

SEAFARER SUBJECT GUIDE

SHIP ARREST FOR SEAFARERS' WAGES IN KENYA

This Guide deals with the rights of seafarers of any nationality to arrest a ship for unpaid or underpaid wages in a port in Kenya.

This document is not intended to be legal advice, nor does it constitute legal advice.

If a seafarer intends to arrest a ship in Kenya, he is strongly advised to consult a lawyer qualified to practise in that country.

*A full text version of this Subject Guide including footnotes will become available for subscription in due course. In the meantime if there is a specific inquiry on any Subject Guide, please contact SRI.

1. Can a seafarer arrest a ship for unpaid wages regardless of his nationality and regardless of the flag of the ship?

1.1 The Merchant Shipping Act ('the Act') gives the High Court of Kenya jurisdiction to arrest ships regardless of the flag of the ship or the nationality of the seafarer while a ship is in a port or place in, or within the territorial and other waters under the jurisdiction of, Kenya.

2. What is the time limit within which a seafarer must start a claim for unpaid wages?

2.1 With regard to a seafarers claim for unpaid wages arising out of a maritime lien, section 112 of the Act states that:

'The maritime liens relating to a ship....shall be extinguished after a period of one year from the time when the claims secured thereby arose, unless, prior to the expiry of such period, the ship has been arrested and the arrest has led to a forced sale....'

2.2 If a seafarer institutes an *in personam* action against the owner or charterer of a ship for unpaid wages, that is, a contractual claim for damages, then the Employment Act of Kenya will apply and the seafarer must bring the claim within three years from the date when the wages became due.

3. What documents are required to obtain an arrest of a ship?

3.1 According to the Judicature Act, the admiralty jurisdiction of the Courts in Kenya 'shall be exercisable over and in respect of the same persons, things and matters, and in

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the same manner and to the same extent, and in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.'

- 3.2 The High Court Admiralty Rules state that: 'the forms to be used in admiralty proceedings shall be those in use for the time being in the Queen's Bench Division (Admiralty Court) in England...'
- 3.3 The documents required to obtain the arrest of the ship will be:
- (1) form ADM1, which is the claim form which sets out the 'brief detail' of the nature of the claim and counterclaim (in Kenya, the claim form is called a plaint);
 - (2) form ADM4, which is the undertaking to pay the Admiralty Marshal's costs of the arrest; and
 - (3) form ADM5, which is a declaration of support of the application signed by either the claimant or its solicitor. (In Kenya, this will be in the form of a supporting affidavit).
- 3.4 The language of the Admiralty Court of Kenya is English and any written application must be in the English language. Therefore, any documents to be filed in court which are completed in any language other than English must be translated by a translator and certified by a Notaries Public.
- 3.5 The only document that must be signed before a Commissioner of Oaths or Notaries Public is form ADM 5 (the supporting affidavit).

4. What are the costs of the arrest, including court expenses and other expenses?

- 4.1 The High Court (Admiralty Court Fees) (Amendment) Rules 1997 lists the court fees for filing documents at the High Court. The filing fees of the requisite documents must be funded in advance. The following are the costs of filing the main documents for the arrest of ships in Kenya:
- (1) on filing a plaint the filing fees will depend on the amount of the claim with a minimum of Kshs. 1500.00 and a maximum of Kshs. 70,000.00;
 - (2) on filing a request to the court to search the caveat book - Ksh.100.00;
 - (3) on filing praecipe for arrest - Ksh.500.00;
 - (4) on filing an affidavit in support of an application for arrest – Kshs. 1,000.00;
 - (5) on issue of warrant of arrest is Ksh.100;

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- (6) on filing written undertaking regarding Marshall's expenses - Ksh.100.00 (There does not have to be satisfaction of the undertaking when filing the undertaking); and
- (7) on execution of warrant of arrest is Ksh.350.00.

4.2 The other expenses which may accrue during the arrest of a ship are legal costs which are usually demanded in advance by lawyers from the crew. The crew may also be liable for the cost of sustaining and maintaining the ship which is at the discretion of the Admiralty Marshal and which may be passed on to the crew but ultimately recoverable from the proceeds of sale of the ship or security lodged by the shipowner. In practice, the Admiralty Marshal funds the costs and expenses of arrest of a ship and recovers this from the proceeds of the sale. Further disbursements may include the costs of valuation of the vessel and the appointment of a broker by the Admiralty Marshal.

5. Does the arresting party have to lodge counter security against wrongful arrest?

- 5.1 An arresting party is not required to lodge a counter security against wrongful arrest. However, if the ship is arrested by reason of *mala fides* or *crassa negligentia* the shipowner can claim losses and damages in admiralty or at common law. Damages may also be recovered where an arrest has been unduly continued.
- 5.2 However, the 1993 Convention permits a member state's court to require the claimant to provide some type of security in order to apply the arrest.
- 5.3 The more widely used procedure for obtaining security for a claim *in personam* in Kenyan law is the Mareva injunction. However, there is an undertaking in damages required and the liability in respect of that undertaking arises upon the basis that, if the underlying claim fails, the plaintiff is liable for all losses caused by the injunction. The absence of a similar facility in admiralty proceedings *in rem* may thus leave without remedy an innocent defendant shipowner who has suffered loss by an unjustifiable arrest but who is unable to establish *mala fides* or *crassa negligentia*.

6. Once a vessel has been arrested, will the court accept jurisdiction over the substantive claim?

- 6.1 This will depend on the circumstances of the case. If the claim arises out of a contract which contains an exclusive jurisdiction clause or an arbitration clause, it may be the case that the proceedings are stayed in favour of the relevant foreign court or arbitral tribunal. However, for most other claims the court will usually accept jurisdiction.

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7. Will the crew and vessel be maintained/supported during the arrest?

- 7.1 The vessel will be maintained by the Admiralty Marshal during the arrest of the ship. Once a ship is arrested it comes under the custody of the Admiralty Marshal whose duty is to maintain the safe custody and preservation of the ship. The Admiralty Marshal may demand funds for the upkeep of the ship from the arresting party but in practice the Admiralty Marshal funds the arrest of the ship and recovers the funds from the proceeds of sale.
- 7.2 The Admiralty Marshal incurs no liability for crews' wages until such time as there is an agreement between the Admiralty Marshal and the crew that the latter will provide services as and when requested by the Admiralty Marshal. Therefore, the Admiralty Marshal may, if he considers it necessary for the safety of the ship or to preserve it, pay wages and provide accommodation and sustenance to the crew on board for such time following arrest of the ship as the Marshal considers necessary. If the Admiralty Marshal does not require the presence of the crew to maintain the ship the crew will be responsible for their own maintenance aboard the ship and can claim the same from the proceeds of sale of the ship after payment of the Marshal's costs and expenses.

8. Is the presence of the crew on board the vessel necessary during the course of the legal proceedings or can the crew be repatriated before the ship is sold?

- 8.1 The presence of the crew on board the ship is only necessary in so far as the Admiralty Marshal requires their presence to preserve the safety and custody of the ship. There is no other requirement that the crew be present on board the ship during the course of legal proceedings for arrest of the ship.
- 8.2 Whether or not a ship is crewed after arrest will depend upon whether crewing is necessary to discharge the Admiralty Marshal's duty to retain the ship in safe custody and to preserve it. Thus, where a ship can be safely locked up as a dead ship, for example, a yacht there will be no restriction on repatriation of the crew before the ship is sold. Indeed, if there is no use for the crew on the ship the Admiralty Marshall would want vacant possession of the ship so as to reduce expenses and sell the ship with vacant possession.
- 8.3 The Admiralty Marshal is not under a duty to repatriate the crew of an arrested ship and to pay cost of repatriation. The costs will usually rest with the crew who will then be reimbursed from the proceeds of sale after payment of the Admiralty Marshall's costs of the arrest and appraisalment. However, where no-one is prepared or able to

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pay the crew in order to get vacant possession of the ship, the court may order that the Admiralty Marshal pay the crew's repatriation expenses and, if necessary, the wages claim. Such expenses may be rationalised as payments made to realise the ship on an Admiralty Marshal's sale *pendente lite* to best advantage. If ordered, the expenses will be part of the Marshal's expenses and the first claim against the ship.

9. Do the seafarer's wages continue to accrue during the arrest?

9.1 The arrest of a ship does not operate to determine the employer/employee relationship between the owners and the master and crew. Nor does it follow that the issue of a writ against the ship by the master or crew to recover outstanding wages automatically determines the employment relationship. It will be a question of fact in each case whether or not there is conduct on the part of the owner amounting to repudiation of the employment contract, for example, failure to pay wages and allowances which are owing, which is accepted by the crew as terminating the relationship. As long as the employment contract has not been terminated, the owner of the ship will be liable for the seafarers wages under the employment contract.

10. How long on average does it take for the court to sell the vessel and then distribute the sale proceeds in settlement of the crew's claim?

10.1 On average it would take between six to nine months from the time of filing a claim form until sale proceeds are distributed in settlement of a crews claim. This on the basis that there is no application for a stay or an appeal from the judgment, which will inevitably delay the distribution of sale proceeds. The Admiralty Marshal is not a ship keeper and the court will ensure that parties do not delay in prosecuting a matter in which a vessel is under arrest.

10.2 The Civil Procedure Rules provide that judgment must be rendered within two months from the conclusion of the hearing of the matter.

11. How are the lawyer's fees for arresting the ship paid?

11.1 A seafarer bringing a claim for arrest of a ship is liable to pay for his own legal costs. There is no established system of legal aid in Kenya. In addition, in Kenya the lawyers are not allowed to bill clients on a 'no win no fee' basis. However, non-profit organisation and trade unions may be willing to support seafarers in terms of legal costs.

11.2 In Kenya, any cost award by the court at the conclusion of a case follows the event. Therefore, if a seafarer is successful in his claim for unpaid wages the court will award costs to the seafarer. The court would however assess the legal costs based on the

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Advocates Remuneration Order. Therefore, a seafarer may not be able to recover his entire legal costs which are over the prescribed minimum in the Advocates Remuneration Order, as is usually the case. A seafarer would be able to recover the legal costs incurred from the proceeds of sale.

- 11.3 Similarly, if a crewmember is successful in his claim for unpaid wages and security has been lodged by the owner against the arrest of the ship, then the seafarer can recover the legal costs from the security lodged (as determined by the court in accordance with the Advocates Remuneration Order).

12. Are there any other procedures to enforce a seafarer's wage claim?

- 12.1 An actions *in personam* can be instituted against a person resident or carrying on business in Kenya (or in the case of a company, registered in Kenya), or whose property has been attached to found or confirm jurisdiction, or who has consented to the jurisdiction of the court. The matter proceeds in the same court, and the same law is applicable as to actions *in rem*.