REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISCELLANEOUS CIVIL APP. NO.E 074 OF 2018

DESNOL INVESTMENTS LIMITED.....APPLICANT

VERSUS

EON ENERGY LIMITED.....RESPONDENT

R U L I N G

Before this Court is the Notice of Motion dated **21st September 2018,** in which **DESNOL INVESTMENT LIMITED** (the Applicant) seeks the following Orders:-

> **"1. SPENT**
>
> **2. SPENT**
>
> **3. THAT The decision of the sole arbitrator in letter dated 6/09/2018 be set aside and an order be issued by this honourable court directing that clause 20(1) of the product supply Agreement dated 2/10/2017 between the Applicant and the Respondent be complied with fully.**
>
> **4. THAT this honourable court be pleased to decide on the matter of jurisdiction of the sole arbitrator.**
>
> **5. THAT this Honourable Court be pleased to make further or other orders as it may deem necessary in the interest of justice.**
>
> **6. THAT the costs of this Application be provided for.**

The application was supported by the Affidavit sworn on even date by **CLIVE OUKO NATONYE** a Director of the Applicant.

The Respondent **EON ENERGY LIMITED**, opposed the application through the Replying Affidavit sworn on **29th October 2018** by **DWALO ARIARO**, the Chief Executive Officer of the Respondent Company. Pursuant to directions made by the court the Application was disposed by way of written submissions. The Applicants filed their written submissions on **12th November 2018** whilst the Respondent filed their submissions on **7th December 2018.** On **11th December 2018**, Counsel for both parties attended court in order to highlight the written submissions.

BACKGROUND

On **2nd October 2017** the Applicant entered into a Product Supply Agreement with an entity known as **SABILI ENERGY LIMITED**. The said Agreement contained an Arbitration Clause governing how disputes between the parties were to be settled. The arbitration clause provided that in case of any dispute the parties were to first resort to negotiations and it is only where such negotiations failed to yield a settlement that by request in writing either party could seek the appointment of a single arbitrator to resolve the dispute. If the parties failed to agree on a single arbitrator then the Chairman of the **Chartered Institute of Arbitrators** [Kenya Branch] would appoint the arbitrator.

The Applicant contends that appointment of the single arbitrator **MS EUNICE LUMALAS** was undertaken solely by the Respondent without the participation of the Applicant in contravention of clause 20(1) of the Product Supply Agreement.

The Applicant through its Advocates wrote to the sole – Arbitrator objecting to her jurisdiction to hear and determine the dispute. The Applicant also objected to the terms and conditions of the proposed Arbitration.

On **6th September 2018** the Sole Arbitrator delivered a Ruling in which she dismissed the Applicants objection and ruled that she had jurisdiction to hear and determine the dispute. On **10th September 2018** the Sole Arbitrator made an order directing the Applicant to file its response and counterclaim (if any) to the claimant's Statement of claim by **17th September 2018**. The matter was scheduled for hearing before the Sole Arbitrator on **27th** and **28th September 2018**. At this point the Applicant filed the present application.

ANALYSIS AND DETERMINATION

The Applicant contends that it was neither involved in the process of appointing the Sole Arbitrator nor did it receive any communication from the Respondent inviting it to submit any proposal on the appointment of an Arbitrator. This the Applicant avers contravened Clause 20(1) of the Product supply Agreement signed by the parties.

The Applicant further contends that the proceedings before the Arbitrator are premature as negotiations ought to have taken place in an effort to resolve the dispute. The Applicant is aggrieved by the Preliminary Award made by the sole Arbitrator and is apprehensive that the matter would proceed for hearing unless stay orders were not granted compelling the Applicant to participate in a process which ought to be voluntary and consensual to its prejudice. The Applicant submits that it is yet to file its statement of Defence in the Arbitral proceedings.

On their part the Respondent counters that the Applicant has moved heaven and earth to scuttle the Arbitral process. The Respondent avers that the requirement for negotiations prior to referring the matter to arbitration has been met. That the Applicant has continually declined to receive most of the documents from the Respondent including service of process. The Respondent categorically denies any violation of clause 20(1) in appointing the sole Arbitrator. That despite several invitations to suggest its preferred arbitrator, the Applicant did not respond. Accordingly the Respondent on **24th April 2018** wrote to the **Chartered Institute of Arbitrators** on the need to appoint an arbitrator in the matter. That the appointed sole Arbitrator **Ms Eunice Lumalas** invited the parties to select dates for a preliminary meeting. The Applicant continued to prevaricate. That the Applicant has at all times been kept in the picture and all letters on e-mails have been copied to them. The Respondent submits that the present application is nothing but a continuation of the Applicants tactics to delay and/or scuttle the Arbitral process.

I have carefully considered the submissions of both counsel as well as the relevant statute and case law. The following issues emerge for determination:-

(i) Was the Sole Arbitrator properly appointed?

(ii) Is the sole Arbitrator vested with requisite jurisdiction in this matter?

(i) Appointment of the Sole Arbitrator

It is a hallowed principle in law that the duty of the court is purely to enforce contracts between parties. The courts have no business re-writing contracts for parties. In **HOUSING FINANCE CO. OF KENYA LTD –VS – NJUGUNA LLR NO.1176 Hon Justice John Mwera** [retired] held that:-

> **"Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they chose. This they must do together with the meeting of minds……"**

The parties in this matter voluntarily entered into and executed the contract (Agreement) between themselves. That agreement was binding on both parties. The Agreement included clause 20(1) which provided as follows:-

> **"20.1. Any dispute arising out of or in connection with this Agreement shall first be resolved through amicable negotiations between the parties. If such negotiations are unsuccessful, the dispute shall be referred by a written request of any party to the decision of a single arbitrator to be agreed upon by the parties. In default of such Agreement within 7 days, such appointment shall be made by the chairman for the time being of the United Kingdom Chartered Institute of Arbitrators (Kenya Chapter) or his appointee within 7 days of written request of a party."**

The import of this clause is clear. In the event of a dispute parties should first attempt to resolve the dispute through negotiations. Should such negotiations fail then any party would be at liberty to refer the matter to a single arbitrator by written request. If parties were unable to agree upon a single arbitrator within seven (7) days, then an arbitrator would be appointed by the chairman for the time being of the United Kingdom **Chartered Institute of Arbitrators** (Kenya Chapter).

From the Replying Affidavit dated **29th October 2018**, it is clear that the parties did engage in negotiations via a series of e-mail communications in an attempt to resolve their dispute. This did not bear fruit. In full compliance with Clause 20(1) the Respondent then wrote to the Applicant on **11th April 2018** invoking clause 20 of the Agreement. That letter was referenced **"Notice of Action on Contract Breach".** The Respondent did in the same letter indicate that they had no preferred arbitrator.

The Applicant did not respond to this letter notably the Applicant did not indicate that it had a preferred arbitrator. The Respondent then under clause (20) had the option of referring the matter to the Chartered Institute of Arbitrators within 7 days. In actual fact the Respondent did not so refer the matter until **24th April 2017** thirteen days later. I find that the Applicant had full notice of the fact that the dispute had been referred by the Respondent to an arbitrator. Similarly the Applicant opted not to participate in the selection of an arbitrator by failing to respond to the letter of **11th April 2018**. The Applicant cannot now claim to have been shut out of the process. I therefore find that this sole arbitrator was properly appointed in full compliance with clause 20(1) of the Product Supply Agreement.

JURISDICTION OF ARBITRAL TRIBUNAL

The Constitution of Kenya 2010 exhorts courts to encourage Alternative Dispute Resolution. In keeping with this the courts are required not to interfere with arbitral proceedings except in terms of Section 17 of the Arbitration Act. In **NATIONAL OIL CORPORATION OF KENYA LIMITED –VS – PRISKO PETROLEUM NETWORK LTD [2014] eKLR** the Court held as follows:-

> **"The Statutory act of reserving the authority to determine objections to the Arbitral tribunal, aims at paying due deference to and serving as a mark of recognition of arbitration as a recognized mechanism for Alternative dispute Resolution (ADR): by preventing the Court from unsurping the jurisdiction of the Arbitral tribunal allowing the arbitral tribunal to exercise its jurisdiction without court interference. The basis of that approach draws from the doctrine of Kompetenz Kompentez which is replicated in most jurisdictions which have adopted the UNICITRAL Model Law on Arbitration. The Kenyan Arbitration Act follows after the UNICITRAL Model Law on Arbitration."** [own emphasis]

The Applicant is aggrieved by the decision made by the sole Arbitrator regarding her jurisdiction to hear and determine the dispute. In **SAFARICOM LIMITED –VS- OCEANVIEW BEACH HOTEL LIMITED & 2 others [2010]** eKLR, the court held that the Arbitration Act gives the Arbitral Tribunal powers to rule on its jurisdiction as well as to substantively determine the matter in dispute before it. In that case **Hon Justice Gikonyo** stated as follows:-

> **"The Section gives an arbitral tribunal the power to rule on its own jurisdiction and also to deal with the subject matter of the arbitration. It is not the function of a national Court to rule on the jurisdiction of an arbitral tribunal except by way of an appeal under Section 17(6) of the Arbitration Act as the Commercial Court in this matter purported to do. In this regard, I find that the superior court did act contract to the provision of Section 17 and in particular violated the principle known as "competence/competence" which means the power of an arbitral tribunal to decide or rule on its own jurisdiction. What this means is "compliance to decide upon its competence" and as expressed elsewhere this ruling in German it is "Kompetenze/ Kompetenz and in France it is "competence de la competence". To my mind, the entire ruling is therefore a nullity and it cannot be given any other baptism such as "acting wrong but with jurisdiction"** [emphasis supplied]

Accordingly I do find that the Arbitral Tribunal was clothed with requisite jurisdiction in this matter.

In any event as pointed out by the Respondent in their written submissions **Section 5** of the **Arbitration Act** estops the Applicant from bringing this application to the High Court. Section 5 provides as follows:-

> **"5 Waiver of right to object a party who knows that any provisions of this Act from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without undue delay or if a time limit is prescribed, within such period of time, is deemed to have waived the right to object."**

The Applicant attended before the sole arbitrator on **15th August 2018,** where directions were given regarding filing the Response to the statement of claim and timelines set for hearing. The Applicant is thus barred from raising the issue of jurisdiction before this court.

My own reading of the facts of this matter reveal an Applicant who is hell bent on scuttling the Arbitration process despite having accepted the same by executing the Product Supply Agreement. The Applicant cannot be allowed to approbate and reprobate in this manner. The Arbitration clause was valid and enforceable. The Applicant declined to participate in selecting an arbitrator. As such the Respondents action in writing to the Chairman of the **Chartered Institute of Arbitrators** was proper and complied with clause 20(1) of their Agreement. I am satisfied that the Arbitral Tribunal was properly constituted and that the sole Arbitrator has jurisdiction to hear and determine this dispute. Accordingly the Notice of Motion dated **21st September 2018** is dismissed in its entirety with costs to

1st day of **July 2019**.

Justice Maureen A. Odero