



REPUBLIC OF KENYA



KENYA LAW
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**In re Defang Shipping Company Limited (Commercial Case
E005 of 2023) [2023] KEHC 22571 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22571 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL CASE E005 OF 2023
DKN MAGARE, J
SEPTEMBER 19, 2023**

RULING

1. This claim was triggered by the initial dismissal of admiralty claim no. E003 of 2021 in the matter of the motor vessel dolphin star.
2. Subsequently, the parties reinstated the claim. According to them the dismissal was during the pendency of an order of the court of Appeal order staying proceedings in that claim. In a quick succession this matter was filed by Defang Shipping Company. This are the owners of the motor vessel Dolphin Star. The vessel is registered in the state of panama.
3. Their claim is for USD 141,330.39., being an amount that is payable to the Kenya Ports Authority for marine services rendered to the vessel and the crew. The ship had hitherto been arrested pursuant to an order issued by the admiralty court on 4/4/2021. The said Order was issued on application of E T Timber. PTE Company.
4. The ship is registered by the Autoridad Maritima De Panama – The Maritime Authority of Panama as 23936-97 G, IMO number 9162394, call sign 3FFJ7.
5. From the registry, the registered owners are De Fang Co Ltd. The Kenya Ports Authority advised that the ship incurred a debt of USD 162,740/=. A sum of USD 21,409.32 was paid leaving a sum of USD 141,330.39. The said due and owing, and is slated to continue accruing.
6. According to the owners of the ship, she was chartered on 1/1/2019 to star shipping company. There was a charter for delivery of logs to Chiattagong, Bangladesh. They state that the vessel did not belong to Star Shipping Company.
7. The subjection application dated 24/5/2023 was served on 31/8/2023. It is their postulation that the port charges of USD 141,330.39 continue accumulating.
8. The claim is for : -
 - a. USD 141,330.39 which continues to accrue.



- b. An order to pay storage charges including wages, spare parts and fuel, materials and related services offered by KPA.
 - c. The Arrest of the cargo inside the vessel Dolphin star
9. During the vacation, a myriad of other applications were filed in the related matters in a dazzling speed. The court directed the same to await ruling of the court in the related file.
 10. The Respondent filed a 17-paragraph preliminary objection. To determine the preliminary objection, I must settle issues of fact. Pendency of a related suit is a matter of fact. A claim of damages of USD 3,000,000 is a subject to proof.
 11. The Court is not involved in the finding of fact when determining a preliminary objection. The Court proceeds on the understanding that what is pleaded in the claim is true. If is what the English common law used to call a demurrer. In the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd* [1969] EA 696, the Former Court of Appeal, for East sitting in Kampala made this pertinent observation: -

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop”.

12. In a Tanzanian case of *Hammers Incorporation Co. Ltd v The Board Of Trustees Of The Cashewnut Industry Development Trust Fund*, where the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the *Mukisa Biscuit case (supra)* still persists. They stated as doth: -

“It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in *Karata Ernest & Others v The Attorney General*, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the *Mukisa Biscuit case (supra)*. The late call appears to be falling on deaf ears as this ruling will demonstrate.”

13. In the case of *Martha Akinyi Migwambo v Susan Ongoro Ogenda* [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in *Mukisa Biscuit Manufacturing Co. Ltd (supra)*: -

“A preliminary objection must be on a point of law. The Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:

....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.



At page 701 paragraph B-C Sir Charles Newbold, P. added the following:

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion....”

14. A Tanzanian Court of Appeal sitting in Dar es Salaam, in *Karata Ernest & Others v Attorney General* (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

“A point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only “consists of a point of law which has been pleaded, or which arises by clear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the “normal manner” when deliberating on the merits or otherwise of the concerned legal proceedings.

15. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection a Kenyan the case of *Oraro v Mbaja* [2005] eKLR:

“I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

16. It is therefore my view that a preliminary objection must be based on current law, and be as pleaded by the claimant. It cannot be based on disputed facts or facts requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required The impugned law, the claim and preliminary objection. If you have to refer to the Respondent’s case, then then the preliminary objection is untenable.

