REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Case 122 of 2004

IN THE MATTER OF ARBITRATION ACT NO. 4 OF 1995

AND

IN THE MATTER OF AN ARBITRATION

BETWEEN

KENYA OIL COMPANY LIMITED……...……..……....APPLICANT

VERSUS

KENYA RAILWAYS CORPORATION…….....RESPONDENT

RULING

This is an application brought under Section 7 of the Arbitration Act, 1995, the Arbitration Rules of 1997, and Order XXXIX Rule 2 Civil Procedure Rules. The Applicant seeks follows Orders:-

1. That this application be certified urgent.

2. That service of this application upon the Respondent in the first instance be dispensed with and the application be heard ex-parte.

3. Alternatively, directions be given for fixing an urgent date for the inter-parties hearing of the Application.

4. That the status quo in the contract dated 8th February, 2001 be maintained between the parties pending the hearing and determination of the dispute declared by the Applicant in terms of Clause 19 of the said Contract.

5. **That the Respondent be restrained by a temporary Injunction order from breaching or in any way interfering with the terms of the Contract dated 8th February, 2001 entered between the parties pending the hearing and determination of the dispute declared by the Applicant.**

6. That costs of this suit and/or application be provided for.

The Application is based on the following grounds that:-

(a)The Respondent in clear breach of the covenants or terms of the said contract has served notice on the Applicant that it intends to terminate the contract before the expiry of the contract term or period.

(b)With full knowledge that the Applicant disputes the validity of its actions, the Respondent in further breach of the covenants in the said contract has deliberately refused to refer to the said dispute to arbitration in terms of clause 19 of the contract and has instead taken the law in its own hands by prejudicing the issue in dispute and inviting 3rd parties to tender for the services exclusively contracted to the Applicant under the said contract.

(c) The Applicant deliberately intends to steal a march on the due process of the law or the Court.

(d)The Respondent cannot benefit from its own wrongs as to do so would replace the rule of law with anarchy and defeat the whole object of entering into or signing the said contract.

(e) Damages will not be an adequate remedy to the Applicant if the Injunction order is not granted and the Applicant succeeds in the above dispute.

(f) **On the balance of convenience the Injunction order prayed for ought to be granted to the Applicant.**

The said Application is further supported by the Affidavit of George Njoroge Mwangi dated 9th March 2004, and was filed with an undertaking as to damages issued by the Applicant in which it states as follows:-

"We, Kenya Oil Company Limited of Post Office Box Number 4202 Nairobi in the Republic of Kenya do hereby undertake that if the Court grants the Injunction Order applied for herein ex-parte and if the Court later finds that the said Order has caused loss to the Defendant or any other affected party and the Court further decided that the said Defendant or party should be compensated for the loss, we will comply with any order that the Court may make.

Deponed by George Njoroge Mwangi,

Acting Managing Director on behalf of the Applicant".

The ex-parte application came before Hon. Justice Azangalala made the following ruling:-

"The Contract exhibited by the Applicant clearly gives the applicant the option to renew the Contract at the expiration of the 1st term of 3 years. When the term was due to expire the applicant intimated its desire to review the contract. Apparently the respondent has not accepted the applicant's intuition or desire to renew the contract. The respondent is therefore in clear breach of the terms of the contract between it and the applicant. Respondent has advertised for tenders in respect of the subject matter of the contract between it and the Applicant. The advertisement stated that the tenders were to be opened on 4th March 2004. Counsel does not think that the tenders have been awarded. Even if they have been awarded they have not been concluded. The threatened and breach of contract will be persisted if this application is not heard ex-parte. Indeed if this Application is not granted as prayed ex-parte the Respondent will proceed and conclude a contract with a third party. This must be prevented in the interests of justice. Besides it appears as if the respondent does not wish to have the apparent dispute it has with the applicant arbitrated upon in terms of the provisions of the particular clause 19 of the said contract.

Under the circumstances and to avoid the respondent "stealing a match" from the applicant I grant prayers sought in paragraph 1, 2 and 5. The prayer sought in paragraph 5 is granted until the hearing of this application inter-parte on 23rd March 2004.

The costs shall be in cause".

The interim orders subsists to date.

The Respondent filed its grounds of opposition on 2nd June 2004 citing four grounds:-

(a) The Contract that forms the basis of the Applicant's application is in breach of the Exchequer and Audit Public Procurements) Regulations, 2001.

(b) No notice has been issued by the Applicant as required by Section 83 and 87 of the Kenya Railways Corporation Act.

(c) The Applicant has not satisfied the conditions precedent to the grant of an interlocutory Injunction.

(d) The conditions of the subject contract are onerous and the Respondent is unable to meet its obligations under the said Contract.

The Application was argued on 21st June 2004 by Counsels for the parties with Mr. Oyatsi representing the Applicant and Mr. Aboge for the Respondent.

In his submission, Mr. Oyatsi stated that the Applicant had entered into a contract with the Respondent on 8th February 2001 for a period of 6 years broken into 2 terms of 3 years. He referred the Court to clause 9 of the said agreement, which states as follows:-

"This agreement is for a term of 3 years plus one renewal option of 3 years upon expiry of the term hereby created. If KENOL wants to utilize the 3 years option, they have to give notice in writing 3 months before expiry of the agreement."

Mr. Oyatsi reiterated the option to renew was given to the Applicant. It was an automatic renewal if the Applicant chose to exercise it. And the Applicant did exercise that option and gave a prior notice 6 months before the expiration of the 1st term of 3 years on 4th September 2003 by the Applicant's Marketing Manager and stamped received by the Respondent, which read in part:-

"RE: AGREEMENT FOR SUPPLY OF FUEL AND RUNNING OF KENYA RAILWAYS FUELING POINTS, STORAGE TANKS AND STATION(S) AT NAIROBI

We refer to the above agreement signed between us on 8th February, 2001 and hereby give notice of our intention to exercise the option period, as detailed under Clause 9 of the existing agreement."

The Respondent's Managing Director responded to the above letter on 8th January 2004 stating thus:-

"I refer to the above subject and wish to notify you that Kenya Railways Corporation do not intend to grant a renewal option to the existing contract upon expiry in February 2001.

This is in line with the current Public Procurement Regulations that came into force in March 2001 which emphasizes on open competitive yearly contracts. The Tender for the same shall be shortly advertised.

However, Management has extended the above contracts for a further three (3) months upon expiry.

Signed

Andrew A. Wanyadeh

Managing Director".

Mr. Oyatsi submitted that the Respondent's argument on the Procurement Regulations does not affect an existing Contract. He stated that the position taken by the Respondent has effectively re-written the contract dated 8th February 2001. He further reiterated that the Applicant has declared a dispute as provided under Clause 19 of the said Contract.

Clause 19 provides that:-

"***If any dispute or difference shall arise between the parties such dispute or difference shall be referred to a single arbitrator to be appointed for the time being by the Chairman of the Chartered Institute of Arbitrators (Kenya Chapter). The Arbitrator shall have all the powers conferred as an arbitrator by the Arbitration Act 1995 or other Act or Acts for the time being in force in Kenya. The Arbitrator's decision or recommendation shall be final and binding on the parties"***

Mr. Oyatsi further argued that although the Respondent is a party to the dispute it has ignored it and they do not intend to wait until the dispute is resolved. The Learned Counsel further submitted that the Applicant will suffer loss and damage if the Applicant is evicted from the stations which was at Kshs. 35,978,436/=. It has from the commencement of the contract to date performed its obligations under the contract without default.

Mr. Aboge for the Respondent submitted in opposition of the application. He stated that the Applicant did not satisfy the conditions precedent for the grant of an interlocutory Injunction. He further submitted that the Applicant, can only suffer financial benefit which can be quantified and compensated by an award of damages noting that the Applicant had set out specific terms of the nature and amount of their loss.

In regards to the option to renew, Learned Counsel for the Respondent responded by stating that a contract in as much as it has an option to renew it cannot be extended unilaterally. He noted that the option to renew which is exercisable under clause 9 of the contract was rejected by the Respondent.

He further submitted that the Exchequer and Audit (Public Procurement) Regulations 2001 came into on 30th March 2001 and that it applies to the Contract even if it came later. He reiterated that the provisions of the law override that of any contract.

It is Mr. Aboge's contention that the Respondent refused to renew the contract because of the provisions of the regulation. He further stated that the terms of the Contract overburdened the Respondent and that it was not in conformity with the Regulations.

In a nutshell, the Applicant's case is that the option to renew the contract period is contemplated in the contract itself. The method of exercising the option to renew is also in the contract and that one party cannot unilaterally reject. It is also the Applicant's case that the attempt to reject the option in the contract is breach of the contract. On the other hand, the respondent's case is that the option indeed is in the contract but the exercise of the option to extend the contract period is frustrated by a subsequent legislation. In view of the gazetted Exchequer and Audit (Public Procurement) Regulations 2001, the contract cannot be renewed without public tender because the respondent is public entity whose operations are subject to the Exchequer and Audit (Public Procurement) Regulations 2001. However, the respondent extended the contract term for three months.

I have considered Counsels' submissions together with the proceedings on record. I have also considered the pleadings and the exhibits placed before me.

Clauses 9 and 19 of the Contract between the two parties are clear and unambiguous. The Respondent refused to accept the exercise of the option to renew the contract for another 3 year term. This is despite being given 6 months prior notice. As I have stated, the Respondent is citing the Exchequer and Audit (Public Procurement) Regulations 2001 for its reasons. If the Respondent is sincere in its reliance

on the Exchequer and Audit (Public Procurement) Regulations 2001 in rejecting to accept the option to renew the contract, how did it extend the contract period for three months? What is the difference between 3 months and 3 years apart from the duration? I reserve these questions to be dealt with by a trial forum. It is against public policy to terminate contracts on such flimsy ground and to inform the Applicant less than a month to the end of the 1st term. I agree with Mr. Oyatsi that the application of the Regulations to the contract is a matter for the arbitrator. It is a matter for the arbitrator to determine whether the Regulation applies retrospectively. The Respondent has ignored this fact and advertised tender for new suppliers. The law requires that parties to a contract exercise their rights under that agreement honestly, fairly and in good faith.

In regards to damages, the Applicant has quantified the amount of damages under oath which was not challenged by the Respondent through affidavits. In the absence of an affidavit as reiterated by Mr. Oyatsi, these facts are established. I share the sentiments of the Learned Justice Azangalala that the Respondent should not be allowed to steal a much on the Applicant.

I grant prayer 4 and 5 as prayed in the Application. Costs to the Applicant.

Dated AND signed at Nairobi on this 22ND day of AUGUST 2012.

M. K. Ibrahim
Judge

DATED AND Delivered at Nairobi on this 2ND day of OCTOBER 2012.

W. KORIR
JUDGE

In the presence of :