



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Case 14 of 2012**

**MIDOCEAN (10M) LIMITED.....PLAINTIFF**

**VERSUS**

**KENYA PORTS AUTHORITY.....DEFENDANT**

**RULING**

1. This is an application by the Defendant that the Plaintiff be struck out and the suit be dismissed with costs under Order 2 Rule 15(1) of Civil Procedure Rules. The grounds are that the plaintiff discloses no reasonable cause of action pursuant to Order 15 (1)(a), as the Plaintiff's cause of action is under negligence; that no duty of care was owed to Plaintiff; that the damages sought are in respect of amounts paid and costs incurred by the Plaintiff to the family of the deceased pursuant to a contract of employment with the deceased; and that the death of a human cannot be complained of as an injury in the tort of negligence.
2. The brief background to the claim is as follows: According to the plaintiff, the Plaintiff is a company incorporated in the Isle of Man. It was the crew manager of Motor Vessel, "**Nicholas Delmas**". The Plaintiff had employed one Ivarov Volodymyr ("**the Deceased**") of Ukraine as Second officer on board the said vessel. An accident occurred on board the vessel on 14<sup>th</sup> July, 2011 when the Defendant's crane operator was offloading empty containers onto the vessel. One such container was misplaced on another, causing both to break loose thereby colliding with the Deceased and causing fatal injuries.
3. The Plaintiff has claimed special damages as follows: compensation paid to the Defendants US\$ 124,740.00; funeral and repatriation costs of US\$ 9,759.09, P & I correspondent costs in Mombasa in rands equivalent to US\$ 8,407.07, and P&I correspondent costs in Ukraine of US\$ 4,424.00, all amounting to US\$ 147,330.10. Plaintiff has also claimed interest thereon at court rates and costs.
4. The Defendant denies negligence or that the doctrine of *res ipsa loquitor* applies, and charges that the suit is incompetent and bad in law, there being no cause of action against the Defendant.
5. The Plaintiff's grounds of opposition include: that a pleading can be cured by amendment; that such an amendment could introduce a separate cause of action against the Defendant for breach of its statutory duty owed to the Plaintiff and or the Owners of the Motor Vessel Nicholas for loss and damage for breach; and that the Defendant was carrying out stevedoring marine and general services on behalf of the owners of Motor Vessel Nicholas for whilst Defendant was paid.

6. As earlier stated, the application is made pursuant to Order 2 Rule 15 (a) of the Civil Procedure Rules. That rule provides that:

***“15 (1) At any stage of proceedings the court may order to be struck out or amended any pleading on the ground that -***

***a) it discloses no reasonable cause of action or defence in law....”***

Accordingly, the sole issue for determination is whether the plaint discloses a reasonable cause of action in law.

7. The Applicant has cited several authorities as follows:

**Halsbury's Laws of England** 3<sup>rd</sup> Ed Vol 28 page 34-40 where it is posited that at common law there is no civil liability in tort for the death of person as the result of negligence in cases where the cause of action was the wrong which caused the death. Further, that where statutory provisions impose certain liabilities, there is still no liability at a common law for injury caused by the death to any person other than the deceased.

8. **Charlesworth and Percy on Negligence** 10<sup>th</sup> Ed 2001 paragraph 15-86: was also relied on, where the learned author's point out that:

***“When the injured party has died as a result of the injuries inflicted by the negligence of the Defendant, no action at all can be brought by a person, whether, husband, parent or employer who has sustained special damage thereby” (see Baker vs Bolton (1808) 1 Camp 493***

The Plaintiff pointed out that in **Charlesworth**, it is clearly stated that different considerations may apply if the negligence also constitutes a breach of contract.

9. Reliance was also placed by the Applicants on **Admiralty Commissioners vs Steamship Amerika (Owners) the Amerika** [1906-17] ALL ER 177 where the Plaintiffs sued the Defendant for the negligent sinking of the Respondent's steamship and all but one of her crew drowned. The Admiralty brought an action to recover damage they had sustained; including pensions and grants paid or payable by them to the relatives of the crew who had drowned. The court, upholding **Baker vs Bolton**, found that a person aggrieved by an injury is not at common law entitled to the claims made in respect of those sums.

