



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 253 OF 2014

JADE PETROLEUM LIMITED..... PLAINTIFF

VERSUS

ULTRA PETROLEUM LIMITED.....1ST DEFENDANT

KENYA PIPELINE COMPANY LIMITED.....2ND DEFENDANT

RULING

[1] The Notice of Motion that is coming up for determination is dated **11 January 2017**. It was brought by the 2nd Defendant, Kenya Pipeline Company Limited, pursuant to **Sections 1A, 1B, 3A** of the **Civil Procedure Act, Chapter 21 of the Laws of Kenya, Order 1 Rule 10(2)** and **Order 2 Rule 15(1)** of the **Civil Procedure Rules, 2010** and all other provisions of the law, for Orders that the Court do strike out the 2nd Defendant from this suit; and that the costs of the application and the suit as against the 2nd Defendant be borne by the Plaintiff. It was the contention of the 2nd Defendant, vide the Supporting Affidavit, sworn on **11 January 2017** by its then acting Company Secretary, **Gloria Khafafa**, that it ought not to have been enjoined to this suit as it was not a party to the subject contract from which the Plaintiff's cause of action arose.

[2] It was further the contention of the 2nd Defendant that, by its Grounds of Opposition dated **24 July 2014**, it opposed the Plaintiff's Notice of Motion that was filed simultaneously with the Plaintiff; and that as it was finalizing on its response to the said Notice of Motion and the Plaintiff, the Plaintiff informed the Court that it did not intend to proceed with the suit against the 2nd Defendant. According to the 2nd Defendant, the misjoinder was further underscored by the fact that the Plaintiff and the 1st Defendant, without involving it, thereafter entered into a consent to settle the claim between them; and therefore that there is no reason why, two years down the line, it is still shackled as a party to the suit.

[3] The Plaintiff responded to the application by filing Grounds of Opposition thereto. Its posturing was that:

[a] The application as drawn and filed is bad in law, incompetent, misconceived and is an abuse of the process of the court;

[b] The 2nd Defendant has been properly enjoined in the suit since it had fuel products belonging to the 1st Defendant in its possession;

[c] There is no issue of misjoinder of parties in the suit;

[d] The 2nd Defendant was a necessary party to this suit since the Plaintiff sought an injunction against its servants and or agents from releasing the 1st Defendant's petroleum products that it held on the 1st Defendant's behalf;

[e] The Plaintiff's claim as against the 1st Defendant relates to fuel products stored by the 2nd Defendant;

[f] The 2nd Defendant has not demonstrated sufficient cause for the grounds upon which the court can grant the orders sought.

[4] The Grounds of Opposition aforesaid were augmented by the Plaintiff's Replying Affidavit sworn by a director of the Plaintiff Company, **Mr. Amar Pandya**, on **5 May 2017**. It was deposed therein that on or about **February 2013**, the Plaintiff received a Proforma Invoice dated **6 February 2013** from the 1st Defendant requesting the Plaintiff to make payments of **USD 460,000** towards the purchase of Automotive Gas Oil (AGO) at a price of **USD 920** per cubic meter; and that the 1st Defendant agreed to supply the Plaintiff with said products for the contractual amount. It was further averred that the Plaintiff subsequently made payments to the 1st Defendant for **USD 57,040**, **USD 102,000** and **USD 183,200** on 7th, 8th and **11 February 2013**, respectively; and that after the third payment, the Plaintiff received communication from the 1st Defendant instructing it not to make further payments as they had no more fuel products available. The Plaintiff therefore contends that the 1st Defendant was in breach of their contract and that in spite of demand for it to rectify the default, the 1st Defendant persisted in its acts of breach; hence the suit.

[5] As for the 2nd Defendant, it was averred by **Mr. Pandya** that it is a necessary party to this suit in that it holds as security in its line fill, the 1st Defendant's fuel products; which, he contended, is a condition for the 1st Defendant to conduct business in the oil industry. It was further averred that this was why in the Consent Order of **25 July 2014**, it was confirmed that the 2nd Defendant actually held the 1st Defendant's fuel products in its line fill; and that the Consent Order included an injunction directed at the 2nd Defendant to restrain it from releasing or disposing of the 1st Defendant's fuel products in its custody pending the satisfaction of the Decree.

[6] **Mr. Pandya** further averred that the 1st Defendant defaulted in its payment of the Decretal Sum then standing at **Kshs. 5,887,195.09**. It was thus the averment of the Plaintiff that it wrote to the 2nd Defendant inquiring about the 1st Defendant's fuel products in his possession, whereupon the 2nd Defendant wrote the letter dated **20 May 2015** stating that it did not have any products of the 1st Defendant in its line fill. The letter was exhibited as **Annexure "AP5"** to the Replying Affidavit. Thus it was the contention of the Plaintiff that, in releasing the 1st Defendant's fuel products without any reference to it, and in disregard of the Consent Order, the 2nd Defendant is liable to it, and is therefore a necessary party to these proceedings.

[7] At the request of Counsel for the Plaintiff, directions were issued on **19 July 2017** for the application to be canvassed by way of written submissions. However, the Plaintiff failed to comply within the set timelines, and was permitted to make oral submissions instead, which its Counsel did on **23 October 2017**. The 2nd Defendant's written submissions, filed on **4 August 2017** was themed along three strands. Firstly, it was the 2nd Defendant's argument that there existed no privity of contract between it and the Plaintiff, nor was it involved in the negotiations or execution of the said contract. Counsel for the 2nd Defendant relied on the cases of Kenya **National Capital Corporation Ltd vs. Albert Mario Cordeiro & Another Civil Appeal No. 274 of 2003**; **William Muthee Muthami vs. Bank of Baroda Civil Appeal No. 91 of 2004** and **Savings & Loan (K) Ltd vs. Kanyenje Karangaita Gakombe & Another [2015] eKLR**, wherein it was held that a contract affects only the parties to it and cannot therefore be enforced by or against a non-party.

[8] It was further argued on behalf of the 2nd Defendant that the parties entered into a consent, without any reference to it and had the case compromised and a Consent Order recorded. That in those

circumstances, the case against it is not tenable; and that it ought to be discharged from any further participation in this suit. Counsel relied on **Cecilia Karuru Ngayu vs. Barclays Bank of Kenya & Another [2016] eKLR** and **Apex International Limited & Anglo -Leasing and Finance International Limited vs. Kenya Anti-Corruption Commission [2012] eKLR** to buttress the argument that proper parties must be identified before a cause of action can be considered competent and justiciable.

[9] The second line of argument was in connection with the Notice to Produce that the Plaintiff relied on at Paragraph 15 of the Replying Affidavit. According to the Plaintiff, the 2nd Defendant is a necessary party because it had served a Notice to Produce on it. The 2nd Defendant urged the Court to look at the timing of the Notice, which was evidently filed on **23 March 2017** when the application was scheduled for hearing; the information requested for, and the law governing such requests. It was submitted that the Plaintiff and the 1st Defendant having entered into the Consent dated **24 July 2014** whereby the 1st Defendant admitted liability to the Plaintiff as claimed, there are no outstanding issues which the documents requested for would help to determine. It was also argued that no summons was applied for or issued under **Order 16** of the **Civil Procedure Rules** before the said Notice was issued. In this regard reliance was placed on **Diana International Limited vs. Adam Ogden & Another [2012] eKLR**.

[10] Finally, it was argued by the 2nd Defendant that the suit herein was premature, granted that the contract between the Plaintiff and the 1st Defendant had an Arbitration Clause. Reference was made to Page 67 of the Plaintiff's Bundle of Documents accompanying the Plaintiff wherein the Plaintiff was advised by the Chartered Institute of Arbitrators to request for appointment of an Arbitrator. It was the assertion of the 2nd Defendant that the Plaintiff disregarded this and instead filed this suit, unnecessarily enjoining it and thereby encumbering it with preventable legal costs. The case of **Ohulo Building Construction Ltd vs. Constituency Development Fund Board [2015] eKLR** was cited to support the argument that parties ought not to be allowed to skip the steps they have agreed on and run to court simply because they are frustrated by the process. Thus, it was the 2nd Defendant's argument that this was a dispute between the Plaintiff and the 1st Defendant over a contract that it had nothing to do with; and therefore that it ought to be struck out from the suit with costs as prayed.

[11] On his part, **Mr. Anyona**, Learned Counsel for the Plaintiff, reiterated the averments of the Plaintiff as set out in the Grounds of Opposition dated **1 February 2017** and **Mr. Pandya's** Replying Affidavit. He underscored the fact that Counsel for the 2nd Defendant was in attendance in Court on **25 July 2014** when the Consent Order was recorded and that he had no objection thereto. He drew the Court's attention to Order No. 6 whereby the 2nd Defendant was directed not to release any products held by it on behalf of the 1st Defendant pending the satisfaction of the Decree herein; which, he submitted, the 2nd Defendant disobeyed. It was further argued that, since **Section 6** of the **Arbitration Act** requires that a reference be made within certain timelines, the argument that this suit was prematurely filed is not tenable.

[12] Having looked at the provisions of **Order 16 Rules 1, 6 and 7 of the Civil Procedure Rules** that were relied on by **Mr. Moenga**, I have no hesitation in holding that his arguments in connection therewith appear to be off-tune from the general symphony that is portrayed by 2nd Defendant's application. **Order 16** is in connection with the procedures for the summoning and attendance of witnesses. **Rule 6** thereof provides for summons to persons whose attendance is only required to produce documents and not to adduce evidence; while **Order 16 Rule 1, Civil Procedure Rules** stipulates that:

"At any time before the trial conference under Order 11 the parties may obtain, on application to the court or to such officer as it appoints in this behalf, summonses to persons whose attendance is required either to give evidence or to produce documents."

[13] Whereas this matter is exempt from the provisions of **Order 11** of the Civil Procedure Rules by dint of the **Practice Directions Relating to Case Management in the Commercial and Admiralty Division of the High Court at Nairobi, Gazette Notice No. 5179 of 25 July 2014**, it is manifest that the context in which the Plaintiff has sought documentation herein is not what was envisaged by **Order 16 Rules 1 or 6**, Civil Procedure Rules, and I so find. In the same vein, I find untenable the 2nd Defendant's arguments that this suit was prematurely filed on account of the letter dated **8 August 2013** from the chartered Institute of Arbitrators, Kenya Branch, by which the Plaintiff was advised to write to the Chief

Justice or apply to court for the appointment of an Arbitrator, for the simple reason that the Arbitration Agreement does not avail the 2nd Defendant, it not being a party to the main agreement. In any event, there is no arbitrable dispute between the Plaintiff and the 1st Defendant in connection with their contract, the suit between them having been compromised on **25 July 2014**. All that remains is payment of the decretal sum by the 1st Defendant.

[14] I have carefully perused and considered the application, the affidavits filed in respect thereof as well as the submissions made herein. I have similarly gone through the court record, and it does confirm that the Plaintiff filed this suit against the two Defendants on **13 June 2014** seeking to be paid a sum of **USD 102,154** (then equivalent to **Kshs. 8,887,398/=**), loss of profit of **USD 2.197** (equivalent to **Kshs. 191,139/=**, together with interest at 18% per annum compounded monthly from **12 June 2014**. The Plaintiff also prayed for costs as well as:

"An order of injunction to issue restraining the Defendants, their agents, servants, and/or representatives from in any way releasing, charging, dealing with or alienating the 1st Defendant's fuel products held by the 2nd Defendant as security in its line fill pending the satisfaction of the decree herein."

[15] Along with its Complaint, the Plaintiff filed a Notice of Motion **dated 13 June 2014** seeking, *inter alia*, a temporary injunction to restrain both Defendants from disposing of the 1st Defendant's fuel products held by the 2nd Defendant as security in its pipeline as line fill, not only pending the hearing and determination of the application, but also pending the hearing and determination of this suit. The court record further confirms that on **25 July 2014**, a Consent was reached between the Plaintiff and the 1st Defendant, which was endorsed as an Order of the Court in the presence of **Mr. Kanjama** for the Plaintiff, **Mr. Mulanya** for the 1st Defendant and **Mr. Kabue** who was holding brief for **Mr. Ogeto** for the 2nd Defendant. The Consent was in the following terms:

1. Judgment be and is hereby entered for the Plaintiff against the 1st Defendant for the decretal sum as follows:

a. For the principal sum of USD 102,154 (translated at Kshs. 8,887,398.00 as at 12th June 2014).

b. The said sum to attract interest at 18% per annum from 12th June 2014 until payment in full; and

c. Costs to the Plaintiff.

2. The parties agree that the 1st Defendant shall enjoy a 30-day stay of execution, and shall be thereafter entitled to a full rebate of the decretal interest PROVIDED the principal sum is settled strictly in accordance with the agreement in paragraph 3 hereunder.

3. The 1st Defendant agrees to settle the principal sum as follows:

a. By making payments of eight monthly instalments of USD 10,218.00, commencing on 30th August 2014, and thereafter on the 30th day of each subsequent month until payment in full.

c. By fully and effectively transferring fuel product to the Plaintiff, and it shall be the 1st Defendant's duty to provide relevant customs documents for the said fuel product to facilitate loading by the Plaintiff within thirty days of the judgment date, equivalent to USD 20,410.00, and whose volume is about 23.4 cubic meters of fuel, currently located at the VTTI Kenya Ltd depot in Mombasa. In the event of failure to provide the relevant documents to facilitate loading as aforesaid, the said sum of USD 20,410.00 shall remain a debt outstanding and part of the principal sum to be settled by further monthly instalments of USD 10,218.00 as per clause 3 a. above.

4. The 1st Defendant agrees to settle the Plaintiff's Costs of the suit separately within thirty days of determination, upon agreement or after taxation in the event the Parties are unable to agree.

5. In the event of default of any of the payments or transfers agreed in paragraphs 3 and 4 above, the entire decretal sum including interest and costs to become immediately due and payable, and the Plaintiff to be at liberty to execute after further ten-day notice to the 1st Defendant.

6. The Parties hereby agree that an Order of Injunction do hereby issue restraining the Defendants, their agents, servants and/or representatives from in any way releasing, charging, dealing with or alienating the 1st Defendant's fuel products held by the 2nd Defendant as security in its line fill to a level lower than 100 cubic meters of fuel pending the satisfaction of the decree herein.

[16] It is further evident from the proceedings of **25 July 2014** that, as between the Plaintiff and the 2nd Defendant, the matter was left open to further discussions with a view of recording an appropriate consent; and that whereas **Mr. Kabue** had no objection to the Consent made between the Plaintiff and the 1st Defendant endorsed and adopted by the Court, he made it clear that **Mr. Ogeto** was intent on filing an application to have the suit against the 2nd Defendant struck out.

[17] It is manifest from the two affidavits filed in respect of the instant application that the 1st Defendant failed to adhere to the terms of the Consent Order of **25 July 2014**; and that the Plaintiff then sought to know from the 2nd Defendant how much, in terms of fuel products, it was holding on behalf of the Plaintiff. The 2nd Defendant's response, vide the letter marked **Annexure "AP5"** to the Replying Affidavit revealed that the 2nd Defendant did not comply with the Order of Injunction that was part of the Consent Order of **25 July 2014**. On this account the Plaintiff contends that the 2nd Defendant is a necessary party herein; and that its application to be struck out of these proceedings ought to be dismissed with costs.

[18] The law, as was well explicated by **Mr. Moenga** for the 2nd Defendant, is that, as a general rule, a contract cannot confer any rights or impose obligations on strangers to it. Hence, there is no gainsaying that the Plaintiff cannot look to the 2nd Defendant for the payment of sums that are patently due to the Plaintiff herein on account of its contract with the 1st Defendant. Indeed, when this suit was compromised on **25 July 2014** and instalment payments sanctioned, that consent was expressed to be between the Plaintiff and the 1st Defendant only. However, **Order 1 Rule 3** of the **Civil Procedure Rules** also recognizes that:

"All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."

[19] From the Plaintiff, it is manifest that the Plaintiff's claim against the 1st Defendant was so intertwined with the relief sought against the 2nd Defendant as to warrant the joinder of the 2nd Defendant. Hence, Prayer 2 of the Plaintiff was directed at both Defendants and was to last pending the satisfaction of the Decree. Similarly the 6th Order in the Consent dated **24 July 2014**, which was adopted by the Court on **25 July 2014** was explicitly directed at both Defendants. As has been pointed out hereinabove, the Consent Order was made in the presence of Counsel for the 2nd Defendant and no objection was raised or exception taken to the recording of that particular aspect of the Order.

[20] I would thus take the view that in so far as the Decree has not been fully settled, the 2nd Defendant is a necessary party to these proceedings, including any contempt proceedings as was suggested by Counsel for the 2nd Defendant, noting that **Rule 5 of Order 1** of the **Civil Procedure Rules**, recognizes that:

"It shall not be necessary that every defendant shall be interest as to all the relief claimed in

any suit against him."

[21] The foregoing being my view of the matter, I would dismiss the 2nd Defendant's Notice of Motion dated **11 July 2017** with costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF MARCH 2018

OLGA SEWE

JUDGE