



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

**Civil Case 1099 of 1995**

**KENYA OIL COMPANY LIMITED .....PLAINTIFF**

**VERSUS**

**KENYA PIPELINE COMPANY LIMITED .....DEFENDANT**

**RULING**

In the application dated 30<sup>th</sup> July, 2007 under Section 75 of the Civil Procedure Act, Order XLII rule 3, Order XLI Rule 4(1) and Order L rule 1 of the Civil Procedure Rules, the applicant **Mr. George Okungu** seeks;

- 1) **That this Honourable court be pleased to grant the 1<sup>st</sup> respondent herein leave to appeal against the order made on 16<sup>th</sup> July 2007 denying the 1<sup>st</sup> respondent leave to file a further affidavit and**
- 2) **That this Honourable court be pleased to stay further proceedings herein pending hearing and determination of the intended appeal.**

The applicant contends that he is aggrieved by the decision made by this Honourable court denying him a chance to file a further affidavit in answer to an affidavit of service filed by one **Hezron Ochieng Odongo** which the court allowed to be used as the basis of an application for contempt of court against him. He also alleges that it is in the interest of justice that further proceedings herein be stayed pending hearing and determination of the intended appeal of the applicant. And that unless the orders are granted, the applicant stands to suffer irreparable loss in that his liberty would be gravely prejudiced, as the application for contempt would proceed to conclusion.

**Mr. Gaita** learned counsel for the applicant submitted that in an application for committal, a party must confine itself to the grounds set out in the motion and in the statement. And anything else can be done with the leave of the court only. He says that the applicant is aggrieved by the ruling made on 16<sup>th</sup> July, 2007 because it denied the applicant a chance to controvert and answer new charges leveled against him based on affidavit of service which was filed and sworn by one Hezron.

As regards the prayer for stay, the 1<sup>st</sup> respondent has deponed that if the hearing were to proceed on the basis of the affidavit of service and without according him an opportunity to controvert the new charges and evidence then he will be gravely prejudiced as he would be denied a chance to be heard in accordance with the rules of natural justice.

**Mr. Oyatsi** learned counsel of the original applicant submitted the procedure adapted by the present

applicant would delay the quick determination of the contempt application, which would be an abuse of the court process.

I have considered the rival positions taken by each party. It is necessary to note that the present applicant is the 1<sup>st</sup> respondent in the main application for contempt. The applicant in the contempt application has completed its arguments and the Advocate for the 1<sup>st</sup> respondent almost completed his arguments in reply to the contempt application. And in the middle of his submission **Mr. Gaita** learned counsel of the 1<sup>st</sup> respondent made submissions;

***“in the light of the reliance by the applicant on the affidavit of service filed on 9<sup>th</sup> March 2006, which raises issues that touch on my client’s conduct”.***

According to **Mr. Gaita** Advocate the said affidavit was brought to his attention while in the middle of his submission. And on 16<sup>th</sup> July 2007 **Mr. Gaita** Advocate made an application for leave to file a further affidavit to answer new charges of contempt of court for alleged interference with the service of court process. This court made an order declining to grant the leave sought. The applicant contends that the alleged interference with the process server was not contained anywhere in the originating notice application dated 24<sup>th</sup> February 2006 or in the statement of the same date.

Further references having been made to additional grounds and evidence in the affidavit of service sworn by one **Hezron Ochieng**, the applicant thinks that it was unlawful for this Honourable court to deny the applicant an opportunity to controvert any allegations made against such a party. And that should the hearing be concluded on the said grounds which are outside the application and statement, the interest of the applicant would be subverted.

In my view the applicant had the opportunity to give oral or affidavit evidence in opposition to the subject affidavit. He also had the right to ask for the cross-examination of the deponent of the affidavit of service. He did not exercise either option and was happy to proceed with his case until the applicant prosecuted his contempt application. If the applicant failed to invoke the right available to him at the ideal time then he cannot be allowed to have another opportunity when the applicant had closed its pleadings and arguments.

In my understanding it is applicant who appears to have departed from the issues in contest between the parties. The applicant filed a replying affidavit on 13<sup>th</sup> July, 2006 and in that affidavit the issue of service is raised for the first time in the proceedings.

In paragraph 4 of the said affidavit the applicant states and I quote;

***“That I am advised by my advocate on the record which advice I verily believe to be true that the law requires that I must personally be served with a Notice of Motion filed in contempt of court proceedings. I was not served with such notice or any other application”***

That is a clear testimony that the issue of service was raised by the applicant and the applicant relied on it as ground to challenge the contempt proceedings.

In my view it was incumbent upon the applicant in the main motion to respond to such allegations which was meant to defeat the central issue that concerns whether the present applicant is really in contempt of a court order.

I am therefore in agreement with **Mr. Oyatsi** advocate that the applicant in the main motion was perfectly within his rights to rely on the affidavit of service which was initially filed and which is in court record. **Mr. Oyatsi** reiterated the position that was contained in the replying affidavit that apart from being served the present applicant committed acts of obstructing service and interfering with the due administration of justice. That is an issue in contest between the parties in the main Motion. The applicant in the main Motion had concluded its submission for the main contest. **Mr. Gaita** for the

present applicant did not make an application immediately his turn to reply to the application had come. He did so while he was about to complete his client's submissions in reply. It is therefore my position that the present application has come too late in the day to contest what was within the knowledge of the applicant for almost two years. It is also false to allege that the applicant in the main Motion relied almost on new grounds which had not been pleaded in the main Motion.

In conclusion and I am in agreement with **Mr. Oyatsi** advocate that it was not possible for the applicant in the main Motion could to have predicted and predicated the behaviour on the part of the 1<sup>st</sup> respondent/applicant in the main motion which was filed in February, 2006.

**In short the prayers in the Motion under my determination do not lie and I hold the application is an abuse of the process of the court and it is hereby dismissed with costs to the applicant in the main Motion.**

Dated and delivered at Nairobi this 21<sup>st</sup> day of February, 2008

**M. A. WARSAME**

**JUDGE**

**Court:** Ruling delivered in the presence **Mr. Gaita** for the 1<sup>st</sup> respondent, **M/S Maina** and **M/S Mati** for 2<sup>nd</sup> respondent in open court.

**M. A. WARSAME**

**JUDGE**

**21/2/2008**