Owners of the Motor Yacht "Sea Jaguar" v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) (4 November 2022) (Ruling)

Neutral citation: [2022] KECA 1240 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL (APPLICATION) E012 OF 2020

AK MURGOR, P NYAMWEYA & JW LESSIT, JJA

NOVEMBER 4, 2022

BETWEEN

BLUE THAITIAN SRL (OWNERS OF THE MOTOR YACHT "SEA JAGUAR") ..... APPLICANT

AND

ALPHA LOGISTICS SERVICES (EPZ) LIMITED ..... RESPONDENT

(An application for security for costs prior to the hearing of the appeal against the judgment of the High Court of Kenya at Mombasa (D. Chepkwony J.) dated 27th August 2020inMombasa Admiralty Claim No 3 of 2018)

RULING

1. The application before us is dated February 8, 2022, brought by Alpha Logistics Services (EPZ) Limited, the Applicant herein, who is the Respondent in the main appeal (hereinafter the Applicant"). The said application is brought by way of a Notice of Motion brought pursuant to section 3A and 3B of the *Appellate Jurisdiction Act*, Rule 107(3) of this *Court's Rules* of 2010, the inherent jurisdiction of this Court, Part 25 Rules 12 and 13, and Part 52 Rule 10 (1) of the *Civil Procedure Act of England* of 2010.

2. The Applicant seeks an order that Blue Thaitian SRL, the Owners of the Motor Yacht 'Sea Jaguar', which is the Appellant in the main appeal and the Respondent herein (hereinafter the "Respondent"), provides security for the costs of the High Court proceedings as well as of the appeal in this Court in the sum of Kenya Shillings Fifteen million (Kshs 15,000,000/=), by way of a deposit into the parties' Advocates' joint account within a period to be fixed by this Court prior to the hearing of the appeal. Further, that in default of providing the security orders, this appeal be dismissed.

3. The application is supported by an affidavit sworn on February 8, 2022 by Rossella Lospenatto, the Applicant's General Manager for Projects, who deponed that this application arises from the judgment

delivered in the Applicant's favour by the High Court on August 27, 2020, in admiralty proceedings it brought against the Respondent. That it has however come to the Applicant's knowledge that the Respondent was placed into liquidation, and that after an inquiry by the Applicant's advocates on record, the advocate appearing for the Respondent has failed to confirm on whose instructions he is acting in the circumstances, as between the Respondent or its Receiver. Furthermore, that the condition of the motor yacht 'Sea Jaguar' continues to deteriorate, and its present market value is extremely low and will not be able to cover the decree of Euros 785,000/=, which is in excess of Kenya Shillings 10 Million (Kshs 10,000,000/-), and which includes Euros 485,000/= which was agreed to by the parties in a Settlement Agreement dated May 23, 2019.

4. The deponent annexed copies of an extract dated October 23, 2020 from the Italian Business and Company Registration Office of the Italian Chamber of Commerce and Industry, showing that a liquidator was appointed for the Respondent which is in liquidation; and of a letter dated November 18, 2021 written by the Applicant's advocates and addressed to the Respondent's advocates on instructions from the said liquidator.

5. The Respondent opposed the application by way of grounds of objection dated February 25, 2022, in which eleven grounds are raised, along two threads. Firstly, that the application is bad in law for lacking a legal and jurisprudential basis, for reasons that it is seeking an additional order for security for costs for the Respondent's claim, which order was already granted by the High Court when it ordered the arrest and sale of the Motor Yacht 'Sea Jaguar'; In the alternative , that the application is bad in law for seeking an additional order for security for costs that cannot be granted as the judgment of the High Court was issued in rem against the Motor Yacht 'Sea Jaguar' (the res), and not in personam against Blue Thaltlan SRL, and which cannot be granted in a rem claim where the owner of the res becomes insolvent . Secondly, that even if a legal or jurisprudential basis for the application were found to exist, the grounds stated by the Respondent are insufficient for failure to offer requisite documentary proof that the Respondent is insolvent, is unable to meet its costs obligations, or that the res is deteriorating in value whilst under arrest.

6. The background to the instant application is the Applicant filed an admiralty claim in the High Court, initially for the arrest of the Respondent's Motor Yacht ''Sea Jaguar'' arising from the Respondent's failure to pay, or provide security for the Applicant's remuneration, interest and costs arising from salvage and docking services which the Applicant accorded to said Motor Yacht ''Sea Jaguar', after it ran aground on November 23, 2018 at the Tudor Creek in Mombasa. The High Court issued the orders of arrest on December 19, 2018, and the Applicant subsequently filed an application dated February 22, 2019, seeking judgment in default of the Respondent filing a defence, declaring that the Applicant was entitled to salvage remuneration from the Respondent; and that the Motor Yacht 'Sea Jaguar' be appraised and sold by the Admiralty Marshal pending the assessment of the salvage remuneration, costs and interest that was payable by the Respondent to the Applicant: and orders on various actions required to be undertaken by the Admiralty Marshal in the exercise of the said sale. .

7. The Respondent thereupon objected to the entire proceedings in a Notice of Preliminary Objection dated March 13, 2019; Response and Grounds of Opposition dated April 4, 2019; and an application to strike out the Applicant's claim dated April 26, 2020. The main ground raised by the Respondent was that the High Court lacked jurisdiction to hear the claim, in light of an arbitration clause in the Lloyds Standard Form Salvage Agreement executed by parties, and that the in rem jurisdiction of the High Court was erroneously invoked. The High Court after hearing the parties, found in favour of the Applicant and entered judgment against the Respondent, who was ordered to pay the Applicant an all-inclusive sum of Euros 785,000/= . The Respondent, being aggrieved, thereupon filed an appeal in this Court.

8. We heard the application virtually on May 18, 2022, and learned counsel Mr Sanjeev Khagram appeared for the Applicants, while learned counsel Mr Kevin Okere appeared for the Respondent. Mr Khagram raised a preliminary issue on the competency of the Respondent's participation, firstly, on account of the Respondent's form of response, and secondly, that the failure to file an affidavit in reply confirms the lack of instructions on the part of Muregi Okere Advocates. Mr Khagram submitted in this respect that the *Court of Appeal, 2010 Rules*, and in particular Rule 50 thereof, only envisage the filing of affidavits in reply to an application filed before this Court, and have no provision for the filing of Grounds of Opposition, neither are Grounds of Opposition recognized under English procedure.

9. Therefore, that the Grounds of Opposition filed by the Respondent are, in the circumstances, a nullity and of no effect. Further, that even if the said Grounds of Opposition were to be considered, they cannot dwell on matters of fact, particularly since the High Court has already granted an order for security of costs and what is being sought is an additional order. That therefore, the unrebutted facts contained in the affidavit filed in support of the application must prevail. Reliance was in this regard placed on the decision in case of *Mohamed & Another v Haidara* [1972] EA 166

10. Mr Okere's submissions in reply were that he had filed the Grounds of Opposition to expedite the hearing of the application, and regardless of the nature of his response, the issue at hand is whether the application meets the necessary legal threshold. On the competency of its appeal, counsel submitted that the appeal before this Court is properly framed, as in an in rem claim, the defendant is described simple as the 'Owners of the ship X' , whether in liquidation or not , and that it is this same defendant, described as 'Owners of the Motor Yacht 'Sea Jaguar',that has filed the present appeal. Further, that the Applicant has not produced any document to show that the ownership of the Motor Yacht 'sea Jaguar'has changed from Blue Thaitian SRL to another entity. Lastly, that there is also no requirement in admiralty law, or corporate or insolvency law, especially as far as maritime liens are concerned, to demonstrate in the pleading that an in personam owner's status has changed to 'in liquidation' which status is alleged by the Respondent. Therefore, that the description of the Respondent as "Blue Thaitian SRL, Owners of the Motor Yacht "sea Jaguar"is correct.

11. Rule 50 of the *Court of Appeal Rules of 2010*, which was succeeded by Rule 52 of the *Court of Appeal Rules* of 2022, provided that a person who has been served with a notice of motion may (a) lodge one or more affidavits in reply and shall serve a copy or copies thereof on the applicant within fourteen days after receipt of the application, unless otherwise directed; and (b) with the leave of a judge or with the consent of the applicant, lodge one or more supplementary affidavits. Mr Okere claims to have received the directions to file Grounds of Opposition from this Court, However, a perusal of the record shows that the directions given by this Court on February 14, 2022 were for the Respondent to file its response to the instant application within certain timelines, which can only be a response as envisaged by the rules of this Court. Be that as may, it is notable that a statement of Grounds of Opposition is provided for in Order 51 Rule 14 of the *Civil Procedure Rules* as a recognized pleading opposing an application in the High Court, but is not expressly provided for in the *Court of Appeal Rules*.

12. What then is the import of filing Grounds of Opposition in response to an application filed in the Court of Appeal? A "ground" is in this regard defined in *Black's Law Dictionary*, Ninth Edition at page 772 as "the reason or point that something, (as a legal claim or argument), relies on for validity". An affidavit on the other hand is defined at page 66 as "a voluntary declaration of facts written down and sworn to by a declarant before an officer authorized to administer oaths". Therefore, any facts sought to be introduced in an application before this Court can only be done by way of an affidavit, and cannot be by way of Grounds of Opposition, and any attempt to do so through the Respondent's Ground of Opposition will be incompetent. In essence, the Respondent is therefore restricted to only raising issues of law and to making legal arguments in this application.

13. On the issue of the Respondent's counsel having instructions in this matter, it is notable that the Respondent who has been sued by the Applicant in the instant application is "Blue Thaitian SRL, the Owners of the Motor Yacht 'Sea Jaguar'", and on June 7, 2019, the firm of Muregi Okere Advocates did file a notice of Change of Advocates to act on behalf of the said Respondent, which notice was served on the Applicant's counsel. The Liquidator, if any, of the said Respondent has not been joined as a party in this application by the Applicant or Respondent, and the question of whether or not the firm of Muregi Okere Advocates has instructions from the said Liquidator is therefore of no legal consequence in the circumstances.

14. With the foregoing clarifications on the preliminary issue raised by Mr Khagram in mind, we shall now proceed with a determination of the substantive issue before us, which is whether the Respondent should provide security for costs for the High Court proceedings and of this appeal. Under Rule 111(3) of the *Court of Appeal Rules* of 2022, which Rule succeeded Rule 107(3) of the *Court of Appeal Rules* of 2010, this Court has power and unfettered discretion to at any time direct that further security for costs be given and security be given for the payment of past costs relating to the matters in question in the appeal. It was held in *Marco Tools & Explosives Ltd vs Mamujee Brothers Ltd*, [1988] KLR 730 that this Court has unfettered judicial discretion to order or refuse security, and much will depend upon the circumstances of each case.

    There is a caveat however which is that, the final result must be reasonable and modest.

15. The result therefore, of the arguments made by the Respondent against having two sets of security for costs in an in rem claim existing side by side at the same time, for the reasons that the arrest of the res was comprehensive security for a claimant's entire in rem claim including its claim for costs accruable on appeal, and that additional security for costs in an in rem claim can be sought only in restricted circumstances, and that the nature of security of costs in maritime liens are inapplicable in an application for further security for costs, are expressly precluded and overtaken by the clear provisions of Rule 111(3) of this Court's Rules.

16. In addition, it is also evident from the provisions of Part 61 of the English *Civil Procedure Rules* on security, which were relied on by the Respondent's counsel for some of the above arguments, that the said Part only applies where in a claim in rem, security has been given either to obtain the release of property under arrest; or prevent the arrest of property. The Respondent did not bring any evidence of having provided any alternative security.

17. The requirements for an order for further security of costs to issue by this Court are set out in various cases by this Court. It was stated in the case of *Gatirau Peter Munya v Dickson Mwenda Githinji And 2 Others*, Ca (Application) No 38 of2013 [2014] eKLR that in an application for further security for costs, the applicant ought to establish that the respondent, if unsuccessful in the proceedings, would be unable to pay costs due to poverty. In the case of *Mama Ngina Kenyatta and Another v Mahira Housing Company*, Civil Application No NAI 256 of 2003 [2005] eKLR the considerations taken into account when the Court is exercising its discretionary power under Rule 107(3) of the *Court of Appeal Rule* of 2010 were set out as follows:

    "i. whether the claimant's claim was *bona fide* and not a sham;

    ii. whether the claimant had a reasonably good prospect of success;

    iii. whether there was admission by the defendant on the pleadings or elsewhere that money was due;

iv. whether there was a substantial payment into court or an "open offer" of a substantial amount;

v. whether the applicant for security was being used oppressively, for example so as to stifle a genuine claim;

vi. whether the claimant's want of means had been brought about by the conduct of the defendant's, such as delay in payment or in doing their part of the work;

vii. whether the application for security was made at a late stage in the proceedings."

18. Mr Khagram, while citing the applicable principles in the cases of *Marco Tools & Explosives Ltd vs Mamujee Brothers Ltd*, [*supra*] ,*Messina & Anor v Stallion Insurance Company Ltd* [2005] 1KLR 431, and *Westmont Holdings Sdn-Bhd v Central Bank of Kenya Limited* [2017] eKLR, submitted on the first line of argument made by the parties, namely whether the Applicant had demonstrate that the Respondent is unable, through poverty or bad faith, to pay the costs of the appeal. He urged that the Applicant's averments in this regard made in the affidavit in support of the application have not been rebutted by the Respondent, as it has only filed Grounds of Opposition and not a replying affidavit.

19. Mr Okere in reply cited the decisions in in *Marco Tool & Explosives Ltd v Mamujee Bros Ltd* (*supra*) and *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [*supra*] to submit that this Court would be remiss to accept that Blue Thaitian SRL, an Italian registered company based there, is insolvent without proof of (foreign) insolvency proceedings in Italy against it, and that an application, for recognition of a foreign insolvency, can only be filed in the High Court of Kenya in accordance with the *Insolvency Act* (No 18 of 2015). Further, that absent of such recognition, a foreign liquidation as the one alleged by the Applicant gives no direct or automatic consequence in relation to the assets of Blue Thaitian SRL, including the Motor Yacht 'sea Jaguar', located in Kenya. Additionally, that even if Blue Thaitian SRL were to be recognized as insolvent by the High Court of Kenya, which it has not, the remedy that would avail from such recognition is an in personam order for stay of proceedings and execution against Blue Thaitian SRL's assets, rights, obligations or liabilities, and but not for security for costs pending appeal. Reference was made to the decision in *In re Cooperativa Muratori and Cementisti – CMC DI Ravenna (Insolvency)* [2020] eKLR and the *Insolvency Act* (No 18 of 2015), section 720, Schedule 5, paragraph 22.

20. In somewhat contradictory submissions, the Respondent's counsel then proceeded to urge that the alleged liquidation of Blue Thaitian SRL, if recognized in Kenya, would not stay the present appeal which arises from a 'pure' in rem action as held in *Dan-Bunkering (Singapore) PTE Ltd v The Owners of the Ship or Vessel "PDZ Mewah" & Anor* [2021] 10 CLJ; that an action in rem can be continued even at the stage of the liquidation of a corporate debtor, as the claim is against the res and not in personam against the corporate debtor, as held in *Angre Port Private Limited v Tag 15 and Anor*, Bombay High Court (Interim Application (L) No 112 of 2021 in Commercial Admiralty Suit (L) No 4 of 2020); that a pure in rem action is not affected by liquidation of the owner of the res, and the liquidator, once appointed, merely acts as custodian whilst the ownership and status of the res remains unchanged; and that upon the filing of an in rem claim, the claimant becomes a secured creditor to the extent of the value of the res and is excluded from asserting in personam rights over a corporate debtor's other assets comprised in a fund held by the liquidator as custodian.

21. The counsel further submitted that the Applicant has merely alleged in its supporting affidavit that the res continues to deteriorate and has a low market value, and no proof has been tendered of the circumstances that would infer either that the vessel is deteriorating or that it has a low market value.

That even if it were proved otherwise, and the res is deteriorating, the orders that would issue ought to be pendente lite against the res.

22. In *Westmont Holdings Sdn-Bhd vs Central Bank of Kenya Limited* [2017] eKLR, this Court, after considering the applicable principles in an application for security for costs made under Rule 107 (3) of the *Court of Appeal Rules* of 2010, emphasised that the Court should not be drawn into the merits of the appeal, as that would prejudice or embarrass the Bench that will deal with it , but that the issues raised regarding the winding up of the appellant in the application was a weighty matters in regard to the issue of security for costs. This Court cannot therefore attempt to address the merits of the lengthy arguments made by the Respondent on the legal import or effect of the evidence of the purported liquidation of Blue Thaitian SRL, as that will be venturing into forbidden territory, in an application for security for costs. It suffices for the purposes of this application that the Applicant has provided evidence that prima facie demonstrates that the Respondent may face difficulty or be unable to meet the costs of the suit in the High Court and of this appeal, namely that the Respondent appears to be in liquidation. Further, the credibility of that evidence has not been controverted by any contrary evidence provided by the Respondent.

23. The second line of arguments urged by the parties was on the prospects of success of the Respondent's appeal. Mr Khagram submitted that while the action before the High Court was an action in rem, from the moment an Acknowledgement of Service was filed, it proceeded as a hybrid action - both in rem as well as in personam- so that judgement given is both against the yacht as well as the party acknowledging service, such that the owners rendered themselves liable for any unsatisfied balance. In addition, arising from the hybrid nature of the action, it is clear that the yacht cannot physically or feasibly give any instructions and these can be given only through a body corporate or individuals.

24. Mr Okere in reply submitted that the Respondent has demonstrated that it has a bona fide appeal that is arguable and has good prospects of success, as it challenges the Applicant's failure to invoke the admiralty in rem jurisdiction of the High Court, by failing to serve the res with an in rem claim or by arresting by way of service of an arrest warrant. Reliance was placed on the decisions in *Owners of the Ship "Al Khattiya" vs The Owners and/or Demise Charterers of the Ship "Jag Laadki"* [2018] EWHC 389 (Admlty), *Stallion Eight Shipping Co SA v Natwest Markets PLC* [2018] EWCA Civ 2760, and *The Global 1* [2006] SGHC 30, as well as the provisions of the *English Civil Procedure Rules* Part 61.3(5)(a) and Practice Direction 61.3.6(1) for this submission.

25. According to the Respondent's counsel, the Acknowledgment of Service they filed dated January 2, 2019 did not acknowledge service of an in rem claim on the res., and only acknowledged that the person who has filed the Acknowledgment of Service, namely Blue Thaitian SRL, could be proceeded against in personam. Further, that the filing of an Acknowledgment of Service, merely triggers the in personam element of an in rem claim but does not invoke the admiralty in rem jurisdiction over the res. Reliance was placed on the decisions in *Stolt Kestrel BV v Sener Petrol Denizcilik Ticaret AS* and *CDE SA v Sure Wind Marine Limited* [2015] EWCA Civ 1035 and *The Global 1* [*supra*]. According to counsel, the only valid acknowledgment of service that was filed in the High Court on behalf of Blue Thaitian SRL and which stated the full names of the person acknowledging service, was the acknowledgment of service filed by the firm of Muregi Okere Advocates, which clearly states that it was filed on behalf of Blue Thaitian SRL to contest the Jurisdiction of the High Court, and not to defend the claim in that court. That the appearance was therefore essentially an appearance gratis to contest jurisdiction; Blue Thaitian SRL did not file a defence or deposit security for the in rem claim which acts were consistent with submission to the in personam jurisdiction of the court in a pending in rem claim; that there was therefore no appearance by Blue Thaitian SRL to defend the in rem claim filed by the Respondent in

the High Court, and that this was affirmed by the High Court when it entered Judgment in default of appearance.

26. On the Acknowledgment of Service filed by Sherman Nyongesa & Mutubia Advocates dated January 7, 2019, the counsel submitted that the said acknowledgment of service clearly failed to mention the full names of the person acknowledging service, and it cannot be argued by the Applicant that it was filed on behalf of Blue Thaitian SRL Therefore, that requiring it to deposit security for costs pending appeal, will be construed to mean that the admiralty in rem jurisdiction of the High Court was properly invoked, and that this Court should proceed with caution not to validate an in personam jurisdiction over Blue Thaitian SRL whilst the appeal over invocation of the admiralty in rem jurisdiction over the Motor Yacht 'Sea Jaguar' remains pending. Lastly, that having confirmed that there was no appearance by Blue Thaitian SRL to defend the in rem claim and entered judgment in default, it follows that enforcement proceedings, including for costs, will be against the res and not in personam against Blue Thaitian SRL.

27. We again need to emphasize that we are not at this stage called to definitively determine the nature of the admiralty proceedings in the High Court, and particularly, whether the action in the High Court was one in rem or in personem or both an in rem and in personem claim, as this is an issue in the substantive appeal. Likewise, the issue of whether the High Court's jurisdiction in an in rem claim was properly invoked is one of merits to be determined in the appeal, At this stage, what we are required to determine is the reasonable and rational prospects of success of the Respondent's appeal. It is notable in this regard that, Mr Okere does not dispute that there was a claim made by the Applicant, arising out of services it rendered to the Motor Yacht 'Sea Jaguar',leading to the warrant of arrest issued against the said Motor Yacht, and judgment in default of defence being entered against the Respondent.

28. The legal issues arising in this regard about the service of the said warrant of arrest and the effect thereof on the admiralty proceedings, and the legal effect of the Acknowledgements of Service filed by both the Respondent's previous advocates of record, and by its current advocates on record, are matters to be determined on appeal. While the Respondent's counsel has made very lengthy arguments on these legal effects to demonstrate the viability of the Respondent's appeal, what tilts the balance against the Respondent in our view, and in favour of the Applicant, and in light of the considerations set out in *Mama Ngina Kenyatta and Another vs Mahira Housing Company* (supra), is the fact that the parties did enter into a settlement agreement dated May 23, 2019 after the admiralty claim was filed by the Applicant, and that this fact was not disputed by the Respondent, nor did the Respondent bring any evidence to demonstrate that the said agreement was set aside.

29. In the circumstances, we are satisfied this is a suitable case to order the Respondent herein namely "Blue Thaitian SRL, the Owners of the Motor Yacht 'sea Jaguar'", to deposit further security to guarantee the costs of the proceedings in the High Court and of this appeal in the sum of Kenya Shillings Fifteen Million (Ksh 15,000,000/). In arriving at the said sum, we have considered the sum of Euros 785,000 ordered to be paid by the Respondent by the High Court, that of this amount, the sum of Euros 485,000/= had been agreed to by the parties in their Settlement agreement, and the professional services and attendant costs likely to be incurred in defending the Respondent's pending appeal.

30. Accordingly, we order that the said sum be deposited within 45 days of the date of this ruling into a joint account to be opened by the Applicant's and Respondent's Advocates' prior to the hearing of the Respondent's appeal, failing which the said appeal shall stand struck out with costs to the Applicant.

31. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 4TH DAY OF NOVEMBER 2022.

A.K. MURGOR

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR