REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA **

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 115 OF 2016

BGP KENYA LIMITED.....PLAINTIFF

VERSUS

EAST AFRICAN EXPLORATION (K).....DEFENDANT/RESPONDENT

RULING

1. BGP Kenya Limited (The Plaintiff) is anxious that a sum of US$.2,059,026.50 owed to it by East African Exploration (Kenya) Ltd be settled and has commenced this action in that regard. Filed alongside the Plaint, is a Notice of Motion dated 13th April 2016 brought to Court under urgency.

2. This ruling is in answer to that Motion whose substantive prayer is for:-

- A temporary injunction be issued restraining the Defendant by itself, agents, servants, employees or otherwise howsoever from selling, disposing, alienating and/or in any manner whatsoever transferring its Oil Exploration Blocks in Kenya, known as Block No.L17, L18 and BLOCK 1, pending the hearing and determination of this suit.

3. The facts giving raise to this action are not involved and many aspects are agreed. The Government of Kenya is desirous of accelerating the exploration and development of potential Petroleum resources. As part of its programme, the Government entered into Production Sharing Contracts (PSCs) with the Defendant relating to certain Oil Exploration Blocks. Nothing turns on the details of those Contracts save to note that one incident of termination of the Contracts is if the Defendant became insolvent, or makes a composition within Creditors or goes into liquidation other than for reconstruction or amalgamation. Of significance as well is that any assignment of the Assets to be carried out pursuant to the PSCs must receive the consent of the Minister for the Time Being Responsible for Energy.

4. Between December 2014 and May 2015, the Defendant contracted the Plaintiff to carry out 2D Seismic Services on oil Exploration Blocks No. L17 and L18 which are subject to the PSCs. Those contracts were contained in two written Agreements dated 10thDecember 2014 and 10th May 2015.

5. The Plaintiff performed the services under the Contracts and there is an unsettled sum of US$ 2,059,026.50 in respect thereof. It is the contention of the Plaintiff that notwithstanding numerous promises, the amount remains due and owing.

6. What must have precipitated the filing of the suit is the Defendant's intention to divest its Assets in the PSCs to a third party, Octant Energy Corporation (Octant). Indeed, the two entities have concluded the negotiations for the sale and have entered into two (2) Sale and Purchase Agreements (SPAs). The Plaintiff was not kept in the dark about the decision made by the Defendant and a proposal was put for part payment of the Debt. In the Replying Affidavit sworn by Jeremy Martin on 27th May, 2016 on behalf of the Defendant, it is explained as follows:-

> 7. 'THAT as a result of its parent company Afren going into insolvency the Joint Administrators have commenced the managed divestment of all assets owned by the Afren group in order to realise value. The Afren group is no longer able to fund EAXKL's operations. As part of this managed divestment process EAXKL has wound down its operations in Kenya, and apart from the Assets there are no other material assets which the company owns in Kenya'.
>
> 8……..

9…….

10……

11 'THAT as a result of the intended sale and the proceeds anticipated to be realised (which are substantially less than the aggregate sum owed to EAXKL's creditors), EAXKL approached its Trade Creditors (including BGP) with a view to arriving at settlement agreements for the respective debts owed to them as required under the SPAs. From the anticipated proceeds it was proposed that the Trade Creditors accept a settlement of 25% of their total debt. The balance of the sale proceeds were then proposed to be paid to the Intercompany Creditors, a proposed payment to them of approximately 4% of their total debt. Over 90% in value of EAXKL's Trade Creditors (excluding BGP) have expressed strong support for the settlement proposal and have intimated that they will accept the settlement.

The Plaintiff is displeased with that proposal and rejects it.

7. At the hearing of the Application Mr. Agwara for the Plaintiff asserted that there is no justification for the Defendant settling only part of the debt as the Defendant shall be receiving full payment of this sum from Octant. In this regard Counsel directed this Court's attention to paragraph 2.2 of The SAP in respect to BLOCK L17/18 on the purchase price:-

The price to be paid by Purchaser to Vendor for the Assets (the "Purchase Price") shall be equal to the total of:

a. An amount equal to the Vendor Costs;plus

b. Three Hundred and Thirty Three Thousand, Three Hundred and Thirty Three Dollars ($333,333); plus

c. Any fee required to be paid by Seller to the seismic contractor licensor of the Included Seismic Data for the transfer by Seller of the Included Seismic Data to Buyer under this Agreement.

The parties acknowledge that, in determining the Purchase Price, they have taken into account among other things Purchaser's assumption of responsibility for the Assumed Liabilities and Vendor's being released from responsibility for those Assumed Liabilities.

8. This Court was asked to read that Clause together with definition of the word 'Vendor costs' given in Article 1 of the said Agreement. There, Vendor Costs means;-

'All costs incurred (including for the avoidance of doubt any Sales Taxes by the Vendor associated with the exploration, appraisal, development and production of Petroleum Substances in respect to or attributable to the Assets, including all costs in relation to: acquisition of lands, rights and interests, drilling, testing, completion and equipping of wells, geological and geophysical activities (including seismic) and infrastructure, which costs were incurred prior to the Closing Date and remain unpaid by the Vendor as of the Closing Date, including all costs described in Schedule F'.

Counsel submitted that the entire debt to the Plaintiff is covered in Schedule F.

9. Mr. Esmail for the Defendant thought that the Plaintiff's interpretation of the SAPs was warped and self-serving. Counsel asked the Court to pay attention to Clause 2.3. on the Limitation on the Purchase Price which provides:-

"The Parties acknowledge that the Transaction is one of a series of three transactions pursuant to which the Vendor will (subject to the approval of Government Authorities) sell blocks in Kenya and Tanzania to the Purchaser. It is the intention of the Parties that the total consideration payable in respect of Vendor Costs (as set out in Section 2.2(a) and the corresponding sections of the agreements in respect of the other blocks) not exceed the sum of US$8,000,000.00. If all three transactions close at the same time, then the Parties will, as necessary, make such adjustments to the Purchase Price under this Agreement and the purchase price under the other agreements as are necessary to ensure that such total consideration in respect of Vendor Costs does not exceed US$8,000,000.00. If the transactions do not close at the same time, then the Parties will make such adjustments to the purchase price under the final agreement to close as are necessary to ensure that such total consideration in respect of Vendor Costs does not exceed US$8,000,000.00".

10. Mr. Martin has deposed as follows:-

'THAT on or about 30th October, 2015, after a lengthy and thorough sales process whereby EAXKL marketed the Assets, EAXKL concluded that the offer from Octant was the best available. EAXKL entered into two (2) Sale and Purchase Agreement s ("SPAs") with Octant Energy Corp. ("Octant"), A Canadian firm, for the sale of the Assets – one SPA relates to Block 1 and one SPA relates to Block L17/18. The SPAs are materially identical. Afren Tanzania, EAXKL's sister company, has entered into a separate SPA with Octant in relation to the sale of its Tanzanian Tanga Block to Octant. The only relevance of the Tanga Block sale in relation to these proceedings is with respect to the calculation of the aggregate amount payable by Octant to EAXKL and Afren Tanzania upon completion of the Kenyan and Tanzanian sales. The SPAs and the Tanga Block sale agreement calculate a portion of the consideration with reference to the amount owed to trade creditors, and this amount is capped at an aggregate of US$ 8,000,000 in respect of the Kenyan Sales and the Tanzanian sale. The anticipated payment from Octant to EAXKL under the two SPAs is US$5,864,941 only. EAXKL will not receive any additional funds. Only US$2,702,613 of this amount is payable by Octant to EAXKL under the Block L17.18 SPA. US$ 2,162,328 is payable under the Block 1 SPA'.

11. The Defendant asked this Court to consider that it is in the throws of insolvency. It was averred by Mr. Martin that the Defendant Company is a wholly owned subsidiary of East Africa for Afren PLC (Afren) which was placed into administration on 31st July 2015 by an Order of Court issued by the Chancery Division of the High Court of Justice in England. As a result of the difficulties Afren was facing, it was no longer able to fund the Defendant's operations and so the Defendant has wound down its operations in Kenya.

12. At the time of Winding down its operations, the company owed US$ 4,838,864.48 to Trade Creditors and US$ 109,420,000/= to Intercompany Creditors. That other than pursuing the divestment of the Assets, the Defendant is no longer a going concern. It is for this reason that the Company is selling its assets with a view to paying its creditors a proportionate share of their respective debts. The proposal being that Trade Creditors accept a settlement of 25% of their total debt while the Intercompany Creditors accept 4% of their total debt. It is averred by Mr. Martin that 9o% (in value) of the Trade Creditors have expressed strong support for the settlement proposal. Of course, the Plaintiff is not one of those Creditors.

13. Mr. Esmail submitted that the Plaintiff is taking a do or die approach and by insisting on the Injunction, the Plaintiff is seeking that the Defendant gives a preference to it. This, it was argued will have an implication under the provisions of Section 683 of The Insolvency Act.

14. As I turn to determine the Application, I need to turn on a Jurisdictional question raised by the Defendant in its Grounds of Opposition. The Defendant maintained that:-

> 'This Hon. Court lacks jurisdiction to entertain the dispute and the application on the grounds that the contract underlying these proceedings is subject of an arbitration clause with London as the seat of arbitration and the applicable rules being the London Court of International Arbitration Rules'.

15. The two Seismic Services Contracts entered between the parties have similar terms and conditions. Article 30 is on Dispute Resolution and provides:-

> "The Parties may agree that any particular matter of dispute or disagreement which cannot be amicably resolved after thirty (30) days can most expeditiously be settled by an expert. In such event, prior to selection of an expert, the parties shall jointly prepare and sign a statement of dispute or disagreement describing the matter to be resolved. If the Parties mutually agree upon the selection of an expert, then any subsequent ruling by the expert on the dispute or disagreement shall be final and binding on the Parties. If the Parties cannot agree upon the selection of the expert within fourteen (14) days after the date the Parties sign the statement of dispute or disagreement, then the dispute or disagreement shall be referred to arbitration as set out below.
>
> Any dispute or disagreement between the Parties as to the performance of the Contract or the rights or liabilities of the Parties herein, or any matter arising out of the same or connected therewith, which cannot be settled amicably shall be settled by arbitration in accordance with the LCIA (London Court of International Arbitration) Rules, which are deemed to be incorporated by reference into this clause. The seat or legal place of arbitration shall be London. The number of arbitrators shall be three (3). Each Party shall nominate an arbitrator to be appointed by the LCIA and the two arbitrators so appointed shall nominate a Chairman to be appointed by the LCIA. In the event that the two appointed arbitrators are unable to agree upon the nomination of the Chairman, the Chairman shall be selected and appointed by the LCIA. The language of the arbitration shall be English. The decision shall be final and binding upon the Parties concerned".

There is indeed, an Arbitration Agreement for resolution of disputes or disagreements between the Parties.

16. The Defendant did not press the issue of jurisdiction at the hearing of the Application and neither did it raise the matter in prefatory. Further the Defendant did not seek to have these proceedings Stayed either informally or through the formal Application contemplated by Section 6 of the Arbitration Act. Perhaps, it was an acknowledgement that as the Debt is admitted, there is no dispute to be referred to Arbitration.At any rate, what the Plaintiff seeks through this Application is an Interim Measure of Protection. It wound not be incompatible with the Arbitration Agreement for the Plaintiff to request for an Interim Measure of Protection(Section 7 of the Arbitration Act.). Looked at either way this Court has jurisdiction to hear and determine the instant Application.

17. Although the Motion is said to be brought under the provisions of both Order 39 Rule 8 and Order 40 Rules 1 and 2 of The Civil Procedure Rules, the Plaintiff did not urge for Attachment before Judgement. In any event even the body of the Application does not bespeak this prayer. I take it that the Plaintiff abandoned the quest for attachment before judgement.

18. On the Prayer for injunction, the nature of the Prayers sought by the Plaintiff brings this Motion squarely within the ambit of order 40 Rule 1(b) of The Civil Procedure Rules as the crux of the argument by the Plaintiff is that by disposing of its Assets and leaving the jurisdiction of this Court, the Defendant will obstruct, delay or defeat the realisation of the Plaintiff's claim. Order 40 Rule 1b provides:-

> "Where in any suit it is proved by affidavit or otherwise-
>
> (a)…….
>
> (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders".

19. The Principles upon which an Interim Injunction may be granted is old hat:-

a. An Application must show a prima facie case with a probability of success.

b. An injunction will not normally be granted unless the Applicant might otherwise suspect irrespirable injury.

c. When the Court is in doubt, it will decide the Application on the balance of convenience.

20. The Defendant admits that it owes the Plaintiff the sum of US$ 2,059,026.50. That admission is contained in Communication between the parties and in particular the letter of 1st December 2015 to the Plaintiff's Advocates. A similar admission is contained in paragraph 5 of Mr. Martin's affidavit in which he avers:-

> 'THAT it is also admitted that BGP performed the services provided under the Contracts and has severally demanded payment of its dues of USD$ 2,059,026.50. It is necessary to clarify that the amounts claimed by BGP from EAXKL relate to seismic services performed on EAXKL's Block L17/18 only and there is no outstanding debt in relation to Block 1'.

21. In so far as the substantive prayer in the Plaintiff's Action is for judgement for payment of US$ 2,059,026.50, the prospects of the Plaintiff succeeding is overwhelming. The Plaintiff has a strong case with overwhelming prospects of success.

22. It is also admitted by Mr. Martin, on behalf of the Defendant, that the Defendant has wound down its operations in Kenya and apart from the Assets there are no other material assets which the Company owns in Kenya (see paragraph 7 of his affidavit). In responding to the Application, the Defence Counsel, Candidly admitted (and deserving credit) that the Defendant no longer has residence in Kenya.

23. It is not in dispute that the Defendant only assets in Kenya are the rights and interests in the Production Sharing Contracts. If those contracts were to be sold, the Defendant Company would be left with no assets. Taken together with the fact that the Company is in the throws of Winding Up its operations in Kenya, the apprehension by the Plaintiff that the disposal of those assets portends an irreparable loss to it is not without justification. It is therefore understandable that the Plaintiff's view this Application to stop the Sale as its Armageddon with the Defendant. This Court is persuaded that unless the Application is granted, the Applicant may suffer irreparable injury.

24. But that is not the end of the matter because of a caution sounded by the Defendant. The Defence Counsel told Court that the proposed divesture was the last real chance of the Defendant raising money. That the company is at the brink of insolvency and if this were to happen then the Government of Kenya would be entitled to terminate The Production Sharing Contracts (see clause 6 of The Contracts). Counsel argued that the injunctive Orders already now subsisting on an interim basis are jeopardising the Divesture process.

25. Counsel proposed that, if the Court were to pay heed to that caution and be minded to lift the injunction, it should be conditional upon the following:-

a. That within 7 days of completion of the SPAs for Blocks L17 and L18 and the sums of monies due under the agreement being paid to the Defendant, the Defendant will deposit US$ 2,059,026.50 into Court.

b. The deposit of the money does not and shall not convert the Plaintiff into a secured Creditor and the said deposit is expressly made subject to the rights of the Defendant's Creditors and the operation of the Insolvency Act 2015.

c. The Court will distribute the funds out of Court in the main suit.

26. The Plaintiff's Counsel was not hostile to these proposals but raised the fear about enforcement. Counsel counter proposed that the Deposit to court be paid directly into Court by Afren. Secondly as no other Creditors had come forward, the deposit should be available to the Plaintiff at the outcome of these proceedings.

27. The real concern by the Plaintiff is the possibility of the Defendant disposing of its only assets and leaving the jurisdiction of the Court without attending to its debt. On the other hand, the warning by the Defendant is that if it is restrained from selling these assets then it may ran aground in debt and loose its only assets through termination of the PSCs by the Government. This could lead to a total loss to all its creditors. Fortunately, these two positions may not be incompatible for other reasons but also because none of the creditors of the Defendant is a Preferential Creditor. All Creditors rank in *paripassu*. The position of the Plaintiff and the Defendant are, in my view, tractable.

28. If the SAPs were allowed to proceed and the sum equivalent to the debt owed to Plaintiff deposited in Court, then that amount would be within the jurisdiction of the Court and could be available to settle a Decree that the Plaintiff may ultimately obtain in its favour. At the same time some amount may remain for the Defendant to meet its other obligations. This Court favours a solution that does not imperil the Plaintiff's position yet at the same time does not wholly disadvantage the other Creditors. A conditional Order for Deposit will be the final Order this Court shall be making.

29. Right from the outset, the Defendant sought to clarify that the amount claimed by the Plaintiff from the Defendant relates to services performed on Blocks L17 and L18 only and that there was nothing outstanding in relation to Block l and therefore any orders should be limited to Block L17 and Block L18 and should not touch on Block l. That is an attractive argument which may not be entirely correct. The Plaintiff does not seek to enforce a lien (contractual or legal) over those Assets. What the Plaintiff seeks is to preserve the Assets of the Defendant within the Local Limits of the Court so that they are ultimately available to satisfy any decree passed against the Defendant in this action. For that purpose the Assets in respect to Block l are as much assets as those in relation to Blocks L17 and L18.

30. That said, the Plaintiff does not dispute that the sale of the Assets over Blocks L17 and L18 can yield a sum that is more than sufficient to pay off its debt. The amount the Defendant is to receive from Octant on this sale is US$2,702,613 against its indebtedness of US$ 2,059,026.50 to the Plaintiff. It is my view it would be inequitable for this Court to make an Order that saddles the Defendant more than is

necessary. Only for that reason will the Court be making Orders limited to Blocks L17 and L18.

31. A concern by the Defendant is that an Order for Deposit may convert the Plaintiff into a secured Creditor. That concern is needless. The contemplated Order for Deposit is not an Order for Attachment. The Plaintiff as of now does not have a judgement against the Defendant. Its position is not any superior to the other Creditors. An Order for Deposit is simply to ensure that the Assets do not leave the jurisdiction of the Court. It is not for this Court to speculate on whether the Defendant will go into Insolvency. But if the present action were to be caught up by any Insolvency Proceedings then the Deposit would be dealt with like any other property of the Company.

32. Let me turn to the concerns of the Plaintiff. The Plaintiff is apprehensive that given that the Company no longer has a residence in Kenya, it will be impossible to enforce an Order for Deposit. That may be true but the Plaintiff on page 245 of its documents has filed a search of the Defendant Company which names Richard Schmitt and Lancelot Christison as its only two shareholders each with one share. Lancelot is a Kenyan National. The two together with Benjamin Sassoon are Directors of the company. This may be the basis of what is deponed in the Affidavit in support of the Application 'that the Defendant's Directors and Shareholders are mainly foreigners'. In so far as one Director/shareholder of the Defendant Company is Kenyan, he can be made to account for the actions of the Company. That said, whatever Orders this Court will make must address this real apprehension by the Plaintiff.

33. It needs to be emphasised that the Plaintiff has made out a case for Injunction as prayed for in the Notice of Motion dated 13th April, 2016 save that the Order should not extend to Block l. However, given the circumstances explained in the preceding paragraphs of this decision and that the Plaintiff's Counsel reaction to it, this Court shall allow the proposed SAPs to proceed but on condition that an amount equivalent to the amount owed by the Defendant to the Plaintiff be deposited in Court.

34. These are the Orders of the Court;-

i. Prayer (c) of the Notice of Motion dated 13th April 2016 is allowed save that the Order is in respect to Oil Exploration Blocks L17 and L18.

ii. An Order Nisi is hereby issued lifting the Injunctive Orders granted in (i) above. The Order Nisi is conditional upon the Defendant, within seven (7) days hereof, giving an undertaking acceptable to the Plaintiff for the deposit of **US$ 2,059,026.50 into Court.**

iii. The Order Nisi above shall become Absolute upon the Plaintiff's Advocates filing with the Court a Certificate that the Defendant has issued an undertaking acceptable to the Plaintiff for the aforesaid Deposit.

iv. Upon the deposit of US$ 2,059,026.50 into Court, the same shall be held by the Court pending the hearing and determination of this suit or such further Orders of the Court.

35. The Plaintiff shall have costs of the Application.

Dated, signed and delivered in court at Nairobi this 29th day of June, 2016.

F. TUIYOTT

JUDGE