



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 247 of 2007**

**OSHO CHEMICAL INDUSTRIES LIMITED.....PLAINTIFF**

**VERSUS**

**AGRICHEM & TOOLS LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOHN K. MUHIA.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

The application is dated 2<sup>nd</sup> July, 2008 and is brought under Order XLI rule 4 and Order L rule 1 of the Civil Procedure Rules, section 3A of the Civil Procedure Act. The application seeks four orders as follows: -

1. **THAT this application be certified as urgent and be heard ex-parte in the first instance.**
2. **THAT there be a temporary stay of execution pending the hearing of this Application interpartes.**
3. **THAT there be a stay of execution of the Ruling herein and the resultant Order therefrom and of any consequential orders pending the hearing and determination of the Defendant's Appeal.**
4. **THAT the cost of this appeal be provided for.**

The grounds upon which the application is based are cited on the face of the application as follows:

- (a) **The Plaintiff filed an application dated 14<sup>th</sup> May 2007 praying for an injunction against the Defendants which was ruled in their favour by the Honourable Mr. M. A. Warsame J. on 13<sup>th</sup> June 2008.**
- (b) **The Defendants being dissatisfied with the said Ruling have sought to appeal against the whole of the said Ruling.**
- (c) **Unless and until the said Ruling and Order are stayed as sought, the Defendants will suffer substantial and irrecoverable loss in that the manufacture of the 1<sup>st</sup> Defendant's products will be halted indefinitely, marketing and distribution will cease, contracts with suppliers and customers will be breached, employees will be rendered redundant, thereby occasioning the collapse of the 1<sup>st</sup> Defendant's business.**

- (d) **The Defendants/Applicants have an arguable appeal with a high probability of success.**
- (e) **The Defendants/Applicants have moved this Honourable Court without unreasonable delay.**
- (f) **The Defendants/Applicants are ready and willing to abide by such reasonable terms as may be ordered by this Honourable Court.**
- (g) **Such other reasons and grounds to be adduced at the hearing hereof.**

The application is supported by the affidavit sworn by Shiraz Nazil Karmali on 2<sup>nd</sup> July, 2008, which I have considered together with the annexures thereto.

This application is opposed. The Respondent filed a replying affidavit sworn by Manoj K. Shah, its Managing Director, which I have considered. There is a 'replying' affidavit sworn by Shiraj Nazil Karmali, the Managing Director of the 1<sup>st</sup> Defendant. This affidavit is wrongly described. It should have been described as a further affidavit since it was sworn in reply to the Respondent's replying affidavit dated 2<sup>nd</sup> September, 2008. That notwithstanding, I have also considered the content of that affidavit.

The Applicants herein are seeking a stay of the execution of the ruling by Hon. Warsame, J. delivered in this court on 13<sup>th</sup> June, 2008. That ruling was in respect of the application by the Plaintiff dated 14<sup>th</sup> May, 2007 in which the Plaintiff was seeking to injunct the Defendants from manufacturing, selling, offering for sale, supplying, distributing or displaying for sale the product known as AGRIFEED and from revealing or disclosing the formula and the ingredients for the manufacture of the products known as AGROFEED and AGRIFEED, to any person or party. The learned Judge granted the orders. In this application, the Applicant who is the Defendant in the suit is, through this application seeking either to lift the order of injunction made against it or to stay that order.

Mr. Otieno for the Applicant has relied on the grounds on the face of the application, which are contained in the body of this ruling. Mr. Otieno argued that the application should be granted because the effect of the order of injunction issued by Hon. Warsame, J. was the shut down of the Applicant's business of manufacture, sale and distribution of the products in issue in this suit. Counsel submitted that the effect of complying with the order will lead the applicant to suffer substantial loss as in addition, the Defendant was required to recall all the suit products in the market and to destroy all the products held in stock. Mr. Otieno submitted that this in turn would lead to all the employees of the Defendant companies being dismissed from employment. Mr. Otieno relied on the case of **Kimui & Anor. vs. Mburugu [2008] E. KLR** and **Oceanic View Hotel Limited vs. KCB [2002] 2 KLR 338**. In the later case Khaminwa CA (as she then was) held:

***"1. An applicant must satisfy two conditions before he is granted a stay of execution pending appeal, namely, that the intended appeal is not frivolous and that the intended appeal if successful would be rendered nugatory if a stay of the order is not granted.***

***2. If an applicant has a right to appeal on the amount of money involved in a dispute, this constitutes special circumstances meriting a stay of execution pending an appeal.***

***3. In a discretionary matter, the court should take into consideration all the circumstances including the merits of the intended appeal."***

Mr. Maondo for the Respondents has taken up an issue with the application on the grounds that it sought to stay an order of injunction which, according to Mr. Maondo cannot be stayed. Counsel submitted that Hon. Warsame, J. considered all the issues now raised as the basis for this application, including the issue of loss that may be suffered by the Applicant if the order of injunction was made, and that therefore what the Applicant was doing in this case was to ask the court to reconsider the merits of the application. Counsel submitted that the proper cause for the Defendant/Applicant was to go on appeal to the Court of Appeal. Mr. Maondo submitted that the application is incompetent having been made pursuant to order

XLI of the Civil Procedure Rules. Counsel relied on the case of **Consolidated Bank (K) and others vs. Usafi Limited [2006] E KLR.**

I have considered the application and the rival arguments by both counsel. I have also read the ruling of the learned Judge Warsame and the order the learned Judge made in the application now sought to be stayed. Mr. Maondo for the Respondent has submitted that Warsame, J went to great lengths to consider the issues now being argued in this application.

It must be remembered that this is a case of infringement of Trade Mark and the loss that the owner of the Trade Mark may suffer as a result of such infringement. The learned Judge specifically found that the Plaintiff/Respondent owns a registered Trade Mark for the Product AGROFEED and that the Plaintiff as the registered proprietor of the Trade Mark, had the right to claim exclusive rights of its use and that as a result the Plaintiff had the right to be protected against any infringement under our law. The learned Judge found that the Applicant had infringed on the Plaintiff's Trade Mark and that as a result of the infringement there was a real probability that the Applicant would confuse customers and that that confusion would cause loss and damage to the Plaintiff, which will not be adequately compensated by an award of damages.

The Applicant has offered to meet any conditions ordered by the court. Counsel for the Applicant relied on the case of **Kimui & Anor. v Lucy Mburugu, Nairobi CA No. 370 of 2008.** The cited case was an application before the appellate court. The High Court from the subordinate court ordered against the Appellant requiring him to reconstitute a vehicle to the Respondent. The learned judge granted a stay of execution but ordered that the Appellants deposit Kshs.400,000/- within 7 days as a condition for the order of stay.

Unlike in the cited case where the learned judge was able to assess a suitable sum as a condition for the stay, I am unable to assess what would be adequate security for an order of stay in this case. There are clear findings that compensations will not be an adequate remedy due to the danger posed to the Plaintiff's company's very existence and its businesses. In view of the factors and given the fact that the Applicant did not quantify the security it was offering as precondition for the grant of the order for stay, I find it difficult to order any stay in the circumstances.

The learned Judge's ruling has not been set aside. In view of the conclusion that he arrived at in this ruling, I agree with Mr. Maondo that it would be absurd for this court to stay the orders of the learned Judge, as it would mean that the status of the parties would revert to the position they were before they came to court. At this stage, this court being of parallel jurisdiction as the court that made the order, and in view of the nature of the case, it cannot go into the merits of the intended appeal before the Court of Appeal. The merits of that appeal can only be considered by the Court of Appeal itself. I do find that granting the application now being sought would be quashing or setting aside the orders of the learned Judge. The Judge found that the damage and loss likely to be caused or which has been caused to the Respondent would not adequately be compensated by an award of damages. To grant this application would be a travesty of justice in view of the conclusion that have been arrived at by my learned brother in his ruling.

Having come to the conclusion that I have of this application it leads me to the following orders:

**The application dated 2<sup>nd</sup> July 2008 be and is hereby dismissed.**

**Costs of this application will be borne by the Applicant**

Dated at Nairobi this 30<sup>th</sup> day of January 2009.

**LESIIT, J.**

**JUDGE**

**Read, delivered and signed in presence of:**

Mr. Otieno for the Applicant

N/A for Mr. Maondo for the Respondent

**LESIT, J.**

**JUDGE**