



**MULTISERVE OASIS COMPANY  
LTD.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**THE KENYA PORTS AUTHORITY.....1<sup>ST</sup>  
DEFENDANT/APPLICANT**

**COMPACT FREIGHT SYSTEM LTD.....2<sup>ND</sup>  
DEFENDANT/RESPONDENT**

**RULING**

The 1<sup>st</sup> defendant herein moved the Court by Notice of Motion dated **22<sup>nd</sup> March, 2011** and brought under Order 2, Rule 15(1)(a) of the Civil Procedure Rules, 2010. The application carries two substantive prayers:

- (i) THAT this Honourable Court be pleased to strike out the name of Kenya Ports Authority as 1<sup>st</sup> defendant in the suit;
- (ii) THAT this suit as against 1<sup>st</sup> defendant be dismissed with costs to 1<sup>st</sup> defendant.

The application rests on the following grounds:

- (a) *the plaint discloses no reasonable cause of action against 1<sup>st</sup> defendant;*
- (b) *this Court has no jurisdiction to hear, determine or otherwise deal with this suit;*
- (c) *the plaintiff's claim against 1<sup>st</sup> defendant is for the loss of a consignment delivered to 1<sup>st</sup> defendant as warehouseman;*
- (d) *the 1<sup>st</sup> defendant's power to act as warehouseman is conferred by s.12(1)(e) of the Kenya Ports Authority Act (Cap. 391, Laws of Kenya);*
- (e) *s.62 of the Kenya Ports Authority Act (Cap.391) ousts the jurisdiction of this Court in respect of damage suffered by any person as a result of 1<sup>st</sup> defendant's exercise of its powers, inter alia, under s.12 of the Kenya Ports Authority Act (Cap.391).*

To the application, 2<sup>nd</sup> defendant filed a statement of grounds of opposition, by virtue of Order 51, Rule 14 of the Civil Procedure Rules, 2010. The 2<sup>nd</sup> defendant contends as follows:

- (i) *the application is misconceived and incompetent;*
- (ii) *the application is an abuse of the process of the Court;*

- (iii) *1<sup>st</sup> defendant's application has no merit, and is merely intended to delay the hearing of the suit;*
- (iv) *the plaintiff's goods were stolen while the same were under the control and custody of 1<sup>st</sup> defendant;*
- (v) *the Court has jurisdiction to hear the suit, pursuant to ss.2(4) and Article 159(1), (2) of the Constitution of Kenya, 2010.*

Learned counsel, **Mr. Noorani**, for the applicant, had no objection to the plaint *as a whole*, as there was a 2<sup>nd</sup> defendant; but he contended that there was no reasonable cause of action against 1<sup>st</sup> defendant and that, as regards this defendant, this Court lacks jurisdiction. Counsel submitted that the Kenya Ports Authority Act (Cap.391) establishes and governs 1<sup>st</sup> defendant: and that s.62 of that Act provides that where any person suffers damage in the course of exercise of 1<sup>st</sup> defendant's powers, no action lies, by virtue of s.12 of the Act; the injured, in such circumstances, has a special mode of redress provided for under s.62 of the Act. Counsel urged that paragraphs 8 and 9 of the plaint, which contained the "supposed cause of action" bore the complaint that 1<sup>st</sup> defendant had failed to provide the requisite secure conditions for containers – but that, in respect of such a matter, the Court lacked jurisdiction; and s.62 of the Act provides that no action shall lie against 1<sup>st</sup> defendant. Counsel invoked in support of his contention (the Court of Appeal decision, **Kenya Ports Authority v. Kunston (Kenya) Limited**, Civil Appeal No.315 of 2005, in which the following passage appears:

***"We agree with [counsel]...that the provision of s.62 [of the Act] touches on the jurisdiction of the superior Court and that the parties could not in the face of the Act providing for compulsory arbitration, contract out of a statute and bring the suit instead. The Court's jurisdiction has been ousted by statute and the parties could not confer jurisdiction on the superior Court. There cannot be any waiver just because both parties took part in the suit. Parties cannot as a matter of public policy be allowed to circumvent a statute...The suit should not have been instituted at all and the appeal succeeds on this ground as well."***

Counsel urged that the foregoing decision has a binding effect, and, therefore the High Court lacks jurisdiction to hear and determine the cause herein, as it relates to 2<sup>nd</sup> defendant.

Learned counsel **Mr. Lakicha**, for the plaintiff/respondent, contested the applicant's case on the basis of grounds of opposition filed on **19<sup>th</sup> May, 2011**. Counsel submitted that the application is "*misconceived, incompetent, and intended to delay*"; and that this Court's jurisdiction "*is not ousted by mere provision in statute.*" Counsel submitted that the Court should consider matters of fact: such as whether the plaintiff had attempted to have the matter settled by way of arbitration. It was not, however, the right stage yet for determining such matters of fact – and so the filing of suit could not be challenged.

Counsel submitted that the **Kuston (Kenya) Limited** case upon which 2<sup>nd</sup> defendant was relying, was a decision of **11<sup>th</sup> December, 2009** and ante-dated the **Constitution of Kenya, 2010** which is the lawful basis of the High Court's jurisdiction today. Counsel invoked Article 159(1) and (2)(d) of the Constitution, which thus provides:

***"(1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.***

***"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***

....

***(e) justice shall be administered without undue regard to procedural technicalities..."***

Counsel asked the Court to pay regard to the limitation attached to “procedural technicalities,” and urged that Article 2(4) of the Constitution stipulates that:

**“Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.”**

**Mr. Lakicha** urged that this Court’s jurisdiction has not been taken away, relying on several authorities: **Pangaea Development Holdings Limited v. Hacienda Development Limited & 3 Others** [2011] (Apondi, J); **Kisii Farmers Co-operative Union Limited v. Sanjay Natwarlal Chauhan t/a Oriental Motors**, Civil Appeal No.32 of 2003 [2006] eKLR (Court of Appeal); **Said Hamad Shamisi v. Diamond Trust of Kenya Ltd**, Civ. Appeal No. 109 of 2005.

In the High Court case above-listed, it seems that the pertinent passage upon which counsel, **Mr. Lakicha** relies is the following:

**“Right now we are in a new constitutional dispensation which requires the Courts to dispense justice impartially and speedily without any undue technicalities.”**

Similarly the element which appears most significant in counsel’s submissions, in the **Kisii Farmers Co-operative Union Limited** case, is the following:

**“It is now well settled law, that the power to strike out a pleading or any part of a pleading is a power that Courts must exercise with a lot of restraint. Normally it is better to allow a weak case to go to trial than to invoke the guillotine process.”**

And from the **Said Hamad Shamisi** case, it seems the crucial point in the Court of Appeal Judgment, is the following:

**“With respect, from the facts set out in the pleadings..., it is clear to us that the pleadings reveal many issues for adjudication in a full trial...; and therefore the appellant was, without the benefit of a hearing, sent away from the seat of justice as regards the other issues raised...”**

Learned counsel **Mr. Sitonik**, for 2<sup>nd</sup> respondent, expressed agreement with the line of submission taken by counsel for the plaintiff/respondent.

In his response, **Mr. Noorani** discounted the significance being attributed to Article 159 of the Constitution, and its principle that the Courts are to dispose of matters in contention on the basis of real merits, rather than technicalities. Counsel urged that Article 159 of the Constitution is only a statement of threshold, general principles, and is to be read in the light of Article 165(3) and (5): in particular, the said clause (5) providing that –

**“The High Court shall not have jurisdiction in respect of matters –**

**(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or**

**(b) falling within the jurisdiction of the courts contemplated in Article 162(2).”**

What are the matters beyond the High Court’s jurisdiction which are contemplated under Article 162(2) of the Constitution? That Article and sub-Article thus provides:

**“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to –**

**(a) employment and labour relations; and**

**(b) the environment and the use and occupation of, and title to, land.”**

It is quite obvious, in my opinion, that the limitations to the High Court's jurisdiction aforementioned only relate to matters reserved to *other Courts*: such as the Supreme Court; an industrial Court if established by Parliament; and an environmental Court if established by Parliament. This does not suggest a *general parliamentary power* to limit the High Court's jurisdiction, outside the clear terms of the delimitations in the Constitution itself.

**Mr. Noorani** was relying on a Court of Appeal decision, *Narok County Council v. Transmara County Council & Another*, Civ. Appeal No. 25 of 2000, rendered on **7<sup>th</sup> April, 2000**, some ten years before the enactment of the current Constitution; and he thus invoked the following passage in the Judgment of the Court of Appeal (**Akiwumi, J.A.**):

**“...the extent of the jurisdiction of the High Court may not only be that which is conferred or limited by the Constitutions but also, that which the Constitution or any other law, may by express provisions or by necessary implication, so confer or limit.”**

Similarly, counsel invoked the following passage in the Judgment of **Kwach, JA**:

**“Section 60 of the [1969] Constitution does give the High Court unlimited jurisdiction but I do not understand it to mean that it can be used to clothe the High Court with jurisdiction to deal with matters which a statute has directed should be done by a Minister as part of his statutory duty.”**

**Mr. Noorani**, though making his submissions on **25<sup>th</sup> May, 2011**, well after the current Constitution came into effect on **27<sup>th</sup> August, 2010**, maintained that the High Court's jurisdiction was subject to any limiting provisions of ordinary statute law. Counsel submitted that **“the Constitution of Kenya, 2010 has generally recognized [the] jurisdiction [of the High Court], but it still allows statutes to limit [this] jurisdiction...”**

From the plaint of **23<sup>rd</sup> July, 2010**, it is clear that the plaintiff perceives the gravamen as squarely falling at the doors of **both 1<sup>st</sup> and 2<sup>nd</sup> defendants**. With regard to **1<sup>st</sup> defendant**, the following statements in the pleadings are pertinent:

(i) [para.5] –

**“On or about 26<sup>th</sup> July, 2009 the plaintiff duly informed and directed the 1<sup>st</sup> defendant that it had nominated a vessel Kota Nanhai to transport the said container to its final destination at the Port of Mombasa.”**

(ii) [para.6] –

**“The container PCIU Number 8230479 was discharged at the Port of Mombasa by the vessel Kota Nanhai on 26<sup>th</sup> July, 2009.”**

(iii) [para.7] –

**“On or about 31<sup>st</sup> July, 2009 the 1<sup>st</sup> defendant at its own behest nominated and delivered the container PCIU Number 8230479 containing the plaintiff's consignment to the 2<sup>nd</sup> defendant.”**

(iv) [para.8] –

**“The defendants failed to safely or securely store and/or warehouse the said container as aforesaid and did not deliver them to the plaintiff, full particulars of which are well within the knowledge of the defendants.”**

(v) [para.9] –

“Further in breach of...statutory duty, the defendants did not safely and/or securely store or warehouse, the said container containing the plaintiff’s consignment and, as a result, the consignment in the aforesaid container was stolen and/or lost in the custody of the defendants.”

(vi) [para.9 (i) and (ii)] –

“(i) The 1<sup>st</sup> defendant having possession of the goods as warehouse for the plaintiff for reward were negligent in the discharging of the said consignment which [was] stolen and/or lost in their custody.

“(ii) The loss and/or theft of the consignment was caused by the want of reasonable foresight and care on the part of the defendants and/or its employees.”

From those pleadings, the very transaction perceived to have occasioned loss is *continuous* in binding 1<sup>st</sup> and 2<sup>nd</sup> defendants together, and is *unseverable* with separate liability attributed to the two defendants as individual parties.

The applicant herein, however, asks to be dropped from the cause of action, so that the plaintiff canvasses his case by *suit against 2<sup>nd</sup> defendant*, and, in effect, mounts a parallel, but *differently-conceived, claim against 1<sup>st</sup> defendant*; and in aid of this argument, 1<sup>st</sup> defendant invokes protections of its constitutive statute, the Kenya Ports Authority Act (Cap.391, Laws of Kenya), and calls in aid a Court decision of **7<sup>th</sup> April, 2000**.

The clear issues for determination are as follows: (a) Is it the law that an ordinary statute law can limit the jurisdiction of the High Court to hear and determine the main suit herein? (b) Does the High Court have the jurisdiction to hear and determine the case, in relation to 1<sup>st</sup> defendant?

Although the gravamen in the suit had arisen during the currency of the **1969 Constitution**, neither party has attached any significance to that; and this Court proceeds on the basis that the governing law is that established and validated under the **Constitution of Kenya, 2010**, whereunder all Judges of the High Court have taken their oaths of office.

From the evaluation of submissions, and the consideration of relevant provisions of law, in this Ruling, it is clear that the *new Constitution* is today, the *basis of the jurisdiction of the High Court*; and it is not permissible to limit this jurisdiction on the basis of ordinary Statutes not provided for within the terms of the Constitution. On that basis alone, it is the case, in my opinion, that the applicant’s position founded on the **Narok County Council** Case (Civ. Appeal No.25 of 2000) cannot stand. The law of jurisdiction emerges clearly enough, from the terms of the **Constitution of Kenya, 2010**.

The **Constitution of Kenya, 2010**, in its deliberate purpose of setting up a basis of *good governance* (Article 10), has instituted a setting of *separation of powers* (Article 1); donated the judicial authority to “the courts and tribunals established by or under this Constitution” (Article 159(1)); and specified that “justice shall be administered without undue regard to procedural technicalities” (Article 159 (2)(d)).

As already noted herein, the plaintiff’s gravamen brings the two defendants into a *single chain of causation*; and thus the judicial process, in resolving the question holistically and in substance, must not sever those parties by technicality, as this may lead to an ineffectual determination of the matter in controversy. Besides, any award such as the Court may, in the event make, should justly apportion responsibility as between the defendants – something not achievable if each defendant is subjected to a different process.

Moreover, the Constitution’s stated principle [Article 159(2)(b)] that “*justice shall not be delayed*”, is apt to be defeated if the plaintiff herein had to institute two separate processes – one against 1<sup>st</sup> defendant, and the other against 2<sup>nd</sup> defendant.

Upon reading the plaintiff's plaint of **23<sup>rd</sup> July, 2010**, and the 1<sup>st</sup> and 2<sup>nd</sup> defendants' statements of defence of **16<sup>th</sup> September, 2010** and **2<sup>nd</sup> September, 2010** respectively, I have formed the clear impression that issues in real contest, constituting a proper *lis* for judicial resolution, have been laid before the High Court, and that Court, by law and practice, is under obligation to conduct a hearing and arrive at a decision on the merits.

**Consequently, 1<sup>st</sup> defendant's Notice of Motion of 22<sup>nd</sup> March, 2011 is dismissed, with costs to the plaintiff and 2<sup>nd</sup> defendant.**

*Orders accordingly.*

**SIGNED at NAIROBI .....**

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA this 24<sup>th</sup> day of February, 2012.**

.....  
**M.A. ODERO  
JUDGE**