



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KOOME & MURGOR, J.J.A.)

CIVIL APPEAL NO. 53 OF 2018

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

AND

SUMMIT COVE LINES

COMPANY LIMITED.....RESPONDENT

(Appeal from the ruling and order of the of the High Court of Kenya at Mombasa (P.J. Otieno, J.) delivered on 2nd March 2018

in

Mombasa H.C.C.C. No. 118 of 2016)

JUDGEMENT OF THE COURT

In this appeal, **the appellant, Kenya Ports Authority**, is dissatisfied with the decision of the High Court which determined that the defence of limitation of time under **section 4 (1)** of the **Limitation of Actions Act Cap 22** and **section 66** of the **Kenya Ports Authority Act** were not applicable to the respondent, whereas the pleadings specified that the cause of action arose from an alleged breach of contract by the appellant.

The background of the case is that in January 2008, the appellant requested interested parties to present bids for the operation of an empty container yard within the vicinity of the Port of Mombasa which would be used for storage, handling and transportation of empty containers. Summit Cove lines Company Limited, the respondent was found to have complied with the tender specifications, and was awarded the tender vide a Notification of Award Letter dated 12th May 2008. Following receipt of the letter, the respondent proceeded to acquire equipment, engage manpower to undertake the services, and to renovate a plot on which to undertake the operations.

On 26th August, 2016 the appellant wrote to the respondent informing it that the storage for empty containers was no longer necessary as this had been overtaken by events. It advised that should additional storage be required in the future, another tender would be floated under the Public Procurement Disposal Act of 2015. The letter aggrieved the respondent, and prompted it to institute proceedings against the appellant on 1st December 2016 for breach of contract, compensation for losses incurred, general damages, investment costs for machinery and equipment to undertake the services following the tender award and for loss of business.

On 14th March, 2017 the appellant filed a Preliminary Objection challenging the jurisdiction of the court to entertain the suit on the grounds that the suit was statute barred by reason of **section 4 (1) (c)** of the **Limitation of Actions Act**, and the mandatory provisions of **section 66** of the **Kenya Ports Authority Act, Cap 391**.

Upon considering the arguments of the parties, as well as the law, the learned judge dismissed the Preliminary Objection with costs and concluded that;

“...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 of 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.”

In its written submissions of 20th June 2018, the appellant submitted that the learned judge misdirected himself in the interpretation and application of **section 4 (1)** of the **Limitations of Actions Act** and **section 66** of the **Kenya Ports Authority Act**.

It was submitted that in the absence of a procurement contract between the appellant as a procuring entity and the respondent as a tenderer, the learned judge had correctly concluded that no formal contract existed between the parties between 2008 and the time the respondent was informed of the cancellation of the tender; that since there was no tender agreement or procurement contract signed between the parties that could sustain a claim for breach of contract, as pleaded, a cause of action could not have arisen upon issuance of the letter of 26th August, 2016. Counsel argued that this finding was based on **Section 68** of the **Public Procurement and Asset Disposal Act**, which specifies that a contract is created when a written agreement is entered into between the person submitting the successful tender and the procuring entity, so that since that there was no contract between the parties when the letter of termination was issued, there was nothing to terminate.

If anything, counsel asserted, since there was no contract, only the tender award notification letter could have been subjected to the six-year statutory limitation period imposed by **section 4 (1)** of the **Limitation of Actions Act**, as well as **section 66** of the **Kenya Ports Authority Act**, and that in any event, any contract that might have existed had in effect lapsed following the expiry of the 14 days' period specified in the tender award notification.

Opposing the appeal, the respondent who also filed its submissions dated 4th June, 2018 argued that, the cause of action arose on 28th August 2016 when it received the notification of termination of the tender award from the appellant, and further, that the appellant had not pleaded any specifics in its defence as to when, if at all, the respondent's suit was time barred.

It was submitted that the learned judge rightly found that the notification of 28th August, 2016 gave rise to a cause of action against the appellant, and consequently, both the Limitation of Actions Act and the Kenya Ports Authority Act were not applicable to the circumstances of the case. It was further asserted that the appellant's Preliminary Objection relied heavily on the facts of the case and not on law, which facts require to be proved during the trial and not in a preliminary objection which must be a pure point of law.

We have considered the pleadings, the parties' submissions and the law and are of the view that the core issue for consideration is whether the suit was statute barred by the time it was instituted on 1st December, 2016. To do so, it will be essential to consider whether the cause of action arose after receipt of the letter of Notification of award dated 12th May, 2008 or upon notification of termination of the tender on 26th May, 2016.

