

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Admiralty Claim 15 of 2003

ECO-TEC (ZANZIBAR) LIMITEDCLAIMANTS

VERSUS

THE OWNERS OF MOTOR VESSELS

‘UKOMBOZI’ AND ‘MAPINDUZI’.....DEFENDANTS

R U L I N G

The subject matter of this ruling is the summons dated 10th April 2006 in which the claimant is seeking for judgment in default of defence against the defendant in the sum of US\$ 731,000/- plus costs and interest. The summons is supported by the affidavits of Soud H. Soud, the principal officer of the claimant. The defendant has opposed the summons by filing the replying affidavit of Captain A.C. Haj M. Sururu sworn on 3rd July 2007. This court approved the consent order recorded by learned counsels to file and rely on written submissions.

I have carefully considered the grounds raised in support and against the application. I have further considered the written submissions plus the authorities cited. The facts leading to the filing of the application appear to be straight forward. The claimant entered into a strategic fuel Storage Facility agreement (storage Agreement) with the Government of Zanzibar, on 31st March 2000. The Respondent executed a security deed under which it mortgaged the vessel known as Ukombozi to the claimant for the due payment of the secured liabilities. The Government of Zanzibar (G.O.Z) mortgaged the vessel through the Shipping Corporation of Zanzibar, a limited liability company in which the Government of Zanzibar held shares. Prior to the execution of the aforesaid storage agreement, the parties had on 31.3.00 entered into a consolidated fuel supply agreements hereinafter referred to as the supply agreement. Whose expiry date was 30th June 2005. On 1st July 2003, the Government of Zanzibar issued a notice of intention to take immediate control of the storage facility. The claimant alleges that the action by Government of Zanzibar was in breach of the supply Agreement. The claimant invoked clause 6.1. of the storage Agreement and demanded for payment of US\$1000 from the date of default until 20th June 2005 which adds up to 731 days thus making the claim to be US\$731,000. That is the basis of this claim. On 22nd September 2003, the applicant filed this claim. The claim form was secured upon the Respondent which acknowledged service by filing the requisite form ADM 3 on 3rd October 2003. In the aforesaid for it is clear that the Respondent intended to defend the claim and to contest the jurisdiction of this court. The claimant has alleged that 28 days lapsed on 31st October 2003. By then the Respondent had not filed any defence. On the basis of the above allegations the claimant now seeks for judgment in default of defence.

The defendant conceded that it was served as alleged by the claimant. However, it is the contention of the defendant that the defence would only be filed after the statement and particulars of claim have been served. It is said that the claimant has failed to serve the aforesaid documents. The defendant states that it has a good defence in that the agreements annexed to the affidavit of Soud H. Soud raises diverse issues which will require examination of the makers in a full hearing. The defendant further blamed its erstwhile firm of advocates Muthoga Gaturu & Co. Advocates of withdrawing from the matter without advising it of the position of the matter.

I have carefully considered the material placed before me and the submissions tendered. It is admitted

by the defendant that it has not filed a defence to the claim because it has not been served with the statement and particulars of the claim. It is also alleged that the advocate who appeared for the defendant pulled out of the dispute before properly advising the defendant on the position of the case. I have carefully perused form A.D.M. 3 and on the face of it is clear that the defendant was required to file a defence within 28 days from the date of service of the particulars of the claim and in default judgment will be given. As that submission is correct subject to rule 61.3 of the English Civil Procedure (Practice Directions). In the aforesaid provision a claimant in an admiralty claim has the option to either include the particulars in the claim form. Serving the particular together with the claim form or serving the particulars of the claim after serving the claim form. A careful perusal of the claim form filed on 22nd September 2003 indicates that the claimant included the particulars of the claim in the claim form. If the firm of Muthoga Gaturu & Co. Advocates failed to advise the defendant, then it has itself to blame. This is one of those cases where the client must suffer for the sins of his/her advocate.

In the end I am convinced the summons dated 10th April 2006 is well founded. It is allowed as prayed with costs to the claimant.

Dated and delivered at Mombasa this 22nd day of July 2009.

J. K. SERGON

J U D G E

In open court in the presence of Mr. Kibaara h/b Iseme K.B.M. for the claimants and Mrs. Wabuoto h/b Omondi for the defendants.