



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT MOMBASA

ADMIRALTY CLAIM NO. 12 OF 2011

CLAIMANTS: BASHIR MUSE MOHAMED

SAHIL DEVELOPERS COMPANY LIMITED

RESPONDENTS: THE OWNERS OF MOTOR VESSEL "GHADEER 1"

P.MUGO T/A MUGO SCRAP MERCHANTS

RULING

Introduction

1. Before court is a Notice of Motion application dated 17th August 2012 by the Claimants. The application seeks stay of execution of the ruling of this court (by Mwangi, J.) delivered on 26th July 2012 pending hearing and determination of the appeal filed against the said ruling.
2. Briefly, the Claimant's claim was that sometime in May 2009 or soon thereafter, with the consent of the owner, they took charge of a ship known as "MV GHADEER" when the same was unoperational and unseaworthy. That at or about the beginning of the years 2010, the owner of the vessel requested the 1st Claimant to offset the salary arrears of the ship crew on the understanding that the owner would refund the same to the Claimants and that the ship would act as security for the money advanced.
3. The Claimants claimed that they paid the salary arrears and incurred further expenses in repair and maintenance of the ship with the consent of the owner. That the total costs came to kshs. 2,142,800.00 and when an invoice was presented to the ship owner for payment, he did not object to the same and only sought more time to enable him settle the same. That however, instead of paying the said amount, the owner commenced the process of disposing of the ship as scrap metal without involvement of the Claimants.
4. The Claimants therefore filed this Claim to recover the said amount. They also filed an Amended Notice of Motion dated 23rd December 2011 for orders that the ship "MV GHADEER" be arrested and placed in the custody Admiralty Marshall pending hearing and determination of the Claim. The interim orders of arrest were granted by this court on 23rd December 2011.
5. On 23rd January 2012, the Respondents filed an Application of even date in which they sought that the claim be dismissed or struck out with costs and the warrant of Arrest issued against the vessel on 23rd December 2011 be discharged on the basis that there was no admiralty jurisdiction because the claim was based on loans advanced and not mortgage.

6. Mwongo J. delivered a ruling on 26th July 2012 in which he held that the court in issuing the warrant of arrest, acted *ipso facto* without jurisdiction and he therefore discharged and vacated the warrant of arrest. In his said ruling, the learned Judge stated *inter alia* as follows:

“...the Warrant issued, incorrectly indicated the ship’s port of registry as Mombasa [and] not Tanzania. Secondly, the warrant did not reflect the details contained in the declaration in support of the Application for Warrant of Arrest. To that extent, I find that the non-compliance with the mandatory procedural requirements led to a situation where the Warrant of Arrest, as drafted, was not premised on information declared to the court. The court not being seized of any of the critical information required for issuance of Warrant of Arrest, acted, *ipso facto* without jurisdiction.

I therefore have no hesitation in holding that the warrant of Arrest was unfounded as up to the date of this hearing, there was no material information upon which the warrant could be issued, as the accompanying information was missing or incomplete. Therefore, the warrant was issued irregularly and without jurisdiction and is hereby declared to have been null and void *ab initio*. All acts done pursuant to, or in consequences therefore, are therefore void, and are hereby discharged and vacated forthwith.”

7. It is that ruling of 26th July 2012 that the Claimants now seek to stay by their Application dated 17th August and which is now under consideration.

The Arguments

8. The Claimants argued that if stay of execution is not granted, they will not be able to execute a decree issued if the appeal succeeds because the money deposited in the bank as security shall have been alienated.
9. The Respondent’s, position on the other hand was that this court lacks jurisdiction to determine the Claimant’s application touching on the warrants of arrest having found that the same were irregularly and without jurisdiction hence declaring them to have been null and void.

The issue for Determination

10. The main issue for the court’s determination is whether the application meets the threshold for which stay of execution should be granted.

Analysis/Determination

11. Both Claimants and respondents filed their written submissions on the Application. On 16th March 2015, this court ordered that it will not consider the Claimant’s written submissions because the same were filed and served out of time set by the court on 25th February 2015. I have therefore not considered the Claimants’ written submissions in this Ruling. I have however considered the ruling sought to be stayed by the Claimants, the Respondents’ Ground of Opposition filed on 29th October 2012 and their submissions filed on 5th March 2015. My finding is that the ruling of 26th July 2012 cannot be stayed. I so find because in that ruling, the court held that the Warrant of Arrest was issued irregularly and without jurisdiction and declared the same to have been null and void *ab initio*. By that ruling, the court did not order any party to do or refrain from doing any act. The order made by the court simply declared the Warrant of arrest to be null and void and discharged the same
12. It is trite law that a negative order which does not order any party to do anything or refrain from doing anything cannot be stayed. This position was pronounced by the Court of Appeal in the case of **Kanwal Sarjit Singh Dhiman V Keshavji Jivraj Shah, Civil Appli Nai 320 of 2006 [2008] eKLR** where Githinji, Waki and Aluoch (as she then was), JJA held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see Western College of arts & Applied Sciences vs. Oranga & others [1976] KLR 63 at page 66 paragraph C.” (emphasis added)

13. Since the impugned ruling only discharged existing Warrants, it cannot be stayed as sought by the Claimants save to the extent of costs. The Claimants have not asked the court to stay the order for costs. If the court were to grant stay of execution of the subject ruling as sought by the claimants, the implication of doing so would be that the Warrant of Arrest which had already been declared null and void and discharged is validated and reinstated. Perhaps the best approach the Claimants should have taken if they wanted the Respondents to be restrained from withdrawing the money deposited in the bank as security was to seek an order of injunction pending appeal. For the foregoing reasons, it is my considered view that the Notice of Motion dated 17th August 2012 be and is hereby dismissed with costs to the Respondents.

It is so ordered.

DATED and DELIVERED at MOMBASA this 25TH day of JUNE, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A Kavuku

For Claimant

For 1st Defendant

For 2nd Defendant

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE