



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 15 OF 2017

EMMESS TRANSPORT LIMITED...1ST APPLICANT/RESPONDENT

SPEAR LOGISTICS (K) LIMITED....2ND PLAINTIFF/RESPONDENT

VERSUS

INTERCON FREIGHT LOGISTICS LIMITED.....DEFENDANT

AND

KENYA REVENUE AUTHORITY.....1ST INTERESTED PARTY

KENYA PORTS AUTHORITY.....2ND INTERESTED PARTY

ALLIED WHARFAGE LIMITED.....3RD INTERESTED PARTY

INTERPEL INVESTMENTS LIMITED.....4TH INTERESTED PARTY

AND

SPEKE HOTELS LIMITED.....1ST APPLICANT/OBJECTOR

ROSEBUD LIMITED.....2ND APPLICANT/OBJECTOR

RULING NO. 2

1. The application dated 14th November, 2017 has been brought under the provisions of Order 22 rules 51, 52, 54, 59(1) and (2) of the Civil Procedure Rules, 2010, Sections 81, 1A, (1) and (2), 1B, 3A of the Civil Procedure Act and all enabling rules of Act (sic). It states as follows:-

(i) That the objectors/applicants herein object to the orders of this Honourable court made on 25th day of August, 2017 delivered on the same day by this Honourable court wherein the said court ordered the auction, sale and disposal of five containers, wherein the objectors/applicants are the legal owners of two containers namely:-

(a) TRLU 7539943 and

(b) EISU 3849603, and stay of execution be ordered by this Honourable court against the sale, auction of disposal (sic) of the above containers until the final determination of this Notice of Motion;

(ii) That the Honourable court would (sic) not have ordered the said sale, or auction since the objectors were not aware of the above suit and therefore not part of the said proceedings;

(iii) That the objectors/applicants are legal and rightful owners of the above containers and will suffer extreme financial loss of its

cargo;

(iv) That the objectors/applicants ownership was known to the 1st and 2nd respondents all along and acted with attendant malice and underhand trade practice to the disadvantage of the objectors/applicants; and

(v) That costs be provided for.

2. The application is supported by the facts on the face of it and the affidavits of Dimple Mehta sworn on 14th November, 2017 and Tom Mugenga sworn on the same date. The objectors filed a notice of objection on 15th November, 2017.

3. The 1st and 2nd plaintiffs filed grounds of opposition on 13th December, 2017 and a replying affidavit to the present application on 3rd January, 2018 sworn by Mohamed Hameed Shahul.

4. Counsel for the 1st and 2nd objectors filed her written submissions on 26th January, 2018. Counsel for the 1st and 2nd respondents did not file written submissions.

5. In highlighting her submissions, Ms. Mwaka, Learned Counsel for the objectors referred to paragraph 3 of the Notice of objection by the objectors who claim to be the rightful owners of containers No. TRLU 7539943 and EISU 3849603. She stated that the attachment of the containers arose as a result of a lien between the plaintiffs and the defendants which applied to the attachment of the defendant's goods but not the objectors' goods. She made reference to the annexures marked as DM3 and DM4 attached to the affidavit of Dimple Mehta which show that the goods in issue belong to the objectors.

6. Counsel submitted that the objectors gave their agent instructions to transport the containers which were in transit to Uganda and that the plaintiffs should have done due diligence before attaching the goods to establish the true owners. It was further submitted that by attaching the said documents, the objectors had discharged their duty to prove ownership. It was contended that the plaintiffs had in their affidavit not disputed that the containers belong to the objectors and as such, the present application should be allowed.

7. Ms. Mwaka argued that had the plaintiffs conducted due diligence to establish the true owners of the containers, they would have enjoined the objectors to the suit. She prayed for the containers to be released to the applicants.

8. Ms. Gathoni for the plaintiffs opposed the application. She stated that on 17th March, 2017, a company known as Maina Speedy (U) Ltd., together with other persons filed an application dated 16th March, 2017. The said application was supported by the affidavit of Tom Mugenga in his capacity as a Director of the said company. Counsel indicated that the said Tom Mugenga also filed an affidavit in support of the present application. Counsel stated that the earlier application was abandoned as the Advocate who had filed it had no valid practicing certificate or credentials to appear before the court.

9. It was submitted that the objectors herein filed a case on 12th May, 2017 in Kampala, Uganda being HCC No. 352 of 2017, Maina Speedy (U) Ltd, Speke Hotels Ltd., Rosebud Ltd. and Emmess Transport Limited and Spear Logistics (K) Ltd. It was argued that, the said case was a deliberate effort by the objectors to circumvent the jurisdiction of this court. It was thus submitted that the objectors were very much aware of the proceedings before this court.

10. Ms. Gathoni made reference to the annexure marked as SHH-4 attached to the plaintiff's replying affidavit which comprises a copy of the pleadings filed in the Kampala High Court. She indicated that this court delivered a Judgment holding that the plaintiffs had a lien over the containers in issue.

11. Counsel submitted that it was curious that when payments were made to the 1st and 2nd Interested parties and the goods were ready for clearance, the present application was filed.

12. It was further submitted that the plaintiffs have a decree for which no application has been made to set aside and that at the point of decree the goods changed hands and now belong to the plaintiffs with two containers having been released and sold. She termed the present application an academic exercise.

13. It was stated that the objectors failed to disclose material information of the case that had been filed in Kampala and that the plaintiffs have incurred great costs for storage. She stated that no appeal had been filed and prayed for the application to be dismissed with costs.

14. In a very brief rejoinder, Ms Mwaka submitted that there was no document attached to the replying affidavit to show that the plaintiffs are the legal owners of the containers in issue. She prayed for the application to be allowed.

ANALYSIS AND DETERMINATION

The issue for determination is if the objectors have a legal or equitable interest in the goods in container and Nos. TRLU 7539943 and EISU 3849603.

15. The reasons advanced for the orders sought is that the objectors are the legal and rightful owners of the containers in issue and stand to suffer extreme financial loss of its cargo is not released to them. One of the objectors' deponents, Dimple Mehta, deposes in his affidavit that container No. TRLU 7539943 was imported by Rosebud Ltd, a company in which he serves as a Director. He attached a bill of lading, marked as DM3 for the said container to his affidavit. He attached annexure DM6, which is an invoice in the name of Speke Hotel (1996) Ltd to show that the contents in container No. EISU 3849603 were purchased by the said company and were destined for Kampala, Uganda.

In the said affidavit, the objectors give an undertaking to pay clearance fees under the contract and transport charges if any, raised by the plaintiffs after verifying their true and lawful account for work done by them and state that the defendant should pay all the charges that have accrued since the containers arrived at the port of Mombasa.

16. In the 2nd affidavit sworn by Tom Mugenga, he deposes that he is a Director of the objectors herein and a Director of Maina Speedy (U) Limited which was contracted by the objectors herein to clear and forward their containers No. TRLU 7539943 and EISU 3849603. The deponent further states that Maina Speedy (U) Ltd. contracted the defendant which in turn sub-contracted the plaintiffs to clear and forward the goods.

17. In paragraphs 10 and 11 of the said affidavit, the deponent avers that it learnt that the plaintiffs and the defendant had an agreement allowing them to recover debts from previous business dealings and had exercised a lien over goods belonging to the objectors. It was further deposed that neither Maina Speedy (U) Ltd nor the objectors were privy to the said agreement.

18. This court is surprised that the objectors herein have told an outright lie about their lack of knowledge as to the existence of the present suit. As was submitted by Ms. Gathoni for the plaintiffs, one of the objectors' deponent, Tom Mugenga on 3rd March, 2017 swore an affidavit in support of an application filed in this suit on 8th March, 2017 in which Maina Speedy (U) Limited and two other parties sought orders to be enjoined in this suit as interested parties, among other orders. In paragraph 2 thereof, the said deponent states that he is a Director of Speke Hotel (1996) Ltd., the consignee of container No. EISU 3849603 and Rosebud Limited the consignee of container No. TRLU 7539943 which form the subject of this suit. The said application was filed by the law firm of Richard Muhereza Associates.

19. On 17th March, 2017 another application was filed by the said law firm. It was supported by the affidavit of Tom Mugenga and 2 other deponents. On the said date, the law firm representing the proposed 5th, 6th and 7th Interested parties filed a notice of withdrawal of the application dated 8th March, 2017. The foregoing withdrawal therefore left the application filed on 17th March, 2017 subsisting. It was however never prosecuted. Ms Gathoni advanced the reason for non-prosecution as being due to the fact that the Advocate who filed the said application had no practicing certificate. The applications that had been filed by the objectors before the present one are a clear indication that they were very much aware of the suit that had been filed by the plaintiffs as against the defendant seeking to attach the containers in issue. It is however apparent that the objectors rested on their laurels and the suit proceeded to full hearing without their involvement. This court delivered a Judgment on 25th August, 2017 and gave orders for the auction, sale and disposal of all the goods and cargo in the containers in issue.

20. Although the objectors have exhibited documents to show legal or equitable interest in the goods in the containers, apart from seeking orders for stay of execution pending the hearing and determination of the present application and lamenting on the reasons why the court should not have granted the orders for sale, auction and disposal of the goods in the two containers in issue; the objectors did not seek any substantive orders. The Malawi Supreme Court in **Malawi Railways Ltd vs Nyasulu** [1998] MWSC 3 quoting an article by Sir Jack Jacob entitled **"The present importance of pleadings."** published in [1960] Current Legal Problems, at page 174 stated as follows:

"As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial.

The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any other Business" in the sense that points other than those specific may be raised without notice."

21. It is not the work of the court to make presumptions as to the orders being sought. Although Ms. Mwaka prayed for the goods in the containers in issue to be released to the objectors, there was no such prayer in the application dated 14th November, 2017. It is the duty of a litigant who moves the court to be precise on the orders that he/she/it is seeking. In the absence of such further prayers, this court's hands are tied. I therefore find the objectors' application to be incompetent as framed and it is hereby struck out. Costs of the application are awarded to the plaintiffs.

It is so ordered.

DELIVERED, DATED and SIGNED at MOMBASA on this 14th day of June, 2018.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms. Gathoni for the plaintiffs

Mr Gathu holding brief for Mr. Githinji for the 3rd Interested party

Ms. Wamithi for the 4th Interested party

No appearance for the objectors