



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 118 OF 2016

SUMMIT COVE LINES CO. LTD.....PLAINTIFF

VERSUS

KENYA PORTS AUTHORITY.....DEFENDANT

RULING

1. A preliminary objection on a pure point of law is argued on the assumption that the facts as pleaded by one side are true or admitted by the opposite side raising the objection[1].

2. Before court is an objection by the defendant worded as follows:-

i) THAT this Honourable Court has no jurisdiction to hear, entertain and/or determine the matters in question herein by virtue of Section Sec 4(1) (c) of the Limitation of Actions Act, Cap 22 of the Laws of Kenya.

ii) THAT this Honourable Court has no jurisdiction to hear, entertain and/or determine the matters in question herein by virtue of mandatory provisions of Section 66(b) of the Kenya Ports Authority Act, Cap 391 of the Laws of Kenya.

iii) THAT the suit filed by the Plaintiff herein is incompetent, fatally defective, misplaced and bare of any reasonable cause(s) of action, ground(s) or proof to warrant the grant of the orders sought and the same should be struck out.

iv) THAT consequently this suit is an abuse of this Honourable Court process and should be struck out with costs to the Defendant.

3. To put the matter into context one needs to interrogate the facts which are not disputed as are appurtenant to the issue at hand. Upon reading the pleadings filed, I discern the facts disclosing the cause action to be pleaded by the plaintiff at paragraph 13 of the plaint and answered by the defendant at para 10 of the statement of defence.

Those paragraphs read:-

Paragraph 13: The Plaintiff further states

that on or about 28th August, 2016 the Defendant unilaterally and without any notice terminated the Tender Agreement between the Plaintiff and the Defendant and alleging that the same has since been overtaken by events.

Paragraph 10: The Defendant totally denies the contents of paragraph 13 of the Plaintiff by stating that even though the Defendant wrote to the Respondents on 28th August 2016 indicating that the services tendered for had been overtaken by time, that communication did not in any way terminate any tender agreement as alleged by the Plaintiff. The Defendant vividly states that all along there was no tender agreement in existence between the Plaintiff and the Defendant.

4. From the two pleadings, it is not disputed that the only time the parties ever developed a misunderstanding as to their dealings is upon the plaintiff receiving the letter of 28/8/2016.

5. On the plain reading of the pleading, that is the time the plaintiff felt aggrieved and hence when the cause of action arose. But in any event the defendant makes a very critical point of law in its pleading by stating that there was no contract between the parties. That must be seen to be adverting to the provisions of section 68 of the Public Procurement and Asset Disposal Act. That section provides:-

“(i) The person submitting the successful tender and the procuring entity shall enter into a written contract based on the tender documents, the successful tender, any clarifications under section 62 and any corrections under section 63.

(ii) The written contract shall be entered into within the period specified in the notification under section 67(1) but not until at least fourteen days have elapsed following the giving of that notification.

(iii) No contract is formed between the person submitting the successful tender and the procuring entity until the written contract is entered into”.

6. Indeed as no formal contract was executed between the parties there could not have been a contract in the year 2008 for the plaintiff to sue upon upto the time the defendant told it of there being no chance of proceeding with the tender. It thus cannot be said that the cause action being grounded on a contract arose or accrued in the year 2008. It did not. In any event the letter of 28/8/2016 must be seen to be the mode and means by which the defendant sought to terminate any relationship or expectation that ever exists between the parties. That being the case when the suit was filed it was filed within the time provided by Section 66(b) and the matter is not statute barred.

7. For that reason alone, the objection is improperly taken, it must fail and is hereby dismissed with costs.

8. Having said that, I note that the objection is grounded on both Section 4(1) Cap 22 and Section 66 of Cap. 391. Granted that Cap 22 is the general statute that provide for the general law on limitation, I consider it that it is not applicable to the defendant because the defendant as a creature of a statute has its own unique law which is a complete code under Cap 391. I consider Section 66 Kenya Ports Authority Act to be so specific and complete for the defendant’s purposes that one does not need to invite the general provisions under Cap 22.

Dated and delivered at Mombasa this 02nd day of March 2018.

P.J.O. OTIENO

JUDGE

[1] Mukisha Biscuits Co. vs West End Distributors Ltd [1969] EA 696