REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL SUIT NO. 1388 OF 1992

RONO LIMITED ……...……..……... PLAINTIFF

VERSUS

CALTEX OIL (KENYA) LIMITED ….……....…..…….. DEFENDANT

R U L I N G

1. For determination by the Court is the Notice of Preliminary Objection dated 7th October, 2013. In seeking to have the Preliminary Objection upheld, the Defendant/Objector seeks *inter alia:*

   "1. The Court finds that:

a. **The Plaintiff lawfully relinquished its claim for special damages and interest in the Plaint dated 9th March, 1992, upon the entry of the consent order by this Court on 18th September, 2002;**

b. **That the Court lacks jurisdiction to award general damages for breach of contract in the nature in the Plaint dated 9th March, 1992;**

c. **That the Court lacks jurisdiction to proceed with the assessment of special damages on the basis of the Plaint dated 9th March, 1992 as the waiver of special damages and interest is *res judicata* on account of the consent order of this Court recorded on 18th September, 2002**

d. **The Plaintiff's claim for damages as sought in the Plaint dated 9th March, 1992, be and is hereby dismissed".**

2. The Preliminary Objection is predicated upon the grounds that the Court's jurisdiction to proceed with the assessment of damages is debarred by application of the principles of *res judicata* and/or issue estoppel under **Section 7** of the *Civil Procedure Act*. It is further contended that this Court lacks jurisdiction to award general damages for breach of contract and that the jurisdiction to proceed with assessment of special damages that are not pleaded does not lie with the Court. The Defendant/Objector relied upon the case of **Savannah Development Company Limited and Posts Telecommunications Employees Housing Co-operative Society Ltd Civil Appeal No. 160 of 1991** and **Chief Justice M. Monir (1996) *Principles and Digest of the Law of "ESTOPPEL" "RES JUDICATA" with "LEGAL MAXIMS"*** and **Sarkar's *Law of Evidence* 15th Edition at 1752**.

3. In oral arguments and submissions before the Court on 17th June, 2014, it was submitted that the objection was based on a plea of *res judicata* as provided under **Section 7** of the *Civil Procedure Act* and further upon the consent order entered into by the parties dated 18th September, 2002. It was submitted that the Plaintiff is debarred from making a claim of special damages and the Court lacks the jurisdictional capacity to allow for the assessment of such damages, in purview of the consent order. Failure to plead damages, it was argued, precludes the Plaintiff from proceeding with assessment of damages (see **Habib Zurich Finance (K) Ltd v Muthoga & Another [2000] 2 E.A 521 CAK**), that general damages may not be awarded in breach of contract (see **Nairobi City Council v Thabiti Enterprises Ltd [1995-98] 2 E.A 231**) and as per that case, special damages need to be specially pleaded and proved. Such is a legal requirement and not merely procedural. Further, it was argued that **Section 7** of the *Civil Procedure Act* determines the finality of a matter, and that the current application by the Plaintiff for damages was filed after interlocutory judgment was entered as against the Defendant.
4. The Plaintiff opposes the Notice and contends that the applicability of the principle of *res judicata* and **Section 7** of the *Civil Procedure Act* is actually working against the Defendant. It contended that when the Court entered judgment on admission as against the Defendant, the Court ordered for specific performance and made further orders as to the damages payable to be assessed. What the Plaintiff seeks, as argued, is for damages as awarded by the Court, which it maintains arise from loss of profits and thus general damages (see **Dharamshi v Karsan C.A No. 37 of 1973; [1974] E.A 41, City Council of Nairobi v Amritlal Civil Appeal No. 102 of 1987 (Unreported)** and **Oakacre v Claire Cleaners (1981) 2 All E.R 667**). The Plaintiff contends its claim is under the equitable jurisdiction of the Court and in line with the terms of the consent Order dated 18th September, 2002.
5. **Section 7** of the *Civil Procedure Act* provides:

   "No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court." (Emphasis mine).

   It is further provided at explanation 4 thus:

   "Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit".

   Various Courts have issued rulings premised on the provisions of **Section 7**, including **North West Water Ltd v Binnie & Partners [1990]3 ALL E.R.547** at 556, where Lord Drake, J held *inter alia:*

   "Where an issue had been decided in a court of competent jurisdiction, the court would not allow that issue to be raised in a separate proceeding between the different parties (emphasis added) **arising out of identical facts and dependant on the same evidence since, not only was the party seeking to re-litigate the issue prevented from doing so, by virtue of issue estoppel but it would also be an abuse of process to all, that the issue to be re-litigated."**

6. It has been enunciated further in **Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others Civil Appeal No. 36 of 1996** thus:

   "…**There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of a similar nature that is further, wider principles of res judicata apply to applications with the suit. If that was not the intention we can imagine that the**

courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."

The purpose and intent of **Section 7** of the *Civil Procedure Act* and the provisions of the plea in bar of *res judicata* is that there should be a finality to litigation, and parties should not be allowed to re-litigate on issues that have already been directly and substantially in issue in a former suit (or application, as the case may be) between the same parties. The single issue before this Court for determination is whether the application by the Plaintiff for the assessment of damages on the basis of the Plaint dated 9th March, 1992 violates the principles of *res judicata* and the provisions of **Section 7** of the *Civil Procedure Act*.

7. The Plaintiff contends that its claim is for damages accruing from loss of profits, and relied upon the decisions of **Dharamshi v Karsan** (supra) and **Abdul Karim Khan v Mohamed Roshan Civil Appeal No. 52 of 1963** where it was held:

   "The averment that a Plaintiff has at all times and is still willing to perform his obligations under the contract, the subject of suit for specific performance, is an essential ingredient to support a claim for specific performance and it relates only to that claim; further it does not mean that the Plaintiff is precluded from pursuing an alternative claim in the same proceedings, such as a claim for damages at common law against the defendant for breach of contract or for rescission of contract."

   Further in **Bullen & Leake & Jacob's Precedents of Pleadings Fourteenth edition, Vol. 2** at para. 96-05 and 96-08 it was stated that compensation may be ordered in lieu or in addition to specific performance and that the measure for damages for breach of contract is the loss caused to the claimant by the non-performance of the contract. In **Cottrill v Steyning & Littlehampton Building Society [1966] 1 WLR 753** referred to at para. 96-08, it was held that damages for loss of profits may be recovered where the purchaser was intending to use the property for a particular purpose which was made known to the vendor at the date of the contract. Similarly, in **Oakacre Ltd v Claire Cleaners** (supra) it was reiterated that the Court has the jurisdiction in equity to award damages in addition to specific performance, the jurisdiction arising under the inherent jurisdiction of the Court. The Plaintiff further relied on the case of **Hoystead v Commissioner of Taxation (1926) A.C 155** as to *res judicata* and avered that the Defendant was debarred from bringing further notices of preliminary objection, as two previous notices had already been dismissed in the determinations of Mbaluto, J and Waweru, J on 24th May, 2002 and 25th February, 2005 respectively.

8. The inherent jurisdiction of the Court in making an award for damages in addition to specific performance was covered by Ole Keiwua, J in his Ruling delivered on 15th February, 1999. In that Ruling, the learned Judge issued orders for the assessment of damages incurred from the breach of the sale agreement as between the parties. That decision by the Court has not been appealed or reviewed to date, save for the appeals dismissed, being **Civil Appeal Nos. 192 of 1999**, **126 of 2006** and **97 of 2008**, the latter in which an application to strike out is still pending hearing and determination as well as the interpretation of the Decree extracted from the determination of Keiwua, J by Mbaluto, J on 24th May, 2002. In my view, the two preliminary objections dismissed previously by the two aforesaid Judges were in effect, directly and substantially similar in nature and content to the present Notice of Preliminary Objection before this Court. Having been heard and determined by Courts of competent jurisdiction, in my opinion, the Defendant is debarred under the provisions of **Section 7** of the *Civil Procedure Act* from bringing a similar application. The same would amount to re-litigation of a rested matter, and would go against the principles of *res judicata*.
9. In the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors [1969] E.A 696** at 701, Law, JA (as he was then) held in his ruling *inter alia:*

   "…a preliminary objection is in the nature of what used to be a demurrer. It raises a pure

point of law which should be argued on the assumption that all the facts pleaded by the other side are correct. <u>It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.</u> The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues…"

In this case, the application for the assessment of damages for breach of the contract was allowed by Keiwua, J in his Ruling dated 15th February, 1999. As reiterated in **<u>Oakacre Ltd v Claire Cleaners</u>** (supra) and in exercise of the Court inherent jurisdiction, the Judge allowed for the assessment of damages in order to ascertain and determine what damages were to be payable to the Plaintiff. That decision still stands and has not been set aside. For the Defendant to make three applications, two of which have been previously dismissed, amounts to an abuse of the process of the Court, in violation of the overriding objective of **Sections 1A and 1B** of the *Civil Procedure Act* allowing for the expeditious, cost effective, efficient and fair determination of issues. The Notice of Preliminary Objection dated 7th October 2013 as raised by the Defendant seeks to re-litigate on issues that have already previously been canvassed and determined. As per **<u>Hoystead v Commissioner of Taxation</u>** (supra), **<u>Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others</u>** (supra) and **<u>North West Water Ltd v Binnie & Partners</u>** (supra), once a Court of competent jurisdiction has had the benefit of having heard and determined a matter in issue, the same shall not be open to further litigation between the parties, based on the same issues that had been canvassed in the previous matters.

10. As a result, the Court hereby finds the said Notice of Preliminary Objection unmeritorious, and the same is dismissed with costs to the Plaintiff, which may now set down its Application for assessment of damages on a priority basis. Finally, I should warn the Defendant's advocates that if such Preliminary Objection brought on the same issues is raised again, the advocates themselves will open themselves up to the payment of the Plaintiff's costs themselves.

DATED and delivered at Nairobi this 16th day of July, 2014.

J. B. HAVELOCK

JUDGE