



**Endmor Steel Millers Limited v Tata International West Asia DMCC & another  
(Civil Application E005 of 2022) [2022] KECA 786 (KLR) (10 June 2022) (Ruling)**

Neutral citation: [2022] KECA 786 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E005 OF 2022  
SG KAIRU, A MBOGHOLI-MSAGHA & P NYAMWEYA, JJA  
JUNE 10, 2022**

**BETWEEN**

**ENDMOR STEEL MILLERS LIMITED ..... APPELLANT**

**AND**

**TATA INTERNATIONAL WEST ASIA DMCC ..... 1<sup>ST</sup> RESPONDENT**

**SEAFORTH SHIPPING (K) LIMITED ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of the orders issued on 28th October 2021  
by the High Court (Chepkwony, J. in Mombasa HCCC E031 of 2021)*

**RULING**

1. By an application dated 4<sup>th</sup> February, 2022 the applicant seeks an order to conserve the consignment of 2,308.780 metric tonnes of Prime Hot Rolled Steel Square billets in the custody of the 1<sup>st</sup> respondent or their servants and agents pending the appeal; stay of the orders issued on 28<sup>th</sup> October 2021 pending the hearing and determination of the appeal; any other appropriate and equitable orders; and that the costs of the application be borne by the respondents.
2. The grounds for the application are as follows: The High Court delivered a ruling in this matter on 28<sup>th</sup> October 2021 disallowing the applicant's application dated 20<sup>th</sup> March 2021 seeking release of 2,308.780 metric tonnes of billets. The 1<sup>st</sup> respondent has refused to engage in meaningful negotiations or arbitration of this dispute or release the consignment. The applicant has learnt that the 1<sup>st</sup> respondent is about to sell or release its cargo to Steel Makers Limited and which cargo they have fully paid for. That the 1<sup>st</sup> respondent is using the court proceedings and orders mischievously to circumvent justice. The applicant has already appealed against the court decision of 28<sup>th</sup> October 2021 and sought copies of proceedings which are yet to be provided.



3. The Government ban on scrap metal has led to a drastic increase in the price of billets and thus the 1<sup>st</sup> respondent is taking unfair advantage to sell the applicant's cargo. There is urgent need to preserve the subject cargo awaiting the hearing of the appeal. It is in the interests of justice that the application be allowed.
4. The application is supported by an affidavit sworn on 4<sup>th</sup> February 2022 by Gabriel Kiama, the director of the applicant. According to the director, the applicant had in April 2020 ordered for 9,000 metric tonnes of billets which were delivered save for the 2,308.780 tonnes which the 1<sup>st</sup> respondent is still holding. The applicant moved to the High Court for orders to compel the 1<sup>st</sup> respondent to release the billets but the court declined to issue the orders. The applicant then filed an application for conservatory orders, while the 1<sup>st</sup> respondent filed an application to refer the matter to arbitration, and the 2<sup>nd</sup> respondent filed an application to be removed from the proceedings. The court on 28<sup>th</sup> October 2021 delivered a ruling and dismissed all the applications.
5. The applicant's chairman has tried to engage the 1<sup>st</sup> respondent's directors with a view to settling this matter but they have ignored all calls for amicable settlement. Through a letter sent by the Kenya Revenue Authority the applicant has established that the 1<sup>st</sup> respondent is about to sell their 2,308.780 metric tonnes of billets, hence the need to preserve the subject matter of the appeal.
6. In response, the 1<sup>st</sup> respondent filed a replying affidavit sworn on 21<sup>st</sup> February 2022 by Vishal Tank. According to the 1<sup>st</sup> respondent, the two parties entered into a contract by which the applicant contracted to purchase 9,000 metric tonnes of billets from the 1<sup>st</sup> respondent. Before shipping the consignment, the respondent issued the applicant with three sets of order acknowledgement forms and pro forma invoices dated 24<sup>th</sup> April 2020, 30<sup>th</sup> April 2020 and 1<sup>st</sup> May 2020. The Order Forms contained standard terms and conditions of sale which were binding on the parties, the key being that the applicant was to pay 20% of the purchase price in advance by telegraphic transfer to the 1<sup>st</sup> respondent's account; and the balance within 5 days from the date of the applicant's receipt of shipment documents. The 1<sup>st</sup> respondent shipped the consignment on 22<sup>nd</sup> June 2020 and emailed the applicant the shipment documents on 26<sup>th</sup> June 2020. However, when the consignment was received sometime in July 2020, the applicant had not fulfilled its obligations, that is, making payment of the balance of the purchase price within 5 days as agreed under the contract.
7. That despite the applicant's breach, the 1<sup>st</sup> respondent still released to the applicant part of the consignment but retained the 2,308.780 metric tonnes. The 1<sup>st</sup> respondent issued a number of warnings to the applicant to regularise payments, the final one by an email dated 20<sup>th</sup> September 2020 warning the applicant to make payment of the outstanding sum by 22<sup>nd</sup> September, failure to which the 1<sup>st</sup> respondent would resell the cargo. The applicant continued to pay the outstanding sum in instalments and eventually cleared the balance on 20<sup>th</sup> December 2020 upon which it demanded the consignment but by that time, the 1<sup>st</sup> respondent had already sold 1,000 metric tonnes of the consignment to a third party. The 1<sup>st</sup> respondent had informed the applicant in advance of the sale, and that it would refund the applicant the payment it had made for the consignment, less the attendant costs of resale.
8. The 1<sup>st</sup> respondent's contention was that the applicant did not effect service of the Notice of Appeal as required by Rule 77 (1) of this Court's rules. The applicant was aware, prior to filing the application at the High Court, that the 1<sup>st</sup> respondent had already sold 1,000 metric tonnes of the consignment to mitigate its losses caused by the applicant's breach. The appeal is not meritorious because the Order Forms as read together with the Standard Terms and Conditions of Sale had provided for arbitration as the forum for the resolution of all disputes, controversy or claims arising out of or related to the



- contract. The applicant cannot evade the arrangement for dispute resolution and the involvement of the third parties cannot override the obligation upon which the Court can stay proceedings and refer the matter for arbitration.
9. On the issue of irreparable damage, the position of the 1<sup>st</sup> respondent was that it was the party that stood to suffer should the orders be granted. It continues to incur storage charges and incidental expenses. The prolonged delay in releasing the 1,000 metric tonnes consignment sold to the third party exposes the 1<sup>st</sup> respondent to potential lawsuit by the third party for a claim of specific performance and/or damages.
  10. In written submissions, Counsel for the applicant submitted that the appeal was arguable as evidenced by the nine grounds of appeal enumerated in the applicant's draft memorandum of appeal. The appeal was generally centred around the grounds that the High Court had jurisdiction over the matter since other parties not bound by the arbitration clause were involved in the dispute; and that the applicant had undoubtedly paid for the cargo in full and therefore the title to the goods had passed to the applicant. In dismissing the 1<sup>st</sup> respondent's application to refer the matter to arbitration without giving any other reason, the judge seemed to appreciate that arbitration was incapable of being performed. That there was no prayer to strike out the entire suit and that was not expected by the parties.
  11. On the nugatory aspect, Counsel submitted that the 1<sup>st</sup> respondent had not sold any part of the consignment of the 2,038 metric tonnes of billets and has never provided any sale agreement or any document confirming the sale. The letter from KRA attached to the affidavit of Mr. Kiama confirms that the cargo is still there, and if there is no conservation of the cargo then the appeal will be in vain.
  12. Counsel for the 1<sup>st</sup> respondent submitted that the applicant's grounds of appeal are not only inarguable but are also frivolous. Counsel contended that the contract between the parties provided for arbitration as the forum for the resolution of all disputes, controversy or claims arising out of or relating to the contract, and therefore the parties are bound by the terms of their contract unless coercion, fraud, or undue influence are pleaded and proved.
  13. On the nugatory aspect, Counsel submitted that the applicant has not tendered any evidence that the intended appeal would be rendered nugatory if the orders sought are not granted. That the 1<sup>st</sup> respondent has sold 1,000 metric tonnes of the consignment which fact was communicated to the applicant in advance of the sale, and therefore the consignment is not available and the sale is not reversible. That the applicant's prayer for a conservatory order has been overtaken by events because the court cannot make that order in vain.
  14. On whether the Court can stay the order issued on 28<sup>th</sup> October 2021, Counsel submitted that the order was incapable of being stayed as the refusal of the court to assume jurisdiction over the applicant's suit simply means that the Applicant remains in the position it was before lodging the suit. Counsel cited *Feisal Amin Janmohammed T/A Dunyia Forwarders v Shami Trading Company Limited* [2014] eKLR for the proposition that a negative order is incapable of execution hence cannot be stayed.
  15. This application was brought under Rule 5 (2) (b) of this *Court's Rules* from which the Court can only grant the orders of a stay of execution, an injunction or a stay of any further proceedings. The manner in which the applicant has framed its application gives an initial impression that, along with orders of stay, it is also seeking conservatory orders with respect to the consignment of 2,308.780 metric tonnes of steel billets. However, in circumstances somewhat similar to that of the applicant in *United Millers Limited v Kenya Bureau of Standards & 5 others* [2019] eKLR, it appears from the submissions that the ultimate aim of the application is to obtain injunctive orders restraining the 1<sup>st</sup> respondent from



selling the steel billets to a third party, as well as a stay of the orders issued on 28th October 2021 pending the hearing and determination of the appeal.

16. The High Court in the orders the applicant is seeking to stay did not only dismiss the three applications before it, but also struck out the applicant's suit dated 20<sup>th</sup> March 2021. This was a negative order that is incapable of being stayed. It follows therefore the applicant's prayers for a stay cannot be entertained. In *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR, the predecessor of this Court held as follows with respect to a negative order:

“But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs... In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

17. Regarding the prayers for injunctive orders, the principles governing the exercise of the Court to order an injunction are set out in *Bob Morgan Systems Ltd & another v Jones* [2004] eKLR:

“The Court will grant a stay or an injunction, as the case may be if satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable; and secondly, that unless a stay or injunction is granted his appeal or intended appeal, if successful, will be rendered nugatory.”

18. Regarding the consideration of whether the appeal is arguable, this Court in *Stanley Kang'ethe v Tony Keter & 5 others* [2013] eKLR elaborated as follows:

- “vi) On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised. *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.
- vii) An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008.”

19. From the draft memorandum of appeal, the applicant has shown that it intends to appeal the High Court decision on the ground that the learned judge erred in finding that the court did not have jurisdiction over the matter when there were parties outside the contract involved in the dispute. The applicant also intends to question whether the judge properly reached the decision after considering the other applications, especially the 1<sup>st</sup> respondent's chamber summons application seeking orders staying the proceedings and referring the dispute to arbitration. These are arguable issues that deserve to be argued fully before the court. The applicant has therefore satisfied the first requirement of having an arguable appeal.

20. Regarding whether the appeal would be rendered nugatory should the orders sought not be granted, the Court is bound to consider the particular circumstances of each case and weigh the consequences of refusal to grant the orders against any suffering the respondent might undergo while awaiting the hearing and determination of the appeal. See *Reliance Bank Limited v Norlake Investments Ltd* [2002]1 EA 227. Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed, if allowed to happen, is reversible; or if it is not reversible, whether damages will reasonably compensate the party aggrieved. See *Stanley Kang'ethe v Tony Keter & 5 others* (supra).



21. While the applicant contends that the 1<sup>st</sup> respondent is yet to sell off the 2,308.780 metric tonnes of steel billets, the 1<sup>st</sup> respondent's position is that it has already sold the consignment to a third party on account of the applicant's breach and a prolonged delay in releasing the consignment would result in the 1<sup>st</sup> respondent incurring more costs relating to storage and expose it to a potential lawsuit by the third party. This is a case where damages will reasonably compensate the applicant should its appeal succeed, and the balance of inconvenience tilts more against the 1<sup>st</sup> respondent should the status quo of the steel billets be preserved.
22. It is our view that the application does meet the second requirement, that the appeal shall be rendered nugatory if injunction orders are denied. It follows therefore that the application is dismissed with costs.

**DATED AND DELIVERED AT MOMBASA THIS 10<sup>TH</sup> DAY OF JUNE 2022.**

**S. GATEMBU KAIRU, FCIArb**

.....

**JUDGE OF APPEAL**

**A. MBOGHOLI MSAGHA**

.....

**JUDGE OF APPEAL**

**P. NYAMWEYA**

.....

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

