



Owner of Motor Vessel “Mirembe Judith” v Jade International Shipping Line DMC (Civil Appeal (Application) E124 of 2022) [2023] KECA 1046 (KLR) (1 September 2023) (Ruling)

Neutral citation: [2023] KECA 1046 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E124 OF 2022
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
SEPTEMBER 1, 2023**

BETWEEN

THE OWNER OF MOTOR VESSEL “MIREMBE JUDITH” APPELLANT

AND

JADE INTERNATIONAL SHIPPING LINE DMC RESPONDENT

(Being an application for review under Rule 33 (c) & 37 of the Court of Appeal Rules of the Judgement delivered on 14th April, 2023 from the Ruling No.1 and orders of the High Court at Mombasa (Hon. Lady Justice Njoki Mwangi) dated and delivered on 28th October 2022 in Admiralty Claim No. M001 of 2022)

RULING

1. On April 14, 2023, this court delivered a judgement in this appeal in which we expressed ourselves, inter alia, as hereunder:

“In our view, the proceedings commenced before the High Court were not expressed to be facilitative in nature but were completely separate proceedings. We accordingly find that one cannot commence or maintain proceedings which run concurrently with arbitral proceedings. To do so amounts to an abuse of the process.

We find merit in this appeal, set aside the decision made by the Learned Judge on October 28, 2022 dismissing the applicant’s application dated August 26, 2022 and substitute therefor an order allowing the same. We set aside the warrants of arrest issued against Motor Vessel “Mirembe Judith” on August 10, 2022 and strike out the Respondent’s Claim. For avoidance of doubt we set aside the alternative order as regards the deposit of US\$16,000,000 by the Appellant.

We award the costs of this appeal and those before the trial court to the Appellant.”



2. The Appellant is back before us, this time round vide a Notice of Motion Application dated July 24, 2023. By the said Motion, the Appellant substantially seeks an order for a review and rectification of the said judgment and orders and directions that the Respondent, Jade International Shipping Line DMCC be held liable for all costs, charges and all consequential charges on detention of the Motor Vessel 'Mirembe Judith' incurred at the Kenya Ports Authority as a consequence of these proceedings against the owners of the Motor Vessel 'Mirembe Judith' and costs of the proceedings be provided for and paid by the Respondent.
3. The grounds upon which the application is based are that on August 18, 2022, the Respondent had the Appellant's Ship arrested and detained at the port of Mombasa; that on April 14, 2023, this Court found that the arrest was unwarranted and set aside the said arrest as well as the arrest warrants and struck out the Respondent's claim with cost to the Appellant both in this Court and in the High Court; that the Kenya Ports Authority is demanding for costs occasioned by the detention of the Motor Vessel 'Mirembe Judith' from the Appellant/Applicant: and that this Court did not make an order as to who would be liable for the costs occasioned by the arrest of the vessel.
4. It was averred that the Motor Vessel 'Mirembe Judith' has now been detained on account of unpaid costs and the continued detention of the Motor Vessel 'Mirembe Judith' on account of the Respondent's acts will occasion the Appellant irreparable harm and loss as its movement in and out of the port of Mombasa will continue to affect its operations and business. The Appellant therefore sought for an order compelling the Respondent to be liable for all the charges payable on account of the arrest of the Motor vessel 'Mirembe Judith' and that the said order be included as part of the orders issued earlier in the judgement.
5. When this matter was called out for hearing on this Court's virtual platform on August 16, 2023, Learned Counsel, Mr Kevin Mogeni appeared for the Appellant/Applicant while Mr Ahmed Idris appeared for the Respondent. While Mr Mogeni was ready to proceed, Mr Idris informed us that he had not filed a replying affidavit due to the fact that his instructions had been withdrawn and he had filed an application seeking to cease acting for the Respondent who, upon being informed of the Motion dated 24th July, 2023 instructed him not to take any further action in the matter.
6. We directed that the matter proceeds as the Respondent were aware of the proceedings but failed to instruct counsel to appear for them.
7. Mr Mogeni relied on his written submissions dated July 3, 2023, and cited rule 1 (2) and rule 31 of the *Court of Appeal Rules, 2010*. Reference was also made to *Benjob Amalgamated Limited & Another v Kenya Commercial Bank Limited* [2014] eKLR where the Court found pursuant to Rule 1 (2) of the Court of Appeal Rules, that it has jurisdiction to make such orders as may be necessary for the ends of justice or prevent abuse of the process of the Court. The Appellant submitted that the application dated July 20, 2023 seeks to meet the ends of justice, as the Applicant having gotten a valid judgment before this Court is now being condemned to pay detention costs for the vessel, a situation which the Respondent occasioned by the wrongful detention and ought to be obligated to pay.
8. In the Appellant's view, it satisfied the requirements for the grant of the orders sought and contended that there is indeed a need to bring the issue to finality by dealing with the issues of the wrongly incurred detention costs, and the need to ensure that justice is done by ensuring that the party occasioning the wrongful costs is held liable to pay for the same.
9. We have considered the Motion, the supporting affidavit and submissions filed. In our view, the Application before us is not, strictly speaking, one seeking a review of the judgement. What the Appellant is seeking, is that this Court clarifies who, between the Appellant and the Respondent ought



to bear the expenses incurred as a result of the arrest and detention of the Appellant's ship. In other words, what is being sought is an order resulting from and consequential to the judgement delivered herein.

10. We have no doubt, both on the law and on authorities that this Court has the residual jurisdiction to clarify its orders for the purposes of implementation. Sections 1A and 1B of the [Appellate Jurisdiction Act](#) provides for the overriding objective of the Act. While interpreting those provisions, this Court in [Hunker Trading Company Limited v Elf Oil Kenya Limited](#) Civil Application No Nai. 6 of 2010 held, *inter alia*, that:

“The “O2 principle” poses a great challenge to the courts in both the exercise of powers conferred on them by the two Acts [the [Civil Procedure Act](#) and the [Appellate Jurisdiction Act](#)] and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In the court's view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day.” [Emphasis provided]

11. Apart from the overriding objective, rule 1(2) of the Court of Appeal Rules provides that:

These Rules shall not limit or otherwise affect the inherent power of the Court to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court.

12. That rule was the subject of the decision in [Benjob Amalgamated Limited & another v Kenya Commercial Bank Limited](#) [2014] eKLR, where this Court held that:

“...it has residual jurisdiction to do so in case of fraud, bias, or other injustice with a view to correct the same and in doing so the principles to be had regard to are, on the one hand, the finality principle that hinges on public interest and the need to have conclusiveness to litigation and on the other hand, the justice principle that is pegged on the need to do justice to the parties and to boost the confidence of the public in the system of justice...”

13. Accordingly, this Court is clothed with inherent jurisdiction, being a court of justice, to make orders necessary for the ends of justice to be met and to prevent abuse of its process. It is a jurisdiction which is not necessarily conferred by a legal provision but which inheres in a court and may be reserved by a legal provision but not created by legal provisions, which only manifests the existence of such powers. See [Ryan Investments Ltd & Another v The United States of America](#) [1970] EA 675.

14. It follows therefore that the inherent jurisdiction as the name suggests is not donated to the Court by any legislation but underlie the very nature of the Court as a seat of justice which the Court ought to draw upon whenever necessary and when all else fails in order to ensure that justice is attained. It must however be distinguished from the power of review.

15. What is being sought in this application is that having found that the Respondent put into motion a process by which the Appellant's ship was found to have been wrongly arrested and detained, the Respondent ought to bear the consequential loss including the costs and expenses occasioned by that wrongful action. The law is that costs follow the event and such costs not only encompass the costs incurred in defending or prosecuting the suit but also the costs necessarily due and payable, for



instance, storage charges payable to those who are legally in custody of the subject matter. They may be costs payable to an auctioneer in whose custody the item in dispute is placed pending the determination of the suit or the costs incurred by an interpleader in securing the item while the rightful owner of the item is being determined. In this case, they are the costs demanded by Kenya Ports Authority which was the legal custodian of the subject ship.

16. The Appellant having succeeded in challenging the actions of the Respondent, it follows that it ought not to be saddled with the resultant costs and it was on that basis that we directed that the costs be borne by the Respondent. It is however true that this Court did not expressly deal with the costs incurred by the Kenya Ports Authority, a third party. We are being asked to clarify that issue so as to effectuate our judgement. The predecessor of this Court, the East African Court of Appeal in *Mawji v Arusha General Store* [1970] EA 137 while citing *Rawal v Mombasa Hardware Ltd* [1968] EA 392 expressed itself as follows:

“ A Court must have power to effect its orders. This is not a case of recalling an order but giving effect in one part of the order to the decision arrived at in another part. It would be nonsense to stultify the activities of any court of justice that it would be unable to give effect to a decision which it had just handed down. No provision of the rules should be so construed as to preclude a court from giving effect to its decision...Under the inherent powers of the court, a court should not be precluded by anything incidentally set out in the Code or in the rules made under the Code from giving effect to its decision, and giving effect in a way which will result immediately in justice between the parties and in saving of unnecessary proceedings...A court must have power, unless it is most clearly set out to the contrary by legislation, to give effect to its decision and that is all that the court sought to do here. It is not suggested that the discretion, which, of course must lie in the court as to the manner in which to give effect to its decision, was wrongly exercised in this case but the argument is that the court did not have the power to make this order. The Court is satisfied that it did, and, indeed, that any court must have the power to give effect to its decisions.”

17. That power, as was held in *Mesballum Wangubu v Kamau Kania* Civil Appeal No 101 of 1984 1 KAR 780[1987] KLR 51; [1986-1989] EA 593, is a residual jurisdiction, which should only be used, in special circumstances in order to put right that which would otherwise be a clear injustice since the Court has the duty to ensure that its orders are at all times effective. See *Nicholas Mahibu v Ndima Tea Factory Ltd & another* Civil Application No Nai. 101 of 2009.
18. This Court having found the action of arresting the Appellant’s ship unwarranted, it must exercise its powers of restitution and vacate the orders of arrest as was done in the judgement and where there is an impediment to that restitution, to make necessary consequential orders for the ends of justice to be met. We are satisfied that the restitution cannot be effectually met as long as the clarification of which party ought to bear the costs demanded by Kenya Ports Authority remain un-clarified.
19. We accordingly find the Notice of Motion Application dated July 24, 2023 merited. We allow the same and clarify the judgment delivered on April 14, 2023 and make a further order that apart from the costs of the proceedings as directed in the judgement, the respondent, Jade International Shipping Line DMCC be held liable for all costs, charges and all consequential charges on detention of the Motor Vessel ‘Mirembe Judith’ incurred at the Kenya Ports Authority as a consequence of these proceedings, against the owners of the Motor Vessel ‘Mirembe Judith’.
20. Since these are consequential proceedings, we make no order as to the costs of the instant application.
21. It is so ordered.



DATED AND DELIVERED AT MOMBASA THIS 1ST DAY OF SEPTEMBER, 2023.

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

