IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Akiwumi, Tunoi & Shah JJ A)

CIVIL APPLICATION NO NAI 162 OF 1995

BETWEEN

KENYA PORTS AUTHORITY.....APPLICXANT

AND

KUSTROM (K) LIMITED .....RESPONDENT

(Being an application for stay of execution of the ruling of the High Court of Kenya at Machakos (The Honourable Mr Justice Osiemo) given on the 13th day of June, 1995

in

HCCC No 93 of 1995)

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RULING OF THE COURT

The applicant (the defendant in the suit) did not file its written statement of defence within the stipulated time as a consequence whereof an *ex-parte* default judgment was entered against it on April 5, 1995. Its application to set aside the said judgment and to stay execution was dismissed by Osiemo, J on June 13, 1995. Immediately after the dismissal of its formal application the applicant made an oral application for stay of execution pending the making of a formal application. The learned judge granted a stay on condition that the applicant provided security by depositing in Court the whole of the decretal amount of about Shs 10,000,000/- within 14 days during which period the formal application would have been made. The applicant did not make the deposit and in his ruling made on June 29, 1995 the learned judge said:

> "The applicant having failed to comply with this court's order dated 13th June, 1995, he has no right to be heard. Stay of execution granted on 13th June, 1995 having expired today the same is not extended."

The upshot of that refusal, without having given the applicant a chance to explain its delinquency, was that the applicant was in immediate danger of the decree being executed against it. Hence this application to say execution under rule 5(2)(b) of the Court of Appeal Rules.

The applicant is a corporation incorporated under Cap 391 of the Laws of Kenya. By its plaint the respondent (the plaintiff in the suit) averred that the applicant pursuant to and in exercise of its statutory

duty to provide facilities for handling, consigning and warehousing cargo and other goods imported into Kenya through Kilindini Harbour (Port of Mombasa) did receive from the vessel "MV Tilia" the respondent's container number CMBU 40356-4 which contained general merchandise. The final destination of this container was Nairobi ICD Embakasi by rail but it was broken into and some of its contents stolen in transit. The respondent contended that the loss of its goods was occasioned by the negligence and or breach of duty of the applicant or its servants and agents.

It is on the basis of the circumstances as set out briefly herein above that the respondent instituted the suit against the applicant and sought judgment, *inter alia*, for:

> (a) Kenya shillings 7,716,015/- being the value of the goods lost. (The equivalent of US$ 171,467.00 calculated at the mean rate of Kshs 45/- per dollar).
>
> (b) A further Kshs 2,143,337/50 being the loss incurred due to currency fluctuation.
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> (c) General damages.
>
> (d) Costs and interest at commercial rates of 20%.

The principles on which this Court exercises its jurisdiction in applications under rule 5(2)(b) are now well settled. See the cases of *Githunguri v Jimba Credit Corporation Ltd* Civil Application No 161 of 1988 (unreported) and *JK Industries Ltd v Kenya Commercial Bank Ltd* 1982-1988 1 KAR p 1088.

Mr Kiage, for the applicant, submitted that there are serious points of law to be canvassed in the intended appeal. He submitted, and we think with some justification, that it will be contended on behalf of the applicant that the respondent was not entitled to compensation because it did not give notice of its claim to the managing director of the applicant authority as is mandated by section 65 of Cap 391. Mr Kiage further argued that the applicant's defence disclosed several triable issues and that the learned judge was in error to deny the applicant the right to ventilate its defence at a full hearing. Moreover, Mr Kiage went on, the applicant had shown reasonable explanation for the delay in filing its defence.

On the materials before us, and having perused the draft memorandum of appeal, we cannot say that the intended appeal is frivolous. In our view, the applicant has shown *prima facie* that it has substantial points to present on appeal.

The next point for determination is whether if stay is not granted, the intended appeal if successful, will be rendered nugatory. No doubt the amount of the decree is quite substantial. We have not been given the capital base of the respondent and we cannot say for certain that it is a company of substance and one to which if the decretal sum is paid over, it will not be beyond the reach and control of the applicant. On the other hand, the capability of the applicant to pay any decretal sum is beyond doubt.

For these reasons we allow the application and grant the stay of execution without conditions pending the hearing and final determination of the intended appeal. Costs of this application shall be costs in the intended appeal.

Dated and delivered at Nairobi this 31st day of July, 1995

A.M AKIWUMI

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JUDGE OF APPEAL

P.K TUNOI

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JUDGE OF APPEAL

A.B SHAH

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JUDGE OF APPEAL