



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

Civil Case 437 of 2003

CALTEX OIL KENYA LIMITEDPLAINTIFF

VERSUS

CRESCENT CONSTRUCTION CO. LIMITED.....DEFENDANT

RULING

There are two applications before me for determination. The first one is the plaintiff's Notice of Motion dated 31st July, 2007 seeking summary judgement for the sum of Kshs.23,405,647/= together with interest thereon at commercial rates from 23rd July, 2003 until payment in full. The second prayer in the application is costs of the suit, costs of audit and the costs of this application be awarded to the plaintiff.

The other application is by the defendant and it is a Notice of Motion dated 21st September, 2007 seeking the setting aside of the consent order of 6th February, 2007. It is undisputed that the plaintiff supplied the defendant with petrol and petroleum products for the period dating back to 1990s until when the dispute arose sometimes in the year 2001. The goods were either collected by the defendant's agents or transported by the plaintiff to the defendant. It is alleged that the plaintiff's sent invoices to the defendant and thereafter issued statements on the status of the account on monthly basis.

The plaintiff's case is that the defendant paid for the goods leaving a balance of Kshs.26,749,366.90 which is the sum claimed in the amended pleadings. When the matter came up for hearing on 26th October, 2006, and after a brief deliberations, the parties agreed that since the matter at hand is an accounting problem, the same could be referred to an auditor to reconcile the respective accounts between the parties.

After assessing and analyzing the profiles of various auditors the parties settled on the firm of **Deloitte & Touche** to do the reconciliation of the accounts between the two parties.

On 6th February, 2007 the parties appeared before court and recorded a consent in terms;

- (1) The parties hereto hereby appoint Deloitte and Touche to be the auditor to carry out the audit in line of the proposal made by the firm dated 18th December, 2006.
- (2) The auditor shall receive from the parties the documents each party relies upon in respect to the rival positions taken by the parties including but not limited to the following;
 - (a) The account record,

- (b) Documents relating to disputed sales and/or payments made including any credit issued.
- (c) Correspondence relating to the dispute.
- (3) The plaintiff shall submit its documents to the auditor with a copy to the defendant on or before 20th February, 2007. The defendant shall submit his documents to the auditor with a copy to the plaintiff on or before 6th March, 2007.
- (4) The auditor shall convene a meeting to the parties and the advocates within 10 days from 6th March, 2007 for the taking of directions of the proceedings
- (5) The auditor shall allow each party an opportunity to send its accounts and to answer any question that opposing party may reasonably wish to put to the other party. The presentation of the accounts and any questions thereupon shall be conducted in such manner as the auditor shall determine.
- (6) The auditor shall at liberty to seek any further clarification and/or further documents from either party.
- (7) The auditor shall hold formal session with both parties in attendance and shall at all times correspond to the parties formally and at the same time. The auditor however may proceed in the absence of a party who has been notified of a formal hearing and has, without reasonable cause neglected to attend the session.
- (8) The auditor shall be at liberty to seek any clarification and/or further document from either party.
- (9) The auditor shall call formal sessions with both parties in attendance and shall at all times correspond to the parties formally and at the same time. The auditor however may proceed in the absence of a party who has been notified of the formal hearing and has without reasonable cause neglected to attend the session.
- (10) After receiving all the pertinent documents and such clarification as presented by the parties, the auditor shall take the dispute in consideration and prepare a report to be submitted to the High court detailing inter alia the following;
 - a. The auditors finding on the claim made by the plaintiff.
 - b. The auditors finding on the claim made by the defendant.
 - c. The auditors finding on the party who is in debt including a finding on the debt due.
 - d. The report shall be submitted to court and both parties on or before the 17th May, 2007.
- (11) The case to be mentioned in court on 24th May, for further orders or directions.
- (12) Both parties shall pay the auditors fee and expenses equally.

The parties proceeded as per the consent order to present all the documents in support of their respective case until 20th June, 2007 when the defendant wrote a letter to the auditors asking them to disclose any relationship they have with the plaintiff. The auditors responded through a letter dated 16th June, stating that their tax department provides tax compliance services to the plaintiff on instructions from Chevron USA. The defendant responded by a letter dated 29th June, 2007 calling upon the auditors to disqualify themselves.

It is alleged by the plaintiff that the action taken by the defendant was made after the draft report was submitted hence it was not made in good faith.

It is important to consider the nature of the defendant's application which seeks to set aside the consent dated 6th February, 2007. And secondly that the report submitted by **Deloitte & Touche** through a letter dated 3rd July, 2007 be expunged from the court record. It was contended on behalf of the defendant that there was a conflict of interest as the firm of **Deloitte & Touche** was at the material time of the audit exercise employed by the plaintiff to act for it in other matters. The fact that the firm of **Deloitte & Touche** was engaged by and/or working for the plaintiff was not disclosed by the said firm and/or the plaintiff until mid way through the reconciliation exercise when the defendant stumbled upon information and acted on it. The defendant contend that the auditors and the plaintiff in the first meeting held on 21st March, 2007 and the second one on 17th April, 2007 made no mention of the relationship between the plaintiff and the auditor. It was contended by **Mr. Saende** Advocate on behalf of the defendant, that the relationship between the plaintiff and the firm of **Deloitte & Touche** creates a likelihood of bias and conflict within the work given to the firm by both the plaintiff and the defendant. He also stated that the defendant only discovered the relationship late in the reconciliation exercise and therefore had no other opportunity to raise the issue. He stated that the plaintiff never disclosed this fact, so as to give the defendant an opportunity to decide whether or not they were comfortable to proceed with the reconciliation exercise before the Auditors. He placed reliance in the case of **Trust Bank Limited v Midco International (K) Ltd. & 4 others 2004 KLR** where **Ibrahim J** held;

“A party cannot be expected to know the clients of a judge who has come to the bench from private practice. It is the judge deciding who ought to have known and also in this case the respondent. It was their duty and obligation to have disclosed or declared the past relationship. Having not been given an opportunity and judgement having been entered against him for a colossal sum of Kshs.165,398,567, I do hold that the applicant suffered a miscarriage of justice. This is not from a case of actual bias or prejudice to raise the issue of disqualification and place it before a judge. The discovery of a new matter herein discloses that there was serious breach of cardinal rule of natural justice”.

And in the case of **Kamlesh Mansukhlal Pattni & Goldenberg International Limited v Republic Civil Appl. No.601 of 1999** the Court of Appeal held;

“It is no answer for the judge to say that he is in fact impartial and that he will abide by the judicial oath. The purpose of disqualification is to preserve the administration of justice from any suspicion of impartiality”.

It is on the light of above sound legal proposition, that the defendant wants to set aside the consent order dated 6th February 2007 due to the non disclosure by the plaintiff and the auditor that they had a client/auditor relationship which amounted to misrepresentation.

Upon being confronted with allegation for disqualification the auditors asserted that they were not the auditors for **Caltex/Chevron** but their tax department provides tax compliance services and that the opinion and the decision of the person who was conducting the reconciliation exercise would not in any way be impeached by the said relationship.

It was also contended by the auditors in a letter dated 3rd July, 2007 in part and I quote;

“we do not however see any conflict of interest as we operate under strict Chinese wall principles therefore there is no reason to disqualify ourselves moreover having been appointed by the consent of the parties we doubt that we have the power to disqualify ourselves without the court disengaging us”.

In my understanding the fact that the relationship between the plaintiff and the auditor was not disclosed to the defendant gives credit to the fears and apprehensions expressed by the defendant. Disclosure of material facts necessary to the rules of engagement is a continuous process which must be disclosed to the opposite party at any time when there is incidence or actions which may prejudice the right of opposite party. The fact of the relationship, whether it falls in a different department was within the knowledge of

the auditor and in my view it was incumbent upon the auditors to disclose that information to the defendant. After such disclosure the defendant would have the opportunity to elect whether to proceed or seek an alternative depending on the circumstances.

I do not think the assertion of the Auditors that they were operating under strict Chinese wall would change the fears expressed by the defendant. I reckon that even the alleged Chinese wall is permeable to leakages, which is at most times outside the control of the Auditor who was handling the dispute between the plaintiff and defendant. It must be appreciated that information travels within the same institution, notwithstanding the rules put in place to safeguard such leakage.

The other issue is which of fundamental importance is the perception to be created in the minds of a reasonable bystander that justice may not be done to the defendants due to the fiduciary relationship between the plaintiff and the auditors. It is important that justice must not only be done but also be seen to be done. The defendant cannot see justice would be done or might have been done when there is a fiduciary relationship between the plaintiff and the auditors. My understanding of the relationship as disclosed amounts to a clear conflict of interest. And material non disclosure by the firm of **Deloitte & Touche** and the plaintiff has gravely interfered with the rights of the defendant to raise any objection to the said relationship. That was not done and in my view a neutral bystander is likely to view the case of the defendant in a favourable manner due to the facts disclosed and/or expressed.

Now having made a decision that the fears expressed by the defendant is justified the only thing that remains is to what extent does the application for the defendant succeeds. And secondly what is the position of the plaintiff's application for summary judgement.

Having gone through the various documents filed by the parties, it is clear in my mind that auditor gave a lot of room or leeway for the parties to reconcile their accounts. In the initial meeting, it was agreed that the accountants from the respective companies would meet and reconcile the accounts. **Mr. Mark Kezegule** represented the defendant while **Mr. Okinda** represented the plaintiff in the exercise. At the initial reconciliation stage certain pertinent issues were sorted out by the parties and the only issues that was disputed was left to the auditor to reconcile.

In the meeting of 17th April, 2007 the parties reported that they have reconciled the following accounts;

- (a) General account at Kshs.3,817,089/= credit to the plaintiff.
- (b) Bitumen account at Kshs.5,118,866.10 credit to Chevron

Prior to that meeting and in a letter dated 9th May, 2007 addressed to the plaintiff by the defendant, the defendant adjusted the balances;

- (1) Account No.0378 L/C and the adjusted balance in favour of the plaintiff was found to be Kshs.11,731,933/=,
- (2) Account No.030526 general balance the amount adjusted in favour of the plaintiff was found to be Kshs.2,492,682.02,
- (3) Account No.045485 Bitumen balance and the amount adjusted in favour of the plaintiff was Kshs.5,118,866.10, giving a total balance of Kshs.19,343,481.12.

As stated earlier the auditor gave each party an opportunity to present a comprehensive items deemed to be in dispute. The auditor also suggested that each team to sit down with its accountants and auditors to reconcile the information presented by both sides. After that exercise each party was required to present a report to the auditor highlighting the following;

- (1) The areas in which they were in agreement.

(2) Areas of dispute and the nature of the dispute.

(3) The auditor would then handle and attend to the disputed issues and determine the rights and obligation to each party.

In my understanding the attitude and flexibility expressed by the auditor gives credence to the accounts rendered by the defendant in favour of the plaintiff. I think it is against that background that the defendant admitted a sum of Kshs.19,343,481.12 in favour of the plaintiff. According to the letter dated 9th May, 2007 the defendant did not dispute the figures stated therein. And in so far as that figure is not disputed, I think the plaintiff is entitled to judgement be entered for that sum.

In conclusion and having this matter my utmost consideration it is my decision;

(1) The consent order entered into by the parties dated 6th February, 2007 appointing the sum of Deloitte & Touche to be auditors in the reconciliation exercise between the parties is hereby set aside.

(2) Judgement be and is hereby entered for the plaintiff against the defendant for the sum of Kshs. 19,343,481.12 together with interest at court rates until payment in full.

(3) The plaintiff shall have the costs based on the sum of Kshs. 19,343,481.12.

(4) The balance of the plaintiff's claim shall await a further determination or directions of the parties. i.e. the parties are hereby directed and/or ordered to appoint another auditor to reconcile the remaining balance of the plaintiff's claim within the next ten (10) days.

(5) Upon agreement of an auditor by the parties the said auditor shall present his report to court within the next 45 days.

(6) If the parties fail to agree on the appointment of a joint auditor the plaintiff shall be at liberty to set down the suit for hearing within the next 45 days.

(7) The parties are hereby ordered to pay the fees incurred by Deloitte & Touche on equal basis and the court shall determine the party who shall bear that cost at the end of the determination of the remaining issues.

Dated, signed and delivered at Nairobi this 13th day of March, 2007

M. A. WARSAME

JUDGE