Owners of Motor Vessel "Dolphin Star" v ET Timbers PTE Limited & another (Civil Appeal E131 of 2024 & E078 of 2021 (Consolidated)) [2025] KECA 891 (KLR) (7 March 2025) (Judgment)

Neutral citation: [2025] KECA 891 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E131 OF 2024 & E078 OF 2021 (CONSOLIDATED)

KI LAIBUTA, GWN MACHARIA & LA ACHODE, JJA

MARCH 7, 2025

BETWEEN

THE OWNERS OF MOTOR VESSEL "DOLPHIN STAR" ..... APPELLANT

AND

ET TIMBERS PTE LIMITED ..... 1ST RESPONDENT

THE KENYA PORTS AUTHORITY ..... 2ND RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 14th July 2021 in Admiralty Cause No. E003 of 2021 AND Being an appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (Kizito Magare, J.) delivered on 24th May 2024 in Admiralty Cause No. E003 of 2021)

JUDGMENT

1. Before us are two consolidated appeals, to wit, Civil Appeal No. E078 of 2021 against the ruling and orders of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 14th July 2021 delivered in Admiralty Cause No. E003 of 2021 and Civil Appeal No. E131 of 2024 from the consolidated judgment and decree of the High Court of Kenya at Mombasa (Kizito Magare, J.) delivered on 24th May 2024 in the same admiralty cause as the lead file consolidating Admiralty Cause Nos. E003 of 2023 and E005 of 2023.

2. The genesis of the impugned ruling and judgment is the claim in Admiralty Cause No. E003 of 2021 lodged by the 1st respondent, ET Timbers PTE Limited, against Starryway Trading & Shipping Company Limited (Starryway) therein described as "the Defendant, the disponent owners of the

Motor Vessel 'DOLPHIN STAR'" with the head owners described as Defang Shipping Company Limited, the appellant. In its claim for breach of the Voyage Charterparty, the 1st respondent prayed for:

> " 1. USD 2,000,000.00, alternatively damages;
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> 2. Interest thereon pursuant to Section 35A of the [Senior Courts] Act 1981 and/or under the inherent Jurisdiction of this Honourable Court sitting as an Admiralty Court at Court rates (12%); and
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> 3. Costs of and incidental to this suit."

3. The 1st respondent's case was that it entered into a standard Gencon Voyage Charterparty with Starryway (the disponent owners of the Motor Vessel 'Dolphin Star') as modified by the terms and conditions contained in the Fixture Note dated 19th January 2021 for the carriage of 6,500 to 6,800 cubic metres of Liberia Ekki (Azobe round logs) (the cargo) subject to the vessel's full capacity at permissible draft of 7.5 metres.

4. The Voyage Charterparty was founded on the presumption that Starryway (as disponent charterer) had duly chartered the vessel from its actual registered owner (the appellant) with power to sub-charter or lease it out to others. According to the 1st respondent, it was a specific term of the Charterparty that the cargo loaded at Greenville in Liberia would be the only cargo loaded for carriage to Chittagong, Bangladesh (the discharge port); and that Starryway and the appellant would not carry any other cargo on board the vessel or deviate from the direct voyage to the discharge port.

5. According to the 1st respondent, Starryway acted in breach of the Voyage Charterparty by carrying part cargo on the vessel other than the 1st respondent's cargo aforesaid; by deviating from the load port of Greenville en route to the discharge port of Chittagong without the 1st respondent's consent; that the vessel had called at the port of Mombasa to discharge part cargo; and that the vessel had called at other ports in Southern Africa in breach of the terms of the Charterparty.

6. In addition to the breaches aforesaid, the 1st respondent averred that Starryway was in further breach of the Charterparty in that it refused, failed or neglected to issue Bills of Lading in respect of the cargo despite demand vide a letter dated 1st April 2021, and notwithstanding prior approval by the 1st respondent of the terms of the draft Bills of Lading in respect of part of the cargo; that, by reason of the breach complained of, the 1st respondent stood to suffer loss of USD 2,000,000 being the CF (cost and freight) value of the cargo; that Starryway had refused to divulge any details of her voyage and that, by its material deviations, the 1st respondent stood the risk of non-delivery of the cargo at the appointed port of Chittagong; and that, by reason of the matters aforesaid, the 1st respondent was entitled to indemnity under the Charterparty together with damages for the deviations from the voyage in breach of the Voyage Charterparty. Hence, the admiralty claim for the reliefs aforesaid.

7. Along with its Claim Form, the 1st respondent filed an Application and Undertaking dated 4th April 2021 for arrest and custody of the motor vessel pending determination of its claim. The Application and Undertaking was supported by a Declaration of even date made by learned counsel Mr. Sanjeev Khagram essentially restating the averments in the 1st respondent's particulars of claim aforesaid. According to counsel, the motor vessel sought to be arrested was 'Dolphin Star' of the Port of Panama; that the amount of security sought by the 1st respondent was USD 3,000,000; and that the said motor vessel remained under the charter and control or possession of Starryway, who were presumably liable in a claim in personam. Consequently, an ex parte warrant of arrest was issued on 4th April 2021.

8. On 8th April 2021, the appellant filed an Acknowledgment of Service Form of even date indicating that it intended to contest the court's jurisdiction. Soon thereafter, the appellant filed an Application Notice dated 16th April 2021 by which it sought orders that the warrant of arrest issued on 4th April 2021 be set aside, and that the claim brought against the motor vessel be struck out. The appellant's Application Notice was founded on the grounds that the action brought against the vessel did not fall within the High Court's admiralty jurisdiction in rem under sections 20 and 21 of the Senior Courts Act, 1981 (the Act) and that the court had no jurisdiction to either entertain the claim so far as it concerns the action brought against the vessel or to issue a warrant of arrest against it; and that the action against the vessel and the warrant of arrest procured thereunder were founded on non-disclosure of material facts and thereby constituted an abuse of the court process, which justified setting aside of the warrant of arrest and striking out of the claim ex debito justitiae.

9. The appellant's Application Notice was supported by the annexed albeit argumentative affidavit of Nishit Maru, counsel for the appellant, sworn on 16th April 2021 essentially deposing to the grounds on which the appellant's Application Notice was anchored, namely: that the 1st respondent's claim did not disclose any evidence that the court had jurisdiction to entertain its admiralty claim as pleaded; that the 1st respondent had not demonstrated that it had a contract with the appellant for the carriage of goods by a ship, or that its alleged contract involved the use or hire of a ship; that the 1st respondent had not demonstrated that the appellant, as owner of the vessel and distinct from the charterers thereof, were liable in an action in personam; that the 1st respondent had failed to establish that it was prima facie entitled to claim the entire unsubstantiated value of the cargo in the sum of USD 2,000,000, or otherwise entitled to security, while it had failed to refer the claim to arbitration in terms of the Voyage Charter; and that the 1st respondent had failed to show that it had title to the cargo or the right of claim in the cause.

10. In opposition to the Application Notice, the 1st respondent filed a declaration by Mr. Sanjeev Khagram dated 26th April 2021 stating that the 1st respondent had a dual cause of action against the Head Charterers, to wit, Starryway (described as owners in the Fixture Note dated 19th January 2021) as well as against the owners of the motor vessel, the appellant, who agreed to carry the 1st respondent's cargo from Greenville in Liberia to Chittagong in Bangladesh; and that the agreement between the 1st respondent and Starryway was evidenced by the annexed bundle of correspondence and other evidential documents.

11. According to Mr. Khagram, the appellant's agents, OBT Shipping Limited (OBT), the Master of the motor vessel and/or the appellant, refused, failed or neglected to issue the 1st respondent with the requisite Bills of Lading in respect of the cargo despite approval by the 1st respondent of the draft Bills of Lading; that the agents aforesaid purported to exercise lien on the cargo to enforce payment of freight to the appellant; that, at all material times, Starryway were also acting as the appellant's agents under and by virtue of the Voyage Charter aforesaid; that, in an attempt to unjustly enrich itself, the appellant "appeared to have" entered into a different Charterparty dated 9th January 2021 pursuant to which the motor vessel deviated from her voyage to Port Gentil in Gabon to load other project cargo after which she called at the port of Mombasa to discharge; that, even after the arrest of the motor vessel, the appellant's agents, Fairwind International Shipping Company Ltd, communicated to the 1st respondent's broker, one Captain S. M. Sabed, that they had now nominated a different agent from whom the Bills of Lading could be collected once the appellant received the freight; and that, from the evidence on record, the 1st respondent also had a contract of carriage with the appellant under which the appellant was responsible for carriage and delivery of the cargo and obliged to issue the Bills of Lading.

12. In view of the foregoing, Mr. Khagram contended that the court's jurisdiction had been properly invoked pursuant, not only to the Charterparty, but also to the agreement of carriage between the appellant and the 1st respondent. He urged the trial court to dismiss the appellant's application with costs.

13. By a ruling dated 14th July 2021, the High Court (Njoki Mwangi, J.) declined to grant the orders sought by the appellant and ordered the appellant to deposit in court USD 3,000,000 as security for release of the motor vessel. In addition to the orders and directions aforesaid, the learned Judge made an order suo motu allowing the 1st respondent to amend its Claim Form in Admiralty Cause No. E003 of 2021. We take the liberty to set out the learned Judge's reasoning in extenso as hereunder:

> " 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.
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> 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 –
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> a. the error does not invalidate any step taken in the proceedings unless the court so orders; and
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> b. the court may make an order to remedy the error.
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> 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.
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> ... .

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 16th 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."

14. Pursuant to the orders aforesaid, the 1st respondent amended and filed its Claim Form on 4th August 2021 to reflect the 1st respondent's claim as being founded on the alleged breach of the terms of the contract of carriage as evidenced by the Bills of Lading approved and agreed between the 1st respondent and the appellant in March 2021, and which incorporated the terms of the Charterparty entered into between the 1st respondent and Starryway (wrongfully describing themselves as the owners of the motor vessel while they were the appellant's agents).

15. Further, the 1st respondent averred that Starryway acted as the appellant's agents; that the Master of the motor vessel wrongfully withdrew his prior authorization to OBT to sign and release the Bills of Lading to the 1st respondent as previously agreed; that the refusal was on account of the alleged non-payment by the 1st respondent of the freight; that the vessel wrongfully deviated from the agreed route resulting in failure to deliver the cargo as contracted; that, consequently, 8 letters of credit covering the value of the cargo expired; that the market for the cargo in Chittagong had since become saturated resulting in the 1st respondent's inability to negotiate sale thereof on the same terms; and that, under the contract of carriage, the 1st respondent was entitled to claim cargo shutout charges on account of the vessel's inability and wrongful refusal to load cargo, and that it was also entitled to recover the related brokerage commission. The amended Claim Form was presented in the form of argumentative submissions, which offend every rule and principle governing pleadings.

16. Be that as it may, we also take note of the amended prayers now fashioned in the following terms:

"1. USD 2,601,294.02, alternative damages;

2. Further and/or in the alternative, damages on account of the loss sustained by the Claimant due to the reduction in sale price for late delivery of the cargo caused by the wrongful conduct of the Defendant and/or her owners, servants, employees, agents or Master;

3. USD 8,780.00 being cargo shut out charges payable by the Defendant to the Claimant;

4. USD 22,742.00 being the brokerage commission due and owing by the Defendant to the Claimant;

5. Interest thereon pursuant to Section 35A of The [Senior Courts] Act 1981 and/or under the inherent Jurisdiction of this Honourable Court sitting as an Admiralty Court at Court rates (12%); and

6. Costs of and incidental to this suit."

17. Subsequently, the appellant filed its Defence dated 26th October 2023, which is equally verbose and unduly argumentative in complete departure from the rules and principles governing pleadings in civil proceedings. We pause here to advise learned counsel that pleadings and submissions have their rightful place in civil proceedings. That said, suffice it to note that the appellant denied the jurisdiction of the admiralty court and the 1st respondent's claims as amended. It averred that, in any event, the amended claim did not disclose any cause of action against the appellant.

18. According to the appellant, it had chartered its vessel to Starryway under a Time Charter dated 1st January 2019; that Starryway entered into a Voyage Charter with the 1st respondent to which the appellant was not party; that the Bills of Lading under the contract of carriage were not agreed upon as between the appellant and the 1st respondent; that at no time did Starryway act as the appellant's agent; that the Master of the vessel had withdrawn his authority to OBT to sign the Bills of Lading on behalf of the Master or the appellant, and that OBT had no authority to sign such Bills on the appellant's behalf; that the 1st respondent could not rely on the draft and unsigned Bills of Lading to found a claim against the appellant; that OBT was coerced by the Ministry of Justice of Liberia to issue the Bills of Lading to the 1st respondent on solicitation by the 1st respondent acting in collusion with Euro Liberia Logging Company; that Starryway had protested OBT's action to issue the Bills of Lading to the 1st respondent and commenced arbitration in London against the 1st respondent pursuant to the Voyage Charter, but that the appellant was not party to the arbitral proceedings; that, on 19th August 2021, Starryway issued a second set of Bills of Lading in its own name through its authorized local agents, Blue Cross Surveyors Limited (Blue Cross), but that the 1st respondent declined to accept the Bills; that the second set of Bills of Lading aforesaid were found to be valid and binding as between Starryway and the 1st respondent under and by virtue of the Partial Final Award of Clive Aston and Jonathan Elvey (Arbitrators) issued in London on 11th February 2022; and that the arbitration award having recognised the validity of Starryway's Bills of Lading, the 1st respondent has no right of claim against the appellant in reliance of the draft Bills of Lading aforesaid.

19. The appellant further contended that the alleged loss of cargo was occasioned by the 1st respondent's own wrongful and unreasonable arrest of the motor vessel without any breach on the part of the appellant; that the cargo shut out charges would only apply if Starryway failed to load the minimum quantity of 6,500 cubic metres, and that the 1st respondent had not demonstrated that less cargo was loaded as claimed, an issue purely between them and Starryway; and that the 1st respondent acted in breach of the equitable duty of inconsistent claims obligation by claiming under an alleged contract with the appellant containing an arbitration clause, but inconsistently deny the arbitration agreement in a subsequent claim in the admiralty court.

20. Dissatisfied by the ruling and orders of the learned Judge, the appellant moved on appeal in Civil Appeal No. E078 of 2021 – Owners of the Motor Vessel 'Dolphin Star" v ET Timbers PTE Limited, to which Kenya Ports Authority (KPA) was subsequently joined as 2nd respondent by an order made with the consent of the parties on 2nd October 2024 on application by KPA on account of its claim against the appellant to recover USD 166,293.99 being port charges for services extended to the motor vessel together with other charges accruing after 30th June 2023 until the vessel is appraised and sold in execution of KPA's decree in Admiralty Cause No. E003 of 2023 to which we will shortly return.

21. The appellant's Civil Appeal No. E078 of 2021 is anchored on 9 grounds, some of which are needlessly argumentative and against the grain of rule 88 of the Court of Appeal Rules, which requires that a

memorandum of appeal concisely sets forth under distinct heads, without argument or narrative, the grounds of objection to the impugned decision.

22. In summary, the grounds set out in its Memorandum of Appeal dated 10th September 2021 are that the learned Judge erred: in dismissing the appellant's application to strike out the 1st respondent's admiralty action and set aside the warrant of arrest issued and executed against the motor vessel; by failing to find that the court's admiralty jurisdiction was not properly invoked at the time the claim was brought and the warrant of arrest issued against the vessel; in failing to find that the 1st respondent had not satisfied the requirements of sections 20(2) (h) and 21(4) of the Senior Courts Act, 1981 to justify the admiralty claim in issue; in finding that the appellant had conceded that it was liable in personam and not in rem, despite the appellant's denial of liability in rem and in personam; in failing to find that the 1st respondent had altered its case by contending that it had a dual cause of action against both Starryway and the appellant, and that, by reason of such alteration, the court had no jurisdiction in the circumstances to issue a warrant of arrest against the vessel; in finding that the appellant was liable both in rem and in personam on the basis of its failure to issue Bills of Lading, which was not an issue before the court or relevant for determination of the 1st respondent's claim; in holding that the appellant, and not Starryway, was the "relevant person" for the purposes of section 21(4) (b) (i) of the Act; by wrongfully exercising her discretion to allow the 1st respondent to amend its claim so as to cure the defect in naming Starryway as the party liable in personam; and in making an order for security to be furnished by the appellant as condition for release of the motor vessel thereby determining suo motu an issue not before the High Court, and without hearing any of the parties thereon.

23. On 17th May 2024, the 1st respondent filed a Notice of Grounds Affirming the Decision and Varying Part of the Decision. Its Notice of Grounds contains 7 grounds affirming the impugned decision, namely: that the appellant acknowledged the existence of a contractual agreement between the appellant as owner and the 1st respondent as Voyage Charterer of the motor vessel and that, therefore, the appellant was the "relevant person", but that its advocates acted contrary to the acknowledgement by challenging the admiralty jurisdiction of the court; that, under the Bills of Lading signed on behalf of the Master of the motor vessel, the appellant was identified as the carrier of the 1st respondent's cargo, and was therefore the "relevant person"; that, under Clause 10 of the Rider Clauses of the Charterparty, the Bills of Lading were to be signed by the Master or on his behalf; that the appellant was Starryway's undisclosed principal and could not hide behind the sham Charter to challenge the court's admiralty jurisdiction; that the High Court has jurisdiction under Article 165(3) of *the Constitution* to hear and determine the claim, limited only by Article 165(5); that the learned Judge's decision to dismiss the jurisdictional challenge accords with the National Values and Principles of Governance set out in Article 10(2) read with Articles 159(2) (e) and 259(1) of *the Constitution*; that the jurisdictional challenge was a mixed question of fact and law; and that the facts could not be ascertained without a full trial on evidence.

24. The Grounds advanced by the 1st respondent for Varying the decision in paragraphs 152 and 153 to the effect that the Time Charter dated 1st January 2019 is a genuine document and to hold instead that the Time Charter is a sham are: that, even though the Time Charter named the appellant as owner of the motor vessel and Starryway Trading & Shipping Company Limited as the charterer, the entities that executed the Charter at the bottom of the document are Dolphin Star Shipping Company Limited as owner and Starryway Company Limited as charterer; that the appellant is the registered owner of the motor vessel and not Dolphin Star Shipping Company Limited, while Starryway Trading & Shipping Company Limited is also distinct and separate from Starryway Company Limited; that there was no material on record upon which the learned Judge could conclude that the appellant had authorized Dolphin Star Shipping Company Limited to sign the Time Charter on its behalf; that companies do

not authorise other companies to execute contractual documents on their behalf; that the appellant and Starryway were not party to the alleged Time Charter, and that the Time Charter could not be relied upon to challenge the court's jurisdiction; that the learned Judge had erred in law and in fact by holding that the appellant had authorized Dolphin Star Shipping Company Limited to execute the Time Charter on its behalf, and that the Charter was a genuine document; that there was no explanation as to why the Time Charter was signed by Starryway Company Limited as charterer and not by Starryway Trading & Shipping Company Limited in that capacity; that the learned Judge erred in law by failing to make a decision on that issue, which was raised by the 1st respondent; and that the learned Judge ought to have held that the Time Charter was a sham as it was not entered into by the appellant and Starryway, and in light of the email signed off by Starryway as agent, the pre-fixture email communication, the Clean Fixture Recap, the Notice of Readiness, the Certificate of Entry and other material before her.

25. Pending determination of the appeal in No. E078 of 2021, and subsequent to dismissal of the 1st respondent's claim in Admiralty Cause No. E003 of 2021 on 21st March 2023, the appellant (Defang) filed a "Claim" dated 24th May 2023 in Admiralty Cause No. E005 of 2023 seeking to recover as against the 1st respondent: (a) a sum of USD 141,330.39 allegedly payable to the 2nd respondent (KPA) together with "any additional costs that would be demanded by KPA"; (b) an order to compel the 1st respondent to pay storage fees during the period of arrest of the motor vessel, including crew wages, spare parts and materials, fuel, water and related services; (c) an order for the arrest of the cargo inside the motor vessel 'Dolphin Star' to recover port charges and related expenses; (d) general damages; (e) an order that costs be in the cause; and (f) any other or such further relief that the court may deem fit to grant in favour of the appellant against the 1st respondent.

26. We pause here to observe that the 1st respondent's claim in Admiralty Cause No. E003 of 2021 was subsequently reinstated on 26th June 2023 thereby breathing new life to the appeal in No. E078 of 2021.

27. The appellant's case in Admiralty Cause NO. E005 of 2023 was that it was at all material times the owner of the motor vessel "Dolphin Star'; that, on or about 4th April 2021, the High Court of Kenya at Mombasa issued a warrant of arrest of the said motor vessel in Admiralty Cause No. E003 of 2021 lodged by the 1st respondent; that at the time of its arrest, the 1st respondent, by a letter of undertaking dated 4th April 2021 and submitted by its advocates (M/s. A. B. Patel & Patel), undertook to pay on demand all expenses relating to the arrest of the vessel; that, on or about 21st March 2023, the 1st respondent's claim was dismissed by Kizito Magare, J. and the file closed; that from the time of arrest to date, the vessel had accumulated port charges payable to the 2nd respondent in the sum of USD 141,330.39 on account of marine services; that, on 11th May 2023, the appellant instructed its advocates to demand payment of the port charges aforesaid, but that the 1st respondent refused or neglected to pay; and that the 2nd respondent had threatened to commence proceedings for the recovery of the outstanding amounts.

28. Along with its Claim, the appellant filed a Notice of Motion of even date, but which is not contained in the record as put to us. In its Motion, the appellant prayed for orders, inter alia: that the court be pleased to lift the warrants of arrest issued on 4th April 2021 against the motor vessel pending hearing and determination of the suit; that the 1st respondent be directed to immediately pay to the 2nd respondent the outstanding port charges in the sum of USD 141,330.39 on account of marine services rendered to the vessel pending hearing and determination of the suit; that the 1st respondent do pay fees for the Admiralty Marshal, and all expenses incurred or to be incurred by the appellant on account of the

arrest of the motor vessel; and an order for the arrest of the cargo inside the motor vessel to recover the port charges aforementioned pending hearing and determination of the suit.

29. In response to the Motion, the 1st respondent filed a notice of preliminary objection dated 30th May 2023 seeking to have the Motion struck out on grounds which we need not replicate here. Suffice it to observe that the preliminary objection was dismissed in limine by Kizito Magare, J. vide his ruling dated 19th September 2023 on the grounds that it was founded on contested facts that required determination on evidence. In addition, the learned Judge directed that the Claim be fast- tracked for hearing on 28th September 2023; that all related cases pending in the court be fixed for directions for hearing; and that the cargo aboard the motor vessel be arrested as security for the claims on account of port and other charges, and those of the shipowner.

30. In addition to the claims in the corresponding causes aforesaid, the 2nd respondent (KPA) filed its undated Claim Form in Admiralty Claim No. E003 of 2023 against the appellant and the 1st respondent for: (a) USD 166,293.99 outstanding as at 30th June 2023 together with other port charges accruing as from that date; (b) an order directing the appellant and the 1st respondent, jointly and severally, to remove the motor vessel to shore; (c) in the alternative, and in the event of non-compliance with the removal order, an order permitting the 2nd respondent to remove the motor vessel to shore at a cost recoverable by the 2nd respondent from the appellant and the 1st respondent jointly and severally; (d) a movement order to issue allowing the appellant and the 1st and/or 2nd respondents to remove to shore the vessel and cargo laden on board; and (e) interest on (a) and c. above.

31. It would appear from the record that no Defence was filed by either the appellant or the 1st respondent in response to the 2nd respondent's claims, which remained uncontested.

32. In addition to its Claim Form, the 2nd respondent filed an Application Notice dated 28th July 2023 praying for orders directing the removal to shore of the motor vessel as sought in their Claim Form; an order directing the appellant and the 1st respondent to pay 75% of the then outstanding port charges amounting to USD 166,293.99 and/or provide security for a similar amount; that, in default of compliance with the order for deposit, the court do issue an order that the motor vessel, her tackle, apparel and furniture, and/or the cargo laden on board, be sold pendente lite by the 2nd respondent by way of a public auction to recover all outstanding port dues on account of marine services rendered to the motor vessel together with costs incurred by the 2nd respondent in carrying out measures to prevent, mitigate or eliminate risks posed on account of the continued harbour of the vessel at the 2nd respondent's Mtongwe anchorage; and that the court orders the 2nd respondent to deliver the balance of the proceeds of the sale (if any) to the Admiralty Marshal.

33. In response to the 2nd respondent's Application Notice aforesaid, the appellant filed a replying affidavit sworn on 31st August 2023 by Yu Zhongjian, its Marine Manager, essentially deposing, inter alia: that it was the 1st respondent which undertook to pay the Admiralty Marshal's fees and all expenses incurred in respect of the arrest, care and custody of the motor vessel; that any attempt to hold the appellant liable would be in contravention of the 1st respondent's undertaking; that the appellant rightfully holds the cargo aboard the motor vessel in lien owing to loss and damage suffered as a result of the arrest of the motor vessel; that the cargo should not be released until final determination of the issue as to who should pay the port charges due; that the appellant stood to suffer miscarriage of justice which cannot be compensated by an award of damages if the vessel were to be sold, or if the appellant were to be ordered to pay the port charges; that, apart from the cargo aforesaid, the 1st respondent does not have any known assets, which makes it impossible for the appellant to execute any form of judgment or decree of the court; and that the motor vessel was at all times in good shape with the crew on board

since the year 2021, and that no evidence/reports had been adduced to show that the vessel was in bad condition.

34. On its part, the 1st respondent filed a replying affidavit sworn on 25th August 2023 by Annamalainadar Thalamuthu, the 1st respondent's sole shareholder and director, deposing, inter alia: that the 1st respondent challenges the court's jurisdiction on the ground that it is not the owner of the motor vessel, and that it was intent on filing an Application Notice to strike out the claim as against it; that the claim was wrongly filed against it due to wrong interpretation of its undertaking for arrest and custody dated 4th April 2021; that the 1st respondent did not undertake to pay to the 2nd respondent any moneys for the supply of goods and services; and that its undertaking was to pay on demand the fees due to the Admiralty Marshal and the expenses incurred by him/her on its behalf in respect of the arrest, care and custody of the motor vessel while under arrest.

35. The deponent further averred that the 1st respondent had not received any demand or invoice from the Admiralty Marshal to pay any fees or any of the expenses aforesaid; that the Admiralty Marshal's fees do not include port charges; that the undertaking given in Admiralty Claim No. E003 of 2021 could only be enforced in that claim and not in a different claim; that the motor vessel remained under arrest from April 2021 consequent upon the appellant's failure to furnish security for its release; that Admiralty Claim No. E003 of 2021 was still pending and the warrant of arrest still in force; and that it was therefore premature for the appellant and the 2nd respondent to demand payment of port charges on account of the 1st respondent's undertaking to the Admiralty Marshal.

36. In addition to the foregoing, the 1st respondent contended that it did not have any access to or control over the vessel, and that it could not comply with any order for its removal ashore; that the 2nd respondent was entitled to sell the motor vessel in view of the appellant's admission of the debt arising from the port charges; that the vessel should be sold without delay as port charges rank in priority over other claims and continue to eat into the 1st respondent's security; that the cargo aboard the vessel should not be sold along therewith since it belongs to the 1st respondent and was not under arrest; and that it had no objection to the appraisement and sale of the motor vessel on condition that the cargo be discharged to facilitate proper appraisement, and that the sale be conducted under the usual conditions of sale.

37. With regard to the issue concerning the proposed removal of the vessel ashore, the parties reached amicable settlement as recorded in the Order of the Court dated 13th November 2024 in terms that:

> "(a) the appellant and the 2nd respondent do jointly take the necessary steps to forthwith move the vessel and its cargo ashore to ensure its safety;
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> b. in the event that the appellant is not adequately equipped or well-resourced to assist the 2nd respondent to execute the order in (a) above within thirty (30) days from the date hereof, the 2nd respondent do take all necessary measures to secure the vessel and its cargo ashore within fifteen (15) days next following; and
>
> c. that the cost of execution hereof shall be recoverable on reimbursement basis."

38. Having come thus far, we pause to reflect on the words of John A. Shedd, who said that "[a] ship in harbor is safe, but that is not what ships are for." Yet the intricacies of the competing claims in the admiralty causes aforesaid, the impugned decisions and the ensuing appeals before us have so far done little to employ the "Dolphin Star' to achieve the purpose for which it was constructed.

39. Pending determination of the interlocutory appeal in No. E078 of 2021, Admiralty Cause No. E003 of 2021 proceeded to hearing and determination vide the judgment of Kizito Magare, J. dated 24th May 2024, which is the subject of Defang's appeal in Civil Appeal No. E131 of 2024. In the impugned judgment, the learned Judge consolidated and determined the three claims in Admiralty Cause Nos. E003 of 2021 (ET Timbers PTE v Defang); E003 of 2023 (KPA v Defang & ET Timbers PTE); and E005 of 2023 (Defang v ET Timbers Pte). It is noteworthy that the impugned judgment on the three claims as consolidated came on the heels of full hearing on evidence of the dispute in Admiralty Claim No. E003 of 2021 (ET Timbers PTE Limited v Owners of the Motor Vessel 'Dolphin Star' – Defang and KPA as Interested Party) while the other two were held "in abeyance" awaiting determination thereof.

40. While there appears to be no formal order for consolidation on record, it is instructive that the parties were the same; the issues in contention were closely related (in that they related to the claim by ET Timbers PTE against Defang for breach of the contract of carriage, the contested liability to pay port charges, the contested liability as between Defang and ET Timbers PTE to pay storage fees during the period of arrest, crew wages, the Admiralty Marshal fees, whether to arrest the cargo and sell to recover port charges, and removal to shore of the motor vessel, which removal is now settled by consent on terms as aforesaid).

41. In determination of the three claims, the learned Judge made the following findings, which we find necessary to quote in extenso:

> " 110. The claim by Kenya Ports Authority was not [contested]. In any case the only question is who was liable to pay. The court was asked to take into consideration the undertakings made at the time of arrest of the ship.
>
> 111. Jurisdiction was not contested thereafter within 28 days. Therefore, the court's jurisdiction was [thus] deemed as admitted...
>
> 112. Kenya Ports Authority has been under duty to supply to the crew provisions. I find the claim for US $ 166,293.60 proved. They said amounts continued to accrue. The same shall also be ascertained and paid upon appraisal and sale of the ship. The amounts due to KPA and to some extent Kenya Revenue authority shall have priority payment.
>
> 113. The sum of US $. US $ 166,293.60 accrued by 30/6/2023 shall be paid in priority to all except the Marshal's charges. The Defendant to pay for provisions to that will be made of expenses incurred by the claimant KPA, including to move the ship and disembark the logs. The claim by KPA is thus allowed with costs of US $ 5118. The claimant in Admiralty No. 3/2021 who was the 2nd Defendant incurred costs defending the claim. A sum of US $ 2,000 will be sufficient in costs.
>
> 114. In regard to COM E005 of [2023], a claim for over US $ 2 million was made. The same was baseless. Costs of US $ 11,000/= will suffice as costs given that the claim was not fully heard. Further, the defence in that matter was materially the same as the claim in Admiralty Cause No. E003 of 2021.
>
> 115. The suit E005 of 2023 is thus terminated with costs of US $ 11,000/= in view for the findings in E003 of 2021.

116. The next issue is the status of the timber [in] the vessel. The order was given to inspect the cargo. Parties did not take advantage of the order to ascertain the status of the timber. The Defendant had to grant permission for boarding. There were questions on what went wrong. Nevertheless, the status of the timber remains unascertained. The permission to open the ship was not granted by the defendant. Parties were given ineffective right of access which to any reasonable person, it amounts to denial of access.

117. Effectively this court is entitled to presume that had the inspection been carried out, adverse findings could have been made. It is true that subsequently I ordered the matter to lay in abeyance. This was to avoid the interlocutory applications from clogging the hearing on the face of the postulations by Kenya Ports Authority that the ship was at a grave danger of sinking.

118. I find and hold that it is not possible to return the timber to the Applicant having been not delivered after a period of 3 years and 5 months. The warrant of arrest against the timber against the timber or cargo in the ship is hereby lifted. If there is any cargo other than timber, the same should be released to the owners thereof as it has not been arrested.

119. The said timber should be disembarked and placed under the custody of the interested party as valuation and subsequent sale is done. If it is fit for transshipment, the same should be sold to Bangladesh or transshipped. I have also noted [the] submission that the timber is unique and is only useful in Bangladesh. No evidence was given either way. Whichever condition the timber is, it should be valued, sold and transshipped. The cost of transshipment to Bangladesh shall be recovered out of sale of the timber and the ship. In lieu of the timber the claimant is entitled to the amounts claimed, being, cost, insurance, freight, commission and other dues."

42. Aggrieved by the learned Judge's decision, Defang moved to this Court on appeal in Civil Appeal No. E131 of 2024 on a legion of 21 grounds against the grain of rule 88 of the Rules of this Court, which dictates that a memorandum of appeal shall "concisely set forth under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against". To our mind, the appellant's substantive grounds of appeal may be reduced to 6, namely that the learned Judge erred in law and in fact: (i) in concluding that the court had jurisdiction to hear and determine the claims; (ii) by concluding that the Time Charter was irrelevant as it was signed by other companies and not produced in evidence; (iii) in concluding that the appellant was bound by the acts of OBT Shipping in issuing the Bills of Lading, and yet the 1st respondent was aware that OBT Shipping's authority had been withdrawn; (iv) in dismissing the appellant's claim No. E005 of 2023, and in determining KPA's claim No. E003 of 2023 when the same had been held in abeyance as Admiralty Claim No. E003 of 2021 proceeded to full hearing; (v) by awarding the 1st respondent the amounts claimed while there was no contract between the appellant and the 1st respondent; and (vi) by holding that the appellant was in breach of the contract for carriage of goods.

43. The two appeals were consolidated by an order of the Court made on 16th September 2024 in the following terms, namely that:

" 1. The interlocutory Appeal No. E078 of 2021 and Civil Appeal No. E131 of 2024 be consolidated and heard together on 2nd October, 2024.

2. The parties do file consolidated submissions together with any supplementary record of appeal that may be necessary to facilitate final determination of the two appeals.

3. Such supplementary records and submissions be filed and served by 25th September, 2024;

4. .....

5. ....."

44. In support of the appeal in No. E078 of 2021, learned counsel for the appellant, M/s. Ababu Namwamba & Co., filed written submissions and list of authorities dated 24th April 2024 citing the cases of National Union of Metal Workers of South Africa & Others v Fry's Metals (Pty) Ltd [2005] ZASCA 39 for the proposition that, while it is true that the court's inherent power to protect and regulate its own process is not unlimited, it does not extend to the assumption of jurisdiction not conferred upon it by statute; and Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd [1989] eKLR, highlighting the principle that jurisdiction is everything and that, without it, the court should down its tools and not take any other step in the proceedings.

45. In addition, counsel filed consolidated submissions and a further list of authorities dated 25th September 2024 citing an impressive number of 15 judicial authorities, to which we will shortly refer in our decision on issue-to-issue basis. Suffice it for the moment to observe that the consolidated submissions are with respect to the two appeals as consolidated.

46. In rebuttal to the appellant's submissions in Civil Appeal No. E078 of 2021, learned counsel for the 1st respondent, M/s. Kinyua Muyaa & Co., filed written submissions dated 12th September 2024, but cited no judicial authorities.

47. On their part, learned counsel for the 2nd respondent, M/s. Munyao, Muthama & Kashindi, filed consolidated written submissions dated 12th October 2024 in respect of the consolidated appeals, but cited no judicial authorities.

48. When the two consolidated appeals came up for hearing on the Court's GoTo Meeting virtual platform on 13th November 2024, learned counsel Mr. Njuguna for the appellant, learned counsel Mr. Kinyua Kamundi for the 1st respondent and learned counsel Mr. Amakobe for the 2nd respondent, appeared and made oral highlights of their respective written submissions.

49. The two matters having come before us on first appeal, we take to mind the Court's mandate as espoused in Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others [2009] KLR 331 in the following words:

> " An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

50. This mandate was reiterated in the case of Kenya Ports Authority vs. Kuston (Kenya) Limited [2009] 2 EA 212 as follows:

> " On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

51. We are however conscious as cautioned by the predecessor to this Court in Peters vs. Sunday Post Ltd [1958] E.A 424 that:

> " It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion."

52. Having considered the record as put to us in the two appeals, the grounds on which they are anchored, the 1st respondent's

> " Grounds for Affirming the Decision and Varying Part of the Decision", the respective submissions, and the law, we form the view that the issues which commend themselves for our determination are: (i) whether the High Court had admiralty jurisdiction to hear and determine the three claims or any of them; (ii) whether the learned Judge was at fault in consolidating and determining the three claims notwithstanding previous indication that Admiralty Claims No. E003 and E005 of 2023 were to be held "in abeyance" awaiting determination of Admiralty Claim No. E003 of 2021; (iii) whether the three claims involved the three parties (Defang, ET Timbers PTE and KPA), and whether they related to common issues to warrant exercise of the trial court's discretion to pronounce itself in a consolidated judgment; (iv) whether the appellant was liable as claimed by the respondents in E003 of 2021 and E003 of 2023, or in either of them; (v) whether the 1st respondent was liable to the appellant as claimed in E005 of 2023 or at all; and (vi) who bears the costs in the two appeals.

53. On the 1st issue as to whether the trial court's admiralty jurisdiction was properly invoked in the three claims, we need to point out right at the outset that the answer lies in the nature of the respective claims, and that such jurisdiction can only be invoked pursuant to sections 20 and 21 of the Senior Courts Act, 1981 which make provision for the admiralty jurisdiction of the High Court and the mode of exercise of such jurisdiction respectively. Put differently, did the three claims constitute admiralty claims as between the appellant and the respondents within the meaning of the 1981 Act so as to confer jurisdiction on the trial court to hear and determine them?

54. Our plain reading of section 20 of the 1981 Act points to the answer to the foregoing question and reads:

> 20. Admiralty jurisdiction of High Court.
>
> 1. The Admiralty jurisdiction of the High Court shall be as follows, that is to say—

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

... .

2. The questions and claims referred to in subsection (1)(a) are—

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

... ...;

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

... ...;

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

... ...;

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

... .

(4) The jurisdiction of the High Court under subsection (2)(b) includes power to settle any account outstanding and unsettled between the parties in relation to the ship, and to direct that the ship, or any share thereof, shall be sold, and to make such other order as the court thinks fit.

55. Section 21 makes provision for the mode of exercise by the trial court of its admiralty jurisdiction and reads:

20. Mode of exercise of Admiralty jurisdiction.

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

2. In the case of any such claim as is mentioned in section 20(2) (a), (c) or (s) or any such question as is mentioned in section 20(2)(b), an action in rem may be brought in the High Court against the ship or property in connection with which the claim or question arises.

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

4. 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.

56. We pause here to point out that the pivotal jurisdictional issue raised by the appellant in its Application Notice dated 16th April 2021 in Civil Appeal No. 078 of 2021 seeking orders to strike out the 1st respondent's claim and set aside the warrants of arrest is twofold: firstly, the issue as to whether the learned Judge was correct in exercising her discretion to allow amendment of the 1st respondent's Claim Form dated 4th April 2021 suo motu and; secondly, whether the nature of the 1st respondent's claim as amended on 4th August 2021 disclosed the kind of claims contemplated in section 20(2) of the Act so as to found a claim in respect of which the trial court's admiralty jurisdiction could be properly invoked.

57. With regard to the first limb of the jurisdictional challenge aforesaid, the appellant faulted the learned Judge's exercise of judicial discretion to allow amendment of the 1st respondent's Claim Form in the absence of a formal application for leave to amend. In so doing, the learned Judge considered the nature of the contract (to wit, a contract of carriage of goods by sea); the nature of the Charterparty; the terms thereof; the parties thereto; the identity of the registered owner of the motor vessel; and the party liable in personam.

58. In the impugned ruling dated 14th July 2021, part of which we take the liberty to reel off in extenso, the learned Judge observed:

" 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 ....

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 ....

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 19th 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 ....

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 22nd 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 22nd 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 3rd 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 ....

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 ....

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."

59. The appellant takes issue with the exercise of the Judge's discretion to allow amendment of the Claim Form as aforesaid and submits that the admiralty jurisdiction under sections 20 and 21 of the Act requires a clear nexus between the claim and the vessel; that the 1st respondent's claim did not establish this connection; and that, therefore, the trial court did not have the requisite jurisdiction to proceed and, in particular, to allow the amendment. According to the appellant, the fact that the learned Judge "correctly noted that the 1st respondent's claim could only be upheld if amended to an in personam claim against the appellant" was good reason to dismiss the claim and not allow an amendment.

60. The appellant submitted further that the admiralty jurisdiction cannot be remedied by invoking the provision of rule 3.3(4) of the Civil Procedure Rules and Practice Directions of England (relating to court's power to make orders of its own initiative), nor by the inherent powers of the court under section 3A of *Civil Procedure Act* (saving or inherent powers of court) or Articles 10, 159 and 259(1) of *the Constitution* (relating to national values and principles of governance, (judicial authority and interpretation of *the Constitution*, respectively); that reliance on the foregoing provisions to justify the grant of leave to amend was unwarranted; that the 1st respondent's pleadings as they stood were fundamentally flawed and could not be salvaged by amendment; and that the 1st respondent completely altered its case by contending that it had a dual cause of action against both Starryway and the appellant and that, by reason of that alteration, the court did not, and could not, have had the requisite jurisdiction to issue a warrant of arrest against the vessel on the facts as pleaded.

61. It is noteworthy that the 1st respondent does not address itself to the effect of the amendment of its Claim Form on the court's admiralty jurisdiction. Instead, it contends that it had a contractual

agreement with the appellant for the carriage of its cargo; that the Time Charter pleaded by the appellant was a sham; that the court had jurisdiction to determine the claim before it; that the appellant was Starryway's undisclosed principal; and that the learned Judge should have held that the alleged Time Charter was a sham.

62. Notably, the 2nd respondent was not party to the proceedings in Admiralty Cause No. E003 of 2021 and, accordingly, had no stake in the jurisdictional issue in controversy, or in the propriety of the court's exercise of discretion to grant leave to the 1st respondent to amend its Claim form. Though in issue in the consolidated appeals, the 2nd respondent did not form any view on the pertinent jurisdictional issue raised in Civil Appeal No. E078 of 2021.

63. Having considered the impugned ruling and the rival submissions by learned counsel for the appellant and for the 1st respondent, it is not lost on us that the appellant concedes ownership of the motor vessel. Neither does it deny that the said motor vessel was the subject of carriage of the cargo belonging to the 1st respondent under a contract of carriage. Its only point of departure is marked by its contention that the 1st respondent had failed to establish that the claim arose out of an agreement between the 1st respondent and itself relating to the carriage of goods in a ship, or the use or hire of a ship.

64. We take to mind the fact that an admiralty claim in rem or in personam by one party against another as contemplated in sections 20(2) and 21(4) of the Act presuppose the existence of, inter alia, the following elements: possession, charter, ownership or control of the marine vessel by either of the parties to the contract of carriage; ownership of the cargo by the charterer or consignor; loss or damage of the goods aboard the vessel; the existence of an agreement relating to the carriage of goods in the vessel or to the use or hire of the vessel. The bare facts as put to us in the consolidated appeals are that the 1st respondent's cargo was carried aboard 'Dolphin Star' of which the appellant was the undisputed registered owner under a contract of carriage whose terms and liability therefor are in issue, not to mention the elements aforesaid on which the court's admiralty jurisdiction is anchored primarily to determine the relevant person or the person who would be liable in personam. In our considered view, the existence of the above-mentioned elements in the instant case establish the basis for an admiralty claim or claims in respect of which the trial court has jurisdiction to determine.

65. In view of the foregoing, the amendment of the 1st respondent's Claim Form with leave of the court albeit suo motu was merely intended to lend clarity to the form thereof and highlight the elements that clearly pointed to the appellant as the relevant person named in the Claim, the one who would be liable in personam. On the facts before the trial court, the learned Judge was not at fault in granting, on her own motion, the 1st respondent leave to amend its Claim Form pursuant to Order 8 rule 5, which reads:

> 5. General power to amend [Order 8, rule 5]
>
> (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

66. In Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR, this Court held that amendment of pleadings is another discretionary power, liberally exercised, and which is donated under Order 8 rule 5 (1) of the Civil Procedure Rules.

67. In the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR, which was relied on by the appellants in Rubina's case (ibid), this Court, differently constituted, observed:

> " The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 Others *vs First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:
>
> 'The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.'
>
> ... ...
>
> The learned authors of Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings:-
>
> '.... The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.
>
> .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side....'"

68. We need not overemphasise the spirit of *the Constitution* with regard to judicial authority in the administration of justice. Article 159(2) (d) requires courts to administer justice without undue regard to technicalities of procedure, all to the ends of substantive justice to which section 1A(1) of the *Civil Procedure Act* (Cap. 21) lends weight by providing that:

> 1A. Objective of Act
>
> (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

69. Section 3A goes further to provide for the inherent powers of courts in the administration of justice and reads:

> 3A. Saving of inherent powers of court.

Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

70. Contrary to the appellant's submission that the perceived impropriety of the amendment complained of does not find cure in sections 1A and 3A of Cap. 21 or Article 159 of *the Constitution* in admiralty claims, section 4(3) of the *Judicature Act* does not draw a distinction between the admiralty and civil jurisdiction of the High Court. The section reads:

4. High Court is court of admiralty

(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.

71. The propriety of the learned Judge's discretion to allow amendment of the 1st respondent's Claim Form to clearly identify the "relevant person" finds further reason in the principle that claims arising from a statutory right to claim in rem that depend upon establishing a link with liability in personam are enumerated in section 20(2) (e) to (r) of the Act, the relevant ones of which we have highlighted in the foregoing paragraphs.

72. As stated by Goff, J. in I Congreso del Partido [1978] 1 All ER 1169, the nature of such claims is such that:

> "... actions in rem and actions in personam cannot be conveniently segregated into separate compartments. Invocation of the Admiralty jurisdiction by an action in rem presupposes the existence of a claim in personam against the person who, at the time when the action is brought, is the owner of the ship."

73. In the case of Republic of India and others v India Steamship Company Limited (1996) 2 Lloyd's L.R 12 (The Indian Grace (No. 2), the House of Lords stated that:

> "... an action in rem is an action against the owners from the moment that the Admiralty Court is seized with jurisdiction. The jurisdiction of the Admiralty Court is invoked by the service of a writ, or where a writ is deemed to be served, as a result of the acknowledgement of the issue of the writ by the defendant before service..."

74. Finally, we cannot be heedless of the decision in The St Elefterio [1957] 1 P 179 where the defendants attempted to set aside the plaintiffs' action in rem on the ground that the court's admiralty jurisdiction had been improperly invoked under section 3(4) of the Administration of Justice Act 1956 (the equivalent of section 21(4) of the Senior Courts Act) because, inter alia, the defendants had various defences to the plaintiffs' claim. In his judgment, Willmer, J. had this to say:

> "...I do not propose to go into the merits ... now, or to decide whether the defendants are right or whether the plaintiffs are right. It seems to me, having regard to the view I take of the construction of section 3 (4) of the Act, that this is not the moment to decide whether the defendants are right or whether they are wrong in their submissions on the points of law raised. If they are right on all or any of these various points advanced, it may well be that in the end they will show a good defence to the action. But that, in my judgment, furnishes no good reason for setting these proceedings aside in limine, and thereby depriving the plaintiffs of the right to have these issues tried...
>
> In my judgment the purpose of the words ... 'the person who would be liable on the claim in an action in personam,' is to identify the person or persons whose ship or ships may be

arrested in relation to this new right... of arresting a sister ship. The words used, it will be observed, are 'the person who would be liable' not 'the person who is liable,' and it seems to me, bearing in mind the purpose of the Act, that the natural construction of those quite simple words is that they mean the person who would be liable on the assumption that the action succeeds."

75. In the same vein in The "Bunga Melati 5" [2012] SGCA 46, the Court of Appeal of Singapore explored the requirements to be met for the court's jurisdiction to be deemed to have been properly invoked in the face of a jurisdictional challenge by the defendant under sections 3 and 4 of Singapore's High Court (Admiralty Jurisdiction) Act, the corresponding provisions to sections 20 and 21 of the Senior Courts Act. The Court held that:

> " 112 In summary, we re-state the various steps and respective standards of proof for a plaintiff to invoke admiralty jurisdiction in Singapore. Under s 4(4) of the HCAJA, a plaintiff has to, when challenged:
>
> a. prove, on the balance of probabilities, that the jurisdictional facts under the limb it is relying on in s 3(1)(d) to (q) exist; and show an arguable case that its claim is of the type or nature required by the relevant statutory provision ("step 1");
>
> b. prove, on the balance of probabilities, that the claim arises in connection with a ship ("step 2");
>
> c. identify, without having to show in argument, the person who would be liable on the claim in an action in personam ("step 3");
>
> d. prove on the balance of probabilities, that the relevant person was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship ("step 4"); and
>
> e. prove on the balance of probabilities, that the relevant person was, at the time when the action was brought: (i) the beneficial owner of the offending ship as respects all the shares in it or the charterer of that ship under a demise charter; or (ii) the beneficial owner of the sister ship as respects all the shares in it ("step 5")."

76. In the same case, Chan Sek Keong, CJ. further observed that:

> " 129 In my view, the court's approach as described in the italicised words in the above passage meets the requirements of procedural justice in determining factual challenges under step 1 in an admiralty action. The court must conduct a trial of the issue at the interlocutory/jurisdictional stage, if the defendant seeks a conclusive finding of fact from the court. However, if the defendant is only prepared to rely on its affidavits, the court will only be able to determine the disputed issue on a preliminary basis. Consistent with the nature of the hearing, there can be no finding of fact on the balance of probabilities, but only on a prima facie basis that, on the facts, the court has jurisdiction. Although there will be no conclusive finding towards the disputed jurisdictional fact(s) under step 1 at the interlocutory stage, the issue of jurisdiction will merge at the liability stage with the issue of whether the plaintiff has proved its claim on the facts on the balance of probabilities, and the court at the liability stage would

be entitled to come to a differing opinion from the court at the interlocutory stage based on evidence beyond contested affidavits which might surface at trial. However, at the liability stage, "[t]he court is not deciding if there is good cause for it to assume jurisdiction – it is deciding if there is good cause for it to give judgment for the plaintiff" (The Jarguh Sarwit (CA) at [44]). It does not matter how the standard of proof (at the interlocutory/jurisdictional stage) is labelled provided it is understood that a factual dispute cannot be conclusively decided on contested affidavit evidence alone."

77. It is not lost on us that, by raising the jurisdictional challenge in respect of the 1st respondent's claim against it, and by proceeding to file its own claim in the same court on the basis of the same transaction or series of transactions, it is obvious that the appellant is approbating and reprobating, which is an inconsistent and unacceptable conduct. Such conduct was considered in Evans v Bartlam (1937) 2 ALL ER 649 at 652 where Lord Russel of Killowen observed:

> " The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man, having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit."

78. In the same vein, in Banque De Moscou v Kindersley (1950) 2 ALL ER 549, Sir Evershed said of such conduct:

> " This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish Lawyers (frame it) approbating and reprobating or, in the more homely English phrase, blowing hot and cold."

79. That said, we rest the first limb of the appellant's jurisdictional challenge here for fear of overindulgence in what might be construed as an overkill. Suffice it to pronounce ourselves thus: that the learned Judge was not at fault in granting leave, suo motu to amend its Claim Form to reflect "the relevant person" who "would be liable" in personam; that, on the facts of the case, the trial court had admiralty jurisdiction to exercise the inherent jurisdiction as aforesaid; and that the appellant was by no means prejudiced, bearing in mind that it had the opportunity to wield its defences and cross-claims as it did in a subsequent Claim, and on the merits of the respective cases to which we will shortly return.

80. Turning to the second limb of the jurisdictional challenge, we hasten to observe that it is instructive that the High Court has jurisdiction under the Act to hear and determine any of the claims specified in section 20(2) (a), (h), (m) and (p) of the Act in the manner stipulated in section 21. However, for such claims to hold, it is imperative to determine: (i) who may lodge any of such claims; (ii) against whom; and (iii) on what basis, that is, the nature and terms of the contractual or other legal relationship on which the right of action is founded, not to mention the nature of the relief or reliefs sought. This threefold test is the basis on which an admiralty claim may be lodged in rem or in personam. For the avoidance of doubt, the claims to which sections 20 and 21 of the Act relate may be either in rem or in personam, and often in tandem.

81. A claim in rem may be defined as one in which the claim is filed against the vessel itself to recover a debt or enforce a maritime lien. In Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR), this Court observed thus:

> " 91. Admiralty actions therefore may be either in rem or in personam. An admiralty action in rem is in effect an action against a res. A res is usually a ship but may

in some cases be cargo or freight or an aircraft. In such an action the plaintiff may cause the res to be arrested if it is within jurisdiction."

82. On the other hand, a claim in personam is one which is brought directly against a person involved in a maritime claim. Such an action seeks to hold the individual liable for damages or breach of contract. It is comparable to a normal action filed against a person (see Owners of the Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd) (ibid). Such a claim may be brought against the owner, operator, charterer, or other parties responsible for the claim under section 20(2) of the Act, including claims to enforce contracts for the carriage of goods under a Charterparty, a Voyage Charter, or a Time Charter, as the case may be. The 1st respondent's claim against the appellant in Admiralty Cause No. E003 of 2021 and the appellant's claim against the 1st respondent in Admiralty Claim No. E005 of 2023 were undoubtedly in personam.

83. The pertinent question raised in the two appeals is whether the three claims in E003 of 2021, E003 of 2023 and E005 of 2023 satisfy the requisite elements of admiralty claims either in rem or in personam to justify the appellant and the respondents or any of them to invoke the trial court's admiralty jurisdiction. Put differently, whether the High Court had admiralty jurisdiction to hear and determine the three claims or any of them.

84. The 1st respondent's claim against the appellant in Admiralty Cause No. E003 of 2021 was founded on the alleged breach of the terms of a contract of carriage by sea of the cargo aforesaid contained in the draft Bills of Lading purportedly issued by OBT Shipping to the 1st respondent as agent for and on behalf of "the Master of the motor vessel " 'Dolphin Star'. For the avoidance of doubt, the term "master" in relation to a merchant vessel may be described as the highest authority on board the motor vessel responsible for the overall operation of the vessel, including navigation, administrative duties, cargo operations and crew management. In the case of 'MV Dolphin Starr', it is indubitable that the Master of the vessel was Captain Ye Chonggan, a servant or agent of the appellant, the relevant person or entity against which claims in rem or in personam could be raised in proper cases.

85. Closely linked to the element of ownership of the motor vessel, which points to the "relevant person" in respect of whom the court's admiralty jurisdiction may be invoked, is the issue as to who was responsible to issue the Bills of Lading pursuant to the contract of carriage. According to the 1st respondent, it was a term of the contract of carriage and the Charterparty that the Bills of Lading would be used and issued to the 1st respondent by the disponent owners and/or the owners for the cargo aboard the motor vessel. By its very nature, this plea by the 1st respondent in its amended Claim Form confers admiralty jurisdiction on the trial court to hear and determine the merits of its claim and of any defences available to the appellant.

86. In view of the foregoing, the appellant's claim that the court had no jurisdiction to entertain the admiralty claims to which the two appeals relate is unfounded. It is also instructive that the appellant submitted to the court's admiralty jurisdiction in the related Claim No. E003 of 2023 (KPA v Defang & ET Timbers PTE) and, subsequently, submitted to the court's admiralty jurisdiction in its own Claim No. E005 of 2023 (Defang v ET Timbers PTE). As already observed, the appellant's attempt to approbate and reprobate, or 'blow hot and cold' as the saying goes, does not hold. In conclusion, we hold that the High Court had admiralty jurisdiction to hear and determine the three claims in issue in the consolidated appeals before us.

87. Turning to the 2nd issue as to whether the learned Judge was at fault in consolidating and determining the three claims, the appellant's case was that previous indication had it that Admiralty Claims No. E003 and E005 of 2023 were held "in abeyance" awaiting determination of Admiralty Claim No. E003 of 2021.

88. According to the appellant, the learned Judge was at fault in dismissing its Claim No. E005 of 2023 while determining KPA's Claim No. E003 of 2023 in its favour and the 1st respondent's Claim No. E003 of 2021 while the two had been held in abeyance as Claim No. E003 of 2021 proceeded to hearing.

89. The appellant further laments that it "could not have been expected to file a defence in that [KPA's] claim in light of the trial court's directive" and that, in any event, "... the 1st respondent had undertaken... [on] 4th April 2021 to pay on demand the fees of the Marshal and all incurred or to be incurred expenses in respect of the arrest of the motor vessel, care and custody of the vessel and release of the vessel". We hasten to point out, though, that the 'Admiralty Marshal's fees and expenses' are distinct from 'port charges' recoverable by the Admiralty Marshal and the 2nd respondent respectively; and that the appellant's omission to defend the 2nd respondent's claim in rem to recover port charges was of itself inexcusable and certainly consequential.

90. Even though KPA's Claim Form against the appellant and the 1st respondent in Claim No. E003 of 2023 was undated, its Application Notice dated 28th July 2023 was apparently filed contemporaneously with the Claim Form or followed on its heels soon thereafter. The fact that the order holding Claim Nos. E003 and E005 of 2023 in abeyance pending determination of Claim No. E003 of 2021 was made on 12th October 2023 suggests that the appellant had about two-and-a-half months within which to file its defence to KPA's claim. In any event, the appellant failed to comply with the provisions of Part 61.3(10) of the Practice Directions as read with Parts 15 and 58.10 of the English Civil Procedure Rules, which require a defence to an admiralty claim to be filed within 28 days after the particulars of such a claim have been served upon the defendant. The appellant having filed its acknowledgment of service on 22nd August 2023, about fifty (50) days after service of the particulars of KPA's claim.

    Accordingly, it defeats reason for the appellant to argue that the order for directions aforesaid prevented it from filing its defence. We find that it did not.

91. It is also worth noting that the record as put to us is not clear as to whether being held "in abeyance" meant that Claim Nos. E003 and E005 of 2023 were also to be heard thereafter on evidence; or whether the outcome of Claim No. E003 of 2021 was to apply to Nos. E003 and E005 of 2023; or whether the learned Judge's intention was to hear Claim No. E003 of 2021 and thereafter render one decision in determination of the three claims on the basis of the evidence common to them as adduced at the trial as if they were consolidated. The last proposition appears to have been the trial court's intention. The only pertinent question is whether the consolidated judgment complained of disposed of all the issues in the three claims, and whether the learned Judge was at fault in determining them as consolidated after hearing Claim No. E003 of 2021.

92. The answer to this question depends on the nature of the issues raised in each of the three claims. Claim No. E003 of 2021, which proceeded to hearing as the other two were put on hold, involved the 1st respondent's claim against the appellant for: compensation on account of alleged breach of the contract of carriage; cargo shutout charges; brokerage fees; costs and interest. In the alternative, it sought damages on account of loss allegedly suffered due to late delivery of the cargo and the reduced market price thereof.

93. On the other hand, KPA's Claim No. E003 of 2023 against the appellant and the 1st respondent was on account of port charges and marine services in respect of the appellant's motor vessel; removal of the motor vessel ashore at the cost of the appellant and the 1st respondent; costs of the claim; and interest thereon.

94. It is noteworthy that, apart from their response to KPA's Application Notice dated 28th July 2023 seeking removal of the vessel ashore and payment of at least 75% of the charges then due and payable and in default the vessel be sold, neither the appellant nor the 1st respondent defended KPA's claim, whose judgment was entered in its favour as prayed. To this day, no substantive appeal has been preferred from that judgment, which awaits execution failing satisfaction of the decree for which the appellant and the 1st respondent were found liable jointly and severally.

95. Our intentional use of the phrase "substantive appeal" in the preceding paragraph should not be construed as being in disregard of the appellant's appeal No. E131 of 2024 in which it faults the learned Judge for determining the 2nd respondent's claim "prematurely" while the same had been "held in abeyance" pending determination of the lead Claim No. E003 of 2021 under which the consolidated judgment was delivered. To our mind, the procedure adopted by the trial court did not by any means preclude or render it impracticable for the appellant or the 1st respondent to file their defence (if any) in KPA's Claim No. E003 of 2023.

96. Finally, the appellant's Claim No. E005 of 2023 against the 1st respondent is akin to third party proceedings by which the appellant prayed for judgment in the sum awarded to KPA on account of port charges; and any additional costs that might be demanded by KPA; an order to compel the 1st respondent to pay storage fees during the period the motor vessel remained under arrest, including crew wages, spare-parts and materials, fuel and water, and all related services; an order for the arrest of the cargo aboard the motor vessel to recover port charges and the related expenses; general damages and costs of the claim.

97. Addressing itself to the court's discretionary power to consolidate suits, the High Court of Kenya at Mombasa in Ahmed Zain Mohammed v Zain Ahmed Zain & 4 Others [2003] eKLR, correctly observed that Order 11 of the civil procedure Rules provides for the consolidation of suits and reads:

> where two or more suits are pending in the same court in which the same or similar questions of law or fact are involved, the court may either upon the application of one of the parties or of its own motion, at its discretion, and upon such terms as may seem fit –
>
> a. Order consolidation of such suits; and
>
> b. Direct that further proceedings in any of such suits be stayed until further orders.
>
> (see also Pascal Otieno Amoke v Abigael Ayuma Osotsi [2021] eKLR)

98. Order 11 of the Civil Procedure Rules is buttressed by section 3A of the *Civil Procedure Act*, which reads:

> " Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

99. In Law Society of Kenya v Centre For Human Rights & Democracy & 12 Others [2014] eKLR, the Supreme Court enunciated the general principles to be applied when considering consolidation as follows:

> " The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties.

Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion

any disadvantage towards the party that opposes it."

100. The practical principles which courts apply when considering consolidation were correctly stated and applied by Maraga, J. (as he then was) in Nyati Security Guards & Services Ltd v Municipal Council of Mombasa [2004] eKLR where he stated thus:

> " Consolidation is a process by which two or more suits or matters are by order of court combined or united and treated as one suit or matter. The main purpose of consolidation is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. The situations in which consolidation can be ordered include where there are two or more suits or matters pending in the same court where:-
>
> 1. some common question of law or fact arises in both or all of them; or
> 2. the rights or relief claimed in them are in respect of, or arise out of the same transaction or series of transactions; or
> 3. for some other reason it is desirable to make an order for consolidating them." [Emphasis ours]

101. Similarly, in Korean United Church Of Kenya & 3 Others v Seng Ha Sang [2014] eKLR, it was observed that:

> " Consolidation of suits is done for the
>
> purpose of achieving the overriding objectives
>
> of the *Civil Procedure Act*, that is, for the expeditious disposal of Civil disputes. The main purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action." [Emphasis added]

102. It is instructive that Claim Nos. E003 of 2023 and E005 of 2023 related to liability arising from the accrued port charges, fees and expenses incurred in consequence of the arrest of the motor vessel pursuant to the warrant of arrest issued in Claim No. E003 of 2021. The fact that the appellant and the 1st respondent did not contest the 2nd respondent's claim No. E003 of 2023, and from which no appeal has been preferred to date, is a clear indication that no issue ever arose therefrom deserving of the trial court's attention beyond upholding KPA's undisputed claim as prayed.

103. In view of the foregoing, we find that common question of law or fact arose in the three claims, and that the rights or reliefs claimed in them are in respect of, or arise out of, the same transaction or series of transactions pursuant to a contract for carriage of goods in respect of which the appellant and the respondents had a stake. In conclusion, the three claims involved the three parties (Defang, ET Timbers PTE and KPA. They related to common issues to warrant exercise of the trial court's discretion to pronounce itself in a consolidated judgment, which settles the 3rd issue before us. Accordingly, the learned Judge was by no means at fault in consolidating and determining the three claims in one decision notwithstanding prior intimation that Admiralty Claims No. E003 and E005 of 2023 were to be held "in abeyance" awaiting determination of Admiralty Claim No. E003 of 2021.

104. Be that as it may, we can only observe that it would have been desirable for the avoidance of doubt for the learned Judge to expressly indicate that the three claims were being consolidated. However,

that minor procedural infraction was of no consequence to the outcome of the three claims, and did not occasion prejudice to the appellant as claimed. The only question worth of our scrutiny is whether the consolidated judgment delivered after full hearing of the 1st respondent's claim against the appellant in Claim No. E003 of 2021 on evidence effectively disposed of the issue of liability raised in the appellant's Claim No. E005 of 2023 which, to our mind, is akin to third party proceedings against the 1st respondent with intent to shift liability for KPA's Claim No. E003 of 2023.

105. Turning to the 4th and 5th closely linked issues as to whether the appellant was liable as claimed by the respondents in E003 of 2021 and E003 of 2023, or in either of them; and whether the 1st respondent was liable to the appellant as claimed in E005 of 2023 or at all, we begin by pointing out the fact that a cursory look at the impugned judgment as consolidated with Claim No. E003 of 2021 as the lead case reveals that the learned Judge comprehensively dealt with all the issues raised in Claim Nos. 003 of 2021 and E005 of 2023. The same applies to the issue of liability for the 2nd respondent's claim in No. E003 of 2023 which, for all practical purposes, remained undefended. As already observed, the appellant's mistaken belief was that it was not obligated to file its defence (if any) before final determination of the three claims.

106. With regard to liability under Claim Nos. E003 and E005 of 2023, the learned Judge had this to say:

> " 110. The claim by Kenya Ports Authority was not [contested]. In any case the only question is who was liable to pay. The court was asked to take into consideration the undertakings made at the time of arrest of the ship.
>
> 111. Jurisdiction was not contested thereafter within 28 days. Therefore, the court's jurisdiction was [thus] deemed as admitted. The De Fang Company Ltd filed acknowledgment of service. They indicated that they were to defend the claim but had no issue on jurisdiction upon perusing the pleadings and testimony.
>
> 112. Kenya Ports Authority has been under duty to supply to the crew provisions. I find the claim for US $ 166,293. 60 proved. The said amounts continued to accrue. The same shall also be ascertained and paid upon appraisal and sale of the ship. The amounts due to KPA and to extent Kenya Revenue authority shall have priority payment.
>
> 113. The sum of US $ 166,293. 60 accrued by 30/6/2023 shall be paid in priority to all except the Marshal's charges. The Defendant to pay for provisions to that will be made of expenses incurred by the claimant KPA, including to move the ship and disembark the logs. The claim by KPA is thus allowed with costs of US $ 5118. The claimant in Admiralty No. 3/2021 who was the 2nd Defendant incurred costs defending the claim. A sum of US $ 2,000 will be sufficient in costs.
>
> 114. In regard to COM E005 of 2022, a claim for over US $ 2 million was made. The same was baseless. Costs of US $ 11,000/= will suffice as costs given that the claim was not fully heard. Further, the defence in that matter was materially the same as the claim in Admiralty Cause No. E003 of 2021.
>
> 115. The suit E005 of 2023 is thus terminated with costs of US $ 11,000/= in view of the findings in E003 of 2021.
>
> 116. The next issue is the status of the timber [in] the vessel. The order was given to inspect the cargo. Parties did not take advantage of the order to

ascertain the status of the timber. The Defendant had to grant permission for boarding. There were questions on what went wrong. Nevertheless, the status of the timber remains unascertained. The permission to open the ship was not granted by the defendant. Parties were given ineffective right of access which to any reasonable person, it amounts to denial of access.

117. Effectively this court is entitled to presume that had the inspection been carried out, adverse findings could have been made. It is true that subsequently I ordered the matter to lay in abeyance. This was to avoid the interlocutory applications from clogging the hearing on the face of the postulations by Kenya Ports Authority that the ship was at a grave danger of sinking.

118. I find and hold that it is not possible to return the timber to the Applicant having been not delivered after a period of 3 years and 5 months. The warrant of arrest against the timber against the timber or cargo in the ship is hereby lifted. If there is any cargo other than timber, the same should be released to the owners thereof as it has not been arrested.

119. The said timber should be disembarked and placed under the custody of the interested party as valuation and subsequent sale is done. If it is fit for transshipment, the same should be sold to Bangladesh or transshipped. I have also noted [the] submission that the timber is unique and is only useful in Bangladesh. No evidence was given either way. Whichever condition the timber is, it should be valued, sold and transshipped. The cost of transshipment to Bangladesh shall be recovered out of sale of the timber and the ship. In lieu of the timber the claimant is entitled to the amounts claimed, being, cost, insurance, freight, commission and other dues."

107. We hasten to observe that the 2nd respondent's claim against the appellant and the 1st respondent in No. E003 of 2023 was undefended, and that the consequent judgment and decree dated 24th May 2024 has not been challenged on appeal to this Court. Accordingly, no issue falls to be determined thereon, save for the appellant's lamentation that the trial court erred in law by dismissing its claim in E005 of 2023, and in determining KPA's claim in E003 of 2023 when the same had been held in abeyance as was the 1st respondent's claim in E003 of 2021; and that, in any event, the 1st respondent had on 4th April 2021 undertaken to pay on demand the Admiralty Marshal's fees incurred in respect of the arrest, care and custody of the motor vessel and its release.

108. The application and undertaking dated 4th April 2021 filed by counsel for the 1st respondent (the claimants therein) for the arrest and custody of the motor vessel was admittedly in the following words:

> " The Claimants undertake personally to pay on demand the fees of the Marshal and all expenses incurred, or to be incurred by him or on his behalf in respect of:
>
> 1. The arrest, or endeavours to arrest, the property; and
>
> 2. The care and custody of it while under arrest; and
>
> 3. The release or endeavours to release it."

109. The 1st respondent's case was that it had only undertaken to pay the Admiralty Marshal's fees and expenses incurred on account of the arrest of the motor vessel, but not the port charges recoverable by the 2nd respondent under the decree issued in its favour; that the 1st respondent was not the owner

of, and had no control over, the motor vessel; that the 2nd respondent's claim was erroneously filed against it due to the wrong interpretation of its undertaking for arrest and custody dated 4th April 2021; that the 1st respondent did not undertake to pay to the 2nd respondent any moneys for the supply of goods and services; that the Admiralty Marshal's fees do not include port charges; that no demand has been made for payment of any Admiralty Marshal's charges and expenses; that it was therefore premature for the appellant and the 2nd respondent to demand payment of port charges on account of the 1st respondent's undertaking to the Admiralty Marshal; that the 2nd respondent was entitled to sell the motor vessel in view of the appellant's admission of the debt arising from the port charges; that the cargo aboard the vessel should not be sold along therewith since it belongs to the 1st respondent, and was not under arrest; that it had no objection to the appraisement and sale of the motor vessel on condition that the cargo be discharged to facilitate proper appraisement; and that the sale be conducted under the usual conditions of sale.

110. In practice, no security is required to secure the arrest of a ship apart from the undertaking given by the advocate for the arresting party to pay the Admiralty Marshal's fees and any expenses incurred by him in respect of the arrest of the ship, the care and custody of it while under arrest and the release or endeavors to release it. For the avoidance of doubt, the Admiralty Marshal is the Court Officer who deals with the administrative functions of arrest, sale and appraisement of property in Admiralty proceedings in accordance with the High Court (Admiralty) Rules, *Legal Notice No. 8 of 1979*. The undertaking covers all the expenses the Admiralty Marshal may incur in discharge of his duties, such as expenses incurred in hiring a launch or instructing agents to serve the arrest papers on the ship. These costs are recoverable by the arresting party on appraisement and sale of the ship, but only if the proceeds of sale of the ship exceeds the Admiralty Marshal's fees and expenses.

111. It is not lost on us that, in practice, the arresting party pays all costs and expenses of the Admiralty Marshal for the duration the ship is under arrest, but that such costs do not include port charges on account of services rendered to the motor vessel and its crew while under arrest, and which are essentially recoverable in rem.

112. It is also instructive that neither the appellant nor the 1st respondent filed a defence to KPA's claim for port charges in Admiralty Cause No. E005 of 2023 in which KPA pleaded that the appellant was liable for the outstanding port dues by virtue of being the owner of the motor vessel while the 1st respondent was allegedly liable pursuant to the undertaking filed in Admiralty Claim No. E003 of 2021 in its capacity as the arresting party. In view of the foregoing, we reach the conclusion that the learned Judge was not at fault in holding, as we hereby do, that:

    a. the 1st respondent was liable to pay the Admiralty Marshal's fees and expenses relating to the arrest and detention on shore of the motor vessel, but that such fees and expenses are recoverable on appraisal and sale of the motor vessel;

    b. the 1st respondent was not liable to the appellant or to the 2nd respondent on account of the port charges claimed in Admiralty Cause No. E005 of 2023; and

    c. that the appellant is solely liable to the 2nd respondent on account of the port charges claimed in rem in Admiralty Cause No. E003 of 2023.

113. Turning to the 1st respondent's claim against the appellant in Claim No. E003 of 2021, it is noteworthy that the learned Judge's decision was rendered under three main heads, namely: the existence of the alleged Time Charter between the appellant and Starryway; the alleged agency relationship between Starryway and the appellant; and OBT's alleged issuance of the Bills of Lading to the 1st respondent.

114. Concluding that the alleged Time Charter between the appellant and Starryway did not exist, the learned Judge observed thus:

> "160. The agreement between Dolphin Star Shipping Company Limited and Starryway shipping has no bearing in this case. The agreement signed by those companies does not provide rates. It was not even produced in evidence. On the other hand, the claimant produced an inspection report dated 23/6/2021 where Captain Ye Chonggang declared the Defendant as the owner and Fairwind international company limited as agent.
>
> 161. In 2023, Captain Labbuanan made the same declaration. In absence of evidence to the contrary, the declaration of the captains are correct. The owner of the Ship is the defendant ....
>
> 163. The P&I insurance for the ship Dolphin Star No. 9162394 was for US $ 1 Billion for a period 20/2/2022 to 20/2/2023. The owner is indicated as Defang shipping company ltd. of the British Virgin Islands. The ship is registered at the port of panama. In the P&I Starryway Trading & Shipping Company Ltd are the Commercial managers. There has been no ownerships by Starryway Trading & Shipping Company Ltd from the evidence in court.
>
> 164. There was an allegation that there was a forged time charter. The defendant failed to call a witness to address this charter. It is unnecessary to delay with the same given that no evidence of its existence was tendered. The defendants were in a unique position to produce evidence of [the] existence of the time charter. They [failed] to do so.
>
> 166. It follows that the initial burden of proof lies on the Plaintiff, but the same may shift to the Defendant, depending on the circumstances of the case...."

115. Faulting the learned Judge's finding in that regard, learned counsel for the appellant submitted that the trial court contradicted itself as Kizito Magare, J., in the impugned judgment, disregarded Njoki Mwangi, J.'s ruling which considered the Time Charter to be a valid document; that the appellant provided a sworn affidavit stating that Dolphin Star Shipping Company Limited and Defang Shipping Company Limited were different English translations of the same company, but that the same was ignored by the trial court; that the learned Judge failed to consider that it is inherently unlikely that a completely unrelated party would enter into a Time Charter for a vessel which it did not own; and that it is even more implausible that a completely unrelated party has a name similar to that of Starryway.

116. In reply, learned counsel for the 1st respondent contended that, while the parties to the Time Charter are named as 'Defang Shipping Company Limited' as Owner and 'Starryway Shipping and Shipping Company Limited' as Time Charterer, the Time Charter was executed by different parties, namely 'Dolphin Star Shipping Company Limited' as Owner and 'Starryway Company Limited' as Time Charterer; that Njoki Mwangi, J., without any evidence, held that the appellant had authorised Dolphin Star Shipping Company Limited to sign the Time Charter; that there was no such authority on record, and that no explanation was given for the discrepancy; that the Time Charter is a sham manufactured by the appellant after the arrest of the vessel for purposes of challenging the court's admiralty jurisdiction on the grounds that the appellant was not in possession of the vessel, that it was not the carrier; and that it was not liable in personam.

117. From the record as put to us, the appellant filed a statement by Lu Jian, a senior manager of the appellant, dated 17th July 2023 explaining that 'Defang Shipping Company Limited' and Dolphin Star' are "true and correct English versions for the Chinese" version of the appellant's name; and that, although the name in English on the seal/stamp looks different, the name in Chinese is "completely true and correct".

118. Lu Jian's statement of 17th July 2023 was followed by a second statement dated 21st February 2024 in which he stated thus:

> " I hereby declare that I resigned from Defang Shipping Company Limited on 31 July 2023 and cannot attend the court hearing to testify on behalf of Defang Shipping Company Limited. However, I hereby guarantee that all documents submitted by me on behalf of Defang Shipping Company Limited to the court in Kenya through their lawyers are authentic, AND the 'Time Charter" dated 1st January 2019 between Defang Shipping Company Limited and Starryway Trading and Shipping Company Limited as well as the "Personal Statement" dated 17th July 2023 regarding the identity of the company stamp on the Time Charter were actually signed by me."

119. The first of the two statements was first introduced in the proceedings at the trial court in Claim No. E003 of 2021 vide the appellant's bundle of documents dated 26th October 2023 with the intention of adducing it in evidence in defence of the 1st respondent's claim. The bundle of documents containing the statement aforesaid was followed by a letter dated 22nd February 2024 from counsel for the appellant M/s. Ababu Namwamba & Company addressed to the Deputy Registrar of the High Court of Kenya at Mombasa and copied to the 1st respondent's advocates, M/s. Kinyua Muyaa & Company, forwarding Lu Jian's second statement dated 21st February 2024. Counsel's letter read in part:

> " This matter is coming up for further defence hearing on 23rd February 2024 whereby Capt. Lujian is suppose[d] to testify. However, our Client is having challenges to get Mr. Lu Jian to testify as he already resigned from the Company.
>
> Attached, please find Lujian['s] personal statement for your reference."

120. A cursory look at the proceedings in the trial court reveals that the only defence witness called to testify for the appellant was Captain Yu Zhongjian, who did not produce the evidential documents in the bundle aforesaid, including the Time Charter in issue and the two statements by Lu Jian. Consequently, the learned Judge cannot be faulted for finding that there was no valid Time Charter in existence at the time the voyage contract was undertaken as well as throughout the duration of the voyage. In effect, the appellant could not rely on a non-existent Time Charter with a third party to avoid liability to the 1st respondent as claimed in E003 of 2021. Moreover, the bundle of documents aforesaid were of no probative value having been introduced by correspondence without according the parties the opportunity to test their admissibility, relevance, reliability and the probative value, to wit, the probability of their evidential weight to establish proof on the required balance of the relevant facts in issue. (see Parkar & another v NQ & 2 others [2023] KECA 908 (KLR)).

121. Pronouncing itself on the admissibility of documentary evidence in a picturesque speech, the Supreme Court of India in Arjun Pandit Rao Khotkar v Kailash Kushanrao Gorantyal & Others [2020] 7 SCR 180 had this to say:

> " Documentary evidence, in contrast to oral evidence, is required to pass through certain check posts, such as- (i) Admissibility; (ii) Relevancy; and (iii) Proof, before it is allowed

entry into the sanctum. Many times, it is difficult to identify which of these check posts is required to be passed first, which to be passed next and which to be passed later. Sometimes, at least in practice, the sequence in which evidence has to go through these three check posts, changes. Generally, and theoretically, admissibility depends on relevancy. Under Section 136 of the *Evidence Act*, relevancy must be established before admissibility can be dealt with."

122. Though relevant and admissible in evidence, the purported Time Charter was filed as part of the 1st respondent's list of documents and produced as Exhibit No. 23. However, no evidence was tendered to clear up the discrepancy between the parties named as Owner and Charterer of the motor vessel and the parties by whom the Time Charter was actually executed. In any event, clause 4 (the hire clause) of the charter document does not specify the agreed rate of hire of the motor vessel. A cursory glance at the Charter document reveals that the space designated for specification of the rate of hire was left incomplete.

123. In the absence of any indication as to the consideration furnished by the charterer, the contract cannot be considered as valid or complete. Even though in cross-examination DW1testified that Starryway hired the vessel at USD 10,000 per day, no evidence of such payments was tendered in support of that claim to lend validity to the purported Charter.

124. It is trite that there are three essential elements of a valid contract, namely an offer, acceptance and consideration (see Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & another [2014] KECA 538 (KLR). Halsbury's Laws of England, Volume 9 (4th Edition 2006 Reissue) at para 727 sets out the general rule thus:

> " Ordinarily, consideration is one of the three essential elements of a valid contract. Thus, a promise which is made without consideration may not be sued upon in the law of contract, for it is merely a bare promise on which no such action will lie. In the case of a contract which is divisible into two parts, for only one of which there is valuable consideration, that part only gives rise to a cause of action."

125. With regard to the hire rate as stipulated in a charterparty, Lord Wright observed as follows in A/S Tankexpress v Compagnie Financiere Belge des Petroles [1949] AC 76:

> " The importance of this advance payment to be made by the charterers, is that it is the substance of the consideration given to the shipowner for the use and service of the ship and crew which the shipowner agrees to give."

126. On the issue as to whether Starryway was the appellant's agent, the learned Judge observed:

> " 172. At all times Starryway Trading & Shipping Company Ltd signed as agents. They gave line of cargo coping Defang Shipping Co. as ahead Owners, sent to ET Timber PTE Ltd as Head owners as voyage charters and alleged Owner of the cargo. They stated that by a charter party dated 19/1/2021 the owners chartered the vessel to E T Timber who claim the cargo. The owner claimed That clause 8 Gen con 1994. Proforma as incorporated into the voyage charter gave the claimant notice for: -
>
> i. Freight US $ 614,964.13
>
> ii. Load port demurrage US $ 35,744.40

iii. Damages ON the ship, US $ 2,120,816.47 as at October 2021 and increasing daily

173. In this connection I find and hold that the company Starryway trading and shipping was an agent who took over from Fairwaind Co. Ltd they are not the owners. Where there is a disclosed [principal], [a] suit can't be against an agent."

127. Dissatisfied with the learned Judge's findings, learned counsel for the appellant submitted that the allegation by the 1st respondent that Starryway wrongfully described itself as Owners was laughable because Starryway were the disponent owners under the Time Charter; that the London Arbitration Tribunal, in the dispute between Starryway and the 1st respondent, had no difficulties identifying the counterparty to the Voyage Charter; and that there is clear authority that that where a party signs a charter as "owner" that excludes the possibility of there being a separate undisclosed principal.

128. To buttress their contention, counsel cited the case of Humble v Hunter (1848) 116 ER 885 where it was held that:

> " [w]e were rather inclined at first to think that this case came within the doctrine that a principal may come in and take the benefit of a contract made by his agent [i.e., the undisclosed principal doctrine]. But that doctrine cannot be applied where the agent contracts as principal; and he has done so here by describing himself as "owner" of the ship..."

129. In addition, counsel cited the House of Lords decision in Fred Drughorn Ltd v Rederiaktiebolaget Transatlantic [1919] AC 203 which approved of the proposition in Humble v Hunter (supra) that evidence of authority of an outside principal is not admissible, if to give such evidence would be to contradict some term in the contract itself.

130. In counsel's view, the contested voyage charter provides in express terms that the 'owner' was Starryway, which should have precluded any suggestion that the appellant was party to the voyage charter as an undisclosed principal. They submitted that the insurance policy documents exhibited by the 1st respondent indicating that Starryway was the appellant's Commercial Manager are irrelevant and do not change the fact that the Voyage charter was signed between Starryway as Owners, but not as agents; and that, in maritime law, it is not uncommon to see related companies entering into Time charterparties for their own commercial benefits.

131. On their part, learned counsel for the 1st respondent submitted that there were several emails produced in which Starryway describes itself as agent; and that the learned Judge should have held that the purported Time Charter was a sham in light of the fact that it was not entered into between the appellant and Starryway, and in light of the emails signed off by Starryway as agent, the pre-fixture email communication, the Clean Fixture Recap, the Notice of Readiness, the Certificate of Entry of Appeal and other material before the court.

132. To our mind, parties to a written contract cannot successfully lurk behind shadows to conceal or disguise their identity, or otherwise take cover behind proxies by whatever name called to elude liability. Neither is it tolerable at law for a party "A" to hold itself out as an agent of another "P" in fair- weather circumstances and, when the tide turns against that other, profess to be the principal to shield "P" from liability. It goes without saying that their real identity goes to the root of the contract of carriage.

133. In the UK's House of Lords decision in The Starsin [2004] 1 AC 715, Lord Millet observed that:

> " 175. The identity of the parties to a contract is fundamental. It is not simply a term or condition of the contract. It goes to the very existence of the contract itself. If it is uncertain, there is no contract. Like the nature and amount of the consideration and the intention to create legal relations it is a question of fact and may be established by evidence. Such evidence is admissible even where the contract is in writing, at least so long as it does not contradict its express terms, and possibly even where it does: see Young v Schuler (1883) 11 QBD 651, Chitty on Contracts 28th edn p 633...
>
> 176. Where a contract is contained in a signed and written document, the process of ascertaining the identity of the parties and the capacity in which they entered into the contract must begin with the signatures and any accompanying statement which describes the capacity in which the persons who appended their signatures did so. This may require interpretation, and to this extent the process may without inaccuracy be described as a process of construction. But it is not of the same order as the process of construing the detailed terms and conditions of the contract. These describe the incidents of the contract and the nature and extent of the parties' obligations to each other. But the identity of the parties themselves is not an incident of the contract. Where a signature is accompanied by a description of the capacity in which the signatory has appended his signature the description is not a term or condition of the contract. It is part of the signature and so part of the factual evidence of the identity of the party which is undertaking contractual liabilities under the contract." [Emphasis added]

134. Indeed, it would not be difficult to ascertain the identity of parties to a written contract. The signatures appended alongside their names and the capacity in which they execute the contract go a long way in unmasking any party seeking to conceal their identity behind what may be termed as 'nominee signatories' as was the case here. In effect, the legal status of an agent as was Starryway could not be camouflaged by the assumed label of 'disponent owners' against the grain of the glaring evidence of such agency.

135. In Navig8 Inc v South Vigour Shipping Inc [2015] EWHC 32 (Comm) where the claimant had chartered four vessels through charterparties which had been signed by the vessels' commercial manager; and each charterparty contained the phrase "the disponent owners signatory in contract", followed by the manager's name, the court held that:

> " 97. So one is left with having to decide on the evidence who Mr. Pal, Mr. Rexer and Mr. Brocklesby intended to be liable as owner by agreeing to the words "Disponent Owners Signatory in Contract: SMMC." All of them envisaged, to the knowledge of each other, that Nan Fung was to be liable as owner. Yet it is hard to imagine words less likely to refer to Nan Fung. For, usually, the phrase "disponent owner" refers to a person who is himself a charterer of the vessel from the registered owner; see The Astyanax [1985] 2 Lloyd's Rep. 109 at p. 113 per Kerr LJ... However, there is one recorded instance of the phrase "disponent owner" being used to refer to a person who is the agent of the registered owner; see O/Y Wasa Steamship Co.Ltd. v and NV Stoomschip

Hannah v Newspaper Pulp & Wood Export Ltd. (1949) 82 Lloyd's List Rep. 936 at p.954 per Morris J. who held in the particular circumstances of that case that the phrase "though somewhat vague, is, in my judgment, not inapt to cover someone who is a manager, particularly if he is a manager having very wide powers." The evidence of Mr. Brocklesby and Mr. Rexer was to the effect that this is not a current use of the term.

98. I have come to the conclusion that the present case is another example of the phrase disponent owner being used in that, admittedly rare and unusual, sense of a manager of a vessel. The parties cannot have intended it to be used in its usual sense of a person who had chartered the vessel from the owner because that would mean that they intended Sparkle and Shining to be liable as owner which none of them did. I consider that the charterparty must be regarded as having been signed by SMMC as disponent owner in the sense of being the manager of the vessel.

I do not consider that any of the parties envisaged that SMMC was incurring personal liability on the charters. They must have considered that SMMC was acting on behalf of Nan Fung."

136. In the instant case, the chain of email communications before the recap of the fixture that constituted the Voyage Charterparty reveals that the pre-fixture communications were undertaken between Vena Wang (Vena) of Fairwind International Shipping Co. Ltd, which was at the time designated as the appellant's commercial manager, and one Raj (Raj) of CAS Agencies, the brokers who were negotiating on behalf of the owners of the motor vessel. In all of her communications with Raj, Vena would sign off as follows:

" Ms. Vena Wang Chartering Team Fairwind Shanghai as agent"

137. After communicating with Vena, Raj would then proceed with negotiations through emails with Capt. SM Sabed of Seatime Shipping PTE Limited, who was negotiating the charter of the vessel on behalf of the 1st respondent.

138. The negotiations culminated in a clean fixture recap dated 19th January 2021 sent by Raj to Sabed in which the owners were named as 'Fairwind International Shipping Co. Ltd'. The clean fixture recap was forwarded to the 1st respondent's director, Mr. Thalamuthu, by Sabed on 20th January 2021. However, later that day, Vena wrote an email to Raj seeking to revise the recap, stating that:

" tks for below clean recap, basically ok only owners pls revise asf,

* CHRTRS: ET TIMBERS PTE LTD

* Owners: Starryway Trading and Shipping Company Limited ...."

139. Accordingly, Raj revised the clean fixture recap by replacing 'Fairwind' with 'Starryway' as Owners, and sent the revised clean fixture recap to Sabed for onward transmission to the 1st respondent.

140. Subsequently, Vena emailed Raj the contacts of the person from their operation team who would handle post-fixture communications. The email read in part:

" ...for post fixture, pls contact our op team, details

asf,

ZHOU KAIKAN (CARL ZHOU)

Operation Team

...

Starryway as agent..."

141. Going forward, one Shawn Yang of the Operation Team was the person who communicated on behalf of the vessel owners, signing off every email thus:

> " Best Regards Shawn Yang Operation Team Starryway as agent".

142. It is also noteworthy that the Certificates of Entry issued to the Motor Vessel for the years 2020 to 2022 by Japan P&I Club clearly indicate that Fairwind was the appellant's commercial manager in 2020 before being replaced by Starryway as commercial manager in 2021; and that Starryway maintained its role as the appellant's commercial manager in 2022. According to the clean fixture recap and the Fixture Note finally executed by Starryway and the 1st respondent, these documents were among the documents the owners provided before fixing of the main terms.

143. The inescapable conclusion to be drawn from Fairwind's act in negotiating the fixture as 'agent' and from the vessel's documentation provided to the 1st respondent indicating that the appellant was the registered owner, and that Fairwind was its commercial manager, is that the phrase "Owners" in the initial clean fixture recap date 19th January 2021 was being used in reference to Fairwind as the manager of the vessel acting on behalf of the registered owners. The usage of this phrase in the context of the owners' commercial manager was maintained when Fairwind was replaced by Starryway as 'Owners' in the revised clean fixture recap and the Fixture Note executed by Starryway and the 1st respondent.

144. The fact that Starryway executed the Fixture Note as 'Owners' and not as 'disponent owners' pursuant to the Time Charter correctly found to be invalid as aforesaid defeats the appellant's claim that Starryway executed the voyage charter in the capacity of a disponent owner rather than an agent of the appellant. This is more so in light of the above-mentioned chain of email communication identifying Starryway as the appellant's agent.

145. In view of the foregoing, we also agree with the concluding findings by the learned Judge on the existence of the alleged Time Charter:

> " 174. The next question is the Time Charter. The time charter, whether forged or not, is irrelevant in these proceedings. It is between Defang Company limited and charterers who are not indicated.
>
> 175. Every clause is blank. Without consideration being rejected, there is no contract for the time. To make matters worse, the company signing is not party to the case. The counterparty to the time charter is not given. No one owned the time charter. It is a document inconsistent with all documentations and pleadings in the case. I find that there was no time charter at the time the voyage contract was undertaken and the entire duration of the voyage. The Defendant remained the owner of the ship MV dolphin star and Starryway Trading & Shipping Company Ltd was its agent after Fairwinds were repealed."

146. With regard to the Bills of Lading allegedly issued to the 1st respondent by OBT, the learned Judge's findings were that OBT, as the appellant's agent, received irrevocable instructions from the Master of

the motor vessel to issue Bills of Lading to the 1st respondent. According to the learned Judge, OBT failed to issue the Bills in consequence of which the 1st respondent successfully sued for breach of the contract of carriage in E003 of 2021. In the words of the learned Judge:

> " 176. ... for purposes of Liberia the agents were OBT Liberia Ltd. They received irrevocable instructions to issue bill of lading to the plaintiff. The defendant alleged pressure from the state of Liberia. The cardinal principle of law is audi aliterum paterm. We cannot condemn the state of Liberia unheard.
>
> 177. They were not party to the proceedings. It is a question that is not open to this court. Secondly the master who issued the irrevocable instructions did not tender any evidence. A document executed by a person with authority deemed to be effective till evidence to the contrary is given. In any case, the Defendants' were not the shippers they were the carriers. The masters bill of lading is a contract. It has to have the following:
>
> a. Offer
>
> b. Consideration
>
> c. Acceptance
>
> d. Legality
>
> 177. All the element of a valid contract were in place. Indeed, the defendant's agent sued for the agreed consideration, successfully."

147. In addition to the foregoing, it is noteworthy that the Bills of Lading issued by OBT and the second set of Bills of Lading issued by Blue Cross incorporated the terms of the Fixture Note dated 19th January 2021. Clause 2 of the Fixture Note specified the quantity of the logs to be loaded, which logs would be the sole cargo, and further stipulated that no part cargo would be allowed. On the 1st respondent's contention that the appellant acted in fundamental breach of the contract of carriage on account of the vessel having been loaded with less timber than the agreed quantity, and the vessel having carried part cargo and deviated to call on the port of Mombasa to offload part cargo, the learned Judge correctly observed and held thus:

> " 100. The Ship hired to carry cargo measuring at minimum 6,500 M^3 to a maximum of 6,800M3 of Liberian Ekika (Azobe Round [Logs] from Greenville Liberia to Chittagong Bangladesh. The said timber did not arrive and has not to date arrived in Bangladesh to [date]. Though the cargo was to be carried exclusively, the ship took in more cargo of Heavy machinery to be off loaded at Mombasa ...
>
> 153. Contrary to what the defendant stated in relation to prove of the matter, the Claimant laid before the court a plethora of evidence from the ship itself, to show that a claim herein is substantially proved ...
>
> 156. The documents filed for both sides were loudly silent on the discrepancies on the amount of timber. The documents state that the volume carried was 6,252.315M^3. This as far less than 6500/6800M^3 which were agreed upon. This was not explained. The contract provided for shutout. I have not seen

any dispute on the amount for shutout. A sum of US $ 8,780 is thus due and payable.

157. This is even evidenced by the use of extra space for carriage by Hongkong Shengua Trading Ltd for Cale Infrastructure Construction Company Ltd from Port Gabon to Mombasa Kenya. This was contrary to exclusive carriage contract. The voyage map shows that Kenya is not en route whether the route is though the Suez Canal or Cape of Good Hope.

158. I do not wish to repeat the factual matrix. [A] ship is a highly documented person with a standing in rem. The captain and the master of the ship have final words on the status of a ship. The declaration made to arrest Captain Ye Chonggang declared the defendant as the owner and Fairwind Shipping Company Ltd as the agent. This is the same Captain who gave authority to OBT shipping to sign original bill of Lading.

159. The bill of lading signed on the authority of OBT for 921 pieces of Liberian Ekki (Azobe) having 6,252.315. The clean recap fixture also had its particulars which are in consonance with the claimant's pleadings ....

168. At page 111 the claimant produced [a] bill of lading for a third party, which led to the docking in Mombasa. The cargo was picked at the port of Gental Gabon. The cargo was 30 used excavators, wheel loaders, Bulldozers, motor grader, stored rollers among others. It was for a charter dated 9/2/2021. The ship had been cleared for Chittagong on 5/3/2021."

148. Having found that the Fixture Note was executed by Starryway as the appellant's agent, the appellant's contention that the Bills of Lading issued by OBT were not binding as they had been issued without its authority is not worth exploring as the terms of the contract of carriage between the appellant and the 1st respondent were clearly evidenced in the Fixture Note, which terms had been incorporated into the Bills of Lading. It is also noteworthy that there was no rebuttal by the appellant to the 1st respondent's witness evidence that the vessel deviated to Gabon to load part cargo belonging to a third party; that the vessel switched off its communication, prompting the 1st respondent to engage the International Maritime Bureau to trace the vessel; and that the vessel was discovered to be en route to Mombasa to discharge the part cargo, whereupon she was arrested. To our mind, the learned Judge correctly concluded that the deviation constituted breach for which the appellant was liable to the 1st respondent as claimed.

149. Thus far, the decisive issues in the instant appeals (as consolidated) stand settled. Having carefully considered the records of appeal, the grounds on which they were anchored, the commendable spirited rival submissions of learned counsel in a dispute of this magnitude in complexity, the cited authorities and the law, we reach the inescapable conclusion that:

a. the High Court had admiralty jurisdiction to hear and determine the three claims culminating in the impugned ruling, judgment and decree;

b. the learned Judge was not at fault in consolidating and determining the three claims notwithstanding previous indication that Admiralty Claims No. E003 and E005 of 2023 were to be held "in abeyance" awaiting determination of Admiralty Claim No. E003 of 2021;

c. the three claims involved the three parties (Defang, ET Timbers PTE and KPA), and the same related to common issues to warrant exercise of the trial court's discretion to pronounce itself in the consolidated judgment;

d. the appellant was liable as claimed by the respondents in Admiralty Claim Nos. E003 of 2021 and E003 of 2023; and

e. the 1st respondent was not liable to the appellant as claimed in Admiralty Claim No. E005 of 2023 or at all.

150. In view of the foregoing, we hereby order and direct that:

(a). Civil Appeal No. E078 of 2021 and Civil Appeal No. E131 of 2024 (Consolidated) be and are hereby dismissed with costs to the respondents;

b. The Ruling and Orders of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) dated 14th July 2021 be and are hereby upheld; and

c. The Judgment and Decree of the High Court of Kenya at Mombasa (Kizito Magare, J.) delivered on 24th May 2024 be and are hereby upheld.

Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH 2025.

DR. K. I. LAIBUTA CArb, FCIArb.

.....

JUDGE OF APPEAL

L. ACHODE

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR