



REPUBLIC OF KENYA

High Court at Mombasa

Commercial Civil Case 19 of 2009

MODERN HOLDINGS (EA) LTD.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

1. This is the Defendant's motion dated 7th September, 2011 seeking that the Plaintiff's amended plaint be struck out on the following grounds:

- “a) The Plaintiff/Respondent's suit is barred by limitation by dint of Section 66 Kenya Ports Authority Act Cap 391;***
- b) The Plaint also contravenes Section 65 of Kenya Ports Authority Act Cap 391;***
- c) The Plaintiff/Respondent imported the consignments forming the subject of the suit as an agent of disclosed principals (named consignee);***
- d) The Plaintiff/Respondent's suit is bad in law for misjoinder and non-joinder of parties.***
- e) Consequently, the Amended Plaint filed by the Plaintiff/Respondent is frivolous and vexatious.”***

The application is brought under sections 3 and 3A of Civil Procedure Act, Order 2 Rule 15 and 51 of Civil Procedure Rules and Sections 65 and 66 of Kenya Ports Authority Act, Chapter 391.

2. The proposed amendment to the plaint only relates to clarifying that the Plaintiff is also incorporated in Kenya. The Plaintiff filed its Replying Affidavit sworn by its Chairman, Anselm Minja.

3. The brief background to the matter is that between 9th December, 2007 and 17th January, 2008, the Plaintiff imported 21 X 40 foot containers of assorted juices and mineral waters for onward delivery within Kenya, Uganda and Tanzania. They landed at Mombasa port which is managed by the Defendant. Due to post election violence the consignment delayed in the port incurring over Kshs. 5,161,200/= as at 28th April, 2008 in customs warehouse rent. The Kenya Revenue Authority agreed to waive 80% of the warehouse and rent, but the Defendant allegedly failed, refused or neglected to effect the waiver, and to release the consignment to the Defendant. The Defendant allegedly insisted on clearance of the consignment through Makupa Transit Shade Limited. In the result, the waiver could not be enjoyed by the Plaintiff, who seeks compensation.

4. After due consideration of the application, the reply, the annexed documents and the parties' submissions. The issues arising for determination in this matter are as follows:

- a) whether the Plaintiff's suit is time barred
- b) whether the plaint contravenes Section 65, of Civil Procedure Act.
- c) whether the Plaintiff has *locus standi* in this matter.
- d) whether the Plaintiff's suit is bad in law for misjoinder.
- e) whether the Plaintiff's suit is frivolous and vexatious.

Limitation of Time

5. The Defendant Applicant argues that the cause of action occurred in January, 2008 whilst the suit was filed in April 2009. The Applicant relies on Section 66 of the Kenya Port Authority Act which provides:

“Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect-

(a)

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of, or in the case of a continuing injury or damage, within six months next after cessation thereof.” (underlining mine)

6. The plaint was filed on 29th April, 2009. It indicates that the consignments landed at Mombasa port on diverse dates between 9th December, 2007 and 17th January, 2008. Thereafter the question of waiver for the warehouse rent emanating due to delays occasioned by post election violence was under discussion. The Applicant granted the Respondent waivers of 80% on storage charges vide its letters of 22nd February, 2008, 4th March, 2008 and 6th March, 2008. These are annexed as M H 5, 6 and 7 in the Applicant's Replying Affidavit.

7. Paragraphs 25 and 26 of the plaint, among others, do in my view constitute the kernnal substance of the Defendant's default. They provide as follows:

“25 Despite a demand made by the Plaintiff to the Defendant the Defendant failed and or refused to return the part of the consignment of the Plaintiff and instead imposed unlawful, unreasonable and untenable demands as a result of which part of the consignment was lost to the Plaintiff.

26 By reason of the Defendants default, the Plaintiff has been deprived of part of his consignment and hassuffered loss and damage, as hereinafter particularised.”

Section 66 of the Kenya Ports Authority Act, which refers to an act of default, is thus invoked in the above paragraphs.

8. By the Applicant's letter of 30th April 2008 “MH9” it is evident that the parties were still discussing the issue of waiver. The documents availed do not show on what date the discussions finally broke down thus crystallising the “**default.**”,butit must have been after 30th April, 2008.

The Plaintiff filed this plaint on 29th April 2009. It was therefore within the twelve month

limitation period, provided in Section 66. There being evidence that discussions on waiver were still on going as at 30th April, 2009, this ground of the application therefore fails.

9. Section 65 of the Kenya Ports Authority Act requires a Plaintiff claiming compensation to give a six month notice to the Managing Director from the date on which the goods were accepted by the Authority.

Counsel's argument is, in essence, that upon each consignment being received at and by the Port, the owner of the consignment should have written to the Managing Director of the Kenya Ports Authority within 6 months of each such receipt.

10. I consider this nit-picking argument as intended to raise statutory procedural technicalities to the height of substantive requirements. The Plaintiffs exhibit MH4 dated 11th July, 2008 is a demand letter addressed to the Managing Director of the Defendant giving a full account of the demands of the Plaintiff. Once the last of the Plaintiff's bunch of consignments was landed on 17th January, 2008, the Plaintiff had six months, up to 16th July, 2008, to give notice. As the demand letter is dated 11th July, 2008, I am prepared to accept the same as a sufficient notice for all the consignments.

11. I take this view considering the provisions of Article 159 of the Constitution that provides for judicial authority to be exercised guided by *inter alia*, this principle:

“2 (d) justice shall be administered without undue regard to procedural technicalities.”

Counsel did not explain why this statutory procedural technicality is of such essence that Article 159 could not cure default thereunder.

Accordingly this limb of the application also fails.

Locus standi

12. The Applicants key argument on this point was that the Plaintiff had pleaded that it made the imports on behalf of other consignees or customers. These are its principals who, having been disclosed, the Plaintiff could then not sue because it had no *locus standi*. Counsel referred to the common law and to Civil Appeal Number 5 and 48 of 2002, Anthony Francis Warehouse t/a AF Warehouse & 2 Others vs Kenya Post Office Savings Bank.

13. In the Warehouse case the court of appeal held that:

“it was prima facie imperative that the court should have dismissed the Respondent's claim against the second and third Applicants for they were impleaded as agents of a disclosed principal contrary to the clear principle of common law that were the principal is disclosed the agent is not to be sued.”

This is the principle relied upon by the Applicant.

14. In the Warehouse case the 1st and 2nd Appellants had been sued as agents of a disclosed principal in connection with the contract. The first Appellant denied existence of a contract. The second Appellant admitted he was an agent of first Appellant but submitted that he could not be sued.

15. These are not similar to the circumstances evident in this case at all. The Plaintiff is a distributor as distinguished from an agent. Unlike an agent, distributors, in law, are generally described as direct purchasers of products from a company and they then sell or distribute the product in the market and even offer after sales service. That is not the case with agents.

16. Accordingly, the Defendants ground alleging lack of *locus standi* has no basis, and fails.

Whether the suit is bad in law for Misjoinder or nonjoinder

17. The Defendant/Applicant states that the Plaintiff has clearly alleged that the consignment had been stored in Makupa Transit Shade Limited. Paragraph 26 of the Plaintiff explains the circumstances of the storage. Further that the consignments were held for failure to pay warehouse rent to the Makupa Transit Shade Limited. The Defendant thus alleges that the suit is bad in law and incurably defective for misjoinder or non-joinder.

18. On his part, the Plaintiff argues that the suit arises directly from and raises allegation against the Defendant. Further, that although they could also sue Makupa Transit Shade Limited, they still retained that option, and in any event they had pleaded that the Defendant is liable for the actions of Makupa Transit Shade Limited. In addition, the Plaintiff cites Order 1 Rule 9 Civil Procedure Rules which provides as follows:

“...no suit shall be defeated by reason of the misjoinder of non-joinder of parties.”

19. I am persuaded by the argument of the Plaintiff. In particular, I concur that the provisions of Order 1 Rule 9 do except defeat of a suit for misjoinder on non-joinder. Accordingly, I decline to strike out the suit on that ground as, in any event, an amendment to the plaint can easily cure that defect. This limb of the application also fails.

Whether the Plaintiffs suit is frivolous or vexatious

20. I will not dwell on this point. Although it is the fifth point in the Applicant's motion, other than the statement in paragraph 13 in the Affidavit of Michael Sangoro to the effect that he believed the suit to be frivolous and vexatious, there were no arguments in the submissions or grounds in the motion to support this prayer.

In the absence of any supporting arguments. This ground also fails.

21. The upshot is that the motion fails on all its limbs and is hereby dismissed with costs.

22. Orders Accordingly.

Dated, signed and delivered this 21st day of December, 2012.

R.M. MWONGO

JUDGE

Read in open court

Coram:

Judge: R.M. Mwongo

Court clerk: R. Mwadime

In Presence of Parties/Representative as follows:

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