FTCC.174/19 2019 P. NO. 30

BETWEEN:

PENINSULAR FISHING AGENCY LTD - PLAINTIFF

AND

THE OWNERS AND/OR PERSON - DEFENDANT

INTERESTED IN THE SHIP "MV HAHAWA (EX-TIMA NO. 1)

RULING OF THE HONORABLE JUSTICE LORNARD TAYLOR DATED 15TH JUNE 2020

The application before this court is filed for and on behalf of the 1st defendant seeking inter alia that this honourable court sets aside the default judgment obtained on the 8th October 2019 ex debitojusticia on the following grounds;

a. That the default Judgment was irregularly obtained on the grounds that the judgment in default of appearance and defence was entered for the Plaintiff herein, when in fact the 1st defendant had already entered an appearance to this action and was seeking to file her defence with leave before the judgment was obtained.
b. That the 1st defendant/applicant has a good and meritorious defence to the action.

The Applicant also prayed that leave be granted to file her statement of defence out of time.

The Applicant's case is that a writ of summons was issued against her on the 22nd July 2019. There is no doubt that the action was brought to the attention of the Applicant as an appearance was entered on her behalf dated the 30th July 2019 but same was in actual fact signed by the Master's office on the 7th August 2019. On the 2nd October 2019, the Plaintiff filed a notice of motion praying inter alia for judgment to be entered against the defendants for default in filing an

appearance and a defence. Judgment was entered for the Plaintiff on the 8th October 2019 and on the 24th October 2019, the 1st Defendant then filed an application for leave to file her defence out of time. This notice of motion was struck out for want of prosecution and costs awarded. On the 14th January 2020, the Plaintiff filed a notice of Motion praying that the court approves the sale of the vessel the subject-matter of this action. The 1st defendant also filed the Notice of Motion dated 14th January 2020 praying for leave to file her statement of defence out of time. The Plaintiff's application being ex parte came up for hearing on the 16th January 2020 while the application of the 1st Defendant was fixed for the 20th January 2020. The court granted the order prayed for by the Plaintiff and the undersheriff was mandated to take the necessary steps to ensure that the vessel was transferred to the new owners. On the 23rd January 2020, counsel for the 1st Defendant sought the leave of the court to withdraw their Notice of Motion of 14th January 2020 on technical grounds and the said Notice of Motion was again struck out with costs thus culminating in the present application.

The Applicant set out to make a case that the judgment in default of appearance and defence entered on the 8th October 2019 is irregular and should be set aside. To make this case she filed and affidavit in support of the application deposed to by Mohamed Pa-MomohFofanah to which were attached several exhibits. The pith and substance of the arguments of the Applicant is that as at the 2nd October 2019 when the Plaintiff applied for judgment, the1st Defendant/Applicant had already entered an appearance on the 7th August 2019. On this basis, it is alleged that the Plaintiff can therefore not take judgment in default as there was already an appearance in the file and to do so would mean that the Plaintiff was in breach of Order 56 rule 21(3) of the High court rules which deals with approaching the court for a judgment in default in admiralty matters. Can the judgment of 8th October 2019 be set aside ex debitojusticia on this ground? The Plaintiff/Respondent also filed an affidavit in opposition deposed to by Ibrahim SorieMansaray on the 28th January 2020. The argument as contained based on the facts therein is that the Judgment obtained by the Plaintiff was in default of both appearance and defence. They maintain that inasmuch as the 1st Defendant is making heavy weather of the fact that an appearance was entered prior to the application for judgment, the Plaintiff before obtaining the said judgment searched the records and applied for Judgment in default of both Appearance and defence as the period fixed by the rules for filing and serving both documents had elapsed.

Pursuant to Order 12 rule 3(1) of the High Court Rules 2007, the defendant is to enter his appearance to a writ of summons by delivering to the Master, a memorandum of appearance dated on the day of its delivery. The purpose of this rule is to ensure that the court becomes aware that the defendant has been put

to notice that an action has been commenced against him and that all further communication from the court should be directed to the address of service indicated on the memorandum of appearance. Rule 4 of the same order states that the defendant on the day on which he enters appearance, give notice of the appearance to the Plaintiff's solicitor. From the records before me, there is no question that the writ of summons was served on the defendants. There is also no question that the 1st Defendant entered an appearance on the 7th August 2019. At the same time this court has in its records that the Plaintiff conducted a search of the registry which said search revealed that as at the time of the application for judgment, no appearance had been entered by the defendants. Both solicitors are respectable gentlemen and I have no reason to doubt that which is contained in their respective affidavits. I already envision a number of instances in which they could both be saying the truth in their respective affidavits in spite of the present circumstances. Thankfully, this is not an issue of such importance that the decision of this court on this matter will have to rest squarely on the accuracy of either position. The 1st Defendant argues that judgment in default of appearance ought not to be taken against her because she had entered an appearance before the application for judgment. The Plaintiff argues on the other hand that the judgment before the court is for both default of appearance and defence. Hence, should it be the case that the Defendant is wrong and did not actually enter an appearance on the date the Plaintiff applied for judgment then there still remains the question of whether a defence was filed within the time limited for filing and serving same. Before this court, there is no evidence of a defence being filed on behalf of any of the defendants. In fact the deponent of the affidavit in support made clear the fact that the 1st defendant was asking this court for leave to file the defence out of time. No arguments regarding the status of the judgment with respect to it being in default of both appearance and defence was raised by the 1st Defendant and my research on the issue could not reveal any authority that would hold such a judgment as irregular. In the circumstance, this court cannot set aside the judgment of 8th October 2019 ex debito Justicia as the judgment, based on the above analysis, a regular judgment and there was no breach of law and or procedure by the Plaintiff to warrant an ex debito justicia setting aside.

It is trite law that the court has the inherent jurisdiction to set aside any regular default judgment regardless of the circumstances under which it was obtained, on the singular condition that the Defendant's proposed defence must raise triable issues. In the invoking and exercising this coercive power, the court has to be mindful of the fact that since the judgment is not being set aside as of right, and that it is merely the court in the exercising its equitable discretion, such

setting aside has to be on such terms as it may seem just and within such parameters as the court may decide.

The 1st Defendant has asked that this courts sets aside the default judgment on the grounds that the 1st Defendant has a good and meritorious defence to the action (albeit that the prayer was made under the rubric ex debitojusticia), and that the 1st defendant be granted leave to file her defence out of time. The proposed defence and counter-claim is exhibited and marked Exhibit L in the affidavit attached to the application. A summary of the Plaintiff's case is that by agreement dated 16th December 2016, expressed to be made between the Plaintiff and the 2nd Defendant the Plaintiff supplied the defendants a number of goods/materials and performed services for the vessel, the subject-matter of this action. As such the defendants became indebted to the Plaintiff in the sum of US$ 381, 094.64 which said sum became due and owing. Attached to the affidavit in opposition were a number of documents in proof of this claim ranging from statements of accounts to invoices and delivery receipts. According to Exhibit L, which is the proposed defence and counter-claim of the 1st Defendant, the 1st Defendant maintains that she is the owner of the vessel MV Mahawa (Ex Tima No.1) which is one of the subject-matter of this action. She maintains that the said vessel was stolen from Guinea and brought to Sierra Leone and that she had made a report to the Sierra Leone Police in that regard. She maintains that as bonafide owner of the vessel, she does not owe a duty to the Plaintiff and that she is not indebted to the Plaintiff.

It is trite law in this jurisdiction is that the court will set aside any judgment obtained by default where the proposed defence of the defendant raises triable issues.

Based on the above, I am confident that there are in fact three issues that need examination to determine whether there is the need for the judgment to be set aside and for the matter to proceed to trial. If these issues can or have been satisfactorily addressed in this application to the point that it would not be necessary to hear from witnesses at trial, then I cannot set aside the judgment and order trial as to do so will be a waste of resources as nothing different, including the outcome will emerge at trial.

1. Is the 1st Defendant the owner of the vessel the subject-matter of this action?
2. Was the vessel stolen as alleged by the 1st defendant?
3. If the answer to the answer to 1 above is in the negative, is the owner of the Vessel bound by the terms of the contract between the Captain and the Plaintiff.

