



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISC. CIVIL APPLICATION NO. 221 OF 2014

ALI MOHAMED ALI APPLICANT

-VERSUS-

NATIONAL POLICE SERVICE 1ST RESPONDENT

THE DIRECTOR OF PUBLIC PROSECUTIONS 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

AND

KHALID FAKI HAJI INTERESTED PARTY

JUDGMENT

1. By this Judgment the Court is invited to determine who amongst the parties before Court is entitled to have the Vessel known as “LAXMI NARAYAN.” (the Vessel)

BACKGROUND

2. The Vessel was on its way to Zanzibar when on 25th April 2014 it developed mechanical problems. The Vessel berthed at Old Port, Mombasa. The Vessel was then loaded with 200 bags of Cement, 624 empty drums, 100 pieces of mattresses and 100 floor carpets.

3. The Vessel was the subject of Police investigation because it was suspected to have been used in Narcotic Drugs trafficking. During that time its eleven (11) crew members left the Country, one destined to Pakistan and 10 to India. According to correspondence of National Police Service, in the file, the Vessel was left in the custody of Captain Ali Mohamed Ali (Ali).

4. As investigations were on going, that is investigation on whether the Vessel was used to transport narcotic drugs, the Director of Public Prosecution arrested three persons who were taken before the Mombasa Chief Magistrate’s Court on 30th April 2014 in Criminal Misc. No. 106 of 2014. Out of the three persons under arrest included the two who are now before Court in this matter. These persons are Ali Mohamed Ali (Ali) and Khalid Faki Haji (Khalid). The three persons were subsequently released by Police, when the investigations revealed that there was no evidence the Vessel was used to ferry Narcotic Drugs.

THE CASE

5. By Notice of Motion dated 18th July 2014 Ali brought this action seeking the following orders-

- **That the Honourable Court be pleased to issue an order directing the Provincial Criminal Investigation Officer Mr. Ondieki to personally release the Vessel LAXINARAYANI VRL 8661 INDIAN and the goods on board to the Applicant (Ali) herein.**
- **That the Honourable Court do issue a declaration that any further holding of the said Vessel and goods is illegal and/or unlawful.**

6. By that Notice of Motion Ali sued The National Police Service, The Director of Public Prosecutions and The Attorney General. In support of that application Ali deponed that after the Police cleared the Vessel of wrong doing he had attempted to get the custody of it but had failed. That although he had demanded its release from the Director C.I.D Coast Region that they had ignored, failed and or neglected to release the Vessel.

7. Khalid filed a Notice of Motion dated 30th July 2014 where he sought to be joined as an Interested Party in this action. Although his participation was objected to by Ali the Court allowed Khalid to participate in the mater because the Court was very concerned that there was no document brought before it which would assist the Court to determine the ownership of the Vessel.

8. Khalid annexed to his affidavit a Special Power of Attorney donated to him by Rav Isha Husen in respect of the Vessel. The Special Power of Attorney permitted Khalid to have custody of the Vessel to the exclusion of any other person. This is what Khalid deponed in respect of how the Vessel was left in his custody-

- **THAT I recall very well that on 25th April, 2014 I was approached by the Master of the Ship known as M/V Laxmi Narayan.**
- **THAT his desire was to get a Shipping Agent and also to be able to have his Ship transported back home as his Ship was leaking and had developed problems on the way to Zanzibar and I could not proceed with the voyage.**

9. After the meeting with the Master of the Ship it appears that the Special Power of Attorney was donated to him. According to Khalid he had a superior right to have the Vessel released to him over and above that which was claimed by Ali.

10. The Counsel from the office of Director of Public Prosecution representing the Respondents submitted that the Respondents were ready to release the Ship to the person the Court orders such release.

