Owner of Motor Vessel "Mirembe Judith" v Jade International Shipping Line DMC (Civil Appeal E124 of 2022) [2023] KECA 452 (KLR) (14 April 2023) (Judgment)

Neutral citation: [2023] KECA 452 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E124 OF 2022

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

APRIL 14, 2023

BETWEEN

THE OWNER OF MOTOR VESSEL "MIREMBE JUDITH" ..... APPELLANT

AND

JADE INTERNATIONAL SHIPPING LINE DMC ..... RESPONDENT

(Being an appeal from the whole of the Ruling No.1 and orders of the High Court at Mombasa (Hon. Lady Justice Njoki Mwangi) dated and delivered on 28.10.22) in Admiralty Claim No. M001 of 2022)

JUDGMENT

1. On August 10, 2022, the respondent herein filed a claim form before the High Court at Mombasa in the nature of an Admiralty Action in rem against the appellant herein. The said claim was for US $ 15,870,000.00 together with interest at court rates of 12% as well as the costs of the suit. The respondent's claim, as pleaded, was that it entered into a cargo service agreement for slots for carriage of goods to transport cargo from port of Mombasa to port of Mundra (India) and from port of Mundra to port of Jebel Ali (United Emirates) with its client, Ms Feeder Logistics. In order to perform that contract, on or about the June 29, 2022, the respondent, as charterers and the appellant as owners of Motor Vessel "Mirembe Judith", through Messrs Trinity Ship Brokers Limited, agreed to a time charter of the said motor vessel "Mirembe Judith" with the initial delivery date thereof being 10th to July 15, 2022 at the port of Mombasa.

2. It was claimed that pursuant to the terms of the said charter party, the appellant issued a 10 days' notice of readiness to deliver the said vessel to the respondent at Mombasa at midnight 15/July 16, 2022. However, on July 8, 2022, the appellant sought an extension of the date of delivery to July 25, 2022 on the ground that there was congestion at the port, which request was accepted by the respondent. As a result, there was a revised charter party indicating the said new date. Notwithstanding that request, the appellant failed to deliver the vessel at the port of Mombasa and as at the time of the filing of the

claim, had not done so. As a result, the respondent was unable to meet its obligations to M/s Feeder Logistics. The claim was therefore for the loss and damages suffered as a result of termination of a service agreement with the respondent's client, M/s Feeder Logistics.

3. Contemporaneously with the claim, the respondent filed an application for a mandatory interlocutory injunction under certificate of urgency in which the respondent sought that a warrant of arrest be issued against motor vessel "Mirembe Judith" and in the alternative, the appellant do deposit security in the sum of US$ 15,870,000.00. The application was supported by a declaration in support of application for warrant of arrest by Idris Ahmed, the respondent's advocate on August 10, 2022. In the said declaration, the advocate reiterated the contents of the claim and added that the it had been informed by Messrs Trinity Ship Brokers Limited that the appellant was negotiating with Messrs Takaful Shipping for the charter of the subject vessel. The respondent was apprehensive that in the event that the said negotiations were concluded the subject vessel could sail for voyage to unknown destinations. In such event, the respondent would be unable to recover the loss and damages suffered. As a result, the respondent required the aid and process of the court to enforce its claim by arresting the motor vessel "Mirembe Judith".

4. On August 10, 2022, Njoki Mwangi, J certified the matter urgent, directed that the matter be heard during the vacation, issued warrant of arrest for the vessel "Mirembe Judith" and directed that the claim form be served forthwith and listed the matter for mention on August 18, 2022 before the duty judge. She also granted liberty to apply to either party. A warrant of arrest was accordingly issued together with notice of arrest of the said vessel.

5. By an application notice dated August 26, 2022, the appellant sought, inter alia, that the warrant of arrest issued on August 10, 2022 be set aside and that the claim be struck out with costs both of the application and the claim. That application was brought on the ground that the action in rem had not been shown to fall within the court's in rem admiralty jurisdiction under section 21 of the *Senior Court's Act, 1981*; that the court had no jurisdiction to determine the dispute given that the alleged charter party agreement between the appellant and the respondent contained an arbitration agreement pursuant to which the respondent had already referred the dispute for determination by the arbitral tribunal and that the institution of the action and the warrant of arrest procured by the respondent was an abuse of the process of the court and without jurisdiction. Further, it was contended that there was non-compliance with the requirements of part 61 of the *English Civil Procedure Rules, 2010* and *The Senior Courts Act, 1981* particularly as relates to provision of undertaking.

6. According to the appellant, whereas the claim was brought under section 20(2) of the *Senior Courts Act, 1981* of England, on the basis of 'a claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship', the evidence tendered in support of the claim did not satisfy the statutory threshold under section 21(4) of the said Act, permitting the court to exercise its admiralty jurisdiction. Further, it was alleged that the respondent failed to comply with the mandatory requirements of part 61 of the *Civil Procedures Rules, 2010* of England and the practice directions thereunder. According to the appellant, the said part 61 makes it clear that in order to come within the admiralty jurisdiction of the court, a claimant has not only to fall within the ambit of the claims set out in section 20(2), but has also to satisfy the jurisdiction requirements in section 21 of the *Senior Court Act* at the time the claim is filed.

7. Regarding section 21(4)(i) of the *Senior Courts Act*, it was contended that a claim against a ship under section 20(2)(e) to (r) of the Act can only be brought against a person who would be liable on the claim in an action in personam and who must, *inter alia*, either beneficially own all the shares in that ship or be a charterer of that ship under a charter by demise. It was therefore contended that the

respondent failed to establish that the appellants, as the owners of the vessel, would be liable in an action in personam in terms of the said section 21(4).

8. It was further contended that the mandatory provisions of form ADMS5 had not been fully met in the declaration in order to lead to the warrant of arrest. According to the appellant, the respondent did not cause the requisite search to be carried out with the registrar nor obtain his/her endorsement on the application for arrest as provided in part 61 *Civil Procedure Rules* of England and the practice directions thereunder; that the respondent failed to give its undertaking as required in the said rules and practice directions prior to or at the time the arrest was sought; and that in the absence of strict and substantial compliance with the law and the mandatory pre-conditions set out, the court's jurisdiction was not properly invoked and could not be exercised at all since there was no proper and lawful application for arrest of the vessel. In addition, it was averred that any dispute between the parties was to be referred to arbitration in London hence the court had no jurisdiction to hear the same. In this case the respondent had already referred the matter to arbitration.

9. Based on the foregoing, it was the appellant's contention that the court ought to have divested the respondent of any advantage it had secured by reason of material failures to comply with the mandatory requirements of the law hence the orders sought in the application. Reliance was placed on *Pembe Flour Mills Limited v The Owners of the Motor Vessel 'Loamis'* [2017] eKLR. The court was urged to set aside the warrant of arrest so that the pending London arbitral proceedings which were filed on August 8, 2022 can determine the existence of the charter party.

10. The respondent's case in reply, was that the claim was brought pursuant to section 20(2)(h) of the *Senior Courts Act, 1981* being a sum that had arisen out of an agreement relating to the carriage of goods in a ship or to the use or hire of a ship. It was his contention that, from the pleadings filed, it was clear that the subject matter of the issue in dispute related to the hire of the appellant's ship by the respondent and a breach of the said agreement by the appellant to the respondent's detriment hence bringing the matter within the purview of section 20(2)(h) of the *Senior Courts Act, 1981*. It was averred that the appellant on July 5, 2022 partly performed the charter party by issuing a "notice of readiness to deliver MV Mirembe Judith" on midnight 15th/ July 16, 2022 but failed to deliver the vessel to the respondent as agreed. As a result of the breach, the respondent was unable to perform its slot agreement with M/s Feeder Logistic DMCC thereby suffering loss damages.

11. On behalf of the respondent it was submitted that though the charter party was not signed, it was fixed through correspondence between Trinity Ship brokers, the respondent and the appellant and that the terms had been agreed upon by the boards of both parties leading to the notice of delivery of the vessel by the appellant. It was submitted, based on *Lydgett v Williams* [1845] 14 CJ 459, *L T Timbers v Dolphin Star* [2021] eKLR, *Mountain Pecush Mahajan v Yashwant Kumari Mahajan* [2017] eKLR and *E-Star Shipping & Trading Company v Nabiha Queen* [2021] eKLR that charter parties need not be signed as they can be oral and that some agreements may be in writing and signed while some do not have to be signed.

12. In answer to the allegation that there was no evidence as to how the claim was arrived at, it was contended that clause 11 o the claim form gave a breakdown of the damages. It was the declarant's position that the respondent had demonstrated and proved that the appellant was the legal and beneficial owners of the subject vessel, based on the search that indicated that the PMMM Estates (2001) Ltd were the legal owners of motor vessel Mirembe Judith. Further a search at the registrar of cautions revealed that there was no caution, a fact which was confirmed by the admiralty marshall, and that on August 10, 2022 the respondent gave an undertaking in the prescribed form.

13. While acknowledging that clause 67 of the charter party between the appellant and the respondent contained an arbitration agreement whose preliminaries the parties had already commenced, it was however averred that it is not incompatible with an arbitration agreement for a party to request from the court, before or during the arbitral proceedings, an interim measure of protection and for the court to grant that measure and that in this case, though there were arbitration proceedings, the orders were sought pursuant to clause 7 of the *Arbitration Act*. Based on *Euro Water Services Limited v Peter Gatune* [2015] eKLR, it was the respondent's case that it required the aid and process of the court to enforce its claim against the appellant. Accordingly, to set aside the warrant of arrest would not be in the interest of justice hence the court was urged to dismiss the application. Lastly, it was contended that form ADM 4 was filed on August 10, 2022 but was inadvertently not signed by the admiral marshall until September 6, 2022.

14. In a rejoinder by the appellant, it was submitted that the existence of the arbitral proceedings was not disclosed in the pleadings. Further, contrary to the assertions by the respondent, the application for the arrest of the ship did not state that it was simply meant for obtaining security. it was submitted that the application ought to have been under part 61 of the *Civil Procedure Rules*. Accordingly, one cannot, in such a claim purport to bring the same pursuant to section 7 of the *Arbitration Act*, as argued by the respondent. According to the appellant, section 7 applies to claims filed in commercial court and not for admiralty matters, such as the claim in rem that was filed by the respondent. In other words, once a dispute is covered by an arbitration clause, it ought not to be subject of in rem proceedings. Regarding the value of the subject matter in dispute, reference was made to an email sent by Trinity Shipbrokers on July 25, 2022 in which a loss of USD 250,000 was stated as having been incurred as opposed to the sum quoted in the pleadings of USD 15,870,000.00. The appellant insisted that the 1st declaration bore no pleadings on the beneficial ownership of the vessel.

15. In her ruling delivered on October 28, 2022, the subject of this appeal, the learned judge relied on *Lydgett v Williams* [1845] 14 CJ 459 and held that a charter party does not need a special form and does not need to be signed. According to the court, the emails exchanged by the parties culminated in a charter party. The learned judge then cited part 61 of the CPR – England and practice direction 61.5 which provide for the procedure for the arrest of ships and agreed that an application for arrest should be accompanied by form ADM 4 which must also contain an undertaking as to the arrest, expenses of the admiralty marshal and form ADM 5 which is a declaration in support of the application for warrant of arrest. The learned judge, however, found that though the claimant filed form ADM 4 on August 10, 2022, it was endorsed on September 6, 2022 by the admiralty marshal. The endorsement was meant to confirm that no caveat had been filed or entered against the arrest of the vessel. Based on *The Evangelismos* (1858) 12 Moo PC 352, *Stallion Eight Shipping v Nat West Capital Markets* [2018] EWHC 2033 (Admlty), *Republic v Anti-Counterfeit Agency exparte Caroline Mangala t/a Hair Works Saloon* [2018] eKLR, the learned judge held that since the search eventually revealed that there was no caveat, there was no evidence that the arrest warrants were obtained in bad faith or through gross negligence which would have been the basis for setting aside the warrants. To the learned judge, the appellant could be compensated by an award of costs for the prejudice caused by the arrest before the endorsement. The court however noted that the respondent should have been diligent in ensuring that the endorsement was made on August 10, 2022.

16. As regards the existing arbitral proceedings, it was found that the respondent's claim was based on beach of charter party agreement and based on *Republic of India and others v India Steamship Company Limited* (1996) 2 Lloyd's LR 12, the learned judge found that the respondent's claim was in rem proceedings. The court however found that it was not clear what the issues, claims and parties before the arbitral tribunal were and when they were instituted as no pleadings were exhibited by the

parties. The learned judge, therefore was not persuaded that the claim ought to be struck out based on the existence of the arbitral proceedings. In dismissing the application dated August 26, 20222 the learned judge awarded the costs to the appellant and ordered that the appellant was at liberty to deposit USD 16,000,000.00 in court to secure release of the motor vessel “Mirembe Judith”.

17. It is that decision that provoked this appeal in which a total of 36 grounds were raised.

18. At the hearing of this appeal which was hosted on virtual platform, learned counsel Mr Kinyua appeared for the appellant, while learned counsel Mr Ahmed appeared for the respondent. It was submitted before us by Mr Kinyua that the respondent’s application seeking for warrant of arrest or in the alternative deposit of security in the sum of US$ 15 870 000.00 was never heard *inter partes*. Instead, that what was fixed for hearing and was heard was the appellant’s application dated August 26, 2022 seeking to set aside the warrants of arrest and for striking out of the claim. Therefore, that the learned judge’s decision allowing the respondent’s application and ordering the appellant to deposit in court the sum of US$ 16 000 000.00 to secure the release of the motor vessel "Mirembe Judith" was a blatant violation of the fundamental right to a fair trial under article 25(c), access to justice under article 48 and the right to be heard under article 50(1) of the *Constitution* rendering that ruling and those orders null and void.

19. It was further submitted that since the appellant's claim was for alternative security in the sum of US $ 15 870 000.00, the court’s suo moto decision of enhancing the security by USD 130,000.00 to the sum of USS 16 000 000.00 was a manifestation of bias and was without jurisdiction since a judge cannot order security in an amount exceeding the security sought. In the appellant’s view, by ordering security deposit in foreign currencies, the learned judge exposed the appellant to a loss in the event that the claim is dismissed. In its view, it is extremely rare and would be irresponsible for any commercial minded litigant to deposit any money in court since getting money out of court is a challenge in itself and money deposited in court does not earn interest.

20. It was contended that though the learned judge appreciated that under part 61.5 (10) of the *English Civil Procedure Rules*, where an in-rem claim has been issued and security sought, any person who has filed an acknowledgment of service may apply for an order specifying the amount and form of security to be provided, the learned judge failed to appreciate that though the appellant acknowledged service, it had not made any such application since it challenged jurisdiction and filed an application to discharge the vessel from arrest and to strike out the claim form. Accordingly, since there was no application by the appellant before the learned judge for an order specifying the amount and form of security, the judge had no jurisdiction to deal with an application that was not before her.

21. According to the appellant, it was not necessary to file a document titled "application for mandatory interlocutory injunction" and similarly seek an arrest of the same vessel *vide* an application in form ADM4 on August 10, 2022. In the appellant’s view, had the learned judged considered this issue, she would not have entertained any doubt that the respondent had not filed a form ADM4 application for arrest and custody and therefore there was no undertaking given. In other words, it was the appellant’s case that by filing the application for mandatory interlocutory injunction, that was an indiation that no application under form ADM4 had been filed.

22. It was submitted that by dealing with the issue of security before considering the appellant’s postion regarding the same, the learned judge denied the appellant the opportunity to place on record the appellant’s view thereon and her decision cannot stand. To the appellant, the amount of security to be offered for the release of any vessel from arrest is calculated on the basis of the claimant's best arguable case and in this case, the claimant's best arguable case does not exceed US$ 250,000/-.

23. The appellant doubted the respondent's position regarding the profit it was making and submitted that the judge did not consider that nothing prevented the respondent from chartering or hiring a vessel of similar tonnage at the same, less or more daily hire as the daily hire in the charter party which would not have caused any damage to the respondent and then claim for the difference in the daily hire assuming that there was a valid charter party. It was submitted that these are some of the arguments the appellant was denied the opportunity to make when the court directed the appellant to deposit the said sum of US$ 16,000,000.00. It was further submitted that the learned judge did not address her mind to part 61.6 (3) to the effect that under no circumstances can the court order deposit of security in an amount exceeding the value of the vessel.

24. According to the appellant, it is only the owner of the vessel or other property under arrest that has capacity to apply to the court for an order specifying the amount and form of security to be provided. The arresting creditor or alleged creditor has no such capacity. His obligation is to state the amount of security sought in his declaration accompanying a competent application and undertaking for arrest and custody in form ADM4. In this case, it was submitted that no such application existed in the court file. Furthermore, there is no reasoning or discussion anywhere in the ruling relating to the amount and form of security. A ship owner whose vessel has been arrested, it was contended, has multiple options on the form security should take. Therefore, the amount and form of security is not an issue that can be determined by a judge suo moto or by a judge and the claimant alone.

25. It was the appellant's case that whereas under article 50(1) of the *Constitution* of Kenya 2010 every person has a right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body, a person cannot go to court and to such tribunal on the same dispute against the same defendant over the same subject matter. In this case, the learned judge had evidence from the respondent itself that the respondent had commenced arbitral proceedings in London which proceedings were underway.

26. The learned judge, it was submitted, held, quite prematurely, that there was a valid charter party between the appellant as owner and the respondent as the charterer of the "Mirembe Judith" and in so doing, the learned judge interfered with matters governed by the *Arbitration Act*. It was submitted that it was clear from the record that the subject matter in both proceedings was the same charter party between the same parties over the same vessel and to the dispute arising out of or in connection with the charter party including but not limited to the respondent's claim in respect to the appellant's renunciation and /repudiation of the charter party. The respondent was accused of abusing the process of this court by pursuing its claim in the High Court alongside London arbitration and forcing the appellant to run up two sets of costs and creating a potential for conflict between decisions of the High Court and those of the arbitrators on merits and procedure.

27. According to the appellant, when a judge finds that a vessel has been arrested without an application or without compliance with the mandatory requirements the warrant should be set aside as a matter of right. It was submitted that contrary to the learned judge's finding that an application for arrest should be accompanied by form ADM 4, judicial arrests of ships follows a duly completed form ADM 4 titled "application and undertaking for arrest and custody", containing a request that a search be made in the register before the warrant is issued to determine whether there is a caution against the arrest in force. According to the appellant, an application in form ADM4 serves three purposes: First, it is the application for arrest and custody and not a form accompanying an application for arrest and custody as the judge erroneously thought; secondly, it is an undertaking by the claimant to personally pay the fees of the marshal and all expenses incurred or to be incurred in respect of the arrest, the endeavours to arrest, the care and custody of the vessel while under arrest and the release or endeavours to release

it, including the upkeep of the crew and their wages; thirdly, it contains a request to the court to carry out a search in the register of cautions at the bottom.

28. It was reiterated that the form speaks for itself that the confirmation must be provided before the warrant is issued and certainly before the court file is taken to the judge. In this case, the appellant contended, the learned judge issued the warrant without that confirmation. If the learned judge had seen the application in form ADM 4 on August 10, 2022, it was submitted, she would not have issued the warrant because that confirmation according to her ruling was not given by the admiralty marshal until September 6, 2022. In the appellant's view, the learned judge trivialized form ADM4 which she reduced to the issue of a caution against arrest. Whether a caution exists or not there can be no arrest in the absence of an application and undertaking for arrest and custody in form ADM4.

29. It was further contended that contrary to the position taken by the respondent, the search and the confirmation is the preserve of the court officials in the registry and the confirmation is signed by the deputy registrar or the admiralty marshal and not by claimants' advocates; as the form ADM4 omitted the request for the search it cannot be said to be in the prescribed form; that since the form ADM 4 did not contain any request on the issue of the caution the admiralty marshal acted without authority or jurisdiction by issuing the confirmation at the bottom of that form.

30. The appellant insisted that the claim form, the document titled "application for a mandatory interlocutory injunction", the certificate of urgency and the declaration were bound together and filed in a tamper proof bundle on August 10, 2022 and that the bundle did not include form ADM 4 which did not include the request to carry out a search. It was explained that applications and undertakings for arrest and custody in form ADM4 are not subjected to any hearings. The function of a judge on receipt of form ADM 4 in an admiralty claim in rem is to be satisfied that there is a claim form and there is a form ADM4 application and undertaking for arrest and custody duly signed and filed by the claimant containing a confirmation from the admiralty marshal that there is no caution against arrest and that a declaration complying with all the requirements is filed in support of the form ADM 4 application.

31. When so satisfied the court will order the arrest of the vessel and issue the warrant of arrest where upon the application will be spent and the court will become *functus officio*. The appellant added that there are no replying affidavits, statements of case, witness statements, grounds of opposition, written submissions, oral arguments or preliminary objections in form ADM 4 applications which the learned judge and the respondent were engaged in. When not satisfied the judge declines the application summarily. Any person dissatisfied with the arrest must file their own application to set aside the warrant or if jurisdiction is not contested, file an application notice under part 61. 5 (10) for an order specifying the amount and form of security so as to obtain a release of the vessel.

32. It was therefore submitted that in this case, from the course adopted by the court, the judge was dealing with the "application for mandatory interlocutory injunction" hence its orders made on August 10, 2022 that the application be mentioned on August 18, 2022 before the duty judge, the request by learned counsel for the respondent that the two applications be heard together and his submission that the respondent's application was also urgent and ought to be heard as a matter of urgency. Accordingly, it was submitted, the respondent could not have been referring to a form ADM4 application which had not been filed and which in any event cannot be the subject of any hearing nor can there be hearings of form ADM4 applications after the warrant is issued. If what the learned judge had dealt with was an application and undertaking for arrest and custody in form ADM4, there would have been no further scope for any hearings or mentions.

33. Whereas, there is a serious dispute between the parties in the court below and in the London arbitration on whether there was a valid charter party, it was contended that the learned judge determined that

issue with finality at an interlocutory stage. This, according to the appellant, was a violation of section 10 of the *Arbitration Act* 1995. The learned judge also pre-judged that issue assuming that the claim proceeds in the High Court to trial.

34. It was noted that none of the three declarations made by Idris Ahmed, advocate on behalf of the respondent were sworn otherwise they would have amounted to perjury and their contents were untruthful. It was urged that the learned judge should have rejected all the declarations by Mr Idris Ahmed without which the claim cannot lie and the warrant of arrest cannot be sustained even assuming that there was an application and an undertaking for arrest and custody in the first place. To the appellant, in practical terms this is a claim by Mr Idris Ahmed and not by the respondent, yet litigants cannot by resolutions turn their advocates into witnesses and that advocates being officers of the court cannot be witnesses of contested facts beyond formal and routine business.

35. According to the appellant the inappropriate contact between a party and a judicial officer should have been dealt with in a more procedural manner. The learned judge ought to have recalled the parties' advocates, disclosed and read into the record the whatsapp and text messages and recused herself. It was submitted that when a judicial officer is contacted inappropriately by a party or an advocate the decision whether to disclose that contact and to recuse oneself is a judicial decision and not an administrative function. In the appellant's view, it was the learned judge that was seized of the application the hearing of which she had concluded the previous date. There was no need to discuss the issue with the presiding judge or to seek advice from the presiding judge on whether to recuse herself. In doing so the learned judge did not act independently and as it turned out the advice she received and acted upon was wrong.

36. It was urged that if a judge considers contact to be inappropriate the judge cannot subsequently determine the dispute, deliver the judgment or ruling and then recuse herself. She ought to have recused herself immediately after that inappropriate contact. It defeats logic to recuse oneself after determining the dispute. It was therefore contended that the inappropriate contact influenced the learned judge's decision in granting an application she had not heard and condemned the appellant without a hearing and also without an amendment of the application for security and without any request at all enhanced the security by US$ 130,000.00.

37. The appellant therefore sought that this appeal be allowed, the ruling and orders of the judge given on August 28, 2022 be set aside, the appellant's application notice dated August 26, 2022 be granted as prayed, the motor vessel "Mirembe Judith" be released from arrest unconditionally and the appellant be awarded costs of this appeal and in the court below.

38. On behalf of the respondent, an issue was taken as regards the 36 grounds of appeal as not being realistic. It was submitted that following the appellant breach by the appellant of its obligations under the charter party by failing to deliver the vessel, the respondent moved to secure its interest by applying for warrants of arrest to the trial court which was allowed *ex-parte* and an *inter partes* hearing fixed for a later date. It was submitted that the respondent's statement of claim was brought under the auspices of section 20(2)(h) of the *Seniors Court Act, 1981*.

39. According to the respondent, the charter party was fixed by the parties by way of correspondence and thereafter partly performed by both parties. In support of this mode of agreement, the respondent relied on the case of *Lidget v Williams* (1845) SC 14 LJ ch 459 and *Welex AG Rosa Maritime Ltd (The Epilson Rosa)* [20021EWHC 762 (Comm) and "time charters", seventh edition and submitted that its claim is in respect of the breach by the appellant of a charter party agreement which squarely brings it within the ambit of the Admiralty Court.

40. On the issue of arbitration clause, the respondent cited section 7 of the *Arbitration Act* (cap 9 Laws of Kenya) and submitted that the existence of the arbitral proceedings do not take away the Admiralty's Court's jurisdiction to issue interim orders for protection purposes and that the order issued was to secure and protect the respondent herein from the exposure of loss and damage as the respondent has no other means of recovery of the award it will ultimately obtain other that the subject vessel.

41. It was submitted that the claim at the admiralty court is one made in rem and sought to secure the ultimate award of the respondent would have in its claim and the claim at the arbitral tribunal are in personam as they emanate from a contract between the appellant and the respondent which contained an arbitration clause. Accordingly, the proceedings at the admiralty court are not sub judice as purported by the appellant and if the appellant truly believed that to be the case then prudence would demand that the appellant makes an application under section 6 of the *Arbitration Act* to stay the proceedings at the Admiralty Court pending hearing and determination of the arbitration proceedings which the appellant has not. The respondent noted that the appellant on one hand denies the fact that there is a valid charter party and on the other hand relies on the arbitration clause in the very same agreement that it seeks to disown. To the respondent, it is impractical for the appellant to require the court to determine the question of jurisdiction without determining whether there is a valid charter party between the parties.

42. Regarding the alleged non-compliance with mandatory requirements of part 61 of the *English Civil Procedure Rules*, 2010 and in particular in relation to undertakings, the respondent reproduced rule 61 and practice direction 61.5 of the English Civil Procedure Practice Directions and contended that both these documents, in prescribed forms, were duly filed by the respondent in court on August 10, 2022 prior to the warrant of arrest being issued and the arrest of the subject vessel and that the trial judge had sight of them prior to granting a warrant of arrest as provided by the rules. It was submitted that form ADM4 is an entry in public record stating a fact that it was received by the High Court Admiralty registry on August 10, 2022 and its validity cannot be nullified by mere conjecture on the part of the appellant as there is no evidence of the allegations by the appellant that rebuts the document. Furthermore, the respondent has no control over the admiralty marshal 's hand to sign the endorsement at the bottom of form ADM4 and to apportion blame on the respondent for the inadvertent delay would be unfair. Reference was therefore made to the decision of the Supreme Court of Kenya in *Hassan Nyanje Charo v Khatib Mwashetani and 3 others*, [2014] eKLR.

43. In any event, it was contended, rule 61 of the *English Civil Procedure Rules, 2010* makes it mandatory for an applicant to request for a search and not ensure that the endorsement is done by the admiralty marshal. In any case, it was argued, there was no prejudice suffered on the part of the appellant by the inadvertent delay in signing form ADM4 by the admiralty marshal as it was confirmed that there was indeed no caution against the arrest of the subject vessel therefore it was as at the material date free of encumbrance from arrest.

44. On the appellant's right to be heard, it was submitted that the application that was dismissed was that by the appellant seeking to set aside the warrant of arrest and strike out the respondent's claim and that there was an ample opportunity to be heard as envisaged by law. However, the appellant appeared to confuse the impugned ruling to have been meant for the respondent's application for warrant of arrest which is still yet to be heard and determined. In fact, it was contended, the appellant is to date yet to file any response to the said application and that the orders that emanated from the impugned ruling are quite clear that it is only the application dated August 26, 2022 that was dismissed. There was no order allowing any other application on record.

45. It was however clarified that there was an order made by the court that gave the appellant an option to deposit a sum of US$ 16,000,000/= in court so as to secure release of the vessel, this was made in the court's wisdom and cognizance of the fact that the subject vessel as well as the appellants are in business and would want the vessel to voyage therefore to avoid any further losses and for commercial expediency the learned judge gave an option to the appellant. In the respondent's view, it is far fetched to deem the impugned ruling to be a determination of the respondent's application.

46. It was explained that the value of the security orders by court is based on the respondent's claim as set out in the statement of claim dated August 10, 2022 of US$ 15,870,000/= plus costs and interest therefore cannot be deemed excessive. In the respondent's view, the sum of US$ 250,000/= mentioned by the appellant was way below the sum claimed by the respondent which is what the respondent sought to protect whilst making the application for arrest of the subject vessel. Furthermore, the learned trial judge was never presented with nor was she aware of the existence of the valuation report that the appellant referred to therefore she had no way of knowing what the value of the subject vessel is the purported sum of US$ 3,000,000/=.

47. It was contended that the valuation itself is suspicious especially with the appellant's repeated averments that its suffers a loss of US$ 20,000/= per day which would translate to a losses equivalent to the vessel's purported value within 5 months. That in itself is highly curious. Either the value is grossly undervalued or the unspecified and unproved alleged losses are highly exaggerated. It was contended that in the event the appellant felt that the value of the security is excessive then it ought to have made an appropriate application to court for reduction thereof in accordance with rule 61.6 of the *English Civil Procedure Rules*.

48. On the issue of execution of documents, it was submitted that the very nature of maritime claims have an international angle which usually don't afford the parties the time or ease of having the parties execute all documents on their own especially where a party is apprehensive that the subject vessel may sail away from the jurisdiction of the court (as was the case herein). Parties are therefore allowed by the *English Civil Procedure Rules* and practice directions to have declarations executed on their behalf by counsel. This is seen by the wording of the various prescribed forms which clearly state that they can be signed by the party or its advocate and the sample declaration also provides for a statement of truth which is signed by the party making the declaration.

    Furthermore, the declarations filed on behalf of the respondent have disclosed the source of the information as well as documents in support of the averments in the declaration.

49. To the respondent, the comparison by the appellant of the declarations to an affidavit is a very erroneous presumption as the declarations firstly need not be sworn. Secondly the declarations on contentious matters may be prepared by an advocate on record whilst affidavits cannot, and as advocates work under instruction from a client, the concept of hearsay would not be applicable. It would therefore erroneous to reject the declarations filed by counsel on behalf of the respondent herein.

50. It was urged that the learned trial judge considered the issues and delivered a well reasoned ruling on the issues and based on fact and law. It was contended that the allegations of bias against the trial judge were unfounded in light of the appellant's own conduct. It was therefore sought that the appellant's appeal is devoid of merit and ought to be dismissed with costs.

Analysis And Determination

51. We have considered the issues raised in this appeal. Before we deal with the substance of the appeal, the respondent took issue with the number of grounds that were raised in this appeal. This appeal is

grounded on a whopping 36 grounds. Rule 88(1) of the *Court of Appeal Rules, 2022* provides 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. A memorandum of appeal that does not strictly comply with the said rule was deprecated by this Court in *James Mwangi Nganga v Kenyatta University Council & 4 others* civil appeal (application) No 317 of 2000. We associate ourselves with the sentiments made therein that counsel ought to strictly comply with the rules when formulating the grounds in the memorandum of appeal. Unnecessarily lengthy memorandum of appeal and numerous grounds of appeal do nothing but unnecessarily take up precious judicial time required in arguing and determining the appeal and, on occasion, confuse the issues in the appeal. We urge counsel, in framing their grounds of appeal, to ensure that they are concise and to avoid unnecessary grounds. An appeal is not necessarily to be judged merited by the number of grounds cited but by the quality of those grounds. In our view, from the submissions placed before us, this appeal could have easily been disposed of by setting out no more than 10 grounds of appeal. Accordingly, we do not intend to deal with those grounds sequentially.

52. This being the first appeal, this court's mandate as re-affirmed in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way."

We however must be cautious in making determination that do not prejudice pending proceedings, this being an interlocutory appeal. We defer to the decision of this court in *David Kamau Gakuru v National Industrial Credit Bank Limited* civil appeal No 84 of 2001 where it was held that in an interlocutory appeal where the suit is yet to be tried in the superior court, the Court of Appeal will refrain from expressing concluded views on any issue which it thinks may arise in the intended trial. In this case there are proceedings pending before the High Court as well as before the arbitral tribunal. Accordingly, we will avoid the invitation to deal with matters which in our view are both unnecessary and inappropriate in determining this appeal.

53. In our view, the determination of this appeal revolves around the issues whether the respondent complied with the procedural requirements when it applied for warrant of arrest of the ship; whether it was proper for the learned judge to determine an application for security when what was before her was an application seeking to set aside the warrants of arrest; and whether in the light of the pending arbitral proceedings, the court had jurisdiction to deal with the matter.

54. It was the appellant's case that the respondent failed to establish that the appellants, as the owners of motor vessel "Mirembe Judith, would be liable in an action in personam in terms of the said section 21(4). In response to this, the respondent contended that though the charter party was not signed, it was a fixture through correspondence between Trinity Ship brokers, the respondent and the appellant and that the terms had been agreed upon by the boards of both parties leading to the notice of delivery of the vessel by the appellant.

Since there are pending arbitral proceedings, we will refrain from dealing with that issue so as not to prejudice the outcome of the said proceedings.

55. It is agreed by both parties that the instant appeal arose from a ruling delivered by the High Court from the appellant's application dated August 26, 2022. That application, as we have stated above, sought the setting aside of the warrants of arrest issued in respect of motor vessel "Mirembe Judith" on August 10, 2022 and for the striking out of the claim. In her ruling the learned judge apart from disallowing

the application proceeded to direct the appellant to furnish security in the sum of US$ 16,000,000 in order to secure the release of the said vessel. It ought to be noted that the prayer for the security as an alternative to issuance of warrant of arrest was one of the prayers sought in the respondent's application dated August 10, 2022. The parties were in agreement that the said application is yet to be heard *inter partes*. It is therefore true that the learned judge dealt with a matter which was not properly before her and arrived at a decision thereon when she had not been addressed on the same by the parties and in particular, the appellant. That a court ought not to deal with a matter that is not properly before it was appreciated by this court in *Nairobi City Council v Thabiti Enterprises Ltd* civil appeal No 264 of 1996 [1995-1998] 2 EA 231 where the court held that strange results would follow if a judge were free to determine issues not properly before him, and that a judge has no power or jurisdiction to decree an issue not raised before him. The respondent has, before us, justified the order on security on the ground that the learned judge gave the appellant an option to deposit a sum of US$ 16,000,000/= as in the court's wisdom, and cognizance of the fact that the subject vessel as well as the appellants are in business and would want the vessel to voyage, the order was therefore made to avoid any further losses and for commercial expediency. One may well be advised to take seriously the wisdom of this court in *James Njoro Kibutiri v Eliud Njau Kibutiri* 1 KAR 60 [1983] KLR 62; [1976-1985] EA 220 that short cuts are fine, as long as you are absolutely sure they won't land you in a ditch. Similarly, in *Macharia v Wanyoike* [1981] KLR 45, the court appreciated that whereas shortcuts may not be an out of place on grounds of expedience or as a time-saving device, experience has repeatedly shown that short-cuts invariably result in litigation being more expensive and time-absorbing in the end, hence a short-cut in breach of a fundamental rule creating or occasioning remedial action cannot escape the stigma of 'delay'. Lastly, on this point it was held in *Lehmann's (East Africa) Ltd v R Lehmann & Co Ltd* [1973] EA 167 that the supposed short-cuts in procedure almost always confuse and obscure the true issues and almost always result in prolonged litigation and unsatisfactory decision.

56. With due respect the learned judge simply had no reason to give gratuitous orders which none of the parties had sought before her. The court had not yet benefited from arguments from the parties as regards the nature and amount of security and in any case the application was seeking security in the sum of US$ 15,870,000.00 and not the US$16,000,000.00 which seemed to have been plucked from the air. Accordingly, that part of the order cannot stand.

57. In her ruling the learned judge extensively set out part 61 of the *Civil Procedure Rules* of England and practice direction 61.5 as regards the procedure for the arrest of ships. Part 61.5 Part 61(10) provides that:

> Where an in rem claim form has been issued and security sought, any person who has filed an acknowledgement of service may apply for an order specifying the amount and form of security to be provided.

58. It is therefore clear that whereas the claimant may in the claim form seek security, it is upon those who have acknowledged service to move the court for the determination of the amount and form of security that ought to be provided. The claimant or the court cannot determine that since, in so far as the claimant in whose favour an arrest warrant has been issued is concerned, its interests are secured. Accordingly, it was not proper for the learned judge to determine the security suo moto, when the issue of security is a preserve of those parties who have acknowledged service, such as the appellant.

59. In her ruling the learned judge found, and rightly so in our view, that from the above cited English provisions, an application for arrest should be accompanied by form ADM 4 which must also contain an undertaking as to arrest, expenses of the admiralty marshal and form ADM5 which is a declaration in support of an application for warrant of arrest. The court found that whereas the claimant filed

form ADM4 on August 10, 2022, the said form was endorsed on September 6, 2022 by the admiralty marshal to show that no caveat had been filed or entered against the arrest of the vessel. While the learned judge found that it was not contested that the admiralty marshal searched the register after the warrant of arrest had been issued, she nevertheless was of the view that since the subsequent search revealed that no caveat was registered against the ship, the appellant had failed to prove that "the discrepancy in the dates" was done in bad faith and gross negligence. She therefore declined to set aside the warrants on that basis.

60. In our view, the procedure for arrest of the ship is clearly illustrated in part 61 of the *Civil Procedure Rules of England* and practice direction 61.5. The remedy of arrest of ship is akin to mareva injunctions in civil proceedings, the difference being that whereas the former is a remedy in rem, the latter is a remedy in personam. This court in *Kuria Kanyoko T/A Amigos Bar & Restaurant v Francis Kinuthia Nderu & others* [1988] KLR 169; [1988-92] 2 KAR 126; [1986-1989] EA 237 detailed the circumstances under which such remedies ought to be issued. In our view, considering the consequences that follow the issuance of such orders, the prescribed procedure for their issuance ought to be scrupulously complied with in order to prevent persons who might abuse the said procedure in order to gain undeserved forensic advantage and compel the owner of a ship to settle an otherwise undeserved claim. One of the requirements before a warrant of arrest is issued, as provided in part 61.5(3)(a) of the *English Civil Procedure Rules* is that a party making an application for arrest must request a search to be made in the register before the warrant is issued to determine whether there is a caution against arrest in force. That is a condition precedent that must be complied with before a warrant of arrest can issue. It is clear that it was not complied with in this case. Being a condition precedent and considering the drastic consequences that follow upon the issuance of warrant of arrest of a ship, it is our considered view that it cannot be wished away by simply being termed as "the discrepancy in the dates" the way it was termed in the impugned ruling. A rule of procedure particularly where the procedure in question is a special procedure as in cases where what is sought is the arrest of a ship, ought to be taken seriously. As was held in *Chelashaw v Attorney General & another* [2005] 1 EA 33, without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law. Procedural rules are not made for fun. See *Ngare v Attorney General and another* [2004] 2 EA 217.

61. This court in *Onjula Enterprises Ltd v Sumaria* [1986] KLR 651, emphasised the need to comply with procedural rules when it held that:

> "It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See *London Association for the Protection of Trade & another v Greenlands Limited* [1916] 2 AC 15 at 38.

We accordingly find that the failure to take a necessary step in the procedure for issuance of the warrants of arrest without any reason being proffered for non-compliance, ought to nullify the proceedings leading to the same.

