



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADMIRALTY CLAIM NO. 4 OF 2017

JAMAL MOHAMED BANDIRA.....CLAIMANT

VERSUS

THE OWNERS OF THE MOTOR VESSEL

“NASIBU”.....DEFENDANT

R U L I N G

Introduction and outline of the dispute

1. Before the court for determination is the application dated 10/7/2017 by the Respondent which seeks in the main an order that the claim be dismissed or struck out with costs. It is grounded on some fifteen grounds capable of being summarized that the monies claimed to have been paid by the claimant on account of the vessel and to the crew and on their account do not found an admiralty claim. The application also seeks to set aside the warrants of arrest issue and executed against the vessel.
2. As against the warrant the Respondent contend and avers that the same failed to comply with the requirements of section 2D part 61.5 of the English Civil Procedures Rules on the basis that it does not reveal who would be liable for the action in personam and that it also failed to disclose the owners' name and the vessels and that the warrants were issued against a vessel outside Kenya. Lastly it is alleged that there is no evidence to justify payment of custom's in the sum of Kshs.10,000.00, payment to Ms PIL for Kshs.130,000.00 and no reasons for payment of Kshs.220,000.00 to court. Finally, it was pointed out that the fishing vessel does not have a captains stamp and the stamp on the documents do not reveal the captains details and that the vessel needs to be released in order to mitigate on the continuing watch keeper's charges as well as and port charges.
3. The application was supported by an affidavit of MUMIN ALI MUMIN whose gist is that there is no admiralty jurisdiction to entertain the claim as presented on the basis that the claimant had no obligation to effect payment he alleges to have effected; that the claimant does not operate a dry dock to have been able to effect the repairs alleged, that the vessel was docked in Mombasa and not Kilifi on the 23/6/2016 and that there being no express agreement between the supplier and the maritime property the court lacks admiralty jurisdiction in the matter. Even the merits of the claim or part of it is disputed and attributed to what the Respondent calls a forgery.
4. There is then exhibited documents to include the certificate of Kenya Registry to show that the vessel was last registered as No. 1 of 2016 in Mombasa and Port Shipping position to show that the vessel was in Mombasa between 22/7/2016 and 26/8/2016 and therefore could not be in Kilifi on 23/6/2016.

Proceedings in Kilifi CR Case No. 389 of 2016 were also exhibited to show how the alleged crew were released on bond and that such bonds were never met by the claimant as alleged. Lastly the Respondent exhibited a defense which contests courts jurisdiction and denies that any supplies could have been made to the ship on 23/6/2016 in Kilifi because the ship was not in Kilifi but Mombasa.

5. In opposition to the application, the claimant did file a Notice of Preliminary Objection and a Replying affidavit by JAMAL MOHAMED BANDIRA. The Notice of preliminary objection resists and faults the Application notice on grounds that the acknowledgement of service and defense are improperly on record having been filed out of time without leave or consent, hence the claimant has already applied for judgment and the defendant thus has no *locus standi* in the matter.

6. On the other hand the Replying affidavit repeats the assertions in the Notice of preliminary objection and adds that having been served on the 14/5/2017, the Respondent ought to have filed an acknowledgement of service not later than the 29/5/2017 but did not do so till 4/7/2017 as a consequence whereof the claimant did file an application for judgment on which the Deputy Registrar has sat on todate. The Respondent is then faulted for having filed an acknowledgement out of time as well as a defence but did so without the leave of the court or concurrence of the claimant hence no proper defence presents itself against the claim to found the application which in any event is not signed. Finally, the claimant contends that the matters complained about in the application 'CAN ONLY BE ADDRESSED AT TRIAL'.

The Submissions by the parties

7. Having filed their respective papers, when the parties attended court to argue the application the court directed that the preliminary objection be argued as an opposition to the application notice together with the Replying affidavit. On that basis and directions, Mr. Obara for the Respondent/Applicant, was very brief in his urging of the application. He put it simple and straight forward that the claim as pleaded and filed does not pass as a proper claim in admiralty jurisdiction. Secondly, he doubted the genuiness of the documents made by hand and stressed the point that on the 23/8/2016 when the expenses were allegedly incurred, the vessel was in Mombasa and not Kilifi as confirmed by old port shipping position which show the vessel arrived in Mombasa on 22/7/2016 and left on 26/8/2016 for Djibouti.

8. On merits the advocate pointed out that there was a dearth of explanation on how the oral agreement to merit the expense was reached. On a technical approach the advocate pointed out to court the fact that the warrants as issued were for a vessel docked in Zanzibar when the subject vessel was in Mombasa a reason enough to have the warrants set aside and a security offered to protect the claimants claim. For the security, the log book of the vessel was offered.

9. On the Replying affidavit and the preliminary objection stressing on late taking of steps, the advocate submitted that, that goes to technicality and not merits and that there being an acknowledgment of service and defence on record, the court should not shut its eyes to those documents as no judgment has been issued as yet. He stressed the fact that the current dispensation is to shun technicalities and go for the substance before striking out any pleadings.

10. For the claimant/Respondent Mr. Wachira opposed the application and placed reliance on Rule 61 subrule 3(4) of the Supreme Court Rules, which dictates that an acknowledgement of service must be made within 14 days after service which was not done in this case. He then cited Rule part 61 of Rule 2D on how a claim in rem arises from a claim in persona and added that the nature of the claim and its merits can only be determined at trial and not by affidavit evidence. On security to be offered, Mr Wachira said, they would not accept the log book but would not mind cash security.

Issues for determination

11. The determinant issue for determination is whether the claim herein should be struck out on the basis that it does not fit as an admiralty claim. However before that is canvassed, there is a preliminary objection to the effect that the Respondent is not properly before the court as it failed to acknowledge

service within the timelines set by the rules and also filed a defence out of time without leave of the court or the consent of the claimant. I think it is prudent to deal with the preliminary objection first even though I had directed that it be heard as an opposition to the application.

Preliminary Objection

12. As known in law, a preliminary objection takes the nature of a demurer and is argued on the basis that it is capable of disposing of the matter in a summary manner. It ought to be a clear and pure point of law deserving no strenuous arguments by production of evidence.

13. Being grounded on the specific procedural Rules cited, I entertain no doubt that what has been filed would pass as a preliminary objection is so far as it seeks the answer on the effect of failure to acknowledge service and file a defence within the stipulated time. What however, needs to be delved into deeply is the effect of upholding such objection on the need to resolve the dispute between the parties and whether its determination would be capable to dispose off the matter finally.

14. Any court of law proceeds from the stand point that the purpose of the court is to determine disputes in a just, timely and proportionate manner. That is to this court the dictate, rationale and justification of Article 159 of the constitution and the overriding objectives of the court as coded at section 1A of the Civil Procedure Act. Being an admiralty claim, this matter calls for no lesser considerations. The court must maintain its core character and purpose, to do justice. In any event the overriding objective of the court are not peculiar and applicable to the court in its civil jurisdiction only but every time and all the time. The English Civil Procedure Rules, volume 1 part 1, 2011, (The white book service 2011) equally adopts the overriding objective in terms and language that is not very different from the Civil Procedure Act, Kenya.

15. Now my appreciation of the overriding objective of the court is that as far as possible, and unless great prejudice would be occasioned to the administration of justice, out of abuse of process, or to the other side of the litigation or such other unconscionable conduct by the adversary, a court of law always strives to give a party his day in court to ventilate its grievances. That is invariably only achievable by allowing the party, even if in default to comply with the timelines set by the Rules, to say and put across his side of the story on the dispute. In this matter and file, the Respondent has not only filed an acknowledgment of service but also a defence. It is not in doubt that the Rules mandate that the acknowledgment of service be done within 14 days from the date of service of the claim form. The question then arises as to when was the defendant served with the claim form.

16. There is the affidavit of service by one Babuji A Aleli sworn on the 2nd June 2017 and filed in court with the Application for judgment in default of an acknowledgment of service. That affidavit says that the persons served were the; officer commanding Kilindini Marine Police, the head of marine operation at the Harbour House, Head of Litigation & Legal Disputes at the port and one Mr. Mumin Ali, the captain of the motor vessel Nasibu. The claim form and the accompanied documents including the claimants' witness statement at paragraph 7, 8 & 9 disclose the owner of the vessel to be Nasibu Fishing Company Ltd of Post Office Box Number 90423-80100 Mombasa. The affidavit of service aforesaid details how the warrants of Arrest as well as the other court document were served upon the vessel and also the captain being the owners representative on Board. From that affidavit I do not doubt that the Claim Form was duly served on the 15/5/2017 and therefore the acknowledgement of service ought to have been filed not later than the 29/5/2017. It was not done till 4/7/2017 well after the application for judgment in default had been filed. Indeed the acknowledgment was filed late and out of time. However it was filed and it says that the Respondent intends to defend all of the claim. It was then followed by a defence in answer to the statement of claim. That defence denies that any supplies were ever made to the vessel on the 23/8/2016 as the ship was not on sail but anchored at the old port, Mombasa, and would only get its supplies there and not Kilifi. To this court that defence raises substantial resistance to the claim and having been brought to the attention of the court, the court cannot shut its eyes to it neither can it be ignored. To accede to the objection would be to shut the courts eyes to the defence and the view of the court is that it would not be just to do so. I decline to accept the objection and dismiss it as not helping achieve the overriding objective of the court. In any event, the claimant argues on oath at paragraph 10 of

the Replying affidavit that the issues raised in the application need be interrogated at the trial. That to this court is a concession that substantial and weighty issues have been raised which ought to go to trial.

Should the claim be struck out?

17. I understand the rules to dictate that a Respondent who wishes to contest jurisdiction of the court must do so in the acknowledgment of service. The acknowledgment of service served did not indicate that the jurisdiction of the court is contested. Part II of volume 1 Civil Procedure Rules, headed, '**disputing courts jurisdiction**' mandates that a party disputing jurisdiction must file an application in that regard within 14 days of acknowledgment of service. The application, having been filed on the 10/7/2017 some 6 days after the acknowledgement was filed within time.

18. Leaving the merits of the claim aside, for that can only be dealt with at trial, can it be said that the sum claimed, it including alleged supplies and repairs to the vessel, are not claims properly due for consideration in an admiralty claim? I have had a look at the Supreme Court Act, Part II, on the jurisdiction of an Admiralty Court and in particular 2A -140. At, paragraph 20(2) m & n claims with respect to supplies of goods and materials to the vessel for her operation or maintenance and in respect of construction, repair or equipment of the vessel are matter that to this court qualify as admiralty claims. In any event a dispute that is apparently arguable ought not to be struck out without a hearing. Even without the Rules, I would still resort to section 4(3) Judicature Act and invoke the courts ordinary jurisdiction to do justice to parties in this matter.

19. In so far as the claim made includes supply of fuel, spare parts food and petty cash to the vessel for her operation, maintenance and security, I do not, at this level, accept that the claim is irredeemably a non admiralty claim. That alone is enough reason for the court to refuse the application dated 10/7/2017 which is hereby dismissed with costs.

Propriety of the warrants of Arrest

20. The Respondent faults the warrants of Arrests on several grounds among them that the warrants were issued against a vessel in Zanzibar but were executed against a vessel in Kenya and further that the person against whom the resultant determination would bind was never disclosed.

21. To this court these requirements are purposeful and logically intended to make court orders effective and efficacious. It is necessary to disclose the whereabouts of the vessel and the person against whom any order in personam would attach so that the court prior to issuing a warrant of arrest establishes that it has the requisite jurisdiction and that the orders are not made in vain. However that is the furthest those requirements must be seen to go.

22. Once warrants issued are executed like in this case within jurisdiction, I would consider it in substance to raise such an issue as being capable to negate the warrant so as to call for its setting aside. One would ask what prejudice has been occasioned by that failure. None has been shown to exist and the court sees none as capable of being in existence. The same would apply to the need to discharge the person in whose name the vessel is registered on the date the cause of action arose. But, in this file, I have looked at paragraphs 7, 8, 9 & 10 of the claimants witness statement and find that it meets the requirement for disclosure. Even on this ground the application could not succeed but must be dismissed.

23. Having so determined the application, this file needs to be given a way forward if not for anything else but to achieve the overriding objectives of the court. The acknowledgment of service and the defence filed shall be deemed properly filed and shall be taken into account at trial. Let parties attend the court on a date taken at the Registry during the last 15 days of the month of October 2017 for purposes of a case conference.

24. I have said the foregoing well cognizant of the fact that there has been pending before the court and in the file an application for judgment in default of acknowledgment of service which the claimant says has been sat on by the Deputy Registrar. Now that I have declared the acknowledgment and defense duly on

record, it would serve no purpose to have the application listed for hearing.

25. I however wish to point out that, unlike civil proceedings, in a admiralty proceedings, the deputy registrar, properly called admiralty marshall, has no jurisdiction to enter a judgment in default. That is the duty of the court and if for any reason, then file was ever taken to the marshall to enter any judgment, a fact not born out by the record, that was misadventure and it is very well that the marshall did not taken that adventure.

What becomes of the vessel as the matter awaits determination?

26. The parties have been unable to agree on security for the release of the vessel. It is not in doubt that as the vessel continues under arrest, it continues to incur costs which costs either of the parties will have to bear at the end. Such costs need to be mitigated even if they cannot be avoided all the same. I have therefore considered the pleadings on record and the submissions of the parties on a viable security and based on what I consider the claimants best arguable claim and I direct that the vessel may be released if the Respondent deposits in court cash security in the sum of Kshs.400,000/=. I consider it inappropriate to release the vessel without its registration document not serve any useful purpose because such documents are known to be part of the vessel without which it cannot be operated effectively.

27. It is so ordered.

Dated and delivered at Mombasa this 4th day of August 2017.

P.J.O. OTIENO

JUDGE