



ET Timbers PTE Limited v Owners of Motor Vessel ‘Dolphin Star’; Starryway Trading & Shipping Company Ltd (Intended Interested Party) (Admiralty Cause E003 of 2021) [2022] KEHC 17112 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEHC 17112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ADMIRALTY CAUSE E003 OF 2021
MN MWANGI, J
JULY 29, 2022**

BETWEEN

ET TIMBERS PTE LIMITED CLAIMANT

AND

OWNERS OF MOTOR VESSEL ‘DOLPHIN STAR’ DEFENDANT

AND

STARRYWAY TRADING & SHIPPING COMPANY LTD INTENDED INTERESTED PARTY

RULING

(Admiralty claim *in rem* against the owners of the motor vessel ‘Dolphin Star’ of the Port of Panama)

1. There are three Application Notices on record for determination. The first application was filed by the claimant. It is dated 23rd August, 2021. It seeks the following orders-
 - a. Spent
 - b. Spent
 - c. Judgment in default of filing an acknowledgement of service be given for the claimant:
 - i. In the sum of US\$ 2,601,294.02 (or in an amount to be assessed on account of damages for the loss sustained by the claimant due to reduction in sale price for late delivery of the cargo caused by the defendant’s wrong conduct as well as that of its servants, employees, agents or masters); and
 - ii. US\$ 8,780.00 on account of the cargo shut-out charges;



- iii. US\$ 22,742.00 for the brokerage commission due and owing by the defendant;
 - iv. Interest on items (i), (ii), and (iii) above as prayed in the Amended Claim Form dated 4th August, 2021 and filed herein on the same date.
 - d. The Motor Vessel ‘Dolphin Star’ be appraised and sold by the Admiralty Marshal by public auction, whether pendente lite or in consequence of judgment against the defendant, for the highest price that can be obtained, but not less than the certified value unless otherwise ordered by the Honourable Court.
 - e. The Admiralty Marshal be entitled to deduct his/her fees and expenses incurred in respect of the appraisal and sale of the Motor Vessel ‘Dolphin Star’ from the proceeds of sale thereof.
 - f. On completion of the sale, the Admiralty Marshal signs the certificate of sale together with any bill of sale or other documents necessary to effect transfer of ownership of the Motor Vessel ‘Dolphin Star’ to the purchaser.
 - g. Such other orders or reliefs as this Honourable Court may deem fit.
 - h. The costs of this application and that of the suit be awarded to the claimant and be summarily assessed.
2. The second Application Notice was filed by the defendant. It is dated 8th October, 2021. It seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That after inter-parte hearing the Amended Claim brought against the Motor Vessel ‘Dolphin Star’ (the vessel) herein be struck out on the grounds:
 - i. That service of the amended claim was effected on the defendant’s Advocate well outside the time prescribed in the Honourable Court’s orders dated 14th July, 2021; and
 - ii. That this constitutes an abuse of the Court’s process or is otherwise likely to obstruct the just disposal of the proceedings as provided for under Rule 3.4(2)(b) of the English Civil Procedure; and/or
 - iii. That there has been a failure to comply with a Court order as provided for under Rule 3.4(2)(c) of the English Civil Procedure Rules; and
 - iv. That there has been no attempt by the claimant, retrospectively or otherwise, to seek an order granting an extension of time for service of the Amended Claim under Rule 3.1(2)(a) of the English Civil Procedure Rules.
 - d. That the costs of this Application Notice be provided for.
3. The third Application Notice is by the claimant. It is dated 5th November, 2021. It seeks the following orders-
 - a. Spent



- b. The time for service of the Amended Claim Form on the defendant be extended up to and including 27th August, 2021 and the Amended Claim Form served on it and received under protest for having been ‘filed out of time’ be deemed to have been served within time.
 - c. The costs of this application be awarded to the claimant.
4. To put matters into perspective, I will give a brief background to this Admiralty Cause. It was instituted on 4th April, 2021 by way of a Claim Form. On the same day, this Court issued an ex parte warrant of arrest for the motor vessel ‘Dolphin Star’ which was said to have been in breach of a charterparty entered into, between the claimant and the defendant. Thereafter, on 16th April, 2021 the defendant filed an Application Notice inter alia challenging the jurisdiction of this Court to hear and determine the claim. When determining the application, this Court found four issues for determination, namely; if the action in rem filed by the claimant falls under Sections 20 and 21 of the Senior Courts Act, 1981 of England; secondly, if this Court had jurisdiction to issue the warrant of arrest against the motor vessel ‘Dolphin Star’; thirdly, if this Court has jurisdiction to hear the claim in rem; and fourthly, if the warrant of arrest should be set aside and/or the action in rem should be struck out and if the defendant should deposit security for release of the said vessel.
 5. A ruling on the said Application Notice was delivered on 14th July, 2021. On the first issue, the Court found that the action in rem as filed fell within the ambit of Sections 20 and 21 of the Senior Courts Act. On the second issue, this Court found that it had jurisdiction to issue the warrant of arrest. On the third issue, this Court found that it had jurisdiction to hear the claim in rem. On the fourth and last issue, this Court held that the warrant of arrest shall be lifted as soon as the sum of Kshs. US\$ 3,000,000.00 is deposited in Court. In the said ruling, the Court stated that it had noted some defects in the Claim Form and instead of striking out the claim, the Court in the interest of justice granted leave to the claimant to amend and file its pleadings within 21 days, and effect service of the same on the defendant. The claimant filed its Amended Claim Form on 4th August, 2021.
 6. Aggrieved with this ruling, the defendant filed an appeal to the Court of Appeal together with an application for stay of proceedings of this Court. The Court of Appeal dismissed the application for stay of proceedings. The Court is yet to make a determination in the appeal.

The first Application

7. The claimant’s Application Notice dated 23rd August, 2021 is premised on the grounds set out on the face of the said application, the supporting affidavit and supplementary affidavit sworn by one A. Thalamuthu, a director of the claimant. He averred that as per the ruling dated 14th July, 2021, the Court upheld its jurisdiction.
8. The claimant deposed that the defendant wrongfully withheld the release of the signed bills of lading in the agreed format without any lawful basis or justification and continues in such wrongful conduct. The claimant further deposed that the true identity of the carrier is the defendant, Defang, and Starryway is simply a façade that was the loading agent (at Greenville) of the true owner and carrier, Defang. It was stated that it is common ground that Defang are the registered owners of the vessel and as noted from the e-mail exchange annexure AT1 that OBT Shipping Limited was instructed as the defendant’s and the vessel’s agent in Greenville by the defendant and/or the Master of the aforesaid motor vessel and directed to only take instructions from Fairwind, the defendant’s (and vessel’s) Commercial Managers as stipulated in the P&I Certificate exhibited at annexure AT1.
9. It was deposed by the claimant that clause 2 of the applicable charterparty Fixture Note provides that the ‘shutout’ clause would apply if owners failed to load a minimum quantity of 6,500 cbm with the



applicable shut out costs agreed at US\$20.00. That it was also agreed under the said clause that the carriage would be on sole cargo basis only with no part cargo allowed.

10. It was contended that during the loading operation without the claimant's knowledge and agreement, the Master of the motor vessel altered the stowage plan and only loaded 6,252.13 cbm (921 pieces of Liberian logs) as per the mate's receipt issued instead of the 6,500 cbm as per the stowage plan. The claimant averred that the foregoing was deliberate and pre-meditated to allow for an empty space in the forward hold to load separate cargo under a different charterparty dated 9th February, 2021.
11. It was averred that under the charterparty Fixture Note that formed the contract of carriage between the claimant and the defendant, the latter was under an implied obligation to proceed from the load Port of Greenville Liberia directly to the discharge Port of Chittagong, Bangladesh without deviation and with reasonable dispatch and that the voyage was expected to take 33 days from 6th March, 2021, with the vessel arriving at the Port of discharge at the end of March, 2021 or early April, 2021, but instead of doing that, in breach of the contract of carriage, the motor vessel deviated to Port Gentil, Gabon to load additional project cargo pursuant to a 9th February, 2021 charterparty and that the said load was then discharged in Mombasa, Kenya.
12. The claimant further averred that the last minute change in stowage plan was no doubt pre-meditated to accommodate the additional project cargo which the defendant unilaterally decided to carry thereby unjustly enriching itself and earning additional freight at the claimant's expense and loss. The claimant referred to annexure AT1 attached to its affidavit which shows the space left for the loading of additional cargo despite the fact that the motor vessel was cleared by the Port Authorities in Liberia, to sail directly to Chittagong as her next destination. It was deposed that having regard to the terms of contract of carriage, the deviation to load/discharge the additional cargo in Port Gentil/Mombasa was unreasonable and a breach of the said terms of carriage.
13. It was stated by the claimant that the total cost and freight value of the cargo (921 pieces of Liberian logs of 6,252.13 cbm) is US\$2,601,294.02 and that the defendant's refusal to issue and release the signed original bills of lading, amounts to conversion of the claimant's cargo and the claimant is entitled to the full value thereof. The claimant's deponent further stated that even if it obtains the delivery of the cargo, he anticipates that the condition of the cargo will have rapidly deteriorated to the extent that he expects at least 10% measurement loss amounting to US\$260,000.00, if not more. He stated that in addition to the foregoing, all eight letters of credit covering the value of the cargo issued by the claimant's buyers had expired and even if the bills of lading in the original format were to be released, the claimant would be unable to negotiate a sale on the same terms, if at all, particularly taking into account the condition of the cargo given that the market for the cargo in Chittagong had adversely changed and had since fallen as a result of saturation.
14. The claimant averred that the continued delay and frustration by the defendant's wrongful actions may well result in the entire cargo becoming unsalvageable and being a total loss. It was stated that some of the purchasers had cancelled their purchases and that the claimant was being debited interest by its bankers.
15. It was contended that the defendant has no defence to the claimant's claim herein which is meritorious, and neither is the defendant entitled to withhold delivery of the cargo to the claimant for transshipment to Chittagong in an attempt to mitigate the losses. It was further contended that given the defendant's breaches and wrongful conduct, all costs and expenses arising out of the discharge, delivery and transshipment of the subject cargo of logs ought to be for the defendant's account to be paid forthwith and, in any event no later than 7 days from the date of grant of the orders sought. It was stated that the cost of transshipment would be anything between US\$130,000.00 and US\$250,000.00 depending



on the nature of the operation, which is exclusive of the additional freight cost to be incurred for the voyage between Mombasa to Chittagong.

16. The claimant deposed that it was apparent that the defendant was not intent on putting up security to secure the release of the motor vessel 'Dolphin Star' and to facilitate the completion of the of the voyage to Chittagong, Bangladesh as it had earlier evidenced in its marine Broker's instruction note attached to Nishit Maru's affidavit filed on 16th April, 2121. It further deposed that the only conclusion to be drawn from this is that Defang is either unwilling, or is unable to put up security for the release of the vessel which, effectively, in the absence of proper maintenance would be a wasting asset. It was stated that in order to preserve the value of any realizable fund, it is now imperative, given the circumstances, that he motor vessel Dolphin Star be sold but the defendant appears to be content in allowing its asset to waste away and it will have an adverse effect on the cargo and its quality.
17. The claimant prayed for its application for judgment in default, for discharge and delivery of the cargo and the sale of the vessel to be allowed as prayed.
18. The defendant replied to the said application through several affidavits. They include an affidavit in reply dated 14th September, 2021, a further affidavit in reply dated 15th September, 2021, both sworn by Samir Inamdar, learned Counsel for the defendant. The last is a second further affidavit dated 15th September, 2021 sworn by Nishit Maru, learned Counsel for the defendant and a partner of Mr. Inamdar. The crux of their opposition to the application is that the Amended Claim Form and the claimant's application dated 23rd August, 2021 was served to them on 27th August, 2021, hence, they received the pleadings under protest for being served out of time.

The second application.

19. The second application sought orders for the Amended Claim Form to be struck out for late service. The application is supported by the supporting affidavit sworn by Nishit Maru, one of the defendant's Counsel. He deposed that the claimant was directed to amend, file, and serve its pleadings before 21 days after the date of the ruling delivered on 14th July, 2021. He further deposed that the claimant filed its Amended Statement of Claim on 4th August, 2021 but inexplicably served the same three weeks later on 27th August, 2021. He deposed that the Amended Statement of Claim was then received under protest. He averred that the claimant served the Amended Statement of Claim with an application seeking orders of default judgment against the defendant. Mr. Maru deposed that the late service of the Amended Claim is clearly non-compliant with the order of 14th July, 2021 as provided for under Rule 3.4 (2)(c) of the Civil Procedure Rules-England. He added that no leave retrospective or otherwise was sought to extend or enlarge time for this purpose as required under Rule 3.1(2)(a) of the Rules. He deposed that the Amended Claim is irregularly on the Court record and should be struck out.
20. The claimant opposed the Application Notice through a replying affidavit sworn by one Josephat Munika Sore an employee of the law firm representing the claimant. He deposed that he was instructed to serve the Amended Claim Form to the defendant's Counsel on 4th August, 2021 but his mind was preoccupied with personal matters of his mother-law who was admitted to hospital and by the time he arrived at the defendant's Counsel's office, it was late, and the offices were closed for the day. He further deposed that his mother-in-law passed on and due to bereavement and an oversight on his part, he did not hand over the Amended Claim Form to his colleague to effect service on the defendant's Counsel. He stated that he was out of the office and only managed to serve the pleadings on 23rd August, 2021.



The third application

21. The third application is by the claimant. It seeks for orders that the time for service of the Amended Claim Form on the defendant be extended up to and including 27th August, 2021 and for the Amended Claim Form served on it and received under protest for having been 'filed out of time' to be deemed to have been served within time.
22. The application is premised on the grounds on the face of the application and the depositions in the replying affidavit of Josephat Sore aforementioned. It was submitted that no protest was raised out of time and the defendant waived any objection it may have had. It was further submitted that the objection raised was simply an afterthought to impede the Court process. It was stated that no prejudice has been caused nor alleged by the defendant and it had ample time to respond to the matter raised if it so desired. He contended that the defendant's conduct is simply intended on frustrating and delaying the conclusion of this matter for collateral purposes.
23. The defendant opposed the application through a replying affidavit sworn by Samir Inamdar Advocate, for the defendant. He deposed that the said application was brought over three months after the Amended Claim Form was required to be served. He deposed that the defendant is opposed to such extension of time being given on the ground that the substantial delay is bringing the application does not justify or warrant such leave being granted.

Submissions

24. The 3 applications were canvassed by way of written and oral submissions. Mr. Khagram, learned Counsel for the claimant submitted that Part 61 of CPR-England states that an acknowledgment of service must be filed in every Admiralty claim in rem and it must be done within 14 days of service of the Claim Form. He added that once jurisdiction has been upheld, an Acknowledgment of Service should be filed within 14 days in accordance with Part 11(7) of the CPR-England or such other period as the Court may direct. He submitted that under the said provisions, the Acknowledgment of Service as filed by the defendant ceased to have any effect and the defendant was at liberty to file a further Acknowledgment of Service within 14 days. According to the claimant, the 14 days lapsed on 28th July 2021 without any action from the defendant, therefore, the claimant is entitled to judgment in default of Acknowledgment of Service under the provisions of Part 61.9 of the CPR-England. He contended that the continued stay of the vessel at Mombasa is adversely impacting the claimant's business as well as its cargo which could potentially become unsalable.
25. Mr. Khagram submitted that Euro Liberian Logging claims ownership of the cargo, the bills of lading were signed showing that the contract of carriage was between the claimant and the defendant. He stated that all his client has to show is that it has a valid claim. He referred to practice direction 2D-60 in stating that before judgment in default can be obtained under the provisions of Part 61.9 of the CPR-England, there must be evidence adduced to the satisfaction of the Admiralty Court.
26. He stated that the carriage of goods was on sole cargo basis and no part cargo was allowed. He indicated that the voyage was from Liberia to Cittagong in Bangladesh. He further indicated that the permission to sail was obtained on the understanding that the vessel was going to Chittagong but the vessel went to Port Gentil and then to the Port of Mombasa, where she was arrested. It was submitted that the contract of carriage was reached by the defendant and as such, the claimant is entitled to discharge goods after diversion. And is also entitled to costs for transshipment. Mr. Khagram contended that the real reason for deviation was that the owners of th vessel were complaining about the cost of bunkers



27. He submitted that the application dated 23rd August, 2021 was not controverted since no Acknowledgment of Service was filed after this Court found that it had jurisdiction. He stated that all the letters of credit have expired which means that as far as his client is concerned, the entire cargo is a total loss and the claimant is entitled to judgment on the entire cargo as there is no doubt that the contract of carriage was breached.
28. He stated that lesser cargo was carried than agreed and that his client was claiming shut out charges. He also stated that his client was claiming brokerage commission and interest as well as the cost for transshipment. He submitted that the claimant has applied for the sale of the vessel in light of the defendant's deliberate failure to put up security. He indicated that they had filed a draft order for endorsement if this Court finds that the application dated 23rd August, 2021 is merited.
29. In regard to the application by the defendant seeking an order to strike out the Amended Claim Form and the one filed by the claimant seeking an extension of time for service of the said document or for it to be deemed as having been properly filed, Mr. Khagram submitted that *the Constitution* of Kenya is the supreme law of the land and all other laws including the *Judicature Act* remain subordinate to it. He stated that the only ground relied on by the defendant in the application for striking out the Amended Claim Form, as well as the opposition to the claimant's extension of time application is the question of delay.
30. He stated that whilst Court processes are guided by rules and regulations, the provisions of Article 159(2)(d) of *the Constitution* requires Courts to administer justice without undue regard to technicalities. He relied on the decision in *Shabbir Ali Jusab v Anaar Osman Gamrai* [2013] eKLR, to show that a Court should not allow the prescriptions of procedure and form to trump the primary object of dispensing substantive justice to the parties.
31. While addressing the issue of delay in the service of the Amended Claim Form to the defendant, Mr. Khagram relied on the Court of Appeal decision in *Pkiech Checimana v Limakorwai Achipa* [2020] eKLR, and submitted that the principles for delay are that the Court has to be satisfied that the delay was inordinate; that such delay must be excusable and if so satisfied, the Court ought to consider whether justice can still be done to the parties notwithstanding the inordinate delay; and that if the Court is satisfied that justice can be done then it will in the exercise of its discretion, refuse the application for dismissal. He submitted that there is no allegation or evidence that the delayed service has caused the defendant prejudice.
32. In urging this Court not to strike out of the Amended Statement of Claim, the claimant's Counsel relied on several cases, such as *D Chandulal K Vora & Co. Ltd v Kenya Revenue Authority* [2017] eKLR, *Trust Bank Limited v Amalo Company Limited* [2002] eKLR and *Peter Ngugi Kabiri v Esther Wangari Githinji* [2015] eKLR.
33. He submitted that the Amended Claim Form was filed within time but it was served three weeks out of time on account of the circumstances explained by Josephat Munika Sore in his affidavit sworn on 18th October, 2021, filed in opposition to the application for striking out the said document. He stated that the claimant was relying on the affidavit by Josephat Munika Sore, in support of the application for extension of time. Mr. Khagram expressed the view that the delay cannot be said to be inordinate.
34. He disagreed with the proposition by Mr. Inamdar that an application for default judgment cannot be treated as valid when it was filed before service of the Amended Claim Form on the basis of which the defendant is allegedly being deprived of its right to defend the action, which he regarded as not only misleading but outrightly misconceived. He submitted that the application for judgment was filed on account of the defendant's failure to file an acknowledgment of service as was required under the



provisions of Part 11 Rule 7 of the English Civil Procedure Rules, for filing an Acknowledgement of Service within 14 days of the Court upholding jurisdiction in the matter which expired on 28th July, 2021. Mr. Khagram contended that the obligation to file an acknowledgment of service did not arise in law as a consequence of the filing and service of the Amended Claim Form which the defendant is simply using as a smokescreen to disguise its own default.

35. He invited the Court to examine the defendant's conduct in these proceedings which has never been towards defending the suit but rather frustrating the expeditious resolution thereof by even failing to put up security for the release of the vessel as directed by the Court. He contended that the defendant has at every step of the proceedings sought to delay and/or frustrate these proceedings to the detriment of the claimant whose cargo continues to deteriorate on board the motor vessel.
36. He stated that it is fallacious for the defendant to suggest that the requirement to file an Acknowledgment of Service accrued after service of the Amended Claim Form when the requirement was for it to be filed even earlier than the time for filing of the Amended Claim Form had expired. He prayed for the application for striking out of the Amended Claim Form to be dismissed and the application for extension of time to be allowed.
37. Mr. Inamdar submitted that in view of the hardship that parties undergo with the ship remaining under arrest, the breach of service cannot be termed as trivial or immaterial. He stated that the claimant has no right to ignore, overlook, or evade the consequences of that obligation to serve within time. He contended that the claimant's attempt to place a burden of its failure on an employee simply cannot wash as the ultimate responsibility to comply with an order of Court rests of the firm and so there can be no reasonable explanation as to why the person responsible for conducting the claimant's claim were not vigilant enough to know that the Amended Claim Form had not been served for three weeks. He cited the case of *Mitchelle vs. News Group Newspaper Ltd Ltd* (2013) EWCA Civ 1537, to buttress the submission that even a delay of four days cannot be allowed to stand because it is wholly unprocedural, contumelious and an abuse of the Court process.
38. In regard to the specific order given by this Court in its ruling dated 14th July, 2021 granting leave to the claimant to amend its pleadings within 21 days, Mr. Inamdar, pointed out that the claimant filed its Amended Particulars of Claim in Court on 4th August, 2021 being the last day of the 21 day period but did not serve the said Amended Claim Form on the defendant until the 27th August, 2021, which was over three weeks later. He stated that on 23rd August, 2021, four days before it served its Amended Claim Form, and that the claimant filed its application seeking default judgment, which application it served on the defendant on 27th August, 2021 together with the Amended Claim Form. He stated that the said action constitutes a flagrant violation of the Court process as the order was quite clear on what required to be done within 21 days. Mr. Inamdar contended that the claimant's failure to serve means that there is no valid claim on record and the claimant is in no position to seek any of the orders, and in particular, the application for default judgment.
39. He submitted that the key provisions are CPR Rule 3.4(2)-England which gives the Court the power to summarily strike out a statement of case. He was of the view that the grant of the orders being sought for extension of time would be wholly unfair and incompatible with Rule 1.3 of CPR-England which provides that the parties are required to help the Court further the overriding objectives. In relying on the case *Mitchell vs. News Group Newspapers Ltd.* (supra), which concerned an appeal arising out of the refusal by the High Court to enlarge time under CPR Rule 3.9 to enable the appellant to file a costs budget outside the time prescribed by the rules, he stated that the delay in that case was of 5 days and the Court of Appeal upheld the decision of the High Court. He submitted that the case of *Mitchell vs. News Group Newspapers Ltd.* (supra), was followed by the case of *Denton v TH White*



Ltd (2014) EWCA Civ 906, where the Court of Appeal sought to clarify and amplify the principles in the case of *Mitchell vs. News Group Newspapers Ltd.* (supra), on the basis that the judgment in the said case had been misunderstood and was being misapplied by some Courts.

40. He submitted that an application for extension of time made before the time has expired will be looked upon more favourably than an application for the relief from sanction made after the event. He also cited the case of *Electrical Industries Ltd v Alstom Ltd* [2014] EWCA civ 4330 (com), where a claim form was served 20 days late and the defendant applied to strike out the claim, prompting the claimant to make an application for extension of time, but Mr. Justice Smith dismissed the application for extension and struck out the claim. He also relied on the decision in *Price v Price* [2003] EWCA 888 and *North Midland Construction Plc v Geo Networks Ltd* (supra) both on extension of time and the striking out of claims.
41. Additionally, Mr. Inamdar submitted that in the *North Midland Construction* case (supra), the learned Judge also spoke of the consequences of failing to comply with the rules of service by stating that there could be no valid service of particulars of claim after expiry of the time prescribed without leave of the Court, as until then, the action is stayed.
42. He submitted that an application for default judgment cannot be valid when it was filed before an amended claim was served on to the defendant hence, to sanction that would not only deprive the defendant its right to defend the action but it would be tantamount to sanctioning an abuse of process and a miscarriage of justice. He cited CPR 10.3(1)(b) to demonstrate that as a general rule, an acknowledgment of service can only be filed within 14 days of service of the Particulars of Claim on the defendant. He submitted that in this case, there was no obligation for the defendant to file a second acknowledgment of service until 14 days after it was served with the Amended Claim Form, which period could not have commenced earlier than 27th August, 2021.
43. The defendant asserted its earlier position that it was not obliged to file a second Acknowledgment of Service as by so doing, it would be submitting to the jurisdiction of this Court under CPR Rule 11.8. Mr. Inamdar relied on the case of *Deutsche Bank AG London Branch v Petromena ASA* [2015] EWCA civ 226.
44. On the issue of discharge of cargo as prayed by the claimant, he submitted that the ownership of cargo remains to be determined and that can only be properly tested at trial. He also indicated that arbitral proceedings are ongoing.
45. In regard to the prayer made by the claimant for appraisalment and sale of the vessel pendent lite, Mr. Inamdar submitted that such an order is usually made before judgment and as a matter of practice and law, it is made very rarely and requires a number of conditions to be satisfied before it can be made. He stated that the considerations and conditions to be met are laid out in “The law and Practice of Admiralty Matters” by Derrington and Turner at paragraphs 7.59 and 7.60 on pages 170-171. He asserted that the grounds and the material set out in the claimant’s application do not satisfy the said conditions.

Analysis and Determination.

46. I have considered the Application Notices filed by the parties herein, the submissions of Counsel and the authorities relied on. The issues that arise for determination are as follows-
 - a. Whether default judgment should be entered against the defendant for failure to file an Acknowledgment of Service?
 - b. Whether the Amended Claim Form should be struck out for delayed service?



- c. Whether the time of service of the Amended Claim Form should be extended or whether the Amended Claim Form should be deemed as having been properly served?

Whether default judgment should be entered against the defendant for failure to file an Acknowledgment of Service?

47. The prayer for default judgment is on the grounds that the defendant failed to file a further Acknowledgment of Service after the Court upheld its jurisdiction. Rule 12.3(1) of CPR-England provides for the conditions to be satisfied before default judgment is issued. It states as follows-

- “(1) The claimant may obtain judgment in default of an acknowledgment of service only if at the date on which judgment is entered—
- (a) the defendant has not filed an acknowledgment of service or a defence to the claim (or any part of the claim); and
 - (b) the relevant time for doing so has expired.”

48. Mr. Inamdar deposed in his affidavit in opposition of the application for entry of default judgment that the Amended Claim Form was served upon them on 27th August, 2021 alongside the application seeking default judgment. On the other hand, the Court Clerk working for the law firm representing the claimant who was meant to serve the Amended Claim Form deposed that due to his personal challenges at home he forgot to delegate service of the Amended Claim Form to his colleague and only realized that the said document had not been served when he was instructed to serve the application seeking entry of default judgment. Given the orders arising from the ruling of 14th July, 2021, this Court concurs with Mr. Inamdar that the defendant was not required to file an Acknowledgment of Service before being served with an Amended Claim Form. As such, Rule 12.3(1) of the CPR–England could not be complied with, due to non-service of the Amended Claim Form within the timelines set by this Court.

49. The Court of Appeal in CA No. 6 of 2015 *James Kanyita Nderitu V Maries Philotas Ghika & another* [2016] eKLR, cited with approval, the case of *Frigonken Ltd v. Value Park Food Ltd*, HCC No. 424 of 2010, where the High Court demonstrated how a default judgment could be irregular. It stated as follows-

“If there is no proper or any service of summons to enter appearance to the suit, the resulting default judgment is an irregular judgment liable to be set aside by the court *ex debito justitiae*. Such a judgment is not set aside in the exercise of discretion but as a matter of judicial duty in order to uphold the integrity of the judicial process”.

50. In the ruling by this Court dated 14th July, 2021, instead of striking out the claimant’s suit, this Court held that the defect in the pleadings could be remedied by an amendment. This Court also noted that if it struck out the claim at an interim stage, it would be doing an injustice to the claimant. It was therefore the responsibility of the claimant to file its Amended Claim Form first and thereafter, the defendant would be at liberty to file its Acknowledgment of Service. It is evident, and it was admitted by the Court Clerk working for A.B. Patel & Patel Advocates, that the defendant was only served with the Amended Claim Form on the same day the claimant filed an application seeking default judgment. That was unfair on the part of the claimant’s Counsel. The same hand of equity that granted leave the claimant to amend its pleadings, is the same hand that will strike out the application for default judgment. It is a doctrine of equity that whoever comes to equity must come with clean hands and he who seeks equity must do equity, not forgetting that delay defeats equity. As a result of this Court’s finding that there



was negligence in effecting service of the Amended Claim Form within the timelines set by this Court, the application dated 23rd August, 2021 is hereby struck out with costs to the defendant.

51. This Court however notes that the delay in effecting service of the Amended Claim Form was occasioned by the law firm of A.B. Patel & Patel Advocates and not by the claimant, who is an innocent party in as far as the default in service is concerned. The said law firm shall meet the costs of the Application Notice dated 23rd August, 2021.

Whether the Amended Claim Form should be struck out for delayed service?

52. In the ruling dated 14th July, 2021, this Court ordered the claimant to amend, file and serve its amended pleadings within 21 days of the date of the said ruling. The defendant was to be served on or before 4th August, 2021. This was not done due to the negligence of a Court Clerk at the law firm of A.B. Patel & Patel Advocates. The excuse given was that the said Court Clerk who was tasked with service of the documents was having personal issues. This Court is alive to the fact that once in a while errors do occur. It must however not be forgotten that an oversight such as the one made by the said Court Clerk might have a ripple effect as the hands of time do not stop to wait for man.

53. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, the Supreme Court of Kenya addressed itself on the issue pleadings being filed out of time by stating the following-

“By filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such ‘an appeal’, is tantamount to moving the Court to remedy an illegality. This, the Court cannot do. To file an appeal out of time and seek the Court to extend time is presumptive and inappropriate. No appeal can be filed out of time without leave of the Court. Such a filing renders the ‘document’ so filed a nullity and of no legal consequence.”

54. In this case, pleadings were filed within time but served out of the time prescribed. The holding in the above case still relates to the application herein. This Court prescribed time to the claimant for service of the Amended Claim Form. If this Court was to accept service out of time, it will be remedying an illegality.

55. It is however the general principle that a litigant should not suffer due to a mistake of his/her Counsel. That was the position taken in *Lee G. Muthoga -v- Habib Zurich Finance (K) Ltd & another*, Civil Application No. Nair 236 of 2009 where it was held that:

“it is widely accepted principle of law that a litigant should not suffer because of his Advocate’s oversight.”

56. In the case *Winnie Wambui Kibinge & 2 others -v- Match Electricals Limited* Civil Case No. 222 of 2010 the Court held that:

“It does not follow that just because a mistake has been made a party should suffer the penalty of not having his case heard on merit.”

57. Article 159(2)(d) of *the Constitution* of Kenya requires that Courts should administer justice without undue regard to technicalities of procedure. Having noted the fact that the Amended Claim Form was filed within the 21 days given by the Court, I decline to struck it out on the basis of delayed service. Costs of the Application Notice dated 8th October, 2021 are awarded to the claimant.



Whether the time of service of the Amended Claim Form should be extended or whether the Amended Claim Form as served should be deemed as having been properly served?

58. The last application dated 5th November, 2021 sought orders for either the time of service to be extended or for the Amended Claim Form as served to be deemed as having been properly served. In the case of Nicholas Kiptoo Arap Korir Salat (supra) the Court held that pleadings filed outside time are presumptive and inappropriate. In this Court's considered view, the decision also applies to service of pleadings out of the time prescribed. Article 159(2)(d) of *the Constitution* place a duty on Courts to apply the principle of substantial justice, rather than to rely on procedural technicalities in dispensing justice. The discretion bestowed on Courts should be exercised while taking into consideration the special and unique circumstances of each case. (see Raila Odinga vs Independent Elections and Boundaries Commission & others, Petition No. 5 of 2013).
59. The Supreme Court in the case of Nicholas Kiptoo Arap Korir Salat (supra) laid down the underlying principles that must be considered by Courts in the exercise of discretion to extend time. The principles are-
- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
 2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.”
60. The reasons put forth by the claimant for delayed service have not satisfied this Court, all that can be seen was that the law firm representing the claimant was negligent in effecting service of the Amended Claim Form. It would be unjust and unfair to the defendant if this Court was to deem the Amended Claim Form as having been properly served because the defendant will have been robbed of its time to file an Acknowledgment of Service and respond to the Amended Claim Form, if it wishes to do so. Further to the foregoing, this Court would be accentuating an illegality.
61. In the said circumstances, the application dated 5th November, 2021 is hereby dismissed. The claimant is ordered to serve the defendant with the Amended Claim Form within 7 days from the date of this ruling. The defendant will be at liberty to file its Acknowledgment of Service within the time prescribed by law. The costs of the application dated 5th November, 2021, are awarded to the defendant. The law firm of A.B. Patel & Patel Advocates shall bear the said costs of the said application as it came about due to the negligence of one of its employees in effecting service of the Amended Claim Form on the defendant's Counsel.



DELIVERED, DATED, AND SIGNED AT MOMBASA THIS 29TH DAY OF JULY, 2022. RULING DELIVERED THROUGH TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of-

Mr. Khagram for the claimant

Ms Akwana h/b for Mr. Inamdar for the defendant

Mr. Oliver Musundi – Court Assistant.

