

The Right of Appeal under Section 35 of the Arbitration Act of Kenya: A Critique of the Supreme Court Decision in *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR

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Abstract

An arbitral award is final and binding on the parties but may be set aside for failure to adhere to due process requirements. Section 35 of the Arbitration Act (Act hereafter) provides grounds for setting aside an arbitral award. It does not state whether decisions of the High Court on setting aside an arbitral award are final and thus cannot be appealed. In Nyutu Agrovet Limited v Airtel Networks Limited, the Supreme Court interpreted Section 35 to allow appeals on High Court decisions of setting aside an arbitral award. This paper analyses the Supreme Court decision and finds that it abrogated the internationally recognised arbitration principles such as party autonomy, the finality of arbitral awards and limited court intervention. Additionally, the paper discusses the implications of the decision on arbitral practice in Kenya. Using literature review and comparative jurisprudence, it advances that Section 35 does not allow appeals on decisions of the High Court. To this end, it proposes better interpretation techniques to safeguard the sanctity of arbitral awards.

Keywords: *Arbitral award, Section 35 of the Kenyan Arbitration Act, Nyutu Agrovet decision, Residual jurisdiction, Supreme Court of Kenya*

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I. Introduction

i. Background

Generally, arbitral awards are regarded as final and binding. Parties resort to international commercial arbitration because of transnational enforcement and limited court interference, thus speeding the resolution of disputes.¹ As a matter of principle, finality implies that courts cannot interfere with an arbitral award through judicial review.² The finality of arbitral awards and limited court intervention is entrenched in international instruments, that is, the United Nations Commission on International Trade Law (hereafter UNCITRAL) Model Law and the New York Convention.³ The main objectives of the UNCITRAL Model Law are to limit court intervention and to ensure the expeditious and efficient settlement of commercial disputes.⁴ The New York Convention, on the other hand, aims at providing for the mutual recognition and enforcement of arbitral awards made in countries that are parties to it. Kenya ratified the New York Convention in 1989 which means that Kenya is bound by the obligations under that Convention, for instance, the enforcement of international arbitral awards.⁵

The finality of arbitral awards and limited court intervention are desirable because, first, a party that agreed to arbitration as a private method of resolving disputes may be brought unwillingly before national courts which hold their hearings in public. Moreover, details about the cases are published and made available to the public. This amounts to a breach of confidentiality and privacy.⁶ Secondly, there is a possible lack of knowledge by a domestic judge in

¹ Platt R, 'The appeal of appeal mechanism in international arbitration: Fairness over finality' 30(5) *Journal of International Arbitration*, 2013, 531.

² Muigua K, *Settling disputes through arbitration in Kenya*, 3rd ed, Glenwood Publishers Limited, Nairobi, 2017, 152.

³ *UNCITRAL Model Law on International Commercial Arbitration*, 21 June 1985, UN documents A/40/17, annex 1, and A/61/17 with amendments as adopted in 2006, United Nations, Vienna, 2008; *Convention on the recognition and enforcement of foreign arbitral awards*, 10 June 1958, UNTS vol. 330, No 4739.

⁴ Greenberg S, Kee C, and Weeramantry R, *International commercial arbitration: An Asia-Pacific perspective*, Cambridge University Press, Sydney, 2011, 16.

⁵ Article 2(6), *Constitution of Kenya* (2010) provides that any treaty or convention ratified by Kenya forms part of laws under the Constitution. See also Luis Franceschi who argues that the 2010 Constitution establishes a monist legal system since 'legislative approval of a treaty is not required at any instance, except as provided for by Article 71 of the Constitution on agreements relating to natural resources. Franceschi L, 'Constitutional regulation of International Law in Kenya' in Lumumba PLO, Mbondenyi MK and Odero SO (eds), *The Constitution of Kenya: Contemporary readings*, LawAfrica, Nairobi, 2011, 245.

⁶ Obura L and Wesonga E, 'What is there to hide? Privacy and confidentiality versus transparency: government arbitrations in light of the Constitution of Kenya 2010' 3(2) *Alternative Dispute Resolution*, 2015, 1.

understanding international commercial arbitration.⁷ Thirdly, the litigation in an attempt to set aside an arbitral award tends to defeat the essence of arbitration as a speedy dispute resolution process.⁸ Additionally, limited court intervention is also supported by the public policy that there must be an end to litigation. Furthermore, an appeal process is likely to be used by a losing party to postpone the day on which payment is due and frustrate enforcement.⁹

Under Kenyan law, an arbitral award is final and binding upon the parties and no recourse against the award is permitted unless as provided under the Act.¹⁰ Therefore, an arbitral award is conclusive as to the issues it seeks to address unless there is a successful challenge to the award.¹¹ Similarly, Section 10 of the Act restricts court intervention only to matters as are provided in the Act.¹² This restriction is modelled on the UNCITRAL Model Law which disallows courts to intervene in arbitration unless expressly authorised.¹³ By adopting the UNCITRAL Model Law, Kenya did not only make a distinct shift away from judicial interference of the arbitral process, but it also infused into its legal system the international arbitration principles of party autonomy; separability; competence-competence and the enforceability of arbitral awards. It also meant that courts can only act where the Act has expressly authorised them.¹⁴

According to Section 35 of the Act, recourse against an arbitral award may be made by an application to the High Court for setting aside. An arbitral award may only be set aside if one or more of the following grounds are proved, namely: (i) incapacity of a party; (ii) invalidity of an agreement; (iii) insufficient notice of appointment of an arbitrator or the arbitral proceedings; (iv) where an arbitrator exceeds the scope of his or her reference; (v) where an award is induced

⁷ Greenberg S, Kee C, and Weeramantry R, *International commercial arbitration*, 16.

⁸ Nurhayati Y, 'The finality of arbitration: The pros and cons of the court's power to set aside arbitral awards in Indonesia' 5th International Conference for Legal Reconstruction based on Human Rights, Sultan Agung Islamic University, Semarang, 2019, 380.

⁹ *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.

¹⁰ Section 32A, *Arbitration Act* (Act No 4 of 1995).

¹¹ Kamau K and Melly K, 'Attitude of Kenyan courts towards arbitration' in Oryema E (ed), *Rethinking the Role of African National Courts in Arbitration*, Kluwer Law International, Alphen aan den Rijn, 2018, 356.

¹² Section 10, *Arbitration Act* (Act No 4 of 1995).

¹³ Article 5, *UNCITRAL Model on International Commercial Arbitration*, 21 June 1985. In the context of member states, the domestic law on arbitration applies. See Kerr M, 'Arbitration and the courts: UNCITRAL Model law' 34(1) *British Institute of International and Comparative Law*, 1985, 2.

¹⁴ *Synergy Industrial Credit v Cape Holdings* (2018) eKLR, para 223. See also, Sankalp J, 'Framework governing international commercial arbitration: UNCITRAL Model Law and Principles', 10 November 2015, 3-<https://ssrn.com/abstract=2777728> accessed 18 June 2020.

or influenced by fraud or corruption; (vi) where the dispute is not capable of being resolved by arbitration; or (vii) where the arbitral award is against public policy.¹⁵ This provision is modelled on the wider arbitral context of *Article 34 of the UNCITRAL Model Law*, and *Article V of the New York Convention* which Kenya ratified in 1989.

Section 35 of the Act has attracted controversy because it does not expressly state whether a decision of the High Court is amendable to appeal before the Court of Appeal. Section 35 makes no mention that a decision of the High Court is final. As a result of this conundrum, the Court of Appeal has taken conflicting positions regarding whether there is a right of appeal emanating from Section 35. For instance, while in *Nyutu Agrovet Limited v Airtel Networks Limited*, the Court of Appeal was of the view that the decision of the High Court in setting aside an arbitral award is final and that the Court of Appeal has no jurisdiction to hear that appeal,¹⁶ in *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited*, the Court of Appeal held that lack of an express limitation against appeals under Section 35 meant that the decision was appealable.¹⁷ The Court of Appeal in the *Nyutu Agrovet Limited v Airtel Networks* emphasized that intervention by the Court of Appeal only arises under Section 39(3) of the Act and is predicated upon agreement by the parties to refer any questions of law arising in the course of the arbitration to the Court. The parties must have agreed prior to the making of the arbitral award that an appeal would lie to the Court of Appeal from determinations of the High Court on questions of law. Therefore, according to them, the Court of Appeal cannot exercise jurisdiction under Section 35 unless expressly authorised as dictated by Section 10 of the Act.¹⁸

Given the conflicting decisions by the Court of Appeal, the High Court was left in the dilemma of choosing the view to associate itself with, when faced with an application of granting leave to appeal a decision on setting aside an arbitral award.¹⁹ These opposing views have worsened the uncertainty regarding the proper interpretation of Section 35 and precipitate this paper's analysis of the Supreme Court's decision in *Nyutu Agrovet v Airtel Networks Limited*.²⁰ Besides this, at a comparative level, an analysis and review of courts' attitude towards

¹⁵ Section 35, *Arbitration Act* (Act No 4 of 1995).

¹⁶ *Nyutu Agrovet Limited v Airtel Networks Limited* (2015) eKLR, para 9.

¹⁷ *DHL Excel Supply Chain Kenya Limited v Tilton Investments Limited* (2017) eKLR.

¹⁸ *Nyutu Agrovet Limited v Airtel Networks Limited* (2015) eKLR (Ruling by Justice Mwera).

¹⁹ In the case of *Mwai Kibaki v Daniel Toroitich Arap Moi* (2008) eKLR, it was emphasised that decisions of higher courts bind lower courts because of the doctrine of stare decisis whether they agree with it or not.

²⁰ *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR.

arbitration in best practice jurisdictions such as Singapore and United States of America (USA) is undertaken. Singapore has been chosen because it is one of the most preferred and widely used seats in the world. Additionally, it is the most improved arbitration seat owing to its impartial legal system, supportive national courts, and a high track record in enforcing arbitral awards.²¹ Furthermore, the Singaporean arbitration laws are inspired by the Model Law, just like Kenya.²² Lastly, the USA is chosen because American courts are supportive towards arbitration. They generally confirm and enforce, as opposed to vacate, arbitral awards.²³

This paper has six parts. Part I is this general introduction that sets the study context. Part II focuses on the Supreme Court decision in *Nyutu Agrovet v Airtel Networks Limited*. It gives a brief background and facts of the case, the submissions by the parties, and a summary of the findings by the Supreme Court. Part III evaluates the strengths and weaknesses of the decision against arbitration principles like the finality of arbitral awards and party autonomy. It then discusses the doctrine of residual jurisdiction to highlight that the invocation of this doctrine was arguably misplaced. Part IV assesses the impact of the decision on arbitration practice nationally and internationally. Part V proposes better ways of interpreting Section 35 of the Act. Finally, Part VI gives the recommendations and the conclusion.

II. The Supreme Court Decision in *Nyutu Agrovet v Airtel Networks*

i. Brief history and facts

The parties entered into a distributorship agreement in terms of which Nyutu Agrovet was contracted to distribute airtime and scratch cards in Donholm Estate in Nairobi on behalf of Airtel Networks. The dispute arose when Nyutu Agrovet's agent, one George Changa, ordered products from Airtel Networks using Nyutu Agrovet's account. Between 9 March 2009 and 16 March 2009, Changa presented bank payment slips amounting to Kshs 11 million to employees of Airtel Networks, purporting to be a sum paid in the account of Airtel Networks by Nyutu Agrovet to purchase the former's products. Airtel

²¹ Queen Mary University of London, *International Arbitration Survey: Improvements and Innovations in International Arbitration*, 2015, 2.

²² Mohan P, 'The Singapore Arbitration Regime and the UNCITRAL Model Law' 20(4) *Arbitration International*, 2004, 372-386.

²³ Ware S, 'Vacating Legally-Erroneous Arbitration Awards' 6(56) *Yearbook on Arbitration and Mediation*, 2014,56.

Networks delivered the products but the said paying-in slips proved to be forgeries, prompting Airtel Networks to reverse the credits made. This had the effect of debiting from Nyutu's account a total sum of 11 million Kenyan shillings which it failed to pay. The parties referred the dispute to Fred Ojiambo as the sole arbitrator who after the arbitral proceedings awarded Nyutu Agrovat Kshs 541,005,922.81 wherein most of the claims were under the tort of negligence.²⁴

Airtel Networks filed an application to the High Court under Section 35 of the Act to set aside the award on the ground that the said award had dealt with a dispute not contemplated by the parties. Justice Kimondo set aside the award on the basis that it contained decisions on matters outside the distributorship agreement and terms of reference to arbitration.²⁵ Nyutu Agrovat thereafter appealed to the Court of Appeal to challenge the ruling and orders of Justice Kimondo. However, a five bench of the Court of Appeal unanimously held that a decision of the High Court under Section 35 was final and thus cannot be appealed.²⁶

Aggrieved by the finding of the Court of Appeal, Nyutu Agrovat appealed to the Supreme Court on several grounds, the main one being that the appellate court had adopted a wrong and restrictive interpretation of *Article 164(3) of the Constitution of Kenya* (hereinafter the Constitution).²⁷ Second, that the Court of Appeal had misinterpreted Article 164(3) by holding that it only provides for the jurisdiction of the Court of Appeal to hear appeals and not the right of appeal. Further, that the appellate court had failed to appreciate that the right of appeal is conferred by the Constitution.²⁸

Before the Supreme Court, the main issue for determination was whether there is a right of appeal to the Court of Appeal under Section 35 of the Act.

ii. Submissions of the parties

a. Nyutu Agrovat

Nyutu Agrovat contended that Section 10 of the Act is unconstitutional because it purports to limit the right of appeal conferred by Article 164(3) of the

²⁴ *Nyutu Agrovat v Airtel Network Kenya Limited* (2016) eKLR, para 1.

²⁵ *Nyutu Agrovat v Airtel Network Kenya Limited* (2016) eKLR, para 2.

²⁶ *Nyutu Agrovat v Airtel Network Kenya Limited* (2016) eKLR, para 9.

²⁷ Article 164(3), *Constitution of Kenya* (2010) 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.

²⁸ *Nyutu Agrovat v Airtel Network Kenya Limited* (2019) eKLR, para 8.

Constitution and that it fetters the right of access to justice under Article 48.²⁹ Further, it asserted that Article 259(1) requires the Constitution to be interpreted in a liberal, broad, generous, and purposive manner which was not done in the instant case.³⁰ Additionally, it argued that the drafters of the Constitution did not intend to place restrictions on the appellate jurisdiction of the Court of Appeal from the decisions of the High Court.³¹ Moreover, it stated that there is no express denial of the right to appeal under Section 35 of the Act. As such, the deprivation of the right of access to courts must be in clear words.³²

Furthermore, it submitted that the principle of finality applies to the arbitral award itself and not any subsequent civil proceedings instituted by an aggrieved party.³³ Finally, Nyutu Agrovet argued that further to the constitutionally entrenched right of appeal, there is an ordinary statutory right of appeal by dint of Sections 66 and 75(1) of the Civil Procedure Act. In line with this argument, they submitted that since leave to appeal was granted by the High Court, the appeal was properly before the Court of Appeal.³⁴

b. Airtel Networks

Airtel Networks submitted that no right of appeal lay against the decisions of the High Court under Section 35 since the very purpose of the Act is to limit court intervention.³⁵ It posited that the right of appeal must be expressly provided for either in the Constitution or statute. Airtel Networks emphasised that in the Act, there is no right of appeal outside Section 39 of the Act.³⁶ Additionally, it stated that the right of appeal precedes jurisdiction and that the Court of Appeal's jurisdiction to hear and determine an appeal from the High Court does not entitle Nyutu Agrovet to file an appeal where such a right is absent.³⁷ Lastly, it contended that minimal judicial intervention is important to promote expediency as well as maintaining the sanctity of the arbitral process and finality of the award.

²⁹ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 9.

³⁰ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 9 - para 10.

³¹ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 11.

³² *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 13.

³³ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 15.

³⁴ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 14. Sections 66 and 75, *Civil Procedure Act* (Chapter 21 of 2010). These provisions provide that an appeal shall lie from the High Court to the Court of Appeal from orders made or with leave of the court which gave the orders.

³⁵ *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR, para 18.

³⁶ *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR, para 31.

³⁷ *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR, para 21.

c. Interested party–The Chartered Institute of Arbitrators- Kenya Branch (CIArb)

The CIArb contended that the absence of an express provision prohibiting the right of appeal under Section 35 of the Act meant that such decisions are appealable.³⁸ It postulated that since arbitral awards are increasingly being set aside on grounds that they do not conform to the Constitution, then an appeal lies.³⁹ This is because awards are being challenged on grounds that were neither envisaged by Parliament nor the parties. As a result, this makes the High Court the first instance court in relation to constitutional arguments advanced at the setting aside stage.

