



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 92 OF 2016**

**BASE TITANIUM LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA PORTS AUTHORITY.....DEFENDANT**

**J U D G M E N T**

1. In the suit the plaintiff sued the defendant and advanced only substantive prayer that:-

**a. A temporary injunction be issued against the Defendant whether by itself, its servants, agents, advocates, assigns or nominees or otherwise howsoever from imposing, levying, charging or in any manner whatsoever demanding stevedoring charges from the Plaintiff or its agents pending the resolution of the dispute between the parties through arbitration.**

**b. A temporary injunction be issued against the Defendant whether by itself, its servants, agents, advocates, assigns or nominees or otherwise howsoever from unlawfully holding, restraining, detaining or in any way restricting the Plaintiff's shipments through the Port of Mombasa on purported account of stevedoring charges pending the resolution of the dispute between the parties through arbitration.**

2. The basis and facts founding the claim by the plaintiff are briefly that the plaintiff is the owner of a private storage and ship holding facility constructed on a private owned piece of land and constructed with the aim and purpose of making the plaintiff entirely self-sufficient and independent of all external stevedoring requirements, with the agreement and concurrence of the defendant. Having so constructed the facility, the defendant started to levy, and the plaintiff deemed unlawful, stevedoring charges on the plaintiff agents which agents then passed the charges to the plaintiff as the industry customs dictate. The plaintiff demanded of the defendant that it ceases the levy but the defendant stood its ground that it is entitled to levy and continue levying the stevedoring charges.

3. All the while, the plaintiff was awaiting the processing by the defendant of an application for port operating licence. Attempts at negotiation stalled with each party maintaining their stand on the dispute. To the plaintiff such a dispute calls for reference to an arbitration by an arbitrator appointed by the Chief Justice of the Republic of Kenya pursuant to the provisions of section 62 of Kenya Ports Authority Act. The defendant thought otherwise in reliance to the said provision the defendant did request the Chief Justice to appoint an arbitrator, and an arbitrator, one Nyamu JA (Rtd) was so appointed after the filing of this suit. However despite the pending resolution of the dispute the plaintiff complains that the defendant persists in its levy of the charges hence the need for the prayers as framed in the suit.

4. Before the matter could be heard, parties expressed optimism of prospects of a negotiated settlement but did not quite reach there. Instead an interim consent, was entered by which the charges as levied by the defendant were to be, and I believe have been, deposited in an escrow account in the names of the advocates for the parties.

5. H SCHWARZ exhibiting documents among them a letter by defendant authorizing the construction of the facility, a letter authorizing operation pending issuance of a licence and subject to the prevailing port regulations, agreed operating procedures and subject to application of KPA tariffs as well as the standard operating procedures, copy of the standard operating procedures, correspondence on the dispute and correspondence of the pending application for operating license, in all of which the question of levy of stevedoring charges is a continues thread.

6. The plaintiff filed a supplementary affidavit whose purpose was to respond to the defendants Replying affidavit sworn by John Turasha.

7. In opposition to the suit, the defendant did file a Statement of Defence a Replying Affidavit by John Turasha, aforesaid, and a further affidavit by the same deponent. In the documents the defendant resists the plaintiffs claim and maintain that it is merely discharging statutory mandate of managing the operations of the port and the duty to collect revenue from such operations as are obligated by the creating statute. There is then the position taken that the defendant has never levied stevedoring charges upon the plaintiff but does so against the vessels or owners of vessels calling at the port of Mombasa and therefore contests the plaintiffs claim that it is being charged the levy.

8. On the merits of the case the defendant contends that the provisions of section 62 of the Kenya Ports Authority Act is to no avail to the plaintiff as there is no agreement between the parties as yet. It is added by the defendant that the right to proceed to arbitration under the statutory provision only avails itself to a party to whom a damage has been occasioned by the defendant while undertaking its mandates under sections 12,14,15 & 16 and that the power of the arbitrator is only limited to the determination of compensation payable. For that reasons the defendant contends that the suit is misconceived as there exist no dispute between the parties as to merit reference to an arbitrator.

9. By consent of the parties, it was agreed that the application be canvassed by way of written submissions pursuant to which order the plaintiff did file submissions dated 9/12/2016 together with a list of authorities and submissions in Reply to the defendants submissions. That was dated 6/4/2017. For the defendant, was filed submissions dated 17/3/2017 and a list of authorities dated 11/5/2017.

### **Analysis of the dispute**

10. Although parties agreed that it is the application dated 26/8/2016 be heard by the filed submissions, as highlighted orally, in reality, when that application is determined on the terms of its prayers nothing will remain pending on the plaint to merit further adjudication.

11. I hold that view because a look at the application dated 26/8/2016 show that prayers 1,2,3 & 4 have been spent and stood spent the moment this matter was set for hearing interparties and submissions offered. That state of affairs leave only prayers 5 & 6 apart from the omnibus prayer 7 and the incidental prayer for costs. Prayers 5 & 6 in the application are word for word the prayers 2 & 3 in the plaint. It would thus follow that should the application succeeded the suit shall have been disposed off with nothing remaining for determination. However, there may be need to revisit the suit only if the application is ultimately dismissed.

12. When all is considered, the issue and question this court has to pose for itself and resolve, one way of the other, is whether there is a dispute between the parties and concerning the execution of the defendant's mandate under section 12,14, 15 & 16 of the Act, which ought to be referred by an arbitrator under section 62. If that is established, then the 1<sup>st</sup> test in ***Giella vs Casman Brown [1973] 358*** shall have been met and the court could then consider whether or not the other prerequisites have been meet or need to be met, before the plaintiff can be granted the orders sought.

