IN THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISC . APPLICATION NO. 19 OF 1992

NJERU TOWN COUNCIL::APPLICANT

VERSUS

NYANZA TEXTILE INDUSTRIES LTD::::::::::::::::::::::::::::RESPONDENT

BEFORE: THE HON. MR. JUSTICE G.M OKELLO

RULING:

This application was taken wider O.43 r. 5 of the CPR for an order of this court to appoint an arbitrator in terms of the parties Agreement.

The back ground to this application is briefly as follows, the parties had entered into a lease agreement. Under that agreement, any dispute arising between the parties from the agreement was to be referred to an arbitrator agreed on by both parties. In the event of the parties failing to agree on the appointment of an arbitrator however, an arbitrator shall be appointed by a Judge of this court.

Disputes infact arose between the parties over alleged breaches of the conditions of the agreement and the parties have failed to agree on the appointment of an arbitrator to whose decision the disputes should be referred, Hence this application seeking an order of this court to appoint an arbitrator. The application was brought by a Notice of Motion and was supported by an affidavit which was sworn on 3rd March 1992 by Dr. Byamugisha as counsel duly instructed by the Applicant to conduct the prosecution of the case.

When the application came up for hearing before me on 25/03/92 Mr. Kania, Counsel for the Respondent took a preliminary objection in which he contended that the court was not properly moved.

(1) Because the Procedure adopted by the applicant in bringing this application to court was wrong.

(2) That the application was supported by a defective affidavit.

Mr. Kania counsel for the Respondent argued that this application was wrongly brought under **O.43 r. 5 of the CPR** and by a Notice of Motion. That the law applicable in bringing application of this nature to court is the Arbitration Act Cap.55 Laws of Uganda and the Rules made under section 19 of that Act. That rule 16 of the Arbitration Rules provides procedure of bringing to court application of this nature. That under this rule, such application must be brought to court by chamber summons and supported by an affidavit except where the rules provide otherwise.

He submitted that the procedure adopted by the Applicant in this case is wrong and that on this ground the application should be struck out with cost.

The learned counsel further attached the supporting affidavit sworn on 3rd March 1992 by Dr. Byamugisha as being defective. That the affidavit contains hearsay without disclosing the source of the information. He argued that all those allegations of breaches of the agreement are matters which are not within the personal knowledge of the deponent. For example that the alleged failure of the Respondent to pay rent; to develop the land and the allegation that the Respondent has sub-let the said land are matters which are not in a position to be within the knowledge of the deponent. He submitted that an official of the council would have been better suited to depone to those facts. That as it is, the affidavit contained hearsay and urged me to reject it. He relied on Misc. Cr. Application No. 54/74 reported in HCB (1974) on page 201 whore Nyamuchoncho J as he then was held that the contents of the supporting affidavit to that application having been sworn by the applicant's counsel and not by the applicant himself were hearsay.

Dr. Byamugisha, counsel for the Applicant on his part conceded that rule 16 of the Arbitration Rules provides procedure to commence a proceeding in an arbitration. He pointed out that O.43 r. 5 of the CPR also provides a procedure to commence proceedings in an Arbitration. He submitted that since there are two alternative procedures to

commence proceedings in the Arbitration, a party was free to choose any of those alternatives. That the procedure he adopted has been used on several occasions and was not condemned.

As regard to the defectiveness of his supporting affidavit, Dr. Byamugisha contended that his affidavit does not contain hearsay. That he had visited the land twice and had entered into correspondence with the Respondent over the matter and that he was therefore in a position to know about those breaches. That those matters were within his personal knowledge. He thus prayed that the preliminary objection be overruled.

In reply, Mr. Kania reiterated his earlier argument. He retorted that wrong procedure should not be followed merely because it had been used before. He challenged that Dr. Byamugisha would have been of much assistance to court if he cited anyone of those cases in which the procedure he adopted was used.

I think it is not in dispute that rule 16 of the Arbitration Rules made under section 19 of the Arbitration Act Cap 55 Laws of Uganda and O.43 r. 5 of the CPR, each provides a procedure to commence proceedings in Arbitration. But I do not agree with Dr. Byamugisha that the two rules provide two alternative procedures from which a party was free to choose any. Each of these rules provides a procedure which applies to Arbitration under different circumstances. Rule 16 of the Arbitration Rules regulates proceedings in arbitrations under the Arbitration Act. It provides procedure to commence proceedings in arbitrations under the Arbitration Act. **O.43 r. 5 of the CPR** on the other hand regulates proceedings in arbitrations under a court order. It provides procedure to commence proceeding in an Arbitration under order of a court.

In **Bilimora Vs. Bilimora (1962) EA 198** an award was made by an arbitrator pursuant to a submission agreed between the three partners of a firm. The award was duly filed in the High Court under the arbitration ordinance. Appellant applied to have the award set aside. The Respondent filed a cross objection. He objected to the procedure of commencement of the proceedings. It was by Notice of motion. The award was set aside for some other errors and an order was made that there should be no cost. The appellant appealed against this order denying cost at the hearing of that appeal, a preliminary objection was taken on behalf of the Respondent that the order was interlocutory and

not a decree and that no appeal therefore lay against it without leave of the court. The matter turned on the question whether that order was made in a "suit" to be a decree or it was made in any other proceedings and was a more "order". A suit was defined in MANSION HOUSE LTD .VS. WILKINSON (1954) 21 EACA at 101 to be any civil proceedings commenced in any manner prescribed by Rules and forms made by the Rules Committee to Regulate the procedure of the court under section 81 of the ordinance. Following that definition Gould J. as he then was said in Bilimora case thus equally in the present cases it can not be said that the proceedings were commenced in any manner prescribed by the rules committee. The civil procedure Rules made by that committee under section 85 of the ordinance do contain in O.43 Provisions regulating arbitrations under orders of a court, The present arbitration was not within that category and the proceedings were taken under powers conferred by the Arbitration ordinance (Cap 21.) and under the procedure laid down by the Arbitration Rules".

It is clear from the quotation that **O.43 r. 5 CPR** regulates procedure to commence proceedings in arbitration under a court order. In an arbitration under the arbitration Acts proceedings are taken under power conferred by that Act and under the procedure laid down by the Arbitration Rules.

In the instant case, the Arbitration was by agreement of the parties and was under the Arbitration Act. It was not an arbitration under a court order. In such arbitration proceedings are taken under the powered conferred by that Act and under procedure laid down by the Arbitration Rules. This procedure is provided under **rule 16 of the Arbitration Rules**. Under that Rule, the application of this nature must be brought by chamber summons. To that extent, I respectfully agree with Mr. Kania that the instant application having been brought under O.43 r.5 of the CPR, and by Notice of motion in an arbitration which was not by order of a court, was wrongly brought. It violated the mandatory provision of Rule 16 of the Arbitration Rules. On this ground the preliminary objection is bound to succeed.

Further more, Mr. Kania attacked the supporting affidavit which was sworn on 3/3/92 by Dr. Byamugisha as being defective because it contains hearsay.

It is pertinent to point out at this stage that the law allows affidavit as evidence in interlocutory proceedings to contain certain amount of bear—say (statements of information). It is however mandatory that where an affidavit is based on information, the source of that information must be disclosed. There is a wealth of authorities on this point and I think this matter may rightly be regarded as settled.

In Patrick Rwekibire Vs Kamaya (1972) ULR 1 166 the remark of Spry JA in P,Raichand Vs. Quary Services (1969) EA 514 was quoted with approval. In that case Spry J.A. as he than was said:-

> *"It has repeatedly been said by this court that affidavit based on information must disclose the source of information". It was further said in that case thus:—*
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> *"This is not merely a matter of form but goes to the essential value of an affidavit. It may have been sworn in all sincerity and the deponent may have been advised as he says, but since the source of the information may have been unreliable, the affidavit can have no evidential value".*

In the instant cases, from the face of it the supporting affidavit in question was not based on information. All its contents are stated to have been based on the deponent's Knowledge.

Mr. Kania argued that the deponent as counsel for the applicant Town Counsel in a position to know those facts of alleged breaches of the covenant as contained, in paragraph 3 of the affidavit. That these facts should have best been deponed to by an official of the applicant Town Council as he would be in a position to know them.

I understand Mr. Kania by his said argument to be insinuating that what is contained in paragraph 3 of the affidavit is false in the affidavit that it was based on the deponent's knowledge, it is infact based on information.

If my understanding is correct, then this is a challenge to the truthfulness of the affidavit's contents. Clearly an affidavit which is shown to contain falsehood however minor is bound to fail. **(See Bitaitano Vs. Kanaura (1977 HCB 33).**

In the instant case, there is need to establish that the affidavit contains falsehood. This requires evidence to rebut the deponent's claim that whatever is contained in that affidavit was based on his knowledge. There was no such evidence to rebut that of the Deponent. In the circumstances I am unable to take Mr. Kania's argument at the Bar as being sufficient to rebut and disprove a sworn affidavit. The challenge to the affidavit must therefore fail.

In the whole however, the preliminary objection is upheld for reasons given above. In consequence, the application is struck out with cost to the Respondent.

…… G.M. OKELLO

JUDGE
2/4/92