



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL SUIT NO. 34 OF 2010**

**ABSON MOTORS LTD.....PLAINTIFF**

**-V E R S U S-**

**1. PACIFIC INTERNATIONAL LINES PTE LTD**

**2. HABIB BANK LTD**

**3. DIAMOND TRUST BANK KENYA LTD**

**4. MARINE CLAIMS OFFICE OF ASIA PTE LTD..... DEFENDANTS**

**RULING**

1. By this Ruling the Court is considering two applications dated 13<sup>th</sup> December 2010 and 15<sup>th</sup> August 2012.
2. The Notice of Motion dated 13<sup>th</sup> December 2010 is filed by 1<sup>st</sup> Defendant. It is brought under Order 2 Rule 15(1) (a) (b) (c) and (d) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act Cap 21. The 1<sup>st</sup> Defendant by that Notice of Motion sought the prayer; that the Plaintiff's suit against the 1<sup>st</sup> Defendant be struck out. This Court by its Ruling dated 19<sup>th</sup> December 2011 entertain another prayer in that Notice of Motion for the discharge of exparte injunction.
3. The other Notice of Motion dated 15<sup>th</sup> August 2012 is filed by the 3<sup>rd</sup> Defendant. It is also based on Order 2 Rule 15(1) (b) (c) and (d) of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The 3<sup>rd</sup> Defendant by that Notice of Motion also seeks the striking out of Plaintiff's suit against it. The issue relating to this case is the hijacking of the motor vessel 'KOTA WAJAR' by pirates.
4. The Vessel while on a voyage from Singapore to Mombasa was attacked and captured on 15<sup>th</sup>

October 2009 by pirates in the Indian Ocean. It was taken to and anchored off Haradere on the East Coast of Somalia. On 28<sup>th</sup> December 2009 the Vessel was released after negotiations and payment of ransom to the pirates.

5. The Plaintiff shipped its goods from China to Mombasa on board the motor vessel Mackinac Bridge but which goods were subsequently transferred to motor vessel KOTA WAJAR owned by 1<sup>st</sup> Defendant, Pacific International Lines PTE Ltd. That was the Vessel that was later hijacked.
6. In January, 2010 the Plaintiff was informed that the general average of USD 3,000,000 had been declared in regard to the amount of ransom paid to the Pirates. The Plaintiff was required to procure a bank guarantee for the amount USD 102,111.92 from his banker, Diamond Trust Bank Kenya Limited, in favour of the 2<sup>nd</sup> Defendant Habib Bank Ltd. The 2<sup>nd</sup> Defendant then guaranteed 4<sup>th</sup> Defendant payment on behalf of Plaintiff not exceeding USD 102,111.92.
7. On those guarantees being executed the Plaintiff was subsequently informed that his proportion of the declared general average was USD 76,264.50.
8. Plaintiff in filing this claim has alleged that the guarantees issued herein and the general average adjustment were illegal, null and void and unenforceable both in Kenya and Singapore. In his Plaintiff presented the following particulars of illegality-
  - **Piracy is an offence under the Penal Code, Chapter 224 of the Laws of the Republic of Singapore.**
  - **Piracy is an offence under Part XVI of the Merchant Shipping Act, Kenya.**
  - **Piracy is an offence under the Convention For The Suppression of Unlawful Acts against the Safety of Maritime Navigation passed in Rome on 10.3.1988 (hereinafter referred to as the Rome Convention).**
  - **It is illegal to pay ransom to pirates under the provisions of the English Ransom Act of 1782 applicable in Kenya as a statute of general application under the provisions of Section 3(1)(c) of the Judicature Act Chapter 8 Laws of Kenya.**
9. Plaintiff further pleaded that to pay USD 76,264.50 would constitute an offence under the Ransom Act, the Merchant Shipping Act and Rome Convention and that accordingly the guarantees issued were illegal, null and void. Further that payment of ransom by the 1<sup>st</sup> Defendant was contrary to public policy, repugnant to justice and would encourage further hijacking of ships by Pirates.
10. By its Plaintiff seeks the following declarations-
  - **A declaration that any payment made to any pirate is illegal and unlawful under the Merchant Shipping Act of Kenya, the Rome Convention and under the Laws of the Republic of Singapore.**
  - **A declaration that the payment of a ransom to pirates to procure the release of any ship, cargo or crew is illegal under the Ransom Act, 1782 of England.**
  - **A declaration that the declaration of a general average by the 1<sup>st</sup> Defendant and the adjustment of general average by the 4<sup>th</sup> Defendant is illegal, invalid, unlawful and null and void.**
  - **A declaration that the guarantee dated 17.2.2010 and any other guarantee by the 3<sup>rd</sup> Defendant to the 2<sup>nd</sup> Defendant are null and void and are unenforceable on the grounds of illegality.**

- In the alternative and without prejudice to any of the foregoing, a declaration that the 4<sup>th</sup> Defendant failed to establish that the sum of US\$3,000,000.00 was paid to the alleged pirates and that in the absence of proof of payment the 1<sup>st</sup> Defendant ought not to have declared general average and the 4<sup>th</sup> Defendant ought not to have apportioned general average.
- In the further alternative and without prejudice to any of the foregoing a declaration that the 4<sup>th</sup> Defendant, in its adjustment of general average allowed items it ought not to have allowed and that certain items including consulting fees and expenses allegedly paid to Mr. John Young and Mr. Nigel Stock, the ransom delivery expenses, the ransom delivery fees, debrief fees, debriefing expenses, the premium for insuring the transit of the ransom money, the hotel bills for Mr. John Young and Mr. Nigel Stock, the travel expenses, the accomodation, lawyers charges allegedly paid to Holman Fenwick and Willan of London, the 1<sup>st</sup> Defendant's petties, the commission allegedly paid to the 4<sup>th</sup> Defendant and the ransom itself were unreasonable and exorbitant.
- In the further alternative and without prejudice to any of the foregoing a declaration that the 1<sup>st</sup> and 4<sup>th</sup> Defendants made decisions concerning the alleged payment of ransom and other expenses without involving the Plaintiff and that therefore the Plaintiff ought not to be made to pay or contribute towards payment of the ransom and the other associated expenses. In the alternative a declaration that the payment of ransoms to pirates is repugnant to justice and morality and is against public policy and against Kenya's best national interests and that the Plaintiff's funds held in a bank within Kenya, the 3<sup>rd</sup> Defendant ought not to be released to finance a criminal enterprise.
- A declaration that the finding by the 4<sup>th</sup> Defendant that freight was included in the value of cargo and that the contributory value of freight was nil was invalid the Plaintiff's Bill of Lading having been marked "freight collect" and freight having subsequently been paid after arrival of the cargo at Mombasa.
- Judgment against the 1<sup>st</sup> Defendant in the sum of Kshs. 1,557,553.70 together with costs and interest thereon.
- An order of injunction restraining the 3<sup>rd</sup> Defendant from debiting the Plaintiff's account with any funds paid to the 4<sup>th</sup> and/or 2<sup>nd</sup> Defendant or in any manner recovering or attempting to recover the sum of US\$76,264.50 from the Plaintiff on account of any guarantee concerning the alleged hijacking of the motor vessel "KOTA WAJAR" by Somali Pirates.

## THE LAW

11. Before embarking on parties affidavit evidence and submissions it is important to consider the Rule and Sections of Civil Procedure Act which will guide me as well as the legal authorities.
12. Both applications rely on the provisions of Order 2 Rule 15(1) (a)(b) (c) and (d). That Rule provides that-
 

**"15.(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-**

  - a. It discloses no reasonable cause of action or defence in law; or
  - b. It is scandalous, frivolous or vexatious; or
  - c. It may prejudice, embarrass or delay the fair trial of the action; or
  - d. It is otherwise an abuse of the process of the Court,

**And may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”**

13. It is to be noted that Defendants Applicants have relied on more than one of the paragraphs in Rule 15(1). It follows that although under Rule 15 (2) an Applicant is restricted from relying on evidence the Applicant Defendants herein, having however relied on those other paragraphs will be permitted to rely on evidence.

14. It is important to remember the guiding principles that my mind should be directed towards as I consider the applications. The Judge in the case **ECOBANK KENYA LIMITED –Vs- BOBBIN LIMITED & 2 OTHERS [2014]eKLR** had this to say on those principles-

**“On this subject, I am content to quote a work of the Court in NBI HCCC NO. 79 OF 2013 SAUDI ARABIA AIRLINES CORPORATION v PREMIUM PETROLEUM COMPANY LIMITED that:**

**‘I need not re-invent the wheel on the subject of striking out a defence. A great number of judicial decisions have now settled the legal principles which should guide the Court in determining whether to strike out a pleading. Except, I can state comfortably that these principles now draw, not only from judicial precedent, but from the principles of justice enshrined in the Constitution especially in Article 47, 50 and 159. The first guiding principle is that, every Court of law should pay homage to its core duty of serving substantive justice in any judicial proceeding before it, which explains the reasoning by Madan JA in the famous DT DOBIE case that the Court should aim at sustaining rather than terminating suit. That position applies mutatis mutandis to a statement of defence and counter-claim. Secondly, and directly related to the foregoing constitutional principle and policy, courts should recognize the act of striking out a pleading (plaint or defence) completely divests a party from a hearing, thus, driving such party away from the judgment seat; which is a draconian act comparable only to the proverbial drawing of the “Sword of the Damocles”. Therefore, the power to strike out a suit or defence should be used sparingly and only on the clearest of cases where the impugned pleading is ‘demurer or something worse than a demurer’ beyond redemption and not curable by even an amendment.”**

15. It is also important to consider the discussion in the case **G. B. M. KARIUKI –Vs- NATION MEDIA GROUP LIMITED & 3 OTHERS [2012]eKLR** viz-

**“In The Co-operative Merchant Bank Ltd –Vs- George Fredrick Wekesa Civil Appeal No. 54 of 1999 the Court of Appeal stated as follows-**

**‘The power of the Court to strike out a pleading under Order 6 rule 13(1)(b)(c) and (d) is discretionary and an appellate Court will not interfere with the exercise of the power unless it is clear that there was either an error on principle or that the trial Judge was plainly wrong ... Striking out a pleading is a draconian act, which may only be resorted to, in plain cases .... Whether or not a case is plain is a matter of fact .... Since oral evidence would be necessary to disprove what either of the parties says, the Appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice, embarrass or delay the expeditious disposal of the Respondent’s action or which is otherwise an abuse of the process of the Court. The defence raises a fundamental issue, namely, whether there was any misrepresentation as alleged by the Respondent, a question which, cannot possibly be answered at the stage of an application or striking out; nor will it be competent for the court of appeal to try to answer it as its jurisdiction only extends to identifying whether, if any, there are issues which are fit to go for trial. The court has no doubt whatsoever, that the above is a fundamental triable issue .... A Court may only strike out pleadings where they disclose no semblance of a cause of action or defence and are incurable by amendment. The**

appellant's defence cannot be said to fall into that category and had the trial Judge considered fully all the matters alluded to, he would not have come to the same conclusion as he did."

In *Yaya Towers Limited vs. Trade Bank Limited (In Liquidation)* Civil Appeal NO. 35 of 2000 the same court expressed itself thus:

**"A Plaintiff is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant can demonstrate shortly and conclusively that the Plaintiff's claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial .... It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved ... If the Defendant assumes the heavy burden of demonstrating the claim is bound to fail, he will not be allowed to conduct a mini trial upon affidavits ... It is not the length of arguments in the case but the inherent difficulty of the issues, which they have to address that, is decisive .... The issue has nothing to do with the complexity or difficulty of the case or that it requires a minute or protracted examination of the documents and facts of the case but whether the action is one which cannot succeed or is in some way an abuse of the process of the Court or is unarguable ...."**

It is also important to refer to the overriding principle in Sections 1A and 1B of Cap 21. Those Sections provide-

**"1A(1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.**

**(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).**

**(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.**

**1B. (1) For the purpose of furthering the overriding objective specified in Section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims-**

- a. **The just determination of the proceedings;**
- b. **The efficient disposal of the business of the Court;**
- c. **The efficient use of the available judicial and administrative resources;**
- d. **The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and**
- e. **The use of suitable technology.**

16. With that overriding principle in mind the following decision is useful. The Court of Appeal in the case **DEEPAK CHAMANLAL KAMANI & ANOTHER -Vs- KENYA ANTI-CORRUPTION COMMISSION & 3 OTHERS [2010]eKLR** referred to the case of **BIGUZZI -Vs- RANK LEISURE PLC [1999]1WLR 1926** where Lord Woolf stated that the initial approach of the Courts now must not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to a striking out are available, the Courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking

out.

### **NOTICE OF MOTION DATED 13<sup>TH</sup> DECEMBER 2010**

17. The 1<sup>st</sup> Defendant in support of the Notice of Motion submitted that the Ransom Act of 1782 of England had been repealed in England and that was confirmed by the decision in England the case **MASEFIELD AG –Vs- AMLIN CORPORATE MEMBER 2010 EWHC 280 (COMM)**. That accordingly that Act is not a statute of general application in Kenya. 1<sup>st</sup> Defendant further submitted that it is not against public policy or custom to pay ransom money but that such payment are made as a matter of necessity particularly where lives and safety of the crew and vessel are involved.

18. 1<sup>st</sup> Defendant also submitted that Plaintiff is bound in law to pay the general average which was declared by 4<sup>th</sup> Defendant, a reputable and professional average adjuster.

19. That the Plaintiff cannot, after arranging for the guarantee to be issued by 3<sup>rd</sup> Defendant, stop payment flowing from that guarantee.

20. By written submissions 1<sup>st</sup> Defendant's Learned Counsel stated that Plaintiff could not sue on the guarantee between the 2<sup>nd</sup> Defendant and 1<sup>st</sup> Defendant because the guarantee excluded it. That guarantee provided in one of its terms thus-

**“A person who is not a party to this guarantee shall have no right under the contracts (right of Third Parties) Act (Cap 53B, Singapore Statutes) to enforce any of its terms or enjoy the benefits of this guarantee.”**

21. It is because of the above Clause that 1<sup>st</sup> Defendant submitted that this Court had no jurisdiction over this case.

22. 1<sup>st</sup> Defendant further submitted that the guarantee issued by 3<sup>rd</sup> Defendant in favour of 2<sup>nd</sup> Defendant guaranteeing payment of Plaintiff's proportion of general average had nothing to do with piracy. That the guarantee was to enable the release to Plaintiff of goods shipped by 1<sup>st</sup> Defendant.

