REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Case 2269 of 2007

AISHA C. RYU …………………….…...……..……………. PLAINTIFF

VERSUS

VIRI GOSWAMI ……………………………………...... DEFENDANT

RULING

What is to be determined by me is a Notice of Preliminary Objection on a point of law dated 20th November, 2007.

It reads:

"Take Notice that at the hearing of the Applicant's Originating Summons dated 5th November, 2007, the Respondent will raise a Preliminary Objection on a point of law that the application is incompetent for not complying with the Arbitration Rules and the Originating Summons itself has a fundamental defect which makes it a nullity"

The grounds of opposition filed by the Defendant on 20.11.07 also raise similar points. Hence, I allowed the hearing of preliminary objection.

The Claimant has filed this matter by way of Originating Summons under Section 7(1) of the Arbitration Act, 1975.

It seeks for an order to allow the Claimant with her structural Engineer/Quantity Surveyor/.Land Valuer an access to the suit premises so that she could submit their reports at the hearing of the arbitration between the parties herein and also seeks interlocutory orders against the Respondent.

This Originating Summons has been filed under Section 7(1) (referred to as 'the Act' hereinafter).

"7(1). It is not incompatible with an arbitration agreement for a party to request for the High court before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."

Thus it cannot be denied that the Act does permit the Claimant to apply and the High Court to grant interim measures of protection.

The Hon. Chief Justice has also made Rules on 6th May, 1997 under the Act under the powers conferred to him under Section 90 of the Act.

Rule 2 of the said Rules stipulates that applications under Section 6 and 7 of the Act shall be made by summons in the suit.

This is what is relied upon by Mr. Oraro the learned counsel for the Respondent. It is contended that no rule under the Act is relied upon or mentioned by the Claimant while filing this Originating Summons. The Rules under the Act have provided the procedure and hence the Civil Procedure Rules cannot apply to the application under Section 7(1) of the Act.

Section 3 of the Civil Procedure Act was also cited to support the said contention which provides:

"**3. In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred, or any special form or procedure prescribed, by or under any other law for the time being in force"**.

This application is filed by way of Originating Summons which is not prescribed under Rule 2 of the Arbitration Rules. It was stressed that it has to be made by way of a summons in a suit and there is not suit before me.

Moreover, the Originating Summons is signed by an Advocate which is contrary to Order IV Rule 3(2) of Civil Procedure Rules.

I am not very sure how the aforesaid provision shall apply to an application for interim orders. Order IV is entitled "**Institution of suit and issue of summons"** to appear to be accompanied by a plaint which needs or is required to be signed by a judge and sealed with the seal of the court. This is not the case here. But for clarity I do state that I have noted the contents of Rule (2) which provides for procedure to be followed for an application under Section 7 of the Act which is the one before me.

Mr. Khaminwa Jr., when submitted that Act is silent on procedure, cannot be wholly correct as Rule 2 of the Rules has specified the procedure. What the Act has given are the remedy and power of the court and the Rules promulgated as per Section 40 of the Act have prescribed the procedure to be followed while seeking the remedy.

When I have observed now as aforesaid, the contentions as regards the application of provisions of Supreme Court Practice or Atkin's Encyclopedia, in my opinion, cannot be of any help to either the Claimant or to the court. Our laws have already stipulated the procedure to be followed and thus this court ought not to look at the procedures adopted by any other jurisdictions.

I thus reject the submissions that I have to follow the English system when our system has provided a procedure.

Mr. Khaminwa Jr. also valiantly submitted that this court has to take a broad view of the provisions as regards the procedure because the role of this court under Section 7 is to give quick decision, i.e. only to grant interim order, and that he court is not deciding the dispute.

That could be true and I do not make any finding thereon However, there provisions of the Act, and I have the statutory provisions by way of Rule 2 of the Arbitration Rules which indisputably provides the procedure for obtaining orders under Rule 7, which is summons in a suit.

I cannot read anything more or anything less in the said provision. There is no room for any other interpretation by the court.

In the premises aforesaid, I do uphold the Preliminary Objection and hold that the Originating Summons is incompetent and incurably defective. Thus the Originating Summons dated 5th November, 2007 is

dismissed.

As it is a procedural defect, I shall order that each party shall bear its own costs.

Dated and signed at Nairobi this 5th day of February, 2008.

K.H. RAWAL

JUDGE

5.2.08