



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLICATION NO. 6 OF 2010**

**BETWEEN**

**HUNKER TRADING COMPANY LIMITED ..... APPLICANT**

**AND**

**ELF OIL KENYA LIMITED ..... RESPONDENT**

***(An application for stay of execution orders of judgment and decree of the High Court of Kenya at Nairobi Milimani Commercial Courts (Lesiit, J) dated 17<sup>th</sup> July, 2009***

***in***

***H.C.C.NO.1785 of 20010)***

**\*\*\*\*\***

**RULING OF THE COURT**

This application is a unique one in the sense that as far as we know it is the first application which has been grounded on the new provisions of the Appellate Jurisdiction Act, namely **sections 3A** and **3B** of the Act. It is also expressed to be based on **Rules 5(2)(b)** and **42** of this Court's rules.

The applicant **Messrs Hunker Trading Company Limited** has applied for a stay of execution of the judgment and decree of the superior court (Milimani Commercial Court (**Lesiit, J.**) dated 17<sup>th</sup> July, 2009. The decree was given in favour of the respondent **Messrs ELF OIL KENYA LIMITED** which from the contents of the judgment merged with Messrs Total (K) Limited on 28<sup>th</sup> February 2001 by virtue of an agreement between the two companies. This merger took place only a few days before the filing of the suit.

The background facts giving rise to the challenged judgment as per the pleadings are brief. The respondent by a plaint filed in court on 23<sup>rd</sup> November, 2001 claimed from the applicant company shs.8,932,710 being the sum due and owing to it for petroleum products delivered to the applicant company between September, 1999 and October, 2000. Following an amendment to the plaint the amount allegedly due was varied to Kshs.10,548,780. The applicant denied owing the claimed amounts or at all and in particular denied entering into an agreement with the respondent. Following the filing of the defence, the parties framed five issues and the matter was subsequently heard and the court entered

judgment in favour of the respondent in the sum of Kshs.10.031,358/15 with interest. Parties were also ordered to pay their respective costs.

On 7<sup>th</sup> August, 2009, the applicant filed an application in the superior court seeking an order staying execution of the decree until the determination of an intended appeal to this Court. In a reasoned ruling dated 20<sup>th</sup> November, 2009, the superior court (Koome, J.) allowed the application for stay of execution on terms. The material part of the learned Judge's ruling states:-

***“It is clear from the pleadings and the judgment that this was a liquidated claim in respect of goods supplied to the defendants by the plaintiff. This application was brought to court without delay. I am not certain about substantial loss because the plaintiff claims that it is a large company dealing with the petroleum and in the event of the appeal succeeding, they will repay the money. On the other hand the defendant contends that settling the claim will render their company insolvent thereby rendering the results of the appeal nugatory. Balancing those two factors it is necessary for the defendant to provide security for the very reasons that they fear to be rendered insolvent if the appeal succeeds in the same way, they may have no money to pay even when the appeal is not successful. I therefore allow the application for stay of execution on condition that the defendant will deposit a sum of Kenya shillings five million (Kshs.5 million) being about 50% of the decretal sum in an interest earning account to be opened in the joint names of the plaintiffs advocates and the defendants advocate within 30 days. Failure to comply with the above condition, the order of stay will lapse. The plaintiff will have the costs of the application.”***

At this stage we consider it important to observe that no notice of appeal has been lodged with the Court against the said ruling or any part thereof. Instead, the notice of appeal is directed at the judgment described above and handed down by (Lesiit, J.).

The application dated 21<sup>st</sup> January 2010 is based on grounds set out in the body of the application and the grounds contained in a draft memorandum of appeal annexed to the affidavit in support of the application. For reasons which will presently become apparent, we do not consider it necessary to set them out in extenso but to state that the grounds were framed with a view to satisfying the two well known requirements under **Rule 5(2)(b)** of this Court's Rules namely that, the appeal is arguable, that is, it is not frivolous, and that if the order were not granted, the appeal were it eventually to succeed, would be rendered nugatory.

We have taken into account the submissions made on behalf of the parties including the contents of the affidavits in reply all of which were centred on **Rule 5(2)(b)** of this Court's Rules. However, having identified the principal points raised in the application and this being a novel situation, we have opted to focus our attention on the impact of the overriding objective on the special circumstances of the matter before us.

As stated above, no notice of appeal has been lodged in this Court against the order of stay of execution on terms given by (Koome, J.) which order although granted on different grounds to those applicable to an application for stay of execution in this Court and the order has since lapsed, this is a factor which this Court cannot fail to take into account because the non-compliance with the order has a bearing on the provisions of **section 3A** of the Appellate Jurisdiction Act. Moreover the disobedience of the order in our view has an impact on the management of the Court resources. **Sections 3A** and **3B** of the Appellate Jurisdiction Act and also in the context of the High Court **sections 1A** and **1B** of the Civil Procedure Act, have in the recent past generated what appears to have the markings of enlightened jurisprudence touching on the management of civil cases and appeals and therefore as the sections have been extensively reproduced in many recent decisions we need not reproduce them here except the material part in the Act because the two sets of sections are in pari materia. **Section 1A (3)** of the Civil Procedure Act reads:-

***“A party to civil proceedings, or an advocate for such party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the direction and, orders of the Court.”***

As the applicant has admitted having failed to comply with the order of stay by (Koome, J.) we find that it is in breach of **section 1A(3)** of the Civil Procedure Act and also **section 3A(3)** of the Appellate Jurisdiction Act. We do not think that the fact that the order has since lapsed has in any way eroded the relevance of the disobedience of the order to the operation of the overriding objective. The thrust of the applicant's application to this Court under **section 3A** is substantially to seek similar orders to those he was granted in the superior court and failed to obey. Under **section 1A(3)** the applicant has a duty to obey all court processes and orders. In our opinion, coming to us having abused the process in the superior court violates the overriding objective (which in another case has been baptized the **(double "O" principle)**) and in this case, we have chosen to call it ("**the O<sub>2</sub> or the oxygen principle**") because it is intended to re-energise the processes of the court's and to encourage good management of cases and appeals. The violation arises from the fact that this Court is again being asked to cover almost the same points although using different rules and this is a waste or misapplication of this Court's resources (time) and also an abuse of its process. The fact that the notice of appeal under **rule 5(2)(b)** and **74** is directed at the judgment of (Lesiit, J.), would still not take the matter outside the provisions of section 3A which is a provision of an Act of Parliament.

As the applicant did not appeal against the order of stay on terms and has not challenged it in any way for example demonstrating that it was onerous or unjust but just ignored the order, in our view, the application falls outside the provisions of **Rule 5(2)(b)** and **section 3A** and is therefore incompetent. The order of stay of execution on terms was subsequent to the decree. In the circumstances, we find that the exercise by us of any original jurisdiction would be inappropriate where, as in this case, the lower court has exercised a parallel jurisdiction, it must be demonstrated to this Court that the jurisdiction of the lower court has not been properly exercised, otherwise we would be encouraging duplication of effort and poor management of the available resources.

The applicant is seeking the same orders it declined to obey. We think that we have the jurisdiction to stop it in its tracks in order to attain or further the "O<sub>2</sub>" principle. We would act unjustly if we were to allow it another chance in this Court to defeat the cause of justice by failing to obey an important order of the superior court.

Perhaps, it is appropriate for us to observe that litigants and their advocates should note that in "**O<sub>2</sub> principle**", they have a powerful ally where they are advancing its aims and a powerful adversary where they are bent on subverting its aims. As stated severally now, in some of our recent decisions the "**O<sub>2</sub> principle**" is the hub upon which the objectives of the two Acts, their provisions and the rules made thereunder turn. It is a requirement of "**O<sub>2</sub> principle**" that the exercise of any power under the Act or the rules must be exercised in line with its principal aims. Similarly, the interpretation of any provision in the Acts and the rules has to be "O<sub>2</sub>" compliant.

In the case of **MRADULA SURESH KANTARIA AND SURECH NANILLAL KAPTARIA CIVIL APPEAL NO. 277 OF 2005** (unreported) this Court observed:-

***"In this regard we believe one of the principal purposes of the double "OO principle" is to enable the Court to take case management principles to the centre of the Court process in each case coming before it so as to conduct the proceedings in a manner which makes the attainment of justice fair, quick and cheap"***

The applicant cannot be allowed to invoke the "**O<sub>2</sub> principle**" and at the same time abuse it at will as has happened in this matter.

Again in this Court's decision which was cited by the applicant's counsel, namely, **CALTEX OIL LIMITED vs EVANSON WANJIHIA Civil Application No. Nai 190 of 2009 (unreported)** this Court delivered itself as under:-

**Before we set out the terms of the conditional stay it is important to state that in our view, the powers of this Court have recently been enhanced by the incorporation of an overriding objective in sections 3A and 3B of the Appellate Jurisdiction Act Cap 9 and sections 1A and 1B of the Civil**

**Procedure Act Cap 21 following the amendment of the Statute Law (Miscellaneous Amendment Act No.6 of 2009). The overriding objective provides that the purpose of the two Acts and the rule is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes. Although the overriding objective has several aims the principal aim is for the Court to act justly in every situation either when interpreting the law or exercising its power. The Court has therefore been given greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective.”**

As stated above, it would be unjust for the applicant to violate the **“O<sub>2</sub> principle”** in the superior court and again purport to invoke it in this Court.

In conclusion, we wish to observe that **“O<sub>2</sub> principle”** which must of necessity turn on the facts of each case is a double faced and for litigants to thrive under its shadow they must place themselves on the **“right side”**. In the circumstances of this matter, the applicant is clearly on the **“wrong side”** and for this reason the principle must work against it.

The advent of the **“O<sub>2</sub> principle”** in our opinion, ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings; ensures the efficient use of the available judicial and administrative resources of the courts; and results in the timely disposal of the proceeding at a cost affordable by the respective parties. That culture must include where appropriate the use of suitable technology. It follows therefore that all provisions and rules in the relevant Acts must be **“O<sub>2</sub>”** compliant because they exist for no other purpose. The **“O<sub>2</sub> principle”** poses a great challenge to the courts in both the exercise of the powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In our view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail our redesigning approaches to the management of the court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.

The **“O<sub>2</sub> principle”** is certainly not going to be a magic potion capable of solving all our problems in the civil justice system. Instead it is a challenge to every court in every matter that comes up before it. The best design for each matter will be determined on a case to case basis; and above all the attainment of the objective at least in the short term will depend on the skills, innovativeness and the commitment of the courts including the Rules Committee, which in our view has a special role in assisting the courts attain the objective by, for example, undertaking a continuous review of the rules so as to retain those that would serve the interests of the objective and shed off those that hinder the objective. In the long term, we believe that best practices and precedents will emerge for use and improvement by future generations.

It seems to us that in the exercise of our powers under the **“O<sub>2</sub> principle,”** what we need to guard against is any arbitrariness and uncertainties. For that reason, we must insist on full compliance with past rules and precedents which are **“O<sub>2</sub>”** compliant so as to maintain consistency and certainty. We think that the exercise of the power has to be guided by a sound judicial foundation in terms of the reasons for the exercise of the power. If improperly invoked, the **“O<sub>2</sub> principle”** could easily become an unruly horse. For this reason, we would like to reiterate here what this Court observed in the case of **MRADURA SURESH KANTARIA vs SURESH NANALAL KANTARIA(supra):-**

***“While the enactment of the of the “double OO principle” is a reflection of the central importance the court must attach to case management in the administration of justice we wholly endorse the holding in the Australian case of PURUSE PTY LIMITED vs COUNCIL OF THE CITY OF SYDNEY [2007] NSWLEC 163 where the Court underscored that in exercising the power to give effect to the principle, it must do so judicially and with proper and explicable foundation.”***

In the KANTARIA case we observed: -

***“The overriding principle will no doubt serve us well but it is important to point out that it is not going***

***to be the panacea for all ills and in every situation. A foundation for its application must be properly laid and the benefits of its application judicially ascertained.”***

We trust that in the matter before us we have walked the talk. Disobedience of a court order that was intended for the same purposes being pursued by the applicant in this Court is a clear violation of the “***O2 principle***” as demonstrated above and we hereby invoke the power vested in us under ***section 3A*** to dismiss the application.

Accordingly the same is dismissed with costs to the respondent.

***DATED and delivered at Nairobi this 24<sup>th</sup> day of March, 2010.***

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

**ALNASHIR VISRAM**

.....

**JUDGE OF APPEAL**

**J.G. NYAMU**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**