REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

HC.COMM. CASE NO. 16 OF 2009

PETRO OIL KENYA LIMITED.....PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LTD.....DEFENDANT

RULING

Background:

1. In the matter before me, the plaintiff filed a suit against the defendant seeking a raft of prayers among them Kshs.150,434,131/= on the 6.4.2009. That plaint was amended an 20.3.2012 to delete some of the prayers an enhance the liquidated claim.

2. On coming into force of the Civil Procedure Rule 2010, and pursuant to court order of 21.2.2012, (Mwera J) the parties filed witness statements as well as lists and copies of documents. The parties also filed witness statements including the Supplementary Witnesses Statement of one BENJAMIN GATHURA KINGORI dated the 17th October 2014 and filed in court on 21.10.2014. That statement was bound together with a supplementary list of document containing, among other 6 documents, a document entitled *"Forensic Investigation by Price Waterhouse Coopers".*

3. The defendant has not been pleased with the two document and has moved this court by the Notice of Motion dated 2.2.2015 seeking orders that the two be struck out on the grounds that the statement relies on the document which is subject to legal privilege. The basis is that it was procured by the defendant in contemplation of litigation and for purposes of obtaining legal advice and contains legal advise from **Coulson Harvey advocates**; that reliance on it by the plaintiff would prejudice the defendant who has not waived its privilege.

4. On its part the plaintiff filed a reply by its Chief Executive Officer which affidavit refutes that the report is subject to legal privilege; that is was not made with the dominant purpose and in contemplation of litigation and that PWC is a third a party to the proceedings and not an advocate for which legal privilege could attach. On procedure the plaintiff pointed out that the defendant failed to identify the report in its list of documents as being privileged and failed to point the grounds of such privilege.

Submissions by the Defendant/Applicant:

5. In its submissions dated 24.1.2015 and filed on 29.4.2015 as amplified in the highlights by Ms.Wanjiru Ngigi, the Defendant /applicant avers that the report by Price Water House Coopers headed *'Project Bahari Forensic Investigation into the administration of DFA Arrangement'* was made in contemplation of litigation was thus privileged and could not be produced in litigation by the plaintiff unless there had been a waiver by the defendant; that it took the earliest and first opportunity to claim the privilege and sufficiently identified the document and gave reasons for claiming privilege in its list of documents dated 7.2.2011 and that, that being the position it was not open to the plaintiff to produce the document as it had purported to do.

6. The defendant then relied on treatise by **Zuckerman,** *Principles of Civil Procedure,* in which the writer underpines the principles of legal privilege to the inviolable right to fair hearing based on unfettered access to legal advice. Reliance was equally put on the decision in **Glucore Energy UK Ltd.-vs- Kenya Pipeline Co. Ltd. [2011]eKLR** in which Judge Mugo held that the report subject matter of the ruling was procured in contemplation of litigation and was thus privileged and could not be relied upon by the plaintiff in that case. **Baseline Architects Limited & 2 Others -vs- National Hospital Insurance Fund [2008] eKLR** was equally cited to the court for the proposition that document exchanged between the respondent and the office of the Attorney General, as its counsel, having been obtained by some unconventional means by the plaintiff were not admissible for portending possible injury to the public interest expected to be enhanced by free and candid communication between the defendant and that office in the course of obtaining legal advice.

7. Reference was made to the decision in **Waigh -vs- British Railway Board to [1980] AC 521** to the effect that legal advice and communication leading to it are inviolable and cannot be allowed to be produced by the opposing side. The Defendant/applicant closed its submissions by praying that the application be allowed, the supplementary witness statement and the list of documents attached and bound with it be struck out.

Plaintiff/Respondents submissions:

8. In response to the submissions offered on behalf of the defendant/applicant, the plaintiff filed written submissions dated 8.8.2015 together a list of authorities with decided cases, and at highlighting, was represented by Mr.Muiruri who reiterated the writings and pointed out the fact that there was nothing to show that the document prepared by PWC was procured in contemplation of litigation neither was it a legal advice; that the principle and shield of legal privilege was only available on communication and legal advice itself between advocate and client and that the dictates of disclosure and reservation of the privilege as set out by the learned author of HALBURY'S LAWS OF ENGLAND had not been met by the defendant's applicant in that there was no claim to privilege made in the list of documents with sufficient grounds of claiming the privilege.

9. The decision in **Glencore Energy** was then cited to buttress the point that the document must be sufficiently described and identified in the list of documents or affidavit in the same manner as documents not objected to. In addition the plaintiff/Respondent relied on the paragraph 433 of the Supreme Court Practice 1997 Vol 1 to the effect that a document coming into existence for any other purpose other than to instruct a lawyer or form part of his brief, such document are not deemed to be privileged. This was furthered with an argument that Section 137 of the Evidence Act only protects communication between an advocate and his client and does not extend to a communication between the defendant and its auditors. For that reason Mr. Muiruri relied on *Halsburys' Laws of England 4th Edition (Vol 13)* to the effect that the privilege is confined to the legal profession and does not extend to communication between a party and his accountant.

10. Mr.Muiruri then relied on **Waigh -vs- British Railways Board** and **Chantrey Martin & Co. -vs- Martin [1953] 2 All ER, 691** for the proposition that there must be advocate client relationship and that the purpose of preparation of the document, to be accorded privileges, was to get legal advice. The counsel then wrapped up his submissions by pointing out that the decision by Mugo J, In Glencore Energy(supra) was a decision of a court of concurrent jurisdiction and therefore merely persuasive and not binding upon this court.

Analysis and determination:

11. My appreciation of the dispute I am called upon to resolve in the application before the court is whether a document now referred to as '**PWC report**' headed '***Project Bahari, forensic investigation into the administration of the CFA arrangement***" is privileged by virtue of having been prepared in contemplation of litigation or as an advice by a solicitor to a client.

12. To understand the document, its purpose, import and intendment one needs to look at the Notices and Nature the author served and attributed to it. As a preamble, the author has given a notice and confidentiality tag to the report: it says:

"Important Notice: This report 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 on going proceedings currently before the courts or in the anticipated arbitration and as such is subject to legal privilege.(empahsis provide)

Confidentiality:This report has been prepared for the exclusive use of the Kenya Pipeline Company Ltd. And the Ministry of Energy. The contents of this report may not be in whole or part be copied quoted, referred to disclosed or deliminated to any other party without our prior written consent."

13. Then there is a letter by the defendant dated 26.1.2009 to Inamdar and Inamdar Advocates. The third last and second last paragraphs of that letter are crucial in understanding how and why the report was sought and procured. In it, the Ag. Managing Director writes:-

"4.The ministry of Energy of the Government of Kenya has established a team to coordinate the verification of the various claims and coordinate discussion with the various parties effected by the developments at Triton Account.

In the circumstances, we would request that kindly withhold any action to enable us conclude the audit within the next thirty days. Further, the Government of Kenya through the Ministry of Energy and KPLC is keen to reach an amicable resolution to the various matters that have arisen out of this saga satisfactory to all parties. We will keep you updated of progress to this end." (emphasis provided)

14. It may interest one to note that the letter above was written on the 26.1.2009, the PWC report was made on the 6.4.2009 and the suit herein filed on the same day.

15. Even before I seek to answer the question whether the document is one protected by legal privilege under section 137 of the Advocates Act, which has been invoked to found the application, I will address the question whether or not the report was prepared in contemplation of litigation and in particular this particular ligation. My reading of the excerpts of the report produced above and the letter that requested for indulgence from the plaintiffs reveal to me that the report was intended for negotiation with the

affected parties on what the defendant and his accountant called the *"triton saga"*. From the important Notice, it is clear that the primary purpose was for use in negotiating a settlement. The only time the report could be used for litigation was for cases that were already on going before court. It is noteworthy that the letter of 26.1.2009 was unequivocal on its terms that the report was awaited to facilitate resolution to *'various matters that have arisen out of this saga satisfactory to all parties.'* Even to this extent only, I am convinced in my mind that the report was never procured nor was it made in contemplation of this or indeed any future litigation but primarily for an amicable resolution of claims by parties affected by the triton saga and to address the ongoing litigation. This matter was never in existence or ongoing at the time the report was requested and prepared.

Is there legal privilege:

16. Section 137 of the Evidence Act has side note reading

"No one shall be compelled to disclose to the court any confidential communications which has taken place between him and his advocate unless he offers himself as a witness, in which case he may be compelled to disclose any such communications as may appear to the court necessary to be known in order to explain any evidence which he has given, but no others."

17. In my view this is a privilege to protect communication between an advocate and his client intended to promote, bolster and facilitate fair hearing and able representation in that a client is assured, to the full extent, that whatever communication or confessions made to an advocate are kept confidential. It must be kept in mind that that privilege is to the client and not the advocate.

18. Having reviewed the treatises cited to me and the decided cases, I am firmly convinced that the legal privilege, as the name suggests, is a preserve of the legal profession.

Halsbury's (ibid) leave no doubt on this point when it states at paragraph 72:-

"Cases in which privilege arises: The privilege is confined to the legal profession. It extends to barristers, solicitors and legal executives in their employ whether in private practice or full time as salaried, legal advisors by government departments or commercial concerns, provided they are acting in their capacity as legal advisors.. the privilege does not extend to communication between a party and his medical advisor or spiritual adviser, or non-professional friend or adviser or an accountant."*(emphasis provided)*

19. This position was followed with approval in the case of **CHANTREY MARTIN & CO. -VS- MARTIN** (supra) where the court of appeal said and held that an audit report by the plaintiff to the company created a relationship of a professional man and his client and not an agent and principle and that their having been no question of legal advice, the defence professional privilege could not arise.

20. I have had a chance to visit the website of the audit firm of Pricewater House Coopers at **www.pwc.com/ke/en** just to find out what its entity is and what services they provide. My visit reveal that; ***"Pricewater House Coopers is one of the Kenya's leading professional services firms focused on providing audit and Assurance, Advisory and Tax Services".*** There is no claim whatsoever that the firm provides legal services or can indeed act as an advocate's firm. That to me shuts any window for any argument that the report rendered at the request of the defendant and forming the subject of this determination could have been intended or indeed deemed as a legal advice in the nature of solicitor/advocate client legal opinion intended for litigation and therefore capable of being accorded legal privilege.

21. Having found that there is no relationship in the nature of Advocate/client or indeed any legal opinion rendered by such advocate to the defendant, my determination is and can only be that the report is not subject to legal privilege can be produced and relied upon at trial and therefore the application dated the 2.2.2015 was founded upon misconception of the law in that regard and must fail. It thus fails and is therefore dismissed with costs.

22. For purpose of case management I wish to only add that the application having been premised on order 11 Rule 3(2) (O) III it was an outright waste of judicial time and an act in escalating costs of litigation. I say so noting that by the time the application was filed, this file had been listed for pretrial directions on 22/10/2014 when the judge made the following observations:

"Since the defendant has an expert report which they have not filled, the pretrial is adjourned. The pretrial is adjourned to 3.12.2014."

23. On the 3.12.2014, instead of drafting and filling the current application on 3/2/2015 and taking a date for hearing some three months later, I am of the view that a lot of valuable time would have been saved had the defendant instead fixed the matter for case conference and sought directions in the nature of orders sought in the current application.

24. I express displeasure at this practice where a party seeks to ground a formal application where none is anticipated by the rules and in the course of it going diametrically contrary to the overriding objective of the court. For courts' time and resources to be used efficiently and proportionately this practice must be discouraged. Matter that can be dealt with under **Order 11** during the three set conferences ought to be dealt with as prescribed by the Rules and not otherwise.

Dated, signed and delivered at Mombasa this 11th day of March 2016.

In the presence of:-

Mr.Oduor holding brief for Mugiru for the Applicant/plaintiff.

Mr.Tole holding brief for Mr.Muthuri for the Defendant/Respondent.

P.J.O.OTIENO

JUDGE