ET Timbers Limited v Owners of the Motor Vessel 'Dolphin Star' (Adm claim in rem against the owners of the motor vessel 'Dolphin Star' of the Port of Panama) (Admiralty Cause E003 of 2021) [2023] KEHC 23029 (KLR) (28 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23029 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

ADMIRALTY CAUSE E003 OF 2021

DKN MAGARE, J

SEPTEMBER 28, 2023

BETWEEN

ET TIMBERS LIMITED .... CLAIMANT

AND

THE OWNERS OF THE MOTOR VESSEL 'DOLPHIN STAR' .... DEFENDANT

ADM CLAIM IN REM AGAINST THE OWNERS OF THE MOTOR VESSEL 'DOLPHIN STAR' OF THE PORT OF PANAMA

RULING

1. This matter has a checkered history. It started with the file being placed before my predecessor on 4/4/2021 under certificate of urgency. This Court issued an order on Sunday 4/4/2021 for arrests of the ship on 4/4/2021. The firm of Inamdar made an application to set aside the warrants. Directions were given. The Court was informed of the need for security for the release of the arrested ship. In that matter the dispute appeared to have been between the Head owner, and the Charterer or Deponent owner.

2. There was another application dated 23/8//2021.

3. In the meantime, in the midst of the myriads of applications. By an application filed on 15/10/2021 Starryway Trading sought to be joined to the proceedings as against the owners of Motor Vessel Dolphin Star.

4. The application dated 23/8/2021 was for the default Judgment, appraisal and sale of the vessel and discharge of cargo on board. The 2nd application was that the claimant's claimed that Starryway claimed to be the owner of the vessel and the relevant person within the meaning of Section 21(4) of the Senior Court Act of England. This was based on a Time Charter dated 1/1/2019.

5. This was based on Gencom 94 as evidenced 'by other terms.' The issue were seen through an affidavit of Chalamunthu who stated that Starryway was an agent of the defendant.

6. The Court dismissed the application dated 15/10/22. In its 4th Ruling there was an application for leave to Appeal and stay. Leave to Appeal was granted.

7. In its 5th Ruling for judgment in default dated 23/8/2021 the Court dismissed the application dated 5/11/21. The raison d etre was that there was no proper service effected. The applications did not stop.

8. There have also been a myriad of other letters addressed or copied to court by various parties, none of which I have read. My view is that parties should always move the court by Application Notice and not by letters.

9. The matter was substantially stayed by the Court of Appeal. When the stay was lifted, the applicant filed an application Notice dated 16/8/2021 but filed on 17/8/2021 for extension of time to file an acknowledgment of service.

10. The application dated 14/7/2021 is the mater for the present Ruling. It is opposed. I will start with the opposition. The claimant opposes the Application Notice on ground that;

    a. The Defendants have no audience.

    b. The application was filed without instructions.

    c. The claimant relies on the evidence in another suit Adm Cause No. 5 of 2023.

11. The Court has no way of dealing with another file which is not consolidated with this one. There is no affidavit dated 16/10/2022. Further that in the application Notice is dated 16/10/2021 there was forgery perjury and contempt of court. They stated there was a forged time charter party.

12. Finally, they state that the application notice is overtaken by events. According to the Respondent, the period lapsed on 25/8/2021. There is also an issue of prayer for stay of proceedings. It is their view that the same is unnecessary. I will not summarise the whole submissions as they are 21 odd pages.

13. The applicant field submissions that they needed a 7 days extension to enable them seek instructions. They filed the Application in anticipation as time had not lapsed. They rely on a Kenyan case, Fahim Yasin Twaha v Timamy Issa Abdalla & 2 others [2015] eKLR, where the supreme court held as doth; -

    (29) As regards extension of time, this Court has already laid down certain guiding principles. In the Nick Salat case, it was thus held:

    > "... it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the Court to exercise its discretion in favour of the applicant.
    >
    > ... we derive the following as the underlying principles that a Court should consider in exercising such discretion:
    >
    > 1. extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party, at the discretion of the Court;
    >
    > 2. a party who seeks extension of time has the burden of laying a basis, to the satisfaction of the Court;

3. whether the Court should exercise the discretion to extend time, is a consideration to be made on a case- to- case basis;

4. where there is a reasonable [cause] for the delay, [the same should be expressed] to the satisfaction of the Court;

5. whether there will be any prejudice suffered by the respondents, if extension is granted;

6. Whether the application has been brought without undue delay; and

7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time" [emphasis supplied].

14. They also rely on the case of Data Select Limited v The Commissioners for HM Revenue and Customs: [2012] UKUT 187 (TCC), where the Court held as follows: -

> " As a general rule, when a court or tribunal is asked to extend a relevant time limit, the court or tribunal asks itself the following questions:
>
> (1) what is the purpose of the time limit?
>
> (2) how long was the delay?
>
> (3) is there a good explanation for the delay?
>
> (4) what will be the consequences for the parties of an extension of time? and
>
> (5) what will be the consequences for the parties of a refusal to extend time. The court or tribunal then makes its decision in the light of the answers to those questions.

35. The Court of Appeal has held that, when considering an application for an extension of time for an appeal to the Court of Appeal, it will usually be helpful to consider the overriding objective in CPR r 1.1 and the checklist of matters set out in CPR r 3.9: see Sayers v Clarke Walker [2002] 1 WLR 3095; Smith v Brough [2005] EWCA Civ 261. That approach has been adopted in relation to an application for an extension of the time to appeal from the VAT & Duties Tribunal to the High Court: see Revenue and Customs Commissioners v Church of Scientology Religious Education College Inc [2007] STC 1196."

The Court continued at para 37:

> " We recognise that CPR 3.9 requires the court to consider "all the circumstances of the case, so as to enable it to deal justly with the application". The reference to dealing with the application "justly" is a reference back to the definition of the "overriding objective". This definition includes ensuring that the parties are on an equal footing and that a case is dealt with expeditiously and fairly as well as enforcing compliance with rules, practice directions and orders. The reference to "all the circumstances of the case" in CPR 3.9 might suggest that a broad approach should be adopted. We accept that regard should be had to all the circumstances of the case. That is what the rule says. But (subject to the guidance that we give below) the other circumstances should be given less weight than the two considerations which are specifically mentioned."
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> Then gave the following guidance:

"40. We hope that it may be useful to give some guidance as to how the new approach should be applied in practice. It will usually be appropriate to start by considering the nature of the non-compliance with the relevant rule, practice direction or court order. If this can properly be regarded as trivial, the court will usually grant relief provided that an application is made promptly. The principle "de minimis non curat lex" (the law is not concerned with trivial things) applies here as it applies in most areas of the law. Thus, the court will usually grant relief if there has been no more than an insignificant failure to comply with an order: for example, where there has been a failure of form rather than substance; or where the party has narrowly missed the deadline imposed by the order, but has otherwise fully complied with its terms. We acknowledge that even the question of whether a default is insignificant may give rise to dispute and therefore to contested applications. But that possibility cannot be entirely excluded from any regime which does not impose rigid rules from which no departure, however minor, is permitted.

41. If the non-compliance cannot be characterised as trivial, then the burden is on the defaulting party to persuade the court to grant relief. The court will want to consider why the default occurred. If there is a good reason for it, the court will be likely to decide that relief should be granted. For example, if the reason why a document was not filed with the court was that the party or his solicitor suffered from a debilitating illness or was involved in an accident, then, depending on the circumstances, that may constitute a good reason. Later developments in the course of the litigation process are likely to be a good reason if they show that the period for compliance originally imposed was unreasonable, although the period seemed to be reasonable at the time and could not realistically have been the subject of an appeal. But mere overlooking a deadline, whether on account of overwork or otherwise, is unlikely to be a good reason. We understand that solicitors may be under pressure and have too much work. It may be that this is what occurred in the present case. But that will rarely be a good reason. Solicitors cannot take on too much work and expect to be able to persuade a court that this is a good reason for their failure to meet deadlines. They should either delegate the work to others in their firm or, if they are unable to do this, they should not take on the work at all. This may seem harsh especially at a time when some solicitors are facing serious financial pressures. But the need to comply with rules, practice directions and court orders is essential if litigation is to be conducted in an efficient manner. If departures are tolerated, then the relaxed approach to civil litigation which the Jackson reforms were intended to change will continue. We should add that applications for an extension of time made before time has expired will be looked upon more favourably than applications for relief from sanction made after the event."

15. The Applicant further relied on the case of In Raval versus Mombasa Hardware (1968) EA 392, where the Court stated that the court can exercise inherent jurisdiction to prevent miscarriage of justice. This

decision is quoted with approval in Republic v Speaker of Nairobi City County Assembly & another Exparte Evans Kidero [2017] eKLR as doth: -

> " 51. In Raval Vs The Mombasa Hardware Ltd [1968] EA 392, the court considered inherent jurisdiction of the court and held that the reason usually given by the court for resorting to its inherent jurisdiction which is not conferred by any statute or constitutional provision is to prevent a miscarriage of justice, especially where the adverse party is not prejudiced in any way if the court extended time.
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> 52. Article 159(2) of *the Constitution* is clear that in exercising judicial authority, the courts and tribunals shall be guided by principles including (a) justice shall be administered without undue regard to procedural technicalities. This is not to say that procedural rules shall be disregarded for they are handmaidens to substantive provisions of the law. However, as was stated in Bremer Vulcan Schiff bar and Maschinen Fabrick vs South Indian Shipping Corporations Ltd [1981] AC 909 by Lord Diplock in relation to the inherent powers of the Court, typifying such powers as enabling the court to take necessary actions to maintain its character as a court of justice;
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> > " it would dampen the constitutional role of a court if as a court of justice it were not armed with power to prevent its process being abused, in such a way as to diminish its capability to arrive at a just decision of the dispute."

16. The Applicant relied on several other authorities including Charles Karanja Kiiru v Charles Githinji Muigwa [2017] eKLR, where the Court of Appeal held as follows: -

> " We find it necessary to cite the above Rule in entirety because even assuming the learned Judge was wrong in deeming the appeal as having been deemed to have been duly filed, this Court would still have jurisdiction to validate the said leave if it deemed it appropriate to do so. Moreover, in our view, under Order 50, Rule 6 of the Civil Procedure Rules on which the learned Judge relied, the court has power to enlarge time "upon such terms as the justice of the case may require...
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> If therefore the learned Judge finds it in the interest of justice to deem an already filed document as having been duly filed, then his discretion in that respect should not be fettered."

Analysis

17. The Applicant maintains that the matter was stayed hence could not prosecute the Application earlier. It was however filed before the lapse of time. They were involved in other issues in this case including what I have noted as a record milieu of applications filed at dazzling speeds.

18. The record reflects that this matter had hitherto been dismissed for want of prosecution. The same was reinstated by consent between the warring parties herein. The consent was between Inamdar & Company Advocates and Kinyua Muyaa and company advocates. The dilemma the court is in is that, if I agree that Inamdar & Company advocates does not have the instructions in this matter, then they had no instructions to consent. The effect of such a scenario, is that the consent, will not be effective

and the matter will then stand dismissed as per my earlier order. The same parties have been battling for almost 3 years without these issues being raised.

19. I do not agree with the claimant that the applicant lost the right to file an application to file acknowledgment or extension of time. The only thing the Defendant lost under Rile 11(1) (2) is the right to question the court's jurisdiction. There has been no application notice filed for entry of judgment. The application for default judgment dated 23/8/2021 was dismissed. Further an application dated 5/11/2021 was allowed.

20. The claimant was ordered to serve the amended claim within 7 days from the date of the Ruling, that is within 7 days from 29/7/2022, that is by 3/8/2022. In other words, service ought to have been done on 3/8/2022. The applicant ought to have filed Acknowledgment of service by 18/8/2022. The Applicant filed an application dated 17/8/2022. It was set for hearing but unfortunately, the proceedings were stayed.

21. When I dismissed the cause on 21/3/2023, I was informed there were proceedings for stay. I cannot trace them in the court file. I relied entirely on the concession by Inamdar & Company Advocates.

22. The application was filed within a reasonable time. The issue whether, the application notice is dated in the year 2021 or 2022 is purely academic. The court had already certified the application Notice as dated 17/8/2022.

23. Upon considering the application, I note that service was effected, upon the advocates for the parties. If it was so, finding that the parties were not on record, means that no service was effected. Effectively, this creates an imbroglio that we may not countenance. Earlier in this case, as reported in ET Timbers PTE Limited v The Dolphin Star [2021] eKLR, Justice Njoki Mwangi had this to say on this very issue; -

> 23. Henry Carr, J. in the case of Conversant vs. Huawei (supra) had this to say about Part 11 of CPR of England;
>
> > "(29) In my view, the structure of the rules is that the first acknowledgment of service does not constitute a submission to the jurisdiction, but once the court has rejected a jurisdictional challenge and the defendant chooses to file a second acknowledgment of service, that second acknowledgement of service does constitute a submission to the jurisdiction. The purpose of rule 11(8) is to give the second acknowledgment of service its normal effect in the absence of a jurisdictional challenge. It is not necessary to imply that the rule is intended to ...
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> 24. In further interpretation of Part 11 of CPR, Floyd, LJ., in the case of Deutsche Bank (supra) referred to two cases which conflicted with each other. The first case was Sage v Double A Hydraulics Ltd and Chambers v Starkings, The Times, 2 April 1992; (1992) CA Transcript No 311 (26 March 1992) (Sage/Chambers). The judgment in that case was as follows:-
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> > "The danger inherent in the defendant doing anything further after [the defendant] has issued a summons to set aside, lies in the risk that he may be taken to have waived his right to challenge the writ of the court's jurisdiction. It is necessary in each case to determine whether any step taken, looked at objectively, falls into that category. A useful test is whether a disinterested bystander with knowledge of the case, would regard the acts of the defendant (or his solicitor) as inconsistent with the making and maintaining of a challenge to the validity of the writ or to the jurisdiction."

24. In Owners of Motor Vessel “Dolphin Star” v ET Timbers PTE Limited (Civil Appeal (Application) E078 of 2021) [2023] KECA 437 (KLR) (14 April 2023) (Ruling), the Court of Appeal stated as doth:

> in Winkler v Shamoon [2016] ELVA-IC 217 (Ch) the court, while holding that that the Defendants had not submitted to jurisdiction expressed itself as hereunder:-
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> > “ Furthermore, I do not accept that this question is answered by asking whether the defendant has done more than is required or is necessary in order to challenge jurisdiction. Rather, the Court must be satisfied that the defendant has unequivocally renounced his right to challenge the jurisdiction. There is no question of statutory submission in the present case. Therefore, the issue is whether there has been a waiver of the right to challenge jurisdiction (see Deutsche Bank (supra)). The relevant test for submission to the jurisdiction was set out by Lord Collins in Rubin & Anor v Eurofinance SA and Ors [2012] 3 WLR 1019:“The general rule in the ordinary case in England is that the Party alleged to have submitted to the jurisdiction of the English Court must have "taken some step which is only necessary or only useful if' an objection to jurisdiction "has actually been waived, or if the objection has never been entertained at all.Applying these principles to the acts relied on by Mr Winkler, it is clear that none of them amount to a submission to the jurisdiction. In respect of the Procedural Strike Out Application, the Set Aside Application and the Request for Further Information, Mrs Angela Shamoon and Ms Alexandra Shamoon have consistently made clear that such steps were without Prejudice to their jurisdictional challenge. This is the very opposite of an unequivocal renunciation of such a challenge.”

25. My understanding is that the acknowledgement of service could not have been filed earlier as there were jurisdictional challenges. The application sought only 7 days to file acknowledgement of service. The Respondent is stating that 7 days are already over. When did the days lapse? The time sought always runs from the date of the court granting the order.

26. I note the multiplicity of applications and counter applications. The main claim is still in abeyance while the ship is languishing at the port with crew. Every time this matter comes for hearing there are multiple applications. Even in this one I am aware that some were subsequently filed while this matter is pending ruling. In the case of Murri International Salvage Operation Company Limited v M/s Festival Limited & another [2017] eKLR, Justice P.J.O. Otieno, lamented as doth: -

> “ 41. This Claim was filed in August 1998. There has been a multiplicity of applications. An appeal to the Court of Appeal was determined in 2007 but the Court file went missing and had to be reconstructed. Several attempts were made by parties to dispose of the preliminary objections. The 2nd Defendant’s advocates have explained that they could not immediately find the Court file. The Claim has been pending for 18 years now. In the circumstances I could not find the delay in filing the application notice dated 26.6.2015 inordinate.
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> 42. This Claim has been pending for almost 20 years. The suit is nowhere close to a determination of any issue on merit. I urge the parties and their advocates to answer to their obligation under the overriding objectives of the court and be guided by Article 159 of *the Constitution* to resolve preliminary matters as soon as possible. By way of case management, it is hereby ordered and directed

that, all pending applications be kept in abeyance so that the application to substitute and the preliminary objections be heard on priority basis on a date to be taken soon after delivery of this ruling and in court

27. The application notice is therefore merited. Consequently, I allow the application Notice herein dated 17/8/2022 and for avoidance of doubt filed in court on 18/10/2022. Costs shall abide the outcome of the claim.

Determination

28. The upshot of the foregoing is that I make the following orders: -

    a. Time be extended within which the Applicant is to file an acknowledgment of service or take protective measures as per the Admiralty rules.

    b. The same be filed within 7 days of this Ruling.

    c. The matter be listed for directions after this Ruling.

    d. Failing to file an acknowledgement within 7 days of the ruling, the same shall cease to have effect.

    e. The matter be heard and concluded by 24/2/2024, failing which it shall stand dismissed

    f. Costs be in the cause.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF SEPTEMBER, 2023. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kinyua for the claimant

Ms Luvai for the Respondent