Owners Masters and crew of the Motor Tugs 'Barbara' and 'Steve B' v Owners and Masters of the Motor Vessel 'Joey' & another (Admiralty Cause E002 of 1998) [2024] KEHC 6273 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6273 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

ADMIRALTY CAUSE E002 OF 1998

DKN MAGARE, J

MAY 24, 2024

BETWEEN

THE OWNERS MASTERS AND CREW OF THE MOTOR TUGS 'BARBARA' AND 'STEVE B' ..... CLAIMANT

AND

THE OWNERS AND MASTERS OF THE MOTOR VESSEL 'JOEY' ..... 1ST DEFENDANT

THE OWNERS OF THE CARGO OF THE LADEN ABOARD MOTOR VESSEL 'JOEY' ..... 2ND DEFENDANT

JUDGMENT

Introduction

1. The matter has had run-ins with the Judicial system. At one-time Justice Waki, as he then was made Ruling on 10/8/2000. This resulted in an Appeal to the Court of Appeal being in the CACA 286 of 2000. The Appellant were the defendants in this matter. The good Retired Judge found that the tow hire agreement included salvage there was also an independent claim for maritime Lien which arises under Section 21(3) of the Senior Court act of England.

2. The use of English Law is a throwback to colonial times. It is self-evident that the legislature has not been keen on this area. It is one that can easily support the blue economy. The court found that there was acceptance by conduct. The Appeal was preferred. The Court of Appeal delivered its Judgment on 27/4/2007. (R.S.C. Omolo, P.K Tanui and E.M Githinji, JJA, as they then were.

3. The implication of the Court of Appeal decision is that the court affirmed the finding by Justice Waki, as he was then, in the ruling over an Application Notice dated 11/8/1998. The Court of Appeal noted that the plaintiff herein signed an international towage agreement.

4. Since then there been were several developments that took place one of them was that the Court of Appeal dismissed the Appeal No. 286 OF 2000. Later a consent dated consent dated 27/6/2017 and filed in court on 17/7//2017 was adopted by this court. It was signed by: -

    a. Ms Anjarwallsa & Khana advocates for the plaintiff.

    b. Ms Daly & Inamdar for the 2nd defendant and

    c. Ms Kinyua Muyaa for the 2nd Defendant.

5. I wish to set out the tenor of the said consent letter dated 27/6/2017 as follows: -

    a. All pending interlocutory applications and Preliminary Objections filed herein be marked as withdrawn with costs to be in the cause. The withdrawal of the said applications and Preliminary Objections shall not prevent the parties thereto from raising any points in their Defence and or Statement of Claim contained in any of their applications and objections.

    b. The Defendants do file and serve their respective fresh acknowledgments of service within 10 days from the date of this consent.

    c. The plaintiff do file fresh Statement of Claim the original title as contained in the amended writ of summons dated 26th August, 1998 within 14 days from the date of service of the fresh acknowledgments of service of the Statement of Claim.

    d. The Plaintiff do file its reply to the Defences within 14 days of the date of service of the Defences.

    e. The Notice of appeal dated 2nd March, 2017 shall be deemed to have been abandoned.

    f. The Advocates for the parties to schedule a meeting to settle on pre -trial directions. In that meeting parties shall agree on time line for the exchange of lists of bundles of documents and to address any request by either party for the supply of any specific documents by any other party.

    g. After the conclusion of all the steps any of the Parties may, on notice to the other parties, set the matter for a case conference for purposes of obtaining the approval of the court of pre- trail directions and of purposes obtaining a hearing date."

6. There were agreements on what each party we to do and whom they represented. To the parties, the matter was concluded taken to another level. This was not to be. There were decisions that were to be made thereafter including the one dated 16/12/2022.

7. The Hon. Lady Justice Njoki Mwangi delivered a ruling in which she allowed an application for listing of the warrants of arrest of the ship, motor tanker Joey as soon as soon as a sum of US $ 3,000,000 was deposited. The Court also restrained itself from striking out the claim. In a ruling delivered on 24/2/2017, my brother Justice PJ O Otieno captured the mood in this case. He stated: -

    > " 1. If one was to undertake a study on 'how not to' have a matter heard and determined in a just, expeditious, even and proportionate manner, then this is a very good case study. A plethora of applications, some filed in a hurry, other filed in disregard to the status of the file, and therefore the matter has been convoluted to an extent that it is almost a punishment to be asked to read and understand what is outstanding and what has been dealt with. Even after this ruling it would take the parties and their counsel to embrace the need to have

this dispute resolved one way or the other so that its decade of pendency in court may be brought to an end."

8. The prophetic words rang true up to now. The parties had to proceed at the pain of striking out. Nevertheless, the advocates were very professional and were able to present their cases forcefully. Any upset in the results does not reflect any weakness in presentation but the inherent merit of the case. The danger with multiple applications and counter applications and appeals, is that certain facts crystalize that may not necessarily be available for determination during full trial.

9. At the end of the day, it was not a matter of life and death but about ships. The dispute reminds me of the vanity of human adventures of years gone by. The dispute reminds of Shylock's remarks in reference to his adversary, Antonio in Act 1 Scene 3 of William Shakespeare's, The Merchant of Venice as follows:

Ho, no, no, no, no!

My meaning in saying he is a good man is to have you understand me that he is sufficient. Yet his means are in supposition: he hath an argosy bound to Tripolis, another to the Indies. I understand, moreover, upon the Rialto, he hath a third at Mexico, a fourth for England, and other ventures he hath squandered abroad. But ships are but boards, sailors but men; there be land rats and water rats, water thieves and land thieves—I mean pirates—and then there is the peril of waters, winds, and rocks. The man is, notwithstanding, sufficient. Three thousand ducats. I think I may take his bond.

10. The dispute rests upon the limits of human capacity to help and gain rewards in case of perils. There is no dispute that certain actions left the motor tanker in the high seas stranded and drifting towards the Arabian sea in a perilous speed. The humongous tanker was laden with precious cargo that the Claimants now hold the owners liable for. The parties were for some reason not ready to proceed. The parties were literally then proceeding under perils.

Pleadings

11. Vide the Amended Statement of Claim dated 6th August 2019, the Plaintiff pleaded that by an International Ocean Towage Agreement dated 22nd June 1998, between the Plaintiffs and the Defendants, the Plaintiffs agreed to provide towage for the ship Barbara to tow motor tanked Joey and her cargo at an agreed rate of US$ 5,000 per day payable after every 5 days in advance, safely to Mombasa.

12. It was stated that the Motor Tanker Joey with its laden tanker was immobilized within the Arabian Sea in the High Seas.

13. The Plaintiffs performed their part of the Agreement and Tug Barbara commenced the towage of M.T Joey on 29th June 1998 but there were challenges owing to strong winds and tides in the sea. The Plaintiffs averred that due to disagreements, the 1st Defendant terminated the towage agreement on 2nd July 1998 and another Tug Sea bulk Dana had been engaged on 1st July 1998 to continue the towage but returned to Mumbai due to extreme weather

14. Parties carried out negotiations to enable them to reconnect Tug Barbara to continue the towage. The Plaintiffs avers that they engaged a second Tug Steve B under Clause 15, Part II and Clause 26 of the Towage Agreement. When conditions worsened, the Plaintiffs sought to involve Motor TUG Steve B, all in vain. There was a flurry of activities and emails on the fateful day. At some point there was active resistance to have the situation declared as a salvage operation. Given the state of the sea and the Motor Tanker and crew, the Plaintiffs decided to convert the towage to salvage.

15. It is in respect of the salvage by both motor tug Steve B and Barbara that the Plaintiffs' claimed for towage and salvage services. The lengths of salvage are different for the two tugs. Motor Tug Barbara rendered both salvage and towage. Towage was under agreement. The towage agreement was terminated while the Motor Tanker Tug was in peril. Motor tug Steve B provided standby and salvage services. It was common ground that the motor tanker was brought safely to the shores of the republic of Kenya. It was subsequently released, apparently upon repair upon deposit of security of US $ 3,000,000/=.

16. The 1st Defendant opposed the claim and raised the following defence:

    i. The contractual conditions precedent to the conversion of the towage agreement into salvage operations were never satisfied.

    ii. There was no justification for the Plaintiffs to have converted the towage services into salvage operations

    iii. The Plaintiffs are not entitled to the salvage services at all.

17. On the part of the 2nd Defendant, the claim was opposed on the following Grounds:

    i. The numerous breakages in the towlines was evidence that the alleged towage and salvage were unsuitable

    ii. The 2nd Defendant had no obligation to pay for any Tug that rendered no services.

    iii. The bad whether did not extend to Mombasa

    iv. There were no crew lists, copies and certificates of competence of the crew of motor tanker Joey provided by the Plaintiffs.

    v. Bad whether was foreseeable

Evidence

18. PW1, Paulo Murri testified for the Plaintiffs. The relied on his witness statement and documents filed by the Plaintiffs. Therein, he relied on the towage agreement dated 22nd June 1998. In cross examination, he stated that it was his case that Murri International and Imperial Maritime had authorised him to testify in these proceedings.

19. He further testified that the 1st Defendant was at all times acting for the 2nd Defendant until the release from arrest of MT Joey. He testified that the entire cargo laden on MT Joey was successfully salvaged and costs were incurred irrespective of any agreement. It was his stated case that salvage was necessary.

20. The witness testified that salvage services attracted higher charges than towage as they depended on the value of the vessel, freight and cargo. That they offered salvage at US$ 7500 which was lower than the normal rate of US$ 9000.

21. On the part of the Defendants, they relied on their filed Defences and Affidavits without calling a witness. The second defendant relied on the affidavit filed by evidence of Captain Shankar Narayana and the Master of the ship Cayetano Fajardo.

Submissions

22. The Claimants filed submissions dated 11th August 2023 where they submitted that they had proved their case on a balance of probabilities based on their particulars of claim for remuneration in respect of salvage and towage services rendered by Motor Vessel Tugs.

23. They relied on the Ruling dated 10th August 2000 to submit that the Court had already decided the Plaintiffs' claim in respect of salvage services pleaded in the Amended Statement of Claim for 3rd July 1998 to 9th July 1998

24. Further, it was the submission of the Plaintiffs that in exercise of absolute discretion, the Tug Master of Barbara had deemed that the services of Barbara were no longer limited to towage and the salvage services were for both tug and tow.

25. It was submitted that based on the evidence of PW2, the assessment of salvage charges was such that it was double the amount of towage charges. Therefore, that the towage charges of US $ 10,000 was reasonable and proved on a balance of probabilities.

26. They submitted further that it was necessary to use the services of Steve B under the fresh Agreement and consequently, the Plaintiffs notified the 1st Defendant of the necessity to engage the services of Steve B at US $ 4,500 daily but since there was no response and the services of Steve B were as such construed to be applicable under Clause 15(b) of the Tow hire Agreement dated 22nd June 1998 as to be considered as salvage services.

27. They also submitted that the Master of Joey subsequently accepted the services of Steve B on 11th July 1998 and the 1st Defendant impliedly acquiesced and accepted the salvage services under Clause 15(b). The 2nd Defendant though not a party to the Agreement was liable for all salvage services rendered on behalf of both Defendants to salvage both the vessel and cargo.

28. They relied on the International Convention on Salvage IMO, 1989 to define salvage operations as stipulated under Clause 2 as doth:

> " Any act or activity undertaken to assist a vessel or any other property in danger in navigable waters or any other waters whatsoever."

29. They also referred to Chapter III therein on the Rights of Salvors under Article 12 as follows: -

'Salvage operation which have had useful result give right to a reward.'

30. They also cited and relied Clause 73(2) as follows:

> " Payment of a reward fixed according to paragraph 1 shall be made by all of the vessel and other property interests in proportion to their respective salved values."

31. The Plaintiff filed Supplementary Submissions dated 27th October 2023 where they submitted that the 2nd Defendant's submissions were filed late without leave and should be struck out. It was noted that that the 2nd Defendant's Defence dated 17th August 2017 was struck out and is there is no Defence and the 2nd Defendant has no audience. They rely on Part 11 of the English Civil Procedure Rules, Order 11 Rule 7 as follows:

> " If on an Application under this Rule, the Court does not make a declaration: -
>
> The acknowledgement shall cease to have effect

> The Defendant may file a further acknowledgement of service within 14 days or such other period as the court may direct."

32. On this, it was submitted that the Rules applies where there was no Application to contest the court's jurisdiction. It was the submission of the Plaintiffs that the 2nd Defendant's submissions were an abuse of the court process.

33. They stated that it was necessary for the service of the warrant of arrest against the vessel or cargo to be effected on the property to be arrested as required under Order 75 Rule 8 of the English Civil Procedure Rules. They also relied on Article 13 of the International Convention on salvage IMO of 1989 to submit that the salvage reward is required to be fixed by the court.

34. Submissions 19th September 2023 in response to the 1st Defendants submission. Were filed. The plaintiff relied on the Ruling dated 10th August 2000. In that respect they stated that Rule 32.15 of the English Civil Procedure Rules, 1998 only applied to evidence which is required to be given in proceedings or any other hearing which is not a trial. Consequently, it was their case that Practice Direction 22 (2.1) of the White Book 2021 only came in force on 6th April 2021 and were inapplicable before then.

35. It was the plaintiff's case that the spirit of the convention was to encourage salvage operations and not suppress them. They relied on Article 13 of the Convention.

36. The 1st Defendant filed submissions dated 15th September 2023, where they relied on Section 4 of the *Judicature Act* Cap 8 Laws of Kenya to submit that the admiralty jurisdiction of the High Court of Kenya was exercisable in accordance with the procedures of the High Court in England. Therefore, it was submitted that the Senior Courts Act, 1981 and the English Civil Procedure Rules 1998 as amended in 2020 ousted the Application of other relevant substantive statutes applicable for the purpose of other civil matters before the High Court.

37. It was also submitted that Murri, as agent of undisclosed principal would not sue the 1st Defendant. They relied on the case of Agricultural Finance Corporation v Lengetia Limited & Jack Mwangi [1985] eKLR as follows:

> " As it stated in Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110:
>
> "As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.

38. The 1st defendant stated that the plaintiff as agents had no authority to sue and as such they lacked locus standi. On this reliance was placed on the case of Lochab Brothers v Kenya Furfural Co Ltd [1983] eKLR as follows:

> The more serious objection is that the receivers had no locus standi and they could not bring the proceedings in their own name. They were authorized to take proceedings only in the name of the company whose agents they were, or otherwise as may be deemed expedient (clause 10(a) of debentures). There was no attempt to show that it was deemed expedient to take proceedings otherwise.

39. They also submitted that the Plaintiff had not satisfied the criteria for fixing the salvage reward as required under Article 13 of the Convention.

40. On whether there was breach of contract, they submitted that there was none and general damages would not be granted and on the basis of the decision of Dharamshi v Karsan (19740 KLR 1 and Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR. In the latter case the court stated as follows:

> " :With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason

41. It is the 1st respondents' case that specials must be specifically pleaded. They cannot be thrown to the court. In the case of Postal Corporation of Kenya v Gerald Kamondo Njuki t/a Geka General Supplies [2021] eKLR the court stated as follows" - as doth:

> " The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic).
>
> What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove."
>
> Likewise, the respondent claimed the sum of Kshs. 205,095,000 as the loss that he claimed to have suffered out of the appellant's breach. It was a duplication of his claim to seek an award for general damages. In any case, having failed to prove his claim for Kshs. 205,095,000 there was no basis for the learned Judge awarding him the sum of Kshs. 20 million. We come to the conclusion that the learned Judge misapprehended the law in making the award."

42. The 2nd Defendant also filed submissions dated 13th October 2023 where they raised 10 issues for determination.

43. On whether there was proper service of the writ of summons, it was submitted that fair trial was a right in the bill of rights and as there was no service, there was no fair trial. That the summons would not be said to be properly served 12 months after issuance unless renewed by an Order of court.

44. It was posited that under Article 23 of the Convention, a cause of action arising from salvage action would be time barred after 2 years. Reliance was placed on Order 6 Rule 8 of the Rules of the Supreme Court. It was submitted that the Plaintiffs' were unnamed persons and as such unidentified and so could not enjoy any rights under Article 25 (c) as read with 50 of *the Constitution* of Kenya.

45. As to whether the conditions at the sea drastically changes, they submit that the 2nd Defendant was not privy to the Towhire Agreement.

, no masters of officers of the Tugboats was called to conform this fact in evidence that the claim should fail as not proved. Reliance was placed on sections 107,108,109 and 112 of the *Evidence Act*, Cap 80 Laws of Kenya.

46. They Submitted that the involvement of Steve B was a towage agreement and not salvage agreement. They stated that the failure by the Plaintiff to provide the deck, engine room, and bridge logbooks was evidence that the weather did not worsen as alleged. In the circumstances, they posited that there were no circumstances for salvage. The only question they left out is, after worsening of circumstances, how the motor tanker reached the shore with a dead engine.

47. It was their case that salvage costs assessed in 1998 were to the tune of no kore than US $ 195,000/-. These costs were however not paid.

Analysis

48. This suit had what I can call a plethora of preliminary objections. They derailed the suit for years. When on the hearing date the Plaintiff wanted to rasie the same, I declined to hear them and directed that there can be nothing preliminary in a suit which is over a quarter century old. I ordered that any issue was to be dealt with finality as per their earlier consent On the hearing date the claimant still had some form of preliminary objection but at the pain of choosing

49. Witnesses were cross examined over a number of days. To be able to foreclose the postponed preliminary objections, the court may need to address what a preliminary objection is. What they called preliminary objections were not true points of law. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation as hereunder: -

> " The first matter relates to the increasing practice o f raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

50. In a Tanzanian case of Hammers Incorporation Co. Ltd Versus the Board of Trustees of the Cashewnut Industry Development Trust Fund, where the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar es salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

51. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra): -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
>
> "....A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."
>
> At page701 paragraph B-C Sir Charles Newbold, P. added the following:
>
> A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...."

52. A Tanzania Court of Appeal sitting in Dar Es Salaam, in Karata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), Luanda, J.A., Ramadhani, C.J., Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings."

53. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR:

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

54. It is therefore my view that a preliminary objection must be based on current law, and be factual. The facts should not be disputed. All the so called preliminary objections I have seen on record do not amount to preliminary objections. There is nothing preliminary about them. I do not find it necessary to address each of them.

Jurisdiction

55. The jurisdiction of this court is circumscribed under Article 165(3) of *the Constitution* of Kenya, which posits as follows: -

> (3) Subject to clause (5), the High Court shall have-
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

56. The court must have jurisdiction to determine a claim. The Admiralty jurisdiction is provided under Section 4 of the *Judicature Act*, which provides as follows: -

> (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 or other navigable inland waters in Kenya.
>
> (2) The admiralty jurisdiction of the High Court shall be exercisable-
>
> (a) over and in respect of the same persons, things and matters; and
>
> (b) in the same manner and to the same extent; and
>
> (c) in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations.
>
> (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.
>
> (4) An appeal shall lie from any judgment, order or decision of the High Court in the exercise of its admiralty jurisdiction within the same time and in the same manner as an appeal from a decree of the High Court under Part VII of the *Civil Procedure Act* (Cap. 21)."

57. It is noted that such jurisdiction is the same as the one exercised under by the High Court in England. The jurisdiction is exercised in conformity with International Law and comity of nations. What this means is that the admiralty jurisdiction is exercised using the current Law of England as modified for the circumstances of this conventions governing the power of sovereign nations to control economic activities in certain zones of the sea. Section 4(2) c is the section that needs an amendment by deletion and as a result we gain full independence as a country. The section is of dubious legality. However, it is not for determination today.

58. The law relating to salvage is expressly acknowledged in Article 303 of the United Nations Convention on the Law of the Sea, 1982 as doth: -

> " 1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall cooperate for this purpose.
>
> 2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the seabed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.
>
> 3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.
>
> 4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

59. Under the *Judicature Act*, there are Admiralty Rules, known as High Court (Admiralty Rules). Under Rule 7 of the High Court (Admiralty) Rules, 1979, provide for use of Admiralty forms which are for the time being used by the Queens Division (Now King's Division) subject such variation as may be expedient. The Rule provides –

> " (1) Subject to paragraph (2), the forms to be used in admiralty proceedings shall be those in use for the time being in the Queen's Bench Division (Admiralty Court) in England, subject to any variations of whatever nature which may be expedient.
>
> (2) The heading to the forms shall be— "In the High Court of Kenya at (name of registry) Admiralty Jurisdiction" followed by the title of the suit as in England.

60. Before proceeding it is imperative that the court satisfies itself that it has jurisdiction. Jurisdiction is usually divided into four

a. Jurisdiction ratione personae.

b. Jurisdiction ratione temporis

c. Jurisdiction ratione materiae

d. Jurisdiction rational soli.

61. Jurisdiction rational personae is upon parties themselves. That is to say whether parties are in a position to be bound by the law suit. Having noted that the ship MV Joey was towed to Kenya, the parties are subject to the jurisdiction rational personae. The claimant was the managers and crew the motor tugs Barbra and Steve B. The first defendant is Alba petroleum as manager of Festival limited while the second defendant is said to be Veba Oil supplies trading GMBH, Hamburg of Bahamas.

62. Whether this was a towage or salvage, the voyage ended with motor tanker Joey in Kenya. The court therefore has jurisdiction ratione personae over the ship.

