REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

HIGH COURT CIVIL SUIT NO. 57 OF 2019

CHINA TECH INTERNATIONAL CORP.....PLAINTIFF

-VERSUS-

SAKIMA INVESTMENTS SARL.....1ST DEFENDANT

GULF BADR GROUP (KENYA) LTD.....2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 19th November, 2020 brought under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act. The plaintiff seeks the following orders-

    1) Spent;

    2) A mandatory order be issued compelling the defendant to release one of the three (3) bills of lading with the series number; 0118350118/0118350119/0118350120 under B/L number; 321900006023 as decreed by the Court in the ruling of 25/09/2019 and Court order issued on 27/09/2019, without causing any amendments;

    3) Any other order as the Court may deem fit to give efficacy to the orders of 25/09/2019; and

    4) Costs.

2. The application is supported by an undated affidavit filed on 19th November, 2020 and a supplementary affidavit sworn on 2nd February, 2021 by Simon Kanoga, a duly authorized agent of the plaintiff's company.

3. The 1st defendant filed a replying affidavit sworn on 7th December, 2020 by one of its directors, Richard Bisima, to oppose the application.

4. The 2nd defendant in opposing the application filed a replying affidavit sworn by its representative, Amr Abdelsalam on 21st January, 2021.

5. The application was heard though oral submissions made by the Counsel on record. Mr. Karina submitted that pursuant to the ruling by Judge P.J. Otieno on 25th September, 2019, the 2nd defendant was ordered to release the original bill of lading to the plaintiff to enable it to collect the cargo in issue and take it to a bonded warehouse in China. He further submitted that the 2nd defendant instead issued the plaintiff with an amended bill of lading on 23rd November, 2019 pursuant to the said court order.

6. Counsel for the plaintiff posited that as at 25th September, 2019 when Judge P.J. Otieno ordered that the plaintiff should be given the original bill of lading, he meant that it should be without amendment. That had the Judge ordered for the bill of lading to be presented to the court on that day, it would have been without any amendments. Counsel further submitted that his client paid the accrued demurrage due as at 6th September, 2019 and was thereafter issued with the amended bill of lading. That his client had been unable to put its cargo in a bonded warehouse in China since the said bill of lading was not recognized.

7. Mr. Karina prayed for the original bill of lading as at 25th September, 2019 to be released to his client since the order was aimed at protecting the subject matter of the arbitration. He went further to submit that the arbitration was still ongoing, a fact which had also been admitted by the 2nd defendant in its replying affidavit. Counsel submitted that the application before this Court constitutes supplemental proceedings to give effect to Judge P.J. Otieno's orders.

8. He contended that the case filed in China was different from the present one because in the former case, the Plaintiff was China Tech

International and the defendants were Evergreen Marine (Singapore) Pte Ltd and Shenzhen Master International Shipping Agent Co. Ltd. Counsel further submitted that the said case was a dispute over carriage of goods by sea, where the plaintiff was trying to enforce a contract of carriage and not a contract of sale. Further, that the two parties (defendants) in China were not privy to the case herein.

9. Counsel submitted that this Court has jurisdiction to hear this matter since the plaintiff has come to court under Section 63 of the Civil Procedure Act. That the plaintiff will suffer loss as it had paid demurrage and would be made to pay more demurrage which it is incurring in the sum of Kshs. 12,000/= per day.

10. Ms. Azei for the 1st defendant on the other hand submitted that by 4th November, 2019 no arbitration proceedings had commenced. That the said arbitral proceedings commenced on 20th November, 2020. She submitted that the orders of Judge P.J. Otieno elapsed when no arbitral proceedings commenced within 40 days of the order. Counsel further submitted that the orders issued were a temporary injunction which elapsed after 12 months by operation of the law.

11. She further submitted that by the plaintiff requesting to be given the original bill of lading, that was equivalent to asking to be given title to the goods. She submitted that the plaintiff was forum shopping and that when it got the orders from Judge P.J. Otieno, it went to a Court in China where it sought for the release of the goods. Counsel was of the view that the plaintiff's conduct by requesting for the goods to be delivered to it meant that it would take the cargo and take off with it and that would defeat the proceedings in the arbitral tribunal. She urged this Court to refrain from issuing any orders which will affect the arbitral proceedings.

12. Counsel for the 1st defendant submitted that the present application has been brought under Sections 1A, 1B and 3A of the Civil Procedure Act, thus the jurisdiction of this Court to grant interim orders for a matter which was undergoing arbitral proceedings would mean that this court would be making a final determination of the dispute. She further submitted that special and exceptional circumstances must be shown to exist for a court to grant a mandatory injunction.

13. Mr. Wafula, Counsel for the 2nd defendant submitted that the applicant was seeking to vary/alter the orders by Judge P.J. Otieno, which could not be corrected by this Court. Counsel submitted that after the order was given, the plaintiff went to China and commenced proceedings where it applied for the release of the goods which were supposed to be stored at a warehouse awaiting arbitral proceedings. Counsel submitted that the Court in China ruled that the cargo should be in a customs warehouse awaiting arbitration in Hong Kong.

14. He stated that the plaintiff was abusing the court process since the goods in issue are in China, the shipping line is in China and the mother company of the 2nd defendant was in China. He also stated that it was common ground that the issue of the ownership of the goods was being tried in Hong Kong. Counsel submitted that the Judge P.J. Otieno never gave a blanket order for release of the goods to the plaintiff but it was apparent that it was trying to appeal the ruling of the said Judge.

15. Counsel for the 2nd defendant further submitted that there was no evidence that the bill of lading had been rejected anywhere. He indicated that the 2nd defendant was a party to the contract of carriage of goods and since the principal was sued by the plaintiff in China on behalf of Evergreen Marine, it renders the application herein *res judicata* and runs counter to the provisions of Section 7 of the Civil Procedure Act.

16. Mr. Wafula stated that an appeal was filed in China and if it was to succeed then there will be no dispute to be considered. He submitted that arbitral proceedings had begun in Hong Kong. He indicated that the plaintiff had not paid even 10% of the cost of the cargo and if the Court was to order for the release of the goods, it would lead to a colossal loss to his client and the 1st defendant.

17. In response to the submissions by Ms. Azei and Mr. Wafula, Mr. Karina submitted that all the parties to this suit are limited liability companies therefore one cannot be assumed to be acting for another. He further submitted that the order by Judge P.J. Otieno was premised on the arbitral proceedings commencing within 40 days. Counsel submitted that the 2nd defendant delayed in issuing the bill of lading and issued it on 23rd November, 2019 therefore time did not run for 29 days. Counsel further submitted that time had not even started running as the 2nd defendant delayed in issuing the bill of lading.

18. He indicated that Judge P.J. Otieno's order was to be in place pending the hearing and determination of the arbitral proceedings. That the dispute in China was instituted because the 2nd defendant was hiding behind the corporate veil to frustrate the plaintiff by saying that it was Evergreen. Counsel indicated that his client disclosed that there were proceedings in this Court and that the disputes between China and Kenya were different.

19. He stated that arbitral proceedings were started late due to *force majeure* and operations in China were put on hold in November, 2019 due to the outbreak of Covid-19. He further said that it was in the public domain that the said disease started in China. Counsel submitted that they instituted arbitral proceedings in China in the month of May, 2020 and asked this court to allow the orders sought or any other order which may assist the parties in this case.

ANALYSIS AND DETERMINATION.

20. I have considered the present application and the responses made by the defendants. I have also borne in mind the submissions made in support of each party's case. The issues which arise for determination are as follows-

(i) **Whether this Court has jurisdiction to grant the orders sought;**

(ii) **Whether the rights and obligations of the parties were settled by Hon. P.J. Otieno, J in his ruling delivered on 25th September, 2019;**

(iii) **Whether the ruling delivered on 25th September, 2019 is still in force; and**

(iv) **Whether the plaintiff has demonstrated special and exceptional circumstances to warrant grant of a mandatory injunction.**

Whether this Court has jurisdiction to grant the orders sought.

21. It is not disputed that the plaintiff and the 1st defendant got into an agreement on 26th March, 2019 for the sale of 70,560 kilograms of Tantalite ore of Congo origin under the terms and conditions stipulated in the agreement. That on the request of the 1st defendant, the plaintiff made payment of USD 100,000.00 on condition that the 1st defendant would give the plaintiff one original bill of lading against the said payment. The plaintiff averred in its affidavit that it turned out that the bill of lading bearing series number 0012523500 which it was given by the 1st defendant on 20th June, 2019 turned out to be fake. That the 1st defendant had already sent the 3/3 full sets of the bills of lading to the 2nd defendant and asked it to transfer the cargo under the contract to UAE.

22. It was further deposed that it was a term of the agreement of 26th March, 2019, under clause 12 that any dispute would be submitted to and resolved by way of arbitration in Hong Kong and the decision made by the arbitral tribunal would be accepted as final and binding upon both parties. That on 1st July, 2019, the subject matter of the arbitration became under threat of being wasted or removed from the jurisdiction of the Court in Kenya by virtue of the 1st defendant's threats to transfer the bill of lading or otherwise sell the goods to a 3rd party in Turkey.

23. That on 9th August, 2019, the plaintiff filed the suit herein under Section 7(1) of the Arbitration Act seeking an injunction restraining the 2nd defendant from releasing to the 1st defendant or any other 3rd party the bill of lading No., EVGLV321900006023 which was then in the 2nd defendant's custody. That the application was heard and a ruling delivered on 25th September, 2019 which culminated into an order allowing the plaintiff's application in the following terms-

> (i) That pending the hearing and determination of the dispute between the plaintiff and the defendant herein by arbitration, an injunction be and is hereby issued restraining the 2nd defendant Gulf Badr Group (KENYA) LTD whether by itself, its employees, servants or agents or otherwise howsoever from releasing to the 1st defendant or any other 3rd party pending the bill of lading No. EVGLV321900006023 currently in the custody of the 2nd defendant in order that the parties choice of forum be respected and made binding;
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> (ii) That Gulf Badr Group (KENYA) LTD be and is hereby ordered to release one (1) original bill of lading to the plaintiff to enable the plaintiff keep the cargo in a custom bonded warehouse to avoid colossal amounts of money incurring as demurrage costs on a daily basis in order that the parties' choice of forum be respected and made binding;
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> (iii) That this shall not be a blanket order *ad in functum (sic)*, it is conditioned on the arbitration proceedings being instituted or commenced within 40 days from today; and
>
> (iv) That the costs of this application shall abide the outcome of the arbitration proceedings.
>
> (v) That this matter shall be mentioned in Court on 4/12/2019 to report on the progress made.

24. The plaintiff in its supporting affidavit stated that on 23rd October, 2019, the 2nd defendant gave it a bill of lading with series No. 0120073297 under B/L No. 321900006023 which had been amended by the 2nd defendant. The plaintiff averred that the amendment was unlawful because it was made after the ruling of 25th September, 2019. The plaintiff stated that the said amendment was causing it injury because the bill of lading was being regarded as 'un-clean" and could not be accepted by the Shipping Line Evergreen China or Master International Shipping Agency Co. Ltd for issuance of a delivery order for purposes of keeping the cargo in a customs bonded warehouse.

25. It was averred that the bill of lading was not valid under the customs of the People's Republic of China Measure for Administration of Manifests of Inbound and Outbound Transport Vehicles and that under Articles 8 and 9 thereof, the plaintiff could not clear the cargo. It was contended that the amended bill of lading did not exist in the records/system of Evergreen China or Master International Shipping Agency Co Ltd.

26. The plaintiff further deposed that it believed the representations made by the 2nd defendant that it would release the correct bill of lading and based on the same, on 22nd October, 2019 it paid USD 14,353.00 being all the accrued demurrage and storage charges as at 15th October, 2019. The plaintiff claimed that it would continue to suffer huge financial losses at the rate of RMN 240 per container per day as from 25th October, 2019.

27. As per the supplementary affidavit, filed by the plaintiff, it deposed that the dispute before the Tianjin Maritime Court of the People's Republic of China namely (2019) Jin 72 Min Chu No. 1280 was a dispute over a contract of carriage of goods by sea and not a dispute arising from the contract of sale. That the said suit was filed as a result of the carrier failing to honor the High Court Order to release the bill of lading for the plaintiff to transfer the cargo to a bonded warehouse. The 2nd defendant was not a party to the contract of sale and has no rights or obligations under it.

28. That the court in China found that the defendants in the case before it, namely, Evergreen Marine (Singapore) Pte Ltd and Shenzhen Master International Shipping Agency Co. Ltd, were not parties to the present suit and no orders had been issued against them that could be

enforced in China under case No. (2019) Jin 72 Min Chu No. 1280. The plaintiff further deposed that arbitral proceedings were ongoing under Application for Arbitration, Notice of Composition of Arbitration Tribunal and the Notarial Certificate (2020) JDNMZZ No. 08433 in Hong Kong ICC for Arbitration.

