



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO 678 OF 2019

OCEANIC OIL LIMITED.....1ST APPELLANT

WAVES PETROLEUM LIMITED.....2ND APPELLANT

VERSUS

ILADE OIL COMPANY LIMITED.....1ST RESPONDENT

KENYA REVENUE AUTHORITY.....2ND RESPONDENT

RULING

1. In their Notice of Motion application dated 21st November 2019 and filed on 22nd November 2019, the Appellants sought orders for unconditional release of Prime Movers Registration Numbers KBQ 485K, KBU 015N (hereinafter referred to as “the subject Prime Movers”), Trailers ZD 9696 and ZD 8383 (hereinafter referred to as “the subject Trailers”) and the petroleum products therein pending the hearing and determination of the Appeal herein. The said application was supported by the Affidavit of the 1st Appellant’s Director and 2nd Appellants’ Managing Director, Joseph Karoba, which was sworn on 21st November 2019.

2. The Appellants stated that the 1st Respondent herein filed suit against them and the 2nd Respondent herein seeking an order that they be compelled to release the subject Prime Movers and Trailers, that they pay the 1st Respondent a sum of Kshs 500,000/= being costs for the tracing and tracking the said subject Prime Movers and Trailers and that they be permanently restrained from recovering from the 1st Respondent’s assets or bonds held by the 2nd Respondent herein for the sum of Kshs 3,681,921/=, general damages, costs of the suit and any other relief the court wished to grant.

3. They averred that a temporary injunction was granted by the lower court on 12th April 2019 whereupon they moved to court vide an application dated 29th May 2019 seeking to set aside the said order, which application was allowed on condition that they deposited a sum of Kshs 5,000,000/= in court. It was this order that they had appealed against.

4. They pointed out that their subject Prime Movers and Trailers were loaded with petroleum products belonging to Arech Petroleum Company Limited making them breach a contract with the said company. They added that they had been denied their tools of trade since 12th April 2019 as they carried on the business of re-selling and transporting petroleum products to Uganda, Congo and South Sudan.

5. They further said that the continued holding of the subject Prime Movers and Trailers far outweighed any loss that would be occasioned by an order of their release. It was their contention that they were not a freight (**sic**) risk and that the said subject Prime Movers and Trailers were valued at much more than the amount the 1st Respondent was claiming. They therefore urged this court to allow their application as prayed.

6. On its part, on 24th February 2019, the 1st Respondent filed a Replying Affidavit through its Operations Manager, Mohamed Said. The same was sworn on even date. The 1st Respondent explained that it would import petroleum products and sell to its clients which included the Appellants herein. It contended that the 2nd Respondent would charge levies and taxes for the products to be sold locally and cleared products for export and that it would realise any performance bonds and/or suspend trade licences and or issue demands upon default in the event there was a failure to comply with the set laws.

7. It stated that instead of transporting the petroleum products that had been earmarked for export, the Appellants dumped the same at Eldoret

where the 2nd Respondent's agents apprehended the same and issued a demand notice for the sum of Kshs 3,681,921.78. It averred that the Appellants failed to pay the same whereupon it tracked the subject Prime Movers and Trailers at Eldoret and detained the same to recover costs of investigations, recovery, apprehension and storage of the same.

8. It accused the agents of the 2nd Respondent of having colluded with the Appellants to have the subject Prime Movers and Trailers released whereupon it rushed to court and obtained the injunctive orders. It was their contention that the decision of the Learned Magistrate was sound and ought not to be interfered with.

9. In opposition to the said application, on 18th May 2019, the 2nd Respondent filed Grounds of Opposition dated 21st November 2019. It was its contention that the Appeal herein was only intended to deny the State the right to collect taxes as had been stipulated in the Statute. It added that the 1st Respondent's suit in the lower court and the Appeal herein were intended to divert the attention of the court from the main issue which was that the Appellants and the 1st Respondent owed taxes amounting to Kshs 3,681,921.73.

10. It further said that they had committed offences under Section 203 and 85(1) of the East African Community Customs Management Act (EACCMA) as read together with Regulation 104 of the 2010 EACCMA Regulations which prohibit interference with goods under customs control and diversion of transit goods without authority of the Commissioner. It was emphatic that the Appellants and the 1st Respondent were fully liable to pay duty on the dumped oil as transporters and owners respectively.

11. It added that the Appellants had not exhausted all the available remedies before approaching this court contrary to the provisions of Section 51 of the Tax Procedures Act No 29 of 2015 and thus offended the doctrine of exhaustion.

12. It was their averment that after establishing that the suit had a high probability of success, the Learned Magistrate sought to secure the taxes that would have been due upon the hearing and determination of the suit. It therefore termed the present application as misconceived, bad in law and a gross abuse of the court process and thus urged this court to dismiss the same.

13. The parties did not file Written Submissions. They instead asked this court to deal with the matter based on their respective pleadings filed herein. However, it was evident that the Appellants were seeking a mandatory injunction.

14. In the case of Locabail International Finance Limited vs Agro-Export & Another (1986) 1 All ER, the court therein stated as follows:-

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

15. The basis of granting an order of a mandatory injunction at an interlocutory stage would essentially be that the court would have been satisfied that the Appellants would not be required to pay any taxes as had been demanded by the 2nd Respondent. This was not a clear cut case. The 1st Respondent had cast aspersions on the Appellants' diversion and dumping of petroleum products at Eldoret contrary to the intended destination whereupon the subject Prime Movers and Trailers were intercepted by the 2nd Respondent herein, a position that was supported by the 2nd Respondent.

16. Going further, the 2nd Respondent had accused the 1st Respondent of having colluding with the Appellants herein to deprive the State taxes while the 1st Respondent had in turn accused the 2nd Respondent and the Appellants of having colluded to have the said subject Prime Movers and Trailers released to the Appellants herein. The outcome of this case was thus not easily discernible at this interlocutory stage rendering the issuance of a mandatory injunction a very perilous and risky action by the court as it was a very final order.

17. In the case of Shepherd Homes Limited vs Shadahu [1971] 1 Ch. 34, Meggery J had the following to say:-

“It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such an injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even it is sought to enforce a contractual contract (emphasis court) ...”

18. The court noted that amongst other grounds, the following formed part of the Appellants' Grounds of Appeal:-

1. THAT the learned Honourable Magistrate erred in law and fact in making a determination in favour of the appellants and despite making the said determination, imposing a condition on the appellants.

2. THAT the learned Honourable Magistrate erred in law and in fact in imposing a condition on the appellants to deposit a sum of Kshs 5,000,000,00 (sic) in court and in so doing:-

a. Condemned the appellants unheard;

b. Determined that the appellants were liable before hearing their case;

c. Imposed a higher financial burden on the appellants than the amount claimed by the 1st appellant.

19. Prayer No (2) of the Appellants' present application sought the unconditional release of the subject Prime Movers and Trailers.

20. The entire question of whether the Learned Magistrate could impose a condition upon setting aside her order was an issue to be addressed during the appeal. The following questions were therefore central in the Appeal herein:-

1. Whether or not the Learned Magistrate was right in having directed the Appellants to deposit monies in court before the subject Prime Movers and Trailers could be released to them;

2. Whether or not the Learned Magistrate was right in having directed the Appellants to deposit a sum of Kshs 5,000,000/= whereas the 1st Respondent had demanded a lesser sum.

21. Allowing the present application as drafted was thus tantamount to allowing the Appeal herein without it having being heard on merit. It was unfortunate that the Appellants' subject Prime Movers and Trailers were still being held making them incur heavy losses in their business. However, depositing the monies in court would not prejudice them as the same were secured and would be released to them in the event they were successful in their Appeal.

DISPOSITION

22. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application dated 21st November 2019 and filed on 22nd November 2019 was not merited and the same is hereby dismissed. Costs of the application will be in the cause.

23. It is so ordered.

DATED and DELIVERED at NAIROBI this 29th day of July 2020

J. KAMAU

JUDGE