REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 188 OF 2015

ORYX ENERGIES KENYA LIMITED……..…...PLAINTIFF

VERSUS

MASTERMIND KENYA LIMITED……..…….....DEFENDANT

RULING

1. This ruling relates to a Notice of Motion Application dated 23rd June 2016, brought under Section 1A, 1B, and 3A of the Civil Procedure Act, Order 2 Rule 15(1) (b), (c) and (d) and Order 51 Rule 1 of the Civil Procedure Rules 2010. It is based on the grounds on the face of it, and an affidavit sworn by Robert M. Mutuma.

2. The Defendant (herein "Applicant") is seeking for orders that:

- ***The suit and pleadings hereof be struck out and/or dismissed, and***
- ***The costs of the Application be provided for.***

3. The background facts of the case are that, pursuant to Section 126(2) of the Environmental Management and Coordination Act, the Applicant in exercise of its statutory right, lodged an Appeal, vide NET 109 of 2012, between the Applicant and National Environmental Management Authority, with the National Environmental Tribunal in relation to the Environmental Impact Assessment Licence issued to the Plaintiff. The Licence issued on 26th November 2012, was in respect of the construction and maintenance of a Liquidified Petroleum Project (hereinafter "LPG Project") on L.R. NO.12715/604, Syokimau, within Machakos County. Subsequent to the filing of the Appeal, the Plaintiff raised a Notice of Preliminary Objection dated 19th December 2012, seeking for the dismissal of the Appeal on the grounds that it was time barred. However, the Preliminary Objection was dismissed vide a Ruling delivered on 30th January 2013.

4. Being dissatisfied with the said ruling, the Plaintiff filed an Application dated 12th June 2013, seeking to vary and/or set aside the ruling. The Application was also dismissed vide a Ruling delivered on 31st December 2013. The Plaintiff then appealed against both Rulings through a case **Civil Appeal No. 81 of 2013** and **No. 1 of 2014**, between the Plaintiff and National Environmental Management Authority versus the Defendant. The Environment and Land Court Division of the High Court, heard the two Appeals, and allowed the Appeal in relation to the Ruling delivered on 6th August 2014, with costs to the Plaintiff. The Plaintiff then filed a Bill of Costs being the costs for the Appeals dated 22nd December 2014, drawn at Kshs.26, 727,611.21, which was taxed at Kshs.9, 653,999.33, by the Taxing Officer through a Ruling

delivered on 30th March 2016.

5. Subsequently the Plaintiff filed the suit herein. The Applicant argues that since the Plaintiff has been awarded costs as aforesaid, it's claim for compensation for alleged loss occasioned by the Applicant is *Res judicata*. That, the suit is thus scandalous, frivolous, vexatious, it will prejudice the Applicant, and it is meant to delay the fair trial of the action. It is otherwise an abuse of the court process.

6. Further, the suit is fundamentally defective and lack in merit. That ***"it is so hopeless that it plainly and obviously discloses no reasonable cause of action, it is oppressive, and tends to cause the Defendants unnecessary anxiety, trouble, and expense. It is further so weak beyond redemption and incurably by whatever amount of amendment".*** The Applicant argues that, this Court not being and Environmental and Land Court, it lack jurisdiction to hear and determine the suit in the first instance or at all. Hence, the suit should be struck out and/or dismissed with costs to the Applicant.

7. The Application was opposed vide a Replying Affidavit sworn by Edward Rutto, a Project Manager of the Plaintiff Company, dated 5th August 2016. He deposed that, the Defendant's Application is made in bad faith and is an attempt to subvert the Plaintiff's legitimate claim and/or delay the determination of this suit. He averred that, despite the issuance of costs as aforesaid, the present proceedings relate to a distinct and legally separate claim founded on financial loss arising from the malicious proceedings instituted by the Applicant and National Environmental Management Authority Tribunal in the form of an Appeal filed out of time. That, as a direct result of the proceedings the Applicant instituted National Environmental Tribunal and obtaining stop orders against the Plaintiff/Respondent's construction of the LPG Plant, which was at an advanced stage, the Plant came to a grinding halt, causing the Plaintiff substantial monetary loss. Therefore the remedy sought for in the present suit is in the form of damages for malicious prosecution and loss of profits. The concepts of costs and damages are completely distinguishable under law. That costs follow the event, and costs awarded were only with respect to the particular proceedings and do not cover damages claimed in respect of loss suffered as a result of the proceedings herein. As such this Court is properly seized of this matter. The contention that this court lacks jurisdiction is founded on misapprehension of the Plaintiff's claim and is therefore misplaced, misconceived and bad in law. The dismissal of the suit would greatly limit the Plaintiff's right to be heard under Article 50 of the Constitution of Kenya. The Application should thus be found to be a sham and an afterthought and be dismissed with costs to the Plaintiff/ Respondent.

8. The Applicant filed a Supplementary Affidavit sworn by Robert M. Mutuma in response to the Replying affidavit and deposed that, an action for malicious prosecution as alluded to by the Plaintiff in Paragraph 5, 9, 10, and 17 of the Replying Affidavit, precedes a criminal suit, and the proceedings before National Environmental Tribunal were civil in nature. That, ***"A claim for damages for unlawful arrest, false imprisonment and malicious prosecution, is instituted by the Attorney-General, since it is the responsibility of the Police to investigate the complaint"***, and prosecute it. That, the claim for loss of profit, is not a cause of action, known in law, but rather a consequent relief or order or prayer sought on a particular cause of action. Hence, the suit herein raises no reasonable cause of action and is a clear recipe for dismissal.

9. The Parties agreed to canvass the Application through written submission. The Applicant's submissions were filed on 20th September 2016 and the Respondent's on 10th September 2016. I have fully considered the same in this ruling. However, before I proceed to identify and determine the key issues herein, I wish to make an observation that, most of the information detailed out in the Affidavits sworn by the respective parties, was a reproduction of the pleadings and/or matters canvassed in the previous proceedings before the National Environmental Tribunal or the Nairobi High Court Division of Environmental and Land Court. This fact is alluded to by both parties as follows, under Paragraph 6 of the Replying Affidavit, the Respondent states that:

> ***".....that the issues raised in Paragraph 5 of the Supporting Affidavit are irrelevant to these proceedings as they are merely a regurgitation of the Defendant's allegations before the Tribunal which have been fully and finally adjudicated upon by the High Court in Civil Appeals No. 81 of 2013, and No. 1 of 2014. The issues raised in the said paragraph are res judicata".***

10. The Applicant on the other side, under paragraph 9 of the Supplementary Affidavit states that;

> ***"……recitals contained in paragraphs 10 – 16 of the Replying Affidavit sworn on 5th August 2016, are copy paste from recitals contained in the Plaintiff's Application dated 7th December 2012, in NET 109/ 2012 which Application was dismissed by the Tribunal but allowed on Appeal by the Environment and Land Court on……."***

11. The Court will not fall into the trap of delving into the merits of the suit at this interlocutory stage. The matters raised in relation of the same will be left to rest where it has fallen.

12. However upon consideration of the arguments advanced by the respective counsel in relation to the Notice of Motion Application herein, I find that, the issues for determination are basically whether:

- **The Applicant has met the threshold for striking out the pleadings and/or the suit herein;**
- **The pleadings/suit herein should be struck out; and**
- **The costs should be awarded.**

13. The procedural provisions that guide the striking out of pleadings are found under Order 2 Rule 15 of Civil Procedure Rules 2010 which states that:

> ***i. "At any state of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-***
>
> ***(a) It discloses no reasonable cause of action or defence in law; or***
>
> ***(b) It is scandalous, frivolous or vexatious; or***
>
> ***(c) It may prejudice, embarrass or delay the fair trial of the action; or***
>
> ***(d) It is otherwise an abuse of the process of the court.***
>
> ***And may order the suit to be stayed or dismissed or judgement to be entered accordingly, as the case may be".***

14. In the cases of; **James Kimani Kabogo Vs Kenya Commercial Bank Ltd & Another (2014) eKLR**, and **Samuel Ndungu Mukunya Vs Nation Media Group Ltd & Another 2012 eKLR,** the Court has held that the striking out of pleadings by the Court should be exercised cautiously and with a lot of restraint. The power to strike out pleadings must be exercised sparingly, and only in clear, obvious and plain cases. Thus the pleadings must be prima facie hopeless in the eyes of a reasonable prudent man in the given circumstances. This is informed by the fact that, the Defendant should not be denied the right to ventilate the defence. It is a constitutional right under Article 48 and 50 of the Constitution of Kenya. The right to be heard, is thus a basic requirement of natural justice, that a person must not be condemned unheard and that a litigant should not be driven away from the seat of justice. As such, a defence that raises even a single triable issue should be allowed to proceed to a full hearing, whether it succeeds or not.

15. Further reference was made to the cases of; **Yaya Towers vs Trade Bank Ltd (in liquidation) 2000 eKLR; Crescent Construction Co. Ltd Vs Delphis Bank Ltd 2007 eKLR** and **Naglers Feilden & others (1966) 2 QB 633 at 651;** where the Court has held, that it is unfair to drag a person to the seat of justice when a case purportedly brought against him is a non-starter; or where the claim is an abuse of the court process.

16. I find that in the instant case, the Applicant relies on two grounds under Order 2 Rule 15 (supra). That the suit;

- ***Discloses no reasonable cause of action or defence in law; and***

- ***It is otherwise an abuse of the process of the Court.***

17. On the first ground, the Plaintiff's contention is that, the suit herein is founded on malicious prosecution which is criminal in nature as stated herein before. The Applicant relied on the case of **Douglas Odhiambo Apel & Another Vs Telkom (K) Limited & 2 others (2006) eKLR** to support the argument that the claim of malicious prosecution lies against the Attorney General alone. The Plaintiff reiterated that a claim for loss of profit is not a cause of action but a consequent relief or prayer pegged on a cause of action.

18. In rebuttal, of the Applicant's argument, the Plaintiff maintained that it was subjected, to improperly instituted legal proceedings which naturally grieve be they civil or criminal proceeding. The Plaintiff quoted heavily from **Clerk & Lindsell on Torts 18th Edition at page 821**, to submit that there are three sorts of damage to a claimant, any of which is sufficient to support an action of malicious prosecution. The one applicable is damage to the claimant's property, whereby he/she is put to charges and expenses. That the extension of the tort of malicious prosecution to civil proceedings was confirmed in the case of **Stephen Gachau Githaiga & Another Vs Attorney General (2015) eKLR** where the Court held:-

> ***"Malicious prosecution is an action for damages brought by one against whom a civil suit or criminal proceeding has been unsuccessfully commenced without Probable Cause and for a purpose other than that of bringing the alleged offender to justice.***
>
> ***An action for malicious prosecution is the remedy for baseless and malicious litigation. It is not limited to criminal prosecutions but may be brought in response to any baseless and malicious litigation or prosecution, whether criminal or civil. The criminal defendant or civil respondent in a baseless and malicious case may later file this claim in civil court against the parties who took an active role in initiating or encouraging the original case. The Defendant in the initial case becomes the Plaintiff in the malicious prosecution suit, and the Plaintiff or prosecutor in the original case becomes a defendant".***

19. The Plaintiff argued that, under paragraphs 14 and 15 of the Plaint, detailing the particulars of loss of profits incurred, that the claim only comes as a result of the Defendant's action. Therefore the Plaintiff does not plead loss of profits as a separate and distinct cause of action as suggested by the Defendant. The loss of profits claimed is merely resultant.

20. I shall now consider the rival arguments on the second issue as to whether the suit is an otherwise abuse of the Court process. The Applicant submitted that, the Plaintiff's case is a non-starter, and an abuse of the court process. A Person cannot be condemned to pay damages for malicious prosecution and loss of profit, merely for exercising its statutory right. That, the Applicant herein was merely exercising its statutory right under Section 126(2) of the Environmental Management and Coordination Act, when it appealed to the National Environmental Tribunal in NET 109/12 as aforesaid. The Applicant reiterated that, the suit is an abuse of the court process, as the Court lacks jurisdiction to investigate evidence of malice on the part of the Defendant. The Applicant insisted that, the suit herein concerns the environment and use of land and occupation whose jurisdiction lies with the National Environment Tribunal or the Environment and Land Court; Division of the High Court. The case of **Mudanya Kisanya Peter & Another Vs Speaker of the National Assembly (2015) eKLR** was cited as a reference.

21. Finally, the Applicant submitted that, the ***"dispute in respect of Environmental Impact Assessment Licence issued to the Plaintiff on 7th March 2012 to construct and maintain a LPG was already determined".*** The Preliminary Objection and Application filed by the Plaintiff to vary or set aside the various ruling were dismissed, save for the Application allowed in ***Civil Appeal No. 81 of 13 (supra)***. After the Taxing of the Bill of Costs, the Plaintiff is precluded from making any other claim, on the basis of filing an Appeal out of time by the Defendant, as the same has already been determined. The Applicant made reference to the decision in the following cases in support its argument that the matter herein is Doctrine of *Res Judicata*.

- ***State of Karantaka & Another Vs All India Manufacturers Organization & Others MANU/SC/***

2206/2006, 4 SCC 683, AIR 2006 SC 184;

- ***Escorts Farms Ltd (M/S Escorts Farms (Ramgarh) Ltd Vs Commissioner, Kumaon Division Nainital U.P. & Others. MANU/SC/1044/2004 – 4 SCCC 281; (AIR 2004 SC 2186)/];***
- ***Nancy Mwangi t/a Worthlin Marketers Vs Airtel Networks (K) Ltd (Airtel (K) Ltd) & 2 Others 2014 eKLR;*** and
- ***Henderson Vs Henderson (1843) 1843 67 ER 313***.

22. In response, to the above issues, the Plaintiff/Respondent submitted that, the Defendant/Applicant has sought to reopen matters fully and finally determined, in the **Civil Appeal NO. 81/13** and **No. 1/14**, to argue that the suit herein is an abuse of the court process and *Res Judicata* under Section 7 of the Civil Procedure Act. That the Maxim of *"interest reipublicae ut sit finis litium"* – in the interest of society as a whole, litigation must come to an end. This maxim will play in vital role in decision making herein. That this was relied on in the case of Julius Kariuki Mungai Vs Baluga Ltd & Another (2004) eKLR. Thus the Decision of the High Court Ruling delivered on 6th August 2014, closed the door on the issues raised by the Defendant.

23. The Plaintiff reiterated that, the Plaintiff herein has sought for USD.4,956,721.61 as well as costs of the suit. The costs awarded, were in a different distinct matter. Finally, the Plaintiff submitted that, as already stated in the Replying Affidavit, this Court has jurisdiction to hear and determine the suit herein. This suit is founded on tortuous liability and the issues regarding the validity of the Environmental Impact Assessment (EIA) Licence were determined in the Environment and Land Court. Neither is this suit an Appeal of the decision of the National Environmental Management Authority Tribunal.

24. All in all the law is trite that, the striking out of a suit is a draconian act. As already said it has to be applied as a last resort, and where indeed a pleading raises even a single issue, then, the party who has filed such pleadings must be allowed not only to enter the temple of justice but approach the seat of justice. The merit of such a pleading or lack of it can only be determined upon full trial. It is in the interest of the Parties to prosecute the main suit.

25. It's unfortunate that, lately Parties file numerous Applications, rightfully though, supported heavily by Affidavits, bundles of documents and several cited authorities and as much as this is a right, what is emerging in practice is that, these Applications and the supporting documents are turned into mini-trials through Affidavit evidence which could be useful in the main hearing.

26. In the instant matter, I note that, the Parties have heavily relied on the proceedings in the previous matters. The issues both parties raised relating to *Res Judicata*, Costs awarded, and jurisdiction can only be fully ventilated, if the court hears the main suit. At that point Court will deal with inter alia; the following questions:

i. What was the subject matter therein before the National Environmental Management Authority Tribunal and/or Environment and Land Court about?

ii. What is the exact claim herein? Was it adjudicated on, by the previous arbitral and judicial bodies that heard the previous Applications?

iii. What were the costs awarded herein in respect of?.

iv. Is the claim herein based on malicious prosecution? If so, is it a criminal or civil claim?

v. Is the claim herein of loss of profit well founded? Is it criminal, civil and/or already dealt with by award of costs in the High Court Ruling delivered by Environment and Land Court?

27. All these questions cannot be answered on Affidavit evidence. In fact, when I read through the submissions, it became crystal clear that, the parties are inviting the Court to interrogate the issues. That interrogation can only be done through a full trial. If anything be the case, the Applicant is not lost of an opportunity to sustain the issues raised in this Application. At the main hearing of the main suit, the

Defendant will have an opportunity to canvass these issues. In that case, I shall not strike out the pleadings/suit herein. The matter should now be prepared for full hearing at the earliest opportunity and on priority basis. The costs of this Application shall abide the outcome of the main suit.

28. Those then are the orders of the Court.

Dated, signed and delivered on this 25th day of May 2017 in Open Court at Nairobi.

G. L. NZIOKA

JUDGE

In the presence of

Ms. Woodward for Mr. Jelle for the Plaintiff

Mr. Okumu for the Respondent

Teresia Court Assistant.