11. I need to state that through out the hearing of this matter I requested the parties to place before Court documents that would assist me to determine who was entitled to have the Vessel. When parties concluded their submissions and I reserved my decision to be delivered on 9th October 2014 it was brought to my attention that the two opposing parties, Ali and Khalid, had entered into a Consent. That Consent is in a letter dated 15th September 2014 and filed on 16th September 2014. The Consent is in the following terms-

“CONSENT

We would be grateful if this Consent was filed and adopted by this Honourable Court.

ALI MOHAMED and KHALID FAKI agree by Consent as follows-

1. **THAT the suit Vessel ie MV LAXMI NARAYAN and all its cargo be released to KHALID**

FAKI and ALI MOHAMED ALI.

2. THAT each party shall bear its own costs.”

12. The intention of that Consent was to arrest this Court’s decision while at the same time using this Court to order the Vessel to be released to the two contending parties equally.

13. The important issue for my consideration is, was the Vessel the property of either contending party to enable them to enter into such a Consent? My emphatic answer is **NO**.

14. In the case of Ali, he produced the registration document of the Vessel entitled Certificate of Registry of Asailing Vessel which shows that the Vessel is registered in the name of a Company called M/s Meghji Ghela & Company as the sole owners. There was no document presented before Court showing that that registration had changed. It then follows that the contention by both Ali and Khalid that the Captain of the Ship left the Ship to them and in particular in the case of Khalid that he could sign any instrument, paper and agreement with regard to the Vessel is hard to accept. What right did the Captain have to give such authority? That has not been made clear by any party. It matters not to this Court how many affidavits a party has filed showing the Vessel was left in their custody, short of the Registered Owner showing that it had given such authority this Court will not act on those affidavits or any consents for that matter. In this regard I say that it is wholly unacceptable for a Government Officer to have involved himself in this dispute by swearing affidavit as was done by Gabriel Lubale, Senior Immigration Officer where he supported the claim made by Ali.

15. Further looking at a form from the Office of the President, Ministry of Interior & Coordination of National Government entitled disembarking of crew of the Vessel it detailed the following amongst others-

“RE: DISEMBARKING SAIL CREW OF MV LAXMI NARAYAN

Listed are Sail Crew who arrived at this Boarder Control Point on 25th April 2014 aboard the stated Vessel which was sold to a Tanzanian Citizen living in Dar Es Salaam. The Vessel anchored here in the custody of Captain Ali Mohamed Ali and Statutory Registered Ship’s Agent – Al-Amry.”

16. There are two issues that are evident from the above disembarking form that remain unanswered todate. Firstly is who is the person the Tanzanian National who purchased the Vessel and what does he have to say about the parties before Court getting the Vessel. Secondly who is the Vessel’s Agent Al-Amry and why does he not have a say on the application before Court.

17. Over and above my findings above I need to state that the Power of Attorney relied upon by Khalid was unregistered and accordingly it cannot be relied upon by this Court.

18. Further the Applicant Ali, filed this action by way of Miscellaneous Notice of Motion for what is clearly for orders that are final in their nature. That is contrary to the provisions of the Civil Procedure Act and Rules which provide that every suit shall be instituted by filing a Plaint as per Order 3 Rule 1 of the Civil Procedure Rules or by Originating Summons as per Order 37 of the same Rules. Pleadings as per Section 2 of Civil Procedure Act are defined as-

“Pleadings” includes a Petition or Summons, and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counterclaim of a defendant.”

The Miscellaneous application filed by Ali in this matter fails that test of what a pleading is. On that ground alone this action fails.

19. What then becomes of the Vessel? In my view with both parties having failed to prove ownership or

valid right to have custody of the Vessel there remains but one option. That is, the Vessel and cargo shall be forfeited to the State.

20. In the end these are the Orders of the Court-

- a. **The Notice of Motion dated 18th July 2014 is dismissed with no orders as to costs.**
- b. **The Vessel 'MV LAXMI NARAYAN' and the cargo in it are hereby forfeited to the Kenyan Government.**

DATED and DELIVERED at MOMBASA this 25TH day of SEPTEMBER, 2014.

MARY KASANGO

JUDGE