



**REPUBLIC OF KENYA**

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

**Civil Case 239 of 2005**

**SEBHAN ENTERPRISES LIMITED.....PLAINTIFF**

**VERSUS**

**WESTMONT POWER (KENYA) LIMITED.....DEFENDANT**

**RULING**

On 6.5.2005, the applicant filed Originating Summons under Section 17 of the Arbitration Act 1995, Rule 3 of the Arbitration Rule's 1997 Order XXXVI of the Civil Procedure Rules and all enabling provisions of the Law seeking the determination of one question that the arbitral tribunal does have jurisdiction to hear and determine the arbitration proceedings between the plaintiffs and the defendants. The arbitrator had on 25-2-2005 come to the conclusion that he did not have jurisdiction to receive and adjudicate upon the applicants' claims against the respondent. He also ruled that as the applicant did not comply with contractual time limits in giving its notice to commence arbitration its claim was lost leaving nothing to adjudicate upon in the arbitration.

On 14.6.2005 the Respondent filed a Notice of preliminary objection to the Originating Summons objecting to the jurisdiction of this court to hear the Originating Summons when the arbitral tribunal had ruled on a plea raised as a preliminary question that it had no jurisdiction. The foundation of the objection is Section 17(6) of the Arbitration Act 1995.

I heard arguments for and against this objection on 30.11.2005 and on 9.2.2005. I have considered the submissions and the cases cited. Having done so, I take the following view of the matter. Section 17(6) of the Arbitration Act 1995 reads:-

***“17(6) Where the arbitral tribunal rules as a preliminary question that it has jurisdiction any party aggrieved by such ruling may apply to the High Court within 30 days after having received notice of that ruling, to decide the matter.”***

This section clearly gives any party aggrieved by a determination that the arbitral tribunal has jurisdiction to apply to the High Court to decide the matter. There is no equivalent provision for reference to the High Court where the arbitral tribunal declines jurisdiction as happened in the case at hand. I have perused the Arbitration Bill 1995 which was presented to Parliament for debate before the enactment of the Arbitration Act 1995. The Bill's Section 17(6) was retained word for word in the Act. I have also perused the Memorandum of Objects and Reasons for the Bill. It states inter alia that the Bill adopts substantially the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (**UNCITRAL**). It is also stated in the Memorandum that the Bill provides for circumstances in which parties to an arbitration may refer certain matters to the High Court.

I have further perused **UNCITRAL** Model Law on International Commercial Arbitration contained in Bernsteins Handbook of Arbitration and Dispute Resolution Practice by John Tackaberry and Arthur Marriott 4<sup>th</sup> Edition Volume 2. Article 16(3) on competence of arbitral tribunal to rule on its jurisdiction reads:-

***“16(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction; any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending the arbitral tribunal may continue the arbitral proceedings and make an award.”***

It is clear from the above that our Section 17(2) (6) (7) and (8) of the Arbitration Act 1995 was lifted from **INCITRAL** Model Law on International Commercial Arbitration. In the premises it appears that the decision to refer the matter to the High Court only where the arbitral tribunal rules as a preliminary question that it has jurisdiction is deliberate. The English position is in my view irrelevant. The English Arbitration Act 1996 is therefore not helpful. The position in **E.A. Industries –vs. Transgoods Ltd [1972] E.A 420** is distinguishable from the present position. In the earlier case the Court of Appeal held that an unqualified right of appeal existed against both orders granting and orders refusing relief even though there was no express provision for a appeal as of right against an order declining relief. In that case the Court of Appeal found a clear anomaly in allowing an automatic right of appeal where an order of injunction was ordered and none where an injunction was refused. There is no such anomaly in the matter at hand as I have found the decision to apply to the High Court only where jurisdiction is accepted as deliberate and informed.

Reliance placed upon the English case **of Hill –vs- William Hill (Park Lane) Ltd [1949] ALL ER 452** by the application was misconceived because in that case the majority decision did give effect to the actual words of the Gaming Act 1845. I am also of the view that Judge Megarry’s decision in

**Number 20 Cannon Street Ltd –vs- Singer & Friedlander Ltd [1974] 2 All ER 577** is not helpful. In that case a statute governing tenancies contained two prohibitions. One prohibition was wide and another applied to a limited class of cases. The Learned Judge found that the wide prohibition was to be treated as not applying to cases within the limited prohibition. That situation does not arise in the case at hand where the statutory language is unequivocal.

The case of **Luke – vs – Inland Revenue commissioners [1963]1 All ER 655** also relied upon by the applicant is also distinguishable from the case at hand. In that case a literal interpretation of certain provisions of the Income Tax Act lead to a wholly unreasonable result and their Lordships saw it fit to do some violence to the words of the statute to achieve the obvious intention of the Legislature. That is not the situation in the case at hand where the intention of the Legislature is clearly conveyed in the provisions of the statute. Indeed in my view a different interpretation would in effect impute to Parliament an intention which is not supported by any material. For the same reasons the case of **Dockers Labour Club and Institute Ltd –vs- Race Relations Board [1974] 3 All ER 592** is not helpful and dealt with different circumstances. That case dealt with whether the appellants were guilty of unlawful discrimination under the Race Relations Act 1968. Lord Simon of Glaisdate observed as follows:-

***“A fundamental principle of our constitution is the sovereignty of a Parliament in which the executive is potently represented. Under such a constitution it is self-evidently undesirable that statutes should be so interpreted as to run counter to what Parliament meant to say - even where the interpretation may be the meaning of what Parliament has said. Some times such a divergence is the result of human error in Parliament or court. Sometimes the actual forensic situation was not envisaged by Parliament; the courts then have to ascertain whether an intention that it should be handled in a particular way is to be imputed to Parliament.”***

Such a situation does not arise in the case at hand. Parliament in our case was clear as to its intention.

That intention is clear in the language of the statute. There is no error in Section 17(6) of the Arbitration Act 1995. There is no absurdity or inconsistency as was the case in **Re Lockwood (deceased). Atherton and Another –vs- Brooke and Another: [1957]3 All ER 520** where provisions of the Administration of Estates Act 1925 strictly construed lead to absurdity and in constituency by preferring in the administration of the estate the State or uncles and aunts of half blood relatives of the deceased to those of uncles and aunts of the whole blood. Such a situation does not arise in the case at hand.

I appreciate that there would be situations where the court will not adopt a non literal construction and not stick to the letter of the statute but go by its true intent as Lord Denning found in **Ministry of Housing and Local Government –vs- Sharp and Another [1920]1 All ER 1009**. In that case however, Lord Denning held the dissenting view. Fortunately in the case at hand the letter of Section 17(6) of the Arbitration Act and the true intent of the Legislature are not at variance.

Finally, I have also found as unhelpful, the reliance placed upon the case of **Federal Steam Navigation Co. Ltd and Another –vs- Department of Trade and Industry [1974]2 All ER 97** where an error was found in the Oil in Navigable Waters Act 1955 and their Lordships found that certain provisions of the said Act made no sense and concluded that an, “and” be substituted for “or” in order for the provisions to make sense. That situation obviously does not arise in our case. It cannot be said that Section 17 (6) of the Arbitration Act 1995 does not make sense. The language of the section does not require any substitution in order to make sense.

As Lord Simon of Glaisdale in the last cited case had earlier thought, the course urged by the applicant before me goes beyond the permissible limits of judicial law-making in a matter of statutory construction.

In the result I uphold the Preliminary Objection by the respondent/defendant and order struck out the Originating Summons dated 6.5.2005 and filed on the same date with costs to the respondent/defendant.

Orders accordingly.

**DATED AND DELIVERED AT NAIROBI THIS 13<sup>TH</sup> DAY OF MARCH, 2006.**

**F. AZANGALALA**

**JUDGE**

**13.3.2006**