Kenya Petroleum Refineries Limited v Total Kenya Limited; Energy Regulatory Commission (Interested Party) (Miscellaneous Civil Application 518 of 2016) [2021] KEHC 12536 (KLR) (Civ) (29 July 2021) (Ruling)

Neutral citation: [2021] KEHC 12536 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

MISCELLANEOUS CIVIL APPLICATION 518 OF 2016

JK SERGON, J

JULY 29, 2021

BETWEEN

KENYA PETROLEUM REFINERIES LIMITED ..... APPLICANT

AND

TOTAL KENYA LIMITED ..... RESPONDENT

AND

ENERGY REGULATORY COMMISSION ..... INTERESTED PARTY

RULING

1. The applicant filed a notice of motion dated 29/9/2016 brought pursuant to section 12 (5) of the *Arbitration Act* 1995, sections 1A, 1B and 3A of the *Civil Procedure Act* and all enabling provisions of the law seeking for orders:

    a. That this honorable court be pleased to declare that the dispute between the applicant and the respondent is no longer subject to arbitration pursuant to article XX of the processing agreement dated 17/6/1966

    b. That this honorable court be pleased to order that the respondent fully and effectually waived the right to refer the dispute to arbitration pursuant to the said Article XX of processing agreement.

    c. That the appointment of Mr. Kyalo Arbitrator be set aside pursuant to section 12 (5) of the *Arbitration Act*.

    d. That costs of this application be provided for.

2. The application is based on the grounds on the face of the motion and on the facts deponed in the supporting affidavit of Charles Nguyai who averred that the applicant and respondent entered into the processing agreement dated 17/6/1966 for the processing of feed stocks by the applicant for the respondent. Pursuant to article XX of the agreement the parties were required to refer to any dispute arising between them to arbitration,

3. Sometime in March 2013 however, a dispute arose with regard to oil yield shifts and notwithstanding the said article XX the respondent as a member of the Oil Markets Companies (OMC's) and the applicant agreed to refer and did refer the dispute to the Energy Regulatory Commission (ERC) for adjudication. A decision by the ERC was rendered on 19/4/2016 and published in accordance with the requirements of section 25 of the *Energy Act*. The respondent as part of the OMC's has appealed the said decision to the Energy Tribunal under section 26 of the *Energy Act*

4. The respondent has now sought to refer the dispute for arbitration according to the said article XX notwithstanding the said appeal process. By virtue of section 25 (2) of the *Energy Act* the decision of the ERC rendered on 19/4/2016 upon gazetement became effective and binding on all the parties.

5. In having elected the ERC as the forum in which to agitate their claim the respondent cannot now turn to arbitration which was available under the said article XX of the processing agreement as the respondent's action reeks of a blatant case of forum shopping.

6. The respondent opposed the motion by relying on the replying affidavit of Boniface Abala who stated that under the *Arbitration Act* the appointment of an arbitrator and the jurisdiction of an arbitrator are dealt with separately. Section 12 refers to appointment whereas section 17 refers to the jurisdiction therefore the issue as to whether the parties have waived the right to arbitration is a question that goes to the heart of the jurisdiction of the arbitrator which is reserved for determination by the arbitrator.

7. However, it is the respondent's position that there was no waiver as alleged and that the arbitration clause contained in the agreement was clear and equivocal and continues to bind the parties.

8. On 6/2/2017 the court ordered that the application be dispensed with by way of written submissions which the parties have since filed.

9. The applicants in their submissions argued that the principle of Sub judice prevents the continuation of proceedings in a matter in which the issue tried is also directly and substantially in issue in a previously instituted suit or proceeding. A "suit" is defined in section 2 of the *Civil Procedure Act* to mean all civil proceedings commenced in any manner prescribed. The whole decision of the Energy Regulatory Commission on the question of yield shift cost recovery is a determination of a matter in issue between the applicant and respondent and therefore a matter which was directly in issue in a previously instituted suit between the applicant and respondent.

10. The applicants added that it would be a blatant abuse for the proposed arbitration to be allowed to proceed as this court has the power and the jurisdiction to stay those unlawful proceedings because they have been rendered nugatory.

11. It was additionally the applicants who added that once the decision of the energy regulatory commission had been rendered the matter became res judicata subject to any appeal.

12. On the argument that the present application is time barred, the applicants argued that the arbitrator cannot assume jurisdiction in the matter whereby such jurisdiction has been divests by the conduct of one party and acquiesced into b the other. They added that if in an event the delay in filing the application was not in any way deliberate and is by no means inordinate given by the fact that the applicant has at all times made its position clear with regard to the defective arbitral proceedings.

13. The interested party in their submissions argued that the issues under contemplation in the present matter are matters which are in direct issue before the energy tribunal in which the respondent herein impugns the decision of the interested party as a regulator. That with the assumption of jurisdiction by the energy tribunal the present proceeding and the arbitral proceedings, giving rise to the same, being later in time run afoul of the res sub judice rule which bars the creation of parallel proceedings on the same subject matter.

14. The respondents on the other hand argued that applicant in this present case seeks to challenge the jurisdiction of the arbitrator to determine its dispute with the respondent however section 17 (1) of the *Arbitration Act* states that that the arbitral tribunal may rule on its own tribunal and therefore the jurisdiction of the arbitral tribunal does not lie with this court but with the arbitral tribunal itself.

15. They added that the matter herein is not sub judice as the applicant is not a party to appeal No. 006 pending before the Energy Tribunal as the appeal only involves the respondent and the interested party. The subject matter of the dispute is between the applicant and the respondent in arbitration is the former's refusal to implement the report carried out by Deloitte consulting Limited dated 27/3/2013 contrary to the processing agreement while the subject matter of the dispute before the energy tribunal is with regard to the recovery of yield shift losses incurred by the respondent.

16. The subject matter from the present proceedings is the removal of the arbitrator which has no relation to the proceedings before the arbitral and energy tribunals. It was therefore their position that the various proceedings involving the parties are distinct from each other and sub judice does not arise.

17. The respondent further argued that the arbitral process has already began and various orders and directives have been issued by the arbitrator and therefore this court is barred from interfering with the arbitration process by dint of section 10 of the *Arbitration Act*.

18. I have carefully considered the application, the affidavits, the submissions and the record in its entirety and the issues that arose for determination are two fold

    a. Whether this court has jurisdiction to determine the application herein?

    b. Whether to grant the orders as prayed?

19. On the first issue, the applicants herein are seeking orders to declare that the dispute between the applicants and the respondents is no longer subject to arbitration and that the respondents waived its rights to refer the dispute to arbitration.

20. It is not in dispute that the applicants and the respondents entered into a processing agreement where the applicant was to process feed stocks for the respondent. However, a dispute arose between them over the oil yields shifts that was referred to the Energy Regulatory Commission.

21. It was also not in dispute that the process agreement contained an article XX that provided as follows

> " In the event of any dispute or difference between the parties hereto touching or concerning this agreement or any matter arising thereout, the party may by notice to the other party require such dispute or difference to be referred to the arbitration of a single arbitrator to be agreed upon by the parties. Any such reference shall be a submission to arbitration in accordance with the English *Arbitration Act* 1950 or any statutory variation, modification or re-enactment thereof for the time being in force"

22. The applicant has argued that the respondent is prohibited from proceeding to arbitration as the dispute is Sub judice by dint of section 6 of the *Civil Procedure Act*. However, the respondent brought

to light the fact that the applicant was not a party to Appeal No. 006 that is pending before the Energy Tribunal as it only involves the respondent and the interested party. It is also indicated that the dispute between the applicant and respondent in arbitration is the applicants refusal to implement the report carried out by Deloitte Consulting Limited dated 27/3/2013 contrary to the processing agreement while the subject matter of the dispute before the Energy Tribunal is with regard to the recovery of yield shift losses incurred by the respondent and finally the present application is on the removal of the arbitrator which has no relation to the proceedings before the arbitral and Energy tribunals.

23. Section 10 of the *Arbitration Act* provides'

> " No court shall intervene in a matter governed by the Act except as provided under the Act"

24. In Prof. *Lawrence Gumbe & another v Honourable Mwai Kibaki & others*, High Court Miscellaneous No. 1025 of 2004 the court had the following to say about section 10

> " Our section 10 is based on the United Nations Model Law on arbitration and all countries who have ratified it recognize and enforce the autonomy of the arbitral process. Courts of law can only intervene in the specific areas stipulated in the Act and in most cases that intervention is usually supportive and not obstructive or usurpation oriented. If the Kenyan courts refused to recognize this autonomy, we would become a pariah State and could be isolated internationally."

25. With regard to this proposition, in the case of *Wringles Company (East Africa) v Attorney General & 3 Others* [2013] eKLR the court held:-

> " That courts cannot re-write what has already been agreed upon by the parties as set out in the agreement. The parties had agreed that in the case of a dispute arising as to the validity of the agreement, then the same would be subject to arbitration and the court cannot re-write the same."

26. Further, Justice Kimaru applied the same principle in *Kenya Airports Parking Services Ltd & another v Municipal Council of Mombasa* [2010] eKLR where he stated that–

> " It is in this courts view that where there exists an agreement with an arbitration clause, under the principle of separability of the arbitration clause, if a party to the agreement is of the opinion that the agreement is unlawfully and therefore invalid, such view does not invalidate the arbitration clause in the agreement."

27. Upon perusal of the record this court notes that the applicant's did not present any substantial evidence that is in line with the *Arbitration Act* that would necessitate this court to interfere with the arbitration Process that has already began.

28. Consequently, I find the application dated 29/9/2016 lacks merit and is therefore dismissed with costs to the respondents.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 29TH DAY OF JULY, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Applicant

.....for the Respondent