Topaz Petroleum Limited v Kenya Pipeline Company; Energy and Petroleum Regulatory Authority (Interested Party) (Commercial Case E719 of 2024) [2025] KEHC 13056 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)

Neutral citation: [2025] KEHC 13056 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE E719 OF 2024

AA VISRAM, J

SEPTEMBER 18, 2025

BETWEEN

TOPAZ PETROLEUM LIMITED ..... PLAINTIFF

AND

KENYA PIPELINE COMPANY ..... DEFENDANT

AND

ENERGY AND PETROLEUM REGULATORY AUTHORITY .... INTERESTED PARTY

RULING

Introduction and Background

1. Before the Court for determination is the Plaintiff's ("Topaz") Application dated 2nd December, 2024, which seeks a referral of the matter to arbitration, and an injunction against the 1st Respondent (KPC) and the Interested Party (EPRA) from interfering with Topaz's operations pending the hearing and determination of the arbitration.

2. The Application is supported by grounds on its face and the undated affidavit of Topaz's Managing Director, Francis Wanyiri. KPC has responded to the Application through the replying affidavit of its Ag. Chief Legal Officer, Nelson Nyaduwa sworn on 28th March, 2025. EPRA opposed the Application through a Notice of preliminary objection dated 5th December, 2024.

3. The background giving rise to this Application is briefly as follows: On 28th November, 2024, KPC issued a notice via email requesting Expressions of Interest for the sale of petroleum products belonging to Oil Marketing Companies (OMCs) listed as debtors, including Topaz. Topaz alleged that KPC

breached internal dispute resolution processes and acted in bad faith, particularly in light of an earlier email dated 1st October, 2024 and submitted that despite its compliance with the applicable conditions, payment was nonetheless demanded.

4. Topaz stated that KPC's intention to sell Topaz's petroleum products are claimed to be in violation of the Transportation and Storage Agreement (TSA) between the parties, and that Topaz served KPC with a notice of appointment of an arbitrator as required under Clause 22.0 of the TSA, which mandates arbitration for disputes arising from the agreement. Topaz thus seeks referral of the dispute to arbitration and an order to stay all proceedings, including the sale, transfer, or disposal of Topaz's assets listed in KPC's 28th November, 2024 schedule, pending arbitration.

5. In opposition to the Application, KPC pointed out that Topaz has admitted owing Kshs. 130,826,178.32/= to the Respondent in a letter dated 3rd May, 2023, and acknowledged that the said debt had accrued over a period of nine years. A subsequent demand letter of 14th September, 2023, reiterated the outstanding sum of USD 1,469,855.41 plus interest, which remains unpaid to date.

6. KPC asserted that Topaz failed to pay invoices under Clause 16.2 of the TSA triggering Clause 16.3, which clause grants KPC a lien on Topaz's petroleum products after 60 days of non-payment. KPC argued that the debt is undisputed, leaving no basis for arbitration under Clause 22.0, which only covers "disputes or differences" arising out of the said Agreement. It submitted that Topaz's arbitration notice dated 29th November, 2024 fails to specify the nature of the dispute, and further violates the requirement under Clause 22.0 which provides for informal negotiations prior to arbitration.

7. KPC contended that arbitration is inappropriate in the present matter because the debt is admitted and because there is already an applicable mechanism for recovery stipulated in the Agreement. Namely, that is, product sales under lien pursuant to the Agreement. Further it submitted that Topaz will not suffer irreparable loss because the sale proceeds will offset the debt only. Any surplus following the sale would be remitted to Topaz. KPC urged the court to dismiss Topaz's Application with costs, arguing it lacks merit and seeks to delay lawful debt recovery.

8. In its Objection, EPRA stated that the court's jurisdiction has been improperly invoked as the suit disregards provisions in the *Energy Act*(Chapter 314 of the Laws of Kenya) and the *Petroleum Act*(Chapter 308 of the Laws of Kenya), which outline EPRA's mandate, the framework for dispute resolution, and appeal mechanisms for aggrieved parties. It stated that the suit also disregards regulations from the Energy (Complaints and Dispute Resolution) Regulations, 2012, which specify the correct procedures for resolving disputes under the *Energy Act* and that the suit transgresses the doctrine of exhaustion of remedies because Topaz approached the wrong forum for their grievances in disregard of Article 159(2) of *the Constitution* which promotes alternative dispute resolution mechanisms such as mediation, arbitration, and conciliation.

9. For these reasons, EPRA contended that the suit is an abuse of the court process because it does not establish a relationship between Topaz and EPRA, and thus, prays for the Court to dismiss the Application with costs.

Analysis and Determination

10. I have considered the affidavits filed in support and in opposition to the Application together with submissions, the preliminary objection, and the applicable law.

11. The primary issue for determination is whether an appropriate basis has been made out for the issuance of an injunctive order pending the hearing and determination of the substantive dispute by an arbitral tribunal.

12. I must point out from the outset, that the Applicant has moved this Court improperly and irregularly. A party wishing to refer a dispute to arbitration ought not file a plaint in court and commence legal proceedings in court and at the same time pray for a referral to arbitration. Similarly, such a litigant may not seek injunctive relief pursuant to Order 40 of the Civil Procedure Rules, and at the same time, seek interim relief under Section 7 of the *Arbitration Act*. A litigant may not invoke parallel proceedings in court and in arbitration at the same time. To do so is an abuse of court and arbitral proceedings. In any event, by filing a plaint in court and by commencing its cause of action under court process, I am of the view that the Applicant has lost its right to proceed by way of arbitration.

13. Additionally, while it is not in dispute that the Agreement contains an arbitration agreement at Clause 22, there must still be a dispute that is capable of referral to a tribunal. In the present matter, the Respondent submitted, and I am in agreement, that the debt is admitted and accordingly, there is, in fact, no dispute on this issue. Evidence of the same is found in the letters dated 3rd May, 2023, and 14th September, 2023. The said letter of 3rd May, 2023, expressly states the following:-

> " Further to our letter dated 20th April 2023 and subsequent deliberations, we have carefully considered our operations to propose a payment plan for the outstanding amount of Kshs. 130,826,178.32 that has been in our account for 9 years....." (Emphasis mine)

14. The next issue for consideration is whether or not to grant the injunctive orders sought by the Applicant?

15. It is worth stating that the Applicant did not file in the CTS system any of the annextures referred to in its supporting affidavit to the Application. There was no documentary evidence to support or corroborate the allegations made by the Applicant in support of its version of events.

16. Further to the above, the Applicant, in its written submissions, did not speak whatsoever to the applicable criteria upon which such an injunctive order, or conservatory ought to be issued, or demonstrate that it had met the criteria, either under Section 7 of the *Arbitration Act*, or under Order 40 of the Civil Procedure Rules.

17. Based on the evidence before this Court, it is evident that the Applicant failed to fulfill its contractual obligation under Clause 16.2 of the TSA to pay invoices raised by the Respondent. Its failure to do so constitutes a breach of contract, which triggered the actions by the Respondent. This has not been disputed by the Applicant.

18. It is also evident that the action by the Respondent was in accordance with the terms of the TSA contract, which provides for an agreed on, an inbuilt mechanism for recovery of the debt. Clause 16.3 of the Agreement provides as follows: -

> KPC shall have a lien on equivalent Product Quantity upto the extent of exposure belonging to the OMC in custody of KPC. After 45 days' notice from the due date, KPC shall be at liberty to sell all such products and apply the proceeds of such sale to the satisfaction of such lien and all proper charges and expenses...

19. It is further evident, that the actions of the Respondent were carried out in light of an admission of debt, and that the Applicant was provided with due notice on 14th September, 2023, when the 1st Defendant demanded payment of the entire admitted sum, and warned that if the sum was not fully settled, the 1st Defendant would proceed to activate the default Clause as per Paragraph 16.2 thereof. Evidence of the same is found at Annexure ER-3 of the replying affidavit.

20. Based on the circumstances as described above, and applying the applicable law, I am satisfied that the Applicant has not met the threshold for a grant of injunction as set out in Giella v Cassman Brown [1973] EA 358, namely:-

    a. Establish his case only at a prima facie level,

    b. Demonstrate irreparable injury that cannot be compensated by way of damages if a temporary injunction is not granted, and

    c. Ally any doubts as to (b) by showing that the balance of convenience is in his favour.

21. In particular, I am satisfied that based on the facts set out above, the Applicant has failed to make out a prima facie case under the first limb, in accordance with Mrao Ltd v First American Bank of Kenya Limited and 2 Others [2003] eKLR, namely "a case in which on the material presented to the Court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter."

22. I say so, because the right to exercise sale was premised on the agreed terms of the contract between the parties as set out above. The grant of an injunctive order in the current circumstances would curtail the exercise of the contractual right of sale and amount to rewriting the contract of the parties.

23. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the Applicant is expected to surmount sequentially. Having failed to pass the first hurdle, and to show that there is a right that is capable of being infringed, the Applicant may not leap frog to the next hurdle. In my view, this brings the matter to an end.

24. Finally, as regards the preliminary objection raised by the 2nd Respondent, beyond raising the same, the 2nd Respondent did not file any written submissions to elaborate on its position in relation to the specific facts of the present matter. Neither did the Applicant or the 1st Defendant address this issue in their written submissions.

25. Based on the limited evidence before the Court at this stage, it is therefore not evident if the particular decision made by the 1st Defendant falls within the dispute resolution framework contemplated under inter alia Sections 11, 23, 24 and 36 of the *Energy Act*. In the absence of sufficient clarity on this issue, I am reluctant to make a finding on this issue. I therefore refer the parties to mediation on this issue with liberty to file further submissions and address the Court on the same in the event of no agreement.

26. The orders of this Court are as follows:-

    a. Based on the reasons as set out above, I find that the Application is without merit. The same is accordingly dismissed with costs.

    b. For the avoidance of doubt, any interim orders subsisting at this time are hereby discharged.

    c. The parties are referred to mediation. Further directions in relation to the hearing of the main suit shall await the outcome of the mediation.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 18TH DAY OF SEPTEMBER, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

Court Assistant: Lisper

.....for Plaintiff/Applicant

.....for Defendant/1st Respondent

..for Interested Party/Defendant/2nd Respondent