



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA DISTRICT REGISTRY
CLAIM NO.1 OF 2014

1. JOSEPH MWANYASI

2. MDIO ROBERT MBITO JOHNSON

3. MSHAMU HAMISI KILINDO.....CLAIMANT:

VERSUS

THE OWNERS OF THE MOTOR VESSEL "CHUN CHENG 212".....DEFENDANT (S)

RULING

1. By application Notice dated 12th March 2014 the Defendant seeks the following prayers-

- **That the claim forms in this claim be dismissed or struck out with costs.**
- **That in the meantime and pending the hearing and determination of prayer 2 above, the warrant of arrest issued against the Fishing Vessel Chun Cheng 212, be discharged, struck out or set aside and the fishing vessel Chun Cheng 212 be released from arrest and custody.**
- **That in the alternative to the striking out of the claim form in this claim, the Defendant be allowed to deposit security not exceeding US\$5634 in the parties Advocates joint interest earning account to facilitate the release of the motor vessel Chun Cheng 212 from arrest.**
- **That the costs of this application and the release and any of the Admiralty Marshall's expenses as well as port and any incidental charges incurred during the period of the arrest be paid by the Claimants.**

2. The Claimants filed a claim against the motor vessel 'CHUN CHENG' for unpaid wages and damages for injuries sustained on board the Vessel. A warrant of arrest was issued by this Court on 6th March, 2014.

3. Defendant's application Notice is supported by the following grounds-

- a. **The motor vessel Chun Cheng 212 is under arrest, pursuant to a warrant of arrest issued by The Admiralty Marshall against motor vessel Cheng Chung on the 6th March, 2014.**
- b. **That the claim by the Claimants is for inter alia monies allegedly unpaid to the crew which**

- includes salaries and wages while employed aboard the vessel YU TUNA 212 IMU NO. 8821319 while flying the flag of Seychelles. The Admiralty claim in “rem” made herein has not been made against the vessel YU TUNA 212 or warrant of arrest issued herein against the motor vessel YU TUNA 212 to warrant the arrest of motor vessel CHUN CHENG 212.
- c. This Honourable Court therefore has no jurisdiction to order the arrest of motor vessel CHUN CHENG 212 in view of the above stated facts in (a) & (b).
 - d. The claim is for crew wages, none of the Claimants claims to have been employed by the Defendant or was a contracted officer or member of the crew of the Fishing Vessel CHUN CHENG 212.
 - e. There is no nexus between the Fishing Vessel CHUN CHENG 212 and YU TUNA 212 IMU NO. 8821319 to infer culpability against the owner of CHUN CHENG 212 or that can entitle the Claimants to lay a claim over the said vessel through arrest as maritime lien.
 - f. The documents in support of the claim annexed to the declaration in support of the application for a warrant of arrest show that the Claimants claim is frivolous. The Claimants claim is “rem” against the motor vessels YU TUNA 212 and ought to be in persona against YU TUNA FISHERIES LTD.
 - g. The declaration in support of the warrant of arrest fails to comply with the requirements of Section 2D part 61.5 of the English Civil Procedure Rules relating to arrest and the court issued a warrant of arrest without knowledge of who would be liable in an action in personam. The Declaration did not disclose the name of the owner of the vessel to be arrested.
 - h. There is no agency relationship between the motor vessel YU TUNA 212 of the Port of Seychelles and the motor vessel CHUN CHENG 212 of the Port of Kaohsiang especially without an admiralty claim against the motor vessel which is privy to the employment contract or claim in personam against the employer to entitle the Claimants claim for salary and/or wages from motor vessel CHUN CHENG 212.
 - i. The Claimant never filed a declaration in support of the for a warrant of owner and/or issued a notice to the consular of the intention to apply for warrant of arrest.
 - j. The motor vessel, CHUN CHENG 212, which is under arrest is incurring heavy watch keepers charges and Port charges. The daily crew wages and costs for provisions are approximately US\$5,000 per day and there is loss of business while the vessel is under arrest; which loss is unquantifiable.
 - k. It is therefore necessary that this application be heard urgently.
4. DUNCAN ODIWUOR KAWINO (DUNCAN) swore an affidavit in support of that Application Notice. He swore the same as an agent of Ms HSIEH MAN FISHERY CO. LTD, who are the owners of CHUN CHENG 212. He deponed that CHUN CHENG 212 owned by HSIEH MAN FISHERY CO. LTD had no relationship whatsoever with motor vessel YU TUNA or its owner YU TUNA FISHERIES LTD that the Claimant were on board. He attached a copy of the Certificate of Registration of Vessel CHUN CHENG 212. The deponent criticized the Claimant’s claim on the ground that there was no claim that they were employed or contracted to work on board CHUN CHENG 212 as crew members. That the shore passes relied upon by the Claimants did not have date and were not signed by the issuer and holder. In particular one of the shore pass was in the name of MSHAMU HAISI which was dissimilar to the 3rd Claimant, MSHAMU HAMISI KILINDO. That from the Claimants documents one could not tell that they were on board CHUN CHENG 212 since the shore passes had been issued by AKL Shipping Company; which was a company unknown to “the Defendant and/or the owners of CHUN CHENG 212.” Deponent stated this Court had no jurisdiction to issue the warrant of arrest

because the Claimants had failed-

- i. **To state the owner of the vessel at the time the alleged cause of action arose and at the time the warrant was sought.**
- ii. **The Claimants failed to disclose the name of the person whom the claim would lie against/who would be liable were the claim not commenced in rem.**
- iii. **The Claimants failed to state who the owner of the vessel was when the claim arose and whether such owner was the charterer or in control of the ship in connection with which the claim arose.**
- iv. **The Claimants failed to disclose who the beneficial owner was at the time of the claim and/or time of issuing of the warrant of arrest.**

That having failed to do as stated above the Claimants had wrongly caused the Vessel CHUN CHENG 212 to be arrested which vessel was incurring heavy keeper's charges and part charges.

5. On 17th March 2014 a consent was recorded by the parties to the following effect-
 1. **THAT the Defendants do deposit security in the sum of US\$10,000 in a joint interest earning account of the Claimants and Respondents Advocates names.**
 2. **THAT the Claimants passport held by the Captain of CHUN CHENG 212 be released to the Claimants Advocates forthwith.**
 3. **THAT upon the deposit being effected as per No. 1 above and the Passport being released as per No. 2 above a release order be issued releasing the Vessel CHUN CHENG 212 effectively lifting the warrant of arrest issued on 6th March, 2014.**

A release order was signed by the Admiralty Marshall, in terms with that consent on 19th March, 2014.

6. By his further affidavit Duncan deponed that CHUNG CHENG 212 has its local agent by the name Ms SEEDCOL GLOBAL SHIPPING E.A. LTD and not Ms AKL who issued Claimants with shore passes. He denied that CHUNG CHENG 212 could have fished in the Somali waters because the said Vessel did not have licence to fish there.
7. Claimant's responded to the Application Notice by their affidavit sworn by the 1st Claimant. He deponed as follows-
 - **THAT we left Kilindini Port, Mombasa on YU TUNA 212 but after about 2 (two) weeks we were transferred to CHUN CHENG and we were advised that this new vessel was owned by YU TUNA Fisheries Limited. We had no way of verifying this in the High Seas.**
 - **THAT we were not given amended contracts on board CHUN CHENG contrary to the requirement that an employer prepares employment contracts.**
 - **THAT however we had been advised before departure that YU TUNA Fisheries Limited had three other vessels and we were likely to be asked to work on any of the other vessels.**
 - **THAT we worked on YU TUNA 212 and CHUN CHENG 212 during the period November 2013 to February 2014. Annexed is an extract of our Passports showing we all departed from Kilindini Harbour on 29th November 2013.**

- **THAT in response to paragraph 10 of the Affidavit we were given Shore Passes to reenter Kenya on 24th February 2014 by the Captain aboard CHUN CHENG 212. He is the one who prepared and stamped the Shorepasses with the stamp of CHUN CHENG 212 and was supposed to date and stamp them. However these were duly stamped by the Immigration Department on 24th February 2014 on the reverse side. Annexed are copies of the shorepasses marked “JMM 10A, 10B AND 10C.”**
- **THAT since we surrendered our Passports to the Captain of YU TUNA 212 we received the originals following a Consent Court Order on 17th March 2014 through the lawyers of the CHUN CHENG 212.**
- **THAT the Defendant is truly indebted to the Claimants in the amount US\$5,361.00 (United States Dollars Five Thousand Three Hundred Sixty One) together with general damages for injuries sustained whilst we were working aboard CHUN CHENG as well as costs and interest.**

8. By a further affidavit sworn by 1st Claimant and dated 11th April 2014 he stated-

- i. **Myself, Robert Mbito and Mshamu Hamisi were engaged to work through Ms. Salma and all the documentation was done with her and the Seafarer’s Union.**
- ii. **We met Mr. Duncan Odiwuor Kawino of Seedcol Global Shipping Ltd (Mr. Duncan) when we returned to Kenya and I personally met him on board “MV CHUN CHENG 212” when we were offloading Tuna on our return.**
- iii. **Also upon our return after we lodged a complaint we met with Mr. Duncan at Kenya Maritime Authority and it was he who sent the vehicle to send us to hospital and arranged for our treatment at his friends clinic called Tudor Healthcare.**

(iv) In any event Mr. Duncan was able to deliver our Passports which had been held by the Ship’s Captain throughout the voyage within hours of the Court Order being given in this case.

DEFENDANT’S SUBMISSIONS

- 9. Defendant drew Court’s attention to the fact that although the Claimants’ claim is against the Vessel CHUN CHENG and not CHUN CHENG 212 it was CHUN CHENG 212 that had been arrested following the Court’s warrant of arrest.
- 10. On jurisdiction, Defendant submitted that neither the owners of motor vessel YU TUNA 212 or its owner or the owners of CHUN CHENG 212 had been sued as Defendants in the claim.
- 11. That Claimants ADM 4 was not in conformity with Section 2D Rule 5.1 of the Practice Direction No. 61.
- 12. That Claimants had failed to file a declaration form in terms of ADM 5 because the form failed to have a mandatory statement of truth as required under the Practice Directions.
- 13. That the Claimants failed to include the name of the person who would be liable on the claim, if the claim was not in *rem*.
- 14. Defendant referred to the International Convention on Arrest of Ships, 1999 and submitted that the Claimants did not comply with its provisions.

CLAIMANTS’ SUBMISSIONS

15. In setting out the factual background of the claim learned Counsel for the Claimants drew the Court's attention to the Claimant's contention that the person who authorized Duncan to swear affidavits on behalf of the Defendant, GM Lin Lee, was the same person who initially employed Claimants to work on board YU TUNA 212 in 20th November 2013.

16. Counsel submitted that Claimants had surrendered their Passports to the Captain of YU TUNA after they were stamped by Immigration

Department as they departed and yet when their claim was lodged and a consent of the parties entered as stated above the Passports were returned on 17th March 2014 by the Defendant (CHUNG CHENG 212) through their own Counsel.

17. That when Claimants returned to Mombasa their shore passes were issued by Captain of CHU CHENG 212.

18. On jurisdiction, Claimants' Learned Counsel submitted the Claimants exercised their Maritime lien on the Defendant's vessel *in rem* as per Section 21(3) SCA 1981 which provides-

“In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against that ship, aircraft or property.”

19. That the Defendant having acknowledged service of the claim unconditionally on 11th March 2014 did not indicate it would challenge the jurisdiction of this Court to hear this matter.

20. Further that Claimants had a Maritime lien over the Defendant which arose and attached to the Defendant's vessel the moment Claimants were transferred to CHUN CHENG 212, and began to work on that vessel.

21. Claimants' learned Counsel discounted Defendant's satellite movement data, relied upon by Defendant to disprove Claimants' Claim that the ship went to Somalia water, because the Satellite had not been translated from Mandarin (Chinese) as required by law.

22. In distinguishing Defendant's authorities, Claimants submitted that

Maritime lien is different from Statutory lien by stating that Maritime lien arises upon the mischief done by a ship and Maritime lien arises by operation of Law and does not depend on possession of the property or an agreement. That it arises from the moment of the event which gives rise to a cause of action and it travels with the property. That submission relied on the book *Modern Maritime Law and Risk Management* (2nd Edn) 2009, page 24.

23. In answer to Defendant's submission that Claimants' claim must fail

for failing to state the person liable for their claim, Claimants' Counsel submitted-

“There have been two perspectives in considering the meaning of the in rem claim:

- 1. The procedural theory is that this claim compelled the Defendant liable for the claim to appear in Court and defend the claim personally;**
- 2. The personification theory was to the effect that the action was against the res (the property) which was personified as the Defendant.”**

24. On whether the claim fails for failing to abide by the Admiralty Forms Claimants argued they had complied. That they had filed ADM4 and ADM5.

ANALYSIS

25. Although Duncan, who swore the affidavits in this case stated he was authorized and indeed attached the authority of the Director of the owners of CHUN CHENG 212 he did proceed, in that affidavit to state that AKL Shipping Company is distinct to the Defendant and to the owners of CHUN CHENG 212. That deposition in my view causes a blurring of who exactly Duncan's principals are. Are they owners of CHUN CHENG or CHUN CHENG 212? I pose that question because Duncan himself deponed that the Claimants' claim is against CHUN CHENG yet the warrant of arrest was issued against CHUN CHENG 212 which are distinct vessels. The answer to the question I pose to myself cannot be found in the evidence submitted by the Defendant.
26. I will again pose another question. Was it motor vessel CHUN CHENG that was arrested or CHUN CHENG 212? Going by the warrant issued by this Court on 6th March 2014 the vessel ordered to be arrested was CHUN CHENG.
27. Again I ask a rhetorical question had the Defendant shifted the burden of proof that Claimants were not entitled to lay claim against motor vessel CHUN CHENG? I find that in a far as the issue of the correct vessel to be before Court, the Defendant has failed, since those questions posed above remain unanswered, and further because of Claimants' contention that Director who authorized Duncan to swear the affidavit was the same one involved in the employment of the Claimants. It also does not escape my attention that the Passports surrendered to the Captain of motor vessel YU TUNA 212 were released by the Defendants to the Claimants in this action. I find that there is some credibility in the Claimant's account of events in that regard.
28. I do find that the Claimant has complied with Admiralty Forms ADM 4 and ADM 5 in their claim. More particularly and contrary to what is submitted on behalf of the Defendant, Claimants made a declaration of Statement of Truth, and set out the motor vessel concerned and its Port as Kaohsiung Taiwan.
29. Acknowledgment of service was filed by the Defendants herein on 11th March 2014 wherein the Defendants were described as-

“The Owners of the Motor Vehicle (sic) Vessel CHUN CHENG No. 212 wrongly sued as CHENG CHUNG.”

In filing the defence however the Defendant was described as-

“The Owner of The Motor Vessel CHUN CHENG 212.”

In paragraph 1 of that Defence it was pleaded-

“The Defendant denies the whole claim as laid out in the claim form and puts the Claimants to strict proof thereof. In particular, the Defendant denies that the Claimants were crew on board motor vessel CHUN CHENG 212 or that they sustained any injuries while on board as alleged or that the Defendant owes them any unpaid wages.”

The defence therefore is of CHUN CHENG and the acknowledgement of service shows CHUN CHENG 212 as wrongly sued as CHENG CHUN. The titles of vessels, seem to cause confusion. If nothing else in this action but that confusion, which even the Defendant shares, it is not sufficient to lead the Court to grant the orders sought by the Defendant.

30. In response to Defendant's submissions that the Claimants' claim fails because they did not state the person liable in my view is answered in the negative when placing reliance on the case decided by House of Lords **REPUBLIC OF INDIA AND OTHERS -Vs- INDIA STEAMSHIP COMPANY LIMITED** where the House of Lords held that the real Defendant in the *in rem*

proceedings is the person interested in the ship who appeared in the action to defend the asset and the claim (see Modern Maritime Law and Risk Management 2nd Edn (2009)).

31. Defendant's reliance on the International Convention on arrest of Ships 1999 is rejected because Defendant failed to show that Kenya is one of the state parties bound by it. In that regard I will accept Claimants submissions that there are only 10 states who have acceded to that convention and Kenya is not one of them.

32. I do find that indeed the Claimant's claim is one in Maritime Lien and Statutory Lien because claim of wages and personal injury gives rise to Maritime Lien. This is so stated in International Convention Relating to arrest of sea-going ships, 1952 (Brussels, Belgium Articles 1(b) and 1(m) which guide both the U.K and Kenya. Also in Kenya's Domestic Law, Kenya Merchant Shipping Act Section 105 creates Maritime Lien on a vessel and crew's wages.

33. Claimants were correct in submitting that the Satellite data relied upon by Defendant, without its translation from Chinese is not of any evidential value.

34. In the end having considered parties affidavit evidence their submission I find no merit in the Application Notice dated 12th March 2014. Accordingly, prayers seeking the striking out of the Claim (Prayer No. 2), striking out of the Warrant of Arrest (Prayer No. 3) and for costs of the Application and costs of Admiralty Marshalls expenses (Prayers No. 5) are hereby dismissed with costs.

DATED and DELIVERED at MOMBASA this 19TH day of JUNE, 2014.

MARY KASANGO

JUDGE