REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL AND TAX DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 491 OF 2016

IN THE MATTER OF THE ARBITRATION ACT (1995)

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

POWER GOVERNORS (K) LIMITED.....APPLICANT

VERSUS

FLEET TRACKING SOLUTIONS AFRICA LTD....RESPONDENT

RULING

1. This Ruling relates to two applications; a notice of motion Application dated 24th October 2016, (herein "the 1st application") brought under the provisions of; Section 3A of the Civil Procedure Act, Section 35(2)(a)(iv) of the Arbitration Act (No. 4 of 1995) (herein "the Act"), Rules 4(2) and 11 of the Arbitration Rules 1997, (herein "the Rules"), Order 51 Rule 1 of the Civil Procedure Rules, and all enabling provisions of law.

2. The second application is a chamber summons Application dated 14th November, 2016, (herein "the 2nd application") brought under the provisions of; Sections 1A, 1B, and 3A of the Civil Procedure Act, Section 36 of the Act, Rules 6,9,and 11 of the Rules, and all enabling provisions of the law.

3. The Applicant in the second application also filed a Preliminary objection of the even date, challenging the jurisdiction of the Court to entertain 1st application. The objection is premised on Sections 10, and 35,(2) of the Act, as read in line with clause 23.2.4 o the exclusive Distributorship agreement of 1st April, 2014, (herein "the Agreement").

4. The Applicant in the 1st application is seeking for orders that the Honourable court be pleased to set aside the final arbitral award (herein "the Award"), made by the Arbitration on 2nd August 2016, and the cost of this Application be borne by the Respondent, whereas the Applicant in the 2nd application is seeking for orders that, the Court adopt the Award as the judgment of the Court and give the Applicant leave to enforce it as a decree of the Court and the costs thereof be borne by the Respondent.

5. The 1st application is supported by the grounds thereto and an Affidavit sworn by Chrispus Kinene Thuku, the managing director of the Applicant's Company, whereas the 2nd application is premised on the grounds on the face of it and the Affidavit dated 14th November 2016, sworn by Arunkumar Acharya the managing director of the Applicant's Company.

6. The brief background facts of the case, are that; the parties herein entered into the agreement whereby, Fleet Trucking Solutions Africa Limited (herein "the Respondent") was granted by Power Governors (K) Limited (herein "the Claimant") the status of; an exclusive distributor of "Auto-Control" Speed Governors or Limiters within, East Africa region. The Respondent was to pay a one off non refundable fee of; Kenya shillings ten million (Kshs 10, 000, 000) in consideration thereof. The sum was payable in two equal installments.

7. It is alleged that the Respondent paid the first installment of; Kenya shillings five million (Kshs 5,000,000) on 3rd April 2014, but failed to honour payment of the balance. In the meantime the Claimant, supplied the Respondent with 200 units of the devices at an agreed price of; Kenya shillings ten thousand (Kshs 10, 000) per unit.

8. Subsequently the Respondent placed a further order for 208 units amounting to; Kenya shillings two million eighty thousand, (Kshs 2,080,000), plus VAT of; Kenya shillings three hundred and thirty two thousand eight hundred, (Kshs 332,800), giving rise to a total of; Kenya shillings two million four hundred and twelve thousand and eight hundred (Kshs 2,412,800), which the Respondent has failed to pay despite the demand.

9. The Applicant avers thereafter a dispute arose between the parties on the quality of goods and the non-payment thereof. The Arbitral clause in the agreement was invoked commencing the Arbitral proceedings, wherein the Claimant sought for payment of the balance sums of; Kenya shillings five million (Kshs 5,000,000), Kenya shillings two million four hundred and twelve thousand, and eight hundred, (Kshs 2,412,800), interest thereon at 2%, damages and the costs of the proceedings.

10. After hearing the dispute, the Arbitrator dismissed the Claimant's claim and ordered it to pay the Respondent a sum of; Kenya shillings two million three hundred and twenty thousand (2,320,000), plus interest at the rate of 12%per annum from the date of the award to payment in full. The Claimant was also ordered to bear costs of both the Respondent and the Arbitrator. Being aggrieved with the decision of the Arbitrator the Claimant seeks to set it aside while the Respondent seeks to enforce it.

11. It is argued that by the Arbitrator referring to communications received by the Respondent which were merely proposals to unlock a stalemate, and which in any event, never originated from the Claimant, the award contains decisions and matters beyond the scope of reference to arbitration. Further, the Arbitrator went outside the agreement by finding that, the Respondent was owed the amount of; Kenya shillings two million, three hundred and twenty thousand (Kshs. 2,320,000) based on evidence adduced by the Respondent outside the agreement rather than what is stipulated therein. Therefore the Arbitrator did not decide the reference in accordance to the terms of contract, thereby re-writing the same.

12. Similarly, the Arbitrator granted relief sought in the counter claim whose demand had not been made known to the Claimant by the Respondent during the pendency of the agreement, as envisaged in the agreement signed by the parties. That the award misinterpreted and/or failed to consider the rights and obligations of the parties as contained in the agreement and implications thereon. The agreement stated that, in the event that a party felt aggrieved by the other, such a party would declare a dispute and seek to solve it in the agreement's confinement. Further, in the event of unmitigated breaches, a party was entitled to terminate the agreement, and such termination would not affect rights and obligations arising prior to the termination.

13. That to the contrary, the Arbitrator held that the Claimant had wrongfully terminated the agreement before expiry of 180 days and the payment of the balance was negated by the fact that there is no future relationship between the parties to justify the claim. The Claimant argue that, the agreement states in clause 15.3 that "any provision of the agreement that expressly or by implication is intended to come into or continue in force on or after termination of this agreement shall remain in full force and effect."

14. Therefore, the payment of the outstanding balance of the goodwill fee should not be premised on condition of the termination agreement but rather on the duty of the Respondent's towards the Claimant and whether indeed there was a breach on the part of the Claimant in view of provisions under the agreement on making of order for products, payment and delivery of the goods, and return policy as may be applicable.

15. It was averred that, the agreement was terminated in accordance with clause 15.2 thereof which provided for termination of the agreement by a party if the other party did not remedy the breach within 30 days. The Claimant took upon itself to abide by the contract and declared a dispute on 25th July 2014, well over a month prior to the termination of the agreement and sought for an appointment for an Arbitrator. That in the circumstances of this case, it is only fair and just that the Award be set aside and the dispute referred back to a different Arbitrator.

16. However, the Respondent opposed the application vide a Replying affidavit dated 14th November 2016 referred to above. He termed the Claimant's Application as an afterthought, a non-starter, frivolous, vexatious and meant to delay enjoyment of the fruits its labour and sought it be dismissed.

17. The Respondent argued that, the Claimant is on a broad daylight fishing expedition notwithstanding the hot sun and azure sky. The Honourable Court was invited to look into and determine really whether there exist any traces of a fact that, the Arbitrator re-wrote the agreement for the parties. That the amount awarded cannot have been outside the agreement as the Claimant's witness, Crispus Kinene Thuku testified, that he had not at the time of hearing the dispute supplied the goods that had been paid for.

18. The Respondent argued that the application to set aside the award has not in the first instance been adopted by the Honourable Court so as to grant the Court the requisite jurisdiction to question it. Further the Act empowers the Arbitrator to deal with such disputes as pertains to matters arising from that dispute, which he has been appointed to arbitrate in and the decision once given by the Arbitrator is always binding unless and until it is contested in the High Court on particular aspects enunciated in Section 35 of the said Act.

19. That from the reading of the agreement dated 1st April 2014, the award herein is final, save as to what the law permits. Further, clause 23.2.4 stipulates: "the award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by law and any party may apply to court of competent jurisdiction for enforcement of such an award…....."

20. The Respondent averred that the reading of the Claimant's application, the Affidavit in support and annexures thereto do not reveal a single action under Section 35 of the Act that can awaken the Court into disturbing and/or questioning the award. The Award met the legal threshold and is within the terms of the agreement. The Arbitration process was carried out with utmost efficiency and the appropriate degree of, expertise and all issues presented before the Arbitrator were dealt with in length, therefore the Claimant cannot at all allege it amounted to the re-writing of the agreement or was unfair at all.

21. That the Claimant terminated the agreement before the lapse of 180 days, in breach thereof and was not entitled to benefit from the

second installment of fees under the Agreement. The Respondent argued that, there was no new supply of the goods on 18th April 2004 and that in reality, the Claimant only supplied goods once for which payment was made and is acknowledged. The alleged supply of 208 units of the devices on 15th May 2014, is not known to the Respondent and neither has the Respondent been in breach of any of the contractual terms to date.

22. That the Claimant cannot contest the final award on the basis of breach of contract as by wrongfully terminating the agreement. Consequently the substantial consideration was defeated by the Claimant's conduct of not supplying the goods and the Arbitrator could not remain silent and let him enjoy the money to the detriment of the Respondent.

