



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 219 of 2003

PANAFCON ENGINEERING LIMITEDPLAINTIFF

VERSUS

KENYA REINSURANCE CORPORATION LIMITEDDEFENDANT

RULING

This application has been brought by the Defendant in this matter seeking the striking out of the Plaint for being scandalous, frivolous, vexatious and otherwise an abuse of the process of the court. The Applicant is expressed to be brought under Order VI rule 13 (1) (b) and (d), and 16 of Civil Procedure Rules and Section 3A of Civil Procedure Rules.

Four grounds are cited as the basis of these application, on the face of it, which are as follows:-

- 1. THAT the existence of a concluded arbitration on the issues raised in the instant suit renders the suit filed herein by the Plaintiff res judicata.**
- 2. THAT the Plaintiff's claim which is grounded on the tort of detinue from 17th April 1998, is barred by the Limitation of Actions Act as it was lodged five years after the alleged cause of action arose.**
- 3. THAT in any case, this honorable court lacks jurisdiction to entertain the plaintiff's claim due to the existence of an arbitration clause in the contract the alleged breach of which the subject of this suit.**
- 4. THAT the suit is instituted is fatally defective and incapable of forming the borne of the subject suit.**

The application is opposed. The Plaintiff has filed grounds of opposition and a replying affidavit on which it entirely relies.

The first ground raised by the Applicant through it's advocate, Mr Mungla, is that the claim is barred by the Limitation of Actions Act being a claim based on the tort of detinue whose cause of action arose more than three years before 23rd April 2003 when the suit was filed. Counsel relied on the definition of detinue in Bullen and Leake and Jacob's Precedents of Pleadings which in part provides:-

"General Note.

An action lies for the specific recovery of personal chattels wrongfully detained from the person entitled to the possession of them, and also for damages occasioned by the wrongful detainer...is founded on tort.”

Miss Kilonzo for the Respondent urged the court to find that the Plaintiff’s claim did not lie in detinue. Counsel submitted that whereas a claim in detinue requires that goods still be detained and that a prayer for their release be included, conversely the Plaintiff’s claim was for damages for bailment under the contract between the parties. Counsel relied on the definition of ‘**Contract**’ under the limitation of Actions Act which interpretes contract under the Act as ‘**Contract includes bailment and quasi – contract**’, Counsel submitted that the limitation period for bailment as contract is six years. Section 4 (1) of the Act quite clearly states thus:-

“4(1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued.

(a) actions founded on contract”

Counsel further relied on Winfield and JOLOWICZ on tort 14th Edition 1994 by W. V. H. Rogers, M. A. at page 497 of the book where following is contained:-

“Apart from one or two minor matters this Act did not interfere with the concept of conversion at common law. However, the Act abolished detinue, which was wrongful retention of a chattel. In most cases of detinue there would be concurrent liability in conversion based upon a demand and refusal to return but as we have seen conversion required a positive act and had never lain where the Defendant once had the plaintiff’s goods but was unable to return them because they had been lost or negligently destroyed. Accordingly, to deal with this situation, the Act provides that an action lies in conversion for loss or destruction of goods which a bailee has allowed to happen in breach of his duty to his bailor (that is to say it lies in a case which is not otherwise conversion, but would have been detinue before detinue was abolished).”

Mr. Mungla in response submitted that the cause of action is clearly stated at paragraph 9 of the plaint as being unlawful detention of goods and that what the Plaintiff was seeking was for damages for the period of time their goods were unlawfully detained.

Paragraph 9 of the plaint provides:-

9. The Plaintiff avers that as a result of the Defendant’s act in denying the Plaintiff access to its aforementioned machinery and equipment, the Plaintiff was denied the use and benefit of the same for material gain and has suffered damages and pecuniary loss in the aggregate sum of Kshs.8,360,000.00/= for the 1,045 days the said machinery and equipment was in the Defendant’s custody as more particularly set out hereunder”.

I have considered the divergent submissions by both counsels to this matter on this issue of whether the action brought by the Plaintiff lay in detinue or contract. I do not think it needs much scrutiny of the plaint to answer this question. Paragraph 4 and 8 of the plaint provides:-

4. The Plaintiff avers that it was a term of the aforesaid contract upon determination of the said contract by the Defendant, the Plaintiff was under a duty as contractor to remove from the project site all temporary buildings, plant, tools equipment and goods belonging to or hired by it. The Plaintiff shall at the hearing of this suit seek to rely on the said agreement for its full effect and tenor.

8. As a result of the Defendant’s aforesaid acts, the Plaintiff avers that for a period of 1,045 days between 7th April 1998 and 14th February 2001, it was denied the use and benefit of its machinery,

plant and equipment as more particularly enumerated hereunder, which the Defendant had no colour of right whatsoever to detain or to refuse to grant the Plaintiff access to under the terms of their agreement.

Without belaboring the point, it is quite clear that the Plaintiff has brought its claim in contract and that it relies entirely on the contract entered into between it and the Defendant to support its claim. It is not quite correct to say that there is a claim for damages for unlawful detention of the Plaintiff's goods. The Plaintiff pleaded that it was denied unlawfully, access to its machine, plant and equipment. The Plaintiff's claim is dependent on the alleged act of the Defendant to deny the Plaintiff access to the goods in issue based on the terms of the contract between the parties. The Plaintiff's claim lies not in detinue but in contract. As such the relevant limitation period is six years and going by the Plaintiff, the suit was timeously filed.

The second ground urged by Mr. Mungla for the Defendant is that the suit is otherwise *res judicata* on grounds this matter was the subject of an Arbitration award reached as a result of a compromise settlement between the parties. Counsel submitted that the compromise agreement included an aspect in respect of the loss incurred by the contractor on plant and equipment for loss of user. That in the circumstances the sum agreed having been paid, the Plaintiff was barred under the doctrine of *res judicata* from litigating on the same issue. Mr. Mungla relies on the court of Appeal case of **GREENFIELD LTD. vs BABER MAWJI CA NO. 160 OF 1997** where **Gicheru JA** sitting with **Akiwumi** and **Owuor JJA**, who also agreed with him observed thus:-

“Section 7 of the Civil Procedure Act, Chapter 21 of the Laws of Kenya

the following terms:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Dealing with the aspect of res judicata where it becomes an abuse of the process to raise in subsequent proceedings matters which could and therefore should have been raised in earlier proceedings, Wigram, V. – C. In Henderson v. Henderson, (1843) 3 Hare 100, 115 had this to say:

*“Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties of that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.”*

The Phrase “every point which properly belonged to the subject of litigation” quoted in the passage set out above was expanded in Greenhalgh v. Mallard, [1947] 2 ALL E. R. 255, 257, by Somervell, L. J. in these terms:

“...res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but ...it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them.”

And in Yat Tung Investment Co. Ltd. v Dao Heng Bank Ltd. and another, [1975] A. C. 581, 590E, it was observed that:

‘The shutting out of a “subject of litigation” – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless “special circumstances” are reserved in case justice should be found to require the non-application of the rule.’

Mr. Mungla relied on the cited authority to submit that the Court of Appeal expanded the *res judicata* rule provided under Section 7 of Civil Procedure Act to include not only issues before the court but all issues that ought properly to have been raised in the suit. Mr. Mungla argued that the issue of loss of user was discussed during the Arbitration settlement and that if the Plaintiff failed to bring its entire claim of loss then, it cannot raise it in this suit.

Miss Kilonzo did not agree with the learned counsel for the Defendant. Learned counsel for the Respondent submitted that the cause of action arose on 7th April 1998 while the Arbitration award referred to by the Defendant was dated 6th April 1998. That further the parties exchanged various correspondences on the issue of detention of equipment which started on 7th May 1998 and ended on 12th February 2001. Most importantly, Miss Kilonzo submitted that the question of removal of Plant and equipment could only have arisen after the determination of the contract between the parties and that the determination was heralded by the final Arbitration Award dated 6th April 1998. Counsel submitted that the issue of removal of equipment could not have been discussed during the Arbitration process, as it had not arisen until after the settlement. Counsel cited clause 25(3)(c) of the contract between the parties. The Agreement is annexure ‘A’ to the replying affidavit of Joseph Njuguna Ngae. Clause 25(3)(c) provides:-

“25(3) In the event of the employment of the contractor being determined as aforesaid and so long as it has not been reinstated and continued, the following shall be the respective rights and duties of the employer and contractor:

(a)

(b)

(c)The contractor shall as and when required in writing by the Architect so to do (but not before) remove from the works any temporary buildings, plant, tools, equipment, goods and materials belonging to or hired by him. If within a reasonable time after any such requirement has been made the contractor has not complied therewith, then the employer may (but without being responsible for any loss or damage) remove and sell any such property of the contractor, holding the proceeds less all costs incurred to the credit of the contractor.”

Miss Kilonzo took her submissions further by stating that an Arbitration is not a suit and neither an Arbitration Award a decree of the court; and neither is a settlement the same as a hearing and determination. In the circumstances, counsel submitted, since the award was never registered in court, it does not fall within Section 7 of Civil Procedure Act.

Section 7 of Civil Procedure Act provides:-

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court”.

This provision is very clear, it shows what constituents a court should consider to determine whether a matter is *res judicata* or not. There must be either a “former suit(s)” or a subsequent suit before a court competent to try the matter in issue either between same parties, or parties claiming under any of them, which suit has been heard and decided before the *res judicata* can be invoked as a bar to a subsequent suit. What counsel for the Applicant is arguing is that since the issue of loss of user was discussed during the Arbitration settlement the Respondent should not be allowed to raise it again in court. It would appear that Mr. Mungla believes that an Arbitration Award is envisaged as ‘a hearing and determination’ of a court as provided in Section 7 of Civil Procedure Act. A court is defined under Section 2 of same Act as **“means the High Court or a subordinate court, acting in the exercise of its civil jurisdiction”**. An Arbitrator is not a court. An Arbitration Award is not a determination of the court unless it has been registered in court. There is no evidence before me that the Arbitration Award reached between the parties was ever adopted by the court.

In regard to the **Greenfields case**, Supra, my understanding of their Lordships decision was to make it clear that once a matter became ‘the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case.’ And that none of the parties will be allowed to open up the matter subsequently to bring out an issue that ought to have been raised earlier no matter the excuse given for the omission. That position is quite clear and binding to this court. However it does not advance the Applicant’s case as stated earlier. The court of appeal compared three causes of action between the parties to rule that each of those matters raised different issues for determination and further that in none of them could the issue raised in either have been envisaged or could have formed part of the subject matter of the litigation between the parties in all three cases. In the instant case. Mr. Mungla is urging me to consider the Arbitration Award vis a vis the plaint and the prayers there under to declare this case *res judicata*. Nowhere in the **Greenfields case** is it suggested that matters raised outside court and forming any settlement between the parties outside of civil litigation should be taken into consideration to determine this issue. The issue can only be raised within civil litigation before a court as defined under Section 2 of the Civil Procedure Act. Clearly the matter before this court does not fall under Section 7 of the Civil Procedure Act and the Applicant’s arguments to that end are misguided. Quite apart from the matter not falling within the provision of Section 7, I would go further to say that even if the Arbitration Award was “a hearing and determination” as provided there under, which it is not, the Plaintiff’s claim would still not be affected by the *res judicata* rule. The Plaintiff has clearly demonstrated that the cause of action could only have arisen and in fact arose after the settlement and Arbitration Award. There was no way it could have arisen before the award as events giving rise to the claim could only come after and therefore there was no way the matter could have been raised within the Award. Even in the scenario I have described above, the Plaintiff could not be accused of abusing the court process by failing to present its case in whole.

Let me conclude this matter by stating that the issue of whether the terms of the contract between the parties gave the Plaintiff the rights it now claims in this suit and whether the claim falls within the contract in the first place will be matters for determination by the trial court. For the reasons I have advanced in this ruling I find that this suit is neither statute barred nor barred by the *res judicata* rule. The Applicant has failed to demonstrate that the Plaintiff’s plaint is scandalous, frivolous and or vexatious or otherwise an abuse of the process of the court.

For these reasons the Application dated 22nd March 2007 is dismissed with costs.

Dated at Nairobi this 21st day of September 2007.

LESIT, J.

JUDGE

Read, signed and delivered in presence of:-

Mungla for applicant

Ngatia holding brief Miss Kilonzo for Respondent

LESIIT, J.

JUDGE