



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 COMPANY LIMITED.....DEFENDANT/
RESPONDENT**

R U L I N G

By a Notice of Motion dated 16th September, 2010, the plaintiff seeks orders under Order X Rules 13 and 14 of the Civil Procedure Rules as follows:

(i) THAT the Defendant be ordered by this court to produce for inspection, by the plaintiff, the documents referred to in item 58 of the second schedule of the Defendant's Affidavit as to Documents sworn by Flora Okoth and filed on 18th March, 2010.

(ii) THAT the costs of the application be provided for.

The application is premised on the grounds that the documents sought are, ex facie, not entitled to any privilege from production and inspection and that the defendant has failed to produce the said documents, despite being served with a formal notice to do so. The request was made under a letter dated 27th January, 2010, a copy of which is annexed (as annexure AG1) to the affidavit of Andrew Gibson of 6th September, 2010 filed in support of the Notice of Motion. The letter was addressed to the advocates for the Respondents, calling upon the Defendant to verify on affidavit, a full and complete list of documents relating to the matters in issue and which ought, as a matter of course, to be the subject of discovery.

The Notice of Motion is opposed on the strength of a Replying affidavit sworn on 30th September, 2010 by Flora Okoth, the Company Secretary of the Defendant. She has deponed that the documents sought by the plaintiff are of a confidential nature and therefore privileged, a fact which was stated in her Affidavit as to Documents, sworn on 18th March, 2010 and filed on the same date in answer to the plaintiff's letter of 27th January, 2010.

Item 58 (Second Schedule) of the Schedule to the Affidavit as to Documents is said to represent "Confidential Internal Reports and Minutes in compliance with the Defendant's Internal audit, review and disciplinary procedures". The deponent states that the said documents were created in contemplation of litigation and for the purpose of obtaining legal advice and do contain legal advice and are therefore covered by legal professional privilege. She explains, in the Replying Affidavit sworn and filed on 30th September, 2010, that the said documents consist of

- (i) **Minutes of the Defendant's Management Meeting of 19th December, 2008.**
- (ii) **The report of the Defendant's Audit Team of January, 2009.**
- (iii) **The Minutes of the Defendant's Central Staff Disciplinary Meeting of 30th December, 2008.**

The Defendant's position is that there is a real and appreciable risk that the production of the said documents would expose the Respondent, its officers and employees to Criminal charges or penalties. The Defendant therefore claims privilege on this ground and also on the ground that the documents in question were generated in contemplation of litigation.

In the submissions made at the hearing, the counsel for the applicant emphasized that the applicant is not concerned with the documents evidencing correspondence between the Respondent and its advocates but the Respondent's internal documents as relate to reviews and procedures in regard to discipline. According to the plaintiff/applicant, there is no confidentiality in the documents sought as would bar the court from examining the same in a claim as is before this court, based on the holding by the House of Lords in the English case of **ALFRED CROMPTON AMUSEMENT MACHINES LTD -VS- COMMISSIONERS OF CUSTOMS AND EXCISE** (No. 2) [1973] 2 ALL E. R. 1169 at 1180 where it was stated that;

"---in general a party cannot object to produce a document not covered by legal professional privilege because the information contained in it was imparted to him in confidence".

The applicant relies also on the general principle as stated in **CHANTREY MARTIN & CO. -VS- MARTIN** [1953] ALL E. R. 691 cited in the **ALFRED CROMPTON** case (Supra) that;

"The mere fact that the giving of the discovery will involve a breach of confidentiality as against some third person or in any way affect or prejudice his interests does not constitute of itself an independent objection to giving the discovery, disclosure under the compulsion of the court being for this purpose distinguished from voluntary disclosure out of court".

The above argument is in response to the Respondent's contention that a disclosure of the contents of the

documents in respect of which production is objected to would most likely expose the Respondent, its officers or employees to criminal liability.

Citing the provisions of Order 24 Rule 5 of the Supreme Court Practice 1997, which is the English equivalent of our Order X Rule 17, the applicants have submitted, and rightly so that privilege, in regard to discovery and inspection strictly applies to three categories of documents, viz:-

1. **Documents protected by legal professional privilege**
2. **Documents tending to incriminate or expose to a penalty a party who would produce them**
3. **Documents privileged on ground of Public Policy.**

The applicants argue that the documents sought to be produced related to communications between the Respondent and its employees which is not privileged, since it was not obtained in the course of legal proceedings. They submitted also that the claim to privilege and the grounds thereof, having not been disclosed in the Affidavit as to Documents but only raised in the Replying Affidavit is merely an afterthought. According to the applicants the Respondents waived the right to claim privilege when they referred to the documents in question merely as internal correspondence, without specifying any of the grounds for which privilege can be inferred as their reason for the objection.

The Respondent submitted that in paragraph 3 of the Affidavit as to documents the documents were stated to have been of confidential nature. In the 2nd schedule, item 57 indicated that the documents for which privilege is claimed thereunder came about in the course of obtaining legal opinion in contemplation of litigation whilst those referred to in item 58 related to internal disciplinary processes in view of the contemplated litigation and related purposes. The Respondents position, therefore, is that the documents are privileged because their dominant purpose is the preparation for legal representation. The Respondents have submitted that the authority of BLUNT -VS- PARK LANE HOTEL LTD [1942] 2 KB 253 supports their position as will be seen from the holding of Hallett J where he stated that

“Dealing ---- with with the general rule of objection which applies both to oral evidence and to interrogatories, the rule is that no one is bound to answer any question if the answer therto would, in the opinion of the judge, have a tendency to expose the deponent to any Criminal charge, penalty or forfeiture which the judge regards as reasonably likely to be preferred or sued for”.

The Respondent’s objection is therefore grounded on legal professional privilege as regards the audit report and the likelihood of exposure to Criminal liability as regards the internal disciplinary meetings.

I have carefully considered the submissions made by the parties hereto in support of their opposing arguments, in light of the pleadings and the authorities cited. The Notice of Motion challenges the refusal by the Respondent to produce the documents listed as item 58 of the second schedule to the Affidavit as to Documents of Flora Okoth, sworn on 18th March, 2010. The said documents are said to comprise of

“ Confidential Internal Reports and Minutes in compliance with the Defendants internal audit, review and disciplinary measures”.

Paragraph 3 of the Affidavit only states that they are objected to “due to their confidential nature”. It is only in the Affidavit filed on 30th September, 2010 that the Defendant states that the said documents were created in contemplation of litigation and for the purpose of obtaining legal advice and that their production would place the Defendant and its officers or employees at the risk of criminal liability.

It being clear that the only documents for which the court is being asked to order inspection are those stated in item 58 of the 2nd Schedule, it is not in dispute therefore, that the privilege claimed herein is as relates to category 2 documents as stated earlier in this Ruling. Clearly from the wording of paragraph 67 of Halsbury’s Laws of England 4th Edition (Vol, 130), cited herein by the applicants, the claim for privilege must be made in the list of documents served, with sufficient statement of the grounds of the privilege being made. The grounds of objection must also be stated in the schedule. The documents must also be sufficiently described and identified in the list or affidavit (in the same manner as in the case of documents not objected to) so that production can be enforced if ordered.

Other than the advocates-clients communications, which are not in issue in this application, the Respondent has listed in part D of its schedule to the Supplementary List of documents dated 14th December, 2009 (at paragraph 45) what it calls;

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

Flowing from the above it is clear that the documents listed as items 44 and 45 of part D of the schedule to the Supplementary List are the same ones reproduced as items 56 and 57 of the Second schedule of the affidavit as to Documents. This court takes the view that the documents referred to in item 58 of the said Schedule were not contemplated when the Supplementary list was drawn and filed and the fact that they are listed separately means that they do not fall within the documents stated under item 57. The conclusion I make therefore, is that the same were not created in contemplation of litigation or for the purposes of furnishing and obtaining legal advice or opinion.

If indeed the documents listed as item 58 are of the nature described in the first part of paragraph 3 of the Replying Affidavit, then they would not have been listed separately from those falling under item 57. If, on the other hand, their production would have the effect stated in the second part of the said paragraph of the Replying Affidavit, then that fact ought to have been stated in the Affidavit as to Documents instead of describing them only as

“Confidential Internal Reports and Minutes in compliance with Defendant’s Internal Audit, review and disciplinary procedures”

It is impossible, given the present scenario, to ascertain and conclude that the dominant purpose of the said documents is as stated in the Respondent’s Replying Affidavit of 30th September, 2010.

The Respondent’s very late attempt to describe or identify the said documents for the purposes of according them privilege does not assist the court in determining whether it should inspect them to decide on the validity of the objection, given the earlier generalizations as addressed herein.

In view of the above I find that the claim to privilege in respect of the documents listed as item 58 of the

Second Scheduled of the Affidavit as to Documents cannot be sustained. I allow the application and order that the defendants do produce for inspection, the documents referred to in item 58 of the 2nd Schedule of the Affidavit as to Documents sworn on 18th March, 2010.

Due compliance within 14 days.

Delivered and signed this 28th day of October, 2010.

M. G. MUGO

JUDGE

In the presence of :

Mr. Muchiri

For Plaintiff/Applicant

Ms. Ngige

For defendant/respondent