

CC 167/2010

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C NO. 7

IN THE HIGH COURT OF SIERRA LEONE

(COMMERCIAL AND ADMIRALTY DIVISION)

ADMIRALTY ACTION IN REM AGAINST THE FISHING VESSELS "F/V  
ICOZA SHRIMPER, F/V NANGIETO SHRIMPER, F/V KAWA FISHING  
TRAWLER, F/V AMOULOME"

BETWEEN:

COASTAL FISHING COMPANY

VICTOR KAMARA

- PLAINTIFFS

AND

KALYPSO COMPANY

SPRIDIMITRIS DIMOULAS

SIDIBAY

- DEFENDANTS

COUNSEL:

E N B NGAKUI ESQ for the Plaintiffs

A F SERRY-KAMAL ESQ for the Defendants.

BEFORE THE HONOURABLE MR JUSTICE N C BROWNE-MARKE  
JUSTICE OF APPEAL

JUDGMENT DELIVERED THE 4 DAY OF NOVEMBER, 2011

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1. The Defendants have applied to this Court by Notice of Motion dated 20 April, 2011 for the Orders set out on the face of the Motion paper. Principally, they are asking that the Order made by this Court on 22 March, 2011 be set aside for irregularity on three grounds, viz: that the action herein is an action in personam, and therefore, a warrant cannot be issued for the vessels which have been arrested pursuant to the said Order; that the Writ of Summons herein as amended, was made in violation of Order 56 Rule 3(1) of the High Court Rules, 2007; that the proceedings leading to the issuing of the Warrant of Arrest were in breach of Order 6 of the High Court Rules. The Defendants also asked

for a Stay of all proceedings pending the hearing and determination of the action.

2. The Application is supported by the affidavit of Mr Abdul Serry-Kamal, deposed and sworn to on 20 April, 2011. In it, Mr Serry-Kamal deposes to the following facts: 1<sup>st</sup> Plaintiff company were agents for 1<sup>st</sup> Defendant company, and 2<sup>nd</sup> Plaintiff was Managing Director of 1<sup>st</sup> Plaintiff company. He believes that 1<sup>st</sup> Defendant paid some of the agency fees in cash, and some in kind. He explained how agency fees were to be paid. In 2004 it was agreed between the parties that the Plaintiffs were indebted to the Defendants in the sum of USD79,982. The 2<sup>nd</sup> Plaintiff admitted to this level of indebtedness on 24 April, 2004. A copy of the agreement reached is exhibited as "AFSK1." It is signed by both Victor Kamara, 2<sup>nd</sup> Plaintiff, and S P Dimoulas, 2<sup>nd</sup> Defendant. In 2005, it appears, on a reading of paragraphs 7 and 8 of the affidavit, that it was the 2<sup>nd</sup> Defendant who was then indebted to the 2<sup>nd</sup> Plaintiff in the sum of USD2,645. Paragraph 8 is not very clear as it refers to the 2<sup>nd</sup> Defendant, to the Defendants, and to 'him'. On his return to Greece on or about 25 October, 2005 2<sup>nd</sup> Defendant received word from Freetown that 2<sup>nd</sup> Plaintiff was now claiming agency fees for 2000 through to 2005. 2<sup>nd</sup> Defendant sent emissaries demanding payment from the 2<sup>nd</sup> Plaintiff of the monies owed the 2<sup>nd</sup> Defendant, to no success. 2<sup>nd</sup> Defendant got to know about the action herein on or about 13 August, 2010. He was never served with the Writ of Summons. The 3<sup>rd</sup> Defendant (mistakenly referred to as "the second Defendant" in paragraph 14 of the affidavit) is a Guinean national but resident in Freetown. He took the writ to Mr Serry-Kamal, a copy of which is exhibited as "AFSK2."
3. In March, 2011 Mr Serry-Kamal's colleague in chambers, Mr Sahid Sesay, informed him that the 3<sup>rd</sup> Defendant and all servants of the Defendants on board the vessels had been evicted from the same. It was thereafter that Mr Serry-Kamal searched the Court file. He found out that the writ which had been issued was a writ in personam and not in rem. He found out about the amendment which had been allowed by Order of this Court on the Application of the Plaintiffs. A copy of the Application is exhibited as "AFSK4" and the Order of Court as "AFSK5". A copy of the writ as amended, is exhibited as "AFSK6". Prior to the Order exhibited as



