



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ADMIRALTY CLAIM NO. 12 OF 2004

**ADMIRALTY ACTION IN REM AGAINST THE OWNERS OF THE MOTOR
VESSEL “ALPHA MANYARA”**

CLAIMANTS: LEONARD SANDE NGWABE

DEFENDANTS: The Owners of Vessel “ALPHA MANYARA”

Coram: Before Hon. Justice Mwera

**Mrs. Maina for the Claimant/Respondent
Kinyua for the Defendant/Applicant
Court clerk – Sango**

R U L I N G

By their application notice dated 5-10-04 the owners of the motor vessel ALPHA MANYARA approached this court, exercising its admiralty jurisdiction, for urgent orders following a warrant of arrest issued on 4-10-04 and by which Alpha Manyara which was set to sail was detained on a claim lodged by Leonard Sande Ngwabe. The prayers in the said notice were for a certificate of urgency, issuing interim orders and giving directions regarding the hearing of the said notice inter partes. The substantive prayers were:

- i) That the claim of KSh.500,000/- and/or any other claim against the vessel *Alpha Manyara* for aggravated damages for pain, fear and risk of death be struck out and the warrant of arrest issued against that vessel on that basis be discharged , lifted or dismissed with costs.
- ii) That the claim for payment in lieu of notice, discharge, care, refund on food, accommodation and transport expenses, uniform and mess allowances raised by the claimant against the M/V “Alpha Manyara” be struck out and the warrant of arrest be discharged etc.
- iii) That the warrant of arrest issued on 4-10-2004 be discharged for noncompliance with mandatory procedural provisions.
- iv) That in the alternative to discharging the warrant (see (iii) above) the vessel be released from arrest on the provision of security of Sh.140,000/- to be deposited in the parties’ advocates joint income-earning account.
- v) Costs.

The reasons for the above prayers were that:

- 1) The said vessel had been arrested on warrants on 4-10-04.
- 2) That it was supposed to sail on 5/10/04 and so its continued detention was causing much loss to the owners which loss could not be compensated by damages.
- 3) That this court while exercising its admiralty jurisdiction could not entertain the claim of aggravated damages as set out in the claim. That this claim fell out of the ambit of S.20 (2) (f) of the Supreme Court Act 1981 of England which conferred jurisdiction on this court and thus it could not issue a warrant of arrest based on that item in the claim.
- 4) That similarly this court lacked jurisdiction under the said Act to entertain claims based on payment in lieu of notice, discharge, care or discharge cargo supervision, wages or refund on food, accommodation, transport etc. in an action brought by a member of the crew against the vessel as the claimant had done.
- 5) That the warrant of arrest was issued when the vessel was already protected against such by a caution duly lodged in court [NOTE: The caveat was lodged on 29-9-04 and the claimant alluded to it when seeking the warrant in issue]
- 6) That the claimant's claim rested on his best arguable case together with interest and costs and that that would not exceed the sum of Sh.140,000/- in the caution. 7) That it was unjust and oppressive to maintain the arrest on the basis of the excessive security sought by the claimant.
- 8) That the amount of security was malicious and brought for other purposes and not for resolving the dispute and
 - (a) That the declaration supporting the application for the warrant of arrest was unprocedural for not setting out the amount sought against each of the ten headings of the claim.

An affidavit by Arif Kurji, a director of Bluepoint Enterprises, the owners of the vessel, swore an affidavit in support. Its contents may be reverted to as the arguments by Mr. Kinyua Advocate for the defendant/applicant are considered. The affidavit exhibited several annextures to sustain the prayers sought and several authorities were cited in the same regard.

On 7-10-04 the claimant, Leonard Sande Ngwabe swore an affidavit in reply and also appended a substantial number of annextures. Mrs. Maina who opposed the application also brought along several authorities. This court will endeavour to refer to the parties' annextures and authorities as much as they will assist in the determination of the application under review. Indeed the claimant filed a further replying affidavit on 14- 10-04. The deposition therein and the annextures will also be referred to below. To it, Arif Kurji also filed a supplementary affidavit on 15-10-04.

All the foregoing arises from a claim that Leonard Ngwabe filed here on 4-10-04. The accompanying certificate of urgency to arrest the ship bore the following grounds:

1. That the Claimant had lodged his claim against the motor vessel "Alpha Manyara" and requires security in the sum of KSh.1,252,700/-.
2. That the vessel was the only security for the claimant available within the jurisdiction of the court, and 3. That it was about to leave the jurisdiction and thus frustrate the claimant's claim.

The brief detail of the claim set out in the certificate, and also in the claim itself were:

- 1) Salary arrears
- 2) Leave allowance

- 3) Off days
- 4) Sundays and holidays worked and not paid for
- 5) Overtime wages
- 6) Pay in lieu of notice
- 7) Discharge cargo supervision wages
- 8) Refund on food, accommodation and transport
- 9) Uniform and mess allowances and
- 10) Aggravated damages for pain, fear and risk of death when the vessel sailed into the hostile Somali waters and Tanzania without prior consent of the Claimant,

all the above with costs and interest. The aggravated damages were estimated at Sh.500,000/-.

The usual forms were duly appended.

The claim itself for an admiralty action in rem against the defendants/owners, was also filed. To it were annexed the copies of documents in support of the claim and these included:

..... the contract for services, a letter from the employer and the seaman's book.”

It was added that the claim had not been satisfied – hence these proceedings. Admiralty Form No. 4 (Application and undertaking for arrest and custody) also availed.

On the same day 4-10-04, an ex-parte application for the ship's arrest was presented and argued before this court more or less on the same terms as set out above. The Claim was repeated for Sh.1.2 m, (but may it be noted that neither the application nor the claim set out specifically how this sum was made up) and that it was outstanding. The court was urged to issue the warrant of arrest so that the vessel could be detained within its jurisdiction until the claim was settled otherwise if let to sail out of the port of Mombasa and away, the claimant would lose. He would, as it were, not have anything to fall back on, or unless a security was furnished in the claimed sum.

The claimant acknowledged that the defendants had by caution come up with a security of Sh.140,000/- but that this was manifestly less than the claim of Sh.1.2 m. At the end of it all, the court appeared satisfied that a proper case had been made out and a warrant of arrest was issued. On the command of His Excellency Emilio Mwai Kibaki, the President of the Republic of Kenya, the Admiralty Marshal of the High Court of Kenya signed the warrants to detain the vessel until further orders.

It is this warrant of arrest which gave rise to the application notice under review seeking prayers on the material and detail already referred to. The arguments from either side were long and learned. They may not be captured in every detail here but the vital elements thereof shall be. They were heard over several days. Before their end, it was considered prudent and practical for the parties to agree that the ship should sail and security of Sh.600,000/- was deposited on that account.

The starting point was the Jurisdiction. While Mr. Kinyua posited that this court's admiralty jurisdiction was in accordance with S.4 of the Judicature Act Laws of Kenya by which the Supreme Court Act (1981) of U.K. is applicable here, Mrs. Maina's view was that those legal provisions did not confine this court's jurisdiction, but they permitted it also to apply and exercise what it does during its unlimited ordinary civil jurisdiction. The applicant's stand was that the items of claim over which this court could exercise admiralty powers were limited as contained in S.20 of the Supreme Court Act (1981) of the U.K. and that that excluded most of the items that the claimant had set out e.g. Sunday and holiday wages,

mess and accommodation allowances etc. The court heard that on a claim including items that this court would not entertain in an admiralty action, it could not accept them and accordingly issue a warrant of arrest based on such items. That claimant would be entitled to seek a warrant of arrest of the ship, yes, but according to his claim, only the items of salary arrears and possible leave allowance would avail. That the rest of the items were irrelevant or misconceived. To this, Mrs. Maina responded that this court's jurisdiction ought to be seen in a wider context and that wages should be interpreted to mean and include any earning, allowances, expenses etc that could reasonably and properly be seen to have gone hand in hand with or were necessary for the claimant to perform his duties or as the defendants saw such items and promised or paid the claimant, as he performed his duties. Both sides were agreed that the claimant was a seaman (a quality controller on the subject fishing ship). The contract of his services will come in for scrutiny later.

