



REPUBLIC OF KENYA



KENYA LAW
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**Autoports Freight Terminals Limited v General (Civil Case
10 of 2017) [2023] KEHC 22163 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 22163 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 10 OF 2017
F WANGARI, J
JULY 7, 2023**

BETWEEN

AUTOPORTS FREIGHT TERMINALS LIMITED PLAINTIFF

AND

THE ATTORNEY GENERAL DEFENDANT

RULING

1. The Plaintiff instituted suit against the Defendant for : -
 - a. Special and general damages as claimed in paragraph 18 (a) and (c) above;
 - b. Special damages in the sum of United States Dollars 1,065,050 as pleaded in paragraph 18 (b);
 - c. Costs of this suit;
 - d. Interest on items (a), (b) and (c) above at court rates from the date of filing suit until payment thereof in full.
2. The Defendant entered appearance on January 2, 2018. The Defendant further filed a notice of preliminary objection dated May 17, 2018. It raised several grounds among them that the suit is statute time barred as provided by section 3 of the *Public Authorities Limitations Act*.
3. Directions were taken that the preliminary objection 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 parties' pleadings, the preliminary objection, 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 preliminary objection is merited;
 - b. Who bears the costs?
5. On the first issue, the Defendant has raised a preliminary objection on among other grounds, section 3 of the [Public Authorities Limitation Act](#). Section 3(1) provides as follows: - "No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued."
6. The parameters of consideration of a preliminary objection are now well settled. A preliminary objection must only raise issues of law. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co Ltd vs West End Distributors Ltd* [1969] EA 696 At page 700, Law, JA stated: -

"A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

At page 701, Sir Charles Newbold, P added: -

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."
7. For a preliminary objection to succeed the following tests ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit or application.
8. I am satisfied that as per the case of Mukisa Biscuit (above), limitation of action is a point of law which is enough to dispose off a suit. If the court finds in favour of sustaining an objection, it is automatically stripped of jurisdiction to consider the matter further. In the celebrated case of Owners of the [Motor Vessel "Lillian S" v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR, Nyarangi, JA 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..."
9. The Defendant contends that the suit was filed out of time. In deciding on the issue, it is imperative to consider what the dispute in question was. I have perused the plaint dated January 27, 2017 and more particularly paragraph 16 thereof. The Plaintiff stated that as a result of closure of its facility due



to the letter dated January 28, 2016, it suffered damages and colossal losses to its business. Paragraph 18 specifies and pleads the losses averred. As per section 3 (1) of the Public Authorities Limitation Act, the proceedings must be based on tort. Tort means a wrong recognised by law. To address the wrongs done on it, the Plaintiff filed judicial review proceedings which I agree that they are special proceedings as they are neither civil nor criminal. This is in consonance with the Court of Appeal decision in Commissioner of Lands v Hotel Kunste [1997] eKLR cited by the Plaintiff.

10. To fit the intention of the framers of the Public Authorities Limitation Act and more particularly section 3 thereof, a claim should be based on tort or contract. From the contract, it is clear that the same was between the Plaintiff and Kenya Ports Authority (hereinafter referred to as KPA). The Kenya Revenue Authority which occasioned the closure of the Plaintiff's business are not parties to the contract. It is settled that a contract only binds the parties thereto. To this extent, non-parties cannot seek to enforce terms of contract they are not part of. I am thus satisfied that the claim was not based on contract.
11. Was it based on tort? It is not in dispute that the Plaintiff was wronged by Kenya Revenue Authority as a result of the letter dated January 28, 2016. The wrongs perpetrated as a result of the said letter were addressed through the judicial review proceedings and therefore not amenable to re-litigation. To this end, I am satisfied that the Plaintiff's claim was equally not based on a tort as that was addressed in the judicial review proceedings. Having found as such, I need not consider the other grounds raised. I think I have said enough to show that this preliminary objection is not merited. The suit shall proceed to its logical conclusion.
12. 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. 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. This is a preliminary application and having sustained the suit, the only order that lends itself on costs is that the same shall abide the outcome of the suit.
13. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. The Notice of Preliminary Objection dated May 17, 2018 is without merit and is hereby dismissed;
 - b. Costs to abide the outcome of the suit.

Orders accordingly.

Dated, signed and delivered at Mombasa this 7th day of July, 2023.

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F. WANGARI

JUDGE

In the presence of;

Buti Advocate for the Plaintiff

N/A for the Defendant

Barile, Court Assistant

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