REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS

Civil Case 1239 of 2002

KENYA OIL CO. LIMITED……...……PLAINTIFF

VERSUS

CHIEF PETROLEUM…….……....……DEFENDANT

RULING

The Plaintiff Kenya Oil Co. Ltd. filed the suit herein on11th December, 2002 claiming a sum of shs. 10,681,571.73,interest and costs against the Defendant, Chief PetroleumLimited. The claim to be the balance of agreedpurchase price of goods sold and delivered by the Plaintiff tothe Defendant at Nairobi and Kisumu between August andOctober, 2002. The Defendant entered appearance on 13thJanuary, 2003, and on the next day, 14th January, 2003,before any Defence was filed, the Plaintiff filed a Notice ofMotion under Order 35, Rules 1 and 2 of the Civil ProcedureRules seeking summary judgment. The ground given by thePlaintiff was that the Defendant has no defence to the actionand that it has entered an appearance merely for thepurpose of delaying judgment. It was supported by a verybrief affidavit sworn by one Jacob Israel Segman on 14th January, 2003.

The Defendant filed a defence and counterclaim on 29thJanuary, 2003. And on 13th February, 2003, the Defendantfiled its Replying affidavit sworn by one of its directors, Mr.Azim Rajwani. After the said pleadings were filed, there wasa request for particulars by the Plaintiff and one by theDefendant. Subsequently with the leave of the court, theDefendant filed a Replying affidavit on 8th April, 2003 withregard to the request for particulars while the Plaintiff filedanother affidavit on 9th April, 2003.

The parties then set down the hearing of the Plaintiff'smotion dated 14th January, 2003. On the 4th July, 2003 theDefendant herein filed a Notice to cross-examine Mr. JacobIsrael Segman on his 2 affidavits sworn on 14th January,2003 and 8th April, 2003 respectively. The Defendantrequired the personal attendance of the said Mr. Segman atthe hearing of the motion for that purpose.

The said motion came for hearing before me on 10thJuly, 2003 when the matter of the Notice to cross-examineMr. Segman was raised by Mr. Ragot, advocates for theDefendant. Mr. Akbar Esmail, advocate for the Plaintiff saidhe was opposing the said Notice and application to cross-examine Mr. Segman.

Mr. Ragot said that the application was made underOrder XVIII Rule 2 (2) and Rule 8. He said under the saidRule any party is entitled upon application to cross-examineany deponent of an affidavit in a suit. That the said application can be made formally or orally. Mr. Ragot saidthat the main reason why the Defendant wished to cross-examine Mr. Segman is that he does not disclose in his 2affidavits his sources

of information. He said that thisprejudices the case of the Defendant in respect of theapplication for summary judgment. He said that theDefendant is embarrassed as he may not be in a position toeffectively respond to the application for summaryjudgment. Mr. Ragot says that this can only be remedied ifMr. Segman is ordered to personally attend the hearing sothat he can tell the court the sources of his information. Hesays that the affidavits are very vague there will be prejudiceof the Defendant's rights. He says that he will require leaveto put in a further affidavit in response to Mr. Segman'saffidavit of 8th April, 2003. He says that the Defendantwants to respond to paragraph, 4, 5, 6 and 7 thereof.

Mr. Esmail for the Plaintiff strongly opposed theapplication contending that the application was completelymisconceived and had no basis in law. He says that Mr.Segman in both affidavits swore that the facts were "withinmy knowledge" and as such it was not true that he had notdisclosed the sources of his knowledge. Mr. Esmail contendsthat the Defendant wants to turn the hearing of theapplication into that of the suit.

As the Defendants counsel was prosecuting theapplication for the cross-examination of Mr. Segman, he alsodealt with the Notice to Produce Documents he had filed andserved the Plaintiff with under Order X, Rule 13 and 14 ofthe Civil Procedure Rules. This was also addressed by bothcounsels.

I have had the opportunity to consider the Defendant'sapplications and the counsel's submission. This court is ofthe view that applications under Order 35 are of a summary nature. In fact the heading reads "SUMMARY PROCEDURE".In the Oxford - Advanced Learner's dictionary, the meaningof word summary is said to include"

"…….. *done immediately, without paying attention to the normal process that should be followed: summary justice/execution – summary Judgment'.*

The magical notes against order 35 Rule 1 refers to "summary judgment". To me an application under this order does not constitute a normal trial where all the processes under Order 10, Rule 11 (A) have been exhausted including Interrogations, Discovery and Inspection. That is why summary procedure is possible even before a Defence is filed. It ought to only be invoked or summary judgement entered where from evidence adduced through an affidavit, it is shown to the court that the Defendant has or possibly cannot have a defence whatsoever to the claim or cause of action, that the Defence is hopeless, a sham and does notraise any triable issues/s. Under the said rules, theDefendant is given a right to show by way of affidavit oreven oral evidence that he should have leave to defend the suit.

I think that it is due to the summary nature of theprocess that applications under Order 35 are restricted toliquidated demands and recovery of land without any otherclaims. Hence the causes of action must be such that theyare uncontestable and can be proven by little effort andevidence through an affidavit. As a result, this court findsthe hearing of an application for summary judgment mustremain what it is supposed to be and not converted into atrial or other process, for to do so would change its meaningand very purpose.

Having considered the powers of this court to order theattendance of a deponent for cross-examination under order XVIII, Rule 2,1 think that such power and/or discretion mustbe applied sparingly. Mr. Esmail referred me to the supremeCourt Practice 1993 VOL. 1 at p. 150 and the case ofSULLIVAN -vs. - HENDERSON (1973) 1 ALL ER 48 in whichthe cautionary words of Field 1 in MILLARD -vs. - BADDELEY (1884) was expressed - that is *" The power to examineparties orally is only to be exercised in exceptional cases asit would otherwise lead to great expense and the trial ofactions on summons".*In the Sullivan case Megarry, 3. j observed:-

"The present case seems to me to illustrate thedifficulties that arise if leave to cross-examine awitness on his affidavit is given in cases underRSC Order 86. The summary process under RSCOrder 86 is another thing and the trial of action isanother, a hearing under RSC Order 86 with oralevidence is liable to become neither one nor the other, and to share the disadvantages of each

In the light of such possibilities, it is the view of thiscourt that there must be some qualifications and

specialcircumstances which would make it necessary for this courtto order the attendance of a deponent in court for cross-examination. So the court must ask itself why does theDefendant want Mr. Segman to be cross-examined andexactly on what points or issues? Mr. Ragot does not referto any specific point or issue except to say that thedeponent does not disclose his sources of informationtherefore he must come to court to state his sources ofinformation. With due respect, this ground is neitherconvincing nor sufficient for this court to invoke its powers.Mr. Segman in both affidavits depones:

"That the facts herein deponed save as otherwisestated are within my knowledge".

To this court that is a full disclosure of his sources -i.e. himself. This court deems that for Mr. Segman todeclare so, all the facts are known to him personally as theManaging Director of the Plaintiff Company. He is not evenrelying on information or belief which could have elementsof hearsay. If the Defendant does not believe that Mr.Segman has the facts from his own knowledge then it oughtto wait and challenge his testimony or velocity thereof,during cross-examination at the trial, if the suit survives thesummary procedure. At this stage the rules do notcontemplate that; neither will this court allow a fishingexpedition on the part of the Defendant which the presentapplication seems to want to achieve. This is confirmed bythe simultaneous application for production of documentsunder Order 10, Rule 13 and 14. Counsel for the Defendantsaid that if given a chance to inspect the documents, hewould come with them and cross-examine Mr. Segman and challenge his knowledge of the facts. Is this possible in anapplication for summary judgment. I think not. All theDefendant is supposed to show is that he should have leaveto defend the suit. I accept Justice Ringera's observation inHCCC No. 1238 of 2002 KOBIL PETROLEUM LIMITED - vs-KISII PETROLEUM PRODUCTS LIMITED (unreported)

"*..... It appears to be common ground and indeed it is correct position in law - that once the Plaintiffs motion for summary judgment satisfied the provisions of Order 35, Rule 1, the onus shifts to the Defendant to show pursuant to the provisions of Rule 2 that he should be given leave to defend".*

This court will only order the cross-examination of Mr. Segman if there exists some special reasons or Circumstances and the areas or points of cross-examination identified and specified lest we turn this summary processinto a fully fledged trial.

This court has noted that the Defendant has served aNotice under Order 10, Rule 14. Each party knows what todo before and at the trial if the suit reaches that stage.Each party has a right to move the court formally under Rule13. At present, we have neither reached trial nor is there aformal application before me.

At the end of his submissions, counsel for theDefendant appeared to be asking this court for leave to putin a further affidavit to respond to that of Mr. Segman.

This court has looked at the records and finds that bothparties have filed 2 affidavits in this matter and for thepurpose of the summary application appear exhaustive.There must be a restriction on the number of affidavits thatparties may file in applications otherwise it would be endlessand the purpose of affidavit-based applications would be lost. Parties must give the courts some credence that it hasits own mind. It is capable of understanding issues, facts,documents and making a finding with assistance of counselsbut does not need an endless paper-trial for it to reach areasonable and/or fair decision. The court, therefore,declines to grant any further leave to the parties to file anyfurther affidavits.

This court, therefore, rejects the application to orderthe examination of the deponent Mr. Segman and hisappearance for such purpose. The costs of this application isawarded to the Plaintiff. The parties are now to proceed tofix the hearing of the application for summary judgment orprepare the ground for the trial as the case may be.

DATED and DELIVERED at Nairobi this 4th August,2003.

MOHAMMED IBRAHIM

JUDGE