23. That the alleged grounds of misinterpretation on the part of the arbitrator, is an attempt by the Claimant to conceal material facts and defeat the purpose of the litigation. The law governing Arbitration clearly stipulated how and the specific reasons that can warrant the award to be set aside. Thus the application is devoid of any merit and the grounds on which the application is anchored are an afterthought, in the interest of justice it should be dismissed with costs.

24. The parties disposed of the applications by filing submissions which I have considered herein. As stated herein the Respondent filed a Preliminary objection, at the risk of repeating what is already stated, on the grounds that the Court lacks jurisdiction to entertain the application to set aside the award.

25. Reliance was placed on the provisions of Section 10 of the Act which states that; "except as provided in this Act, no court shall intervene in matters governed by this Act". Further reliance was placed on Section 35(2) that tabulates the grounds upon which an arbitral award may be set aside. Finally the provision of clause 23.2.4 of the agreement were invoked which provides that " the award of the arbitration tribunal shall be final and binding upon the parties to the extent permitted by the law and any party may apply to the court of competent jurisdiction for enforcement of such an award….."

26. The Respondent also relied on the case of; *Tanzania National Roads Agency vs Kundan Singh Construction Limited (2014)* where the court stated as hereunder:-

> *"jurisdiction is everything. Without it, a court has no power to make one step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before in the moment he holds the opinion that it is without jurisdiction."*

27. However the Claimant submitted that, the clause in the agreement cannot oust the jurisdiction of the Court under Section 35 of the Act. Therefore the preliminary objection is baseless.

28. I have considered the above arguments and I find that Section 35 of the Act clearly allows a party aggrieved with the decision of the Arbitral tribunal, to apply to the High Court for setting it aside. The Court's statutory jurisdiction cannot be ousted by any agreement between the parties to the Arbitral proceedings. In this regard reference is made to the case of; *Nyutu Agrovet Limited vs Airtel Networks Limited (2015) eKLR.* Therefore the Respondent's argument is not tenable, indeed Section 10 of the Act supports Section 35 thereof. It does not oust it.

29. The Respondent further argued that although the Court has power under Section 35 of the Act, to hear the subject application, the Applicant has not demonstrated any of the circumstances to warrant the Court it. However, I find that first and foremost this argument is based on a pure point of law as required of a Preliminary point of law. It is based on factual matters that cannot form a subject of a preliminary objection which is a pure point of law as held in the case of; ***Mukhisa Biscuit Manufacturers Limited vs West End Distributors Ltd, (1969) E.A. 696*, where** Law, J.A. observed; **"so far as I am aware a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleading and which if argued as preliminary objection may dispose of the suit."**Based on the aforesaid, I respectively dismiss the preliminary objection.

30. I shall now deal with the merits of the two applications. As stated, the first application is brought under the provisions of section 35(2) (a) (iv), of the Act which states as follows:

> *"(2) An arbitral award may be set aside by the High Court only if—*
>
> *(a) the party making the application furnishes proof-*
>
> *(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration, provided that if the decisions on matters referred to arbitration can be separated fromthose not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside"*

31. I have already summarized the arguments advanced by the Applicant in support of the application, however to recap the same and put the matter in perspective, the Claimant in a nutshell, submitted that the Arbitrator awarded the Respondent the sum herein, without taking into account that the Respondent had not invoked the provisions of the agreement, which provided that any aggrieved party had to declare a dispute in the first instant and attempt to resolve it amicably. The Respondent only moved via the counter claim. At no time did the Respondent complain of a breach of contract, yet that was the reason the Applicant's claim of, Kenya shillings five million (Kshs. 5,000,000) was dismissed. The Arbitrator failed to consider that payment of that sum was based on the terms of the agreement and not the breach. Thus the Arbitrator attributed a different meaning to the word "termination" and went outside the scope of the arbitration agreement and rendered an award outside the matters contemplated by the parties.

32. The Applicant relied on the case of; *Cape Holdings Limited vs Synergy Credit Limited (2016)e KLR* where it was held that, the express words in the Arbitral agreement should be interpreted with express reference to the subject matter of the dispute.

33. However, the Respondent argued in a nutshell that; although the Applicant pleads under paragraph 6 of the grounds to the application that the Arbitrator went outside the agreement between the parties and awarded the Respondent the sum so awarded, the Claimant does not expound on the same and does not cite the variance in the award that would attract the invocation of Section 35 of the Act. That for the Court to interfere with the award, the Applicant has to demonstrate that it is contrary to public policy and is unconstitutional. The Claimant has not cited the ground of public policy. Reference was made to the case of; *Kenya Shell Limited vs Kobil Petroleum Limited (2005) eKLR.*

34. The Respondent submitted that, the Arbitral award is final as contemplated under section 32 of the Act and relied on the case of; *Nyutu Angrovet Limited (supra)* to argue that, the Court's intervention, is strictly confirmed to Section 35 of the Act. Interference should be in furtherance and not hindrance of the Act. Further reference was made to the case of; *Ann Mumbi Hinga vs Victoria Njoki Gathaara (2009) eKLR*.

35. I have considered the application in the light of the arguments advanced and the submissions and find that, first and foremost the Applicant relies on one of the ground under Section 35 (2) (a) (iv). The Respondent argues that, the Applicant should have cited the ground of public policy. However I find that, the grounds set out under Section 35 (2) (a)(i) to (iv), are independent and can be relied on without necessarily citing the ground of public policy.

36. The provisions anticipates, that the High Court shall consider inter alia the ground of public policy in considering an application under Section 35 but the Applicant may still rely on it. In that regard Section 35 (2)(b) states that the High Court may set aside a final Arbitral award if:-

> "*High Court finds that-*
>
> *(i)the subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or;*
>
> *(ii)the award is conflict with the public policy of Kenya*

37. Therefore the application is well premised in the law. To revert back to the issues herein, I have considered the statement of the claim filed in the Arbitral proceeding (at pages 65 to 68), the statement of defence (at pages 103 to 1120) of the Applicant's documents, annexed to the application, the Arbitral proceedings and the final award. The Applicant's claim was for a sum of Kshs. 2.412,800, being an amount of the 208 units allegedly ordered for by the Respondent and not paid for and the balance of Kshs. 5,000,000 outstanding on the distributive agreement. There was also a claim for damages arising out of the material breach of the contract by the Respondent leading to loss and damage as the Applicant could not sell its products in the general public or appoint another distributor during the subsistence of the agreement.

38. From the record, I note that the Arbitrator analyzed the evidence on these claims at paragraphs 11 to 12 of pages 18 to 27 of the final award. He also considered the documents produced and dismissed the claim, due to inadequate evidence to prove that the 208 units order was made on 15th May, 2015 and delivered through one; Elisha Alumasi. He held that the invoice for the sum of, Kenya shillings two million four hundred and twelve eight hundred (Kshs 2,412,800) plus VAT was issued and not paid. Having considered the evidence adduced I concur with the findings of the Arbitrator that the Applicant did not adduce adequate evidence to support its claim.

39. Similarly the Arbitrator analyzed the evidence adduced in support of the issue of the balance of the Kenya Shillings Five million (Kshs 5,000,000), under paragraphs 21.4 to 12.7 at page 23 of the Award and held that by the Applicant terminating the Agreement on 1st September 2014 and declaring the dispute on 24th July 2014, before the expiry of the 180 days within which the sum claimed was payable, the Claimant was in breach of the Agreement, and therefore the sum was not recoverable. Although the Applicant argues that the termination of the agreement and the liability of the Respondent to pay that sum are distinct, I find that the agreement expressly provided that the sum was payable if "suppliers shall not be in breach of any of the obligations under the agreement"

40. Indeed, there was a finding that some of the devices supplied by the Applicant were faulty, although the Arbitrator did not fault the Applicant on the same. I find that having invoked its rights to terminate the agreement and declare the dispute the Applicant compromised its rights to the payment of the balance of the Kshs 5,000,000 and I concur with the findings of the Arbitrator.

41. In the same vein, I am in agreement with the finding of the Arbitrator under paragraph 12.8 to 13 at page 27 of the award on the claim of Kenya shillings five million (Kshs 5,000,000) by the Respondent, for the refund of the sum paid for the distribution agreement. The Respondent is certainly not aggrieved by this finding at all. I equally note that the Arbitrator considered the claim for damages for breach of contract and made a finding under paragraphs 15.5 that, it is speculative and in fact unproven. He held that, damages cannot be claimed in abstract. Again, I concur with the findings of the Arbitrator that based on evidence adduced the claim in damages was not proved.

42. That leads me to the counter claim. I find that, it is evident that the sum claimed of; Kenya shillings nine million six hundred and forty thousand (Kshs 9,640,000) was not particularized in the claim. However the Arbitrator held and properly so under paragraph 16.1 at page 31 of the award that, it had been explained in evidence.

43. At paragraph 61.4, the Arbitrator makes a finding that the second supply of goods was paid for but not supplied. He found that there was evidence of payment and no supply and allowed the Respondent a sum of Kshs 2,320,000 inclusive of VAT. The Applicant argues that this claim had not been made known as per the requirement of the Agreement prior to the filing of the counter claim nor a dispute declared over it, nor an attempt to settle it amicably. This issue was not considered in the decision and I sought to find out whether it was ever raised before the Tribunal.

44. In that regard I have considered the evidence of the Claimants witness and its submissions dated 22nd March 2016, before the Arbitrator and I find that the issue was not raised at all. Indeed, in the Claimant's submissions at page 15, it is simply stated in relation to the counter claim that;-

> *"the Respondent bases its claim on alleged breach on the part of the Claimant. This is as discussed as herein above and the Claimant reiterates its position above that in no way was the Claimant in breach of any term of the Agreement. The Claimant reiterates that it was indeed the Respondent who was in breach and humbly prays that the Respondent's counter claim be dismissed."*

45. To the contrary, the Respondent submitted that;-

> *"the Claimant's witness PWI testified that he had received the amount as claimed in the counter claim and even upon being asked to clarify by the Arbitrator, he accepted t having received the amount so far from the Respondent. This is the amounts that the Respondent is requesting for from the Claimant plus interest. The Respondent has tendered evidence towards the same and the Claimant has indeed accepted to having received the same but there is nowhere the Claimant has justified why the monies were received and/or the products that were supplied to the Respondent. Having accepted the receipt of the money in the counter claim, and the same not being countered during hearing before the Honourable Arbitrator, it is obvious that the Claimant agreed to amounts and thus they should be ordered to pay back."*

46. According to the statement of Chrisus Thuku, after the first supply, the Applicant supplied the Respondent with four hundred (400) units of products on or about the 18th April, 2014 which the Respondent paid for, but the Respondent denied the same and alleged after the first supply there was an order made on 4th April, 2014 for 200 units but no supply was made. The record shows that Mr. Thuku admitted in cross examination that the Respondent paid Kshs 2,640,000 in respect of 200 PGL units plus VAT and confirmed that the supply was not made. However the Respondent's witness Mr. Archarya testified that the Respondent ordered for 200 units that were not supplied though paid for.

47. The Arbitrator found at paragraph 12.2 that;

> *"I have already determined as a matter of fact that the Respondent paid for two batches of the Units. Having found that there was only one supply of 200 units of the devices, I logically hereby further determine and hold as a matter of fact that, since the Respondent had paid for two batches of the devices, and evidence confirms only delivery of one batch, the Claimant is indebted to the Respondent in the sum of Kshs. 2,320,000 being in respect of the undelivered batch of 200 Units of Auto Control speed limiting devices."*

48. However the Arbitrator held that the auto control units were unavailable.

49. The question is this, were these PGL products alternative under the agreement? The Arbitrator considered the issue and held that since no other supply was made under the proposed arrangements, it is not material or significant to make a specific determination whether there was a variation or novation of contract.

50. Even if the payment was for a different product as the subject product of the agreement was out of stock, the only recourse is for the Applicant to refund the sum as paid. If it did not fall within the subject agreement then no interest is chargeable under the agreement and the Arbitrator rightfully held so.

51. Based on the above analysis I find that the Applicant did not raise the issue of the Respondent with non compliance with the terms of the Agreement in declaring and dispute and amicable settlement and cannot raise it now. The Applicant fully participated in the proceeding and indeed defended the impugned counter claim.

52. I have considered the entire matter and in particular the decision of the Arbitrator and I find no evidence that the Arbitral award dealt with a dispute outside the dispute contemplated or not falling within the terms of reference. Neither does the decision contain matters beyond the scope of the reference.

53. The upshot of all this is that the notice of motion Application dated 24th October 2016, is dismissed with costs

54. As regards the Chamber summons application, the Applicant submitted that it offends the provisions of section 36 of the Act . Reference was made to the case of; *Masinde Muliro University of Science and Technology vs Alfatech Contractors Limited (2015) eKLR* and the case of; *Samura Engineering Limited vs Don Woods Company Limited (2014) eKLR.*

55. The Court was invited to consider the provisions of section 37 of the Act for grounds of refusal to recognize an Arbitral award. The Respondent relied on the provisions of sections 36(1) and 37 of the act alongside the case of; *National Oil Corporation of Kenya Limited vs. Petroleum Networks Limited CITATION* and urged the court to allow the application.

56. Having dismissed the application for setting aside the award and there being no bar under sections 36 and 37 of the Act to allow it, I allow it as prayed with no orders as to costs, the costs having already been allowed on the notice of motion.

57. Those then are the orders of the court.

Dated, delivered and signed in an open court this 8thday of July 2019

G.L. NZIOKA

JUDGE

In the presence of;

Mr. Anam for the Applicant

Mr.Wambui Shadrack for Mr. Akenga for the Respondent

Court Assistant----------Dennis