



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**CIVIL APPLI 14 OF 2006**

**QUASAR LIMITED ..... APPLICANT**

**AND**

**KOBIL PETROLEUM LIMITED ..... RESPONDENT**

***(Application for stay of proceedings pending the lodging and determination of an intended appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Milimani, Commercial Courts (Honourable Lady Justice Mary Kasango) dated and delivered on the 27<sup>th</sup> April, 2005 in H.C.C.C. NO. 412 OF 2003)***

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**RULING OF THE COURT**

This application expressed to be brought under **rule 5(2)(b)** of the Rules of this Court seeks an order of stay of proceedings in **Nairobi Milimani HCCC NO. 412 of 2003**, pending the hearing and determination of an appeal which we are informed from the bar that it has been preferred against the ruling and order of the superior court (Kasango J.) made on **27<sup>th</sup> April, 2005**.

On **9<sup>th</sup> July, 2003**, the applicant filed suit at the High Court of Kenya being **KISII HCCC NO. 99 of 2005** (“*the Kisii Suit*”) against the respondent seeking, inter alia, a permanent injunction restraining the respondent from evicting the applicant from certain premises known as **Kisii Mun/Block 111/77**. Two days later, the respondent also lodged another suit at Nairobi, Milimani, being **HCCC 412 of 2003** (“*the Nairobi suit*”), seeking certain injunctive orders against the applicant in respect of the same premises.

It is on record that on the **21<sup>st</sup> July, 2003** the respondent filed an application in the Kisii suit for orders that the suit be transferred to the Commercial Division of the High Court of Kenya at Milimani, Nairobi, for hearing and determination, but, the said application was dismissed with costs on **7<sup>th</sup> October, 2003** and on **17<sup>th</sup> October, 2003**, the respondent herein filed a notice of appeal and we have not been informed whether an appeal thereafter had been preferred or not.

However, on **15<sup>th</sup> December 2003** the respondent once again filed another application in the Nairobi suit seeking orders to consolidate the Kisii suit with the Nairobi suit for trial and determination before the Commercial Court in Nairobi. The proceedings before the superior court showed that the applicant opposed the aforesaid application on various grounds, it being argued in the main ground that the application was Res-Judicata and a grave abuse of the court process and also that the respondent having filed a similar application in Kisii High Court and the same having been dismissed. Despite these submissions, the application was allowed being directed that the two cases be consolidated and heard together at Nairobi. Thus, it is plain that the respondent reversed and obtained in the Nairobi suit what it

had lost in the Kisii suit. Promptly, the applicant took immediate steps to initiate an appeal by filing a Notice of Appeal.

We have considered the rival submissions advanced by both Mr. Makori, for the applicant, and Mr. Esmail, for the respondent. We are prepared to assume in favour of the applicant and we do so that the appeal is an arguable one and is not a frivolous one. But, will it be rendered nugatory if we do not grant a stay of proceedings in the superior court? We do not think so. Relying on our decision in **DAVID M. SILVERSTEIN V. ATSANGO [2002] 1 KLR 867** we hold that the applicant has failed to satisfy us that the success of the intended appeal would be rendered nugatory.

In the result this application fails and we dismiss it with costs.

*Dated and delivered at Nairobi this 23<sup>rd</sup> day of March, 2007.*

**P.K. TUNOI**

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**JUDGE OF APPEAL**

**E.O. O’KUBASU**

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**JUDGE OF APPEAL**

**E.M. GITHINJI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**