



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: W. KARANJA, GATEMBU & J. MOHAMMED, J.J.A)

CIVIL APPLICATION NO. E284 OF 2020

BETWEEN

KENYA PIPELINE LIMITED.....APPLICANT

AND

MAFUTA PRODUCTS LIMITED.....RESPONDENT

(Being an application for stay of execution pending the lodgment, hearing and determination of an intended appeal from the Judgment of the High Court of Kenya at Nairobi (Maureen A. Odero, J.) delivered on 14th May, 2020

in

Nairobi High Court Civil Case No. 201 of 2007)

RULING OF THE COURT

1. In its application dated 4th September 2020, Kenya Pipeline Limited, the applicant seeks an order of stay of execution of the Judgment of the High Court at Nairobi (*Maureen A. Odero, J.*) delivered on 14th May 2020 pending the hearing and determination of an intended appeal. The application is made under Rule 5(2)(b) of the Court of Appeal Rules.

2. The background, in brief, is that the applicant instituted suit in the High Court against the respondent, Mafuta Products Limited based on a Transportation and Storage Agreement claiming transport and storage charges for various oil products transported and stored by the applicant on its behalf. The amounts claimed against the respondent in that regard were Kshs.5,650,473.87 and USD143,339.16. The respondent counterclaimed asserting that the applicant was holding its products worth about Kshs.100 million.

3. In the judgment sought to be stayed, the learned Judge found that the applicant's claim was proved and that it was entitled to the amounts claimed but allowed the respondent "to set off the amount awarded to the [applicant] against the linefill being held" by the applicant. The learned Judge concluded the judgment as follows:

"(i) Judgment be and is hereby entered in favor of the plaintiff against the defendant in the sum of Kshs. 5,650,473.87 and USD 143,339.16.

(ii) interest shall be payable on one above in accordance with clause 16.3 of the Transportation and Storage Agreement dated 10th May 1999.

(iii) the defendant shall be entitled to set-off the amount due to the plaintiff from the defendants linefill held by the plaintiff.

(iv) each party to meet its own costs of this suit."

4. In effect the judgment sought to be stayed is in favor of the applicant and it would appear strange, at first glance, that the applicant would be seeking to stay a favourable judgment. However, the respondent's claim against the applicant for "linefill" in respect of which set off is claimed in the amount of Kshs.119,415,256.00 exceeds the applicant's claim. In the result, and although on the face of the judgment the amount of set off was not quantified, the respondent is on the strength of the judgment seeking to recover an amount Kshs.86,430,866.20

from the applicant.

5. Based on the material exhibited to the affidavit of Stanley Manduku in support of the application it is apparent that the respondent has extracted a decree and instructed auctioneers to attach the properties of the applicant in execution of the decree. The applicant has also exhibited a notice of appeal dated 19th August 2020 and a draft memorandum of appeal.

6. In the affidavit in response, Nasser Motha, a director of the respondent asserts that the application is an abuse of the process of the court; that upon being given notice of entry of the judgment by the respondent's advocates, the applicant did not respond, and the respondent thereafter applied for the decree and warrants of attachment in execution.

7. We have considered the application and the written submissions by the firms of G.N. Gichongi Gichuhi & Co Advocates for the applicant and by Khalwale & Company for the respondent. In an application of this nature, it is necessary for the applicant to demonstrate that its intended appeal is arguable and that if the orders sought are not granted, and the appeal is eventually successful, it will have been an appeal in vain. See Ishmael Kagunyi Thande vs. Housing Finance of Kenya Ltd

8. Although counsel for the respondent has argued at length that the application is incompetent for want of a notice of appeal, there is, as already noted, exhibited to the affidavit of the applicant a notice of appeal dated 19th August 2020 which we have no reason at this stage to disregard. We take it that it was filed as deposed.

9. As to whether the intended appeal is arguable, it is contended by the applicant that the learned Judge erred in ordering the applicant to pay to the respondent a liquidated sum as its mandate is restricted to offering "transport and storage facilities and does not have capacity to solely sell any petroleum products that are loaded" in its pipeline; that the learned Judge failed to appreciate that the disposal of the line fill that is in its custody must be sold in accordance with established procedure under the Transportation and Storage Agreement between the parties. We do not think the intended appeal is frivolous. We are indeed satisfied that the intended appeal is arguable.

10. As to whether the appeal will be rendered nugatory, the applicant has asserted in its submissions that "the decree in question is a money decree and in the event that the appeal is not successful, the applicant being a government body is unlikely to lack money to settle the decretal amount." However, perhaps the more pertinent question is whether the respondent will be in a position to refund the amount if the appeal succeeds. The respondent does not assert that it would be in a position to refund the amount in question should the appeal succeed.

11. Consequently, we are inclined to allow the application, which we hereby do, and order that there will be a stay of execution of the judgment of the High Court pending the hearing and determination of the appeal. If it has not already done so, the applicant shall file and serve the memorandum and record of appeal within 45 days from the date of delivery of this ruling failing which the orders of stay shall automatically lapse.

12. The costs of the application shall be in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 23RD DAY OF APRIL, 2021.

W. KARANJA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCI Arb)

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR