REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO. 82 OF 2020

KENYA PORTS AUTHORITY.....APPLICANT

VERSUS

BASE TITANIUM LIMITED.....RESPONDENT

R U L I N G

1. This may be a case study for scholars and arbitration practitioners to reevaluate whether it is always true that arbitration turns out as cheap, cost effective and expeditious mode of dispute resolution as compared to litigation. When looked from the attribute that the process must remain consensual and voluntary, then a discourse must ensue on the place and practicability of statutory arbitrations like the one here.

2. The Court is called upon to determine, if the arbitrator, one **Joseph Nyamu J, (Rtd)** has conducted himself in a manner that the parties, or one of them, can no longer have confidence in him. The applicant, as the respondent in the claim before the arbitrator, has approached the court and sought that the arbitrator be removed from the arbitration proceedings pursuant to Section 14 of the Arbitration Act, by reversing his order dismissing the challenge.

3. The reasons advanced to premise the request are that in his proceedings and in reaching the decision dated 13/12/2020, the arbitrator dismissed the challenge without any proper basis in law and the real matters in controversy in the challenge; that he consistently failed to address and resolve the query on his fees leading to applicants decline to sign the fees agreement presented and that there was an unilateral insertion of the right by one party to pay fees and claim a reimbursement from the other side. On misconduct the arbitrator is faulted for changing his hourly rate charge from Kshs. 30,000/- to 60,000 without agreement by parties or any jurisdiction and insisted on the payment thereon as a basis for withholding the award pending payment.

4. The hourly rate charge was said to have been communicated to parties at the preliminary meeting but the arbitration wholly ignored that fact by insisting on a higher figure and rejected the challenge which included the challenge on the monthly charge of Kshs. 100,000.00 for the facility charge which he had reserved to be dealt with only at the conclusion of the proceedings but when the time so came he declared himself *functus officio*.

5. The arbitrator is faulted for constant resort to reflection and recollection to avoid addressing the issues of validity of this appointment and to keep shifting the rate of calculation of fees and expenses. There is a further fault that the arbitrator did not treat the parties equally and fairly on the award of costs which was done without affording the applicant an opportunity to present its position as sign of outright bias which coupled with the fact that in his decision dismissing the challenge the arbitration has heavily relied on the respondent's submission which had in fact been expunged. The arbitrator was faulted for failure to address the issue of challenge squarely by blaming the applicant for engaging in backdoor challenge rather than addressing the issues under Section 35 of the Act and that the taxation of costs at 6,620,350 and the sum of Kshs.3,200,000 as estimation of the respondents expenses was speculative and ignored the objection by the parties thereby ignoring the rules applicable to arbitration as captured in the chartered institute of Arbitration, Kenya Branch, Rules.

7. The applicant revisits the issue of fees and alleged misconduct by asserting that the ascertainment or taxation of costs was done without regard to the objection raised by the applicant thereby affronting the principle of party autonomy by exhibiting bias and oppression in that the sum in excess of 3,200,000 represents double charge as a consequence of which the approach has lost confidence in the arbitrator's ability to family and justly make any determination in this matter.

8. Those challenges and accusation against the arbitration are reiterated in the Affidavit in support sworn by STEPHEN KYANDIH in which document are exhibited to include correspondence on appointment of the arbitrator in which the current applicant contends that there is no right to appoint one while the respondent maintains that these is a dispute, the written claim before the arbitrator, written statement of defense, reply to defence, draft issues by both sides, submissions by both sides on jurisdiction, the final award on jurisdiction, the additional award on costs and various document and correspondence between the parties and the arbitrator including the arbitrators proposed fee agreement and objections taken by the current applicant.

9. The application was registered by the respondent by the Replying Affidavit sworn by SIMON WALL on 5/5/2020. The gist of that opposition is that there is no valid reason to consider the prayer for stay of arbitration proceedings and that the grounds upon which a challenge may be upheld by the court is limited by the provisions of Section 13(3) of the Act from which the court cannot deviate and that the court has no jurisdiction to deal with the challenges if not lodged within 15 days after becoming aware of any circumstances giving rise to the matters referred to in Section 13(3), and lastly that the foundation of the challenge is the award dated and notified to parties on the 25/06/2018 which made the challenge made on 20/12/2019 to be outside the time prescribed and was thus time barred.

10. It was the contended and asserted that the imposition of Kshs.60,000 per hours for fees and Kshs.100,000 per month for facility costs was not a ground to question the impartiality and or independence of the arbitration under the Act and that the respondent's choice to pay the fees and costs could not be of indication of impartiality or bias upon the arbitrator as the same was necessitated by delay by the applicant to pay and the need to advance the arbitration. To the arbitrator, a genuine issue with the question of fees ought to have been presented to the court pursuant to the provisions of Section 32 B of the Act for an order of payment of the fees into court and subsequent determination of the fees payable.

11. On unfair and unequal treatment, the respondent pointed out that all correspondence to the arbitrator by the respondent was at all times copied to the applicant just as those by the arbitrator to the counsel. On the appointment of the arbitration by the Chief Justice, the respondent took the position that, the issue was not available as a challenge before to arbitrators because the Chief Justice led exhausted his mandate and that the same issue had been raised and decided by the court in a ruling delivered in Mombasa HCC 92/2016 delivered on 3/8/2017.

12. On the right to address the arbitrator on the quantum of costs, the respondent took the position and stance that the arbitrator did ask parties to make submissions, the respondents opted to offer no submissions while the applicant refused to file any representation in that regard and thus ought not be allowed to question a decision arrived at after it close of remain silent and leaving to the arbitrator the discretion to determine costs. There was a denial that the award was informed and accentuated by his charge for fees albeit the respondent also took issues with aspects of the fees it infeed to take up with the arbitrator at subsequent meetings. The purport of the current application was cast as an attempt to challenge the decision on jurisdiction and costs purposely to achieve delay toward fast determination of the dispute and to scuttle the court's decision in Mombasa HCC 92/2016.

13. On the fault that the arbitrator relied on the decisions cited by the respondent to dismiss the challenge the respondent took to position that mere reliance on decisions cited by the respondent in the expunged submissions could never be indicative of bias and that the arbitrator merely did determine the matter placed before him by conducting own research. Even on delay in transmitting the 1st award on jurisdiction to the applicant, it was asserted that it could not indicate bias as the delay was due to postal delays and cannot be the basis of questioning the impartiality or independence of the arbitrator and that the decisions and awards were mode in conformity with the Chartered Institute of Arbitrators (Kenya Branch) Rules as agreed between the parties.

14. The applicant was then accused of being hell-bent to delay and frustrate the arbitration proceedings as demonstrated by failure to pay arbitration fees while continuing to participate in the proceedings; seeking and obtaining stay of proceeding on the basis of an intended appeal and then failing to file such appeal for years over and above filing this matter subsequent to Mombasa Misc. Application 456/2019 which raises same issues. the deponent then concluded by giving a view and opinion that this application is just an instalment of the many ploys the applicant has employed to delay and frustrate the determination of the dispute and not genuine nor bona-fide grievance contrary to the dictates of the constitution to encourage and promote of alternative dispute resolution mechanisms and that the least the court ought to do is to uphold the arbitrators decision and decline the challenge by dismissing the application for reasons that no basis had been laid nor proved to justify or merit the prayer for removal.

15. That Replying Affidavit exhibited various correspondence and the decision of the court in HCC 92 of 2016 among others decisions and made extensive reference to the documents exhibited in the applicant's Affidavit.

16. Pursuit to the directions by the court given on those 6/5/2020, the applicant filed written submissions dated 12/5/2020 on the 13/05/2020, bound together with the list authorities, while the respondent did so by those dated 12.05.2020 and filed on 14.05.2020 The directions of 6/5/2020 also gave to the arbitrator the chance to have input on the application seeking to have him removed from the arbitration. Pursuant to those directions, the arbitrator filed his grounds for confirmation of the decision dated 9/4/2019(sic) and challenge dated 20/12/2019.

17. In those grounds the arbitrator fully relies on the decision subject of the application and then took the position that the application is a departure from the written challenge which was limited to issues of costs and expenses together with the failure to rule on the validity of the appointment. It was then contended that the provisions of Section 14(2) of the Act bar the applicant from bringing the challenge in that the decision on costs and expenses having been brought to his attention on the 25/06/2018 the current application was clearly out of time and not maintainable. The issue on appointment was contended to be an old one having being raised before the court and the honourable chief justice more than three years ago and was equally barred by the statute for being raised and that court lacks jurisdiction to entertainment.

18. There was then an attack on the originating summons for being incompetent on account of the fact that parties had framed issues and jurisdiction was the one given priority over the others and that issue having been determined pursuant to Section 17 of the Act, the remedy to the aggrieved was to raise a challenge under Section 17(6) within 30 days or section 34(4) by asking for an additional award but never to invoke Section 14 of the Act.

19. The third point raised was that the court lacks jurisdiction to adjudicate on costs and expenses because under Section 32B (4), when the award was withheld, the applicant had the option to deposit the decided costs and expenses into court, a remedy it declined to pursue and thus it was not permissible for it to mount the challenge under section 14 in clear violation of its duty pursuant to Section 19 of the Act.

20. To the arbitrator, the ascertainment of costs and expenses where there is no agreement is the statutory duty of the arbitrator and exercise of the statutory mandate cannot be termed a misconduct and the only remedy being an application pursuant to Section 34(4) and not otherwise by challenging the conduct of the arbitrator. On the allegation by the applicant at paragraph 17 of the Affidavit in support of the

Application that the arbitrator had denied the applicant opportunity to present submissions on the challenges and having expunged the respondent's submissions, he proceeded to put heavy reliance on the submissions and authorities cited by the respondent in the expunged submissions, the arbitrator denied the accusations and asserted having used on resources to come up with the decisions cited. On such grounds the arbitrator prayed that the application be dismissed for lack of merits. I will consider such grounds as an opposition to the application by way of a response and submissions.

Submissions by the parties

21. The applicant, from the onset, seeks to clarify that the decision on arbitrator's jurisdiction is the subject of a separate matter being Mombasa Misc. Application No. 456 of 2019 which pends determination. On the opposition that the challenge was statute barred, the applicant insists that the decision having been made on the 13/12/2020(sic?) a challenge mounted on 20/12/2020(sic) was brought within time and cannot be faulted just as the current application having been brought on the 24/4/2020 against a decision made on the 9/4/2020 could not be faulted as time barred. It was equally stressed that even though the reasons for the challenge were succinctly put forth, the decision on the challenge stressed the merit of the decision on jurisdiction as well as that on costs and expenses.

22. The applicant faults the respondent for seeking to cloud and blur the issues for determination by alleging that the challenge is on the two decisions when the challenge is strictly on the conduct revealed beginning with the two decisions and ending with that on further award on costs dated 13/12/2020(sic).

23. On the applicable law, the applicant pointed out that the Chartered Institute of Arbitrators code of Professional and Ethical Conduct for Members, [2007], 73 Arbitration Journal Vo. 2 231, was applicable and setting the minimum standards of conduct to be observed by members while acting as neutrals in dispute resolution and that the arbitrator here, being a fellow of the institute and a chartered arbitrator of the institute is bound by the said code. The decision in **MINISTRY SAUDA PARBAT CO. LTD VS GRANSBULK HAMDLERU LTD [2012] eKLR** was cited on the test to be applied when removal of an arbitrator is sought it being stated that the test must remain whether the conduct of an arbitrator has been such that the parties can no longer have confidence in him so that the matter cannot be concluded without the parties or one of them concluding that the same had been prejudged. It was then submitted that in the instant matter the honorable arbitrator had failed to apply to test. The decision by **Gikonyo J,** in **Zadock Furniture Systems Ltd vs Central Bank of Kenya [2014] eKLR** was cited for the same enunciation.

24. That arbitration is a consensual process was underscored with its attendant dictate that parties be accorded equal treatment with independence and impartiality. The court was therefore implored to consider the totality of the matter and to find that the conduct by the arbitrator was such that the applicant no longer had confidence in him and that the grounds set out do not depart further original challenge but rather confined within its bounds.

25. The applicant then set out to demonstrate the incidents of misconduct to include denial of equal treatment as regards the manner the tribunal dealt with the twin issues of jurisdiction and costs and expenses. The applicant stresses that the determination that the issue of jurisdiction to appoint had been abandoned was clear demonstration of unequal treatment and thus bias because from the record and particularly the drafted issues raised there had not been an abandonment. Reference was made to the decision by the court in HCC No. 92 of 2016, the final award on jurisdiction and the decision on the challenge to demonstrate that the issue of jurisdiction was a live issue and was not and could not be abandoned and that it was strange for the respondent to contend that it was never an issue formulated for determination by the tribunal.

26. The incident of delivery of the award to the respondent, with offices based in Nairobi, where the arbitration seat is equally situate, by way of courier, while the documents to the applicant based in Mombasa, was delivered by registered mail, was highlighted and the court called upon to take notice of the notoriety of ineffectiveness of the postal services and to find that the applicant did not get equal treatment and was thus bound to be prejudiced. The applicant then placed precedence on the correspondence at pages 184, 192, 208, 239, 263, 277 and 208-381 as a demonstration of unequal-treatment visited upon him by the arbitrator.

27. On the question of fees and expenses the applicant stresses the point that to it, it is inconceivable how the honorable arbitrator could renege on his written proposal on fees including one signed by the respondent on the single basis of recollection. The position of the applicant is that in totality the conduct of the arbitrator fails the threshold that would imbue confidence in him as a neutral arbitrator and calls for his removal. The arbitrator is accused of patent bias by an attempt to deliver himself on the challenge made to court pursuant to Section 35 of the Act and that the applicant was denied a chance to have an input on the decision on costs which was then assessed at Kshs.9,820,352.00 which is termed speculative without of any claim laid by the respondent, who also has reservation on the charged hourly rate. It is then asserted that incoming to the costs of the respondent there was lack of judicious considerations and demonstrated caprice and whim rather than discretion.

28. The other submission was that the arbitrator had prejudged the matter on costs even before the time afforded to the applicant to offer submission could expire and before he received the respondent's intimation not to intend to offer any submissions.

29. Other than the decided cases cited, the applicant availed to court the Act, an article in the international journal of arbitration, mediation and dispute management Vol. 72 No. 2, headed Arbitrators code of professional and Ethical Conducts for member (January 2007), an article by Ronkin Chung titled the Rules of Natural Justice in arbitration, an article by Graham Morrow, Removal of arbitrator: ICT Pty Ltd vs Sea Containers and the CIArb (Kenya Branch) Arbitration Rules.

30. For the respondent, the position was taken, very strongly that none of the remedies sought was available for grant to the applicant on the basis that: -

i) The court lacks jurisdiction to grant prayer on stay of proceedings just as there are no compelling reasons to grant the same.

ii) That prayer 3 is not merited.

iii) That prayer 4 cannot be made on account of want

of jurisdiction.

iv) There is no basis to cushion the applicant from Payment of costs and lastly that the applicant is not entitled to the costs of the application costs of any part of the arbitral proceedings.

31. The respondent then identifies some 5 issues for determination and renders its submissions along those lines. On whether there should be stay of arbitral proceedings, the respondent contends that while the applicant has the right to pursue his grievances strictly under Section 14 of the Act, the respondent has the converse right to have the claim with the arbitration to proceed and cites the provisions of article 159(2) of the constitute as well as Section 10 and 14(8) of the Act. The court was reminded to exercise caution before embarking on the need to interfere with the arbitration proceedings which has its underpinning in the constitution and to ever appreciate that any interference with the process should be supportive rather than obstructive.

32. The decision in **Equity Bank Ltd vs Adopt A Light Ltd [2015] eKLR** was cited for that preposition. The point made is that Section 14(8) does not grant to the court jurisdiction to grant stay of proceedings and that even if the court was to be minded to grant such stay, it should be wary and cautions to grant stay only when compelling reasons are availed and that in the instant case no compelling reason had been preferred. Instead, the respondent cites and relies on Section 14(8) to dictate that the proceedings be progress save that any award thereby reached does not take effect until the challenge has been overcome and further that it should be borne in mind that parties would always design to abuse the arbitral process by attempts at removing the arbitrator. Even though the submissions made in this regard are very forceful, I consider the same immaterial because this prayer was merely intended to be interlocutory and pending determination of the matter. Now that I have heard the matter and I am determining it finally, it would be futile to seek to consider such a prayer unless one sets on a Superfluous journey.

33. On whether the decision by the tribunal dismissing the challenge should be set aside, it was submitted that the jurisdiction of the court to uphold the challenge are circumscribed by Section 13(3) and only four windows are provided with no other opening by the court to deviate to.

34. The respondent contends that the current application is time barred, as far as challenge on fees and expenses on the grounds that the request for fee was by a letter of 25/6/2018 as appended by the letter of 18/12/2018 and therefore pursuant to Section 14(2), the grounds to challenge the arbitrator became known to the applicant by that date from which date he had a period of 15 day to make the challenge and this period expired on 1/1/2019 but no steps were taken till the 20/12/2019 out of time. It was thus contended that there being no avenue for extension of time provided by the Act, this court and the tribunal have no jurisdiction to entertain the challenge.

35. On the merits, the respondent contends that there is no merit in seeking to set aside the dismissal of the challenge as mere misconduct is not sufficient unless it be demonstrated that the misconduct raises justifiable doubt as to impartiality and independence. That test is said to be stringent and objective for which position the decisions in **Kipkoech Kangongo & 62 Others vs Board of Governors Sacho High School & 5 Others [2015] eKLR** and **Kenya Pipeline Co. Ltd vs Kenya Oil Company Ltd [2015] eKLR** were cited. There was an emphasis that no bias had been established and that the imposition of Kshs. 60,000.00 fees per hour and Kshs.100,000.00 per month for facility costs were not indicative or proof of bias, partiality or lack of independence. The applicant was faulted for refusal and failure to sign the fees agreement, pay the fees demanded and or deposit same into court but opted to participate at the proceedings such refusal notwithstanding.

36. The decisions in Kenya Pipeline Co. Ltd (supra) and Zadock Furniture System Ltd (supra) were again cited for the proposition of the law that finding in favour of one party is no basis to infer bias and that erosion of confidence as a stand-alone reason to remove an arbitrator is not sufficient. The decision in **Chania Gardens Ltd vs Gilbi Construction Co. Ltd [2015] eKLR** was cited for the position that perception of bias without proof amounts to no misconduct for purposes of removal.

37. On the validity of the decision and if it should be declared void, it was contended that the court lacks jurisdiction to declare the award of costs void within the confines of Section 14 of the Act and that the setting aside of an award can only be pursued under Section 35(1) as has been done in Mombasa Misc. Appl. No. 456 of 2019.

38. On whether the request to discharge the applicant from its obligation under Section 19 of the Act, it is contended and submitted that Section 14(7) only envisages a situation where the court can determine the entitlement of an arbitrator to fees already paid after and not before removal. In the instant case the respondent contends that having failed to establish a threshold for removal, the question of entitlement to fees arises not. It was in the alternative submitted that even in the unlikely event of removal and thus termination of mandate, the termination only takes effect upon the pronouncement by the court but does not negate on the work done and rights accrued and acquired prior to the termination which remain valid and therefore for the work done and leading to the two awards, the arbitrator needs to retain his fees. The applicant was accused of engaging in a ploy to evade payment of fees due on an arbitration proceeding in which he participated and outside the parameters of the law and selfishly for itself as a single party in the proceedings.

39. On costs of the application, the position taken is that there having been not established any basis to grant any of the orders sought, the application must be seen to be what it is, a design to obstruct and delay the arbitral proceedings for which reason there cannot be a basis to award the costs of the application and the arbitral proceedings to the applicant. It was urged that the application be dismissed with costs.

Analysis and determination

40. This application calls for the court's mandate to strike a balance between the duty to observe and respect party autonomy in arbitration which constantly urged restraint for court interference thereby and the equally important dictate that dispute resolution by arbitration remain just and inconsonance with the hallowed dictates of fair hearing including the demand that those charged with resolution of legal and commercial disputes remain neutral, impartial and unbiased.

41. On the materials placed before the court, the dispute here is clearly and squarely on the manner the question of the fees and costs of the arbitrator and those of the respondent at the arbitral proceedings have been handled by the arbitrator. The determination whether that has been done well will be the fulcrum upon which the decision for removal or otherwise ought to rotate. If that remains the court's focus, it must always be born in mind that it is a requirement that an arbitrator remains the neutral third party in dispute resolution showing utmost disinterest in the matters in controversy save for the duty to resolve the dispute.

42. For that position, the legislature in the model law, at Section 13 set the grounds upon which parties may challenge the suitability of an arbitrator once appointed. In that provision, impartiality and independence are underscored as irreducible qualities and attributes of the person to be appointed an arbitrator in a dispute. The law obligates are arbitration to disclose without delay any matter or circumstance which may give rise to justifiable doubt as to impartiality and independence at the time of the appointment and throughout his tenure.

43. There is equally a leeway to parties to challenge the arbitrator even if the appointment was by such party or with its participation. To my mind the stipulation in the statute have one incontestable purpose, reinforce and bolster independence and impartiality and therefore confidence in arbitration as an alternative to litigation as the current predominant dispute resolution mechanism. That intention tells me that all must be done by all concerned to ensure that the mechanism is not only entrenched and encouraged but is equally guarded against abuse by all concerned including the parties and the arbitral tribunal itself.

44. For that reason, while the court must respect the position of the arbitration as the neutral and master of facts presented and law applicable, the court of law must at all times retain the control to supervise the process, if not for anything but to ensure that the notions and the minimum requirements of justice are maintained and not vilified. The supreme court in **Nyutu Agrovet limited vs Airtel Networks Kenya Limited (2019)eKLR** affirmed the need for courts intervention in arbitral proceedings in the following words:-

> **"Further, even in promoting the core tenets of arbitration, which is an expeditious and efficient way of delivering justice, that should not be done at the expense of real and substantive justice. Therefore, <u>whereas we acknowledge the need to shield arbitral proceedings from unnecessary Court intervention,</u> we also acknowledge the fact that there may be legitimate reasons seeking to appeal High Court decisions." (**Emphasis provided)

45. In this matter, even though the arbitrator was appointed way back in February 2017, the last four years have been spent in handling the single question of jurisdiction, without delving into the merits, at a cost of slightly over nine million[9,000,000] and it begs the question adverted to at the beginning of this determination whether such was the anticipation of the law that encourages arbitration as an efficient, cost effective and expeditious mechanism of dispute resolution over litigation. That is a matter that must concern the arbitration practitioners, lawyers, legislators and public policy formulators and must thus concern the court. It is more compelling when regard is had to the fact that this is not the usual consensual arbitration parties chose by an agreement but a statutory mandated process.

46. The dispute here, even though the respondent says to concentrate around and concern the 1st and 2nd award, is purely the grief the applicant maintains over the manner the arbitration has calculated his fees and expenses and the manner of ascertainment and quantification of the respondent's fees.

47. It is of note and agreed by both sides, that there was never an agreement at commencement of the process, as is expected in most cases and anticipated by Section 32B of the Act by the repeated use of the phrase *"unless otherwise agreed by its parties"*. The ideal should have been for the parties to agree on both the formula for calculation of the arbitrator's fees and expenses but that did not happen.

48. Lack of agreement notwithstanding, the arbitral tribunal wrote to the parties on the 12/4/2017 and confirmed having quoted to them a fee charge rate of Kshs. 30,000 per hour. That letter was followed by another of 6/7/2017 which enclosed a fee agreement to be executed by the parties. That fee agreement was explicit that parties would pay Kshs. 30,000 per hour or part thereof being consider half day of 4 hours and for a sitting lasting 4 hours or more to constitute a full day of 8 hours. It also set facility fees to be chargeable at Kshs. 100,000 per month to include administrative, secretarial and electronic document management services over and above out of pocket expenses that would be met separately. With the amendment on the clause on joint and several obligation of the parties, proposed by the respondent, the agreement was accepted and signed by the respondent but never by the applicant. The respondent even paid his portion of the obligation but the applicant did not.

49. The reasons for failure to sign the agreement are disclosed in the applicant letter dated 11/4/2018 in which it is expressed that being *a state corporation subject to regulatory frame works, it would be difficult to justify and detained the facility fees of Kshs. 100,000 per month for being excessive*. The arbitrator was thus requested to consider his position in the matter. On receipt of that request, the arbitrator in his words, "upon reflection", reduced the sum to Kshs. 50,000 per month.

50. That however was not the end of the controversy over the matter fees and expenses. The arguments on jurisdiction were invited and argued and the tribunal did prepare an award which was then justifiably withheld pursuant to Section 32B (3) pending payment of fees and expenses. That position is disclosed in the tribunal's letter said to have been received by the applicant on the 25/6/2018 and enclosing a fee statement. The fees statement sets the foundation of fees charged to be **59 hours 55 minutes** at Kshs. 60,000 per hour and for facility fees at 100,000 per month, apparently for 30 months, in the sum of Kshs.3,00,000/=.

51. That letter and demand did not elicit immediate response from the parties and it took the tribunal to do a reminder dated 22/10/2018, this time round with a warning that if payment is not made within 7 days the sum outstanding would then attract interest at 14% p.a. Yet two other reminders dated 23/11/2018 and 17/12/2018.

52. That last letter seems to have pricked the respondent counsel who then wrote to the tribunal expressing inability to respond earlier due to the need to talk to the applicants. The respondents counsel was however fast to point out that there were a number of items in the fee request note which need reconsideration. Hourly rate charge was pointed out to have been agreed at Kshs. 30,000 and not Kshs. 60,000 just like the facility fees was to take effect on 10/10/2017 when the agreement was executed and therefore it could not amount to Kshs. 3,000,000.00.

53. The applicant equally took issues with the request note on the basis that the facility fees remained contested hence the failure to execute the agreement. Those two letters leave no doubt that contention is on hourly rate of Kshs. 60,000.00 and facility fees of 100,000 per month. The protestation did not fully meet the favour of the tribunal. In his response to the concerns the tribunal insisted that he had quoted Kshs.60000.00 per hour subject to approval by the clients but conceded to have the facility fees lowered to Kshs. 50,000.00

54. He also conceded that the demand for interest and penalties could not find a footing in any agreement or the Act and did abandon that demand. For good measure he did send a revised fee statement charging hourly rate of Kshs. 60,000.00 now buying Kshs. 30,000 per party and facility fees at Kshs.50000.00 per month. On further correspondence the tribunal maintains in the letter of 07/01/2019 but sent by mail on 23/12/2018 that the scale for the chartered institute was Ksh.35,000/= and he could not have charged the lower figure of Kshs. 30,000.00 per hour. In that letter the tribunal sticks to his guns and invites no more correspondence while firmly reminding parties of their obligation to pay as billed or deposit the sum into court.

55. On 31/10/2019 the respondent then wrote to the tribunal intimating intention to pay so that the matter is progressed. When given the greenlight by the tribunal, the respondent did pay the sum of Kshs.6,620,352 quoted in the 25/6/2018 and without regard to the revised fee statement sent by letter of 18/12/2018 in the sum of Kshs.5,158,752. When the respondent realized that it had committed what it called error on the sum payable and brought the fact to the attention of the tribunal, the response was that there was indeed an overpayment but the same would be absorbed by facility fees for the period July 2017 to November 2018.

56. The figure and correspondent between the tribunal and the respondent and the subsequent payment of the demand fees and charges seem to have infuriated the applicant wholly and by a letter of 12/11/2019, the applicants declared their lack of obligation to pay any of such charges and notified the respondents that they would not pay even if costs were ultimately ordered. A very unfortunate relationship that ought not to manifest between a party and the arbitrator.

57. That notwithstanding, the respondent did effect payment and the award was, by mail of 15/11/2019, said to have been sent to parties by registered mail. It however turned out that the award to the respondent was sent by courier while that to the applicant was sent by registered mail. The applicant sees no mistake on that act and labels it unequal treatment. For a neutral, it is not enough to regard this as an inadvertence of mistake. Not when the parties had cultivated not so cordial relationship with him.

58. It would appear that the respondent did receive the award on 15/11/2019 and on the 19/11/2019, studied the same and elected that the arbitrator to quantify and determine the amount of costs payable without any submissions. The applicant on the other hand had not received the award by the 22/11/2019 on which date it addressed the arbitrator expressing dissatisfaction in the matter correspondence had been handled and lamenting prejudice to client if in the event it was to prefer a challenge

59. On 9/12/2019 the tribunal now wrote to parties intimating that the award on costs was now ready for collection and that no fees was payable on the same. That is the award that has provoked the events and challenge leading to the current application. That award is not disputed to have been made on the 13/12/2019 on its basis the applicant considered the tribunal to lack impartiality and independence and sought his removal. The challenge was lodged by the written statement of reasons of challenge to arbitrator dated the 20/12/2019 and confirmed by the arbitrator to have been received by mail and a response thereto was dated 28/01/2020.

60. The applicant then sought directions on the disposal of the challenge and proposed that parties file written submissions within 21 days. That proposal did not meet the arbitrator's approval in that to him the challenge was complete in terms of Section 14(2) of the Act and that he would accept no submissions unless the same were to come by way of an agreement. No such agreement was forthcoming and the tribunal then opted to decide the challenge on the basis of the two documents filed, the decisions was communicated by the mail of 9/4/2020 but as fate would have it the attachment could not be opened by the applicant and had not been received by then on the said date forcing the arbitrator to request that a physical copy be picked for his offices.

61. I have anxiously considered the matter while confining myself to the test whether or not the arbitrator has behaved in a way that build and imbues confidence of the parties in the proceedings or in a way that lowers that confidence as to impartiality and independence.

62. In my view it is the impartial conduct that would impact on the perception on independence. The independence of an impartial arbitrator or neutral must be from all including himself. In this matter parties failed to seize the opportunity provided by Section 32B to agree on formula and parameters for quantifying the tribunals costs and expenses so as not to put the tribunal on the seat of judgment over the decision of how much fees and costs are due to him.

63. As a consequence, I see in the trail of documents beginning with the fee agreement and subsequent correspondence a very difficult position in which the arbitration is put to own defence of what his entitlement is. The situation depicted is that of the tribunal pursuing the parties for his costs. That position is best revealed in the tribunals letters dated 18/12/2018 and that of 07.01.2019 in answer to the queries raised by both parties. In the letters the tribunal writes: -

> 18.12.2018 **"Thank you for your letter dated 17th December 2018.**
>
> **As regards the arbitrator fees per hour, this was discussed in the first preliminary meeting when the arbitrator gave a figure of 60,000 per hour for both parties. Counsel agreed to this subject to their client's approval and the consensus was that this was the going rate for an arbitrator of my standing.**
>
> **A written remuneration agreement was drawn up and signed and the administrative charges were reflected at the rate of 100,000 per month. <u>The intention was that this would be the facility charges per party. The Respondents objected to this item by a letter.</u>**
>
> **Pursuant to the Remuneration Agreement, the parties were requested to pay a deposit to represent a commitment fee. This**

was calculated at the rate of 30,000 per hour per party (Kshs.300,000 per party)and together with the commitment fee of Kshs.600,000 per party, it amounted to Kshs.1,044,000 per party inclusive of VAT. The number of hours was estimated at 10hours.

One of the parties paid the total fees so that the matter could proceed.

In light of the above, we reiterate that the hourly rate has been properly raised.

On the administrative/facility charges we have reflected on further, and have decided that it be reduced to Kshs.50,000 per party per month. Accordingly, a revised Statement has been done to reflect the reduction and the same is attached hereto.

On VAT penalties and interest on unpaid fees, I concede that after perusing the appointment agreement, it is noted that the power to levy this was inadvertently omitted and the Arbitration Act is also silent.

However, on VAT, this is chargeable under the relevant law.

I look forward to the parties paying their respective portions or one party to pay for the non-paying party as is provided for in the agreement."

07.01.2019 **RE: ARBITRATION BETWEEN BASE TITANIUM LIMITED (BTL) AND THE KENYA PORTS AUTHORITY (KPA)**

We refer to your letter dated 21st December 2018.

I have expressed my position already. The only additional comments I wish to add are that the figure of Kshs. 60,000 was what I considered to be the going rate of an arbitrator of my standing. I took into account that the scale fees of the Chartered Institute of Arbitrators Kenya Branch, as at that time was Kshs. 35,000. Surely, there was no way I could have suggested a lower figure than Kshs. 30,000 in the circumstances.

As stated earlier the commitment fees were separately billed using the same figure and the combined figure paid by one party.

Please note that a party cannot now invoke the written agreement. The agreement between the arbitrator and each party is bilateral not tripartite hence the figure of Kshs. 30,000 in each agreement.

In my own discretion and as a sign of good faith I have reduced the administrative and facility costs from Kshs. 100,000 a party to Kshs. 50,000 and applied retroactively and this is reflected in the account to you.

In the circumstances, I do not consider it proper for any further exchange on this. The law provides that parties pay the arbitrators bill or pay the amount of the bill into court for determination by the court. No party has a right not to pay at all or query one item and use it to decline to pay at all.

It is up to the parties to decide what option is in their interest".

(emphasis provided)

64. That position taken in the two letters clearly contradicts the written agreement on fees drafted by the tribunal and subsequently amended with the input of the respondent (see letters dated 14/9/2017 and 22/9/2017 at pages 209 and 210 of the bundle of the application). That is an apparent difficulty which I find to cast one as conflicted for having to decide his rights and the measure thereof is to me an outright lack of independence from one-self. To the extent that the parties and the tribunal allowed that seed of personal conflict to be sowed nurtured and allowed to thrive, the tribunal was unfortunately placed in a situation that is difficult to divorce from that of a conflicted arbitrator. That is a sure recipe that does very little to build and sustain confidence in his work as the arbitrator in the matter and the arbitration in general as a mode of dispute resolution. On that finding alone, I would find that by the time the request for fees was made, revised, signed by the respondent but resisted by the respondent, circumstances had arisen to merit questioning the tribunals impartiality and independence going forward.

65. Of more concern is the costs and expenses called facility costs and calculated at Kshs. 100,000 per month. That charge was contested by the applicant on the basis of reasons in the letters of 10/12/2018 and 18/12/2018. That to this court is a substantial expense that need mutuality and consensus and should have been dealt with before the process began. When the process began and as it progressed the applicant remained adamant that it was unable to justify and defend such a cost to its regulating structures, it was not prudent but inadvisable for parties and the tribunal to proceed with the stalemate intact. That option by parties and the tribunal went to the very root of arbitration as a consensual process.

66. Another concern comes with the proportionality and conscionability of such a charge when regard is given to the fact that the applicant is a public entity with obligations under the constitution to observe prudence and responsiveness in the application and employment of public finance[1]. The need for prudence and financial transactions however pervades all boundaries and more prevalent in the private sector, corporate or individual, where thrift is the order of the day.

67. To my mind, to ask parties to an arbitral proceeding to pay to the arbitrator any amount of money as a monthly obligation for office facilities, whether the same is used or not, cannot pass the test as prudent and responsive. I consider it disproportionate and unconscionable. Of course I would never venture in questioning any sum, however high, if there had been an agreement by the parties.

68. In the same decision leading to challenges, there was a determination and quantification of the respondent's costs in the sum of Kshs. 3,200,000. In coming to that conclusion the tribunal observed: -

> **"I am acutely aware that my duty and discretion must be used or exercised fairly and impartially. This is turn means that I must have regard to the principles of taxation, assessment or settlement of costs. First, whether costs are of reasonable amount. Second, whether they have been reasonably incurred"**
>
> **…legal fees and expenses of the claimant's counsel based on one day hearing at an estimated hourly rate of Kshs. 40,000 per hours at 5 hours per day for 15 days of work including research and preparation of written submissions and preparing and studying the respondents' submissions and compiling submissions in reply Kshs. 3,200,000."**

69. I hear the tribunal to appreciate and say that the counsel for respondent employed a total of 75 hours in the matter and that he was entitled to an hourly rate of Kshs. 40,000 for five hours a day making a sum of Kshs. 200,000 per day. But that calculation grounded on what is called "an estimated hourly rate". No foundation is laid for that estimate and it begs the question if the figure was not picked from the air. Such are the circumstances then when revealed of an exercise of discretion calls for courts interference. I find and hold that any determination that imposes on parties' obligations and rights ought to have a foundation or justification. A decision must have a basis and a sound one for that matter. I see no foundation nor justification on the assessment of the respondent's costs at Kshs. 3,200,000.00. the tribunal have set out the rules of taxation as demanding reasonableness in the amount of costs and if reasonably incurred needed to be guided by the parties on what had been incurred so as to assess if reasonably incurred. That was not done and I do find that the costs appear to me to be exorbitant and excessive.

70. I have highlighted the above facts so as to juxtapose the complaint in the challenge with the decision on the said challenge. In dealing with the challenge, the tribunal was only expected to find if there was demonstrated conduct that had made it not possible for the parties to have confidence in him. I have commented and found that the way the tribunal dealt with calculation of his costs and facility expenses made him conflicted. If conflicted, it was difficult or just impossible for him to remain impartial.

71. For that reason, I do find that the material availed to the tribunal was enough to accede to the challenge and that in dismissing the challenge the tribunal did not make the confidence levels in his ability to steer the process any better. I do set aside the decision on challenge and in its place substitute a decision allowing the challenge. The consequence is that prayer 3 in the application dated 24/4/2020 is allowed.

72. Having so said, and for the reasons leading to the said conclusions, I do fault the decision on costs and would have rendered myself on its validity but I refrain for doing so noting that it is accepted by both sides that it is one of the issues in Mombasa HC. Misc. Application No. 456 of 2019. Having refrained from making a determination on the order awarding costs, I cannot make any declaration on the liability of the applicant as to costs. Suffice to say that the costs of the arbitrator must be paid by the parties even in situations where the parties are ordered to meet own costs. I have also delivered myself on the efficacy or just propriety of prayer for stay pending the hearing and determination of the matter to the effect that the said prayer became spent the moment submissions were offered and a debt reserved from this ruling. The totality of all the foregoing is that only prayer 3 succeeds.

73. Having removed the tribunal and noting that the parties have spent resources in the arbitration and that the dispute is yet to be heard on the merits, I direct that the parties invoke afresh, the provisions of Section 62 of KPA Act to have a new tribunal appointed.

74. Because costs follow events, unless for compelling reasons to be recorded, I do award the costs of the application to the applicant.

Dated, **signed** and **delivered** at **Mombasa** this **26th** day of **February 2021**

PATRICK J O OTIENO

JUDGE

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[1] Article 201 (a)