"AFSK5", the Plaintiffs had applied ex parte to this Court for Injunctive relief. That Application is exhibited as "AFSK7" and the Orders made thereon, are exhibited as "AFSK8". "AFSK9" is a copy of an affidavit of service of the amended writ of summons deposed and sworn to by Raymond Aina Kallon, Bailiff, on 2 September, 2010. In it, Mr Kallon deposes to service of the amended writ on the vessels as prescribed by Law. Another Motion dated 23 August, 2010 and filed by the Plaintiffs is exhibited as "AFSK10". It was not pursued by the Plaintiffs. Yet another ex parte Motion dated 10 March, 2011 was filed by the Plaintiffs, and is exhibited as "AFSK11." It sought the arrest of the vessels herein. On 22 March, 2011, this Court Ordered their arrest. The Order of Court is exhibited as "AFSK12." The Warrant issued pursuant to the said Order is dated 25 March, 2011 and is exhibited as "AFSK13". It was duly indorsed by the Under-Sheriff.

4. Mr Serry-Kamal deposes further, that the said Warrant was issued and executed without the Plaintiffs giving the necessary undertaking, and that the Defendants have been deprived of the use of their vessels in the absence of an action in rem. He says by virtue of the Rules of Court, the proceedings ought to be set aside for irregularity. He has also exhibited as "AFSK14" another Application dated 15 April, 2011 filed by the Plaintiffs, asking that Judgment be entered in their favour. He ends by stating that the Defendants have a valid defence to the Plaintiffs' claim, and also a valid counterclaim against them. The Defendants do not owe Plaintiffs and money at all. Finally, he asks that all proceedings be stayed until the Defendants' Application is determined.
5. The Plaintiffs, naturally, are opposed to the reliefs sought, being granted by this Court. Mr Ngakui deposed and swore to an affidavit on 2 May, 2011 opposing the Application, As regards the matter of whether the sum of USD79,982 was due the Defendants or not, Mr Ngakui deposed that that sum was in respect of fish which perished, and in respect of which 2<sup>nd</sup> Defendant demanded payment. According to Mr Ngakui, the agency relationship between the parties continued between 2004 and 2005, and was only ended in 2005 with 1<sup>st</sup> Defendant's letter to 1<sup>st</sup> Plaintiff, a copy which is exhibited as "A". In that letter, also, 1<sup>st</sup> Defendant company

requested information relating to any balance due "....to your agency, Government, Port, Marine House and any other debts whatsoever. We undertake that outstanding balance against crew and Union is our responsibility. By this letter, we totally clear you up from crew's and Union's payments." More controversially, Mr Ngakui in paragraph 5 of his affidavit deposes that 2<sup>nd</sup> Defendant acted dishonestly, in that on the same date, i.e. 18<sup>th</sup> October, 2005 prepared a letter purporting to have been written by the 2<sup>nd</sup> Plaintiff and asked 2<sup>nd</sup> Plaintiff to sign the same. The latter refused. 2<sup>nd</sup> Defendant thereupon went on to sign it himself. That letter is exhibited as "B". I have looked at Mr Kamara's signature on the documents exhibited to Mr Serry-Kamal's affidavit, three of them being, Mr Kamara's signature on exhibit "AFSK1"; Mr kamara's affidavit in support of the Application dated 13 August, 2010 which forms part of exhibit "AFSK7 pages 1-52"; and Mr Kamara's affidavit in support of the Application dated 10 March, 2011 which forms part of exhibit "AFSK11 pages 1-52". It is clear that that signature is considerably different from that which appears on exhibit "B". The discrepancy gives some credence to Mr Ngakui's reasons for disbelief.

