REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ADMIRALTY CAUSE NO. 2 OF 1998

MV BARBARA & ANOTHER...PLAINTIFF

VERSUS

MV JOEY & ANOTHER..DEFENDANT

RULING

The matter that falls for my decision is the Notice of Motion dated 11.8.98 seeking three substantive orders:

(1) That the action in *rem* brought against the motor vessel "Joey" and her cargo bunkers, stores and freight be struck out and the warrant of arrest issued herein be set aside as the said action does not fall within the ambit of section 20(2) (j) of the Supreme Court Act 1981 of England (as applied to Kenya) and this honourable Court therefore has no jurisdiction to hear and determine the same.

(2) That alternatively and/or further, the endorsement of the writ issued in this cause and the consequential warrant of arrest be set aside on the ground that they are otherwise an abuse of the process of the Court and/ or that in all the circumstances of the case, the issue of the writ in *rem* and the continuance of the arrest is unjust.

(3) That further and/or in the alternative, and in any event, the action purported to be filed against the cargo on board the motor-vessel “Joey” and the consequential warrant of arrest issued in respect of it be set aside on the ground that no valid basis exists or is shown to exist, either in law or otherwise, for any cause of action against the said cargo.

Order 75 r 1 and o 18 r 19 of the Rules of the Supreme Court of England are invoked. The inherent jurisdiction of this court is also thrown in.

The action referred to was at first instituted on 4.8.98 by the owners Master and crew of the motor tugs "Barbara" and "Steve B" against the owners and Master of the motor vessel "Joey" seeking to recover remuneration for salvage rendered by them to the vessel and her cargo. *Exparte* orders were then issued for the arrest of the vessel and her cargo and were executed on the same day. It then turned out that the cargo belonged to someone else who was not a party to the suit and the claim was amended with leave of the court to implead the owners of the cargo. Soon after, suitable arrangements were made for release of the cargo on terms. Prayer (3) in the application has thus been overtaken by events.

It further turned out that the endorsement of writ referred only to “remuneration for salvage” and the plaintiffs sought leave to amend the same to include other claims. With leave of the court the writ of

summons was further amended and now makes 4 substantive claims, namely:-

" 1. The plaintiff's claim against the 1st defendant is for remuneration agreed between the plaintiff's and the 1st defendant under a towhire agreement dated 22nd June, 1998 at the daily rate of $5,000 in respect of towage service rendered to motor vessel "Joey" by the plaintiff's tug "Barbara" with effect from 23rd June, 1998 to the 2nd July, 1998 when the said towhire agreement was terminated by the 1st defendant in breach thereof and upto and including 8th July, 1998 when "Barbara" was on stand by.

2. The plaintiff's further claim is against the 1st and 2nd defendant for agreed and or reasonable remuneration for salvage services rendered by the plaintiff's Tugs "Barbara" and "Steve B" to the defendants motor vessel "Joey" and her cargo, bunkers, stores and freight in the Indian Ocean/Arabian Sea at the daily rates $ 7,5000 in respect of "Steve B" and $10,000 in respect of "Barbara" making a total daily rate of $17,5000 with effect from 9th July, 1998 to the 4th August, 1998 (inclusive).

3. The plaintiff further claims damages against the 1st defendant for breach of contract.

4. The plaintiff further claims interest pursuant to section 35A of the Supreme Court Act 1981 and/or under inherent jurisdiction of the Admiralty Court."

Although the amendments were made after the filing but before the hearing of the Notice of Motion now under consideration, in law amendments to pleadings go back to the original pleadings. It is therefore the "further amended writ of summons" which constitutes the action in *rem* sought to be struck out on the basis that the Court has no jurisdiction to hear and determine the prayers made or that they are an abuse of court process.

A brief background to the application is pertinent

The motor vessel (it is infact a motor tanker) "Joey" (hereinafter "the Joey") flies the National Flag of Bahamas but is owned by M/s Festival Ltd of the isle of Man. She is managed by M/s Alba Petroleum Ltd (Alba whose Commercial Manager in Mombasa is Mr Shankar Narayan (Narayan).

On 13.6.98, the "Joey" left Fujaira in the United Arab Emirates with a cargo of 10,536.5 Mts of fuel oil belonging to M/s Veba Oil Supply and Trading GmbH of Hamburg. It was destined for Mombasa to deliver the cargo which had been on-sold to the cargo-owners' customers in Kenya. Nine days later (22.6.98) whilst she was negotiating the Arabian Sea, South of Socotra, off the North - Eastern Horn of African, (the Northern Coast of Somalia), her intermediate propeller shaft was broken and the vessel was immobilized to prevent further damage to the engine. She had to be towed from there to Mombasa.

