REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA,

AT MOMBASA

CIVIL, COMMERCIAL AND ADMIRALTY DIVISION

ADMIRALTY CAUSE NO. E003 OF 2021

ET TIMBERS PTE LIMITED..CLAIMANT

-VERSUS-

THE OWNERS OF THE MOTOR VESSEL'DOLPHIN STAR'...........DEFENDANTS

(Admiralty claim *in rem* against the owners of the motor vessel 'Dolphin Star' of the Port of Panama)

RULING

BRIEF BACKGROUND.

1. On 14th July, 2021, this Court delivered a ruling on an Application Notice seeking to set aside a warrant of arrest issued against the motor vessel 'Dolphin Star' (the vessel). It was the defendant's claim that the action *in rem* brought against the vessel did not fall within this Court's admiralty jurisdiction *in rem* under the provisions of Sections 20 and 21 of the Senior Courts Act 1981, and therefore, this Court had no jurisdiction to either entertain the claim so far as it concerns the action brought against the vessel or to issue a warrant of arrest against it. One of the reasons why the defendants challenged this Court's jurisdiction was because in their view, the claimant had sued the wrong party. This Court relied on Section 21(4) of the Senior Courts Act 1981 and held that the claimant properly brought the claim *in rem* as against the owners of the vessel as the said ship is beneficially owned by Defang Shipping Company Limited. The claim *in rem* could not have been brought against Starryway Trading & Shipping Company Limited as it was not in possession of the said vessel under a Demise Charter as the said company had chartered the vessel from Defang Shipping Company Limited under a Time Charter. The Court finally held that it had jurisdiction to hear the claim *in rem* and to grant the warrant of arrest.

2. Further to this, the Court relying on Rule 3.3(4) of the Civil Procedure Rules and Practice Directions of England, on its own initiative granted orders for the claimant to amend its pleadings.

3. Lastly, the Court ordered that the warrant of arrest against the vessel shall only be lifted on condition that the sum of US$ 3,000,000.00 was deposited in Court as security.

4. Aggrieved with the ruling of this Court, the defendants filed an appeal at the Court of Appeal to challenge the issue of jurisdiction, among other grounds of appeal.

5. The claimant then filed an application dated 23rd August, 2021 seeking *inter alia*, an order to compel the defendants to discharge and deliver the claimant's cargo from the vessel for transshipment, and for interlocutory judgment to be entered against the defendant for default to file an acknowledgment of service.

ORAL SUBMISSIONS

6. When the matter came up for *inter parte*s hearing, Mr. Inamdar, learned Counsel for the defendants submitted that he had filed a Record of Appeal in the Court of Appeal on 10th September, 2021, challenging the jurisdiction of this Court as to the wrongful invocation of the admiralty jurisdiction at the time of arrest of the vessel, and that alongside the appeal he had also filed an application seeking stay of the proceedings of this Court. Counsel submitted that if this Court was to hear and determine the claimant's application it would run the risk of having parallel proceedings to the Court of Appeal, and further to this, if the Court was to grant the orders sought in the claimant's application, it would affect the substratum of the appeal. The defendants' major contention was that if they were to argue the claimant's application, it would mean that the defendants had submitted to the jurisdiction of this Court. Mr. Inamdar prayed for the hearing of the Application Notice by the claimant to be deferred until after the Court of Appeal has made a decision on the defendants' application for stay

of the proceedings of this Court, pending the hearing and determination of the appeal.

7. Mr. Inamdar referred this Court to paragraph 35 in the case of **Deutsche Bank AG London Branch vs. Petroleum ASA [2015] EWCA civ 226** and submitted that the Court in the said case addressed the issue of filing of an acknowledgment of service, and at paragraph 37 of the said ruling, the Court stated that a defendant returns a second acknowledgment of service after an unsuccessful challenge to the jurisdiction and that the defendants herein are not compelled to return the acknowledgment of service. Counsel submitted that the defendants cannot file an acknowledgment of service when there is a pending application for stay of proceedings in the Court of Appeal. He submitted that the Court of Appeal being a superior Court has the jurisdiction to determine what will become of the proceedings of this Court.

8. Mr. Khagram, learned Counsel for the claimant opposed the application for adjournment and stated that the defendants' application was a delaying tactic. He submitted that the Court of Appeal did not issue an *ex-parte* stay of proceedings. He referred to an email sent to the claimant, which read as follows:-

> "Owrs refer to brokers' message the other day which is plainly misguided.
>
> As the brokers were left out of update, Owrs just write to bring them into same page where the London and Mombasa proceedings rest.
>
> In the London proceedings, the Chtrs are urged to engage the PFA application and explain why they disagree with the bill of lading already issued and made nil payment on freight, failing which the Award is coming to the Owrs' way sooner or later.
>
> In the Mombasa proceedings, the Chtrs' application made this late Aug was stayed by the court of Appeal at Mombasa and they were also summoned to respond to the Owrs' application as a matter of top urgency. In other words, no court hearing of 16th Sept will take place anymore and no cargo transshipment is ever possible without agreement from the parties concerned.
>
> In context of the above developments, brokers should now become aware how far the parties' understanding to the matters at dispute therefore the Chtrs' proposed terms of MOU in July is something completely unsensible and unreasonable to start with.
>
> With the above said, as Owrs repeated over time it is the time for Chtrs to make meaningful move if they wish to engage commercially and wish to avoid the risk of losing the legal battles and the associated costs and interest arising." (emphasis added)

9. Further to this, Mr. Khagram referred the Court to another email which reads as follows:-

> "Owners hereby declare that any and all damages or losses to vessel and losses of cargo quantity and quality onboard together with any harm or problems caused to the crew members onboard are as consequence of the prolonged ship arrest by chrs for over 5 months.

We hereby hold charterers fully responsible for all cost and risk and any other consequences in connection therewith.

Charterers are urgently requested to take action to release the vessel within today. Furthermore, charterers to pay the freight to owners immediately before 1400hrs Beijing time today as Bs/L already issued on 19 Aug." (emphasis added).

10. Mr. Khagram submitted that as per page 1 of the defendants' affidavit, they had stated that they did not intend to deposit security for the release of the ship. Counsel stated that this Court's ruling had not been set aside, and the attempt to defer the hearing of this application should not be allowed.

11. In making reference to paragraph 35 of the case of **Deutsche Bank (supra**), he submitted that a defendant can seek to file an acknowledgment of service out of time. He also referred this Court to paragraph 52 of the said case and submitted that the defendants herein are taking it for granted that the Court of Appeal would grant them the orders for stay of proceedings and that is the reason why they were seeking for deferment of the proceedings by this Court.

12. Counsel further cited the case of **Conversant Wireless Licensing Sarl vs. Huawei Technologies Co. Ltd & others [2018] EWHC 1216 [ch].** He stated that as per paragraphs 28 to 31 of the said authority, this Court can proceed to hear the Application Notice even though there is an outstanding challenge in the Court of Appeal on jurisdiction since there is no automatic stay of proceedings after an appeal has been filed in the Court of Appeal. According to Mr. Khagram, stay of proceedings cannot be a substitute to a prayer for extension of time to file an acknowledgment of service.

13. He further referred this Court to paragraph 23 of the case of **King's College Hospital NHS Foundation Trust-And- Takesha Thomas & others [2018] EWHC 147**. He submitted that the Court in that case stated that the Court must take account of the circumstances of the case, that a stay is the exception rather that the general rule, and the party seeking a stay must provide cogent evidence that the appeal would not be stifled or rendered negatory unless stay is granted. Mr. Khagram submitted that there is no guarantee that the Court of Appeal would proceed on 18th October, 2021 to hear the application for stay of proceedings and further, they were not sure that the ruling in the said Court would be delivered expeditiously.

14. The claimant's Counsel submitted that by the defendants' own admission, the vessel is not worth US$ 2,000,000.00 and the security requested for was much higher than the value of the cargo. Mr. Khagram submitted that the Port and crew charges were not being paid, yet the same come first in priority to the claimant's claim.

15. Mr. Khagram submitted that in the **Conversant vs. Huawei case (supra)**, the Court relied on the decision in the **Deutsche Bank case** and the law of England with regard to the issue of acknowledgment of service. Mr. Khagram stated that the cargo on board the vessel is perishable and that the vessel needs to be dealt with. He also stated that all letters of credit for the cargo have expired.

16. Mr. Inamdar, responded by submitting that under paragraph 37 of the **Deutsche Bank case (supra)**, the Court stated that the defendant is not compelled to return an acknowledgment of service. He submitted that the Court of Appeal had given an early date of 18th October, 2021 for hearing of the defendants' application. He urged this Court to look into the proportionality of the foregoing. Counsel submitted that the Court of Appeal would consider the **King's College Hospital case (supra)**. On the issue of security, Mr. Inamdar submitted that the defendant had also appealed against the order made for the deposit of security. He also submitted that they could not seek extension of time to file an acknowledgment of service before this Court, since they have appealed to the Court of Appeal.

17. Mr. Inamdar further submitted that in the **Conversant vs. Huawei case (supra)**, permission to appeal had not been granted. He added that as per paragraphs 1 and 7 of the said case, permission to appeal was declined. He referred this Court to paragraph 30 of the said case and submitted that once permission to appeal is granted, then stay can be granted. He submitted that when an appeal is pending on the issue of jurisdiction and it appears that an appeal may be rendered nugatory, one applies for extension of time. He contended that the cargo on board the vessel is not perishable and there was no fact to prove that the defendants had not paid Port charges and crew wages.

ANALYSIS AND DETERMINATION.

18. This ruling concerns two issues; first, whether the defendant should file the second acknowledgment of service after filing an appeal challenging the jurisdiction of this Court as stated by Mr. Khagram, and secondly, if so, whether further progress in the suit and claimant's application should be deferred pending the determination of the application and appeal before the Court of Appeal, as submitted by Mr. Inamdar.

19. The defendants contend that this Court should defer the hearing of the claimant's application until the Court of Appeal determines the application for stay of proceedings and subsequently, the appeal. According to Mr. Inamdar, any step and orders made by this Court will render the appeal nugatory. Further to this, the defendants claim that if they were to argue the claimant's application, it would mean that they have submitted to the jurisdiction of this Court. This Court has therefore been requested to stay its proceedings by deferring the Application Notice dated 23rd August, 2021 until the application for stay of proceedings is determined and the appeal on jurisdiction is heard and concluded.

20. Mr. Inamdar submitted that if the defendant was to argue the claimant's application, and further file the second acknowledgment of service, it would mean that the defendant had submitted to the jurisdiction of this Court. Both Counsel relied on the **Deutsche Bank Case (supra**) to buttress their claims. In the said case, the defendant (Petromena) had filed an appeal against an order whereby the Court at first instance had refused a declaration that the English Court had no jurisdiction over a claim brought by Deutsche Bank. The critical event in that case was that the defendant had filed a second acknowledgment of service, and Deutsche Bank submitted that under Rule 11(8) of the Civil Procedure Rules (CPR) of England, the filing of the second acknowledgment of service amounted to a submission of jurisdiction.

21. Rule 11 of CPR of England is drawn as follows: -

> **1. A defendant who wishes to:**
>
> > **a. Dispute the court's jurisdiction to try the claim; or**
> >
> > **b. Argue that the court should not exercise its jurisdiction may apply to the court for an order declaring that it has no jurisdiction or should not exercise any jurisdiction which it may have.**
>
> **2. A defendant who wishes to make such an application must first file an acknowledgment of service in accordance with Part 10.**
>
> **3. A defendant who files an acknowledgment of service does, not, by doing so, lose any right that he may have to dispute the court's jurisdiction.**
>
> **4. An application under this rule must-**
>
> > **a. be made within 14 days after filing an acknowledgment of service; and**
> >
> > **b. be supported by evidence.**
>
> **5. If the defendant-**
>
> > **a. files an acknowledgment of service; and**
> >
> > > **b. does not make such an application within the period specified in paragraph (4), he is to be treated as having accepted that the court has jurisdiction to try the claim.**
>
> **6. An order containing a declaration that the court has no jurisdiction or will not exercise its jurisdiction may also make**

further provision including-

a. setting aside the claim form;

b. setting aside service of the claim form;

c. discharging any order made before the claim was commenced or before the claim form was served; and

d. staying the proceedings.

7. In an application under this rule if the court does not make a declaration-

a. the acknowledgment of service shall cease to have effect;

b. the defendant may file a further acknowledgment of service within 14 days or such other period as the court may direct; and

c. the court shall give directions as to the filing and service of the defence in a claim under part 7 or the filing of evidence in a claim under part 8 in the event that a further acknowledgment of service is filed.

8. If the defendant files a further acknowledgment of service in accordance with paragraph (7)(b) he shall be treated as having accepted that the court has jurisdiction to try the claim.

22. Rule 11(8) of CPR of England is not independent to the other rules in Part 11. Part 11 should be read as a whole. Rule 11(2) provides that a defendant who wishes to challenge jurisdiction under rule 11(1) must first file an acknowledgment of service. Sub-rule 3 thereof provides that a defendant who has filed an acknowledgment of service does not by doing so, lose any right he may have to dispute the jurisdiction of the Court. Rule 11(7) then states that if the Court declines to make a declaration pursuant to Rule 11(6), then the acknowledgment of service should cease to have effect and the defendant may file a further acknowledgment of service then he should be treated as having accepted that the Court has jurisdiction to try the claim.

23. Henry Carr, J. in the case of **Conversant vs. Huawei (supra)** had this to say about Part 11 of CPR of England;

"(29) In my view, the structure of the rules is that the first acknowledgment of service does not constitute a submission to the jurisdiction, but once the court has rejected a jurisdictional challenge and the defendant chooses to file a second acknowledgment of service, that second acknowledgement of service does constitute a submission to the jurisdiction. The purpose of rule 11(8) is to give the second acknowledgment of service its normal effect in the absence of a jurisdictional challenge. <u>It is not necessary to imply that the rule is intended to have the consequence that all other steps in the proceedings must be stayed</u>." (emphasis added).

24. In further interpretation of Part 11 of CPR, Floyd, LJ., in the case of **Deutsche Bank (supra)** referred to two cases which conflicted with each other. The first case was <u>*Sage v Double A Hydraulics Ltd and Chambers v Starkings, The Times, 2 April 1992; (1992) CA Transcript No 311 (26 March 1992) (Sage/Chambers)*</u>. The judgment in that case was as follows:-

"The danger inherent in the defendant doing anything further after [the defendant] has issued a summons to set aside, lies in the risk that he may be taken to have waived his right to challenge the writ of the court's jurisdiction. It is necessary in each case to determine whether any step taken, looked at objectively, falls into that category. A useful test is whether a disinterested bystander with knowledge of the case, would regard the acts of the defendant (or his solicitor) as inconsistent with the making and maintaining of a challenge to the validity of the writ or to the jurisdiction."

25. The second case was that of <u>*Hoddinott vs. Persimmon Homes (Wessex) Ltd [2008] 1 WLR 806*</u>. It was held that the meaning of Rule 11 (1)-(5) of CPR of England was clear. The Court of Appeal stated that if a defendant filed an acknowledgment of service and failed to make an application under Rule 11(1) within the specified period, he was, as stated in Rule 11(5), to be treated as having accepted that the Court has jurisdiction to try the claim. The Court further stated that this was so despite the existence of the defendant's application to set aside the orders granting the extension of time, which no doubt carried with it the implication that the defendant did not accept that the Court had jurisdiction. The Court held that the application was by virtue of Rule 11(5), treated as abandoned.

26. Floyd, LJ. in the case of **Deutsche Bank (supra**) resolved the apparent conflict in the two abovementioned cases. He held as follows: -

"(35) The language of CPR rule 11 (8) is clear, and it is likely in the extreme that the draftsmen intended the words in paragraph (5) and (8) to have different meanings. <u>The correct cause for a defendant who has failed in a jurisdiction challenge and who wishes to appeal is to ask for an extension of time for filing the acknowledgment of service sufficient to enable his application for permission to appeal, or his appeal, to be determined. It is quite unrealistic to suppose that a sensible claimant, or if not the court, would refuse such an extension when the effect of such a refusal would be to render the appeal nugatory. It is unnecessary therefore to read qualifying words into the rule 11(8).</u>" (emphasis added)

27. It is thus abundantly clear that the course to be followed by a defendant who wishes to appeal from the Judge's decision that a court has jurisdiction to try a claim and does not wish for a judgment in default to be entered while it is appealing, is to ask the Court to extend time for filing the 2nd acknowledgment of service pending an appeal. That has not happened in this case. The repercussion of the defendants' actions

by failing to comply with Rule 11 of CPR of England are unambiguous and as clear as day.

28. The decision to stay proceedings pending an appeal is a fact-sensitive matter and the substratum of the matter should not be interfered with, lest the appeal is turned into an academic exercise and further cause irreparable harm to any of the parties.

29. In deciding whether to defer the hearing of the claimant's Application Notice, as requested by Mr. Inamdar, this Court must consider two competing interests. The claimant should not be denied his right for expeditious disposal of its claim and the defendants' right of appeal should be safeguarded from his appeal being rendered nugatory. These two competing interests should be balanced. It is common ground that the appeal filed in the Court of Appeal can take a considerable length of time before determination. It is worth noting that the cargo on board the vessel being timber is very susceptible and vulnerable to the vagaries of the weather. The more the cargo remains on board the vessel, the more its value depreciates, while Port charges and crew wages continue to accrue day by day as the vessel remains berthed at the Port of Mombasa.

30. This Court has considered the case of **King's College Hospital (supra)** where Macdonald, J. held as follows: -

> **"(23) In NB v Haringey LBC [2011] EWHC 3544 (Fam), [2012] 2 FLR 125, Mastyn, J reviewed the case law in civil proceedings and held that in determining whether to grant stay the following factors should be considered by the court:-**
>
> > **i. The court must take account of all the circumstances of the case**
> >
> > **ii. A stay is the exception rather than the general rule;**
> >
> > **iii. The party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;**
> >
> > **iv. The court must apply a balance of harm test in which the likely prejudice to the successful party must be carefully considered;**
> >
> > **v. The court must take into account the prospects of the appeal succeeding. Only where strong grounds of appeal or a strong likelihood of success is shown should stay be considered."**

31. If the defendants opt to comply with the provisions of Part 11 of CPR of England and seek extension of time to file a second acknowledgment of service, I do not think that the defendants will be irreparably harmed if the claimant's application is heard and determined.

32. If the defendants' application for stay of proceedings is granted by the Court of Appeal on 18th October, 2021, then this Court will be barred from taking any further step in these proceedings and no party will have been prejudiced. However, if the application for stay is denied by the Court of Appeal, and this Court had already taken the decision to defer the hearing of the claimant's application, prejudice will have been occasioned to the claimant as it will have led to a delay in the hearing of the Application Notice dated 23rd August, 2021 that was filed under certificate of urgency. It is however apparent that what the defendants are seeking by praying for deferment of the hearing of the Application Notice dated 23rd August, 2021 is a stay of proceedings of this Court, through the back door.

33. In addition to this, I hold similar views with Henry Carr, J in the **Conversant vs. Huawei case (supra)**, where he stated as follows: -

> **"Secondly, if Huawei's and ZTE's arguments were correct, then once permission to appeal was granted, there would be no choice but to grant stay, even if that would lead to injustice. For example, in a case where the respondent would be irreparably prejudiced by a grant of a stay and the balance of justice would indicate that a stay should be refused, nonetheless the mere existence of an appeal on jurisdiction would mean the claim would be have to be frozen. <u>I would be reluctant to reach that conclusion, and I do not accept that I am required to do so.</u>"** (emphasis added)

34. The Court of Appeal sitting in Mombasa did not issue *ex parte* stay of the proceedings of this Court when the Counsel on record appeared before the said Court for directions. The mere fact that there is an appeal challenging the jurisdiction of this Court does not mean that the claimant's claim should go into stasis. This will only occasion prejudice to the claimant. It would mean that during litigation whenever a party is aggrieved with an order of the Court and exercises his right to appeal, then it would lead to an automatic freeze of the suit in the Court appealed from.

35. This Court has addressed this issue at length to demonstrate that this suit will continue to be prosecuted unless the Court of Appeal directs otherwise. The defendants have herein already filed their response to the claimant's Application Notice dated 23rd August, 2021 and each Counsel has filed their list of authorities. This Court will therefore proceed to give directions as to the hearing of the said application.

DATED, SIGNED AND DELIVERED AT MOMBASA ON THIS 8TH DAY OF OCTOBER, 2021. IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO THE COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL, 2020 AND SUBSEQUENT DIRECTIONS, THE RULING HEREIN HAS BEEN DELIVERED THROUGH TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Khagram for the claimant

Mr. Inamdar for the defendants

Mr. Oliver Musundi- Court Assistant