Secondly, the CIArb proposed that limited appeals should be allowed with the leave of court in any of the instances where: i) the determination of the question will substantially affect the rights of one/more parties; ii) where the question is one of the general public importance or decision of the High Court is open to serious doubt and is manifestly wrong; and iii) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.

d. Summary of the findings by the Supreme Court

The majority opinion found that the Act and the UNCITRAL Model Law do not expressly bar further appeals to the Court of Appeal. It was their view that the Constitution dictates that Section 35 of the Act should be interpreted in a way that promotes its purpose, the objectives of arbitration, and the purpose of an expeditious yet fair dispute resolution legal system.⁴⁰ As a result, the majority opinion acknowledged the need to shield arbitral proceedings from unnecessary court intervention. However, it also acknowledged the fact that there may be legitimate reasons to appeal High Court decisions that have been set aside.⁴¹

Regarding the constitutionality of Section 10 of the Act, the majority opinion rejected Nyutu Agrovet's argument that Section 10 is unconstitutional to the extent that it can be interpreted to limit appeals of High Court decisions under Section 35.⁴² In their view, Section 10 was enacted to ensure predictability and certainty of arbitral proceedings by specifically providing instances where courts may intervene. Therefore, parties who resort to arbitration must know

³⁸ *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR, para 23.

³⁹ *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR, para 75.

⁴⁰ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 71.

⁴¹ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 71.

⁴² *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 58.

with certainty instances when the jurisdiction of the Courts may be invoked.⁴³

Additionally, the majority opinion decided that there was no absolute bar to appeals under section 35 and that an unfair determination of the High Court should not be immune from the appellate review. It held that in exceptional circumstances, the Court of Appeal ought to have residual jurisdiction to enquire into such unfairness. According to them, these circumstances arise where the High Court, in setting aside an arbitral award, has stepped outside the grounds set out in the said section and thereby decided so manifestly wrong.⁴⁴

In his dissenting opinion, Chief Justice David Maraga, emphasised that the right of appeal is granted by statute, and not assumed. According to him, the whole Act should be interpreted as a whole considering its purpose and provisions. As a result, he observed that when Sections 10, 32A, and 35 are read together, there is no appellate court intervention under Section 35. The appellate court intervention is only enshrined under Section 39 of the Act as agreed by the parties.⁴⁵

III. Analysis and Discussion

i. Strengths of the Supreme Court decision

a. The remission of the matter back to the Court of Appeal

Having set aside the arbitral award in the *Nyutu Agrovet v Airtel Networks*, the High Court failed to give directions leaving the parties uncertain about their rights. In addition, when the matter was before the Court of Appeal, the court struck out the application citing lack of appellate jurisdiction. As a result, Nyutu Agrovet was not given an opportunity to challenge the finding of the High Court.⁴⁶ The Supreme Court remitted the case back to the Court of Appeal to determine whether the appeal meets the threshold, that is, the High Court judge in setting aside an arbitral award went outside the grounds under Section 35 and thereby decided so manifestly.⁴⁷ The remission of the case to the Court of Appeal will give the parties certainty.

⁴³ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 57.

⁴⁴ *Nyutu Agrovet Limited v Airtel Network Kenya Limited* (2019) eKLR.

⁴⁵ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 107.

⁴⁶ *Nyutu Agrovet v Airtel Network Kenya Limited* (2019) eKLR, para 16.

⁴⁷ *Nyutu Agrovet v Airtel Networks Limited* (2019) eKLR.

b. The decision highlighted many increasing substantive and procedural concerns in arbitration today

It may be necessary for parties to have recourse to courts because of some unique arbitration characteristics which may be positive but affect assurance of a party's access to justice. Some of these characteristics are the absence of a harmonised framework for the arbitrators' accountability, the relaxation of evidentiary rules, decreased opportunities for thorough discovery, insufficient explanations of the reasoning of arbitrators in decisions, and limited protection for vulnerable parties.⁴⁸

Khan argues that by choosing arbitration, parties forego several rights accompanying litigation, for example the right to access courts, the right to due process of law, and equal protection of the law. He adds that these rights are surrendered to acquire expedition and finality of the arbitral award.⁴⁹ This has also been illustrated in the Kenyan case of *Hinga v Gathara* wherein the court observed that 'in entering an arbitration agreement, parties gave up most of their rights of appeal and challenge to the award in exchange for the finality of arbitral award'.⁵⁰ While Khan's views are true to some extent, the same may not stand under the 2010 constitutional dispensation of Kenya. This is because the Constitution guarantees the right to a fair trial which is absolute and cannot be limited.⁵¹ Moreover, the Constitution recognises alternative forms of dispute resolution (ADR) including reconciliation, mediation, arbitration, and traditional dispute resolution mechanisms, subject to clause (3).⁵² Clause 3 dictates that Traditional Dispute Resolution mechanisms shall not be used in a way that: contravenes the Bill of Rights; is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality or is inconsistent with the Constitution or any written law.⁵³ Therefore, it follows that arbitration must be carried out in a manner that is consistent with constitutional principles and values.⁵⁴ Consequently, wrong decisions of the High Court on setting aside arbitral awards may need to be appealed to the Court of Appeal to correct errors of law and achieve justice.

Additionally, Eric Muthiri notes that the Arbitration (Amendment) Act No. 11 of 2009 introduced new grounds for setting aside arbitral awards under

⁴⁸ Muigua K, 'Constitutional supremacy over arbitration' 4(1) *Alternative Dispute Resolution*, 2016, 123.

⁴⁹ Khan A, 'Arbitral autonomy' 74(1) *Louisiana Law Review*, 2013, 10.

⁵⁰ *Court of Appeal Civil Application No. 285 of 2008 (UR 187/2008)*.

⁵¹ Article 50 and Article 25, *Constitution of Kenya* (2010).

⁵² Article 159(2)(c), *Constitution of Kenya* (2010).

⁵³ Article 159(2)(c), *Constitution of Kenya* (2010).

⁵⁴ Muigua K, 'Constitutional supremacy over arbitration' 125.

Section 35 of the Act. These were fraud, bribery, undue influence, or corruption.⁵⁵ According to him, when the High Court is exercising original jurisdiction, such a decision is appealable to the Court of Appeal.⁵⁶ He relies on the decision of the High Court in *National Cereals & Produce Board v Erad Suppliers & General Contracts Limited* where it was held that the High Court would be exercising its original jurisdiction while it takes evidence in proof of such grounds. The Court stated as follows,

In order to arrive at a decision whether an arbitral award was induced or affected by fraud, bribery, undue influence or corruption, the High Court must, in our view, be guided by evidence. For that purpose, it is open for parties to present evidence before the High Court and for the High Court to take and consider such evidence. In doing so and to that extent, we consider for purposes of Rule 29 that the High Court is called upon to exercise original jurisdiction.⁵⁷

From Muthiri's discussion, appeals may lie against the decisions of the High Court on setting aside arbitral awards where the award is being challenged on grounds of bribery, or undue influence, or corruption. This position is a further illustration of the increasing substantive and procedural concerns about arbitration.

c. The decision underscores the vigilance of courts in supporting arbitration

The quality of arbitral awards from good arbitrators compels court support for their acceptability and enforcement. Arbitration creates three basic and enabling expectations. First, to the parties, enabling them to conduct the arbitration to resolve their dispute and make the award. Second, to the impartial arbitrators, by enabling them to conduct the arbitration and make the arbitral award, and lastly, to the competent courts, to monitor arbitration's basic procedural integrity when needed. When these expectations are fulfilled, arbitration purports to uphold the rule of law in its broader sense under the court's duty to balance the competing interests of the parties within the limits of their contractual commitments and public policy.⁵⁸

Where the expectations are not met, courts should step in to safeguard the tenets of arbitration but also to balance them with achieving justice for the

⁵⁵ Muthiri E, 'Revisiting the right of appeal under the Arbitration Act', 7.

⁵⁶ Muthiri E, 'Revisiting the right of appeal under the Arbitration Act', 8.

⁵⁷ *National Cereals and Produce Board v Erad Suppliers and General Contracts Limited* (2014) eKLR.

⁵⁸ Torgbor E, 'Overview of the disposition of courts towards arbitration in Africa' in Onyema E, *Rethinking the Role of African National Courts in Africa*, Wolters Kluwer, Alphen aan den Rijn, 2018, 53.

parties.

In *Sadrudin Kurji & Another v Shalimar Limited*, the High court stated that:

‘Arbitration is intended to facilitate the quicker resolution of settling disputes without the undue regard to technicalities. This however does not mean that the Courts will stand and ignore where cardinal rules of natural justice are being breached by the process of arbitration. Hence, in exceptional cases in which the rules are not adhered to, the courts will be perfectly entitled to step in and correct obvious errors’.⁵⁹

This was emphasised in the Supreme Court decision wherein the majority opinion observed that even in promoting arbitration, this should not be done at the expense of real and substantive justice. Thus, there may be instances where decisions of the High Court on setting aside may need to be appealed to promote justice.⁶⁰

ii. *Weaknesses of the Supreme Court decision in respect of finality of an arbitral award and party autonomy*

a. *Setting aside an arbitral award on constitutional grounds*

In the case of *Christ for All Nations v Apollo Insurance Company Limited*, Justice Ringera noted that ‘public policy is a most broad concept incapable of precise definition’, and he likened it to ‘an unruly horse’ that ‘*once one got astride of it you never know where it will carry you*’. The Court was of the view that an award that is inconsistent with the public policy of Kenya is one that is inconsistent with the Constitution or other laws of Kenya, inimical to the national interests of Kenya (including interests of national defence, security, good diplomatic relations with friendly nations and the economic prosperity of Kenya), and contrary to justice and morality (including corruption, fraud or an award founded on a contract that is contrary to public morals).⁶¹

The *Christ for All Nations v Apollo Insurance Company Limited* decision has been used as the *locus classicus* on setting aside arbitral awards on the public policy ground even in the new constitutional dispensation.⁶² From Justice Ringera’s elaboration, constitutional matters fall within the ambit of public policy. However, the Supreme Court stated that where an arbitral award has been set aside under

⁵⁹ *Sadrudin Kurji and another v Shalimar Limited and 2 others* (2008) eKLR.

⁶⁰ *Nyutu Agrovat v Airtel Network Kenya Limited* (2019) eKLR, para 71.

⁶¹ *Intoil Limited and another v Total Kenya Limited and 3 others* [2013] eKLR.

⁶² See *Kenyatta International Convention Centre v Greenstar Systems Limited* (2018)eKLR, para 45. Also, see *Kundon Singh Construction v Tanzania National Roads Agency* (2012) eKLR.

constitutional grounds, the Court of Appeal can exercise appellate jurisdiction to allow and hear the appeal. The challenge with this view is that constitutional grounds have always been raised under the public policy ground. As such, it is ambiguous what the Supreme Court meant. Similarly, matters of manifest wrongness can be encompassed within the public policy ground. It should be recalled that Section 35 provides that an arbitral award can only be set aside if (a) a party furnishes proof for grounds under Section 35(2)(a), or where (b) the High Court finds that the subject matter is incapable of settlement by arbitration, or that the award conflicts with the public policy of Kenya.⁶³ It follows therefore that the High Court cannot set aside an award on grounds that it is inconsistent with the Constitution. This is because this will be acting outside the grounds provided under Section 35 of the Act.⁶⁴

b. Contradictions in the majority judgment

The Majority judgement presents some contradictions. First, it acknowledges that Section 10 of the Act was enacted in line with the international policy of limited court intervention under the Model Law. Furthermore, it stated that Section 10 was enacted to ensure predictability and certainty by specifying instances where a court may intervene.⁶⁵ To this end, the Supreme Court rejected Nyutu Agrovet's contention that Section 10 is unconstitutional to the extent that it limits the Court of Appeal's jurisdiction to hear appeals arising from decisions of the High Court on setting aside arbitral awards. However, the majority judgment observed that Section 10 cannot be used to explain whether an appeal lies against a decision of the High Court setting aside an arbitral award.

According to them, by the time an appeal is preferred, the High Court would have already assumed jurisdiction under Section 35 and made a determination. As a result, by assuming jurisdiction under Section 35, the High Court would conform to Section 10 by ensuring that the Court's intervention is only on instances that are specified by the Act hence ensuring predictability.⁶⁶ Consequently, it was their view that just like Section 35 of the Act, Section 10 does not answer the question.

This view taken by the majority judgment can be criticised. First, it interprets Sections 10 and 35 separately yet a holistic reading of the said sections would reveal that appellate intervention is limited in the Act. This paper associates itself with the minority opinion wherein Justice David Maraga stated that Sections

⁶³ Section 35, *Arbitration Act* (Act No 4 of 1995).

⁶⁴ Section 35, *Arbitration Act* (Act No 4 of 1995).

⁶⁵ *Nyutu Agrovet Limited v Airtel Network Kenya Limited* (2019) eKLR, para 57.

⁶⁶ *Nyutu Agrovet Limited v Airtel Network Kenya Limited* (2019) eKLR, 58.

10, 32A, and 35 when read together, limit the appellate court intervention on decisions of the High Court on setting aside an arbitral award. He emphasised that Sections 10 and 35 restrict judicial intervention in the arbitral process to expedite dispute resolution while maintaining the sanctity of the principle of finality in the arbitral process. The Court of Appeal is only permitted to intervene under Section 39 of the Act.⁶⁷

c. Finality of an arbitral award

The gravity of the decision is that it questions the finality of the arbitral award which the parties sought as the final determination of their rights. As a result, this undermines the place of an arbitral award in arbitration because an award is principally the conclusive determinant of parties' rights and duties. Pursuing subsequent proceedings automatically extinguishes the finality of arbitral award. The arbitral award in *Nyutu Agrovet* was issued in 2007 but because of court interference, the case took about 12 years from the High Court to the Supreme Court. This interference defeats the quick resolution of disputes, a feature that distinguishes litigation from arbitration.

d. Reference to Section 67(4) of the 1996 United Kingdom Arbitration Act

The majority judgment relied on Section 67(4) of the UK Arbitration Act to hold that the Court of Appeal has residual jurisdiction to enquire into the unfair determination of the High Court on setting aside arbitral awards. The challenge with this approach is that Section 67 of the UK Arbitration Act is not *pari materia* with Section 35 of the Kenyan Arbitration Act.

Under the English Arbitration Act, an appeal from the decision of the court on setting aside may be made only with permission.⁶⁸ Where the Court does not give permission, the Court of Appeal cannot give that permission.⁶⁹ However, the Court of Appeal can exercise residual jurisdiction to review the misconduct and unfairness of the judge's determination of the grant or refusal of leave to appeal.⁷⁰ The Kenyan Arbitration Act, on the other hand, does not explicitly provide for appeals on decisions of the court on setting aside arbitral

⁶⁷ *Nyutu Agrovet Limited v Airtel Network Kenya Limited* (2019) eKLR, para 107.

⁶⁸ Article 67(4), *Arbitration Act* (United Kingdom).

⁶⁹ *Athletic Union of Constantinople v National Basketball Association and Others* (2002), The United Kingdom Commercial Court.

⁷⁰ *CGU International Insurance plc v AstraZeneca Insurance Co Ltd* (2007), The United Kingdom Commercial Court.

awards. Moreover, it does not have a provision that High Court decisions on setting aside an arbitral award can be appealed with leave of court.⁷¹

It should be recalled that the United Kingdom rejected the UNCITRAL Model law reasoning that its introduction into England would lead to a divorcing of arbitral regimes; domestic and international. The former being governed by the English Arbitration Act and the latter by the Model Law.⁷² Additionally, the second concern related to the existing legal framework and experience of lawyers and arbitrators. The Model Law did not resemble a typical English statute and, as a result, those involved in the arbitral procedure would be required to substantially revise their existing wealth of knowledge and established practice.⁷³ In 1996, the United Kingdom enacted its own arbitration legislation: the 1996 English Arbitration Act which is a follow-up to the Departmental Advisory Committee (DAC) report published in June 1989. The report is commonly known as the Mustill Report named after Lord Mustill, the chairman of the DAC who was appointed in 1984 to advise whether the United Kingdom should enact the Model Law.⁷⁴

From the foregoing, the Supreme Court should not have relied on Section 67(4) of the 1996 Arbitration Act to interpret Section 35 of the Act because the two pieces of legislation are inspired differently. The former being governed by English tradition and the latter the Model Law. Additionally, the said sections are worded differently. To illustrate the unconvincing way the doctrine of residual jurisdiction was used by the Supreme Court, the author expounds further on the doctrine in the next sub-section.

iii. The doctrine of residual jurisdiction

The main issue of determination right from the Court of Appeal to the Supreme Court has been whether a decision of setting aside by the High Court is appealable. The Supreme Court acknowledged that the right of appeal is not automatic but rather a creation of law conferred by either the Constitution

⁷¹ Section 35, *Arbitration Act* (Act No 4 of 1995).

