



**Starryway Trading & Shipping Company Limited v ET Timbers PTE Limited & another
(Civil Application E026 of 2022) [2022] KECA 1121 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KECA 1121 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E026 OF 2022
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 21, 2022**

BETWEEN

STARRYWAY TRADING & SHIPPING COMPANY LIMITED APPLICANT

AND

ET TIMBERS PTE LIMITED 1ST RESPONDENT

OWNERS OF MOTOR VESSEL 'DOLPHIN STAR' 2ND RESPONDENT

*(An application for stay of proceedings pending an appeal of the decision
of the High Court at Mombasa InHC Admiralty Claim No. E003 of 2021)*

RULING

1. The current application is related to civil application No E063 Of 2021 heard before this court, in which The Owners of The Motor Vessel 'Dolphin Star', was the applicant, and ET Timbers Pte Limited, was the respondent. These two parties are the 2nd and 1st respondents respectively in the present application. The application was a notice of motion dated September 10, 2021, and sought stay of all further proceedings pending the hearing and determination of an intended appeal from the ruling and orders of the High Court of Kenya at Mombasa by Njoki Mwangi J made on July 14, 2021, in Admiralty Cause No E003 of 2021. The applicant indicated that it had filed a notice of appeal in the Court of Appeal being Court of Appeal Application No E063 OF 2021. The proceedings sought to be stayed in that application are the same proceedings in this current application.
2. In a ruling delivered at Mombasa on December 17, 2021, this court disallowed the application on the grounds that what was sought to be stayed would not render the appeal nugatory, as the applicant therein, if it succeeded in its appeal would be entitled to damages, which we were satisfied would be sufficient to compensate it for any loss or damages it may suffer.
3. Back to the present application, it is a notice of notion dated April 27, 2022 brought under rule 5 (2) (b) of the Rules seeking orders that there be a of stay of all the proceedings in the High Court of Kenya



at Mombasa in HC Admiralty Claim No E003 of 2021 pending an appeal of the decision of that court delivered on March 18, 2022.

4. The facts of the case are that on January 1, 2019, the applicant entered into a time charter party with the 2nd respondent, the Owners of Motor Vessel 'Dolphin Star', where the 'Dolphin Star', the vessel was chartered to the applicant. On January 19, 2021, the applicant entered into a voyage charter with the 1st respondent herein under a fixture note incorporating other terms from GENCON 94 form of voyage charter party. The agreement provided that the 1st respondent was to pay full freight; that the applicant had lien over the 1st respondent's cargo; and, that all disputes between the applicant and the 1st respondent would be resolved by arbitration in London.
5. The background to the application is that the 1st respondent filed an admiralty claim in rem against the 2nd respondent suit vessel for the C& F value of the cargo at a sum of US \$ 2,000,000.00 on account of breach of charter-party entered into between the 1st respondent as charterers of the suit vessel and the applicant, the disponent owners of the suit vessel, the head owners being Defang Shipping CO Ltd; that the agreement was for direct carriage of solo cargo to the discharge port of Chittagong. That however the 2nd respondent went ahead and carried other cargo and also deviated from the load point of Greenville Liberia by calling on other ports in Southern Africa. The 1st respondent also challenged the failure of the disponent owners of the suit vessel or the owners to issue bills of lading for the cargo loaded at the port of Greenville Liberia, and only issued a draft bill of lading which the 1st respondent claimed led to a loss of 2 million US\$. The claim was said to be pursuant to section 35A of the Supreme Court Act 1981 and or under the inherent jurisdiction of the court sitting as an admiralty court. The claim was also stated to have been brought pursuant to section 20(2) (g) and (h) of the Seniors Courts Act for it arose out of an agreement for the carriage of goods in a ship or the use or hire of a ship. The 1st respondent claimed US \$ 2 million, and alternatively damages.
6. The 1st respondent on April 4, 2021 filed an application for judgment in default and on the same day filed an application for execution of their claim by way of arrest of the suit vessel and the warrant was issued. The 2nd respondent then filed application dated April 16, 2021 seeking to set aside the arrest warrant and default judgment on the grounds that the applicant was not party to the voyage charter that the 1st respondent hinged its claim, and that neither was it the registered owner of the suit vessel, that therefore the applicant was not liable for any claims arising from the voyage. It was also averred that the High Court did not have jurisdiction to entertain the dispute.
7. In the ruling rendered on July 14, 2021, the High Court ordered that the arrest warrant be lifted conditional upon the deposit of US\$ 3m/- in court by the 2nd respondent.
8. The 1st respondent then filed an application dated August 23, 2021 seeking to sell the suit vessel and transship the cargo to another vessel.
9. An application dated October 15, 2021 was filed by the applicant seeking that it be made a party to the proceedings; that the applicant be allowed to exercise lien over the suit cargo on board the suit vessel and that there be stay of the subject proceedings until the arbitration proceedings touching on the subject matter are determined.
10. A partial award was issued on February 11, 2022 by the arbitral tribunal in London with the result that the 1st respondent was to pay to the applicant the sum of USD 578,779.69 together with interest for freight. The applicant then ran to the High Court in Mombasa with an application seeking to arrest the ruling of the High Court, and seeking that the court do consider the arbitral award when it delivers a ruling in the stay application.



11. In a ruling rendered on the February 25, 2022, the High Court declined stay and went ahead to render its ruling on the application dated October 15, 2021.
12. On the March 18, 2022 the High Court rendered its ruling on the applicant's application dated October 15, 2021, dismissing the application for joinder, and declining to grant stay of proceedings pending the arbitral proceeding between the applicant and the 2nd respondent.
13. The applicant was aggrieved by the ruling of the court and therefore filed two (2) notices of appeal against the impugned ruling and orders of the court.
14. The applicant has not filed a memorandum of appeal. However from the affidavit in support of the application, it can be deciphered that the applicant's counsel challenges the learned judge for failing to consider the arbitral award dated February 11, 2022 in its ruling of February 25, 2022. Counsel also took issue with the decision made on March 18, 2022 contending that the High Court went into error for failing to stay the proceedings before it as it lacked jurisdiction to entertain the same; for failing to consider that the applicant was a necessary party and needed to be enjoined in the proceedings. It was sought that the impugned decisions be set aside and that the applicant's applications be allowed.
15. The facts in the admiralty claim are that on January 1, 2019, the applicant entered into a time charter party with the Owners of Motor Vessel 'Dolphin Star', the 2nd respondent where the 'Dolphin Star', the vessel was chartered to the applicant and thereafter on January 19, 2021, the applicant entered into a voyage charter with ET Timbers PTE Limited, the 1st respondent herein under a fixture note incorporating terms from. The agreement provided that the 1st respondent was to pay full freight, the applicant had lien over the 1st respondent's cargo and thirdly, that all disputes between the applicant and the 1st respondent would be resolved by arbitration in London.
16. The 1st respondent contrary to the agreement, filed the admiralty proceedings, arrested the vessel and proceeded to make an application to the High Court seeking orders to allow the sale of the vessel and tranship the applicant's cargo onto another vessel. The applicant being aggrieved that it would be seriously prejudiced by the 1st respondent's actions in the trial court sought orders for stay of the matter in the trial court however in the intervening period before a ruling was issued on the same, the arbitral tribunal in London found that the freight in the minimum sum of USD 578,779.69 was due and owing by the 1st respondent to the applicant.
17. The grounds for the application are that the appeal is arguable as it challenges inter alia the jurisdiction of the High Court to entertain the proceedings; challenges the failure of the High Court to consider that the applicant ought to be joined as party to the subject proceedings for its interests were affected by an order sought or made by the High Court. It was stated that the stay sought is necessary before the appeal is heard as the applicant will be prejudiced because the application to sell the suit vessel and transship the cargo to another ship will proceed, thereby rendering the appeal nugatory. The applicant contends that the 1st respondent has no known assets and if the suit cargo is transshipped to another vessel, then the applicant will lose its lien over the 1st respondent's cargo. It was added that the applicant already has at hand the interim arbitral award from the London Arbitration Tribunal that may be rendered irrelevant if the suit vessel is sold and the subject cargo transshipped.
18. The application was heard virtually on the July 4, 2022. Learned counsel Mr Ousa Okello urged the application on behalf of the applicant. Learned counsel Mr Sanjeev Khagram was present for the 1st respondent and opposed the application. Learned counsel Mr Inamdar was present for the 2nd respondent and supported the application.



19. Mr Okello relied on submissions dated April 29, 2022 and his supporting affidavit dated April 27, 2022. Much of what was in his submissions and replying affidavit is part of the brief background which we have given in this ruling. In brief Mr Okello urged us to find that the appeal was arguable on the grounds the applicant was denied a chance to be enjoined in the proceedings yet it was a necessary party as its interest, including that of lien over the 1st respondent's cargo on the 2nd respondent's vessel stood to be lost if the 1st respondent sold the cargo, which he urged it was in the process of doing. Secondly, that if the cargo were to be sold, the appeal would be rendered nugatory as the applicant stood to lose its lien, and further that the pecuniary ability of the 1st respondent was unknown. Counsel urged that the applicant had a half award and if the orders sought were not granted, it may never be able to recover.
20. Mr Khagram for the 2nd respondent relied on the replying affidavit sworn by the director of the 1st respondent dated June 29, 2022; written submissions, case and authorities digest dated June 30, 2022 and filed on the same date. In brief Mr Khagram raised a technical point that the applicant's application for leave to appeal was pending before this court. Mr Khagram urged that the applicant had failed to establish with cogent evidence that its appeal is likely to be stifled or rendered nugatory, or that it has an arguable appeal. Relying on the replying affidavit by the 1st respondent's director. Counsel urged that the applicant and the 2nd respondent were abusing the judicial process to stifle the proceedings in Kenya. Further that the issues in the award from the London tribunal were different from those before this court. Counsel urged that in any event stay had been granted in Singapore. Counsel urged that this court had no jurisdiction to issue a stay under rule 5 (2) (b) of this court's rules.
21. Mr Inamdar for the 2nd respondent relied on his replying affidavit dated June 30, 2022, and the written submissions of even date. He urged that there was need to allow the application in order to enable the applicant and the 1st respondent pursue the arbitration between them in London, further that if the applicant was enjoined in the proceedings before the High Court, that will enable the court resolve all the issues between the parties, and that it was advisable as it will further the overarching objective of the courts by making reference to the facts in each case. He urged that the applicant and the 1st respondent had willingly submitted to arbitral process, and that the 2nd respondent had nothing to do with same.
22. Before we could rule on the application dated April 27, 2022, whose ruling was reserved for October 21, 2022, the applicant Starryway Trading & Shipping Company Ltd filed a fresh application dated July 12, 2022. In the application, brought under ULE 1(3) and rule 29 (now rule 31 of the 2022 rules) of the court's rules. In the application, the applicant sought orders;
 - a. That, this court give directions for the inter-parties hearing of the present application and in the interim, stay all proceedings in the superior court pending delivery of its decision on the applicant's application dated April 27, 2022 which is reserved for judgment on October 21, 2022.
 - b. That, this court in exercise of its inherent jurisdiction, allow the applicant to file, by way of additional evidence, the orders made by the High Court of Justice in England in the in the matter of HC CL- 2022-000124 between ET Timbers PTE Ltd v Starryway Trading and Shipping Company Ltd and in the matter of HCCL-2022-000199 between ET Timbers PTE Ltd v Starryway Trading and Shipping Company Ltd.
23. We heard the application dated July 12, 2022 virtually on the August 17, 2022. At the hearing, learned counsel Mr Ousa Okello was present for the applicant, learned counsel Mr Sanjeev Khagram was present for the 1st respondent, while learned counsel Mr Inamdar was present for the 2nd respondent. The applicant essentially prays that this court in exercising its inherent jurisdiction, allows the applicant



to file additional evidence with regard to the aforementioned orders by the High Court of Justice in England further to the prayers sought in their application dated April 27, 2022 for stay of proceedings. In urging the court to exercise its inherent jurisdiction, the applicant cited the case of *Archer & Another v Archer & 2 Others (Civil Application E058 OF 2021) [2022] KECA 9(KLR)* which sets out the principles applicable to an application for adduction of new evidence.

24. The 2nd respondent did not oppose the application. However, the application was opposed by the 1st respondent through its replying affidavit sworn on June 29, 2022. According to the 1st respondent, the orders sought have little relevance to the question of stay of proceedings, and that the orders were given on July 1, 2022 well before the arguments of July 4, 2022. It was submitted that the applicant ought to have availed them in the earliest opportunity. It was further submitted that the applicant filed an application on July 15, 2022 on the eve of the judgment dated July 29, 2022 with the intentions of stifling the trial court's decisions and continues to pursue enforcement of the second partial award in Singapore. Hence, the 1st respondent urged that the application ought to be dismissed.
25. We have considered the two applications, the affidavits filed in both applications and the submissions by the counsel to the parties. We propose to deal with the application dated July 12, 2022 first, then the one dated April 27, 2022 next. This is because the additional evidence sought to be adduced, if leave is granted, is intended to be considered alongside the application dated April 27, 2022.
26. In regard to the application dated July 12, 2022, what this court should consider was succinctly set out in the case cited by the applicant of *Archer & Archer v Archer*, supra, where the court stated:
 - ' Leave to adduce additional evidence is therefore at the discretion of the court, and the principles applicable are;
 - a. It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;
 - b. The evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;
 - c. The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, though it need not be incontrovertible.'
27. The applicant seeks leave to adduce additional evidence in support of the application dated 2. What it needed to be proved is that the evidence could not have been obtained with reasonable diligence. We have considered that since what the applicant seeks to bring is a judgment of the court which was not in existence at the time the appeal was filed, and in the circumstances no exercise of diligence could have availed it, we find that the applicant has satisfied that first step in persuading this court that he is deserving of the order sought. However, it is important to consider whether the judgment, if admitted will have an important influence on the result of the application. We have considered that the judgment is relevant being between the applicant and the 1st respondent, and touches on the same matters as those before this court and the superior court. In addition, it is a court order which this court can take judicial notice of. We find that there is no harm in admitting the said judgment.
28. In regard to the application of April 27, 2022, we are aware that we cannot make definitive or final findings of either fact or law at this stage as doing so may embarrass the ultimate hearing of the main appeal. We are guided that the applicant needs to satisfy twin requirements in order to have the court



rule in its favour. This is what this court decided in [Stanley Kangethe Kinyanjui v Tony Ketter & 5 others \[2013\] eKLR](#), where the court held:

- ' ii) The discretion of this court under rule 5(2)(b) to grant a stay or injunction is wide and unfettered provided it is just to do so.
- iv) In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni*, Civil Application No Nai 189 of 2001.
- v) An applicant must satisfy the court on both of the twin principles.
- 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.'

29. The sole purpose of an application for stay under rule 5 (2) (b) of the Court of Appeal Rules is to preserve the substratum of an intended appeal so that the right to appeal is safeguarded and the appeal if successful is not rendered nugatory. The purpose of the inquiry into whether an intended appeal, if successful, will be rendered nugatory is to preserve the integrity of the appellate process so as not to render any eventual success a mere pyrrhic victory devoid of substance or succor by reason of intervening loss, harm or destruction that turns the appeal into a mere academic ritual. See [Abmed Musa Ismael v Kumba Ole Ntamorua & 4 Others, CA No 256 of 2013](#) and reiterated in [Oliver Collins Wanyama v Engineers Board of Kenya \[2019\] eKLR](#).
30. We are also aware that 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. Further that it is sufficient if the applicant raises only one triable issue. See [Joseph Gitahi Gachau & Another v Pioneer Holdings \(A\) Ltd & 2 others, Civil Application No 124 of 2008](#).
31. Having considered this application we are satisfied that the appeal is not frivolous but is one that is arguable. The issue of whether the High Court had jurisdiction to entertain the proceedings, and the issue whether the applicant is a necessary party in the proceedings before the High Court is arguable.
32. As to 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 *Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd & 2 other, supra*. Further that where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent's alleged impecuniness, the onus shifts to the latter to rebut by evidence the claim. See [International Laboratory for Research on Animal Diseases v Kinyua, \[1990\] KLR 403](#).
33. The applicant has contended that it has a lien over the cargo on the 2nd respondent's vessel, that there is in process an attempt by the 1st respondent to transship the cargo into another vessel. In addition the applicant has a half award as against the 1st respondent. We are satisfied that if the applicant loses the cargo it stands to suffer loss of its lien. That would render the appeal nugatory as the substratum of the appeal will be lost.
34. We have come to the conclusion, after a careful consideration of this application, that the applicant has satisfied the twin requirements for the granting of the stay sought. In the circumstances, we find merit in the application.
35. In the result, the application dated April 27, 2022 is granted in terms of order 3 as follows:



i.) There be a stay of all the proceedings in the superior court in HC Admiralty Claim No E003 of 2021, ET Timbers PTE Limited v The Owners of Motor Vessel 'Dolphin Star.' pending the hearing and determination of the intended appeal;

ii.) If it has not already done so, the applicant shall file and serve its memorandum and record of appeal, within 30 days from the date of delivery of this ruling. The appeal shall immediately thereafter be fixed for case management before the deputy registrar for purposes of giving directions on filing of submissions, and the appeal shall thereafter be fixed for hearing on basis of priority in the first term of 2023.

iii.) In default of the applicant filing the appeal within 30 days of delivery of this ruling, the orders of stay granted herein will automatically lapse and stand discharged.

iv.) The costs of this application shall abide the outcome of the appeal.

36. Those are our orders.

DATED AND DELIVERED AT MOMBASA THIS 21ST DAY OF OCTOBER 2022.

S GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

P NYAMWEYA

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JUDGE OF APPEAL

J LESIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