Mariama Camara though not named specifically on the face of the action, has presented herself as the owner of the vessel, the subject-matter of this action and was so described in the first paragraph of the affidavit in support of the application by the deponent therein. Attached to the affidavit in support of the application before this court is Exhibit A which is a document titled Ownership Certificate. I have taken the liberty to examine the document and a number of doubts come to my mind. I note that this document is a translation of the original which is probably in a language other than English and the translation was duly notarized and signed by the General Director of Protocol in the Ministry of Foreign Affairs in the Republic of Guinea. This document was issued in Conakry on the 17th December 2018 and notarized on the 17th October 2019. Firstly, in spite of the fact that the document was entitled Ownership Certificate, its final inscription referred to it as a power of attorney being issued for any legal purpose it may serve and to whom it may concern. Secondly, the document is not signed by any state authority nor does it bear the name and signature of the issuing authority. Rather, it was signed, sealed and delivered by the General Manager Mariama Camara the 1st Defendant herein. On these bases, I cannot rely on Exhibit A as being conclusive proof of ownership of the vessel MV MAHAWA EX TIMA NO. 2. I therefore hold that Exhibit A is not conclusive proof of ownership of the Vessel MV Mahawa EX TIMA No. 2 the subject-matter of this action.

The 1st defendant in her proposed defence alleges that she was never aware alleged to be made between the Plaintiff and the 2nd Defendant in respect of goods and services rendered to the vessel MV MAHAWA EX TIMA NO.2. Assuming without conceding that Exhibit A was indeed conclusive proof of ownership and Mariama Camara was indeed the owner of the Vessel MV MAHAWA EX TIMA NO.2, the matter before this court concerns an agreement between the Plaintiff and the defendants that was entered into on the 16th December 2016. As per the invoices and delivery notes before this court as Exhibit B attached to the affidavit in opposition deposed to by Ibrahim Sorie Mansaray, the goods supplied to the vessel were done between January of 2018 through to February of 2019. Ownership of the vessel by virtue of Exhibit A was passed to MariamaCamara on the 17th December 2018, by which date there was in force already an agreement between the Plaintiff and the Captain of the Vessel and a number of supplies had been made in fulfilment thereof. If the 1st defendant is not aware of this agreement, the chances are that proper due diligence during the acquisition was lacking and therefore the transaction was probably not brought to her knowledge. The agreement sought to be enforced by the Plaintiff had come into force even prior to the alleged acquisitionof the vessel. The action is therefore for the enforcement of a right older than the title of the 1st Defendant. If she indeed became the owner of the vessel, only as at the 17th December 2018, she must

then understand that her acquisition is burdened with potential liabilities as well.

The 1st Defendant in her proposed defence alleges that the vessel was in fact stolen from Guinea and was brought to Sierra Leone without her consent. To prove this point, she exhibited Exhibit B attached to the Affidavit in support of the application. This exhibit is the translated version of a letter addressed to the Minister of Fisheries and Marine Resources of Sierra Leone as well as a copy of the original French version. According to the said letter, the vessel Mahawa flying the Guinean flag left Guinea in a conflict situation without authorization. The letter asked the Minister of Fisheries to make urgent arrangements to board the vessel and keep the author informed. This letter I also have a few issues with. Firstly, the letter is not dated and as such this court cannot be sure whether on this basis the act complained of in the said letter was still an issue. I see no reason why a letter of such importance will not carry a date. Secondly, there is nothing on the said letter that shows the office or designation of the author of the letter. It was signed by a certain Frederic LOUA but that is as far as it goes. Who is he? Who does he work for? Does he have the authority to make the requests as contained therein? These answers cannot be deciphered from Exhibit B and I cannot therefore rely on it as conclusive proof of the facts deposed to in paragraph 3 of the affidavit in support of the application. Since this is the document on which the 1st Defendant intends to rely on should this matter proceed to trial, I can only say, trial on this basis will be a waste of time and resources.

