REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 173 OF 2005

TRIPLE CAPITAL LIMITED ……………………..……...……..PLAINTIFF

VERSUS

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

R U L I N G

The defendant seeks an order that; the court be pleased to strike out the plaint herein and dismiss the suit against the defendant with costs. The application is brought under O VI Rule 13 (1) (b) (c) and (d) and XVI of the Civil Procedure Rules.

The defendant is a state corporation and is indeed sued as such by the plaintiff in respect of agreements, entitled deeds of assignment, for lending money. The defendant being a state corporation is caught by section 5 (2) of the state Corporation Act (Cap 446 in respect of such transactions the provisions of that section are: -

> **"……the power of a state corporation to borrow money in Kenya or elsewhere shall be exercised only with the consent of the minister and subject to such limitations and conditions as may be imposed by the Treasury with respect to state corporations generally or specifically with respect to a particular state corporation."**

Learned counsel Mr. Ohaga for the defendant argued that there were two letters dated 23rd and 28th October 2003, which approved the borrowing by the defendant from the Standard Chartered Bank of Kenya Ltd for purpose of refinancing money owed to the plaintiff. Subsequent to those letters the plaintiff and defendant entered into agreements, four in total, which provided that it was for lending of money to the defendant and for the benefit of the defendant. It was submitted on behalf of the defendant that those letters, aforesaid, did not constitute approval to the lending by the plaintiff to the defendant, counsel submitted that the approval for borrowing was to borrow from Standard Chartered Bank of Kenya Ltd for kshs 2 billion.

It may perhaps assist if relevant parts of those letters could be re produced here. The letter dated 23rd October 2003 provided in part.

> **"……in accordance with section 5 (2) and section 4 of the state corporation Act Cap 446, consent is hereby given for Kenya Pipeline Company Limited (KPC) to borrow on a revolving basis kshs 2 billion from Standard Chartered Bank Kenya Limited (SCBK) to allow SCBK to refinance amounts owed to Tripple A capital Limited by KPC under Deeds of assignment of debt from time to time…………. Yours sincerely DAVID MWIRARIA MP MINISTER FOR FINANCE"**

The letter dated 28th October 2003 in part provided as follows:

"I am pleased to inform you that pursuant to the provisions of section 4 and subsection 5 (2) of the state corporation Act,. Cap 446 of the Laws of Kenya. Consent is hereby granted for the Kenya Pipeline company (KPC) to borrow www.kenyalaw.org Triple Capital Limited v Kenya Pipeline Company Limited [2005] eKLR 3 on a revolving basis kshs 2 billion from the Standard Chartered Bank Limited (SCBK) to allow SCBK refinance amounts owed to Tripple A Capital Limited by KPC under deeds of assignment of debt from time to time.

Yours sincerely

HON Ochilo G M Ayacko M P

Minister for Energy"

Defence argued that these two letters authorized borrowing from Standard Chattered Bank Kenya Ltd and not from the plaintiff.

It is deponed on behalf of the defendant that at the time the said approval was granted the defendant was not indebted to the plaintiff, and subsequent to the approval the defendant borrowed the sum of kshs 2 billion from Standard Chartered Bank Kenya Ltd. Defence submitted that it was clear that there was no approval of the borrowing between the plaintiff and the defendant and that being so the foundation of the plaintiff cause of action, based on section 5 (2) cap 446, was ultra vires, contra statute and illegal.

The defendant referred to the plaintiff's pleadings, paragraph 6 of the plaint, which states in part:

"……the plaintiff and the defendant entered into four agreements described as "Deeds of Assignment" but which were in reality Agreements for the lending of money by the plaintiff to and/or for the benefit of the defendant."

Defence argued that that plea clearly showed that what the agreement stood for was lending, which had not received approval in accordance with section 5 (2) cap 446. In this regard counsel argued that the plaintiff cannot move away from its pleadings because every party is bound by its pleadings: see GANDY – VERSUS – CAPSAR AIR CHARTERS LTD [1956] 23 EACA 139.

Defence counsel was also emphatic that the court cannot lend aid to the plaintiff in its endeavour to enforce the lending which had not obtained authority of the minister in accordance with section 5 (2) cap 446, he added that the court will not enforce illegal contracts in support of that position. Counsel relied on the cases:

· RE An Arbitration Agreement between Mahmoud and Ispahani [1921] ALL ER 217.

· SNELL – VERSUS – UNITY FINANCE LTD [1963] 3 ALL ER 50

· CREDIT SUISSE – VERSUS – ALLERDALE BOROUGH COUNSEL [1996] 4 ALL ER 129

· HEPTULLA – VERSUS – NOOR MOHAMMED [1984] KLR 580;

This later case is a local case where it was held:

"No court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the court is himself implicated in the illegality."

Counsel on this argument, concluded that the court cannot enforce the Deed of Assignment which

were agreements for lending and which were not approved by the minister as per section 5 (2) Cap 446. He submitted that to enforce such illegal contracts was frivolous, vexatious and would delay the disposal of this suit.

The application was opposed; plaintiff's counsel relied on a replying affidavit. I wish to start with the defence objection to paragraph 5 of that affidavit. That paragraph deponed to resolutions reached at the defendant's board meeting and proceed to refer to the annexture, the said resolution. Defence counsel objected to this paragraph and sought its striking out on the basis that the deponent failed to state whether its content was from information and if so the source of that information. On this issue I am of the view that it does not breach OXVIII Rule 3 (1) because the deponent simply relied on an annexed document without adding his own interpretation or otherwise. I therefore reject that prayer for striking out paragraph 5 of the replying affidavit.

The defendants arguments in response to the defendants application was that the plaintiff's transaction was approved by the letters of 23rd and 28th October 2003 and subsequent to that approval the plaintiff and defendant entered into the Deeds of assignment the subject of this suit. That the defendant paid its instalments pursuant to those agreements up to September 2004, when the payments were stopped and the defendant is still indebted to the plaintiff.

The plaintiff relied on the case D.T. DOBIE COMPANY (KENYA) LTD – VERSUS – MUCHINA [1982] KLR 1; he quoted the following

> **"The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merit of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross examination in the ordinary way."**

Indeed those are the submissions made before me. For the court to exercise its discretion granted under Order VI Rule 13 (1) (b) (C) and (d) the matter ought to be plain and obvious for recourse to be had, to the summary process under this rule. I have carefully looked at the letter of approval and more particularly letter dated 28th October 2003. The authority was to allow the defendant to borrow on a revolving basis kshs 2 billion. Revolving implies where funds are drawn and replenished to the total amount of kshs 2 billion. This amount owed to the plaintiff from time to time. Those particular words of that letter create in me doubt whether indeed the defendant's application is merited. Without wishing to make final finding I am not in a position to state that the amount authorised to be borrowed was merely kshs 2 billion and for one time only. I am of the view that this unclarity can only be cleared by oral evidence in a full hearing. I am alive to the defendants argument that the plaint pleads that the transaction between the plaintiff and the defendant was lending, however looking at the Deeds of assignment it is possible that the transactions covered by those deeds were those authorized by the letter of the minister. I believe that that can only be clear when evidence, viva vorce, is tendered.

The end result is that

1) That the defendants application dated 24th May 2005 is dismissed with costs being in the cause.

Dated and delivered this 14th day of July 2005.

MARY KASANGO

JUDGE