17. Secondly, the practice of raising repetitive and prolixous points of law should cease. A point of law must point out which law must be given out, it should not be to throw several objections and hope one sticks

18. All the points of law raised are points of fact. The court in dealing with a preliminary objective, must be laser guided.

19. The practice that is recommended is to hear cases on merit as far as possible. This is especially so where the claims are multi-faceted and may obfuscate the issues. It is not the practice of Courts in England and in the Common Wealth to just strike out pleadings. Perfunctorily the Court of Appeal.



20. In the case of *DT Dobie & Company Ltd v Muchina* [1982] eKLR, the Court of Appeal stated as thus;

“The Court ought to act very cautiously and carefully and consider all the facts of the case without embarking upon a trial before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the Court. At this stage, the Court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the Court itself is not usually fully informed so as to deal with the merits without discovery, without oral evidence tested by cross-examination in the ordinary way. As far as possible indeed, there should be no opinions expressed upon the Application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.” (emphasis mine)

As I understand the preliminary point to be a point of fact that ought to be settled by evidence.

2. In *Simon Kirima Muraguri & another v Equity Bank (Kenya) Limited & another* [2021] eKLR, Justice E. C. Mwita, sitting as a High Court of Kenya, at Kajiado, had this to say: -

“ 21. The jurisdiction to strike out pleadings is discretionary and must be exercised judicially. In *Postal Corporation of Kenya v I. T Inamdar & 2 Others* [2004] 1 KLR 359, the court stated that the law is now well settled that if the defence filed by a defendant raises even one bona fide triable issue, then the defendant must be given leave to defend.

23. In *The Co-Operative Merchant Bank Ltd. v George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal stated: Striking out a pleading is a draconian act, which may only be resorted to, in plain cases... Whether or not a case is plain is a matter of fact... Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.

24. In *Yaya Towers Limited v Trade Bank Limited* (In Liquidation) (Civil Appeal No. 35 of 2000) the same court expressed itself thus: A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial... It cannot be



doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

21. It is a different thing to argue that the claim is untenable or unmerited and another one to raise a preliminary objection. I therefore dismiss the preliminary objection as it is based no facts. The Respondent should tender evidence on the issues raised.
22. The only issue remaining is what to do with the claim herein.
23. The preliminary objection has been found untenable. However, for 3 years, the matters related to Dolphin Star are not moving anywhere. It is important that the court gives a way forward. This is to ensure that the costs incurred by the arrested ship are guaranteed.
24. The question herein is whether the could be claimed by the owners of the ship? The Respondent indicated that the ship will be destined to pay the amount, if for any reason, the claim is dismissed.
25. The claimant has been able to show that for 3 years charges for the ship have not been paid. The ship has not to date been found liable to be sold. Without the owner of the cargo moving with speed to prosecute the matters where those issues are being dealt with, the ship owner is left without a remedy. It is clear the dispute is between the owners of the cargo and Star Shipping Company.
26. This leaves the owners of the ship expenses without assurance of their dues being paid.
27. In a Ugandan case, The locus classic case of *Giella v Cassman Brown & Co. Ltd* (1973) EA, 358, 360, sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

“The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience.”

28. In a Kenyan Case in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -

“In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages



are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd v. Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

29. Indeed, under English law, injunctions of negative nature are given as a matter of course.
30. I am satisfied that the order for issuance of arrest for the cargo as security for the port charges and any damages that may be incurred is a proper one. Without issuance of such an order the owners of the ship will be left exposed when the charterer and the cargo owner settle their case.
31. The admiralty rules do not envision a hearing past 60 days. I direct that this matter together with three others be mentioned on 28/9/2023 when I shall issue directions on the disposal of these matters to enable parties know their fates.

Determination

32. In the circumstances, I make the following orders: -
 - a. The preliminary objection dated is hereby dismissed in limine as it is based on facts that require evidence.
 - b. The matter is fast tracked for hearing on 28/9/2023.
 - c. To avoid quadruple judgments, all the pending cases regarding MV Dolphin Star be fixed for directions on hearing.
 - d. Meanwhile the cargo aboard mv Dolphin star is hereby arrested as security for the claims for ports and other charges and the claims by the ship owner.
 - e. The Costs to the claimant.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Wanyama for the Applicant

Nassanga for the Respondent

