REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 306 OF 2015

EMPRO ELECTRICAL & MECHANICAL ENGINEERS COMPANY LIMITED…....PLAINTIFF

- VERSUS -

KENYA PIPELINE COMPANY LTD……..….....…...1ST DEFENDANT

ENGINEER G.W. KIAMA, THE PROJECT ENGINEER MANAGER, KENYA PIPELINE

COMPANY LIMITED…….……..….....….2ND DEFENDANT

RULING

1. This Ruling is in relation to the Preliminary Objection lodged by the Defendants against both the suit and the Plaintiff's application for interlocutory injunctions.
2. The said Preliminary Objection is in the following terms;

> **"1.THAT the honourable court lacks jurisdiction to entertain the suit and the Application to the extent that the contract has already expired.**
>
> **2. THAT the Application as presented violates Order 40 Rules 1 and 2 of the Civil Procedure Rules.**
>
> **3. THAT the orders sought by the Plaintiff/Applicant violate the sanctity of contracts.**
>
> **4. THAT the affidavit sworn by Jackson Adembesa on 22nd June, 2015 is fatally defective as it fails to comply with the requisite rules.**
>
> **5. THAT to the extent that all the reliefs sought in the suit cannot be granted, there is no purpose of the suit going on.**
>
> **6. THAT there is no cause of action against the 2nd defendant since the contract was between the plaintiff and the 1st defendant only, and the 2nd defendant was not a party and did not assume any obligation to the plaintiff under the contract.**
>
> **7. THAT the suit and Application are an abuse of the court process.**

8. <u>THAT</u> it is in the interest of justice that the suit and the Application herein by dismissed with costs to the plaintiff/applicant".

3. The Defendants submitted that the Preliminary Objection was based strictly on the facts which were laid out in the Plaint and in the Application. The Defendants made it clear that the Preliminary Objection assumes that the facts laid out by the plaintiff were factually correct.

4. According to the defendants, one of the facts was that upon the lapse of 12 months, from 24th March 2014, the contract expired.

5. However, although the contract was for a period of 12 months, the defendants had not completed the construction of the additional truck bottom loading facility.

6. Being aware that the contract had lapsed, the plaintiff was said to have sought an extension of the contract. However, the defendants rejected the plaintiff's request for an extension of time.

7. Therefore, the plaintiff had now instituted these proceedings, to ask the court to extend the expired contract. That is the defendants' take.

8. In the circumstances, the defendants asked the court to reach the following conclusion, as was arrived at by Njagi J. in **OSTERIA ICE CREAM LIMITED Vs THE JUNCTION LIMITED (TJL) Hccc No. 898 of 2010;**

> ***"Since the term agreed upon expired by effluxion of time, there is nothing to extend and there is no basis for such extension. Any attempt by a court to extend the period would amount to re-writing the contract between the parties. Only the parties themselves can rewrite their contract. The duty of the court is to interpret and enforce contracts entered into by the parties but not to rewrite them".***

9. The learned Judge went on to find as follows;

> "***Again, considering that the agreement between the parties came to an end by effluxion of time, the respondent would not have had a hand in its expiration".***

10. The respondent in that case had been accused of having an ulterior motive, which was intended to force out the plaintiff from the suit premises. But the court held that the respondent's motive was irrelevant in the termination, as the same happened automatically, when the duration of the agreement lapsed.

11. The defendants also placed reliance on the following words of the Court of Appeal in **NATIONAL BANK OF KENYA LIMTIED Vs PIPE PLASTIC SAMKOLIT (K) LIMITED & ANOR [2002] E.A. 503;**

> ***"This, in our view, is a serious misdirection on the part of the Learned Judge. A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause".***

12. In answer to the Preliminary Objection, the plaintiff submitted that the matters raised by the defendants did not constitute pure points of law which could dispose of the suit, if argued as a preliminary point.

13. As far as the plaintiff was concerned, none of the points raised go to the jurisdiction of the court. Indeed, the plaintiff believes that none of the issues had the potential of disposing of the suit. That belief is founded upon the plaintiff's contention that the issues had been raised in the

midst of contested facts.

14. In order to determine the issues, therefore, the plaintiff submitted that there would be need for the court to conduct investigations in order to ascertain the facts.

15. As an example, the plaintiff made it clear that it had not conceded that the contract had already expired. The plaintiff said that before the court could determine whether or not the contract had indeed expired, the court would have to investigate the facts, peruse the documents, and also examine the minutes of meetings, the correspondence exchanged and the conduct of the parties.

16. But why would that be necessary if the contract was for a fixed period of time?

17. The defendants answer was that the decision made by the 2nd Defendant was a nullity, because the said defendant had not acted in accordance with the contract.

18. If that be the case, the plaintiff believes that it would then persuade the court not to allow the 1st defendant to enforce an illegality or a nullity.

19. It was for that reason that the plaintiff expressed the view that the case was not as simple as the defendants would want the court to believe.

20. That submission was said to also apply to the second Objection.

21. In my considered view, the likelihood of the applicant's failure to satisfy the requirements for the grant of an interlocutory injunction, ought not to be the basis for locking out the application through a Preliminary Objection. The strength or weakness of the application should be determined through a substantive hearing of the application.

22. In this case, the plaintiff's prayers in the Plaint, include a prayer for a permanent injunction to restrain the defendants from terminating the contract.

23. Logically, if the plaintiff were deemed to have admitted that the contract had already been terminated, it would defy logic for the plaintiff to then ask for an injunction to restrain the defendants from terminating the said contract.

24. By seeking that injunctive relief, the plaintiff must be deemed to hold the view that the contract had not yet been determined. Therefore, the defendants' assertion to the contrary is not borne out by the pleadings.

25. On the one hand, the plaintiff holds the view that Clause 44.1 of the Contract gave rise to an entitlement on the part of the plaintiff, to have an extension of the time for Completion of the Works, whilst on the other hand the defendants contend that the contract expired automatically, by effluxion of time.

26. Of course, the 12 months duration has lapsed. Therefore, according to the defendants, the contract had been terminated.

27. But the plaintiff insists that the Engineer, who was required to assess the situation, with a view to ascertain whether or not the plaintiff was fairly entitled to an extension of time, failed to carry out his responsibility. I understand the plaintiff to be reasoning that if only the Engineer had conducted his task in terms of the contract, then he would have concluded that the plaintiff had become entitled to an extension of time.

28. That is the reason given by the defendants for enjoining the Engineer to this suit, as the 2nd defendant.

29. In my considered opinion, since the plaintiff intends to blame the Engineer for acts and omissions which the plaintiff considers to have led the Employer to reject a request for an extension of time, which the plaintiff considers itself to be entitled to, the Engineer may well be an essential party in this case.

30. But if, ultimately, the court were to find that the joinder of the Engineer to the suit was improper, that of itself would not necessarily lead to the termination of the whole suit.

31. As the suit is meant to establish, *inter alia,* whether or not the contract had expired, it would, in my humble opinion, be wrong to set off by already making a finding in that respect.

32. I also find that whether or not the affidavit of Jackson Adembesa was fatally defective, would not determine the issues raised in the suit. A party could always seek leave to file an affidavit which was in compliance with the law, if the one that he had filed did not meet some legal requirements. Of course, the fact that such leave can be sought does not necessarily mean that the court would grant leave. But because there is a possibility that the court could grant leave which could thereafter result in a remedy being found, means that the defect in the affidavit, if it is present, should not necessarily defeat the suit or the application.

33. If the Engineer feels strongly that he ought not to be a party to the suit, he could always make an appropriate application to the court. If and when such an application were made, the court would accord it appropriate consideration.

34. In my view, it would be interesting having a scenario where the Engineer wished to have the suit against him struck out, on the basis that it did not disclose any cause of action against him. I say that that would be an interesting scenario because if the court were persuaded to strike out the suit against the Engineer, it would mean that the said Engineer had chosen not to have a direct opportunity to respond to allegations levelled against him.

35. However, regardless of whether or not the claim against the Engineer were to be struck-off, that would not determine the claims against the Employer. Therefore, the absence of a cause of action against the Engineer, if it were established, would not dispose of the suit. Accordingly, that ground in the Preliminary Objection fails.

36. In conclusion, I find that the suit and the application for interlocutory injunctions are not an abuse of the process of the court.

37. I also find that the interest of justice dictate that the suit and the application be sustained, so that the same can be determined on their merits.

38. Before giving the parties an opportunity to substantively present their respective cases, it would, in my considered view, be premature to declare that all the reliefs sought in the suit cannot be granted.

39. In effect, neither the suit nor the application are so hopeless that they ought to be disposed of, summarily.

40. Accordingly, I find no merit in the Preliminary Objection. The same is therefore overruled in every respect.

41. The defendants will pay to the plaintiff, the costs of the Preliminary

Objection.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **14th day** of **September** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Plaintiff

Arwa for the Defendant

Collins Odhiambo – Court clerk