REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL SUIT NO. 136 OF 2006

CORAM: D.S. MAJANJA, J.

BETWEEN

KITANO CHACHA .... 1ST PLAINTIFF

MKOMBOZI FISHING AND MARINE

TRANSPORT COMPANY LTD .... 2ND PLAINTIFF

AND

UGANDA RAILWAYS CORPORATION .... DEFENDANT

JUDGMENT

Background

1. This suit was instituted by the plaint dated 27th November 2006. Thereafter, the 1st plaintiff made further amendments culminating in the Further Amended Plaint dated 30th July 2014. The 1st plaintiff is one of the directors of the 2nd plaintiff company while the 2nd plaintiff is the registered owner of a marine vessel christened *MT Munanka*. The defendant is a corporation established under the ***Uganda Railways Corporation Act (Chapter 331 Laws of Uganda)*** and the owner of the marine vessel, *MV Pamba.*

2. The plaintiffs' claim against the defendant as set out in the Further Amended Plaint is for Kshs. 12,221,280.00 or the equivalent in US dollars or any convertible currency, Kshs. 15,946,507.20 being the cost of 92 trips made from 16th February 2003 to 7th July 2006 when the plaintiffs' operated the ship to Kisumu, general damages for the negligence of the defendant's servant and costs of the suit.

3. The plaintiffs' case was that on 16th February 2003, *MV Munanka* was damaged in the Kenyan waters of Lake Victoria around Homa Point following a collision with the *MV Pamba*. They blamed the accident on the negligence of Captain Godfrey Byarugaba, an employee of the defendant, for failing to keep a proper look-out while navigating the vessel, for failing to maintain a reasonable distance between *MV Pamba* and *MT Munanka* and for failing to switch on appropriate navigational lights immediately before the collision.

4. The plaintiffs further pleaded that the defendant admitted liability for the accident, a fact supported by the Report of the Committee of Inquiry dated 24th December 2003 and the Memorandum of Understanding entered into between the parties on 6th December 2004. The plaintiffs therefore pleaded an additional claim based on breach of contract for the defendant's failure to abide by the terms of the Memorandum of Understanding by failing to pay damages, costs of repair and other costs incurred in repairing the ship.

5. The plaintiffs' case was supported by five witnesses. Christian Lusabo Stanslaus (PW 1) testified that he was the captain of *MV Munanka* on the date of the accident. He recalled that the ship was damaged in front and on the deck and that the defendant's captain caused the collision when he failed to steer the ship as required. He added that the captain failed to respond before and after the accident. After the accident, PW 1 navigated the ship to the port in Kisumu and made a report.

6. The quartermaster, Hamisi Kitundu (PW 2), was aboard the ship on the date of the accident. He stated that he lit a search to signal that the ship was approaching and steered the ship as directed by PW 1 but the defendant's ship kept on approaching them at a high speed. He added that the captain of the approaching ship failed to respond to PW 1's radio calls. After the collision, they proceeded to Kisumu and reported the incident to the police who came to assess the damage caused on the left side of the vessel.

7. Kitano Chacha (PW 3) was informed about the accident by PW 1, following which an inquiry was conducted which found the captain of the defendant's ship liable. He testified that the defendant thereafter approached the plaintiffs to agree on how to repair the ship. A meeting

was held between the parties on 6th December 2004 and thereafter the parties entered into a Memorandum of Understanding. The defendant selected the company to undertake the repairs but failed to meet the cost of the repairs necessitating this suit. He stated that the cost of repairs was Tanzania Shilling (Tshs.) 147,192,000.00. He also stated that one of the ship's tank with a capacity of 52,000 litres was damaged. He also demanded damages for loss of business for 92 trips valued at Kshs. 15,946,507.20.

8. At the material time, Vitalis Ouma (PW 4), was in charge of maintaining vessels belonging to the Kenya Railways Corporation. He chaired the Committee of Inquiry, comprising of three members. He produced the report of the inquiry which found that the captain of the defendant's ship was responsible for the accident. Gordon Ochieng (PW 5), then a human resources officer at the Kenya Railways was the secretary of the committee of inquiry and supported PW 4's account of the inquiry.

