



Mkwizu t/a Inland Services v Kenya Ports Authority (Civil Case 1649 of 2002) [2023] KEHC 17889 (KLR) (Civ) (17 February 2023) (Ruling)

Neutral citation: [2023] KEHC 17889 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 1649 OF 2002

DO CHEPKWONY, J

FEBRUARY 17, 2023

BETWEEN

GASPER MOHAMED SHABA MKWIZU T/A INLAND SERVICES .. PLAINTIFF

AND

KENYA PORTS AUTHORITY DEFENDANT

RULING

1. The brief background of this case is that on or about the April 25, 1998, the Plaintiff's goods arrived at the Kenya Ports Authority. The Plaintiff avers that the said goods which comprised of 4 Scania Trucks were offloaded and taken into custody by the Defendant pending further processing, clearing and release to the Plaintiff.
2. The Plaintiff avers that it duly paid the Defendant all its charges including inter alia, its charges in relation to the handling, warehousing and processing of the said trucks and further declared their value in accordance with Section 23 of the Kenya Ports Authority.
3. According to the Plaintiff, by reason of the above premises, a legally binding contract between the parties came into existence, hence the Defendant was contractually and statutorily bound to observe due care and diligence in the handling and warehousing of his goods so as to ensure that the same were not lost or damaged.
4. It is the Plaintiff's contention that in breach of its statutory and contractual obligation to observe due care and diligence as aforesaid, the Defendant proceeded to recklessly, carelessly and negligently dump the trucks at the Container Terminal rather than storing them at the Motor Vehicle Section. As a consequence, the vehicles were vandalized and stripped to the shell.



5. As a result of the alleged breach, the Plaintiff pleads to have suffered massive loss and colossal damage, particulars of which are as per the Plaintiff dated and filed November 1, 2002.
6. The Plaintiff seeks for Judgment against the Defendant for;
 - a. The sum of Kshs 110,866,800/=
 - b. Costs of this suit.
 - c. Interest on (i) and (ii) at commercial rates.
 - d. Any further or other relief as the court deems fit.
7. The Defendant filed a defence dated December 10, 2002 denying the allegations and claims contained in the Plaintiff and contended that the Plaintiff's claim is fictitious, highly exaggerated and at gross disparity with the value of the consignment as declared at the port, thus the Defendant is not liable to the Plaintiff for the claim.
8. It is the Defendant's averment that it would raise a Preliminary Objection at the hearing of this suit on the ground that it is bad in law for contravening the provisions of *Kenya Ports Authority Act*.
9. The Defendant thus proceeded and filed a Notice of Preliminary Objection dated May 24, 2005, couched in the following manner;

“The Defendant herein will raise a preliminary objection at the hearing of this suit whereof has already been given in the defence dated 10th December, 2002 on the grounds that the suit filed herein is bad in law for contravening the limitation period under the *Kenya Ports Authority Act*”.
10. In opposition to the Preliminary Objection, the Plaintiff filed a Replying Affidavit dated July 4, 2022 and sworn by Gasper Mohamed Shaba, the Plaintiff herein.
11. The Plaintiff deposed that on April 17, 1998 and April 23, 1998 respectively, he wrote letters to the Defendant seeking permission to inspect four (4) used Scania Truck Ex MV Barrister E.T.A (Mombasa) 22/4/1998 B/L 672594 of 7/4/1998, arriving in Mombasa on 24th April, 1998 through M/V Barrister B/L 67259485 of 7th April, 1998.
12. That on April 25, 1998 the Plaintiff goods comprising 4 Trucks arrived at the Kenya Ports Authority aboard the Vessel MV Barrister, and were offloaded and taken into custody by the Defendant to await processing, clearing and release to the Plaintiff.
13. That on August 6, 1998, the Plaintiff wrote another letter to the Defendant informing them that the vehicles had been vandalized and the Plaintiff wanted to have a survey carried out on the items. He paid the Defendant all its charges which included those for handling, warehousing and processing of the said trucks and declaration of their value as required by law.
14. The Plaintiff deposed that on August 24, 1999, he wrote a demand letter demanding compensation, a survey having been conducted which revealed that the missing items were totalling to US\$182,210. That this was because a legally binding contract had come into existence between the Plaintiff and Defendant, hence the Defendant was contractually and statutorily bound to observe due care and diligence in its handling and warehousing of goods to ensure they are neither lost nor damaged.
15. According to the Plaintiff, the Defendant always expressed its willingness to make good the losses on diverse dates, being in 1998, 1999 and 2001.



16. The Plaintiff avers that on October 4, 2002, his advocate wrote a demand letter requesting the Defendant to pay for the damage caused to the trucks, which amounted to Kshs 14,576,800/= with interest as from April 25, 1998 at the commercial rate of 24%.
17. The Plaintiff contends that the suit was instituted after negotiations had failed and that is when time started to run which resulted in filing the suit on November 1, 2002 after realizing that the Defendant was not willing to compensate him.
18. On March 10, 2022, this Court issued directions regarding the hearing of the Notice of Preliminary Objection dated May 24, 2005. This court issued directions to the effect that the Preliminary Objection be disposed of by way of written submissions.
19. Both parties filed their respective submissions in support and in opposition to the Preliminary Objection. The Defendant's submissions are dated May 13, 2022 while the Plaintiff's submissions are dated July 1, 2022.

Analysis and determination

20. I have considered the Notice of Preliminary Objection, the response and the submissions in support and in opposition thereof. I find the issue for determination being whether the Notice of Preliminary Objection dated May 24, 2005 is merited.
21. As I start the determination of this matter, it is worth-noting that this is a very old matter and certainly one of the oldest matters pending before this court. And infact, the Notice of Preliminary Objection dated 24th May, 2005 which is for determination is evident of this Court's sentiments.
22. The parameters on Preliminary Objections were well settled in the famous decision in the case of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd* (1969) EA 696, where the court held that;

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

Further: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

23. The Supreme Court in the case of *Independent Electoral & Boundaries Commission –vs- Jane Cheperenger & 2 Others* (2015)eKLR made the following finding on Preliminary Objections;

“The true Preliminary Objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party



to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

24. In view of the above observation, this court seeks to establish whether the Preliminary Objection that has been raised herein and the grounds upon which it is anchored on meet the threshold as set out in the cited authorities.
25. The Notice of Preliminary Objection is premised on the provisions of Section 66 of the [Kenya Ports Authority Act](#) which provides as follows;
- [66] Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—
- a. The action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the Plaintiff or his agent;
 - b. The action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of continuing injury or damage, within six months next after the cessation thereof.
26. In his submissions dated May 13, 2022, Counsel for the Defendant submitted that the suit was filed more than four (4) years after the alleged statutory and contractual breaches which arose on April 25, 1998, and therefore, it is time barred as it contravenes the provision of Section 66 of the [Kenya Ports Authority Act](#). The Defendant has made reference to several decisions in support of its argument namely; [Attorney General & Another –vs- Andrew Maina Gitinji & Another](#) [2016] eKLR, [Bob Thompson Dickens –vs- Kenya Poarts Authority & Others](#) [2017]eKLR and [Rift Valley Railways \(Kenya\) Ltd –vs- Hawkins Wagunza Musonye & another](#) [2016] eKLR.
27. In his written submissions dated July 1, 2022, the Plaintiff urged that contrary to the assertions by the Defendant that the matter should have been filed in 1998, the reasons the matter was not filed within the said timelines is because parties were negotiating for an out of court settlement and indicated that this happened on April 23, 1998, August 6, 1998, and August 24, 1999.
28. It was further submitted for the plaintiff that a preliminary objection should be raised when there is no opposition to the facts of the case. He cited the case of [Oraro –vs- Mbajo](#) (2005)1 KLR where the court held that;

“Preliminary Objection, correctly understood, is now well identified as and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not as a matter of legal principle, a true preliminary objection which the court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo, that “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.” This legal principle is beyond dispute, as there are diverse weighty authorities carrying the message”.



29. The Plaintiff contended that Section 65 and 66 of the *Kenya Ports Authority Act* provide for 30 days statutory notice but this court and the Court of appeal have on numerous occasions declared the 30 days' notice as unconstitutional. He has relied on the case of *Kenya Revenue Authority –vs- Habimana Sued Hemed* (2015) eKLR and *Bob Thompson Dickens Ngobi –vs- Kenya Ports Authority*(*supra*).
30. Having read the Notice of Preliminary Objection filed herein and the submissions by both parties, it is noted that the Preliminary Objection raises a pure point of law as the same has been anchored majorly on Section 66 of *Kenya Ports Authority Act* which basically provides for limitation period within which an action can be commenced against the Authority, and which is a statutory provision. From this observation, this Court finds that the Preliminary Objection raised meets the threshold of an objection as envisioned in the decision of *Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd* (*supra*). What this Court is now left to determine is whether the Objection as provided for by the *Kenya Ports Authority Act* is merited in the circumstances of this case.
31. The other point that has been raised by the Plaintiff in his submission is on the question of when time starts to run where there are negotiations between the parties in a dispute. He has cited the case of *A.M Bahaji & Co. Ltd –vs- Kenya Ports Authority* (2019) eKLR.
32. In this Court's humble view, time starts running immediately after an alleged breach occurs. A perusal of the Plaintiff's Complaint and the submissions indicated that several letters were written by the Plaintiff to the Defendant on April 23, 1998, August 6, 1998, and August 24, 1999 respectively. But the letter that has caught my attention is the one dated August 6, 1998 which speaks of vandalization of the Trucks, and is believed and taken to be the time when a dispute is likely to have been noted. Be that as it may, this claim was instituted way after the expiry of the 12 months' period envisioned by the law.
33. According to the wording of Section 66(b) of the *Kenya Ports Authority Act*, the cause of action ought to have been brought within 12 months after the occurrence of the the act, neglect or default complained of. Based on that communication between the parties, and the institution of the suit on November 1, 2002, this Court is in agreement with the Defendant that this matter is indeed time barred as it was instituted after a period of four (4) years of noting the breach, hence this Court has no entry point but to allow the Preliminary Objection as raised by the Defendant.
34. The upshot of the foregoing is that the Defendant's Notice of Preliminary Objection dated May 24, 2005 is merited to the extent that the Plaintiff's claim is statute barred pursuant to the provisions of Section 66 of the *Kenya Ports Authority Act*, and subsequently, the Plaintiff's suit dated November 1, 2002 is dismissed.
35. In view of the circumstances presented, this Court makes no orders as to costs.
Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 17TH DAY OF FEBRUARY, 2023.

D. O. CHEPKWONY

JUDGE

