



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT EMBU**

**Civil Appeal 76 of 1996**

**PATRICK NGUNGU.....APPELLANT**

**VERSUS**

**JUSTUS NJAGI NYAGA.....RESPONDENT**

**RULING**

Notice of Motion dated 11/10/2007 was argued together with the Preliminary Objection raised by Mr. Njagi Esq prayer 3, 4 and 6 were argued and this is the Ruling.

The supporting affidavit shows that the said suit was commenced by way of plaint in claims of money. That the subordinate court ordered the dispute be referred to arbitration. I have noted that the reference to arbitration was by consent of the parties on 18/1/1995 in presence of parties. Plaintiff advocate reported the consent to court. Advocate for Defendant was present. The award was read on 28/7/1995 in presence of plaintiff only and his advocate. Defendant was represented by M/s Kwena. Award was read and 30 days period was given to raise objections. However, arbitration award was confirmed on 15/11/1996. The provisions for referring a suit already in court for arbitration is under order 45 CPC.

Grounds to set the same aside are set out under rule 15 (1)

- (a) Corruption or misconduct of arbitrator or umpire.
- (b) Either party has fraudulently concealed any matter which he ought to have disclosed or has willfully misled or deceived the arbitrator.

The applicant says he was not heard by the arbitrator and he does not understand how the Respondent's claim stated in the plaint as Shs.199,772/= became Shs.412,467.75 in the arbitration. The applicant had filed a counterclaim but the same was not considered he says.

From the arbitration record it shows that the Arbitrator wrote letters to the parties including applicant on 16/2/1995. It is recorded that the applicant did not respond. Thereafter the Arbitration order was amended so that the elders were dropped. The arbitrator obtained and acted on Inventory as on 3/9/87. The tenant has failed to submit to arbitrator his copy so as to verify landlords claims Arbitration reviewed landlord's claims against the tenancy agreement and came to a decision.

From the above it can be seen that the Applicant was given opportunity to participate but he failed to take the same. He cannot now say he was denied an opportunity to be heard. It is clear the arbitrator in reaching to Shs.412467/75 relied on an inventory provided by the landlord since the Applicant (tenant)

failed to submit his inventory.

It is my finding therefore that the applicant had full opportunity to be heard. I do not therefore find the arbitration a nullity. In view of my said finding I do not find it necessary to decide on the issues procedural defects complained of by the landlord.

The application is dismissed with costs to the Respondent

Dated this 29<sup>th</sup> January, 2008.

**J. N. KHAMINWA**

**JUDGE**

**Khaminwa – Judge**

**Njue - Clerk**

**Mr. Mwanthi - present**

**Mr. Njagi – present**

Read in open court.

**J. N. KHAMINWA**

**JUDGE**