



REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI
Civil Appli 4 & 5 of 2007

MBARAKI BULK TERMINAL LTD APPLICANT

AND

EAST AFRICAN BULKING SERVICES LTD 1ST RESPONDENT

DISTRICT LAND REGISTRAR MOMBASA 2ND RESPONDENT

EAST AFRICAN MOLASSESS COMPANY LTD3RD RESPONDENT.

An application for stay of execution of the ruling and order of the High Court of Kenya Mombasa (Sergon J.) delivered on 15th December 2006 in H.C.MISELLANEOUS CIVIL APPL. NO.946 OF 2005.

RULING OF BOSIRE JA

With the consent of counsel for the parties Civil Application No. NAI.5 of 2007, was consolidated with Civil Application No. NAI 4 of 2007, because the parties are the same and the issues raised in both applications arose from the same decision of the superior court. The applicant in both applications is Mbaraki Bulk Terminal Ltd (*the applicant*) with East African Bulking Services Ltd (*1st respondent*); District Land Registrar, Mombasa (*2nd respondent*), and East African Molasses Company Ltd (*3rd respondent*) as respondents. The two applications are expressed to be brought under rule 5(2)(b) of the Court of Appeal Rules, and the principal order sought is a stay of execution of the decision of the superior court (*Sergon J.*) delivered on 15th December, 2006 in Mombasa High Court Miscellaneous Civil Application No.967 of 2005.

The jurisdiction of this Court under that rule is original and in exercise of that jurisdiction the court exercises discretionary powers. An applicant in such an application has to satisfy the court on two issues. Firstly, that his appeal or intended appeal raises arguable points, or put another way that it is not frivolous. Secondly, that unless the stay prayed for is granted its intended appeal if successful will be rendered nugatory. In this matter, it was common ground that the applicant’s intended appeal raises arguable points. That being so I will only deal with the second issue, namely, whether unless the stay prayed for is granted its appeal or intended appeal if it eventually succeeds, the success will be rendered nugatory. If an applicant does establish one issue but not the other, his application must fail.

The litigation giving rise to the applications started in the superior court when the 1st respondent with leave brought two separate applications for Judicial review pursuant to the provisions of **O.LIII Civil Procedure Rules**. Before I set out the prayers in those applications a resume of the background facts is essential.

The litigation centres on four plots of land namely, Mombasa/Block XLVIII/135, 138, and 139 and 140 respectively, which as at 25th May 2005 were registered in the name of East African Molasses Co. Ltd (3rd respondent) as the leaseholder. It is common ground that on 25th May 2005 the 3rd respondent agreed to sell and East African Bulking Services Ltd (1st respondent) agreed to buy the four plots together with the 3rd respondent's business, goodwill and other assets on the plots at an agreed price of about US\$4 million.

There were other conditions precedent which the 3rd respondent was required to fulfil by 30th September, 2005, failing which the agreement would become null and void. The completion date was mutually extended to 30th November, 2005.

But on 7th November, 2005, which to some misunderstanding, the 1st respondent registered cautions against the titles of all the four plots, claiming a purchaser's interest on each of them. On 10th November, 2005, the 3rd respondent, notwithstanding that the aforesaid contract was still in force, entered into another sale agreement with the applicant agreeing to sell to it the same subject matter of the earlier agreement on more or less the same terms. That was apparently the genesis of the legal tussle between the parties. Whether or not there was any breach of the first contract by either party is not the subject matter of this litigation. There is a pending suit to wit Mombasa High Court, Civil Case No. 250 of 2005 in which the 3rd respondent has sought a declaratory decree to the effect that its agreement with the 1st respondent had become null and void.

