



ATI Freight (K) Limited v Cape Suppliers Limited & another (Commercial Civil Case E869 of 2021) [2022] KEHC 12048 (KLR) (Commercial and Tax) (18 August 2022) (Ruling)

Neutral citation: [2022] KEHC 12048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE E869 OF 2021**

**WA OKWANY, J
AUGUST 18, 2022**

BETWEEN

ATI FREIGHT (K) LIMITED PLAINTIFF

AND

CAPE SUPPLIERS LIMITED 1ST DEFENDANT

JUVENTUD LOGISTICS LIMITED 2ND DEFENDANT

RULING

Background

1. The Plaintiff/Applicant is the registered owner of three (3) 29,000 liters' capacity ISO Swap body Tanktainers Serial Nos. FEPU 510002 (6) AMT, FEPU 5100067 (0) AMT, and FEPU 510094 (1) AMT (2) (hereinafter "Tanktainers").
2. Pursuant to a Bailment Agreement dated 25th May, 2020 the 1st Defendant instructed the 2nd Defendant to store the 3 Tanktainers aforesaid to the order of the Plaintiff/Applicant as the registered owner.
3. The terms of the Bailment Agreement were as follows: -
 - i. It is confirmed that the 3 ISO Swap body Tanktainers are being stored on behalf of the registered owners ATI Freight Kenya Ltd (the Plaintiff/Applicant)
 - ii. The Tanktainers shall be stored at the yard for a daily rate of USD 32 per tank to be paid by the registered owner/depositor upon demand or on collection of the tank. In the event of extended stay, storage fees shall be paid monthly in arrears.
 - iii. The registered owners or their representative shall upon issuance of a three (3) days written notice be permitted access to the Tanktainers for inspection.



- iv. The registered owner shall make payment of the storage costs to the custodian upon demand.
 - v. The registered owner shall not remove the goods from the custodian premises until payment of storage costs in full.
4. The three (3) ISO Tanktainers aforesaid were received from the 1st Defendant/Respondent as the depositor by the 2nd Defendant for storage on the 25th of May, 2020 at the 2nd Defendant's Storage Yard located in Eastleigh, Nairobi.
 5. It is alleged that no payment for storage has been made for the said tanktainers from the time they were deposited by the 1st Defendant/Respondent on the 25th of May, 2020.
 6. It is further alleged that as at 20th September, 2021 the outstanding storage charges stood at USD, 46,464/= which amount continues to accrue daily charges at USD 32 per tank thereby prompting the 2nd Defendant to issue a Notice of Intention to Sell the Tanktainers. The intention to sell the Tanktainers precipitated the filing of the application that is the subject of this ruling.

Application

7. This ruling is in respect to the application dated 18th October 2021 wherein the plaintiff/applicant seeks the following orders:-
 - a. Spent
 - b. Spent
 - c. That pending the hearing and determination of the suit herein between the Plaintiff and the 2nd Defendant and the intended Arbitral proceedings between the Plaintiff and the 1st Defendant. The Defendants be restrained.
 - d. That the Honourable Court do order the 1st Defendant to provide security equivalent of US dollars 100,000 to the Plaintiff pending the hearing and determination of the intended Arbitral proceedings between the Plaintiff and the 1st Defendant.
 - e. That the 2nd Defendant be ordered by this Court to forthwith release to the Plaintiff unconditionally the ISO Tanktainers Serial Nos. FEPU 510002 (6) AMT, FEPU 5100067 (0) AMT, and FEPU 510094 (1) AMT (2).
 - f. That the 2nd Defendant be ordered by this Court to demand and pursue from the 1st Defendant any storage charges due to her allegedly on account of the storage of the subject ISO Tanktainers.
 - g. That costs of this application be provided for.
8. The application is supported by the affidavit of Mr. Vinay Singh and is premised on the grounds that:-
 - a. That the plaintiff is the registered owner of the said Tanktainers.
 - b. The plaintiff leased the said Tanktainers to the 1st defendant by a lease Agreement which provided for where from and how the Tanktainers were to be collected at the onset of the said lease and returned upon termination thereof.
 - c. The plaintiff and the 1st defendant in that lease agreement provided for disputes arising there from to be referred to arbitration.



- d. The defendant terminated the lease agreement and was directed by the plaintiff on where to return the Tanktainers but has for over a period of one year failed to do so and just taking the plaintiff round and round in circles.
 - e. The plaintiff has stated the process of arbitration and is about to file the claim against the 1st defendant with the arbitrator to be appointed as per the contract.
 - f. In the meantime the 2nd defendant, a total stranger to the plaintiff has sprung up claiming from the plaintiff US dollars 44,464 as at the 20th September 2021 with further daily charges of 99 dollars on alleged account of storage of the subject tanks since 25th May 2020.
 - g. The 2nd defendant is alleging that the 1st defendant delivered the subject Tanktainers to the 2nd defendant to store on account of the plaintiff and that the plaintiff was to pay for the charges.
 - h. The plaintiff until the 21st September 2021 never knew of and had never heard of the 2nd defendant. The plaintiff has never contracted with the 2nd defendant with respect to the alleged storage and has never authorized the same, consented to the same or ratified the same.
 - i. The plaintiff is seeing a scheme hatched between the defendants herein to deny the plaintiff the lease monies owed to the plaintiff by the 1st defendant through this fictitious claim by the 2nd defendant.
 - j. That since the month of May 2020 to date, the 1st defendant has never even once mentioned to the plaintiff that the plaintiff's Tanktainers were in the 2nd defendant's storage subject to an agreement of bailment made between the 1st defendant and the 2nd defendant allegedly on behalf of the plaintiff.
 - k. The defendant has now threatened to sell the plaintiff's Tanktainers should the plaintiff fail to pay her US dollars 44,464 and the accruing daily charges by the 22nd October 2021.
 - l. In order to protect the plaintiff's Tanktainers from this intended unlawful sale, this court be pleased to reserve the Tanktainers pending the hearing and determination of this application and suit herein.
 - m. The 1st defendant has also been displaying an attitude geared towards avoiding paying her liabilities to the plaintiff under the hire lease and as so as to protect the subject matter of the intended arbitration this court should order the defendant to provide security in the sum of US dollars 100,000 to the plaintiff pending the hearing and determination of the arbitration proceedings.
 - n. This is a good case to grant the orders sought herein by the plaintiff.
9. The 1st respondent opposed the application through the replying affidavit of its director Mr. Kinaro Kibanya who states that the applicant and the 1st respondent entered into a Lease Agreement to Lease the Tanktainers for a term of six (6) months, beginning 11th December 2016, with the extension of the term thereof, being subject to written addenda between the parties. The salient terms of the lease agreement were, inter alia, as follows:-
- a. That the Lease Rental amount payable by the Lessee was USD 24 per day, per tank, payable monthly in advance, within seven (7) days of receipt of an invoice;



- b. That either party would have the right to terminate the agreement before expiration of the Agreement in its entirety or partially, upon giving the other party one (1) month notice in writing.
 - c. That upon expiration or earlier termination of the agreement, the Lessor would take possession of the tanktainers in clean and good operation condition free from all advertising or insignia placed on it by the Lessee at the original place of handover, which was the Rift Valley Railways, Changamwe Yard in Mombasa.
 - d. That any dispute or difference between the parties would be settled amicably by mutual discussion, failing which the dispute shall be referred to Arbitration.
 - e. That any notices and any other communication between the parties must be in writing, to be served or delivered to either party by prepaid recorded delivery or registered post, by hand delivery or personal service, by electronic mail and/or facsimile and shall be deemed to have been received by the addressee within seven (7) days of posting or the next working day if sent by personal delivery.
10. The 1st respondent's deponent further states that the Lease agreement was mutually extended by the parties through the signing of written Addenda, and that in the third addenda of the agreement dated 14th June 2018 they agreed that the lease rentals would be remitted strictly by Electronic Funds Transfer to an account at Stanbic Bank but that in the course of their engagement, the Applicant's officials suddenly directed the 1st Respondent to immediately stop making remittances of the lease rentals in accordance with the lease agreement and instead directed the 1st Respondent to make all further payments in cash which they would personally collect periodically. He adds that it was the express intention of the said officials to obfuscate any document trail for these lease rentals.
 11. He further states that the Plaintiff's officials also directed the 1st Respondent to cease all communications with the company using their official email addresses set out in the lease agreement and that the applicant appeared to be geared towards secrecy thus raising fears on the part of the 1st Respondent on whether the persons dealing with them were the *bona fide* officials of the Plaintiff. He adds that upon raising the concerns with the applicant, the applicant proceeded to terminate the Lease and called for the delivery of the tanktainers to two different locations which were not the location indicated in the lease agreement thus prompting the 1st respondent to deposit the tanktainers at the 2nd Respondent's yard for storage and safe-keeping after which it instructed the 2nd Respondent to release the tanks to the bona fide officials of the Plaintiff upon positive identification.
 12. He states that following the deposit of the tanktainers at the 2nd Respondent's storage yard, it was incumbent upon the Applicant to settle all storage charges accruing to the 2nd Respondent, as the failure to deliver the tanks by the 1st Respondent, was purely and admittedly brought about by the conflicting instructions and the apparent surreptitious manner in which the said Applicants officials conducted themselves in clear departures from the terms of the lease agreements.
 13. He further avers that upon depositing the tanktainers at the 2nd Defendant's premises, it duly informed the Applicant of the location of the 2nd Respondent's storage yard and their responsibility to collect the said tanks.
 14. It is the 1st Respondent's case that it feared that it was being roped into a nefarious and potentially criminal scheme and that it therefore acted in the manner most reasonably recommending itself to it; which was to preserve the tanktainers for the *bona fide* Lessor after its failed attempts to reach the applicant through the address indicated in the lease agreement. He states that upon identifying the



applicant's *bona fide* officials, its advocates directed the said Plaintiff/Applicant's advocates to the 2nd Respondents storage yard and provided them with the contact persons for the said yard for purposes of inspection and collection of the tanks.

15. He further avers that the Applicant's application for deposit of security in the sum of USD 100,000 is premature, incompetent and does not meet the legal threshold as the 1st Respondent poses no risk of absconding from the country's jurisdiction or failing to satisfy an order for costs should it be made by this court.
16. The 2nd respondent opposed the application through the replying affidavit of its Managing Director Mr. John Guchu Ng'ang'a who avers that the 2nd respondent is not a party to any leasing agreement between the plaintiff and the 1st defendant and is therefore a stranger to the terms and alleged breaches in respect to the said leasing agreement. He however states that pursuant to a Bailment Agreement dated 25th May, 2020 the 1st defendant instructed them to store them to the order of the Plaintiff/Applicant as the registered owners. He adds that despite numerous demands for payment from the time the three Tanktainers were deposited by the 1st Defendant/Respondent on the 25th of May, 2020 aforesaid no payment for storage whatsoever has been made by either the Applicant or the 1st respondent.
17. He further states that they no interest in the ownership of the 3 ISO Swap body Tanktainers and that their only interest in the subject matter is the outstanding storage charges costs that stood at USD 46,464/- as at 20th September, 2021.
18. It is the 2nd respondent's case that the bailee's right of lien allows the bailee to retain the goods if his lawful charges are not paid and that it will therefore be extremely prejudicial to them and unconscionable for the court to order for the release the tanktainers to the plaintiff without having their storage charges paid first. The 2nd respondent further states that Sections 6, 7 and 8 of the [*Disposal of Uncollected Goods Act*](#) Cap. 38 of the Laws of Kenya allows them, as the custodian of goods, to sell the goods where the depositor has not taken delivery of the goods by the date specified in the notice of delivery and to deduct from the proceeds of sale any sum payable by the depositor to us as the custodian of the goods in respect of the goods.

Analysis and determination.

19. The application was canvassed by way of written submissions which I have considered. The main issues for determination are as follows:-
 - i. Whether an order of injunction should issue restraining the 2nd Defendant from selling or otherwise disposing of the 3 ISO Tanktainers pending the hearing and determination of the suit?
 - ii. Whether this Honourable Court should order the 2nd Defendant to release the ISO Tanktainers to the Plaintiff?
 - iii. Whether this Honourable Court should order the 2nd Defendant to demand and pursue the storage charges from the 1st Defendant?
20. On the prayer for injunction, this court notes that the principles/conditions governing the granting of the orders of injunction were stated in the case of *Giella v Cassman Brown* (1973) EA 358 as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in East Africa. First, an applicant must show a *prima facie* case with a probability of success.



Secondly, an interlocutory injunction will not be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

21. In *Mrao v First American Bank of Kenya Limited & 2 Others* (2003) KLR 125, a *prima facie* case was described as follows: -

“a *prima facie* case in a Civil Application includes but is not confined to a ‘genuine and arguable case’. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

22. The defendants submitted that the Plaintiff/Applicant has not demonstrated that it has a genuine and arguable case or a right which has apparently been infringed by the 2nd Defendant as to call for an explanation or rebuttal from it and that a *prima facie* case had therefore not been established.

23. The applicant’s case, on the other hand, was that that it entered into a chattels Lease Agreement with the 1st Respondent with respect to the (3) ISO SWAP containers and that the parties agreed that the said tanktainers were to remain the properties of the Applicant and except for the purposes for which they were leased, the 1st Respondent was never to part with possession of the same except with the consent of the Applicant. It was further, the plaintiff’s case that agreement has provided for resolution of disputes between the parties through the arbitration.

24. The applicant claimed that the 1st Respondent not only failed to pay for part of the hire charges but also has failed to return the subject tanktainers to the Applicant as per the very clear terms of the Lease Agreement. The applicant adds that it has declared a dispute in line with the provisions of the said lease agreement and that in the interim period, it seeks the prayers for injunction and security for costs pending the hearing and determination of the intended arbitration and in order to preserve the subject matter of the intended arbitration.

25. It is trite that this court has unfettered jurisdiction and discretion to grant the prayers sought against the Respondents pending the arbitral proceedings.

26. The Applicant stated that it had no agreement or understanding with the 2nd Respondent on the purported storage of the subject tanktainers and that the alleged costs of such storage are therefore not applicable.

27. The applicant submitted that it had made out a case for the granting of the orders sought. Reference was made to the decision in Miscellaneous Application No.425 of 2019, *Elite Earthmovers Limited vs the Machakos County Government & Another* 120201 eKLR Machakos High Court where Odunga,J, was confronted with an Applicant seeking injunctive orders pending reference of a commercial dispute to arbitration. When granting the injunctive orders the learned Judge cited the decision in *Inforcord Holdings Limited v The Honourable Attorney General & 2 Others* (2014) eKLR, wherein it was held: -

“That a consensus seems to have emerged from the string of judicial authorities and which the Court is familiar with that, if an injunction is sought in the interim Under Section 7 of the *Arbitration Act*, existence of an enforceable arbitration agreement constitutes *Prima Facie* case in the context of *Giella v Cassman Brown*”

28. Reference was also made to Civil Appeal No.93 of 2016 at Kisii *Kenya Power & Lighting Company Limited vs Samuel Mandere Ogeto* (2017)eKLR where the Court cited the Court of Appeal Ruling in



Kenya Breweries Limited & Another v Washington O. Keya (2002) eKLR where the Court of Appeal stated that:-

“A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases where the Court thought that the matter ought to be decided at once or where the injunction is directed at a simple and summary act which could be easily remedied or where the Defendant had attempted to steal a match against the Plaintiff. Moreover before granting a mandatory injunction the Court had to feel a higher degree of assurance that at the trial it would appear that the injunction had been rightly granted, that being a different and a higher standard that was required for a prohibitory injunction.”

29. In the present case, it was not disputed that the plaintiff and the 1st defendant entered into a lease agreement that contained an arbitration clause. It is also not in doubt that the tanktainers that were the subject of the agreement are in danger of being sold by the 2nd defendant for alleged non-payment of storage charges. I am therefore satisfied that the applicant has made out a case for the granting of the interim orders injunction pending the hearing and determination of the intended arbitral proceedings.
30. Turning to the prayer that the 1st Defendant provides security for costs equivalent of US dollars 100,000 to the Plaintiff pending the hearing and determination of the intended Arbitral proceedings between the Plaintiff and the 1st Defendant, I find that no material has been placed before this court to show that the 1st defendant will either be unable to pay the costs that may be ordered against it or that it is about to escape from the jurisdiction of this court. I am therefore not persuaded that the applicant has made out a case for the granting of the order for security.
31. As regards the prayer that the 2nd Defendant be ordered to forthwith release to the Plaintiff, unconditionally, the ISO Tanktainers Serial Nos. FEPU 510002 (6) AMT, FEPU 5100067 (0) AMT, and FEPU 510094 (1) AMT, I find that it was not disputed that the said tanktainers belong to the plaintiff and were leased to the 1st defendant. The 1st defendant concedes that it deposited the tanktainers at the 2nd defendant's yard without the plaintiff's consent or instructions. I find that the issue of whether or not the 1st defendant was justified to deposit the said tanktainers at the 2nd defendant's yard is one of the issues that will be considered by the arbitrator when the matter is finally filed before him.
32. Be that as it may, and my above findings notwithstanding, I note that the 2nd defendant does not lay any claim over ownership of the said tanktainers. For this reason, I find that it will not serve any useful purpose for the 2nd defendant to continue keeping the tanktainers which also continue to accrue storage charges. My finding is that, in the justice of this case applicant will require that the said tanktainers be released to the plaintiff, albeit, on condition that it does not charge, or dispose of them pending the hearing and determination of the intended arbitration and or suit.
33. On the issue of whether the 2nd Defendant should be ordered to demand and pursue any storage charges on account of the tanktainers from the 1st Defendant, I once again find that this is an issue that can best be determined by the court or the tribunal that will hear the dispute between the parties herein. I therefore decline to grant the said orders at this stage.
34. Having regard to the findings and observations that I have made in this ruling, I find that the application dated 18th October 2021 is merited and I therefore allow it in the following terms: -



- a. That pending the hearing and determination of the suit herein between the Plaintiff and the 2nd Defendant and the intended Arbitral proceedings between the Plaintiff and the 1st Defendant. The Defendants be restrained from selling the plaintiff's tanktainers.
- b. That the 2nd Defendant is hereby ordered to forthwith release to the Plaintiff the ISO Tanktainers Serial Nos. FEPU 510002 (6) AMT, FEPU 5100067 (0) AMT, and FEPU 510094 (1) AMT (2), but on condition that the plaintiff will not sell or mortgage the said tanktainers or in any way whatsoever part with the possession of the tanktainers pending the hearing and determination of this suit and the arbitral proceedings.
- c. That costs of this application shall abide the outcome of this suit and/or the arbitral proceedings.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF AUGUST 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Okeyo for Plaintiff/Applicant.

Ms Keru for 1st Respondent.

Mr. Mbaji for 2nd Respondent.

Court Assistant- Sylvia

