



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 234 OF 2012**

**SHEETAL KAPILA .....PLAINTIFF**

**VERSUS**

**WESTMONT POWER (KENYA) LIMITED.....DEFENDANT**

**RULING**

1. Through the application dated 23<sup>rd</sup> June 2020, the plaintiff/applicant seeks the following orders: -

**1. Spent.**

**2. That the order of the court issued on 26<sup>th</sup> March 2015 attaching the sums ordered to be restituted to the defendant by Kenya Oil Company Limited be kept in force and the status quo maintained pending the hearing and determination of this application.**

**3. That directions be given for an early hearing date for prayer 4.**

**4. That the order of this court issued on 26<sup>th</sup> March 2015 attaching the sums ordered to be restituted to the defendant by Kenya Oil Company Limited be kept in force and the status quo maintained pending the hearing and determination of the plaintiff's intended Appeal.**

**5. That the costs of this application be awarded to the plaintiff.**

2. That application is supported by the affidavit of the plaintiff's advocate **Mr. Sheetal Kapila** who also filed a further affidavit dated 9<sup>th</sup> September 2020. The application is premised on the grounds that: -

**1. The plaintiff will suffer substantial loss if this application is not granted.**

**2. Other than the monies of Kenya Oil Company Limited ("Kenol") that have been attached under the order of this court issues on 26<sup>th</sup> March 2015, there are no assets available to satisfy the plaintiff's claim should his intended appeal be allowed.**

**3. The defendant ceased to trade in 2007 and has no assets in Kenya or otherwise.**

**4. The defendant did not counterclaim in the action for general or special damages, and will not suffer any pecuniary loss, other than the costs of the action, should the stay be granted.**

**5. The defendant has no financial interest in the monies that have been attached under the said order of 26<sup>th</sup> March 2015, and accordingly will not suffer any pecuniary loss if this application is granted.**

**6. If the plaintiff's application is not granted, the subject matter of the attachment will become irretrievably lost, and the said monies will become irrecoverable, as the said Kenol is not a party to this suit, and the plaintiff's intended Appeal will be rendered nugatory.**

**7. The plaintiff has an arguable appeal with a good probability of success.**

**8. It was not open to the learned judge to hold that the remuneration agreements were invalid for being agreements to pay fees**

*only in the event of success, as the defendant had not raised this question in its pleadings.*

*9. The defendant did not make any submissions to the court that the said agreements were invalid on the grounds that they were agreements to pay fees only in the event of success.*

*10. In the premises, the issue of the remuneration agreements being invalid for having been based on the contingency that they would only be paid in the event of success were not questions that had been placed before the court for its decision.*

*11. The defendant did not produce any witnesses at the hearing.*

*12. By reason thereof, the learned judge ought to have treated the plaintiff's case as uncontroverted and thereby admitted.*

*13. There has been no delay in the making of this application.*

*14. The plaintiff will abide by any order of the court as to security.*

3. The respondent opposed the application through the statement of Grounds of Opposition dated 29<sup>th</sup> July 2020 wherein it lists the following grounds: -

*1. The application is contrary to the express requirements of the provisions of Order 42 Rule 6 of the Civil Procedure Rules under which the party who seeks an order for stay pending appeal has the onus of furnishing security for the due performance of the decree. The plaintiff, being the unsuccessful party in this litigation, cannot transfer the obligations to uphold the conditions with regard to furnishing security upon the successful party of this litigation, the defendant.*

*2. The order sought to be entertained was an ex parte interlocutory order issued on 24<sup>th</sup> March 2015 by Lady Justice Farah Amin pending the hearing and determination of the Plaintiff's Notice of Motion dated 23<sup>rd</sup> March, 2015.*

*3. Both parties filed their respective written submissions in support to and in opposition to the said motion dated 23<sup>rd</sup> March, 2015 and proceeded to highlight the same before the learned judge.*

*4. Final orders were not confirmed at conclusion of the application upon which the interlocutory orders had been issued and the substantive suit having been heard and determined, the court has become functus officio and now has no jurisdiction to reinstate the status quo arising from an ex parte order issued on an interlocutory application.*

*5. The application invites the court to re-litigate matters which were a subject of a concluded interlocutory application and which has since been overtaken by events following the hearing and determination of the main cause.*

*6. Further, the matters the court is called to adjudicate upon has since become resjudicata.*

*7. The sums ought to be deposited relate to dispute between the defendant and Kenya Oil Company Limited in the Court of Appeal in Civil Application No. NAI 254 of 2013 and HCCC No. 106 of 2002 respectively as per annexure SK-2 of the plaintiff's motion.*

*8. The dispute between the defendant and Kenya Oil Company Limited was resolved by the said parties as per the consent dated 19<sup>th</sup> June, 2015 and filed in court on 23<sup>rd</sup> March, 2015 (annexure SK-3 to the Plaintiff's Motion). The said consent had already been agreed upon by the parties before the filing of the Plaintiff's Motion dated 23<sup>rd</sup> March, 2015.*

*9. There is no dispute between the defendant and Kenya Oil Company Limited to result into any monies being deposited into the court since the consent filed in court on 23<sup>rd</sup> March, 2015 settled all matters between them.*

*10. The motion is consequently misconceived and an abuse of the process of the court.*

4. The application was canvassed by way of written submissions.

#### **Applicants submissions.**

5. The applicant submitted that it has made out a case for the continuation of orders that were in force prior to the dismissal of its suit, pending the determination of the appeal. It was submitted that the funds need to be protected as the defendant is a foreign company not trading in Kenya and that it would be difficult to recover the money should the appeal be successful.

6. The applicant observed that the present application is unique in the sense that it does not seek to stop the execution of a judgment *per se* but rather seeks the court's orders to keep the orders that were in force during the pending of the case so that the appeal is not rendered an academic exercise.

7. The applicant argued that the grounds upon which its suit was dismissed are invalid and that the appeal therefore stood high chances of success. It was the applicants case that the orders sought are in the nature of Mareva injunction which this court has jurisdiction to grant. For

this argument, the applicant relied on the decision on *Madhupaper International Limited vs Kerr* [1985] eKLR.

#### **Respondent's submissions.**

8. The respondent faulted the applicant for seeking to rewrite the law on stay of execution by asking for stay when the judgment in question was a negative one dismissing the applicants suit. Reference was made to the decision in *Sonalux Limited & Another v Barclays Bank of Kenya Limited and 2 others* [2008] eKLR. It was submitted that the status quo sought to be restored was only to last pending the *inter partes* hearing of 24<sup>th</sup> March 2015. The respondent added that the said hearing had already been conducted after which Kenya Oil Company entered into a consent to resolve the dispute between it and the defendant herein.

9. The respondent argued that the court cannot be called upon to revisit the matter when the substantive suit and interlocutory application had been concluded.

10. The respondent's case was that the application does not meet any of the conditions for the granting of orders of stay of execution and that this court is *functus officio* on the issue of restitution of any sums of money. The respondent added that the sums sought to be deposited relate to a dispute between the defendant and Kenya Oil Company Limited in the Court of Appeal Civil Application No. Nairobi 254 of 2013 and HCCC NO. 106 of 2002 and that no party was condemned to pay the same in the judgment and decree sought to be stayed.

#### **Analysis and determination.**

11. I have carefully considered the application, the response made by the respondent and the parties respective submissions together with the authorities that they cited.

12. I find that the main issue for determination is whether the applicant has made out a case for the granting of the order to keep in force and maintain status quo this court's order issued on 26<sup>th</sup> March 2015 attaching the sum ordered to be restituted to the defendant by Kenya Oil Company Limited pending the hearing and determination of the intended appeal.

13. The application is brought under Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows: -

#### ***Stay in case of appeal [Order 42, rule 6.]***

***(1) 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 order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (1) unless—***

***(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and***

***(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.***

***(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.***

***(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.***

***(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.***

***(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been***

***complied with.***

14. My understanding of the above provision is that it is only applicable in instances where the applicant seeks to stay the execution of a judgment pending an appeal. In the instant case however, it is not disputed that judgment in question was a negative judgment dismissing the applicants suit in which case, there is no positive order to be executed save for the defendant's claim for costs of the case. I therefore find that an application for stay of execution is not applicable to the present case.

15. My above finding notwithstanding, I am still minded to consider the applicant's contention that an order attaching money to be restituted to the defendant by Kenya Oil Company Limited was issued on 26<sup>th</sup> March 2015. It is this order of 26<sup>th</sup> March 2015 that the applicant implores the court to keep in force pending the hearing and determination of the appeal.

16. I have perused the order of 26<sup>th</sup> March 2015 and I note that it states as follows at Order No.2 thereof: -

***“That the defendant by itself, its servants or agents or otherwise, be and are hereby prohibited from dealing with the sums ordered to be restituted to it be Kenya Oil Company Limited by virtue of an order of the Court of Appeal at Nairobi in Civil Application No. NAI No. 254 of 2013 made on 24<sup>th</sup> November, 2014 and the said sums be attached, and the proceeds of the execution thereof be deposited in court or in a joint interest bearing account held by the advocates of the parties herein until inter partes hearing.”***

17. A simple reading of the said order shows that it was an interlocutory order intended to last pending the *inter partes* hearing of the application.

18. The respondent's case was that final orders were not confirmed at the conclusion of the application that gave rise to the interlocutory order. It was also the respondent's argument that the substantive suit having been heard and determined, this court is *functus officio* and has no jurisdiction to reinstate a status quo arising from an *ex parte* order issued on an interlocutory application.

19. The parties herein did not disclose the amount of money that was attached following the issuance of the interlocutory order or if the said order was acted upon or extended pending the hearing and determination of the suit.

20. Even assuming that the said orders were to last until the determination of the suit, I find that the judgment having been rendered in the main suit on 5<sup>th</sup> June 2020, this court is *functus officio*. My further finding is that in the circumstances of this case, it is not open for me to revisit or purport to keep in force or maintain status quo in relation to an order that was issued at an interlocutory stage more than 5 years ago.

21. For the above reasons, I am not persuaded that the instant application is merited and I therefore dismiss it with costs.

**Dated, signed and delivered via Microsoft Teams at Nairobi this 15<sup>th</sup> day of July 2021 in view of the declaration of measures restricting court operations due to Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Karani for Wandabwa for Plaintiff.

No Appearance for Defendant.

Court Assistant: Sylvia.