

SEAFARER SUBJECT GUIDE

USING LAWYERS IN KENYA

This Guide deals in general terms with using lawyers in Kenya. It aims to help a seafarer understand the legal profession in Kenya, and how to select, engage, and if need be, change his lawyer. This Guide does not, however, constitute specific legal advice in relation to the use of any particular lawyer. If a seafarer is dissatisfied with his lawyer, he is strongly advised to consult another lawyer qualified to practise in Kenya.

1. What is the structure of the legal profession?

- 1.1 The Kenyan legal system is founded on the English common law system and dominated by statute and case law. The Advocates Act prescribes the rules governing legal practice, and the bar association known as the Law Society of Kenya (www.lsk.or.ke) (website in English) is mandated, pursuant to the Law Society Act, to administer the rules.
- 1.2 In order to practice as a lawyer, a person must be qualified as an advocate of the High Court of Kenya. An advocate is qualified to handle contentious (disputed) and non-contentious matters and may appear at any level of court.
- 1.3 The legal profession is fused, which means that an advocate of the High Court of Kenya is able to perform the functions of both barristers and solicitors. In practice, advocates may have a preference for advocacy (barrister function) or non-contentious matters (solicitor function). It is required of the Kenya School of Law (under the Council of Legal Education), to train all advocates so that they are competent in both functions.
- 1.4 An advocate may have his own law firm where he is a sole practitioner and he may engage junior advocates (associates) to assist him. However, an advocate is not permitted to engage in practice on his own behalf either full-time or part-time unless he has practiced in Kenya continuously on a full-time basis for a period of not less than two years after obtaining his first practising certificate in a salaried post. Alternatively an advocate may be part of a law firm where there are several partners and associates.
- 1.5 Advocates usually specialise in any one or several areas of the law. Some of the small sized firms specialise in contentious work only, other firms primarily handle non-

SEAFARER SUBJECT GUIDE

contentious work, and some firms handle both contentious and non-contentious work but may have particular expertise in maritime law, commercial law, employment law and so on.

2. How is the legal profession regulated?

- 2.1 The Law Society of Kenya (the 'LSK') is an independent body established by the Law Society of Kenya Act. One of its main functions is to maintain and improve the standards of conduct and learning of the legal profession. It also performs a disciplinary role by checking the conduct of advocates.
- 2.2 The rules regulating advocates in Kenya can be found in the Advocates Act. This Act states the requisite qualifications of an advocate, the procedure to become an advocate and the framework within which an advocate may practice.
- 2.3 Every advocate must hold a practising certificate issued by the High Court of Kenya for the current year of practice. Law firms must have professional indemnity insurance. The LSK keeps an online database with information on the status of all advocates admitted to the bar. A seafarer can therefore find out whether an advocate is certified to practice at any given time by searching the online database.

3. How can a seafarer find a lawyer?

- 3.1 Until 2012, the rules in the Advocates Act prohibited advocates from advertising their services, which made it difficult to find an extensive local publication on advocates in Kenya.
- 3.2 On 29th March, 2012, the High Court of Kenya ruled that advocates can advertise their services. Rule 2 of the Advocates (Practice) Rules made under the Advocates Act states that no person may apply for or seek instructions, directly or indirectly or do anything which can be reasonably regarded as touting or advertising.
- 3.3 The High Court of Kenya held that Rule 2 of the Advocates (Practice) Rules banning advertising by advocates was unconstitutional and inconsistent with article 46(1) and article 48 of the Constitution of Kenya 2010. Rule 2 is now effectively inapplicable and advocates may advertise. To date there has been no guidance from either the Chief Justice or the Law Society of Kenya regarding the regulation of advertising by advocates.

SEAFARER SUBJECT GUIDE

- 3.4 The international Chambers & Partners guide (www.chambersandpartners.com) (website in English) and the Legal 500 Guide (www.legal500.com) (website in English) and HG Legal Directories (www.hg.org) (website in English) have a section on Kenyan Advocates which, although not comprehensive, are a useful resource.
- 3.5 As mentioned, the LSK maintains a database of all active advocates on its website. However, the database is classified simply by the name of each advocate and does not contain any information on the level of qualification or speciality of each advocate and, as a result, it is a limited resource.
- 3.6 Some law firms have websites which set out the areas of specialisation of the firm.
- 3.7 Seeking a reference from existing clients of a firm is a reliable way of locating a suitable advocate to handle any matter. Some foreign government embassies (such as the US and UK embassies) maintain a list of recommended Kenyan advocates according to specialisation and experience for reference by their nationals.
- 3.8 There are few firms in Kenya that specialize in maritime law and they are mainly located in Mombasa. A seafarer could contact the Kenya Maritime Authority (www.maritimeauthority.co.ke) (website in English) for recommendations regarding firms specialising in maritime law. Cross-referencing recommendations with the experience of other seafarers, the internet or any other source is advised prior to any engagement.
- 3.9 Where a seafarer requires legal advice on his rights as an employee, he should seek advice from a firm specializing in maritime law and employment law. If a seafarer belongs to a trade union, then the trade union may also be able to recommend a law firm.
- 3.10 If the seafarer has been charged by the police then a good criminal lawyer should be appointed.

4. On what terms can a seafarer engage a lawyer?

- 4.1 Currently there is no standard regulated way of formalising the engagement of advocates as compared to jurisdictions such as the UK where the client care letter is mandatory.

SEAFARER SUBJECT GUIDE

- 4.2 Generally a seafarer will first meet an advocate and, depending on the nature of legal work, they will come to an agreement on the scope of work to be done and the fee to be paid for such work.
- 4.3 Recently firms dealing with international clients have adopted the practice of preparing an engagement letter which sets out the nature and scope of the work to be done, the mode of billing, the partner/associate in charge and the systems for informing the client of the matter's progress. A seafarer should insist on an engagement letter, clarifying the terms of the engagement.

5. How will a seafarer be charged fees by his lawyer?

- 5.1 Fees chargeable by advocates are regulated under the Advocates (Remuneration) Order (as amended from time to time) which prescribes the range of minimum fees to be charged for certain classes of work. Advocates are not to charge below such a fee as this would be deemed to be undercutting, which is prohibited. However there is no ceiling on the amount of fees that may be charged. The fee above the fee provided under the Advocates (Remuneration) Order must be agreed upon between the advocate and the seafarer.
- 5.2 Therefore, the fee quoted by a firm for a particular type of work depends on the type of law firm, the experience/seniority of the advocate engaged and the type, value and complexity of work to be done, among other factors.
- 5.3 For classes of work (such as commercial contracts and employment matters) where no fees are prescribed in the Advocates (Remuneration) Order, an advocate will quote fees based on the type, value and complexity of the matter.
- 5.4 Seafarers should also factor in costs usually incurred by advocates on behalf of their clients such as court costs, medical report costs, expert's costs and so on as these are payable in addition to the legal fees. It is therefore recommended that an estimate of such disbursements likely to be incurred during the matter should be requested. Where advice is being given in Kenya, VAT is chargeable on the legal fees.
- 5.5 A seafarer can engage an advocate on a fixed fee basis or on an hourly fee basis. Contingency fees (that is fees based on a percentage of the amount recovered for the client at the end of a case) are prohibited under the Advocates Act.

SEAFARER SUBJECT GUIDE

6. Can a seafarer get legal aid in a criminal case?

- 6.1 There is no established system of legal aid in Kenya for criminal cases. Under the Merchant Shipping Act 2009 there are no provisions that expressly or impliedly give a seafarer any right to free legal service or representation.
- 6.2 For a defendant facing a murder charge who is unable to afford legal fees, the government of Kenya through the judiciary, has a list of lawyers who have volunteered to act in the defence of such suspects on a pauper brief basis. Such lawyers are paid minimal fees and are reimbursed their expenses by the government for undertaking such briefs.
- 6.3 The Constitution of Kenya states that every accused has the right to have an advocate assigned to him at the state's expense, if a substantial injustice would otherwise result by him not being represented by an advocate. Once the accused/defendant seafarer is brought to a Kenyan Court the state would first make this assessment before assigning him an advocate. The law does not seem to distinguish between criminal and civil matters.
- 6.4 There is a distinction between state appointed advocates and other pro bono advocates.
- 6.5 State-appointed advocates are available to all accused persons brought before a Kenyan court and at the state's expense only if a substantial injustice would otherwise result. This is a very limited right guaranteed under the Constitution of Kenya. A seafarer with no money/resources who wants to make a claim against someone else can have no constitutionally guaranteed right to a state-appointed advocate. Therefore state-appointed advocates are not available to all persons.
- 6.6 Other pro bono advocates include those working for non-governmental and not for profit organisations such as the Federation of Women Lawyers and Kituo cha Sheria charities and those from private law practices who regularly give a certain amount of billable hours to pro bono cases. Such pro bono advocates will use their own individual criteria on a case by case basis in assessing whether or not they take on pro bono work. To receive pro bono services, the seafarer would usually have to be resident or domiciled in Kenya and the matter will have to fall under the jurisdiction of Kenyan courts.

SEAFARER SUBJECT GUIDE

7. Can a seafarer get legal aid in a civil case?

7.1 There is no established system of legal aid for civil cases. Similar to a criminal case, under the Merchant Shipping Act 2009, there are no provisions that expressly or impliedly give a seafarer any right to free legal service or representation.

8. Can a seafarer get any other free legal advice?

8.1 Organisations such as Kituo Cha Sheria (www.kituochasheria.or.ke) (website in English) exist but they have a huge backlog of cases. A seafarer would be advised to contact the Kenya Maritime Authority (www.maritimeauthority.co.ke) (website in English) or a seafarer's organisation such as the Mission to Seafarers office in Mombasa (www.missiontoseafarers.org) (website in English) in order to obtain advice on local advocates that may offer their services at reasonable rates or on a pro bono basis.

8.2 If a seafarer is charged with a criminal offence, he will usually have to cover his own costs or obtain assistance from his country's embassy, except where his circumstances are such that he will be eligible for the services of a state-appointed advocate.

9. Can a seafarer sue his lawyer?

9.1 A seafarer may begin civil proceedings in court against an advocate where the advocate-client contract was breached, or where the advocate breached a duty of care owed to the seafarer and that breach caused quantifiable damage to the seafarer, that is, a tort such as professional negligence where, in his opinion, an advocate he engaged acted negligently and to the detriment of his case.

9.2 Where the advocate has committed a crime, for example, by stealing funds or property, then the seafarer should report the advocate to the police for investigation and prosecution.

10. How can a seafarer complain about his lawyer?

10.1 The Advocates Act provides for making complaints where a seafarer is dissatisfied with the handling of his matter by an advocate. Where a seafarer feels that his advocate has acted in a manner that is disgraceful, dishonourable or incompatible with the status of an advocate, he can make a complaint to the Disciplinary Committee of the LSK directly or through any one of the LSK's Offices countrywide.

SEAFARER SUBJECT GUIDE

The LSK has offices in each of its major cities including Nairobi, Mombasa, Kisumu and Nakuru.

- 10.2 The Disciplinary Committee will then hold disciplinary proceedings where both the seafarer and the accused advocate will present their case for determination.
- 10.3 The seafarer can also report the advocate to another body called the Advocates Complaint Commission, which is a department in the Attorney General's office. This body works in a similar manner as the Disciplinary Committee. The Advocates Complaints Commission is obliged by law to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof.
- 10.4 If it appears to the Complaints Commission whether before or after instruction that there is substance in a complaint but that the matter complained of constitutes or appears to constitute a disciplinary offense, the Complaints Commission refers the matter to the LSK Disciplinary Committee for appropriate action.

11. How can a seafarer change his lawyer?

- 11.1 A seafarer may change his advocate at any time by terminating the advocate's engagement. If the advocate's fees and costs to the point of termination have been settled, a seafarer may take his file to a different advocate. If the fees and costs have not been settled, the advocate will usually exercise a lien (hold) over the client's file and documents until payment is made in full.
- 11.2 Where a matter is in court, the same applies save that where the seafarer has obtained judgement he can only change advocates with leave of the court. The new advocate will, in addition file a notice of change of advocates with the court to inform it of such a change.
- 11.3 Seafarers should be aware of the extra time and cost of making a change especially where a matter has reached an advanced stage.

12. Is a foreign seafarer treated differently?

- 12.1 Foreign nationals are not treated differently from Kenyan nationals as long as the Kenyan courts have jurisdiction to hear the matter. The language of the court is English and Kiswahili and translators may be requested where necessary.

SEAFARER SUBJECT GUIDE

12.2 However, foreign seafarers should ensure that their claim has merit before commencing proceedings. If the defendant has a strong defence to the claim, he could ask the court to compel the foreign seafarer to deposit security for costs so that if the defendant wins, his legal costs are paid for by the foreign seafarer. Such a request for security would be difficult for the court to resist, especially where the foreign seafarer has no assets in Kenya.

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