REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

MISC. CIVIL APPLICATION NO. 390 OF 2012

NATIONAL AGRICULTURAL

EXPORT DEVELOPMENT BOARD …..... APPLICANT

VERSUS

CARGILL KENYA LIMITED.....…RESPONDENT

IN THE MATTER OF THE ARBITRATION ACT 1995 (AS AMENDED BY THE ARBITRATION (AMENDMENT) ACT NO. 11 OF 2009)

AND IN THE MATTER OF AN ARBITRATION

BETWEEN

NATIONAL AGRICULTURAL

EXPORT DEVELOPMENT BOARD …..... APPLICANT

VERSUS

CARGILL KENYA LIMITED .....…RESPONDENT

(In respect of the Respondent's Notice of Preliminary Objection dated 13th December, 2012 and filed in Court on 14th December, 2012)

RULING

The preliminary objection by the Respondent is to the effect that the Applicants application is misconceived incompetent and does not lie for reasons that

(a) It amounts to an appeal against the ruling given by the Arbitrator, Ms Steven Gatembu Kairu (as he then was) on 25th September, 2012.

(b) That this Court does not have jurisdiction to entertain an appeal or any challenge to the said ruling.

(c) That the application offends inter alia, the strict provisions of section 10 of the Arbitration Act No. 4 of 1995 (as amended) by Arbitration Act of No. 11 of 2009).

By way of a Notice of motion application dated 20th November, 2012 the applicant sought orders by this Court to set aside the Arbitral Award made by Mr. Steven Gatembu Kairu - a sole arbitrator dated 25th September, 2012 and allow the claimants application for security for the claim dated 12th July, 2012.

Secondly, that the costs herein and before the Arbitrator regarding the applications dated 8th June, 2012 and 12th July, 2012 be paid by the Respondent.

The grounds were that the arbitral Award made by the Learned Arbitrator is contrary to public policy of Kenya in that, it is inconsistent with article 47 of the Constitution which provides that there should be fair administrative action and article 159 of the Constitution of Kenya 2010 which provides that in exercising Judicial authority, Courts and tribunals shall not use dispute resolution mechanisms in a way that is repugnant to justice or morality or inconsistent with the Constitution or any written Law.

Secondly, that the learned Arbitrator erred in failing to address the issue of reciprocation in enforcement of Judgments enjoyed between the Republic of Kenya and the Republic of Rwanda in terns of the foreign Judgments (Reciprocal enforcement) Act Cap 43 Laws of Kenya while the said issue was a core one.

That Arbitrator failed to appreciate the fact that the claimants claim against the Respondent is quite substantial being USD 1,175,383.84 and given that the Respondent is a private company. It was susceptible to being wound up.

Counsel for the Respondent Mr. Thuo submits that the ruling that is being challenged is just that – a **ruling** but not an arbitral award in that it was merely a ruling on interlocutory applications for security for costs and security for the claim.

It is counsels contention that there is a difference between a ruling and an arbitral award.

Further that the High Court can set aside an arbitral award within the narrow confines of section 35 of the Act but it does not have jurisdiction to entertain an application for setting aside a ruling of an arbitrator.

Counsel relies on the authority of **Nairobi Misc. Application No. 297 of 2008 Kenya Oil Company Ltd. & Anor. - Vs- Kenya Pipeline Company Limited**, where he applicant was aggrieved by the order of security made by an arbitrator and the Court refused to set aside the order stating that it would not substitute its discretion for that of the arbitrator and it could not determine issues which had already been determined by the arbitrator.

Counsel also relies on the case of **Pacific Insurance Brokers (EA) Ltd. -Vs- Housing Finance Co. Ltd. Milimani HCCC No. 227 of 2009**. where the Court held that it was not open to a party to re-litigate matters that have already been the subject of litigation.

