



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. APPLICATION NO. 131 OF 1996**

**NATIONAL HOUSING CORPORATION.....PLAINTIFF**

**VERSUS**

**INTEX CONSTRUCTION LIMITED.....DEFENDANT**

**R U L I N G**

The proceedings herein are founded on a Building contract between the parties herein a standard copy of which has been annexed to the application.

There is an existing suit between the parties, H.C.C.C. No. 2136 of 1994 (O.S.) upon which a consent order was recorded on 20th July, 1994. One of the terms of the consent order was to refer to arbitration all claims between the parties relating to the matters or disputes upto 20th May, 1994.

Following the said consent order Mr. N. Mururu of Mururu & Associates was appointed the arbitrator. Mr Mururu made an interim award which was delivered

on 22nd December, 1995. On 20th February, 1996 the applicant herein filed an application by way of an Originating Motion for orders:

***1 THAT the interim award delivered on 22nd December, 1995 by Mr. N. Mururu in the arbitration proceedings between the parties hereto on issues 1 and 2 be set aside.***

***2 THAT the arbitration proceedings before Mr N. Mururu be stayed pending determination of these proceedings***

This application is said to be under the Arbitration act, 1995. The respondent then filed Notice of Preliminary point of Law and listed five(5) grounds of objection. The learned counsel for the respondent has for now confirmed his submissions to grounds 1 and 2. These are that 1) the Origination Motion having been filed under the Arbitration Act, 1995 is misconceived, incompetent and should be struck off and 2) that the matter was referred to the arbitrator by agreement of both parties under the provisions of Arbitration act (Cap. 49 Laws of Kenya) who dealt with the same under the provisions of the said act. The respondent contends that the promulgation of the arbitration Act, 1995 after the commencement of this Arbitration has no effect on these proceedings and these proceedings continue to be governed by the Arbitration Act Cap. 49 Laws of Kenya.

Both learned counsel have submitted at length on these issues with the applicant emphasizing that the application is properly before the court under the Arbitration Act, 1995.

By legal Notice NO. 394 of 18th December, 1995, the Attorney General appointed 2nd January, 1996 as the day on which the Act - The Arbitration Act, 1995 - "shall come into operation."

The preamble to The Arbitration Act, 1995 reads as follows:

***“An Act of Parliament to repeal and re-enact with amendments the Arbitration Act and to provide for connected purposes.”***

Section 42 of the Arbitration Act, 1995 provides as follows: “

***42(1) The Arbitration Act is repealed.***

***(2) The repeal of the Arbitration Act shall not affect any arbitral proceedings commenced before the coming into operation of this Act.***

***(3) For purposes of this sub-section, an arbitral proceedings shall be deemed to have commenced on the date the parties have agreed the proceedings should be commenced or, failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.”***

The marginal note to section 42 aforesaid reads “repeal of Cap. 49 and saving. Section 23(3) (e) of the Interpretation and General Provisions Act cap. 2 Laws of Kenya provides.

***23 (3) Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears, the repeal shall ..... (e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation legal proceeding or remedy may be instituted continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealed written law had not been made.”***

Section 3 of Cap. 2 defines “repeal” as follows:

***“repeal” includes rescind, revoke, cancel or replace.”***

My attention has been drawn to Halsburys Laws o England 3rd Edition paras. 714 to 719 and statutory Interpretation 2nd Edn by Francis Bennion. see also H.C.C.C. No 562 of 1994 - Omniprex Overseas S.A & Another -vs- The National Cereals & Produce Board.

In the Omnipex Case the arbitral process commenced and culminated in the award challenged before the enactment of the Arbitration act, 1995 . If it was for that reason that Ringera J. held the proceedings shall continue under Cap.49 I would agree. But, with respect, the arbitral proceedings herein were overtaken by events. An interim award was made. The Arbitration Act, 1995 then came into operation. The application to set aside the said interim award was made when the Arbitration act, 1995 was in operation. as at that time Cap. 49 had been rescinded, or revoked or cancelled or replaced. The only substratum existing as at 20th February, 1996 was the Arbitration Act 1995.

On my part, I find that the import of Section 42 of the Arbitration act, 1995 was to Repeal Cap. 49 but save the proceedings commenced thereunder. I cannot see a situation whereby parliament can repeal and with the same breath save a statute. Accordingly, I find that the application before me under the Arbitration act, 1995 is properly before the court. The preliminary objection is therefore dismissed with costs to the applicant. Orders accordingly.

**Dated and delivered at Nairobi this 12th day of March, 1998.**

**A. MBOGHOLI MSAGHA**

**JUDGE**