REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 106 OF 2002

KENYA OIL CO. LTD. ……..…….. PLAINTIFF

VERSUS

WESTMONT POWER (K) LTD. ……..…… DEFENDANT

RULING

1. Before the Court is a Notice of Motion application by the defendant dated 11th May, 2012. It is brought under the provisions of **Section 1A, 1B, 3A and 91** of the *Civil Procedure Act* and seeks for orders of restitution against the Plaintiff. It is brought upon the grounds that the Decree issued in favour of the Plaintiff has been reversed vide the Court of Appeal's Ruling dated 1st April, 2011.
2. The application is supported the Affidavit of **Sheetal Kapila** sworn on the same date as the application. The applicant contends that the Plaintiff has failed to comply with the orders issued by the Superior Court on 16th March, 2012 and has failed to remit the decretal sum, necessitating the filing of the present application. It is the Defendant's contention that the refusal and failure by the Plaintiff to repay the said sum is wrongful and without justification. The applicant relied on the cases of **Kenya Post Office Savings Bank Ltd v Wareham & 2 Others (2004) eKLR, Mulla's Code of Civil Procedure, 16th Edition pg 5-14, Mustill & Boyd, Commercial Arbitration, 2nd Edition pgs 15-17** and the **Black's Law Dictionary, 8th Edition pgs 19-19.**
3. The application is opposed. The Plaintiff filed the Affidavit of **Akber Abdullah Kassam Esmail** sworn on 20th July, 2012. The deponent contends that the orders issued by the Court of Appeal in **Civil Appeal No. 154 of 2003** were that the decretal amount was to be deposited into a joint interest earning account. It also contended that the stay orders issued by this Court on 16th March, 2012 were to subsist pending the determination of the Arbitration hearing and as such no costs can be ordered until then. The Plaintiff cited **Halisbury's Laws of England (4th Edition) para 975-977, Mulla's Code of Civil Procedure Vol. 1 (14th Edition) pg 148-149** and **Greenhalgh v Mallard (1947) 2 All ER 255** in support of its position.
4. The first issue that the Court will need to determine was raised by the Plaintiff with regard to the representation by the Advocates on record, **A.R Kapila & Co. Advocates.** It is the Plaintiff's contention that the firm of Advocates had not had the conduct of the proceedings at all times and that it only came into the picture on 7th April, 2011 when the said firm filed a Notice of Change of Advocate. It is also the Plaintiff's contention that the Defendant's instructions were only limited to the handling of the Appeal and therefore, the deponent of the Affidavit in support of the Application for restitution had no authority to swear the Affidavit in support of the Defendant's application.

5. To that issue, the Defendant's advocate responded that it had always had instructions to represent the party and had filed two Notices of Change of Advocate, dated 15th June, 2004 and 7th April, 2011 taking over the handling thereof from the firms of **Messrs. Kapila Anjarwalla & Khanna Advocates** and **Messrs. Okoth & Kiplagat Advocates** respectively. It was its contention that given that it had proper mandate from the Defendant to represent it in the suit, its deponent could swear and file an affidavit on its behalf as regards the matters before court.
6. To the Court's mind, this is a non-contentious issue which the Plaintiff is subjecting to the Court to render for determination. It is evident that indeed the Advocates for the Defendant did receive instructions, manifested by the 2 Notices of Change of Advocate filed, which in any event are and were not contested. In the Court's opinion, the Plaintiff should ascribe to the salient issues to be determined by the Court and not dwell on matters touching the issue of instructions. The Plaintiff is not privy to what instructions the Defendant's advocates had received from its client and therefore, should not cast aspersions to what it cannot authoritatively contest. As a result, it is this Court's determination that the Defendant's advocates are properly on record and (whether or not they were on record at all times), the firm is conversant with the issues at hand.
7. In its case for restitution, the Defendant contended that its application was necessitated by the reversal of the Superior Court's decree dated 22nd March, 2002, by the Court of Appeal. In referring to the Court of Appeal's ruling, the Defendant submitted that the Orders of the Court were clear and unambiguous in that there was an order that the application under **Section 6 (1)** of the *Arbitration Act* should be heard and determined on merit. It further alleged that by the said Orders, the Decree issued by the Superior Court was irregular and was thus set aside. The same applied to all consequential orders thereto. The Defendant further alleged that since the application for stay has been heard and determined with the suit being referred to Arbitration, the Plaintiff should not continue to hold on to and retain the decretal sum. It cited the case of **Kenya Post Office Savings Bank v Wareham & 2 Others** (supra) where Waweru, J held *inter alia*;

> **"The statutory provisions quoted give the Court the necessary jurisdiction to grant what they seek. The facts of this matter are such that the Court would have absolutely no reason to deny them what they seek. I will therefore grant the application."**

The Defendant's allegations are that the Court of Appeal's Ruling set aside the judgment entered in favour of the Plaintiff and directed for the Defendant's application to be heard and determined. Pending the determination the decretal amount held by the Plaintiff was too be either deposited in a joint interest earning account or with the Court. It is its contention that since the application to have the matter before Court stayed was allowed, (and the matter was to proceed to Arbitration), thus in accordance with its interpretation of the Court of Appeal ruling, the monies should be restituted to it. It went further to say that the conduct of the Plaintiff amounted to unjust enrichment and a violation of the overriding objectives of expeditious resolution of disputes.

8. The Plaintiff, on its part, contended that the matter was *res judicata*, having been heard and determined by the Court of Appeal when rendering its Ruling. It was contended that the Defendant had specifically asked for the Appellate Court to order for a refund of the decretal sum, which prayer had been rejected. Instead the Court had ordered for the money to be deposited in a joint interest earning account or with the Court. At paragraph 8 of the Affidavit of **Akber Abdullah Kassam Esmail**, the deponent avers;

> **"8) The Court of Appeal's decision is very clear and it did not make an order for such deposit to be made "pending the outcome of the Defendant's application for stay of proceedings under Section 6(1) of the Arbitration Act" as contended by the deponent in paragraph 7 of his said affidavit."**

The Plaintiff contends that the suit has only been stayed and not dismissed and shall subsist until the hearing and determination of the arbitration.

9. In considering the application, the Court stands to be guided by two factors namely: 1) what the Ruling of the Court of Appeal portends and 2) whether the suit and consequential orders have been dismissed after the Ruling of the superior Court dated 16th March, 2012. The Ruling of the Court of Appeal with regard to the setting aside of the judgment of the Superior Court of 22nd March, 2002 is undisputed. The Ruling read in part as follows:

> **"Accordingly, we allow this appeal, set aside the ex-parte judgment entered against the appellant on 22nd March, 2002 and order that the appellant's application under Section 6(1) of the Arbitration Act dated 13th March, 2002 be set down for hearing in the superior court before any judge other than Ombija, J."**

In the Court's opinion, the authority of **Kenya Post Office Savings Bank v Wareham & 2 Others** (supra) can be distinguished from the circumstances in the present case. In that matter, the Court of Appeal set aside the judgment and *dismissed* the suit. There were no consequential orders such as there are in the instant case where the matter was referred back to the Superior Court to hear and determine an application that had already been filed. In that case the issue of restitution was made in accordance with the provisions of **Section 91 (1)** of the *Civil Procedure Act*. In the instant suit, however, the suit has not been dismissed, but stayed pending the hearing and determination by the Arbitration tribunal. The Orders issued by the Superior Court on 16th March, 2012 were to the effect that the suit, and all proceedings in relation thereto, be stayed pending the matter being referred to arbitration. Kimondo, J in issuing the orders detailed:

> **"For all the above reasons, I find merit in the defendant's Chamber Summons dated 12th March, 2002 and filed in Court on 15th March, 2002. I thus order that the suit herein and all proceedings in relation thereto be and are hereby stayed. I also order that the dispute between the parties be referred to arbitration. I also award the defendant costs of this application."**

It therefore follows that the suit still pends, but is currently stayed pending the determination of the Arbitration as ordered by Kimondo, J in his said Ruling dated 16th March, 2012.

10. Now the factor that arises is whether the Court of Appeal *determined* the issue of restitution. In the Affidavit of Akber Abdullah Kassam Esmail, the deponent adduced an exhibit marked "A", being the Memorandum of Appeal filed by the Appellant dated 4th July, 2003. At paragraph 2 of the proposal for Orders to be issued contrary to those of the superior Court, the Defendant sought to have the following prayer:

2. **All monies paid to the Respondent/Plaintiff in execution of the decree dated 22nd March, 2002 *be refunded to the Applicant/Defendant*.**

The Court of Appeal rendered it Ruling with regard to that factor as follows:

> **"In the prayers before us, the appellant also seeks refund of the decretal sum already paid to the respondent. The order that best commends itself to us in the circumstances of this case is that the decretal sum paid to the respondent be deposited in an interest earning account in the joint names of the advocates on record with any reputable bank within the next 21 days. If that cannot be accomplished for any reason within the time frame stipulated therein, we order that the funds be deposited in Court."**

From the finding of the Court of Appeal, it is quite clear and in no uncertain terms, that the decretal sum paid to the Respondent was to be deposited in a joint account within 21 days, failure to which the same was to be deposited in Court. It made no mention (as alleged by the Defendant), that the same were to be refunded once the application for stay had been heard and determined. In this Court's opinion, no other inference can be discerned from the Court of Appeal's Ruling and

any attempt to interpret the Ruling otherwise, would be tantamount to the Superior Court sitting on appeal of the decision of the Court of Appeal. Can the matter then be said to be *res judicata?*

11. **Section 7** of the *Civil Procedure Act* reads:

> **"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".**

The Defendant, in its appeal, did raise the issue of refund of the decretal sum with the Court of Appeal. However, in the submissions made on its behalf by Mr. Wandabwa, it was stated that the issue as relates to restitution had not been determined by any court. He contended that the issue determined by the Court of Appeal did not concern the issue of restitution. It was his submission that the issue dealt with by the Court of Appeal was incidental and collateral to the issue of restitution.

12. The Defendant contends that an application of this nature under:

> **"Section 91 (1) of the *Civil Procedure Act* could not have been before the Court of Appeal. It was its contention, by the authorities submitted, that it was the Superior Court that had the jurisdiction to determine the matter of restitution".**

The provision reads:

> **"Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits, which are properly consequential on such variation or reversal".** (Underlining mine).

The Defendant alleges that it is only the Court of first instance (in this case, the superior Court), that has the jurisdiction to hear and determine the question of restitution, once the Decree or Order has been varied or reversed. At **Section 3 (1)** of the Appellate Jurisdiction Act, it is provided that:

> **"For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, *the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court*."**

13. That provision allows for the Court of Appeal, in the hearing and determination of issues under its jurisdiction, to make similar orders as the Superior Court. It is evident that the Defendant, in its Memorandum of Appeal, sought to have the decretal sum refunded to it, in similar fashion to the application that it now makes before this Court, under **Section 91(1)** of the *Civil Procedure Act*. In an application for restitution, the Court of Appeal by virtue of **Section 3 (1)** of the *Appellate Jurisdiction Act*, is empowered to make such orders as it may deem fit and which may have been found consequential on such variation. As above the Court of Appeal, in determining the Appeal, directed that the funds were to be deposited in a joint interest earning account within 21 days or deposited in Court, hence conclusively determining the issue of restitution. This was similar to what was determined by Somervell, L.J in **Greenhalgh v Mallard** (supra). The learned Judge therein, on the issue of *res judicata* held that:

> **"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the Court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the Court to allow a new proceeding to be started in respect of them."**

14. In my opinion, the Defendant herein by its application and submissions in that regard, has made an attempt to circumvent the decision of the Court of Appeal by alleging that it is only the Superior Court that has the mandate to determine the issue of restitution. The Court of Appeal effectually took up the issue raised by the Defendant and made a determination on the same. The Court subsequently finds that the matter before it is indeed *res judicata* as the same issue was raised by the Defendant in its application as had already been heard and determined by the Court of Appeal. It follows therefore that the Defendant's Application dated 11 May 2012, is dismissed with costs to the Plaintiff.

DATED and determined at Nairobi this 19th day of June, 2013.

J. B. HAVELOCK

JUDGE