



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
MISCELLANEOUS CAUSE NO. 279 OF 2016

COMFORT HOMES INTERNATIONAL

LIMITED.....APPLICANT/RESPONDENT

VERSUS

JOSEPH GEORGE MBUGUA T/A

GEM CONSTRUCTION COMPANY.....RESPONDENT/APPLICANT

RULING

1. This Ruling is on the Preliminary Objection which the Claimant, **JOSEPH GEORGE MBUGUA T/A GEM CONSTRUCTION COMPANY**, had raised against the application to set aside the Arbitral Award.
2. **COMFORT HOMES INTERNATIONAL LIMITED** were the Respondents at the arbitral proceedings. When the arbitral award was delivered, the said Respondents were displeased, and they decided to challenge the award.
3. On 30th May 2016, Comfort Homes filed an application to set aside and vary a part of the Award.
4. In response to the application **GEM CONSTRUCTION** lodged a Notice of Preliminary Objection in which it raised the following points;
 - a. **The application was incompetent in law and it should be struck out because it was filed before the Award had been filed. That situation was said to be a violation of Rule 4 (2) of the Arbitration Rules;**
 - b. **The application is fatal because it is not based on the specific grounds for setting aside Arbitral Awards, as provided for under Section 35 of the Arbitration Act;**
 - c. **The failure to enjoin the Arbitrator into the application is fatal, as it violates Rule 7 of the Arbitration Rules;**
 - d. **Questions of law arising during the arbitral process could only be raised;**
 - i. **if there was a specific agreement between the parties;**

ii. by way of an Originating Summons. as there is no specific agreement, and because these proceedings were not commenced by Originating Summons, they were incompetent;

e. The application cannot be brought pursuant to both Sections 35 and Section 39 of the Arbitration Act. It is bad for misjoinder;

f. The application is irregular and misconceived as it is based on provisions of the Civil Procedure Act and Rules which are excluded by Section 10 of the Arbitration Act;

g. The mandate to correct or to interpret the arbitral award is vested in the Arbitrator, pursuant to Section 34 (1) of the Arbitration Act;

h. The application is incompetent as it seeks to re-litigate the matters which were already the subject matter of arbitration.

5. I have given due consideration to the Preliminary Objection and the submissions made, together with all the authorities cited. I will now make a determination on each of the grounds upon which the said Preliminary Objection is founded.

a. Non-compliance with Rule 4 (2) of the Arbitration Rules

6. The said rule provides as follows;

“All applications subsequent to filing an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date”.

A literal meaning of that rule is that after an award had been filed, any person filing an application shall do so by way of summons, which should be filed in the same cause in which the award had been filed.

7. In effect, applications filed after the award was filed, should not be filed elsewhere.

8. Secondly, such applications, which are to be by way of summons, ought to be served upon all parties, at least 7 days before the hearing date.

9. In my understanding, Rule 4 (2) was providing guidance about how, where and within what time span, applications should be filed, if the applications were being filed after the award had been filed.

10. In effect, it is a rule of procedure.

11. In **P.N. MASHRU LIMITED Vs TOTAL KENYA LIMITED Hccc No. 47 of 2008**, Odunga J. made the following observations, with regard to the question as to whether or not an application was incompetent for failing to comply with the provisions of rule 4 (2) of the Arbitration Rules, 1997;

“The East Africa Court of Appeal in Brooke Bond Liebig (T) Ltd Vs Mallya [1975] E.A. 266 held that Rules of procedure are designed to give effect to rights of the parties and once parties are brought before the courts in such a way that no possible injustice is caused to either, then a mere irregularity in relation to the rules of procedure would not result in vitiating of proceedings”.

12. Accordingly, I find that non-compliance with rule 4 (2) of the Arbitration Rules is not fatal.

b. No specific grounds were cited from Section 35 of the Arbitration Act.

13. The respondent submitted that a party who was seeking to set aside an arbitral award under Section 35

must strictly restrict itself to the grounds set out under that statutory provision.

14. In this case, the applicant is said to have failed to cite and to demonstrate the particular ground upon which it was relying.

15. Nonetheless, the respondent goes on to say;

“A reading of the Application clearly shows that the Applicant is aggrieved by the Arbitrator’s findings on the facts before him and therefore seeks to have this Honourable Court sit on Appeal against the Arbitral Award”.

16. The point is that even though the applicant may not have specified the ground upon which it was founding the application, the respondent was able to appreciate what (*in his understanding*), the application was about.

17. That implies that even in the absence of specific citation of the particular ground or grounds in Section 35 of the Arbitration Act, it is possible for the parties and the court to appreciate the substance of the application.

18. In determining the application, the court would assess whether or not the applicant had discharged the onus of proving one or more of the grounds cited in Section 35 of the statute.

19. If, as the respondent has submitted, the application was nothing more than an appeal, through which the applicant was challenging the findings of the arbitral tribunal, then the court would dismiss the application. However, such a determination can only be made after the court has given due consideration to the submissions on the substantive aspects of the application.

20. As the respondent has pointed out, when the court is dealing with an application under Section 35 of the Arbitration Act, it cannot go into the merits or otherwise of the award, as the court was not sitting on an appeal from the decision of the arbitrator.

c. Failure to enjoin the Arbitrator to the proceedings

21. Rule 7 of the Arbitration Rules, 1997 reads as follows;

“An application under Section 35 of the Act shall be supported by an affidavit specifying the grounds on which the party seeking to set aside the arbitral award and both the application and affidavit shall be served on the other party and the arbitrator”.

22. The rule requires the applicant to serve the arbitrator with application and the affidavit. It does not say that the arbitrator must be enjoined to the suit as a party.

23. Of course, ordinarily, it is only persons who were parties to court proceedings who were required to be served. Therefore, by extension, it is arguable that by requiring the applicant to serve the application on the arbitrator, the rule anticipated that the arbitrator would be a party.

24. On the other hand, it is noted that the rule makes reference to *“the other party and the arbitrator”*.

25. There is therefore a possibility that by distinguishing the arbitrator from *“the other party”*, the rule did not make it obligatory to have the arbitrator as a party.

26. But, in any event, the question regarding whether or not the arbitrator had been served, is a matter of fact, as opposed to a matter of law. It cannot, therefore, be the basis of a Preliminary Objection.

Reliance on Section 35 and Section 39 of the Arbitration Act, in the same application.

27. The respondent submitted that by bringing the application under those 2 provisions, rendered the application both ambiguous and omnibus.

28. It is the respondent's position that the applicant ought to have made an election.

29. That argument is premised on the fact that an application under Section 39 has to be brought by an Originating Summons; and it can only be brought where parties had agreed.

30. There is merit in the respondent's submissions concerning the procedure to be applied when a party invoked Section 39 of the Arbitration Act.

31. However, the fact that the application also sought reliance on Section 35 of the Arbitration Act did clothe the court with the requisite jurisdiction to hear and determine the application to set aside the arbitral award.

32. In the case of **MASHRU LTD Vs TOTAL KENYA LIMITED, Hccc No. 47 of 2008**, the applicant had cited both Section 35 of the Arbitration Act, and Sections 3A and 80 of the Civil Procedure Act.

33. In rejecting the preliminary objection, the learned Judge stated that;

"...no issue turns upon the citing of superfluous and irrelevant provisions".

34. In the circumstances, the alleged misjoinder of the 2 statutory provisions does not render the application fatally defective.

35. Similarly, the citation of provisions of the Civil Procedure Act and the Civil Procedure Rules, do not render the application fatally defective. Those provisions are superfluous and irrelevant to an application seeking to set aside an arbitral award. If they had been cited on their own, they would not have assisted the applicant. However, as they were cited alongside Section 35 of the Arbitration Act, they are simply superfluous and irrelevant.

36. As regards the contention that the applicant wishes to re-litigate issues which had already been determined by the arbitrator, that cannot constitute a preliminary objection.

37. The respondent would have to wait for the application to be canvassed, in order to gauge whether or not the applicant was re-litigating matters which had been determined.

38. Similarly, if the applicant sought to have the court correct or interpret the arbitral award, the respondent can only become aware of that fact when the applicant was canvassing the application. It is thus premature for the respondent to anticipate that the applicant will go beyond the scope of the reliefs which are permissible under Section 35 of the Arbitration Act.

39. Finally, the Court of Appeal made it clear that;

"The Arbitration Act appears to us to envisage two stages when objection may be raised. The first stage is before the award is filed in court, and the second, after it has been filed. The grounds upon which the applications may be filed at the first stage are set out under Section 35 of the Act. The grounds for applications made at the second stage are set out under section 37 of the Act".

See **SANRUDIN KURJI & ANOTHER Vs SHALLIMAR LTD & 2 OTHERS, CIVIL APPEAL No. 64 of 2006**

40. It therefore follows that even though the application herein was filed before the award had been lodged in court, that did not render it fatally defective, as alleged by the respondent.

41. In the result, I hold that there is no merit in the respondent's preliminary objection. It is therefore overruled, with costs to the applicant.

DATED, SIGNED and DELIVERED at NAIROBI this 22nd day of May 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Ndegwa for A.G.N. Kamau for the Claimant

Mwachia for Odhiambo for the Applicant

Collins Odhiambo – Court clerk.