

## SEAFARER SUBJECT GUIDE

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### MARITIME LIEN FOR SEAFARERS' WAGES IN KENYA

This Guide deals with the rights of seafarers of any nationality to unpaid or underpaid wages in respect of Kenyan flagged ships, and foreign ships which are in the ports of Kenya. These rights can be enforced in the High Court Admiralty Division, where they are secured and preferred by maritime liens and enforced by the arrest and forced (judicial) sale of the ships.

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

If a seafarer intends to claim his wages, he is strongly advised to consult a lawyer qualified to practise in Kenya.

\*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.

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#### 1. What is the maritime lien for seafarers' wages? How is it enforced?

- 1.1 A maritime lien for seafarers' wages is a privileged claim reserved for a seafarer upon the ship for unpaid wages. The ship is treated as a wrongdoer, not the owner, and hence the seafarer can enforce his claim for unpaid wages against the ship. A maritime lien is a proprietary remedy that gives rights against maritime property to which it relates.
- 1.2 The Kenyan Merchant Shipping Act ('the Act') recognizes the right of a seafarer to secure unpaid wages by means of a maritime lien. The legal framework for seafarers' wages is contained mainly in the Act. The Act adopts the International Convention for the Unification of certain Rules relating to Maritime Liens and Mortgages 1967 ('the 1967 Convention'). Kenya is also a signatory to the International Convention on Maritime Liens and Mortgages 1993 ('the 1993 Convention') but the 1993 Convention has not been ratified into Kenyan law. The lack of ratification means that the 1993 Convention is not Kenyan law, but in any argument the court would treat that Convention as being persuasive.
- 1.3 There are no specific provisions in the Act on how maritime liens can be enforced. However, by virtue of s. 4 (2) of 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 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.' Therefore, the English Civil Procedure Rules will apply to enforcement of maritime liens in Kenya. The English

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Civil Procedure Rules state that a maritime lien for wages can be enforced by instituting an admiralty claim *in rem*. A claim *in rem* is in effect a claim against a *res*. In such a claim the seafarer may cause the *res* to be arrested for unpaid wages if it is within the jurisdiction of an admiralty court in Kenya. If the *res* is arrested and the seafarer's claim is successful then unless the *res* has been released, judgement may be given against the *res* and an order made for its appraisal and sale. The proceeds of sale will be paid into court and will, after deduction of the fees and expenses in connection with the arrest, custody, appraisal and the sale of the *res*, be available to go towards the satisfaction of the claimant's judgement.

- 1.4 Kenya is also a signatory to the International Convention relating to the Arrest of Sea-Going Ship 1952 and the International Convention on the Arrest of Ships 1999. Without any local provisions relating to arrest in Kenyan legislation, the provisions of the 1952 and 1999 Conventions respectively would apply in addition to the English Civil Procedure Rules.

### 2. Which courts have jurisdiction over seafarers' wage claims?

- 2.1 The High Court of Kenya, Admiralty Division has jurisdiction over seafarers' wage claims.

- 2.2 Section 158 of the Act states that:

'The Court shall hear and determine any action, suit or proceeding instituted by or on behalf of any seafarer or apprentice for the recovery of wages, where –

- a. The owner of the ship is bankrupt;
- b. The ship is under arrest or is sold by the authority of the court; or
- c. A magistrate's court refers the claim to the court.'

- 2.3 Section 2 of the Act defines 'Court' as the 'High Court of Kenya'. Furthermore, the Judicature Act specifically gives the High Court of Kenya 'admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake or other navigable inland waters in Kenya.'

### 3. Can the courts refuse to hear seafarers' claims for wages?

- 3.1 The High Court can refuse to hear a seafarer's claim for wages in the following instances:

- (1) a claim relating to a maritime lien for wages which has been brought one year after the claim thereby secured arose;

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- (2) all claims by seafarers on board foreign ships which are not in a port or place in, or within the territorial and other waters under the jurisdiction of Kenya;
- (3) all claims by seafarers on vessels owned by the State (that is, vessels of the Kenya Police; vessels of the Kenya Navy or a foreign navy; aircrafts of the defence forces, and other ships belonging to, or under the control of, the Government).

