**REPUBLIC OF KENYA**
**IN THE HIGH COURT OF KENYA**
**AT MOMBASA**
**ADMIRALTY CAUSE NO.19 OF 1993**

**1.VOLCANO ENGINEERING LTD**

**2.DAVID N. KIHIUHI……...……PLAINTIFFS**

**V E R S U S**

**OWNERS & CAPTAIN OF m/v 'GLOBE TOURS'…….DEFENDANTS**

**R U L I N G**

The matter under consideration is the Notice of Motion dated 14.2.95 which was taken out by the Defendants in the main suit seeking five prayers, to wit:-

> ***"1.The affidavit to lead arrest sworn by Mr. Lumatete Muchai on the 2 nd September, 1993 be struck out.***
>
> ***2. The warrant of arrest issued on the 2 nd September, 1993 be set aside.***
>
> ***3. Alternatively and without prejudice to the above, this cause be dismissed with costs for want of prosecution.***
>
> ***4. The charge registered in favour of the plaintiff s against Title No.C.R. 9431 subdivision No.1054 (Orig. No.1013/1) Section VI M.N. be discharged by Order of theCourt.***
>
> ***5. The costs of this application be provided for.***
>
> > ***" Orders 25 r.1(4) and 75 r.5(4) of the Rules of the Supreme Court (RSC) in England are invoked. They may be reproduced:- "O.25. r.1(4) If the Plaintiff does not take out a summons for directions in accordance with the foregoing provisions of this rule, the Defendant or any Defendant may do so or apply for an order to dismiss the action." And "O.75. r.5(4) A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph(9); however, the Court may, if it t hinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars".***

The brief background to the application is this:

On 2.9.1993, the two Plaintiffs in the main suit appeared before Mbaluto, J., through their Advocate on record Mr. Lumatete Muchai seeking the arrest of the motor vessel "GLOBE TOURS". Its real name is actually "Global Tour" (hereinafter "the ship"). The Affidavit to lead to the arrest was sworn by Mr. Lumatete Walubengo Muchai who described himself therein as an "Advocate of this Honourable Court".

The order for arrest was issued forthwith on the strength of that Affidavit. It stated that there was an outstanding debt of USD.6965 owing on account of repair works made on the ship.

It would appear that an endorsement of the claim was also filed on the same day purporting to be the statement of claim. The Plaintiffs' Advocates however sought leave of court to file a statement of claim out of time and leave was granted to do so with the consent of the parties on 23.6.1994. Subsequently the Defendants filed a defence to the claim on 8.7.94. The pleadings were therefore closed on 26.7.94 under Order 18 r.20 RSC.

Long before that stage was reached, the Defendants had provided security for the release of the ship and it was released on 4.10.93 with the consent of the parties. Numerous letters were then written by the Defendants urging the Plaintiffs' counsel to proceed with the claim as by law required. The suit however still remains unheard and the security given by the Defendants is still held up 8 years down the road.

The main prayer made is the setting aside of the warrant of arrest granted ex-parte and the reason for that is because the Affidavit in support of the application for arrest was fatally defective.

Defective in the sense that it was not sworn by the Plaintiff or an Agent who ought to have disclosed his source of information. Mr. Lumatete who swore it did not say he was an Agent and never disclosed how he obtained the information stated or whether he believes it to be true. Secondly, it does not comply with the requirements of O.75 r.5 (9) RSC and particularly omits the following statements:-

> ***"a) The name of the person who would be liable in an action in personam ("t he relevant person").***
>
> ***b) Whether the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the 'GLOBAL TOUR".***
>
> ***c) Whether at the time of the issue of the Writ the relevant person was either the beneficial owner of all the shares in the "GLOBAL TOUR" or thecharterer of the "GLOBAL TOUR" under a charter by demise"***

. No leave was obtained under sub-rule 4 to make such omissions.

Learned counsel for the Defendants Mr. Omolo submitted that the omission to submit a proper Affidavit to lead to arrest goes to jurisdiction and that can be raised at any time as there is no time limit or bar for raising jurisdictional issues. He referred to O.41 r.5 RSC on contents of Affidavits.

He also referred to the decided case of "**The Varna"** [1993] Vo.2, **Lloyds Law Reports** to the effect that a Plaintiff is entitled to a warrant of arrest as of right "***if the statutory requirements set out in r.5 were complied with and if the required Affidavit was filed complying with paragraph 9***". The converse is that he would not be entitled if there was no compliance.

Secondly, **"The Owners of the Motor Vessel "Lillian S** " case which dealt with matters of Admiralty jurisdiction and material non-disclosure of information. Information required by statute in this matter was not disclosed.

The response to those issues by learned counsel Mr. Lumatete was that it was too late in the day to seek the setting aside of the warrant arrest since it was granted by the Court. Secondly, the Affidavit to lead to arrest was not defective as it disclosed that the debt was owed which is now a matter for trial. In any event, he submitted, there was discretion under O.75 r.5(4) RSC to allow an Affidavit which omits the required particulars. As an Advocate he was an agent of the Plaintiff and could therefore swear the Affidavit.

The issue arising for determination on this aspect is whether the same court may set aside an arrest warrant of arrest issued ex-parte and if so whether the warrant issued herein should be set aside.

I answer the first limb of this issue in the affirmative as I think it is beyond argument. In the first place the order was granted ex-parte and the other party is at liberty to return to court and present arguments against the grant of the orders in an inter-parte hearing. Secondly, there is legal provision for it. Order 75 r.13 RSC provides for "Release of property under arrest" under various circumstances. One of those is by setting aside the warrant of arrest and the explanation is made in Page 1324 of the Supreme Court Practice, 1997 Edition:-

> "**Where the affidavit leading to warrant of arrest contains material inaccuracies relating to the statutory requirements set out in O.75, r.5(9) a nd arrest cannot be validly maintained: in The Varna [1993] 2 Lloyd's Re. 253, C.A., the Court held that beyond the establishment of the facts required by O.75, r.5(9) there was no further scope for an attack upon the issue of a warrant of arrest on the gr ounds of material non -discolusre, such issue not being a discretionary remedy.The Court of Appeal, however, stated that a warrant might be set aside as a result of the writ in rem being struck out or the proceedings stayed and that there might be a gener al discretionary power on an inter partes application to set aside the warrant on the basis that its continuance was in all the circumstances unjust"**

. It is indeed the law that the issuing of a warrant of arrest is no longer a discretionary matter for the Court but must be issued as a matter of course once an Applicant for it has satisfied certain laid down requirements. It was so held in CA.238/97 **Roy Shipping S.A. & All Other Persons Interest In the Ship "Mama Otan" –vs- Dodoma Fishing Co. Ltd., (UR)**. The question is whether the Applicant satisfied the laid down requirements.Ringera, J. was dealing with a similar application and issue in Msa Admiralty Cause No.28/95 **Abdulkadir Haji Bashir –v- The Owners of the motor vessel "Mickey Dev" & Its One Barge**" (UR). He found that the Affidavit sworn to lead to warrant of arrest was not in compliance with Order 75 r.5(9) RSC. The warrant of arrest was thus irregularly issued and it was set aside.

In this case the complaint made against the Affidavit in support is threefold: It is not sworn by the Plaintiff or his Agent; it does not state the sources of information or grounds of belief as required under O.41 r.5; and it omits essential requirements under O.75 r.5 (9) RSC. I am prepared to accept that the proceedings herein are in the nature of "Interlocutory Proceedings" and that therefore they are exempt from the strict application of O.41 r.5(1) which requires that:

> ***"an Affidavit may contain only such facts as the deponent is able of his own knowledge to p rove".***

I am also prepared to accept that an Advocate in such application may swear a supporting Affidavit although it is always most prudent that the party himself if available shall do so. But O.41 r.5(2) requires in such event that the sources of information and grounds of belief in such information be disclosed. The sources and grounds should be stated with precision and particularity. The Affidavit sworn by Lumatete Walubengo Muchai on 2nd September, 1993 and filed herein on the same day clearly makes no disclosure that the matters related therein were derived from information or the source of that information and what grounds there are for believing the information. If the deponent was able of his own knowledge to prove the facts, he does not say so either. In my assessment it is a defective Affidavit and is for striking out.

More importantly, it fails totally to comply with the requirements of O.75 r.5 (9) of the RSC. The omitted requirements of that Rule are listed above. The Sub-Rule is in mandatory terms and there is no room for discretion. The only discretion is contained under Sub-Rule (4). But here there was no application under that Sub-Rule seeking leave of Court to omit the particulars required under Sub-Rule 9 and the Court did not state that it was exercising such discretion Suo Motu. In such event the Affidavit sworn to lead to arrest was incurably defective and the warrant of arrest was issued irregularly. It is for setting aside and I so order.

The consequence of that order is to obviate the necessity for security since the security was given as a precondition for the release of the arrested ship which ought not to have been arrested in the first place. The fourth prayer in the application is therefore granted.

As for the third prayer, it is made on the basis that it has taken the Plaintiffs 8 years to prosecute this case.. Order 25, r.1 RSC states:-

> "***1.(1) With a view to providing, in every action to which this rule applies, an occasion for the consideration by the Court of the preparations for the trial of the action, so that: -***
>
> ***(a) all matters which must or can be dealt with on interlocutory applications and have not already been dealt with may so far as possible be dealt with, and***
>
> ***(b) such directions may be giv en as to the future course of the action as appear best adapted to secure the just, expeditious and economical disposal thereof, the plaintiff must, within one month after the pleadings in the action are deemed to be closed, take out a summons (in these rules referred to as a summons for directions) returnable in not less than 14 days.***"

Sub-Rule (2) does not apply to these proceedings.

The onus is on the Plaintiff and the requirement is mandatory. The pleadings were closed on 26.7.94 under O.18, r.20 RSC. It is conceded by the Plaintiffs' counsel that there is no application upto now for any Summons for directions. The Defendant has now invoked Sub-rule (4) and I think properly so. The taking out of Summons for Directions, even though there is an option to consider it under Sub-rule 5, comes seven years too late and I would decline to take such option. I would have granted the alternative prayer for dismissal too.

The upshot is that the application dated 14.2.1995 is granted with costs to the Defendants both in the application and in the main suit.

**Dated this 11th day of September, 2001.**

**P.N. WAKI**

**J U D G E**