



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL DIVISION, MILIMANI
CIVIL CASE NO. 1063 OF 2002

SPANFREIGHT SHIPPING COMPANY LTD.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

The Defendant herein, KENYA PORTS AUTHORITY, seeks by chamber summons dated 16th September, 2004 an order to strike out the plaint under Order VI, rule 13(1)(b) of the Civil Procedure Rules. There is an alternative prayer for the suit to be dismissed. The application is made upon the following grounds as they appear on the face thereof:-

- (a) There was no contractual relationship between the parties in the transaction referred to in the suit.***
- (b) The Plaintiff has no cause of action against the Defendant in negligence or contract.***
- (c) The Defendant received the said goods in the discharge of its statutory duty under the provisions of Cap 391, Laws of Kenya, and the only cause of action available to the Plaintiff against the Defendant is for breach of the said statutory duties.***
- (d) The suit is a nullity and the court has no jurisdiction to hear it for noncompliance with the mandatory provisions of section 65 of Cap 391.***

As the application is brought under paragraph (b) of subrule 1 of rule 13 aforesaid, striking out of the plaint is being sought upon the ground that it is scandalous, frivolous or vexatious. The application is opposed by the Plaintiff, SPANFREIGHT SHIPPING CO. LTD., upon the grounds set out in the replying affidavit. Those grounds are, in brief, that the Defendant, as a warehouseman, was liable as such in negligence; that the loss, breach of contract pleaded and/or breach of the Defendant's statutory obligations do not fall within the provision to section 22 of Cap.391; that notice of the Plaintiff's claim was given in terms of section 65 of Cap. 391; that the Defendant unconditionally entered appearance and submitted to the jurisdiction of the court; that neither the acts of the Defendant nor the provisions of Cap. 391 can oust the jurisdiction of the court to hear and determine disputes involving the Defendant and other parties; and, in any event, the defendant did not plead in its defence the main ground upon which it now seeks to have the plaint struck out.

I have read the affidavit sworn in support of the application and that sworn in reply. I have also perused the plaint and the defence. Finally, I have given due consideration to the submissions of the learned counsels appearing, including the two cases cited by Mr. Oyatsi for the Defendant. The issues raised by the Defendant crystallize into the one all important ground: whether or not the court has jurisdiction to

entertain the suit. A suit placed before the court which it cannot hear for lack of jurisdiction may well be scandalous, frivolous or vexatious.

The Plaintiff's case against the Defendant, as set out in the plaint, is that the Defendant received certain containerized goods of the Plaintiff's principal at Kilindini Port as a bailee, *inter alia*, awaiting re-shipment elsewhere as the goods were on transit; that the Defendant was in breach of contract in that it failed to safely or securely store or warehouse the goods as a result of which the goods were stolen or lost; that further, the Defendant was negligent in its manner of loading, storing, transporting, handling or unloading of the goods leading to their loss. Particulars of both breach of contract and negligence are given. The Defendant's defence is that it did not receive the goods as a bailee but in due performance of its statutory duties under its mother Act, Cap. 391. Any remedy available to the Plaintiff is as prescribed in that statute, subject to the strictures also prescribed in the same statute.

The Defendant was established by section 3 of the Kenya Ports Authority Act Cap. 391 as a body corporate with perpetual succession and a common seal, and with power to sue and be sued in its corporate name. The Defendant has various statutory duties and powers as set out in sections 8,9,10 and 12 of the Act. The main duty of the Defendant is to provide a co-ordinated system of ports and facilities relating thereto (section 8 (1). The powers of the Defendant include the power to carry on the business of stevedore, wharfinger or lighterman (paragraph (d) of subsection 1 of section 12), and the power to act as warehouseman and to store goods whether or not such goods have been or are to be handled as cargo or carried by the Defendant (paragraph (e) of the same subsection).

Under section 22 of the Act the Defendant, acting as a warehouseman, shall be liable for the loss, misdelivery or detention of, or damage to goods delivered to, or in its custody where such loss, misdelivery, detention or damage is caused by want of reasonable foresight and care on its part or its employee, and subject to certain limitations set out in the proviso thereto. It appears to me that the Plaintiff's suit herein is a claim under section 22 aforesaid. Section 65 of the Act sets down the procedure for lodging a claim for compensation. Strict compliance with that procedure is necessary in order for one to be entitled to compensation for non-delivery of the whole of a consignment of goods, or for any separate package forming part of any such consignment which has been handled or warehoused by the Defendant. More importantly, section 66 of the Act prescribes certain limitations with regard to legal proceedings. That section says,

“66. 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) the action or legal proceeding shall not be commenced against the Authority until at least one month after 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;

(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”

Although in the replying affidavit sworn by JOHANNES ANDEREA GWADA it is deponed at paragraph 5 that the Plaintiff fully complied with the provisions of section 66 of the Act, no copy of any written notice with particulars of claim and intention to sue served upon the Defendant's Managing Director has been exhibited. No such notice is infact pleaded in the plaint. Paragraph 12 of the plaint pleads only a demand for payment having been made. This written notice to the Managing Director was a statutory condition precedent to filing suit.

The Plaintiff could have pleaded it, without ambiguity, in the plaint. It did not. It could have exhibited a copy of the notice in the replying affidavit. It did not. In these circumstances I can only infer that no such

notice was served. Without that statutory notice having been served there is no suit properly before the court. In the circumstances I will allow the Defendants application. The Plaintiff's suit is hereby struck out with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 12th DAY OF JANUARY, 2005.

H. P. G. WAWERU

JUDGE