



IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: MAKHANDIA, OUKO & M'INOTI, JJ.A)

CIVIL APPEAL NO. 108 OF 2016

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

VERSUS

MODERN HOLDINGS [E.A] LIMITED.....RESPONDENT

(Appeal from a Judgement and decree of the High Court of Kenya at Mombasa (Otieno, J.) dated 19th September, 2016

in

HCCC No. 19 of 2009)

JUDGMENT OF THE COURT

The post-election violence that convulsed Kenya in 2007/2008 had serious economic ramifications that were felt beyond Kenya, throughout East Africa, particularly in the landlocked countries of the Great Lakes Region that depend for their imports and exports, upon Kenyan infrastructural links from the port at Mombasa. This appeal arises from a decision of the High Court in which the dispute had a direct consequence of on the post-election violence. This is how the dispute arose.

The respondent, a company incorporated and registered in the United Republic of Tanzania at the time material to the dispute, was an importer and sole distributor of Masafi products, which include fruit juices and mineral water in the East Africa Region. The products were imported from a company called Masafi Mineral Water Co. (LLC) in the United Arab Emirates. On this occasion, the respondent imported 21 x 40ft containers of assorted Masafi fruit juices and mineral water which arrived at the port of Mombasa on diverse days in December 2007 and January 2008. The consignment could, however not be cleared from the port within the stipulated time as it was at the height of the post-election violence in the country and it was risky to transport cargo by road out of Mombasa. Although the route the respondent's consignment was destined, Tanzania, was not affected, it was, however, caught up in the huge backlog of cargo and confusion at the port caused by non-movement of cargo on the affected routes.

When the situation normalized, and because the delay in clearing the consignment was attributed to the post-election violence, the respondent sought and obtained from the Minister for Finance a waiver of

customs warehouse rent of 80% for the period running up to 13th March 2008. After this, the respondent discovered that the cargo was in fact not warehoused within the appellant's premises but at a third party's (Makupa Transit Shade Limited) premises. Makupa Transit Shade Ltd had been contracted by the appellant to help it ease the congestion. Makupa Transit Shade Limited introduced terms and conditions for the clearance of the cargo that the respondent considered both unreasonable and onerous. First, it disregarded the 80% waiver by the Minister for Finance and refused to have the goods removed until the entire customs warehouse rent was paid in full. It was contended by the respondent that it had hired trucks from Tanzania to carry the consignment; that even after meeting the conditions, the process of release was frustrating in the manner the containers were stored, which made their identification and verification very difficult due to lack of equipment. Because of these conditions, only 6 out of the 21 containers were cleared within the three days directed by Makupa Transit Shade Ltd. The rest (15) could not be traced, have not been traced to date and are the subject of this dispute.

Being of perishable nature, the goods shelf-life expired before being retrieved from the warehouse. This in turn resulted in the termination of the respondent's sales and distribution agreement with Masafi Mineral Water Co. (LLC). The respondent insisted that as a consequence, it suffered pecuniary loss for the unexpired period of the contract. It instituted a claim in the High Court for:

“i) A declaration that the decision and the action of the defendant in refusing to clear and release the plaintiff's consignments was unlawful.

ii) A declaration that the plaintiff has discharged all its obligations to the defendant.

iii) A declaration that no further customs warehouse rent is payable to the defendant by the plaintiff on the fifteen (15) containers in their custody, whose contents and/or products have since expired.

iv) Damages for loss of the consignments through expiry @ US\$, 819,554

v) Damages for loss of profits from January to June 2008 - US\$, 1,395,816

vi) Special damages - US\$, 15,520,916

vii) Interest on borrowed funds up to June 2008 - US\$ 28,759

viii) Loss of profits for the remaining period of the sales and distribution agreement which was to expire on the 31st day of December, 2010 at the rate of US\$ 232,636 per month for thirty (30) months from the 1st day of, July, 2008 totaling to (sic): - US\$, 6,979,080.

ix) Expenditure on following up clearance and Transport charges - US\$, 75,000

TOTAL - US\$ 24,819,115

x) General damages to be assessed by the court together with interest thereon at rates to be determined by the court.

xi) Interest on items(iv), (v), (vi), (vii), (viii) and (ix) herein above and/or interest on the decretal sum from the 1st day of July, 2008 to the date of full payment at commercial rates and/or such rates as this Honourable court may deem fit.

xii) Any other relief that this Honourable court may deem fit to grant.

xiii) Costs of this suit be borne by the defendant in any event”.

The appellant denied having breached any statutory duty owed to the respondent and pleaded that the post-election violence was not the cause of the delay in the clearance of the goods because the route to

their destination, Tanzania was not affected by the disturbances; that in transferring the cargo to Makupa Transit Shade Ltd, it acted within its statutory authority; and that it was not only the respondent's goods that were transferred to the premises of Makupa Transit Shade Ltd, but also those of the other importers. Regarding the complaint on the waiver, the appellant argued that it was not bound by the recommendations of the parent ministry or the permanent secretary and that the respondent did not have to seek the waivers from the ministry because the appellant is not subject to such interventions; that it was not responsible for the alleged losses to the respondent; and that if the respondent was aggrieved by the actions of the appellant, it ought to have sued Makupa Transit Shade Ltd and not the appellant.

On the shelf-life of the goods, the appellant denied knowledge of the nature of the goods since that was never brought to its attention and that if indeed the goods expired, then such fate was caused by the procrastination of the respondent. Finally, it was contended by the appellant that the claim was in contravention of **sections 65 & 66** of the Kenya Ports Authority Act.

To prove its claim, the respondent called four (4) witnesses, being its managing director, directors of the clearing and logistics company and the Financial Director. On the other hand, the appellant relied on the evidence of 2 witnesses to show that no liability attached on it for the reasons that the alleged losses did not result from any breaches of its statutory obligations; that as a stevedore it was obligated to handle containers brought to the port and facilitate their release; and that in the course of that mandate it has authority to engage third parties to assist in the discharge of its statutory obligations.

By mutual consent of the parties, certain documents were produced as evidence. They included, the distributorship agreement with Masafi Co. LLC, audit reports by Earnest and Young in support of the respondent's claim and another report made by PWC on behalf of the appellant. It was noted that the three audit reports were in agreement that the respondent suffered some loss. Both sides, however, could not agree on how much loss was suffered. At the end of the trial, the learned Judge (Otieno, J) framed five (5) issues for his determination thus:-

“i) As a stevedore, did the defendant discharge its mandate to the plaintiff under the statute and at all? (sic)

ii) Were the suit containers ever transferred to the Makupa Transit yard in the usual and disclosed manner?

iii) If (ii) above is answered in the negative; has the plaintiff suffered any damages as a consequence?

iv) If (iii) above is answered in the affirmative, what is the heads of such damages and the quantum thereof?

v) What orders are desirable on costs?”

We are not quite satisfied that those were really the issues in the dispute before the learned Judge. But because of the ultimate decision he reached, we do not wish to take any more time on this.

The learned Judge began his consideration of the action with a determination of the question whether the respondent gave to the Managing Director of the appellant, in writing, the full particulars of the claim within six months of the date upon which such goods were accepted by the appellant. According to **section 65** of the Kenya Ports Authority Act, a person will only be entitled to compensation for non-delivery of a consignment which the appellant accepts for handling or warehousing, if such notice has been given. The learned Judge dealt with this question as a preliminary issue and, on the contents of a letter dated 11th July, 2008, he found that it was sufficient demand as contemplated under the aforesaid section hence, in his opinion the objection lacked substance.

Turning to the merit of the case, the learned Judge expressed the view that the law allowed the appellant to contract Makupa Shade Transit Limited for the purposes of providing the services the appellant is

authorized by law to provide; that the arrangement between the appellant and Makupa Shade Transit Limited was one of a principal and an agent.

