



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ADMIRALTY CLAIM NO.E002 OF 2021

E-STAR SHIPPING & TRADING COMPANY.....CLAIMANT

-VERSUS-

THE OWNERS OF MOTOR VESSEL “NABIHA QUEEN”.....DEFENDANT

RULING

1. On **3rd March, 2021**, the Claimant herein, **E-Star Shipping Company** on 3/3/2021 lodged a claim against the Owners of Motor Vessel “Nabiha Queen” claiming for USD2,132,658.84 being an alleged loss and damage suffered by the claimant resulting from breach of charter Party Agreement by the Defendant. On the basis of the said claim the claimant presented an application under certificate of urgency on 3/3/2021 for the arrest and custody of the motor vessels “Nabiha Queen” lying at Makupa Creek within Kenya’s territorial waters.

2. Upon hearing the application on 3/3/2021, The Honourable Lady Justice Njoki Mwangi granted the orders and a warrant of arrest issued against the vessel which was executed.

3. On **15th March, 2021**, the firm of **M/S Derrick Odhiambo and Company advocates** filed an application notice seeking to set aside the warrant of arrest on grounds that this court lacks admiralty jurisdiction over the subject motor vessel. To be precise, the said application sought the following orders.

a) Spent.

b) Pending the hearing and determination of this application the motor vessel “Nabiha Queen” be released forthwith without any condition attached and without any admission on part of the Defendant of any allegation contained in the claim form, the application notice dated 3/3/2021, the certificate of urgency dated 15/3/2021 or the affidavit sworn by Ali Abdi Ahmed on 15/3/2021 without submitting to the jurisdiction of this court and only for purposes of securing the immediate release of that vessel.

c) This application be heard before the claimant’s application notice dated 3/3/2021.

d) Further proceedings in this claim be stayed as a matter of right pending arbitration in London under English law in terms of clause 31 of the Charter party agreement dated 22/12/2020 upon which this claim and defendant’s application is based.

e) That this honourable court do direct that the matter in dispute be referred to arbitration in London.

f) Without in any manner waiving the claimant’s right to have the dispute adjudicated through arbitration in London and only on grounds that this court no admiralty jurisdiction to hear and determine this claim the warrants of arrest of MV “Nabiha Queen” and issued on 03.03.2021 be set aside as a matter of right.

g) On the grounds that this honourable court has no admiralty jurisdiction to hear and determine this claim and without in any manner waiving the parties’ right to have the dispute resolved through arbitration in London the claimant’s claim form dated 11/2/2021 be struck out with costs.

h) The costs of this application be paid by the claimant in any event.

4. The grounds set out in the application are inter alia, that; *the Motor vessel is incurring great losses as a result of the arrest warrants issued by this court; the vessel is laden with various containerized perishable cargo approximately weighing 12,155 tons and continued arrest of the ship will delay the delivery of the cargo and attract civil claims for non-delivery of the cargo; that this court while exercising its*

admiralty jurisdiction under Section 4 of the Judicature Act, just like its sister courts in England has no admiralty jurisdiction over disputes concerning agreements for claims with arbitration clause.

5. It is also averred that the Defendant has already appointed an arbitrator to preside over the dispute but the Claimant has refused to disclose to the court that there were progressive arbitration proceedings which the court should give way to. Further, it is submitted that the Claimant has no known address of business in Kenya or abroad since its name is none existent even in Singapore where it is alleged to have been incorporated.

6. Lastly, it is stated that the claimant's advocate herein is also on record acting against the Claimant in **Admiralty Cause No.003 of 2021**, a matter which relates to the same subject matter and has as a result subjected the defendant to double jeopardy.

7. The application is supported by the affidavit of one **Richard John Allen** sworn on 15/3/2021. He has stated that he is authorized by the Owners of Motor Vessels "Nabiha Queen" to swear the affidavit on their behalf. He added that he has been given authority by **Carlton Marine Limited** to negotiate, agree and execute documents pertaining to the said motor vessel.

8. He depones that this court's jurisdiction is curtailed by the parties by dint of Clause 31 of the Charter Agreement dated 22/12/2020 and an Addendum thereto dated 11/2/2021 which has expressly stated that any dispute between the parties is to be settled through arbitration. In his view, it would be oppressive to maintain a warrant of arrest order that has been issued without jurisdiction.

9. The court is also invited to consider **Section 10 of the Arbitration Act, 1995, Laws of Kenya** which ousts the court of its jurisdiction when parties have agreed to refer disputes to arbitration. That being the case, it is averred that the claimant has not been candid with the court in disclosing all the facts when the arrest warrants were issued. Further that the court cannot purport to exercise concurrent jurisdiction with the arbitrators which means that this Court cannot issue any substantive order pending arbitration.

10. It is also averred that in any case, the Claimant is indebted to the Defendant for failing to remit disbursement-expenses and the debt has accrued to USD46,603.60 for Mombasa Port, USD13,044.00 for Mahajanga port, USD84,617.00 for port Louis and USD33,251.00 for Nacala. Besides that, the Motor vessel is said to be incurring demurrage at the rate of USD8,750.00 per day which should be met by the Claimant.

11. In response to the aforesaid statements and allegations, the claimant filed grounds of opposition on 22/3/2021. It opposed the application on inter alia grounds that; *the acknowledgment of service filed on 15/3/2021 fails to comply with CPR Part 10.5 as it is not signed by either the Defendant or the Defendant's legal representative and therefore defective. The acknowledgment of service is also faulted for being defective in failing to state the full names of the person acknowledging service contrary to CPR (Practice direction) 61.3(9)*. On basis of those faults, the claimant seeks the court to dismiss the application under consideration and direct the Defendant to file the correct acknowledgment of service.

12. Be that as it may, the Claimant further submits that the Defendant has wrongfully argued that the arbitration clause as incorporated under Clause 31 of the Charter Party Agreement renders the arrest of the ship unlawful. It was argued that Section **26 of the Civil Jurisdiction and Judgment Act 1982** allows the court not to release the motor vessel from arrest notwithstanding the presence of the arbitration clause.

13. The claimant further states that it will produce documents of the Claimant's incorporation to counter the argument that it is not existent in law. It would however be contradictory for the Defendant to state on one hand that it had executed an arbitration agreement and on the other hand state that the Claimant is not existent in law.

14. The Last ground in opposition of the application is with regard to the affidavit sworn in support of the application. It is stated that the deponent has not stated how he came to be possessed of those facts and in as much as the deponent avers that he was authorized to negotiate and agree on behalf of the Defendant, no such authority has been annexed to the application, and the supporting affidavit should therefore be struck out.

15. On 23/3/2021, directions were issued that the application be disposed of by way of written submission and that the same to be highlighted on 26/3/2021. However, the record reflects that only **Mr. Okere**, Counsel for the Claimant filed his submissions on 24/3/2021 but failed to attend court on 26/3/2021. On the date of highlighting, **Mr. Khagram** and **Mr. Odhiambo** appeared for the Respondent and proceeded with the oral submissions.

ANALYSIS AND DETERMINATION

16. I have considered the rival pleadings, the annexures and material on record. I have also considered the submissions by Counsel and read through the submissions by the Defendants' Counsel. I have further taken into consideration the law and authorities referred to. The first question which this court must consider and determine is that of jurisdiction as it has been raised as a main ground in the application by the Defendant, and is capable of disposing of the entire matter before this court.

17. The Defendant argues that in view of Clause 31 of the Charter Party Agreement between the Claimant and Defendant, this court did not have the jurisdiction to arrest the Motor Vessel "Nabiha Queen".

18. In this regard **Section 6 of the Arbitration Act** provides as follows:-

"(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds:-

a) *That the arbitration agreement is null and void, inoperative or incapable of being performed; or*

b) *That there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.*

19. Then **Section 10** provides that;

“Except as provided in this Act, no court shall intervene in matters governed by this Act”.

20. Consequently, it is apparent from the above provisions of **Section 6(1) of the Arbitration Act** that a party who desires to enforce an arbitration clause in an agreement must do so at the earliest opportunity and in the words of the statute **'not later than the time that a party enters appearance to the action'**. For purposes of admiralty proceedings, one acknowledges service of the writ as an equivalent of entering appearance. If no appearance is entered, the appropriate time would be at the time of filing any pleadings or at the time of taking any step in the proceedings.

21. In this particular case, it is not in dispute that the firm of *M/S Derrick Odhiambo & Company advocates* filed an acknowledgment of service under protest and then filed the Application Notice now under consideration. Although the Claimant challenges the acknowledgment of service and the affidavit in support of the application as being defective, those are issues to be considered later in the Ruling.

22. As regards the presence of the arbitration clause, *Mr.Okere* submitted that the proper recourse the court should take is to stay the instant proceedings and refer the matter for arbitration. Thereafter the court can order for the release of the motor vessel and as well direct the Defendant to provide security prior to the said release. He founded his arguments on the *Jalamatsya case of 1987*.

23. In this instant case, it is clear that the Claimant herein did not pursue the alternative methods of resolving the instant dispute including arbitration as provided for in Clause 31 in their Charter Party Agreement. It is the view of this court that parties in an agreement are bound by the mutually agreed and express terms of their agreement. And it is not the duty of a court to re-write the agreement for the parties. Although the application can be faulted for not having been properly drafted, it can be discerned that by this instant application the Defendant was invoking the arbitration clause.

24. Clause 31 provides that; *all disputes arising from this charter party unless the parties agree forthwith on a single Arbitrator, be referred to the final arbitration in London of two arbitrators*. Reading through the Claim form, it is evident that there is a dispute between the parties. That dispute revolves around the failure by Defendant to perform the Charter Party Agreement by demanding additional freight fees and demurrage charges contrary to the Charter Party Agreement. It is on these terms that the Claimant seeks compensation in monetary terms.

25. The Defendant on the other hand, denies having breached any terms and indeed avers that the Claimant is indebted to it on account of daily demurrage fees as a result of the arrest. In my view, there are triable issues in the matter, and that being the case, it follows that there is indeed a dispute as envisaged under **Section 6(1) a & b of the Arbitration Act** as well as under the Charter Party Agreement between the parties which can now not be said to be null and void.

26. I also find and hold that the court should encourage the spirit under **Article 159 2(c) of the Constitution** for disputants to explore alternative forms of dispute resolution including mediation, arbitration and others.

27. To that end, this court has two options that is, to stay the proceedings pending the referral of the same to arbitration or strike out the suit. In my considered opinion, the striking out of the suit will not serve the interest of justice in view of the fact that, the person claimed to acknowledge service on behalf of the defendant has not been disclosed, although it was alleged that the Claimant is a not existent entity, I have seen its certificate of incorporation in the bundle of documents filed on 22/3/2021. I am constrained not to comment much on those issues so as to avoid pre-empting the decision of the arbitrator when the same are argued before him/her. It is therefore in the interest of justice, and that of the parties to order that the proceedings herein be stayed pending referral of the dispute to arbitration, other than striking out the entire suit.

28. The application, as indicated before, sought among other orders an order for setting aside and release of the Motor Vessel “Nabiha Queen”. **Section 4(2)(c) of the Judicature Act** is worded as follows:-

4. (High court is court of admiralty)

(1).....

(2) *The admiralty jurisdiction of the High Court shall be exercisable—*

(a)....

(c) *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.*

29. In my reading and opinion upon such reading, the architecture of legislation is to adopt the law in England and the international law applicable, but in doing so does not abandon, abdicate, or neglect its powers as is inherently vested.

30. **The England Civil Procedure Part 61** on admiralty claim guides the court on what orders to make with regard to release of motor vessel when a claim is stayed. In essence, the said section provides that on an application to release a vessel held as security for a claim in

arbitration, the court would, in accordance with the usual practice, only exercise its discretion to release on provision of sufficient security to cover the claim on the basis of the claimant's reasonably arguable best case.

31. Taking into consideration the particulars of losses as provided under head claim in paragraph 17 of the statement of claim, it is my view that most of the expenses are subject to be proved upon a full hearing. I therefore find that a security of USD1,000,000.00 as a precondition of the release would be reasonable in the circumstances.

DISPOSITION

32. In the end, having considered the case in its entirety and based on the analysis I have tendered above, the following orders do issue;

a) The proceedings herein shall be so stayed pending referral of the dispute to arbitration.

b) An order is hereby issued directing the release of Motor vessel "Nabiha Queen" on condition that the defendant avails a bank guarantee from a First class international Bank in the sum of US&1,000,000/=.

c) Each party shall bear its own costs.

It is hereby so ordered.

DELIVERED, DATED AND SIGNED VIRTUALLY AT MOMBASA THIS 30TH DAY OF MARCH, 2021.

D. O. CHEPKWONY

JUDGE

30/3/2021