IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 64 OF 2006

SADRUDIN KURJI ……..…….….. 1ST APPELLANT

AKBAR KURJI …….. 2ND APPELLANT

AND

SHALIMAR LIMITED ……....…...……..……. 1ST RESPONDENT

SAZ CATERERS LIMITED …...……...……. 2ND RESPONDENT

ZULFIKAR RAHEMTULLA ……....…….…….. 3RD RESPONDENT

(Appeal from the ruling and order o the High Court of Kenya at Nairobi (Emukule, J.) dated 31st day of March, 2004

in

H.C.MISC. CAUSE NO. 59 OF 2003)

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JUDGMENT OF THE COURT

This is an appeal from the order of the superior court (Emukule, J.) dated *31st March, 2004* made in *Nairobi High Court Civil Case No. 59 of 2003*, in which the learned Judge upheld a preliminary objection against a motion by the appellants herein, namely, ***Sadrudin Kurji*** *(1st appellant)* and ***Akbar Kurji*** *(2nd appellant)* seeking a review of an earlier order of the same court. There are three respondents in the appeal, namely, ***Shalimar Limited*** *(1st respondent)*, ***Saz Caterers Limited,*** *(2nd respondent)* and ***Zulfikar Rahemtulla*** *(3rd respondent)*. The background facts are short and straightforward.

On *26th February, 1996*, the 1st respondent and the second, entered into an arbitration agreement concerning a dispute over the shareholding in the two companies and also over premises occupied by the 1st respondent in Meridian Court. The arbitration agreement also covered the relationship of landlord and tenant between the 1st respondent and Metropolitan Holdings Ltd. concerning rents and other payments. The agreement was to the effect that the dispute between the parties be referred to a single arbitrator, one, ***Azim Virjee***. It was also agreed that the ***Arbitration Act 1995*** would apply.

The arbitrator considered the matters referred to him and rendered his written award dated *22nd January,*

1997. In his award he held that ***Kshs.2,243,330/=*** was due and owing to 3rd respondent as the 3rd claimant in the dispute, plus interest at 27% per annum compounded monthly from *9th March, 1997* until payment in full.

By an application dated *21st* but filed in the superior court on *22nd January, 2003*, the three respondents herein moved that court for an order that the award be enforced against the appellants as respondents in that application. The applicants contended that though the appellants had been served with a copy of the award they did not honour it. The application was expressed to be brought under ***section 36*** of the Arbitration Act and ***Rule 9*** of the Arbitration Rules.

By his order made on *13th March, 2003*, Osiemo J. granted the application. But on *11th March, 2003*, the appellants herein filed an application in the superior court for an order staying execution of Osiemo, J's order pending the hearing of another application dated *10th April, 2003*, in which the appellants were seeking a permanent stay of execution of Osiemo, J's order. That application was heard by Mwera, J. and for the reasons in his ruling dated *26th September, 2003* he dismissed it.

The appellants were aggrieved by that decision and by their application dated and filed in court on *2nd October, 2003*, they sought an order reviewing the aforesaid ruling on, amongst other grounds the following: *First, that they had been denied an opportunity of being heard in the application for an order enforcing the award as a judgment of the Court. Second, that there was an error on the face of the record because the claimants had not obtained leave of the court before making the application for enforcement of the award as a judgment of the Court*. The appellants alleged that the application for judgment was not served on them.

It was that application which gave rise to the ruling of *31st March, 2004*. The ruling concerned a preliminary objection which was raised by the claimants that the application was mala fide and in absence of a formal decree it was a non-starter. The objection raised included a statement that the application was improperly brought under the *Civil Procedure Rules* which in the respondents' view had no application to proceedings under the Arbitration Act and Rules.

Anyara Emukule, J heard the application and in his ruling dated *31st March, 2004*, he agreed with the respondents that the application did not lie, upheld the preliminary objection and struck out the appellants' application and thus provoked this appeal.

There are five grounds of appeal, namely:-

(i) The learned judge erred in law in failing to appreciate sufficiently or at all that the respondents should have served their application which sought an order that the arbitration award be made a judgment of the superior court against the appellants.

(ii) The learned judge erred in law in failing to take into account the fact that the appellants were not given an opportunity to be heard before the arbitration award was made a judgment of the superior court, contrary to the rules of natural justice and the Arbitration Rules, 1997.

(iii) He erred in holding that the provisions of Order IXB rule 8 of the Civil Procedure Rules were inapplicable to the appellant's application seeking an order setting aside the judgment which was entered in terms of the arbitration award.

(iv) The learned judge erred in failing to appreciate that prior leave was essential before applying to enforce the arbitral award as a decree of the court.

(v) The learned judge erred in law by failing to hear the appellant's application to set aside the ex parte judgment on the merits and by determining it on a preliminary objection when the issue raised was not in law a preliminary objection.

We will deal with each of the aforestated grounds seriatim.

In the first ground, the appellants contend, and it is the submission of Mr. Ougo, appearing for them, that the motion seeking an order that the arbitral award be made a judgment of the court should have been served upon them. They cite the Arbitration Rules as authority for that submission. It was conceded by the appellants that they had been served with the notice of the filing in court of the arbitral award but the issue which was before the superior court was not whether notice of the filing of the award had been given, rather whether the application seeking judgment in terms of the arbitral award was served upon the appellants. That application was filed in the superior court on *22nd January, 2003* and it is quite obvious that it was made ex parte through the firm of Rayani, Rach and Sevany, Advocates. ***Section 36*** of the ***Arbitration Act 1995, Act No. 4 of 1995*** Laws of Kenya, makes provision for the recognition and enforcement of arbitral awards by the High Court. ***Subsection (i)*** thereof provides that:-

"An arbitral award, irrespective of the state in which it was made shall be recognized as binding and, upon application in writing to the High Court, shall be enforced subject to this Section and Section 37."

The section does not provide the procedure for making the application. Likewise, ***section 37*** does not provide such procedure. It thus follows that we should have recourse to the rules made under that Act. The relevant rule appears to us to be ***rule 4*** of the ***Arbitration Rules 1997***. The rule provides that:-

"4. (1) Any party may file an award in the

High Court.

(2) All applications subsequent to filing of an award shall be by summons in the cause in which the award has been filed and shall be served on all parties at least seven days before the hearing date."

We stated earlier that the arbitral award in this matter was filed in court by the respondent, who subsequently filed a Chamber Summons, ex parte, dated *21st January, 2003.* Notice of filing the award was dated *20th January, 2003*, and states in the body that "the 3rd claimant ***Zulfikar Rahemtulla*** has on the *20th day of January, 2003* filed the arbitration award of ***Azim Virjee*** dated *22nd day of January, 1997*" in ***Misc. Cause No. 59 of 2003***. The claimant was a party in the arbitral proceedings and pursuant to ***rule 4(1)***, above, he was entitled to file it as he did. It is however quite clear that neither the claimant nor his advocates complied with the provisions of ***rule 4(2)*** of the rules when they filed the application dated *21st January, 2003*. As we stated earlier that application was made ex parte and it was not therefore served on the appellants. The two appellants were parties in the arbitral proceedings and were therefore entitled to be served with the application in terms of ***rule 4(2)*** aforesaid. Contrary to submissions by Mr. Nagpal for the respondents, that service upon the appellants of a notice of the filing of the award was sufficient, ***rule 4(2)*** above is categorical that *"All applications subsequent to filing of an award shall be served on all parties."* For that reason we agree with Mr. Ougo that there was a failure to comply with that procedural requirement.

As regards the second ground of appeal ***rule 4(2)*** above was intended to give all parties concerned an opportunity to raise any issue which would make the court refuse either to recognize the arbitral award, or decline to enforce it as a judgment of the court. ***Section 37*** sets out grounds upon which enforcement of such award may be challenged. But Mr. Nagpal argued that if the appellants were in any way dissatisfied with the arbitral award they were obliged pursuant to the provisions of ***Section 35*** of the Arbitration Act to apply to set it aside. That section makes provision for an application to set aside the arbitral award. ***Section 35(3)*** limits the time within which such an application may be made, namely 3 months from the date the award is received by the applicant. Mr. Nagpal's submission was that the appellants having not taken advantage of that provision within the stipulated period, they were not entitled to be served with the application for enforcing the arbitral award as a judgment of the court. Consequently, he said, the issue about notice is a red herring.

The Arbitration Act, appears to us to envisage two stages when objection may be raised. The first stage is before the award is filed in Court, and the second, after it has been filed. The grounds upon which the applications may be made at the first stage are set out under ***section 35*** of the Act. The grounds for applications made at the second stage are set out under ***section 37*** of the Act. The appellants complaint is not that they were not afforded a hearing during the first stage but during the second stage. Clearly, the failure to serve the appellants with a notice of the application for enforcing the arbitral award as a judgment denied them a hearing and this offended the rules of natural justice.

As regards the 3rd ground of appeal, the appellants lament that the superior court erred in holding that *Civil Procedure Rules* were inapplicable and were therefore improperly invoked by the appellants in their application for an order of review and setting aside the judgment which had been entered in terms of the arbitral award. The *Arbitration Act* is silent on the application of the *Civil Procedure Act* and Rules made thereunder. However, ***rule 11*** of the *Arbitration Rules* provides that:-

"11. So far as is appropriate; the Civil Procedure Rules shall apply to all proceedings under these Rules."

The rules were promulgated on *6th May, 1997*. The award was made on *22nd January, 1997*. The application in issue was made on *2nd October, 2003* and was filed in court on the same day. It sought on the main, an order reviewing and setting aside the ruling of the superior court delivered on *13th March, 2003*. The application was expressed to be brought under ***Order IXB rule 8*** and ***Order XLIV rule 1*** of the *Civil Procedure Rules* and ***Section 3A*** of the *Civil Procedure Act*. The respondents' submission before the superior court which was upheld by that court was that the new Arbitration Act provides a complete code as an alternative method for dispute resolution and therefore ***Order IXB rule 8*** and ***Order XLIV rule 1*** of the *Civil Procedure Rules* had no application to the matter.

There is no provision in the ***Arbitration Act*** concerning review or setting aside a judgment entered in terms of the arbitral award. We believe the rules making authority must have had in mind situations as this one when promulgating ***rule 11***, above. The appellants' complaint and their counsel's submission is that the denial of a review was prejudicial as the judgment which was entered against them was entered without affording them an opportunity of being heard. Mr. Ougo for the appellants submitted before us that had they been given a hearing they would have raised various legal issues, among them, that the leave of the court was essential before an ex parte application could be brought. Mr. Nagpal for the respondents did not think the appellants were entitled to be heard having not brought any application to challenge the award before it was made a judgment of the court. Besides he said, no application could properly be brought under the *Civil Procedure Act* and *Rules* made thereunder unless there was a decree in place.

Order IXB rule 8 of the *Civil Procedure Rules*, provides that:-

"8. where under this Order judgment has been entered or the suit has been dismissed, the Court, on application by Summons, may set aside or vary the judgment or order upon such terms as are just."

The judgment the appellants wanted set aside or reviewed was not entered pursuant to the provisions of ***Order IXB***, but under the Arbitration Act. ***Rule 11*** above, comes into play where there is a lacuna in the arbitration provisions to assist a party who considers himself to be in distress. It is true the appellants had tried earlier to attack the judgment in vain. In their first application which was dated *10th April, 2003* the first prayer therein was for an order that the arbitral award by Azim Virjee made on *22nd January, 1997*, *"cannot be enforced* ***……"***. The main ground which was proferred for the application was limitation. That application was brought under ***rule 4(2)*** of the Arbitration Rule, ***Section 4(1)*** of the Limitation Actions Act, and ***Section 3A*** of the Civil Procedure Act. No issue was raised concerning the application of the ***Civil Procedure Act*** and ***Rules*** made thereunder. Mwera, J. who handled that application did not think limitation applied.

The next application by the appellants was made on *2nd October, 2003*, and it is the one on which Anyara

Emukule J. ruled and which gave rise to this appeal. From these applications it is clear that the appellants want to challenge the judgment, for whatever reason. We find no provision in the Arbitration Act to empower the appellants to do so other than ***rule 11*** of the Arbitration Rules. So notwithstanding the fact that there is no clear provisions in the Civil Procedure Act and Rules to deal with entry of judgment under ***section 36*** of the Arbitration Act, ***Order IXB*** is the nearest provision to deal with the situation, and that Order applies because of ***rule 11*** of the Arbitration Rules. Likewise the review provisions under ***Order XLIV*** of the Civil Procedure Rules would be invoked where necessary. However, the grounds for challenging the judgment entered as aforesaid must be within the ambit of the provisions of ***sections 35*** to ***37*** of the ***Arbitration Act***. One will not necessarily be entitled to apply under the two provisions of the Civil Procedure Rules, only when there is a decree in place. The right to apply accrues after judgment is entered. Besides, by dint of the provisions of ***rule 6*** of the Arbitration Rules any judgment entered pursuant to the Arbitration Act is enforceable as a decree. So contrary to what Mr. Nagpal submitted the judgment which the appellants were seeking to set aside was in the nature of a decree and was therefore amenable to review if the appellants would establish reasonable and relevant grounds for seeking review.

The ***4th ground*** of appeal relates to leave to apply to enforce the arbitral award. Mr. Ougo submitted before us that under ***rule 6*** of the Arbitration Rules, leave is essential before an application for enforcement of an arbitral award. In his view prior leave was the foundation for seeking entry of judgment. Mr. Nagpal on the other hand submitted that ***rule 6*** has to be read with ***section 35*** of the Arbitration Act. In his view if a party fails to apply under ***section 35*** to set aside the arbitral award then he is not entitled to a hearing under ***rule 4***. Consequently, in his view, leave was not necessary.

Rule 6, aforesaid, reads as follows:-

"6. If no application to set aside an arbitral award has been made in accordance with section 35 of the Act, the party filing the award may apply ex parte by summons for leave to enforce the award as a decree."

The procedure as we understand it is that at the conclusion of arbitral proceedings, as those in issue before us, either party may file the arbitral award in Court, ***(rule 4(1)***. Upon filing of the award by dint of the provisions of ***rule 5,*** the party filing is obliged to notify all parties of the filing. Thereafter any party aggrieved has a right to apply pursuant to ***section 35*** of the Act for an order setting aside the award for any one, some or all the reasons which are set out under that section. A careful reading of the rules suggests that ex parte proceedings are eschewed. However if any party wishes to move the court ex parte, then ***rule 6*** comes into play. One must seek the leave of the court to enforce any arbitral award. Such an application may only be made where no party has taken steps to move the court under ***section 35*** to set aside the arbitral award.

The appellants' lamentation here is that the respondents applied for judgment **ex parte** before seeking leave. We agree with Mr. Ougo that such leave was necessary. It is intended, so we think, to enable the court to satisfy itself that all necessary steps before judgment have been taken and that the judgment which would follow will not be impugned for failure to satisfy necessary procedural steps. This ground succeeds as well.

The last ground is whether the objection which the respondents raised in bar of the appellants' application for review qualified as a preliminary point of law. The notice of the objection read as follows:-

"The application is misconceived, is bad in law and does not lie and in particular order XLIV of the Civil Procedure Rules has no application here."

There was a further notice of a preliminary objection which was filed further to that one, and it read as follows:-

"TAKE NOTICE that our Notice of Preliminary Points dated 17th November, 2003 the respondent will raise the additional preliminary point that the applicant's application dated 2nd October, 2003 is also

bad in law because it does not include an order extracted from the Ruling of this Honourable Court delivered on 13th March, 2003 which is sought to be reviewed or set aside."

In ***MUKISA BISCUIT CO. V. WEST END DISTRIBUTORS (1969) EA 696 at p. 701*** *Sir Charles Newbold P.* rendered himself thus:-

"A preliminary objection is in the nature of what used to be a de murrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."

Starting with the point raised concerning the non-inclusion of an extracted version of the order sought to be reviewed, no provision was cited which required an applicant to include such a copy in an application for review. That being our view of the matter, we do not think the point is one of law. If there was a need for its inclusion that would merely be a procedural requirement.

Regarding ***Order XLIV*** of the Civil Procedure Rules cited in the appellants' application, though the point was pleaded in the third claimant's grounds of opposition, and although it is a point of law, it is a point which calls for exercise of judicial discretion. The court has to first decide whether or not the application falls within the ambit of that provision before going into the merits of the application. In the matter before us, there is no express provision barring an application under ***Order XLIV***, aforesaid. Had that been so, then an issue of jurisdiction would have arisen which would perfectly qualify as a preliminary point. For that reason, we agree with Mr. Ougo that the objection based on ***Order XLIV*** did not strictly qualify to be a preliminary point. The superior court erred in relying on that objection to deny the appellants an opportunity to urge their application on the merits. Besides that court delved into the facts of the case and improperly dealt with issues like the bona fides of the appellants' application, which was clearly outside the ambit of preliminary objection.

In the result and for the reasons we have endeavoured to give, we allow the appellants' appeal, set aside the order of the superior court dated *31st March, 2004*, striking out the appellants' Chambers Summons dated *2nd October, 2003*. We award the appellants the costs of this appeal.

The result is that we direct that the appellants' aforesaid application to set aside the judgment of the superior court entered on *13th March, 2003*, be set down for hearing before the superior court to be heard by a Judge other than ***Mwera*** and ***Anyara Emukule, JJ.***

It is so ordered.

Dated and delivered at Nairobi this 31st day of October, 2008.

S.E.O. BOSIRE

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

……..

JUDGE OF APPEAL

J. ALUOCH

……..

JUDGE OF APPEAL

I certify that this is a

true copy of the original

DEPUTY REGISTRAR