In transferring the cargo from its premises to those of Makupa Transit Shade Limited, the appellant was required to prepare an inventory of all containers that had overstayed before depositing them with Makupa Transit Shade Limited; and further that handing over of such cargo would be by an interchange filled in triplicate with a copy of the interchange being availed to the customer as evidence of transfer. The learned Judge found as a fact that some of the containers were not readily identifiable due to the manner in which they were stored; that 2 of the containers were traced to the appellant's own yard. The learned Judge came to the conclusion, on this issue, that, in the absence of an inventory and interchange that would have disclosed the dates of the transfer, as well as the fact that no Notice of Removal of the Cargo to Makupa was served on the respondent as required under Kenyan law and the East African Community statutes, the appellant had failed to demonstrate that the respondent's containers were indeed transferred to Makupa Transit Shade Ltd on account of having not been cleared within the stipulated time. For these reasons, the learned Judge found that the appellant failed to warehouse the goods in the manner that would ensure that they were safe and readily available; and that, that obligation extended to Makupa Shade Transit Ltd where they were eventually transferred. As a result, the learned Judge found the appellant liable for the respondent's loss.

Having found that the appellant was liable to the respondent, the learned Judge merely made reference to **section 22** of the Kenya Ports Authority Act, which limits the liability of the appellant to only instances where the loss is occasioned by want of reasonable foresight and care on the part of the appellant or its employees. The liability for any loss, in any case does not exceed two hundred shillings unless at the time the goods were deposited their value was declared to exceed that amount. He did not consider its effect on the claim. Instead, he noted that the respondent was entitled to the value of the lost 15 containers and also all the losses incurred as a consequence of the lost containers. Under the head of loss of consignment, and relying on the invoices presented at the trial by the respondent, the learned Judge awarded US\$ 819,554, stating that;

“69. With the use of invoices to the customers the plaintiff was to supply the goods, the value is disclosed as US\$ 819,554. That is the sum the plaintiff was entitled to receive upon the delivery of the goods. With the aborted delivery the sum was totally lost. I do not agree that the plaintiff need to show the value at which the goods were brought as the value and loss incurred. I take it that to the plaintiff the cargo was a merchandise which in the plaintiff's evidence was to be picked by the consignees from the port once cleared and therefore get payment for the sale price. This sum is not disputed as the value of the goods and I therefore award it to the plaintiff. In making this award, I have not followed the sum proposed by the two experts because they don't justify why the plaintiff is only entitled to cost of purchase. Under the head, loss of consignment, I award to the plaintiff US \$ 819,554.”

On the loss of profits for the contract period, the appellant commissioned Price Waterhouse Coopers (PWC) who filed a report, which considered two scenarios and recommended in the first scenario a loss of US\$ 1,355,475 and US\$ 2,046,109 in the second scenario. Upon the report being served on the respondent it too asked Earnest Young (E & Y) to evaluate their loss. In its report, also based on two scenarios, E&Y assessed the loss at US\$ 4,698,932 and 8,296,536 respectively.

Having considered these forensic audit reports, the learned Judge, correctly, in our assessment, observed that they were only opinions in terms of **section 48** of the Evidence Act and did not bind him. Deciding between the two divergent reports the learned resolved the controversy thus;

“I have read both reports, I consider that the report by E&Y is more convincing to this court. More convincing because it has discounted and pointed out errors in the report by PWC. I find that the loss of projected profits suffered by the plaintiff for the period 2008-2010 is as calculated by the plaintiff's expert. For that reason I award to the plaintiff the sum of US\$ 8,296,536. I have adopted scenario B by E & Y because the evidence that the territory was extended to include some other 12 additional countries in Africa was never controverted”.

The Judge also found that the reports were unanimous that the respondent was entitled to US\$ 71,000 in **“loss on following up clearance and transport charges”**, based on the number of days the respondent’s witness, a Tanzanian national stayed in Kenya during the period under review. Because the expert reports prepared by both sides agreed on the expenditure, the court awarded the sum of US\$ 71,000.

Regarding the claim for punitive or aggravated damages, the learned Judge found no improper motive on the part of the appellant and rejected the same.

In the end the respondent was awarded; ,

- a). Loss of consignment - US\$ 819,554
- b). Loss of profit for the contract period - US\$ 8,296,536
- c). Loss on following clearance and transport charges - US\$, 71,000

Total US\$ 9,187,090

with interest at court rates from the date of filing the suit till payment in full. The respondent was also awarded the costs of the suit.

This appeal challenges that decision on a whopping 28 grounds, which were condensed and argued in the written submissions as five, leading us to wonder what purpose it served to bring an appeal on such a long list of grounds only to abandon nearly all. We can do no better than to remind counsel of the provisions of Rule 86 of the Court of Appeal Rules, 2010 that;

“86 (1) A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appealed against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make.”

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.”

It was submitted, on the first ground that by **section 62** of the Kenya Ports Authority Act, the learned Judge had no jurisdiction to entertain the claim.

Secondly, it was submitted that the learned Judge also erred in relying on the invoices presented by the respondent to award US\$ 819,554 for loss of consignment instead of using the prevailing market price of the goods at the time of the loss; that in the case of loss involving the appellant, the respondent was only entitled to compensation in terms of **section 23** of the Kenya Ports Authority Act, which caps the amount payable to two hundred shillings (Kshs. 200) unless the value of the goods were declared to be in excess of that amount. Thirdly, the decision was faulted also for disregarding the mutual consensus of the parties through their respective forensic audit reports, that the cost of the lost consignment was US \$ 655,643.20.

On the fourth ground it has been contended that it was in error for the learned Judge to award consequential loss or damages arising from loss of profit since such an award is prohibited by **section 23** aforesaid and they are also not recoverable at common law; that the report upon which the claim under this head was based did not meet the threshold of proof of that claim and at best was merely speculative; that there was no proof to support the claim that the respondent intended to penetrate 18 new countries; and that the learned Judge had no reason to prefer one report over the other.

Turning to the fifth ground, it was argued that some of the documents constituting evidence of expenditure for clearing and transport, having been expunged by the respondent from the record, the learned Judge misdirected himself by relying on them and awarding US\$71,000. Finally, the appellant was aggrieved by the award of interest at court rate from the date of filing suit and an award of costs without providing any grounds upon which the discretion was exercised.

In support of these grounds the appellant cited, among other authorities, the decision in the case of **Floriculture International Limited V Central Bank of Kenya Limited & 3 Others** Civil Appeal No. 121 of 1995, on the question of raising for first time in this court, issues that were not canvassed in the court below; **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others**, S.C Application No. 2 of 2011, on the source of court's jurisdiction; **Kenya Ports Authority V Kunston(Kenya) Limited** (2009)2 EA 212; **Kenya Ports Authority V African Online Transport Company Limited** Civil Appeal No.149 of 2012, regarding the application of **section 62** aforesaid.

The respondent obviously was satisfied with the decision of the learned Judge and therefore opposed the appeal, arguing that it was too late in the day for the appellant to object to the jurisdiction of the trial court; that **section 62** of the Kenya Ports Authority Act denies parties aggrieved by the actions of the appellant a right of access to justice through the court system; that the application of **section 62** must be subject to necessary alterations, adaptations, qualifications and exceptions to bring it into conformity with the Constitution. Reference was made to **section 7** of the Sixth Schedule. It was further contended that no legislation can take away the right to have a dispute resolved in a fair and public hearing before an impartial tribunal; that the hearing before the arbitrator contemplated in **section 62** is not a public hearing; that the decisions cited by the appellant on this point represent the jurisprudence of a by-gone era. The respondent cited **Threeways Shipping Services (K) Limited V Kenya Ports Authority & Another**, Commercial Civil Suit No.28 of 2010, where Odero J , found that it was untenable to suggest that **section 62** has the effect of ousting the jurisdiction of the court; that **section 23** does not prevent any party in the respondent's position from seeking compensation for the actual loss suffered on account of breach of statutory duty or negligence; and that in limiting the amount that can be awarded, **section 23** goes against **Article 40 (b)** of the Constitution. It was submitted further that there was sufficient evidence and foundation to warrant the determination on the loss of profit; and that an award of both interest and costs being discretionary were properly granted.

We remind ourselves of our primary role in this first appeal, to re-evaluate, re-assess and re-analyse the evidence on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See **Kenya Ports Authority versus Kuston (Kenya)** (Supra).

Generally speaking and on the authority of the Supreme Court decision in **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others**, a court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. 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.

This Court in **Adero & Another V Ulinzi Sacco Society Limited** [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;

“1.....

2. **The jurisdiction either exists or does not *ab initio* and the non constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.**

3. **Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such**

jurisdiction.

4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.

5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.

6.

7.” (Our emphasis).

We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage of the proceedings and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised:

“...at any time, in any manner, even for the first time on appeal, or even *viva voce* and indeed, even by the Court itself

- provided only that where the Court raises it *suo motu*, parties are to be accorded an opportunity to be heard.”

(See **All Progressive Grand Alliance (APGA) v. Senator Christiana N.D. Anyanwu & 2 others**, LER [2014] SC. 20/2013 Supreme Court of Nigeria). We agree with these authorities and, hold that the question of jurisdiction was properly raised before this Court because, as they say in Latin, *ex nihilo nihil fit* (out of nothing comes nothing).

Did the learned Judge have jurisdiction to entertain the claim in light of **section 62** of the Kenya Ports Authority Act? That section provides that;

“62. (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 therefor 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)”. (Our emphasis).

Among the appellant's many powers as a statutory body are those outlined in **sections 12, 14, 15 and 16**. Relevant to this appeal are the powers to carry on the business of stevedore, wharfinger or lighterman; 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; to the extent determined by the Minister, to act as carriers of goods or passengers by land or sea; and to consign goods on behalf of other persons to any places whether within Kenya or elsewhere. By this section the appellant is expected, indeed required to do all it can in the exercise of any of its powers to do as little damage as possible to the goods in their custody.

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.

Following the promulgation of the Constitution we notice a shift in some recent decisions where courts have held that **section 62** is untenable in the present constitutional dispensation. Ojwang J, as he then

was, argued in Multi-serve Oasis Company Limited V Kenya Ports Authority (supra) that;

"It is quite obvious, in my opinion, that the limitations to the High Court's jurisdiction aforementioned only relate to matters reserved to other Courts: such as the Supreme Court; an Industrial Court if established by Parliament; and an Environmental Court if established by Parliament. This does not suggest a general parliamentary power to limit the High Court's jurisdiction, outside the clear terms of the delimitations in the Constitution itself..... it is clear that the new Constitution is today, the basis of the jurisdiction of the High Court; and it is not permissible to limit this jurisdiction on the basis of ordinary Statutes not provided for within the terms of the Constitution."

Likewise Odero, J following this line of reasoning found in Threeways Shipping Services (K) Limited (supra), that;

".....the express terms of the Constitution of Kenya, 2010 have rendered otiose the earlier law of jurisdiction, as existed under s.60 of the 1969 Constitution and as was reflected in decisions such as Kenya Ports Authority v. Kunston (Kenya) Limited, Civil Appeal No.315 of 2005; and Narok County Council v. Trans Mara County Council and Another, Civil Appeal No. 25 of 2000. 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 that, in the suit herein, s.62 of the Kenya Ports Authority Act has ousted the High Court's jurisdiction is not tenable"

The first point that must be stressed is that the Constitution in Article 1 decrees that;

"Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution".