Having held that the vessel was not stolen, this court is left only to decide on the question of whether the Owner of the Vessel is bound by the terms of the contract between the Captain and the Plaintiff. Maritime law in this regard has over the years been quite settled and a number of case law and writings of jurists have held sway on this issue. In the book Admiralty and Maritime Law, by Robert Force, A.N. Yiannoupolous, and Martin Davies, at page 626 it is stated "Where conformity with the Law is concerned, the captain of a vessel has as previously noted, implied authority to bind the owner thereof to the purchase of necessaries for the use of his ship" Implied authority is said to be that authority which comes in conformity with either law or general business customs of a particular trade. In the present case likewise, the question is whether the captain could bind the owner (assuming without conceding that Mariama Camara is the owner) to his agreement with the Plaintiff. The answer by the above is in the affirmative. Counsel for the Plaintiff cited the case of Mclever v Boston Deep-Sea fishing and Ice company (1924) S.L.T. pg 106 which thoroughly addresses this issue. It was held in that case that *"The sellers of the supplies now seek to make the owners of the Normanby liable for the price of the goods purchased by her master. The*

owners deny liability on the grounds that these supplies were not necessary for the prosecution of the voyage on which they had dispatched the ship and that even is necessary, the Master did not although he could have done so communicate with them for instructions regarding the matter. ……The fact is somewhat obscured by many of the expressions in the judicial dicta, but the owners' liability usually appears to depend not on mandate, but on "holding out". By putting the master in charge of the ship, the owners hold him out to third parties as having certain powers of agency on their behalf".

This doctrine of holding out estops the owner from objecting to the Captain's actions within his apparent authority and this court cannot turn a blind eye to it. This being the law, and the owners presumably having held the captain out as having certain powers of agency on their behalf, it seems to me quite clear that it can only be equitable that the owners of a vessel be held liable for contracts which they themselves would reasonably have entered had they been in the position of the captain when such contracts are in the line of business of the vessel. As such, this court would not have held binding a contract for fine wine or jewellery for the captain as they will not be in the line of business of a fishing vessel.

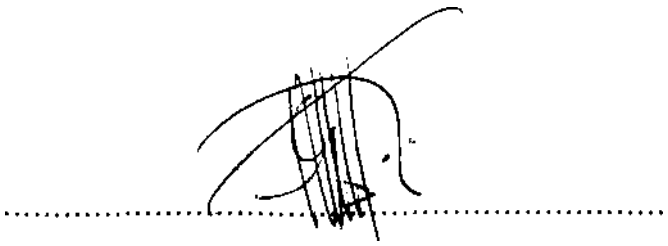
It is for that reason that emphasis is laid by the courts on the fact that the goods and supplies have to be necessary for the voyage of vessel. In the Maclever case mentioned above, the vessel was a fishing vessel as in the present case. The captain contracted for the supply of coal for the vessel's use. It was held by the court that the owners of the vessel were liable for the price of the coal as the supplies had been ordered by the Master from sellers who reasonably believed the purchase to be within the authority of the Master for the prosecution of the trade on which the vessel was engaged, according to the usage of trade.

In the book Abbott on Shipping 13th edition at page 12, the author wrote ..*"but if the person who thus advances money, does not choose to take upon himself the risk of the Ship's return, and will be content not to demand maritime interest, there seems to be no reason why the master should not pledge both the ship itself and the personal credit of the owner".*

This is the position of the law on the issue of the captain of a vessel binding the owners of the vessel to contracts made with third parties and I am bound by it. As shown in Exhibit B of the affidavit in opposition, the goods supplied by the Plaintiff in this matter to the vessel do fall within the category of necessary goods. They are all goods necessary in the line of business of the vessel. Marine gas oil, lubricant oil, down payment of fishing licence fee, port fee, etc. are all products without which the vessel would not fulfil its purpose. As such, and in these

circumstances, this court cannot hold as a triable issue, the fact that the 1st Defendant maintains that she is privity to the contract between the captain of the vessel and the Plaintiffs. I therefore order as follows:

1. This application is accordingly dismissed.
2. The cost of this application is assessed at Le 20 million to be paid by Mariama Camara to Solicitors for the Plaintiff.



HONORABLE JUSTICE LORNARD TAYLOR