



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 156 OF 2014**

**SOCIETE MINIERE DELEST.....PLAINTIFF**

**VERSUS**

**1. AFRIKA INVEST LIMITED**

**2. KERILEE INVESTMENTS LIMITED**

**3. MEDITERRANEAN SHIPPING COMPANY S.A....DEFENDANTS**

**RULING**

1. This Ruling relates to a Notice of Motion (the Application),

dated 12<sup>th</sup> January, 2015 and filed on 13<sup>th</sup> January, 2015 and in which the third defendant (the Applicant), seeks the following orders:-

- a. Spent
- b. That the ex-parte order made on 22<sup>nd</sup> December, 2014 and extended on 2<sup>nd</sup> January, 2015 restraining the third defendant, its employees, servants and/or agents from releasing the consignment contained in Container Numbers CAIU 2812957 and MEDV 663770 to the first and second defendants be set aside;
- c. That the plaint herein as against the third defendant be struck out as against it and be dismissed with costs to the third defendant; and
- d. That the costs of the application be awarded to the third defendant (the Applicant).

2. The application was supported by the affidavit of

Mohammed Tamimu sworn on 13<sup>th</sup> January, 2015 and on the grounds that:

1. this court has not only no jurisdiction to grant preservative orders by way of an injunction as an interim measure of protection as sought by the plaintiff but also no jurisdiction to hear and determine this matter at all.
2. that the duplicate set of the Bill of Lading No. MSCUKE 807389 obtained by the shipper MARUA GROUP LIMITED on account of the alleged loss of the Original Bill of Lading was obtained through deception.
3. that there is no privity of contract between the plaintiff and the third defendant and the plaintiff cannot therefore seek any relief as against the third defendant.

4. that the suit against the third defendant is scandalous, frivolous and or vexatious and is an abuse of the process of the court and,
  5. that the plaintiff is guilty of material not disclosure of facts and is, as such, not deserving of the exercise of the Court's discretion.
3. These grounds were reiterated by Mr. Khagram in his

submissions to the Court when this matter was heard on 26<sup>th</sup> January, 2015. However according to the details stated in the affidavit of Mohammed Timamu, the Export Manager of Ocean Freight (E.A.) Limited, the agents in Kenya of Mediterranean Shipping Company SA, the third defendant (Applicant), received the cargo from Marua Group Limited through **Ocean Pacific International Lines** (Marua Group Limited presumably acting for the principal). The containers were boarded on Motor Vessel MSC Jeanne which sailed from the port of Mombasa on 5<sup>th</sup> October, 2014 to the port of Jiujiang in China.

4. However on 31<sup>st</sup> October, 2014 the plaintiff received a

request from the shipper's representative, Ali Rashid Birindwa of Marua Group Limited, for a change of destination from Jiujiang to Salalah in Oman. When informed by the applicant that the change would be subject to further charges, and the production of the original Bill of Lading, the shipper (Marua Group – Ali Rashid Birindwa), informed them that the original Bill of Lading was lost, but that they would pay the charges for issue of a duplicate set of Bill of Lading. With the new set of Bill of Lading, and a guarantee from Equity Bank Limited, to secure the costs of the shipment, the cargo was returned to Singapore for transshipment to Salalah.

5. Having learnt of the changes, the second defendant raised

a protest with the third defendant claiming an alleged breach of contract since it was holding the original Bill of Lading.

6. When confronted with the fact, Birindwa (Marua Group

Limited), is said to have feigned the loss of the original Bill of Lading so as to block the release of the cargo. In the circumstances the third defendant concluded that the second set or duplicate bill of lading was a nullity and demanded its return. The third defendant further claimed that the purpose of the Bank Guarantee was to indemnify it in the event of a conflicting claim being made for delivery upon the original Bill of Lading being found, whereas the guarantee of Kshs. 1,435,125.00 was to cover only the cost of transshipment which had been valued at US\$16,125.00 as per a copy of the invoice, and not the value of the cargo which was indicated in the original Bill of Lading as US\$ 648,395.20.

7. The third defendant consequently contended that the

dispute herein does not concern it since the contract of carriage between it (the third defendant) and the plaintiff as the shipper or the second defendant as the consignee is wholly independent of, and unconnected with the contract for sale of the coltran (the cargo). Further, and the plaintiff did concede as much, the third defendant is under a duty in terms of the Bill of Lading to deliver the cargo to the second defendant. The third defendant therefore claims that it is non-suited and any suit against it would expose it to liability for breach of contract under the Bill of Lading.

8. It was stated, and acknowledged that the cargo was already

at the port of Jiujiang, China, and the third defendant complained that it has and continues to suffer heavy losses in terms of the cost of re-transshipment to and from Singapore – China and storage charges. It therefore prayed that the injunctive orders granted herein be vacated.

9. Mr. Khagram, learned counsel for the third defendant

further said that the suit against it be struck out. He submitted that the third defendant was not a party to any dispute arising out of the contract of sale or arbitration and has no relationship with any of the parties to this suit. The contract of carriage was between the third defendant and Marua Groups Limited (who are not a party to this suit). Counsel submitted that having regard to the law on carriage of goods, and based on the facts disclosed, including the plaintiff's admission that they voluntarily sent the original Bill of Lading to the consignee, there is no liability to the third defendant.

10. In addition, Mr. Khagram submitted, a Bill of Lading

imposes upon the third defendant an obligation to deliver the cargo to the consignee. In that regard counsel relied on the **Textbook - Carriage Goods by Sea** – 2<sup>nd</sup> Edition by John Wilson, section 5.2.3 that: –

**(i) A bill of lading is a document of title;**

**(ii) the holder of a bill of lading is entitled to delivery of the goods at the port of discharge on presentation of the Bill of Lading.**

**(iii) the holder of a bill of lading can transfer the ownership of the goods during transit merely by endorsing it.**

**(iv) the bill can be used as security for a debt.**

11. For these reasons counsel urged the court to vacate the

injunctive orders granted herein, and the suit against the third defendant be struck out with costs to it.

12. The application was however opposed. The plaintiff

(respondent) filed both grounds of opposition as well as a Replying Affidavit by one Ali Rashid Birindwa sworn and filed on 26<sup>th</sup> January, 2015. The submissions by Mr. Khatib learned counsel for the plaintiff are that:-

- i. the court has jurisdiction to issue interim orders pending institution of arbitration proceedings;
- ii. the third defendant's application is an omnibus;
- iii. under clause 10 of the Contract of Sale, (dated 22<sup>nd</sup> September, 2014), the third defendant's role may be inferred in the phrase "*transactions contemplated by the contract*"

13. For those reasons, counsel submitted it cannot be said that

there was no privity of contract. Counsel relied on the decision of the court in **SHEPHERD CATERING LIMITED VS. NAIROBI HOLDINGS LIMITED & 2 OTHERS [2010] eKLR**, as well as **AJIT SINGH VIRDI VS. J. F. McCLOY [2014] eKLR** in support of the proposition that the Replying Affidavit of one Ali Birindwa Rashid as an agent of the plaintiff was proper and duly filed.

14. On the factual position, counsel for the plaintiff submitted

that the said Birindwa admitted that the duplicate bill of lading had been cancelled by the third defendant, and that the cargo was now being delivered to Jiujiang the original port of destination as earlier agreed, that the third defendant would not suffer any prejudice since the storage charges incurred would be settled before the cargo was released for collection and that in any event the third respondent had not shown proof of any loss incurred in Jiujiang.

15. In conclusion, counsel submitted that the third

respondent had shown no reasonable grounds to warrant the court to set aside the order made on 22<sup>nd</sup> December, 2014 and extended on 2<sup>nd</sup> January, 2015.

### **OPINION**

16. I have considered the rival arguments and I perceive the following as the issues for determination:

1. Whether this court has authority/jurisdiction to

determine the suit herein and grant the orders sought.

2. Whether the suit is tenable against the third

defendant.

(3) Whether the orders sought can be issued by this court.

I will consider each of these issues in turn.

### **WHETHER THIS COURT HAS JURISDICTION TO DETERMINE THE SUIT HEREIN.**

17. Jurisdiction, as the late Nyarangi JA said in the owners of

**Motor Vessel Lillian S Vs. Caltex Oil (Kenya) Limited [1989] KLR 1(14)** is everything. It is conferred by the Constitution or Statute. The court downs its tools once it finds that it lacks jurisdiction.

18. Under Article 165(3) of the Constitution of Kenya 2010,

(the Constitution of the Second Republic), this court has unlimited original jurisdiction in criminal and civil matters, except in matters reserved to the courts of the same status as the High Court under Article 162(2) and 165(5) (b) of the Constitution.

19. In matters of a civil nature section 15 of the Civil Procedure

Act, (Cap 21, Laws of Kenya) confers upon this court, jurisdiction in terms of explanation three (3) which provides as follows:-

Explanation 3 – In suits arising out of contract, the cause of action arises within the meaning of this section at any of the following places, namely –

i. **the place where the contract was made;**

ii. **the place where the contract was to be**

**performed or the performance thereof completed;**

iii. **the place where in performance of the**

**contract any money to which the suit relates was expressly or impliedly payable.**

20. In this case the contract for shipping was made in

Mombasa that is to say within the jurisdiction of this court. This is clearly indicated in the Shipping Order annexed to the affidavit of Mohammed Tamimu marked “MT-1” and “MT-4”. Consequently, and in so far as the orders sought against the third defendant are concerned, this court has

jurisdiction. This being so, the next issues may be determined together.

**OF WHETHER THE SUIT AGAINST THE THIRD DEFENDANT (APPLICANT) IS TENABLE, AND WHETHER THE ORDERS SOUGHT BY THE APPLICANT CAN BE GRANTED BY THE COURT**

21. The applicant's argument is that the suit is not tenable

against it because there is no nexus or privity of contract between it and the plaintiff. The contract of Sale (the first contract) is clearly between the plaintiff (**Societe Miniere Delest**), and the first defendant (**Africa Invest Limited**) to the exclusion of all other parties. That contract was signed on behalf of the seller by one Ali Rashid Birindwa while one Emmanuel Mutaharugamba signed on behalf of Africa Invest limited (the buyer). The shipping contract on the other hand is between the third defendant and **Marua Group Limited** of Kampala Uganda, and was signed by the same Ali Rashid Birindwa and another person. That contract is in the form of the Bill of Lading. In addition to its other legal attributes already referred to above, according to "*LEXIS NAVIGATOR DICTIONARY*" –

**“ A Bill of Lading is a receipt signed by the person or his agent who contracts to carry certain specific goods, and setting out the terms of the contract of carriage under which the goods have been delivered to and received by the ship.**

**The signed Bill of Lading is handed over to the shipper, who may either hold on to it or transfer it to a third person. During the voyage and transit, the Bill of Lading under the law merchant is considered the symbol of the goods described in it, and the endorsement and delivery of the Bill of Lading operates as a symbolic delivery of the goods. This person may be named in the Bill of Lading as the person to whom the delivery of the goods is to be made on arrival at the destination, in which case he is known as the consignee; if he is not named in the Bill of Lading, he is usually known as the holder or endorsee of the Bill of Lading.**

**The holder of the Bill of Lading is entitled as against the shipper to have the goods delivered to him to the exclusion of other persons. It is thus in the same position as if the goods were delivered to him or in his physical possession, subject to the qualification that he takes the risk of non-delivery of the goods by the ship owner, and that, in order to obtain actual delivery of the goods from the ship owner, he may be obliged to discharge the ship owner's lien for freight. A Bill of Lading issued by the ship owner's agent in the absence of any contract of carriage is a nullity.”**

22. Halsbury's Laws of England Volume 7 paragraph 314, says

*inter alia*:-

**“...although a bill of lading has often been described as a negotiable instrument, it is not in the strict sense of the words. The principal points of resemblance of a bill of lading to a negotiable instrument are that:-**

- 1. the right to demand delivery of the goods from the carrier is transferred by the delivery to the lawful holder of the Bill of Lading, no distinct contract of assignment and no notice to the carrier being necessary for the transfer to take effect;**
- 2. in some cases the transferee may acquire, by virtue of the transfer, rights over the goods which are greater than those of the transferor;**
- 3. the transferee of the bill may in certain cases sue and be sued on the contract contained in the Bill of Lading;**
- 4. the transferee, even if his title is defective may give a good discharge to the carrier who delivers the goods to him, and**
- 5. the consideration provide by the transferee may be a past consideration.**

23. Apart from the very nature of a Bill of Lading already

referred in the foregoing paragraphs of this Ruling, the sustainability of the suit against the third defendant is grounded on quick sand. The reasons are not far to find. The second defendant is identified in the original Bill of Lading as the consignee. The plaintiff in this case is Societe Miniere Delest. It is described as a limited liability company, registered in the Democratic Republic of the Congo (DRC), in the contract for the sale of the cargo. The company has a Kenya mobile phone number and is represented by one Ali Rashid Birindwa, who describes himself in the affidavit verifying the plaint, as the plaintiff, and thus competent to swear the affidavit.

24. Under the Companies Act (Cap 486, Laws of Kenya), the

Said Ali Rashid Birindwa can only be regarded as an officer of the company or an attorney duly authorized under the company's seal. Order 4 rule 1(4) of the Civil Procedure Rules 2010, provides:-

**“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”**

25. To say that he is the plaintiff when the plaintiff is a limited

liability company is a monumental inaccuracy both in law and fact. Even if it was an error of counsel who drew up the pleadings, the said Ali Rashid Birindwa needed to be painted in a brush which described him as an officer of the company, that is to say -

**“any person who is regularly employed as part of the business or occupation in conducting the affairs of the company.....”**

26. Under the Companies Act 1985 of the United

Kingdom –

**“an officer of the company is defined as including any director, manager or secretary. “Manager” means, in everyday language, a person who has management of the whole of the affairs of the company. It connotes a person holding, whether *de jure* or *de facto*, a position in, or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit. It does not include a local manager.”**

27. The person who swore the affidavit verifying the plaint,

does not fit any of the shoes of an officer of the company as envisaged in our law, or the more expansive meaning under the United Kingdom Companies Act. There is consequently a serious and legal disconnect between the plaintiff and Marua Group Limited whose only link is the said Ali Rashid Birindwa. In circumstances the said affidavit is a fit candidate for striking out. However, even if this court were to be guided by the decision of Ringera J, (as he then was) in **MICROSOFT CORPORATION VS. MITSUMI COMPUTER GARAGE LIMITED [2001] 2EA 460** strike out the current affidavit and allow the plaintiff to file a compliant affidavit, such order would not cure or bridge the chasm between **Marua Group Limited** and the plaintiff, both of which claim distinct legal personality. The plaintiff cannot sustain a suit against the third defendant, as there is no contract between them.

28. Finally, it was Mr. Khatib's learned counsel for the

plaintiff argument that the phrase in clause 10 of the Contract of Sale –

**“In the event of any dispute arising from the transactions contemplated by this contract.....”**

included the shipper's contract contracted under the Bill of Lading. That argument cannot be correct simply because neither the third defendant, nor the holder of the Bill of Lading were parties to the arbitration agreement. For the same reason neither section 7 of the Arbitration Act 1995 (No. 4 of 1995), which is in **pari materia** with Article 26-3 of the UNICTRAL Arbitration rules which states –

**“A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or a waiver of the agreement.”**

29. In the premises therefore though the court has

jurisdiction to grant the requisite temporary injunction, the relief is being sought against a party which has no relationship of a contractual nature with the plaintiff. Put simply, there is no privity of contract between the plaintiff and the third defendant/applicant.

30. Learned counsel for the plaintiff urged the court to

nevertheless maintain the injunctive orders against the third defendant under the agreement for indemnity of any costs and liabilities as against the holder of the original Bill of Lading. No court, I think and less, no commercial person would accept an indemnity of KShs. 1.4 million against a Bill of Lading for a cargo valued at over US\$ 648,395.20 (or KShs. 58,355,568). In any event, the second set of Bill of Lading have been rendered inoperative by virtue of the resurrection of the original Bill of Lading, the indemnity Agreement cannot be of any value to the third respondent. Further, the Bill of Lading having been already delivered to the collector of the goods, or agent of the consignee, it is no longer by its nature within the control of the third defendant.

31. The ultimate justice of the case requires that the plaintiff

can only fall back on the contract with the buyer and has no recourse against the third defendant. The bird in the form of the Bill of Lading having flown across the oceans cannot be caught and brought back to our shores.

32. The plaint as against the third defendant is therefore

struck out as disclosing no cause of action against that party. The injunctive orders hereinbefore granted against the third defendant are vacated forthwith.

33. The third defendant will also have the costs of this

application as well as the suit in relation to it.

34. There shall be orders accordingly.

**Dated, Delivered and Signed at Mombasa this 13<sup>th</sup> day of February, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In open court

In the presence of:

Mr. Khatib for Plaintiff

No Appearance 1<sup>st</sup> Defendant

No Appearance 2<sup>nd</sup> Defendant

Mr. Ngare holding brief Mr. Khagram for 3<sup>rd</sup> Defendant

Court Assistant Mutisya