of the arbitration hearing, the Arbitrator, on 17th February 2011, delivered an award of Kshs. 541,005,922.81 in favour of Nyutu; the bulk of which was awarded under the heading "tort of negligence". It is this award that Airtel sought to set aside in the High Court and forms the basis of the subsequent appeals.

[4] At the High Court, Airtel had filed an application under Section 35 of the Act seeking to set aside the award in its entirety Kimondo J, in ***Nyutu Agrovet***

Ltd v Airtel Networks Kenya Ltd (supra), had to decide *inter alia* whether the arbitral award had dealt with a dispute not contemplated by the parties; whether it had dealt with a dispute outside the terms of reference to arbitration and whether the said award was in conflict with public policy. The entire arbitral award 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 and for other reasons and deliberations contained in the learned Judge's Ruling.*

[5] Immediately after delivery of the High Court decision, Nyutu orally sought leave to appeal to the Court of Appeal, which application was opposed by Airtel on the basis that no right of appeal existed in relation to a decision made under Section 35 of the Act. Despite the objection, the High Court granted Nyutu leave to appeal, noting that *"it will be a matter for the appellate court to determine whether the journey was a false start."*

[6] Nyutu thereafter filed an appeal on 2nd April 2012 to which Airtel responded with an application dated 3rd May 2012 seeking to strike out the record of appeal. A five judge bench was constituted to hear the application in ***Nyutu Agrovet Limited v Airtel Networks Kenya Limited*** Civil Appeal No. 61 of 2012. In a ruling delivered on 6th March 2015, the Court of Appeal allowed the application. It unanimously 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; thus striking out the appeal and awarding costs to Airtel.

[7] Aggrieved by the finding of the Court of Appeal, Nyutu filed the present appeal. The Petition was later certified under Article 163(4)(b) of the Constitution as raising a matter of general public importance. The question for determination as framed by the Court was whether there is any right of appeal to the Court of

Appeal upon a determination by the High Court under Section 35 of the Act. Nyutu in that regard seeks the following orders from this Court:

(a) *The appeal be allowed with costs.*

(b) *Return a finding of law that a party has a right of appeal from the High Court to the Court of Appeal on a ruling/decision arising out of an application made under the provisions of Section 35 of the Arbitration Act.*

(c) *Setting aside the order of the Court of Appeal delivered on the 6th March 2015 in its entirety and substituting it with (i) an order dismissing the Notice of Motion Application dated 3rd May 2012 with costs to the [Petitioner] and (ii) an order reinstating Civil Appeal No. 61 of 2012* ***[Nyutu Agrovet Limited v Airtel Networks Kenya Limited].***

[8] In pursuit of their claim, that the Court of Appeal erred in striking out the appeal on the ground that there is no right of appeal to the Court of Appeal from a decision made by the High Court under Section 35 of the Act, Nyutu has raised 14 grounds of appeal which can be summarised thus:

(a) *The Appellate Court adopted a wrong and restrictive interpretation of Article 164(3)(a) of the Constitution which grants the Court of Appeal the right to hear appeals from the High Court;*

(b) *The learned Judges erred in law in misapplying and misinterpreting Article 164(3)(a) of the Constitution by*

holding that it only provides for the jurisdiction of the Court of Appeal to hear appeals and not the right of appeal;

(c) *The learned Judges erred in law in failing to appreciate that the right of appeal to the Court of Appeal is conferred by the Constitution [and] as such cannot be ousted by statutory provisions and neither is the right of appeal dependent on statutory provisions;*

(d) *The learned Judges erred in law in finding that as a matter of law, a right of appeal has to be specifically provided for in statutory instruments whilst the correct position is that it has to be specifically excluded;*

(e) *The learned Judges erred in misapplying rules of statutory interpretation by returning a finding that Section 35 of the Arbitration Act did not provide for a right of appeal to the Court of Appeal whereas that right of appeal was not specifically excluded by Section 35 of the Arbitration Act.*

(f) *The learned Judges misdirected themselves when derogating from the principle that where there is a deprivation of the right of access to Courts, such a deprivation must be in clear and express terms;*

(g) *The learned Judges erred in law when finding that the provisions of the Civil Procedure Act and the Rules made thereunder were inapplicable in the circumstances of the case;*

(h) The learned Judges misapprehended and misapplied the principle of finality of arbitral awards to the detriment of the Petitioner as that principle ought to be applied strictly in terms of the award itself and not a civil process commenced by either party as a result of the arbitral award;

(i) The learned Judges failed to appreciate that the appeal raised a point of law of general importance, the determination of which would have substantially affected the rights of parties engaged in commercial transactions and arbitration proceedings herein vis-a-vis the failure of the learned High Court Judge to determine the suit at the High Court, conclusively.

C. PARTIES' SUBMISSIONS

(a) The Petitioner's

[9] It is Nyutu's argument that the Court of Appeal has jurisdiction to hear all appeals from the High Court. Counsel submits in that regard that any statute that purports to limit the right of appeal conferred by Article 164(3) of the Constitution is unconstitutional. Particularly, that Section 10 of the Act which appears to limit the level of intervention of Courts is unconstitutional to the extent that it can be interpreted by comparison that there is no right of appeal from a decision of the High Court under Section 35 aforesaid. Relying on the authority of ***Lady Justice Kalpana Rawal v Judicial Service Commission*** Civil Application No. NAI 308 2015, Nyutu argues further, that Article 259(1) of the Constitution requires that the Constitution be interpreted in

a liberal, broad, generous and purposive manner which was not done in the instant case.

[10] By comparison, it has also been urged on behalf of Nyutu that Article 163(4) which provides for appeals from the Court of Appeal to the Supreme Court is instructive since there are specific limitations on the appellate jurisdiction of the Supreme Court. The question that is then posed is, why were similar restrictions not placed on the jurisdiction of the Court of Appeal? And in answer, Nyutu contends that no such restriction was intended to be placed on the appellate jurisdiction of the Court of Appeal from decisions of the High Court. Consequently, such denial of the right to appeal could fetter a party's constitutional right of access to justice under Article 48 of the Constitution which would then call for a liberal, generous and broadest possible interpretation preferred in line with Articles 24(1) and 24(2) of the Constitution.

[11] Nyutu has furthermore urged that the Judicature Act as well as the Appellate Jurisdiction Act support the position that the jurisdiction of the Court of Appeal emanates from both the Constitution and statute. And that Section 3(1) of the Judicature Act provides that *"the jurisdiction of the High Court, Court of Appeal and of all subordinate courts shall be exercised in conformity with the Constitution and subject thereto, all other written laws...."*. Section 3(1) of the Appellate Jurisdiction Act in addition provides that *"the Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal as prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law."* This position, it reiterates was well expressed in the case of ***Lady Justice Kalpana Rawal v Judicial Service Commission*** (supra).

[12] Nyutu has further taken issue with the position taken by Kiage, Githinji and M'Inoti JJA in ***Equity Bank Limited v West Link MBO Limited*** Civil

Application No. 78 of 2011, that a textual reading of Section 35 of the Act reveals that no right of appeal from the High Court to the Court of Appeal is disclosed. To Nyutu, this is an unduly restrictive approach not supported by law and instead, it relies on the decision in ***Edward Mwaniki Gaturu & another v Attorney General & 3 others*** Petition No. 72 of 2013 where it was stated that *"it is a cardinal principle in the interpretation of statutes that due regard must be had to those other laws and statutes as impact or influence the interpretation of the particular statute being interpreted."*

[13] It is also Nyutu's contention that there is no express denial of the right of appeal which is in recognition of the very serious nature of orders that the High Court can grant under Section 35. The words of Omolo JA in ***Kenya Shell Limited v Kobil Petroleum Limited*** Civil Appeal No. 57 of 2006 are referred to in that regard where, in part, the learned Judge said; *"[i]f 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."* Nyutu adds to this point by arguing that a deprivation of the right of access to the Courts must be in clear words and that the circumstances where a statute is silent on a right of appeal or where and when a general right of appeal will attach, must be procedurally laid down in law, such as is the case in Section 10 of the Act.

[14] Further to the constitutionally entrenched right of appeal which Nyutu argues for in respect of Section 35, there remains, it states, the ordinary statutory right of appeal which parties have access to. That includes for example Sections 66 and 75(1) of the Civil Procedure Act which provide that an appeal shall lie from the High Court to the Court of Appeal from orders made or with leave of the Court making such orders. Since leave to appeal was thus granted to Nyutu by the High Court, which leave was never challenged substantively by Airtel, the appeal

was properly before the Court of Appeal and should have been determined on its merits. They rely again on the pronouncement of Omolo JA in ***Kenya Shell Limited v Kobil Petroleum Limited*** (supra) in that regard.

[15] Nyutu in addition faults the reasoning of the Judges of Appeal because they *"unduly lay great emphasis on the principle of finality in arbitrations"* and submit that this principle applies only to the arbitration award itself and not any subsequent civil processes instituted by an aggrieved party. That the arbitration award was in any event not set aside on any grounds set out in Section 35 but purely because *"the award contained decisions on matters outside the distributorship agreement, the terms of reference to arbitration or the contemplation of the parties"* which illegality Nyutu seeks to challenge on appeal. Nyutu in that context relies on ***Safaricom Limited v Ocean View Beach Limited*** Civil Application No.327 of 2009 (unreported) where Nyamu J *(as he then was)* had this to say on the use of the overriding objective principles to intervene where there is an extraordinary wrong: *"Because extraordinary wrongs call for extraordinary remedies, in my opinion, it would be unjust not to invoke Section 3A to strike out a ruling which has so openly subverted the arbitral process..."*

[16] Lastly, Nyutu points out that when it made an oral application for leave to appeal, Airtel only opposed the application on the basis that under Section 35 of the Act leave is not automatic. Airtel's concern was then not that there was no right of appeal, as it argues now, but that Nyutu should have made a formal application for leave to appeal. In the end, the High Court failed to give directions on how the matter should proceed, having set aside the arbitration award, thus leaving the parties in an uncertain legal and commercial state. It therefore prays for a firm determination by this Court on the issues at hand.

(b) The Respondent's

[17] In response to the appeal, Airtel identifies four issues for determination by this Court. They are:

> *(a) Whether Nyutu has a right of appeal to the Court of Appeal against a decision of the High Court made under Section 35 of the Act;*
>
> *(b) Whether Article 164 (3) of the Constitution confers the Court of Appeal with jurisdiction to hear appeals arising from a decision of the High Court made under Section 35 of the Act;*
>
> *(c) Whether the concept of finality in an arbitral process contravenes a party's right to access justice under Articles 48 and 50 of the Constitution; and*
>
> *(d) Whether Sections 10 and 35 of the Act are ultra vires the provisions of Articles 24 (1) and 25 (c) of the Constitution.*

[18] Airtel in that regard argues that no right of appeal lies against the decision of the High Court made under Section 35 of the Act since the very purpose and spirit of the Act is to oust or, at the very least, limit the jurisdiction of the Courts save for instances explicitly stated in the Act. These instances are then set out in Sections 10 and 39 of the Act which are adopted from the UNCITRAL Model Law on International Commercial Arbitration, 1985 (The Model Law) to which Kenya is a signatory.

[19] In response to Nyutu's argument that the right of appeal in Section 35 must be implied if it is to be in line with the Constitution, Airtel submits that the right of appeal must be expressly provided for either in the Constitution or in statute and is not present in the Act outside of Section 39 thereof. They rely on the authority of ***Abdulshakoor Khandwa v East African Building Society*** [2008] eKLR in support of this argument. They add that the granting of leave to appeal by the High Court amounts to naught since the statute does not authorize an appeal with leave of the Court for awards made in terms of Section 35 and that the said Section envisages an end to litigation. On this point they conclude by citing ***Jasbir Singh Rai and 2 Others v Tarlochan Singh Rai and 4 Others*** [2007] eKLR where it was held that *"litigation must end at a certain point regardless of what the parties think of the decision which has been handed down. It is a doctrine or principle based on public interest."*

[20] Airtel argues, still on the right of appeal, that the Civil Procedure Act is inapplicable to arbitral proceedings and does not grant Nyutu a right of appeal. That, Nyutu's argument in respect of this issue is against the gradient of settled jurisprudence that the Act is a complete code except where it expressly imports the provisions of the Civil Procedure Act and Rules. For this submission they find support in the decisions of ***Anne Mumbi Hinga v Victor Njoki Gathara*** [2009]eKLR and ***Mall Developers Limited v Postal Corporation of Kenya*** [2014] eKLR.

[21] On the second issue, that is, Article 164(3) of the Constitution and the jurisdiction of the Court of Appeal, the argument made is that "jurisdiction" in Article 164(3) is incorrectly treated as synonymous with the "right of appeal" by Nyutu. Airtel submits in response that the right of appeal precedes jurisdiction and so the Court of Appeal's jurisdiction to hear and determine appeals from the

High Court does not entitle Nyutu to file an appeal where such a right is absent. They rely on ***Tumaini Transport Services Ltd v Tata Chemicals Magadi Limited*** [2017] eKLR where the Court ultimately concluded that the *"[a]rbitration Act sets under what circumstances a party may challenge his choice of forum should never be seen as a fetter to access to justice* (sic). *Rather, it is an acknowledgement that a party is the best custodian and protector of own right including the right to access justice and the right to choose forum* (sic). *It does not oust the court's jurisdiction but streamlines when a party should question a forum it consciously chose".* On this point, Airtel concludes that Nyutu's submission to arbitration was in itself an instance of unrestricted access to justice whereat its case was heard by a tribunal of its choice and lawfully determined. This conclusion, it says, one must arrive at when reading Articles 87(1), 48 and 261 of the Constitution together.

[22] On the constitutionality of Sections 10 and 35 of the Act, Airtel submits that taking into account all the relevant factors, particularly that restricted judicial intervention in the arbitral process is designed to expedite dispute resolution while maintaining the sanctity of the process and finality of the resultant award, the statutory restriction is reasonable and justifiable in an open and democratic society. For the above reasons, Airtel prays that the appeal be dismissed with costs.

(c) Interested Party's

[23] The Chartered Institute of Arbitrators – Kenya Branch (The Chartered Institute), the Interested Party in this appeal, is a professional member organization representing the interests of Alternative Dispute Resolution Practitioners in Kenya. Arising from the pleadings filed by the parties, the Chartered Institute identifies two main issues for determination. They deal in

their submissions firstly, with the effect of the absence of an express provision in Section 35 of the Act with respect to the right of appeal and secondly, if the right of appeal is available, whether it should be absolute or limited and the applicable principles where it is found to be limited.

[24] They submit in that regard that Section 35 of the Act as well as the Model Law is silent on whether there is a right of appeal. As such, they reason that the issue as to whether there is a right of appeal is not governed by the Act. Thus, citing cases such as ***Thika Coffee Mills Limited v Rwama Farmers' Co-operative Society*** Civil Appeal No. 251 of 2013, they submit that in the absence of any specific provision in domestic arbitration law prohibiting access to the Court of Appeal from decisions made under Section 35, such decisions are appealable.

[25] The Chartered Institute further contends that an interpretation that favours insulating a High Court decision made under Section 35 from appeals poses the risk of the law being seen as protecting judgments of the High Court rather than arbitral awards even where the High Court wrongly sets aside an otherwise correct arbitral award and/or purports to review the merits of the award. It thus urges the point that it would defeat the purpose of ensuring that arbitral awards are respected and protected if the law was interpreted to permit review by way of an application to set aside of the award while prohibiting review by way of an appeal of the decision made by the High Court. This they say would be inimical to the established principles and practice of arbitration.

[26] The Interested Party is also concerned that alleged breach of the Constitution is increasingly being adopted as an additional ground for setting aside of awards under Section 35 of the Act. The effect of such an approach is that awards are now being disturbed on grounds that were neither envisaged by the

Legislature and the parties nor considered by arbitral tribunals, making the High Court the first instance Court in relation to constitutional arguments advanced at the setting aside stage. Consequently, where awards are set aside as a result of the High Court interpreting and applying the Constitution, it would be difficult to argue that interpreting Section 35 as barring any appeals would be in the interest of protecting the sanctity and finality of an arbitral award.

[27] They also submit that there ought to be a balance between the principles and values which call for promotion of arbitration and its hallmark characteristics of finality of arbitral awards and minimal court intervention with the constitutional principles of correcting grave errors by the High Court which may ultimately undermine the practice and benefit of arbitration. This can be achieved, they argue, by providing for limited appeals only upon obtaining leave of the Court on very specific grounds, especially where the decision of the High Court is patently wrong.

[28] As a middle path then, they urge the Court to set guidelines for grant of leave to appeal by providing timelines within which such applications for leave shall be made and providing that decisions of the Court of Appeal on such applications shall be final. They thus propose that leave to appeal should not be automatic but should be limited to instances where:

(a) *The determination of the question will substantially affect the rights of one or more of the parties;*

(b) *The question is one of general public importance or the decision of the High Court is at least open to serious doubt;*

(c) *A substantial miscarriage of justice may have occurred or may occur unless the appeal is heard; and*

(d) *The decision of the High Court on the question is manifestly wrong.*

D. ISSUES FOR DETERMINATION

[29] From the above submissions, the following issues crystalize for determination:

(a) *Whether Sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution and are therefore unconstitutional to that extent.*

(b) *Whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act.*

(c) *What are the appropriate reliefs?*

(d) *Who should bear the costs of the Appeal?*

E. ANALYSIS

(a) Whether Sections 10 and 35 of the Act contravene a party's right to access justice under Articles 48, 50(1) and 164(3) of the Constitution?

[30] Nyutu urges that Article 164(3) of the Constitution gives the Court of Appeal unfettered powers to assume jurisdiction on all appeals arising from the

decisions of the High Court. Accordingly, that any statute which deprives the Court of Appeal jurisdiction to hear appeals from the High Court, offends Article 164(3) and is unconstitutional. Nyutu further submits that, unlike the jurisdiction of the Supreme Court as provided for, under Article 163(4), no constraints or conditions are placed on the Court of Appeal in hearing appeals from the High Court. It is thus urged that placing restrictions on a litigant who seeks to appeal to the Court of Appeal fetters the right of access to justice under Article 48 of the Constitution and by extension, Article 50(1).

[31] In response to Nyutu's case in this regard, Airtel urges that a right of appeal must be expressly provided for either in the Constitution or a statute. Thus, it is also urged that the Court of Appeal's jurisdiction to hear and determine appeals from the High Court under Article 164(3) does not entitle every party to file an appeal where such a right is absent. That further, the restrictions placed in denying a right of appeal in arbitration matters are reasonable and justifiable in an open and democratic society. Airtel concludes by relying on the decision of ***Jasbir Singh Rai and 2 Others v Tarlochan Singh Rai and 4 Others*** [2007] eKLR to urge the position that all litigation must at some point come to an end and the present dispute thus ended at the High Court.

[32] Certainly, these submissions raise a critical question on whether there exists a right of appeal under Article 164(3) of the Constitution and if in the affirmative, whether any limitation to such a right hinders the right of access to justice. As properly submitted, Article 164(3) provides the jurisdiction of the Court of Appeal in the following words:

"The Court of Appeal has jurisdiction to hear appeals from—

(a) The High Court; and

(b) Any other Court or tribunal as prescribed by an Act of Parliament" [Emphasis added]

[33] What exactly does the term "jurisdiction" mean? In ***Republic v Karisa Chengo & 2 others*** SC Petition No. 5 of 2015; [2017] eKLR, we defined jurisdiction as the *"the Court's power to entertain, hear and determine a dispute before it."* Also, *"the sphere of the courts operations."* Is jurisdiction therefore synonymous with a right of appeal? In other words, does Article 164(3) grant a litigant a right of appeal to the Court of Appeal? Nyutu urges that Article 164(3) indeed grants such a right of appeal. We disagree. As urged by Airtel, this provision does not confer a right of appeal to any litigant. It only particularises the confines of the powers of the Court of Appeal by delimiting the extent to which a litigant can approach it. In this case, the appellate Court only has powers to hear matters arising from the High Court or any other defined Court or Tribunal. There is thus no direct access to the Court of Appeal by all and sundry. As such, Article 164(3) defines the extent of the powers of the Court of Appeal but does not grant a litigant an unfettered access to the Court of Appeal.

[34] With regard to a right of appeal, our position is that such right can either be conferred by the Constitution or a Statute. For example, under Article 50(2)(q), a person who has been convicted of a criminal offence has a right to appeal or apply for review to a higher court as prescribed by the law. Further, with regard to disqualification from being a Member of Parliament or County Assembly (Articles 99(3) and 199(3), respectively), a person is not disqualified until all possibilities of appeal or review of the relevant sentence or decision have been exhausted. Our statutes have also provided for circumstances when an appeal may be specifically preferred to the Court of Appeal or any other Court.

For example, Section 39(3) of the Arbitration Act provides circumstances when an appeal may lie to the Court of Appeal.

[35] Even more crisply, the Appellate Jurisdiction Act, Cap 9, captures our position that a right of appeal is not automatic but rather is a creation of the law. Section 3(1) thereof provides that:

> ***"The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law."***
> [Emphasis added.]

[36] By this provision therefore, jurisdiction and the right of appeal are clearly delineated to the extent that jurisdiction is only excised where the right of appeal exists. We also note that this same issue was canvassed before the Court of Appeal in this matter and *Mwera JA* had this to say on it:

> ***"I do not agree that Article 164(3) of the Constitution, section 3(1) of the Appellate Jurisdiction Act and even section 75 of the Civil Procedure Act, giving this Court jurisdiction to hear appeals from the High Court, should be read to mean that these provisions of law also confer the right of appeal on the litigants. ... This Court has jurisdiction to hear any matters coming on appeal from the High Court and any other court or tribunal prescribed by law. But a party who desires his appeal to be heard here has a duty to demonstrate under what law that right to be heard is conferred, or if not, show that leave has been granted to lodge the appeal before us. However, be it appreciated that***

such leave does not constitute the right to appeal (sic). The right must precede leave."

[37] We completely agree with the above reasoning by the Court of Appeal but we also note that Nyutu has urged the point that limiting a party's right to appeal to the Court of Appeal fetters the right of access to justice under Article 48 and fair hearing under Article 50(1) of the Constitution. While we recognise that access to justice is an important principle in the administration of justice and is wide and long in its many dimensions, in the case of ***Dry Associates Limited v Capital Markets Authority & Another Interested Party Crown Berger (K) Ltd*** High Court Constitutional Petition No.328 of 2011 [2012] eKLR, *Majanja J* succinctly identified some of the components of access to justice as follows:

[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."

[38] Further, in ***Kenya Bus Service Ltd & another v Minister for Transport & 2 others*** [2012] eKLR, it was 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."

[39] This Court also elaborated on the confines of access to justice in the case of ***Francis Karioko Muruatetu & another v Republic*** SC Petition No. 15 of 2015; [2017] eKLR, where we stated:

> **"[57]** ***Thus, with regards to access to justice and fair hearing, the State through the courts, ensures that all persons are able to ventilate their disputes. Access to justice includes the right to a fair trial. If a trial is unfair, one cannot be said to have accessed justice. In this respect, when a murder convict's sentence cannot be reviewed by a higher court, he is denied access to justice which cannot be justified in light of Article 48 of the Constitution.***"

[40] Nyutu has in the above context submitted that denial of a right to appeal fetters on the right to access justice. While we appreciate that unhindered access to courts is one of the key components of access to justice, we do not think that statutory limitations on appeals necessarily infringe on that right. Each case must be evaluated on its own circumstances. That is why even where a right of appeal exists, depending on the circumstances of the case, Courts may still exercise their discretion by refusing to assume jurisdiction. In this case, Nyutu started on the wrong footing by assuming that there exists an unhindered right of appeal. We have shown why that is not so. Indeed, this matter was first heard by a Sole Arbitrator and later by the High Court in exercise of its jurisdiction under Section 35. The conduct of proceedings therein has not been impugned. We have also not been informed of any difficulties experienced by either of the parties in pursuing justice. Nyutu's claim of denial of a right to access justice solely rests on its desire

to prefer a further appeal which matter is the fulcrum of the present appeal. In the circumstances, we do not find a proper basis for finding that there is denial of access to justice and thus we reject the plea to declare Sections 10 and 35 of the Arbitration Act unconstitutional. In stating so, we shall only add that the issue of unconstitutionality of the two Sections was raised for the first time in this Court, an approach we have consistently frowned upon.

(b) Whether there is a right of appeal to the Court of Appeal following a decision by the High Court under Section 35 of the Arbitration Act?

[41] As urged by the parties, Section 35 of the Arbitration Act is silent on whether an appeal should lie to the Court of Appeal following a decision of the High Court. That silence has been interpreted by the parties to mean different things. According to Nyutu, Section 35 does not expressly bar appeals to the Court of Appeal, thus, an aggrieved party should not be deprived an opportunity to access the appellate Court unless such a bar is in clear words. That further, Sections 66 and 75(1) of the Civil Procedure Act provide that an appeal shall lie from the High Court to the Court of Appeal from orders made or with leave of the Court making such orders. As such, since Nyutu was granted leave by the High Court (Kimondo J) to appeal to the Court of Appeal, and the Respondent did not challenge that grant of leave, then the Court of Appeal should have determined the matter on merits.

[42] Nyutu furthermore urges that the principle of finality of arbitration protects only the arbitral award and not any subsequent civil processes and that the High Court did not set aside the award because of any of the reasons specified under Section 35 of the Act but rather, because the award went outside the distributorship agreement. In conclusion, Nyutu submits that the decision of the High Court setting aside the award left the parties in a state of legal and

commercial uncertainty which is not the expectation of the law. Thus, it calls upon this Court to give directions by determining the issues at hand.

[43] On the other hand, Airtel urges that there is no right of appeal that exists against decisions of the High Court made under Section 35 of the Act. It thus urges that the spirit of the Act was to oust the jurisdiction of the Courts save in very limited circumstances which are expressly provided for in the same Act. And in this regard, it is urged that a right of appeal must be expressly provided for either in the Statute or the Constitution. Airtel also faults Nyutu's argument that the Civil Procedure Act is applicable to in this case and urges that the Arbitration Act is a complete code save for instances where it expressly imports the provisions of the Civil Procedure Act and in this case, the Civil Procedure Act is certainly inapplicable. Airtel also submits that the grant of leave to appeal by the High Court amounts to nothing since the Act does not recognise any right of appeal under Section 35 thereof.

[44] On its part, the Interested Party submits that since Section 35 and the Model Law are silent on whether there is a right of appeal, it can then be inferred that the issue as to whether a right of appeal exists is not governed by the Act. It is thus contended that an interpretation that favours the insulation of a High Court decision made under Section 35 from appeals poses the risk of the law being seen as protecting judgments of the High Court rather than arbitral awards even where the High Court wrongly sets aside an otherwise correct arbitral award. As such, they urge that the principle of respecting and protecting arbitral awards would lose meaning if the law was interpreted to favour reviewing of awards by way of setting aside while prohibiting review by way of an appeal against such decisions of the High Court.

[45] Further, the Interested Party urges that in the recent past, arbitral awards are increasingly being set aside on grounds that they do not conform to the Constitution. As such, if Section 35 is interpreted in a manner that bars appeals, then the High Court would be the first and only forum where constitutional arguments are made and such a proposition would not be in the interests of protecting the sanctity and finality of arbitral awards. They thus propose that there should be a balance between finality of arbitral awards and minimal court intervention. This, they say, can be achieved by providing for limited appeals with the leave of the court especially where a decision of the High Court is patently wrong. They conclude by suggesting various guiding principles which they say should guide the Courts in determining whether to grant the proposed leave to appeal.

[46] We begin our analysis by setting out what Section 35 entails. This section provides that recourse to the High Court against an arbitral award may be made by an application for setting aside the award only. It then goes on to provide circumstances which may guide the High Court in setting aside an award. It also provides the time limit within which the application for setting aside should be made. Finally, it provides some of the possible reliefs which the High Court may issue upon granting an application for setting aside. As we have already indicated, Section 35 does not expressly indicate whether the decision of the High Court in that regard is final, hence, the crux of this case.

[47] The issue of the extent of the Court of Appeal's jurisdiction under Section 35 was considered in this case by the Court of Appeal which agreed with Airtel that no right of appeal exists against decisions of the High Court made under Section 35. In holding so, the appellate Court took into consideration the principle of finality of arbitral awards and the desired limited participation by the

Courts. In particular, as expressed by *Mwera JA*, the appellate Court was of the following view:

> ***"... 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 it is set aside as was the case here, that decision of the High Court final remains their own (sic). 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."***

[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.

[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 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.

[54] The Model Law indeed advises that all instances of courts intervention must be provided for in legislation. That is the explanation that the Model Law accords to Article 5 which is in *pari materia* with Section 10 of the Act. The said Section 10 provides, ***"Except as provided in this Act, no Court shall intervene in matters governed by this Act."*** On the other hand, Article 5 provides, ***"In matters governed by this Law, no court shall intervene except where so provided in this Law."***

[55] In illuminating the meaning of Article 5, the explanatory notes of the Model Law provide that, beyond the instances specifically provided for in the law, no Court shall interfere in matters governed by it. That further, the main purpose of Article 5 is to ensure predictability and certainty of the arbitral process. That understanding is also discerned in the Court of Appeal decision of Singapore in the case of ***L W Infrastructure Pte Ltd v Lim Chin San Contractors Pte Ltd and another appeal*** [2012] SGCA 57 where the Court stated that:

> ***"The effect of art 5 of the Model Law is to confine the power of the Court to intervene in an arbitration to those instances which are provided for in the Model Law and to 'exclude any general or residual powers' arising from sources other than the Model Law....The*** *raison d'être* ***of art 5 of the Model Law is not to promote hostility towards judicial intervention but to*** *'satisfy the need for certainty as to when court action is permissible'."*

[56] In the above case, the Court noted that Article 5 could be compared to Section 47 of the Singapore Arbitration Act (Cap 10, 2002 Rev Ed), which governed the proceedings of that case and provides:

> ***"The Court shall not have jurisdiction to confirm, vary, set aside or remit an award on an arbitration agreement except where so provided in this Act."***

In that context, the Court reasoned that:

> ***"In our view, having regard to the need for a broadly consistent approach to the interpretation of the Act and the Model Law, s 47 of the Act should be construed in a manner that is consistent with the intent underlying art 5 of the Model Law. Section 47 of the Act states that the Court shall not have jurisdiction to interfere with an arbitral award except where so provided in the Act. The certainty which is sought to be achieved by this provision would be significantly undermined if the courts retained a concurrent 'supervisory jurisdiction' over arbitral proceedings or awards that could be exercised by the grant of declaratory orders not expressly provided for in the Act. In short, in situations expressly regulated by the Act, the courts should only intervene where so provided in the Act"*** [Emphasis added.]

[57] Thus, it is reasonable to conclude that just like Article 5, 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.

[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.

[59] What therefore is the proper interpretation to be given to Section 35 of the Act? Unlike Kenya, Canada and United Kingdom in their laws specifically provide instances when leave to appeal a decision of the High Court confirming or setting aside an award may be granted. In Canada for example, leave to appeal may be granted under Section 31(2) of the Arbitration Act, [RSBC 1996] if;

(a) *the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice; or*

(b) *the point of law is of importance to some class or body of persons of which the applicant is a member, or*

(c) *the point of law is of general or public importance.*

Such decisions are then appealable to a higher Court and it seems that the Interested Party in this appeal is attracted to such an approach. Thus, in the case of ***Sattva Capital Corp. v Creston Moly Corp.*** [2014] 2 SCR 633, the Supreme Court of Canada explained that:

> ***"In order to rise to the level of a miscarriage of justice ... an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. According to this standard, a determination of a point of law 'may prevent a miscarriage of justice' only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of 'may prevent a miscarriage of justice' because there would be no chance that the outcome of the appeal would cause a change in the final result of the case."***

[60] On the issue of the "importance of the results of the arbitration", the Court relied on the case of ***British Columbia Institute of Technology (Student Assn.) v British Columbia Institute of Technology,*** 2000 BCCA 496, 192

D.L.R. (4th) 122 in which it was held that *"the result of the arbitration [must] be 'sufficiently important', in terms of principle or money, to the parties to justify the expense and time of court proceedings."*

[61] On the other hand, Section 67 of the UK Arbitration Act, 1996 provides that:

> ***"(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the Court—***
>
> ***(a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or***
>
> ***(b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.***
>
> ***A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).***
>
> ***(2) The arbitral tribunal may continue the arbitral proceedings and make a further award while an application to the court under this section is pending in relation to an award as to jurisdiction.***
>
> ***(3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—***
>
> ***(a) confirm the award,***
>
> ***(b) vary the award, or***
>
> ***(c) set aside the award in whole or in part.***

(4) The leave of the court is required for any appeal from a decision of the court under this section". [Emphasis added]

[62] Thus, it follows that under the above provision, the grant of leave to appeal *"is not automatic but accrues only in exceptional cases"* as was outlined in the case of ***Amec Civil Engineering Ltd v. Secretary of State for Transport*** [2005] EWCA Civ 291, where the Court of Appeal explained that:

> ***"The policy of the 1996 Act does not encourage such further appeals which in general delay the resolution of disputes by the contractual machinery of arbitration."***

[63] In explaining the said policy, Sutton D, Gill J & Gearing M, in their book "*Russell on Arbitration*", 23rd (ed) (Sweet & Maxwell) 2010, at page 484(8-070) state that the said "*policy suggests that leave to appeal a decision rejecting a challenge under section 67 will very rarely be given.*" Thus, there has to be a justification for grant of leave and even then, only in the rarest of circumstances.

[64] We further note that in the case of ***AstraZeneca Insurance Co Ltd v CGU International Insurance plc and others*** [2006] All ER (D) 176 (Oct) **(CGU)** the Court of Appeal of the UK held that it had jurisdiction to review a decision of a first instance Judge where there was evidence of unfairness or misconduct at the determination concerning the grant or refusal of leave to appeal. In holding so, it stated that:

> ***"A right of appeal, a residual jurisdiction, should nevertheless be granted, by virtue of the Human Rights Act itself, to deal with those cases which raised questions of misconduct or unfairness."***

[65] This position, the Court stated, was for purposes of protecting the integrity of the decision making process or the decision maker which a Court should be vigilant to protect but not an attack on the decision itself. Particularly, at paragraph 72 the Court elaborated on the said principle as follows per **Lord Justice Rix** (*per incuriam)*;

> ***"The truth of the matter is: there are all sorts of contexts in which, for good reason, Parliament has provided that there should be restrictions on the appeal process, and a limit to appellate jurisdiction. In such situations, ..., it is natural to conclude that, even in the absence of express language, the statute intended the lower court's discretion as to whether or not to give permission to appeal to a higher court to be exclusive and final. However, there is no similar rationality, it may be said, no good reason at all, for thinking that a court's unfairness is to be left incapable of appellate review. While bearing fully in mind the need for finality in litigation, and the injustice which may itself be created by losing sight of that need, this court ... recognised the imperative need for an effective remedy, in a possible case of bias, to maintain confidence in the administration of justice.... It adopted the words of Lord Diplock in another case of the need for courts to have power*** *"to maintain its character as a court of justice"* ***... Although the context there might have been one where it was assumed that the court in question had an underlying or inherent jurisdiction, I cite the doctrine to highlight the unlikelihood that Parliament,*** *a fortiori* ***in a situation where an appeal jurisdiction was possible, intended the unfair***

process of a lower court to be immune from appellate review."

[66] Still on the grounds for grant of leave, in ***Antaios Compania Naviera SA v Salen Rederierna AB (The Antaios)*** [1984] 3 All ER 229, the House of Lords held that leave to appeal may also be granted where there are conflicting decisions on an issue.

[67] Unlike UK and Canada, in Singapore, a decision to set aside an award made under Section 24 of the International Commercial Arbitration Act and Article 34 of the Model Law is appealable to a higher Court even though the law is silent on whether such jurisdiction exists. The said Section 24 provides:

"Notwithstanding Article 34(1) of the Model Law, the High Court may, in addition to the grounds set out in Article 34(2) of the Model Law, set aside the award of the arbitral tribunal if —

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award by which the rights of any party have been prejudiced."

Article 34 of the Model Law then provides:

"34 (1) Recourse to a court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this Article.

(2) An arbitral award may be set aside by the court specified in Article 6 only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) 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

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) ...".

[68] Taking the position explained above therefore, in ***AKN & another v ALC and others and other appeals*** [2015] SGCA 18, the High Court had set aside an award pursuant to Section 24(b) as read with Article 34(2)(a)(ii) & (iii) of the Model Law. On appeal, the Court of Appeal was categorical [paragraphs 38 & 39] that:

> ***"In particular, there is no right of appeal from arbitral awards. That is not to say that the courts can never intervene. However, the grounds for curial intervention are narrowly circumscribed, and generally concern process failures that are unfair and prejudice the parties or instances where the arbitral tribunal has made a decision that is beyond the scope of the arbitration agreement. It follows that, from the courts' perspective, the parties to an arbitration do not have a right to a 'correct' decision from the arbitral tribunal that can be vindicated by the courts. Instead, they only have a right to a decision that is within the ambit of their consent to have their dispute arbitrated, and that is arrived at following a fair process. In the light of their limited role in arbitral proceedings, the courts must resist the temptation to engage with what is substantially an appeal on the legal merits of an arbitral award, but which, through the ingenuity of counsel, may be disguised and presented as a challenge to process failures during the arbitration."*** [Emphasis added.]

[69] The above comparative review thus shows circumstances where a decision challenging an award may be appealable. With regard to jurisdictions that grant leave to appeal, Courts have 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.* In addition, leave would be granted in order *to prevent an injustice from occurring and to restore confidence in the process of administration of justice.* In other cases, *where the subject matter is very important as a result of the ensuing economic value or the legal principle at issue.* An appeal may also arise when there is need to bring clarity to the law by

settling conflicting decisions. However as cautioned by the Singapore Courts, an intervention by the Courts should not be used as an opportunity to delve into the merits of the arbitral award but rather that the intervention should be limited to the narrowly circumscribed instances for reviewing or setting aside an award.

[70] In this case, the Interested Party has urged us to adopt a middle ground in determining whether appeals should be preferred against decisions of the High Court made under Section 35 of the Act. They also urge that there should be a balance between finality of arbitral awards and minimal Court intervention. It is also their suggestion that it is not the Ruling of the High Court under Section 35 but rather the arbitral awards that should be protected. Thus, there should be opportunities for appeal when the High Court is patently wrong in reaching its decision. They also suggest that this Court should provide timelines within which applications for leave to appeal should be made and also provide that the decision of the Court of Appeal shall be final.

[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.

[73] The Interested Party has in the above context suggested various guiding principles which the Court should take into consideration before granting leave to appeal. In that regard, they urge that limited appeals should be allowed with the leave of the Court where:

> *(a) The determination of the question will substantially affect the rights of one or more of the parties;*
>
> *(b) The question is one of general public importance or the decision of the High Court is at least open to serious doubt;*

(c) A substantial miscarriage of justice may have occurred or may occur unless the appeal is heard; and

(d) The decision of the High Court on the question is manifestly wrong.

[74] Whereas the above proposals are clearly progressive and well thought out, if adopted as they are, they may considerably broaden the scope of the exercise of the limited jurisdiction under consideration. As we have stated above, there has to be exceptional reasons why an appeal should be necessary in a matter arising from arbitration proceedings which by its very nature discourages court intervention. Thus, we do not think as suggested by the Interested Party that an issue of general public importance should necessarily deserve an appeal. This is because such an issue cannot be identified with precision because of its many underling dynamics. To that extent we reject that proposal.

[75] With regard to the first proposal, the issue of 'substantially affecting one or more of the parties', we think that it is not a proposal that should stand on its own. Generally, a Court decision has the ultimate effect of affecting the parties and hence even though the 'substantial' element is important, it should be tied to something more-other than just 'affecting the parties'. In that context and going back to the submissions by the parties, we recall that the Interested Party had raised an important observation to the effect that arbitral awards are now being set aside because they allegedly do not comply with constitutional principles. As urged by the Interested Party, when that happens, the High Court becomes the first and final Court of determining that issue. We are on our part persuaded by the argument that where an award is set aside on constitutional grounds, then that should be one of the exceptional grounds in which an appeal should be preferred against a decision made under Section 35 because Section 35 is clear as

to the issues for which proof is required before setting aside of an arbitral award. That Section provides in the relevant part:

2. "...

(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 to 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 decision 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

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."

[76] Reading each of the above provisions, alleged breaches of the Constitution cannot be properly introduced by way of an application to set aside an arbitral award. Breaches of the Constitution are properly governed by Articles 165(3) and 258 of the said Constitution and cannot by litigational ingenuity be introduced for adjudication by the High Court by way of invocation of Section 35 of the Arbitration Act.

[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 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.

[78] In stating as above, we reiterate that Courts must draw a line between legitimate claims which fall within the ambit of the exceptional circumstances necessitating an appeal and claims where litigants only want a shot at an opportunity which is not deserved and which completely negates the whole essence of arbitration as an expeditious and efficient way of delivering justice. The High Court and the Court of Appeal particularly have that onerous yet simple task. A leave mechanism as suggested by Kimondo J. and the Interested Party may well be the answer to the process by which frivolous, time wasting and opportunistic appeals may be nipped in the bud and thence bring arbitration proceedings to a swift end. We would expect the Legislature to heed this warning within its mandate.

[79] Having held as above, does the case at hand justify the Court of Appeal's intervention? In answer to that question, it will be noted that the High Court (Kimondo J) set aside the arbitral award on the grounds *inter alia* that the award contained decisions on matters outside the distributorship agreement, the terms of the reference to arbitration or the contemplation of parties. In granting leave to appeal, the learned Judge washed his hands of the matter and left it to the Court of Appeal to determine the question of the right to appeal to that Court. It so determined hence the present Appeal.

[80] The Court of Appeal, it is now clear, never determined the substantive complaint by Nyutu as to whether the learned Judge properly applied his mind to the grounds for setting aside an award under Section 35 of the Act. We have clarified the circumscribed jurisdiction of the Court of Appeal in that regard. Without a firm decision by the Court of Appeal on that issue, we cannot but direct

that the matter be remitted back to that Court to determine whether the appeal before it meets the threshold explained in this Judgment or in the words of Kimondo J, the *"journey was a false start"*.

(c) What are the appropriate reliefs?

[81] We have answered the question whether there is a right of appeal from the High Court to the Court of Appeal under Section 35 of the Arbitration Act but have delimited the circumstances under which the right can be exercised. We have also determined that the Court of Appeal ought to determine in *limine*, whether the threshold for admitting Nyutu's appeal has been met and if the appeal before it ought to be heard at all.

[82] The remedies available to Nyutu, as the succeeding party, shall therefore be set out in our final orders below. In stating so, we are well aware that this matter has remained unresolved for a long time. However, we also understand the importance of ensuring that the novel issue addressed in this Judgment may well settle the lines between expedition in arbitral matters and the overarching duty of Courts not to overly interfere in arbitration matters yet retain their solemn duty to undo injustices without interfering with the awards themselves.

[83] Turning back to the specific prayers in the appeal, prayer (a) is a plea to this Court to find that a party dissatisfied with a setting aside order under Section 35 of the Act has a right of appeal to the Court of Appeal. We have addressed that issue above and which is that, indeed such an appeal lies where it is shown that in setting aside an arbitral award, the High Court went beyond the grounds set out in that Section (See Para. 77 above).

[84] Prayer (b) seeks an order to set aside the order of the Court of Appeal delivered on 6th March 2015 and instead substituting it with an order dismissing the Notice of Motion Application dated 3rd May 2012 as well as an order reinstating Civil Appeal No.61 of 2012 ***Nyutu Agrovet Limited v Airtel Networks Kenya Ltd.*** We have shown why such an order is one for granting.

(d) Who should bear the costs?

[85] As regards costs, in ***Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*** SC Pet. No. 4 of 2014; [2014] eKLR, we held that we have discretion to award costs in order to ensure that the ends of justice are met. In this case, it is our considered opinion that this case is important for purposes of bringing to an end the debate on the extent of the Court of Appeal's jurisdiction in arbitration matters and in ensuring that there is clarity of law on that issue. As such, neither party can be faulted for this Court's determination. In the event, we find that the justice of the case demands that neither party should be condemned to bear the burden of costs. Consequently, each party will bear its own costs.

F. THE DISSENTING OPINION OF JUSTICE D.K. MARAGA, CJ & P

[86] Having had the advantage of reading in draft the majority Judgment in this Appeal, I am unable to agree with it hence this dissent.

[87] The factual background and the summary of the submissions advanced by the parties in this appeal have comprehensively been set out in the majority Judgment. I will therefore not rehash them in this dissent save in limited aspects for purposes of clarity of any point I will be making.

[88] From the Petition of appeal and the parties' submissions, three major issues arise for determination in this appeal. They are: whether or not there is a right of appeal against High Court decisions made under Section 35 of the Arbitration Act; whether or not Sections 10 and 35 of the Arbitration Act limit a party's right of access to justice; and the scope of the principle of finality in arbitration.

[89] The main issue raised in this appeal is whether or not there is a right of appeal from decisions of the High Court made under Section 35 of the Kenyan Arbitration Act, No. 4 of 1995 (the Arbitration Act). On this issue, the appellant's argument is in two parts. The first part was that on a broad and purposeful interpretation as required by Article 259(1) of the Constitution and on the authority of ***Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal*** [2015] eKLR, Article 164(3) of the Constitution provides for both the jurisdiction and the right of appeal to the Court of Appeal against all decisions of the High Court and Courts of equal status. As such, the appellant further argues, Section 10 of the Arbitration Act which purports to deny a party the right of appeal is unconstitutional.

[90] In response, the Respondent argues that though Article 164(3) of the Constitution confers upon the Court of Appeal jurisdiction to hear appeals from the High Court and Courts of equal status, in light of Article 159(2)(c) which entrenches arbitration in the Kenyan legal system, there is no right of appeal to the Court of Appeal against decisions of the High Court in arbitral proceedings save as stated in the Arbitration Act. In the circumstances, the Respondent concludes that Section 10 of the Arbitration Act is not unconstitutional.

[91] On its part, the Interested Party, the Institute of Chartered Arbitrators, argues that Section 35 of the Arbitration Act neither provides for nor excludes the right of appeal to the Court of Appeal. The Section thus leaves open that issue and

that fact has created uncertainty manifested in the various conflicting decisions rendered by the Court of Appeal. The Interested Party therefore invites this Honourable Court to settle the issue and thus create certainty in the practice of arbitration in Kenya. The Interested Party, however, urges that if we find that there is a right of appeal, then we should limit it to correcting grave and patent errors of the High Court which, if left to stand, will undermine the practice and benefits of arbitration.

[92] In the above context, it is trite practice that arbitration has for a long time been *"a generally accepted method of resolving disputes in a variety of ... transactions, [especially in commercial transactions and] ... in specialised or technical industries such as shipping, construction, energy and financial services sector."*[1] The main objective of this preference is the expeditious and inexpensive disposal of disputes. Most parties to commercial transactions in particular, desire expeditious determination of their disputes to enable them move on with their businesses.[2]

[93] Loathe with the dragging on of disputes in Courts of law, in the mid twentieth century, under the aegis of the United Nations, the international business community established the UNCITRAL Model Law to guide the international arbitration practice. The main objectives of that model law was to limit Court intervention in arbitration, the expeditious and efficient settlement of commercial disputes as well as to cut down the costs of litigation.

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[1] Datuk Professor Sandra Rajoo, Law, Practice and Procedure of Arbitration (Second Edition), LexisNexis Malaysia Sdn Bhd (Co. No. 7625-H), at p 6. In the 2013 Survey by PWC, *Corporate Choice in International Arbitration, 2013 PWC*, a majority of the respondents stated that arbitration was the preferred mode of resolution of their disputes.

[2] See Ivan Cisár, Slavomír Halla, 'The finality of Arbitral Awards in the Public International Law' *Conference Právní Rozpravy*, Grant Journal, 2012, pp. 1

[94] Expeditious disposal and limited Court intervention in arbitral proceedings also informed the enactment of the Arbitration Act No. 4 of 1995. The Act, which repealed the Arbitration Act of 1968 and largely adapted the UNCITRAL Model Law, directs in Section 10 thereof that "*Except as provided in this Act, no Court shall intervene in matters governed by this Act.*" On this direction, Section 32A of the Arbitration Act, added in the 2009 amendment of that Act, is equally categorical: "*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.*" The only court intervention allowed is by an application to the High Court under Section 35 to challenge an arbitral award on grounds therein specified.

[95] I thus concur with the Court of Appeal decision in ***Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal*** (supra) that on the issue of the appellate jurisdiction of the Court of Appeal, Article 164(3) makes a complete departure from its predecessor in the old Constitution. The predecessor of Article 164(3) of the current Constitution was Section 64(1) of the retired Constitution. It provided that "*There shall be a Court of Appeal which shall be a superior court of record, and which shall have such jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law.*" Clearly, that provision left the jurisdiction of the Court of Appeal and ancillary powers like the right of appeal to be conferred by other legislation.

[96] In contrast, Article 164(3) of the current Constitution provides that "*The Court of Appeal has jurisdiction to hear appeals from—(a) the High Court; and (b) any other court or tribunal as prescribed by an Act of Parliament.*" I therefore agree with the appellant that with this clear departure, the appellate jurisdiction conferred upon the Court of Appeal by Article 164(3) of the current

Constitution embraces the right of appeal. In other words, as the Court of Appeal found in the case of ***Judicial Service Commission & Secretary, Judicial Service Commission v Kalpana H. Rawal***, (supra) the right of appeal is subsumed in the appellate jurisdiction conferred by this Article. The issue is whether this right of appeal is universal to all decisions of the superior Courts.

[97] It is not in dispute in the above regard that Article 159(2)(c) entrenches arbitration in the Kenyan legal system. It requires Courts to promote "*alternative forms of dispute resolution including ... arbitration.*" I have already shown that one of the main objectives of the enactment of the Kenyan Arbitration Act of 1995 was to limit Court intervention in arbitral proceedings. Does Article 159(2)(c) entrench that position? Put in another way, does Article 164(3) contradict Article 159(2)(c) on the issue of Court intervention?

[98] Section 7 of the Sixth Schedule to the Constitution provides for harmonization of the current Constitution with the existing laws. It states that "*All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.*" One of the laws in force in this country prior to the promulgation of the 2010 Constitution is the Kenyan Arbitration Act No. 4 of 1995. As stated, the enactment of the Arbitration Act No. 4 of 1995 was prompted by the need to adapt the Kenyan arbitration framework to the UNCITRAL Model of Law, limit court intervention and elevate Kenya to the international plane on arbitration.

[99] On the principle of harmonization succinctly stated by the Ugandan Court of Appeal in the case of ***Olum -vs- Attorney General of Uganda***[3], a decision that has been cited with approval by our Court of Appeal in ***Nderitu Gachagua v Thuo Mathenge & 2 others***[4], ***Dennis Mogambi Mong'are v Attorney***

[3] [2002] 2 EA 508.

General & 3 others[5] and in many other cases, provisions of a Constitution cannot contradict each other. As that court observed, this is on account of the fact that:

> ***"The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other... [and] without subordination of any one provision to the other."***

[100] In light of this principle, it follows that Articles 159(2)(c) and 164(3) of the Kenyan Constitution, 2010 do not contradict each other. In my view they are actually complimentary. While Article 164(3) provides for the appellate jurisdiction of, and the right of appeal to the Court of Appeal, Articles 159(2)(c) entrenches arbitration in Kenya as an ADR mechanism with its strictures. This means that in arbitral proceedings, an exception has to be made. In arbitral proceedings, court intervention, including appellate intervention, has to be as provided by the Arbitration Act. In the circumstances, Sections 10, 32A and 35, which, when read together, limit the appellate Court intervention to domestic arbitrations and only by the consent of the parties, cannot be said to run counter to Article 164(3). Consequently, they are not unconstitutional.

[101] The appellant's other argument on the right of appeal was that Section 35 of the Arbitration Act does not expressly prohibit appeals from decisions made under it. To bolster that submission, the appellant cited Justice Omollo's observation in ***Kenya Shell Limited v Kobil Petroleum Limited*** Civil Application No. 57 of 2006 (unreported), and argued that if the restriction Section 10 purports to impose was intended to prohibit appeals, then there was

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[4] [2013] eKLR
[5] [2014] eKLR

nothing to stop Parliament from specifically providing in Section 35 that there shall be no appeal from decisions made thereunder.

[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.

[103] The appellant also raised the issue of access to justice. It argued that access to justice includes the right of appeal. As such, the restriction that Section 10 purports to impose deprives the appellant access to the appellate justice. It argued that the deprivation of the right of access to justice can only be on express words and not by implication from the silence of a provision as the one in Section 35 of the Arbitration Act.

[104] Arbitration does not deny access to the Courts. Courts are but one of the means of resolving societal dispute. The other modes of dispute resolution, as stated in Article 159(2)(c) include "*reconciliation, mediation, arbitration and traditional dispute resolution mechanisms....*" Every litigant has the right to choose which mode best serves his or her interests. As AM Gleen posited,

"Parties enter into arbitration agreements for the very reason that they do not want their disputes to end up in court."[6] Once one has made that choice, one cannot be heard to claim that one's right of access to justice has been denied or limited. As the United States' Second Circuit of the Court of Appeal also stated in ***Parsons Whittemore Overseas Co Inc v. Société Générale de l'Industrie du Papier (RAKTA),***

> ***"By agreeing to submit disputes to arbitration, a party relinquishes his courtroom rights ... [including the appellate process] in favor of arbitration with all of its well-known advantages and drawbacks."***[7]

[105] Finally, the appellant argued that the principle of finality in arbitrations applies only to an arbitration award itself and not to any Court proceedings founded on it. I do not think this is correct.

[106] One of the main objectives of preferring arbitration to Court litigation is the principle of finality associated with doctrine of *res judicata* that is deeply rooted in public international law. Section 32A captures this principle: *"Except as otherwise agreed by the parties, an arbitral award is final and binding upon the parties to it...."* Most parties, especially those engaged in commercial transactions, desire expeditious and absolute determinations of their disputes to enable them go on with their businesses.[8] They require a final and enforceable outcome. That is why the Section goes on to limit recourse *"against the award otherwise than in the manner provided by this Act."*

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[6] A. M Gleeson (Hon., AC, QC,), 'Finality' *Bar News,* 2013, pp. 41.
[7] 508 F2d. 969
[8] See Ivan Cisár, Slavomír Halla, 'The finality of Arbitral Awards in the Public International Law' *Conference Právní Rozpravy,* Grant Journal, 2012, pp. 1

[107] In the circumstance, I concur with the respondent that, read together, Sections 10 and 35 of the Arbitration Act restrict judicial intervention in the arbitral process to expedite dispute resolution while maintaining the sanctity of the principle of finality in the entire arbitral process. If the principle of finality is limited to the arbitral awards only and not to any court proceedings founded on them as the appellant contended, then the objectives of arbitration would be defeated and arbitration will be *"a precursor to litigation."*[9] This is because any Court proceedings that render an award unenforceable affects the principle of finality.

[108] For these reasons, I would myself dismiss this appeal with no order as to costs. However, as the majority hold a contrary opinion, the final orders of the Court shall be as set out in their Judgment.

G. ORDERS

[109] Consequent upon our findings above, we make the following orders:

(a) The Petition of Appeal dated 15th July 2016 is hereby allowed as prayed.

(b) The Order of the Court of Appeal made on 6th March 2015 is hereby set aside in its entirety.

(c) The Notice of Motion Application dated 3rd May 2012 in Civil Appeal No.61 of 2012 Nyutu Agrovet Limited v Airtel Networks Kenya Ltd. is hereby dismissed.

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[9] Amy J. Schmitz, 'Ending a Mud Bowl: Defining Arbitration's Finality through Functional Analysis' *Georgia Law Review,* Vol. 37, 2002, pp. 123.

(d) Civil Appeal No.61 of 2012 aforesaid shall be heard and determined by the Court of Appeal on an expeditious basis.

(e) Each party shall bear its own costs.

[110] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **6th day** of December, **2019**

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D. K. MARAGA
CHIEF JUSTICE/PRESIDENT OF THE THE SUPREME COURT

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M. K. IBRAHIM
JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA
JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU
JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA