Kenya Pipeline Company Limited v Kenya Oil Company Limited & another (Miscellaneous Application 380 of 2016) [2022] KEHC 12081 (KLR) (Commercial and Tax) (18 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12081 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION 380 OF 2016

WA OKWANY, J

AUGUST 18, 2022

BETWEEN

KENYA PIPELINE COMPANY LIMITED ..... APPLICANT

AND

KENYA OIL COMPANY LIMITED ..... 1ST RESPONDENT

KOBIL PETROLEUM LIMITED ..... 2ND RESPONDENT

RULING

1. On May 10, 1999, the parties herein entered into a transportation and storage agreement (hereinafter "the agreement") wherein the applicant, Kenya Pipeline Company Limited, agreed to provide transportation of the respondents' petroleum products through its systems and deliver the products to specified delivery points on terms and conditions set out in the agreement.

2. The agreement provided, at clause 22.0 thereof, that disputes arising under it would be referred to arbitration.

3. A dispute arose between the parties, and by an agreement dated June 12, 2009, the parties appointed Mr Ahmednassir Abdullahi SC (the arbitrator) as the sole arbitrator to determine the dispute. The arbitral tribunal published its award dated December 10, 2009.

4. Aggrieved by the award, the applicant herein filed an appeal before this court and the court rendered its judgment on January 26, 2012 in which it remitted the matter to the arbitrator for reconsideration.

5. Aggrieved by the High Court's decision, the respondents lodged an appeal at the Court of Appeal and a verdict was delivered on January 31, 2014 wherein the Court of Appeal affirmed the High Court decision and remitted the dispute to the arbitrator for the assessment of loss and damages.

6. In a decision rendered May 26, 2016, the arbitrator rendered his award on reassessment of loss and damages thus precipitating the filing of the application dated August 18, 2016 that is the subject of this ruling.

Application

7. The applicant herein seeks the following orders in the application dated August 18, 2016: -

    1. (spent)

    2. That the re assessment of loss & damages by Mr Ahmednassir Abdullahi SC awarded in arbitral proceedings between Kenya Oil Company Ltd & Kobil Petroleum Ltd vs Kenya pipeline Company Limited dated and published on May 26, 2016 be set aside in entirety.

    3. That costs of an incidental to this application be provided for.

8. The application is based on the grounds on the face of the application which can be summarized as follows:-

    1. That the arbitrator flagrantly dismissed the scope of the dispute defined by the Court of Appeal and embarked upon a most vile and contemptuous criticism of the judgements by the High Court and the Court of Appeal.

    2. The arbitrator declined to determine the dispute that was contemplated by the parties and in place thereof invented what he perceived to be the dispute and proceeded to determine that dispute. Hence the reassessment of loss and damages deals with a dispute which was conceived by the arbitrator instead of the dispute which the court of appeal referred to as the arbitrator for his reassessment of loss and damage.

    3. The arbitrator refused to be bound by the judgement made by the Court of Appeal and instead defined and delineated another dispute and thereupon determined the reassessment of loss and damages outside the terms of the reference made by the Court of Appeal.

    4. In addition to the following reassessment of loss and damages is founded upon a refusal by the arbitrator to be bound by the judgement made by the court of appeal. Failure to be bound by a valid court order is an act of contempt and such failure is against public policy.

    5. That the reassessment of loss and damages contains decisions and awards which are beyond the scope which was defined by the Court of Appeal

    6. The arbitrator rejected the courts direction to take cognizance of the *Kenya Ports Authority Act* cap 391 which by dint of section 12 confers upon Kenya Ports Authority the discretion to decide when and which ship will occupy which berth within the harbor.

    7. The arbitrator also rejected the courts direction to consider and apply provisions of the *Energy Act* no 12 of 2006. At section 96 which places upon the respondents the onus of ensuring that it had sufficient stock in its branches.

8. The arbitrator deliberately ignored the direction made by the Court of Appeal as well as the statutory provision aforesaid and proceeded to hold the applicant liable for the respondents "dry outs" of their service stations. Failure to abide by the directions made by court as well as statutory provisions is in breach of statutory policy as stated above.

9. The arbitrator further disregarded the terms of the contract between the parties and proceeded to award the sum of US 11,833,793.00 to the respondents despite the fact that such charges were borne by the respondents. This was not a dispute contemplated by the parties and the consequential monetary award is in breach of public policy.

10. The arbitrators refused/and ignored to acknowledge matters of trade and usage at the port when dealing with arrival, docking and berthing of vessels despite the parties having agreed that these matters must be taken into account and also the court directing that the arbitrator should take the same into account.

11. In all the foregoing instances the arbitrator violated the provisions of section 35 of the *arbitration Act* in the following manner.

    a. The reassessment of loss and damages deals with a dispute which was not contemplated by the parties.

    b. The reassessment of loss and damage does not fall within the terms of the matters which were referred to the arbitrator by the Court of Appeal.

    c. The reassessment of loss and damage contains decisions on matters which are well beyond issues which the court of appeal referred to the arbitrator.

12. That by refusing to pay heed to the judgment of the Court of Appeal and in place thereof questioning the competence of the judgment the arbitrator violated the essence of the rule of law and acted in breach of public policy.

9. The respondents opposed the application through the replying affidavit of the 1st respondent's Group Managing Director Mr David Ohana who states that the Court of Appeal, in its ruling dated January 31, 2014, held that the applicant was liable for breach of the contract and referred the matter back to the arbitrator for reconsideration of the question of quantum/reassessment of loss and damages.

10. He avers that the arbitrator reassessed the loss and damages as directed by the Court of Appeal and that the allegation that the reassessment is against public policy is *resjudicata*, void and does not fall within the grounds for setting aside as stated under section 35(2) of the *Arbitration Act*. He further states that the application is an attempt to re-litigate the dispute as the prayers sought were denied by both the High Court and the Court of Appeal.

11. He contends that the Court of Appeal excluded KPA from any blame even though the applicant sought to shift the burden of liability to Kenyan Ports Authority (KPA). It was the respondents' case that the parties submitted themselves to arbitration and that the applicant's intention to initiate court litigation is a breach of the terms of the contract.

12. The application was canvassed by written submissions which the parties highlighted at the hearing on March 28, 2022.

Applicant's Submissions

13. Mr Ohaga SC submitted that the arbitrator completely ignored the directions issued by the Court of Appeal and embarked on determining issues beyond the scope of reference to arbitration and made an award that conflicts with public policy of Kenya.

14. Counsel submitted that the arbitrator, in reassessing loss and damages, was exercising judicial authority in terms of article 159 of the *Constitution* and was therefore enjoined to promote the purpose and principles of the *Constitution*.

15. On demurrage charges, counsel submitted that the High Court and the Court of Appeal found that the arbitrator did not to adhere to the provisions of *Kenya Ports Authority* and the *Energy Act*.

16. Counsel submitted that the arbitrator's failure to comply with the directions of the High Court and the Court of Appeal amounted to conflict with the public policy of Kenya to the extent that it interfered with a well-established principle of law on which the entire judicial decision making process is anchored thus eroding the proper administration of justice. It was further submitted that the intemperate language used by the arbitrator constituted to an attack on the dignity of the court and undermined the administration of justice.

17. On the arbitrator's jurisdiction, the applicant submitted that arbitrator was bound by the directions of the High Court and the Court of Appeal but instead went beyond the stated scope by delineating and determining a dispute that was not within the terms of the reference made by the court of appeal.

The Respondents submissions

18. Mr Muthui, learned counsel for the respondents submitted that the arbitrator confined himself to the orders of the Court of Appeal in reassessing the loss and damages. He argued that criticism, by the arbitrator or a party, is not against public policy as what was not permitted is personal attacks on a judge.

19. Counsel submitted that the arbitrator adopted a systematic and methodological approach in the re assessment of loss and damage and maintained that there was no proof that the reassessment was outside the scope of the dispute outlined by the parties.

20. It was submitted that the applicant did not furnish the court with any judicial authority to support its assertion that criticism of a judgement amounts to violation of public policy. It was submitted that by interrogating and analyzing the decision of the High Court and Court of Appeal, the arbitrator was simply trying to understand the judgements and was not reviewing them or sitting on appeal over the said judgment. It was submitted that the arbitrator's robust analysis of the decision of the High Court and the Court of appeal was neither contemptuous nor against public policy.

21. It was the respondents' case that after analyzing the issues of breach in the context of the law, the evidence and the submissions, the arbitrator considered the provisions of the *Kenya port Authority Act* and proceeded to reassess the loss and damages.

22. I have carefully and anxiously considered the application, the respondents' response and the parties' respective submissions. Even though the parties herein focused their arguments on the issue of whether the applicant has made out a case for the setting aside of the arbitral award, I find that the main issue is whether this court has the jurisdiction to entertain a second round of application to set aside the

arbitral award having already dealt with the same matter before an appeal was filed before the Court of Appeal.

23. As I have already stated in this ruling, this matter first commenced before the arbitrator who published his initial award way back on December 10, 2009. The applicant herein appealed against the said award before this court and a judgment was rendered on January 26, 2012. The respondent herein was aggrieved by the judgment and preferred an appeal to the Court of Appeal which delivered its verdict on January 31, 2014 in which it remitted the dispute to the same arbitrator for the reassessment of loss and damages. It is the arbitrator's reassessment of loss and damages that is the subject of the instant application.

24. From the above summary of the sequence of events that culminated to the present application. It is clear that this is a fairly old case that has run its full course all the way to the Court of Appeal before finding its way back to this court on yet again, another quest to set aside the arbitral award.

25. With all due respect to the parties herein and their respective advocates, this court is of the view that this matter having been litigated upon all the way up to the Court of Appeal cannot be reopened to a fresh process of an appeal before this court. Indeed, the Court of Appeal was silent on what should happen in the event one of the parties is dissatisfied with the said reassessment.

26. My finding is that this court is *functus officio* having already considered the matter on appeal and cannot turn back and deliberate on yet another round of dispute over the same matter. To entertain this matter again will result in a scenario of a back and forth or merry-go-round system of litigation with no end in sight contrary to the *res judicata* doctrine and the adage that litigation must, at some point, come to an end. I am guided by the decision in *Lal Chand vs Radha Kishan*, AIR 1977 SC 789 where it was stated that: -

> " The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.
>
> The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

27. The question that arises is what will happen if one party is not satisfied with this court's verdict. Will the matter proceed yet again to the Court of appeal? Will the arbitrator conduct another reassessment? At what point will the matter come to a close?

28. In view of the fact that the final order that led to the reassessment of loss and damages by the Arbitrator emanated from the Court of Appeal, I find that this court cannot interrogate the said decision in order to establish if the reassessment was done in compliance with the said court's directives. My finding is that the Court of Appeal is better placed to determine if their orders have been complied with.

29. For the reasons that I have stated in this ruling, I decline the invitation to grant the orders sought in the application dated August 18, 2016 which I hereby strike out for lack of jurisdiction. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF AUGUST 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Leyla for J. Ohaga Senior Counsel for the Applicant.

Mr. Muthui for Respondent.

Court Assistant- Sylvia