



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA

Admiralty Case 6 of 2005

KENYA MARINE CONTRACTORS EPZ LTD.PLAINTIFF

- Versus -

THE OWNERS OF MOTOR VESSEL "OMIROS" DEFENDANT

Coram: Before Hon. Justice L. Njagi

Mr. Kinyua for Respondent

Mr. Abeid for the Defendant

Court clerk – Kinyua

R U L I N G

This application seeks orders that the writ served herein and all subsequent proceedings be struck out and or set aside, and that the costs of the application be provided for. It is dated 10th March, 2006 and is expressed to be brought under Order 12 rule 8 of the Rules of the Supreme Court and all other enabling acts and provisions of the Law.

The application is supported by the annexed affidavit of Wilson Nyangala, the claims officer of such cape shipping services limited, and is based on the following grounds-

- (a) The owners of motor vessels Omiros, namely Narima maritime were not persons liable to the plaintiff in an action in personam.
- (b) The person who would be liable in an action in personam was Bamburi cement, the sub charterers of the motor vessel Omiros on behalf of the charterers, ED & F Man.
- (c) The fenders provided were not for the use of the motor vessel Omiros and therefore the High court had no jurisdiction to entertain the application for arrest.
- (d) The claim for loss of use for USD 8000.00 is not covered under sections 20 and 21 of the supreme court act, 1981.
- (e) The claimant failed to disclose vital information to wit the parties to the fender hire agreement in the ex-parte application for arrest.

(f) There was no evidence before the Honourable court to Warrant the grant of the arrest order. Opposition the application, the claimant filed the following grounds of oppositions –

1. The application is incompetent, frivolous, vexatious and an abuse of the court process.
2. The application lacks merit as the claim for loss of use was brought under the relevant sections 20 and 21 of the Supreme Court Act, 1981.
3. The grant of the arrest order was properly issued by the Honourable court after a consideration of all the relevant Materials brought before it.
4. The application is brought in bad faith with the sole aim of Defeating the ends of justice and so it ought to be dismissed with costs

At the hearing of the application, Mr. Abeid appeared for the defendant/applicant and Mr. Kinyua for the claimant/respondent. Mr. Abeid raised four points in support of the application. The first was that the court has no admiralty jurisdiction since the owners of the vessel are not liable to the plaintiff in an action in personam as they are not party to the fender hire agreement referred to by the claimant in the claim Form in the agreement dated 22nd March, 2005. This is a requirement under section 21 (4) (b). Secondly, Mr. Abeid argued that the plaintiff had not brought the suit under sections 20 and 21 which would have given the court admiralty jurisdiction as the claimant has not demonstrated any connection between the alleged agreement for the fenders and the operation of the vessel. He submitted that the fenders, provided were not for the operation or maintenance of the vessel, and therefore the court had no jurisdiction. Thirdly, counsel submitted that if the claimant had disclosed to the court that the owners of the vessel were not party to the agreement, the court would have declined to arrest the vessel. Lastly, he submitted that there was no evidence before the court to warrant the arrest since the declaration in support of the application was neither an affidavit nor a statutory declaration and was not commissioned by a Commissioner for Oaths or a magistrate. He submitted that the orders were improperly issued and should be vacated as the court lacks admiralty jurisdiction. He referred the court to **OWNERS OF THE MOTOR VESSEL “LILLIANS” v. CALTEX OIL (KENYA) LTD.** [1989] KLR 1 and urged the court to determine the issue of jurisdiction first.

Mr. Kinyua opposed the application as incompetent on the ground that it is expressed to be brought under the rules of the Supreme Court which are none existent having been replaced by the Civil Procedure Rules. Counsel submitted that the Claim Form as well as the Acknowledgement and Warrant of Arrest were filed under the Civil Procedure Rules and not the Rules of the Supreme Court. In the Form on Acknowledgement of service dated 12th April, 2005, the defendant did not indicate that it would contest the jurisdiction of the court. But where that jurisdiction is challenged, the application should be brought within 28 days of the Acknowledgement of Service. In the instant matter, the acknowledgement of service was filed on 12th April, 2005, and the present application was filed on 10th March, 2006, which was almost one year after acknowledgement of service. Finally, Mr. Kinyua submitted that the LILLIANS was not applicable as it had been overtaken by the English Court of Appeal decision in the VARNA, [1993] 2 Lloyds Law Reports 253. He also submitted that the application was not accompanied by an affidavit of truth.

In reply, Mr. Abeid stated that the English Authority does not take precedence over a decision of the Court of Appeal of Kenya.

The application before the court is brought by a notice of motion expressed to be made under certain provisions of the Rules of the Supreme Court of England. Under Section 4(1) (c) of Judicature Act, the High Court of Kenya, is enjoined to exercise its admiralty jurisdiction in accordance with the same procedure as that obtaining in the High Court in England. In 1998, the Rules of the Supreme Court were replaced by Civil Procedure Rules under which all applications on admiralty should now be made. Basing an application under the Rules of the Supreme Court renders the application incompetent as such Rules are no longer in force. Such, unfortunately, is the fate of this application. It is incompetent and stands to be struck out.

Apart from that technicality, the application seeks to challenge the jurisdiction of the court. The procedure for filing such a challenge is clearly spelt out in the Form of Acknowledgement of Service of an Admiralty Claim. The Form provides a Response pack with three options. The respondent should indicate by ticking in the appropriate box whether he intends to defend all of the claim, or part of the claim, or to contest jurisdiction. A party intending to contest jurisdiction should then file an appropriate application within 28 days of the date of service of the particulars of claim. If such party does not file the application within 28 days of service of the particulars of claim, then it will be assumed that he accepts the court's jurisdiction. In the instant matter, the applicant ticked only one box indicating that he intended to defend all the claim. By omitting to tick in the box expressing an intention to contest jurisdiction, the applicant thereby, implicitly, submitted itself to the jurisdiction of the court. That being so, it is now estopped from challenging that jurisdiction.

Secondly, a party is required to file the requisite application contesting jurisdiction within 28 days of the date of service of the particulars of claim. The court record shows that the particulars of claim were filed in court on 7th June, 2005. The defendant's statement of defence was filed in court on 1st July, 2005, but is dated 28th June, 2005. This would tend to establish that they had been served with the particulars of claim by 28th June, 2005. Even assuming that they were served with those particulars on 28th June, 2005, they had 28 days from that date during which to file the requisite application contesting jurisdiction. However, instead of filing the application by August, 2005, they waited until March 27, 2006, when it was filed in court. That was a whole 7 months out of time. In the circumstances, I agree with Mr. Kinyua for the claimant that the intended contest is time barred and therefore it is too late to challenge the court's jurisdiction.

The case of **The VARNA** [1993] 2 Lloyd's L.R. has introduced a new dimension to the doctrine of full disclosure as hitherto embraced and applied by our courts. In that case, the English Court of Appeal held that the requirement of full and frank disclosure had no real substance except in the context of an application for a discretionary remedy in circumstances in which there was an obligation of disclosure cast upon the applicant. I sympathise with Mr. Abeid when he argues that the English authority does not take precedence over the Court of Appeal of Kenya. While that statement is generally true, it does not and cannot be applicable to the admiralty jurisdiction of this court inasmuch as our own Judicature Act enjoins this court to apply the English law, line hook and sinker, while exercising admiralty jurisdiction. To that extent, English decisions will take precedence over those of our own court. The Varna will therefore be preferred to the Lillian.

Finally, Mr. Abeid argued that there was no evidence upon which to order the arrest of the motor vessel "OMIROS". Let it suffice to say, at this stage, that there was a declaration in support of the application for the warrant of arrest, and a statement of truth regarding that declaration. As to the allegation that the defendant herein was not party to the fender hire agreement, the documents attached do not establish as much. A copy of the hire contract is not annexed, and that is the document which would have countered conclusively the claimant's declaration.

In sum, the notice of Motion fails and it is hereby dismissed with costs.

Dated and delivered in Mombasa this 14th day of September, 2006.

L. NJAGI

JUDGE