



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA DISTRICT REGISTRY
ADMIRALTY JURISDICTION
ADMIRALTY CAUSE NO. 2 OF 1998

CLAIMANT: MURRI INTERNATIONAL SALVAGE OPERATION COMPANY LIMITED
THE OWNERS OF THE MOTOR TUGS “BARBARA” AND “STEVE B” AND THEIR
MASTERS.

DEFENDANTS:

1. M/S FESTIVAL LIMITED

THE OWNERS OF THE MOTOR TANKER “JOEY” AND ITS MASTER

2. M/S VEBA OIL SUPPLY AND TRADING GMBH OF HAMBERG
GERMANY

THE OWNERS OF THE CARGO LADEN ABOARD MOTOR TANKER
“JOEY”

R U L I N G

Outline

1. If one was to undertake a study on ‘**how not to**’ have a matter heard and determined in a just, expeditious, even and proportionate manner, then this is a very good case study. A plethora of applications, some filed in a hurry, other filed in disregard to the status of the file, and therefore the matter has been convoluted to an extent that it is almost a punishment to be asked to read and understand what is outstanding and what has been dealt with. Even after this ruling it would take the parties and their counsel to embrace the need to have this dispute resolved one way or the other so that its decade of pendency in court may be brought to an end.

2. Before the court for determination are two application notices. The first application is by the 2nd Defendant dated 26.6.2015 and filed on 30.6.2015. It is supported by affidavit sworn by F. Kinyua Kamundi on 26.6.2015 and by a supplementary affidavit sworn jointly by James Mugunda Kimaguti and Kefa Karenga Nyaga on 9.10.2015. in it the applicant prays for orders that:-

(i) Stay of execution pending hearing of that application.

(ii) Certification of urgency.

(iii) Setting aside of the judgment given on 26.2.2015.

(iv) The hearing of the Claimant's Notice of Motion application dated 23.3.2012 after determination of some preliminary objections.

(v) Review and setting aside of orders made on 26.2.2015 dismissing the 2nd Defendant's application dated 21.2.2012.

(vi) Reinstatement of the 2nd Defendant's application dated 21.2.2012 for hearing.

(vii) Costs.

3. That application is opposed by the Claimant through an affidavit in reply sworn by Mr. Ushwin Khana, advocate, on 16.10.2015.

4. The 2nd application is by the Claimant and is dated 15.7.2015 in which the claimant seeks the following orders:-

(i) Certification of urgency.

(ii) Extension of time to file that application.

(iii) Setting aside of the ex-parte orders made on 26.6.2015.

(iv) Dismissal of the application notice dated 26.6.2015.

(v) Costs.

The application was opposed by the grounds of opposition dated 26.10.2015.

5. When the two applications are looked at together it's evident that a determination on the 2nd defendant's application one way or the other would effectively dispose of the plaintiff's application. I make this comment noting that there are only two substantive prayers in the claimant's application being prayers (iii) and (iv). To this court a finding on the 2nd defendant's application either way would inevitably answer those two prayers. With that in mind, and notwithstanding, the directions given herein on the 17 .11. 2015, I will purpose to determine the 2nd defendant's said application with hope that it will dispose of the related application.

6. Before I proceed to the merits, it is important to mention that on 30.12.2015 the Plaintiff filed a document headed "Corrective affidavit of service" which was sworn by Herbert Ngisiang'e on 24.11.2015. This is important because one of the issues the court is called upon to determine is whether the *Amended And Further Amended Writ Of Summons In Rem* were served upon the 2nd Defendant in 1998.

7. Both parties filed written submissions on both applications. The 2nd Defendant's submissions are dated 26.10.2015 while those of the Plaintiff are dated 15.3.2016.

8. The 1st Defendant did not participate in the two applications beyond the filing of its submissions dated 8.3.2016 limited to the corrective affidavit of service. In those submissions the 1st Defendant clarified that the Late Mr. I. T. Inamdar did not act for the 2nd Defendant and the corrective affidavit is therefore incorrect to that extent. When the 1st Defendant filed an acknowledgement of service on 11.8.1998 the

2nd Defendant had not been made a party. At page 268 of the Record of Appeal the Late Mr. I. T. Inamdar confirmed to the Court that he is not on record for the 2nd Defendant on 14.9.1998.

Brief history of the matter

9. This Claim was commenced by a *Writ Of Summons* issued on 4.8.1998 against the 1st Defendant claiming remuneration for salvage rendered by the owners, Master and crew of the Motor Tugs “Barbara” and “Steve B”. The writ was amended on 26.8.1998 by adding the 2nd Defendant. The endorsement of it remained unchanged.

10. There is a further amended writ of summons whose amendments relates to the cargo then laden on board and an endorsement contained in four paragraphs. Under the endorsement in the further amended writ the Plaintiff Claim:-

(i) against the 1st Defendant is for remuneration agreed between the Plaintiffs and the 1st Defendant under a tow hire agreement dated 22.6.1998 at the daily rate of US Dollars 5,000 in respect of towing services rendered to the motor vessel “JOEY” by the Plaintiffs tug “Barbara” from 23.6.1998 to 2.7.1998 when the tow hire agreement was terminated by the 1st Defendant in which thereof and up to and including 8.7.1998 when the “Barbara” was in standby.

(ii) against the 1st and 2nd Defendants for agreed and reasonable remuneration for salvage services rendered by the Plaintiffs tugs “Barbara” and “Steve B” to the motor vessel “Joey” and her cargo, bankers, stores and freight in the Indian ocean/Arabian sea at the daily rates US Dollars 7,500, in respect of “Steve B” and Dollars 10,000 in respect of “Barbara” making a total daily rate of Dollars 17,500 with effect from 9.7.1998 to 4.8.1998 inclusive.

(iii) damages against the 1st Defendant for breach of contract.

(iv) The Plaintiff further claims interest pursuant to Section 35 A of the Supreme Court Act, 1981 and/or under inherent jurisdiction of the Admiralty Court.

11. The 1st Defendant had challenged jurisdiction of the Court but lost. It appealed to the Court of Appeal in Civil Appeal No. 286 of 2000. The Plaintiff had close “appealed”. Both the appeal and close appeal were dismissed with costs by the Court of Appeal on 27.4.2007.

12. By a Notice of Motion application dated 18.5.2001 the Plaintiffs sought judgment against the 2nd Defendant in default of acknowledgment of service. The application was supported by affidavits sworn by Jian Battista Murri and Herbert Ngisiang’e sworn on 21.5.2001. There is no specific sum or amount mentioned in that application or those affidavits. The application was allowed by order given on 25.10.2001. No specific amount is mentioned in that order.

13. The 2nd Defendant filed an application notice dated 22.2.2012 to set aside the judgment of 25.10.2001 unconditionally, to strike out the Plaintiffs Claim against the 2nd Defendant with costs, and in the event that the Claim is not struck out the 2nd Defendant be granted an extension of time to file a Defense. That application was supported by an affidavit sworn by Mr. F. K. Kamundi Advocate.

14. The Claimants/Plaintiffs itself did file a Notice of Motion application dated 23.3.2012 seeking to set aside judgment they had obtained against the 2nd Defendant on 25.10.2001. So as at 23.3.2012 there were two applications to set aside that default judgment. One was by the Plaintiffs themselves and the other was by the 2nd Defendant.

14. On 10.3.2011 the Claimants had filed the Chamber Summons application dated 7.3.2011 for leave to amend the Statement of Claim by striking out the name Murri International Salvage Operation Co. Limited and replace it with Imperial Maritime Co-operation of Liberia. That application was supported by

an affidavit by Mr. Khana. It was said that Murri International Salvage Operation Co. Ltd is not a proper Claimant as it was only an agent. That application has not been challenged.

15. There were some preliminary objections dated 19.9.2011 and 22.9.2011. An order was made on 3.5.2012 that the preliminary objections be heard first and that those preliminary objections be fixed for hearing within 21 days. Various attempts were made by the parties to have those objections determined but to date those objections have not been dealt with or withdrawn. The preliminary objection dated 19.9.2011 challenged the capacity of Murri International Salvage Operation Co. Limited to filing application or to participate in the proceedings.

16. The Claimant had filed a Notice of Motion application dated 28.5.2011 to strike out the 1st Defendants Defense dated 16.10.2007. That application has not been determined.

17. On 1.7.2011 the 1st Defendant filed a Notice of Motion application dated 30.6.2011 for leave to lodge a further acknowledgment of service and to declare that a further acknowledgement of service is filed and served pursuant to such leave the 1st Defendant's defense dated 16.10.2007 is deemed to be regularly and validly filed. That application has not been heard.

18. By Notice of Motion application dated 23.3.2012 Murri International Salvage Operation Co. Ltd describing itself as the owner of the two tugs "Barbara" and "Steve B" sought an order that the judgment entered against the 2nd Defendant on 25.10.2001 be set aside and that judgment be entered in default of acknowledgment of service of writ for US Dollars 492,500 plus interest thereon at 8% above the libor rate p.a. with effect from 5.8.1998 until payment in full or alternatively in such an amount for salvage services rendered by the Claimant to be determined or assessed by this Honorable Court in respect of salvage claim plus interest thereof as **against the 1st and 2nd Defendants jointly and severally** (emphasis mine).

19. The grounds in support of the application dated 23.3.2012 are failure by the 1st Defendant to lodge a fresh acknowledgment of service after dismissal of the 1st Defendant's appeal on jurisdiction and failure on the part of the 2nd Defendant to acknowledge service of the further amended writ and statement of claim. The application is supported by an affidavit sworn by Pamela Tutui, the then learned counsel for the Claimant, on 23.3.2012.

20. I have considered the applications dated 26.6.2015 and 15.7.2015, the various affidavits in support and in opposition, the written submissions and the very detailed oral submissions made by Mr. Kamundi, learned counsel for the 2nd Defendant and Mr. Khana learned counsel for the Claimants. I have also considered the corrective affidavit of service sworn by Herbert Ngisiang'e on 24.11.2015.

Issues for Determination

21. There are four broad issues for determination. These are:-

- (i) whether the 2nd Defendant had been served with the amended/further amended writ of summons,
- (ii) whether the Plaintiffs application dated 23.3.2012 should have been heard on 19.11.2014,
- (iii) whether the orders dismissing the 2nd Defendant's application notice dated 21.2.2012 should be set aside and whether that application should be reinstated for hearing,
- (iv) whether the Plaintiffs/Claimants application notice dated 15.7.2015 should be granted and whether judgment was regularly entered for the Plaintiffs against the 2nd Defendant on 26.2.2015.

Analysis and Determination

22. On whether the 2nd Defendant was served with the amended and/or further amended writ of summons in 1998, it is not possible to answer the question conclusively without predetermining the 2nd Defendant's application dated 21.2.2012. However, there was no affidavit of service of the amended and further amended writ of summons in the file and none had been filed when the Plaintiffs obtained judgment against the 2nd Defendant on 25.10.2001 and on 26.2.2015. At paragraphs 7 and 8 of the corrective affidavit sworn by Herbert Ngisiang'e on 24.11.2015 the deponent states that his earlier affidavit of service was incorrect and that what he served was the amended writ of summons and not the writ of summons. Without determining the truth or otherwise of that corrective affidavit all I can say is that when the Court entered judgments for the Plaintiffs against the 2nd Defendant there was no affidavit of service of the amended and further amended writ of summons in the file. For this reason those judgments should not have been entered in the very first place. Judgment on default can only be entertained upon evidence of service capable of proving default. This, to me, is one of those situations that a court of law would be entitled, *ex-debito justitiae*, once that error is detected, to correct by undoing the act occasioned by the error. Having not been due for entry as the court did, and that error having been revealed to court now, justice demands that the error be corrected by setting aside. It therefore follows that the default judgment against the 2nd defendant ought to be set aside and is hereby so set aside.

23. It is my finding that both judgments were entered against the 2nd Defendant without proof of service. The Plaintiffs applied to set aside the judgment given on 25.10.2001 and that application was allowed. Although the 2nd Defendant requests that the application dated 23.3.2012 be heard afresh I see no reason why a judgment which both the Plaintiffs and the 2nd Defendant wish to set aside should remain.

24. Before I leave the issue of the corrective affidavit of service the practice in default judgment is that evidence of service must be provided before judgment. A Plaintiff cannot seek to provide evidence of service after obtaining judgment. Every time a plaintiff seeks to do so, it is simply owning up to have obtained a default judgment irregularly.

25. On whether the Plaintiffs/Claimants application dated 23.3.2012 should have been heard on 19.11.2014 I find firstly that the orders made on 3.5.2012 that the preliminary objections be heard first are still in force and have not been reversed, discharged, reviewed or set aside. I also find that Murri International Salvage Operation Co. Limited had filed a Chamber Summons application dated 7.3.2011 to amend the Statement of Claim by removing its own name from this Claim and replacing it with Imperial Maritime Corporation of Liberia and by 19.11.2011, when the Plaintiffs prosecuted their application dated 23.3.2012 their application for amendment of the Statement of Claim had not been determined. The result is that Murri International Salvage Operation Co. Limited obtained judgment in its favor on 26.2.2015 when it and its lawyers had already indicated that they were never the proper parties to the suit and that the proper Plaintiff/Claimant is Imperial Maritime Corporation of Liberia. If the judgment is sustained this court would give to that litigant a remedy it does not deserve or merit.

26. As the Plaintiffs had applied for leave to remove themselves out of these proceedings the 2nd Defendant had no obligation to respond to an application by a party that no longer wished to remain a party. I also find that the 2nd Defendant had an existing application to strike out the Plaintiffs suit and that application had not been heard owing to the orders made on 3.5.2012.

27. In the affidavit sworn by Pamela Tutui on 23.3.2012 in support of the application for judgment dated 23.3.2012 it is stated that Murri International Salvage Operation Co. Ltd were the operators of the two tugs and acted on behalf of the owners of those tugs. The Claimants were aware that their application dated 7.3.2011 for leave to amend a statement of Claim had not been heard. The application for judgment was therefore prosecuted by Murri International Salvage Operation Co. Ltd who no longer wished to remain as Plaintiffs.

28. When a default judgment is set aside either by the Court or by consent it is customary and practice that the Defendant be given time to file his defense. In this case the Court in its ruling delivered on 26.2.2015 set aside the judgment obtained by the Plaintiffs against the 2nd Defendant on 25.10.2001 and in the same ruling entered judgment for the Plaintiffs against the same Defendant thereby affording to it

no opportunity to file its defense between the setting aside of the first judgment and the entry of the second judgment. I hold the view that the second judgment should not have been entered on 26.2.2015. I find the entry of the second judgment to constitute a clear and manifest error on the face of the record and I hold that this Court has power to review errors that stare on the face of the court from the record.

29. For these reasons I hold that the Plaintiffs/Claimants application dated 23.3.2012 ought not to have been heard on 19.11.2014 and it matters not whether the 2nd Defendant had responded to it.

30. On whether judgment should have been entered for the Plaintiffs against the 2nd Defendant on 26.2.2015 I have already found that there was no evidence of service on the 2nd Defendant in 1998 and that the corrective affidavit of service was not filed until January 2016 almost 17 years later. I have found that the 2nd Defendant had a pending application dated 21.2.2012 to strike out the Plaintiffs Claim but that application had not been heard owing to the orders made on 3.5.2012 that the preliminary objections be heard first.

31. One of the preliminary objections filed challenged the Plaintiffs' capacity to file or prosecute any application on this Claim. That application should have been determined first and before any steps could be taken. If it had been argued and allowed the Plaintiffs would not have succeeded in their application for judgment.

32. On 19.11.2014 the Claimants advocate informed the Court (the Honorable Lady Justice Kasanga) that it was not pursuing the application dated 23.3.2012 against the 1st Defendant. The 2nd Defendant had no notice of this last minute change.

33. I note that at paragraph 6 the 1st Defendant is said to have paid US Dollars 25,000 towards part settlement of the towage Claim. I however see that at paragraph 7 an indication that the sum paid was US Dollars 80,000.

34. Under the International Convention on salvage the application for judgment could not proceed against the owners of the cargo in exclusion of the owners of the vessel. Both must contribute to salvage if the Plaintiffs' Claim is proved. I find that judgment entered against the 2nd Defendant alone violated with the provisions of that Convention. A successful salvage operation benefits both the vessel and the owners of the cargo and freight. The Court has not been told of the manner in which the suit was resolved or is meant to be resolved between the Plaintiffs and the 1st Defendant. It would interest this court to learn how a salvage operation claim could be severed as between the the owner of the cargo away from the owner of the vessel

35. The Plaintiffs had sought judgment against the Defendants jointly and severally in the sum of US Dollars 492,500. The judgment does not give credit for the amount that had already been paid.

36. Under the International Convention on Salvage the Court is required to assess the salvage award after considering the matters set out in that convention. None of those matters were considered. A consideration of those matters would have required a formal proof and not affidavit evidence. The affidavits in support of the application for judgment did not address the matters under that convention. These to this court are issued that deserve interrogation and would call for evidence by the parties hence a compelling reason to grant to all the parties an opportunity to present their respective sides of the case

37. On whether the orders dismissing the 2nd Defendant's application dated 21.2.2012 and whether that application should be reinstated for hearing the record shows that the application was dismissed before the 2nd Defendant had opportunity to prosecute it. Ms. Muyaa, advocate, appeared for the 2nd Defendant on 19.11.2014 when the hearing of the application dated 23.3.2012 had almost been completed. The record shows that she did not have her file. Two of her clerks swore an affidavit stating that the hearing for 19.11.2014 had not been diarized. She requested to rely on the application dated 21.2.2012 as a response. She did not prosecute that application.

38. The application dated 21.2.2012 had three substantive prayers, setting aside of the judgment given on 25.10.2001, striking out the Claim against the 2nd Defendant and extension of time is the Claim if not struck out. The Plaintiffs' advocate informed the Court that that application had been overtaken by events with the setting aside of that first judgment. This is not so. The prayer for striking out had not been dealt with or considered. As that application itself shows the 2nd Defendant had sought extension of time to file its defense after the setting aside of the default judgment. It did not have opportunity to do so. The application was dismissed before it was heard.

39. That notwithstanding however, now that the default judgment has been set aside, to this court, substantial justice demands that the party in whose favour a judgment has been set aside gets its day in court. It would serve no purpose to set aside a judgment and deny a party a right to defend the claim.

40. On the Plaintiffs' application notice dated 15.7.2015 firstly I note that the Claimants are described as Murri International Salvage Operation Co. Ltd, the owners of the motor tugs "Barbara" and "Steve B". I have already found that there is a pending application to amend the statement of Claim to remove Murri International Salvage Operation Co. Ltd. I have also found that Court has power to review rulings and judgments. No appeal was filed against the ruling delivered on 26.2.2015. Having held that there was no affidavit of service when two judgments were entered some fifteen years earlier, the main issue relates to the manner in which those judgments were obtained. I also find that a party is under no obligation to disclose facts that are already on record because full disclosure is designed to gain relevant facts to the Court.

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.

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

Conclusions and Orders.

(a) Prayer (c) of the application notice dated 26.6.2015 is hereby granted and the judgment given on 26.2.2015 is hereby set aside.

(b) The orders dismissing the 2nd Defendant's application notice dated 26.2.2015 are hereby set aside and that application is hereby reinstated for hearing on the merits.

(c) Each party share bare own costs

(d) This file shall be heard on the 20/4/2017 as aforesaid so that this matter could be fast tracked toward conclusion.

It is so ordered

Dated and delivered at **Mombasa** this **24th** day of **February 2017**

P.J.O. OTIENO

JUDGE

Ruling delivered in the presence of:-

Mr. Abbas for the Claimant

Ms Muyaa for the 2nd Defendant

Hon. Justice P.J.O Otieno J

24/02/2017