63. Secondly, there is jurisdiction ratione temporis. This refers to the jurisdiction pursuant to the time or period the court's powers are in force. Given that the matters in dispute were raised within 2 years

of the salvage, then the court has jurisdiction. This is in line with article of the salvage convention. Further, savage occurred into after coming into force of the treaty in Kenya and England. The salvage convention, 1989 provides as follows: -

> " Limitation of actions (1) Any action relating to payment under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operations are terminated.
>
> (2) The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration to the claimant. The period may in the like manner be further extended.
>
> (3) An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted.

64. Thirdly, jurisdiction ratione materiae is over the subject matter. As early stated, the subject matter, MV Joey docked or brought to Mombasa within the jurisdiction of Kenya. Therefore, the court has found that it has jurisdiction over the subject matter. The court notes that the happenings occurred or ended in Kenyan territory. Therefore, this court sitting in Mombasa has jurisdiction ratione loci over the ship.

65. It is important to note that the warrant of arrest for the tanker was lifted upon deposit of US $ 3,000,000/=. It must be recalled that the court cannot assume jurisdiction it does not have nor eschew jurisdiction it has. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the Supreme Court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

66. The court will therefore take up jurisdiction where it has and eschew jurisdiction where none exists. In Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he then was stated as doth;

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. 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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: -

> "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics."

67. The question then that we have is whether the Defendants, especially the 2nd Defendant are properly on record. The plaintiff raises questions regarding Acknowledgment of service. In the Ruling by P.J.O. Otieno J, as then he was, as reported Murri International Salvage Operation Company Limited v M/s Festival Limited & another [2017] eKLR, stated as doth: -

> "41. This Claim was filed in August 1998. There has been a multiplicity of applications. An appeal to the Court of Appeal was determined in 2007 but the Court file went missing and had to be reconstructed. Several attempts were made by parties to dispose of the preliminary objections. The 2nd Defendant's advocates have explained that they could not immediately find the Court file. The Claim has been pending for 18 years now. In the circumstances I could not find the delay in filing the application notice dated 26.6.2015 inordinate.
>
> 42. This Claim has been pending for almost 20 years. The suit is nowhere close to a determination of any issue on merit. I urge the parties and their advocates to answer to their obligation under the overriding objectives of the court and be guided by Article 159 of *the Constitution* to resolve preliminary matters as soon as possible. By way of case management, it is hereby ordered and directed that, all pending applications be kept in abeyance so that the application to substitute and the preliminary objections be heard on priority basis on a date to be taken soon after delivery of this ruling and in court."

68. The claim was amended pursuant to the consent dated 27/4/2017. The plaintiff was to file a fresh claim. If for any reason one or the other defendant is not properly on record, there consent will be otiose. This will also mean that there will be no claim. The fresh claim was filed pursuant to a consent order. I decline to any invitation to strikeout any of the parties.

69. The judgment herein proceeds on dual laws of Kenya as the jurisdiction loci and the Law of England as Applicable law. However, to enable the matter be concluded the court shall set out issues and discuss them seriatim.

    a. The Applicable law to the claim.

    b. Whether there was a towage of slave contract in for either and/or both Tugs Barbara and Steve B.

    c. Quantum Costs.

70. By amended Application notice where, the plaintiff sought strike out the Amended defence filed on 27/8/2023. Further they stated that the defence was incomplete as it was not made under a valid statement of oath. They Submitted that the Defence was filed without leave. This was said to have been

made under RSC order 18, Rule, Order 19 (1) and Order 12 Rule. Part II (7) of the Civil Procedure Rules of England 2013.

71. The 2nd defendant maintained that parties cannot thrive on interlocutory applications for 21 years. This is true for reason that the law applicable, despite protestation and pretense is the law of Kenya. The English law is applied not as English law but a lazy adaptation of the same. England does not have an equivalent of Article 159 of *the constitution*. Consequently, all colonial relics that tie the claims in court forever are afoul our constitution.

72. To the extent that strict compliance of English law is requested, it is undue regard to procedure technicalities. It does not go into the substance. It is a duty of this court to promote indigenous jurisprudence. It cannot be achieved by blind deference to English law.

73. The matter has had checkered history. The court made several Rulings and given a myriad of orders. The most significant is that ex parte Judgment that had been entered against the 2nd defendant for US $ 492,800/= plus interest above Libor with effect form 5/8/1998 on 20/4/2017 was set aside. Libor is an acronym for London interbank interest rate which is used as a benchmark for short-term interest rates in that country. The most appropriate in this country is the central bank rates. The claim was reinstated for hearing on merit that was never to be

74. A consent was thereafter recorded giving life to the claim. At the time of recording the consent, the claimant's claim was tenuous. It survived by virtue of the consent. I cannot go behind the consent and rule on acknowledgment of service since they ae tied at the hip. The Court of Appeal pronounced itself on setting aside of a consent judgment may be set aside in the case of Board of Trustees National Social Security Fund versus Micheal Mwalo [2015] eKLR as hereunder: -

> " The judgment arose from a consent of the parties to the suit. The law pertaining to setting aside of consent judgments or consent orders has been clearly stated. A Court of law will not interfere with a consent judgment except in circumstances such as would provide a good ground for varying or rescinding a contract between parties. To impeach a consent order or a consent judgment, it must be shown that it was obtained by fraud, or collusion or by an agreement contrary to the policy of Court

75. In Brooke Bond Liebig vs Mallya (1975) EA 266 where Mustafa Ag. VP stated posited as doth: -

> " The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in certain circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy or for such reasons as would enable a court to set aside or rescind a contract. In this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all the material facts and there could not have been any mistake or misunderstanding. None of the factors which could give rise to the setting aside of a consent agreement existed."

76. It is not necessary to decide on the acknowledgement of service. This question has been decided by this court and the court of Appeal many times in this matter. I will proceed and conclude the matter on merit. Parties need to chart their destiny from thenceforth.

77. The matter was set down for hearing the plaintiff filed another Application dated 19/4/2023 to strike out the Defence. I declined to hear the Application and ordered the suit to proceed. I was for a

considered view that the Plaintiff did not want to have the matter heard on merit. It could because of the usual delay to enhance interest which is paid on special claims.

78. Indeed, during the first hearing the court was surprised with a request for Italian interpreter. When the court asked a few questions including the fidelity of documents signed by the same party which are written in English. I concluded that parties were playing games. The witness turned out to be proficient in English for the several days he was in the dock. Some parties were thus playing games. The matter then proceeded and was concluded. As Justice P.J. Otieno stated in one of his ruling, this is a classic case study on how not to conduct a case.

