Posh Pen Services v Odyssey Capital Limited (Miscellaneous Application E977 of 2023) [2024] KEHC 852 (KLR) (Commercial and Tax) (30 January 2024) (Ruling)

Neutral citation: [2024] KEHC 852 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E977 OF 2023

FG MUGAMBI, J

JANUARY 30, 2024

BETWEEN

POSH PEN SERVICES ..... APPLICANT

AND

ODYSSEY CAPITAL LIMITED ..... RESPONDENT

RULING

Introduction

1. This ruling determines the Notice of Motion application dated 10th November 2023 brought under Order 40 rule 1,8 and 10 of the *Civil Procedure Rules* and Section 7 of the *Arbitration Act*. The application seeks restraining orders against the respondent from dealing in any way with its properties, assets or monies deposited in its bank accounts pending the determination of the arbitral claim between the parties herein. It also seeks an order directing the respondent to provide security pending the hearing and determination of the arbitral proceedings.

2. The application is opposed by the respondent vide Grounds of Opposition and a replying affidavit both dated 24th November 2023. The respondent additionally raised a Preliminary Objection (P.O) dated 5th December 2023 on the ground that the application contravenes the provisions of Rule 2 of the Arbitration Rules 1997 and is therefore incompetent and ought to be struck out with costs.

3. At the hearing of the P.O on 6th December 2023, the respondent argued that an application filed under section 7 of the *Arbitration Act* ought to be by Chamber Summons in an existing suit while in this case the applicant had filed a Miscellaneous Application via a Notice of Motion with no underlying suit. The respondent submitted that this rendered the application incurably defective and prayed to have it dismissed.

4. The respondent on its part submitted that section 7 of the Act does not prescribe the procedure for approaching the court. It was also submitted that rule 11 of the Arbitration Rules allowed the application of the Civil Procedure Rules.

Analysis

5. Section 7(1) of the *Arbitration Act* under which the application of 10th November 2023 is brought states as follows:

> "It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure."

6. Rule 2 of the Arbitration Rules, 1997 in turn requires that:

> "Applications under sections 6 and 7 of the Act shall be made by summons in the suit."

7. The respondent relied on the Court of Appeal decision in *Civicon Limited V Fuji Electric Co Limited & Another*, [2020] eKLR which I find relevant in the instant case. The Court held as follows:

> "It must be borne in mind that the substantive provision that the 1st respondent invoked was section 7 of the Act. The 1st respondent was seeking an interim measure of protection pending arbitration. The procedure applicable in such circumstances is clearly spelt out by rule 2 of the Arbitration Rules, 1997. Suffice it to say, that the rule is couched in mandatory terms. Our jurisprudence reflects the position that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or Statute, that procedure should be strictly followed (See *Speaker of National Assembly V Njenga Karume* [2008] 1 KLR 425).
>
> The 1st respondent did not proffer any reason or excuse for its failure to premise its application upon a suit as was required by the rules. It however sought to rely on Article 159 of *the Constitution* for the proposition that justice is to be administered without undue regard to technicalities. That Article also provides that alternative forms of dispute resolution mechanisms like arbitration should be promoted by the courts. There are however many decided cases to the effect that Article 159 of *the Constitution* should not be seen as a panacea to cure all manner of indiscretions relating to procedure.
>
> Despite the foregoing, the court still went ahead to exercise its discretion in favour of the 1st respondent by invoking that Article, the overriding objective under the *Civil Procedure Act*, and the interests of justice, to hold that failure to anchor the application on a suit did not render the application fatal or incurably bad.
>
> The manner of initiating a suit cannot be termed as a mere case of technicality. It is the basis of jurisdiction. Obviously, in overlooking a statutory imperative and the above authorities, the learned Judge cannot be said to have exercised his discretion properly. There can be no other interpretation of rule 2. The application should have been anchored on a suit. It was not about what prejudice the appellant or and 2nd respondent would suffer or what purpose the suit would have served. Discretion cannot be used to override a mandatory statutory provision. For these reasons, we are in agreement with the submissions of the appellant that the application was fatally and incurably defective."

8. The decision of the Court of Appeal is binding upon this court. I do not think that I need to say anything further in affirmation of the preliminary objection raised, that the procedure for approaching the Court under section 7 of the *Arbitration Act* is clearly set out. It is a mandatory requirement that the applicant ought to have approached this Court by way of a Chamber Summons anchored on a suit.

Determination

9. For these reasons I therefore find merit in the respondent's P.O and strike out the application with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 30TH DAY OF JANUARY 2024.

F. MUGAMBI

JUDGE