



**Rubis Energy Kenya PLC (Formerly Kenol Kobil Limited) v Downstream
Energy Kenya Ltd (Miscellaneous Application E078 of 2022)
[2023] KEHC 19233 (KLR) (Commercial and Tax) (23 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
MISCELLANEOUS APPLICATION E078 OF 2022
FG MUGAMBI, J
JUNE 23, 2023**

BETWEEN

**RUBIS ENERGY KENYA PLC (FORMERLY KENOL KOBIL
LIMITED) APPLICANT**

AND

DOWNSTREAM ENERGY KENYA LTD RESPONDENT

RULING

Brief Facts

1. Before the court is the amended chamber summons application dated March 29, 2023. It is brought under section 35(2)(a)(iii) and section 35(2)(b)(ii) the Arbitration Act 1995, Rule 7 of the Arbitration Rules 1997& Article 50(1) of the Constitution of Kenya 2010.
2. The application seeks the following orders; -
 - i. That the following parts of the final arbitral award dated 19th September 2022 published by Mr. Richard M. Kariuki MCI ARB, CS (the final award) sitting as the sole arbitrator in the arbitration between the applicant and the respondent be set aside, namely,
 - a. The arbitrator's award of Kshs. 2,520,000/- made pursuant to prayer 3 of the claimant's prayers and being damages for loss of earnings on account of the termination of the Dealership License Agreement dated 1st February 2014; being award number 3 in the final award.
 - b. The arbitrator's award of Kshs. 14,700,000/= made pursuant to prayer 4 of the claimant's prayers and being damages for loss of earnings on account of the termination



of the Transport Agreement dated 31st January 2017, being award number 4 in the final award.

- c. The arbitrator's award on costs of the reference, save for the costs of and incidental to the respondent's Notice of Motion dated 19th April 2022 which costs were awarded to the applicant; being part of award number 6 in the final award.
 - d. The arbitrators award of interest with respect to awards 3, 4 and 6 of the award, being part of award number 7 in the final award.
 - ii. That the Respondent bears the costs of this application.
3. The dispute before the court is premised on a dealership license agreement (DLA) dated February 1, 2014 and a transport agreement (TLA) dated 31st January 2017 entered into between the parties. A dispute ensued and pursuant to the agreement the same was referred to arbitration. An award was published by the arbitrator Mr. Richard Kariuki on September 19, 2022, which the applicant seeks to set aside
4. The application is supported by an affidavit sworn by Angeline Ibara on December 6, 2022 and submissions dated March 24, 2023. The applicant faulted the arbitrator for making arbitrary and unexplained monetary awards to the claimant. It avers that the arbitrator acted contrary to laid down decisions that require special damages to be specifically pleaded and also proved. The applicant also took issue with the award for damages for loss of earnings for breach of the DLA amounting to Kshs. 2,520,000/= and Kshs. 14,700,000/= for damages for loss of earnings for termination of the TLA together with costs and interest.
5. According to the applicant, the award violated public policy in awarding general damages in a claim for special damages, awarding special damages for claims that were not specifically proved and without justification admitted awards that were not based on damages. Further it was averred that the arbitrator shifted the burden of proof to the applicant thus violating the principle that he who alleges must prove.
6. The application is opposed through a replying affidavit sworn by Charles Kiama Muriithi on 16th December 2022 together with written submissions dated 10th March 2023. It was contended that the application before court was meant to deny the respondent the enjoyment of the fruits of the final award. It was the respondent's averment that the applicant failed to demonstrate how the award was in conflict with the public policy of Kenya and therefore not deserving of the orders sought.
7. According to the respondent the arbitral award dealt with a dispute that was contemplated by the parties and did not contain any decisions on matters beyond the scope of reference to arbitration. That the arbitral proceedings were conducted within the law free from fraud, bribery, corruption or undue influence.
8. The respondent also averred that the applicant had failed to demonstrate how it was not given proper notice of the appointment of an arbitrator, of the arbitration proceedings or was otherwise unable to present his application before the arbitration tribunal as alleged. The respondent stated that the arbitrator was appointed through the Chartered Institute of Arbitrators and parties agreed to the appointment.

Analysis

9. I have carefully considered the pleadings, rival arguments presented by the parties and the authorities relied on. The main issue for determination is whether the application meets the required threshold for setting aside an arbitral award as set out in section 35(3) of the [Arbitration Act](#).



10. The applicant particularly argues that the award is against public policy. The term ‘public policy’ is a very broad concept, as enunciated in *Christ for All Nations v Apollo Insurance Co. Ltd* [2002] 2 E.A 366. Judicial decisions that have attempted to unpack the idea of public policy include *Kenya Shell Limited vs Kobil Petroleum Limited* [2006] eKLR and *Mall Developers Limited vs Postal Corporation of Kenya ML* Misc. No. 26 of 2013 [2014] eKLR where the court observed that:

“Public policy must have a connotation of national interest. It cannot mean fairness and justice as was submitted by the parties herein as it was only the claimant and the respondent who were individuals entitled to be affected by the decision of the Arbitrator. They did not both demonstrate to this court how the decision by the Arbitrator would negatively affect, impact or infringe the rights of third parties and thus offend public policy.”

11. Just like the above case, the present dispute is one that affects the claimant and respondent. No evidence has been presented before the court to prove how the award would affect or impact on rights of third parties.

12. On the ground that the applicant was not granted an opportunity to fully present its case, I note that the issue of loss of earnings was an issue before the tribunal and the respondent produced an audit report dated March 2, 2022. From the award, the arbitrator noted that the applicant had a chance to cross examine the audited reports but chose not to. I therefore find that the applicant was given a chance to present its case before the tribunal and it cannot be said that the award was against the applicants right to a fair hearing.

13. In any case, I have perused the award and I note that the arbitrator captures the evidence as presented by the claimant and the respondent through their respective witnesses. The arbitrator further noted that both parties filed their separate issues forcing the tribunal to frame the issues from the pleadings and evidence. This is evidence that both parties participated in the proceedings contrary to the averment made by the applicant.

14. The applicant also takes issue with the award of the arbitrator under certain heads. On this, my take is that the decision to avoid the judicial route in favor of arbitration proceedings is an agreement entered into by the consent of the parties. It is based on amongst others, the need for finality of proceedings before the arbitration forum. From the very nature and objective of arbitration proceedings, courts have a very limited window for interfering with the findings of an arbitrator.

15. This need for finality goes to the root of the arbitration proceedings. It is therefore not for the court to enquire into the correctness of an award. I have noted that the arbitrator gave reasons for his findings. This court is bound by the decision of the Supreme Court in *Geo Chem Middle East v Kenya Bureau of standards* [2020] eKLR, where the Court quoted with approval the holding of Ochieng J (as he then was) in the High Court that:

“It is not the function nor 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 and award ... 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. In light of the public policy of 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 appeal over the decision of the arbitral tribunal”.

16. I concur with this view and as such, I would be hesitant to disturb the findings of the arbitral tribunal based on the merits of the dispute.



Determination and orders

17. For the reasons that I have stated, I find no merit in the application and the same is dismissed with costs to the respondents. Since no application has been brought for the converse orders, this court makes no orders as to the enforcement of the award.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 23rd DAY OF JUNE 2023.

F. MUGAMBI

JUDGE

Court Assistant: Ms. Lucy Wandiri.

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