



REPUBLIC OF KENYA

IN THE HIGH COURT AT MILIMANI

CIVIL SUIT NO 262 & 267 OF 2001

KAMCONSULT LTD..... APPLICANT

VERSUS

TELKOM KENYA LTD

POSTAL CORPORATION OF KENYA.....RESPONDENT

RULING

On 17.9.01 this Court determined a reference under section 17 of the Arbitration Act by finding that the arbitrator had no jurisdiction to arbitrate over the claims by Kamconsult Ltd against Telcom Kenya Ltd and the Postal Corporation of Kenya. I referred the matter back to the arbitrator for necessary consequential orders under the Arbitration Act. Dissatisfied with the Court's decision but finding that the avenue of an appeal was closed by the provisions of section 17(7) of the Arbitration Act, Kamconsult, the applicant herein, filed a notice for the review of the orders of 17.9.2001 and for a stay of execution and/or implementation of the said orders or the making of any consequential orders by the arbitrator pending the hearing and determination of the application for review. The motion was expressed to be brought under order 44 rule 1, 21 and 22; sections 3A, 68 (e) and 80 of the Civil Procedure Act and rule 11 of the Arbitration Rules, 1997.

Before the commencement of the hearing of the motion, the respondents took preliminary objections of which due notice had been given that no appeal or review lay against the order or decision of the Court arising out of proceedings under section 17 of the Arbitration Act. It was argued on behalf of the respondents that section 17 of the Arbitration Act did not confer any right of appeal or review in respect of a decision under subsection (6) thereof and accordingly the application for review was precluded by section 10 of the same Act which forbade the Court from intervening in matters governed by the Act except as provided in the Act itself. It was further submitted that the Civil Procedure Act and in particular section 80 thereof were inapplicable because section 3 saved any special jurisdictions which were conferred by other written laws and the

Arbitration Act procedure thereunder was one such special jurisdiction.

It was argued that section 80 referred to matters arising from the Civil Procedure Act itself. It was further argued that rule 11 of the Arbitration Rules did not give parties to an arbitration any substantive right of review or stay.

On behalf of the applicant, it was argued that section 17 of the Arbitration Act does not preclude review; it only bars an appeal. It was further contended the proceedings on which the orders sought to be

reviewed were brought not only under section 17 but also under rule 3(2) of the Arbitration Rules which rules are made pursuant to section 40 of the Act. It was contended that the said rule 3(2) contemplates that applications can arise out of proceedings brought under section 17(6) as well as rule 3(1). It was argued that the Civil Procedure Rules were to apply to any such applications by dint of rule 11 of the Arbitration Rules and accordingly order 44 of the Civil Procedure Rules which empowers the Court to review decrees and orders for reasons stated therein was properly invoked by the applicant. It was contended that section 10 of the Arbitration Act was not violated as the applicant had moved the Court under a procedure prescribed by the Act. In that connection, it was argued that the power to review is not an inherent one but is one to be conferred by law either expressly or by necessary implication. The necessary implication relied upon by counsel for the applicant was the provision in rule 11 that the Civil Procedure Rules would so far as appropriate apply to all proceedings under the Arbitration Rules, 1997.

In reply the respondent argued that if rule 11 imported a jurisdiction to review orders made under section 17 (6) it was inconsistent with the statute which not only did not confer the power of review but expressly barred all manner of interventions other than those allowed. It was also contended that rule 11 only applied to proceedings brought under rule 3(1) and could not confer substantive rights. Counsel for the respondents argued that to hold otherwise would create an absurdity of the Civil Procedure Rules it would follow that even appeals could be preferred.

From the above submission, it is apparent that the issue for determination is whether by dint of rule 11 of the Arbitration Rules a power to review orders and decisions made pursuant to proceedings under section 17 (6) of the Act is conferred on the Court and if it is whether such conferment is inconsistent with the substantive enactments and therefore null and void. I think the point of departure should be an understanding of rule 11.

The rule reads that

“so far as is appropriate, the civil procedures rules shall apply to all proceedings under these rules”.

Plainly, for the Civil Procedure Rules to be invoked, the proceedings in respect of which those rules are sought to be applied must be proceedings under the rules. And what proceedings may be made under the rules?

They are applications under sections 12, 15, 17, 18, 28 and 39 (see rule 3(1)); any other application arising from any such application (see rule 3(2)); an application to file an award in the High Court and applications incidental or connected to such an application (rule 4); an application to set aside an award under section 35 and an application under section 36 of the Act. It appears to me on a plain reading of rules 2-9 and the pertinent substantive enactments which indicate the sort of proceedings which may be brought under the rules that an application for review of an order made under section 17(6) is not one such application. The question of invoking the provisions of the Civil Procedure Rules in respect of such an application does not therefore arise. The applicant attempts to go round that obvious procedural barrier by contending that its application is contemplated by rule 3(2) which provides for the making of other applications which arise from an application made under sub rule (1). This is an ingenious interpretation but I don't accept it for two reasons. First, my interpretation of the sub rule is that it contemplates applications incidental to or ancillary to the substantive applications under sub rule (1), that is to say only applications within the substantive application itself. It does not contemplate applications made with respect to substantive orders and decisions made after the hearing of those substantive applications.

Secondly, the rule enjoins that such incidental and ancillary applications should be by way of summons in the cause. That the applicant herein has brought the present application by way of motion on notice shows, in my view, that the applicant was aware that its application was not within the ambit of sub rule (2) of rule 3. In short, I am of the persuasion that rules 2- 9 of the Arbitration Rules do not contemplate an application to review an order made under section 17(6) of the Act and the application to which objection is taken could not therefore be made under rule 11. Furthermore, I accept the submission by counsel for the respondents that even where rule 11 applies, it does not confer substantive rights. It only confers procedural rights and obligations such as affording a basis for the use of certain forms, invocation of the

required modes of services, the rights and obligations of filing grounds of opposition and replying affidavits and such like. The rule cannot confer a mode of intervention in the proceedings or in respect of the orders flowing from the proceedings where such modes are not expressly provided for in the substantive sections of the Act. To hold otherwise would subvert the main Act to the extent of even invoking the appellate machinery provided under the Civil Procedure Rules. That would be clearly contrary to the express provisions of section 10 of the Act to the effect that no Court shall intervene in matters governed by the Act save as provided in the Act itself.

To conclude, I am of the opinion that the right of review of orders and/or decisions made pursuant to reference under Section 17(6) of the Arbitration Act is neither expressly conferred by the Act nor is it to be implied on a proper interpretation of the application of rule 11 of the Arbitration Rules. In the premises, I uphold the preliminary objection by respondents that there is no jurisdiction to entertain the applicant's motion on notice dated 2nd October, 2001. I order it dismissed with costs to the respondents.

Dated and delivered at Nairobi this 11th day of December, 2001

A.G. RINGERA

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JUDGE