



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 594 OF 2000**

**RELIABLE FREIGHT SERVICES LIMITED.....PLAINTIFF**

**VERSUS**

**1. MEDITERRANEON SHIPPING CO. (PTY) LTD**

**2. KENYA PORTS AUTHORITY.....DEFENDANTS**

**R U L I N G**

1. On 27/11/2002, the 2<sup>nd</sup> defendant filed a Notice of Preliminary in which it contended that the plaintiff has no locus standi to bring this suit and that the suit should thus be dismissed. The court on its own motion requested the parties to address it on its jurisdiction to handle the matter with focus being placed on Section 62 of the Kenya Ports Authority Act.

2. On those two preliminary points parties filed written submissions then attended court to highlight the same. The 2<sup>nd</sup> defendant filed its submissions on 18/8/2017 those by the 1<sup>st</sup> defendant were lodged on 23/8/2017 while those by the plaintiff were filed on 21/5/2019. When the matter came up for the highlighting of submissions, the plaintiffs' counsel opted not to highlight while the defendants offered their highlights.

3. The submission by the 2<sup>nd</sup> defendant as written and highlighted was to the effect that the court's jurisdiction over the matter is ousted by dint of Section 62 of Kenya Ports Authority Act and that the plaintiff lacked locus standi to bring the action on the basis of the fact that an agent acting for a disclosed principal cannot sue on own rights.

4. On jurisdiction, the advocate said that the suit alleges failure by the 2<sup>nd</sup> defendant in execution of its powers under Section 12 of the Act and therefore the law mandates that no suit lies against the authority but the compensation thereof be negotiated and agreed with the authority and on default determined by a single arbitrator appointed by the Chief Justice.

5. Counsel cited to court two decisions in KPA vs CUSTON (K) LTD and KPA vs Modern Holdings Ltd. In the first suit the Court of Appeal reiterated that there being a mandatory statutory arbitration parties were not at liberty to contract in a manner that circumvents the statutory provisions while on the later suit the same court of appeal held that Section 62 further the value and principles at article 159 of the constitution. There was also the decision in *Allrakia vs Aqa Khan [1969] EA 613* that parties cannot confer jurisdiction even by consent.

6. On the locus standi of the plaintiff to institute the suit, the counsel for the 2<sup>nd</sup> defendant, submitted that the plaintiff expressly pleaded that it was an agent for a disclosed principal deprived the locus standi to bring the suit Resort was then made to the words of the author of *Halsbury's Laws of England, 4<sup>th</sup> Editions Vol. 43* on what rights are constituted in a bill of lading. The decision in *Semell vs Burdick, the Zoe [1884] 10 APP, 74*, was also cited for the proposition of the law that the endorsement and delivery of a bill of lading does not necessarily move the absolute or general interest in the goods unless there be an express intention by the parties or payment for the value of such goods. It was then contended that the same principles applied even to agents like clearing and forwarding agents whose purpose is to have the goods cleared unless there be clear intention to have the title pass to such agents. The Kenya decision in *PIL Kenya Ltd vs John Oppong [2009] eKLR* was also cited to support the 2<sup>nd</sup> defendant's position.

7. For the 1<sup>st</sup> defendant, counsel largely associated himself with the position taken and submissions offered by the 2<sup>nd</sup> defendant and concerning the jurisdiction of the court being ousted by the provisions of Section 62 of the Act while reinstating the fact that public policy prohibited parties from contracting outside the statute so as to circumvent its provisions and purpose.

8. For the plaintiff the written submissions were to the effect that the point raised does not qualify as a preliminary objection because it is incapable of disposing the entire suit because the suit against the 1<sup>st</sup> defendant will remain unaffected.

9. Counsel cited to court the immortalized position of the law enunciated in the celebrated case of *Mukisa Biscuits vs Nest End Distributors Ltd [1969] EA 696* urging that the improper raising of points as preliminary objection ought to stop. Nothing much was said by the plaintiff on its *locuse standi* same that to the plaintiff the suit was based on Article III Rule 2, Hague Rules and largely against the 1<sup>st</sup> defendant.

10. I have had the benefit of reading the submissions filed by the parties and the law relied upon in line with the pleadings and I take the view that the two points argued as preliminary objection address two distinct areas of law; jurisdiction and the standing of the plaintiff to bring the suit. There being a question of jurisdiction it supercedes all other questions because before a court determines its jurisdiction it cannot set to deal with any other thing in the matter. I will thus deal with the question of jurisdiction before I can delve into the question of standing of the plaintiff.

#### **Does the court have jurisdiction in the matter?**

11. The established position of the law is that court's jurisdiction must be conferred by the constitution and therefore in every matter filed in court, the odds are only two; the court has or has no jurisdiction at initio and not even the parties can confer upon the court the jurisdiction it does not have<sup>[1]</sup>.

12. I would entertain some discomfort on how Section 62 Kenya Ports Authority Act, sits with the constitutional right to access to justice, and the position of the superior courts that ouster of jurisdiction must be clear and unambiguous<sup>[2]</sup> but I note that the decisions cited to court are binding upon it having been made by the Court of Appeal and I am bound by the doctrine of precedence to follow the same. I am more bound taking into account the fact that the Court of Appeal has in the past delivered itself on that point in a matter that the parties and the court never addressed the issue at trial at all and made the issue the fulcrum of its determination of the appeal. That only goes to underscore the fact that jurisdiction is all important and can be raised at any time in the cause of the proceeding even on appeal for the first time. In *Kenya Ports Authority vs Modern Holdings [E.A.] Ltd [2017] eKLR* the Court of Appeal said:

**“In our view...the earlier decisions including Kenya Ports Authority vs Kuston (K) Ltd (supra) remain good law. We say, finally, that where the constitution or statute confers jurisdiction upon a court, a tribunal, person or body or any authority, that jurisdiction must be exercised in accordance with the constitution or statute. This time without number been stated by courts”.**

13. Here, in this suit, the plaintiffs claim against the 2<sup>nd</sup> defendant is pleaded at paragraphs 11 & 12 to have been grounded on the failure by the said defendant to deliver the goods once discharged into its possession. That pleading clearly places the claim to fall under the defendant's powers conferred by Section 12 of the Act. It is therefore a claim to be governed by Section 62 of the Kenya Ports Authority Act. The intention of parliament remains that the dispute be dealt with as enacted and not otherwise. This court being a court of law has the singular duty to further and protect the spirit, letter and purpose of the law and must own up to the fact that the law requires parties to negotiate their dispute and on default seek arbitration and not come to court. That remains the law even though I have learnt from the decision in *Modern Holdings Ltd vs Kenya Ports Authority [2018] eKLR* that the question is pending determination by the Supreme Court. Before the apex court say otherwise the law remains that the plaintiffs claim against the 2<sup>nd</sup> defendants does not lie before the court and ought to be struck out which I hereby do with costs to the 2<sup>nd</sup> defendant.

14. Having done so, the protection intended and provided by Section 62 of the Kenya Ports Authority Act is specific to the 2<sup>nd</sup> defendant and not applicable to the 1<sup>st</sup> defendant. On that basis, only the suit against the 2<sup>nd</sup> defendant is struck out but that against the 1<sup>st</sup> remain.

#### **Is the plaintiff possessed of locus**

##### **standing to bring the suit?**

15. Having read the pleadings and submissions offered this point to me is a matter that may not qualify as a pure point of law to be raised and canvassed as a preliminary objection.

16. That an agent for a disclosed principle may not sustain a suit on own right is just but a general rule with its own exceptions. One of the exceptions is that where an agent acts for a disclosed foreign principle the agent is deemed to contract personally with the third party<sup>[3]</sup>.

17. It is therefore not a clear cut case that every time one reveals his capacity as an agent for a disclosed principle then it is forever deemed incapable of pursuing his claims in court. Infact the decision and treatice cited to court by the 2<sup>nd</sup> defendant confirm the rule is not absolute Lordwright in *Montgomerie vs UK Mutual Steenship Association [1891] 1 QB 370* at page 371, point to the fact that there are indeed situations when an agent for a disclosed principle even where the agency and contract is revealed in a bill of lading may sue on own right. In such situations evidence needs to be adduced to establish the agreement or understanding between the parties. The author of *Halsburys Laws of England [Supra]* for example says:-

**“However, where the agent has the authority, express or implied, to deal with the bill of lading so as to pass the property in the goods, transfer of a bill of lading by him in accordance with his authority will be equivalent to a transfer by the principle himself, and will pass the property to the transferee”.**

18. Upto this point it is enough to say that the extent of endorsement of the bill of lading and the interest of the plaintiff in the goods is a matter for determination upon production of evidence. It is a matter thus ill-suited to be argued as a preliminary objection. I dismissed that limb of the objection with costs to the plaintiff.

19. The upshot is that the suit against the 2<sup>nd</sup> defendant is struck out with costs but the suit against the 1<sup>st</sup> defendant shall proceed to hearing

on the merits.

**Dated and delivered at Mombasa this 17<sup>th</sup> day of October 2019.**

**P.J.O. OTIENO**

**JUDGE**

---

[1] Adero vs Ulinzi Sacco Society [2002] 1 KLR 577

[2] Per Supreme Court in Judges and Magistrates vetting Board vs Centre for Human Rights and Democracy & 11 Others [2014] eKLR

[3] Mayfair Holdings Ltd vs Ahmed [1990] eKLR