



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME, J.J.A)

CIVIL APPLICATION NO. 94 OF 2018

BETWEEN

MISNAK INTERNATIONAL (UK) LIMITED ..... APPLICANT

AND

4MB MINING LIMITED C/O MINISTRY OF

MINING, JUBA REPUBLIC OF SOUTH SUDAN ..... 1<sup>ST</sup> RESPONDENT

TOTAL LINK LOGISTICS..... 2<sup>ND</sup> RESPONDENT

UNION LINK LOGISTICS ..... 3<sup>RD</sup> RESPONDENT

FREIGHT FORWARDERS (K) LIMITED ..... 4<sup>TH</sup> RESPONDENT

*(An application for stay of Proceedings and the Order of the High Court of Kenya at Mombasa (Mwangi, J.) dated 6<sup>th</sup> July, 2018*

*in*

*H.C.C.C No. 30 of 2018.)*

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**RULING OF THE COURT**

1. The applicant herein is calling upon us to invoke our original and discretionary jurisdiction under **Rule 5(2)(b)** of the **Court of Appeal Rules** (the Rules) and issue the following orders:

*i. Stay of the order issued on 6<sup>th</sup> July, 2018 in H.C.C.C No. 30 of 2018 pending the hearing and determination of the intended appeal against that order.*

*ii. Stay of all further proceedings in H.C.C.C No. 30 of 2018 pending the hearing and determination of the intended appeal against the order issued therein on 6<sup>th</sup> July, 2018.*

The applicant is of the view that those orders will preserve the subject matter of the intended appeal pending its determination as envisaged in ***Equity Bank Limited vs. West Link Mbo Limited [2013] eKLR***.

2. The salient facts which gave rise to the application are that the 1<sup>st</sup> respondent was contracted by the Government of South Sudan to undertake mining activities in Juba and Luri. In order to carry out its obligation, the 1<sup>st</sup> respondent engaged the services of the applicant to source, purchase and ship container loads of mining materials to Juba in South Sudan on or before 17<sup>th</sup> March, 2018. Delivery of the consignment on or before the aforementioned date was crucial so as to obtain tax exemption from the Southern Sudanese government. The applicant sourced the materials in question and issued an invoice which was paid for by the 1<sup>st</sup> respondent.

3. Apparently, at least according to the 1<sup>st</sup> respondent, the shipment arrived at the Port of Mombasa on 4<sup>th</sup> March, 2018 but instead of the

same being transported to Juba as agreed, the applicant allegedly raised further invoices demanding exorbitant fees. The 1<sup>st</sup> respondent would have none of it and refused to pay the same. As a result, the applicant with the assistance of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents who acted as clearing agents were alleged to have illegally detained the consignment until the amount demanded was paid.

4. Faced with the stalemate the 1<sup>st</sup> respondent on 27<sup>th</sup> April, 2018 filed suit in the High Court being **H.C.C.C No. 30 of 2018** against the applicant. It also joined the 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> respondents as interested parties. The 1<sup>st</sup> respondent sought orders ranging from the forthwith release of the detained consignment, general damages for illegal detention, storage charges levied on the consignment to taxes which would be levied against the consignment by the Government of South Sudan.

5. In addition, the 1<sup>st</sup> respondent filed an interlocutory application on even date under a certificate of urgency seeking a variety of interlocutory orders. The High court (**Mwangi, J.**) directed service of the said application on the applicant and the other respondents. It seems that the 1<sup>st</sup> respondent's advocate on record effected service using the email addresses of the respective parties.

6. Subsequently, the applicant instructed her advocate to enter a conditional appearance and to also file a preliminary objection challenging the legal standing of the suit. In short, the preliminary objection attacked the High court's jurisdiction on the grounds that firstly, the 1<sup>st</sup> respondent had failed to file and serve the summons to enter appearance together with the plaint contrary to **Order 5 rule 5** of the **Civil Procedure Rules**. Secondly, in total disregard to **Order 5 rules, 21, 22, 23 & 25** of the **Civil Procedure Rules**, the 1<sup>st</sup> respondent had failed to seek leave of the High Court to serve the applicant who is resident in the United Kingdom with summons to enter appearance out of the court's jurisdiction. The totality of it was that the High Court was divested of jurisdiction to entertain the suit.

7. In response, the 1<sup>st</sup> respondent contended that it had filed and served the summons to enter appearance in accordance with the law. Furthermore, it had sought leave of the High court to effect service using the email addresses of the respective parties in the interlocutory appeal which leave it believed was granted when the learned Judge directed service of the application. Moreover, even if the said leave was not obtained the omission amounted to a technicality capable of being cured under **Article 159** of the **Constitution**.

8. The learned Judge agreed with the 1<sup>st</sup> respondent and in a ruling dated 6<sup>th</sup> July, 2018 she dismissed the preliminary objection. In doing so, she pronounced herself as follows with respect to the issue of summons to enter appearance:

***“The record reveals that there are copies of summons to enter appearance in the court file that were given under the hand and the seal of the court on 30<sup>th</sup> April, 2018. The said date relates to when the Deputy Registrar executed the said documents. The said summons do not bear the registry stamp to show when they were filed. The fact however remains that the said documents are in the court file, thus they cannot be considered to be a nullity for lack of a court filing stamp. If at all they were not filed together with the plaint on 27<sup>th</sup> April, 2018 that is a procedural technicality under the provisions of Article 159(2) (d) of the Constitution of Kenya, 2010.”***

9. The learned Judge went on to express:

***“As this court has said, it gave the plaintiff 5 days to effect service of the application dated 27<sup>th</sup> April, 2018 due to the fact that goods in issue were being held at the port of Mombasa and there was daily accrual of demurrage (sic). The plaintiffs' Counsel resorted to use of email to bring to the attention of the parties the institution of the suit and the date scheduled for the hearing of the application dated 27<sup>th</sup> April, 2018. Courts superior to this one, have considered the effects of procedural infractions in different circumstances and it is apparent that it behoves the court seized of a matter to determine if an infraction is a substantive one or goes to the jurisdiction of the court.***

...

***In line with the above decisions, it is my finding that in the circumstances surrounding this case, justice should not be sacrificed at the altar of procedural technicalities, more so as the defendant who filed the PO is very much aware of the existence of the suit herein and did instruct an Advocate to act for it; and the said Counsel was duly served with summons to enter appearance and other documents on behalf of the defendant. This court also notes that on 7<sup>th</sup> May, 2018, the law firm of Gikera & Vadgma Advocates filed a conditional memorandum of appearance for the defendant. Having taken into consideration all the foregoing factors, I decline to sustain the PO and order that the suit against the defendant will proceed to hearing on merit.”***

10. The applicant was not happy with that decision and it filed a Notice of Appeal dated 11<sup>th</sup> July, 2018 against the decision. On that very day, the 1<sup>st</sup> respondent filed another application at the High court this time seeking summary judgment against the applicant principally on the ground that it had not filed a statement of defence. Subsequently, the learned Judge on 24<sup>th</sup> July, 2018 directed the 1<sup>st</sup> respondent's applications dated 27<sup>th</sup> April, 2018 and 11<sup>th</sup> July, 2018 be heard together on 27<sup>th</sup> September, 2018; the applicant and other respondents to file their respective replies to the applications within 14 days.

11. Those directions are what instigated the application before us. Mr. Peter Ferdinand, the applicant's Managing Director, deposed that the applicant is resident in England and a member of the British International Freight Association (BIFA) whose terms and conditions of trading contain an exclusive foreign jurisdiction clause designating contractual disputes to the jurisdiction of English courts. The applicant is apprehensive that unless the orders sought are granted it would be forced to annex its draft defence in its reply to the application of summary judgment which will in turn render the intended appeal overtaken by events. According to the applicant, taking any further steps in the High court suit such as attaching and/or filing such a defence could be deemed as the applicant acquiescing to the jurisdiction of Kenyan courts.

12. The applicant is also worried that the 1<sup>st</sup> respondent may apply for a default judgment to be entered against it on account of failure to file a defence. In its view, the 1<sup>st</sup> respondent would not suffer any prejudice if the orders sought were granted. Mr. Ferdinand also deposed that the intended appeal raises arguable points *to wit*, whether the learned Judge erred in finding that, the failure to file and serve summons to enter appearance with the plaintiff is a procedural technicality; the applicant was served with summons to enter appearance; service by use of email addresses was proper; conditional appearance by the applicant waived her right to challenge the court’s jurisdiction; and directing the 1<sup>st</sup> respondent to effect service of its application without first granting the 1<sup>st</sup> respondent leave to effect service of the summons of appearance out of the court’s jurisdiction;

13. In opposing the application, Mr. Yoram Moussaieff, the 1<sup>st</sup> respondent’s Director, deposed that the application was not only incompetent but also frivolous. In his opinion, the orders sought were untenable taking into account the circumstances of the case. Besides, the applicant was not deserving of the said orders since in the month of August it had in collusion with the 3<sup>rd</sup> and 4<sup>th</sup> respondents removed the consignment from the Port of Mombasa to the Port of Jebel Ali in Dubai with the aim of stealing a match from the 1<sup>st</sup> respondent.

14. In his address, Mr. Kithinji, learned counsel for the applicant, reiterated that the intended appeal raises arguable points mainly on the jurisdiction of the High Court to entertain the suit. He submitted that unless the orders sought were granted the intended appeal would be rendered nugatory since the High Court will proceed with the matter thus defeating the substratum of the appeal.

15. Supporting the application, Ms. Onyango, learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondents, argued that leave of the court is required for a foreign company to be brought into litigation under **Order 5 rule 21** of the **Civil Procedure Rules**. She emphasised that the said leave was mandatory and in its absence the High Court lacked the jurisdiction to handle the suit in issue.

16. On his part, Mr. Ngonze, learned counsel for the 1<sup>st</sup> respondent, contended that the applicant was not deserving of the exercise of our discretion in its favour. The reason being that the applicant had approached the Court with unclean hands by removing the consignment out of the Court’s jurisdiction. Nevertheless, counsel did acknowledge that the 1<sup>st</sup> respondent was required to seek leave to serve the applicant with summons to enter appearance out of the court’s jurisdiction which it did not.

17. Having taken into consideration the rival submissions on behalf of the parties, we are conscious that our discretionary power under **Rule 5(2)(b)** of the Rules albeit being unfettered ought to be exercised within prescribed parameters. We have to satisfy ourselves firstly, that the applicant has demonstrated that it has an arguable appeal or an appeal that is not frivolous, and secondly, that if the orders sought are not granted, the intended appeal will be rendered nugatory, if it eventually succeeds. Further, the applicant is obliged to satisfy both of those principles; it is not enough to satisfy only one of them. These principles are well settled and have been restated in several decisions of this Court, in the line of ***Patel vs. Transworld Safaris Ltd [2004] eKLR*** and ***Githinji vs. Amrit & Another [2004] eKLR***.

18. Taking caution not to make determinations that would otherwise prejudice the hearing of the intended appeal, we are of the view that whether or not the High Court has jurisdiction to proceed with the suit in the absence of leave to the 1<sup>st</sup> respondent to serve the applicant with summons to enter appearance outside the court’s jurisdiction is arguable and warrants the consideration of this Court.

19. On the nugatory aspect, we find that unless the orders sought are granted the High Court will proceed with the suit and issue further orders which would defeat the intended appeal. The crux of the intended appeal is that the High Court has no jurisdiction to entertain the suit and to allow it to continue, in our view, it would not only be prejudicial to the applicant but will also not be economical use of judicial time in the event the intended appeal succeeds. In the circumstances, we find that the balance of convenience tilts in favour of allowing the orders sought.

20. The upshot of the foregoing is that the application has merit and is hereby allowed. For avoidance of doubt we issue the following order:

***The order issued on 6<sup>th</sup> July, 2018 in H.C.C No. 30 of 2018 as well as the proceedings therein are hereby stayed pending the hearing and determination of the intended appeal against the order dated 6<sup>th</sup> July, 2018.***

Costs of this application shall abide the outcome of the intended appeal.

**Dated and delivered at Mombasa this 15<sup>th</sup> day of November, 2018.**

**ALNASHIR VISRAM**

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**JUDGE OF APPEAL**

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**