



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE 450 OF 2011

1. BEATRICE ANYANGO OKOTH.....PLAINTIFF/APPELLANT

VERSUS

1. RIFT VALLEY RAILWAYS (K) LTD.....1ST DEFENDANT/RESPONDENT

2. KENYA PORTS AUTHORITY.....2ND DEFENDANT/RESPONDENT

R U L I N G

1. What is before me is the 2nd Defendant's Notice of Preliminary Objection dated 31st October, 2011, which asserts as follows:

“...during the hearing of this case the 2nd Defendant shall raise a Preliminary Objection that the suit herein contravenes the provisions of Section 62 of the Kenya Ports Authority Act and that at this stage the Court has no jurisdiction to hear and determine the matter and suit against the 2nd Defendant ought to be dismissed with costs.”

2. Section 62 of the Kenya Ports Authority Act, Chapter 391, cited in the Preliminary Objection, provides as follows:-

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

Given the above provision, the critical question that arises is: whether or not the claim by the plaintiff herein is one triggered by actions arising from the exercise of the powers and functions of the Authority under or pursuant to or Sections 12, 14, 15 and 16 of the Kenya Ports Authority Act.

3. Before I delve into that provision, a brief background of the matter is relevant. According to the plaintiff, Beatrice Anyango Okoth, the Plaintiff, was at the material time a Shipping Clerk contracted by cargo and freight companies at Mombasa Port, and did her own business. As a regular user of the port, she had a Port Pass. On 29th January, 2011, while in the 2nd Defendant's premises to access some containers at its Roro Yard, she was knocked down and ran over by the 1st Defendant's train. Her legs were severed off among other injuries. She now uses a wheelchair. It was an accident plain and clear. She has sued the 2nd Defendant for negligence and breach of statutory duty of care. She has itemised six particulars of negligence and breach of statutory duty. She has also sued the 1st Defendant jointly and severally for negligence and breach of duty as the owner or operator of the train that knocked her down in the 2nd Defendant's premises. The alleged breaches relate largely to the 2nd Defendant's alleged failure to

provide a safe working environment for her within their premises.

4. The issue raised by the Preliminary Objection is whether Beatrice Okoth is required by Section 62 of the Kenya Ports Authority Act to seek compensation by negotiation or arbitration with Kenya Ports Authority, the organisation in whose premises she encountered her tragedy. Kenya Ports Authority's counsel, says Section 62 of the Kenya Ports Authority Act creates an absolute bar to suits against it, and that the suit in any event, is premature. It should have been preceded by negotiations, which failing, an arbitrator should have been appointed to determine the dispute. He cited the Court of Appeal case of **Kenya Ports Authority and Kuston Civil Appeal Number 315 of 2005**. In that case, the Court of Appeal stated:

“.....the provisions of Section 62 touches on the jurisdiction of the superior court and [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 has been ousted by the 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.”

5. Accordingly, Mr. Ouma, for Kenya Ports Authority, urged that the court has no jurisdiction to handle the matter any further and should down its tools. Alternatively, he argued, the court could order a stay of the proceedings and order the parties to go back for negotiations under Section 62 of the Kenya Ports Authority Act, and if necessary, arbitration as prescribed therein.

6. The Plaintiff opposes the Preliminary Objection on three grounds:

First, he says that only claims for damages arising out of the exercise of the 2nd Defendants powers and functions under Sections 12, 14, 15 and 16 are statute barred from litigation. That, they argue, does not include a personal injury claim arising in respect of a mere visitor to the premises. Such person would be entitled to claim under the Occupiers Liability Act, Section 3, which imposes the common law duty of care. In addition, the 2nd Defendant has pleaded apportionment of liability in Paragraph 7 of their pleadings and, as such, they are a necessary party in the proceedings.

Second, that the **Kuston Case** is distinguishable from the present case in that in **Kuston**, the subject matter of the claim was loss of goods by Kenya Ports Authority. That falls squarely within Section 62 because there was a contract between Kuston and Kenya Ports Authority. Here, there is no contract between the Plaintiff and 2nd Respondent.

Thirdly, the Constitution under Articles 165(3) (a) 159 (2)(e) and 50(1) vests the court with “unlimited original jurisdiction in civil and criminal matters” which cannot be subjugated to the provisions of a lesser statute; power to administer “justice without undue regard to procedural technicalities”; here, all the parties sued are essential for the resolution of the dispute; and the constitutional right to “a fair and public hearing before a court” irrespective of any other statute.

7. Counsel for the 1st Defendant, Rift Valley Railways also opposes the Preliminary Objection. He relies on Article 165 of the Constitution as to original jurisdiction. Further, he pointed out that under Section 62 of the Kenya Ports Authority reference in Sections 14, 15 and 16 as to matters that are statute barred from litigation and subjected to arbitration relate to “authorised employees” of the 2nd Defendant. Thus, Section 62 only applies to bar “authorized employees” sustaining injury. Finally, counsel pointed out that the Preliminary Objection seeks “dismissal” of the suit against it, which the Court cannot do without a hearing. He urged that the best option is for the Court to deal with the matter in exercise of its inherent and constitutional power, and not shirk away from its adjudicative role.

8. In brief reply, counsel for Kenya Ports Authority pointed out that the Constitution at Article 159(2) (e) recognises and requires promotion of alternative dispute resolution. Thus, there is no constitutional conflict in the requirement, under the Act, for resolution by arbitration.

9. I have considered the detailed submissions of counsel, to whom I am grateful. As earlier indicated, the starting point is to critically examine the provisions under Section 62 which give rise to circumstances that are statute barred from litigation. Rephrased, Section 62 provides as follows: that whenever Kenya Ports Authority is exercising the powers conferred on it by Sections 12, 14, 15 and 16 any damages claims that arise in the process of such exercise must be negotiated as to compensation, or that failing, they must be determined by arbitration.

10. Section 12 of the Kenya Ports Authority Act is an omnibus provision which, under Section 12(1) gives Kenya Ports Authority powers, inter alia:

“1 (a) to maintain, operate, improve and regulate the Ports set out in the Second Schedule;

(h) to provide such amenities or facilities for persons making use of the services performed or the facilities provided by the Authority as may appear to the board necessary or desirable.”

One of the ports regulated under the Second Schedule is “Mombasa” Port, where the Plaintiff herein, was run over by the 1st Defendant’s train. She claims she was there under a port pass to access containers in the Roro Yard within the 2nd Defendant’s premises. The yard may therefore, properly be called a “facility” a place where necessary functions can readily or easily be performed, or provided either by the Authority (the 2nd Defendant), or pursuant to its powers. Being within the Authority’s premises such facility can loosely be said to have been provided on the 2nd Defendant’s authority or behalf.

11. Under Section 12 (2), the 2nd Defendant’s powers include, amongst others, powers as are necessary:-

“(f) to operate trains and road transport

[and for this purpose]

(n) to enter into agreement with any person –

(i)

(ii) for the performance or provision by that person of any of the services or the facilities which may be performed or provided by the Authority.”

So, the operation of trains by, or on behalf of, or under agreement or arrangement with the Authority, would be a power vested under Section 12 on the Authority.

As such, an accident **in the 2nd Defendant’s premises** with a train operating or allowed to operate therein by the 2nd Defendant, for provision of a service which would be statutorily performed by the Authority would be, subject to evidence of consent or authority, within the scope of Section 12. The statutory powers of the 2nd Defendant, namely, the power to provide trains and transport, whether by itself directly or under arrangement with any person for the provision or performance of the facilities or services which may be performed or provided by the Authority, when evidenced to be lawfully performed on its authority, is an exercise of the Authority’s powers. What needs to be shown therefore is pleaded information that demonstrates, as stated in Section 62 that the 2nd Defendant was **engaged in the exercise of its powers** in relation to the unfortunate events that befell the Plaintiff.

12. The link I have made in paragraph 10 between the Roro Yard as a facility of Kenya Ports Authority or as one established on the authority of the 2nd Defendant, and its statutory power to operate or provide the operation of trains within that facility, is a critical link. I can readily make that legal theoretical link by argument, to say that there was very likely a statutory relationship between the 2nd Defendant and the Plaintiff when using that facility.

However, it must be recalled that the matter I am dealing with herein is a preliminary objection by the 2nd Defendant who is opposing the continuation of proceeding in court, on the basis that any claims arising from the use of that facility and the services provided thereat, should be resolved through negotiation and arbitration. It is 2nd Defendant's responsibility to show those linkages, in particular, that it was exercising its statutory powers, as it has raised the preliminary objection.

13. What is a Preliminary Objection? In **Mukisa Biscuit manufacturing Company Limited vs West End Distributors Ltd.**[1969] EA 696, at 701 Newbold P. proffered the famous and poignant definition of a preliminary objection as follows:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

14. Given the foregoing, what facts are **pleaded** by Kenya Ports Authority to show that it was exercising its powers and functions in the circumstances under which the claim herein arose? There are several questions that arose in my mind when seeking to drawing the link between the statutory power given to, and existing within, the 2nd Defendant, and the factual exercise of it, to enable the 2nd Defendant to raise a Preliminary Objection on pleaded facts, that establish the statutory linkage to fend off claims by invoking Section 62.

Troubled by these, I did ask the parties on 2nd March, 2012, to address me further by written submissions on the following:

- ***under what arrangements was the 1st Defendant operating the trains at the 2nd Defendant's premises?***

- ***What is the relationship between the 2nd Defendant and the 1st Defendant?***

None of the parties responded to these questions. So that, the chain of pleaded facts underpinning the Preliminary objection is incomplete. To complete the statutory link to enable invocation of Section 62, facts should have been pleaded that clearly show the connection between the Roro facility, the rail facility or service, the 2nd Defendant's powers or factors relative thereto and the 1st Defendant's role.

15. Had sufficient connecting facts been provided, I could have found that there was a statutory relationship between the Plaintiff and the 2nd Defendant, once the plaintiff was in the 2nd Defendant's premises using facilities or services therein, whether directly operated by the 2nd Defendant or by others pursuant to the powers of the 2nd Defendant to so permit, or on its behalf. While a finding would not establish any liability, it would place the parties in proper perspective, in that regard, as to the operation of the law.

16. Section 12(3) of the Kenya Ports Authority Act provides as follows:

“(3) For the avoidance of doubt, it is hereby declared that subsections (1) and (2) relate only to the capacity of the Authority as a statutory authority and nothing in those provisions shall be construed as authorizing the disregard by the authority of any law.”

Clearly, the 2nd Defendant is enjoined, in the exercise of its statutory powers and functions, and whether by itself or by its agents, representatives or assigns, not to disregard any law. It seems to me therefore, that for example in paragraph 4, the Plaintiff correctly places the Plaintiff's claim in terms of perspective, although it incorrectly fails to identify the statutory relationship between the parties beyond the Occupiers Liability Act.

17. Given what I have stated so far, and the absence of factual linkages, am not satisfied that the situation created as between the Plaintiff and the 2nd Defendant falls within the Section 62 statutory powers of the Authority. Accordingly, the Plaintiff's claim for compensation does not fall within the ambit of Section 62 of the Kenya Ports Authority Act and is not for resolution by agreement between the 2nd Defendant and the Plaintiff, or failing agreement, for determination by arbitration.

18. I also agree with the 1st Defendant's counsel that Sections 14, 15 and 16 of the Kenya Ports Authority Act relate only to special situations involving compensation arising out of specific acts of the "authorised employees" of the 2nd Defendant. As such, those Sections have no basis for reliance upon in this case by the 2nd Defendant.

19. But even if I was to find that there was a statutory relationship between the 2nd Defendant and Plaintiff with the ambit of section 12, that would bring me to the next issue, which is consideration of the **Kuston** case. I agree with the Plaintiff that **Kuston** was decided on the basis of the direct provision of a statutory service as between the Authority, the Kenya Railways and Kuston (Kenya) Limited. It is therefore distinguishable on its categorical facts. However, the legal proposition held there is that Section 62 ousts the jurisdiction of the court by providing for compulsory arbitration.

20. If, in the case before me, I had **found that there was a statutory** relationship factually demonstrated between the Plaintiff and 2nd Defendant, I would have found that that relationship arose by virtue of the statutory obligation imposed solely on the 2nd Defendant to establish, operate and manage ports in Kenya, to the exclusion of all others, except through its auspices by delegation or agency. In this case, neither delegation nor agency have been demonstrated by the pleadings, nor has the **exercise** of the 2nd Defendant's statutory powers.

21. The final issue before me is whether by providing for statutory arbitration the Kenya Ports Authority Act is inconsistent with the constitutional provisions of Articles 165 (3)(g), 159 (2)(a) and 50(1), as argued by the Plaintiff and 1st Defendant. I will deal first with Articles 165(3) and 159(2)(a).

Article 165(3) (a) provides as follows:

“(3) Subject to Clause (5), the High Court shall have unlimited original jurisdiction in criminal and civil matters.”

The argument made was that the High Court's constitutional original jurisdiction cannot be subjugated by a statute which purports to deny such jurisdiction to it and vest it in another person or body. That any statute that is inconsistent with the Constitutional Provision would therefore, be unconstitutional. The argument is attractive, but unconvincing, as it does not consider the Constitution Provision within the whole spectrum of the law and the legal system. Applied as argued, the provision would mean that all litigation would have to be subjected to or conducted at the High Court. The argument overlooks Article 159(2) (c), as argued by the 2nd Defendant, which specifically enjoins the court and tribunals to promote alternative dispute resolution mechanisms. Article 159(2) (c) provides:

“(2) In exercising judicial authority the courts and tribunals shall be guided by the following principles-

(a) Alternative forms of dispute resolution including reconciliation, medication, arbitration and traditional dispute resolution mechanism shall be promoted, subject to clause (3).”

22. The **2010 Constitution** therefore recognises the age old truism, deeply embedded on the common law tradition, that there are matters which are not suitable for litigation in court, at least in the first instance, and this provision gives an opening or entry point for them to be resolved otherwise.

Secondly, the Plaintiff's and 1st Defendant's arguments ignore Article 165(6) which, although not

circumscribing the scope of the Court's original jurisdiction, concomitantly recognises that the supervisory jurisdiction of the High Court is critical within the legal framework in respect of matters where its original jurisdiction need not come into play in the first instance.

Article 165(6) provides as follows:

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

The underlined words give emphasis to the intention of the constitutional provision that other bodies including arbitral tribunals- may, equally, dispense justice under law in Kenya.

23. **The Constitution** here gives express recognition to a string of actors on the dispute resolution stage engaged in judicial or *quasi* judicial functions. This is an essential recognition, in line with and supportive of Article 159(2) (k) that other players in dispute resolution may also acquire jurisdiction notwithstanding Article 165(3) (a), and that such other players are subject to the High Court's **supervisory jurisdiction**. I therefore see no contradiction in essence whatsoever, between Section 62 of the Kenya Ports Authority Act and Article 165(3) (2), read in context with Articles 165(6) and 159(2)(c).

24. I would hasten to add that there is a myth among litigants, usually perpetuated by ignorance, that a proceeding such as arbitration, not being litigation in court, cannot equal or even approximate litigation in terms of fairness, due process and in achieving a just outcome. The myth is good only for debunking. There are many non-litigative processes that give as much, if not more, satisfaction to parties engaged in disputes. It is such processes which Article 159(2)(c) seeks to promote. It should be added here that given the Court's supervisory jurisdiction over such other processes, the fears of parties are often unwarranted.

25. However, I do see an inimical challenge which would invariably be faced by disputants in a statutory arbitration, say under the Kenya Ports Authority Act, who seek to invoke the supervisory jurisdiction of the court. The Civil Procedure Act Part VI – Special Proceedings – at Section 59, seems only to recognise arbitration under or **“by an order in a suit and all proceedings thereunder”**.

These are arbitrations commencing under court orders pursuant to a suit – what are often called **“court instituted”** or **“court ordered”** arbitrations. The rules established under the Civil Procedure Rules in Order 46 re-emphasise the fact that the order relates to “Arbitration under Order of a court.” This is relevant to situations:

“Where in any suit all the parties.... agree that any matter in difference between them in such suit shall be referred to arbitration.”(Order 46 Rule 1)

26. Thus, the Civil Procedure Rules make prescription for arbitrations that are court ordered emanating from a suit. But that leaves a gap in, that there are in effect, no rules under the Civil Procedure Act and Rules **for supervision of statutory, or mandatory, non-private arbitrations** that do not emanate from an order of court. Whilst this challenge may, in my opinion be somewhat ameliorated, by invocation of Sections 3A, 1A and 1B of the Civil Procedure Act and perhaps Order 46 Rule 20, the overall situation is wholly, unsatisfactory from a justice delivery standpoint. Where a statute compels parties, without option, to do or engage in a specified legal process, such as arbitration it should also provide clear accessible guidelines or rules for operationalising that process, or for a statute under which that process is to be conducted. That would include under what conditions and manner court supervision is to be sought or effected. In the absence of such a procedure, it is patently unsafe and unjust to compel a party to enter into a system for which there are no procedures or rules, to enable one navigate their legal and procedural rights. On that score, the Kenya Ports Authority provision for arbitration is wanting and would lead to manifest injustice, in that the litigant would not have knowledge or the rules and procedures under which the litigation of arbitration would be conducted. On account of that undesirable situation, it is questionable whether Section 62 of the Kenya Ports Authority can be judicially supported, until rules of

statutory arbitration are put in place for use of litigants.

27. I, also think the requirement at Article 165(6) of the 2010 Constitution, does *ipso facto*, create a difficulty for non supervised judicial or *quasi* judicial bodies. Since the High Court has supervisory jurisdiction over such any person, body or authority exercising judicial or quasi judicial powers, the absence of any rules or subsidiary legislation, under the Civil Procedure Rule or elsewhere, to enable the High Court to be properly seized of such jurisdiction in an orderly, non *ad hoc* manner is a grave nail in the coffin of statutory arbitration. Under what rules and in what manner would the court be moved? and under what rules or principles would the actions of statutory arbitrator be challengeable? In the absence of such supervisory rules, a statutory arbitratory would be as loose as wild horse, until such rules are in place I would hold that statutory arbitration would contravene constitutional issue.

28. In stark contrast, for **private** or **consensual** arbitrations, that is arbitrations commenced by agreement of the parties, there are rules of court and also statutory arbitral procedures under the Arbitration Act 1995, and (Amendment) Act of 2010, and the Arbitration Rules thereunder. Because these are comprehensive and self regulating, consensual arbitration like court instituted or court-ordered arbitration, are adequately catered for.

Having recognised the serious challenge pointed out aforesaid, I do see that it diminishes or negates the constitutional or legal propriety of a statutory arbitration under section 62 Kenya Ports Authority Act as discussed herein. Legislative action would have to be invoked to deal more precisely with the challenge, but that is the work of Parliament.

29. The final issue raised concerned Article 50(1) of the Constitution which was hoisted by the Plaintiff as a bastion for a fair hearing in court, the argument being that if the plaintiff is forced to go to arbitration there would be a breach of her constitutional right to a fair hearing. The Article provides:

“(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a public hearing before a court of law or, if appropriate, another independent and impartial tribunal or body.”

I need not overstate the fact that this provision grants every person the right to be heard by a **court or another** independent and impartial tribunal or body. The Constitution provides a safeguard in the event of failure by any such tribunal or body, whether it be an arbitral tribunal of one or more, or a commission or board or other body, to exercise independence and impartiality. Its decision, when subjected to the original supervisory jurisdiction of the court would be scrutinized and, if found not to meet the requisite thresholds and benchmarks as to due process, impartiality and independence would be subject to review, ermission or setting aside as the case may be.

30. The upshot is of all the foregoing is that the 2nd Defendant’s Preliminary Objection fails for all the reasons stated herein. Accordingly, I order as follows:

- a) The Plaintiff’s suit shall proceed in court with due expedition.
- b) The parties shall comply with Order 11 of the Civil Procedure Rules by filing pre-trial documentation within twenty one (21) days from the date hereof.
- c) A mention shall be held within thirty (30) days of the date hereof for further directions.
- d) Costs shall be in the cause.

Dated, signed and delivered this 29th day of March, 2012

R.M. MWONGO
JUDGE

Read In Open Court

Coram:

1. Judge: Hon. R.M. Mwongo
2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

- a)
- b)
- c).....
- d).....