REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CAUSE NO. 455 OF 2016

KENYA BUREAU OF STANDARDS……....…….....APPLICANT

VERSUS

GEO-CHEM MIDDLE EAST.....RESPONDENT

RULING

1. On 29th July 2016 the arbitral tribunal delivered its final award, in which it held that the **KENYA BUREAU of STANDARDS** was in breach of the contract between it and **GEO-CHEM MIDDLE EAST.**

2. Having found the Kenya Bureau of Standards liable for breach of contract, the arbitral tribunal ordered it to compensate Geo-Chem Middle East to the tune of US $ 15,401,504.70, less Kshs. 87,988,213.15 which the Kenya Bureau of Standards was awarded on its counter-claim.

3. The arbitral tribunal ordered that the compensation be paid within 45 days, failing which it would attract interest at 5% per annum, compounded.

4. The costs of the reference were awarded to the Claimant, whilst the costs of the award were to be shared equally.

5. Geo-chem has asked the court to adopt the award as a judgement of the court, so as to enable it execute the said award.

6. On the other hand, the Kenya Bureau of Standards has asked the court to set aside the award.

7. As the two applications basically constitute different sides to the same coin, the parties agreed that they would be canvassed together.

8. The court accepted the approach suggested by the parties as it was clear that if the award were to be set aside it could not be enforced; whilst if the award was not set aside, it would be adopted as a judgement of the court.

9. This Ruling is therefore in respect to the 2 applications.

10. The first point that I wish to make is that the party in whose favour an arbitral award is made, does not have to do much work to persuade the court to adopt the award as a judgement.

11. On the other hand, the party seeking the setting aside of the award has to try and persuade the court that his case will fall squarely, within the provisions of Section 35 (2) of the Arbitration Act. The reason for that is explicitly stated as follows in that statutory provision, which reads as follows;

> **"An arbitral award may be set aside by the High Court only if - ?.**

12. It follows that if an application seeking to set aside an arbitral award does not meet the requirements of Section 35 (2) of the Arbitration Act, it was doomed to fail.

13. In this case, the Kenya Bureau of Standards has asserted that;

> **a) The arbitral award deals with a dispute not contemplated by or not falling within the terms of reference to arbitration, and contains decisions on matters beyond the scope of the reference to arbitration; and**
>
> **b) The award is in conflict with the Public Policy of Kenya.**

14. Pursuant to Section 35 (2) (a), the onus of proof rests on the party who had sought orders to set aside the award.

> **a) Dispute not contemplated by the parties and not falling within the terms of reference to arbitration.**

15. It is common ground that the arbitral tribunal made decisions on issues which the parties canvassed before it.

16. In the event, if this was a regular civil case, I would have had no hesitation in declaring that the tribunal was right to make determinations on each and every issue which the parties had canvassed before it.

17. I am fully alive to the legal position concerning pleadings; that parties are bound by their respective pleadings.

18. But is equally clear that when the same parties choose to mutually address matters which are not necessarily spelt out in their pleadings, the court would be expected to determine such matters.

19. The question which arises in regard to arbitration is about the stage at which parties are deemed to have contemplated that a dispute ought to be referred to arbitration.

20. Can parties expand the scope of the terms of reference to arbitration, by raising matters which were not initially contemplated?

21. In my considered opinion, the answer is in the negative.

> **"Longmans Dictionary of Contemporary English? defines the word Contemplate as meaning:**
>
> **"to think about something that you intend to do in the future?.**

22. Therefore, when parties to a contract were contemplating the kind of dispute which should be referred to arbitration, they would be doing so about something which might or might not happen in the future.

23. The parties would be saying that if the kind of dispute which was in their contemplation arose, it would be referred to arbitration.

24. That situation is radically different from that in which the same parties would be discussing about how they could resolve a dispute which had already arisen.

25. And yes, the parties may even agree that the dispute which had arisen, may best be resolved through the medium of arbitration. However, in respect to disputes which were not originally in the contemplation of the parties, they cannot be a part of what constituted the original agreement to refer disputes to arbitration.

26. In effect, a dispute which was not contemplated by the parties at the time when they entered into the contract, is said to fall outside the scope of the terms of reference to arbitration.

27. In this case, the parties did not contemplate a scenario in which the Government of the Republic of Kenya could issue a directive which would bar the inspection of petroleum products.

28. However, the parties did anticipate, *(at clause 6 of their contract)*, that there was a possibility of "*Force Majeure?*, which they described in the manner following;

> **"…an event which is beyond the reasonable control of a party, and which makes a Party's performance of its obligations hereunder impossible or so impractical as reasonably to be considered impossible in the circumstances, and includes, but is not limited to, war, acts of a public enemy, riots, civil disorder, earthquake, fire, explosion, storm, flood or other adverse weather conditions, strikes, lockouts or other industrial action (except where such strikes, lockouts or other industrial action are within the power of the party invoking Force Marjeure to prevent), confiscation or any other action by government agencies?.**

29. Therefore, even though the parties did not specifically mention the kind of government action which was later taken in this case, I find that they did contemplate force marjeure.

30. Indeed, the Kenya Bureau of Standards is citing the action through which the government stopped the inspection of petroleum products, as constituting force marjeure. That being the position, it therefore follows that the kind of action which the government took had been contemplated, *(not in specific terms)*, but by categorization.

31. And the parties had agreed that they would, first, use their best efforts to amicably settle **ALL DISPUTES** arising out of or in connection with the contract or its interpretations.

32. In the event that <u>any disputes</u> were not settled amicably, the parties agreed to refer the same to arbitration.

33. That is exactly what transpired in this case.

34. And, in fact, none of the parties raised the question concerning the scope of arbitral tribunal's jurisdiction to determine the dispute arising out of the government's action.

35. If anything, neither of the parties could have raised the question of the jurisdiction of the arbitral tribunal, because the parties expressly agreed on the issues which the tribunal was required to determine.

36. I find that the said agreement did not raise issues which were not in the original contemplation of the parties.

37. The decision of the tribunal does not thwart, or defeat or frustrate the express contractual intentions of the parties. I so hold because, as I have already stated, the parties had an express desire to refer all disputes to arbitration. That is exactly what they did.

38. Furthermore, the issue concerning the government decision to bar the inspection of petroleum products in Kenya was contemplated by the parties from the start.

39. As regards the finding that the Kenya Bureau of Standards was liable for the payments to Geo-chem, that is a decision on the merits of the case. It is not the function nor the mandate of the High Court to re-

evaluate such decisions of an arbitral tribunal, when the court was called upon to determine whether or not to set aside an award.

40. If the court were to delve into the task of ascertaining the correctness of the decision of an arbitrator, the court would be sitting on an appeal over the decision in issue.

41. In the light of the Public Policy in Kenya, which loudly pronounces the intention of giving finality to Arbitral Awards, it would actually be against the said public policy to have the court sit on an appeal over the decision of the arbitral tribunal.

42. When the court is called upon to decide whether or not to set aside an arbitral award, issues such as the justice, morality and fairness do not come into play, unless they were so perceived within the confines of Section 35 of the Arbitration Act.

43.The court cannot set aside an arbitral award on the grounds that it was unfair, unreasonable or non-feasible.

44.On the issue concerning the stage at which the arbitral tribunal should determine the question of jurisdiction, the Kenya Bureau of Standards suggests that the tribunal ought to have first determined it.

45.Ordinarily, the issue of jurisdiction ought to be raised and determined at the earliest possible stage in any proceedings.

46. Section 17 (2) of the Arbitration Act enjoins parties who assert that the arbitral tribunal has no jurisdiction, to raise that issue not later than the stage when the statement of defence was being lodged. However, the same rule provides that parties are not precluded from raising issues concerning the jurisdiction of the arbitral tribunal, just because the parties had appointed or participated in the appointment of the arbitrator.

47. In the circumstances, the parties know when to raise challenges to the jurisdiction of the arbitrator.

48. The question is; does the arbitrator have to determine the issue as a preliminary question?

49. Section 17 (5) of the Arbitration Act says;

> **"The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an arbitral award on merits?.**

50. Therefore, although it may generally be better to have the issue determined as a preliminary question, the statute expressly empowers the arbitral tribunal either to determine it as a preliminary question or in an arbitral award on merits.

51. The arbitrator cannot be faulted for choosing to determine the issue in the award.

52. The Kenya Bureau of Standards has criticized the arbitral tribunal for interpreting the contract and in applying facts purposely in favour of Geo-chem, even when such interpretation presented contradictions.

53. In other words, it was being argued that the award was erroneous and that it lacked merit.

54. Regrettably, this court does not have authority to make an assessment on the merits of the arbitral award. The jurisdiction of the High Court, when called upon to set aside an award, is limited to what is permissible pursuant to Section 35 of the Arbitration Act.

55. Any other intervention by the Court is expressly prohibited by Section 10 of the Act; and I therefore decline the invitation to ascertain if there were any contradictions in the various aspects of the decision made by the arbitral tribunal.

56. In the final analysis, I find no grounds to warrant the setting aside of the arbitral award dated 29th July 2016.

57. And because there is no reason for setting aside the award, I now recognize it as a judgement of the court, and order that it be so registered.

58. The costs of the 2 applications are awarded to Geo-chem Middle East.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **30th day** of **May** 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Arwa for the Applicant

Fred Ngatia for the Respondent

Collins Odhiambo – Court clerk.