



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**ADMIRALTY CLAIM NO. 3 OF 2020**

**SHIMPARC AGENCY & LOGISTICS LIMITED.....CLAIMANT**

**-VERSUS-**

**THE OWNERS OF THE MOTOR VESSEL "TANYA".....DEFENDANT**

**RULING**

1. There are two applications pending in this matter for determination. The first is the Defendant's application dated **12<sup>th</sup> October, 2020** and the second one is the Claimant's application dated **27<sup>th</sup> October, 2020**.
2. The Defendant's application seeks to set aside a warrant of arrest issued herein and for the entire claim to be struck out. It predominantly involves the interplay of the doctrines of *res-judicata* and the confines of admiralty jurisdiction on claims in rem.
3. The Claimant's application on the other hand, ideally seeks for an order striking out the statement of Defence filed on **1<sup>st</sup> October, 2020** and further, that the court does enter a summary Judgment in favour of the claimant as sought.
4. On **10<sup>th</sup> November, 2020**, directions were issued that the two applications be canvassed contemporaneously by way of written submissions. Having gone through the court file, it is clear that both parties dutifully complied with the directions by filing their respective submissions.
5. That notwithstanding, I am of the view that the two applications ought to be determined serially, starting with the Defendant's application, so that if the court finds no merit in the same, then it will move to the Claimant's application. That view is informed by two reasons; the first being that the two applications are bound to attract different determinations. Secondly, that if the Defendant's application is successful and the suit is struck out then there will be no basis of venturing on the Claimant's application.

**The Defendants application dated 12<sup>th</sup> October, 2020**

6. As earlier pointed out, in its application, the Defendant seeks for the warrant of arrest issued against it by this court on **3<sup>rd</sup> September, 2020** to be set aside and the entire claim struck out mainly on grounds that the Claimant had previously filed a similar claim on the same issues and a similar subject matter but the same was dismissed. The Defendant has also contested the existence of any agreements between itself and the Claimant which forms the basis of the claim in this matter.
7. The application is supported by the **affidavit of Vincent Omollo**, the Defendant's advocate sworn on the **12<sup>th</sup> October, 2020**. He has deponed that the Claimant had filed **Admiralty Claim No.1 of 2018** against the Defendant claiming for a sum of US\$728,705.01 allegedly being the costs of goods and materials supplied together with costs for towage and maintenance services rendered for **motor vessel "Tanya"**. And in opposing that claim, the Defendant filed an application to set aside the warrant of arrest and sought the court to dismiss the same. Vide a **Ruling** delivered on **25<sup>th</sup> January, 2019** the application was allowed and the suit struck off.
8. Given that state of affairs, the counsel added that the Claimant cannot claim as against the Defendants on same grounds as it did in the previous suit hence the present suit is an abuse of the court process. The pleadings in **Admiralty Claim No.1 of 2018** and the Ruling thereof are annexed on the Affidavit.
9. The Claimant opposed the application on basis of the **Replying Affidavit** sworn by its advocate **Kelvin Asige** on **27<sup>th</sup> October, 2020**. In that affidavit, it is not denied that the Claimant had instituted a previous claim being **Admiralty No.1 of 2018** but it is averred that the said suit was not determined on its merits for the doctrine of *res judicata* to apply. **Mr. Asige's** view is that the previous suit was dismissed merely because the court's jurisdiction was not properly invoked and not because the claim was unmerited. He then added that the Claimant

was justified to claim on basis of the agreement evidenced on the attached email correspondence and that it is the statement of defence which should be struck off for disclosing no triable issues.

#### **Defendant's Submissions on the Application dated 12<sup>th</sup> October, 2020**

10. In its submissions filed on **15<sup>th</sup> December, 2020**, the Defendant argued that the court has power to strike out a pleading which is an abuse of the process of court under **Rule 3.4(2)(b)** of the **English Civil Procedure Rules**. The present suit claim is termed to be an abuse of the court process firstly, because it has increased the amount claimed from USD\$293,881.62 (claimed in the earlier suit) to USD728,705.01 when the surrounding facts have not changed at all. Secondly, that in the former suit, it had been deponed that the person liable in an action in *personam* is **Yoni Bendas** but this Claimant has now changed that position and is alleging that the person liable in *personam* is **Benmar Marine Limited**. According to the Defendant, statements made on oaths should not contradict lest the deponent will be seen to be abusing the court process.

11. In support of that line of argument, the Defendant has relied on the cases of **Muchanga Investments Limited –vs- Safaris Unlimited (Africa) Limited & 2 Others [2009]eKLR**, and the persuasive Nigerian case of **Sarak –vs- Kotoye**. In the latter case, the Nigerian Court of Appeal expressed itself as follows as to what amounts to abuse of judicial process.

***“Instituting multiplicity of actions on the same subject matter against the same opponent on the same issue or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action”***

12. Finally, it is submitted that the present suit is *res-judicata* in that the parties in the earlier action and the present action are the same, the matters in issue herein were also determined by this court in the former suit and lastly, that the claim form in the former suit has been raised again in this suit.

#### **Claimant's Submissions on the Application dated 12<sup>th</sup> October, 2020**

13. In its submissions, the Claimant has pointed out two issues for determination. The first being whether the suit herein is *res-judicata* or an abuse of the court process and secondly, who should bear the costs of the application.

14. As to whether the suit is *res-judicata*, the Claimant acknowledges that it had filed a previous claim being **Admiralty Claim No.1 of 2018** but submits that that suit was dismissed on jurisdictional grounds without being determined on merit and it cannot be gainsaid that the present suit is *res-judicata* since the suit never went on for trial. According to the Claimant, the Defendant misapprehended the principle of *res-judicata* because there being no substantive Judgment in place, the doctrine of *res-judicata* cannot lie. And even if the same was to apply in circumstances of this case, then the Defendant failed to acknowledge as such in the form of acknowledgment of service.

15. These submissions were buttressed by excerpts from the cases of **Cosmas MromboMoka –vs- Co-operative Bank of Kenya Limited & Another [2018]eKLR** and **Kenya Comercial Bank Ltd -vs- Benjoh Amalgamated Limited [2017] eKLR**.

#### **Analysis and Determination**

16. I have considered the application, the affidavit in support and in rebuttal thereof, the annexures and the authorities cited by the parties as well as the relevant law. In my considered view, the substantive issue which distils for determination is whether the claim herein should be struck out and the warrant of arrest issued on **3<sup>rd</sup> September, 2020** set aside for being an abuse of the court process.

17. It is a common ground from the submissions tendered by both parties that the Claimant had filed a similar claim, *to wit Admiralty Claim No.1 of 2018: Shipmarc Agency & Logistic Ltd-vs-The Owners of the Motor Vessel “Tanya”*. In that case, just like the present suit, the claim was for costs in respect of goods, material and services rendered to **Motor Vessel “Tanya”** for her towage, operation and Maintenance. The basis of the claim was also said to be on agreement arising from the course of dealings between both parties. To support the fact of the existence of the agreement, the Claimant attached an email correspondence between the Claimant's agent and **Yoni Bendas** on the other hand.

18. That claim was however dismissed solely on the basis that **Yoni Bendas**, described as the relevant person who would have been liable in an action in *personam* was not a beneficial owner of the **Motor Vessel “Tanya”** and thus the court's jurisdiction in rem had been improperly invoked.

19. Up to this point, it is noteworthy that the material facts in **Admiralty Claim No.1 of 2018** are also the basis of the present claim save for the fact that the relevant person who allegedly would be liable in a claim in action in rem is now said to be **Benmar Marine Limited**. Therefore, the point of contestation is whether the present claim is an abuse of the court process given that the court had dismissed the previous claim on the same facts or better still whether the present claim is *res-judicata* the previously dismissed one.

20. In my understanding, the doctrine of *res-judicata* as provided under **Section 7 of the Civil Procedure Act Cap 21 Laws of Kenya** operates to preclude later litigation if an earlier decision was, (1) *a final judgment on the merits*, (2) *by a court of competent Jurisdiction*, (3) *in a case involving the same parties or their privies*, (4) *involving the same cause of action*.

21. A cardinal ingredient to the doctrine is that the issues in dispute ought to have been heard and finally determined in the former suit and it matters not whether the dispute was based on the same cause of action or between the same parties litigating under the same title or that a competent court had rendered a decision, in so far as a matter is not heard and determined on its merits, the doctrine on *res-judicata* cannot apply.

22. Therefore, if for instance a matter is dismissed preliminarily on questions of jurisdiction just as the present case, that cannot operate as *res judicata* for the merits of the claim. The Claimant in such a case is not barred from properly invoking the jurisdiction of the court in a subsequent claim.

23. Turning to the circumstances of the present case, the previous claim between the parties, being **Admiralty Claim No.1 of 2018** was not determined on its merits and *res-judicata* does not bar any subsequent action touching on the merits of the claim. However, the point for consideration is whether the Claimant has now properly invoked the jurisdiction of the court as intimated by the Learned Justice P.J Otieno in the **Ruling** delivered on **25<sup>th</sup> January, 2019?**

24. My understanding of the law is that a claim in an action in rem which essentially is a claim against a thing or the res only lies when there is a peculiar relationship existing between the relevant person and the vessel at two critical times, that is, when the cause of action arose and when the action is brought. In the Kenyan courts, such jurisdiction is exercised by virtue of **Section 4** of the **Judicature Act of Kenya** as under **Section 21(4)** of the **Senior Courts Act** which provides as follows:-

***“In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—***

***(a) The claim arises in connection with a ship; and***

***(b) The person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—***

***(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or***

***(ii) Any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.” (Emphasis added).***

25. The above provision demonstrates that for proceedings in rem to lie, the relevant person has to have some connection with the vessel proceeded against in rem either by being the beneficial owner or demise charterer of the vessels and above all should be the person who would be liable in *personam*.

26. Applying those principles to the present case, the relevant person in the

claim form is described as **Benmar Marine Limited** and the certificate of registration exhibited thereto shows that **Benmar Marine Ltd** are the owners of the **Motor Vessel “Tanya”**. However, it is denied that the owners of the ship ever had an agreement with the Claimant, **Shipmarc Agency & Logistics Limited** for supply of goods, materials or services rendered to the vessels as asserted in the claim form and they are not liable for such a claim. On the other hand, in buttressing the existence of the agreement, the Claimant annexed as **“KA-1”** being copies of email correspondences with one **Mr. Yoni Bendas** who is described in the claim form as the Director of the ship-owners.

27. I have had the benefit of reading through all the email correspondences as annexed by the Claimant but I have not seen any of them indicating that **Yoni Bendas** undertook the negotiations as or was acting in the capacity of a Director of **Benmar Marine Ltd**. There is also no document annexed to show that **Yoni Bendas** was a Director of **Benmar Marine Ltd** at the time when the cause of action arose or was authorized to negotiate on behalf of **Benmar Marine Ltd** so as to establish the underlying liability against owners of a ship which is necessary for the arrest of the ship for enforcement of a maritime claim.

28. In my understanding, a liability in *personam* can only arise as a matter of contract or quasi-contract or by way of tort or under statute. However, pertinent to the present case, the only issue to be considered is liability in *personam* as arising from contractual agreements as between the concerned parties. In such cases, it is necessary to show privity of contract between the Claimant and the person liable, for without such privity no contract can be said to exist. Nonetheless, there may be cases where elements of contract may be absent and yet the relationship between the parties gives rise to a right in one party and a corresponding liability in the other. In this case, I have pointed out that the claimant has not established the privity of **Benmar Maritime Ltd** to the negotiations it had with **Yoni Bendas**.

29. I must also appreciate that in an application for setting aside the arrest warrants, the court should only consider whether the Claimant has a reasonably best case for the arrest to subsist and the applicable test would be that of a reasonably arguable case. However, this does not mean that the court should keep a blind eye to the averments in the other pleadings already filed by the parties, such as the defence and so on, since it would be a great danger in upholding an arrest warrant on unilateral assertions made by the Claimant.

30. In this case, the Claimant asserts that the basis of the claim is an agreement between the parties. I have also discussed that the purported agreements were between the Claimant and **Yoni Bendas** who is yet to be ascertained to either being a director of **Benmar Marine Ltd** or

having authority to act on behalf of the Defendant at length. The Defendant has denied the existence of such agreements and the Plaintiff has not shown any evidence indicating that the Defendants were bound by the agreements in the email correspondences as alleged. In my humble view, it would then be a travesy to justice to still allow the Claimant to rely on the unilateral assertions in the claim form for the court to confirm the arrest as justified.

31. In the upshot and on the yardstick of the above discussion, this court is not persuaded that the Claimant has a reasonably arguable case as against the Defendant who has not been shown to be privy to the agreements in the email correspondences between the Claimant and **Yoni Bendas**.

32. Consequently, I find that the Claimant has no case to proceed against the **Motor Vessel “Tanya”** in rem on the basis of the agreements in the email correspondences between itself and **Yoni Bendas** and the claim is eligible to be struck out.

33. For those reasons, the followings orders do issue;

- a) An order does and is hereby issued striking out the Claimants Claim as is in the claim form filed on 3<sup>rd</sup> September, 2020.*
- b) An order does and is hereby issued setting aside the warrants of arrest dated 3<sup>rd</sup> September, 2020.*
- c) The Defendant is awarded costs of this matter.*

34. As indicated earlier in this Ruling, the determination of the Defendant’s application dated **12<sup>th</sup> October, 2020** would impact on the Claimant’s application for setting aside the defence and/or entering interlocutory Judgment as prayed.

35. Now that the arrest has been set aside and the claim dismissed, the Plaintiff’s application is deemed to have gone with the claim and I will not belabor on its merits.

It is hereby so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24TH DAY OF SEPTEMBER, 2021.**

**D. O. CHEPKWONY**

**JUDGE**

In the presence of:

Mr. Asige counsel for Claimant

Mr. Omollo counsel for Defendant

Court Assistant - Winny