



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: NAMBUYE, M. WARSAME & OTIENO-ODEK JJA)

CIVIL APPEAL No. 18 Of 2013

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

AND

THREWAYS SHIPPING SERVICES (K) LIMITED.....RESPONDENT

(Appeal against the ruling of the High Court of Kenya at Mombasa (J. B. OjwangJ.) delivered on 16th February 2012

in

HCCC No. 28 of 2010)

JUDGMENT OF THE COURT

1. The appellant, **Kenya Ports Authority** is a statutory body incorporated under the provisions of **Section 3** of the **Kenya Ports Authority Act, Chapter 391 of the Laws of Kenya**. The headquarters of the Authority is in Mombasa; the Authority controls and manages the Port of Mombasa which is a gate way for imports into Kenya and other land locked countries in the region.
2. **Section 12 (1) (e)** of the **Kenya Ports Authority Act** stipulates that one of the functions of the Authority is to act as warehousemen and to store goods whether or not such goods have been or are to be handled as cargo or carried by the Authority. The Authority is also mandated to provide such amenities or facilities for persons making use of the services performed or the facilities provided by the Authority as may appear to the Board necessary or desirable.
3. In line with the functions and powers of the Authority, on or about 10th August 2009, the respondent, **Three Way Shipping Services (K) Limited**, was contracted by its client to clear at the Port of Mombasa goods in 4 x 20 feet containers to be transported to Uganda and delivered to **Ken Group of Companies Limited**.
4. The container numbers were SCMU 2024039; MSKC 4053410; MSKU 4074244 and MSKU 7231985. The four containers arrived at the Port of Mombasa on 7th September 2009. The containers were off loaded and placed in the custody, warehouse and control of the appellant and or its agents or servants.
5. On or about 11th September 2009, the respondent arrived at the Port of Mombasa to collect the four containers for transportation to Uganda. Lo and behold, all the four containers were missing. Upon discovering the loss, the respondent established that the containers were loaded by road on Truck Registration Nos. KAV 647 J and KAZ 387Z/ZC 4171 on 10th September 2009 and which trucks did not belong to the respondent or any of its consignees.
6. By a plaint dated 22nd July 2010, the respondent filed suit against the appellant seeking *inter alia* damages for the loss of the four containers and demurrage charges thereon.

7. In its plaint, the respondent's cause of action is founded on the tort of negligence. It is averred that the loss of the four containers was due to negligence on the part of the appellant and or its servants, employees or agents in storing, managing, handling, warehousing or securing the containers; and that the appellant and or its servants were negligent in releasing the containers to unknown persons.

8. In its statement of defence dated 28th September 2010, the appellant averred the High Court had no jurisdiction to entertain, hear and determine the suit; that the respondent filed suit in contravention of the provisions of **Kenya Ports Authority Act**; that the proper forum for hearing and determining the dispute between the parties is arbitration proceedings with the arbitrator appointed by the Hon. Chief Justice.

9. The appellant cited the provisions of **Section 62** of the **Kenya Ports Authority (KPA) Act** to support its defence that the High Court had no jurisdiction to hear and determine the dispute. **Section 62** of the **KPA Act** provides as follows:

(1) 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.

(2) Nothing in this section shall be construed as entitling any person to compensation:

(a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or

(b) or any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.

10. In an interlocutory application, the appellant raised a preliminary objection to the jurisdiction of the High Court citing the provisions of **Section 62** of the **KPA Act**. It was contended the court had no jurisdiction to hear and determine the suit. The appellant sought an order to strike out the plaint as being incompetent. It was urged the respondent had no right of action against the appellant in relation to matters set out in the plaint; that **Section 62** of the **KPA Act** ousts the jurisdiction of the High Court to entertain, hear and determine the claim in the plaint.

11. Replying to the appellant's contention that the jurisdiction of the High Court had been ousted by **Section 62** of the **KPA Act**, the respondent cited **Section 22** of the **Kenya Ports Authority Act** which provides as follows:

“Subject to this Act or any contract, the Authority shall not be liable for the loss, misdelivery or detention of, or damage to, goods delivered to, or in the custody of the Authority except where such loss, misdelivery, detention or damage is caused by the want of reasonable foresight and care on the part of the Authority or any employee:”

12. Upon hearing the submission by both parties as to whether **Section 62** of the **KPA Act** ousts the jurisdiction of the High Court, the learned judge by a ruling dated 16th February 2012 held that **Section 62** did not oust the jurisdiction of the court. The judge held that pursuant to **Section 22** of the **Act**, the court had jurisdiction to entertain, hear and determine the respondent's claim as filed in the plaint. In finding that the court had jurisdiction the judge expressed himself thus:

“From the pleadings on both sides, it is clear that a serious controversy, with implications for parties' rights and duties, exists. Issues of such a kind generally fall to the judicial review process for fair hearing and resolution under the adjudicate authority which has been entrusted with a specific mandate under Article 159 of the Constitution of Kenya 2010. Against this principle, the Court must adopt a strict interpretation of any ordinary statutory dispensation tending to confer *differential favours* – such as **Section 62 of the **Kenya Ports Authority Act** is clearly doing. By Article 159 (2) (a) of the Constitution, the Court, in exercising judicial authority is required to ensure that justice shall be done to all, irrespective of status. Hence in this case, I accept the plaintiff's submission that the gravamen raised is to be resolved in the context of **Section 22** rather than **Section 62** of the **Kenya Ports Authority Act** and that the alleged loss is a proper subject for the jurisdiction of this Court.**

Of still more relevance, in that regard, is, again as urged for the respondent that the express terms of the Constitution of Kenya 2010 has rendered otiose the earlier law of jurisdiction.....In my opinion, the law today is that the High

Court has unlimited jurisdiction in all causes, save in matters reserved by the Constitution itself to the Supreme Court or to certain specialized courts. Consequently, the contention, in the suit herein, section 62 of the Kenya Ports Authority Act has ousted the High Court's jurisdiction is not tenable.

13. Aggrieved by the ruling of the High Court, the appellant has proffered the instant appeal raising *inter alia* the following grounds:

(i) The judge erred in finding the High Court had jurisdiction to hear and determine the suit before it.

(ii) The judge erred in finding that **Section 62 of the **Kenya Ports Authority Act** tends to confer differential favours.**

(iii) *The judge erred in his interpretation and application of Article 159 of the Constitution.*

(iv) *The judge erred in holding that the authorities on the jurisdiction of the High Court under the repealed Constitution are now otiose.*

(v) *The judge erred in concluding that the provision of Section 62 of the Kenya Ports Authority Act cannot oust the jurisdiction of the High Court.*

14. At the hearing of the instant appeal, learned counsel **Mr Abdulhafeez Noorani** appeared for the appellant while learned counsel **Mr. Isaac Onyango** appeared for the respondent. Both parties filed written submissions and lists of authorities.

APPELLANT'S SUBMISSIONS

15. Counsel for the appellant rehashed the background facts leading to the instant appeal. Counsel observed that central to this appeal is the interpretation and application of **Section 62** of the **KPA Act**. The critical issue is whether **Section 62** of the **KPA Act** ousts the jurisdiction of the High Court to entertain, hear and determine the respondents claim.

16. It was submitted the Judge erred in law in finding that **Section 62** of the **Act** did not oust the jurisdiction of the High Court. Counsel cited various judicial decisions of this Court where it has been held that **Section 62** of the **KPA Act** ousts the jurisdiction of the High Court. The appellant cited the case of **Kenya Ports Authority -v- African Line Transport Co. Limited (2014) eKLR**, where this Court sitting at Malindi expressed itself as follows:

“We do not think; from what we have said that the promulgation of the Constitution in 2010 changed the law in terms of the application of section 62 of the Kenya Ports Authority Act. As recent as 2012, Mwera, J as he then was, after hearing arguments about the constitutionality of section 62 found in Safmarine Container N.V of Antwerp V Kenya Ports Authority, HCCC No. 263 of 2010, thus;

“In the view of this case the course open to the plaintiff under the Act to seek compensation from the defendant is set out in S.62 of the Act not through this court. Yes, this court has unlimited jurisdiction in matters civil but where a statute has excluded it from entertaining certain matters, then that exclusion must be respected. It was legislated for good cause- not to deny a wronged party a remedy, but to go by the laid out procedure to seek it. In this case the Legislature in its wisdom, considered that damage that results from the acts of the defendant while exercising its powers under S. 12, getting compensation is by way of agreement between the claimant and the Authority (defendant). And if that does not work, and the plaintiff stated here that it had not attempted the method of agreement, then the Chief Justice shall appoint an arbitrator to resolve the issue. We are here not asked to answer why the Act settled on the Chief Justice to appoint the arbitrator or even why the procedure of such appointment was not set out. But suffice it to say that the facility to pursue compensation under S. 62 is open to the claimant. It cannot suffer prejudice simply because this court has not adjudicated over his claim”.

17. In the instant matter, counsel submitted that the primary cause of action as pleaded in the plaint is for loss of the four containers due to the appellant's breach of its duty to care for the goods that were being stored, handled and warehoused. The appellant faults the learned judge for failing to explain how **Section 62** of the **KPA Act** tended to confer differential favours and how it differentiates parties based on status.

18. On the application of **Section 22** of the **Kenya Ports Authority Act**, the appellant submitted the section talks about loss, mis-delivery or detention or damage to goods; that there is no distinction between **Section 62** and **22** of the **KPA Act** as concluded by the learned judge; that **Section 62** is restricted to cases of physical damage while **Section 22** is restricted to cases of mis-delivery or non-delivery; that **Section 22** is restricted to damages to goods in relation to **KPA's** responsibility as a warehouse man in the storage and handling of goods; that **Section 62** is more general to cover all kinds of damage including loss, mis-delivery and physical damage. It was submitted the judge erred in drawing a distinction between **Sections 22** and **62** of the **KPA** yet there should be no distinction in the meaning, interpretation and application of the two sections of the **Act**.

19. The appellant further submitted that the Judge erred in interpreting **Article 165** of the Constitution as conferring unlimited jurisdiction to the High Court in all cases. In so doing, the judge ignored the guideline in **Article 159 (2) (c)** of the Constitution which enjoins courts to promote and encourage alternative dispute resolution. It was submitted **Section 62** of the **KPA Act** recognizes and promotes **Alternative Dispute Resolution (ADR)** by way of arbitration; to this end, the learned Judge erred in failing to promote ADR.

RESPONDENT'S SUBMISSIONS

20. The respondent in opposing the instant appeal submitted that the Judge did not err in finding that the court had jurisdiction to hear and determine the suit pending before it. Citing **Section 22** of the **Kenya Ports Authority Act**, it was submitted the appellant is liable for loss, mis-delivery or detention or damage to goods delivered to or in its custody. That in the instant matter, the Authority received four containers and failed to deliver the same; that the loss of the containers is due to mis-delivery and want of care on the part of the Authority and its servants or employees. Counsel submitted that questions of non-delivery or mis-delivery and or complete loss of goods do not fall within the ambit of **Section 62** of the **KPA Act**. That mis-delivery and non-delivery fall within the ambit of **Section 22** of the **KPA Act** and thus the learned judge was correct in finding that the two sections are different in meaning, interpretation and application.

21. Counsel submitted that the Kenya Ports Authority Act does not absolve the Authority from the exercise of its common law duty of care; that **Section 22** of the **KPA Act** reinforces the common law duty of care and provides that the Authority's liability is limited to the extent that the damage is caused by "want of reasonable foresight and care." That in the instant matter, the loss arose from want of reasonable care on the part of the Authority and its employees and thus Section 22 of the Act is the applicable law conferring jurisdiction to the High Court to hear and determine the respondent's claim as per the plaint.

ANALYSIS and DETERMINATION

22. We have considered submissions by counsel, the record of appeal, authorities cited and we have analyzed the impugned ruling of the High Court dated 16th February 2012. As this is a first appeal, as was said in **Peters -v- Sunday Post Ltd [1958] EA 424, at P 429** by O'Connor P.

"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand."

23. Our first observation is that the memorandum of appeal in this matter sets out repetitive grounds of appeal. The singular issue in this appeal is whether **Section 62** of the **Kenya Ports Authority Act** ousts the jurisdiction of the High Court. We abhor repetitiveness of grounds of appeal which tend to cloud the key issue in dispute for determination by the Court. In **William Koross V. Hezekiah Kiptoo Kimue & 4 others, Civil Appeal No. 223 of 2013**, this Court stated:

"The memorandum of appeal contains some thirty-two grounds of appeal, too many by any measure and serving only to repeat and obscure. We have said it before and will repeat that memoranda of appeal need to be more carefully and efficiently crafted by counsel. In this regard, precise, concise and brief is wiser and better."

24. In this matter, it is urged by the appellant that despite the provisions of **Section 62** of the **KPA Act**, the Judge erred in finding the High Court had jurisdiction to entertain, hear and determine the respondents claim as per the plaint. On the authority of the Supreme Court decision in **Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 Others, eKLR 2014** a court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Jurisdiction is in the end everything since it goes to the very heart of a dispute. Without it, the court cannot entertain any proceedings and must down its tools. See **The Owners of the Motor Vessel Lilian 'S' v. Caltex Kenya Limited (1989) KLR 1.**

25. In this matter, we note the appellant filed a statement of defence. However, we observe that in the defence, the jurisdiction of the High Court is contested. Persuasively, in **Kenya Broadcasting Corporation -v - National Authority for the Campaign Against Alcohol and Drug Abuse (NACADA) [2015] eKLR** it was held that:

"...once a defendant files an application for stay of suit and seeks for referral of the matter for arbitration, he/she is not expected to file a defence to the claim, until or unless the court determines that application dismissing it thereby paving way for an opportunity to file defence."

26. Of relevance to the instant appeal, the provisions of **Section 62** of the **Kenya Ports Authority Act** has received judicial consideration in various decisions of the Superior Courts in Kenya. For instance, this Court in **Kenya Ports Authority - - Modern Holdings [E.A] Limited [2017] eKLR, Malindi Civil Appeal No. 108 of 2016** observed that:

"From its plain and unambiguous language, courts have consistently and unanimously construed section 62 aforesaid, in a long line of cases to deny the court's jurisdiction, in the first instance to entertain any dispute arising from the breach of any of the appellant's powers. We were referred to cases such as, Kenya Ports Authority -v- Kuston (Kenya) Limited (supra), Kenya Ports Authority -v-African Line Transport Company Limited (supra) decisions of this Court and Multi-serve Oasis Company Limited -v- Kenya Ports Authority, Civil Suit No.252 of 2010, and Threeways Shipping Services (K) Limited V Kenya Ports Authority (supra), decisions of the High Court.

27. We have examined and analyzed the various judicial decisions in which it has been held that **Section 62** of the **Kenya Ports Authority Act** ousts the jurisdiction of the High Court. The decisions are distinguishable as they do not consider and determine the negligence exception embodied in **Section 62 (2) (a)** and **(b)** of the **Act**. Further, the decisions have not examined and considered the relationship between **Sections 22** and **62** of the Kenya Ports Authority Act. On our part, we note that the interpretation and application of **Section 22** as read with **Section 62** of the **Kenya Ports Authority Act** has not previously been canvassed and determined by this Court.

28. A plain reading of **Section 22** of the **Act** imposes liability on the part of the Kenya Ports Authority for loss of goods occasioned by mis-

delivery caused by want of reasonable foresight and care on the part of the Authority or its employee. In the instant matter, the claim and cause of action against the appellant is founded on negligence whose particulars *prima facie* allege want of reasonable foresight and care on the part of the Authority.

29. Conversely, **Section 62** of the **Act** specifically refers to the powers of the Authority exercised pursuant to **Sections 12, 14, 15 and 16 of the Act**. Of relevance to this appeal is the exception in **Section 62 (2) (a) and (b)** of the **KPA Act** which stipulate that a person is entitled to compensation for any damage suffered through negligence or damages entitled otherwise than through the provisions of the Kenya Ports Authority Act. (Emphasis supplied)

30. In arriving at our decision in this matter, we bear in mind that the **Kenya Ports Authority Act** has no express provision for striking out a suit. We also bear in mind that access to justice as enshrined in **Article 48** of the Constitution is a fundamental right, that cannot be derogated from. Whereas **Alternative Dispute Resolution (ADR)**, such as arbitration, is crucial in expeditious disposal of disputes, by its very nature ADR is inferior to the principle of access to justice.

31. The appellant submitted **Section 62** of the **Act** ousts the jurisdiction of the High Court. **Section 62** of the Act should not be interpreted to impede access to justice by denial of access to a court of law. Further, the provisions of **Section 62** of the **Act** is not aimed at shielding the Authority from any and all liability particularly liability arising from negligence. **Section 62** should be interpreted and applied in a manner that enhances efficiency in Port management and expeditious resolution of disputes between the Authority and its customers. The Section is not a carte blanche to escape liability from common law duty of care. In our considered view, **Section 62 (2) (a) and (b)** of the **KPA Act** establishes an exception whereby a person is eligible to compensation if that person was entitled to compensation otherwise than through the provisions of the **Act**. The legal question is what forum would determine the loss or damage suffered otherwise than through the provisions of the **Kenya Ports Authority Act**? The answer to this question perforce incorporates negligence as a cause of action that is not covered by **Section 62** of the **KPA Act**.

32. Convinced that **Section 22** of the **KPA Act** impose liability for mis-delivery of goods and satisfied that **Section 62(2)(a) and (b)** of the **KPA Act** creates a negligence exception, we find the learned judge did not err in his determination that the High Court had jurisdiction to entertain, hear and determine the respondent's claim which is founded on negligence and want of care on the part of the appellant and or its employees.

33. The upshot is that this appeal has no merit and is hereby dismissed with costs.

Dated and delivered at Malindi this 17th day of July, 2019

R.N. NAMBUYE

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. OTIENO ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR