REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 75 OF 2015

RUHRPUMPEN GLOBAL LIMITED……..…….....PLAINTIFF

- **VERSUS -**

ZAKHEM INTERNATIONAL CONSTRUCTION LTD…….1ST DEFENDANT

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

RULING

1. The application before me is dated 30th March 2015. It is an application which was filed by the plaintiff. Through the application, the plaintiff sought the following 2 substantive reliefs;

> *"2. **THAT** leave be granted to the Applicant to submit new and important evidence in respect of the amended notice of motion **dated 9th March 2015.***
>
> *3. **THAT** pending the delivery of the Ruling in the Applicant's application dated 9th March 2015, which ruling is scheduled for delivery on 5th May 2015, the Honourable court be pleased to issue an interim injunction restraining the respondents jointly or severally or through their agents from signing, executing or concluding any agreement or contract with any party, individual and or company in respect of the Pipeline replacement project and in particular the supply of main line and booster pumps".*

2. Upon being served with the application, the 2 defendants each filed Notices of Preliminary Objection.
3. On the part of the 1st Defendant, the Preliminary Objection was worded as follows;

> *"1.The Application has no basis or foundation in law and is a gross abuse of the court process and ought to be dismissed in limine.*
>
> *2. The plaintiff filed a Chamber Summons dated 24th February 2015 seeking an order for interim injunction pending inter-partes hearing, and the same was declined by the court.*
>
> *On 9th March 2015 the plaintiff filed a Notice of Motion and prayed for interim orders of injunction pending inter-partes hearing, but the orders were declined by the Honourable Court.*

The plaintiff is now seeking the same orders pending the delivery of the ruling and this prayer has no legal basis, is Res Judicata as it has already been denied twice and is a gross abuse of the court process.

3. Article 159 (2) (d) of the Constitution is not applicable in the circumstances of this case and it is not a licence for parties to abuse the court process".

4. That summed up the position of the 1st Defendant.

5. Meanwhile, the 2nd defendant put forth its Preliminary Objection

in the following words;

"1. The Application is bad in law.

2. The purported discovery of new evidence is not a ground for opening a matter that is pending for Ruling.

3. The Plaintiff/Applicant's remedy is to await the outcome of the pending application and to take further steps as it may wish.

4. This Honourable Court lacks jurisdiction to entertain the Plaintiff/Applicant's Application at this point in time.

5. The Application is frivolous, vexatious and an abuse of the court process.

6. The 2nd Defendant/Respondent therefore prays that the Application be dismissed with costs to the Defendant/Respondents".

6. The two preliminary objections were canvassed on 23rd April 2015.

7. Mr. Mwaniki, the learned advocate for the 1st defendant, submitted that this new application had attempted to expand the original application as it now sought to include new issues which had not been previously canvassed.

8. As those new issues were being introduced when the parties had already made their respective submissions on the original application, the plaintiff was deemed to be attempting to abuse the process of the court.

9. The 1st defendant pointed out that the court had already declined the plaintiff's request, to stop work when the plaintiff's application was still pending.

10. In the circumstances, the 1st defendant reasoned that Article 159 of the Constitution of the Republic of Kenya was inapplicable to this case, because there were no technicalities being applied.

11. Mr. Ogeto, the learned advocate for the 2nd defendant, submitted that the plaintiff's application was bad in law and is also an abuse of the court process.

12. The 2nd Defendant said that the discovery of new evidence was not a ground for re-opening a matter in which the parties were waiting for the court to deliver its Ruling.

13. The 2nd defendant then submitted that there was no new evidence, in any event. When advancing that argument further, Mr. Ogeto pointed out that the documents dated December 2014

and 4th March 2015 were both available to the plaintiff before the applications dated 24th February 2015 and 9th March 2015 came up for hearing inter-partes, on 11th and 20th March 2015.

14. The 2nd defendant added that whereas the other document which the plaintiff seeks to rely on is dated 20th March 2015; which fact may lead to the argument that the said document only became available after the parties had made their respective submissions, the document did not add anything new to the plaintiff's case.

15. The 2nd defendant also pointed out the plaintiff had not disclosed the source of the documents.

16. Finally, the 2nd defendant emphasized that the plaintiff was simply seeking to advance the same alleged contract as had already featured in the submissions made when the parties were canvassing their respective positions on the plaintiff's original application. Therefore, Mr. Ogeto submitted that the *"new documents"* relate to an issue which had been considered by the court when the court declined to grant interim reliefs.

17. For those reasons, the defendants asked the court to dismiss the application dated 30th March 2015.

18. When responding to the Objections, Mr. Muite, the learned advocate for the plaintiff, submitted that Mr. Ogeto had not raised a Preliminary Objection. He was said to have delved into the substantive application.

19. Why did the plaintiff say so?

20. It was because the 2nd Defendant had gone into the dates and contents of letters which the plaintiff had annexed to the supporting affidavit, in an attempt to demonstrate the new evidence which had become available.

21. Considering that Preliminary Objections should be founded upon points of law, the plaintiff urged the court to dismiss the Preliminary Objection herein.

22. It was the contention of the plaintiff that the court would have to delve into evidence, before it could determine whether or not the plaintiff had actually come by new evidence as it has alleged in the current application.

23. The plaintiff said that its current position was that whilst the parties were waiting for the court to deliver its Ruling, the 2nd defendant was seeking to pre-empt the orders of the court, by concluding a contract, so that the plaintiff would then be shut out.

24. Therefore, the plaintiff said that its intention was to persuade the court to protect the integrity of its process, by ordering that the status quo be maintained until the court gives its Ruling.

25. In contrast, the defendants are said to want to steal a march on the plaintiff, by proceeding to conclude the contract before the court delivers its Ruling.

26. Mr. Muite requested the court to block the defendants' intention to argue the current application by the plaintiff, under the guise of a Preliminary Objection.

29. As far as the plaintiff was concerned, the court ought to allow the parties to argue the application dated 30th March 2015.

30. Finally the plaintiff said that Article 159 of the Constitution should not be rubbished when

the court was handling a case emanating from a sphere in which corruption had become so dominant.

31. In determining these Preliminary Objections, I first take note of the facts which are not in dispute.

32. The proceedings herein were commenced by way of a plaint which was filed in court on 24th February 2015.

33. Simultaneously with the plaint, the plaintiff filed an application dated 24th February 2015. The said application was for an injunction to restrain the defendants from signing, executing or concluding any contract or agreement with any party, individual or company, regarding the supply of booster and mainline pumps.

34. The application dated 24th February 2015 was filed under a Certificate of Urgency, and the plaintiff's first request was that the application be heard *ex-parte* in the first instance.

35. On 24th February 2015 the matter was placed before Gikonyo J. The learned Judge directed the plaintiff to serve the defendants. The court further directed that the application be heard on 5th March 2015.

36. By the 5th of March 2015, both the defendants had filed their respective responses to the plaintiff's application.

37. Mr. Kibunja, the learned advocate for the plaintiff informed the court that he needed some 7 days to enable the plaintiff respond to some issues which had arisen from the defendants' responses.

38. Secondly, Mr. Kibunja asked the court to grant some orders which would then remain in force for the period of 7 days.

39. Mr. Mwaniki, the learned advocate for the 1st Defendant, and Mr. Ogeto, the learned advocate for the 2nd Defendant, both opposed the plaintiff's application for interim relief pending the hearing of the substantive application.

40. Having heard the respective submissions, Gikonyo J. allowed the plaintiff a period of three (3) days to file and serve a supplementary affidavit.

41. The application was then adjourned to 11th March 2015.

42. However, the court did not grant any interim reliefs which the plaintiff had asked for.

43. On 11th March 2015, the court directed the parties to file written submissions within specified time-frames. It was further directed that after the submissions had been filed, each of the parties would have 10 minutes to highlight the same. The process of highlighting was supposed to have been undertaken on 20th March 2015.

44. However, when the matter came up before the Judge on 20th March 2015, Gikonyo J. disqualified himself from the case. He cited *"personal reasons"* as the basis for the decision to stop handling the case.

45. In the light of that development, the case was referred to me, in my capacity as the Presiding Judge of the Commercial Admiralty and Tax Division.

46. On the same date, (20th March 2015) the case was mentioned before me, and I then decided to take over the case.

47. After consultations with the advocates for all the three parties I decided that there would be no need for any of them to highlight their submissions. My said decision was informed by the fact that the court was under a legal obligation to give due consideration to all the submissions which had been filed. Therefore, there would be no need to highlight any specific portions of the written submissions.

48. The court then fixed the Ruling date as 5th May 2015.

49. It was whilst the parties were waiting for the court to write and thereafter deliver its Ruling that the plaintiff filed the application dated 30th March 2015.

50. I now need to determine whether or not to uphold the Preliminary Objections.

51. Clearly, the first task that I have no tackle is to decide whether or not the issues raised constitute a Preliminary Objection.

52. In the celebrated case of **MUKISA BISCUIT MANUFACTURING CO. LIMITED VS WEST END DISTRIBUTORS LIMITED [1969] E.A 696,** at page 700 Law J.A. said;

> *"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration".*

53. In the same case, Sir Charles Newbold P. expressed himself thus at page 701;

> *"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 the 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".*

54. In the light of those definitions, it is obvious that when the 2nd defendant started delving into questions about whether or not the evidence which the plaintiff intended to rely on was actually new, the said defendant was no longer urging a preliminary objection.

55. If the court were to make a determination on that issue, it would imply that the court was dealing with the substance of the application, rather than an objection which would constitute a bar to the whole application.

56. Meanwhile, the plaintiff indicated that the reason why it wished to canvass the application was that it had learnt of the 2nd defendant's attempt to pre-empt the Ruling which was still being awaited from the court.

57. The moment that the plaintiff made that disclosure, it became apparent that the plaintiff was already beginning to urge its application, before the court had determined whether or not the Preliminary Objections may constitute a complete bar to the whole application.

58. The plaintiff's assertion that corruption was rampant in the area from which the dispute arose would require the plaintiff to make available evidence to prove it. Until and unless such evidence was provided, the court could not make a determination.

59. In the light of that fact, the said assertion was not useful in enabling the court to make a determination on the preliminary objection.

60. The said preliminary objections relate to the application dated 30th March 2015. Therefore, one of the factors to be taken into account would be whether or not a determination of the preliminary objections could dispose of the application.

61. The other factor to be taken into account is whether or not the defendants had accepted the accuracy of the facts being pleaded by the plaintiff.

62. As far as the facts put forward by the plaintiff were concerned, the defendants have expressly disputed the same. The defendants have emphasized that the plaintiff's contention concerning the discovery of new evidence was fallacious.

63. In order to establish if the plaintiff had come by some new evidence after the parties had argued the application dated 25th February 2015, the court would need to delve into facts. And that is not within the province of preliminary objections.

64. The one fact which is not in dispute is that the application dated 25th February 2015 had already been argued in full. The parties were only waiting for the court to deliver its Ruling.

65. In those circumstances, could the plaintiff be permitted, in law, to bring more evidence to the court? I have made reference to *"more evidence"* deliberately as it would then not matter whether or not such evidence was new.

66. To my mind, once parties had concluded their submissions, it would be improper to re-open the same. I say so because if parties could re-open a case after close of submissions, there would be a real danger that the court may find it difficult to bring finality to arguments and submissions.

67. It has often been stated that there must be an end to litigation.

68. In this case, all the parties had, earlier, concluded their submissions on the application dated 25th February 2015.

69. Was the plaintiff attempting to re-open that application?

70. In my understanding, the plaintiff is attempting to stop the defendants from concluding the contracts which are the subject matter of the application dated 25th February 2015.

71. So far, the plaintiff had attempted to do so, but without success.

72. The failure to get the interim reliefs pending the finalization of the application was pegged on facts which the court took into account at that time.

73. And it is on the basis of the facts which were in play at that time that the court will be called upon to make a determination on the application dated 25th February 2015.

74. Therefore, I hold the considered view that if the court were to open the doors so that either party could make available more evidence on a matter upon which parties had concluded submissions, that process may result in unsettling the basis upon which the application had already been argued.

75. But then again, the plaintiff does not appear to want to unsettle that foundation of the substantive application. As I understand the situation, the plaintiff only wishes to have the *status quo* preserved until the court delivers its Ruling, which Ruling will still be based on the

submissions already made.

76. Although there might appear to be a thin line between the scenario in which there was an attempt to influence the earlier submissions and the situation in which a party says that it only wishes to preserve the subject matter of the application, my considered view is that it would be wrong to have the court consider, at this stage, if it should now grant an order which had already been declined.

77. When Gikonyo J. did not order that the *status quo* be maintained, there was always a possibility that the defendants would proceed to do that which the plaintiff had hoped to have them stopped from doing. Nonetheless, the court did not grant any injunctive relief pending the hearing and determination of the application dated 25th February 2015.

78. The court's decision was pegged on the circumstances then prevailing.

79. Should the court allow the plaintiff to urge an application allegedly pegged on new evidence, which could impact on the earlier decision, which was pegged on the circumstances prevailing at the material time?

80. This is not an application for review of the earlier orders. It is an application for an injunction to issue after the court had earlier not been persuaded to issue such an injunction. The basis for the new application is additional evidence.

81. To my mind, it would be highly irregular to permit the plaintiff to canvass the application when the parties were already waiting for a Ruling from the court.

82. Accordingly, the Preliminary Objections are upheld.

83. The application dated 30th March 2015 is therefore struck out, with costs to the defendants.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **5th day** of **May** 2015.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

……...for the Plaintiff

……for the 1st Defendant

……for the 2nd Defendant

Collins Odhiambo – Court clerk.