REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

Civil Appli 81 of 2009 (UR 50/2009)

CHEVRON KENYA LIMITED (CALTEX) .....APPLICANT

AND

KANYOTTA HOLDINGS LIMITED .....RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Nairobi (Khaminwa, J.) dated 5th March 2009

in

H.C.C.C. NO. 402 of 2008)

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RULING OF THE COURT

On the 5th of March, 2009, ***M/S. Chevron Kenya Ltd*** (formerly Caltex Oil (Kenya) Ltd) (hereinafter "*the applicants"*) were ordered by the superior court (Khaminwa, J.) to deposit a sum of Kshs. 44,100,000/= by way of security against any judgment that may be made in favour of ***M/S. Kanyotta Holdings Ltd*** (hereinafter "*the Respondents"*). The said sum was to be deposited within 45 days of the order. The applicants were dissatisfied with the order and have sought to challenge it in **Civil Appeal NO. 59 of 2009** which has already been filed. In the meantime the applicants come before us under ***rule 5 (2) (b)*** of the rules of this Court for the following substantive orders: -

"3. THAT there be stay of execution of the ruling and orders of the Hon. Lady Justice J. Khaminwa delivered on 5th March, 2009 at the High Court of Kenya at the Commercial & Tax Division-Milimani in civil Case No. 402 of 2008 pending the lodging, hearing and determination of the intended appeal.

4. THAT in the alternative to prayer (3) above there be stay of the ruling and orders of the Hon. Lady Justice J. Khaminwa delivered on 5th March, 2009 in High Court at Commercial & Tax Division, Milimani, in civil Case NO. 402 of 2008, pending the lodging, hearing and determination of the intended appeal."

It is not clear to us what the "*alternative"* prayer (4) is meant to achieve and in any event it is not within the purview of ***rule 5 (2) (b).*** We disregard it. In order to succeed on the prayer (3), the onus is on the applicants to show, not only, that the intended appeal is arguable or is not frivolous, even on a solitary

ground, but also that if the order for stay of execution is not granted, the intended appeal, if successful, will be rendered nugatory.

The background to the application is this: -

In the year 2004, the respondent entered into an agreement with the applicants for transportation of the applicants' petroleum products within the Republic of Kenya. There were agreed rates of payment for such transportation and the agreement had no fixed term. Among other clauses, however, there was a clause for termination of the agreement without cause by either party upon giving thirty days notice. There was also a clause for dispute resolution through arbitration.

After 21 months of the agreement, the applicants served notice of termination in accordance with the agreement and it came to an end on 2nd June, 2006. Two years down the line, the respondents discovered that the applicants, had, upon termination of their contract, appointed another transporter and paid them a higher transportation rate for the same task. The respondents then decided to claim the difference between the low rate they were paid and the higher rate paid to the new transporter for the period of 21 months. They alleged various breaches of contract and also misrepresentations by the applicants as the basis of the claim. On their calculations, the respondents had suffered a loss of Shs.44,100,000/= the payment of which they demanded but was resisted by the applicants.

On 18th July, 2008, the respondents went before the superior court and filed suit to recover the amount. Upon being served with the summons to enter appearance the applicants applied under ***section 6*** of the ***Arbitration Act, 1995*** for an order that the suit be stayed pending arbitration as stipulated in the agreement between the parties. That order was subsequently made with the consent of the parties and it is common ground that the arbitration is underway.

In the meantime, the respondents had learned through an email circulating on the internet since April, 2008 that the applicants were divesting their investments by selling their assets in Kenya, Uganda, Benin, Togo, Cameroon, Congo, Cote d'Ivoire and Nigeria. They sought security for the amount they were claiming but the applicants would not hear of it, preferring that the arbitrator deals with such demand. The respondents then took out a chamber summons on 7th August, 2008 for an order, *inter alia*:

"**2. THAT the Defendant be and is hereby ordered to provide security for the plaintiff's claim herein in the sum of Kshs.44,100,000/= together with interest and costs pending the hearing and determination of this suit and/or reference to arbitration on such terms as the court may in its sole discretion determine."**

The provisions of the law relied on were: -

"**Order XXXVIII Rules 1, 2, 5 and 12 and Order XV Rules 1, 2, 3 and 19 of the Civil Procedure Rules, Sections 63(b) and 3A of the Civil Procedure Act Cap 21 Laws of Kenya and Section 6 (1) (b), and 7 of the Arbitration Act, No. 4 of 1995 and all other enabling provisions of the law."**

In seeking the order aforesaid, the respondents swore through Mr. Wachira Muritu, their director, that the applicants were intent on liquidating their interests in Kenya and moving out of the jurisdiction of the court, thus making it impossible to execute any resultant judgment or decree in the respondents' favour. That averment was based on an email ascribed to an official of the applicants' parent company stating *inter alia*: -

"**Today we have reached a milestone in our deployment of the global Downstream strategy and wish to announce that following several months of detailed reviews of our business, we have decided to approach the market with a view to seeking a market response through potential buyers of our assets in the following countries: Kenya, Uganda, Benin, Togo, Cameroon, Congo, Cote d'Ivoire and Nigeria.**

This is part of our assessment effort to align our business with the Global Downstream

strategy. Please note that the final decision will only be made once we have had a reaction from the market."

In response to those averments the applicants swore through Mrs. Edith Malombe, their Chief Corporate Counsel-East Africa as follows: -

"**9. THAT I am well aware in my capacity as the defendant's Chief Corporate Counsel-East Africa that any sale of the Defendant's business in this jurisdiction will be as a going concern and the purchasing entity shall take up any liabilities of the defendant.**

10. THAT I am also well aware in my capacity as the defendant's Chief Corporate Counsel-East Africa that the defendant's parent company, Chevron Limited, has since issued a clarification on the issue of sale of its shares in Chevron Kenya Ltd and explained that it is still considering the sale and that any such transaction would be by sale of the entire share capital of the defendant and that the defendant would be transferred as a going concern as borne out in the annexed official communication marked "EM "a".

The learned Judge in her brief ruling considered those averments amongst others and was of the view that a substantial dispute had been admitted since the matter was before an arbitrator. She was also of the view that the applicants had admitted they were intending to sell their share holding and leave the country. In the end she held: -

"**In principle, the applicants are entitled to a protection order for security. However, the amount of security has to be reasonable. The amount mentioned in the application is Kshs.44,100,000/= that is the sum claimed in the plaint. Under Order 38 Civil Procedure Code it is required security for the appearance of the party. That amount should cover the plaintiff's claim costs and interest. Having found that the defendant has not forwarded even a draft proposed agreement of the proposed transfer of shares to prove that the plaintiff will be secured if the transfer of liabilities is made, I am not convinced that the defendants are not trying to avoid the plaintiff's debt."**

The applicant now says through learned counsel Mr. Munge, that the superior court made serious errors in its approach to the application and the applicants will argue in the intended appeal that ***order 38*** of the Civil Procedure Rules was not properly considered and applied; that the application was based on speculations rather than evidence; that the sale of the applicant's shares would leave the company as a going concern and therefore no prejudice would ensue; that there was no admission of the sale of assets and no proof was provided; and that there was no material to warrant the grant of an order for security at Shs.44,100,000/= as sought by the respondents. On his part, Mr. K'opere, learned counsel for the respondents submitted that the intended appeal was frivolous since it was common knowledge, and the applicants had confirmed it in their further affidavit, that they were negotiating with M/S. Total Ltd for sale of shares of Chevron and Chevron would then leave the country; that the email information which was not denied referred to sale of the applicants assets in Kenya; and that the application was not only under ***Order 38*** of the Civil Procedure Rules but also under ***section 7*** of the Arbitration Act which provides for protection without any preconditions.

We have carefully examined the application, the affidavits on record, the applicable law and the submissions of both counsel. There is in our view a serious issue as to whether the respondents' application in the superior court ought to have been considered under ***order 38*** of the Civil Procedure Rules or ***section 7*** of the Arbitration Act or both and, in either case, whether the requirements of those provisions were properly applied. It is also not frivolous to question the finding that the applicants were selling their assets and leaving the jurisdiction of the court when there was affidavit evidence to the contrary. The quantum of the security ordered and the basis for requiring a deposit for it are also live issues. In sum, the applicants have surmounted the first hurdle on arguability. We hasten to add that an arguable case is not one that will necessarily succeed or has high chances of success.

As for the nugatory aspect, Mr. Munge submitted that the security deposit is colossal and the consequence of default is attachment of the applicant's property. It was also possible that the arbitrator

may finalise the arbitration process before the intended appeal is finalized thus rendering it futile. Mr. K'opere on the other hand could not see how payment of the money which would be deposited in an interest-earning account would render the result of the appeal nugatory. The only fear by the respondents was attachment and not inability to make the deposit. There was no basis therefore to make a finding that the success of the intended appeal would be rendered nugatory. At all events, he submitted, the payment had not been made within the time set in the order of the superior court and therefore the applicants were in contempt and ought not to be heard.

We find no difficulty in hearing the applicants on their plea even before compliance with the court order in the circumstances of the case. We may repeat what this Court stated in **Fatma Ali Mohamed v. Harbans Singh Soor Civil Appl. NAI. 313/06 (UR)**:

"**It is apparent in this case that the learned Judge was of the view that the alleged contemnor who had made an application to set aside the order alleged to have been disobeyed could not be heard on such application unless and until she obeyed the order first then question it later. With respect, the learned judge does not appear to have appreciated the full import of the *Hadkinson Case* or that he was seized of any discretion in the matter. In that case Lord Denning L.J. stated: -**

"***It is a strong thing for a court to refuse to hear a party to a cause and it is only to be justified by grave considerations of public policy. It is a step which a court will only take when the contempt itself impedes the course of justice and there is no other effective means of securing his compliance."***
……..…….

And later at page 575: -

"***I am of the opinion that the fact that a party to a cause has disobeyed an order of the court is not of itself a bar to his being heard, but if his disobedience is such that, so long as it continues, it impedes the course of justice in the cause, by making it more difficult for the court to ascertain the truth or to enforce the orders which it may make, then the court may in its discretion refuse to hear him until the impediment is removed or good reason is shown why it should not be removed."***

There is no doubt that the amount of Shs.44 million required for security is enormous by any standards. Any investor, however robust, would experience the impact of the sudden withdrawal of such sum from its working capital, even when it would be in a safe deposit. The obvious consequence of default is attachment. On the other hand the uncertain nature of the transaction admittedly in the process of conclusion by the applicants gives no comfort to the respondents. Whether Chevron will disappear from the scene after conclusion of the transaction and whether Total will definitely take on the responsibility of discharging any liability that the applicants may owe to the respondents remains moot. In those circumstances, the order that commends itself to us is to grant a conditional stay of execution. Accordingly, as a condition for grant of prayer 3 of the application, the applicants shall provide a bank guarantee from a reputable bank in Kenya or an Insurance Bond from a reputable Insurance company in the sum of Kshs.25 million. The said bank guarantee or insurance bond shall be provided within 21 days of this order and in default, the application shall stand dismissed with costs without further recourse to court. The costs of the application shall otherwise be in the main appeal.

Dated and delivered at Nairobi this 12th day of July, 2009.

E.O. O'KUBASU

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JUDGE OF APPEAL

P.N. WAKI

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JUDGE OF APPEAL

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR