REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 150 OF 2013

MOGAS KENYA LIMITED.....PLAINTIFF

Vs.

GALANA OIL LIMITED.....DEFENDANT

JUDGMENT

1. Two Oil Marketers have a misunderstanding in regard to some Petroleum products sold by one to the other. Mogas Kenya Limited (Mogas or the Plaintiff) and Galana Oil Kenya (Galana or the Defendant) have cross claims against each other.

2. Sometime in October 2012, Galana was awarded an open tender (OT) coordinated by the Ministry of Energy to import Gasoil (AGO) for sale to other oil marketers in the Country. Gasoil AGO is what is commonly known as diesel. Under this importation, Mogas bought and fully paid for 125.298 Cubic meters of the product.

3. There was a second tender awarded to Galana for similar product in January 2013. Mogas bought 944.497 Cubic meters of the said product and fully paid for it.

4. Under the arrangement, the Purchaser would nominate the place of storage of the product. The earlier product which was imported via the vessel "Merkur" was to be stored at the Hashi depot in Mombasa. The latter product which was imported via the vessel "Torm Almena" was to be stored at the Gapco depot at Mombasa. The grievance by Mogas is that Galana has refused to release 180.801 cubic meters of the first product and further has refused to release the entire product under the second order.

5. Galana has sought to explain the state of affairs. It is Galana's case that by a contract dated 15th September 2010 Mogas purchased from it 1500 Metric Tons (MT) of Premium Motor Spirit (PMS). The product was fully paid for by Mogas and discharged to Mogas in two batches of 685MT in November 2010 and 801.599MT in December 2010.

6. It was explained to Court that through an error, physical products of 801.599MT of PMS were again discharged to Mogas. This was in two batches of 98.356MT and 703.243MT.

7. The above error was discovered sometime in August 2012 and brought to the attention of Mogas and the Kenya Petroleum Refineries Limited (KPRL). It is stated by Galana that Mogas acknowledged receipt of the earlier discharge and of the further amount of 801.599MT and engaged Galana with a view to refunding it with PMS of similar quantity. It was while the issue of the reversal of PMS was pending that Mogas bought and paid for the second batch of AGO.

8. The case for Galana is that after a meeting held between the two, Mogas advised Galana to hold the said AGO as lien. There was an earlier development in which Galana alleges that it was agreed that so as to effect the reversal, Mogas issues KPRL transfer documents supported by a Bank Guarantee equivalent to the value of 801.599 MT of PMS to enable KPRL release to Galana the same amount of product.

9. The matter remained unresolved and Galana avers that at a meeting chaired by the Ministry of Energy on 18th March 2013, the following agreement and resolutions were reached:-

> "(i) That the Plaintiff shall issue a Bank Guarantee to KPRL whose sole purpose shall be to enable KPRL give 801.599 MT of PMS to the Defendant latest by 4th June, 2016 (before the expiry of the Bank Guarantee).
>
> (i) In the event the Plaintiff does not deliver to KPRL 801.599 MT of PMS to enable KPRL give the same to the Defendant, KPRL

shall cash the Bank Guarantee and transfer the full proceeds of the Bank Guarantee to the Defendant.

(ii) A tripartite agreement between the Plaintiff, the Defendant and KPRL shall be prepared & executed by all parties binding them to this arrangement".

Galana complains that Mogas failed to honour its agreement and justifies holding to the said product as lien.

10. Mogas does not accept the explanation of Galana and raises the following issues. The first is that it never agreed to issue a guarantee to the Defendant or the release of the product held. And secondly on the issue of the PMS product it asserts that the same belong to Mogas International Limited, UAE (hereafter Mogas International) and not itself and that it was merely an agent of the UAE Company. Mogas seeks to differentiate itself from Mogas International which it states is a different legal entity. It is the case for Mogas that Galana cannot exercise its right of lien over a product it does not own. Following this standoff both sides allege that they have suffered loss.

11. For Mogas it seeks the following prayers:-

a) An order restraining the Defendant by itself or any of its agents from selling the 1,125.298 cubic meters of GASOIL (AGO) already paid for by the Plaintiff and stored in the depots of Hashi Energy and Gapco in Mombasa in the respective quantities stated above, pending hearing and determination of this suit.

b) An order compelling the Defendant to release the 1,125.298 cubic meters of petroleum product (AGO) held by them, to the Plaintiff who has fully paid for it.

c) Aggravated and punitive damages for unlawfully withholding Plaintiff's product already fully paid for.

d) Special damages as hereunder:-

i) Compensation for lost business opportunities Kshs.17,841,150.

ii) Compensation for price change Kshs.10,445,000.

iii) Financing cost of @ 18.00% pa from 14th Nov 2012 to the date of judgment for financing the stock worth Kshs.105,226,000 Ex vessel Merkur O.

iv) Financing cost of @18.00% pa from 20th Feb 2013 to the date of judgment for financing the stock worth Kshs.88,221.000 Ex vessel Torm Almena.

e) Interest on the decretal sum from the date of judgment till the payment is made in full at the commercial rate.

f) Costs of the suit.

g) Any other relief this Honourable Court may deem fit to grant.

12. Galana on the other hand has set out the following Counterclaim:-

a) A Declaration that it is entitled to sell at the prevailing market rates the products of the 1st Defendant that it has been holding as lien to secure the payment of its 801.599 MT of PMS appropriated by the 1st Defendant and apply the products to off-set the 1st Defendant's indebtedness to it.

b) An order that the Plaintiff sells the products of the 1st Defendant that it holds as lien and/or security for its 801.599 MT of PMS appropriated by the 1st Defendant to recover the amount owed by the 1st Defendant.

c) In the alternative, the 1st Defendant be compelled to offer suitable banker's guarantee to the 2nd Defendant as security for the Plaintiff's 801.599 MT of PMS and the 2nd Defendant to immediately on being offered that Bank Guarantee release to the Plaintiff 801.599 MT of PMS.

d) The 1st Defendant be compelled to pay to the Plaintiff an amount equivalent to the current market value of 801.599 MT of PMS in the event that the 1st Defendant fails to issue the Bank Guarantee under paragraph (c) above within such a period as may be stipulated by the Court.

e) Loss as a result of Price Valuation 39,973.000.

f) Finance costs from August 2012 until August 2017.

g) ,,,,,

h) Costs and interest on (d) (e) above.

