



**Starryway Trading & Shipping Co Ltd v ET Timbers PTE Limited & another
(Civil Application E026 of 2022) [2023] KECA 983 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 983 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E026 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

STARRYWAY TRADING & SHIPPING CO LTD APPLICANT

AND

ET TIMBERS PTE LIMITED 1ST RESPONDENT

**THE OWNERS OF THE MOTOR VESSEL "DOLPHIN
STAR" 2ND RESPONDENT**

(Being an application to review the orders of stay of proceedings issued in the ruling rendered by this court on 21st October 2022 arising from an appeal from the decision of the High Court of Kenya at Mombasa delivered by Njoki Mwangi J. on 18th March 2022 in Admiralty Cause No E003 of 2021)

RULING

1. ET Timbers Pte Limited, the 1st respondent, is the applicant in the application under consideration herein dated December 21, 2022, hereinafter the 1st respondent. It seeks two (2) primary orders. Firstly, that this court reopen, rehear and re-determine the 1st respondent's application dated April 27, 2022 where it sought and obtained a stay of all the High Court proceedings in Mombasa High Court Admiralty Cause No E003 of 2021.

Secondly, that the order of stay of proceedings vide ruling rendered by this court on October 21, 2022 be reviewed, set aside and rescinded.

Background And 1st Respondent's Case

2. The application is supported by grounds on the face of the application and reiterated in the supporting affidavit sworn by a director of the 1st respondent, A. Thalamuthu, dated December 26, 2022. There have been several cases filed related to this matter. It is contended that the [original] applicant Starryway



Trading & Shipping Company Ltd, hereinafter Starryway, attempted to obtain stay of proceedings of the High Court in MSA High Court Admiralty Claim No 3 of 2021, pending the delivery of this Court's ruling which was eventually delivered on October 21, 2022, and which ruled against Starryway.

3. That on August 23, 2022, whilst the ruling before this Court was pending, Starryway filed MSA High Court Miscellaneous Application No 1 of 2022, Starryway Trading & Shipping Limited vs ET Timbers Limited, seeking leave to enforce the Partial Award of the Tribunal in which it also sought, inter alia, leave to exercise lien over the 1st respondent's cargo. That Starryway had made a similar application in MSA High Court Admiralty Claim No 3 of 2021, which matter is still pending before the Superior Court. It is deposed that on August 25, 2022, before the 1st respondent received the process in MSA High Court Miscellaneous Application No 1 of 2022, it paid to the Starryway a sum of USD 628,262.21, on account of freight earned and costs which were the subject of the Partial Final Arbitral Award, which it made after the original Bills of Lading issued on March 4, 2021, were released to it by the Shipper.
4. It is deposed that in its ruling of October 21, 2022, this Court ordered there be a stay of the Superior Court's proceedings in High Court Admiralty Claim No E003 of 2021, ET Timbers Pte Limited vs. The Owners of The Motor Vessel 'dolphie Star', pending the hearing and determination of MSA High Court Miscellaneous Application No 1 of 2022, Starryway Trading & Shipping Limited vs ET Timbers Limited (Starryway) Intended Appeal.
5. The 1st respondent deposed that the stay of the proceedings in MSA High Court Miscellaneous Application No E003 of 2021 was granted to Starryway on condition it filed and served its Memorandum and Record of Appeal within 30 days of the date of the delivery of the said ruling. That Starryway filed the records as required on November 21, 2022, but did not serve until November 29, 2022, outside the time ordered.
6. The 1st respondent avers that it is an abuse of the Court process for a party to file numerous cases seeking similar reliefs, highly unjust and tantamount to lead to a miscarriage of justice for Starryway to stay the 1st respondent's claim against Defang for reason:
 - i. The freight amount of US\$ 628,262,21 including costs which was awarded to Starryway was fully paid on August 25, 2022 well before the stay of proceedings was issued;
 - ii. Starryway is not a party to the claim against Defang in High Court Admiralty Claim No E003 of 2021 and has already brought alternate proceedings in MSA High Court Miscellaneous Application No 1 of 2022;
 - iii. That the proceedings in High Court Admiralty Claim No E003 of 2021 and the Tribunal in London are not related;
 - iv. That the cargo is wasting away as the value of ET Timbers' security continues to be deliberately eroded by Starryway's and Defang's contumelious conduct;
 - v. That Motor Vessel 'Dolphine Vessel' is out of class and its safety and seaworthiness questionable;
 - vi. That it is unlikely that the Vessel is under P&I cover, and in the event of any adverse occurrence, there is real risk of its claim being rendered nugatory.



Submissions

7. The application was heard through this Court's virtual platform on February 6, 2023. Counsels present for the hearing were Dr B Musau for the 1st respondent who is the applicant in the present application, Mr Ousa Okello for the applicant (Starryway) against who the present application is brought and Mr Inamdar for the 2nd respondent. Each counsel relied on their respective affidavits and filed submissions. They highlighted their submissions before us.
8. Dr Musau's submissions are dated January 9, 2023, which he relied on as well as on the affidavits dated December 21, 2022. In his submissions, counsel reiterated what was deposed in the affidavit by the 1st respondent's director, which we have set out in the background and summary of the 1st respondent's claim herein above. Dr Musau urged that the application by Starryway was brought for collateral purposes to delay and stall proceedings before the High Court. He urged that Starryway is not a party to the 1st respondent's claim against Defang. That Starryway applied for stay for alleged freight charges of US\$ 978,000 as part of their award. That the claim for freight was paid on August 28, 2022. He urged that the continued stay of the proceedings is not in the interest of all the parties; that the 1st respondent cannot sell or transport the cargo; that the ship is deteriorating; the cargo's value is diminishing; the vessel is at the verge of sinking and no one is gaining.
9. Dr Musau urged that alternatively the Court can order both cargo and vessel be sold and the money deposited in an escrow account. With due respect to counsel this alternative prayer was not sought in the application and therefore cannot be considered.
10. Regarding the Court's jurisdiction to review its own judgment, rulings or orders, counsel cited *Standard Chartered Financial Services Limited & 2 others vs Manchester Outfitters (Suiting Division) Limited (now Known as King Wollen Mills Limited) & 2 others, [2016] eKLR* for the proposition that this Court has residual jurisdiction to review and set aside its own orders.
11. He also relied on *Kamau James Gituthu & 3 others vs Multiple ICD Ltd & another [2019] eKLR* for the proposition that the 1st respondent has met the legal threshold for exercise of this Court's residual jurisdiction.
12. Mr Okello for Starryway relied on his submissions dated January 28, 2023 and list of authorities, and the replying affidavit sworn by LI XING the officer in charge of operations at Starryway. He refutes the averments by the 1st respondent's director and stated that the Company filed the appeal on 21st November 2022 and served it on even date on both respondents; that out of abundance of caution it served the appeal physically. He contended that contrary to the claim by the 1st respondent Starryway complied with the condition given for stay by this Court. He denied that Starryway has been indolent and urged that upto date they were still waiting for the proceedings from the High Court.
13. In response to the allegations by the 1st respondent that the Starryway 's application for stay of proceedings was brought for collateral purposes, he averred that on January 1, 2019, Starryway entered into a time charter party with the owner of the vessel, the 2nd respondent, wherein the vessel was chartered to Starryway and thereafter on the January 19, 2021, entered into a voyage charter with the 1st respondent which was evidenced by a fixture note incorporating 'other terms from the GENCON94 form of voyage charter-party (the agreement) and the agreement provided, inter-alia, as follows:
 - i. The 1st respondent was to pay full freight;
 - ii. The applicant had a lien over the 1st respondent's cargo.



- iii. All disputes between the applicant and the 1st respondent would be resolved by arbitration in London
14. Starryway deposed that the 1st respondent in direct violation of the dispute resolution clause in the agreement, proceeded to make the application to the Superior Court the High Court of Kenya at Mombasa) in HC Admiralty Claim no £003 of 2021/ ET Timbers PTE Limited vs the Owners of Motor Vessel 'Dolphin Star; with intention to sell the vessel and tranship its cargo onto another vessel. He deposed that Starryway would have been seriously prejudiced and that is the reason it made an application dated the October 15, 2021 and filed in HC Admiralty Claim No 003 of 2021, ET Timbers PTE Limited vs The Owners of Motor Vessel 'Dolphin Star' seeking inter-alia to join the said proceedings and protect its interests. That the High Court of Kenya dismissed the application on the 18th of March 2022. That Starryway made an application for a stay pending appeal, which this Court granted on October 21, 2022 after arguments were made before it. He averred that from the foregoing, it was abundantly clear that the application for stay of proceedings in the High Court was not made for collateral purposes, but for sound reasons which this Court agreed with.
15. In regard to the payment made by the 1st respondent, Starryway averred that though the freight amount of USD 578,779.69 was paid together with costs, an amount of US\$ 36,187.44, balance of the freight claim remains to be decided upon by the London Tribunal. Starryway contended that the 1st respondent had no agreement with the 2nd respondent and its claim in the High Court is filed in a court without jurisdiction contrary to the dispute resolution clause and section 21 (4) of the Senior Courts Act. Further, that it was not filed for collateral purpose of side stepping the London Arbitration. The allegations that the vessel was wasting away, it was the 1st respondent to blame for filing the suit in a Court without jurisdiction, which issue it averred was one of the grounds in the appeal.
16. Mr Inamdar on his part relied on the replying affidavit dated January 18, 2023, sworn by his partner in the firm, Mr Nishit Maru. Mr Nishit on behalf of their client, reiterated that as it said before to both the High Court and this Court in its pending appeal, it does not submit to the High Court's jurisdiction in respect of the proceedings before it. The deponent denied that the 2nd respondent was in collusion with Starryway to frustrate this matter or any of the proceedings related to this matter. He deposed that the application is opposed on three grounds; First, it has no new material justifying any review. Second, much of the Supporting Affidavit simply repeats the grounds and facts stated in its previous responses to the Applicant's applications of 27th April and July 12, 2022. Third, so far as it asserts anything new, such assertions are speculative conjectures without any evidential backing. That there was nothing justifying this court to review, set aside and rescind its order for stay of proceedings.
17. Mr Nishit averred that the grounds urged in support of the application, for instance the lack of a relationship between the London Arbitration, the Partial Final Award and MSA E003 of 2021 and the alleged collusion between their client and Starryway were tired arguments that were raised before.
18. He averred that as to the proclamations about the poor state and condition of the Vessel and the prospect of the Vessel's sinking in the harbour are concerned, that a Port State Control (PSC) inspection on the Vessel took place under the auspices of the Kenya Maritime Authority (KMA) on 16th and January 17, 2023. the report shows that the auxiliary and ancillary engines are in good working order, that the safety equipment was found to be in satisfactory condition, and that certain deficiencies recorded, none were so serious as to threaten the flotation of the Vessel or imperil the cargo aboard it.
19. We have considered the submissions by counsel, as well as the affidavits by or on behalf of the parties and the authorities cited. The first question to consider is whether this Court has residual jurisdiction



to review its own ruling, and therefore to entertain this application. The second is whether the 1st respondent has met the threshold to justify the exercise of this Court's residual jurisdiction and review its ruling.

20. On the first issue, Starryway and the 2nd respondent have opposed the application, saying that nothing new has been shown to justify the exercise of the residual jurisdiction. Dr Musau submitted that this Court has the jurisdiction to review its own rulings after the 2010 Constitution. That is the confirmed position, that this Court not being a final Court has residual jurisdiction to review its own rulings. See *Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd [2014] eKLR*.
21. Dr Musau cited two cases, one of them being the case of Standard Chartered Financial Services Limited & 2 others vs Manchester Outfitters (Suiting Division) Limited (now Known as King Wollen Mills Limited) & 2 others, supra, where this Court expressed itself regarding the jurisdiction of the Court to review its own decisions as follows:

' This Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands, but that such jurisdiction will only be exercised in exceptional situations where the need to obviate injustice outweighs the principle of finality in litigation.'

22. The other case he cited was *Kamau James Gituthu & b others vs Multiple ICD Ltd & another [2019] eKLR* which held as follows:

' Be that as it may, the above position was altered by the current constitutional dispensation as discussed in Standard Chartered Financial Services Limited & 2 Others vs Manchester Outfitters (Suiting Division) Limited (Now Known As King Woollen Mills Limited & 2 Others [2016] eKLR (the Standard Chartered case). In that case, this Court was alive to the fact that despite the establishment of the Supreme Court as the highest court in the land, this Court still remained as the court of last resort in most disputes. It therefore observed as follows:

'We have deliberately quoted extensively from the Rai case, the Nguruman case, and the Benjoh case in order to bring out the position that this Court has taken in the past and the reason for any deviations. From the analysis it is evident that although the facts in the Rai case were similar to the Benjoh case, to the extent that in both instances there was a motion seeking to reopen a concluded judgment of the Court, the new constitutional dispensation justified a departure from the Rai case as it called for an interpretation of the Court's jurisdiction in a manner that brings it into conformity with the principles of the 2010 Constitution, and gives allowance for the development of the law We reiterate that position and stress that this Court is clothed with residual jurisdiction to reopen and rehear a concluded matter where the interest of justice demands.'

23. The Supreme Court of Kenya in *Menginya Salim Murgani vs Kenya Revenue Authority [2014] eKLR* in re-affirming the decision of this Court in *Benjoh Amalgamated Ltd & Another v Kenya Commercial Bank Ltd*, supra stated:

' In *Benjoh amalgamated Ltd & Another v Kenya Commercial Bank Ltd (2014) eKLR*, the Court of Appeal comprehensively analysed the Court's jurisdiction to review its decisions before and after the date of promulgation of the 2010 Constitution. The Appellate Court held that prior to the promulgation of the new Constitution, it had no jurisdiction to review its decisions, except in the application of the slip rule under Rule 35 of the Court



of Appeal Rules. As to the position after the promulgation of the 2010 Constitution, the Court held that as it was not the final Court in the land, it had a residual jurisdiction, where there was no appeal to the Supreme Court, to correct errors of law that had occasioned real injustice, or failure, or miscarriage of justice. Such a position notwithstanding, the Court held that it would not entertain applications for the review of decisions made before the 2010 Constitution came into being.

Nonetheless, the above development did not do away with the principle of finality. It simply calls upon the Court to take into account the principles of finality and justice in determining whether to exercise the abovementioned residual jurisdiction'

24. We have reviewed the cases from this Court and from the Supreme Court and are satisfied that we have residual jurisdiction to review our own ruling or judgment or order, whatever the case may be.
25. The second is whether the 1st respondent has met the threshold to justify the exercise of this Court's residual jurisdiction and review its ruling. The scope of this jurisdiction as was discussed in the Benjoh case, supra is 'This is jurisdiction that has to be exercised cautiously and only where it will serve to promote public interest and enhance public confidence in the rule of law and our system of justice.'
26. As can be seen from the cases we have examined, the residual jurisdiction of this Court to re-open its own decision is exercised with caution and only in exceptional cases. It follows therefore, that this residual jurisdiction can only be set in motion once the established threshold is met. Kamau James Gituthu & b others vs Multiple ICD Ltd & another, set the threshold to be met, which we adopt, stating that the applicant must demonstrate the following:
 1. The decision in issue has occasioned injustice or a miscarriage of justice; and
 2. The said injustice or miscarriage of justice has eroded public confidence in the administration of justice; and,
 3. No appeal lies against in the decision in issue.
27. It is expedient for us to re-visit the ruling on Starryway's application dated April 27, 2022 to see the basis for allowing 'stay of all proceedings in the Superior Court in HC Admiralty Claim No. E003 of 2021 pending appeal.' To begin with it is not contested that Starryway filed its application before this Court after the Superior Court declined to enjoin it in the HC Admiralty No 003 of 2022 dismissed its application to be enjoined in that suit which was between the 1st respondent and the 2nd respondent, Claimant and Defendant respectively. The basis of filing the application for stay was to prevent loss of its lien over the cargo on the 2nd respondent's vessel over which it had lien for freight charges and other costs owed to it by the 1st respondent, and which cargo the 1st respondent intended to transship to another Ship in order to sell the Vessel. It also raised two other issues, that the High Court had no jurisdiction to entertain the suit, as there was an Arbitration Clause.
28. We found that Starryway had raised triable issues, which were whether the High Court had jurisdiction over the aforementioned suit and two whether it was a necessary party in the High Court Admiralty proceedings. On the nugatory aspect, we found that as the 1st respondent owed Starryway freight charges and other costs, and since its security for the debt owed was a lien over the cargo on the 2nd respondent's cargo, then if it lost the cargo it stood to suffer irreparable loss.
29. Has the 1st respondent demonstrated that our ruling has occasioned injustice. The 1st respondent has relied on the state of the Vessel [MV Dolphin] since the stay was ordered. Their position was that the Vessel was wasting away and was not in class. Starryway, not only contested that fact but brought a



report to show that the vessel is in good state. The only problem is that the Report was dated seven months ago and a lot can happen during such period.

30. Nevertheless, the 1st respondent has shown that it has paid to Starryway US\$ 978, 000 in satisfaction of the Partial Final Award for freight and other costs. Starryway admitted it was paid in satisfaction of the London Arbitral Award. However, it stated that it was still owed US\$ 35,700, and that the Arbitral proceedings were still ongoing.

31. As we have stated the basis for the stay was the pending awards.

The Partial Award, which was the basis for the stay has since been paid. The outcome of the pending London Arbitration and when the process will be finalized is unknown.

32. Having considered this application and all the arguments by counsel to the parties, we find that there is nothing to justify the continued stay of the proceedings in this matter. In the result we order:

i). That the 1st respondent's application dated December 21, 2022 be and is hereby allowed in terms of prayer(2);

ii. The order of stay of proceedings issued by this Court on the October 21, 2022 be and is hereby lifted;

iii. The costs of this application will go to the 1st respondent.

33. Those are our orders.

DATED AND DELIVERED IN MOMBASA THIS 28TH DAY OF JULY, 2023

P, NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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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