6. Further, according to Mr Ngakui, the true reconciliation stating who owed who, is that exhibited by him as "C". It shows that Defendants owe Plaintiffs a total of USD154,409 which is the amount claimed in the writ of summons. It appears that Mr Kamara signed it on 22 October, 2005, 4 days after he had purportedly agreed as shown in exhibit "B", that the Defendants were no longer indebted to the 1<sup>st</sup> Plaintiff company. These are the facts presented in support of, and against the Application being granted.
7. The first compliant of Mr Serry-Kamal is that the action brought by the Plaintiffs is an action in personam, and not an action in rem; therefore the warrant of arrest issued by Order of this Court, and the arrests carried out by the Under-Sheriff are unlawful. He contends, impliedly, that by naming the Defendants, and by giving 1<sup>st</sup> and 2<sup>nd</sup> Defendants addresses in Greece, which is outside the jurisdiction of these Courts, the Plaintiffs have converted an action in rem, into an action in personam. Leave must be obtained from the Court before such a writ of summons could be issued,

as it has to be served outside the jurisdiction. He argued before me on 4 May, 2011 that a special form of writ should be used. The writ, as amended by Order of this Court is exhibited to Mr Serry-Kamal's affidavit as "AFSK6". It is headed "*Admiralty Action in Rem against the fishing vessels "F/V ICOZA..." et al.*" He referred me to the White Book, 1999 para 75/1/17 at page 1433 which explains how an Admiralty Action in Rem should be brought. The precedent is to be found at page 519 of Volume 2 of the White Book, 1999 - para 6A-1. In the most important respects, exhibit "AFSK6" corresponds with that precedent. Order 56 Rule 3(1) of the High Court Rules, 2007 provides that: "An action in rem shall be begun by writ; and the writ shall be in the appropriate form." The 'appropriate form' is not provided in the Rules, but Order 1 Rule 2 of the Rules provides that: "*'appropriate form' means the appropriate form in volume 2 of the English Supreme Court Practice, 1999 with such modification as may be necessary or as the particular circumstances may require.*" That is the form I have referred to above. The fact that parties have been named as Defendants, does not in view, detract from the essence of the pleading: that it is an action in rem against the vessels named. These are civil proceedings, and the Plaintiffs can amend their pleadings at any stage on terms. It seems to me therefore, that Mr Serry-Kamal's contention in this respect is untenable.

8. His further argument is that the writ in its original form, and as amended, violates Order 56 Rule 3(1) of the High Court Rules, 2007. Now, the original writ issued on 12 August, 2010 and exhibited as "AFSK2" may have breached Order 56 Rule 3(1). But this error was rectified by Order of this Court on 25 August, 2010 - see exhibit "AFSK5". On 14 March, 2011 the Plaintiffs applied ex parte to this Court, and before me, for Warrants to Arrest the vessels named in the Application dated 10 March, 2011. Mr Ngakui, Counsel for the Plaintiffs could not proceed that day because he had not exhibited the amended writ of summons - page 3 of minutes. Without the writ being headed as stated above, I could not have made the Orders the Plaintiffs sought. Mr Ngakui appeared before me again on 15 March, 2011. By then, the Plaintiffs had filed an additional affidavit deposed and sworn to by the 2<sup>nd</sup> Plaintiff on 14 March, 2011 to which both the Order dated 25 August, 2010 allowing the amendment, and



the amended writ were respectively exhibited. On 22 March, 2011 I Ordered the arrest of the Defendants' vessels - see exhibit "AFSK12". Pursuant to that Order, the Plaintiffs sued out a Warrant of Arrest which is exhibit "AFSK13". It seems to me therefore, that there has been no "violation of Order 56 Rule 3(1) as contended by Mr Serry-Kamal.

9. The 3<sup>rd</sup> contention of Mr Serry-Kamal is that the proceedings herein were issued in breach of Order 6 Rule 8 of the High Court Rules. That Rule provides that "*No writ of Summons for service out of the jurisdiction or of which notice is to be given out of the jurisdiction shall be issued without the leave of the Court or Judge.*" Mr Serry-Kamal's argument, as I understand it, is that the Plaintiffs have specifically named Kalypso Company, Spiridimitris Dimoulas and Sidibay, as Defendants respectively, without stating that they are the owners of, and/or persons interested in or in control or in possession of the vessels arrested. The action is indeed intitled properly, but the parties are not. Does this deprive the action of being an admiralty action in rem? Does failure to use the appropriate or usual description, 'owners of and/or persons interested in' deceive or mislead anyone including the Defendants into thinking no action is being brought against the vessels named, but just against they themselves? I think not. Further, even if I am wrong in the conclusion I have reached, should I go on and Discharge the Warrant of Arrest? I think not, also. I have before me the affidavit of Raymond Aina Kallon deposed and sworn to on 12 March, 2011 which forms part of exhibit "AFSK14" which shows that the warrant was executed by him in accordance with the Rules of Court. I cannot there Discharge the Warrant of Arrest.

10. I shall therefore move to the next phase, which is to decide whether there has been such non-compliance by the Plaintiffs with the Rules of Court, that the Writ, and all subsequent proceedings ought to be set aside. Section 494 of the Merchant Shipping Act, 2003 confers jurisdiction on our Courts to try actions in rem. Order 56 of the High Court Rules sets out how the jurisdiction could be exercised. Order 2 Rules 2 and 3, deal with the effects of non-compliance with those Rules. Firstly, those Rules provide that failure to comply with these Rules shall

be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings or any document, judgment or order therein. If there has been such a failure, the Court may set aside the proceedings affected, or it may allow such amendments to be made and to make such Order dealing with the proceedings generally as it thinks fit. Rule 2(1) goes on to provide that Applications to set aside process for irregularity shall not be allowed unless made within a reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity. That is not all. Order 12 Rule 15 provides that the entry of appearance by a party shall not be construed as a waiver of any irregularity. Rule 16 thereof provides that "*a party who wishes to dispute the jurisdiction of the Court in the proceedings by reason of the irregularity referred to in rule 15, or on any other ground shall, within the time limited for service of a defence, apply to the Court for: (a) an Order setting aside the process or service of the process.....(c) the protection or release of any property of the applicant seized or threatened with seizure in the proceedings;.....(g) a declaration that in the circumstances of the case the Court has no jurisdiction over the applicant in respect of the subject matter of the claim or the relief or remedy sought in the action.*" All of this was well within the Defendants' grasp; and they let it all go. Appearance was entered by and on behalf of the Defendants on 16 August, 2010 to the original writ. The Memorandum and Notice of Appearance are exhibits "AFSK3A&B". Defective as that original writ was, Defendants took no steps to set it aside. It was, as I have stated above, amended by an Order of Court on 25 August, 2010. The vessels were Ordered to be arrested on 22 March, 2011. By Notice of Motion dated 15 April, 2011 the Plaintiffs applied to this Court for Judgment in Default of Defence. It was only then, the Defendants were roused from their slumber. They came awake on 20 April, 2011 with the Notice of Motion herein. The cases show that speed is essential in these matters. In any event, Order 12 Rule 16 makes it clear. If you wish to challenge the jurisdiction of the Court, you must do so within 10 days i.e. within the time limited for filing a defence. It is my view, that what the Defendants have embarked on in one sense, is a challenge to the jurisdiction of this Court to have Ordered the arrest of the vessels pursuant to process which they claim is defective.



11. To succeed, they should have done so within 10 days of 16 August, 2010. If one takes the view however, that they were simply exercising their rights under Order 2, they will be met with the same hurdle: why wait 8 months to assert your rights? It is my view that a delay of 8 months - August, 2010 to April, 2011 is inordinate in all the circumstances of the case. And I am supported in this view by the cases, a sampling of which are to be found on pages 10-12 of the White Book, 1999. I find it unnecessary to refer to them in detail because of the conclusion I have reached.
12. I have also to consider separate issue of whether I should Discharge the Warrant of Arrest I had Ordered to be issued. For the reasons stated in paragraph 9 above, I shall not do so. The Warrant shall stand.
13. I have considered the submissions made by Mr Ngakui, but as they do not raise issues which have not been already dealt with by the Court, I have not found it necessary to recite and deal with them seriatim.
14. In the premise the Defendants' Application dated 20 April, 2011 is DISMISSED with Costs to the Plaintiffs, such Costs to be Taxed if not agreed.



THE HONOURABLE MR JUSTICE N C BROWNE-MARKE, JUSTICE OF APPEAL