



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Misc Appli 1566 of 2007

TOTAL KENYA LTD APPLICANT

VERSUS

CHEVRON KENYA LTD 1ST RESPONDENT

MOBIL OIL (K) LTD 2ND RESPONDENT

KOBIL PETROLEUM LIMITED 3RD RESPONDENT

GALANA OIL KENYA LIMITED 4TH RESPONDENT

PETRO OIL KENYA LIMITED 5TH RESPONDENT

HASS PETROLEUM (K) LIMITED 6TH RESPONDENT

INTOIL LIMITED..... 7TH RESPONDENT

RULING

(1) There is before me an “**Originating Summons**” filed by Total Kenya Ltd. described therein as the “**Applicant.**” The title of the cause is given as “**Misc. Civil Application No.1566 of 2007.**” And the parties against whom the Application is brought (Chevron Kenya Ltd., Mobil Oil Kenya Ltd., Kobil Petroleum Ltd., Galana Oil Kenya Ltd., Petro Oil Kenya Ltd., Hass Petroleum (K) Ltd., and Intoil Ltd.) are all described as “**Respondents.**”

(2) The Summons is expressed to have been taken out under section 12(3) of the Arbitration Act, Rule 3(1) of the Arbitration Rules, 1997 and section 3A of the Civil Procedure Act.

(3) The Applicant filed the application and seeks among others orders that the court do appoint one Richard Mwongo, an Advocate of the High Court of Kenya and a Chartered Arbitrator, as a sole Arbitrator to hear and determine a dispute said to have arisen between the parties under an Agreement called Open Tender System Agreement (“**the OTS Agreement**”). The parties to the OTS Agreement are key players in the oil industry in Kenya. The OTS Agreement contains an Arbitration Clause for settlement of any disputes that may arise thereunder.

(4) The Applicant was awarded a tender to import crude oil for the month of November, 2004. In October, 2004, the Applicant imported into the country crude oil which was sold to the Respondents and other oil companies operating in the Kenya market. The parties failed to agree on the relevant date in

relation to which the price to be paid by the OTS participants was to be. The Applicant argued that the relevant date was October, 2004 while the Respondents said it was November, 2004. The Permanent Secretary in the Ministry of Energy intervened and agreed with the Respondents. The Applicant got that decision reversed by an application for judicial review.

(5) Following that successful challenge, the Applicant requested the Respondents to pay up. They refused. The Applicant took the view that a dispute had arisen as regards the price to be paid for the oil. The Respondents resisted and hence this application to appoint an Arbitrator.

(6) The application is opposed by all the Respondents on various grounds. Anyhow, before it could be heard on merit, Mr. Ismail, learned counsel for Kobil Petroleum Ltd. (the third Respondent) by notice bearing date the 10th December, 2007 (and filed on the 11th December, 2007) raised a preliminary objection on five grounds, the first of which is that:

“1. The so called “originating summons” taken out and issued by the Applicant’s advocates is defective, incompetent and not in accord with the applicable laws.”

(7) Rule 3(1) of the Arbitration Rules, 1997, states that applications under sections 12, 15, 17, 18, 28 and 39 of the Arbitration Act **shall** be made by originating summons made returnable for a fixed date before a Judge in chambers and shall be served on all parties at least fourteen days before the return date.

(8) Order XXXVI rule 7 of the Civil Procedure Rules provides that an originating summons shall be in Form No.13 or No.13A of Appendix B with such variations as circumstances may require, and shall be prepared by the applicant or his advocate and shall be filed in court; service where necessary shall be effected in accordance with Order V.

(9) And it is provided by rule 8 of the same Order that the originating summons when filed

“shall be filed and entered in the register of suits, but after the serial number the letters “O.S.” shall be placed to distinguish it from complaints filed in ordinary suits.”

(10) If one looks at Form No.13, one will see that the process is addressed to the Defendant requiring him to enter an appearance within a specified number of days after service of the summons on him. It also gives the name of the person on whose application the summons had been issued and the nature of the claim being made.

(11) The application filed by the Applicant on the 24th October, 2007 was not a civil suit and the letters **“O.S.”** were not placed after the serial number as prescribed. It was a miscellaneous civil application brought by an applicant against seven respondents. If it was an originating summons, the person making the application would be called the Plaintiff and the parties against whom the claim was being brought would be called Defendants, who would be required to enter appearance within a specified period of time.

(12) The application filed by the Applicant stated in material part:

“LET CHEVRON LIMITED, MOBIL (KENYA) LIMITED, KENOL/KOBIL LIMITED, GALANA OIL KENYA LIMITED, PETRO OIL LIMITED, HASS PETROLEUM LIMITED, and INTOIL PETROLEUM, the Respondents herein attend Court before the Honourable Judge in chambers on theday of 2007 at 9.00 O’clock in the forenoon or soon thereafter for hearing of an Application by TOTAL KENYA LIMITED for ORDERS:-”

(13) From the various provisions I have referred to so far, it should be obvious to anyone who is conversant with these matters that the application which the Applicant filed was not an Originating Summons. It was, in fact, a Chamber Summons. The application does not contain a single characteristic of an originating summons.

(14) For the reasons I have given, Mr. Esmail’s preliminary objection succeeds and is upheld. The

order which must follow is that the Applicant's Miscellaneous Civil Application dated the 18th October, 2007 and filed in court on the 24th October, 2007 is defective and incompetent. It is accordingly struck out with costs to the first, second, third, fifth and sixth Respondents.

Orders accordingly.

Dated and delivered at Nairobi this 14th day of April, 2008.

P. Kihara Kariuki

Judge