

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: KWACH, SHAH & O'KUBASU, J.J.A

CIVIL APPLICATION NO. NAI. 334 OF 2000 (UR.166/2000)

BETWEEN

TOPEN INDUSTRIES LIMITED APPLICANT

AND

AFROLITE INDUSTRIES LIMITED RESPONDENT

(An application for stay of execution pending the lodging, hearing and determination of an intended Appeal from the decision of the High Court at Milimani by (Hon. Mr. Justice P.J. Hewett) dated 31st October, 2000 in H.C.C.C. NO. 619 OF 2000)

RULING OF THE COURT

This is an application under rule 5 (2)(b) of the Court of Appeal Rules for stay of the order of Hewett J made on 31st October, 2000 whereby the learned Judge imposed a temporary injunction as a condition for granting an adjournment to the applicant whose lead counsel could not attend court on account of illness.

At that stage the learned Judge was not dealing with an application for injunction. The matter was before him for hearing of the suit on the merits. What makes it grossly unjust is that far-reaching orders namely grant of an interim injunction pending the hearing and determination of the suit, were made without reference to merits or demerits of any sort.

Even more unjust is the issue regarding extension of the irregularly granted injunction on 31st October, 2000 when the hearing of the suit was adjourned as the respondent's affidavit complied with the order for discovery and inspection until 30th October, 2000 well beyond the date fixed by the Court. These documents were filed without an extension being sought and without the courtesy of obtaining the consent of the opposite party.

Obviously the learned Judge had a discretion in the matter but the exercise of judicial discretion has to be exercised judicially, not oppressively or capriciously as appears to have happened here.

We grant the application and stay in its entirety the order of Hewett J made on 31st October, 2000 pending the hearing of the intended appeal or further order. Costs of the application to be in the intended appeal.

Dated and delivered at Nairobi this 7th day of December, 2000.

R. O. KWACH

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JUDGE OF APPEAL

A. B. SHAH

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JUDGE OF APPEAL

E. O'KUBASU

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JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR