REPUBLIC OF KENYA
IN THE COURT OF APPEAL OF KENYA
AT NAIROBI

Civil Appeal 286 of 2000

THE OWNERS AND MASTER OF THE

MOTOR VESSEL "JOEY" …….....…… APPELLANTS

AND

THE OWNERS AND MASTERS OF THE MOTOR

TUGS "BARBARA" AND "STEVE B" …….....…… RESPONDENTS

(*An Appeal from a Ruling and Order of the High Court of Kenya*

mbasa (Waki, J.) dated 10th August, 2000

In

Admiralty Cause No. 2 of 1998)

****

JUDGMENT OF THE COURT

This was not an easy matter and we spent a considerable amount of time thinking and deliberating over it. It was argued before us by Mr. Inamdar, learned counsel for the appellants, and Mr. Khanna, learned counsel for the respondents, with long breaks in between their arguments and as is usual and as the Court has come to expect from them, where any particular previous decision/s of the Court supported any particular proposition of law being advanced by them, the decision to the extent of the support would be said to be correct, but whenever the decision did not support the proposition advanced, then to that extent, the decision would be said to be wrong and ought not to be followed. It is our sincere hope that this practice will end.

The issues which we are grappling with in the appeal, the cross-appeal and the grounds for affirming the decision of the High Court arose way back on 22nd June, 1998, when Murri International Salvage Operation Company Ltd. (hereinafter Murri) signed with Alba Petroleum Ltd. (Alba) a "TOWHIRE INTERNATIONAL AGREEMENT (Daily Hire) in respect of the towage of the motor vessel (Tanker) "The Joey" which at the time the agreement was being signed was standing immobilized at latitude :08.49.6 North and Longitude: 52:50.7 East within the Arabian Sea/Indian Ocean. The registered

owners of "the Joey" were M/s Festival Ltd. of Donglas, Isle of Man and the vessel operated under the flag of the Bahamas. She was, in fact, an oil tanker.

On 13th June, 1998, "the Joey" left Fujaira in the United Arab Emirates. She was loaded with a cargo of 10,536.58 MT of fuel oil. That oil belonged to Veba Oil Supply and Trading GmbH of Hamburg Germany, and the oil was to be delivered to Veba's customers in Mombasa. "The Joey" was under a voyage charter to Veba. Around 22nd June, 1998, "The Joey" ran into turbulent waters and its propeller shaft broke. To avoid further damage to the engine, the Master of "The Joey" switched off her engine and "The Joey" became immobilized at the site already indicated herein. Alba Petroleum Ltd. are based in Mombasa and on behalf of Veba, they were the appointed managers of "The Joey" at the Port of Mombasa. Murri carries out salvage business in Mombasa and are the managing agents of the owners of the Motor Tugs "Barbara" and "Steve B". These tugs are used for towing or salvage business as the case and the circumstances may warrant.

So there was "The Joey", immobilized in the high seas. Alba needed tugs to go to the high seas to bring "The Joey" to the Port of Mombasa. Murri was ready and available to do so. Two important personalities then appear on the scene: Gordon Macmillan Cuthbert for Murri and Shankar Narayan for Alba. Cuthbert was the Operations Manager of Murri in Mombasa. Narayan was the Commercial Manager of Alba. The two gentlemen, after negotiations, both verbal and written, signed the agreement of 22nd June, 1998. At first, only the Tug Barbara was involved in the agreement. The Barbara sailed from the Port of Mombasa on 23rd June, 1998, a day after the signing of the agreement. The Barbara reached "The Joey" on 29th June, 1998, and the towlines were connected and towing began. But on that same day at about 2005 hours the towlines parted; they were reconnected at 1045 hours and the towing resumed at 1100 hours. The towlines parted again on 30th June, 1998 and the Master of "The Joey" started complaining to Narayan that the Barbara was not in a fit condition or state to tow "The Joey". For Murri, Cuthbert was contending that the weather conditions in the area had become unexpectedly too severe and even the engine of the Barbara was being affected. The seeds of a dispute were sprouting fast. Matters deteriorated so fast that by 1st July, 1998, Narayan had engaged another tug, "the Seabulk Danah" from Bombay to come and tow "The Joey". The Barbara, however, remained by "The Joey". To Narayan, the matter remained simply one of towage. Cuthbert thought otherwise and informed Narayan that he would be sending out the "Steve B" to join in the operation. On 8th July, 1998, "the Seabulk Danah" was recalled to Bombay, apparently due to the weather condition in the area. The Master of "The Joey" had apparently, no option but to rely on the Barbara. The towlines were reconnected on 9th July, 1998 and the towing resumed. Narayan was informed that the "Steve B" would joint the Barbara on 10th July, 1998 and obviously with very bad grace, Narayan in the end agreed that the "Steve B" should join in the operation. "The Steve B" joined on 11th July, 1998. There were clearly wrangles over the terms and conditions on which the "Steve B" was to join in the operation but we are really not concerned with that at least at this stage. Troubles still continued on the way with the towlines of the "Steve B" parting but in the end the two tugs brought "The Joey" to the Port of Mombasa.

