



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ADMIRALTY CAUSE NO. 18 OF 2002

GULF OIL CO. W.L.L. PLAINTIFF

- VERSUS -

THE OWNERS OF THE MOTOR TANKER “TOOFAN”)

THE OWNERS OF THE MOTOR TANKER “APEXS II”DEFENDANTS

R U L I N G

The Claimant Gulf Oil Company W.L.L. filed a claim under the provision of the supreme Court practice and in particular order 75 therein. They applied for and obtained a warrant for the arrest of motor vessel “APEXS II” for a claim against its owners of a sum of US Dollars 294,577.60 plus interest. The writ and warrant of arrest were served but the initial warrant of arrest was consequently set aside. The Defendants on being served, failed to file an acknowledgement of service as required. Instead their Counsel filed a Notice of Appointment. No defence was filed either and it is on this background that the claimants have applied for entry of judgement in default of an Acknowledgement of service and/or filing a Defence.

Mr. Wanyondi for the defendants did not say anything on the failure to file an Acknowledgement but submitted that they had filed a defence before the entry of judgement and therefore that is adequate. The claim in this case was endorsed on the writ and order 75 rule 21 (3) of the Supreme Court Practice clearly sets out that failure to acknowledge service of the write within the time limited for so doing warrants an application for judgement in default.

Part 10 (1) 3 of the English Civil Procedure which applies in Admiralty jurisdiction sets out when acknowledgement is to be filed. It says:

“3. A defendant may file an acknowledgement of service if:-

(a) he is unable to file a defence within the period specified in rule 15. 4 or

(b) If he wishes to dispute the co sts jurisdiction”

In the current case the Defendant decided to file a Notice of appointment which is not provided for in the English Procedure.

The Form served together with the writ clearly indicated that Acknowledgement was to be within 14 days. The only exception is where the defendant opts to file the defence on receipt of the writ endorsed with the claim.

The notes provided under the English Civil Procedures Part 10.1.4 is that the period for filing a defence is 14 days after service of the particulars of claim or 28 days after service the particulars of claim if the defendant files an acknowledgement of service within 14 days of service of particulars of claim.

The Rules are clear that an acknowledgement if not filed then a defence must follow within 14 days if writ contains particulars of the claim. In this case, the defence was filed on 28.10.02 while the writ duly endorsed with the claim was served on 12.9.02 clearly outside the Mandatory set period. The Counsel for the defence also raised the issue as concerns the Affidavit in support having been sworn by the claimant's Counsel.

The Amended practice rules provide that an application for judgement in default has to be by Notice by Form No. ADM 13. The same is to be signed by the Advocate as the Agent of the Claimant. This has been done.

As for the Affidavit, the Advocate is the authorized agent and all he is required to do is to show the claimant has a case by exhibiting proof therein. In the current case, the Counsel for the Claimant has annexed and exhibited to show the parties had entered into an agreement whereby the plaintiff was to supply the defendant's vessels with Gas oil. There is a further claim incurred on account of food, medicine and repairs. On the 6.1.00 an agreement was executed between the parties in which the defendants are shown as having conceded they owed the plaintiffs a sum of US\$206.184.

Mr. Wanyondi did not touch on the said exhibits and therefore the claimants evidence as regards amounts owing is unchallenged. In the circumstances I am satisfied the claimants have shown their claim is well founded and I enter judgement in their favour in the sum of US Dollars 206.184 plus interest as prayed plus costs.

I further grant an order or the appraisalment and sale of the Motor Vessel 'APEXS II' and the proceeds to be paid into court through the Admiralty Marshal.

Dated and delivered at Mombasa this 4th day of April, 2003.

P.M. TUTUI

COMMISSIONER OF ASSIZE