



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 1388 OF 1992**

**RONO LIMITED ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**CALTEX OIL (K) LTD. .... DEFENDANT/APPLICANT**

**RULING**

1. The application before the Court is dated 19<sup>th</sup> January, 2012 and is brought under the provisions of **Sections 1A, 1B, 3A and 63** of the *Civil Procedure Act*. The Applicant seeks the following prayers:

**“1) THAT pending the hearing and determination of this application, there be a stay of further proceedings in the suit;**

2. **THAT pending the hearing and determination of C.A Civil Appeal No. 97 of 2008 Caltex Oil (K) Ltd v Rono Ltd, there be a stay of any further proceedings in this suit.**

3. **THAT costs of and/or incidental to this application be in the cause”.**

2. The grounds upon which the application is predicated are that the appeal is merited and arguable and that the appeal would be rendered nugatory if the prayers sought are not granted. The Applicant detailed that undue prejudice will be suffered by it which cannot be adequately compensated by an award of costs and/or damages.

3. The application is opposed. In the Grounds of Opposition dated 24<sup>th</sup> February, 2012, the Respondent contends that the application is frivolous, having been filed over 10 years after judgment on the issue was entered (by Ole Keiwua, J on 15<sup>th</sup> February, 1999). It maintained that the Applicant’s conduct in the matter does not merit an equitable remedy and that it is a belated attempt to prevent assessment of damages due to the Respondent. The Respondent relied on the authorities of **Silverstein v Chesoni (2002) 1 E.A 296**, **I.I.E.C v Mwangi (2011) eKLR** and **Mbuthia v K.P.L.C (2010) eKLR** in its defence.

4. The Applicant in its application relied on **Sections 1A, 1B and 63** of the *Civil Procedure Act*. These sections provide for the expedient, fair and just disposition of matters and the Court’s exercise of its authority in supplemental proceedings. The courts inherent jurisdiction may be

invoked in instances where there are no strict guidelines or procedure on how a matter is to be presented before or determined by Court. This power should be exercised with discretion. It should not be exercised or used as a panacea in all matters, but only in matters where the Court reserves the use of its residual authority. The Applicant seeks a stay pending intended appeal. The provisions of law that it has cited, in particular **Sections 1A and 1B**, are with regard to the effective, expeditious, just, proportionate and affordable resolution of disputes. It has nothing to do with stay of proceedings pending appeal. Likewise **Section 63** deals with supplemental proceedings or orders that the courts may invoke or make in the interests of justice under prescribed law.

5. Although the Court can decipher the Applicant's intentions, the law is express that the Court shall be guided by the rules of procedure and cannot act *sui moto*. The laid out procedure under the *Civil Procedure Rules* are the handmaidens of the Courts, and as such, it shall be bound by them. This is the position that was adopted by the Court of Appeal in **Mbuthia v K.P.L.C** (supra) in which the learned Judge of the appellate Court held, *inter alia*:

**“We take it that the applicant is asking the Court for an order of stay of execution and a stay of further proceedings under Rule 5 (2) (b) of the Court’s Rules; we do not know what Sections 3A and 3B have got to do with the matter. Those Sections are meant to deal expeditiously and justly with matters before the Court.”**

6. However, in **Mediratta v Kenya Commercial Bank & Others [2006] 2 E.A 194**, Emukule, J found that the rules and principles under **Order 5 (2) (b)** of the *Court of Appeal Rules (2010)* do not apply to the High Court in an application for stay of proceedings and/or execution. To my mind, the principles which the learned judge was referring to were that the intended appeal is arguable and would be rendered nugatory should the stay order not be issued. These were the grounds upon which the Applicant herein brought his application. Whether the issues raised in the intended appeal are arguable are beyond the scope and jurisdiction of this Court. It is for the Court of Appeal to determine whether the issues raised have merit and indeed if argued, may render the intended appeal nugatory or otherwise.
7. In my view, the Applicant has relied on grounds which only the Appellate Court has the jurisdiction to determine. The grounds upon which an application for stay pending appeal may be brought before the High Court are encapsulated under **Order 42 Rule 6** in which the Court may, for sufficient cause, order for stay pending an appeal. **Rule 6 (1)** provides for the grounds upon which the Court will determine whether or not to issue its Orders. These are not the grounds upon which the Applicant relied in its application. In referring to the ruling of **Owner of Motor Vessel “Lilian S” v Caltex Oil (K) Ltd (1989) KLR 1**, which was aptly cited by the Applicant in its Skeletal arguments on the issue of jurisdiction, the Court of Appeal in the matter held:

**“... jurisdiction is everything. Without it a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings...a court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction ...”**

8. As above, I fully concede with the remarks of my learned brother Emukule J as expressed in the **Mediratta** case:

**“Order XLI, rule 4 (1) of the Civil Procedure Rules empowers this Court for sufficient cause to order a stay of execution of its decree or order. The same rule confers upon the Court of Appeal the same powers to stay execution. For the Court of Appeal to grant a stay of execution, the applicant must satisfy the provisions of rule 5 (2) (b) of the rules of that Court, that:**

**“(i) The intended appeal is arguable and not frivolous at all;**

**(ii) That if the injunction or stay order is not issued and the intended appeal eventually succeeds, it will be rendered nugatory by the refusal of the grant of**

such injunction or stay”.

**We are not here concerned with the principles for grant of stay or injunction in the Court of Appeal, although as observed by Mwera J in Century Oil Trading Company Limited v Kenya Shell (supra), counsel often mix up these principles with those applicable for grant of stay in this Court. The principles for grant of a stay in this Court are set out in Order XLI, rule 4 (2) and which the applicant must satisfy the Court that:**

- “(i) Substantial loss may result unless the stay is given.**
- (ii) The application for stay had been lodged without delay; and**
- (iii) The applicant has furnished security for due performance”.**

**Order XLI, rule 4 (1)** as referred to above is now **Order 42 Rule 6** of the *Civil Procedure Rules, 2010*.

9. From the above, it is plain that the provisions of the law that the Applicant has employed are irrelevant to the application before this Court and fall within the purview of the Court of Appeal **(Rule 5 (2) (b))**. The Applicant has not shown how it will suffer substantial loss or undue prejudice should the stay not be granted. Neither has the Applicant offered to furnish any security for due performance. Further, the application has been brought 10 years after the Judgement appealed from, was delivered, which amounts to inordinate and undue delay. The conclusion to all the above is that the Applicant’s Notice of Motion dated 19<sup>th</sup> January 2012 fails and is dismissed with costs to the Respondent.

**DATED and DELIVERED at NAIROBI this 28<sup>th</sup> day of May 2013.**

**J. B. HAVELOCK**

**JUDGE**