



IN THE COURT OF APPEAL

AT NAIROBI

CIVIL APPLICATION NO. 245 OF 2009

EAST AFRICAN POWER MANAGEMENT LIMITED APPLICANT

AND

THE OWNERS OF THE VESSEL “VICTORIA EIGHT..... RESPONDENTS

(Application for an injunction and/or stay of execution and/or stay of proceedings in the intended appeal from the orders of the High Court of Kenya at Mombasa (Sergon, J) dated 24th July, 2009

In

Admiralty Claim No. 13 of 2005)

RULING OF THE COURT

The applicant herein, **East African Power Management Limited**, asks us under **Rule 5 (2) (b)** of this Court’s Rules to grant to it the following orders:-

- “1. THAT the execution of the orders made by the superior court on the 24th day of July, 2009 be stayed pending the hearing and determination of the intended appeal therefrom.**
- 2. THAT this Honourable Court be pleased to order that the status quo that existed between the parties prior to the ruling dated 24th July, 2009 be maintained by the Respondent until the hearing and determination of the intended appeal.**
- 3. THAT the proceedings in the superior court Admiralty claim No. 13 of 2005 be stayed pending the hearing and determination of the intended appeal therefrom.”**

The application is brought on the following grounds:-

- “1. In the absence of the aforesaid orders the said intended appeal will be rendered nugatory.**
- 2. There are several substantial issues of fact and law to be determined in the intended appeal and the**

same is an arguable appeal and is not frivolous.

3. The Applicant has filed a Notice of Appeal against the whole of the decision of the superior court.”

This application arises from the ruling of Sergon, J delivered at Mombasa on 23rd July, 2009 pursuant to an application and undertaking for arrest and custody filed in the High Court of Kenya at Mombasa in Admiralty Jurisdiction in which the applicant herein was the claimant while the respondent was the defendant. This was in Admiralty No. 13 of 2005. The respondent raised the issue of jurisdiction and after considering the submissions by both sides on that issue of jurisdiction, the learned Judge in the course of his ruling said:-

“I have considered the material placed before me and the above submissions made by Messrs. Kapila and Khanna, learned advocates for the defendant and the claimant respectively. There is no doubt that the claim is for US\$1,125,000/- as set out on the claim form dated 25.10.2005. That is the claim form the defendant now seeks to be struck out on the ground that this court lacks jurisdiction. The question which has been posed is whether or not vessel “Victoria 8” should be treated as a ship or plant. If the same is treated as a ship, then the defendant’s application must fail and vice-versa. There is no doubt that “Victoria 8” sailed to Mombasa as a ship through the deep waters to be used as a power generating plant mounted on a barge. With respect, I agree with the submission of Mr. Kapila that “Victoria 8” had its voyage as a ship but upon reaching Mombasa it became a platform. In my view the claim herein falls under the operations and maintenance of the power plant based on a fixed power generating plant.”

Having so stated the learned Judge concluded his ruling thus:-

“Since the claim has nothing to do with a ship I declare that this court has no admiralty jurisdiction to deal with such a dispute.”

Being dissatisfied by the foregoing, the applicant filed a notice of appeal on 7th August, 2009 and pursuant to that notice of appeal, filed this application which came up for hearing before us on 20th January, 2010. Mr. U. Khanna appeared for the applicant while Mr. O. P. Nagpal together with Mr. Kapila appeared for the respondent.

In his opening remarks, Mr. Khanna told us that the respondent’s counsel had not challenged the fact that the appeal would be rendered nugatory. In his submission, Mr. Nagpal did not challenge that contention by Mr. Khanna, but argued that the claim did not fall under Admiralty law and hence the issue of arguable appeal did not arise.

Mr. Khanna relied on the certificate of urgency in a bid to show that the appeal would be rendered nugatory if the orders sought are not granted. That certificate of urgency was to the following effect:-

“I. USHWIN KHANNA, Advocate practicing as a partner in the firm of Anjarwalla & Khanna, Advocates acting for the Applicant, EAST AFRICAN POWER MANAGEMENT LIMITED hereby certify that this Application is extremely urgent as the High Court has ordered the immediate release of the security towards the Claimant’s entire claim in this Admiralty suit which is presently held in the joint bank account in the names of the parties’ Advocates. A temporary stay of the said Order has been granted for a period of 15 days from the 24th July, 2009. The Respondent herein had no assets whatsoever other than the Vessel “Victoria Eight” and a Fuel Barge “Sky Two” which have both been sold to a foreign company. In consideration of the release of the said Vessel “Victoria Eight” the Respondent has put up Security. Unless an injunction or a stay of execution of the said Court Order or a stay of the proceedings is granted the intended Appeal will be rendered nugatory.”

Mr. Khanna then went on to argue that the respondent was a sham company with no attachable assets; that the company ceased to trade; that all its assets were sold; that the shareholders have been put in liquidation and that all the directors are in Malaysia.

On the issue of the intended appeal being arguable, Mr. Khanna submitted that it is arguable whether “Victoria 8” is a ship or not. Indeed, in Mr. Khanna’s view this will be the only issue to be canvassed during the appeal. Mr. Khanna then went into details of definition of a ship etc. but we would point out that since that would be one of the main issues to be canvassed in the appeal, the less we talk about it the better.

To counter the foregoing submissions, Mr. Nagpal referred to the two Agreements – Operation and Maintenance Agreement and Power Purchase Agreement and the claim by the applicant. It was Mr. Nagpal’s contention that the claim did not fall under Admiralty law and that once the question of jurisdiction was raised, that was the end of the matter. It was in view of the foregoing that Mr. Nagpal submitted that as there was no arguable appeal this application before us was as good as dead.

The principles upon which this court exercises its jurisdiction when called upon to do so under **rule 5 (2) (b)** of the Rules is now trite law. The Court will grant an injunction or a stay of execution or proceedings if it is shown that the intended appeal is an arguable one, that is, that it is not frivolous and that unless an injunction or stay is granted, the eventual success of the appeal would be rendered nugatory. In **Bob Morgan Systems Ltd & Another v. Jones [2004] 1 KLR 194** at p. 196 this Court said:-

“The powers of the Court under rule 5 (2) (b) are specific. The Court will grant a stay if it is satisfied, firstly, that the applicant has demonstrated that his appeal or intended appeal is arguable and secondly, that unless a stay or injunction is granted, his appeal or intended appeal, if successful, will be rendered nugatory.”

Counsel appearing for the parties appreciated these principles although Mr. Khanna chose to argue the nugatory aspect before dealing with the question whether the intended appeal was arguable. It does not, however, matter in which order he argued the application.

What was before Seron, J was a claim by the applicant and an issue arose as to whether the vessel “Victoria 8” should be treated as a ship or a plant. It was found that “Victoria 8” sailed to Mombasa as a ship through the deep waters, to be used as a power generating plant mounted on a barge. Then the issue of jurisdiction arose and the learned Judge declared that the court had no jurisdiction. That is what is to be challenged in the intended appeal. It has been pointed out to us that there were two Agreements which Mr. Nagpal referred to in his submissions and that once the issue of jurisdiction is raised then that has to be resolved first. On his part, Mr. Khanna submitted that the respondent is a sham company without attachable assets and that its shares are valueless as the company ceased to trade.

Taking into account the foregoing submissions it cannot be said that the intended appeal is frivolous. And taking into account what has been said about the respondent company, we think that indeed the intended appeal would be rendered nugatory if the orders sought were not granted.

In view of the foregoing, we allow this application and order that there be a stay of execution of the order made on 24th July, 2009 pending the hearing and determination of the intended appeal. We further order that the proceedings in the superior court Admiralty Claim No. 13 of 2005 be stayed pending the hearing and determination of the intended appeal.

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

Dated and delivered at Nairobi this 5th day of March, 2010.

E.O. O’KUBASU

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JUDGE OF APPEAL

J.W. ONYANGO OTIENO

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JUDGE OF APPEAL

ALNASHIR VISRAM

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JUDGE OF APPEAL

I certify that this is a
true copy of the original

DEPUTY REGISTRAR.