**Galana Oil Limited v Mogas Kenya Limited (Civil Appeal 316 of 2019)**
**[2025] KECA 1733 (KLR) (24 October 2025) (Judgment)**

Neutral citation: [2025] KECA 1733 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAIROBI**

**CIVIL APPEAL 316 OF 2019**

**W KARANJA, J MOHAMMED & AO MUCHELULE, JJA**

**OCTOBER 24, 2025**

**BETWEEN**

**GALANA OIL LIMITED ..... APPELLANT**

**AND**

**MOGAS KENYA LIMITED ..... RESPONDENT**

***(Being an appeal against the judgment of the High Court of Kenya at Nairobi (F. Tuiyott, J.) dated 27th June 2019 in HCCC No. 150 of 2013)***

## JUDGMENT

1. The parties herein are renowned dealers in petroleum products and had transacted amicably before the incident leading to this litigation, whereby the respondent herein sued the appellant after efforts to settle the dispute amicably out of court bore no fruit.

2. By its plaint dated 18th April 2013, Mogas filed suit against Galana seeking;

    a. An order restraining the defendant by itself or any of its agents from selling the 1,125.298 cubic meters of GASOIL (AGO) already paid for by the Plaintiff and stored in the depots of Hashi Energy and Gapco in Mombasa in the respective quantities stated above, pending hearing and determination of this suit.

    b. An order compelling the defendant to release the 1,125.298 cubic meters of petroleum product (AGO) held by them, to the plaintiff who has fully paid for it.

    c. Aggravated and punitive damages for unlawfully withholding plaintiff's product already fully paid for.

    d. Special damages as hereunder: -

        i. Compensation for lost business opportunities Kshs.17,841,150.

ii. Compensation for price change Kshs.10,445,000.

iii. Financing cost of @ 18.00% pa from 14th Nov 2012 to the date of judgment for financing the stock worth Kshs.105,226,000 Ex vessel Merkur O.

iv. Financing cost of @18.00% pa from 20th Feb 2013 to the date of judgment for financing the stock worth Kshs.88,221.000 Ex vessel Torm Almena.

e. Interest on the decretal sum from the date of judgment till the payment is made in full at the commercial rate.

f. Costs of the suit.

g. Any other relief this Honourable Court may deem fit to grant.

3. Galana on the other hand while denying the claim set out the following Counterclaim: -

a. A Declaration that it is entitled to sell at the prevailing market rates the products of the 1st defendant that it has been holding as lien to secure the payment of its 801.599 MT of PMS appropriated by the 1st defendant and apply the products to off-set the 1st Defendant's indebtedness to it.

b. An order that the plaintiff sells the products of the 1st defendant that it holds as lien and/or security for its

801. 599 MT of PMS appropriated by the 1st defendant to recover the amount owed by the 1st defendant.

c. In the alternative, the 1st defendant be compelled to offer suitable banker's guarantee to the 2nd defendant as security for the plaintiff's 801.599 MT of PMS and the 2nd defendant to immediately on being offered that Bank Guarantee release to the plaintiff 801.599 MT of PMS.

d. The 1st defendant be compelled to pay to the Plaintiff an amount equivalent to the current market value of 801.599 MT of PMS in the event that the 1st defendant fails to issue the Bank Guarantee under paragraph (c) above within such a period as may be stipulated by the Court.

e. Loss as a result of Price Valuation 39,973.000.

f. Finance costs from August 2012 until August 2017, 85,585,175

g. ...

h. Costs and interest on (d) (e) and (f) above.

4. The High Court at Nairobi (F. Tuiyott, J., as he then was) heard the matter and in a judgment dated 27th June 2019 allowed the respondent's suit and dismissed the appellant's counterclaim.

5. The facts culminating into the suit as narrated before the trial court are that, sometime in October 2012, Galana was awarded an open tender (OT) coordinated by the Ministry of Energy to import Gasoil (AGO) for sale to other oil marketers in the Country. Gasoil AGO is what is commonly known as diesel. Under this importation, Mogas bought and fully paid for 125.298 cubic meters of the product.

There was a second tender awarded to Galana for similar product in January 2013. Mogas bought 944.497 cubic meters of the said product and fully paid for it.

6. Under the arrangement, the purchaser would nominate the place of storage of the product. The earlier product which was imported via the vessel "Merkur" was to be stored at the Hashi Depot in Mombasa. The latter product which was imported via the vessel "Torm Almena" was to be stored at the Gapco Depot at Mombasa. The grievance by Mogas is that Galana has refused to release 180.801 cubic meters of the first product and has also refused to release the entire product under the second order. The reason given by Galana for holding the said oil will become apparent shortly.

7. It was Galana's case that by a contract dated 15th September 2010 Mogas purchased from it 1500 Metric Tons (MT) of Premium Motor Spirit (PMS). The product was fully paid for by Mogas and discharged to Mogas in two batches of 685MT in November 2010 and 801.599MT in December 2010.

8. Galana explained to the court that through an error, physical products of 801.599MT of PMS were again discharged to Mogas. This was in two batches of 98.356MT and 703.243MT. The above error was discovered sometime in August 2012 and brought to the attention of Mogas and the Kenya Petroleum Refineries Limited (KPRL). Galana maintained that Mogas acknowledged receipt of the earlier discharge and of the further amount of 801.599MT and engaged Galana with a view to refunding it PMS of similar quantity. It was while the issue of the reversal of PMS was pending that Mogas bought and paid for the second batch of AGO, which Galana refused to release on account of the unresolved issue with the 801.599MT of PMS.

9. According to Mogas, however, the error was purely in its records, where there was a double entry of the disputed amount of PMS but there had not been any physical supply of the 801.599MT of PMS to Mogas by KPRL and Mogas had not benefited in any way from the double entry.

10. The matter remained unresolved precipitating a meeting between the two parties chaired by the Ministry of Energy on 18th March 2013, in which, inter alia, the following agreement and resolutions are said to have been reached: -

> " (i) That Mogas shall issue a Bank Guarantee to KPRL whose sole purpose shall be to enable KPRL give 801.599 MT of PMS to Galana latest by 4th June, 2016 (before the expiry of the Bank Guarantee).
>
> ii. Galana shall immediately release all the SOT stock of MGS upon delivering bank guarantee to KPRL- a) accepting to oversee this process and b) confirming receipt of duly executed Bank guarantee in the pre- agreed format GOKL shall proceed and release the SOT AGO we are currently holding.
>
> iii. KPRL shall on or before 04/06/2013 avail to GOKL physical stocks amounting to 801.599MT of physical PMS stocks against stocks from MGS.
>
> iv. In the event Mogas does not deliver to KPRL 801.599 MT of PMS to enable KPRL give the same to Galana, KPRL shall cash the Bank Guarantee and transfer the full proceeds of the Bank Guarantee to Galana.
>
> v. A tripartite agreement between Mogas, Galana and KPRL shall be prepared & executed by all parties binding them to this arrangement."

11. Galana complained that Mogas failed to honour its part of the agreement and justified holding to the subsequent products purchased by Mogas as lien. Apparently, KPRL did not also act on the above resolutions and no agreement was executed as anticipated in the above resolutions.

12. On its part, Mogas maintained that it never agreed to issue a guarantee to Galana for the release of the product held. And secondly, on the issue of the PMS product it asserted that the same belonged to Mogas International Limited, UAE (hereafter Mogas International) and not itself and that it was merely an agent of the UAE Company. Mogas sought to differentiate itself from Mogas International which it stated was a different legal entity. It was Mogas's case that Galana cannot exercise its right of lien over a product it does not own. Following this standoff both sides alleged that they had suffered loss.

13. The High Court heard the matter and after reviewing the evidence and considering the submissions, the learned Judge discerned the following as requiring answers: -

    1. is Galana in breach of the terms and conditions of the tender it won under the open tender system by refusing to release the 1,125 Cubic meters of Gasoil (AGO) already paid for by the plaintiff?

