



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Admiralty Claim 13 of 2009

**DEEQA CONSTRUCTION & WATER WELL
DRILLING COMPANY LTD.....CLAIMANT**

VERSUS

**THE OWNERS OF MOTOR VEHICLE “ONEGA 1”
(Now motor vessel “MAMALUCA”).....DEFENDANT**

RULING

The Claimant Deeqa Construction and Water Well Drilling Company Limited on 11th December 2009 lodged a claim in the High Court of Kenya at Mombasa against the Owners of the Motor Vessel “Onega 1” now Motor Vessel “Mamaluca”. The claim was for US Dollars 349,263.36 as at 30th November, 2009 being alleged payments due under a Charter Party dated 22nd September 2008 and payments made by the Claimant on the Defendant’s request.

The Particulars of the claims were that:-

1. *The Claimant chartered the vessel vide Charter Party Agreement dated 22nd September 2008 from the Defendants. The Claimant then entered into a contract with the World Food Programme to transport humanitarian food to Somalia from the Port of Mombasa.*
2. *While the vessel was under the control of the claimant (Chartered), the Defendant requested the Plaintiff at various times to make payment on its behalf due to third partys on account of the Motor Vessel “Onega 1”.*
3. *The Claimant settled party claims against the Defendant and the Motor Vessel “Onega 1” at its request totaling to US\$538,281.36 out of which the Defendant has paid a sum of US Dollars 189,018.00 leaving a balance of US\$ 349,263.36 due to the claimant.*
4. *Numerous demands have been made to the defendant but the Defendant persists in its refusal to pay.*
5. *The claimant claims interest on the amount due at 12% per annum under the provisions of Section 26 of the Civil Procedure Act.*
6. *The Claimant also claims costs in the claim.*

On the basis of the said claim the Claimant presented an application under certificate of urgency for the arrest and custody of the motor vessel “Onega 1” (now Motor Vessel “Mamaluca”) lying at the Anchorage at the Port of Mombasa.

Upon hearing the application on 11.12.2009, the Honourable Justice Maureen Odero granted the orders, and a warrant of arrest issued against the vessel and the same was executed.

On the 23rd December 2009, a company called Gulf Shipping company S.A. claiming to be the owner of the

Motor Vessel "Mamaluca" filed an application for Interim relief and to set aside the warrant of arrest and strike out the claim forms against the Defendant. The said Applicant sought the following orders.

- "1.
2. *Pending the hearing and determination of this application, the Defendants be granted leave, at their expense, to arrange for the supply of bunkers and other necessities to the Motor Vessel "Mamaluca" presently under arrest and lying at the Port of Mombasa.*
3. *The Warrant of Arrest issued herein on 11.12.2009 be set aside.*
4. *A declaration be made that this Honourable court has no jurisdiction to hear and determine the Claimant's claim herein;*
5. *The claim Form as against the Defendant herein be struck out and/or set aside and this claim dismissed with costs to the Defendant.*
6. *A declaration be made that the Motor Vessel "Mamaluca" was wrongfully arrested and that the question of damages for her wrongful arrest be referred to the Admiralty Marshal for assessment.*
7. *Cost of this Application and the claim be awarded to the Defendant.*

The grounds set out in the application are as follows:-

- (i) The arrest of the Motor vessel "Mamaluca" is wrongful;
- (ii) This Honourable Court has no jurisdiction to arrest the said Motor Vessel "Mamaluca" for a claim by the Charterer (Claimant) for disbursements made on account of a ship as the "relevant person" when the alleged cause of action accrued was not the beneficial owner of all the shares in the said Motor Vessel when the action was brought.
- (iii) None of the Claimants' alleged claims constitute a maritime lien;
- (iv) The Motor Vessel "Mamaluca" is running low on necessary supplies including bunkers and it is essential for her maintenance and safety that necessities be supplied for her;
- (v) The claim is an abuse of the process of this Honourable Court against the Defendant.

Prayer 2 regarding the supply of bunkers and other necessities to the vessel was dealt with summarily in view of the nature of the application.

The application was supported by the affidavit of one Amjad Ali Mughal sworn on 23rd December 2009. He deponed as follows:-

- "1. That I am Director and President of Gulf Shipping Company S.A. who is the owner of the Motor Vessel "Mamaluca" (presently in port at Mombasa, Kenya) and am duly authorized by it and its board of directors to make this affidavit on its behalf.
2. I have read the contents of the certificate of urgency application and Undertaking arrest and custody and claim Form all dated the 11th December, 2009 as well as the Declaration in support of the application and undertaking for arrest and custody made by Abdulkadir Mohammed Nur on the 11th day of December 2009 in support of the said Application (hereinafter referred to as "the said Declaration")
3. That by a Warrant of Arrest issued on the 11th day of December, 2009 to motor vessel "Mamaluca" was arrested by this Honourable court at the instance of the claimant herein on the basis of alleged claims that give rise to purportedly a maritime lien or action *in rem*

4. That it is evident from all of the aforesaid documents that the claimant's claims herein are against Needham Network Corporation who no longer has any interest whether beneficial or otherwise in all of the shares in the Motor Vessel "MAMALUCA". The said Motor Vessel was by a Bill of Sale dated 15th May 2009 transferred to Gulf Shipping S.A. I annex hereto and mark as Exhibit "AAM 1" a true photostat copy of the said Bill of Sale dated 15th May 2009.

5. That I also annex hereto in a bundle and collectively mark as Exhibit "AAM2" various documents certifying the ownership of the said motor vessel as well as showing the various charges in her name from "Omega 1" (when purchased) to "ALAMDAR" and now the "MAMALUCA".

6. That from the claim form and the said Declaration, it is abundantly clear that assuming (without admitting) that the Claimant's alleged claim are indeed due, they can only be for disbursements made by a charterer on account of a ship under section 20 (2) (p) of the Supreme Court Act 1981 in respect of which I verily believe there is no maritime lien. The apparent attempt by the Claimant to bring his claim within the provisions of Sections 20 (2) (k) and (q) is wholly misconceived and untenable as neither were any towage services provided by the Claimant nor can it have any claim in General Average as against the previous owners of the vessel – the previous owners having declared the General Average seeking contribution from the cargo interests, the World Food Programme (WFP). I am informed by Jeni Vaiscovici, a director of Needham Network Corporation, the previous owners and verily believe that a General Average Bond was indeed executed by the WFP in favour of the previous owners. I annex hereto and mark as Exhibit "AAM 3" a true Photostat copy of the said duly executed General Average Bond as well as certain correspondence showing that the claimant has no claim arising out of the act of General Average.

7. That I am advised by Mr. Sanjeev Khagram of A.B. Patel & Patel Advocates for the Defendant herein and verily believe that in view of the fact that none of the claimant's claims constituted maritime lien or other charge on the said motor vessel, the claimant cannot invoke the jurisdiction of the Honourable Court under the provisions of Section 21(3) of the Supreme Court Act in Order to validly have the motor vessel "MamalUCA" arrested.

8. That in the premises, I am further advised by Mr. Sanjeev Khagram of A.B. Patel & Patel, Advocates for the Defendant herein and very believe in order to invoke the jurisdiction of this Honourable court in Rem and the Motor Vessel "MAMALUCA" arrested to secure the claimant's alleged claim, it must satisfy the provisions of section 21(4) of the Supreme Court Act, 1981. Needless to say, the claimant has failed to satisfy the requirements set out therein as the relevant person (i.e. person who would be liable in an action in person when the cause of action arose) was not the beneficial owner of the said Motor Vessel "MAMALUCA" as respects all the shares in it at the time the action was brought – the ownership having changed from Needham Network Corporation (person liable in person) to Gulf Shipping Company S.A. (person who was the beneficial owner at the time of action was brought). Consequently, I verily believe that this Honourable Court had no jurisdiction to arrest the above Motor Vessel "MAMALUCA" and the Claimant has wrongfully caused the same to be arrested. The Warrant of Arrest must therefore be set aside.

9. That consequently, I also believe that the Claimant has no cause of action against the Defendant herein and the claim Form ought to be struck out and this claim dismissed with costs to the Defendant as being an abuse of the process of this Honourable Court and/or disclosing no or no reasonable grounds for bringing the claim. Further, I humbly pray this Honourable Court declare

that it has no jurisdiction to try the claim.

10. That the Defendant herein has suffered immense loss as a result of the wrongful arrest of the Motor Vessel “MAMALUCA” by reason of the fact that she cannot be employed on voyages thereby depriving the Defendant of any income whilst she continues to remain under wrongful arrest and cannot be employed on any meaningful voyages, the Defendant continues to suffer a daily loss in the sum of US\$5,000.00 due to the expenses incurred. Besides, her machinery is at risk of wasting away for being non-operational for a long period.
.....”

In reply to the aforesaid statements and allegations, the Claimant filed a Replying Affidavit sworn by a director of the Claimant Company Mr. Abdulkadir Mohamed Nur on 23rd January 2010. The Claimant also filed two other affidavits sworn by one Stefano Napoleoni and one Leonardo Ziliani.

In Mr. Abdulkadir Mohamed Nur’s affidavit the Claimant states inter alia,

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4. That it is true that the claim by my company is against Needham Network Corporation.

5. That I was first introduced to Amjad Ali Mughal by Stefano Napoleoni in 2008 while I was looking for a vessel to transport food for me from Mombasa as the partner of Jeni Vaiscovici, the owner of Motor Vessel “Omega 1”.

6. That I met Amjad Ali Mughal and Jeni Vaiscovici together with Stefano Napoleoni in our office in Dubai and they offered me a Charter Party. However, they asked me to assist them because the vessel was in trouble and they wanted me to bail them out.

7. That Amjad Ali Mughal explained that the vessel had broken its generator and they required some supplies. It was agreed if I bail them out they would allow me to Charter the vessel to use in the shipment of Cargo for the World Food Programme when they finished the voyage to Mogadishu.

8. That around October 2008 the motor vessel encountered mechanical problems, crew demanding wages and creditors demanding payment for outstanding debts leading to the arrest of the vessel in Mogadishu, Somalia. Amjad Ali Mughal and Jeni Vaiscovici called and pleaded with me to bail them out by making the said payment totaling to \$133,520 to their creditors which I did pay.

9. That during the negotiations for the Charter Party I was negotiating with both of them and Amjad Ali Mughal at all times referred to Motor Vessel “Omega 1” as “Our Vessel”.

10. That after my company loaded the vessel and it developed mechanical problems near Malindi, I called Jeni Vaiscovici and she told me to deal with Amjad Ali Mughal on all issues concerning the vessel and that he was in Mombasa.

11. That I called Amjad Ali Mughal and he confirmed he was in Mombasa and

we agreed I would meet him in Mombasa.

12. That Amjad Ali Mughal negotiated for the towage with Southern Engineering Company Ltd in my presence but he did not have the money to pay. He asked me to pay and I agreed with Southern Engineering Company Ltd and paid for the towage.

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19. That I am convinced that the transfer of shares in the vessel by Jeni Vaiscovici to Amjad Mughal was calculated move aimed at frustrating my claim.

20. that in the Charter Party dated 22nd September, 2008 Clause 19 provides for Arbitration in London and I am prepared to proceed to Arbitration provided that an acceptable security is posted before the release of the vessel.

21. That if the vessel is released without security my claim will be frustrated as it's the only asset I know belongs to Needham Network Corporation and Jeni Vaiscovici.

22.”

I have found it un-necessary to refer to the other two affidavits by Stefano Napoleoni and Leonardo Ziliani as they are not directly relevant are of no assistance to the court as to the ownership of the Motor Vessel “MAMALUCA” as on the date when the action herein was lodged and brought.

I have carefully perused the affidavits, annexure/exhibit and all material or records. I have also considered the submissions by counsel, and the authorities referred to.

The first question which this court must consider and determine is that of jurisdiction as it has been raised as the main ground in the application.

Did this court have the jurisdiction to arrest the motor vessel “MAMALUCA” for a claim by the Claimant as Charterer?

There is no dispute and it is an admitted fact that the claimant’s claim is against a company called Needham Network Corporation. This is admitted expressly in paragraphs 4 and 21 of the affidavit of claimant’s director Abdulkadir Mohamed Nur.

In the White Book, Civil Procedure Volume 2 (2007), the mode of exercise of admiralty jurisdiction is provided for: section 21 provides as follows:

“Mode of exercise of Admiralty jurisdiction

21 – (1) subject to Section 22, an action in personam may be brought in the High Court in all cases within the Admiralty jurisdiction of that court.

(2) In the case of any such claim as is mentioned in Section 20(2), (a), (c) or (S) or any such questions as is mentioned in Section 20 (2) (b) an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises.

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

(4) In the case of any such claims as is mentioned in Section 20 (2) (e) (v) where

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(a) the claim is in connection with a ship and

(b) the person who would be liable on the claim in an action in personam (“the relevant person) was when the cause of action arose the owner or Charterer of or in possession or in control of the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against –

(i) that ship if at the time the action is brought the relevant person is either the beneficial owner of that ship as respects all shares in it or the Charterer of under a Charter by demise or

(ii) any ship of which at the time when the action is brought, the relevant person is the beneficial owner respects all shares in it”

From the foregoing law, my understanding is that for this court to have legality and lawfully ordered the arrest of the motor vessel “MAMALUCA” in circumstances of this case and on the basis of the claim, then the relevant person, Needham Network Corporation must have been the owner of the ship at the time the action was brought. Needham Network Corporation which is the person who is alleged to be liable for the claim must have been the beneficial owner of all shares in the motor vessel “MAMALUCA”. The claim here was lodged in this court on 11th December 2009.

Exhibit AAM” is a Bill of Sale. It shows that on 15th May 2009 Needham Network Corporation transferred to Gulf Shipping Company one hundred per cent (100%) shares in the ship called “Omega 1”.

The Bill of Sale shows that the Port of Registration of the ship was Panama.

AAM 2 is a certificate issued by what is called Public Registry of Panama. It is the certificate of Incorporation of Gulf Shipping Co. S.A. in Spanish and duly translated into English. There are some questions on some of the dates given but this court may not have the jurisdiction to go unto any discrepancy in the dates since it is a certificate issued by another Sovereign state.

It shows that the subscribers of the company are:

1. Abdiel Diaz Hiun
2. Leandro McTaggart

The Directors are:

1. Amjad Ali Mughal
2. Lupu Aura
3. Gafton Curteza

Also shown to the court is a certificate of Ownership of the ship called ALMDAR formerly called ‘Omega 1’. I have been told during submissions that these are previous names of motor vessel “MAMALUCA”. Also exhibited is what is called a Continuous Synopsis Record issued by the Government of Panama, through it’s Panama Maritime Authority in accordance with International Conventions. It certified that the ship ALMDAR was registered in Panama on 12th March 2008 and the registered owner is Gulf Shipping Co. S.A.

From the foregoing, I am satisfied that on a balance of probabilities that Needham Networks Corporation did sell

the ship 'Onega 1' to the Defendant Gulf Shipping Corporation which became the registered owner of the ship now called "MAMALUCA" on 24th June 2009.

I also do find that one hundred per cent of the shares in "MAMALUCA" are owned by Gulf Shipping Corporation.

Gulf Shipping Corporation is not the relevant person and when the action was brought Needham Networks Corporation was not the beneficial or owner of the shares in the said ship.

I was referred to the English case THE MARITIME TRADER" LLOYD'S LAW REPORT (1981) VOL.2 153 in which the court held the following:

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The House of Lords case of "The Eschersheim" (1976) 1 Lloyd's Rep 81 in which it was held:

"It is clear that to be liable to arrest a ship must not only be the property of the defendant to the action, but also be identifiable as the ship in connection with what the claim made in the action arose (or a sister ship of that ship)."

In MARITIME TRADER, Lord Sheen considered a similar question. He said:-

"

The second ground upon which MTS seek to set aside the writ is that the action has been brought against a ship which is not beneficially owned by the person who would be liable in an action in personam. The claims in the writ relate to the ship Antaios which was Chartered by MTO from the plaintiff's company MTO and no other company would be liable in an action in personam. That is not in dispute. The plaintiff claim that the ship MARITIME TRADER is beneficially owned by MTO.

As I have said, MTS are the registered owners of MARITIME TRADERS. That company was incorporated in December, 1975 under another name. It took delivery of "Maritime Trader" in February 1976 direct from the builder's yard. The Company name was changed to MTS on April 9, 1976. All shares in MTS are owned by MTO. The question is whether at the time when the action was brought Maritime Trader was beneficially owned as respects all the shares therein by MTO, the person who would be liable on the claim in an action in personam. The starting point is the fundamental principle of company law that a shareholder has no property legal or equitable in the assets of the company.....

Following that principle, MTO who owned all the shares in MTS has no property in Maritime Trader which was one of the assets of MTS."

I am unreservedly persuaded by the statemate of law by Lord Diplock in "The Eschersheim" and Justice Sheen in 'The Maritime Trader'.

I do hold that:-

- Needham Networks Corporation is the person who would have been liable on the claim in an action in person.
- When the action was brought the motor vessel "MAMALUCA" was not beneficially owned as respects all of its shares by Needham Networks Corporation.

The net result is that I hold that the Motor Vessel "MAMALUCA" is not a ship against which the jurisdiction of the court can be invoked in respect of this claim.

During submissions counsel for the claimant while conceding that there was actually change of ownership raised question on the perceived mode of change. counsel submitted that change of ownership is shrouded in perceived intention to defeat the claim of claimant . That it appeared that there was a conspiracy between Needham Network Corporation and Gulf Shipping to defeat the claim. It was suggested in effect the directorship of Amjad Ali Mughal in Gulf Shipping was not accidental as he was the one representing the owners of “Onega 1” when the liability was incurred.

I have considered the allegations of conspiracy. As suggested by Lord Sheen, the court would not hesitate to lift the corporate veil if evidence suggested that there was a possibility of fraud or conspiracy. However, I do not find any evidence to prove that Needham Network Corporation, Amjad Ali Mughal or Jeni Vaiscovici have shares or beneficial interest in the Defendant, Gulf Shipping Corporation.

For the foregoing reasons I hold that this court has no jurisdiction to arrest and continue the arrest of the motor vessel “MAMALUCA”.

I do allow grant prayers 3,4 and 5.

I do hereby declare that the motor vessel ‘MAMALUCA’ was wrongfully arrested and that the question of damages for her wrongful arrest be and is hereby referred to the Admiralty Marshall for assessment in terms of prayer 6. Such determined damages shall be paid by the claimant.

The Claimant shall pay the costs of the Application and claim to the Defendant.

Dated and delivered at Mombasa this 11th day of February 2010.

**M.K. IBRAHIM
J U D G E**