Current Arbitration Landscapes in Africa through the Cases; a glimpse of Kenya

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- The good
- The bad
- The ugly?

The good!

The law

The Constitution of Kenya, 2010 in Article 2 provides;

- (5) The general rules of international law shall form part of the law of Kenya
- (6) Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution.

Article 159 (2) (C) - In exercising judicial authority, the courts and tribunals are required to promote arbitration & other ADR Mechanisms.

Kenya's Arbitration Act, 1995 is based on the model law. S. 10 limits court intervention and S. 36 (2) provides that international awards shall be recognised as binding and enforced under the New York Convention or any other convention in which Kenya is a signatory.

Court support during the arbitration process

In Talewa Road Contractors Limited v Kenya National Highways Authority (Civil Appeal 246 of 2019) [2021] KECA 276, the **Court of Appeal** affirmed that;

"20. …If parties opt to have an arbitration agreement in their contract of employment which spells out how disputes between them would be resolved, that is perfectly within their rights. **The parties entered into the said agreement freely and opted to oust other means of dispute resolution mechanisms other than arbitration. They cannot turn around and denounce the arbitration agreement.**"

Euromec International Limited v Shandong Taikai Power Engineering Company Limited [2021] KEHC 93 (KLR) (Commercial and Tax)

51. "… the Arbitrator, and not the court has authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the agreement including, but not limited to any claim that all or any part of the agreement is void or voidable…."

85. "…The Act confers the Arbitrator with exclusive jurisdiction over questions of fact and law which flows from the provisions of the Act which exclude appeals and limits reviews. The court may only be approached as provided by the Act.

Kenya Oil Company Ltd &another vs Kenya Pipeline Co. [2014]eKLR , the **Court of Appeal** held that;

*"40. …*The arbitrators are the masters of the facts. On an appeal the court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the findings of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be…. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a court ought never to question the arbitrators' findings of fact."

Easy Properties Limited v Express Connections Limited [2019] eKLR

"….Section 10 of the Arbitration Act correctly in my view **excludes from the jurisdiction of the High Court matters which fall within the mandate of the Arbitrator under the Act. It would defeat the purpose of ADR for parties to rush to court to challenge every single decision/award made by an arbitrator**…. The Court should resist calls to delve into the Arbitral process by making orders which go towards resolving the dispute between the parties as these are matters which lie exclusively within the mandate of the arbitrator…. **If litigants are allowed and/or encouraged to rush to court every time a decision made by the arbitrator displeased them, then the whole object of arbitration would fail.**"

Open Joint Stock Company Zarubezhstroy Technology v Gibb Africa Limited [2017] eKLR

"52. There exists international public policy which prevents an entity whether private or public from invoking restrictive provisions of its domestic or national laws in order to prevent *a posteriori* arbitration agreed between the parties."

"71. The duty of the court should be to encourage and support international arbitration or arbitration generally. Avoidance of the process through the court ought to be in exceptional circumstances duly proven to fall within the limited prescription of the Arbitration Act. The limited instances where the court is allowed to interfere must be so cautiously invoked and approved by court. The evidence leading to the interference must be convincing enough and where there is doubt; progress of the arbitral process is to be favoured."

Court support post arbitration

Zakhem International Construction Limited v Quality Inspectors Limited [2019] eKLR (12th July 2019) the High Court upheld an award and relying on the decision in **Christ for All Nations v Apollo Insurance Co. Ltd** held that;

> "…an error of fact of law or mixed fact and law or of construction of a statute or contract on the part of an arbitrator cannot by any stretch of legal imagination be said to be inconsistent with the Public Policy of Kenya. **On the contrary, the Public Policy of Kenya leans towards finality of arbitral awards and parties to arbitration must learn to accept awards**…"

Kenya Airports Authority v World Duty Free Company Limited t/a Kenya Duty Free Complex [2018] eKLR

"…even if it had not been formally recognized, the ICSID Award was a final pronouncement in respect to the illegal nature of the 1989 Agreement…**The point to be underscored, given its superior hierarchical status, is that the ICSID Award is binding not only on any Tribunal in Kenya but on all Courts in respect to the matters it pronounces itself on." [unless stayed]**

University of Nairobi V Multiscope Consultancy Engineers Limited [2020] eKLR

"…For that reason, **delivery happens when the arbitral tribunal either gives, yields possession, releases or makes available for collection a signed copy of the award to the parties. Actual receipt of the signed copy of the award by the party is not necessary…"**

This is about the 3 months within which to bring a challenge against an award

THE BAD...

Nyutu Agrovet Limited v Airtel Networks Kenya Limited; Chartered Institute of Arbitrators-Kenya Branch (Interested Party) [2019] eKLR

"[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."

SCOK 6th December 2019

Geo Chem Middle East v Kenya Bureau of Standards [2020] Eklr

"*41*. …To expect arbitration disputes to follow the usual appeal mechanism in the judicial system to the very end would sound a death knell to the expected expedition in such matters and our decisions in *Nyutu* and *Synergy* should not be taken as stating anything to the contrary. In this regard, one issue we did not pronounce ourselves on in the Nyutu and Synergy decisions, is whether a further appeal lies to this Court from a determination by the Court of Appeal. *For the avoidance of doubt, we now declare that in conformity with the principle of the need for expedition in arbitration matters, where the Court of Appeal assumes jurisdiction in conformity with the principle established in these two decisions, and delivers a consequential Judgment, no further appeal should ordinarily lie therefrom to this Court*"

SCOK, 18th December 2020.

- Issues arising on the meaning/interpretation by courts on the meaning of;
  - a decision so grave, so manifestly wrong and which has completely closed the door of justice to either of the parties
  - no further appeal should ordinarily lie therefrom to this Court."
- It would have been helpful if the Supreme Court would have given more specific guidance on instances/circumstances that the law would consider so manifestly wrong, and which completely close the door of justice to either of the parties.
- As it is, the meanings attributed to these words by lawyers and courts are so varied that there is no objective criteria to be used in determining what decision falls within that classification

- Saying that **no further appeal should ordinarily lie** is problematic since court does not expressly state that the decision of the Court of Appeal is final. This can be seen from the Cape v Synergy loop in and out of the Courts after the award;
- **30th Jan 2015** – an arbitral award is made in favour of Synergy for 11.4M USD
- **11th March 2016** – HC set aside the award of a finding that tribunal had exceeded jurisdiction
- **20th Dec 2016** – the COA delivered a ruling that it had no jurisdiction to entertain an appeal filed by Synergy
- **6th December 2019** – SCOK makes a decision in favour of Synergy and directed the COA to consider Appeal 81 of 2016 on merit
- **6th Nov 2020-** COA reinstates the award which the HC had set aside in March 2016

- **29th Jan 2021** – COA rejects Cape's application for leave to go to the SCOK
- **10th March 2021** – Cape lodges application in the SCOK for review of the COA decision of 29th Jan 2021
- **8th Oct. 2021** – SCOK dismisses Cape's application for want of jurisdiction
- The SCOK states that the legal position regarding its jurisdiction to entertain appeals arising from Section 35 judgments of the High Court was settled in Geo Chem case and then proceeds to reiterate that the Court lacks jurisdiction to entertain the appeal as it challenged the COA decision, where the COA had assumed jurisdiction under the principles in **Nyutu** and **Synergy** and delivered a consequential judgment.
- - **30th Jan 2024** – Cape is back to SCOK saying the 2020 COA decision was in error and is creating new jurisprudence where the arbitrator gets excessive powers to award relief not sought by parties, outside the express terms of the Contract.

There is no ugly since;

- the Supreme Court still has the opportunity in this new challenge to state, without ambiguity, that no appeal shall lie from the COA decisions and also what it meant by **a decision so grave, so manifestly wrong & completely locked the door of justice**
- After Cabinet approved the National ADR Policy in March 2023, the AG's office is working on overhauling the AA 1995 and the feedback by practitioners is to include specific provisions regarding these issues that give rise to varied interpretations by the courts, instead of leaving it to judge made law.

Many thanks!!

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