Counsel for the Respondent further submits the rationale behind the Arbitration Act was examined in **Civil Appeal No. 57 of 2006 Kenya Shell Ltd. -Vs- Kobil Petroleum Limited** where Court of Appeal held,

> **"The arbitration act, which came into operation on 2nd January 1996 and the rules thereunder, repealed and replaced chapter 49 Laws of Kenya and the rules thereunder, which had governed arbitration matters since 1968. A comparison of the two pieces of legislation underscores an important message introduced by the latter Act. The message we think, is a pointer to the public policy the country takes at this stage in its development. We think as a matter of public policy, it is in the public interest that there should be and end litigation and the arbitration Act under which the proceedings …. underscores that policy".**

Further that section 10 of the Act is emphatic on that position of limiting of access to Courts and it

provides,

> **" Except as provided in this act, no court shall intervene in matters governed by this act".**

Counsel for the Respondent also relies on the case of **Epco Builders Limited – Vs- Adams S. Marjan Civil Appeal No. 248 of 2000** where the court of appeal held,

" If it were allowed to become common practice for parties dissatisfied with the procedure adopted by the arbitrators to make constitutional applications during the currency of the arbitration hearing, resulting in lengthy delays in the arbitration process, the use of alternative dispute resolution, whether arbitration or mediation would dwindle with adverse effects on the pressure on the Courts. This does not mean that recourse to a constitutional court during arbitration will never be appropriate. Equally it does not mean that a party wishing to delay arbitration (and there is usually one side that is not in a hurry) should be able to achieve this too easily by raising a Constitutional issue as to fairness of the trial when the arbitration Act 1995 itself has a specific provision in section 19 stipulating that,

> **"the parties shall be treated with equality and each party shall be given full opportunity of presenting his case, in order to secure substantial delay. If it were to become common, commercial parties would be discouraged from using ADR".**

This application for setting aside the arbitral award made by Mr. Steven Gatembu Kairu is expressed to be brought under section 35 of the arbitration Act 1995 (as amended by Arbitration (amended) Act 2009 and under rules 3(2) and 7 the arbitration rules.

Section 35 (1) of the Arbitration Act is as follows,

"Recourse to the High Court against an arbitral award may be made only by an application for setting aside the award under subsections (2) and (3)

2. **An arbitral award may be set aside by the High Court only if:-**

(a) The party seeking to set aside the award furnishes proof;

(i) That a party to the arbitration agreement was under some incapacity; or

(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the Laws of Kenya; or

(iii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(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 from those not so referred, only that part of the arbitral award which contains decisions on matters not referred to arbitration may be set aside or

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with agreement of the parties, unless that agreement was in conflict with a provision of this Act from which the parties cannot derogate; or failing such agreement, was not in accordance with this Act; or

(vi) the making of the award was induced or affected by fraud, bribery, undue influence or corruption;

(b) The 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) <u>the award is in conflict with the public policy of Kenya</u>

In my view public policy of Kenya is an issue which is germaine to this application. The applicant has brought this application within the confines of section 35 (2) (b) (ii) of the Arbitration Act.

Its contended that the award is inconsistent with Article 47 of the Constitution and article 159 of the Constitution of Kenya 2010.

Article 47 provides for a fair administrative action.

Whereas article 159(2) (c) provides for promotion of alternative forms of dispute resolution including reconciliation, medication, arbitration and traditional dispute resolution mechanism, but subject to clause 3.

Clause 3 provides,

> **"Traditional dispute resolution mechanism shall not be used in a way that**
>
> **(a) Contravenes the bill of rights**
>
> **(b) is repugnant to Justice and morality or results in outcomes that are repugnant to justice or morality; or**
>
> **(c) is inconsistent with the Constitution or any written law".**

I do find that it will be upon the Judge hearing the main application to determine whether there was an award in the first place and secondly whether the award is in conflict with the public policy of Kenya. It would be unjudicious to shut the applicant from arguing its application when it has brought it within the confines of section 35 of the Arbitration Act. The preliminary objection has no merit and its dismissed with costs.

Ruling delivered dated and signed this **4th** day of **October, 2013**

….....

M. MUYA

JUDGE

<u>4TH OCTOBER, 2013</u>

<u>In the presence of:-</u>

Leaned Counsel for the applicant Mr. Kabebe holding brief Gikandi

Learned Counsel for Respondent (absent)

Court clerk Musundi