ET Timbers PTE Ltd v Defang Shipping Company Ltd (A claim in rem against the owners of the motor vessel 'Dolphin Star' of the Port of Panama); Kenya Ports Authority as the Harbour Master (Interested Party) (Admiralty Cause E003 of 2021) [2024] KEHC 6270 (KLR) (24 May 2024) (Judgment)

Neutral citation: [2024] KEHC 6270 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

ADMIRALTY CAUSE E003 OF 2021

DKN MAGARE, J

MAY 24, 2024

BETWEEN

ET TIMBERS PTE LTD ..... CLAIMANT

AND

DEFANG SHIPPING COMPANY LTD ..... DEFENDANT

A CLAIM IN REM AGAINST THE OWNERS OF THE MOTOR VESSEL 'DOLPHIN STAR' OF THE PORT OF PANAMA

AND

KENYA PORTS AUTHORITY AS THE HARBOUR MASTER .... INTERESTED PARTY

(For consolidated cases E003 of 2021, HCC COM E005 OF 2023 and Admiralty case no E003 OF 2023)

The need for the Parliament of Kenya to enact independent admiralty legal framework and legislative reform

Reported by Flora Weru and John Ribia

Constitutional Law *– sovereignty - legal sovereignty in matters admiralty – interaction between historical United Kingdom's legal principles and the Kenyan Constitution in matters admiralty - where the Kenyan courts placed reliance on foreign legal frameworks in admiralty disputes - impact of the reliance of UK laws and the white book in admiralty cases on the Kenya's legal sovereignty - whether the continued reliance on English admiralty law post-1963 infringed Kenya's sovereignty and legislative independence - whether Kenya's Legislature was under an obligation to enact local admiralty laws tailored to Kenyan circumstances - Constitution of Kenya, article 159; Judicature Act (cap 8) section 3.*

Jurisdiction *- jurisdiction of the High Court – jurisdiction to adjudicate admiralty claims – where there was a claim that the High Court had no jurisdiction to hear and determine admiralty claims - whether the High Court of Kenya had jurisdiction to determine admiralty disputes considering the lack of local admiralty laws and considering the international nature of admiralty disputes – Constitution of Kenya, article 165; Judicature Act (cap 8) section 3.*

Admiralty Law *– legislative framework - laws governing admiralty issues within Kenya's legal framework - what laws governed admiralty issues within Kenya's legal framework - Constitution of Kenya article 165; Judicature Act (cap 8) section 3; Statute of the International Court of England, article 38.*

Agency Law *– principal agent relationship – liability of agents vis-à-vis liability of principals – agency agreements in shipping - whether shipping agents bore liability in the absence of a direct contractual relationship or disclosed principal - whether a suit could be brought against an agent when there was a disclosed principal.*

Alternative Dispute Resolution *- arbitration - arbitration clauses – enforceability of foreign arbitration locations for Kenyan disputes - effect of distant arbitration on Kenyan parties – whether arbitration clauses that designated foreign jurisdictions (for example London or Marseilles) for dispute resolution in contracts involving Kenyan parties and subject matter were enforceable - whether such clauses negatively affected Kenyan parties involved in admiralty disputes.*

Alternative Dispute Resolution *- arbitration – reference of a matter to arbitration – where a party declined arbitration – where a party denied existence of underlying contract – whether arbitration was applicable in the circumstances – Arbitration Act (cap 49) section 6.*

Law of Contract *– bill of lading – bill of lading status as a contract – nature of bills of lading – legal status of a bill of lading after the arrest of a vessel - whether the bill of lading was a contract - what elements must a bill of lading contain for it to be considered to be a contract - what was the legal status and enforceability of bills of lading issued after the arrest of a vessel.*

Law of Contract *– voyage contracts - charter agreements – time charters – validity and enforceability of time charters – whether a valid time charter existed at the time the voyage contract was undertaken and the entire duration of the voyage.*

Law of Evidence *– admission in pleadings- clear and unequivocal admission – legal consequences – burden of proof - what was the effect of a clear and unequivocal admission – Evidence Act (cap 80) section 112; Civil Procedure Rules (cap 21 Sub Leg) order 2 and order 13 rule 2.*

Law of Evidence *– burden of proof - duty of a party to produce their evidence – where a party refused to produce documentary evidence that it had filed in its pleadings - whether the refusal to testify or produce key documents by a party in a suit supported an adverse inference that their evidence would be unfavorable - Evidence Act (cap 80) section 112; Civil Procedure Rules (cap 21 Sub Leg) order 2 and order 13 rule 2.*

Brief facts

The litigation concerning the MV Dolphin Star was marked by numerous applications and significant delays over the preceding three years. In September 2023, the court had recognized the necessity of expediting proceedings and established a firm hearing deadline of February 24, 2024, to prevent further stagnation. Despite subsequent applications being filed, many were abandoned once the court set the hearing dates. The vessel had remained at Mtongwe anchorage since its arrest in April 2021, posing environmental risks and safety concerns, which led the court to prioritize the resolution of the case.

The initial claim was filed by ET Timbers PTE Limited, seeking substantial damages related to alleged cargo delivery issues, while the defendant contested the court's jurisdiction and the existence of a contractual agreement. Complications arose from multiple related suits, including claims for unpaid port dues by the Kenya Ports Authority. The court ruled on various preliminary objections and directed that the claims proceed in conjunction with the main case, emphasizing the urgency of resolving the matter as the vessel continued to incur costs and presented a hazard at its current location.

The claimant sought damages totaling US $2,632,286, stemming from cargo issues related to the Motor Vessel Dolphin Star, asserting that their case was supported by witness statements. They contested the validity of certain bills of lading issued by surveyors, claiming that proper documentation was issued by OBT Shipping. The defendant, on the other hand, argued there was no contractual relationship with the claimant and challenged the court's jurisdiction, stating the claims of the first set of bills of lading were null and void. Additionally, they highlighted inconsistencies in the claimant's submissions and referred to a previous court ruling that rejected the claimant's appeal. Both parties called attention to procedural issues and the importance of adhering to legal standards regarding documentation and jurisdiction.

Issues

i. Whether the continued reliance on English admiralty law post-1963 infringed on Kenya's sovereignty and legislative independence.

ii. Whether Kenya's Legislature was under an obligation to enact local admiralty laws tailored to Kenyan circumstances.

iii. Whether the High Court of Kenya had jurisdiction to determine admiralty disputes considering the lack of local admiralty laws and considering the international nature of admiralty disputes.

iv. What laws governed admiralty issues within Kenya's legal framework?

v. Whether arbitration clauses that designated foreign jurisdictions (for example London or Marseilles) for dispute resolution in contracts involving Kenyan parties and subject matter were enforceable and whether they negatively affected Kenyan parties involved in admiralty disputes.

vi. Whether contractual requirements for reference of a matter to arbitration were enforceable when one party denied the existence of the underlying contract.

vii. Whether a valid time charter existed at the time the voyage contract was undertaken and the entire duration of the voyage.

viii. What elements must a bill of lading contain for it to be considered to be a contract?

ix. What was the legal status and enforceability of bills of lading issued after the arrest of a vessel?

x. Whether shipping agents bore liability in the absence of a direct contractual relationship or disclosed principal.

xi. Whether a suit could be brought against an agent when there was a disclosed principal.

xii. Whether the refusal to testify or produce key documents by a party in a suit supported an adverse inference that their evidence would be unfavourable.

Held

1. Despite attaining self-governance in 1963, the Law of England on admiralty was still applicable to Kenya. Admiralty law was one area where Kenya was a British colony. The Kenyan courts depended fully on the UK Parliament's wisdom or lack of it, to conduct its own admiralty cases. It was done under the lazy guise that the Judicature Act provided so. To make matters worse, even subsidiary legislation in terms of the white book was also produced and expensively sold for use. It was an indictment of the Kenya's Parliament which was among the most fiercely independent in the world, and of course well remunerated. The white books cost UK £ 200,000 and expired yearly. It was a challenge that Kenya had to embrace its own destiny and guard its hold on ships. There was no international treaty obligating any country to use the law of England. The contracts requiring London as an arbitral centre could be overridden even with the use of English Arbitration Act which differentiated the seat of the tribunal and the applicable law.
2. The bulk of the applications related to referral to the arbitration in London. The British had absolutely no idea why timber held in Mombasa, would be arbitrated in that country. Most bill of ladings required arbitration in Marseilles in France. The travelling to arbitration in a far-off country alone was prohibitive and costs could surpass the value of the claim. The subject matter could also disappear. There was a public policy issue in driving parties out of cases through referral to some far-off places.

3. There must be indigenous jurisprudence developed in the novel areas of law. The law on admiralty had risen to a status where the court could have its own code on admiralty and a black book. The instant matter being the instant court's last admiralty decision for a long time, it was a clarion call to Kenya to avoid sheer laziness and enact a local legislation on admiralty law.
4. To a large extent the law of Kenya was applicable, given that the court was seated in the Republic of Kenya as a High Court exercising powers under article 165 (3) of the Constitution. The law of England was thus applied to the extent that the circumstances of the people of Kenya allowed. The instant court was not sitting as a Crown Court or King's Division but a High Court of Kenya.
5. An appeal from the instant decision was to the Court of Appeal of Kenya. There had to be compliance with both the Civil Procedure Act and Rules, (order 42 rule 1) and the Court of Appeal Rules, 2010. The white book, being rules made of procedure made under the Civil Procedure Code of England. The applicable white book was the one in force as at March 4, 2021 when the claim was filed.
6. The following laws were applicable:
    a. Constitution of Kenya.
    b. The Evidence Act, (cap 80, Laws of Kenya).
    c. Evidence Act of England (1851).
    d. Supreme Court Rules of England, Order 75.
    e. International Treaties applicable.
    f. Further to the extent applicable;
        i. Statute of the International Court of England, article 38.
        ii. Arbitration Act of England.
        iii. Arbitration Act of Kenya.
        iv. Decided cases in most civilised nations of the world. By that latter, meaning the rules and principles that had been crystallised from major world system.
7. The reference of matters to arbitration in Kenya was under a very strict regime. The right to arbitration was not absolute. Under section 6(3) of the Arbitration Act stated if a court declined to stay proceedings, a clause related to arbitration was of no effect. The decision to decline arbitration killed arbitration. Whereas the court was encouraged to support arbitration, it must be applied before any step in the proceedings.
8. For arbitration to work, the person seeking arbitration must as a corollary admit to the existence of an agreement containing an arbitration clause. In a case where the agreement was not recognized, there could be no arbitration. Section 4(3) of the Arbitration Act was operative in the instant matter. The existence of the underlying contract was denied by the defendant. With such denial, there was no basis for arbitration. There was no basis to address the ICO principle when it was neither pleaded nor testified on. No basis was laid for the same. (The ICO principle is a legal concept derived from the Latin maxim "Competence-Competence", where an arbitral tribunal had the jurisdiction to rule on its own jurisdiction, including determining the existence or validity of the arbitration agreement).
9. The admission that the defendant was the owner of the vessel was complete and irrevocable. It could not be un-admitted. The defendant was the owner of the ship.
10. The contracts and bills of lading were all signed by the captain of the ship. It was Starryway Trading and Shipping Company Ltd as agent who dealt with the powers of OBT, another agent. The p urported termination of the voyage was irrelevant. Revocation of a voyage meant, the voyage ought to have been put on hold and returned to the port of Greenville. The voyage continued on the basis of authorization by the Liberian Local agent for the ship, OBT shipping company Ltd.
11. The master of the ship issued the master's draft bill of lading. The bill of lading accompanied the actual voyage. A bill of lading transferred ownership from the shipper to the consignee or on order. The ship itself did not have a hand in the transfer of title. A shipping line or his agent did not have any business issuing bills of lading for goods long after their arrest.

12. The defendant refused to testify. They had evidence that they declined to have produced. Evidence lacked its essence when a party did not wish to have it produced. The defendant was playing games. The failure to produce documents was deliberate. The only defense the witness appeared to know consequences of perjury hence the refusal to produce documents. It was always the adverse party who objected to production of documents and not the owner of the documents. Where a party had custody or was in control of evidence which that party failed or refused to produce it, the court was entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party.
13. The Kenya Ports Authority (KPA) had a duty to supply provisions to the crew, proving a claim of $166,293.60, which would continue to accrue and be paid upon the appraisal and sale of the ship, with priority being given to Kenya Ports Authority and Kenya Revenue Authority. The amount was to be paid in priority to all except the Marshal's charges, and the defendant was required to cover provisions and expenses incurred by KPA, including moving the ship and disembarking logs. KPA's claim was allowed, including costs of $5,118, while a separate baseless claim in COM E005 of 2022 for over $2 million was dismissed, with costs of $11,000 awarded. Consequently, suit E005 of 2023 was terminated with costs of $11,000, based on findings from E003 of 2021.
14. It was not possible to return the timber to the applicant as it had not been delivered after a period of 3 years and 5 months. The warrant of arrest against the timber or cargo in the ship was lifted. If there was any cargo other than timber, the same should be released to the owners as it had not been arrested.
15. The timber should be disembarked and placed under the custody of the interested party as valuation and subsequent sale was done. If it was fit for trans-shipment, the same should be sold to Bangladesh or trans-shipped. The timber was unique and was only useful in Bangladesh. No evidence was given either way. Whichever condition, the timber was in, it should be valued sold and transshipped. The cost of trans-shipment to Bangladesh should be recovered out of sale of the timber and the ship. *In lieu* of the timber the claimant was entitled to the amounts claimed, being, cost, insurance, freight, commission and other dues.
16. The claim related to the lien on the goods by Starrway Trading and Shipping Company Ltd was not due for discussion in the instant matter. They had a lien over the cargo. It was settled and charges paid after London Arbitration. The cargo thereafter became free. Any purported lien was untenable. The cargo in the ship was therefore free from any kind of lien whatsoever.
17. The jurisdiction of the instant court was circumscribed under article 165(3) of the Constitution of Kenya. The court must have jurisdiction to determine a claim. The admiralty jurisdiction was provided under section 4 of the Judicature Act. Such jurisdiction was the same as the one exercised under by the High Court in England. The jurisdiction was exercised in conformity with international law and comity of nations. It meant that the admiralty jurisdiction was exercised using the current law of England as modified for the circumstances of the conventions governing the power of sovereign nations to control economic activities in certain zones of the sea.
18. Rule 7 of the High Court (Admiralty) Rules, 1979, being rules under the Judicature Act, allowed use of Admiralty Forms, which were for the time being used by the Kings Division subject such variation as was expedient.
19. Jurisdiction was usually divided into four:
    a. Jurisdiction *ratione personae.*
    b. Jurisdiction *ratione temporis*
    c. Jurisdiction *ratione materiae*
    d. Jurisdiction *rational soli.*
20. Jurisdiction *rational personae* was upon parties themselves. That was to say whether parties were in a position to be bound by the decision. Having noted that the ship MV Dolphin star was arrested in Kenya, the parties were subject to the jurisdiction *ratione personae.* Whether it was a towage or

salvage, the voyage ended with motor tanker Joey in Kenya. The court therefore had jurisdiction *ratione personae* over the ship.

21. The ship was arrested at the time it docked in Kenya and remained in Kenya, throughout hence jurisdiction *ratione temporis* was in place. That was not challenged. That also applied to jurisdiction *ratione materiae* over the subject matter. The ship was docked or came to Mombasa within the jurisdiction of Kenya. The instant court had jurisdiction over it. The happenings occurred or ended in Kenyan territory. The instant court had jurisdiction *ratione loci* over the ship.
22. The warrant of arrest remained in force. Another warrant was issued and remained over the cargo. The importance of establishing jurisdiction was to make a rational decision which a court had power to issue. It was of no use to sit and issue a judgment that was a nullity.
23. The court could not assume jurisdiction it did not have nor eschew jurisdiction it had. The court would therefore take up jurisdiction where it had and eschew jurisdiction where none existed.
24. The London arbitration proceedings were not clearly produced in evidence. In any case they related to freight. It was seen that US $ 1,490,000 was paid. US $ 628,262.21 was also paid. The cargo was not transported to Chittagong Bangladesh. The said amount ought to be refunded. It was irrelevant that it was claimed in another proceeding in a foreign court. Payment of freight was upon sight of bills of lading.
25. Though obliquely, the decision of the arbitral tribunal was not challengeable. The only question was what the decision was all about. Payment of freight to an agent could not be gainsaid. However, an admiralty claim had been made by an owner. It had not been impeached. In the instant case, it was taken that freight was paid. Even if it was paid of basis of later bill of lading. The bills of lading were however issued during the pendency of the case.
26. Starryway Trading and Shipping Company Ltd acknowledged that the cargo belonged to ET timber though issuance of later bills of lading which were in substance the same as the Master's bill of lading. That did not make them owners of the ship but they remained agents. However, strictly speaking they could not issue bills of lading as they were not shippers. That foreign decision did not bind the instant court on the questions it was dealing with.
27. For 3 years the cargo had remained in the ship. Its status was unknown and it had not been released. The court could not order release to the claimant without knowing the conditions. The owners of the ship were in breach of the contract of carriage. They failed to deliver the cargo to its destination. The international shipping route was from Libreville to Singapore.
28. The agreement between Dolphin Star Shipping Company Limited and Starryway shipping had no bearing in the instant case. The agreement signed by those companies did not provide rates. It was not produced in evidence. On the other hand, the claimant produced an inspection report where Captain Ye Chonggang declared the defendant as the owner and Fairwind International Company Limited as an agent.
29. There was an allegation that there was a forged time charter. The defendant failed to call a witness to address the charter. It was unnecessary to delay with the same given that no evidence of its existence was tendered. The defendants were in a unique position to produce evidence of existence of the time charter. They failed to do so. The initial burden of proof lay on the plaintiff, but the same may shift to the defendant, depending on the circumstances of the case.
30. The company Strarrway Trading and Shipping was an agent who took over from Fairwaind Co. Ltd they were not the owners. Where there was a disclosed principal, a suit could not be instituted against an agent.
31. Whether the time charter was forged or not was irrelevant in the instant proceedings. It was between Defang Company limited and charters who were not indicated.
32. With regard to the time charter, every clause was blank. Without consideration, there was no contract for the time. The company signing it was not party to the case. The counter party to the time charter

was not given and there was no owner to the time charter. It was a document inconsistent with all documentations and pleadings in the case. There was no time charter at the time the voyage contract was undertaken and the entire duration of the voyage. The defendant remained the owner of the ship MV Dolphin star and Starryway Trading and Shipping Company Ltd was its agent after Fairwinds were repealed.

33. For purposes of Liberia, the agents were OBT Liberia Ltd. They received irrevocable instructions to issue a bill of lading to the plaintiff. The defendant alleged pressure from the State of Liberia. The cardinal principle of law was *audi aliterum paterm*. The court could not condemn the State of Liberia unheard. They were not party to the proceedings. It was a question that was not open to the instant court. The master who issued the irrevocable instructions did not tender any evidence. A document executed by a person with authority deemed to be effective until evidence to the contrary was given. In any case, the defendants' were not the shippers they were the carriers. The masters bill of lading was a contract. It had to have the following:
    a. Offer
    b. Consideration
    c. Acceptance
    d. Legality
34. All the elements of a valid contract were in place. Indeed, the defendant's agent sued for the agreed consideration, successfully. Further there were principles in Civil and Common Law governing the liability of agents. Where the rue of principles was crystalized, the court would be free to roam all over the English-speaking world for persuasive precedent.
35. There were also binding precedent in the Kenyan courts. Though sitting and applying English Law, the seat of the court was in Mombasa. Therefore, only precedents by the Kenyan Court of Appeal were binding. The decision by the courts in England, including the Supreme Court of the then House of Lords were persuasive. It did not mean that the court would disrespect them.
36. The instant judgment was a wake up call to the Kenyan Legislature to save the country from the embarrassing scenario where Kenya had to rely on the law of England in extremely mundane matters. It had strange terminologies that were simply meant to obstruct and muddy issues. A simple Act of Parliament, even domesticating the Senior Courts Act of England, the same way for over 100 years, Kenya domesticated the Indian Transfer of Properties Act, which was finally repealed in 2012, with its effects reserved. It was the least Parliament could do, in line with the under the Preamble to the Constitution.

Claim allowed.

Orders

i. *Judgment entered for the claimant against the respondent for: -*
   a. *A sum of US $ 2,149,784 with costs of US $ 72,450.*
   b. *The ship MV Dolphin Star was to be appraised and sold to recover the amounts awarded and costs, taxes, Marshal costs and other charges, that the court shall certify.*
   c. *The claim by Kenya Ports Authority of US $ 166,293. 60 was allowed with costs of US $ 5118 to Kenya Ports Authority and ET Timbers PTE ltd will have costs of US $ 2,000.*
   d. *The defendant was to pay charges of US $ 166,293 claimed by Kenya Ports Authority together with other charges accruing after June 30, 2023 until the ship was appraised and sold were payable out of the proceeds of sale of both timber and the ship.*
   e. *The suit filed by Defang, meaning, HCC COMM No. E005 of 2023 was dismissed with costs of US $ 11,000 to ET Timber PTE Ltd.*
   f. *The warrant of arrest against the timber or the cargo in the ship was lifted. If there was any cargo other than the subject timber, the same should be released to the owners thereof as it had not been arrested.*
   g. *The ship should be moved to shore forthwith to avoid losing the same. The costs of moving shall be recovered form the cost of sale of the ship.*
   h. *The timber laden aboard MV Dolphin Star should be disembarked and placed under the custody of the Kenya Ports Authority as valuation and subsequent sale was done. Whichever its condition, the timber shall be valued, sold and trans-shipped to Bangladesh or other state where it could economically and safely be shipped to.*
   i. *The cost of trans-shipment to Bangladesh or other near state shall be recovered out of sale of the timber and the ship. In lieu of the timber the claimant is entitled to the amounts claimed, being, cost, insurance, freight, commission and other dues arising from the sale of the ship.*

ii. *The three cases were closed.*

iii. *The defendant's case was dismissed.*

Citations

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2. *Guardian Bank Limited v Jambo Biscuits Kenya Limited* Civil Case 301 of 2013; [2014] KEHC 1796 (KLR) - (Mentioned)
3. *Independent Electoral and Boundaries Commission & another v Mule & 3 others* Civil Appeal 219 of 2013; [2014] KECA 890 (KLR) - (Explained)
4. *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* Civil Case 644 of 2005; [2012] KEHC 5590 (KLR) - (Explained)
5. *Mabachi, Victor & another v Nurtun Bates Limited* Civil Appeal 247 of 2005; [2013] KECA 204 (KLR) - (Mentioned)
6. *Macharia & another v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Mentioned)
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8. *Moi v Mwangi Stephen Muriithi & another* Civil Appeal 240 of 2011; [2014] KECA 642 (KLR) - (Explained)
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4. Shakespeare, W.,(Ed) (1600), *The Merchant of Venice* London: Thomas Heyes

Statutes

Kenya

1. Arbitration Act (cap 49) section 3 - (Interpreted)
2. Civil Procedure Act (cap 21) part 7 - (Interpreted)
3. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 13 rule 2; order 42 rule 1 - (Interpreted)
4. Constitution of Kenya articles 42, 69, 70, 165(3) - (Interpreted)
5. Court of Appeal Rules, 2010 (cap 9 Sub Leg) In general - (Cited)
6. Evidence Act (cap 80) sections 107, 108, 109, 112 - (Interpreted)
7. High Court (Admiralty) Rules, 1979 (cap 8 Sub Leg)) rule 7 - (Interpreted)
8. Judicature Act (cap 8) section 4 - (Interpreted)
9. Kenya Ports Authority Act (cap 391) sections 10, 12(2); 30; 39 - (Interpreted)
10. Merchant Shipping Act (cap 389) sections 105(b); 110 - (Interpreted)
11. Supreme Court Act (cap 9B) section 35A - (Interpreted)

United Kingdom

1. Arbitration Act, 1996 (cap 23) sections 68(1); 69; 70; 73 - (Interpreted)
2. Civil Procedure Rules rule 61.3 - (Interpreted)
3. Evidence Act, 1851 In general - (Cited)
4. Senior Courts Act, 1981 sections 20(1)(2); 21(3)(4)(7)(8) - (Interpreted)
5. Supreme Court Rules order 75 - (Interpreted)

Advocates

Ababu Namwamba & Co Advocates for the defendant.
Kinyua Muyaa & Co Advocates for the claimant.

JUDGMENT

1. This has been a highly contested High-Octane litigation by the parties' Advocates. There has been a myriad application filed by the parties over the last 3 years or so. The court handled those certificates religiously until, September 2023 when the court noted that it was being inundated with a myriad of interlocutory applications, which were not moving the matters forward. I then directed that this matter be heard and concluded by February 24, 2024 failing which the suit shall be closed. Several other applications were filed thereafter but were abandoned when parties realised that the court had cast the hearing dates in stone. I gave several hearing dates for hearing.

2. Two auxiliary suits were filed but the court was firm on proceeding. This was informed by the fact that the subject matter, MV Dolphin Star had been arrested in April 2021 and was at Mtongwe anchorage for the last over 3 years and 2 months. It was becoming both a danger to the environment and a hazard to the crew.

Background

3. The dispute reminds of Shylock's remarks in reference to his adversary, Antonio in Act 1 Scene 3 of William Shakespeare's, *The Merchant of Venice* as follows:

> " 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."

4. It is unfathomable that when a ship, worthy billions of Yuan, is being wasted away after being arrested, the parties do not seem to care about the consequences. The parties, to the contrary, appeared interested in the dispute itself regardless of the rewards that lie concomitant with the determination of the dispute.

Pleadings

5. The claimant the following claim in respect of the claim herein was commenced by the claimant *vide* an admiralty claim in rem dated April 4, 2021 and amended on August 24, 2021 and in which the following reliefs were sought: -

    a. US $ 2,601,294.02,

    b. alternatively damages;

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

    d. US $ 8,780.00 being cargo shut out charges payable by the defendant to the claimant;

e. US $ 22,742.00 being the brokerage commission due and owing by the defendant to the claimant;

f. Interest thereon pursuant to section 35A of the *Supreme Court Act* 1981 and/or under the inherent jurisdiction of the court sitting as an Admiralty Court at court rates (12%); and

g. Costs of and incidental of the suit.

6. The defendant opposed the same. Their main case was that it was that the owner of the ship vide a time charter was Starryway Trading & Shipping Company Ltd. They protested jurisdiction of the court stating that there should be arbitration in London. In one of the most inconsistent pleadings I have ever seen, they posited that the contract between them required arbitration.

7. The defendant averred that:-

i. There was a time charter between the Defendant and Starryway Trading & Shipping Company Ltd dated 1/1/2019.

ii. The said company Starryway Trading & Shipping Company Ltd sub charted to the claimant through a voyage charter.

iii. They denied existence of Cogenbill Edition 1994 bill of lading- draft bill of lading dated 10/3/2021.

iv. They denied there being a contract between the claimant and defendant.

v. The defendant denied that shut out charges apply as the cargo was at the maximum height of 7.51m hence 6,500M^3 (Cubic Metres) was passed.

8. It was their defence case that the claimant colluded with the ministry of justice of Liberia and Euro Logging Company of Liberia to force the ship's local agents, OBT Shipping Ltd to issue authorization for the voyage. I was indeed their case that the bill of lading had not been signed and released hence there was no contract. They prayed that I dismiss the suit.

9. At the end of the pleadings, I could not fathom how, in a serious case involving millions of dollars, anyone can file such pleadings. It is a long established tradition that no person should ever be condemned unheard. The three parties that allegedly colluded are not parties. How the court is supposed to find collusion against non-parties remains a mystery.

10. In the course of this long journey, I dismissed this claim for want of prosecution. Parties were livid and used choice words in an application to set aside. The dismissal was eventually set aside but with conditions, which were all fulfilled.

11. In the meantime, the defendant filed an admiralty cause No 3 of 2021. In that suit, Defang Shipping Company Limited pleaded that they were the owners of motor vehicle Dolphin Star at all material times. They stated that ET Timbers PTE Limited, who is claimant in Admiralty Cause No E003 of 2021 caused arrest of their vessel in Admiralty Cause No E003 of 2021. This was after the court dismissed the matter for want of prosecution.

12. ET Timbers PTE Limited filed the acknowledgement of service dated 15.08.2023 while the defendant filed theirs dated August 22, 2023.

13. The ET Timbers PTE Ltd entered an appearance and responded through a preliminary objection dated May 30, 2023. The court delivered a ruling on September 19, 2023which the court dismissed

the preliminary objection in limine on grounds that the preliminary objection was based on disputed facts. The court directed the matter to be heard alongside this case and Admiralty No 3 of 2023.

14. The interested party also filed a suit, being Mombasa HCC Comm E005 of 2023 against the defendants and the claimant herein as the first and second defendants for a sum of US $ 166, 293.99 for care and provisions for the ship's crew between April 5, 2021 to June 30, 2023 and for removal of the vessel to show as the same respondents have failed to remove the same form Mtongwe Anchorage.

15. KPA sought for US $ 166,293.99 as at 30/6/2023 and other amounts from June 30, 2023M/s E T Timbers PTE Ltd filed acknowledgement of service on August 15, 2023and indicated that they intended to contest jurisdiction and defend the claim.

16. However, no response has been filed to KPA's claim by the said parties. There were however responses to the application notice filed. I note that this file has a large number of notices of appeal and letters bespeaking proceedings. Though sought and proceedings typed only one serious appeal has so far been mounted.

17. Subsequent upon filing the main claim, the defendant's agent, Starryway Trading & Shipping Company Ltd placed a lien over the timber for: -

    i. carriage and Freight US $ 614,967.3

    ii. Demurrage US $35,744.40

    iii. Damage to the vessel US $ 2,120,816.47

18. The foregoing items were never sought in this claim. However, the defendant filed Mombasa HCCC Admiralty Claim No E003 of 2023 on 24/05/2023 claiming

    a. US $ 141,330.39 demand by KPA

    b. Payment of crew wages spare parts machines fuel water and raters service, are

    c. Arrest of cover

    d. General damages.

19. The interested party filed a claim in respect to its claim dated July 28, 2023 filed in Mombasa High Court Commercial and Admiralty Case Number E003/2023 between *Kenya Ports Authority v The Owners of the Motor Vessel 'Dolphin Star*.'

20. By the said claim, KPA sought the following reliefs from the court;

    i. US $ 166,293.99 outstanding as at 30.06.2023 together with other port charges that will accrue from June 30, 2023to the date of payment as will be determined by claimant.

    ii. An order directing the 1st and 2nd defendants jointly and severally to remove to shore the Motor Vessel' Dolphin Star' lying at the claimant's Mtongwe Anchorage.

    iii. In the alternative and in the event of non-compliance of order number (b) hereinabove, an order be issued allowing the claimant to remove to shore the Motor Vessel 'Dolphin Star' lying at its Mtongwe Anchorage at a cost recoverable by claimant jointly and severally from the 1st and 2nd defendants.

    iv. A movement order do issue allowing the 1st and 2nd defendants jointly and severally and/or the claimant, whichever the case, to remove to shore the vessel and cargo laden on board.

v. Interest on (a) and (c) above until payment in full.

vi. Costs of this claim and any other incidental costs and expenses thereof provided for.

21. It was their case that upon the ex-parte hearing of the claimant's application, the court issued the warrant of arrest dated April 4, 2021 commanding the arrest of the Motor Vessel 'Dolphin Star' ("the vessel") and keeping of the vessel under arrest until further orders of the court.

22. It was their case that vessel was arrested on April 5, 2021 pursuant to warrant of arrest issued on 4/4/2021 subsequently, the vessel has been lying at the KPA's Mtongwe Anchorage. They stated that as at June 30, 2023, the outstanding port dues stood at a sum of US $ 166,293.99, which have continued to accrue each day until payment in full. This is the bill the harbor master is seeking to recover.

23. Defang Shipping Company Limited also sought for the collection of port charges owing to KPA in respect to services rendered to the vessel at the Port and the removal of the vessel to shore in the protection of the marine environment.

24. The Kenya ports authority sought that the court determines the following issues: -

a. Whether the honourable court has the jurisdiction to hear and determine the claim filed by KPA in Mombasa HCCOMMADMIR E003/2023.

b. Whether KPA is entitled to the reliefs sought in the claim filed in Mombasa HCCOMMADMIR E003/2023.

25. On 12.10.2023, the Court directed that the claim filed by KPA in Mombasa HCCOMMADMIR E003/2023 and the claim filed by the Defendant in Mombasa High Court Commercial & Admiralty Case Number E005 of 2023 between *Defang Shipping Company Limited v E.T. Timbers Limited* be put in abeyance and move together with this case. Determination of this case was also to determine those cases.

Evidence

26. The claimant's witness PW1 relied on his witness statement and bundle of documents both dated January 31, 2024 which he adopted in evidence. The prayed that the court awards the claimant the sums prayed for. The sums were lower than claimed hitherto.

27. The witness was cross examined and stated that testified that he was not aware that there was arbitration in London that declared the bill of lading invalid. It was his evidence that he paid Starryway Trading & Shipping Company Ltd as the agent of the defendant. The witness further testified that there was a binding contract and he was aware of the second batch of the bill of lading. He testified that the partial award was for freight for goods they have not received.

28. Further, it was his stated case that the bill of lading was property of the shipper and a second bill could not be issued. By a party other than a shipper.

29. The second witness, relied on his witness statement dated January 31, 2024. In cross examination, it was his testimony that a fixture note becomes a contract upon its term being settled. It was stated that the fixture note in issue was a contract. This can be seen from the clean recap issued.

30. To the witness, the purported time charter was a sham. It was signed by Defang shipping ltd and Starryway Company Ltd. Both these companies were non-existent and had nothing to do with the case. He testified that the bill of lading were signed but not released. That the bill of lading should be released by the shipper. In this case the shipper was Euro Logging Company Ltd of Liberia.

31. It was his stated case that the ship was to go to Bangladesh but sailed to Mombasa without giving the bill of lading. Further, that the letter of authorization was impliedly irrevocable for the voyage. That bills of lading by the interested party were not the correct ones.

32. He also testified that it was the owners' and not master's responsibility for the overall ship. In re-examination, he testified that Fairwind International company was the commercial manager of the owner and the rest of the documents showed De fang shipping as the owner. This included the P &I, the insurance issued for the voyage. He stated that as agent, he advised the Claimant to sign fixture note, which they duly did.

33. On the part of the defendant, DW1 adopted his witness statement. He did not produce documents. In spite of the claimant's advocate conceding to production of all documents, the defendant refused to produce documents filed. On cross examination, he denied knowledge of the directors of the defendant. He stated that he knew the company but not its directors.

34. He testified that Starryway Trading & Shipping Company Ltd hired the ship at US $ 10,000 per day and which was to be paid to the defendant. He stated that authorization was issued by OBT Shipping ltd but the defendant and Starryway Trading & Shipping Company Ltd ordered the captain to revoke the authorization. It was also his case that the cargo belonged to the Claimant and Starryway Trading & Shipping Company Ltd were the charterers.

35. The witness denied that the time charter dated 1/1/2019 was not forged. It was their case that even where there are issues on the time charter, it should be submitted to London Arbitrator.

36. However, I note that the defendant in their submissions addressed issue of Captain Yu and Cap Lu Jian. Cap Lu Jian irrelevant as he never testified. They prayed that the case be dismissed with costs. The defendant did not address 2 crucial matters: -

    1. The cargo in the arrested ship

    2. Raison d'etre why the cargo is in Kenya instead of Singapore.

Submissions

37. Contrary to my directions the plaintiff filed 110 pages of submission out of which 42 were written work and the rest were annexures including of ,the *Constitution* *Evidence act* of Kenya 1963, Civil Procedure White Book 2011, of England, Vol 1, a decision in admiralty clause No M001 of 2022 owners of Motor Vessel Murembe Judith of the Port of Panama (a decision by Justice Njoki Mwangi on 28/10/2022. I wish parties could stick to agreed page limits and separate submission and authorities.

38. The claimant submitted that their claim is for: -

    a. US $ 2,601,294 as cost of cargo loaded on Motor Vessel Dolphin Star.

    b. Cargo shut out charges of US $ 8,750.

    c. Brokerage commission of US $ 22,742.

39. It was their case that their suit was supported by statements of a Amanalaidar Thalamutha and Captain SM Abel both dated January 31, 2024. They stated that both cross reference documents in a list dated January 31, 2024. It was their case that they did not rely on bills of lading on pages 80 – 86. The said documents were provided by the defendant and there included by mistake.

40. It was submitted that stated that their witnesses were examined and their case closed. They noted that though the claimant offered to produce defence documents by consent, the defendant was not willing

to have them admitted. They stated that the defendant closed its case without producing documents. At paragraph 7 of the submissions, the claimant invited the court to take note of 10 issues, starting from page 3 to page 9 of the submissions.

41. The claimant submitted that the original bill of lading were issued by OBT shipping. These are issued on the authority of the Master of the ship. It was their case that even those issue by Blue Cross Surveyors were cogent bills of lading and that surveyors having out inspections and no authority to issue contractual documents or bills of lading.

42. They submit that the *Black's Law Dictionary* 11 Edition defines a bill of lading as "A document acknowledging the receipt of goods by a carrier of by the shipper's agent and the contract for transportation of those goods.

43. Further, that the bill of lading is thus a document that indicates receipt of goods for shipment and that is issued by a person engaged in the business of transportation or forwarding goods. A negotiable bill of lading is a document of title.

44. To the claimant the defendant was a party to the lading through their agent, Starryway Trading & Shipping Company Ltd. They stated that the issue of London Arbitration has been ruled on and as such this court cannot sit on Appeal from its decision.

45. On stay of proceedings they posited that my predecessor in this case Hon Lady Justice Njoki ruled and her decisions is in situ. The Court of Appeal dealt with the issue with finality. Her decision is still in force.

46. On Acknowledgement of service they submitted that the same is required by the Rules and does not bind the court. According to them they state that the issue of jurisdiction has been dealt with by the court. According to them they state that the issue of jurisdiction has been dealt with by the court. It is their case that by refusing to produce documents, the plaintiff's case is unopposed. In other words, the defence is hollow and a sham.

47. The claimant posited that that jurisdiction is a mixed question of fact and law. The same was proved through between the claimant and the defendant's commercial manager/agent. They stated that OBT Bills of lading were issued on March 4, 2021 while the surveyors Bill were issued on August 19, 2021. They disputed that the bills by OBT bills, were null and void. The bills of lading are agreed on by the shipper the master of the vessel, the agent of the vessel and claimant.

48. They questioned the cancellation of authority after the ship sailed. They urged the court to distinguish between signing and releasing bills of lading. They stated that authorisation of voyage by masters of ships to vessels are irrevocable. The vessel could not leave Greenville without the signing of bill of lading or a clean recap.

49. One clear element of all submissions is repetition. Repetition is a literary device used for emphasis. I shall not deal with the rest of the submissions but I have read them painstakingly. Most of the issues addressed are not Germaine to the decision making.

50. The Defendant filed a 10-page submission, here they requested that the court ignores the remainder of 321 pages out of 402 filed by the claimant.

51. It was the defence case that the claimant and defendant did not have any contract between themselves. The contract with OBT shipping was null and void. The defendant was not a party to the fixture note dated January 19, 2021 between the claimant and Starryway Trading & Shipping Company Ltd and the claimant.

52. Further, that there are inconsistent claims on the obligation to arbitrate under the first setoff voyage charter in London. The defendant therefore contested the jurisdiction of the court, a matter which they state in the Court of Appeal.

53. They submitted that they indicated when filing that 'I intend to contest jurisdiction. this is indicated in paragraph 15 of their defence. They denied that the contest on jurisdiction is based on a time charter. They state that the contest is based on the ICO Principle. They stated that the first set of bill of lading are null and void and should be rejected.

54. It is then recalled that on August 19, 2021 Starryway Trading & Shipping Company Ltd issued second bill of lading Nos LBBR 21-1017-1023, LBBB L21-1020 and LBBL21. 1021 under a voyage charter issued the bills by their agents as the carrier. Thereafter, on August 31, 2021, Starryway Trading & Shipping Company Ltd applied for US $ 578,770.89 as freight. There was an award on basis of second set of Bills of lading. According to the defendant, the claimant was not entitled to reject the by Starryway Trading & Shipping Company Ltd.

55. It was their further submission that the claimant's appeal was rejected by the High Court of England on July 1, 2022. This part of evidence is not on record as testimony. It was elicited in bits and pieces from cross examination. The decision are not part of this court's record. The appeal process is provided for under section 69 of the *Arbitration Act* 1996, cap 23 of UK as follows: -

> "(1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings. An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except—
>
> (a) with the agreement of all the other parties to the proceedings, or
>
> (b) with the leave of the court. The right to appeal is also subject to the restrictions in section 70(2) and (3).
>
> (3) Leave to appeal shall be given only if the court is satisfied—
>
> (a) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (b) that the question is one which the tribunal was asked to determine,
>
> (c) that, on the basis of the findings of fact in the award-
>
> (i) the decision of the tribunal on the question is obviously wrong, or
>
> (ii) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.
>
> (4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted.

(5) The court shall determine an application for leave to appeal under this section without a hearing unless it appears to the court that a hearing is required.

(6) The leave of the court is required for any appeal from a decision of the court under this section to grant or refuse leave to appeal.

(7) On an appeal under this section the court may by order—

(a) confirm the award,

(b) vary the award,

(c) remit the award to the tribunal, in whole or in part, for reconsideration in the light of the court's determination, or

(d) set aside the award in whole or in part. The court shall not exercise its power to set aside an award, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

(8) The decision of the court on an appeal under this section shall be treated as a judgment of the court for the purposes of a further appeal. But no such appeal lies without the leave of the court which shall not be given unless the court considers that the question is one of general importance or is one which for some other special reason should be considered by the Court of Appeal

56. It is also a strange submission given that there is no Appeal from the decision of an arbitrator. The court only deal with application for setting aside under section 68(1) as doth: -

(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).

57. I wish parties can plead the whole of their cases. The Court of Appeal in the case *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, considered with approval two foreign cases on the issue of parties being bound by their pleadings as follows-

" ... the decision of the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, in which the learned Judges quoted with approval from an article by Sir Jack Jacob entitled "*The present Importance of Pleadings*." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated-

'As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings ... for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event,

the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice.'

The Appellants also cited the Ugandan case of *Libyan Arab Uganda Bank For Foreign Trade And Development & anor v Adam Vassiliadis* [1986]UG CA 6 where the Uganda Court of Appeal (judgment of Odoki J.A) cited with approval the dictum of Lord Denning in J*ones v National Coal Board* [1957]2 QB 55 That-

'In the system of trial which we have evolved in this country, the Judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries.'"

Referring also to a decision of Nigerian Supreme Court our Court of Appeal

stated-

"*Adetoun Oladeji (nig) Ltd v Nigeria Breweries Plc* Sc 91/2002, Judge Pius Aderemi JSC expressed himself, and we would readily agree, as follows;

'.... it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded."

58. Therefore, parties are bound to plead their cases fully. In the case of *Daniel Otieno Migore v South Nyanza Sugar Co Ltd* [2018] eKLR, Justice AC Mrima stated as doth: -

> " 11. It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of *Independent Electoral and Boundaries Commission & Ano v Stephen Mutinda Mule & 3 others* (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -
>
> ".....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....
>
> ...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

59. In the case of *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, Malawi Supreme Court of Appeal stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "*The Present Importance of Pleadings" published in [1960] Current Legal Problems* at p 174 whereof the learned author posited that: -

> " As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings .....for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

60. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR found and held as follows in an election petition: -

> " In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings....."

61. Submissions are supposed to be summaries and a recap of main points. They do not originate evidence and are talking points. A limit on the number of pages of submissions filed. Have over 400 pages of submissions and authorities odes npt drive the point home but obsecures issues. This was stated succinctly by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR:

> " Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented."

62. To the defendant on 25/3/2022 OBT issued a first set of Bills of lading to the shipper according to the direction of Liberian authorities without authorisation from the defendant and the master. This was more than one year before the first bill of lading. They stated that thorough the master authorised OBT to issue, such authorisation lead been revoked in March 2022. The said drafts were prepared for parties concerned for verification before the master revoked the authorisation.

63. The defendant further submitted that OBT were compelled to issue Bills of lading. They stated that an act where an agent does all act without authority, then the principal is not bound. This appears to be a new thinking that I have not come across. The court is aware of the reverse, that an agent carrying out work with ostensible authority binds the principal.

