



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Appeal 13 of 2010

KENYA PIPELINE COMPANY LTD.....APPELLANT/RESPONDENT

VERSUS

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

KOBIL PETROLEUM LTD.....2ND RESPONDENT/APPLICANT

RULING

1. I have before me a chamber summons dated 22nd January, 2010 filed by Kenya Oil Company Ltd and Kobil Petroleum Ltd (hereinafter referred to as the applicants). The chamber summons is brought under the Arbitration Act 1995 Rule 3(2) of the Arbitration Rules 1997, and Order VI Rule 13 (b) and (d) of the Civil Procedure Rules. It seeks to have the memorandum of appeal filed on 18th January, 2010 by Kenya Pipeline Company Ltd (hereinafter referred to as the respondent), struck out. The applicants further seek to have the appeal lodged in this court by the respondent on the 18th January, 2010 dismissed, and costs awarded to the applicants.

2. The application is supported by an affidavit sworn by the applicants' Managing Director, Jacob Israel Segman. In response to the application, a replying affidavit has been sworn by the respondent's Managing Director, Selest Ngati Kilinda. In a nutshell, the background to the application as is evident from the two affidavits is as follows: The applicants and the respondent have been having a business relationship governed by an agreement known as Transportation and Storage Agreement. A dispute arose between the parties concerning the management of the respondent's pipeline system and the use of the pipeline by the applicants. In accordance with the Transportation and Storage Agreement, the parties referred the dispute to a single Arbitrator Mr. Ahmednassir Abdullahi. The Arbitrator heard the dispute and gave his final award on the 10th December, 2009. In the award the Arbitrator inter alia awarded the applicants US\$.37,909,879.5 and Kshs.1,886,494,783/=.

3. Being dissatisfied with that award, the respondent moved to this court by way of an appeal said to be brought under Section 39(1)(b) of the Arbitration Act 1995, Section 79G of the Civil Procedure Act and Order XLI Rule

1 of the Civil Procedure Rules. The respondent filed a memorandum of appeal on 18th January, 2010 setting out 22 grounds of appeal as follows:

- (i) The Arbitrator erred in law when he failed to determine the dispute in accordance with the contract between the parties;
- (ii) The Arbitrator erred in law when he exhibited clear bias against the appellant by the use of injudicious language;
- (iii) The Arbitrator erred in law when he acted in excess of his jurisdiction by considering and making findings on matters not referred to him;
- (iv) The Arbitrator erred in law when he failed to treat each party with equality contrary to the express provisions of Section 19 of the Arbitration Act, 1995 by undertaking extensive research into the law in support of the respondents' case;
- (v) The Arbitrator erred in law by failing to give the appellant a full opportunity of presenting its case contrary to the express provisions of Section 19 of the Arbitration Act, 1995 when he did not avail the appellant an opportunity to respond to or comment on the numerous new authorities introduced in the final Award in support of the respondents' case;
- (vi) The Arbitrator erred and misdirected himself in law when he found that the Transport and Storage Agreement dated 10th May, 1996 provided for the allocation of ullage;
- (vii) The Arbitrator erred in law in finding that the custom and usage in the oil industry did not apply to the Transport and Storage Agreement between the parties;
- (viii) In the alternative, the Arbitrator erred in law when he failed to recognize that the respondents had admitted and acknowledged the existence of a trade usage with respect to the allocation of ullage;
- (ix) The Arbitrator erred in law when he imposed an onerous and unreasonable evidential burden on the appellant in respect of the responsibility for the delay in the docking and berthing of the respondents' ships and from which the liability for demurrage would arise;
- (x) The Arbitrator erred in law when he failed to appreciate the effect of the Kenya Ports Authority Act, Chapter 391 of the responsibility for the docking and berthing of vessels;
- (xi) The Arbitrator erred in law when he purported to interpret clause 9.5 of the Transport and Storage Agreement as imposing liability upon the appellant in respect of demurrage charges;
- (xii) The Arbitrator erred in law when he held that the claim for demurrage by the respondent was within the contemplation of the parties, such claim having been expressly excluded by the express provisions of the Transport and Storage Agreement;
- (xiii) The Arbitrator erred in law when he failed to apply the provisions of Section 29(5) of the Arbitration Act, 1995 in finding the appellant liable for the demurrage incurred by the respondents;
- (xiv) The Arbitrator erred in law in his findings on the maintenance of stock which are contrary to the provisions of Section 96 of the Energy Act No.12 of 2006;
- (xv) The Arbitrator erred in law in his application of the concept of mistake to the Transport and Storage Agreement between the appellant and a third party, Triton Petroleum Company Ltd;
- (xvi) The Arbitrator fundamentally misdirected himself as to the provisions of the Transport and storage agreement on ullage allocation and thus erred in law by basing his findings on this misdirection;
- (xvii) The Arbitrator erred in law by finding that there was a "special relationship" between the appellant and the respondents despite the existence of an agreement between the parties, the Transport and Storage Agreement, and therefore, in his consequent findings on fraud,

concealment and deceit;