To address the issues, we will bear in mind the tenets applicable to Preliminary Objections, which were succinctly put in the case by Law, JA in the celebrated case of **Mukisa Biscuit Manufacturers Ltd vs Westend Distributors Limited [1969] E.A 696** wherein it was stated that;

“...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection 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.”

This case is concerned with a plea for limitation, and if we understand the appellant correctly, its complaint is that following the notification to the respondent that it had been awarded the tender, no tender agreement or procurement contract was entered into between the appellant and the respondent that could sustain a claim for breach of contract, as pleaded. As a consequence, the letter of notification of termination of 26th August, 2016 was not based on any contract, and therefore, that the learned judge misdirected himself in finding that the letter of 28th August, 2016 had given rise to a cause of action.

When we consider the ruling, the learned judge found that, *“...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 of action being grounded on a contract arose or accrued in the year 2008. It did not.”*

In other words, what the learned judge was saying is that, no contract existed between 12th May, 2008 and 26th August, 2016 upon which a cause of action could be founded. This finding is consistent with the appellant's case that, no formal contract existed between the parties pursuant to the tender award on 12th May, 2008, and by the time the respondent was notified of the tender cancellation.

Needless to say, the appellant's submissions make it clear that the point of departure from the decision was the learned judge's finding that the letter of 26th August, 2016 which cancelled the tender, gave rise to a separate cause of action. Indeed, the learned judge found that the letter of cancellation had given rise to a separate cause of action, which entitled the appellant to institute the suit. The judge went on to find that the suit was not statute barred by either the Limitation of Actions Act or under the provisions of the Kenya Ports Authority Act.

In considering whether a contract existed, the respondent contended at **paragraph 7** of the Plaintiff that;

“...vide the Defendant's letter dated 12th May 2008 the Defendant formally informed the Plaintiff that they had indeed won the advertised tender.”

At **paragraph 8** it further stated;

“...that pursuant to the Defendant’s formal information to the Plaintiff that they had won the said Tender, the Plaintiff states that it embarked on acquisition and preparation of all the required machines, manpower and the premises for storage of the empty containers ...”

In its defence, the appellant denied that any contract was signed between the appellant and the respondent in respect of the tender that was awarded, and specified that the letter of 12th May, 2008 merely notified the respondent that it had won the tender award.

The above assertions are clear that by a letter dated 12th May, 2008 the appellant notified the respondent that it had won a tender for provision of storage. Based on the notification, it commenced investment into storage facilities. It is apparent from the pleadings that subsequent to the letter of 12th May 2008, no formal contract was entered into between the appellant and the respondent. And that is why the learned judge concluded, and we agree, that no contract existed between the time of the notification of the tender award, and the notification of termination.

That said, was the suit based on a cause of action arising from the notification of tender award or the notification of the termination? The Plaintiff is unequivocal that the respondent relied on the tender award notification letter of 12th May 2008 as the basis of its claim against the appellant, and as a consequence, time would begin to run from that date.

Section 4 (1) of the Limitation of Actions Act, provides;

“(1) the following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(a) actions founded on contract;

(b) actions to enforce a recognizance;

(c) actions to enforce an award;

(d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

(e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.”

And section 66 of the Kenya Ports Authority Act stipulates;

“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 of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect-

(a) the action or legal proceeding shall 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;

(b) 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 case of continuing injury or damage, within six months next after the cessation thereof.”

From the date of the letter of notification of the award to the date the suit was instituted on 1st December, 2016 is 8 years while 12 months from 12th May 2008 would end on 11th May, 2009, well before the suit was filed, meaning that the suit was uncontrovertedly statute barred, not only in terms of the period stipulated in the Kenya Ports Authority Act, but also the period specified in the Limitation of Actions Act.

Having so found, it is apparent that, the learned judge misdirected himself by concluding that the letter of cancellation of the tender award gave rise to a separate cause of action. This is because, the pleadings specifically pointed to the tender award notification of 12th May 2008 as the foundation of the claim, and the learned judge having concluded that “...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...” then, he ought not to have read into the pleadings another cause of action based on the letter of 26th August 2016.

In sum, we find that the preliminary objection is merited, and as a consequence the respondent’s suit dated 1st December 2016 and filed on the same date is dismissed with costs to the appellant.

It is so ordered.

Dated and delivered at Malindi this 19th day of June, 2019.

ALNASHIR VISRAM

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL

A. K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR