REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADMIRALITY CLAIM NO. 2 OF 2014

ADVANCED DISTRIBUTORS CO.LTD.....PLAINTIFF

VERSUS

IGNAZIO MESSIMA & CO. SPA OR OWNERS OF MOTOR VEHICLE

"JOLLY ROSSO" & "JOLLY VERDE"

& OWNERS OF MV. JOLLY DIAMANTE.....DEFENDANT

RULING

1. By an APPLICATION Notice issued on 29.8.2014, the Defendant IGNAZIO MESSINA has sought from the court orders that:-

a) **This application be certified as extremely urgent and be heard exparte in the first instance.**

b) Pending the hearing and determination of this application the Motor Vessel JOLLY DIAMANTE be released forthwith on the security of a Letter of Understaking to be issued to the Claimant by The United Kingdom Mutual Steam Ship Assurance Association (Europe) Limited for and on behalf of the Defendant in the sum of US$1,500,000.00 without any admission on the part of the Defendant of any allegation contained in the Claim Form, the Application Notie dated 27.8.2014, the Certificate of Urgency dated 27.8.2014 or the Affidavit sworn by Sanjeev Jain on 27.8.2014, without submitting to the jurisdiction of this Court and only for purposes of securing the immediate release of that Vessel.

c) This application be heard before the Claimant's Application Notice dated 27.8.2014.

d) Further proceedings in this claim be stayed as a matter of right pending arbitration in London under English law in terms of Clause 16 of the Memoranda of Agreement upon which this claim is based.

e) Without in any manner waiving the Claimant's right to have the dispute adjudicated through arbitration in London and only on the grounds that this Court has no admirality jurisdiction to hear and determine this claim the freezing orders given and issued on 27.8.2014 be set aside as a matter of right.

f) On the grounds that this Honourable Court has no admirality jurisdiction to hear and determine this claim and without in any manner waiving the parties' right to have the dispute resolved through arbitration in London the Claimant's Claim Form dated 27.8.2014 be struck out with costs.

g) The costs of this application be paid by the Claimant in any event.

2. Prayers a, b & c are spent by the time this matter was argued in that the motor vessel JOLLY DIAMANTE was by consent released on terms.Therefore what the parties require a determination on in this matter are the prayers no d, e, f and g on costs.

3. As worded, prayers (e) is dependent upon my findings on prayer (f) while prayer d can be considered as stand alone. I will therefore consider and determine the application first by considering whether or not this court sitting as an admirality court is clothed with jurisdiction to determine the application and thereafter, depending on whether there is jurisdiction, if the matter should be referred to arbitration on the basis of section 6 of the Arbitration Act 1995.

Applicant's case:

4. It is the applicants case as disclosed on the face of the application and the affidavit of GIUSEPPE FEDELE that this court exercises admirality jurisdiction pursuant to the provisions of section 4 of the judicature Act which itself in the same way and over matter and manner the mandates that the jurisdiction be exercised High Court in England does. It is contended tht the High Court in England is not seized of admirality jurisdiction over a dispute as to purchase of a ship and therefore this dispute being all about whether or not the defendant delivered and transferred to the plaintiff motor vessels JOLLY VERDE & JOLLY ROSSO. To the defendant any dispute over such a transaction and its execution does not fall anywhere near any of the matters provided under section 20 of the Supreme Court Act, 1981, which exclude a contract of sale of a ship. Accordingly this claim and the freezing order granted was an abuse of the court process.

5. Additionally the defendant contends, without submitting to this courts admirality jurisdiction, that by a memorandum of agreement between the parties, it was agreed that any dispute between the parties be referred to arbitration to be concluded in London. On that score it was contended and submitted by Mr.Kinyua for the Applicant that the parties are bound by their own bargain which when subjected and applied to section 10 of the Arbitration Act, 1995 barred the court from exercising jurisdiction in a matter governed by the statute. The defendant/applicant then delves into the manner the agreement was executed and performed and contend in effect that it was executed and premised on its terms. That was to this court a matter for the merits that need to wait if the time for determination of the substantive matter were to come.

6. Mr.Kinyua therefore submitted and prayed to court that on the basis of lack of admirality jurisdiction this claim be struck out but if not struck out it should be stayed and referred to arbitration, which by the time the parties argued before me, it was said, had commenced but the claimant had not submitted itself to the process.

7. On the part of the Claimant/Respondent Mr.Khagram resisted the Application Notice and relied on the affidavit of one SANJEEN JAIN a further affidavit and a list of authorities. In his view the English statute vests additional jurisdiction under subsection 3 including jurisdiction vested in the High Court prior to the commencement of the Act.

8. It was Mr.Khagram's position and submissions that Mr.Kinyua conceeded that the High Court in Kenya excercises jurisdiction, which is constitutional and can only be limited by the constitution. In his submission Mr.Khagram said rather than struck out even when it is established that the court lacks jurisdiction, there is power to transfer the matter to another division of the High Court. It was further admitted that the jurisdiction here was founded upon the issuance of a write and that under part 61.1 of the English statute, the English courts assumed jurisdiction once a write was issued and that once the

matter concerned a ship the admirality jurisdiction is property invoked.

9. On a arbitration, Mr.Khagram submitted that memorandum of agreement between the parties disclosed the tonnage of the two vessels and that the same would be proved by details and that a dispute arose about the lightweight of the two vessels as materials had been removed by the Defendant between the point of sale and point delivery. Reliance was thereafter placed on decided cases to the effect that once a party takes steps in a litigation he loses the right to insist on reference to arbitration. In this case it was pointed out that the Defendant could not be allowed to have this matter referred to arbitration after he had filed an application and obtained orders in its favour.

10. In response Mr.Kinyua submitted that the position taken by Mr.Khagram on what amounts to taking a step in the litigation was a misunderstanding of the law applicable. That the Defendant merely acknowledged service and reserved the right to contest jurisdiction. In the defendants words seeking other orders with an application for reference to arbitration is not prohibited and that it does not diesentitle the defendant to its right in the arbitral clause. The right to be heard was invoked with an assertion that the same cannot be limited under the constitution.

11. On the additional jurisdiction of an admirality court prior to the commencement of the English Statute, it was the applicant's contention and submission that it was the claimant's duty and onus to prove what that jurisdiction was then. It was in conclusion submitted for the defendant that section 22 of the English Statute was on the mode of exercise of jurisdiction and that the writ system was abolished in the English system in 1998.

Issues for determination:

i. Whether this court sitting as an admirality court has jurisdiction to entertain the matter.

ii. Whether or not the suit ought to be stayed pending the arbitration to be conducted in London.

Jurisdiction of the High Court:

12. Since the decision in **Owners of Motor Vessel "Lilian"** and the subsequent decision following it, it can now not be gainsaid that Jurisdiction is everything and a court of law down its tools the moment it determines that it is not vested with the power to handle a matter. In Kenya, the jurisdiction of the High Court is created by the constitution and in my reading of Article 165 there is no allowance for that to be limited or restricted otherwise than by the express words of the same constitution.

13. The constitution provides at article 165(3) Subject to clause (5), the High Court shall have:-

> ***"(a) unlimited original jurisdiction in criminal and civil matters:***
>
> ***(b) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.***
>
> ***(c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144.***
>
> ***(d) Jurisdiction to hear any question respecting the interpretation of this Constitution including thedetermination of:-***
>
> > ***(i) the question whether any law is inconsistent with or in contravention of this Constitution;***
> >
> > ***(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this***

Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e)any other jurisdiction, original or appellate, conferred on it by legislation.

14. Can it be said therefore that the admirality jurisdiction of this court is donated by the judicature Act. I don't think so. In so far as admirality matters are not criminal in nature, they must be consider civil in nature and therefore the category that the High Court must exercise jurisdiction except as ousted by Sub Article 165(5). Section 4 of the Judicature Act is worded as follows:-

4. (High Court is court of admiralty)

"(1) The High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.

(2) The admiralty jurisdiction of the High Court shall be exercisable—

(a) over and in respect of the same persons, things and matters; and

(b) in the same manner and to the same extent; and

(c) in accordance with the same procedure,

as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.

(3) In the exercise of its admiralty jurisdiction, the High Court may exercise all the powers which it possesses for the purpose of its other civil jurisdiction.

(4) An appeal shall lie from any judgment, order or decision of the High Courtin the exercise of its admiralty jurisdiction within the same time and in the samemanner as an appeal from a decree of the High Court under Part VII of the Civil Procedure Act (Cap. 21)."

In my reading and opinion upon such reading, the High Court has a duty to exercise admirality jurisdiction and in so exercising the said jurisdiction it is bound under subsection 3 to fuse same with its other powers in other civil jurisdiction.

15. It is therefore the position of this court that the architecture of legislation is to adopt the law in England and the international law applicable and in doing so does not abandon, abdicate, or neglect its powers as is inherently vested.

16. In this matter the defendant while acknowledging the unlimited jurisdiction of the court has prayed that this claim be struck out for not being one of those enumerited under section 20 of the Supreme court Act, of England. It is the finding of this court that is exercises admirality jurisdiction as of right and duty and that it does not need to look beyond the boundaries of the constitution to see if it has or has no jurisdiction. To say that the court denounces its legal powers over this matter on the basis that claim is about a contract of sale of a ship which should have been filed otherwise than as an admirality claim is to be pedantic. It would be abdication miss the point and adopt a rather techinical approach to the administration of justice which itself is discouraged and forbidden by the spirit and letter of Article 159(2) d.

17. In the present case if the court were to acceed to the Defendants request and find that the dispute ought to have been filed otherwise than as admirality, it would be open to the claimant to being it as a civil and commercial dispute and file it before this court. In that event what justice would be served by striking out? I say none at all. The effect and totallity of such a finding would be that the court shall have abdicated duty. I find that the challenge of this courts jurisdiction lacks merit, was improperly taken and is dismissed.

Should the matter be referred to arbitration?

Section 6 of the Arbitration Act provides;

Stay of legal proceedings

> ***"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party the proceedings and refer the parties to arbitration unless it finds:-***
>
> > ***(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or***
> >
> > ***(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.***

Then section 10 provides

'"Except as provided in this Act, no court shall intervene in matters governed by this Act."

18. The spirit of the law under the statute is that a party who desires to enforce an arbitration clause in an agreement must do so at the earliest opportunity and in the words of the statute ***'not later than the time that party enters appearance to the action'.*** For purposes of admirality proceedings one acknowledges service of the writ as an equivalent of entering appearance. In my opinion this is the spirit that should guide entire case management and discourage delay.
19. It is not indispute that the firm of Kinyua Muyaa and company advocates filed an acknowledgement of writ and then filed the Application Notice now under consideration. The application, as indicated before, sought among other orders an order for the release of a motor vessel JOLLY DIAMANTE. Having certified the application urgent on the 1/9/2014 the advocates appeared before the judge on 2/9/2014 and agreed to discuss on possible security or an undertaking. Such discussion did not yield much and the application was argued partly with focus on prayer(b) and a ruling dated 5/9/2014 delivered releasing the vessel on conditions that the defendant avails a bank guarantee from a First class international Bank in the sum of US&1,500,00.
20. The question before me is the determination of whether or not the defendant has satisfied the dictates of section 6 (I) of the Arbitration Act so as to merit the application being allowed and the proceedings stayed pending arbitration.
21. The defendant/applicant contends that it was within its right, it not being barred by any law, to bring an application for the release of the vessel together with the application for stay. On the other hand the claimant maintains that having come to court and obtained an order for the release or varation of the *exparte* freezing orders the Defendant has taken steps in the suit and is therefore estopped from seeking to have the proceedings stayed pending Arbitration.
22. In this courts opinion, whether or not to refer matter to arbitration is a matter of judicial discretion even though the statute appear to be worded in mandatory terms. I say it is a discretion because the court is bound to consider among other things the existence of a dispute. As it were, arbitration proceedings, like court proceeding, sought not be undertaken for the sake of taking them and in the absence of a dispute. The Court of Appeal in **UAP Provincial Insurance Co. Ltd -vs- Michael John Beckett, (2013)eKLR** while interpreting section 6 of the Arbitration Act said, at

paragraph 17:-

> ***"It is clear from this provision that the inquiry the court undertakes and is required to undertake under section 6(1) b of the Arbitration Act is to ascertain whether there is a dispute between the parties and if so, whether such dispute is with regard to matters agreed to be referred to arbitration. In other words. If as a result of that inquiry the court comes to the conclusion that there is indeed a dispute and that such dispute is one that is within the scope of the arbitration agreement, then the court refers the dispute to arbitration as the agreed forum for resolution of the dispute. If on the other hand the court comes to a conclusion that the dispute is not within the scope of the arbitration agreement, then the correct forum for resolution of the dispute is the court. Indeed in dealing with a section 6 application, the court is enjoined to form an opinion on the merits or otherwise of the dispute"***

23. In the case before court, the claimant contends that there is a dispute as to the lightweight of the two ships while the Defendant contends that the agreement between the parties was not grounded on any agreed tonnage. In the opinion of the court, there is indeed a dispute meriting resolution. The only question is which forum is apt for resolution of the dispute.
24. It is not enough that there exist a dispute and an arbitration agreement and therefore the matter must, as or right, be referred to arbitration. The court must equally be satisfied that there has been made an application not later that the time of entering appearance by the party insisting on the agreement and that the said party has not filed any pleadings or taken any steps in the proceedings.
25. This bring me to the question of what is meant by the expression *'taken any steps in the proceedings.'* The records of the court as summarised above show that either due to the exigencies of the case or just the dictates of practice of commerce the defendant made a deliberate choice to first prosecute a limb of the application that availed to it the release of the vessel on terms, prior to pursuing the order for stay pending arbitration. That step and choice has vested upon it a benefit by this court. Can it be said that action is step in the proceedings or it is a mere assertion of a right? There is equally in the application before court for consideration a prayer that the claim be struck out.
26. In the words of G.S.Pall J.A, in **Kisumuwalla oil industries Ltd. -vs- Pan Asiafic Commodities PTE Ltd & Another**, *"the applicants application to strike out the plaint and dismiss the suit cannot be anything but a step in the proceedings."*
27. I am on this pronouncement by the court of appeal convinced that the defendant took a step in the proceedings. Contrary to the Defendants assertion that nothing stops a defendant from filling an omnibus application as it did, I find that it is not open to a defendant to seek such varied orders together with an application for stay. I hold the view that an application under section 6 is not a terminal application as such. It is but a stop gap measure and step seeking to further the parties bargain if filed in accordance with the dictates of the law.
28. Having found that the court is clothed with jurisdiction to entertain this matter as filed and further that the defendant applicant took steps in the proceedings and obtained for itself a benefit, I have no hesitation in finding that the Application Notice dated 29.8.2014 has no merit and I therefore dismiss it with costs to the claimant/Respondent.

Dated, signed and delivered at Mombasa this 15th day of April 2016.

In the presence of:-

Mr.Khagram for the Defendant/Respondent.

Mr.Kinyua for the Defendant/Applicant.

P.J.O.OTIENO

JUDGE