REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MISC. APPLICATION NO.E180 OF 2018

PROTO ENERGY LIMITED……..…….APPLICANT

VERSUS

HASHI ENERGY LIMITED……RESPONDENT

RULING

1. Before Court for determination is the Notice of Preliminary Objection dated **14th December 2018** filed by **HASHI ENERGY LIMITED** (the Respondent herein).

2. By way of background, **PROTO ENERGY LIMITED** (the Applicant) had filed a Notice of Motion dated **7th December 2018**, seeking to dispose by way of public auction, uncollected gas cylinders through an auctioneer appointed by themselves for the amount of **Kshs.76,061,992.05**. The application was based upon the **LPG Cylinder Exchange Pool Agreement** dated **1st December 2009** to which both parties were members.

3. In response to that Notice of Motion the Respondents filed this Notice of Preliminary Objection in which it raised the following grounds:-

> **"1. There are no proceedings known in law by which a Notice of Motion can originate a suit.**
>
> **2. The Defendant has not been served with any originating proceedings.**
>
> **3. The dispute is covered by elaborate alternative dispute resolution mechanisms by which any dispute is first to be presented to a Complaints Sub-Committee for deter-mination and subsequently for a dissatisfied party to refer the matter to arbitration. The "suit" herein is premature at best and fatally defective in any event."**

4. On the basis of the above grounds the Respondent urges that the application ("**suit**") be struck out. The Preliminary Objection was canvassed by way of written submissions. The Respondents filed their written submissions on **30th January 2019**, whilst the Applicants filed their submissions on **14th February 2019.**

5. The Respondents submit that the motion before court is a nullity **"ab initio"** on the grounds that the same was filed in clear violation of the **Constitution of Kenya (Protection of rights** and **Fundamental Freedoms) Practice** and **Procedure Rules 2013, [**hereinafter referred as the **"Mutunga Rules" 2013].** They argue that a suit cannot be commenced by way of a Notice of Motion but can only be commenced by way of a Plaint, a Petition or an originating process. That no Plaint, petition or Originating Plaint was attached to the Notice of Motion dated **7th December 2018**.

6. The Respondent goes on to submit that by purporting to initiate its suit by way of a Notice of Motion, it meant that no summons could competently issue and accordingly the Defendant could not enter appearance which is could be only entered in answer to a summons. The Respondent further submits that the move to initiate a suit by way of a Motion was a clever move by the Applicant to evade payment of filing fees, and thereby perpetrate a fraud against the revenue collection mandate of the Court. Finally the Respondents submits that the present claim is premature as the parties have not exhausted the alternative dispute resolution procedures provided for in the Agreement and that there are no proceedings capable of being stayed.

7. On their part the Applicant submits that the application is properly filed and is legally sound. They submit that a Notice of Motion is a competent way of initiating a suit depending upon the governing statute of the particular proceedings. The Applicant concedes that the Agreement in question contains elaborate alternative dispute resolution mechanisms but urges the court to invoke the **"contra preferendum**" rule on the basis that the Respondent is bullishly trying to alter express provisions of the pool agreement in order to meet its needs. They

contend that the Applicant has rightly exercised its right to take legal action as opposed to submitting itself to the Complaints Committee. Finally the Applicant submits that this Preliminary Objection is nothing more than an attempt by the Respondents to continue their breach of the **Exchange Pool Agreement** by derailing the hearing and determination of the present application.

Analysis and Determination

8. I have considered the submissions filed before me, in respect of this Preliminary Objection as well as the relevant statute and case law. The definition of a Preliminary Objection was given in the case of **MUKHISA BISCUIT MANUFACTURING CO. LTD –VS- WEST END DISTRIBUTORS [1969] E.A 696** in which it was held thus:-

> **" A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."**

9. Therefore a Preliminary Objection can only be raised on a pure point of law and where proof of facts is required then that cannot be said to be a Preliminary Objection. Two main issues arise here for determination:-

(i) Is the "**suit**" herein fatally defective?

(ii) Is the doctrine of Exhaustion applicable in the present case?

i) Is the "suit" fatally defective?

10. The Respondent submitted that there is no provision in law by which a party can institute a suit by way of a Notice of Motion application. One can only institute a suit through Originating process e.g Plaint, a Petition or an Originating summons. Accordingly the Respondent submits that this "**suit**" is void, it is a non-starter and is for dismissal. The Notice of Motion dated **7th December 2018** is stated to be premised upon **Articles 40,48 and 162(2)(b) Constitution of Kenya, 2010.**

11. The **Constitution of Kenya** [**Protection of Rights and Fundamental Freedoms] Practice Rules 2013** otherwise known as the **"Mutunga Rules" 2013,** stipulate that any suit brought for the enforcement of Constitutional rights must be commenced by way of a Petition as provided for by **Section 10(1)** of said Rules. In the case of **METHODIST CHURCH OF KENYA –VS- MOHAMED FUGICHA & Others [2019] eKLR**, the Supreme Court held that any failure to obey the strict provisions of the **Mutunga Rules** renders an application null and void. The Application in this matter has clearly failed to comply with **Rule 10(1) of The Mutunga Rules, 2013.**

12. The Applicant also cited **Sections 1A, 3A and 63 (e)** of the **Civil Procedure Act**. However these are enabling provisions which cannot be used to originate a suit.

13. The Applicants also cited **Order 51 Rule 1 Civil Procedure Rules 2010** – which is a provision relating specifically to applications and not to suits. The Applicants contention is that a suit may be initiated by way of a notice of Motion – it will all depend on the governing statute of the particular proceeding. They rely on the decision of **Justice Gikonyo** in **ABDI ABDULLAHI SOMO –VS- BEN CHIKAMAI & 2 others [2016] eKLR** where the Court held that:-

> **"In my life as a Judge I have in the past heard similar arguments being advanced that a Notice of Motion cannot commence substantive proceedings. But, it should be understood that as a matter of general principal, a notice of Motion is a competent way of initiating substantive proceedings in Court. it will all depend on the particular statute governing the particular proceeding in question. Therefor where the law provides for the manner of commencing a suit or proceedings in court then that procedure applies…"** [own emphasis]

14. **Order 3 Rule (i) (ii)** provides that every suit shall be instituted by way of a Plaint. 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. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of Motion renders the entire suit defective.

Doctrine of Exhaustion

15. The Doctrine of Exhaustion is a legal principle, that in general a Plaintiff must exhaust all available administrative remedies before seeking judicial review. It is also known as the "**Exhaustion of Rights Doctrine."**

16. It was submitted by the Respondent and conceded by the Applicant that the **LPG Exchange Pool Agreement** contained elaborate provisions for Alternative Dispute Resolution. The Applicant did not seek to avail itself of any of these remedies before coming to Court. On its part the Applicant argues that the Respondent is bullishly trying to alter otherwise express provisions of the Agreement and urges the court to apply the "**Contra Preferendum Rule**." In my view the contra preferendum rule which provides that any ambiguous clause should be interpreted as against the interests of the party that requested that clause is not applicable here. **Clause 17** of the Agreement under the heading **Penalties for Breach** provides that:-

> **"PROVIDED THAT these penalties shall be without prejudice to a member's right to pursue legal action in respect of any unfavourable practices, including those provided for in Clause 15.**

17. That notwithstanding I am of the opinion that the Applicant ought to have pursued the **ADR** alternatives provided before approaching this court. The purpose of **ADR** is to remove from the already heavily clogged court system, cases that can be resolved before other fora. If the courts encourage people to ignore **ADR** alternatives in favour of the court process then the heavily burdened judicial system will crash under the weight of cases filed. In **GEOFFREY MUTHINJA KABIRU & 2 others –VS – SAMUEL MUNGA & 1756 others [2015]eKLR** it was held that:-

> **"It is imperative that where a dispute resolution exists outside courts the same ought to be exhausted before the jurisdiction of the court is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The doctrine of exhaustion is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts. This accords with Article 159 of the Constitution which commands courts to encourage alternative means of dispute resolution."** [own emphasis]

I therefore find that this suit/application is premature as the **ADR** alternatives provided for in the Agreement signed by both parties have not been explored and/or exhausted.

18. Accordingly I direct that the Applicant first exhaust the **ADR** provision of the **LPG Energy Pool Agreement** before advancing this case further.

19. The Preliminary Objection dated **14th December 2018** therefore succeeds. Costs will be in the cause.

It is so ordered.

Dated in Nairobi this 22nd day of July 2019.

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Justice Maureen A. Odero