

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
ADMIRALTY & COMMERCIAL DIVISION
CLAIM NO. E003 OF 2021

E.T. TIMBERS PTE LIMITED.....CLAIMANT
-VERSUS-
OWNERS OF MOTOR VESSEL DOPLHIN STAR.....DEFENDANT

RULING

1. The application before court is by neither of the parties to the suit; it is by an entity called ERIMAC Shelters and it is dated 27 June 2025. The prayers in the application have been couched as follows:

“1.That this Application be certified as urgent and the same be dispensed off at first instance.

2. That pending the hearing of this Application, the Court be pleased to direct the Admiralty Marshal to allow The Interested party/Applicant be enjoined in these proceedings by virtue of the fact that pursuant to the report of the Admiralty Marshal On the sale by public Auction of the Motor Vessel "Dolphin Star, it they that emerged the second highest bidder.

3. That pending the hearing and determination of this Application, the Court be pleased to direct the Admiralty Marshal to allow the interested/Party and their agents to re-counter their bid to the tune of purchasing THE OWNERS OF MOTOR

VESSEL 'DOLPHIN STAR' at USD 950,000.00 TOGETHER WITH THE Liberia Round Logs AT USD 136,000.00 as the claimant has failed to abide by the directions dated the 28th of April 2025 and the cargo on board THE OWNERS OF MOTOR VESSEL 'DOLPHIN STAR' [the Defendant] is not discharged.

4. That pending the hearing and determination of tof this Application, the Court be pleased to direct the Admiralty Marshal to allow the interested/Party pay 25% Of the total bidding price of both the vessel and the property on board [Liberia Round Logs].

5. That pending the hearing and determination of this Application, the Court be pleased to direct the Admiralty Marshal to allow the interested/Party and/or their agents, servants and employees to inspect and validate the current condition of the cargo on board THE OWNERS OF MOTOR VESSEL 'DOLPHIN STAR' [the Defendant].

6. That the Honourable Court be pleased to direct the Admiralty Marshal to grant orders restraining the claimants through themselves and/or agents, servants and employees by way of a temporary injunction from disposing off, dealing, selling, wasting, damaging, interfering and/or moving property in THE OWNERS OF MOTOR VESSEL 'DOLPHIN STAR' [the

Defendant] pending the hearing and determination of this application.

7. That this Honourable Court be pleased be pleased to direct the Admiralty Marshal to make such further and/or other orders as it may deem just, fair, reasonable, and appropriate in the circumstances in order for the ends of justice to be met.

8. That the cost of this Application be provided for.”

2. Except for the last three prayers, the rest of the prayers are spent. The application is supported by the affidavit of Crispus Macharia who has sworn that the interested party is a limited liability company registered in Kenya and that he is the agent of the company.
3. According to Macharia, on 24 May 2024, this Honourable Court delivered a judgment in which it ordered the appraisal and sale of the Motor Vessel 'Dolphin Star' and the cargo of timber on-board.
4. On 7 April 2025, the Admiralty Marshal allowed the Applicant's agents to access the Motor Vessel 'Dolphin Star's relevant parts or areas for purposes of deciding on purchase options before bidding. After inspection on 11 April 2025, the Applicant wrote to the Admiralty Marshal on even date expressing interest in the purchase of the Liberia Round Logs (the property on board the Motor Vessel 'Dolphin Star'). Together with the letter, the applicant submitted a bid for the cargo in the sum of Kshs.

8,000,000.00 and a bank payment slip showing 25% of the bid amount deposited in the Admiralty Marshal Account.

5. On the same date of 11 April, 2025, the Applicant wrote to the Admiralty Marshal expressing interest in the purchase of the Motor Vessel 'Dolphin Star'. The letter to Admiralty Marshall was accompanied by the applicant's bid in the sum of Ksh. 80,000,000.00. The applicant enclosed a bank payment slip showing 25% of the bid amount deposited in the Admiralty Marshal Account.
6. After the bids by both the claimant and the applicant, the Admiralty Marshall directed that the matter be referred to this court as neither of the bidders was successful. Even then, the results showed the claimant was the highest bidder and the Applicant emerged the second highest bidder.
7. Following the directions and orders of the Admiralty Court, the Motor Vessel "Dolphin Star" was to be sold to the claimant or the Claimant's nominee at US\$ 2,100,000.00 and the Cargo of Liberia Round Logs on board the "Dolphin Star" to the Claimant at US\$135,000.00.
8. The Admiralty Marshal was also directed to deliver the Bill of Sale to the Motor Vessel "Dolphin Star" and the Cargo of Liberia Round Logs and to deliver possession of both the vessel and the Cargo to the claimant or the Claimant's nominee on condition that the Claimant first settles the Kenya Ports Authority's claim against the vessel and meets the Admiralty

Marshal's expenses in relation to the Appraisal and Valuation of the Vessel and the cargo and all expenses related to the sale.

9. The Claimant was granted twenty one days from the date the order was made for sale of the vessel and the cargo to the Claimant within which to arrange settlement of Kenya Ports Authority's charges as ordered in the Decree and Admiralty Marshal's expenses.

10. However, the Claimant did not comply with the court's directions within the twenty one-day period and, therefore, the Applicant is willing and ready to re-submit a fresh bid and abide by the court's conditions for sale pursuant to the purchase of the Motor Vessel "Dolphin Star" and the cargo on board.

11. The Claimant opposed the application and Mr. Kinyua Kamundi, the learned counsel for the Claimant, swore a replying affidavit to that effect.

12. According to Mr. Kinyua, it is not true that Applicant made any payments towards deposit of the bids either for the vessel or its cargo. Counsel has sworn that he telephoned Mr. Hithcliff N. Oyas, the Applicant's learned counsel, warning him that Mr. Crispus Waithaka Macharia had committed the offence of perjury contrary to Section 108 of the Penal Code, cap. 63 and that Mr. Oyas, had committed the offence of subornation of perjury by drawing and filing Macharia's affidavit.

13. Counsel has also sworn that he did mention to Mr. Oyas that he should have asked Mr. Crispus Waithaka Macharia for a copy of the deposit slips

before he drew the impugned affidavit particularly because on the date the Admiralty Marshal opened the bids in the presence of the Applicant, he (the Admiralty Marshal) disqualified the Applicant's bids on the ground that no deposit slips were enclosed.

14. The Applicant, therefore, lied to the Admiralty Marshal in those bids and is now lying on oath to this Honourable Court. By alleging that he had paid a deposit for the vessel and for the cargo, the Applicant is effectively accusing the Admiralty Marshal of falsifying records. Mr. Kinyua is of the view that this is an issue that should now be referred to the Directorate of Criminal Investigations to investigate the perjury and subornation of perjury.

15. At the background of the Applicant's application is a consent order recorded on the Claimant's application dated 14 April 2025. In that application, the claimant had prayed for the following orders:

“a) This application be certified as urgent and be heard on priority basis during this vacation.

b) The Court be pleased to direct the Admiralty Marshal to sell the Motor Vessel "Dolphin Star" to the Claimant or the Claimant's nominee at US\$ 2,100,000.00 and the Cargo of Liberia Round Logs on board the "Dolphin Star" to the Claimant at US\$ 135,000.00.

c) The Court be pleased to direct that the Claimant need not pay the purchase price for the vessel and for the cargo as its claim inclusive of interest exceeds US\$ 3,000,000.00.

d) The Court be pleased to direct the Admiralty Marshal to deliver the Bill of Sale of the Motor Vessel "Dolphin Star" and the Cargo of Liberia Round Logs and to deliver possession of both the vessel and the cargo to the Claimant or the Claimant's nominee on condition that the Claimant first settles the Kenya Ports Authority claim against the vessel and meets the Admiralty Marshal's expenses in relation to the Appraisalment and Valuation of the Vessel and the Cargo and all expenses related to the sale.

e) The Court be pleased to allow the Claimant 21 days from the date the order is made for sale of the vessel and the cargo to the Claimant within which to arrange settlement of Kenya Ports Authority's charges as ordered in the Decree and Admiralty Marshal's expenses.

f) The Court be pleased to direct the Admiralty Marshal to issue the Claimant or the Claimant's nominee with a clean Certificate of Title of the Motor Vessel "Dolphin Star" and the Cargo of

Liberia Round Logs on board free and clear of all claims, liens and encumbrances following upon the Judicial Sale.

g) In view of the fact that the sale has not taken place, there will be no order on costs of this application.”

16. Save for prayer (a) which was spent when the claimant's and the defendant's respective counsel appeared in court on 28 April 2025, the rest of the prayers were allowed and the consent to that effect entered accordingly. As far as I understand the Applicant, the claimant did not comply with the order granted in terms of prayer (e) of the Claimant's application and, therefore, seeks a fresh auction so that it can submit a fresh bid for both the Motor Vessel "Dolphin Star" and the cargo on board. In the event its prayer is granted, the Applicant is prepared to comply with any conditions of sale of the two items.

17. The record shows that during the public auction of the Motor Vessel Dolphin and its cargo on 11 April 2025 all the bids were found to be non-responsive. This is clear from the "*Report of the Admiralty Marshall on the Sale by Public Auction of the Motor Vessel 'Dolphin Star' and Timber*" a copy of which has been exhibited on the affidavit sworn on behalf of the Applicant. According to that report, none of the bidders, including the Applicant, deposited the 25% deposit of the amounts quoted in their respective bids for the purchase of the vessel and the cargo.

18. The Applicant's bids are also stated to have been made in Kenya Shilling and not dollars contrary to the conditions of sale. Further, apart from the Applicant failing to make the requisite deposit of 25% of the amount of the bid, its bid also fell below the reserve price. It is in these circumstances that the Admiralty Marshal declared the bids non-responsive and auction unsuccessful.

19. This is the background against which the Claimant's application of 14 April 2025, was made and on which a consent was subsequently entered. According to the Claimant, the vessel and the cargo could not be sold at less than the appraised value without an order of the Judge. Previously, the Admiralty Marshal had advertised the vessel and the cargo for sale in the Daily Nation of 5 September 2024. The bids were supposed to be opened by the Admiralty Marshal on 8 October 2024 but not a single bid was received.

20. The second advertisement for the sale of the vessel and cargo was placed in the Daily Nation of 13 March 2025 but it attracted only two bids which, as noted, were unsuccessful.

21. The Claimant sought for certain specific orders in its application because it could not wait for the market to rise. In any event, the vessel and the cargo were in danger of deteriorating and even sinking. In order to avoid total loss, the Claimant offered to take ownership and possession of the vessel and cargo in full and final satisfaction of its Decree on condition

that it settles Kenya Ports Authority charges and the Admiralty Marshal's expenses. The Claimant undertook to settle the Kenya Ports Authority claim and Admiralty Marshal's expenses prior to receiving the Bill of Sale and taking delivery of the Vessel and the Cargo. It was also going to assume all risks on the safety of the vessel and cargo if its application was granted.

22. Turning back to the instant application, I note that contrary to the Admiralty Marshall's report, the Applicant has sworn that it made a deposit of 25% price for each of its bids for the motor vessel and the cargo. In particular, the Applicant's agent swore as follows:

“E. That on the 11th of April, 2025 upon inspection vide a letter dated the same date the interested party/Applicant wrote to the Admiralty Marshal Chambers at the Mombasa High Court expressing interest in the purchase of the Liberia Round Logs [the property on board the MOTOR VESSEL 'DOLPHIN STAR'. (Annexed herewith and marked as "CWM-4" is a copy of the Letter).

F. That the letter dated the 11th of April, 2025 titled the offer for the Liberia Round Logs was coupled with the submission of the bid for the said cargo in the amount of Ksh. 8,000,000.00 together with a bank payment slip showing 25% of the bid

amount deposited in the Admiralty Marshal Account. [Refer to CWA-4]

G. That on the 11th of April, 2025 upon inspection vide a letter dated the same date the interested party/Applicant wrote to the Admiralty Marshal Chambers at the Mombasa High Court expressing interest in the purchase of the MOTOR VESSEL 'DOLPHIN STAR'. (Annexed herewith and marked as "CWM-5" is a copy of the Letter).

H. That the letter dated the 11th of April, 2025 titled the offer for the MOTOR VESSEL 'DOLPHIN STAR' was coupled with the submission of the bid for the said cargo in the amount of Ksh. 80,000,000.00 together with a bank payment slip showing 25% of the bid amount deposited in the Admiralty Marshal Account. [Refer to CWA-5].”

23. Going by the Admiralty Marshall's Report on the aborted auction, these depositions are obviously untrue. But even if the Applicant were to be given the benefit of doubt, no proof has been provided of the deposit slips allegedly issued after payment of the 25% deposit on each of the bids made by the Applicant. It is also clear from the applicant's affidavit that its bids were made in Kenya Shilling when, according to the Admiralty Marshall's report, they ought to have been made in United States dollars.

24.It is thus legitimate to conclude that the factual basis upon which the applicant’s application has been made is not only misleading but it is also contrary to the available evidence some of which has been presented by the applicant itself.

25.That said, this suit was concluded way back in May 2024 when this Honourable Court (Magare, J.) decreed, *inter alia*, the sale of the Motor Vessel Dolphin Star and the timber with which it was laden. Except for the execution proceedings, there is no pending litigation in this Honourable Court in which the Applicant can be joined as an interested party. In **Civicon Limited -vs- Kivuwatt Limited and 2 Others [2015] eKLR** which the applicant relied upon in its submissions on the application, the court was clear that:

“...the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter. so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...”(Emphasis added).

26.The rules to which reference was made are the Civil procedure Rules and, in particular, order 1 rule 10(2) of those Rules. The claim against the

defendant was determined and, therefore, it is unnecessary to add any party to the suit as if the dispute between the claimant and the defendant has not been determined.

27. Even if it was to be assumed that the execution proceedings constitute a subsisting dispute to which the applicant could possibly apply to be joined, the Applicant's application would still fail because the applicant has proceeded on the presumption that it has an identifiable interest in the matter for the reason that it submitted bids for the motor vessel and cargo yet it has now emerged that the purported bids were not backed by any payments of the deposit of the purchase price offered by the applicant and were, in any event, contrary to terms and conditions of sale.

28. Finally, the prayers sought in the Applicant's application are, in any event, contra the consent order entered between the claimant and the defendant on 28 April 2025. Without the order having been varied, set aside or overturned, the orders sought by the Applicant are not viable. I may add that if there is a case for an application to review, vary or set aside those orders, the application can only be made by any of the parties to the consent and not a stranger to the proceedings.

29. It is for this reason that I cannot accept the Applicant's submission that this Honourable Court "*has no option but to render the said Directions null and void and order a complete new advertisement of the bidding (sic) process for the sale of the Motor Vessel*" on the basis that the claimant

has not complied the consent order. Only parties to the consent can move the court for appropriate orders including the order for enforcement of the order if the claimant, or any other party to the consent for that matter, is in default of the order.

30. In the ultimate, I hold the Applicant's application to be misconceived, an abuse of the due process of this Honourable Court and, at any rate, without any merit. It is hereby dismissed with costs.

Signed, dated and delivered on 24 April 2026

Ngaah Jairus
JUDGE