



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**COMMERCIAL, CIVIL & ADMIRALTY DIVISION**

**ADMIRALTY CAUSE NO. E003 OF 2021**

**E.T TIMBERS.....CLAIMANT**

**VERSUS**

**THE OWNERS OF THE MOTOR VESSEL DOLPHIN STAR.....DEFENDANTS.**

(Admiralty claim *in rem* against the motor vessel Dolphin Star of the Port of Panama).

**RULING ON AN APPLICATION TO SET ASIDE A WARRANT OF ARREST ISSUED AGAINST THE MOTOR VESSEL DOLPHIN STAR.**

**Brief background.**

1. On 4<sup>th</sup> April, 2021, this Court issued an *ex parte* warrant of arrest for the motor vessel Dolphin Star which was said to have been in breach of a charterparty entered into between the claimant and the owners of the motor vessel Dolphin Star as evidenced by a Fixture Note dated 19<sup>th</sup> January, 2021, entered into by the claimant, ET Timbers Limited and the defendants, the disponent owners of the said motor vessel 'Dolphin Star', namely Starryway Trading & Shipping Company Limited, with the head owners being Defang Shipping Company Limited.
2. The claimant alleged that the defendants carried part cargo on the motor vessel Dolphin Star instead of only the claimant's cargo of timber logs and that the said motor vessel deviated from the load Port of Greenville, Liberia *en route* to the discharge Port of Chittagong, in Bangladesh, without any agreement from the claimant.
3. The claimant further alleged that the motor vessel Dolphin Star called at the Port of Mombasa to discharge project cargo when she was not entitled to carry any part cargo and that the defendants have and continue to wrongfully fail, neglect and/or refuse to issue the bills of lading for the cargo of 6,254.32M3 (cubic metres) of timber logs loaded at the Port of Greenville, Liberia.
4. The claimant's claim against the defendants is for the cost and freight (C&F) value of the cargo of Liberia Tali (ERY) round logs in the sum of US \$2,000,000.00 on account of the breach of the charterparty.

**The Application Notice**

5. On 16<sup>th</sup> April, 2021 the defendants filed an Application Notice under certificate of urgency seeking the following orders-

i. Spent;

ii. Spent;

iii. That after the *inter partes* hearing, the warrant of arrest issued herein on 4<sup>th</sup> April, 2021 be set aside and the claim brought against the motor vessel Dolphin Star ("the vessel") herein be struck out on the grounds that-

- a. the action *in rem* brought against the vessel does not fall within this Honourable Court 's admiralty jurisdiction *in rem* under Section 20 and 21 of the Senior Courts Act 1981 and that this Honourable Court therefore had no jurisdiction to either entertain this claim so far as it concerns the action brought against the vessel or to issue a warrant of arrest against it (sic); and/or;

b. the institution of this action against the vessel and the warrant of arrest procured under it by the claimant on 04<sup>th</sup> April, 2021 are founded on non-disclosure of material facts and thereby constitute an abuse of the process of this Honourable Court justifying the setting aside of the warrant of arrest and the striking out of the claim *ex debito justitiae*; and

(iv) That the costs of the Application Notice be provided for.

6. The Application Notice is supported by the affidavit sworn on 16<sup>th</sup> April, 2021 by Mr. Nishit Maru Advocate, a partner in the law firm of CMS Daly Inamdar Advocates, who averred to have been duly authorized to make the affidavit on behalf of the defendants.

7. On 27<sup>th</sup> April, 2021 Mr. Sanjeev Khagram Advocate, a partner in the law firm of A. B. Patel, Advocates filed a declaration sworn on 26<sup>th</sup> April, 2021 in opposition to the Application Notice filed by the claimant. He averred that he had been duly authorized by the claimant to make the said affidavit.

8. Submissions were subsequently filed on 4<sup>th</sup> May, 2021 by the defendants' Counsel and on 18<sup>th</sup> May, 2021 by the Counsel for the claimant. They also filed numerous authorities in support of their respective cases to bolster their submissions.

9. The defendants' learned Counsel Mr. Samir Inamdar (S. Inamdar) submitted that the Claim Form and paragraph 5 of the claimant's declaration state that the claim falls under Section 20(2)(h) of the Senior Courts Act 1981 of England, on the basis of a "*claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship*". Further, that paragraph 2 of the particulars of claim and paragraph 6 of the claimant's declaration identify the parties to the charterparty as evidenced by the Fixture Note of 19<sup>th</sup> January, 2021, as being ET Timbers Private Limited as the claimant and Starryway Trading and Shipping Company Limited who are described as the "*disponent owners*" with Defang Shipping Company Limited, the applicant herein, as being "*head owners*".

10. Mr. S. Inamdar urged this court to note from the Fixture Note dated 19<sup>th</sup> January, 2021 annexed as Exhibit A to the claimant's declaration that-

- a. the parties to it are the claimant and Starryway Trading and Shipping Company Limited ;
- b. it makes no reference to either the applicant or to "head owners";
- c. it is a voyage charterparty incorporating the Standard Form Gencon 1994 Edition's terms and conditions save as varied by the Fixture Note;
- d. the cargo is said to be Liberian Ekki Azobe Round Logs; and
- e. the load port for the said cargo is Greenville, Liberia and the discharge port is Chittagong, Bangladesh.

11. The defendants' Counsel stated that at paragraph 12 of the claimant's 1<sup>st</sup> declaration, it has been asserted that by a letter dated 1<sup>st</sup> April 2021, the claimant gave notice of default to the defendants and demanded immediate issuance of the original bills of lading for the cargo loaded onto the said motor vessel Dolphin Star but the defendants had failed, neglected and/or refused to discharge their contractual obligations under the charterparty. It was submitted that contrary to what was asserted in the said letter, it was not written on behalf of the claimant but on behalf of the shipper, Euro Liberia Logging Company. It was stated that the foregoing was a serious and material misrepresentation and brings into question whether or not the claimant has the right of title to the cargo it claims it owns in the first place.

12. It was submitted that in the claimant's affidavit it is shown that under the terms of a Time Charter dated 1<sup>st</sup> January, 2019, the defendants hired out the motor vessel Dolphin Star to Starryway Trading and Shipping Company Limited and that during the currency of the Time Charter, the claimant entered into a Voyage Charter with Starryway on 19<sup>th</sup> January, 2021 in terms of the Fixture Note referred to earlier in the submissions.

13. The defendants' Counsel indicated that the claimant's replying declaration (2<sup>nd</sup> declaration) consists of a lengthy response which attempts to explain the claimant's position in further detail to justify the action taken against the motor vessel Dolphin Star. He also indicated that the said material was available to the claimant at the time it filed the action *in rem* and when it applied for a warrant of arrest against the said motor vessel.

14. It was submitted that admiralty jurisdiction of this Honourable Court flows from Article 165(3)(e) of the Constitution and Section 4 of the Judicature Act, Cap 8, Laws of Kenya. He referred to the decision in the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] 1 KLR, where Kwach JA stated that in the exercise of its admiralty jurisdiction, the High Court has to apply the law of England and in order to discover what the law is, one has to look at the Supreme Court Act and more specifically, Sections 20 and 21 of the said Act. This court notes that the said Act was replaced with the Senior Courts Act 1981.

15. The defendants' Counsel was of the view that the claimant had failed to bring its claim within the ambit of Sections 20 and 21 of the Senior Courts Act which provide for the Admiralty jurisdiction of the High Court. He made reference to Nyarangi JA's decision in the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** (supra), when dealing with the pre-requisites of admiralty jurisdiction in *in rem* proceedings, where the said Judge stated that it should be noted that where a claim is based on Section 20(1)(a) of the Supreme Court Act, the claim must come within Section 20(2)(a) to (s) of the said Act, otherwise the court would not have admiralty jurisdiction.

16. The defendants' Counsel indicated that the claimant's pleaded claim was specifically brought under Section 20(2)(h) of the Senior Courts

Act which relates to a claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship. It was submitted that Section 21(4)(b)(i) of the Senior Courts Act is specifically directed to the jurisdictional requirement that an action *in rem* can only be brought against a ship if the person who would be liable in a claim *in personam*, defined as “*the relevant person*” was:-

- i. when the cause of action arose, either the owner, charterer or the person in possession and control of the ship with which the claim arose; and
- ii. that at the time the claim form was issued the said person was the beneficial owner of all the shares in the ship to be arrested, or if the ship to be arrested is the ship in connection with which the claim arose, the demise charterer of the ship.

17. Mr. S. Inamdar asserted that the “*relevant person*” is key to the exercise of the court’s jurisdiction over a general maritime claim under Section 21(4)(b)(i), if, and only if, the said provision is satisfied, can a claimant found his claim as of right by bringing *in rem* proceedings against the ship engaged in wrongdoing, in which case, the court has no discretion not to prevent him from so doing. He relied on the Treatise **The Law and Practice of Admiralty Matters**, Derrington and Turner at page 83 to support the said submission.

18. He referred to **Part 11 of the White Book, Vol. 1**, which outlines the procedure for challenging the court’s jurisdiction. He also referred to the principles of disputing the court’s jurisdiction as set out in the **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** (supra), to the effect 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.

19. It was submitted that the claim in this matter has been brought against the defendants as the owners of motor vessel Dolphin Star and not the Head Charterers, Starryway Trading and Shipping Company Limited. It was contended that from the content of the claim form and the claimant’s declaration, the claimant’s claim arises out of the voyage charterparty entered into by the claimant with Starryway Trading and Shipping Company Limited. It was stated that the defendants were not a party to the said voyage charterparty and that the claimant had not established that the claim arose out of an agreement between the claimant and the defendants, relating to the carriage of goods in a ship or the use or hire of a ship.

20. Reference was made to a letter dated 1<sup>st</sup> April, 2021 annexed to the claimant’s 1<sup>st</sup> declaration allegedly demanding for the immediate issuance of the original bills of lading for the cargo loaded on board motor vessel Dolphin Star. It was contended that the letter was not issued by or on behalf of the claimant as its content shows that the complaint regarding the failure by the Master of the said vessel to issue the bills of lading was made on behalf of Euro Liberia Logging Company as the owners of the cargo as it uses the words “*its logs*” in the letter.

21. It was submitted that the demand by the shipper for the original bills of lading indicates that it and not the claimant, had title to the cargo on board the motor vessel Dolphin Star. It was further submitted that there was nothing in the declaration by the claimant showing that they owned the cargo. It was thus stated that on the basis of the material produced by the claimant at the time of the arrest, it plainly had no right or locus to present a claim *in rem* under section 20(2)(h) of the Senior Courts Act, in respect of the cargo against anyone and to apply for the arrest the said motor vessel.

22. The defendant’s Counsel in making reference to the claimant’s 2<sup>nd</sup> declaration indicated that the shipper was Euro Liberia Logging Company and that is the party which is entitled to bring a claim and not the claimant, who is named as the consignee and Notify Party under the said bill of lading.

23. Mr. S. Inamdar made reference to the General Paramount Clause under the draft bill of lading at page 20 of the exhibits to the claimant’s 2<sup>nd</sup> declaration, which provides that **The Hague Rules** apply where neither the country the cargo is loaded nor the country of discharge apply either **The Hague Rules** or any other convention relating to bills of lading. It was stated that neither Liberia nor Bangladesh apply **The Hague Rules** or any other enactment but on the basis of the claimant’s own case, **The Hague Rules** apply to the shipment.

24. He cited **Carver on Bills of Lading 2<sup>nd</sup> Edition**, which at paragraphs 9-149 reproduces Article III rule 3 of The Hague Rules, which provides that the shipper and not the consignee is the party entitled to be issued with a bill of lading by stating that after receiving the goods into his charge, the carrier or the Master or agent of the carrier shall, on demand of the shipper, issue to the shipper a bill of lading. He indicated that issuance of a bill of lading serves to preserve title to the cargo by the shipper. He was of the view that the claimant had failed to bring its claim within Section 20(2)(h) of the Senior Courts Act.

25. Mr. S. Inamdar submitted that the claimant had not satisfied the mandatory jurisdictional requirement to establish a connection between the motor vessel Dolphin Star and a person with personal liability in respect of the claim under Section 21(4)(b)(i) of the Senior Courts Act, which requires that at the time the Claim Form was issued, such person must either beneficially own all the shares in the vessel or be the demise charterer of the vessel. He indicated that the claimant’s 1<sup>st</sup> declaration at paragraph 16, clearly and unequivocally states that the “*relevant person*” liable in a claim *in personam* is Starryway Trading and & Shipping Company Limited and not the defendants. He posited that the foregoing was not surprising as it flows from the fact that the breach pleaded in the Claim Form arises out of the Voyage Charterparty entered into between the claimant and Starryway Trading and & Shipping Company Limited.

26. He urged that there was no evidence adduced in the claimant’s 1<sup>st</sup> or 2<sup>nd</sup> declarations, to show that Starryway Trading and & Shipping Company Limited beneficially owned all the shares in the Dolphin Star, when the claim was brought, but the defendants had shown that the registered owners of the said vessel are Defang Shipping Company Limited and that the said fact was uncontroverted. It was stated that there was no evidence to show that Starryway Trading and & Shipping Company Limited was the Demise Charterer of the motor vessel Dolphin Star at the time the claim *in rem* was filed.

27. Mr. Inamdar asserted that Starryway Trading and & Shipping Company Limited was the Head Charterer and that it was under the provisions of a Time Charter and not a Demise or Bareboat Charter. In illustrating the distinction between the two charters, he relied on the

decision in *Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)* [1984] eKLR, where Hancox JA distinguished a Demise Charter from a Time or Voyage Charter and the said Judge cited Lord Esher's definition of a Demise Charter in *Baumvoll Manufactur Von Scheibler v Gilchrest* [1892] 1 QB.

28. The defendants' Counsel referred to the Treatise **Carriage of Goods by Sea Chapter 1.4**, by John F. Wilson where a distinction was made between a Demise or Bareboat Charter and a Time Charter.

29. It was stated that the fact that Starryway Trading and Shipping Company Limited was neither the beneficial owner of the motor vessel *Dolphin Star* nor a demise charterer of the said vessel was known to the claimant before it filed the claim *in rem*. It was reiterated that the claimant knew the identity of the defendant as the owners of the motor vessel *Dolphin Star* as it referred to them by name and by the term "*Head Owner*" in paragraphs 6, 7 and 15 of the claimant's 1<sup>st</sup> declaration and exhibited at page 13 of Exhibit A, in support of its application for a warrant of arrest for the said vessel.

30. The defendants' Counsel cited the decision in **The Kommunar (No 2)** 1997 1 LLR 8, where Colman J was emphatic about the importance of "*the relevant person*" under the provisions of section 24(1) of the Senior Courts Act. The defendants' Counsel contended that the material placed before this Court by the claimant falls nowhere near the statutory requirements for the invocation of the admiralty jurisdiction of this Court as its case does not come within the ambit of sections 20(2)(h) or 21(4)(b)(i) of the said Act. This court was urged to down its tools by reason of the claimant's failure to fall within the said statutory provisions.

31. Mr. S. Inamdar submitted that the applicable substantive and procedural law with regard to admiralty matters in English law is not only set out in the Admiralty Jurisdiction Act but is also laid out in Part 61, Vol 2 of the White Book and the Practice Directions set out thereunder. He indicated that in its declaration, the claimant was required to provide the specific information required under Form ADM 5 in order to comply with the procedural requirement for arrest and in this respect, the declaration should have complied with the formalities of an affidavit as stated in the Treatise **Arrest of Ships at paragraph 1.608**, Berlingieri.

32. The defendants' Counsel stated that under Practice Direction 32PD4.2 which supplements Part 32 of Volume 1 of the White Book, the body of any affidavit needs to indicate and differentiate which of the statements in it are from the deponent's own knowledge and which are matters of information and belief and to identify the source for matters of information and belief. It was further stated that the claimant's declaration at paragraph 14, simply asserts that the deponent makes the declaration on the basis of information and documents supplied to him by Captain SM Sabed who represents the claimant's interests in the matter, but no indication was given on who Captain SM Sabed is or what his relationship is to either the claimant or to the claim itself.

33. It was submitted that Form ADM 5 specifically requires that the name and occupation of the informant be given. The Counsel for the defendants relied on the commentary at 2A – 95 in the Practice Directions under Part 61 Vol 2 of the White Book, which states that the sources and grounds in a declaration should be stated with precision and particularity and that a general statement such as "*from documents and information supplied to me by the claimants will not suffice*".

34. The defendant's Counsel submitted that Form ADM 5 also requires the "*relevant person*" to be identified with some particularity as to whether that person is either the owner or the charterer or the person in possession or control of the motor vessel and that the foregoing are options which the claimant had to choose *one* from but that the claimant's declaration simply failed to do that. He indicated that the entire declaration was devoted to elliptical descriptions of Starryway Trading and Shipping Company Limited as "owners", "disponent owners", "charterers" and "defendants", and as being "in possession or in control of the ship" and the claimants as either "Head owners" or "owners" and that the same was apparent at paragraph 15 of the claimant's 1<sup>st</sup> declaration.

35. It was contended that the above statement is not only a completely muddled assertion but amounts to a gross misstatement of English law as it seeks to completely violate the mandatory requirement under Section 21(4) of the Act and Form ADM 5 to identify precisely the "*relevant party*" being sued, the basis on which that party is sued and the connection that party has with the motor vessel *Dolphin Star*. He indicated that the defendants and Starryway Trading and Shipping Company Limited are two distinct and separate entities.

36. It was stated that the muddle was extended in the claimant's 2<sup>nd</sup> declaration at paragraph 5 where the claimant seeks to assert that they have a "dual cause of action" against Starryway Trading and Shipping Company Limited and the defendants. Mr. Inamdar stated that the foregoing amounts to an abuse of process.

37. He submitted that the letter attached as exhibit A to the claimant's 1<sup>st</sup> declaration was not from or on behalf of the claimant as alleged but it was written by lawyers instructed on behalf of the shipper of the cargo, Euro Liberia Logging Company and that the demand by the shipper for original bills of lading indicates that the shipper and not the claimant, had title to the cargo aboard the motor vessel *Dolphin Star*. It was stated that the assertion by the claimant that the said demand letter emanated from the claimant in paragraph 12 of the said declaration was a material misrepresentation, which misled this court into believing that the claimant was entitled to arrest the motor vessel *Dolphin Star* on the strength of that assertion, which constitutes a flagrant abuse of this Court's process.

38. It was indicated that it was clear from the 2<sup>nd</sup> declaration by the claimant that the dispute relating to the failure to issue bills of lading revolves around the fact that the claimant had failed to pay freight under the terms of the Voyage Charterparty. It was also indicated that although the defendants' submissions were not aimed at going into the merits of the claim or the dispute, the said fact should have been disclosed to this Honourable Court at the time an application was made to arrest the motor vessel *Dolphin Star*.

39. On the issue of non-compliance with the rules governing arrest in Practice Direction 61 of the Civil Procedure Rules and Practice Directions (White Book), it was submitted that the claimant failed to demonstrate that it had made any search in the Register of Ships to determine whether there was a caution in force against arrest of the motor vessel *Dolphin Star* under Rule 61.5.3(a) of the White Book, whereas the same is a mandatory requirement under the said Rules. It was indicated that it was questionable whether the particulars of ownership of the motor vessel *Dolphin Star* shown on an unheaded piece of paper, without the slightest evidence showing where it emanated

from, suffices as adequate evidence for the purposes of Form ADM 5, to justify the issuance of a warrant of arrest. The defendants' Counsel relied on the commentary at 2A – 95 in the **Practice Directions under Part 61 Vol 2 of the White Book**, on the need for such information to be being obtained from the Lloyd's Register.

40. This court was drawn to an earlier decision in which it struck out a claim *in rem* and set aside the warrant of arrest in the case of **Pembe Flour Mills Ltd v the Owners of the Motor Vessel "Ioannis G"** [2017] eKLR, for failure by the claimant to comply with the mandatory requirements under Part 61.5 of Practice Direction 61 of the Civil Procedure Rules and Practice Directions of England.

41. This Court was urged to strike out the claimant's claim as it does not fall within admiralty jurisdiction *in rem* or within the ambit of Sections 20 and 21 of the Senior Courts Act. The defendants' Counsel prayed for the orders obtained to be peremptorily struck out *in limine*, with costs to the defendants. The claimant's Counsel in the alternative, and without prejudice to its earlier submissions, prayed for the orders procured by the claimant from this Court on 4<sup>th</sup> April, 2021 to be set aside on the ground of a blatant abuse of the court's process in light of the claimant's failure to either make full and frank disclosure of all material facts or to comply with the mandatory provisions of Practice Direction 61.

42. The claimant's Counsel Mr. Khagram refuted that the claimant was guilty of any material non-disclosure and that it could not be said to have abused the process of the Court whether as alleged or at all, in a manner as to entitle the defendants to the setting aside of the warrant of arrest issued herein on the 4<sup>th</sup> April, 2021 and/or the striking out of the claim. He contended that the defendants were the ones who were abusing the process of the Court and were the cause of the alleged muddle as they were conducting themselves with complete lack of candour, in a bid to avoid their liability as carrier of the claimant's cargo of Liberian round logs.

43. On the issue of whether this court has jurisdiction, Mr. Khagram relied on the Court of Appeal decision in the case of the **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited** (supra), where Nyarangi JA stated 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. He also stated that in the said case both Kwach and Masime JJA concurred with Nyarangi JA's holding and relied on **I Congresso del Partido** [1981] 2 ALL ER, **The River Rima** [1987] 3 All ER 1, **Gatol International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co & Others** [1985] 1 ALL ER 129 and **Eypo Agnic, The** [1988] 3 All ER 810, which held that the question of jurisdiction ought to be decided on all the evidence placed before the Court.

44. Counsel for the claimant also referred to the decision by Waki J (as he then was) in **MV Barbara & Another v MV Joey & Another** [2000] eKLR, in which he held that the inherent power of the Court which is limited to staying proceedings or striking out part of the indorsement on the writ or dismissing actions is discretionary and is limited to actions which are obviously frivolous or vexatious or an abuse of the process of court process. He further went on to hold that based on the decisions of the Court of Appeal in the **Owners of the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited** (supra) as well as the case of **Roy Shipping S.A. and all other persons interested in the Ship 'Mama Otan' v Dodoma Fishing Company Ltd (1995 – 1998) 2 EA 294 – 318**, once the issue of jurisdiction is raised in an admiralty matter, that issue must be decided *in limine* and on a balance of probability.

45. It was submitted that in the **MV Barbara & Another v MV Joey & Another** (supra), the Judge noted that the Claim Form was defective but found that admiralty jurisdiction does not preclude the Court's civil jurisdiction under Section 4(3) of the Judicature Act and allowed the amendment of the pleadings. It was also stated that the Court of Appeal in an appeal arising from the **Owners and Master of The Motor Vessel "JOEY" v Owners and Masters of The Motor Tugs "BARBARA" & "STEVE B"** [2007] eKLR, upheld the decision of Waki J.

46. Counsel for the claimant stated that it is an undisputed fact that the motor vessel Dolphin Star is owned by Defang Shipping Company Limited, a fact which was also confirmed by the defendants and that the Ship's Registration Certificate was placed before this court right at the outset by the claimant. He stated that other ownership documents were also supplied to this Court by the defendants' Commercial and Technical Managers, Fairwind International Shipping Co. Limited and Rightway Shipping Services Company Limited, both also entered with Japan P&I Club.

47. It was submitted that by a Fixture Note dated 19<sup>th</sup> January, 2021 made between Starryway Trading & Shipping Company Limited as owners and the claimant as charterers, the parties entered into a Voyage Charter of the motor vessel Dolphin Star and incorporated the terms of the CONGENBILL GENCON 1994 Charterparty Form. It was stated that the Fixture of the Charterparty was on a sole cargo basis only, with no part cargo allowed. It was further submitted that the Master of the Dolphin Star tendered a Notice of Readiness upon arrival in Greenville, Liberia on 16<sup>th</sup> February, 2021 to the defendants, the owners of the motor vessel Dolphin Star and her Commercial and Technical Managers and after loading the cargo, he obtained port clearance to sail directly to Chittagong, Bangladesh as per page 7 of the annexures to the claimant's 2nd declaration. It was stated that the Notice of Readiness was not given to Starryway Trading & Shipping Company Limited, now alleged to be the Time Charterer.

48. The claimant's Counsel contended that in breach of the terms of the charterparty dated 19<sup>th</sup> January, 2021, the defendants entered into a further charterparty dated the 9<sup>th</sup> February, 2021 for the carriage of project cargo from Port Gentil, Gabon to the Port of Mombasa in Kenya. In regard to the claimant's cargo, it was stated that 921 pieces equivalent to only 6,252.315 CBM of Liberian round logs were loaded on the motor vessel Dolphin Star at Greenville, Liberia for carriage to Chittagong, Bangladesh instead of the 6,500 CBM contracted and agreed on, in accordance with the pre-stowage plan availed by the Master of the said vessel. It was claimed that the foregoing was done in order to facilitate the carriage of the project cargo.

49. It was submitted that the Master of the motor vessel Dolphin Star had authorized the signing of the bills of lading for the said cargo of Liberian round logs on request by OBT Shipping Limited of Liberia, as his agent, and on the 10<sup>th</sup> March, 2021, the draft bills of lading were confirmed as being in accordance with the agreement for carriage of the cargo. It was also stated that the claimant was named both as the consignee of the cargo as well as the Notify Party in the said draft bill of lading.

50. It was also stated that as of 11<sup>th</sup> March, 2021, whilst the defendants had confirmed the bills of lading were in order, they had not

authorized their agents, OBT Shipping Limited of Liberia, to release the same and the latter requested the claimant to push the owners for the release of the said documents. That OBT Shipping Limited of Liberia confirmed that they had been authorized by the defendants by a letter of 4<sup>th</sup> March, 2021 to sign the original bill of lading for the subject cargo but it was still awaiting the authorization to release the same.

51. The claimant's Counsel indicated that on 12<sup>th</sup> March, 2021, OBT Shipping Limited of Liberia wrote stating that whilst the bill of lading had been approved, it was being withheld until further instruction on settlement of the full freight. That on the same date, as well as on 11<sup>th</sup> March 2021, the shipper, Euro Liberia Logging Company confirmed that the sale of the cargo was on Free on Board (FOB) terms and that it neither negotiated the freight rate nor freight payment with the vessel owner/operator.

52. It was indicated that on 17<sup>th</sup> March, 2021, the Master of the motor vessel Dolphin Star, on instruction of the defendants, withdrew his authorization to OBT Shipping Limited of Liberia for signature of the original bill of lading and on 22<sup>nd</sup> March, 2021, the said company forwarded a message from Starryway Trading and Shipping Company, writing as owners' agents rejecting any unauthorized bill of lading and purporting to exercise a lien over the cargo until freight was fully paid. It was pointed out that the said company invoked the charterparty terms as its justification for doing so. It was indicated that in the said message, OBT Shipping Limited of Liberia once again advised the buyers to discuss the matter further with the charterers and the owners to have the matter resolved. Mr. Khagram stated that by 22<sup>nd</sup> March, 2021, the claimant had paid the entire value for the cargo as per page 11 of the annexures to the claimant's 1<sup>st</sup> declaration.

53. The claimant's Counsel submitted that on 22<sup>nd</sup> March, 2021, the shipper wrote to the claimant informing it of the follow ups it was making, including the demand made on the defendants, through its attorneys, for issuance of the bill of lading and that on 1<sup>st</sup> April, 2021, the shipper's Advocates wrote to OBT Shipping Limited of Liberia demanding the immediate release of the bill of lading.

54. It was stated that on 7<sup>th</sup> April, 2021, following the arrest of the motor vessel Dolphin Star at Mombasa, the defendants wrote to the claimant and the shipper, through OBT Shipping Limited of Liberia, alleging the said vessel was owned by Dexing, a BVI company, which was chartered by their company (Starryway) 2 days before the 7<sup>th</sup> April, 2021 but was unlawfully arrested. It was further stated that all the negotiations between the claimant for charter of the motor vessel Dolphin Star were between the claimant's agents and the defendants and their agents, the Commercial Manager, Fairwind International Shipping Company Limited and that the charterparty was fixed with them on 8<sup>th</sup> January, 2021, but strangely Starryway Trading and Shipping Company was subsequently named as the owners in the Fixture Note entered into on 19<sup>th</sup> January, 2021.

55. Mr. Khagram submitted that the bill of lading whose terms had been agreed within the reasonable contemplation of the parties was a CONGENBILL Edition 1994, reflecting that freight was payable as per the charterparty dated 19<sup>th</sup> January, 2021 and that all the terms and conditions of the said charterparty, including the law and arbitration clause, were incorporated into the conditions of carriage and as reflected by the draft bill of lading. He also submitted that the draft bill of lading and all the email exchanges are evidence that the contract of carriage was with both the defendants, Defang Shipping Company Limited, as the owners of the motor vessel Dolphin Star, as well as with Starryway Trading and Shipping Company.

56. He indicated that the defendants had accepted and acknowledged the above to be the case, as they had not only, all along in correspondence accepted that the charterparty dated 19<sup>th</sup> January, 2021 and its terms equally applied to them. It was indicated that they had also placed reliance on the General Paramount Clause, as well as the law and arbitration clause set out in the conditions of carriage stipulated in the bill of lading.

57. The claimant's Counsel further indicated that despite the issuance of a Mate's receipt by the Master of the motor vessel Dolphin Star and by OBT Shipping Limited of Liberia confirming receipt of 6,252.315 CBM of Liberian round logs, the owners began to dispute the quantity of cargo received by the motor vessel Dolphin Star as early as 17<sup>th</sup> March, 2021, when the claimant reminded them that their deviation constituted a material breach of contract. He submitted that the claimant informed the owners (defendants) that their entitlement to freight was not only abrogated but that they had a bailment obligation to the cargo interest which was not linked to the existence of charterparty and bill of lading terms. It was stated that the defendants wrongly and without just cause deviated the motor vessel Dolphin Star to Port Gentil, Gabon under a charterparty dated 9<sup>th</sup> February, 2021, to load project cargo which was for discharge at the Port of Mombasa.

58. The claimant's Counsel asserted that the defendants being intent to breach the charterparty and conditions of carriage terms were deliberate and pre-meditated as they entered into a further charterparty for carriage of goods to Mombasa when they knew that they ought not to have done so under the terms of the charterparty dated 19<sup>th</sup> January, 2021. It was stated that the obvious intent was to unjustly enrich themselves by earning additional freight without any regard for the claimant's rights.

59. It was claimed that even after the arrest of the motor vessel Dolphin Star, the defendants intimated to the claimant's representative that they were willing to release the bill of lading upon payment of freight. It was thus contended that the Time Charter placed before this Court was a sham only intended by the defendants, through collusion with Starryway Trading & Shipping Company Limited, to attempt to avoid their liability to the claimant and/or putting up appropriate security for the claims made.

60. It was further contended that the defendants had failed to establish the nexus between them and the carriage of the cargo on the motor vessel Dolphin Star, the owners of the said vessel, Defang Shipping Company Limited who were said to have no contract of affreightment with the claimant, thus would not be liable to any claim *in personam*. In the claimant's view, the person who would be liable *in personam* would be Starryway Trading & Shipping Company Limited. It was stated that the defendants were also alleging that the value of the claim was unsubstantiated and so was the claimant's title to the cargo and right to sue.

61. Counsel for the claimant submitted that the documents placed before the Court establish that the claimant has a contract of carriage with both Defang Shipping Company Limited as admitted by the defendants themselves, as well as with Starryway Trading & Shipping Company Limited and would as such have a dual cause of action *in personam* as against both. It was stated that the contract of carriage between the

claimant and Defang Shipping Company Limited is evidenced by the agreed draft bill of lading, which was reasonably contemplated by the parties for issuance under the hand and signature of the Master of the motor vessel Dolphin Star, who had authorized OBT Shipping Limited of Liberia, as his agent, to sign and issue the same.

62. Mr. Khagram indicated that the defendants in their submissions accepted that the terms of the draft bill of lading placed before this court were agreed on and that the claimant was named as the consignee therein and that they had also accepted that Euro Liberia Logging Company was the shipper as reflected on the said draft document. He stated that the defendants sought to rely on the General Paramount Clause contained therein to challenge the claimant's entitlement to bring these proceedings and sue the defendants on the basis that **The Hague Rules** apply to the carriage of goods in issue, given that neither Liberia nor Bangladesh, with the latter being the country of destination, have any local applicable enactment relating to the subject shipment. It was also stated that the defendants sought to preserve application of English law and jurisdiction to the matter as incorporated in the conditions of carriage in the draft bill of lading, together with the voyage charterparty terms.

63. Counsel for the claimant submitted that from the above, it cannot be disputed that the claim *in rem* arises out of an agreement relating to the carriage of goods in a ship as stipulated in Section 20(2)(h) of the Senior Courts Act, as the defendants relied on the contract of carriage as evidenced by the draft bill of lading. He further stated that the terms had been agreed on, as contained in the draft bill of lading referred to. He pointed out that the draft bill of lading was not a '*free standing*' one but a CONGEN Bill 1994 Edition, since it was for use in conjunction with the charterparties and was intended to fill in gaps in the contractual duties and obligations between the parties to the contract for carriage.

64. On the issue of the parties to the contract of carriage, it was stated that from the draft bill of lading which had been agreed on and was within the reasonable contemplation of the parties, there was no doubt that Defang Shipping Company Limited, the owners of the motor vessel Dolphin Star, was a party to the contract of carriage given that the Ship's Master had authorized OBT Shipping Limited of Liberia to sign the same on his behalf. It was thus stated that the actions of the Master who was the agent or servant of the owners of the said motor vessel, clearly showed that Defang Shipping Company Limited were, without any doubt, a party to the contract of carriage and that they had themselves acknowledged as much.

65. Mr. Khagram contended that the defendants in order to avoid liability and the depositing of security in court, had suggested that the claimant's claim is solely predicated upon the agreement contained in the Voyage Charter between the claimant and Starryway Trading & Shipping Limited dated 19<sup>th</sup> January, 2021 and that they had hired out the motor vessel Dolphin Star to the said company under a Time Charter way back on the 1<sup>st</sup> January, 2019. He submitted that the Time Charter was a sham intended to mislead this court, in light of the email correspondence and the fact that Starryway Trading & Shipping Limited had described themselves as the '*Owners*' in the Fixture Note of 19<sup>th</sup> January, 2021 but in all the correspondence, they described themselves '*as agents*'.

66. He also submitted that it was uncontroverted, that the claimant had a contract of carriage with Defang Shipping Company Limited, the owners of the motor vessel Dolphin Star, under the draft bill of lading terms which incorporated the Voyage Charter terms and that the said owners of the motor vessel Dolphin Star remained responsible for the carriage and delivery of the actual quantity of cargo loaded onto the vessel at Greenville, Liberia as acknowledged in the Mate's Receipt issued by the Master. Mr. Khagram asserted that the said owners were as such obliged to issue bills of lading on a '*freight collect*' or '*freight payable as per charterparty*' basis, a fact that cannot be disputed by the defendants, since the voyage charterparty terms formed part of the contract of carriage as evidenced by the draft bill of lading.

67. It was stated that the Master's purported withdrawal of authorization after receipt of and loading of the cargo onto the said motor vessel was wrongful and in breach of the terms of the agreement for the carriage of goods entered into by the defendants as evidenced by the email exchanges as well as terms of the draft bill of lading itself. The claimant's Counsel cited the case of **I Congresso del Partido** (supra), as concerns the question of the contracting party, where a bill of lading is issued under the hand of the Master and its effect.

68. The claimant's Counsel submitted that where no bill of lading or other document is given upon shipment, the contract of carriage ought to be deciphered from the arrangements made prior to the goods being shipped. He relied on the Treatise **Carver's Carriage by Sea, 12<sup>th</sup> Edition, Volume 1**, by Raoul Colinvaux. He further submitted that the defendants, through OBT Shipping Limited of Liberia confirmed the applicability of the bill of lading terms which included the voyage charterparty terms, duly incorporated therein and that is the reason why the defendants were relying on the Paramount Clause Terms. It was stated that the existence of and possession of a Mate's receipt by the claimant also impacts on the question as to who a bill of lading ought to be given and in this instance, it was evidence of the claimant's entitlement. It was asserted that the claimant was entitled to the bill of lading as it is the owner of the goods and has the right to bring this claim.

69. The claimant's Counsel indicated that the contention by the defendants on the application of **The Hague Rules** was erroneous as the provisions of the Paramount Clause in the bill of lading are clear, as the relevant clause provides that **The Hague Rules** shall apply as enacted in the country of shipment, but where no such enactment is in force in the country of shipment, the corresponding legislation of the country of destination applies. He further indicated that contrary to the assertion made by the defendants, in Bangladesh, the country of destination, the legislation governing carriage of goods by sea is contained in its **Bills of Lading Act 1855** and **Carriage of Goods by Sea Act 1925**.

70. He also submitted that in addition to legislating the application of **The Hague Rules**, the two pieces of legislation also state that "*every consignee of goods named in a bill of lading,..... upon and by reason of such consignment, shall have transferred to him all rights of suit . . . .*". It was thus submitted that the argument that only the shipper is entitled to the bill of lading by reason of application of **The Hague Rules** was rendered inapplicable in this instance.

71. It was stated that in clause 1 of the conditions of carriage contained in the agreed draft bill of lading, all terms of the charterparty including the law and arbitration clause were incorporated and that includes the application of English Law.

72. The claimant's Counsel submitted that a validly chartered ship should not be employed in a manner inconsistent with the charter and that

a charterer's remedy therefor would be by an action in damages either against the owners who made the contract or *in rem* against the ship. He also submitted that the effect of a refusal to release of the bill of lading amounts to a conversion as stated in **Carver's Carriage by Sea, 12<sup>th</sup> Edition Volume 1**, Raoul Colinvaux.

73. On the issue of whether this court has jurisdiction in this matter under the provisions of Section 20(2)(h) of the Seniors Courts Act, on it being '*a claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship*', the claimant's Counsel relied on the text in **Admiralty Jurisdiction and Practice** by Nigel Meeson, where the learned author states that the language of the Section is construed to be wide enough to cover claims, whether in contract or tort, arising out of any agreement relating to the carriage of goods in a vessel without it being necessary that the claim in question be directly connected with some agreement for the carriage of goods in a ship or the agreement be one made between the two parties to the action. That under the provisions of Section 20(2)(h) of the Seniors Courts Act, the phrase ". . . arising out of. . ." is to be given the broader meaning of ". . . connected with . . ." and not the narrower meaning of ". . . arising under . . .". Mr. Khagram indicated that the defendants in the instant case are seeking for the latter, narrower, interpretation to be adopted.

74. In making reference to the pleadings contained in the Claim Form herein, Mr. Khagram stated that a claim in tort, of the nature referred to above, has been pleaded at paragraphs 5 and 6 whereas the contractual breach by both Defang Shipping Company Limited and Starryway Trading & Shipping Limited, is pleaded at paragraphs 3, 6 and 7 of the Claim Form and Paragraphs 7, 8, 9, 10 and 11 of the claimant's 1st declaration herein. He relied on the case of **The Antonis P Lemos** [1985] 1 All ER 695, where the House of Lords held that there was no good reason why a restrictive approach should be adopted and that the Courts retained jurisdiction on claims which were connected with an agreement relating to the carriage of goods notwithstanding that the defendants were not a party to either agreement. Counsel for the claimant stated that at this stage the claimant was not required to prove that the cause of action is sustainable at the trial but simply that the defendants would possibly be liable if an action was or could be brought against them personally, in other words an arguable claim has been made out, as was stated in **The St Eleferio, Schwarz & Co (Grain) Ltd v St Eleferio ex Arion (owners)** [1957] 2 ALL ER 374 at 376H.

75. The claimant's Counsel stated that defendants had not suggested that the claims made by the claimant were either frivolous or vexatious, and that due to the facts stated by the claimant, they cannot be. This Court was urged to make a finding that the claimant was entitled to bring this claim and to have it tried whether it turns out to be a good one or not, and that it is well within the meaning ascribed to the words '*a claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship*'. In making reference to the observation made by Waki J (as he then was), in the **MV Barbara & Another v MV Joey & Another** (supra), it was stated that even where pleadings of a claim are unhappily made, it is not insurmountable as they can be amended and amendments are liberally granted. Counsel for the claimant in relying on the **Civil Procedure Rules and Practice Directions 2010 of England, Volume 1**, stated that it is clear that in England, just like in Kenya, striking out of a claim is viewed to be drastic and is very sparingly exercised, with the powers available to permit amendments.

76. He cited the English Court of Appeal case of **Brink's-Mat Ltd v Elcombe & Others** [1988] 3 All ER 188, which illustrates that it does not automatically follow that a failure to place proper facts accurately before the court will invariably lead to the setting aside of the order obtained as the defendants appear to deem by stating that it is a right available *ex debito justitiae*. Mr. Khagram stated that in the said case, the Court found that it retained the discretion, notwithstanding proof of material non-disclosure which justifies the immediate discharge of an *ex-parte* order, to continue the order or make a new order. In the present case, the claimant denied that there was non-disclosure of material information as alleged by the defendants.

77. The claimant's Counsel stated that the contention by the defendants that the claimant failed to establish that the claim arose out of an agreement between the claimant and Defang Shipping Company Limited, the owners of the motor vessel Dolphin Star relating to the carriage of goods in a ship or the use or hire of a ship was without merit and ought to be rejected. It was also stated that through correspondence, the defendants had also been alerted to a potential claim in bailment and that even now, the claimant is not precluded from pursuing the said claim, given that the shipowners become bailees for reward of the cargo and owe cargo owners a duty of care as stated in **Marine Cargo Claims, 3<sup>rd</sup> Edition**, by William Tetley.

78. Mr. Khagram stated that the claimant would have causes of action both against Defang Shipping Company Limited as well as Starryway Trading & Shipping Limited. He further stated that claim against the former is under the affreightment contract evidenced by the draft bill of lading which incorporates the charterparty terms from the Fixture Note dated 19<sup>th</sup> January, 2021, a fact that is common ground between the parties and which the defendants rely upon in their affidavit as well as in their submissions.

79. It was indicated that in the instant case, the Master had authorized the owners' agents, OBT Shipping Limited of Liberia, to sign the bill of lading incorporating the charterparty terms and that being the servant of Defang Shipping Company Limited, he bound them as a contracting party to the contract of carriage. It was contended that the defendants are the cause of the alleged muddle and, have and continue to conduct themselves with complete lack of candour, by asserting that the motor vessel Dolphin Star was under a Time Charter when it was not, as is evident from the evidence placed before this Court, thus the claimant was compelled to assert the claim *in rem* against the said vessel and the defendants being the owners of the motor vessel Dolphin Star.

80. It was also stated that it is common ground that Defang Shipping Company Limited are the owners of the motor vessel Dolphin Star and it is they who would be liable in an action *in personam*. It was submitted that the claim against Starryway Trading & Shipping Limited is a separate dual claim *in personam* and this cannot be used as a basis of defeating the clear cause of action against the said vessel and its owners. It was pointed out that the registration certificate of the motor vessel Dolphin Star was adduced as proof of ownership by the defendants in their affidavit and the claimant in its 1<sup>st</sup> declaration which the defendants now purport to question, was part of the documents supplied to the claimant by them or their agents, at the time the charter was being negotiated with the owners' agents as is apparent from the material placed before this Court.

81. In making reference to paragraph 15 of the 1<sup>st</sup> declaration, Mr. Khagram submitted that the claimant stated that the owners of the motor vessel Dolphin Star would be liable to the claimant *in personam* and so would Starryway Trading & Shipping Limited. He posited that nowhere in law is there a requirement that the claimant can make an election as to which of the two parties it shall proceed against as is purported by the defendants in their submissions with reference to who the claim is being preferred against. It was stated that the claimant is

entitled to proceed against the defendants *in rem* in addition to asserting its rights against Starryway Trading & Shipping Limited too, particularly in circumstances where it is apparent that Defang Shipping Company Limited as the owners of the motor vessel Dolphin Star and its Commercial and Technical agents as well as Starryway Trading & Shipping Limited are all collaborating in the matter in a bid to mislead the Court.

82. Counsel for the claimant urged that a plain reading of Section 21(4)(b)(i) of the Senior Courts Act reveals that an action *in rem* may be brought in the High Court under its admiralty jurisdiction in any case where the claim falls under the provisions of Section 20(2)(e) to (r) of the said Act, if at the time the action is brought against the ship, the relevant person who would be liable in a claim *in personam* is either the beneficial owner of that ship or the charterer of it by demise. Mr. Khagram submitted that this court is enjoined on the evidence before it at the threshold stage, to examine whether this is indeed the case in terms of the law cited in the authorities relied on.

83. He asserted that it was uncontroverted that Defang Shipping Company Limited is the registered and beneficial owner of the motor vessel Dolphin Star and was so at the time the cause of action arose and therefore an application to set aside the warrant of arrest and to strike out the claim cannot stand given the defendants' own admission that it is the registered owner of the motor vessel Dolphin Star. It was submitted that in the circumstances, the requirements of Section 21(4) of the Senior Courts Act were not only satisfied at the time the warrant of arrest was issued but do not now arise as Defang Shipping Company Limited is, of the defendants' own admission, the owner of the said motor vessel and would be the person who would be liable *in personam*.

84. It was submitted that since the claim has been made against the right party, the claimant is *prima facie* entitled to claim the entire unsubstantiated value of the cargo in the sum of US\$ 2,000,000.00 as a defined claimable loss or to insist on security of US\$ 3,000,000.00 in circumstances where the claimant has not referred the matter to arbitration. It was contended that the said issue was not a jurisdictional one but one of merits as it relates to the question of reasonableness of the security to be put up as bail for the release of the motor vessel Dolphin Star. It was pointed out that the defendants had not raised the said issue for the court's determination nor was there any application for the court to determine the question of security and that they were therefore precluded from relying on the said issue at this stage.

85. It was further pointed out that since the defendants had wrongfully refused to issue the bill of lading and placed the claimant in a perilous situation such that they were not in a position to take delivery of the cargo, whose carriage to Chittagong had also been delayed, the claimant was of the view that the amount sought as security was reasonable based on the value of the cargo, which could be considered as having been converted, in the absence of issuance of bill of lading by the defendants.

86. With regard to the point that the claimant is not entitled to security in the absence of having commenced arbitration proceedings, it was stated that no challenge had been made by the defendants to the court's jurisdiction on account of an arbitration clause by seeking a stay of the present proceedings. It was further stated that even if that had been done, the claimant was of the view that authorities abound, including the statutory right to security under the **Civil Jurisdiction and Judgments Act 1982** as well as the cases of **The Jalamatsya** [1987] 2 Lloyd's Report 164 and **The World Star** [1986] 2 Lloyd's Report 274. It was stated that it was erroneous for the defendants to suggest that the value of the cargo was unsubstantiated or that the claimant was not entitled to security as it had not referred the claim to arbitration given the evidence on record before the Court, as well as the law relied on above.

87. On the submission made by the defendants that the claimant had not shown that it has title to the cargo in issue and by extension, the right to bring or prosecute this claim upon their reliance on the shipper's Attorney's letter dated 1<sup>st</sup> April, 2021 annexed to the claimant's 1<sup>st</sup> declaration and supported by the reliance on the **Hague Rules**, the claimant's Counsel was of the view that the defendants' position was at best speculative particularly given that there was sufficient evidence before this court to show that the sale of the cargo by Euro Liberia Logging was on Free on Board (FOB) terms and it neither negotiated the freight rate nor freight payment with the vessel owner/operator.

88. The claimant's Counsel indicated that prior to the arrest of the motor vessel Dolphin Star at the Port of Mombasa, the claimant had fully paid for the cargo as exhibited in a bank transfer attached to the claimant's 1<sup>st</sup> declaration. It was thus submitted that when all the evidence laid before this Court is examined, there is no doubt that the title and property in the cargo passed to the claimant upon the loading of the cargo on the said motor vessel even though the balance of the payment was completed on 22<sup>nd</sup> March, 2021. It was indicated that the follow ups by Euro Liberia Logging with OBT Shipping Limited of Liberia were being made for and on behalf of the claimant, the named consignee on the bill of lading and the claimant therefore had the right to sue.

89. The claimant's Counsel was of the view that the defendants filed the present application as a tactical measure in order to avoid putting up security for the claimant's claim.

90. He stated that the defendants' Counsel's reliance on the case of **Pembe Flour Mills Ltd v the Owners of the Motor Vessel "Ioannis G"** (supra) is misconceived because in that case, and rightly so, this Court set aside the warrant of arrest on the basis that the beneficial owner of the vessel was not disclosed at all, even at the hearing of the application, contrary to the current position where through the ship's registration certificate, the owners of the motor vessel Dolphin Star have been identified.

91. Mr. Khagram was emphatic that there was no doubt that there was a contract of affreightment and carriage between the claimant and the defendants and that Defang Shipping Company Limited are the *relevant* party for the purposes of Section 21(4)(b)(i) of the Senior Courts Act even on the defendants' own reckoning, given that they themselves rely on the terms of the contract of carriage in a bid to allege that it is the shipper and not the claimant who is entitled to the issuance of the bill of lading. Mr. Khagram stated that it was incongruous for them to then assert that the claim can only be predicated upon the Voyage Charter with Starryway Trading & Shipping Limited.

92. In addressing the allegation that the claimant failed to carry out a search at the Admiralty Registry to confirm whether there were any cautions against arrest of the motor vessel Dolphin Star, Mr. Khagram stated that the record would bear the claimant out that the Executive Officer on 4<sup>th</sup> April, 2021 did certify on the Application for Arrest that there were no cautions registered against the said motor vessel. In responding to the suggestion made by Mr. S. Inamdar that a declaration must be in the form of an affidavit and must be sworn as such, the claimant's Counsel submitted that the Civil Procedure Rules of England are quite clear on this aspect and the defendants attempt to read matters into the rules based on suggestions not contained in the said rules themselves were misplaced. In that regard, this court was invited to

refer to the contents of the **Civil Procedure Rules and Practice Directions 2010, Volume 1**. The claimant prayed for this Court to dismiss the defendants' application with costs.

93. In responding to the submissions by the claimant's Counsel, Mr. S. Inamdar indicated that Mr. Khagram had relied a lot and in details to the case of the **Owners of the Motor Vessel "Lillian S" v Caltex (Kenya) Ltd** (supra). He indicated that this court has to be satisfied if, on the material before it, it has jurisdiction to hear the claim herein. He referred to page 302 paragraph f of the said decision, where Omolo JA stated that it was well to remember that Caltex failed to bring its claim within the ambit of Section 21(4) because it failed to prove to the court, that the goods which were supplied to the ship were necessary for its operation or maintenance.

94. He stated that the threshold required was for this court to determine if with the material it has before it now, it could have sustained the warrant of arrest at the time it issued the same, but the court should not look at a reformulation of a case that was not before this court. He submitted that in **Roy Shipping S.A. and all persons interested in the ship 'Mama Otan' v Dodoma Fishing Company Ltd** (supra) case and **Owners of the Motor Vessel "Lillian S" v Caltex (Kenya) Ltd** (supra) case, the applicants failed to prove that the claims fell under Section 21(4) of the Supreme Court Act (as it then was) of England.

95. In making reference to page 215 of Mr. Khagram's bundle of authorities about Rule 16.5.3 of the Civil Procedure Rules and Practice Directions of England, the defendants' Counsel stated that the said rules must be fully complied with by having ADM5 properly filled. He stated that the provisions therein had not been complied with as the declaration was a departure of the requirements of ADM5. He stated that it was for the claimant to ascertain to this court that Captain Saed gave the information to claimant's Counsel based on the capacity he had and that he did so on behalf of the claimant.

96. Mr. S. Inamdar submitted that in the **Owners and Master of The Motor Vessel "JOEY" v Owners and Masters of The Motor Tugs "BARBARA" & "STEVE B"** case (supra), the issue of the amendment was challenged at the stage of setting aside of the *ex parte* orders and the court said that amendments to pleadings go back to the original pleadings. He indicated that the applicants in the said case argued that a claim for towage had not been made in the first instance and by extension, if this court finds that the claim herein was not properly made, it should fall by the wayside.

97. Mr. S. Inamdar indicated that the issue of the bill of lading was not an issue in the claim form as the claim was for breach of contract of a Voyage Charterparty and a Fixture Note and not a bill of lading. He further indicated that the claimant's Counsel had stated that the terms of the charterparty had been incorporated in the draft bill of lading as the shipper was shown to be Euro Logging as the owner of the goods and it was demanding for the bill of lading through emails. He contended that the Time Charter was not referred to in any of the declarations but was referred to only in the submissions by the claimant's Counsel. He stated that if the Time Charter had been addressed in the declarations, they would have responded by way of an affidavit.

98. The defendants' Counsel indicated that on page 21 of the annexures to the 2<sup>nd</sup> declaration, the email exhibited therein was written by the Operations Manager, OBT Shipping and freight was payable to Starryways Trading under the charterparty, wherein the claimant was being referred to as the charterer.

99. Mr. Inamdar stated that the General Paramount Clause addresses the contract of carriage and the only person who can sue his client is the shipper but the owner cannot be sued by the shipper under a charterparty. He submitted that in this case there is no connection between the claimant and the owners and that the claimant's case is against Starryway Trading. He indicated that if Mr. Khagram had in his declaration mentioned "*Starryway was an agent*", then he would have taken instructions on the said issue. He thus submitted that Starryway Trading was a Head Charterer.

100. He submitted that in the **Evpo Agnic** (supra), the court stated that the right to arrest a ship in a claim *in rem* under Section 21 of the Supreme Court Act 1981 was restricted to a particular ship in connection with which a claim arose.

101. In making reference to the case of **Pembe Flour Mills Ltd v the Owners of the Motor Vessel "Ioannis G"**, the defendant's Counsel stated that the court was right in striking out the claim as there was no compliance with Form ADM 5, which has to be wholly complied with. He also stated that Form ADM 5 cannot be cured as the rules do not allow for amendment.

102. When referring to the case relied on by Mr. Khagram in his supplementary list of authorities of **LD Commodities Rice Merchadizing LLc and Another v Owners/Charterers of the vessel "Stylani 2"** (supra), the defendants' Counsel indicated that the Court found that the case did not go to the issue of jurisdiction. He explained that in the said case, the claimant instead of using a Claim Form *in rem* used a Claim Form *in personam* and the latter had to be served within 4 months in England, whereas in the former, service had to be effected within 12 months. He indicated that the Judge found that the wrong claim form had been erroneously used and he noted that the intention of the claimant was to issue a claim form *in rem* after it was served 4 months after the claim was filed. He pointed out that in paragraph 43 of the said decision, there is a summary of cases that were relied on and at page 44, the Judge held that the said cases did not apply to the case which was before him. He indicated that the Court in paragraph 50 of the said decision dealt with the issue of the error that had been made. Mr. S. Inamdar asserted that in this case, failure to comply with Form ADM 5 is a statutory lapse.

103. He referred to the case of the **The "Tychy"** [1999] 2 Llyod's Report on page 32 of the claimant's supplementary bundle of authorities which states that under Section 21(4) of the Senior Courts Act, the person who would be liable in the claim *in personam* (the relevant person) has to be, when the cause of action arises, the charterer of, or in possession or in control of the ship.

104. Mr. S. Inamdar submitted that a claim *in rem* can be brought under Section 24(4)(b)(i) of the Senior Courts Act if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all shares in it or the charterer of it under a charter by demise.

105. He wondered why if the action *in rem* was against Defang Shipping, the claimant did not bring it in the claim. He was of the view that

even if the claim was *in personam*, the claimant should have joined Defang Shipping as the claim by the claimant was based on a charterparty and the owners were not brought in as a party.

#### ANALYSIS AND DETERMINATION.

106. The issues for determination in the Application Notice are-

- i. If the action *in rem* filed by the claimant falls under Sections 20 and 21 of the Senior Courts Act, 1981 of England;
- ii. If this Honourable Court had jurisdiction to issue the warrant of arrest against the motor vessel Dolphin Star and has jurisdiction to hear the claim *in rem*;
- iii. If the warrant of arrest should be set aside and/or the action *in rem* should be struck out; and
- iv. If the defendants should deposit security for release of the motor vessel Dolphin Star.

107. Section 4 of the Judicature Act of Kenya confers on the High Court jurisdiction to hear admiralty matters in the following terms-

***(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)***” (emphasis added).

108. The applicable provisions for a claim *in rem* under the Senior Courts Act of England are found in Section 20. The claimant’s claim herein was brought under Section 20(2)(h) of the said Act as being a claim arising out of an agreement relating to the carriage of goods in a ship or to the use or hire of a ship.

109. The defendants have however strongly contended that this court has no jurisdiction to hear the said claim and should not have issued a warrant of arrest for the motor vessel Dolphin Star. In an affidavit sworn on 16<sup>th</sup> April, 2021 by Mr. Nishit Maru Advocate, he stated that the matters deponed to thereon are within his knowledge or derived from documents and information in the defendants’ possession which were forwarded to him by Richard Cheng of Andrew Liu & Co, a firm of marine brokers based in Hong Kong who represent the defendants’ interests in the matter, which he believed to be true.

110. Annexed to the said affidavit is a certificate of registry for the motor vessel Dolphin Star establishing that she is registered by the Panama Maritime Authority under IMO No. 9162394, she is thus a Panamanian flagged vessel. The owners of the said motor vessel are disclosed as Defang Shipping Company Limited (Defang Shipping). A Time Charter exhibited by the said affidavit shows that it was entered into in Shanghai on 1<sup>st</sup> January, 2019 between Defang Shipping as the owners of the motor vessel Dolphin Star and Starryway Trading and Shipping Company Limited (Starryway Trading) as charterers. The said charter provides that the charterers have the liberty to sub-let the vessel for all or any part of the time covered by the charter, with the charterers remaining responsible for the fulfilment of the charterparty. Although the agreement was between Defang Shipping and Starryway Trading, the stamp affixed on the part for the owners, on the last page of the agreement bears the name of ***Dolphin Shipping Company Limited*** and not that Defang Shipping Company Limited.

111. A Time Charter which is also known as a Time Charterparty or Catch-time Charter is defined in **Black’s Law Dictionary Tenth Edition** as –

***“A charter for a specified period, rather than for a specific task or voyage; a charter under which the shipowner continues to manage and control the vessel, but the charterer designates the ports of call, and the cargo carried. Each party bears the expenses related to its functions and for any damage it causes.”.***

112. One of the exhibits attached to the applicant’s affidavit is a Fixture Note dated 19<sup>th</sup> January, 2021 between the claimant herein, E.T Timbers PTE Limited, who are described as the charterers and Starryway Trading who are described on the said document as the owners of the motor vessel Dolphin Star. Clause 2 of the Fixture Note sets the terms of carriage as Liberia Ekki (Azobe round logs) as the only cargo on board, with no part cargo allowed. Clause 8 indicates that full freight payment less commission, was to be paid in US Dollars within 4

banking days after completion of loading.

113. As per clause 11 of the said Fixture Note, CONGEN bills of lading forms were to be used and the charterers were to indemnify the owners against any claims, or damages arising from the bills of lading not being in conformity with the Mate's receipt. The Fixture Note provides for arbitration in London and for English law to apply. The Fixture Note was signed by both Starryway Trading as the owner (of the motor vessel Dolphin Star) and ET Timbers Private Limited as the Charterer.

114. It is therefore apparent from the above Fixture Note that the two parties entered into a Voyage Charter for the carriage of the cargo in issue. A Voyage Charter is defined in **Black's Law Dictionary** as-

***“a charter under which the ship owner provides a ship and crew, and places them at the disposal of the charterer for the carriage of the cargo to a designed port and that the voyage charterer may lease the entire vessel for a voyage or series of voyages or may by “space charter”, lease only part of the vessel.”***

115. The defendants' contention is that they have never been a party to the voyage charter and can therefore not be possibly the party who would be held liable *in personam* for any claims arising thereunder and that the claimant in paragraph 15 of its declaration confirms that the person who would be liable for the claim *in personam* is Starryway Trading. It was further contended that there was nothing to suggest from the ownership particulars of the motor vessel Dolphin Star, that Starryway Trading owns all the shares in the vessel, as the registered owner is clearly shown to be the defendants and that Starryway Trading was not charterer by demise. It was also stated by the defendants' Counsel that the Head Charter is a Time Charter and not a Demise (bareboat) Charter as provided under Section 21(4)(b)(i) of the Senior Courts Act.

116. In order to establish if the claimant has failed to discharge the burden of proof that the defendants would be liable in an action *in personam*, the court must go back to the declaration in support of the claim form filed on 4<sup>th</sup> April, 2021. The declaration was sworn by Mr. Sanjeev Khagram Advocate. In paragraph 4 of the said declaration (1<sup>st</sup> declaration), he stated as follows

*“That the claimant's claim against the defendant is for C&F value of the cargo of Liberian Tali (ERY) Round Logs being sum (sic) of US\$ 2,000,000.00 on account of breach of the charter party entered between the claimant and the owners of the motor vessel Dolphin Star evidenced by a Fixture Note dated 19<sup>th</sup> January, 2021 with interest thereon pursuant to Section 35A of the Supreme Court Act 1981 and/or under the inherent jurisdiction of this Honourable Court sitting as an Admiralty Court at Court rates (12%) and costs of this suit. The Claimant further claims, from the defendant, damages for breach of the charterparty and/or an indemnity pursuant thereto.”*

117. In paragraph 6 of the same declaration, the declarant stated thus-

*“That a Charterparty entered into between the claimant and the owners of the motor vessel Dolphin Star as evidenced by the Fixture Note dated 19<sup>th</sup> January, 2021 entered into between the claimant, ET Timbers Limited and the defendant, the disponent owners of the motor vessel Dolphin Star namely Starryway Trading & Shipping Company Limited (with head owners being Defang Shipping Company Limited), for carriage of 6500 to 6800 cbm of Liberia Ekki (Azobe Round Logs) (subject to the vessel's full capacity at permissible draft of 7.5M). The Charterparty was a standard Gencon Charter amended by the terms contained in the Fixture Note”.*

118. The claimant exhibited to the 1<sup>st</sup> declaration the Fixture Note, GENCON uniform general charter terms as revised in 1922, 1976 and 1994, CONGENBILL 1994 Edition to be used with charterparties, which contain a General Paramount Clause on the applicability of the of **The Hague Rules** to conditions of carriage of cargo and incorporated the law and arbitration clause. A draft CONGEN 1994 Edition draft bill of lading was also exhibited in the documents attached to the 1<sup>st</sup> declaration. The name of the shipper is given as Euro Liberia Logging Company of Monrovia, Liberia. The consignee is named as the claimant, ET Timbers Private Limited. It is indicated thereon that the freight is payable as per the charterparty dated 19<sup>th</sup> January, 2021. The work of loading of the goods on the ship was completed on 4<sup>th</sup> March, 2021. OBT Shipping Ltd is reflected on the said draft bill of lading as an agent for and on behalf of the Master of the motor vessel Dolphin Star.

119. Other documents attached to the claimant's 1<sup>st</sup> declaration are an invoice dated 12<sup>th</sup> March, 2021 from Technowood Commercial LLC of Dubai addressed to the claimant for the cost of shipment from Greenville to Chittagong for cargo carried Free on Board (FOB) the motor vessel Dolphin Star. It shows that a down payment of USD 1,490,000.00 was made. A letter dated 1<sup>st</sup> April, 2021 from Justice Advocates & Partners, Inc (JAP Inc) attached to the claimant's 1<sup>st</sup> declaration and addressed to the Agency Manager OBT Shipping, Monrovia, Liberia refers to a letter dated 19<sup>th</sup> of March, 2021 to which no response had been received, in which a demand was made for the immediate delivery to Euro Liberia Logging Company the bill of lading (sic) for *its logs* loaded on the MV Dolphin Star, which was still in possession of OBT Shipping, but they had refused to deliver. The claimant herein also attached to the 1<sup>st</sup> declaration several safety and security compliance certificates for the motor vessel Dolphin Star.

120. The claimant deposed in the 1<sup>st</sup> declaration that no part cargo was permissible aboard the motor vessel Dolphin Star as it was a specific term of the charterparty that the cargo loaded at Greenville, Liberia, would be the only cargo loaded for carriage directly to the discharge port of Chittagong, Bangladesh, on a *“sole cargo basis only”*.

121. It was further deposed by the claimant that in breach of the charterparty, the defendants carried part cargo on the vessel other than only the claimant's cargo of timber logs and materially deviated the motor vessel Dolphin Star severally from the load Port of Greenville, Liberia *en route* to the discharge Port of Chittagong, Bangladesh, without any consent or agreement of the claimant. It was averred that the said motor vessel had called the Port of Mombasa to discharge project cargo when she was not entitled to carry any part cargo and had prior to Mombasa called other ports in Southern Africa in breach of the terms of the charterparty.

122. The claimant's 2<sup>nd</sup> declaration was also sworn by Mr. Sanjeev Khagram Advocate on 26<sup>th</sup> April, 2021. It was filed to oppose the Application Notice herein. He stated that save for the matters expressly stated therein, the matters deponed to were within his knowledge or derived from information in the possession of the claimant forwarded to him by Mr. Thalamuthu, the Principal Director of ET Timbers PTE Limited, the claimant herein, and Shreyas Sevak of Cas Agencies, UK, broker and agent acting on behalf of the claimant.

123. In paragraph 5 of the 2<sup>nd</sup> declaration, the claimant averred that its claim had been brought under Section 20(2)(h) of the Senior Courts Act 1981 of England on the basis that the claim arises out of an agreement relating to the carriage of goods in a ship or to the use or hire of a ship. The claimant further averred that it has a dual cause of action under the said head both against the Head Charterers, Starryway Trading and Shipping Company, described as the "owners" of the motor vessel Dolphin Star in the Fixture Note dated 19<sup>th</sup> January, 2021 as well as against the owners of the motor vessel Dolphin Star, Defang Shipping Company Limited, who agreed to carry the claimant's cargo from Greenville, Liberia to Chittagong, Bangladesh. Several documents were attached as exhibits to the claimant's 2<sup>nd</sup> declaration.

124. As per the ship's certificate of entry in Japan P&I Club, attached to the claimant's 1<sup>st</sup> declaration, it is shown that Fairwind International Shipping Co. Ltd is the Commercial Manager and Rightway Shipping Services Commercial Limited is the Technical Manager.

125. The Notice of Readiness to load cargo dated 16<sup>th</sup> February, 2021 issued to the Port Greenville, Liberia by the Master of the motor vessel Dolphin Star states that the said motor vessel was ready to load cargo in accordance with the terms and conditions of the charterparty. On 4<sup>th</sup> March, 2021 a Mate's receipt was issued confirming that 921 pieces of Liberia round logs occupying 6,252.315 CBM had been loaded on the motor vessel Dolphin Star from 25<sup>th</sup> February, 2021 to 4<sup>th</sup> March 2021 at the Port of Greenville. The Master of the ship, Captain Ye Chonggang signed the said receipt and so did Albert Gibson of OBT Shipping Limited. On 5<sup>th</sup> March, 2021 a certificate of clearance to sail was given to the motor vessel Dolphin Star by the National Port Authority of the Port of Greenville. The cargo on board is indicated as round logs and *the ship's next destination is given as Chittagong*.

126. Through an email dated 8<sup>th</sup> January, 2021 from Cas UK – Dry Cargo to [chartering@fairwind.com.cn](mailto:chartering@fairwind.com.cn), the author of the email forwarded a Fixture Recap between ET Timbers PTE Ltd as charterers and Fairwind International Shipping Company Co. Ltd as the owners of the motor vessel Dolphin Star. It should be noted that the ship's certificate of entry in Japan P&I Club mentioned earlier indicates that Fairwind International Shipping Co. Ltd is the Commercial Manager of the motor vessel Dolphin Star. It is thus not clear if at one time Fairwind International Shipping Co. Ltd acted as a disponent owner of the motor vessel Dolphin Star.

127. In another email dated 22<sup>nd</sup> March, 2021 from *Shawn Yang of the Operation Team of Starryway as agent to Operation- drycargo*, the author indicated that in view of the charterers continual failure to pay the freight, they were exercising their rights to lien on the cargo and were withholding the issuance of the bills of lading till freight was fully paid. He further stated that the owners had the right to hold all bills of lading before the receipt of freight was confirmed by the owners' bank, but they would release all bills of lading after freight was received.

128. Captain Sabed SM in an email dated 17<sup>th</sup> March, 2021 addressed to Shawn Young claimed that the Fixture Note/charterparty had been breached, there had been deviation hence freight payment had come under questionable radar. He also raised the issue of 247.658 CBM of cargo which he said was subject to a joint draft survey at the discharge port.

129. Pursuant to the filing of a Claim Form and an Application Notice against the owners of the motor vessel Dolphin Star, seeking the arrest of the *res (ship)*, this court granted the said orders on 4<sup>th</sup> April, 2021 at *ex parte* stage. Article 7 of the Arrest Convention confers jurisdiction upon the Courts of contracting States to issue warrants of arrests against motor vessels.

130. In the Claim Form filed by the claimant, it has been clearly stated that its claim falls under the provisions of Section 20(2)(h) of the Senior Courts Act 1981, for 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. Under Chapter 11 of the Civil Procedure Rules and Practice Directions, the defendants have challenged this Court's jurisdiction to hear the claim herein and the issuance of the warrant of arrest. From the Claim Form filed before this court, I do agree with the submissions made by the Counsel for the claimant that it is evident that the claim rests on the issue of the carriage of the logs loaded on board the motor vessel Dolphin Star at the Port of Greenville, Liberia which were to be offloaded at the Port of Chittagong in Bangladesh. The issue of breach of the charterparties and the allegation that the motor vessel Dolphin Star deviated from the route that it was intended to take to deliver the cargo are disputes that relate to the agreement of carriage of goods in a ship, in use of or hire of a ship.

131. During the subsistence of the Time Charter, the motor vessel Dolphin Star was by way of a charterparty dated 9<sup>th</sup> February, 2021 chartered to load cargo from the Port of Gentil, Gabon and transport it for offloading at the Port of Mombasa, which it did and that is when she was arrested. At the said time, the logs destined for Chittagong, Bangladesh were on board the said motor vessel as they had not been delivered. The claimant therefore claims that apart from failing to deliver its cargo, the motor vessel Dolphin Star deviated from the route she was meant to take to Chittagong. In this court's view, the said allegation falls squarely under Section 20(2)(h) of the Senior Courts Act as it arises out of an agreement relating to the *carriage of goods in a ship, use of or hire of a ship*.

132. On the interpretation of the words "*arising out of*" contained in Section 20(2)(h) of the said Act, the Court in **The Sennar** [1983] Lloyd's Report 295 held that in the ordinary meaning of the words in subparagraph (h)(sic), the claim did arise out of an agreement relating to the carriage of goods in a ship. It was also held that it was not necessary for the claim in question to be directly connected with the agreement of the kind referred to in the sub-section, or that it be the agreement of the kind referred to in the sub-section, or that it be an agreement made between the two parties to the action themselves. The Court stated that the phrase "*arising out of*" does not mean "*arising under*" an agreement and it has been given a broad meaning which can be equivalent to the phrase phrase "*connected with it*".

133. Similarly, when interpreting the term "*arising out of*" in Section 20(2)(h) of the Senior Courts Act in the case of **The Antonios P Lemos** at pages 717 and 719, Parker LJ in the Court of Appeal held as follows-

**“Section 20(2)(h) contains no words of limitation restricting the agreements mentioned to agreements between the plaintiff and the defendant. It would have been simple so to limit them if any such limitation had been intended. The Convention contains no words of limitation either. I am unable to find any sufficient reason for importing such words, and would only do so if compelled by authority. In the absence of such authority, I would accordingly hold that, if the plaintiff can establish that his claim arises out of an agreement of the relevant kind, that is, an agreement relating to the carriage of goods in a ship or to the use or hire of a ship, then even if such agreement is not between himself and the defendant, that claim falls under para(h). It is sufficient for the purposes of this appeal to say that on the ordinary meaning of the words the plaintiffs’ claim is, in my view, a claim arising out of the relevant agreement notwithstanding that such agreement is not between the plaintiffs and the defendants, and on the simple ground I would allow this appeal.”** (emphasis added).

134. In the above case, the defendants appealed to the House of Lords and Lord Brandon agreed with the interpretation given by the Court of Appeal and stated thus-

**“I would readily accept that in certain contexts the expression ‘arising out of’ may, on the ordinary and natural meaning of the words used, be equivalent of the expression ‘arising under’ and not that of the wider expression ‘connected with’. In my view, however, the expression ‘arising out of’ is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression ‘connected with’. Whether the expression ‘arising out of’ has the narrower or wider meaning in any particular case must depend on the context in which it is used”** (emphasis added).

135. In the above case, the claim was enforced under the provisions of Section 20(2)(h) of the Senior Courts Act as it arose out of an agreement which, although it was not between the parties to the claim filed, the said agreement was connected to them.

136. In regard to the issue of jurisdiction, in the case of **The August 8**, [1983] 1 Lloyd’s Rep 351 at 355, Lord Brandon held as follows-“

**“.....once a defendant in an admiralty action in rem has entered an appearance in such an action, he has submitted himself personally to the jurisdiction of the of the court, and the result of that is that, from then on, the action continues against him not only as an action in rem but also as an action in personam.** (emphasis added).

137. Still on the issue of jurisdiction, in **The Nordglint** [1987] 2 Lloyd’s Report at 470, Hobhouse J, stated as follows in regard to the issue of when an action in rem becomes enforceable in personam-

**“Unless and until anyone appears to defend an action in rem, the action proceeds solely as an action in rem and any judgment given is solely against the res. It is determinative and conclusive as against all the world in respect of the rights in the res, but does not create any rights that are enforceable in personam. An action in rem may be defended by anyone who has a legitimate interest in resisting the plaintiff’s claim on the res. Such a person may be the owner of the res but, equally, it may be someone who has a different interest in the res which does not amount to ownership, or, again, it may be simply someone who also has a claim in rem against the res and is competing with the plaintiff for a right to the security of a res of an inadequate value to satisfy all the claims that are being made upon it .....Unless and until a person liable in personam chooses to defend an action in rem, the action in rem will not give rise to any determination as against such person or any personal liability on his part, nor will it give rise to any judgment which is enforceable in pesonam against any such person.”**

138. Part 11 of the Civil Procedure Rules and Practice Directions of England, provides for the manner in which a defendant can dispute the court’s jurisdiction. Paragraph 11 states as follows-

**“(1) A defendant who wishes to-**

**a) Dispute the court’s jurisdiction to try the claim; or**

**b) Argue that the court should not exercise its jurisdiction, may apply to the court for an order declaring that it has no such jurisdiction or should not exercise any jurisdiction which it may have.**

**(2) A defendant who wishes to make such an application must file an acknowledgement of service in accordance with Part 10.**

**(3) A defendant who files an acknowledgment of service does not, by so doing lose any right that he may have to dispute the court’s jurisdiction.”**

139. One of the reasons why the defendants have challenged this Court’s jurisdiction to hear the claim is because in their view, the claimant has sued the wrong party, namely, the owners of the motor vessel ‘Dolphin Star’ Paragraph 2 of the particulars of the claim filed by the claimant read thus-

**“by a charterparty entered into between the claimant and the owners of the motor vessel ‘Dolphin Star’ as evidenced by a Fixture Note dated 19<sup>th</sup> January, 2021 entered into between the Claimant ET TIMBERS LIMITED and the Defendant, the disponent owners of the motor vessel ‘DOLPHIN STAR’ namely STARRYWAY TRADING & SHIPPING COMPANY LIMITED (with head owner being DEFANG SHIPPING COMPANY LIMITED), for the carriage of 6500 to 6800 cbm of Liberia Ekki (Azobe Round logs) (subject to the vessel’s full capacity at permissible draft of 7.5M). The charterparty was a standard Gencon Charter as amended by the terms contained in the Fixture Note.”**

140. The defendants contend that they would be liable *in personam* but not *in rem* as being the owners of the motor vessel they are distinct from the charterers. The defendants thus hold the position that the claim herein is defective. In the declaration filed on 4<sup>th</sup> April, 2021 incorrectly headed as ‘*declaration in support of application for sale*’ but meant to be in support of the Application Notice for the arrest of the motor vessel Dolphin Star, in paragraph 16 it is deposed as follows-

*“THAT the Property to be arrested is the Motor Vessel ‘Dolphin Star’ of the port of Panama and the amount of security sought by the Claimant is US\$3,000,000.00. This is the ship in connection with which the claim has arisen and the said Motor vessel remains under the charter and/or control and/or possession of STARRYWAY TRADING & SHIPPING COMPANY LIMITED who would be liable in a claim in personam. At the time the claim arose, STARRYWAY TRADING & SHIPPING COMPANY LIMITED was the Disponent owner and charterer or in possession and control of the ship in connection with which this claim has arisen and continues to remain so.”* (emphasis added).

141. The mode of exercise of the court’s jurisdiction based on a claim in *rem* falls under Section 21(4) of the Senior Courts Act which provides as follows-

*“In the case of any such claim as is mentioned in section 20(2)(e) to (r), where—*

*(a) the claim arises in connection with a ship; and*

*(b) the person who would be liable on the claim in an action in*

*personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against—*

*(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or*

*(ii) any other ship of which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.”* (emphasis added).

142. Bearing in mind the provisions of Section 21(4)(b)(i) above, it is evident in this case that the claim *in rem* has been brought against the owners of the motor vessel Dolphin Star, yet the claimant at the same time asserts that the person that would be liable *in personam* would be Starryway Trading & Shipping Company Limited. I therefore concur with Mr. S. Inamdar for the defendants that the pleadings by the claimant are muddled up.

143. In the case cited by the said Counsel for the defendants in **The Kommunar (No.2)** (supra) Coleman J while expounding on the meaning of the relevant person said the following-

*“The function of this sub-section is to lay down the required connecting factors between the ship in connection with which the claim arose, the person liable in personam in respect of that claim (“the relevant person”) and the vessel against which an action in rem can be brought. The effect of the sub-section is to prescribe that the person liable in personam in respect of the claim must have that connection with the ship with connection with which the claim arose which is identified at s. 21(4)(b), that is to say such person must have been the owner or charterer of it or must have been in possession or control of it when the cause of action arose. The latter part of sub-section (4) then identifies the prescribed connection between the ship to be arrested and that person by requiring that such ship, if the same ship as that in connection with which the claim arose, must either be wholly beneficially owned by the relevant person or demised chartered to him, or if a different ship, that it must be wholly beneficially owned by that person.*

*Fundamental to this connection code is that the beneficial owner or demise charterer of the vessel to be proceeded against in rem should also (i) be the person who would be liable in personam and (ii) have been the owner or charterer of or in possession or control of the vessel in connection with which the claim is brought at the time when the cause of action arose.*

*Thus, if the beneficial owner of the vessel proceeded against in rem is not the same person as the relevant person having the required connection with the vessel which is the subject matter of the claim, the proceedings in rem cannot be pursued.”* (emphasis added).

144. Applying the provisions of Section 21(4)(b)(i) of the Senior Courts Act and the above decision to the circumstances of this case, it is apparent to this court that the claimant properly brought the claim *in rem* as against the owners of the motor vessel Dolphin Star as the said ship is beneficially owned by Defang Shipping Company Limited. The claim *in rem* could not have been brought against Starryway Trading & Shipping Company Limited as it was not in possession of the said vessel under a Demise Charter as the said Company had chartered the vessel from Defang Shipping Company Limited under a Time Charter.

145. In the case of **Carl Ronning v Societe Navale Chargeurs Delmas Vieljeux (The Francois Vieljeux)** (supra), when addressing the issue of charters, the Court of Appeal stated as follows-

*“...it will be necessary to refer to the law relating to the charter of ships by demise, which, as I understand the position, differ from time charters and voyage charters in that the charterer takes the ship, with or without captain and crew, so that he has full*

*possession of and control over the ship and can use and employ it without reference to the owner.”.*

146. In the Treatise **Carriage of Goods by Sea** by John F. Wilson, 6<sup>th</sup> Edition, in defining what constitutes a demise charterparty, the learned professor of law states thus-

*“Finally, brief mention must be made of the demise or bareboat charter which must be distinguished from the types of charter already discussed in that it operates as a lease of the vessel and not as a contract of carriage. It differs from other charterparties in much the same way as a contract to hire a selfdrive car differs from a contract to engage the services of a taxi. Whereas in an ordinary time charter the shipowner retains control over the operation of the vessel, under a demise charter the charterer displaces the owner and, for the period of the ‘lease’, takes possession and complete control of the ship. Under this type of contract, the charterer mans and equips the vessel and assumes all responsibility for its navigation and management. For all practical purposes, he acts as owner for the duration of the charter and is responsible for all expenses incurred in the operation of the vessel, and also for insuring her.”*

147. The above explanation demonstrates the reason why Section 21(4)(b) (i) of the Senior Courts Act places a demise charterer as the same pedestal as the beneficial owner of a motor vessel as such a charterer completely displaces the registered owner of the motor vessel thereby gaining possession and control of how the vessel will be manned and enters into contracts with third parties solely for its own financial benefit or uses the motor vessel for his/its business without making any reference to the registered owner of the vessel.

148. Unlike a Time Charterparty or a Voyage Charterparty where the registered owner of a motor vessel retains some degree of control over the motor vessel. A Demise Charterparty divests the registered owner of his rights of operation of a motor vessel for the duration of the charter. It is for the said reason that a demise charterer in an admiralty claim regarded as a “*relevant person*” and by virtue of acting as an owner of the chartered motor vessel under **Article 1(a) of The Hague and Hague/Visby Rules**, it would be regarded as the carrier, just like how a registered owner of a motor vessel is categorized as a *relevant person*. The charterer by demise would be liable under the bills of lading signed by the Master. Due to the nature of a demise charter which renders the charterer to be in possession and control of the motor vessel, the shipowner cannot exercise a lien over cargo as security for the charter hire.

149. Mr. S. Inamdar cited **The Law and Practice of Admiralty Matters** by Sarah C. Derrington and James M. Turner at Paragraph 5.13 on page 83 on who can be regarded as a “*relevant person*” in a general admiralty claim. The learned authors state as follows-

*“The ‘relevant person’ is key to the exercise of the of the court’s jurisdiction over a general maritime claim. If the same person:*

*i. Would be liable on the claim in personam;*

*ii. Was, at the time the time the cause of action arose, the owner or charterer of, or in possession or control of the wrongdoing ship; and*

*iii. Is, at the time the action is brought, the beneficial owner or demise charterer of that ship or the beneficial owner of any other ship,*

*Then the claimant may found his claim as of right by bringing in rem proceedings against the wrongdoing ship or a sister-ship and the court has no discretion not to prevent him from doing so.”* (emphasis added).

150. The Time Charterparty in the case before this court had a provision for sub-letting of the motor vessel Dolphin Star to a third party. When the claimant and Starryway Trading entered into a voyage charter, two independent charterparties were running simultaneously. The foregoing placed the original charterer Starryway Trading, in a dual position as against the owners of the vessel with his position being that of a charterer, whereas Starryway Trading’s position with the claimant in regard to the motor vessel became that of an owner. It was not therefore incorrect for the claimant to refer to Starryway as the disponent owner, as that aptly describes its relationship with the owners of the motor vessel Dolphin Star, after the former sub-let the said vessel on a voyage charter.

151. From the bundle of emails exhibited by the claimant, it is evident that the registered shipowner retained some control over the operation of the motor vessel Dolphin Star, to the extent of declining to issue the claimant with the bill of lading on account of a balance of unpaid freight. Communication from the Master of the said motor vessel, Captain Ye Chonggang shows the extent to which the defendants were involved and the extent of control they had over the carriage of the claimant’s goods. In one of the emails whose date is not shown, the said Master of the motor vessel Dolphin Star wrote to OBT Shipping and Shawn Yang advising them that as per the instruction of the **shipowners**, he was withdrawing the authorization of signing of the bills of lading. In the email of 19<sup>th</sup> March, 2021, from Operation-Shawn to drycargo, written by Shawn Yang on behalf of Operation Team, Starryway as agent, it stated among several things that the **owners** would place a lien on logs if charterers failed to arrange the freight payment and the **owners** reserved the right of cancelling the contract. It further states that as per the charterparty, the **owners** had a right to hold all bills of lading before the freight was confirmed by the **owners’** bank but the **owners** would release all the bills of lading after all freight had been received.

152. The facts deduced from the documents availed by the claimant, ET Timbers Limited and the defendants (Defang Shipping Company Limited) as the owners of the motor vessel Dolphin Star is that on 1<sup>st</sup> January, 2019 the defendants entered into a Time Charter with Starryway for a minimum period of 36 months, with an option to extend the charter by 15 days. The Time Charter gave Starryway the liberty to sublet the vessel for all or any of the time covered by the said charter but the charterers would remain responsible for the fulfilment of the charterparty. Clause 8 thereof states that the Captain shall discharge his voyages with utmost despatch, and shall render all customary assistance with ship’s crew. As earlier stated, it is however surprising that the Time Charter was signed between **Dolphin Star Shipping Company Limited** as the owners and Starryway Company Limited as the charterers. The said document was attached to the affidavit signed by Mr. Maru Advocate, in support of the present application. There was no explanation in the said affidavit as to who Dolphin Star Company

Limited is and the issue was not challenged in the 2<sup>nd</sup> declaration signed by Mr. Sanjeev Khagram. This court will therefore accept that the Time Charter as being a genuine document and hereby conclude that **Dolphin Star Company Limited** had the full authority to sign the Time Charter on behalf of Defang Shipping Company, the owners of the motor vessel Dolphin Star.

153. It is thus obvious that Defang Shipping Company Limited were the Head owners, Starryway was the Head charterer. It is however not lost to the court that in an email dated 22<sup>nd</sup> March, 2021 from Operation – Shawn to Operation; Drycargo, the author states that the bills of lading issued without **their**, or **owner's** or Shipmaster's authorization are illegal null and void. In the said email and another one where the date of sending has not been shown, Starryway has signed off as "*Starryway as agent*". It refers to itself as an agent and ET Timbers Company Limited as the voyage charterer. It is apparent from the email of 22<sup>nd</sup> March, 2021 that the Head owners, Defang Shipping Company Limited, were actively involved in the charter by the claimant herein. One only needs to look at the literal meaning of the words used by Shawn Young, the author of the said email. Some of the words he uses are- "Please be advised that the bills of lading issued without **our** or '**owners**' or shipmaster's authorization are illegal and null and void".

154. Another sentence reads – "As charter party, **owners** have the right to hold all BLS before freight was confirmed receipt (sic) by **owners bank** (sic). But **owners** would release all BLs after all freight have (sic) been received." There are also 2 additional sentences that make reference to the owners in the said email. One of them states "On the other hand, there is no term in charter party that stated the vessel must arrive discharge port (sic) within a fixed duration or before a fixed date, therefore no delay of cargo delivery at discharge port and **owners** reject all claims from charterers about alleged cargo detention. The other sentence reads "No matter what disputes occurred, of cargo quantity or of delayed delivery, **owners** are not hindered to receive freight from charterers because these disputes should be settled at discharge port and should not be the reason of payment rejection, this rejection is also a fundamental breach of contract." The next sentence that makes reference to owners reads – "**Owners** could release BL stated shore figures after **owners bank** (sic) confirmed receipt of freight of shore figures but this is based on **owners'** reservation of all their rights."

155. In this Court's understanding, the word "**owners**" in the context it has been used in the correspondence referred to means the Head owners who are the shipowners, Defang Shipping and not the disponent owners, Starryway Trading, as on a voyage charter, the registered owners of a ship retain some control in her operation. Further, it was communicated by the Master of the motor vessel Dolphin Star that he was withdrawing the authorization of the signing of the bill of lading on instructions of the **shipowners**. In some of the emails Starryway Trading refers to itself as "**our**", and as the **Head Charterer**, its reference to "**owner**", could only be to a 3<sup>rd</sup> party, Defang Shipping Company Limited.

156. The exhibits thus availed by way of emails leave no doubt in this court's mind that the "**relevant person**" in the present circumstances are the owners of the motor vessel Dolphin Star, namely, Defang Shipping Company Limited. In light of the said documents, the applicable law and legal precedents cited in the preceding paragraphs, it is clear that the registered owners of the motor vessel Dolphin Star, Defang Shipping Company Limited, are the ones who would be liable *in personam*. It is thus apparent that the claimant rightly sued the defendants but mixed up the pleadings by stating that Starryway Trading & Shipping Company Limited would be liable *in personam*. Since the said company had entered into a Time Charter with Defang Shipping Company Limited, and subsequently entered into a Voyage Charter with the claimant herein, Starryway Trading & Shipping Company Limited, the latter would not be liable *in personam* in a claim *in rem*. Mr. Khagram contended that the Time Charter was a sham, this court does not agree with the said position. In my view, the Time charter is legally tenable.

157. Apart from being urged to strike out the claim *in rem* for being defective, Mr. S. Inamdar was of the view that at the time of hearing the Application Notice for setting aside the warrant of arrest for the motor vessel Dolphin Star, this court should consider if at the time when this court gave orders for the arrest of the said motor vessel, the claimant had availed sufficient information to warrant the court to grant the orders it did on 4<sup>th</sup> April, 2021. He cited the case of **Roy Shipping SA & Others v Dodoma Fishing Co. Ltd** (supra), where Judge Omolo JA, at page 302 stated as follows on the issue of setting aside the warrant of arrest of a res-

**"Once again, I repeat that in the case of the "Lillian S", what was before the Court was an application to set aside the writ of summons and to discharge the ship from arrest. Caltex was required to show at that stage, and not during the trial of the action, that the goods it had supplied to the ship were necessary for its operations or maintenance and whether the Appellants in that case were persons who would be liable in personam. These issues had to be determined at that stage, namely at the stage to set aside the writ of summons. The determination of those issues, one way or the other would enable the court to say whether it did or did not have jurisdiction to proceed any further with the matter, Nyarangi JA, put it thus**

**"I think 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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...."** (emphasis added).

158. In **Roy Shipping SA & Others v Dodoma Fishing Co. Ltd** case (supra) Omolo JA adopted the holding by Wilmer J in the case of **The St Eleferio, Schwarz & Co (Grain) Ltd v St Eleferio ex Arion (owners)** (supra), who stated as follows-

**"I need hardly say that none of these contestations advanced on behalf of the defendants was accepted as correct by the plaintiffs; but I do not propose to go into the merits of these various contestations now, or to decide whether the defendants are right or the plaintiffs are right. It seems to me, having regard to the view I take of construction of section 3(4) of the Act of 1936, that this is not the moment to decide whether the defendants are right or whether they are wrong in their submissions on the point of law raised. If they are right on all or any of these points raised, it may well be that in the end, they will show a good defence to the action. That, in my judgment, furnishes no good reason for setting aside these proceedings aside in limine, and thereby depriving the plaintiffs of the right to have these issues tried."** (emphasis added).

159. Although Mr. S. Inamdar was of the view that the above case is no longer good law as it was decided long before the Senior Courts Act of 1981, this Court's view is that the *ratio decidendi* in the above case remains applicable to maritime claims up to present time.

160. On the submission made by Mr. S. Inamdar that the claim as framed by the claimant is defective for stating that Starryway Trading & Shipping Company Limited would be liable *in personam*, Mr. Khagram was of the view that if this court was to find that the pleadings were defective, it could allow amendment, instead of striking out the claim. The latter Counsel relied on the case of **Owners & Masters of the of the Motor Vessel 'Joey' v Owners and Masters of the Motor Tugs 'Barbara' and 'Steve'**, (supra) where the Court of Appeal upheld the decision of Waki J., in allowing amendments in an admiralty claim which was defective.

161. Mr. Khagram also relied on the case of **LD Commodities Rice Merchandising LLC & LD Commodities Mea Trading DMCC v The Owners of the owners and/or demise charterers of the vessel Stylianiz 2** [2015] EWHC 3060, where the claimant's Advocate made an error when filling a claim form and filled a form for a claim *in personam* (Form ADM1A) instead of a claim form *in rem* (Form ADM1). In the said case Brooke LJ stated thus about the error that had been made by the claimant's Advocate-

**"One must not lose sight of the fact that the overriding objective of the new procedural code is to enable the court to deal with cases justly, and this means the achievement of justice as between the litigants whose dispute it is the court's duty to resolve. In taking into account the interests of the administration of justice, the factor which appears to me to be of paramount importance in this case is that the defendants and their solicitors knew exactly what was being claimed when the quirky petition was served on them. The interests of justice would have been much better served if the defendants' solicitors had simply pointed out all the mistakes that had been made in these very days of the new rules and Mrs. Hannigan's Solicitor had corrected them all quickly and agreed to indemnify both parties for the expense unnecessarily caused by his incompetence."** (emphasis added).

162. A section of the particulars of the claim and a part of the declaration is no doubt jumbled up in regard to the person who would be liable *in personam*. The lack of clarity on the said issue must have given the defendants and their Counsel as it did to this court some difficulty in comprehending with precision whether the claimant meant that the defendants would be liable *in personam* or whether it is Starryway Trading and Shipping Company Limited which would be liable *in personam*.

163. The certificate of registry from Panama Maritime Authority gives the name of Defang Shipping Company Limited as the registered owners of the motor vessel Dolphin Star. Taking due regard to provisions of Rule 17.1(2) of the Civil Procedure Rules and Practice Directions of England, if a statement of case has already been served, a party may amend only with the written consent of all the parties or with permission of the court. The claimant has not made an application for amendment of the statement of the case. The naming of the wrong party as being the one who would be liable *in personam* is not a procedural error and therefore this court cannot rely on the provisions of the Civil Procedure Rules and Practice Direction 3.10 which states that where there has been an error of procedure such as a failure to comply with a rule or practice direction –

(a) the error does not invalidate any step taken in the proceedings unless the court so orders; and

(b) the court may make an order to remedy the error.

164. The Civil Procedure Rules and Practice Directions of England in Rule 1.1 provide for the overriding objectives of the court to deal with cases justly at a proportionate cost. Rule 3.3(4) of the said Rules gives courts powers on their own initiative to grant orders for amendment. This court notes that the error that was made by the claimant's Counsel in the pleadings can be remedied by amendment. This court also notes that if it strikes out the claim at this stage, it will be doing an injustice to the claimant as the ship will sail away whereas the matter in issue under the provisions of Section 20(2)(h), about breach of the Voyage Charter will remain at large, whereas no one at this moment knows where the ship will sail to with the claimant's cargo on board, as such information will only be availed to the Kenya Ports Authority before the MV Dolphin Star sets sail.

165. The issue of the alleged deviation of the said motor vessel and the carriage of part cargo fall under the main issue of carriage of the claimant's cargo, use of and hire of the motor vessel Dolphin Star. This court does not wish to delve deeply into the issue of deviation of the ship which ought to be tried by the court which will hear the claim. In the circumstances of this case and notwithstanding the shortcomings in the statement of case which this court has held can be amended, this court finds that it has jurisdiction to hear the claim *in rem* and it had the jurisdiction to grant the warrant of arrest as the claim in issue falls under Section 20(2)(h) of the Senior Courts Act and that Section 21(4)(b) (i) of the said Act applies to the claim herein.

166. On the issue of failure by the claimant to disclose material information, this court's finding is that the 1<sup>st</sup> declaration filed by Mr. Sanjeev Khagram substantially complied with Form ADM 5, in regard to the information which he had within his knowledge and what he was informed by Captain SM Sabed, who was representing the claimant's interest in the claim. This court however notes that the capacity held by Captain Sabed in relationship to the claimant was not disclosed but in the interest of justice and noting that other additional information was availed to this Court through the 2<sup>nd</sup> declaration filed on 16<sup>th</sup> April, 2021, it is deemed that the sources of information given to the claimant's Counsel were adequate.

167. In the case of **Pembe Flour Mills v the owners of the motor vessel "IOANNIS G"** (supra) which this court struck out, the claimant completely failed to comply with the requirements of Form ADM 5 and also failed to undertake a search to ascertain who the owners of the motor vessel IOANNIS G were. Apart the foregoing, the claimant had relied on Order 75 of the Supreme Court Act which had been replaced by Part 61 of the Senior Courts Act. The pleadings therein were therefore beyond salvage and the said case is thus distinguishable from the present case.

168. Mr. S. Inamdar suggested that title and property in the goods had not passed to the claimant at the time it filed the claim as it had not been issued with a bill of lading. The General Paramount Clause on conditions of carriage of the claimant's cargo backed by the law in Bangladesh as cited by Mr. Khagram, gives the claimant herein the *locus standi* to file the claim herein as the property in the goods changed

when the said goods crossed the ship's rail when being loaded on the ship. Section 1 of the **Bangladesh Bills of lading Act, 1856** which is applicable in the circumstances of this case states as follows-

*“Every consignee of the goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon or by reason of such consignment or endorsement shall have transferred to and vested in him all rights of suit, and be subject to the same liabilities in respect to such goods as if the contract contained in the bill of lading had been made with himself.”*

169. In **Marine Cargo Claims Third Edition**, by William Tetley, at page 187 the learned author states as follows regarding the person who may sue in a contract of carriage by sea-

*“Under the terms of the contract of sale, the buyer may become vested with title to the goods before or upon shipment. The seller may nevertheless have acted as shipper in contracting with the carrier. The buyer with whom title has already vested, may be the consignee on the bill. Such a consignee, who cannot benefit from the Bills of Lading Act, should nevertheless be able to maintain an action in his own name against the carrier for loss of or damage to goods due to the latter's failure to exercise proper care”.*

170. The above exposition supports the legal position that the right to sue attaches to a consignee of the goods shipped Free on Board (FOB), when the goods cross the ship's rail. In this court's view, the circumstances under which a consignee can sue a carrier are extensive and include the ones which have brought the claimant before this court.

171. In **Carver's Carriage by Sea 12<sup>th</sup> Edition Volume 1**, by Raoul Colinvaux, at page 40 he states that if no bill of lading or other document is given upon the shipment, the contract of carriage must be collected from the announcements and the arrangements that were made prior to the goods being shipped.

172. Further, a Mate's receipt was issued when the cargo of logs was loaded on the motor vessel Dolphin Star. The import of a Mate's receipt is explained in **Carver's Carriage by Sea 12<sup>th</sup> Edition Volume 1** (supra) at page 44, where the learned author states as follows-

*“But the matter is sometimes complicated by the existence of a mate's receipt. This may have been transferred to a purchaser; or the owner of the goods may have required the receipt to be given up to him by the person who has shipped for him, in order to obtain the bill of lading himself. The shipowner ought, therefore, in prudence, when a mate's receipt has been given, to require that it be given up in exchange for the bill of lading. Possession of it by the person who claims the bill of lading is evidence that he is either the real shipper, or has the authority of the shipper; whereas non-possession of it is an indication he has not that authority.”*

173. It is worth noting that when there was delay in issuance of the bill of lading to the claimant herein by the defendants, Euro Liberia Logging Company which was the shipper tried to intervene so as to ensure that the claimant (consignee) was issued with the same. The foregoing is supported by the emails attached to the claimant's 2<sup>nd</sup> declaration and the letter dated 1<sup>st</sup> April, 2021 from the Advocates for Euro Liberia Logging Company.

174. I have weighed the prejudice that will be occasioned to the claimant and noting that it had paid freight costs (although I could not establish if it had completed paying the full amount) to have its cargo of logs delivered to Chittagong, Bangladesh from Greenville, Liberia, but which cargo remains undelivered. I have balanced the said fact with the interest of the defendants, whose ship continues lying at the Port of Mombasa, under the warrant of arrest. Given the said circumstances, this court orders the defendants to deposit in court the sum of US\$ 3,000,000.00 (Three Million US Dollars) as security for the release of the motor vessel Dolphin Star from arrest.

175. Noting that the statement of case by the claimant contains some defects and will require amendment and that this court has restrained itself from striking out the claim in the interest of justice so that parties can be heard on merit, also noting that the claimant's claim is not frivolous or vexatious, I order that the costs of the Application Notice dated 16<sup>th</sup> April, 2021 shall be shared equally between the claimant and the defendants.

176. Apart from the provisions of Rule 3.3(4) of the Civil Procedure and Practice Directions of England, this court still retains its inherent powers under Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya to grant orders in the interest of justice. The claimant is therefore granted 21 days to amend, file and serve amended pleadings. In the case of **LDT Commodities Rice Merchandising LLC & LD Commodities Mea Trading DMCC V The Owners and/or demise Charterers of the Vessel STYLIANZ** (supra), the Court held that amendment can be used to add or substitute a new claim (see CPR 17.4(2)) and so “*amendment*” is not restricted to the alteration of the details of an existing claim and it can include the making of a new claim. The said Court considered that “*amendment*” should not be given a restricted meaning but should cover any alteration to the wording of a Claim Form.

177. The warrant of arrest against the motor vessel Dolphin Star shall be lifted as soon as the sum of US\$3,000,000.00 has been deposited in Court.

178. This court was to deliver this ruling at an earlier date but the same was not possible as at the time the Application Notice was heard, I was about to commence my annual leave. The said fact was brought to the attention of the Counsel representing the parties. The said Counsel also relied on a lot of authorities which this court needed to go through before delivering this ruling. This court also had to look for the relevant authorities in maritime law but the same were not readily available. The wealth of knowledge the 2 Counsel have in the specialized area of maritime law is appreciated. The authorities they relied on have been illuminating, worthwhile and useful to this court.

Either party is at liberty to apply.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 14<sup>TH</sup> DAY OF JULY, 2021. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM DUE TO THE OUTBREAK OF THE COVID-19 PANDEMIC.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of-**

Mr. S. Khagram for the claimant

Mr. S. Inamdar for the defendants

Mr. Oliver Musundi – Court Assistant.