



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: MUSINGA, GATEMBU, MURGOR, J.J.A.)**

**CIVIL APPEAL NO. 23 OF 2019**

**BETWEEN**

**JAMAL MOHAMED BANDIRA.....APPELLANT**

**AND**

**THE OWNERS OF THE MOTOR VESSEL "NASIBU".....RESPONDENT**

(An appeal from the Judgment of the High Court of Kenya at Mombasa (Njoki Mwangi, J.) delivered on 13th December, 2018 *in H.C. Admiralty Claim No. 4 of 2017.*)

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**JUDGMENT OF THE COURT**

1. The appellant filed an admiralty claim in the High Court of Kenya at Mombasa. The claim was against the Owners of Motor Vessel "Nasibu", a ship, (*M/V Nasibu*).

2. The appellant stated that he hired *M/V Nasibu* to transport some cargo from the Port of Kismayu, Somalia, to Mombasa; that enroute the motor vessel developed mechanical problems; that the crew members were arrested and charged at Kilifi Senior Resident Magistrates' Court for being in Kenya illegally but were later released; that he provided petty cash to the captain of the vessel to cater for legal costs, including cash bail to secure the release of the vessel and the crew; that he supplied food to the captain and the ship's fuel and spare parts, all totaling to **Kshs.722,000/** which he claimed against the respondent.

3. The respondent denied the appellant's claim in its entirety. By way of a counterclaim, the respondent stated that the appellant caused an unlawful arrest of *M/V Nasibu* and as a result the respondent had suffered loss and damage, the particulars thereof being as follows:

**"i. Repair costs for the main engine and generator – Kshs.2,400,000/=;**

**ii. Mooring costs from 10th May 2016 to 18th September 2017 – Kshs.65,000/=;**

**iii. Mooring costs from 19th September 2017 until conclusion of the case – at Kshs.15,000/= per month;**

**iv. Travelling and accommodation expenses for the defendant (the defendant's witness) –**

**Kshs.25,000/= per visit;**

**v. Travelling and attendance expenses for the lawyer – Kshs.62,000/=; and**

**vi. Hire charges for round trip from Mombasa Port to Kismayu Port at a maximum of 15 days – Kshs.450,000/= for every 15 days, until the release of the vessel."**

4. In response to the counterclaim, the appellant stated that the respondent would not have incurred the alleged loss and damage if it had deposited Kshs.400,000/ as security to secure the release of the motor vessel as ordered by the High Court.

5. During the hearing, the appellant testified that he hired M/V Nasibu through the respondent's agent and paid US Dollars 3000 plus fuel worth US Dollars 1,200 for transportation of his cargo from Kismayu to Mombasa.

6. With regard to the appellant's claim, the appellant relied on a handwritten ledger that showed various payments to the captain, crew and diesel, all amounting to Kshs.133,000/; another handwritten document showing payments of Kshs.13,500/ to an undisclosed lawyer, Kshs.220,000/ to the court, Kshs.20,000/ to the Criminal Investigation Department (C.I.D), Kshs.20,000/ to Customs, and Kshs.130,000/ towards

*"PIL EXPENSES."* There were also two other handwritten documents showing various payments to certain individuals for Kshs.54,040/ and Kshs.20,000/. All the four documents were allegedly signed by the captain of MV Nasibu, **Osielo Okoth, PW2**. It was however not clear what the payments were for.

7. The trial court rejected the appellant's claim, holding that the evidence adduced was insufficient to prove the claim. The learned judge summed it up as follows: -

**"41. It is the finding of this court that although the claimant specifically pleaded the amounts that he gave to the Captain of the MV Nasibu, the same were not proved. No proof was tendered to show that the money was spent for purposes suggested by the claimant and Captain of the ship."**

8. Regarding the counterclaim, the respondent's contention was that had the appellant not moved the court to issue the order for the ship's arrest, it would have been operational; that following its arrest, the ship remained at the sea unoperated, thus occasioning her immense damage.

9. In an interlocutory ruling delivered on 4th August, 2017, the Court had found that the arrest of the ship was lawful but ordered its release upon deposit of security in the sum of Kshs.400,000/ in order to reduce the loss and damage it was incurring. However, the respondent did not provide the said deposit, saying that it was unable to raise the said sum. That notwithstanding, the learned judge held: -

**"44. The implication of the dismissal of the claimant's claim would be that the loss suffered by the defendant would have to be paid by the claimant as, was it not for the claimant's action, the defendant would not be in the situation it finds itself in now."**

10. The trial court rejected a sum of Kshs.15,000/ that was allegedly claimed as Port dues because it had not been pleaded though a receipt was produced as proof of payment. Equally, the court rejected claims for salaries paid to crew from June 2017 to August 2018 because the claim had also not been pleaded and so could not be claimed.

11. The trial court found that the respondent had proved some of the particulars of its counterclaim and allowed them as follows: -

***i. Repair costs of the main engine and generator of MV Nasibu – Kshs.2,400,000/=;***

***ii. Mooring costs from 10th May 2017 to 18th September 2017 – Kshs.65,000/=;***

***iii. Mooring costs from 19th September 2017 until conclusion of the case at Kshs.15,000/= per***

***month = 15 months x 15,000=Kshs.225,000/=;***

***iv. Hire charges for a round trip from Mombasa port to Kismayu port and back at Kshs.400,000/= per month from the date of the arrest of MV Nasibu on 10th May 2017= Kshs.400,000 x 19 months = Kshs.7,600,000/=;***

***v. Gross award = Kshs.10,290,000/=."***

12. The trial court declined to award general damages as no evidence had been adduced in support thereof. Costs of the claim and interest were awarded to the respondent.

13. Being aggrieved by the said judgment with respect to the counterclaim, the appellant preferred an appeal to this Court. The appellant did not appeal against dismissal of his claim. In the memorandum of appeal, the appellant contended that the learned judge erred; in failing to hold that if the respondent was dissatisfied with the arrest of MV Nasibu, it was duty bound to timeously move the court to set aside the arrest order so as to mitigate its losses; in failing to take into account the respondent's obligation to mitigate losses by depositing the security of Kshs.400,000/; in awarding Kshs.7,600,000/ as loss of income without sufficient proof; in failing to take into account that between October 2017 and May 2018 the ship was stranded at Kilifi and Old Port, Mombasa, for no fault of the appellant; in awarding Kshs.2.4 million as repair charges for the engine and generator without sufficient proof; and in awarding mooring costs to the respondent.

14. The appellant urged the Court to set aside the impugned judgment and substitute therefor a judgment dismissing the counterclaim with costs, and award costs of the appeal to the appellant.

15. Parties filed comprehensive written submissions and bundles of authorities and their advocates, **Mr. Mogaka** for the appellant, and **Mr. Yunis Mohammed** for the respondent, made brief oral highlights of their respective submissions.

16. We shall start with grounds 1 and 2 that relate to the arrest of MV Nasibu and the appellant's contention that the respondent failed to mitigate its losses.

17. The motor vessel was arrested on 10th May, 2017 following a successful application for its arrest by the appellant. Service of the claim and the arrest warrant was effected upon the respondent on 12th May, 2017. The respondent did not file acknowledgement of service until 4th June, 2017. A statement of defence was then filed on 10th July, 2017 together with an application seeking discharge of the warrant of arrest. The appellant filed a replying affidavit on 12th July, 2017 in opposition to the application for the release of the ship. The application was heard on 19th July, 2017.

18. In a ruling delivered on 4th August, 2017, the Court declined to order unconditional release of the ship. Instead, the learned judge (**P.J. Otieno, J.**) stated, *inter alia*: -

**“The parties have been unable to agree on security for the release of the vessel. It is not in doubt that as the vessel continues under arrest, (sic) it continues to incur costs which costs either of the parties will have to bear at the end. Such costs need to be mitigated even if they cannot be avoided all the same. I have therefore considered the pleadings on record and the submissions of the parties on a viable security and based on what I consider the claimant's best arguable claim I direct that the vessel may be released if the Respondent deposits in court cash security in the sum of Kshs.400,000/=. I consider it inappropriate to release the vessel without its registration document (sic) not serve any useful purpose because such documents are known to be part of the vessel without which it cannot be operated effectively.”**

19. The respondent neither deposited the security as ordered nor filed an appeal against that ruling. Instead, on 6th November, 2017 the respondent filed an application for recusal of P.J. Otieno, J. from handling the matter, saying that from the manner in which the learned judge had handled the matter, “*a reasonable or fair minded person would think there was actual bias or apprehended likelihood of bias.*”

20. Subsequently, the respondent withdrew the application for the judge's recusal and sought leave to amend the statement of defence to introduce the counterclaim, which was granted. The hearing commenced before P. J. Otieno, J. on 29th July, 2018 when the appellant and his witness, PW2, testified and closed the appellant's case. The respondent sought an adjournment which was granted. The defence case was adjourned to 28th March, 2018, but come that day, the record shows that there was no appearance for the respondent. The court on its own motion adjourned the defence case to 3rd July, 2018.

21. When the defence case came up for hearing on 3rd July, 2018, the learned judge observed that the respondent, within a span of 29 days, had written letters to the court alleging that he was favouring the appellant. The judge opted to recuse himself from the matter. Subsequently, the case file was placed before **Njoki Mwangi, J.** who finalized the hearing and delivered the impugned judgment on 13th December, 2018.

22. We have set out the above chronology of events to demonstrate that from the date of arrest of the ship, 10th May, 2017 until 13th December, 2018, a period of about 19 months, the respondent did very little, if any, to mitigate its losses. During the hearing, the respondent's main witness, **Mumin Ali Mumin, DW1**, told the court that “*the judge who was hearing this case asked we deposit security at Kshs.400,000/ but I did not have the money. In my view, the arrest of the vessel was unlawful and the amount of security required was steep.*”

23. MV Nasibu is owned by Nasibu Fishing Company Limited, whose directors are **Mumin Ali Mumin** and **Hanna Mumin Ali**. DW1 told the trial court that the company is a profitable one, it even owns another motor vessel. The witness did not therefore satisfactorily explain why the respondent could not have taken an appropriate action to mitigate its losses over a period of 19 months, if indeed the respondent was losing as much money every month as indicated in the statement of claim.

24. It is trite law that a plaintiff has a duty to mitigate loss. In ***Halsbury's Laws of England, fourth Edition Volume 12 at para 1193***, the learned author states as follows: -

**“The plaintiff must take all reasonable steps to mitigate the loss which he has sustained consequent upon the defendant's wrong, and, if he fails to do so, he cannot claim damages for any such loss which he ought reasonably to have avoided.”**

See also ***African Highland Produce Limited v John Kisorio [2001] eKLR*** where this Court stated: -

**“The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort, and he is then bound to act, as best as he may, not only in his own interests but also in those of the defendant.”**

25. We agree with the appellant that the learned judge, in making an award for loss of income ought to have taken into account the respondent's obligation to mitigate losses, by depositing security as ordered by the court on 4th August, 2017, which it failed to.

26. We now turn to consider whether the respondent proved its claim for special damages and loss of earnings. We shall first consider the claim for Kshs.2,400,000/ for repair of the vessel's engine and generator. The basis of that claim was that, if the appellant had not moved to apply to have the ship arrested, the ship would have been operational and not in need of any repair.

27. The respondent's sole witness, DW1, testified that prior to its arrest, the ship was in good state. He relied on a safety certificate dated 30th June, 2016 that was issued after the ship was surveyed and inspected on 24th June, 2016. The certificate was valid for one year, and so

it was due to expire on 23rd June, 2017. The ship was inspected on 1st December, 2017 and according to the evidence adduced, it was found to be unseaworthy. The inspection report showed very many defects. On 16th January, 2018 Ajitec Engineering Services assessed the condition of the ship's engine and recommended replacement of the water pump and the generator.

28. Before we deal with the issue of the documents that the respondent relied upon in support of the claim for repair of the ship's engine and generator, it is important to first examine whether the damage to the said parts was entirely occasioned by the arrest of the ship.

29. The record shows that before its arrest, the ship was inoperative for about 7 months. DW1 told the court that on 13th October, 2016, the ship and its crew were arrested by the police and the ship's captain was charged in ***Criminal Case No. 389 of 2016***, in the Senior Resident Magistrates' Court at Kilifi. The captain and the crew were suspected to be terrorists. The ship and the crew were eventually released on 21st February, 2017.

30. The appellant had nothing to do with that arrest. The ship's captain, PW2, told the court that before the arrest the ship had developed mechanical problems, forcing him to dock at Kilifi where it also fueled. After the release of the ship, it sailed to the Old Port, Mombasa, where it remained inoperative for about 3 months, until 10th May, 2018, when it was arrested.

31. Apart from the annual certificate of seaworthiness, no other evidence was adduced by the respondent to show that the ship was being maintained over that period of almost 8 months when it was inoperative, both at Kilifi and Mombasa Old Port. Such evidence would have been necessary to justify the respondent's contention that the ship's unseaworthiness was due to its arrest at the instances of the appellant and not otherwise.

32. Furthermore, the ship was arrested on 10th May, 2017 and the order for its release on deposit of security by the respondent was made within a period of less than 3 months thereafter, that is on 4th August, 2017. It was not shown that the damage to the engine and the generator occurred between 10th May, 2017 and 4th August, 2017. Had the respondent provided the security as ordered by the court, the ship would have been free to sail shortly after the order of its release was made, assuming it was in a good condition before its arrest. We therefore do not agree with the learned judge that all the loss and damage suffered by the respondent as pleaded was attributable to the appellant due to the arrest of the ship.

33. We now turn to consider the respondent's evidence in support of the claim for loss and damage.

**i. Repair costs for the engine and generator-Kshs.2,400,000/.**

The learned judge allowed a sum of Kshs.160,000/ for the assessment of the engine of the vessel and a further sum of Kshs.380,000/ allegedly paid for mechanical services. The respondent's witness, DW1, had produced two receipts dated 1st January, 2018 for the aforesaid sums. However, the two receipts were issued by Nasibu Fishing Company Limited, the owner of MV Nasibu. DW1 is the principal shareholder of the said company.

34. Similarly, the learned judge also awarded Kshs.60,000/ paid for security of the vessel; Kshs.50,000/ for towing of the vessel to Tudor for service, and Kshs.65,000/ as mooring costs. What was produced by the respondent as evidence of payment of these sums were receipts issued to DW1 by Nasibu Fishing Company Limited.

35. How could a company issue receipts to one of its directors in purported payment for repairs and services rendered to the motor vessel and then use such receipts to claim special damages? These, in our view, were fabricated documents. These special damage claims that were based on receipts issued by Nasibu Fishing Company Limited to Mumin Ali, DW1, were not proved and must be disallowed.

36. Regarding the other expenses in respect of costs of repair of the engine and generator, the learned judge held as follows: -

***“47. Also, the claimant entered into a contract on 1st January 2018 with Ajitec Marine Engineers to maintain and service the MV Nasibu at a cost of Kshs.20,000/= per month. This amount was proved by the defendant vide a letter dated 1st January, 2018. Additionally, there are invoices received by the defendant for various parts of the vessel that will need to be replaced; maritime safety equipment proforma from Sun Fire & Safety at Kshs.478,500/=; proforma for the generator from Car & General at Kshs.817,105.98/=; spare parts of the main engine from Mantrac for Kshs.2,695,078.89/= and proforma for water pump from Engineer Supplies for Kshs.51,000/=. The expenses that are payable to the defendant by the claimant so as to restore the vessel back to working condition are those pleaded in the counter-claim.”***

37. It is important that we examine whether indeed the respondent proved these heads of special damage. The contract and the letter dated 1st January, 2018 could not be relied upon as proof of special damage of oiling and greasing services. That contract on its own, could not be used to prove payment of the contract sum. Similarly, an invoice or a proforma invoice is not evidence of payment of the quoted sum. In ***Total (Kenya) Limited v Janevams Ltd [2015] eKLR***, this Court, citing its earlier decision in ***Great Lakes Transport Co. (U) Ltd v Kenya Revenue Authority [2019] eKLR 720*** held that: -

***“A proforma invoice is given in respect of an advice sought from a supplier as to what the cost of goods wanted would be, i.e. quotation given on enquiry as to the price of the goods sought and an invoice is given in cases where an order for supply of goods has been made but payment is not yet made. In either case none of the two documents would amount to a receipt.”***

38. The Court went on to state: -

**“A proforma invoice is considered a commitment to purchase goods at a specified price. It is not a receipt, and as such cannot attest to the existence of or the acquisition of goods. We consider that a proforma invoice was not satisfactory proof of the respondent’s loss, or the replacement value of the respondent’s equipment, and the learned judge misdirected himself in finding that the proforma invoices were sufficient proof of special damages for the respondent’s equipment supposedly withheld by the appellant.”**

39. From the foregoing, it is therefore evident that the respondent’s production of the invoices and proforma invoices was not proof of the special damages claimed on account of repair costs of the engine and generator. The learned judge therefore erred in allowing the same. We must therefore discount the awarded sum of Kshs.2,400,000/

**(ii) Loss of income.**

40. The respondent averred that it had lost income as a result of the unlawful detention of the motor vessel. DW1 stated that the hire charges for a round trip from Mombasa Port to Kismayu Port at a maximum of 15 days is Kshs.450,000/ and claimed that sum for every 15 days from the date of arrest of the ship until its release.

41. The respondent relied on two agreements for charter of the ship for 15 days’ round trip. The first one was dated 14th October, 2015 and the second one 29th March, 2016. Each of them showed that the hire charges were Kshs.400,000/ for round trip.

42. The learned judge stated: -

**“49. The mere fact that the defendant produced two agreements to show that the MV Nasibu generates Kshs.400,000/= for a round trip of 15 days is not sufficient proof that the defendant was assured that the vessel would be hired after every 15 days. Therefore, one cannot conclude that the claimant made Kshs.900,000/= every month. The defendant's ship has however been lying idle due to the warrants of arrest that were issued on application of the claimant. I therefore award the defendant Kshs.400,000/= per month as loss of income from 10th May, 2017 until the date of this Judgment, based on the charter agreements he produced as evidence of the earnings the MV Nasibu made for carriage of goods. It was DW1’s evidence that when the MV Nasibu was not chartered, she was engaged in fishing business.”**

The total sum awarded as loss of income due to non-hire of the motor vessel was Kshs.7,600,000/, being Kshs.400,000/ per month from 10th May, 2017 up to December 2018, a period of 19 months. The respondent’s counsel submitted that the court properly exercised its discretion in making that award.

43. On the other hand, the appellant’s counsel submitted that there was no sufficient evidence to justify the award for loss of income. Counsel referred the Court to the evidence of DW1 in his examination in chief where he stated: -

**“I was using the ship for cargo transportation from Mombasa to Kismayu and then I would carry fish back to Mombasa. I would also charter the ship, that would be about 2 times in a year but it would depend on variables.”**

44. In cross examination, DW1 stated: -

**“In the year(s) 2015 and 2016 I hired the vessel once per year. Hire charges costs Kshs.450,000/ for 15 days. I don’t charter all the time. I do not have documents to show the amount of money I earn when the vessel is not on hire.”**

45. We agree with the appellant’s counsel that Nasibu Fishing Company Limited, the registered owner of MV Nasibu, ought to have prepared annual returns and audited books of accounts from which the income generated from the hire of the ship would have been shown. The ship was acquired in 2012 and yet no evidence of the income generated from it was availed. Apart from the two hire contracts, no receipts in acknowledgment of the hire charges were ever produced.

46. But even if any compensation was payable for loss of income, it could not have been from the date of the ship’s arrest until the date of judgment. Earlier on, we held that the respondent was under an obligation to mitigate its losses. From the date of the ship’s arrest, 10th May, 2017, to the date when the court ordered its conditional release, 4th August, 2017, was a period of less than 3 months. That is the maximum period for which the appellant would have been liable. However, the respondent did not demonstrate that in the three or four months preceding the ship’s arrest any hire contract had been entered into and could not be performed due to the arrest. To the contrary, there is evidence that for a period of nearly seven months before its arrest, the ship was inoperative, for reasons that were not attributable to the appellant.

47. All in all, we find and hold that the respondent did not prove its counterclaim. Consequently, we allow this appeal with the result that the award of Kshs.10,290,000/ in favour of the respondent is hereby set aside. As regards costs, the order that commends itself to us is that each party should bear its own costs of the appeal.

**Dated and delivered at Nairobi this 8<sup>th</sup> day of May, 2020**

**D.K. MUSINGA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**A.K. MURGOR**

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**JUDGE OF APPEAL**

I certify that this is a ntrue copy of the original

**Signed**

**DEPUTY REGISTRAR**