REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)

MISC. APPLICATION 297 OF 2008

KENYA OIL COMPANY LIMITED ……..……1ST PLAINTIFF

KOBIL PETROLEUM LIMITED…….……2ND PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED ……..…… DEFENDANT

RULING

The applicant companies carry on business as petroleum importers and distributors in this country and the Eastern African region including Tanzania, Uganda, Rwanda, Burudi and Zambia. In the course of their business they own and market various grades of petroleum products. The respondent is a State corporation mandated by the Government of the Republic of Kenya to operate fuel storage facility at Kipevu Mombasa and to manage its pipeline distribution network in this country. In essence the respondent owns controls and manages storage tanks and pipeline through which the petroleum products imported by oil dealers are offloaded at the port of Mombasa and transported upcountry.

It is contended that all oil companies in Kenya are required upon importation of their fuel products to have the same received at the point of landing and store the same at Kipevu in Mombasa for transportation to various points where the oil dealers collect their products. For that service the respondent issues monthly invoices to various oil companies for settlement for the services it rendered during the period covered in a particular invoice.

The applicants are users of the respondent's said facilities. The rights and obligations of the parties in relation to the use of the said facilities are contained in a written agreement known as The Transportation and Storage Agreement entered into in May 1999. Sometimes in 2005, a dispute arose between the respondent and the applicants herein, which dispute is the subject of arbitration proceedings before an arbitrator who has substantially dealt with the dispute. According to clause 22 of that agreement, all disputes arising under the contract shall be resolved through arbitration. The parties thereafter appointed **Mr. Nzamba Kitonga** advocate as the sole arbitrator to hear and determine the dispute.

As the arbitration proceedings were proceeding before the arbitrator, the respondent made an application for the arbitrator to give some interim measure of protection concerning issues that were pending before him but which the applicants took unilateral decision as per the respondent. After hearing the rival submissions of the parties the arbitrator delivered a well considered ruling dated 3rd October, 2007. The

issue before the arbitrator is the interpretation and effect of clause 16.3 of the agreement dated 10th May 1999. That clause states;

"**Where the amounts outstanding are not in dispute, in the event of non payment by the shippers under the terms of clause 16.2, KPC shall be entitled to a lien on any petroleum product of the defaulting shipper in KPC's custody as security for payment of any outstanding amounts due from that ship. In addition KPC shall be entitled to charge compound interest at the interbank rate ruling on the 1st working day of the month at default as advised by the Central Bank of Kenya plus 1% on the outstanding amount from the date the payment was due until the date payment is made".**

One of the issues pending for determination before the arbitrator is an allegation by the applicants that the respondent refused and/or delayed in discharging the applicants' fuel products from ships arriving at the port of Mombasa. And as a result the applicants had to pay a late demurrage charges to the ship owners which according to the applicants is a loss they would not have had to shoulder had the respondent performed its part of the contract. The applicants have raised a substantial claim against the respondent on the account of demurrage charges based on the alleged failure of the respondent to discharge its responsibility and/or obligation under the transport and storage agreement. There is no dispute that in the course of the arbitral proceedings, the applicants decided to recover the alleged demurrage charges by deducting the same from the monthly invoices in respect of the services rendered to them by the respondent. It is on strength of that unilateral decision, that the respondent sought an interim measure of protection that the amount in dispute on account of demurrage charges and other related fees be deposited into a designated escrow account pending the hearing and determination of the main reference between the parties.

The arbitrator held that the applicants' claim relating to demurrage charges is part of the pleadings and the dispute pending before him for determination and that it would be preemptive and premature for the applicants to deduct the late charges from the respondent's invoices. The learned arbitrator was also of the view that it would be equally preemptive and premature for him to declare such deductions to be contrary to the arbitration clause No.22 of the transport and storage agreement dated 10th May, 1999 for that would amount to determining part of the dispute before the proceedings before him was concluded. He therefore made a decision in terms that;

"**In view of the rivaling contentions by the parties, I find that the fairer interim measures will be to order that the amounts so far deducted from the respondent's invoices by the claimants by way of demurrage charges and further deductions if any thereafter be deposited by the claimants in an escrow account in terms of prayer No.(IV) of the respondent's application".**

Being aggrieved with the decision made by the arbitrator, the applicants made an application by way of Originating Notice of Motion under Section 18 of the Arbitration Act 1995, rule 11 of Arbitration Rules 1997 seeking;

1. THAT the ruling and order made on 3rd October 2007 by the Arbitrator in the Arbitral Proceedings between the parties herein be reviewed.

2. THAT the said order be varied to provide that the interim measure of protection to be given to the Applicants herein in respect of the subject matter of the dispute, being the deducted demurrage charges, be substituted from funds to be placed in an escrow account to a lien on the Applicant s' petroleum products in the Respondent's system of equivalent value.

