REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

MISC. APPL. NO. E054 OF 2020

IN THE MATTER OF SECTION 7(1) AND 10

OF THE ARBITRATION ACT, 1995

BETWEEN

LIAISON GROUP (INSURANCE BROKERS) LIMITED .....APPLICANT

AND

CMC HOLDINGS LIMITED.....RESPONDENT

AND

COMPLETE SOLUTIONS INSURANCE BROKERS LIMITED.....INTERESTED PARTY

RULING

1. The applicant has moved this court by a Notice of Motion dated 7th February 2020 made under **sections 7(1)** and **10** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking the following main reliefs:

> *iii. Pending hearing and determination of the dispute between the Applicant and the Respondent herein by Arbitration, an injunction do issue restraining the defendant, whether by himself, his employees, servants or agents or otherwise howsoever from conducting any business pertaining to the General Insurance Covers, Insurance Services and or Insurance Brokerage Services with the Interested Party, its partners, employees, servants or agents or otherwise howsoever.*
>
> *iv. Pending the hearing and determination of the dispute between the Applicant and the Respondent herein by Arbitration, an order be issued in favour of the Applicant for its renewal proposal served to the Respondent on December 10, 2019, and revised on December 11, 2019, to be operational as the renewal of the Contract as intimated by the Respondent in November 23, 2019.*

2. The application is supported by the affidavit of Moses Mathini, Legal Counsel for the applicant, sworn on 7th February 2020. It is opposed by respondent through the replying affidavit of Paul Chege, its chief accountant, sworn on 17th February 2020.

3. The basic facts from the depositions are that the applicant and respondent entered into a contract dated 1st January 2017 in which the applicant appointed its broker for various insurance services. The contract was effective for 3 years from 1st January 2017, renewable thereafter upon satisfactory performance but terminable by either party on certain terms. At any rate, Clause 16 provided that any dispute between the parties would be settled by a single arbitrator appointed by the Chairman of the Institute of Chartered Arbitrators (Kenya Chapter). That a dispute has arisen under the contract is not contested.

4. What is in issue is whether I should grant an interim measure of protection under **section 7(1)** of the ***Act***. The parties made oral arguments which supplemented written submissions. However, in its submissions, counsel for the respondent raised an important point of procedure which is a preliminary point which I am obliged to consider and determine. It is that the Notice of Motion is fatally and incurable defective as it is not anchored on a suit contrary to **section 7** of the ***Act*** and **Rule 2** of the ***Arbitration Rules, 1997*** ("the ***Rules***"). **Rule 2** states as follows:

Applications under section 6 and 7 of the Act shall be made by summons in the suit. [Emphasis mine]

5. The respondent relied on the Court of Appeal decision in ***Scope Telemantics International Sales Limited v Stoic Company Limited*** **NRB CA Civil Appeal No. 285 of 2015 [2017] eKLR** where it considered the import of **rule 2** of the ***Rules*** and held that compliance with the rule was mandatory. It stated as follows:

> *It must be borne in mind that the substantive provision that the 1st respondent invoked was Section 7 of the Act. The 1st respondent was seeing (sic) an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by Rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or Statute, that procedure should be strictly followed (See Speaker of National Assembly vs. Njenga Karume [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of the Constitution for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to procedure (See Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Ors [2010] eKLR; Dishon Ochieng v SDA Church, Kodiaga (2012) eKLR; Hunter Trading Company Ltd v Elf Oil Kenya Limited, Civil Application No. NAI. 6 of 2010). Despite the foregoing, the court still went ahead to exercise its discretion in favour of the 1st respondent by invoking that Article, the overriding objective under the Civil Procedure Act, and the interests of justice, to hold that failure to anchor the application on a suit did not render the application fatal or incurably bad. The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.* [Emphasis mine]

6. The same position was adopted in ***Tyl Limited v China National Aero-Technology International Engineering Corporation*** **ML HC Misc. Appl. No. E110 of 2019 [2019] eKLR** and ***Civicon Limited v Fuji Electic Company Limited and Another*** **ML HC Arb. Cause No. 002 of 2020 [2020] eKLR**. In the former case, Nzioka J., gave three reasons why the filing of a suit was necessary; for the court to appreciate the nature of the pleadings to inform it whether or not to grant the interim measures of protection, to give a footing to the application and if the interim measures of protection are not granted, inter alia, on the ground that, there is no arbitral clause, then the matter can be determined in court.

7. **Rule 2** of the ***Rules*** is couched in mandatory terms and it is not disputed that the Notice of Motion filed in this matter is not anchored in any suit hence the application is incompetent. Since I am bound by the ***Scope Telemantics Case*** **(Supra)** on the interpretation of **rule 2** of the ***Rules***, I find and hold that the motion is incompetent and fatally defective. I do not consider it necessary to delve into whether I should grant interim measures of protection.

8. I strike out the Notice of Motion dated 7th February 2020 with costs to the respondent and interested party.

DATED and **DELIVERED** at **NAIROBI** this **25th** day of **FEBRUARY** 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Mr Ong'aya instructed by Ong'aya Ombo Advocates for the applicant.

Mr Owiti instructed by Hamilton, Harrison and Mathews for the respondent.

Mr Kiplagat instructed by Munene Wambugu and Kiplagat Advocates for the interested party.