



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA DISTRICT REGISTRY

Claim No. 5 Of 2012

ADMIRALTY CLAIM IN REM. AGAINST THE MOTOR VESSEL “INDIAN OCEAN EXPLORER 2” OF THE PORT OF PANAMA

BETWEEN

STARLITE PICTURES S.R.O.CLAIMANT

AND

THE OWNERS OF THE MOTOR VESSEL “INDIAN OCEAN EXPLORER”
.....DEFENDANTS

RULING

This application seeks various orders:-

1. Spent
2. (a) That terms and conditions of sale of the motor vessel “INDIAN OCEAN EXPLORER 2” of the port of Panama attached be approved.

(b) Mr. Raphael Wambua Musau, marine surveyor of Industrial and Maritime Surveyors Limited, 5th floor, Mbaraki Wing, Cannon Tower II, Moi Avenue P O Box 82566, Mombasa be appointed to appraise the said vessel and be sworn in forthwith by the Admiralty Marshal.

(c) the conditions of sale herein be advertised once in the Daily Nation and once in the East African and the claimant be at liberty to appoint at its own cost an International ship broker to advertise these conditions of sale on the International markets.

(d) The motor vessel “INDIAN OCEAN EXPLORER 2” be sold in US dollars;

(e) the claimant do have liberty to make a bid at any such sale,

(f) the Admiralty marshal be authorized to use the Admiralty Marshal's existing US dollar account at Commercial Bank of Africa Limited, Moi Avenue Branch, account no. 0316261507 Mombasa, for the purposes of receiving the proceeds of sale.

(g) the proceeds of sale shall be held by the Admiralty Marshal in the said account pending the

determination of the London Arbitration or until further costs.

The grounds for this application are that on the 23rd day of January, 2013 this Court ordered that the terms and conditions of sale of the Motor Vessel **“INDIAN OCEAN EXPLORER 2”** be appraised and sold **pendente lite**.

2. That before the Vessel can be sold, the terms and conditions of the sale must be approved.
3. The vessel which is the claimant's only security, is a wasting asset and is costly to maintain while under arrest and therefore needs to be sold urgently to avoid any further diminution of value and losses to creditors.

The Defendants who are the owners of the motor vessel **“INDIAN EXPLORER 2”** object to the appointment of Raphael Wambua Musau to appraise the vessel before its sale.

The grounds for the objection are found in paragraphs 6 -15 of the replying affidavit sworn by Thierry Thevenet a Director of the Company that owns **“INDIAN OCEAN EXPLORER 2”**.

The gist being that there is apprehension on their part as to the impartiality of the proposed survey or based on the fact that the deponent is also a Director of another company Hawkwind Corporation the owners of motor vessel Kairos which was razed down by a fire while being repaired at the shipyard of Africa Marine Engineering Company Ltd. whereupon a dispute arose as to who was responsible for causing the fire which matter is subject to litigation in Hccc No. 40 of 2008. The shipyard had retained the services of Industrial and Maritime Surveyors Ltd. the organization for which Raphael Wambua Musau works for.

There ensued unpleasant exchange between the representatives of that company and the deponent.

The Defendants are apprehensive and have reservations about the abilities of industrial and Maritime Surveyors Ltd. And by extension that of Mr. Raphael Musau.

The second ground of objection relates to the vessel itself and as to whether the proposed surveyor has the necessary experience to appraise it.

It is the Defendants Contention that the vessel is a specialized yacht that ought to be appraised and sold as such.

The Defendant proposes the yacht to be appraised by Gary Smith of Sarasota Yatch & Ship.

This Gary Smith is said to be a certified professional yacht Broker with extensive knowledge of all aspects of yacht ownership. He is a member of globally acclaimed Sarasota yacht & shipping organization based in Miami-Florida U.S.A. specializing in International yacht sales and charter of vessels ranging from 30 to 170 feet.

The Defendants concerns are that any appraisal done by a person not well versed with the yacht market will be meaningless in that it will be limited to calculation of mere tonnage that expresses the value based on tonnage without one account of actual state of demand and similar vessel and prices that such a vessel would attract.

I will first deal with the second ground of objection which revolves around the nature of vessel **“INDIAN OCEAN EXPLORER 2”**.

The Defendant contends that its a yacht but does not go further to point out what particular attributes qualifies it to be referred as a yacht. The simple and ordinary meaning of a yacht is a luxury vessel.

Annixture **'uk 3'** of the Supporting affidavit of Ushwin Khanna for the claimant in claim No. 5 of 2013 is a data sheet containing photographs of motor vessel INDIAN OCEAN EXPLORER 2. It is

shown as a patrol Escort with accommodation of 25 cruise speed 10 kts and a range of 3500 meters.

The particulars are also given. It is shown that it was built in 1966 at Colling wood ship yard for Canadian Coast Guard. There is no indication that it was converted into a yacht at any given time.

I have duly perused “**u k 1**” which is also an annexure to the Supporting affidavit of Ushwin Khanna Advocate. It is the curriculum vitae (cv) of Raphael Wambua Musau. The Academic qualification span the years 1954 to 1967. Work experience in the military in the navy span the years 1968 – 1972.

Merchant Navy Services 1973 – 1978 further Academic qualification form 1978 – 1984. He has been a surveyor from 1997 to date. This is by no means a small achievement mark so when compared to that of the Defendants preferred Gary Smith of Sarasuta yacht and ships.

The Court has already observed that vessel “**INDIAN OCEAN EXPLORER 2**” is not a yacht but a patrol boat. It follows therefore that the services of Gary Smith who is a certified professional yacht **broker** would not suffice. There is also the question of logistical problems including flight expenses, accommodation, obtaining of work permits etc.

The Surveyor proposed by the claimants has more than the necessary qualifications for a surveyor. He is based in Mombasa and for expediency's sake he is best placed.

Raphael Wambua Musau and the company he works for, are two distinct persons or entities. If the Defendant had an altercation with other representatives of the organization Raphael Wambua works for, it cannot be said with any certainty that he was part of it or aided and abetted in it.

The upshot is that Mr. Raphael Wambua is appointed to appraise the said motor vessel as prayed. The Defendant is not estopped from proposing any other local surveyor as the appraisal can be done by one or more experienced persons.

As there is no objection to the other orders, they are granted as prayed.

Ruling dated, signed and delivered in open Court this **14th June, 2013**.

In the presence of:-

Asige holding brief Khanna

Kalaber holding brief Ogunde for the Defendant

Miss Muyaa for the claimant

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M. MUYA

JUDGE

17TH JUNE, 2013