



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

Misc Civil Appli 551 of 2008

HON. ATTORNEY GENERAL.....APPLICANT

VERSUS

MANCHESTER OUTFITTERS LIMITED.....1ST RESPONDENT

HON. JUSTICE (RTD) TORGBOR.....2ND RESPONDENT

RULING

The Applicant filed an original summons under Section 11(2), 12(3) (B) (5) of the Arbitration Act and Rule 3 of the Arbitration Rules and Order XXVI of the Civil Procedure Rules and Section 3A of the Civil Procedure Act. The Applicant then filed a Chamber summons application invoking Section 3A of the Civil Procedure Rules and rule 3(2) of the Arbitration Rules. In the application, the Applicant seeks to stay arbitration proceedings being conducted by the 2nd Respondent in the case between the Applicant Government through the Attorney General and Manchester Outfitters Limited. The Applicant also seeks any other/further orders as the court may deem fit to give. Upon service with the application, the 1st Respondent Manchester Outfitters Limited filed a Notice of Preliminary Objection, in which four grounds are raised as follows:

1. THAT this honourable court lacks jurisdiction to entertain the instant application as the same falls within the Arbitration Act 1995.
2. THAT there are no proceedings to be stayed as the proceedings have already been closed and parties have already filed their submissions.
3. THAT the present application is incompetent and misconceived as the legal and procedural ground upon which it is premised is no longer available, the same having been determined by the arbitral tribunal's ruling on its positive jurisdiction.
4. THAT this application is not brought in good faith and is an abuse of the due process, more so in view of the fact that the issue of jurisdiction was determined on 12th July 2007 and that is one year before the instant application.

Mr. Muriuki who argued the Preliminary Objection on behalf of the 1st Respondent argued only three points. Counsel argued that since the Applicant had challenged the jurisdiction of the Arbitrating Tribunal, and a ruling having been made, the Applicant should have appealed against the ruling within 30 days as prescribed under Section 14 of the Act. Learned counsel also argued that the application could only have been brought under Section 17 of the Act, since it was the applicable provision in the

circumstances. Mr. Muriuki submitted that the Applicant had fully participated in the arbitral process and that what was pending was the judgment and that therefore the application was an abuse of the court process.

Mr. Bitta for the Applicant opposed the Preliminary Objection. In answer to the issue of the applicable provisions bringing the instant application, learned counsel urged the court to note that the Chamber Summons is premised on an Originating Summons grounded on Sections 11 and 12 of the Arbitration Act. Regarding participation in the arbitral process, counsel submitted that the Applicant proceeded under protest without prejudice of their right to raise issues with the process before the court. Mr. Bitta submitted that in any event the proceedings were yet to be completed. Counsel denied that the Applicant had made any submission before the Arbitrator as alleged. Mr. Bitta argued further that since the Applicant had not participated in the appointment of the 2nd Respondent, it did not recognize him and therefore it could not invoke Section 17 of the Act to bring the instant application.

Finally Mr. Bitta submitted that the preliminary objection must fail as it raised matters grounded on contentious issues of fact which have been contradicted in the application. He gave the allegation that the Applicant had made submissions before the Arbitrator as an example of contested facts.

I have considered the submissions by both counsel in this matter. The main issue for determination in my view is whether the Respondent has raised a preliminary objection. By that I mean to determine whether the four grounds raised by the Respondent in its Notice of Preliminary Objection are in fact “a preliminary objection.”

In the celebrated case of **MUKISA BISCUIT CO. VS. WEST END DISTRIBUTORS [1969] EA 696** at 698, at pages 700 and 701 Law, J.A. and Sir Charles Newbold, P. observed:

“Per law, JA

‘So far as I am aware, a preliminary objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of elimination, or a submission that the parties are bound by the contract giving rise to the suit to refer to the dispute to arbitration.

‘Per Newbold P.

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.

The test to be applied in determining whether a Preliminary Objection raised by the Respondent is proper is to answer the question whether the grounds argued by the Respondent can in fact dispose of this suit. I will deal with each seriatim.

The first issue was that this court lacked jurisdiction to entertain the application as the application falls within the Arbitration Act, 1995. In Mr. Muriuki’s submission, he did not demonstrate in what way this court lacked jurisdiction to entertain the application. The learned counsel instead argued that the Applicant had failed to come to court within the time prescribed under Section 17 of the Act. It has not been shown that the said section applies as that will involve a consideration of contentious issues and may necessitate the calling of evidence. For that reason, ground one is not a proper preliminary objection.

Same can be said of ground two. Whether proceedings before the Arbitral Tribunal are complete or not is

a matter of fact which will need to be proved. Ground two is not a preliminary objection either.

Ground three challenges the application for being incompetent and misconceived on the basis that it has no legal basis since the arbitral tribunal has ruled on it. Again the issue whether the application is incompetent, misconceived or not will need adduction of evidence. There will need to be an investigation to determine that point. That is not an exercise that can be undertaken in a preliminary objection. This ground too is not befitting of the term.

Ground four raises the issue of bad faith and abuse of process on the basis that the arbitral tribunal's ruling on the matter of jurisdiction has already been made. Again what the arbitral tribunal based its ruling on needs to be placed before this court by way of evidence for the court to determine whether there is abuse or bad faith.

Even if the court found that there is abuse, would it lead to the disposal of this suit? I do not think so. Indeed I do not think that any of the grounds raised in the preliminary objection, even if they were proved, would lead to the disposal of the suit. At most they would lead to the striking out of the application and no more.

I am satisfied that no proper preliminary objection has been raised or argued before me as would, if upheld, lead to the disposal of the suit. For this reason, the preliminary objection as raised herein is dismissed with costs.

Dated at Nairobi, this 26th day of September, 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Bitta for the Applicant

Mr. Muriuki for the 1st Respondent

LESIIT, J.

JUDGE

Court:

By consent of parties, application dated 23/7/08 be heard on 6/11/08.

Interim orders extended till then.

LESIIT, J.

JUDGE