⁷² Lemba S, 'The 1996 United Kingdom arbitration act and the UNCITRAL Model Law: A contemporary analysis' Unpublished PHD Thesis on Internal and International Arbitration, Universita Luiss Guido Carli, 2010, 32.

⁷³ Lemba S, 'The 1996 United Kingdom arbitration act and the UNCITRAL Model Law: A contemporary Analysis' Unpublished PHD Thesis on Internal and International Arbitration, Universita Luiss Guido Carli, 2010, 33.

⁷⁴ Muigua K, 'Arbitration Act 1995 and Arbitration Act 1996 of UK Lecture' Chartered Institute of Arbitrators-Kenya Branch Entry Course held at College of Insurance, Nairobi, on 25 and 26 August 2008, 22.

or statute.⁷⁵ Further, it agreed with the Court of Appeal's observation that jurisdiction is exercised only where such right exists and where leave is granted, such leave does not constitute the right of appeal; the right must precede leave.⁷⁶ However, it stated that in exceptional circumstances, the Court of Appeal should exercise residual jurisdiction *albeit* not giving examples of such circumstances to warrant appeals.

The invocation of residual jurisdiction is arguably misplaced because such jurisdiction cannot be invoked to conflict law or a rule. This section examines the doctrine of residual jurisdiction and its limitations to show that the Supreme Court decision abrogated the well-known principle of law that the right of appeal is granted by law, and not assumed.

a. Origin and scope of residual jurisdiction

Residual jurisdiction is used interchangeably with inherent jurisdiction.⁷⁷ Sir Jack Jacob defines inherent jurisdiction as the reserve fund of powers which may be invoked by a court whenever it is just or equitable to ensure the observance of due process of the law, to prevent vexation or oppression, to do justice between parties, and to secure a fair trial between the parties.⁷⁸ In the case of *Taylor v Lawrence*, Lord Woolf extensively explained the inherent jurisdiction of the Court of Appeal. He stated inter alia:

‘The Court of Appeal was established with a broad jurisdiction to hear appeals; it was not established to exercise an originating as opposed to an appropriate jurisdiction. It is therefore appropriate to state that in that sense, it has no inherent jurisdiction. It is however wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court, it has implicit powers to correct wrong decisions to ensure that justice between the litigants involved. Second, to ensure public confidence in the administration of justice not only by remedying the wrong decision but also clarifying and developing the law.

The residual jurisdiction which we are satisfied is vested in the Court of Appeal to avoid real injustice in exceptional circumstances is linked to a discretion which enables a court to confine the use of that jurisdiction to cases in which it is appropriate for it to be exercised. There is tension between a court of having residual jurisdiction and the need to have finality in litigation. The ability to re-open proceedings after the ordinary appeal process has been concluded can also create injustice. Therefore, there needs to

⁷⁵ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* (2019) eKLR, para 34.

⁷⁶ *Nyutu Agrovet Limited v Airtel Networks Kenya Limited* (2019) eKLR, para 36.

⁷⁷ Black's Law Dictionary, 7th ed.

⁷⁸ Heinrich J, ‘The Inherent Jurisdiction of the Court’ 23(1) *Current Legal Problems*, 1970, 24-25. See also Sanam G, Halsbury's Laws of England, 4th ed.

be a procedure that will ensure that the proceedings will only be re-opened when there is a real requirement for this to happen i.e bias, breach of natural justice. This makes it imperative that there should be a remedy'.⁷⁹

From Lord Woolf's observation, the Court of Appeal can re-open appeals where there is an injustice. This has been illustrated in the Kenyan context in the case of *Benjob Amalgamated & Another v Kenya Commercial Bank* wherein the Court of Appeal held that it had the jurisdiction to review its decisions to which there is no appeal, to correct errors of law that have occasioned real injustice or miscarriage of justice. Furthermore, the court stated that residual jurisdiction will not be invoked where there are laches or where legal rights of innocent third parties have vested during the intervening period, and such interference would occasion a further injustice.⁸⁰

It is important to highlight that in the above cases, the Court of Appeal is re-opening cases it had decided; it had jurisdiction because appeals lay in the first place. This is different from our present inquiry because Section 35 of the Act neither grants the Court of Appeal appellate jurisdiction nor donates the right of appeal to any litigant in decisions of setting aside an arbitral award by the High Court. This means that the invocation of residual jurisdiction where no jurisdiction was provided in the first place is problematic.

b. Limitations of the doctrine of residual jurisdiction

Professor William Charles argues that inherent/ residual jurisdiction is limitable. He contends that a court's resort to its inherent jurisdiction must be employed within a framework of principles relevant to the matter in issue. According to him, inherent jurisdiction is primarily a procedural concept and courts should not invoke it to make changes in substantive law because it cannot be exercised to conflict with an existing rule/law.⁸¹ Furthermore, he argues that residual jurisdiction does not empower a judge to make an order negating the unambiguous expression of legislative will.⁸²

Similarly, Ferrere argues that inherent jurisdiction is inapplicable to appeals. He posits that, appeals do not involve the inherent jurisdiction of the court at all, but rather arise where the legislature has specifically granted jurisdiction to the

⁷⁹ (2002), The Court of Appeal of the United Kingdom.

⁸⁰ (2014) eKLR.

⁸¹ William C, 'Inherent jurisdiction and its application by Nova Scotia Courts: Metaphysical, historical or pragmatic' 33(2) *Dalhousie Law Journal*, 2010, 89, 97.

⁸² *Baxter Student Housing Ltd v College Housing Co-operative (1975)*, The Supreme Court of Canada.

court to review a decision of a tribunal. Invoking such jurisdiction undermines and is against legislative intent. According to him, '*establishing powers of inherent jurisdiction in a statutory appellate contest is conceptual confusion*'.⁸³

Another scholar, Yihan, has developed a three-stage criteria to determine when a court can and should invoke its inherent jurisdiction. He states that the courts should ask themselves three questions:

- i) Whether there is an express legislative exclusion of the jurisdiction.
- ii) If not, whether legislative exclusion can be implied.
- iii) Whether there is sufficient need to exercise jurisdiction.⁸⁴

In the first case, where there is an express exclusion of the court's exercise of jurisdiction or power, there is no scope for exercise of jurisdiction. This is based on the sovereignty of parliament in making law leaving the courts with a duty to apply the legislation. If there is no express prohibition, the second question to ask is whether parliament has impliedly excluded the court's inherent jurisdiction or power in the matter concerned. According to Yihan, exclusion can be discerned by implication from the text by reading the statute as a whole. Additionally, he observes that where the jurisdiction or power of the courts originates from statute, such jurisdiction or power has to be exercised within the ambit of legislative intent.⁸⁵ Furthermore, he states that where parliament has not spoken about the court's jurisdiction, its silence is more likely to be interpreted as an implied exclusion.⁸⁶

⁸³ Ferrere M, 'The inherent jurisdiction and its limits' 13(1) *Otago Law Review*, 2013, 123. See also, *National Union of Metal Workers of South Africa v Fry's Metal (Pty) Ltd* (2005), the Supreme Court of Appeal of South Africa which held that a court cannot use inherent jurisdiction and power to assume jurisdiction that it does not otherwise have.

⁸⁴ Yihan G, 'The inherent jurisdiction and inherent powers of the Singapore Courts: Rethinking the limits of their exercise' *Singapore Journal of Legal Studies*, 2011, 201-209.

⁸⁵ Yihan G, 'The inherent jurisdiction and inherent powers of the Singapore Courts' 204. Pinsler also argues that whether the court exercises its inherent relation to the procedure prescribed by statute depends on the interpretation of the relevant positions and the legislative intention in Pinsler J, 'The inherent powers of the court' 1(1) *Singapore Journal of Legal Studies*, 1997, 33. See also, *Universal City Studios and Others v Video (Pty) Ltd Network* cited with approval Yihan's works and held that a court does not have an inherent power to create substantive law. In *Moch v Nedtravel (Pty) Ltd American Travel Express Service* (1996), the South African Court of Appeal declined to entertain under its inherent jurisdiction an appeal against an order that was not otherwise appealable. It held that inherent jurisdiction does not extend to the assumption of jurisdiction not conferred upon by statute.

⁸⁶ Yihan G, 'The inherent jurisdiction and inherent powers of the Singapore Courts' 206. See also Ananis-Welsh R, 'The inherent jurisdiction of courts and the fair trial' 41(4) *Sydney Law Review*, 2019, 428. She argues that inherent jurisdiction is limited in the scope of the underlying statute. Additionally, she posits that such jurisdiction is susceptible to either express or implied statutory curtailment.

Applying Yihan's criteria to the Supreme Court decision, Section 10 of the Act provides that courts shall only intervene where authorised by the Act. Section 35 provides for the setting aside of an arbitral award. However, it is silent about the question of whether High Court decisions on setting aside an arbitral award are appealable. Using Yihan's test, Section 35 does not expressly exclude the inherent jurisdiction of the Court of Appeal to hear appeals from the High Court. This being the case, we ask ourselves the question of whether legislative intent can be implied from this section. The answer is yes; implied exclusion can be inferred for three reasons. First, inherent jurisdiction cannot be invoked to substitute an existing rule that the right to appeal is granted by statute and not merely assumed.⁸⁷ Second, a contextual interpretation of all provisions of the Act shows that one of its overarching threads is limited court intervention and ensuring quick resolution of disputes. Under Section 10 of the Act, courts only intervene where authorised by the Act.

The import of Section 10 is that the Act defines the scope of court jurisdiction in arbitration matters. The Hansard of the National Assembly during the debate about the Act indicates that the strict time limits and finality of the High Court decisions were to ensure that neither party frustrates the arbitration process. Furthermore, it was stated that the limited court interference was to ensure an efficient resolution of commercial disputes.⁸⁸ It follows that the jurisdiction of the courts in this regard is statutory. Subsequently, such jurisdiction should be exercised in a manner that conforms to the legislative intent of the whole Act. Parliament aimed at limiting court intervention and ensuring quick resolution of commercial disputes by reducing the fora of appealing arbitral awards.⁸⁹

As a result, the court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the court under the Constitution or by statute. In *Apa Insurance Company v Vincent Nthuka*, it was held that, '*where the court has been deprived of jurisdiction, it will not draw upon its reserve under the inherent jurisdiction to confer upon itself such non-existent jurisdiction (emphasis mine)*'.⁹⁰ This paper argues that the Court of Appeal was deprived of jurisdiction under Section 35 of the Act and therefore it cannot confer upon itself the jurisdiction to hear appeals under the said section.

⁸⁷ *South African Broadcasting Corporation Ltd v National Director of Public Prosecutions* (2006), The Constitutional Court of South Africa. The court found that the exercise of inherent jurisdiction to create new rights would open the door to uncertainty and potential chaos.

⁸⁸ National Assembly Hansard Report, 27 July 1995, 1759.

⁸⁹ Section 10, *Arbitration Act* (Act No 4 of 1995). See also National Assembly Hansard Report, 27 July 1995, 1759.

⁹⁰ *Apa Insurance Company v Vincent Nthuka* (2018) eKLR.

With due respect, the Supreme Court should not have invoked the inherent jurisdiction of the Court of Appeal in setting aside an award, yet there is an express provision that the right to appeal must be granted by law. The Court of Appeal's jurisdiction in arbitration matters is set out only in Section 39 of the Act and not under Section 35. Even then, the intervention by the courts is predicated upon agreement by the parties before the delivery of the arbitral award.⁹¹

c. Regional decisions on the doctrine of the residual jurisdiction

It is important to look at how other courts have outlined the limits of residual or inherent jurisdiction. In the case of *Baku Raphael v Attorney General*, the Supreme Court of Uganda held that a right of appeal is a creature of statute and that there is no such thing as inherent appellant jurisdiction. It further emphasised that appellate jurisdiction must be specifically provided under law.⁹² Similarly, in the case of *R v High Court (General Jurisdiction) Accra, Ex parte Magna International Transport Limited*, the Supreme Court of Ghana held that where there is a clear statutory provision that conflicts with the court's inherent jurisdiction, the statute law will prevail.⁹³ Lastly, in *Moch v Nedtravel (Pty) Ltd American Travel Express Service*, the South African Court of Appeal declined to entertain under its inherent jurisdiction an appeal against an order that was not otherwise appealable. It held that inherent jurisdiction does not extend to the assumption of jurisdiction not conferred upon by statute.⁹⁴

IV. Implications of the Decision Nationally and Internationally

i. *The Nyutu Agrovet v Airtel Networks arbitral award*

The Supreme Court set aside the Court of Appeal decision and re-instated the Civil Appeal No. 61 of 2012, *Nyutu Agrovet v Airtel Networks Limited* in the Court of Appeal. This order has implications on the finality of the arbitral award in *Nyutu Agrovet v Airtel Networks Limited*. This is because there is a shortage of judges in the Court of Appeal since the President has not yet appointed new judges.⁹⁵ The Nyutu decision was heard by a bench of 5 judges at the Court of

⁹¹ Section 39, *Arbitration Act (Act No 4 of 1995)*.

⁹² (2015), The Supreme Court of Uganda.

⁹³ (2018), The Supreme Court of Ghana.

⁹⁴ (1996), The South African Court of Appeal.

⁹⁵ Kwamboka E, 'How President Uhuru's failure to appoint judges is hurting courts' Standard Newspaper, 4 January 2020, <https://www.standardmedia.co.ke/nairobi/article/2001355264/judges-stalemate-leaves-courts-staring-at-a-crisis> on 22 January 2021. The High Court in *Adrian Kamonho v Attorney General (2020)* eKLR ordered the President to appoint orders but as of January 2021, this has not been done.

Appeal which unanimously held that the Court of Appeal lacked jurisdiction. The leave to the Supreme Court was heard by 3 other different judges. This shows that already 8 judges may not resit in the matter because of their earlier positions. This means that the parties will have to wait for another year or two until this matter is resolved, hence delaying the outcome.⁹⁶

ii. *Nairobi as a safe arbitration seat*

It is debatable whether Nairobi is a safe arbitration seat following the Supreme Court decision.⁹⁷ The Queen's University of London is famous for carrying out international arbitration surveys. In its 2018 survey, 97 percent of the respondents indicated that enforceability of awards continued to be the most valuable characteristic of arbitration. The survey reported that the five most preferred seats are London, Paris, Singapore, Hong Kong, and Geneva. Preference for a given seat is primarily determined by its general reputation and recognition. This is followed by the user's perception of its formal legal infrastructure, neutrality, and impartiality of the legal system, the national arbitration laws, and its track record in enforcing agreements and arbitral awards.⁹⁸

In the 2019 survey, the ability of courts to support the arbitration process is very vital for a place to be considered a safe arbitration seat. 66 percent of the respondents identified that limited court intervention denoted efficiency.⁹⁹ Other characteristics of a safe arbitration seat include reduced grounds of review, the ability to waive all review advances, and arbitral matters appear before a specialised court. All these factors show that investors may reconsider their decision to choose Nairobi as a seat of arbitration because of the expanded court intervention under Section 35 on setting aside arbitral awards.

V. **Towards a Better Interpretation of Section 35 of the Act**

The previous sections have identified the loopholes in the decision of the Supreme Court as well as the gaps in the Act. The discussions and analysis in

⁹⁶ William Mutubwa, 'The CI Arb Debate, Arbitration Act Section 35: Interpretation, ADR Practice and the Supreme Court decision in Nyutu Agrovet v Airtel' at Fairview Hotel, Nairobi, 13 February 2020.

⁹⁷ The seat of arbitration must be a city and not a country. See Fry J, Greenberg S, and Mazza F, '*Secretariat's Guide to ICC Arbitration, International Chamber of Commerce*, Paris, 2012, 44 and 59.

⁹⁸ Queen Mary University of London, *International Arbitration Survey*, 2018, 2.

⁹⁹ Queen Mary University of London, *International Arbitration Survey-Driving Efficiency in International Construction Dispute*, 2019.

the said sections faulted the interpretation of Section 35 by the Supreme Court which allowed appeals on decisions of the High Court on setting aside arbitral awards. This section proposes better approaches that should be adopted in the interpretation of Section 35 of the Act on setting aside arbitral awards.

i. Interpretation based on Article 159 of the Constitution

The Constitution provides that one of the guiding principles in exercising judicial authority is ADR which includes reconciliation, mediation, arbitration, and traditional dispute resolution mechanism. Courts must be guided by ADR.¹⁰⁰ ADR mechanisms, including arbitration, are central to the realisation of access to justice given the increased backlog of cases.¹⁰¹

The constitutional mandate of promoting ADR mechanisms is imperative and therefore, courts must support, rather than cripple the realisation of such mechanisms.¹⁰² In *TSJ v SHSR*, the Court of Appeal held that courts are commanded by Article 159(2) of the Constitution to promote arbitration and other dispute resolution mechanisms when exercising judicial authority.¹⁰³ Moreover, courts have relied on this constitutional mandate to allow the applicability of Traditional Dispute Resolution Mechanisms in criminal cases.¹⁰⁴

The Constitution provides for arbitration as an ADR mechanism which implies that it is entrenched with its tenets.¹⁰⁵ One of the core tenets of arbitration is limited court intervention, a feature which gives arbitration an advantage over litigation. This tenet does not contradict the Constitution by failing to provide for appellate intervention on decisions of the High Court on setting aside arbitral awards. On the contrary, it seeks to sustain one of its core features –finality of an arbitral award. It follows that the Supreme Court of Kenya ought to have obeyed their constitutional mandate of promoting arbitration. This requires respecting the core tenets of arbitration since allowing appeals on decisions of the High Court on setting aside arbitral awards defeats the tenets of finality of awards and limited court intervention.

¹⁰⁰ Article 159(2), *Constitution of Kenya* (2010).

¹⁰¹ Wabuke E, 'Enhancing access to justice: The imperative of adopting the alternative dispute resolution approach' 3(1) *Alternative Dispute Resolution*, 2015, 216-217.

¹⁰² Kariuki F, 'Redefining arbitrability: Assessment of Articles 159 and 189 (4) of the Constitution of Kenya' 1(1) *Alternative Dispute Resolution*, 2013, 183.

¹⁰³ (2019) eKLR.

¹⁰⁴ *R v Mohamed Abdow Mohamed* (2013) eKLR.

¹⁰⁵ *Nyutu Agrovet v Airtel Networks*, para 100 (Minority Judgement of Justice Maraga).

ii. *Interpretation based on the doctrine of constitutional avoidance*

The Interested Party, the CIArb, raised an argument that since arbitral awards are being set aside on grounds that they do not comply with constitutional principles, appeals should lie under Section 35 of the Act. The Supreme Court was persuaded by that argument and observed that where an award is set aside on constitutional grounds, then it is one of the grounds in which an appeal lies against the decision of the High Court on setting aside an arbitral award.¹⁰⁶ This paper advances that Kenyan courts should be guided by the doctrine of constitutional avoidance.

The doctrine of constitutional avoidance dictates that courts should not determine a constitutional issue when a matter may properly be decided on another basis.¹⁰⁷ The doctrine originated from the Supreme Court of the United States of America (USA) in 1936.¹⁰⁸ In *Ashwander v Tennessee Valley Authority*, the Supreme Court of the USA held that it would not decide a constitutional issue properly before it, if there was also another basis upon which the case could be decided.¹⁰⁹ The court further laid down rules that should guide courts. First, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the court will decide on the latter.¹¹⁰ Second, the court will not formulate a rule of constitutional law broader than is required by the facts to which it is to be applied.¹¹¹ Third, the court will not anticipate a question of constitutional law in advance of the necessity of deciding it. This is because it is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to the decision of the case.¹¹²

The above rules of constitutional avoidance have been upheld by the Supreme Court of Kenya in *Communications Commission of Kenya v Royal Media Services*.¹¹³ Therefore, the rules bind lower courts, including the High Court which

¹⁰⁶ *Nyutu Agrovet v Airtel Networks*, para 75.

¹⁰⁷ Minority Opinion of Kentridge JA in *S v Mhlungu* (1995), The Constitutional Court of South Africa, para 59.

¹⁰⁸ Fish E, 'Constitutional avoidance as interpretation and as a remedy'¹¹⁴(7) Michigan Law Review,2016,1282.

¹⁰⁹ (1936), The Supreme Court of the United States of America.

¹¹⁰ *Ashwander v Tennessee Valley Authority* (1936), The Supreme Court of the United States of America, para 69.

¹¹¹ *Ashwander v Tennessee Valley Authority* (1936), The Supreme Court of the United States of America, para 68.

¹¹² *Ashwander v Tennessee Valley Authority* (1936), The Supreme Court of the United States of America, para 67.

¹¹³ *Communications Commission of Kenya v Royal Media Services* (2014) eKLR. See also *Jorum Kabiru Mwangi*

deals with applications of setting aside arbitral awards. Applying the doctrine of constitutional avoidance, the High Court should not be quick to set aside an arbitral award on constitutional grounds when the said award can be rectified by remitting it to the tribunal or be set aside under the grounds in the Act. Moreover, the High Court should stay within the grounds provided under the Act on setting aside an arbitral award. This way, arbitral awards will be protected from appeals on High Court decisions on setting aside since they are not set aside on constitutional grounds.

iii. *Interpretation based on internationally recognised arbitration principles*

a. Party autonomy

Arbitration is based on the respect of private arrangements; people are free to arrange their private affairs as they see fit provided that they do not offend public policy or mandatory law.¹¹⁴

The principle of party autonomy offers a degree of psychological satisfaction to the parties in that they may have chosen the best arbitrators, the form, forum of arbitration, and the governing law. It provides aspirations that their arbitration will proceed according to their wishes.¹¹⁵ In turn, this makes the process more certain, predictable, and uniform thus enabling parties to prepare their argumentations and predict the outcome of the dispute.¹¹⁶ Where party autonomy is balanced with other foundational concepts including the right to be heard, the principle of equal treatment; the resultant award should be upheld.¹¹⁷

Section 35 of the Act should be interpreted by giving effect to the principle of party autonomy. This is because parties voluntarily choose arbitration as their preferred method of dispute resolution. Parties who choose to be governed by the Act anticipate that the arbitral award will not be affected by unexpected decisions of the arbitrators and courts.¹¹⁸ Interpreting Section 35 to permit

v Co-operative Bank of Kenya (2016) eKLR. The High Court held that the doctrine of constitutional avoidance is alive in the Kenyan legal system.

¹¹⁴ Williams D, 'Balancing party autonomy' in Kaplan N and Moser M (eds) *Jurisdiction, admissibility, and choice of law in international arbitration*, Kluwer Law International, Alphen aan den Rijn, 2018, 88.

¹¹⁵ Chatterjee C, 'The Reality of the Party Autonomy Rule in International Arbitration' 20(6) *Journal of International Arbitration*, 2009, 551.

¹¹⁶ Mourre Alexis and Brozolo L, 'Towards finality of arbitral awards: Two steps forward and one step back' 27(1) *Arbitration International*, 2011, 15.

¹¹⁷ Williams D, 'Balancing party autonomy' 88.

¹¹⁸ Lew MD and Mistelis L, *Comparative International Arbitration*, 415.

appeals on the decision of the High Court on setting aside arbitral awards is contrary to the legitimate expectation of parties that their choice of the mode of dispute of resolution and governing law will be respected. Moreover, it brings about uncertainty and unpredictability.¹¹⁹ This is because parties rarely anticipate that decisions on setting aside will be appealed against since the provision does not state whether decisions of the High Court on setting aside arbitral awards are appealable. However, appeals did occur but on rare occasions.

b. The finality of an arbitral award

Arbitration is chosen freely by parties when they incorporate an arbitration agreement into their contract, and at times even include the finality clause. When they do so, they send the message that they do not wish to be subjected to the long, tedious, expensive, and sometimes inconvenient journey that commercial litigation entails. They want the resultant award to be final and binding.¹²⁰

The finality of an arbitral award is discernible at two levels: namely, finality which implies that no right of appeal lies, and finality on the merits of an arbitral award.¹²¹ By choosing arbitration, parties have waived their right to appeal in favour of the speedy and efficient dispute resolution method. The principle of finality of arbitral awards is supported by the principle of *dubio pro validate* which implies that national courts in uncertain cases should uphold awards instead of setting them aside.¹²²

Although the principle of finality implies that arbitral awards cannot be challenged on substantive grounds, there are procedural grounds upon which awards could be challenged to ensure minimum standards of objectivity, fairness, and justice.¹²³ In *Hall Street Associates v Mattel Inc*, the Supreme Court of the USA struck out an arbitration agreement that allowed courts to overturn an arbitration award which contained legal errors or factual findings that were not supported by ‘substantial evidence’. The court held that enhanced court review of arbitration awards opens the door to the full-bore evidentiary appeals that render arbitration merely a prelude to a more cumbersome and time-consuming judicial review

¹¹⁹ Mutubwa W, ‘Consistency and predictability versus finality under the Kenyan Arbitration Act’ 83(3) *The International Journal of Arbitration, Mediation, and Dispute Management*, 2017, 303.