### 4. Who can claim seafarers' wages?

- 4.1 The Act provides that a claim by a seafarer for unpaid wages *in rem* or *in personam* can be brought by a 'seafarer or a person authorised on his behalf'.
- 4.2 'Seafarer' is defined in the Act to include: 'any person (except a master, pilot or apprentice duly contracted indentured and registered) employed in any capacity on board a ship.' Furthermore, the Act states that maritime liens attach to unpaid wages 'due to the master, officer and other members of the ship's complement, in respect of their employment on the ship'.
- 4.3 As stated above, the Act also allows a person authorised by a seafarer to bring a claim on behalf of the seafarer. There has been no judicial interpretation of who would be considered an 'authorised person' but it is likely that this would be interpreted by the courts in a similar manner to civil claims, in that all that would be required is for the seafarer to give written authority to a person or body to institute a suit of his behalf.

### 5. Which ships are subject to the jurisdiction of the courts?

- 5.1 The High Court of Kenya will be seized of a claim *in rem* from the moment of service of the claim form or of arrest of a ship (whichever is earlier). Where, however, proceedings are brought against a ship already under arrest in High Court proceedings, the court will be seized of jurisdiction from the moment the claim form is issued. The court cannot have jurisdiction over a ship which does not come within the jurisdiction of the High Court.
- 5.2 The following ships shall be subject to the jurisdiction of the High Court in the Admiralty Division:
  - (1) Kenyan Ships wherever they may be; and
  - (2) all other ships while in a port or place in, or within the territorial and other waters under the jurisdiction of Kenya.

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### 6. What is included in the maritime lien for seafarers' wages?

- 6.1 The Act defines wages simply as 'including emoluments' but does not define what constitutes 'wages'. However, s. 105 of the Act is broadly drafted and states that maritime liens will secure wages and other sums due....in respect of their employment on the ship.' Thus, in addition to wage payments in the narrow sense, paid leave, overtime, sick pay, bonuses and damages for wrongful dismissal, breach of contract, repatriation costs and social insurance contributions will all fall within this category.
- 6.2 There has not been much judicial interpretation on this subject in Kenya. By virtue of the Judicature Act where Kenyan law is silent on the matter, the High Court can adopt English law as to the meaning of wages.
- 6.3 The English Admiralty Court has tended to regard seafarers with a degree of benevolence as favoured litigants and have interpreted the definition of a seafarer's wages broadly. However, in some respects a seafarer's claims have been looked at narrowly and claims are limited to monies due to a seafarer in respect of services to the ship, which is subject to *in rem* proceedings. Therefore, seafarers will not be able to recover wages in respect of services on board another vessel as a priority claim or for severance pay which relates to services on more than one vessel.

### 7. Can seafarers' wages be claimed if there is no written contract of employment?

- 7.1 Generally, employment law in Kenya does not require an employment contract to be in writing unless explicitly required in an Act of Parliament. Furthermore, the Constitution of Kenya protects the right of every worker in Kenya to fair remuneration. It therefore follows that it would arguably be unconstitutional to deny a seafarer a claim for wages because he does not have a written contract of employment.
- 7.2 There is no explicit provision in the Act that states that a seafarer's contract of employment must be in writing in order to bring a claim based on wages in the High Court of Kenya. Part VII of the Act does however contain provisions *inter alia* stipulating which provisions must be included in a crew agreement, including the requirement to have a crew agreement signed by a seafarer and the master of a ship, and the requirement to display a crew agreement on a ship travelling from and beyond Kenyan waters. These provisions imply the requirement for a written agreement. However, there is no provision excluding wage claims where there is no written contract. In a situation where there is no crew agreement these mandatory

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provisions can be implied into an oral contract as long as the provisions are not contrary to the laws of the flag state of a ship.

- 7.3 Further, s. 123(3) of the Act states that: 'In any proceedings, a seafarer may introduce evidence to prove the contents of any crew agreement or otherwise to support his case without producing or giving notice to produce the agreement or any copy thereof.'
- 7.4 Based on the above provision and relying on the general employment legislation in Kenya and the Constitution of Kenya, a seafarer does not have to produce a crew agreement in court to prove his case and can produce evidence to support his claim for wages in a situation where there is no written contract.