- (xviii) The Arbitrator erred in law by failing to take into consideration all pleadings in the making of the Final Award;
- (xix) The Arbitrator erred in law by making contradictory legal findings on the issue of Tariff Adjustment;
- (xx) The Arbitrator erred in law by failing to assess the probative value of documents placed before him by the respondents as evidence of loss suffered;
- (xxi) The Arbitrator erred in law in his assessment of damages; and
- (xxii) The Arbitrator erred in law by radically adjusting the contractual arrangements between the parties and imposing a new contract on the parties.

4. The applicants now contend that memorandum of appeal ought to be struck out and the appeal dismissed on the following grounds:

- (a) The appeal is misconceived and does not lie.
- (b) No questions of law arise from the award that affords a ground for nullifying proceedings and the award.
- (c) Assessment of damages is an issue of fact.
- (d) The issues relied upon in the said appeal are in fact issues of fact and do not afford a ground for challenging the award.
- (e) By choice and agreement of the parties, freely made, the Tribunal was a tribunal of fact and its finding on facts is unassailable especially in this case where the evidence was entirely documentary and some of the findings of fact were made upon the appellant's failure to adduce any evidence before the Tribunal to prove the grounds of defence pleaded.
- (f) This honourable court has no jurisdiction to intrude into the forbidden territory of fact finding process in the Arbitration proceedings.
- (g) The Tribunal/Arbitrator having decided from the said unassailable facts that the respondent caused or committed the breaches, that decision concluded the matter and this honourable court has no jurisdiction to re-open the matter.
- (h) The language used by the Arbitrator was a justified expression of disapproval of and indignation at the fraudulent conduct of the appellant established from the unassailable findings of fact made by the Arbitrator and the said language affords no independent ground for challenging the award and/or setting it aside.
- (i) No procedural unfairness is alleged and in the absence of procedural unfairness any inconsistency in the arbitration findings of fact, if any, affords no independent ground for challenging the award.
- (j) The Arbitrator was the appellant's nominee or choice later accepted by the respondent and the appellant is estopped from alleging that the said Arbitrator was biased against the appellant.
- (k) The appellant is further estopped from challenging the award having freely elected to transfer the proceedings from the previous Arbitrator to a new Arbitrator of its choice.
- (l) The appellant is also estopped from challenging the award having freely elected to dispense with oral evidence and having freely decided that the Arbitrator makes his decision based on issues agreed upon by the appellant and the documentary evidence produced before the Arbitrator with the consent of the appellant.
- (m) The appellant is precluded and estopped from filing the present appeal as the Arbitrator has made an unassailable finding of fact that the appellant attempted to conceal evidence from the Tribunal and thereby committed acts of fraud or obstruction of justice in the proceedings.

- (n) The appeal is scandalous, frivolous and vexatious.
- (o) The appeal is otherwise an abuse of the process of the court.

5. Following an agreement between the parties, it was agreed that the application be disposed of by way of written submissions. Accordingly, written submissions have been duly exchanged and filed. It is necessary for me at this stage to recapitulate those submissions.

6. For the applicants, it was argued that the court can only have a jurisdiction over an Arbitration matter if the jurisdiction to do so is expressly donated under the Arbitration Act 1995. Reliance was placed on Section 10 of the Arbitration Act, which provides that:

“Except as provided in this Act no court shall intervene in matters governed by this Act.”

Two ways were identified wherein the Arbitration Act 1995 provides for jurisdiction in which an arbitral award can be challenged through the High Court. These were, firstly, Section 35 of the Arbitration Act, which provides for an application to set aside the arbitral award, and secondly, Section 39 of the Arbitration Act, which provides for an appeal on any question of law arising out of the award.

7. A distinction was drawn between an appeal under Section 39 of the Arbitration Act, where the party challenging the arbitral award, can only rely on the award itself to address the question of law that has arisen out of the award, and an application to set aside the award under Section 35 of the Arbitration Act, where the applicant has the right to furnish proof to the court. Thus, while the court has no jurisdiction to receive and admit evidence under Section 39 of the Arbitration Act, the court has a right to receive such evidence under Section 35 of the Arbitration Act.

8. It was pointed out in the applicant’s submissions that the grounds set out in the respondent’s memorandum of appeal filed on 18th January, 2010 did not meet the requirements of Section 39(b) of the Arbitration Act. It was argued that some of the grounds set out in the memorandum of appeal, could only be argued in support of an application for setting aside an award under Section 35 of the Arbitration Act, and not in support of an appeal under Section 39 of the Arbitration Act. This was because the grounds required evidence to prove the allegations made, and this court as an appellate court, has no jurisdiction to receive and admit such evidence on appeal.

9. Several grounds in the memorandum of appeal were identified as seeking to challenge findings of fact made by the Arbitrator on the Transport and Storage Agreement, the custom and usage in the oil industry, and the application of such usage to the Transport and Storage Agreement. It was argued that these were issues which could not be adjudicated upon without evidential proof, and yet the court has no jurisdiction to receive and admit evidence on appeal, under Section 39 of the Arbitration Act. Thus, those grounds were not arguable under Section 39 of the Arbitration Act.

10. It was further submitted in the applicant’s submissions, that although the Arbitrator had to give his reasons for making his award, the reasoning of the Arbitrator in the discharge of his function under Section 32 of the Arbitration Act, could not be a basis for an appeal under Section 39(b) of the Arbitration Act. It was argued that a finding of fact on a serious misconduct by any party, and reasons given for such finding, even using strong language, was nothing more than the Arbitrator discharging his functions. It was further argued that in order to challenge the reasoning of the Arbitrator, the court would need to be furnished with proof of the reasons advanced by the parties at the hearing of the Arbitration and the court has no jurisdiction to receive and accept such evidence or proof. It was maintained that it was within the Arbitrator’s power to use language which explains or gives reasons for his award, and that it was within the Arbitrator’s power to undertake extensive research into the law.

11. On the grounds of appeal which alleged errors of law, the applicants argued in their submissions, that unless an error of law amounts to unprocedural unfairness that goes to the root of the award, like failing to apply the rules of natural justice, it cannot be a ground of appeal under Section 39 of the Arbitration Act. Relying on *Civil*

Application No.57 of 2006, Kenya Shell Ltd vs Kobil Petroleum Ltd, the applicants submitted that when parties refer a case to Arbitration, they do so on the understanding that the Arbitrator's decision shall be final and binding irrespective of the errors either of fact or law that may be made by the Arbitrator in the reasons stated in the award. To buttress this position, the applicants drew the court's attention to the memorandum and objects of reasons on the bill which led to the enactment of the Arbitration Act 1995, where the object of enacting the Arbitration Act comes out as follows:

- (i) That the then Arbitration Act Cap 49 was outdated and out of step with current trends in International Arbitration.
- (ii) That the new act was to enable Kenya to present itself as an attractive venue in the region, for International Commercial Arbitrations.
- (iii) The new Act adopts substantially the model role on International Commercial Arbitration on the United Nations Commission on International Trade Law, which has already been adopted in a number of Commonwealth countries.

12. It was argued that in interpreting the Arbitration Act 1995, it was important that Kenya conforms to what is happening in other jurisdictions. In that regard, reliance was placed on **Geogas SA vs Trammo Gas Ltd [1993] Vol. 1 Lloyds Law Reports 215**, in which a need was identified for the court to be vigilant in ensuring that attempts to question or qualify the Arbitrator's finding of facts, or to dress up questions of fact as questions of law, were carefully identified and firmly discouraged. A holding made in the same case that as a matter of principle, the court should not intrude into the fact finding process in Arbitration, was also highlighted. It was submitted that the grounds in the memorandum of appeal lodged by the respondent, purporting to raise issues of law were nothing more than red herrings, and did not constitute points of law arising out of the award, in terms of the provisions of Section 39(b) of the Arbitration Act.

13. Finally, the court was urged to award the applicants getting up fees in accordance with schedule 6(3) of the Advocates Remuneration Order, and instruction fees under Schedule 6(1)(b) under the Advocates Remuneration Order. The applicants justified this by arguing that the appeal and the application raised complex issues on the validity of the award, the interpretation of the Arbitration Act, and the right of appeal under the Act, and that a lot of efforts had gone to research to review the law as contained in the Arbitration Act and the application of the Arbitration Act to the appeal.

