REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL CASE NO 50 OF 1978

SHASHIKANI BADIAN .....APPLICANT

VERSUS

SHREE SAUATAN DHARAM SABHA.....RESPONDENT

JUDGMENT

This is a ruling on a matter of procedure. The applicant, dissatisfied with the arbitration award made between the parties to the arbitration, approaches the Court:

> ... for an order that the award made between the parties to the above-mentioned arbitration by Mr MS Sharma, the arbitrator therein, dated 7th October 1977 be set aside on the following grounds ...

The grounds are duly set out, ending with one of alleged personal interest and partiality on the part of the arbitrator.

The application has been made by way of originating summons; and coming on for hearing, counsel for the respondent raised a preliminary objection, ie "That the incorrect procedure has been adopted by the applicant".

The first reaction of counsel for the applicant was to seek an amendment of the summons citing order VI, rules 3 and 4, of the Civil Procedure Rules and pointed to the "plaint".

Counsel for the respondent contended that the application for amendment was in effect conceding the validity of the objection; but nonetheless argument ensued, and it is now for the Court to decide upon the merits or otherwise of the objection; and if I am correct, I see the question before the Court as one to be answered by an examination of the provisions of the relevant statute together with those of the Civil Procedure Rules.

I must first turn to the Arbitration Act. The title of this Act is "An Act of Parliament to make provision in relation to the settlement of differences by arbitration".

As stated above, this application is for the setting aside of the arbitrator's award; rule 16 of the Arbitration Rules provides:

All applications for the appointment or cancellation of the appointment of arbitrators or of an umpire, and all other applications under the Act other than those directed by these rules to be otherwise made, shall be

by way of chamber summons supported by affidavit.

It is therefore clear that, for the present application to come before the Court by way of originating summons, it must be shown that it is an application under the Act which has been directed to be made other than by way of chamber summons, eg by originating summons, expressed or implied. I say "expressed or implied" on the principle *expressio unius, exclusio alterius*

Put simply, the Arbitration Act and the Rules thereunder relate to a special type of proceedings as declared in the title of the Act. In my humble view, it would appear that the Legislature appreciating that the ultimate satisfaction of a litigant rests in his personal conception of that which is "fair" even though not strictly just in his dispute, adopted and promulgated the Act (incidentally sparing the Courts from the inconvenient stigma of being always unjust to one side or the other, whichever way the Court's justice happens to fall).

I have no doubt that it is perhaps in accord with the latter portion of this view of mine that the rules maker did not direct that an originating summons should be the mode of bringing the present application.

In any event, if originating summons was a directed mode of proceeding in a number of disputes moving to arbitration, the very object of arbitration might well be lost sight of or entirely brushed aside.

Born of experience in my Court and with the greatest respect to the rulemaking authority, the present practical scope of proceeding by way of originating summons in Kenya may need careful consideration in the very near future; unless it was expressly contemplated and intended that proceedings by way of originating summons should be freely available as an alternative to proceeding by way of plaint.

Counsel for the applicant urged that the Rules themselves are not statutory provisions, that procedure does not go to the root, that there is no prejudice to the interest of the respondent and that all that was being asked was to amend. He referred the Court to section 100 of the Civil Procedure Act and cited *Adonia v Mutekanga* [1970] EA 429.

Section 100 of the Civil Procedure Act provides:

> The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on such proceeding.

I have emphasised the portions of this section for the purposes of that which is to follow.

Applying the broad principle of this section I have read the reported case cited and mentioned above and I think that the relevant question in that case was: whether the exercise of the Court's inherent jurisdiction was available when a specific procedure was available under the Civil Procedure Rules.

The question here, however, is somewhat the reverse, or indeed not quite the same. It is whether the Civil Procedure Rules could be resorted to when the special Act governing the particular subject-matter has under its authority and for purposes of the implementation of the provisions of the Act its own prescribed Rules within the intendment of the Act, even though the subject-matter is a form or item of civil litigation.

I also think that in the cited case the gist of the question was directed to remedy as opposed to the bringing forward of a contention in search of a remedy, as is the case.

In the matter before me, it is not the case that the Rules under the Act are devoid of a mode of procedure for the application. If that were so, I would readily say that the unlimited jurisdiction of the court overrides any specific procedure by rules provided.

The Court has not as yet entered upon an examination or the consideration of merits or possible results of

the application and counsel for the applicant has himself stated that there would be no prejudice to the respondent if an amendment is granted. I take this to mean, perhaps, that since justice is not unilateral there is also no prejudice to the applicant at this stage at the bringing of the matter before the Court.

In the matter *per se*, the stage of the determination of acclaimed justification for the bringing of the application has not been entered upon. Reverting to the portions of section 100 of the Civil Procedure Act emphasised above, it would appear that it is being urged that the Court is asked to substitute or transplant a general rule in one Act in place of a specific rule of a special Act. I have already remarked, in passing, on whether or not proceeding by way of originating summons in fact secures the speed that procedure was intended to secure.

Finally, although this Court holds counsel for the applicant in favourable regard over nigh on fourteen years of practice before it, I am feelingly reminded that the Kenya Judiciary is now more duty bound to erect principles of practice and procedure easily recognisable by our Bench and Bar; and although I may not in a proper case spurn the exercise of virtually implanting a rule where one does not exist, I hesitate to assume the role of disregarding one expressly designed for a special stated purpose.

For these reasons, and as a matter of interpretation, I hold that the application is properly to be brought as prescribed by rule 16 of the Arbitration Rules.

It is open to the applicant to proceed in the prescribed manner towards the relief being sought. The preliminary objection is upheld and the summons dismissed with costs.

Summons dismissed with costs.

Dated and delivered at Nairobi this 18th day of September 1978.

C.H.E MILLER

JUDGE