REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 782 OF 2009

KENYA OIL COMPANY LIMITED.. 1ST PLAINTIFF

KOBIL PETROLEUM LIMITED..2ND PLAINTIFF

VERSUS

KENYA PETROLEUM REFINERIES LIMITED ....DEFENDANT

RULING

1. The 1st and 2nd plaintiffs took out an originating summons under section 12 of the 1995 Arbitration Act and Rule 3(1) of the Arbitration Rules of 1997. The applicant is seeking for an order that this court do appoint a single Arbitrator to hear and determine a dispute between the parties under the processing agreement dated 1st October 1979 and 15th June 1966 respectively. The applicant also gave the following lists from which the court can appoint a sole Arbitrator.

i). Mr. Richard Ndungu - Ex KPMG Partner

ii) Mr. Babu Rao - Ex Kenya Pipeline Company Managing Director

iii) Mr. Mike Somen - Former partner, Hamilton Harrison & Mathew Advocates

iv) Mr. George Maina - Ex Shell

v) Mr. Evanson Mwaniki - Ex Shell

2. This application is supported by the affidavit of David Mohan sworn 10th September 2009. According to the plaintiffs they entered into the processing agreement with the defendant dated 1976 and 1966 respectively. Under Clause XX of the Agreement, there is an Arbitration Clause. It is alleged that on 10th July 2009, the defendant purported to terminate the processing Agreement by giving 12 months notice pursuant to the agreement. On 25th July 2009 the plaintiffs responded through their advocate and declared a dispute under clause XX of the contract. They gave the defendant 14 days within which to give an indication of the person to be nominated as a sole arbitrator. On 19th August 2009 Messrs Kaplan and Stratton Advocates on behalf of the defendant replied indicating that there was no dispute between the parties. That is what has snow bowed in the present dispute.

3. According to the plaintiffs, their rights under the processing agreement included the right to refine petroleum crude oil imported into the country by the plaintiff at the defendant's refinery. They had a right to refine at the defendant's refinery a minimum of 70% of the petroleum product imported in the country. They also have a right not to be discriminated against by the defendant in the provision of the

said services, the right to refer any dispute arising under the contract to arbitration, and to have the dispute heard and determined by an independent and impartial Arbitrator appointed jointly with the defendant and the plaintiff. The dispute should also be heard and determined expeditiously through the said arbitration process and the right to seek the intervention of the Honorable court to appoint the Arbitrator if the defendant refuses to participate in the appointment of the said Arbitrator.

4. According to the plaintiffs the defendant too had an obligation to refine crude oil imported to the Country by the plaintiff in terms of the provisions of the Petroleum Act, Cap.116 Laws of Kenya. The obligation under the Restrictive Trade Practices, Monopolies and Price Control Act, Cap 504 Laws of Kenya not to discriminate against the plaintiffs in the provisions of the said services. The obligation under the Restrict Trade Practices, Monopolies and Price Control Act, Cap 504 Laws of Kenya not to refuse to render the said services to the plaintiffs. The obligation to appoint an Arbitrator jointly with the Plaintiffs as soon as the plaintiffs declared a dispute the arbitration proceedings commenced. The obligation not to obstruct the hearing and determination of the arbitration proceedings commenced by the plaintiff. The obligation not to become a judge in its own case or pre-judge an issue pending for determination in arbitration proceedings or in court. The obligation not to steal a march on the due process of law.

5. It is alleged that the defendant breached the plaintiffs' rights by giving the notice to terminate processing agreement without giving any reasons. It is argued that the defendant's right to terminate the contract is not unfettered. It is a violation of the plaintiffs rights not to be discriminated against by the defendant has the monopoly as provided for under the Restricted Trade Practices Monopolies and Price Control Act, especially legal notice No. 31 dated 20th July 2006 which was enacted under the provisions of the Petroleum Act and provides as follows:-

"Any person engaged in the importation of refined petroleum products for use in Kenya other than:

a) Liquefied petroleum gas

b) Bitumen; and

c) Fuel oil

Shall refine such minimum quantities of petroleum crude oil as the Minister may from time to time prescribe at the Kenya Petroleum Refineries Limited"

6. The termination of the contract was termed as a breach of the plaintiff's rights to provide service to their customers. Further the defendants' refusal to appoint an arbitrator to hear and determine the dispute declared by the plaintiff is a breach of the plaintiff's contractual and statutory obligations to have all disputes under the contract determined through an arbitrator. The allegation by the defendant that there is no dispute is a usurpation of the arbitrators function and prejudices the out come of the dispute, it is also an obstruction of the arbitration proceedings.

7. Mr. Oyatsi further argued that there is a dispute because parties could not agree. He referred to the case of **<u>Dawlish (1910) The Law Reports , Probate Division Courts of Probate, Divorce, and Admiralty</u> as per Sir Samuel Evans**

". . . On one side it is said that the word "dispute" means "contention," and that therefore it arises where the contention is made. On the other hand it is said that "dispute" means the matter or question in dispute. If the latter be the right meaning, then the matter in dispute arose at the port offloading. Now I put to myself two questions, and the answers, in my view, determine the construction to be placed on clause 10. The first is what is in dispute? It is this – and therefore the dispute is this – "what are the proper charges for stevedoring at Marioupol?" If that be the dispute, where does it arise? It arises, in my opinion, where the stevedoring work is done and where the charges which are in dispute are made. If that be so, clause 10 applies in this case, and there must be arbitration. Putting it in one work, in my view, "dispute" in clause 10 means, not disputation, but matter in dispute. We see no reason to interfere with the exercise of his discretion by the learned judge, and the appeal therefore fails."

8. Mr. Oyatsi went on to submit that under section 10 of the arbitration Act, this court has no jurisdiction to interfere with arbitration matters. It is the arbitrator who should determine whether there is a dispute, and how to determine that dispute. Under the arbitration Act, it is unlawful for one party to refuse to participate in the appointment of the arbitrator. The agreement clearly provided for an arbitration clause one party cannot therefore obstruct the arbitration proceedings. The arbitration proceedings commenced when the dispute was declared. The plaintiffs filed a second interlocutory application dated

24th May 2010 seeking for interim measure of protection of the plaintiff's status quo regarding those contracts pending the outcome of the arbitration proceedings which commenced on 25th July 2009.

9. Under section 7 of the Arbitration Act, the High court is given power to issue an interim order of injunction to protect the status quo of the matters under arbitration. The plaintiff is seeking the right to import petroleum and refine the product in the defendant's refinery. They are also seeking to protect their rights not to be discriminated and the rights to have the dispute determined by an arbitrator.

10. This application was opposed by the defendant, a preliminary objection on a point of law was filled and also reliance was placed on the replying affidavit by Caroline Katisya sworn on 29th October 2009. It was argued that there is no dispute between the parties capable of being referred to arbitration. Moreover, the originating summons is filed under the provisions of section 12 of the Arbitration Act Rule 3(1) of the Arbitration Rules of 1997. Whereas the processing agreement the subject matter herein, under article XX on page 23 provides that the arbitration shall be in accordance with the English Arbitration Act 1950 or an enactment thereof for the time being in force. The English Arbitration Act 1996 is the applicable law and it is different from section 12 of the Kenyan Arbitration Act in the sense that a decision of the High Court in respect of appointment of an arbitrator, can be appealed against, with the leave of the court, Whereas, under the Kenyan Act, the Court's appointment of an arbitrator is final and the decision cannot be appealed.

11. On the issue of whether there is a dispute; Section 6(1) of the English Arbitration Act of 1995, provides that a court may refer parties to arbitration unless it finds there is no dispute between the parties. According to the defendant, even prior to July 2006, it was still a requirement for any one engaged in importation or distribution of petroleum products were required to refine petroleum crude oil at the Kenya Petroleum Refineries Limited. The defendant annexed the 2001 rules which were in force prior to 2006. But more importantly, the agreement provided that either party could determine the contract by giving a notice of not less than 12 months notice. The plaintiffs also had issued a notice in March 2002 pursuant to the same clause which clearly demonstrates that the party's rights to terminate the contract are completely unfettered as long as the requisite notice is given.

12. It was further argued that under the provisions of Cap.504 Section 5(a) the oil refinery is a monopoly of a quasi Government body. This monopoly is given by an Act of Parliament. The Act does not however affect the terms of contract that are applied between the plaintiffs and the defendant. The provisions of that contract are sacrosanct. The contract provides for determination subject to the notice of one year. If this is the only dispute it flies away because it is a provision of the contract. Mr. Ojiambo made reference to Halsbury laws of England, 4th edition volume 2 paragraph 403 in which the learned authors described a dispute as follows:-

"The dispute or difference which the parties to an arbitration agreement agree to refer must consist of a justiciable issue triable civilly. A fair test of this is whether the difference can be compromised lawfully by way of accord and satisfaction. Thus an indictment for an offence of a public nature cannot be the subject of an arbitration agreement, nor can disputes arising out of an illegal contract, nor disputes arising under agreements void as being by way of gaming or wagering. Equally, disputes leading to a change of status, such as a divorce petition, cannot be referred, nor, it seems, can any agreement purporting to give an arbitrator the right to give a judgment in rem. Similarly, there is no dispute within the meaning of an agreement to refer disputes where there is no controversy in being, as when a party admits liability but simply fails to pay, or when a cause of action has disappeared owing to the application, where it now continues to apply, of the maxim, actio personalis moritur cum persona"

13. Mr. Ojiambo went on to argue that even if there was a dispute it was one of law, which should not be determined by an arbitrator but by the court. Nothing stops the court in determining whether there is not or there is a dispute under the English Arbitration Act. There is no room for the application of the provisions of the Monopoly Act because the parties are bound by the provisions of the contract. There is therefore no reason why this court should grant the applicant conservatory orders. The defendant has not obstructed the arbitral proceedings merely by pointing out that there was no dispute.

14. The above is the summary of the rival submissions, the issues for determination are whether the court should appoint an arbitrator and proceed to issue an interim order of injunction to preserve the status quo pending the determination of the dispute by the arbitrator. The plaintiff's case is founded under the processing agreements made on the 15th June 1966 and 1st October 1979. Under article XX of those Agreements the Arbitration clause is 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 thererof for the time being in force.”***

Under article 1 of the contract it is provided as follows:-
“The contract period for the purpose of this Agreement shall begin with the Appointed Date and continue thereafter indefinitely subject to not less that <u>*twelve month’s notice of termination*</u> ***given in writing by either party to the other so as to take effect on or at any time after the fifth anniversary of the Appointed Date. The Appointed date shall be 1st October 1999***.

15. There is no dispute that the applicable law under these contracts is the Arbitration Act of 1996 of England that is the one in operation at the present. This application was seriously challenged for citing the Kenyan Arbitration Act which has some variation with the English Act. Also had the plaintiffs followed the English Act, especially the provisions of sections 17, this application would not have been necessary because there is a provision for the appointment of an arbitrator and if two parties fail to agree on the appointment of a sole arbitrator, and one party refuses or fails to agree to appoint an arbitrator within a specified time, the other party may appoint his arbitrator as a sole arbitrator who can proceed with the arbitration. Had the applicant followed the English law to the letter, it was not necessary to file this case as they would have proceeded under section 17 to appoint a sole arbitrator and merely notify the other side of the appointment.

16. I am in agreement that the English Arbitration Act, 1996 is the one applicable to this case as per the agreements, thus this application is defective as it is premised on the Kenyan law not the English law which is provided for in the agreement. The two laws are at variance in regard to the powers given to courts for the appointment of an arbitrator. If this court followed the provisions cited in the application, that would lead to an erroneous decision because under the Kenyan law, the decision of this court is final. The second reason why this court cannot appoint an arbitrator is because the qualifications of the suggested names are not provided so as to guide the court on whom to appoint based on the relevant skill. I believe that is why the procedure of the appointment of the sole arbitrator is so elaborately provided to give room for objective selection.

17. The third reason will be developed within the arguments on whether this court can make a finding on whether or not there is a dispute. Several arguments were put forward by the plaintiff’s counsel who explained in very great details why the court should find that there is a dispute and proceed to appoint an arbitrator. On the same breath, Mr. Oyatsi submitted that the court has no jurisdiction to make a finding that there is no dispute. With tremendous respect, I find that line of argument contradictory. If the court has jurisdiction to establish there is a dispute, the court should also make a finding that there is no dispute or issue capable of being referred to arbitration.

18. The two agreements were entered into before the monopolies rules were enacted, which the court was told were entered into in 2001, the parties must follow the provisions of the contract with obedience. The issues of Monopolies Act and discrimination of the plaintiffs by the defendant are outside the two agreements. This court cannot rewrite the agreement to factor in matters that are not envisaged and provided for in the agreement. The plaintiff’s counsel vehemently argued that for the court to rule there is no dispute, that would infringe on the plaintiffs fundamental rights to a fair trial and access to justice because that would be tantamount to blocking the plaintiff from ventilating their dispute according to the agreement through an arbitrator. Thus the defendant was accused of obstructing justice and stealing a match on the plaintiff by taking undue advantage of the plaintiffs. The defendant is also accused of attempting exclude the plaintiff from participating in an open tender process for the importation of the fuel. It is for this reason the plaintiffs applied for the conservatory orders.

19. During these arguments I asked Counsel, and this is the same question l pose, whether in determining whether to issue the conservatory order, under the Arbitration Act, there is need to evaluate the bonafides or whether there is prima facie case which raises triable issues to support the issuance of a conservatory order of injunction. According to Mr. Oyatsi the court should automatically grant the orders under section 7 of the Kenya Arbitration Act. However these proceedings are not governed by the Kenyan Act,. This agreement has a termination clause. The Notice given to the plaintiffs is according to the

agreement, l am afraid there is no prima facie case to warrant this court to issue the conservatory orders. As regards the appointment of the arbitrator, I find the exercise of this courts jurisdiction was wrongly invoked, moreover, the notice issued by the defendant is accordance with the agreement, thus I do not find any dispute. It is trite that a court of law cannot issue orders in vain.

20. For those reasons this application is disallowed with costs to the defendants.

RULING READ AND SIGNED ON 9TH JULY 2010 AT NAIROBI

M.K. KOOME
JUDGE