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

Civil Suit 155 of 2007

CHEVRON KENYA LIMITED ……...…….……..PLAINTIFF

VERSUS

TAMOIL KENYA LIMITED……..……DEFENDANT

RULING

According to the plaint dated 26th March, 2007 sometimes on 16th December, 2007 the plaintiff then known as **Caltex Oil Limited** and **Mobil Kenya Limited** entered into an agreement for the joint ownership and operation of equipment and facilities for the purposes of fueling planes at **Jomo Kenya International airport Nairobi**. Clause 2 of the said agreement provided for the formation of an operation committee comprising of members of the parties to the agreement with mandate;

(1) To oversee all policy matters relating to finance, design, construction, maintenance and operation in respect of the fueling of the planes, otherwise referred to as joint into-plane service.

(2) Appoint any one of the parties to the agreement to act as an operator charged with the responsibility of maintaining the JIPS joint for a rotational period for four years.

The agreement also provides that the operator for the time being of the joint-into plane service shall hold in trust the property over which the equipment and facility is located which is LR NO. 9042/54 registered in the name of **Mobil Kenya Limited**. In the event of change of effective control in the shares of one of the parties to the agreement, the obligation of such party is set out in clause 20 of the agreement which states;

"**20.1 "In event that there should at any one time be or be an impending change in the effective control of any participant thinless otherwise agreed:**

i) That participant shall forthwith give notice of such change to the operating committed.

Such notice shall contain an offer by that participant to sell its shares to the participant at a price equivalent to the current replacement value less depreciation of its share in the JIPS in the accounting records of the JIPS.

20.2 Without prejudice to the generality of clause 20.1 above, of effective control of a participant by a controlling entity is founded on the interest of the controlling entity in the participant in

question, a decrease of more than twenty five (25%) per cent in such interest as at the date thereof shall be deemed to be a change in the effective control of that participant unless that participant is able to demonstrate otherwise.

20.3 Subject to clause 20.1, should a participant transfer or should there be a transfer by sale or otherwise, of any part of the equity shareholding of that participant to one or more third party non-participant as the term "effective control" is defined in clause 20.2 such transfer shall be effective as to such transferee under this agreement and with respect to the other participant only if such transferee satisfies the new criteria as set forth in clause 14.3".

It is the case of the plaintiff that the above clause gives it pre-emptive rights over the shares and/or interest of **Mobil Kenya Limited** in agreement in the event of change of effective control of **Mobil Oil Kenya Limited**. And the plaintiff being the operator for the time being was charged with responsibility of ensuring that any new entrant to the agreement complied with the requirements set out in clause 14.3 of the agreement which are;

(a) That it has obtained a certificate of approval from the Kenya Airports Authority and any other relevant authority, approving the distribution of fluids and greases under the terms of such Authority's regulations or any other relevant governing law.

(b) A written confirmation and demonstration that the new entrant has access to an internationally accredited laboratory testing facilities capable of confirming the quality of aviation fuels consistently and promptly.

(c) A demonstration of ability to perform its obligations under the agreement and in particular, financial ability, sufficient qualified manpower and an adequate insurance coverage adequate to meet the indemnity obligations of such entrant.

(d) To establish the entrant's technical ability to perform the duties of an operator as defined in the agreement when called upon to do so.

(e) To confirm that it is a signatory to the Tarbox agreements which are the agreement on applicable law and the agreement on conduct and control of litigation arising from interalia a case of jointly owned facilities operated in consortium where one of the participant is the operator.

It is clear that sometimes in 2006 **Tamoil Africa Holdings Limited** took over all the shares in **Mobil** resulting in a change in controlling shareholding in **Mobil** and consequently a change in the name of the entity from **Mobil** to **Tamoil Kenya Limited** (the defendant herein). That change of status ofcourse brought into play clause 20.1 of the agreement for the joint operation of an into-plane service. It is the case of the plaintiff pursuant to the acquisition and in compliance of clause 20 of the agreement, the defendant was obliged to offer its shares in the joint venture to the plaintiff to exercise the first option in the purchase.

In a letter dated 1st December, 2006 **Mobil Oil Kenya Limited** brought to the notice of the operation committee giving a notice of the change in the effective control of its company and its acquisition by the defendant. In the said letter **Mobil Oil Kenya Limited** offered its shares to the plaintiff at a price of US$650,000. The offer was open for acceptance or for rejection by the participants within 40 days from the date of the notice. It is the contention of the plaintiff that in total disregard and in breach of the provisions of the agreement, **Mobil Oil Kenya Limited** went ahead to effect an arranged transfer of its shares and interest in the joint venture agreement with the defendant. And to make matters worse, the defendant outrightly disregarded the requirement of clause 14.3 and has commenced fueling activities in a purported exercise of its right but without the consent of the operation committee. It is also case of the plaintiff that the defendant has not demonstrated its ability to fulfill its obligation by complying with strict requirements under the agreement, thus there is real danger of the operations and standards of the JIPS being compromised. It is for that reason that the plaintiff has taken out chamber summons application dated 28th March, 2007. In the said application, the plaintiff seeks orders in terms:

"**Pending the hearing and determination of this suit the defendant, by itself, its officers, employees, servants and/or agents or otherwise howsoever be restrained and/or injuncted from exercising any alleged right arising from the agreement dated 16th December, 1997 and in particular the defendant be restrained from;**

1. Carrying out any joint into-plane service pursuant to the agreement.

2. Refueling of planes pursuant to the agreement.

3. Evicting and/or threatening to evict the plaintiff from land reference No.9042/54 the premises on which the joint into-plane service are carried on.

4. Harassing, intimidating, threatening or in any other way whatsoever interfering with the smooth running and operation by the plaintiff, its employees, dealers, servants, agents, assigns or licensees on the premises.

The said application is supported by a supporting affidavit by **James Chilongo.** And after the defendant filed a replying affidavit sworn on 18th July, 2007, the plaintiff filed first further affidavit and second further affidavit by **James Chilongo** and one **S. K. Bichnoi** respectively. Thereafter the advocates for the parties filed substantive skeleton submissions on behalf of their clients.

I have considered the application together with all the affidavits in support of the application and in opposition thereto. I have also taken into consideration the written skeleton arguments by **Mr. Waweru Gatonye** and **Mr. Ohaga** learned counsels for the parties. The many authorities cited by the Advocates in their written submissions have not also escaped my mind. Having undertaken that venture, it is my view that the plaintiff's cause of action in this suit is the agreement dated 16th December, 1997 entered into between **Caltex Oil Kenya Limited** and **Mobil Oil Kenya Limited**. The contents and provisions of the said agreement involve a joint operation of an into-plan service at **Jomo Kenyatta International Airport**.

It is clear that pursuant to a transaction for sale and transfer of shares, **Tamoil Africa Holdings Limited** took over all the shares in **Mobil** resulting in a change in the controlling shareholding in **Mobil** and consequently a change in the name from **Mobil** to **Tamoil Kenya Limited**. Pursuant to the said transaction and being cognizant of the plaintiff's pre-emptive rights to its shares under the JIPS agreement, **Mobil** duly gave notice by a letter dated 21st December, 2006 in accordance with clause 20 of the agreement offering the said shares to the plaintiff. The defendant contends the said notice was clear and in complete compliance with clause 20 of the JIPS agreement. Upon receipt of the notice, the plaintiff purported to respond through a letter dated 19th December, 2006 which goes;

SUBJECT: NOTICE OF CHANGE IN INTEREST AS A PARTICIPANT IN THE JOINT AGREEMENT IN RESPECT OF AGREEMENT FOR THE JOINT OPERATION OF AN INTO PLANE SERVICE AT JOMO KENYATTA INTERNATIONAL AIRPORT IN NAIROBI, BETWEEN CALTEX OIL (KENYA) LIMITED AND MOBIL OIL KENYA LIMITED, DATED 16TH DECEMBER 1997.

We refer to your letter dated 1st December 2006 subject as above (the "letter"). The Letter quotes a price for Mobil Oil Kenya's fifty percent interest in the Joint Operation equivalent to current replacement value less depreciation and this is shown as USD 650,000 (the "Price").

We would be grateful if you would provide us as soon as possible with a complete and detailed breakdown of the Price showing the value of each of the assets and other line items you have considered in your calculation. Please also provide any reasonable form of evidence supporting the price for each asset and other line items in your depreciated price build up.

Only after we have received these can we begin to seriously assess the opportunity presented in the

Letter, and would request therefore that the forty (40) day deadline you have provided us begin to run on the date that we receive the requested data.

Your prompt response will be highly appreciated. Please call me on 071 830 115 or 3668206 should you have any questions or concerns regarding this request".

In the said reply the defendant did not state whether the offer had been accepted or rejected. But it purported to seek clarification as to how the price of USD 650,000 had been arrived at as well the breakdown showing the value of each asset together with evidence supporting the price of such asset. It was contended on behalf of the defendant that the plaintiff did not even given any indication as to whether it was prepared to accept or reject the offer. And that it requested the 40 day deadline be suspended and began to run after the receipt of the requested data.

It is clear upon reading of the letters of 19th and 20th December, 2006, the period for acceptance of the offer was withdrawn by the defendant at the request of the plaintiff. The reason why the defendant withdrew the notice was because it was agreed in a discussion between the plaintiff's General Manger **Mr. S. K. Bichnoi** and the defendant's Managing Director **Mr. Kamel Jarnaz**. It is alleged by the defendant that in the course of discussion between **Mr. S. K. Bichnoi** and **Mr. Kamel Jarnaz,** the plaintiff unequivocally stated that it had no intention of exercising its preemptive rights over **Mobil's** share in the JIPS agreement. And that it had no difficulty with the defendant continuing as a participant in the agreement.

It is clear in my mind that the parties to the agreement in this case share a common premises, equipment, facilities and personnel for fueling planes at **Jomo Kenyatta International Airport**. It is also clear that the application by the plaintiff touches on the use and control of the property known as LR NO.9042/54 upon which are erected the common facilities used by the parties under the agreement. There is no dispute that the defendant is the registered owner of the property. On its part the plaintiff resists that the agreement has been terminated. However, it insists there is a continuing licence in its favour granting it the use of the premises. The plaintiff's argument is that the defendant holds the suit property in trust for both itself and the plaintiff.

The question is whether the defendant can be excluded from access to and the use of its own property. In my view that is an issue which must go for trial. However, I also take the view that the plaintiff cannot assert the termination of the agreement as a basis for seeking an injunction against the defendant and in the same breadth insist on the continuing existence of a licence for the use of the premises which licence would have been granted by virtue of the agreement. It is true that the parties co-owned the equipment on the premises. It is also true that the plaintiff does not claim any proprietary right in respect of the suit premises but it relies squarely on the terms and conditions of the agreement that brought the parties in the joint venture agreement.

The joint into plane service under the agreement is a delicate and complex nature of service that has to be maintained for the interest of the parties and the general expectation of good commercial practice. In my humble view such a business which involves fueling of planes at **Jomo Kenyatta International Airport** cannot be disrupted, interrupted and/or stopped without giving adequate notice and opportunity to all the parties involved. The players involved are not only the parties herein but third parties who would suffer monumental liability if a disruption occurs. It will also impact negatively on the operation of **Jomo Kenyatta International Airport** which is a public institution.

As stated disruption or termination without adequate notice can cause considerable and substantial loss to the parties involved and to various aircrafts fueled by the parties herein. In my humble view this considerable financial implication can be avoided by maintaining the status quo for a limited period. That aspect in my humble view is of paramount importance due to the nature of the business and the parties involved in the transaction and/or operation. It is difficult if not impossible for this court to declare the joint venture agreement commercially valueless by refusing to give an order of injunction. Prima facie the interest, shares and liabilities of the defendant in the joint venture agreement are matters which must be investigated and determined through a full hearing. I agree that a degree of care and diligence is

required of a trustee who acquires shares by virtue of having acquired the shares and liabilities of the original party to the agreement. The defendant cannot invalidate anything done by the initial party to the joint venture agreement. And it cannot be released from any obligation before a proper determination of the issues at stake is carried out.

I am therefore satisfied that the issues raised by the parties herein involves a substantial question which must be investigated and determined through a full hearing. In the meantime it is in the interest of justice to preserve the subject property so that the business carried out by the parties is not jeopardized. It is for that reason that I am inclined to grant orders as hereunder:

(1) Pending the hearing and determination of this suit no party is entitled to interfere in the business and/or activities of the other party as it concerns and/or arising from the agreement dated 16th December, 1997. i.e.

(a) Carrying out any joint into-plane service pursuant to the agreement.

(b) Refueling of planes pursuant to the agreement. It means either party is at liberty to carry out refueling of planes pursuant to the agreement, jointly or otherwise.

(c) The defendant is hereby restrained from evicting and/or threatening to evict the plaintiff from land reference No.9042/54, the premises on which into-plane services are carried on and vice versa.

(d) the defendant is hereby restrained from harassing, intimidating, threatening or in any other way whatsoever interfering with the smooth running and operation by the plaintiff , its employees, dealers, servants, agents, assigns, licensees on the premises and vice versa.

(e) The parties are hereby directed and/or ordered to continue in the joint-venture agreement before the dispute until further orders of this court.

(f) The parties are hereby directed to conclude all pre-trials within the next 60 days and thereafter to set down the suit for hearing within 15 days after conclusion of the pre-trials.

Costs shall be in the cause. Orders accordingly.

Dated, signed and delivered at Nairobi this 6th day of May, 2008.

M. A. WARSAME

JUDGE