



## THREEWAYS SHIPPING SERVICES

**(K) LIMITED.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**KENYA PORTS AUTHORITY.....DEFENDANT/APPLICANT**

### **RULING**

Against the background of the suit dated **22<sup>nd</sup> July, 2010**, the defendant moved this Court by Chamber Summons dated **14<sup>th</sup> December, 2010**, brought by virtue of Order VI [Rule 13(a)] of the earlier edition of the Civil Procedure Rules, and s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya).

The applicant asks that the plaint be struck out, and the suit be dismissed with costs. The applicant asks for the costs of the application, as well.

The application rests on the following grounds:

- (i) the plaint raises no reasonable cause of action against the defendant;*
- (ii) the plaintiff lacks legal or possessory title to the 4 x 20 containers NO.SCMU 2024039, MSKU 4053410, MSKU 4074244 and MSKU 7231985 or the contents thereof, and therefore has no rights of suit in negligence in respect of the same;*
- (iii) this Court has no jurisdiction to hear, determine, or otherwise deal with this suit;*
- (iv) the plaintiff's claim against the defendant is for the loss of a consignment delivered to the defendant as warehouseman;*
- (v) the 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);*
- (vi) Section 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 the defendant's exercise of its powers inter alia, under s.12 of the Kenya Ports Authority Act (Cap.391).*

The plaintiff responded by filing grounds of opposition, dated **31<sup>st</sup> January, 2011**, and bearing the following content:

- (a) the cause of action herein does not fall within ss.12 and 62 of the Kenya Ports Authority Act (Cap.391);*
- (b) the application does not conform to Order VI, Rule 13(1) (a) of the Civil Procedure Rules;*

(c) the defendant is estopped by their defence of 28<sup>th</sup> September, 2010, filed on 29<sup>th</sup> September, 2010 from raising the issue of arbitration;

(d) s. 62 of the Kenya Ports Authority Act (Cap.391) is not applicable and therefore, is immaterial and irrelevant to the issues in the suit;

(e) the defendant's application has been made in bad faith, in view of Order 11, Rule 3(2) of the Civil Procedure Rules, and s.66 of the Kenya Ports Authority Act (Cap.391);

(f) the prayers sought in the application and the grounds thereof, run contrary to ss.1A and 1B of the Civil Procedure Act (Cap.21) and Order 1 of the Civil Procedure Rules;

(g) the prayers sought and the grounds thereof are untenable, and "in contravention of [Articles] 159 and 165(3) of the Constitution of Kenya.";

(h) the application is "misconceived and clearly an abuse of Court process";

(i) there has been unreasonable delay on the part of the defendant in raising the issues in the application.

Learned counsel, **Mr. Noorani** for the defendant/applicant, submitted that this Court has *no jurisdiction* to hear and determine the suit; and that the plaintiff has "no right of suit against the defendant in relation to matters set out in the plaint."

Counsel urged that the jurisdictional question, in relation to this case, is governed by the Court of Appeal decision in **The Owners of the Motor Vessel "Lilian S" v. Caltex Oil (Kenya) Ltd** [1989] KLR 1, in which the following passage (*per Nyarangi, J.A.*) appears (at p.14):

**"Jurisdiction is everything. Without it, a court has no power to take one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law [must] down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

The plaintiff's claim against the defendant is for loss of a consignment delivered to the defendant as warehouseman; and the basis of the obligation is thus stated in the plaint (para.5):

**"[The plaintiff] [entrusted the goods to] the defendants, their servants, employees, agents and/or representatives...who are mandated by statute and/or contractual obligations between the plaintiff, the consignee and the defendant, to handle, store and warehouse goods received by them safely until onward transmission ....[for] final destination."**

Counsel submitted that the defendant, a statutory body established under the Kenya Ports Authority Act (Cap.391, Laws of Kenya), derives all its powers from the Act; and that the defendant *unless expressly authorized*, cannot take any action falling outside the terms of the statute – and that if it should nonetheless take such action, then its action is "a nullity *ab initio*": **Narok County Council v. Trans Mara County Council & Another**, Civ. Appeal No. 25 of 2000 [2000] eKLR.

Counsel submitted that the defendant's powers to act as warehouseman are contained in s.12(1)(e) of the statute which provides that the defendant shall have power "to act as warehouseman and to store goods whether or not such goods have been or are to be handled as cargo or carried by the Authority" [s.12(1)(e)]. **Mr. Noorani** urged that "it is then up to the defendant whether it wishes to exercise the power itself or through some third party and whether it [will] exercise the power on the basis of a specific contract or on general terms and conditions."

On the relevance of an invoice issued to the plaintiff by the defendant, as a contractual document, **Mr. Noorani** submitted that "a contract does not come into existence by the issuing of an invoice",

*“because by the time an invoice is issued, all the elements necessary for a contract are already in existence and therefore the contract is already formed.”*

Counsel urged that the jurisdiction of the Court was excluded by s.62(1) of the said statute, which provides:

***“In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Authority or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.”***

In aid of his contention that where a person suffers damage in the circumstances in contemplation herein, the High Court lacks jurisdiction to determine the question, counsel cited a Court of Appeal decision, ***Kenya Ports Authority v. Kuston (Kenya) Limited***, Civil Appeal No. 315 of 2005 which was decided on **11<sup>th</sup> December, 2009**, in the following passage:

***“...[T]he provision of section 62 [of the Kenya Ports Authority Act (Cap.391)] touches on the jurisdiction of the superior court and that the parties could not in the face of the Act providing for compulsory statutory arbitration, contract out of a statute and bring the suit instead. The court’s jurisdiction had 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 and once an illegality always an illegality.... The suit should not have been instituted at all....”***

**Mr. Noorani** submitted that there is an authority [the ***Kuston Case***], “binding on this Honourable Court, to the effect that section 62 of the KPA Act ousts the jurisdiction of the Court in these matters,” and “the end result is that without jurisdiction, this Honourable Court cannot take any further steps in this matter save to strike out the plaint from the record and dismiss the suit with costs to the defendant.”

Counsel submitted that the plaintiff, in any event, had no right of suit: for the plaintiff has not shown that it had the legal or possessory title to the subject property, at the time of damage or loss, this suit being based on the torts of breach of statutory duty, and negligence. In the persuasive authority, ***Leigh & Silavan Ltd. v. Aliakmon Shipping Co. Ltd., The Aliakmon*** [1986] 2All E.R. 145 the following passage (*per Lord Brandon of Oakbrook*) appears:

***“My Lords, there is a long line of authority for a principle of law that, in order to enable a person to claim in negligence for loss caused to him by reason of loss of or damage to property, he must have had either the legal ownership of or a possessory title to the property concerned at the time when the loss or damage occurred, and it is not enough for him to have only had contractual rights in relation to such property which have been adversely affected by the loss of or damage to it.”***

Counsel, applying the foregoing criterion, urged that “the plaintiffs have admitted that they were..... mere clearing agents in respect of the consignment which is subject to the claim and the actual consignee was Ken Group, Uganda” [paras.4 & 7 of the plaint].

Para. 4 of the plaint reads:

***“On or about the 10<sup>th</sup> August, 2009 the plaintiff was contracted to clear at the Port of Mombasa goods in 4 x 20” containers to be transported to Uganda on behalf of Audit Control and Expertise (U) Limited who are the collateral managers of Uganda Development Bank, which cargo was destined for delivery to Ken Group of Companies Limited in 4 x 20” containers”.***

Counsel submitted that the plaintiffs, as agents, have “no right of suit in tort against the defendant whether for the loss of the consignment or any consequential loss or damage resulting therefrom”; for “the legal title to the goods rests with the person named as consignee in the bill of lading, which by the plaintiff’s own admission, is another person who is not party to this suit.”

Counsel urged that “*the plaintiffs also have no possessory right to the consignment themselves; they merely hold the consignment as agent of the consignee and for specific purposes within their mandate.*”

Learned counsel, **Ms. Okata** for the plaintiff/respondent, submitted that “*whereas the consignment...[was] deposited with the defendant pursuant to contractual and/or statutory duty, [with] the defendant as warehouseman under s.12(1)(e) [of the governing statute] the plaintiff’s complaint does not relate to damage [to] the consignment while in the custody of the defendant...but the loss, misdelivery and non-delivery of the consignment.*” By s.62 of the Act, the defendant was under obligation [s.62] to “*do as little damage as possible*”; and counsel urged that this phrase when read with s.12(1)(e) of the Act, “*means while the goods are handled and/or stored by the defendant as warehousemen, the defendant should ensure that no physical damage occurs.*” This provision, counsel urged, was well depicted in the **Kuston Case**, where the container had been broken into and tampered with, while in the Authority’s custody: and so it was “*proper and correct for the [Court] to have upheld s.62 [of the Act], since there was physical damage...to the consignment while in the custody of the defendant as warehouseman.*”

Such a position, learned counsel submitted, contrasts with the circumstances in the instant case. The instant gravamen is in respect of “*misdelivery, non-delivery and/or complete loss of the subject-matter and not to any physical damage...*”

Counsel submitted that questions of non-delivery, misdelivery and/or complete loss of goods do not fall within the ambit of s.62 of the governing statute: “*and therefore the jurisdiction of the Court has not been ousted.*” Counsel urged that the failure by the Legislature to include “*misdelivery, non-delivery and/or loss*” within its special dispensation to the functioning of the Kenya Ports Authority, should lead to the inference that “*such questions were never intended to be ousted by s.62 of the Act: and hence the High Court’s unlimited jurisdiction in civil cases remains intact.*”

Counsel urged the foregoing interpretation in respect of jurisdiction to be supported by the terms of s.22 of the Kenya Ports Authority Act (Cap.391), which, in respect of liability for loss of goods, provides:

**“Subject to this Act or any contract, the [Kenya Ports] Authority shall not be liable for the loss misdelivery or detention or damage to goods delivered to or in the custody of the Authority except where such loss, misdelivery, detention on damage is caused by want of reasonable foresight and care on the part of the Authority or any employee...”**

Counsel submitted that s.22 of the Act “*creates...liability, obligation and/or responsibility on the part of the defendant and such include liability for damage (physical damage), loss and misdelivery...*,” and that although s.62 ousts jurisdiction in respect of liability for damage, “*it does not oust the jurisdiction of the Courts in respect of other liabilities such as loss and misdelivery under s.22...*”

The defendant thus states, in para.5 of the statement of defence:

**“[The] defendant avers that the 4 containers consigned to the plaintiff were duly [processed] for clearance and transportation by road mode of transport on 10<sup>th</sup> September, 2010 and under the instruction of the plaintiff as the agent of the principal owner of the containers, M/s. Ken Group of Companies, Kampala, Uganda.”**

From that assertion, learned counsel urges that it should be considered as a certainty, “*that the issue in dispute is whether the defendant is liable for the misdelivery of the consignment or not, and not whether there was any damage to the consignment while in the custody of the defendant as warehouseman, as envisaged under s.62 as read with s.12 of the Act.*”

For effect, learned counsel urged that s.62 of the governing statute would have no application in this case: for that section is concerned with the determination of the *amount in compensation*, such as an arbitrator would determine, where a complainant’s goods have been damaged. Yet, from the pleadings in this case, “*it is obvious that the question of liability arises, which shall be outside the mandate of the*

arbitrator...” Since the defendant has denied *liability* from the outset, this question can only be determined by a Court of law.

Learned counsel submitted that the instant suit should, in any case, not be considered in the context of the limitation to the High Court’s jurisdiction implied in s.62 of the governing statute: for that provision stands in conflict with the terms of the **Constitution of Kenya, 2010** and so, should be declared to be a nullity. By Article 165(3)(a) of the Constitution, the High Court has “*unlimited original jurisdiction in criminal and civil matters*”; and the only limitation to that jurisdiction is by the Constitution itself, in Articles 165(5) and 162(2). The only limitations to the High Court’s jurisdiction are in respect of (a) matters reserved to the Supreme Court; and (b) matters reserved to special Courts dedicated to employment and labour relations, land, and environment. This position, counsel urged, differs from the jurisdictional law of the 1969 Constitution, which had empowered an ordinary parliamentary limitation to the High Court’s jurisdiction (and which is reflected in the Court of Appeal decisions in ***Kenya Ports Authority v. Kuston (Kenya) Limited***, Civil Appeal No. 315 of 2005 and ***Narok County Council v. Trans Mara County Council & Another***, Civil Appeal No. 25 of 2000).

Counsel urged that the application ought not to be upheld, on the basis of another provision of the **Constitution of Kenya, 2010**: “*insofar as the defendant’s application seeks to forestall the hearing of this case on its merits, it contravenes [Article] 159(1)(d) and (e) and (3) (a) and (c) of the Constitution which enjoins the Courts to determine and administer justice without undue regard to procedural technicalities [and] to protect, promote and uphold the purpose and principles of the Constitution in a manner that does not contravene the Bills of Rights...*”

**Mr. Noorani**, by contrast, urged that “a clause ousting the jurisdiction of the Courts in relation to any specific matter...is not a violation of the ‘unlimited jurisdiction of the High Court’ [as] conferred by the Constitution”; and to support this contention counsel merely cited certain past Court decisions: ***Narok County Council v. Trans Mara County Council & Another***, Civil Appeal No. 25 of 2000; ***Kenya Ports Authority v. Kuston (Kenya) Limited***, Civil Appeal No. 315 of 2005; ***Mayers and Another v. Akira Ranch Ltd.*** (No.2) [1972] E.A. 347. The relevant statement in ***Mayers and Another v. Akira Ranch Ltd*** is that of ***Spry, V-P*** (*op. cit.* at p.349):

***“The fact that the High Court is a court of unlimited jurisdiction does not mean that the legislature cannot limit the relief to which a person is entitled or even deprive him of relief, as indeed is done by the laws relating to limitation of actions.”***

Quite some other points have been urged by counsel in this application, but which, in my opinion, though illuminating, in forensic terms, are not quite as vital in determining the outcome of this interlocutory matter. Such points include the following: a possible ambiguity in the terms of s.62 of the Kenya Ports Authority Act (Cap.391) upon which the applicant relies; whether the doctrine of estoppel should apply against a defendant/applicant who had filed defences to the action; whether s.66 of the said statute confers broad rights of suit against the Kenya Ports Authority; whether it is open to the Court to stop the suit and refer the matter to arbitration; whether the plaintiff lacks legal or possessory title to the consignment, and so has no *locus standi*; whether there is bad faith on the part of the defendant, in lodging this application.

I should note, however, on the issue of the plaintiff’s *legal* or *possessory rights* entitling them to sue, that it does not emerge, at this stage, that they were devoid of such rights. Counsel for the plaintiff relied on the Court of Appeal decision in ***Galaxy Paints Company Ltd. v. Falcon Guards Ltd.***, Civil Appeal No. 219 of 1998 which bears the following passage:

***“It is trite law...that issues for determination in a suit generally flow from the pleadings, and unless pleadings are amended...the trial Court...may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the Court’s determination.”***

Counsel submitted that the defendant had not, in the pleadings, “raised any question as regards right to sue and/or [challenged] the legal and/or possessory right of the plaintiff.” After anxiously considering the submissions of counsel on this point, I am of the firm opinion that it, by itself, gives no reason to strike

out the suit; it is a point resting on detailed evidence, the nature of which would become clear only *after* the hearing of the case.

The vital question in this application is: whether this Court has the jurisdiction to hear and determine the suit. Counsel for the plaintiff has raised the persuasive argument that the dispensation of s.62 in favour of the operations of the Kenya Ports Authority, is only in respect of *damage to goods*, rather than of “misdelivery, non-delivery and/or loss” – in respect of which the applicable provision is s.22 of the statute.

From the pleadings on both sides, it is clear that a *serious controversy*, with implications for parties’ rights and duties, exists. Issues of such a kind generally fall to the *judicial process* for fair hearing and resolution under the adjudicative authority which has been entrusted with a specific mandate, under Article 159 of the **Constitution of Kenya, 2010**. Against this principle, the Court must adopt a strict interpretation of any ordinary statutory dispensation tending to confer differential favours – such as s.62 of the Kenya Ports Authority Act (Cap.391) is clearly doing. By Article 159(2)(a) of the Constitution, the Court, in exercising judicial authority, is required to ensure that “justice shall be done to all, irrespective of status.” Hence, in this case, I accept the plaintiff’s submission that the gravamen raised is to be resolved in the context of s.22, rather than s.62 of the Kenya Ports Authority Act (Cap.391), and that the alleged loss is a proper subject for the jurisdiction of the High Court.

Of still more relevance, in that regard, is, again as urged for the respondent, that the express terms of the **Constitution of Kenya, 2010** have rendered otiose the earlier law of jurisdiction, as existed under s.60 of the 1969 Constitution and as was reflected in decisions such as ***Kenya Ports Authority v. Kunston (Kenya) Limited***, Civil Appeal No.315 of 2005; and ***Narok County Council v. Trans Mara County Council and Another***, Civil Appeal No. 25 of 2000. In my opinion, the law today is that the High Court has unlimited jurisdiction in all causes, save in matters reserved by the Constitution itself to the Supreme Court, or to certain specialized Courts. Consequently, the contention that, in the suit herein, s.62 of the Kenya Ports Authority Act has ousted the High Court’s jurisdiction is not tenable.

**I hereby dismiss the defendant’s application by Chamber summons dated 14<sup>th</sup> December, 2010. The costs shall be in the cause.**

***Orders accordingly.***

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

**J.B. OJWANG  
JUDGE**

**DATED and DELIVERED at MOMBASA** this 16<sup>th</sup> day of February, 2012.

**MAUREEN ODERO  
JUDGE**