



REPUBLIC OF KENYA



KENYA LAW
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Kenya Fishing Industries Corporation v Kalolwanga Engineering Services (Civil Application E088 of 2023) [2024] KECA 1575 (KLR) (8 November 2024) (Ruling)

Neutral citation: [2024] KECA 1575 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E088 OF 2023
S OLE KANTAI, KI LAIBUTA & GV ODUNGA, JJA
NOVEMBER 8, 2024**

BETWEEN

KENYA FISHING INDUSTRIES CORPORATION APPLICANT

AND

KALOLWANGA ENGINEERING SERVICES RESPONDENT

(Being an application for stay of execution and proceedings against the ruling of the High Court of Kenya at Mombasa (Wangare, J.) delivered on 13th September, 2023 in JR. Misc. Civil Application No. E007 of 2023)

RULING

1. The applicant herein, Kenya Fishing Industries Corporation, is aggrieved by the decision made by Hon Justice Wangare Macharia made on 13th September, 2023 in Mombasa JR Misc. Application No. E007 of 2023. It has filed a Notice of Appeal dated 14th September 2023.
2. In the present Notice of Motion dated 21st September 2023, the applicant essentially seeks orders: that this Court grants a stay of execution of the ruling of Hon. Lady Justice Wangare Macharia delivered in Misc. Application No. E007 of 2023 on 13th September 2023 and further proceedings in the same matter pending hearing and determination of the appeal against the said ruling.
3. The said application is supported by an affidavit sworn by the applicant's Ag. Chief Executive Officer, Dr Mikah O. Nyaberi, on 21st September 2023. According to the deponent, the applicant is a state corporation established under legal Notice No. 214 issued on 23rd November 2018 titled Kenya Fishing Industries Corporation Order; that the applicant operates the fishing port at Liwatoni Mombasa, which is gazetted under [Legal Notice No. 7 of 2019](#) in accordance with section 2 of the Fisheries Management Development Act, 2016; that the fishing vessel FV Sea Mfalme (formerly F V RA Horarkhty referred to as "the Vessel") has been docked at the said fishing port from 7th August 2020; that, through its agent, East Africa Deep Sea Fishing Ltd, the Vessel undertook to pay all necessary



- port charges incidental to its stay at the port; that, however, the Vessel changed its ownership through judicial sale after the crew initiated a claim for payment of their dues; and that, from the date of its sale, the Vessel continued to use the fishing port of Liwatoni while incurring charges in relation to electricity supply and security at the port which charges were in excess of USD 99,082 as at 9th August 2023.
4. It was averred by the deponent that the applicant initiated High Court Commercial and Admiralty Cause No E004 of 2023 (the Admiralty Cause) in an effort to recover port fees owed to it; that, by an application dated 23rd August 2023, the respondent filed a judicial review application being Misc Application No. E007 of 2023 in which it sought leave to commence judicial review proceedings aimed at challenging the said port charges and seeking the release of the Vessel, which application was opposed by the applicant; that the matter having been certified urgent, was heard inter partes and, in her ruling dated 13th September 2023, the learned Judge granted leave to commence judicial review application and further ordered that the Vessel be released; that the effect of the said order was to allow the vessel to leave the jurisdiction of the Admiralty Marshal of the High Court before the final determination of the substantive Judicial Review application, and without the Admiralty Cause being determined; that the eventuality will prejudice the applicant and is likely to render the appeal nugatory since the nature of admiralty matters is that a ship, upon sailing, can change flagship and be sold in another port destination; that absent an order of stay, the appeal, the substantive Judicial Review application and the Admiralty Cause will be rendered nugatory; and that it is in the interest of the general public that the orders sought be granted in order to allow all the three matters to be concluded and prevent loss of public funds in the event that the pending matters are determined in the applicant's favour.
 5. According to the applicant, in its intended appeal, it will challenge the jurisdiction of the Judicial Review Court to release the fishing vessel the subject of a pending maritime lien for recovery of port fees. It also intends to challenge the propriety of granting an order at leave stage whose effect is to compromise the entire judicial review application without a substantive hearing. According to the applicant, unless the orders of stay are granted, the applicant risks being cited for contempt of court while compliance with the orders being challenged is likely to lead to the sale of the vessel.
 6. The respondent opposed the application by way of a replying affidavit sworn by its director, Jude Njomo, on 5th October 2023 in which he deposed: that he is unaware of the existence of the appeal; that no orders were made against the applicant on 13th September 2023 but that, instead, orders were made against the Kenya Ports Authority, a non-party to this application; that the orders made on 13th September 2023 were negative in nature and incapable of being stayed; that the learned Judge had the power and the jurisdiction to exercise her unfettered discretion in granting the orders complained of since the applicant and Kenya Ports Authority had denied having restrained the vessel from leaving Mombasa; that, in the demand letters addressed to the respondent by the Attorney General, the applicant sought USD 10,600 as its charges for security; that there are no Warrants of Arrest against the vessel in Admiralty Claim No. E004 of 2023; that there cannot be an arguable appeal as the orders appealed against were not made against the applicant, that the vessel is a Kenyan owned vessel registered in Mombasa; and that, by their very nature, fishing vessels must leave the port for fishing and return to the port to land the catch.
 7. We heard the application on this Court's GoTo virtual platform on 24th October 2023 during which learned counsel, Mr. Penda, appeared for the applicant while learned counsel, Mr. Kinyua Kamundi, appeared for the respondent. Both counsel relied on their written submissions, which they highlighted briefly.
 8. In its submissions the applicant reiterated the averments in the supporting affidavit and averred that the court erred in issuing orders for release of the vessel when it was not sitting as admiralty court.



In support of its submissions, the applicant, in our view, inappropriately relied on the High Court decision in the case of *Re Global Tours & Travel Ltd HCWC No. 43 of 2000*.

9. On its part the respondent, without citing any authority, set out in its submissions factual matters which ought to have been set out in the replying affidavit and submitted that the applicant failed to satisfy the two tests in rule 5(2) (b) of the Rules of this Court; that there was no order issued against the applicant requiring it to do or desist from doing anything, but that what were issued were negative orders; that such orders are incapable of being executed; and that, in any case, the orders were issued against the Kenya Ports Authority; that based on its own documents, the amount allegedly due from the respondent for security and electricity is some USD 10,000; that there is no allegation that the respondent, a modern fishing vessel, will not be able to pay the said sum in the unlikely event that the applicant succeeds in the admiralty proceedings; and that, on the other hand, severe prejudice is likely to be caused to the respondent if the orders sought are granted since the respondent has to meet the expenses of running the vessel without generating any income.
10. We have considered the application and the submissions made before us. The basis for the exercise of this Court's jurisdiction under rule 5(2) (b) of this Court's Rules have now been clearly crystallised by numerous case law emanating from this very Court. By way of illustration, we shall highlight a few. The exercise of this jurisdiction is original, independent and discretionary (see *Githunguri v Jimba Credit Corporation Ltd No (2) (1988) KLR 838*). It is a procedural innovation designed to empower the Court to entertain interlocutory application for the preservation of the subject matter of the appeal where one has been filed or is intended (see *Equity Bank Ltd v West Link Mbo Limited [2013] eKLR*). It only arises where the applicant has lodged a notice of appeal (see *Safaricom Ltd v Ocean View Beach Hotel & 2 Others Civil Application No. 327 of 2009 UR*).
11. The conditions to be met before a party can obtain relief under rule 5(2) (b) have also been enunciated in case law. These are that the applicant has to demonstrate that the appeal is arguable on the one hand and, on the other hand, that if the stay sought is not granted, the appeal/intended appeal, as the case may be, will be rendered nugatory (see *Githunguri v Jimba Credit Corporation Ltd No (2) (supra)*). By the term "arguable", it is not meant an appeal or an intended appeal that will succeed, but one which raises a bona fide issue worth of consideration by the Court (see *Kenya Tea Growers Association & Another v Kenya Planters Agricultural Workers Union, Civil Application No. Nai. 72 of 2011 UR*). An appeal need not raise a multiplicity or any number of such points, and a single arguable point is sufficient to earn an applicant such a relief (see *Damji Praji Mandavia v Sara Lee Household Body care (K) Ltd Civil Application No. Nai 345 of 2005 (UR)*). It is therefore trite that demonstration of one arguable point will suffice (see *Kenya Railways Corporation v Ederman Properties Ltd Civil Appeal No. Nai. 176 of 2012*; and *Alimohamed Musa Ismael v Kimba Ole Ntamorua & 4 others Civil Appeal No. Nai. 256 of 2013*.)
12. As for the second prerequisite requirement, an appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible or, if it is not reversible, whether damages will reasonably compensate the party aggrieved (see *Stanley Kangethe Kinyanjui v Tony Keter & 5 others [2013] eKLR*). Loss to the parties on both sides of the appeal plays a central role in the determination since it is what the Court must strive to prevent by preserving the status quo (see *Total Kenya Limited versus Kenya Revenue Authority [2018] eKLR*).
13. Both limbs must be demonstrated before a party can obtain relief under rule 5(2) (b) (see *Republic v Kenya Anti- Corruption Commission & 2 others (2009) KLR 31*; *Reliance Bank Ltd v Norlake investments Ltd (2012) 1 EA 22*); and *Githunguri v Jimba Credit Corporation (supra)*.



14. In this case, the applicant intends to argue in the intended appeal, inter alia, that the learned Judge erred in granting orders without jurisdiction since the orders for the release of the vessel could not be granted in an application for judicial review; and that the effect of the orders granted was to compromise the pending substantive motion. Those issues, in our view, are not frivolous but, to the contrary, are arguable.
15. As regards the second limb of the twin principle, it is clear that what is in contest is the payment of charges for security and electricity. According to the applicant, it was owed in excess of USD 99,082 as at 9th August 2023. On the other hand, the respondent challenges the said claim and contends that, in its demand letter, the applicant sought USD 10,000 which amount the respondent contends that it is not unable to pay. In other words, the subject claim is in respect of a determinable sum of money. While we appreciate that, in the event that the vessel is disposed of or leaves the jurisdiction of the Admiralty Marshall, the applicant, should it succeed in its claim, risks losing what might be found due to it, it would be unjust to the respondent if its fishing activities were brought to a halt by restraining it from the use of its vessel. We have seen the demand letter written by the Hon Attorney General to the respondent dated 29th May 2023 in which the applicant claims from the respondent USD 10,600 on account of security and power charges.
16. We have considered the submissions made in light of the overriding objective in sections 3A and 3B of the *Appellate Jurisdiction Act*, which requires that, when exercising discretion, the principle of proportionality be taken into account. This Court in the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR appreciated that:

“...it is incumbent upon the Court to pursue the overriding objective to act fairly and justly... to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”
17. In the premises, the order that commends itself to us, and which we hereby make, is that there be a stay of release of the subject motor vessel pending the hearing and determination of the intended appeal or the appeal (if already filed), unless the respondent deposits with the applicant USD 10,600. Should the respondent deposit the said sum with the applicant, the stay would stand vacated.
18. The costs will be in the intended appeal.
19. It is so ordered.
20. The delay in the delivery of this ruling was not deliberate but was due to inadvertence for which we apologise to the parties and their counsel.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF NOVEMBER, 2024.

S. ole KANTAI

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCI Arb.

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JUDGE OF APPEAL

G.V. ODUNGA



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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR

