



**Maersk Kenya Limited v Corporate Legends Limited; Bcs
Kenya Limited (Interested Party) (Civil Appeal E024 of 2022)
[2022] KEHC 13499 (KLR) (Commercial and Tax) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13499 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E024 OF 2022
EC MWITA, J
SEPTEMBER 23, 2022**

BETWEEN

MAERSK KENYA LIMITED APPLICANT

AND

CORPORATE LEGENDS LIMITED RESPONDENT

AND

BCS KENYA LIMITED INTERESTED PARTY

RULING

1. Maersk Kenya Limited, (Maersk), took out motion on notice dated March 3, 2022, under order 42 rule 6 of the *Civil Procedure Rules*, seeking stay of execution of the ruling dated February 17, 2022 and order issued thereafter in CMCC No 11479 of 2021, pending the hearing and determination of this appeal.
2. The motion is premised on the grounds on its face, the supporting and further affidavits both sworn by Natasha Gichuki on March 3, 2022 and May 20, 2022 respectively. The grounds are that Maersk stands to suffer irreparable damage and loss as corporate legends might proceed and apply for contempt for breach of the orders issued against it; that Maersk will suffer great loss in business as the orders of the trial court are so vague and wide as to give corporate legends *carte blanche* in claiming the release of pre-release validations and deposit refunds for its clients not party to this suit without fulfilling its obligations under the contract between the parties and that Maersk may fail to recover losses suffered if the impugned orders were complied with as no summons to enter appearance have been issued in the main suit.
3. The background to the application is that corporate legends was engaged in clearing and forwarding business carried out through Maersk's trading portal. Parties signed a container guarantee agreement



for a standard dry container in which corporate legends agreed to return maersk's containers within specific timelines. The agreement stipulated that failure to return the container within the specified timelines or damaged, corporate legends would pay detention and administration charges. Maersk claims that corporate legends incurred detention charges of USD 20,300 which remains unpaid despite demand.

4. Corporate legends on the other hand asserts that the delay in returning the container was due to unforeseen circumstances and that it sought and was given an indemnity against the detention charges accrued from the interested party. It paid USD 2300 on behalf of the interested party in settlement of the initial detention invoice, which was a final invoice, generated by Maersk. However, Maersk generated further invoices which corporate legends claims were not substantiated. Maersk also limited corporate legend's transactions in the trading portal.
5. Following the disagreements, corporate legends filed a plaint dated September 27, 2021 against Maersk before the trial court and simultaneously filed a notice of motion seeking injunction restraining Maersk from holding delivery orders, pre-release validations (PRVs) and deposit refunds for corporate legend's clients and from limiting the conduct and practice of corporate legends in its trading portal pending the hearing and determination of the suit.
6. Maersk, states that although it was not served with summons to enter appearance, its advocates filed a notice of appointment dated November 2, 2021 and later put in a replying affidavit and submissions in opposition to corporate legend's motion. By ruling delivered on February 17, 2022, the trial court allowed the motion and issued the temporary injunction sought.
7. Aggrieved, Maersk filed an appeal contemporaneous with the present motion On March 10, 2022, the court directed parties to agree on interim orders which parties failed to do and on March 24, 2022, the court directed corporate legends to deposit Kshs 2,000,000/- in court within fourteen days in default of which the impugned orders would stand stayed pending the disposal of this motion.
8. Maersk states that corporate legends failed to comply with the order to deposit Kshs 2,000,000 which meant the orders of the trial court were stayed; that corporate legends filed a notice of appeal dated March 29, 2022 which was served on March 31, 2022 and that corporate legend further filed Misc Appl No E108 of 2022 before the court of appeal seeking to set aside this court's orders of March 24, 2022.

Response

9. In response to this motion, corporate legends has filed a replying affidavit by Erick Ochieng Yamo, a sales representative, sworn on March 23, 2022. Corporate legend states that it was indemnified against any loss or demurrages by the interested party; that the container guarantee agreement signed between the parties did not provide for closure of trading portal or its limitation as an execution option. For these reasons, corporate legends argues that Maersk's appeal has no chances of success and the motion does not meet the threshold for grant of stay of execution.

Submissions by Maersk

10. Maersk submits that it has satisfied the conditions for grant of stay of execution as required by order 42 rule 6 of the *Civil Procedure Rules* and relies on *Obadiab Mugambi v Joyce Ncoro* [2021] eKLR. Maersk asserts that the appeal is arguable given that the trial court granted a mandatory injunction despite breach of the container guarantee agreement by corporate legends.
11. Regarding substantial loss Maersk argues that if stay is not granted it will be forced to offer service to corporate legends on its trading portal despite breach of the contract thus suffer business loss more



than corporate legends will suffered as legends will continue to get services. Maersk also submits that the application has been made without any delay.

12. On security, Maersk undertakes to provide suitable security as the court may direct and relies on *Rosengrens Ltd v Safe Deposit Centers Ltd* [1984] for the proposition that security should be given in a way which is least disadvantageous to the party giving that security and that as long as it is adequate, the form is immaterial.

Submissions by Corporate Legends

13. Corporate legends submits that Maersk has not satisfied the conditions for granting stay of execution and relies on *Kenya Women Microfinance Ltd v Martha Wangari Kamau* [2020] eKLR.
14. According to corporate legends, arguability of the appeal and its chances of success are minimal. Corporate legends takes the view, that Maersk will not suffer substantial loss if it is allowed to transact in the portal account pending the hearing and determination of the appeal. To the contrary, corporate legend asserts that it will suffer substantial loss as goods belonging to other customers not party to the suit will not be cleared on time and will attract penalties and charges due to the limit in the use of the portal.

Determination

15. Maersk seeks stay of execution of the orders made by the trial magistrate on February 17, 2022, pending the hearing and determination of this appeal. The impugned orders restrained Maersk from holding delivery orders, pre-release validation and deposit funds for corporate legends' clients not party to the proceedings before the trial court pending the hearing and determination of that suit. In other words, Maersk is to allow corporate legends to continue using the portal for other customers other than the interested party until determination of that suit.
16. This is an application for stay of execution pending appeal under order 42 rule 6 of the *Civil Procedure Rules*. Rule 6(1) provides that an appeal or second appeal does not operate as stay of execution or proceedings under a decree or order appealed from except in so far as that court or the court to which the appeal is preferred may order, as it deems just. Rule 6(2) also states that an order of stay shall not be made unless the court is satisfied that substantial loss may result to the applicant unless the order is made; that the application has been made without unreasonable delay and such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant
17. The rule give this court a wide discretion to grant a stay pending appeal. The discretion should however to be exercised under well-settled principles. That is; the applicant must establish that that substantial loss will be suffered; that the application has been brought without delay and that the applicant has offered security for the due performance of the decree should the court so require.
18. Considering the grounds for granting or declining an application for stay pending appeal, the Court of Appeal stated in *Butt v Rent Restriction Tribunal* (civil App No Nai 6 of 1979) that the power to grant or refuse an application for a stay of execution is a discretionary power which should be exercised in a way that will not prevent an appeal. The court emphasized that a judge should not refuse stay if there are good grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings. Similarly, in exercising this discretion, the court should consider the special circumstances of the case and its unique requirements.



19. Although stay may be granted as a matter of discretion, the discretion must be executed judiciously and only as circumstances of each case may require. Under order 42 rule 6, the fundamental principle is that an applicant must show that he will suffer substantial loss if stay is not granted. As to what substantial loss is, has been the subject of consideration by courts. In *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the court observed that the fact that execution process has been put in motion, or is likely to be put in motion does not by itself amount to substantial loss. The applicant must establish other factors which show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. In other words, substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
20. In *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR, the court again stated that the only way of showing or establishing substantial loss is by demonstrating that if execution is carried out, the respondent would not be in a position to pay back or return the applicant to the original position before execution in the event the appeal succeeds. (See also *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] 2 KLR 63).
21. Applying the above principles to the present application, has Maersk demonstrated that substantial loss will be suffered should stay not be granted? To answer this question, one must look at the nature of the impugned orders, the subject of the intended appeal.
22. As already alluded to, the impugned orders restrained Maersk from holding delivery orders, pre-release validation and deposit funds for corporate legends' clients "not party to the suit" before that court pending the hearing and determination of the suit. The order also restrained Maersk from preventing or limiting corporate legends from trading in the portal pending the hearing of that suit. The first order properly understood, meant that Maersk could withhold delivery orders for the interested party and the interested party could not in essence use the portal for transaction until the court resolved the dispute that the parties had been presented before it.
23. Maersk has not demonstrated the substantial loss that would be suffered if the other importers not party to the suit continue to use the portal. The issue of non-payment either by corporate legends or the interested party or whether the amount claimed by Maersk is due or not is the subject of litigation before the trial court. Maersk has not alleged that corporate legends would not be in a position to pay were the suit before the trial court to be heard to be dismissed.
24. I have carefully read through the application, supporting affidavit and submissions. It is plain that Maersk has not attempted at all to establish the substantial loss to be suffered if stay is not granted. Maersk has not even alleged that corporate legends is a person of no means incapable of making good the claim if the appeal succeeded. In other words, Maersk merely alleges that substantial loss would be suffered without demonstrating how. That, in my view, is not the meaning of substantial loss as contemplated by order 42 rule 6 and the authorities referred to above. Maersk was required to do much more than merely asserting that there will be substantial loss, to satisfy this court that stay of execution is deserved and for the court to exercise this discretion in its favour.
25. When considering an application for stay, (and more so in an interlocutory appeal), the court has a duty to balance interests of both the applicant seeking stay of interim orders and the party in whose favour the orders have been made, bearing in mind that the trial court is yet to dispose of the main suit. It may well be that the interim orders may be discharged after the trial court has finally determines the suit. As the court stated in *Machira T/A Machira & Co Advocates v East African Standard (No 2)* (supra), the ordinary principle to be borne in mind when considering application for stay, is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage.



26. Taking into account the facts disclosed in this application, depositions in the supporting affidavit, submissions and on the strength of the authorities cited, I am not persuaded that Maersk has met the threshold for granting stay of execution. In short, Maersk has not demonstrated the substantial loss to be suffered if stay of execution is not granted. This is so because stay of execution pending an intended appeal is intended to preserve the subject matter of the intended appeal to enable parties exercise their right on appeal but not to cause prejudice to the other party or hinder the cause of justice.
27. It is also noteworthy that the issue before the trial court is on specific claim and amount whether to be paid or not and not a general allegation that is not incapable of isolation as parties wait for the hearing and determination of the main suit.
28. Having come to that conclusion that the threshold for granting stay of execution has not been met, I need not consider the other limbs, namely; whether the application has been brought without delay or the issue of security since these would not affect the conclusion arrived at, and that alone would not prevent the court from making any orders it thinks fit for the ends of justice.
29. In the end, I find no merit in the application. Consequently, the application dated March 3, 2022 is declined and dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF SEPTEMBER 2022

E C MWITA

JUDGE