13. That is the sketch of the Parties respective cases as set out in the pleadings and the evidence of the witnesses. Two witnesses, one for each side were called to give evidence. The evidence from Ashish Goyal (Goyal) for the Mogas and Stephen Mucheru (Mucheru) for Galana is discussed in greater detail in the following part of the decision.

14. But first what are the issues that require resolution. The parties did not present a joint set, each preferring to frame theirs in the submissions to Court at the close of hearing. Giving regard to those proposals and the pleadings before Court, I discern the following as requiring answers:-

(i) Is Galana in breach of the terms and conditions of the tender it won under the open tender system by refusing to release the 1,125 Cubic meters of Gasoil (AGO) already paid for by the Plaintiff?

(ii) Is Galana entitled to 801.599MT of PMS or its worth from the Plaintiff?

(iii) If the answer to (ii) above is in the affirmative, does Galana have a right of lien over the 1,125 Cubic meters of Gasoil (AGO) already paid for by the Plaintiff?

(iv) Which party is in breach of the obligation due to the other?

(v) Which party is entitled to Damages? If so, of what nature and quantum?

Of the OTS contract

15. It is uncontested that the Gasoil (AGO) under dispute was imported under the open tender system (OTS) governed and administered by the Ministry of Energy (M.O.E). It is suggested by Mogas, and not disputed by Galana, that the said arrangement was governed by the agreement made on 1st June 2011 between buyers and sellers of Refined Petroleum Products within the Kenya Petroleum Oil Industry (P Exhibit pages 13-43). The effective date of the agreement was on 15th June 2011 and was to continue until reviewed or terminated (clause 1.1.). There is no evidence that it was either reviewed or terminated and the Court accepts the proposition by Mogas that in respect to the products under the OTS, the agreement of 1st June 2011 is the governing contract.

16. It is common ground that Mogas fully paid for 1,125.290 cubic meters of Gasoil (AGO) imported via vessel "Merkur" and 944.497 cubic meters of the same product imported via vessel "Torm Almena". For that reason the expectation of Mogas would be that the products would be released to it and Mogas relies on clause 11.6.1 in respect to Transfer of Entitlement which reads:-

"*Except where there are disputes related to OTS, SELLER shall transfer to BUYER the full entitlement as invoiced and paid for without deduction or set off within the next working day following payment by BUYER. For the purposes of this clause, Transfer of Entitlement shall be deemed to be the issuance of Title Transfer documents by Seller to Buyer. Such title transfer documents shall be:*

a. Stock Adjustment fax instruction to KPC

b. Customs Form C-21

c. Customs warehousing entry

d. Any other documents as shall be stipulated by T&S agreement as well as the prevailing Customs regulations. (my emphasis)

17. In so far as there was no dispute or claim related to the OTS, the expectation of Mogas was thus far not misplaced. However, Galana makes the argument that Mogas on its own will created a lien over the withheld products. That leads this discussion to the next issue.

Of the claim by Galana

18. There is evidence that prior to the OTS purchases by Mogas, Mogas International had through Contract No. 201009109 of 15th September 2010 (D Exhibit pages 44-47) purchased 1500MT of PMS from Galana. The product was paid for by the Purchaser and discharged by Galana in two batches:-

(a) 685MT in November 2010 (D Exhibit page 48)

(b) 801.599MT in December 2010 (D Exhibit pages 62)

19. Sometime in August 2012, an audit exercise carried out by Galana revealed that stock worth of 801.599MT of PMS had been credited to Mogas twice. This was an error. Perhaps to be noted for now is that although the PMS product was purchased by Mogas International the discharges and the erroneous credit was to Mogas Kenya Ltd (the Plaintiff) which was providing services for Mogas International as an agent.

20. That there was an error is acknowledged by Mogas after carrying out its own audit. It however, had its own version as to how the error occurred. In his written testimony Goyal states,

> "*The Audit further revealed that January 2010, Galana erroneously authorized another credit in the PMS stock account of Mogas Kenya through an outturn amendment for the same quantity of PMS in favour of Mogas leading to extra credit to the PMA toll stocks of Mogas".*

21. Goyal further adds,

> "*It is worth noting that KPRL stock accounts confirms that Mogas, PMS stock balance as in August 2012 was 1,008MT which signifies that Mogas did not sell this extra stock from Galana and did not in any way benefit from this error".*

This reflects the position of Mogas that although there was a double book entry in the books of KPRL it did not receive any extra physical stock of 801.995MT of PMS.

22. Howsoever the error occurred, the events that followed its discovery showed that the error disadvantaged Galana and there was need to reverse it to make amends. This is also demonstrated by the following averments made in the Amended Reply to Defence of Mogas filed on 21st March 2018,

> "6. *On 20th November, 2012 the Plaintiff did not admit receiving the extra stock but admitted the double book entry in the books of the Kenya Petroleum Refinery Ltd. The meeting agreed to correct the book entry but there was no admission of double receipt or refund of physical stocks against this book entry.*
>
> *7. The Plaintiff agreed was to do what was under its control that is to correct the book stock balance. The release of physical stock is not under the control of Plaintiff but it is under the control of KPRL. KPRL is supposed to release physical stock to the oil marketers against these book stock balances.*
>
> *8. The Plaintiff has neither admitted nor has undertaken to refund to the defendant the physical stocks of 801.599MT and puts the Defendant to strict proof thereof.*
>
> *9. The Plaintiff has always been willing to correct the book error but has never undertaken to refund physical stock since the Plaintiff did not receive any extra physical stock from KPRL.*

23. On 22nd November 2012 (D Exhibit 21) Mogas writes the following letter to KPRL in which Galana is copied in.

> TO: KPRL ATTN: M. Ruwa/Abigail
>
> CC: Galana ATTN: S. Mucheru
>
> DATE: 22nd November, 2012 Fax No: 020 530384
>
> No. of pages including this page: ONE (1) REF:MGS/ASE/GALANA/925/12
>
> PLEASE ADVICE SENDER IF YOU DO NOT RECEIVE ALL PAGES TRANSMITTED
>
> RE: ADJUSTMENT OF STOCK ENTITLEMENT
>
> We request you to effect the following adjustment to our respective stocks entitlement at KPRL on a permanent basis as follows:-
>
> INCREASE GALANA/DECREASE MOGAS – 912.944m3(703.243MT)-PMS
>
> Galana to confirm.
>
> Yours faithfully
>
> *Signed* *Signed*
>
> Nathan Kosgei Ashish Goyal
>
> Supply Manager Managing Director
>
> CC. Galana: S. Mucheru

24. The contents of the letter are confirmed by a letter of Galana of even date to KPRL (D Exhibit 22).

25. Reading those letters and the position taken by Mogas in its pleadings this Court has understood the position to be that although Mogas may not have benefitted from the error by drawing physical stock the error prejudiced Galana whose stocks in the KPRL books had been reduced by 801.599MT of PMS.

26. So who was to initiate the process of making the adjustments so as to correct the position? If one was to look at paragraph 9 of the Amended Reply to defence and the letter of 22nd November, 2012 (see paragraph 23 above) then the matter ought not to attract any controversy. Paragraph 9 reads:-

> '*9. The Plaintiff has always been willing to correct the book error but has never undertaken to refund physical stock since the Plaintiff did not receive any extra physical stock from KPRL".*

It would seem that Mogas had accepted that it had a critical role to pay in having the book error corrected.

27. However, Mogas has argued that the error emanated from a contract in which the Purchaser was Mogas International and it should not be held liable for the woes afflicting Galana.

28. First it has to be observed that the Plaintiff as currently known, that is, Mogas (k) Ltd was previously known as MGS International (k) Ltd (see certificate of change of name dated 13th October 2011). At the time the error was committed on 24th January 2011, the Plaintiff existed as MGS International (k) Limited and was admittedly the entity to which 801.599MT of PMS was credited at the expense of Galana. Of course, by the time the error was discovered by Galana in August 2012, the Plaintiff's name had changed from MGS International to Mogas (k) Ltd. Whether as principal or as an agent, it is into the account of Mogas that the erroneous entry was made. It is therefore, little wonder that Mogas (k) ltd pleaded that it has been willing to correct the book error and in fact, wrote to KPRL on 22nd November 2012 (P. Exhibit page 115) to adjust its stock entitlement on a permanent basis by decreasing 703.243MT of PMS in favour of Galana. Mogas cannot now resile on that position by invoking the authority of rule of separation of legal entities.

Does Galana have a right of lien over the products of Mogas?

29. The running narrative by Galana is that it withheld some of the products of Mogas under the OTS arrangement because it has a right of lien over them. In making this argument Galana nevertheless accedes to the force of clause 11.6.1 of the OTS agreement whose effect is that except where there are disputes related to OTS the Seller cannot exercise a right of lien over products invoiced and paid for by a Buyer.

30. That said, Galana makes the argument that Mogas waived its rights under the tender terms by expressly agreeing that it holds the products as lien. This all important waiver is said to be in an email communication dated 26th February 2013 (P Exhibit 124). This email features from time to time. It is an email from Nathan Kosgei of Mogas to Stephen Mucheru (DW1) of Galana which reads:-

> "*Stephen,*
>
> *As per our meeting this morning kindly release AGO ex Merkur O at Hashi and hold on AGO ex Torm Almena in Gapco. I have attached copy of Bank guarantee for your perusal as agreed.*
>
> *Best regards*
>
> *Nathan Kosgei*".

31. Galana presses that in subsequent meetings and agreements Mogas expressly and/or by necessary implication confirmed that it sanctioned the lien. It is therefore the proposition by Galana that in respect to the withheld product, Mogas had waived its right under the OTS contract.

32. However before considering the legal implication of the communication of 26th February 2013 and whether it and/or subsequent interaction between the parties gave rise to an enforceable right of lien in favour of Galana, the Court must determine two issues raised by Mogas.

33. During the highlighting of submissions by Counsel, Ms. Waitere for Mogas argued that Galana cannot rely on the principle of waiver and that no evidence was led to support this by Galana. Simply put, waiver is an intentional relinquishment or abandonment of a known right or privilege. That relinquishment or abandonment can be in writing or by conduct. As a general rule waiver needs to be specifically pleaded or otherwise revealed in pleadings (See Habib Bank AG Zurich vs. Rajhikant Khetshi Shah [2018], Erdemann Company (k) Limited vs. Cannon Assurance Ltd [2019] eKLR. Although it need not be pleaded in any special form, the circumstances constituting waiver must be spelt out such that it is clear that the party relies on it in defence or answer. The rationale is that the defence or answer of waiver can be so material that if not pleaded will take the other side by surprise.

34. Where however waiver is not pleaded but appears from the course of trial and arguments by parties that it is a matter left or placed before Court for determination, then it will be considered notwithstanding that it has not been pleaded. This is the essence of the rule which was restated in the case of Odd Jobs vs. Mubia [1970] EA page 476 where the Court held:-

> "(i) a Court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the Court for decision.

(ii) on the facts, the issue had been left for decision by the court as the advocates for the appellants led evidence and addressed the Court on it".

35. So what is the situation here? So as to discover whether waiver is either pleaded specifically or otherwise revealed in the pleadings it is necessary to reproduce parts of the Amended Statement of Defence in extenso:-

"8. Against the above background, by the time the Plaintiff imported 944.497 Cubic meters of AGO ex MT Torm Almena, it had expressly admitted and undertaken to refund the Defendant 801.599MT worth of PMS.

9. The Plaintiff failed to provide a bank guarantee in terms acceptable to KPRL that would enable KPRL to give the Defendant back 801.599MR of PMS with the result that KPRL could not give the 801.599MT of the Defendant.

10. Consequently upon the Plaintiffs failure to provide a suitable guarantee such as would enable the Defendant obtain its 801.599MT of PMS from KPRL, a meeting was held on 27th February 2013 in the Plaintiff's offices at SIMCO PLAZA attended by the Plaintiff and the Defendant where it was agreed that there was need for a quick resolution for the mutual benefit of both companies. It was agreed as follows:-

a. That the Plaintiff should amend the Guarantee issued to KPRL to be suitable for the purpose of giving the Defendant 801.599MT of PMS.

b. In the alternative the Plaintiff to provide the Bank Guarantee directly to the Defendant and the Defendant offered that if the Guarantee was issued they would allow the Plaintiff to refund the 801.599MT of PMS over a period of three months.

c. The Defendant releases the older material from the vessel Motor Tanker (hereafter referred to as 'MT' Merkur O and holds the products from MT Torm Almena.

11. The Plaintiff acknowledged the agreement arrived at in the said meeting by formally writing to the Defendant and instructing the Defendant to release of its undertaking to provide a suitable Bank Guarantee directly to the Defendant, informed the Defendant to hold on the AGO 944.497 Cubic Metres of AGO imported vis MT Torm Almena.

12. In compliance with the agreement arrived at during the meeting and the Plaintiff's express instructions in writing the Defendant released 7876 Meter Cubes (M3) of AGO ex MT Merkur O and held the AGO ex MT Torm Almena.

13. The allegations in the Plaint to the effect that the Defendant has refused to release to the Plaintiff 944.497 Cubic Metres of AGO imported via MT Torm Almena are therefore misleading and false as the Plaintiff itself advised the Defendant to hold onto the same as it processed the bank guarantee in suitable terms to enable the Defendant release the 944.497 Cubic Metres of AGO and obtain its 801.599 MT of PMS.

14. It is therefore clear that the Defendant has a lien over the AGO petroleum product claimed in the Plaint and is entitled to retain the same until the Plaintiff either offers alternative security for the 801.599 MT of PMS referred to above".

36. On my reading of the above averments Galana is justifying its right to hold onto the OTS product on express instructions from Mogas to do so pending resolution of the erroneous entry. Galana is arguing that Mogas had granted it a right of lien over some of the OTS product. It can be argued for Galana that when Mogas did so, Mogas was aware that the erroneous entry was outside the OTS agreement and that clause 11.6.1 of the said agreement would protect Mogas from Galana insisting on retaining the product. This Court takes the view, and so holds, that the defence by Galana reveals that one answer it sets up to the claim by Mogas is that by granting it an alleged right of lien over the OTS product, Mogas was waiving its right to insist on release of the product expressly provided for in the agreement. Waiver, in my view, is sufficiently revealed as a defence or answer.

37. The second issue raised by Mogas and adverted to by Goyal in his evidence is that Mogas was literally coerced into creating the impugned lien. That at the time Kosgei wrote the email of 26th February 2013, Galana held so much product of Mogas and was threatening to run the Plaintiff out of business. An argument that Mogas was coerced, arm-twisted or blackmailed into creating the lien.

38. This, of course, is a serious allegation made against Galana. It is an allegation that Galana was engaging in quasi-criminal conduct. This not only needed to be pleaded but proved to the standard of proof required of quasi-criminal allegations. That is above a balance of probabilities although not as high as beyond reasonable doubt.

39. This Court has studied all communication exchanged between the Parties leading to the letter of 26th February 2013 and is able to pick out only one communication in which Mogas was complaining about the product held by Galana under the OTS arrangement. It is the email of 16th November 2012 (P Exhibit Page 78) in which Nathan Kosgei writes to Mucheru as follows:-

"Mucheru,

We received the outturn for Merkur O but the product is still under c/o Galana. We paid for the product and all duties last week and our effort to have this product available for sale has been futile. Kindly and urgently advice the cause of this delay and when this document will be available to us.

Best regards,

Nathan Kosgei"

40. That said, neither this nor any other mail can lead to a conclusion that Mogas was blackmailed into writing the letter of 26th February 2013. And in the course of hearing, the author of the letter was not called to explain the circumstances under which he wrote it. Nothing suggests that Mogas attempted to insist on its rights under clause 11.16.1 of the OTS contract. The evidence is far too tenuous for this court to hold, in favour of Mogas, that the crucial letter of 26th February 2013 was obtained through blackmail.

Was a lien created and if so, what was the scope?

41. The parties herein are in agreement as to what a right of lien entails. This Court adopts the meaning and appearing in *Black's Law Dictionary, (10th Edition),*

"*A legal right or interest that a creditor has on another property, lasting usually until a debt or duty that it secures is satisfied"*.

Mogas also alludes to a voluntary lien which is a lien created with the debtors consent. That really is what voluntary lien is (See *Black's Law Dictionary)(Supra).*

42. In this part of the decision, the Court discusses whether a lien was created by Mogas in favour of Galana and if so what was the scope of that lien. The scope simply to mean the duty or responsibility for which the lien was predicated.

43. But first an auxiliary issue to which this Court had touched on earlier. It is common ground that the error that has led to the controversy herein was in respect to products purchased by Mogas International from Galana outside the OTS arrangement. There is also evidence that Mogas as agent of Mogas International received the product under that agreement. It is further common ground that the erroneous and vexing double credit was made in favour of Mogas. Mogas, in its very communication with Galana and KPRL (not in the least the email of 26th February 2013) took responsibility in respect of that matter on behalf of Mogas International.

44. A trail of emails and letters reveals how the dispute that is the subject of this suit unfolded. On 8th August 2012 Galana informs KPRL that it (KPRL) credited Mogas 801.599MT twice. In that mail it requests KPRL to reverse the erroneous credit. On 10th August KPRL informs Mogas that it was planning to reverse the second transaction.

45. Two days later (on 18th August 2012) Mogas asks KPRL for time to finalize reconciliation on its end and confirm its position. This did not happen quickly and on November 2012 (P Exhibit P110) KPRL writes to Mogas confirming the double credit. On 13th November 2012 (P Exhibit Page 111) Mogas asks KPRL whether it had effected the reversal. KPRL responds saying it had not done so.

46. On 16th November 2012, Mogas writes to KPRL stating as follows:-

"*From our previous communication it is evident that,*

1) *The double credit error was from you side (KPRL).*

2) *Mogas only presented one document for our share 801.599 MT.*

3) *Mogas has not drawn this toll product from the refinery till date*.

It is therefore upon KPRL to correct the error and advice the involved parties".

47. This email is of some significance because in it Mogas makes the point that any error is attributable to KPRL and that it had not drawn the product arising from the erroneous credit. As to Galana's position in this regard, Mr. Mucheru stated as follows in his oral testimony to Court,

"*The problem arose because of the change of procedure. The error is attributed to KPRL"*.

48. In respect to whether Mogas benefited from physical uptake of the product, this Court has understood that the procedure then was that an importer would discharge the product from a vessel into KPRL Tanks. So as to move the product to a purchaser, the importer would prepare a document known as an Outturn Amendment which KPRL would use to debit the importer and credit the buyer with the same amount. Galana's evidence is that it did not issue two Outturn Amendments for the product of 801.599 MT.

49. Back to the paper trail. On 16th November 2012, Galana complains to KPRL that the issue of reversal was taking too long to resolve and seeks a confirmation that upon reversal of the error it would receive both book and physical stocks. When it became apparent that the reversal had not been effected Mogas wrote to KPRL on 19th November 2012 seeking to know why this had not been done. In that email Mogas states that it had enough stock balance to cover the reversal. The email ends with this request,

"*Kindly and urgently correct the error before yield shift debits to the accounts. Any corrective measures for feeding the shortfall in*

Mogas account after the final yield shift numbers have agreed shall be sorted out between Mogas and KPRL".

50. It turns out that the reversal could not be a straightforward affair because there was a change of system at KPRL. The details of the changes are not necessary but suffice it to say that Galana argues that so as not to be disadvantaged by the change it had to access the physical product represented by the erroneous entry. That is, a simple reversal on paper stocks was not satisfactory.

51. For Mogas, Goyal testified that whether the reversal was on paper stocks or on yield shift (physical delivery), it had sufficient stock balances to cover the reversal,

"*KPRL manages stocks industry. They were not sure how the yield shift could affect our stock position. We had enough of stock to cover the reversal but KPRL was not sure how much stock would be affected by the yield shift and so requested us to give them a Bank Guarantee to cover the yield shift*".

An explanation that as KPRL requested for a Bank guarantee to cover any negative impact because of the yield shift, it issued a Bank Guarantee in the interest of resolving the festering issue.

52. On 22nd November 2012 Mogas writes to KPRL requesting for the following adjustments to be made,

"***increase Galana/Decrease Mogas – 912.944m3 (703.243MT) –PMS***".

53. By a letter of the same date, Galana confirms to KPRL that the request by Mogas can be affected. However in an email of 14th January 2013, KPRL informs Galana that while a reversal on paper stock would be possible '*physical product will not be available until findings of forensic audit are released and resolution of legality stocks is reached'*.

54. Galana persisted in its demand that it be issued with physical products upon reversal and on 31st January 2013 writes as follows to Mogas:-

Stephen Mucheru

Thursday, January 31, 2013 4.52Pm

Nathan Kosgei

cc. George N. Kahira, Anthony Munyasya, "Ashish Goyal

Subject: Refunds of 801.599 MT PREMIUM

Hello Nathan,

Subject above refers,

Further to mail from KPRL we state our position on subject as below:-

1) It is a fact that you have no PMS stocks at KPRL that you can give us.

2) The proposal that you give KPRL a bank guarantee against which they shall give us paper stocks that we can never access is not tenable.

In view of the above and to bring this issue to a close we propose that you make alternative arrangements to give us equivalent stocks in KPC mainline KPC.

Please revert urgently on the way forward.

Regards,

Stephen *Mucheru*

55. On 26th February 2013 Nathan Kosgei of Mogas writes as follows to Stephen Mucheru of Galana,

"*Stephen,*

As per our meeting this morning kindly release AGO ex Merkur O at Hasni and hold on AGO ex Torm Almena in *Gapco. I have attached copy of Bank guarantee for your perusal as agreed.*

Best regards

Nathan Kosgei".

56. Goyal of Mogas told Court that it was Galana who asked Mogas if they could hold the product until the stock entries were reversed with KPRL. In respect to the above email he testified,

"*We had a credit balance but in the interest of transaction and to maintain an accurate stock we undertook to issue a Bank Guarantee to cover any unlikely exposure on hydrocarbon value*".

57. Galana gives its perspective of the email. Mucheru's testimony was that in a meeting of 26th February 2013, the two parties agreed to that arrangement. It was however his further testimony that Mogas failed to provide a suitable guarantee.

58. That takes us to the events that followed. On 27th February 2013 there was a meeting of the parties after which Galana on 8th March 2013, wrote an email to Mogas. In it Galana asks Mogas to issue a Bank Guarantee to KPRL so that Galana would access physical stocks.

59. Nothing seems to have come out of that meeting and another meeting was held on 18th March 2013 between the parties and under the auspices of the Ministry of Energy. In an email of 22nd March 2013, Galana sets out its understanding of what was agreed as follows:-

"1. That MGS shall issue Bank Guarantee to KPRL whose sole purpose shall be to enable KPRL give physical stock amounting to 801.599 MT PMS to GOKL latest by 4.6.2013 (before the expiry of the Bank Guarantee).

2. The Bank guarantee will have a tenure of three months starting around 20.3.2013 and expiring around 19.6.2013.

3. The wording of the Bank Guarantee shall be proposed by MGS and shall have to be acceptable to both KPRL & Galana Oil.

4. Galana shall immediately release all the SOT stock of MGS upon delivery bank guarantee to KPRL upon KPRL a) accepting to oversee this process and b) confirming receipt of duly executed Bank Guarantee in the pre-agreed format GOKL shall proceed and release the SOT AGO we are currently holding.

5. KPRL shall on or before 4.6.2013 avail to GOKL 801.599 MT of physical PMS stocks against stocks from MGS.

6. In the event KPRL is unable to avail to GOKL physical stocks amounting to 801.599MT because MGS has not availed the same to KPRL, KPRL shall cash the Bank Guarantee and transfer the full proceeds of the Bank Guarantee to GOKL nominated bank account without any offset or deductions. KPRL has to cash the Bank Guarantee at least 10 working days before it expires.

7. A tripartite agreement between MGS, GOKL and KPRL shall be prepared & executed by all parties binding them to this arrangement".

60. However Mogas understood things a little differently and returned an email on 2nd April, 2013 with points allegedly missed out:-

"*In addition to Mucheru mail below see additional comment not captured but crucial in resolving this issue.*

1. *That MGS shall issue a Bank Guarantee to KPRL whose sole purpose shall be to enable KPRL*

· *Immediately effect the PMS ASE between Mogas and Galana on Toll stocks amounting to 801.599 MT PMS and correct Toll stock anomalies.*

· *Cover KPRL exposure as a result of effecting PMS ASE (transferring the paper stock in favour of Galana). Mogas liability shall be limited to Global negative HCV at KPRL after final yield shift number.*

2. *The Bank guarantee will have a tenure of three months starting around April 2013 and expiring around June 2013.*

3. *The wording of the Bank Guarantee shall be proposed by Galana and shall have to be acceptable to both KPRL and Mogas.*

4. *Galana shall immediately release all SOT stocks they are holding ie. 944.223m3 of AGO ex MT Torm Almena at Gapco Terminal/Depot and 180.801m3 of AGO ex MT Merkur O in Hashi terminal/Depot to Mogas upon delivering, acceptance and confirmation of bank guarantee by KPRL.*

5. *KPRL shall avail to GOKL 801.599 MT of physical PMS stocks.*

6. *A tripartite agreement between MGS, GOKL and KPRL shall be prepared and executed by all parties binding them to this arrangement".*

61. On 15th April, 2013, Galana writes to the Ministry of Energy complaining about the apparent reluctance of KPRL to get involved in the

settlement arrangement. It therefore proposes to proceed as follows:-

> "In view of the foregoing and in order to close this issue at the earliest we propose to proceed with the other options discussed in our March 18th 2013 namely:-
>
> a) MGS issues the Bank Guarantee directly to GOKL against which they refund the PMS to GOKL in three installments.
>
> b) If MGS does not issue the Bank Guarantee to GOKL within a week, GOKL to sell the SOT AGO they are holding at Hashi and Gapco Terminals and use the funds to procure the PMS".

62. A meeting was subsequently held between Galana and Mogas. Galana followed up the meeting with an email of 17th April 2013 (D Exhibit page 134) as follows:-

> "Stephen Mucheru
>
> April 17 2013
>
> Subject: REFUND OF 801.599 MT OF PREMIUM BY MOGAS KENYA LTD TO GALANA
>
> Hello Ashish,
>
> Further to a meeting held in our offices today 16.4.2013 between Galana Oil Kenya Ltd (GOKL) and Mogas Kenya Ltd (MGS) it was agreed as follows:-
>
> 1. That in the event KPRL shall not have given a commitment to facilitate the option agreed on by MGS & GOKL during the meeting held at MOE on 18.3.2013 by COB today, 17.4.2013, then this option shall be considered unworkable and the parties shall move to option 2.
>
> 2. Option 2 involves MGS issuing the Bank Guarantee (BG) directly to GOKL within seven (7) days from 16.4.2013. With this BG, MGS shall undertake to refund GOKL 801.599 MT PMS in three (3) tranches by 16.7.2013 latest.
>
> 3. Once BG is in place GOKL to release AGO held at SOT to MGS.
>
> 4. If MGS does not establish the BG by 24.4.2013, then option 3 shall kick in whereby GOKL shall sell the AGO and use the funds to buy the 801.599 MT PMS.
>
> 5. An agreement shall be executed by MGS & GOKL to cover above understanding.
>
> Kind Regards
>
> Stephen Mucheru

63. In his testimony Goyal refutes that there was such an agreement and that the email contained a proposal from Galana and not an agreement. He however admits that he did not write a letter disputing the contents of the email. As it turned out this suit was filed 3 days after the meeting.

64. From the evidence before Court this Court has been able to draw a conclusion that Mogas on its own volition, choose to step into the shoes of Mogas International to resolve the issue of the double credit made to Mogas. It is also not in contest that the double entry that afflicted Galana was an error by KPRL and the blame falls on its shoulders.

65. Two issues are less clear. First what was the effect of the double entry? Was it merely a book entry as asserted by Mogas or did Mogas actually benefit twice by lifting actual product as argued by Galana? Mogas repeatedly and as early as 15th August 2012, insisted that it was merely a book error.

66. On its part, Galana's lawyers submit that there was actual physical stock released to Mogas and points out to KPRL statements (D page 85 and 96) and an email from KPRL (D page 110) as evidence of this. However there is nothing to prove that this is not just the book entry. Neither Galana nor KPRL, reacted by production of proof, to the assertion by Mogas in its email of 16th November 2016 that "*Mogas has not drawn this toll product from the refinery till date"*.

67. A second issue is whether Mogas dragged on unnecessarily before confirming the error, that a toll regime change at KPRL caught up with the intended reversal from KPRL and that Mogas must take responsibility. There is evidence that while Galana first raised the issue with Mogas on 9th August 2012 (D page98) it was not until November 2012 that Mogas gave KPRL the go ahead to correct the error. Galana's case is that this delay was unnecessary but Mogas insists that it was caused by the fact that it involved reconciling old accounts. What is clear however, is that by November 2012 the regime had changed and effecting the reversal would no longer be a straightforward matter.

68. Whatever is to be said about whether Mogas unjustly benefited from the double entry or whether it was to blame for the delay, Mogas offered to help resolve the issue and this was manifest when on 22nd November 2012 (D page 115) it requested to KPRL to effect the adjustment that would cure the error.

69. The solution was not forthcoming and on 26th February 2013 Mogas wrote as follows to Galana:-

> "*Stephen,*
>
> *As per our meeting this morning kindly release AGO ex Merkur O at Hashi and hold on AGO ex Torm Almena in Gapco. I have attached copy of Bank guarantee for your perusal as agreed*".

Mogas expressly asked Galana to hold on the AGO ex Torm Almena. Although it was not explicit on what terms Galana was allowed to hold to the product, the purported issuance of a Bank Guarantee would suggest that Mogas was allowing Galana a lien over that product to give Galana an opportunity to resolve the issue with KPRL.

70. Crucial however, is whether the lien was open ended or indefinite. Put differently, was it subject to Galana getting a satisfactory solution?

71. It is common ground that Galana was insisting on physical products and an arrangement needed to be worked out so that KPRL would accede to that request. So in the meeting held between Mogas, Galana and the Ministry of Energy on 18th March 2013 and emails that followed showed that there was a broad agreement on how to move the matter.

72. The Court uses the term "broad agreement" because it took 3 emails to set out the exact parameters of the arrangement. In the last email of 2nd April 2013, which Mucheru (paragraph 47 of his witness statement) does not dispute, captures some of the aspects of the agreement as follows:-

> *1. That MGS shall issue a Bank Guarantee to KPRL whose sole purpose shall be to enable KPRL;*
>
> *· Immediately effect the PMS ASE between Mogas and Galana on Toll stocks amounting to 801.599 MT PMS and correct Toll stock anomalies.*
>
> *· Cover KPRL exposure as a result of effecting PMS ASE (transferring the paper stock in favour of Galana). Mogas liability shall be limited to Global negative HCV at KPRL after final yield shift number.*
>
> *2. The Bank guarantee will have a tenure of three months starting around April 2013 and expiring around June 2013.*
>
> *3. The wording of the Bank Guarantee shall be proposed by Galana and shall have to be acceptable to both KPRL and Mogas.*
>
> *4. Galana shall immediately release all SOT stocks they are holding ie. 944.223m3 of AGO ex MT Torm Almena at Gapco Terminal/Depot and 180.801m3 of AGO ex MT Merkur O in Hashi terminal/Depot to Mogas upon delivering, acceptance and confirmation of bank guarantee by KPRL.*
>
> *5. KPRL shall avail to GOKL 801.599 MT of physical PMS stocks.*
>
> 6. *A tripartite agreement between MGS, GOKL and KPRL shall be prepared and executed by all parties binding them to this arrangement.*

73. Two weeks later this arrangement had not been implemented and the letter of 15th April 2013 is telling as to who takes responsibility for the failure to implement. The letter makes mention of the meeting of 18th March 2013 and of the agreement that Mogas would issue a Bank Guarantee to KPRL whose sole purpose was to enable KPRL give Galana physical stock amounting to 801.599 MT PMS to GOKL latest by 4th June 2013. Galana was to write to KPRL for them to confirm their willingness to undertake the settlement arrangement.

74. In that letter of 15th April, 2013 Galana laments,

> "*GOKL wrote to KPRL on March 22nd 2013. But despite constant remainders KPRL is yet to revert. This delay has led us to believe that KPRL is not ready or willing to get involved in the settlement arrangement*".

75. Galana sees KPRL as the problem and says so unequivocally. Galana does not blame Mogas for the failure. And Galana may not have had reason given that in two emails by Mogas, the latter one being of 2nd April 2012, Mogas showed its willingness to go along with the arrangement. The averment by Galana in paragraph 18 of its Defence (and repeated in 3T of the counterclaim) that Mogas had frustrated the arrangement is thus not borne out by the contents of its own letter of 15th April 2013 to the Ministry of Energy.

76. There is no consensus by the parties as to what happened thereafter. Galana in its letter of 15th April 2013 indicates its intention to proceed with other options discussed on 18th March 2013. Mogas denies any agreement on the "other options". Curious though is that in the three emails exchanged by the two in respect to meeting of 18th March 2013 and which supposedly penned down the agreement reached, the alleged second option is not mentioned. This Court has to find that there is lack of sufficient evidence to prove that the said option was on

the table or agreed.

77. There was however a further meeting of 16th April, 2013 between Galana and Mogas which was followed by an email of the same day by Mucheru to Goyal. The contents of the email were:-

> "Stephen Mucheru
>
> April 17 2013
>
> Subject: REFUND OF 801.599 MT OF PREMIUM BY MOGAS KENYA LTD TO GALANA
>
> Hello Ashish,
>
> Further to a meeting held in our offices today 16.4.2013 between Galana Oil Kenya Ltd (GOKL) and Mogas Kenya Ltd (MGS) it was agreed as follows:-
>
> 6. That in the event KPRL shall not have given a commitment to facilitate the option agreed on by MGS & GOKL during the meeting held at MOE on 18.3.2013 by COB today, 17.4.2013, then this option shall be considered unworkable and the parties shall move to option 2.
>
> 7. Option 2 involves MGS issuing the Bank Guarantee (BG) directly to GOKL within seven (7) days from 16.4.2013. With this BG, MGS shall undertake to refund GOKL 801.599 MT PMS in three (3) tranches by 16.7.2013 latest.
>
> 8. Once BG is in place GOKL to release AGO held at SOT to MGS.
>
> 9. If MGS does not establish the BG by 24.4.2013, then option 3 shall kick in whereby GOKL shall sell he AGO and use the funds to buy the 801.599 MT PMS.
>
> 10. An agreement shall be executed by MGS & GOKL to cover above understanding.
>
> Kind Regards
>
> Stephen Mucheru

78. As stated earlier, Goyal did not respond to this letter and this suit was filed 3 days later. Goyal denies that there was an agreement in those terms. It is therefore the word of one against the other. And since it would seem that by its own mail, Galana states that an agreement was to be executed by the two to cover the understanding and no such agreement was ever executed, the Court is constrained to find that no firm agreement was reached by the two in that respect.

79. Given this Court's appreciation of the facts it is able to deduce the following:-

(i) KPRL was to blame for the double entry that has caused the crisis that is the subject matter of this suit.

(ii) Whether or not Mogas did not act promptly in cooperating on the reversal and was therefore to blame for the non-reversal before the system changed may not be relevant because Mogas took it upon itself to help resolve the matter.

(iii) In doing so, Mogas created a voluntary lien in favour of Galana.

(iv) After some push and shove, the solution that was arrived at was that in the meeting of 18th March 2013 and the agreement reached is captured on the emails of 22nd March 2013 and 2nd April, 2013.

(v) It is evident that Mogas was willing to play its part by giving the Bank Guarantee but KPRL needed to accede to the arrangement.

(vi) Clear, as well, is that from the letter of 15th April 2013, Galana blames KPRL and not Mogas for frustrating the implementation of the arrangement.

80. It would seem, and this Court holds, that Mogas cannot be blamed for the collapse of the arrangement that would have enabled a just settlement of the problem that the double entry had created. Galana blamed KPRL. KPRL was not a casual observer in this matter because both Galana and Mogas attribute the error to KPRL. It is in these circumstances that the Court holds that Mogas by showing its willingness to cooperate in the implementation of the agreement of 18th March 2013 (as captured in the three emails) had discharged the obligation for which the lien was predicated. The lien was not open ended. It was not a surrender by Mogas of its product at whatever cost. It was pegged upon Mogas cooperating to correct the error and as the evidence reveals Mogas did so. It would be unjust to visit KPRL's failure to accede to the arrangement on Mogas.

81. In making this finding the Court bears in mind two aspects of this case. First that there is no evidence that Mogas benefited from the double entry. There is no proof that, because of the erroneous entry, it received physical stock twice. If it had, then the Court would not have been sympathetic to Mogas because to do so would be to unjustly enrich it.

82. Secondly, whilst the system change complicated the reversal process, there is nothing placed before this Court to prove that KPRL could not be held responsible by Galana in April 2013 when it refused to cooperate. KPRL shouldered the blame. Galana itself said so. This Court is not told why, at that time, Galana would not seek to recover its loss from KPRL. This Court notices though, that Galana had joined KPRL as a co-defendant to Mogas in the Counterclaim but choose to withdraw its claim against KPRL.

83. In the end the Court finds that the lien given by Mogas was limited to it cooperating so that KPRL would reverse the double entry and release physical stock to Galana. Having demonstrated its willingness to do so, Galana was and is not entitled to continue holding the product.

84. In its Pleadings the Plaintiff seeks the following prayers:-

a) An order restraining the Defendant by itself or any of its agents from selling the 1,125.298 cubic meters of GASOIL (AGO) already paid for by the Plaintiff and stored in the depots of Hashi Energy and Gapco in Mombasa in the respective quantities stated above, pending hearing and determination of this suit.

b) An order compelling the Defendant to release the 1,125.298 cubic meters of petroleum product (AGO) held by them, to the Plaintiff who has fully paid for it.

c) Aggravated and punitive damages for unlawfully withholding Plaintiff's product already fully paid for.

d) Special damages as hereunder:-

i) Compensation for lost business opportunities Kshs.17,841,150.

ii) Compensation for price change Kshs.10,445,000.

iii) Financing cost of @ 18.00% pa from 14th Nov 2012 to the date of judgment for financing the stock worth Kshs.105,226,000 Ex vessel Merkur O.

iv) Financing cost of @18.00% pa from 20th Feb 2013 to the date of judgment for financing the stock worth Kshs.88,221.000 Ex vessel Torm Almena.

v) Interest on the decretal sum from the date of judgment till the payment is made in full at the commercial rate.

e) Costs of the suit.

f) Any other relief this Honourable Court may deem fit to grant.

85. It is common ground by both Mogas and Galana that in the nature of the petroleum industry prices of products change from time to time. In the witness statement of 31st May 2017, Goyal placed the value of unreleased stock at US$ 1,243,085.00 at the time of purchase in 2012. However, that owing to price reduction the value had reduced to US$ 839,612. In its own pleadings, Galana had sought Kshs.39,973,167.00 reflecting the loss resulting from price variation.

86. The general philosophy behind an award for breach of contract is that a breaching party is liable for all losses that the contracting parties could have foreseen. However, it is not liable for losses it could not have foreseen on the information available (Hadley v. Baxendale [1854] EWHC J70).In the matter at hand, a foreseeable loss would be a negative variation in the price of the withheld product. It is therefore apparent that to merely order the release of the product, without more, may leave Mogas in a worse place than it would have been in the year 2012 when it paid for the product.

87. In its prayers Mogas had asked for compensation resulting from the price change. The price on 18th April, 2013 when the pleading was filed may not be the same as at the time of release. In fairness, therefore, the Court will order that in addition to releasing the product, Galana meets any loss resulting from a price change.

88. Mogas had made a further claim for loss of business opportunities and financing costs. Neither was proved and the Court grants nothing for this.

89. If I had held in favour of Galana I would have made similar orders, but with a tweak to fit its circumstances. The Court would have granted Galana authority to sell the product it is holding at current market prices and a further order for any loss resulting from price variation. Just like Mogas, Galana did not prove the finance costs claimed.

90. These are the orders of the Court:-

(1) The Defendants counterclaim is dismissed with costs.

(2) Judgment is entered for the Plaintiff as follows:-

(2.1) An order is hereby issued compelling the Defendant to release 1,125.298 cubic meters of petroleum product (AGO) to the Plaintiff within 30 days of this judgment.

(2.2) 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.

(2.3) If the parties are unable to agree on the price variation, then either party is at liberty to move the Court to prove the loss, if any.

(2.4) If for whatever reason the Defendant is unable to release the product referred to in 2.1 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.

(3) The Plaintiff shall be entitled to interest on any unpaid sum at Court rates from the date of judgment until payment in full.

(4) The Plaintiff shall also have costs of this suit.

Dated, Signed and Delivered in Court at Nairobi this 27th day of June, 2019.

.....

F. TUIYOTT

JUDGE

PRESENT;

Masika for Defendant

Waitere for Plaintiff

Nixon – Court Assistant