

IN THE HIGH COURT OF SIERRA LEONE
COMMERCIAL AND ADMIRALTY DIVISION
FAST TRACK COMMERCIAL COURT
ADMIRALTY ACTION IN REM AGAINST THE VESSEL MV KATA

BETWEEN:

SIERRA MINERAL HOLDINGS LIMITED - PLAINTIFF

MAAZ LIMITED - 1ST DEFENDANT

THE OWNERS, DEMISED CHARTERERS - 2ND DEFENDANTS
& OR PERSONS INTERESTED IN THE
VESSEL MV KATA AT NITTI

E. PABS-GARNON - COUNSEL FOR THE 2ND DEFENDANT/APPLICANT

B. KOROMA - COUNSEL FOR THE PLAINTIFF/RESPONDENT

RULING DELIVERED BY THE HONORABLE JUSTICE LORNARD TAYLOR
ON THE 8TH AUGUST 2022

The Plaintiff commenced this action by writ of summons issued on the 15th July 2022. The action was between the Plaintiff Sierra Mineral Holdings Limited and Maaz Limited the defendant. On the same date, 15th July 2022, the Plaintiff approached this court by an Ex-Parte Notice of Motion praying for an interim injunction to restrain the defendant's vessel MV KATA from sailing out of the territorial waters of Sierra Leone pending the hearing and determination of the said application as well as the hearing and determination of the matter itself. This court heard the determined the said application on the same date and ordered that;

1. The Vessel MV KATA was not to leave the territorial waters of Sierra Leone pending the hearing and determination of the Application.
2. The undersheriff was to use the necessary authority to ensure that the injunction was complied with
3. The writ of summons was to be served on the defendant by leaving it with the captain of the vessel or by pasting it on the vessel itself.



4. The Ex-parte Application was to be served on the defendant by leaving same with the captain of the vessel.
5. The matter was to come up for hearing again of the 19th July 2022 at 11 a.m.

On the 19th July 2022, the Plaintiff filed an amended writ of summon which inter alia made the Owners, Demised Charterers and or Persons interested in the Vessel MV KATA as 2nd defendant to the action.

The Plaintiff also filed another Ex-Parte Notice of Motion on the same day praying for a warrant to be issued for the arrest of the vessel MV KATA and that this court makes an order dispensing with the requirement to serve the Russian Consulate with the requisite notice. This application was heard and determined on the 20th of July 2022 and the court ordered that;

1. The Plaintiff was at liberty to issue a warrant for the arrest of the vessel MV KATA and its captain.
2. That the requirement for notice to be served on the Russian Consulate be dispensed with.
3. That the Captain of the vessel was to be brought before the court forthwith upon arrest.

Both the vessel and the captain were arrested on the 23rd July 2022. The Captain was brought before the court on the 25th July 2022 and was put on bail. The court made the following orders;

1. The vessel MV KATA was to continue in the custody of the undersheriff pending the determination of the matter.
2. In the alternative, the defendants were to deposit the sum of US\$ 115,000 in an account to be managed by the Undersheriff
3. The Captain was put on bail on his own recognisance as well as that of the 1st mate as surety.

On the 29th July 2022, the 2nd defendants filed the present application praying for the following;

1. That the original writ of summons be set aside as same was issued without the leave of the court contrary to Order 11 and Order 46 rules 3 and 4 of the High Court Rules 2007.
2. That should this Court refuse the aforementioned prayer, that the 2nd Defendant be removed as a joined party to the action.
3. That the name of the 2nd defendant be struck off the writ of summons on the grounds that the 2nd defendant was improperly or unnecessarily made a party to the action.
4. That the Order of 20th July 2022 be set aside for same being a wrongful arrest because this court has no authority to arrest the captain and the first mate in an action in rem and that the writ of



summons in fact discloses no cause of action against the 2nd defendant.

Counsel for the 2nd Defendant/Applicant applies that this court sets aside the original writ of summons on the basis that same was issued without the leave of the court contrary to Order 11 and Order 56 rules 3 and 4 of the High Court Rules 2007. He maintains that the defendant named on the said writ of Summons MAAZ LIMITED has an address in Hong Kong which is out of the jurisdiction of this court. That on this basis, it must be inferred that the said writ of summons was issued for service out of the jurisdiction. Should this be the case, then the leave of the court ought to be obtained before the writ of summons is issued. Order 6 rule 8 of the High Court Rules 2007 when read together with Order 56 Rule 3 of the High Court Rules 2007 is quite instructive on this. It states;

“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 a Judge”

In answer to this allegation, counsel for the Plaintiff/Respondent argued that this provision will only apply in situations where the writ is intended to be served out of the jurisdiction. Where no such intention exists, the provision is not applicable. Counsel argues that the Plaintiff's actions are authorised by the provisions of Order 56 Rule 8 of the High Court Rules 2007 which regulates service of writs of summons in actions in rem.

Counsel for the Plaintiff/Respondent further argues that the 2nd Defendant lacks locus to seek a remedy of this nature considering that as at the date of issue of the writ of summons, the 2nd defendant was not a party to the action and there was no case against the 2nd defendant. They cannot therefore complain on an issue that does not concern them.

The provision is clear and unequivocal. If the writ is to be served out of the jurisdiction, the leave of the court or a judge must first be obtained. Clearly, this was not done. Of critical importance in this regard however is the question do the 2nd defendants have capacity to apply that the writ of summons in which they were not parties be set aside for non-compliance with the Order 6 rule 8 of the High Court Rules 2007?

As at the 15th July 2022 when this matter was instituted, it had only one defendant, MAAZ LIMITED. It is true that the 2nd defendant was not a party to the action and as such no claim against it was made. If the Plaintiff was to proceed from that perspective to judgment, the fact is that the said judgment would not have affected the 2nd defendants. So why should they in these circumstance be entitled to an application for the writ containing no claim against them to be set aside? This court considered the issue from the

point of view of the said writ of summons forming the foundation on which subsequent proceedings which made the 2nd Defendant/Applicant a party is based.

When the action was commenced by writ of summons, the 2nd defendant was not a party to same. The writ was amended to make the 2nd defendant a party. The complaint of the 2nd defendant is that by the provisions of Order 6 rule 8 of the High Court Rules 2007, the Plaintiff ought to have sought the leave of the court to commence the action considering that the defendant named therein ought to be served out of the jurisdiction. After due consideration, I have no doubt in my mind that justice demands that I hold this issue as a matter for the 1st Defendant to complain about and that this does not lie of the lips of the 2nd defendant. Should this court proceed to hear and determine the issue based on an application by the 2nd Defendant/Applicant, the doors for any subsequent determination on an application by the party who it actually affects would have been shut in the face of the 1st Defendant MAAZ LIMITED. As these are civil proceedings, there still lies the possibility on a balance of probabilities that the 1st Defendant might have no issues with the alleged non-compliance or conversely might have better reasons to base its application in that regard but which the court could no longer entertain based on the principle of Res Judicata if a determination is made on this issue in this application. If this court must err, it will in the circumstances err on the side of caution.

There is no need for the 2nd defendant to be served out of the jurisdiction of this court and having entered an appearance to the action, the presumption is that notice of the action has been brought to their attention and they certainly therefrom have a duty to defend the claims of the plaintiff against them. The 2nd defendants cannot benefit from the Plaintiff's non-compliance with Order 6 rule 8 of the High Court Rules 2007 particularly as they would suffer no injustice by the Plaintiff's non-compliance with the said provision. On this basis, this court will not consider the issue as raised by the 2nd defendants of whether the leave of the court ought to have been obtained before the original writ of summons was issued as the prejudicial effect of such determination will outweigh its probative value.

On this issue, this court also considered the argument that Exhibit EPG5 which is the order of 15th July 2022 in practice prevented the 2nd Defendant from removing its vessel from the waters of Sierra Leone. It placed it under de facto arrest. As such, in view of the fact that property belonging to the 2nd defendant had become affected by the claims of the Plaintiff contained in the writ of summons, the 2nd defendants became a party interested in the proceedings and therefore entitled to apply for the writ to be set aside. There is obviously no merit in this argument. Where execution of an order is levied on property belonging to an individual who is not a party to an action,



his remedy lay in interpleader proceedings pursuant to Order 20 of the High Court Rules 2007. He only becomes entitled to question the procedure in the proceedings after he is made a party which is why the 2nd defendants only filed the present application after the original writ of summons was amended to join them as parties. As such, the arrest of the 2nd defendant's vessel cannot in the circumstances raise a valid argument based on which this court would set aside the writ of summons and all subsequent proceedings for non-compliance with Order 6 rule 8 of the High Court Rules 2007. There is a prescribed remedy for complaints of such a nature which unfortunately for the 2nd Defendant/Applicant at this stage cannot be activated.

The 2nd defendants also argue that they ought to be removed as parties to the action considering that they were improperly or unnecessarily made parties to the action. The first argument canvassed by the 2nd Defendants is that the process by which they were made 2nd defendant to the action is flawed. Counsel for the 2nd Defendant argues that the Plaintiff ought to have sought the leave of the court before adding the 2nd defendants as parties to the action. Order 18 rule 6 (2b) and (3) are quite instructive on this. It states;

“Subject to this rule, at any stage of the proceedings in any cause or matter the Court may, on such terms as it thinks just and either of its own motion or on application –

(b) order any of the following persons to be added as a party:-

(i) any person who ought to have been joined as a party or whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon; or

(ii) any person between whom and any party to the cause or matter where there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the Court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter.

(3) Any application by any person for an order under sub-rule (2) to add that person as a party shall be made by motion supported by an affidavit showing the person's interest in the matter in dispute before or at the trial.”



In answer to this application made by the 2nd defendants, counsel for the Plaintiff cited Order 23 rule 9 of the High Court Rules 2007. I took the liberty of extensively studying this provision and find that it does not in any way answer the allegation that the leave of the court ought to be sought before the adding the 2nd defendant as a party to the action. I have no doubt in my mind that this provision is instructing that were as in the present case the Plaintiff intends to add the 2nd defendants as party to the action, it ought to seek the leave of the court. This the Plaintiff did not do when it amended the original writ of summons to make the 2nd defendants a party to this action. Its action is a breach of procedure and therefore non-compliance with the rules and I will hold such. The 2nd defendant was certainly improperly made a party to these proceedings by the Plaintiff/Respondent.

The 2nd defendant also argues that this court must set aside its order of 20th July 2022 which in effect ordered the arrest of the vessel MV KATA IMO 9015450 call sign UBZU4, NO 201241656 currently within the territorial waters of Sierra Leone. The application they maintain is based on the fact that this court lack jurisdiction to arrest the captain and the first mate in an action in rem and also that the writ of summons discloses not cause of action against the 2nd defendants.

Having heard counsel for the 2nd defendant on this application, I must state that no authority was cited or submitted to back the assertion that this court lacks the jurisdiction to have the captain and the first mate under arrest pending the hearing and determination of the action. My research on the issue also ended up empty handed. I cannot in the circumstances grant an application that is not backed by law.

Inasmuch as I agree with counsel for the 2nd defendant that the writ of summons does not disclose any cause of action against the 2nd defendant, I must hasten to point out that the amended writ of summons does disclose a cause of action that must be inquired into by this court. Even though the amendment was done without recourse to the rules of procedure, this court will not turn its face away from the fact that the Plaintiff might have a genuine claim which this court must investigate. The 2nd Defendant/Applicant might have improperly been made a party to this action but based on the contents of the amended writ of summons, the 2nd Defendant/Applicant was not unnecessarily made a party.

The above being held, I must also point out that contrary to the submissions of counsel for the 2nd Defendants, this non-compliance with the rules does not nullify the proceedings. This position of the law is based on Order 2 rule 1 (1) of the High Court Rules 2007. It provides thus;



“Where, in beginning or purporting to begin any proceedings or at any stage in the course of or in connection with any proceedings, there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these Rules, whether in respect of time, place, manner, form or content or in any other respect, the failure shall be treated as an irregularity and shall not nullify the proceedings, any steps taken in the proceedings or any document, judgment or order in therein”

In the present proceedings, the Plaintiff’s claim against the defendants is for inter alia, payment for accrued demurrage charges and damages for breach of contract. These claims are directly linked with the vessel MV KATA IMO 9015450 call sign UBZU4, NO 201241656 currently within the territorial waters of Sierra Leone. There is no evidence before this court on this application that the said claim lacks merit. This application it seems has as its purport, the nullification of the proceedings which would in effect release the said vessel from its arrest thereby enabling it to leave the territorial waters of Sierra Leone. If this happens, the claim of the Plaintiff before this court is more likely than not to be an effort in futility as the 2nd defendants would be beyond the reach of enforcement of any judgment that might be passed against it by this court. This state of affairs, this court cannot allow. This court is machinery for the upholding and delivery of justice and will not allow itself to be used otherwise. In the circumstances, I make the following orders;

1. The Application for the writ of summons in this action to be set aside is refused.
2. The amended writ of summons dated 19th July 2022 is accordingly set aside.
3. The Plaintiff is at liberty to add the 2nd Defendant/Applicant herein as a party to this action and amend and file the writ of summons in this action accordingly within 3 days from the date of this order.
4. The vessel MV KATA IMO 9015450 call sign UBZU4, NO 201241656 currently within the territorial waters of Sierra Leone shall continue to be under arrest pending the hearing and determination of this matter unless the Plaintiff defaults in amending and filing the writ of summons as ordered above.
5. The captain of the vessel MV KATA IMO 9015450 call sign UBZU4, NO 201241656 currently within the territorial waters of Sierra Leone shall continue to be under arrest and on the terms of his release pending the hearing and determination of this matter unless the Plaintiff defaults in amending and filing the writ of summons as ordered above.

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6. Notwithstanding the 4th and 5th Orders above herein, the vessel MV KATA IMO 9015450 call sign UBZU4, NO 201241656 currently within the territorial waters of Sierra Leone shall be forthwith released from arrest in the event the 2nd defendant deposits the sum of US\$ 150,000 in an account to be opened at the Guaranty Trust bank Freetown by the Plaintiff, a representative of the 2nd defendant and the Undersheriff of which the Undersheriff of Sierra Leone shall be principal signatory and such sum as deposited therein shall be security for any judgment that may be passed against the 2nd defendant.
7. The cost of this application is assessed at Le 5 million to be paid by the Plaintiff to Solicitors for the 2nd Defendants.



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HONORABLE JUSTICE LORNARD TAYLOR