



**Proto Energy Limited v Swift Energy Distributors Limited (Civil Suit E504 of 2023)
[2024] KEHC 9863 (KLR) (Commercial and Tax) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9863 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E504 OF 2023
JWW MONG'ARE, J
JULY 25, 2024**

BETWEEN

PROTO ENERGY LIMITED PLAINTIFF

AND

SWIFT ENERGY DISTRIBUTORS LIMITED DEFENDANT

RULING

Introduction and Background

1. Proto Energy Limited, the Plaintiff herein, filed a suit against Swift Energy Distributors Limited herein, the Defendant, *vide* a Plaint dated 16th October, 2023 seeking judgment to be entered against the Defendant in the sum of Kshs.241,754,047.80/= for the supplied LPG by the Plaintiff.
2. The Defendant filed a Notice of Preliminary Objection dated 10th November, 2023 alleging that the instant suit is fatally defective and the same was an abuse of the court process for breach of section 6 of the *Civil Procedure Act* in that it failed to disclose that there was a pending suit in High Court HCCComm No. E348 of 2023 Swift Energy Distributors Limited vs. Proto Energy Limited and First Community Bank Limited arising from the same set of facts and cause of action.
3. The court directed that the Preliminary Objection be canvassed by way of written submissions. Mr. Munene, counsel for the Defendant, did not file submissions but opted to rely on the filed list of authorities. Mr. Odeny, counsel for the Plaintiff, filed written submissions dated 18th June 2024 in which he argues the cause of action and the matter in issues are different. The Plaintiff contended the matter in issue in HCCOM No. E348 of 2023 relates to a bank guarantee in which Defendant sought the payment of Kshs.30,000,000/= to the Plaintiff while in the instant case, the matter in issue is the non-payment of Kshs.241,754,047.80/=.



Analysis and Determination

4. I have carefully considered the objection raised by the Defendant through the Notice of Preliminary Objection, the written submission and the cited authorities and I note that the issue that arises for consideration is “whether the present suit is sub-judice.”
5. The doctrine of Sub-judice is to prevent a court from proceeding with the trial of any suit in which the matter in issue is directly and substantially similar to a matter previously instituted in another court of competent jurisdiction.
6. The Provisions of Section 6 of the Civil Procedure Act provides as follows:-

“..... No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties or between parties under whom they or any of them claim litigating under the same title, where such suit or proceeding is pending in the same court or any other court having jurisdiction in Kenya to grant the relief claimed.”
7. The Supreme Court of Kenya in Kenya National commission on Human rights vs Attorney General, Independent Electoral & boundaries commission & 16 other (2020) eKLR pronounced itself on the subject of sub judice as follows:-

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”
8. I have considered the issues raised in HCCCOM E.348 of 2023 between *Swift Energy Distributors Limited vs. Proto Energy Limited and First Community Bank Limited*. I note that in the said suit Swift Energy Distributors is seeking an order of injunction restraining First Community Bank, its agents or servants, and employees from releasing and paying Kshs.30,000,000/= the monthly payment guarantees to Proto Energy Limited for the supply of the LPG gas as per the contract entered between the parties. Swift Energy Ltd also seeks to suspend the payment Guarantee dated 11th April 2023 to allow a joint reconciliation of the accounts by the parties.
9. In the instant suit, the issue in dispute stems from the agreement dated 30th April, 2022 between Proto Energy Limited and Swift Energy Distributors Limited for the supply of Liquefied Petroleum Gas (LPG). The Plaintiff Proto Energy Ltd claims breach of the contract by the Respondent for non-payment of Kshs.241,754,047.80/= for LPG gas and cylinders supplied at the Defendant’s request, in which it seeks judgment be entered against Swift Energy Distributors Limited.



10. Therefore, going by the doctrine of res sub-judice I am not persuaded that the two suits are similar, though the history of the two suits emanates from the same contract agreement, entered between the parties for the supply of Liquefied Petroleum Gas, however the reliefs sought are different.
11. In the event the same are allowed to succeed I am not persuaded the courts will issue conflicting decisions. This court finds that therefore the outcome of one suit will not interfere with the other. In the Circumstances I find and hold that the Preliminary Objection dated 10th October 2013 is without merit and the same is dismissed with costs.
12. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF JULY, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

Mr. Odeny Kachero for the Plaintiff.

Mr. Munene for the Defendant.

Amos- Court Assistant

