



**Jade International Shipping Line DMCC v The Owner of the Motor Vessel ‘Mirembe Judith’ (Admiralty Cause M001 of 2022) [2022] KEHC 17110 (KLR) (28 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 17110 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
ADMIRALTY CAUSE M001 OF 2022  
MN MWANGI, J  
OCTOBER 28, 2022**

**BETWEEN**

**JADE INTERNATIONAL SHIPPING LINE DMCC ..... CLAIMANT**

**AND**

**THE OWNER OF THE MOTOR VESSEL ‘MIREMBE JUDITH’ ..... DEFENDANT**

**RULING**

1. The subject of this ruling is the defendant’s Application Notice dated 26<sup>th</sup> August, 2022. It seeks the following orders-
  - a. Spent;
  - b. That the warrant of arrest issued herein on 10<sup>th</sup> August, 2022 be set aside and the claim brought herein against the Motor Vessel ‘Mirembe Judith’ be struck out; and
  - c. That the cost of this Application Notice and the claim be awarded to the respondent.
2. To put matters into perspective, this Admiralty cause was instituted through a Claim Form filed and dated 10<sup>th</sup> August, 2022. The claimant brought this claim pursuant to the provisions of Section 20(2) (h) of the *Senior Court’s Act*, 1981 (SCA). The claimant’s claim against the defendant is for the alleged loss of USD 15,870,000.00 being the cost of the cancellation of carriage of cargo from the Port of Mundra, India and from the Port of Jebel Ali, United Arab Emirates and damages suffered as a result of the termination of a service agreement with the claimant’s client M/S Feeder Logistics which loss and damages, have been suffered by the claimant on account of the defendant’s failure to deliver the Motor Vessel ‘Mirembe Judith’ (hereinafter, ‘the vessel’) on due date, which actions amount to a breach of a charterparty entered into between the claimant as the charterer and the defendant on 29<sup>th</sup> June, 2022 and partially performed by the claimant and the defendant as evidenced in the charterparty and the correspondence between the parties and the broker. The claimant also seeks interest thereon pursuant



to Section 35 of the Senior Court's Act, 1981 (SCA) and under the inherent jurisdiction of this Court, at the rate of 12%. The claimant also seeks and costs of the suit.

3. Alongside the claim form, the claimant filed an Application Notice seeking a warrant of arrest of the vessel or in the alternative, for the defendant to deposit security in the sum of USD 15,870,000.00. On 10<sup>th</sup> August, 2022, this Court issued warrants of arrest of the said vessel.
4. The instant Application Notice is based on the grounds that the action in rem does not fall within this Court's admiralty jurisdiction in rem under the provisions of Section 21 of the SCA because the alleged charterparty between the claimant and the defendant contains an arbitration agreement pursuant to which the claimant had already referred the dispute to an Arbitral Tribunal in London for determination. It is contended that the warrant of arrest was an abuse of the Court process, as it did not comply with the mandatory requirements of Part 61 of the English Civil Procedure Rules, 2010 (CPR-England) and the SCA and in particular, as relates to the provision of the undertaking. According to the defendant, the warrant of arrest of the vessel by the claimant is wrongful and highly prejudicial to the defendant who is suffering substantial loss and damage, as a result of the wrongful arrest of the said vessel.
5. The application is supported by the affidavit of Captain Paul D. Chacha, the defendant's Shipping Director. He deposed that his deposition is on behalf of PMM Estates (2001) Limited, the owners of the vessel. He added that the claim has been brought pursuant to Section 20(2)(h) SCA based on a 'claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship' but the evidence tendered in support of the claim does not satisfy the statutory threshold of Section 21(4) of the SCA that permits this Court to exercise its admiralty jurisdiction.
6. Captain Chacha deposed that the claimant has also failed to comply with the mandatory requirements of Part 61 CPR-England and the practice directions thereunder. He further deposed that the claimant has failed to establish that the defendant would be liable in an action in personam in terms of Section 21(4) SCA; that the claimant failed to comply with the mandatory requirements of Part 61 CPR-England in invoking the Court's jurisdiction in a manner other than that provided by law; that the claimant did not cause the requisite search to be carried out with the Registrar or obtain his/her endorsement on the application for arrest as is provided in Part 61; that the claimant failed to give its undertaking, as required in the Rules and Practice Directions prior to or at the time the arrest was sought; and that in the absence of strict and substantial compliance with the law and the mandatory pre-conditions set out thereunder, this Court's jurisdiction was neither properly invoked nor could it be exercised at all given the circumstances and manner of its invocation, particularly that no application for the arrest of the vessel was properly or lawfully made.
7. The deponent averred that the provisions of Part 61 CPR-England make it clear that to come within the admiralty jurisdiction of the Court, a claimant must not only fall within the ambit of the claims set out in Section 20(2) SCA but has also to satisfy the jurisdiction requirements provided under Section 21 SCA at the time the claim is filed. He stated that Section 21(4)(i) SCA requires that a claim against a ship brought under Section 20(2)(e) to (r) SCA can only be brought against a person who would be liable on the claim in an action in personam and who must inter alia either beneficially own all the shares in that ship or be a charterer of that ship under a charter by demise.
8. According to Captain Chacha, the mandatory provisions of Form ADM 4 had not been fully met in the declaration that led to the warrant of arrest being issued. He averred that any dispute between the parties is to be referred to arbitration in London and this Court has no jurisdiction to hear and determine this case.



9. In response to the application, the claimant through his learned Counsel, Mr. Idris Ahmed, filed a second declaration on 25<sup>th</sup> August, 2022. He stated that the application is frivolous, baseless, mischievous, and a grave abuse of the process of the Court as it is calculated to prevaricate and obfuscate the issues in question herein and delay the hearing and determination of this matter. According to Mr. Ahmed, the subject matter in contention in the suit relates to the hire of the defendant's vessel by the claimant and a breach of the said agreement by the defendant to the claimant's detriment which brings it well within the purview of Section 20(2)(h) SCA.
10. He further stated that the charterparty agreement between the claimant and the defendant is evidenced by the correspondence between the parties and the broker, M/S Trinity Shipbroker, wherein a recap of the terms was negotiated and agreed. He stated that the email written by the defendant's Director Captain Chacha on 29<sup>th</sup> June, 2022 clearly stated- "I hereby confirm that the Owners can herewith lift their bod approval for the below terms..." which email was replied to in the positive by the claimant through an email from Captain Giuseppe Marra on 30<sup>th</sup> June, 2022 accepting the terms and lifting the BOD approval by the claimant, thereby confirming the agreement and fixing the charterparty between the claimant and the defendant. Mr. Ahmed further stated that Captain Chacha in his email dated 24<sup>th</sup> July, 2022 to the brokers explicitly confirmed the fixtures by stating inter alia "...kindly advise Charterers Jade Shipping that we intend to perform the agreement as fixed."
11. Mr Ahmed emphasized that there was a binding charterparty between the claimant and the defendant because on 5<sup>th</sup> July, 2022 the defendant partly performed the charterparty by issuing a 'Notice of Readiness to Deliver MV Mirembe Judith' sent through the broker giving a laycan of midnight 15<sup>th</sup>/16<sup>th</sup> July, 2022. He averred that despite the said notice, the defendant breached the terms of the binding charterparty by failing and/or refusing to deliver the vessel to the claimant as agreed, hence the claimant was unable to perform its slot agreement with M/S Feeder Logistic DMCC and therefore, it suffered loss and damage as pleaded in the claim form.
12. He deposed that the claim by the defendant that the claimant failed to pay for bunkers ROB is untenable because firstly, no demand was made for the same by the defendant and secondly, bunkers can only be demanded and paid for upon assessment of the sums due which can only be done after the vessel has been delivered at the agreed Port.
13. Mr. Ahmed averred that despite the defendant's denial of negotiating with M/S Takaful Shipping for the hire of the MV Mirembe Judith, the defendant's assertions in paragraph 26 of the declaration in support of the Application Notice made by Said Mgupu Advocate on 15<sup>th</sup> August, 2022 and the copy of the Slot Agreement with M/S Mediterranean Shipping Company SA annexed thereto clearly confirm that the defendant was engaging in/had engaged other parties for the hire of the Motor Vessel Mirembe Judith which only confirms the claimant's apprehension that the subject vessel shall sail away to unknown destinations to the prejudice of the claimant as it has no other means of securing its claim against the defendant.
14. On 12<sup>th</sup> September, 2022, the claimant's Counsel, Idris Ahmed, filed a 3<sup>rd</sup> declaration made on the same day. He averred that the claimant has brought the suit herein pursuant to the provisions of Section 20(2)(h) of the Senior Courts Act, 1981 being a claim that has arisen out of an agreement relating to the carriage of goods in a ship or to the use or hire of a ship. He stated that from the pleadings filed by both parties, it is clear that the subject matter of the issue in contention in this suit relates to the hire of the defendant's ship (Motor Vessel Mirembe Judith) by the claimant and a breach of the said agreement by the defendant to the claimant's detriment which brings it well within the purview of Section 20(2)(h) SCA.



15. He averred that the claimant's allegation that the claimant does not satisfy the statutory threshold under Section 21(4) SCA and has failed to comply with the provisions of Part 61 CPR-England are unfounded on the grounds that the claimant had demonstrated that the defendant is the legal and beneficial owner of the vessel, that the claimant's Advocate did conduct a search at the Registrar's to establish if there was a caution and confirmed that there was none, and that the claimant on 10<sup>th</sup> August, 2022 gave an undertaking in the prescribed form.
16. Mr. Ahmed stated that the claimant confirms that the Clause 67 of the recap charterparty between the claimant and the defendant contains an arbitration agreement and the parties herein had already commenced arbitral proceedings. He added that it is not incompatible with an arbitration agreement for a party to request from the Court before the arbitral proceedings, an interim measure of protection and for the Court to grant the measures. He stated that the application for and grant of a warrant of arrest of the vessel was well in line with the ongoing arbitration and the terms of the charterparty. He stated that the claimant requires the aid and process of this Court to enforce its claim against the defendant and to set aside the warrant of arrest issued would not be in the interest of justice.
17. The defendant through Captain Chacha filed a further affidavit in support of the application. He denied the contents of the claimant's declaration and annexed a copy of an email from the claimant's Advocate to the defendant's Advocate Messrs. A.B. Patel & Patel Advocates. He then stated that given the contents of the purported Application and Undertaking for arrest, it could not have been possibly filed on the 10<sup>th</sup> August, 2022 as is now purported.

#### **Submissions by defendant's Counsel**

18. The Application Notice dated 26th August, 2022 by the defendant proceeded by way of oral submissions. Both Counsel cited several authorities as contained in their bundles of authorities.
19. Mr. Khagram, learned Counsel for the defendant submitted that there was no signed charterparty. He stated that there were various correspondences showing intention to enter into a charterparty subject to certain conditions being fulfilled. He contended that it was not clear if the provisions of Section 20(2) (h) of the SCA were fulfilled. He argued that the question of whether there was a charterparty fixed had been referred to arbitration in London. He submitted that Form ADM 4 as filed was not in the prescribed form. He also stated that the claimant requested for a deposit of Form USD 15,870,000.00 as security but there was no computation of how the amount was arrived at.
20. He argued that as per Form ADM 4, a claimant is obliged to give an undertaking and that it has to be given before a warrant of arrest can be issued. He contended that this Court had no jurisdiction to issue a warrant of arrest in the absence of an undertaking. He submitted that as per the claimant's declaration, it attached Form ADM 4 with an undertaking bearing the Court's stamp on 10<sup>th</sup> August, 2022 but the Executive Officer's signature was appended on the said document on 6<sup>th</sup> September, 2022 certifying that there was no caveat against (arrest) of the ship. Mr. Khagram submitted that if there was no certification done on 10<sup>th</sup> August, 2022 by the time the file was being taken before the Judge, the Form ADM 4 should not have been taken for certification. He stated that if Form ADM 4 had been signed on 10<sup>th</sup> August, 2020, then it would have been secured by the Captain of the ship but Form ADM 4 which was attached to the claimant's declaration was not served and stamped as having been received by the Court.
21. The defendant's Counsel submitted that in the preamble of SCA and CPR-England, a Court will not issue a warrant of arrest in the absence of an undertaking. He contended that the warrant of arrest was issued wrongly before the High Court's jurisdiction had been invoked as Section 21(4) SCA was not



- satisfied, no statement was made, and the declaration as to the beneficial owner of the ship was also not done. He further submitted that the claimant had averred that there is a bundle of documents that were filed, but a bundle of documents cannot just be filed without being attached to an affidavit or during the trial.
22. Mr. Khagram indicated that there are arbitral proceedings filed in London and the Arbitral Tribunal would determine if there is a valid charterparty between the parties.
23. He relied on the case of *Pembe Flour Mills Ltd v Owners of the Motor Vessel "Ioannis G"* [2017] eKLR and submitted that in that case the Court held that the claimant had the duty to disclose the beneficial owner of the motor vessel at the time of filing the Claim Form. He argued that this Court could have noted that the certificate by the Executive Officer was not signed and that the Court file showed that only one application was paid for.