13. In seeking to determine that question and issue I have had enormous benefits of reading the materials presented to court by the parties. It must however be pointed out that this determination is not about whether or not Stevedoring charges are payable on account of use of the plaintiffs jetty. No. It is about whether or not the plaintiffs get an injunction to enable the parties proceed to arbitration in terms of section 62 of Cap 391.

14. Applying those facts to the dispute, one must relate the facts as pleaded by each side against the law said to be applicable. For that reason what the court deems as the meaning and purport of section 62 would ultimately carry the day. That provision says:-

**“Compensation**

**(1) In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.**

**(2) Nothing in this section shall be construed as entitling any person to compensation—**

**(a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or**

**(b) for any damage suffered as a result of the user of any works authorised under this Act unless such damage results from negligence in such user”.**

15. This court interpretes the provision to say that the courts jurisdiction to assess compensation for damages occasioned to anybody by the defendant in execution of its mandate pursuant to sections 12, 14, 15 & 16 is ousted and that power handed to the parties to agree upon and in the event of a disagreement the dispute thereof be referred to an arbitrator appointed by the Chief Justice. For a resort to be made to that provision section 62, one must be able to prove that:-

**i) Damage has been occasioned to it.**

**ii) The damage has been occasioned by the defendant while exercising its powers under sections 12,14,15 & 16 of the Act.**

**iii) The person suffering damage would be entitled to compensation even in the absence of section 62.**

**iv) The damage has been caused due and as a result of negligence on the part of the defendant.**

**v) The parties have failed to agree on the damages payable.**

16. But, what are the powers of the defendant under sections 12,14, 15 & 16 of Cap 391. Section 12 of the act gives the authority its powers to operate the port and port services and connected purposes. Sections 14,15 & 16 on the other hand donates to the defendant the power to enter land and survey same, power to enter land to prevent an accident and power to alter positions of pipes, cables or drains.

17. It is the damage that may result as a result of exercise of such powers the law mandates to have compensation therefore determined by agreement or arbitration.

18. Now in this matter the plaintiff asserts that it operates a ship loading and storage facility within the port of Mombasa and has been granted an interim operating license that must be seen to have been issued pursuant to the section 12(2) e & i. Having been granted the said interim license, the plaintiff in this suit

and before its institution, maintained and now maintains that it is not liable to pay Stevedoring charges. That to this court is a dispute that needs resolution.

19. Being a dispute between the parties and being alleged to arise out of the defendants exercise of power under section 12 of the Act, where would it be resolved? I interpret the law to say that no suit lies to this court but parties have the remedy and recourse to reference to arbitration. To that extent, I do find that there is to this court a prima facie case for the plaintiff to seek that it gets a temporary injunction to preserve the subject of the dispute to be determined by an arbitrator. For that finding, the plaintiff satisfies the first requirement for grant of a temporary injunction.

20. That however is not all. The plaintiff equally needs to establish and prove that even with prima facie case he stands to suffer injury incapable of compensation by damages unless the temporary injunction be granted. In this case, the suit is not for damages anticipated after production of evidence. It is a simple dispute of whether or not the status quo, since altered and secured by a consent order to avail the money in an escrow recount, should be maintained. Even if that consent had not been put in place, I do not understand the principle to be that where damages is an adequate remedy then no temporary injunction lies or can be granted. The principle is that in normal cases, a court would be hesitant to grant a temporary injunction if damages would surface. However, I think, now and today, in this country we have appreciated the need for access to justice and the right to a fair hearing to the extent that it would be indeed a very strong case for a court of law to allow a citizen's right to be triumphed upon merely because damages will assuage his flouted rights. When we come to that level it would be a battle lost for the rule of law in favour of rule of the 'HAVES'.

21. The plaintiff in this matter seeks no more than a right to be heard by an arbitrator, appointed by no less than the hand of the head of the judiciary in the Republic of Kenya. He cannot be said to be asking far too much. Let him have his day before that forum and be assured that its right to ventilate his grievances has been protected and upheld.

22. For those reasons, I am at the point, and must now say that the plaintiff is entitled to an order of temporary injunction against the defendant in terms of prayers 2 & 3 of the Notice of Motion dated 26/8/2017.

23. The defendant argued and did so forcefully that the arbitrator has no jurisdiction in the matter and that is a matter from this court to determine. I am not persuaded by that argument. I hold the view that once the parties appear before the arbitrator it will be open to them to raise all issues that preliminarily present themselves to be raised before the dispute is put for determination. That must include the question of whether or not the arbitrator has jurisdiction in the matter. It would be wrong on the face of both section 17 of the Arbitration Act and the decision in the *Owners of Motor Vessel Lilian 's' vs Caltex Oil [1989] Kenya Ltd [1989] KLR 1* for this court to decide on the presence or lack of jurisdiction on the arbitrator. Let the arbitrator undertake that task should it be raised before him.

24. The application is allowed as prayed, its costs awarded to the Plaintiff/applicant and it is ordered that once the arbitration proceedings are concluded, parties shall within 30 days of the award becoming final, report to court in this matter for further directions or orders.

25. It is so ordered.

**Dated and delivered at Mombasa this 3rd day of August 2017.**

**P. J. O. OTIENO**

**JUDGE**