



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 15 OF 2017**

EMMESS TRANSPORT LIMITED .....1<sup>ST</sup> APPLICANT

SPEAR LOGISTICS (K) LIMITED .....2<sup>ND</sup> PLAINTIFF

VERSUS

INTERCON FREIGHT LOGISTICS LIMITED ..... DEFENDANT

AND

KENYA REVENUE AUTHORITY. .... 1<sup>ST</sup> INTERESTED PARTY

KENYA PORTS AUTHORITY. ....2<sup>ND</sup> INTERESTED PARTY

ALLIED WHARFAGE LIMITED. .... 3<sup>RD</sup> INTERESTED PARTY

INTERPEL INVESTMENTS LIMITED. .... 4<sup>TH</sup> INTERESTED PARTY

**RULING**

1. Through an application dated 8<sup>th</sup> February, 2017 the applicant sought the following orders:-

(i) Spent;

(ii) Spent;

(iii) Pending the hearing and determination of this suit, an injunction be issued restraining the interested parties whether by themselves, their agents, employees, assigns, servants or any other person claiming or acting under their instructions from releasing, disposing of, dispatching, selling, diminishing the value of, dealing and interfering in any manner whatsoever with the following containers and goods cleared by the 2<sup>nd</sup> plaintiff and awaiting transportation:-

(a) Container No. EISU3849603;

(b) Container No. MRKU9969549;

(c) Container No. ESPU2032963;

(d) Container No. XINU1177429; and

(e) Container No. TRLU7539943;

(iv) That the costs of this application be awarded to the applicant.

2. The application is premised on the provisions of Order 51 rule 1, Order 40 rules 1, 2 and 3 of the Civil Procedure Rules, 2010, Section 1A, 1B, 3A and 63(e) of the Civil Procedure Act and all other enabling provisions of the law. It is supported by the grounds on the face of it and the supporting affidavit of Salahudeen Hussain Hajee Mohamed sworn on 8<sup>th</sup> February, 2017. Counsel for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> interested parties filed their respective responses to the said application. There was no response by the defendant. This court notes that interlocutory judgment was entered against it on 20<sup>th</sup> March, 2017 due to failure to enter appearance.

3. The position taken by Mr. Esmail, Learned Counsel for the plaintiffs/applicants was that the defendant had not challenged the former's lien to hold on to the defendant's goods. He argued that his application was not opposed, thus the temporary injunctive orders issued should be confirmed pending the hearing and determination of the case.

4. Counsel submitted that the interested parties concern is the payment of the charges which are accruing as a result of their custody of the containers. In his view, such payments can only be made at a later date. He contended that the interested parties have sufficient security under the law and the goods could not be spirited away without payment of charges. He cited the provisions of section 42 of the East African Community Customs Management Act (EACCM Act) which vests the 1<sup>st</sup> interested party with the powers to forfeit goods if duty is not paid and to offset all other charges due to the parties. Counsel also stated that the provisions of sections 68 and 130 of the EACCM Act are relevant.

5. He relied on the case of **Giella vs Cassman Brown** [1973] EA 358 on the principles for grant of an injunction. He also cited the case of **Upward Scale Investments & 7 Others vs Mwangi Keng'ara & Co. Advocates** [2017] eKLR where it was stated that the nature for security for costs is to ensure firstly that the party is not left without recompense. Counsel observed that in the present case, the interested parties had not requested for security for costs and in any event, the goods do amount to security for costs. On the same point, he relied on the case of **Caltex Oil (Kenya) Limited vs Rono Limited** [2016] eKLR, where the Court of Appeal stated that pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour.

6. Mr. Mbaye, Learned Counsel for the 1st interested party submitted that under Section 3 of the Kenya Revenue Authority Act and Section 16 of the Government Proceedings Act, the 1<sup>st</sup> interested party cannot be enjoined from carrying out its duties. He further stated that under the provisions of section 42 of the EACCM Act, the Commissioner of customs can deal with the goods as he deems fit after the expiry of 30 days as the goods in issue were transit goods. Whereas the 1<sup>st</sup> interested party has a statutory lien, the applicant has a contractual lien over the goods. Under section 130 of the EACCM Act, the 1<sup>st</sup> interested party has a lien over the goods until duty is paid and its lien supersedes others. He further argued that if the court grants the orders sought, the effect will be to remove the goods from the realm of transit goods and to localize the same, which would attract duty.

7. Counsel relied on the case of **Power Solutions Limited vs CMA CGM Kenya Ltd. & 2 Others** [2013] eKLR, an authority supplied by Counsel for the 4th interested party where the court held that non-payment of storage charges was undesirable.

8. Mr. Mbaye referred to the provisions of section 85(2) of the EACCM Act which is to the effect that when goods are entered, the Commissioner may seek security for the goods to forestall non-recovery of payment. Mr. Mbaye sought security for their taxes and costs by way of a bank guarantee. He prayed for the application to be dismissed.

9. Mr. Turasha Kinyanjui, Learned Counsel for the 2<sup>nd</sup> interested party associated himself with the submissions by Mr. Mbaye and stated that the 2<sup>nd</sup> interested party cannot be enjoined. Counsel submitted that they are in custody of 2 containers which have accumulated storage charges of US Dollars 6,720.00. He added that the containers continue to attract charges until cleared from the port. Their apprehension was that they might not be paid as the 1<sup>st</sup> interested party has a priority over them in payment of its dues. Counsel submitted that he had raised the issue of a bank guarantee for the said amount in paragraph 3 of the 2<sup>nd</sup> interested party's defence. He prayed for a bank guarantee for the said amount. He submitted that the case of **Upward Scale Investments Co. Ltd & Others** (supra) was not applicable to issues in this case.

10. Mr. Okadia, Learned Counsel for the 3<sup>rd</sup> interested party submitted that their only interest was on the charges arising from storage of one container. He submitted that the 3<sup>rd</sup> interested party may not recover its storage charges due to the provisions of section 42(4) of the EACCM Act. Counsel further stated that they were willing to release the goods upon payment of their charges accruing from 3<sup>rd</sup> February, 2017 at US dollars 80 per week and handling charges of US dollars 120 for container TRLU7539943.

11. Ms. Wamithi, Learned Counsel for the 4<sup>th</sup> interested party relied on her replying affidavit filed on 22<sup>nd</sup> March, 2017, the supplementary affidavit filed on 3<sup>rd</sup> May, 2017 and her list of authorities. She submitted that the 4<sup>th</sup> interested party was nominated by the 2<sup>nd</sup> interested party on 18<sup>th</sup> December, 2016 as a container Freight station (CFS) to provide storage services of 2 containers under the consignee name Elizabeth Kaka Sauda of South Sudan. CFS handling services and storage charges as at 21<sup>st</sup> March, 2017 had accrued to the tune of US dollars 6,200. Counsel added that the said amount must be paid before release of the containers and had in paragraph 4 of the supplementary affidavit sought deposit of security for the payment of all the amounts including costs of this suit. In her view, no prejudice would be occasioned by such deposit. She requested that the applicant be ordered to deposit Kshs. 2 Million in respect to the 4<sup>th</sup> interested party as at the end of the trial, the only party that stands to benefit in priority is the 1<sup>st</sup> interested party. Counsel further submitted that there is no prayer in the plaint in respect to container No. IXNU11177429 which the 4<sup>th</sup> interested party is holding thus any orders granted will be in perpetuity.

12. Counsel further stated that the value and the nature of the goods in the containers is unknown and an inventory would put all parties at ease of what is in the said containers. She cited the case of **Power Solutions Limited vs CMA CGM Kenya Limited & 2 Others** (supra) where Kasango J., was of the view that an early date would assist due to grey areas in the suit. She also referred to the case of **Council of Governors vs Senate & Another** [2014] eKLR where the Supreme Court at paragraph 29 outlined the considerations be taken into account to safeguard the issue of costs. She prayed for the application to be dismissed with costs.

13. In response to Mr. Mbaye's submissions, Mr. Esmail responded that this matter could have been settled out of court but the 1<sup>st</sup> interested party knows that for each day that they delay, it leads to charges to their credit, as such he was not being candid. If they had no interest on the lien, they should have said so. He further stated that the courts have time and again enjoined the Government on some of its aspects.

14. Counsel submitted that section 42 of the EACCM Act gives the 1<sup>st</sup> interested party a statutory lien that allows them to collect duty when duty is payable thus adding credence to his argument that the 1<sup>st</sup> interested party has power to forfeit the goods.

15. With regard to the storage charges, he submitted that they keep on accruing and in the long run they will be left with nothing. He expressed the view that the 1<sup>st</sup> interested party should facilitate its tax payers to recover its money.

16. In response to Ms. Wamithi's submission on the non-inclusion of container No. XINY1177429 in the plaint, Counsel submitted that there was an oversight in drafting of prayers 3 and 4 of the amended plaint but the said container was captured in the present application. As such, they would apply at an appropriate

time to further amend the amended plaint. He added that the Kshs. 2 Million being sought by Ms. Wamithi as security for costs has not been expounded on so as to show how it was arrived at. He prayed for his application to be allowed with costs.

## **ANALYSIS AND DETERMINATION**

The issues for determination are:-

- (i) If the 1<sup>st</sup> and 2<sup>nd</sup> respondents can be enjoined; and
- (ii) If a case has been made out for grant of the orders sought.

17. Although Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> interested parties submitted that injunctive orders cannot be granted against them as it would be contrary to the law, I am of the view that the said orders can be granted and have in the past been granted by the courts. In the case of **Pankaj Vraylal Somaia & Another vs Kenya Revenue Authority & 2 others** [2015] eKLR, the court had the following to say:-

*"the law on injunctive relief, just as any limb of law has grown to great refinement in order to provide for situations which were not exactly foreseen before. Therefore the court has to consider the entire and peculiar circumstances of each case in order to determine whether an injunction is deserved or not. And in so doing, court has to be minded to take a path with less risk of injustice should it turnout that the court was wrong in issuing the injunction."*

18. The 1<sup>st</sup> interested party's concern is that if the orders are granted as prayed, the effect will be to domesticate the goods in issue, thus duty will be payable. Mr. Esmail argued that the property in the goods constitute sufficient security for duty that may be due to the 1<sup>st</sup> interested party. Counsel for the 2<sup>nd</sup> to the 4<sup>th</sup> interested parties concern is in respect to storage charges due to them due to the fact that the 1<sup>st</sup> interested party has a statutory lien over the goods. They may therefore suffer irreparable loss if security is not deposited by the applicant.

19. This court has considered all the arguments advanced in support of each party's case and the statutory provisions relied on as well as decided cases. I see no justification to deny the applicant the orders sought. In so stating, I am guided by the case of **Giella vs Cassman Brown Company Limited** (supra) on the principles for the grant of an order of an injunction. I therefore grant orders for an injunction as prayed in the application dated 8<sup>th</sup> February, 2017 pending the hearing of the suit herein.

20. On the issue of security for costs, Order 26 Rule 1 of the Civil Procedure Rules, 2010 provides as follows;

*"In any suit the court may order that security for the whole or any part of the costs of any Defendant or third or subsequent party be given by any other party".*

21. The case of **Keary Development Vs Tarmac Construction (1995) 3 ALL ER 534** was cited with approval by the Court of Appeal in **Ignazio Messina & Another vs Stallion Insurance Co. Ltd [2005] eKLR** on the principles to be considered on the issue of security for costs:-

*(i) "The court has a complete discretion whether to order security and accordingly it will act in the light of all the relevant circumstances;*

*(ii) The possibility or probability that the plaintiff company will be deterred from pursuing its claim by an order for security is not without more a sufficient reason for not ordering security;*

*(iii) The court must carry out a balancing exercise. On the one hand it must weigh the injustice to the plaintiff if prevented from pursuing a proper claim by an order for security. Against that, it must weigh the injustice to the defendant if no security is ordered and at the trial the plaintiff's*

*claim fails and the defendant finds himself unable to recover from the plaintiff the costs which have been incurred by him in his defence of the claim;*

*(iv) In considering all the circumstances, the court will have regard to the plaintiff company prospects of success. But it should not go into the merits in detail unless it can clearly be demonstrated that there is a high degree of probability of success or failure;*

*(v) The court in considering the amount of security that might be ordered will bear in mind that it can order any amount up to the full amount claimed by way of security, provided that it is more than a simply nominal amount, it is not bound to make an order of a substantial amount;*

*(vi) Before the court refuses to order security on the ground that it would unfairly stifle a valid claim, the court must be satisfied that, in all circumstances, it is probable that the claim would be stifled;*

*(vii) The lateness of the application for security is a circumstance which can properly be taken into account”.*

22. This court is not oblivious to the fact that charges for the applicant’s containers held in storage by the 2nd to the 4th interested parties continue to pile day by day, it would therefore be unconscionable if the court failed to cushion the said interested parties whose interest do not rank in priority over the goods in issue. The 1st interested party's interest is secured by the provisions of section 42(4) of the EACCM Act. Mr. Mbaye did mention the issue of stripping of the containers to ascertain the nature of the good contained therein. The 1st interested party is at liberty to strip the containers to ascertain the value of the goods and move the court in the event that the value of the said goods will not be adequate to secure its interest.

23. I therefore make orders for the applicant to deposit the sum of Kshs. 4 Million shillings in court as security for the said storage charges and costs within 30 days from today. Due to the issue of the accruing charges, this case will be accorded priority hearing. No order as to costs.

**DELIVERED, DATED and SIGNED at MOMBASA on this 6<sup>th</sup> day of June, 2017.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms. Gathoni holding brief for Mr. Esmail for the plaintiff/applicant

No appearance for the defendant

No appearance for the 1st Interested Party

No appearance for the 2nd Interested Party

Mr. Masore holding brief for Mr. Okadia the 3rd Interested Party

Mr. Kamami holding brief for Ms Wamithi for the 4th Interested Party.

Mr. Oliver Musundi - Court Assistant