



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ADMIRALTY CLAIMNO. 7 OF 2011

MS VERONICA KANYI

TITUS KILONZI

FELIX N. KIMWELICLAIMANTS

HAMISI MWENYEDI

POLYCARP LEMAYAN

BIWOT EDWIN

VERSUS

THE OWNERS OF THE MOTOR VESSEL “PONMUDI”DEFENDANT

RULING

1. On or about 4th June 2010 motor vessel (mv) “Ponmudi” developed engine problems while in open sea. She began to drift because her engines had broken down. She drifted toward Somali waters and by the time towage services were requested, she had drifted 241 nautical miles from Mombasa coast, and was likely to reach the Somali Coast and was in danger if there had not been security provided to repel possible piracy attack. She was eventually successfully towed to port of Mombasa.
2. There are various admiralty claims that were filed following that unfortunate incident.
- 3 Admiralty claim No 10 of 2010 was filed by the owners of Motor Tug “Ham 1400” against owners of MV “Ponmudi”. The Tug “Ham 1400” was the first to be requested to provide towage services as “Ponmudi” was fast drifting to the Somali Coast. Tug “Ham 1400” successfully performed rescue of MV “Ponmudi” by hooking the tow line, towing the vessel and offering security. The owners of Tug “Ham 1400” claimed in their claim for expenses of the successful salvage operation plus interest.
- 4 Admiralty No.11 of 2010 was filed by the owners of motor tug “Alpha Pina” against MV “Ponmudi”. Tug “Alpha Pina” was the second vessel to be requested to avail salvage assistance to MV “Ponmudi”. Tug “alpha Pina” jointly with tug “Ham 1400” and successfully salvage MV “Ponmudi” from the Somali Coast and brought it to port of Mombasa. The claim of Tug “Alpha Pina” plus interest is USD. 5,000.00 Per day, USD 4,000.00 per day for security and the costs of bunkers.

5 Admiralty No. 12 of 2010 was filed by fossil Fuels Limited against MV “Ponmudi”. This claim relates to the supply of fuel within Somali waters to MV “Ponmudi”, on 28th May 2010 at the request of MV “Ponmudi”. The claim is for USD 23,175.00 plus interest

6 Admiralty No. 1 of 2011 was filed by ten crew members who were on board the MV “Ponmudi” and who claim unpaid wages totaling USD 38,463.00 plus costs and interest.

7 The advocates appearing in Admiralty claim Nos. 10, 11 and 12 of 2010 by consent had judgment entered for all the claimants in those claims. This was on 28th April 2011.

8 By consent of all advocates in Admiralty claim Nos. 10,11 and 12 of 2010 and No.1 and 7 of 2011 recorded in court on 10th July 2012 they agreed to have the Mv “Ponmudi” sold and the proceeds to be retained by the Admiralty marshal of this court. The vessel was sold to Kraal Scrap Metal Enterprises Ltd for USD 238,432.00. That amount minus USD 2,850.00 paid to the surveyor continues to be held in the Admiralty Marshall’s account.

9 For consideration in this Ruling is that Application Notice dated 1st November 2012. It is filed by claimants in Admiralty claim Nos. 10, 11 and 12 of 2010 and No. 1 of 2011. They seek the following orders;

a) This application be certified as urgent and prayer (b) hereof be heard without notice in the first instance.

b) The claimants in claim Nos 10, 11 and 12 of 2010 and 1 of 2011 be permitted to intervene in this claim.

c) The claim form in this claim be struck out with costs.

d) In the alternative to the claim form in this claim be amended and each claimant be required to sign a statement of Truth to verify the claim Form if the order for amendment is issued and the claimants in claim Nos. 10,11 and 12 of 2010 and 1 of 2011 be granted leave to defend this claim.

e) The claimants be ordered to provide certified copies of their full passports and seamen’s books pending the hearing and determination of this application.

f) The judgment given in this claim on 17.11.2011 be set aside as a matter of right.

g) The order given on 17.11.2011 and issued on 23.11.2011 be set aside as a matter of right.

h) The document purporting to be a decree given and issued by the court on 23.11.2012 be set aside, struck out and be expunged from the record.

i) Payment out of the proceeds of sale of any sums to the claimants in this claim be stayed until the hearing and determination of this application.

j) The costs of defending this claim by the claimants in claim Nos. 10, 11 and 12 of 2012 and 1 of 2011 be paid by the claimants in this claim.

10 The background to the above prayers is that the defendant (MV “Ponmudi”) did not file a defence to Admiralty claim No 7 of 2011 (which for brevity I shall hence forth refer to it as Veronica’s claim). The claimants in Veronica’s claim applied for judgment to be entered in default of that defence. That application was heard on 17th November 2011 when the court entered judgment in default of defence for all the claimants in Veronica’s claim. It is that judgment which

is the subject of prayers (f) (g) and (h) reproduced above.

The Application Notice of 1st November 2012 based on grounds which refer to errors in extracting the decree in Veronica's claim; on allegations that the claimants in Veronica's claim overstated their wages in their claim and the court fees paid; that the statement of truth in the claim form, signed by learned counsel for claimants in Veronica's claim, was false and accordingly the claim form should be struck out; and that the application for judgment in default of defence in Veronica's claim was not supported by an affidavit and that accordingly the claim was not proved.

11 I will begin by considering the least controversial ground in that application. The claimants in Veronica's claim conceded that there was an error in the extracted decree in respect to the filing fees in their claim. It was however argued that the error should not lead to the striking out the claim nor to the setting aside judgment in default.

12 The amount paid to the court when filing Veronica's claim was Ksh 71,115. There were other minor fees paid when filing other documents.

13 The extracted decree in Veronica's claim reflects filing fees as being USD 1,500. According to the applicants they overstated the filing fees by Ksh 52,525.00.

14 What both side failed to address as they submitted on this ground is the rate of exchange from Kenya shillings to U.S Dollars as at the time the decree was extracted. However since the claimants in Veronica's claim concede that there was an error in the stated filing fees in the decree, the court will order that the decree be expunged from the record to enable another decree to be drawn reflecting the correct filing fees.

15 The applicants also stated in their grounds to the application that the application for judgment in default of defence in Veronica's claim should have failed because it was not supported by any of the claimant's affidavit.

16 Claimants in Veronica's claim through the replying affidavit of Titus Kilonzi sworn on 20th November 2012 attached the affidavit that supported their application for judgment in default of defence. That attached affidavit also sworn by Titus Musyoka Kilonzi on 4th August 2012 is not on court record. It however bears the court stamp of a date similar to the one stamped on the application for judgment in default of a defence that is 11th August 2012.

17 The fact that it is not on court record is not correct in my view to allege wrong doing on the part of the claimants in Veronicas claim. It is not unusual to find that court documents do get mis-filed or not filed at all. It is a frequent occurrence, more to do with human error, rather than fraud.

18 Because that affidavit is now proved to be there, the application for judgment in default of defence cannot be faulted as the applicants sought.

19 The other two grounds not yet considered in this Ruling are intertwined. They are the applicant's allegations that the claimants in Veronica's claim overstated their wages; and that accordingly the statement of truth signed by their learned counsel was false.

20 The applicants through the affidavit of Abudakar Haji Sharri, one of the claimants in Admiralty Claim No. 1 of 2012 which was also for a claim for wages, deponed that when the MV "Ponmudi" arrived at the port of Mombasa only Felix N Kimwe, one of the claimants in Veronica's claim, remained on board MV 'Ponmudi" up to June 2011. That the other claimants in that claim ought not to have made a claim for wages after MV "Ponmudi" arrived at the port of Mombasa.

21 Further that the salary of Felix had been overstated in the claim. That his salary was USD

300.000 but in Veronica's claim it had been stated to be USD600.000.

22 The applicant also stated that the other claimants in Veronica's claim had overstated their wages and in respect of Biwot Edwin, the 6th claimant in that claim, that he was not an employee on MV "Ponmudi".

23 All the allegations made by the applicants against the claimants claim in Veronica's claim were in my view well responded to and were proved to bear no truth. The claimant attached their contracts of employment of MV "Ponmudi"; their sea fearor's book which showed that they were engaged on MV "Ponmudi" as claimed; and copy of the captain's crew list which showed that rather it was some of the claimants in the applicants claim who had deserted duty by the time the MV "Ponmudi" reached port of Mombasa and therefore they ought not to have filed a claim against MV "Ponmudi".

24 I have considered the replying affidavit of Titus Kilonzi and I make a find that there is no foundation, whatever to the prayers made by the applicant

25 In that affidavit Kilonzi made some very damning deposition against the applicant, those depositions were not controverted. Kilonzi deposed:

"...The captain and the second engineer's monthly wages have been exaggerated and not what their contracts of employment stipulate. Mr Abubakar Haji wages as per contract is \$2,000 and 2nd engineer Joseph Muthama was earning \$1,200 but they have depicted their wages as \$2,600 and \$1,400 respectively".

Kilonzi annexed their contracts of employment to support his contention. Abubakar and Muthama are co-claimants in Admiralty claim No 1 of 2011.

26 That damning deposition as stated before was not controverted by the applicants who themselves allege, which has been proved otherwise, that the claimants in Veronica's claim had overstated their wages.

27 The applicant's learned counsel by their written submission went on a tangent on matter not raised in the application. The court cannot allow a party to bring an application on one ground but in submissions present a totally different application.

28 It follows that submissions that claimant's in Veronica's claim failed to serve the vessel will be rejected.

29 The applicant's submission to the effect that the judge who entered judgment in default of defence failed to satisfy himself of the claim is also rejected. That judge is of a concurrent jurisdiction with me. I therefore cannot sit in appeal against the decision he reached. But perhaps more than that the said judge did in his order of 17th November 2011 stated that he perused the documents in this file before entering judgment in default of defence.

30 The applicant's application will partly fail. I do not find any fraud committed either by the applicants in Veronica's claim or their advocate which would entitle the setting aside the judgment of 17th November 2011. It is on that finding that I decline to allow the applicants to intervene in this matter.

31 In the end I grant the following orders:

a) The decree herein issued on 23rd February 2012 is hereby expunged.

b) The claimants in this claim shall have the Advocates costs settled by the Deputy

Registrar of this court and shall thereafter prepare another decree reflecting the amount settled by the Deputy Registrar and also reflecting the correct filing fee in this matter. Once that is done the decree shall then be signed and sealed.

c) To the extent that the applicant have only partially succeeded in their Application Notice dated 1st November 2012 and because they failed to controvert allegations that some of them have exaggerated their wages there shall be no orders as to costs to the application Notice dated 1st November 2012.

DATED and DELIVERED at MOMBASA this 24th day of September 2015.

MARY KASANGO

JUDGE

24.9.2015

Coram

Before Justice Mary Kasango

C/Assistant -

For the Claimants:

For the Defendant:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE