



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADMIRALTY CLAIM NO. 3 OF 2020

SHIPMARC AGENCY & LOGISTICS LIMITED.....CLAIMANT

-VERSUS-

THE OWNERS OF MOTOR VESSEL "TANYA".....DEFENDANT

RULING

[1] This ruling is in respect of the Application Notice dated **29 September 2021**. The application was filed on behalf of the claimant by M/s Mwakireti & Asige Advocates pursuant to **Sections 1A, 1B and 3A** of the **Civil Procedure Act, Chapter 21** of the **Laws of Kenya**, as well as **Order 42 Rule 6** and **Order 50 Rule 6** of the **Civil Procedure Rules, 2010**; among other provisions of the law. The claimant seeks orders that:

[a] the application be certified as urgent and that service thereof be dispensed with in the first instance; (spent)

[b] pending the hearing and determination of the application *inter partes*, the Court be pleased to grant stay of proceedings and stay of execution of its order and/or award made on **24th September, 2021**, including the order that the **Motor Vessel "TANYA"** remains under arrest until the hearing and final determination of the application herein; (spent)

[c] until the hearing and final determination of the intended Appeal to the Court of Appeal, this Court be pleased to grant a stay of proceedings and stay of execution of its order and/or award made on **24th September, 2021**, including the order that the **Motor Vessel "TANYA"** remains under arrest until the hearing and final determination of the intended appeal;

[d] The Court be pleased to give directions as to service of the Application and/or for service of any interim orders granted herein; (spent)

[e] The application be fixed for *inter partes* hearing on such a date as the Court shall order; (spent)

[f] the costs of the application be provided for.

[2] The application was predicated on the grounds that the claimant is dissatisfied with the decision and award of this Court made on **24 September 2021**; and that it has already instructed its advocates to lodge an appeal against the decision. It was further the contention of the applicant that the intended appeal is arguable and has high chances of success; for which reason it stands to suffer substantial loss in the event of a successful outcome should the impugned orders be executed before the hearing and determination of the appeal. Thus, the claimant took the stance that the intended appeal will be rendered nugatory if the stay orders sought are not granted at this stage.

[3] The grounds aforementioned were explicated in the Supporting Affidavit sworn on **29 September 2021** by **Kailesh Chauhan**, the claimant's Managing Director, in which he deposed that the effect of the order dated **24 September 2021** was that the defendant is free to begin the process of execution and to have the subject motor vessel released; yet the claimant has filed a Notice of Appeal dated **24 September 2021** signifying its intention to appeal the orders. **Mr. Chauhan** therefore reiterated the applicant's posturing that the intended appeal will be rendered nugatory unless the orders sought are granted. The claimant exhibited a copy of the Notice of Appeal as **Annexure "KC1"** to the Supporting Affidavit.

[4] On behalf of the defendant, a Replying Affidavit sworn on **5 October 2021** by **Mr. Vincent Omollo**, Advocate, was filed herein on **6 October 2021**. He averred that the impugned ruling resulted in a negative order; and therefore is incapable of stay. He explained that the claimant had initially filed **Admiralty Claim No. 1 of 2018** against the defendant and obtained a warrant of arrest of **Motor Vessel "TANYA"** on **14 March 2018**; and that shortly thereafter, that claim was struck out. He added that the claimant then filed the instant claim and obtained another warrant of arrest, thereby occasioning huge losses to the defendant in the sense that wages have to be paid to crew and

yet the defendant is unable to use the ship. **Mr. Omollo** further averred that, due to the lengthy stay of the ship on the anchorage, the condition of the ship has deteriorated so much that it is in need of urgent repairs. He therefore urged the Court to find no merit in the application and to dismiss it as the claimant has not shown how the intended appeal is arguable or how it has high chance of success.

[5] A Further Affidavit was filed on behalf of the claimant, sworn by **Mr. Kailesh Chauhan** on **12 October 2021**, refuting the allegations made in **Mr. Omollo's** Replying Affidavit. For instance, at paragraph 6 of the Further Affidavit, **Mr. Chauhan** refuted the assertion that this claim was instituted shortly after the previous **Admiralty Claim No. 1 of 2018** was struck out. He explained that, whereas **Admiralty Claim No. 1 of 2018** was struck out on **25 January 2019** on jurisdictional grounds, this particular claim was not instituted until **3 September 2020**; about 1 year and 8 months later. He further pointed out that if any loss or damage was suffered by the defendant as alleged by **Mr. Omollo** then it was due to the willful indolence and negligence on the part of the defendant. **Mr. Chauhan** reiterated the claimant's stance that the setting aside of the Warrant of Arrest against **Motor Vessel "TANYA"** through the ruling dated **24 September 2021** is indeed a positive order as it changes the status of the vessel. He pointed out that there is a set procedure for the release of a ship which is yet to be undertaken with regard to the subject vessel; and is therefore capable of being stayed.

[6] Pursuant to the directions given herein on **14 October 2021**, the application was canvassed by way of written submissions. Consequently, in his written submissions dated **21 October 2021**, **Mr. Asige** proposed two issues for determination, which appear to me to be two sides of the same coin, namely:

[a] Whether the applicant has satisfactorily discharged the conditions warranting the grant of stay of execution of decree pending appeal; and

[b] What considerations the Court should bear in mind in determining the stay application.

[7] Counsel then made reference to the **Senior Courts Act, 1981** as imported by virtue of **Section 4 of the Judicature Act, Chapter 8 of the Laws of Kenya** as the basis for the arrest of the subject ship. He explained that this is only a temporary measure pending resolution of the dispute between the parties. He pointed out that the instant application was filed without undue delay and that the other conditions provided for under **Order 42 Rule 6 of the Civil Procedure Rules** have likewise been met. In particular, **Mr. Asige** submitted that, as the ship is not registered in Kenya, the claimant stands to suffer substantial loss should it be released to its owners before the hearing and determination of its appeal. He relied on **Butt vs. Rent Restriction Tribunal** [1982] KLR 417 and **R W W vs. E K W** [2019] eKLR. The case of **National Industrial Credit Bank Ltd vs. Aquinas Francis Wasike & Another** [2006] eKLR was also cited in support of the argument that it was imperative for the defendant to demonstrate that it is in a position to satisfy any orders of the Court of Appeal in the event of a successful appeal.

[8] On security, counsel relied on **H G E vs. S M** [2020] eKLR for the proposition that it is sufficient for the claimant to state that it is ready to provide security; and that the purpose of security is to simply guarantee the due performance of such decree or order as may ultimately be binding on the applicant. Thus, it was the submission of **Mr. Asige** that the claimant has discharged the obligation under **Rule 6 of Order 42, Civil Procedure Rules**, bearing in mind that the impugned order did not yield a money decree.

[9] In response to **Mr. Omollo's** averment that the order sought to be stayed is in the nature of a negative order, and therefore not amenable to stay, **Mr. Asige** submitted that the decision of **24 September 2021** did not effectively release **Motor Vessel "TANYA"** from arrest, in the sense that no Release Order, issued by the Admiralty Marshall, Mombasa, was ever issued or served. Counsel endeavoured to distinguish the case of **Republic vs. Kenya Revenue Authority & Another, Ex Parte Rayan Logistics Ltd**, that **Mr. Omollo** relied on and in place thereof, urged the Court to be guided by the decision of the Court of Appeal in **Cooperative Bank Limited vs. Banking Insurance & Finance Union Kenya** [2015] eKLR for the holding (Per **Hon. Kantai, JA**) that:

"An order for stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposed the existence of a situation to stay – called a "positive order" – either an order that has not been complied with or has partly been complied with..."

[10] Consequently, **Mr. Asige** took the view that the negative order principle does not apply in this case. He urged the Court to note that the impugned ruling required the respondent to proceed to perform positive order of having the vessel released, which is yet to happen; and therefore is amenable to stay to enable the claimant proceed with its intended appeal.

[11] On his part, **Mr. Omollo** submitted that the application is incompetent in so far as it seeks stay and yet there are no proceedings to be stayed. He pointed out that the claim was struck out and therefore there is no claim in *rem* which the Court can stay. In his view, an order striking out a suit can be likened to an order dismissing a suit; and is therefore a negative order which cannot be stayed. He relied on the **Republic vs. Kenya Revenue Authority and Another, Ex Parte Rayan Logistics Limited** (supra) to support his argument. He nevertheless prayed that sufficient security, including an order for the repair of the ship in the interim, be made for compliance by the claimant, should the Court be inclined to grant the orders sought.

[12] I have carefully considered the application in the light of the averments set out in the respective affidavits filed by the parties, as well as the written submissions filed by their counsel and the useful authorities relied on by them. The brief background to the application is clear from the pleadings and the proceedings held herein, and has been well captured by learned counsel in their submissions, namely: that the claimant herein filed this claim on **3 September 2020** for **USD 728,705.01** in respect of goods and materials supplied and services rendered. The claim was filed contemporaneously with an application for a warrant of arrest in respect of **Motor Vessel "TANYA"**. The application was allowed and a warrant of arrest was issued ex parte on **3 September 2020**.

[13] The defendant thereafter filed an application for the striking out of the claim; which is the application that gave rise to the impugned ruling dated **24 September 2021**. The Court (Hon. Chepkwony, J.) consequently ordered that:

[a] An order does and is hereby issued striking out the claimant's claim as is in the Claim Form filed on **3 September 2020**;

[b] An order does and is hereby issued setting aside the warrants of arrest dated **3 September 2020**;

[c] The defendant is awarded costs of this matter.

[14] In the premises, the general rule is that the defendant, as the successful litigant herein, is entitled to the outcome of this litigation by dint of the ruling of **24 September 2021**; and unless sufficient cause be shown for stay, the defendant ought to be left to enjoy his success without undue delay or restrictions. Hence, in **Machira T/A Machira & Co. Advocates vs. East African Standard (No. 2)** [2002] KLR 63, it was held that:

"The ordinary principle is that a successful party is entitled to the fruits of his judgment or any decision of the court giving him success at any stage. That is trite knowledge. This is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way we handle applications for stay of further proceedings or execution, pending appeal...in the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in the courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court."

[15] Nevertheless, **Order 42 Rule 6** of the **Civil Procedure Rules** recognizes that:

"No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order, but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside..."

[16] In the premises, the single issue that arises for determination herein is whether the claimant has satisfied the conditions set out in **Rule 6(2) of Order 42**, namely:

[a] **that substantial loss may result to the applicant unless the order is made;**

[b] **that the application has been made without unreasonable delay.**

[c] **that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.**

[17] However, before turning attention to the merits of the application, it is imperative to address the technical objection taken by **Mr. Omollo**; namely, that the impugned order being in the nature of a negative order, is not amenable to stay. I have no quarrel with the position taken in **Republic vs. Kenya Revenue Authority, Ex Parte Rayan Logistics Ltd** (supra) that:

"...a stay of execution is not available where the court has declined to issue judicial review orders since a refusal to issue the orders cannot be executed. A broader holding would be that whenever a Court strikes out a suit and refuses to grant the substantive orders sought by the court a stay of execution is not available since any such stay of execution would not be directed at a decision against which the intended appeal is not directed."

[18] Nevertheless, it is not lost on the Court that the **Rayan Logistics Ltd Case** involved a public body; and that while the Court (**Hon. Ngugi, J.**) was in no doubt that a negative order is not capable of being stayed, he was invited, by dint of the prayers sought, to consider whether conservatory orders could nevertheless issue in the interest of justice. In the result, the application was allowed on account of the prevailing economic conditions caused by the COVID-19 pandemic and the ensuing economic downturn; the applicant having failed to satisfy the conditions for the grant of a conservatory order.

[19] Hence, in **Cooperative Bank Limited vs. Banking Insurance & Finance Union Kenya**, the Court of Appeal explained that:

"An order of stay of execution is ordinarily an interim order which seeks to delay the performance of positive obligations that re set out in a decree as a result of a judgment. The delay of performance presupposed the existence of a situation to stay – called a "positive order"- either an order that has not been complied with or has partly been complied with...The Court has identified negative orders that are incapable of execution. Consequently, an order for stay of execution cannot be issued in respect of such an order."

[20] The same approach had been taken by the Court of Appeal in **William Wambugu Wahome vs. Registrar of Trade Unions & Another** [2006] eKLR, thus:

"By dismissing the Judicial Review Application, the Superior Court did not thereby grant any positive order in favour of the Respondents which is capable of execution. If the order sought is granted, it will have the effect of reviving the dismissed application. This Court cannot undo at this stage what the superior court has done. It can only do so after the hearing of the appeal."

[21] In the premises, it is plain that the orders issued vide the ruling dated **24 September 2021**, being negative orders, are incapable of being stayed. To stay those orders would be to revive and reinstate a suit which has, for all intents and purposes, been struck out. It is within that context that I find it unnecessary to look at the application from the prism of **Order 42 Rule 6, Civil Procedure Rules**.

[22] The foregoing notwithstanding, the claimant has demonstrated that it has filed a Notice of Appeal and therefore that it has in fact filed an appeal, from the standpoint of **Rule 75 of the Court of Appeal Rules**. It is also plain that the instant application was filed without undue delay; having been filed on **29 September 2021**, only 5 days after the impugned ruling. There is further no denying that the claim is for a substantial sum of money; and that the ship is the only known property that the claimant would have recourse to for the satisfaction of any decree/order that may ultimately be binding against the defendant. The vessel itself is not registered in Kenya. The implication here is that should the ship be released in line with the ruling dated **24 September 2021**, the claimant may be left in a rut; with no or little likelihood of ever recovering its **USD 728,705.01** in the event of a successful appeal and favourable judgment.

[23] Hence, these circumstances aforementioned bring to the fore the question whether the claimant's right to appeal should thus be rendered otiose simply because no order of stay is available to an unsuccessful litigant. In the **Rayan Logistics Ltd Case, Hon. Ngugi, J.** took the view, which I entirely agree with, that:

“...The Katiba Institute Case seems to suggest that there is a narrow category of cases where a Court may invoke its inherent jurisdiction as well as Article 23 of the Constitution to grant conservatory orders aimed, primarily, at preserving the subject matter of the appeal in appropriate cases. In this narrow category of cases, the Courts would be willing to grant such conservatory orders even where the orders appealed against are “negative orders” not capable of being stayed in the “traditional way.”

[24] I am persuaded that this is one such case in which it would be in the interest of justice to preserve the subject matter pending the hearing and determination of the intended appeal. Accordingly, it is hereby ordered, pursuant to the inherent powers of the Court under **Section 3A of the Civil Procedure Act**, that:

[a] An Order be and is hereby granted staying the execution of the order and/or award made herein on **24th September, 2021**; and hence the **Motor Vessel “TANYA”** shall remain under arrest pending the hearing and final determination of the intended appeal;

[b] The costs of the application be costs in the intended appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 3RD DAY OF
DECEMBER, 2021
OLGA SEWE
JUDGE**