



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appli 190 of 2009 (UR 131/2009)

CALTEX OIL (KENYA) LTD (Now renamed
TOTAL MARKETING KENYA LTD).....APPLICANT

AND

EVANSON NJIIRI WANJIHIA.....RESPONDENT

(Application under Rule 5 (2) (b) of the Court of Appeal Rules for stay of execution of the Ruling and Order issued by the High Court of Kenya at Nairobi, (Ali-Aroni, J) dated 16th June, 2009

in

H. C. C. C. NO. 5366 OF 1993)

RULING OF THE COURT

The applicant Caltex Oil (Kenya) Ltd now renamed Total Marketing Kenya Ltd filed an application dated 26th June, 2009 under **Rule 5 (2) (b)** of the Court of appeal Rules seeking the following substantive orders:

“2. That the Honourable Court be pleased to grant a stay of execution of the Ruling and Order issued by the High Court of Kenya at Nairobi (the Honourable Lady Justice Ali-Aroni) on 16th June, 2009 pending the hearing and determination of the application.

3. That the Honourable Court be pleased to grant a stay of execution of the Ruling and order issued by the High Court of Kenya at Nairobi (Honourable Lady Justice Ali-Aroni) on 16th June, 2009 in High Court Civil Case No. 5366 of 1993 pending the lodging, hearing and determination of the intended appeal).....”.

The applicant relies on the following grounds:

“1.The applicant has an arguable appeal with good prospect of success and the intended appeal raises important points of law including the fact that the Honourable Judge erred in law and in fact in completely failing to take into account the purchase of the business as a going concern

through the sale and transfer of its shareholding (where liabilities are ordinarily taken up), as opposed to the sale of its assets (where liabilities are not ordinarily taken up)

2. Unless a stay of execution of the Ruling and Order of the High Court of Kenya at Nairobi (the Honourable Lady Justice Ali-Aroni) made and/or issued on 16th June, 2009 is granted, pending the hearing and determination of the application as well as the intended appeal:

(i) The intended appeal if successful will be rendered nugatory.

(ii) On account of this ruling that completely failed to take into account the purchase of the business as a going concern the applicant has now been compelled to deposit additional security in excess of Kshs.12 m which is by any standards a huge sum which any investor would experience the impact of sudden withdrawal of its working capital.

(iii) There is a real risk that other claimants having pending cases against Caltex Oil Kenya Limited or Chevron Kenya Ltd will now move the court to require Total Marketing Kenya Limited to furnish security for all its pending claims and it stands to suffer immediate and substantial loss as well as irremediable disruption to its operations which operations are sustained and/or dependent on substantial financial liquidity.

3. The balance of convenience lies in favour of the Applicant in that:

(i) Total Marketing (K) Ltd stands to suffer immediate and substantial loss as well as irremediable disruption to its operations, which operations are sustained and/or dependent on substantial financial liquidity, sudden withdrawal of additional sums would impact negatively on its working capital. To the contrary the Respondent is currently secured through a sum of Kshs.3,000,000/= which was deposited in a joint interest earning account as security for the decretal sum, costs or such other sum as would be ultimately found binding on it upon conclusion of the intended appeal.

(ii) At the time of recording consent, both parties were fully aware of the cumulative sum of the award by the Honourable Justice Osiemo was in excess of Kshs.15,000,000 and this notwithstanding both parties recorded an agreement that a sum of Kshs.3,000,000 was adequate security. Weighing the claims of both sides in relation to the judgment and decree of the Honourable Mr Justice Osiemo delivered on 31st May, 2007 this is adequate security.

(iii) Total Marketing (K) Limited is part of a multinational company and would be in a position to pay the decretal sum awarded together with interest thereon, in the event the defendant's appeal is dismissed. To the contrary there is no demonstrable evidence that the plaintiff will be in a position to repay and/or make good the losses the applicant stands to suffer if it is denied the use of the money to be deposited in court pending the hearing and determination of the intended appeal.

(iv) If compelled to furnish additional security the applicant stands to suffer immediate and substantial loss through disruption to its operations which operations are substantial and/or dependent on substantial financial liquidity.

(v) There is a real risk that other claimants having pending cases against Caltex Oil (K) Limited will now move the courts to require Total Marketing (K) Limited to furnish security for all its pending claims and it stands to suffer immediate and substantial loss as well as irremediable disruption to its operations which operations are sustained and/or dependent on substantial financial liquidity.

(vi) The defendant has an arguable appeal against the judgment and decree of the Honourable Mr Justice Osiemo delivered on 31st May, 2007. It is notable from the

pleadings that no special damages were pleaded by the plaintiff and the court lacked jurisdiction to enter into an inquiry into special damages where none had in fact been pleaded.

4.This application has been brought without undue delay and no prejudice will be caused to the Respondent if it is grated as prayed.”

When this application came up for hearing the applicant was represented by the learned counsel Mr Waweru Gatonye and the respondent was represented by Neruda Ojiambo.

The genesis of the application before us is that the plaintiff/respondent, Mr Evanson Njiiri Wanjihia filed suit against the defendant/respondent in the superior court being H. C. C. No. 5366 of 1993. In the suit the respondent sought inter alia orders of specific performance and damages against applicant on the basis of an alleged breach and/or unlawful termination of a dealership agreement with the respondent company. Following a hearing before the Honourable Mr Justice Osiemo on 31st May, 2007 he gave judgment in favour of the respondent in the sum of Kshs.15,055,423/= being damages at large for breach of contract together with costs and interest. It is not in dispute that the applicant has since filed a notice of appeal in order to appeal against the said judgment. On 14th June, 2007 the applicant filed an application for stay of execution of the decree pending appeal and the application was fixed for hearing on 3rd March, 2008. The hearing did not take place following negotiations between the advocate on record for the respective parties prior to the hearing.

The negotiations resulted in a consent order and on 29th February, 2008 just a few days before the appointed hearing date, a consent order was recorded in Court wherein the applicant was granted a stay of execution on condition that a sum of Kshs.3,000,000/= was to be deposited in a joint interest earning account as security for the decretal amount. The account No.0150392606316, was opened as per the consent order with Equity Bank Ltd, Mama Ngina Street Branch.

For a period of one year the relationship between the parties was regulated in terms of the consent order. However matters appear to have taken a different turn in that on 18th March, 2009 the respondent filed a notice of motion application under provisions of Order XLIX Rule 1 and 6 of the Civil Procedure Rules seeking orders, inter alia, that the court reviews and/or sets aside the consent order entered into between the parties and order for the immediate payment of the outstanding decretal amount under the judgment granted by Osiemo, J in H. C. C. C. 5366 of 1993.

The application was granted on the respondent's contention that since entering into the consent order the applicant had proceeded to wind up its business operations in Kenya thereby frustrating the consent order and further that the presence of the applicant in the country was the very foundation of the consent order and the winding up of its business was a new and important matter not known by the respondent at the time of agreeing to the terms of the consent. The application was opposed by the applicant. However in a reasoned ruling given on 16th June, 2009 the Honourable Lady Justice Ali-Aroni set aside the consent order and also made an order that the applicant deposits in court the total decretal amount less the amount in the joint account. The additional payment would be Kshs.12 million. Dissatisfied with the ruling the applicant has since filed a notice of appeal.

One of the intended grounds of appeal is that a consent order cannot be set aside on the basis of discovery of a new and important matter which is only a ground of review under Order 41 of the Civil Procedure Rules.

During the hearing of this application on 16th September, 2009 the learned counsel for the respondent Mr N. Ojiambo informed the court that he concedes that the intended appeal is arguable. For this reason, this being an application under **Rule 5 (2) (b)** of the Court's rules the learned counsel for the parties agreed to confine themselves to the second test under the rule which is whether or not the appeal if it succeeds would be rendered nugatory.

Mr Gatonye the learned counsel for the applicant in his submissions relied on the grounds set out in the body of the application as set out above and in greater detail in the affidavit sworn by Edith Mawira Matombe the Chief Corporate Counsel of Total Marketing Kenya Ltd dated 26th June, 2009 and for this reason we find it unnecessary to restate the grounds again except the highlights of Mr Gatonye submissions namely that as the applicant deals with petroleum products, they require heavy capital outlay and a deposit of Kshs.32 million which is the approximate decretal amount would interfere with the level of the requisite financial liquidity of the applicant and thereby create hardship in terms of the applicant's operations should the state of affairs remain as per the order by Lady Justice Ali-Aroni; and that other claimants against the applicant would follow suit thereby occasioning even greater hardship to the applicant in terms of further demands of similar deposits which would in turn result in diminished liquidity on the part of the applicant. He further contended that in terms of possible hardship to both parties the balance of convenience was in favour of the applicant in the circumstances and that it was necessary for the court to balance the claims of both parties and ascertain the party likely to suffer the greater hardship. On this point Mr Gatonye relied on the cases on his list of authorities especially the case of **Oraro & Rachier Advocates vs Co-operative Bank of Kenya Limited (1999) I E A 236** and **Rose Detho vs Ratlal Automobiles Ltd and 6 Others Nai 304 of 2006 (unreported)**. He further urged the Court to note that only shares of the applicant company had changed hands and the normal commercial practice is for liabilities to be assumed by the company as opposed to the sale of assets where liabilities are taken over by the incoming purchaser. Mr Gatonye concluded his submissions by stating that in any event the applicant company was a substantial company which would be in a position to pay to the respondent the entire decretal amount should the intended appeal fail.

Mr Ojiambo the learned counsel for the respondent urged the court to note that no evidence whatsoever had been availed by the applicant in support of the alleged sale of shares or the alleged change of shareholding in the applicant company. Mr Ojiambo lamented that the alleged sale is shrouded in mystery and secrecy for unknown reasons and for this reason the conduct of the applicant supports the respondent's case for the deposit of the entire decretal amount. He added that information received by the respondent and which was exhibited in the form of newspaper articles concerning the sale transactions clearly shows that the applicant might not be in a position to satisfy the decree and was on the contrary busy trying to dispose of all of its assets in Kenya but unfortunately as at the time the consent order was recorded the respondent had not received this information. He claimed that the respondent was already in breach of express and implied terms of the consent order in that, it has so far not filed any record of appeal, but is busy disposing of all its assets in Kenya, and in the circumstances, the need to protect the respondent pending the hearing of the appeal is even greater.

The respondents counsel also drew the Court's attention to the response of the applicant company to the allegation that it had no intention to continue trading in Kenya. In the applicant's written submissions filed in the superior court the applicant denies that it ever represented to the respondent either expressly or by implication that it would continue trading in Kenya. In the written submissions the applicant states:-

“This is simply because the defendant, as with any other business, continually evaluates its business operations globally to determine whether or not to make changes to its operations, including divestitures and with this in mind no such representations can be made.”

Further, in the written submissions the applicant had clearly stated that the transaction is yet to be actualized and that once the transaction is completed, the mandatory prerequisites of any transfer of shareholding cannot be obtained secretly since approval would have to be obtained from inter alia public bodies such as the Monopolies Commission and published in the Kenya Gazette. The applicant, contrary to what it is now asserting in the Court swore an affidavit in reply to the application to review or set aside the consent order as follows:

“The plaintiff has never requested for or indeed demanded any explanation from the defendant as regards the nature of the proposed transfer of shares to Total Outre Mer SA which has led to his assertion that his judgment if upheld on appeal will not be recoverable from Total Outre Mer SA if the transaction is completed which is wholly incorrect. As explained in the foregoing paragraphs it is not a transaction involving a sale of its assets but rather that Total Outre Mer

SA will be purchasing Chevron's shares in the local company and indeed the business as a going concern."

Mr Ojiambo argued the position taken by the applicant as described above is contrary to the submissions made in support of this application, in that counsel for the applicant has stated that the big company which is capable of satisfying the ultimate decretal amount is Chevron (K) Limited now renamed Total Marketing (K) Ltd. To illustrate the point Mr Ojiambo referred to the applicant's assertion in these terms:

"Total Marketing (K) Ltd is part of a multinational company and would be in a position to pay the decretal sum awarded together with interest thereon in the event the defendant's appeal is dismissed"

Mr Ojiambo observed that nothing would have been easier than exhibiting evidence concerning the involvement of Total Outre Mer SA or evidence to support the financial ability of Total Marketing (K) Ltd and that it was not good enough for counsel to state from the bar the respective companies abilities to satisfy the decree especially when the applicant has given two inconsistent stories regarding the responsibility to pay as outlined above.

On the point concerning the balance of convenience Mr Ojiambo's response was that the balance must obviously tilt in favour of the respondent who is concerned that the applicant might not satisfy the decree should it relocate from Kenya or dispose of its undertaking in a manner that does not take care of the decree. He argued that it is a contradiction for the applicant's counsel to argue that the applicant and the associated companies are big and substantial and at the same time argue in Court that the deposit of the decretal sum by the applicant would cause undue hardship.

On the cited cases counsel submitted that the principle enunciated in them and in particular the ***Oraro case*** did not support the applicant's case since ***Oraro & Rachier case*** involved a law firm whereas in the current case the applicant is a commercial entity. Counsel invited the Court to look at the respondent's list of authorities and in particular the case of ***Reliance Bank Ltd vs Norlake Investments Ltd EALR (2002) I EA 227 (CAK)***, ***Attorney General vs Equip Agencie C A Nai 432 of 2001*** and ***Kenya Shell Ltd vs Benjamin Karuga C A Nai 97 of 1986***. Counsel emphasized that that what emerges from the cases is that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case and that in considering this second limb, on, whether an appeal would be rendered nugatory if a stay was not granted the court is bound to consider the conflicting claims of both sides. He wondered how a new company such as Total Marketing (K) Limited could involve a third party company concerning the issue of the satisfaction of a decree against it as judgment debtor company whereas Total Outre Mer SA which though admittedly big was a completely different entity based outside the country. He lamented that unless any such third parties provided guarantees their involvement had no legal basis. He urged the Court to dismiss the application or to give a conditional stay on terms.

We have carefully considered the submissions of both parties as outlined above. We agree with the holding in the ***Norlake case*** that on this second limb on whether an appeal would be rendered nugatory must be considered within the circumstances of each particular case. Consideration of the conflicting claims of both parties must also be undertaken where circumstances permit such as in the application before us. The reason why we have in this case put the two claims on the scales is that on the one hand, we have an individual decree holder who is concerned over the ability of the applicant judgment debtor satisfying the decretal amount in the face of what appears to be uncompleted and unconfirmed transaction affecting the applicant's shareholding and which might affect the assets of the company and on the one hand, and on the other hand an applicant company which claims that a deposit of the decretal amount as ordered by the superior court which is currently estimated at Kshs.30,000,000/= (30 million) could cause hardship to its financial liquidity, and in the same breath, urges the Court to note that the applicant's company or the intended buyer company or companies would be able to satisfy the decree in full should the appeal fail. In considering the conflicting claims we have taken into account that the proposed sale transaction which might affect the status of the applicant company remains confidential and it has not been indicated when the veil of secrecy might be lifted. For this reason we think the concerns of the respondent are not frivolous, because should the status of the applicant company change without the

decretal amount being provided for in the transaction, the loss to the applicant would be substantial and irremediable.

The respondent has in its own submissions as outlined above indicated that whether it is Total Marketing Kenya Limited or Total Outre Mer S A each one of them is able to pay the entire decretal amount. We have taken into account that the third party companies named herein have not offered any guarantees. In our view the applicant is not likely to suffer greater hardship than the respondent in the immediate future because it has itself said it is big and has the funds and since the deposit of whatever amount is ordered is likely to attract interest the chances of it suffering a total loss are highly unlikely or considerably reduced.

On the issue of hardship to the parties the applicant's counsel has submitted that other claimants against the applicant are likely to seek similar orders in order to secure their positions and this could result in the applicant being required to make substantial deposits. While we appreciate that this could be a possibility, the solution to it, is not to deny the respondent of any deserved orders because the applicant could in our view stop the likelihood of other claimants following suit by stating categorically how any current and potential liabilities of the applicant have been provided for in the proposed sale transaction. In this regard, we are alive to the fact that before transactions of this nature are completed due diligence inquiries are conducted to ascertain inter alia, current and potential liabilities and a provision is made in the final agreement concerning who is to assume the liabilities. It follows therefore that all the applicant needs to do is to disclose to the claimants a confirmation on how liabilities have been provided for in the sale transaction and this would in turn keep the claimants away from the courts. It would not be the responsibility of the courts to protect applicant. Indeed we think that the current dispute would have been prevented by a candid disclosure by the applicant that a proper provision had been made to satisfy the claim if the appeal succeeds.

With the above observations in view, we think that when the hardships of both parties are put on the balance, the respondent might suffer greater hardship than the applicant unless the court makes an appropriate order to prevent any undue hardship.

In the circumstances we think the balance of convenience favours the respondent. We are therefore inclined to grant a conditional stay on terms.

Before we set out the terms of the conditional stay it is important to state that in our view the latitude of the Court has recently been considerably extended by the incorporation of Sections 3 A and 3 B of the Appellate Jurisdiction Act Cap 9 on overriding objective by the Statute Law (Miscellaneous Amendment) Act No. 6 of 2009.

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 in exercising its powers. The provision came into operation on 23rd July, 2009 and it is our view that by striking the balance as set out above we have also given effect to the overriding objective taking into account the special circumstances of the matter before us.

All in all we consider that a conditional stay would serve the interests of both parties.

We accordingly grant a conditional stay of execution on condition that the applicant deposits within 45 days from the date hereof the sum of Kshs.15,000,000/= (inclusive of the Kshs.3,000,000/= deposit previously covered by the consent order) in a joint account in the name of the advocates' firms representing both parties and such an account to be an interest earning account to be maintained as such until the appeal is determined or upon further orders of the Court. In default, the application for stay to automatically stand dismissed. It is so ordered.

Dated at Nairobi this 16th day of October, 2009.

E. O. O'KUBASU

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JUDGE OF APPEAL

J. W. ONYANGO OTIENO

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JUDGE OF APPEAL

J. G. NYAMU

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JUDGE OF APPEAL