



REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL SUIT NO 370 OF 2015

QUADCO SEVENTY FIVE LIMITED.....PLAINTIFF

VERSUS

KENYA AIRPORTS AUTHORITY.....1ST DEFENDANT

KENYA CIVIL AUTHORITY.....2ND DEFENDANT

RULING

INTRODUCTION

1. The 1st Defendant's Notice of Motion application dated 7th May 2019 and filed on 8th May 2019 was brought pursuant to the provisions of Section 1A & 3A of the Civil Procedure Act, Order 2 Rule 15(1) (a), (b) and (d) of the Civil Procedure Rules, 2010, the inherent powers of the court and any other enabling provisions of the Law. It sought the following orders **THAT:-**

- 1. The Complaint dated 21st October 2015 and filed in Court on 30th October 2015 be struck out and the suit be dismissed.**
- 2. In the alternative to prayer 1, the 1st Defendant be struck out as a party to the suit.**
- 3. The costs of this suit and the application be awarded to the 1st Defendant.**
- 4. The Court do grant any other order it deems fit and just to grant.**

2. The 1st Defendant's Digest of Authorities was dated and filed on 17th June 2019 while its Written Submissions were dated 2nd July 2019 and filed on 4th July 2019. The Plaintiff's List of Authorities were dated 10th June 2019 and filed on 17th June 2019 while its Written Submissions were dated and filed on 26th July 2019.

3. The parties requested the court to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Ruling herein is therefore based on the said Written Submissions.

THE 1ST DEFENDANT'S CASE

4. The 1st Defendant's application was supported by the affidavit of its Legal Officer, Margaret Munene, that was sworn on 17th April 2019,

5. Through her, the 1st Defendant contended that the Kenya Airports Authority Act Cap 395 (Laws of Kenya) empowers it to construct, operate and maintain aerodromes and to provide other amenities for passengers and other persons using the service as it deems desirable. It added that it also had powers to enter land for survey to prevent accidents and to enter land for purposes of altering the position of pipes.

6. It pointed that any person who has suffered damage as a result of its powers under Sections 12, 14, 15 and 16 of the Kenya Airports Authority ought only to be compensated in accordance with the agreement reached with it or as determined by an arbitrator appointed by the Chief Justice. It was its averment that the said Sections oust the jurisdiction of the court.

7. It averred that in view of the foregoing, the filing of a suit against it for a claim for damages was prohibited by the law and that consequently, the suit was fatally defective, incompetent and bad in law for being contrary to the mandatory provisions of Section 33 of the

Kenya Airports Authority Act.

8. It therefore urged this court to grant its application as it was in the interests of justice to do so.

THE PLAINTIFF'S CASE

9. In response to the said application, the Plaintiff filed Ground of Opposition dated 10th June 2019 on 11th June 2019.

10. The grounds were as follows:-

1. The duties of the first defendant set out in paragraph 5 of the Plaintiff were imposed on the first defendant by section 8 of the Kenya Airports Authority [Cap 395] (hereinafter referred to as "the Act.")

2. Section 33 of the Act had no application to the claims brought in the Plaintiff under the duties imposed by section 8 of the Act.

3. Section 33 of the Act only referred to compensation for damage suffered as a result of the exercise of the powers conferred by sections 12, 14, 15 or 16 of the Act.

4. Section 33 of the Act did not provide for the determination of liability for causing damage where such liability was disputed. The Defence of the first defendant denied liability and therefore section 33 of the Act had no application.

5. The matters raised in the application only related to the first defendant and could not even if established, lead to the dismissal of the suit against the second defendant.

LEGAL ANALYSIS

11. The 1st Defendant reiterated the averments in its Supporting Affidavit. It placed reliance on the case of **World Duty Free Company Limited vs Kenya Airports Authority [2012] eKLR** where Mabeya J held that Section 33 of the Act applies when the Authority exercises power under Sections 12, 14, 15 and 16 of the Act, a person suffers damage as a result of the exercise of that power and that the dispute is for compensation. It also referred this court to the case of **Paul Mungai Njogu & 2 Others vs Kenya Airports Authority & 3 Others [2019] eKLR**.

12. It was emphatic that the latter two (2) limbs of that holding could not be disputed since the Plaintiff was seeking compensation for the loss and damage that was said to have been occasioned to its aircraft as a result of the accident. It was adamant that the Plaintiff's claim was not hinged on Section 8 of the Act.

13. It pointed out that the Plaintiff had accused it of not having maintained and managed the landing facilities at the Manda Airstrip Lamu and in particular runway 16 which was its mandate as per Section 12(1) (a) of the Act. It added that the Plaintiff had also accused it of depositing a mound in the runway and averred that under Section 12(4) of the Act, it had power to construct or improve any of the prescribed aerodrome which shall include construction or execution of any works necessary thereto on land vested in it.

14. It also stated that it had pleaded that the Plaintiff's agent failed to notice that part of the runway was closed and that he landed beyond the prescribed hours. In this regard, it referred this court to Section 12(3) (f) of the Act that provided that the Act empowered it to control or regulate, the use by any person of the services performed or the facilities it provided or the presence of any person, aircraft or goods within any prescribed aerodrome or any premises it controlled or occupied.

15. It placed reliance on the case of **Kenya Planters Co-operative Union vs Kenya Commercial Bank Ltd & 3 Others [2014] eKLR** where when dealing with an application to strike out a petition for failure to exhaust an alternative remedy, Majanja J stated that what the court ought to consider is the substance of the claim howsoever the pleadings and the cause of action is couched. It submitted that the Plaintiff was not entitled to the prayers it had sought and that the current suit was an abuse of the court process as Majanja J in the aforesaid case where the petitioner had not exhausted the remedies available to it before coming to court.

16. It submitted that whereas Section 8 of the Act provided its general duties, the specific duties were set out in Section 12 of the Act. It was emphatic that Section 8 of the Act dealt with its policy and operational framework. It also argued that the Plaintiff sued the Authority and not the Board and consequently, it was not possible to consider Section 8 of the Act without considering Section 12 of the Act. It averred that in the event the Grounds of Opposition were to be taken to their logical conclusion, then the Plaintiff ought to have sued the individual members of the Board and not sue it.

17. It was also its contention that Section 33 of the Act was applicable notwithstanding a denial of liability and that if Parliament had intended that the issue on liability would have to be determined by the court, nothing would have been easier than for them to have stated so. It stated that the phrase "in default of an agreement" under Section 33 of the Act meant the existence of a dispute and hence the said Section did not distinguish between a dispute on liability or quantum. It was emphatic that the case of **World Duty Free Company Limited vs Kenya Airports Authority** (Supra) did not uphold the argument that Section 33 of the Act did not apply to a dispute on liability only and that if there was a dispute, then court was not the proper forum. It was on that basis that it insisted that the court had no jurisdiction to deal with the matter herein.

18. On the other hand, the Plaintiff referred this court to the cases of **Meru Farmers Co-operative Union vs Abdul Aziz Suleman [1966]**

EA 436 and **D.T. Dobie & Company (Kenya) Limited vs Muchina [1982] EA 1** where it was held that applications to strike out pleadings should normally be made promptly and if possible filing any defence or at the close of the pleadings and that the court should act cautiously and carefully before striking out pleadings respectively.

19. It placed reliance on the cases of **Firestone Tire and Rubber Co (SS) LD vs Singapore Harbour Board [1952] AC 452 at pp 464-465** and **Littlewood vs George Wimpey & Co Ltd and British Overseas Airways Corporation [1953] 1 WLR 426 at pp 432 -434** where the common holdings were that not all matters complained of fall within what would be considered a public duty by a public authority. It was emphatic that the said principles applied to Section 33 of the Act and that the provision must be strictly construed so as not to extend to matters that were not within the protection by Section 33(1) of the Act.

20. It set out the powers under the different Sections of the Act and was emphatic that the said Act did not have a mechanism for determining liability and presupposes that the causing of such damage under those sections was admitted and only the quantum or compensation remained to be determined.

21. It was its submission that the provisions of Section 8 of the Act were the foundation of the averments in its Plaintiff. It added that Section 33(1) of the Act could not be read in isolation from Section 34 of the Act which provides as follows:-

“Where any action or other legal proceedings is commenced against the Authority for any act done in pursuance for execution, or intended execution of this Act or any public body or authority, or in respect of any alleged neglect or default in execution of this Act or of any duty or authority...”

22. It referred this court to Section 2 of the Interpretation and General Provisions Act that states as follows:-

“Action means any civil proceedings in a court and includes any suit defined in section 2 of the Civil Procedure Act.”

23. It was emphatic that if the 1st Defendant’s contention was correct, then it meant that there would have been no need for Section 34 of the Act. It contended that Section 34 of the Act was the statutory recognition of the principles set out in the two (2) cases it referred to. It further argued that Mabeja J recognised the limitation in Section 33 of the Act as was held in the case of **World Duty Free Company Limited vs Kenya Airports Authority** (Supra).

24. It therefore submitted that its claim did not fall within Section 33(1) of the Act and consequently, this court had jurisdiction to hear and determine the matter herein.

25. It was correct as the 1st Defendant submitted that a court should be very quick to decline jurisdiction where a party has not exhausted all the procedures available to it before coming to court for determination of a dispute.

26. Having said so, it was evident from the very detailed submissions by both the 1st Defendant and the Plaintiff herein that there was no convergence between them as to whether or not the dispute that was presently before the court was limited by Section 33 (1) of the Act. They were in diametrically opposite poles.

27. This court recognised that the Act also envisaged suits being filed against the 1st Defendant pursuant to the execution of the Act or of any duty or authority. This was clear from Section 34 of the Act that an action or legal proceedings could be commenced against the Authority. It was therefore not correct as the 1st Defendant had submitted that it could not be sued at all. The Act contemplated that suits could also be filed against the Authority.

28. Whether the Plaintiff’s claim was under Section 8 of the Act as it had argued and not limited under Section 33(1) of the Act as had been submitted by the 1st Defendant was a matter of evidence. Where a court finds that there are several fora for a party to seek recourse and the dispute is not straight forward, it must not presume or assume that a party’s claim falls under a particular fora and thus refuse jurisdiction. It is better for the court to err on the side of caution by hearing the case and at its conclusion, dismiss the case for want of jurisdiction if it emerges that the claim ought to have been filed in a different forum.

29. It further took cognisance of the fact that any party has a right to present its case any way it deems best. Striking out of a suit against a party denies the claimant from fully prosecuting its case. Until a party concludes prosecuting a case, a court cannot purport to know what that party’s case is. A court must therefore exercise great restraint before it strikes out a party’s pleadings against another. It can only do so in the clearest and obvious cases. It must therefore exercise its discretion to strike out pleadings as a last recourse because it is a very drastic and draconian action as was held in **Geminia Insurance Company Limited vs Kennedy Otieno Onyango [2005] eKLR** where Musinga J (as he then was) when he stated that striking out of pleadings out to be done only in the clearest of the cases.

30. This court therefore fully associated itself with the holding in the case of **D.T. Dobie & Company (Kenya) Limited vs Muchina** (Supra) that courts should act cautiously.

31. Going further, this court also agreed with the holding in the case of **Meru Farmers Co-operative Union vs Abdul Aziz Suleman** (Supra) that applications for striking out ought to be filed promptly and if possible prior to filing a defence.

32. This court noted that the 1st Defendant had contended that Section 33(1) of the Act contemplated that the dispute between it and the Plaintiff was to be determined by an arbitrator appointed by the Chief Justice. While this may have been so, this court found and held that, this court became seized of this matter herein the moment the 1st Defendant filed a Statement of Defence dated and filed on 24th December 2015. It was not sufficient for it to have denied the jurisdiction of this court. This is because any arbitral proceedings that were contemplated

by the Act would be conducted in accordance with the Arbitration Act No 4 of 2005.

33. Section 6 of the Arbitration Act provides as follows:-

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

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

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

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

34. It was therefore clear from Section 6(2) of the Arbitration Act that proceedings in the court could only be stopped if the application under Section 6(1) of the Arbitration Act had been made and the matter remained undetermined.

35. Further, Section 5 of the Civil Procedure Act is clear that courts have jurisdiction to try all suits except those that are expressly barred. The said Section provides as follows:-

“Any court shall, subject to the provisions herein contained, have jurisdiction to try all suits of a civil nature excepting suits of which its cognizance is either expressly or impliedly barred”.

36. Accordingly, having considered the affidavit evidence, the Written Submissions and the cases the respective parties relied upon, this court came to the firm conclusion that this was not a clear cut case that would persuade it to strike out the suit, if at all or as against the 1st Defendant only as doing so, it had the potential of prejudicing the Plaintiff and denying it a right to fair trial as envisaged in Article 50(1) of the Constitution of Kenya, 2010. All the issues that were raised in this application were matters of evidence. It was only fair and in the interests of justice that the Plaintiff be given an opportunity to have its day in court and prove its case.

37. This court was therefore not persuaded that it should strike out the Plaintiff suit *in limine* as that was too draconian.

DISPOSITION

38. For the foregoing reasons, the upshot of this court’s decision was that the 1st Defendant’s Notice of Motion application dated 7th May 2019 and filed on 8th May 2018 was not merited and the same is hereby dismissed. Costs of this application shall be in the cause.

39. It is so ordered.

DATED and DELIVERED at NAIROBI this 30th day of January 2020

J. KAMAU

JUDGE