



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NAIROBI
CIVIL APPEAL NO.238 OF 1997
BETWEEN
ROY SHIPPING S.A. AND ALL OTHER PERSONS
INTERESTED IN THE SHIP 'MAMA OTAN' APPELLANTS
AND
DODOMA FISHING COMPANY LTD RESPONDENTS
(Appeal from an order of the High Court of Kenya at
Mombasa (The Honourable Lady Justice M.A. ANG'AWA)
dated the 28th day of February 1997
in
Admiralty Cause No. 19 of 1996)

RULING OF THE COURT

On 6th September 1996, Dodoma Fishing Company Limited, which we shall hereafter refer to as the respondent, issued a writ in rem against the motor vessel "Mama Otan," claiming possession of it on the ground that it is the owner of the vessel. The vessel was subsequently arrested.

On 3rd October, 1996, Roy Shipping S.A, which we shall hereafter refer to as the appellant, moved the High Court (Ang'awa J), for an order striking out the writ and for the release of "Mama Otan" from arrest on the ground that no action in rem lay because the respondent had neither a legal nor equitable right over the vessel as would entitle it to bring the action. However, Ang'awa J. declined to grant the orders for reasons which are not relevant in the motion before us, and thereby provoked this appeal.

In this motion the respondent has moved the court under rule 80 of this court's rules for an order striking out the appeal on the ground that no prior leave to appeal had been obtained in terms of the provisions of Section 75(1) of the Civil Procedure Act, as the order appealed from did not finally determine the rights of the parties.

Mrs Gudka, who with Mr C.B. Gor appeared for the respondent, submitted before us that a right of appeal being a substantive matter it means that, like is the practice in England where except for appeals on the question of liability, in Kenya too, appeals from the High Court in admiralty matters lie with the leave of that court. Besides, she said, a careful reading of Section 4(4) of the Judicature Act, which confers a right of appeal from such decisions, clearly shows that the distinction in Part VIII of the Civil Procedure Act, between decrees and orders is retained with regard to appeals in admiralty matters and consequently leave to appeal was essential here.

On the other hand Mr Inamdar, who with Mr Nanji appeared for the appellant, submitted that contrary to the view expressed by Mrs Gudka that Section 4(4) above, apart from preserving the distinction talked about in the preceding paragraph and that it prescribes a time frame and the mode of entering appeals, a plain reading of the sub-section clearly shows that it confers a substantive and unqualified right of appeal which cannot be taken away by inference. Besides, he said, the sub-section excludes the application of English Law.

The determination of the motion depends on the construction of the provisions of Section 4(4) of the Judicature Act. Section

4(1), of that Act, designates the High Court as a court of admiralty. Section 4(2) thereof prescribes the jurisdiction the court exercises and the law and procedures applicable in the exercise of that jurisdiction. Section 4(4), as we said earlier, confers a right of appeal from decisions of that court. The central issue in the motion is whether that right is automatic and unqualified or whether it is restricted.

Section 4(4), above, reads as follows: An appeal shall lie from any judgment, order or decision of the High Court in exercise of its admiralty jurisdiction within the same time and in the same manner as an appeal from a decree of the High Court under Part VII of the Civil Procedure Act."

The reference to Part VII in the sub-section is, in our view, an error in drafting because that Part does not at all deal with appeals. The relevant Part which we think was intended is Part VIII. It has several sections which make provision for appeals from both decrees and orders. Section 75 of the Civil Procedure Act, which falls within that Part makes provision for appeals from orders. The first limb of S.75(1), deals with appeals from orders which do not require leave, while the second limb deals with appeals from any other orders which require prior leave. As a general rule, orders which conclusively determine the rights of the parties on all or any of the matters in controversy in a suit or matter are appealable as of right. All the other orders fall in the second category in which prior leave to appeal against them is essential.

The jurisdiction exercisable under section 4, above, is special, and so are the procedures for seeking a remedy. The section re-enacts English law and practice in admiralty matters by reference. Sub-section (4) of it which we reproduced earlier, must be construed not only in terms of its wording but also in light of the jurisdiction being exercised. Prolonged detention of a motor vessel certainly has the often undesired effect of increasing expense on the owner or hirer thereof and may lead to serious breaches of contractual obligations. So the policy of the law in admiralty matters appears to us to be that judicial proceedings should be determined with minimum delay. So contrary to what Mrs Gudka urged, section 4(4), above, seems to us to have been intended not only to confer an unrestricted right of appeal but also to remove the distinction between appeals from decrees and orders under English practice as also under Part VIII of the Civil Procedure Act, and prescribes that appeals from all decisions of an admiralty court would be appealable in the same way as decrees in an ordinary civil suit, that is without first obtaining leave. Any other construction will, in our view, render the entire sub-section otiose.

In the result we are of the view and so rule that the application has no merit. It is, therefore, ordered dismissed with costs to the appellants.

Dated at Nairobi and delivered this 16th day of December 1997.

A.M. AKIWUMI

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JUDGE OF APPEAL

G.S. PALL

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JUDGE OF APPEAL

S.E.O. BOSIRE

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR