



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 271 OF 2017**

**GAZEBO INDUSTRIES LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**RIFT VALLEY RAILWAYS (K) LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**EAST AFRICAN RAIL AND HANDLING**

**LOGISTICS LIMITED.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**KENYA RAILWAYS CORPORATION.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This Ruling relates to, two Notice of Motion Applications. The Application dated 19<sup>th</sup> September 2017, brought under the provisions of Article 159 of the Constitution of Kenya, 2010, Section 80 of the Civil Procedure Act, Order 45 Rule 1, Order 40 Rule 1, Order 36, Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and all other enabling provisions of law and supported by the grounds thereon and the Affidavit of the same date sworn by Sushil Kapoor.

2. The Applicant is seeking for orders that:-

*a) A temporary injunction do issue restraining the Defendants whether by their servants or agents or employees or Advocates or otherwise from removing, transferring, disposing, charging or any dealing with the 50 Traction Motors Armature with shaft and 12000 sleepers supplied to the 1<sup>st</sup> Defendant pursuant to purchase orders Nos. 5500001771, 5500001806, 5500001801 and 5500001799 on diverse dates between the years 2015 and 2017 pending the hearing and determination of this Application;*

*b) That this court review the Ruling and order it delivered on 16<sup>th</sup> August 2017 and allow summary judgment against the 1<sup>st</sup> Defendant for the decretal sum of USD 530,307,90 and USD 120,012,34 being the principal debt amount and interest amount accrued at interest rate of 0.5% per month accrued as at 31<sup>st</sup> May, 2017 respectively plus further interest and the cost of the suit herein;*

*c) That in the alternative to prayer (c) this court grant summary judgment against the 1<sup>st</sup> Defendant for the decretal sum of USD 530,307,90 and USD 120,012,34 being the principal debt amount and interest amount accrued at interest rate of 0.5% per month accrued as at 31<sup>st</sup> May 2017 respectively plus further interest and the cost of the suit herein;*

*d) That this Court allow the joinder of East African Rail and Handling Logistics Limited and Kenya Railways Corporation as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively in this suit;*

*e) That upon grant of summary judgment, the court allows for preliminary decree against the 1<sup>st</sup> Defendant and attachment before taxation of the 50 Traction Motors Armature with shaft and 12000 sleepers currently in the possession of the 1<sup>st</sup>, 2<sup>nd</sup> and/or 3<sup>rd</sup> Defendants.*

*f) That the costs of this Application be provided for.*

3. The 2<sup>nd</sup> Application is dated 28<sup>th</sup> September 2017 brought under the provisions of Article 159 of the Constitution of Kenya 2010 Section 3 and 3A of the Civil Procedure Act, Order 40 Rule 1 Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 and all other enabling provisions

of law and is equally supported by the grounds thereto and the Affidavit sworn by the deponent referred to above.

4. The applicant seeks for the following orders in that;

(b) (i) *A temporary injunction do issue restraining the Defendants whether by their servants or agents or employees or Advocates or otherwise from removing, transferring, disposing, charging or any dealing with the 50 Traction Motors Armature with shaft and 12000 sleepers supplied to the 1<sup>st</sup> Defendant pursuant to purchase orders Nos. 5500001771, 5500001806, 5500001801 and 5500001799 on diverse dates between the years 2015 and 2017 pending the hearing and determination of this Application;*

(ii) *That this Court allow the joinder of East African Rail and Handling Logistics Limited and Kenya Railways Corporation as the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively in this suit;*

5. It is clear from the prayers in the two Applications that, the prayers in the 2<sup>nd</sup> Application are a duplicate of the prayers in the 1<sup>st</sup> Application. In that regard, the Application dated 28<sup>th</sup> September 2017, shall be and is hereby stayed. The Ruling will therefore address the prayers in the Application dated 19<sup>th</sup> September 2017 only.

6. I have perused the Court record and I find that it is not clear as to whether the subject Application of 19<sup>th</sup> September 2017 was served upon all the parties who are and would be affected by any orders the Court may issue. Apparently, the record reveals that, when the Application was filed on 20<sup>th</sup> September 2017, the Court ordered that it be served for directions on 22<sup>nd</sup> September 2017. On the said date, the Applicants were absent. The Court then ordered they be notified to appear to show cause why the Application should not be dismissed.

7. However the Applicant appeared and the 1<sup>st</sup> Defendant/Respondent sought for 14 days to respond to the Application. There was no objection thereto. By consent of the Parties, the Respondent was granted the 14 days as prayed and the Applicant 14 days within which to file and serve their submissions on the Application with a similar period given to the Respondent. The confirmation of compliance was set for 3<sup>rd</sup> November 2017.

8. However, before that date, the Applicant filed another Application referred to herein dated 28<sup>th</sup> September 2017. The Court directed it be served for inter parties hearing on 6<sup>th</sup> November 2017. Unfortunately, the Court was not sitting then. The matter was stood over to 12<sup>th</sup> October 2017. On that date, the only parties in court were the Applicant represented by the Learned Counsel Mr. Kanjama and the proposed Defendants represented by Mr. Angwara. The Court ordered that the issue of joinder of parties be heard on priority.

9. The Parties then agreed by consent, that 2<sup>nd</sup> and 3<sup>rd</sup> Proposed Defendants file and serve responses to the Application dated 28<sup>th</sup> September 2017 by 23<sup>rd</sup> October 2017 and the Applicant to file and serve submissions by 25<sup>th</sup> October 2017, with the Proposed Parties filing responses by 30<sup>th</sup> October 2017. The Ruling was scheduled for 3<sup>rd</sup> November 2017, but was deferred in view of the Application of 19<sup>th</sup> September 2017 which was pending and which seeks for similar prayers.

10. Similarly, save for the Applicant's submissions on the Application dated 28<sup>th</sup> September 2017, the other parties have not filed any submissions as on both Applications as ordered. In the given circumstances, I find that, the Court is not able to write a full Ruling on any or both Applications.

11. I therefore order that, all parties be summoned to appear before the Court on 8<sup>th</sup> March 2017 for directions in the following matters;

a) Which of the Applications herein should the court consider first and whether they concur that the Application dated 28<sup>th</sup> September 2017 be stayed;

b) Whether the parties are prioritizing the hearing of the Application for joinder of the intended Defendants;

c) Whether any of the other parties filed submissions on any of the Applications.

12. It is so ordered.

Dated, delivered and signed in open Court this 9<sup>th</sup> day of March, 2018.

**G.L. NZIOKA**

**JUDGE**

**In the presence of:**

Mr. Anyona for the Plaintiff/Applicant

No appearance for the 1<sup>st</sup> Defendant/Respondent

No appearance for the 2<sup>nd</sup> Defendant/Respondent

Mr. Wafula holding brief for Angwara for 3<sup>rd</sup> Defendant/Respondent