

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 76 OF 2019

EAST GLOBAL LOGISTICS KENYA LIMITED.....PLAINTIFF

VERSUS

MAKUPA TRANSIT SHADE LIMITED.....DEFENDANT

RULING

Outline of facts

1. In the matter both parties have sought orders in the nature of injunctions. The extent and intendment however differ. While the Plaintiff seeks an order of mandatory injunction compelling the defendant to release some 16 identified goods, the defendant on its side seeks an order to restrain the plaintiff from moving the same property from its yard to any other yard as well as another lot of property described as breakbulk cargo including windmill blades on board a recently arrived vessel, **MV Martine Sinchai** to any other container Freight Station (CFS) or storage yard other than the defendant's yard.
2. The relationship between the parties is obviously that of bailment by which the plaintiff, as an agent of one CMEC Africa Development Limited (CMEC) stored or warehoused the identified property at the defendant's yard at a fee negotiated and agreed between them.
3. For clarity, the two applications are worded and make prayers as follows:-

Notice of Motion dated 18/9/2019

i. *Spent*

ii. *Spent*

iii. **Pending the hearing and determination of this suit, a mandatory injunction be issued to the Defendant, its agents, servants, employees as well as any and all other persons claiming any interest or right through it, ordering and directing the Defendant to forthwith and unconditionally release to the Plaintiff and to allow the Plaintiff to enter the Defendant's Container Freight Station known as Makupa Transit Shade CFS located in Shimanzi to collect each and every one of the items constituting cargo as particularized below:-**

Item	Description of Goods	Particulars	Type	Make	B/L Number
1.	3 axle extensible trailer	Chassis No. LA99PH83XKYHY Y365	Flatbed	Huayun Shuntong	
2.	3 axle extensible Trailer	Chasis No. LA99PH831KYHY Y366	Flatbed	Huayun Shuntong	
3.	3 axle extensible Trailer	Chasis No. LA99PH833KYHY Y367	Flatbed	Huayun Shuntong	
4.	3 axle	Chasis No.	Flatbed	Huayun	

	extensible Trailer	LA99PH835KYHY Y368		Shuntong	
5.	3 axle extensible Trailer	Chasis No. LA99PH837KYHY Y369	Flatbed	Huayun Shuntong	
6.	3 axle extensible Trailer	Chasis No. LA99PH833KYHY Y370	Flatbed	Huayun Shuntong	
7.	3 axle extensible Trailer	Chasis No. LA99PH835KYHY Y371	Flatbed	Huayun Shuntong	
8.	3 axle extensible Trailer	Chasis No. LA99PH837KYH Y372	Flatbed	Huayun Shuntong	HOEGE433TJ M10002
9.	3 axle extensible Trailer	Chasis No. LA99PH839KYHY Y373	Flatbed	Huayun Shuntong	
10.	3 axle extensible Trailer	Chasis No LA99PH830KYHY Y374	Flatbed	Huayun Shuntong	
11.	Road roller	Chasis No LCL8228TAK2000 199	Model No. 8228T	N/a	HOEGQF10CS M10004
12.	Road roller	Chasis No LCL8228TAK2000 200	Model No. 8228T	N/a	
13.	Wheel loader	Chasis Nol LCL955TOLK1000 754	Model No. 955T	N/a	

14.	Toolbox	n/a	n/a	N/a	
15.	117 PKS STC 2317 PIECES	Buckstays, Wall and Bottom Support, Insulation support frames, Blowdown tank, continuous blowdown tank, other tanks, other external piping, boiler economizer casing, ash hoppers, air ducts with supports, boiler casing (flue gas duct 2 nd and 3 rd pass, fly ash storage	Flatbed	N/a	FANNOM-001
16.	Modular trailer	Chassis No. 10456	Goldhoeffer	n/a	MUN/MON-001

4. The grounds giving rise to the application as revealed in the plaint and its own face and the Affidavit of support are that the goods having been delivered to the defendant by the plaintiff, in the plaintiffs capacity as a clearing and forwarding agent of various consignee, to the defendant has refused to release the goods even after payment of its due charges and the only disclosed ground for detainer is that the plaintiff has decided to nominate a different CFS to receive cargo then expected to arrive aboard motor vessel *maritime sinchai* at the port of Mombasa on 17/9/2019.

