



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. 54 OF 2016

NATIONAL OIL CORPORATION OF KENYA..... PLAINTIFF

=VERSUS=

REAL ENERGY LIMITED..... DEFENDANT

RULING

1. The appellant/applicant is the registered owner of LR No.209/6776 situated at Ngong Road in Nairobi. By a Dealer Licence Agreement dated 1st April 2014, the Applicant agreed with the Respondent to operate, sell, display and advertise exclusively for the Applicant at the Applicant's service station on the said property at a fixed period of two (2) years.
2. In the year 2015, the Respondent filed a case against the Applicant at the Business Premises Rent Tribunal (BPRT) No. 720 OF 2015. The Applicant raised a preliminary objection on the ground that the BPRT had no jurisdiction to hear the matter before it. The chairman of the Tribunal overruled the objection and held that he had jurisdiction to entertain the matter.
3. The Applicant was aggrieved with that ruling and preferred an Appeal to this court against that ruling. The Applicant thereafter filed a notice of motion dated 20th June 2016 in which it sought stay of proceedings of the Tribunal pending the hearing and determination of the Appeal filed herein.
4. On 22nd May 2016, the applicant's application was placed before the Judge who certified it urgent and granted an order of stay of execution ex-parte. The interim orders were subsequently extended.
5. The applicant contends that the Tribunal had no jurisdiction to entertain the matter. That it has since preferred an appeal to this court against the Tribunal's ruling. That the Dealership agreement has since lapsed by effluxion of time and that the continuance of the Respondent in the Applicant's property is causing a lot of losses to the Applicant in that the Respondent is in breach of the Dealership Agreement. Some of the Applicant's complaints include non-sourcing of products by the Respondent from the Applicant, stocking adulterated fuel resulting in complaints from customers, non-payment of monies due to the applicant among others.
6. The Applicant further contends that due to the ex-parte injunctive orders which the Respondent obtained from the Tribunal, the Respondent has been allowed to stay on the subject property beyond the contractual period. The Applicant therefore contends that there is need to stay the Tribunal proceedings because if that is not done, the Tribunal will go ahead to hear the matter when there is an appeal pending which appeal may be rendered nugatory.

7. The respondent opposed the applicant's application in which it contends that it had raised numerous complaints to the applicant about leakages going on which resulted in customers vehicles being repaired at huge costs. That as a result of the complaints as shown in the letters to the applicant, the relationship between the two ceased to be that of a dealership agreement and impliedly became that of tenant and landlord and that therefore the BPRT had jurisdiction to hear the dispute before it.

8. I have carefully considered the applicant's application as well as the opposition thereto by the respondent. I have also considered the submissions by both parties. A fundamental issue on jurisdiction has been raised. This issue was raised at interlocutory stage but the same was dismissed. The applicant is aggrieved with that decision and has come for stay of proceedings pending appeal from the refusal to uphold the preliminary issue of jurisdiction raised.

9. In the case of **Global Tours & Travels Limited; Nairobi High Court Winding up Cause No. 43 of 2000** which was cited with approval in Gichuki Macharia & another –Vs- Kiai Mbaki & 2 others Winding Up Cause No. 1 of 2000, Ringera J. as he then was stated as follows:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercise in the interest of justice....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially, weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether if an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously”

10. The principles to be applied in a case where the applicant is seeking stay of proceedings pending appeal has been clearly captured in the above quoted case. At this stage, the applicant is expected to demonstrate that it has an arguable case and an arguable case does not mean one that will ultimately succeed. In the instant case, the applicant is contending that the Tribunal had no jurisdiction to entertain the matter as there was no tenant and landlord relationship between the two. Besides this, the dealership agreement provided for parties to go for arbitration. When I consider all the factors in this case, I find that the applicant has made out an arguable appeal with a high likelihood of success. In that case, the court has to guard the fact that if such appeal succeeds, it will not be rendered nugatory.

11. The dealership agreement has already lapsed by effluxion of time. The respondent will continue benefiting from what has lapsed due to injunctive orders which were granted in its favour. This will obviously cause the applicant to suffer substantial loss. This application was brought expeditiously. There is need for the appeal herein to be heard and disposed of expeditiously. I find merit in the applicant's application which I allow in terms of prayers No. three (3), four (4) and five (5).

It is so ordered.

Dated, signed and delivered at Nairobi on this 12th day of June 2017.

E. OBAGA

JUDGE

In the presence of advocates for the parties who were aware of the date and time of delivery of ruling.