



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Admiralty Claim 3 of 2009

MOHAMED HANSHI IBRAHIM.....CLAIMANT

VERSUS

THE OWNERES OF MOTOR VESSEL "SHERRY".....DEFENDANTS

RULING

I have before me an application by Salat Moshen Saleh Al Kasadi the defendant/respondent (hereinafter "the applicant") for one main order namely: that the claim for US Dollars 10,380.00 and costs against the Fishing Vessel "Sherry" (hereinafter "the Sherry") be struck out and the warrant of arrest issued against the said vessel be discharged, lifted or dismissed with costs. The application has been lodged against Mohamed Ibrahim Hanshi the Claimant (hereinafter "the Claimant"). The principal reasons for the application are that the Sherry is in a state of disrepair and may run aground unless urgent mechanical attention is given to restore it into serviceable condition; that this court has no admiralty jurisdiction to entertain the claim which claim has been made with ulterior motives and that the claimant has not disclosed receipt of part of the debt claimed.

The application is supported by an affidavit sworn by one Harun Abdul Majid Omar the Manager of the Sherry. It is deponed in the said affidavit that the Sherry is experiencing a mechanical breakdown due to engine failure and requires urgent mechanical attention to rehabilitate it to enable it resume its fishing expeditions to meet orders to customers and its continued arrest is detrimental to those operations and is causing loss; that the deponent was authorized to pay USD 10,000/= to the claimant in repayment of sums owed by the Sherry owner out of which he paid Kshs. 150,000/= which the claimant has not disclosed; that the Sherry broke down in Somalia and was towed to Lamu by the deponent's business colleagues and thereafter was propelled by waves to Mombasa; that in the premises, the claimant's claim does not constitute a maritime lien and the Sherry's arrest was unlawful, that a search whether a caution had been registered against the Sherry was never carried out; that the Sherry is registered in the name of the claimant who could not therefore raise a claim against the same; that the claimant's desire is to purchase the Sherry yet his claim is bad in Law; in the alternative the Sherry be released on the security of Kshs. 30,000/= pending determination of this suit.

In opposition to the application, the claimant has filed a replying affidavit. In the affidavit, it is deponed that the arrest of the Sherry does not affect her repair and maintenance and that in view of her status she cannot perform any fishing expeditions; that the claimant not only advanced monies to the Sherry for her operations and maintenance but also supplied ice, fuel and other goods; that the debt due to the Claimant was acknowledged and so is the existence of a mortgage in his favour; that Harun Abdul Majid Omar only deposited Kshs. 110,000/= and not Kshs. 150,000/= as alleged; that it was not true that the Sherry was towed by swimmers but by another vessel to Mombasa for which the Claimant paid Kshs. 30,000/=; that the Sherry is indeed registered in his name but the beneficial owner remains the applicant; that there was no caution against the Sherry and even if there was it would not *per se* prevent her arrest and that his only interest is to recover his money.

When the application came up before me for hearing on 18th February 2010, counsel agreed to file written submissions which submissions were duly filed by 13th March 2010. The submissions merely substantiated their client's respective stand-points.

I have considered the application, the affidavits filed both for and in opposition to the application and the submissions of counsel. Having done so, I take the following view of the matter. The gist of the applicant's objection to the arrest of the Sherry is the alleged want of admiralty jurisdiction of this court in view of the claimant's claim which, according to the applicant, is a debt against the owners of the Sherry. In the applicant's view, the claimant's claim does not fall under section 20 (2) of the English Procedure Rules. I have keenly perused the said section and note that subsections 2 (k) and 2 (m) are in the following terms:-

“20 (1) The Admiralty Jurisdiction of the High Court shall be as follows that is to say:

(a) Jurisdiction to hear and determine any of the questions and claims mentioned in sub-section (2).

(2) The questions and claims referred to in sub-section 1 (a) are:-

.....

(k) any claim in the nature of towage in respect of a ship or an aircraft.

.....

(m) any claim in respect of goods or materials supplied to a ship for here operation or maintenance.”

In the declaration in support of the application for Warrant of Arrest, the claimant deponed at paragraph 4 and 5 as follows:-

(4) My claim against the Fishing Vessel “SHERRY” is for provisions made to that vessel at the owner’s request in the sum of US \$ 10,000.00.

(5) The Fishing Vessel “SHERRY” developed engine problems while in Somalia waters. At the defendant’s request I arranged for the towage of that vessel by the Fishing Boat “WAMU” belonging to a friend of mine, Mr. Abdi Samad. I paid him Kshs. 30,000/= (US \$ 380_ for the towage and the “SHERRY” was towed to Lamu.....”

It is plain that the claimant’s claim fell squarely under the purview of the said section 20 (2) (k) and (m) of the Supreme Court Act. The applicant’s basis of objecting to this court’s Admiralty Jurisdiction is that the claimant’s claim is for a debt against the owner of the Sherry. In support of that averment the applicant exhibited MIH 4 which is an agreement between the owner of the Sherry and the said Harun Abdul Majid Omar dated 5th August 2008. Clause 8 thereof reads as follows:-

“The owner acknowledges that the previous manager of the fishing boat Mr. Mohamed Ibrahim Hanshi is owed US \$ 10,000 only. The owner authorizes the representative to repay the said amount US \$ 10,000 on his behalf.”

This clause acknowledges the claimant’s debt by the owner of the Sherry. The clause does not, however, give particulars of the debt. It does not exclude the claimant’s assertion that the debt was for goods or materials supplied to the Sherry for her operation or maintenance.

The applicant has also exhibited a copy of another agreement between the Claimant and the said Harun Abdul Majid Omar dated 7th August 2008. In the preamble the following is stated:

“WHEREAS the creditor is owed the sum of US Dollars 10,000 or its equivalent in Kshs. 670,000/= at the current rate particulars whereof are within the knowledge of the parties herein AND WHEREAS the said debt is with respect to the boat known as SHERRY particulars whereof are within the knowledge of the parties herein.”

The creditor is the claimant and Harun Abdul Majid Omar is the current Manager of the Sherry. Clause 2 reads as follows:-

2. The Manager hereby confirms and undertakes to settle the said sum of US DOLLARS 10,000 to the creditor on behalf of the debtor one Saleh Moshen Saleh Al-Kasadi.”

Once more, the particulars of the debt are not disclosed but it cannot be said that, the debt was not in respect of the Sherry’s maintenance or for goods supplied for her operations. In any event annexed to his replying affidavit in opposition to this application, the claimant has furnished evidence of the manner in which the debt was incurred. That evidence clearly shows that the claimant’s claim came under the purview of the said section 20 (2) (m) of the Supreme Court Act 1981.

The applicant also took issue with the manner the Sherry was arrested contending that the same was irregular and unlawful as the statutory requirement for searching the register before the issue of the warrant to establish whether any caution against arrest of the Sherry existed or not was not fulfilled. With all due respect to the applicant, that contention is not serious. There is no suggestion that there was indeed a caveat duly registered against the arrest of the Sherry. In any event even if one had been registered that fact *per se* would not prevent the issuance of a warrant of arrest.

Then the applicant makes the intriguing submission that the Sherry is registered in the name of the claimant and he cannot therefore raise a claim against a vessel which is registered in his name. With that acknowledgement, it is rather difficult to appreciate the foundation of the applicant’s claim. Do I detect a disregard of candour? Be that as it may the claimant is in no doubt as to his interest in the Sherry and the proposition by the applicant that the claimant has ploys for unfairly gaining ownership of the Sherry is in my view absolutely

without basis.

Striking out is a draconian remedy. It can be devastating to the party whose pleading is struck out. In this case the owner of the Sherry and the applicant freely acknowledged the claimant's debt and desire that the claim be struck out on the basis of defects which he has failed to demonstrate. The jurisdiction to strike out applies only where a pleading is incontestably bad. That cannot be said about the claimant's claim by any stretch of imagination.

The upshot of the above consideration of the applicant's application dated 31st March 2009, is that the same is devoid of merit and is dismissed with costs.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 26TH DAY OF APRIL 2010.

F. AZANGALALA

JUDGE