62. It was also the appellant's case that the respondent did not file form ADM4 which is an application and undertaking for arrest and custody by the time the warrant of arrest was issued. Our attention has, however, been drawn to a document bearing the court stamp for August 10, 2022 titled application and undertaking for arrest and custody. Whereas the latter document is not exactly in the form prescribed, it does substantially comply with the said form. From the body of the prescribed form, the appellant's

submission that apart from that form ADM4 no other application is contemplated is not entirely lacking in substance. However, in order for us to make a determination whether or not the documents relied upon by the respondent as having been filed at the time the matter was placed before the learned judge would require us to undertake an investigation which is beyond the scope of the appeal before us. Suffice it to say that section 72 of the *Interpretation and General Provisions Act*, cap 2 Laws of Kenya provides as hereunder:

> Save as is otherwise expressly provided, whenever a form is prescribed by a written law, an instrument or document which purports to be in that form shall not be void by reason of a deviation therefrom which does not affect the substance of the instrument or document, or which is not calculated to mislead.

Accordingly, nothing turns on non-compliance with the format of the prescribed form.

63. On the issue of jurisdiction, the parties agreed that there were arbitral proceedings between the parties herein. However, the respondent took the view that since the proceedings before the High Court were proceedings in rem intended to secure the subject of the arbitral dispute, it was proper for the respondent to move the High Court for the reliefs in the nature sought. This submission was based on section 7 of the *Arbitration Act* which provides that:

> 1. It is not incompatible with an arbitration agreement for a party to request from the High Court, before or during arbitral proceedings, an interim measure of protection and for the High Court to grant that measure.
>
> 2. Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

64. In our view, an application under section 7 of the *Arbitration Act* must be expressly stated to be and must seek interim proceedings meant to protect the applicant pending the determination of the arbitral proceedings. In other words, the court in granting an order under section 7 of the *Arbitration Act* plays a facilitative role. It does not, under the guise of exercising that jurisdiction, usurp the role of the arbitral tribunal. Once the order is given in such applications, those proceedings come to an end.

65. In this case, the proceedings before the High Court did not purport to be interim in nature and nowhere was it disclosed that the claimant was only seeking an interim protection. The proceedings were commenced by a claim form in which the respondent sought an award of US $ 15,870,000.00 together with interest at court rates of 12% as well as the costs of the suit. It was in the application that the warrant of arrest of the ship was sought. Accordingly, the proceedings were not commenced as contemplated in section 7 of the *Arbitration Act*. In her ruling the learned judge, while acknowledging that the issue of ongoing arbitration proceedings was not controverted by either party, found that it was not clear what the issues, claims and parties were before the arbitral tribunal or when they were instituted.

66. Assuming that the proceedings were in the nature of interim relief pending arbitration, then it would necessarily follow that the claim before the court was the same as the one before the arbitral tribunal since a claim under section 7 of the *Arbitration Act* can only succeed where the parties in both the arbitral proceedings and the protective proceedings are the same and the substratum of both proceedings is the same. Accordingly, the learned trial judge's failure to find that, based on the submission by the respondent that it was merely seeking protective relief, the parties were necessarily the same and the substratum the same, cannot hold. In any case, the grounds relied upon by the learned

judge for declining to find that the pending arbitration proceedings were relevant to the proceedings before her were not alluded to by the respondent. To the contrary, the respondent readily admitted that the proceedings before the High Court were ancillary to the arbitration proceedings.

67. We are therefore of the view that the proceedings before the High Court were not brought pursuant to section 7 of the *Arbitration Act*. Being substantive action, the High Court ought not to have entertained or continued to entertain the said proceedings once the parties brought to its attention the existence of the arbitral proceedings. Section 10 of the *Arbitration Act* bars the court from intervening in matters governed by that Act. This position was affirmed by this court in *East African Power Management Limited v Westmont Power (Kenya) Limited* civil appeal No 55 of 2006 where the court expressed itself as follows:

> " The intention of the parties to refer any dispute to arbitration is clearly expressed in the clause and as held by the superior court it was not only necessary to give effect to the intention of the parties but it was a mandatory duty on the part of the court. Again it has not been demonstrated that there is no agreement at all to refer to arbitration or that it is not valid. Thus, the court's limited role in intervening where parties have agreed to refer a matter to arbitration is set out in section 10 of the *Arbitration Act* as follows: "except as provided in this Act no court shall intervene in matters governed by this Act." The equivalent to article 6 of the *Model Law* upon which the Kenyan provision is based reads: "In matters governed by this law, no court shall intervene except where so provided by this Law." In short, the role of the court as captured in the 1995 Act is a facilitative role. Thus, in the (*ICC Publication, 1993*) an English Judge, Lord Mustill in "*Comments and Conclusions" in Conservatory & Provisional Measures in International Arbitration 9th Joint Colloquium*" has described the relationship between the courts as follows: "ideally, the handling of arbitral disputes should resemble a relay race. In the initial stages, before the arbitrators are seized of the dispute, the baton is in the grasp of the court; for at that stage there is no other organization which could take steps to prevent the arbitration agreement from being ineffective. When the arbitrators take charge, they take over the baton and retain it until they have made an award. At this point, having nolonger a function to fulfil, the arbitrators hand over the 'baton so that the court can in case of need lend its coercive powers to the enforcement of the award." Going by the above, the issues which have been raised...are all well within the ambit of a future arbitrator appointed under the agreement in question. Thus, whether or not there is a dispute is a matter the arbitrator can rule on. Similarly, whether or not the arbitrator to be appointed has jurisdiction to rule on his jurisdiction is beyond question. He would be entitled to rule on his jurisdiction."

68. In our view, the proceedings commenced before the High Court were not expressed to be facilitative in nature but were completely separate proceedings. We accordingly find that one cannot commence or maintain proceedings which run concurrently with arbitral proceedings. To do so amounts to an abuse of the process.

69. In the premises, we find it unnecessary to deal with the other issues raised before us. We find merit in this appeal, set aside the decision made by the learned judge on October 28, 2022 dismissing the applicant's application dated August 26, 2022 and substitute therefor an order allowing the same.

    We set aside the warrants of arrest issued against motor vessel "Mirembe Judith" on August 10, 2022 and strike out the respondent's claim. For avoidance of doubt we set aside the alternative order as regards the deposit of US$16,000,000 by the appellant.

70. We award the costs of this appeal and those before the trial court to the appellant.

71. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR