

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
(Coram: Ojwang, J.)

CLAIM NO. 1 OF 2009

IN RE ADMIRALTY CLAIM AGAINST THE MOTOR VESSEL “FONARUN NAREE”

NATIONAL CEREALS & PRODUCE BOARD... ..CLAIMANT

-VERSUS-

THE OWNERS OF MOTOR VESSEL “FONARUN NAREE”DEFENDANT

RULING

The main cause is in the claim dated and filed on 2nd January, 2009, and within its framework, a number of applications have been filed. One of these applications is in the form of the Application Notice dated 19th March, 2010 and filed on 22nd March, 2010.

The application relates to pre-trial arrangements; and the claimant’s advocates seek Court orders requiring the defendant to give specific disclosure and inspection of the following documents:

- (a) recommendations made by the Fumigator-in-charge in writing after the Pre-Fumigation, about sealing improvements and repairs;
- (b) documentary evidence of Off-hire Claim by the charterer at Mombasa between 2nd January, 2009 and 20th January, 2009 as pleaded in the counterclaim;
- (c) proof of payment of bunkers during the period the vessel was under arrest;
- (d) proof of re-sale of cargo in Iran as pleaded in the counterclaim;
- (e) notice of re-delivery of vessel by charterer to owners;
- (f) signed photocopy of the original Voyage Charter Party dated 21st August, 2008 by both parties;
- (g) e-mail dated 6th January, 2009 from Risk Management Team to Seaforth Mombasa.

The claimant, in the application, is relying on the following evidence:

- (i) the defendant’s list of documents filed on 27th November, 2009 under item No. 8 contains the Fumigation-in-Transit Safety & Ventilation Report that, at pages 1 & 2 reference is made to recommendations for repair and amelioration of sealing that were made to the master which were to be carried out and, as the damage to the cargo occurred whilst the same was on board the vessel, the seaworthiness of the ship in all respects, including the holds where the cargo was carried, is an issue for trial as pleaded in the claim, and the defendant is therefore withholding documents that are prejudicial to their case;
- (ii) the defendants have claimed Off-hire by Charterers, whereas, contrary to the said claim, as at 6th January, 2009 the defendants had advised the claimant that the ship had been sold to buyers at Singapore and, contrary to a self-generated Charterer’s Hire Statement, the Charter-Party agreement had long since expired, and the defendants are again withholding documents prejudicial to their case and contradictory to their counterclaim;

(iii) the defendants have claimed for bunkers while the vessel was under arrest, but have failed to provide any document to authenticate the purchase of fuel consumed during this period;

(iv) the defendants have pleaded at paragraph 18 of the counterclaim that the damaged/contaminated cargo was resold to consignees in Iran, but have failed to disclose and avail any documents to support the averment – and this renders it difficult for the claimant to respond;

(v) on the defendants' list of documents filed on 27th November, 2009 the Charterer is required to give notice of redelivery of the vessel; and the same document indicates that the charter period had expired – and so it contradicts any claim of an Off-hire; the alleged charter Hire Statement cannot take the place of the notice;

(vi) the defendant's item No. 2 in the list of documents filed on 27th November, 2009 is a charterparty that bears no charterer's signature; and despite request for assigned copy, the defendants have not supplied it – so the unsigned charterparty is of no evidential value;

(vii) the defendants have claimed for Off-hire from 2nd January, 2009 to 20th January, 2009 whilst failing to disclose their own e-mail of 6th January, 2009 in which it is clearly stated that the vessel had long been sold, and so the defendants could not have been chartering a vessel already sold.

The defendant's reply was not by affidavit evidence – and to this fact, learned claimant's counsel, Mr. Thuo raised an objection. M/s. S.W. Muhuni & Co for the defendants elected instead to respond by their letter of 19th April, 2010: and they say in the letter that –

- no recommendations were made by the fumigator as he was satisfied with the sealing arrangements in place (they enclose copy of fumigator Mr. Gerard Moustache's e-mail of 11th February, 2010 confirming that no recommendations were made);

- the disclosed Charterers' Hire Statement had not been generated by the defendants, but by the charterers;
- the charterers have said in their Charterers' Hire Statement, that the value of the bunkers consumed during the period of the vessel's arrest at Mombasa, was deducted by the charterers from hire – and this is what led to the defendants' counterclaim;
- the defendants do not and could not have documents relating to the re-sale of the cargo in Iran, as the cargo was not theirs to sell;
- the defendants have obtained copies of documents relating to the shipment of the cargo from Mombasa to Iran – including copy of the bill of lading naming "Holbud Limited" as the shipper of the cargo, and the port of discharge as Bandar Imam Khomeini, in Iran; the defendants intend to disclose those documents in a further supplementary list of documents, if this becomes necessary;
- the re-shipment and/or re-sale of the cargo for any valuable consideration including an exchange for other commodities, directly relates to the claimant's duty to mitigate their loss/salvage value of the cargo- and so the claimant has a duty to disclose this information;
- the claimant has already disclosed the Jos Van Den Dries Re-export Agreement which shows the re-sale value of the cargo as Zero;
- the date and time of re-delivery of the vessel to the owners is shown on the Charterers' Hire Statement already disclosed;
- the e-mail dated 6th January, 2009 does not indicate that the Time Charter-party period ended on 6th January, 2009; and the Charter-party period did not end until the discharge of all cargo from Hold No. 3;

the charterer's Hire Statement shows the re-delivery date and time as 23rd January, 2009 at 9.30 GMT.

Mr. Thuo stated that even though the defendants had filed a list of documents and a supplementary list of documents on 27th November, 2009 and 9th December, 2009 respectively, it emerged, in the light of the defendants statement of defence and especially the amended defence and counterclaim of 25th November, 2009, that one document was not disclosed: the document from the Fumigator-in-Charge. It was urged that while the defendants, in the list of documents filed on 27th November, 2009 had (under item No. 8) mentioned the fumigation, safety and ventilation report, and referred to written recommendations on repair and sea-worthiness of the motor vessel, they had not disclosed those recommendations even though the recommendations touch on an issue in the main cause.

Counsel was asking for documents in relation to the claim in the counterclaim in respect of bunkers: since the defendant claims for bunkers used on the motor vessel, there should be documentation disclosing the particulars of those who paid for the same.

Mr. Thuo urged that the defendant should provide documentation, in proof of the statement that contaminated maize rejected in Kenya had been sold in Iran.

In response, learned counsel Mr. Khanna submitted that the claimant's application of 19th March, 2010 was unnecessary at this pre-trial stage, and that the claimant would be limited to the orders which it had sought in the main cause. It was counsel's view, moreover, that the documents now sought had already been supplied earlier to the claimant and this was clear from the claimant's replying affidavit sworn by Anne G. Kamau, the claimant's Board Secretary, on 16th February, 2010. Mr. Khanna submitted that some of the requests for information now being made by the claimant, were entirely new: for instance, the e-mail of 6th January, 2009 or risk assessment; and the e-mail stating that the ship had been sold on 6th January, 2009. Counsel contended that the claimant must have already received the e-mail concerning the sale of the ship – and so there was no need to make an entirely new request regarding that information; and that reference to the question had not featured in any of the pleadings. Counsel contended that the claimant, by demanding information that was not signalled in the pleadings, was making demands beyond what the rules entitled them to. Counsel urged further, that the claimant has stated they require certain kinds of information, but without naming the specific documents in the hands of the defendant which they want produced; for instance, since it is a fact that there were no recommendations by the Fumigator-in-Charge, what document does the claimant want, produced in this regard?

Mr. Khanna submitted that the claimant, once given standard disclosure of documents in accordance with their request, have then resorted to the contents of those documents, spawning still more demands: but this is not the time for challenging the content of a document already disclosed. Counsel urged that the claimant was restricted to seeking only documents referred to as relevant, in the pleadings, and besides, the document sought must be identified; "the claimant cannot seek disclosure of any document within a document that has been disclosed, unless it is shown to the satisfaction of the Court that the one shown within the other is necessary for establishing the issues arising from the pleadings".

Mr. Khanna submitted that the claimant's request for documentary evidence in respect of the pleadings in the counterclaim, was not reasonable: for such a request for evidence only comes as an aspect of the hearing of the main cause, it is not the same thing as seeking specific disclosure at the pre-trial stage.

Counsel urged that it was not right for the claimant, at the pre-trial stage, to ask for proof of payment for bunkers: that can only become a relevant question when the evidence has been tendered, during the trial. On the question relating to the counterclaim element on bunkers consumed while the ship was under arrest, counsel urged that there was not specific disclosure applicable in this matter, as oral evidence would be given at the trial, and subjected to the normal process of cross-examination.

Mr. Khanna contested the claimant's position, that the defendant's documents disclosed should have been accompanied by an affidavit; for even the claimant's documents supplied, had not been accompanied by an affidavit: and counsel submits that the claimant invoked no authority to show that, when a specific disclosure is made, it has to come in some particular form.

Learned counsel Mr. Thuo contested the submission made for the defendant, that the claimant had in a number of cases asked for the disclosure of unidentified documents; he urged that the claimant was entitled to demand classes of documents.

The question before the Court is whether the defendant is required by law to disclose all the information sought by the claimant, before the main cause can be heard and determined. The law will invariably make specific requirements, the terms of which are transparent enough for the person making the disclosure to comply with. However, learned counsel Mr. Thuo has contended that the class-of-document concept, entitles his client to seek disclosure even of unnamed documents: but this must present difficulty of compliance, unless the category of documents in question is defined with much specificity.

The foregoing point links up with the reason and the characteristics of the trial process: that process itself generates facts, and it gives room for both parties to examine witnesses, in such a manner as to bring out the true facts; and failing the proof of the facts by the party who relies on them, that party stands to lose, as the outcome is determined on the basis of balance of probability.

I am more in agreement with learned counsel, Mr. Khanna, on the point that disclosure of documents lies at the threshold of the larger process of trial, and it is aimed at providing only that which is adumbrated by the pleadings; it is not based on a fore-prying into the likely or possible course of the evidence that will be tendered, for matters of evidence must be dealt with only at the right time, during trial. This perception, in my opinion, is consistent with the definition of “discovery of documents” in Osborn’s Concise Law Dictionary, 6th ed [by John Burke], (London: Sweet & Maxwell, 1976) [at p. 121]:

“In actions begun by writ, lists of documents must be served by each party after close of pleadings, and any party entitled to have discovery may serve a notice requiring an affidavit verifying the list of documents. Also, in any action, however begun, the court may order any party to make and serve a list of documents, and may order him to make a verifying affidavit. On application, the court may make an order requiring the making of an affidavit stating whether any particular document is or has at any time been in the power.....of a party, and if not then in his possession, what has become of it.....”

These, in my opinion, are basic pre-trial rules, and they apply no less in maritime cases than they do in day-to-day litigation.

And from those rules, it is clear that a party who files and serves a list of documents at the pre-trial stage or at any other time, does not begin with an obligation to attach a sworn statement; though a party can seek an order of the Court requiring the other party to make a disclosure of documents accompanied by an affidavit.

On the merits of the submissions by each side, it becomes apparent to me that the claimant’s position is not to be sustained, but a window remains open to the claimant to request with specificity any particular, named document which is known to be in the possession and power of the defendant.

The prayers in the claimant’s Application Notice dated 19th March, 2010 are disallowed, with costs to the defendant in any event.

Orders accordingly.

DATED and DELIVERED at MOMBASA this 1st day of October, 2010.

.....
J. B. OJWANG
JUDGE

Coram: Ojwang, J.
Court Clerk: Ibrahim
For the Claimant: Mr. Thuo Kanai

For the Defendant: Mr. Khanna