Kenya Ports Authority v Base Titanium Ltd (Civil Appeal 132 of 2019) [2023] KECA 449 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 449 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 132 OF 2019

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

APRIL 14, 2023

BETWEEN

KENYA PORTS AUTHORITY ..... APPELLANT

AND

BASE TITANIUM LTD ..... RESPONDENT

(Being an appeal from the Ruling of Hon Justice P.J. Otieno delivered on 3rd August 2017) in Mombasa High Court Commercial Cause 92 of 2016)

JUDGMENT

1. By his plaint dated August 26, 2016, the Respondent herein sued the Appellant before the High Court sitting in Mombasa in HCCC No 92 of 2016 seeking temporary injunction against the appellant from imposing, levying, charging or in any manner whatsoever demanding stevedoring charges from the Respondent pending the resolution of the dispute between the parties through arbitration. The Respondent further sought an injunction restraining the Appellant from unlawfully holding, detaining or in any way restricting the Respondent's shipments through the Port of Mombasa on purported account of stevedoring charges pending the same arbitration resolution.

2. The cause of action, according to the Respondent arose from, an agreement between the Respondent and the Appellant by which the Appellant allowed the Respondent to construct a private jetty (hereinafter referred to as "BTL Jetty") on a privately owned piece of land in Likoni, Mombasa to enable the Respondent be self-sufficient and independent of all external stevedoring requirements. According to the Respondent, the Appellant further granted the Respondent a waiver to operate the said Jetty pending the issuance of a port operating licence.

3. However, the Respondent averred, on February 17, 2014, the Appellant started unlawfully levying stevedoring charges on the Respondent's agents who would in turn pass on the same to the Respondent. Upon the Respondent's demand that the Appellant cease the said levies and refund

the amounts already levied, the Appellant insisted that it was entitled to levy the said charges notwithstanding the fact that the Appellant did not provide any stevedoring services. It was pleaded that attempts to resolve the matters in dispute failed to yield any fruits with the Appellant continuing with its demands and also failed to conclude the port operating licence based on its insistence to include the unlawful stevedoring charges in the formal licence agreement.

4. According to the Respondent, the *Kenya Ports Authority Act*, Cap 391 provides for arbitration as the mode of resolving disputes that arise as a result of damages caused by the Appellant in the exercise of its duties. It was the Respondent's case that the dispute in question calls for the appointment of an arbitrator to resolve the issues in dispute which the Respondent declared and issued a notice to the effect on June 29, 2016. By a letter dated August 23, 2016, the Respondent issued a notice seeking for the appointment of an arbitrator by the Chief Justice.It was the Respondent's case that since the Appellant continued to levy the said charges notwithstanding the pendency of the said dispute, it was imperative that an interim measure of protection, in the manner prayed, be accorded to the Respondent pending the resolution of the dispute as sought in the suit.

5. Together with the plaint, the respondent filed a notice of motion dated August 26, 2016, expressed to be brought under Section 7(1) of the *Arbitration Act*, 1995 and Section 62(1) of the *Kenya Ports Authority Act*, seeking substantially the same prayers as sought in the plaint. In the supporting affidavit, the Respondent reiterated the averments in the plaint and added that the cost of the construction of the said jetty was close to US$30 million and that there was a waiver pending the grant of the port operating licence. It was averred that the Standard Operating Procedures (SOP) entered into between the parties did not place any legal duty on the Appellant to provide either the Respondent or its agents with stevedoring services, and nor did it provide for levying of any stevedoring charges by the Appellant. Instead, the said SOP provided that all stevedoring activities would be carried out by the Jetty owner themselves. Though there were several meetings and communications between the Respondent and the Appellant regarding the port operating licence establishment fee, annual licence fee and wharfage charges, the issue of imposition of stevedoring charges as a condition to the conclusion of the operating licence did not arise.

6. According to the Respondent, the Respondent, through its agents was compelled to unlawfully pay the Appellant a total sum of USD 1,275,393 albeit under protest. The Respondent reiterated that unless restrained, the Appellant intended to continue the levying of the said illegal charges It was further averred that though the Respondent had initiated the arbitral process by notifying the Chief Justice of the existence of the dispute, as there was no substantive Chief Justice as at that time, the Respondent was apprehensive that the commencement of the said arbitral process was likely to delay hence the necessity of the interim measure of relief.

7. In its defence, the Appellant contended that it simply approved the design and construction installation plans of the Jetty submitted for its approval in accordance with its statutory mandate and obligations, but the operation of such facility was and still remains subject to statutory requirements being met and a mutually acceptable Port operating licence being concluded and formalised. The Appellant further denied that it has levied stevedoring charges upon the Respondent or its agents but averred that such charges are usually levied upon the vessel/vessel owners calling at Kilindini Harbour at the port of Mombasa and are paid by the respective vessel/vessel owners either directly or through their local agents. The Appellant insisted that at no time did it charge the Respondent or raise any invoices against the Respondent for the said charges. The Appellant therefore denied receipt of any monies in respect of the alleged charges and reiterated that any invoices that have been raised and any payments received by the Appellant were lawfully received from the vessel/vessel owners and/or their agents hence the Respondent has no right to claim for refunds.

8. It was therefore the Appellant's position that there was not and there could not have been any dispute between the parties to the suit as regards the payment of stevedoring charges by the respective vessels/ vessel owners to the Appellant. In the Appellant's view, the real controversy in issue between the parties related to the terms of the Port Operating Licence to be granted by the Appellant to the Respondent. In those circumstances, it was contended that the provisions of Section 62 of the *Kenya Ports Authority Act* were inapplicable to the matter and that in the absence of any agreement between the Appellant and the Respondent, any issue regarding the negotiations relating to the terms of the Port Operating Licence Agreement cannot be referred to arbitration.

9. In the Appellant's view, the matters which fall under the said Section and which the Chief Justice may be called upon to appoint an arbitrator are limited to matters where the Appellant causes damage in the course of discharging its powers conferred by Sections 12, 14, 15 and 16 of the said *Act*, and that the Arbitrator's jurisdiction thereunder is limited to determining the compensation payable for such damages. In this case, given the nature of the Respondent's grievances, it was the Appellant's position hat reliance on the said provision was misconceived and untenable as it was inapplicable in the circumstances. It was therefore urged that the Court had no jurisdiction to grant the interim measures of protection under Section 7 of the *Arbitration Act*, *1995*.

10. The Appellant, while admitting that SOP for the BTL Jetty dated February 10, 2014 was formulated and agreed upon by all stakeholders, contended that agreement was not intended to replace or contradict requirements or procedures provided for by law or regulations particularly the powers given to the Appellant to carry out stevedoring business pursuant to Section 12 of the said *Act*. It was averred that the interim waiver granted to the Respondent to load cargo at the BTL Jetty was pending the terms of the Port Operating Licence being agreed upon and approved by the Appellant's Board.

11. After considering the issues before him, the learned Judge in his decision which was titled Judgement dated 3rd August 2017, referred to Section 62 of the *Act* as regards compensation and found that the Respondent's case fell within Section 12 of the Act since it revolved around the operation of the port and port services by the Appellant. Since in the operation of its services pursuant to the alleged interim licence, the Respondent maintained that it was not liable to pay Stevedoring Charges, it was the Court's view that there was a dispute that needed resolution. In those circumstances, it was the Learned Judge's view that such a dispute could only be resolved by an arbitration. He therefore found that the Appellant had established a prima facie case for the purposes of grant of interim measure of protection as thebRespondent was only seeking a right to be heard. He accordingly granted the orders sought and advised the parties to raise the other issues before the arbitrator.

12. It was that decision that provoked this appeal.

13. According to the Appellant, the gravamen of the Respondent's contention before the Superior Court was that the Appellant was not entitled to charge stevedoring charges given that it was utilizing its own jetty for purposes of loading/unloading ships despite the fact that a Port Operating Licence was yet to be entered into between the parties or the terms thereof agreed upon. The Appellant, on the other hand, denied it had any relationship with the Respondent in so far as the question of stevedoring charges was concerned. Since the Respondent confirmed that the invoices settled by the Vessel's agents (on behalf) of the owners are back-charged to the Respondent, it was submitted that essentially, the Respondent accepted and acknowledged that its contractual relationship is with the Ship Owners and not the Appellant. Accordingly, no dispute could possible arise as between the Appellant and the Respondent arising out of the payments made for the stevedoring charges.

14. The Appellant submitted that the only recourse the Respondent had, if it was aggrieved, was to seek a refund/repayment from the ship owners with whom it had contractual relationships for the carriage of

cargo, to which the Appellant was not privy. Its position was that the matter of the negotiations relating to the terms of the Port Operating Licence and any disputes arising therefrom did not relate to the question of payment of stevedoring charges and was incapable of reference to arbitration in any event,

15. According to the Appellant, the question raised was not as regard the arbitrator's jurisdiction to hear the dispute but rather one of whether proper circumstances had arisen for the appointment of an arbitrator and consequent exercise of the power to appoint and was not a matter that could be left to the arbitrator to decide upon.

16. It was therefore submitted that the appointment made by the Chief Justice was a nullity as no or no proper circumstances had arisen to justify his exercise of the power under Section 62 of the *Kenya Ports Authority Act* and in these circumstances, the Respondent could not have established a prima facie case to entitle it to the issue of an injunction hence no interim measure of protection could be afforded by the Superior Court where the entire process was a nullity.

17. According to the Appellant, since the exercise of the power of appointment is not a mere administrative act but rather a judicial one, the Chief Justice was obliged to satisfy himself that the conditions for appointment did exist and that his jurisdiction under the appropriate statutory provision had been properly invoked. In this regard the Appellant cited *S.B.P & Co. v M/S Patel Engineering Ltd & Anor*. - Supreme Court of India Appeal (Civil) 4168 of 2003 and submitted that in the present instance, despite the Appellant's protest that no circumstances had arisen nor could a dispute be said to have arisen to warrant an appointment of arbitrator.

18. We were therefore urged to hold that where the appointment of a Tribunal is apparently invalid, no proper or lawful proceedings can take place before such Tribunal and any award made by it would be equally invalid. According to the Appellant, the Court's jurisdiction under the provisions of Section 7 of the *Arbitration Act* cannot be validly invoked as this necessarily presupposes that a dispute is pending determination before a validly constituted Tribunal with the conditions for its appointment having been met. In this regard, the Appellant relied on *Niazons (K) Ltd v China Road & Bridge Corporation Kenya* [2001] eKLR.

19. It was further submitted that the finding by the Learned Judge that the Respondent had been granted Interim Port Operating licence and that the dispute that required to be resolved was whether it was liable to pay stevedoring charges was against the evidence that was adduced before the High Court. According to the Appellant, had the Learned Judge properly considered this and the evidence that was placed before him, he would not have concluded that the Respondent had satisfied the first test of the Giella principles in establishing a prima facie case.

20. It was therefore submitted that the High Court erred in the grant of Interim relief under the provisions of Section 7 of The *Arbitration Act* when the legal requirements so to do had not been satisfied. It was sought that this Appeal be allowed and the decision of the High Court be set aside and be substituted with a decision as prayed in the Memorandum of Appeal. The Appellant also prayed that the costs of the Appeal and proceedings before the High Court be award to it.

21. On behalf of the Respondent, it was submitted that Section 7 of the *Arbitration Act* No 4 of 1995 empowers the High Court to grant an interim order to a party before or during the arbitral proceedings as a measure of protection to that party and that in instances where it is important to preserve the assets that are subject to the arbitral proceedings, the court will grant an interim injunction to the party.

    In this regard reliance was placed on Civil Application No 327 of 2019: *Safaricom Limited v. Ocean View Beach Hotel Limited & 2 Others* [2010] eKLR and Civil Appeal No 285 of 2015: *Scope Telematics International Sales Limited v Stoic Company Limited & another* [2017] eKLR.

22. According to the Respondent, the granting of an interim injunction is an exercise of judicial discretion and the Court may not readily interfere with the exercise of discretion by the High Court unless the Court is satisfied that the discretion has not been exercised judicially. Such discretion is judicial and, as is always the case, judicial discretion has to be exercised on the basis of the law and evidence. In this regard, the Respondent relied on Civil Appeal No 36 of 1983: *United India Insurance Company Limited v. East African Underwriters (Kenya) Limited* [1985] E.A. 898.

23. As to whether a prima facie case had been made, the Respondent relied on Civil Appeal No 43 of 1982: *Habib Bank AG Zurich v. Eugene Marion Yakub*, Civil Appeal No 9 of 1997: *National Bank of Kenya v. Duncan Owour Shakali & Another*, Civil Appeal No 77 of 2012: *Nguruman Limited v. Jan Bonde Nielsen & 2 Others and Mugoya Construction & Engineering Limited Case v. National Social Security Fund Board of Trustees & Another* [2005] eKLR.

24. It was submitted that the Learned Judge did not err in making a finding that there was a dispute between the parties. According to the Respondent, the determination of whether there was any damage arising from the Appellant's purported exercise of its powers under Section 12 of the *KPA Act* and consequently whether there is any compensation payable arising therefrom, falls squarely within the purview of an arbitrator to be appointed under Section 62 of the *KPA Act* and that the trial judge was conscious of his mandate and declined the invitation to delve into the merits and demerits of the dispute between the parties to be resolved in the prospective arbitration. All the High Court needed to be satisfied with was whether there existed an arbitration agreement/provision, whether the subject matter of the arbitration was under threat, whether the orders sought were an appropriate measure of protection after an assessment of the application, and for what period such measure was to be issued.

25. According to the Respondent, having established the agency relationship between the Respondent and the various vessel agents, it was the Respondent as a disclosed principal who is entitled to sue on any dispute with the Appellant rather than the various vessel owners or agents, as the Appellant suggested. Based on the *Safaricom Limited Case* (Supra) it was submitted that the factors a court is to take into account prior to granting an interim measure of protection were identified as being:

    a. The existence of an arbitration agreement;

    b. Whether the subject matter of an arbitration is under threat;

    c. In the special circumstances, which is the appropriate measure of protection after an assessment of the merits of the application; and

    d. For what period must the measure be given especially if requested for before the commencement of the arbitration so as to avoid encroaching on the Tribunal's decision making power as intended by the parties.

26. Reference was made to the case of *Seven Twenty Investments Kenya Limited v. Sandhoe Investment Kenya Limited* (2013) eKLR, where the court stated that:

> "all that a court would be interested in is whether or not there was a valid arbitration agreement and if indeed the subject matter of the arbitral proceedings was in danger of being wasted or dissipated so as to preserve the same pending the hearing and determination of the arbitral reference."

27. It was submitted that the Appellant's exercise of power to levy stevedoring charges is provided under Section 12 (1) (d) of the *KPA Act* which accords it power to, inter alia, carry on the business of stevedore and Section 12(2)(i) which accords it power to, inter alia, determine, impose and levy rates, fares,

charges, dues or fees for any service performed by the Appellant. The Respondent does not dispute the Appellant's power to carry on the business of stevedore or its power to charge for stevedoring services that it provides to port users. However, it is the Appellant's purported exercise of this power in the Respondent's context, in seeking to levy charges for stevedoring services that it does not provide, that was the subject of the Application.

28. According to the Respondent, having disputed the legality of the stevedoring charges levied upon it on account of the fact that no stevedoring services are offered to the Respondent or otherwise the vessels that ship the Respondent's product, was entitled to declare a dispute and commence the dispute mechanisms provided under the *KPA Act*. In the Respondent's view, the determination of whether there was any damage arising from the Appellant's purported exercise of its power under Section 12 of the *KPA Act* and consequently whether there is any compensation payable arising therefrom, all fall squarely within the province of an arbitrator to be appointed under Section 62 of the *KPA Act*. This submission was based on *Kenya Ports Authority v Kunston (Kenya) Limited* [2009] 2 EA. in the following passage:

> " The provision of section 62 [of the *Kenya Ports Authority Act* (Cap 39)] touches on the jurisdiction of the superior court and that the parties could not in the face of the Act providing for compulsory statutory arbitration, contract out of a statute and bring the suit instead. The court's jurisdiction had been ousted by statute and the parties could not confer jurisdiction on the superior court. There cannot be any waiver just because both parties took part in the suit. Parties cannot as a matter of public policy be allowed to circumvent a statute and once an illegality always an illegality...The suit should not have been instituted at all..."

29. Further reliance was placed on the decision in *Kenya Ports Authority v. African Line Transport Co. Limited* [2014] eKLR and we were urged to affirm the decision of the Learned Judge in granting the injunctive relief on the above basis.

30. 1n the Respondent's view, Section 62 of the *KPA Act* does not violate a party's right to a fair trial simply by providing an alternative dispute resolution forum. See the Supreme Court decision in Petition No 20 of 2017 *Modern Holdings (EA) Limited v Kenya Ports Authority* [2020] eKLR.

31. It was reiterated that the Learned Judge did not make a definitive and conclusive pronouncement on whether the Respondent had been granted an Interim Port Operating Licence as the Appellant alleges. In any event the Appellant granted the Respondent a waiver to operate the BTL Jetty pending issuance of a Port Operating License. To the Respondent, the Learned Judge simply reiterated the Respondent's factual contentions as contained in the Application and the supporting affidavits filed with the trial court and addressed himself on the proper forum for handling the dispute and avoided the temptation to make sweeping pronouncements on the parties' respective rights under Section 62 of the *KPA Act*.

32. It was submitted that by reason of the foregoing, the Appellant failed to establish any of the grounds of appeal set out in the Memorandum of Appeal and it was prayed that the Appellant's appeal be dismissed with costs to the Respondent, and that High Court's decision be upheld.

Analysis and determination

33. The issue before us is whether the Learned Judge properly exercised his discretion in granting the interim measures of protection to the Respondent. We must make it clear that the issue before the High Court was not whether the Court should remit the matter to arbitration. What was before the Court was simply an application for interim protective orders pending the arbitral proceedings. Accordingly,

the merits of the dispute was not properly before the trial court and the trial court could not be faulted for not dealing with the merits.

The Appellant has argued its case as if what fell for determination was a referral to arbitration.

34. Before us it has been argued that the Court ought not to have found that a prima facie case existed as regards the dispute. In our view, the Court could not have dealt with the issue whether or not there existed a dispute since he was not called upon to decide that issue which was what the arbitrator ought to have dealt with. This Court in the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 Others* [2003] KLR 125, dealt with the issue of prima facie case and held as follows:

> " The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are, first, a Plaintiff must show prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the Plaintiff might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience...A mere scintilla of evidence can never be enough: nor can any amount of worthless discredited evidence. It is true that the Court is not required at that stage to decide finally whether the evidence is worthy of credit, or whether if believed it is weighty enough to prove the case conclusively: that final determination can only properly be made when the case for the defence has been heard. It may not be easy to define what is meant by "prima facie case", but at least it must mean one on which a reasonable tribunal, properly directing its mind to the law and the evidence could convict if no explanation is offered by the defence...The terms "prima facie" case, and "genuine and arguable" case do not necessarily mean the same thing, for in using another term, namely a sustainable cause of action, the words "prima facie" are frequently used to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner of considering, which was in relation to the pleadings that had been put forward in the case. It would be in the appellant's interest to adopt a genuine and arguable case standard rather than one of a prima facie case, the former being the lesser standard of the two...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. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the Plaintiff's case upon trial. That is clearly a standard, which is higher than an arguable case."

35. While adopting the same position the Court of Appeal in *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR added that:

> " The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. We reiterate that in considering whether or not a prima facie case has been established, the court does not hold a mini trial and must not examine the merits of the case closely. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been or is threatened with violation. Positions of the parties are not to be proved in such a manner as to give a final decision in discharging a prima facie case. The Plaintiff need not establish title it is enough if he can show that he has a fair and bona fide question to raise

as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put, on a preponderance of probabilities. This means no more than that the Court takes the view that on the face of it the Plaintiff's case is more likely than not to ultimately succeed."

36. In this case the Learned Trial Judge found that a prima facie case had been established. What informed this view was that the material placed before him brought the case within Section 12 of the Act since it revolved around the operation of the port and port services by the Appellant. Since in the operation of its services pursuant to the alleged interim licence, the Respondent maintained that it was not liable to pay Stevedoring Charges, it was the Court's view that there was a dispute that needed resolution. We have considered the material on record and being an exercise of discretion, we can only interfere with that finding if it be shown that the discretion has not been exercised judicially. This Court will therefore interfere only if satisfied that the Judge acted on wrong principles or failed to take into account a relevant factor or took into account an irrelevant factor or short of this that the discretion is plainly wrong. Upon our reconsideration of the record, we are not satisfied that in arriving at his decision the Learned Judge committed any of these. There was material placed before him on the basis upon which he could arrive at his discretion. The issue is not whether this Court would have arrived at the said decision but whether the Learned Judge had material on the basis of which he could properly arrive at the sane decision and that in arriving at is decision he did consider that material and that his decision was not perverse or plainly wrong. See *Mbogo and Another v Shah* [1968] EA 93 at 95.

37. In this case the learned Judge considered the facts placed before him. He found that there was a dispute regarding whether or not the Appellant was entitled to levy stevedore charges on the Respondent and in light of Section 62 as read with Section 12 of the Kenya Ports Authority found that there existed a dispute for the purposes of a prima facie case. He also found that the issue was not whether damage was being suffered but the right to a hearing. In our view, since the Appellant's contention was that it was not levying the charges against the Respondent but against the vessels or vessel owners, even on a balance of convenience, the grant of the interim measures of protection was justified.

38. In the premises and as the Arbitrator has already been appointed, we find no merit in this appeal. Let the parties appear before the appointed arbitrator and ventilate their issues in that forum.

39. Consequently, this appeal fails and is dismissed with costs.

40. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023.

S. GATEMBU KAIRU (FCI Arb.)

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR