



Shipmarc Agency & Logistics Limited v The Owners of the Motor Vessel “Tanya” (Civil Appeal E026 of 2022) [2024] KECA 1165 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KECA 1165 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL E026 OF 2022
SG KAIRU, KI LAIBUTA & GV ODUNGA, JJA
SEPTEMBER 20, 2024**

BETWEEN

SHIPMARC AGENCY & LOGISTICS LIMITED APPELLANT

AND

THE OWNERS OF THE MOTOR VESSEL “TANYA” RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Mombasa (D. Chepkwony, J.) dated 24th September 2021 in Admiralty Claim No. 3 of 2020)

JUDGMENT

1. The précis of the claim culminating in the appeal before us is that the appellant, Shipmarc Agency & Logistics Limited, lodged a claim in rem against the respondent, who it described as the Owners of the Motor Vessel “Tanya,” (the motor vessel) vide a claim form in Mombasa Admiralty Cause No. 1 of 2018. The appellant’s claim was for a sum of USD 293, 881.62 allegedly due and payable on account of goods and materials allegedly supplied and services said to have been rendered to, inter alia, the Motor Vessel “Tanya” for her towage operation and maintenance; and in relation to the use and hire of the said Motor Vessel, including disbursements. The appellant further claimed interest on the sums claimed with effect from April 2015 together with costs of its claim.
2. The appellant’s claim was made pursuant to an agreement inferred from a course-of-dealings or “understandings” between the parties sometime during the month of April 2015.
3. In addition to the claim, the appellant filed an application and the requisite undertaking for the arrest and custody of the said Motor Vessel. Its application was accompanied by a declaration by Kelvin Asige, learned Counsel for the appellant, stating that the person liable on the claim in an action in personam (“the relevant person”) was a Mr. Yoni Bendas, as the owner or person in possession or control of the Motor Vessel “Tanya” and the beneficial owner of all the shares in Motor Vessel or a charterer of it under a charter by demise.



4. A warrant of arrest of the Motor Vessel was subsequently issued whereupon the respondent filed an application to set aside the claim and warrant of arrest on the ground that the court had no jurisdiction to entertain the claim as the declaration in support of the application for the arrest warrant stated that the person who would be liable in an action in personam was Mr Yoni Bendas, who was not the owner of the said Motor Vessel at the time the claim form was issued. In the affidavit in support of the respondent's application to set aside, counsel for the respondent described Mr Yoni Bendas as "the Managing Director of Benmar Marine Limited, the owners of the motor vessel "Tanya" and deponed that the Motor Vessel had since 15th June 2011 been legally and beneficially owned by Benmar Marine Limited after acquiring all shares in the ship from Fardon Limited.
5. In a ruling dated 25th January 2019, the High Court (P. J. O. Otieno, J.) concluded that the documents filed by both parties displaced the assertion of Mr Bendas' ownership of the vessel; that the court's jurisdiction was not properly invoked; and that the ensuing warrant of arrest was erroneously issued. Accordingly, the court set aside the warrant of arrest and dismissed the claim form with costs to the respondent.
6. Subsequently, the appellant filed a second claim in rem against the *Owners of the Motor Vessel "Tanya" in Admiralty Cause No. 3 of 2020*. It also filed a second application and undertaking for the arrest of the said Motor Vessel. The particulars of the subsequent claim were identical to those disclosed in the previous claim, save that the fresh claim was for USD 728,705.01; and that, in the declaration in support of the application for arrest and custody of the Motor Vessel, Benmar Marine Limited was named as the person who would be liable on the claim in an action in personam. An arrest warrant was subsequently issued on the strength of the claim and application.
7. The respondent filed a defence dated 1st October 2020 denying the allegations set out in the claim. In its defence, the respondent averred that the appellant had filed a similar claim which was dismissed; and that, therefore, the fresh claim was an abuse of the court process. Thereafter, it filed an application dated 12th October 2020 to strike out the claim form and warrant of arrest on the grounds that they were an abuse of the court process in that the appellant had previously instituted a claim and obtained a warrant of arrest against the *Motor Vessel "Tanya" in Admiralty Claim No. 1 of 2018*, which was dismissed and the warrant of arrest set aside.
8. In reply, the appellant filed a replying affidavit deponing that its Admiralty Claim No. 1 of 2018 was dismissed because the jurisdiction of the court was not invoked; that its claim was dismissed for want of jurisdiction, and that it was not determined on merit; and that, therefore, its subsequent claim was not res judicata.
9. By an application dated 27th October 2020, the appellant sought to have the respondent's defence struck out with orders that summary judgment be entered against the respondent as sought in the claim form. The appellant's application was made on the grounds that the respondent's defence amounted to a mere denial and did not controvert any of the facts pleaded in the claim; that the defence did not raise any triable issue or reasonable defence; that the respondent had made no attempt at settling the outstanding amount; that the defence was merely an attempt to create a smokescreen and was an abuse of court process; that the defence sought to invoke the doctrine of res judicata, which did not apply to the suit; and that it was in the interest of justice that the defence be struck out and summary judgment entered as prayed.
10. In response to the appellant's application, the respondent filed grounds of opposition dated 25th November 2020 contending, inter alia, that the claim was bad in law as it was an abuse of the court process, the appellant having previously filed Admiralty Claim No. 1 of 2018 which was dismissed by



the High Court vide a ruling dated 25th January 2019. The remaining five grounds touch on the merits of the appellant's claim on which we need not pronounce ourselves for reasons given hereunder. In response thereto, the appellant filed a supplementary affidavit sworn by Kelvin Asige, learned counsel for the appellant, on 1st December 2020 deposing, inter alia, that the grounds of opposition was filed after the High Court had issued directions on 10th November 2020, and reiterated the same on 16th November 2020, that the parties herein file written submissions in respect of the two applications and, as such, the said grounds of opposition was on record without leave of the court; that the grounds of opposition amounted to a gross abuse of the court and should be struck out; that the suit was not res judicata; and that it was in the interest of justice that the appellant's application be allowed with costs.

11. The two applications were canvassed contemporaneously by way of written submissions. In its ruling dated 24th September 2021, the High Court (D. O. Chepkwony, J.) held that the doctrine of res judicata did not apply in view of the fact that the previous suit was not heard and determined on its merits; and that the only point for consideration was whether the appellant had properly invoked the jurisdiction of the court in its subsequent claim.
12. In its ruling, the court observed that the appellant had annexed copies of email correspondence with one Mr. Yoni Bendas, who was described in the claim form as the Director of the ship-owners to buttress the existence of the agreement forming the basis of the claim. However, the court found that none of the correspondence indicated that Yoni Bendas undertook the alleged negotiations as, or was acting in the capacity of, a Director of Benmar Marine Ltd; and that there was no evidential document annexed to show that Yoni Bendas was a Director of Benmar Marine Ltd at the time when the cause of action arose, or that he was authorized to negotiate on behalf of Benmar Marine Ltd so as to establish the underlying liability against the owners of the motor vessel. In view of the foregoing, the trial court concluded that the appellant had failed to establish the privity of Benmar Maritime Ltd to the negotiations it had with Yoni Bendas; and that, the respondent having denied the existence of such agreements, it would be a travesty of justice to rely on the unilateral assertions in the claim form for the court to confirm the arrest as justified.
13. In conclusion, the trial court found that the appellant had no case to proceed against the Motor Vessel in rem on the basis of the agreements in the email correspondence and, consequently, struck out the appellant's claim and set aside the warrant of arrest with costs to the respondent. In view of its decision, the court did not proceed to consider the merits of the appellant's application to strike out the respondent's defence.
14. Dissatisfied with the decision of Chepkwony, J., the appellant moved to this Court on appeal on the grounds that the learned judge erred in law and in fact by:
 - “(i) failing to first consider the appellant's application dated 27th October 2020 seeking to have the respondent's Defence struck out before hearing the respondent's application dated 12th October 2020 seeking to set aside the arrest warrant and to strike out the entire claim;
 - ii. misinterpreting and/or misapplying the doctrine of res judicata in her aforesaid ruling that led to the setting aside of the Appellant's arrest warrant and striking out of the entire claim;
 - iii. determining the aforesaid applications solely on issues of fact that should have been properly aired at trial with witnesses being called to ascertain the facts alleged by the appellant and the mere denials posited by the respondent;



- iv. failing to appreciate that it is already on record in Admiralty Claim No. 1 of 2018 that the respondent did admit to the court by way of sworn Affidavit that Mr. Yoni Bendas is indeed a director of Benmar Marine Ltd, the Owners of the MV Tanya;
 - v. unilaterally striking out the entire claim without going through a trial to call witnesses in order to give evidence on the same; and
 - vi. finding that the appellant had not properly invoked the jurisdiction of the Honourable Court in respect of a claim in rem against the Motor Vessel “Tanya”.”
15. In support of the appeal, learned counsel for the appellant, M/s. Mwakireti & Asige, filed written submissions dated 8th April 2024 citing the cases of Kenya Commercial Bank vs. Benjoh Amalgamated Ltd [2017] eKLR, highlighting the requisite factors to be considered in determining whether a claim is res judicata; and D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaira Muchina & another [1980] eKLR where this Court observed that “The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court... No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment.”
 16. On their part, learned counsel for the respondent, M/s. Kamoti Omollo & Company, filed undated written submissions on 12th April 2024. Counsel cited Muchanga Investments Limited vs. Safaris Unlimited (Africa) Limited & 2 others [2009] eKLR; and Henderson vs. Henderson (1843) 67 ER 313 highlighting the principle that a party may not raise any claim in subsequent litigation which the party, exercising reasonable diligence, ought properly to have raised in a previous action.
 17. Having considered the record as put to us, the impugned ruling, the rival submissions, the cited authorities and the law, we consider the two main issues for determination are: whether the appellant properly invoked the jurisdiction of the High Court in respect of its claim in rem against the motor vessel in Admiralty Claim No. 3 of 2020; and whether the learned Judge was correct in determining the respondent’s application to strike out the appellant’s claim form and set aside the arrest warrant at an interlocutory stage in the proceedings in the face of disputed questions of fact.
 18. We take to mind the fact that the impugned ruling relates to contested facts that have a bearing on the appellant’s claim in the High Court in exercise of its jurisdiction to hear and determine admiralty cases by virtue of section 4 of the Judicature Act (Cap. 8), which provides that the High Court is a court of admiralty with power to “... exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.”
 19. The jurisdictional challenge in issue was founded on the question as to whether the appellant properly invoked the court’s jurisdiction, which is exercisable in accordance with such procedure as in the High Court in England, and in conformity with international laws and the comity of nations (see section 4(1) and (2) of Cap. 8 as read with the Senior Courts Act 1981 (previously known as the Supreme Court Act 1981, which confers admiralty jurisdiction on the High Court of England and Wales).
 20. To our mind, the jurisdictional challenge to which the impugned ruling relates involves substantive issues of law and fact that ought to have been determined on evidence at the trial.
- For the avoidance of doubt, we form the view that the competing claims relate to:



- (i) the name of the person who would be liable on the appellant’s claim if it were not commenced in rem;
 - (ii) whether this person was, when the right to bring the claim arose, the owner or charterer or in possession or in control of the motor vessel in connection with which the claim arose; or
 - (iii) whether at the time the claim form was issued, this person was the beneficial owner of all the shares in the ship in respect of which the warrant was required, or the charterer of it under a charter by demise.
21. In our considered view, these issues are not suitable for determination on affidavit evidence tendered in interlocutory proceedings as was the case here. They call for full inquiry on evidence at the trial. We do not see how else the trial court would determine the linkage with the person named in the declaration as the owner of the ship and as the person liable in personam, which forms the basis upon which the court’s jurisdiction is invoked and exercised. See *Owners of the Motor Vessel “Lillian S” vs. Caltex Oil (Kenya) Ltd* [1989] eKLR; and Meeson, N. and Kimbell, J in *Admiralty Jurisdiction and Practice* (4th Edn) (Informa 2011) at paragraph 4.1 where the learned authors observe in part that “... where the issue depends upon disputed questions of fact, the claimants ought not to be forced to have the question of fact tried on an application to set aside the claim form and arrest”
22. In *Vostok Shipping Co Ltd vs. Confederation Ltd* [2000] 1 NZLR 37, the Court of Appeal of New Zealand echoed the holding of Robert Goff J in *I Congreso del Partido* [1978] 1 All ER 1169 that, when dealing with an application to set aside an admiralty arrest, matters going to jurisdiction must be dealt with on the motion to set aside the arrest; and additionally held as follows:
- “ 21. But, though holding that the matter of jurisdiction had to be dealt with on the motion, Robert Goff J said that evidence would be admitted for the purpose of the ruling on jurisdiction and there could be oral evidence, for example, by cross-examination of deponents of affidavits. In *Baltic Shipping* this Court said that ownership must, if in issue, be decided on the motion to set aside and must be decided on evidence and not merely on pleadings. It seems to us that, even allowing for the urgency of the matter, there is no reason why the High Court should not allow an adjournment of the application to set aside the proceeding to give time for the assembling of the necessary evidence and, if necessary, for deponents to be brought to this country for cross-examination so that the important question of ownership, or any other factual issue arising under s 5 as a matter going to jurisdiction, can be determined without undue haste and consequent prejudice to a party which perhaps may not have immediate access to all relevant factual materials.”
23. In the same vein, Chan CJ of the Court of Appeal of Singapore had this to say in the case of *The “Bunga Melati 5”* [2012] SGCA 46:
- “ 124. ..Under our adversarial system of justice, factual disputes can only be decided on the basis of oral evidence and cross-examination of the witness or deponent, unless the defendant is able to produce undisputable and conclusive evidence that the requisite jurisdictional fact does not exist...
128. In my view, the correct procedural position as to how a court should proceed adjudicating over a factual challenge at the interlocutory/jurisdictional stage



was stated by the New Zealand Court of Appeal in *Vostok Shipping Co Ltd v Confederation Ltd* [2000] 1 NZLR 37 (“Vostok Shipping”)...

129. In my view, the court’s approach... meets the requirements of procedural justice in determining factual challenges... in an admiralty action. The court must conduct a trial of the issue at the interlocutory/jurisdictional stage, if the defendant seeks a conclusive finding of fact from the court. It does not matter how the standard of proof (at the interlocutory/jurisdictional stage) is labelled provided it is understood that a factual dispute cannot be conclusively decided on contested affidavit evidence alone.”

24. We need not say more lest we embarrass the court that will ultimately hear and determine the appellant’s claim on its merits. Suffice it to conclude that, having carefully considered the record, the written and oral submissions of the parties, the judicial authorities cited and the law, we find that the appeal succeeds and, accordingly, hereby order and direct that:

- a. the Ruling and Orders of the High Court of Kenya at Mombasa (D. Chepkwony, J.) dated 24th September 2021 be set aside;
- b. the appellant’s Admiralty Claim No. 3 of 2020 and any related application remaining undetermined be remitted for full hearing and determination on its merits by a Judge other than P. J. O. Otieno, J. and D. Chepkwony, J.; and
- c. the costs of the appeal be borne by the respondent.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C. Arb, FCIArb

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