3. THAT alternatively the Applicants do provide a first class Bank Guarantee to the Respondent as security for the sums pleaded in the Counter-claim.

4. THAT the costs of this application be provided for.

The application is brought under section 18 of the Arbitration Act of 1995. Section 18(1) states;

"**Unless the parties otherwise agree, the arbitral tribunal may at the request of a party order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute, and the arbitral tribunal may require any party to provide appropriate security in connection with such measure".**

Under section 18(2) states;

"**The arbitral tribunal or a party with the approval of the arbitral tribunal, may seek assistance from the High Court in the exercise of any power conferred on the arbitral tribunal under subsection (1)".**

From the plain reading of Section 18 of the Arbitration Act 1995 it is clear in my mind that the respondent was entitled to seek for an interim measure of protection before the arbitrator pending the resolution of the dispute. Upon such an application being made, the arbitrator was empowered to order any party to provide an appropriate security in connection with such measure. In this case, the arbitrator in exercise of his discretion and in consideration of clause 16.3 of the agreement dated 10th May 1999 ordered the applicants to deposit the sums in dispute in an escrow account pending determination of the dispute.

It is not my role to assign or give a particular interpretation or meaning to clause 16.3 of the agreement dated 10th May, 1999. I also must say that it is outside my jurisdiction to substitute my discretion to that of the learned arbitrator who gave a well reasoned and considered decision in arriving at the conclusion he reached. Section 18(1) of the Arbitration Act says that the arbitral tribunal may require any party to provide an appropriate security. It means the nature and the kind of security is left to the discretion of the arbitrator taking into consideration the circumstances of the case. I do not think the learned arbitrator in any way exceeded his powers and misapprehended the law. With respect he gave ample consideration to the issues before him and exercised his discretion to the best interest of the parties. I reckon that he appreciated that the conduct of the applicants would create and/or open floodgate for other related disputes resulting from the issue of non payment of the demurrage charges. I agree with him, that in the event the respondent were to refuse to provide services to the applicants for non payment of invoices, the applicants would declare another dispute leading to another arbitral proceedings. The creation of another dispute would automatically impact negatively the pending arbitration proceedings. It would also jeopardize the interests of the parties in resolving their dispute in an orderly manner. Multiplicity of disputes and filing of another suit is a matter which any court would frown court.

Mr. Oyatsi learned counsel for the applicants submitted that the application for security is different from an interim award or summary judgement. And in the case of security he was of the view that all the applicants were required was to provide a measure of security to ensure that if the case of the respondent succeeds in the dispute, it has some security. He also submitted that the applicants do not challenge the findings and the ruling of the arbitrator on its merit but he said that the arbitrator overlooked what is contained in the contract between the parties. That the parties had themselves agreed and reached a covenant on the type of security the respondent is entitled. And if the parties have negotiated a contract, the function of the court is to enforce that contract.

Having considered the application and the rival submissions of the advocates for the parties, I make a finding that this application is an attempt on the part of the applicants to seek this court to substitute its discretion for the discretion already exercised by the learned arbitrator who heard full arguments of the matter. In his wisdom and having considered the totality of the dispute before him, the learned arbitrator decided on the form of security that should be furnished in this case. I do not think, it is within the powers of this Honourable court to question the form and nature of security as ordered by the learned arbitrator.

Like the arbitrator did I must be cautious in interpreting the effect and the correct meaning of clause 16.3. However I must state that there is already a dispute and that is why there is an arbitration proceedings,

therefore the interpretation of the applicants as to the nature of security envisaged under clause 16.3 is questionable. One may be tempted to say that the very fact or question of the applicants' right to deduct demurrage charges is central to the dispute between the parties and which is pending for determination. The arbitrator clearly recognized that dispute. And in humble view a party who has clearly recognized the issues in dispute cannot question a direction/decision given by the arbitrator especially the applicant who accepts the merits of the arbitrator's decision.

In conclusion this application in so far as it questions the discretion of the learned arbitrator and the interpretation of clause 16.3 cannot lie. The parties had not agreed on a security, therefore under section 18(1) of the Arbitration Act, the arbitrator was clearly within his rights. He properly exercised his powers in determining the sort of security that the applicant should place. I am in agreement with **Mr. Ohaga** Advocate that a party cannot be allowed to chose and/or determine the kind of security suitable for him for its commercial purposes. I think that is what the applicants are trying to do and it is hereby declined.

Order: **The originating Notice of Motion dated 11th April, 2008 is dismissed with costs to the respondent.**

Dated, signed and delivered at Nairobi this 10th day of June, 2008.

M. A. WARSAME

JUDGE