



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & TAX DIVISION

HCCC NO. 150 OF 2013

MOGAS KENYA LIMITED.....PLAINTIFF

VERSUS

GALANA OIL KENYA LIMITED.....DEFENDANT

RULING

1. The Notice of Motion dated 21st July 2020 seeks the following prayers:-

1. Spent.

2. *THAT this Honourable Court do stay and set aside the portion/part its orders of 22nd June 2020 requiring that the Plaintiff do give security for the sum of USD 1,243,085.00 within 60 days and do discharge the requirement to furnish further security.*

3. *THAT in the alternative, this Honourable Court do stay its order on furnishing security pending the institution, prosecution and determination of an intended partial Appeal against its ruling of 22nd July 2020.*

4. *THAT leave to Appeal against the Ruling of the Court dated 22nd July 2020 (if needed) be granted and the Notice of Partial Appeal filed in Court on the 7th day of July 2020 be deemed as duly filed.*

5. *THAT this Honourable Court do confirm that its ruling on stay of execution dated 20th June 2020 shall endure and last until the hearing and determination of NBI C.A No. 316 of 2020 Galana Oil Ltd versus Mogas Kenya Limited in view of the alternative in the prayers 3 of the Defendant application dated 24th July 2019 which the Court granted without clarifying which prayer it had granted.*

6. *THAT costs of this application be borne by the Plaintiff.*

2. The Application is opposed. The Respondent filed a Replying Affidavit of Fregustus Masai Musyoka sworn on 7th September 2020 and a Notice of Preliminary Objection of 5th November 2020.

3. One of the prayers should be easy to grant. On 22nd June 2020, this Court delivered a Ruling in answer to an application for stay of execution brought under Order 42 Rule 6 of the Civil Procedure Rules. The Applicant is aggrieved by part of that Ruling and filed a Notice of Partial Appeal on 7th July 2020. The Applicant seeks that belated leave of Court be granted in that respect.

4. A ruling under Order 42 Rule 6 is not one of those from which an appeal lies as a matter of right (Order 43 Rule 1). The Respondent has not opposed this limb of the application and I cannot see any reason not to grant it.

5. Grant of the other orders face at least two challenges. One, the order sought to be stayed or set aside has now been complied with, albeit late. There is now a Bank Guarantee issued by Absa Bank Kenya PLC dated 27th October 2020 as condition for the stay granted on 22nd June 2020. A copy of the Guarantee has been filed with Court. In a sense, the application before Court has been overtaken by events. In particular, the alternative one for stay of the order on furnishing of the security.

6. The other difficulty, and this is raised in the Replying Affidavit of Fregustus Masai Musyoka, is that what the Applicant in essence argues in the setting aside application is for this Court to sit on appeal over its decision. For instance it is argued that the order granted by Court is

erroneous, unreasonable and only addresses the claims of the Plaintiff whilst overlooking all legitimate claims for the Defendant.

7. As to the other ground that the Ruling contains an error apparent on the face of the record in its holding on the issue of security to be provided, the Applicant seeks to elaborate the error in paragraph 9 of the affidavit of Anthony Nzale Munyasya sworn on 21st July 2021. He deposes:-

“[9] That the Ruling and Judgment contain an error apparent on the face of the record in that;

a) The Judgment denies the Defendant compensation for the double credit of 801,599 MT of I.M.S despite the admission in writing by the Plaintiff. The Court dismissed the counterclaim.

b) The Honourable Court issue an injunction to preserve the subject Petroleum products and these products are safely store by a 3rd party as great expense. The injunction remains in place. A true copy of the injunction order is hereby annexed as “A.N.M-4”

c) The Court has now ordered the Defendant to furnish security to the extent of the entire price of the fuel, yet the fuel is still safe and sound.

d) The Court has granted an order for the release of the fuel to the Plaintiff in its Judgment.”

8. As is clear, the Applicant is rearguing the application for stay and asking this Court to take a different view of the matter. That is not an error apparent on the face of the record. For an error to be apparent on the face of the record, it has to be self-evident and not requiring “an elaborate argument to be established” (See National Bank of Kenya Limited vs Ndungu Njau[1997]eKLR).

9. The Applicant has filed a Notice of Partial Appeal against the impugned decision and has now obtained leave in that regard. That is the proper forum for the Applicant to challenge the merit of that decision.

10. Save for grant of prayer 4 thereof, the Notice of Motion of 21st July 2020 is dismissed with costs.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 1ST DAY OF MARCH 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT:-

Kingara for Defendant/Applicant.

No appearance for the Plaintiff/Respondent