

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 404 OF 1995

L U INTERNATIONAL LTD.....APPLICANT

VERSUS

KENYA NATIONAL TRADING CORPORATIONRESPONDENT

COMBINED WAREHOUSE/ALLIED WHARFAGE....RESPONDENT

RULING

This is an application for stay of the execution of the Ruling of this court dated the 16th of June, 1995 and the orders made therein pending the hearing and determination of an intended appeal to the Kenya Court of Appeal. The application is brought under Order 41 rule 4 of the Civil Procedure Rules. It is supported by the affidavit of learned counsel for the Appellant, Mr. Lumatete Muchai sworn on the 22nd of June, 1995.

The gist of the ruling of this court, sought to be challenged on appeal, was that the Applicant and the Respondent had entered into a valid and enforceable contract of sale of some 5000 metric tones of Brazilian sugar for export valued at Kshs. 115,000,000/-. The contract was partly performed and the Respondent/Plaintiff paid for and obtained part of the consignment sold. The Applicant then unilaterally rescinded the contract on the grounds of non-payment for the remainder of the goods which was then resold to some 3rd parties who have not yet collected the same. The Respondent/Plaintiff then sued for an order of specific performance of the contract and moved the court for an order restraining the Applicant/Defendant from releasing the remainder of the consignment sold to any 3rd parties other than to themselves. The court upheld their claim but ordered them to pay for the said goods before delivery is obtained. It is against this order that the Applicant's wish to proceed on appeal.

I accept that sugar is a perishable commodity and may not be safely kept in a godown for unduly long period of time. The sugar the subject matter in dispute is still held in a bonded warehouse at Mombasa at the expense of the Respondents who had executed the necessary bonds. The Applicants want to honour their subsequent agreements regarding the sale of the said sugar to 3rd parties but not their first agreement with the Respondent/Plaintiff. This court has held that they cannot do that and must honour the first agreement with the Plaintiff company.

Mr. Lumatete, counsel for the Applicant firmly believes that they have an arguable case with great probability of success on appeal. Counsel for the Respondent, Mr. Nassir is of the contrary view and urges the court to dismiss the application more so as no security has been provided in terms of order 41 rule 4 (2) (b) of the Civil Procedure Rules.

It is plain to me that this is a case where the Applicant is in breach of their contract of sale with the Respondent/Plaintiff. It does not appear to me that they stand to suffer any substantial loss if the orders sought in this application are not granted. I specifically dealt with this matter in my ruling. If anything, it is the Respondent who stands to suffer financial loss as the sugar in question were specifically bought for export and with fluctuations in the market, their loss may be quite substantial. I do not propose to encourage the applicant, the Kenya National Trading Corporation to be flouting the contracts they have entered into whenever big money is dangled in front of their faces by granting them orders sought. In any case, I have reason to doubt their capability to pay any substantial damages to the Respondent if the sugar in question can be released to the 3rd parties. This may explain why they were not able to offer any security

in the first place as required under rule 4 (2) (b) of Order 41 of the Civil Procedure Rules. I regard this application as frivolous.

For reasons given, I decline to grant the orders sought and dismiss this application with costs.

Dated and delivered at Mombasa this July 4, 1995

S.O OGUK

JUDGE