### **8. Must seafarers' services have been rendered on board the ship?**

- 8.1 Section 105(a) of the Act is broadly drafted to cover maritime liens for 'wages....in respect of their (seafarers') employment on the ship.' There has been no judicial interpretation in Kenya of what constitutes 'employment on ships' but it is likely to be given a wide interpretation to include all work whether on board or on land in connection with the service on the ship. The English position is that wages can be earned while the seafarer is not on board a ship, and that wages continue to accrue to a seafarer until his repatriation and are not affected by the seafarer instituting proceedings for the recovery of such wages.
- 8.2 However, in *The Ever Success*, it was held that, although seafarers can still provide 'service to the ship' when they are not living on board the ship, they will not be able to recover as wages time waiting to join the vessel, even if under contract to do so. Separate *in personam* proceedings could be brought against the employer in this regard. By bringing a maritime claim against the vessel, the seafarer does not terminate his employment contract and therefore the wages continue to become due and payable even whilst the vessel is under arrest.

### **9. What is the ranking of seafarers' claims for wages in the event that sale proceeds are distributed?**

- 9.1 In Kenya, the order of ranking of liens and mortgages against a ship is as contained in the 1967 Convention and, by virtue of s. 4 of the Judicature Act, the 1993 Convention will be referred to by the courts for the interpretation of issues dealing with the priority of maritime liens.

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- 9.2 Under s. 107(a) of the Act the priority of maritime liens is as follows: wages; dues; death and personal injury; tort claims against the owner and salvage claims. Claims for wages, dues death, personal injury and tort claims rank *pari passu* as between themselves. A maritime lien for a claim of salvage which has attached prior to the time when the operation giving rise to the lien was performed shall take priority over all other liens in the order stated under section 107(a) of the Act. The costs awarded by the court and arising out of the arrest and subsequent sale shall be paid first from the sale proceeds before the balance of the proceeds are distributed to the lien holders. Under the Act, holders of preferential rights and mortgages shall be paid from the proceeds of sale of the ship after the maritime lien holders.
- 9.3 The ranking of other claims against a ship is determined according to the law of the flag state. Any such rights will always rank after any maritime lien provided in the 1967 Convention.
- 10. Can wages be claimed if the employer is not the shipowner or acts illegally?**
- 10.1 Under Kenyan law, there is no restriction that wages can only be claimed by a seafarer if the employer is the shipowner. Section 110 of the Act states that a maritime lien 'shall arise whether the claims secured by such liens are against the owners, the demise or other charterer, manager or operator of the ship and such liens shall.....remain attached to the ship, notwithstanding any change of ownership or of registration.'
- 10.2 There are no provisions in the Act or Kenyan employment statutes barring a seafarer from claiming wages as a result of the employer's illegality. The employer's illegality will not affect a legitimate claim for wages by a seafarer as the Constitution of Kenya guarantees workers the right to remuneration which right cannot be denied due to the employer's illegal acts. However, if both the employer and the employee act in an illegal manner with regard to wages (for example, tax fraud) then it is possible that the Court may bar a claim by a seafarer.

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### 11. Can the seafarer's maritime lien for wages be abandoned or waived by agreement?

11.1 A maritime lien cannot be abandoned or waived by agreement.

11.2 Section 147(1) of the Act states that: '(1)...a seafarer's lien on a ship.....shall not be capable of being waived...(2) Any stipulation in any agreement inconsistent with subsection (1)....shall be void.'

### 12. When is the seafarer's maritime lien for wages forfeited or not recognised or extinguished?

12.1 A seafarer who is entitled to a maritime lien will forfeit his right if he does not bring a claim for arrest of the ship before a period of one year from the time when the claim secured arose or if the seafarer does something inconsistent with the lien.

12.2 The maritime liens recognized by Kenyan law are those listed in s. 105 of the Act, the 1967 Convention and the 1993 Convention and national law. Under English law, a maritime lien has been held not to exist in respect of towage, the supply of goods and material, or insurance contributions.

12.3 Claims to enforce liens are liable to be statute-barred. Section 112 of the Act states that the maritime lien:

'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 pursuant to the provisions of the rules of court or any other law for the time being in force relating to the sale of property in admiralty proceedings.'

12.4 According to Halsbury's Laws of England Vol. 43(2) para 1928:

'A maritime or statutory lien is extinguished by giving bail or a guarantee to prevent the arrestor secure the release of the *res* in an action to enforce the lien, by arrest and sale of the ship in an action *in rem* by a court of competent jurisdiction, whether English or foreign, by assignment without the sanction of the court.'

12.5 A maritime lien will also be extinguished by the destruction of the ship.