
Case Alert - Civil Appeal No. E620 of 2022 SBM Bank (Kenya) Limited v Afrasia Bank Limited [2025] KECA 386 (KLR) (28 February 2025) (Judgment)

Key Point

The Court of Appeal has clarified a crucial issue in arbitration law. The Courts have recently held that leave to appeal is required when challenging a decision of the High Court setting aside an award under Section 35 of the Arbitration Act. It has been an open question as to whether leave should be granted by the High Court or the Court of Appeal. The Court has conclusively determined that such leave can only be granted by the Court of Appeal.

Background Facts

The facts are straightforward and of general interest to litigation and banking lawyers.

Afrasia Bank had deposited a sum of **USD 7,500,000.00** in a fixed deposit with Chase Bank to be repaid a month later. 10 days before the payment, Chase Bank was placed under receivership and its assets acquired by SBM Bank.

Afrasia sued SBM for repayment of this amount. The dispute was referred to arbitration with the consent of the parties. Afrasia claim was that following the acquisition, SBM was required to publish a notice pursuant to the Transfer of Business Act stating, *inter alia*, whether it was assuming all of Chase Bank's liabilities. The effect of failure to publish this notice was that SBM was automatically liable for all of Chase Bank's liabilities. SBM argued that it was only required to issue a notice under the Kenya Deposit Insurance

Corporation Act, which it did. It therefore denied liability.

The arbitrator agreed with SBM and dismissed the claim. Afrasia challenged the award both under Section 35 and Section 39 of the Arbitration Act. Section 39 allows parties to agree to appeal the final award to the High Court.

Decision in the High Court

The High Court agreed with Afrasia and set aside the award. The Court found that the Transfer of Business Act applies to banking transactions as well as to other transfers of businesses. The Court held that excluding the application of the act "*would create room for businesses, especially banks, to engage in opaque transfers to the detriment of their customers.*" On this basis, the Court found that the award was wrong in law and against public policy. It held that SBM's failure to publish the requisite notice under the Transfer of Business Act rendered it liable for all of Chase Bank's liabilities. The Court therefore set aside the arbitral award and entered judgment for Afrasia. The High Court also granted leave to appeal this decision upon an informal application made by SBM.

Decision in the Court of Appeal

The Court of Appeal first considered whether the leave granted was effective. The Court conclusively held that the forum to seek leave is before the Court of Appeal, not the High Court. Accordingly, it concluded

that it was *“beyond peradventure that the leave granted by the High Court is a nullity.”*

The Court further held that its jurisdiction to consider a second appeal from an arbitral decision has to be agreed between the parties, or leave is sought and granted by the Court of Appeal.

The Court appreciated that the substantive issue on the appeal was a critical one for banking law. It involves the question of whether the provisions of the Transfer of Business Act apply to the disposal and transfer of assets and liabilities from a bank in receivership to another Bank implemented pursuant to the provisions of the Kenya Deposit Insurance Corporation Act. The Court therefore left open the possibility of further proceedings on this issue.

Comment

The Court of Appeal decision is welcomed as it clarifies the procedure for challenging arbitral awards. It reinforces the finality of arbitral awards by limiting the jurisdiction of the High Court in granting peremptory leave to appeal such decisions. This ensures commercial predictability which is fundamental to contracting parties. It also clarifies the extent of party autonomy in agreements to appeal awards to the High Court and Court of Appeal.

The case emphasises the need for parties to clearly draft their arbitration agreements and provide for 2 levels of appeal where the Courts' input on an arbitral award is considered desirable.

If you have any questions arising from this article, you can contact our dispute resolution department.



Victor Njenga, Partner

VNjenga@kapstrat.com