IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CORAM: D. S. MAJANJA J.

ARBITRATION CAUSE NO. 002 OF 2020

IN THE MATTER OF SECTION 7 OF THE ARBITRATION ACT, 1995

BETWEEN

CIVICON LIMITED ……...……..……..… APPLICANT

AND

FUJI ELECTRIC CO. LIMITED …… 1ST RESPONDENT

MARUBENI CORPORATION ……..…….. 2ND RESPONDENT

RULING

1. The issue I have to decide in this ruling is whether the applicant's Chamber Summons dated 15th January 2020 is fatally defective because it is filed in violation of **Rule 2** of the ***Arbitration Rules, 1997*** ("the ***Rules***") which states as follows:

> *Applications under section 6 and 7 of the Act shall be made by summons in the suit.* [Emphasis mine]

2. The applicant commenced these proceedings by the Chamber Summons dated 15th January 2020 under **section 7** of the ***Arbitration Act, 1995*** ("the ***Act***") seeking interim measures of protection, inter alia, restraining the respondents from appointing or imposing a third party contractor or other company at the Olkaria I Additional Unit 6 Geothermal Power Plant Project pending the commencement and determination of arbitration proceedings.

3. The 2nd respondent objected to the application on that grounds that the application was fatally and incurable defective based on **rule 2** of the ***Rules***. The 2nd respondent contended that the meaning of the rule is that an application under **section 7** of the ***Act*** must be filed together with a suit and since the applicant filed a chamber summons, the application was incompetent. The 2nd respondent relied on the Court of Appeal decision in ***Scope Telemantics International Sales Limited v Stoic Company Limited*** **NRB CA Civil Appeal No. 285 of 2015 [2017] eKLR** where it considered the import of **rule 2** of the ***Rules*** and held that compliance with the rule was mandatory. It stated 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 (sic) 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 Speaker of National Assembly vs. 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.* [Emphasis mine]

4. The 2nd respondent therefore urged that in light of the aforesaid decision, the applicant's application was fatally defective and should be dismissed on this ground.

5. While admitting that the application was not anchored in any suit, counsel for the applicant valiantly argued that the application was not defective for two reasons. First, that this court is not being called upon to determine the rights or obligations of the parties as would be the case in an ordinary suit. He pointed out that there is no action for trial as the issues in dispute remain the subject of the intended arbitration proceedings. In his view, the application for interim relief are not capable of being presented by a substantive suit.

6. Second, that the limitation placed on the extent of intervention by the court in arbitral matters under **section 7** of the ***Act***, does not permit the existence of a substantive suit. Counsel cited the decision of ***Safaricom Limited v Ocean View Beach Hotel Limited and 2 Others*** **NRB CA Civil Application No. NAI 327 of 2009 [2010] eKLR** where Nyamu JA., held as follows:

> *In addition, after the grant or failure to grant an interim measure under section 7 of the Arbitration (sic), there is no pending suit because the substance of the suit under section 7 is grant or refusal (sic) interim measure itself.*

7. I must point out that the applicant's submission is attractive since an application under **section 7** of the ***Act*** is for one purpose only and it is exhausted once the court determines the application one way or another as stated by Nyamu JA., in the ***Safaricom Limited Case (Supra)***. This, however, is a case where this court is bound by a decision of the Court of Appeal on exactly the same point and interpreting the same rule in issue. The issue of the procedure for applying for interim measures under the ***Act*** was not in issue in the ***Safaricom Limited Case*** **(Supra)**. At any rate, that case was determined earlier than the ***Scope Telemantics Case*** **(Supra)** in which the Court of Appeal considered that case and relied on it for other purposes other than determining the procedural issue. It is thus clear that the binding nature of the ***Scope Telemantics Case*** **(Supra)** is undoubted.

8. Before I conclude let me put the issue of precedent in context. In ***Mwai Kibaki v Daniel Toroitich Arap Moi*****[2008] 2 KLR (EP) 351 the Court of Appeal considered whether the High Court can disregard the appellate court's precedents and held that:**

> ***The High Court, while it has the right and indeed the duty to*** *critically examine* ***the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that*** *obiter dictum* ***if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers.***

9. On the same note the Court of Appeal in ***National Bank of Kenya Ltd v Wilson Ndolo Ayah*** **[2009] KLR 762** observed that:

> ***It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter.***

10. Although there are good reasons why the filing of the suit is necessary, I sympathize with the applicant and I hope that the Court of Appeal may reconsider its position particularly in view of the fact that the respondents, as the court recognised, do not suffer any prejudice whatever procedure is adopted. I would also urge the Rules Committee to consider recommending amendment of **rule 2** of the ***Rules*** to accord with good sense and justice.

11. Having reached the conclusion that I am bound by the ***Scope Telemantics Case*** **(Supra)** on its interpretation of **rule 2** of the ***Rules***, I do not consider it necessary to deal with the other objections raised to the application.

12. I strike out the Chamber Summons dated 15th January 2020 with costs to the respondents.

DATED and DELIVERED at NAIROBI this 7th day of FEBRUARY 2020.

D. S. MAJANJA

JUDGE

Court Assistant: Mr. M. Onyango

Mr Njoroge instructed by Philip Muoka and Company Advocates for the applicant.

Ms Kirimi instructed by Hamilton Harrison and Mathews Advocates for the 1st respondent.

Ms Lubano instructed by Oraro and Company Advocates for the 2nd respondent.