



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
ADMIRALTY CLAIM 12 OF 2011

ADMIRALTY CLAIM IN REM AGAINST THE OWNERS OF THE MOTOR VESSEL “GHADEER
1”

CLAIMANT: 1. BASHIR MUSE MOHAMED and

2. SAHIL DEVELOPERS COMPANY LIMITED

DEFENDANTS: 1.THE OWNERS OF MOTOR VESSEL “GHADEER 1” and

2. P. MUGO T/A MUGO SCRAP MERCHANTS

RULING

1. Before me are two applications. The first by the 1st Defendant is dated 23rd January, 2012 challenging the court’s jurisdiction herein. The second, by the Claimant, is dated 2nd February, 2012 and seeks to commit the 1st Defendant for alleged contempt of court. Both were argued on 27th March, 2012.
2. The matter arose when the claimants allegedly took charge of the ship MV Ghadeer after extensive repair to prevent it from sinking and to make it sea worthy. About the beginning of 2010, the owner one Munawar Somji, allegedly called the 1st Claimant requesting the Claimants to offset the six months’ salary arrears of the ship’s crew on the understanding that he, the owner, would refund the said sum to the claimants. Meanwhile, the ship would act as a security on a maritime lien for the moneys advanced, and the Claimants would take charge of the ship. The salary arrears were subsequently paid through intermediaries by the claimants on behalf of the ship’s owners. Further costs in repairs, maintenance and day to day running costs, had been incurred with the consent of the owners several times between 2009 and 2011.
3. The ship’s owner was present in Kenya in 2011 and was presented with an invoice of 2,142,800/= to which he did not object. However he was in the process of disposing off the ship as scrap metal to the 2nd Defendant without involvement of the claimant. Hence, the filing of the claim. Pursuant to a Notice of Motion application dated 23rd December, 2011 the ship was arrested by warrant of this Court, of even date.
4. In their acknowledgement of service form ADM 2, the 1st Defendant indicated that they intended to defend the whole claim and to contest jurisdiction. Boxes 1 and 3 of ADM Form 2 are so ticked in. The 1st Defendant then filed on 23rd January, 2012, an Application notice, supported by the Affidavit of Munawar Jafferli Somji, a shareholder of the ship owner Haidery Fishstock Co. Ltd of Tanzania. The application seeks inter alia, the following orders:

“i)

ii) This claim be struck out with costs.

iii) In the meantime and pending the hearing and determination of prayer ii above the Warrant of Arrest issued against the fishing vessel “Ghadeer 1” be discharged, struck out or set aside and the fishing vessel Ghadeer 1 be released from arrest and custody.

iv) The costs of this application and of the release and any Admiralty Marshal’s expenses as well as port charges be paid by the Claimants.”

5. The grounds of the application are ten (10), but I refer to a few key ones as follows:

“(ii) That claim as for monies allegedly advanced to the 1st Defendant by the Claimants to pay crew salaries and maintenance expenses. There is no admiralty jurisdiction for loans on the absence of a mortgage.”

(iii) The claim is also for crew wages. None of the claimants claims to have been employed by any of the Defendants as an officer or member of the crew of fishing vessel ‘Ghadeer 1’.

(iv) The claim is also for crew wages. None of the Claimants claims to have been employed by any of the Defendants as an officer or member of the crew of the fishing vessel GHADEER 1.

(V) The documents in support of the Claim annexed to the declaration of the application for Warrant of Arrest show that the 1st Claimant has no claim at all against any of the Defendants. The total clam of Kshs. 2,142,800.00 is claimed only by the 2nd Claimant.

There is no admiralty jurisdiction for joinder of separate causes of action in one claim by two separate and distinct Claimants.

(vi) The Declaration in support of the application for warrant of arrest failed to comply with the requirements of section 2D part 61.5 of the English Civil Procedure Rules relating to arrests and the Court issued the warrant of arrest without knowledge as to 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 or the vessel’s Port of Registry.

(vii) The Court issued a Warrant of Arrest against the motor vessel GHADEER 1 of the Port of Mombasa but the Warrant was executed against the Motor Vessel GHADEER 1 of the Port of Zanzibar.

(viii) There is no agency relationship between the 1st Defendant and any of the Claimants to enable the Claimants to claim agency fees. The alleged agency is founded upon a forged letter of appointment addressed to the Kenya Maritime Authority.

(ix) No evidence was produced on the alleged cost of repairs of the fishing vessel GHADEER 1. None of the defendants is an engineer or ship repairer or owner of a dry dock. No repair were carried out by the Claimants on the fishing vessel GHADEER 1. If they did so they would have carried out those repairs under the terms of the joint Venture Agreement which to achieve the fraud was not disclosed to the court.

(x) The vessel is incurring heavy watch keeper’s charges and port charges. Furthermore the Kenya Ports Authority intends to dredge the scrapping site where the vessel currently lies and it is impossible to move the ship. It is therefore necessary that the application be heard most urgently.”

6. The 1st Defendant also provided a list of authorities including:

- The Judicature Act Cap 5
- The English Civil Procedure Rules 2011 (part 61 (5.1) 61 (5.7))
- Civil Appeal No. 50 of 1989 **The Owners of the MV Lillian S Vs Caltex Oil Kenya Ltd. 1989 KLR.**

7. The Claimants filed a Replying Affidavit sworn by Bashir Muse Mohamed. He depones inter alia as follows:

- That there is no requirement that the claimants must have personally carried out repairs, and they did so as agents.
- That there is only one cause of action for monies advanced to settle crew salaries, rations, maintenance and repairs arising from the agency relationship.
- That Mr. Somji has consistently regarded himself as the owner of the ship as shown in all exhibits MSJ 4 – 9 and therefore loses the moral and legal authority to deny.
- That the 2nd claimant was and still is the Agent of the ship as the agency has not been revoked.

8. The claimants filed the following authorities in support of their case:

- The international Convention Relating to Arrests of sea going ships
- Admiralty Cause Number 3 of 2009, Mombasa, **Mohamed Hanshu Ibrahim Vs The owners of MV “Sherry”.**
- **Owners and Masters of Mv ‘Joey’ Vs Owners and Masters of the Motor Tugs “Barbara” and “Steve B”.** CA No. 286/2000 (2008) EA (CAK) 367.
- The Supreme Court Act 1981

Jurisdiction:

9. I will deal with this issue first on account of its significance to the continuance of the suit. The Applicant’s argument is that the claim is for monies allegedly advanced to the 1st Defendant by the Claimants to pay crew salaries and maintenance expenses, and that there is no admiralty jurisdiction for loans in absence of a mortgage. The Respondent’s argument is that the monies claimed were paid by the agents of the 1st Defendant on its behalf. In Paragraph 3 of his Further Affidavit Bashir Muse depones:

“3. That there is only one cause of action for monies advanced to settle crew salaries, rations, maintenance and repairs arising from urgency relationship which payment were made from accounts of the claimants”.

10. There is no dispute that the Admiralty jurisdiction of the High Court now exercised under section 4 of the Judicature Act 2010. The admiralty jurisdiction is itself set out under section 20 of the English Supreme Court Act 1981 provides under section 20 (1) that jurisdiction of the High Court inter alia, be to hear and determine any of the questions or claims mentioned in sub section (2). And sub section (2) (p) given jurisdiction for:

20 (2) “ (p) any claim by a master, shipper charterer or agent in respect of disbursements made on account of a ship”. (underlining mine)

11. In this case, the 2nd Plaintiff was described in the Affidavit of Bashir Muse as a company duly licensed by the Kenya Maritime Authority as a “Shipping agent”. It was therefore making a claim as a “shipping agent” and attached documents supporting that agency. Amongst the documents attached to the affidavit of Bashir Muse Mohamed, sworn as director of the 2nd Plaintiff, were a letter by the 2nd plaintiff to Haidery Fishstock Company Ltd the owners of the ship, dated 2nd December 2011 and claiming the amount of shs. 2,142,800/= as unpaid expenses and another similar letter dated 10th November 2011 claiming the said amount being moneys incurred over 2 years between 2009 – 2011. The amount is broken down into staff costs food, equipment, supplies, agency fees of sh. 1,296,000/= and full clearing costs. The full clearing costs are itemized in a survey report also attached thereto.

12. It is true, as argued by the Respondent, that at the time of making the claim there was no evidence of the agency of the Claimant or any other evidence to fit the claim into the categories of jurisdiction under section 20 of the Supreme Court Act. On the basis of the documents filed in the claim, therefore, there was no evidence of agency, and the claim stood solely as one for a “maritime lien” by the Claimants to recover, by way of refunds or set off, money they had spent in paying salaries and facilitating repairs and maintenance. On the basis of the claim information then availed, it was improper for the court to issue the warrant of arrest as it did.

13. In respect of the 1st Plaintiff, his role was that of a director of the 2nd Plaintiff, and he had and has, no claim against any of the Defendants. Although in his affidavit at paragraph 7 he deponed that he had incurred “extensive costs in repair of the ship severally to save it from sinking”, the evidence attached to his affidavit relates to costs incurred by the 2nd Plaintiff a limited Liability Company of which he is a director. The 1st Plaintiff cannot be said to have any claim against the 1st Defendant in such terms as to avail him of admiralty jurisdiction under section 20 of the Supreme Court Act. On this ground, I am prepared to, and do hereby, strike out the 1st Defendant as a party to the claim, there being no claim by him against any of the Defendants, nor is there any admiralty jurisdiction available to him as a director of the 2nd Plaintiff in this claim.

14. For the 2nd plaintiff, as I said earlier, there was no evidence of agency at the time of filing the claim. Such evidence would have provided the jurisdictional link for the claimants claim. The warrant of arrest should therefore not have been issued in the circumstances. Be that as it may, in the Affidavit of Munawar Jafferli Somji for the 1st Defendant in support of the Application Notice dated 23rd January, 2012, he attached a letter exhibited at ‘MJS 3’ which, on the face of it, shows the existence of an agency by the 1st Defendant to the 2nd Plaintiff. Although the 1st Defendant disputes the authenticity of the said letter, it is nevertheless in existence, and the dispute on it is a triable issue. The parties did not address me on the issue whether the subsequent establishment of evidence which, on the face of it shows agency, can be used to found or firm up a claim of agency I will therefore make no pronouncement on that point.

15. The 1st Defendant also complained of the failure of the Claimants documentation to comply with the required form. These failures are stated in paragraph (vi) of the Application notice, and particularized in the Affidavit of Munawar Somji at paragraph 22. There he states:

“22. This Honorable court had no jurisdiction to issue a warrant of arrest against the fishing vessel “GHADEER 1” as the Declaration in support of the application completely failed to satisfy the requirements of part 61.5 of the English Civil Procedure Rules and Sections 20 and 21 of the Supreme Court Act, 1981 of England. The Claimants failed:-

(i) To state the owner of the vessel at the time the cause of action arose and at the time the Warrant was sought.

(ii) The Claimants failed to state the port of Registry of the fishing vessel/motor vessel “GHADEER 1”.

(iii) The Warrant was issued to arrest the motor vessel “GHADEER 1” of the Port of Kilindini,

Mombasa but was instead executed against the Motor Vessel “GHADEER 1” of Zanzibar.

(iv) The Motor Vessel “GHADEER 1” is not registered in the port of Mombasa Kenya.

(v) The Claimants failed to disclose or to state the name of the person who would be liable on the Claim if it were not commenced in rem.

(vi) 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.

(vii) The Claimants failed to disclose who the beneficial owner of all the shares in the ship was at the time the claim was issued and the arrest warrant was sought”.

16. I have perused the plaintiff’s Declaration and the warrant, and can confirm all the omissions marked out. The question that arises then, is whether the said omissions are fatal to the claim thus denying the Claimant jurisdiction. Section 4(2) of the Judicature Act provides as follows:

“The Admiralty jurisdiction of the High Court shall be exercisable -

a) Over and in respect of the same persons, things and matters, and

b) In the same manner and to the same extent, and

c) In accordance with the same procedure as in the High Court in England and shall be exercised in conformity with international laws and the comity of nations “ (Underlining mine).

The procedure to be followed is the same as that in English courts ie English procedure. Although the Claimant argued that the procedures applicable in admiralty actions consist of the law in place in England in 1988, this is manifestly incorrect. The Admiralty jurisdiction of the High Court is exercised under section 4 of the Judicature Act 2010. Further, as pointed out by the 1st Defendant’s counsel, the 1988 law was repealed in 1998. The English law in place, or after, 2010 is therefore applicable.

17. What do the English procedures require? The English Civil procedure Rules 2011 have the following requirements:

As to warrants of arrest, section 2D Rule 5.1 of the Practice Direction No. 61 provides:

“5.1 An application for arrest must be –

(1) In form ADM 4 (which must also contain a

(2) Undertaking) and by a declaration in ADM 5”. (underlining mine)

The claimants form ADM 4 was not as stipulated. However it was in the form of an ADM form for an earlier year, and the one filed was substantially the same form, though not in every respect.

18. The ADM Form 5 Declaration in support of Application for Warrant of Arrest attached by the Claimants was, however, completely of a different nature from that required under the Practice Directions. It did not contain the statement of Truth, nor did it state the person who would be liable on the claim in an action in personam. Rule 5.3 provides:

“5.3 The declaration required by Rule 61.5 (3) (b) must be verified by a statement of truth and must state –

(i) In every claim –

(b) the nature of the property to be arrested, and if the property in a ship the name of the ship and her point of registry; “ (underlining mine)

These are mandatory requirements.

The claimants declaration is in fact stated in paragraph 10 thereof to be an affidavit whose object is as follows:

“10. That I swear this affidavit in support of an application to stop further dealings with the ship between the first and second defendants or their agents and to preserve the ship and any payments yet to be made in that regard”

19. I have very carefully perused the claimant’s Declaration in support of the Application for Warrant of Arrest. As I said earlier, it identifies the “Ghadeer 1”. But it does not identify it as “the property to be arrested”, nor does it anywhere indicate the word “arrest”. The declaration does not, in fact indicate against whom or against which property the claim is brought. The word “claim” in relation to the ship does not even feature on the Declaration.

In summary, the Declaration annexed to the application was so wanting in form and also in detail as to the property against which the claim was made, the property to be arrested, and the port of its registry, that it did not have the effect of supporting the Application for Warrant of Arrest.

20.The result was that the Warrant issued, incorrectly indicated the ship’s port of Registry as Mombasa not Tanzania. Secondly, the Warrant did not reflect the details contained in the Declaration in support of the Application for Warrant of Arrest. To that extent, I find that the non-compliance with the mandatory procedural requirements led to a situation where the Warrant of Arrest, as drafted, was not premised on information declared to the court. The court, not being seized of any of the critical information required for issuance of a Warrant of Arrest, acted, ipso facto without jurisdiction.

21.I therefore have no hesitation in holding that the Warrant of Arrest was unfounded, as up to the date of this hearing, there was no material information upon which the warrant could be issued, as the accompanying information was missing or incomplete. Therefore, the warrant was issued irregularly and without jurisdiction and is hereby declared to have been null and void ab initio. All acts done pursuant to, or in consequence thereof, are therefore void, and are hereby discharged and vacated forthwith. The Claimants shall pay the costs herein.

Dated, signed and delivered this 26th day of July, 2012.

**R.M. MWONGO
JUDGE**

Read in open court

Coram:

1. Judge: Hon. R.M. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a)

b)

c)

d)