



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 92 OF 2016

BASE TITANIUM LTD.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

R U L I N G

1. The defendants application dated 16/8/2017 filed on the 17/8/2017 and supported by the Affidavit of Stephen Kyandih seeks from court orders that:

i) (spent)

ii) THAT the Order of this Honourable Court made on the 3rd August 2017 granting the Plaintiff interim relief by way of an injunction pending arbitration be stayed pending the hearing and determination of the Defendant's Intended Appeal from the said decision.

iii) THAT pending the hearing and determination of the Defendant's Intended Appeal in this matter, this Honourable Court direct that the present status quo be maintained with a direction to the effect that the interim order made herein on the 16th September 2016 continue to subsist pending the hearing and determination of the Defendant's Intended Appeal in this matter.

iv) THAT the costs of this application be provided for.

2. The grounds disclosed be found the application are to the effect that the stevedoring charges, the subject matter of these proceedings, are levied and made payable by the vessels/owners of vessels calling at the port of Mombasa and payable by such vessels or owners and not the plaintiff hence if left unsecured as parties proceed to arbitration as ordered by the court and on appeal as preferred by the Defendant/Applicant, the litigation by the defendant in the event of success in the Appeal whose notice of Appeal has been filed may be rendered academic and nugatory because all the ships and their owners are based outside jurisdiction and it shall be impossible to recover same.

3. Those are the same grounds alluded to and detailed in the Affidavit of Mr. Stephen Kyandih and the submissions filed on behalf of the defendant/Applicant. The Application is expressed to be brought pursuant to Order 42 Rule 6 as well as Sections 1A & 1B of the Act.

4. The Application was opposed by grounds of opposition dated 28/9/2017 as well as the Replying Affidavit of JOSEPH SCHWARZ both filed on the 4/10/2018. The grounds of opposition allude to the position that the application fails to meet the thresholds under Order 42 Rule 6, that there is no substantial loss likely to be suffered if stay is not granted and that the plaintiff would be able to meet the payment of the legitimate Stevedoring charges even if the appeal succeeds because the charges are levied and sent to the ship agents who in turn charge all disputed stevedoring charges upon the plaintiff as the principle. It was equally contended that the orders sought to be stayed were prohibitory in nature and incapable of execution and as such cannot be subjected to stay of execution hence no rationale to order status quo because there had not been offered the security for the due performance of the order should the appeal become unsuccessful.

5. The same facts are expounded in the Replying Affidavit with the stress being put on the fact that the only relief this court has given is an injunction pending arbitration while the dispute itself is yet to be determined upon the arbitral proceedings, therefore there is no merit in seeking to stay the orders issued on 3/8/2017. On substantial loss as an important consideration for grant of stay pending appeal, the plaintiff Respondent took the view and averred that the arbitrator has the power to order any due stevedoring charges to be paid and that the said charges are back-charged to the plaintiff as shown in the bundle of invoices and email correspondence exhibited in the Affidavit in Reply. The deponent then went into merit by asserting that it operates a private jetty facility upon which it entirely carries out stevedoring

functions independent of the defendant and that the question never arose beforehand because it was plain and obvious that the plaintiff would never need the defendants stevedoring services and that, is the sole dispute forestalling the execution of a formal port operating licence between on the parties. It is then underscored and reiterated that it is the plaintiff who pays the subject stevedoring charges and not the ship owners.

Analysis and determination

6. While there are two substantive prayers in the application now due for determination, and while taking note that the effect of my decision dated 3/8/2017 was to maintain the status quo pending arbitration, I do consider that to grant prayer 2 wholly be to forestall the arbitration process in which an arbitrator has been appointed and therefore, undo all the court has done since the matter was filed in court.

7. It is of critical note that the application not only invokes order 42 Rule 6(2) of the Rules but also the overriding objective provisions of the Act.

8. Under Order 42 Rule 6(2) this court is empowered to consider an application for stay pending appeal provided; a Notice of Appeal has been filed; and the Applicant demonstrates an elacrity and promptitude in bringing an application and further producing proof that it is exposed to suffer substantial loss if stay is not granted. Further one needs to provide security for the due performance of the decree should the appeal be unsuccessful.

9. The purpose of that rule is, as can be seen, intended to balance the competing interests of the litigants. While an unsuccessful party intending to appeal need not be obstructed from pursuing that undoubted right, to access justice, and have this dispute determined by the court, in an robust and fair manner without being put to mere academic exercise in getting a judgment when the very substratum of the litigation shall have dissipated, the successful party is on the other side a holder of a decree and thus a property that enjoys constitutional protection from being arbitrarily. For this decree he needs an assurance that should the appeal fail he has something to hold unto. Those consideration must now be juxtaposed and mirrored against the objects of section 1A & 1B of the Act which include the just and expeditious disposal of legal disputes.

10. I regard justice to connote fairness with each party having its right evenly and appropriately protected. Accordingly therefore in determining an application for stay pending appeal the court must never lose sight of its very purpose for which it exists, dispensation of justice^[1].

11. The court must do everything to balance the scales of justice to remain even without weighing unevenly heavy on one side. For me in this matter, while I note that I have made my determination that there is a genuine dispute to go to arbitration, I am equally aware that, that is the very decision the Defendant/Applicant has sought to challenge on appeal. There are two real options and fate of my decision once the Court of Appeal get its time to consider it. It may be upheld or just reverse all together. Either way parties shall have had their rights investigated and determined. It is that determination that my determination here must seek to secure.

12. In this matter, there is strictly no decree capable of execution by a property changing hands by being delivery like in a monetary decree. However there is an order for injunction that effectively restrains the defendant from charging stevedoring charges pending arbitral proceedings.

13. The justification placed forth by the defendant/applicant is that the said charges are charged and payable by the vessel or vessel owner who are not resident within jurisdiction and if there is no stay granted they would make their call at the port and depart from jurisdiction and therefore go beyond reach of the defendant and the Kenyan courts hence it would be impossible or atleast difficult to collect the charges in the event the appeal succeeds. That to this court would present a substantial loss. Loss of revenue to a public body like the defendant and be termed unsubstantial.

14. To the contrary the plaintiff respondent contend that the said charges are back-charged on it by the ship agents and it is able to pay at any time the same became due.

15. That is a matter and consideration that goes to the merits of the dispute due for consideration before the arbitrator and subject to the outcome of the appeal. For me, I recognize that the parties have rights to be secured in the litigation on appeal. I only need to secure such rights so as not to be adversely and negatively affected as to leave it as merely academic.

16. Having weighed all the factors and being cognizant of the court's duty and power to preserve the subject of litigation and being aware that while the application was pending determination, before me, the parties had opened an escrow account in which the disputed charges have been deposited that account is still in existence and operational pursuant to the interim order issued herein on the 3/8/2017, I do order that the status quo subsisting and obtaining on the date of the ruling of 3/8/2018 shall be maintained pending the hearing and determination of the appeal.

17. I direct that the costs of this application be costs in the Appeal.

Dated and delivered at Mombasa this 27th day of July 2018.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Per Court of Appeal in Kamlesh Mansuklal D. Patni vs Director of public prosecutions [2015] eKLR