



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT MOMBASA  
(Coram: Ojwang, J.)**

**ADMIRALTY CLAIMS NO. 3 & NO. 8 OF 2010**

3. PHAEDRA MARITIME S.A.

.....CLAIMANTS/RESPONDENTS

8. PANCRETAN CO-OPERATIVE BANK

**-VERSUS-**

THE OWNERS OF THE MOTOR VESSEL “STAR 7”  
*Previously* MOTOR VESSEL “MICHAIL

ARHANGELOS” .....DEFENDANT

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STAR MATRIX LIMITED *the owners*  
*of* MOTOR VESSEL “STAR

7” .....INTERESTED/  
AFFECTED PARTY

(INTERVENER)

**RULING**

**I. CLAIMS AGAINST EARLIER SHIP-OWNER, AND ARREST ORDERS**

Against the Owners of the Motor Vessel “*Michail Arhangelos*” which docked at Mombasa Port, there was a series of claims by different parties, leading to repeated orders of arrest made by this Court. In the run-up to the latest re-arrest, on account of which the motor vessel remains moored at Mombasa Port, the Intervener herein came into the picture as the new owner, with the ship now re-named “Star 7”.

The Intervener moved the Court by an Application Notice dated **10<sup>th</sup> May, 2010**, primarily contesting an application under Admiralty Claim No. 3 of 2010 which was dated **16<sup>th</sup> April, 2010**, and which came following an earlier claim of **24<sup>th</sup> March, 2010**. The original claim which led to the arrest warrant against the ship, of **24<sup>th</sup> March, 2010** was classified as an Admiralty claim *in rem* and was prosecuted as such, its subject-matter being: bunkers consumed by the motor vessel; food and water used by the vessel’s crew; and essential expenses of the motor vessel.

Of the many claims against the motor vessel, one was in respect of mortgages, the mortgagee being the claimant in Admiralty Claim No. 8 of 2010.

This ruling is limited to the claims of the Intervener, Star Matrix Limited, as against the claimants in Admiralty Claims No. 3 and No. 8, though it may be regarded as a general signal of directions.

**II. NEW OWNERSHIP, AND QUESTIONS OF JURISDICTION**

The Intervener contests the said two claims, anchoring their case, at this stage, primarily on the question of **jurisdiction**. The Intervener seeks orders as follows:

- (i) that the order of this Court made on 16<sup>th</sup> April, 2010 restraining the Motor Vessel “Star 7” from departing the Port of Mombasa, be discharged unconditionally;**
- (ii) that it be declared that this Court has no jurisdiction to hear and determine the claimant’s application;**
- (iii) that the question of damages for the wrongful restraining order obtained by the claimant be referred to the Admiralty Marshal for assessment;**
- (iv) that the claimant’s application dated 16<sup>th</sup> April, 2010 be struck out and/or dismissed;**
- (v) that the costs of the instant application be borne by the claimant.**

The grounds to support the Intervener’s case are set out as follows:

- (a) the Motor Vessel “Star 7” has been wrongfully restrained from sailing from the Port of Mombasa under the guise of an “arrest”, and as a consequence, her present owners suffer and continue to suffer a daily loss of about U.S. \$ 12,000.00;**
- (b) the claimant’s application of 16<sup>th</sup> April, 2010 is scandalous, frivolous and/or otherwise an abuse of the process of the Court and does not lie;**
- (c) as at 16<sup>th</sup> April, 2010 when the ex parte order restraining the Motor Vessel “Michail Arhangelos” from sailing from the Port of Mombasa was made and issued, the amount due under the Judgment entered herein on 30<sup>th</sup> March, 2010 had not fallen due for payment and the said restraining order was wrongfully obtained;**
- (d) as Judgment had been entered on 30<sup>th</sup> March, 2010 and the Motor Vessel “Michail Arhangelos” was on that date released and the warrant of arrest set aside, this Court is now functus officio;**
- (e) the right of arrest has now merged into the Judgment of 30<sup>th</sup> March, 2010; and so the proceedings have ceased to be in rem; and consequently, the Court has no jurisdiction and cannot give the orders sought;**
- (f) the claimant has no claim in personam (or otherwise), as the Motor Vessel “Star 7” (previously “Michail Arhangelos”) has, since 8<sup>th</sup> April, 2010, been wholly owned beneficially by Star Matrix Limited, against whom the claimant has no right;**
- (g) since 8<sup>th</sup> April, 2010 Michail Arhangelos S. A. have ceased to have any proprietary interest in the Motor Vessel “Star 7” (previously “Michail Arhangelos”) or over any of the shares in the said motor vessel;**
- (h) in the premises, the claimant can neither obtain an order for the sale of the vessel “Star 7” or determination of priority of claims, nor seek to enforce judgment against the new owners, in relation to whom the claimant has no Judgment;**
- (i) no attachment has been levied, and no execution proceedings have been commenced by the claimant;**
- (j) no objection has been raised to Star Matrix Limited being joined as an Interested/Affected Party herein, and the respondents will suffer no prejudice by such joinder.**

Facts in support of the Intervener’s case are set out in the affidavit of **Sanjeev Jain**, a director of Star Matrix Limited, sworn on **6<sup>th</sup> May, 2010**. The deponent avers that Star Matrix Limited is the present registered owner of the Motor Vessel “Star 7” (previously known as “**Michail Arhangelos**”), having acquired her on **8<sup>th</sup> April, 2010** from her previous registered owner, Michail Arhangelos S.A. of the Marshall Islands. To validate the averment on changed ownership, the deponent annexes the following documents:

- (i) Bill of Sale, dated 8<sup>th</sup> April, 2010;**
- (ii) Licence for establishment and operation of a ship; continuous synopsis record; Interim International Tonnage Certificate – all issued by the Tanzania-Zanzibar International Register of Shipping;**
- (iii) Registration of Mortgage – issued by the Tanzania-Zanzibar International Register of Shipping;**
- (iv) A current search on the status of the Motor Vessel “Michail Arhangelos”; and**
- (v) Constitution documents of Star Matrix Limited.**

The depositions give certain other details: on **16<sup>th</sup> April, 2010** the claimant caused to be served upon the master of the Motor Vessel “Star 7”, **Captain Ramesh Singh**, a Court order restraining the Motor Vessel “**Michail Arhangelos**” from sailing from or leaving the Port of Mombasa at Kilindini; a copy of the claimant’s application was also served on **Captain Ramesh Singh** together with the supporting affidavit of **Mr. Justus Mulwa Nduya**, Advocate; Advocates for Star Matrix Limited, led by **Mr. Sanjeev Khagram**, caused a search of the Court file, and found that the claim had been filed on **24<sup>th</sup> March, 2010** when the Motor Vessel “**Michail Arhangelos**” was arrested in an action *in rem* as security for the claim; on **29<sup>th</sup> March, 2010** one **Mr. Polioudkasis Stelios** filed an acknowledgment of service on behalf of the defendant: and on **30<sup>th</sup> March, 2010** Judgment by consent was entered, by the Admiralty Marshal, in favour of the claimant in Admiralty Claim No. 3 of 2010, for the sum of U.S. \$ 1,390,000.00 – all inclusive. The parties to the consent Judgment, according to the deponent, **“purportedly deemed this to be a maritime lien over the Motor Vessel ‘Michail Arhangelos’ even though this claimant’s claim herein was one for [the] supply of bunker fuel, diesel oil, lubricant oils, and disbursements made on behalf of the vessel”**.

The deponent deposes that, by the consent Judgment, payment of the first instalment of U.S. \$ 450,000.00 was postponed to between **25<sup>th</sup> April, 2010** and **30<sup>th</sup> April, 2010**. The arrest warrant issued as against the Motor Vessel “**Michail Arhangelos**” on **24<sup>th</sup> March, 2010** was, by the consent Judgment, “discharged and/or set aside and the said motor vessel discharged and released from arrest”; and in default, the claimant was at liberty to enforce and execute the Judgment.

The deponent avers that the claimant in Admiralty Claim No. 3 of 2010 was aware that the Motor Vessel “**Michail Arhangelos**” was being sold, and that payment of the first instalment of U.S \$ 450,000.00 had been postponed to between **25<sup>th</sup> April, 2010** and **30<sup>th</sup> April, 2010**, and that the previous owner of the Motor Vessel “**Star 7**” had not defaulted under the terms of the Judgment of **30<sup>th</sup> March, 2010**: and so they did not have to provide security for the sum of U.S \$ 1,390,000.00.

The deponent believes to be true the advice of his Advocate, **Mr. Sanjeev Khagram**, that since the Motor Vessel “**Michail Arhangelos**” was released from arrest on **30<sup>th</sup> April, 2010** and the warrant of arrest discharged, there could no longer be a judicial sale of the Motor Vessel “**Star 7**”; for upon the release of the motor vessel and the setting aside of the warrant of arrest, the proceedings ceased to be *in rem* proceedings; and so the claimant had wrongfully and unlawfully obtained arrest of the Motor Vessel “**Star 7**” when there is no Judgment against her or her present owners.

The deponent believes to be true the advice of his Advocate aforesaid, that since the beneficial ownership of Motor Vessel “Star 7” has since **8<sup>th</sup> April, 2010** vested in Star Matrix Limited, a company against which the claimant has no claim or decree or right (*in personam* or otherwise), the claimant can obtain neither an order of sale of the Motor Vessel “Star 7”, nor one for a determination of priorities, and that the claimant cannot seek to enforce the Judgment against the property in respect of which it has no Judgment. The deponent deposes that the claimant was aware the beneficial ownership of all the shares in the Motor Vessel “Star 7” had been transferred to Star Matrix Limited; and so it was an abuse of the process of the Court to seek the exercise of jurisdiction in a matter in which the Court lacks jurisdiction.

The deponent deposes that the Intervener “has suffered immense loss as a result of the wrongful and unlawful detention of the Motor Vessel ‘Star 7’, by reason of the fact that she cannot be employed on voyages”; “the [Intervener] continues to suffer a daily loss in the sum of US \$ 12,000.00 due to expenses incurred and which the defendant retains the right to claim from the claimant”; and the Intervener’s machinery is “at risk of wasting away for being non-operational for a long period”.

By an Application Notice of **14<sup>th</sup> May, 2010** the claimant in Admiralty Claim No. 3 of 2010 had sought judicial orders of sale against the Motor Vessel “Star 7”, in execution and enforcement of the Judgment debt of U.S. \$ 1,390,000.00; and the applicant stated that the motor vessel was already subject to two other arrest warrants in Admiralty Claim No. 7 of 2010 and No. 8 of 2010, in respect of payments required to be made by the Owners of the Motor Vessel “**Michail Arhangelos**”.

Although the Intervener’s case is more directly concerned with Admiralty Claim No. 3 of 2010, the applicant accorded both claimants in No. 7 and No. 8 an opportunity to make a response during the *inter partes* hearing.

### III. CONTEST BY THE RESPONDENTS

The issues emerging from the Intervener's application are highlighted by the contrasting claims made by the claimants. In the affidavit of **14<sup>th</sup> May, 2010** sworn by **Mr. Justus Mulwa Nduya**, Advocate for the claimant in Admiralty claim No. 3 of 2010, it is deponed that:

***"There is no bona fide sale or change of ownership since as at 26<sup>th</sup> April, 2010.....the Motor Vessel 'Michail Arhangelos' was and continues to be in the same beneficial ownership and the same port of registration and of the same name since the proceedings herein were commenced and the Affected Party/Intervener has no bona fide legal title to Motor Vessel 'Star 7' also known as Motor Vessel 'Michail Arhangelos' and the Intervener's own documents on the current status of the vessel and particularly their annexure SJ-4 clearly show that the Motor Vessel is still owned by Michail Arhangelos S.A....."***

The master of the Motor Vessel "Star 7", **Captain Ramesh Singh** had sworn an affidavit on **22<sup>nd</sup> June, 2010** further to the affidavit of **Sanjeev Jain** of **6<sup>th</sup> May, 2010** and had denied that the sale of the Motor Vessel "**Michail Arhangelos**" was secretly done or was shrouded in mystery as alleged by the claimants; in the deponent's words:

***"It is clear.....that the claimant was fully aware of the intended sale of the said vessel at the time the Settlement Agreement was entered into and also when Judgment was entered and the vessel released from arrest and the warrant of arrest discharged.....this being the very reason for the setting aside and discharge of the warrant of arrest"***.

**Captain Ramesh Singh** denied the contention that the sale of the motor vessel to Star Matrix Limited is not **bona fide** but is a sham, void, fraudulent and intended to obstruct the recovery of the decretal amount of the claim.

**Captain Ramesh Singh** expressed his belief in the truth of counsel received from his Advocate, that the Motor Vessel "Star 7" 's Bill of Sale represents the **transfer of ownership** of the vessel to the purchaser and "does not concern a party that is not privy to that Bill [of sale] and the registration thereof is a mere formality in the process". **Captain Ramesh Singh** deposed that the Motor Vessel "Star 7" was properly and lawfully transferred to Star Matrix Limited on **8<sup>th</sup> April, 2010**, and thereafter registered in accordance with the relevant statutory provisions of Tanzania, on **12<sup>th</sup> April, 2010**.

For the claimant in Admiralty Claim No. 8 of 2010, **Mr. Mansur Satchu**, Advocate, swore a further affidavit on **7<sup>th</sup> July, 2010** deposing that Star Matrix Limited or Michail Arhangelos S. A. owes that claimant the sum of € 700,000.00 – and that this is the reason a warrant of arrest was obtained by this claimant (in Claim No. 8), at a time when the motor vessel was owned by Michail Arhangelos S. A. The deponent averred that the subject motor vessel "is still owned by that company and is still registered in the same registry"; the deponent deposed:

***"A temporary registration procured for that vessel from St. Kitts and Nevis to the Republic of Panama also shows that the Motor Vessel "Michail Arhangelos" was still registered in Panama under the ownership of Michail Arhangelos S. A. until 7<sup>th</sup> June, 2010"***.

To his further affidavit, **Mr. Mansur Satchu** annexed a copy of the "deletion certificate" issued by a Director General of the Merchant Marine in Panama, and deponed, in summary, as follows:

(i) ***the subject motor vessel remained under arrest in Admiralty Claim No. 1 of 2010 from 15<sup>th</sup> January, 2010 to 15<sup>th</sup> April, 2010;***

(ii) ***the Application Notice dated 6<sup>th</sup> May, 2010 and the affidavit of Sanjeev Jain dated 6<sup>th</sup> May, 2010 indicate that the Motor Vessel "Michail Arhangelos" was sold and transferred to Star Matrix Ltd on 8<sup>th</sup> April, 2010, and that the vessel was registered anew in Zanzibar on 12<sup>th</sup> April, 2010 and on 17<sup>th</sup> April, 2010 a mortgage was registered against the Motor Vessel "Star 7" in favour of Punjab National Bank;***

(iii) ***on both 8<sup>th</sup> April, 2010 [date of sale] and 12<sup>th</sup> April, 2010 [date of registration in Zanzibar] the Motor Vessel "Michail Arhangelos" was still under arrest and in the care and custody of the Admiralty Marshal of the High Court; She was physically present within Kenyan Waters at the Port of Mombasa; she could not legally change ownership or names while under arrest – as that would defeat the warrant of arrest, enabling her to leave Mombasa not as "Michail Arhangelos", but as "Star 7";***

(iv) ***the Motor Vessel "Michail Arhangelos" is still registered in St. Kitts and Nevis, and there is a "Permanent Certificate of Registry" issued in St. Kitts and Nevis, and it shows the owners as Michail Arhangelos S. A. [the defendants in Admiralty Claim No. 8 of 2010]; and the IMO number is***

shown as 7637266;

(v) **the Motor Vessel “Michail Arhangelos” is still owned by Michail Arhangelos S.A: share details being 64 – 64; the IMO Number remains 7637266; the managers remain Sea Wind Maritime SA.; the record shows a first mortgage, registered in favour of Pancretan Co-operative Bank [the claimant in Admiralty Claim No. 8 of 2010] on 15<sup>th</sup> January, 2007 at 12.30pm, and a second mortgage registered also in favour of Pancretan Co-operative Bank on 29<sup>th</sup> December, 2008 at 12.00 noon;**

(vi) **the Motor Vessel “Michail Arhangelos” cannot change her name or registry before the claimant’s mortgage is discharged in full, or without the consent of the claimant;**

(vii) **the motor vessel could not be legally registered in Zanzibar without the “certificate of deletion” from Panama and/or St. Kitts and Nevis; and so the purported registration of the Motor Vessel “Star 7” in Zanzibar on 12<sup>th</sup> April, 2010 was invalid, in the light of the admission by Star Matrix Limited that the “certificate of deletion” from Panama was issued in June, 2010;**

(viii) **the Motor Vessel “Michail Arhangelos”, by whatever other name called, was not eligible for registration in Zanzibar on 12<sup>th</sup> April, 2010.**

**Captain Ramesh Singh**, the master of Motor Vessel “Star 7”, swore a further affidavit on **19<sup>th</sup> July, 2010** in response to the affidavit of **Mansur Satchu**; he denied that the claimant in Admiralty Claim No. 8 of 2010 had any valid claim against Star Matrix Limited, and also denied that the claimant, in the 2007-2008 period, had advanced any monies to Michail Arhangelos S.A.; he attributed *mala fides* to the said claimant. The deponent denied the averment that the Motor Vessel “**Michail Arhangelos**” is still registered in St. Kitts and Nevis, and also denied the averment that the Motor Vessel “Star 7”, as at the date of the warrant of arrest, was owned by Michail Arhangelos S.A.

The deponent believes to be true the advice of his Advocate, **Mr. Khagram**, that a pre-purchase search at the Panama Registry had shown that there were no encumbrances or liens registered against the Motor Vessel “Michail Arhangelos”; and the St. Kitts and Nevis Registry too had confirmed the said motor vessel to be unencumbered, save that there was an unpaid registry fee. The deponent believes it to be true that his Advocate, **Mr. Khagram**, had requested the previous owners of the motor vessel to ensure her deletion from the Panama Registry, to avoid incurring further charges, as she was already registered in Tanzania.

**Mr. Khagram** contested the legal basis of the claimants’ case against the Owners of the Motor Vessel “Star 7”, stating that even as at **15<sup>th</sup> January, 2010** when the vessel as “**Michail Arhangelos**” was arrested, the ownership question had not arisen: and now it was being raised, with the claimants herein alleging they had a mortgage over her, and that the owners were indebted in respect of bunkers supplied. It was urged that while the deponent in Admiralty Claim No. 8 of 2010, in the affidavit of **2<sup>nd</sup> July, 2010** had acknowledged that the Motor Vessel “Star 7” was registered in Zanzibar on **12<sup>th</sup> April, 2010** the claimant was challenging the validity of the registration, on the ground that the vessel was still under arrest in Mombasa. Counsel submitted that it was clear from the evidence, that the motor vessel’s registration in St. Kitts and Nevis had expired and was first transferred to Panama, and then to Tanzania. Learned counsel, **Mr. Kinyua**, took the contrasting position, which he urged to be the nub of the dispute: that while the motor vessel was registered in Tanzania-Zanzibar as “Star 7”, the critical document of transfer of ownership, the Bill of Sale, “cannot be said to have been registered in Tanzania”.

#### **IV. TRANSFER OF PROPERTY IN A SHIP: APPLICABLE LAW**

To illuminate the question of transferred ownership of the Motor Vessel “Michail Arhangelos”, the Court considered relevant authority. **Mr. Khagram** called in aid the learned work by **Christopher Hill**, *Maritime Law* (London: Lloyd’s of London Press, 1995), where the following passage appears (p.49): **“Ships are ‘goods’, a chattel within the meaning of section 61 of the Sale of Goods Act, 1979. That this was so confirmed in Behnke v. Bede Shipping Co. [1927] 1KB 649 and, generally speaking, the sale of a vessel is subject to the terms of the Sale of Goods Act.....The passing of property in the ship is effected by transfer of a normal bill of sale from seller to buyer. On this point section 24 of the Merchant Shipping Act, 1894 is the ruling section”.**

Relevant as well is the old English authority, **Stapleton v. Haymen and Another**, S. C. 33 L. J. EX. 170; (CLIX) E.R. in which the following passage appears:

**“.....the property in a ship passes immediately on the execution of a bill of sale in the form in which**

***the statute prescribes, although the transferee cannot himself confer a title until the transfer is registered. In Dixon v. Ewart (3 Mer. 322), in the case of a ship at sea, Lord Eldon was of opinion that the bill of sale passed the interest, and not the subsequent formalities, which were merely a duty imposed for the completion of the title”.***

**Mr. Khagram** submitted that, in the instant matter, property in the motor vessel passed to Star Matrix Limited immediately upon execution of the bill of sale – save that the transferee acquires title only after **registration** in their name has taken place; and the transferee is not able to give good title to anyone else until such registration has been effected.

The claimants had challenged the avowed transfer of the motor vessel to the Intervener herein: on the basis that there was evidence of the existence of two separate Bills of Sale, raising a question of validity. **Mr. Khagram’s** response was that the Bill of Sale purportedly executed by Sea Wind Maritime S. A. was of no validity – as that company was only a managing entity, but was not the **owner**; but the other Bill of Sale, which was executed by Michail Arhangelos S. A., was valid, the effect being that as at **8<sup>th</sup> April, 2010** ownership had passed to Star Matrix Limited.

Counsel urged that the date of transfer of ownership, **8<sup>th</sup> April, 2010**, was significant in considering the validity of the warrants of arrest issued against the motor vessel – and in particular, arrest on account of unpaid mortgages. Counsel invoked, in relation to the law of liens and mortgages, **I.S. Goldrein** (ed.), **Ship Sale and Purchase**, 2<sup>nd</sup> ed. (London: Lloyd’s of London Press, 1993), at p. 205:

***“The purpose of the lender securing his loan on the ship by way of a mortgage is that if the borrower defaults and does not repay the loan the lender can enforce his claim against the ship as well as the shipowner: the ship can be sold and the loan recouped out of the proceeds of sale, even if the borrower is bankrupt. Another purpose is to protect the mortgagee against a sale of the ship by the shipowner who then disappears with the money. By taking a mortgage, the lender can generally enforce his security against the ship itself, even if it has been sold.”***

It is clear that a duly registered mortgage is an invaluable protection for the mortgagee, and it operates through the concept of “maritime lien”, which the authors thus define (op. cit., p. 205):

***“A maritime lien is a claim which ‘gives a right against a ship which continues notwithstanding a change of ownership. A purchaser of an encumbered res therefore takes the res subject to the maritime lien and it is of no avail to plead want of notice’ (The Colorado [1923] P. 102 – per Atkin, L.J.). It is therefore an invisible encumbrance on the ship. The only exception to this is where the ship has been sold by a court order exercising Admiralty jurisdiction, as the effect of such a sale is to clean all maritime liens off the ship and transfer them to the proceeds of sale”.***

The authors of the learned work state, in respect of the creation of a mortgage on a motor vessel (at p. 206):

***“In order to obtain a valid and enforceable mortgage on a ship it is necessary to comply with the requirements for the creation of a mortgage laid down by the law of the state of registry of the ship, the law of the flag.....[T]he most important requirement is that the mortgage be registered on the register of the ship.”***

The authors state further (p.206) that:

***“The consequences of failing to register a mortgage are usually that the security is lost and the mortgage will be unenforceable against the purchasers of the ship.....”***

## **V. MORTGAGES AND MARITIME LIENS**

**Mr. Khagram** submitted that the claims made against the subject motor vessel were not in respect of **maritime liens** – and so there was no basis for granting such claims. The principle in support of this argument is found in **A. Mandaraka-Sheppard, Modern Admiralty Law** (London), in which the following passage appears (p.29):

***“Most ships, nowadays, are registered abroad under the laws of a particular State carrying the flag of that State. Other than the Commonwealth States and former British colonies, foreign systems of law do not recognize the concept of equitable mortgages. So, if the mortgage is unregistered under the system of the law in the State in which the ship is registered, such a mortgage cannot be enforced by an in rem claim against the ship, although the mortgagee will be able to sue the borrower (mortgagor) in personam and enforce his claim against any insurance proceeds of the ship, provided he has obtained an effective assignment of the insurance proceeds or policy of the ship”.***

Learned counsel submitted that the claim now being made against the Owners of the Motor Vessel “Star

7” would be barred by Panamanian law, if Panama is regarded as the “Flag State”; Panama does not recognize equitable mortgages on ships: *The Angell Bell* [1979] 2 Lloyd’s L.R. 491. That case concerned a Panamanian ship, and a mortgage claim; the substantive law governing the mortgage was that of Panama. The mortgagee had omitted the registration of his mortgage within six months after grant of provisional registration (as required by statute); and this, it was held, deprived the mortgagee of his rights *in rem*. The Court held (*Donaldson, J* at p.496):

**“I am satisfied that the contract took full effect inter partes just as if it was a fully effective ship’s mortgage, with the sole qualification that, being unregistered, [the claimant] obtained no rights in rem against the ship....The absence of registration did not affect the formation or continued existence of that contract. It merely reduced its effectiveness in that the contract was thereby deprived of one of its most important incidents, namely, the conferment of a right in rem against the ship”.**

Learned counsel urged, in the case of the Motor Vessel “Michail Arhangelos”, that no right *in rem* accrued against her – due to want of registration of mortgage in Panama. *Mr. Khagram’s* perception of evidence, which was however contested by *Mr. Kinyua*, was that the motor vessel had first been registered in St. Kitts and Nevis, thereafter in Panama, and lastly in Tanzania; according to *Mr. Kinyua*, she had no registration in Panama at the material time. Such a position is, with respect, not supported by the evidence; for *Mansur Satchu* [in support of Admiralty Claim No. 8 of 2010] in his affidavit of 7<sup>th</sup> July, 2010 thus deposed:

**“She is still owned by that company [Michail Arhangelos S.A.] and is still registered in the same registry. A temporary registration procured for that vessel from St. Kitts and Nevis to the Republic of Panama shows that the Motor Vessel ‘Michail Arhangelos’ was still registered in Panama under the ownership of Michail Arhangelos S.A. until 7<sup>th</sup> June, 2010”.**

That evidence is confirmed by *Captain Ramesh Singh* [for the Intervener] who thus deposes in his affidavit of 19<sup>th</sup> July, 2010:

**“THAT it is not disputed by the claimant that the motor vessel previously known as ‘Michail Arhangelos’ was registered in Panama in December 2009 as is evident from the ....affidavit and .....replying affidavit of Mansur Satchu as well as all the other evidence laid before this.....Court. The continued insistence of the claimant and Mr. Mansur Satchu that the said motor vessel....is still registered at the Registry of St. Kitts and Nevis has no legal or factual basis whatsoever”.**

Relying on the affidavit of *Captain Ramesh Singh* of 19<sup>th</sup> July, 2010 and its several annexures, *Mr. Khagram* made certain submissions: (i) the Motor Vessel “Michail Arhangelos” was validly registered within the Merchant Marine of Panama on 30<sup>th</sup> December, 2009; (ii) the registered owner was Michail Arhangelos SA; (iii) the patent number was shown as D-1992-2380 PEXT, expiry date – 25<sup>th</sup> June, 2010; (iv) the vessel was deleted from the Panamanian Registry on 11<sup>th</sup> June, 2010 – due to a new registration in the Merchant Marine of Tanzania; (v) “no liens or mortgages either provisional or permanent appear to have been registered within the Public Registry, while the vessel remained in Panama”: the relevant annexure is signed by one *Guillermo Marquez*, an Attorney practising maritime law before the Supreme Court of Panama, who further states –

**“...we can confirm that the provisional registration of a title and of a mortgage, has the same effect and value as a permanent registration, in accordance with Articles 10 and 252 of Law No. 55 of 2008, for a period of six months as of the date of the provisional registration of the title and/or the mortgage, respectively, within the [record] of the Public Registry”.**

The Attorney also made the trite statement on the standing in law, of mortgages:

**“We can further confirm that, in accordance with Panamanian law, a lien consisting in a mortgage over a vessel of [the] Panamanian Registry must be registered within the Public Registry in order to [carry effect as a basis for] in rem action against the vessel to [a] creditor, otherwise it [will be] in personam against [the] debtor.....”**

## VI. MARITIME LIENS, CLAIMS IN REM, AND CONTESTED FACTS

*Mr. Khagram* submitted that there were no valid claims *in rem*, as against the Motor Vessel “Star 7”; and this is quite contrary to the depositions of learned counsel *Mr. Justus Mulwa Nduya* [for the claimant in Admiralty Claim No. 3 of 2010] in his affidavit of 14<sup>th</sup> May, 2010; the deponent thus deposed:

**“...information received from the Panama Ship Registry from one Bettina Luna who is the Deputy Chief of the Registry Department of Panama as at 13<sup>th</sup> May, 2010 MV ‘Michail Arhangelos’ is owned**

**by Michail Arhangelos S. A. and not Star Matrix Limited as alleged by the Intervener.....”**

The deponent went on to depose, in relation to the *in rem* claim:

**“I verily believe that the alleged change of ownership by the Intervener is a sham, void and fraudulent and intended to obscure and obstruct the recovery of the Judgment herein and the same contravenes the Merchant Shipping Act, 2009 which prohibits the flying of two flags simultaneously as is happening in this case where the.....Intervener is now flying a Tanzanian flag when the registration port is Panama and hence the registered flag”.**

By **Mr. Khagram’s** submission, the evidence showed that the registration of the motor vessel in St. Kitts and Nevis had expired on **30<sup>th</sup> November, 2009**, while ownership remained with Michail Arhangelos S. A. On the question as to who, between Michail Arhangelos S. A. and Star Matrix Limited, now owns the motor vessel, counsel urged that this was a substantive question for resolution only by way of trial of the main cause.

The more relevant question at this stage, counsel urged, was the state of liens: and he submitted that since the registration of the motor vessel transferred to Panama immediately upon the expiration of the St. Kitts and Nevis registration (on **30<sup>th</sup> November, 2009**), it followed that as **no mortgage was registered** at the Panama Registry, the motor vessel had no mortgage claims attaching to her *in rem*; and her ownership later passed on unencumbered, to Star Matrix Limited. Counsel urged that even though it was now contended for the claimant in Admiralty Claim No. 8 of 2010 that there was impropriety in the acquisition of the motor vessel by the Intervener, the affidavits proffered by that claimant spoke differently:

“nowhere has wrong-doing been alleged against the current owners who are a **bona fide** purchaser and who have exercised due diligence”.

Counsel submitted that the claimants herein, as unregistered mortgagees, could make no claim against the Intervener. For the law regulating the priority of claims against shipowners, counsel relied on a passage from **Halsbury’s Laws of England**, 4<sup>th</sup> ed. (1983), Vol. 43, at para.143:

**“The rights of unregistered mortgagees are postponed to those of registered mortgagees, even though the date of the unregistered mortgage is antecedent to that of the registered mortgage, and even though the existence of the unregistered mortgage was known to the registered mortgagee when he took his mortgage. The rights of the unregistered mortgagee are also postponed to those of a purchaser in good faith for value without notice from the legal owner, and to those of all persons with prior equities”.**

Counsel submitted that in the instant case, the rights of the claimant are postponed to those of Star Matrix Limited.

It followed, **Mr. Khagram** submitted, that the consent Judgment of **30<sup>th</sup> March, 2010** was a Judgment **in personam** and not *in rem*; and that it was after the said release from arrest, that the vessel was sold to Star Matrix Limited – before the claimants sought to enforce their claim.

**Did the Court have jurisdiction to issue a warrant of arrest after the consent Judgment allowing release of the ship, on 30<sup>th</sup> March, 2010?**

**Mr. Khagram** urged that the claimants had not shown the existence of a **registered mortgage** in their favour: and therefore, they had no claim against the Intervener, on an *in rem* basis; meaning that the **res** could no longer be arrested upon their demand. For this reason, learned counsel submitted, the Court had no jurisdiction to issue a warrant of arrest or to make any orders based on the purported mortgage.

Counsel submitted that the Intervener had a right to purchase the motor vessel at the material time: because the ship had provisional registration in Panama for six months, and such registration is as good as final registration; it was during the said six-month period of validity, that Star Matrix Limited purchased the motor vessel.

**Mr. Khagram** submitted that the registration of the motor vessel at the Tanzanian Registry was proper in every respect, as the Tanzanian Merchant Shipping Act, 2003 (Act No. 21 of 2003) did not require a “certificate of deletion” from the previous ship registry; the relevant provision is s. 50(2) of the Act, which thus provides:

**“When a ship is registered anew, her former register shall be considered as closed, except so far as relates to any unsatisfied mortgage or existing certificates of sale or mortgage entered thereon, but the names of all persons appearing on the former register to be interested in the ship, as owners or mortgagees shall be entered in the new register, and the registration anew shall not affect the rights of any of those persons”.**

On that basis, counsel urged that the Panamanian registration was **considered as closed**, in Tanzanian law. Consequently, counsel submitted, it could not be said the Motor Vessel “Star 7” was flying two flags.

**Was it tenable in law to arrest the motor vessel after its release by the terms of the consent Judgment of 30<sup>th</sup> March, 2010?**

Counsel answered this question in the negative, on the authority of *The "Alletta"* [1974]1Lloyd's L.R. 40 in which the following passage appears (*Mocatta, J.*, at p. 50):

***"If a ship may be arrested after judgment on liability has been obtained against her and she is by the date of the arrest the property of a third party who had bought her without knowledge of the maritime lien, grave injustice may be done. The third party may have no right of indemnity or, which is less unlikely supposition, his indemnity may be worthless. His vendor may, through lack of adequate funds, incompetent legal advice or other reason, not properly and fully have contested the issue of liability. Despite [counsel's] efforts to answer these supposed circumstances by saying that the Court would find some method of re-opening the issue of liability so as to enable the third party to contest it properly and anew, I cannot see how such an end could be achieved."***

## **VII. WHAT IS THE SCOPE OF THE ADMIRALTY JURISDICTION OF THE HIGH COURT? DOES IT COVER THE MORTGAGE CLAIMS HEREIN?**

While *Mr. Khagram* sought the discharge of earlier orders on the basis that the Court lacks jurisdiction, *Mr. Kinyua* contended that this Court has a wider jurisdiction in Admiralty matters, than the Supreme Court of England –founded firstly upon the Constitution, and secondly upon the statute law, notably the Judicature Act (Cap. 8, Laws of Kenya). Counsel submitted that the terms of the power grant in the Judicature Act were broad *ex facie*, with s. 4 providing:

***"(1) The High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or in territorial waters, or upon any lake other than navigable inland waters in Kenya.***

***"(2) The admiralty jurisdiction of the High Court shall be exercisable .....as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.***

***"(3) In the exercise of its admiralty jurisdiction, the High Court may exercise all the powers which it possesses for the purpose of its other civil jurisdiction".***

*Mr. Kinyua* urged that the effect of the foregoing provision is to confer upon this Court wider powers than are vested in the English courts, under the Supreme Court Act of 1981; and that such extended powers apply to the sphere of Admiralty as in other areas of civil law. Counsel submitted that whereas the English Supreme Court Act, in s. 20 (1) and (2) strictly defined the Admiralty jurisdiction of the High Court, s. 4(2) of Kenya's Judicature Act gave a wider discretion, which incorporates also room for interpretation based on international law and the comity of nations. Counsel submitted that the opening to the comity of nations in particular, substantially widened the discretion of the Court – and so it should entertain the claimant's cases without any constraints. Such an expansive approach to jurisdiction, it was urged, entailed that this Court should take into account foreign law as well as all relevant treaties even those not ratified by Kenya.

The purpose of such an elastic jurisdiction was so as to accommodate the claimant's case: that "when a bank lends money to a ship, on the security of a mortgage, [the mortgagee] is secure in the knowledge that any Court will enforce those rights". *Mr. Khagram* had questioned the legal basis of the mortgages claimed to be still attaching to the subject motor vessel, in Admiralty Claim No. 8 of 2010; but *Mr. Kinyua* contended that the said mortgages were valid, on the basis of the International Convention on Maritime Liens and Mortgages, 1993. On the strength of the said Convention, learned counsel submitted that the process of purchase, transfer and registration of the subject motor vessels as "Star 7", was a nullity. Counsel was relying on Article 3 of the said Convention, which thus provides:

***"With the exception of the cases provided for in articles 11 and 12, in all other cases that entail the deregistration of the vessel from the register of a State Party, such State Party shall not permit the owner to deregister the vessel unless all registered mortgages, 'hypothèques' or charges are previously deleted or the written consent of all holders of such mortgages, 'hypothèques' or charges is obtained. However, where the deregistration of the vessel is obligatory in accordance with the law of a State Party, otherwise than as a result of voluntary sale, the holders of registered mortgages, 'hypothèques' or charges shall be notified of the pending deregistration in order to enable such holders to take appropriate action to protect their interest: unless the holders consent, the deregistration shall not be implemented earlier than after a lapse of a reasonable period of time which shall be not less than three months after the relevant notification to such holders".***

**Mr. Kinyua** submitted that the foregoing provision applied to Tanzania, Kenya and Panama, as these countries had acceded to the Convention; and so it was not possible for the Motor Vessel “Michail Arhangelos” to be registered in Tanzania as “Star 7”, without a “certificate of deletion” from Panama or St. Kitts and Nevis; thus Michail Arhangelos S. A. must be regarded as still being the owner – and still cognizant of the fact that the ship remained under arrest in Kenya.

**Mr. Kinyua** submitted that the motor vessel was deregistered in Panama only on **11<sup>th</sup> June, 2010**, well after the registration in Tanzania – whereas it should have been deregistered before the new registration. Such a situation, counsel submitted, was inconceivable in law, because “a Tanzanian vessel must never use two names....., ‘Star 7’ and ‘Michail Arhangelos’.” Counsel submitted that as at **11<sup>th</sup> June, 2010** the subject motor vessel was registered in three different countries – St. Kitts and Nevis, Panama and Tanzania – and the Intervener has no right to name her as “Star 7”, since the written permission of the Tanzanian Registrar of Ships had not been given as required under s.42 (1) of the Merchant Shipping Act, 2003; and that the St. Kitts and Nevis Registry-entry on the Motor Vessel “Michail Arhangelos” has not been closed, though the vessel was deleted from the Panama Registry on **11<sup>th</sup> June, 2010**.

**Mr. Kinyua** submitted that even though the registration of the Motor Vessel “Michail Arhangelos” in St. Kitts and Nevis expired on **30<sup>th</sup> November, 2009** the two existing mortgages in favour of the claimant in Admiralty Claim No. 8 of 2010 survived, as they are protected under the International Convention on Maritime Liens and Mortgages, 1993, as well as under the laws of St. Kitts and Nevis, Tanzania, and Kenya.

Counsel urged that the Intervener is a stranger in the proceedings, in respect of Claim No. 8 of 2010: for the prayers in that claim relate only to the Motor Vessel “Michail Arhangelos”; and the Owners of the Motor Vessel “Michail Arhangelos” have not denied that upon their ship, there were two mortgages executed or registered.

**Mr. Kinyua** continued to urge that the Kenya High Court’s Admiralty jurisdiction is broader than its English counterpart; and he submitted that the authorities relied on by the Intervener, which mainly came from England, were founded on statute and common law, whereas the Kenyan Judge drew a broader jurisdiction from the competence to interpret the written Constitution. Counsel also submitted that the authorities relied on by the Intervener “do not deal with the effect of fraud on existing claims”. **Mr. Kinyua** urged that the Kenyan Court has a wider jurisdiction than the English Court in Admiralty matters involving fraud: “If the Court is satisfied even on a *prima facie* basis that fraud was the basis of the registration, then the Court has the obligation to protect the mortgage”. Counsel urged that the several authorities relied on by the Intervener do not take into account the international maritime conventions to which Kenya is a party.

On this novel point, based on a comparison of the Admiralty jurisdiction in Kenya and in England, **Mr. Khagram** for the Intervener, urged that this Court should be guided by case authority: and a primary such authority is the Court of Appeal decision, *Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd.* [1989]KLR1. That Court began by stating the threshold character of *jurisdiction*, in any decision-making by a Court (*Nyarangi, JA* at pp. 14-15):

**“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step”.**

**Mr. Khagram** contested the submission by **Mr. Kinyua**, that the language of s. 4(2) of the Judicature Act (Cap. 8) as read together with international law and the comity of nations, in some way extended the jurisdiction of this Court beyond the limits of the Admiralty jurisdiction as practised in the Supreme Court of England. **Mr. Khagram** doubted that this Court can go beyond the jurisdictional question and hold a full trial on matters such as the ownership of the Motor Vessel “Star 7”; counsel submitted: “this is what ‘Lillian S’ rejects, because of the jurisdictional issue.....The contention regarding the ownership of ‘Star 7’, on *viva voce* evidence, is unacceptable – because of the question of jurisdiction.”

Counsel invoked the High Court’s (*Mwera, J.*) decision in *Leonard Sande Ngwabe v the Owners of Motor Vessel “Alpha Manyara”*, Mombasa H.C. Admiralty Claim No. 12 of 2004, on the extent of the jurisdiction:

**“.....[it] is apparent that [the] admiralty jurisdiction of the High court is basically different from [the] other jurisdictions conferred on it to exercise. It is specifically set out by an Act of Parliament as per s.60 of the [1969] Constitution.... Only that while exercising that jurisdiction it may also exercise**

***all powers it [holds] in its civil jurisdiction. This Court understands that to mean that the High Court in its capacity as an admiralty court entertaining matters arising from the high seas, territorial waters, etc. cannot mix them with claims of trespass ... on land [or] property, defamation, sale of goods and services... if these happen to feature and unless they fall within the Supreme Court Act (1981) of England.”***

Counsel submitted that the claimants had the initial burden to show that they were properly invoking this Court’s Admiralty jurisdiction, but instead, they “were only trying to show weaknesses in the [Intervener’s] case”; and that this Court should hold that it has no jurisdiction. It was urged that the claimants’ submissions were out of place, for being concerned with trial-related facts, rather than the initial question of ***jurisdiction***.

***Mr. Khagram*** submitted that the notion of claim ***in rem*** was being proffered as the basis for challenging the ownership of the motor vessel by Star Matrix Limited; but that the Court lacked the power to reverse the said ownership.

In ***Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd*** [1989] KLR 1 the Court of Appeal had clearly defined this Court’s Admiralty jurisdiction (at p. 3, per ***Nyarangi, J.A.***):

***“The Admiralty jurisdiction of the High court is equal to that possessed by the High Court in England. The High Court applies the same law and procedure as applies in England.”***

The Court went further to consider the Supreme Court Act (1981), and the relevant part reads as follows:

***“20. ....***

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

***(2) The questions and claims referred to in subsection (1) 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 or as to possession, employment or earnings of that ship;***

***(c) any claim in respect of a mortgage of or a charge on a ship or any share therein.....”***

Section 21 of the Act provides:

***“(1) Subject to section 22, an action in personam may be brought in the High Court in all cases within the Admiralty jurisdiction of that Court.***

***“(2) In the case of any such claim as is mentioned in section 20 (2) (a), (c) [i.e. claim in respect of a mortgage or a charge on a ship] or (s).... An action in rem may be brought in the High Court against the ship, or property in connection with which the claim or question arises.***

***“(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action in rem may be brought in the High Court against the ship, aircraft or property.”***

***Mr. Khagram*** submitted that even though, in Admiralty Claim No. 8 of 2010 two registered mortgages were alleged to exist, in reality there was ***none***: for, in any proof of the existence of a mortgage, jurisdiction arose only from s. 21 of the Supreme Court Act (1981) of England – but there was ***no registered mortgage*** in Panama.

Whereas the claimant had contended that the duty fell on the owners of the vessel to ensure the registration of the mortgages in Panama, ***Mr. Khagram*** took the position that it was for the mortgagees to ensure that their mortgages were duly registered – this was provided for in article 251 of Law No. 55 of 2008, of the Republic of Panama.

Counsel submitted that the High Court had no jurisdiction, not only because the mortgages were unregistered and so were not maritime liens and not enforceable by action ***in rem***, but also because, release of the motor vessel after arrest, on the basis of the consent Judgment, meant that the settlement was now incorporated in the consent Judgment, and there was no further jurisdiction to order arrest; and any subsequent claim had to be based on a new cause of action. For this reason, ***Mr. Khagram*** urged that the injunctions currently recorded against the motor vessel be discharged ***ex debito justitiae***.

## **VIII. SUPPLIES TO THE MOTOR VESSEL: WAS THIS A MARITIME LIEN? A CLAIM IN REM?**

The issue of ***jurisdiction*** is linked to the question whether the claim in Admiralty Claim No. 3 of 2010 was a claim ***in rem***: although ***Mr. Khagram*** disputed this, learned counsel ***Mr. Justus Mulwa Nduya*** had

filed proceedings captioned as proceedings *in rem*, and the claimant was seeking a warrant of arrest against the motor vessel, in execution and enforcement of a Judgment for U.S. \$ 1,390,000; the claimant was asking that the orders of **11<sup>th</sup> May, 2010** enjoining the Intervener be set aside, on the ground that the Intervener had no *locus standi*; the claimant was seeking judicial sale of the Motor Vessel “Michail Arhangelos”, for the purpose of satisfying the consent Judgment for U.S. \$ 1,390,000 in favour of the claimant.

**Mr. Mulwa** typified his client’s claim as a proceeding *in rem*, a claim against the motor vessel herself: on the basis that, on **30<sup>th</sup> March, 2010** a consent Judgment had been entered between the claimant and the Owners of the Motor Vessel “Michail Arhangelos” for U.S. \$ 1.39 million; that the parties to the consent Judgment agreed that the claimant was at liberty to reserve his rights in the suit, and to execute the Judgment if there was default on any of the terms; that the consent Judgment subsists to-date and has remained unchallenged; that the Intervener was not a party to the said consent Judgment.

According to this claimant, the motor vessel appears, up to **30<sup>th</sup> November, 2009**, to have been registered in St. Kitts and Nevis, and the St. Kitts and Nevis registry shows the owners to have been Michail Arhangelos S.A.; thereafter the motor vessel was provisionally registered in Panama, up to and including **11<sup>th</sup> June, 2010**; that the registry details in Panama up to **11<sup>th</sup> June, 2010** show that the Motor Vessel “Michail Arhangelos” retained the same IMO number, i.e. 7637266, and ownership remained with Michail Arhangelos S.A.; that up to **11<sup>th</sup> June, 2010** there was no record in Panama of any interest in the motor vessel by Star Matrix Limited (the Intervener); that the motor vessel was deleted from the Panama Registry on **11<sup>th</sup> June, 2010**; that long before the “certificate of deletion” was obtained from the Panama Registry, the motor vessel had been registered in Tanzania, on **12<sup>th</sup> April, 2010**, as “Star 7”.

**Mr. Mulwa** submitted that the Intervener had acted in violation of the Tanzanian Merchant Shipping Act, 2003, because that Act requires a “certificate of deletion” from the previous foreign registry, before registration in Tanzania can be granted; and that the claimant had already commenced proceedings for arrest and sale when the motor vessel was deleted from the Panamanian Registry on **11<sup>th</sup> June, 2010**. Counsel submitted that when the claimant first came before this Court (**16<sup>th</sup> April, 2010**) and when the claimant applied again before this Court (**14<sup>th</sup> May, 2010**), the motor vessel was still registered in Panama and was owned by Michail Arhangelos S.A.; and therefore, the right party against whom to claim on both occasions was Michail Arhangelos S.A.

There was a Bill of Sale dated **8<sup>th</sup> April, 2010**, bearing the following content:

***“We, Michail Arhangelos S.A. (hereinafter called ‘the Transferors’), Marshall Islands in consideration of the sum of United States Dollars One Million One Hundred Thousand only (USD 1,100,000) paid to us by M/S Star Matrix Limited of Hong Kong (hereinafter called ‘the transferee(s)’ the receipt whereof is hereby acknowledged, transfer 100/100 shares in the ship above particularly described, and in her boats and appurtenances, to the said Transferees.”***

***“Further, we the said Transferors for ourselves and our successors covenant with the said Transferee(s) and their assigns, that we have power to transfer in manner aforesaid the premises hereinbefore expressed to be transferred and are certifying that the vessel is free from all Encumbrances, Maritime Liens and any other debts whatsoever.”***

The Bill of Sale is signed and stamped by **Stelios Poulidakis**, as Managing Director of Michail Arhangelos S.A.

**Mr. Mulwa** contested the trite position in law, urging that the aforesaid Bill of Sale did **not** pass the property in the motor vessel to the Intervener, because “it was in all material respects false and contained falsehoods”. Counsel submitted that the certification in the Bill of Sale that the subject motor vessel was free from all encumbrances “was false”: “The motor vessel was on that very day encumbered by the arrest warrant [in Admiralty Claim No. 1 of 2010].” Counsel submitted that the subject ship had still other encumbrances: “the crew in East Africa were making a claim on the defendant [Michail Arhangelos S.A.]; and .....there was also a debt arising from a consent Judgment before the Court.”

**Mr. Mulwa** urged that the two parties had executed a Bill of Sale which they knew to be false, and attributed sham character to the sale-and-purchase transaction; and he submitted that the transaction was intended to defraud creditors.

Counsel submitted, from the evidence, that the owners of the motor vessel, acting through a local firm of Advocates, M/s Cootow & Associates Advocates, filed (on **13<sup>th</sup> April, 2010**) a caution, which operates like bail-pending-arrest; they were giving a security of U.S. \$ 200,000.00 as part of the caution: and then

the Motor Vessel “Star 7” was registered the following day (**14<sup>th</sup> April, 2010**). Counsel questioned the security thus given, firstly because it was not actually deposited, and secondly, because it was not enough to cover the debts on the Motor Vessel “Michail Arhangelos”. **Arrest** of the vessel, counsel urged, was necessitated by the insufficiency of the security offered by the Intervener.

**Mr. Mulwa** urged, in effect, that the status of his client’s claim as a claim *in rem*, even if it turned out to be not so, was not to be questioned by the Intervener, for the Intervener was not a party to the consent Judgment.

**Mr. Mulwa** submitted that the said consent Judgment had terms which justified the actions taken against **the motor vessel**: the Owners of the Motor Vessel “Michail Arhangelos” had agreed with the claimant that, in default of any single term of the Judgment, the claimant would be at liberty to execute and enforce the Judgment; and certain terms of the Judgment had been breached by Michail Arhangelos S.A. – and so “the claimant acquired the right to enforce the Judgment.”

Counsel submitted that there were specific reasons for the claimant to seek to enforce the Judgment: the proposed buyer was to send confirmation to the claimant by **29<sup>th</sup> March, 2010** that this buyer would make part-payment to the claimant, in the sum of U.S. \$ 450,000.00 – but this undertaking was not kept; the buyer was to issue notice on **29<sup>th</sup> March, 2010** that the motor vessel was ready to sail to Chittagong – but this was not done; the owners were to arrange for confirmation from the buyers, that the buyer would transfer the money to the claimant; and by the fourth order, the owners were to agree to accept the claimant’s application at Mombasa Port.

Counsel submitted, on the question of **jurisdiction**, that the Owners of the Motor Vessel “Michail Arhangelos” had, under the consent, agreed that this Court would continue to retain jurisdiction in the case then pending – in case of any default by the owners. It was the claimant’s case that the owners had defaulted on the terms of the agreement – and that agreement was urged to be “personal” to the claimant and Michail Arhangelos S.A., the Intervener being a stranger.

Since the claimant’s claim had been described in the application papers as a claim *in rem*, counsel contended that the proceedings remained *in rem* throughout. On that basis, counsel urged that the claimant was entitled to seek a warrant of arrest against the motor vessel.

**Mr. Mulwa** urged that this Court had jurisdiction to make orders of arrest, because this was a claim *in rem*, and he relied on the authority of **Republic of India v. India Steamship Company Limited** [1997] 3WLR 818; [1998] 1 Lloyd’s Rep. 1 HL (E) in which it was held that:

**“...a [claim] 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 [claim form], or, where a [claim form] is deemed to be served, as a result of the acknowledgement of the issue of the [claim form] by the defendant before service”.**

Counsel submitted that the defendants, who are the owners, had filed an acknowledgement of service: “From that moment, the owners became parties to the proceedings *in rem*; so the subsequent judgment issued is both a judgment *in rem* against the vessel, and a judgment *in personam* against the owners”. Counsel urged that an owner who acknowledges service, “unconditionally submits himself to the jurisdiction of the Court”: and in those circumstances, a claimant who obtains judgment in the proceedings has three options for realizing the judgment – (i) enforcing against the **res**; (ii) proceeding against the owner’s properties (including the released vessel); (iii) proceeding against **both** the owner and the vessel, especially if the claim exceeds the value of the vessel.

Counsel urged that there was no significance to the change of names, from “Michail Arhangelos” to “Star 7” on **12<sup>th</sup> April, 2010**: because the Intervener had not produced any documents to show **how** the name-change took place; it was not shown that consent had been obtained from the ship registries in Panama or Tanzania; and it was not shown that a notification of name-change had been given to the International Maritime Organization; but, by contrast, it is the claimant who had produced documents showing that, as at **26<sup>th</sup> April, 2010** the motor vessel was known as “Michail Arhangelos”, and its owners were Michail Arhangelos S.A. with the port of registry as **Panama**.

**Mr. Mulwa** submitted that the claimant did not know how the ownership of the motor vessel changed; but when this Court was moved, the claimant satisfied it that **there was a debt** against the ship, and so the Court granted an **arrest warrant**: in this respect the claimant initially satisfied the conditions for maintaining suit. Counsel submitted that the fact of **change of ownership** became a secondary question to the main question of upholding the **claimant’s rights**. Counsel defended such rights, and urged that the claimant had the right to have the motor vessel **re-arrested** after it had previously been released.

**Mr. Mulwa** contested the applicability to this case of **The “Alletta”** [1974] Lloyd’s LR 40 relied on by

the Intervener, especially on the principle that (*Mocatta, J* at p. 50):

***“If a ship may be arrested after judgment on liability has been obtained against her and she is by the date of the arrest the property of a third party who had bought her without knowledge of the maritime lien, grave injustice may be done.”***

Counsel distinguished *The “Alletta”* on the basis that some security had been given in that case, unlike in the instant matter; that in *The “Alletta”* the new owners were ignorant of any actual or potential claims; and that in *The “Alletta”* a period of ten years had elapsed between the first arrest and the second attempted arrest. Counsel submitted that in the instant case, the new owners filed a caution, suggesting they were aware of the existence of ***the claim and the debt***; “the [Intervener] knew of the judgment; that it had not been settled; and that they still had to deal with it.”

On the basis that Panamanian law was applicable to the Motor Vessel “Michail Arhangelos” at the material times, counsel urged that Law No. 55 of 2008 required the owners to ***clear their debts***; Article 4 of that Law provides:

***“Vessels shall be liable for the payment of the debts of the owner, whether ordinary or privileged, and creditors shall be entitled to claim against the vessel in that regard, even if the vessel is in the possession of a third party, as long as this liability continues to exist.”***

This provision, counsel urged, “still binds any third party for debts subsisting against the vessel when it is purchased or taken possession of”; that ***it matters not whether such debts are secured or unsecured***; and that ***such debts will follow the vessel and the third party.***

Counsel submitted that the sale of the vessel was void; but that even if the sale was held not to have been void, “the subsisting debt will still follow the vessel to the ***new owners***”; and that ***“subsisting debts include claims already commenced but not yet settled.”***

Article 15 of Panama’s Law No. 55 thus provides:

***“In the event of a voluntary sale, the title of a vessel shall be transferred to the buyer together with all liens and encumbrances, with the exception of such rights and privileges as may be specified in the corresponding deed.”***

Counsel urged that the seller is obliged to deliver to the buyer a ***list of outstanding debts*** on the vessel, to be included in the Bill of Sale; but that in the instant case, the seller purported to certify that the vessel was free of liens.

***Mr. Mulwa*** submitted that since the motor vessel, at the time of sale to Star Matrix Limited was flying the Panamanian flag, she was obliged to comply with the laws of Panama.

## **IX. WAS THE SALE OF THE MOTOR VESSEL TAINTED? IF SO, WOULD THIS AFFECT PREVIOUS DEBT- CLAIMS?**

It was claimed by the claimant in Admiralty Claim No. 3 of 2010 that the Bill of Sale which conveyed the ship to the Intervener was “falsified”, and that on this account the sale could not accord the Intervener a shield against existing claims. Counsel, in this regard, relied on *The Despina* [1982] 3 WLR 950 in which it was held (*Sheen, J*, at p. 951):

***“... a judgment creditor who has obtained a final judgment against the owner of a vessel by proceedings in rem in a foreign admiralty court could bring an action in rem to enforce the decree of the foreign court if the vessel arrived at a port within the jurisdiction and provided that she was still in the same ownership.”***

***Mr. Mulwa*** urged that the authority, *The Despina*, applied to the instant matter; for until ***11<sup>th</sup> June, 2010*** the subject motor vessel remained under the ownership of Michail Arhangelos S.A.; the vessel was at the Port of Mombasa under the same ownership, and with the jurisdiction of this Court; and that, therefore, the claimant had a right to seek the arrest of the motor vessel.

Counsel also relied on *The Gemma* [1899] p. 285 in which it had been held that the owners of a foreign vessel had, by appearing in an action ***in rem***, rendered themselves ***personally liable***; and that if the amount of bail given for the release of the ship was insufficient to satisfy the judgment, the balance outstanding could be enforced against any of the defendant’s goods and chattels including the released vessel if she came within the jurisdiction.

Counsel submitted that once a claim ***in rem*** is filed, it becomes a ***statutory lien***; and such a lien clings to the vessel immediately the action is commenced; and the lien follows the vessel into the hands of any third parties whether they had notice of the claim or not. So it was urged that from the moment the

claimant filed the case, the statutory lien attached to the vessel, and did not detach therefrom when judgment was entered.

Counsel also relied on *The “Helene Roth”* [1980] 1 Lloyd’s L.R. 477 in which the relevant principle is set out (*Sheen, J* at p. 480):

**“Merchant ships move freely all over the world. Sometimes they leave port before their owners have discharged their debts to those ashore who have supplied the ship with goods, materials or fuel, or to those who have repaired or equipped the ship, or to agents who have made disbursements on account of the ship. One of the functions of this Court is to assist creditors to obtain satisfaction of their claims. Accordingly, if a writ in rem is issued before any change in the ownership of the ship has occurred, a subsequent change of ownership would provide good cause for renewing the writ.....”**

*The “Helene Roth”* sheds light on the standing of the claimant’s debt-claim. In that case, the Court clearly stated the practical concerns that justified the **arrest** (or **re-arrest**) of a ship, and recognized the unlimited jurisdiction of the Admiralty Court, in a proper case. In *The “Helene Roth”* the Court was dealing with the position of Interveners – just as in the instant case; and the Court held (p. 481):

**“It would be surprising if the interveners had not protected themselves against a claim such as this one by taking an indemnity from the seller against any claims which attached prior to the sale. Even if the interveners did not take this precaution, I should not regard that as a good reason for depriving the plaintiffs of the security of the ship to satisfy any judgment they may obtain.”**

Of arrest (or re-arrest), the Court thus held (p. 481):

**“The right to arrest a ship is part of the Law of England and is recognized by international convention. It is a valuable weapon in the hands of any court. All shipowners are, or should be, aware of it.”**

**Mr. Mulwa** urged that this Court has jurisdiction to hear the claimant’s case, and to order the arrest of the subject motor vessel, in enforcement of the **in rem** judgment. Counsel asked that the Intervener’s application be dismissed, and the claimant be allowed to proceed with the claims.

## **X. ASSESSMENT OF FACT, LAW AND SUBMISSIONS**

### **(1) Questions of Jurisdiction**

The complex dispute coming up before the Court arose from the fact that both the claimants in Admiralty Claim No. 3 of 2010 and Admiralty Claim No. 8 of 2010 believed they were, in law, the holders of certain rights as against the Owners of the Motor Vessel “Michail Arhangelos”; that such rights were in the first place rights **in rem**; that the High Court had the jurisdiction to redress breaches of such rights by making appropriate orders; that any orders so made had to be complied with on an **in rem** basis, and that they could seek judicial orders for the sale of the motor vessel; that they could obtain orders of arrest against the motor vessel at the beginning, and they could thereafter, obtain warrants for the re-arrest of the vessel, so long as their entitlements had not yet been rendered in full; that they were entitled to orders of restraint against the vessel departing the Port of Mombasa. The two claimants believed too that the motor vessel “Michail Arhangelos” was secured against sale to a third party, so long as their claims lodged in Court against that vessel remained outstanding; and in any event, the claimants believed their said rights could not be defeated by a sale of the Motor Vessel “Michail Arhangelos” in a manner that did not comply with the provisions of certain international conventions, and certain laws of foreign countries.

Counsel for both claimants/respondents have had to deal with the question of jurisdiction, firstly as an essential condition to the validity of their claims; and secondly, as the nub of the Intervener’s case is that this Court had no jurisdiction to entertain the claimants’ cases, to make any orders in favour of the claimants, to issue arrest warrants against the motor vessel, or to order re-arrest of the motor vessel when once it had been ordered by consent Judgment to be released.

Therefore, the outcome of this matter, at this stage, turns on **jurisdiction**. The claimants, who found support in rules set out in international treaties and in the statutes of foreign countries, have substantially rested their cases on the principle that the Kenyan Court has a broad jurisdiction guided, firstly, by the **Constitution**, secondly, by the rules of **international law**, and thirdly, by the **comity of nations**: the essential point being that this Court should not be constantly guided by the case law from the Courts of England. But such a position has been vigorously contested by the Intervener, who urges that the base-line law on jurisdiction, in the context of the Judicature Act (Cap. 8, Laws of Kenya), was laid down by the Court of Appeal in *The Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Limited* [1989]KLR 1.

The relevant aspects of the jurisdictional question may be set out as follows:

- (i) What was the status of the debt-obligation which the claimant in Admiralty Claim No. 3 of 2010 attributes to the Owners of the Motor Vessel “Michail Arhangelos”? Was such debt a claim *in rem*? Could such debt, in law, be enforced against the *res*, the motor vessel? Did such a debt, at any time, become a claim *in rem*? Did this Court have the jurisdiction to entertain the claim, and to enter Judgment? Did this Court have the jurisdiction to order arrest of the motor vessel in connection with such a debt-claim? If there was non-compliance with the terms of the Judgment, did this Court have jurisdiction to order the re-arrest of the motor vessel? Has the claimant established the validity of an *in rem* claim which accords this Court jurisdiction to order the sale of the motor vessel? If the claimant has an *in rem* claim against the motor vessel, does the claimant also have an *in personam* claim against the owners? If the Court lacked jurisdiction, should it now order the release of the motor vessel?
- (ii) In relation to the claim in Admiralty Claim No. 3 of 2010, is it relevant that while the claim existed, the motor vessel was sold to third parties? Is that a claim *in rem*, and does it bind the third parties? Does the Court have jurisdiction in relation to the terms of *transfer of title*, or in relation to the *rights of the third parties*? If the Court lacks jurisdiction in relation to the claims of third parties, should it order release of the motor vessel from arrest?
- (iii) Does this Court have jurisdiction to inquire into the modalities of the sale and transfer of the Motor Vessel “Michail Arhangelos” to Star Matrix Limited, as “Star 7”?
- (iv) With regard to the mortgage-claims in Admiralty Claim No. 8 of 2010, what was the status of these mortgages in law? Were these mortgages registered, were they valid, did they create any rights *in rem*? Did the status of these mortgages accord this Court jurisdiction in Admiralty law, to make orders against the Owners of the Motor Vessel “Michail Arhangelos”? Could the Court issue orders of arrest against the Motor Vessel “Michail Arhangelos”?
- (v) On the jurisdictional question, is it relevant that third parties acquired the said motor vessel and re-registered it as “Star 7”?

## (2) *Recalling Basic Facts*

On the face of the complaints, and on the bare facts of the preliminary stage, the High Court issued arrest warrants against the Motor Vessel “Michail Arhangelos” on **24<sup>th</sup> March, 2010**. But on **29<sup>th</sup> March, 2010**, the owners of the motor vessel made a “Settlement Agreement” with the claimant in Admiralty Claim No. 3 of 2010. It is necessary to set out the substantive terms of this agreement, as they were later to be the basis of a Judgment which has also become relevant in relation to jurisdiction; and it should here be stated that, where consensus between parties takes the form of a lawful settlement, it is the judicial policy to sustain the same.

The settlement begins by stating that there is, indeed, a debt on the part of the owners, Michail Arhangelos S A:

***“[Owner] is aware that there is [an] arrest order by Mombasa Court dated 24<sup>th</sup> March, 2010 covering [the] outstanding debt. Total outstanding is USD 1,390,000 – covering USD 869,511 + interest (% 2 monthly) covering bunker supplies [for] 2007 and 2008 to MV Michail Arhangelos secured by maritime lien”.***

It emerges that the parties were privy to the fact that the motor vessel was *due to be sold*; this is clear from the following terms of the settlement:

***“Owner [agrees] to pay USD 450,000 – from sale of the vessel as per attached MOA within 4 banking days when the vessel gives notice of readiness in Chittagong on 29<sup>th</sup> March, 2010: Buyer Australi Bangladesh Trading Pty Ltd. in Victoria, Australia will arrange the payment to Phaedra Maritime SA’s authorized account.”***

On the modality of payment, the “Settlement Agreement” stated:

***“Owner will arrange confirmation in writing from buyer that the buyer will transfer USD 450,000 to Phaedra Maritime SA’s authorized account and remain balance of USD 166,854 – or any balance will be transferred by mutual instruction of supplier and Destel Marine Ltd. from sale of vessel as per terms of MOA. Destel Marine Ltd and Supplier will make agreement [for] payment on remaining balance separately”.***

The “Settlement Agreement” provided for further communication between the parties, at a later stage:

***“Owner will inform [on] the vessel position and Notice of Readiness [upon] arrival [at] Chittagong to Supplier on time and also [provide information on] whether there would be any cancellation and breach of [the] MOA.”***

Not only did Michail Arhangelos SA participate in the Settlement on the basis that a *maritime lien* was

involved, but they also accepted jurisdiction, by the following term:

**“Owner will agree to accept [the Application Notice] in [the] Mombasa Court and, later [on] the same day, [the] Supplier will [accept discharge of] the arrest order in [the] Mombasa Court. [The] Supplier reserves legal rights in [the] Mombasa Court in case of any default by the owners.”**

The parties, by the “Settlement Agreement” contemplated possible disputes, and made due arrangements in the following provision:

**“5. Law and arbitration: Gencon 1994 C/P 19 (b) arbitration clause is applied as: Should any dispute arise out of this Agreement, the dispute shall be referred to a three-person arbitration panel in the City of New York, one person to be appointed by each of the parties hereto, and the third person by the two so chosen; their decision or that of any two of them shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Agreement shall first be governed by the Federal Maritime Law of the United States. If an issue of state law shall govern an issue in the dispute, then laws of the State of New York shall apply. The proceedings shall be conducted in accordance with the Rules of the Society of Maritime Arbitrators, Inc.”**

On the following day, 30<sup>th</sup> March, 2010 the Admiralty Marshal entered a consent Judgment embodying the “Settlement Agreement”, in the following terms:

**“1. By consent final Judgment be and is hereby entered for the claimant Phaedra Maritime S.A. against the defendant, The Owners of Motor Vessel “Michail Arhangelos” for the total sum of U.S. Dollars 1,390,000 all inclusive and which shall be deemed a maritime lien over the Motor Vessel “Michail Arhangelos.**

**“2. The defendant to pay the sum of U.S. Dollars 450,000 between the 25<sup>th</sup> April, 2010 and 30<sup>th</sup> April, 2010 in terms of the separate Settlement Agreement dated 29<sup>th</sup> March, 2010 [made between] the claimant and the defendant.**

**“3. The separate Settlement Agreement dated 29<sup>th</sup> March, 2010 reached between the claimant and the defendant be and is hereby deemed part of this consent final Judgment.**

**“4. The arrest warrant issued on the 24<sup>th</sup> March, 2010 against the Motor Vessel “Michail Arhangelos” be and is hereby discharged and/or set aside and the said motor vessel be discharged and released from arrest in this claim.**

**“5. In default on any single term of this consent Judgment, the claimant be at liberty to enforce and execute this final Judgment against the defendant. The consent is signed by both parties”.**

Although the parties had regulated their dispute on the basis of a consent which was incorporated in a final Judgment, it is apparent that each of them lost confidence in the commitment of the other; for, on 12<sup>th</sup> April, 2010 the defendant sought to lodge a caution against arrest of the motor vessel; and the claimant, on 16<sup>th</sup> April, 2010 obtained restraint orders against the motor vessel sailing out of Mombasa Port. By that date the motor vessel had already been sold to Star Matrix Limited, which on the same date filed the Application Notice which is the subject herein. On 30<sup>th</sup> April, 2010 the claimant in Admiralty Claim No. 8 of 2010 obtained an arrest order against the Owners of the Motor Vessel “Michail Arhangelos”, even though it had by then been sold and re-named “Star 7”.

### **(3) Admiralty Claim No. 3 of 2010**

This claim, to the full knowledge of the parties, came as a claim *in rem*, and it was received as such. Was it truly a claim *in rem*? What was the implication for the Court’s jurisdiction?

By the “Settlement Agreement”, the defendant not only acknowledged indebtedness, but also conceded that the debt constituted a *maritime lien*. In the decision of the High Court of Sindh at Karachi, Pakistan, in *M.V. Goloz ex M.V. Mustafa Bey v. Trukuaz Deniz Hizemetlty Tasimacilik TIC Ltd & Another*, Admiralty Appeal No. 05 of 2009, it was held (*Mushir Alam, J.*):

**“Maritime lien is a substantive right, which springs into action and clings to the delinquent vessel instantaneously the moment [the] incident of mischief is done by or for the ship. It is [an] invisible [legal] claim, which [clings] to the vessel like a leech and follows in the hands of [the] bona fide purchaser for value and without notice; [the] only exception is where change in ownership occurs on account of judicial sale; it is enforceable by action in rem against the res.”**

From the foregoing principles, and in the light of *The “Helene Roth”* [1980] 1 Lloyd’s L.R. 477, which deals with the broad question of indebtedness on the part of ships, I must draw the conclusion that the claimant in Admiralty Claim No. 3 of 2010 had at first brought before this Court a claim *in rem*, and the

Court did indeed have jurisdiction to entertain the matter, as was well acknowledged in the “Settlement Agreement” itself.

The said claim was the subject of a **mutual agreement**, which was then incorporated in a final Judgment by the Admiralty Marshal, on **30<sup>th</sup> March, 2010**, and it follows that the matter was now concluded, as there was no application by any party to re-open the consent Judgment.

Although learned counsel, **Mr. Mulwa**, submitted that he had acted on the terms of the consent Judgment by obtaining a re-arrest of the motor vessel, for the reason that the owners had not complied with “some” of the terms of the Judgment, it is now clear to me that the terms of the Judgment, as read together with the “Settlement Agreement”, were not free of ambiguity: but a fair construction of the same would not favour arrest of the motor vessel. Any substantive dispute arising from the terms of the “Settlement Agreement” has been committed to arbitration, and the choice of forum of arbitration, as well as the applicable law, is defined in detail in the consent; I hold that these aspects of the “Settlement Agreement”, and thus of the final judgment, are intended as the primary basis for the resolution of any dispute arising. It follows that, with the said judgment, the matter was **res judicata**, and it was improper to re-activate the Court’s powers to make orders re-arresting the motor vessel. The Court had no jurisdiction to re-arrest the motor vessel, just as it had no jurisdiction to issue orders restraining the ship from departing the Port of Mombasa.

An aspect of the “Settlement Agreement” deserving of special note is the provision for **arbitration**, as the preferred device for the resolution of any dispute arising. Not only must this Court uphold that consensus on the part of the parties, the Court must recognise the status of an arbitral formula, aside from the judicial forum. **Private contract** is indeed one of the bases of jurisdiction for a Court, in non-criminal process; and it is entirely up to the contractants to decide the kind of forum in which their dispute is to be heard and determined. It has been held by the Court of Appeal in **Mukisa Biscuit Manufacturing Co. Ltd. v. West End Distributors Ltd.** [1969] EA. 696 that a party may raise a decisive objection to the jurisdiction of a Court on the basis that “the parties are bound [by] contract.....to refer the dispute to arbitration” (*per Law, JA* at p.700).

A related question is the significance of the sale and transfer of the ship to Star Matrix Limited on **8<sup>th</sup> April, 2010**. Both respondents herein have urged that the transfer was improper, and should be regarded as a nullity. It is clear that even if the vessel had remained in the hands of Michail Arhangelos S.A., the Court would have no jurisdiction to re-arrest her, or to restrain her from leaving Mombasa; but such is now the case **a fortiori** where the ship has passed on to Star Matrix Limited, and under a new name “Star 7”. Thus, the many technical questions raised by counsel about possible defects in the registration effected in Zanzibar on **12<sup>th</sup> April, 2010** are, as a matter of law, not relevant. As already noted hereinabove, the claimant in Admiralty Claim No. 3 of 2010 had been well aware that the motor vessel was being sold, and it was precisely that opportunity for a sale, that would occasion the making of certain payments to defray the outstanding debt. The claimant could not resile from this arrangement, as it would be unfair, in the light of the authorities on the passage of property in a ship to a third party: **The “Alletta”** [1974] 1 Lloyd’s L.R. 40.

I must come to the conclusion that the orders made by the Court in answer to the claimant’s prayers, following the entry of final Judgment incorporating the “Settlement Agreement”, were entirely without jurisdiction, and the said orders will have to be discharged.

#### **(4) Admiralty Claim No. 8 of 2010**

In this claim, counsel attributed an **in rem** status which, by virtue of a registered mortgage being a **maritime lien**, would confer jurisdiction upon this Court and entitle the claimant to seek orders against the motor vessel, including orders of arrest. On that basis, this claimant had indeed moved the Court and obtained arrest orders. The question is whether, truly, there were valid mortgages taken by the Owners of the Motor Vessel “Michail Arhangelos” which justified this Court arresting and detaining the motor vessel at the Port of Mombasa. A related question is whether there had been a valid sale and transfer of the motor vessel to the Intervener herein, and how that would affect the claim.

There was much contest on the status of the two mortgages, said to have been recorded in 2007 and 2008; whether these were registered or not; the relevant registry – whether that of St. Kitts and Nevis, or Panama; whether such registration was ever withdrawn, at the time of the latest registration in Tanzania on **12<sup>th</sup> April, 2010**; whether there was a valid transfer of ownership and then registration of the ship in Tanzania.

The claimant's case rested, for the most part, on the relevance of foreign law and international conventions, as a basis for this Court to assume jurisdiction and to nullify the entire process said to have transferred the subject ship from the hands of Michail Arhangelos SA to those of Star Matrix Limited. The claimant maintains their claim against Michail Arhangelos S.A., on the basis that no valid transfer of the ship had taken place – and justification for such a contention is founded on a rather expansive view of this Court's Admiralty jurisdiction. The Intervener's position, by contrast, is that this Court's Admiralty jurisdiction is no wider than that of the Supreme Court of England – and so the several authorities from the English jurisdiction are commended.

The general principle on the standing of international law in Kenya is stated in broad terms, in the Constitution of Kenya, 2010, Article 2(5) which reads thus:

***“The general rules of international law shall form part of the law of Kenya”.***

Such a generality of expression, it is clear to me, will commit this Court in general principle and direction, but will not qualify the Court's reliance on clear precedent, nor the Court's interpretive jurisdiction.

The jurisdiction question in Admiralty matters was carefully considered by the Court of Appeal in ***Owners of the Motor Vessel “Lillian S” v. Caltex Oil (Kenya) Ltd*** [1989] KLR 1, and it was held that this Court's Admiralty jurisdiction is the same as that of the Supreme Court in England.

I see justification in such a position, in circumstances in which judicial notice is to be taken. Maritime commerce, the core subject of the Admiralty jurisdiction, is a pragmatic undertaking the governing rules of which have evolved over many centuries, based especially on the activities of the seafaring nations; and England, an island-nation of industrial might, and consequential international-trade links, with numerous centuries of experience in this domain, is a model recourse in the search for relevant law; the Kenyan Court has, in practice, to anchor its judicial approach on such well-laid foundations. I will, therefore, rely on the maritime experience represented by the several decisions from the English jurisdiction.

As already noted in this Ruling, the ***registration of a mortgage*** in the “Flag State” is essential, for the mortgage to be a claim ***in rem***: ***A. Mandaraka-Sheppard, Modern Admiralty Law***, op. cit (at p.29); ***The Angell Bell*** [1979] 2 Lloyd's L.R. 491; and without such registration, any claim which a mortgagee might have is only a claim ***in personam*** – which, of course, does not confer jurisdiction upon the Court to make ***in rem*** orders, such as those for the arrest and detention of the ship, in the first place.

From the evidence on record, it is clear to me that the Motor Vessel “Michail Arhangelos” had been registered in St. Kitts and Nevis, but that registration expired on ***30<sup>th</sup> November, 2009*** and was not renewed; instead, she was now given temporary registration at the Panamanian registry, on ***30<sup>th</sup> December, 2009***, and this registration would have carried validity up to ***25<sup>th</sup> June, 2010*** – except that the vessel was, in the meantime, registered at the Port of Zanzibar, and the Panamanian registration was deleted on ***11<sup>th</sup> June, 2010***.

These processes of registration, deletion, sale, transfer of title, registration in Tanzania, were all contested as invalid by the claimant, who urged that the status of the two mortgages of 2007 and 2008 should be determined on the basis of the law of St. Kitts and Nevis. Apart from the fact that there is conflicting evidence on the state of registration of the mortgages at the registry of St. Kitts and Nevis, there is ascertained evidence that, between ***30<sup>th</sup> December, 2009*** and ***11<sup>th</sup> June, 2010*** the ship was registered at the Port of Panama. The only reliable evidence which this Court must act on, is that of the registration in Panama, up to and beyond the time of the sale transaction, and up to the most recent registration in Tanzania.

The prior question for this Court, is the determination of the status in law of the two mortgages of 2007 and 2008. It is absolutely clear that so long as these mortgages were not registered in Panama, they had no ***in rem*** status for the entire period, as from ***30<sup>th</sup> December, 2009***, that the ship remained the property of Michail Arhangelos S.A. Therefore, it would not be tenable in law for the claimant to move this Court on the basis of a claim ***in rem***, against Michail Arhangelos S.A.

This forecloses any further inquiry into the sale, transfer and registration, in favour of Star Matrix Limited; no maritime lien was created by the two mortgages, and so, sale and transfer of the ship to a third party would pass on the title free of any encumbrance: ***I.S. Goldrein*** (ed.), ***Ship Sale and Purchase***, 2<sup>nd</sup> ed. (London: Lloyd's of London Press, 1993). Pp. 205-206.

It is clear to this Court, on the basis of the consideration of the relevant facts and the applicable law, that there was no jurisdiction to entertain the claims brought under Admiralty Claim No. 8 of 2010; there was

no claim *in rem* before the Court; and consequently there was no legal basis for the Court to issue a warrant of arrest against the ship, and such was the case, *a fortiori*, after ownership of the motor vessel passed on to the third party. Issues of merit regarding the sale and transfer of the ship to a third party are not relevant, and, insofar as the indicia of sale, transfer, registration and re-naming are shown in the evidence, the Court is to regard them, *prima facie*, as the operational reality.

## **XI. ORDERS**

While foreshadowing their substantive claims in the main cause, both the claimants herein were responding to the Intervener's application. The detailed consideration of the evidence, law and submissions leads to an inevitable finding in favour of the Intervener, and against both respondents. The Intervener's prayers are to be answered by making the following orders:

- (1) ***The Order of this Court made on 16<sup>th</sup> April, 2010 restraining the Motor Vessel "Star 7" from departing the Port of Mombasa is hereby discharged unconditionally.***
- (2) ***This Court has no jurisdiction to hear and determine the claimant's application.***
- (3) ***The Admiralty Marshal shall conduct an assessment of the damages occasioned to the Intervener by the wrongful restraining orders obtained by the claimant, and the same shall constitute a debt payable by the claimant.***
- (4) ***The claimant's application dated 16<sup>th</sup> April, 2010 is hereby struck out, and dismissed.***
- (5) ***The costs of this application shall be borne by the claimant.***

**DATED and DELIVERED at MOMBASA this 18<sup>th</sup> day of November, 2010.**

**J. B. OJWANG**  
**JUDGE**

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For the Intervener: ***Mr. S. Khagram***

For the Claimant (No. 3)/Respondent: ***Mr. Mulwa Nduya***

For the Claimant (No. 8)/Respondent: ***Mr. Kinyua Kamundi***