On 20th July, 1998 Cuthbert and a Mr. Murri visited Narayan and informed him (Narayan) that "the Barbara" and the "Steve B" had rendered salvage services to "The Joey" and were entitled to be remunerated on the basis of salvage and not on the basis of towage. For the uninitiated, it may help if we explained that salvage is a much more difficult operation than towage and is, therefore, paid on a higher scale. Narayan considered the position taken by Murri and after a couple of days following the visit to his office, Narayan told Cuthbert that the two Tugs had not rendered any salvage operation and that Alba would be prepared to pay reasonable towage charges after taking into account all the circumstances of the tow. Murri was adamant that the two tugs had rendered salvage services. The dye was cast and the next step for the parties was the High Court of Kenya at Mombasa.

That is how it came to pass that on the 4th August, 1998 THE OWNERS, MASTER AND CREW OF THE MOTOR TUGS "BARBARA AND "STEVE B" as plaintiffs, issued a WRIT OF SUMMONS against the OWNERS AND MASTER OF THE MOTOR VESEEL "JOEY" as defendants. It was an ADMIRALTY ACTION IN REM AGAINST THE MOTOR VESSEL "JOEY."

It appears that judges and lawyers who deal with admiralty matters love the use of arcane procedures and that intelligibility is still a prized concept there. The writ of summons ran thus:-

"***<u>DANIEL TOROITICH ARAP MOI</u> President of the Republic of Kenya:***

To the Defendants and other persons interested in the motor vessel "JOEY" registered at the Port of Bahamas:

THIS WRIT OF SUMMONS has been issued by the plaintiffs against property described above in respect of the claim set out herein.

WE RECOMMEND YOU that within 14 days after the service of this writ, counting the day of service, you do either satisfy the claim or lodge in the High Court Civil Registry, Law Courts, P.O. Box 90140 Mombasa an ACKNOWLEDGEMENT OF SERVICE.

AND TAKE NOTICE if fail (sic) to satisfy the claim or to lodge an Acknowledgment within the time stated the plaintiffs may proceed with action and judgment may be given without further notice to you and if the property described in this writ is under arrest of the court it may be sold by order of the Court.

WITNESS the Honourable Zachaeus Chesoni, Chief Justice of Kenya this ….. day of August, 1998."

We pause here to remark that Daniel Toroitich Arap Moi was the President of the Republic of Kenya when the writ of summons was issued while Zachaeus Chesoni was the Chief Justice. Neither of them signed that document; nor did anyone expect that any of the two would even see the document before it was issued. Nevertheless, it was signed on their behalf on 4th August, 1998 by Mr. Justice Waki who was then a High Court Judge in Mombasa. Why such fiction is still persisted in we leave to heads wiser than us.

The writ then continues, in the relevant places:-

INDORSEMENT OF WRIT:

"***The plaintiff's claim is for remuneration for salvage rendered by them to the Defendants' motor vessel "Joey" and her cargo, bunker, stores, and freight, in the Indian Ocean/Arabian Sea between 29th June, 1998 and 4th August, 1998 at the daily rates of USD 5000 and 4,500 as stipulated in the Towhire Agreement dated 22nd June, 1998 and the Amendments therein whose terms are contained in letter dated 10th & 11th July, 1998 together with interest pursuant to section 35A of the Supreme Court Act 1981 and/or under the inherent jurisdiction of the Admiralty Court."***

The High Court of Kenya exercises an admiralty jurisdiction and by ***section 4(1)*** of the Judicature Act, ***Chapter 8*** Laws of Kenya.

"***The High Court shall be a court of admiralty, and shall exercise admiralty jurisdiction in all matters arising on the high seas, or international waters, or upon any lake or other navigable inland waters in Kenya."***

Then ***section 4(2)*** of the Act tells the High Court the manner in which it is to exercise its admiralty jurisdiction. The section provides:-

"***The admiralty jurisdiction of the High Court shall be exercisable –***

(a) over and in respect of the same persons things and matters, and

(b) in the same manner and to the same extent, and

(c) in accordance with the same procedure, as in the High Court in England, and shall be exercised in conformity with international laws and the comity of nations."

The Supreme Court Act, 1981 is an Act of Parliament of the United Kingdom and is applicable in Kenya by virtue of the above provisions . There cannot or should not be much complaint about this because the vessels which visit our port city of Mombasa come from all nations of the world and if the High Court is to exercise jurisdiction over them, it must do so in conformity with the international laws and the comity of nations. The United Kingdom Act appears to be a reflection of the international laws and the comity of nations though as we have seen in the writ of summons, we have removed the Queen of England and substituted her with the President of Kenya.

For our purposes ***section 4(3)*** of the Judicature Act is also important as it provides that:-

"***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."***

There is accordingly, nothing in law to prevent a judge of the High Court exercising admiralty jurisdiction from applying the powers such a judge has under the Civil Procedure Act or the rules made thereunder if exercise of such power is necessary to enable the judge do justice between the parties. In the appeal before us, Mr. Justice Waki held that amendments to pleadings relate back to the time when the pleadings being amended were first filed. That is an accepted principle under the Civil Procedure Act and the Civil Procedure Rules. The learned Judge was perfectly entitled to hold so in the proceedings which are now the subject of this appeal.

The writ of summons dated and lodged in the High Court on 4th August, 1998 was as is usually the case in such matters, accompanied by an AFFIDAVIT TO LEAD WARRANT OF ARREST." The party to be arrested was the motor vessel Joey and in that affidavit, Cuthbert swore that between 29th June, 1998 and 4th August, 1998 certain salvage services were rendered by the motor tugs Barbara and "Steve B" to the Joey, that the action was brought by the plaintiffs pursuant to ***section 20(2)(j)*** and ***section 21(3)*** and/or ***(4)*** of the Supreme Court Act, 1991, that "The Joey" was the ship against which the action was brought, that the plaintiffs' claim had not been satisfied and thus it was necessary for the court to order the arrest of the Joey and such like maters. The learned trial Judge, by his order dated 4th August, 1998 held, and we quote him:-

"***I am satisfied from the affidavit of the Applicants' Operations Manager that there is a claim in rem against the motor vehicle "Joey." There is jurisdiction, therefore, to issue the order sought.***

I have perused the Lloyds report on the motor vessel and have heard counsel for the applicants. The provisions of 0.75 RSC have been substantially complied with. In the event I grant the order sought pending the determination of the applicants' claims. Costs in the cause."

Chief Justice Zachaeus Chesoni then duly issued the warrant of arrest against "The Joey", though the warrant was only signed by Waki, J. "The Joey" was duly placed under arrest pending the determination of the plaintiffs' claims. The defendants moved quickly to force the determination of the plaintiffs' claims. By a notice of motion dated and lodged in the High Court at Mombasa on 11th August, 1998 and said to have been brought under ***RSC 0.75 r 1***, ***O.18 r. 19*** and the inherent jurisdiction of the court, the Owners and Master of "The Joey" asked the Judge in Mombasa for three orders, namely:-

"***(1)That the action in rem brought against the motor vessel "Joey" and her cargo, bunkers, stores and freight be struck out and the warrant of arrest issued herein be set aside as the said action does not fall within the ambit of section 20(2) (j) of the Supreme Court Act, 1981 of England (as applied to Kenya) and this Honourable Court therefore has no jurisdiction to hear and determine the same.***

(2) That alternatively and/or further the endorsement of the writ issued in this cause and the consequential warrant of arrest be set aside on the ground that they are otherwise an abuse of the

process of the court and/or that in all the circumstances of the case, the issue of the writ in rem and the continuance of the arrest is unjust.

(3) That further and /or in the alternative, and in any event, the action purported to be filed against the cargo on board the vessel "Joey" and the consequential warrant of arrest issued in respect of it, be set aside on the ground that no valid basis exists or is shown to exist, either in law or otherwise, any course or action against the cargo.

(4) ……..."

We need to point out that ground (3) was spent long before the matter was ventilated in the High Court and was not urged in that court or in this Court. The motion was supported by a first affidavit of Narayan which was only nine paragraphs. The relevant paragraphs were (3), (4), (5), (6), (7), (8) and (9). Those paragraphs ran as follows:-

*"**3. That I have read and understood the writ of summons issued in this action and the affidavit to lead Warrant of Arrest sworn by Gordon Macmillan Cuthbert (hereinafter referred to as "Mr. Cuthbert) on the 4th day of August, 1998 and filed herein.***

4. That I accept that on 22nd June, 1998 Murri International Salvage Operation Company Ltd. (hereinafter referred to as "Murri") acting on behalf of their principals, Imperial Maritime Corporation of Liberia and Alba Petroleum Limited (hereinafter referred to as "Alba") acting on behalf of their principals, Festival Limited of the Isle of Man, entered into the towage contract referred to as Exhibit GMC1 in Mr. Cuthbert's aforesaid affidavit.

5. That I further accept that pursuant to the said towage agreement, the tug "Barbara" rendered towage services to the vessel Joey and that because the said services were unsatisfactory and inadequate in some respects Murri supplied an additional tug called "Steve B" to provide additional services to tow the vessel "Joey" to Mombasa.

6. That I do not however accept that the services of either the tug "Barbara" or the tug "Steve B" were in the nature of salvage services and neither the Writ in Rem nor Mr. Cuthbert's aforesaid affidavit has shown, or has attempted to show, how the said services, which admittedly began as towage services, became transformed into salvage services.

7. That I am advised by my advocate, Mr. Samir Inamdar, and verily believe that the plaintiffs have not made out any case whatsoever that their claim falls within section 20(2) (j) of the Supreme Court Act 1981 (as applied to Kenya) and that therefore this Honourable Court has no jurisdiction to entertain the said claim or to arrest the vessel "Joey" or her cargo or her bunkers, stores or freight.

8. That I am further advised by my said advocate and verily believe that the plaintiffs have, by their writ and by the aforesaid affidavit of Mr. Cuthbert, caused the cargo on the vessel Joey to be arrested ex parte without joining the owners of the said cargo as parties to this action. The said cargo which consists of approximately 10,500 metric tons of fuel oil valued at approximately USD 1,10,000.00 belongs to Veba Oil Supply and Trading GmbH of Hamburg and not to the owners of the vessel Joey. The cargo owners have accordingly had no opportunity to be heard on the validity or otherwise of the present action so far as their cargo is concerned. In any event I am advised by my said advocate and verily believe that the said cargo owners were not a party to the aforementioned towage agreement and the plaintiffs cannot therefore set up any claim for services rendered under that agreement against the said cargo owners.

9. That on the strength of what is stated above, I state that there is no valid basis which the plaintiffs can bring this action under section 20(2)(j) of the Supreme Court Act 1981 either against the Defendants as owner of the vessel "Joey" or against the cargo on board the said vessel. I therefore pray that this Honourable Court decline to entertain this claim for want of jurisdiction and make appropriate orders to strike out the plaintiffs' action and set aside the warrant of arrest issued herein."

The filing of the motion with this supporting affidavit resulted in some furious action on the part of the Respondents herein namely "The Owners of the Motor Tug "Barbara and Steve B". By a chamber summons dated 21st August, 1998, leave to amend the writ of summons was applied for and leave to amend was granted by consent on 24th August, 1998. By that order the Respondents were also granted leave to file affidavit or affidavits in reply, presumably to the affidavit of Narayan whose contents we have set out herein. There was to be a further chamber summons dated 4th September, 1998 for a further amendment of the writ of summons and by his ruling dated and delivered on 14th September, 1998 the learned Judge ordered as follows:-

In the event, I order that all the documents filed with the chamber summons dated 4.9.98 other than the affidavit of Pamela Mwikali Tutui and the draft "Further Ammended Writ of Summons" be expunged from the record. The further Ammended Writ of Summons shall be deemed to have been filed upon payment of the requisite fees."

After or as these things were going on, Narayan filed another affidavit dated 27th August, 1998 and which ran into some 53 paragraphs. That affidavit expounded in greater details the matters the appellants, i.e. the Owners, and Master of the Vessel Joey, were relying on in asking the court to strike out the writ of summons. Cayetano Fajaardo Arellano, the Master of "The Joey" also swore an affidavit dated 27th August, 1998 and the effect of his affidavit was that there really was nothing extra-ordinary or unexpected about the condition of the weather at the sea or region where "The Joey" became immobilized, that that sort of weather was to be expected in that region at that time of the year, that the winds were not anywhere near gale-force and things of that nature. Engineers such as Brian Dentol Rolls also swore an affidavit with regard to the state of "The Joey" and the two motor tugs. Clearly the parties were placing before the learned trial Judge such evidence as they could muster to show either that there could not have been any reason or basis upon which the towage contract between the parties could have been converted into a salvage service as contended by the owners of "The Joey" or that the state of the weather was such that towage of "The Joey" was not reasonably feasible in the circumstances and the towage contract which contained within itself provisions for turning towage into salvage, had in fact been turned into a salvage operation. That was what the owners of the two Tugs were seeking to prove before the learned trial Judge. If the owners of "The Joey" succeeded in showing to the Judge that no situation had arisen which turned or could have turned the contract of towage into a salvage, then the owners of the two tugs would not be able to bring themselves within the provisions of ***section 20 (2)(j)*** of the Supreme Court Act, 1981 and if they were unable to bring themselves within those provisions, then the trial Judge would have no jurisdiction to deal with the matter any further and could only strike out the writ of summons. That is the underlying principle contained in the two previous decisions of this Court in the cases of **THE OWNERS OF THE MOTOR VESSEL "LILIAN S" V. CLATEX OIL (KENYA) LTD [1989] KLR 1, and ROY SHIPPING SA & ALL OTHER PERSONS INTERESTED IN THE SHIP "MAMA OTAN" VS. DODOMA FISHING COMPANY LTD**, Civil Appeal No. 238 of 1997 (unreported). In the **LILIAN S**, the Court, consisting of the late Mr. Justice Nyarangi, the late Mr. Justice Masime, and Mr. Justice Kwach, relying on previous decisions of the Courts of the United Kingdom, decisions such as **The River Rima [1987] 3 ALL E.R 1**, **The I Congreso del Partido [1983] 1 AC 244** and such like cases, held that the question of jurisdiction, raised in the circumstances such as those existing in the present appeal, is a thresh-hold issue and must be determined by a judge at the thresh-hold stage, using such evidence as may be placed before him by the parties. Nyarangi, J.A graphically put it thus:-

"…… ***I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court siezed ……. of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down (sic) tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. ……..."***

The learned Judge of Appeal then referred to certain passages in the text "Words & Phrases Legally Defined." – Vol. 3: I – N at pg. 113 and then continued:-

"***It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."***

And in concluding his judgment, Masime, J.A, said at pg. 26 of the Report:-

"***The evidence placed before the court in support of the claim as well as the motion has been analyzed above and I have also, as I said before, had the advantage of reading in draft the comments of my brothers, Nyarangi and Kwach, JJ.A on it with which I respectfully agree that evidence so far as it was adduced by the respondent fell foul of the requirements of rule 5 of Order 75; it failed to establish that the appellant was "the relevant person." The upshot of that is that the High Court did not have the admiralty jurisdiction and that the respondent was not entitled to invoke that jurisdiction."***

In his judgment, Kwach, JA largely concentrated on the question of candour where ex parte orders are involved but there can be no doubt that he agreed that the question of jurisdiction once raised had to be determined at the thresh-hold.

We would better remind ourselves what the decision of the High Court (Bosire, J. as he then was) had been in the **LILIAN S**. We take that from the judgment of Masime JA at page 19, paragraphs 10 to 35:-

"***The superior court having heard full argument of the appellant's application held that the facts alleged in the writ, the request for the warrant of arrest and the affidavits filed in support thereof and the motion satisfied the statutory requirements for the invocation and exercise of the court's admiralty jurisdiction. The learned trial Judge put it as follows:-***

' I quite agree with Mr. Inamdar that a claimant in an action in rem has to make averments in the writ of summons or statements of claim or affidavit in support of a request for a warrant of arrest against the res for this Court to assume jurisdiction. The question which, however, immediately comes into mind is whether of necessity, the averments must be expressly made. To my mind it is not imperative that such averments be expressly made. Those are maters which may be inferred from other facts averred.'

The learned Judge then examined the affidavit evidence and continued:-

'***From the facts averred an inference could be drawn that the gas oil and fuel was <u>probably</u> for use on the 'Lilian S.' It is not a remote inference …. setting aside a writ is a harsh measure. To my mind it should only be resorted to in the clearest of cases, where it can be shown that the claim is either frivolous, vexations, or is otherwise an abuse of the process of the court. Also where from the averred facts no reasonable cause of action in rem is disclosed.'***

He therefore dismissed the appellant's application [to strike out the writ of summons] and ordered the costs thereof to abide the outcome of the trial of the suit. The appellant is aggrieved by that decision hence this appeal. After we heard the appeal the court was of the unanimous view that the appeal should be allowed and we did so reserving our reasons. ….."

The view of Bosire, J that from the facts of the case before him an inference could be made that the gas oil and the fuel <u>was probably for use on the 'Lilian S', was stoutly</u> repelled by this Court. He had to find as a fact on the material placed before him at that stage that:-

"…… ***the gas oil and the fuel was for use on the "Lilian S"***

and it would be only on the basis of such a concluded view at that stage which would have brought the

claim of Caltex Oil (Kenya) Ltd. within the ambit of section 20(2) (m) of the Supreme Court Act, 1981 and thus clothed the court with jurisdiction to proceed further in the matter. The trial Judge's finding that the items were probably for use on the "Lilian S" amounted to no more than that the court probably had jurisdiction to proceed with the matter. It was that approach which was unanimously rejected by the Court in the 'Lilian S'.

In the second case of "the Owners of the Motor Vessel, Mama Otan," Mr. Inamdar made an application by way of notice of motion under ***RSC 75 r 1***, and ***RSC 18 r 19*** and they had sought the striking out of the writ of summons, just as they have done in the present appeal. The motion to strike out the writ of summons in, the "Mama Otan" case was heard by Ang'awa, J who ruled that:-

" ***I would rule that to strike out the writ in rem and lift the warrant of arrest would be of (sic), an injustice. In this situation the issue of ownership is shrouded in some mysteries. I would therefore decline to give the orders prayed (sic) and would order that this Admiralty Cause proceed to full trial – after taking of summons for directions. The application stands dismissed with costs."***

In the above paragraph, it is clear that Ang'awa, J refused to strike out the writ of summons on the ground that the ownship of "Mama Otan" was:-

"…… ***shrouded in some mysteries."***

Dealing with that point on appeal, Omolo, JA had this to say:-

"***Ang'awa, J was asked to determine the issue of jurisdiction on the basis that the respondent was not the owner of the vessel "Mama Otan" at the time when the writ of summons and the subsequent warrant of arrest were issued. As we have seen, she avoided that question by holding that the issue of ownership was 'shrouded in mysteries', and ought to be allowed to proceed to trial. With respect to her, the learned Judge erred in adopting that position. She was required to solve that issue straightaway on the material that was placed before her. If she found as a fact that "Mama Otan" was owned by the respondent, then she would have jurisdiction and would be entitled to proceed further with the matter. If, on the other hand, she found that "Mama Otan" was not owned by the respondent, then she would have no jurisdiction in the matter and in the words of Nyarangi, JA. she would be obliged to down tools in respect of the matter before her and she would not be entitled to proceed one step further. She was clearly wrong in leaving the question of ownership in abeyance, however much it may have been shrouded in mystery."***

Omolo, JA then proceeded to examine the evidence on record with regard to the ownership of the "Mama Otan" and found as a fact that by the time the writ of summons was being issued "Mama Otan" had been sold to ROY SHIPPING SA, the appellant therein and Dodoma Fishing Company Ltd., the respondents therein, were not the owners of "Mama Otan" and could not qualify to bring a claim under ***section 20 (2)(a)*** of the Supreme Court Act. The Court had, accordingly no jurisdiction to proceed in the matter. Gicheru, JA, as he then was, agreed with this position and stated as follows at pages 4 and 5 of his judgment:-

"***As indicated earlier in this judgment, the respondent's claim in the superior court was for a declaration that it was the sole legal and beneficial owner of the motor vessel "Mama Otan" of the Port of Dar es Salaam Tanzania. This claim was therefore under the provisions of section 20(1)(a) and 2(a) of the Act as are set out above . As at the date of instituting the Admiralty proceedings in the superior court – 6th September, 1996 by the respondent against ROY Shipping, SA the legal ownership of the motor vessel 'Mama Otan' together with its physical possession were in ROY Shipping SA. The determination of any questions and claims relating to the possession or ownership of the said motor vessel was then no longer an issue. In the result the respondent did not bring itself within the Admiralty jurisdiction of the superior court in terms of the provisions of section 20(1)(a) and (2)(a) of the Act ----------"***

Shah, JA who was the third member of the Court disagreed, but of course the judgment of the majority

carried the day. We have not been told, nor was any valid reason or reasons given, that the two previous judgments we have extensively dealt with have been overturned or that they ought to be over-turned. We see no reason for doing so and we would emphatically assert that there is no basis upon which the correctness of the "**Lilian S**" and the "Mama Otan" judgments should be doubted. They will continue to represent the legal position until and unless a properly constituted court shall have ruled otherwise.

Perhaps this is now the appropriate position to deal with Mr. Khanna's contention that the present motion to strike out the writ of summons just as was the motion in the "Mama Otan" case did not lie under ***RSC 0.75*** and ***RSC O.18 rule 19***, but ought to have been brought under ***Order 12 rule 8***. He appeared to submit that because of this, the application was untenable and ought to have either been struck out or dismissed. Our short answer to that contention is that there is in fact a provision for striking out a writ of summons. We earlier referred to ***section 4(3)*** of the Kenya Judicature Act. That section confers on the superior court the power to call in aid any power conferred on it when exercising its civil jurisdiction. ***Order 50*** r***ule 12*** of the Civil Procedure Rules provides that:-

"***Every order, rule or other statutory provision under or by virtue of which any application is made must ordinarily be stated, but no objection shall be made and no application shall be refused , merely by reason of a failure to comply with this rule."***

We would see no reason why the High Court would not be entitled to make use of this rule where a wrong order is cited as the basis of an application. The position would be different if there is absolutely no provision for making the kind of the application made. Mr. Khanna did not tell us that there was no provision for making an application to strike out a writ of summons. He himself seemed to know that the application could be properly made under ***O. 12 rule 8.*** We were not able to appreciate what prejudice or embarrassment was suffered by them by failure to institute the motion under the correct provisions. We reject that contention.

What did Mr. Justice Waki do in the matter?

We have seen that in the "**Lilian S,**" Bosire, J had merely held that the gas oil and the fuel was probably for use on the ship while in the "Mama Otan", Ang'awa, J was of the view that the ownership of the vessel was shrouded in mystery and she could not decide that question at the threshhold stage. Waki, J, however, adopted a different approach altogether. He set out all the evidence placed before him by the parties and having done so, held as follows:-

"***I have considered the evidence on record and it seems to me that the "Barbara" at least qualifies for salvage services between 3.7.98 when the Master of the Joey was informed that the Barbara's steering problem had been rectified and the 9.7.98 when the tow was reconnected. Between that period, the Towhire contract had been terminated and the Barbara had no obligation to offer any services. Indeed its attempts to reconnect the tow were actively resisted. But it continued to be on standby and I agree with Mr. Khanna that it provided solace and comfort to the Joey and the crew. More so, when it was common ground that the Arabian Sea was rough at that time of the year and indeed there was evidence that another tug, the Seabulk Danah could not make it to the rendezvous and had to turn back and return to Bombay. That rendered the condition of the Joey even more precarious as she was still drifting in rough weather. ---------. I would find on a balance of probability that the Barbara was entitled to claim salvage for that period."***

The learned Judge then dealt with the state of the pleadings as they then stood before him and continues at page 425 of the record:-

"***There is also the possibility after the hearing of the claims that the salvage claims made in respect of the 'Steve B' may be reduced to towage, which would still be within the court's power to do. But as the claim stands, the offer was made for the use of the "Steve B". It did not only provide towing services in tandem with the Barbara but gave fresh supplies to the Joey and the Barbara. The defendants (sic) as the contract allowed them to opt for salvage services and there was no response from the defendants. In my view, there was acceptance by conduct.***

On the whole I do not find that the Admiralty jurisdiction of this court is impeached and I do not grant the application [i.e. application to strike out the writ of summons]. I dismiss it with costs."

It was against these orders that the Owners and Master of the Motor Vessel Joey appealed to this Court and their memorandum of appeal contained a total of fifteen grounds, some of the grounds being divided into various sub-paragraphs. The gravamen of those grounds and the burden of Mr. Inamdar's submissions before us were basically that it was not proved or shown that conditions had arisen in the sea which would justify or entitle the Respondents to turn the purely towhire agreement of 22nd June, 1998 into salvage services. On this aspect of the matter , Mr. Inamdar quoted to us numerous authorities regarding the circumstances in which an ordinary towage contract would be converted into a salvage service. We agree with Mr. Inamdar that the authorities he cited to us correctly state the circumstances under which a towage contract might be converted into a salvage service and additionally, we agree with Mr. Inamdar that the courts are always reluctant to allow such conversions because of the financial implications involved in such conversions. If we do not go into each and every authority cited, it is not out of disrespect to Mr. Inamdar or Mr. Khanna both of whom did an excellent piece of work for their respective clients. But the truth of the matter is that even admiralty cases must be decided on the facts and circumstances surrounding each one of them.

It was proved before Waki, J that the Joey broke down in the high seas and on its own motion, it could not have reached Mombasa, its port of destination. Its engine had been switched off and it could only drift in the high seas. The Barbara was sent out to tow it to Mombasa and there was absolutely no evidence that on the way to the Joey the Barbara had any problems, mechanical or otherwise. It was only after the Barbara's towlines were connected that problems arose. When the problems continued, Narayan terminated the tow-hire agreement and engaged another tug from Bombay to come and tow the Joey to Mombasa. The tug from Bombay did not even reach the Joey and was recalled. There was no evidence that the Bombay tug had any mechanical or some other defect which would prevent it from reaching the Joey and which necessitated its being recalled. Clearly, the weather conditions in the area where "The Joey" had been immobilized must have been extremely violent. "The Joey" itself had lost its propeller shaft and it was not suggested that that had happened because she had not been properly maintained. In those circumstances we think the learned trial Judge was entitled to agree with the Respondents that the Respondents were entitled to invoke Clauses 15, 21 and 26 in the towhire agreement and to treat the services of the Barbara in particular as salvage.

With regard to the services rendered by the "Steve B", the learned Judge was of the view that if those services were not to amount to salvage, the judge hearing the matter would be perfectly entitled to reduce them to towage services. Both towage and salvage services qualify as admiralty claims, salvage under ***20(2)(j)*** and towage under ***section 20(2)(k)***. The latter section specifically provides for:-

"***any claim in the nature towage in respect of a ship or aircraft."***

We do not understand the law, as established in the "**Lilian S**" and the Mama Otan" to be that a judge would have no jurisdiction to reduce a salvage claim to a towage one and award relief for towage rather than salvage.

As we have seen, the learned Judge also relied on the various clauses of the towage agreement between the parties and for that purpose, Clause 15 and 26 were particularly relevant.

"Clause 15:-

(a) Should the tow break away from the Tug during the cause of the towage service, the Tug shall render all reasonable services to reconnect the towhire and fulfill this agreement without making any claim for salvage.

(b) If at any time the Tugowner or the Tugmaster considers it necessary or advisable to seek or accept salvage services from any vessel or person on behalf of the Tug or Tow, or both, the Hirer hereby undertakes and warrants that the Tugowner or his duly authorized servant agent including the

Tugmaster have the full actual authority of the Hirer to accept such service on behalf of the Tow on any reasonable Terms.

Clause 26:-

In the event that the 'Joey' drifts into Somali Territorial Waters (12 miles) or should the actual physical conditions of the Joey in the opinion of the Tug-Owner change or alter from that of being immobilized but otherwise safely adrift or safely anchored, to that of one of real peril or danger, then the Tug Owner shall have the option, and if necessary after the inspection of the 'Joey' to,

(a) Continue their services as provided under this Agreement;

or

(b) Render all services including services already provided under the terms and conditions of Lloyds Standard Form of Salvage Agreement 'No Cure No Pay' 1995. Should the Tug-Owner decide to exercise this option, then such option and services provided shall not be refused, denied or frustrated by the Owners of Joey, her master or crew, and any services provided thereafter by the Tug/s shall be deemed to have been provided under Lloyd's Open Form 1995."

Clause 15 dealt with possessory lien conferred upon the owners or agents of the tugs. Having examined these provisions, the learned trial Judge came to the conclusion that :-

"***Clause 26 is an implication of Box 22. It makes provisions for salvage services under the Lloyds Open Form 1995 by the Barbara itself. And again it is at the option of the Tugowner and the decision is subjective. At risk was a 12,100 ton tanker fully laden with 10,500 metric tons of fuel oil. Both the ship and the cargo were of immense value let alone the crew whose lives were invaluable. They were all in an immobilized state with a broken shaft and were drifting without motive power in the high seas. By the time the Barbara reached her she had drifted more than 320 Nautical Miles away from her original position. There was no knowing what might befall her and her cargo if she continued drifting in that state. An oil spillage would have caused environmental disaster. In my considered view there was a state of danger which the parties contemplated before signing the agreement and made provisions for salvage services to be rendered. I find that the Towhire agreement was not purely for towage but included salvage services. The plaintiff was therefore entitled to make claims for salvage under the contract and this court's Admiralty jurisdiction is well founded. I need not therefore consider how towage was converted to salvage."***

We are of course alive to the fact that the appeal we are considering is a first appeal to the Court and we remind ourselves of the duties imposed on a court hearing a first appeal. We are aware that on a first appeal, the parties to it are entitled to expect from the court its own independent assessment and re-evaluation of the recorded evidence and its own conclusions from that evidence – see for example **PETERS VS. SUNDAY POST LIMITED, [1958] EA 424**. There, it was held that:-

"***Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial Judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide ----------".***

In the appeal before us we are far from convinced that there was no evidence before Waki, J upon which he could hold as he did that his admiralty jurisdiction had been properly invoked. Nor has it been shown to us that he failed to appreciate the weight or bearing of any piece of evidence put before him and thus reached a wrong decision. It would be wholly unjustified for us to hold that the learned Judge was plainly wrong. The conclusions he arrived at were clearly justified and even if we ourselves thought that had we sat in his place we might have reached different conclusions on certain factual issues, that alone would not justify our interfering with his conclusions.

In our view complaints such as:-

"***1. The learned Judge erred in law in dismissing the appellant's notice of motion dated 11th August, 1998 to strike out the admiralty action in rem brought by the Respondents against the motor vessel Joey and to set aside the warrant of arrest issued and executed against her;***

2. The learned Judge erred in failing to appreciate that the appellant's application to strike out the writ of summons and to discharge the Warrant of Arrest raised an issue of jurisdiction which required the court to immediately decide in limine and on the basis of the Respondent's claims as formulated in their existing pleadings and affidavits whether the claims made in respect of the services rendered by the Barbara and Steve B amounted to claims for salvage; and

3. The learned Judge erred in Law and in fact in holding that the services rendered to the Joey by the Barbara during the period 23rd June, 1998 to 4th August, 1998 and by the Steve B during the 11th July, 1998 to 4th August, 1998 were salvage services."

are really not justified. We have picked on these few grounds because the three of them are typical examples of the issues which were strenuously argued before us.

On the question of jurisdiction we have found and held that unlike Bosire, J in the **Lilian S** and Ang'awa, J in the "Mama Otan", Waki, J dealt head on with the facts placed before him and came to the conclusion that the Barbara had rendered salvage services between the dates set out. We see no reason to warrant our interfering with that conclusion. In respect of the "Steve B" the Judge held that if the services rendered did not amount to salvage, they could be reduced to towage. Towage, like salvage, is an admiralty claim. Even the appellants themselves did not contend, either before Waki, J or before us, that the "Steve B" did not render any services at all. If the towage services have been paid for and the subsequent trial judge is satisfied that no salvage services were rendered by the "Steve B", the payment already made for the towage will be taken into account and an appropriate order made. There was, however, no payment by the time the original writ of summons was issued. Payment was only made by the appellants vide their letter of 11th September, 1998; the original writ of summons was issued on 4th August, 1998.

We have said enough, we think to show that we are for dismissing the appeal. The Respondents for their part, filed a notice of cross-appeal containing three grounds. Ground one complained about the use of wrong procedure employed in bringing to court the motion to strike out the writ of summons. We have already dealt with that issue and rejected it. Ground two dealt with the alleged failure by the learned Judge to make a specific finding that by doing certain things, the Respondents had submitted to the jurisdiction of the court. Having found as a fact that his admiralty jurisdiction had been properly invoked, there was no reason why the Judge should have been expected to make further findings on that issue. We reject this complaint as well. Ground three also seems to be dealing with the same issue though differently framed. In our view these grounds contained in the notice of cross-appeal were not really necessary as they unnecessarily lengthened the hearing of the appeal. Nor do the grounds for affirming the decision of the Judge carry the matter any further and in our view they were totally unnecessary.

In the event , the appellants' appeal wholly fails and we order that it be and is hereby dismissed with costs and we certify costs for two counsel. In the same way, we order that the notice of cross-appeal and the notice of grounds for affirming the decision also fail and we order that both be and are hereby dismissed with costs. We also certify those costs for two counsel.

Dated and delivered at Nairobi this 27th day of April, 2007

R.S.C. OMOLO

…….

JUDGE OF APPEAL

P.K. TUNOI

……..

JUDGE OF APPEAL

E.M. GITHINJI

…….

JUDGE OF APPEAL

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

DEPUTY REGISTRAR.