10. Lord Denning in **Spartan Steel vs Martin Ltd** [1972] 3 All ER 557 in discussing what economic loss is recoverable stated;

***“...where a person is injured in a road accident by the negligence of another, the negligent driver owes a duty to the injured man himself, but he owes a duty to the servant of the injured man.”***

11. The Applicant also pointed to the statement of Kennedy J. in **Jackson vs Watson & Sons** [1909] 78 KBD 587, at 594 where he said:

***“Where persons death has been caused by the actionable conduct of another...no one, whatever his connection with the deceased may be, can maintain an action of tort for damage resulting to himself from the death...”***

There, the action was brought to recover damages for the pecuniary loss sustained by the Plaintiff by reason of the death of his wife through eating tinned salmon supplied and sold to the Plaintiff and his wife by the Defendants. It was held that:

***“where there is a cause of action independently of a wrong causing the death – such as breach of contract – damage arising from the death of a human being may be included as an element of damage and, as the death of the Plaintiff's wife was caused by the breach of warranty on the part of the***

***Defendants that the tinned salmon was fit for the purpose of food, the Plaintiff was entitled to recover damages for the loss of his wife's services.***”

12. It is that holding that the Plaintiff relies on for its proposition in its grounds of opposition that the plaint can be amended to introduce a cause of action for loss arising from breach of statutory duty or contractual obligation.

13. Finally, the Applicant relies on **Kirkham vs Boughey** [1957] 3 All ER 153. That was an action for damages by the plaintiffs, a husband and wife, who were involved in an accident with the Defendant; who admitted liability. The husband was on leave from employment in Lagos, and could not return there after the accident after his leave expired. It was held that the Plaintiff was not entitled to damages for loss of earnings, because the loss did not flow from the injuries that he sustained, and his right to recover damages in respect of the injuries that his wife sustained was limited to damages for loss of consortium, together with the cost of her medical treatment did not extend to the husband's loss of earnings.

14. In response, the Plaintiff did not contest the authorities relied on by the Applicant's counsel. The Plaintiff however, points out that the entire duties of the Defendant are provided for by the Kenya Ports Authority Act. Counsel argues that they are not suing under common law but under statute. He points out that in **Halsbury's** it is clear that different considerations apply where there is a contract and statutory provisions come into play. Plaintiff indicates that it will amend the plaint to include breach of contract under statute by indicating specifically that the Defendant had a statutory duty to Plaintiff and to the owners of the vessel.

15. Counsel referred to **Joseph Muthama Ndambuki & Others vs Delmonte** (K) Limited [2012] e KLR where Justice Ngugi reiterates the well known principles from the *DT Dobie & Company vs Joseph Muchina* [1982] KLR 1, that:

***“A suit should only be struck out if it is so weak that it is beyond redemption, and incurable by amendment. As long as a suit can be injected with life by amendment it should not be struck out. The redemptability and curability of a suit are determined by looking at the cause of action or major complaint of the Plaintiff and determining whether that complaint, on the facts before the court is maintainable or not.”***

16. It is clear to me that the plaint, as it stands, does not create a cause of action known to the law. The claim is grounded wholly on negligence and the particulars thereof clearly emanate therefrom. It also relies on the doctrine of *res ipsa loquitur*. Taking into account the legal principles already enumerated in the various authorities: that no civil liability in tort can arise under common law for the death of a person; and that only where there is a breach of contract or statutory duty may different principles come into play; it is clear that the plaint discloses no reasonable cause of action.

17. The only question is whether, on the facts before the court, the suit herein can be redeemed or cured by amendment. The Plaintiff argues that they can amend by pleading breach of contract or breach of statutory duty. I have perused the plaint, and the grounds of opposition. It is not stated therein precisely on what basis there was an alleged contract or statutory duty. Mr. Khanna for the Plaintiff did, however, argue in his oral submissions, that section 12 (d)(h) of the Kenya Ports Authority Act imposes a contractual duty on the Defendant as a stevedorer. In response, Mr. Noorani for Plaintiff pointed out that the Plaintiff is not the owner of the vessel, to which Plaintiff pointed out that it is permissible, also, to amend the plaint by including new parties.

18. I do not think the Plaintiff has given enough foundation to his grounds of opposition to enable this court make a finding that the amendments proposed can cure his case. The Defendants argument, for example, that Section 12 of the Kenya Ports Authority Act merely gives it powers and did not impose any statutory obligation, least of all to the Plaintiff, the fact that there was nothing to show the relationship between the ship owners and the Defendant, should the plaint be amended, all these weigh heavily against the Plaintiff.

19. In the end, I am persuaded that this is a case fit for striking out. It is so weak that no cause of action exists, and the amendments sought are not sufficiently grounded or explained as to support a finding that the plaint is curable. The plaint is therefore struck out and the suit dismissed with costs.

**Dated and signed this day of 2013**

**R.M. MWONGO**  
**JUDGE**

**Read in open court**

**JUDGE**

Date

**Coram:**  
Judge:

Court clerk:

**READ BY HON. JUSTICE MUYA FOR HON. JUSTICE MWONGO ON 19TH FEBRUARY 2013**