



REPUBLIC OF KENYA



KENYA LAW

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**Jonerics Cargo Forwarders Limited v TBEA Company Limited & 2 others;
Rais Shipping Services Kenya Limited (Interested Party) (Commercial Case
E029 of 2024) [2024] KEHC 16955 (KLR) (21 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16955 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E029 OF 2024
F WANGARI, J
NOVEMBER 21, 2024**

BETWEEN

JONERICS CARGO FORWARDERS LIMITED PLAINTIFF

AND

TBEA COMPANY LIMITED 1ST DEFENDANT

MINISTRY OF ENERGY & MINERALS DEVELOPMENT 2ND DEFENDANT

HON ATTORNEY GENERAL UGANDA 3RD DEFENDANT

AND

RAIS SHIPPING SERVICES KENYA LIMITED INTERESTED PARTY

RULING

1. This ruling is in respect of two applications both preferred by the Plaintiff. The first application is the one dated 7th June, 2024 (hereinafter “the first application”) brought under the provisions of order 40 rule 1 and 2 of the *Civil Procedure Rules*, sections 1A, 2A and 3A of the *Civil Procedure Act* and any other enabling provisions of the law. It sought for the following prayers: -
 - a. Spent;
 - b. That this Honourable Court be pleased to issue an order of temporary injunction compelling the 1st and 2nd Respondents to release 36 empty containers and transport the same to the shipper in Mombasa, settle storage charges, clear the container detention charges and demurrage charges pending inter-parte hearing of the application;
 - c. That this Honourable Court be pleased to issue an order of mandatory injunction compelling the 1st and 2nd Respondents to release 36 empty containers and transport the same to



the shipper in Mombasa, settle storage charges, clear the container detention charges and demurrage charges pending hearing and determination of the suit; and

- d. That the costs of the application be provided for.
2. The grounds in support of the first application are that the Plaintiff (Applicant) was contracted by the 1st and 2nd Defendants (Respondents) to clear their project materials from the Port of Mombasa to Kampala, Uganda. The Applicant cleared and transported the Respondents' project materials from the Port of Mombasa to Kampala, Uganda.
3. The Respondents have failed to release the 36 containers, transport the same to Mombasa, settle storage charges, settle container charges and demurrage charges. The shipping line has threatened to blacklist the Applicant for being clearing agent. Kenya Freight Forwarder (KIFWA) might suspend the Applicant's license due to the actions of the Respondents.
4. It concludes that it stands to suffer irreparable loss and damage due to the negligence and omissions of the Respondents. It is for the said reasons that they seek the mandatory orders of injunction. The application is further supported by the affidavit sworn by one David Nzikali, its authorized agent. In the affidavit, it annexed bills of lading in support of the said contract and a letter of appointment of agency. Other than the annexures, the affidavit is more or less a restatement of the grounds and thus I do not see the need to rehash the same.
5. Upon service of the application, the 1st Respondent filed its grounds of opposition dated 28th August, 2024. Among the grounds raised is that this court lacks geographical jurisdiction for the reasons that the cause of action arose in Uganda while the 1st Respondent is a private company registered in the People's Republic of China conducting business in the Republic of Uganda. The case of *Owners of Motor Vessel Lilian 'S' v Caltex Oil Kenya Ltd* was cited to buttress this ground.
6. The second ground was that the Applicant had not offered sufficient grounds that meet the threshold to warrant the exercise of discretion of this court to grant temporary injunction. It was the 1st Respondent's position that the principles governing grant of interlocutory injunction as set out in the case of *Giella v Cassman Brown* [1973] EA 358 had not been made.
7. It was equally contended that the application was defective in form and substance for failing to prove that the Applicant's property was at risk of being disposed by the Respondents as it sought an injunction to compel the Respondents rather than restrain the Respondents from disposing off the Applicant's property which property is not under the 1st Respondent's control.
8. Lastly, it was the 1st Respondent's view that it had been improperly joined in the suit noting that it had not have and have never had any contractual relationship. The 1st Respondent further filed an undated replying affidavit sworn by one Luo Zhiqiang, its logistics department manager.
9. He averred that the 1st Respondent is an exporting company registered in the People's Republic of China that signed a general procurement contract with the 2nd Respondent who is the owner for the Project of Accelerating Rural Electrification to Meet the Balance of Electricity Supply and Demand in Uganda to supply the project with electrification equipment.
10. Since the materials needed to construct the project had to be imported from China, the 1st Respondent as an exporter signed logistics contracts with its subsidiary company called TBEA Hunan International Logistics Technology Co. Ltd for the whole process of Uganda Accelerated Rural Electrification to meet the balance of electricity supply and demand.



11. He further averred that the 1st Respondent had never entered into a legally binding contract with the Applicant and have never had any payment record with the Applicant to clear any cargo from the Port of Mombasa and transfer the same to Kampala, Uganda.
12. In relation to the project in issue, it was the 1st Respondent's position that it only entered into a contract with its subsidiary company (TBEA Hunan International Logistics Technology Co. Ltd) and it was the subsidiary that was responsible for the transportation of goods for the 2nd Respondent's project from China to Mombasa Port, entry customs clearance in Uganda and onsite unloading and packaging at designated warehouse in Uganda.
13. When the cargo got to the Port of Mombasa from China, the subsidiary entered into another contract with a company known as Godspeed Logistics Company Limited who was responsible for customs clearance in Uganda, customs transfer at Mombasa Port, transportation to Uganda by road, customs at Uganda port, unloading, packaging at designated warehouses in Uganda, purchasing transportation insurance and handling insurance compensation claims.
14. Godspeed Logistics Company Limited handed over some of the work to another company called Freight Concept (U) Ltd who proceeded to hand over the custom transfer at Mombasa, execution of transportation between Kenya and Uganda to the Applicant who was responsible for the road transport from Mombasa Port to Uganda, unloading and container removal at the designated warehouses in Kampala.
15. In reference to the Bills of Lading annexed to the Applicant's affidavit in support, the 1st Respondent averred that the transportation charges from Mombasa, Kenya to the final destination in Uganda were to be borne by the consignee at their own cost. On the proforma invoices raised by Rais Shipping Services (Kenya) Ltd for demurrage charges, they were clear that they were not addressed to the 1st Respondent.
16. It is further stated that when the 1st Respondent was notified of excessive charges that led to the delay in the release and transportation of the containers from Kampala to Mombasa and after numerous negotiations, the charges were reduced to USD 8,640 which the 1st Respondent paid to Freight Concept (U) Ltd pursuant to a request by Godspeed Logistics Company Ltd since the 1st Respondent did not have any contractual relationship with Freight Concept (U) Ltd. It thus prayed for the application to be dismissed.
17. The Applicant then filed the second application dated 23rd August, 2024 (hereinafter "the second application"). It was brought under the provisions of order 40 rules 1 and 2 of the Civil Procedure Rules, sections 1A, 2A and 3A of the Civil Procedure Act and any other enabling provisions of the law. The prayers sought were as follows: -
 - a. Spent;
 - b. That the Honourable Court be pleased to issue an order of temporary injunction restraining the Interested Party, their agents and/or employees from detaining the Plaintiff's customers' containers and not to utilize the already deposited container revolving deposits Defendants' cargo pending hearing and determination of this suit;
 - c. That the Honourable Court to issue an order compelling the Interested Party to allow the Plaintiff to operate without any interruption and/or disturbance in clearance of cargo at the Interested Party's shipping line pending hearing and determination of this suit;
 - d. Spent;



- e. That the Interested Party be ordered to accept back to their depot 36 containers being the suit properties pending hearing and determination of this suit; and
- f. The costs of this application be in the cause.
18. The grounds in support were that the Plaintiff wished to join the Interested Party due to its vast interest in the suit property. The Interested Party had threatened to cease its operations with the Plaintiff over the 36 containers in the hands of the Defendants. That the Plaintiff would suffer irreparable loss and damage if the Interested Party stopped operations with the Plaintiff and thus it was in the interest of justice if the Interested Party be joined in the suit. It is further supported by the affidavit of David Nzikali sworn on even date. It restates the grounds and more so the threats to cease operations by the Interested Party.
19. Upon service, the 1st Respondent filed grounds of opposition dated 6th September, 2024. It raised among other issues that the application was defective in form and substance for failure on the part of the Applicant to properly enjoin the Interested Party at the time of filing suit through their plaint for the Interested Party to be part of the original pleadings. The case of *John Harun Mwau v Simone Haysom & 2 Others; Attorney General & 2 Others (Interested Parties)* [2021] eKLR was referred in support.
20. Further, it was the 1st Respondent's position that the Applicant had not offered any justifiable grounds that meet the guiding elements to warrant the exercise of discretion of this court to admit the proposed Interested Party even after their plaint failed to make the proposed Interested Party a part of the original pleadings. The Supreme Court's decision in *Francis Kariuki Muruatetu & Another v Republic & 5 Others* [2016] eKLR was referred to as the guide on joinder of Interested Parties in suits. It thus prayed for the application to be dismissed.
21. The 1st Respondent also filed a replying affidavit of even date majorly restating its earlier averments save to add that in the Bills of Lading annexed to the application, it was shown as a shipper and not a consignee as alleged by the Applicant. It equally averred that the sums the Applicant was suing for was not due to it but to the Proposed Interested Party who intends to file suit against the 2nd Respondent being the consignee and the Applicant by virtue of Guarantee and Indemnity that the Applicant was issued on behalf on the consignee.
22. On 18th September, 2024 when the matter came for further directions, the Proposed Interested Party joined the fray and sought for time to put in a response. Since it had no objection in being joined to the case, prayer 4 of the application was allowed and leave granted for it to file its response. It duly complied and filed its response of even date sworn by one Jim Opiyo Olum, its Senior Executive.
23. In its response, they highlighted that it is the local agent for Korea Marine Transport Co. Ltd and enumerated several containers that left the Port of Shanghai for the Port of Mombasa. It confirmed that the Applicant was nominated by the 2nd Respondent as its clearing agent. As a condition, prior to release of containers to nominated clearing agent, the agent has to issue a guarantee which then requires the agent to return the containers to a nominated yard and cover any demurrages or damage caused to containers. The Applicant issued such a guarantee.
24. On the strength of the guarantee, the Interested Party released the containers to the Applicant. It is averred that the Applicant has failed, neglected and/or refused to return the empty containers to date. As a result, demurrage has accrued and continues to accrue and as of 3rd August, 2024, the sum due and payable was USD 512,081.00 and which amounts continue to accrue on daily basis up to and including the date of the return of the containers.



25. It confirmed that a demand and notice to sue had been issued but despite the same, neither the containers have been returned nor the outstanding charges paid. As such, the Interested Party has a right in law to take such legal steps to enforce the guarantee. It denied the allegations of threats but was not opposed to being enjoined as parties. Finally, the prayed that the costs be borne by the Applicant.
26. The Applicant filed a further affidavit dated 6th September, 2024 and annexed among other documents, a demand letter from the Interested Party's advocates. It is noteworthy that the 2nd Respondent have not participated so far.
27. Directions were taken to have both applications disposed off by way of written submissions. All the participating parties duly complied with the directions. The Applicant's submissions in respect to the first application are dated 4th September, 2024 while those in support of the second application are dated 10th September, 2024. For the 1st Respondent, they are dated 17th September, 2024. The Interested Party's submissions are dated 24th October, 2024.
28. I am grateful to Counsel for the industry they put in preparing detailed submissions in support of their rival positions, citing decisions of various superior courts and the applicable legal provisions. They go a long way in illuminating the court's path as it makes its decision which like any engagement with two or more rivalries, some quotas will be happy while others will be disappointed. Either way, the role of the court is to be guided by the law and strive to strike a balance for the betterment of the justice system.

Analysis

29. Considering that the two applications seek almost similar orders albeit addressed towards different parties, I proposed to consider them simultaneously.
30. This Court has carefully considered the two applications, the grounds of opposition, replying affidavits, parties' rival submissions, the authorities cited and the law and the issues that fall for the Court's determination are as follows: -
 - a. Whether the prayers for temporary injunction are capable of being granted;
 - b. If the answer to (a) above is in the affirmative, what efficacious orders ought to issue; and
 - c. What is the order as to costs?
31. Before delving on the issues substantively, the 1st Respondent and the Interested Party submitted on the issue of joinder of Interested Parties. Prayer 4 in the second application made a prayer that the Interested Party be made a party. However, when the intended interested party joined the fray, it did not oppose being made a party.
32. The effect of that action meant that the prayer for joinder had been already granted and therefore any submissions to the contrary are deemed spent. I shall only point out that a party does not come in automatically as an interested party. An application by any party in the suit or that intended party must be made. Before ones being a party, he can only be considered as an intended party.
33. Based on the foregoing, the drafting elegance of prayer 4 of the second application was wanting. Had the intended interested party objected to its inclusion, this court's view on prayer 4 would have been different. Parties need to take time in drafting their pleadings. A good case can be lost because of



drafting inelegance. In *Pius Yattani Wario v Independent Electoral Boundaries Commission & Another* [2018] eKLR, the Court of Appeal expressed in matters elegantly pleading as follows: -

“... It is not the business of the Court in each and every matter to jump into the haystack to look for the needle. It is for the litigant to frame the issues that aggrieve him or her with precision and clarity. Encouraging that kind of practice will ultimately make nonsense of the rules of pleadings and encourage parties to present to the Court a potpourri of myths, rumours, allegations, facts, and so on, in the mistaken belief that it is the business of the Court to sort out the relevant from the irrelevant, as it strives to sustain all and sundry claims, however presented...”

34. I shall therefore not address the issue of joinder as the same was not objected.

35. I now turn to address the substance of the two applications. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co. Ltd* [1973] EA 358. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

“...In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) allay any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rest the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially... if the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted will be irreparable. In other words, if damages recoverable in law are an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant’s claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration...”

36. Having set out the principles, has the Applicant establish a prima facie case in respect to the first application? A prima facie case was defined in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125 as follows: -

“...In civil cases a prima facie case is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter...”

37. It is not in dispute that the Applicant transported the subject cargo from the Port of Mombasa to Kampala, Uganda using thirty-six (36) containers secured from the Interested Party. It is equally not contested that the containers are yet to be returned as per the Interested Party’s averments. Further, the delay has occasioned accrued charges which the Interested Party confirms that as of 3rd August, 2024, the amount was standing at over USD 512,000 and continues to accrue daily.



38. According to the Bills of Lading exhibited, it was the duty of the 2nd Respondent to ensure the transport charges were to be catered at its own costs. Similarly, it was its duty to ensure that there are no delays in clearance in Uganda so that the containers would be returned within the requisite period. On this alone, I am satisfied that a prima facie case has been established.
39. What of irreparable injury or loss? In *Nguruman* (supra), irreparable injury was defined as follows: -
- “...An injury is irreparable where there is no standard by which their amount can be measured with reasonable accuracy or the injury or harm is such a nature that monetary compensation, of whatever amount, will never be adequate remedy...”
40. The various charges that continue accruing with the continued detention of the containers are getting colossal and likely to negatively affect the future operations of the Applicant. If its license is suspended or revoked, it stands to lose clients and I do not think monetary compensation can satisfy an entity which has been self-reliant and contributing to the country’s economy in terms of taxes and creating employment opportunities for a number of people.
41. I am thus persuaded that the Applicant stands to suffer irreparable loss or injury if the equitable remedy sought herein is not granted.
42. Lastly, on balance of convenience, the court in *Pius Kipchirchir Kogo v Frank Kimeli Tenai* [2018] eKLR observed as follows: -
- “...The meaning of balance of convenience in favor of the plaintiff is that if an injunction is not granted and the suit is ultimately decided in favor of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that which would be caused to the defendants if an injunction is granted but the suit is ultimately dismissed. Although it is called balance of convenience it is really the balance of inconvenience and it is for the plaintiffs to show that the inconvenience caused to them would be greater than that which may be caused to the defendants. Should the inconvenience be equal, it is the plaintiffs who suffer? In other words, the plaintiffs have to show that the comparative mischief from the inconvenience which is likely to arise from withholding the injunction will be greater than which is likely to arise from granting it...”
43. Applying the above rationale to the present case, the continued withholding of the containers in Uganda has a direct negative impact on the Applicant and even if it succeeds in main suit, whatever award or costs made in its favour might not be of any help to it because the changes would have astronomically grow.
44. The same cannot be said of the Respondents and in particular the 2nd Respondent. If the suit is finally dismissed, it can sue to recover whatever it may have expended. It equally has a right to costs.
45. In light of my findings above, I am satisfied that the Plaintiff has satisfied the conditions necessary for the grant of the injunctory orders and I shall pronounce the specific orders at the end of this discourse.
46. Turning to the second application, the same is addressed to the Interested Party. On prima facie, the demand letter issued confirms that if the containers are not returned, the Applicant stands the risk of among others being sued by the Interested Party for the sums that have accrued to date. Therefore, I am satisfied that a prima facie case has been established.
47. On irreparable harm or injury, in its replying affidavit, the Interested Party averred that the law allows it to take such legal steps to enforce the guarantee. It is common knowledge that some of those steps



include utilizing the revolving deposit that is held by them meaning that the Applicant cannot benefit from the time to time guarantees on the strength of lack of revolving deposits. I therefore find that the Applicant stands to suffer irreparable harm or injury if its operations are halted or interfered with.

48. Lastly, on balance of convenience, it tilts in favour of the Applicant considering that the Interested Party still holds sway and in the event the suit is dismissed, they can still sue for any sums outstanding as of then. I equally return a positive finding on the second application in the second application.
49. Before making final orders on the two applications, I wish to state that the two applications are in the nature of mandatory injunctions as they seek to compel a party to do or refrain from doing something. They are not the normal restraining orders. However, I am satisfied that there exist special circumstances to warrant this court issue the said mandatory orders.
50. The party who has occasioned the whole problem is the 2nd Respondent who despite service chose not to participate in these proceedings. Being the consignee, it was its duty to ensure that the containers are transported and returned at its costs within requisite time. To date, it has chosen not to do so. It would be onerous, to punish the Applicant for actions outside its ambit and therefore, whatever charges that have accrued to date shall be borne by the 2nd Respondent.
51. On costs, the court reserves discretion. Though the two applications have succeeded, being interlocutory applications, I order that the costs shall abide the outcome of the suit.
52. The upshot of the foregoing is that the court renders itself as hereunder: -
- a. The Notice of Motion Application dated 7th June, 2024 has merit and the same is allowed on the following terms:
 - i. An order of temporary injunction is hereby issued against the 2nd Respondent, its servants, agents or anyone claiming through them compelling them to release 36 empty containers and transport the same to the shipper in Mombasa, settle any accrued storage charges, clear any accrued container detention charges and any accrued demurrage charges pending hearing and determination of the suit; and
 - ii. Costs to abide the outcome of the suit.
 - b. The Notice of Motion dated 23rd August, 2024 has merits and the same is allowed in terms of prayers 2, 3 and 5; and
 - i. Costs to abide the outcome of the suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 21ST DAY OF NOVEMBER, 2024.

.....

F. WANGARI

JUDGE

In the presence of;

N/A for the Applicant

M/S Wangui h/b for Mr. Gitonga Advocate for the 1st Respondent

N/A for the 2nd Respondent

N/A for the Interested Party



Brian, Court Assistant

