



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

THE COMMERCIAL AND TAX DIVISION OF THE HIGH COURT

CIVIL SUIT NO. 244 OF 2009

**GLENCORE ENERGY U. K. LIMITED.....PLAINTIFF/
APPLICANT**

VS

**KENYA PIPELINE CO. LIMITED.....DEFENDANT/
RESPONDENT**

R U L I N G

On 28th October 2010, I delivered a Ruling allowing the Plaintiffs' application dated 16th September 2010, for an order that the Defendants do produce, for inspection, certain documents which the Defendants claim to have been privileged on account of confidentiality and legal professional privilege.

In the course of taking evidence from the Plaintiff's first witness, **James Philip Mallinder** (PW1), an objection was raised by counsel for the Defendants, Prof. Githu Muigai (now, the Attorney General) to the reference and/or attempt by the Plaintiff's advocate, Mr. George Oraro to introduce, in support of the Plaintiff's case, a Forensic Audit Report entitled "*Project Bahari*", itemized as item (iii) in the Plaintiff's Notice to Produce Documents filed and served on 23rd November 2010. The said report is said to have been prepared by the audit firm of Pricewaterhouse Coopers on or about 6th April 2009. It was the subject of correspondence between the parties to this suit, culminating in the Defendant's advocate's letter on 9th November 2010, stating their final position in that regard as follows:

“As there is no agreement on the issue of the PwC Report, we suggest that we leave it to the court's determination as and when it arises.”

For the purposes of this Ruling, Pricewaterhouse Coopers will be referred to as PwC and their report "*the PwC Report*.”

Quite interestingly, the said audit report was not made part of the discovery and inspection conducted

earlier by mutual agreement or under the court order sought in the application dated 16th September 2010. The decision by learned counsel for the Plaintiff to introduce the said report, through PW1, was informed by the fact that the Defendants had stated in their letter of 26th January 2009, to the Plaintiffs' advocates that the independent forensic audit had been sought as part of the joint measures the Defendant and the Government of Kenya were taking to address, inter alia, the apparent unauthorized release of products by the Defendant, upon which the Plaintiff's claim is founded. The said letter was followed by a letter dated 3rd February 2009, written by the Defendant's advocates to the Plaintiffs, indicating that the results of the audit were expected within 30 days of the said letter.

From the correspondence referred to by counsel for the Plaintiff, Mr. George Oraro, as he led PW1 in the examination in chief, it is apparent that the Plaintiffs' expectations were that the contents of the Forensic Audit Report would be shared with them. The Defendant's objection was precipitated by the attempt by counsel for the Plaintiff to have the witness testify in regard to a copy of the report, said to have been downloaded from the internet, arguing that the same and the contents thereof were in the public domain and enjoyed no privilege at all, as had been claimed by the Defendants when refusing to make a copy available to the Plaintiffs.

The Defendant's objection, as presented by their learned counsel, Prof. Muigai is that the PwC Report is privileged on the basis that:

- (i) **It was obtained in contemplation of litigation and for the purposes of obtaining legal advice.**

- (ii) **It contains legal advice given to the Defendants by the firm of Coulson Harney thus acquiring legal professional privilege.**

Relying on **Section 137** of the **Evidence Act** and the authorities furnished to court under a list dated 10th May 2011, counsel submitted that the report was created in contemplation of litigation with the dominant purpose of obtaining legal advice. He told the court that in the exchange of correspondence relating to this report, the Plaintiffs were always told that the same was sought for the purposes of determining liability and was intended for establishing the extent of what was "*at the time perceived to be fraudulent trading on the part of Triton and that account alone.*" It is common ground that the Plaintiffs were Triton's Financiers in the importation of gas oil through the Defendant.

Counsel submitted further that, as the Plaintiffs have not formally applied to challenge the assertion of privilege, which has not been waived, the same remains intact and the court can neither allow nor order the production of the disputed document in evidence. In Prof. Muigai's opinion, the fact that the said report was not included in the Plaintiffs' earlier application for discovery must be taken to mean that they do appreciate the privilege ascribed to it. He asked the court to find that the decision in **BASELINE ARCHITECTS LTD & 2 OTHERS V NATIONAL HOSPITAL INSURANCE FUND BOARD MANAGEMENT(?)[2008] eKLR**, applies in favour of the Defendant's objection and to uphold the same.

At the request of the court, counsel agreed that the copy downloaded from the internet by the Plaintiffs be submitted to examination by the court but with Prof. Muigai maintaining that the PwC Report was meant exclusively for the use of the Defence in preparing its defence on liability and that the Plaintiffs should not be allowed to peek at it and/or rely on its contents whether downloaded from the internet or otherwise acquired. He refuted also the Plaintiffs' counsel's suggestion that the copy from the internet should be admitted as secondary evidence, under **Section 66** of the **Evidence Act**, submitting that there was no basis for such a proposition.

The said document is said to be part of the privileged documents under the 2nd Schedule to the Defendant's Affidavit as to Documents of 18th March 2010. This position appears to have been acceptable to the Plaintiffs up until on or about 22nd June 2010, when, in a letter to the advocates for the Defendants, counsel for the Plaintiffs stated that:-

“As is now common knowledge, the PwC Report commissioned by your client is in the Public domain as it is freely accessible on the internet via the website www.marsgroupkenya.org or www.scribd.com. It is therefore no longer entitled to any privilege from production.” (emphasis by this court)

Subsequent to the above mentioned letter, the Plaintiffs' advocates prepared a Supplementary List of Documents including the PwC Report, downloaded by the Plaintiffs, and forwarded the same to the Defendants' advocate on 15th November 2010. On 16th November 2010, the Defendants' advocates wrote to the Plaintiffs' advocates reiterating that the privilege claimed over PwC Report remained intact irrespective of how the Plaintiffs purported to have obtained a copy thereof. They categorically stated that they would not accept the inclusion of the said report in the agreed bundle and would “*strenuously object to any attempt (on the Plaintiffs' part) to produce and or rely on (the) report*” (variations by the court). Not being persuaded, the Plaintiffs decided to serve the Defendants with a Notice to Produce (Documents), dated 22nd November 2010, and filed on 23rd November 2010 but which appears not to have been followed through.

Mr. Oraro submitted that the audit report was commissioned, not for the purposes of litigation or in contemplation thereof, but for the purposes of exploring amicable settlement and to establish the circumstances surrounding the release of the Plaintiff's products by the Defendant and the volumes thereof. He invited the court to look at letters dated 9th February 2009, (Defendant's advocates to the Plaintiff's advocates), 17th February 2009, (Defendant to Plaintiff's advocates), 5th March 2009 (Defendant's advocates to Plaintiff's advocates) and 7th April 2009 (Plaintiff to Pricewaterhouse Coopers), and to find that the report was produced by joint effort of the parties, as is demonstrated by the fact that on 7th April 2009, the Plaintiff sent, directly to the independent auditors, relevant documentation towards the facilitation of the audit. The said letter was in response to the Defendant's advocates' letter of 5th March 2009, which stated, inter alia that:-

“---in order to finalize the forensic audit, and specifically to enable PwC to ascertain the volume of product supplied under the CFA arrangement that was either released without authority and/or is yet to be paid for by Triton and/or its Financiers, your clients are required to provide the following additional information to PwC with copies to ourselves ---

----- kindly note that a timely conclusion of the forensic audit is dependent on your client's full and continued cooperation as such, your expedited provision of the required information will be highly appreciated.”

My perusal of the letters referred to above does not disclose any direct link between the forensic report and the intended amicable settlement as to lead to a conclusion that it was sought predominantly for that purpose. The Defendants and their advocates letters of 26th January 2009, 3rd February 2009 and 9th February 2009, indicate quite clearly that the report was but just one measure towards resolving the issue of unauthorized release of products and/or fraudulent actions effecting various players, including the Plaintiffs herein. Indeed, in the Letter of 9th February 2009, the Defendants' advocates did point out to the Plaintiff's advocates that the Defendant would still put each claim to strict proof. Although the letter from the Defendant to the Plaintiff's advocates dated 17th February 2009, did state that the objective of the forensic audit was to find out the circumstances surrounding the alleged irregular release of products and

to ascertain the volume of the product that may have been released without the financiers' authority, it did not concern itself solely with the Plaintiff's products but of all affected parties.

Correspondence exhibited at pages 208 to 214 of the Plaintiff's bundle point to the delay by the Plaintiffs' to furnish the documentation requested, which, as earlier stated, were eventually sent to Pricewaterhouse Coopers on 7th April 2009. From the correspondence exhibited at pages 217 to 226 of the Plaintiff's bundle, the sending of the same at that date appears to have been overdue.

On 29th April 2009, the Plaintiffs' advocates requested the Defendants' advocates to let them have a copy of the PwC Report having heard that the audit had been completed. The Defendants' advocates promised to seek instructions on the same and revert. However, on 19th June 2009, in reply to a reminder from the Plaintiff's advocates the Defendant's advocates communicated the refusal by the Defendant to release the report in the following terms:-

“—Our client has indeed received the PwC Report on the Forensic Audit conducted on the above matters. The KPC Board of Directors has taken a decision not to release the Report in order not to jeopardize ongoing KACC and CID Investigations into any fraudulent activity that may have taken place over the operation of the Triton Account.”

It would appear from the letter of 21st July 2009, written by the Plaintiff's advocates to the Defendant's advocates and the one of 12th June 2009 (Plaintiff to Defendant), that the Plaintiffs had taken the position (although with some disappointment) that they could dispense with the copy of the audit report, provided that the Defendants gave them due cooperation and access to relevant records to enable them carry out own investigations through an independent firm of oil loss investigators of their choice.

Mr. Oraro, concluded his submissions by stating that the Defendants' claim to privilege is belated (an afterthought perhaps?) and not supportable on the basis upon which it is made. In his view the Forensic Audit Report is not a legal document but an ordinary document suitable and necessary for production in evidence. He further submitted that since M/S Coulson Harney advocates were advocates for Pricewaterhouse Coopers and not for the Defendants, no privilege can be claimed under **Section 137** of the **Evidence Act**, which relates to confidentiality between advocate and client and not to secondary evidence sought to be introduced by way of a copy of an original, as was the case as regards the disputed report. He finished by submitting that the present case is distinguishable from the authorities of **Re: HIGHGRADE TRADERS LTD [1984] BCLC 151** and **BASELINE ARCHITECTS LTD (Supra)**, which the Defendants have sought to rely on. He asked the court to find that the decisions in **WAUGH V BRITISH RAILWAYS BOARD [1979] 2 ALL ER 1169** and **CALCRAFT V GUEST [1898] 1 QB 759**, do support the Plaintiff's prayers for discovery herein and that the court should, therefore, overrule the objection.

On his part, Prof. Muigai concluded his submissions by reiterating that the exchange of correspondence regarding the forensic audit report was set in motion by the demand from the Plaintiffs' advocates to the Defendant to admit liability, and that the report was to inform the Defendant on how to respond to possible litigation. He finished by submitting that **Section 66** of the **Evidence Act** did not come to play since the copy of the PwC Report sought to be produced could only, at best, be "*purported secondary evidence*" which was not in issue at this stage.

From my perusal of the several correspondences exchanged as between the parties themselves, with/or

through their advocates, and having had the occasion to examine the copy of the forensic audit report furnished to the court by consent, I am led to find that both counsel are right in their opinions regarding the non-applicability of **Sections 137 and 66** of the **Evidence Act** to these “*objection proceedings.*”

There is no contest as regards the legal principles applicable. That the PwC Forensic Audit Report does exist and that it was produced on or about 6th April 2009 is not disputed. The Defendants say that it forms part of the documents in respect of which privilege is claimed under item 57 in the 2nd Schedule of the Affidavit as to Documents, sworn on 18th March 2010, which relates to:-

“Documents of a confidential nature created in contemplation of litigation for the purposes of furnishing, and containing, legal advice and opinion.”

The refusal by the Defendants to make available, a copy of this report to the Plaintiffs, was communicated to the Plaintiffs vide the Defendants’ advocates’ letter of 19th June 2009, after which the Plaintiffs sought to commission their own independent investigations. The Plaintiffs’ interest in the said report waned until it was rekindled by information coming over 1 year later, to the effect that the same was in the public domain and could be downloaded from the internet. From the wording in M/S Inamdar & Inamdar’s letter of 22nd June 2010, viz:

“--- It is therefore no longer entitled to any privilege” (underlining by the court),”

it is quite clear that the Plaintiffs did accept that the document enjoyed privilege, which would explain why it was not subjected to the court’s determination as to its discovery and inspection, when similar orders were sought under the Notice of Motion dated 16th September 2010, in which I delivered the Ruling of 28th October 2010.

The copy of the PwC Report shown to the court with the consent of the Defendants’ contains a notice to the effect that the same has been

“---prepared for the client for use in negotiating a settlement with various financiers or for use in defending Kenya Pipeline Company Limited’s position in ongoing legal proceedings currently before the courts or in the anticipated arbitration and as such is subject to legal privilege.”

Although this suit was filed on 8th April 2009, it is clear from the Plaint that the final demand (I believe with a threat to litigation) had been sent as early as 15th January 2009.

There would be no justification in finding otherwise than that the disputed report is privileged as claimed, since the notice above must have been given in line with the terms of reference under which PwC were commissioned to carry out the audit.

In my mind therefore, the said report is one which legal professional privilege, also known as legal privilege (and which includes reports from experts) does attach, within the legal principle that:

“Communications between a solicitor or a client and a third party where a document is created with the dominant purpose of using the document or its contents in order to obtain legal advice or to help in the conduct of litigation which was at the time reasonably in prospect are privileged.” (underlining by the court).

[See: Stuart Sime's: A practical Approach to Civil Procedure 4th Edition at Paragraph 26.6.2.2]

As regards the Plaintiffs' assertion that privilege was eroded by the appearance of the report at the stated websites, the court finds that the same cannot hold since, as was held in **WAUGH V BRITISH RAILWAYS BOARD (Supra)**, a document, once privileged is always privileged, unless, ofcourse, the person claiming that privilege waives the same. There is no evidence of the privilege having been waived in the present case.

Under the Rules, and in this case, I believe this court is properly guided by **Order 24 Rules 11-13** of the **Supreme Court Practice, 1995**, no order for the production of any document for inspection or to the court or for the supply of a copy of any document shall be made unless the court is of the opinion that the order is necessary either for disposing fairly of the cause or matter, or for saving costs.

Having regard to what the Plaintiff considers to be the issues in dispute (as per the Plaintiff's Statement of Issues filed on 29th November 2010, and having exercised my discretion to examine the document, (the same having not been verified by any affidavit), I am of the considered view that the same does not appear material to the fair and just resolution of the issues in dispute.

For all the above reasons I uphold the Defendant's objection to the production and/or reference to the PwC Forensic Audit Report of 6th April 2009. The costs of the objection shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 30th day of SEPTEMBER, 2011.

M. G. MUGO

JUDGE

In the presence of :

Mr. Oraro For Plaintiff/Applicant

Mr. Imdende For defendant/Respondent