**Hass Petroleum (K) Limited & another v Hashi Energy Limited & another (Commercial Civil Case E058 of 2020) [2022] KEHC 119 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 119 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL CIVIL CASE E058 OF 2020**

**DAS MAJANJA, J**

**FEBRUARY 18, 2022**

**BETWEEN**

**HASS PETROLEUM(K) LIMITED ..... 1ST PLAINTIFF**

**HASS TERMINAL LIMITED ..... 2ND PLAINTIFF**

**AND**

**HASHI ENERGY LIMITED ..... 1ST DEFENDANT**

**HASHI ENERGY TANZANIA LIMTED ..... 2ND DEFENDANT**

**RULING**

1. The parties are embroiled in a dispute stemming from a 'Throughout Hospitality Agreement' dated 5th May 2015 and entered into between the 2nd Plaintiff and the 2nd Defendant ("the Agreement"). Under the Agreement, the 2nd Defendant, who is licensed to import, export and trade petroleum products, and is the owner of petroleum products to be specified from time to time was to use the 2nd Plaintiff's facilities in Tanzania for the purposes of receiving, storing, handling and loading into road trucks of Premium Motor Gasoline, JetA1/Kerosene and Automotive Gas oil for local and transit trade. The 2nd Plaintiff was to charge the 2nd Defendant for the use of the facilities.

2. On 9th August 2021, the Plaintiffs filed this suit stating that from June to August 2015, the 2nd Defendant made requests to the 2nd Plaintiff under the Agreement for Borrow-Loans of fuel valued at USD 274,638.36 which were duly delivered to the 2nd Defendant on various dates during the aforementioned duration but that upon delivery, the 2nd Defendant defaulted on payment. Thereafter, the 1st Plaintiff and the 1st Defendant, who are affiliates of the 2nd Plaintiff and 2nd Defendant respectively, held discussions over the outstanding debt which led to the amount demanded being reviewed to USD 189,908.65 after a set-off.

3. The Plaintiffs allege misrepresentations and breach of contract against the Defendants and pray for judgment for USD 189,908.65, general damages for breach of contract, interest and costs of the suit.

4. The parties have also filed two applications which the court is now called upon to determine. The Defendants have filed the Notice of Motion dated 4th October 2021 made, inter alia, under section 6(1) of the *Arbitration Act*, 1995 and seeks a stay of this proceedings and referral of the dispute to arbitration as mutually agreed by the parties under the Agreement. This application is supported by the affidavit of Abdirahman Adan, the 2nd Defendant's director, sworn on 4th October 2021. There was no response to the application by the Plaintiffs.

5. The Plaintiffs' have filed a Notice of Motion dated 12th January 2022 application under section 36(1) and (3) of the *Energy Act*, 2019 seeking an order that the matter be referred to the Energy and Petroleum Tribunal for hearing and determination. The application is supported by the affidavit of the 1st Plaintiff's Group Chief Executive Officer, Mohamud Salat, sworn on 12th January 2022. It is opposed by the Defendants through their Grounds of Opposition dated 17th January 2022.

**Analysis and Determination**

6. I have gone through the parties' rival pleadings and depositions and considered the respective counsel's oral arguments. As admitted by the parties, it is now clear that this court does not have jurisdiction to determine the parties' dispute. What the court is to determine is whether the dispute is to be referred to arbitration as per the Agreement or the Energy and Petroleum Tribunal by dint of section 36(1) and (3) of the *Energy Act*, 2019.

7. It is common ground that the exhaustion doctrine, which is what the two applications are grounded on, provides that where a dispute resolution mechanism exists outside the court, the mechanism should be exhausted before the court's jurisdiction should be invoked (see *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR and *In the Matter of the Mui Coal Basin Local Community* [2015] eKLR). This principle is consistent with Article 159 of *the Constitution* which enjoins the court to promote alternative dispute resolution mechanisms and where possible the court ought to give it full effect.

8. Under section 6(1)(a) and (b) of the *Arbitration Act*, the court may only decline to refer a matter to arbitration only when the arbitration agreement is null and void, inoperative or incapable of being performed; or there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration (see *Niazsons (K) Ltd v China Road & Bridge Corporation Kenya* NRB CA Civil Appeal No. 157 of 2000 [2001] eKLR). The court must stay the proceedings once the application is brought to court not later than the time when the parties enters appearance or otherwise acknowledges the claim.

9. The Plaintiffs do not invoke any of the above grounds but rather seek a referral to a quasi-judicial body, being the Energy and Petroleum Tribunal which the Plaintiffs claim has jurisdiction to determine the dispute between the parties. While this could be true, this is not what the parties agreed to in their Agreement. The Court of Appeal, in *Nyutu Agrovet Limited v Airtel Networks Limited* NRB CA Civil Appeal(Application) No. 61 of 2012 [2015] eKLR stressed the importance of the parties' choice in deciding to resolve their disputes by way of arbitration as follows:

> it is not disputed that the mode to resolve disputes and particularly commercial ones by way of arbitration, is entirely the disputants' own choice. The State has set up the court system to resolve disputes but the larger commercial community has decided, for various reasons that it will in a consensual manner, take the resolution of whatever disputes that may arise in their transactions in their own way. And so by agreements duly executed and therefore binding

on them, the business people and merchants place their disputes before a single or whatever number of arbitrators, again selected, appointed in their own way or in the way they agree on, to settle their disputes. It has been variously said that the reasons parties choose arbitration is to save time, money and resolve disputes in an "amicable' way. The jury may still be out on those reasons because some arbitration proceedings take long and cost colossal sums of money and many still find their way back into the courts the parties desired to avoid in the first place. But that is not the subject for the moment. For the moment, it is not in doubt that the international business community in its wisdom, formulated the UNCITRAL MODEL RULES of arbitration which most business countries like Kenya took into consideration to formulate their respective statutes. It is accepted without argument that the legislature considered, on behalf of the business community, that arbitration was actually a useful tool as a matter of public policy, to settle disputes. Accordingly, the *Arbitration Act*, (1995) was passed and then more importantly the people of Kenya in *the Constitution* 2010 (Article 159(1)(c) stated in one voice that the desire of the business community to prefer dispute resolution, not through the courts, but via their own agreed arbitration process was indeed a noble way. So I can say that the consensual, voluntary and preferred way of arbitration is a great idea. And because the commercial community desired to keep clear of the courts as far as possible, through Parliament, business people included in the *Arbitration Act*, only limited instances to allow for court intervention when engaged in arbitration. To ensure that only limited court intervention would be allowed, the parties to any arbitration proceedings do state in the relevant agreement that the award issued will be final and binding.

10. The decision to bypass the judicial and court system and take the arbitration route in settlement of their disputes was voluntarily taken by the parties herein. Tribunals are quasi-judicial and subordinate bodies in our judicial system that are also supervised by this court. The fact that the tribunals may have jurisdiction to determine disputes of parties cannot tramp an express agreement by parties to bypass the said tribunals and proceed to settle their disputes by way of arbitration. Once it is clear that the arbitration agreement is valid, operative or capable of being performed and there is in fact a dispute between the parties with regard to the matters agreed to be referred to arbitration, then the same is binding upon the parties and they are obliged to follow the arbitration agreement. The court is only giving effect to their intention.

**Disposition**

11. Having found that the agreement between the parties must now be enforced, the parties' dispute must be referred to arbitration. As a result, I now make the following orders:

    (a) The Plaintiffs' application dated 12th January 2022 is dismissed.

    (b) The Defendants' application dated 4th October 2021 is allowed and an order be and is hereby issued referring the dispute subject of this suit to arbitration and that this suit be and is hereby stayed pending hearing and determination of the arbitration.**

    (c) The Plaintiffs shall bear the costs of both applications which I now assess at KES. 50,000.00.

**DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY 2022.**

**D. S. MAJANJA**

**JUDGE**

Mr Andala instructed by Omulele and Tollo Advocates for the Plaintiff.

Dr Kiplagat instructed by Okoth and Kiplagat Advocates for the Defendant.