### Submissions by claimant's Counsel

24. Mr. Ahmed for the claimant submitted that the claim before this Court is for the hire of a ship by way of a charterparty that was made through correspondence between Trinity Ship Brokers and the defendant and that the terms had been agreed upon by the Board of the Parties. He also submitted that the defendant issued a notice of delivery of the vessel as at midnight of the 15<sup>th</sup> and 16<sup>th</sup> July, 2022 but the defendant failed to deliver the vessel on 24<sup>th</sup> July, 2022. He stated that the defendant wrote an email stating that 'kindly inform the charterers that we intend to perform' and that this confirmed that there was a charterparty since Section 20(2)(a) *SCA* applies to this case. To buttress his submission, he relied on the case of *Lidgett v Williams* (1845) 14 LJ Ch. 459 and the decision in *Welex AG v Rosa Maritime Ltd (The Epsilon Rosa)* (2002) EWHC 762 (Comm.). He submitted that in those decisions, the Courts held that charterparties did not need to be signed, as they can be oral. He contended that the claimant's case is based on the charterparty and as a result of the said agreement, the claimant entered into a contract with a third party, Feeder Logistics, for a slot for carriage of goods aboard the vessel but the defendant failed to deliver the said vessel, therefore, the action herein is a claim in rem.
25. Mr. Ahmed admitted that there are ongoing arbitral proceedings and that the orders sought in the claimant's application in this suit are in terms of Clause 7 of the *Arbitration Act*. He cited the case of *Euro Water Services Limited v Peter Gatune* [2015] eKLR and submitted that in that case, it was held that arbitral proceedings do not take away the jurisdiction of the High Court to give protection measures. He submitted that the claimant has no other measures to ensure that the sum claimed is secured other than through the arrest of the vessel or by the defendant to depositing security for the release of the vessel.
26. On the issue of Form ADM 4, Mr. Ahmed submitted that the said form was filed in Court on 10<sup>th</sup> August, 2022 but it was inadvertently not signed by the Admiralty Marshal until the 6<sup>th</sup> September, 2022. In regard to the said form not being in the format required or on there being information that was not included in the declaration, he pointed out that Mr. Khagram was not specific.
27. He relied on the decision in *ET Timbers v The Dolphin Star* [2021] eKLR and submitted that this claim falls under a claim in rem. He cited the case of *Mamta Peesh Mahajan (Suing on behalf of the estate of the late Peesh Premal Mahajan) v Yashwant Kumari Mahajan (Sued personally and as executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan)* [2017] eKLR and submitted that some agreements should be in writing and signed but some do not require to be signed. He also relied on the case of *E-Star Shipping and Trading Company v The Nabiba Queen* [2021] eKLR, which addressed the issue of Courts granting interim injunctions when arbitral proceedings are ongoing.



### Further submissions by the defendant's Counsel

28. Mr. Khagram argued that in the pleadings filed by the claimant on 10<sup>th</sup> August, 2022, it did not disclose that there were arbitral proceedings that had been commenced and that the arrest of the vessel was simply for obtaining security of the claim. He submitted that the application should be under Part 61 *CPR*-England hence, Section 7 of the *Arbitration Act* applies to claims filed in the commercial Court, such as the claim in rem that has been filed.
29. He submitted that in the 1<sup>st</sup> declaration filed by the claimant in his application for the arrest of the ship, the claimant failed to state the beneficial ownership of the vessel and as such, this Court ought to have ensured that the Executive Officer signed the certificate that there was no caution against the arrest of the vessel. He reiterated that in decision in the *Pembe Flour Mills Ltd* case (*supra*), this Court held that English Law was applicable. He submitted that Section 72 of the *Interpretation and the General Provisions Act* does not apply to this claim.
30. He contended that there was non-disclosure of material information that arbitral proceedings had been filed and that the claim herein was the second set of proceedings in which the claimant is seeking USD 15.8 Million. He submitted that the *E-Star Shipping & Trading Company* case (*supra*) would have been applicable if the jurisdiction of this Court had been properly invoked. Lastly, Mr. Khagram argued that the claim herein had been filed so as to put pressure on the defendant to settle the claim.

### Analysis and Determination

31. I have considered the pleadings filed, the affidavits in support of and against the Application Noticed dated 26th August, 2022. I have also considered the submissions made by Counsel for the parties herein and the authorities cited. The issues for determination are as follows-
  - a. Whether this Court has jurisdiction to hear and determine the Admiralty Cause filed by the claimant;
  - b. Whether there was a valid charterparty;
  - c. Whether the warrant of arrest was wrongly issued; and
  - d. Whether this claim should be struck out.
32. This Court is cognizant of the fact that jurisdiction is everything, and without it, this Court must down its tools. Mr. Khagram argued that this Court did not have jurisdiction to issue a warrant of arrest because there was no valid charterparty between the parties. Mr. Ahmed on the other hand contended that there was an agreement because there was correspondence between the parties herein to that effect and that the parties even partly performed of the said agreement. He also argued on the applicability of Section 20(2) *SCA* to this case. Section 20 of the *SCA* is drawn in the following terms-

“(1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say

—

- a. jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);
- b. jurisdiction in relation to any of the proceedings mentioned in subsection (3);



- c. any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and
  - d. any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court.
- (2) The questions and claims referred to in subsection (1)(a) are—
- a. any claim to the possession or ownership of a ship or to the ownership of any share therein;
  - b. any question arising between the co-owners of a ship as to possession, employment or earnings of that ship;
  - c. any claim in respect of a mortgage of or charge on a ship or any share therein;
  - d. any claim for damage received by a ship;
  - e. any claim for damage done by a ship;
  - f. any 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. any claim for loss of or damage to goods carried in a ship;
  - h. any 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. ...
  - j. 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;]
- k. any claim in the nature of towage in respect of a ship or an aircraft;
- l. any claim in the nature of pilotage in respect of a ship or an aircraft;
- m. any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- n. any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- o. 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);
- p. any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- q. any claim arising out of an act which is or is claimed to be a general average act;
- r. any claim arising out of bottomry;
- s. 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.” (emphasis added).

33. On the issue of whether there was a valid charterparty that entitled the claimant to invoke this Court’s jurisdiction under Section 20(2)(h) *SCA*, Mr. Ahmed referred the court to two cases; *Lidgett v Williams* (supra) and *Welex AG v Rosa Maritime Ltd* (supra). I have read the cases in detail. In *Lidgett v Williams* (supra), the Court held that a charterparty does not need a special form and does not need to be signed. The said decision was upheld in the case of *Welex AG v Rosa Maritime Ltd* (supra). The Court held as follows-

“I therefore consider that, as a matter of the construction of the bill of lading, it does not incorporate the terms of the charterparty which, at the date of the bill of lading, is issued, had not been reduced to writing. For the reasons given earlier, an oral contract evidenced only by a re-cap telex does not seem to me to qualify for this purpose. ...There is in my judgment no significance in the use of capital letters, more than there is anything to be derived by dictionary references to charter party into the form of deeds...whilst a contract for chartering a ship is normally embodied, in due course, in printed form, the parties agreement can remain in the written fax or telex exchanges: a signed charter party is unnecessary...the terms can be readily identified from the contents of the re-cap telex and the standard form to which it refers. Indeed, freight was payable (and paid) according to the terms of the very



same charter party...there is no significance in the fact that the formal written agreement, whether executed or not, is in different terms, subject of course to the appropriate authority of those who have executed it.”

34. There was email correspondence dated 24<sup>th</sup> June, 2022 from Captain Chacha to Giuseppe Marra and others. It reads as follows-

“Re: Mirembe Judith-jade Shipping-recap Sofar private and confidential

Dear Victor,

Reference is made to our telecon this morning.

I hereby confirm that Owners can herewith lift their BOD approval for the below terms on condition that the charters can amend the trading clause as follows:

Worldwide trade to be deleted and replaced with ‘container trade’.

Trade limitation to be within East Coast Africa up to West Coast India including the Red Sea, PG and the Arabian Sea.

Trading outside this area to be approved by Owners, however same not to be unreasonably withheld.

I hope this will meet charterer's approval”

35. There is also an email correspondence dated 27<sup>th</sup> June, 2022 from Captain Chacha to Trinity. It read as follows:

“Re; Urgent/Firm Offer/Jade Shipping

Dear Victor Carvalho,

I acknowledge receipt of the charterer firm offer and on behalf of PMM Estates (2001) Ltd Owner of MV Mirembe Judith, I do hereby confirm that the vessel is offered to Jade Shipping on Time Charter basis once all formalities are completed.

It is however important to note that the Charterer shall pay in advance for the bunker ROB in Mombasa and bunkers required to deliver the vessel at Jebel Ali from Mombasa.

Secondly, hire time to count on the vessel's safe arrival at Jebel Ali.

We look forward to receiving a comprehensive BIMCO TC Agreement”

36. There was a response to this email. Trinity Project emailed Captain Chacha as follows-

“Dear Paul,

Cc Judith Mhina/Charterers Reading in copy

Good afternoon,

Just as per our telecon, pls find offer sent last week, kindly confirm the Safe receipt of the same and pleased to hear the Owners feedback. Kindly ask to treat it very confidential.”



37. On 28<sup>th</sup> June, 2022, Trinity Project responded to the aforementioned email as follows-

“Dear Paul, as per our latest talks, I am pleased to revise what has been agreed on Sofar, with owners/charterers BOD still to be lifted as follows. Please kindly advise accordingly id All In Line as discussed, so we can apply for BOD approval.”

38. There is an email correspondence from Captain Chacha to Trinity Project and others dated 24<sup>th</sup> July, 2022. The email reads as follows-

“Re: Delivery Of Mv Mirembe Judith

Dear Victor,

We hereby acknowledge receipt of the letter from Winter Scott Solicitors in London.

As per our discussion on the phone a while ago, kindly advise charterers Jade Shipping that we intend to perform the agreement as fixed.

However, we request the charterer if we can manually agree on the new Laycan of 30<sup>th</sup> July 2022 in Mombasa.

The reason being that the owners have changed the ships registry from Zanzibar to Panama, so we are waiting for the arrival of the new certificate in a couple of days time.

Pleased to hear if charterers accepted the new Laycan then I will provide delivery notice accordingly.

Looking forward to a good outcome, so we can finalize this matter.”

39. The defendant through Captain Chacha was aware of the agreement between the claimant and the defendant. I find that the email correspondence culminated in a charterparty. It is the duty of this Court to give an intelligible meaning to documents surrounding commercial transactions. It must also be appreciated that despite the inconsistent realities of commercial transactions; it is usually convenient and rather common that parties negotiate by modifying standard charterparty forms. The advantage in doing so is that such forms include arrangements on the obligations and the general risk allocation, which minimizes the possibility of omission. Also relevant standard form terms have often benefitted from the interpretation of their terms in Court thus they provide, if not amended, more certainty concerning their meaning.

40. Part 61 [CPR](#)-England and [Practice Direction](#) 61.5 provide for the procedure for the arrest of ships. Part 61.5 [CPR](#) - England states as follows-

“In a claim in rem –

a. a claimant; and

b. a judgment creditor

may apply to have the property proceeded against arrested.

(2) *Practice Direction* 61 sets out the procedure for applying for arrest.



- (3) A party making an application for arrest must –
- a. request a search to be made in the Register before the warrant is issued to determine whether there is a caution against arrest in force with respect to that property; and
  - b. file a declaration in the form set out in *Practice Direction 61*.
- (4) A warrant of arrest may not be issued as of right in the case of property in respect of which the beneficial ownership, as a result of a sale or disposal by any court in any jurisdiction exercising admiralty jurisdiction in rem, has changed since the claim form was issued.
- (5) A warrant of arrest may not be issued against a ship owned by a State where by any convention or treaty, the United Kingdom has undertaken to minimise the possibility of arrest of ships of that State until –
- a. notice in the form set out in *Practice Direction 61* has been served on a consular officer at the consular office of that State in London or the port at which it is intended to arrest the ship; and
  - b. a copy of that notice is attached to any declaration under paragraph (3)(b).
- (6) Except –
- a. with the permission of the court; or
  - b. where notice has been given under paragraph (5), a warrant of arrest may not be issued in a claim in rem against a foreign ship belonging to a port of a State in respect of which an order in council has been made under section 4 of the Consular Relations Act 1968, until the expiration of 2 weeks from appropriate notice to the consul.
- (7) A warrant of arrest is valid for 12 months but may only be executed if the claim form –
- a. has been served; or
  - b. remains valid for service at the date of execution.
- (8) Property may only be arrested by the Marshal or his substitute.
- (9) Property under arrest –
- a. may not be moved unless the court orders otherwise; and
  - b. may be immobilised or prevented from sailing in such manner as the Marshal may consider appropriate.
- (10) Where an in rem claim form has been issued and security sought, any person who has filed an acknowledgment of service may apply for an order specifying the amount and form of security to be provided.”

41. Practice Direction 61.5 of the [Civil Procedure Rules](#) – England is drawn as follows-

- “5.1 an application for arrest must be –
- (1) in form adm4 (which must also contain an undertaking); and
  - (2) accompanied by a declaration in form adm5.



- 5.2 when it receives an application for arrest that complies with the rules and the practice direction the court will issue an arrest warrant.
- 5.3 the declaration required by rule 61.5(3)(b) must be verified by a statement of truth and must state –
- (1) in every claim –
    - (a) the nature of the claim or counterclaim and that it has not been satisfied and if it arises in connection with a ship, the name of that ship;
    - (b) the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and
    - (c) the amount of the security sought, if any.
  - (2) in a claim against a ship by virtue of section 21(4) of the senior courts act 1981 –
    - (a) the name of the person who would be liable on the claim if it were not commenced in rem;
    - (b) that the person referred to in sub-paragraph (a) was, when the right to bring the claim arose –
      - (i) the owner or charterer of; or
      - (ii) in possession or in control of, the ship in connection with which the claim arose; and
    - (c) that at the time the claim form was issued the person referred to in sub-paragraph (a) was either –
      - (i) the beneficial owner of all the shares in the ship in respect of which the warrant is required; or
      - (ii) the charterer of it under a charter by demise;
    - (3) in the cases set out in rules 61.5 (5) and (6) that the relevant notice has been sent or served, as appropriate; and
    - (4) in the case of a claim in respect of liability incurred under section 153 of the *merchant shipping act* 1995, the facts relied on as establishing that the court is not prevented from considering the claim by reason of section 166(2) of that act.
- 5.4 the notice required by rule 61.5(5)(a) must be in form adm6.
- 5.5 property is arrested –
- (1) by service on it of an arrest warrant in form adm9 in the manner set out at paragraph 3.6(1); or
  - (2) where it is not reasonably practicable to serve the warrant, by service of a notice of the issue of the warrant –



- (a) in the manner set out in paragraph 3.6(1) on the property; or
- (b) by giving notice to those in charge of the property.

5.6 when property is arrested the registrar will issue standard directions in form adm10.

5.7 the marshal does not insure property under arrest.”

42. From the above provisions, it is evident that an application for arrest should be accompanied by Form ADM 4 which must also contain an undertaking as to the arrest, expenses of the Admiralty Marshal and Form ADM 5 which is a declaration in support of an application for warrant of arrest.
43. The defendant’s case is that both Forms ADM 4 and ADM 5 were not properly drafted and executed. In regard to Form ADM 4, the defendant’s case is that a request for a search of the Register was conducted after the warrant of arrest was issued, which is in contravention of Part 61.5 (3)(a) *CPR-England*. Mr. Khagram submitted that Form ADM 4 was dated and signed on 10<sup>th</sup> August, 2022, whereas the Admiralty Marshal confirmed that there was no caveat lodged against the vessel on 6<sup>th</sup> September, 2022. He further stated that said Form was filed in Court on 10<sup>th</sup> August, 2022 and the warrant of arrest for the vessel in issue was issued by this Court on the same day. His argument is that the search was done after the issuance of a warrant of arrest.
44. Mr. Khagram relied on a decision of this Court rendered on 18<sup>th</sup> July, 2017 in *Pembe Flour Mills Ltd v Owners of the Motor Vessel “Ioannis G”* [2017] eKLR. In the said case this Court struck out the claim therein for failure by the claimant to comply with the mandatory requirement of disclosing the beneficial owner of the Motor Vessel “Ioannis G” when filling its claim form and application and undertaking for arrest and custody. The said case is distinguishable from the present case as the beneficial owners herein are known as PMM Estates of P.O Box 337900 Dar-es-Salaam, Tanzania and the claimant has not filed a declaration that is not in conformity with the required format given in ADM4. In the matter herein, the claimant filed Form ADM4 on 10<sup>th</sup> August, 2022. The said form was however endorsed on 6<sup>th</sup> September, 2022 by the Admiralty Marshal to show that no caveat had been filed or entered against the arrest of the vessel. Mr. Khagram’s contention is that the warrant of arrest should be set aside for failure of the claimant to comply with mandatory provisions of the law.
45. The test for wrongful arrest of a vessel dates back 150 years to the Privy Council decision of *The Evangelismos* (1858) 12 Moo PC 352. To succeed in a claim for wrongful arrest, the owners must demonstrate that there is either mala fides (bad faith) or crassa negligentia (gross negligence) which implies malice. This decision was upheld in the case of *Stallion Eight Shipping v NatWest Capital Markets* [2018] EWHC 2033 (Admlty).
46. The *Black’s Law Dictionary* 11<sup>th</sup> Edition defines bad faith as ‘dishonesty of belief, purposes, or motive.’ It also defines gross negligence as ‘a lack of even slight diligence or care. The difference between gross negligence and ordinary negligence is one of degree and not of quality.’ Mativo J., (as he then was) discussed bad faith in the case of *Republic v Anti-Counterfeit Agency Exparte Caroline Mangala t/a Hair Works Saloon* [2019] eKLR and stated as follows-

“A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

Bad faith has been defined rarely, but an Australian case defined it as “a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker.” Even though “Bad faith” has not been given a precise definition, it has been



frequently associated with actions involving malice, fraud, collusion, illegal conduct, and dishonesty, abuse of power, discrimination, unreasonable conduct, ill-motivated conduct or procedural unfairness. Justice Southin in *MacMillan Bloedel Ltd. v. Galiano Island Trust Committee* articulated the concept of bad faith as follows:-

“The words bad faith have been used in municipal and administrative case law to cover a wide range of conduct in the exercise of legislatively delegated authority. Bad faith has been held to include dishonesty, fraud, bias, and conflict of interest, and discrimination, abuse of power, corruption, oppression, unfairness, and conduct that is unreasonable. The words have also been held to include conduct based on an improper motive, or undertaken for an improper, indirect or ulterior purpose. In all these senses, bad faith describes the exercise of delegated authority that is illegal, and renders the consequential act void. And in all these senses bad faith must be proven by evidence of illegal conduct, adequate to support the finding of fact.”

A decision maker must not seek to achieve a purpose other than the purpose for which the power to make the decision has been granted by Parliament.” (emphasis added).

47. It is not contested that the Admiralty Marshal searched the Register after the warrant of arrest was issued. The search however indicated that there was no caveat registered against the arrest of the vessel, hence, even if the search was done before the warrants of arrest were issued, the outcome would have been the same, the vessel would have still been liable for arrest. To prove wrongful arrest of a vessel, the defendant was required to prove that the discrepancy in the dates was done in bad faith and gross negligence. I do not see how this Court, the Admiralty Marshal or Counsel for the claimant was to personally benefit from the procedural mishap. Whichever way I look at it, I do not see any ulterior motive that would compel me to set aside the order for the warrant of arrest for the vessel in issue. In this Court’s view, the defendant can be compensated by an award of costs for the prejudice occasioned to the defendant by the arrest of the vessel on 10<sup>th</sup> August, 2022 to 5<sup>th</sup> September, 2022 before the endorsement was made by the Admiralty Marshal on Form ADM4 on the non-existence of a caveat against arrest of the vessel. In this Court’s view, the Counsel for the claimant should have been diligent in ensuring that the endorsement was made on 10<sup>th</sup> August, 2022.
48. On whether this claim should be struck out, the claimant contends that there are arbitral proceedings pending in the Arbitral Tribunal in London and that the defendant would be liable in an action in personam in terms of Section 21(4) *SCA*. In the said circumstances, is the claimant’s claim herein an in personam or an in rem claim? Part 61 Rule 2(bc) and (c) define claims that are in personam and in rem. It states as follows-
- “(bc)“claim in personam” means an admiralty claim, other than a claim in rem, brought in accordance with section 21(1) of the *Senior Courts Act* 1981;
- (c) ‘claim in rem’ means a claim in an admiralty action in rem brought in accordance with section 21(2) to (5) of the *Senior Courts Act* 1981.”
49. The claimant brought this claim pursuant to the provisions of Section 20(2)(h) *SCA*, for any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship. The claim against the defendant is for the loss of USD 15,870,000.00, being the cost of cancellation of cargo and damages suffered as a result of the termination of a service agreement with the claimant’s client which loss and damages have been suffered by the claimant on the account of the defendant's failure to deliver the vessel on the due date, which actions amount to a breach of their Charterparty. It has already been established that there was a charter party agreement.



50. In the case of *E.T Timbers v The Dolphin Star* (*supra*) this Court addressed the difference between action in rem and in personam. This court placed reliance on the case of *Republic of India and others v India Steamship Company Limited* (1996) 2 Lloyd's L.R 12 (The Indian Grace (No. 2) where the House of Lords stated as follows-

“...an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service...”

51. From the above and taking into consideration the facts of this case, an action in rem is an action for any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship and an action where the admiralty court has been seized with jurisdiction. This is so in this case.

52. Should this claim be struck out due to the ongoing arbitration proceedings? First and foremost, it must be noted that the issue of ongoing arbitration proceedings has not been controverted by either party. It is unclear what the issues, claims, and parties are before the Arbitral Tribunal or even when the arbitral proceedings were instituted as no pleading relating to the arbitral proceedings has been exhibited by either party.

53. In the case of *MacAndrews & Co. Limited v Global Containers Lines Limited*-MSA HCCC No. 328 of 1987 (Unreported), the Court issued injunctive orders on the basis that the vessel and cargo were in the Court's jurisdiction. The court held as follows: -

“The charter party which is the basis of the claim was made in Hamburg. The charter party provides that, should any dispute arise between the owners and charterers the matter in dispute shall be referred to arbitration in New York. The plaint does not show where the breach of Contract was committed but the breach is not said to have been committed in Kenya. The only indication of jurisdiction of this Court is that the vessel is in Kilindini Harbour with bunkers on board belonging to the charterers, so the jurisdiction is founded on the presence of the vessel and bunkers at Kilindini Harbour.”

54. I am not persuaded that these in rem proceedings should be struck out because there are ongoing in personam arbitral proceedings.

55. In the end, having considered the application in its entirety and based on the analysis made, I find no merit in the defendant's application dated 26<sup>th</sup> August, 2022. I make the following orders-

- i. The application dated 26<sup>th</sup> August, 2022 is hereby dismissed;
- ii. Costs of the said application are awarded to the defendant as against the claimant for the prejudice occasioned by the arrest of the vessel on 10<sup>th</sup> August, 2022 to 5<sup>th</sup> September, 2022; and
- iii. The defendant is at liberty to deposit USD 16,000,000.00 in Court to secure release of the Motor Vessel Mirembe Judith; and

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 28TH DAY OF OCTOBER, 2022.  
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**



## **JUDGE**

In the presence of-

Mr. Idris Ahmed for the claimant

Mr. Khagram for the defendant

Mr. Oliver Musundi - Court Assistant.

