



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 87 OF 2013

BOB THOMPSON DICKENS NGOBIPLAINTIFF

VERSUS

KENYA PORTS AUTHORITY & OTHERS.....DEFENDANT

J U D G M E N T

Outline of the facts

1. Before court for determination are two Notices of Preliminary Objection by the 1st & 3rd Defendants dated 4/8/2014 and 24/4/2014 respectively and a Chamber Summons by the 2nd defendant dated the 22/4/2014.
2. On 6/5/2014, the court directed that the Preliminary Objection and the Chamber Summons be heard together. By further directions given on the 2/12/2005, parties were directed to file submissions and responses to the three matters by set timelines.
3. Pursuant to the said directions the 1st defendant did file written submissions on the 5/2/2016, the 2nd defendant filed submissions on 13/4/2016 while the plaintiff filed Replying Affidavit, submissions and list of authorities on the 21/12/2015. The Replying affidavit must be seen to respond to the 2nd defendant's application while the submissions and list of authorities are in opposition to the Notices of the Preliminary Objectives and the Application by the 2nd defendant. On 7/12/2016, the matter could not proceed for the highlighting of the submissions and was therefore stood over to the 26/4/2017 for the same purpose. However, on the date for taking the highlights of submission, the plaintiff was never represented while the Defendants were represented by Ms. Adagi, Mr. Ondiego and Mr. Chabala respectively.
4. The court having ordered and directed that the three matters be heard together and the same having been indeed heard as such with the result that only one determination is expected, it would however only be neat and tidy if each is considered separately for the sake of clarity of the issues involved. For that reason I will set out each of the three matters and determine each separately albeit in the same decision.

Notices of Preliminary Objections by the 1st & 3rd defendant

5. The two defendants attacks the plaintiff suit and seeks to have it struck out on the following grounds:-

1. The said application and the entire suit is time barred under the provisions of Section 66 of the Kenya Ports Authority Act, Cap. 391 ("the KPA Act").

2. Without prejudice to Paragraph 1 above, the entire suit is fatally defective as no Notice of Intention to Sue as is mandatory under Sections 65 and 66 of the KPA Act was issued to the 1st Defendant.

6. That objections ask of the court for the interrogation of the suit as it relates to compliance and application of sections 65 and 66 of the Kenya Ports Authority Act, Cap 391, as well as section 3(2) Cap 469, Section 13A & 16 of Government Proceedings Act. The provisions do provide as follows:-

Section 65 Cap 391:

(1) No person shall be entitled to compensation for non-delivery of the whole of a consignment of goods, or for any separate package forming part of such consignment, accepted by the Authority for handling or warehousing unless a claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within six months of the date upon

which such goods were accepted by the Authority.

(2) No person shall be entitled to compensation for any goods missing from a packed or unpacked consignment or, or for misdelivery of, or damage to, any goods accepted by the Authority for handling or warehousing unless:-

- a. The Managing Director is notified of such fact in writing within four days of the date upon which such goods were delivered to the consignee or person entitled to take delivery thereof; and
- b. A claim in writing, giving such particulars as may reasonably be necessary, is given to the Managing Director within one month of such date.

(3) Where the person claiming compensation proves that it was impracticable for him to notify the Managing Director, or give the Managing Director his claim, as set out in subsection (1) and(2) within the time specified therein and that such notification or claim was made or given in reasonable time nothing in those subsections shall prejudice the right of such person to obtain compensation.

Section 66 Cap 391:

“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 cessation thereof”.

Section 3(2) Cap 469:

“The Authority shall be a body corporate with perpetual succession and a common seal and shall, subject to this Act, be capable in its corporate name of:-

- a) Suing and being sued: Provided that any legal proceedings against the Authority arising from the performance of the functions or the exercise of any of the powers of the Authority under section 5 shall be deemed to be legal proceedings against the Government within the meaning of the Government Proceedings Act;
- b) Taking, purchasing or otherwise acquiring, holding, charging or disposing of movable and immovable property;
- c) Borrowing or lending money;
- d) Doing or performing all other things or acts for the furtherance of the provisions of this Act, which may be lawfully done or performed by a body corporate”.

Section 13A Cap 40:

(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars:-

- a. The full names, description and place of residence of the proposed plaintiff;
- b. The date upon which the cause of action is alleged to have accrued;
- c. The name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;
- d. A concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;
- e. The relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

Section 16 Cap 40:

(1) In any civil proceedings by or against the Government the court may, subject to the provisions of this Act, make any order that it may make in proceedings between subjects, and otherwise give such appropriate relief as the case may require:

Provided that:-

(i) Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and

(ii) In any proceedings against the Government for the recovery of land or other property the court shall not make an order for the recovery of the land or the delivery of the property, but may in lieu thereof make an order declaring that the plaintiff is entitled as against the Government to the land or property, or to the possession thereof.

7. To the 1st and 3rd defendants the suit is bad for having been filed prior to a notices the considers mandatory and was also brought after the prescribed period had lapsed and hence time barred.

Does the failure to issue a notice pursuant to section 65, Cap 391 render the suit incompetent?

8. After the promulgation of the Constitution of Kenya 2010, certain provisions of the hitherto existing laws have the option of being read as being modified by the constitution so as to be compliant or just be rendered and declared unconstitutional. One of the many hallmarks of our Constitution is the entrenched bill of rights with various rights including right to access justice unhindered.

9. I must say, as various superior courts in this country have said more than once, that a statutory provision that seeks to hinder any person's access to justice, seeks to impose hurdles on the way of citizens from seeking accountability, openness and efficiency in service delivery by government or government agencies must be seen to violate Article 48 and must be held to be unconstitutional for being antibusiness, oppressive, and I dare add, suppress the need to interrogate the constitutional values of accountability, transparency and efficiency expected of state agencies. The *Court in Kenya Revenue Authority vs Habimana* sued *Hemed & Another* [1] decided on 31/7/2015 made the position clear beyond doubt that the 3rd defendant ought to be the institution parliament sought to create under the statute and not to continue considering self as an abandage or extension of the government. The court said:-

“.....it is not necessary that a party who finds itself on the wrong side of the appellant would be greatly prejudiced if they are shaded from accessing justice for a minimum of 30 days as happens many times”.

“.....it is nonetheless an autonomous, cooperate, statutory body specifically with powers to sue and be sued. The appellant cannot hide behind the clock of the Attorney General when it is accused of breaking the law or otherwise violating people's rights purely in Order to take advantage of the 30 days statutory notice”.

10. Even though the decision was strictly rendered with regard to the provisions of the Kenya Revenue Authority, I consider the 1st and the 3rd defendants to be created in the like manner, by acts of parliament and both have been given legal personally in that they are capable of suing and being sued independent of the office of the Attorney General. Infact the two statutes creating the two defendants are explicit. That the two run as distinct corporates not as government department. I take notice that both recruit their personnel including the legal personnel independent of the office of the Attorney General whose involvement is limited to representation in the board of directors. No repetition is needed for the position that any statutory provision that seeks to hinder a citizen for accessing court merely because a notice has to be served upon the two defendants is undesirable for being illogical and unconstitutional.

11. For that reason, I am bound by the Court of Appeal [2] add my voice to those of my brothers, Mbogoli Msagha[3], David Majanja[4], J.B. Ojwang[5] and Osieno JJ[6] and hold that a statutory corporation, unless the creating statute says otherwise, is not an appendage or department of the Government as contemplated under the Government Proceedings Act. One need not invite the application of the Government Proceedings Act when parliament in its own wisdom has spende time and public resources to enact a statute to regulate the body so desired to be created.

12. I also consider the provisions of section 65 of the Kenya Ports of Authority to be in *Pari nateria* to sections 13A Cap 40 and 3(2) of Cap 469. That being so the interpretation which the superior courts have given to section 13A, and 3(2) Cap 469 must apply to section 65 of Cap 391. Being fully persuaded by the decisions of the High Court and fully bound by the findings of the Court of Appeal, I cannot escape from but hold that Section 65 Cap 361 is in violation of Article 48 and to that extent unconstitutional. For that reason, the two limbs in the two Notices of Preliminary Objection cannot stand but must fail and are dismissed.

13. In any event section 65(3) also provide for a window for a claimant to explain inability to give the Notice. Such an explanation can only be given by evidence adducing facts hence this is a point that ought not be canvassed as a Notice of Preliminary Objection.

Is the suit by the plaintiff against the 1st & 3rd defendants statute barred?

14. For the 3rd defendant, reliance was placed on Section 39(1) Public Authorities Limitation of Action Act to contend and persuade the court that the cause of action having allegedly accrued on 25/2/2012, when this suit was filed on 19/7/2013, it was filed out of time and statute barred. I think the 3rd defendant being a creature of the specific statute need not seek resort in other legislations on matters otherwise fully covered and which ought to be covered by its parent statute. I have taken time to read Cap 39 and I am convinced that it does not apply

to Kenya Revenue Authority at all. The use of word public authority by itself does not invite the application of the Act to the 3rd defendant. The short title to the Act says it all respecting the application of the Act. It says:-

“An Act of Parliament to provide for the limitation of proceeding against the Government and a local authority, and for purposes incidental to and connected with the foregoing”.

15. It is clear to me having said so in this ruling that the 3rd defendant is not a Government department nor a local authority and cannot get refuge behind Cap 39. That being the position the law on limitation pertaining to the 3rd defendant, its parent act having not provided for limitation, must be the limitation of Actions Act Cap 22. Accordingly reliance by the 3rd defendant upon Cap 39 is ill founded conceived and advised and cannot be sustained.

What of Section 66(b) of Cap 361?

16. Respecting the 1st defendant, parliament has specifically provided a prescription on timelines within which to file suit to be twelve months after the act. In this suit it is pleaded at paragraph 12 of the amended plaint that the loss sued upon occurred on the 15/10/2011 and the suit was not filed till 19/7/2013. That was clearly outside the time prescribed by the statute and it is not difficult to find that the suit when filed was statute barred. If it was time barred it must be struck out as against the 1st defendant.

Application by the 2nd defendant

17. In the application, the 2nd defendant seeks the striking out of the suit against it on the basis that it being a Shipping Company, it did discharge the contractual obligation with the plaintiff when it did deliver the suit container to the 1st defendant and by that sole fact the plaintiffs suit against it is capricious, frivolous and scandalous revealing no cause of action.

18. In response to that attack, the plaintiff filed a Replying Affidavit in which it is deponed that the reason the container has not been released is the fact that it has demanded for the plaintiff a sum of USD37,357.20 on account of demurrage charges. Indeed paragraphs 7 and 22 (ii) (iii) and (iv) and prayer (c) plead and pray specifically against the 2nd defendant regarding the cost of freight and demurrage charges. Whether or not such claims are merited must be left to the realm of trial by production and cannot be adequately and lawfully determined by an application to strike out. It is not in dispute that striking out of a pleading is a drastic and draconian remedy that the court must never resort to freely and every time but must only be available for the clear of the clearest cases^[7].

19. On the filed pleadings, the dispute on the demurrage charges is not available for determination if the 2nd defendant is not a party to the suit being the party claims are made against. At this level and before evidence is led, I am unable to find that the plaintiff is nonsuited against the said defendant as much as I am unable to find that there is no reasonable claimed shown against the said defendant. I don't find the claim against the 2nd defendant frivolous at all. Having so found, the application by the 2nd defendant dated 22nd April 2014 cannot succeed and is therefore dismissed with costs.

Rendition and Orders

20. i) The Notice of Preliminary objection by the 1st defendant dated 4/8/2014 is upheld and the suit against that defendant is struck out with costs for having been filed out of time and is statute barred.

ii) The Notice of Preliminary Objection dated 25th April 2014 by the 3rd defendant being grounded upon the Provisions of Section 3(1) Cap 39 and Section 13A Cap 40 lacks merit and is misconceived is therefore dismissed with costs to the plaintiff's.

ii) The application by the 2nd defendant dated 22nd April 2014 lacks merit and is dismissed with costs to the plaintiff.

iii) By way of directions the suit shall now proceed as between the plaintiff and the 2nd & 3rd defendants and shall be mentioned on 28/2/2018 for case conference. For that reason, leave is granted to any party who may desire to file any additional witness statements or bundles of documents to do so within 30 days from today.

Dated and delivered at **Mombasa** this **22nd day** of **December 2017**.

P.J.O. OTIENO

JUDGE

[1] [2015] eKLR

[2] Kenya Revenue Authority vs Habimana Sued Hemed [2015] eKLR

[3] Gurdoba Enterprises Ltd vs Kenya Revenue Authority, HCC No. 676 of 1998

[4] Kenya Bus Services Ltd & Another vs Minister for transport & 2 Others[2012]eKLR

[5] Menginya Salim Murgani vs Kenya Revenue Authority HCCC No. 1139 of 2002

[6] Habimana Sued Hemed vs Kenya Revenue Authority & Another HCCC No. 364 of 2001

[7] **D.T. Dobie & Co. Ltd vs Mincuna**