REPUBLIC OF KENYA

IN THE HIGH OF KENYA AT NAIROBI

MILIMANI LAW COURTS

Civil Case 495 of 2010

MAGUTA INVESTMENTS LIMITED ……. PLAINTIFF

VERSUS

KENYA SHELL LIMITED ……..……. DEFENDANT

RULING

1. What is before this court is the Defendant\'s application by way of Notice of Motion dated 14 February 2011. It is supported by the annexed affidavit of Catherine Musakali dated 15 February 2011 in which the deponent describes herself as the Company Secretary of the Defendant Company. The Notice of Motion seeks an order that the Plaint herein be struck out. In the alternative it seeks an order that the suit be marked as "compromised". The application is brought under **Order 2 Rule 15 (1) (b)** and **(d)** as well as **Order 25 Rule 5 (1)** of the *Civil Procedure Rules*. It is based on the grounds that the Plaintiff\'s suit is an abuse of the court process as the Plaintiff has no basis for presenting any claim against the Defendant. The latter maintains that the suit is based on a non-existent contract and that the claim put forward by the Plaintiff has been fully satisfied. Further, the Defendant maintains that the suit is scandalous, frivolous and vexatious in that the Plaintiff has failed to supply particulars or even show of the basis of its cause of action.

2. In her Supporting Affidavit, the said Catherine Musakali refers to previous affidavits sworn in September 2010 by herself and one Alison Kariuki and adopted the contents thereof. Basically the deponent has detailed that the Defendant had no agreement with the Plaintiff prior to 1 January 2010. It was on that date that the Plaintiff entered into an agreement with the Defendant. However, there was an agreement between the Defendant and one Eddie Waiyaki Hinga entered into on first of March 2004 which allowed the latter to operate the Defendant\'s Highview service station. A dispute arose between the parties and eventually a settlement agreement was entered into between the Defendant and the said Eddie Waiyaki Hinga. In the deponent’s opinion the present suit is an attempt to introduce claims which have already been compromised.

3. The deponent continued by stating that she had been informed by the advocates on record that:

(a) On 27 September 2010, the advocates’ firm served a request for particulars on the Plaintiff\'s advocates.

(b) No particulars were forthcoming leading to the advocates sending a reminder letter to the Plaintiff\'s advocates on 22nd of October 2010.

(c) Due to failure by the Plaintiff to furnish particulars, an application to compel the Plaintiff to furnish particulars was filed in court on 1 November 2010.

(d) It is only after being served with the application to give particulars that the Plaintiff\'s advocate, one Philip Wachira, filed a replying affidavit stating that the particulars sought were within the knowledge of the Defendant.

(e) In the said replying affidavit, the said advocate did not mention anything regarding the particulars sought in paragraphs 5 and 6 of the request for particulars.

(f) The Plaintiff\'s advocate alleged that the defendant was seeking evidence as opposed to particulars.

(g) The Plaintiff\'s advocate also stated that the particulars sought had been made available in the various affidavits already filed in court.

4. It was Catherine Musakali's further view that as a result of the contents of the Plaintiff\'s advocate\'s said replying affidavit, the Plaintiff\'s claim is premised on contracts between the Defendant and the said Eddie Waiyaki Hinga. She reiterated that all amounts due to the said Mr. Hinga had been paid as under the aforesaid settlement agreement. It was for this reason that the Plaint herein was an abuse of the court process as it is based on contracts which were entered into between the Defendant and a third party.

5. The said Eddie Waiyaki Hinga swore an affidavit in reply dated 14 March 2011. He deponed to the fact that he was a director of the Plaintiff company and conversant with all matters pertaining to the suit. The deponent maintained that by the Defendant applying to have the suit marked as compromised, when all the outstanding issues raised in this suit are all still alive and pending before court, the Defendant was, in effect, trying to steal a march over the Plaintiff. The deponent noted that the Defendant had filed two applications which he believed were aimed at delaying the quick hearing and determination of this suit. The first was the application seeking particulars and now the present application seeking to have the Plaint struck out. The deponent continued with his affidavit stating that the suit was not scandalous, frivolous or vexatious nor an abuse of the process of the court. He maintained that the claim as put forward by the Plaintiff has not been fully satisfied and that it was not just or fair that the suit be struck out without giving the Plaintiff the opportunity to prosecute the same. This would amount to determining the matter through a technicality. He maintained that the affidavit of Catherine Musakali was merely a repetition of all the other affidavits that the Defendant has previously filed in court and does not contain any new averments in support the current application which he considered to be strange because the Plaintiff\'s application for an injunction against the Defendant has not been determined. Thereafter the deponent continued detailing information and advice that he had received from his advocates which basically amounted to the fact that the Defendant's application to strike out the Plaint is brought *mala fides* with the intention of blocking the suit from being heard on its merits.

6. The Defendant filed its submissions herein on 24th of February 2012 following upon the filing of the Plaintiff\'s submissions on 13 February 2012. The Plaintiff\'s submissions gave some background to the application in order to put into proper perspective a brief synopsis of the Plaintiff\'s claim against the Defendant. It detailed that the said Mr. Eddie Waiyaki Hinga was trading as Maguta Investments and entered into a Dealer Licence Agreement way back in 1999 for the operation of the Defendant\'s branded petrol station along Mbagathi Way, Nairobi. That initial agreement was amended by the parties firstly in the year 2004 and later in 2010. Under the agreement, the Plaintiff was to faithfully purchase all its petroleum products from the Defendant, which the submissions detailed, the Plaintiff had done all along. The Plaintiff claimed that in the year 2008 it noticed that it was experiencing fuel losses (or short deliveries as the Defendant claims was the case) whereupon it notified the Defendant of the same. Having carried out a joint audit, the parties had a series of meetings more specifically one on 24th November 2009. After that meeting, the said Eddie Waiyaki Hinga, as managing director as of the Plaintiff company wrote to the Defendant accepting payment of an ex-gratia sum to compensate for the fuel losses. On 7th December 2009, the Plaintiff executed its part of the settlement agreement. The submissions detailed that it was an express term of that agreement that the Defendant was to issue the settlement cheque strictly within 30 days of the execution of the settlement agreement. Payment was not forthcoming at the expiry of the 30 days and it was only after the Plaintiff wrote to the Defendant on 15 January 2010 that the Defendant paid to the Plaintiff a sum of KShs.1,526,442/- on 19 February 2010. Thereafter, on 29 April 2010, the Defendant wrote to the Plaintiff notifying the Plaintiff of its intention to sell its downstream

business in Kenya. Thereafter, the Plaintiff filed suit against the Defendant on 2 August 2010.

7. Having given that background, the Plaintiff identified several issues arising out of the grounds upon which the Defendant\'s application is premised. The Plaintiff referred the court to the Ruling of Hon. Justice Ouko in *HCCC 347 of 2008* (Nakuru) in the case of **Sher Karuturi v V/d Berg Roses Kenya Ltd** in which the learned judge cited the Court of Appeal\'s finding in **Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others** in which the Court adopting a South African precedent stated:

"What constitutes an abuse of process of the court is a matter which needs to be determined by the circumstances of each case. There can be no-all encompassing definition of the concept of "abuse of process". It can be said in general terms, however, that an abuse of process takes place where the proceedings permitted by the rules of court to facilitate the pursuit of the truth are used for purposes extraneous to that objective."

The Court of Appeal then stated:

"we are of course aware that we cannot formulate any hard and fast rule to determine whether in any given facts abuse is to be found or not."

In the view of the Plaintiff, although the court has inherent jurisdiction to dismiss or strike out an action which is an abuse of the process of the court, it is a jurisdiction which the court exercises sparingly and only in exceptional cases. The Plaintiff maintained that this case is not exceptional.

8. The Plaintiff also referred me to the quotation from Madan J A (as he then was) in the **D. T. Dobie v Muchina** case (1982) KLR1 as follows:

"A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal."

This case had again been referred to in Mr. Justice Ouko's matter as aforesaid. Similarly, the Plaintiff referred me to another Court of Appeal case being the **Kisii Farmers' Co-operative Union Ltd v Sanjay Natwaral Chaunhan T/A Oriental Motors,** *Civil Appeal No. 32 of 2003***.** The Court stated as follows:

"Normally it is better to allow a weak case to go to trial than invoke the guillotine process."

9. As to the legal position as regards whether a suit can be termed scandalous, frivolous or vexatious, the Plaintiff referred me to the case of **Patrick K. Muriuki v Barclays Bank of Kenya Ltd & Anor.** *HCCC No. 1251 of 2005 (2010)* **eKLR** where **Dulu J.** quoted from **Ringera J's** (as he then was) finding in **Mpaka Road Development v Kana (2001) 2EA 468** wherein he stated:

"A matter would be scandalous, frivolous and vexatious if it would be inadmissible in evidence to show the truth of any allegation in the pleading which was sought to be impugned…a pleading would be frivolous if it lacked… it would be vexatious if it annoyed or tended to annoy."

It was the Plaintiff's submission that nothing in the suit could be said to impute on the character of the Defendant, the pleadings cannot be said to annoy and the Defendant is a corporate entity without feelings. Further, the Plaintiff submitted that nothing can be said to be frivolous in the Plaintiff's claim and even if the Plaintiff's case was weak, this would be the preserve of the trial court to deal with and assess the evidence.

10. In the same vein as the Plaintiff, the Defendant opened its submissions by outlining the documents filed for and against the application. It detailed that in its Plaint, the Plaintiff was claiming *inter alia* the sum of Shs.1,465,189/91 plus interest at 20% per annum thereon being alleged fuel losses it suffered as the operator of the Highway Petrol Station, Mbagathi Way, Nairobi. It outlined that its Defence to the claim was that, at the time that the fuel losses were allegedly incurred, there was no dealership agreement in existence as between Plaintiff and the Defendant. In the alternative, the Defendant submitted, that if an

agreement did exist or was found to be in place, then the Defendant had paid all the monies due under the agreement and thus the suit should be marked as compromised. The Defendant further submitted that it and the Plaintiff had entered into a dealer licence agreement on 1 January 2010 for the operation of the Mbagathi Way Highview Service Station. Prior to that agreement the Defendant had a dealer licence agreement with Eddie Waiyaki Hinga dated first of March 2002. Thus the Defendant had no contractual or business dealings with the Plaintiff prior to 1 January 2010, all previous business and dealings had been with Mr. Hinga.

11. The Defendant noted that a dispute had arisen with Mr. Hinga as regards alleged fuel losses which resulted in a settlement agreement dated 7 December 2009, which the Plaintiff had not disclosed to court and which was, in the Defendant\'s opinion, an abuse of the process of the court. Under that settlement agreement, the Defendant had made an ex-gratia payment to the bank account nominated by Mr. Hinga. The Defendant submitted that clause 1 of the settlement agreement had provided that the ex gratia payment had been "in full and final settlement of all and any claims by the Retailer against Shell in respect of the alleged short deliveries of petroleum products". It was therefore the Defendant\'s submission that this suit discloses no reasonable cause of action there being no agreement in place between the Plaintiff and the Defendant at the time of the alleged losses for which the said ex gratia payment was made to Mr. Hinga. It was the Defendant\'s opinion that the suit or to be struck out as it is incurable by an amendment and does not arise from any legal relationship between the Plaintiff and the Defendant.

12. In this regard, the Defendant referred this court to the **D. T. Dobie** case (supra) as well as *Civil Appeal No. 146 of 2001* - **Crescent Construction Company Ltd v Delphis Bank** (2007)eKLR. As regards the point that no prima facie case has been made out against the Defendant counsel referred to the case of **Mohammed & Anor. v Haidara** (1972) EA 166. The Defendant also maintained that under the doctrine of privity of contract, no cause of action lay against the Defendant for claims by the Plaintiff in respect of the contract between the Defendant and the said Mr. Hinga. The court was referred to the case of **Agricultural Finance Corporation v Lengetia Ltd** (1985) KLR 765. Further, the Defendant maintained that a third party cannot sue on a contract which he is not a party and the court was referred to the case of **Kenindia Assurance Company Ltd v Otiende** (1991) KLR 38.

13. I have a carefully perused the two what are described as Dealer Licence Agreements as between the Defendant on the one hand and the Plaintiff and the said Eddie Waiyaki Hinga on the other. These are attached and annexed to the Replying Affidavit of Catherine Musakali dated 7 September 2010. This was the Replying Affidavit that the said Catherine Musakali referred to and adopted in her Affidavit in support of the Defendant\'s Application before court. The first Agreement in time is dated first of March 2004 and is made between the Defendant Company and Mr. Hinga. Under Schedule 1 of that Agreement, the Licensee is detailed as Waiyaki Hinga trading as Maguta Investments. The Schedule does not describe the operated premises but I doubt that there can be any disagreement other than the Agreement applies to the Defendant\'s Mbagathi Way, Highview Service Station. That agreement was for a term of two years from 1 March 2004 and follows upon other agreements for the operation of the service station. It can also be determined from the Affidavits that the agreement was extended from time to time. The second Agreement was dated the 1 January 2010 and is made between the Defendant and **Maguta Investments Ltd.** It is described as a Retail Business Agreement with FBS. Maguta Investments Ltd is obviously a private limited company although this is not stated in the Agreement. Under the definition of "Start Date" in clause 1 of the said Agreement such is a given that as the 1 January 2010 and the term is detailed as a period of three years from the Start Date.

14. Also attached to the said Replying Affidavit of Catherine Musakali as Exhibit "CM 3" is what is headed **"Settlement Agreement Relating to Alleged Short Deliveries of Petroleum Products"**. That agreement was entered into on the seventh day of December 2009 between the Defendant of the one part and the said Mr. Eddie WaiyakiHinga on the other part. In the preamble thereto the Agreement refers to "a Dealer Licence Agreement ("Initial Licence Agreement") dated first of March 2002 as thereafter amended by and between the Parties, the Retailer was appointed by Shell as a Licensee with respect to Highview Service Station". That agreement appears to have been executed by one Jimmy D. Mugerwa on behalf of the Defendant on 19 October 2009. It appears to have been executed by the said Mr. Eddie

Waiyaki Hinga on 7 December 2009. Clause 1 of that agreement reads as follows:

"1. That purely on an ex-gratia basis, and without any admission of liability on the part of Shell, and in the interest of good business relations, Shell will, by the issuance of a cheque to that effect, pay the Retailer an ALL INCLUSIVE sum of KShs. 1,526,442 [hereinafter the "settlement sum"] within 30 days of signing this Agreement and the Retailer Business Agreement (enclosed share with), in full and final settlement of all and any claims by the Retailer against Shall in respect of the alleged short deliveries of petroleum products;"

The Plaint herein in paragraph 6 claims that the fuel losses suffered by the Plaintiff amounted to over KShs. 2,993,631.81 which resulted in the Defendant paying the Plaintiff a sum of KShs. 1,528,442/-. This is not quite the figure contained in the Settlement Agreement, there is a difference of KShs 2000/-. The Plaint actually claims an amount of KShs. 1,465,189.81 which is the difference between the amount of the fuel losses as claimed by the Plaintiff and the sum paid by the Defendant under the Settlement Agreement. However, what arises out of all this is that the Plaintiff herein was not the Retailer referred to in the Settlement Agreement. The Retailer was Mr. Hinga and at that time, he was the Retailer under the Dealer Licence Agreement. The Plaintiff did not come up on the scene until 1 January 2010.

15. I have considered both the authorities put forward by the Plaintiff and those of the Defendant as regards the Application before this court. It seems to me and that what the Plaintiff is trying to do is to reopen the question of the petroleum losses which were allegedly incurred when the Highview service station was being operated by Mr. Hinga. I consider this to be an abuse of the court process and adopt the finding of my learned brother Ouko J. in the

Sher Karuturi case as set out above. I am satisfied that the proceedings hearing permitted by the Rules of court are being used for purposes extraneous to the pursuit of truth. In my view, this suit should be struck out summarily as it is one of the clearest cases that he does not show a reasonable cause of action as in my view, the wrong Plaintiff is suing. If Mr. Hinga feels that the need to reopen the question of alleged fuel losses then he should be the plaintiff so to do. However, having executed in the said Settlement Agreement dated 7 December 2009, he is no doubt bound by clause 3 thereof which reads:

"The Retailer further remarkably agrees that all causes of action relating to the alleged short deliveries up to and including the date of execution hereof be and are hereby extinguished."

16. To this end, the doctrine of the privity of contract quite clearly applies as regards this suit. I take on board the definition in this regard the quote in the **Agricultural Finance Corporation** case (supra) adopted by the Court of Appeal from Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 10:

"As a general rule a contract effects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that the person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract".

From the 1 March 2004 Agreement, I noted that Mr. Hinga was trading under the name of Maguta Investments. From 1 January 2010 Agreement, it appears that the business of Maguta Investments was converted to a limited company, which is a different legal entity to Mr. Hinga himself. Under the doctrine of privity of contract and looking at the quotation above, to my mind it does not matter that the "near relationship" exists, the Plaintiff in this case cannot open up matters that appear to have been settled in the past.

17. The upshot of all the above is that I allow the Defendant\'s Notice of Motion dated 14th of February 2011 in prayer 1. I also award the costs of the Application to the Defendant.

DATED and delivered at Nairobi this 31st day of July 2012.

J. B.HAVELOCK

JUDGE