



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT AT MOMBASA

CAUSE NUMBER 369 OF 2013

[Originally Mombasa High Court Civil Case Number 1 of 2013]

BETWEEN

1. DIDOVSKY IGOR
2. ANTOSYEV YURIY
3. MYALO OLEKSANDR
4. DRACHUK YURIY
5. GROMOVENKO STANISLAV
6. MALYOVANY VASYL
7. CHERNOV OLEKSIY
8. SOROCHAN VALERIY
9. ARNAUTOV IVAN
10. GACHOMBA GODFREY WAKARIA
11. MOHAMMED RUFAI SALIM
12. MELNIKOV OLEG..... CLAIMANTS

VERSUS

1. INTERNATIONAL BULK CARRIER SPA
2. LEADARROW SA
3. SEKUR HOLDINGS INC.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Mr. Ananda Advocate, instructed by Ananda & Company Advocates for the Claimants

Mr. Sumba Advocate, instructed by Chaudhri & Associates Advocates for the 1st Respondent

No appearance for the 2nd and 3rd Respondents

ISSUES IN DISPUTE: 1. EMPLOYMENT REMEDIES FOR ABANDONED SEAFARERS

2. THE ADMIRALTY JURISDICTION OF THE INDUSTRIAL COURT

AWARD

[Rule 27 [1] [a] of the Industrial Court Procedure Rules 2010]

1. This Claim was transferred from the High Court to the Industrial Court, both in Mombasa, on 31st October 2013. Parties do not seem to have amended their Pleadings upon transfer, to conform to the Industrial Court [Procedure] Rules 2010, with the result that the terms Plaintiffs, Respondents, Claimants are mixed up, and the title to the Claim given as being in the 'High Court at Mombasa, Industrial Claim Number 369 of 2013.' Was not the Claim transferred to the Industrial Court? Even when guided by the Industrial Court in a Ruling dated 23rd May 2014 on the correct title, the Parties have persisted in their misnaming of the Cause. It is important that the Rules governing proceedings in the Industrial Court are respected, and Claims and Parties are properly defined, in conformity to those Rules.

2. The 10th and 11th Claimants are Kenyan Nationals, while the rest are Ukrainians. The Ukrainians authorized their Kenyan Colleagues to pursue this Claim, in an Authority filed at the High Court at Mombasa, on 18th January 2013.

3. The 1st Respondent is as a Company registered and /or trading for gain at Piraeus Greece, and/or at Algeria. The 2nd Respondent is a Company with Offices in New York, the U.S.A. The 3rd Respondent is a Company registered and trading for gain in Greece. At all material times, the 1st Respondent was the registered Owner of the Ship Known as MV BLIDA.

4. The Ship arrived in Kenya in November 2011. The Ukrainians joined the Ship at the Town of Malindi in North Coast of Kenya, while the Kenyans joined at Mombasa. The Claimants were employed onboard as Officers and Men [the Crew].

5. The Claimants allege that once the Ship was at the Port of Mombasa, the Respondents abandoned the Ship and the Crew. The Ship ran out of gasoil; could not run; and there was no water or electricity onboard. The Claimants were left to their own devices, without food, water, security or wages.

6. In separate proceedings at the High Court Mombasa [Consolidated Claims Numbers 7 and 8 of 2012], the Claimants sought and were granted orders for provision of accommodation off board, food, security, transport to and from the Ship, and other necessities, through Sainif [Kenya] Limited t/a Sairose Hotel Mombasa. They also obtained orders for sale, through auctioning, of MV BLIDA, to recover accrued wages, repatriation expenses for the Ukrainians, costs and interest in the aggregate sum of US\$208,485.06. The Ship MV BLIDA was sold by the Admiralty Marshal in November 2012, fetching US\$ 1,000,000 and, the outstanding claims satisfied. The excess of the sum paid to the Claimants from the sale proceeds, was retained by the Admiralty Marshal pending the outcome of the instant Claim.

7. The Claimants warned the Respondents, and submit, that the Consolidated Claims at the High Court

were *actions in rem*, which could not redress the claim for compensation. Holding that they were subjected by the Respondents to conditions of slave labour onboard the abandoned MV BLIDA, the Claimants seek the following remedies:-

- a. *A declaration that the Respondents exposed the Claimants to slave labour.*
- b. *A declaration that the Respondents were in breach of the contracts of employment.*
- c. *General, punitive and aggravated damages for the suffering the Claimants underwent the Vessel onboard.*
- d. *Interest at Court rates.*
- e. *Costs of the Claim.*

8. The 1st Respondent filed its Statement of Response and Counterclaim on 12th November 2013 with the leave of the Court. The other Respondents did not file their Statements, or participate in the proceedings.

9. The 1st Respondent states, it was not a party to any employment contract with the Claimants. The 1st Respondent chartered MV BLIDA to the 2nd Respondent. At no time was the 1st Respondent a Principal to the 2nd and 3rd Respondents. The 1st Respondent cannot be burdened with the liability of the Co-Respondents. There is no cause of action against the 1st Respondent. The 1st Respondent had no obligation to supply the Crew of MV BLIDA with utilities. Although not a Party in the Consolidated Admiralty Claims at the High Court, the 1st Respondent was aware the Claimants sought and were granted orders for upkeep and, cannot therefore claim they worked in slave conditions. The 1st Respondent lodged a Counterclaim for the loss suffered pursuant to the sale of its Merchant Ship. It states that the Claimants misrepresented facts before the High Court leading to the auction and sale of MV BLIDA. These misrepresentations included: averring that the 1st Respondent had abandoned the Vessel; failure to notify the Court on the Legal Owner of the Vessel; failure to disclose that the Legal Owner was neither the Employer, nor the Principal to the Claimants; taking the sale of the Vessel as the only redress open to the Claimants; and by holding that the 1st Respondent was liable for the Employees' salaries. The 1st Respondent seeks by way of Counterclaim, special damages to the full value of the Ship, as shall be quantified; general damages; costs; and any other relief the Court may deem it fit to grant.