Narayan then contacted M/s Murri International Salvage Operation Company Ltd (Murri) of Mombasa and specifically its Operations Manager, Mr Gordon Macmillan Cuthbert (Cuthbert). They own and manage motor tugs for towhire and salvage operations.

Narayan explained the situation and condition of the "Joey" to Cuthbert and sought towage services. Cuthbert offered the tug "Barbara" which he believed on the basis of the information given was capable of carrying out the towage services. It had as "winches and main towing gear":

"Skagit Double Drum Towing Winch. 1 drum fitted with 650 meters of 51 mm O wire. Towing ropes, bridles sufficient for contemplated operations".

A sea going engineer by profession Mr Brian Denton Rolls (Rolls) the Branch Manager of M/s Independent Adjusters Kenya Ltd was instructed by the "Joey's" hull underwriters to examine the tug and its towing equipment. About six hours before "the Barbara" departed, Rolls examined the tag and according to him:

" ...gained the visual impression that the tug was well maintained and that its towing equipment was in reasonable order"

That same day, Murri and Alba through Cuthbert and Narayan respectively had signed a towhire agreement on a standard form "recommended by the International Salvage Union, the European Tugowners Association and the Baltic and International Maritime Council. It is entitled; "Recommended International Ocean Towage agreement (Daily Hire)". As some vital clauses of that agreement turned out to be contentious and gave rise to these proceedings they will be examined in detail shortly.

The "Barbara" then sailed out for rendezvous with “the Joey” in the high seas. It took her seven days to reach "the Joey" which had in the meantime drifted in her immobilized state for some 320 Nautical Miles away from the Somali Coast in a North Easterly direction. The tow was connected on the same day (29.6.98) and towing commenced. The towline however parted after 5 hours. It was reconnected the following day (30.6.98) and against the tow commenced. The towline however parted again after about one hour. At the same time "the Barbara" developed steering gear problems.

The reasons or the parting of the towline and the damage to the steering gear are again contentious and will be examined shortly in detail. But while Cuthbert maintained that it was due to weather conditions which were unusually severe, Narayan says the weather conditions were usual in that area at that time of the year and it was the “Barbara” which was not fit for the intended purpose.

So on 2.7.98, Narayan unilaterally terminated the towhire agreement with Murri and contacted another tug in Bombay " the Sea Bulk Dana" to take up the tow without informing Murri. The “Joey” continued to drift while the “Barbara” remained on station nearby, also disabled by its steering gear problem. Murri then dispatched a second tug, the "Steve B" from Mombasa to the Arabian Sea. Again there is controversy as to why the “Steve B” was dispatched and I will revert to it shortly. But it was only disclosed to Murri on 6.7.98 that another tug had been engaged for the services and neither the “Barbara” nor the “Steve B” should be involved in the tow. That other tug ‘Sea Bulk Dana’ never arrived as expected on 9.7.98. She had communicated to the Master of the “Joey” on 8.7.98 that she had experienced flooding problems in her engine and had been recalled to Bombay.

Meanwhile the “Barbara” had repaired her steering problem by 3.7.98. The Master of the “Joey” was so informed. It attempted to reconnect the tow on 5.7.98 but the Master of the “Joey” refused as he had no instructions to reconnect. The “Barbara” continued to standby and on the 8.7.98 she requested for her towlines from the “Joey”. However, in view of the delay that would occur in fetching another tug, Narayan reinstructed Murri to recommence the tow on the original terms of the towhire agreement with the “Barbara”. The tow was reconnected by the “Barbara” on 9.7.98 and towing commenced towards Mombasa. Two days later (11.7.98) the “Steve B” arrived in the area and in accordance with instructions received from Narayan, the Master accepted the towline of the “Steve B” which commenced towing in tandem with the “Barbara”. After a few hitches of the parting of the towline and maneuvering problems, the “Joey” was safely towed to Mombasa harbour on 4.8.98.That is when Murri filed the claims referred to above after disagreeing with Alba on payments due either for towage and/or salvage. Alba offered to pay reasonable charges for towage only for both tugs but Murri would not hear of it without the element of salvage being considered. The die was cast.

These are only brief facts summarized from lengthy affidavits filed on both sides.

Both parties were ably represented by senior counsel. The Master and owner of the “Joey” by Bill Inamdar who led Samir Inamdar. The tug owners, by Ushwin Khanna who led Mrs Pamela Tutui. They argued the interlocutory application for days and cited numerous authorities. I am very grateful to them for their research and industry and if I do not do justice to them by referring to each of the authorities cited or factual or legal proposition put forward, it is not out of disrespect but because I am satisfied with those that persuade me to reach my decision in the matter.

As I understand them, the submission of Mr Inamdar, in an abridged, and I fear oversimplified, form are these:

(1) The plaintiffs came to Court and made a claim for salvage services rendered to the “Joey” by the two tugs “Barbara” and “Steve B” from 29.6.98 to 4.8.98.

(2) The provisions of the law invoked at the time were s 22(2)(j) and s 21(3) of the Supreme Court Act.

(3) S 22(2)(j) relates to salvage while s 21 (3) relates to "Maritime *Lien*". On authority only salvage gives rise to 'Maritime *Lien*'. (*Admiralty Jurisdiction & Practice* by Nigel Meson Pg 39 and 70).

(4) The whole basis for issuing a warrant for the arrest of the "Joey" and its cargo was that salvage services were rendered and that therefore the Court had admiralty jurisdiction.

(5) The Notice of Motion filed challenges the very foundation of the suit and asserts that there were no salvage services rendered either by the "Barbara" or the "Steve B" and therefore no admiralty jurisdiction lies.

(6) As the orders were obtained *exparte*, on authority the procedure is to make such application before the filing of any defences and thus submitting to Jurisdiction:

(See o 32 r 6 RSC, *WEA Records Ltd v Visions Channel Ltd* [1983] 2 All ER and *Minister of Foreign Affairs v Vehicles Supplies* [1991] 4 All ER 65.

(7) On further authority now settled in Kenya by "The Lilian S" CA 50/89 and "the Mama Otan" CA 238/97 when admiralty jurisdiction has been invoked on the basis that the claim falls within the ambit of one or more of paras (a) to (s) of s 20(2) and that jurisdiction is challenged on the ground that it is not covered under those paragraphs, it is incumbent upon the claimant to satisfy the Court *in limine* that the claim does infact fall within the ambit of that paragraph.

(8)The claim was amended with leave of the court before the Notice of Motion was heard but that did not affect the challenge on jurisdiction. On the contrary it made it even stronger for the following reasons:

> (a) The original claim for salvage in respect of the two tugs from 29.6.98 to 4.8.98 was abandoned confirming that there was no basis for seeking them in the first place.
>
> (b) The first amended prayer is purely for towage services in respect of the "Barbara" only for the period 23.6.98 to 8.7.98. That claim has already been conceded and payment made for it by the defendant and therefore the prayer is no longer live.
>
> (c) There is no claim for any salvage services rendered by the "Barbara" between 23.6.98 to 8.7.98.
>
> (d) There is no claim for towage rendered by the "Barbara" between 9.7.98 to 4.8.98.
>
> (e) The only live issue is the amended prayer 2 whether both the "Barbara" and "Steve B" provided any salvage services to the "Joey" between 9.7.98 to 4.8.98 at the daily rates of USD7500 and USD 10,000 respectively.

(9) In the absence of a contract for salvage, none can lie at specified daily rates since they can only be assessed on equitable principles as a lumpsum.

(10) There was no contract for salvage services for the 'Barbara', the only express agreement being one for towage.

(11) The towage services rendered by the "Barbara" between 23.6.98 to 8.7.98 never converted to salvage services since none of the strict conditions precedent to such conversion arose on the authority of "*The Minehaha*" (186) XV Moo 133 and "*The Homewood*" (1928) 31 LLL Rep 336, amongst others.

That is:

"To constitute a salvage service by a tug under contract to tow two elements are necessary (1) that the tow

is in danger by reason of circumstances which could not reasonably have been contemplated by the parties; and (2) that risks are incurred or duties performed by the tug which could not reasonably be held to be within the scope of the contract."

The towhire contract contemplated the prevailing conditions at the area of tow.

(12) On the authority of "*The Leon Blum* (1914) 13 Aspinall's Maritime Law cases 273 amongst others;

"Where salvage services (which must be voluntary) supervene upon towage services (which are under contract) the two kinds of services cannot coexist during the same space of time. There must be a moment when towage ceases and salvage begins".

(13) The salvage services claimed on behalf of the "Barbara" between 9.7.98 to 4.8.98 do not arise since the only basis relied upon was extreme weather and sea conditions which on the evidence was normal at that time of the year in Arabian Sea. Between the two dates the weather and sea conditions were on the evidence even better than the period 29.6.98 to 8. 7.98. If no salvage is claimable for the "Barbara" between 23.6.98 and 8.7.98 as the plaintiffs by not claiming it appear to concede, and the facts and law suggest, then there would even be less justification for claiming salvage services for the "Barbara" during the latter period.

(14) At no time was there any written contract either for towage or salvage by the tug "Steve B". The tug was introduced by the plaintiffs themselves to assist the "Barbara". When it was offered for hire, it was for towage at suggested daily rates of USD4,500 but there was no concluded agreement on it. There were no exceptional or unforeseen circumstances at the time or imminent and grave danger to the "Joey" nor exceptional risk to be taken by the "Steve B". It was only believed that the joining of the "Steve B" in the tow would hasten the speed. There was thus no basis for converting the services of the "Steve B" to salvage. If towage services for "Steve B" were claimed at reasonable rates, they would have been discussed and paid.

On the whole there was only a contract for towage and it continued throughout as towage since no exceptional circumstances arose and therefore there was no basis either at inception or as the claim now stands for claiming salvage services. The plaintiff's claim stands or falls on the pleadings and there is no room for scouting around for other claims which are not pleaded. The correct order to make at this stage would therefore be the striking out of the claim and discharging the warrant of arrest against the "Joey".

There was an equally spirited opposition to the application by Mr Khanna and I fear once again that I may oversimplify his otherwise substantial submissions.

Considerable time was taken in challenging the procedure adopted in bringing the application. The only substantive procedural order relied on was order 18 r 19 RSC. But that order says nothing about challenging the admiralty jurisdiction of the court. It only relates to striking out or amending pleadings or endorsements of writs on grounds stated in the rule, as 1 (a), (b), (c) and (d) none of which is specified in the application. It also requires no evidence if it is asserted that there is no reasonable cause of action, but the application here is supported by lengthy affidavits.

The relevant provisions for challenging jurisdiction are order 12 r 8 RSC which is not invoked and is in any event only available where the defendant has given notice of intention to defend the proceedings and has applied within the time limited. The other provision is o 75 r 13 (2) RSC for setting aside warrants of arrest but again that provision was not invoked.

The inherent power of the court is also invoked but is only discretionary and is limited to stay of proceedings or striking out part of indorsement of writ or dismissing actions which are obviously frivolous or vexatious or an abuse of court process. (Whitebook Commentary on 18.19.18).

In Mr Khanna's submission order 18 r 19 would not apply where as in this case the pleadings involve prolonged and serious argument, and disclose numerous triable issues. For the rule to apply there should

be no dispute as to facts.

On his attention being drawn that the same procedure was used in ‘the “*Mama Otan*” and that both in "the *Mama Otan*" and "the *Lilian S*" there were disputed facts which the Court of Appeal had to grapple with, Mr Khanna, boldly but without being disrespectful, distinguished aspects of the two cases and submitted that the two cases were not good law and do not apply to the application before us. In ‘the *Mama Otan*’ he adopted the reasoning in the dissenting judgment.

As for the merits of the plaintiffs’ claim Mr Khanna submitted that this Court had the admiralty jurisdiction to determine the matter as well as at inception as after the further amendment of the writ. In law the amendment at any rate goes back to the original pleading. The plaintiffs had clearly stated at inception that they were relying on the towhire agreement signed between the two parties and were invoking the jurisdiction of the court under s 20(2) (j), (k) and (h) SCA 1981. (J) and (k) have reference to salvage and towage respectively. Contrary to submissions made by the defendant, the towhire agreement is not limited to towage and makes provision for salvage services. Salvage services are therefore sought under contract and not under the general common law rules of towage converting to salvage under some circumstances, although that too the plaintiff qualifies to do.

There was also an independent claim which arose under s 21(3) on "Maritime *Lien*" and was sufficient on its own to found admiralty jurisdiction. There was no definition of "Maritime *Lien*" in the Act itself (see *Kennedy’s Law of Salvage* 5th Edition – "Jurisdiction and Mode of Enforceability"). It has only been defined in court decisions to mean.

"a claim or privilege upon a thing to be carried into effect by legal process....

It travels with the thing into whosoever’s possession it may come and is inchoate from the moment the claim or privilege attaches. When carried into effect by legal process by proceedings in *rem* it relates back to the period when it first attached"

See "*The Bold Buccleugh*" (1851) Moo PC 267. Although only four categories were listed in that case as the limited class of maritime *liens* recognised in English law, they include salvage and there is provision made in the towhire agreement for a *lien*.

There was an agreement, Mr Khanna further submitted that under the towhire agreement the plaintiffs were entitled to payment for towage services of the “Barbara” from 23.6.98 to 4.8.98. There is jurisdiction under s 20(2) (k) to claim them. The payment made by the defendant was only accepted on account without prejudice as part payment for the claims made. That there is no express prayer made in the further amended writ for towage services by the “Barbara” over the period does not preclude the Court from considering the matter. A party is always at liberty to amend his pleadings to enable the Court to adjudicate on the entire claim in one sitting. The same goes for the omission to plead salvage services for the “Barbara” which were voluntarily offered after the unilateral termination of the towhire contract by the defendant from 2.7.98 to 9.7.98 when the tow was reconnected. The “Barbara” and her crew stood by and provided hope, moral support and comfort to the “Joey” which was drifting in an immobilized state. The “Joey” was in a state of danger and distress. The danger referred to was stated in "*The Charlotte*" (1848) 3 W Rub 68 and approved by the Privity Council in "*The Strathnaver*" (1875) 1 App (as 58). That is:

"It is not necessary that the distress should be actual or immediate or that the danger should be imminent and absolute; it will be sufficient if, at the time assistance is rendered, the ship has encountered any damage or misfortune which might possibly expose her to destruction if the services were not rendered"

It was sufficient if there was a state of difficulty and reasonable apprehension. The other requirement was that the service be voluntary which it was, because the “Barbara’s” towhire contract had been terminated and her towline handed back after refusal by the “Joey” Master to accept attempts to reconnect the tow. It must also be successful, which it was, since the two was reconnected on 9.7.98. "Standing-by" services were held to amount to salvage services in" *The Guernsey Coast*: (1950) LLLR Vol 83 – 483. That claim

was therefore not abandoned. Nor were the salvage services offered by the “Barbara” for the entire period which converted from towage on account of exceptional circumstances arising after the towhire agreement was signed. All that can be cured by amendment.

As for "the Steve B", the services rendered were salvage and are claimed under the contract on the basis that the defendant acquiesced to the option exercised under the contract by the plaintiff to engage "the Steve B" on terms that she was performing salvage services. The Court is nevertheless at liberty and after hearing the evidence, to decide whether the claim for salvage only amounted to towage and award payment accordingly. The jurisdiction of the court remains throughout and the application is therefore misconceived.

I have anxiously considered the application, affidavits on record and the submissions of counsel.

The starting point is the procedure adopted which was heavily attacked by Mr Khanna. I think he made some valid objections particularly relating to o 18 r 19 RSC which is invoked without stating which sub-rule is relied on and which prohibits the adduction of evidence where the claim is that there was no reasonable cause of action raised. It should be plain and obvious that there is no such cause of action. The same order and rule was however used to challenge jurisdiction in "*The Mama Otan*" and the Court of Appeal does not appear to have raised any objections. The substance of the matter was still dealt with. It does not also seem to be of relevance that there are disputed matters of fact which may require oral evidence or verification in cross-examination. Indeed this was the forceful argument put forth by Mr Khanna who quoted *in extenso* from "*the Moschanthy*: [1971] vol I LLLR 37.

It was stated there that although the defendant was at liberty to apply to the Court for stay of an action on the ground that it has no chance of success and is therefore vexatious, the Court should only stay the action on that ground when the claim is beyond doubt. If it is not beyond doubt and the plaintiff has an arguable, even though difficult case in fact and in law the action should be allowed to proceed to trial. It was inappropriate the Court there stated, to embark on the examination of affidavit evidence of limited scope, together with documents which can only be part of the documents ultimately relevant, in a matter that involves a considerable number of questions both of fact and law, of a complex or not wholly simple character and to form a concluded view against the plaintiff on such merits.

But the two Court of Appeal decisions CA 50/89 "*The Lillian S*" (Nyarangi/ Kwach/Masime JJ A) and CA 238/97 "*The Mama Otan*" (Gicheru & Omollo JJ A, Shah JA dissenting) have decided that once the issue of jurisdiction is raised in an admiralty matter, that issue must be decided *in limine* an on a balance of probability. In the "*Lilian S*" which was applied by the majority in "*The Mama Otan*", "*The Moschanthy*" was cited and considered but was no followed. I am not at liberty therefore to question the wisdom of the Court of Appeal in giving top priority to the issue of jurisdiction regardless of the procedure adopted in urging it. They are both binding me. Nyarangi JA laid it out in "*the Lilian S*"

“I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seised 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 basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it holds that it is without jurisdiction.

Any party may raise the issue or the Court may do so on its own motion. It matters not that there is scanty or limited facts to constitute evidence. It is still evidence which should be considered.

I therefore overrule the objections made on procedure and embark on the examination of the evidence on record to satisfy myself that the matter does or does not fall within the admiralty jurisdiction of this court. On authority the onus is on the plaintiff to show on a balance of probability that the jurisdiction lies.

The admiralty jurisdiction of this court in section 4 of Judicature Act is that conferred on the High Court in England and shall be exercised in conformity with International Laws and the Comity of Nations. In exercise of the admiralty jurisdiction, this Court may also exercise all powers which it posseses for the purpose of its other civil jurisdiction.

The jurisdiction is set out in section 20 of the Supreme Court Act 1981. Where the claim is based on section 20(1) (a) then it must be expressly stated under s 20(2)(a) to (s) otherwise the Court would not be clothed with any jurisdiction to hear it. Where it does, the mode of exercise of the jurisdiction is provided for under s 21.

The plaintiffs' further amended writ bases its three claims (other than interest) under s 20(2)(j) and (k). In construing the provision under (j) some difficulty may arise depending on the edition of the *Supreme Court Practice (The White Book)* one is using. That is because there was an amendment to the provision between 1995 and 1997 and the 1995 edition will refer only to:

"Any claim in the nature of salvage..."

That appears to be the provision that has received considerable judicial interpretation some, it cited before me. The 1997 edition has this provision:

"(J) any claim-

(i) Under the Salvage Convention 1989

(ii) Under any contract for or in relation to salvage services; or

(iii) In the nature of salvage not falling within (i) or

(ii) above.

(k) relates to

"any claim in the nature of towage in respect of a ship..."

I have already held in an interlocutory matter herein that the provision "any claim under any contract" would include damages for breach of contract. I did not perceive serious or any objections being raised in respect of the 3rd prayer made in the indorsement of writ and I find that it is relevant in founding the admiralty jurisdiction of this court. Which leads me to the contract itself and the contentious clauses referred to.

It was negotiated and signed on 22.6.98 by both parties. I therefore have to give the ordinary and natural construction to the words used therein, and need not revert to prior negotiations or other material *de hors* the agreement unless any ambiguity deserving such consideration arises.

As I stated earlier the agreement is in approved standard form. It is in two parts. Part I has boxes which contain information that requires to be provided by the parties. Part II has written clauses governing the relationship of the parties.

The fundamental contention made by the defendants is that it was purely a towhire agreement while the plaintiffs contend that it was in addition to towhire, a salvage agreement. If it was a salvage agreement then it would mean that there was a contractual basis for pleading salvage and that

therefore it is not necessary to decide how the towage converted to salvage.

The following are the contentious clauses:

(1) Part I; Box 22;

"Nature of Service(s) (Cl1)

To include but not limited to towage always at the discretion of the tug master and within safe working

limits of the tug and crew".

(2) Part II Clause 15

"Salvage

(a) Should the tow break away from the tug during the course of the towage service, the tug shall render all reasonable services to re-connect the towline and fulfill this agreement without making any claim for salvage.

(b) If at any time the tugowner or the tugmaster considers it necessary or advisable to seek or accept salvage services from any vessel or person on behalf of the tug or tow, or both, the hirer hereby undertakes and warrants that the tugowner or his duly authorized servant agent including the tugmaster have the full actual authority of the hirer to accept such service on behalf of the tow on any reasonable terms."

(3) Clause 21

"*Lien*

Without prejudice to any other rights which he may have, whether in *rem* or in *personam*, the tug owner, by himself or his servants or agents or otherwise shall be entitled to exercise a possessory *lien* upon the tow in respect of any sum howsoever or whatsoever due to the tugowner under this agreement and shall for the purpose of exercising such possessory *lien* be entitled to take and/or keep possession of the tow; provided always that the hirer shall pay to the tugowner all reasonable costs and expenses howsoever or whatsoever incurred by or on behalf of the tugowner in exercising or attempting or preparing to exercise such *lien* and the tugowner shall be entitled to receive from the hirer the tug's daily rate of hire, throughout any reasonable delay to the tug resulting therefrom"

(4) Clause 26, with reference to Box 22 of towhire

"In the event that the "Joey" drifts into Somali Territorial Water's (12 miles) or should the actual physical condition of the "Joey" in the opinion of the tug owner, change or alter from that of being immobilized but others safely adrift or safely anchored, to that of one of real peril or danger, then the tug owner shall have the option, and if necessary after inspection of the "Joey" to:

a) Continue their services as provided under this agreement

or

b) Render all services, including services already provided under the terms and conditions of Lloyds' Standard Form of Salvage Agreement 'No Cure No Pay' 1995. Should the tug owner decide to exercise this option, then such option and services provided shall not be refused, denied or frustrated by the owners of "Joey" her master or crew, and any services provided thereafter by the tug/s shall be deemed to have been provided under Lloyd's Open Form 1995".

It was the submission of Mr Inamdar that clause 26 superceded clause 15 while Mr Khanna asserted that it was the intention of both parties that the two clauses be operative and binding on them. I think Mr Khanna's submission must be right. It is evident that there are various clauses in part II which the parties did not wish to invoke and they deleted them and countersigned the deletions. Not so clause 15 sub clause (b) gave the tugowner the option at his discretion if he considered it necessary or advisable to accept salvage services from any other vessel. It is on that basis that the "Steve B" was invited to join the tow. It is submitted that it was neither necessary nor advisable to do so. But this is to view the matter objectively after the event. In their agreement in Box 22 the parties gave absolute discretion to the tug master to perform task which were not limited to towage. What becomes necessary or advisable must therefore be the subjectively decision of the tug master. Under part I, there is provision that "in the event of a conflict

of terms and conditions, the provisions of part 1 and any additional clauses, if agreed shall prevail over those of part II to extent of the conflict but no further". In my view the tug master was granted absolute discretion under Box 22.

Clause 26 is an amplification of Box 22. It makes provision for salvage services under the Lloyd's Open Form 1995 by the "Barbara" itself. And again it is at the option of the tug owner and the decision is subjective. At risk was a 12,100 ton-tanker fully laden with 10,500 metric tons of fuel oil. Both the ship and the cargo were of immense value let alone the crew members whose lives were invaluable. They were all in an immobilized state with a broken shaft and were drifting without motive power in the high seas. By the time the "Barbara" reached her she had drifted more than 320 nautical miles away from her original position. There was no knowing what might befall her and her cargo if she continued drifting in that state. An oil spillage would have caused environmental disaster. In my considered view there was a state of danger which the parties contemplated before signing the agreement and made provision for salvage services to be rendered. I find that the towhire agreement was not purely for towage but included salvage services. The plaintiff was therefore entitled to make claims for salvage under the contract and this court's admiralty jurisdiction is well found. I need not therefore consider how towage was converted to salvage.

If I am wrong, (and I do not say I am) and it turns out that the agreement was for towage only, then I must remember that it is not in the public interest that an agreement for towage should be easily convertible to one of salvage and the Courts have always closely watched and jealously guarded such contracts. The rationale was applied in "*The Dragon Sunrise*", a Hong Kong case cited to me which applied "*The Liverpool* "(1893) P 154, "*The Minnehaha*" (1861) 15 Moo 133 and also cited "*Kennedy on Salvage* 5th Edition Para 499:

"While it is the duty of the Court to take care to adequately remunerate all salvors for salvage services, in order to encourage those services to be performed – and in this spirit salvage services are always looked upon in this Court – it is equally the duty of the Court to see, where towing contract has been made, that a little departure from the exact mode in which the contract is to be performed is not magnified so as to convert towage into salvage".

The subject of the Court's restraint and careful control is the increase in tugs' claim. That is why the two tests propounded in "*the Homewood*" (*supra*) have to be applied.

I have considered the evidence on record and it seems to me that the "Barbara" at least qualifies for salvage services between 3.7.98 when the Master of the "Joey" was informed that the "Barbara's" steering problem had been rectified and the 9.7.98 when the tow was reconnected. Between that period, the towhire contract had been terminated and the "Barbara" had no obligation to offer any services. Indeed its attempts to reconnect the tow were actively resisted. But it continued to be on standby and I agree with Mr Khanna that it provided solace and comfort to the "Joey" and the crew. More so when it was common ground that the Arabian Sea was rough at that time of the year and indeed there was evidence that another tug, the "Seabulk Dana" could not make it to the rendezvous and had to turn back and return to Bombay. That rendered the condition of the "Joey" even more precarious as she was still drifting in rough weather. It was submitted that the force of the winds and the sea fluctuated between 5-6 and sometimes 7 and that this was normal at that time of the year. Some scales were even produced to show that the fluctuation of the wind force was between "fresh breeze through strong breeze to moderate gale" while the corresponding sea disturbances scales fluctuated between "rather rough with waves 5 – 8 ft high, through rough with waves 8 – 12 ft high with waves 12 – 20 feet high". The deck log for confirmation of the weather statistics was not in evidence. That notwithstanding, it is in my view that the danger to the "Joey" was not lessened by the knowledge that the Arabian Sea was rough at that time of the year. I would find on a balance of probability that the "Barbara" was entitled to claim salvage for that period.

But then it is submitted that the claim is not made. Admittedly the pleading of the plaintiffs' claim is unhappily made. But that is not insurmountable. The plaintiffs submit that amendments which are liberally granted will be sought to accommodate all the claims. O 18 r 19 RSC which is the equivalent of

o 6 r 13 of the Civil Procedure Act, does not simply enjoin the Court to strike out pleadings. It also provides for amendments which the Court of Appeal in CA 222/98'*Central Kenya Ltd v Trust Bank Ltd & 4 others* (UR) said:

"It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the Court will not later permit him to reopen the same subject of litigation (see o II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, *Beoco Ltd v Alfa Laval Co Ltd* [1994] 4 All ER 464)".

It was more graphically put by Madan JA in *DT Dobie & Co (Kenya) Ltd v Joseph Muchina & anor* (UR)

"If an action is explainable as a likely happening which is not plainly and obviously impossible the Court ought not to overact by considering itself in a bid summarily to dismiss the action. A Court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it".

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a Court of justice ought not to act in darkness without the full facts of a case before it."

It shall be recalled that admiralty jurisdiction does not preclude the court's civil jurisdiction. The same approach goes for claims for towage for the "Barbara" which are not made from 9.7.98 to 4.8.98. Can it be argued that they are irrecoverable because they have not been asked for when it is not denied that there was an agreement for towhire covering that period which is the agreement pleaded in the suit? The defendants state that they made payment in full by their letter dated 11.9.98:

"Re: "Joey"

We refer to the proposed amendments to the writ of summons in this case and in particular to your client's newly formulated claim for remuneration in respect of the towage services rendered by the "Barbara" during the period 23rd June 1998 to 8th July 1998 under the Towage Agreement dated 22nd June 1998 and enclose herewith a banker' draft for US $ 55,000 in settlement of that claim made out as under:

Tow hire @ US $ 5000 per day for the period 23rd June

1998 to 8th July 1998 US$ 80,000.00

Less paid for the period 23rd June

to 27th June 2, 2005 US$ 25,000.00

Balance US$ 55,000.00

Please note that this payment is made without prejudice to our clients' right (which they expressly hereby reserve) to bring an action or take any other step in the future in respect of the under performance or negligent performance of your clients' obligations under the aforesaid Towage Agreement."

The plaintiffs' letter accepting the cheque on 15.9.98 however did so without prejudice to their claims on towage, salvage and breach of contract. It states:

15th September 1998

"Re: "Joey"

We refer to your letter of the 11th September 1998 together with the bankers draft for USD 55,000.00 which is accepted entirely without prejudice to our clients' rights and on account towards our clients claim for towage and or salvage herein. The said payment cannot be treated as payment in settlement of our clients' claim for towage services. Our clients' will however accept the payment in part settlement only of the towage and or salvage services rendered *inter alia* by the "Barbara" and "Steve B" for the period stated in your letter. As you are aware our clients further claim damages for breach of contract in respect of the aforesaid services.

Our clients deny your clients' alleged claim or right to bring any action in respect of the under performance or negligent performance on the part of our clients' obligations under the Towage Agreement as alleged."

It was contended subsequently that it was not for the plaintiff to choose whether to accept the payment for a particular account but for the defendant to choose what amount to pay and for what. That may well be an accurate proposition of law. But it does not answer the question whether the undisputed towage services for the "Barbara" between 9.7.98 and 4.8.98 were paid or payable. I think the plaintiffs are entitled to pursue them and it is an admiralty claim within the jurisdiction of this court.

There is also the possibility after the hearing of the claims that the salvage claims made in respect of the "Steve B" may be reduced to towage which would still be within the court's power to do. But as the claim stands, the offer was made for the use of the "Steve B". It did not only provide towing services in tandem with the "Barbara" but gave fresh supplies to the "Joey" and the "Barbara". The defendants as the contract allowed them to do opted for salvage services and there was no response from the defendants. In my view there was acceptance by conduct.

On the whole I do not find that the admiralty jurisdiction of this court is impeached and I do not grant the application. I dismiss it with costs.

Both sides agree that this was a complex and lengthy matter and therefore any order for costs ought to include a certificate for two counsel. I so certify.

Dated and Delivered at Mombasa this 10th day of August 2000.

P.N.WAKI

JUDGE