

REPUBLIC OF KENYA

High Court Of Kenya At Nairobi
Milimani Commercial Courts

misc 529 of 2000

Palmac Oil Refiners Limited

v

Kenya Ports Authority Limited

RULING

This is an application under sections 3, 27, 28, 30 and 31 of the Limitations of Actions Act, section 65(3) and 66 of the Kenya Ports Authority Act, Section 95 of the Civil Procedure Act and Orders XLIX rule 5 and 36 Rule 3C(1) of the Civil Procedure Rules for leave to file out of time a claim for damages against the respondent. The claim arises from alleged damage on December 5, 1997 to the applicant's vessel known as Ex-Floriana.

The application is supported by an affidavit sworn by Churchill Midwa, the legal officer of the insurers of the applicant who have subrogated powers to pursue the claim and grounded on the following:-

- (a) That the (filing of the) suit was delayed by an attempt to resolve the matter out of court, which said attempt did not in the end succeed;
- (b) That the extent and scope of the damage caused by the respondent had not been ascertained; and
- (c) That the bulky, expansive technical and sophisticated nature of the damaged machinery necessitated requisition of scarce personnel with the requisite sophisticated technical know-how to inspect, assess and test the machinery and advise on the quantum of the loss occasioned by the damage.

Annexed to the supporting affidavit is a bundle of documents the contents of which in my view corroborate the grounds stated above. Several of the documents show that both the applicant and the respondent co-operated and participated in the survey of the vessel to establish the extent of the damage, a task which appears to have taken considerable time.

The section of the Limitation of Actions Act which limits the period within which actions of tort may be brought is 4(2). It specifies that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. However section 27 of the same Act provides that section 4(2) does not afford defence to an action founded on tort where the action is for damages for:-

“negligence ... and the court has, whether before or after the commencement of the action, granted leave for the purposes of the section.”

The application before me is for such leave. However, for section 27 to apply, the action must be for damages, for negligence “in respect of personal injuries of any person.”

As we are well aware, the intended action against Kenya Airports Authority is for damages arising from damage to a vessel. It is thus clear that the action is very different from one for damages in respect of personal injuries of any person. It follows from this that section 27 of the Limitations of Actions Act does not apply and has no relevance to the matters before this court.

For all those reasons, it is the finding of this court that the application presented to this court by Palmac Oil Refiners Limited for leave to file action out of time is misconceived and must fail. It is dismissed with costs.

Delivered on October 11, 2000 T

Mbaluto, Judge