



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 117 OF 2010

BETWEEN

KENYA OIL COMPANY LIMITEDAPPLICANT

AND

JAYANTILAL DHARAMSHI GOSRANIRESPONDENT

(An application for stay of execution of the decree pending the lodging, hearing and determination of an intended appeal from the judgment of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 21st December, 2009

in

H.C.C.C. NO. 39 OF 2005)

RULING

On the 3rd of June, 2010, I declined to certify as urgent, the notice of motion filed herein on the same day. I was not satisfied on the material placed before me that it was urgent. The motion seeks an order under **rule 5 (2) (b)** of the rules of this Court for stay of execution of a decree ensuing from the judgment of the superior court (Khaminwa J) delivered on 21st December, 2009. In the judgment, the applicant here was ordered to pay in excess of Shs. 97 million with interest thereon to the respondent. Subsequent to that judgment the applicant applied to the superior court for an order of stay of further proceedings and execution pending the hearing and determination of an intended appeal to this Court. That application was properly made under **rule 41 r 4** of the Civil Procedure Rules and upon full consideration of it, another Judge of the superior court, Koome J. granted a stay of execution on condition that:

“The judgment-Debtor will deposit in court within thirty (30) days from the date hereof, a sum Kshs. 15 million by way of cash, a bank guarantee or insurance bond to be held in court as security pending the determination of the appeal. Failure to do so, the order of execution will lapse.”

The order was made on 7th May, 2010 and was therefore valid upto 6th June, 2010. On 31st May, 2010, the applicant herein, furnished a Bank guarantee through the **Bank of Africa Kenya Ltd** securing the sum of Shs. 97,174,900 plus interest thereon which it understood to be the entire balance of the decretal sum. It found no need to deposit Shs.15 million in cash as directed in the order of Koome

J. Furthermore it did not challenge the order of Koome J. but instead took out the motion now before this Court whose certification of urgency is sought.

The matter was placed before me on 9th June, 2010 under **rule 47 (5)** of the rules for hearing *inter partes*. I heard learned counsel for the applicant Mr. Oyasti who submitted that the object of the application was to forestall execution of the decree ensuing from the judgment of Khaminwa J, a draft of which has already been submitted to his firm for approval. It was therefore a matter of time before the process of execution is embarked on in which event the motion will be overtaken. In his view, once the Bankers' guarantee had been given to cover the entire decretal amount, there was no need of depositing cash to cover the same amount as that was an onerous obligation. If on the other hand the applicant was forced to deposit the said amount and also furnish a Bank guarantee, as ordered by Koome J, it will suffer irrecoverable loss.

In opposing the application, learned counsel for the respondent, Mr. Rumba Kinuthia submitted that the main application, let alone the certificate of urgency, was in abuse of the court process and it cannot be entertained before a court of law. That is because there was only one notice of appeal challenging the judgment of Khaminwa J but none against the ruling of Koome J who granted a stay of execution on terms. The applicant cannot be heard to seek further or other orders of stay when, as admitted by it, it has not complied with a previous court order. That, in his submission, would fly in the face of the overriding objecting in civil litigation which the new **sections 1A** and **1B** of the Civil Procedure Act and **sections 3A** and **3B** of the Appellate Jurisdiction Act require every court to be guided by. In aid of that proposition Mr. Kinuthia cited this court's decision in **Hunker Trading Company Ltd v Elf Oil Kenya Ltd Civil Appl. No. NAI. 6 of 2010 (ur)** where an application such as the motion before this Court was dismissed for want of compliance with the terms of a similar order granted by the superior court. He also submitted that there was nothing to stay since the period granted for compliance with the orders of Koome J had expired. In any event, he pointed out, the execution of the decree was not imminent although there was nothing to prevent the respondent from pursuing the matter further.

In response to the authority cited, Mr. Oyatsi contended that the motion is made pursuant to the original jurisdiction of this Court under **rules 5 (2) (b)** which may be invoked regardless of the orders of the superior court and is not an appeal from such orders. The authority was therefore not applicable.

I am in no doubt that in fullness of time the merits and demerits of the motion will be fully argued and determined before the full court which has the jurisdiction to determine it. The limited jurisdiction I have for now is to decide, on the basis of the material placed before me at the time the motion was filed, whether it is deserving of a certificate of urgency. As I have stated before, my view of the essence of urgency is that all scheduled activities and other matters before this Court must be stopped in order to hear and determine a matter that is submitted to it. In that case the facts and circumstances of such new matter ought to be compelling and irresistibly persuasive, considering the well known fact that this Court has not operated at its full judicial capacity for sometime and is saddled with a backlog of cases spread throughout the country. Acceding to certificates of urgency willy nilly would consign other deserving matters to the back burner and cause injustice and perhaps an outcry from numerous other litigants.

I have re-examined the matter, but I am not persuaded that it is deserving of a certificate of urgency. Execution of a decree does not take place surreptitiously or overnight. It is a process which the applicant will become aware of and is at liberty to seek certification for urgency when the execution is imminent and the consequences irreversible or uncompensable. Being of that frame of mind, I decline to certify the matter urgent and it is so ordered. Costs to the respondent.

Dated and delivered at Nairobi this 11th day of June, 2010.

P.N. WAKI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR