



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

Civil Case 412 of 2003

KOBIL PETROLEUM LIMITED.....PLAINTIFF

VERSUS

QUASAR LIMITEDDEFENDANT

RULING

Quasar Limited, the defendant herein, has brought a Notice of Motion, dated 14th September 2005. That application is brought under Order XLI Rules 4 (1), (2), (3) and 4 of the Civil Procedure Rules. The defendant seeks stay pending appeal.

The grounds of that application are:

- (1) That the defendant has filed a Notice of Appeal against the order of this court made on 27th April 2005, which order allowed consolidation of Kisii HCCC No. 99 of 2003, with this suit.
- (2) That the plaintiff respondent has filed an application, dated 22nd June 2005 and if it does succeed the defendant will lose its right of appeal over the order of 27th April 2005.
- (3) That the defendant's intended appeal raises serious and arguable points of law that ought to be heard on merit.
- (4) That the plaintiff respondent stands to suffer no prejudice which cannot be adequately compensated by way of costs if stay orders sought, herein are granted.

The defendant in submitting, in support of the application, referred to matters that were the subject of the application for consolidation, which matters cannot be reconsidered in this present application. Such matters are, for example, that Hon Justice Mwera dismissed an injunction application in this matter on the basis that another injunction had been issued by the High Court at Kisii, that the respondent had unsuccessfully applied for the transfer of the Kisii High Court file to be consolidated with this file; and that the respondent had filed notices of appeal in respect of that refusal as well as the refusal for injunction.

The defendant/applicant's learned counsel, Mr. Ragot stated, in argument that the order of consolidation had set the suit in a state of confusion for two reasons; firstly there was a conflict with the

ruling of the Hon retired Justice Wambilyangah, delivered on 7th October 2003, and in view of that conflict counsel argued that stay pending appeal should be allowed; secondly, that the capacity in which the parties appear before court was not clear, because the plaintiff in the present case is a defendant in the Kisii High Court case, and the defendant in the present case is a plaintiff in the Kisii High Court case. That because of that confusion, counsel submitted that the prudent thing to do was to stay the suit.

On the ground of opposition filed by the respondent, to the effect that the applicant was out of time in filing the appeal, applicant's counsel responded that, there is a pending application, in the court of appeal seeking extension of time.

The applicant opposed the respondent's reliance on the grounds of opposition filed on 16th September 2005 and reliance on an affidavit of George Mwangi, sworn on 11th July 2003. Applicant's counsel argued that order 50 Rule 16 (1) gives a party an option to either rely on a replying affidavit or grounds but not both.

Learned counsel Mr. Esmail opposed the application on behalf of the plaintiff/respondent.

He began by saying that whether or not the defendant has applied to extend time to file an appeal did not matter; that the fact was that time has expired.

Plaintiff counsel further argued that Order 41 Rule 4 had not been met by the applicant. In this regard counsel relied on the case VISHRAM RAVJI HALAI AND ANOTHER – AND – THORNTON & TURPIN [1963] LTD CIVIL APPLICATION NO NAI 15 OF 1990 counsel referred to the following portion of that case: -

“.....the court said that before it could decide the application (for stay of execution) it must have regard to the requirements of Order XLI Rule 4 (2) of the Civil Procedure Rules under which the Applicant had to satisfy the court of two matters. Firstly, that substantial loss may result to the applicant unless the applicant is granted,secondly, the Applicant had to give such security as the court may order.”

The plaintiff argued that the defendant had failed to satisfy those conditions and other conditions in the sub rule.

The plaintiff argued that the defendant's application was an after thought, since it was made five months later, after the order of consolidation and after the period of appeal had expired. Plaintiff argued that there was no evidence that an appeal would be rendered nugatory if the suits were heard in Nairobi as opposed to Kisii High Court, since the plaintiff's pending application could have been filed whether or not there was an order for consolidation.

In response to plaintiff's argument, defendant's counsel argued that the defendant, did not have to satisfy Order 41 Rule 4 because that only applied to stay of execution, where as the defendant was seeking stay of suit.

Those were the arguments made before me. The defendant's argument that **Order XLI Rule 4** does not apply to an application for stay of proceedings is not entirely correct. **Sub rule (1) of the Rule 4** provides in part.

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may for sufficient cause order stay of execution of such decree or order.....” (Underlined mine)

It is clear that, that subsection covers an order. Accordingly the defendant was required to show sufficient cause why stay should be granted.

The defendant argued that one of the reasons why stay should be granted was because the order of

consolidation, made hereof, was in conflict with a previous order made in Kisii High Court. That argument I refuse to consider because it was considered when this court ordered for consolidation of the suit. On the issue that the parties are confused as a result of the order of consolidation in my view does not 'hold water'. The ruling of 27th of April 2005 stated as follows: -

“Whether one party has a counterclaim and what will be the consequence of that counter claim at trial, I will leave it to the trial judge.”

Indeed to follow from that statement, it is open to the parties to seek directions from the court on how the parties should proceed at trial.

On defendant's argument on the provisions of Order 50 Rule 16, I accept that submission. Order 50 rule 16 provides: -

“Any respondent who wishes to oppose any motion or other application shall file and served on the applicant a replying affidavit or a statement of grounds of opposition.....”
(Underling mine)

The provisions thereof clearly show the respondent is permitted to file a replying affidavit, singular, or a statement of grounds of opposition. The plaintiff respondent in this matter was not entitled to rely on an affidavit having relied on grounds of opposition.

On considering the grounds argued before me, the basis upon which the defendant sought the orders, hereof, I do agree with the plaintiff's counsel, that the defendant failed to show how it would be adversely affected if the suits are heard in Nairobi rather than in Kisii. I am of the view that the defendant's submission, that the purpose of having two courts was to ensure the matters are heard by two different judges, cannot be acceptable and does not sufficiently sustain the application for stay.

I therefore find that the defendant has failed to show sufficient cause why the suit hereof should be stayed pending appeal. The application therefore dated 14th September is dismissed with costs being awarded the plaintiff, Kobil Petroleum Limited.

Dated and delivered this 17th day of November 2005.

MARY KASANGO

JUDGE