¹²⁰ *Anne Mumbi Hinga v Victoria Njoki Gatbara* (2009) eKLR.

¹²¹ Mutubwa W, ‘Consistency and predictability versus finality under the Kenyan Arbitration Act’ 306.

¹²² Hakansson E, ‘Arbitrator’s application of the wrong substantive law– A ground for challenge?’ Unpublished Master’s Thesis in Arbitration, Department of Law, Uppsala Universitete, 2013, 22.

¹²³ Hakansson E, ‘Arbitrator’s application of the wrong substantive law– A ground for challenge?’ 21.

process.¹²⁴ Other courts all over the world have upheld the finality of award. In *AJU v AJT*, the Court of Appeal of Singapore held that even if an arbitral tribunal's findings of law and /or fact are wrong, they are binding on the parties and may not be set aside or appealed against except in situations provided under the International Arbitration Act of Singapore.¹²⁵

For many business users of international arbitration, justice delayed is justice denied. The core value of expeditious dispute resolution would be undermined if national courts were to re-examine the arbitrator's decision on the merits.¹²⁶ It follows that interpreting Section 35 of the Act to allow appeals lengthens the arbitral process and defeats the finality of the outcome.

c. Limited court intervention

The law of arbitration admits the notion that the role of the court in arbitration is inevitable and almost universally provides for it. This was emphasised by Lord Mustill in *Coppee-Lavin NV v Ken-Ren Chemicals and Fertilisers Limited*:

'Whatever view is taken regarding the correct balance of the relationship between international arbitration and national court, it is impossible to doubt that at least in some instances the intervention of the court may not only be permissible but highly beneficial'.¹²⁷

Importantly, the law of arbitration also appreciates the need to limit court intervention in arbitration to a basic minimum.¹²⁸ Courts should supervise with a light touch but assist with a strong hand.¹²⁹ The UNCITRAL Model Law limits the scope of the role of the court in arbitration only to situations that are contemplated thereunder. This provision is to the extent that except where the law specifically provides for court intervention, the court has no recognised basis for intervening in the arbitration process.¹³⁰ The provision of the UNCITRAL

¹²⁴ *Hall Street Associates v Mattel Inc* (2008), The Supreme Court of the United States of America.

¹²⁵ *Hall Street Associates v Mattel Inc* (2011), The Court of Appeal of Singapore. Article 24 of the *International Arbitration Act* of Singapore provides for grounds that warrant setting aside arbitral awards.

¹²⁶ Helmut O and Schuch Y, 'The award and the courts: How to apply the applicable law in International Arbitration' *Austrain Yearbook on International Arbitration*, 2017, 207.

¹²⁷ *Coppee-Lavin NV v Ken-Ren Chemicals and Fertilisers Limited* (1994), The High Court of England and Wales.

¹²⁸ Abwuor J, 'Role of courts in arbitration: A critical analysis of the Kenyan Arbitration Act No.4 of 1995' Unpublished LLM Thesis, University of Nairobi, 2012, 13.

¹²⁹ Hwang M, 'Commercial courts in international arbitration– Competitors or partners? 31(193) *Arbitration International*, 194.

¹³⁰ Abwuor J, 'Role of courts in arbitration: A critical analysis of the Kenyan Arbitration Act No.4 of 1995' 13.

Model Law limiting court intervention is reflected in the Act which provides that, ‘*Except as otherwise provided in the Act, no court shall intervene in matters governed by the Act.*’¹³¹

Other courts have discouraged intervention which is not provided for in arbitration legislations. In *Sob Beng Tee & Co Pte Ltd v Fairmount Development Limited*, the Court of Appeal of Singapore held that aggressive judicial intervention can only result in the prolonging of the arbitral process and encourage myriad unmeritorious challenges to arbitral awards. Left unchecked, an interventionist approach can lead to indeterminate challenges and cause indeterminate costs to be incurred thus leading to indeterminate delays.¹³²

The Singaporean Court of Appeal further recognised that in dealing with claims of breach of natural justice in arbitral awards, the threshold is high. A party challenging an arbitral award on breach of natural justice must establish (i) which rule of natural justice was being breached, (ii) how it was breached, (iii) in what way the breach is connected to the arbitral award, and (iv) how the breach prejudiced its rights. It is not enough for a party to allege that there was a breach of natural justice; they must show how it prejudiced their rights and how it affected the outcome of the case.¹³³

VI. Conclusion

Some judges have continued to support arbitration while others have interpreted several constitutional provisions in a manner that has a potential negative effect on the practice of arbitration.¹³⁴ Consequently, the gains of arbitration are undermined if judges without the requisite specialised knowledge of arbitration decide on the matters. The former Chief Justice of India, YK Sabharwal, remarked that ‘*we are final not necessarily because we are always right - no institution is infallible - but because we are final.*’ In these remarks, he admitted that even the highest court can be wrong. But because it is final, its decisions bind lower courts.

The Supreme Court reasoning in *Nyutu Agrovet v Airtel Networks* proves that this court is arguably fallible. The paper has shown that the decision is bad

¹³¹ Section 10, Arbitration Act (Act No 4 of 1995).

¹³² *Sob Beng Tee & Co Pte Ltd v Fairmount Development Limited* (2007), The Court of Appeal of Singapore.

¹³³ *Sob Beng Tee and Co Pte Ltd v Fairmount Development Limited* (2007), The Court of Appeal of Singapore.

¹³⁴ Karoni K and Melly K, ‘Attitude of Kenyan Courts towards arbitration’ in Onyeme E (eds), *Rethinking the role of African National Courts in arbitration*, Kluwer Law International, Alphen aan den Rijn, 2018, 360.

law and has adverse effects on arbitration practice. Accordingly, in addition to better approaches of interpreting Section 35, this paper makes the following recommendations.

First, the Respondent (Airtel Networks) or the Interested Party (the CIARB) may apply to the Supreme Court to review its decision. The Supreme Court Rules permit the Supreme Court to review any of its decisions which it considers meritorious, exceptional, and in the public interest. The Supreme Court can review a decision on its own motion or upon application by a party.¹³⁵ The decision in *Nyutu Agrovet v Airtel Networks* is reviewable because it abrogates the practice of arbitration and the internationally recognised arbitration principles as illustrated by this paper. Given its grave impact on arbitration practice, it is meritorious, exceptional, and in the public interest to review the decision.

Second, there should be regular training of judges and their administrative staff in arbitration law and process. This will equip them with the knowledge and understanding of the arbitral process and the respect of arbitration principles like party autonomy, limited court intervention, and finality of arbitral awards. Also, there should be sessions where Kenyan judges benchmark and interact with judges from best practice jurisdictions. This will equip them with practical experiences from other judges on how to promote arbitration and safeguard its principles while achieving justice.¹³⁶

Third, arbitration institutions and organisations should set out specifically and stringently a fit for purpose criteria and credentials to guide the appointment of a suitable arbitrator for a particular dispute. In addition, there should be regular training and re-training of arbitrators to enable them to appreciate due process requirements and understanding internationally recognised arbitration principles. This will enable them to resolve disputes between parties while taking into account the rules of the natural justice as well as using their powers in accordance with the Act. Consequently, there will be reduced applications of setting aside arbitral awards to the High Court.

Furthermore, there should be specialised training of arbitrators, for example, training arbitrators in investment and energy disputes, and training of arbitrators in family disputes. This will ensure that arbitrators who are appointed, are experts in the specific fields thus promoting party satisfaction with the resultant award.¹³⁷

¹³⁵ Rule 28(5), *Supreme Court Rules* (No 6 of 2020). According to Rule 2, the party includes a petitioner, respondent, or an interested party.

¹³⁶ Torgbor E, Overview of the disposition of courts towards arbitration in Africa, 42.

¹³⁷ Torgbor E, Overview of the disposition of courts towards arbitration in Africa, 62.

Lastly, as the Supreme Court noted, there is a need for Parliament to come up with a leave mechanism outlining the exceptional circumstances that may warrant appeals under Section 35.¹³⁸ Moreover, there should be amendments to the whole Act to bring it in conformity with the Constitution. This will minimise instances of attacking arbitral awards and the arbitral process on grounds that they do not conform to the Constitution.¹³⁹

¹³⁸ *Nyutu Agrovet Limited v Airtel Network Kenya Limited* (2019) eKLR, para 87.

¹³⁹ Torgbor E, 'A comparative study of law and practice of arbitration in Kenya, Nigeria and Zimbabwe with particular reference to current problems in Kenya' Unpublished LLD Thesis, University of Stellenbosch, 2013, 106.