REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Misc. Appli. 1099 of 2005

KENYA OIL COMPANY & ANOTHER…..……..... PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED…...….....…… DEFENDANT

RULING

I have before me an application by the plaintiff/applicant for primarily interlocutory injunctive relief against the defendant craved in the following terms.

(a) That the status quo in the contract dated 10.5.1999 entered into between the parties be maintained pending the hearing and determination of the dispute declared by the applicants in terms of Clause 22 of the said contract.

(b) That the respondent be restrained by a temporary injunction order from breaching or in any way interfering with the terms of the contract dated 10.5.1999 entered into between the parties pending the hearing and determination of the dispute declared by the applicants.

The application is expressed to be brought under S.7 of the Arbitration Act, 1995. The Arbitration Rules of 1997 and Order XXXIX Rule 2 of the Civil Procedure Rules. The application is supported by an affidavit of **GEORGE NJOROGE MWANGI,** the Assistant Managing Director of the Applicants, sworn on 13.12.2005.

The plaintiffs carry on business as petroleum distributors in Kenya and the East African region including Tanzania, Uganda, Rwanda, Zambia and Burundi and in the course of their business, the applicants own and market various grades of petroleum products. The defendant is a state corporation within the provisions of Chapter 446 Laws of Kenya. It operates and maintains a pipeline system, storage and auxiliary facilities including all piping and receipts storage and delivery facilities and equipment required for the transportation of petroleum products between Mombasa, Nairobi, Nakuru, Eldoret and Kisumu.

By an agreement dated 10.5.1999, the parties agreed inter alia as follows:-

(a) The defendant to accept petroleum products of certain specifications for storage and transportation of the products through the system and deliver the same to specified delivery points.

(b) The ownership of the petroleum products tendered for transportation and storage would remain

vested in the plaintiff at all times.

The plaintiff would pay for the said services based on certain tariffs specified under Clause 15 of the said Agreement which tariffs would be reviewed under Clause 15.4. Under Clause 22 of the said agreement all disputes arising there under except as provided under Clause 11 and 12 thereof would be resolved through arbitration.

From correspondence exchanged a dispute seems to have arisen between the plaintiffs and the defendant. According to the plaintiffs the dispute relates to 3 areas:-

(a) Unilateral and arbitrary increase on storage charges or tariffs by the defendant.

(b) Rebates

(c) Unpaid invoices.

The plaintiff has deponed that in breach of the said clause 22 of the agreement, the defendant has unilaterally and arbitrarily declared that the plaintiffs should pay the charges stated at (a) above whether they accept them or not. In default the defendant threatened to suspend its performance of the agreement with effect from 16.12.2005. Because the plaintiffs dispute the defendant's claims, they have declared a dispute. It is the plaintiffs' position that even if the defendant's claims were not in dispute the defendant does not have the right under the agreement to suspend or stop providing the services under the agreement. It is in that event only entitled to a lien on petroleum products of the plaintiff in the defendant's custody. The plaintiffs further maintain in the supporting affidavit aforesaid that the defendant's total claim is far below the value of the stocks of petroleum products in the defendant's system yet the defendant's threat is directed at the said entire stocks. The plaintiff maintains that the threatened action of the defendant to suspend or stop the services agreed under the said contract is a clear breach of the contract, unlawful punitive and malicious and unless it is restrained it will ruin economic activities of not only the plaintiffs but its customers also spread beyond Kenya.

On 9.2.2006, the said George Njoroge Mwangi the Assistant Managing Director of the plaintiffs filed a further affidavit in which he has deponed that since the filing of the application the plaintiff had paid to the defendant KShs.100,000,000/= and USD700,000 in settlement of what the plaintiffs believe was the undisputed debt and the balance of KShs.39,500,000/= had been set off against demurrage charges which the defendant is liable to pay to the plaintiff as compensation. Details of the defendant's liability are given. It is further deponed in this affidavit that notwithstanding the said payment, and in breach of the agreement between the parties the defendant on 7.2.2006 unilaterally and arbitrarily stopped the supply of all the plaintiffs' fuel products under the contract when at the said date the defendant was holding fuel stocks of the plaintiffs valued at KShs.461,218,272.00 as against the defendant's claim of approximately KShs.39,500,000/= (a small portion of the said stocks in the defendants possession). The plaintiffs' position in this affidavit is that under the agreement between the parties, the defendant could only exercise a lie over a quantity of products sufficient to provide security for its payment. In any event as the payment is now the subject of a dispute declared by the plaintiffs, the defendant's right to payment is dependent on the outcome of the arbitration proceedings.

The application is opposed and there is an affidavit in opposition sworn by one Peter Mecha the Operations Manager of the defendant. Mr. Mecha depones that the averments in paragraphs 3,4,5,6 and 7 of the supporting affidavit of George Njoroge Mwangi are not disputed by the defendant. The affidavit then sets out the defendant's version of the dispute. It is as follows:-

That under Clause 16.2 of the said agreement the plaintiffs were to settle the defendant's invoices within 15 days of receipt of the invoices. That under Clause 15 of the same agreement the defendant lawfully increased its tariffs and notified the plaintiffs and other stake holders. In the defendant's view the said increase was not arbitrary and was infact made after 10 years and based on sound economic reasons. The defendant's answer to the claim to rebates made by the plaintiffs is that the same were unilateral discounts from the respondent to all shippers including the plaintiffs but were withdrawn with notice to the

plaintiffs and the other shippers. These rebates according to the defendant were not part of the agreement between the parties. That the plaintiffs have deliberately failed to settle a sum of KShs.134,700,055/28 and USD 776,088.26 together with interest which sums are due to the defendant from the plaintiffs. According to the defendant the sum disputed by the plaintiffs is KShs.26,181,321.08 and USD 216,860.22 together with interest thereon. In the event the defendant contends that it is not in breach of the provisions of Clause 22 of said agreement. Instead it is the plaintiffs in breach of the agreement as it is lumping together the increased tariffs which are disputed and the undisputed tariffs. The defendant further contends that it is entitled to a lien on any petroleum products of the plaintiffs in its custody as security for payment of the outstanding amounts. In the premises, the defendant contends that, it is inequitable to grant the interim orders sought when the plaintiffs have deliberately withheld undisputed payments due to the defendant. The said Peter Mecha has filed a further affidavit sworn on 17.2.2006. In this affidavit Mr. Mecha gives the balance of undisputed sums due from the plaintiffs to the defendant as USD211,032.53 and KShs.41,452,598/71 as at 25.1.2006 after the plaintiffs' payment of KShs.100,000,000/= and USD700,000.00. In the defendant's view the plaintiff is not entitled to set off the said sum of KShs.39.5 million against sums owing to the defendant on account of alleged demurrage charges which have not been determined in accordance with the said agreement which demurrage charges are not payable by the defendant and which charges should await the determination of the tribunal. The defendant denies the details of the demurrage charges given by the plaintiffs. The defendant further contends that its lien over the plaintiffs' fuel products in its possession was a general lien and not limited to a quantity equivalent to the sums owed. In the premises the defendant contends that as the plaintiffs as at 25.1.2006 owed the defendant Shs.41,452,598.71 and USD211,032.53, it lawfully exercised its right of lien in accordance with Clause 16.3 of the said agreement of 10.5.1999. In the premises the defendant prays for dismissal of the plaintiffs' application.

The application was canvassed before me at length on 10/2/06, 20.2.2006 and 21.2.2006. Counsel relied upon the affidavits of their respective clients and cited several cases. I will not refer to most of the cases as they are irrelevant in this ruling. I have considered the application, the affidavits together with the annextures. I have also considered the submissions of the learned Counsels. I have finally given due consideration to the authorities cited. Having done so, I take the following view of this matter. I remind myself that where a party's legal or equitable rights have been violated or are threatened with violation by the unlawful acts of another an interlocutory injunction will issue. The necessary conditions were laid down in the rule setting case of **Giella -Vs – Cassman Brown & Co. Ltd [1973] EA 358.** They are as follows:-

First an applicant must show a prima facie case with a probability of success at the trial. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by any award of damages. Thirdly, if the court is in doubt it will decide an application on the balance of convenience. I also remind myself that at this interlocutory stage I am not required to decide with finality the various positions urged by the parties.

The main prayer of the plaintiff is an injunction as an interim protective measure pending the hearing and determination of the dispute between the parties by arbitration. Specifically the plaintiffs seek the maintenance of the status quo as at 10.5.1999 and that the defendant be restrained by a temporary injunction from breaching or in any way interfering with the terms of the contract dated 10.5.1999 entered into between the parties pending the hearing and determination of the dispute declared by the plaintiffs.

From the affidavit evidence and the submissions made to me it seems to me that there is no dispute between the parties as to the existence of a dispute that should be determined by an arbitral tribunal. What appears to be disputed is the extent of the dispute and how the parties should operate pending the resolution of the dispute by the arbitral tribunal. The plaintiffs' case at the tribunal as I understand it will be that the defendant has unilaterally and arbitrarily increased its storage charges or tariffs and has unlawfully demanded payment from the plaintiffs of the increased charges or tariffs yet the defendant has notice that they are disputed by the plaintiffs and ought before being levied to be resolved by an arbitral tribunal. The plaintiffs will also at the tribunal claim that the sums claimed by the defendant include sums that the defendant is not entitled to by reason of rebate offers made to the plaintiffs by the defendant during the currency of the contract before the unilateral increase. The plaintiffs will further argue at the

tribunal that the defendant is liable to pay demurrage charges under Clause 4.10 of the said agreement with respect to loss occasioned when the defendant failed to take certain deliveries of the plaintiff's products by reason whereof the plaintiffs are entitled to a set off. In view of the plaintiffs' claims the defendant's invoices cannot be paid. Hence the reference to the arbitral tribunal.

At this interlocutory stage it is the plaintiffs' case that they are entitled to the equitable remedy of a temporary injunction as their rights under the agreement of 10.5.1999 are threatened with violation by the defendant and infact

on 7.2.2001 while this application was pending hearing the defendant executed its threat and unilaterally and arbitrarily stopped the supply of all the plaintiffs' fuel products under the contract. The plaintiffs further argue that even if there are undisputed sums due from them to the defendant, the defendant's right to a lien under Clause 16.3 of the said agreement is limited to petroleum products of the plaintiffs equivalent to the amounts outstanding and not generally to the entire stocks of fuel products in the defendant's custody. In this event as the sums claimed by the defendant are a small fraction of the plaintiffs' stocks in the custody of the defendant, supply of fuel products to the plaintiffs by the defendant cannot be suspended. The defendant should only exercise its right of lien over such stocks of the plaintiff in its custody as would secure the sum owed and not generally against the entire stocks of the plaintiffs.

In my view this application turns on the interpretation of Clauses 3,4,15 and 16 of the agreement dated 10.5.99. Counsels have given the clauses the interpretations that suit their respective clients. Clause 16.3 reads:-

"**16.3 Where the amounts outstanding are not in dispute, in the event of non-payment by shippers under the terms of Clause 16.2, KPC shall be entitled to a lien on any outstanding amounts due from that shipper. In addition KPC shall be entitled to charge compound interest at the inter-bank rate ruling on the 1st working day of the month at default as advised by the Central Bank of Kenya plus one per cent on the outstanding amount from the date the payment was due until the date payment is made".**

Underlining mine. The plaintiffs while not admitting that the defendant's claim against them is undisputed, argue that even if there were outstanding amounts that were undisputed, the defendant does not have the right under the above clause to exercise its lien on the plaintiffs entire fuel stocks in the defendant's custody. The plaintiffs' contention is that in the said event, the defendant can only exercise a lien over a quantity of products sufficient to provide security for its payment. If this contention is accepted, the plaintiffs argue that the defendant holds large stocks for them far excess of the sum being claimed by the defendant and cannot stop or suspend services contracted in the said agreement.

The defendant holds the contrary view. Its position is that as at 25.1.2006 the undisputed balance payable by the plaintiffs stood at USD211,032.53 and KShs.41,452,598.71 and under the same clause, it has a general lien against the plaintiffs' petroleum products in its custody which lien it is entitled to exercise. This controversy is not as simple as it looks. I will use other material availed to me to attempt to resolve the controversy. In the further affidavit of George Njoroge Mwangi sworn on 9.2.2006 the plaintiffs have deponed that as at 7.2.2006, the defendant held fuel stocks of the plaintiffs valued at KShs.461,218,212.00. This fact is not controverted by the defendant. With regard to the plaintiff's indebtedness to the defendant, Peter Mecha its Operation's Manager has deponed at paragraph 6 of his further replying affidavit sworn on 17.2.2006 that as at 26.1.2006, the undisputed balance payable by the plaintiffs was USD211,032.53 and KShs.41,452,598.71. This indebtedness if taken to be the position is only a fraction of the value of the plaintiffs' fuel stocks in the defendant's custody. As both parties agree the said Clause 16.3 of the agreement was intended to furnish security to the defendant for outstanding undisputed sums. Mecha's averment in paragraph 33 of his further replying affidavit makes this very clear. The lien in Clause 16.3 of the said agreement is the defendant's security to enforce payment. It is not intended to put the plaintiffs out of business which would be the consequence of the defendant's threatened action to suspend or stop providing services to the plaintiffs especially as the defendant has a monopoly over the said services. In the premises, I am, on a prima facie basis, satisfied that the defendant is in equity not entitled to exercise its right of lien over the entire fuel stocks of the plaintiffs in its

custody. It is however, perfectly entitled to exercise its lien over the plaintiff's fuel stocks in its custody sufficient enough to enforce payment of undisputed outstanding sums.

The other complaints raised by the plaintiffs present no difficulties at all. The dispute over Tariffs is governed by Clause 15 of the agreement between the parties. By Clause 15.4, the defendant reserves the right to review the tariffs in the event of exceptional circumstances occurring which result in the tariffs being uneconomical or exceptionally onerous. The defendant's right of review of tariffs although unilateral is not absolute. The defendant should ensure that such review is not arbitrary and reasons for revisions have to be communicated to all parties well in advance of the review. The agreement does not have an in-built way of determining what constitutes exceptional circumstances. It also does not provide a system of determining uneconomical or exceptionally onerous tariffs and the fact that other parties have to be notified suggest that a challenge from the other parties is possible. In the premises the challenge made by the plaintiffs against revised tariffs is not an idle one. Indeed the defendant recognizes that the challenge raised against the increase in the tariffs makes the sums thereby charged disputed and therefore subject to the arbitral proceedings.

With respect to rebates and demurrage charges, I am of the view that the controversy cannot be resolved in this application. The plaintiffs contend that the defendant made a rebate offer to them together with the other shippers which rebate was subsequently withdrawn. However before the withdrawal rebate amounts for the year 2002 were not paid by the defendant to the plaintiffs. The defendants answer is merely that the rebates were unilateral and were withdrawn – and were in any event not part of the contract between the parties. The defendant is silent about the averment that the rebate amounts before the withdrawal were not paid. With respect to demurrage charges, the defendant is categorical that the same can only be determined by an Arbitral Tribunal in accordance with Clause 22.0 of the said agreement. The plaintiffs on their part have set off the sums in computing what they believe are the correct sums payable to the defendant.

On a consideration of the material placed before me, I am satisfied that it is necessary to order interim relief as sought under Section 7 of the Arbitration Act 1995. In other words the plaintiffs have shown a prima facie with a probability of success at the trial before the Arbitral Tribunal. The plaintiffs state that they carry on business as petroleum distributors in Kenya and the East African region including Tanzania, Uganda, Zambia and Burundi and a complete stoppage of services by the defendant will adversely affect if not ruin the economic activities of these countries and the livelihood of millions of people. The defendant's affidavits do not respond to this averment. In the premises I am satisfied that damages would not adequately compensate the plaintiffs if the injunction sought is denied. The justice of the case therefore requires the preservation of the status quo in the contract dated 10.5.1999 entered into between the parties pending the hearing and determination of the dispute between the plaintiffs and the defendants.

I further order that a temporary injunction do issue restraining the defendant from breaching or in any way interfering with the terms of the contract dated 10.5.1999 entered into between the parties pending the hearing and determination of the dispute between the parties by an Arbitral Tribunal.

The injunction will be conditional on the plaintiffs filing undertakings under their seals to pay damages if any to the defendant in the event that it is found at the trial before the Tribunal that the injunction ought not to have been issued. The undertakings shall be fortified by undertakings of one each of the plaintiffs' directors. The undertakings to be filed within 7 days of today.

Costs to follow the event in the arbitration.

Parties have liberty to apply.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY MARCH, 2006.

F. AZANGALALA

JUDGE

15/3/2006