



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 115 OF 2009

KENYA COMMERCIAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED.....DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated and filed on **31st May, 2016** was brought under the provisions of **Article 35 (1) (b) of the Constitution of Kenya, Section 1A,1B, 3A and 22 (a) of the Civil Procedure Act 2010 and Order 51 Rule 1 of the Civil Procedure Rules**. It sought the following orders :-

1. Spent

2. Spent

3. An order do issue compelling the Defendant to produce on oath, the following;

a) A schedule of all petroleum stocks received by the Defendant on account of Triton Petroleum Company Limited and subsequently released by the said Defendant from **1st January 2007 to 31st December 2008** clearly showing the following:

i. Description of Petroleum Product

ii. Quantity of Petroleum product

iii. Date of Receipt of Petroleum Product by the Defendant

iv. Date of Release of Petroleum Product by the Defendant

v. Date of the Plaintiff's Release advise to the Defendant with regard to the particular petroleum released (if any was received)

vi. Value of the Petroleum Product Released by the Defendant

4. An order do issue compelling the Defendant to produce on oath the following, in receipt of the oil stocks of **25,949.68 Metric tonnes** admitted to be held as at **30th November 2008** by the Defendant in

trust for the Plaintiff :

i. Description of the various Petroleum Products comprised in the 25,949.68 metric tonnes admitted.

ii. Value of the said 25,949.64 metric tonnes as at 30th November 2008

iii. Date of Release of Petroleum Product by the Defendant and the person or parties to whom it was released

iv. Date of the Plaintiff's Release advise to the Defendant with regard to the particular petroleum Product Released (if any was received)

5. An order compelling the Defendant to produce on oath the Report of Forensic Investigation carried out on behalf of the Defendant by Messrs. PriceWaterhouseCoopers known as "Project Bahari" dated 6th April 2009 in respect of the oil stocks managed by the Defendant.

6. Costs be awarded to the Plaintiff.

2. The application was based on the grounds outlined in the application and supported by the affidavit of **Tom Okoth Ogola** sworn on **31st May, 2016**. It was the Plaintiff's position that its claim was with regard to the value of stocks of petroleum products wrongfully released by the Defendant to third parties in breach of the terms of the Collateral Financing Agreement. However, the Plaintiff asserted that the precise details of the stocks of petroleum products received and released by the Defendant is peculiarly within the knowledge of the Defendant as admitted by its Managing Director in its letter dated **17th January, 2009**. Further to this, it was deponed that the Defendant also commissioned an independent investigation into the matter by **PriceWaterhouseCoopers** (hereinafter "**PwC**") who released a Report dated **6th April, 2009** that is in the hands of the Defendant. The receivers appointed by the Plaintiff have on several occasions requested for the information sought without success. The Plaintiff pointed out that in its letter dated **26th January 2009**, the Defendant promised to confirm the oil stock positions once the **PwC** audit and report was released. As such the Plaintiff pleaded that it had the Constitutional right to apply for access to the said documents to ensure a fair trial.

3. In response to the application, the Defendant relied on the affidavit of **Gloria Khafafa** sworn on **21st June, 2016**. It was averred therein that on **26th June, 2015**, a case management conference was held before **Kamau, J** where all parties confirmed that they had filed all the necessary witness statements and documents in support of their respective case. Thereafter, the matter was certified as ready for trial and it was on the strength of the parties' representation that the court proceeded to the main hearing of the case. However, during the cross examination of the first plaintiff's witness (PW1) on **30th May, 2016**, numerous objections were raised by the Plaintiffs' counsel. When the matter came up for hearing the following day, it was the Defendant's contention that the present application was filed with the aim of scuttling the proceedings and derailing the ongoing cross examination of the **PW1**.

4. The Defendant maintained that the information sought vide **Prayer 3** is contained in the Plaintiff's Bundle of Documents at pages **32-107** and the Defendant's bundle of documents at **pages 28 to 57**. That as such, the documents sought are already before the court. With regard to **Prayer 4**, the Defendant contended that this is a matter in contest as there was no admission made with regard to the oil stocks held. That in any case the information sought in that prayer is in the custody of the plaintiff who ought to have placed it before this court. Further to this, the deponent claimed that from a cursory examination of the documents before the court, the information sought in **Prayer 4** is already contained in **Pages 32 to 107** of the Plaintiff's Bundle of documents and **pages 28 to 57** of the Defendant's Bundle of Documents. According to the defendant, the **PwC Report** sought by the Plaintiffs is a privileged document containing confidential legal advice.

5. In sum, the Defendant contended that the Application is mischievous and amounted to a fishing expedition launched for the sole purpose of derailing proceedings and delaying the conclusion of the suit. The Defendant, therefore urged the court to dismiss the application.

6. The application was canvassed by way of written submissions. The Plaintiff filed its submissions on **24th June, 2016**, while Defendant filed its respective submissions on **27th June, 2016**. The Plaintiff argued that the information sought in the application was pertinent to its case and the documents therein were of high evidential value in determining the precise detail of the stocks of petroleum products received and released by the Defendant. That though the defendant contends that the information sought with regard to the product it received and released to third parties on account of **Triton Petroleum Company** is already available in the bundles of documents provided, the said position is misleading. According to the Plaintiff, the information contained in the bundle of documents for both parties is only a portion of the disclosure being sought herein. Such a conclusion can be drawn from the various unanswered letters from the Receivers of Triton Petroleum addressed to the Defendant. Learned Counsel to the Plaintiff therefore urged that the only logical conclusion was that given this status of affairs, it can be concluded that the Defendant has persistently refused to disclose the information sought.

7. It was further submitted that despite the Defendant's Managing Director's admission that the Defendant held **25,949.68 Metric Tonnes** in trust for the Plaintiff vide a letter dated **17th January, 2009**, the Plaintiff maintained that the letter did not amount to an admission, and that the Court should issue an order for the production of the schedule of the oil stocks admitted to and held in trust for the Plaintiff. It was also the Plaintiff's contention the forensic report by **PwC** was central to the dispute at hand. According to the Plaintiff, the Managing Director admitted that the a forensic audit was being commissioned with PwC to audit and ascertain the actual position of the oil stocks held by the Defendant on behalf of Triton Petroleum Company Limited. That given this disclosure, the Applicant had a legitimate expectation that the contents of the Forensic Audit Report would be shared with them. That as such, the claim that the document is privileged is a mere afterthought since any legal advice contained therein is capable of being severed from the audit report.

8. In a nutshell, the Plaintiff submitted that the documents sought to be produced are relevant as they will shed more light to the claims made and the evidence to be adduced later in the course of the proceedings in this suit. The Plaintiff relied on inter alia the case of **Oracle Productions Limited –v- Decapture Limited & 3 Others (2014) eKLR**, **Joginder Auto Services Ltd –v- Mohammed Shaffique & Mohamed Parvez Saroy (2001) eKLR** and **Chantrey Martin & Co. –v- Martin (1953) ALL E.R 691** in support of its submissions.

9. The Defendant on the other hand argued that there was inordinate and unexplained delay by the Plaintiff in filing the application, and that, if the Plaintiff had any intention of making an application for the production of any documents, then it ought to have made the application during the case management conference before the matter was certified ready for hearing in accordance to **Rule 15** of the **Practice Directions** relating to case management in the Commercial and Tax Division. In support of their contention that the Report by **PwC dated 6th April, 2009** is a privileged document relied on **Alfred Crompton Amusement Machines Ltd –v- Customs and Excise Commissioners (1974) AC 405**, and **Glencore Energy U.K Limited –v- Kenya Pipeline Co. Limited (2011) eKLR** as well as **Section 137 of the Evidence Act**.

10. I have considered the affidavits on record and the submissions by the respective parties, as well as the authorities relied on. The background on this suit reveals that the documents sought are pertinent to the case as they will be used in determining the precise details of stocks of petroleum products received and released by the Defendant/Respondent which were held in trust for the Plaintiff/Applicant. Before addressing the merits or otherwise of the application, I deem it important to comment on the issue raised by the Defendant, with regard to the timing of this application. It was the contention of the Defendant that this application should have been raised at the case management stage, before the suit was certified as ready for hearing.

11. I have no hesitation in rejecting that argument granted the provisions of **Section 22 of the Civil**

Procedure Act which, *inter alia*, donates to the Court power to grant orders for discovery of certain information at any stage of the trial process. The section provides as follows ; -

“22. Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party –

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence...” (Emphasis added)

12. As such, I agree with the submission of the Plaintiff that an application for production of documents can be made at any time as long as the same is necessary and reasonable for the fair disposal of proceedings. I therefore find no merit to the argument by the Defendant that there was inordinate and unexplained delay in filing the application.

13. I now turn to **Prayer 3** , seeking for a schedule of all petroleum products received by the Defendant on account of **Triton Petroleum Company** and subsequently released by the Defendant from **1st January 2007 to 31st December 2008**. According to the Defendant, all the information that is sought is contained in the respective bundles of the parties. Specifically, the Defendant pointed out to **pages 32 to 107** as well as **pages 28-57** of its bundle of documents. In response to this, the Plaintiff suggested that this was just a portion of the disclosure sought. The Plaintiff pointed specifically to the unanswered letters from the receivers of **Triton Petroleum** addressed to the Defendant with regard to the Petroleum Products received and released.

14. I have considered the various arguments proffered by the parties. The objective of discovery cannot be overemphasized. In **Halsbury’s Laws of England Vol 13 Paragraph 1**, this point is made thus :-

“The function of discovery of documents is to provide the parties with the relevant documentary material before trial so as to assist them in appraising the strength and weakness of their relevant cases, and thus provide the basis for the fair disposal of the proceedings before it or at the trial. Each party is thereby enabled to see before the trial or to adduce in evidence at the trial relevant documentary evidence material to support or rebut the case made against him, to eliminate surprise at or before the trial relating to the documentary evidence and to reduce the cost of litigation.”

15. Thus, the purpose of discovery is to avoid ambush at the trial. Discovery allows parties to perceive and analyze their opponents’ case to best be able to present their case in response thereto in a manner that enables the court to effectually determine the issues in controversy between the parties. In this case, the Plaintiff has sought discovery of the petroleum products received and released by the Defendant to other third parties on account of Triton Petroleum Company Limited for **1st January 2007 to 31st December, 2008**. I have examined the bundles of documents before the court. Both bundles contain details as to the Petroleum products held and released by the Defendant. With regard to the oil stocks held, I have seen the **letter dated 15th January, 2009** from the defendant’s then Acting Managing Director, **Selest Kilinda**, to the joint receivers of Triton Petroleum. The same details the oil stocks it held as at **January, 2009**. Further, in the defendant’s list and bundle of documents received in court on **13th March, 2013**, release orders issued by the Plaintiff to the Defendant from **18th December, 2007 to 13th November, 2008** have also been exhibited.

16. Even though the receivers of **Triton Petroleum** complained of not receiving certain documents, it is clear that the Plaintiff has had in its possession data with regard to the products released by the Defendant at its behest. As such it is my view that the Defendant as it were, has already put on the table, its entire case by providing copies of the documents that it seeks to rely on during the trial. I find that it has provided the particulars as best as it could, especially with regard to the stocks held and released. With respect, I think that the Plaintiff is on a fishing expedition. In my view, the Plaintiff already has the

particulars with regard to the defendant's claim sufficient for it to confront the case at hand. I find that the request for documents as per Prayer 3 by the Plaintiff is wholly unnecessary and only serves to derail this court's proceedings.

17. With regard to the production of a schedule of oil stocks of **25,949.68 Metric Tonnes** admitted to be held as at **30th November, 2008** in trust for the Plaintiff, I note that this matter is highly contested as the Defendant deponed that there were certain admissions made on the oil stocks held. Although the Plaintiff relies on a letter dated **17th January, 2009** by the Managing director of the Defendant to the Chief Executive Officer of the Plaintiff admitting that the Defendant held oil stocks of **25,949.68 Metric Tonnes** in trust for the Plaintiff, I note that the Defendant has set out to rebut the same during the trial, by also producing documents to the effect that it did not hold oil stocks to the tune of **25,949.68 Metric Tonnes** as indicated by its letters to the Plaintiff and the Plaintiff's advocates dated **29th December, 2008** and **31st December 2008** exhibited at **pages 102 and 105**, of the Plaintiff's bundle. In view of these contradictions, it is my finding that the matter should be left for determination at the trial. Accordingly, I would turn down **Prayer 4**.

18. This leads me the production of the **PwC report**. It was claimed that **PwC** was commissioned to undertake a forensic audit to establish the true and actual position of oil stocks of **Triton Petroleum Company Limited** held by the Defendant. This was indeed acknowledged by the Defendant's Managing Director vide a letter dated **26th January 2009** promising to confirm the oil stock once the **PwC** audit report was released. It is the Plaintiff's contention that this Report is essential as it contains information as to the actual and true position of oil stocks of **Triton Petroleum Company Limited** that were held by the Defendant at the material time. The Defendant however urged the court to decline this request since the document in question is a **privileged document** that contains legal advice. According to the submissions of the Defendant the **PwC report** was commissioned when the legal proceedings against the Defendant were threatened as evidenced by the Plaintiff's letter of demand on **31st December, 2008**. As such, it was the contention of the Defendant that the **PwC report** was clearly not produced for the sole purpose of litigation and the same contained legal advice which is privileged.

19. The Defendant relied on the case of **Glencore Energy U.K Limited –v-Kenya Pipeline Co. Limited (2011) eKLR**, in which the court made a finding that the Forensic Audit Report in question was **privileged**. It should be noted that the court in the **Glencore Energy U.K Limited (supra) Case** had the benefit of examining the Forensic Audit Report in question with the consent of the parties in order to determine the real purpose of the audit in order to determine whether the same was privileged or not. I am able to draw this conclusion from the passage where the court stated as follows;

“ The copy of the PwC Report shown to the court with the consent of the Defendants’ contains a notice to the effect that the same has been

“---prepared for the client for use in negotiating a settlement with various financiers or for use in defending Kenya Pipeline Company Limited’s position in ongoing legal proceedings currently before the courts or in the anticipated arbitration and as such is subject to legal privilege.”

Although this suit was filed on 8th April 2009, it is clear from the Plaintiff that the final demand (I believe with a threat to litigation) had been sent as early as 15th January 2009.

There would be no justification in finding otherwise than that the disputed report is privileged as claimed, since the notice above must have been given in line with the terms of reference under which PwC were commissioned to carry out the audit.”

20. In the premises, I would accept the foregoing as constituting sufficient proof that the report is privileged, there being no evidence to the contrary. There is no indication that that finding was reviewed or overruled. Thus pursuant to **Section 90 of the Evidence Act, Chapter 80 of the Laws of Kenya**, I would come to the same conclusion that the document is privileged.

21. In the result, I find no merit in the plaintiff's application dated **31st May, 2016**. The same is hereby dismissed with costs.

It is so ordered.

SIGNED DATED AND DELIVERED AT NAIROBI THIS 2nd DAY OF SEPTEMBER, 2016.

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OLGA SEWE

JUDGE