



**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CORAM: OMOLO, TUNOI & SHAH, J.J.A**

**CIVIL APPLICATION NO. NAI. 319 OF 1998 (UR.125/98)**

**BETWEEN**

**MARK WANGAI MUCHEMI T/A BORDER SERVICE STATION.....APPLICANT**

**AND**

**AGIP (K) LIMITED.....RESPONDENT**

**(An application for stay of execution in an intended  
appeal from an order of the High Court of Kenya at  
Busia (Mr. Justice Mbiti, J) dated 2/12/98,  
in  
H.C.C.C. NO. 64 OF 1998)**

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**RULING OF THE COURT**

In the circumstances of this case, we think the learned judge correctly exercised his discretion in refusing to grant to the applicant the injunction sought. The applicant was a licensee and his case before the superior court was that the respondent could only terminate the agreement upon given a notice of thirty days. It was also alleged in the plaint that if there was any dispute between the parties, the matter would be referred to arbitration. The purpose of these averments in the plaint was that the respondent was not entitled to terminate the agreement without having served the applicant with a notice of thirty days or that if there was a dispute between the parties, such dispute sought to be referred to arbitration.

The learned judge of the superior court thought that the agreement between the parties had other provisions for terminating the agreement other than through the notice of thirty days. On the material before him, we think the judge would validly refuse to grant the injunction. We note that the applicant virtually put aside his claims as set out in the plaint and sought to rely on other matter. The applicant was not entitled to do so. What we are saying is that we do not think the applicant has an arguable appeal and that being so we do not think it is necessary for us to go into the question of the appeal being rendered nugatory. We accordingly refuse this application and order that the motion herein be and is hereby dismissed with costs to the respondent.

**Made at Nairobi this 23rd day of December, 1998.**

**R. S. C. OMOLO**

**JUDGE OF APPEAL**

**P. K. TUNOI**

**JUDGE OF APPEAL**

**E. OWUOR**

**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**DEPUTY REGISTRAR.**