REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCC. NO. 115 OF 2016

BGP KENYA LIMITED.....PLAINTIFF

VERSUS

EAST AFRICAN EXPLORATION (K) LIMITED.....RESPONDENT

RULING

1. Sometimes, strict interpretation of Statute is at tension with what seems to be just and fair. That tension is present in the circumstances of this case.

2. There is a Judgement for USD 2,059,026.50 in favour of BGP Kenya Ltd (BGP) against East African Exploration (Kenya) Ltd (EAXKL) and BGP now brings a Notice of Motion under the Provisions of Order 23 Rule 2 and Order 22 Rules 1 and 2 of the Civil Procedure Rules and Section 1A, 1B, 3A, 38, 63 and 94 of The Civil Procedure Act for the following prayers:-

a) *spent*

b) *Spent.*

c) The Honourable Court be pleased to allow the execution of the Decree issued herein on 6th December 2016 before the taxation and/or ascertainment of the Plaintiff's costs incurred in the suit and the computation of the accrued interest.

d) The USD 2,059,026.50 deposited in Court in April 2017 pursuant to the Court's Ruling and Order of 29th June 2016 and the order of 24th November 2016 be released to the Plaintiff to partially answer/settle the judgement entered herein on 18th July 2016 and the Decree issued on 6th December 2016.

e) The Costs of this application be provided for.

3. The Application would be less than intricate were it not for the background to this matter.

4. There is a buzz about the prospects of existence of substantial Oil Reserves in Kenya. EAXKL was appropriated three Oil Exploration Blocks by the Government of Kenya to accelerate the exploration and development of the potential Petroleum resources in those Blocks. In turn EAXKL enlisted BGP to provide certain seismic services on two of those Exploration Blocks namely L17 and L18. It is agreed that BGP provided the services which had been captured and reduced into two contracts executed on 8th December 2014 and 10th May 2015. After part payment for the services, a sum of USD 2,059,026.50 remained unpaid.

5. EAXKL always admitted the debt and discussions between the parties herein reveal an attempt to resolve the matter amicably. EAXKL's position is that this was not by any means its only debt. It says that it owes other Trade Creditors a sum of USD 4,838,864.48 (see the affidavit of a Mr. Jeremy Martin sworn on 27th May 2016). A proposal was made by EAXKL to sell its interest in the Oil Blocks and settle a proportion of the debt owed to its various Creditors. This proposal was contained in an Email of 25th October 2015 from Afren PLG to BGP. Each Creditor was asked to accept *"25 cents on the dollar*". BGP flatly rejected this offer and hence this suit.

6. Perhaps it needs to be mentioned that the negotiations for settlement of the debt involved East African for Afren PLG as it is the parent Company of EAXKL.

7. The proposed sale of the Oil Exploration Blocks was a source of concern to BGP who were apprehensive that being the only known asset in Kenya, EAXKL would wind up its operation in Kenya before settling its debt. These fears were expressed in an Application dated 13th

April, 2016 brought by BGP seeking an Order of Temporary Injunction against EAXKL from selling, disposing, alienating and/or in any manner whatsoever interfering with all the three Blocks pending the hearing and determination of the suit.

8. The injunction Motion was determined by Court in a Ruling of 29th June, 2016 in which it issued the following Orders:-

> (i) Prayer (c) of the Notice of Motion dated 13th April 2016 is allowed save that the Order is in respect to Oil Exploration Blocks L17 and L18.
>
> (ii) An Order Nisi is hereby issued lifting the Injunctive Orders granted in (i) above. The Order Nisi is conditional upon the Defendant, within seven (7) days hereof, giving an undertaking acceptable to the Plaintiff for the deposit of **US$ 2,059,026.50 into Court.**
>
> (iii) **The Order Nisi above shall become Absolute upon the Plaintiff's Advocates filing with the Court a Certificate that the Defendant has issued an undertaking acceptable to the Plaintiff for the aforesaid Deposit.**
>
> (iv) **Upon the deposit of US$ 2,059,026.50 into Court, the same shall be held by the Court pending the hearing and determination of this suit or such further Orders of the Court.**

9. The Ruling allowed the sale of the Exploration Blocks to proceed and a sum of USD.2,059,026.50 was deposited into Court in April, 2017. The implication of that Ruling in the context of the controversy before Court is discussed herein given the conflicting views taken by the parties.

10. There were other developments of significance. EAXKL did not file Defence and on 10th May 2016, BGP requested for Judgement and Judgement was duly entered on the same day being 10th June 2016. BGP extracted a Decree following that judgement. A Decree was issued on 18th July 2016 with a date of 20th July 2016. EAXKL questioned the propriety of that Decree but the matter was finally resolved through a consent entered by Counsel for parties on 14th October 2016 as follows:-

> "By consent the Application dated 19th August 2016 is settled on the following terms:-
>
> 1) The Decree issued on 18th July 2016 and dated 20th July 2016 be and is hereby set aside.
>
> 2) The Default judgement on liquidated sum remains and is maintained.
>
> 3) No Order as to costs on the application".

11. Through a Notice of Motion dated 24th January 2017 BGP sought the following Orders of Court:-

> 1. *Spent*
>
> 2. Pending the hearing and determination of this application, the Court be pleased to order that the USD 2,059,026.50 scheduled to be deposited in Court pursuant to the Court's ruling of 29th June 2016 and the Order of 24th November 2016 is only available to the P Plaintiff for settlement of the decree herein.
>
> 3. The USD 2,059,026.50 scheduled to be deposited in court pursuant to the court's ruling of 29th June 2016 and the order of 24th November 2016 be released to the Plaintiff, immediately upon deposit, to answer/settle the judgment and the decree herein.
>
> 4. In the alternative and without prejudice to the above, the sum of USD 2,059,026.50 together with an additional sum of USD 85,000/- being the accrued interest and costs of the suit herein be remitted to the Plaintiff Decree Holder by Octant Energy Corp (the Garnishee) to answer the judgement and the decree herein.
>
> 5. The costs of this application be provided for.

Through a Ruling delivered on 5th October 2017, the Motion was struck out as premature as the Court found that the Decree as it stood was not executable.

12. In the meantime, on 3rd October 2017, Afren petitioned for the liquidation of EAXKL being Insolvency Cause No 15 of 2017,In The Matter of East African Exploration Kenya Ltd.

13. Section 94 of The Civil Procedure Act provides as follows:-

> "Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation".

BGP pitches for these orders on the following grounds:-

> "17. (i) The Defendant has no known assets and is actively taking steps to irregularly and unlawfully defeat the Plaintiff's judgement herein.
>
> (ii) The assessment of costs through the process of taxation of the Plaintiff's bill of Costs will take some time, which time the Defendant will apply to liquidate itself and defeat the claim herein.
>
> (iii) The Defendant on 4th October 2017, irregularly and fraudulently commenced winding up proceedings with the effect that a receiving order is likely to be issued against the Defendant prior to the conclusion of the taxation proceedings herein.
>
> (iv) The assessment of the Plaintiff's costs in the matter is a mere academic exercise as the Defendant has no means to settle the same".

14. In other circumstances the Court would have little difficulty granting that prayer. See the rationale of the provisions of Section 94 as explained in this Court's Ruling of 5th October 2017 as follows:-

> "*The rationale for the provisions of Section 94 is that a Judgement Debtor should not be vexed or burdened by multiple executions. The requirement nevertheless recognises that there would be instances where it is necessary for a Decree Holder to proceed with the execution immediately without the delays that may be caused by awaiting ascertainment of costs by taxation. An example is where the Judgment Debtor intends to leave the jurisdiction of the Court or is attempting to put its Assets beyond the reach of the Court so as to evade or avoid execution. The Plaintiff may have good reason to seek the immediate settlement of its Decree but it cannot overlook the clear and mandatory provisions of Section 94. If there was urgency as argued by the Plaintiff, then it should have moved Court in a composite application with the prayer for permission under Section 94 being the first prayer*".

15. Yet the real controversy here is whether that Order and Orders for Execution and release of the deposited money are still viable in the face of the liquidation proceedings against EAXKL. This is so because the liquidation of EAXKL is deemed to commence at the time of the presentation of the winding up petition on 3rd October 2017 (Section 431 of The Insolvency Act) and the present application has come after.

16. Mr. Agwara for BGP has however asked this Court to find that the money deposited in Court is not caught in the rigours of the Insolvency law and makes four propositions. First that the Deposit does not constitute an Asset of EAXKL as Section 430 of The Insolvency Act only applies to Assets of the Insolvent Company. Section 430 reads:-

> "If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void".

Counsel argues that the Deposit was made by the Purchaser of the Oil Blocks on the understanding that the money would be released to BGP and EAXKL confirmed as much by signing the Agreement.

17. Secondly as both the Trial and Execution Court, this Court is entertaining its requests in respect to which Execution proceedings had commenced before the presentation of the Insolvency cause. Counsel is making reference to the earlier attempt at Execution by the BGP through the Motion of 24th January 2017 which were found by this Court to be premature.

18. In addition the Court is asked to be attentive to the fact that BGP's claim is in respect of Seismic Services. These Services is said, though, part of the Assets was separate from the Oil Blocks and was identified as such in the Sale and Purchase Agreement (SAP) Agreement that yielded the deposit. EAXKL would therefore be fully aware that the Deposit was only returnable if BGP's claim failed. But to the contrary BGP's claim is successful and it holds a judgement. To shore up this argument, the date of the deposit being on 18th April, 2017, a date after the Judgement was emphasized. It is said that EAXKL was well aware that the Deposit was to settle the Judgement.

19. The answer of EAXKL is that the Deposit is so obviously its asset otherwise it would make non-sense of the Application in the first place. Mr. Mailu for the EAXKL argued that the Deposit was part of proceeds of the sale of Assets belonging to its Client. In support of this argument Mr. Mailu referred to paragraph 28 of the Court's Decision which ordered the Deposit. Paragraph 28 reads:-

> "28. *If the SAPs were allowed to proceed and the sum equivalent to the debt owed to Plaintiff deposited in Court, then that amount would be within the jurisdiction of the Court and could be available to settle a Decree that the Plaintiff may ultimately obtain in its favour. At the same time some amount may remain for the Defendant to meet its other obligations. This Court favours a solution that does not imperil the Plaintiff's position yet at the same time does not wholly disadvantage the other Creditors. A conditional Order for Deposit will be the final Order this Court shall be making*".

20. To facilitate the Deposit of the money EAXKL entered into a Closing Instructions Deed dated 31st October 2016 with Octant Energy Corp, the Purchasers of the Exploration Blocks. EAXKL point to certain recitals in that Deed as further evidence that the Deposit belongs to it and the spirit under which the Deposit was made. The cited Recitals are B,C and F and read as follows:-

> B. In the Ruling a conditional order was given for the Defendant to supply to the Plaintiff an undertaking acceptable to the Plaintiff for the deposit of the sum of USD 2,059,026.50("BGP's claim") into Court for purposes of having the injunction lifted to allow completion of the SPS.

C. Subsequently, the Plaintiff has also obtained judgment in default against the Defendant in the sum of USD 2,059,026.50.

F. By entering into this Closing Instructions Deed, EAX is seeking to comply with the Ruling and does not in any way waive or intend to unlawfully prefer BGP over any other creditors. Closing of the SPA is the only realistic prospect of recovery for both its trade and inter-company creditors and on that basis. EAX should proceed to enter into this Deed for the benefit of all the creditors as a whole.

21. So as to answer this fundamental question as to who owns the money deposited in Court, one has to start from the positions taken by the parties herein at the presentation of these proceedings.

22. In paragraph 3 of the Plaint, BGP avers :-

"*At all material time relevant to this suit, the Defendant was and remains the proprietor of three Oil Explorations Blocks in Kenya, known as Block No. L7, L18 and Block 1".*

BGP further states that EAXKL has no known assets other than the Oil Blocks. This is in paragraph 19 which reads:-

"The Plaintiff states that the Defendant has no known assets in Kenya other than the Oil Blocks and will definitely disappear with the Plaintiff's USD 2,059,026.50, once it concludes the sell to Octant Energy".

23. In a Motion presented on the same day as the Plaint BGP seeks to injunct EAXKL from selling the interests in the Oil Blocks. It turned out that indeed EAXKL had entered into an SAP Agreement to sell its interest to Octane. After considering rival arguments on the matter, the Court did not find merit in restraining the sale of interests in Oil Exploration Block 1. In respect to Blocks L17 and L18 the Court allowed the sale only on condition that a sum of USD.2,059,026.50 from the proceeds of sale would be deposited in Court. The sum to be deposited was equivalent to the claim by BGP.

24. It seems clear enough that upto that point the money to be deposited in Court belonged to EAXKL being a portion of the Purchase price for sale of its assets being interests in Blocks L17 and L18. However, BGP seeks to rely on clause 2.2 of the SAP Agreement in respect to the two Oil blocks as indicative that the amount deposited in Court was set apart as its contractual fees and therefore not part of the Assets belonging to EAXKL. Clause 2.2. reads:-

"2.2. The price to be paid by Purchaser to Vendor for the Assets (the "purchase price") shall be equal to the total of:-

(a) An amount equal to the Vendor Costs; plus

(b) Three Hundred and Thirty Three Thousand, Three Hundred and Thirty Three Dollars($333,333); plus

(c) Any fee required to be paid by Seller to the seismic contractor licensor of the included Seismic Data for the transfer by Seller of the included Seismic Data to Buyer under this Agreement.

The parties acknowledge that, in determining the Purchase Price, they have taken into account among other things Purchaser's assumption of responsibility for the Assumed Liabilities and Vendor's being released from responsibility for those assumed Liabilities".

On the other hand, EAXKL takes the position that the only reason the Vendors costs are defined was to inform of the Purchase price.

25. I take this view. In the definition Section of the Agreement, Assets is assigned the following meaning:-

a) The Petroleum and Natural Gas Rights; and

b) The miscellaneous interests.

Under clause 2.2, the purchase price for the entire Assets is given as comprising the three heads. One head is of interest to the Court. This is Vendor costs. Vendor costs are defined in Article 1.1 of the SAP Agreement to mean costs incurred by the Vendor associated with exploration including Seismic activities. These would be the activities undertaken by BGP. There is however no stipulaion that these costs would be paid directly to BGP. It was nevertheless an acknowledgement by EAXKL that part of its assets was Seismic activities that had been undertaken but not paid for. At the time the Order for Deposit was made, there was neither a Judgement nor an attachment against EAXKL and so if the Deposit had been made before the happenings of either event, there could be no merit at all in an argument that the Deposit was not an asset of EAXKL. The terms of SAP Agreement does not support the assertion by BGP that the cost of providing the Seismic Services was set up and earmarked specifically for BGP.

26. And it has to be recalled that at the time Afren (on behalf of EAXKL) communicated to BGP its intention to sell the Assets (the email of 15th October 2015), it had made it clear that the proceeds of sale would be used to "repay a proportion of the debt owed to its various Creditors". This fortifies the position of EAXKL that no specific part of the purchase price was set apart exclusively to settle BGP's debt fully.

27. It is however common ground that BGP obtained a Decree for the sum of USD 2,059,026.50 against EAXKL before the Deposit was

eventually made. The Decree was affirmed by Counsel for both sides on 14th October 2016 and the Deposit made on 18th April, 2017. Did that affect how the Deposit should be treated?

28. So as to comply with the order for Deposit, EAXKL needed to give certain assurances to BGP that the monies from the sale proceeds would be deposited in Court. This was to be done through a Closing Instructions Deed under which EAXKL would authorise Octant (the Purchaser) to deposit the sum equal to the BGP's claim into the Account of Anjarwalla & Khanna Advocates (Advocates for EAXKL) for onward deposit into Court. The Court record (see for example of 11th October 2016, 18th October 2016, 22nd November 2016) shows that it took the parties herein sometime before agreeing on the terms of an undertaking under the Deed to be given by the firm of Anjarwalla & Khanna Advocates. This could partly explain the delay in the deposit. However, at whatever time it was made, the Deposit was made in compliance with the Court Order of 29th June, 2016. In the Deed of EAXKL reiterated its position that by making the Deposit it was seeking to comply with the Ruling and did not in any way 'waive or intend to unlawfully prefer BGP over any other Creditor". Submissions by Counsel for BGP that as there was already an affirmed judgement the making of the Deposit was an acknowledgement by the Defendant that the Deposit was to settle the judgement may not be entirely accurate. The conclusion to be drawn is that, in the peculiar circumstances of this matter, the money was still an Asset of EAXKL at the time it was deposited into Court.

29. On 25th January 2017, BGP filed the following application:-

> *a) This application be certified urgent and be heard ex parte in the first instance.*
>
> *b) Pending the hearing and determination of this application, the Court be pleased to order that the USD 2,059,026.50 scheduled to be deposited in Court pursuant to the Court's ruling of 29th June 2016 and the Order of 24th November 2016 is only available to the Plaintiff for settlement of the decree herein.*
>
> *c) The USD 2,059,026.50 scheduled to be deposited in court pursuant to the court's ruling of 29th June 2016 and the order of 24th November 2016 be released to the Plaintiff, immediately upon deposit, to answer/settle the judgment and the decree herein.*
>
> *d) In the alternative and without prejudice to the above, the sum of USD 2,059,026.50 together with an additional sum of USD 85,000/- being the accrued interest and costs of the suit herein be remitted to the Plaintiff Decree Holder by Octant Energy Corp (the Garnishee) to answer the judgement and the decree herein.*
>
> *e) The costs of this application be provided for.*

30. As the application was argued on 7th June 2017, a date after the Deposit had been made, BGP sought an amendment to prayer (c) to provide for release of the money deposited and abandoned prayer (d) as it had been overtaken by events.

31. The bringing of the Application seems to the Court a concession by BGP that it could not appropriate the Deposit without taking certain steps. And the steps to be taken were in the nature of execution proceedings. Indeed when addressing Court on the Motion in which this Decision relates, Mr. Agwara for BGP told Court that execution commenced on 25th January 2017 when the Application was made for release of the funds. He added that execution commenced before the presentation of the Insolvency Cause.

32. Given these circumstances, is the Deposit still an asset of EAXKL or is it beyond the reach of the Liquidation Cause? The answer could lie in the provisions of Section 481 of The Insolvency Act which provides:-

> 1) If—
>
> (a) a creditor—
>
> (i) has issued execution against the goods or land of a company; or
>
> (ii) has attached any debt due to it; and
>
> (b) the company is subsequently liquidated, the creditor is not entitled to retain the benefit of the execution or attachment against the liquidator unless the creditor has completed the execution or attachment before the commencement of the liquidation.
>
> (2) However—
>
> (a) if a creditor has had notice of a meeting having been convened at which a resolution for voluntary liquidation is to be proposed—the date on which the creditor had notice is, for the purpose of subsection (1), substituted for the date of commencement of the liquidation;
>
> (b) a person who, under a sale conducted by the enforcement officer or other officer charged with the execution of the writ goods of a company on which execution has been levied, purchases the goods in good faith acquires a good title to them as against the liquidator; and
>
> (c) the Court may set aside the rights conferred on the liquidator by subsection (1) in favour of the creditor to such extent and subject to such terms as it considers just.

(3) For purposes of this Act—

(a) an execution against goods is completed by seizure and sale;

(b) an attachment of a debt is completed by receipt of the debt; and

(c)an execution against land is completed by its seizure or by any other event prescribed by the insolvency regulations for the purposes of this section.

33. Even if it is accepted as argued by BGP that execution commenced on 25th January 2017 and was only faulted for overlooking a procedure, can it be deemed to have completed before the commencement of Liquidation (ie. the Presentation of liquidation)?.

34. A Liquidator deals with assets of a Company and not those which have been lost to a Creditor through execution or attachment. A Liquidator can have no greater control of assets than the Company under liquidation and if control or ownership is lost by a completed execution and attachment then, ordinarily, the Creditor should be entitled to retain the benefit of execution or attachment. In essence the Asset of the Company has passed to the Creditor and is beyond the control or reach of the Liquidator. If I perceive the rationale of Section 481 in that sense then I am unable to find the money deposited is beyond the reach of the Liquidation proceedings because BGP has not received the money. Consequently, even if I find that execution or attachment had been initiated by the application of 26th January 2017 then it had not completed before 3rd October 2017 when Liquidation of EAXKL commenced.

35. This has not been an easy conclusion to draw because the outcome seems to dampen the effort of a Creditor who has moved Court to secure its position and has in fact obtained orders that should have protected its success. Yet Statute is unequivocal, only those Creditors who have gone past the post by completing Execution or attachment are protected and enjoy a special position. The rationale as explained is that upon completed Execution or attachment the asset ceases to be the property of the Company.

36. BGP finds itself in the position of a Judgment Creditor who is treated equally to other unsecured Creditors. The irony is that BGP's diligence in pursuing this suit has not paid off. BGP is now in equal competition with the most indolent of Creditors. Yet the Law on Insolvency may have a good answer to these state of affairs. The Law equitably distributes assets of an Insolvent Company to all unsecured Creditors (be they judgement Creditors or not). If this were not so, then there would be a rat race by Creditors to obtain Judgments against an obviously ailing Company in the hope of obtaining an advantage over the general body of Creditors. This would be to destroy the equilibrium that all Creditors ought to enjoy so that each, hopefully, receives something on a pro rata basis.

37. It is for this reason, I should think, that a Liquidation Court is entitled to interrogate a Judgement against the Company (even where execution has completed) where there is reason to believe that it has been simulated by the Company and a Creditor to give preferential treatment to a Creditor or to overstate a debt. This Court is persuaded that the observation made in the following old Decision holds true in respect to the current Insolvency Laws:-

> "It is the settled rule of the Court of bankruptcy, on which we have always acted, that the Court can inquire into the consideration for a judgement debt. There are obviously strong reasons for this, because the object of the bankruptcy laws is to procure the distribution of a debtor's goods among his just creditors. In a judgment were conclusive, a man might allow any number of judgements to be obtained by default against him by his friends or relations without any debt being due on them at all; it is, therefore, necessary that the consideration of the judgement should be liable to investigation" (Per Sir W M James LJ in, In Re Onslow, ex p Kibble(1875) LR 10 Ch App 373, 376).

38. The consequence of my finding that the execution or attachment by BGP has not completed (*perhaps it has just began again by the Motion before Court*) and so to allow the Prayer sought in the Motion would be to infract on the provisions of Section 430 of The Insolvency Act which reads:-

> "If a company is being liquidated by the Court, any attachment, sequestration, distress or execution instigated against the assets of the company after the commencement of the liquidation is void".

39. This Court is keenly aware that there is an allegation by BGP that the Insolvency proceedings is a pretended cause by Afren, the Parent Company of EAXKL. Yet the proper Court to deal with that allegation is the Insolvency Court.

40. The application dated 7th November 2017 is hereby dismissed with costs.

Dated, Signed and Delivered in Court at Nairobi this 4th Day of May, 2018.

F. TUIYOTT

JUDGE

PRESENT;

Agwara for Plaintiff

Mailu for Defendant