THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISC APPLICATION NO E001 OF 2022

PAUL OMONDI OBIERO.....PLAINTIFF

-VERSUS-

CYTONN INTEGRATED PROJECT LLP.....DEFENDANT

RULING

1. Before me for determination is the notice of motion dated 7/1/2022. That is the instrument which the applicant, **Paul Omondi Obiero,** used to initiate these proceedings, seeking an interim measure of protection under **Section 7** of the **Arbitration Act 1995.** Two key issues fall for determination in the said application. The first issue is whether the application is fatally defective due to non-compliance with the provisions of **rule 2** of the **Arbitration Rules 1997**. The second issue is whether the application satisfies the criteria upon which our courts exercise jurisdiction to grant an interim measure of protection under **Section 7** of the **Arbitration Act 1995**, pending the substantive determination of the dispute by the arbitral tribunal. The Court of Appeal pronounced itself on the import of **rule 2** of the **Arbitration Rules** in ***Scope Telemantics International Sales Limited v Stoic Company Limited NRB Civil Appeal No 285 of 2015 [2017] eKLR.*** Similarly, the Court of Appeal [Nyamu JA] outlined the criteria upon which our courts exercise jurisdiction under Section 7 of the Arbitration Act 1995 in ***Safaricom Limited v Ocean View Beach Hotel Limited & 2 others***, **NRB CA Civil Application No NAI 327 of 2009 [2010]eKLR.** Before I dispose the above two issues, I will outline a brief background to the application under consideration.

2. On 1/9/2016, the applicant and the respondent entered into a sale agreement pursuant to which the applicant agreed to purchase **Apartment Number B-804,** located on the 8th Floor of **Block B,** which the respondent agreed to erect on ten parcels of land that were to be amalgamated into one title. The ten parcels of land are located in **Ruaka, Kiambaa, Kiambu County**. The sale agreement was subsequently varied through a **deed of variation** dated 6/12/2019. The agreed purchase price was Kshs 9,019,491. The applicant contends that he paid a deposit of Kshs 2,360,000 in instalments and procured his financiers to issue an irrevocable letter of guarantee relating to the balance. Clause 20 of the sale agreement contained an arbitration agreement providing for arbitration as the agreed dispute resolution forum.

3. The applicant contends that a dispute has arisen and he is in the process of initiating arbitration proceedings because parties have failed to amicably resolve the dispute. He further contends that on 20/12/2021, the respondent served on him a completion notice, threatening to terminate the contract, despite being aware of the arbitration reference. It is his case that he stands to suffer great loss of "capital and expectation" if the respondent terminates the contract and disposes the apartment. Mr Mwale, counsel for the applicant, contends that the applicant is an innocent purchaser seeking an interim measure of protection, pending arbitration.

4. The respondent opposed the application through a replying affidavit expressed as sworn on 26/2/2022 *[sic]* but filed on 26/1/2022. The respondent's case is that the applicant has failed to discharge his contractual obligations, in that he has failed to pay purchase price as agreed in the contract. The respondent adds that the applicant has failed to provide an undertaking from the bank's advocate. The respondent contends that it properly issued a termination notice and it is ready to make a net refund of the deposit in terms of the sale agreement. The respondent terms the application as an abuse of the court process. Mr Mueke, counsel for the respondent, contends that the application is fatally defective and urges the court to strike it out on the ground that it violates the mandatory requirements of rule 2 of the Arbitration Rules 1997. Counsel adds that the applicant is in breach of the sale agreement and does not deserve the orders sought.

5. In his rejoinder, Mr Mwale, counsel for the applicant argues that arbitration proceedings begin the moment a party declares a dispute. He contends that a dispute was declared between the parties herein on 21/10/2021. Counsel adds that rule 2 of the Arbitration Rules is not specific and that "summons" referred to in rule 2 can be taken to mean a notice of motion such as the one under consideration. I now proceed to make brief pronouncements on the two key issues that were identified in the opening paragraph of this ruling.

6. The import of rule 2 of the Arbitration Rules 1997 was the subject of discussion and interpretation by the Court of Appeal in ***Scope Telemantics International Sales Limited v Stoic Company Limited NRB Civil Appeal No 285 of 2015 [2017] eKLR.*** The Court of Appeal rendered itself thus:

"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 seeking 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 others [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."

7. Confronted with exactly the same issue as the one under consideration in **Civicon Limited v Fuji Electric Co Limited & another [2020] eKLR,** Majanja J stated as follows:

" I must point out that the applicant's submission is attractive since an application under Section 7 of the Act is for one purpose only and it is exhausted once the court determines the application one way or another as stated by Nyamu JA, in the Safaricom Limited Case (Supra). This, however, is a case where this court is bound by a decision of the Court of Appeal on exactly the same point and interpreting the same rule in issue. The issue of the procedure for applying for interim measures under the Act was not in issue in the Safaricom Limited Case (Supra). At any rate, that case was determined earlier than the Scope Telemantics Case (Supra) in which the Court of Appeal considered that case and relied on it for other purposes other than determining the procedural issue. It is thus clear that the binding nature of the Scope Telemantics Case (Supra) is undoubted."

8. The above pronouncement by the Court of Appeal is the prevailing jurisprudence on the interpretation to be given to rule 2 of the Arbitration Rules 1997. Under the doctrine of stare decisis [precedent], this court is bound by the above interpretation by the Court of Appeal.

9. The application under consideration is not a chamber summons brought in a suit. It was filed as a stand-alone notice of motion. Whereas majority of the ranks of the third tier superior courts have expressed the view that a suit brought under Section 7 of the Arbitration Act is rendered redundant the moment the plea for interim measure of protection is disposed [a view which I entirely share], the doctrine of stare decisis (precedent) remains central in the orderly administration of justice in any jurisdiction. Any legal system which aspires to enjoy the confidence of the consumers of justice would defer to the doctrine of stare decisis (precedent) to secure evenhandedness, predictability, consistency and order in the decisions of the courts.

10. Since the question and the facts in the present application are exactly the same as what the Court of Appeal pronounced itself on in the case of **Scope Telemantis** (supra). I cannot ignore the pronouncement of the Court of Appeal on the question. The result is that the notice of motion dated 7/1/2022 is adjudged fatally defective for non-compliance with the mandatory requirements of rule 2 of the Arbitration Rules 1997.

11. There is a possibility that the applicant might, subsequent to this, decide to pursue the same remedy on the platform of a suit as required under rule 2 of the Arbitration Rules. I will, in the circumstances, refrain from making any pronouncement on the merits of the plea in this application. I will therefore not make any determination on the second issue in the application, to avoid exposing the applicant to future prejudice.

12. Lastly, I direct the Registrar of the Court to cause a copy of this ruling to me availed to both the Chairman and the Secretary of the Rules Committee of the Judiciary, for the Committee's reflection on the possibility of proposing amendments to rule 2 of the Arbitration Rules 1997.

13. In the end, the notice of motion dated 7/1/2022 is struck out with costs but without venturing into its merits, on the ground that it was brought in contravention of the mandatory requirements of rule 2 of the Arbitration Rules 1997.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF FEBRUARY, 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Mwale for the Plaintiff/Applicant

Mr Mueke for the for the Defendant

Court Assistant: Lucy Muthoni