REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 263 of 2010

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SAFMARINE CONTAINER N.V OF ANTWERP……..…PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY……. ……..... DEFENDANT

Coram:
Mwera J.
Noorani for Defendant/Applicant
Omondi for Plaintiff/Respondent

RULING

As per O 2 r. 5 (a) Civil Procedure Rules the defendant has in its notice of motion dated 8/4/2011 asked this court:

1) to strike out the plaint herein; and

2) dismiss the suit with costs.

It was contended that the plaint did not disclose any reasonable cause of action against the defendant authority and besides, this court did not have jurisdiction to entertain the suit, because the claim is for damages caused by a ship's crane in the course of stevedoring operations. In that connection reference was made to SS. 12, 62 of the Kenya Ports Authority Act, the Act in that the defendants' power to carry on its business of stevedore was conferred on it as per S. 12 (a) (d) of the establishing Act Cap 391),whereby S. 62 of the same Act ousts this court's jurisdiction to deal with claims of damages said to have been suffered by a person as a result of the defendant's exercise of its powers under S.12 afore- said.

Directed to submit the defendant's stand is that jurisdiction is everything and if a court of law does not have it, it cannot proceed to entertain a given matter. That the plaintiff's claim was basically that while the defendant's driver was operating a crane to discharge a certain container, it was not properly managed in that some loss/damage was caused. Then attention turned to S.12 of the Act which gives the defendant power to carry out the activities like the one engaged in on 4/8/2009. But that if damage does occur during such engagement, S.62 states that no suit shall lie but compensation will be paid as agreed with the defendant, or in default of this, as determined by an arbitrator appointed by the Chief Justice. So the court had no jurisdiction in this case. That ample case law existed in that regard e.g Kenya Ports Authority vs Kuston (K) Ltd C.A. No. 315/05. That S.62 had oust the jurisdiction of the court in disputes as these, conferring the same on arbitral process. It is no matter that the defendant had entered appearance

and even filed a defence. And whether under the 2010 Constitution a statute could not oust this court's jurisdiction in any manner, (see Art. 165 (3) (a), the case of Threeways Shipping Services vs KPA Mombasa Hcc 28/10 was distinguished with the present case and in particular that the Threeways case did not address Act 165 (3) (e) of the Constitution It is not only the Constitution that can limit/confer jurisdiction of the court, any other law may by express provision or by necessary implication confer or limit that jurisdiction. In this connection the defendant appeared quite at home with the obiter dictum of Akiwumi JA in Narok County Council Vs Transmara County Council, whose citation was not given. It is fit, proper and in the interests of justice that where specific statutes repose jurisdiction in some mechanism of dispute resolution than in the High Court, that be the course to follow. Such included arbitration provided for in Art 159 of the Constitution. Other fora too can deliver justice and all is not for this court alone. And that S.62 spreads itself over physical loss, misdelivery or detention involving land, goods and property, by referring to also SS. 14, 15, 16 of the Act. That the Act established a statutory duty together with the forum to determine actions arising from it. So if this court does not have jurisdiction then it cannot refer the dispute herein to arbitration. In essence the court was being told that the Act itself had stated which body/forum disputants should go before.

The plaintiff's position was as per grounds of opposition filed in court on 1/9/2011 in that the motion under review was seeking to deny the plaintiff its accrued rights; striking out the suit would deny the plaintiff justice in a draconian manner; the application was a misconception of S. 62 of the Act because the plaintiff had not attempted discussion with the defendant as to compensation and no procedure is set out for the Chief Justice to follow to appoint an arbitrator. Herein was a cause of action based on contract, and not the defendants power exercised under SS. 12, 14, 15 and 16 of the Act because there had been no evidence adduced in that direction. Perhaps it should be pointed out that at this stage no evidence, by affidavit or otherwise is expected. Just points of law.

In submission the court was urged to find that without demonstration the defendant had not shown the court that a reasonable cause of action had not been disclosed even after it was stated in the grounds that:

"……the cause of action herein arises from a contract……."

It was submitted that the claim of US$ 300,000 was on account of:

"…….the damage occasioned by the defendant's drivers, servants or agents to jib and wire of the Motor Vessel Glory."

And then the defendant had denied negligence or that damage was suffered. So as at this stage the court was left with the impression also gleaned from the pleadings, that the claim was based on tort and not contract. Negligence is a category of tort. That the defendants denial of negligence in the defence and admission that the parties ought to proceed under S.62 of the Act means that its motion must fail. It is all contradictory. The court was urged to confine itself only to the pleadings and not have recourse to additional evidence to determine whether a reasonable cause of action had been pleaded in the plaint. Several authorities were introduced defining the phrase "a reasonable cause of action" as one with some chance of success and no more. But even with whatever is gathered from a pleadings, the court should only consider to strike out a pleading with utmost caution. It is not clear so far that the defendant was offering stevedoring services and so the plea to strike out the plaint is untenable. That the defendant had not exhausted all that was contained in SS 12, 14, 15 and 16 of the Act. There were for instance SS. 3,9, 10 and 11 where the plaintiff claim was one in negligence. Then the plaintiff proceeded to appreciate the Kuston and Threeways cases above. It remained of the view that S. 62 of the Act should not be read and applied to oust the jurisdiction of this court as urged by the defendant. Adopting the course as per Act. 159 (2) (d) of the Constitution – alternative dispute resolution, the court should make the reference but stay the suit here and not strike it out. This court should not down its tools as argued by the defendant so that it cannot do anything more including the issue of costs or make other house-keeping orders. It is impractical just to lay down one's tools on finding that jurisdiction is lacking, it was submitted.

Having all the foregoing in mind, it is now time to consider the impact and application of the provisions of law placed before this court. But first a quick glance at the pleadings.

The plaint filed on 3/8/ 2010 states that the defendant's crane driver was negligent in operating the equipment while a container was being discharged from the plaintiffs ship "Glory". As a result an item called a jib of the crane was destroyed and damaged- hence the claim for its repair costs. In the amended defence the claim was denied and jurisdiction was not admitted. It was averred that on that point the defendant would seek orders to strike out the plaint. In response the plaintiff pleaded that this court had unlimited original jurisdiction to entertain the suit. And those were the two sides of one point that parties took up in submissions.

It is a well-known principle of law that a court must have jurisdiction over any matter in entertains. Further, that jurisdiction is bestowed by statute or a written legal instrument. In the same manner jurisdiction can be denied or ousted. And parties cannot bestow or waive jurisdiction.

Under the KPA Act focus went to two sections- 12 and 62. The applicant/authority's position is that while in the process of carrying on business of stevedore the act complained of by the plaintiff occurred. And if damage resulted as the plaintiff claims, then either by agreement of the two or by an arbitrator appointed by the Chief Justice, the issue should be resolved. By so stating here the defendant relied on S. 12 of that Act and in particular S. 12 (1) (d), under its powers as a statutory body:

"12. (1) The Authority shall have power…

(a) ……..(c)……..

(d) to carry on the business of stevedore, wharfinger or lighterman;

(e) ……..(h) ……."
(2)……..(4)……..."

The section is longer and more is stated in it. But here we confine ourselves to what the defendant said it was doing at the time in question—stevedoring. According to the Concise Oxford Dictionary(8th edition), stevedore is defined as a noun:

"**Stevedore" - a person employed in loading and unloading ships.**

The defendant has made a verb of this word – hence the submission:

"The defendant's powers to provide stevedoring services are contained in Section 12 (1) (d) of the KPA Act……."

And the plaintiff pleaded

"5. The plaintiff states that on or about 4th August, 2009 while the Motor Vessel "Glory" was discharging container No. TCNU 990152 0 at the defendant's berth No. 144 using ship's crane No. 2, the defendants driver, Mr. Mohamed Sosi, lowered the jib beyond the cut position, as a result of which the luffing wire rolled out from its secured position in the drum."

From all the above, the defendant was carrying on the business of loading and unloading ships – a stevedore. And while doing that via its agent, employee or whatever, Mohamed Sosi, damage occurred and the plaintiff has sued to recover the repair costs of its equipment for US$300,000.

The Defendant avers that when such damage occurs while it is engaged in exercising its powers under S.12, obtaining a remedy from it is as provided for in S. 62 (1) of the Act:

"62. **Compensation**.

(1) In 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 therefore 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."

(2) ……."

The plaintiff claimed that the jib of crane No. 2 was deformed and damaged: So the defendant must pay the cost of its repair by way of compensation.

In the view of this case the course open to the plaintiff under the Act to seek compensation from the defendant is set out inS.62 of the Act.- not through this court. Yes, this court has unlimited jurisdiction in matters civil but where a statute has excluded it from entertaining certain matters, then that exclusion must be respected. It was legislated for good cause- not to deny a wronged party a remedy, but to go by the laid out procedure to seek it. In this case the Legislature in its wisdom, considered that damage that results from the acts of the defendant while exercising its powers under S. 12, getting compensation is by way of agreement between the claimant and the Authority (defendant). And if that does not work, and the plaintiff stated here that it had not attempted the method of agreement, then the Chief Justice shall appoint an arbitrator to resolve the issue. We are here not asked to answer why the Act settled on the Chief Justice to appoint the arbitrator or even why the procedure of such appointment was not set out. But suffice is to say that the facility to pursue compensation under S. 62 is open to the claimant. It cannot suffer prejudice simply because this court has not adjudicated over his claim.

In the Kuston case (supra), whose copy was not made available by counsel and the court could not in its own research readily come by it, it was stated in part:

"[T] he provision of section 62 touches on the jurisdiction of the superior court and that 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 matter of public policy be allowed to circumvent statute and once an illegality always an illegality…….This suit should not have been instituted."

The above was a unanimous pronouncement by the Court of Appeal. Not only is that decision binding on this court but it is also sound in jurisprudence.

The court was urged by the plaintiff to see the present case in the light of Art. 159 (2) (d) (e) of the Constitution 2010. True, the Kuston case was decided long before the present Constitution came into force . The provision alluded to in Art. 159 reads:

"**159. (1)…….**

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

(a)……..(c)……..

(d) justice shall be administrated without undue regard to procedural technicalities; and

(e) the purpose and principles of this Constitution shall be protected and promoted."

The plaintiff did not expand on what procedural technicalities it will face and which will impact adversely on it when seeking compensation as set out in S. 62 of the Act. Neither did it explain what purpose or principles of the Constitution will not be protected and promoted if parties utilize the said S. 62. Or even how the promotion and protection will be wanting. Nonetheless at the end of the day, this court is of the firm view that jurisdiction is conferred by a written instrument be it a statute or a

constitution. In the same manner jurisdiction can be ousted or curtailed.

Arbitration statutorily mandated by the KPA is not and will not cause injustice to the plaintiff. It is set in place by way of a statute and the Constitution 2010 itself has mandated such modes when doing justice to the parties and their causes. See the Art. 159 (1) (c):

(c) alternative forms of dispute resolution including reconcilation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted subject to clause (3);"

These alternative forms of disputes resolution are provided for e.g. in the Arbitration Act (1995) and O 46 Civil Procedure Rules. So what is provided in S.62 of the Act is not contrary to the Constitution. It is still a valid course to pursue a remedy.

In sum the prayers laid out in the motion are granted to the extent that the plaint herein is struck out but each side will bear its own costs. The jurisdiction to deal with the dispute the plaintiff has raised is to be resolved by the parties own agreement, failing which the Chief Justice will be called upon to appoint an arbitrator to decide. That is the law.

Delivered on 23/3/2012

J.W. MWERA
JUDGE