14. In the respondent's submissions, it was submitted that the application before the court was incompetent as it was an attempt to invite the court to consider the merits of the proposed appeal at an interlocutory stage. It was argued that such consideration would be a usurpation of the function and jurisdiction of the appellate court. It was pointed out that the Arbitration Act, 1995 does not donate any power to the court to strike out an appeal, or otherwise deal with the appeal in the matter proposed by the applicants. It was argued that Order VI Rule 13 of the Civil Procedure Rules only provides for the striking out of pleadings and dismissal of suits. It was argued that Order VI Rule 13 of the Civil Procedure Rules is not applicable to an appeal, as an appeal is neither a pleading nor a suit as defined in Section 2 of the Civil Procedure Act.

15. Section 79B of the Civil Procedure Act was identified as the one which deals with this court's jurisdiction to deal with and dismiss an appeal summarily. It was submitted that under that Section jurisdiction is exercised by the judge *suo moto*, and the procedure does not invite interlocutory consideration of the merits of the appeal. Reliance was placed on **Civil Appeal No.270 of 1999 John Njiru Muya vs Nguu Muya & another**, in which the

stages that an appeal goes through were identified as those provided under Section 79B, 79C of the Civil Procedure Act, Order XLI Rules 8B(3) & (4) and Rule 31(1) of the Civil Procedure Rules.

16. It was maintained that the respondent had a statutory right of appeal under Section 39 of the Arbitration Act 1995. It was argued that the question as to whether the grounds of appeal enumerated in the memorandum of appeal constitutes proper questions of law as provided under Section 39 of the Arbitration Act, must be left to the appellate court. It was pointed out that at this stage, the court does not have the benefit of the documents contemplated by Order XLI Rule 8 of the Civil Procedure Rules, and therefore it cannot properly determine the competence or otherwise of the appeal or engage in a consideration of the merits of the appeal.

17. It was further argued that each of the grounds of appeal advanced by the respondent raised proper questions of law, which will require extensive reference to the submissions made on behalf of each of the parties, careful consideration of the award, and reference to case law. This could not be done in a summary and casual manner as proposed by the respondent. The court's attention was drawn to the applicants' submission that the appeal and application raise complex issues on the validity of the award, the interpretation of the Arbitration Act, and the right of appeal under the Arbitration Act. It was submitted that, that was an implied concession that the appeal could not be said to be scandalous, frivolous, vexatious or an abuse of the process of the court.

18. I have given due consideration to the application and the submissions made. There are a few issues which emerge for consideration. The issues are as follows:

- Whether the application for striking out the appeal is properly before this court,
- Whether the court has powers or jurisdiction to strike out an appeal under Order VI Rule 13(1) of the Civil Procedure Rules,
- Whether, it is appropriate at this stage to determine whether the grounds raised in the memorandum of appeal raise questions of law arising out of the award.

19. Rule 3(2) of the Arbitration Rules 1997, provides for the manner in which an application, arising from another application brought under Section 39 of the Arbitration Act, can be brought. The application before me being one arising from an appeal brought under Section 39 of the Arbitration Act has properly been brought by way of summons under Rule 3(2) of the Arbitration Rules 1997. The substantive prayers sought in the application are for striking out, and dismissal of the appeal. As stated on the body of the application, the substantive prayers are anchored on Order VI Rule 13(b) & (d) of the Civil Procedure Rules. The first thing which strikes me is that there is no Order VI Rule 13(b) & (d) in the Civil Procedure Rules. To that extent the application has been brought under non-existing Rules.

20. Be that as it may, Order VI Rule 13(1) (b) & (d) of the Civil Procedure Rules deals with striking out of pleadings. Therefore, assuming that the application was intended to be brought under those Rules, I have considered whether this court has powers to strike out an appeal under Order VI Rule 13(1)(b) & (d) of the Civil Procedure Rules. Those Rules provides as follows:

“13(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that –

(a)

- (b) *It is scandalous, frivolous or vexatious; or*
- (c)
- (d) *It is otherwise an abuse of the process of the court,*

and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

21. It is apparent that Order VI Rule 13(1)(b) & (d) of the Civil Procedure Rules, deals with striking out of pleadings, and can lead to a suit either being stayed or dismissed or judgment entered accordingly. A pleading is defined in Section 2 of the Civil Procedure Act as:

“Includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant.”

22. In my understanding, this definition covers the initial pleadings giving rise to a suit, and does not include an appeal which arises after a judgment or order has been made. Moreover, there is no mention of an appeal in that provision. Therefore, Order VI Rule 13(1)(b) & (d) cannot apply to an appeal. Further, the appeal before this court is one emanating from an Arbitration Award. Apart from the manner of bringing the appeal which is provided under Section 3(1) & (2) of the Arbitration Rules 1997, the Arbitration Rules do not contain any other provisions for procedures relating to an appeal from an Arbitration Award. Therefore, under Rule 11 of the Arbitration Rules 1997, so far as appropriate, the Civil Procedure Rules applies. This brings into play procedures relating to appeals which are provided for under Order XLI of the Civil Procedure Rules. I have perused Order XLI of the Civil Procedure Rules, but find no provision which provides for the striking out of an appeal.

23. The only provision which provides for the termination of an appeal before it is heard is Section 79B of the Civil Procedure Act which provides for summary rejection of an appeal. This is a very limited power exercisable by the judge upon perusal of the appeal for admission, without the benefit of hearing the parties. Moreover, it is a power to summarily reject an appeal which is distinct from striking out an appeal. A party cannot therefore move the court under Section 79B of the Civil Procedure Act to strike out an appeal. As was stated by the Court of Appeal in ***Oreoro vs Seko [1984] KLR 238***, the power granted by the Civil Procedure Act Section 79B to a Judge of the High Court to summarily reject an appeal, should be used most carefully and only in the clearest cases such as an appeal based wholly on matters of fact, upon which proper findings will have been made.

24. An appeal brought under Section 39 of the Arbitration Act is one based on law and the appeal cannot therefore be summarily rejected under Section 79B. Moreover, under Rule 11 of the Arbitration Rules 1997, the procedure governing the appeal is that provided under Order XLI of the Civil Procedure Rules as modified by the Arbitration Rules 1997. The substantive law remains the Arbitration Act 1995 and Section 79B of the Civil Procedure Act cannot be applied to the Arbitration proceedings as there is no express provision either in the Arbitration Act 1995 or Arbitration Rules 1997 allowing for the application of Section 79B of the Civil Procedure Act. For the same reason, the appeal cannot be anchored under Section 79G of the Civil Procedure Act. The applicants have rightly not moved the court under Section 79B of the Civil Procedure Act.

25. As the application for striking out the appeal is not provided for in law, this court has no powers to grant the prayers sought. Accordingly, I find that the application for striking out the appeal is improperly before the court. Notwithstanding the above, I have considered the application for striking out the appeal, and do note that it is

mainly anchored on the contention that the grounds raised in the memorandum of appeal do not raise questions of law arising out of the Arbitration Award. The question is, is it appropriate at this stage to determine whether the grounds raised in the memorandum of appeal raise questions of law arising out of the Arbitration Award?

26. In this regard, extensive submissions were made addressing specific grounds of appeal in an attempt to show that evidence was required to prove the grounds. Other grounds were objected to as challenging findings of fact. Bearing in mind that this court has not given directions either under Order XXXVI Rule 8A, 8B and 9 of the Civil Procedure Rules or Order XLI Rule 8B(1), (2), (3) and (4) of the Civil Procedure Rules, I do not find it appropriate at this stage to consider the propriety of the grounds of appeal, which were raised in the memorandum of appeal, or to consider whether they meet the requirements of Section 39(b) of the Arbitration Act. Suffice to state, that the arguments raised by the parties clearly show that the issues raised are arguable issues, and that this appeal is neither frivolous nor vexatious. Moreover, I believe that it would be premature at this stage to say more as that would preempt the hearing of the appeal. I do note that contrary to Rule 3(1) of the Arbitration Rules 1997, the respondent did not bring its appeal by way of an originating summons. However, that is not an issue which was argued before me and therefore, it is not a matter for determination.

27. For the above reasons, I come to the conclusion that the application before me is incompetent. It is accordingly dismissed with costs. Those shall be the orders of this court.

Dated and delivered this 20th day of April, 2010

H. M. OKWENGU

JUDGE

In the presence of: -

Ohaga for the appellant/respondent

Oyatsi for the respondents/applicants

Eric - Court clerk