



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPEAL NO. 303 OF 2001

BETWEEN

CASTROL LIMITED.....APPELLANT

AND

KOBIL PETROLEUM LIMITED.....RESPONDENT

*(An appeal from an order of the High Court of Kenya at Nairobi (Ransley,*

*Commissioner of Assize) dated 3<sup>rd</sup> May 2001*

*in*

*High Court Miscellaneous Application No. 73 of 2001)*

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**RULING OF THE COURT**

This appeal is against an order of the High Court dated 3<sup>rd</sup> May 2001 dismissing an application to set aside interim orders of injunction. The appeal has been pending for a long time.

On 27<sup>th</sup> March 2012, Miss Malik, learned counsel for the appellant, applied for leave to withdraw the appeal with no orders as to costs on the ground that, the Order of the High Court appealed from has been overtaken by events.

Mr. Oyatsi, learned counsel for the respondent expressed no objection to the withdrawal of the appeal but prayed that the appellant should pay the costs of the appeal to the respondent.

This ruling relates to the dispute on costs.

The respondent has been distributing the appellant's products in the East African region since 1992 under various Distribution Agreements.

The latest Distribution Agreement was executed on 13<sup>th</sup> September 1996 and it was to run for five years from 1<sup>st</sup> September 1994 (past). It had an Arbitration Clause – clause 18.2 to the effect that failing amicable settlement, all disputes, conflicts and controversies arising in connection with the agreement should be referred to arbitration. Before the expiry of the agreement the parties started negotiating for terms of renewal agreement for a further 5 years. Apparently, the parties agreed that the new agreement would be backdated to 1<sup>st</sup> September 1999 and that whilst the terms of the renewal agreement were being

negotiated the relationship of the parties would continue to be principally governed by the terms of the 1996 Agreement. Before the negotiations were concluded the respondent terminated the relationship by a letter dated 14<sup>th</sup> November 2000 which stated in part:-

**“.....castrol will not continue to supply Castrol products to Kobil effective from 23<sup>rd</sup> November 2000 on which date the Agreement will come to an end”.**

Consequent on that letter, the respondent filed an originating chamber summons dated 21<sup>st</sup> March 2001 mainly under S.7 of the Arbitration Act in the **High Court Miscellaneous Application No. 73 of 2001** seeking various orders of injunction including an order of injunction to restrain the appellant from committing or continuing to commit breaches of the distribution agreement renewed or alternatively extended on 1<sup>st</sup> September 1999 or a mandatory injunction pending arbitration compelling the appellant to perform all the obligations under the contract.

On 22<sup>nd</sup> February 2001, the High Court granted interim orders pending the hearing of the application inter parties. The application was ultimately allowed on 7<sup>th</sup> March 2001. Subsequently, the appellant filed a chamber summons dated 21<sup>st</sup> March 2001 seeking an order that the interim orders given on 22<sup>nd</sup> February 2001 be set aside on various grounds. That application was dismissed by the High Court on 3<sup>rd</sup> May 2001 giving rise to the present appeal.

Miss Malik submitted in essence that the Distribution Agreement which was to be executed and which the High Court ordered the appellant to continue honouring pending arbitration has expired by exffluxion of time and that the respondent is not distributing the products of the appellants as the parties have recognized that the agreement has lapsed.

She contended that the appellant has been willing to prosecute the appeal but it has been adjourned on several occasions due to no fault of the appellant and that it is not fair to order the appellant to pay costs.

On his part, Mr. Oyatsi while conceding that the appeal was overtaken by events a long time, submitted that the appellant's counsel has applied for adjournment on two occasions; that the matter has been adjourned before for parties to negotiate on the issue of costs; that, the appellant's counsel had expressly agreed to pay reasonable costs and that the only difference between them was the quantum of costs. He contended that the respondent was entitled to the costs of the appeal.

However, Miss Malik contended that the negotiations were in respect of a global settlement of the suit and the underlying arbitration but the respondent's counsel was not in favour of a global settlement.

It seems that the appeal was first listed for hearing on 17<sup>th</sup> November 2003. On that day, Mr. Oyatsi brought to the attention of the Court that the respondent had filed **Misc. Civil Application No. 308 of 2003** for an order to strike out the appeal and applied that the application be heard first. The court agreed with him and adjourned the appeal. It was fixed for hearing again on 13<sup>th</sup> December 2005 but it was adjourned on the application of the appellant's counsel. Thereafter the appeal was adjourned on several occasions for various reasons including lack of time by the Court to deal with the appeal.

It is on 17<sup>th</sup> March 2010 that the Court realized that the appeal may have been overtaken by events and adjourned it for mention so that the respective advocates could get full instructions from their respective clients. Thereafter the appeal was mentioned on two occasions but no progress on the fate of the appeal was recorded.

The above synopsis shows that the appeal was overtaken by events in or about 2004 when the 5 year anticipated Distribution Agreement which was to take effect from 1<sup>st</sup> September 1999 expired by exffluxion of time.

Nevertheless, the appeal has been kept alive for over seven years without either party taking active steps

to terminate it. However the delay in disposing the appeal before it lapsed cannot be attributed to either party. It was an institutional delay caused by court diary. Costs are at the discretion of the Court. It is just in the circumstances of the appeal that each party should bear its own costs.

In the result, the appeal is withdrawn under Rule 96 (5) of the Court of Appeal Rules with no orders as to costs.

Dated and delivered at Nairobi this 28<sup>th</sup> day of March 2012

**E. M. GITHINJI**

.....  
**JUDGE OF APPEAL**

**W. KARANJA**

.....  
**JUDGE OF APPEAL**

**K. H. RAWAL**

.....  
**JUDGE OF APPEAL**

I certify that this is a true copy of the original

**DEPUTY REGISTRAR**