



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
MILIMANI COMMERCIAL COURTS
WINDING UP CAUSE NO. 57 OF 2001**

IN THE MATTER OF K & A SELF SELECTION STORES LIMITED

AND

**IN THE MATTER OF THE COMPANIES ACT
(CAP 486 LAWS OF KENYA)**

AND

**IN THE MATTER OF ARBITRATION ACT (ACT NO. 4 OF 1995)
AND IN THE MATTER OF AN ARBITRATION**

BETWEEN

DILSHAD SADRUDIN MOHAMED as the

legal representative of the estate of

SADRUDIN H. HOMAMED (Deceased).....CLAIMANT

AND

K & A SELF SELECTION STORES LIMITED1ST RESPONDENT

KHATUN SHAMSHUDIN MOHAMED as

the legal representative of the estate of

SHAMSHUDIN H. MOHAMED (Deceased)2nd RESPONDENT

GALIB MOHAMED3RD RESPONDENT

KHATUN S MOHAMED4TH RESPONDENT

RULING

The claimant in the arbitration filed a preliminary objection to certain paragraphs in an affidavit in support of an application to set aside an arbitral award.

The Preliminary Objection is dated 5th October 2004. The same is two limbs: -

(a) That the court do order the striking out of Paragraph 9, 10, 11, 13, 14 and 15 and all annexures to the supporting affidavit of **BALIB SHAMSHUDIN MOHAMED** on the ground that they offend the specific provisions of the Arbitration Agreement of the parties; and

(b) That the court do order the striking out of Paragraph 20 in the Supporting Affidavit of **GALIB SHAMSHUDIN MOHAMED** on the ground that it offends the specific provisions of Order 18 of the Civil Procedure Rules.

Counsel for the claimant the movant of the preliminary objection stated that after Winding up Cause was filed parties in this matter agreed to take the matter to Arbitration and an agreement to that effect was drawn up. Counsel argued that paragraph 5 of that agreement provided that the proceedings before the arbitrator were not to form part of the High Court matter.

Paragraph 5 of that agreement states as follows: -

“It is hereby expressly agreed and declared that the proceedings before the Arbitrator shall not form part of the record of the Arbitration proceedings and the same shall not be available either to the parties and or the High Court in any event.”

The claimant counsel said that this clause equated the arbitration proceedings to a hearing in camera. He argued that contrary to the provisions of that clause the subject affidavit had in paragraphs 9,10,11,13,14 and 15 included those proceedings.

I have perused those paragraphs and I find that Paragraph 9 referred to two statements of claims filed before the arbitrators; paragraph 10 refers to two statements of defence; Paragraph 11 refers to Reply to the statement of defence; Paragraph 13 referred to the decision by the arbitrator to have an independent audit report prepared; paragraph 14 referred to the annexed report of the accountant; paragraph 15 referred to a letter of objection written by the respondents objecting to the accountant’s report.

The claimant’s counsel further argued in support of the second limb of the objection and said that Paragraph 20 violated Order 18 Rule 3 of the Civil Procedure Rules, which provides that a deponent to an affidavit should confine himself to such facts as he is able from his own knowledge to prove.

Looking at that paragraph it lays down the grounds, which have aggrieved the respondent from the decision of the arbitrator. That paragraph has 20 sub paragraphs and I have perused the same and I am of the view that they have not violated Order 18 rule 3. Respondent’s counsel opposed the objection by saying that it fails to meet the test of the case: - **MUKISA BISCUIT MANUFACTURING CO. LTD – V – WEST END DISTRIBUTORS LTD (1969) E.A. 696**. Counsel referred to the judgment of Sir Charles Newbold P by quoting the following passage: -

“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 respondent’s counsel said that the facts in this matter are not agreed and that they were in dispute.

He then said that the arbitration agreement forbid the use of the proceedings before the arbitrator where else the deponent had annexed to his affidavit pleadings. Counsel proceeded to define the word proceedings by quoting from the Oxford Advance Learner’s Dictionary which provided that proceedings

means; Law suit: start proceedings for divorce, what takes place at a meeting, ceremony etc.

The claimant's counsel argued that the word proceedings has a wider definition, which encompasses pleadings.

I must begin by saying that I am in agreement with the respondent's counsel that the objection raised herein fails to meet the test of a preliminary objection. In the first place the parties cannot agree what they meant in the arbitration agreement in the use of the word proceedings. One says it related to the hearing before the arbitrator the other says it encompassed the pleadings and the documents given in evidence.

Since the court is being asked to define the word proceedings then the objection falls on its back and fails miserably.

The respondent's counsel pointed out the definition of pleadings in Section 2 of the Civil Procedure Act and it is clear from that definition the word proceedings is not included.

Proceedings I would define to be the business done or carried out before a court. Proceedings can also be the record of all court attendance and steps taken in an action or suit.

To my mind proceeding before the arbitrator are the record of submissions and testimonies of witnesses thereof and the final decision.

That being my conclusion I am of the view that the claimant's objection must fail.

Accordingly the claimant's Preliminary Objection dated 5th October 2004 is dismissed with costs to the respondent.

Dated and delivered this 11th day of November 2004.

MARY KASANGO

JUDGE