On 17th November, 2005 the 3rd respondent, in an apparent attempt to facilitate the transfer of the four plots to the applicant, applied to the land Registrar, Mombasa (2nd respondent) to discharge the cautions the 1st respondent had lodged against the four plots, alleging that the sale agreement of 25th May 2005 was no longer valid. The 2nd respondent fixed the application for hearing inter partes, before her on 8th December, 2005 and despite objection from the 1st respondent, on the ground that an order had been made in Civil Suit 250 of 2005, for the status quo to be maintained, the Land Register proceeded to hear the application. She refused a request for the adjournment of the hearing of the application to a latter date. In a ruling delivered on 9th December, 2005, she discharged the cautions, and on the same day, at the request of the 3rd respondent, consolidated the plots into one title and registered a transfer of the same to the applicant. The 3rd respondent then filed Civil Case No. 250 of 2005; aforesaid, seeking orders that the agreement with the 1st respondent had become null and void as the subject matter of that agreement had been sold to third parties and that possession of the said property had been delivered to them against payment of the purchase price. On 28th November, 2005, the 3rd respondent returned to the 1st respondent the purchase price, which the latter rejected.

It was contended in the court below on behalf of the 1st respondent, that the 2nd respondent did not hear the application for the discharge of the cautions, and instead she discharged the same on grounds other than those which had been proffered by the 3rd respondent. It was also contended on behalf of the 1st respondent that the conduct of the 2nd respondent of acting with haste to consolidate the titles on the same day of her ruling and thereafter registering the transfer thereof to the applicant was a clear manifestation that she was acting in complicity with the applicant and the 3rd respondent to defeat the 1st respondent's claim over the subject property.

The 1st respondent's Chamber Summons for leave to commence Judicial Review Proceedings, dated 13th and 19th December, 2005, respectively, had the following prayers:

In the application dated 13th December 2005, that:-

- (i) The summons be heard on a priority base.
- (ii) Applicant's failure to file a Notice under **O.53 rule 1(1)** of the Civil Procedure Rules be excused.
- (iii) Court grants leave to the applicant to apply for an order of certiorari to move into the court and to quash the decision of the District Land Registrar, Mombasa dated 9th December 2005 ordering the removal of the cautions lodged on 7th November, 2005 against the aforementioned four titles of land.
- (iv) That such leave do operate as a stay of all proceedings before the District Land Registrar relating to the said four titles, pending determination of the application for judicial review.

The prayers in the application dated 19th December 2005, related to the decision to consolidate the four plots and to register the instruments of transfer of the resultant title, namely, Mombasa/Block XLVIII/185.

Leave was granted, the relevant motions were then filed and heard by Serгон J. After hearing the parties' respective counsel he came to the conclusion that the 1st respondent had satisfied him that orders of Judicial Review should issue and he proceeded to grant the same.

In the two motions under consideration the ruling of the superior court has been attacked on both procedural and substantive grounds. But as I stated earlier, the 1st respondent having conceded that the intended appeals by the applicant are arguable, although according to Mr. Oraro for the 1st respondent it was on grounds other than those the applicant proffered, those grounds are not for consideration here. The only issue remaining for consideration is the nugatory aspect.

In his submissions on that issue, Mr. Regeru for the applicant urged the view that unless the applicant is granted a stay, the transfer of L.R. No. Mombasa/Block XLVIII/185, to the applicant will be nullified, the consolidation cancelled and cautions restored as before.

It had already paid the purchase price for the four plots of land, which is unlikely to be recovered immediately, and at the same time and at the same time it has spent a lot of money in upgrading the property, which is unlikely to be recovered. In his view the success of the applicant's intended appeals will thus be rendered nugatory. He also talked about the serious adverse economic effects a reversal of the registration, consolidation and restoration of cautions are likely to have on the applicant's operations and the country in general.

Messrs. Nyaoga and Maroro for the 3rd and 2nd respondents respectively concurred. Mr. Nyaoga submitted that his client is no longer interested in the property, as it had laid off all its workers after selling the property and the business it was operating thereon, and a restoration of the assets to it will, in effect, cause them to lie idle, and there was the potential danger of it being sued by the applicant for breach of contract.

