Were (As legal representative of Peter Ouma Onyango - Deceased) v Karlsson (Arbitration Cause E015 of 2023) [2023] KEHC 21553 (KLR) (Commercial and Tax) (2 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21553 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

ARBITRATION CAUSE E015 OF 2023

DAS MAJANJA, J

AUGUST 2, 2023

BETWEEN

ROSE NYALWENGE WERE AS LEGAL REPRESENTATIVE OF PETER OUMA ONYANGO - DECEASED) ..... APPLICANT

AND

MATS KARLSSON ..... RESPONDENT

RULING

1. The Respondent objects to the Applicant's Notice of Motion dated 16.01.2023 made under section 36 of the *Arbitration Act* ("the Act") and seeking to recognize and enforce an arbitral award. The ground is set out in the Notice of Preliminary Objection dated June 14, 2023 stating that, "The application is incompetent, fatally bad in law and incurable as it made contrary to the requirements of rule 9 of the *Arbitration Rules*, 1997." Rule 9 of the Arbitration Rules ("the Rules") provides that, "An application under section 36 of the Act shall be made by summons in chambers."

2. I directed the parties to address the preliminary objection by written submissions which I have considered.

3. The Respondent submits that under Rule 9 of the Rules, an application under section 36 of the Act can only be made by summons in chambers and that in accordance with section 10 of the Act, all matters of arbitration must be governed by the Act. That failure to adhere to the provision renders the application fatally and incurable defective, null and void

4. The Respondent avers that the application cannot be saved by article 159(2)(d) of the *Constitution* which provides that justice shall be administered without undue regard to procedural technicalities as not every procedural blunder can be excused as a 'mere technicality' as was held in the following cases:

> *Wanja & another v Roothaert* (Miscellaneous Application E193 of 2021) [2022] KEHC 10255 (KLR), *Dishon Ochieng v SDA Church* NRB CA Civil Appeal No. 333 of 2010 [2012] eKLR, *Scope Telematics International Sales Limited v Stoic Company & another* NRB CA Civil Appeal No. 285 of 2015 [2017] eKLR and *Africa Inland Church Kenya Registered Trustees v Julius Mwanza & 2 others* MKN HCCA No. 19 of 2020 [2021] eKLR.

5. The respondent maintains filing the application by way of a chamber summons is a mandatory requirement under Rule 9 when an applicant makes an application to enforce an arbitral award under section 36 of the Act. Therespondent submits that there is no provision in the Act and Rules that permits the court to depart from the strictures of Rule 9. Further that the court does not have discretion under the Act and strict adherence to the rule is non-negotiable.

6. The respondent submits that even an ex parte application for leave to enforce an arbitral award under Rule 6 of the Rules is by way of summons and that Rule 9 is a substantive procedural requirement for which the Applicant must adhere to and follow all processes provided for in the Act and Rules. Accordingly, the Respondent submits that thecourt lacks jurisdiction over this matter and no power to intervene by making any order other than to strike out the application since thecourtis prevented from intervening by section 10 of the Act and there is no provision in the Act for leave to amend or file a fresh enforcement application.

7. The applicant opposes the preliminary objection and urges the court to dismiss it. She submits that the fact that the application is brought by a Notice of Motion as opposed to a Chamber Summons is a procedural defect that would not render the application incurably defective as was held in the case of *Patrick Kabue Muchene v Hannah Wangari Kinuthia & another* ML ELC No. 788 of 2015 [2021] eKLR.

8. The Applicant contends that the court should render substantive justice pursuant to article 159(2)(d) of the *Constitution*. It further relies on the court's decision in *Susan K. Baur v Shashikant Shamji Shah & another* NKU HCCC No. 279 of 2010 [2011] eKLR and submits that the Applicant will not suffer any prejudice based on a technical error that is a matter of form and not substance.

9. The court is being called to strike out the application for being filed by way of a Notice of Motion as opposed to a Chamber Summons as provided by Rule 9 of the Rules. It is common ground that the application has been brought by way of a Notice of Motion and not a Chamber Summons. The question is whether this is a technical error that can be excused underarticle 159(2)(d) of the *Constitution* or a fatal error of substance that cannot be salvaged or excused by the court.

10. In *Scope Telematics International Sales Limited v Stoic Company & another* (*supra*) the Court of Appeal dealt with the compliance with mandatory procedures in arbitral proceedings under the Act. It considered the import of Rule 2 of the Rules which states that, "Applications under section 6 and 7 of the Act shall be made by summons in the suit." The court held that compliance with the rule was mandatory and proceeded to strike out the application which was not anchored in a suit. The court observed as follows:

> It must be borne in mind that the substantive provision that the 1st respondent invoked was section 7 of the Act. The 1st respondent was seeing an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by

> Rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by the *Constitution* or Statute, that procedure should be strictly followed (See S*peaker of National Assembly v Njenga Karume* [2008] 1 KLR 425). The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on article 159 of the *Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that article 159 of the *Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure (see *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 ors* [2010] eKLR; *Dishon Ochieng v SDA Church, Kodiaga* (2012) eKLR; *Hunter Trading Company Ltd v Elf Oil Kenya Limited*, Civil Application No NAI 6 of 2010). Despite the foregoing, the court still went ahead to exercise its discretion in favour of the 1st respondent by invoking that Article, the overriding objective under the *Civil Procedure Act*, and the interests of justice, to hold that failure to anchor the application on a suit did not render the application fatal or incurably bad. The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of Rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective.

11. The aforesaid decision is direct authority that failure to file a suit to support an application under section 7 of the Act as read with Rule 2 of the Rules is fatal to the application. In several decisions, the High Court has held that the decision is binding and an application filed in violation of those provisions is fatally defective (see *Machiri Limited v Sogea-Satom Kenya Branch* HCOMM No. E677 of 2020 [2020]eKLR, *Revival Holdings Limited v Grand Afrique Consulting H* Misc. No. E094 of 2021 [2021]eKLR, *Civicon Limited v Fuji Electric Co., Ltd and another* HCOMM ARB Cause No. 002 of 2020 [2020]eKLR and *TYL Limited v China Aero-Technology International Corporation* H Misc. E110 of 2019 [2019] eKLR).

12. As to whether the decision in *Scope Telematics International Sales Limited v Stoic Company & another* (*supra*) applies to an application made under section 36 of the Act and Rule 9 of the Rules, I hold that while the aforesaid decision can be distinguished on the ground that the decision dealt specifically dealt with Rule 2 and the requirement of filing a suit to support an application seeking interim measures of relief, in this case, there is no requirement to file a suit to support the application. In *TYL Limited v China Aero-Technology International Corporation* (*supra*), the court held that the reasons for filing a suit when applying for interim measures of protection are for the court to appreciate the nature of the pleadings to inform it whether or not to grant relief, to give a footing to the application and if the application for interim measures of protection is not granted on the grounds, inter alia, that there is no arbitration clause, then the matter can be determined in court.

13. The issue then is whether the filing of an application by Notice of Motion rather than by Chamber Summons is fatal in the circumstances. As I have pointed out, there is no requirement to file a suit in the manner contemplated by Rule 2 of the Rules. This means that whether the application is a

motion or summons is really a matter of form that does not detract from the substance. Concerning the difference between the two forms of application, the court in *Susan K. Baur v Shashikant Shamji Shah & another* (*supra*) observed as follows:

> The difference between a Summons in Chambers and a Notice of Motion is today very much blurred. In the olden days, summons in chambers was heard in chambers unless the court adjourned it for good reason to be heard in open court. Similarly, Motions were heard in open court unless the court as stated in Order L, rule 1 directed that it be heard in chambers. Today, both Chamber Summons and Motions may and are heard in chambers, and in open court. So that christening an application a Chamber Summons or a Notice of Motion when the rules provide otherwise does not go to the root or basis of the claim, and is merely a matter of form not substance. It does not render the application fatally defective.

14. It is also worth noting that when the *Civil Procedure Rules* were revised and enacted in 2010, they did away with Chamber Summons and all applications are now made by Notice of Motion. Of course, the Rules which were enacted in 1997 have not caught up with this development and to insist that an application is fatal merely on the ground that it can only be brought by summons and not a motion when matters are now heard online would amount to elevating a matter of procedure and form to a fetish. I would adopt what the Court of Appeal (per Nambuye JA) stated in *Njoroge & another v Njoroge & another* (Civil Application E106 of 2021) [2021] KECA 258 (KLR) (3 December 2021) (Ruling) when faced with a similar scenario:

> The above default on the part of the applicant will not however per se disentitle the applicant the right to have their application considered on its own merits. The default is curable in law not only under the inherent power of the court and the overriding objective principle of the court but also under the now crystallized non-technicality principle in the delivery of justice enshrined in article 159(2)(d) of the *Constitution*.
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> .....
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> On the strength of the above, the applicants' application is rectified to read as "a Notice of Motion" as opposed to a Chamber Summons, while the access provisions are also amended to read Rule 23(2) of the Court of Appeal Rules.
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> 8.Being satisfied that I am now properly seized of the matter, proceed to pronounce myself thereon on its merits....

15. I do not think that respondent will suffer any prejudice as there is nothing further to be determined other than the application itself. Unlike the failure to file a suit to support an application for interim measures of protection, the error in this case is in the form of application. The error can, in these circumstances, be condoned as it does not go to root of the cause or to jurisdiction.

16. I dismiss the Preliminary Objection contained in the notice dated June 14, 2023. The costs shall be in the application.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST 2023.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Ondijo instructed by J. A. Makau and Company Advocates for the Applicant.

Mr Kimata instructed by Kimata Alutira and Company Advocates for the Respondent.