5. The plaintiff adds that part of the unlawfully detained cargo consist of 10 specialized flatbed trailers required for the handling of the cargo aboard the expected vessels hence the defendants actions are termed malicious and solely intended to fetter the plaintiff's rights to contract by way of extortion which actions by the defendant portend the breach by the plaintiff on its contractual obligations to third parties thereby damage the plaintiff's reputation with the resultant inevitable delay in delivery of the equipment for a major and life changing infrastructural development. It was then contended that the defendant stands to suffer no prejudice if the orders are granted.

6. The defendant opposed the application by the Replying Affidavit sworn by Abdiwahib Haji Yerow. The gist and effect the application was not ripe for being heard because there were other necessary persons, with interest in the suit goods, who were yet to be joined to the suit, and thus proceeding with the matter before joinder would visit prejudice on such parties. Such parties are named to be Kipeto, CMEC, Ministries of Energy and that of Transport, KPLC and KPA. Over and above the need not to hear the matter before joinder, the defendant asserted that there was an implied contract with the plaintiff that guarantees that the goods be received and handled at the defendant's yard which contract would be breached by grant of the orders sought. As a result of the implied contract the defendant had altered its position to its disadvantage and therefore the plaintiff was estopped from breaching the contract by diverting goods to another CFS. It was added that the KPA was unlikely to release the cargo to any other yard apart from the defendant's hence it would be in vain to make the orders for release. The court was then urged to balance the interests of all the persons involved in the matter by restraining from issuing orders that would affect strangers to the suit by asking the plaintiff to effect an amendment to the plaint by joinder of the necessary parties.

Notice of Motion dated 24/9/2019 by the defendant

a) *Prayer a – spent*

b) *Prayer b – spent*

c) *Prayer c – spent*

d) *Prayer d – spent*

e) Pending the hearing and determination of this suit the Plaintiff, by itself, its Directors, its employees, its servants, its subcontractors and agents be restrained from moving or to transferring whether for temporary or any type of storage the wind turbine components and blades recently arrived at Mombasa on board the motor vessel “Maritime Sinchai” to any CFS or storage yard other than Makupa Transit Shade belonging to the Defendant by use of the flatbed 3 axle trailers at the Defendant’s premises or any other trailers or vehicles.

f) Pending the hearing and determination of this suit the Plaintiff, by itself, its Directors, its employees, its servants, its subcontractors and agent be restrained from using the flatbed 3 axle trailers held by the Defendant for purposes of using those trailers to transfer or move any break-bulk cargo (including windmill blades) on board or recently arrived at Mombasa on board the motor vessel “Maritime Sinchai” to any CFS or storage yard other than Makupa Transit Shade belonging to the Defendant by use of the flatbed 3 axle trailers at the Defendant’s premises or any other trailers or vehicles.

7. The grounds upon which that application is grounded may be discernible from the defence and counterclaim, the applications own face and the Affidavit of Abdiwahid Haji Yerow to be that:-

- By contract evidenced in various documents including correspondence between the parties here and other third parties, the plaintiff nominated the defendant at the request of CMEC, to be the entity to receive and handle all breakbulk cargo comprising wind power generation equipment including towers, turbines and windmill blades. The plaintiff is then said to have communicated the commitment for the defendant to handle all the cargo to all concerned including Kipeto Energy Plc, Kenya Power and Lighting Co. Ltd, Ministries of Energy and Transport and represented to the defendant that all the cargo for the Project would be handled by the defendant and in such preparation imported some 3axle flatbeds trailers into the country which are already in the possession and premises of the defendant.

· The plaintiff had apparently altered its position and indicated intention to have the said flatbed trailers released to it for the purposes of moving the equipment aboard the vessel to another yard other than the defendant's yard.

8. The defendant contends that based on the misrepresentation it altered its position by creating a designated gate and reserved its facility for the suit cargo thus losing prospective business. The defendant then adds that the question of breach of contract by the plaintiff be dealt with before hand and that there is no prejudice that would visit the plaintiff if the release is not ordered because the plaintiff is not the owner of the cargo. Lastly, the defendant contends that Ms CMEC Africa Development Ltd is yet to cancel or vary the contract requesting that the cargo be handled at the defendant's yard just as the Ministries of Transport and Energy have not revoked the decision preferring handling by the defendant.

9. In opposing that application the plaintiff filed a replying Affidavit sworn by Mr Mehboob Virji whose tenet was that there is no claim to title over the goods in the defendants yard as well as those to be offloaded from the docked vessel but rather a claim of a threat to breach an implied contract and therefore there is no basis to grant a temporary injunction. Details were then delved into by showing that the plaintiff was already threatened with a suit due to delayed delivery. It was then stated that the goods were sensitive in nature and required careful handling and that the most the defendant could earn from storage services were known and quantifiable hence there was no basis to grant the injunction sought that affidavit exhibited various documents including invoices for the goods aboard the vessel, demand letter threatening suit and a trail of email communication.

Submissions by the parties at the hearing

10. The two applications were urged orally by both counsel stating rival positions and citing to court various decisions viewed to support their positions.

11. Before the matter could be heard, the defendants counsel sought the cross-examination of the deponent of the Plaintiffs Affidavit. The request was not objected to and Mr. Mehboob Virji was that thus cross examined and re-examined. During cross examination, the plaintiff's director declined to reveal what terms existed between it and its client CMEC for handling of the cargo at defendant's yard just as he was not willing to reveal the quotation he got from multiple ICD.

12. He confirmed that the exhibited contract between the parties had not been terminated but that scheduled to it had been changed. He admitted forwarding letter from the ministries, Kipeto and Kenya Power and Lighting Co. Ltd but insisted that the same related to containerised cargo and not the subject cargo in the suit which were never SGR bound. He confirmed that the flatbed trailers were unique trailers being about 165 feet-long and that he had never seen a trailer longer than 40 feet and that he intended to use the flatbed trailers to move the windmill blades from the port. In re-examination by Mr. Karega, the witness said that the quotation exhibited as having been given by him was given before contract and was part of the more than 7 quotes given over one year of negotiations. He added that he had addressed the stand point of the ministries and Kipeto in the supplementary Affidavit by showing that there had been further directions to have the cargo handled elsewhere.

Submissions by the plaintiff

13. For purposes of address to court by two counsels acting for the plaintiff, it was agreed between Mr. Gikandi and Mr. Karega from the plaintiff that Mr. Karega would argue the plaintiffs application while Mr. Gakandi would respond in opposition to the defendant's application. In his address to court, Mr Karega opted to submit and argue his application under three heads:-

a) Whether the plaintiff had the locus standi to maintain the action.

b) What was the defendant's duty over the good in prayer 3 of the Notice of Motion?

c) Was there a justifiable cause from the defendant to continue determining the subject goods?

14. On the first issue counsel referred the court to the contract between the parties found at pages 30 – 32 of the bundle of the plaintiff's Application. It was said to be over and about containerized cargo with the only obligation upon the plaintiff to pay the storage charges before removal. There was then exhibited correspondence between the parties on mode of payment and evidence of payment of the billed sum in the sum of USD 103,419.65 made on 16/9/2019.

15. On the basis of the contract and payment made, the counsel pointed out that there existed privity of contract between the two parties upon which only the plaintiff could sue. Counsel made reference to the decision by the Court of Appeal in *Mitchell Cotts (K) Ltd vs Nusa Freighters [2011] eKLR* for the proposition of law that after a party receives consideration in a bailment contract, it could not turn around and assert that the person who paid for storage could not claim damages for the loss. Counsel further cited to court the decision in *Equator Distributors vs Joel Muriu [2018] eKLR* for the position of the law that a bailee owes a duty to the bailor and was expected to return the bailed items to the bailee when the period of bailment ended and in the event of loss the bailee is presumed liable to the bailor. The decision in *Big Road Enterprises vs DHL Global [2017] eKLR* was quoted for the principle of privity of contract that only a party to a contract can sue on its terms and that a third party even if mentioned in a contract enjoys no rights nor risk to be burdened with its obligations. Those same decisions on the duty of the bailee were reiterated for the second question it being repeated that once payment and demand for release are made, the bailee has no otherwise but to release.

16. On the defendants justification to detain the goods, counsel submitted that the defence and counter-claim filed as well as the Affidavits reveal the defendant's grievances to be that the plaintiff has taken away the business from the defendant to another person. Counsel urged the court to distinguish between the business for which the defendant has been paid and the business it wants the plaintiff to give to it. The allegation that the defendant could have altered his position on the representation and promise to be given business was said to be capable of quantification on monetary terms and thus did not disclose an injury that must be prevented by an injunction and therefore there was no

shown legal justification to refuse to release the goods.

17. For the defendant, Mr. Kinyua Advocate, delivered his submissions in opposition to the plaintiff's application together with his arguments in support of the defendant's application for injunction. Counsel started by referring the court to page 30 of the plaintiff's application as evidencing the extent of the contract between the parties as not including the flat bed trailers which are better referred to as breakbulk cargo. He also referred court to page 29 which has the terms of the business contract between the parties. He said anything else and containerized was subject to the document at page 29.

18. It was submitted that based on the document at page 29, the plaintiff's director requested the government ministries to facilitate the handling of the cargo at the defendant's yard which request was accepted and letters issued and shared with the defendant. The defendant urged that the letters be given due regard and not treated as unimportant.

19. In relation to the non-containerised cargo, the defendant urged the court to find that the same can be implied from the series of correspondence and documents exchanged coupled with physical delivery of the suit cargo to the defendant and that the contract was for the defendant to receive and handle the cargo. To the defendant the existence of a contract threatened with breach is *ipso facto* a justification and strong ground to grant a restraining injunction sought by the defendant without more. The consideration as to adequate of damages was said not to be a reason to deny the injunction it being added that principle as laid down in decided cases beginning with ***Giela vs Casmann Brown*** has outlined its usefulness because it cannot be the law that one able to pay damages has the freedom to breach contracts and infringe on other people's rights.

20. On the documents from Kipeto, KPLC and Ministries of Energy and Transport counsel submitted that failure by the plaintiff to avail the same beforehand and at the very first instance should disentitle it to the equitable remedy of injunction. It was urged that the court should appreciate the importance of the contract to the parties and the public including possible losses to be suffered by the parties. Counsel urged that the cargo be left at the yard of the defendant with a condition that the defendant shall not hold it on the basis of a dispute on charges payable. He even offered that the defendant is prepared to accept the cargo at 10.00 USD per square meter.

21. The plaintiff's closing submissions to the defendant's opposition to its application was offered by Mr. Karega while Mr. Gikandi offered submission in opposition to the defendant's application. Mr. Karega's response was short and candid. He took the view that there being no contract between the parties for the handling of breakbulk cargo the defendant was merely inviting the court to re-write a contract between the parties or rather force a contract between them. He referred the court to pages 45 & 61 of the bundle of the application to show that there was no contract between the parties.

22. Mr. Gikandi on his part underscored the fact that there is not concluded contract between the parties that the injunction sought by the defendant can serve to protect. He referred to two copies of email by the defendant's CEO which to him were unanimous that there was no contract concluded. Counsel concluded that in the absence of a contract, there is no basis to grant an injunction adding that even if there was to be a contract, damages would be sufficient for even balance of convenience, tilts in favour of the goods being released rather than being detained. It was stressed that the court must respect parties rights to contract and cited to court the decision in ***Graw Enterprises vs Makupa Transit Shed*** where the court held against the defendant herein and ordered release of the goods for reasons that all due payments had been made and the defendant had no justification to continue holding the cargo as it had no claim over the goods.

23. In his closing submissions in respect of the defendant's application, Mr. Kinyua said that the decision in Graw enterprises case was distinguishable from the facts of the current case and its circumstances. He urged that the plaintiff's application be dismissed while that by the defendant be allowed with costs.

Analysis and determination

24. Looked at from all and every angle, the two applications are actually the flip side of each other. Therefore allowing one would have the effect of dismissing the other and vice versa. I will thus consider the plaintiff's application as being opposed by that of the defendant and if I do find no merit, it would mean that the opposition thus succeeds. I will thus only consider what orders to grant on the defendant's application in the event I dismiss the plaintiff's application.

