REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

MISCELLANEOUS APPLICATION NO. E 128 OF 2020

COLNET LIMITED..... APPLICANT

VERSUS

KENYA AIRPORTS AUTHORITY..... RESPONDENT

RULING

1. These proceedings come to an abrupt end for infringing the provisions of Rule 2 of the Arbitration Rules 1997 which reads:-

> **"Applications under sections 6 and 7 of the Act shall be made by summons in the suit."**

2. The Applicant commenced this matter through the Notice of Motion dated 30th April 2020 and no suit has been filed.

3. The end of the matter comes about in view of the binding decision of the Court of Appeal in **Scope Telematics International Sales Limited v Stoic Company Limited & Another [2017] eKLR** in which it stated:-

> **"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 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."

4. This Court has no choice but to strike out the Notice of Motion dated 30th April 2020, as it hereby does, with costs to the Respondent.

Dated, Signed and Delivered in Court at Nairobi this 21ST Day of September 2020

F. TUIYOTT JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

Ms Sirma holding brief for Musundi for the Applicant.

Botany for the Respondent.