The Applicable Law

79. The question of applicable law is in dispute in this case. The dispute however is limited to the substantive law. The procedural law was settled as the law of England. However, the seat of the court is not in London. This court is not sitting as a king's bench judge. In *Republic v Chengo & 2 others (Petition 5 of 2015)* [2017] KESC 15 (KLR) (26 May 2017) (Judgment) (Judgment), the supreme court stated as doth: -

> "It is against the above background, that Article 162(1) categorizes the ELC and ELRC among the superior Courts and it may be inferred, then, that the drafters of *the Constitution* intended to delineate the roles of ELC and ELRC, for the purpose of achieving specialization, and conferring equality of the status of the High Court and the new category of Courts. Concurring with this view, the learned Judges of the Court of Appeal in the present matter observed that both the specialised Courts are of "equal rank and none has the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived, of the other". Thus, a decision of the ELC or the ELRC cannot be the subject of appeal to the High Court; and none of these Courts is subject to supervision or direction from another. In their words: "By being of equal status, the High Court therefore does not have the jurisdiction to superintend, supervise, direct, guide, shepherd and/or review the mistakes, real or perceived, of the ELRC and ELC administratively or judiciously as was the case in the past. The converse equally applies. At the end of the day however, ELRC and ELC are not the High Court and vice versa. However, it needs to be emphasized that status is not the same thing as jurisdiction. *The Constitution* though does not define the word 'status'. The intentions of the framers of *the Constitution* in that regard are obvious given the choice of... words they used; that the three Courts (High Court, ELRC and ELC) are of the same juridical hierarchy and therefore are of equal footing and standing. To us it simply means that the ELRC and ELC exercise the same powers as the High Court in performance of its judicial function, in its specialised jurisdiction but they are not the High Court."
>
> 51. Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court's operation. Courts can therefore be of the same status, but exercise different jurisdictions

80. This means that though we are using the law of England, the court is still a Kenyan court. In terms of its precedent value, the decision binds in Kenya and it is still foreign judgment in England. Substantive law will be a hodgepodge of laws that govern shipping and admiralty claims. For example, to define a ship, we shall not use the law of England. When procedural law is said to be English law, it does not mean that it will be applied to the letter. It is to the extent circumstances of the people of Kenya allow.

Substantive dispute

81. The substantive dispute relates what the issues are. In effect, what is it that the court has been called to decide on. There are three issues to decide on are: -

    a. Whether there was salvage and or towage.

    b. What rate of towage/ salvage is applicable?

    c. The liability related to: -

        i. Motor Tug Barbara

        ii. Motor Tug Steve B.

82. It was agreed that there was an agreement for towage for motor vessel Barabara. The said agreement provided in Clause 26 provided as follows: -

> " In the event that the 'Joey' drifts into Somali Territorial Waters (12 miles) or should the actual physical conditions of the Joey in the opinion of the Tug-Owner change or alter from that of being immobilized but otherwise 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 the 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."

83. The agreement for Lloyd's Open Form 1995 gives the parties a right to be paid only on successful salvage on terms to be fixed by the tribunal in London or a court of law. This means that the salvage reward has been subject to the salvor successfully saving the ship or cargo, and if neither is saved, the salvor gets nothing, however much time and money has been spent on the project.

84. The principle agreed to appears harsh but agreements are agreements. The courts have no role in saving parties from such agreements. It is a fundamental principle of international law under the mantra pacta sunt servanda. In Kenya the Court of Appeal addressed the issue in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR as follows: -

> " A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
>
> As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

85. This harsh principle is called -No cure – no pay, and is usually prominent in the form titled Salvage Agreement. It is a statement of this fundamental premise upon which salvage is based. Salvage of cargo is not based on agreement but on the cargo being under peril. In this case there was no need for the cargo owner to consent as they are unknown at the time of salvage. The convention places the sharing the responsibility of rescue on the ship and the cargo owners.

86. This is the clause on which this case turns. In spite protestations, I have not been asked to exclude the same from the case.

87. Turning to the merit of the claim, jurisdiction for admiralty dispute is set out in Section 20 of the Senior Courts Act 1981 of England as follows: -

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

(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);

(b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);

(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

(d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen's Bench Division and directed by the rules to be exercised by the Admiralty Court.

(2) The question and claims referred to in subsection (1) (a) are -

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship or as to possession, employment or earnings of that ship;

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

(d) any claim for damage received by a ship;

(e) any claim for damage done by a ship;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of-

(i) the owners, charterers or persons in possession or control of a ship; or

(ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship.

(g) any claim for loss of or damage to goods carried in a ship;

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

(j) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under section 51 of the *Civil Aviation Act* 1949, of the law relating to salvage to aircraft and their apparel and cargo);

(k) any claim in the nature of towage in respect of a ship or an aircraft;

(l) any claim in the nature of pilotage in respect of a ship or an aircraft;

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;

(o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);

(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(q) any claim arising out of an act which is or is claimed to be a general average act;

(r) any claim arising out of bottomry;

(s) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty."

88. The Section provides for various heads which fall under admiralty. In the current circumstances the claim is anchored on sections 20(2)(j) and 9(k) of the Senior Court Act. To that extent I am satisfied that this is a proper admiralty claim and this court has jurisdiction ratione materiae over the ship MT Joey.

89. Jurisdiction for both tow and salvage are important. The court has to be satisfied that it has requisite jurisdiction. In the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others [2012] eKLR, the supreme court stated as doth: -

> "This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

90. Jurisdiction was also addressed in an earlier admiralty Appeal by judges Nyarangi, Masime and Kwach JJA, as then they were in Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, Justice Nyarangi JA, as he then was stated as hereunder: -

> "With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. 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. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
>
> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics."

91. The court will therefore assume jurisdiction where it has and eschew jurisdiction where none exists.

92. Section 2 of the International Convention on International Convention On Salvage, 1989 states: -

> "This convention shall apply here Judicial of arbitral proceedings relating to matters dealt with in this convention are brought in a state party."

93. The convention gives incentive to undertake salvage operations in respect of vessels and other property in damage. Article 5 of the salvage states: -

(1) This Convention shall not affect any provisions of national law or any international convention relating to salvage operations by or under the control of public authorities.

(2) Nevertheless, salvors carrying out such salvage operations shall be entitled to avail themselves of the rights and remedies provided for in this Convention in respect of salvage operations.

(3) The extent to which a public authority under a duty to perform salvage operations may avail itself of the rights and remedies provided for in this Convention shall be determined by the law of the State where such authority is situated."

94. The contract can be nullified if the payment is on an excessive degree too large or too small for the services rendered. Article 10 provides that every master of a ship or vessel is bound so far he can do so without serious danger to his vessel and person thereon render assistance to persons in manager of being lost at sea. It provides as follows: -

> " 1. Every master is bound, so far as he can do so without serious danger to his vessel and persons thereon, to render assistance to any person in danger of being lost at sea.
>
> (2) The State Parties shall adopt the measures necessary to enforce the duty set out in paragraph (1).
>
> (3) The owner of the vessel shall incur no liability for a breach of the duty of the master under paragraph (1)

95. A salvage operation which have a useful result gives rise to a right to Reward. Article 12 of the convention provides as follows: -

> "(1) Salvage operations which have had a useful result give right to a reward.
>
> (2) Except as otherwise provided, no payment is due under this Convention if the salvage operations have had no useful result.
>
> (3) This chapter shall apply, notwithstanding that the salved vessel and the vessel undertaking the salvage operations belong to the same owner."

96. The reward is fixed as per Article 13 of the convention provides for the Criteria for fixing the reward: -

(1) The reward shall be fixed with a view to encouraging salvage operations, taking into account the following criteria without regard to the order in which they are presented below:

a. The salved value of the vessel and other property;

b. The skill and efforts of the salvors in preventing or minimizing damage to the environment;

c. The measure of success obtained by the salvor;

d. The nature and degree of the danger;

e. The skill and efforts of the salvors in salving the vessel, other property and life;

f. The time used and expenses and losses incurred by the salvors;

g. The risk of liability and other risks run by the salvors or their equipment;

h. The promptness of the services rendered;

i. The availability and use of vessels or other equipment intended for salvage operations;

j. The state of readiness and efficiency of the salvor's equipment and the value thereof.

2. Payment of a reward fixed according to paragraph *(1)* shall be made by all of the vessel and other property interests in proportion to their respective salved values. However, a State Party may in its national law provide that the payment of a reward has to be made by one of these interests, subject to a right of recourse of this interest against the other interests for their respective shares. Nothing in this article shall prevent any right of defence.

3. The rewards, exclusive of any interest and recoverable legal costs that may be payable thereon, shall not exceed the salved values of the vessel and other property.

97. The reward shall be proportional to the vessel and property interest as per clause 17(2) of the convention. Under Article 17 services rendered are not rewarded unless they exceed what can be considered due performance.

> " No payment is due under the provisions of this Convention unless the services rendered exceed what can be reasonably considered as due performance of a contract entered into before the danger arose."

98. The salvage is time barred if the Action is not commenced within 2 years. The article 23 of the convention provides as follows: -

> " 1. Any action relating to payment under this Convention shall be time-barred if judicial or arbitral proceedings have not been instituted within a period of two years. The limitation period commences on the day on which the salvage operations are terminated.
>
> 2. The person against whom a claim is made may at any time during the running of the limitation period extend that period by a declaration to the claimant. The period may in the like manner be further extended.
>
> 3. An action for indemnity by a person liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs, if brought within the time allowed by the law of the State where proceedings are instituted."

99. Reading the claim, there is no question that the salvage carried out. I also find and hold that the 1989 convention on salvage applies to this case. By dint of Section 4 of the *Judicature Act*, the court is entitled to consider the Claim for towage and salvage by Motor Tug Barabara and claim for salvage including standby for Motor Tug Steve B.

100. The circumstances pleaded give rise to admiralty claim for salvage. For motor tug Barbara, there was already a contract for towage which terminated and motor tug Sea Bulk Dana was hired from Mumbai or Bombay as it was known then. It could not arrive due to "adverse weather condition." These are the same conditions the two motor tugs carried out Salvage.

101. The 2nd defendant maintained that they were was not privy to the tow hire agreement. They stated that the claim was time barred. The claims were filed within the year of occurrence. The fresh claims were basically amendments. This had been decided by the court of Appeal and as such I shall not differ with a court with binding effect to this court. That issue was settled by the court of Appeal in an appeal

from this case reported as Owners and Master of the Motor Vessel "Joey" V Owners and Masters of the Motor Tugs "Barbara" and "Steve B" [2007] eKLR as follows: -

> " For our purposes section 4(3) of the *Judicature Act* is also important as it provides that:-
>
> "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."
>
> There is accordingly, nothing in law to prevent a judge of the High Court exercising admiralty jurisdiction from applying the powers such a judge has under the *Civil Procedure Act* or the rules made thereunder if exercise of such power is necessary to enable the judge do justice between the parties. In the appeal before us, Mr. Justice Waki held that amendments to pleadings relate back to the time when the pleadings being amended were first filed. That is an accepted principle under the *Civil Procedure Act* and the Civil Procedure Rules. The learned Judge was perfectly entitled to hold so in the proceedings which are now the subject of this appeal.

102. In this the court was addressing the jurisdiction of the court as set out in under section 4(1) of the *Judicature Act*, Chapter 8 Laws of Kenya.

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

103. On weather, I note that the Plaintiff had a solemn duty to prove their case. The case is of civil nature. The question as to what amounts to proof on a balance of probabilities was discussed by Kimaru, J in William Kabogo Gitau vs. George Thuo & 2 Others [2010] 1 KLR 526 as follows:

> " In ordinary civil cases, a case may be determined in favour of a party who persuades the court that the allegations he has pleaded in his case are more likely than not to be what took place. In percentage terms, a party who is able to establish his case to a percentage of 51% as opposed to 49% of the opposing party is said to have established his case on a balance of probabilities. He has established that it is probable than not that the allegations that he made occurred."

104. In Palace Investment Ltd vs. Geoffrey Kariuki Mwenda & Another (2015) eKLR, the judges of Appeal held that:

> " Denning J. in Miller Vs Minister of Pensions (1947) 2 ALL ER 372 discussing the burden of proof had this to say; -
>
> "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say; we think it more probable than not; the burden is discharged, but if the probability are equal it is not. This burden on a balance of preponderance of probabilities means a win, however narrow. A draw is not enough. So in any case in which a tribunal cannot decide one way or the other which evidence to accept, where both parties...are equally (un)convincing, the party bearing the burden of proof will loose, because the requisite standard will not have been attained."

105. This is in line with sections 107-109 of the *Evidence Act* which provides as follows: -

107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person

106. The plaintiff adduced evidence on the perils that were facing MT Joey in the sea drifting towards the Arabian sea. The evidence met the threshold of proof on a balance of probability. In 21. The majority decision of the Supreme Court in Presidential Election Petition No. 1 of 2017 between Raila Amolo Odinga & Another vs. IEBC & 2 Others (2017) eKLR had the following to say on the evidential burden of proof in paragraphs 132 and 133 thereof: -

(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and "remains constant through a trial with the plaintiff, however, "depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.

(133) It follows therefore that once the Court is satisfied that the petitioner has adduced sufficient evidence to warrant impugning an election, if not controverted, then the evidentiary burden shifts to the respondent, in most cases the electoral body, to adduce evidence rebutting that assertion and demonstrating that there was compliance with the law or, if the ground is one of irregularities, that they did not affect the results of the election. In other words, while the petitioner bears an evidentiary burden to adduce 'factual' evidence to prove his/her allegations of breach, then the burden shifts and it behooves the respondent to adduce evidence to prove compliance with the law.....

107. Before the respondent is called upon to answer their respective cases, the Claimant had a duty to produce sufficient evidence to prove their case. This was done. The next question was failure to produce measurements from the ship.

108. The ship and cargo belonged to the Defendants. They are in possession of the said ship and its data. They cannot pace the burden of produce that data on any person. The person who has data and refuses to produce the same invites negative inference. In Kenya Akiba Micro Financing Limited vs. Ezekiel Chebii & 14 others [2012] eKLR the court stated as follows: -

" Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:

'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'

Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of Kimotho –vs- KCB (2003)

1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

109. Further I find that the weather was severe. This was the raison d'etre for the motor Tug Sea Bulk Danah from India had to return back to Mumbai. The Defendants made heavy weather of the issue of the M/v Joey's measurement not being produced. However, they never contradicted the evidence. The plaintiff 's evidence remaining unrebutted.

110. It is the 1st defendant who had the measurements and were in control of the ship when it was released. The ship was around for over a decade and no one bothered to apply for the measurement. On record there are detailed documents of what happened include breakage of the ship's own Propeller shaft. This was not due to lack of maintenance but rough weather at sea giving rise to a salvage situation.

111. The court of Appeal appreciated the findings of Waki J, as then he was as follows in an Appeal from this matter in Owners and Master of the Motor Vessel "Joey" V Owners and Masters of the Motor Tugs "Barbara" and "Steve B[supra]: -

Waki, J, however, adopted a different approach altogether. He set out all the evidence placed before him by the parties and having done so, held as follows:-

"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 Danah 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. ---------. I would find on a balance of probability that the Barbara was entitled to claim salvage for that period...

> "The Joey" itself had lost its propeller shaft and it was not suggested that that had happened because she had not been properly maintained. In those circumstances we think the learned trial Judge was entitled to agree with the Respondents that the Respondents were entitled to invoke Clauses 15, 21 and 26 in the towhire agreement and to treat the services of the Barbara in particular as salvage.
>
> With regard to the services rendered by the "Steve B", the learned Judge was of the view that if those services were not to amount to salvage, the judge hearing the matter would be perfectly entitled to reduce them to towage services. Both towage and salvage services qualify as admiralty claims, salvage under 20(2)(j) and towage under section 20(2)(k). The latter section specifically provides for:-
>
> "any claim in the nature towage in respect of a ship or aircraft."

112. The Court of Appeal invited the judge hearing, (history has placed the fate this on shoulders), the matter to reduce to towage, if I find otherwise. I am unable to find any other circumstances to find that there were circumstances giving rise to only towage. The situation obtaining was salvage. I also find that vessel M/v Barbara was involved in salvage.

113. The next question is for how long and what was the fate of Motor tug Steve B. the motor Tug Steve B was involved in provision of essentials to the crew during the time of standby. This was valid salvage.

This is because they kept the crew alive as salvage was awaited. It could have served no purpose to save the tanker and let life perish.

114. It is therefore clear beyond peradventure that involvement of motor tug Steve B was voluntary and was caused by the perilous nature of Motor Tanker Joey. I shudder to imagine the circumstances obtaining were akin to the circumstances obtaining in R v Dudley and Stephens 14 QBD 273, DC. This makes a sad reading during spare time.

115. Before proceeding it is important to address the defence case. They never tendered evidence. This leaves their defences mere suggestions and of no use to the claim. The Court of Appeal in the case Charterhouse Bank Limited (Under Statutory Management Vs. Frank N. Kamau (2016) eKLR considered the burden of proof of the plaintiff where the defendant did not adduce evidence as hereunder: -

> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified."

116. The cogent evidence tendered by the Appellant was unrebutted. The same showed that there were conditions for salvage. No evidence was tendered to contradict the claimant's evidence, which was firm on cross examination. I dismiss the defences raised. I was invited to read the captain's evidence. The same was used by the court of Appeal in reaching the decision mentioned above. This means that the facts crystalized in the court of Appeal, then still obtain.

117. As I address this it is the duty of the court to fix amounts for salvage. The claims sought are as follows: -

a. Tug Barbara from 2/7/1998 to 8/7/1998 at US $ 70,000/=

b. Tug Barbara from 9/7/1998 – 4/8/1995 – US $ 220,000/=

c. Tug Steve B form 11/7/1998 – 4/8/1998 US $ 282, 500/=

Total US $ 572,500/=

Less paid (US $ 80,500)

d. Sum Claimed US $ 492,500

118. The tow hire agreement was reached for a sum of US $ 5,000 per day. This was in the agreement. The motor tug was entitled to tow up to the time the tow contract was terminated.

119. There were however periods when the tow lines broke. I shall exclude that period as a wasted period. I will also exclude a period of active prohibition as motor tug Sea Bulk Dana was awaited. This relates to motor tug Barbara.

120. This is informed by the Salvage convention that prohibits the rescue where there has been a prohibition. Article 19 of the salvage convention states as follows: -

> " Services rendered notwithstanding the express and reasonable prohibition of the owner or master of the vessel or the owner of any other property in danger which is not and has not been on board the vessel shall not give rise to payment under this Convention."

121. Ipso facto services for tow hire are lesser than the salvage services. The perils associated with salvage are also higher as it is on the basis of succeed and be paid, fail and absorb your losses. This also means that there is express prohibition on forced salvage against reasonable refusal. Therefore, services rendered with express prohibition shall not give rise to a reward.

122. Therefore, I shall exclude the period up to 8/7/1998 when Motor Tug Seabulk Dana was awaited. This is because the owner had already prohibited use of the vessels. Towing resumed on 9/7/1998 and Steve B joined on 11/7/1998.

123. The jurisdiction was addressed and conclusively determined in the appeal referred. I have been able to show that the defendants failed to show me that the threshold was not made. This means that the court of Appeal words in the ealier Appeal must come into play. The court stated in Owners and Master of the Motor Vessel "Joey" V Owners and Masters of the Motor Tugs "Barbara" and "Steve B[supra], stated as follows:.

> " If the owners of "The Joey" succeeded in showing to the Judge that no situation had arisen which turned or could have turned the contract of towage into a salvage, then the owners of the two tugs would not be able to bring themselves within the provisions of section 20 (2)(j) of the *Supreme Court Act*, 1981 and if they were unable to bring themselves within those provisions, then the trial Judge would have no jurisdiction to deal with the matter any further and could only strike out the writ of summons. That is the underlying principle contained in the two previous decisions of this Court in the cases of The Owners Of The Motor Vessel "lilian S" V. Clatex Oil (KENYA) LTD [1989] KLR 1, and Roy Shipping Sa & All Other Persons Interested In The Ship "mama Otan" Vs. Dodoma Fishing Company LTD, Civil Appeal No. 238 of 1997 (unreported). In the LILIAN S, the Court, consisting of the late Mr. Justice Nyarangi, the late Mr. Justice Masime, and Mr. Justice Kwach, relying on previous decisions of the Courts of the United Kingdom, decisions such as The River Rima [1987] 3 ALL E.R 1, The I Congreso del Partido [1983] 1 AC 244 and such like cases, held that the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties

124. It should be remembered that this was an appeal from this matters. The factual findings and conclusions of law are binding. Nevertheless, the court is entitled to reach its own conclusion upon hearing the parties.

125. It can be seen from the submissions filed that parties did their best to place their cleints case before me. If I do not analyse every uthority cited, it is absolutely not due to disrespect or laziness but due to economy of space. The parties filed submission going into hundreds of pages. Nevertheless, I painstakingly read them.

126. I wish to recall the words I stated a few minutes ago in the case of Admiralty Cause E003 of 2021- E.T Timbers PTE Ltd of Singapore versus Defang Shipping Company Limited; A claim in rem against the

owners of the motor vessel 'Dolphin Star' of the Port of Panama v owners of motor vessel the Dolphin Star and Kenya ports authority as the harbor master (yet to be reported): -

> " Ssubmissions are supposed to be summaries and a recap of main points. They do not originate evidence and are talking points. A limit on the number of pages of submissions filed. Have over 400 pages of submissions and authorities does not drive the point home but obscures issues. This was stated succinctly by the Court of Appeal in Daniel Toroitich Arap Moi vs. Mwangi Stephen Muriithi & Another [2014] eKLR:
>
> "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

127. The Court of Appeal already made a finding that the M/v Joey was immobilized due to extreme weather conditions. I also find that M/v Tug Steve B, while on standby provided Fresh provisions and as such was on a salvage case. The court of Appeal left the question to me to decide on evidence. The weather conditions were undoubtedly were bad. The waters were rising upto 4 meters and the ship had drifted into rougher stretches of the Arabian Sea. Both the crew with cargo were in danger of peril. The peril also included supplies running up after the propeller broke and the Engine switched off.

128. I find that both M/v Tug Barbara and Steve B rendered salvage services at various points. My humble task is now to break the salvage down, into days. It should be recalled that Steve B was voluntarily joining. Both the vessel and cargo were in danger. Further the salvage was successful as motor Tanker Joey was brought the Kenyan coast. Both cargo and Motor tanker arrived safely hence entitling the two vessels, Motor Tugs Barbara and Motor Tug Steve B to reward under the Salvage convention.

129. It should be recalled that the 1989 Convention provides for more than one salvors. Award of one salvor does not affect the other affect the reward of the other. I find it unnecessary to apportion the reward within a motor tug and the owners and crew are subsumed into each other. They are not entitled to a different and separate reward. Sharing of the reward should be a subjet matter between the crew and the vessel. As such it is unnecessary to know who the crew were as they do not increase or decrease the award of reward to a Motor tug.

130. Tuning to each motor tug, I shall recall that parties are bound by their pleadings. The court cannot award that which was not prayed for. The Court of Appeal in the case Independent Electoral and Boundaries Commission & Another –Vs- Stephen Mutinda Mule & 3 Others [2014] eKLR, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-

> " ... the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd –vs- Nyasulu [1998] MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "The present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated-
>
> 'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot

be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'

131. Lord Denning in JONES Vs. NATIONAL COAL BOARD [1957]2 QB 55 posited that: -

'In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.'"

132. Therefore, parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

"

" 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

133. In the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The

Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

134. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

135. Motor vessel Steve B was on salvage mode from 11/7/1998 to 4/8/1998 when the salvage was completed. The plaintiff did not claim for the period it was on standby. For tug Steve B the plaintiff sought for a sum of US $. 7500 per day. This is based on two factors. First, the daily rate for towage agreed for the related vessel was US $ 5,000 per. Double this amount will be US $ 10,000/-. The discounted sum offered for this tug, Steve B was US $ 4,500 making its 100% mark up as US $ 9,000/=. A compensation of 50% above the tow rates agreed of US $ 5,000 will suffice. The sum is reasonable for the nature of the work carried out. However, the calculation is for 24 days. This works as US $ 180,000.

136. There was a claim for Motor tug Barbara was for US $ 10,000 per day. This is hundred 100% compensation over the tow rates. The same is exaggerated. A sum of US $. 7500 /= will suffice. This works to 24 days excluding days when the termination had been carried out and there was active resistance. This works US $. 180,000/=

137. The standby period from 2/7/1998 – 8 /7/1998 included a period that the tag had had its tow lines broken. 3 days were wasted due to weak tow lines. These were salvage days. Salvage services

were rendered which included providing moral assurance of safety to the crew and being voluntarily available if the situation turned worse.

138. The towing had already been terminated. The salvage during standby period was for 4 days. This works as 7500 x4 = 30,000/=. The 1st Defendant had made a payment of US $ 80,000/=. This covered part of towage and part salvage. However, in sharing the salvage the owners of cargo will be excluded from sharing tow charges. Nevertheless, the parties shall proceed as if no salvage has been paid or that the owners of motor Tanker Joey had prepaid their share of US $ 35,000

139. I find that towage charges were paid for and partly some salvage. This works out as follows in US $: -

Towage 45,000/=

Barbara stand by 30,000/=

Barbara salvage 180,000/=

Steve B salvage 180,000

Sub Total 435,000

Less 80,000 = 355,000

140. I shall therefore enter judgment for the plaintiff for a sum of US $ 355,000/= being the balance for and towage by Motor tug Barbara and Motor tug Steve B.

141. The total salvage amount for purposes of apportionment is US $. 390,000/= out of which the 1st defendant has already paid part of their share of US $ 35,000.

142. Regard a claim for General damages for breach of contract, in that there was no breach of contract. the towage contract was terminated. Having been terminated, then it was no longer available for performance.

143. In any case, there can be no general damages for breach of contract. I therefore dismiss the claim for breach of contract. The last aspect is interest. The matter has been in court for 26 years largely due to the plaintiff's multiple applications, loss of the file and filing of a fresh claim, which I find to be an amendment of the original claim.

144. The court cannot without offending good sense of morality reward a procrastinator with 3 decades long interest. Therefore, interest shall be limited to 4 years that is from 1/1/2020 till payment in full. I dismiss a claim for interest from 11/8/1998 until 31/12/2019.

145. In any case a fresh claim was only filed after 2017. There is no basis for claiming interest before then. The amount awarded to the plaintiffs shall be apportioned between the owner, Masters and crew of the two vessels as provided for under the salvage convention.

146. The 2nd defendant stated that she was not party to the towage agreement. That may be so. The salvage was for both cargo and vessel. The 2nd Defendant benefited from the salvage. The cargo was said to be valued at US $ 1,100,000/=. This figure was not disputed or other evidence given to the contrary. The figure was provided by the Motor tanker that was carrying the same. It was carrying the cargo hence I take it that the figure was accurate.

147. There were sums amounting to US $ 3,000,000/= Deposited as security to allow the release of the ship. The said amount shall be used to defray the decree herein together with all other expenses, including port charges, taxes that may be due, the Admiralty Marshal's charges and incidental costs. Payments will be made out of the said funds as follows: -

a. The initial amounts shall be paid for the marshal's charges.

b. Revenue and port charges incurred by Motor tanker Joey, if unpaid

c. The entire sum of US $ 355,000 together with interests from 1/1/2020

d. The legal costs shall be paid out of the said deposit.

e. The balance shall be returned.

f. The portion payable by the 2nd Defendant shall be paid by the 2nd defendant to the first defendant.

g. The plaintiff shall have costs of the suit.

148. I note that the defendants took issue with the crew not being named. This is the same for the 2nd defendant as the owners of cargo are not named. The manifests and records maintained routinely by the ships and tugs master and crew were. In any case it did not change the indebtedness of the defendant. Being a claim in rem, it is unnecessary to name the names of the crew.

149. In the circumstances l allow the suit as aforesaid.

Determination

150. The upshot of the foregoing is that I make the following orders jointly and severally against the Defendants;

a. The admiralty claim in rem by the plaintiff against the Defendant jointly and severally succeeds.

b. I declare that the services rendered by M/v Tug Barbara and Motor Tug Steve B were salvage services.

c. The appropriate rate of salvage, taking into consideration the towing rates, and the nature of cargo, is US $ 7,500 per day.

d. I enter judgment as follows: -

i. Tow services by Motor Tug Barbara US $ 45,000/=

ii. Salvage services by Motor Tug Barbara US $ 180,000/=

iii. Salvage during Standby by Motor Tug Barbara US $ 30,000/

iv. Salvage Motor Tug Steve B US $ 180,000/=

TOTAL salvage US $ 390,000

Sub-Total US $ 435,000/=

Less paid (US $ 80,000)

Sum due US $ 355,000/=

e. I decline to grant interest from 1998 to 31/12/2019. Interest on the above Amount shall run from 1/1/2020 until payment in full.

f. Costs of US $ 6,858 to the Plaintiff

g. The payment be made from security deposited as follows: -

i. The marshal charges as priority.

ii. Tax and port charges for Motor Tanker Joey, if still outstanding.

iii. The sum due under decree costs to the plaintiff together with costs.

iv. Balance returned to the depositor.

v. The defendants to refund each other on basis for proportion of value of vessel and cargo.

vi. File is closed.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF MAY, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr U. Khanna for Wanjiku Mohamed

Ms Akwana for 1st Defendant

Ms Nzisa for Ms Akwana for 1st Defendant

Ms Kinyua for the 2nd Defendant

Court Assistant - Brian