



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT MOMBASA

ADMIRALTY CLAIM NO. 2 OF 2011

CLAIMANTS: PACIFIC GULF SHIPPING CO LIMITED

RESPONDENTS: OWNERS MOTOR VEHICLE "ELENEANOR D"

COSCOL (H) INVESTMENTS & DEVELOPMENT CO LTD

TRUMPH CARRIERS LIMITED

RULING

1. Before court is the Claimant's Notice of Motion dated 18th July 2011, hereinafter referred to as claimant's application. The Claimant seeks the striking out of the 1st and 2nd Defendant's Defence and Counter-claim. The application is based on four grounds that:
 - i. **The 1st Defendant failed to file a valid acknowledgment of service;**
 - ii. **The Defence and Counter-claim of the 1st and 2nd Defendants in a nullity;**
 - iii. **The Defence and Counter-claim is otherwise an abuse of the process of the court; and**
 - iv. **That this court has no jurisdiction to hear and determine this suit on merits.**

BACKGROUND

3. The Claimant obtained a warrant of arrest of motor vessel "Elenor D" (subject motor vessel) on 6th May 2011.
4. The Claimant's claims that it is the owner of bunkers valued us dollars 940,815.50 which were on board the subject Motor Vessel. It was claimed that the 1st defendant was holding the said bunkers as bailee and the 2nd Defendant was in control and in possession of the subject Motor Vessel. Claimant's claim therefore is for delivery up of the bunkers or their value and damages for their detention or conversion.
5. 1st and 2nd defendants filed their acknowledgment of service on 11th May 2011. That acknowledgement of service indicated that those Defendants intended to defend the claim and intended to contest jurisdiction.
6. It is to be noted that the 3rd Defendant has not filed any document.
7. 1st and 2nd Defendants also filed an Application Notice filed and dated 13th May 2011. That Application sought three main prayers that:

- i. **“ That the Warrant of arrest issued herein be set aside;**
 - ii. **That the claimant be compelled to immediately take possession or delivery of the bunkers remaining on board the Motor Vessel “ELenor D” by pumping them out**
 - iii. **That is default of the Claimant taking possession or delivery of the aforesaid bunkers within FOUR (4) hours of service of this Court’s as aforesaid (sic), the Warrants of arrest herein to stand discharged and the Motor Vessel “ELenor D” be at liberty to said.”**
8. That Application Notice of the 1st and 2nd Defendant was argued before Mwongo J. Who delivered his Ruling on 24th February 2012. By that Ruling Application Notice was dismissed with costs to the Claimant.

CLAIMANTS APPLICATION

9. By the affidavit of Ushwin Khanna in support of that application it was stated that the 1st and 2nd Defendant’s Acknowledgement of Service gave notice of the intention to contest this court’s jurisdiction; that jurisdiction of the court was challenged by 1st and 2nd Defendant’s Application Notice dated 13th May 2011, that after the Application Notice was dismissed by Mwongo J the 1st and 2nd Defendants have not filed fresh Acknowledgement of Service and the one filed herein on 11th May 2011 by 1st and 2nd Defendant had been spent; and that it follows the 1st and 2nd Defendants defence and Counter-claim was a nullity and or an abuse of the court process.
10. The Claimant by its written submission seems to have waived, considerably, away from the grounds in support of the Claimant’s application. It will be recalled that Claimant relied on the grounds that the 1st and 2nd Defendant’s Acknowledgement of Service was not valid, and that their Defence and Counter-claim was a nullity.
11. In the written submission the Claimant widened its grounds to include a consent letter filed by Claimant, and 2nd Defendants which was an undertaking by West of England Insurance Services (Luxembourg)S.A whereby Claimant agreed to the release of the subject Motor Vessel in consideration of them receiving US dollars 32,500 and payment of legal costs. In that Letter of Undertaking the Claimant and 1st and 2nd Defendants agreed to refer the balance of Claimant’s claim to a London Arbitration.
12. Justice Mwongo by his Ruling of 24th February 2012 held that due to that agreement to refer the dispute to Arbitration nothing was left, in this cause, for this court to determine. Claimant, in that regard submitted, which was not supported by the grounds in the claimant’s application, that this cause ought to be stayed since Mwongo J found that there was nothing left in this cause determination.
13. With respect, a party cannot be allowed to raise certain grounds in an application but when submitting to raise additional grounds. That in my view renders the additional ground to be a nullity. They cannot be considered because if they were the opposite party would undoubtedly suffer prejudice. I will therefore say no more about those additional grounds.
14. The crux of the Claimants application as supported by Claimant’s written submissions is that 1st and 2nd Defendant filed Acknowledgement of service, and therein disputed this court’s jurisdiction and as argued by Claimant, further disputed this court’s jurisdiction by Application Notice dated 13th May 2011. That following the dismissal of that Application Notice by Mwongo J on 24th February 2012, 1st and 2nd Defendants ought to have filed another Acknowledgment of Service as required under Part II of the England’s Civil Procedure Rules. Under that Rule a Defendant who wishes to dispute jurisdiction of the court must first file an Acknowledgment of Service. Thereafter and within 14 days of such filing the Defendant can file an application seeking the court to declare that it has no jurisdiction. If a Defendant does not file such an application within that time period he is deemed as having accepted the court’s jurisdiction. If however he does apply for court’s declaration that it has no jurisdiction and the court declines to declare that it has no jurisdiction the Defendant’s Acknowledgment of service, already filed, ceases to have effect and the Defendant is required under that Rule to file a further Acknowledgment of Service within 14 days of the court. The explanation of that Rule in the white Book of the year 2011 provides that if the defendants fails to move the court by an

application to dispute a jurisdiction, within 14 days of filing Acknowledgement of Service, such a Defendant is treated as having accepted the court's jurisdiction.

15. The position in this case is that 1st and 2nd Defendants filed an Acknowledgement of Service whereby they disputed this court's jurisdiction but in my view did not file an application for the court to declare it had no jurisdiction. Although Claimant submitted that by filing the Application Notice dated 13th May 2011 the 1st and 2nd Defendant sought such a declaration I beg to differ with that submission. Rule 11 (1) of the English Civil Procedure Rules 2011 is very clear on what such application should seek. It provides in part that a defendant would seek:

“...an order declaring that it (the court) has no such jurisdiction or should not exercise any jurisdiction which it may have.”

16. The 1st and 2nd Defendant's Application Notice dated 13th May 2011, to recap, sought for Warrant of arrest to be set aside; for the Claimant be compelled to take possession of the bunkers; and in default of taking possession the warrant of arrest be discharged.
17. The prayers produced above, in my view, do not meet the standard required by Rule 11 (1). In other words that Application Notice did not challenge jurisdiction of the court. This was clearly acknowledge by the Learned Justice Mwongo by his Ruling of 24th February 2012. The Learned Judge on that had this to say:

“Upon this consideration of the application, response, submissions of counsel and upon perusal of the documents on record, I am persuaded by the Plaintiffs (claimants) counsel that there is nothing left for the court to determine. Setting aside the arrest warrant being the only matter in contest as argued upon by both counsels and there having been no application challenging jurisdiction, and further the payments having been made as conceded, this is an open and shut case for dismissal of the application.”

That is the order that dismissed 1st and 2nd defendant's Application Notice dated 13th May 2011. It therefore follows that Application Notice did not seek the court's declaration that it did not have jurisdiction.

18. It is on the above finding, that the Application Notice dated 13th May 2011 did not seek that declaration, that I find the Claimant's Notice of Motion dated 18th July 2011 lacking in merit. Since the 1st and 2nd Defendants did not, as required under Rule 11 (1), seek declaration on jurisdiction they are deemed as having accepted this court's jurisdiction. Whether or not this court has jurisdiction is now mute in view of the parties having referred this dispute to arbitration. Even though that is so there is no basis to order the 1st and 2nd Defendants to pay costs so far awarded in this matter, as sought by the Claimant because the claimants did no so pray for it by its application being considered by this Ruling that issue of award of costs was first raised in claimant's written submissions.

CONCLUSION

- 19. In view of the above finding the Notice of Motion dated 18th July 2011 is dismissed with costs to the 1st and 2nd Defendants.**

DATED and DELIVERED at MOMBASA this 25th day of June, 2015.

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

C/A – Kavuku

For Claimant

For 1st Defendant and 2nd Defendant

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE