



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Admiralty Claim 11 of 2007

ONE EARTH ZANZIBAR LIMITED CLAIMANT

- Versus -

THE OWNERS OF M.V. "KASKAZI" DEFENDANT

RULING

By an Admiralty Claim in rem filed in court on 26th November, 2007 against the owners of the motor vessel "Kaskazi," the Claimant, One Earth Zanzibar Limited, obtained a warrant for the arrest of the said vessel. Pursuant to that warrant, the vessel was duly arrested on 7th December, 2007.

This Application Notice is dated 7th January, and was filed in court on 9th January, 2008. It seeks orders that-

1. *The claimant's claim be struck out.*
2. *The warrant issued in this claim on 7th December, 2007 for the arrest of the motor vessel "Kaskazi" be set aside and the motor vessel "Kaskazi" be released from arrest forthwith.*
3. *Costs of this application be paid by the claimants to the defendant.*

The application is supported by the annexed affidavit of Captain Hassan Mwakitunza, the Captain of the vessel Kaskazi, and is based on the following grounds-

(a) *That this court has no jurisdiction to hear and determine a claim for breach of contract alleged to have been breached by Azania Beach Hotels Ltd against whom the alleged cause of action arose, and yet the said Azania Beach Hotels Ltd was not the owner or charterer, or in possession or control of M. V. "Kaskazi" as at the time when the claim arose or when the warrant of arrest was issued.*

(b) *The claimants did not comply with the mandatory requirement concerning the ownership of the motor vessel "Kaskazi" at the time the warrant of arrest was issued. On 25th November 2007 when the Claim Form was issued and the declaration in support of the application for warrant of arrest was sworn, Azania Beach Hotels Limited was not the owner of the motor vessel "Kaskazi" or of any shares in that vessel. The registered and beneficial owner of that vessel from 2003 was Lipari Maritime Limited. This Honourable Court had no power or jurisdiction, therefore, to issue a warrant of arrest against the motor vessel "Kaskazi" as Lipari Maritime Limited was not liable on the claim in an action in personam and was not the relevant person.*

(c) *The motor vessel “Kaskazi” is registered at Antigua and Barbados in the West Indies and not at Lamu as there is no Ship Registry at Lamu.*

(d) *As the court has no jurisdiction to determine any aspect of this claim, it is oppressive, costly and unreasonable to maintain this claim and to maintain the warrants of arrest on the basis of falsified documents.*

(e) *The claim form is not verified by a statement of truth. The purported verification by the claimant’s advocate is incompetent as the claimant’s advocates are not officers of the claimant. A claim form not verified as required is incompetent, null and void.*

(f) *The claimant did not serve a response pack that is required to be served with a claim form.*

Opposing the application, the claimants filed a replying affidavit sworn by Arne Ranjit Sondhi on 15th January, 2008. He deposes in that affidavit that in his earlier affidavit sworn on 26th November, 2007, he frankly disclosed that they were unable to ascertain the registered owner of the vessel or the port of registry but it was his belief that Azania Beach Hotel Limited were the owners of the vessel when the cause of action arose. The deponent was further informed by one Justin Alexander Aniere of Azania Beach Village Limited, information which he believed to be true, that Azania Beach Village Ltd. had been chartering the subject vessel and that the said Justin had worked extensively with Mr. Francesco, a director of the company which owned the vessel. He was also informed by the said Justin Aniere, which information he believed to be true, that Mr. Francesco Rinauro was informed of the booking of the vessel and duly accepted the same. It was clear, according to him, that Azania Beach Village Ltd acted under authority of Mr. Francesco Rinauro, a director of Lipari Maritime Ltd which owned the vessel, and that the said director all along new of the agreement to hire the vessel, and that the application notice should be dismissed with costs.

At the oral hearing of the application, Mr. Kinyua appeared for the Applicant and Mr. Tindika for the Respondent. In summary, Mr. Kinyua argued that for the claimant’s action to succeed, they must identify clearly who the owner, charterer or person in possession the vessel was at the time when the claim arose. He contended that this was important for the purpose of determining who should acknowledge the claim form. In the affidavit sworn by Arne Ranjit Sondhi in support of the warrant of arrest of the vessel “Kaskazi”, the deponent suggested that the party who would be liable on the claim in an action in personam was Azania Beach Hotel Ltd, yet such party was neither the owner, the charterer or the person who was in possession or control of the motor vessel. The true owner of the vessel was Lipari Maritime Ltd, and not Azania Beach Hotel Ltd or Azania Beach Village Ltd, and yet the money for the hire of the vessel was paid to Azania Beach Village Ltd who were not the owners. He submitted that no money was paid to the owners of the vessel, and that the agreement was entered into by Azania Beach Village Ltd as the Principal.

Mr. Kinyua then argued that the Claim Form in this matter was signed by Mr. Munyithya, Advocate, who was not a director or executive officer of the Claimant. Even if he says that he was authorized to do so, that was not enough, since the document was required to be signed by an officer of the company. Mr. Kinyua also submitted that even though their application is for the striking out of the claim, striking out is discretionary. He urged the court to lift the warrant of arrest if it does not strike out the claim. Finally, he submitted that when the Claim Form was served, it did not contain the Response Pack. The Acknowledgement of Service must be served with the Claim Form, and therefore it should be in the Pack. As it was not in the Pack, there was only Partial Compliance with the Rules.

In his response, Mr. Tindika opposed the application and prayed that it be dismissed with costs. He argued that in the acknowledgement of service, the name of the defendant was given as “Kaskazi” which was incorrect. The defendant also said it would contest the whole claim only to change in a subsequent Acknowledgement of Service filed on “7th January, 2007” (sic). This latter acknowledgement was invalid as there was no leave of the court to amend the first acknowledgment, which was itself grossly at variance with the application and therefore ought to be dismissed. Secondly, Mr. Tindika submitted that the Acknowledgment of Service was filed on 24th December, 2007 and the application filed on 9th

January, 2008 whereas the application should have been filed within 14 days of acknowledgment of service. The application was therefore filed out of time, and the defendants should be deemed to have submitted themselves to the jurisdiction of the court.

Mr. Tindika then referred the court to THE SEMNAR [1983] 1 Lloyd's Rep. 295 as an authority on that point. This is an action in rem and there was no allegation that the vessel arrested was a different vessel. It was the proper one and therefore the application should be dismissed. Counsel also referred to THE ANTONIS P. LEMOS [1985] 1 All ER 695. As for the allegation that the claim form and statement of truth were not properly signed by a director or executive officer of the claimant, Mr. Tindika submitted that they were properly signed by Mr. Muniyithya as the Claimant's Legal representative. And for Mr. Kinyua's contention that there was no agreement with the owners for the hire of the vessel, Mr. Tindika submitted that the owners were aware that there was an agreement for the hire and that there was documentary evidence to that effect. He prayed that the amended application notice be dismissed with costs.

In reply, Mr. Kinyua submitted that the application is about the basic requirements that the claimant should meet before obtaining a warrant of arrest. He then posed the question – would an order for sale of the vessel be made where the claim is proved against Azania Beach Hotel Ltd.? He submitted that the agreement herein was entered into with a third party who was not the owner or charterer, and asked for the orders to be granted as prayed.

I have considered the pleadings and submissions of counsel. The allegation that the claimant did not serve a response pack that is required to be served with a claim form is not supported by any evidence. Therefore it cannot stand. The other issues that arise for determination are whether the claim form and statement of claim are in accord with the rules; whether the amended application notice is itself within the rules; and whether the application should be dismissed.

The first point that Mr. Kinyua took against the Claim Form in this matter was that it was signed by Mr. Muniyithya, Advocate, who was not a Principal Officer of the claimant company. He referred to Form ADM 1 which is a claim form (Admiralty Action in rem) set out in Volume 2 of the 2001 Edition of the Civil Procedure (White Book) at page 212 and submitted that even though Mr. Muniyithya says that he was authorized, that was not enough. In response, Mr. Tindika argued strenuously that it was competent for Mr. Muniyithya to sign the claim as the legal representative of the claimant company and that he was duly authorized to do so.

A close look of the Form in question shows that the statement referred to therein refers to statement of truth and reads as follows-

“This (meaning statement of truth) must be signed by you, by your solicitor or your litigation friend as appropriate.

Where the claimant is a registered company or a corporation the claim must be signed by either the director, treasurer, secretary, chief executive, manager or other officer of the company ...”

The first paragraph deals with the statement of truth while the second one deals with the claim itself. Whereas the statement of truth may be signed by the claimant's legal representative, such courtesy is not extended to the legal representative in respect of a claim. Coming as it does immediately after authorization of a claimant's solicitor to sign the statement of truth, the second paragraph must be taken to mean what it says – that a claim by a registered company must be signed by any of the company's principal officers whose designations are enumerated therein. If it was intended that such a company's legal representative should be able to sign the claim, nothing would have been easier than to say so, especially having conferred the same privilege to a litigant's solicitor in the preceding paragraph. The omission to extend that duty to the company's legal representative must have been deliberate, and since that requirement is couched in mandatory terms, failure to obey it in observance is inimical to the claim.

Coming to the application notice itself, it is instructive that there are two acknowledgements of service

on record. The first one is dated 21st December, 2007, and filed in court on 24th December, 2007. The second one is also dated 21st December, 2007, but was filed in court on “7th January, 2007” (sic). This is clearly a clerical error and the correct date of filing should have been 7th January, 2008. Apart from the date of filing, there are three main differences between the two acknowledgements of service. The first one is in reference to the description of the defendants. Whereas in the acknowledgement of service filed on 24th December, 2007, the defendant is described as “A limited liability company incorporated in Kenya”, in the acknowledgement of service filed on 7th January, 2008, the description of the defendant is given as “A limited liability company incorporated in West Indies.” Secondly, whereas in the earlier acknowledgement the full names of the defendants are given as “Kaskazi”, in the later acknowledgement the names are given as “Lipari Maritime Limited”. Thirdly, in the earlier acknowledgement the defendant indicated that it intended to defend all of the claim, but in the 2nd one the defendant indicated that not only did it intend to defend all of the claim, but also that it intended to contest jurisdiction. The issue now is which of these two acknowledgements we should go by.

The answer seems to be readily provided in Part 10 of Section A, Civil Procedure Rules 1998, which deals with Acknowledgement of Service. Practice Direction Paragraphs 5.4 and 5.5 thereof provide as follows-

“5.4 An acknowledgement of service may be amended or withdrawn only with the permission of the court.

5.5. An application for permission under paragraph 5.4 must be in accordance with Part 23 and supported by evidence.”

From the above direction, the first acknowledgment of service filed in court on 24th December, 2007, could only be amended or withdrawn with the permission of the court. There is no evidence that any such permission was sought and obtained. In the circumstances, the acknowledgement filed on 7th January, 2008, is improperly on record since the one filed on 24th December, 2007 is still on record and was neither amended nor withdrawn with leave of the court. Therefore, the latter continues to be the only acknowledgement which is properly on record.

In spite of all the imperfections in the acknowledgement of service, the defendant proceeded to file an application contesting jurisdiction of the court. The initial application was filed on 9th January, 2008, and an amended version was filed on 7th February, 2008. Mr. Tindika referred to Parts 10 and 11 of the Civil Procedure rules on Acknowledgement of Service and Disputing the Court’s jurisdiction. A defendant who wishes to dispute the court’s jurisdiction to try the claim must file an acknowledgement of service in accordance with Part 10. Under paragraph 5.1 of that Part, the defendant’s name should be set out in full on the acknowledgement of service. As pointed out earlier, the defendant’s name was wrongly described as a limited liability company incorporated in Kenya and the full names thereof given as “Kaskazi.” That information was incorrect and therefore not compliant with the rules. After filing the acknowledgement of service, a defendant must then make the application challenging the jurisdiction within 14 days after filing an acknowledgement of service. And if he fails to do so within 14 days, he is to be treated as having accepted that the court has jurisdiction to try the claim. Mr. Tindika argued that since the acknowledgement of service was filed on 24th December, 2007, and the application challenging jurisdiction was filed on 9th January, 2008, that was the 16th day and therefore it was filed out of time.

If we went strictly by the English rules, that submission filed would be correct. However, I note from the Acknowledgment of Service, which I take to have been in the Response Pack that the defendant was cautioned as follows-

“If you do not file an application within 28 days of the date of service of the particulars of claim, it will be assumed that you accept the court’s jurisdiction and judgment may be given against you.”

Since the applicant was given 28 days of the date of service within which to file an application, it would

be unfair to go back to 14 days as ordained by the English rules. Unless and until our practice is changed from 28 to 14 days, I would find that an application filed within 28 days was filed within the required time frame.

If these preliminaries were in order, and they are not, the crux of the contest would have been whether the failure by the claimants to give the name of Lipari Maritime Limited, a limited liability company incorporated in the West Indies, as the owners of the motor vessel Kaskazi, was fatal as contended by Mr. Kinyua. Alternatively, the claimants gave the name of the person who would be liable in an action in personam as Azania Beach Hotel Ltd. Mr. Kinyua submitted that this was incorrect since Azania Beach Hotel Ltd were neither the owners or charterers of the motor vessel, nor were they in possession of the vessel at the time that the cause of action arose. Prima facie, this is a very strong argument. He also submitted that there was no agreement between the claimants and the owners of the vessel, and if there was such an agreement, the owners were never paid. In view of the position I have taken on the acknowledgement of service, I will only observe that there is on record e-mail evidence that Francisco Ranieri was aware that the vessel had been contracted for a voyage at the material time, and that he tried “to convince” his captain to go on the trip to no avail. In an affidavit sworn on 15th January, 2008 by Justin Alexander Aniere, a director of Azania Beach Village Ltd., the booking of the vessel was done by the deponent himself and confirmed by Mr. Francesco who not only confirmed but also gave Mr. Aniere his account number to deposit the money there. However, the vessel was not availed as agreed.

Apart from the slip as to who would be liable in an action in personam I find on the basis of the authorities cited that the action in rem has some merit, and that the claim is neither frivolous nor vexatious. I would accordingly hesitate to strike it out. Against a background of a non-compliant Acknowledgment of Service by the applicant, which would have given them locus to challenge the jurisdiction of the court, I would at this stage find that defendants application is incompetent and I accordingly strike it out with costs.

It is so ordered.

Dated and delivered at Mombasa this 3rd day of April, 2009.

L. NJAGI

JUDGE