REPUBLIC OF KENYA

High Court at Mombasa

Admiralty Claim 2 of 2011

PACIFIC GULF SHIPPING COMPANY LIMITED .....CLAIMANT

VERSUS

1. THE OWNERS OF THE MOTOR VESSEL "ELEANOR D".....1ST DEFENDANT/RESPONDENT

2. COSCOL (H.K.) INVESTMENT & DEVELOPMENT CO. LTD.....2ND DEFENDANT/RESPONDENT

3. TRIUMP CARRIERS LIMITED, THE TIMES CHARTERERS OF

THE MOTOR VESSSEL "ELEANOR D".....3RD DEFENDANT/RESPONDENT

RULING

1. After the hearing of submissions on the Claimant's motion to strike out the first and second Defendants' defence and counterclaim, the court retired to write the ruling thereon. Whilst the ruling was pending, the Claimant by a letter dated 17th May, 2012 wrote to the Registrar as follows:

"We refer to the above case which is pending ruling to be delivered by the Hon. Justice Mr. Mwongo on notice.

We enclose herewith the relevant pages from the Admiralty Jurisdiction and Practice by Nigel Meeson 3rd Edition and the Admiralty Jurisdiction and Civil Procedure Volume 2 - 2010 in connection with the above.

We would request you to please draw to the learned Judge's attention of the annexed authorities and to kindly list the matter for mention on Wednesday the 30th May, 2012 for further directions in order that the parties may have an opportunity to address the learned judge on the authorities."

2. Claimant's counsel also notified Respondents' counsel of the position, and invited him for the mention. The Respondents opposed the Claimant's request on grounds that: the hearing had been completed, a ruling was awaited and there was no valid reason put forth to warrant re-opening of arguments; litigation should come to an end; and that there was a risk of putting the court in an embarrassing situation.

3. The court directed the Claimant to make and serve a formal application annexing the authorities sought to be introduced, which it did. Claimant then sought leave to address the court in reference to the authority on wrongful arrest. He invoked the court's inherent jurisdiction, overriding objectives and the need to assist the court in arriving at a judicial decision after considering all available material and the law.

4. The Defendant filed grounds of opposition emphasising its earlier grounds of objection, and indicating that the court was capable of conducting its own research. Finally, counsel opposed the re-opening of submissions on grounds that the court could not do so in the absence of an order of arrest of ruling.

5. Parties made oral submissions on the application to re-open the hearing for submissions on the Claimant's authorities. The Claimant argued that advocates, as officers of the court, were under duty to provide all information that would enable the court reach a just decision. Counsel reiterated his earlier grounds.

6. The Defendants opposed the application on the earlier cited grounds. In addition, counsel for Defendant emphasised that their opposition was grounded in the need to ensure that the court does not set a wrong precedent. They argued that the application was akin to one for review.

7. The sole issue this court is required to answer is: whether after closure of submissions on an interlocutory application and pending the ruling thereon, a court may re-open the matter to allow further submissions on an authority or the law.

8. The provision governing submissions by parties in respect of applications is found in Order 51 Rule 16, which states:

"The court may in its discretion limit the time for oral submissions by the parties or their advocates or allow written submissions."

This grants the court unlimited discretion to set the timeframe for oral or written submissions in respect of applications. As in many matters of procedure, the law is silent on the re-opening of submissions on an application.

9. Irrespective of whether or not a timeframe has, or had been, set for written or oral submissions, what is of critical importance in all cases is that the rules of natural justice are observed. In the context of submissions, that means:that each party should have a reasonable opportunity to be heard and to respond to his opponent's position, and that no party should be ambushed. This is why, for example Order 51 Rule 13 (3) provides that an application:

"shall be served on the Respondent together with the list of authorities."

10. As I said earlier, there is no legal provision that speaks to the issue in question. But it is fair to say that rules and procedures are the handmaidens of justice. They are not intended to enslave justice but to aid its achievement. Article 159 of the Constitution read together with Sections 3A, 1A and 1B of the Civil Procedure Act are intended to unshackle any procedural fetters to justice.

11. Contrary to the suggestion by Respondent's counsel, this situation on re-opening a hearing would not be creating a new precedent. In English Practice under the old Order LIV D Rule 6 there was a power to hear an application whether made in court or in chambers so long as the order had not been perfected. In **Re Adam Eyton Ltd Exparte Charlesworth (1) (1887) 36** Ch D 299 it was left open whether a judge could re-hear in chambers an order which he has previously made in chambers, but which had not yet been drawn up. There, Fry LJ said:

"I have the impression that he (Judge) can re-hear it before the order has been drawn up

and Cotton LJ said:

"I am disposed to hold that after an order has been pronounced, and nothing remains but to draw it up, it cannot be re-heard."

In this case no order or ruling has been pronounced or drawn up.

12. Nearer home, in Malindi HCC 56/2009 in **Hassan Hashi Shirwa** vs **Swalahudin Mohamed Ali** Omondi J, after hearing representations by counsel on **Epicure Ltd** (1960) EA 308 and **Michael Mutua Kiema vs Hagginson Malindi Mwangemi** Msa HCC 89 remarked as follows:

"What I understand from the two decisions cited is not the content of the arguments but the principle in them which is that a case can be re-opened for hearing even after parties have closed their arguments. Re-opening a case is not an impossibility, but there must be cogent reasons for re-opening and not because a party has suddenly had a brainwave and spotted a loophole in its case, which it can now seal by re-opening the case."

Omondi J. in that case ultimately disallowed the application to re-open and held:

"A court has a duty to ensure parties are fair to each other and not conduct trial by ambush. The role of the court in this shroud of mystery is to be an impartial umpire ensuring there is no rough tackle and offside play. ...If the court allowed that litigation would never end."

13. I have no difficulties agreeing with my learned sister on both propositions. In the present case, I have written no ruling. And as such, I consider that, so long as both parties have access to the authorities sought to be produced and are given reasonable opportunity to submit thereon, there will be no prejudice on either party. In any event what is sought to be introduced are legal authorities which, as pointed out by the Respondent are accessbile to the court through its own researches.

14. What has not been demonstrated by the Applicant, however, and which has led me to disallow the application, is what was referred to by Omondi J as **"cogent reasons for re-opening"**, beyond a sudden brainwave intending to seal a loophole spotted by the Applicant.

15. Accordingly, I decline to allow the re-opening of the record to allow submissions on the new authorities, though I have no doubt I am entitled to do so. I also find and hold that there is no reason shown why the court cannot read and use the said authorities, which are in the public domain, for purposes of its decision.

In the result, the application is dismissed. Costs to be in the cause.

Dated, signed and delivered this 15th day of January, 2013

R.M. MWONGO

JUDGE

Read in open court
Coram:

Judge: R.M. Mwongo

Court clerk: M. Matano

In Presence of Parties/Representative as follows:

a)…….....
b)…….....

c)…………………………………………………………………………………...................................

d)…………………………………………………………………………...