



REPUBLIC OF KENYA



The Owners of the Motor Vessel ‘Dolphin Star’ v E.T. Timbers Pte Limited (Civil Application E063 of 2021) [2021] KECA 303 (KLR) (17 December 2021) (Ruling)

Neutral citation: [2021] KECA 303 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E063 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
DECEMBER 17, 2021**

BETWEEN

THE OWNERS OF THE MOTOR VESSEL ‘DOLPHIN STAR’ APPLICANT

AND

E.T. TIMBERS PTE LIMITED RESPONDENT

((Being an application for 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 14th July 2021 In Admiralty Cause No E003 of 2021))

RULING

1. This is a notice of motion application dated 10th September 2021, brought pursuant to Section 49 (3) of the *Senior Court’s Act 1981* [of England, hereinafter the Act], Rules 3.1 (2) (f) and 57.2 of the *English Civil Procedure Rules* and Sections 3 A and 3 B of the *Appellate Jurisdiction Act* (Cap 9) and Rule 5 (2) (b) of the *Court of Appeal Rules 2010*, Sections 4 (2) and (3) of the *Judicature Act* (Cap 8) and the inherent Jurisdiction of the Court.
2. The Applicant seeks prayer 1(d) of the application which is as follows:
 - “(d) After the said inter parties hearing to order a stay of the High Court proceedings pending the hearing and determination of an appeal from the Ruling and Orders made in
3. The Applicant has premised its application on the following grounds:
 1. The Respondent issued in rem proceedings against the motor vessel Dolphin Star on 4th April 2021 and obtained a warrant of Arrest on the same day.



2. That the Applicant filed an application dated 16th April 2021 under certificate of urgency seeking orders inter-alia to strike out the suit and/ or set aside the warrant of arrest on the following grounds:
 - a. That the action in rem brought against the vessel does not fall within the court's admiralty jurisdiction in rem under sections 20 and 21 of the Senior Courts Act 1981 and that the court therefore had no jurisdiction to either entertain this claim so far as it concerns the action brought against the vessel or to issue a warrant of arrest against it, and or,
 - b. that the institution of the action against the vessel and the warrant of arrest procured under it by the Respondent on 4th April 2021 are founded on non-disclosure of material facts and thereby constitute an abuse of the process of the court justifying the setting aside of the warrant of arrest and the striking out of the claim *ex debito justitiae*.
4. The background to the application is that the Respondent issued in rem proceedings against Motor Vessel Dolphin Star (hereinafter the suit vessel) for the cost and freight (C&F) value of the cargo at a sum of US \$ 2,000,000.00 on account of breach of a charterparty entered into between the Respondent as charterers of the suit vessel, and Starryway Trading & Shipping Co Ltd, 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, however the Applicant 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 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 Respondent claimed led to a loss of US \$. 2 million.
5. The claim was brought pursuant to Section 35A of the Act, and/or under the inherent jurisdiction of the court sitting as an Admiralty Court. The claim was also brought pursuant to Section 20(2)(g) and (h) of the Act having arisen out of an agreement for the carriage of goods in a ship or the use or hire of a ship. The Respondent claimed for US \$ 2 million, and alternatively, damages.
6. On 4th April, 2021 the Respondent filed an application for judgement 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 Applicant then filed an application dated 16th April, 2021 seeking to set aside the arrest warrant and default judgement on grounds that the Applicant was not party to the voyage charter that the Respondent hinges its claim on, neither was it the registered owner of the suit vessel, therefore it was not liable for any claims arising from the voyage. It was also averred that the court did not have jurisdiction to entertain the dispute.
7. In its ruling rendered on 14th July, 2021 the learned judge framed 4 issues for determination; firstly, if the action in rem filed by the Respondent falls under Sections 20 and 21 of the Act; secondly, if the Court had jurisdiction to issue the warrant of arrest against the suit vessel, and if it had jurisdiction to hear the claim in rem; thirdly, if the warrant of arrest should be set aside and/or the action in rem should be struck out; and finally, if the Applicant should deposit security for the release of the suit vessel.



8. The learned judge, found that Section 4 of the *Judicature Act* of Kenya conferred upon the High Court jurisdiction to be a court of admiralty and exercise admiralty jurisdiction. The learned judge also considered the applicable laws for a claim in rem and found that the Senior Court's Act, 1981 of England, and the English Civil Procedure Rules applied.
9. The learned judge also considered whether the claim was properly brought against the Applicant and found that the Time charterparty in issue in the claim had a provision for subletting of the suit vessel to a third party, meaning that when the respondent and Starryway trading entered into a voyage charter, there were 2 independent charterparties running simultaneously. The first charterparties being between Starryway Trading, as head charterer with the owners of the suit vessel, Defang Shipping Co Ltd; and the second being between Starryway Trading as owner of the suit vessel with the respondent. The court concluded that the Applicant was correctly referred to as the disponent owner given its relationship with the owners of the suit vessel. The court concluded it had jurisdiction to hear the claim in rem, and further that the Respondent properly brought the claim in rem against the Applicant. It also found that the claim fell within Section 20(2)(h) of the Act; that Section 21(4)(b)(i) of the said Act applies to the claim, and thus the court had jurisdiction to grant the warrant of arrest.
10. The court in its ruling dismissed the Applicant's application and made the following orders:
 - a. The defendants to deposit in court the sum of USD \$ 3,000,000.00 (Three Million US Dollars) as security for the release of the motor vessel 'Dolphin Star' from arrest.
 - b. The costs of the Application Notice dated 16th April 2021 be shared equally between the claimant and the Defendants.
 - c. The Claimant be and is hereby granted 21 days to amend, file and serve the amended pleadings.
 - d. The warrant of arrest shall be lifted as soon as the sum of USD \$ 3,000,000.00 (Three Million US Dollars) has been deposited in court.
11. The Applicant challenges the jurisdictional aspects of the impugned ruling being:
 - a. The wrongful invocation of admiralty jurisdiction by the High Court in entertaining the Respondent's claim in rem and in ordering the arrest of the suit vessel;
 - b. The unwarranted grant of leave to amend the Respondent's pleadings so as to purportedly clothe the High Court, post facto, with jurisdiction and to thereby justify the wholly unlawful arrest of the suit vessel;
 - c. The gratuitous orders made for the security to be put up by the Applicant for the release of the suit vessel and thereby effectively determining suo motu an issue that was not before the High Court and without hearing any of the parties to it.
12. The Applicant contends that the appeal is a direct challenge to the manner in which the court exercised its jurisdiction which is a fundamental point that requires to be determined in limine and at the earliest opportunity. That stay of proceedings should be granted pending the hearing of this application and, thereafter, until the appeal is determined to protect the Applicant's right to challenge the jurisdiction



