REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CASE 151 OF 1976

JOSEPH KIMEMIA MBUGUA.....PLAINTIFF

VERSUS

ORIENTAL FIRE & GENERAL ASSURANCE CO. LTD.....DEFENDANT

JUDGMENT

This is an application by the plaintiff seeking orders that the award made by Mr K A McIntyre, the arbitrator in a dispute arising out of an insurance policy between the parties, be remitted to the arbitrator and that costs of this application be provided for.

Mr Shah for the defendant has taken a number of preliminary objections to the application as it has been presented, and I have been asked to deal with those, before I decided whether to hear the application on its merits.

The first objection is that such an application does not lie under the Civil Procedure Rules, order XLV, rule 14, under which it has been brought. I consider that to be a valid objection. Order XLV is headed "Arbitration under order of a court" and all its provisions are directed to that end. It is common ground in the instant case that arbitration had taken place under the provisions of an arbitration clause in an insurance policy, without the matter having first been brought before a Court. However, Mr Shah concedes that an application can lie to this Court under section 23 and 24 of the Arbitration Act and he has no objection to the application being amended accordingly. An application to that effect having been made by Mr Wambaa for the plaintiff, I grant it; and I take this application as having been under section 23 and 24 of the Arbitration Act.

The original Arbitration Act in force was chapter 49 of 1962, and it has been replaced by the Arbitration Act, No 53 of 1968, which is now chapter 49 of the Laws of Kenya. However, Rules made under section 20 of the original Act have remained in force as if made under section 37 of the present Arbitration Act. Mr Shah's next objection is based upon rule 7 of these Rules which provides as follows:

(1)Any party objecting to an award filed under subsection (2) of section 9 of the Act may, within eight weeks after notice of the filing thereof shall have been served upon the party so objecting, apply that the award may be remitted or set aside as the case may be and lodge his objection thereto, together with necessary copies and fees for serving the same upon the other parties interested.

(2)The parties on whom such objections are served may within fourteen days of the service thereto lodge crossobjection which shall be served on the original objector.

This rule refers to section 9 of the repealed Act, and section 9 of the current Act deals entirely with a different matter. Mr Shah tells me that there is now no equivalent provision to section 9 of the repealed Act. However, he argues, firstly, that since there is no provision of a time limit for filing of an award in Court by the arbitrator this should have been done expeditiously. In this case the award was given almost a year before it was filed in Court. Secondly, he contents that the rule imports a procedure of objecting to the award by way of suit and not by chamber summons. However, rule 16 lays down that:

All applications for the appointment or cancellation of the appointment of arbitrator or of an umpire, and all other applications under the Act other than those directed by these Rules to be otherwise made, shall be made by way of chamber summons supported by affidavit.

Rule 9 is silent on the form which the filing of the award in Court should take. Rules 2,3, and 4 deal with filing of the award in Court and all that I can gather about its form is from rule 3 which provides:

An award on being filed shall be given its serial number in the civil list, and all subsequent proceedings in connection therewith shall be similarly numbered.

I note from the copy of the award filed in Court that it is numbered "Miscellaneous Case No 151/76", and all subsequent proceedings thereto are also similarly numbered. Therefore, by applying for issue of a chamber summons in order to give notice of objection to the other party, the plaintiff has done the best he could do to comply with these very confusing rules, and in my view he has not acted wrongly.

Where no time limit is fixed for the doing of an act, it should be done within a reasonable time and what is a reasonable time will depend on the facts and circumstances of each case. Although there has been delay of almost a year on the part of the plaintiff in asking the arbitrator to file his award in Court, I do not consider that it is so inordinate that I should deprive the plaintiff of a chance to be heard on the merits, especially in view of the fact that the Rules do not lay down the time limit during which an arbitrator should, either of his motion or at the request of one of the parties, file an award in Court. I am of the view that in order to decide the real issue in dispute between the parties, I should hear the application on its merits.

However, in order to proceed to do so, I consider it necessary to have a copy of the proceedings, and not only the award itself, before the arbitrator on the record before me. As Duffs JA observed in *Rashid Moledina & Co (Mombasa) Ltd v Hoima Ginners Ltd* [1967] EA 645, 650:

Generally speaking the Courts will be slow to interfere with the award in an arbitration having regard to the fact that the parties to the dispute have chosen this method of settling their dispute and have agreed to be bound by the arbitrator's decision, but the Courts will do so whenever this becomes necessary in the interests of justice, and will act if it is shown, as it is alleged in this case, that the arbitrators in arriving at their decision have done so on a wrong understanding or interpretation of the law.

Before I am able to adjudicate upon the plaintiff's objection to the award, I should have the proceedings before the arbitrator in front of me. I am also of the view that the plaintiff should lodge his objection to the award in the form which is generally used in petitions or memoranda of appeal, in addition to the chamber summons and the affidavit which is already before me, and that the defendant should then have the right to lodge a cross-objection. In the Uganda case of *Re An Arbitration between Muljibhai Madhvani & Co Ltd and I H Lakhani & Co (EA) Ltd* [1957] EA 268, Keatinge J considered Uganda Arbitration Rules, 7 and 16, which are identical to our Rules, and ruled at page 269: "In my judgment the Rules require three documents to be filed, viz: (1) chamber summons, (2) affidavit and (3) objections".

The judge also relied on section 101 of the Uganda Civil Procedure Ordinance provided that nothing in that Ordinance:

Shall be deemed to limit or otherwise affect the inherent power of the court to make such order as may be necessary for the ends of justice or prevent abuse of the process of the court.

and held that there was no provision of the Arbitration Ordinance and Rules which limited the inherent powers of the Court. Section 3A of the Civil Procedure Act of Kenya is in exactly similar terms, and I concur with Keatinge J's opinion that the Court has power to make whatever orders may be necessary for the ends of justice, especially since there is no allegation of prejudice to the other party. It is pertinent to observe that the award in that case was dated 21st February 1956, but the party objecting to it did not receive notice until 28th August 1956 that it had been filed in Court, and the time of eight weeks was computed from the latter date, no importance being given to the earlier time lapse.

The effect of rule 7 of the Arbitration Rules was also considered in *Queensland Insurance Co Ltd v Omar Abdulla Baabad* [1958] EA 621 by the Court of Appeal, although from a different angle. Pelly Murphy J Observed at page 622:

The limitation of time laid down in the rule is obviously designed to ensure that a party objecting to an award cannot be allowed to delay the lodgement of his objections indefinitely after the award has been filed and he is notified to that effect. As was said by Lord Esher NR in *Re North ex parte Hasluck* [1895] 2 QB 264, 269. 'The rational method of computation [of time] is to have regard in each case to the purpose for which the computation is made.

I direct the plaintiff to request the arbitrator to file a copy of the proceedings before him as an exhibit also, in Court, and that after that has been done, the plaintiff shall within fourteen days file and serve the notice of objection on the defendant (through its advocates) who shall then have the right to lodge a cross-objection within a further fourteen days, after which the matter shall be listed for hearing on its merits. I will reserve the question of costs.

Dated and Delivered at Nairobi this 17th day of March 1977.

S.K.SACHDEVA

JUDGE