

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 597 of 2002

1. DAVID CHABEDA

2. TRUPHENA CHABEDAPLAINTIFFS

V E R S U S

FRANCIS INGANJIDEFENDANT

R U L I N G

There has been considerable delay in the preparation and delivery of this ruling. The same was occasioned by my serious illness in 2006 and the long attendant recuperation. The delay is regretted.

In this application (by chamber summons dated 20th September, 2004) the Plaintiffs seek two main orders:-

1. That the noticed of motion dated 18th March, 2004 be withdrawn from the court records and the current chamber summons application be adopted.
2. That the court do receive, recognise and enforce the arbitral award made on 6th November, 2003 which was delivered and read on 7th January, 2004.

The application dated 18th March, 2004 sought to be withdrawn seeks the same order as is sought in prayer No. 2 of the present application.

When the present application came up for hearing on 3rd May, 2006 learned counsel for the Defendant raised a preliminary objection as per notice dated 2nd February, 2006. There are two grounds of that preliminary objection.

(a) That there is no jurisdiction for this court to entertain the claimant's application dated 20th September, 2004 while the application dated 18th March, 2004 has not been determined and/or withdrawn as provided by the Civil Procedure Rules.

(b) That the application dated 20th September, 2004 is incurably incompetent for being in breach of the mandatory provisions of the section 36 of the Arbitration Act, 1995.

I have considered the submissions of the learned counsels appearing. The first ground of the preliminary objection is not well taken because in prayer 1 of the application the Plaintiffs seek leave of the court to withdraw the earlier application by notice of motion dated 18th March, 2004. That objection therefore is raised merely to defeat prayer No. 1 of the application. I will overrule it. The second ground of objection is, in effect, that the second prayer of application is incurably incompetent for being in breach of the mandatory provisions of section 36 of the Arbitration Act, 1995. It was submitted for the Defendant that no duly authenticated original arbitral award or a duly certified copy of it has been furnished by the Plaintiffs. This is a statutory requirement couched in mandatory terms. Indeed, the Plaintiffs have not furnished a duly authenticated original arbitral award or a duly certified copy of it. Failure to comply

with an express statutory provision cannot be cured under section 3A of the Civil Procedure Act. The inherent powers of the court do not include the jurisdiction to ignore express statutory requirements. Prayer No. 2 of the application is therefore incompetent and cannot be heard. It is hereby struck out. That leaves only prayer No. 1 of the application which shall proceed to hearing.

The preliminary objection has therefore partly succeeded and partly failed. The parties shall bear their own costs of the preliminary objection. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF AUGUST, 2007

H. P. G. WAWERU

J U D G E

DELIVERED ON THIS 17th DAY OF AUGUST, 2007