9. The defendant denied the allegations through its amended Statement of Defence dated and filed on 10th June 2008, supported by the evidence of one witness. It denied that it is the registered owner of the vessel, *MV Pamba* and that it was negligent as alleged by the plaintiffs. The defendant pleaded that the report of inquiry was not binding on the court and further that the memorandum of understanding was not enforceable as it lacked the defendant's corporate seal. The defendant further pointed out that the suit is time-barred and failed to disclose a cause of action. It further alleged that the plaint was incompetent as it was neither drawn nor filed by the plaintiff or its advocates and was not filed with an accompanying verifying affidavit.

10. Aggrey Firimon Mbulo Ojwang (DW 1) testified on behalf of the defendant. He admitted that the accident took place. He produced his technical report dated 26th August 2016, which contains an assessment of the costs of repair at USD 2,767. He disputed the plaintiffs' claim as being exaggerated alleging that some of the works alleged to have been done were in fact not carried out.

11. Parties filed their respective written submissions. The plaintiffs submitted that the cause of action arose from the memorandum of understanding entered into between the parties on 6th December 2004. They also submitted that the suit is not time barred under the ***Limitation of Actions Act (Chapter 22 of the Laws of Kenya)*** as the claim, being one for breach of contract, was filed within 6 years of the accrual of the cause of action. They further submitted that the amount sought was appropriate since the assessment of damages was done on the defendant's advice. That loss was incurred since the ship was not operational following the damage and having supported the claim for cost of repair, loss of business and damages by producing documentary evidence the plaintiffs ought to be compensated.

12. The defendant submitted that the plaintiffs' case is statute barred since it was instituted more than 3 years after the cause of action arose while the 2nd plaintiff joined the suit twelve years thereafter. It also the argued that the defendant, being Ugandan statutory corporation, was protected by **section 52** of the ***Uganda Railways Corporation Act (Chapter 331 of the Laws of Uganda)*** which provides that the case ought to have been instituted within twelve months from the date the cause of action arose. The defendant also submitted that the ***Act*** aforesaid is applicable to these proceedings since none of the vessels involved in the accident and parties to the dispute are Kenyan. Counsel for the defendant cited the case of ***Kenfreight (U) Ltd v Uganda Railways Corporation****;* ***Langat v Kenya Posts and Telecommunications Corporation*** **[2003] 1 EA 147**; ***Ephantus Mucheru Mwangi v Kenya Railways Corporation & Another*** **[2005] eKLR.** The defendant also cited ***Halsburys Laws of England 4th Edition 2000 Reissue Vol. 28 page 410 para. 810*** to support the view that the defendant was entitled to the benefit of the special limitation period set out under the ***Uganda Railways Corporation Act*** which superseded the Kenyan ***Limitation of Actions Act***, being a statute of general application.

13. The defendant maintained that the damage occasioned was minor, as PW 1 testified that the ship nevertheless proceeded with its journey to the port of Kisumu while PW 3 confirmed that ship continued operating until 2008 when he had it repaired. The defendant also disputed the claim of damage to the ship's tank as being an afterthought that contradicted PW 1's statement and the issuance of the ship's seaworthiness certificate in September 2003. It contended that the cost of repair required was USD 2,767 as supported by the evidence of DW 1 and that the technical report produced which was not controverted.

14. The defendant also dismissed the plaintiffs' claim for loss of business since the vessel continued to operate immediately after the accident, and continued with its regular operations. It maintained that none of the witnesses indicated that they were unable to carry any assigned cargo as a result of the accident and no evidence was tendered to confirm that the plaintiff was unable to fulfil contractual obligations as a result of the accident. The defendant concluded that the plaintiffs had failed to prove its claims which being special damages, ought to be specifically proved. Furthermore, even if proved, the plaintiffs failed to mitigate their losses. The defendant also cited the plaintiffs' lack of candour before the court, after their concession that the ship continued to operate four years without repairs.

15. The defendant also submitted that the plaintiffs could not rely on negotiations between the parties to sustain the suit since the defendant never waived its statutory rights in the event a claim be instituted against. It cited in support ***Halsburys Laws of England 4th Edition 2000 Reissue Vol. 28 page 408-409; Tana and Athi Rivers Development Authority v Joseph Mbindyo & 3 Others Nyeri Civil Appeal No. 253 of 2011*** **[*2013*]** ***eKLR*** to advance the view that the ongoing negotiations did not did not constitute material facts which were not within the knowledge of the defendant.

Analysis and determination

16. I have framed the following issues after considering the pleadings, testimony of the witnesses and written submissions:

a) Whether suit is statute barred.

b) Whether the defendant is liable for the accident.

c) What relief are the plaintiffs entitled to.

Limitation of action: whether suit is statute barred

17. On the issue of limitation, the defendant challenged the suit on two fronts. First, under the ***Uganda Railways Corporation Act*** which requires that a suit against the defendant ought to have been instituted within twelve months from the date the cause of action arose. Second, under the ***Limitation of Actions Act*** which requires a suit grounded on negligence to be instituted within three years.

18. The defendant is incorporated under the ***Uganda Railways Corporation Act*** which, at **section 52**, provides as follows:

> *Where any action or other legal proceeding is commenced against the corporation for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—*
>
> *(a) the action or legal proceedings shall not be commenced against the corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his or her agent; and*
>
> *(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months after the act, neglect or default complained of or in the case of a continuing injury or damage, within six months after its cessation.*

19. **Section 52** aforesaid sets out the limitation in respect of legal proceedings against the Corporation concerning execution of the ***Act*** or public duty. Since the collision took place in Kenyan waters of Lake Victoria and the parties subjected themselves to the jurisdiction of the court, I am unable to accept the defendant's position that the applicable law is Ugandan law for reasons I will elucidate.

20. On the second limb of the argument, the plaintiff's' claim for damages for negligence arose on the date of the accident, 16th February 2003. Since this is a claim founded on tort, by virtue of **section 4(2)** of the ***Limitation of Actions Act***, the suit ought to have been instituted within 3 years from the date the cause of action arose. Having been filed on 27th November 2006, the cause of action was instituted out of time. I therefore dismiss the claim based on negligence.

21. But this is not the end of the matter as the plaintiff alternative claim was based on breach of contract arising out of the memorandum of understanding that was entered into between the 1st plaintiff and the defendant on 6th December 2004 in Mwanza, Tanzania ("the MOU"). In order to resolve the issue, it is necessary to determine which law is applicable to the MOU.

22. The MOU was entered into in Mwanza, Tanzania while the parties thereto comprise a Tanzanian national and a Ugandan statutory corporation. The MOU did not prescribe the applicable law or provide for the forum of dispute resolution. In such a case the duty of the court is objectively look at all factors regarding the subject and come up with the law applicable. I would adopt the statement of law made by Radido J., in ***Dorcas Kemunto Wainaina v IPAS*** **NRB ELRC No. 165 of 2015[2018]eKLR**

> *[34] In such an instant, there are factors a Court ought to consider before assuming jurisdiction. These connecting or dominant factors equally apply (overlap) when assigning choice of law where there was no express or tacit agreement and they include locus contractus, locus solutionis, domicile and nationality of the parties (see Forsyth, Private International Law, third edition, page 288).*
>
> *[35] The Court is expected to weigh up these features in a qualitative rather than quantitative basis. The Court should also have regard to whether any judgment it renders would be effective and capable of being enforced.*

23. In determining this issue, I take into account that MOU was based on a collision of marine vessels that collided in Kenyan waters and an inquiry carried out by the Kenyan authorities. Since both parties and the respective vessels are of different nationalities, I think the proper law reflecting the nature of the cause of action is Kenyan law. I therefore find and hold that Kenyan law, including the ***Limitation of Actions Act***, is applicable to the application and interpretation of the MOU. Even if Kenyan law was not applicable, the ***Limitation of Actions Act*** is applicable by virtue of **section 40(1)** which provides that:

> *40(1) The law relating to the limitation of actions, whether contained in this Act or in any other written law, applies to actions in the courts of Kenya arising outside, as well as within, Kenya:*
>
> *Provided that, where a foreign law bars either the right or the remedy in respect of a cause of action arising outside Kenya which is sued upon a Kenya court, the action is barred.*

24. Under **section 4(1)** of the ***Limitation of Actions Act***, the limitation period for a cause of action arising from a contract is six years. Whether the suit is time limited turns on when the cause of action in respect of the MOU accrued and when the claim in that respect was lodged in court. When the original plaint was filed on 27th November 2006, it was a claim for negligence against the defendant and did not set out any claim based on the MOU. The cause of action founded on the MOU was introduced by the amended plaint filed on 5th June 2008 following leave granted by the court on 29th May 2008. Since the MOU was entered into on 6th December 2004, the cause of action based on the MOU was within six years contemplated under **section 4(1)** of the ***Limitation of Action Act***. I therefore find and hold that the cause of action grounded on the MOU is not statute barred.

25. Having determined the preliminary issues, I now turn to consider the issue of liability and damages.

Liability

26. The fact that there was a collision between *MV Pamba* and *MT Munanka* on 16th February 2003 is not disputed. The testimony of PW 1 and PW 2 regarding the circumstances of the accident was unchallenged. The recalled that the *MV Pamba* was coming towards them at a

high speed. PW 2 lit a signal to direct the captain of *MV Pamba* so that he could steer the vessel. He also sent radio signals but the captain did not respond resulting in *MV Pamba* colliding with *MT Munanka*. Notwithstanding the finding I have made on the claim of negligence being time barred, I nevertheless and for completeness find that the defendant's captain was negligent in failing to control *MV Pamba* leading to the collision.

27. In addition, the parties subjected themselves to the Committee of Inquiry. In its findings delivered on 16th October 2003, it found that the defendant's agent was liable for causing the accident and resolved that owners of the two ships should meet and agree on how to resolve the matter. The parties thereafter negotiated settlement and entered into the MOU, in which the defendant admitted liability which is reproduced below:

> *MEMORANDUM OF UNDERSTANDING*
>
> *The MEMORANDUM OF UNDERSTANDING made at Mwanza this 6th day of December 2004 BETWEEN UGANDA RAILWAYS CORPORATION of P. O. Box 7150 KAMPALA, UGANDA (hereinafter referred to as the URC) of the one part AND KITANO CHACHA of P. O. Box 10696 MWANZA TANZANIA (hereinafter referred to as the Owner) of the other part.*
>
> *WHEREAS the owner is the registered Proprietor a Marine Vessel Christened MT MUNANKA*
>
> *WHEREAS the said MT MUNANKA was damaged in Kenyan waters in collision on the 16th day of February 2003 with another Marine Vessel Christened MV PAMBA belonging to the URC*
>
> *AND WHEREAS the URC accepts liability for damage caused to the said MV MUNANKA*
>
> *NOW THEREFORE THIS MEMORANUM OF UNDERSTANDING WITNESSESTH AS FOLLOWS*
>
> *1. That URC hereby undertakes to make good the said damage to the said MT MUNANKA, the same to be assessed by a qualified valuer to be jointly agreed upon by the parties hereto*
>
> *2. That the assessment of the damage shall be agreed upon by the parties hereto and shall be carried out by the said valuer within two weeks of the execution of this memorandum of understanding*
>
> *3. That URC shall make repairs to the MT MUNANKA or compensate the owner thereof within three months of the receipt of the assessment or valuation of the damage*
>
> *IN THE WITNESS the parties have executed this memorandum of understanding*
>
> *SIGNED and DELIVERED for and on behalf of the said*
>
> *UGANDA RAILWAYS CORPORATION*
>
> *MOSES EROJU*
>
> *KEEN TWESIGYE*
>
> *WITNESS: CYRIL MUKWASE*
>
> *SIGNED and DELIVERED by the said KITANO CHACHA*

28. On the basis of the evidence I have outlined, I find and hold that the defendant was fully liable for the collision as the MOU superseded the claim in negligence and was therefore not statute barred.

Assessment of damages

29. The issue of damages was dealt with in the MOU. Conditional to settlement of the dispute was that parties would agree on the assessment of damages. The parties exchanged several letters. On 8th February 2005, the defendant wrote to the plaintiffs forwarding a list of ship building companies and requesting the plaintiffs to communicate their acceptance to pave way for a joint due diligence of the companies. The letter read in part as follows:

> *ACCIDENT INVOLVING MV PAMABA AND MT MUNANKA*
>
> *Pursuant to the memorandum of understanding between URC and your client, we hereby forward you names of reputable ship building companies in Mwanza.*
>
> *Please urgently advise us whether your client finds the companies acceptable so that we my jointly embark on the due diligence test on the companies before we can ask them to submit their bids for the repairs.*

30. On 3rd March 2005, the defendant acknowledged the plaintiffs' letter of 25th February 2005. The letter stated in part as follows;

> *ACCIDENT INVOLVING MV PAMABA AND MT MUNANKA*
>
> *This is to acknowledge receipt of your letter dated 25/2/2005 regarding the above subject matter.*
>
> *Reference is made on the memorandum of understanding between URC and your client on the subject matter, our office has considered among the three companies and appoint Songoro Marine Transport LTD. You are therefore, requested to arrange with the appointed company to do the repair and accordingly forward bills to us for necessary action.*

31. On 22nd November 2004, plaintiffs' advocates forwarded to the defendant a pro forma invoice dated 31st August 2004 from Sangoro Marine Transport Company Ltd ("*Sangoro*"). with an estimated cost of Tshs. 74,520,000.00. The defendant maintains that his invoice was inconsistent with the items for repair that were agreed upon between parties in their meeting held on 6th December 2004. The defendant also disputed the quotation issued in August 2008 by the same company of Tshs. 147,192,000.00 for lacking specifications to support the figures quoted. The dispute therefore is in the scope of repairs and the resultant charges.

32. From the plaintiff's account, the repairs carried out as contained in the invoice and the certificate dated 5th May 2008 issued by *Sangoro* confirming the work done and payment received were as follows:

> *- Fabrication of bulwark, deck, side frames flat bars, back pipes, galvanized pipes, fender round bar and angle irons*
>
> *- Tank cleaning before fabrication and pressure test*
>
> *- Painting*

33. The defendant, relying on the testimony of DW 1 and the Technical Report on the accident, maintains that the specifications submitted by the plaintiff went outside those agreed upon by the parties on 6th December 2004. According to the defendant, as indicated in annex IV contained in the Technical Report and supported by DW1's statement of defence, parties had agreed on 6th December 2004 on the following repairs to be carried out:

> *- renewing two rent pipes 3' and 1m each*
>
> *- renewing stanchions 8 No.-2000 x 4mm*
>
> *- renewing pipe 2' – 14mm*
>
> *- renewing rod 5/8'- 2,000 x 4,000mm and*
>
> *- stay plates 5 No. 4m*
>
> *- renewing bulkhead plate $1^{1/2}$ x 1m*
>
> *- renewing ferders and ships – 4m*
>
> *- renewing tank top 4 x 1.8m*
>
> *- renewing valve 4'*

34. The defendant stated that this assessment was done in Tanzania by a joint inspection team which assessed damages for repairs and parties signed the memorandum of understanding. Annex IV is a document dated 21st April 2004 which contains the above specifications for repair, addressed to the defendant's Managing Director. Unlike the MOU, it is not signed. Furthermore, the memorandum entered into by parties on the same date still indicated that '*the assessment of the damage shall be agreed upon by the parties hereto and shall be carried out by the said valuer within two weeks of the execution of this memorandum of understanding.*'

35. If the defendant's case is to be believed, it defeats reason as to why, in the subsequent correspondence, the defendant failed to make reference to the joint assessment especially when it gave the plaintiff a list of companies to carry out assessment and give quotations. Had there been such an agreement, all the defendant would have required of the companies was to give quotations on the basis of the joint assessment in order to ensure that the repairs did not go beyond the agreed scope. While the defendant admitted that it received both the invoices from *Sangoro*., there is no evidence, of what action it took to show that it disputed the specifications for repair.