64. They submitted further that the first Bills of lading were issued after the first were issued by Starryway Trading & Shipping Company Ltd. They state that there is as such no contract of carriage between the defendant and the claimant. The claimants are not holders of first set of Bills of lading in good faith.

65. It was stressed that submitted that the claim was based on a fixture note, whose owners as indicated at the bottom of the same document are Starryway Trading & Shipping Company Ltd. There was a contestation that there was no signature by the Defendant. They submit that without defendant's stamp of signature the defendant cannot be seen as a party. It is at this point I must digress. The defendants do not appear to be aware of their position in the pleadings.

66. On one hand they point that Starryway Trading & Shipping Company Ltd were their agents for purposes of freight and on another they state they were owners. The defence has, what I call as a fragment general denial. They deny one part without regard to their position in another point in the same submissions. They now stated that the claimant had contested that Starryway Trading & Shipping Company Ltd were owners and the defendant was the Head owners. They referred the court to paragraph 6 of the declaration dated April 4, 2021.

67. They stated that Starryway Trading & Shipping Company Ltd was the party entitled to be sued. They stated the defendant is not a party to the fixture note dated January 19, 2021. According to then, Starryway Trading and Shipping Co Ltd as owners and E T Timbers as voyage charters.

68. The interested party also filed submissions. It was their submissions that the court's admiralty jurisdiction flows from the provisions of article 165(3)(e) of the *Constitution* as read together with section 4 of the *Judicature Act* cap. 8 which provide that the court shall exercise such jurisdiction in the same manner and extent and in accordance with the same procedure as in the High Court in England and in conformity with international laws. It is, according to the, in that respect, Mombasa HCCOMMADMIR E003/2023 was brought under the provisions of sections 20(1)(a), (2)(e)(n) & (5)(a) and 21(3), (4), (7) & (8) of the *Senior Courts Act, 1981*.

69. The interested party posited that the issue of jurisdiction was settled by Lady Justice Njoki Mwangi in the ruling delivered on July 14, 2021 in respect to the defendant's application notice dated April 16, 2021. The said decision of the court remains in force as the same has not been set aside. The learned Judge reasoned at paragraph 165 of thereof that: -

    '... this court finds that it has jurisdiction to hear the claim in rem and it had the jurisdiction to grant the warrant of arrest as the claim in issue falls under section 20(2)(h) of the *Senior Courts Act* and that section 21(4)(b)(i) of the said Act applies to the claim herein.'

70. In lengthy submissions they submitted that despite the foregoing, ET Timbers PTE Ltd, filed an acknowledgement of service dated August 15, 2023 in Mombasa HCCOMMADMIR E003/2023 indicating that they intended to contest the jurisdiction of the court to hear KPA's claim. However,

they did not filed a formal application within 28 days of filing its acknowledgement of service to contest the court's jurisdiction as required under the provisions of rule 61.3 (3.4) of the English *Civil Procedure Rules* and the *Practice Directions* set out thereunder as read together with the particulars contained in Form ADM2. 18.

71. Defang Shipping company as the owner of Motor vessel Dolphin star filed an acknowledgement of service dated August 22, 2023 in Mombasa HCCOMMADMIR E003/2023. However, the defendanthad indicated that they do not wish to contest the jurisdiction of the Court to hear and determine KPA's claim.

72. It was their submission that the court has jurisdiction to hear and determine the interested party's case in that under the provisions of sections 10, 12(2)(i), 30 and 39 of the *KPA Act* cap 391, the interested party is allowed to determine, impose and levy rates, fares, charges, dues or fees for any service performed by KPA or for the use of the facilities provided by the Authority. To them a letter dated March 3, 2023, KPA filed herein the letter dated 02.03.2023 which contained a tabulation of all owing port charges in the sum of US $ 141,330.39 payable to KPA for marine services rendered to the vessel from the date of arrest on 04.04.2021 to 28.02.2023 and which continued to accrue is a legitimate amount due. They prayed for the parties jointly and severally to deposit court of 75% of the total outstanding port charges of US $ 166,293.99. 23.

73. They submitted further that both the claimant and the defendant filed their respective responses to said application notice with the claimant filing the replying affidavit of Annamalainadar Thalamuthu dated August 25, 2023 and the Defendant filing the replying affidavit of Yu Zhongjian dated 31.08.2023. Both parties deny the liability to pay the outstanding port charges and the cost for moving the vessel to shore.

74. It was their submission that on the one hand, the defendant is liable for the payment of the outstanding port dues by virtue of being the owners of the vessel. A maritime lien for the outstanding port dues attached to the vessel in favour of KPA from the date of arrest pursuant to the provisions of section 105 (b) of the *Merchant Shipping Act* cap 389. Further, the provisions of section 110 of the said Act state that such a maritime lien attaches to the vessel itself notwithstanding the ownership of the vessel. 26.

75. On the other hand, they posited that the claimant is liable to pay the outstanding port dues pursuant to the undertaking dated April 4, 2021in which the claimant undertook to pay on demand fees of all expenses incurred in the arrest and care and custody of the vessel while under arrest. This was pursuant to the application and undertaking for arrest and custody dated April 4, 2021and produced as annexture KPA-2 attached to the supporting affidavit of Stephen Kyandih dated 28.07.2023.

76. Moreover, they submitted that it is common ground that the vessel was arrested on April 5, 2021and since the date of arrest a period of almost 3 years has lapsed while the vessel remains lying at KPA's Mtongwe anchorage. 30. The last inspection of the vessel was conducted by the Kenya Maritime Authority on January 16, 2023and January 17, 2023 in which KMA found that 8 out of the 11 statutory certificates for the vessel have expired since June 2022 and other vital certificates such as the medical chest certificate and hull and machinery certificates were also not valid. KMA also noted in the report that the hull of the vessel had marine growth and some parts had been seized up with corrosion and not ready for use.

77. They referred to the port state control report produced as the sole annexture A attached to the defendant's replying affidavit of Yu Zhongjian dated August 31, 2023. 31. To them, as a state organ, the interested party has an obligation, err, a duty under the provisions of article 42, 69 and 70 of the *Constitution* to apply to court for orders to prevent, stop or discontinue any act or omission that is harmful to the environment in and around the Port.

78. It was their submission that the vessel has remained laid up at the Port with cargo on board for a long period and there is a possibility that the vessel's condition has deteriorated to the extent that it poses a risk to the public in terms of the safety of life, property and the environment.

79. Therefore, that the vessel together with the cargo laden on board should be moved to shore forthwith after delivery of the Judgment of the court. They stated that court has previously issued the order for the movement of the vessel on September 28, 2023and despite the order being suspended on October 12, 2023, the court was in full agreement that there was a need to have the vessel moved to shore.

Analysis

80. The The court will deal with 4 issues of the cases. The case will be dealt with in under the following heads:-

    a. Preliminaries

    b. Jurisdiction

    c. The 4 issues for determination

    d. Reliefs

81. Under (c) above, the issue for determination are further divided into 3

    a. The issues by KPA

    b. The claim by ET Timbers

    c. The claim by De Fang Shipping company Ltd

82. Majority of the issues raised by the defendant shall be dealt with at the preliminary stages excluding jurisdiction. Jurisdiction shall be dealt with as a stand alone issue. It is also in two aspects;

    a. Parts of jurisdiction that have been settled

    b. Parts of jurisdiction not yet dealt with.

Preliminary

83. The court is alive and regrets that 7 days after delivery of this judgment, Kenya will be celebrating the sixty-first Madaraka day. Kenya attained its self-governance on 1/6/1963. Later we shall happily celebrate in December, the Independent Day. There is however nothing to show for this where admiralty is concerned. It is one area where Kenya is still a British colony. The Law of England as it is in force today applies.

84. We therefore depend fully on the UK parliament's wisdom or lack of it, to conduct our own admiralty cases. We do this under the lazy guise that the *Judicature Act* provides so. To make matters worse, even subsidiary legislation in terms of the white book is also produced and expensively sold for use. It is an indictment of the country's parliament which is among the most fiercely independent in the world, and of course well remunerated. The white books costs of UK £200,000 and expires yearly.

85. It is a challenge that we must embrace our own destiny and guard our hold on ships. There is no international treaty obligating any country to use the law of England. The contracts requiring London as an arbitral centre can be overridden even with the use of English *Arbitration Act* which differentiates the seat of the tribunal and the applicable law.

86. The bulk of the applications relate to referral to the Arbitration in London. The British have absolutely no idea why timber held in Mombasa, will be arbitrated in that country. I even noted that most bill of ladings require arbitration in Marseilles in France. The travelling to litigation in a far off country alone is prohibitive and costs may surpass the value of the claim. The subject matter may also disappear. There is a public policy issue in driving parties out of cases though referral to some far off places: -*Uber Technologies Inc v Heller*, 2020 SCC 16, [2020] 2 SCR. 118, the Canadian Supreme Court sitting at Ontario held as hereunder: -

> " The *Arbitration Act* generally mandates a stay of proceedings when a court action relates to a matter governed by an arbitration agreement (s 7(1)). Of the few exceptions to this general rule, this appeal requires consideration only of whether Mr. Heller's action should proceed because "[t]he arbitration agreement is invalid" (s 7(2)). Answering that question is really this simple. As a matter of public policy, courts will not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law. This obviates any need to resort to, and distort, the doctrine of unconscionability.
>
> [106] While the parties did not argue this appeal on the basis of public policy, we are of course not bound by the framing of their legal arguments. The central question to be answered in this appeal is not whether Uber's arbitration agreement is unconscionable, but whether it is invalid as contemplated by the *Arbitration Act* (ie, unenforceable as a matter of contract law). Whether that question is viewed through the lens of unconscionability or public policy, the basis for reaching a conclusion on enforceability is substantially the same: the issues raised by the parties remain the focus (R v Mian, 2014 SCC 54, [2014] 2 SCR 689, at para 30; see also 1196303 *Ontario Inc v Glen Grove Suites Inc*, 2015 OCA 580, 337 O AC 85, at para 87). Further, this court has said that courts may consider issues of public policy on their own motion, and for a good reason that (by happy coincidence) touches on the very basis for my objection to the putative "arbitration agreement" in this case: "public policy and respect for the rule of law go hand in hand" (*Pro Swing Inc v Elta Golf Inc*., 2006 SCC 52, [2006] 2 SCR 612, at para 59)."

87. On the other hand, there must be indigenous jurisprudence developed in the novel areas of law. In this case the Law on admiralty has risen to a status where we can have our own code on admiralty and a black book (as opposed to the white book (pun intended). This being my last admiralty decision for a long time, it is a clarion call to the country to avoid sheer laziness and enact a local aw on this area.

88. It is only a self-governing country that can be "Proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation". It is that indivisible sovereignty that the legislature can save by enacting our own law. To a large extent the Law of Kenya is applicable, given that the court is seated in the Republic of Kenya as a High Court exercising powers under article 165(3) of the *Constitution*. The said article provides as follows: -

> " Subject to clause (5), the High Court shall have—
>
> (a) unlimited original jurisdiction in criminal and civil matters;
>
> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
>
> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under article 191; and(e)any other jurisdiction, original or appellate, conferred on it by legislation."

89. The *Constitution* is implemented in the *Judicature Act* section 4 thereof, which states as doth: -

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

(2) The admiralty jurisdiction of the High Court shall be exercisable–

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

(b) 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.

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.

(3) An appeal shall lie from any judgement, order or decision of the High Court in the exercise of its admiralty jurisdiction within the same time in the same manner as an appeal from a decree of the High Court under part VII of the *Civil Procedure Act*."

90. The Law of England is thus applied to the extent the circumstances of the people of Kenya allow. It must be remembered that the court is not sitting as a crown court or king's division but a high court of Kenya. Lest we forget. This does not however, diminish the importance and crucial nature of choice of law by the parties. I could see the strain on advocates, indicating applicability of English law, quoting names that sound Kenyan, judges, I see in our college of judges. The façade of English law should be brought down.

91. Further, it should be noted that an appeal from this decision is still to the Court of Appeal of Kenya. There has to be compliance with both the *Civil Procedure Act* and *Rules*, (order 42 rule 1 and the *Court of Appeal Rules, 2010*.

92. The white book, being rules made of procedure made under the Civil Procedure Code of England. The applicable white book is the one in force as at March 4, 2021 when the claim was filed.

93. The following are applicable:

a. *Constitution of Kenya 2010*

b. The *Evidence Act* cap 80, Laws of Kenya.

c. *Evidence Act of England, 1851*.

d. order 75 of the *Supreme Court Rules of England*

e. International Treaties applicable

f. Further to the extent applicable, article 38(1) of the ICJ statute will come in handy.

g. *Arbitration Act* of England.

h. *Arbitration Act* of Kenya.

i. Decided cases in most civilised nations of the world. By this latter, I mean the rules and principles that have been crystallised from major world system.

94. Arbitration is governed in Kenya by the *Arbitration Act*, 1995 as amended from time to time. The reference of matters is under a very strict regime. It provides as follows: -

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

(a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

(3) If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

95. It should be noted that the right to arbitration is not absolute. Under section 6(3) if a court declines to stay proceedings, a clause related to arbitration is of no effect. In other words, the decision to decline arbitration kills arbitration. The court is encouraged to support arbitration. However, it must be applied before any step in the proceedings.

96. Secondly, for arbitration to work, the person seeking arbitration must as a corollary admit existence of an agreement containing arbitration. In a case where the agreement is not recognized, there can be no arbitration. The said section states as follows: -

(1) An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) An arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if it is contained in—

(a) a document signed by the parties;

(b) an exchange of letters, telex, telegram, facsimile, electronic mail or other means of telecommunications which provide a record of the agreement; or

(c) an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other party.

(4) The reference in a contract to a document containing an arbitration clause shall constitute an arbitration agreement if the contract is in writing and the reference is such as to make that arbitration clause part of the contract.

97. Section 4(3) of the *Arbitration Act* is operative in this matter. The existence of the underlying contract is denied by the defendant. With such denial, there is no basis for arbitration. I have seen no basis to address the ICO principle when it is neither pleaded nor testified on. No basis was laid for the same.

98. In England, Arbitration is governed by the *Arbitration Act* 1996, Chapter 23, Laws of England, which is indicated to be enacted on June 17, 1996. The long tittle indicates as follows: -

> " An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes.
>
> Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same …."

99. The seat of the Arbitration is provided for under section 3 *Arbitration Act* 1996, as follows: -

> " In this Part "the seat of the arbitration" means the juridical seat of the arbitration designated-
>
> (a) by the parties to the arbitration agreement, or
>
> (b) by any arbitral or other institution or person vested by the parties with powers in that regard, or
>
> (c) by the arbitral tribunal if so authorized by the parties, or determined, in the absence of any such designation, having regard to the parties' agreement and all the relevant circumstances."

Admission

100. The Ship hired to carry cargo measuring at minimum 6,500 M^3 to a maximum of 6,800M^3 of Liberian Ekika (Azobe Round Loss from Greenville Liberia to Chittagong Bangladesh. The said timber did not arrive and has not to date arrived in Bangladesh to dated. Though the cargo was to be carried exclusively, the ship took in more cargo of Heavy machinery to be off loaded at Mombasa.

101. The question lingering in my mind as parties battled is whether a party can make an inconsistent claim in subsequent pleadings and the court ignores this. In the court the admission that the defendant was

the owner of the vessel was complete and irrevocable. It cannot be unadmitted. Order rule 2 of the Kenyan *Civil Procedure Rules 2010* which provides that: -

> " Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions as he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

102. In respect to admission, in *Simal Velji Shah v Chemafrica Limited* [6] the court cited *Guardian Bank Limited v Jambo Biscuits Kenya Limited* [7] which stated: -

> " The principle applicable in judgment on admission is that the admission must be very clear and unequivocal on a plain perusal of the admission. The admission in the sense of order 13 rule 2 of the *Civil Procedure Rules* is not one which requires copious interpretations or material to discern. It must be plainly and readily discernible. In such clear admission, like J.B. Havelock J stated in the case of 747 *Freighter Conversion LLC v One Jet One Airways Kenya Ltd & 3 others* HCCC No 445 of 2012, there is no point in letting a matter go for a trial for there is nothing to be gained in a trial. See the case of *Botanics Kenya Ltd Ensign Food (K) Ltd* HCC No 99 of 2012, where Ogola J gave a catalogue of other cases which amplified this principle. These cases are: *Choitram v Nazari* (1984) KLE 327 that:-
>
> "...admissions have to be plain and obvious as plain as a pikestaff and clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning."
>
> Chesoni Ag JA went on to add that:-
>
> "...an admission is clear if the answer by a bystander to the question whether there was an admission of facts would be 'of course there was."
>
> *Cassam v Sachania* (1982) KLR 191 –
>
> "The judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where the admissions of fact are so clear and unequivocal that they amount to an admission of liability entitling the plaintiff to judgment."

103. In this case, the admission was in a subsequent pleading. That admission was unequivocal and was not challenged. I find and hold that the admission removed the question of ownership of the ship. The defendant was the owner of the ship.

104. Related to this was a time charter. The same was not useful as it was between Dolphin Shipping Company and another company. On the face of the time charter was between two other parties. Two things come in mind. Why will a company that does not exist or at least lay a claim to a ship, enter into a time charter while another company is in control of an ongoing voyage.

105. All documents relate to Starryway Trading & Shipping Company Ltd. However, the time charter was executed by another company, with a similar name. There is no indication on who Dolphin Shipping Company are in relation to the ship.

106. The contracts and bills of lading were all signed by the captain of the ship. It is Starryway Trading & Shipping Company Ltd as agent who dealt with the powers of OBT, another agent. The purported termination of the voyage is truly irrelevant. Revocation of a voyage means, the voyage ought to

have been put on hold and returned to the port of Greenville. The voyage continued on the basis of authorization by the Liberian Local agent for the ship, OBT shipping company Ltd.

107. The master of the ship issued the master's draft bill of lading. The bill of lading accompanied the actual voyage. So, what do we do with bills of lading issued long after a ship has been arrested? A bill of lading transfers ownership from the shipper to the consignee or on order. The ship itself does not have a hand in the transfer of title. What business then does a shipping line or his agent have issuing bills of lading for goods long after their arrest.

108. To make matters more interesting, the defendant refused to testify. They had evidence that they declined to have produced. What is the essence of evidence of the party having it does not wish to have the same produced. The second witness, who was produce documents did not turn up despite assurances. The court gave extra time, all in vain.

109. It was not lost on the court that the defendant was playing games. The failure to produce documents was deliberate. The only defence witness appeared to know consequences of perjury hence the refusal to produce documents. It is always the adverse party who objects to production of documents and not the owner of the documents. In *Kenya Akiba Micro Financing Limited v Ezekiel Chebii & 14 others* [2012] eKLR the court stated as follows:

> " Section 112 of the *Evidence Act* Chapter 80 of the laws of Kenya provides:
>
> 'In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proofing of disproving that fact is upon him.'
>
> Where a party has custody or is in control of evidence which that party fails or refuses to tender or produce, the court is entitled to make the adverse inference that if such evidence was produced, it would be adverse to such a party. In the case of *Kimotho v KCB* (2003) 1 EA 108 the court held that adverse inference should be drawn upon a party who fails to call evidence in his possession."

Claim by Kenya Ports Authority

110. The claim by Kenya Ports Authority was not contests. In any case the only question is who was liable to pay. The court was asked to take into consideration the undertakings made at the time of arrest of the ship

.

111. Jurisdiction was not contested thereafter within 28 days. Therefore, the court's jurisdiction was this deemed as admitted. The De Fang Company ltd filed acknowledgment of service. They indicated that they were to defend the claim but had no issue on jurisdiction upon perusing the pleadings and testimony.

112. Kenya Ports Authority has been under duty to supply to the crew provisions. I find the claim for US $ 166,293. 60 proved. They said amounts continued to accrue. The same shall also be ascertained and paid upon appraisal and sale of the ship. The amounts due to KPA and to extent Kenya Revenue authority shall have priority payment.

113. The sum of US $ US $ 166,293. 60 accrued by June 30, 2023 shall be paid in priority to all except the Marshal's charges. The defendant to pay for provisions to that will be made of expenses incurred by the claimant KPA, including to move the ship and disembark the logs. The claim by KPA is thus allowed with costs of US $ 5118. The claimant in Admiralty No 3/2021 who was the 2nd Defendant incurred costs defending the claim. A sum of US $ 2,000 will be sufficient in costs.

114. In regard to COM E005 of 2022, a claim for over US $ 2 million was made. The same was baseless. Costs of US $ 11,000 will suffice as costs given that the claim was not fully heard. Further, the defence in that matter was materially the same as the claim in Admiralty Cause No. E003 of 2021.

115. The suit E005 of 2023 is thus terminated with costs of US $ 11,000 in view for the findings in E003 of 2021.

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

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

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

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

120. I do not for a moment think that the claim related to the lien on the goods by Starrway Trading and Shipping Company Ltd is due for discussion in this matter. They had a lien over the cargo. Their was settled and charges paid after London arbitration. The cargo thereafter became free. Any purported lien is untenable. The cargo in the ship is therefore free from any kind of lieu whatsoever. This leaves three issued based on proceedings and evidence

    i. The liability of the defendants for the admiralty claims made in the suit

    ii. Competence of the defence

    iii. Quantum and other ancillary orders that the court can issue.

Jurisdiction

121. The jurisdiction of this court is circumscribed under article 165(3) of the *Constitution* of Kenya, which posits as follows: -

    (3) Subject to clause (5), the High Court shall have-

        (a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this *Constitution* to consider the removal of a person from office, other than a tribunal appointed under article 144;

122. The court must have jurisdiction to determine a claim. The Admiralty jurisdiction is provided under section 4 of the *Judicature Act*, which provides as follows: -

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

(2) 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.

(3) In the exercise of its admiralty jurisdiction, the High Court may exercise all the powers which it possesses for the purpose of its other civil jurisdiction.

(4) An appeal shall lie from any judgment, order or decision of the High Court in the exercise of its admiralty jurisdiction within the same time and in the same manner as an appeal from a decree of the High Court under part VII of the *Civil Procedure Act* (cap 21)."

123. It is noted that such jurisdiction is the same as the one exercised under by the High Court in England. The jurisdiction is exercised in conformity with International Law and comity of nations. What this means is that the admiralty jurisdiction is exercised using the current Law of England as modified for the circumstances of this conventions governing the power of sovereign nations to control economic activities in certain zones of the sea.

124. Rule 7 of the *High Court (Admiralty) Rules, 1979*, being rules Under the *Judicature Act*, allow use of Admiralty forms, which are for the time being used by the Queens Division (Now King's Division) subject such variation as may be expedient. The Rule provides –

> "(1) Subject to paragraph (2), the forms to be used in admiralty proceedings shall be those in use for the time being in the Queen's Bench Division (Admiralty Court) in England, subject to any variations of whatever nature which may be expedient.
>
> (2) The heading to the forms shall be— "In the High Court of Kenya at (name of registry) Admiralty Jurisdiction" followed by the title of the suit as in England.

125. Before proceeding it is imperative that the court satisfies itself that it has jurisdiction. Jurisdiction is usually divided into four

a. Jurisdiction *ratione personae*.

b. *Jurisdiction ratione temporis*

c. Jurisdiction *ratione materiae*

d. *Jurisdiction rational soli*.

126. Jurisdiction rational personae is upon parties themselves. That is to say whether parties are in a position to be bound by the decision. Having noted that the ship MV dolphin star was arrested in Kenya, the parties are subject to the jurisdiction ratione personae.

127. Whether this was a towage or salvage, the voyage ended with motor tanker Joey in Kenya. The court therefore has jurisdiction ratione personae over the ship.

128. The ship was arrested at the time it docked in Kenya and remained in Kenya, throughout hence jurisdiction ratione temporis was in place. This was not challenged. This also applies to jurisdiction ratione materiae over the subject matter. The ship is docked or came to Mombasa within the jurisdiction of Kenya. This court has jurisdiction over it. The court notes that the happenings occurred or ended in Kenyan territory. Therefore, this court sitting in Mombasa has jurisdiction ratione *loci* over the ship.

129. It is important to note that the warrant of arrest remained in force. Another warrant was issued and remained over the cargo. The importance of establishing jurisdiction is to make a rational decision which a court has power to issue. It is of no use to sit and issue a judgment that is a nullity. In *Macfoy v United Africa Co Ltd* [1961] 3 All E at R 1169, Lord Denning delivering the opinion of the Privy Councilpage 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."

130. It must be recalled that the court cannot assume jurisdiction it does not have nor eschew jurisdiction it has. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the supreme court stated as doth: -

> " This court dealt with the question of jurisdiction extensively in the Matter of the Interim Independent Electoral Commission (applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

131. The court will therefore take up jurisdiction where it has and eschew jurisdiction where none exists. 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;

> " With that I return to the issue of jurisdiction and to the words of section 20(2)(m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized 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 tools in

respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: -

"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics."

132. The bottom line is that the court has to deal with its jurisdiction first before proceeding me.

133. The decisions I shall, as much as possible set them herein verbatim only one issue is enough to determine liability. Quantum shall be predicated upon the finding of liability.

134. The issues I can glean from the pleadings are: -

a. Jurisdiction Stay of proceedings

b. Acknowledgement of service

c. Bill of lading

d. Contract of carriage

e. Parties to the contract

f. Liability under various contracts.

g. Effect of revocation on contract already sign- Revocable irrevocability.

h. Quantum

135. The other aspect I needed to point about is the conduct of the parties. The cases herein was filed on 4/4/2021, that is 3 years 1 month and 20 days. There has been a total of 13 ruling by the High Court and several rulings. The have also been 2 – 3 court of appeal rulings.

136. There have been filings every 3 weeks for the last 3 years. Some of the applications had to be dealt with summarily. The court was not impressed that he had to deal with this matter, during every vacation, with some applications filed while the court was writing another ruling. It reached a point where every application was referred to me as I was almost always having the file for one ruling or another. Whereas I like the industry of Advocates, they have a solemn duty to the court. *Republic v Mohammed & another* (Petition 39 of 2018) [2019] KESC 47 (KLR) (15 March 2019) (Ruling), the supreme court [DK Maraga, CJ, Mk Ibrahim, JB Ojwang, Sc Wanjala, NS Ndungu & I Lenaola, SCJJ] posited as doth: -

"So much has, indeed, been the clear message emanating from judicial interpretation. And in *Francis Mugo & 22 others v James Bress Muthee & 3 others*, Civil Suit No 122 of 2005 [2005] eKLR, Justice Musinga thus stated:

> While I agree that the choice of [counsel] is a prerogative of a party to a suit, it must be borne in mind that in the discharge of his office, an Advocate has a duty to his client, a duty to his opponent, a duty to the court, a duty to himself, and

> a duty to the State, as well [expressed] by Richard Du Cann in The Art of the Advocate. As an officer of the court, he owes allegiance to a cause that is higher than serving the interests of his client, and that is to the cause of justice and truth."
>
> 11. It is clear, therefore, that Advocates, while discharging their duties, are under obligation to observe rules of professionalism, and in that behalf, they are to be guided by the fundamental values of integrity."

137. However, I must commend the parties for gallant defence of their clients. It is now my solemn duty to apply the law to the fact and pleadings to come up with the decisions.

138. One of the most daring thing the parties did was to refer to in personum arbitration in London. However, no one had the audacity to annex the pleadings, at any parties referred to earlier arbitration between Starryway Trading & Shipping Company Ltd and the claimant.

139. This was in respect to freight. There is no doubt whatsoever that at some point Starryway Trading & Shipping Company Ltd were agents of the owners of the ship. They claimed for freight which they were paid.

140. The London arbitration proceedings, there not clearly produced in evidence. In any case they relate to freight. It is seen that US $ 1,490,000 was paid US $ 628,262.21 was also paid. The cargo was not transported to Chittagong Bangladesh. The said amount ought to be refunded. It is irrelevant that it was claimed in another proceeding in a foreign court. Payment of freight is upon sight of Bills of lading.

141. Under the *Arbitration Act*, 1995 Section 7 related to conservatory orders, any ruling made is taken as a conclusive fact.

> " (2) Where a party applies to the High Court for an injunction or other interim order and the arbitral tribunal has already ruled on any matter relevant to the application, the High Court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

142. Though obliquely, the decision of the arbitral tribunal is not challengeable here. The only question is what the decuisn os all about. Payment of freight to an agent cannot be gainsaid. However, an admiralty claim has been made by an owner. Is has not been impeached. In this case, it is taken that freight was paid. Even if it was paid of basis of later bill of lading. The bills of lading were however issued during the pendency of this case.

143. The question parties were unable to remove from the court's mind are: -

a. The ship left Libreville Laden with cargo.

b. The cargo and the goods were arrested on April 4, 2021in Mombasa.

c. The claimant paid for freight for the cargo.

d. Why was the cargo never released to the claimant.

144. Starryway Trading & Shipping Company Ltd acknowledged that the cargo belonged to ET timber though issuance of later bills of lading which are in substance the same as the Master's bill of lading. This does not make them owners of the ship but they remain agents. However, strictly speaking they cannot issue bills of lading as they are not shippers. That foreign decision does not bind this court on the questions it is dealing with.

145. For 3 years the cargo has remained in the ship. Its status is unknown and it has not been released. The court cannot order release to the claimant without knowing the conditions thereof. I find and hold that the owners of the ship were in breach of the contract of carriage. They failed to deliver the cargo to its destination. I have taken the liberty to place the international shipping route in from Libreville to Singapore.

146. The first claimant witness statement was Annamalaindar Thalamuthu of Kallang Pudding Road, Tong Lee Building Singapore. He is stated to be the sole shareholder and director of the claimant. He stated that he is claiming the following; -

    i. US $ 2,601,294.02 being the Total sales value as per letter of credit.

    j. US $ 8,750 being shut out charges

    k. US $ 22,742 being Brokerage commissions.

147. They claimed this amount together with interest at court rates till payment in full. The claimant is said to be a holder of original bill of lading Nos E11 – TWD/E71 – 2021, ELL 0 TWD – ET 02 -= 2021, ELL – TWD / ET 3 – 2021 issued by OBT shipping Liberia as on the authority of the master of the ship on 4/3/2021 for a Liberian round logs shipped on board the vessels for carriage at Port Chittagong Bangladesh. The defendant was indicated as a carrier under the bill of lading. The said company OBT shipping were the agent at port Greenville Liberia.

148. There was a voyage charter party entered by a company known as Fairwind International Co Ltd, as the Defendants Commercial Manager at the times. The charter party is said to be contained in a clear Fixture recap dated January 19, 2021. The ship was to carry on the said cargo. The defendant loaded less of the cargo and passed through port Gentile in Gabon to pick 3rd party cargo and earned Freight for delivery to Mombasa. It was their case that it was not necessary to sign a fixture note after the clean fixture recap. The defendant switched the owner of the vessel to Starryway Trading & Shipping Company Ltd but through its commercial agent Fairwind International Shipping.

149. That Starryway Trading & Shipping Company Ltd was an agent. That is how they corresponded. They stated that the cargo is presumed rotten or spoiled beyond salvage value having been loaded 35 months ago, that is February 2-21. [38 up to now. They state that the ship cannot complete the voyage to Chittagong to deliver cargo. They state that the cargo may not be transhipped to Chittagong since it has become quite expensive.

150. They state that the only known market is in Bangladesh, for the Liberian logs. Further, no new letters of credit can be issued due to Bangladesh economic situation. They state that the voyage charter was for sole cargo of Min/Max 65000cbm/6800 cmm of Liberian Eki (Aazobe round logs from the port of Green Ville. They set out a series of emails from CAs agency UK Ltd to SABED SM on 19/1/2039 pm together with the fixture note dated January 19, 2021. The goods and the payments are set out vivid in exhibits 22.

151. The total expenditure was US $ 2,118,262.21. There is an addition in Hotel and travel Expenses. I shall dismiss this part as they are not specifically pleaded and p roved.

152. On the reliefs sought, the nature of damages is a special loss. The cost of the goods and Freight is US $ 2,118,.262.21. The same is not for US $ 2,601,294.02 out of the above figure 2 amounts are dealt with separately, that is

    a. A sum of 22,742 as brokerage commission

b. US $ 8,780 being shut out charges.

153. Contrary to what the defendant stated in relation to prove of the matter, the claimant laid before the court a plethora of evidence from the ship itself, to show that a claim herein is substantially proved. I am bound by The Court of Appeal which expressed itself in the following in the case of *Charterhouse Bank Limited (under statutory management) v Frank Kamau* (2016) eKLR, as follows: -

> "We would therefore venture to suggest that before the trial court can conclude that the plaintiff's case is not controverted or is proved on a balance of probabilities by reason of the defendant's failure to call evidence, the court must be satisfied that the plaintiff has adduced some credible and believable evidence, which can stand in the absence of rebuttal evidence by the defendant. Where the defendant has subjected the plaintiff or his witnesses to cross-examination and the evidence adduced by the plaintiff is thereby thoroughly discredited, judgment cannot be entered for the plaintiff merely because the defendant has not testified. The plaintiff must adduce evidence, which in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities, it proves the claim. Without such evidence, the plaintiff is not entitled to judgment merely because the defendant has not testified. The proposition that failure by the defendant to call evidence lessens the burden on the plaintiff to make out his case on a balance of probabilities as propounded in *Karugi & another v Kabiya & 3 others* (*supra*) is totally different from the proposition advanced by the appellant in this appeal, namely that the failure by the defendant to call evidence invariably entitles the plaintiff to judgment, irrespective of the quality and credibility of the evidence that the plaintiff has presented. In our view the latter proposition has no sound legal basis."

154. Alleges his case depends upon exist. This is known as the legal burden and we need not repeat, save to emphasize the same principle of law is amplified by the learned authors of the leading text book:- The *Halsbury's Laws of England*, 4th Edition, Volume 17, at paras 13 and 14: describes it thus:"

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.14 The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues."(emphasis added)16 The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence?"

155. There was a clean fixture signed for delivery of Ekki (Azobe Round logs). This was signed by Fairwinds Shipping Company Ltd. This was after communication from CAS Agency UK Ltd, who were agents for the Fairwinds, who were the agents for the ship in January 2021. The insurance showed that Fairwinds took over from Starryway Trading & Shipping Company Ltd. Seatime shipping PTE Ltd were brokers for the claimant for the deal.

156. The documents filed for both sides were loudly silent on the discrepancies on the amount of timber. The documents state that the volume carried was 6,252.315M.^{3} This as far less than 6500/6800M^3

Which were agreed upon. This was not explained. The contract provided for shutout. I have not seen any dispute on the amount for shutout. A sum of US $ 8,780 is thus due and payable.

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

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

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

160. The agreement between Dolphin Star Shipping Company Limited and Starryway shipping has no bearing in this case. The agreement signed by those companies does not provide rates. It was not even produced in evidence. On the other hand the claimant produced an inspection report dated June 23, 2021where Captain Ye Chonggang declared the Defendant as the owner and Fairwind international company limited as agent.

161. In 2023, Captain Labbuanan made the same declaration. In absence of evidence to the contrary, the declaration of the captains are correct. The owner of the Ship is the defendant.

162. The claimant claimed for a sum of US $ 2,601,294. However, a sum of US$ 2,118,261.21 was proved. The same is evidenced by the letters of Credit Exhibits. Given the humongous nature of exhibits, I shall not regurgitate each exhibit as I run the danger of having the entire translation of the pleadings. The amount prayed for and pleaded were shown as follows: -

    a. Cost of the logs US $ 1,490,000.

    b. Freight US $ 628,262.21

Subtotal US $ 2,118,262,.21

    c. Brokerage commission US $ 22,742.

    d. Shut out fees. US $ 8,780.00

163. The P &1 insurance for the ship Dolphin Star No 9162394 was for US $ 1 Billion for a period February 20, 2022to February 20, 2023. The owner is indicated as Defang shipping company ltd of the British Virgin Islands. The ship is registered at the port of panama. In the P& I Starryway Trading & Shipping Company Ltd are the Commercial managers. There has been no ownerships by Starryway Trading & Shipping Company Ltd from the evidence in court.

164. There was an allegation that there was a forged time charter. The defendant failed to call a witness to address this charter. It is unnecessary to delay with the same given that no evidence of its existence

was tendered. The defendants were in a unique position to produce evidence of existence of the time charter. They field to do so. Section 112 of the *Evidence Act* provides as follows: -

> " Proof of special knowledge in civil proceedings. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

165. In *Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & another* [2005] 1 EA 334, the Court of Appeal held that:

> " As a general proposition under section 107(1) of the *Evidence Act*, cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in sections 109 and 112 of the Act."

166. It follows that the initial burden of proof lies on the plaintiff, but the same may shift to the defendant, depending on the circumstances of the case.

167. Further, in *Evans Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR it was held that:

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of section 107 (i) of the *Evidence Act*, Chapter 80 Laws of Kenya. Furthermore, the evidential burden... is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in section 109 and 112 of law that proof of that fact shall lie on any particular person...The appellant did not discharge that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail fi no evidence at all were given as either side."

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

169. The authorisation letter was signed by Captain YU Chongign as the master of *MV Dolphin Star* for loading at starting at February 25, 2021 at 2219 hours to March 4, 2021 at 1640. The same was in conformity with mate receipt with the relevant charter party and of fixture note.

170. What I note from the authorisation is that a charter party or fixture notes can be alternatives. So long, As the conform with the mate receipt.

171. The authorisation to load for Voyage PW2101 only was authorised by OBT Liberia Ltd and captain YU Chonggang, as the master of the ship.

172. At all times Starryway Trading & Shipping Company Ltd signed as agents. They gave line of cargo coping Defang Shipping Co as ahead Owners, sent to ET Timber PTE Ltd as Head owners as voyage charters and alleged Owner of the cargo. They stated that by a charter party dated 19/01/2021 the owners chartered the vessel to E T Timber who claim the cargo. The owner claimed That clause 8 Gen con 1994. Proforma as incorporated into the voyage charter gave the claimant notice for: -

    i. Freight US $ 614,964.13

ii. Load port demurrage US $ 35,744.40

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

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

174. The next question is the Time Charter. The time charter whether forged or not is irrelevant in these proceedings. It is between Defang Company limited and charters who are not indicated.

175. Every clause is blank. Without consideration being rejected, there is no contract for the time. To make matters worse, the company singing is not party to the case. The counter party to the time charter is not given No one owner the time charter. It is a document inconsistent with all documentations and pleadings in the case. I find that there was no time charter at the time the voyage contract was undertaken and the entire duration of the voyage. The Defendant remained the owner of the ship MV dolphin star and Starryway Trading & Shipping Company Ltd was its agent after Fairwinds were repealed.

176. However, for purposes of Liberia the agents were OBT Liberia Ltd. They received irrevocable instructions to issue bill of lading to the plaintiff. The defendant alleged pressure from the state of Liberia. The cardinal principle of law is audi aliterum paterm. We cannot condemn the state of Liberia unheard.

177. They were not party to the proceedings. It is a question that is not open to this court. Secondly the master who issued the irrevocable instructions did not tender any evidence. A document executed by a person with authority deemed to be effective till evidence to the contrary is given. In any case, the defendants' were not the shippers they were the carriers. The masters bill of lading is a contract. It has to have the following:

a. Offer

b. Consideration

c. Acceptance

d. Legality

178. All the element of a valid contract were in place. Indeed, the defendant's agent sued for the agreed consideration, successfully. Further there are principles in Civil and Common Law governing the liability of agents. Where the rue of principles is crystalized, the court will be free to roam all over the English speaking world for persuasive precedent. In *Victor Mabachi & another v Nurtun Bates Limited* [2013] eKLR, the court of Appeal of Kenya, Kihara Kariuki, PCA, Mwilu & Gatembu, JJ A stated as follows: -

> (21) It remains now to consider the second issue whether the enjoinment of the appellants in the suit in the High Court breached the principle of law that an agent cannot be sued where there is a disclosed principal. In *Anthony Francis Wareheim t/a Wareheim& 2 others v Kenya Post Office Savings Bank*, Civil Application Nos Nai 5 & 48 of 2002, at page 10, this court unanimously held as follows:
>
> > "It was also *prima facie* imperative that the court should have dismissed the respondent's claim against the second and third appellants for they were impleaded as agents of a disclosed principal contrary to the clear principal of

> common law that where the principal is disclosed, the agent is not to be sued. Furthermore, the court having found on the evidence that the second and third appellants were principals in their own right and not agents of the first appellant in the transaction giving rise to the suit, it should have dismissed the suit against the first appellant who had been sued as the principal."
>
> (22) The principle established in the above case still holds good. In the absence of factors vitiating the liability of the principal, we consider that the enjoinment of the appellants in the case is unwarranted.

179. There are also binding precedent in the Kenyan courts. Though sitting and applying English Law, the seat of the court is in Mombasa. Therefore, only precedents by the Kenyan Court of Appeal are binding. The decision by the courts in England, including the Supreme Court of the then house of Lords are persuasive. It does not mean that the court will disrespect them.

180. Lastly this Judgment will be a wakeup call to the Kenyan Legislature to save the country from the embarrassing scenario where we have to rely on the law of England in extremely mundane matters. It has strange terminologies that are simply meant to obstruct and muddy issues. A simple act of parliament, even domesticating the *Senior Courts Act* of England, the same way for over 100 years, we domesticated the Indian transfer of properties Act, which was finally repealed in 2012, with its effects reserved. It is the least parliament can do, in line with the words of the preamble. This spirit is what is constituted under the Preamble to the *Constitution* of Kenya, where it is propounded as doth:

> "We, the people of Kenya--Acknowledging the supremacy of the Almighty God of all creation:Honouring those who heroically struggled to bring freedom and justice to our land:Proud of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation:Respectful of the environment, which is our heritage, and determined to sustain it for the benefit of future generations:Committed to nurturing and protecting the well-being of the individual, the family, communities and the nation:Recognising the aspirations of all Kenyans for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law:Exercising our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution:Adopt, Enact and give this Constitution to ourselves and to our future generations.God Bless Kenya."

181. The consequence of the foregoing is that I enter judgment for the claimant against the defendant. Further I enter judgment for the Kenya ports Authority, who were the harbour masters. I do not see any evidence to support the suit by the defendant in. It is consequently dismissed with costs.

182. Before I leave note that parties used unfriendly fillings where all documents are neither readable nor copyable. Parties have a duty to assist the court reach its decision without unnecessarily having to covert to word or readable or copyable pdf. Use of a digital signature will help to facilitate litigation in high volume cases in this digital filing age.

183. The practice of filing copious submissions should be desisted from. It is not a chance to exercise the gifts writing.

Determination

184. In the circumstances, I enter judgment in this matter in the three consolidated matters as follows: -

a. I enter judgment for the claimant against the respondent for: -

a. A sum of US $ 2,149,784 with costs of US $ 72,450.

b. The ship MV Dolphin Star be appraised and sold to recover the amounts awarded and costs, taxes, Marshal costs and other charges, that the court shall certify.

c. The claim by KPA of US $ 166,293. 60 is allowed with costs of US $ 5118 to KPA and ET Timbers PTE ltd will have costs of US $ 2,000.

d. The defendant shall also pay charges of US $ 166,293 claimed by KPA together with other charges accruing after June 30, 2023until the ship is appraised and sold are payable out of the proceeds of sale of both timber and the ship.

e. The suit filed Defang, that is, HCC COMM No E005 of 2023 is hereby Dismissed with costs of US $ 11,000 to ET Timber PTE Ltd.

f. The warrant of arrest against the timber of the cargo in the ship is hereby lifted. If there is any cargo other than the subject timber, the same should be released to the owners thereof as it has not been arrested.

g. The ship should be moved to shore forthwith to avoid losing the same. The costs of moving shall be recovered form the cost of sale of the ship.

h. The said timber laden aboard MV Dolphin Star should be disembarked and placed under the custody of the Kenya ports authority as valuation and subsequent sale is done. Whichever its condition, the timber shall be valued, sold and transshipped to Bangladesh or other state where it can economically and safely be shipped to.

i. The cost of transshipment to Bangladesh or other near state shall be recovered out of sale of the timber and the ship. In lieu of the timber the claimant is entitled to the amounts claimed, being, cost, insurance, freight, commission and other dues arising from the sale of the ship.

j. The 3 cases are closed.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 24TH DAY OF MAY 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Ababu Namwamba & Co. Advocates for the Defendant

Kinyua Muyaa & Co. Advocates for the Claimant

Court Assistant- Brian