It is pertinent to endeavour to set out the provisions of law defining/conferring on this court the admiralty jurisdiction. S.4 of the Judicature Act (Rev. 1988) says:

“4. (1) The High Court shall be a court of admiralty and shall exercise admiralty jurisdiction in matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.

(2) 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 of England, and shall be exercised in conformity with international law and the comity of nations.

(3) In the exercise of its admiralty jurisdiction, the High Court may exercise all powers which it possesses for the purpose of its other civil jurisdiction.”

Then a provision adds that decisions from the High Court shall be appealable to the Court of Appeal.

Before we look at the English law on admiralty matters, the provision of our Merchant Shipping Act (Cap. 389) says something about

“court” under that Act: “Court” means the High Court exercising its admiralty jurisdiction.”

At this point is apparent that admiralty jurisdiction of the High Court is basically different from other jurisdictions conferred on it to exercise. It is specifically set out by an Act of Parliament as per S.60 of the Constitution of Kenya mandated. Only that while exercising that jurisdiction it may also exercise all powers it possesses in its civil jurisdiction. This court understands that to mean that the High Court in its capacity as an admiralty court entertaining matters arising from high seas, territorial waters etc. cannot mix them with claims of trespass e.g. on land of property, defamation and sale of goods and services – if these happen to feature and unless they fall within the Supreme Court Act (1981) of England. However be that as it may. Now let us look at the Supreme Court Act 1981) of England on this issue of jurisdiction.

S. 4 of the Judicature Act enjoins this court in exercise of its admiralty jurisdiction over the same persons, things and matters and in the same manner and to the same extent and in accordance with the same procedure to do all that as the High Court of England would do. Parties seemed agreed that the applicable part of the English Act is S.20. It is however noted that the claimant in his replying affidavit sworn on 7.10.04 held a belief that on advice of his lawyer Mrs. Maina, that as per S. 4 (3) of the Judicature Act all his items of claim could be entertained by this court as if it was exercising its ordinary Civil jurisdiction. S.20 of the 1981 English Act, reads in the pertinent parts:

(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 the subsection (2) ; (2) The questions and claims referred to in subsection (1) are –

.....

(o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages) ;

.....

Right away and without a specific and definite definition of wages under this 1981 Act, the Court is left to look at other sources if to understand better what S. 20 (1) (2) (o) is all about. Under **Halsbury's Laws of England Vol. 1 3rd Edition**, covering Admiralty the following extracts fall to be considered:

“WAGES, MASTERS’ WAGES AND DISBURSEMENTS” 113. Extent of jurisdiction : The present Admiralty jurisdiction of the High Court over claims of seamen’s’ wages and master’s wages and disbursements comprises a wider jurisdiction than the inherent jurisdiction in suits of seamen’s wages possessed by the Court of Admiralty before 1840.

The Admiralty jurisdiction which may be exercised in rem or in personam extends over any claim by a seaman of any ship for wages earned by him on board of a ship, whether due under contract or otherwise, and over claim a by the master of any ship for wages and for disbursements made by him on account of the ship.”

Moving to paragraph 118 we have this:

“118. What sums may be recovered : A claim for damages for wrongful dismissal can be prosecuted by him in an action of wages within the Admiralty jurisdiction of the High Court. Certain payments to seamen, though not strictly “wages” are by statute recoverable as wages; for example, the allowance which has to be made by way of compensation for short or bad provisions is recoverable as wages.

Claims by seamen for additional payment by agreement will not however be allowed as wages in the ordinary course , unless entered on the ships articles.” (underlining supplied)

The same Halsbury’s 3rd Edition (Vol. 35), on Shipping and Navigation, did not throw more light on what actually constitutes a breakdown of a seaman’s wages. See some of the following: “259. When right to Wages begins : A seaman’s right to wages and provisions is taken to begin either at the time at which he commences work or at the time specified in the agreement for his commencement of work or presence onboard, whichever happens first.”

Still on wages the same author says –

“261. Extra wages : As a general rule seamen are not entitled to claim any additional wages in respect of services rendered in the course of the period of engagement, even though the master has agreed to pay them, the contract being considered void for absence of consideration as well as from public policy.”

The Merchant Shipping Act (Cap 389) Laws of Kenya says (S. 2)

“Wages” includes emoluments.”

Any definitions that we came by from WORDS AND PHRASES Legally Defined on wages, earnings, emoluments etc. did not add much to what is said already. They were in any case in the common and

general understanding of those words. But it is not out of place to accept that wages comprise what one earns for performing a piece of work. It could be by way of contract or otherwise. In individual admiralty claims quite probably wider definitions need be adopted. However, in our present cause the claimant appended true copies of the contract for services and a letter from the employer, among others. So we are back to the claim. The contract of employment was dated 23-1-2003. In its pertinent parts that contract said of the claimant and the defendants for the employment on the ALPHA MANYARA:

“The said Crew hereby agrees as follows: I hereby agree to enter into this Contract for one voyage (till the Bunkers are over) and will serve on board the said vessel during the period when it is at sea for fishing and any extension of this contract will be mutually agreed upon on a 3 months probati on period

I will agree to work on Basic wages of KSh.10,200/- plus Housing Allowance of 15% which will be KSh.1800 per month.

Statutory deductions as applicable shall be deducted from my salary.

That is all the contract says of the wages and allowances. No more no less. We have seen above that extra wages are not normally paid to seaman for lack of consideration or for the reason of public policy. At this point and for this case, this court will not take it for granted that a seaman's claim ought to be quantified on an item to item basis before he moves this court to issue a warrant to arrest a ship on account of that claim. That is what the claimant did here. All items of the claim were given a total sum of Sh.1,252,700/- and the application to arrest made on that. It was only in the replying affidavit to the present application that some break-down was attempted. Assuming that the initial move was correct (in ordinary civil causes one has to specifically plead items comprising the quantified sum), this court's opinion as regards its jurisdiction, the claimant included many items that do not fall under its admiralty powers. What it considers under the present claim as proper items, can be said to be monthly salary and arrears if any. To this add wages for work done on public holidays and Sundays. The court was told that a seaman is also entitled to basics like food, accommodation and transport and particularly when he was at Dar-es-Salaam. And some vouchers were shown to have been paid/refunded there. Otherwise the whole of other items fall outside this court's admiralty jurisdiction and the claimant may do well to invoke S.120 of the Merchant Shipping Act to recover them in a subordinate court. Indeed one would still be safe to proceed on the contract of employment of 23.1.03, the main and only basis of the claimants demand against the defendants and nothing else. That agreement was for one voyage only and could be mutually extended after 3 months probation. Can it be assumed that by continuing to work for the defendants after the initial one voyage, then the contract was confirmed and or extended? Or that it remained in force on a month-to-month basis? All this is because there was no evidence placed before the court that the contract was confirmed, extended or revised to place the claimant on better terms e.g. to earn Sh.20,225/- p.m. That claim seemed to hang in the air because the claimant must have served on a month to month basis. He had no other contract. It is a common principle in the law of contract that a written contract can only be varied in writing. Mrs. Maina's position that it was the defendants who ought to have drafted and supplied a new contract did not help much at all. So if what the original contract contained be and was the basis of the warrant of arrest, it did not contain all the items of the claim which in any event do not constitute wages at all. The warrant of arrest thus should not have issued. The item of wages alone with such other items as are relevant, could not aggregate the sum of Sh.1.2 m. at all.

There was this further replying affidavit sworn on 14-10-04. Therein the claimant did depone, inter alia:

“2. That all the claims I have set forth and all the basis of which the warrant of arrest herein was issued are contained in and payable under the ITF Fisheries standard collective agreement for F.O.C. fishing vessels which sets the standard terms and conditions applicable to crew members in such fishing vessels a copy whereof is hereto annexed and marked “A”.”

If this “new” approach be accepted it would mean that the claimant has shifted from basing his claim on the contract of employment dated 23-1-2003 and is now harnessing it on the ITF (short for

International Transport Workers Federation), all without amending the claim. Now that cannot be. However on a more substantive point it was not shown to this court as to who between the claimant and the defendants belongs to the I.T.F. Without such nexus then this annexure has no reason to be introduced here. It appears therefore that the claimant is not sure of his claim or the basis for it.

There was this aspect of the claim where the court was asked to find that it has jurisdiction to deal with aggravated damages arising from what the claimant alleged was the fear and risk of death that he went through as “Alpa Manyara” navigated through the hostile waters off Somalia.

This court is unable to agree with the claimant and all this is by virtue of S.20 (1) (a) (2) of the Supreme Court Act. It was set out (above) in its relevant parts. S. 20(2) bears the nature of claims from (a) to (s) over which this court shall exercise jurisdiction. None of them covers:

“----- aggravated damages for pain, fear and risk of death -----”

The nearest available is S. 20(2) (f):

“(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment or in consequence of the wrongful act, neglect or default of _____”.

But that is not what the claim is about.

The issue of jurisdiction of the court in any matter is central and fundamental. Jurisdiction is conferred by statute and not by the court’s mere fact that the it created or that parties say or agree on it. So once jurisdiction of a court is raised that court, or indeed any adjudicating body in question must first settle it before going a step further because any proceedings without jurisdiction are a nullity. This has arisen in cases without number but this court would only cite the following: **THE OWNERS OF THE MOTOR VESSEL “LILIAN S” VS. CALTEX OIL (KENYA) LTD CIVIL APPEAL NO.50/1989 (C.A.) and ROY SHIPPING S.A. AND ALL OTHER PERSONS INTERESTED IN THE SHIP “MAMA OTAN” VS. DODOMA FISHING CO. LTD CIVIL APPEAL NO.238/97.** The first case, simply referred to in this jurisdiction as “Lilian S”, concerned a claim by Caltex that it had supplied goods to the ship and wanted payment. It is this same Supreme Court Act 1981 of the U.K. that was invoked. The question arose as to whether by failing to prove to the court that the oil products Caltex had supplied were necessary for the ships operation or maintenance (s. 21 (4)), the oil company had a proper cause. It failed to do so at the first instance (in limine) and its claim was thrown out. Such a proof would have meant that the court had jurisdiction to deal with the claim. Nyarangi J.A. delivered himself thus:

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it.

Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.

And with that that appeal was allowed because Caltex had not proved that the court had jurisdiction as stated above.

The other appeal (above) which we can refer to simply as “Mama Otan” followed the “Lilian S.” Again the question of deciding jurisdiction in limine featured. The tussle was over the ownership of “Mama Otan”.

The judge in the superior court seemingly avoided to determine jurisdiction again in accordance with S. 20(1) (2) of the Supreme Court Act 1981 of England. In his judgement Omolo J.A., reviewed other cases that had been cited and after quoting extensively from “Lilian S” on jurisdiction, remarked that the judge

had erred in allowing the issue of ownership to proceed to trial. He added:

“She was required to solve that issue straight away on the material placed before her. If she found as a fact that Mama Otan was owned by the respondent, then she would have jurisdiction and would be entitled to proceed further with the matter. If, on the other hand she found that Mama Otan was not owned by the respondent, then she would have no jurisdiction in the matter ----- She would not be entitled to proceed one step further.”

The learned superior court judge was found to have had no jurisdiction and the warrant of arrest that had been issued against “Mama Otan” was set aside and the appeal was allowed.

In our present case the claimant brought in the claim some aspects that did not fall under the jurisdiction of this court and that has amply been set out above. He got the order to arrest the ship. Only for the part of wages (salary, salary arrears, provision etc) the claimant would have been justified to seek the arresting orders. But they were not of such an aggregate sum as to stand at Sh.1.2 m. So with the caution and deposit of Sh.140,000/- one would think that that covered the claimants best arguable case (the claim plus costs and interest) That was a fair estimate. The court was urged not to reduce Sh.600,000/- deposited but instead raise it. On the basis of the best arguable case this court can only say that in the defendants give a security for Sh.200,000/- only. The defendants have in any case been served and they appeared. Even if the ship is not again made subject to the claim herein directly, they will be liable. Or indeed if the claimant proves a larger sum than the security, this court is minded to think that the defendants should be appropriately bound.

In sum the orders here are those as per the alternative prayers (v) of the notice of 5/10/04. The deposit of Sh.200,000/- to be given. The warrant of arrest stands discharged. Costs to the defendants.

Orders delivered on 3rd December 2004.

J.W. MWERA

JUDGE