



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

**ADMIRALTY CAUSE NO.9 OF 2001**

**SHIPMARC LIMITED.....CLAIMANT**

**VERSUS**

**THE OWNERS OF M/V "MAMA MARY".....DEFENDANT**

**JUDGMENT OF COURT**

The Claimant, Shipmarc Ltd comes to this court by Motion under Order 75 Rule 21, sub-rule 3 and 8 of the Supreme Court Rules coded and now known as the White Book. It seeks for judgment to be entered against the Defendant known as The Owners of Motor Vessel "Mama Mary" in the sum of U.S. Dollars 67,418.23 as at 30.9.2001. It seeks for an additional daily sum of US \$ 144.42 from 1st October, 2001 until the vacation of the said motor vessel from the Claimants buoy as well as costs of this claim. The application is based on the affidavit of one Jorgen Nielsen annexed to the application together with the further affidavit of the same deponent sworn on 26.11.2001. The judgment is sought because the Claimant having served the Defendant with the statement of claim as provided under the above quoted Order and rules, did fail to respond by filing an acknowledgment as therein provided. Service was in fact done upon the Defendant by serving it on the motor vessel aforesaid on 5th September, 2001 by the Court Bailiff called Herbert who thereafter filed in this court a Return of Service dated 17th September, 2001.

The background history of the claim is that the Defendant towed the said motor vessel from Mtwara, Tanzania to the Claimant's buoy in Mombasa on 23rd May, 2000. The towing was done by the Claimant at the Defendant's request, for the purpose of effecting repairs thereon. As the vessel rested at the said Claimant's buoy, it was arrested by the Admiralty Marshal at the intervener's request through this court with a view of finding a way of recovering crews' wages and other claims arising in relation to the operation, and maintenance of the vessel while at sea and as it lay at port.

There also arose port charges and security charges which under the relevant law the owner of the vessel is under obligation to meet. The totality of the claim was then, as stated at the beginning filed in this court under this claim and then served upon the Defendant as provided. The latter failed to respond by filing an acknowledgement of the claim as prescribed within the period also prescribed in the White Book. Under the circumstances the Claimant has herein applied to this court for entry of judgment in default of acknowledgement of service of the claim. This is an equivalent of an application for entry of judgment in default of filing defence under our Civil Procedure Act and Rules.

In view of the fact that service was effected by Court Bailiff as aforesaid I would not have hesitated to proceed to enter judgment as prayed without much ado. However, in this particular case this court noted and was addressed in respect of a different claim against the same Defendant by third parties through a replying affidavit sworn by one F.K. Kimundi sworn on 24th November, 2001. He denies that the

Claimants in this claim are entitled to judgment as prayed above, except probably for some little sums of money, for hire of boats to and from the relevant vessel as well as security of the vessel. The interveners further offer another small sum of US \$450 being what they think is the port charge due for the occupation of buoy by the said motor vessel "Mama Mary".

The interveners main argument is that they had already filed their joint claim against the motor vessel "Mama Mary" in Admiralty Cause No.7 of 2000 and have obtained a judgment in the sum of US \$100,000. The judgment is said to be annexed to this intervener's application. It is noted that leave to intervene was granted to the interveners by this court on 24.9.2001. They therefore argued that their intervention was not irregular but lawful. They at the same time had obtained this court's order to sell the m/v in question and in fact sold the same for US \$ 35,000 and had already taxed their bill of costs at Kshs.800,000/-. They effectively indicated that they were opposed to the Claimants' application for judgment as prayed except for those little sums above mentioned in respect to security and a limited port charge of US \$ 450. They strongly, in particular, oppose the Claimant's claim of port charges which they, as aforesaid, wish to limit to about US \$ 450. Their concern arises from the fact that they already have the said judgment in their favour against the said motor vessel, "Mama Mary".

Any other judgments entered against the same boat is going to affect how much they receive into their pockets during the sharing out of proceeds of sale of the vessel. The first question which I must decide is what the item, "port charge" means in this case. I have read the claim carefully and hold that the Claimant by the usage "port charge" intended to claim and wished this court to understand the words to mean all the charges the owner or licensee (if it is one) charges the owner of the vessel "Mama Mary" for keeping, maintaining and protecting the vessel after it was towed into the buoy. The charge is likely to be a contractual sum between the parties or a fixed daily charge which may or may not be varied as between the parties.

It is effectively a rental charge and may differ from one buoy to another. Mr. Kinyua argued that the words "ports charge" must mean the sum the owner of the charge is under obligation to pay for being given a license to operate the buoy by the Kenya Ports Authority. I do not agree with him. Those who rent the buoys from the Ports Authority pay charges for the rental. But the purpose obviously is to use the buoys for commercial purpose. They make them available to motor vessel owners who from time to time anchor their vessels there at an agreed charge, herein loosely referred to as port charge. The words cannot in the context be used by Claimant in his claim to be limited to what the Ports Authority charge its licensees or tenants.

The second issue I would like to dispose of is whether the interveners have made up a sufficient case supported by credible evidence that the Claimants claim totaling US \$ 67418.23 should be reduced by any figure. I have examined documents annexed to this claim supporting the same. I have come to the conclusion that the claim is properly supported and the invoices, cash receipts, cash vouchers and statements are in order. The sum claimed is a liquidated one. The Defendant was properly served by the Claimant through the Court's Bailiff who has filed an affidavit of due service herein. The Defendant failed to acknowledge service within the prescribed time for acknowledging such service. There is on record the Claimants' affidavit verifying the facts on which the claim is based and the Claimant by this motion has applied for judgment by default. I am satisfied that the claim is well founded.

I accordingly see no impediments against entering judgment for the claimant as prayed. Accordingly, this court makes the following orders:-

#### **ORDERS:**

1. Judgment is hereby entered for the Claimant herein for the sum of US \$ 67418.23.
2. A further judgment is hereby entered for the Claimant of US \$ 144.42 per day from 1.10.2001 to 21.2.2002.
3. Costs are to the Claimant to be taxed in the normal way.

4. This judgment is entered without prejudice to other claims against the motor vessel “Mama Mary” and all questions as to the priority of such claims shall be decided hereafter on motion or summons as the case may be.

**Dated and delivered at Mombasa this 21st day of February, 2002.**

**D.A. ONYANCHA**

**J U D G E**

**Delivered in the present of:-**

**Njoroge - For Claimant**

**Abubakar for Kinyua - For Defendant**

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