REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU
Civil Case 266 of 2005

TIMBERLAND KENYA LIMITED……PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY……DEFENDANT

JUDGMENT

It is not in dispute that in the year 1999 the plaintiff imported three used Coe Veneer Roller Dryers in a dismantled form from the

United States. They were freighted to the Port of Mombasa in three 40ft containers and landed on 18th November, 1999. Thereafter the plaintiff paid Kshs.593,035/- being import duty, VAT and port charges and got two containers released to it. The third container was, according to the plaintiff, not released. When the plaintiff demanded for it, the defendant wrote back to say that it could not trace it and that it was investigating after which it would revert.

The plaintiff avers in its amended plaint that the defendant duped it into believing that it was investigating the matter and would revert but it did not. The plaintiff realized this fraud in the year 2005 and soon thereafter it filed this suit. In the circumstances it avers that the defendant cannot be heard to raise the defence of limitation.

The third container had parts of the released ones and the plaintiff claims that without the missing container the parts of the machinery in its possession are useless. It therefore claims a sum of Kshs.6,691,335/- being the value of the entire machinery plus the said port charges of Kshs.593,035/- as well as general damages for detinue and loss of user, costs and interest.

The defendant strongly disputes the plaintiff's claim and avers that the same is bad in law for lack of the requisite notice and is time barred under the **Kenya Ports Act Cap 391** of the Laws of Kenya (the KPA Act). It further avers that if it is liable at all then its liability is limited to the value the plaintiff declared.

The parties did not file an agreed statement of issues. However, from their pleadings, it is clear that five issues fall for my determination. They are whether or not the plaintiff served the defendant with the requisite notice; whether or not the plaintiff's claim is statute barred; if the claim is valid, whether or not the defendant is liable to the plaintiff for the lost container; the quantum of damages and costs as well as interest.

The first issue relates to notice. **Section 66(a)** of the Act prohibits the institution of any legal proceedings against the defendant until after "**at least one [month's]…written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent."**

In this case, the plaintiff's advocates served the Managing Director of the defendant with written notice **(Ex.11)** on 27th July 2005 after which it filed this suit on 31st October, 2005. That issue is therefore resolved in favour of the plaintiff.

The second issue is whether or not this suit is statute barred. This is the defendant's major defence. Counsel for the plaintiff submitted that the plaintiff realized only in 2005 that the defendant had duped it into believing that it was investigating the whereabouts of the container and could revert while its intension was to forestall legal action until the limitation period had expired. In the circumstances, they said the plaintiff's claim is valid under **Section 26** of the **Limitation of Actions Act**. At any rate, they concluded, the plaintiff applied under **Section 27** of that Act and got an extension of time.

In response to these submissions, counsel for the defendant cited **Section 66(b)** of the Act and submitted that as the container got lost in 1999/2000, this suit having been filed on 31st October 2005, is hopelessly time barred. They dismissed the extension of time the plaintiff obtained as of no consequence for two reasons. One, the Kenya Ports Authority Act has no provision for extension of the limitation period. Even if it had, they argued that the purported extension the plaintiff obtained in this case does not avail it as it was sought and obtained after this suit had been filed. Secondly, as the Court of Appeal held in **Mbithi Vs Municipal Council of Mombasa & Another, [1990-1994] EA 359, Sections 27** and **28** of the **Limitation of Actions Act**, which provide for extension of the limitation period, does not apply to Local Authorities. They urged me to hold that those provisions equally do not apply to statutory corporations such as the defendant.

Section 66(b) of the KPA Act requires:-

> **"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 pubic 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 continuing injury or damage, within six months next after the cessation thereof."**

As I have pointed out, the plaintiff readily concedes that under this section its claim is statute barred. It, however, contends that it obtained an extension of time and that on account of the defendant's fraud, by dint of **Section 26** of the **Limitation of Actions Act**, its claim is competently before court.

The validity of the order of extension of time can quickly be disposed of. It does not avail the plaintiff. This is because the relationship between the plaintiff and the defendant in this case was contractual. **Section 27** of the **Limitation of Actions Act** which provides for extension of the limitation period does not apply to contracts unless the alleged breach of contract leads to personal injury or death. A reading of **Subsection (2)** of that section together with **Sections 30 and 31** of the same Act makes this quite clear. They provide the criterion of what falls under their ambit. **Section 27(2)** states that:-

> "**The requirements of this subsection are fulfilled in relation to a cause of action if it is proved that material facts relating to that cause of action were or included facts of a decisive character which were at all times outside the knowledge (actual or constructive) of the plaintiff until a date which –**
>
> **(a) either was after the three-year period of limitation prescribed for that cause of action or was not earlier than one year before the end of that period; and**
>
> **(b) in either case, was a date not earlier than one hear before the date on which the action was brought."**

The material facts of a decisive character, according to **Section 30** are the facts relating to personal injuries or death "resulting from the negligence, nuisance or breach of duty constituting that cause of action." Trevelyan J also made this quite clear in **Mweu Vs Kabai & Another [1972] EA 242**.

We are in this case not dealing with personal injury or death. The purported extension the plaintiff obtained under Sections 27 and 28 was therefore otiose. This being my view of the matter, I do not wish to express any view on whether or not the KPA Act has provision for extension of the limitation period or whether or not Sections 27 and 28 of the Limitation of Actions Act apply to state corporations.

The second aspect of this issue is whether the plaintiff was duped into believing that the defendant was investigating the whereabouts of the third container to while away the time so that the claim would be statute barred.

Under Section 26(b) of the **Limitation of Actions Act** a right of action which has fraudulently been concealed by the defendant accrues when the fraud is discovered. It reads:-

> **"Where, in the case of an action for which a period of limitation is prescribed, either –**
>
> **(a) ……..**
>
> **(b) the right of action is concealed by the fraud of any such person as aforesaid; or**
>
> **(c) ……..**
>
> **the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it."**

Section 2 of the same Act defines fraud as "any conduct which, considering the special relationship between the parties concerned, is an unconscionable thing for one to do towards the other." The point then is whether the defendant in this

case fraudulently concealed the plaintiff's right of action.

When the plaintiff demanded for the third container, on

19th February 2000 the defendant wrote:-

> **"We wish to advise that the matter is being investigated and the outcome will be communicated to your Clearing and Forwarding Agents on completion of the same."**

In response to the plaintiff's letter of

12th May 2000, the defendant again wrote on 18th May 2000 and stated:-

> **"Please be advised that your Clearing Agent, M/s Mechanised Cargo Systems Limited is vigorously pursuing the matter with this office. But we are yet to complete our investigation for which your Clearing Agent was accordingly advised vide our letter of even reference dated ….2000. As a matter of fact, it is too premature to resorting (sic) to legal action taking into account of (sic) the plenty of time in you credit. Please allow us a little more time for all organs of the Port Security to complete their investigations. Your Clearing Agent will definitely keep you posted on the progress of our investigation."**

On

18th June 2000 the defendant again wrote that:-

> **"We are in receipt of your letter dated**
> **6th June, 2000, in respect of the above subject. We wish to advise you that the position of the subject container will be made known when the investigations are complete. Please bear with us."**

Thereafter the defendant does not appear to have written any other letter. PW1 testified that in or about July 2005 it dawned on the plaintiff that it had been duped. It thereafter instructed its lawyer who wrote the demand letter dated 27th July 2005 **Ex. 11** and on receiving no response thereto they filed this suit on 31st October, 2005.

Under these circumstances what does one make of the above correspondence? In my view, the plaintiff is right in saying it was duped into believing that investigations were still going on. The defendant specifically promised that it was going to revert to the defendant with the result of the investigations but there is nothing on record to show that the defendant advised the plaintiff or it agents of the outcome of the investigations. As a matter of fact, the defendant has not revealed the result, if any, of of its investigations. In the circumstances, it is safe to conclude that the defendant never carried out any investigations. If it did, it was obliged to advise the plaintiff of the outcome as it had promised for the plaintiff to decide on what to do. I cannot therefore accept the contention by counsel for the defendant that when correspondence ceased in 2000, the plaintiff should have realized that the defendant was not going to reply. I find the defendant's failure to be fraudulent. I therefore hold that it would be unconscionable to allow the defendant to get away with its fraudulent scheme.

That being my view of the matter, I find and hold that the defendant fraudulently lured the plaintiff into believing that it was carrying out investigations until the limitation period expired. The plaintiff is therefore entitled to take shelter under the provisions of **Section 26** of the **Limitation of Actions Act** and I find that its claim is not statute barred.

Turning now to the merits of the claim, it is not in dispute that the plaintiff imported machinery in three containers. The defendant's Senior Commercial Officer, Mr. Joseph Kinuthia Mwangi, DW1, quite correctly conceded that if cargo in the defendant's possession gets lost before delivery to the consignee or his agent, then the defendant as the bailee is liable. He was, however, quick to add that in this case upon payment of duty, VAT, and the defendant's shore landing charges, the defendant released all the three containers to the plaintiff or its agent Mechanised Cargo Systems Ltd. Pressed in cross-examination to provide proof for the delivery of the third container, he was unable to. In the circumstances I find and hold that the defendant is liable to the plaintiff for the lost container.

The plaintiff's director Mr. B. Patel, PW1, gave the value of the entire consignment of three containers as Kshs.6,691,335/- which is what the plaintiff has claimed in this case as well as the port charges of Kshs. 593,035/=. He said the lost container had parts of the other dryers and without them, the dryers in the plaintiff's possession are useless. He therefore prayed for judgment to be entered against the defendant in the total sum of Kshs.7,284,370/=.

While not disputing the plaintiff's contention that without the lost container the dryers in the plaintiff's are useless, the defendant, however, seriously disputed the sum of Kshs.6,691,335/= claimed. DW1 testified that even if the defendant is held liable, the plaintiff can only recover the equivalent of US Dollars 32,000 that it declared.

PW1 conceded that the plaintiff only declared US Dollars 32,000. He claimed that that was the plaintiff's share of the investment. The other sum, he said, was paid by the plaintiff's
USA partner. I cannot see how can be true. My hunch is that the plaintiff under-declared the value of the imported machinery to safe on import duty and port charges. It is against public policy for the court to assist a party to gain from its nefarious and fraudulent act. Whether or not I am wrong in this assumption, **Section 23(1)** of the KPA Act is quite clear:-

> **"The liability of the Authority for any loss or misdelivery of, damage to, or delay in the delivery of any goods deposited in a cloakroom shall not in any case exceed two hundred shillings unless at the time of such deposit the person depositing the goods declared that the value thereof exceeded that amount and paid, or agreed to pay, such additional charge as may be determined in the Tariff Book in respect of such excess value; and thereupon the liability of the Authority shall not in any case exceed such declared value."**

The defendant is only liable to the extent of the declared sum which is only US Dollars 32,000. Going by the rate at the time of filing this suit which gave Kshs.6,691,335/= for US Dollars 72,000, the equivalent of US Dollars 32,000 is Kshs.2973,926.65. The plaintiff is also entitled to Kshs.593,035/= being import duty, VAT and port charges. I therefore enter judgment for the plaintiff against the defendant in the sum of Kshs.3,566,961.65 plus costs and interest.

DATED and DELIVERED at Nakuru this 10th day of May, 2010.

D.K. MARAGA

JUDGE.