**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)**

**CIVIL CASE 402 OF 2008**

**KANYOTTA HOLDINGS LIMITED ::::::::::::::::::::::::::::::::::::::::: PLAINTIFF**

**- VERSUS -**

**CHEVRON KENYA LIMITED (CALTEX) ::::::::::::::::::::::::::::::: DEFENDANT**

**R U L I N G**

This is a Ruling on the Notice of Motion dated 23rd February 2012 which seeks as the substantive prayer an order that the Orders given on 29th November 2011 by this court in this matter be executed before the costs incurred in the suit and the Arbitration process can be ascertained by taxation. The application is supported by the grounds stated therein, i.e. that:-

**1.** The Plaintiff has been unable to fully enjoy the fruits of the Arbitration Award given on 15/10/2010 on an outstanding payment from the Defendant since June 2006 which Award was to be enforced as a Judgement and Decree of this Honourable court.

**2.** This Honourable court gave an order in favour of the Plaintiff on 29/11/11 which the Defendant is still not intent on fully honoring.

**3.** The said order of this Honourable court was served upon the Defendant and their advocates on 07/12/11 and whereas M/s Standard Chartered Bank honoured part of the order by releasing the guaranteed sum of Kshs.25 million to the Plaintiff on 08/12/11, the Defendant has refused, failed and/or neglected to pay the balance of the award in the sum of Kshs.30,521,183,20 due as at 31/12/11 which continues to accrue interest at 18% p.a. from 01/01/12.

**4.** The Plaintiff has been unable to file a Bill of Costs for taxation as the proceedings from the arbitral process are not ready due to the volume of documentation therein and the fact that those proceedings were taken in long hand and need to be typed and compiled together.

**5.** In addition to serving the order, the Plaintiff has requested the Defendant and their advocates to honour the balance of the award/decree but the Defendant has flatly failed/refused without any reasonable cause.

**6.** The Plaintiff intends to utilize the proceeds of the award to discharge loans and hire purchase debts incurred in 2005/2006 to finance the Trucks it purchased to service the transportation contract with the Respondent.

**7.** The said debts with National Bank of Kenya continues to accrue interest whose rates have now gone up and any resultant recovery if delayed may be meaningless if the same is not settled without further delay.

**8.** The Defendant has used all manner of delaying tactics to keep the Plaintiff away from recovering the award/decree and enforcing the orders of 29/11/11 thus necessitating this application.

It is supported by the affidavit of Wachira Muritu dated 23rd February 2012 together with its annextures and a supplementary affidavit dated 12th April 2012.

The application is opposed through a replying affidavit of Boniface Abala dated 20th March 2012 together with its annextures.

Briefly, the history of the application relevant to this Ruling is that pursuant to the suit having been referred to arbitration by this court an arbitral award was pronounced by the arbitrator on 15th October 2010 in favour of the Plaintiff/Applicant, who sought successfully the leave of this court to enforce the arbitral award as a decree of this court on 29th November 2011 before Justice Njagi. Earlier on the Defendant/Respondent had, unsuccessfully, challenged the said arbitral award before Lady Justice Okwengu who dismissed the challenge through her Ruling dated 30th June 2011. The Defendant/Respondent, has purportedly given Notice of Appeal, or appealed, against both Rulings of the honourable Justices Okwengu and Njagi, and the process of Appeal is still on.

The present application seeks to have the orders of this court on 29th November 2011 by Justice Njagi be executed before the costs incurred in the suit and the arbitration process can be ascertained by taxation. On their part the Defendant states that there is no need for piece meal settlement of the decretal, especially since there are pending issues on the matter in the Court of Appeal.

Counsel for the parties orally submitted on the matter on 19th April 2012.

The Applicant has based the application on the grounds stated in the affidavit, and its counsel Mr. Kopere submitted firstly, that:-

- The claim has partly been satisfied when Standard Bank released to the Plaintiff the guaranteed sum of Kshs.25 million pursuant to the said Ruling of 29th November 2011.
- The Applicant Company is suffering serious prejudice, losses and damages on a daily basis due to the non–payment of the decretal sum. This is so because the Plaintiff owes National Bank of Kenya the said decretal sum on account of loans which the Plaintiff took to buy the trucks which were used for the Plaintiff's transparent business. The Plaintiff suffers interests on the said loan, and the account with the National Bank needs to be settled as soon as possible.
- That there is no appeal filed either in respect of Lady Justice Okwengu's Ruling or that of Justice Njagi's. The Defendant's appeals, which have no chances at all of success, have not been filed. What have been filed in respect of the two appeals are actually leave to appeal out of time, and that at this stage the Defendants cannot claim that there is an appeal.

In response the Defendants have submitted that:-

- They have a right to appeal and granting the orders sought herein will render nugatory that right.
- That they have filed leave to appeal out of time for the two orders of this court aforesaid.
- That a substantial part of the award i.e. Kshs.25 million has been paid by Standard Chartered Bank which had issued a bond and that the intended appeal is not a delaying tactic.

I have considered the entire application, the opposing affidavits and the counsel submissions.

In my Ruling I wish to address only two issues:-

***1. The exercise of right to appeal.***

***2. Justice of the matter.***

Every party whose rights to appeal are guaranteed by law have a right to appeal. The purpose of appeal, especially to the Court of Appeal, is to finally adjust the rights of the parties. This right to appeal is exercisable within given legal parameters. In this case a party who wishes to appeal must appeal within a prescribed period of time. It is also prudent, that when a party who intends to appeal seeks a stay of execution the court to which the application is made is required, without going into any great details at all, to enquire about the merits of the intended appeal. The court will not be duly concerned with the merit as this is the preserve of the Court of Appeal, yet the court has a duty to enquire into the merits of the intended appeal.

In this case, I start with the procedural aspects of the intended appeal. The Ruling rejecting the application to set aside the award was delivered on 30th June 2011. However, the Respondent did not file its Notice of Appeal within the prescribed time. It did so on 16th December 2011 through Civil Application Number Nairobi 282 of 2011 seeking leave of the said court to service a notice of appeal out of time challenging the Ruling of Lady Justice Okwengu of 30th June 2011. There is no evidence before the court that that leave to file Notice of Appeal out of time has been granted. Since the Ruling of 30th June 2011 the Defendant has participated in subsequent proceedings and application for enforcement of the award which was filed on 1st July 2011 and fully heard on various occasions and a Ruling delivered on 29th November 2011. The Defendant then purported to file an application to the Court of Appeal on 16th December 2011, six months after the Ruling of Justice Owengu on 30th June 2011. The application to Court of Appeal against Justice Njagi's ruling was also filed in the court late, and was only served on the Applicant's advocates on 25th January 2012 i.e. six weeks after it was filed. It is clear that the Defendants attempt to file appeal against the two orders have, in the best, been half harted, and frivolous. Under Section 10, 35 and 39 of the Arbitration Act, leave to appeal is mandatorily required, and must be obtained first in the High Court, and if denied a special leave may be sought from the Court of Appeal before. So, what is currently before the court cannot be described as an appeal which may stop the process of the matter at hand. I therefore find that the Defendant has not diligently exercised its right to appeal, and that indeed, there is no appeal as regards the aforesaid two orders of this court. As to whether the purported appeals have merit in law, I am cautious to venture a view as this is a pressure of the Court of Appeal, but looking at the history of this matter, further evidence may convince me of their merits.

The second issue I raised concerned the justice of the matter at hand. I have looked at the history of the application. It is clear to me that the Applicant is in serious financial strain due to interests arising from the loans owed to the National Bank. A clear award and a decree has also been given to the Applicant, a substantial part of which has already been satisfied by Standard Chartered Bank. The Applicant is servicing an oppressive regime of bank interest rates. Unless there is a right of appeal which has been, or its being judiciously exercised by the Defendant, the justice of the matter demands that the order of this court given on 29th November 2011 herein be executed before the costs incurred in the suit and the arbitration process can be ascertained by taxation. In any event the Defendant has already paid Kshs.25 million, hence there is already expressed the intention to satisfy the decree at this stage. I order and direct that intention be extended to the balance of the award and the decree be satisfied pending the ascertainment of costs in taxation.

In the upshot, I grant the Notice of Motion application dated 23rd February 2012 as prayed with costs to the Applicant.

Those are the Orders of the court.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 21ST DAY OF MAY 2012.**

**E. K. O. OGOLA**
**JUDGE**
**PRESENT:**

*Kopere for the Plaintiff*

*N/A for the Defendant*

*Teresia – Court clerk*