



**Mogas Kenya Limited v Galana Oil Kenya Limited (Civil Case 150 of 2013)
[2022] KEHC 11283 (KLR) (Commercial and Tax) (24 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 11283 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
CIVIL CASE 150 OF 2013
DAS MAJANJA, J
JUNE 24, 2022**

BETWEEN

MOGAS KENYA LIMITED PLAINTIFF

AND

GALANA OIL KENYA LIMITED DEFENDANT

RULING

1. By the application dated December 2, 2021, the defendant seeks the following reliefs:
 - (2) That pending hearing and determination of this application and for purposes of just determination of this application, Gapco Kenya Limited be enjoined as an interested party to enable it be heard on the issue of release of the fuel in issue.
 - (3) That this honourable court do order for the immediate release of entire petroleum product (AGO) held at Gapco depot-owned and managed by Gapco Kenya Limited to the applicant.
2. The application is supported by the affidavit of the defendant's Managing Director, Antony Nzale Munyasya, sworn on December 2, 2021. The plaintiff's opposes the application by the affidavit of its Managing Director, Fregustus Musyoka, sworn on December 17, 2021. The parties agreed that the court dispose of the application by written submissions.
3. Before considering the application, an appreciation of the background of the matter is necessary. The plaintiff imported fuel through the defendant and fully paid for it. The defendant refused to release the fuel prompting the plaintiff to file suit. The suit was heard and determined by a judgment delivered on June 27, 2019 by Tuiyott J., on the following terms.
 - a) An order is hereby issued compelling the defendant to release 1,125.298 cubic metres of petroleum product (AGO) to the plaintiff within 30 days of this judgement.



- b) Any loss resulting from price variation between the date when the product was paid for and at the date of release shall be paid by the defendant to the plaintiff.
 - c) If for whatever reason the defendant is unable to release the product referred in (a) above, it shall within the said period of 30 days' pay to the plaintiff a sum equivalent to the value of the said product as at the date it was paid for.
4. The defendant appealed to the Court of Appeal against the judgement in NRB CA CIVIL APPEAL NO 316 OF 2019, *Galana Oil Kenya Limited v Mogas Kenya Limited*. The appeal is still pending. In the meantime, the defendant applied for stay of execution of the judgement pending appeal before this court. It also filed a similar application for stay pending appeal before the Court of Appeal. On June 22, 2020, the High Court granted an order of stay on condition that, "the defendant furnishes to the plaintiff a bank guarantee for the sum of USD (United States Dollars) 1,243,085.00 from a reputable bank within 60 days of today." On September 25, 2020 the Court of Appeal also dismissed the defendant's application for stay before that court. The defendant applied for review of the order of stay issued on June 22, 2020 but the court dismissed the application on March 1, 2021.
 5. It is not in dispute that the defendant has complied with the order for stay and provided the bank guarantee for the sum of USD 1,243,085.00 being the security of decretal amount as entered in the judgment.
 6. The defendant explains it placed loading orders placed on November 25, 2021 to Gapco Kenya Limited ("GAPCO") and copied the same to the plaintiff seeking the lifting and release of the AGO to itself. GAPCO declined to release the petroleum product citing the plaintiff's objection. In order to allow the defendant to lift and release the product, GAPCO demanded a court order.
 7. The defendant contends that it stands to suffer irreparably loss on account of evaporation whilst the plaintiff is entitled to the full value should it appeal not succeed. It adds that it has incurred substantial costs to preserve the product over the last 8 years and said costs continue to accumulate. It states that it is facing imminent insolvency and is incapable of trading with the AGO product due to restrictions and suspensions by the Ministry of Petroleum & Mining and as confirmed in the ruling dated June 22, 2020 and will not be in a position to remedy the losses whatever the result of the appeal.
 8. The thrust of the defendant's case is that the AGO is stored with the third party, GAPCO and since it has furnished security as a condition for stay pending appeal, the court ought to issue an order for release of the AGO as requested by GAPCO. It urges that the joinder of GAPCO is necessary to effect the order since it is the one which demanded an order for release of the same petroleum product.
 9. The plaintiff opposes the application on the ground the court has already rendered judgment in its favour and held that the AGO held by the defendant belongs to it and issued consequential relief. It states that this suit was terminated by the judgment and the only issue pending is to give effect to that judgment. It further states that the security tendered as a condition for stay is supposed to allow the defendant to pursue its appeal in the Court of Appeal and to forestall execution by the plaintiff. Thus, it urges that in seeking to have the fuel released to it, the defendant seeks to have the appeal determined through the back door. That if the application is allowed the substratum of the suit will disappear and the judgment in its favour will be nullified. It urges that the release of any product can only be done in line with the judgment. It rejects the defendant's attempt to add a party to the suit at this stage as the matter has already been determined.
 10. I have considered the parties' arguments and whereas the defendant's case is attractive, it is the same case that was put before court when it applied to review the order of June 22, 2020. This is captured in the ruling of March 1, 2021 where Tuiyott J., recited the defendant's argument as follows:



- (7) As to the other ground that the ruling contains an error apparent on the face of the record in its holding on the issue of security to be provided, the applicant seeks to elaborate the error in paragraph 9 of the affidavit of Anthony Nzale Munyasya sworn on July 21, 2021. He deposes:-

“[9] That the ruling and judgment contain an error apparent on the face of the record in that;

- a) The judgment denies the defendant compensation for the double credit of 801,599 MT of IMS despite the admission in writing by the plaintiff. The court dismissed the counterclaim.
- b) The honourable court issue an injunction to preserve the subject petroleum products and these products are safely store by a 3rd party as great expense. the injunction remains in place. A true copy of the injunction order is hereby annexed as “ANM-4”
- c) The court has now ordered the defendant to furnish security to the extent of the entire price of the fuel, yet the fuel is still safe and sound.
- d) The court has granted an order for the release of the fuel to the plaintiff in its judgment.”

The learned judge then went on to conclude as follows:

[8] As is clear, the applicant is rearguing the application for stay and asking this court to take a different view of the matter. That is not an error apparent on the face of the record. For an error to be apparent on the face of the record, it has to be self-evident and not requiring “an elaborate argument to be established” (See *National Bank of Kenya Limited vs Ndungu Njau*[1997]eKLR.

[9]. The applicant has filed a notice of partial appeal against the impugned decision and has now obtained leave in that regard. That is the proper forum for the applicant to challenge the merit of that decision.

11. The defendant, in substance, seeks the same order it had sought on review but adds GAPCO in order to buttress the same argument that the AGO should be released to it. The learned Judge rejected the argument. The facts have not changed. As the learned Judge indicated, the defendant has already elected to appeal against the order of stay granted on June 22, 2020 and had in fact sought and obtained leave in that regard.
12. For the reasons I have stated, the notice of motion dated December 2, 2021 lacks merit. It is dismissed with costs to the plaintiff.

DATED AND DELIVERED*AT NAIROBI THIS 24TH DAY OF JUNE 2022.

D. S. MAJANJA

JUDGE

Court Assistant: Mr M. Onyango

Ms Waitere instructed by Kang’ethe Waitere and Company Advocates for the plaintiff.

Mr King’ara instructed by Gichuki King’ara and Company Advocates for the Defendant

