Baharini Oil Supply Services Limited & another v Kenya Ports Authority; Ethics & Anti Corruption Commission (Interested Party) (Commercial Case E026 of 2023) [2024] KEHC 16887 (KLR) (19 January 2024) (Ruling)

Neutral citation: [2024] KEHC 16887 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

COMMERCIAL CASE E026 OF 2023

F WANGARI, J

JANUARY 19, 2024

BETWEEN

BAHARINI OIL SUPPLY SERVICES LIMITED .... 1ST PLAINTIFF

BOSS FREIGHT TERMINAL LIMITED .... 2ND PLAINTIFF

AND

KENYA PORTS AUTHORITY .... DEFENDANT

AND

ETHICS & ANTI CORRUPTION COMMISSION .... INTERESTED PARTY

RULING

1. This ruling relates to two applications both commenced by way of Notice of Motion dated 16th October, 2023 and 31st October, 2023 respectively. For ease of reference, the application dated 16th October, 2023 shall be referred to as the first application while the one dated 31st October, 2023 shall be referred to as the second application.

2. The first application sought for the following orders: -

   a. Spent;

   b. Spent;

   c. That pending the hearing and determination of the suit filed herewith, a temporary injunction do issue restraining the Defendant, its agents, officers, employees, assigns or any other person on authority of the Defendant from processing, opening, evaluating, qualifying and dealing in any manner whatsoever any and all bids/tenders submitted by applicants in respect to Mombasa Port Berths 11 – 14 under Tender reference no. KPA/052/2023 – 2024/CPS;

d. That costs of the application be in the cause.

3. The application is supported by an affidavit sworn by one Abdiwahid Haji Yerrow, said to be a director of both Applicants. Among the grounds in support of the application were that the 1st Applicant and the Defendant entered into a Concession Agreement on 18th December, 2002 and that the said agreement was never terminated and thus still in force. By virtue of it still in force, the 1st Applicant opined that it was a legally binding document between it and the Defendant. In the year 2007, there was an attempt by the Defendant to withdraw the approval relating to the agreement and the 1st Applicant moved to court seeking for specific performance.

4. Parties later agreed to have the case withdrawn to enable parties explore an out of court settlement in respect to the concession agreement. It is stated that the outcome of the said discussions was to have the 1st Applicant given access to implement its obligations under the concession agreement. Before parties could reach the implementation part of their discussions, the Interested Party moved in claiming irregularities and thereafter the Defendant/Respondent proceeded to advertise and call for bids on the properties which the Applicants expected to be allocated in respect to construction of the Berth pursuant to the terms of the concession agreement dated 18th December, 2002. This is what precipitated the application.

5. The second application sought for the following orders: -

   a. The 1st Plaintiff's suit be struck out for being time barred;

   b. The 2nd Plaintiff's suit be struck out for lack of privity;

   c. Without prejudice to (a) above, the 1st Plaintiff's suit be stayed pending reference to arbitration.

6. The application is supported by an affidavit sworn by one Michael Sangoro, the Respondent's Manager – Litigation and Disputes. The grounds are that the suit is wholly premised on a supposed breach of a concession agreement dated 18th December, 2002. The breach is said to be because the Ministry of Transport, on 29th January, 2007, cancelled an approval which it had earlier given on 24th January, 2007. According to the Respondent, the 1st Applicant's cause of action accrued on 29th January, 2007 when the approval was withdrawn and access denied.

7. The cause of action was in fact pursued in Nairobi HCC No. 405 of 2007 and the 1st Plaintiff withdrew the suit on 18th January, 2019. Citing section 4 of the Limitations of Actions Act (Cap 22, Laws of Kenya), it was urged that all claims arising in contract must be brought not less than six (6) from when the cause of action accrued. Reliance was also placed on section 34 (1) of Cap 22 as a demonstration that the Act also applies to arbitrations. As such, time bar applies to any arbitration which may be commenced under clause 42 of the concession agreement. According to the Respondent, it was pointless to stay the proceedings pending an arbitration which is time barred.

8. If, however, the claim is not time barred then clause 42 of the concession agreement demands that the dispute be referred to arbitration hence the suit ought to be stayed in line with section 6 of the *Arbitration Act*. Separately, it was contended that the concession agreement is between the 1st Applicant and the Respondent only. The 2nd Applicant is a stranger to the agreement and as such, cannot in law maintain any claim against the Respondent whether by suit or arbitration. The Respondent thus sought for striking out of the suit for the reasons advanced.

9. Both applications were strenuously opposed. The Respondent filed its replying affidavit to the first application and the same is dated 6th November, 2023. It was sworn by one Stephen Kyandih, the Respondent's Principal Litigation Officer – Litigation and Disputes. Among the depositions were

that some of the documents annexed to the Applicants' affidavit ought to be expunged as they were inadmissible. It was further contended that the agreement only related to Mbaraki Wharf accessed through Plot No. Mombasa/Block XLVII/558 and not to Berths 11 to 14 which the Applicants have sought an injunction over.

10. It was also deponed that during the negotiations between the 1st Applicant and the Respondent, the 1st Applicant was notified that Berths 11 to 14 were unavailable since they had been reserved for other uses. However, Mbaraki Wharf accessed through Plot No. Mombasa/Block XLVII/558 was available and that the Respondent had not proposed to dispose the Mbaraki Wharf accessed through Plot No. Mombasa/Block XLVII/558 to any other party.

11. It was further deponed that to grant an injunction as sought by the Applicants would hamper government project to improve efficiency at the port and generate more income to the country. Since the Applicants had a remedy in damages, an injunction was deemed not necessary. The Respondent thus sought for the dismissal of the first application with costs.

12. The Interested Party equally filed a replying affidavit dated 30th October, 2023. It was sworn by one Stephen Ivuvu, an investigator with the Interested Party. The crux of the Interested Party's response was that it was investigating the allegations of irregularities in the grant of non-exclusive licence for the construction of a berthing facility. It was averred that the Interested Party received an anonymous report on 8th September, 2023 regarding allegations of irregularities in the grant of non-exclusive licence for the construction of a berthing facility by the 1st Applicant at Mbaraki Wharf leading to a claim of Kshs. 3.9 billion.

13. It was contended that the investigations were at a preliminary stage and that once the same is concluded, the Interested Party would compile a file and make its recommendations to the Director of Public Prosecutions on its findings. It refuted the Applicants' allegations that its role was to frustrate the concession agreement as its mandate was purely in the public interest. The Interested Party thus sought for the dismissal of the first application with costs.

14. The Applicants filed a further affidavit dated 9th November, 2023. On the documents sought to be expunged, the Applicants averred that they were not privileged as they had been supplied to them during the negotiations. They questioned the Respondent's motive as to why it wanted the court not to know what transpired during the six (6) months of negotiations. It concluded that the Respondent's only reason to try and conceal the documents was because the Respondent was on the wrong. The Applicants thus sought for the first application to be allowed with costs.

15. For the second application, the Applicants filed their replying affidavit dated 9th November, 2023. On whether the claim is time barred, the Applicants averred that the concession agreement dated 18th December, 2002 was to remain in force for thirty-three (33) years up to the year 2035 and as long as the agreement remains unperformed on the part of the Defendant, the claim is not time barred since presently, the Defendant is in breach of the concession agreement and the breach is ongoing.

16. The Applicants further averred that it was misleading on the part of the Respondent to state that the suit is time barred yet at all material times before the filing of the suit, the Applicants and the Respondent were engaged in negotiations in respect to the concession agreement dated 18th December, 2002 which is yet to lapse on 18th December, 2035. The Applicants noted that for every day that passes before the year 2035 while the Applicants are yet to enjoy the fruits of the concession agreement, breach occurs and it is ongoing thus the allegation that breach occurred in 2007 is misguided. According to the Applicants, the cause of action in the present matter is the Respondent's notice dated 12th September, 2023 and the report of January, 2023.

17. As for the 2nd Applicant's standing, it was averred that the 2nd Defendant is a shareholder of the 1st Applicant and that its relevance would be demonstrated during the hearing of the main suit. It was further added that the 2nd Applicant was the main investor of Kshs. 57 million sought for in the plaint. On arbitration, the Applicants stated that the matter ought not to be referred to arbitration since parties had agreed to settle the matter out of court which resulted in self arbitration for a period of six (6) months and it is the Respondent who has failed to implement the recommendations of its own technical committee pursuant to the said arbitration.

18. The Applicants contended that in the event the court is not inclined to infer that arbitration has taken place as highlighted, they would be seeking to invoke the provisions of section 7(1) of the *Arbitration Act*. In totality, the Applicants sought for dismissal of the second application with costs.

19. On 2nd November, 2023, directions were given that the two (2) applications be heard together. Parties were directed to file submissions. Both the Applicants and the Respondent duly complied by filing detailed submissions and cited various authorities in support of their rival positions. The Applicants' submissions are dated 11th November, 2023 while those of the Respondent are dated 8th November, 2023.

Analysis and Determination

20. I have considered both applications, the responses thereto, submissions filed together with the authorities relied upon by the parties as well as the law. Both the Applicants and the Respondent have framed issues for determination and the court shall adopt the same as the issues for determination save to add on the issue of costs.

21. The issue of whether the suit is time barred is a jurisdictional issue and ought to be determined first. This is for the reason that if the court finds that the suit is indeed time barred, then it cannot take any more step other than to down its tools. There is no dispute that the 1st Applicant and the Respondent entered into a Concession Agreement on 18th December, 2002. The terms of the agreement are well set out in the said document. It is equally not in contest that on 24th January, 2007, the Ministry of Transport gave the 1st Applicant its approval to construct the berth. However, the approval was recalled by the same ministry on 29th January, 2007.

22. Upon cancellation of the approval, the Respondent refused to allow the 1st Applicant access to the facility forcing the 1st Applicant to move to court in Nairobi HCCC No. 405 of 2007, Baharini Oil Supply Services Limited v Kenya Ports Authority & Another. It is not in contest that this case was withdrawn on 18th January, 2019 to allow parties settle the issue out of court. Both the Applicants and the Respondent confirm that there were negotiations between the Applicants' representatives and the Respondent's technical committee which resulted in a report in January, 2023. The report contained several recommendations.

23. For purposes of computing time within which a suit ought to have been filed, the Respondent concedes that the Nairobi suit was filed within time. Its point of divergence is that once the 1st Applicant withdrew the Nairobi suit, it could not yet again make a U-turn and file another suit on account of the concession agreement signed on 18th December, 2002 and breached on 29th January, 2007.

24. The Respondent's reasoning is that time had lapsed since the cause of action was in contract which according to the Respondent, breach had ensued on 29th January, 2007. As per the provisions of section 4 (1) (a) of the *Limitation of Actions Act*, any claim ought to have been lodged on or before 29th January, 2013, that is, within six (6) years.

25. On their part, the Applicants submitted that it was misleading for the Respondent to allege that the breach happened in 2007. According to the Applicants, the breach has been continuous and ongoing. The Applicants further allude that their cause of action stems from the January, 2023 report and the notice of 12th September, 2023.

26. To unravel these rival positions, it is imperative to clearly delineate the cause of action. My understanding of the phrase "cause of action" is that it refers to an incident (act or omission) which vests in an individual the right to seek legal redress. Black's Law Dictionary defines the term as the "factual situation that entitles one person to obtain a remedy in court from another person." In the present case, was the breach of the concession agreement the cause of action or was it the notice dated 12th September, 2023?

27. As observed elsewhere in this ruling, there is no doubt that parties consented to having the Nairobi case which had been filed within time to be withdrawn to allow the parties resolve the matter out of court. As an acknowledgement of the consent, the Respondent formed a technical committee to engage with the Applicants. The technical committee's report leaves no doubt that the deliberations were about resolving the impasse created by the concession agreement. To this end, the technical committee came up with recommendations.

28. In its report at page 16, the committee confirmed that the Applicants had requested for berths 11 to 14. However, the request was declined on the following terms: - "...Therefore, the requested berths are not available for allocation..." Having been informed as such, the Applicants turned their sights on Mbaraki Wharf on Plot No. Mombasa/Block XLVIII/558. The technical committee having considered the Applicants' application recommended at page 25 of its report that the Respondent's management does consider approval of lease of the plot for a term of thirty (30) years to BOSS.

29. The report is indicated to have been made in January, 2023. Having not been granted the request for berths 11 to 14, there was legitimate expectation on the Applicant's part that the committee's recommendation to have them allocated Plot No. Mombasa/Block XLVIII/558 would be implemented. What did the Respondent do? Through a notice dated 12th September, 2023, it invited bids from interested bidders for among others berths 11 to 14. This is exactly what spurred the Applicants to move the court.

30. A reading of the technical committee's report leaves nothing to doubt as to why berths 11 to 14 were indicated to be unavailable. The committee clearly noted as follows: - "...Further, under the KPA Masterplan, there is a proposal for the redevelopment of berths 11 to 14 into multipurpose terminals and their operations are to be carried out by an entity to be identified by the Authority..." The Respondent having chosen to implement this recommendation by inviting bidders to bid for berths 11 to 14 was expected to at the same breath notify the Applicants of its approval to Mbaraki Wharf on Plot No. Mombasa/Block XLVIII/558.

31. As at the time of moving court, the issue of the concession agreement had been resolved through the Respondent's technical committee's recommendation in their report. To this end, it is this court's finding that it is not the breach of the concession agreement that precipitated the filing of the present suit but the failure of the Respondent to implement its technical committee's recommendations. Breach of the concession agreement was addressed in the Nairobi suit.

32. It is thus the court's finding that the suit herein is not time barred. Before I conclude on this issue, the Respondent relied on the Court of Appeal decision in Rift Valley Railways (Kenya) Limited v Hawkins Wagunza Musonye & Another [2016] eKLR for the proposition that time does not stop running merely because parties are engaged in out of court negotiations. This court is in agreement

with the Court of Appeal's decision on this issue. However, the facts in that case are distinguishable to the present case. In the cited case, the Respondents engaged the Appellant before moving the court and by the time they sought to do so, the three (3) years provided for under section 90 of the *Employment Act* had lapsed.

33. This is not what obtains in the present case. There was a suit filed within time and parties agreed to have that suit withdrawn and opted for out of court negotiations. Those negotiations culminated with the report which the Respondent seems to be implementing selectively.

34. On whether the suit by the 2nd Applicant ought to be struck out, the Respondent submits that the concession agreement was solely between the 1st Applicant and the Respondent. Accordingly, the 2nd Applicant was a stranger and thus cannot maintain any claim as against the Respondent. On its part, the Applicants submit that the 2nd Applicant is the shareholder of the 1st Applicant thus properly joined in the suit. In its classical adaptation, the doctrine of privity of contract hypothesizes that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party, except in certain cases only. In Dunlop Pneumatic Tyre Co Ltd v Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principle thus:

> " …My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it…"

35. In Savings & Loan (K) Limited v Kanyenje Karangaita Gakombe & another [2015] eKLR, the Court of Appeal relying on its previous decisions in the cases of Agricultural Finance Corporation v Lengetia Ltd [1985] KLR 765, Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another, CA NO 274 of 2003 and *William Muthee Muthami v Bank of Baroda, CA NO 91 of 2004*, reiterated that a contract affects only the parties to it and that it cannot be enforced by or against a non-party.

36. In Savings & Loans (K) Limited v Kanyenje Karangaita Gakombe & Another (above), the Court of Appeal held as follows: -

> "…In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party. In Dunlop Pneumatic Tyre co ltd v Selfridge & Co Ltd [1915] AC 847, Lord Haldane, LC rendered the principles thus: "My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it…"

37. The doctrine of Privity of Contract is a long established part of the law of contract. It is one of the fundamental principles of the English Contract law. The essence of the Privity rule is that only the parties that actually negotiated a contract (who are privy to it) are entitled to enforce its terms. Basically, it advances that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.

38. It is not in doubt that the concession agreement was only between the 1st Applicant and the Respondent. Therefore, technically speaking, the 2nd Applicant cannot seek to enforce a contract it was not part of. However, it was submitted that the 2nd Applicant is a shareholder of the 1st Applicant. According to the CR. 12 attached to the Applicants' supporting affidavit, the 2nd Applicant was registered on 16th May, 2005. Clearly, at the time the concession agreement was being entered into on 18th December, 2002, the 2nd Applicant was not in existence. Without much interrogation, it would appear that the 2nd Applicant is a stranger to the agreement.

39. However, it would be too hasty to declare as such. In the circumstances, a consideration of the concession agreement would be imperative. At clause 1.4 of the agreement, successors are defined as follows: - "Subject to the terms of this Agreement, any reference in this agreement to any party shall include its respective successors and permitted assigns or permitted transferees."

40. Further at clause 3.3, the agreement provides as follows: - "The rights granted under this agreement are personal to the concessionaire and shall not be capable of assignment except as provided in this agreement. Such rights may only be exercised by the concessionaire or its duly authorized servants and agents." (Emphasis added).

41. This court's understanding of the above two (2) clauses is that though the concession agreement is strictly between the 1st Applicant and the Respondent, it did not bar either party from having successors or assigns in future. Though clause 3.3 made the rights under the agreement to be personal to the concessionaire, the same could be assigned as provided in the agreement and this right was solely vested on the concessionaire who in this case is the 1st Applicant.

42. Further, from the report of January, 2023, the Applicants are referred to as BOSS. Though this court is alive to the separate legal entity personality of a company as set out in the celebrated case of Salomon v Salomon [1897] AC 78, a consideration of the 1st Applicant's initials leaves no doubt that the two are related. It has been held severally that striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. In Ramji Megji Gudka Ltd –vs- Alfred Morfat Omundi Michira & 2 others [2005] eKLR the Court of Appeal held as follows: -

> " ...In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in Dt Dobie & Company (Kenya) Ltd. v. Muchina [1982] KLR 1 in which Madan J.A. at page 9 said: -
>
>> 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..."

43. Having found as above, this court finds that the Respondent has not made out a case to warrant the suit by the 2nd Applicant to be struck out and it is so held.

44. On whether the suit ought to be stayed for purposes of arbitration, the Applicants posit that parties have had discussions which culminated in the report of January, 2023. Whatever remains is simply implementation. For the Respondent, it is submitted that there is an admission that the concession has an arbitration clause and thus this suit ought to be stayed and parties to proceed to their self-given dispute resolution forum.

45. It is not in dispute that the concession agreement contains an arbitration clause within the meaning of section 4 of the *Arbitration Act*. On one hand, the Applicants submit that it shall be placing reliance on the provisions of section 7 of the *Arbitration Act* seeking interim protection measures. On the other, the Respondent indicates that the Applicants' position confirms that the dispute would still be referred to mediation were it not time barred.

46. The first application neither invoked any provisions of the *Arbitration Act* nor sought any interim protection measures and though it is pleaded in the plaint, what is for determination is the application, not the suit. The principles governing the grant of interim orders of protection under the *Arbitration*

Act were outlined by the Court of Appeal in Safaricom Limited vs Ocean View Beach Hotel Limited & 2 others Civil Application No. NAI 327 of 2009 [2010] eKLR where Nyamu JA. (as he then was) observed as follows; -

> " ...By determining the matters on the basis of the [GIELLA] principles the superior court failed to appreciate what interim measures of protection entail in terms of arbitration law, during or before the commencement of an arbitration. It may be necessary for an arbitral tribunal or a national court to issue orders intended to preserve evidence, to protect assets, or in some other way to maintain the status quo pending the outcome of the arbitration proceedings themselves... The making of interim measures was never intended to anticipate litigation.......An interim measure of protection such as that sought in the matter before us is supposed to be issued by the court under section 7 in support of the arbitral process not because it satisfies the civil procedure requirements for the grant of injunctions as the High Court purported to do in this matter..."

47. Based on the above decision, this court would be overarching its confines if it grants that which was not sought and thus I decline the Applicants' invitation to issue reliefs they never sought for. On whether the court can stay the proceedings and refer the matter to arbitration, the Respondent in its application had sought for the matter to be stayed pending arbitration. Section 6 of the *Arbitration Act* is the operative provision on stay of proceedings. In UAP Provincial Insurance Company Limited v Michael John Beckett [2013] eKLR, the Court of Appeal while considering this provision noted as follows: -

> " ...It is clear from this provision that the enquiry that the court undertakes and is required to undertake under section 6(1)(b) of the *Arbitration Act* is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words, if as a result of that enquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of that dispute. If on the other hand the court comes to the conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court..."

48. Granted there is an arbitration clause does not ipso facto make the matter a candidate for stay of proceedings for purposes of reference to arbitration. The court is still bound to enquire whether there exists a dispute to warrant reference to arbitration. In the present scenario, it is not in contest that parties have had discussions with a view of resolving the impasse. Out of those discussions, there is a report clearly making certain recommendations. What would arbitration achieve other than delay the matter?

49. The Respondent submitted that the subsisting orders are prejudicial as they are hindering it from carrying out a public function which shall benefit a greater number of people. The current dispute is not about the concession agreement but rather advertising berths 11 to 14 which had been said to be unavailable. When the parties entered into the concession agreement, the issue of berths 11 to 14 was not among what they had discussed and as such, the court finds no efficacy in staying the proceedings and referring the matter to arbitration. The Respondent's application would have fitted in well in the Nairobi suit but not the present suit.

50. On whether the three documents pointed out by the Respondent ought to be expunged, the two (2) letters, that is, the one dated 9th March, 2021 and 1st July, 2021 are said to be privileged. Privileged information or communication is defined under section 130 – 137 of the *Evidence Act*. It deals with

privilege and provides for instances when communication between certain categories of persons can be inadmissible in proceedings for being privileged. These include communication during marriage, official communication to a public officer, communication between an advocate and his client and communications between advocates.

51. The Respondent submitted that the two letters were communication between an advocate and his client. Invoking section 134 of the *Evidence Act*, these documents would be inadmissible. However, a review of the letter dated 9th March, 2021 though addressed to the Respondent by the Attorney General makes reference to the Applicants' letter dated 2nd March, 2021. The Applicants averred that the two (2) letters were availed to them during the negotiations. This equally applied to the technical committee's report. The Applicants' averments on how the documents were obtained have not been controverted.

52. Similarly, there is no averment that the said documents were illegally acquired. As was held in Baseline Architects Limited & 2 Others v National Hospital Insurance Fund Board Management [2008] eKLR, a balance must be struck between public interests and private interests and the prejudice likely to be suffered in the event privileged communication is disclosed. Having perused the two (2) letters, the court notes that there is no harm that can result to the public if the two letters are relied upon. If indeed they were intended to be confidential, they would have been marked as such. I am alive to the fact that some confidential communication need not be marked as such and in such circumstances, the contents of the communication are scrutinized to ascertain whether they are privileged or not.

53. A review of the two (2) letters does not reveal any privilege and as such, the court declines to expunge the two letters. As for the report, the same was prepared having factored in the Applicants' input and ordinarily, it would be expected that once the report is ready, they would be supplied a copy. Therefore, it would be a travesty to bar a party who participated in making of a report from seeking reliance on the same report. The report of January, 2023 is therefore found admissible and the same shall be relied in evidence.

54. On whether injunction ought to be refused, the Respondent submitted that since there was no prayer for injunction in the main suit, the application was fatal. It placed reliance on Safi Terrazo & General Contractors Limited v Teresia Njeri T/A Gata General Agencies [2008] eKLR. The court's understanding of the provisions of Order 40 Rule 2 of the Civil Procedure Rules under which the application is premised is that what is anticipated is a suit. In Proto Energy Limited v Hashi Energy Limited [2019] eKLR, the court observed as follows: -

> " ...As a general rule a suit can only be instituted by way of a Plaint, Petition or an Originating summons. A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit..."

55. There is no doubt that there exists a plaint dated 16th October, 2023. Though there is no prayer for injunction in the suit, I am least persuaded that the failure therein renders the application fatal and defective. The application is competent since it has sought for an order of injunction pending hearing and determination of the suit. Since it is not a prayer in the main suit, the same will not be considered when dealing with the main suit. The case of Safi Terrazo & General Contractors Limited relied upon by the Respondent is persuasive and thus not binding on this court.

56. Having found that the application is competent, I shall now turn to the merits of the application. The guiding principles for the grant of orders of temporary injunction are well settled and are set out in the judicial decision of Giella v Cassman Brown [1973] EA 358. This position has been reiterated in

numerous decisions from Kenyan courts and more particularly in the case of Nguruman Limited v Jan Bonde Nielsen & 2 others [2014] eKLR where the Court of Appeal held that: -

> "...In an interlocutory injunction application, the Applicant has to satisfy the triple requirements to a) establish his case only at a prima facie level, b) demonstrate irreparable injury if a temporary injunction is not granted and c) alley any doubts as to b) by showing that the balance of convenience is in his favour. These are the three pillars on which rest the foundation of any order of injunction interlocutory or permanent. It is established that all the above three conditions and states are to be applied as separate distinct and logical hurdles which the applicant is expected to surmount sequentially..."

57. Have the Applicants demonstrated a prima facie case? Prima facie case was defined by the Court of Appeal in the case of Mrao Limited v First American Bank of Kenya Limited [2003] eKLR as follows: -

> "...in civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exists a legal right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter..."

58. The Applicants submitted that they have a concession agreement which has not been terminated but remains un-performed. According to them, the continuous breach currently stands at U$ 181,203,810.90 and there is the outstanding twelve (12) years. What Applicants rights have been violated or at risk of violation to require a rebuttal from the Respondent? It is not in dispute that the Applicants entered into a concession agreement with the Respondent way back in 2002. It is equally not in doubt that to date, the Applicants have not been granted access by the Respondent to execute their part of the bargain.

59. They must have invested money at the inception and it is common knowledge that had the contract been performed as was expected, the project would have earned the Applicants an income. It therefore behoves the Respondent to give a rebuttal to the Applicants assertions and this court is thus satisfied that a prima facie case has been made out.

60. As held by the Court of Appeal in Nguruman case (above), having made out a prima facie case, a party is not allowed to leapfrog to the injunction but must pass the other two (2) hurdles. The Applicants herein are required to demonstrate irreparable harm. Halsbury's Laws of England, 3rd Edition Volume 21, Paragraph 739 page 352 defines irreparable injury as follows: -

> "Injury which is substantial and could never be adequately remedied or atoned for by damages, not injury which cannot possibly be repaired and the fact that the plaintiff may have a right to recover damages is no objection to the exercise of the jurisdiction by grant of injunction, if his rights cannot be adequately protected or vindicated by damages. Even where the injury is capable of compensation in damages, an injunction may be granted, if the injury in respect of which relief is sought is likely to destroy the subjected matter in question."

61. The Applicants are required to demonstrate the irreparable harm they stand to suffer if injunction was not granted. The Respondent submitted that the Applicants calculated their loss to the cent and therefore, damages in the event they succeed would suffice. It has been held in several decisions that the fact that damages would suffice is not a carte blanche to deny a grant of orders of injunction. In Joseph

Siro Mosioma vs. Housing Finance Company of Kenya Limited & 3 Others [2008] eKLR, Warsame, J (as he then was) held as follows: -

> "...damages is not automatic remedy when deciding whether to grant an injunction or not. Damages is not and cannot be substituted for the loss which is occasioned by a clear breach of the law, in any case, the financial strength of a party is not always a factor to refuse an injunction. More so a party cannot be condemned to take damages in lieu of his crystalized right which can be protected by an order of injunction..."

62. In the present case, the Applicants have an accrued right based on the concession agreement which though entered into over twenty - one (21) years ago, they have nothing to show for it. During their negotiations, they had sought for berths 11 to 14 but they were told they were unavailable and instead referred to their initial parcel of land. Though recommendations have been forwarded to the Respondent to implement, they are yet to do so over one (1) years later and have proceeded to advertise for bids for the berths which were said to be unavailable.

63. If the Respondent is allowed to proceed to advertise the berths without the Applicants securing their legitimate expectation, it would be a serious loss which cannot be made good by an award of damages. The value of the shilling has seriously depreciated and whatever they would have earned from the date of the contract to date cannot be quantified. The court thus returns a verdict that the Applicants have demonstrated that they stand to suffer irreparable harm if injunction is not granted.

64. Lastly, where does the balance of convenience tilts? In Chebii Kipkoech v Barnabas Tuitoek Bargoria & Another [2019] eKLR, it was observed as follows: -

> "...The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to them would be greater than that caused to the defendants if an injunction is granted and suit is ultimately dismissed..."

65. In this case, the Applicants' complaint is that the Respondent has proceeded to advertise and invite bids for berths 11 to 14 which resulted from the negotiations between the parties. In the same breath, it has not taken any steps towards implementing the recommendation approval the lease to the Applicants. As such, the Applicants stand to suffer greater harm if the Respondent is allowed to proceed with the advertisement and invitation of bids before settling the Applicants. However, in the event the Applicants are not successful, the Respondent can simply re-advertise and invite bids for berths 11 to 14. Am thus inclined to find that the balance of convenience tilts in favour of the Applicants.

66. On the issue of costs, Section 27 of the *Civil Procedure Act* decrees that the same follows the event. However, the court retains its discretion to either award or not to award costs. The matter is still at the preliminary stages. Costs shall abide the outcome of the suit.

67. Before concluding, I take note that the subject matter is a matter involving a public good and as such, it is imperative that the suit is fast-tracked to avoid delaying the matter further at the behest of public loss. I thus direct that this matter is heard on priority basis and a hearing date be fixed as soon as possible and not later than thirty (30) days from the date hereof. Parties are urged to ensure full compliance and ensure that all the pleadings and documents are served within twenty – one (21) days from the date hereof. Once the matter takes off, no adjournments shall be entertained.

68. As regards the Interested Party, their role in the application was so peripheral and as discerned from their response, they are simply carrying out an investigation about certain allegations of irregularities

on issuance of licences. They are at liberty to proceed with their investigations as the court does not deem the investigations to hamper the hearing of the matter.

69. Flowing from the foregoing discourse, the following orders do issue: -

a. That the Application dated 16th October, 2023 has merit and it is hereby allowed in terms of prayer (3);

b. That the Application dated 31st October, 2023 lacks merit and it is hereby dismissed;

c. That the matter to be fixed for hearing on priority basis and not later than thirty (30) days from the date hereof;

d. That parties are directed to file and exchange any other relevant pleadings and/or documents within twenty – one (21) days from the date hereof;

e. That once the matter commences for hearing, no adjournments shall be entertained;

f. That the Interested Party is at liberty to proceed with its investigations; and,

g. Costs shall abide the outcome of the suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 19TH DAY OF JANUARY, 2024.

....

F. WANGARI

JUDGE

In the presence of;

Ms. Nzamsa Advocate for the Plaintiffs/ Applicants

Mr. Kongere Advocate for the Defendant/ Respondent

Ms. Abdulrahim Fatma Advocate for the Interested Party

Mr. Barille, Court Assistant