Autoports Freigh Terminals Limited & another v Kenya Ports Authority (Civil Case 5 & 6 of 2017 (Consolidated)) [2023] KEHC 22223 (KLR) (7 July 2023) (Ruling)

Neutral citation: [2023] KEHC 22223 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 5 & 6 OF 2017 (CONSOLIDATED)

F WANGARI, J

JULY 7, 2023

BETWEEN

AUTOPORTS FREIGH TERMINALS LIMITED ..... PLAINTIFF

AND

KENYA PORTS AUTHORITY ..... DEFENDANT

AS CONSOLIDATED WITH

CIVIL CASE 6 OF 2017

BETWEEN

PORTSIDE FREIGHT TERMINAL LIMITED ..... PLAINTIFF

AND

KENYA PORTS AUTHORITY ..... DEFENDANT

RULING

1. This ruling relates to an two related applications dated February 13, 2019 and filed on February 22, 2019 and another dated April 9, 2019 and filed on April 12, 2019. It sought the following orders: -

    a. The Plaint dated January 23, 2017 and filed in court on the same date be struck out for failing to disclose any reasonable cause of action against the Defendant/ Applicant; and for being scandalous, frivolous or vexatious and for otherwise being an abuse of the process of court;

    b. Consequently upon Order 1 above, costs of the suit be awarded to the Defendant/Applicant.

2. The applications were opposed through grounds of opposition dated July 22, 2021 and filed on July 23, 2021. By consent of the parties, the two applications were consolidated as the cause of action in both suits were the similar.

3. Directions were taken that the two applications be disposed off by way of written submissions. Both parties duly complied by filing submissions and cited various authorities in support of their rival positions.

Analysis and Determination

4. I have considered the applications, responses, the submissions together with the authorities relied upon by the parties as well as the law and in my view, the following issues are for determination;

    a. Whether the applications have merit;

    b. Who bears the costs?

5. In answering the first issue, it would be imperative to consider the plaints as well as the statements of defence filed. Considering that the cause of action is the same, I shall first consider the plaint in H.C.C No. 6 of 2017. In the said plaint, it was averred that the Defendant despite being served with a court order staying its decision of nominating containers to the Plaintiff's Container Service Station (CFS), it blatantly disobeyed the order leading to massive losses which were enumerated at paragraph 18 of the plaint. The Plaintiff therefore among other reliefs, general damages and special damages to the tune of Kshs. 1,130,222,078.00/=. In a lengthy statement of defence dated 4th April, 2017 and filed on even date, the Defendant vehemently denied the claim and raised two pertinent legal issues seeking the striking out of the suit. These are; -

    i. The provisions of section 62 of the *Kenya Ports Authority Act* provides that any claim for compensation arising out of the exercise of the powers of KPA under section 12 of the Act shall be settled by Agreement or through Arbitration but that in any event, no recovery action or suit shall lie;

    ii. The provisions of section 66 of the *Kenya Ports Authority Act* provides that action or legal proceedings shall not lie or be instituted unless it is commenced within 12 months next after the act, neglect or default complained of. In the current suit, the alleged act, neglect or default complained of was contained in the Defendant's letter dated 21st January, 2016 which is more than one year to the date the present suit was instituted.

6. As for the plaint in H.C.C No. 5 of 2017, the factual matrix is no different from in H.C.C No. 6 of 2017. The only difference is the reliefs sought. The Plaintiff sought for special damages particularized as Kshs. 113,111,179.00/= and United States Dollars 1,254,260 which is equivalent to Kshs. 127,934,520.00/=, loss of profits and loss of business among others. The statement of defence in the matter raised similar issues particular in connection to sections 12, 62 and 66 of the *KPA Act*.

7. The two applications raised jurisdictional questions and if the court finds that it has no jurisdiction, it shall proceed to strike out the suits. The locus classicus on jurisdiction is the Court of Appeal case in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, where Nyarangi, J.A. had the following to say: - "...Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings

pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

8. The Defendant contends that the suits were based on section 12 of the *KPA Act* and as such, they offended the provisions of sections 62 and 66 of the said Act. For the Plaintiffs, it was submitted that the Defendant exercised powers outside both the purview of section 12 of the *KPA Act* as well as the License Agreement. A consideration of the provisions of section 12 of the KPA Act reveals that it bestows Kenya Ports Authority a plethora of powers among them the one set out at section 12 (2) (n) (ii) which is relevant to the present case. Both parties agree that KPA had the power to enter into agreements with any person for the performance or provision by that person of any of the services or facilities which may be performed as provided by the authority. To this end, there is no dispute that the licence agreements entered between the Plaintiffs and the Defendant was within the purview of the authority.

9. The cause of action in both cases is the Defendant's decision contained in the letter dated 21st January, 2016 suspending the nomination of containers to the Plaintiffs' Container Freight Stations (CFS). It is the suspension that led to the losses which the Plaintiffs now seek to recover from the Defendant. To put the issue into context, was the Defendant's action to suspend the nomination of containers to the Plaintiffs' CFSs among the powers donated under section 12 of the *KPA Act*? A review of the entire section 12 does not in any manner authorize KPA to suspend a person or entity performing or providing any services or facilities as contemplated under the Act. If the legislators intended to bestow such power upon KPA nothing would been harder than to do so. Having made reference to the provisions of section 12 (3) of the *East African Community Customs Management Act, 2004*, the power to revoke an appointment of a customs area is bestowed upon the Commissioner of Customs and the same is done through a gazette notice. To this end, I am in agreement with the Plaintiffs that the suspension was not based on the relevant law. By disregarding the East African Community Customs Management Act, the authority went against its own enabling statute. Section 12 (3) of *KPA Act* provides as follows: -

> "For the avoidance of doubt, it is hereby declared that subsections 1 and 2 relate only to the capacity of the authority as a statutory authority and nothing in those provisions shall be construed as authorizing the disregard by the Authority of any law." Emphasis added

10. I have equally considered the Licence Agreement dated 21st August, 2014. It has a total of twenty one (21) clauses. None of them makes reference to any act of suspension. The closest clause to suspension is clause 13 which deals with termination. However, the circumstances to warrant termination are well set out and they are not at any party's whims. At clause 18 of the said agreement, it provides that the agreement constituted the entire agreement between the parties about its subject matter. What was the subject matter? This is well set out at clause 2.1 (b) where it is clearly provided as follows; - "a non – exclusive Licence to handle, hold/store and deliver FCL containers at Licensee's premises situated at Msa/Block XIV/368, 369 & 372 Moi Avenue, Mombasa." I am thus satisfied that the dispute between the parties was neither founded on section 12 of the *KPA Act* nor the Licence Agreement. Having held as above, I now turn to consider the objection taken on section 62 of the *KPA Act*.

11. The section provides as follows: - "In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice." It therefore follows that to invoke the said section the issue must be a dispute emanating out of the powers bestowed upon the Authority by sections 12, 14, 15 and 16 of the *KPA*

Act. As held above, the suspension was not an exercise of powers set out at section 12. Section 14 is the power to enter and survey land. Section 15 is the power to enter land to prevent accidents, etc while section 16 is the power to enter land to alter position of pipes, etc. Based on the foregoing, it is obvious that none of the sections referred under section 62 of *KPA Act* are applicable. Therefore the issue of arbitration does not arise since the dispute is not in the nature contemplated by the Act.

12. Does section 62 of KPA Act oust this court's jurisdiction to consider the suit? The Plaintiffs' claim was for monetary loss occasioned to them as a result of Defendant's illegal actions to suspend nomination of containers to their CFSs. This clearly fall in all fours of the provisions of article 40 of the *Constitution* on a person's right to property. Can a statute override the *Constitution*? In *Modern Holdings (EA) Limited v Kenya Ports Authority* [2020] eKLR, the Supreme Court while agreeing with Ojwang, J (as he then was) in *Threeways Shipping Services (K) Limited v Kenya Ports Authority* [2012] eKLR held as follows: -

> "...We have no doubt in our minds that any judicial pronouncement that purports to elevate a statutory provision conferring jurisdiction above the express provision of the *Constitution* is erroneous. We wish to state that Section 62 of the *KPA Act*, though now succored by and anchored in article 159(2) (c) of the *Constitution*, cannot oust the jurisdiction conferred on the High Court expressly by Article 165(3) (a)..."

13. It therefore follows that despite the provisions of section 62 of the *KPA Act*, the High Court's unlimited jurisdiction cannot be ousted. I have considered the Defendant's authorities and particularly the cases of *Kenya Ports Authority v African Line Transporter Co*. [2014] eKLR, *Safmarine Container N.V of Antwerp v Kenya Ports Authority* [2012] eKLR and *Maison 425 v Kenya Ports Authority* [2012] eKLR. In all the three (3) cases, objections taken on section 62 of the *KPA Act* were upheld. I note that one of them is a Court of Appeal decision which is per the hierarchy of courts, it is binding on me. However, I note that all the above matters were based on powers bestowed upon the KPA by section 12 of the Act. In the present case, I have found for a fact that KPA's suspension of nomination of containers to the Plaintiffs CFSs was not one of the powers the legislature had intended and thus it was out of scope of section 62 application. The authorities therefore are distinguishable.

14. Was the suit time barred? Section 66 of the *KPA Act* provides as follows: -

> 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 any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or any such duty or authority, the following shall have effect: -
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> i. 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.
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> ii. 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 cessation thereof.

15. The cause of action stemmed from a letter dated 21st January, 2016. The present suits were filed on 23rd January, 2017. That is a period of twelve (12) months and two (2) days thereafter. Construing

this period mechanically will lend credence to the Defendant's argument. However, as a starting point, section 57 (a) of the *Interpretation and General Provisions Act* (IGPA) provides that the period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done. Therefore, I agree with the Plaintiffs that January 21, 2016 when the letter was done is excluded. The suits ought to have been filed by January 21, 2017. This is what is considered as the last day. This day fell on a Saturday and this is an official non-working day while the day after was a Sunday as per section 57 (b) of the *IGPA*. These are excluded days for purposes of computation of time. Having filed the suit on 23rd January, 2017 which was the next day afterwards not being an excluded day, I have no reason to hold that the suits were filed timeously. I thus find no merit on the objection taken on section 66 of the KPA Act.

16. Before concluding on this issue, though none of the parties addressed it in their respective submissions, I note that the letter is dated January 21, 2016. However, in the Judicial Review Application attached to the plaint in H.C.C.C No. 6 of 2017, it was averred that the letter was received on 22nd January, 2016. Therefore, time could only run from the time of receiving the letter. January 22, 2016 was a Friday and considering that it was the day it was received, it was excluded. 22nd and 23rd January, 2016 were excluded days as per section 57 of the *IGPA*. Even if the Plaintiffs had not invoked the last day as under section 57 (b) of the *IGPA*, I note that time could only run from January 24, 2016 which was the next day afterwards, not being an excluded day.

17. On striking out the plaint, order 2 rule 15 of the *Civil Procedure Rules* provides for striking out of pleadings. It provides as follows: -

> 15 (1) At any stage of the proceedings, the court may order to be struck out or amended any pleading on the ground that: -
>
> a. It discloses no reasonable cause of action or defence in law;
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> b. It is scandalous, frivolous or vexatious; or
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> c. It may prejudice, embarrass or delay the fair trial of action; or
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> d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

18. Striking out of pleadings is a drastic remedy that should only be resorted to where a pleading is a complete sham. The Court of Appeal in the case of *Blue Shield Insurance Company Ltd vs. Joseph Mboya Oguttu* [2009] eKLR restated these principles as follows:

> "...The principles guiding the Court when considering such an application which seeks striking out of a pleading is now well settled. Madan J.A. (as he then was) in his judgment in the case of *D.T. Dobie and Company (Kenya) Ltd v Muchina* (1982) KLR 1 discussed the issue at length and although what was before him was an application under Order 6 Rule 13 (1) (a) which was seeking striking out a plaint on grounds that it did not disclose a reasonable cause of action against the defendant, he nonetheless dealt with broad principles which in effect covered all other aspects where striking out a pleading or part of a pleading is sought...We may add that like Madan J.A, said, the power to strike out a pleading which

ends in driving a party from the judgment seat should be used very sparingly and only in cases where the pleading is shown to be clearly untenable…"

19. As guided above, this is power which ought to be sparingly used and in cases which are clearly a sham. While considering such an application, one is required to consider all facts but not embark on the merits of the case as those are reserved for the Trial Judge. I have considered the pleadings on record and I have no doubt that they fall on the categories enumerated under order 2 rule 15. I think I have said enough to show that the two applications lack merit. The consolidated suits shall be heard to their logical conclusion.

20. Lastly, on the issue of costs, it is settled that the same follows the event. That is the import of section 27 of the *Civil Procedure Act*. The court reserves its discretion on whether to award costs to either party or not. This was well enunciated by the Supreme Court in the case of*Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others* [2013] eKLR. These are preliminary applications and having sustained the suits, the only order that lends itself on costs is that the same shall abide the outcome of the suits.

21. Following the foregone discourse, the upshot is that the following orders do hereby issue: -

    a. The notice of motion application dated February 13, 2019 as well as the one dated April 9, 2019 are found to be without merit and they are hereby dismissed;

    b. Costs to abide the outcome of the suits.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF JULY, 2023.

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F. WANGARI

JUDGE