IN THE COURT OF APPEAL

AT MOMBASA

(Coram: Nyarangi, Masime & Kwach: JJ A)

CIVIL APPEAL NO 50 OF 1989

OWNERS OF THE MOTOR VESSEL “LILLIAN S”...APPELLANT

VERSUS

CALTEX OIL (KENYA) LTD.....RESPONDENT

(Appeal from an order of the High Court at Mombasa, Bosire J, in Admiralty Cause No 29 of 1988 dated 28th February, 1989)

JUDGMENT

Nyarangi JA.

The point raised by this appeal turns entirely on the correct interpretation of Section 20 (2) (m) of the Supreme Court Act 1981 of England (The 1981 Act) on the relevant facts of this matter. Two questions arise; first, if the plaintiff’s action is within Section 20 (2) (m) of the Act; second, whether the action can be enforced by an action *in rem* in terms of Section 21 (4) of the 1981 Act.

The appeal raises questions as to the proper manner of invoking the Admiralty jurisdiction of the High Court. The Admiralty jurisdiction of the High Court is equal to that possessed by the High Court in England. The High Court applies the same law and procedure as applies in England.

It might make it clearer if I refer to Section 4 of the Judicature Act, cap. 8 which provides as follows:-

“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.”

The Admiralty jurisdiction of the High Court is set out in Section 20 of

The 1981 Act.

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

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

(a) jurisdiction to hear and determine any of the questions and claims mentioned in subsection (2);

(b) jurisdiction in relation to any of the proceedings mentioned in subsection (3);

(c) any other Admiralty jurisdiction which it had immediately before the commencement of this Act; and

(d) any jurisdiction connected with ships or aircraft which is vested in the High Court apart from this section and is for the time being by rules of court made or coming into force after the commencement of this Act assigned to the Queen’s Bench Division and directed by the rules to be exercised by the Admiralty Court.

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

(a) any claim to the possession or ownership of a ship or to the ownership of any share therein;

(b) any question arising between the co-owners of a ship or as to possession, employment or earnings of that ship;

(c) any claim in respect of a mortgage of or charge on a ship or any share therein;

(d) any claim for damage received by a ship;

(e) any claim for damage done by a ship;

(f) any claim for loss of life or personal injury sustained in consequence of any defect in a ship or in her apparel or equipment, or in consequence of the wrongful act, neglect or default of-

(i) the owners, charterers or persons in possession or control of a ship; or

(ii) the master or crew of a ship, or any other person for whose wrongful acts, neglects or defaults the owners, charterers or persons in possession or control of a ship are responsible, being an act, neglect or default in the navigation or management of the ship, in the loading, carriage or discharge of goods on, in or from the ship, or in the embarkation, carriage or disembarkation of persons on, in or from the ship.

(g) any claim for loss of or damage to goods carried in a ship;

(h) any claim arising out of any agreement relating to the carriage of goods in a ship or to the use or hire of a ship;

(j) any claim in the nature of salvage (including any claim arising by virtue of the application, by or under section 51 of the Civil Aviation Act 1949, of the law relating to salvage to aircraft and their apparel and cargo);

(k) any claim in the nature of towage in respect of a ship or an aircraft;

(l) any claim in the nature of pilotage in respect of a ship or an aircraft;

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance;

(n) any claim in respect of the construction, repair or equipment of a ship or in respect of dock charges or dues;

(o) any claim by a master or member of the crew of a ship for wages (including any sum allotted out of wages or adjudged by a superintendent to be due by way of wages);

(p) any claim by a master, shipper, charterer or agent in respect of disbursements made on account of a ship;

(q) any claim arising out of an act which is or is claimed to be a general average act;

(r) any claim arising out of bottomry;

(s) any claim for the forteiture or condemnation of a ship or of goods which are being or have been carried, or have been attempted to be carried, in a ship, or for the restoration of a ship or any such goods after seizure, or for droits of Admiralty.

It is thus to be noted that where a claim is based on Section 20 (1) (a), the claim must come within Section 20 (2) (a) to (s) otherwise the High Court would not have admiralty jurisdiction.

The next question is the mode of exercise of admiralty jurisdiction. Section 21 which illustrates the mode of that jurisdiction is in these terms; -

“21. (1) Subject to section 22, an action *in personam* may be brought in the High Court in all cases within Admiralty jurisdiction of that court.

(2) In the case of any such claim as is mentioned in Section 20 (2) (a), (c) or (s) or any such question as is mentioned in section 20 (2) (b), an action *in rem* may be brought in the High Court against the ship, or property in connection with which the claim or question arises.

(3) In any case in which there is a maritime lien or other charge on any ship, aircraft or other property for the amount claimed, an action *in rem* may be brought in the High Court against that ship, aircraft or property.

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

(a) the claim arises in connection with a ship; and

(b) the person who would be liable on the claim in an action *in personam* (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, an action *in rem* may

(whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against –

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship which, at the time when the action is brought, the relevant person is the beneficial owner as respects all the shares in it.

(5) In the case of a claim in the nature of towage or pilotage in respect of an aircraft, an action *in rem* may be brought in the High Court against that aircraft if, at the time when the action is brought, it is beneficially owned by the person who would be liable on the claim in an action *in personam*.

(6) Where, in the exercise of its Admiralty jurisdiction, the High Court orders any ship, aircraft or other property to be sold, the court shall have jurisdiction to hear and determine any question arising as to the title to the proceeds of sale.

(7) In determining for the purposes of subsections (4) and (5) whether a person would be liable on a claim in an action *in personam* it shall be assumed that he has his habitual residence or a place of business within England or Wales.

(8) Where, as regards any such claim as is mentioned in section 20 (2) (e) to (r), a ship has been served with a writ or arrested in an action *in rem* brought to enforce that claim, no other snip may be served with a writ or arrested in that or any other action *in rem* brought to enforce that claim; but this subsection does not prevent the issue, in respect of any one such claim, of a writ naming more than one ship or of two or more writs each naming a different ship.”

Paragraph (2), (3), (4) and (5) give instances in which an action *in rem* may be brought.

The next matter which I should here mention is that Order 75, (The Order),

The Supreme Court Practice, 1988 of England has provided for admiralty proceedings. Paragraph 75/1/3 of the Order is to the effect that an admiralty action *in rem* is in effect an action against a *res*, usually a ship but may in some cases be cargo or freight or aircraft. An action *in personam* is like

a normal action filed against a person. In *personam*, the procedure is the usual one of invoking the High Court jurisdiction: See the Shipbrokers Manual Vol. One, page 90, paragraph 3. Paragraph 4 on page 92 – 94 gives a distinction between an action *in rem* and *in personam*.

The object of an action *in rem* is therefore to procure the arrest of a *res*, almost always a ship.

The procedure for arrest is contained in rule 5 of order 75. Order 75 rule 5 states: -

“5. (1) In an action *in rem* the plaintiff or defendant, as the case may be, may after the issue of the writ in the action subject to the provisions of this rule issue a warrant in Form No. 3 in Appendix B for the arrest of the property against which the action or any counterclaim in the action is brought.

(2) Where an action *in rem* is proceeding in a district registry, a warrant of arrest in the action may be issued out of that registry but, except as aforesaid, a warrant of arrest shall not be issued out of a district registry.

(3) Before a warrant to arrest any property is issued the party intending to issue it must procure a search to be made

in the caveat book for the purpose of ascertaining whether there is a caveat against arrest in force with respect to that property and, if the warrant is to issue out of a district registry, the registrar of that registry shall procure search to be made in the said book for that purpose.

(4) A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph (9); however, the Court may, if it thinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars.

(5) Except with the leave of the Court or where notice has been given under paragraph (7) a warrant of arrest shall not be issued in an action *in rem* against a foreign ship belonging to a port of a State having a consulate in London, being an action for possession of the ship or for wages, until notice that the action has been begun has been sent to a consult.

(6) A warrant of arrest may not be issued as of right in the case of property whose beneficial ownership has, since the issue of a writ; changed as a result of a sale or disposal by any court exercising Admiralty jurisdiction.

(7) Where, by any convention or treaty, the United Kingdom has undertaken to minimise the possibility of arrest of ships of another State no warrant of arrest shall be issued against a ship owned by that State until notice in Form No. 15 in Appendix B has been served on a consular office of that State in London or the port at which it is intended to cause the ship to be arrested.

(8) Issue of a warrant of arrest takes place upon its being sealed by an officer of the registry or district registry.

(9) An affidavit required by paragraph (4) must state -

(a) in every case:

(i) the nature of the claim or counterclaim and that it has not been satisfied and, if it arises in connection with a ship, the name of that ship; and

(ii) the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and

(b) in the case of a claim against a ship by virtue of ection 21 (4) of the Supreme Court Act 1981:

(i) the name of the person who would be liable on the claim in an action *in personam* (“the relevant person”); and

(ii) that the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and

(iii) that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise; and

(c) in the case of a claim for possession of a ship or for wages, the nationality of the ship in respect of which the warrant is required and that the notice (if any) required by paragraph 5) has been sent; and

(d) in the case of a claim where notice is required to be served on a consular officer under paragraph (7), that such notice has been served;

(e) in the case of a claim in respect of a liability incurred under s. 1 of the Merchant Shipping (Oil Pollution) Act 1971, the facts relied on as establishing that the Court is not prevented from entertaining the action by reason of section 13 (2) of that Act.

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

(a) a copy of any notice sent to a consult under paragraph

(5);

(b) a copy of any notice served on a consular officer under paragraph (7).”

Paragraphs 5, 6, 7, are not applicable. It is to be observed that the affidavit referred to in paragraph 4 must state *inter alia* in every case the nature of the claim, the name of the ship, the name of the person who would be liable on the claim in an action *in personam*, that the relevant person was when the cause of action arose the owner or charterer of or in possession or in control of, the ship in connection with which the claim arose and that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required.

I should now make a further reference to Section 20 of the Act. I ask the question if the plaintiff’s action is within sub-section 2 of Section 20. If the action is, is the claim enforceable by an action *in rem* in terms of Section 21 (4) of the Act"

In the endorsement of claim is a claim for price of goods supplied by the plaintiffs to the defendant. So on the face of it, Section 20 (2) (m) applies. There can be no dispute that there were goods supplied to the Motor vessel “*Lilian S*”. The affidavit by Kariuki for the immediate arrest of the motor tanker is proof of the supply of goods by the plaintiffs.

The second point on Section 20 (2) (m) is if the goods supplied to the ship were for her operation or maintenance. This much is clear, that if the goods were not for the ship’s operation or maintenance, Section 21 (4) of the 1981 Act would not apply and hence the High Court would not have admiralty jurisdiction in the matter. So if this particular section applies, one result; if it does not, another.

I have necessarily been much preoccupied with the particular jurisdiction, the nature of an action *in rem* as well as an action *in personam* and the mode of the exercise of admiralty jurisdiction.

I turn to the proceedings before the High Court. Pausing there for a moment, I gratefully adopt Justice Bosire’s statement of the background facts in his Ruling the subject matter of this appeal. It is not necessary for me to say very much about the facts at this stage.

It is plain as can be from the Ruling that the trial Judge held there was connection between supply and maintenance or operation by inference.

Also, that the plaintiffs had shown that the goods supplied were suitable for use and so could be used on the vessel. The Judge held the view that in the circumstances, setting aside the writ or the arrest would be a harsh measure.

The argument of the appellant which was urged, and urged most strongly, is that the Judge did not appreciate that he was being urged to decide a question of jurisdiction on the basis of the evidence before him. The second issue is whether the owners of the vessel “*Lilian S*” on their own showing were persons who would be liable in an action in *personam*.

In addition to these contentions, Mr. Inamdar for the appellant staked his case on decided cases. We had *The River Rima,* [1987] 3 All ER 1 (C.A.) cited to us. The facts in *Rima* are different but the jurisdictional question resembles the first question that is if this case falls within Section 20 (2) of the 1981 Act. It was held that in order to maintain an action under Section 20 (2) (m) of the 1981 Act, it is necessary to demonstrate a sufficiently direct connection between the agreement relied on and the operation of the ship. The issue in *Rima* was not whether the claims were not well founded but whether they could be maintained in an action *in rem*. That precisely is the issue here. Dealing with a similar issue in *I Cong*ress*o del Partido,* [1978] 1 QB 500, Golf, J. observed *inter alia* on page 535 as follows: -

“In my judgement, Mr. Alexander’s submission that I should order that the question of Mambisa’s title should be tried as an issue in the actions is one to which I cannot accede. The question raised by .. The motion is one of jurisdiction. Jurisdiction in Admiralty actions is statutory, and is defined by the Administration of Justice Act 1956. Section 3 of the Act lays down the circumstances in which an action *in rem* may be brought; if the case is not within the section then the court has no jurisdiction in respect of an action *in rem* and the writ and all subsequent proceedings should be set aside...”

The issue of jurisdiction was decided, “on the evidence” before Golf, J.

In the same context, we were referred to the decision of House of Lords in *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co & others*, [1985] AC 255. In that case, the respondent insurers raised an action against the appellants claiming payment of premiums on a policy of insurance which it was stated was effected with them by the appellants over a cargo of oil shipped from Iran to various destinations. In order to found jurisdiction over the appellants and also in order to obtain security for their claim, the respondents arrested the ship.

Neither that ship nor any other ship owned by the appellants had been concerned with the carriage of the oil cargo which was the subject of the insurance policy. In the course of his speech Lord Keith at pages 265 – 266 set out the requisite procedural steps and then had this to say on page 270 letter H,

“It is necessary to attribute due significance to the circumstances that the words of the relevant paragraphs speak of an agreement .. It would, on the other hand, be unreasonable to infer from the expressions that it is intended to be sufficient that the agreement in issue should be in some way connected, however remotely, with the carriage of goods in a ship ...”

On page 271, letter A –B, Lord Keith said,

“There must, in my opinion, be some reasonably direct connection with such activities. An agreement for the cancellation of a contract for the carriage of goods in a ship or for the use or hire of a ship would, I think, show a sufficiently direct connection ..”

In *The Evpo Agnic* [1988] 1 WLR 1090, the view of their Lordship as expressed by Lord Donaldson of Lynington M.R. on page 1095, letter H appears in the following passage on page 1095, letter H:

“The first issue to be confronted and decided is therefore who is “the relevant person” for the purpose of Section 21 (4) (b).

As I have already indicated, the appellant’s case is that it is a question of jurisdiction as to whether the defendant would on the facts of this case be liable to the plaintiff in action *in personam*. Mr. Inamdar cited a passage on page 526, B – C in *I Cong*ress*o del Partido* where in the course of his judgement Golf J. said,

“Invocation of the Admiralty jurisdiction by an action *in rem* presupposes the existence of a claim *in*

personam against the person who at the time when the action is brought is the owner of the ship.”

We were invited to examine the entire evidence as the House of Lords did in *I Cong*resso *del Partido*, [1981] 2 ALL E.R. 1064 (H.L.) and also as was done by the English Court of Appeal in *The Evpo Agnic*, [1988] WLR 1090 and to have proper regard to the requirements laid down by Order 75 rule 5. It was submitted that the affidavit in support of the arrest of the motor tanker does not satisfy Order 75 rule 5 subrules (5) and (9).

That the plaintiff failed to disclose information to prove that the defendants were persons who could be liable *in personam*, that the two telexes exhibited show that Southern Oil supply company (SOSCO) would be liable *in personam*, and the plaintiff has failed to bring the case within Section 21 (4) of the 1981 Act.

For the respondents it was urged that an appellate court should be slow to interfere with the exercise of discretion in an interlocutory order in first instance. It was submitted it could not be said that the Judge’s exercise of discretion is plainly wrong. Mr. Satchu said in two affidavits sworn on behalf of the defendant, both the deponents referred to arrangements by the owners of the vessel with SOSCO. The conditions and terms were not, however, stated. Counsel for the respondents submitted that if the appellants had wanted the Judge to exercise his discretion in their favour the appellants should have set out in full the facts of the terms and conditions of the agreement as was done in *The River Rima.* It was however said that there are vital differences between the instant case and *The River Rima.* We were told that there is no doubt as to who received the goods in question – the goods were received by the vessel in its own right, not as agents or operators on behalf of SOSCO. On that basis, it was argued, one should distinguish between this case and *Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co and others*, [1985] AC 255: in so far as the respondents have actually supplied the vessel with the goods for the claim. To the appellant’s complaint of failure to make full and frank disclosure, Mr. Satchu replied that the Judge could exercise discretion on his own and order that a warrant of arrest to issue. In any case, it was argued, the failure to disclose must materially affect the decision on issue and even when such failure has been shown, the court can in its discretion continue the order previously made. Reliance was placed on the judgement in *Brink’s Mat Ltd v Elcombe & Others*, [1988] 3 ALL E.R. 188 where on page 194, a-b, there is an observation that,

“.. there must be a discretion in the courts to continue the injunctions, or to grant a fresh injunction in its place, notwithstanding that there may have been nondisclosure when the original *ex-parte* injunction was obtained ..”

Per Balcombe L.J.

On that passage, Mr. Satchu argued that if the warrant of arrest is lifted, the vessel might sail away and if at the end of the day the respondents are successful, they will have lost an asset from which they could recoup the fruits of any judgment. Mr. Satchu based himself on passages in the judgements in “*Abidin Daver*” *The*, (1984) Llyod’s L.R. 339; *Scwarz & Co. v St. Eleftherio*, (1957) Llyods L.R. 283; *The* “*Moscanthy*”, (1971) Llyods L.R. 37 and “*The Gulf Venture*”, (1984) 2 Llyods L.R. 455 and

urged that in the four cases Judges of admiralty jurisdiction have refused to set aside a warrant of arrest unless it is shown that a continuation of the warrant of arrest is vexatious or frivolous and the defendant must show that the plaintiff’s case is hopeless on the evidence. In *the Evpo Agnic*, the position was so clear as to deserve immediate discharge of the vessel.

In the “*Moscanthy*”, like here, it was not.

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. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

See *Words and Phrases Legally defined* – Volume 3: I – N Page 113

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.

I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado.

In *I Congresso del Partido*, [1978] 1 QB 500, *the River Rima, Gatoi International Inc v Arkwright – Boston M. M. Insurance Co. & Others* and *The Evpo Agnic*, the respective courts analysed the evidence before the court and upon that evidence the question of jurisdiction was immediately decided.

Were the goods supplied to the vessel for her operation or maintenance" To find the answer to this question one must turn first to the affidavit of Mr. Kariuki in support of the immediate arrest of the motor tanker “*Lillian S*”. The deponent is silent as to the purpose for which the gas oil and fuel were supplied. Next I turn to the affidavit of Saliarelis, the Secretary of Sea Guardian Company SA., the legal and beneficial owner of the motor vessel “*Lillian S*”. The secretary states that the master of the vessel did not place any order with the plaintiffs for the supply of any fuel or gas oil to the vessel. The crunch turns on paragraph 7 of the affidavit wherein it is stated that the material fuel was ordered by and was the property of SOSCO and –

“Was only delivered to the vessel in consequence of separate arrangements made between the Master and Southern Oil supply company limited as a result of which the vessel was used as a base for the storage of the said fuel and oil pending its sale by SOSCO to other vessels.”

That evidence is to the effect that the fuel was supplied for a purpose other than operation or maintenance. That view is supported by the account of Tsakiris, a director of SOSCO who in paragraph 5 of his affidavit states-

“That pursuant to arrangements made with the owners of the motor vessel “*Lillian S*” SOSCO Limited used the motor vessel ... as a base for storing the fuel oil pending the sale and supply of the same to other vessels in the port of Mombasa.”

In the light of that evidence, I conclude that the motor vessel “*Lillian S*” was utilized as a base for storing the fuel

oil before it was sold to other vessels. There was therefore no reasonably direct connection between the storage of the fuel oil and the operation or maintenance of the vessel “*Lillian S*”. I do not find in this case any evidence adduced by the plaintiff to show that the supply of the goods was for operation or maintenance of the vessel “*Lillian S*” or indeed a particular ship.

I therefore take the view that Section 20 (2) (m) of the 1981 Act was not satisfied and so the claim does not fall under Section 21 (4), the High Court did not have admiralty jurisdiction and so Caltex Oil (Kenya) Ltd is not entitled to invoke the local jurisdiction *in rem* against the vessel and to arrest her.

With all respect to the Judge, I do not feel that his ruling has any bearing with the issue of jurisdiction which is the matter he should have identified, wrestled with and determined on the evidence before him. On a proper analysis the Judge was bound to conclude that he had no jurisdiction to hear the Notice of Motion.

I pause here only to say in deference to Mr. Satchu’s arguments that his submissions and the decisions which he cited did not touch on the real issue of jurisdiction.

That leaves the last point, whether or not the person who would be liable on the claim in an action *in personam* at the time when the action arose is SOSCO or Sea Guardian Company SA.

The issue is yet again one of jurisdiction to be properly and immediately decided on the evidence before the court. That is so, “because actions in *rem* and actions in *personam* cannot be conveniently segregated into separate compartments”-

*I Cong*ress*o del Partido*, [1978] 1 QB 500, at page 526, between A – B. It is clear that the fuel was supplied to the vessel, “in consequence of separate agreements made between the master and SOSCO ”

There was a contract whereby the plaintiffs agreed to supply and SOSCO agreed to buy 550 metric tonnes of fuel oil and pursuant to that contract, the plaintiffs delivered 5,478.55 metric tonnes of fuel oil to the vessel “*Lillian S*” as requested by SOSCO. Pursuant to the arrangements SOSCO used the motor vessel as a base for storing the fuel pending the sale and supply of the fuel oil to other vessels.

There are two telexes which were exhibited and whose contents show beyond any grain of doubt that SOSCO purchased the fuel oil and would be liable in action *in personam*.

Page 11 of the record of appeal shows Caltex Oil (Kenya) Ltd’s invoice indicating a sale on 20th September, 1988 of an amount of 5,478.55 m/ton. to SOSCO. SOSCO is shown to have received the fuel oil.

The statement of account for the month of October, 1988 is from Caltex Oil (Kenya) Ltd. to SOSCO. The owners of the vessel “*Lillian S*” are not mentioned on the statement of Account.

I must confess my inability to find any substance in the respondent’s case on this score. The point is unanswerable. It is SOSCO who would be liable to the plaintiffs in an action *in personam*.

All the grounds of appeal have been covered.

The further matter arising on this appeal is in respect of a submission by Mr. Inamdar that the respondent as applicant in the High Court did not make a full and frank disclosure. The appellant claimed that it was left to it to furnish the information as to who could be liable on the claim in an action *in personam*.

I was not impressed with the rival contention by Mr. Satchu. The plaintiff’s affidavit in support of the arrest of the

motor vessel does not satisfy Order 75 rule 5, paragraph (9). True, notwithstanding that the affidavit referred to in paragraph (4) does not contain all the particulars required by paragraph (9), the court has the discretion to issue the warrant. However, paragraph (9) is no warrant for deliberate failure to disclose fully and frankly all the facts in possession of the party who is applying for the issue of warrant of arrest. The necessity for full and frank disclosure is even greater in an *ex-parte* application.

In the Andria (Vasso), [1984] 1 QB 477 at page 491, letter Gili Robert Golf L.F. (as he then was) in the course of reading the judgement of the court observed as follows: -

“It is axiomatic that in *ex-parte* proceedings there should be full and frank disclosure to the court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the *ex-parte* application, even though the facts were such that, with full disclosure, an order would have been justified.”

In my judgement here there was not full disclosure by the applicant of the material facts to the High Court. Were the result of the appeal different, I would have been minded to penalize the respondent by ordering payment of extra costs.

I have endeavoured to give reasons for the order of this Court which was made on July 24th, 1989.

I would allow the appeal with costs here and below to the appellant and reiterate the terms of the court’s order mentioned above. As Masime and Kwach JJ A also agree, it is so ordered.

Masime JA.

This appeal concerns the admiralty jurisdiction of the High Court and the occasions when it may be invoked. On the strength of a writ *in rem* taken out by Caltex Oil Kenya Ltd (the respondent to this appeal) the High Court in purported exercise of its admiralty jurisdiction issued a warrant for the arrest of the motor vessel ‘*Lillian S*’ on 5th December, 1988 and that vessel was duly arrested the following day.

The owners of the motor vessel ‘*Lilian S*’ (the present appellants) then filed an unconditional appearance in the suit. And on 19th January, 1989 they applied to the superior court by notice of motion under Order 75 of the rules of the Supreme Court of England and section 4 of the Judicature Act (Cap 8 of the Laws of Kenya) for orders to set aside the writ *in rem* and all consequential proceedings including the warrant of arrest. The respondent objected to the appellant’s challenge of the superior court’s jurisdiction to entertain the claim since the appellant had filed an unconditional appearance but the trial judge dismissed that objection. As the issue goes to jurisdiction it was again raised before us, *in limine*, and having heard counsel’s arguments and submissions we upheld the learned trial Judge dismissed the objection to the appellant’s right to challenge the court’s jurisdiction and held that under Order 12 Rule 8 of the RSC of England, which apply, such appearance was proper and did not amount to the appellant submitting to the court’s jurisdiction nor preclude it from challenging the courts’ admiralty jurisdiction.

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

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

The learned Judge then examined the affidavit evidence and continued: “From the facts averred an inference could be drawn that the gas oil and fuel was probably for use on the ‘*Lilian S*’ It is not a remote inference setting aside a writ is a harsh measure. To my mind it should only be resorted to in the clearest of cases where it can be shown that the claim is either frivolous, vexatious or is otherwise an abuse of the process of the court. Also where from the averred facts no reasonable cause of action *in rem* is disclosed.”

He therefore dismissed the appellants’ application and ordered the costs thereof to abide the outcome of the trial of the suit. The appellant is aggrieved by that decision hence this appeal. After we heard the appeal the court was of the unanimous view that the appeal should be allowed and we did so reserving our reasons. I now give my reasons for judgement. It was submitted by the learned appellant’s counsel that the reasoning of the learned judge shows that he misapprehended the nature and effect of the application before him. The application was brought on the grounds that:

(a) the owners of the motor vessel ‘*Lilian S*’. are not, and have never been, persons who would, in the circumstances of this case be liable to the plaintiffs in an action *in personam*;

(b) the person who would in the circumstances of this case, be liable in an action *in personam* to the plaintiff’s is Southern Oil supply company Ltd., who were not the owners of the said motor vessel either at the time when the cause of action arose or at the time the writ in this action was issued.

Clearly the appellant was challenging the superior court’s jurisdiction to entertain the respondent’s claim *in rem*. And as this sole issue was decided against the appellant all the nine grounds of appeal deal with that issue. As the first four grounds of appeal deal with the construction of the statutory provisions as to jurisdiction I shall consider them first. The grounds of appeal are:

“The learned (trial) Judge erred:

1. in holding that the court has jurisdiction to entertain the claim *in rem* made (by the respondent ..) against the vessel “*Lilian S*”.

2. ... in holding that the facts alleged in the writ and in the affidavit for the request of a warrant of arrest were sufficient to satisfy the requirements of sections 20 (2) (m) and 21 (4) of the Supreme Court Act as applied to Kenya.

3. ... in failing to appreciate that the question whether (the respondents’) claim fell within the ambit of section 20 (2) (m) of the said Act was a question of jurisdiction which he was obliged to decide at once on the affidavit evidence before the court.”

4. ...in failing to hold that the question whether, under section 21 (4) of the said Act, the person “who would be liable on the claim in an action *in personam*” at the time when the cause of action arose was Southern Oil Supply Company Ltd., (SOSCO) or Sea Guardian Co SA (the appellants herein) was likewise a question of jurisdiction requiring immediate decision on the affidavit evidence then before the court. ”

The statutory provisions which vest the High Court of Kenya with jurisdiction in admiralty matters and the relevant provisions of the Supreme Court Act 1981 and the Rules of the Supreme Court Order 75 have been set out fully in the judgements of my brothers Nyarangi and Kwach JJ A.

which I have had the advantage of reading in draft and with which I respectfully agree. Section 4 of the Judicature Act (Cap 8 of the Laws of Kenya) applies the Law and procedure exercised by the High Court in England in its admiralty jurisdiction to Kenya. That law and procedure is contained in the Supreme Court Act 1981 and the Rules

of the Supreme Court (see 1988 Supreme Court Practice) Order 75. Section 20 (1) of the Act gives the High Court jurisdiction over admiralty matters set out therein in four groups (a) to (d). Each of these groups is expounded on in the succeeding subsections. A claimant must get his claim into one of the categories set out in the section.

The respondent’s claim in the present appeal purported to be founded upon sections 20 (1) (a) as particularised in section 20 (2) (m). That is it claimed that the High Court had jurisdiction to hear and determine its claim as it was, in the language of section 20 (2) (m).

“A ... claim in respect of goods or materials supplied to a ship for her operation or maintenance.”

If the claim so lay then the respondent was required to pursue it in accordance with the provisions set out in Section 21 (1) of the Act and Order 75 of the rules of the Supreme Court.

In the instant appeal the appellant questioned the court’s jurisdiction at the first opportunity and in accordance with Order 12 Rule 8 of the Rules of the Supreme Court. This court has in an interlocutory ruling held that the appellant was entitled to so challenge the jurisdiction of the court.

That being so it was incumbent upon the superior court to dispose of that issue forthwith and before entertaining the claim further. A similar issue was raised in *The River Rima* [1987] 3 All ER 1 (CA) and (1988) 2 LG Rep 193 (HL), whether the plaintiff’s claim fell within the jurisdiction of the Admiralty Court under section 20 (2) (m) of the Act. It was held that

it was necessary, to demonstrate a sufficiently direct connection between the agreement relied on and the operation of the ship in order to maintain an action under the section. In that case the plaintiff’s claim did not come within the admiralty jurisdiction and consequently the writ *in rem* and the warrant of arrest were set aside and the ship ordered to be released from arrest. And in *I Congresso del Partido* [1978]1 Q. B 500 at 526, B it was stated by Golf J. (as he then was) that:

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

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

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

(a) the claim arises in connection with a ship; and,

(b) the person who would be liable on the claim in an action *in personam* (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship an action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against-

(i) that ship, if at the time when the action is brought the relevant person is either the beneficial owner of that ship as respects all the shares in it or the charterer of it under a charter by demise; or

(ii) any other ship which at the time when the action is brought, the “relevant person is the beneficial owner as respects all the shares in it.”

It was contended by the Appellant that it was not such a “relevant Person” and consequently that the action *in rem* was brought against it in error as in the circumstances the admiralty jurisdiction could not properly be invoked.

I turn to examine the nature of the respondent’s claim and the mode in which the admiralty jurisdiction of the court was invoked in the light of my above statement of the law and principle. The endorsement of claim on the writ of summons was as follows:

“The plaintiff’s claim against the defendant is for Kshs. 6,110,434/55 due and owing by the defendant to the plaintiff in respect of a quantity of gas oil, fuel and bunkers supplied by the plaintiffs to the defendant.”

The Bunker Delivery Report dated 19.9.88 and the invoice number 67352 both annexed to the affidavit of Johnson Robert Kariuki dated 5th December, 1988 and sworn in support of the claim however showed that although the fuel was delivered to the motor vessel “*Lilian S*” it was for the account of Southern Oil Co. Ltd. It was the appellant’s contention that this Southern Oil Supply Co. Ltd. was the person who would, in the circumstances, be liable in an action *in personam* to the plaintiffs. And that company was not and had never been the owner of the ‘*Lilian S*’ which was, rather, owned by the Appellant, Sea Guardian Company SA of Panama – see the affidavit of Epaminondas Saliarelis, the secretary of the appellant: In that affidavit Mr. Saliarelis depones that:

“7 the said fuel was ordered by and was the property of Sourthern Oil Supply Company Ltd and was only delivered to the vessel in consequence of separate arrangements made between the master (of the “Lilian S”) and Southern Oil Supply Co. Ltd as a result of which the vessel was used as a base for the storage of the said fuel and oil pending its sale by Southern Oil Supply Company Ltd and SOSCO Fishing Industries Ltd to other vessels.”

“8 I am not aware and despite diligent enquiries have not found that my company has placed any order with the (respondents) for supply of the fuel oil referred to ...”

And Theodore George Tsakiris, a director of Southern Oil Supply Company Ltd deponed that that company carries on business of supplying bunkers to ships in Mombasa and had entered into the contract in issue in this case and arranged with the appellant for the motor vessel “*Lilian S*” to be used as “a base for storing the said fuel oil pending the sale and supply of the same to other vessels in the port of Mombasa.” The documents annexed to Mr. Tsakiris’ affidavit evidencing the contract and demands for payment show that the respondent looked to Southern Oil Supply Co. Ltd., and not the Appellants, for payment for the said fuel.

The evidence clearly showed that the respondent’s claim could neither be founded on sections 20 (1) (a) and 20 (2) (m) of the Supreme Court Act nor be the basis for the invocation of the court’s admiralty jurisdiction pursuant to section 21 (4) of the Act. In “*The Evpo Agnic* [1988] WLR 1090, it was held, *inter alia*, that where “the relevant person” for the purposes of section 21 (4) (h) of the Act was the owner of the ship, on a true construction of the section “owner” meant “registered owner” and not merely someone with an equitable property in the ship. In the present appeal the owners of the motor vessel ‘*Lilian S*’ were sued on a claim which on the face of it lay against a third party and as the respondent adduced no evidence that the appellant was “the relevant person” the claim, in my view, fails to qualify for the invocation of the admiralty jurisdiction. For that reason alone I would respectfully hold that the learned trial Judge misapprehended the issue urged before him and consequently came to a wrong conclusion. It is for this reason, *inter alia* that I allowed the appeal.

But the appellant has urged other grounds in the appeal namely grounds 5, 6, 7, 8 and 9. These grounds are:

5. In considering the question whether the plaintiff had satisfied the requirements of S. 21 (4) of the said Act, the learned Judge erred in law

(a) in failing to pay any regard to the contents of the two telexes (marked TGT 1 and TGT 2 and attached to the affidavit of Theodore George Tsakiris filed on behalf of the defendant) and in failing to appreciate that the plaintiff should have disclosed the said two telexes in the affidavit filed in support of its request for the issue of a warrant of arrest but had failed to do so;

(b) in failing to pay any or any proper regard to the terms of the invoice dated 20th September, 1988 annexed to the affidavit of Johnson Robert Kariuki sworn on 5th December, 1988 and filed in support of the plaintiff’s request for the issue of a warrant of arrest.

c) in paying undue regard to the contents of the Bunker Delivery Report dated 19th September 1988 annexed to the said affidavit of Johnson Robert Kariuki filed in support of the plaintiff’s request for the issue of a warrant of arrest.

6. The learned Judge erred in law in holding that “this court has the jurisdiction to entertain this claim *in rem*” on the basis of assumptions or inferences in favour of the plaintiff when such assumptions or inferences were not only not canvassed before him on the hearing of the application but were also contrary to the affidavit evidence placed before him by both the parties.

7. The learned Judge erred in law and/or in principle in deciding the questions of jurisdiction on the wrong basis, namely that a claim which was not frivolous or vexatious and which disclosed a reasonable cause of action, should be allowed to proceed.

8. The learned Judge ought to have decided the question of jurisdiction regardless of the merits or demerits of the underlying claim.

9. The learned Judge erred in law in failing to set aside the writ and the warrant of arrest on the ground that the writ and the affidavit to lead to the arrest were manifestly defective.

It is clear that the appellant here complains of the learned trial judge’s scrutiny, evaluation and appreciation of the pleadings and evidence placed before him and his process or reasoning which led to his erroneous decision in the matter. I have already analysed the evidence that was placed before the superior court and shown that it fell far short of satisfying the statutory requirements for the invocation of the admiralty jurisdiction of the court.

The appellant’s complaints however go beyond that: it was contended that the respondent failed to meet the procedural standards set by Order 75 rule 5 of the Rules of the Supreme Court which I turn to consider.

Order 75 rule 5 (4) and 5(a) provide as follows so far as is relevant:

“5 (4). A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph (g); however, the court may, if it thinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars.

(9) An affidavit required by paragraph (4) must state

(a) in every case:

(i) the nature of the claim or counterclaim and that it has not been satisfied and, if it arises in connection with a ship, the name of that ship, and

(ii) the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and

(b) in the case of a claim against a ship by virtue of section 21 (4) of the Supreme Court Act 1981:

(i) the name of the person who would be liable on the claim in an action *in personam* (“the relevant person”) and

(ii) that the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and

(iii) that at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise; and

The evidence placed before the court in support of the claim as well as the motion has been analysed above and I have also, as I said before, had the advantage of reading in draft the comments and conclusions of my brothers Nyarangi and Kwach JJ A on it with which I respectfully agree.

That evidence so far as it was adduced by the respondent fell foul of the requirements of rule 5 of Order 75: it failed to establish that the appellant was “the relevant “person”. The upshot of that is that the High Court did not have admiralty jurisdiction and the respondent was not entitled to invoke that jurisdiction.

It is for these reasons that I concurred in the order of the court whereby this appeal was allowed as well as the order for costs.

Kwach JA.

At the conclusion of arguments in this appeal, we allowed the appeal and made an order for the immediate release of the motor vessel “*Lilian S*”. I now give my reasons for judgment.

On the 5th December, 1988, Caltex Oil Kenya Limited, the respondent in this appeal (hereinafter referred to as “Caltex”) issued a writ *in rem* against the motor vessel “*Lilian S*” endorsed with a claim for Kshs 6,110,434/55, alleged to be due and owing from The Owners of the MV “*Lilian S*” (hereinafter called the “the appellants”) to Caltex in respect of a quantity of gas oil, fuel and bunkers supplied by Caltex to the appellants. The writ was accompanied by a statement of claim and an affidavit to lead a warrant for the arrest of the motor vessel “*Lilian S*” (hereinafter called the ship.). This affidavit dated 5th December, 1988, was sworn by Mr John Robert Kariuki, an employee of Caltex.

Briefly, Caltex’s claim as pleaded in the statement of claim is that it is owed some Kshs 6,110,434/55, by the appellants in respect of a quantity of gas oil, fuel and bunkers (goods) supplied to the ship by Caltex during the year 1988. According to the affidavit of Mr Kariuki, this amount was due and payable immediately upon supply of the goods to the ship but had not been paid in spite of demand being made. According to Mr Kariuki, delivery had been acknowledged and duly signified on the Bunkers Delivery Report (BDR). In the BDR a company called Southern Oil Supply Company Ltd (SOSCO) is named as the local agents of the owners of the ship. Also annexed to the affidavit is a copy of an invoice directed to SOSCO receipt of which was duly acknowledged by SOSCO in its own right as a customer. On the basis of these facts, the ship which was then berthed at the Port of Mombasa was, on the *ex parte* application of Caltex, ordered to be arrested and was indeed arrested. The order for the arrest of the ship was made by Githinji, J on 5th December, 1988, after a brief hearing in Chambers.

The appellants being aggrieved by the Order of Githinji J, took out a Notice of Motion under RSC Order 75 and Section 4 of the Judicature Act (cap 8) seeking an order that the writ of summons and all subsequent proceedings be set aside and the ship be released from arrest on the grounds that:

“(a) The owners of the motor vessel “*Lilian S*” namely Sea Guardian Company SA of Panama are not, and have never been, persons who would, in the circumstances of this case, be liable to the plaintiffs in an action *in personam*;

(b) the person who would, in the circumstances of this case, be liable in an action *in personam* to the plaintiffs is Southern Oil Supply Company Ltd who were not the owners of the said motor vessel either at the time when the cause of action arose or at the time the writ in the action was issued.”

The application was supported by two affidavits sworn by Mr Epaminondas Saliarelis and Mr Theodore George Tsakiris. Mr Saliarelis is a Greek who lives in Piraeus and is the Secretary of the Sea Guardian Company SA, the legal and beneficial owners of the ship. I will come back to this affidavit later in this judgment. Mr George Tsakiris, lives in Mombasa and is a Director of SOSCO and claimed to be conversant with the facts of the case. More about this affidavit later.

The affidavit in reply to these two and in opposition to the application was sworn again by Mr Johnson Robert Kariuki who also expressed himself to be fully aware of the matters concerning the case.

The application got under way before Mr Justice Bosire on the 14th February, 1989, and on 28th February 1989, he delivered his ruling dismissing the appellants’ application with costs in cause. It is against that decision that the appellants have now appealed.

In rejecting the submissions made on behalf of the appellants on the issue whether the goods were supplied for the maintenance or operation of the ship, the learned Judge said:

“In the instant matter the plaintiff averred that the gas oil, Fuel and bunkers were supplied to the vessel in question at the request of SOSCO. They tendered affidavit evidence to show SOSCO were local agents of the defendants. This last aspect was denied. Whether or not SOSCO were local agents of the defendants will be settled upon receipt of *viva voce* evidence. The oil and fuel supplied to the ship was suitable for use in motor vessels. Tsakiris deposed that the oil was intended for sale to and for use by motor vessels at the Port of Mombasa. In effect it could be used for the operation of the “*Lilian S*”. Whether it was intended for use on the “Lilian S” or for resale is a matter of evidence. From the facts averred an inference could be drawn that the gas oil and fuel was properly for use on the “*Lilian S*”. It is not a remote inference.”

Right at the end of his ruling, dealing with the crucial issue of jurisdiction, the learned judge had this so say:

“In light of the foregoing I am satisfied that the facts alleged in the writ and affidavit for the request of a warrant of arrest sufficiently satisfy the requirements of sections 20 (2) (m) and 21 (4) of the Supreme Court Act, 1981, with the result that this Court has the jurisdiction to entertain this claim *in rem*.”

In their memorandum of appeal, the appellants have listed 9 grounds of appeal against which they seek to impeach the decision of the learned Judge, namely –

“1. The learned Judge erred in holding that the Court has jurisdiction to entertain the claim *in rem* made by Caltex Oil (Kenya) Ltd against the vessel “*Lilian S*”.

2. The learned Judge erred in holding that the facts alleged in the writ and in the affidavit for the request of a warrant of arrest were sufficient to satisfy the requirement of section 20 (2) (m) and 21 (4) of the Supreme Court Act 1981 of England as applied to Kenya.

3. The learned Judge erred in law in failing to appreciate that the question whether the plaintiff’s claim fell within the ambit of Section 20 (2) (m) of the said Act was a question of jurisdiction which he was obliged to decide at once on the affidavit evidence then before the Court.

4. The learned Judge erred in law in failing to hold that the question whether, under section 21 (4) of the said Act,

the person “who would be liable on the claim in an action *in personam*” at the time when the cause of action arose was Southern Oil Supply Company Ltd (SOSCO) or Sea Guardian Company SA (the defendants herein) was likewise a question of jurisdiction requiring immediate decision on the affidavit evidence then before the Court.

5. In considering the question whether the plaintiff had satisfied the requirements of Section 21 (4) of the said Act, the learned Judge erred in law.

(a) In failing to pay any regard to the contents of the two telexes attached to the affidavit of Theodore George Tsakiris and in failing to appreciate that the plaintiff should have disclosed the said two telexes in the affidavit filed in support of its request for the issue of a warrant of arrest but had failed to do so;

(b) In failing to pay any or any proper regard to the terms of the invoice dated 20th September, 1988, annexed to the affidavit of Johnson Robert Kariuki sworn on 5th December 1988 and filed in support of the plaintiff’s request for the issue of a warrant of arrest;

(c) In paying undue regard to the contents of BDR dated 19th September, 1988, annexed to the said affidavit of Johnson Robert Kariuki filed in support of the plaintiff’s request for the issue of a warrant of arrest.

6. The learned Judge erred in law in holding that “this court has jurisdiction to entertain this claim *in rem*” on the basis of assumptions or inferences in favour of the plaintiff when such assumptions or inferences were not only not canvassed before him on the hearing of the application but were also contrary to the affidavit evidence placed before him by both the parties.

7. The learned judge erred in law and/or in principle in deciding the questions of jurisdiction on the wrong basis, namely that a claim which was not frivolous or vaxatious and which disclosed a reasonable cause of action, should be allowed to proceed.

8. The learned Judge ought to have decided the questions of jurisdiction regardless of the merits or demerits of the underlying claim.

9. The learned judge erred in law in failing to set aside the writ and the warrant of arrest on the ground that the writ and the affidavit to lead the arrest were manifestly defective.”

As I understand these grounds of appeal, the appellant’s contention and main issue in this appeal is that the special procedure in the Admiralty

jurisdiction required that Caltex should have satisfied the Court *in limine*

(on the threshold) on the issue of jurisdiction. The admiralty jurisdiction of the High Court of Kenya is conferred by Section 4 of the Judicature (Act (cap 8), the material parts of which provide as follows:

“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

(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.”

It is plain from the foregoing that in the exercise of its admiralty jurisdiction, the High Court has to apply the law of England. In order to discover what that law is one has to look at the Supreme Court Act, 1981, and more specifically Sections 20 and 21 of the said Act. The relevant provisions state:

“20 (1) The admiralty jurisdiction of the High Court shall be as follows, that is to say

(a) jurisdiction to hear and determine any of the questions and claims mentioned in sub-section (2);

(2) The questions and claims referred to in sub-section

(1) (a) are:

(a) ...

(m) any claim in respect of goods or materials supplied to a ship for her operation or maintenance.”

The mode of exercising the admiralty jurisdiction is covered by section 21 of the Act, the relevant parts of which provide:

“21) (1) Subject to section 22, an action *in personam* may be brought in the High Court in all cases within the admiralty jurisdiction of that Court.

(2) ...

(3) ...

“(4) In the case of any such claim as is mentioned in section 20 (2) (e) to (r)

(a) the claim arises in connection with a ship; and

(b) The person who would be liable on the claim in an action *in personam* (“the relevant person”) was, when the cause of action arose, the owner or charterer of, or in possession or in control of, the ship, An action *in rem* may (whether or not the claim gives rise to a maritime lien on that ship) be brought in the High Court against (i) that ship, if at the time when the action is brought ship as respects all the shares in it or the charterer of it under a charter by demise;”

Admiralty actions therefore may be either *in rem* or *in personam*. An admiralty action *in rem* is in effect an action against a *res*. A *res* is usually a ship but may in some cases be cargo or freight or an aircraft. In such an action the plaintiff may cause the *res* to be arrested if it is within jurisdiction.

The learned Judge held on the evidence before him that the claim by Caltex fell within the ambit of Sections 20 (2) (m) and 21 (4) of the Supreme Court Act, 1981. Starting first with Section 20(2) (m), the question to be decided is whether the goods in relation to which the claim was made by Caltex were supplied to the ship for her operation or maintenance. The Judge thought that the nature of the goods was such that it was probably intended for the operation of the ship. The quantity involved was in excess of 6,000 metric tons. Such a large quantity of fuel may or may not have been supplied to the ship for its operation. It is quite probable that it was supplied for some other purpose. Mr Epaminondas Saliarelis deponed in paragraph 7 of his affidavit that he was informed by the Master of

the ship that the said fuel was ordered by and was only delivered to the ship under an arrangement between the Master and SOSCO as a result of which the ship was used as a base for the storage of the said fuel and oil pending its sale by SOSCO and a company called SOSCO Fishing Industries Ltd to other vessels. He was categorical in his assertion that his company, Sea Guardian Company SA, the legal and beneficial owner of the ship, had not placed any order with Caltex for the supply of the fuel oil in question. This is supported by Mr Theodore George Tsakiris, a director of SOSCO, who confirmed in his affidavit that the order for supply of fuel oil was placed by SOSCO and that the ship was used only as a base for storing the fuel pending the sale and supply of the same to other vessels in the port of Mombasa.

Even assuming without deciding that the goods fell within the scope of sub-paragraph (m), were the mandatory requirements of Section 21(4) satisfied" It goes without saying that the claim arose in connection with a ship. What has to be determined is whether the appellants are the persons who would be liable on the claim in an action *in personam*. When the cause of action arose the appellants were certainly the owners of the ship and if they were liable *in personam* on the evidence then an action *in rem* could have been brought against them. But the decisive question is whether on the evidence the appellants were liable to Caltex *in personam*. Put slightly differently the appellants would not be liable in an action *in rem* unless they would also be liable in an action *in personam*. This linkage is important as it constitutes the basis upon which the court’s jurisdiction is to be exercised. It was Mr Inamdar’s submission that on the material before the judge there was no evidence that the appellants could be held liable in an action *in personam*. The contract for the sale and delivery of the goods was made by an exchange of two telexes which I consider to be important and which I will read in full. The first telex is dated 15th September, 1988, and is addressed to SOSCO marked for the attention of Mr Saliarelis and reads:

“FUEL OIL SUPPLY EX-KOT

We confirm sale of 5500MT OF F.O. 180 CST subject to following terms:

AA – Price USD converted to Kenya shillings at the selling rate of the U.S dollar quote by major commercial Banks on the date of invoice.

BB - Credit terms strictly thirty days from date of invoice subject to settlement of total amount in respect of 500 MT fuel oil lifted in late August 1988 ex kot.

CC - Payment of connection/disconnection charges, KPA overtime and Fire Brigade standby charges. Please confirm acceptance of above terms in order that we may make arrangements to supply.

CALTEX NAIROBI.”

SOSCO’S replying telex also dated 15th September, 1988, addressed to Caltex (Nairobi) and copied to Caltex (Mombasa) states:

“FUEL OIL EX KOT

Thanks your telex 852 of today. We hereby confirm acceptance the purchase of 5000 MT FO L80 CST EX

KOT with usual terms. PLS be advised that we nominate

M/T “Lilian S” to lift the parcel. Best regards

T.G. TSAKIRIS.”

It is plain beyond a peradventure looking at these two telexes, that the contract of sale was made between Caltex and SOSCO. It is to be noted that no reference is made to those important telexes in the affidavit to lead a warrant for the arrest of the ship sworn by Mr Johnson Robert Kariuki on behalf of Caltex on 5th December, 1988. On 2nd February, 1989, Mr Kariuki swore a second affidavit in reply to the affidavits of Mr Saliarelis and Mr Tsakaris in which he did not make even a passing reference to those telexes. He attached copies of a delivery note and an invoice. In the result, the averment contained in Mr Tsakaris’ affidavit that the contract for sale of the fuel oil was made between SOSCO and Caltex remained unchallenged and must be accepted as true. The BDR dated 19th September, 1988, signed by the Captain of the ship is no more than an acknowledgment by the captain that the fuel oil was delivered to the ship in accordance with arrangements agreed upon between Caltex and SOSCO in the telexes exchanged between them. The delivery was made to the ship as the vessel nominated for delivery under contract of sale. It was not delivered to the ship either because it was required for its operation or because it had been bought by or sold, to the owners of the ship.

On this evidence, I have no difficulty in finding as a fact that the sale was made to SOSCO and only SOSCO, and no other party, could be liable in an action *in personam* for the value of the goods sold and delivered by Caltex. It is clear therefore that Caltex failed to bring its claim within the mandatory provisions of Section 21 (4) (b) and was consequently not entitled to bring an action in *rem* against the ship. In my view therefore, the learned Judge was plainly wrong when he found that those provisions had been satisfied.

In the case of *The River Rima* [1987] 3 All ER 1 (CA), the plaintiffs entered into an agreement with the defendant shipping line to lease to them containers for use on their cargo-carrying vessels. Under the terms of the agreement the containers were delivered direct to shippers at specified depots to be filled and were used interchangeably on a number of vessels which were either owned or chartered by the defendants. Subsequently, the plaintiffs issued a writ *in rem* claiming, inter alia, damages for breach of the agreement and one of the defendant ships were arrested. Under Section 20 (2) (m) of the Supreme Court Act, 1981, the Admiralty Court had jurisdiction regarding any claim in respect of goods “..supplied to a ship for her operation” and by Section 21(4) an action *in rem* could be brought against any other ship in the same entire beneficial ownership or chartered to the same person under a charter by demise, so long as that person would have been liable on the claim if the action had been brought *in personam*. The defendants applied for the writ to be struck out and the ship released from arrest, on the ground that the plaintiffs’ claim did not lie within the jurisdiction of the Admiralty Court. The judge dismissed the application holding that the containers were goods supplied to a ship for her operation and that accordingly the plaintiffs’ claim fell within S 20 (2) (m) of the 1981 Act. The defendants appealed to the Court of Appeal.

It was held that in order to maintain an action under Section 20 (2) (m) of the 1981 Act, it was necessary to demonstrate a sufficiently direct connection between the agreement relied on and the operation of the ship. Since the true purpose of the leasing agreement was to enable the defendants to meet the convenience of shippers in providing packaging for all their cargoes, the containers had not been shown to be sufficiently closely connected with the operation of the defendants’ ships, or with any ships, as to bring the plaintiffs’ claim within section 20 (2)(m). Furthermore, it had not been established, for the purposes of Section 21

(4) of the 1981 Act, that when the cause of action arose the defendants were the beneficial owners or charterers of a ship or ships to which the plaintiffs’ claim related, and accordingly there was insufficient evidence to justify the ship’s arrest under Section 21 (4). It followed that the plaintiff’s claim did not come within the jurisdiction of the Admiralty Court. The appeal was allowed, the writ set aside and the ship released from arrest.

In the course of his judgment, with which both Nourse and Woolf LJJ agreed, Sir John Donaldson MR, in relation to the meaning of section 20

(2) (m) of the 1981 Act said at page 4-d:

“There is not doubt that the judge was much influenced by the decision of the District Court of Rotterdam in *The River Jimini* to which he referred and by the desirability of there being a common international approach to the admiralty jurisdiction of Courts. In this he was clearly right. The international convention relating to the arrest of Sea-going ships which has been ratified by Great Britain, was intended to have just this effect and the relevant sections of the Supreme Court Act 1981 and their predecessors in the Administration of Justice Act 1959 were intended to give effect to the convention. Nevertheless, it is not yet the case that there is any established body of law as to the meaning of art (1) (k) of the Brussels Convention, which is the equivalent of para (m).” (underlining mine).

The plaintiffs appealed to the House of Lords and their appeal was dismissed (See *The River Rima* (1988) 2 Lloyd’s Rep 193).

Since I have arrived at the conclusion that Caltex failed to bring its claim within the ambit of section 21 (4) of the 1981 Act, it follows that the Court acted without jurisdiction in issuing a warrant for the arrest of the ship and the subsequent application by the appellants to set aside the writ of summons and all subsequent proceedings and for the release of the ship from arrest ought to have been allowed. It follows that grounds 1, 2, 3, 4, 5, 6, 7 and 8 of appeal relating to the issue of jurisdiction succeed and are allowed.

The conclusion I have arrived at on the issue of jurisdiction is sufficient to dispose of this appeal but as Counsel addressed this Court at some length on the sufficiency or otherwise of the affidavit to lead the arrest, I think I ought to deal with ground 9 of appeal as well.

The conditions prerequisite to the issue of a warrant for the arrest of a ship are set out under RSC 0.75 r. 5, and paragraphs 4 and 9 which are relevant stipulate that;

“5(4) A warrant of arrest shall not be issued until the party intending to issue the same has filed an affidavit made by him or his agent containing the particulars required by paragraph (9) ; however, the court may, if it thinks fit, give leave to issue the warrant notwithstanding that the affidavit does not contain all those particulars.

(9) An affidavit required by paragraph 4 must state:

(a) in every case:

(i) the nature of the claim or counterclaim and that it has not been satisfied and, if it arises in connection with a ship, the name of the ship; and

(ii)the nature of the property to be arrested and, if the property is a ship, the name of the ship and her port of registry; and

(b) In the case of a claim against a ship by virtue of section 21 (4) of the Supreme Court Act 1981:

(i) The name of the person who would be liable on the claim in an action *in personam* (“the relevant person”); and

(ii) That the relevant person was when the cause of action arose the owner or charterer of, or in possession or in control of, the ship in connection with which the claim arose; and

(iii) That at the time of the issue of the writ the relevant person was either the beneficial owner of all the shares in the ship in respect of which the warrant is required or (where appropriate) the charterer of it under a charter by demise; and

(c)(not relevant)

(d)(not relevant)

(e)(not relevant)”.

It was Mr Inamdar’s submission before us that the affidavit Mr Johnson Robert Kariuki sworn on 5th December, 1988, was manifestly defective for lack of compliance with the mandatory provisions of RSC 0.75 r 5 (4) and (9). In that affidavit, Kariuki deponed as follows:

“(1) I am employed by the plaintiff company herein and I am dully authorized to swear this affidavit. The contents of this my affidavit are within my own knowledge.

(2) In the month of September the plaintiff company supplied to the said motor tanker “LILIAN S” a quantity of gas oil, fuel and bunkers to the value of Kenya Shs 6,110/434/55. The amount of Shs 6,110,434/55 was due and payable immediately upon supply of gas oil, fuel and bunkers to the vessel but was not paid and we have been demanding payment of the same from the owner’s agents at Mombasa. I annex hereto a delivery note signed on behalf of the defendants, acknowledging the amount of shs 6,110,434/55 as owing and the delivery of the gas oil, fuel and bunkers as having been made.

(3) The aid and processes of this honourable Court are requested to enforce payment of this amount and I make this application for the immediate arrest of the motor tanker “LILIAN S”.

(4) What is stated hereinabove is true and correct to the best of my own knowledge and belief.”

As can be seen from the contents of this affidavit, it applied only with paragraph 9(a) of rule 5 but did not include particulars required to be given under paragraph 9(b) of rule 5, in the case of a claim against a ship by virtue of section 21 (4) of the Supreme Court Act, 1981. The affidavit did not identify the appellants as the person who would be liable on the claim in an action *in personam* nor did it state that the appellants were either the owners or charterers or in possession or control of the ship when the cause of action arose. There was no averment that at the time of the issue of the writ the appellants were the beneficial owners of all the shares in the ship either.

As this affidavit did not comply with the mandatory provisions of RSC 0.75 r 5 paragraph 9 no reliance should have been placed on it unless the Court gave leave as required by the rule to dispense with those particulars. No leave having been obtained the affidavit should have been rejected outright. In this respect, the affidavit to a warrant of arrest was incurably defective.

Mr Inamdar also challenges the validity of this affidavit on another ground namely that it failed to disclose, and in fact concealed, material facts as a result of which the Court was misled into making an *ex parte* order gravely prejudicial to the appellants. He submits that if these material facts had been disclosed, the Court would not have made the order for the arrest of the ship. As I understand him Mr Inamdar’s contention is that Caltex was guilty of lack of candour. The material facts which Mr Inamdar contends were concealed are contained in the two telexes to which I have already referred. The main plank of his argument is that if Caltex had disclosed either the existence or contents of these telexes it would have been readily apparent to the Judge who gave the order for the arrest of the ship that the agreement for the sale of the goods in question was concluded not between Caltex and the appellants, as Caltex had led the Court to believe, but between Caltex and SOSCO. On the basis the Judge would have seen straightway that the appellants could not have been held liable for the claim in an action *in personam* and in consequence would have declined to make the order sought.

This duty of candour has been dealt with in a number of decided cases. In *The Andria (vasso)* [1984] QB 477, the

plaintiffs, the owners of cargo carried on board the defendant’s ship, wished to pursue a claim against the defendants for damage to that cargo. After the plaintiffs had commenced an action *in rem* in the Admiralty Court, the parties made an ad hoc agreement to arbitrate and the plaintiffs actively pursued their claim in the arbitration. The defendants subsequently sold the ship. The defendants refused to provide security for the plaintiffs’ claim, and the plaintiffs applied to the Admiralty Court for an order to arrest the ship.

The application made no mention of the ad hoc agreement to arbitrate or of the fact that the plaintiffs were actively pursing their claim in the arbitration. The Court issued the necessary warrant and the ship was arrested. The ship was released against an undertaking and the defendants applied to the court for a declaration that the Court’s jurisdiction to arrest the ship could not be invoked where its sole purpose was to provide security for arbitration proceedings, and an order discharging the undertaking. The Court made the declaration and order sought by the defendants.

On appeal by the plaintiffs, it was held, dismissing the appeal, *inter alia*, that the power to arrest a ship conferred on the Admiralty Court by RSC, 0.75 r 5 was discretionary; that in exercising that power the Court might take into account the manner in which and the purpose for which the plaintiff had invoked the Court’s jurisdiction; that since the purpose of the power of arrest under RSC 0.75 r 5 was to provide security for the action *in rem* and not for any other proceedings and since it appeared that the plaintiffs when invoking that power had failed to disclose to the court the fact that their claim was being pursued by arbitration, it followed that the invocation of the power of arrest had been an abuse of the process of the court and that therefore the undertaking should be discharged. The Court of Appeal in its judgment which was read by Robert Goff LJ said at page 491 G:

“It is axiomatic that in *ex parte* proceedings there should be full and frank disclosure to the Court of facts known to the applicant, and that failure to make such disclosure may result in the discharge of any order made upon the *ex parte* application, even though the facts were such that, with full disclosure, an order would have been justified; see *Reg v Kensington Income Tax Commisioners, Ex parte Princess Edmond de Polignac* (1971) 1 KB 486. Examples of this principle are to be found in the case of *ex parte* unjunctions, *ex parte* orders made for service of proceedings out of the jurisdiction under Order 11 of the Rules of the Supreme Court. In our judgment, exactly the same applies in the case of an *ex parte* application for the arrest of a ship where, as here, there has not been full disclosure of the material facts to the Court.”

The same principle was dealt with in the case of *Brink’s Mat Ltd v Elcombe* [1988] 3 All ER 188. It is not necessary to set the relevant facts here but I would like to refer to an important passage in the judgment of Ralph Gibson LJ, at page 192 (f) where he said:

“In considering whether there has been relevant non- disclosure and what consequence the court should attach to any failure to comply with the duty to make full and frank disclosure, the principles relevant to the issues in these appeals appear to me to include the following.

(i) the duty of the applicant is to make a full and fair disclosure of the material facts.

(ii) The material facts are those which it is material for the Judge to know in dealing with the application as made; materiality is to be decided by the Court and not by the assessment of the applicant or his legal advisers.

(iii) The applicant must make proper inquiries before making the application. The duty of disclosure therefore applies not only to material facts known to the applicant but also to any additional facts which he would have known if he had such inquiries.

(iv) The extent of the inquiries which will be held to be proper, and therefore necessary, must depend on all the circumstances of the case including

(a) the nature of the case which the applicant is making when he makes the application

(b) the order for which application is made and the probable effect of the order on the defendant, and

(c) the degree of legitimate urgency and the time available for the making of inquiries.

(v) if material non-disclosure is established the court will be astute to ensure that a plaintiff who obtains an *ex parte* injunction without full disclosure is deprived of any advantage he may have derived by that breach of duty.

(vi) Whether the fact not disclosed is of sufficient materiality to justify or require immediatemdischarge of the order without examination of the merits depends on the importance of the fact to issues which were to be decided by the judge on the application. The answer to the question whether the non-disclosure was innocent, in the sense that the fact was not known to the applicant or that its relevance was not perceived, is an important consideration but not decisive by reason of the duty on the applicant to make all proper inquiries and to give careful consideration to the case being presented.

(vii) Finally, it is not for every omission that the injunction will be automatically discharged. A *locus poenitentiae* (chance of repentance) may sometimes be afforded. The court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of the *ex parte* order, nevertheless to continue the order, or to make a new order on terms:

‘. when the whole of the facts, including that of the original non-disclosure, are before it, (the Court) may well grant such a second injunction if the original non- disclosusre was innocent and if an injunction could properly be granted even had the facts been disclosed.’

See *Lloyds Bowmaker Ltd v Britannia Arrow Holdings p/c (larens, third party)* [1988] 3 All ER 178 at 183 per Glidewell LJ.”

And Balcombe LJ had this to say on the same point in the same case at page 193 (h) :

“The Courts today are frequently asked to grant *ex parte* injunctions, either because the matter is too urgent to await a hearing on notice or because the very fact of giving notice may precipitate the action which the application is designed to prevent. On any *ex parte* application, the fact that the Court is asked to grant relief without the person against whom the relief is sought having the opportunity to be heard makes it imperative that the applicant should make full and frank disclosure of all facts known to him or which should have been known to him had he made all such inquiries as were reasonable and proper in the circumstances.

The rule that an *ex parte* injunction will be discharged if it was obtained without full disclosure has a two fold purpose. It will deprive the wrongdoer of an advantage improperly obtained; and see *R v Kensignton Income Tax Comrs, e.p. Princess Edmond de Polignac* (1971) KB 486 at 509. But it also serves as a deterrent to ensure that persons who make *ex parte* applications realize that they have this duty of disclosure and of the consequences (which may include a liability in costs) if they fail in that duty. Nevertheless, this judge–made rule cannot be allowed itself to become an instrument of injustice. It is for this reason that there must be a discretion in the Court to continue the injunction , or to grant a fresh injunction in its place, notwithstanding that there may have been non disclosure when the original *ex parte* injunction was obtained.”

All these cases make reference to the principle as stated in the well known case of *R v Kensington Income Tax Commissioner E.p. Princess Edmond De Polignac* [1917] 1 KB 486, and so for the sake of completeness, I think I ought to read two passages from the judgments delivered in the Court of Appeal in that case.

The first is to be found in the judgment of Warrington LJ at page 509, where he said;

“ It is perfectly well settled that a person who makes an *ex parte* application to the court – that is to say, in the absence of the person who will be affected by that which the court is asked to do – is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, he will be deprived of any advantage he may have already obtained by him. That is perfectly plain and requires no authority to justify it.”

The other passage is from the judgment of Scrutton LJ at pp 513-514 where he said:

“Now that rule giving a day to the Commissioners to show cause was obtained upon an *ex parte* application; and it has been for many years the rule of the court, and one which it is of the greatest importance to maintain, that when an applicant comes to the court to obtain relief on an *ex parte* statement he should make a full and fair disclosure of all the material facts - facts, not law. He must not misstate the law if he can help it – the court is supposed to know the law. But it knows nothing about the facts, and the applicant must state fully and fairly the facts, and the penalty by which the Court enforces that obligation is that if it finds out that the facts have not been fully and fairly stated to it, the court will set aside any action which it has taken on the faith of the imperfect statement.”

This rule applies with equal force in Kenya and looking at the substance of the two telexes, I entertain no doubt at all that Caltex failed in its duty to make a full and frank disclosure of material facts and the application by the appellants to set aside the writ and the warrant of arrest ought to have been allowed because quite clearly the original order made by Githinji J., for the arrest of the ship was improperly obtained. Mr Inamdar’s complaint about the affidavit is well founded and I would uphold his submissions in his last ground of appeal as well.

It was for these reasons I was in favour of allowing the appeal, setting aside the writ and releasing the ship from arrest. I would give the appellants their costs of this appeal.

Dated and delivered at Mombasa this 17th day of Novemebr, 1989.

NYARANGI.

…….

JUDGE OF APPEAL

MASIME

…….

JUDGE OF APPEAL

KWACH

…….

JUDGE OF APPEAL