

SHIP ARREST IN KENYA

*Benjamin Musau**
B M Musau & Co., Advocates
Benjamin.Musau@bmmusau.co.ke
www.bmmusau.com
Reinsurance Plaza, 10th Floor
P.O. Box 16393 – 00100, Nairobi, Kenya
T: +254 20 224 2860 /
+254 724 096098



1. Please give an overview of ship arrest practice in your country.

Ship arrest practice is governed by the Judicature Act (Cap 8) Laws of Kenya and the jurisdiction is exercised by the Admiralty High Court of Kenya.

The Admiralty High Court of Kenya follows the law and procedure of the High Court in England. Kenya has never enacted domestic legislation to govern the procedure of arrest of ships in the country and hence the Admiralty High Court of Kenya has strictly followed the law in England.

The Admiralty High Court in Kenya is situated in Mombasa.

The substantive law is provided by Section 20 of the Senior Courts Act, 1981 of England while the procedural law is provided by Part 61 of the English Civil Procedure Rules. These are the provisions of law to be applied by a party seeking to arrest any vessel within the territorial waters of Kenya.

2. Which International Convention applies to arrest of ships in your country?

Kenya ratified the International Convention for the Unification of Certain Rules Relating to the Arrest of Sea-going Ships made in Brussels on 10th May, 1952. The International Convention on Arrest of Ships, 1999 is also applicable.

The Brussels Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, 1968 is also relevant.

3. Is there any other way to arrest a ship in your jurisdiction?

The Senior Courts Act, 1981 provides only for in rem arrest of a ship through in rem proceedings in respect of maritime claims.

4. Are there alternatives e.g. saisie conservatoire or freezing order?

There is no alternative ways for arresting a ship such as saisie conservatoire or freezing order.

5. For which types of claims can you arrest a ship?

These are exclusively claims that are within the admiralty jurisdiction of the High Court as defined by Section 20(1), 20(2), 20(3), 21(3) and 21(4) of the Senior Courts Act, 1981.

They include:

- a) Claims to the possession or ownership of a ship or to the ownership of any share;
- b) Questions arising between the co-owners of a ship as to possession, employment or earnings of that ship;
- c) Claims in respect of a mortgage of or charge on a ship or any share therein;
- d) Claim for damage received by a ship;
- e) Claim for damage done by a ship;
- f) Claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of –
 - (i) The owners, charterers or persons in possession or control of a ship; or
 - (ii) The master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible. being an act, neglect or default in the navigation or management of the ship, in

the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship:

- g) Claim for loss of or damage to goods carried in a ship.
 - h) Claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship.
 - i) Any claim –
 - (i) under the Salvage Convention 1989;
 - (ii) under any contract for or in relation to salvage services; or
 - (iii) in the nature of salvage not falling within (i) or (ii) above; or any corresponding claim in connection with an aircraft.
 - j) Any claim in the nature of towage in respect of a ship or aircraft.
 - k) Any claim in the nature of pilotage in respect of a ship or an aircraft.
 - l) Any claim in respect of goods or materials supplied to a ship for her operation or maintenance.
 - m) Any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues.
 - n) Any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages).
 - o) Any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship.
 - p) Any claim arising out of an act which is or is claimed to be a general average act.
 - q) Any claim arising out of bottomry.
 - r) Any claim for the forfeiture or condemnation of ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty
 - s) Any action to enforce a claim for damage, loss of life or personal injury arising out of
 - (i) a collision between ships; or
 - (ii) the carrying or omission to carry out a manoeuvre in the case of one or more of two or more ships; or
 - (iii) non-compliance on the part of one or more of two ships, with the collision regulations.
 - t) Maritime claims giving rise to maritime liens brought in rem irrespective of ownership of the ship therefore allowing arrest of the ship :-
 - (i) Any claim for possession or ownership of a ship or to the ownership of any share
 - (ii) Any question arising between the co-owners of a ship as to possession, employment or earnings of that ship
 - (iii) Any claim in respect of a mortgage or a charge on a ship or any share therein
 - (iv) Any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried or have been attempted to be carried in a ship, or for the restoration of a ship or any such goods after seizure or for droits of Admiralty.
 - (v) Any claim which gives rise to a maritime lien for instance claims for damage done by a ship, claims for salvage, claims for master's wages and disbursements, claims for seamen's wages, claims for bottomry and respondentia.
- All other maritime claims without a maritime lien are limited by consideration of ownership and can only be brought in rem and thus against a particular ship if the following conditions are satisfied:-
- (i) must be a claim in connection with a ship;
 - (ii) the person who would be liable on the claim if sued personally was the owner or the charterer or in possession or control of the ship when the cause of action arose; and
 - (iii) at the time when the action is brought, the person who would be liable on the claim if sued personally was the beneficial owner of all the shares in the ship or was the demise charterer of it. A claim form can only be issued and a ship arrested in these circumstances if between the date of the cause of action i.e. the matter or breach of contract complained of, and the date the claim form is issued:
 - 1. the ownership remains unchanged; or
 - 2. the demise charterer is unchanged.

6. Can you arrest a ship irrespective of her flag?

Yes.

7. Can you arrest a ship irrespective of the debtor?

No, a debtor can only arrest a ship as set out Sections 20(2) and 21(4) of the Senior Courts Act, 1981.

8. What is the position as regards sister ships and ships in associated ownership?

A sister ship can be arrested provided that:-

- i) the claim arises in connection with a ship; and
- ii) the person who would be liable on the claim if sued personally was the owner or the (demise) charterer or in possession of the ship at the time the cause of action arose; and
- iii) at the time when the claim form is issued the person who would be liable on the claim if sued personally, is the beneficial owner of all the shares in the sister ship to be arrested.

9. What is the position as regards Bareboat and Time-Chartered vessels?

Generally, a bareboat charter entitles the charterer to take over full control of the vessel by engaging its own master and crew and by fitting a vessel with all necessary equipment to make it seaworthy. Such a charter is otherwise referred to as a charter by demise. A claim form therefore, can only be issued and the ship arrested if the ownership remains unchanged and the demise charterer is unchanged between the date of the cause of action and the date the claim form is issued, unless the claim gives rise to a maritime lien.

However, if the ship is on time charter then in these circumstances a ship can only be arrested in respect of a claim which gives rise to a maritime lien.

A maritime claim without a maritime lien cannot be claimed by arresting the ship if the claim is against the time charterer only and not against the owner of the ship irrespective of whether or not the ship has changed ownership from the date the cause of action arose at the time of her arrest.

10. Do your Courts require counter-security in order to arrest a ship?

No security is required to arrest a ship. However, an undertaking must be given by the advocate to pay the Admiralty Marshal's fees and any expenses incurred by him in respect of the arrest of the ship, the care and custody of it while under arrest and the release or endeavors to release it.

The undertaking is given by the advocates acting for the arresting party.

11. Is there any difference in respect to arresting a ship for a maritime claim and a maritime lien?

Yes.

12. Does your country recognise maritime liens? Under which International Convention, if any?

Yes. This is provided for under Section 21(3) of the Senior Courts Act, 1981 which is applicable in Kenya.

13. What lapse of time is required in order to arrest a ship from the moment the file arrives to your law firm?

In one day, the law firm is able to draft and file the pleadings seeking orders of warrant of arrest of a ship as well as carry out the search to establish ownership and that no caution has been recorded at the registry against arrest of the ship.

14. Do you need to provide a POA or any other documents of the claim to the Court?

No.

15. What original documents are required, what documents can be filed electronically, what documents require notarisation and/or apostille, and when are they needed?

The advocate acting for the arresting party or the arresting party is required to file an application for arrest and a declaration in support of application for warrant of arrest. This declaration contains the specific details of the nature of the claim that has not been satisfied, the name of the ship, her port of registry, the total amount sought, details of the parties and ownership of the ship. The Undertaking to the Admiralty Marshal is also attached to the application.

These documents may be filed electronically and they do not require notarization or apostille.

16. Will your Courts accept jurisdiction over the substantive claim once a vessel has been arrested?

Yes because the ship is within the limits of the port at the anchor or alongside

17. What is the procedure to release a ship from arrest?

Once an application for release of the ship is filed together with the consent of the arresting party and reasonable security is tendered a ship may be release. The party against whom the claim is filed is also required to pay any costs incurred in releasing the ship as well as the Admiralty Marshal's expenses, if any.

The court will order release of the ship once the consent of the arresting party is given.

Where there is another person, who has a right in rem against an already arrested ship, that party may file a caution against the release at the Admiralty Registry to prevent it from being released without its consent.

There remains a right to re-arrest if the security is insufficient. The security cannot exceed the value of the ship at the time the ship was initially arrested.

18. What type of security needs to be placed for the release?

Reasonable security must be provided for a ship to be released. It is an amount sufficient to cover the arresting officer's claim, together with interest and costs. However, the security cannot exceed the value of the ship arrested.

The security is in form of a bank guarantee issued by the bank, a letter of undertaking given by the bank, a payment into the court's account, or a bond paid to court.

19. Does security need to cover interest and costs?

Yes.

20. Are P&I LOUs accepted as sufficient to lift the arrest?

Yes.

21. How long does it take to release the ship?

A ship is released immediately the arresting party consents to its release.

22. Is there a procedure to contest the arrest?

Yes.

The procedure of contesting an arrest is provided by Part II of the English Civil Procedure Rules where the party contests the jurisdiction of the court to try the claim or where a party argues that the court should not exercise jurisdiction.

23. What period of time will be granted by the Courts in order for the claimants to take legal action on the merits?

Full trial takes 2 to 3 years.

24. Do the Courts of your country acknowledge wrongful arrest?

Yes. They acknowledge wrongful arrest and award damages where the action was brought with malice or gross negligence.

25. Do the Courts of your country acknowledge the piercing and lifting of the corporate veil?

Yes.

26. Is it possible to have a ship sold pendente lite; if so how long does it take?

Yes it is possible where there is lack of security and there is a risk that the ships condition and value will continue to deteriorate over time.

The sale is conducted after being advertised and sealed bids received through the court. The ship is sold to the highest bidder.

The proceeds of the sale are retained in an escrow account opened in the name of the Admiralty Marshal until the case is heard and determined and the proceeds are then paid out in the order of priorities.

**Benjamin Musau is the Managing Partner of B M Musau & Co., Advocates, a position he has held since 1999. His work encompasses tax legal, regulatory reforms, county government law and reform, reduction of administrative burdens, the structure of business entities, joint ventures, acquisitions, banking, foreign investment, corporate and commercial law, complex litigation and alternative dispute resolution (mediation, negotiations and arbitration).*