    2. is Galana entitled to 801.599MT of PMS or its worth from the plaintiff?

    3. if the answer to (ii) above is in the affirmative, does Galana have a right of lien over the 1,125 Cubic meters of Gasoil (AGO) already paid for by the Plaintiff?

    4. which party is in breach of the obligation due to the other? and

    5. which party is entitled to damages? If so, of what nature and quantum?

14. In answer to the first issue the learned Judge held that:

> " 15. It is uncontested that the Gasoil (AGO) under dispute was imported under the open tender system (OTS) governed and administered by the Ministry of Energy (M.O.E) ....
>
> 16. It is common ground that Mogas fully paid for 1,125.290 cubic meters of Gasoil (AGO) imported via vessel "Merkur" and 944.497 cubic meters of the same product imported via vessel "Torm Almena". For that reason, the expectation of Mogas would be that the products would be released to it and Mogas relies on clause 11.6.1 in respect to Transfer of Entitlement...
>
> 17. In so far as there was no dispute or claim related to the OTS, the expectation of Mogas was thus far not misplaced. However, Galana makes the argument that Mogas on its own Will created a lien over the withheld products."

15. In answer to the second issue the learned Judge held that –

> " ...by the time the error was discovered by Galana in August 2012, the plaintiff's name had changed from MGS International to Mogas (k) Ltd. Whether as principal or as an agent, it is into the account of Mogas that the erroneous entry was made. It is, therefore, little wonder that Mogas (K) ltd pleaded that it has been willing to correct the book error and in fact, wrote to KPRL on 22nd November 2012 (P. Exhibit page 115) to adjust its stock entitlement on a permanent basis by decreasing 703.243MT of PMS in favour of Galana. Mogas cannot now resile on that position by invoking the authority of rule of separation of legal entities."

16. On the 3rd issue as to whether Galana had a right of lien over the products of Mogas, the learned Judge held that the lien given by Mogas was limited to it cooperating so that KPRL would reverse the double entry and release physical stock to Galana. Having demonstrated its willingness to do so, Galana was and is not entitled to continue holding the product.

17. In conclusion the learned Judge made the following orders;

> "(1) The defendants counterclaim is dismissed with costs.
>
> 2. Judgment is entered for the plaintiff as follows: -
>
> (2.1) An order is hereby issued compelling the defendant to release 1,125.298 cubic meters of petroleum product (AGO) to the plaintiff within 30 days of this judgment.
>
> (2.2) Any loss resulting from price variation between the date when the product was paid for and at the date of release shall be paid by the defendant to the plaintiff.
>
> (2.3) If the parties are unable to agree on the price variation, then either party is at liberty to move the court to prove the loss, if any.
>
> (2.4) If for whatever reason the defendant is unable to release the product referred to in 2.1 above, it shall within the said period of 30 days pay to the plaintiff a sum equivalent to the value of the said product as at the date it was paid for.
>
> 2. The plaintiff shall be entitled to interest on any unpaid sum at Court rates from the date of judgment until payment in full.
>
> 3. The plaintiff shall also have costs of this suit."

18. Aggrieved, Galana lodged this appeal in which it has proferred fourteen grounds, which are accompanied by explanations, contrary to Rule 88(1) of the Court of Appeal Rules which requires the grounds of appeal to be concise and without any narrative or explanations. In summary the appellant states that the learned Judge erred;

> "a) In holding there was no evidence that Mogas benefited from the double entry and that there was no proof that because of the erroneous entry it received physical product twice.
>
> b. In the manner that he interpreted the evidence of the plaintiff's and the defendant's witness.
>
> c. In making a finding that the plaintiff had not benefited from the double entry of 801,599 Metric tonnes of fuel to the plaintiff's account with the defendant at the Kenya Petroleum Refineries Limited.
>
> d. In holding that there was no actual physical stocks released to the respondent after the double entry yet the undisputed statement from Kenya Refineries Limited showed actual transfer of the physical stock;
>
> e. In his interpretation of the effect and purpose of the lien the appellant had(has) over the respondent AGO stock and in holding that the lien was in fact intended to be exercised until the respondent righted its account with Kenya Petroleum Refineries Limited and re- transferred the appellant stock.
>
> f. In holding that the appellant's lien over the respondent AGO stock was discharged because the respondent has cooperated.

g. In interpretation of the dispute between the respondent and the appellant.

h. In his interpretation of the dispute and the evidence led by the witness as he ignored and did not refer to submissions by the appellants lawyer at all.

j. In considering extraneous facts that were not relevant to the issues for determination and in failing to consider relevant facts and documents.

k. In excess of jurisdiction and gave a very punitive judgement in favour of the respondent.

l. The judgment is not balanced and is against the weight of the evidence produced before the court."

19. This appeal was virtually heard before us on 27th November 2024.

Learned counsel, Gichuki Kingara and Mr. Mirie appeared for the appellant while Mr. Havi and Ms. Waitere, learned counsel, appeared for the respondent. Counsel orally highlighted their respective written submissions dated 6th October 2020, 28th September 2023 and 29th January 2021 respectively. We summarise the said submissions as hereunder.

20. On grounds 1, 3, and 4, the appellant submitted that the respondent received 801.599 MT of Premium Motor Spirit (PMS)— in two batches (703.243 MT and 98.356 MT)—from KPRL, exceeding the agreed 1500 MT, and that this extra credit was uncontroverted and admitted by the respondent.

21. It was submitted on behalf of the appellant that under the toll regime (stock entitlement system), KPRL implemented a double- entry mechanism whereby, upon payment, the seller's stock entitlement was debited and the buyer's credited accordingly.

22. The appellant cited the Deloitte Report and KPRL correspondence confirming that the respondent was erroneously credited with 801.599 MT of PMS. The respondent's witness admitted the duplication and confirmed that reversal was permitted but not effected. The appellant questioned how a mere book entry could result in a confirmed increase in respondent's stock and decrease in his own.

23. The appellant submitted that the anomaly, though disputed in effect, was acknowledged by the respondent, and the outturn report showed that stock entitlement adjustments occurred only when the seller's stock was physically available.

24. The appellant maintained that it lost 801.599 MT of PMS and that the Deloitte report, KPRL records, and respondent's negative stock position confirmed that the respondent utilized the credited PMS. As physical stock was affected, the respondent clearly benefited. The respondent neither objected to its own credited entries nor demonstrated how the credited stock was used. Reliance was placed on George Githuku Kamau -vs- Republic [2014] eKLR.

25. The appellant submitted that credit entries increased the respondent's stock and reduced its own, and reversal was only possible if the respondent held sufficient stock. The analogy of Mpesa or bank reversals was used to illustrate that a reversal could only occur if funds Or stock—remained unutilized.

26. Learned counsel reiterated that the respondent's negative PMS stock was confirmed by witnesses, forensic reports, and Deloitte's audit. He stated that the extra PMS had been drawn, and reversal was no longer possible. The appellant claimed losses exceeding Kshs. 112 million and argued that the respondent did not dispute KPRL's audited accounts or its negative stock balance. He blamed the learned Judge for failing to appreciate that the crediting had real effects and was not merely a book entry.

27. On grounds 5, 6, and 11, the appellant submitted that automotive gas oil (AGO) held at Gapco and Hashi Terminals acted as lien security under the respondent's express waiver. The AGO was the only security available to recover the erroneously credited PMS.

28. The appellant argued that parties are bound by their agreements, and that the respondent's witness had admitted to the lien and so the trial Judge's contrary finding was erroneous. Serah Njeri Mwobi -vs-John Kimani Njoroge [2013] eKLR and 748 Air Services Ltd -vs- Theuri Munyi [2017] eKLR were cited on waiver, estoppel, and lien.

29. On grounds 2, 7, 8, 9, 10, 12, 13, and 14, Mercy Kirito Mugeti - vs- Beatrice Nkatha Nyaga & 2 Others [2013] eKLR was cited.

    The appellant submitted that the trial Judge erred by considering extraneous matters and misinterpreting the impact of the erroneous credit. The learned Judge was cudgeled for treating the acknowledged double entry as a mere book error, ignoring the lack of sufficient stock for reversal. According to counsel the trial Judge's dismissal showed bias and misunderstanding of the KPRL toll regime.

30. Learned counsel for the appellant submitted that the learned Judge's misapprehension of facts led to dismissal of the entire case without considering pleadings, evidence, and legal authorities, showing clear bias and an unjust enrichment of the respondent.

31. The judgment, it was submitted, flowed from an illegality - wrongful acquisition of the appellant's PMS. Kenya Ports Authority -vs- Fadhil Juma Kisuwa [2017] eKLR was cited to affirm that no legal benefit can flow from an illegal act.

32. In conclusion, the appellant urged that the respondent admitted receiving the extra PMS, used it, and maintained a negative stock at KPRL and that initially, the respondent was willing to return the product or its value.

33. In reply, the respondent submitted that upon discovery of the error from double instructions, it sought KPRL's help to verify the appellant's claims. KPRL, through emails dated 16 August and 12 November 2012, confirmed the duplication and proposed to rectify the error by stock adjustment - crediting the appellant and debiting the respondent.

34. KPRL also requested a bank guarantee from the respondent to cover any exposure. The respondent complied, despite having sufficient stock to allow correction. Before correction could be effected, the appellant demanded that the guarantee be issued directly to it and that KPRL release the PMS. The respondent denied ever drawing the extra PMS.

35. The respondent on the other hand claimed that the appellant admitted to erroneously issuing double instructions and discovered the error two years later. It then started pressing for physical release due to the impending regime change at KPRL, but the appellant demanded a guarantee, cashable within three months as a condition before the product could be released. The lien was temporary and meant only to ensure cooperation.

36. The respondent submitted that the lien was never meant to secure PMS delivery from KPRL to the appellant. Jabane -vs- Olenja [1986] eKLR was cited on appellate review of factual findings.

37. On grounds 2, 7, 8, 9, 10, 12, 13, and 14, the respondent stated that the withheld AGO related to a different transaction and had no relation to the disputed 801.599 MT of PMS and negotiations were held to resolve the dispute.

38. The appellant, it was alleged, misrepresented facts to the Ministry of Energy, leading to sanctions against the respondent. Upon clarification, the respondent was reinstated, having received only one pump-over.

39. The respondent denied any judicial bias and stated that no pressure was exerted to refund the product. The appellant allegedly failed to respond to the Ministry's letters seeking clarification.

40. According to the respondent they learned that the appellant sought to sell 1.125 cubic meters of AGO it was holding and this prompted the respondent to seek court protection on 19th April 2013.

41. The respondent urged the Court to dismiss the appeal with costs and uphold the trial court's decision.

42. Responding to the respondent's submissions, the appellant reiterated that the 801.599 MT credit was undisputed, uncorrected, and KPRL's books closed with the error. The trial court's finding that it was a harmless book error was contrary to evidence.

43. The trial court, it was submitted, wrongly absolved the respondent of blame for delay in reversing the credit and based its findings on unsupported submissions while ignoring the appellant's evidence.

44. The appellant submitted that KPRL was transitioning into Kenya Pipeline Company, necessitating timely dispute resolution. The respondent engaged in delay tactics, leading to closure of KPRL with erroneous credits benefiting the respondent. The appellant submitted that the resulting judgment amounted to unjust enrichment of the respondent.

45. We have considered the record, the submissions by counsel, the authorities cited and the law. This is a first appeal from the decision of the High Court in its original jurisdiction. Our mandate as a first appellate court is as stipulated explicitly in Rule 31(1) of the Court of Appeal Rules namely, to re-appraise, re-evaluate and re-analyze the record, consider it in light of the rival submissions and draw our own conclusions thereon and give reasons either way.

46. In Selle & Another vs. Associated Motor Boat Company Limited & 2 others [1968] EA 123, the predecessor of this Court delineated this mandate in the following terms:-

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusion. Though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to allow the trial Judge's findings of fact if it appears either that he has clearly failed in some point to take account of particular circumstances or probability materially to estimate the evidence or if the impression based on the demeanour of the witness is inconsistent with the evidence in the case generally."

47. We have considered our above mandate in light of the totality of the record as assessed above. The appellant's hold onto the 1125.298 cubic meters of Gas Oil (AGO) and the refusal to release the same to the respondent leading to the suit before the High Court was intrinsically intertwined with the issue of the double entry of the 801.599 MT of PMS, the subject of the counter claim. The outcome of the latter will impact the former.

48. From the grounds of appeal on record, we discern the main issue for determination to revolve around whether the second entry of 801.599 MT of PMS was a double entry, in paper only, in KPRL's books, or was the entry accompanied by a drawing of the physical

fuel of similar amount?

49. Galana, (the appellant), has maintained the stand that the entry was not merely in paper and that the disputed amount of fuel was actually drawn. Mogas, the respondent, on the other hand insists that although there was a double book entry in the books of KPRL it did not receive any extra physical stock of 801.995MT of PMS; and that basically is the issue that we have been called upon to resolve.

50. From the record and as noted by the trial court it is apparent that sometime in August 2012, an audit exercise carried out by Galana revealed that stock worth of 801.599MT of PMS had been credited to Mogas twice. This was an error according to Galana.

51. That there was an error was acknowledged by Mogas after carrying out its own audit. Mogas stated that its position was that from the audit although there was a double book entry in the books of KPRL it did not receive any extra physical stock of 801.995MT of PMS, nor did it benefit in any way from the said double entry.

52. Efforts to resolve the matter through engagement of auditors and through the intervention of the Ministry of Energy bore no fruit, hence the institution of the suit, counterclaim, and eventually this appeal. After hearing the matter, the learned Judge, in the now impugned judgment, found, inter alia, that the respondent had not drawn the disputed fuel. The learned Judge entered judgment in favour of the respondent as enumerated in paragraph 17 of this judgment. The appellant's counterclaim was dismissed.

53. From the evidence placed before us and having thoroughly read the email communication between the parties herein, KPRL and the ministry of energy, we are able to conclude that there was no evidence placed before the trial court whereby the respondent ever admitted having received the 2nd tranche of the 801.995MT of PMS. Whereas the final email from the ministry spoke about the parties agreeing on some 3 options, the respondent denied having agreed to the terms stated. We observe that the 1st option required KPRL to initiate the process, but KPRL did not act. WHY? Could it be because they had not agreed on the terms? The court will never know the reason as the appellant withdrew the claim it had filed against KPRL in its counterclaim. KPRL's role in the whole saga was important as it was the custodian of the products in question, and it was the party that would have confirmed whether or not the 2nd tranche was released to the respondent.

54. The fact that the respondent agreed to take out a bank guarantee has been used against it. According to the appellant, this amounted to an admission of having received the disputed product. The explanation given by the respondent was that it was coerced, or arm twisted to do so as the appellant had refused to release an unrelated supply (the subject of the suit before the High Court), and also accused the respondent to the ministry of energy and it was becoming very difficult for the respondent to trade. The respondent was consistent to the end that it never received the disputed tranche.

55. There was no document placed before the trial court to demonstrate that the respondent had acknowledged having taken the 2nd tranche of the 801.995MT of PMS. That was the finding arrived at by the trial court, and we find no basis to depart from it. We are satisfied that the learned Judge considered all the material placed before the court, as we have, and he arrived at the right conclusion. That being so, we find that the appellant was not justified to hold the respondents AGO as lien. Our finding is that the orders granted by the trial court were merited and, further, that the appellant's counterclaim was properly dismissed.

56. Ultimately, we find this appeal without merit and dismiss it with costs to the respondent.

**DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF OCTOBER 2025**

**W. KARANJA**

**…….**

**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

**…….**

**JUDGE OF APPEAL**

**A.O. MUCHELULE**

**…….**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**Signed**

**DEPUTY REGISTRAR.**