



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADMIRALTY CLAIM NO 1 OF 2018

SHIPMARC AGENCY & LOGISTICS LIMITED.....CLAIMANT

VERSUS

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

R U L I N G

1. There are two applications due for determination by the court:-

i) Defendant's application dated 11/4/2018 seeking to set aside warrants of arrest and the claim form.

ii) Claimants application dated 7/5/2018 seeking judicial sale of the arrested motor vessel.

2. Even though the court ordered that the two applications be heard Together, I have re-read the applications and have formed the opinion that the defendant's application, challenging the admiralty jurisdiction of the court, be dealt with first and only if it fail then the claimant's application will present itself for consideration by the court.

3. That view has been informed by the appreciation that if the said application by the defendant succeeds and the warrants get set aside, there would be no vessel under arrest to be considered for judicial sale. The other and most compelling reason that application must precede the claimant's application is that the defendant's application questions jurisdiction of the court and must be dealt with first at the onset as a threshold matter.

Application setting aside warrants of arrest

4. The application is grounded on the fact that this being a claim in *rem*, the declaration in support of the warrant of arrest and the Affidavit of Kevin Asige, filed herein reveal that the person who would be liable on the claim in an action in *personam*, is one Mr. Yoni Bendas who was shown by the documents exhibited to have never been a beneficial owner as respects all the shares in the said motor vessel as required by Section 25(4)(2) of the Senior Courts Act 1981 of England, as applied to Kenya, hence the claim is wholly misconceived and should not be maintained as to form the basis of a warrant of arrest. For that reason the respondent contends that the court lacks jurisdiction to entertain the action in *rem* as pleaded and that the warrants should be set aside and the claim dismissed.

5. In support of the application, the defendant exhibited the bill of sale of the vessel and provisional certificate of registry showing the registered owner of the vessel as **CHANTIERS DE NORMANDIE FRANCE** since 5/3/2013.

6. The claimant opposed the application by statement of grounds of opposition dated 16/4/2018 which contend that the statement of claim and application for warrant of arrest was an action in *rem* against the motor vessel "Tanya" and not against Mr. Yoni Bendas, that the Affidavit of Mr. Omolo Advocate showing the registered owner does not change the face and character of the claim because there is a maritime lien whose existence, nature, and quantum has not been denied and the defendant has therefore submitted to the jurisdiction of the court and cannot say otherwise by an otherwise defective incompetent and an application which is an abuse of the court process.

7. Parties did file submission and at the hearing highlighted those submissions. The submissions by the defendant/applicant are short and straight forward to the effect that there is no claim in *rem* because the person said to be capable of being held responsible in a claim in *personam* is not the registered nor beneficial owner of motor vessel Tanya and that there is no maritime lien as known in law. He relied on the provisions Section 20 (2)e for of the Senior Courts Act which dictate that a claim in *rem* lies in connection with the ship and the person who would be liable in a claim in *personam*, when the cause arose, the owner, charterer or the one in possession or control of the vessel. The defendant took the position that action in *rem* is only maintainable against a person as beneficial owner by way of ownership or charter and not otherwise. He cited to court two decisions to support his stand.

9. For the claimant, submissions were offered to the effect that under Section 20 of the Senior Courts Act, as applied in Kenya, allows and recognizes as an admiralty claim the sum claimed on account of goods, materials and services rendered to Tanya for her towage, operation and maintenance arising out of an operation and maintenance agreement between the parties including disbursements and on account of maritime lien.

10. The counsel then took trouble to submit on who is a beneficial owner and faulted the defendants interpretation of Section 21(4) of the Act as strange. He contended that the Section expanded the definition of beneficial owner to include a person in control of the vessel hence in his submissions, Mr. Bendas having represented himself as being in control including the ability to sell the vessel to a scrap metal dealer to pay the claimant's debt, he should be deemed a beneficial owner.

13. I have had a chance to consider parties' submissions and the entire record of the claim and applications. The incontestable position of the law is that parties are bound by their pleadings. In these proceedings the pleading which the plaintiff and the court can't run away from are those in the claim form and the declaration in support of the application for warrant of arrest. To quote the exact words of the declaration, the claimant said:-

- **The person who would be liable on the claim is an action in personam ("the relevant person") is [Mr. Yoni Bendas].**
- **When the right to bring the claim arose, Mr. Yoni Bendas was the owner or in possession or in control of the Motor Vessels "TANYA".**
- **Mr. Yoni Bendas was as at the date hereof the beneficial owner of all the shares in the Motor Vessel "TANYA" or was the charterer of it under a charter by demise.**

12. The words underscore the fact that if a claim in personam was to be pursued, the Defendant would be **Yoni Bendas**, the owner or a person in possession and control of the vessel by virtue of beneficial ownership of all the shares in the motor vessel **Tanya**.

13. Those words are never declared in an application for arrests in vain. They are so declared to invoke the admiralty jurisdiction of the court. The need to make that declaration was explained by Nyarangi JA, in RE MV LILLIAN "S" [1989] KLR to '*serve the purpose of identifying the person who would be liable on a claim in an action in personam to have his ship arrested*'.

14. Now that the documents filed by both sides displace assertion of Mr Benda's ownership, it follows that the jurisdiction was not properly invoked and the ensuing warrant of arrest was erroneously issued and that error must be corrected by setting the warrants aside and the claim being unfounded for that reason ought to be dismissed. I do set aside the warrants of arrest dated 14/3/2018 and order that the claim form be dismissed with costs to the defendant.

15. As said at the onset, a determination of the defendant's application on jurisdiction would impact on the need to consider the application by the claimant for judicial sale of the arrested vessel. Now that the arrest has been set aside and the claim dismissed, that application no longer deserve employment of judicial time to determine. The application stands gone with the claim

14. It is so ordered.

Dated, signed and delivered at Mombasa on this 25th day of January 2019.

P.J.O. OTIENO

JUDGE