



**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURTS**

**Civil Suit 170 of 2009 (OS)**

**BOARD OF GOVERNORS LIMURU GIRLS HIGH SCHOOL.....PLAINTIFF**

**VERSUS**

**MAKWARA CONSTRUCTION AND ENGINEERING COMPANY.....DEFENDANT**

**RULING**

The Defendant in this suit filed a Notice of Preliminary Objection on the 20<sup>th</sup> April 2009. The parties agreed by consent to have the Preliminary Objection raised in the notice argued before the application by way of Chamber Summons dated 13<sup>th</sup> March, 2009 is heard.

There are nine grounds of Objection in the notice namely:

- (a) The application of 13<sup>th</sup> March, 2009 is based on an incompetent Originating Summons and therefore ought to be struck.**
- (b) No order for stay of execution can be issued in terms of the Plaintiff's application since no award has been filed, adopted and a decree issued on the basis of which execution can issue.**
- (c) No order of stay of execution can issue under the provisions of Sections 35 and 39 of the Arbitration Act 1995 and Rule 3 of the Arbitration Rules 1997.**
- (d) The Plaintiff's Originating Summons offends the provisions of S.14 and 17(6) of the Arbitration Act.**
- (e) The Plaintiff's Originating Summons is hopelessly time barred and therefore incompetent.**
- (f) The grounds now being relied upon in support of the Originating Summons arise from the ruling made by the tribunal on 20/4/2006 and the court cannot therefore entertain an Originating Summons when the said ruling was not challenged.**
- (g) An application under S.35 of the Arbitration Act cannot be commenced by way of an Originating Summons.**
- (h) No award under Rule 4(1) of the Arbitration Rules 1997 as read together with Rule 10(1) has been filed to warrant the lodging of an application to set aside the Originating Summons and the application dated 13/3/2009 are therefore premature and incompetent.**

**(i) In view of all the foregoing, the court lacks Jurisdiction to hear and determine the suit and the application.**

The Preliminary Objection has been opposed. I have considered submission by both counsels. I will begin by quoting from the celebrated case of **Mukisa Biscuits Co. vs. Westland Distributors [1969] EA 696** on what constitutes a Preliminary objection. It was held thus:

***“...a preliminary objection consists of a point of law which has been pleaded, or which rises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”***

Mr. Meso for the Applicant has made a very pertinent submission that ordinarily a Preliminary Objection should be premised on the fact that the factual position of the case is not in dispute. Mr. Meso submitted that that factual position is provided in the supporting affidavit to the instant application. That is the correct position in law.

Having considered submissions by Mr. Sigei for the Respondent, and facts averred to in the supporting affidavit, it is quite clear that the Preliminary Objection has been raised based on contested issues of fact. For instance Mr. Sigei submitted that the Arbitral Award has never been filed in court and that therefore the application was incompetent. Secondly, Mr. Sigei urged that the award was made in 2006 and that therefore the application as filed was incompetent and hopelessly out of time.

Having perused the supporting affidavit, it is clear that Mr. Sigei's submissions were in direct contradiction with facts deponed to therein. At paragraph 13 of the supporting affidavit, it is averred that the arbitral award was served upon the Plaintiff only on 15<sup>th</sup> December, 2008. In the same paragraph the arbitration award is adduced as annexure MG8 (b) contained at pages 36 to 159 of the affidavit in support.

Turning to the Preliminary Objection, grounds (b), (e), (h) and (i) they are based on contented facts and do not qualify to be raised as points of law. Ground (f) challenges the entire application on the basis that since the Applicant never challenged the ruling by the Tribunal, it cannot challenge the award. That is not a correct position in law. Section 35 of the Act gives a party grounds upon which to challenge an arbitral award. Nowhere does the section provide that such party can only challenge the award subject to having challenged the ruling of the arbitral tribunal.

In grounds (a), (c) and (g) the Respondent contents that an arbitral award cannot be challenged by way of an Originating Summons and further that no orders of stay of execution can be issued under sections 35 and 39 of the Arbitration Act.

Regarding the grounds (c) this is not a point of law which, if upheld, would lead to the disposal of the instant suit.

Ground (a) and (g) raise a similar issue which is the manner in which an arbitral award can be challenged. Mr. Sigei has not cited any authority to support his arguments that it ought not to be challenged by an Originating Summons. The Arbitration Rules, 1997 prescribe the manner in which arbitration awards are to be filed and how they ought to be challenged. Rule 7 provides that an application under section 35 of the Act shall be supported by an affidavit specifying the grounds upon which the party seeking to set aside the arbitral award. The rules are clear that the application challenging an award is to be filed in the same cause, if a suit already exists on the subject matter. For instance where a party had filed Originating Summons under Sections 12, 15, 17, 18, 28 and 39. Where the award is being filed afresh for the first time, all the rules say [rule 4(1)] is that any party may file. Apart from the summons and affidavit giving grounds, the rules are silent whether such a suit will be filed by plaint, petition or Originating Summons. Mr. Meso submitted that nowhere in the rules is a plaint or petition mentioned. I rule in favor of the Applicant that the Respondent has not demonstrated that the suit and or the application filed herein is incompetent.

**Having come to this conclusion, I rule that the Preliminary Objection raised by the Respondent herein lacks in merit and the same is dismissed with costs.**

**Dated at Nairobi this 30<sup>th</sup> day of April, 2009.**

**LESIT, J.**

**JUDGE**

***Read, signed and delivered in presence of:-***

Mr. Meso for the Applicant

Mr. Sigei for the Respondent

**LESIT, J.**

**JUDGE**