



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Admiralty Jurisdiction Claim 13 of 2005**

**ADMIRALTY CLAIM IN REM AGAINST THE OWNERS OF THE VESSEL “VICTORIA EIGHT”**

**CLAIMANT: EAST AFRICAN POWER MANAGEMENT LIMITED**

**DEFENDANT: THE OWNERS OF THE VESSEL “VICTORIA EIGHT”**

**Coram: Before the Hon. Mr. Justice L. Njagi**

**Mr. Khanna for Applicant**

**Mr. Shah for Respondent**

**Court clerk – Kinyua**

**R U L I N G**

The claim Form in this matter was filed under a certificate of urgency on 28<sup>th</sup> October, 2005, along with an application and undertaking for arrest and custody, and a declaration in support of application for warrant of arrest. The defendants filed an acknowledgement of service on 10<sup>th</sup> November, 2005, intimating therein their intention to defend all of the claim as well as to contest the jurisdiction of the court.

True to their word, the defendants filed on 25<sup>th</sup> November, 2005, an application Notice dated 23<sup>rd</sup> November, 2005, to the effect that they intended to apply for the following orders –

- 1. A declaration that this Honourable Court has no admiralty jurisdiction over the defendant in respect of the subject matter and/or the relief sought by the claimant herein;**
- 2. That the Claim Form dated 31<sup>st</sup> October 2005 against the defendant be struck out and all consequential orders be vacated;**
- 3. That the arrested property being the vessel “Victoria Eight” be released to the defendant**
- 4. That the defendant be awarded the costs of the application and the suit generally.**

The grounds upon which the application is based are stated therein.

By a notice dated 8<sup>th</sup> May and filed in court on 9<sup>th</sup> May, 2006, the Claimant/Respondent put the

defendants on notice that the Claimant/Respondent would raise a preliminary objection on points of law and would seek the dismissal or striking out of the defendant/applicant's application dated 23<sup>rd</sup> November, 2005, on the following grounds –

- (a) The said application is brought out of time;**
- (b) The application is not properly supported by any written evidence and is therefore fatally defective**
- (c) The affidavit filed in support of the application with the annexed affidavits are without leave of this Honourable Court. Consequently the said application should be struck out or expunged**
- (d) The applicant has submitted to the jurisdiction of this Honourable Court.**

It is this preliminary objection which was heard before me and which is the subject of this ruling.

At the hearing of the preliminary objection, Mr. Khanna appeared for the claimant/respondent and Mr. C. Shah appeared for the defendant/applicant. Mr. Khanna argued grounds 1 and 4 of the preliminary objection together. He submitted that under Part 11 of the English Civil Procedure Rules, the procedure for disputing the court's jurisdiction is set out in rule 11.1 which requires that an application under that rule be made within 14 days after the filing of the acknowledgment of service and be supported by evidence. He further submitted that the defendant herein filed its application under this rule after 14 days had expired, and that since it was not filed within 14 days, the defendant had submitted itself to the court's jurisdiction. On the other hand, Mr. Shah referred to Part 58 Rule 58.7 and submitted that the time within which the court's jurisdiction may be disputed is not 14 days but 28 days. Arising out of the positions taken by the two counsel, the issue for determination is whether the period within which the court's jurisdiction should be disputed is 14 days or 28 days. The answer to this might itself turn on whether Part 58, making provisions for the Commercial Court, applies also to the admiralty jurisdiction.

Starting with the latter point, I note that admiralty jurisdiction and proceedings are provided for in Part 61 of the Civil Procedure Rules, and that this part applies to admiralty claims. The editorial introduction cautions that this part and its supplementing Practice Direction do not provide a complete code for admiralty proceedings, but have to be read in conjunction with the other Civil Procedure Rules. However the application of the Civil Procedure Rules and the Practice Directions which supplement them is in admiralty proceedings subject to the provisions of this Practice Direction. In this context, rule 61.1(3) is in the following words –

**“Part 58 (Commercial Court) applies to claims in the admiralty court except where this part provides otherwise.”**

The plain meaning of this clause is that unless there is a provision in Part 61 to the contrary, the provisions in Part 58 apply to claims in the admiralty court. Rule 58.7 lays down the procedure for disputing the court's jurisdiction. It provides as follows –

- (1) “Part 11 applies to claims in the commercial list with the modifications set out in this rule.**
- (2) An application under rule 11(1) must be made within 28 days after filing an acknowledgement of service ...”**

Under rule 11.4(a) an application for disputing the court's jurisdiction must be made within 14 days after filing an acknowledgement of service pursuant to rule 58.7(1). This provision applies to claims in the commercial list, and by extension to claims in the admiralty court by reason of rule 61.1(3). However, it applies subject to the modifications set out in rule 58.7(2). The modification is that an application under rule 11.4(a) contesting the jurisdiction of the court must be made within 28 days, and not 14 days, after filing an acknowledgement of service. Barring any provision to the contrary in Part 58, 61 and no such contrary provision in that part has been drawn to the attention of this court, I find that the

period within which an application challenging the court's jurisdiction should be brought is 28 days and not 14 days.

If I am wrong in so deducing from my reading of rules 61. 1(3) and 58.7(1) and (2), I find solace in the litigation Forms which are used in the admiralty jurisdiction of this court. To the Claim Form (admiralty claim in rem) is invariably attached "Notes for defendant on replying to an admiralty claim form." The notes state –

**"Please read these notes carefully – they will help you decide what to do about this claim ..."**

Under "Disputing the jurisdiction", the Notes give the following guidance –

"If you wish to dispute the court's jurisdiction to try the claim you must:

- Complete the acknowledgement of service form and send it to the court within 14 days; and
- Make any application to contest the court's jurisdiction as soon as possible and in any event within 28 days ... after filing your acknowledgement of service."

Any defendant reading these guidelines as carefully as advised to do would find that he has 28 days within which to dispute the court's jurisdiction. On that score, this court would have no basis upon which to rule that the period is 14 days. Let us practise what we preach. Since the defendant in this matter filed its application disputing the jurisdiction of the court 15 days after filing acknowledgement of service, I find that it was filed on time, and therefore the defendant did not submit itself to the jurisdiction of the court as pleaded in ground 4 of the preliminary objection.

The third point taken by Mr. Khanna is that the application is not properly supported by any written evidence and is therefore fatally defective. In his response, Mr. Shah submitted that the defendant had attached affidavit evidence, and that this satisfied the requirement of Part 11 as to evidence. Going back to the application Notice, it is noteworthy that it is divided into Parts A, B and C. Part A deals with the orders sought and the reasons therefore. Part B gives an indication as to what the defendant wishes to rely on. It can rely on an attached affidavit, its statement, and evidence in Part C in support of its application. From the manner in which these choices are arranged, it seems that the defendant has a choice to rely on either one, or two, or all the three options. This is fortified by the fact that Part C itself provides for the evidence which the applicant wishes to rely upon and is in itself one of the options granted in Part B.

In this matter, the defendant elected to rely on "the attached affidavit". It did not need to do more. Having made its choice, I don't see that it is now open to the plaintiff/respondent to allege that the defendant failed to put in evidence relied on with its application Notice. That is not factual. The truth is that the defendant has opted to rely exclusively on the affidavit evidence and attached an affidavit sworn by one Robert King Sutherland. Having done so, it was not necessary for the defendant to complete Part C.

The fourth and final point raised by Mr. Khanna is that the attached affidavit of Robert King Sutherland contains some exhibits and that such exhibits should not have been annexed without leave of the court. Mr. Shah conceded that the defendant had done as much but quickly submitted that by so doing, the defendant had laid its chest bare for the plaintiff to see what the defendant's case was all about. I agree with Mr. Shah that disclosure of the defendant's case to the plaintiff is not prejudicial to the plaintiff in any manner. On the contrary, it gives the plaintiff a chance to know well in advance the case it is going to meet from the defendant. Unless such exhibits are inimical to the plaintiff's case, which has not been pleaded here, such exhibits are harmless and need not be expunged from the record. That may be resorted to only if they are prejudicial to the other party's case. Fortunately that is not the case here. Who knows, they might even assist in furthering the course of justice in this matter.

In total none of the issues raised by the plaintiff succeeds. In the circumstances, the preliminary

objection fails and it is hereby dismissed with costs.

Dated and delivered at Mombasa this 12<sup>th</sup> day of July, 2006.

L. NJAGI

JUDGE