### **NOTICE OF MOTION DATED 5<sup>TH</sup> AUGUST 2012**

23. This Notice of Motion was supported by the affidavit of Stephen Kodumbe. I will reproduce below his affidavit to understand the grounds upon which 3<sup>rd</sup> Defendant seeks the striking out of Plaintiff's suit-

- **THAT the Plaintiff inter alia seeks an order restraining the 3<sup>rd</sup> Defendant from honouring an irrevocable Guarantee issued at the express order of the Plaintiff.**
- **THAT the said Guarantee was expressly issued by the 3<sup>rd</sup> Defendant on account of a letter from the Plaintiff instructing the 3<sup>rd</sup> Defendant to issue an irrevocable bank Guarantee in the tune of USD 100,244 which amount was subsequently revised to USD 102,111.92 to the 2<sup>nd</sup> Defendant to enable the Plaintiff access its cargo from the 1<sup>st</sup> Defendant. (Annexed hereto and marked SK-1 is a copy of the said letter dated 19<sup>th</sup> January 2010).**
- **THAT further to the said letter of authority, the Plaintiff issued an irrevocable undertaking/authority to the 3<sup>rd</sup> Defendant dated February 17, 2010, which in part stated as below:-**

- a. Irrevocably authorize you to make any payment and comply with any demands which may be claimed from or made upon you under the said Guarantee without any reference to or further authority from us and agree that it shall not be incumbent upon you to enquire whether or not any such payment or demand claimed from or upon you under the said Guarantee is in fact due or whether or not any dispute exists between ourselves and the beneficiary of the said Guarantee and further agree that any payment which you shall make in accordance or purporting to be in accordance with the said Guarantee shall be binding upon us and shall be accepted by us as conclusive evidence that you were liable to make such payment or comply with any such demand and further that you may at any time determine this Guarantee. The format was also approved by Abson Motors Limited. Annexed hereto and marked SK-2 is a copy of the said letter of authority dated February 17,2010.
- THAT based on the aforementioned letters the 3<sup>rd</sup> Defendant issued an irrevocable and unqualified guarantee to Habib Bank Limited (the 2<sup>nd</sup> Defendant) undertaking to pay upto a maximum of USD. 102,111.92 strictly on demand. (Annexed hereto and marked SK-3 is a copy of the said undertaking).
- THAT based on the express request of 3<sup>rd</sup> Defendant, Habib Bank Limited issued an irrevocable undertaking to Marine Claims Office of Asia PTE Limited (4<sup>th</sup> Defendant) undertaking to pay upto a maximum of USD. 102,111.92 on demand. (Annexed hereto and marked SK-4 is a copy of the said undertaking and confirmation of issuance at the 3<sup>rd</sup> Defendant's order).
- THAT based on the said Guarantees issued expressly at the order of the Plaintiff, the Plaintiff obtained it's cargo from the 1<sup>st</sup> Defendant, which position is duly reiterated by the Plaintiff in the instruction letter herein marked as SK1.
- THAT On October 26,2010, Habib Bank Limited received a claim for payment of USD. 76, 264.50 owing to Marine Claims Office of Asia Singapore as per the terms of the Guarantee. (Annexed hereto and marked SK-5 is the said claim dated October 26,2010).
- THAT pursuant to the said demand, the 3<sup>rd</sup> Defendant requested for payment from the Plaintiff herein who failed to honour the same. (Annexed hereto and marked SK-6 is a copy of the demand to the Plaintiff).
- THAT as per the express terms of the Guarantee, custom and trade, the 2<sup>nd</sup> Defendant called up the Guarantee and the 3<sup>rd</sup> Defendant was obliged and indeed honoured the Guarantee by effecting payment to the 2<sup>nd</sup> Defendant. (Annexed hereto and marked SK-7 is a copy of the said remittance advice).
- THAT through the instant suit the Plaintiff is seeking to enjoin the 3<sup>rd</sup> Defendant in a contract that the 3<sup>rd</sup> Defendant is not party to as the terms of the contract between the Plaintiff and the 3<sup>rd</sup> Defendant are clear, unequivocal and irrevocable that on demand, the Guarantee should be honoured.

24.3<sup>rd</sup> Defendant through that affidavit stated that the Plaintiff's suit lacks merit and that Plaintiff is out to defeat the end of justice by filing this suit. That Plaintiff by this action seeks to restrain 3<sup>rd</sup> Defendant from debiting its account with the funds paid by 3<sup>rd</sup> Defendant at Plaintiff's own express instructions. 3<sup>rd</sup> Defendant on the obligation laid on it by the guarantee it issued relied on the case EDWARD OWEN ENGINEERING LTD -Vs- BARCLAYS BANK INTERNATIONAL LTD [1978] IALLER as follows-

**“Whether the obligation arises under a letter of credit or under a guarantee, the obligation of the bank is to perform that which is required to perform by that particular**

**contract, and that obligation does not in the ordinary way depend on the correct resolution of a dispute as to the sufficiency of performance by the seller to the buyer or by the buyer to the seller as the case may be under the sale and purchase contract; the Bank is simply concerned to see whether the event has happened on which its obligation to pay has arisen.”**

25.3<sup>rd</sup> Defendant submitted through its Learned Counsel that the Plaintiff’s suit contravened paragraphs (b) (c) and (d) of Rule 15(1) of the Civil Procedure Rules and in that regard relied on the case **GRACE N. KARIANJAH –Vs- DR. SIMON KANYI MBUTHIA, CIVIL APPEAL NO. 277 OF 2000** where the Court held-

**“The Pleint can also be frivolous, if it has no substance, it is fanciful or that the party is simply trifling with the Court or wasting the Courts time. The Pleading is also vexatious if it has no foundation in law, it is filed for the mere purpose of annoying the other party; it is leading to no possible good and has no chance at all of succeeding. On the other hand, pleadings are otherwise an abuse of the court process when they are filed in court simply to waste its time or when they are worthless or to delay the due process of the law.”**

### **PLAINTIFF’S RESPONSE TO BOTH APPLICATIONS**

26.Plaintiff began in its replying affidavit dated 20<sup>th</sup> December 2010 by criticizing 1<sup>st</sup> Defendant’s reliance on the firm of Solicitors in England hired to negotiate and give legal advise on the issue ransom negotiation with the hijackers of the vessel by stating that they had overcharged for their service, which charges were included in the declared general average. For this reason it was deponed on behalf of Plaintiff that 1<sup>st</sup> Defendant needed to explain why those solicitors were paid USD 50,950.00.

27.Plaintiff also stated that it was necessary to have a full hearing of this case to enable the crew of the vessel testify on the hijacking incident and or why the vessel on being released by the pirates docked in Dar Es Salaam.

28.That since Kenya is governed by the Rule of Law, Plaintiff should not be forced to pay ransom to the pirates.

29.Plaintiff relied on material entitled ‘**Piracy – The East Africa/ Somalia Situation**’, which was intended to give those in charge of vessels indication of best practice in piracy situation. The write up advises captains to take following action amongst others-

### **“ATTACK IMMINENT**

#### **Active measures to deter or prevent boarding attempts:**

- **Maintain maximum sustainable speed**
- **Consider evasive manoeuvres while maintaining maximum speed to create a confused wash.**
- **Manoeuvre to remove any lee from either side of the ship (sea state dependent)**
- **Active fire pumps to commence use of fire hoses and water monitors to cover areas of the vessel vulnerable to attempts to board. The water spray and jets are likely to hamper the pirates’ physical attempts to board and may deluge their boats, swamping them or causing damage to the engine.**

#### **Measures to ensure crew safety and to retain control of the ship:**

- **Crew alerted and told to go to their designated pirate attack muster station.**
- **Roll call carried out to ensure that all crew members are safe and accounted for – once complete all positions to report to the bridge to confirm.**

- Citadel secured.

#### **Attack in progress:**

- Continue evasive measures as outlined above
- ‘mayday’ call on VHF Channel 16 (and VHF Channel 8 as this is also monitored)
- Report immediately to UKMTO and MSCHOA
- Distress message via the DSC (Digital Selective Calling) system and Inmarsat-C as applicable
- Activate all available defensive measures.

Attacks have been thwarted in several cases where the defensive measures described in this booklet were used and the pirates chose not to press home the attack. It is therefore important to try to resist the pirate attack for as long as possible without further endangering the crew.

#### **Pirates onboard:**

##### **Once the pirates are onboard the ship:**

- Try to remain calm
- Stay together so far as it is practicable to do so
- Crew members operating outside secure areas to remain in constant communication with the Bridge
- Offer no resistance
- Cooperate with the pirates
- Leave CCTV recorders running.

#### **DO NOT:**

- Use firearms, even if available
- Use flash photography, which may be mistaken for muzzle flashes by the pirates or by any military forces sent to assist.
- Use flares or other pyrotechnics as weapons against pirates.

#### **ANALYSIS**

30.As stated before the vessel carrying Plaintiffs goods from China to Mombasa was hijacked and taken to the Somalia shores. There were negotiations for its release which negotiations bore fruit only after a ransom was paid.

#### **IS THE PAYMENT OF RANSOM ILLEGAL?**

31.Under the Judicature Act Cap 8, Kenya Court’s Jurisdiction is exercised in conformity with the common law, the doctrines of equity and statutes of general application in force in England on 12<sup>th</sup> August 1897 as well as the Kenyan Constitution and other written Laws. See Section 3(1) of that Act. It is on that basis Plaintiff relies on the English Ransom Act of 1782. That Act was repealed, as evidence by the decision of **MASEFIELD** (supra) where the Judge stated-

**“Then, it is to be observed that there is no legislation against the payment of ransoms, which is therefore not illegal. The repeal of limited legislation in the past (the Ransom Act 1782, which only outlawed the payment of ransom in respect of British ships taken by the King’s enemies or persons committing hostilities against the King’s subjects, and which was repealed by Section 1 of the Naval Prize Acts Repeal Act 1864) only serves to emphasize this fact.”**

It will be noted that even when the Act existed it regarded as illegal the ransom paid in respect of

British ships. The 1<sup>st</sup> Defendant vessel is not a British ship and would not be caught by that Act even if that Act was still subsisting.

32. It is not disputed by any party, and in my view quite rightly so, that the Act of piracy is illegal not only in this country but worldwide. But as correctly submitted by the 1<sup>st</sup> Defendant's learned Counsel, the Defendants did not themselves engage in piracy but that it was the Somalia pirates who did. The 1<sup>st</sup> Defendant was the owner of the vessel, which was hijacked, the 4<sup>th</sup> Defendant was the adjuster of the general average while the 3<sup>rd</sup> Defendant was Plaintiff's banker whom Plaintiff approached and requested that it guarantee the 2<sup>nd</sup> Defendant who was to make payment to the 4<sup>th</sup> Defendant on behalf of the 1<sup>st</sup> Defendant. It is clear from that scenario that the parties in this case did not participate in the act of piracy.

33. In my consideration of the material before me I make a finding that the payment of ransom is not illegal in Kenya.

34. The world is increasingly subjected to incidents of hostage taking and piracy. As quoted from the Best Practice Manual, above the upmost important consideration in such circumstances is to ensure the safety of the hostages, in this case the crew, and secondly the safety of goods. If the payment of ransom will ensure that safety it is then safe to say that ransom should be paid. The RBA's website in discussing this new phenomenal stated thus-

**“The recent devastating deaths of two US journalists and a UK aid workers held hostage by Islamic State have shocked the world. Both the US and the UK refuse to negotiate with terrorists, or to make ransom payments, asserting such payments should be illegal because they fund terrorism. With other states taking a different approach, the debate over the legality of ransom payments has been reignited. Certain ransom payments are permissible under UK law following the repeal of the 1782 Ransom Act in 1864. In *Masefield v Amlin* (2010) EWHC 280 (a ship piracy case involving the vessel *Bunga Melati Dua*) Mr. Justice Steel held that such payments were not illegal and not contrary to public policy.”**

35. With the above finding the paragraphs in the Complaint seeking this Court's declaration that the payment of ransom is illegal must fall and to allow the suit to continue to full hearing on that issue would be to allow delay of fair trial of the action as provided under Rule 15(1) (c).

### **IS GENERAL AVERAGE PAYABLE?**

36. General average is defined in the Black's Law Dictionary as-

**“Average resulting from an intentional partial sacrifice of ship or cargo to avoid total loss. The liability is shared by all parties who had an interest in the voyage.”**

In further explanation of general average the learned author stated-

**“General average refers to certain extraordinary sacrifices made or expenses incurred to avert a peril that threatens the entire voyage. In such a case the party sustaining the loss confers a common benefit on all the parties to the maritime venture. As a result the party suffering the loss has a right – apart from contract or tort – to claim contribution from all who participate in the venture. The doctrine of general average is thus an equitable principle derived from the general maritime law. General average is an exception to the principle of particular average that losses lie where they fall; rather the loss becomes ‘general’, meaning that it is spread ratably among all the parties involved in the maritime adventure. The doctrine of general average is of ancient vintage, and can be traced back to remotest antiquity.”**

Further under the York – Antwerp Rules 1994 it is provided-

**“RULE VI-SALVAGE REMUNERATION**

- a. **Expenditure incurred by the parties to the adventure in the nature of salvage, whether under contract or otherwise, shall be allowed in general average provided that the salvage operations were carried out for the purpose of preserving from peril the property involved in the common maritime adventure.**

**Expenditure allowed in general average shall include any salvage remuneration in which the skill and efforts of the salvors in preventing or minimizing damage to the environment such as is referred to in Article 13 paragraph 1(b) of the International Convention on Salvage, 1989 have been taken into account.”**

37.The Bill of Lading, which is the contract of carriage between Plaintiff and 1<sup>st</sup> Defendant also provided for payment of declared general average under Clause 29 where, in part, it provided-

**“Any general average on a Vessel operated by the Carrier shall be adjusted at any port or place and in any currency at the option of the Carrier and shall be settled in accordance with the York-Antwerp Rules 1994 or subsequent amendments this covering all Goods on or under deck.”**

38.The 4<sup>th</sup> Defendant in presenting its report on general average noted as follows, in part-

**“GENERAL AVERAGE**

- a. **Basis of General Average**

**We are of the opinion that the ship and cargo were placed in peril by the capture of the vessel on 15<sup>th</sup> October 2009 by pirates operating in the Gulf of Aden. We are also of the opinion that the ship and cargo remained in the grip of that peril whilst the vessel was detained off Haradere, Somalia, until release on 28<sup>th</sup> December 2009.**

**The money paid to the pirates in cash, together with directly related costs of negotiating the price and delivery of the money, in order to secure the release of the ship, were necessary for the common safety of ship, cargo and containers.”**

39.The answer to the question I posed to myself, above, is in the affirmative. Plaintiff was obligated to pay the declared general average. In being so obligated, no crime was committed. The payment of the ransom was, without a doubt, a necessity in the circumstances to ensure safety of the crew, cargo and the ship. It was an act done under the doctrine of necessity. Plaintiff’s claim that declared general average is illegal, null and void is therefore not justiciable.

40.Even if the payment of general average was declared illegal the Plaintiff could not benefit from such declaration because the Plaintiff sought out its banker to guarantee the 2<sup>nd</sup> Defendant that it would pay the declared general average. As a consequence of obtaining that guarantee Plaintiff obtained release of its cargo by 1<sup>st</sup> Defendant.

41.The Plaintiff by its letter dated 17<sup>th</sup> February 2010 wrote to its banker the 3<sup>rd</sup> Defendant requesting it to issue guarantee in the terms given by 2<sup>nd</sup> Defendant which terms Plaintiff reproduced in that letter. Plaintiff’s letter was in following terms-

**“In consideration of your issuing or causing to be issued at our request a Guarantee in favour of Marine Claims Office of Asia PTE Limited .... The full text of which is reproduced below-**

**‘We hereby:**

- a. Agree and undertake to keep you indemnified against all actions, proceedings, liabilities, claims, losses, damages, costs and expenses in relation to or arising out of the said Guarantee which may be extended and/or amended from time to time at our request and to pay you on demand all payments, losses, costs and expenses suffered or incurred by you in consequence thereof or arising thereout; and**
- b. Irrevocably authorize you to debit our account with all such payments, losses, costs and expenses; and**
- c. Irrevocably authorize you to make any payment and comply with any demands which may be claimed from or made upon you under the said Guarantee without any reference to or further authority from us and agree that it shall not be incumbent upon you to enquire whether or not any such payment or demand claimed from or made upon you under the said Guarantee is in fact due or whether or not any dispute exists between ourselves and the beneficiary of the said Guarantee and further agree that any payment which you shall make in accordance or purporting to be in accordance with the said Guarantee shall be binding upon us and shall be accepted by us as conclusive evidence that you were liable to make such payment or comply with such demand and further that you may at any time determine the said Guarantee, and**
- d. Agree that you debit our account with Kshs equivalent to USD 1,021.12 per annum being your commission for the issuance of the said Guarantee.’”**

42. The 3<sup>rd</sup> Defendant had no direct dealing, at all with the payment of ransom. 3<sup>rd</sup> Defendant’s involvement in this matter is that as Plaintiff’s banker it acceded to Plaintiff’s request to issue a guarantee to 2<sup>nd</sup> Defendant to ensure the Plaintiff obtained release of the goods. It follows that even if the payment of ransom was declared illegal Plaintiff’s claim in regard to the declaration against the 3<sup>rd</sup> Defendant would for the above reason fail.

43. Plaintiff’s claim would also fail if such a declaration of illegality of ransom was made because Plaintiff benefited from that ransom and rather than refusing to pay the declared average, involved the 3<sup>rd</sup> Defendant in issuance of the guarantee. If indeed the payment of the ransom was illegal it was open to Plaintiff to approach this Court, as it did in this action, to seek mandatory injunction for the release of its goods without seeking 3<sup>rd</sup> Defendant’s guarantee. Why did the Plaintiff not do so? How can the Plaintiff at this latter time be allowed to “cry wolf.” The Plaintiff in my view, very wrongly waited until he benefited from the guarantee issued by 3<sup>rd</sup> Defendant, which enabled Plaintiff’s goods to be released by 1<sup>st</sup> Defendant, and before the payment was sought after the actual general average was declared rushed to this Court and obtained ex parte injunction stopping 3<sup>rd</sup> Defendant from “transferring, or paying in any manner or form any funds from Plaintiff’s account held in the 3<sup>rd</sup> Defendant’s Bank to or in favour of 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Defendant.” That injunction order remained in place until it was discharged by this Court’s Ruling of 19<sup>th</sup> December 2011. It was discharged on account of Plaintiff’s non disclosure of material facts at ex parte stage. As shown in the 3<sup>rd</sup> Defendant’s reproduced affidavit the Plaintiff failed to pay the declared average, the 3<sup>rd</sup> Defendant was then called upon to honour its guarantee and by obtaining the injunction Plaintiff from 12<sup>th</sup> November 2010, until 19<sup>th</sup> December 2011 when the injunction was discharged restrained the 3<sup>rd</sup> Defendant from debiting the amount 3<sup>rd</sup> Defendant paid on the guarantee from Plaintiff’s account.

44. There are two issues raised in the Plaintiff that I have not yet discussed.

45. Firstly is Plaintiff’s claim that 4<sup>th</sup> Defendant in reaching the general average included Plaintiff freight, which had been paid prior to transportation. This is what 4<sup>th</sup> Defendant stated in its report

in regard to freight-

## **“FREIGHT**

**The Bill of Lading conditions show that freight was fully prepaid and non-returnable in case of loss. Therefore, freight is included in the value of cargo. The contributory value of freight is therefore nil.”**

46. That quote from the report clearly shows the 4<sup>th</sup> Defendant did not include freight in general average. It follows Plaintiff's claim that it was included would fail.

47. The second issue is Plaintiff's allegation that 1<sup>st</sup> Defendant in breach of its contract with Plaintiff delivered Plaintiff's cargo to Compact Freight Systems Ltd instead of Interpel Investments Ltd and thereby caused Plaintiff to pay extra charges of Kshs. 1,557,553.70. I have closely looked at the Bill of Lading, the parties contract of carriage, and I have been unable to find an undertaking to the effect as pleaded by Plaintiff. The only condition I found is that the 1<sup>st</sup> Defendant was to deliver Plaintiff's goods in Mombasa Port, which it did after the hijack.

48. I have carefully considered Plaintiff's claim and I have come to the unfortunate conclusion that it was a suit filed by Plaintiff with the sole intention of not paying the declared average and yet it knew that the amount had been paid on its behalf by the 3<sup>rd</sup> Defendant – its banker. The rest of the issues raised in this claim were solely intended to cloud that initial intention. This case should never have seen the light of day. The Defendants were put to the trouble of defending a case that was frivolous. The Plaintiff, it was held in the Ruling in this case of 19<sup>th</sup> December 2011, obtained the ex parte injunction on 12<sup>th</sup> November 2010 by non disclosure of material facts. Plaintiff in obtaining ex parte injunction did not include its copies of request for the guarantee by 3<sup>rd</sup> Defendant and did not include its indemnity to 3<sup>rd</sup> Defendant undertaking to indemnify 3<sup>rd</sup> Defendant for the guarantee it was to issue. As far as I am aware from the record of the Court file the Plaintiff has not to date filed a Notice of Appeal of that finding. The Plaintiff's action of obtaining an ex parte injunction to restrain 3<sup>rd</sup> Defendant from debiting its account for the amount of declared general average and then failing to pay that declared general average exposed the 3<sup>rd</sup> Defendant to liability towards 2<sup>nd</sup> Defendant. The law on performance bond states so. See the case **EDWARD OWEN ENGINEERING LTD –Vs- BARCLAYS BANK INTERNATIONAL [1978] I ALL ER 976** where Lord Denning stated-

**“... All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer, nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee on demand if so stipulated, without proof or conditions. The only exception is when there is clear fraud of which the bank has notice ...”**

49. Nearer home is the case of the Kenya Court of Appeal in the case

**KENINDIA ASSURANCE COMPANY LTD –Vs- FIRST NATIONAL FINANCE BANK LTD CIVIL APPEAL NO. 328 OF 2002** where the Court discussed such a guarantee and that it is-

**“... In the nature of a covenant by the Appellant to pay upon the happening of a particular event. It is a form of security guaranteeing payment by a 3<sup>rd</sup> party. In such cases, the most important factor to consider before liability can attach is whether there has been default. Once default is established and there has been a formal demand, the**

**other conditions are of a secondary nature and may not be used to defeat the security.”**

50. The Plaintiff as stated before should not have filed this case. It is frivolous and vexatious. It is a case in my view where this Court should give a Certificate as per paragraph 50A of The Advocates (Remuneration) Order. This Court will as provided under that paragraph order that the costs that will be awarded to the Defendants be taxed on a higher scale.

51. Before concluding this judgment I wish to make an observation. The 2<sup>nd</sup> and 4<sup>th</sup> Defendant's did not file any documents to defend this case. Indeed I could not find any evidence that they were served with the Summons and Plaint. Both of them have residence out of Kenya. The 2<sup>nd</sup> Defendant runs its banking business in Singapore. If that be so that they were not served, and I will make a finding that they were not, the overriding principles would not be well served by allowing the claim against them to remain alive. That claim against them shall be also be struck out. If the Court is wrong in finding they were not served, it is open to Plaintiff to seek this Court's review and to reinstate the claim against them.

## **CONCLUSION**

52. Being faithful then to the overriding objective of this Court and to Article 159 of the Constitution I will make the following orders.

- a. **The Plaintiffs suit against all the Defendants is hereby struck out.**
- b. **The 1<sup>st</sup> and 3<sup>rd</sup> Defendants are awarded costs of the Notice of Motions dated 13<sup>th</sup> December 2010 and 15<sup>th</sup> August 2012 and also costs of this suit. Such costs shall be taxed at a higher scale as per paragraph 50A of The Advocates (Remuneration) Order.**

It is so ordered.

**DATED and DELIVERED at MOMBASA this 27<sup>TH</sup> day of NOVEMBER, 2014.**

**MARY KASANGO**

**JUDGE**