



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MISC APP. NO. 680 OF 2010

TOWRIT OIL LTD..... APPLICANT

VERSUS

IMPROTECH KENYA LTD RESPONDENT

Coram: Mwera J

Mubea for applicant

Kalove for respondent

Njoroge, court clerk

RULING

On 11.3.11 the applicant company herein came to court with a notice of motion of the same date, brought under sections 1A, 1B, 3A of the Civil Procedure Act and order 42 rule 6 (1), Order 51 rule 1 of the Civil Procedure Rules for the main prayers:

- i) that there be a stay of execution of a decree following the lower court's judgement delivered on 28/5/10; and
- ii) that there be an order to hear CMCC 5088/09 de novo

It was contended in the grounds that judgement was entered against the applicant on 24.11.09 for sh. 356 937/80/=, a thing it became aware of on 8/1/10. So it filed an application dated 18/1/10 to stay proceedings, execution and set aside the judgment of 24.11.09. That application was dismissed on 18/1/10 by (Hon. Mokaya). Thereafter the file in the lower court went missing and so the applicant was not able to obtain copies of the proceedings as well as the ruling of 29.4.10 (or 29.5.10?) In the meantime the respondent got orders to reconstruct the file and then proceeded to execute against the applicant. At this point the applicant does not say whether the reconstruction of the file was done ex parte or with its participation. Anyway, on 17.8.10 Muchelule J granted the applicant an interim stay provided it deposited sh. 419,359/= in court within 7 days. That was done on 19.8.10. On 9.9.10 Rawal J gave a temporary stay on condition that the applicant file its appeal and set it down for hearing in 60 days. On 10/9/10 a memorandum of appeal was filed but the cause could not be set down for hearing because still the lower court file – with the proceedings and ruling could not be traced. That remains the position to date – hence this application. The implication, no doubt, is that the stay orders do remain in force even after the 60 days Rawal J granted because the appeal cannot be prosecuted without the lower court record. And at this point this court wonders as to what the file the respondent reconstructed contained, if there were no

proceedings plus the ruling – both of which are said not to be traced. Then what is it executing? So the applicant sought orders that the trial do start afresh.

An affidavit in support by Diana Ogula counsel for the applicant in this cause said as much, albeit with a little more elaboration to the effect that the lower court at Milimani had responded to the inquiries of the “missing” file. That it had not been traced despite all efforts. On 11.11.10 this court had extended Rawal Js’ 60 days stay, still to no avail. And later the same learned judge had observed that in the circumstances of the case, the suit be heard afresh. She made similar observations on later mention dates but in the opinion of the applicant the respondent appears reluctant to agree to a fresh hearing. Justice demands that the suit be heard afresh in the circumstances.

The respondent filed a preliminary objection on 15/3/11 to the effect that prayer 2 in the application (for stay of execution) is res judicata. This court has no jurisdiction to order hearing afresh in interlocutory proceedings since the suit itself is still pending. And that a miscellaneous application like this does not avail the applicant, who had since filed Civil Appeal no 362/10. There was no replying affidavit to the motion. Then both sides were directed to submit both on the preliminary objection and the merits of the application.

The applicant’s position was that the preliminary objection ought to be a pure point of law which the one before court was not. There was no part of the proceedings herein that were res judicata as none had been finally determined as between same parties and same issues yet. All this arose from orders in an interlocutory application. Then some authorities were cited in support of the above. So the prayers deserve to be granted.

On the part of the respondent it insisted that up to 120 days of stay had been granted and yet even with an appeal having been filed (HCCA 362/10), the applicant continued to litigate in a miscellaneous case file. The suit has never been heard and with overriding objective in litigation in the mind of the court, this application should be dismissed with costs.

Having heard both sides and with the history and circumstances of this case in mind, this court notes that the whole thing here arose from the applicant’s application whose ruling it moved to appeal against. The application was dated 8/1/10, to set aside a default judgement of 24.11.09. It was dismissed on 29.5.10 (or is it 29.4.10). Then the entire file went missing together with the ruling intended to be appealed from (HCCA 362/10). The suit itself remains pending. In the circumstances that the decretal sum was deposited in court and the lower court file cannot be traced to facilitate the hearing of the HCCA 362/10, it is only fair and just that the lower court do hear the application from which the appeal arose afresh to agree or refuse to grant to stay proceedings, execution and set aside judgement. It should do so in the next 45 days from the date hereof on the reconstructed file and before a different magistrate. The preliminary objection is rejected as lacking in merit. Execution to remain on hold in the meantime. The deposit in court to abide the determination of the applicants’ application dated 18/1/10. Costs in the cause.

Delivered on 9.5.11.

J. W. MWERA
JUDGE