



REPUBLIC OF KENYA  
IN THE HIGH COURT  
AT NAIROBI  
MILIMANI LAW COURTS  
Civil Case 309 of 2010

**AUTOLITHO LIMITED ..... PLAINTIFF/RESPONDENT**

**VERSUS**

**DHL GLOBAL FORWARDING KENYA LIMITED ..... DEFENDANT/APPLICANT**

**RULING**

1. The applicant's application dated 15<sup>th</sup> February, 2012 seeks the following orders:

**“2. THAT this Honourable Court be pleased to stay the execution of the Ruling delivered on the 19<sup>th</sup> of January 2012 and any further proceedings in this suit pending the hearing and determination of this application.**

**3. THAT this Honourable Court be pleased to stay execution of the Ruling and order of the court made on the 19<sup>th</sup> of January 2012 and any further proceedings in this suit pending the hearing and determination of the Appeal against the Ruling dated 19<sup>th</sup> January 2010.”**

2. The application was supported by an affidavit sworn by **Michael Munene**, the Credit Manager of the applicant. He stated that on 19<sup>th</sup> January, 2012 the court issued an interlocutory mandatory order compelling the defendant to release and deliver to the plaintiff a container held in Mombasa containing press printing machinery and accessories and pay costs for the plaintiff's application dated 12<sup>th</sup> November 2011.

3. On the same day the defendant was granted leave to appeal against the ruling and a stay of execution of the said ruling was granted for 30 days.

4. On 27<sup>th</sup> January, 2012 the defendant filed a notice of appeal against the said ruling and requested for copies of the proceedings in this matter.

5. The defendant contends that it has a lien and a claim over the subject matter of the ruling for non-payment of outstanding freight charges, costs and penalties arising from a contract between the plaintiff and the defendant. Further, demurrage and storage charges continue to accrue and are payable to third parties to effect the release of the container, Mr. Munene stated.

6. He added that the defendant stands to suffer substantial financial loss if stay of execution is not granted as the plaintiff has already illustrated that it is unable to pay the agreed amounts totaling to over Kshs.4 million. Mr. Munene further averred that if the defendant's application is not granted the appeal will be rendered nugatory in view of the fact that the court determined the issue of liability at an interlocutory stage.

7. **Amit Chotai**, the plaintiff's Managing Director, filed a replying affidavit. In his view, the ruling delivered by Mutava, J. on 19<sup>th</sup> January, 2012 is quite sound.

8. He stated that there were no issues warranting a full trial as the parties had spelt out all their obligations in the contract signed between themselves which the court upheld.

9. He added that the parties had expressly agreed that the party at fault would meet the costs to remedy the fault and the defendant should rightly meet what they willingly brought on themselves.

10. Mr. Chotai further stated that the plaintiff's machine parts in the detained container and the ones cleared by the applicant continue to waste thus exposing the plaintiff to loss and damage. He urged the court dismiss the defendant's application.

11. Both **Mrs. Watende** for the applicant/defendant and **Mr. Karige** for the plaintiff/respondent made brief submissions in support of the averments made by their respective clients in their affidavits.

12. In **BUTT vs RENT RESTRICTION TRIBUNAL [1982] KLR 417**, the Court of Appeal held, *inter alia*, that –

- **The power to grant or refuse an application for a stay of execution is discretionary and the discretion should be exercised in such a way as not to prevent an appeal.**
- **The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appellate court reverse the trial judge's discretion.**
- **The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and unique requirements.**

13. This application ideally ought to have dealt with by Mutava, J. but the trial judge recused himself. In the ruling delivered by the learned judge on 19<sup>th</sup> January, 2012 the court ordered immediate release of the subject container.

14. The defendant has demonstrated that the plaintiff owes it an amount in excess of **Kshs. 4 million** which is the subject of pending proceedings in HCCC No. 324 of 2010. The defendant also alleges that it had a right of lien over the said container in view of the unpaid charges.

15. The defendant intends to exercise its constitutional right of appeal and in my view, the appeal may be rendered nugatory if the container is released to the plaintiff at this juncture.

16. Although Mr. Karige submitted that the defendant has failed to file an appeal within sixty days from the date of filing the notice of appeal, that is not an issue for determination by this court. The defendant has applied for typed proceedings and the same have not been supplied.

17. Taking into consideration the nature of the dispute herein and the intended appeal, I am inclined to exercise my discretion in favour of the defendant/applicant and consequently order that execution of the ruling and/or orders made by this court on 19<sup>th</sup> January, 2012 be stayed as well as further proceedings in this matter pending hearing and determination of the intended appeal. The defendant should however expedite the filing and prosecution of the intended appeal. And in that regard the Deputy Registrar is directed to ensure that the typed proceedings are supplied to the parties, upon payment of the requisite

charges, within the next ten days from the date hereof.

18. Each party shall bear its own costs of the application.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18<sup>TH</sup> DAY OF JUNE, 2012.**

**D. MUSINGA**  
**JUDGE**

**In the presence of:**

Muriithi – Court Clerk

Mr. Njagi for Mrs. Watende for the Defendant

Mr. Kipngeno for Mr. Karige for the Plaintiff