REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

MISC. APPLICATION NO. E110 OF 2019

TYL LIMITED.....APPLICANT

VERSUS

CHINA NATIONAL AERO-TECHNOLOGY

INTERNATIONAL ENGINEERING CORPORATION.....RESPONDENT

RULING

1. The subject of this ruling is a preliminary objection dated 24th April 2019. It is based on the grounds set out as follows;

> *(a) That the application filed herein dated 15th April 2019 is fatally and incurably defective, hopelessly incompetent, frivolous, mischievous and an abuse of the court process, the same having been filed in contravention of the Arbitration Act and the Rules, particularly Rule 2 thereof and having been made in vacuum without any substantive prayer upon which the application and/or the orders could be founded;*
>
> *(b) That the continued pendency of the application dated 15th April 2019 is an abuse of the process of the Honourable court;*
>
> *(c) That the application is incompetently before the court for lack of substantive suit before court and should be dismissed in limine.*

2. The Respondent to the application argues that, Rule 2 of the Arbitration Rules 1997 requires that application under Sections 6 and 7 of the Arbitration Act 1995 (herein "the Act") be made by summons in the suit. That, these provisions are couched in mandatory terms. As such, a suit must be filed first before any order for interim measures is sought. The case of; *Scope Telematics International Sales Limited vs Stoic Company & Another (2017) eKLR* was relied on to state that, where there is a clear procedure for the redress of any particular grievance prescribed by the constitution or stature that procedure should be strictly followed. That Article 159 of the Constitution should not be seen as a panacea to cure all manner of indiscretions relating to the procedure. That the process of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction The Court of Appeal in that matter concluded that there cannot be any other interpretation of rule 2 and the application should have been anchored on a suit. Respondent sought it be dismissed with costs.

3. However, the Applicant argues that, the provisions of Section 7 of the Act, do not prescribe how the application thereunder should be made; although the Rules state, that, it shall be made by summons in the suit. It was argued that, the mere fact that, a rule applies the word "shall" does not make the said requirement mandatory. Reliance was placed on the case of; *Republic vs Public Procurement Administrative Review Board Ex parte Syner – Chemie Limited (2016) eKLR.*

4. Further reliance was placed on the case of; M/S *Blaxton Construction Limited vs Principal Chebara Boys Secondary School & 6 Others (2018) eKLR* where the court stated that, substantive justice under Article 159(d) of the Constitution of Kenya takes precedence over procedural justice.

5. The Applicant further argued that, the case of *Scope Telematics International (supra)* is distinguishable from the case herein in that, the Applicants therein were seeking for substantive orders and not merely interim measures of protection as in the present case.

6. I have considered the Preliminary objection and the submissions filed by the parties on the same, and the only issue to determine is whether the notice of motion dated 15th April 2019 is competent and/or incurably defective. In that regard I find that, procedural requirements however subordinate they may be to the statutory and/or constitutional provisions, must be complied with. Rule 2 of the Arbitration Rules 1997, is couched in mandatory terms which require that applications under Sections 6 and 7 of the Act shall be made by summons in the suit.

7. The purpose of the suit in my opinion are threefold;

> *(a) For the court to appreciate the natures of the pleadings to inform it of the need to grant or not grant the interim measures of protection.*
>
> *(b) To give a footing to the application;*
>
> *(c) 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.*

8. I am also in agreement with the findings in the court of Appeal in the case of; *Scope Telematics International Sales Limited vs Stoic Company & Another(supra*) that there can be no other interpretation of rule 2 and the application under sections 6 and 7 should be anchored on a suit. I note that the other decisions relied on by the Applicants including the decision of; *E.O.N Energy Limited vs Desnol Investment Limited & 4 Others (2018) eKLR*, and *Kamulamba Sugar Co. Ltd vs Vil Limited (2017) eKLR* are decisions of the High court and were related to different issues and cannot overrule the findings of the Court of Appeal.

9. The upshot of all this is that, the preliminary objection dated 24th April 2019, is allowed, as a consequence thereof, the Miscellaneous application dated 15th April 2019 is hereby struck out as prayed.

Dated, delivered and signed in an open court this 30th April 2019.

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Osiemo holding brief for Mr. Oruenjo for the Applicant

Mr. Mugisha for the Respondent

Dennis .....Court Assistant