



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL DIVISION, MILIMANI

Civil Suit 58 of 2004

CALTEX OIL KENYA LTD.....PLAINTIFF

VERSUS

INLAND PETROLEUM LIMITED.....1ST DEFENDANT

INVESCO ASSURANCE CO. LIMITED.....2ND DEFENDANT

R U L I N G

The 2nd defendant has come to court with an application by chamber summons dated 16th May 2005. The application is brought under Order 1XB Rule 8 Civil Procedure Rules and sections 3A, 63 e and 89 of the Civil Procedure Act.

At the outset I need to state that there are certain issues that I shall not consider at this ruling, because they are issues that were raised in the application dated 11th January 2005, which was dismissed on 12th May 2005, and which application is being sought to be reinstated by the present application.

The application is supported by the affidavit of the then advocate for the 2nd defendant. He deponed that by an application dated 11th January 2005, the 2nd defendant was granted interim stay of execution. The matter was subsequently adjourned severally and was finally fixed for hearing on 12th May 2005, when 2nd defendant's advocate was ready to proceed with the hearing of the same at 10.00 am. That he had instructed an advocate called Mr. Otieno to hold his brief and to inform the court that counsel was ready to proceed at 10.00 am. 2nd defendant's advocate further deponed that he had asked for this matter to be adjourned at 10.00 am because he was engaged before Hon Justice Ojwang with the matter HCCC No. 1124 of 2004. 2nd defendant's counsel finally deponed that he had always been willing to proceed with the application dated 11th January 2005. The application is also supported by the affidavit of J Kikui who described himself as the technical manager of the 2nd defendant. There are

many matters that he raises in his affidavit which belong to the dismissed application and which I shall not consider here. The deponent did repeat that the 2nd defendant's advocate in support of the present application submitted that if the court does not set aside the dismissal of the application dated 11th January 2005, the 2nd defendant would suffer irreparable loss, whereas, any loss that will be incurred by the plaintiff can be compensated with costs. He argued that the application, that the 2nd defendant seeks to reinstate raises important points of law touching on the validity of the summons.

The plaintiff opposed the application and accordingly filed a replying affidavit and grounds of opposition. The pertinent point raised in the replying affidavit is that the case, the then advocate for the 2nd defendant alleged to have attended, before Hon Justice Ojwang, namely HCCC No. 1124 of 2004, was listed on 12th May 2005, but at 3.00 pm. The relevant cause list was attached to that affidavit. The plaintiff's counsel in submissions stated that the only relevant point the court ought to consider in respect of the present application is the reason given why the 2nd defendant's application was dismissed.

He stated that the court ought to note that the 2nd defendant's advocate deceived the court in saying that he was held up in High Court before Hon Justice Ojwang at 9.00 am, whereas the matter was actually listed at 3 p.m. He finally said that the plaintiff's court process server was always in attendance in court awaiting to be cross examined.

The 2nd defendant's advocate stated in response that in the wider interest of justice the application ought to be reinstated.

When the application dated 11th January 2005 came before the Hon Justice Waweru in attendance was Mr. Amin for the plaintiff and Mr. Ochieng Otieno for Mr. Wahome for the 2nd defendant.

Mr Ochieng Otieno informed the court that Mr. Wahome was appearing at the High Court registry before a judge and therefore sought an adjournment of this matter until 10.00 am. That application was opposed, and in its ruling the court ordered that the matter to proceed. That is when Mr. Ochieng Otieno, informed the court, that he had no further instructions, and on the application of the plaintiff, the application dated 11th January 2005 was dismissed.

As seen earlier on in this ruling the plaintiff annexed a cause list which showed that the case Mr. Wahome alleged he was attending at 9.00 am, was in fact listed at 3.00 p.m. there was no further affidavit on behalf of the 2nd defendant to respond to that averment, and the court does therefore, accept that is the correct state of affairs as regards that case HCCC 1124 of 2004. That being my finding I take great exception to advocates telling untruth and particularly under oath with a view to getting favourable ruling for their client.

The legal profession is an honourable profession and for an advocate to tell untruth is an affront to the profession. Shah J.A. in the case CIVIL APPLICATION NO. 103 OF 1999 MALINDI AIR SERVICE LIMITED & ANOTHER – AND – HALIMA ABDINOOR HASSAN stated in talking about advocates: -

“They are all officers of the court. Their duty lies first to the court and then to their clients.”

Having found that the reasons given for failing to attend court on 12th May, 2005 are non existence, I am left with no basis to exercise my discretion in favour of the applicant A.A. Lakha J.A. stated in the case of CIVIL APPLICATION NO. 208 OF 1998 FRANCIS KIHONGE NGANGA AND KENYA COMMERCIAL FINANCE COMPANY LTD: -

“But like all discretion it must be judicially exercised. Here, there is no material before me on which I can base an exercise of my discretion in favour of the applicant. Nor do I think.....that is a fit and proper case for the exercise of my discretion which I decline to exercise.”

That quote sums it all up. There is no material before me to exercise my discretion in favour of the 2nd defendant.

Accordingly the order of this court is that the application dated 16th May 2005 is dismissed with costs to the plaintiff.

Dated and delivered this 24th day of August 2005.

MARY KASANGO

JUDGE