Mr. Oraro for the 1st respondent did not think the applicant had shown its intended appeals would be rendered nugatory unless it is granted a stay. In his view the substratum of the intended appeals was the removal of cautions which were intended to preserve the suit property and not the extent of the applicant's loss if the stay prayed for is refused.

I propose to examine the nature of the reliefs the 1st respondent sought before the superior court and what by seeking the same, it intended to achieve. The 1st respondent was the purchaser of the subject property. By lodging the cautions against the property, its whole purpose was to prevent the 3rd respondent from alienating the same to third parties. That explains why the 3rd respondent applied for the discharge of the cautions. It felt that its right to sell its property had been curtailed or restricted. Any

other relief the 1st applicant sought in its applications before the superior court were only ancillary to the prayer for the restoration of the cautions. The superior court, by its decision against which appeals are intended, did not seek to do more than to restore the parties, in relation to the property, to the positions they were in before the cautions were removed. The only difference is that no order was made for the refund of the purchase price by the 3rd respondent to the applicant, as such an order could not properly be made in a judicial review application.

In the foregoing circumstances, will a refusal of a stay herein render the success of the applicant's intended appealed nugatory?

As rightly pointed out by Mr. Regeru for the applicant, the restoration of the property to the 3rd respondent and cautions on the property will not automatically restore the purchase price and whatever expenses it may have incurred back to it. If the 3rd respondent has the money, certainly it will have no basis for withholding it from the applicant. If, however, it does not have the money, the applicant will have to wait until the 3rd respondent is able to raise it. That loss is however, quantifiable. Besides, if it were to succeed in its intended appeals it will be at liberty to take the property back. Whatever loss it is likely to suffer will be in the nature of profits for not operating or not operating fully its business.

On the other hand, there is the 1st respondent which claims a purchaser's interest in the property. The 3rd respondent concedes it resold the suit property to third parties notwithstanding that the contract for the sale of the property to the 1st respondent was allegedly still in force and while there was a valid injunction order in force. There is a decision in favour of the 1st respondent regarding the four plots. There must be just cause for denying it the fruits of the decision in its favour. If stay is granted the applicant will be at liberty to deal with the property as it wishes. The property might thereby be taken beyond the reach of the 1st respondent.

It intends to exercise its undoubted right of appeal. It was contended on its behalf that unless the stay it seeks is granted, it stands to suffer extreme economic loss, and damages will not be an adequate remedy. The country will also suffer as jobs of various employees will be on the line.

I have considered the applicant's position. If a stay is refused, the likely effect will be that the transfer of the suit property to it will be reversed, the consolidation of the four plots be reversed and the cautions which were in *situ* against the respective individual titles be restored. How will such a step render the applicant's intended appeals, if successful, nugatory? The property will revert to the 3rd respondent which says it no longer has any interest in it. The 1st respondent will not have any way of dealing in the property as the property will not be in its name. Nor will the 3rd respondent have any way of entering into any legal transaction over the property because the cautions will be in place. In view of this I see no possibility of the applicant's intended appeals being rendered nugatory. If it eventually succeeds, the property will be restored back to it. If there will be any loss, it will be economic, which I think is quantifiable, and the court will be entitled to make appropriate orders to remedy any such loss. It was not alleged that the 1st respondent and indeed the third are not able to compensate the applicant for such loss. Nor do I discern any such inability.

In the result the applicant having failed to satisfy the second test for the grant of orders under **rule 5(2)(b)(e) of The Court of Appeal Rules**, I would order that these consolidated applications be dismissed with costs.

As Deverell JA is also of the same view, it is hereby ordered that Civil Application Nos.4 and 5 be and are hereby dismissed with costs.

Dated and delivered at Nairobi this 16th day of March, 2007.

S.E.O. BOSIRE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, GITHINJI & DEVERELL, JJ.A.)

CIVIL APPLICATION NO. NAI. 4 OF 2007 (UR. 3/2007)

BETWEEN

MBARAKI BULK TERMINAL LIMITED APPLICANT

AND

EAST AFRICAN BULKING SERVICES LIMITED ... 1ST RESPONDENT

DISTRICT LAND REGISTRAR MOMBASA 2ND RESPONDENT

EAST AFRICAN MOLASSES COMPANY LIMITED.3RD RESPONDENT

(Application for stay of execution of the ruling of the High Court of Kenya at Mombasa (Sergon J) dated 15th December, 2006

in

MISC. APPL. NO. 946 OF 2005)

CONSOLIDATED

CIVIL APPLICATION NO. NAI. 5 OF 2007 (UR. 3/2007)

MBARAKI BULK TERMINAL LIMITED APPLICANT

AND

EAST AFRICAN BULKING SERVICES LIMITED 1ST RESPONDENT

DISTRICT LAND REGISTRAR MOMBASA 2ND RESPONDENT

EAST AFRICAN MOLASSES COMPANY LIMITED 3RD RESPONDENT

(Application for stay of execution of the ruling of the High Court of Kenya at Mombasa (Sergon J) dated 15th December, 2006

in

MISC. APPL. NO. 946 OF 2005)

RULING OF GITHINJI, J.A.

In *Civil Application No. Nai. 4 of 2007* the applicant **MBARAKI BULK TERMINAL LIMITED** (MBTL) seeks under **rule 5 (2) (b)** of the Court of Appeal Rules (Rules) an order of stay of execution of the decision of the superior court (Sergon J) delivered on 15th December, 2006 in *Mombasa High Court Miscellaneous Civil Application No. 967 of 2006* pending the hearing and determination of the intended appeal.

In that application, the superior court allowed an application for judicial review made by **EAST AFRICAN BULKING SERVICES LIMITED** (EABSL) and granted an order of certiorari quashing the decision of the District Land Registrar Mombasa made on 9th December, 2005:

(i) Consolidating titles known as BLOCK/XLVIII/135, 138, 140 to one title MOMBASA/BLOCK XLVIII/185, and

(ii) Registering the transfer of the consolidated title MOMBASA/BLOCK XLVIII/185 in the name of MBTL.

Similarly, in *Civil Application No. Nai. 5 of 2007* MBTL the applicant seeks under **Rule 5 (2) (b)** of the Rules an order of stay of execution of the decision of the superior court (Sergon J) dated 15th December, 2006 in the *High Court Miscellaneous Civil Application No. 946 of 2005* pending hearing and determination of the intended appeal.

By the said order of 15th December, 2005, the superior court allowed an application for judicial review and granted an order of certiorari quashing the decision of the District Land Registrar, Mombasa dated 9th December, 2005 removing the cautions lodged by EABSL against titles Nos. Mombasa/Block XLVIII/135, 138, 139, 140.

The two applications which were filed on the same day were consolidated at the hearing.

The judicial review applications which gave rise to the orders the subject of the consolidated applications were filed by the 1st respondent herein EABSL. It is apparent that the purpose of the judicial review application was to protect a contract of sale dated 25th May, 2005 between EAMCL and EABSL whereby the EAMCL agreed to sell to EABSL all its assets and developments on the four pieces of land Mombasa/Block/XLVIII/135, 138, 139 and 140 situate at Mbaraki High Level Mombasa for a consideration of US. D. 4,000,000. At the time of the agreement, those four pieces of land were leased to EAMCL by Kenya Ports Authority (KPA) for various terms.

The agreement showed that EAMCL had erected buildings, structures, jetty, storage tanks, laid under and over ground pipes, installed plant machinery and equipment and other development and that it had for some years carried on the business of storage and handling in storage tanks and other storage facilities various products and further that all the assets of the business were being sold as a going concern. There were also sub-tenants in the premises such as Oil Taking Tanking (EPZ) Ltd, East African Tea and Coffee parkers EPZ Ltd, Samba Electronic Ltd, Henkel Chemicals (EA) Ltd and Safaricom Ltd. By the

agreement the EABSL was required to pay a deposit of USD 80,000 and the completion date was not later than 30th October, 2005. The documents on record further show that at the time of the agreement EAMCL owed over Shs.276,000,000 to Barclays Bank of Kenya Ltd (BBK) which sum was secured by charges and a debenture over the assets.

It appears that the contract was not completed for various reasons and on 7th November, 2005, EABSL lodged cautions against title Nos. Mombasa/Block XLVIII/135, 138, 139 and 140.

By a subsequent agreement dated 10th November, 2005, EAMCL agreed to sell the same properties and assets to MBTL at a consideration of USD 4,000,000 which was apportioned between properties and assets as follows – properties USD 1,410,000 and assets USD 2,590,000. The completion date was agreed as not later than 28th November, 2005. On 25th November, 2005 various documents were executed in furtherance of the agreement of sale including a Discharge of the Charge on title Nos. Mombasa/Block XLVIII/135, 138, 140 by BBK, a Grant of a new lease for 66 years in respect of Title No. Mombasa/Block XLVIII/135, 138, 140 consolidated title No. Mombasa/Block XLVIII/185 by KPA to MBTL the transfer of that lease to MBTL and the transfer of properties and assets to MBTL. On the same date – 25th November, 2005, EAMCL delivered possession of the properties and assets to MBTL. Previously on 17th November, 2005 EAMCL had written to the District Land Registrar, Mombasa, objecting to the registration of the cautions and on 23rd November, 2005 EAMCL filed a suit *Mombasa High Court Civil Suit No. 250 of 2005* against EABSL seeking various reliefs including a declaration that EABSL was in breach of the agreement dated 25th May, 2005 and a declaration that EAMCL is discharged from the performance of that Agreement. The defendant, EABSL subsequently filed an Amended Defence and Counter-claim in that suit. It has joined MBTL as a second defendant in the counter-claim. EABSL seeks judgment by the counter-claim for, among other reliefs: declaration that the agreement of 25th May, 2005 is valid binding and enforceable; a declaration that the transfer of properties known as Mombasa/Block XLVIII/185 (formerly Mombasa/Block XLVIII/135, 138, 140 and Mombasa/Block XLVIII/139 made on 9th December, 2005 is null and void; rectification of the register cancelling the registration of transfers in favour of MBTL and specific performance of the Agreement dated 25th May, 2005.

The District Land Registrar Mombasa heard the objection to the lodging of the caution on 8th December, 2005 and allowed the objection on the following day, 9th December, 2005. All the relevant documents relating to the transaction between EAMCL and MBTL were presented for registration on the same day and duly registered thereby precipitating the application for judicial review.

The principles on which this Court exercises its unfettered discretion to grant a stay of execution, amongst other interlocutory reliefs, are settled. The applicant should satisfy the court not only that the intended appeal is not frivolous but also that unless the order of stay of execution is made the appeal or the intended appeal, if successful, would be rendered nugatory.

The applicant has filed a draft memorandum of appeal containing 14 grounds of appeal which raise several issues of law including the competency of the application for judicial review and the jurisdiction of the court to grant the impugned orders. Mr. Regeru, learned counsel for the applicant has demonstrated and Mr. Oraro, learned counsel for the first respondent, EABSL, has, quite properly conceded that the intended appeal raises several arguable issues of law for determination by this Court.

The second condition whether or not the appeal would be rendered nugatory, if the order of stay of execution is not granted is contentious and problematical. Mr. Jaruman Akida, the Terminal Manager of the applicant, MBTL, gives several reasons in paragraph 16 of the supporting affidavit why the appeal would be rendered nugatory unless stay is granted. Some of the reasons are that; there will be a nullification, revocation and cancellation of the registration of the transfer of the suit premises in favour of the applicant; that the titles to the suit premises shall revert to 3rd respondent (EAMCL) while the applicant has paid full purchase price of USD 4,640,000 inclusive of VAT to EAMCL; the applicant has spent in excess of USD 3,000,000 upgrading and improving the suit premises; that 3rd respondent, if

registered as proprietor would be entitled to full rights and benefits of a registered proprietor of land; that applicant would have to lay off its entire staff of 26 employees; that it is highly unlikely that any of the respondents would be in a position to compensate the applicant for the colossal losses that it would suffer; and that the monumental loss, damage, hardship that would inevitably result would defeat the ends of justice and that the intended appeal would be rendered nugatory.

The third respondent EAMCL supports the application. Mr. Esmail Jivaji, a director of the 3rd respondent deposes in paragraph 8 of the replying affidavit, thus:

“8. The 3rd respondent sold the suit property on 25th November, 2005 and has been paid an aggregate USD 4,640,000 for the suit properties and has handed over possession to the applicant. With the cautions re-instated the 3rd respondent would be exposed to claims of breach of contract and consequential damages”.

It seems from the replying affidavit of Ameerali Kassamali Somji; the Chairman and Director of the 1st respondent, (EABSL), that the main fear of the 1st respondent is that the applicant would alienate or charge the plots and assets by way of security if the application is allowed. He states in part in paragraph 34 of the affidavit:

“If on the other hand, a stay is granted in terms prayed for in Mbaraki’s application, the result will not be to preserve the situation which existed on 7th December, 2005 but to enhance and improve Mbaraki’s position after the date whereby it will be able to alienate or charge the said plots and/or other assets by way of security regardless of how the proposed appeal is decided. This would not only have the effect of destroying the substratum of the said appeal but it, would have serious consequences on Bulking Services counter-claim in H.C.C.C. No. 250 of 2005 whereby Bulking Services has prayed for an order of specific performance against Molasses in respect of the agreement dated 25th May, 2005”.

The circumstances which may render an appeal nugatory, if successful, varies from case to case. In money decrees, this Court has recognized that requiring an applicant to pay a huge sum of money before the appeal is heard may render an appeal nugatory. In ***The Reliance Bank Ltd vs. Norlake Investment Ltd.*** [2002] 1 EA 218, this Court said at page 231 paragraph e, f:

“..... the issue of the “balance of convenience” or “the claims of both sides” is one of the elements to be considered when dealing with the question of whether the success of an appeal would be rendered nugatory if stay of execution or an injunction is not granted. We do not understand the position to be that in a decree for the payment, of money, for example, the only thing that would render the success of an appeal nugatory is the inability of the other side to refund the decretal sum if it has been paid over to it. In the Oraro and Rachier case [1999] LLR 1118) the court took into account the fact that if the law firm was ordered forthwith to deposit the decretal sum, the firm itself might well be forced to go out of business and such an eventuality may itself be sufficient to render the success of their appeal nugatory”.

And in ***Kenya Breweries Limited vs. Kiambu General Transport Agency Limited*** – Civil Application No. Nai. 100 of 2000, (unreported) this Court said in part:

“The sum involved amounting to Kshs.241,586,711/58 is certainly very large and there is an uneasiness pervading a refusal to grant a stay of execution where such large amount of money is involved owing to the damage such a refusal may occasion to the applicant. Indeed the futility of success of the applicant’s appeal to this Court may result from such a refusal for the damage to the applicant may be irremediable even if the decretal sum was subsequently repaid to it if its appeal to this Court was to be successful”.

Lastly in ***Butt vs. Rent Restriction Tribunal*** [1982] KLR 417, this Court said that the court may grant a stay where special circumstances of the case require and considered the large amount of rent which was in

dispute in that case as a special circumstances.

