



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 295 of 2008

IN THE MATTER OF: THE ARBITRATION ACT, 1995

AND

IN THE MATTER OF: ARBITRATION

BETWEEN

MOHAWK LIMITED..... CLAIMANT

AND

LEO INVESTMENT LIMITED.....1ST RESPONDENT

R.S. GILL T/A GILL CONSULT.....2ND RESPONDENT

RULING

1. By a Chamber Summons application dated 4th October 2011 and brought under Section 32(2) and 35 of the Arbitration Act, 1995 and Rules 42(2) and 7 of the Arbitration Act, the 1st Respondent applied to this court for orders that the arbitration award of Hon. Justice E. Torghbor dated 11th May 2011 be set aside. The application was based on grounds set out on the face of it and on facts deponed in a supporting affidavit sworn by Rahim Chatur, a director of the 1st Respondent.
2. By a Notice of Motion application dated 17th May 2012 and expressed to be brought under Order 2 Rule 15(1)(b)(c) and (d) of the Civil Procedure Rules 2010, the Plaintiff applied for orders that the 1st Defendant/Respondent's Chamber Summons The Application before me is brought by way of a Chamber Summons dated 4th October 2011 aforesaid be dismissed and/or struck out with costs on grounds, *inter alia*, that the same is frivolous, scandalous and/or vexatious and further that the same was meant to prejudice, embarrass and delay just and expeditious determination of the action in the matter.
3. In response to the said Notice of Motion of 17th May 2012, the 1st Defendant/Respondent filed a Notice of Preliminary Objection dated 5th June 2012 supported by a replying affidavit of Okongo Omogeni sworn and filed on the same day. The objection was premised on the following grounds:
 - 1) *The Chamber Summons application dated 4th October 2011 was not a pleading over which Order 2 Rule 15(a)(b)(c) and (d) of the Civil Procedure Rules, 2010 could be invoked.*
 - 2) *The application was bad in law as it did not fall within the ambit of Rule 7 of the Arbitration Rules.*
 - 3) *The application on the whole was misconceived, bad in law and premised on erroneous principles of*

law.

4. Both parties filed rival written submissions in respect of the Notice of Preliminary Objection.

5. I have considered the Notice of Preliminary Objection as guided and informed by the written submissions by counsel for the parties.

6. In the case of ***Mukisa Biscuit Manufacturers Company Limited vs. West End Distributors Limited (1969) E.A. 696***, the court made it succinctly clear that a preliminary objection should raise pure points of law. The Notice of Preliminary Objection filed by the 1st Defendant/Respondent is supported by a replying affidavit sworn by Mr. Okongo Omogeni, its counsel. An affidavit necessarily depones to facts hence I will not venture into looking at what the replying affidavit depones to in the context of the present application. I will merely consider the points of law raised in the Preliminary Objection.

7. The first point of law arising is whether a Notice of Motion application can be brought under Order 2 Rule 15 (a),(b),(c) and (d) of the Civil Procedure Rules, 2010 seeking to strike out a Chamber Summons application. My view on this point is that Order 2 of the Civil Procedure Rules as a whole deals with pleadings. The Order is titled "Pleadings Generally". The marginal note to Order 2 Rule 15 is titled "Striking out pleadings". The issue then is whether a Chamber Summons application can be termed as a pleading.

8. The Civil Procedure Act defines "pleading" as follows:

"Pleading includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff and of defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant".

9. The 1st Defendant/Respondent's Chamber Summons application dated 4th October 2011 seeking to set aside an arbitration award does not in my view answer to the definition of "pleading" reproduced above. The application is neither a Plaintiff nor a Defence and neither is it a reply to either. Such an application cannot therefore be considered for striking out under any of the grounds stipulated in Order 2 Rule 15 of the Civil Procedure Rules. What the Plaintiff is needed to do is to file its response to the application setting out grounds upon which the application should not be allowed. I would therefore uphold the first point in the Preliminary Objection by holding that the application sought to be struck out is not a pleading capable of striking out under Order 2 Rule 15 of the Civil Procedure Rules, 2010.

10. On the next point of objection based on the contention that the of 17th May 2012 does not fall within the ambit of Rule 7 of the Arbitration Rules, my view is that Rule 7 basically requires parties to support or oppose applications seeking to set aside arbitral awards through affidavit evidence. My perusal of the application of 17th May 2012 whilst cushioned in terms seeking to strike out the application to set aside is itself misplaced as a party cannot respond to an application through a contra application. Again, I would humbly think that the Plaintiff should have more resourcefully expended the energies directed at striking out the application to set aside by filing grounds of opposition and a replying affidavit to the application. This point of objection succeeds.

11. As to the third point of preliminary objection, that is an umbrella point that sums up the legal deficiencies of the application dated 17th May 2012 identified by the 1st Defendant/Respondent as discussed above.

12. For these reasons, I am inclined to uphold the Notice of Preliminary Objection and to dismiss the Plaintiff's Notice of Motion application dated 17th May 2012 with costs to the 1st Defendant.

IT IS SO ORDERED.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11TH DAY OF OCTOBER 2012.

J.M. MUTAVA
JUDGE