



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 91 OF 2015

CONSOLIDATED WITH CIVIL APPEAL NO. 23 OF 2016

BETWEEN

EVERGREEN MARINE (SINGAPORE)

PTE LIMITED1ST APPELLANT

GULF BADAR GROUP (KENYA) LIMITED2ND APPELLANT

AND

PETRA DEVELOPMENT SERVICES LIMITEDRESPONDENT

(Being an appeal from the Ruling and Order of Kasango J. delivered on 13th August, 2014 and from the Ruling and order of Otieno, J. delivered on 19th February, 2016 in the High Court of Kenya ,Commercial and Admiralty Division in Mombasa

in

(HCCC.NO.65 of 2014)

JUDGMENT OF THE COURT

At the very heart of this appeal is the construction and application of clause 29 of two bills of lading Nos. 321400001014 and 321400001341 regarding the applicable law and jurisdiction. The common relevant clause provided as follows;

“29 (1) Non-U.S. Trades: Except as provided in subparagraph (2) below all claims arising hereunder must be brought and heard solely in the High Court of London, England to the exclusion of any other forum. Except as provided elsewhere in this Bill, English law shall apply to such claims

(2)

(3) This law and jurisdiction clause is intended solely for the carrier’s benefit and

may be unilaterally waived by the carrier, in whole or in part, before or after proceedings are commenced.” (our emphasis)

By an agreement made in writing on 15th February, 2014 the respondent, a limited liability company incorporated in Uganda where it also has its registered office, agreed with a third company in India (Raj Kripal Lumbars Ltd) (the purchaser) to supply the latter with 250 containers (of 20 feet each) load of rough square wooden beams for a total consideration of US \$3,750,000. The containers were to be shipped from the Port of Mombasa to either Mundra Port or Mangalore Port both in India as directed by the purchaser. Further terms of that agreement were that the shipment would be made in lots of 6 containers to be delivered within 30 days of the date of each letter of credit; that payment of the purchase price would only be made under the letter of credit and upon presentation of, *inter alia*, the complete sets of the original bills of lading relating to the shipment of the 6 containers per lot; and that either party would be entitled to terminate the agreement for non-performance or violation of the terms thereof. Pursuant to the foregoing the purchaser issued to the respondent the first letter of credit through the Bank of India, New Delhi on 17th February, 2014.

The appellants were then contracted by the respondent to ship the first lot of the 6 containers from the Port of Mombasa to India, deliver 4 containers to Mundra Port and 2 to Mangalore Port. The 1st appellant is a limited liability company incorporated in Singapore and carrying on the business of, *inter alia*, carriage of goods by sea, while the 2nd appellant, also a limited liability company incorporated in Kenya, is a shipping agent and was the agent of the 1st appellant in the transaction.

On 6th March 2014 all the 6 containers loaded with timber of the specification alluded to earlier were shipped to India on motor vessel “*Hammonia Gallicum*.” In the meantime the appellants issued to the respondent unsigned copies of the bill of lading in respect of the shipment of the aforesaid 6 containers for perusal and approval of the details contained therein. After the approval the respondent asked the appellants to furnish it with the original bills of lading as a matter of extreme urgency for onward transmission to the purchaser in India. The appellants however refused to do so. This in the respondent’s view amounted to breach of the provisions of **section 3** of the Carriage of Goods by Sea Act (**cap 224**); that as a result of the refusal the respondent was in turn in breach of a contract between it and the purchaser in India; and that even though the consignment had reached its destination in the two ports in India, neither the respondent nor the purchaser could obtain their release without the two bills of lading.

The respondent, as a result instituted Mombasa H.C.C.C. No.64 of 2014 claiming that the appellants, without any justification whatsoever, wrongfully and unlawfully, refused to release to the respondent the two bills of lading contrary to the law and prayed that there be an order of a mandatory injunction to compel the appellants to unconditionally release the bills of lading to the respondent, deliver the consignment to the purchaser, fully indemnify the respondent for any additional charges or penalty incurred or to be incurred in order to take delivery of the 6 containers as a result of the appellants’ unlawful action, an injunction to restrain the appellants from breaching the contract of carriage contained in the bills of lading, and from charging demurrage or other penalties.

The respondent also applied for payment of special damages of US\$ 3,750,000 being the value of purchase price between the respondent and the purchaser for the supply of timber, interest on the above sum, and costs. Upon the suit being filed, summons under **order 5 rule 1** of the Civil Procedure Rules were issued to the appellants. In terms of **order 5 rule 26** the summons issued required the appellants to enter appearance within 15 days from the date of service. By an affidavit of service sworn by Isaac Muriuki Kinyua, a process server, it was deponed that the summons were served on the appellants on 27th May 2014.

On 20th June 2014 the appellants through the firm of Anjarwalla and Khanna Advocates entered unconditional appearance. Later the memorandum of appearance was amended to make it conditional, under protest.

The respondent's plaint was brought simultaneously with a motion on notice for temporary orders of mandatory injunction to compel the appellants to unconditionally release the two bills of lading to the respondent, pending the hearing of the suit. The application was placed before Kasango, J. who on 3rd June 2014 issued the orders sought *ex parte* after the appellants failed to attend despite being served with the hearing notice. Shortly the appellants, also by a notice of motion, applied to the court to stay and/or set aside the *ex parte* orders of 3rd June 2014. The application was opposed by the respondent.

That application and the objection were considered by Kasango, J. who in a rather lengthy ruling reviewed the terms of the bills of lading and specifically construed **clause 29** to mean that, although the parties had chosen to have any dispute arising from their relationship resolved in the courts in London and that English law would apply, the appellants, by filing an unconditional appearance had submitted to the jurisdiction of the court. The learned Judge relied on the case of **Kanti & Co. Ltd v South British Insurance Co. Ltd**, Civil Appeal No. 38 of (1981) KLR 1. She further found that **clause 29** gave the appellants an option to unilaterally waive the exclusive jurisdiction clause and that having so waived it, the appellants cannot be heard to go back to their action of submitting to the jurisdiction of the local court; that there was no provision in the rules for filing an amended memorandum of appearance, as was stated in **Interjoint Investments & 2 others v Paradise Mombasa Ltd & 3 others**; Mombasa Civil Appeal No. 79 of 2002; that a memorandum of appearance, not being a pleading as defined in section 2 of the Civil Procedure Act, could not be amended as provided for under **order 8 rule 1 (1)** of the Civil Procedure Rules; that in any case, any amendment could only be with leave of the court; and that the provisions of **Article 159** of the Constitution were not available to the appellant in the circumstances of the case. The learned Judge found that the amended memorandum of appearance was irregularly filed and expunged it from the record. On the prayer to set aside the orders of 3rd June 2014 the learned Judge dismissed the appellant's claim that it was justified to exercise a carrier's lien over the bills of lading on account of monies owed to it by a company associated with one of the directors of the respondent. The learned Judge found that there was no evidence linking the respondent to that other company. She ultimately found no substance in the application which she dismissed with costs to the respondent.

The dismissal aggrieved the appellants who moved to this Court by way of Civil Appeal No. 91 of 2015. A few days after the ruling of 13th August 2014 the appellants filed another application on 22nd August 2014 for temporary order of stay of proceedings or, without prejudice to that prayer, for leave to file their defence out of time if the Court of Appeal confirmed the jurisdiction of the High Court in an appeal filed against the decision of 13th August 2014. It is not clear to us how the High Court was expected to determine the last question when the appeal to this Court had not been determined. That perhaps explains why the learned Judge made no determination on that prayer.

The application was premised on the grounds that the appellants had challenged the trial court's decision dismissing their application in which, among other things, they challenged the court's jurisdiction; and that the learned Judge's decision went to the very core of the dispute at an interlocutory stage. Before this application could be set down for hearing, it came to the appellants' attention that, on 22nd August 2014, even as they filed the above application, the respondent had obtained an interlocutory judgment in default of defence. They took out another notice of motion dated 2nd September 2014 seeking the setting aside of the interlocutory judgment. The two applications, after consolidation were canvassed before P. J. Otieno, J. In a rather incoherent ruling the learned Judge, on the application for stay of proceedings, held that;

***“11. ...the primary considerations the court takes into account before ordering stay is whether it would be in the interest of justice. If it be in the interest of justice then the court then (sic) considers what terms would serve the established interest of justice in ordering stay of proceedings. As in all discretionary matters the court must consider all the pros and cons in granting or failing to grant stay. The tools available in weighing the said pros and cons are essentially the need for timely disposed (sic) of court cases, optimal utilization of time as a scarce judicial resource and the arguability of the appeal (intended appeal in this case).*”**

12. In the present case I refrain from considering the arguability of the appeal because no

substance was placed before me on the same and in any event by the time the matter was argued before me the appeal was yet to be filed. I have subsequently seen a certificate of delay issued by the Deputy Registrar but that and the notice to appeal is all I can lay hands on about intended appeal since not even draft memorandum of appeal has been exhibited. It is therefore difficult and limiting for me to second guess what that appeal is likely to present itself like. Yet it is a consideration I must make. It is not lost to court that it was the onus of the applicant to avail material to prove the facts showing arguability of the appeal. The applicant has not discharged that onus and I will let rest that failure where it has fallen without disturbance.

13. ...

14. When put in the context of this case and the very rationale of granting stay, I take it that the primary matter for determination by the Court of Appeal as can be discerned from the submissions by the applicant, both before Kasango J and before me, is the question of jurisdiction of Kenyan courts to entertain this matter on the basis of the contract between the parties.

15. I am persuaded that whether or not this matter proceeds even as the appeal pends nothing shall have been lost nor will anything unpleasant have taken place. I say so with the view that if the applicant succeeds on the appeal, and that court finds that the High Court had no jurisdiction in the matter, it shall only take the service of the order and this matter shall stand determined and buried. To the contrary if stay is granted and the appeal fails, and this being a commercial dealing between the parties in which time dictates on possible losses, such losses shall only have accumulated to whichever side they shall ultimately fall. In my assessment that is a factor that dictates against grant of stay of proceedings pending appeal.”

With that the learned Judge rejected the application for stay of proceedings. On the application to set aside the interlocutory judgment the learned Judge, relying on **Shah v Mbogo** (1967) EA 16, considered the conduct of the appellants, blamed them of dexterity and dilatoriness aimed at delaying the process of the court, and for that reason found they did not deserve the orders of setting aside the interlocutory judgment. He also held that the appellants had failed to explain sufficiently their failure to file defence within the prescribed period and concluded:

“This suggests either lack of candour, evasion or just failure to give the matter the due attention deserved by it.”

Once again the appellants were aggrieved and lodged in this Court Civil Appeal No. 23 of 2016. This latter appeal and Civil Appeal No. 91 of 2015 were, by an order of this Court issued on 26th April 2016, and pursuant to **Rule 103** of the Court of Appeal Rules, consolidated.

The parties have, however, filed separate submissions, on each of the consolidated appeals Highlighting the appellants’ submissions in Civil Appeal No. 91 of 2015, Mr. Ochwa, learned counsel argued that the learned Judge (Kasango, J) erred in ignoring the parties’ clear intention to have the dispute adjudicated in London and instead relied on a technicality in the memorandum of appearance to deny the appellants their forum of choice; that by taking the course complained of, the learned Judge purported to re-write the contract for the parties; that an exclusive jurisdiction clause in any agreement ought to be respected; that the learned Judge erred in insisting that jurisdiction was conferred from the time the appellants entered appearance; that there is no established practice to support the position that appearance constitutes acceding to jurisdiction; that words like “unconditional” used when describing an appearance that is not premised on any condition mean very little and are not recognized by the rules; that the court ought to have taken judicial notice that once a party who intends to raise an objection to the court’s jurisdiction is served with summons he must first of all enter appearance; that it is only after entering appearance that the party can challenge the court’s jurisdiction; that the learned Judge erred when she found that the appellants had waived the exclusive jurisdiction clause.

The appellant relied on, a long list of authorities, including; **The owners of Motor Vessel “Lillian” S v**

Caltex Oil (K) Ltd (1989) KLR 1, **Securicor Courier (K) Ltd v Benson David Onyango and another** (2008) KLR 252, **United India Insurance Co. Ltd v East African Underwriters (K) Ltd** (1985) KLR 898, **The Makefjelly** (1976) Lloyd's Reports 29, and the Supreme Court of Nigeria case of **Popoola Elabanjo & another v Chief (Mrs) Ganiat Dawodu, S. C. 386/2001.**

In Civil Appeal No. 23 of 2016 the appellants submitted that the learned Judge (Otieno J.) erred in rejecting an application for stay of proceedings; that since jurisdiction is everything the court ought to have stayed proceedings until the issue was finally determined; that that was why they instituted the second application for enlargement of time in case the challenge on jurisdiction failed; that in view of the claim amounting to Kshs.390,000,000 the learned Judge ought to have allowed the application.

Regarding the prayer for setting aside of the interlocutory judgment, which was also rejected by the learned judge, it was submitted that the learned Judge ought to have been guided by **Article 159** of the Constitution to do substantive justice.

In opposing the appeal the respondent submitted that its claim against the appellant was premised on the tort of detinue and not on the breach of contract of carriage as understood by the appellants; that the respondent was aggrieved by the wrongful detention of the bills of lading, a matter governed by local legislation, the Carriage of Goods by Sea Act (**Cap 224**); that since the respondent's claim was not made under the bill of lading, **clause 29** thereof was inapplicable; that, in any case there was no bill of lading to base a claim on as the draft had not been executed at the time the dispute arose; and that the breach envisaged in the bill of lading could only be in respect of breach of duty and/or breach of contracted obligations in so far as the carriage of goods, the subject of the bill, were concerned.

It was further submitted that since the goods were being shipped out of Mombasa and the bills of lading were to be issued at Mombasa by a party conducting business in Kenya for a shipper based in Uganda, it would be inappropriate for the High Court of England to be the forum to entertain the dispute and that would also offend the mandatory statutory requirement under Kenyan law.

The two applications giving rise to this appeal sought the court's exercise of discretionary powers. Starting with Civil Appeal No. 91 of 2015, the notice of motion dated 25th June 2014 sought:

"1

2. THAT pending the hearing and determination of this application, the Honourable Court be pleased to stay the orders issued on 3rd June 2014 upon such terms and conditions as it may deem just;

3. THAT this Court be pleased to set aside the *ex parte* orders made on 3rd June 2014 upon such terms and conditions as it may deem just

4. ..."

This application was prompted by the orders issued *ex parte* by the court below after the appellants, although served with a hearing notice, failed to attend court. The contentious orders in question were, in their very nature mandatory but interlocutory, pending the determination of the suit. The appellants, by those orders were being compelled to release the two bills of lading to the respondent and to deliver the cargo at the ports of Mundra and Mangalore in India.

In the application for stay and or to set aside, those orders, the appellants deposed that one of the directors of the respondent, Rami Fakhouri had represented himself as a managing partner of Lumber Logs International Trading LLC, in the Kingdom of Jordan; that the said Lumber Logs International Trading LLC had earlier on contracted the 1st appellant to ship and deliver 30 containers of teak wood logs at a cost of US \$ 202, 110.67, and that this amount remained unpaid. As a managing partner in Lumber Logs International Trading LLC, Rami Fakhouri, who was also a majority shareholder in the respondent, was

responsible for the payment of the outstanding amounts; that the respondent was an agent, vessel or conduit of Lumber Logs International Trading LLC; that the appellants were as a result justified on account of the outstanding payments to exercise a carrier's lien over the respondent's consignment together with the relevant documents; that the High Court had no jurisdiction to entertain any claim arising out of the contract of carriage under the two bills of lading; that the orders of 3rd June 2014 were therefore issued without jurisdiction; and that the 2nd appellant being an agent of a disclosed principal (the 1st appellant) was wrongly joined in the suit.

In other words the appellants were contending that, as the court had no jurisdiction, they did not have to reply to the respondent's application for injunction or even appear before the court where it was set to be heard, and secondly that an order of mandatory injunction was not available as the respondent owed the appellants some money in a separate transaction with a company in which one of the directors of the respondent was also a director and in which they were entitled to a lien.

In her determination of these issues the learned Judge was of the opinion that the appellants, by filing unconditional memorandum of appearance had submitted to the jurisdiction of the court and their subsequent "amended" memorandum of appearance "under protest" came too late in the day and was also filed without leave of the court; that the appellants exercised their option under the terms of the bill of lading to unilaterally waive the exclusion jurisdiction clause; that there was nothing to suggest that the respondent was an agent or subsidiary of Lumber Logs International Trading LLC to warrant the exercise of carrier's lien on the former's goods and documents; and that the appellants had not proffered any explanation for their failure to attend the *interpartes* hearing and therefore did not deserve the reliefs sought. For those reasons the learned Judge found no merit in the application and dismissed it with costs as stated earlier.

The notice of motion before Kasango, J was expressed to be brought pursuant to **sections 1A, IB & 3A** of the Civil Procedure Act and **order 15 rule 1 (a)** (sic), **order 51 rules 1 & 15** of the Civil Procedure Rules. We refer, first to **rule 14** which provides that a respondent who wishes to oppose any application may file a notice of preliminary objection and/or replying affidavit and/or a statement of grounds of opposition. If a respondent fails to file any of these document as well as a list of authorities within three clear days before the date of hearing, the court may hear the application *ex parte*. The Court may however by **rule 15** set aside the *ex parte* order.

None of the parties addressed this provision in their submissions and the trial court too missed it, even though it was the fulcrum around which the application rotated. The appellants, however cited relevant case law, which demonstrated that they were alive to the nature of the application and the issues for determination. For instance, they cited **Mbogo & another v Shah** (1968) EA 93 and **Pithon Waweru Maina v Thuku Mugiria**, (1983) KLR 78. In the latter the law on setting aside of *ex parte* judgment or order was considered in great detail. Because of that detailed consideration, its importance and relevance, we reproduce the pertinent part in *extenso* herebelow;

“2. The Principles governing the exercise of the judicial discretion to set aside an ex parte judgment obtained in default of either party to attend the hearing are:

a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.

b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo (1967) EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.

c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some

matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah (1968) EA 93.

d) The court has no discretion where it appears there has been no proper service (Kanji Naran v Velji Ramji (1954) 21 EACA 20).

e) A discretionary power should be exercised judicially and not arbitrarily or idiosyncratically. (Smith v Middleon (1970 SC 30)

3. The power to set aside the judgment does not cease to apply because a decree has been extracted (Fort Hall Bakery Supply Company v Fredrick Muigai Wangoe (1958) EA 118).

4. Some of the matters to be considered when an application is made, are the facts and circumstances, both prior and subsequent, and all the respective merits of the parties together with any other material factors which appear to have entered into the passing of the judgment, which would not or might not have been present had the judgment not been exparte and whether or not it would be just and reasonable, to set aside or vary the judgment, upon terms to be imposed (Jesse Kimani v McConnel (1966) EA 547, 555F).

5. The nature of the action should be considered, the defence if one has been brought to the notice of the court, however irregularly, should be considered; the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered; and finally, it should be remembered that to deny the subject a hearing should be the last resort of a court. (Jamnadas v Sodha v Gordandas Hemraj (1952) 7 ULR 7).” (our emphasis)

These are the contours upon which this appeal must be considered.

The other relevant principle is that this Court, on a first appeal is required to re-evaluate afresh the material that was presented before the trial court and on which the impugned decision was based in order to arrive at its own independent conclusion. See Selle v Associated Motor Boat Co. (1968) EA 123. Finally on the principles, we remind ourselves that, for us to interfere with that power it must be demonstrated that the judge misdirected himself or herself in some material matter as a result of which he arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his or her discretion, and that as a result there has been misjustice. See Mbogo v Shah (supra).

Applying these legal principles to the circumstances and facts in dispute, can it be said that the learned Judge misapplied the law or improperly declined to exercise her discretion in favour of setting aside the *exparte* orders? This Court in JMK v MWM and another, Civil Appeal No. 15 of 2015 stressed the importance of observing the right to be heard, particularly if one stands to suffer adversely if not heard. We observed earlier that the appellant, believing, wrongly or rightly that the court had no jurisdiction did not respond to the application or attend court when the application came up for hearing. They, however entered an appearance and shortly after purported to amend the memorandum of appearance insisting the appearance was under protest. Were the appellants justified in holding the belief that the High Court had no jurisdiction? No doubt **clause 29** of the bill of lading gave exclusive jurisdiction to the High Court of London to resolve any claim arising from the terms of the bills. The appellants under the terms of the bill of lading were however free to waive that jurisdiction.

As a general rule, where parties themselves choose the law to be applied in their contractual relationship and give exclusive jurisdiction to courts other than those in Kenya, such a decision must be respected by local courts, unless the party suing in the non-contractual forum discharges the burden cast on him of showing a strong reason for suing in that forum. See United India Insurance Company Ltd v East African Underwriters (K) Ltd (1985) KLR 898 where Madan, JA (as he then was) explained that;

“The Courts in this country have a discretion to assume jurisdiction over an agreement which is

made to be performed in Kenya notwithstanding a clause therein conferring jurisdiction. Clauses however should normally be respected because the parties themselves freely fixed the forums for the settlement of their disputes; the court should carry out the intention of the parties and enforce the agreement made by them in accordance with the principle that a contractual undertaking should be honoured unless there is strong reason for not keeping them bound by their agreement.

‘Everybody accepts that the general rule is that the jurisdiction clause must be obeyed. There must be something exceptional to justify departure from it and the exceptional circumstances must be such as to afford strong reason for such departure.’

Per Cairn, LJ in Makefjell (1976) 2 Lloyd’s Law Reports, 29”

Where parties have bound themselves on the jurisdiction and the law to govern the transaction, a party, by conduct may be presumed to have waived the term and submitted to the jurisdiction of the local courts. The well-known circumstances where a party is so presumed include where the party upon service of summons enters appearance without protesting jurisdiction like the appellants initially did. For the exclusive jurisdiction clause to have effect it must be clear to all that jurisdiction is protested at the earliest point of entering appearance. A defendant like in the case of **United India Insurance Co. Ltd** (*supra*) can enter appearance in protest and quickly follow it with an application for stay of all further proceedings or for the dismissal of the suit on account of lack of jurisdiction. A party may also file a notice of preliminary objection. See **Raytheon Aircraft Credit Corporation and another v Air Al-Faraj Limited** Civil Appeal No. 29 of 1999 where the court stated that;

*“There are no rules of the court prescribing the procedure for challenging the jurisdiction of the High Court by a foreign defendant who has been sued in this country in breach of contractual forum selection and the exclusive jurisdiction clause. The procedure suggested by the predecessor of the court in **Prabhadas (N) & Co. v Standard Bank** (1968) EA 679 at page 684 paragraph C-E is to enter a conditional appearance and then move the court for setting aside the process.”*

This procedure seems to have gained sufficient traction in law to the point that it is safe to say that the point is settled. In **Fonville v Kelly III and other** (2002) 1 EA 71 it was reiterated that the entering of appearance or filing of a defence under protest, the filing of an application for stay of proceedings or for striking out the proceedings and the raising of a preliminary objection to the suit before trial are all legitimate means of challenging the jurisdiction of the court.

It is common factor that the appellants initially filed unconditional memorandum of appearance which was subsequently amended to send the message that it was filed under protest on account of the court’s lack of jurisdiction. By the time the amended memorandum was filed the horse had bolted and the court assumed jurisdiction. In any case, as correctly stated in the case of **Kanti & Co.** (*supra*), a memorandum of appearance is not a pleading capable of amendment within the meaning of **section 2** of the Civil Procedure Act. The Court in that case explained that;

“..the defendant by entering an unconditional appearance submitted to the jurisdiction of the High Court, and it could not thereafter abrogate or annul it unilaterally by entering an amended appearance even under protest without an order of the court releasing it from its admission and acceptance of the jurisdiction.”

On this aspect of the appeal and for the reasons we have given we come to the conclusion that the High Court had jurisdiction to entertain and determine the application as it did.

In dismissing the application, we conclude, the learned Judge properly exercised her discretion as the appellants had placed no material before her to warrant the setting aside of the *ex parte* orders of 3rd June 2014. She correctly stated the principles that guide the courts in an application for setting aside *ex parte* orders and took into account relevant factors, including the appellants’ conduct.

We may also add, quite apart from the foregoing, that the cause of action pleaded by the respondent vested jurisdiction in the court. The plaint specifically stated that;

“8. The defendants has (sic), without any justification whatsoever wrongfully and unlawfully, in breach of the provisions of section 3 of the Carriage of Goods by Sea Act (cap 224), Laws of Kenya, refused to release to the plaintiff the two original signed Bills of Lading....in respect of the shipment of the six (6) containers....”

It is our view, and with respect agree with the submissions of learned counsel Mr. Khagram for the respondent that this was a claim in detinue founded on a Kenyan legislation which could only be resolved by the High Court in Kenya. The goods were shipped from Mombasa, the bills of lading were to be issued in Kenya and the appellants conducted business in Kenya. Finally on this point, it is common ground that the same appellants declined to sign the bills of lading. The unsigned bills of lading could not create any legal contractual obligation capable of binding the parties. **Clause 29** was, as a result, so to speak, stillborn.

For all the reasons stated herein above, we are satisfied that the learned Judge having exercised her discretion judicially, Civil Appeal No. 91 of 2015 must fail. It is dismissed with costs to the respondent.

Civil Appeal No. 23 of 2016 arose from a safety net application; that should the court find that the High Court had jurisdiction, that it should stay further proceedings pending the determination of the intended appeal, and that without prejudice to that, that the appellants be granted leave to file their defence out of time. The second application sought that the interlocutory judgment entered in default of appearance be set aside. The same principles we have considered in the first application equally applied to this application, which also sought the exercise of judicial discretion.

Although the learned Judge did not apply the provisions of order **42 rule 6** and **order 50 rule 6** of the Civil Procedure Rules, he had them in mind. The same grounds proffered in the first application are advanced here. The same reasons we have given in rejecting that application, will likewise apply in this one.

The consolidated appeals must fail. We accordingly dismiss them with costs. We also award costs in the High Court to the respondent.

Dated and delivered at Malindi this 30th day of September, 2016

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR