



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NUMBER 500 OF 1991

KENYA PORTS AUTHORITY.....PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LIMITED
.....DEFENDANT

AND

1. MVITA CONSTRUCTION CO. LTD
.....1ST THIRD PARTY

2. MISTRY JADVA PARBAT & CO. LTD.....
.....2ND THIRD PARTY

RULING

1. The Defendant had erected a power station on plot Number 539/R/VI MN within Mombasa Port Area. Amongst the installations thereon were large tanks for storing oil. On or about 13th August, 1988, one of those tanks was punctured, causing about 5,000 cubic metres of oil to leak and drift into the water of Kilindini Harbour. According to the Plaintiff, the Defendant neglected to take any remedial measures, thus the Plaintiff, at its own cost and expense, carried a clean up of the oilspill. This cost is Kshs. 9,834, 558/=.

2. On 11th July, 1991, the Plaintiff filed suit against the Defendant upon a statutory claim for recovery of the costs incurred. The basis of the cause of action is at paragraph 7 which states:

“7. The Plaintiff states that by causing the oil to escape and leak into the harbour, the Defendant acted in breach of its statutory duty as contained in Regulation 67 of the East African Harbours Regulations and applied to Kenya under Section 73 of the Kenya Ports Authority Act.”

3. The Defendant’s defence was filed on 9th September, 1991 and at paragraphs 4, 14 and 15, stated:

“4. The Defendant denies that at the material time, it was the occupiers of land or a place within Regulation 67 of the East African Harbours Regulations.”

14. The Defendant denies that it has acted in breach of Regulation 67 of the East African Harbours Regulations.

15. Further or the alternative, Regulations 67 of the East African Harbours Regulations is ultra vires the Kenya Ports Authority Act.”

4. The 1st and 2nd Third parties filed third party notices, and were joined in the suit. Amended defence of the 1st Third party was filed on 22nd March, 1996. At paragraph 5 thereof, the 1st Third party pleaded that the Plaintiff had no cause of action against the Defendant and, consequently, the Defendant does not have a cause of action against the 1st and/or 2nd third parties. At paragraph 2 it pleaded limitation under the Limitation of Actions Act.

5. By 2010, there had been little progress towards a substantive hearing, and one was fixed for 15th April, 2010. On that day, the Plaintiff was not ready to proceed as there was a problem with witnesses. An adjournment was ordered with the judge stating that “In principle, this will be the last adjournment.”

6. A hearing date was fixed in the registry by the 1st Third party, for 25th October, 2010. On that day, all parties were present and Mr. Nanji for the 2nd Third party, told the court he wished to raise a Preliminary Objection on the grounds that the plaintiff did not disclose any cause of action against the Defendant. He relied on the case of **Kenya Ports Authority vs East African Power and Lighting Company Limited** [1982]KLR 410. He pointed out that the cause of action was grounded in Regulation 67, under which the Plaintiff could not recover. If the Preliminary Objection was heard, he argued, it would shorten the trial by disposing of the entire suit. Mr. Kiarie for the Plaintiff said he had not been served with notice of the

Preliminary objection and would require service and adequate time to prepare owing to the seriousness of the Preliminary Objection. He said he had a witness in court all the way from Nyeri and was ready for the hearing. The Defendant and 1st Third party concurred with the 2nd Third party on the Preliminary Objection.

7. Honourable Justice M. K. Ibrahim, in his Ruling, held that a Preliminary point can be taken up at any time in a suit, and that there is a rule of practice that the person taking it up gives notice. He also found that while the point was pleaded in the third party defence, the Plaintiff was not aware it would be taken up at the outset at the hearing. He allowed the filing of a notice of the Preliminary objection to enable the Plaintiff prepare itself.

8. Accordingly, notices of Preliminary Objection were filed as follows: by the second and first Third parties on 2nd and 3rd November, 2010, respectively, and by the Defendant on 16th November, 2010. All three notices of Preliminary Objection have the same essential substance: That the Plaintiff's claim, being premised on Regulation 67 of the East African Harbours Corporation Regulations as applied in Kenya, the Plaintiff does not have any cause of action or valid cause of action for the reason that those Regulations do not avail it of any.

9. At the hearing of the Preliminary Objection on 23rd, February 2012, the Defendant and 1st Third party agreed that all Preliminary Objections be consolidated and argued by Mr. Nanji for the 2nd Third party.

10. The essence of Mr. Nanji's argument is as follows. That the plaint in paragraph 3, alleges that the Defendant, as occupier of plot number 539/R/VI MN within Mombasa Port Area, caused or permitted one of its tanks to spill out 5000 cubic metres of oil into the harbour, which the Plaintiff alleges it collected and cleaned up at a cost of Kshs.4,834,550.

At paragraph 7, the Plaintiff alleges a breach of the statutory duty contained in Regulation 67 of the East African Harbour Corporation Regulations ("the Harbours Regulations") applied in Kenya under Section 73 or the Kenya Ports Authority Act ("KPA Act"). There was, however, no claim under the tort of negligence or for breach under the rule in **Rylands vs Fletcher** (1868) 37 L J Ex 161.

11. Counsel argued that this being a purely a statutory claim, it was accepted that the Harbours Regulations of 1970 apply by virtue of Section 73 (2) of the Kenya Ports Authority Act. Regulation 67 has sub-regulations 1 to 4, of which only sub regulation 1(b) is relevant in that it makes provision as to discharge of any noxious or offensive liquid discharged into the water of a harbour from any vessel, or from any place on land, and creates an offence under the regulation.

Since the Regulation only provides for an offence and not for recovery of expenses incurred, which regulation 67(1) (a) does, there is no cause of action for recovery of expenses.

12. Counsel argued that if Parliament had intended for recovery of compensation, it would have provided for this as in Regulation 67(i) (a), or as in Regulation 295, under which the repealed Merchant Shipping Act is invoked and whose Section 309(3) applies to spillages into the sea and allows for the person who incurs an expense in clearing such pollution to be compensated.

13. At the hearing, Counsel relied on the case of **Kenya Ports Authority vs East African Power and Lighting Company** [1982] KLR 410. That case and the arguments, were the same as those which counsel had highlighted before Honourable Justice M.K. Ibrahim. In that case it was held, *inter alia*, that the port waters was *res nullius* (incapable of ownership) and was therefore, not the property of the Appellant. Thus, any pecuniary loss arising out of purely precautionary measures taken to clean up pollution which might cause damage to property, was not a loss that can be recovered at common law.

14. Mr. Kiarie for the Plaintiff opposed the Preliminary Objection. He said the suit was filed way back in 1991, and for all those years, the Preliminary Objections were not raised. It was, he said, unconscionable for the Plaintiff to be denied his day in court to place evidence on the merits before the court. He argued that it was trite law that pleadings can be amended at any stage of the proceedings and the court should not shut the Plaintiff out as it is a public corporation whose functions are for the public interest. It had spent public money on the clean up, and it cannot be public policy that public funds should be spent in such clean ups without compensation.

15. Counsel argued that judicial notice should be taken that in the Gulf of Mexico oil spill, British Petroleum was made to pay, not because it owned the waters but because it caused ‘pollution.’ He further argued that Article 159(2) (d) of the Constitution provides for the courts to administer justice without regard to procedural technicalities. Counsel doubted whether the **KPA vs EAPL** case was still good law in Kenya given the liberal attitude of the new constitution, the coming into place of a Supreme Court to adjudicate on matters of exceptional public importance, and that the Plaintiff should be allowed to canvass its case which could then go through the appeal process. He felt that Section 1A and 1B of the Civil Procedure Act also required that real justice be done, which would not happen if the Plaintiff’s case were decimated at this stage.

16. I have carefully considered the parties arguments on the Preliminary Objection. Two issues arise. First is an issue of general public concern: that is, **whether a preliminary point such as the one herein is akin to a procedural technicality under the new Constitution and Civil Procedure Act provisions**, and the second is: **Whether the Plaintiff claim under Regulation 67 of the Harbour Regulations can stand.**

17. There is no doubt that under the present Constitution, there has been a paradigm shift in the juridical and legal framework of Kenya. The Constitution belongs to the people now, and all power emanating therefrom is exercised on their behalf. So, Article 159 derives from the people. Article 159(2) (d) provides as follows:

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

(a)....

(b)....

(c).....

d) *justice shall be administered without undue regard to procedural technicalities.*”

Under that provision, would a Preliminary Objection fall under the general description of what might be considered procedural technicalities? I think not. Some definitions may come to aid.

The definition of “**procedure**” is defined in Blacks Law Dictionary is:

“The mode of proceeding by which a legal right is enforced as distinguished from the substantive law which gives or defines the right and which, by means of the proceeding the court is to administer; that which regulates the formal steps in an action or judicial proceeding.”

And in the Collins Dictionary “**procedure**” is defined as “**a way of acting or progressing in a course of action.....the established mode or form of conducting the business of legislature, or the enforcement of a legal right.**”

“**Technicality**” is defined in Collins Dictionary as:

“**Petty, formal point arising from a strict interpretation of rules.**”

Blacks Law Dictionary defines “**Technical**” and “**Technical errors**” as follows:

“**Technical– immaterial, not affecting the substantial rights; without substance’**; and

“**Technical errors – errors committed in course of a trial which have not prejudiced the party and hence are not grounds for reversal.**”

18. Combining the meanings of these words, “**procedural technicalities**” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.

19. Preliminary objections on the other hand, cannot be said to fall into the aforesaid descriptive category. In the celebrated case of **Mukisa Biscuits Manufacturing Company Limited vs Westend Distributors Limited** [1969] E.A 6976, Law, J A described a Preliminary Objection as follows:

“...a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleading, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation....”

In the same case Newbold P. stated:

“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...”

Thus, whilst a preliminary point goes to the root of the cause of action, and may dispose of a suit, a procedural technicality involves insubstantial process or forms that have no interplay with the substantial rights of parties. For the foregoing reasons, I cannot accept the Plaintiff’s argument that the Preliminary objection raised herein falls under the general description of procedural technicalities covered under Article 159(2) (b) of the Constitution.

20. The other main issue, as earlier stated, was whether the Plaintiff can recover under Regulation 67 of the Harbours Regulations as pleaded in paragraph 7 of the Plaint. The relevant portion of the said Regulation provides as follows:

“67 (1) (b) if any noxious or offensive liquid is discharged from any vessel, or from any place on land, into the water of a harbour, then if the discharge is from a vessel, the owner and the master of the vessel, or of the discharge is from a place in land, the occupier of that place shall be guilty of an offence under this regulation.”

It was not disputed that the above provision is imported into and has the force of law in Kenya pursuant to Section 73(2) of the Kenya Ports Authority Act Chapter 391. There is no doubt at all that the provision of Regulation 67 of the Harbours Regulations, relied upon by the Plaintiff, creates criminal liability. However, it does not create any civil liability on the offender or on any other person, and cannot found an action for compensation.

21. The case of **Kenya Power and Lighting vs East African Power and Lighting** which was cited by Mr. Nanji, is on all fours with the present case; and involved the Plaintiff and the predecessor in law of the current Defendant as the defendant.

In that case, which was not premised on Regulation 67 of the Harbours Regulations, the Court of Appeal agreed with the superior Court judge as follows: that the only damage proved to have been caused by the oil leak was to the sea water in the harbour; that the Plaintiff did not own that water; that the Plaintiff had not suffered any damage to its property; and that in consequence, the Plaintiff's claims both for the tort of negligence and on breach of the rule in **Rylands vs Fletcher**, had failed. In the present case, the Plaintiff has not even raised a claim in negligence or under the rule in **Rylands vs Fletcher**. The sole cause of action is that:

“7....the Defendant acted in breach of its statutory duty as contained in Regulation 67 of the East African Harbours Regulations.....”

(Paragraph 7 of the plaint).

As earlier pointed out, Regulation 67 merely creates criminal liability and no civil liability. Accordingly, there is no cause of action for compensation.

22. During the hearing, Mr. Kiarie did point out that pleadings can be amended, at any state, and that is true. Under Section 8 Rule 3 of the Civil Procedure Rules an amendment of pleadings may be made with leave of the court and on such terms as to costs or otherwise as may be directed by the court. But leave for such amendment can only be granted if an application is made. I note that at the hearing of the application, counsel for the Plaintiff did not apply for leave; nor did he make an application for leave when, or at any time after, the initial arguments were made in court before Honourable Justice M.K. Ibrahim on 25th October, 2010. This is despite his having acknowledged in those arguments, and also at the hearing of this application, that a Preliminary Objection may have the consequence of disposing of a suit. He had knowledge of the **KPL VS EAPL** case which was cited in the arguments before Honourable Justice M.K. Ibrahim. In my view, the Plaintiff has not shown any intent on pursuing its claim under an amendment, and I cannot, without an application for leave, grant the same. Order 8 Rule 3(2) is quite clear that an amendment can only be made after an application for leave is filed.

23. Accordingly, I am left with no option but to allow the Preliminary Objection, with the effect that the Plaintiff has no cause of action; and the suit is therefore hereby struck out, with costs to all three respondents.

Orders accordingly.

Dated and delivered this...23rd...Day of March, 2012

R.M. MWONGO

JUDGE

Read in open court

Coram:

1. Judge: Hon. R. Mwongo

2. Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

a)

b)

c)

d)