



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION, MILIMANI
CIVIL SUIT NO.517 OF 2013

TRITON GAS STATION LIMITED.....1ST PLAINTIFF

TRITON SERVICE STATIONS LIMITED.....2ND PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED.....1ST DEFENDANT

EASTERN & SOUTHERN AFRICA TRADE &

DEVELOPMENT BANK (PTA).....2ND DEFENDANT

AND

SAHARA PETROLEUM LIMITED.....INTERESTED PARTY

RULING

1. The central thrust of the dispute in the main suit in this matter filed on 25th November, 2013, concerns a Deed of Settlement dated 16th March, 2009 (the “Deed of Settlement”). A declaration is sought that the said Deed is void and had resulted in the Plaintiffs being deprived of the suit properties.
2. The Defendants’ notice of motion now before me is dated 17th November, 2014, and in part seeks the following orders, namely, that :

“2. In the first instance-;

- a. *This matter be placed before the Presiding Judge of the High Court for the Honourable Court to certify that this application raises substantial constitutional as well as legal issues of great public interest and the same be referred to the Honourable Chief Justice for the purpose of setting up a three judge bench to hear and determine the application.*
- b. *The court records in respect of the following matters be placed before the court before the application is determined.*

- **Mombasa HCCC 462 OF 2009 Triton Gas Stations Limited Vs The Receivers of Triton Petroleum Limited, Kenya Commercial Bank Limited and PTA Bank Limited.**
 - **Milimani HCCC 576 OF 2009 Triton Gas Stations Limited Vs The Receivers of Triton Petroleum Limited.**
 - **Nairobi ELC Case No 1197 of 2014 Sahara Petroleum Vs Triton Gas Stations & Others.**
 - **Kisumu ELC No. 275 of 2014 Triton Service Stations Vs Wells Oil Limited.**
- c. *There be a stay of proceedings in Nairobi High Court ELC 1197 of 2014 Sahara Petroleum Vs Triton Gas Stations & Others, Milimani HCCC 576 of 2009 Triton Gas Stations Limited Vs The Receivers of Triton Petroleum Limited, Kenya Commercial Bank Limited and PTA Bank Limited and Kisumu ELC No 275 of 2014 Triton Service Stations Limited Vs Wells Oil Limited.*
 - d. *Leave be granted to all parties in Nairobi High Court ELC 1197 of 2014 Sahara Petroleum Vs Triton Gas Stations to be heard on the instant application.*
3. *The order made on the 21st October 2014, in this suit, be set aside and be discharged entirely.*
 4. *An order do issue that the Deed of Settlement entered into between the Plaintiffs and the Defendants, among other parties, dated 9th March 2009 is valid and binding as against the Plaintiffs.*
 5. *This Honourable Court be pleased to grant any order or relief that it may deem fit and just to grant in the interest of justice. ”*
 6. The order sought by the applicant in paragraph 2(a) of the application herein that “*this matter be placed before the Presiding (sic) Judge of the High Court*” in the first instance, was granted by Ochieng’ J, who directed on 19 November, 2014, that the matter be placed before the Principal Judge of the High Court.
 7. In addition, it was agreed by the parties – and this court so directed on 2nd March, 2015 – that the Defendants / applicants herein do file and serve on all the parties an “affidavit annexing pleadings in the five affected cases” within a given time. In response, the Defendants filed a Schedule and Bundle of Pleadings (dated 5th May, 2015) and Supplemental Schedule and Bundle of Pleadings (dated 13th May, 2015) for the following affected cases:
 - a. *Plaint in Mombasa HCCC 462 of 2009*
 - b. *Plaint in Milimani HCCC 576 of 2009*
 - c. *Plaint and Defences filed in ELC (Nairobi) 1197 of 2014; and*
 - d. *Pleadings for Nairobi ELC 1573 of 2014*

Accordingly, order 2(b) sought by the applicant in the application seeking that the records of the cases affected be placed before the Court was in fact acceded to by the parties, and is not subject to any decision by this court.

8. After dealing with various other preliminary issues, I heard the application on 22nd June, 2015.
9. The Defendants are aggrieved by the decision of the Court (Ogola, J.) contained in its ruling dated the 21st October, 2014. There, the Court issued temporary injunctive orders restraining the Defendants or anyone authorized by them or acting on their behalf from advertising, selling, offering for sale, or transferring, charging, leasing, pledging or in any way alienating or interfering with or disposing of the 1st and 2nd Plaintiff’s business, assets and parcels of land, namely:
 - a. Nakuru:
 - i. NAKURU/MUNICIPALITY BLOCK 16/95 on which is erected a petrol service station
 - ii. NAKURU/MUNICIPALITY BLOCK 16/96 on which is erected a petrol service station
 - iii. NAKURU/MUNICIPALITY BLOCK 16/97 on which is erected a petrol service station
 - iv. NAKURU/MUNICIPALITY BLOCK 16/98 on which is erected a petrol service station

b. Eldoret:

- i. ELDORET/MUNICIPALITY BLOCK 5/520 on which is erected a petrol service station
- ii. ELDORET/MUNICIPALITY BLOCK 5/521 on which is erected a petrol service station

c. Naivasha:

- i. NAIVASHA/MUNICIPALITY BLOCK 2/634 on which is erected a petrol service station
- ii. NAIVASHA/MUNICIPALITY BLOCK 2/635 on which is erected a petrol service station
- iii. NAIVASHA/MUNICIPALITY BLOCK 2/636 on which is erected a petrol service station
- iv. NAIVASHA/MUNICIPALITY BLOCK 2/637 on which is erected a petrol service station

d. Kitale:

KITALE MUNICIPALITY BLOCK II/108

e. Dagoretti:

DAGORETTI/RIRUTA/4621 on which is erected a petrol service station

f. Kisumu:

KISUMU/MUNICIPALITY BLOCK 9/445 on which is erected a petrol service station

g. Eldoret:

- i. ELDORET/MUNICIPALITY BLOCK 5/522 on which is erected a petrol service station
- iii. ELDORET/MUNICIPALITY BLOCK 5/523 on which is erected a petrol service station

h. Nairobi:

(i) NAIROBI/BLOCK 97/362

(ii) NAIROBI/BLOCK 97/363

(iii) NAIROBI/BLOCK 97/364

i. Kisumu:

KSM/MCPT/BLK IX/192 (Nairobi Road Station)

j. Mombasa:

MSA/BLOCK XXIII/206

MSA/BLOCK XXIII/210

10. The aforesaid Court orders excluded suit properties which may have been transferred to a third party on or before 17th July, 2014.

11. The motion is founded upon the alleged prevarication by the Plaintiffs as to the validity of a Deed of Settlement which, as earlier stated, is at the heart of the substantive dispute herein. The Defendants assert that there are several suits on-going in respect of some of which the Plaintiffs have sued in reliance of the Deed of Settlement, whilst in others, the Plaintiffs have challenged the said Deed. The result, it is asserted, is that contradictory positions have or potentially may

emanate from the courts as to the validity of the Deed.

12. The application is supported by Affidavits deposed by John Oringo, the 1st Defendant's Senior Recovery Manager, and David Mulira, a Senior Legal Officer of the 2nd Defendant. The application is premised on the grounds set out in the motion.
13. The Plaintiffs filed grounds of opposition dated 24th November, 2014 and a replying affidavit deposed by Sanjay Kishorkumar Mashru, a director of both Plaintiffs' companies. The Interested Party also opposes the application and relies on the affidavit deposed by Abdulkader Abdul Majid Bachani, a director of the Interested Party.
14. Mr. Ogunde, Counsel for the Defendants made submissions in support of the application. He stated that, the court has jurisdiction to entertain the application even where there is an appeal pending. Counsel cited the case of **Nguruman Limited vs. Jan Bond Nielsen & 2 others [2013] e KLR** in support of this position, adding that it is open to the court to make any variation to the temporary injunction issued even where an appeal is pending.
15. Counsel further submitted that the matter should be referred to the Chief Justice for the appointment of a 3 judge bench. This arises because there have been various matters filed and the courts have been presented with different positions by the plaintiffs as regards the validity of the Deed of Settlement. On account of this, it is argued that the plaintiffs are 'playing footloose' with the Court. According to Counsel, the substantial question of law, then, is whether the plaintiffs are entitled to take contradictory positions in different pleadings. Mr. Ogunde's submission is that there is a doctrine of "judicial estoppel" that has evolved to deal with this kind of prevaricating litigant.
16. Counsel argues that this doctrine of judicial estoppel is untested in Kenya, yet is intended to protect the court from embarrassment and ridicule where a litigant presents somersaulting positions. On account of the Plaintiffs' said conduct, a blatant erosion of the court's dignity of will necessarily result. As such, the issue qualifies as a substantial question for a three judge bench as it falls squarely within the broad rubric of the protection of rights and freedoms, invoking Article 165(4) of the Constitution.
17. Mr. Nyiha, counsel representing the Plaintiffs opposed the application. He submitted that, Article 165(4) of the Constitution is explicit as to instances in which certification can be made for the empanelment of a bench. Counsel argued that such a bench can only be constituted in matters that fall under Article 165(3) (b) and (d) of the Constitution. Anything outside these provisions does not satisfy the primary test. It was argued that in the instant case, the issues raised do not fall under the infringement of the Bill of Rights and neither is it a question respecting the interpretation of the Constitution. It was also argued that, no single constitutional provision has been cited as having been infringed. Accordingly, it was Mr. Nyiha's submission that the substantial questions of law now being raised were placed before Ogola J., who considered the facts and made a finding.
18. Finally, Mr. Nyiha submitted that the Defendants have the option of proceeding with the appeal at the Court of Appeal, which they have filed in terms of **Rule 2 and 75 of the Court of Appeal Rules**. According to counsel, the present application offends the provisions under the Civil Procedure Rules.
19. Mr. Adala, representing the interested party, also, opposed the application, and fully associated himself with the plaintiffs' sentiments.
20. I have considered the application and replies and supporting documents thereto, as well as the Schedules and Bundles of Pleadings filed and all submissions filed and presented in court.

ISSUES ARISING

21. The issues which arise for determination are as follows:

- i. Whether the application raises a substantial question of law to warrant certification under Article 165(4) of the Constitution.
- ii. Whether the Court has powers to vary and or discharge the injunction issued on 17th October, 2014.
- iii. Whether there are any other orders that the Court can grant, in the interests of justice.

ANALYSIS

Issue (i) - Whether the application raises a substantial question of law to warrant certification under Article 165(4) of the Constitution

22. The Defendants' case as argued is that the Plaintiffs are playing 'footloose' with the courts, by asserting patently inconsistent positions over the same facts in different courts. The Defendants contend that the doctrine of judicial estoppel should be applied in this case to preclude the plaintiffs from inconsistent factual and legal positions over the same subject matter in different courts. It has been argued however, that the doctrine is distinct from principle of *res judicata*, but that it is untested in scope and application in this jurisdiction. Further, that the circumstances of this matter warrant a determination of the application of this principle, and that in this case, this is a "substantial question of law". These, as I understand it, are the Defendants premises for certification under **Article 165(4)** of the **Constitution**.

23. The first question to dispense with is what is a "substantial question of law"?

24. In the case of **Robert N Gakuru & 460 others vs. County Government of Kiambu & another [2015] e KLR**, while quoting with approval the Supreme Court of India decision in **Chunilal V. Mehta vs. Century Spinning and Manufacturing Co, AIR 1962 SC 1314**, in defining what a substantial question of law is, the court held that;

"A substantial question of law is one which is of general public importance or which directly and substantially effects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council of the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be substantial."

25. The court further held that:

"...a substantial question of law would depend on the facts and circumstances of each case. ...it is a matter that has not been previously settled by a Court such that it does not have a binding or persuasive precedent. It also would be a matter that is intertwined and involving diverse areas of the law therefore making the matter relatively complex as compared to other matters normally canvassed before the same Court. It is also a matter that would require extensive research to resolve. In determining whether the case raises a substantial issue of law,...a court ought to consider the jurisprudential value of the matter, its importance to the parties and the impact of the case as well as the general conduct of the case."

26. As stated earlier, the Defendants contend that this matter falls under the doctrine of judicial estoppel and as such, a substantial question of law arises to be referred to the Chief Justice under **Article 165(4)** of the **Constitution**.

27. **Black's Law Dictionary, 8th Edition at page 590** defines Judicial Estoppel as:

'Estoppel that prevents a party from contradicting previous declarations made during the same or an earlier proceeding if the change in position would adversely affect the proceeding or constitute a fraud on the court.- Also termed doctrine of preclusion of inconsistent positions; doctrine of conclusiveness of the judgment.'

28. In further defining judicial estoppel, I refer to an article by **Kira A. Davis**, filed by the Defendant herein entitled: **Judicial Estoppel and Inconsistent Positions of Law Applied to Fact and Pure Law, 89 Cornell L. Rev. 191 (2003)** at page 197-198 where he states that:

"...several courts have justified the doctrine by reference to the need to protect the sanctity of a litigant's oath. Jurists have described the threat to court's integrity as occurring when litigants "play [] fast and loose with the courts to suit the exigencies of self interest." or "abus [e] the judicial process through cynical gamesmanship, achieving success on one position, then arguing the opposite to suit an exigency of the moment." Courts maintain this rationale despite the windfall benefits accruing to some parties who successfully assert judicial estoppels. The Supreme Court has stated that "[b]ecause the rule is intended to prevent 'improper use of judicial machinery,'... judicial estoppels 'is an equitable doctrine invoked by a court at its discretion.'"

29. From the foregoing, judicial estoppel can be said to be antithetic to justice and due process. The rationale is easy to see. A party which pleads and relies on a certain position in a matter and later on in the same or another similar matter contradicts itself, cannot be a credible party in the administration of justice. It appears to me that such estoppel, if applied at all, would be applicable in cases where: firstly, the same party has taken two positions; secondly, the positions have been taken in judicial (or quasi-judicial) proceedings; thirdly, the party was successful in asserting the first position; fourthly, the two positions are totally inconsistent; and fifthly, that the first position was not taken as a result of ignorance, fraud, or mistake.

30. The Defendants contend that the Plaintiffs have asserted patently inconsistent positions over the same facts in different courts. They contend that this is not a situation concerning *res judicata* but judicial estoppel. For the sake of clarity I set out herein **Section 7** of the **Civil Procedure Act**, on *res judicata*, which provides that:

'No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.'

I agree with the applicants that the present situation does not concern *res judicata*. This is clearly not an application concerning a matter that has been previously heard and determined in this or by another court.

31. What the Defendants/ applicants assert in the present application, is that the Plaintiffs are playing 'footloose' with regards to the impugned Deed of Settlement. They contend that the Plaintiffs have been changing their position in different courts to suit their position.

32. In support of this contention, the Defendants attached various pleadings which relate to respective properties under the Deed of Settlement. They are as hereunder:

1. *Sahara Petroleum Limited vs. Triton Gas Stations Limited & Triton Service Stations Limited & 19 Others, ELC Civil Case No. 1197 of 2014*; With regard to parcels of land registered to Triton Service Station Limited (2nd Plaintiff), the properties in dispute include:

- a. NAIVASHA/MUNICIPALITY BLOCK 2/634
- b. NAIVASHA/MUNICIPALITY BLOCK 2/635
- c. NAIVASHA/MUNICIPALITY BLOCK 2/636
- d. NAIVASHA/MUNICIPALITY BLOCK 2/637
- e. NAKURU/MUNICIPALITY BLOCK 16/95
- f. NAKURU/MUNICIPALITY BLOCK 16/96
- g. NAKURU/MUNICIPALITY BLOCK 16/97
- h. NAKURU/MUNICIPALITY BLOCK 16/98
- i. DAGORETTI/RIRUTA/4621
- j. KISUMU/MUNICIPALITY BLOCK 9/445
- k. ELDORET/MUNICIPALITY BLOCK 5/522
- l. ELDORET/MUNICIPALITY BLOCK 5/523
- m. NAIROBI/BLOCK 97/362
- n. NAIROBI/BLOCK 97/363
- o. NAIROBI/BLOCK 97/364
- p. KISUMU/MUNICIPALITY BLOCK IX/192
- q. MOMBASA/BLOCK XXIII/206
- r. MOMBASA/BLOCK XXIII/210
- s. L.R. NO. 14970/57

There the 1st and 2nd Defendants *impugn* the Deed of Settlement – para 6 of Statement of Defence.

2. *Triton Gas Stations Limited vs. Zahir Sheikh and Peter Kahi The Joint Receiver Managers of Triton Petroleum Company Limited (In Receivership), H.C. Civil Case No. 576 of 2009.* With regard to parcels of land on which Triton Gas Stations Limited has business christened Triton Service Stations, the common properties dispute are:
 - a. KISUMU/MUNICIPALITY BLOCK IX/192
 - b. MOMBASA/BLOCK XXIII/206
 - c. MOMBASA/BLOCK XXIII/210

Here the plaintiff *concedes* the effectiveness of the Deed of Settlement – para 6-13 of the plaint.

This Court notes from the proceedings attached by the applicants that this matter was stood over generally on 17-8-2008 as counsel was unable to serve the respondent. As there was no evidence that the suit had ever proceeded to hearing, the Court called for the file and has noted that, according to the record, on 28-2-2012 the suit was *dismissed* for want of prosecution by Mutava, J.

3. *Triton Gas Stations Limited vs. Zahir Sheikh and Peter Kahi The Joint Receiver Managers of Triton Petroleum Company Limited (In Receivership), Mombasa HCCC No 462 of 2009.* With regard to parcels of land alleged to belong to Triton Gas Stations the common properties in dispute are:
 - a. MOMBASA/BLOCK XXIII/206
 - b. MOMBASA/BLOCK XXIII/210

Here the plaintiff *impugns* the Deed of Settlement – para 8(iii) of the plaint.

The Court notes from the proceedings annexed by the Applicant that this matter was heard by the Ibrahim, J, (as he then was) who on 26th August, 2012, noted that the issues raised in it could be ventilated in **Milimani HCCC 576 of 2009**. The Judge then struck out the suit in the following terms:

“I do hereby order the Plaint dated 11th December 2009 be struck out with costs to the Defendants on the ordinary scales on a full indemnity basis”

4. *Jaguar Petroleum Company Limited, Triton Service Stations Limited & Triton Gas Station Limited vs. Emunyinyi Oil Company Limited and Another, ELC Civil Case No. 1573 of 2014*; With regard to parcels of land registered to Triton Gas Stations Limited, the 3rd Plaintiff, the common properties in dispute are:
- a. NAKURU/MUNICIPALITY BLOCK 16/95
 - b. NAKURU/MUNICIPALITY BLOCK 16/96
 - c. NAKURU/MUNICIPALITY BLOCK 16/97
 - d. NAKURU/MUNICIPALITY BLOCK 16/98
 - e. DAGORETTI/RIRUTA/4621

Here, the 2nd Plaintiff asserts absolute unencumbered ownership the parcel at e., above, and the 3rd Plaintiff asserts absolute unencumbered ownership the parcel at a-d, above under paras 6-7 of the plaint, without reference to any encumbrance under the Deed of Settlement.

33. From the foregoing, it is evident that the Deed of Settlement and the properties there-under present an intricate web. Essentially, the key is in unlocking the veracity of the Deed of Settlement. Whether that Deed of Settlement is valid is a question that has been presented to this and those courts, and as such it does not lie with this court at this point to make any determination thereon. From the ruling dated 21st October, 2014, the Court issued a temporary injunction that essentially stops all dealings with the aforementioned properties unless the same is set aside and or varied by the court.

34. Have the plaintiffs been playing ‘footloose’ with the courts?

35. For lack of a better term, it can be stated that the resultant effect of the Deed of Settlement is the generation of a complex web of litigation. There have been a number of matters that have been filed by various parties either by or against the registered proprietors of the properties, which in the present case, is alleged to be Triton Service Stations Limited or Triton Gas Stations Limited. Other suits may well be filed. The Defendants contend that the plaintiffs have been asserting different positions with regard to the Deed of Settlement to suit their position. As stated earlier, judicial estoppel if applied may prevent a party from contradicting its previous declarations made during the same, similar or earlier proceedings. Simply put, a party is precluded from asserting different positions on the same matter either in earlier or other proceedings relating to the same matter. It is trite law that parties are bound by their pleadings in a particular case. Thus, they are precluded from asserting different positions to suit their case.

36. The scenario that the Defendants have demonstrated in this application is that the plaintiffs have asserted different positions in different suits where the subject matter is the same. This court cannot, however, delve into such matters at this point. Nevertheless, there is no doubt whatsoever that at the core and center of these various disputes is the Deed of Settlement. The plaintiffs have, in those cases, asserted different positions to suit the circumstances of the different cases that have been filed.

37. Be that as it may, does this issue raise a substantial question of law to invoke Article 165(4) of the Constitution?

38. As correctly pointed out by the Plaintiffs’ counsel, the Chief Justice is empowered under **Article 165(4)** of the **Constitution** to empanel a bench consisting of uneven number of judges, being not less than three to hear a matter certified by the court as raising a substantial question of law under **Article 165(3) (b) and (d)**, and **Article 165 (3) (b)**. For clarity I will recite the provisions of both **Article 165(4)** and **Article 165(3)(b) and (d)**:

Article 165(4): “Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

Article 165 (3): “**Subject to clause (5), the High Court shall have—**

(a)

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c)

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e)....”

39. Clearly, a High Court Judge’s power to certify under **Article 165(4)** for the Chief Justice to empanel a bench, can only be exercised in relation to the High Court’s jurisdictions set out in **Article 165 3(b)** and **(d)**. These jurisdictions are, firstly, the jurisdiction to determine the question whether a *right or fundamental freedom in the Bill of Rights* has been denied, violated, infringed or threatened; and secondly, the jurisdiction to hear any question respecting the *interpretation of the Constitution; the constitutionality of laws; the constitutional power of state organs in respect of county governments; the constitutional relationship of national and devolved governments and conflict of laws between national and county legislation.*

These jurisdictional parameters must be satisfied for certification to be valid and effective. If they are not satisfied, there can be no constitutionally valid certification for empanelment of a bench by the Chief Justice.

40. Further, under **Article 165(3)(a)** of the **Constitution**, the High Court is vested with unlimited original jurisdiction in civil matters. It is properly constituted with a single judge sitting. It is only in exceptional circumstances and as prescribed by the Constitution or statute that a bench of more than one judge can be empanelled. The decision of one judge sitting at the High Court or in a Court of equal status as provided under Article 162 (2) of the Constitution is not accorded less import than a decision emanating from a 3 judge or 5 judge bench of the High Court. On appeal, both decisions go before the Court of Appeal.

41. In this case, I am not persuaded by the applicant that the determination of the issue whether judicial estoppel here applies, is a substantial question of law for certification as a constitutional matter for empanelment of a bench. As earlier stated, at the heart of this dispute is the veracity of a Deed of Settlement. The resultant effect has been the filing of various disputes emanating under that disputed Deed of Settlement.

42. Inconsistent positions of a party or its prevarication regarding whether or not a contractual instrument is valid and binding does not, in my considered view, give rise to a case that falls

within the parameters of **Article 165(4)** of the **Constitution** requiring a bench to be constituted by the Chief Justice. The matter may be determined by a single judge in the usual manner. I so find and hold.

Issue 2- Whether the Court has powers to vary and or discharge the injunction issued on 17th October, 2014.

43. Under **Order 40** of the **Civil Procedure Rules, 2010**, the court may by order grant a temporary injunction to restrain any act, or make any other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of a suit or until further orders. It is a discretionary power given to the courts in the interests of justice.

44. The purpose of an interlocutory/interim/temporary injunction is to preserve the *status quo* until the rights of parties have been determined in the action. **Halsbury's Laws of England, Fifth Edition, at para 334** states that:

“The object of an interim injunction is to preserve matters pending the trial of matters in dispute ... Such an injunction is usually so framed as to continue in force only until the hearing of the cause or until further order. It cannot be considered in argument as affecting the ultimate decision of a cause. It does not assume finally to dispose of the question of legal right, and will only impose such restraint as may suffice to stop the mischief complained of, or, where the object is to stay further injury, keep things as they are at the moment.”

45. The principles upon which courts grant or discharge an injunction have been elucidated in the landmark case of **American Cyanamid Co vs. Ethicon Limited [1975] AC 396, 407-8**, where Lord Diplock observed;

“The court no doubt must be satisfied that the claim is not frivolous or vexatious, in other words, that there is a serious question to be tried. It is no part of the courts function at this stage of the litigation to try and resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial. ...So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought.” [Emphasis supplied]

46. In terms of the celebrated case of **Giella vs. Cassman Brown [1973] EA 358**, an applicant must show (i) a *prima facie* case with a probability of success, (ii) that irreparable injury which cannot not adequately be compensated by an award of damages will be suffered, and (iii) where there is doubt, that the balance of convenience is applied in favour of the applicant.

47. Under what circumstances can a court vary or discharge an injunction?

48. **Order 40 Rule 7** of the **Civil Procedure Rules, 2010** provides that,

“Any order for an injunction may be discharged, or varied, or set aside by the court on application made thereto by any party dissatisfied with such order.”

49. The injunctive relief was granted, in this case, by Ogola J. In interfering by discharging, varying or setting aside that injunction, this court would be interfering with the exercise of discretion of the judge who granted it. This court therefore has to be very cautious. In **Mbogo vs. Shah [1968] E.A.**, the Court of Appeal held that:

“...a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been injustice.”

50. In this instance, a judge of the High Court is being asked to set aside and discharge entirely the temporary injunction issued by another High Court Judge. In my view the court can only discharge, vary or set aside an injunction where it is satisfied that in granting the same, the judge misdirected himself in order to arrive at a wrong decision, or fraud or corruption is demonstrated. Having read the decision of the court dated 21st October, 2014 and the pleadings, it is clear to me that there are serious questions to be tried which can only be settled at trial. The core question at hand – concerning the validity of the Deed of Settlement for instance – has given rise to many other suits. It is therefore imperative that the question be settled once and for all in trial.

51. It is apt that I recollect here what Ogola J, said at paragraph 26 in his ruling of 21st October, 2014, referred to earlier,:

“26. Central to this application is the allegation by the Plaintiffs/Applicants that the Deed of Settlement dated 16th March 2009 was not valid, and that the same was not authorised through a valid company resolution of the 1st and 2nd Plaintiffs’ companies. The requirement for such a Deed of Settlement to be authorised by company resolution is that of the law, and is a matter of proof. It is upon the Defendant to provide such proof that indeed the Deed of Settlement was supported by a resolution of the said companies. The issue becomes more poignant when one considers the staggering sum of money which this Deed of Settlement secured. The sum of money is said to be USD 25,372,456.83. A Bank considering to lend such an amount of money cannot, in the faintest of situations ignore such a requirement. This court has not found or established that indeed the said Deed of Settlement was not valid. That is a process that is ongoing. Indeed, the Defendant’s counsel submitted that there are a number of cases in which that issue is a central issue for determination, including case in HCCC No. 227 of 2010 Mombasa where the said issue is still outstanding. However, in Milimani HCCC No. 576 of 2009 the Defendant submitted that the Plaintiff is acknowledging the validity or existence of the said Deed of Settlement. In the view of the Defendant, the Plaintiffs are taking contradicting positions in this matter whenever it suits them. However, in my view, the validity or otherwise of the said Deed of Settlement is a crucial issue not only to the parties before the court but also to third parties who are said to be purchasing the suit properties from the Defendants. It is an issue which must be determined one way or another to put to rest any lingering doubts. It is true that Plaintiffs, depending on what type of directors are for the time being in office, will take a position which suit them. However, for this court the correct position is that reached by the court. The validity of the said Deed of Settlement is an issue in this court, even if it may also be in other courts. It is an issue which has not been determined, and which must soon be determined. From that determination will flow a range of rights or liabilities the impact of which will be important. One of such impact is that if the court finds for a fact that the said Deed of Settlement was invalid void ab initio the legal consequences for any actions based on it will be huge, and any purported sale of the suit property to third parties will be a nullity. However, that does not have to happen. It is not necessary to allow sale of properties to third parties when there are lingering questions on the validity of such a move. It is not necessary to involve innocent third parties to a difficult situation which they can avoid. Justice and prudence demand that any action purporting to sale and transfer the suit properties be stayed pending the determination of the validity of the said Deed of Settlement.”

52. I am in general agreement with the finding of Ogola J, that until the core issues are settled, transactions on the suit properties should be stayed. The temporary injunction issued should thus

remain *in situ* in the matter, as this will hopefully prevent further convoluted and escalation of litigation with regard to the subject properties. Further, since the Defendants have filed an appeal in the Court of Appeal which they are at liberty to pursue, there is no rationale for this court to interfere with the interim orders issued.

Issue 3 - Whether there are any other orders that the Court can grant, in the interests of justice.

53. The Defendants have asked for orders that there be a stay of proceedings in:

- **Nairobi High Court ELC 1197 of 2014 Sahara Petroleum vs Triton Gas Stations & Others, Milimani HCCC 576 of 2009;**
- **Triton Gas Stations Limited vs The Receivers of Triton Petroleum Limited, Kenya Commercial Bank Limited and PTA Bank Limited and Kisumu ELC No 275 of 2014;** and
- **Triton Service Stations Limited Vs Wells Oil Limited.**

Further, the Defendants seek that leave be granted to all parties in **Nairobi High Court ELC 1197 of 2014 Sahara Petroleum vs. Triton Gas Stations** to be heard on the instant application.

54. Having found as I have concerning the inconsistent positions of the Plaintiffs in respect of the Deed of Settlement, I am satisfied that this court ought to grant further interim orders.

55. **Section 6** of the **Civil Procedure Act** provides that:

‘No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.’

56. It has been demonstrated that there are other suits with regard to the properties under the Deed of Settlement. In each case, either one or both plaintiffs herein are also parties. I have already set out under paragraph 32 above, the other suits that have been filed. Two of the High Court cases have been struck out or dismissed. With regard to the matters in the Environment and Land Court, the subject matter constitutes the properties in the Deed of Settlement. Given that the veracity of the Deed of Settlement is yet to be established, it would have been proper and appropriate that these other matters be stayed, pending the settling of the question of the Deed of Settlement at trial.

57. This court cannot, however, make that order because of an obvious complication. **Nairobi ELC 1197 of 2014 Sahara Petroleum vs Triton Gas Stations & Others**, and **Triton Service Stations Limited vs Wells Oil Limited Kisumu ELC No 275 of 2014**, are both matters under the jurisdiction of the Environment and Land Court, not that of the High Court.

58. The court is however not powerless to ensure prompt and effective administration of justice. In the exercise of their powers, the courts are bound by the constitutional principle that justice shall not be delayed and that justice shall be administered without undue regard to procedural technicalities: **Article 159 (2)(b) and (d)** of the **Constitution**. In addition, the overriding principles in **Section 1A and 1B** of the **Civil Procedure Act** provide for, *inter alia*, the just, expeditious, proportionate and affordable resolution of civil disputes. Those principles statutorily oblige the court to handle all matters in such manner as to attain the efficient disposal of the business of the court and the efficient use of judicial and administrative time. See also: **John Gakure & 148 Others vs. Dawa Pharmaceutical Co. Ltd & 7 Others Civil Application No. 299 of 2007, (Waki, JA)**; and **Hunker Trading Company Limited vs. Elf Oil Kenya Limited Civil Application No. Nai. 6 of 2010 [2010] 1 KLR 226 (Githinji, Visram & Nyamu, JJA)**

59. To this end, it appears to me prudent that the proper order to give in the interests of justice, is to direct that all parties in all the suits mentioned herein or in the Ruling of Ogola, J, in both the High

Court and in the Environment and Land Court, be served with this Ruling and be invited to participate in this application.

60. Further, this Ruling should be brought by the Deputy Registrar to the immediate attention of all the Judges handling the various suits mentioned herein, so that they are aware of, and if necessary, may give appropriate directions with regard to those suits in which the parties are either seeking determination of the validity of the Deed of Settlement or are relying on it or on its validity. This will pre-empt the courts in these other matters giving varying and inconsistent orders especially where the question of the validity or otherwise of the Deed of Settlement has not been specifically brought before the court but which decision would have ramifications on the properties in the Deed of Settlement.

61. The upshot of all the foregoing is as follows, and I hereby order that:

1. The prayer for certification of a bench under Article 165(4) of the Constitution fails.

2. The temporary injunction orders issued by Ogola J. shall remain *in situ*.

3. An order do and hereby issues that the parties in the following suits, namely:

a). Sahara Petroleum Limited vs. Triton Gas Stations Limited & 20 Others, ELC Civil Case No. 1197 of 2014;

b). Jaguar Petroleum Company Limited & 2 others vs. Emunyinyi Oil Company Limited and Another, ELC Civil Case No. 1573 of 2014;

c). Triton Service Stations Limited vs Wells Oil Limited Kisumu ELC No 275 of 2014; and

d). HCCC No. 227 of 2010 Mombasa (cited in the said Ruling of Ogola ,J);

be forthwith invited by the Defendants herein to participate in this interlocutory application for determination of the sole question as to the validity or otherwise of the Deed of

Settlement dated 9th March, 2009.

4. The Deputy Registrar shall forthwith, and not later than seven (7) days from the date hereof, bring the contents of this ruling to all Judges handling the suits mentioned in paragraph 61.3 above, for appropriate directions in those suits.

62. This file shall be returned to the Presiding Judge of the Commercial Division for allocation and hearing on the highlighted issue on priority basis in the Division.

63. Costs shall be in the cause.

DATED AT NAIROBI ON THIS 29TH DAY OF JULY, 2015

RICHARD MWONGO

PRINCIPAL JUDGE