There is no money decree in this case. Rather, both the applicant and the first respondent agree that the effect of the orders of certiorari granted by the superior court would be to cancel the registration of the applicant as the registered proprietor of title numbers Mombasa/Block XLVIII/135, 138, 139 and 140 and restore EAMCL as the proprietor and also restore the cautions lodged by the EABSL against those titles. Assuming, without deciding, that, that is the effect of the orders granted by the superior court the deregistration of the applicant as the proprietor of the three titles and the restoration of EAMCL as the registered proprietor would mean that EAMCL would get back free of charge the properties and assets which it had sold to MBTL and that the latter would lose, for the time being, a colossal sum of over USD 4,600,000 (approximately Kshs.300,000,000 at today's exchange rate of about Kshs.70 to one USD). This is in spite of the fact that EAMCL does not want the properties back having received the purchase price and having paid the loan to BBK.

The value of the four properties comprised about half of the purchase price. The value of the rest of the assets including good will comprised the other half. The properties and the assets were sold as going business concern. If the applicant is deregistered as the proprietor of the landed properties on which the entire business is located it would be legally and physically impossible for the applicant to effectively run the business with the inevitable result not only that the entire business would virtually collapse but also that all the assets would be wasted.

This situation would persist for some years before the appeal would eventually be heard. The applicant cannot without title, for example, effectively deal with the subtenants, or take any legal proceedings to protect the assets or business or deal with the employees or obtain business licences. The third respondent EAMCL has no interest in the properties, assets and business and has no capacity to run or protect the business.

On the other hand the 1st respondent EABSL will not get any direct benefit from the determination of the appeal either way. It is the determination of the pending suit *H.C.C.C. No. 250 of 2005* which will conclusively determine whether the contract of 25th May, 2005 between EAMCL and EABSL would be specifically performed. The properties that EABSL fears would be alienated if the application is allowed can be protected by an appropriate order.

In the circumstances of this case, I am satisfied that the refusal of an application for stay would not only cause a colossal loss of over USD 4,600,000 paid as purchase price but also the virtual collapse of the entire business which would be irredeemable even if the appeal were to succeed.

The loss of such a colossal sum of money and the collapse of the business would in my view render the appeal, if successful, nugatory. That is a result that a court of justice should strive to avoid.

In the result, I would allow the application and grant an order of stay of execution as prayed. To protect the interest of EABSL and prevent the four properties, title Nos. Mombasa/Block XLVIII/135, 138, 139 and 140 from alienation I would order that a prohibitory order (inhibition) be registered against the respective titles prohibiting the registration of any transaction pending the determination of the appeal.

Costs of the application to be costs in the appeal.

Dated and delivered at Nairobi this 16th day of March, 2007.

E. M. GITHINJI

.....

JUDGE OF APPEAL

IN THE COURT OF APPEAL

AT NAIROBI

CORAM: BOSIRE, GITHINJI & DEVERELL, J.J.A.

CIVIL APPLICATION NOS. NAI. 4 & 5 OF 2007(CONSOLIDATED)

BETWEEN

MBARAKI BULK TERMINAL LTDAPPLICANT

AND

EAST AFRICAN BULKING SERVICES LTD1ST RESPONDENT

DISTRICT LAND REGISTRAR MOMBASA2ND RESPONDENT

EAST AFRICAN MOLASSESS COMPANY LTD....3RD RESPONDENT

*(An application for stay of execution of the ruling and order
of the High Court of Kenya at Mombasa (Sergon J.) dated
15th December, 2006*

in

H.C. MISCELLANEOUS CIVIL APPL. NO. 946 OF 2005)

RULING OF DEVERELL, JA.

I have had the advantage of reading the Rulings in draft of the Hon. Mr. Justice Bosire JA and the Hon. Mr. Justice Githinji, JA, relating to the above application and I concur with the decision to dismiss the consolidated application with costs for the reasons given by the Hon. Mr. Justice Bosire, JA.

Dated and delivered at Nairobi this 16th day of March, 2007.

W. S. DEVERELL

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR