



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

CIVIL CASE NO.738 OF 2018

BARAKAT EXPLORATION INC.....PLAINTIFF

VERSUS

TAIPAN RESOURCE INC.....DEFENDANT

JUDGMENT

(1) Before this Court is the Plaint dated **23rd November 2012** and filed in Court on **27th November 2012**. By that Plaint **BARAKAT EXPLORATION INC** (the Plaintiff) seeks the following Orders: -

“(a) CAD \$ 626,000

(b) In the alternative an order for the Defendant to abide by the terms of the Agreement dated 20th august 2012.

(c) Costs of the suit.

(d) Interest on (a) and (c) above.

(e) Any other relief this Honourable Court may deem fit and just to grant.”

(2) The Defendant filed the Statement of Defence dated **9th April 2015** which was amended on **21st April 2015**. The matter came up for hearing on **27th November 2018**. On that date despite having been properly served with notice of the hearing date the Defendant did not appear in Court. The hearing therefore proceeded in their absence.

(3) At the outset I wish to apologize to the parties for the delay in delivery of this judgment. This was due to the fact that the file was misplaced within my chambers. The inconvenience to parties is sincerely regretted.

BACKGROUND

(4) The Plaintiff called one witness in support of their case **Ms AZIM NATHOO** who is a Director of the Plaintiff Company. The Plaintiff's case is that in the month of **May 2012** one **Mr. JOEL DUMARESQ**, the Chief Executive Officer of the Defendant approached the Plaintiff to negotiate on its behalf the extension of a licence pursuant to Product Sharing Contract between the Defendant and **LION PETROLEUM LTD** and to manage on the Defendant's behalf said Product Sharing Contract with the Government of Kenya. In consideration the Plaintiff and the Defendant agreed on a fee of **Canadian Dollars 500,000** to be paid upon the successful completion of the merger and the grant of the extension of licences.

(5) The Plaintiff states that the merger between **Lion Petroleum** and the Defendant was successful. Subsequently the Plaintiff negotiated with the Government of Kenya and secured a one year extension. The Defendant then paid to the Government a fee of **USD 4 million** and thereafter posted a performance Bond.

(6) The Defendant however failed to pay to the Plaintiff the agreed fee of **Canadian dollars 500,000**. A meeting was held between the parties sometime in **August 2012** at which meeting the Defendant requested to be allowed to pay the fee in installments for a total figure of **Canadian Dollars 626,000**. The first installment was to be of **CAD \$ 50,000** upfront and the balance to be paid in installment of **CAD \$ 12,000** thereafter for a period of 48 months. This would make a total of **CAD \$ 626,000**.

(7) **PW1** states that the agreement was thereafter reduced in writing. It is her statement that she did not receive the first installment of **CAD**

\$ 50,000 or any of the installments. The Defendant failed comply with any of the other payments despite several demands made to it by the Plaintiff. The Plaintiff then filed this present suit.

ANALYSIS AND DETERMINATION

(8) I have considered the evidence before me. The following issues arise for determination: -

- (i) Was there an enforceable agreement between the parties?
- (ii) If so did the Defendant breach said Agreement?
- (iii) Is the Plaintiff entitled to the orders sought?

(i) **Existence of an enforceable Agreement.**

(9) **Blacks Law Dictionary 8th Edition** defines a Contract in the following terms:-

“An agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law.”

(10) The Plaintiff claims that the parties entered into an Agreement on **20th August 2012**. The Defendant however in their Statement of Defence deny the existence of any such agreement or contract. The Plaintiff produced as evidence the Consultancy Agreement between **Taipan Resources Inc and Barakat Exploration Inc** which Agreement is dated **20th August 2012** [Pages 2-11 of the Plaintiff’s Bundle of Documents filed on **5th October 2016**].

(11) I have carefully perused the said Agreement. At Page 2 of the Document (Page 4 of Plaintiff’s Bundle) is the execution page. The Agreement was executed on behalf of the Plaintiff **Barakat Exploration Inc**. However there is no signature against the name of **Joel Dumaresq** who was to execute the document on behalf of **Taipan Resources Inc**. the Defendant. Having not executed the said Consultancy Agreement the Defendant cannot be held by this Court to be bound by said Agreement at all.

(12) Although I note the existence of email correspondence dated **20th August 2012** in which the Defendant appears to admit to having executed the Agreement, no Agreement duly executed by or on behalf of the Defendant was produced in court.

(13) An agreement which has not been executed cannot be enforced as against a party. The Defendant did not execute the Agreement of **20th August 2012**. I therefore find that having that not executed Agreement, the Defendant cannot be bound by it nor is the same enforceable as against the Defendant.

(14) Accordingly the substratum of this case collapses. I find that the Plaintiff’s suit has no merit and the same is hereby dismissed in its entirety. No orders on costs.

Dated in Nairobi this...5th ..day of June 2020.

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Justice Maureen A. Odero