29. The 1st defendant in its replying affidavit stated that this Court has no jurisdiction to hear and determine the application herein and that the order the plaintiff seeks to enforce is no longer in force. It deposed that it and the plaintiff on 26th March, 2019 got into a contract for the sale of 70,560kgs +/-5% of Tantalite ore of Congo origin for USD 2,167,603.20.00. That the plaintiff was to pay USD 800,000.00 as part payment of the cargo and the balance was to be paid upon its inspection of the goods. It was further stated that the first payment was to be made prior to inspection of the consignment at its destination, namely, the Port Tiajin in China. It was indicated that the plaintiff only paid USD 310,000.00 leaving an outstanding balance of USD 490,000.00 which was to be paid prior to inspection of the goods but it had not made any efforts to settle the full purchase price.

30. It was further deposed that the plaintiff had failed to disclose the foregoing material information or that an original bill of lading was to be released to the plaintiff upon payment of the said sum. It was averred that the 3 original bills of lading were then in the custody of the 2nd defendant and were only to be released to the plaintiff as per the terms of the contract. The 1st defendant indicated that they were strangers to any fake bill of lading that was issued.

31. The 1st defendant averred that the literal and strict interpretation of the ruling by Judge P. J. Otieno was that the order for temporary injunction was issued pending the hearing and determination of the dispute between the parties by way of arbitration, which proceedings ought to have commenced within 40 days from the date of issuance of the court order. That the plaintiff never made any efforts to have the arbitral proceedings commence within 40 days from the date of issuance of the court order, thus the said orders lapsed on 5th November, 2019.

32. The 1st defendant stated that it was aware that the 2nd defendant issued a bill of lading with series No. No. 0120073297 under B/L No. 321900006023 which reflected the position of the court order, in compliance with the court orders of 25th September, 2019. The 1st defendant stated that the plaintiff had not demonstrated any special and exceptional circumstances warranting the grant of a mandatory injunction and the orders sought are incapable of being granted by virtue of the orders issued of 25th September, 2019 elapsing on 25th September, 2020.

33. In its replying affidavit, the 2nd defendant stated that the court in granting the said orders was alive to the fact that an original bill of lading is a document of title in the context of the right to possession of the goods from the carrier. That in this case, the bill of lading was only limited to enabling the plaintiff to move or keep the cargo in a customs bonded warehouse hence it was necessary that the terms of release of the bill of lading to the plaintiff as directed by the Court, be endorsed on it, so as also to protect the substratum of the case.

34. The 2nd defendant further averred that on 30th October, 2019, the plaintiff wrote a letter to the carrier demanding to be issued with a delivery order but the carrier through a letter dated 8th November, 2019 responded stating that at that stage, it was inappropriate for the plaintiff to take delivery and put the cargo under its unilateral control.

35. That the carrier through its lawyer Haitong & Partners on 8th November, 2019 in responding to the plaintiff's demand for a delivery order gave a proposal to the plaintiff that would have protected the interests of all the parties, but the plaintiff blatantly refused to accept it. A follow up letter dated 3rd December, 2019 was done by the carrier to the plaintiff reiterating the proposal but the plaintiff refused to cooperate.

36. The 2nd defendant also averred that the plaintiff filed a lawsuit before the Tianjin Maritime Court of the People's Republic of China against the carrier Evergreen Marine (Singapore) Pte Ltd and the port discharge agent Master International Shipping Agent Co. Ltd on 13th November, 2019 seeking delivery of the cargo under bill of lading No. EGLV321900006023. That Judgment was subsequently delivered on 12th December, 2020 dismissing the plaintiff's claim. That the plaintiff had lodged an appeal against that said Judgment hence it was restrained under Section 6 read together with Section 8 of the the Civil Procedure Act from filing any other application.

37. The 2nd defendant deposed that the carrier was not obliged to issue the plaintiff with a delivery order in view of the orders issued by this Court and it would appear as though the plaintiff was trying to re-try the same issues that were tried in Tianjin Maritime Court China. The 2nd defendant further averred that this court has no jurisdiction to grant the order sought by the plaintiff.

38. Further, that pursuant to Order 40 rule 6 of the Civil Procedure Rules, 2010, the injunction order lapsed automatically on expiry of a period of twelve months from the date of issue.

39. Jurisdiction is the bedrock of any case brought before a court. If this court finds that it has no jurisdiction to adjudicate on the matter in issue, then it will have to down its tools. That was well elucidated in the holding in **The Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR 1, w**here **Nyarangi J.A**. stated thus-

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction"***

40. From the depositions made by the plaintiff in its supporting and supplementary affidavits and submissions by Mr. Karina, the application

before me is not seeking an order of temporary injunction but a mandatory order to compel the 2nd defendant to release one of the 3 original bills of lading.

41. The 1st defendant in its Notice of Preliminary Objection stated that this Court lacks jurisdiction on account of the plaintiff having filed a case in China against the 2nd defendant's principal company. Judgment was rendered on merit on 12th December, 2020 and the plaintiff lodged an appeal against the said Judgment in China. The foregoing was admitted by the plaintiff in its supplementary affidavit.

42. Section 6 of the Civil Procedure Act provides as follows-

> ***"No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.***
>
> ***Explanation—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court."***

43. On the other hand, Section 7 of the Civil Procedure Act provides as follows:-

> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

44. The above provisions are aimed at preventing duplicity of suits and also to avoid scenarios where a litigant dissatisfied with a decision made by one court files a similar suit in a different Court in an attempt to get a favorable decision in what is commonly known as forum shopping. This court has gone through the Judgment of the court in China and it was apparent that the dispute therein revolved on the issue of carriage of goods by sea. The said Court found that the plaintiff did not have a contract of carriage of goods by sea with the two defendants who were as a result, not obliged to deliver the cargo to the plaintiff. Save for the plaintiff herein, the defendants in the said case were not the same ones as in this case. The issue raised by Mr. Wafula about the present application being *res judicata* does not arise.

45. Mr. Karina in his submissions stated that the present application was supplemental to the orders made by Judge P.J. Otieno on 25th September, 2019. Section 63 of the Civil Procedure Act makes provisions for supplemental proceedings. It stipulates that in order to prevent the ends of justice from being defeated, the court may make certain orders like issuing a warrant for the arrest of a defendant; directing the defendant to furnish security; grant a temporary injunction or make such other interlocutory orders as may appear just and convenient. Ms Azei and Mr. Wafula would not hear any of that as in their view, the present application seeks to vary the order of 25th September, 2019. In their view, that is tantamount to the plaintiff trying to appeal against the said order. They opined that as a consequence thereof, this court would be sitting as an appellate court in its own decision. This court's finding of the application as crafted is that the plaintiff is seeking to enforce the orders of Judge P.J. Otieno and not to alter, vary and/or to set them aside.

46. The said application dwells on the ruling Judge P.J. Otieno delivered on 25th September, 2019. The said decision is yet to be varied and/or set aside by a Court of competent jurisdiction. Bearing in mind the nature of the orders sought, I hold that they fall in the ambit of the provisions of Section 63 of the Civil Procedure Act as they are geared towards furtherance of the orders granted on 25th September, 2019. This court holds that the pendency of the arbitral proceedings in Hong Kong and the appeal in China does not oust the jurisdiction of this Honorable Court to deal with supplemental issues that may arise from the ruling of 25th September, 2019. The only issues that this court has no jurisdiction over are the ones covered by the arbitration agreement. In light of the foregoing, I find that this Court has jurisdiction to hear and determine the present application since it borders on the issue of enforcement of the orders of 25th September, 2019.

Whether the rights and obligations of the parties were settled in the ruling delivered on 25th September, 2019.

47. On page 5 of the ruling of 25th September, 2019, the Judge P.J. Otieno observed that indeed there was an arbitration agreement between the plaintiff and the 1st defendant providing for reference of disputes between them to arbitration. The said Judge further observed that whether it be the question of whether or not the agreement for purchase was varied or be it who between the plaintiff and the 1st defendant had breached the agreement; the parties chose to be referred to arbitration. The Hon. Judge held that there was both an agreement and a dispute to be arbitrated upon concerning the goods, which need to be preserved, pending determination of the dispute.

48. In light of the above, it is very clear that the Hon. Judge did not settle the rights and obligations of the parties herein as this was and still remains a preserve of the arbitral Tribunal. The orders issued on 25th September, 2019 were aimed at preserving the goods which are the subject matter of the ongoing arbitral proceedings.

Whether the ruling delivered on 25th September, 2019 is still in force.

49. The court granted a temporary injunction pending the hearing and determination of the dispute between the plaintiff and the 1st defendant by arbitration on condition that the arbitral proceedings were to be commenced within 40 days from the date of the ruling. That was not done. The said 40 days from 25th September, 2019 elapsed on 19th November, 2019. Mr. Karina said that arbitral proceedings commenced in the month of May, 2020, while Ms. Azei said that arbitral proceedings commenced on 20th November, 2020. Since the said information is not captured in any of the affidavits filed, it is difficult to verify the said information but in the court's understanding from the submissions made,

arbitral proceedings are ongoing in Hong Kong. Mr. Karina attributed the delay in commencing the arbitral proceedings to the failure by the 2nd defendant to release to the plaintiff one of the original bills of lading and also due to the outbreak of Covid-19 in China.

50. This court takes judicial notice of the fact that the official report from the Wuhan Municipal Health Commission, China to the World Health Organization was made on 31st December, 2019 see https://www.who.int on **Archived: WHO Timeline Covid-19.** The said report about the outbreak of Covid-19 in China and more specifically at Wuhan, was made to WHO way past the elapse of the 40 days that they had been granted by the court in its ruling of 25th September, 2019. The outbreak of the covid-19 pandemic was not to blame for the dragging of feet by the plaintiff in commencing arbitral proceedings. It is also worth noting that the outbreak of Covid-19 started in Wuhan. The arbitral seat for the dispute regarding the contract of sale is in Hong Kong, not Wuhan.

51. This court notes that the fact that the plaintiff was able to institute the suit in China on **13th November, 2019** means that it was also capable of commencing the arbitral proceedings at the same time, or almost at the same time, before the deadline of 19th November, 2019.

52. It is noteworthy that even after the elapse of the 40 days granted by court for institution of arbitral proceedings, the plaintiff did not move this court to seek appropriate orders such as extension of time and/or an order compelling the 2nd defendant to comply with the court order of 25th September, 2019, instead, it chose to file another suit in China seeking an order for release of the goods. The application herein was filed on 19th November, 2020 almost 1 year after the High court in Kenya granted a conditional interim injunction. It is the finding of this court that the present application has been brought with inordinate delay and no plausible and/or justifiable explanation has been rendered by the plaintiff as to the delay in filing the same. The plaintiff has therefore been caught up by the doctrine of laches.

53. Halsbury's Laws of England, 4th ed. Vol. 16(2) at 910 states as follows on the said doctrine-

> ***"A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation, equity aids the vigilant, not the indolent' or 'delay defeats equities'. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (laches').***

54. In **The Lindsay Petroleum Co v Hurd** (1874) L.R. 5 P.C. 221, Lord Selbourne L.C. delivering the decision of the Privy Council stated as follows on the doctrine of laches-

> ***"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving the remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy."*** (emphasis added).

55. In this matter, the plaintiff was too slow in moving to this court. It cannot also hide behind the claim that the 2nd defendant delayed to release the original bill of lading as the reason for failing to begin the arbitral proceedings in good time. The said **original bill of lading** had no bearing in the arbitral proceedings which involve a dispute with regard to the contract of sale and not carriage of goods, where the bill of lading would be a primary document. The suit in China was instituted after the orders herein were granted but it was dismissed. It was only after the said dismissal that the plaintiff came back to this Court with the current application. It is apparent that the plaintiff pegged its hope on the assumption that the Court in China would direct the defendants therein to issue it with a delivery order for the goods in issue, thus its failure to move this court for the orders it now seeks.

Whether the plaintiff has demonstrated special and exceptional circumstances to warrant grant of a mandatory order.

56. In light of the fact that there is no active order before me to enforce, I shall not proceed to determine whether the plaintiff has demonstrated special or exceptional circumstances to warrant grant of a mandatory order. In any event, this court has found that the doctrine of laches applies in this matter.

57. I therefore find that application dated 19th November, 2020 lacks merit and the same is dismissed. The defendants are awarded the costs of the said application.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 26TH DAY OF FEBRUARY, 2021. Ruling delivered through Microsoft Teams online Platform due to the outbreak of the Covid-19 pandemic.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Khomo holding brief for Mr. Karina for the plaintiff

Ms Azei for the 1st defendant

Ms Baraza holding brief for Mr. Wafula for the 2nd defendant

Mr. Oliver Musundi – Court Assistant.