IN THE COURT OF APPEAL
AT NAIROBI

(CORAM: GICHERU, LAKHA & OWUOR, JJ.A.)

CIVIL APPLICATION NO. NAI. 432 OF 2001 (UR.231/2001)

BETWEEN

ATTORNEY GENERAL.....APPLICANT

AND

EQUIP AGENCIES.....RESPONDENT

(Being an application for stay of execution pending an intended appeal against the Ruling and Order of the High Court of Kenya at Nairobi (Honourable Mr. Justice Richard Kuloba) dated 15th December, 2000 in H.C.C.C. NO. 1459 OF 1999)

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RULING OF THE COURT:

In this application which is made under rule 5(2)(b) of the Court of Appeal Rules, the applicant is seeking a stay of execution of the order of the superior court given on 15th December, 2000 pending the lodging and determination of an intended appeal.

By a plaint dated and filed in the superior court on 22nd July, 1999, the respondent herein averred that on diverse dates between 26th June, 1995 and 30th October, 1996 and at the request of the applicant herein, it supplied and delivered to the applicant various anti-malarial equipment and drugs which were received and accepted by the applicant and have since not been paid for with the result that it has suffered loss and damage and continues to suffer the same. The invoice amount of money for these stores together with interest at the rate of 18% per annum as at 28th February, 1999 was **K.Shs. 1,862,302,792/50** and continues to attract interest at the same rate from 1st March, 1999 until payment in full. It is this sum of money together with the accruing interest at the rate aforementioned that the respondent claimed from the applicant together with the costs occasioned by this claim in the superior court.

To the respondent's claim, the applicant's defence was principally that the respondent was non-suited and that the Ministry of Health on whose behalf of the applicant was being sued denied that it was indebted to the respondent. The applicant also reserved the right to raise and argue by way of preliminary objection that the respondent's suit was bad in law as it offended the provisions of ***section 3*** of the ***Public***

Authorities Limitation of Actions Act, Chapter 39 of the Laws of Kenya. This kind of defence did not endear itself to the respondent which by a Chamber Summons dated and filed in the superior court on 19th July, 2000 and taken out under ***Order VI rule 13(1)(b), (c) and (d) of the Civil Procedure Rules*** sought to have the same struck out and judgment be entered in its favour together with costs for the reason that that defence was spurious, evasive, a mere denial, a prevarication and was therefore scandalous, frivolous, vexatious and was likely to prejudice, embarrass and delay the fair trial and determination of the respondent's suit. Nine days later, the applicant by a Chamber Summons dated and filed in the superior court on 28th July, 2000 applied to amend the defence under ***Order V1A rules 3 and 5(1) of the Civil Procedure Rules*** and ***section 3A of the Civil Procedure Act***, Chapter 21 of the Laws of Kenya.The filing of this latter application notwithstanding, by consent of parties on 31st July, 2000 the respondent's application to strike out the applicant's defence was set down for hearing on 3rd October, 2000 and the ruling subsequent thereto was given on 15th December, 2000. In that ruling, Kuloba, J. held that there was a valid contract between the parties for the supply of various anti-malarial equipment and drugs to the Ministry of Health as was evinced by ***Local Purchase Order s NOs. C 312204 , C 312205*** and ***C 047170*** whose invoice value of the goods supplied by the respondent and received by the Ministry of Health amounted to ***K.Shs. 1,157,847,150***/ -. According to the learned judge therefore, the applicant's defence was not viable. It raised no triable issue and was therefore an abuse of the process of the court. He then struck out the applicant's defence and entered judgment for the respondent as prayed in the plaint.

At the hearing of this application on 18th December, 2001, counsel for the applicant, Miss Odingo, submitted that before proceeding to hear the respondent's application to strike out the applicant's defence, there was already before the superior court an application to amend that defence. In not having that application heard together with the respondent's application aforementioned and thereby locking out the applicant from amending the defence sought to be struck out, the learned judge was in error. Indeed, even in the unamended defence, the issue of limitation which was therein pleaded was triable. Considering that the ***Local Purchasing Orders*** in question were part of the contract between the parties and that a large amount of public fund was involved, a much more cautious approach to the matters before the learned judge was necessary. To counsel therefore, the applicant's intended appeal is arguable and since the validity of the supply contract between the parties as is evidenced by the contract documents is doubtful, if a stay of execution of the order of the superior court is not granted, the large sum of money involved in this matter may very well be out of reach of the applicant if the intended appeal is successful and thereby rendering that success worthless.Counsel for the respondent was, however, of the view that the applicant's intended appeal was not arguable considering that the antimalarial equipment and drugs requisitioned through the Local Purchase Orders referred to earlier in this ruling were supplied by the respondent, received and partly used by the applicant. In any event, even if the applicant's intended appeal is arguable, its success would not be rendered nugatory since the respondent is capable of refunding the decretal sum.

The requisition and the supply of the anti-malarial equipment and drugs as between the parties to the matter before us is grounded on the ***Contract Agreement NO. S/4420*** between the respondent and the Government of Kenya made on 14th July, 1995 which was for the supply of insecticide to the Government Ministries/Departments and Institutions on "as and when required" basis for the period ending on 30th June, 1997.

Paragraph 3 of the terms of that supply Contract Agreement provided that:

> "3.The deliveries shall be made by the contractor upon orders signed by the authorised heads of Government Ministries/Departments and Institutions or by an officer authorized to sign on his behalf."

This therefore meant that in a matter such as is before us, the supply of the anti-malarial equipment and drugs to the Ministry of Health was founded on the ***Local Purchase Orders*** referred to in this ruling and the authority and legitimacy of these ***Orders*** was derived from the ***Contract Agreement NO. S/4420*** which latter was inserted in each one of them. The same were therefore part of the Contract Agreement between the respondent and the Government of Kenya as is referred to above.

The opening paragraph of each of the Local Purchasing Orders in issue stipulated that:

> "Suppliers are warned that this Order is INVALID unless availability of funds is confirmed here below by the Accountant I/C VBC."

In neither of the three ***Local Purchasing Orders*** referred to in this ruling was this confirmation made. It would appear therefore that in relation to all the three ***Local Purchasing Orders*** there may have been a breach of one of the terms of the contract between the respondent and the Government of Kenya. The consequences of that breach and indeed the possible breach itself are matters of submission in the applicant's intended appeal. We think therefore that the applicant's intended appeal is not frivolous.

As we have indicated in this ruling, the amount of money the subject-matter of litigation in the superior court is ***K.Shs. 1,862,302,792/50*** which according to the respondent's plaint continues to attract interest at the rate of 18% per annum from 1st March, 1999 till payment in full. This is public fund and it is not an exaggeration that it is colossal. It therefore bears repeating what this Court observed in the Kenya Breweries Ltd. v. Kiambu General Tr ansport Agency Ltd., Civil Application NO. NAI. 100 of 2000 (UR.48/2000), (unreported) that:

> "The sum of money involved amounting to K.Shs. 241,586,711/58 is certainly very large and there is an uneasiness pervading a refusal to grant a stay of execution where such a large amount of money is involved owing to the damage such a refusal may occasion to the applicant. Indeed, the futility of success of the applicant's appeal to this Court may result from such a refusal, for the damage to the applicant may be irremediable even the decretal sum was subsequently repaid to it if its appeal to this Court was to be successful. As Madan, J.A., as he then was, observed in M.M. BUTT V. THE RENT RESTRICTION TRIBUNAL , Civil Application NO. NAI. 6 of 1979, (unreported), where an applicant has an undoubted right of appeal, a large amount of money involved in the dispute between the parties constitutes special circumstances meriting the grant of stay of execution pending the hearing and determination of an intended or already lodged appeal to this Court."

Such is the position as obtains to this application. We think therefore that it would cripple the operations of the Ministry of Health if we were to refuse to grant a stay of execution of the order of the superior court dated 15th December, 2000, a situation that would cause more hardship than would serve the cause of justice. In the result, we grant the applicant's application for stay of execution of the aforesaid order pending the lodging, hearing and determination of the applicant's intended appeal. The costs occasioned by this application shall abide the result of the intended appeal.

Dated and delivered at Nairobi this 22nd day of March, 2002.

J.E. GICHERU

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JUDGE OF APPEAL

A.A. LAKHA

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JUDGE OF APPEAL

E. OWUOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR