



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 49 OF 2018

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

AND

MAUR ABDALLA BWANAMAKA.....RESPONDENT

(Appeal from the ruling and order of the of the High Court of Kenya at Malindi (Chitembwe, J.) delivered on 17th July 2017 by W. Korir, J in Malindi H.C. Constitutional Petition No. 17 of 2015)

JUDGMENT OF THE COURT

The appellant, Kenya Ports Authority, in this appeal is aggrieved by the decision of the High Court (Chitembwe, J.) which declined to strike out a petition on the basis that it had been overtaken by events.

By way of a Notice of Motion dated 27th September 2016, expressed to be brought under **Article 159 (2)** of the **Constitution, sections 1A and B and 3A** of the **Civil Procedure Act**, and **order 2 rule 15** of the **Civil Procedure Rules**, the appellant sought for orders that the Petition filed by the respondent, **Maur Abdalla Bwanamaka** on 10th November 2015 be struck out for having been overtaken by events, and for the court to issue an order for the termination of the proceedings founded upon the petition.

The application was brought on the grounds that in the petition, the respondent had sought orders to restrain the 1st Interested Party, Liebherr Container Cranes Limited, from effecting delivery and installation of the ship to shore gantry cranes (*the cranes*) to the appellant, yet the appellant, through its advocates, had informed the court that the cranes, the subject matter of the petition had since been delivered to the appellant, effectively installed, and had commenced operations. It was further contended that the delivery and installation of the three cranes took place on 21st December 2015, 11th May 2016 and 8th June 2016, and therefore the orders sought in the petition were incapable of being granted. It was contended that the continued maintenance of the petition was a gross abuse of the court process and was prejudicial to the appellant; that the court should be guided by the principles of fairness, justice and equal protection of the law for all parties. The motion was supported by the sworn affidavit of **Stephen Kyandih**, the appellant's Senior Legal Officer.

The respondent responded by way of a replying affidavit sworn on 13th September, 2016. Upon considering the pleadings and the parties' submissions, the learned judge dismissed the application for reasons that the respondent's petition was brought on the grounds that the cranes were not supplied, or that if they were supplied, they were not of the quality specified by the tender. The judge went on to state that before making any order for termination of the petition it should to satisfy itself that the tender was infact fulfilled.

The appellant was dissatisfied with the High Court's decision and brought this appeal on grounds that the learned judge fell into error when he converted the court into an investigative body without having the requisite mandate to do so; in issuing orders for, the appellant, **the 4th respondent, the Kenya Bureau of Standards** and World Crane Services to file separate reports detailing the performance of the Tender in question, yet the orders granted were neither pleaded nor prayed for; in wrongly issuing orders against World Crane Services that was not a party to the proceedings, and was therefore not afforded an opportunity to be heard. It was further contended that the learned judge contradicted himself when he agreed that, if the contract had been fulfilled and the cranes delivered, then the petition could not be sustained, but despite reaching this conclusion, declined to strike out the petition and instead ordered for reports be filed.

Ms. Malik, learned counsel for the appellant, submitted that by the time the ruling was delivered one year later, the cranes had been in operation for three years, and as at the date of this appeal had operated for 5 years. It was argued that the learned judge had observed that the cranes were infact installed, and the contract performed, but instead of striking out the petition, the court ordered the submission of reports which were not prayed for in the pleadings; that there were already in existence public bodies charged with that responsibility of investigating the implementation of procurement contracts; that since the cranes were installed, the orders sought seeking to stop their

installation were overtaken by events, and as a consequence, the petition ought to have been struck out.

On his part, **Mr. Kilonzo**, who was holding brief for Mr. J. Muchiri, had applied for an adjournment of the appeal which was declined as no valid reason was provided for granting the adjournment. Consequently, counsel informed us that he would not make any submissions in the appeal.

We have considered the grounds of appeal and the submissions of the parties. The question for our determination is whether the learned judge properly exercised his discretion in declining to strike out the petition.

But in interrogating the manner of exercise of that discretion, we are cognizant of the principles espoused in the oft cited case of ***Mbogo & Another vs Shah, [1968] EA, p.15*** which are that;

“An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice.”

Accordingly, having regard to the circumstances of the case, the issues that lend themselves for our consideration are whether the petition upon which this application is grounded was overtaken by events, and if so whether it ought to have been struck out.

Before addressing the issues identified, a brief history of the dispute surrounding the petition would be worthwhile. The appellant advertised Tender No KPA-117/2013-14/TE for the design, manufacture, supply, installation, testing and commissioning of three (3 no) cranes (*the cranes*). The tender submissions of the 1st Interested Party and the 2ndInterested Party, Krox Krane GMBH were found to be responsive. Thereafter, the Public Procurement Tender Board awarded the tender to the 1st Interested Party. The 2ndInterested Party and the respondent, who was a director of its local company were dissatisfied with the decision, and subsequently requested for a review of the tender award, but which review did not succeed.

Thereafter, the respondent filed Judicial Review No. 382 of 2013 to challenge the decision of the Review Board which was dismissed by the High Court as it was found to have been filed out of time, with the result that the appellant proceeded with assembly and installation of the cranes. Undeterred, the respondent filed constitutional petition No. 43 of 2014 at the High Court in Mombasa again seeking to stop the installation of the cranes. That petition was not heard. Instead the impugned petition dated 10th November 2015 was filed in the High Court in Malindi seeking similar orders. The orders sought included;

“a) Orders compelling the 2nd Respondent to forthwith cancel of tender No. KPA/117/2013-2014/TE and the consequent contract dated 17th December, 2013, and order the award to the best responsive bidder.

b) Orders restraining the 1st interested party from Assembling, Erecting, Testing, supplying, installing and commissioning (3 NO) New Ship to shore gantry cranes being fabricated and assembled at Cormaco Ship Yard Mombasa.

c) A permanent injunction restraining the 2nd Respondent from receiving and accepting supply, installation and commissioning 3 NO New Ship to shore gantry cranes subject matter Tender No. KPA/117/2013 – 2014/TE.

d) A declaration that the Petitioners are entitled to compensation and/or restitution for violation and infringement of its Constitutional rights and freedoms.

e) A permanent injunction restraining the 2nd Respondent from expending the funds earmarked for the said contract in paying for any services and goods rendered and/or supplied vide Tender No. KPA/117/2013-2014/TE and contract between the 1st interested party and the 2nd Respondent.

f) A declaration that the state agencies and government department has breached and violated their fiduciary duty statutory and public duty owed to the Petitioners by failing to provide effective mechanisms and address for the wrongful violation and infringement of your petitioners Constitutional rights and fundamental freedoms and in particulars failing to act on numerous complaints lodged by the Petitioners for their action inquiry and investigation enforcement of their finding and recommendations.

g) Order mandating the 4th Respondent to do release its finding on forensic investigation they carried out and the 6th Respondent to act on recommendation therein.

h) Order mandating the 2nd Respondent to take decisive actions on all its officers, officials and/or servants who have acted fraudulent in dealing with subject matter of this suit and in perpetrating fraud and economic rip off of public funds entrusted to the 2nd Respondent for common good and of the citizens of Kenya.

i) In any event the costs of and other incidental to this Petition herein be awarded to the Petitioner.

j) Interest on above at court rate.

k) such other or further order as this Honourable Court may deem fit and just to grant.”

The grounds of the petition supported by the respondent’s affidavit were stated to have been brought on behalf of the Republic and the citizens of Kenya in respect of transactions arising out of the tender for the cranes. The respondent’s grievance was that the tender awarded to the 1st Interested party was the subject of various complaints including forensic investigations, controversies, violations, fraud, collusion and breach of the respondent’s and the citizens of Kenya’s constitutional rights and freedoms, which was a fraud on the Kenyan people; that following the award of the tender, the appellant had entered into a contract with the 1st Interested party for a sum of US\$ 29,625,250, for the delivery of cranes to the Port of Mombasa fully erected, assembled, commissioned, and tested in the contractor’s yard; that the appellant had deviated from the terms of the tender and had substituted the original specifications for an inferior model, which were to be assembled, erected, tested, installed and commissioned within the Port of Mombasa at Cormaco Ship yard in violation of the terms of the tender. The respondent asserted that he had complained to the 3rd to 13th respondents but the appellant had obstructed the investigations and inquiry into the deviations and no action had been taken.

The respondent asserted that he was apprehensive that if the breaches and violations continued, the people of Kenya stood to suffer immense loss. It was this petition that the appellant sought to strike out in the application that was before the High Court, the subject of this appeal.

That being the background, we now turn to the question of whether the petition was overtaken by events. In this regard the learned judge had this to say;

“From the information provided by the applicant, it is established that the three tendered cranes were supplied. The only issue for this court to satisfy itself before making any orders as to whether the petition should be terminated or not is whether the tender was fully satisfied. That is to say whether the supplied items comply with the tender specifications.”

The court went on to agree that if the contract has been fulfilled then the petition could not be sustained.

The learned judge then concluded;

“I am aware that the cranes have been in use for the last one year and wear and tear must have started. However, this tender provided for a warranty period and it is common knowledge that the crane procured for over 9, 668, 200 U.S. Dollars should render service for quite a reasonable time.”

Essentially, the learned judge was satisfied that the tender had been largely performed in that the manufacture, supply, installation, testing and commissioning the cranes was completed. As we cannot find anything to the contrary in the record, we too are satisfied that the tender was performed and that the cranes were installed and commissioned.

But despite so finding, the learned judge declined to strike out the petition for reasons that it was, *“... grounded on the contention that the cranes were supplied and if they were supplied then they are not of the same quality as the tender requirements.”*

Which brings us to the next issue which was whether having found that the tender and the contract were performed, the learned judge rightly exercised his discretion to decline to strike out the petition for reasons that the tender award did not conform to what was supplied.

Striking out a suit is entirely dependent on whether a cause of action exists, which would require that the suit be sustained.

In the case of ***Crescent Construction Co. Ltd. vs Delphis Bank Ltd Civil Appeal No. 146 of 2001*** this Court stated;

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the Court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honoured legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

In the case of ***D.T. Dobie Company (K) Ltd vs Muchina & Another [1980] eKLR;***

“ No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

When the prayers in the petition are considered, it becomes apparent that there were prayers related to the award which sought, *inter alia*, to compel the appellant to cancel the tender and the contract dated 17th December 2013; to restrain the 1st Interested Party from assembling, erecting, testing, supplying, installing and commissioning the cranes; a permanent injunction to restrain the appellant from expending funds in respect of the contract. If the tender and the contract were already performed, it would mean that such orders were indeed overtaken by events. With the cranes having already been installed and commissioned, the court could not cancel the contract or order for the submission of fresh tenders.

But from a further consideration of the petition, it becomes apparent that the respondent’s complaint was not merely limited to the tender award. It went further to query into the manner in which the tender and the contract were performed, which is why the learned judge was concerned as to whether or not the cranes, *“...to be supplied were the same quality as the tender requirements”*. Even if the tender had been

performed, there still remained the question of whether the cranes supplied conformed to the requirements of the tender, which in our view remained a live issue for trial. The prayers sought in relation to this were, *inter alia*; a declaration that the respondent is entitled to compensation or restitution for violation and infringement of his Constitutional rights and freedom; a declaration that the state agencies and government department had breached and violated their fiduciary, statutory and public duty and in particular failed to act on numerous complaints lodged by the respondent, amongst other prayers.

These are matters still to be determined by the trial court and consequently, we agree that the learned judge rightly exercised his discretion to decline to strike out the petition.

But that said, the appellant has complained that the learned judge went well beyond the remit of the application to order the filing of reports by the Chief Executive of the appellant, the 4th respondent and the World Crane Services regarding the tender completion, whether the cranes were imported as completely built units and assembled in Kenya, or were imported, and whether the cranes supplied were operational; that these were not matters that were prayed for either in the appellant's application, or in the main petition.

In this regard this is what the court said;

“In order to bring this long protracted and abrasive dispute to an end I do find that the three institutions need to file their respective reports in court with a view to confirm that the contract has been duly performed. Once done the court will have no further role than terminating the petition as prayed. I have opted for this decision taking into account the fact that the court is not in position to determine whether the supplied cranes satisfy the tender requirements”.

Our analysis of both the petition and the appellant's application to strike out the petition does not disclose that there were prayers for such orders. Parties are bound by their pleadings.

In the case of *Galaxy Paints Co. Ltd vs Falcon Guards Ltd (2000) EA 885* it was held that;

“The issue of determination in a suit generally flowed from the pleadings and a trial court could only pronounce judgment on the issues arising from the pleadings or such issues as the parties framed for the court's determination. Unless pleadings were amended, parties were confined to their pleadings. Gandy V Caspair (1956) EACA 139 and Fernandes V People Newspapers Ltd (1972) EA 63.”

See also *Nairobi City Council vs Thabiti Enterprises Ltd (1995 – 98) 1 EA 231*.

By ordering the named parties to file reports without the respondent having prayed for such orders, we find and hold that the learned judge exceeded his mandate and descended into the arena to seek to establish whether or not the tender had been properly performed when it was not asked of him. This was a matter that ought to be left to the trial court for determination during the substantive hearing of the petition. The judge also went too far in ordering World Crane Services to file a report, yet it was clearly not party to the petition, or the application that was before him. It therefore had not been provided an opportunity to be heard contrary to the stipulations of **Article 50 (2)** of the **Constitution**.

In view of the foregoing the appeal partially succeeds, save for the learned judge's order that the appellant, the 4th respondent and World Services submit reports which we hereby set aside, the appeal against the High Court's dismissal of the application dated 27th September is dismissed. In view of the partial success of the appeal, we order each party to bear their own costs.

It is so ordered.

Dated and delivered at Malindi this 31st day of October, 2019.

D. K. MUSINGA

JUDGE OF APPEAL

S. GATEMBU KAIRU (FCI Arb)

JUDGE OF APPEAL

A. K. MURGOR

JUDGE OF APPEAL

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

DEPUTY REGISTRAR