- of the court on appeal otherwise its appeal will be rendered nugatory and it will be irreparably prejudiced.
13. The affidavit in support of the application reiterated the grounds contained on the face of the notice of motion. Submitting in support of the application, learned counsel Mr. Inamdar argued that under Section 4 (2) of the *Judicature Act* (Cap 8), the High Court follows the same admiralty practice and procedure, in all material respects, as that obtaining in the High Court of England. That Section 4 (3) of the Act further provides that in exercising admiralty jurisdiction, the High Court may invoke all powers which it possesses for the purpose of its other civil jurisdiction. It was submitted that it was hence necessary to look at the court's jurisdiction from both English and Kenyan perspective.
 14. On English Law and Procedure, Mr. Inamdar submitted that the court's inherent jurisdictional power to stay court proceedings was set out in *Richbold Norway ASA v Goldman Sachs International* (1999) 1 All ER (Comm) 40 (Sloa No. 1) where it was held, inter-alia that the court's power to stay proceedings is part of its inherent jurisdiction which is expressly preserved by Section 49 (3) of the *Supreme Court Act 1981* [of England].
 15. On Kenya Law and Procedure, it was submitted that an appellate court has recourse to the Constitution, its inherent jurisdiction and the *Appellate Jurisdiction Act*. For that proposition, the Applicant relied in *Nguruman Ltd v Shompole Group Ranch* [2014] eKLR where the court relied on the "overriding objective principles". Counsel contended that Rule 5 (2) (b) of this court's rules permits the court to stay proceedings in the High Court provided a Notice of Appeal has been lodged against the decision sought to be appealed.
 16. The Applicant submitted that by reason of the orders being appealed, the vessel continues to remain under arrest. That the application for default judgement was grounded on the fact that the Applicant had not filed a fresh Acknowledgement of Service under Part II Rule 7 *Civil Procedure Rules* following the High Court's declaration upholding its jurisdiction to entertain suit. However, according to the Applicant, it did not file a fresh Acknowledgement of Service because by doing so, it would be submitting to the jurisdiction of the court and that its appeal, which is grounded on a challenge to that jurisdiction, would be rendered futile.
 17. Mr. Inamdar contended that the correct course for a party challenging jurisdiction is to either apply for a stay as done here, or for an extension of time to file a fresh Acknowledgement. For that proposition they relied on the case of *Deutsche Bank AG v Petromena ASA* (LOA NO 1). The Applicant submitted that it strenuously argued that the High Court had no jurisdiction, and by upholding its jurisdiction and allowing a claimant, post facto, to amend a claim which patently offended jurisdiction and was a nullity in the first place, and thereafter, suo motu, order security of a colossal amount to be put up without hearing any party on it, is sufficient to invoke this court's powers to grant stay of proceedings to enable it to properly interrogate this matter.
 18. Mr. Inamdar urged that if stay is not granted the Applicant will have to defend an application for default judgement but also applications for discharge of cargo and the sale of its vessel which will result in the entire substratum of the appeal disappearing resulting in irreversible prejudice. For that proposition, the Applicant relied on the case of *Stanley Kangethe Kinyanjui v Tonny Ketter & 5 others* [2013] eKLR.
 19. The Respondent opposed the application vide an affidavit deposed by a Director of the Respondent. It was averred that the Applicant is not deserving of discretion in its favour; that there is no arguable appeal in view of the correct finding of the court that it has jurisdiction to entertain the claim. It was refuted that the orders sought would render the appeal nugatory, and if the orders sought are granted, then it would be akin to sanitizing wrongful deviation and carriage of third party cargo in breach of



- the contract of carriage and to the detriment of the Respondent whose claim will not be expeditiously determined.
20. Mr. Khagram learned counsel for the Respondent submitted that as acknowledged by the Applicant, the application falls for consideration under the provisions of both Kenyan and English Law and that in both jurisdictions, the law on the grant of stay of proceedings is well settled. Counsel relied on the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR and *Silverstein v Chesoni* [2002] I KLR 867 on the applicable principles on the issue of stay of proceedings.
 21. Mr. Khagram submitted that the principles applicable in Kenya are equally accepted in English Law. He relied on *Kings College Hospital, NHS Foundation Trust v Takesha Thomas & 2 Others* [2018] EWHC 147 (Fam) which cited with approval the decision of Mostyn J in *NB v Haringey LBC* [2011] EWHC 3544 (Fam), [2012] 2 FLR 125, in which the case law in England relating to grants of stay of proceedings was reviewed and in which the court stated factors that should be taken into account by the court. We shall come to this later in this ruling.
 22. Mr. Khagram submitted that taking into account all the circumstances of the matter as well as the applicable principles, the application should be dismissed. Counsel urged that the Applicant's conduct is intended to gain fanciful advantage and improve its bargaining position by continuing to assert that there is no contract of carriage between itself and the Respondent. That the Applicant has no arguable appeal and has failed to establish that its appeal will be stifled or rendered nugatory. The respondent then prayed that the application be dismissed.
 23. This is an application for stay of proceedings before the High Court. Under the English law, the *Civil Procedure Vol. 2*, Section 49(3) provides that the rules of court found in the CPR apply to proceedings in the Court of Appeal and in the High Court, among others. It also provides the power to stay proceedings is listed as among the court's general powers of case management which may be exercised; and that nothing in the 1981 Act (the Act) shall affect the power of either the Court of Appeal or the High Court to stay any proceedings before it.
 24. There is no doubt that this court has jurisdiction to entertain an application for stay of proceedings arising from a ruling or order of the High Court exercising admiralty jurisdiction.
 25. As to the factors which this court must take into account in determining whether to grant stay, it has been urged before us that this court has both statutory and inherent powers to grant stay. In the English case cited by the Applicant of *Reichhold Norway ASA v Goldman Sachs International* [1999] C.L.C. 486 (1998) the court held:

“The courts power of stay proceedings is part of its inherent jurisdiction which is expressly preserved by s. 49(3) of the Supreme Court Act, 1981. It is exercised under a wide range of circumstances to achieve a wide variety of ends. Subject only to statutory restrictions, the jurisdiction to stay proceedings is unfettered and depends only on the exercise of the court's discretion in the interest of justice.”
 26. Under English law the factors the court should consider are well settled as stated. In the cases cited by the Respondent in *Kings College Hospital, NHS Foundation Trust v Takesha Thomas & 2 Others* [2018] EWHC 147 (Fam) which cited with approval the decision of Mostyn J in *NB v Haringey LBC* [2011] EWHC 3544 (Fam), [2012] 2 FLR 125, in which the case law in England relating to grants of stay of proceedings was reviewed and the court held that the following factors should be taken into account by the court:
 - i. the court must take account of all the circumstances of the case;



- ii. a stay is the exception rather than the general rule
- iii. the party seeking a stay must provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;
- iv. the court must apply a balance of harm test in which the likely prejudice to the successful party must be carefully considered;
- (v) the court must take into account the prospects of the appeal succeeding only where strong grounds of appeal or a strong likelihood of success is shown should a stay be considered.”

27. We agree as submitted by the Applicant’s counsel that the Kenyan position is not dissimilar to the English one. In regard to the inherent powers of the court, in the case of *Nguruman Limited v Shompole Group Ranch & another* [2014] eKLR per Nambuye, JA stated:

“Turning to the inherent power of the Court, Rule 1(2) of this Court’s Rules which enshrines this power was cited as one of the enabling provisions to access the relief sought. It provides:-

‘Nothing in these Rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.’

It is now trite that the inherent power of the Court exists in the Court’s jurisdiction as a safety valve to enable the Court to make such orders as may be necessary for the ends of justice or to prevent the abused of the power of the Court. It cannot be cited where there is a Section, order or rule to cover the relief sought.”

28. Under Kenyan law, the test for grant of stay has been considered variously, including in the case cited by the Respondent of *Kenya Wildlife Service v James Mutembei* [2019] eKLR. It is now trite that the court’s exercise of its mandate under the Rule 5(2)(b) of this Court’s Rules is original, independent and discretionary. The conditions to be met before a party can obtain relief under Rule 5(2) (b) have been numerous restated by the Court. We take it from the crystallization of these in *Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others* [2013] eKLR, wherein the guiding principles for the court’s exercise of its mandate under Rule 5(2)(b) of the Court of Appeal Rules were summarized as hereunder;

- “(i) in dealing with Rule 5(2) (b) the Court exercises original and discretionary jurisdiction and that exercise does not constitute an appeal from the trial judge’s discretion to this court. See *Reuben & 9 Others v Nderitu & Another* (1989) KLR 459;
- (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;
- (iii) the Court becomes seized of the matter only after the notice of appeal has been filed under Rule 75. See *Halai & Another vs. Thornton & Turpin* (1963) Ltd. (1990) KLR 365;
- (iv) in considering whether an appeal will be rendered nugatory the Court must bear in mind that each case must depend on its facts and peculiar



circumstances. See *David Morton Silverstein vs. Atsango Chesoni*, Civil Application No. Nai 189 of 2001;

- (v) an applicant must satisfy the Court on both of the twin principles;
- (vi) in whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised. See *Damji Pragji Mandavia vs. 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. See *Joseph Gitahi Gachau & Another vs. Pioneer Holdings (A) Ltd. & 2 others*, Civil Application No. 124 of 2008;
- (viii) in considering an application brought under Rule 5 (2) (b) the Court must not make definitive or final findings of either fact or law at that stage as doing so may embarrass the ultimate hearing of the main appeal. See *Damji Pragji (supra)*;
- (ix) the term “nugatory” has to be given its full meaning. It does not only mean worthless, futile, or invalid. It also means trifling. See *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA227 at page 232;
- (x) 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;
- (xi) where it is alleged by the applicant that an appeal will be rendered nugatory on account of the respondent’s alleged impunity, 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.”

29. The jurisdiction under Rule 5(2)(b) only arises where the Applicant has lodged a notice of appeal. We are satisfied that the Applicant has filed a Notice of Appeal, and has gone further to annex a Memorandum of Appeal in its affidavit. The application is therefore properly before us.
30. We have considered the rival submissions by both parties to this application as well as the affidavits sworn for and against the application. We have also considered the cases cited by both parties.
31. The Applicant must satisfy the Court on both of the twin principles of whether it has an arguable appeal and whether the appeal will be rendered nugatory if the stay sought is not granted. On whether the Applicant has an arguable appeal, the Applicant’s position is that at the time the suit vessel was arrested at Mombasa, the pleadings as filed before the High Court by the Respondent had not properly invoked its claim in rem, and that therefore it did not fall within the court’s admiralty jurisdiction under Sections 20 and 21 of the Act. The Applicant’s position is that the court had no jurisdiction to either entertain the claim so far as it concerned the action brought against the vessel, or to issue a warrant of arrest. It is the Applicant’s position that the court’s action to grant leave to amend the Respondent’s pleadings without hearing the Applicant on it, resulted in clothing the High Court, post facto, with jurisdiction so as to justify the wholly unlawful arrest of the suit vessel.
32. It is also the Applicant’s position that the gratuitous orders made by the court for the security to be put up by the Applicant for the release of the suit vessel, resulted effectively in determining suo motu, an issue that was not before the High Court and without hearing any of the parties on it.



- 33. The Respondent has urged that the Applicant has not shown that its appeal will be stifled if the stay sought is not granted. It has urged that the Applicant filed the appeal in order to gain advantage and improve its bargaining position with the Respondent, which, it posited, is an abuse of the court process.
- 34. We are of the view that the Applicant’s appeal is arguable on the grounds urged. It is arguable whether the leave to amend clothed the High Court with jurisdiction to entertain the case, post facto. Similarly, whether orders made against the Applicant were those sought in the initial pleadings placed before court, or were not sought for were made suo moto, is indeed an arguable point.
- 35. As to the nugatory aspect it is the Applicant’s submission that the entire stratum of the appeal will be eradicated if stay is not granted. It claimed that if stay is not granted the counsel for the Applicant will be unable to defend his client.

It urged that there was no evidence to support Respondent’s claim that the cargo was perishable, and that in any event it is the Respondent who had arrested the cargo and so it should not be heard to complain.

- 36. The Respondent on the other hand urged that stay ought not to be granted as the Applicant has Respondent’s cargo which it has declined to discharge on the guise it has no contract with the Respondent. The Respondent urged that if the cargo continued to remain in the ship it exposes it to conditions that may render it unsalvageable, which will result in the loss of USD 2.4 million. They urged that the Applicant will not suffer any loss if the cargo and ship are sold as it will be entitled to damages.
- 37. We have considered the arguments by both sides. The burden lies with the Applicant to show that its appeal will be rendered nugatory. The test to apply is to consider 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. We are satisfied that what is sought to be stayed will not render the appeal nugatory, as the Applicant, if it succeeds in its appeal will be entitled to damages, which we are satisfied will be sufficient to compensate it for any loss or damages it may suffer.
- 38. We are satisfied that this application has no merit. Accordingly, the Notice of Motion application dated 10th September 2021 is dismissed with costs to the Respondent.

DATED AND DELIVERED AT MOMBASA THIS 17TH DAY OF DECEMBER 2021.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed



DEPUTY REGISTRAR

