



IN THE COURT OF APPEAL

AT NAIROBI

CORAM: OMOLO, SHAH & KEIWUA, J.J.A

CIVIL APPLICATION NO. NAI. 288 OF 2000 (138/2000 UR)

BETWEEN

B.A.T. KENYA LIMITED.....APPLICANT

AND

MEA LIMITED.....RESPONDENT

(Application for stay of execution pending the hearing and determination of the Appeal against the judgment and decree of the High Court of Kenya at Nakuru (Rimita, J) delivered on 19th January, 1999

in

H.C.C.C. NO. 337 OF 1995)

RULING OF THE COURT

On 19th January, 1999 the superior court (Rimita,J) entered judgment against the present applicant (defendant in the suit) in the sum of Shs.16,463,491/20 plus costs and interests. The dispute between the parties to the suit in the superior court centered on the issue of fluctuations of the value of Kenya Shilling against United States Dollar. The respondent was to import fertilizer for the applicant. The fertilizer in question was imported and supplied to the applicant by the respondent. According to the respondent the applicant was to pay for the said fertilizer in Kenya Shillings but that amount was to be commensurate with the value of the shilling against the sum of dollars paid for the fertilizer by the respondent at the relevant time. According to the applicant the payment was to be made in Kenya Shillings, the price being Shs.604/75 per 50 kilogramme bag of the fertilizer.

It is common ground that a quantity of 2500 metric tonnes of fertilizer was supplied by the respondent to the applicant. It is also common ground that a sum of over Shs.15 million was paid by the applicant to the respondent on the basis that the contract was in Kenya Shillings.

The dispute between the parties which will be the subject of arguments in the intended appeal cannot be said to be without substance. In other words the intended appeal is not frivolous. It is an arguable appeal.

The intended appeal, which we are told is about to be filed, comes up for filing as a result of the first appeal lodged by the applicant having been struck out. That appeal, being Civil Appeal No. 137 of 1999, was struck out as the decree which the record of that appeal contained bore a wrong date in contravention

of Order XX rule 7(1) of the Civil Procedure Rules. A learned single Judge of this Court (Gicheru, JA) has already extended time for filing of a fresh notice of appeal and a fresh record of appeal. Gicheru, JA, on the 24th day of October, 2000, extended the time to lodge the notice of appeal already lodged on 2nd October, 2000 thereby validating the lodgment thereof. We have therefore the jurisdiction to hear the application now before us which is stated to be brought under rule 5(2)(b) of the Rules of this Court.

We have already stated that the intended appeal is arguable. The next point that we have to decide is whether or not the success in the intended appeal will be rendered nugatory if stay of execution of the decree of the superior court is not granted. For determination of this issue we will have to go into the history of this litigation from the date of entry of judgment in the superior court. It was agreed between the parties through their respective counsel that pending the hearing and determination of the appeal to be lodged by the applicant, the applicant would deposit a sum of Shs.25,445,188/40 in a joint account designated Muthoga Gaturu & Company Advocates and Kang'ethe & Company Advocates. Such account was opened with Commercial Bank of Africa, Wabera Street, Nairobi and the said sum was deposited on 21st April, 1999. The deposited sum is still with that bank and is earning interest. As at 6th October, 2000 the principal amount plus interest stood at Shs.28,924,070/02.

As soon as Civil Appeal No. 137 of 1999 was struck out, the respondent's advocates wrote to the applicant's advocates demanding release of the sum deposited plus interest accrued. M/S Muthoga Gaturu & Company Advocates immediately sought indulgence from M/S Kang'ethe & Company Advocates. The indulgence sought was to the effect that pending the filing and determination of the application for extension of time execution of the decree be stayed. M/S Kang'ethe & Company Advocates were not agreeable to granting any such extension and applied for execution of the decree by way of attachment and sale of the applicant's property. The execution of the decree did take place despite the fact that the decree was issued more than a year prior to the date of execution. This was in contravention of the provision in Order XXI Rule 18(1) of the Civil Procedure Rules which provision requires the executing court to issue a notice to show cause why the decree should not be executed.

The more convenient and ethical step which the respondent ought to have taken was to apply to the superior court for an order of release of the deposited sum to the decree-holder. We say no more on the mode of recovery of decretal sum used or adopted by the respondent as that issue may be the subject of another appeal.

Although there is nothing to suggest that the respondent will not be able to refund the decretal sum in the event of the intended appeal succeeding, the issue that has weighed on our mind is the fact that there was earlier an agreement between the parties not to execute the decree provided the decretal sum was deposited in an interest earning account, pending the hearing and determination of an intended appeal. The appeal which has been struck out does not deprive the applicant of its statutory right of appeal and the applicant has already obtained orders to re-lodge the appeal. In the rather peculiar circumstances of this litigation we are minded to preserve the status quo as now prevailing.

In these circumstances the order which commends itself to us and we do make is that the execution of the decree in the superior court be and is hereby stayed pending the hearing and determination of the intended appeal and that the sum already deposited with Commercial Bank of Africa do remain there until the hearing and determination of the intended appeal, or until further orders. It is also ordered that the moveable property of the applicant already attached in purported execution of the decree be returned to the applicant forthwith. It is also ordered that the respondent do pay the costs of the attachment issued on 4th October, 2000.

The costs of this application will be costs in the intended appeal.

Dated and delivered at Nairobi this 3rd day of November, 2000.

R.S.C. OMOLO

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JUDGE OF APPEAL

A.B. SHAH

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JUDGE OF APPEAL

M. KEIWUA

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.