25. The dispute as disclosed in the pleadings filed is over some equipment stored at the defendant's yard which good were admittedly paid for by the plaintiff but the defendant declined to release same on the basis that the plaintiff had reneged on an allegedly implied agreement to clear and handle all cargo imported for use in the construction of wind power project by a corporate called **Kipeto Energy Plc**. The plaintiff's position is that the defendant was its bailee who kept the cargo as long as the plaintiff wanted then kept and was thus obligated to release the cargo once payment was made and demand for release issued.

26. While I have seen a contract for handling of containerized cargo which was to run for a period of two years, I have been unable to see or imply any contract for breakbulk cargo other than those already with the defendant and duly paid for. It being not in contention that the relationship between the parties is that of bailment, I do find that each cargo is handled on its own terms unless there be a standing definite agreement. For that reason I do find that cargo enumerated at Prayer 3 of the plaintiff's Notice of motion having been paid for in full and in the sum the defendant demanded for storage charges, the same is due for release forthwith because there is no justification upon the defendant to detain same. In my view, guided by the decision in ***Equator Distributors vs Joel Muriu [2018] eKLR*** I find and hold that the bailee's time for possession is over and the good ought to be released forthwith.

27. In coming to that conclusion, I have appreciated, as both parties urged me to, that the cargo are unique and duty specific for purposes of moving other sets of cargo from berthed vessels at the Port of Mombasa to their agreed destination somewhere in Kajiado county. I have taken into account the further fact that any delay to offload from the vessel or to pick from the port will not only invite financial costs to the parties but will also delay the delivery of the turbines, windmill blades and related equipment in time and it being said that the contract is a large infrastructural development, the effect of a breach is likely invite huge damages and to impact beyond the relationship between the parties before me and thus escalate the dispute or just its magnitude. That to me is a special circumstance and strong reason to grant a

mandatory injunction.

28. I have said that there is no justification upon the defendant to hold on to the good because it has neither asserted title nor lien over the same. That is a second justification I find in granting a mandatory injunction for I consider the plaintiffs claim to be clear and beyond meaningful challenge by the defendant even upon full trial. It is a matter that gives me the comfort that even after trial, if the same proceeds on the basis of pleadings on record, I would not entertain the feeling that the injunction was not due to be granted.

29. Having demanded payment and insisted on only payment by electronic transfer, having rejected the cheques, while being aware that the equipment in the cargo is unique one for definite and specific use, calling for special handling and specific exemption of the provision of traffic Act, I am persuaded that the defendant is holding onto the cargo to make the plaintiff helpless and desperate so that it yields to the defendants demand to give it the business of receiving and handling the expected cargo exclusively. That to me is what would be called overreaching or just high-landed commercial practice. When such happens, the court and the law must not be rendered or seen as toothless. Equity was smart in providing the remedy as sought by the plaintiff. For those reasons, I do grant to the plaintiff an order of injunction in terms of Prayer 3 and direct that the cargo be released forthwith and if not released within the next 12 hours, the OCS Kilindini Port Police Station shall provide assistance to ensure compliance without there being occasioned a breach of the peace.

30. There was a matter that parties commented upon and which may be raised against the enforcement of the order, I have just given. It relates to storage charges incurred after the 16/9/2019. My view even at this Preliminary stage is that the defendant's right to hold the goods ended the day it was paid and release demanded. After that day it would be unconscionable to expect the plaintiff to pay storage charges for a period it did not seek storage services but when it took the view that its right and possession over the cargo was being deprived.

31. The foregoing decision settles the plaintiff application and that by the defendant relating to the goods described at prayer 3 of the Notice of Motion. It however doesn't fully dispose the defendant's application as for as it seeks to restrain the use of the listed equipment to transfer the cargo comprising breakbulk cargo including windmill blades for storage otherwise than with the defendant and the storage of such other cargo elsewhere apart from the defendants yard.

32. That question can only be answered by a scrutiny of whether or not there existed a contract for the receipt and handling of the said cargo exclusively at the defendant's yard. While the defendant says that the trail of correspondence and document reveal a concluded contract, my perusal of the documents filed do not prove that fact on prima facie basis. I may highlight two sets of documents which tell me there was no contract. In coming to this conclusion, I am well aware that a contract can indeed be discerned from a series of documents. That however is only possible where the series of documents reveal a meeting of minds. I have not seen a meeting of minds in the documents even at this preliminary stage.

33. The first set of document is to be found in the email authored by the Defendants Chief Executive Officer one Dennis Keiser. The two mail I have picked are dated 13/9/2019 and 16/9/2019. The two says respectively:-

“13/9/2019

We believe that MTS CFS is the right facility to handle and store the Wind turbine components and its accessories. The access is far more easier via MTS CFS gate 15b and the distance is also shorter compared to Multiple CFS. Transport ex MTS CFS is also much more convenient since you can move straight out without turning the entire Truck and Trailer.

Unfortunately we did not had (sic have) a chance to submit our final rates and sign an agreement, therefore we were not able to break our wall and construct the new gate as foreseen.

16/9/2019

We are in receipt of multiple cheques amounting to USD 103'419.67, whereby you deducted 505 on storage charges for cargo ex vessel BBC Emsland as agreed upon.

Given the current circumstances and after our meeting on Friday, 13th of September, whereby you decided to work together with Multiple CFS instead of MTS CFS, although we have worked and planeed throughout together this project and were even ready to break a new gate of which we already had the approval by KRA and KPA. It is very sad to see that you jump from a trusted partner to someone else, purely on a price basis without giving us a change to negotiate the rates.

We still believe that MTS CFS is the better solution for this kind of project in terms of safety and operational practicability.

Your decision not to work with MTS CFS erodes the confidence and trust that had been built up before and during the preparation for this project. On this basis we are not confident that the received cheques will mature or been called back. The process takes approximately 6 working days, which is too long to wait for. We therefore recommend that you arrange an RTGS of USD 103'419.67 directly to our account or await the date until the cheques are matured and reflected on our bank account prior to release of any cargo” (emphasis provided)

34. The two letters says unequivocally that there had not been agreement between the parties and that the plaintiff had opted to deal with a different CFS, the defendant felt was less convenient. The two documents also say that the difference was over the rates for storage charges. In fact the mail of 16/9/2019 bemoans having been denied a chance to negotiate the rates. I fail to comprehend how an agreement for storage could be reached and concluded prior to negotiations and agreement on rates for calculating the consideration.

35. The other set of documents are the letters written by, KPLC, Kipeto Plc, and Ministries of Transport and Energy which the Defendant asserts shows the sensitivity and importance of the project to the government and thus the Kenyan public. In fact the first time Mr. Kinyua appeared before court he did administer caution to court that the matter was of great public interest and the court ought to treat it as such. I have had a chance to peruse those letters. Indeed the letters are evidently written at the request and instance of Kipeto Energy Plc. The reasons given for the request to keep the cargo in a CFS temporarily was because Kipeto had changed its name and was thus awaiting documentation for clearance to be transferred to the new name. The request was thus made for an indefinite period. It is also instructive that what was to be kept for the period were containers. The letters from Kipeto were that specific even if the letter from the ministry of Transport did not make any distinction. All the letters are dated July 2019 and none is addressed to the defendant even though mention is made of it. To this court the letters do not amount to a contract between the two parties as to ground a claim for a temporary injunction.

36. But more importantly, the same Kipeto did originate another set of requests essentially reversing the earlier requests and the same were acceded to by the ministry. It there were any rights created by the letters of July which I doubt, I do find that the same were reversed by the letters of September exhibited in the supplementary Affidavit by the plaintiff.

37. The foregoing findings and analysis lead me to find that there is no contract between the parties for receiving and handling the cargo said to have landed or due to land at the Port of Mombasa. Accordingly, I am unable to bind the plaintiff to channel such cargo through the defendant's yard. I would be writing an agreement for the parties. When so unable, it follows that the **prayers e & f** of the defendant's Notice of Motion have no foundation and merit and the same thus fails and is order dismissed.

38. Having come to this foregoing determination, I consider the plaintiff to have succeeded in the two applications and I thus award to it the costs thereof.

Dated and delivered at Mombasa this 30th day of September 2019.

P.J.O. OTIENO

JUDGE