10. Mr. Gachomba Godfrey Wakaria gave evidence and closed the Claimants' case, on the 5th November 2014. The 1st Respondent did not call evidence and adopts the Documents, Pleadings and Submissions on record. Filing of the Final Submissions was confirmed by the Parties to the Court on 3rd December 2014, and Award reserved for 12th February 2015.

11. Wakaria testified he is a Marine Engineer. He worked as Chief Engineer Maintenance and Operations. He was recruited by Express Shipping Limited, the Local Agent for Sekur Holdings of Greece. He was employed as the Chief Engineer onboard MV BLIDA, which was anchored at the Port of Mombasa. He was employed on a contract of 3 months, earning US\$4,500 per month. He was recruited with his Second Engineer Mohammed Rufai Salim and Cook Hamsa Omar. Other Members of the Crew were Ukrainians, who boarded the Ship at Malindi in November 2011. Hamsa Omar left the Ship earlier, before the current issues in dispute arose, and is therefore not a Claimant.

12. The Claimants were not paid any salaries as contracted. No explanation was given for nonpayment. The Employees did not have food. Gasoil which was powering the Ship ran out. Darkness fell upon the Ship. The Employees could not continue living there. They sought legal advice. The Advocates made a demand letter upon the Owners of MV BLIDA. There was no response. The Claimants sought the assistance of the Admiralty Court which gave orders on 30th July 2012, for the Claimants to be accommodated at the Sairose Hotel. They approached the Court again on 24th September 2012 and obtained orders for payment of their arrears of salaries and other expenses amounting to US\$208,403. This was paid after the Vessel was sold through the Admiralty Marshal.

13. Wakaria testified they are now seeking damages for being placed in an inhospitable work environment, for the duration in question. Two of the Claimants had to be in the Ship even when

accommodation was secured at the Sairose Hotel. They had to ensure the Vessel was safe. There was no light; mosquitoes abound; food was scarce and cold; and there was no water. Wakaria was employed by Sekur, to work in MV BLIDA. He did not know the 1st Respondent. The Claimants did not misrepresent the facts to the High Court leading to the sale of MV BLIDA. The Claimants' Advocates warned the Owners of the impending sale, in letters dated 10th August 2012 and 25th August 2012. An earlier letter, dated 25th July 2012, from the Claimants' Advocates to the Owners of MV BLIDA, warned that the Claimants would move the Court, "...on a separate claim for malicious denial of provisions and for pain and suffering..."

14. Wakaria signed his contract with Sekur, represented by Express Shipping Limited, on 30th May 2012. The Ship's Name and Owner are shown on the Crew Agreement. No money was paid to the Claimants, except through the order of the Court. The 1st Respondent had no business being in Court. The Witness testified he did not know of any Charter Agreements. He stated in his Witness Statement paragraph 18, that the 1st Claimant who was the Ship's Captain, contacted an Association known as Seamen Relief Fund, when the Employees were in distress. This Group wrote to the Respondents. The Respondents wrote on 30th July 2012 advising that the Ship had been re-delivered by the 2nd Respondent to the 1st Respondent, and that the 2nd and 3rd Respondents had no further responsibility for the Ship. This confirms that the Respondents indeed abandoned the Crew.

15. Cross-examined, Wakaria testified he has been a Marine Engineer for 40 years. He knows there are basic regulations in the industry. He knows about the Kenya Maritime Authority. He has been serving as part of other Ship's Crew. He is registered as a Seafarer. He did not carry his Certificate of Registration with him to Court.

16. The Captain is the Head of the Ship. He is the Accounting Officer. Problems onboard are reported to the Captain. Wakaria was employed by Sekur on 30th May 2012, for a period of 3 months. The terms are in the contract of employment. There were no other terms and conditions outside that contract. The Ship was at Mombasa Port. It did not move at the material times. Every morning, the Captain sent the Owners e-mail complaining about the conditions in the Ship. Wakaria did have the e-mails in Court. The problems were reported to the Registrar at the Maritime Authority. There was no evidence of the report in Court. The Ship was not seaworthy by the time the Claimants moved to Court. The Witness testified he thought the list of the Crew was presented to the Director General of the Maritime Authority. The Claimants were paid their salaries. The Ukrainians received their salaries and costs of repatriation.

17. Wakaria stated the contract of employment did not mention the 1st Respondent. The Claimants assert the Respondents were to provide a safe system of work. There are 3 Respondents. Security, food and accommodation were made available at the command of the Court. After every 2 days, 2 Crew Members would go onboard. The Witness testified on redirection that the Captain who was Head of the Ship was himself aggrieved, and is the 1st Claimant. The Ship was not seaworthy. Its propeller was bent. The Captain, Chief Officer, and the Witness brought the issue before the attention of the Kenya Maritime Authority. The salaries were not paid on time. It was done 4 or 5 months later.

Final Arguments

18. The Claimants submit that there is no Response to the Claim, as the 1st Respondent's Advocate stated in Court, on 5th November 2014, that he did not intend to cross-examine, and intended to abandon the documents filed on 31st October 2014. The High Court did not have jurisdiction to grant damages in the Consolidated Claims where the Claimants recovered their wages. The Claimants referred the Court to the decision of the **High Court at Mombasa in Admiralty Claim Number 12 of 2004 between Leonard Sande v. Owners of MV ALPHA MANYARA**. The High Court ruled that under its admiralty jurisdiction, the Seafarer's Claim was limited to wages-salary, salary arrears and allowances for provisions. The Claimants argue what was paid in the Admiralty Court did not fully compensate them.

19. MV BLIDA, according to the Claimants had 6 floors, made of metal, and was one and a half times the

size of a football pitch. It accumulated heat during the day, which radiated at night. There was no air-conditioning when the power ran out. There was no food and water. A Ship must remain under constant watch as stipulated in the International Convention relating to Watching Standards. It must be moored and constantly monitored so as not to drift offshore and imperil other Vessels. It must be maintained so as not to soak in water, or have a fire break out, blocking the entire Port Operations.

20. The 1st Respondent's assertion, that it was not responsible for the welfare of the Claimants, is incorrect. The Merchant Shipping Act 2009 defines 'Ship-Owner' to include the registered Owner, and includes a Demise Charterer, Managing Owner or Managing Agent. The Court should not concern itself with the question whether the 1st Respondent leased or chartered MV BLIDA to the 2nd Respondent, who appointed the 3rd Respondent as the Manager. Responsibility under the Merchant Shipping Act lies with the Owner. The 1st Respondent had the option of settling the Claim and pursuing indemnity from the Charterers under the Bareboat Charter. If the 1st Respondent had no obligation to the Claimants, it must have assumed such responsibility upon the re-delivery of the Ship. Evidence of re-delivery was not discounted. The slave like conditions continued after re-delivery. The 1st Respondent conceded in the e-mail of its Officer Nasser- Nedin Mansouri, that it was informed by the 3rd Respondent about the proceedings herein, and sought details of liability to enable it pay. It cannot now turn around and hide behind the Bareboat Charter.

21. The powers of the Minister through the Maritime Authority, in the regulation of terms and conditions of work for Seafarers, are confined to Ships registered in Kenya. MV BLIDA was not such a Ship. The Claimants submit the amount of US\$5000 for each of them, would redress the harm they suffered onboard MV BLIDA, as a result of abandonment.

22. On the Counterclaim, the Claimants submit, it is not supported by a Verifying Affidavit; it is not based on any Witness Statements; no Witness gave evidence to support the Counterclaim; the Ship was sold pursuant to orders of the High Court, and therefore the 1st Respondent cannot sue the Claimants for loss, under the present Claim; no appeal was filed against the Judgment of the Admiralty Court; the Ship was sold by Admiralty Marshal who is not a Party in the present Claim; the 1st Respondent was warned by the Claimants about the intended sale and had the opportunity to pay up, and stop the sale; the Bareboat Charter enables the 1st Respondent to claim indemnity from the 2nd Respondent; the Counterclaim was filed without the leave of the Court, the only leave granted having been on the filing of the Response to the Claim; and the value of the Ship, though sold for US\$1,000,000, was not quantified.

23. The Claimants seek the Court to allow the Claim with costs; dismiss the Counterclaim with costs; and the Award be satisfied from the balance of the proceeds realized through the sale of MV BLIDA, presently in the account of the Admiralty Marshal of the High Court of Kenya.

24. The 1st Respondent submits that the issues for the determination of the Court are:-

- a. Whether the Claimants and the 1st Respondent had an employment contract/ employee-employer relationship;
- b. Whether they have a cause of action against the 1st Respondent;
- c. Whether in any case they were exposed to slave labour; and
- d. Whether they are entitled to the remedies sought.

25. On the first issue the 1st Respondent argues there was no contract between it and the Claimants. It was not a Party to the Crew Agreement. The Crew Agreement exhibited by Mr. Wakaria was a standard document, executed by all the other Claimants. It did not refer to the 1st Respondent. Wakaria testified he did not know Bulk Carrier SPA, and his dealing was with Sekur Holdings. He was specific the 1st Respondent had no business being in Court.

26. Seamen Agreements are strictly regulated by the **Merchant Shipping Act 2009. Section 3 states the law applies to Kenyan Ships, wherever they may be, and all other Ships while in a port or place in, or**

within the territorial and other waters under the jurisdiction of Kenya. **Section 2** defines an 'Employer' to mean "the person who has entered into a crew agreement with the Seafarer for the Employment of the Seafarer on the Ship." **Section 2** of the **Employment Act 2007** defines an 'Employer' to mean "any person, public body, firm, corporation or company, who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager or factor of such person, public body, firm, corporation or company." **Section 9** of this law requires contracts for a period of working days which amount in the aggregate to the equivalent of 3 months or more; or which provides for performance of work which cannot reasonably be expected to be completed within an aggregate of 3 months, to be in writing.

27. The Crew Agreements, concluded between Sekur Holdings and the Claimants, were made in compliance with the laws above. The contracting Parties are shown in the Crew Agreements.

28. The 1st Respondent availed to the Court the Standard Bareboat Charter Agreement, between itself and the Co- Respondents. Part 11 of this Agreement, Paragraph 10 [b] states that, "....the Master, Officers and Crew of the Vessel, shall be the servants of the Charterers for all purposes whatsoever, even if for any reason, appointed by the Owners. Charterers shall comply with regulations regarding Officers and Crew, in force in the Country of the Vessel's flag or any other applicable law"

29. The Bareboat Charter makes it clear who was the Employer of the Crew in MV BLIDA.

30. There is subsequently, no cause of action against the 1st Respondent.

31. The Crew Agreement was crafted pursuant to **Section 119 of the Merchant Shipping Act 2009**. This law establishes what the contents of the Crew Agreements should be. The conditions of work stated under paragraph 8 of the Statement of Claim, are not part of what should be availed to the Crew by their Employer. There is nothing mandating the provision of proper and humane working conditions including supply of fresh water, quality food, habitable cabins etc. The Ship had already docked, could not move into the seas, as it was not seaworthy, a fact acknowledged by the Claimants. The Engineer Claimants were hired to repair the Ship. The performance of the respective roles by the Claimants could not be likened to slavery. They knew they were to work in certain conditions.

32. The Claimants were indeed provided the basic amenities through the Order of the Court dated 30th July 2012. The amenities were paid for with the proceeds from the sale of the 1st Respondent's Ship. The International Conventions making for provision of certain amenities to Seafarers are not ratified by Kenya and cannot be relied upon. The claim for damages is informed by greed and malice.

33 The 1st Respondent submits the Claimants are merely harassing the 1st Respondent with whom they have no relationship whatsoever. They are frustrating the 1st Respondent from accessing the balance of the money realized from sale of MV BLIDA, as it pursues its own claims for damages against the 2nd and 3rd Respondents in Arbitration in the United Kingdom, pursuant to the terms of the Bareboat Agreement. The 1st Respondent prays that the Claim be dismissed with costs, and the funds held by the Admiralty Marshal be released to the 1st Respondent.

The Court Finds:-

34. The issues in dispute are fairly captured in the 1st Respondent's Closing Submissions at paragraph 24 above.

35. The Claimants' argument at paragraph 4 of their Closing Submissions, that there is no Response to the Claim, is incorrect. This may well be the case with regard to the 2nd and 3rd Respondents. The 1st Respondent however sought leave to file a Statement of Response, was granted leave, and there is a Statement of Response on record. The 1st Respondent's Advocate did cross-examine Mr. Wakaria, and even if he did not, that would not result in there being no Response to the Claim. Secondly, it is not true

that the 1st Respondent abandoned the Documents filed on 31st October 2014. These were - a copy of the Bareboat Agreement, and a copy of the MV BILDA's Certificate of Algerian Nationality. They were documents already in the record of the Court. The documents were attached to the 1st Respondent's Application dated 20th November 2013, which sought to have the balance of proceeds from the sale of MV BLIDA released by the Admiralty Marshal to the 1st Respondent. The submission that there is no Response is therefore incorrect.

36. The main ground in the Response is that the 1st Respondent did not employ the Claimants. **Section 2 of the Merchant Shipping Act 2009**, defines an Employer in relation to a Seafarer, as *"the person who has entered into a crew agreement with the Seafarer for the employment of Seafarer on the Ship."*

37. This agrees with the definition of the term 'Employer' in **Section 2 of the Employment Act 2007**, and the interpretation provisions of the Labour Laws enacted in 2007. The definition is: *"any person, public body, firm, corporation, or company who or which has entered into a contract of service to employ any individual and includes the agent, foreman, manager, or factor of such person, public body, firm, corporation, or company. Section 2 of the Employment Act conversely defines an 'Employee' to be "a person employed for wages or salary, and includes an apprentice and indentured learner."* The **Black's Law Dictionary, Page 471, [5th Edition 1979]** describes an 'Employee' to be *"a person under the service of another for hire, express or implied, oral or written, where the Employer has the power or right to control and direct the Employee in material details of how work is to be performed."*

38. The Merchant Shipping Act, 2009 does not have the term 'Employee.' It however defines 'Seafarer' under Section 2, as *"every person [except a master, pilot or apprentice duly contracted or indentured and registered] employed or engaged in any capacity on board a Ship."* A Master includes every person, except a Pilot, having command or charge of a Ship, and in relation to a Fishing Vessel, means the Skipper. A Pilot, in relation to the Ship, means a person not belonging to the Ship, who has the lawful conduct of the Ship.

39. In the **Industrial Court of Kenya Cause Number 684 of 2011 between Child Welfare Society of Kenya v. Margaret Bwire and Isiolo Children's Home- Isiolo County, [Unreported]**, the Court concluded that, *"an employer- employee relationship exists, where an Employee agrees to work for an Employer, full time or part-time, for a specified period or indeterminate period of time, in return for wages or salary. The Employer has the right to decide where, when and how the work is to be done. There are four factors [at common law] in determining the presence of an employment relationship: control; ownership of the tools of work; the chance of profit or risk of loss; and integration."*

40. It is not contested that the 1st Respondent owned MV BLIDA. The Certificate of Algerian Nationality on record shows the Ship belonged to the 1st Respondent. The particular registration was done in Algiers on 13th August 2007.

41. On 24 July 2007, the 1st Respondent executed a Bareboat Charter with Leadarrow S.A of Panama – Guaranteed Affiliate of CTI c/o Sekur Holdings Inc. 81 Akti Miaoulli Street, 18358 Piraeus, Greece. These 2 companies are named as the 2nd and 3rd Respondents herein. They were the Charterers of MV BLIDA at the time the Ship entered the Kenyan Waters, and the 2 Kenyan and 9 Ukrainian Seafarers came on board.

42. **Section 2 of Merchant Shipping Act 2009** explains the term 'Bareboat Charter Terms' in relation to a Ship to mean *"the hiring of the Ship for a stipulated period on terms which give the Charterer possession and control of the Ship, including the right to appoint the Master and the Crew."*

43. In maritime law, a Bareboat Charter has been defined as *"an agreement between the legal or registered owner of a Ship [or a person who has bareboat chartered the vessel from him and become the **disponent owner**] and the Bareboat Charterer, pursuant to which the owner transfers [demises] to the Bareboat Charterer possession of the Ship, and the right to trade it as he chooses for a specified*

period.... The contract is effectively ‘ a dry lease,’ under which the Bareboat Charterer will employ the Crew and be responsible for all Technical Operation and Commercial Operation and Management Expenses...” The **Disponent Owner** therefore displaces the registered Owner, taking over complete control of the Ship and its commercial operation.

44. This was amplified by *the House of Lords in BP Exploration Operating Company v. Chevron Transport [Scotland] [2001] UKHL*. Lord Hobhouse of Woodborough explained:

“a Bareboat Demise Charter is... truly a contract of hire of the Vessel and involves the delivery of the Vessel into the possession of the Charterer and the control of the Vessel resting with the Charterer Employees.”

45. The 1st Respondent transferred possession, the right to trade, to control and manage MV BLIDA, which included the right to employ the Master and Crew, through the Bareboat Charter of 24th July 2007. The 1st Respondent did not recruit the Claimants; it did not know them, their terms and conditions of service on board MV BLIDA; it did not exercise any degree of control on the Claimants in the performance of their seafaring roles; it did not have the management of the Ship; it did not provide the Claimants with their tools of trade; and was not concerned with the profit or risk of loss in the Charterers’ business for the life of the Bareboat Charter. At the time of the Claimants’ entry onboard the MV BLIDA, the 2nd and 3rd Respondents were the **Disponent Owners**, of MV BLIDA.

46. There was no employment relationship between the Claimants and the 1st Respondent. In his evidence, Mr. Wakaria who has a long history in seafaring was blunt about the Claimants’ relationship with the 1st Respondent. He testified he did not know the 1st Respondent, and that the 1st Respondent had no business being in Court. There was no reason why the Claimants should then adopt the position that the 1st Respondent was an Employer. The Bareboat Charter stated under clause 10 [b] that, “*the Charterers shall at their own expense and by their own procurement, man, victual, navigate, operate, supply fuel and whenever required, repair the Vessel during the Charter Period and they shall pay all the charges and expenses of every kind and nature whatsoever incidental to their use and operation of the Vessel under this Charter, including annual flag of the State fees and any foreign, general, municipality, and or State taxes. The Master, Officers and Crew of the Vessel shall be the servants of the Charterers for all purposes whatsoever, even if for any reason appointed by the Owners.*”

47. The submission by the Claimants, that throughout the Merchant Shipping Act 2009, the responsibility for the Ship lies with the Owner, if by Owner the Claimants mean the registered Owner, is not supported by the law as discussed above. The term ‘Ship-owner’ under the Act, and as observed by the Claimants themselves, includes the registered Owner, Demise Charterer [such as the 2nd and 3rd Respondents], Managing Owner or Managing Agent. The 2nd and 3rd Respondents were **Disponent Owners**, and were certainly the Employers of the Claimants.

48. Part VII of the Merchant Shipping Act 2009 deals with the engagement and welfare of Seafarers. Section 119 requires the contract of employment, referred to as Crew Agreement, to be signed by the Master before the Seafarer signs. The contents of the Crew Agreement are detailed in the Act. Section 9 of the Employment Act 2007 similarly imposes the obligation of written contract of employment on the Employer. The Employment Act 2007 must however be read in the Crew Agreements with caution, because the law applicable in the Ship is, under International Law, the law of the Nationality of the flag under which the Ship is registered. MV BLIDA flew the Algerian flag, and the undisputed applicable employment law inside the Ship, would be the Algerian employment law. Maritime law however, is like labour and employment law, highly globalized, and there are standards applying across the Board by virtue of International Principles and Legislation. The Claimants signed Crew Agreements with Sekur Holdings Inc, the 3rd Respondent herein, in accordance with these principles and laws. Given that ‘Employer,’ under Section 2 of the Merchant Shipping Act 2009, a law which applies to all Kenyan Ships and foreign Ships within Kenyan waters, is a person who has entered into a Crew Agreement with the Seafarer for the employment of the Seafarer on a Ship, it is difficult for the Claimants to rope in the 1st

Respondent into an employment relationship, while the Crew Agreements were executed between the Claimants and the Co-Respondents.

49. The Court finds that the Claimants were Employees of the 2nd and 3rd Respondents. They were not employed by the 1st Respondent.

50. The answer to the second question whether they had an employment cause of action against the 1st Respondent must be that, they did not have such a cause of action.

51. The Court notes that although the 1st Respondent was not the Employer of the Claimants, it was nonetheless a necessary Party to these proceedings. The explanation for this finding is perhaps captured in the speech of Lord Hobhouse, in the decision cited at paragraph 44 above. He states:

“... the Charterer has the right to choose how the Vessel shall be used and takes upon itself all the relevant risks. The Charterer must insure the Vessel and give the Owner the benefit of the insurance as a Co-insured and pay the Owner the proceeds of any claim for a total loss. The Charterer must indemnify the Owner against all liabilities incurred as a result of its use of the Vessel and give the Owner the right to join in the defence of any significant claim against the Vessel. Such a clause is necessary because many of the claims which may arise from the trading of the Vessel, are claims for which the Claimant has a maritime or statutory lien upon the Vessel itself and, therefore, although no claim in personam may lie against the Owner, the property of the Owner, and, specifically the Vessel itself, may be arrested and sold to satisfy the claim.” In the **Court of Appeal of Kenya at Mombasa Civil Appeal Number 50 of 1989 between Owners of the Motor Vessel ‘Lillian S’ v. Caltex Oil Kenya Limited 1989 [KLR]**, the Court explained that *“An admiralty action in rem is in effect, an action against the res. A res, [Latin for object or matter] is usually a Ship, but may be Cargo, Freight or Aircraft. In such an action, the Plaintiff may cause the res to be arrested, if it is within jurisdiction.”*

52. **Section 105 [1] and [2] of the Merchant Shipping Act 2009** stipulates that:

“ [1] Subject to the provisions of this Act, the following claims may be secured by maritime liens-

[a] Wages and other sums due to the Master, Officer and other Members of the Ship’s complement, in respect of their employment on the Ship;

[b] Port and other waterway dues and pilotage dues;

[c] Claims against the Owner in respect of loss of life or personal injury occurring whether on land or water, in direct connection with the operation of the Ship;

[d] Claims against the Owner based on wrongful act and not on contract, in respect of loss of or damage to property occurring whether on land or water, in direct connection with the operation of the Ship;

[e] Claims of salvage, wreck removal and contribution in general average.

[2] In sub-section [1] ‘Owner’ in relation to the Ship, includes the Charterer, Manager or Operator of such Ship.”

53. Wages and other sums due to Seafarers are therefore securable by maritime lien under Kenya Maritime Law. Although, the registered Owner of a Ship is not necessarily an Employer of the Ship’s Crew, such Owner becomes a necessary Party to a claim for recovery of wages and other sums due, initiated by the Crew, because ultimately, employment obligations are enforceable through the sale of the Ship.

54. It was argued by the Claimants that the MV BLIDA had been re-delivered by the Co- Respondents to the 1st Respondent at the time this Claim arose. The 1st Respondent engaged in correspondence with the

Claimants, undertaking to pay the Claim, and cannot therefore extricate itself from liability, on the basis of not being the Employer.

55. The e-mail of the 1st Respondent dated 31st August 2012 which called for details of the Claims against the Ship, to enable the 1st Respondent pay, cannot be taken as an admission of the Claim on the part of the 1st Respondent. It was made clear by the 1st Respondent that Sekur Holdings, the 3rd Respondent herein, was the concerned Party. Attempts by the 1st Respondent to settle the Employees' dues were necessitated by the urgency of the moment, and its expected concern over the loss of MV BLIDA.

56. The e-mail communication involving the Group known as Seamen Relief Fund and the Parties herein, suggests that the Ship had been re-delivered to the 1st Respondent, and the 2nd and 3rd Respondents, would no longer have anything to do with the Ship. This communication was exchanged around 29th and 30th July 2012. It was the same time the Claimants were in the process of attaching and selling the Ship to recover their dues. The 2nd and 3rd Respondents were engaged in communication with the Claimants' Advocates on settlement to avoid sale of the Ship. Although the 2nd and 3rd Respondents alleged they had re-delivered the Ship, and no longer had anything to do with it, they continued to engage in communication with the Claimants' Advocates on the subject, seeking information on the sale of MV BLIDA and in particular, information on statement of accounts relating to the sale. They wrote to the Claimants' Advocates in February 2013, while they allegedly re-delivered the Ship to the 1st Respondent sometime in July 2012.

57. While it appears the Bareboat Charter was coming to an end around July 2012, it having been for a period of 5 years beginning July 2007, there was no evidence on the formal termination of the Charter and re-delivery of the Ship. Clause 15 of the Bareboat Charter regulated the procedure in re-delivery; nothing was shown by the 2nd and 3rd Respondent, or by the Claimants who pursued the line of argument on re-delivery, that Clause 15 was followed. There were obligations to the Crew which remained to be met, and which as discussed above, were to be met by the Charterers, regardless of the status of the Bareboat Charter. The Claimants remained un-discharged from the Ship.

58. The sale of MV BLIDA took place to enable the Claimants recover their arrears of wages, and for the Ukrainian complement, wages and repatriation expenses. There are several issues arising out of the proceedings in the Admiralty Court at Mombasa, which led to that sale, in relation to the present Claim. These issues relate to the question whether the Claimants were exposed to slave labour and whether they merit the prayers pursued in the present Claim. There are questions of admiralty jurisdiction, in relation to labour and employment matters raised, particularly as this Claim was transferred from the High Court on the basis that it is an employment dispute, but only after the High Court had presided over the sale of MV BLIDA in recovery of Employees' wages, under the Consolidated Claims.

59. The Claimants relied on the decision of Hon. Justice Mwera in the ***High Court at Mombasa, Admiralty Claim Number 12 of 2004 between Leonard Sande Ngwabe v. Owners of MV ALPHA MANYARA.*** The Claimant Seafarer, Mr. Ngwabe, sought the arrest of the Ship for recovery of his arrears of salary, leave allowance, holiday pay, overtime pay, notice pay, refund of food and accommodation, uniform and mess allowances and aggravated damages for pain, fear, risk of death, after exchange of fire with Pirates.

60. The High Court concluded that it derives its admiralty jurisdiction from Section 4 of the Judicature Act Cap 8 the Laws of Kenya. The High Court exercises jurisdiction in accordance with the same procedure as in the High Court of England, in conformity with International Laws and the Comity of Nations. In essence, the High Court ruled that by virtue of Section 20[1] [2] of the Supreme Court Act [1981] UK, it was limited to granting the Seafarer wages, which is that regular payment agreed to be paid for services rendered to a Seafarer, together with allowances limited to compensation for bad provisions, essentially food provisions and nothing else. Other claims were not justiciable before the Admiralty Court. This informed the Claimants' decision to file separate Claim for recovery of salaries and

repatriation expenses of the one hand, and the present Claim for damages on the other hand.

61. The continued reliance on the procedure of the High Court of England in dealing with our admiralty matters, appears to this Court out-dated. There have been calls for amendment of Section 4 of the Judicature Act, and for development of homegrown admiralty legal regime.

62. The decision of the High Court in **ALPHA MANYARA** preceded the promulgation of the Constitution of Kenya in 2010. A lot of legal beacons have since shifted, particularly with regard to the employment and labour jurisdiction.

63. Article 162 [2] [a] of the Constitution requires Parliament to establish a Court with the status of the High Court, to exclusively hear, and determine disputes relating to employment and labour disputes. Parliament passed the Industrial Court Act 2011, which creates the Industrial Court. Matters to be dealt with by this Court are outlined in Section 12 of the Act. Section 87 of the Employment Act 2007 confers the Industrial Court exclusive jurisdiction in hearing and determining employment disputes.

64. Under Article 165 [5] [b], the High Court is deprived of jurisdiction in disputes relating to employment and labour. The High Court affirmed it no longer has jurisdiction in employment and labour disputes in the **High Court at Nairobi Petition Number 170 of 2012 between the United States International University v. the Attorney General and Others [2012] e-KLR**. This position was approved in the **Court of Appeal at Nairobi Civil Appeal Number 6 of 2012 between Daniel Mugendi v. Kenyatta University and 2 Others [2013] e-KLR**, where the Superior Court went further to caution Parties against filing what was characterized as ‘mixed grill’ claims.

65. In light of these legal developments, the Claimants should have filed their admiralty claims for recovery of wages and repatriation expenses as well as the present claim for damages, under one single Cause, at the Industrial Court. The subject matter of the claims that were litigated at the High Court in its admiralty jurisdiction- employment wages- is a core subject of the jurisdiction of the Industrial Court. Recovery of wages should not have been severed from the present claim and pursued in a different Court.

66. The Shipping Merchant Act 2009 deals to a considerable extent, in employment and labour matters. There is no legislation which would go into defining who an Employer is, without calling in the jurisdiction of the Industrial Court. Provisions that deal with employment of Children onboard Ships; regulations of conditions of service; crew agreements; protection and welfare of Seafarers; are all issues given great attention in the Merchant Shipping Act 2009, and involve the jurisdiction of the Industrial Court.

67. Kenya ratified the International Labour Organization Maritime Labour Convention 2006 [MLC 2006] in July 2014. The Convention covers the minimum requirements for Seafarers to work on Ship, conditions of employment, accommodation, recreational facilities, food, catering, health, welfare, grievance procedures, enforcement and social security protections. These are obligations which Kenya may not adequately discharge, without a proper admiralty legal regime, aligned to the Constitution of Kenya. This demands for among other things, amendment of the laws and rules governing the proceedings of the Industrial Court, to facilitate the exercise of the admiralty labour and employment jurisdiction.

68. The Court finds the Claimants should have filed all their claims at the Industrial Court in Mombasa. There was no need to have truncated proceedings.

69. Were their claims against the Respondents satisfied at the High Court? Are the Claimants entitled to pursue further remedies at the Industrial Court?

70. There was persuasive evidence from the Claimants that they were abandoned by the 2nd and 3rd Respondents at the MV BLIDA, docked at the Port of Mombasa. The Parties seem to have been in agreement that the Ship was somewhat stricken and not seaworthy at the time. It was not made clear to the Court how the Ship sailed to Mombasa, where and when its voyage started, and its purpose at the Port

of Mombasa was left unsaid. Who manned the Ship before the Claimants took over at Malindi and Mombasa? There were some gaps in the voyage, which deprived the Court of certain perspectives. The Claimants were not supplied with fresh water and food was rationed from around 1st July 2012. Other basic supplies were exhausted and not restocked. The Ship ran out of fuel and the generator could not work. The Claimants were thrown into darkness. The Ship was one and a half times the size of a football pitch. It was hot and humid, a giant cauldron, day and night, with no coolers. It was not fit for human habitation. The Claimants were exposed to Mosquitoes. They could not abandon the Ship, and were required to ensure the Ship remained properly moored and safe from the elements, so as not to endanger other maritime users. The Claimants were left looking for assistance from Seafarers' Welfare Groups.

71. It is not correct that the Employers did not owe the Seafarers the obligations asserted in the Claim. The Claimants entered the Ship within the Kenyan Waters. They concluded and performed their contracts in Kenya. The Merchant Shipping Act 2009 applied in full to the Ship and Crew. The complaints raised by the Claimants occurred while the Ship was docked at Mombasa. 2 of the Claimants are Kenyans. They were entitled to the basic, minimum conditions of employment, contained in Part V of the Employment Act 2007. These standards are reflected in various International Labour Instruments, recognized and implemented by Kenya, and Algeria, which was the Nationality of MV BLIDA. These labour standards applied to all the Seafarers onboard MV BLIDA. The Act requires the Employer to provide the Employee with reasonable accommodation; regulate the working hours noting to observe the requirement for rest day; grant the Employee annual leave of at least 21 working days with full pay; grant maternity and paternity leave and sick leave where required; provide wholesome drinking water at the place of employment; ensure the Employee is properly fed where there is an express agreement for feeding at the time of entering into contract; and ensure sufficient provision of medicine during illness. The Crew Agreements offered the Claimants some of these benefits such as annual leave pay, which however was, like the basic salary never paid. Legislation such as Occupational Safety and Health Act 2007 establishes the bare minimum conditions for acceptable working environment. These are standards reflected in ILO Maritime Conventions, ratified by both Kenya and Algeria. The ILO Information System on International Labour Standards [NORMLEX] indicates Algeria has ratified the Occupational Safety and Health Convention, 1981 [No. 167], the Merchant Shipping [Minimum Standards] Convention, 1976 [No. 147] and all the 8 fundamental ILO Conventions, including those outlawing forced labour. Employers are required to retain safe and secure environment at the workplace. Workplaces include Vessels. International Instruments such as the ILO Maritime Labour Convention 2006 and its precursors, impose on Employers the duty of maintaining Employees and the Workplaces. Section 131 of the Merchant Shipping Act 2009 leaves it to the Minister to make regulations providing for conditions of service for Seafarers working in Kenyan Ships, or Kenyans working in foreign Ships. Such regulations would apply to the Kenyan Claimants. This Court was not able to trace specific regulations made by the Minister under this law, but any such regulations, would have, in the respectful view of this Court, the conditions set under the Employment Act 2007, as the basic, minimum conditions of employment. These are conditions that are read into every contract of employment. The Crew Agreements were themselves for fixed term periods. The Employers were obliged to keep the working environment conducive for the Claimants' uninterrupted service up to the end of the term. The 2nd and 3rd Respondents misrepresented to the Claimants that they would serve trouble-free, for specified periods of time, paid certain sums of money for their labour, and work in safe and secure environment. By not fulfilling any end of their bargain, and by abandoning Ship and the Crew, the Employers fundamentally breached the Crew Agreements. They breached the express and implied terms of the Crew Agreements. That breach is remediable through general damages.

72. It was not until the High Court issued orders, for the Claimants to be availed some of the basic conditions of employment through a third Party Sainif Kenya Limited on 30th July 2012 that, some sanity was restored in the MV BLIDA.

73. The conditions in which the Claimants served, no doubt amounted to slave labour. Slave labour means, labour that is coerced and is inadequately, or not at all rewarded, or People who perform such labour. The Claimants did not work without pay, and in the conditions described above, voluntarily. The 2nd and 3rd Respondents seem to have exercised trickery in engaging the Claimants to work onboard MV

BLIDA while knowing, they, 2nd and 3rd Respondent, did not have the financial wherewithal to maintain the Employees and the Ship, and intended to jump Ship without meeting their obligations to the Employees, presumably because the Bareboat Charter was at an end. The Claimants were compelled to continue working in decrepitude, out of the intrinsic requirements of maritime law, both domestic and international. They could not simply walk away. Moreover, they had not been paid their salaries. They were kept waiting for their salaries, and thereby forced to continue serving, as they waited to be paid and discharged. They could not initiate termination of the Crew Agreements and simply walk away. They only seem to have been freed once the Ship acquired a new Owner after the auction. The 2nd and 3rd Respondents simply vanished and purported to have re-delivered the Ship. The Claimants did not voluntarily render unrewarded labour; they were tricked into supplying a form of labour fitting the description of compulsory or forced labour under Section 4 of the Employment Act 2007. Article 30 of the Constitution of Kenya, prohibits slavery, servitude and forced labour. ILO Convention 105 on Abolition of Forced Labour, and ILO Convention 29 Concerning Forced or Compulsory Labour, are Core Conventions, prohibiting this form of involuntary labour. The 2nd and 3rd Respondents exacted labour from the Claimants, which they did not intend to pay for, and which they did not pay for. Some of the Claimants are long-serving specialists in their areas, such as Mr. Wakaria who is a Marine Engineer, with 40 years' experience. The 2nd and 3rd Respondents showed scant regard for the skills, knowledge and experience of their Employees. The Legislation and Constitution of Kenya, as well as International Legislation, outlaw involuntary labour.

74. The intervention of the High Court in having the Claimants paid their arrears of wages, partly accommodated at Sairose Hotel, and provided for with the basic amenities, merely mitigated the injury already inflicted, and which continued to be inflicted, on the Employees. The judicial intervention did not compensate them for their exposure to the hazardous and unacceptable conditions of work. It did not compensate the Claimants for the failure to receive their salaries at the agreed interval. Furthermore they were required to visit the stricken MV BLIDA in turns, and discharge their roles in keeping the Vessel afloat. The intervention of the High Court mitigated the Claimants' circumstances; it did not fully redress the wrong.

75. The Court is satisfied the Claimants have established their joint Claim against the 2nd and 3rd Respondents. The Claim against the 1st Respondent as a registered Owner of MV BLIDA is misplaced. They are entitled to general damages for breach of their Crew Agreements and breach of the terms and conditions implied by the law, in the Crew Agreements. ***The Court grants each Claimant damages assessed at US\$5,000, with costs, and interest at 14% from the date of the delivery of this Award till payment in full.***

76. The Award shall be satisfied from the money held in the account of the Admiralty Marshal. The money was actualized from the sale of MV BLIDA, to satisfy the employment obligations of the Claimants' Employers, the Disponent Owners of the Ship. Under Section 105(1) (a) of the Merchant Shipping Act, such money can be applied to satisfy the Seafarers' wages. It can be applied to satisfy other sums due, which would include general damages, given in an Award of the Court. The 1st Respondent indicated it is pursuing Arbitration proceedings against the Charterers in the UK, in accordance with the terms of the Bareboat Charter. It is open for the 1st Respondent to pursue indemnity against the Charterers in those proceedings. The Employees' obligations, from our jurisdiction however, must be met in full, from the sale proceeds of the *res*.

77. The 1st Respondent's Counterclaim was not supported by evidence. The 1st Respondent did not even say anything about its Counterclaim in its Final Submissions. The value of MV BLIDA was not quantified as the 1st Respondent promised would be, in the Pleadings. Auction and sale followed a Court process, which has not been challenged, stayed or overturned by the Superior Court. The sale of MV BLIDA is done and consummated. The 1st Respondent appears focused on the Arbitral process in the UK, which in the view of this Court is the correct approach. The Counterclaim has no merit and is hereby dismissed.

IT IS ORDERED:-

- a. ***It is declared the Claimants were subjected to forced labour by the 2nd and 3rd Respondents in the abandoned Ship known as MV BLIDA;***
- b. ***The 2nd and 3rd Respondents acted in breach of the Crew Agreements;***
- c. ***Each Claimant be paid general damages for breach of those agreements, under one head at US\$5000;***
- d. ***The Counterclaim is rejected;***
- e. ***Costs of the Claim to the Claimants;***
- f. ***Interest on the principal amount and costs granted at 14% from the date of the delivery of this Award till payment in full;***
- g. ***The Award be satisfied in full from the amount held by the Admiralty Marshal on account of the sale of MV BLIDA in the High Court Admiralty Claims Number 7 and 8 of 2012 [Consolidated]; and***
- h. ***The balance in that account shall be released to the 1st Respondent upon satisfaction of this Award.***

Dated and delivered at Mombasa this 12th day of February 2015

James Rika

Judge