

CIV APPLI 57 of 2006

KENYA SHELL LIMITED VS KOBLI PETROLEUM LIMITED [2006] eKLR

Date of delivery of the Ruling: 10th November 2006

SUMMARY OF FACTS

The parties herein entered into a commercial agreement for the supply and delivery of blended lubricants, amongst other terms. A dispute arose as to the term and the matter was referred to arbitration pursuant to the contract. The matter was heard and determined by a 3-person Arbitral Tribunal. The award was published in favour of the Respondent.

The Applicant then filed an Application in the High Court seeking to set aside the award on the basis that it dealt 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. The court rejected this notion stating that the mandate or jurisdiction of the Tribunal was given to it by the parties in express and unambiguous terms when the parties, by consent, submitted the issues for determination and the Tribunal did not deal with any question outside or beyond the scope of those issues. Thus, the court held that there was no basis that the award was made contrary to Section 35(2)(a)(iv) of the Act.

The High Court further held that the argument advanced by the Applicant that the Tribunal misunderstood or misinterpreted the law in their interpretation of the reference to arbitration in the contract was not tenable. The court was of the view that questions of law could only be raised on the stringent terms stated under Section 39 of the Arbitration Act but the Section had not been invoked in this case. Furthermore, the court held that the award was otherwise a final one as contemplated by the law and by the parties, and it could only be set aside under Section 35(2)(a)(iv) of the Act as sought. Thus, the Applicant's Application to set aside the award was dismissed.

The Applicant's attempt to seek leave to appeal against the High Court's decision was promptly shot down. The court stated that this would unnecessarily prolong the matter that had directly taken long to adjudicate. The Applicant then moved to the Court of Appeal with the same Application seeking leave to appeal the High Court's decision that recognized and adopted the award as a decree of the court.

ISSUES

Whether the Court of Appeal should grant leave to the Applicant to appeal against the High Court's decision?

ANALYSIS/DETERMINATION

The Court of Appeal held that it would not exercise its discretion in the matter in favour of the Applicant, that is, it opted not to grant leave to the Applicant to appeal the High Court's decision. The court was of the view that, as a matter of public policy, it is in the public interest that there should be an end to litigation and the Arbitration Act under which the proceedings in the matter were conducted underscored that policy.

The court held that indeed, the Tribunal did not go outside its jurisdiction and that at all events, the Tribunal was bound to make a decision that would not necessarily sit well with either of the parties. The court further stated that it would nevertheless be a final decision under Section 10 of the Act unless either party can satisfy that court that it ought to be lawfully set aside.

RULING/HOLDING

The court declined to exercise its discretion in favour of the Applicant and dismissed the Application. In concluding, it stated that the High Court's decision was final and they did not feel compelled therefore to extend the agony of the litigation in the matter on account of the issue raised by the Applicant.

RATIONALE

The court reached its decision based on the interpretation of public policy which posits that it is in the public interest that litigation must come to an end and that this is echoed through the principle of finality of arbitral proceedings present in the Arbitration Act. The court was of the view that there was no realistic prospect of success of the intended appeal nor was there a ground of appeal that merited serious judicial consideration.

CASE RELEVANCE

Arbitration is one of the several dispute resolution methods that parties may choose to adopt outside the courts in this country. The parties may either opt for it in the course of litigation under Order XLV of the Civil Procedure Rules or provide for it in contractual obligation in which event the Arbitration Act, Act No.4 of 1995 would apply and the courts take a backseat.

The Arbitration Act came into operation in 2nd January 1996. Together with the Arbitration Rules 1997, they repealed and replaced Chapter 49 Laws of Kenya and its rules 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 finality of disputes and a severe limitation of access to courts. Sections 6,10,12,15,17,18,28,35 and 39 of the Act are particularly relevant in that regard. According to the court, the message is a pointer to the public policy the country takes at this stage in its development