



The Owners of Motor Vessel (Ann’s Import & Export Enterprises Limited (Kenya) v Galana Energies Limited & 2 others (Claim E005 of 2023) [2024] KEHC 2168 (KLR) (26 February 2024) (Ruling)

Neutral citation: [2024] KEHC 2168 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CLAIM E005 OF 2023
DKN MAGARE, J
FEBRUARY 26, 2024**

**ADMIRALTY CLAIM IN REM BY THE OWNERS OF MOTOR
VESSEL “HAIGUI” AGONISTS THE DEFENDANTS**

BETWEEN

THE OWNERS OF MOTOR VESSEL (ANN’S IMPORT & EXPORT ENTERPRISES LIMITED (KENYA) CLAIMANT

AND

GALANA ENERGIES LIMITED 1ST DEFENDANT

KENYA PORTS AUTHORITY (HARBOR MASTER) 2ND DEFENDANT

KENYA PIPELINE COMPANY 3RD DEFENDANT

RULING

1. If there was all the time on Earth, I will have written 3 comprehensive Rulings. I however have neither the time of the luxury of space. I had hoped against hopes when I wrote my first Ruling that parties will take cue and do the needful. This case reminds me of words of shylock in the play by William Shakesphere in Merchant of Venice, at Act scene 3: -

Shylock

Shylock Ho, no, no, no, no! My meaning in saying he is a good man is to have you understand me that he is sufficient. Yet his means are in supposition: he hath an argosy bound to Tripolis, another to the Indies. I understand, moreover, upon the Rialto, he hath a third at Mexico, a fourth for England, and other ventures he hath squandered abroad. But ships are but boards, sailors but men; there be land rats and water rats, water thieves and land thieves



—I mean pirates—and then there is the peril of waters, winds, and rocks. The man is, notwithstanding, sufficient. Three thousand ducats. I think I may take his bond.”

2. In this case a ship Motor tanker Haigui Turned up and left behind a web of truth, ties, half-truths subterfuge and Machinations that were of proportions unknown in the recent world. Not even the legendary Ali Capone and Others could have pulled stunts some of the parties were putting. It was not clear even whether this was a motor vessel or motor tanker.
3. In the midst of all these, the court was left with more heat, and darkness than light and illumination. The truth lay somewhere. Unfortunately, what happened on the fateful 11/10/2023 will remain buried forever. I cannot fathom, encompass and even understand the circumstances where one party is importing diesel and another petrol but shipping it in the same ship exclusively.
4. The case involved discrete probabilities, where the happening of one event excludes another. Hitherto I issued orders as required in admiralty matters as a matter of course. The Claimant took no step to involve the admiralty Marshal or even secure necessary guarantees and undertaking.
5. I stayed the orders subsequently and learnt that the motor tanker Haigui had sailed.
6. Parties filed two other applications in addition to the one accompanying the admiralty claim. For completeness of the record, I will address each of the Applications. Three applications are before me for consideration are as follows: -
 - a. The application Notice by the Claimant under certificate of urgency by owners of motor vessel Haigui supported by the declaration by Ann Njoroge dated 8/11/2023 and filed on the same day.
 - b. The Application dated by the 1st defendant dated 10/11/2023 supported by the affidavit of Anthony Munyasia.
 - c. A notice of motion dated 18/11/2023 supported by the affidavit of captain Moses Muthama.
7. The 2nd defendant’s Notice of Motion is not a proper way of proceeding in this kind of matter. The same should be by way of an Application notice. The same sought the following prayers:-
 - a. The Plaintiff’s claim against the 2nd defendant be struck out
 - b. Costs of the Application be awarded to the 2nd defendant.
8. This was supported by the affidavit of Captain Moses Muthama, the 2nd respondent’s manager of Marine Operations and Hydrography, and the Acting Harbor Master and General Manager. They stated that the vessel called the port and was discharged as per the manifest. He was aware that the Oil terminal is owned by KPC. The 2nd defendant does not lay claim to the oil.
9. The duty of the 2nd Defendant is said to be managing the berth, piloting ships to the berth, and raising and collecting port charges. In short, they were good landlords and nothing more. They are not interested in disputes between the occupants of their houses.



10. They filed submissions stating that the claimant's claim against them is beyond salvaging. They relied on the case of *Elgon House (2010) Ltd v Meya Agri Traders Limited* [2019] eKLR, where D. O. Ohungo, J stated as follows: -

“8. The Court of Appeal distilled case law on summary judgment under Order 36 Rule 1 in *Irene Wangui Gitonga v Samuel Ndungu Gitau* [2018] eKLR as follows:

.....

Further in *Dedan King'ang'i Thiongo versus Mbai Gatune Civil Appeal No. 292 of 2000* and *Bangue Indosuez versus DJ Lowe & Co. Ltd Civil Appeal No. 79 of 2002*, the Court was categorical that where bona-fide- triable issues have been disclosed, the Court has no discretion to exercise in regard to the defendant's right to defend the suit. Lastly, in *D.T. Dobie & Co. Ltd versus Muchina & another* [1982] KLR 1, it was stated inter alia, that a pleading which does not disclose any reasonable cause of action or defence ought to be dismissed. Likewise, no suit ought to be summarily dismissed unless, it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption by way of an amendment.”

11. I agree with the 2nd Defendant that the harbor master has nothing useful to add in this case. They are not interested in the Motor vessel Haigui or its cargo. Their interest is limited to port charges, which apparently have been paid since the ship has said.
12. To dismiss a case or strike it out should be of the last resort and must be done sparingly. In the case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR, the Court of Appeal, C B Madan JA stated as doth: -

“That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments.”
per Lindley L.J. ibi, p. 602.

"It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution."

Per Lord Justice Swinfen Eady in *Moore v. Lawson and Another* (supra) at p. 419.

"It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised. and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in *Lawrence v. Lord Norreys*, 15. A.C. 210 at p. 219.

13. The dispute does not involve any actual, real, or imagined issue between the 2nd Defendant and the claimant.



14. Consequently, the suit against the suit against the 2nd defendant is struck out with costs.
15. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others*, SC Petition No. 4 of 2012; [2014] eKLR, as follows: -
 - “(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.
16. The award of costs is discretionary. Though the dispute was over oil and a ship, the subject matter never existed. The matter has terminated prematurely. Costs of US \$ 165,000. will suffice.
17. The next application notice was by the Claimant. This was based on the fact that the claimant was the owner of the Motor vessel Haigui and the consignee of Diesel EN 590 on board from the Port of Jeddah, in the kingdom of Saudi Arabia to the Port of Mombasa. This was supported by a declaration in support of the Affidavit sworn by Ann Njoroge. The said declaration does not appear to be Notarized or witnessed.
18. The Application turned physics on its head. The said motor vessel was stated to be carrying Diesel EN 590 10ppm measuring 100,000 metric tons. The Round figures are almost impossible to achieve in practical physics. They are more reliable for metaphysics.
19. Despite the ship belonging to the Applicant, she was comparing that instructions came without reverting to her. In practical terms, the plaintiff is pleading that she is also the defendant.
20. The 1st Defendant, filed a replying affidavit and grounds of opposition. A further affidavit dated 22/11/2023 stating that documents from SGS are fake. These are documents that the claimant filed.
21. In the initial application, the cargo manifest dated 9/10/2023 indicate that the vessel manifest is Rowan. The Master is Dougukan Bulut. The cargo is said to have been loaded at Jeddah on 9/10/2023.
22. The said vessel was said to be traveling at 14.3 Knots to 11.5 knots. The shipper and consignee are the same. Despite the cargo having been loaded at Jeddah on 9/10/2023, the Applicant signed the bill of lading both as the shipper and importer. There is no question that the bill of lading is fictitious. If the cargo was bought on board, the bills of lading could not be issued by the purchaser.
23. The ship is a Liberian Flag ship. The same does not have a local agent. Under section 16 of the *Merchant Shipping Act*, no. 4 of 2009, there is a restriction of the ship owner also being its agent the section provides as follows: -



- (1) No owner of a ship or person providing the service of a shipping line shall, either directly or indirectly, provide in the maritime industry the service of crewing agencies, pilotage, clearing and forwarding agent, port facility operator, shipping agent, terminal operator, container freight station, quay side service provider, general ship contractor, haulage, empty container depots, ship chandler or such other service as the Minister may appoint under section 2
24. The authorization on board shows that the Commercial manager was not reported. The question will be whether there is a prima facie case.
25. In the case of *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* (2003) eKLR, the Court of Appeal stated:
- “The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In *Giella v Cassman Brown* to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”
26. In the case of *Giella v Cassman Brown & Co Ltd* [1973] EA 358 at pg 360, it was stated as follows: -
- “First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience. (*EA Industries v Trufoods*, [1972] EA 420.)”
27. In the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court of Appeal was of the view that these tests are sequential. The Court stated: -
- “In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
- (a) establish his case only at a prima facie level,
 - (b) demonstrate irreparable injury if a temporary injunction is not granted, and
 - (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.
- These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.



In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

28. I wish parties, in their pleadings give credit to the courts of a bit of intelligence. Courts are not morons. How does a party who does not produce or process Oil, issue a bill of lading? At least the Master should have issued a Master's bill of lading. Nowhere in the crucial documents that I have seen, does the alleged ship's master Dogukan Bulut sign any of the necessary documents including the shipping receipt and the master's bill of lading.
29. The Applicant, did not produce, any evidence of paying, acquiring, placing an order, contract for purchase, or anything that can be relied on. They have no evidence of ever acquiring title form the seller. There are no letters of credit for the particular cargo offloaded from the ship.
30. Unfortunately, the oil that was offloaded was gasoil. The ones by the Applicant is said to be diesel. I have come to the inevitable decision that there is no prima facie case shown by the Applicant without a prima facie case. There is nothing to lose. I find that the claim by the Applicant does not meet the test for a prima facie case.
31. I need not go into the other limbs. The consequence of the foregoing is that I dismiss with costs the Application Notice filed by the claimant for lack of merit
32. The Last application was filed by the 1st defendant. 2nd Application Notice is dated 10/11/2023. It was supported by the affidavit of Anthony Munyasia, an officer of Galana Energies Ltd, the first defendant.
33. The said Application Notice sought the several prayers under Section 4 of the Judicature Act, Section 3A of the Civil Procedure Act and inherent powers of the court. The applicability of the Kenya Civil Procedure Act, is doubtful. The most appropriate AA of the Senior Court act, 1981 of England.
34. The 1st defendant sought the following prayers:-
 - a. Spent
 - b. Spent
 - c. Spent
 - d. The warrant of arrest issued on 8/11/2023 against motor vessel Haigui and the restraining orders issued on 8/11/2023 be discharged.
 - e. The claim in rem brought against motor vessel Haigui be struck out with costs on a full indemnity basis
 - f. Costs be awarded to the 1st Defendant.
35. They state the dispute was filed over a consignment of diesel EN 590 while the first defendant was imported AGO, that is Automotive Gas Oil. They stated that the sector is highly regulated and requires licenses to import oil into Kenya. The oil was said to be for import into Kenya and partly for export.
36. The sector is stated to include Jet A-1, Dual purpose kerosene, diesel and Automotive Gas Oil. According to them a person requires licensing by Energy and Petroleum Authority. It was their case that Energy and Petroleum Authority confirmed on 9/11/2023 that the Applicant is not licensed.



37. It was their case that there are three companies licensed to import at that time, that is, the first defendant, Gulf Energy and Oryx Energies. They referred to several decisions.
38. I gave the parties a noose to see who was to hang on it. I requested for the parties to have the supply of the manifest. The Kenya Revenue Authority supplied its version. I asked for a proper one which was filed with an affidavit.
39. The claimant has not produced any evidence of making any declaration. The first issue the 1st Defendant found was that MV Haigui did not belong to the Claimant. The vessel is held by Holten Shipping Limited liability partnership.
40. The 1st Defendant had a trail of documentation including a financing agreement with KCB and the 1st Defendant, certificate of quality certificate of quantity, certificate of origin, cargo manifest and bill of lading. These were signed by the required persons.
41. Documentation was signed by the correct parties. The most important was the master of the ship. Captain Dimitrios Stratakos signed as the master of the ship.
42. It is my considered view that the claimant was not licensed by as per EPRA as provided under Regulation 4(1) of the Petroleum, (Importation) Regulations 2020; A fact which it is stated on oath that EPRA confirmed that they had not licensed the Applicant. They also stated that their cargo was Gasoil not Diesel.
43. From the evidence, the ship is not owned by the claimant. This is even self-evident as shown by the affidavits of the claimant. The claimant had no license to import oil. There is no likelihood that 17 billion worthy of oil could be illegally imported into the country. The fact that the applicant did not have all licenses required, shows that any such acts have nullities.
44. In the case of *Macfoy vs. United Africa Co. Ltd* [1961] 3 All E.R. 1169, Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said:

“If an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”
45. All the documents filed by the claimant do no prove any purchase, import or requisition of the oil. With the documents the claimant has, there can be no drop of oil that could have left Saudi Arabia. The Best I can describe the claimant’s claim is that is was an amateurish attempt on a heist. The claimant should stop watching too many movies, especially the “money heist.”
46. The purported claim is over the ship is untenable. The claim for Diesel EN 590. There is no evidence that such oil was imported.
47. The oil that was offloaded was Gas oil 50ppm (AGO). The manifest with KRA was for AGO. The diesel never arrived into the country. The goods purchased by the 1st defendant are different from the purported ones by the claimant. The master of the ship is king. In this matter, he knew what he was carrying. He signed the documentation.
48. In the case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR, Nyarangi, Masime & Kwach: JJ A, elucidated the law governing admiralty in Kenya. Each of the judges tackled the jurisdiction in rem and the claims in personum.



49. The Admiralty jurisdiction of the High Court is set out in Section 20 of the 1981 Act, of England: -

Section 20 of the 1981 Act so far as material for present purpose provides:-

“20.

— (1) The Admiralty jurisdiction of the High Court shall be as follows, that is to say-

- (a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);
- (b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);
- (c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and
- (d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen’s Bench Division and directed by the rules to be exercised by the Admiralty Court.

(2) The question and claims referred to in subsection (1) (a) are -

- (a) any claim to the possession or ownership of a ship or to the ownership of any share therein;
- (b) any question arising between the co-owners of a ship or as to possession, employment or earnings of that ship;
- (c) any claim in respect of a mortgage of or charge on a ship or any share therein;
- (d) any claim for damage received by a ship;
- (e) any claim for damage done by a ship;
- (f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of-
 - (i) the owners, charterers or persons in possession or control of a ship; or
 - (ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession



or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship.

- (g) any claim for loss of or damage to goods carried in a ship;
- (h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;
- (j) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under section 51 of the *Civil Aviation Act* 1949, of the law relating to salvage to aircraft and their apparel and cargo);
- (k) any claim in the nature of towage in respect of a ship or an aircraft;
- (l) any claim in the nature of pilotage in respect of a ship or an aircraft;
- (m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;
- (n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;
- (o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);
- (p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;
- (q) any claim arising out of an act which is or is claimed to be a general average act;
- (r) any claim arising out of bottomry;
- (s) any claim for the forfeiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.



50. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

1. The Supreme Court Practice, 1988 of England has provided for admiralty proceedings. Paragraph 75/1/3 of the Order is to the effect that an admiralty action in rem is in effect an action against a res, usually a ship but may in some cases be cargo or freight or aircraft. An action in personam is like
2. a normal action filed against a person. In personam, the procedure is the usual one of invoking the High Court jurisdiction: See the *Shipbrokers Manual Vol. One*, page 90, paragraph 3. Paragraph 4 on page 92 – 94 gives a distinction between an action in rem and in personam.
3. The object of an action in rem is therefore to procure the arrest of a res, almost always a ship.
4. The procedure for arrest is contained in rule 5 of order 75. Order 75 rule 5 states: -

“5.

- (1) In an action in rem the plaintiff or defendant, as the case may be, may after the issue of the writ in the action subject to the provisions of this rule issue a warrant in Form No. 3 in Appendix B for the arrest of the property against which the action or any counterclaim in the action is brought.
- (2) Where an action in rem is proceeding in a district registry, a warrant of arrest in the action may be issued out of that registry but, except as aforesaid, a warrant of arrest shall not be issued out of a district registry.
- (3) Before a warrant to arrest any property is issued the party intending to issue it must procure a search to be made in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that property and, if the warrant is to issue out of a district registry, the registrar of that registry shall procure search to be made in the said book for that purpose.
- (4) A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph (9); however, the Court may, if it thinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars.
- (5) Except with the leave of the Court or where notice has been given under paragraph (7) a warrant of arrest shall not be issued in an action in rem against a foreign ship belonging to a port of a State having a consulate in London, being an action for possession of the ship or for wages, until notice that the action has been begun has been sent to a consult.



- (6) A warrant of arrest may not be issued as of right in the case of property whose beneficial ownership has, since the issue of a writ; changed as a result of a sale or disposal by any court exercising Admiralty jurisdiction.
- (7) Where, by any convention or treaty, the United Kingdom has undertaken to minimize the possibility of arrest of ships of another State no warrant of arrest shall be issued against a ship owned by that State until notice in Form No. 15 in Appendix B has been served on a consular office of that State in London or the port at which it is intended to cause the ship to be arrested.
- (8) The issue of a warrant of arrest takes place upon its being sealed by an officer of the registry or district registry.
- (9) An affidavit required by paragraph (4) must state -
 - (a) in every case:
 - (i) the nature of the claim or counterclaim and that it has not been satisfied and, if it arises in connection with a ship, the name of that ship; and
 - (ii) the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and
 - (b) in the case of a claim against a ship by virtue of section 21 (4) of the *Supreme Court Act* 1981:
 - (i) the name of the person who would be liable on the claim in an action in personam (“the relevant person”); and
 - (ii) that the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and
 - (iii) that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the



ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise; and

- (c) in the case of a claim for possession of a ship or for wages, the nationality of the ship in respect of which the warrant is required and that the notice (if any) required by paragraph 5) has been sent; and
- (d) in the case of a claim where notice is required to be served on a consular officer under paragraph (7), that such notice has been served;
- (e) in the case of a claim in respect of a liability incurred under s. 1 of the Merchant Shipping (Oil Pollution) Act 1971, the facts relied on as establishing that the Court is not prevented from entertaining the action by reason of section 13 (2) of that Act.

(10) The following documents shall, where appropriate, be exhibited to an affidavit required by paragraph (4) -

- (a) a copy of any notice sent to a consul under paragraph (5);
- (b) a copy of any notice served on a consular officer under paragraph (7).”

5. The disputed between the parties is not is not thus a claim in rem.

6. Justice Masime JA in the said case stated as follows: -

“In that case the plaintiff’s claim did not come within the admiralty jurisdiction and consequently the writ in rem and the warrant of arrest were set aside and the ship ordered to be released from arrest. And in I Congresso del Partido [1978]1 Q. B 500 at 526, B it was stated by Lord Goff J. (as he then was) that:

“Invocation of the Admiralty jurisdiction by an action in rem presupposes the existence of a claim in personam against the person, who, at the time when the action is brought is the owner, of the ship.”



The learned Judge was there dealing with section 3 (4) of the Administration of Justice Act 1956 the substance of which is now comprised in Section 21 (4) of the Act as follows:-

“(4). In the case of any claim as is mentioned in Section 20 (2) (e) to (r), where

- a. the claim arises in connection with a ship; and,
- b. the person who would be liable on the claim in an action in personam (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship an action in rem may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against-
- c. that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or
- d.
 - (ii) any other ship which at the time when the action is brought, the “relevant person is the beneficial owner as respects all the shares in it.”

51. The first fatal claim by the claimant was that they were the owners of the ship. They cannot have a claim against the ship, they own. Did they? All evidence suggests otherwise. The claimant simply had no infrastructure related to the ship and cargo.
52. The second aspect was that the material or cargo they were fighting over was not the same. They should file their case in Jeddah where they may have been misled or otherwise initiated the scheme to steal the oil.
53. Whether or not they were licensed is a different issue. That will mean oil will be returned or exported to some other country. They simply have no claim over the cargo.



54. After informing myself of the facts, I am of the considered view that there is thing to go on trial. Diesel EN590 never arrived and was not aboard motor tanker Haigui. This is a proper case to strike out. It cannot be saved by amendment or otherwise.
55. The consequence of the foregoing is that I strike out the entire claim with cost to the 1st defendant. I had already struck out the name of the 2nd defendant.
56. This leaves the question of what to do with the 3rd Defendant. They were served with an order of 8/11/2023. They never sought variation or stay. They finished offloading cargo and disposed of it. They did not respect the court order or seek to avail facts that would have led to the discharge. I decline to award costs to the 3rd Defendant as they blatantly ignored an order that the court earlier issued. They unlike the 1st defendant who took steps to stay the same, the third defendant did absolutely nothing.
57. However, I decline to award the costs on scale. Costs being discretionary it is important that they should not make litigation exclusive. The 1st defendant's costs shall be US\$ 170,000/= payable within 30 days.

Determination

58. In the end I make the following orders: -
- a. I dismiss the claimant's application dated 8/11/2023 and discharge all orders issued on the said date.
 - b. The 2nd Defendant's name is struck out with costs of US \$ 165,000.
 - c. The entire suit is struck out with costs of US \$ 170,000/= to the 1st defendant
 - d. For avoidance of doubt the application by the claimant is dismissed and order issued on 8/11/2023 are hereby discharged
 - e. The 3rd defendant shall bear their own costs.
 - f. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 26TH DAY OF FEBRUARY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

David Chumo & Advocates

Court Assistant - Brian

Page 13 of 13 M.D. KIZITO, J.