36. In its technical report, the defendant indicated that from 2006, the corporation went into concession which resulted in a breakdown of communication during which period the suit was filed in court. This was not done and to this extent, I find the defendant's account unbelievable.

37. The defendant proposed that the appropriate compensation for repairs done ought to be USD 2,767. This cost is based on an assessment that was done by a team constituted by the defendant to review condition of the ship after the repairs had been done. This review was done in

2015, over seven years after the ship had been repaired as to be a reliable account of scope of work done. Consequently, I reject the defendant's the assessment of compensation for repairs.

38. The plaintiffs stated that on 25th February 2002, they responded to the defendant's request, submitting quotations of the work to be done. However, these were not produced in evidence attached to the letter as to be clear on whether there was clarity on the scope of repairs to be done. In any case, the ship was not repaired then and it continued to operate. The plaintiff admitted that the ship was repaired five years after the accident. PW 1 stated in his statement that they were denied the license to operate the ship around April 2008 until the damaged part of the ship was repaired. It is at this point that the plaintiff sought *Sangoro* to repair the ship. The company revised the cost of repair to Tshs. 147,192,000.00. Again, it appears that there was no communication between the parties upon this renewed quotation. The defendant disputed the claim when it was finally presented. But having acknowledged that it had received both invoices from both quotations, the defendant had an opportunity to engage with the plaintiffs between August 2004 when the first quotation was given and in 2008 before the ship was repaired. It did not do so, and cannot now come to plead from this court to be excused from meeting its costs.

39. The plaintiff prayed for Kshs. 12,221,280.00 or the equivalent in US dollars or any convertible currency as repair costs. The plaintiff did not specify what this figure represented in terms of the currency pleaded. What is clear is that the plaintiffs incurred Tshs. 147,192,000.00 as repair costs. A certificate dated 5th May 2008 was issued confirmed that the repairs were done and the boat collected. A receipt for payment dated 10th June 2008 was issued by *Sangoro*. Under the MOU between the 1st plaintiff and the defendant, the defendant undertook to either make repairs or compensate the owner of *MT Munanka*. On this basis, I award the plaintiffs, TZS 147,192,000.00 being the repair costs. This amount shall be subject to the conversion rate at the date of this judgment.

40. The plaintiff also prayed for Kshs. 15,946,507.20 being a sum for 92 trips made from 16th February 2003 to 7th July 2006. This claim is in the nature of special damages which must be specifically pleaded and strictly proved (see ***Hahn v Singh (1985) KLR 716****).*

41. The plaintiff admitted that the ship was repaired five years after the accident during which period it continued operating until April 2008 when license was denied. The demand for loss of business for 92 trips valued at Kshs. 15,946,507.20 is pegged on trips made by the ship. In this case, even though the special damages were pleaded, they were not proved. The plaintiff did not produce evidence in court particularizing the 92 trips in question and details of such trips. Furthermore, the plaintiff did not show that even if those trips were carried out, the vessel was operating in full capacity save for the tank that was damaged in the accident. The fact that the plaintiff ship continued to operate several years after the business raises doubt as to whether the defendant's breach caused the alleged loss of business. It was therefore not proved with particularity that the diminished capacity of the ship to operate and the resultant loss of business resulted from the defendant's failure. In any case, the fact the vessel continued to operate satisfied the plaintiffs duty to mitigate their loss. The prayer for Kshs. 15,946,507.20 is hereby dismissed.

Disposition

42. Finally, on the question of costs, the law is that costs follow the event. Having found in favour of the plaintiffs, I award the 1st plaintiff costs of the suit.

43. Judgment is therefore entered for the plaintiffs as follows:

a) **Tshs. 147,192,000.00** subject to the applicable conversion rate at the time of enforcement of this judgment or payment.

b) Interest on (a) above at court rates from 5th June 2008 until payment in full.

c) Costs of this suit

SIGNED AT KISII

D. S. MAJANJA

JUDGE

DATED and DELIVERED at KISUMU this 17th day of September 2018.

F. A. OCHIENG'

JUDGE

Mr Mwamu instructed by Mwamu and Company Advocates for the plaintiffs.

Mr Agwara instructed by Prof. Albert Mumma and Company Advocates for the defendant.