REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Civil Application 914 of 2011

KENYA AIRPORTS AUTHORITY……APPLICANT

VERSUS

NAIROBI FLYING SERVICES LIMITED……....……..….RESPONDENT

R U L I N G

Before me is Chamber Summons expressed to be brought under the provisions of **section 35(2)(a)(iv)** and **35(2)(b)(i)** of the Arbitration Act and Rule 7 of the Arbitration Rules, dated 16th November 2011 and filed the same day. The said application is supported by the affidavit of **Joy Nyaga** the applicant's acting Corporation Secretary and Chief Legal Officer. Of relevance to the present ruling is prayer 4 of the said Chamber Summons which seeks that the Interim Award (No. 2) dated 8th September 2011 and made by Justice R O Kwach be set aside in toto on account of being in conflict with the Public Policy of Kenya.

The said arbitral decision resulted from an application brought by way of Notice of Motion dated 15th August 2011 filed by the applicant herein in the said proceedings seeking that the matter be referred to His Lordship the Honourable The Chief Justice of the Republic of Kenya for further directions and in the alternative, the Claim be dismissed with costs to the Respondent for having been filed by a firm of Advocates who do not have legal capacity to act as such.

That application was heard by the learned arbitrator who by an interim award (No. 2) issued on 8th September 2011 dismissed the application with costs.

It is that decision that triggered these proceedings.

Section 35 of the Arbitration Act empowers the High Court to set aside an award under certain conditions. The procedure for that course of action is not provided for under that section. However, under rule 3 of the Arbitration Rules, 1997 it is provided:

(1) Applications under sections 12, 15, 17, 18, 28 and 39 of the Act shall be made by originating summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date.

(2) Any other application arising from an application made under sub-rule (1) shall be made by

summons in the same cause and shall be served on all parties at least seven days before the hearing date.

It is therefore clear that rule 3(1) is not applicable to applications under section 35 aforesaid. **Rule 3(2)**, however, only provides for the procedure for making applications in cases where **subrule (1)** applies i.e. where the proceedings are instituted by Originating Summons.

Under **section 3** of the Arbitration Act it is provided that "arbitral award" means any award of an arbitral tribunal and includes an interim arbitral award. It is not in dispute that the award the subject of these proceedings is an interim award. However for the purposes of the above definition it is an arbitral award all the same.

Rules 4 and **5** of the said Rules provide as follows:

4. (1) Any party may file an award in the High Court.

(2) All applications subsequent to filing of 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.

(3) If an application in respect of the arbitration has been made under rule 3 (1) the award shall be filed in the same cause; otherwise the award shall be given its own serial number in the civil register.

5. The party filing the award shall give notice to all parties of the filing of the award giving the date thereof and the cause number and the registry in which it has been filed and shall file an affidavit of service.

My understanding of the foregoing provisions is that a party who intends to take any step with respect to an award whether in terms of challenge or implementation is at liberty to file the same, obtain a serial number therefor and then if need be proceed to make a necessary application within the cause. Rule 7 which has been cited by the applicant in these proceedings provides that 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. That provision does not provide that proceedings are to be instituted by a Chamber Summons in miscellaneous Application as is the case herein. Generally speaking Chamber Summons is not a mode of commencing proceedings in civil matters. I am aware that in judicial review proceedings, the cause is commenced by chamber summons but such proceedings it has been held time and again are neither criminal nor civil.

Where there is no mode of instituting proceedings provided for, the practice that has gained wide usage is what is known as "Originating Notice of Motion". This is not a suit but a way of originating proceedings in simple matters where it is unnecessary to either file a plaint or Originating Summons, such as in proceedings seeking taxation of costs as between an advocate and client. See **BEN OCHIENG & CO ADVOCATES VS. LOICE KACHE & ANOTHER MALINDI HCMA NO. 105 OF 2006; BEN OCHIENG & CO ADVOCATES VS. MUNICIPAL COUNCIL OF MALINDI MALINDI HCMS NO. 101 OF 2006; IN THE MATTER OF MESSRS SHAPLEY BARRET ALLIN & CO. ADVOCATES (1954) 27 LRK 48; IN THE MATTER OF AN APPLICATION BY OTIENO RAGOT & COMPANY ADVOCATES KISUMU HCMA NO. 32 OF 2008.**

However, in light of the provisions of section 10 of the Arbitration Act, all the provisions including the Civil Procedure Act, Rules and practices do not apply to arbitral proceedings, except in limited circumstances provided under rule 11 of the Arbitration Rules with respect to such processes as execution of the result of the arbitral process.

In the premises there is no justification for the court to import the practice of institution of proceedings in Civil proceedings by Chamber Summons, a practice which, as far as I know is not provided for anywhere in the Civil Procedure, to the provisions of Arbitration Act and proceedings arising therefrom. The law as

I understand it is that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or An Act of Parliament, that procedure should be strictly followed. See **Republic vs. The Commissioner Of Police Ex Parte Nicholas Gituku Karia Nairobi HCMA No. 534 of 2003 [2004] 2 KLR 506.**

In my considered view, the applicant herein should have filed the award, obtained a serial number for the award and then proceeded to make the instant application. In my view, it is the award, in the circumstances of this case that gives the court jurisdiction. That omission, in my view, is not a technicality but is a rule of substantive procedure that cannot be wished away ignobly.

In the result, it is my view and I so hold, that the Chamber Summons dated 16th November 2011 is incompetent having been instituted prematurely as the award the subject of challenge herein has not been filed in accordance with the foregoing provisions. The same is accordingly, struck out but with no order as to costs as the issue has been raised by the Court *suo moto*.

Ruling read, signed and delivered in court this 3rd day of May 2012

G.V. ODUNGA

JUDGE

In the presence of:

No appearance for Applicant

Mr. Kaluma for Respondent