



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION

MILIMANI LAW COURTS

HCCC NO. 150 OF 2013

MOGAS KENYA LIMITED.....PLAINTIFF

VERSUS

GALANA OIL KENYA LIMITEDDEFENDANT

RULING

1. Galana Oil Limited (**the Defendant/Applicant or Galana**) has lodged Civil Appeal No. 36 of 2019 against the Judgment of this Court of 27th June 2019 and now seeks stay of that Judgment for 45 days or such other period to enable it prosecute a stay application before the Court of Appeal. The application before me is dated 24th July 2019.

2. The Application is substantially mounted under the provisions of Order 42 Rule 6 of the Civil Procedure Rules which reads:-

Stay in case of appeal.

6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

3. The conditions to be met before the grant of a stay by the High Court from its own decision to the Court of Appeal are well known:-

a) The suitor must demonstrate that it will suffer substantial loss if stay is not granted.

b) The application is brought without undue delay.

c) The applicant must provide such security as the Court orders for the due performance of such decree or order as may ultimately bind him. All three prerequisites must be met and none is less worthy than the other.

4. At the time of delivery of the Judgment on 27th June 2019, the Court granted stay for 30 days. That temporary stay would lapse on 29th July 2019 because 28th July 2019 was a Sunday. This application was therefore brought 5 days to the end of the stay period. The application was therefore brought promptly and without delay given also that it was just twenty seven days after the date of delivery of the Judgment. Even the Respondent (**Mogas Kenya Limited**) concedes as much.

5. The more critical issue, as is often, is whether the refusal to grant stay will cause substantial loss to the Applicant. Without going into the background of the dispute, the effect of the decision of this Court is that it directed Galana to release 1,125,298 cubic meters of petroleum product (AGO) to Mogas and in addition to pay for any price variation between the date when the product was paid for and at the date of release. If unable to release the product, then Galana was required to pay to the Plaintiff a sum equivalent to the value of the said product as at the date it was paid for.

6. After setting out why he thinks the intended Appeal is arguable (an issue that is not relevant for purposes of the application before Court), Anthony Nzale Munyasya (The Managing Director of Galana) depones:-

i Unless the stay of execution is granted the Appeal and the Application in the Court of Appeal will be rendered nugatory.

ii That in the intervening period, the Respondent is not likely to suffer any prejudice should orders be granted by this Court preserving the subject matter and has directly benefited from the double entry and supply of 801.599 MT of PMS and should this appeal fail, it will still receive the 1,125,298 cubic meters of petroleum product (AGO) held with KPRL.

7. Making greater effort to show the risk of substantial loss, Munyasya

sworn a further affidavit on 10th September 2019. In it he depones that Mogas had closed nearly all its outlets and gives examples as its station

at Mai Mahiu, Nakuru Town, Ngong Town, Kitale Town. That he was aware that Mogas was selling its petrol station at Joska, Nairobi and that its Karatina station was heavily mortgaged. In the end, Galana takes the position that Mogas is “man of straw” (more appropriately a person of straw!).

8. Mogas, perhaps because of the manner in which the application was presented, was drawn into arguing the merit of its case and decision. This as I had stated earlier was an irrelevant consideration and therefore unnecessary.

9. Nathan Kosgei sworn two affidavits on behalf of Mogas. Mogas attempts to demonstrate its ability to satisfy the Judgment if the Defendant was to succeed. He states that Mogas is a profitable company with assets in Kenya. Annexed to the affidavit of 14th August 2019 is a copy of the title to Karatina Block LR No. 1/284 and a valuation report returning an open market value of Kshs.130,000,000/=.

10. Reacting to the allegations of closure of its stations, Mogas states that all the other stations other than Mai Mahiu were under lease and it opted not to renew the leases. It also states that its station at Joska is under a long lease and Mogas is in the process of acquiring it at a price of Kshs.110,000,000/=. As for the Karatina station, Mogas avers that the facility is serviced and there is no risk to the property.

11. Mogas boasts of having other stations on title Nos. Kisumu/Manyatta B/3068, Kijabe/Kijabe 1/6361 and Jogoo Road (L.R No. 209/440/714). Finally it states that it is trading, participating and winning tenders under the OTS to supply petroleum products to other marketers and is on sound financial footing.

12. With this information, the Court is able to make a call as to whether Galana is at a risk of suffering substantial loss if stay is not granted. The Court has considered the rival submissions of counsel.

13. In the matter before Court, Galana expresses reservation about the ability of Mogas to meet the ultimate order emanating from a successful appeal if Galana was to satisfy the High Court decree.

Galana justifies the skepticism on Mogas financial inability. The Applicant has, to its credit, put forward information that challenges the Respondent's fortunes. It asserts that the Respondent is closing its stations and that the property which the Respondent had cited to be a valuable asset is under mortgage.

14. In this type of matter, once the applicant expresses doubt as to the financial strength of the respondent to meet the ultimate decree from an Appeal, then the burden shifts to the respondent to debunk that doubt. This is because more than anybody else the respondent is expected to have intimate knowledge of its financial and asset worth.

15. Mogas has made attempts to debunk the apprehension by Galana as being misplaced. Let me examine the evidence put forward by the Respondent. It admits that it has closed down stations at Nakuru, Ngong Town and Kitale but explains that it opted not to renew the leases.

That may be so but it has not explained the closure of Mai Mahiu station.

16. Other than Karatina, it states that it owns stations at Kisumu, Kitale and Jogoo Road and gives copies of titles to the properties in proof. What it does not do, and this is a crucial omission, is to give the value of these properties. Again looking at copies of the titles, the Kisumu and Karatina properties are encumbered by way of charges.

17. Regarding Karatina station which stands on Karatina Town Block 1/284, whilst its market value is placed at Kshs.130,000,000/=, the property is charged to Barclays Bank to secure Kshs.30,000,000/= and a further sum Kshs.70,000,000/=. That notwithstanding, Mogas gives the assurance that it is servicing the facility and the property is not at risk of forced alienation. Yet what is critical for this purpose is whether the property would be available to satisfy an ultimate decree when required. A property encumbered by a bank loan is not readily available until discharged. The Court is not told if and when the property will be discharged.

18. I turn to the petrol station at Joska. This, the Court is told is on a long term lease and is currently under acquisition from the owner at Kshs,110,000,000/=. However, I observe that from the sale agreement (Clause 4.2) that the entire purchase price is being financed by Equity Bank of Kenya Limited against a charge to be registered over the property. Just like the Karatina property, Joska, once acquired, may not be readily available to meet the ultimate decree if so required.

19. On another front, Mogas says that it is trading, participating and winning tenders under the OTS and is a profitable company. Unfortunately there is no evidence tendered of this successful trade and profitability.

20. In the end, Mogas has only managed to persuade the Court that the assets within reach of an ultimate decree are the Mai Mahiu, Kijabe and Jogoo Road properties. Yet this Court is not told of their values.

21. This Court must weigh this against the exposure that the Applicant will be left with if it were to satisfy the decree at once. The Court's Judgment against the Defendant was 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.

(3) The Plaintiff shall be entitled to interest on any unpaid sum at Court rates from the date of judgment until payment in full.

(4) The Plaintiff shall also have costs of this suit.

22. At the hearing and this was captured in the Judgment, the witness for Mogas placed a value of the unreleased stock at the time of purchase in 2012 at USD 1,243,085.00. This is the least exposure that Galana will be left with upon satisfaction of the decree.

23. Now, Mogas has not revealed the value of the assets or other sources that would be readily available to repay USD 1,243,085.00 if required to do so at the end of the Appeal. For this reason, I find that Galana has established that it's fear of suffering a substantial loss if stay is not granted is not a trifle.

24. This Court is not unaware that Mogas decried that further stay would occasion it immense loss and damage. The truth of the matter is that it has been deprived of this stock for some time now and further stay will only cause it more anguish. Yet, Galana has exercised its undoubted and valued right of Appeal and there is no knowing whether it will succeed. The Court must be careful not to put Galana in a position where it shall be left with a hollow victory. The Court must find a balance between this competing interests.

25. The balance is to grant the order but on condition that it sufficiently secures the interests of Mogas. Galana argues that there is no need for further security as the AGO which ought to be released to Mogas is in the safe hands of KPRL. I am too sure that from the facts that played out at trial and as captured in the Court's Judgment, the matter is that straightforward. This Court shall therefore require Galana to furnish security.

26. The Application for stay is granted as prayed for in the Notice of Motion of 24th July 2019 on condition that the Defendant furnishes to the Plaintiff a Bank guarantee for the sum of USD (United States Dollars) 1,243,085.00 from a reputable Bank within 60 days of today. A copy to be filed with Court. Each party to bear its own costs of the Application.

27. Lastly, I apologise to parties for the time this Ruling has taken. Due to human failing, this matter fell through the cracks. Indeed, were it not for Counsel Waitere's inquiry about it when she made a virtual appearance before me in another matter, the delay could possibly have been worse. And it did not help that the Covid 19 lockdown caught up with me at Eldoret, where i could not readily access the Court file.

Dated, Signed and Delivered in Court at Nairobi this 22nd Day of June 2020.

F. TUIYOTT JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:

Kingara for the Applicant.

Waitere and Havi for the Respondent.