REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
CIVIL CASE 482 OF 2007

KENYA TEA DEVELOPMENT AGENCY LTD. (KTDA)...PLAINTIFF

VERSUS

BUILECON ASSOCIATES.....DEFENDANT

R U L I N G

Chamber summons dated 27/5/08 seeks orders to strike out Originating summons dated 18/9/2007 with costs on the grounds that the application is scandalous and is in violation of **Rule 4 (2)** of the **Arbitration Rules 1997** and that it is an abuse of court process. Supporting affidavit of John Mwai Mathenge states that the application to set aside the arbitral award ought to have been filed in **HCCC Misc. Civil Suit No.1059 of 2007** as is required under **Rule 4 (2) Arbitration Rules 1997.** Notice of filing dated 27/6/2007 is exhibited. The decree is attached. There is non compliance with requirements of **Section 35** of the **Arbitration Act 1995.** That the plaintiffs suit seeks to re-open the issues of contract already closed in the arbitration proceedings. No request for corrections or interpretation of the award were made in terms of **Section 34 (1)** of the **Act.**

In response, the respondent has filed grounds of objection arguing that once the court has given directions which parties comply with the directions the orders sought in application are no longer available. The applicant is estopped from impugning the process and that the procedure adopted by the applicant in **HCC Misc. Case No.1059 of 2007** is erroneous and proceedings thereunder are a nullity and not binding. The Originating summons is not scandalous or vexatious or an abuse of court process. The affidavit of John Mwai Mathenge is argumentative and evidentiary.

A perusal of the **Arbitration Act 1995 Section 32 (5)** shows that after the final award the arbitration proceedings are terminated and within 30 days (**Section 34**) after receipt of the arbitral award a party may request the arbitral Tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors or any other errors of a similar nature and may with agreement by parties request the arbitral Tribunal to give interpretation of a specific point or part of the arbitral award.

There is no dispute that the final arbitral award was given. And on 26/6/2007 it was filed in High Court Milimani Courts. There is no evidence that there was any request for corrections or interpretation as provided for under **Section 34.**

Provisions are made under **Arbitration Act** for recourse to be had in the High Court against arbitral award. **Section 35 (2)** the High Court may set aside the award only if provisions under **2 (a) (i) – (v)** are proved or the High Court finds that matters set out under **2 (b)** are proved. An application for setting aside the arbitral award may not be made after expiration of 3 months after the party making the application had received arbitral award. It is submitted here that the application by Originating Summons was not filed until after 5 months of the award.

The rules prescribed for approaching the court are made by the Chief Justice and cited as **Arbitration Rules 1997.** On the issue of filing an award to court **Rule (2)** provides: All applications subsequent to filing an award shall be by summons in the cause in which the award has been filed.

The rules further provide that if no application to set aside arbitral award is made within 3 months as provided under **Section 35** the party filing the award may apply ex parte by summons for leave to enforce the award as a decree. In this case ex parte application was made on 25/7/2007 and decree issued on 5/10/2007. The application by Originating summons was filed on 18/9/2007 seeking to quash and set

aside the arbitral award dated 19/6/07 aforesaid on grounds set out. **Arbitration Act Section 35, 37, 38 and 39** are invoked and the Originating summons is given a separate serial number in the Register of High Court Milimani Courts. The filing of this suit is contrary to the rules prescribed. The application properly falls under **Section 35.** And since at the filing of the same the Arbitral award was already filed in **Misc. No.1059/2007** and the present applicant was with this knowledge the application is in contravention of the Chief Justice Arbitration Rules, **Rule 4 (2) "All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed …"**

I have perused the authorities relied upon by the Respondent. Halsbury Laws of England and Supreme Court practice, these cannot supercede the authority of the Rules made by the Chief Justice of this country. It is my finding therefore an application to challenge an arbitral award shall be made by summons in the cause where the Final Award was filed meaning **HCC Misc. Application No.1059/2007.** The other authorities numbered 4 and 6 in the list of authorities are local decisions dealing with enforcement of arbitral award and the striking out of pleadings. In the present suit the application to strike out the Originating summons is not intended to deprive the party (applicant), the opportunity to be heard. Firstly, the action is out of time and it would be necessary to seek leave to enlarge time and that can only be done in the original suit. The point raised that once directions are taken application of this nature cannot be brought is not tenable neither can the principle of estoppel be applied if an application is not properly before the court. I do not find that the procedure adopted by the Respondent in suit **No. Misc. 1059 of 2007** erroneous or a nullity. The Respondent followed the rules of court made under the **Act.**

On an argumentative affidavit there is always provision under **Order 18** to call a deponent for cross-examination. This was not done. The other issues raised on challenge of the arbitral award and the court is not required to deal with the same. The merits of the application shall be dealt with when properly before the court.

I allow the application and strike out the Originating summons filed on 18/9/2007 with costs to the applicant for the suit and this application.

It is so ordered.

DATED and **DELIVERED** at Nairobi this 10th July 2008.

JOYCE N. KHAMINWA

JUDGE