



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. E096 OF 2021

JINKO SOLAR CO. LIMITED.....PLAINTIFF

-VERSUS-

GYM RENEWABLE ONE LIMITED.....1ST DEFENDANT

KENYA PORTS AUTHORITY.....2ND DEFENDANT

KENYA REVENUE AUTHORITY.....3RD DEFENDANT

-AND-

CRISPOLL EAST AFRICA LIMITED.....INTERESTED PARTY

RULING

1. The application before this Court is a Notice of Motion dated 4th October, 2021 brought under the provisions of Sections 1, 1A, 1B, 3, 3A, 63(e) of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 40 Rules 1, 2, 3 of the Civil Procedure Rules and other enabling provisions of the law. The interested party/applicant seeks the following orders-

- i. Spent;
- ii. Spent;
- iii. That pending the hearing and determination of any issues between the plaintiff and the defendant, the interested party/applicant be granted an order to offload all consignments (sic) aboard motor vehicle registration numbers KCD 862E/ZF 0648, KCL 032R/ZF 6816 and KCJ 140M/ZB 8592 trucks and store them in the 3rd defendant's yard;
- iv. That all costs due to the interested party in terms of transportation and detention of goods, aboard motor vehicles registration numbers KCD 862E/ZF 0648, KCL 032R/ZF 6816 and KCJ 140M/ZB 8592 trucks currently at Malaba be settled in full and it be discharged accordingly; and
- v. That the Court be pleased to issue any and as such orders(s) expedient in the circumstance of the case.

2. The application is brought on the grounds on the face of it and the affidavit sworn on 4th October, 2021 by Jason Muthamia, the interested party's director. In opposition to the application dated 4th October, 2021, the plaintiff on 18th October, 2021 filed grounds of opposition dated the same day. The 2nd and 3rd defendants did not file responses to the said application.

3. The application was canvassed by way of oral submissions. Mr. Okuta, learned Counsel for the interested party submitted that the transporter was incurring costs by retention of the motor vehicles at the Kenya Revenue Authority yard at Malaba, yet the transporter was innocent and lays no claim on the cargo.

4. Ms. Kageni, learned Counsel for the plaintiff submitted that the interested party had not annexed any transport agreements to its affidavit. She argued that this matter involves fraud and this Court has powers to direct any party to make a determination on the issue before it. She

further submitted that no proof of contract had been availed by the interested party between it and the 1st defendant and no link had been given by the interested party to show that it was instructed by the 1st defendant to transport the goods. She stated that the plaintiff should not be made to pay costs to the interested party as it is not the one that is holding the goods.

5. Mr. Cheruiyot, learned Counsel for the 2nd defendant indicated that they did not wish to participate in the application dated 4th October, 2021. He however indicated that from their replying affidavit filed on 21st October, 2021 in response to the Notice of Motion dated 21st September, 2021, it showed that the interested party was the one who lodged the release documents for the goods at the Kenya Ports Authority. Ms. Muthoni, learned Counsel for the 3rd defendant on the other hand stated that what the 3rd defendant needs is storage charges for the containers in its yard.

6. In a rejoinder, Mr. Okuta submitted that the storage charges for the cargo should be paid to the 3rd defendant by the 1st defendant. He further submitted that the continued detention of the interested party's motor vehicles in the yard was based on the orders given for detention of the cargo.

ANALYSIS AND DETERMINATION

7. This Court has considered the application filed herein, the grounds on the face of it face and the affidavit filed in support thereof. It has also considered the grounds of opposition by the plaintiff and the oral submissions made by the Counsel for the parties. The issue that arises for determination is whether the application herein is merited.

8. In the affidavit filed by the interested party, it deposed that motor vehicles registration Nos. KCD 862E/ZF 0648, KCL 032R/ZF 6816 and KCJ 140M/ZB 8592 trucks, were being held at the Kenya Revenue Authority Port yard, at Malaba as there was a dispute between the shipper and the consignee and the shipper proceeded to Court and an order was issued touching only on the cargo but not on the trucks. The interested party averred that the trucks had been detained since 18th September, 2021 and were likely to be held longer at a cost.

9. It was stated by the interested party that the trucks were four but one which had been held in Uganda was released. It contended that other than transporting the cargo aboard the motor vehicles, the interested party has no interest whatsoever in the goods and/or issues amongst the other parties. The interested party urged this Court to issue an order for the costs of such detention to be paid for fully. The interested party deposed that the 3rd defendant has a yard at Malaba and the goods can be offloaded and kept at the said yard pending determination of any dispute.

10. The plaintiff opposed the application herein through grounds of opposition dated 18th October, 2021, by stating -

- i. That the interested party's application dated 4th October, 2021 is mischievous and lacks merit as the applicant has failed and/or neglected to prove that indeed its dealing with the subject consignment is as a result of it being contracted by the 1st defendant to transport the goods;
- ii. That the applicant's involvement with the 1st defendant is of major concern especially since one of the issues for determination in this suit is the illegal and fraudulent acts by the 1st defendant;
- iii. That the DCIO Kilindini are (sic) still conducting investigations on the fraud complaints lodged by the plaintiff on 21st September, 2021 against the 1st defendant vide OB No. 31/21/9/2021 and this Honourable Court has the powers and discretion to compel the interested party to shed light as to the location of the 1st defendant and/or its principal;
- iv. The interested party having been contracted by the 1st defendant, all costs due to the interested party can only be settled by the 1st defendant and not the plaintiff; and
- v. The application is bad in law as no authority has been annexed to evidence (sic) that Jason Muthamia, the deponent in the supporting affidavit has the authority of the director(s) of the interested party's company to act on its behalf in this matter.

11. It is noteworthy that none of the parties herein filed a replying affidavit to the application dated 4th October, 2021. However, the plaintiff filed grounds of opposition to oppose the said application. It is trite that grounds of opposition are deemed to address issues of law. The grounds of opposition filed by the plaintiff herein are general averments and cannot amount to a proper or valid denial of allegations made on oath by the interested party. In the case of **Peter O. Nyakundi & 68 others vs. Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & another** [2016] eKLR Odero J, in addressing a claim where the Attorney General as the respondent failed to file a replying affidavit stated as hereunder: -

“As stated earlier the Respondents did not file any Replying Affidavit to challenge and/or controvert the sworn averment by the Petitioners that they were victims of the post-election violence. Ground of Opposition, which were filed, are only deemed to address issues of law. They are general averments and cannot amount to a proper or valid denial of allegations made on oath. (see MEREKA & CO. ADVOCATES Vs UNESCO CO. LTD 2015 eKLR, PROF OLAKA ONYANGO & 10 OTHERS Vs HON. ATTORNEY GENERAL CONSTITUTION PETITION NO. 8 OF 2014 and ELIUD NYAUMA OMWOYO & 2 OTHERS -Vs KENYATTA UNIVERSITY). The Respondents have failed to refute specifically the allegations in the Petitioner's sworn affidavit in support. Failure to file a Replying Affidavit can only mean that those facts are admitted. Therefore, in the absence of any evidence to the contrary I find that the petitioners are indeed victims of the 2007/2008 post-election violence.”

12. It is thus evident that by the mere fact of the interested party's supporting affidavit not having been controverted, there is an assumption that what is averred in the said affidavit as factual evidence is admitted.

13. In the present case, it is not in dispute that pursuant to two separate agreements identified as Contract Nos. MCSSOM21Q3011 and MCSSOM21Q3012 entered into on or about 30th July, 2021, the plaintiff agreed at the request of the 1st defendant, to sell and deliver solar modules worth USD 186,004.00 and USD 544,014.996 (sic). The only parties who have any claim to the goods in container Nos. CBHU8688632 and TCKU6189150 loaded onto motor vehicle registration numbers KCJ 140M1/ZB 8592 and KDD 300S respectively, and container Nos. OOCU8753927, OOCU8754121 loaded onto motor vehicle registration numbers KCD 862E/ZF 0648 and KCL 032R/ZF 6816 respectively, are the plaintiff and the 1st defendant. This Court concurs with Mr. Okuta for the interested party that the application made by the plaintiff herein on 21st September, 2021 for detention of the cargo led to detention of the vehicles as the cargo was aboard the said vehicles.

14. It is not in dispute that the transporter is incurring costs of detention of the motor vehicles at the Kenya Revenue Authority yard at Malaba, yet it has made no claim on the cargo. It is evident that this matter involves fraud but the contract between the interested party and whoever contracted it to ferry the goods from Mombasa to Kampala is not necessary to determine the issues between the plaintiff and the 1st defendant. Even though Ms Kageni said that investigations were to be conducted by the DCIO Kilindini, no evidence was put forth before this Court to show that the interested party is complicit in the fraudulent acquisition of the cargo.

15. Section 1B of the Civil Procedure Act imposes a duty on the Court to further the overriding objective in settling of disputes. The said is also anchored on provisions of Section 3A of the Civil Procedure Act which provides that-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

16. In order to give meaning to the overriding objective, this Court is not hamstrung and where circumstances so demand, it can invoke its inherent jurisdiction under Section 3A of the Civil Procedure Act.

17. In view of the fact that the interested party has no claim over the goods herein and is not part of the dispute between the plaintiff and the 1st defendant, it is my finding that the application dated 4th October, 2021 is merited and the same is allowed in the following terms: -

- i. That an order is hereby issued to the interested party/applicant to offload all the consignment aboard motor vehicle registration numbers KCD 862E/ZF 0648, KCL 032R/ZF 6816 and KCJ 140M/ZB 8592 trucks and store them in the 3rd defendant's yard;
- ii. That all the costs due for transportation and detention of goods, aboard motor vehicles registration numbers KCD 862E/ZF 0648, KCL 032R/ZF 6816 and KCJ 140M/ZB 8592 trucks currently at Malaba shall be settled in full by the 1st defendant and the cargo shall be discharged accordingly;
- iii. The plaintiff shall pay the costs of this application for having unnecessarily opposed the release of the interested party's motor vehicles in the absence of any cogent evidence that the said party was part and parcel of the fraudulent scheme against the plaintiff.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 19th day of November, 2021. In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April, 2020 and subsequent directions, the ruling herein has been delivered through Teams Online Platform.

NJOKI MWANGI

JUDGE

In the presence of-

Ms Kageni for the plaintiff

Mr. Ouma holding brief for Mr. Okuta for the Interested Party

Mr. Oliver Musundi – Court Assistant.