



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Commercial Civil Suit 43 of 2009

MAISON 425.....PLAINTIFF/RESPONDENT

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT/APPLICANT

**RULING**

1. On 11<sup>th</sup> October, 2008, the Plaintiff/Respondent imported a container of fabrics bearing Number MOAU 0695610(the Container). It was to be discharged on 17<sup>th</sup> November, 2008, at Mombasa Port, run and operated by the Applicant. Although it was allegedly received at the Port, it could not be traced when the Respondent went to collect it. The Plaintiff/Respondent filed suit on 16<sup>th</sup> October, 2009 claiming **Kshs. 12,630, 454.00** as special damages for the value of the lost fabric, fees and other charges, and **Kshs. 5,000,000/-** for loss of profit.

2. The Defendant/Applicant filed a defence on 17<sup>th</sup> November, 2009, denying receipt of the container and or negligence leading to its loss. It amended its defence by a consent entered between the parties on 3<sup>rd</sup> September, 2010. Under amended Paragraph 11, the Defendant denied the jurisdiction of this court and stating:

***“...The Defendant shall at the earliest opportunity apply for the striking out of the Plaint on grounds that Section 62 of the Kenya Ports Authority Act (Chapter 391) bars the filing of a suit for compensation against the Defendant/Applicant and prescribes statutory arbitration therefor.”***

3. Pursuant thereto, the Defendant has applied by way of Chamber Summons dated 1<sup>st</sup> November, 2010, seeking to strike out the plaint and dismissal of the suit. The grounds are that:

***“(a) The Plaint discloses no reasonable cause of action against the Defendant.***

***(b) This Honourable court has no jurisdiction to hear, determine or otherwise deal with this suit.***

***(c) The Plaintiff’s claim against the Defendant is for the loss of a consignment delivered to the Defendant as warehouseman.***

***(d) The Defendant’s power to act as warehouseman is conferred by Section 12(1)(e) of the Kenya Ports Authority Act (Cap. 391).***

***(e) Section 62 of the Kenya Ports Authority Act (Cap 391) ousts the jurisdiction of this Honourable***

***Court in respect of damage suffered by any person as a result of the Defendant's exercise of its powers, inter alia, under section 12 of the Kenya Ports Authority Act (Cap. 391)."***

4. The application is defended through the Replying Affidavit of Ladeslas Azando Mazio, the Plaintiff's director, deponed on 7<sup>th</sup> December, 2010. In essence, the deponent states that:

- by a letter of 15<sup>th</sup> December, 2008, the Defendant admitted the disappearance of the Container
- the said loss is a breach of the Defendant's duty as a warehouseman
- the appellant submitted to the jurisdiction of the court by filing an unconditional memorandum of appearance, and therefore cannot approbate and reprobate
- the Applicant ought to have filed an application to stay the proceedings upon filing the memorandum of appearance
- the filing of the defence and amended defence amount to taking a further step in the action and the matter cannot therefore be referred arbitration
- the plaintiff will be driven from the seat of justice if the orders sought are granted.

5. The parties filed their lists of authorities and, thereafter, their written submissions on 16<sup>th</sup> November, 2011 and 14<sup>th</sup> December respectively. The Applicant asserts that the court has no jurisdiction on account of Section 12 of the Kenya Ports Authority Act which provides as follows:

***"The Authority shall have power ...***

***(a) ...***

***(e) to act as warehouseman and to store goods whether or not such goods have been or are handled as cargo or carried by the Authority."***

Counsel argues that is not in dispute that the Defendant is sued in its capacity as warehouseman. This is deponed in Paragraph 9 of the Plaintiff's Replying Affidavit; and averred in Paragraph 6 of the Plaint.

Relying on the case of ***The Owners of the Motor Vessel "Lillian S" vs Caltex (Kenya) Ltd*** [1989] KLR at pages 14 and 15, counsel argues that jurisdiction can be raised at any time during proceedings, and that where the court finds it has no jurisdiction, it must down its tools.

6. Counsel also referred to Section 62(i) of the Kenya Ports Authority Act which provides:

***"In the exercise of the powers conferred by Sections 12, 14, 15 and 16, then 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."***(emphasis added)

Counsel argued that this provision of the Kenya Ports Authority Act had been considered in the case of ***Kenya Ports Authority vs Kuston (K) Ltd*** Civil Appeal Number 315 of 2005. There, 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.”***

The Defendant therefore argues that the court has no jurisdiction in this case, and the suit does not lie.

7. The Plaintiff’s submissions were essentially that there are two issues to be determined:

(a) Whether the Defendant submitted to the jurisdiction of this honourable court; and

(b) Whether the suit herein should be struck out.

8. In respect of the first issue, Counsel referred to Section 6 of the Arbitration Act which provides for a party seeking arbitration to apply for a stay of litigation proceedings in:

***“[A] court before which proceedings are brought in a matter which is the subject of an arbitration agreement...if a party so applies not later than the time when that party enters appearance...”***

Counsel argued that the Defendant having failed to file an application for stay submitted to the Court’s jurisdiction. He referred to several authorities interpreting Section 6 of the Arbitration Act, 1995.

9. In respect of the second issue, counsel argued that the issue of jurisdiction should have been raised at the earliest opportunity. Having failed to do so, the Defendant is guilty of laches and the court should not allow the Defendant to benefit and the application should be dismissed. Counsel referred to **Taxtar Investments Ltd vs Kenya Airports Authority** HCC 1238 of 1999, where the court stated that a Defendant cannot benefit from failing to raise an objection to proceedings after having fully taken part in them.

Further, the Plaintiff argued that should the court be inclined to hold that the dispute be determined by arbitration, it should refer the dispute to arbitration in *lieu* of striking it out. Counsel referred to Article 159(2) (d) of the Constitution which enjoins the court to administer justice without undue regard to procedural technicalities. In this regard, counsel also cited **Housing Finance Company of Kenya vs Rose Wangari Ndegwa**. Mombasa Civil Appeal 83 of 2008, where the court held that procedural lapses are technicalities which were excusable in light of Article 159(2)(e).

10. Finally counsel for the Respondent cited the American case of **State Farm Insurance vs Dr. Illises C. Sebato 337 NJ Super, 393, 767, A 2d 485**. There, the Appellate Division of the Superior Court of New Jersey stated:

***“We agree with Defendant that the court should have permitted the claims to proceed to statutory arbitration...”***

11. I have carefully considered the application and the reply thereto, the authorities cited, and the submissions of the parties. I consider the two issues stated by the Respondent as being the only issues for determination herein.

**Whether the Defendant has submitted to the court’s jurisdiction.**

12. First, I am persuaded that the issue of jurisdiction can be raised at any stage of the proceedings as held in the **Lillian** case.

***“Jurisdiction is everything. Without it a court has no power to make one more step.”***

Justice Nyarangi stated in that case, as follows (at page 15), (and this is the fourth holding in that case):

***“I can see no grounds why a question of jurisdiction could not be raised during the proceedings. As***

***soon as this is done, the court should dispose of that issue without further ado.”***

13. Second, whilst I agree with the Respondent that an unconditional memorandum of appeal would invoke the court’s jurisdiction for the resolution of the dispute filed before it, the case herein is peculiar. Here, there is a statute which provides for the manner in which a dispute involving the Respondent is to be dealt with. It is not open to parties to amend the statutory position by their actions. Only parliament can amend or alter the position. And unless or until that is done the parties are under a statutory command and obligation to proceed to arbitration under the specific circumstances stipulated in the statute.

14. The third point under this issue, concerns the point **whether the Respondent was obliged to file an application for stay of proceedings, so that the court may refer the dispute to arbitration under section 6 of the Arbitration Act.** In my view, the Plaintiff has misapprehended Section 6 of the Arbitration Act, quoted earlier. That provision clearly applies only to stay of proceedings where the parties have an arbitration agreement for the resolution of their dispute. Indeed Section 6(1) (b) of the Arbitration Act requires that once an application for stay is made, stay is granted **unless** the Court finds:

***“(a)that the arbitration agreement is null and void inoperative or incapable of being performed.”***

Clearly, the application for stay must be grounded upon the existence of an arbitration agreement between the parties which would be exhibited to the court. In the present case there is no arbitration agreement between the parties. Instead, there is a statutory command without a corresponding requirement to apply for stay of proceedings.

15. Thus, the provisions for stay of proceedings apply to what are commonly referred to as **“consensual”** arbitrations, where parties have chosen, by agreement privy to themselves only, the preferred forum for resolution of their dispute. The provisions for stay do not apply to either **“court instituted”** arbitrations commenced under Order 46 of the Civil Procedure Rules, or to **“statutory”** arbitrations, imposed upon parties by legislative act of parliament.

16. Fourthly, it is clear that the Court of Appeal has interpreted Section 62 of the Kenya Ports Authority Act to oust the jurisdiction of the court.

In the quotation cited from the Lillian in paragraph 6 herein, the meaning of Section 62 of the Kenya Ports Authority Act, is elaborated as follows:

- Parties cannot in the face of a statute contract (and I would add, act,) out [side] of it and bring a suit instead.
- The court’s jurisdiction has been ousted by the statute and the parties cannot confer jurisdiction on the superior court.
- There cannot be waiver of the statutory requirement just because both parties took part in the suit.
- Parties cannot as a matter of public policy be allowed to circumvent a statute.
- Once an illegality always an illegality.
- The suit should not have been instituted at all.

17. This court cannot put the situation any clearer. It simply has no jurisdiction in the matter herein. In absence of jurisdiction it must, in the words of Nyarangi, JA in the Lillian, **“down its tools”** and cease further action in the matter.

18. Thus, I come to the second issue: **Whether the suit herein should be struck out.** This court has no option, since, as stated in the Lillian, the suit should never have been instituted at all. The court, having

no jurisdiction, it cannot proceed with the suit. It will down its tools. The way to do so is to strike out the  
plaint. I hereby so strike it out. I do not even have the jurisdiction to refer the suit to the Chief Justice for  
appointment of an arbitrator. It is for the parties to do that. This court's role in the suit ends with the  
orders given herein.

19. In the result, the application succeeds in its entirety with costs to the Applicant.

Orders accordingly.

**Dated, signed and delivered this 15<sup>TH</sup> day of JUNE, 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).....