



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
MISCELLANEOUS CIVIL APPLICATION 595 OF 2008
IN THE MATTER OF THE ARBITRATION ACT, 1995

DHANJI VELJI.....APPLICANT

VERSUS

MOHAMED SALIM SHAMSUDIN..... RESPONDENT

R U L I N G

The Respondent in the Originating Summons filed herein on 12th August, 2008 has filed a Notice of Preliminary Objection dated 2nd December, 2008. That notice raises two grounds as follows.

- 1. The Arbitration the subject of this Originating Summons was commenced pursuant to a Court order in HCCC No. 200 of 2007, Mohamed Salim Shamsudin Versus Trishcon Construction Limited, in which the award in respect of the pending arbitration shall be filed.**
- 2. Accordingly, the subject application under the provisions of Section 17.6 of the Arbitration Act 1995 ought to have been filed under the said suit, and Originating Summons as filed cannot be sustained.**

Both parties filed therein submissions which I have considered.

In the celebrated case of **Mukisa Biscuit Co. v West End Distributors, [1969] EA 696**, The Court of Appeal for Eastern Africa held:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

Mr. Wandabwa argued the Preliminary Objection. The gist of the Preliminary Objection is that the Applicant herein could not have filed the Originating Summons to challenge an arbitration award ordered

by the court since there exists another case in which the award has already been filed. The Applicant's contention is that the Originating Summons was necessary to have been filed separately as it was an appeal against the award made by the arbitrator following a court order in HCCC No. 200 of 2007. Mr. Oriaro submitted that the Applicant was appealing against the decision by the arbitrator to confer on himself a power he did not have by enjoining into the arbitration proceedings a party not party to the case at the time the matter was referred to arbitration.

I have carefully considered submissions by both counsel. The Preliminary Objection raised herein has merit for the simple reason that the arbitration award, the subject matter of the Originating Summons has been filed in HCCC 200 of 2007 a separate suit from the instant one as evident from submissions by Mr. Wandabwa. The Applicant and another are the parties in HCCC No. 200 of 2007 and the arbitration award in question arose pursuant to a court order made in the said suit

I note that the Originating Summons has been brought under section 17(6) of the Arbitration Act and rule 3(1) of the Arbitration Rules. That section stipulates:

“17(6) Where the arbitral tribunal rules as preliminary question that it has jurisdiction, any party aggrieved by such ruling may apply to the High Court, within 30 days after having received notice of that ruling, to decide the matter.”

Under section 17(8) of the Arbitration Act the arbitrator had jurisdiction to continue with the arbitral proceedings and to make an arbitral award pending an application under subsection 6. That means that after the arbitrator ruled on the question of jurisdiction in this matter, he proceeded to hear the arbitral proceedings to their conclusion. This court has not been told whether the application being brought in this case has been brought within the prescribed period as provided under section 17(6). That notwithstanding, since the arbitration award has already been filed in the other suit that is pending before the court, I think that the entire issue of the arbitration award and its validity are matters which should be determined within the suit where the arbitral award has been filed. Had the proceedings not been concluded by the time this suit was filed, I could have ruled otherwise.

In conclusion, I uphold the objection raised by the Respondent in this suit and I consequently strike out these proceedings.

Dated at Nairobi this 10th day of July 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Ngala holding brief Mr. Oriaro for the Applicant

Ms. Musweti holding brief Mr. Wandabwa for the Respondent

Dated at Nairobi this 17th day of July 2009.

LESIIT, J.

JUDGE