Secondly we reiterate that jurisdiction of any court or tribunal flows from either the Constitution or statute or both; that, though the High Court under **Article 165 (3)** the Constitution has unlimited original jurisdiction in both civil and criminal matters, the same Constitution in **Article 159 (2) (b)** recognizes the application of alternative forms of dispute resolution mechanisms and enjoins the courts and tribunals in exercise of their judicial authority to be guided by and to promote all forms of alternative dispute resolution mechanisms, including reconciliation, mediation and arbitration.

It is, in our respectful view, a misapprehension of the law to argue that, to the extent that **section 62** provides that, **"where any person suffers damage, no action or suit shall lie"**, that that section is inconsistent with the Constitution for limiting the right to access to justice. The provision does not at all oust the jurisdiction of the court but merely limits and postpones it in the first instance. By **Article 165 (3) (e)** and **(6)** the High Court retains both appellate supervisory jurisdiction. **Article 165 (6)**, the High Court has supervisory jurisdiction:

"....over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function.....and may call for the record of any proceedings before any subordinate court or person, body or authorityand may make any order or give any direction it considers appropriate to ensure the fair administration of justice".

Section 62 aforesaid only provides a simpler, faster and cost-effective avenue of disputes resolution. The parties, must in the first place, themselves explore a settlement on the quantum of compensation, failing which the Chief Justice is required to appoint a single arbitrator to determine the quantum. The award of the single arbitrator is subject to the High Court's supervisory jurisdiction or to an appeal. In other words court adjudication is treated in this instance as the final stage in the dispute resolution process.

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 is 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”.

In our view, that remains the law and the earlier decisions including Kenya Ports Authority V Kuston (Kenya) Limited (supra) remain good law. We say, finally that where the Constitution or statute confers jurisdiction upon a court, tribunal, person, body or any authority, that jurisdiction must be exercised in accordance with the Constitution or statute. This has, time without number been stated by courts. We cite only two cases to demonstrate our point. Secretary, County Public Service Board & another v Hulbhai Gedi Abdille, Civil Appeal No. 202 of 2015, where this Court said;

“Time and again it has been said that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. Such party ought to seek redress under the other regime.”

Before Secretary, County Public Service Board & another v Hulbhai Gedi Abdille, (supra) was decided the Court made a similar determination in Speaker of the National Assembly v James Njenga Karume, Civil Application No Nai 92 of 1992 (Nai 40/92 Ur), saying:-

“...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observed without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions....”

Today many jurisdictions, Kenya included are resorting to arbitration as a forum for resolving high value, complex or technical disputes arising from all types of contracts; construction contracts, engineering, procurement and commercial contracts through expertise. Conventional litigation is ill-equipped to handle certain complex disputes where, for instance, like in this case the testimony given by experts is conflicting. We agree with the learned Judge that in the event of conflicting expert evidence, it is the duty of the court to consider the evidence and form its own opinion. However, in so doing, the court must give cogent reasons why it prefers the evidence of one expert over the other. (See Ndolo V. Ndolo [2008] 1 KLR (G&F) 742).

Before the learned Judge was a claim of US\$ 24,819,080, general damages that was to be assessed by the court, interest and costs. In the course of the trial both sides relied on three forensic audit reports prepared by two leading audit firms in Kenya, Price Waterhouse Coopers Limited and Ernst & Young. Their reports were, as it were, worlds apart. While the latter recommended that the loss incurred by the respondent, if liability was established, would be in two scenarios of US\$ 4,698,932 and 8,296,536, respectively, the former likewise proposed two scenarios of US\$ 1,355,475 and US\$ 2,046,109. There was a third report made by G. Washington & Company which was really a review of the financial statements of the respondent. This is how the learned Judge resolved the two rival reports.

“I have taken the three reports into consideration as expert reports and in line with the provisions of section 48 of the Evidence Act. They are and must remain opinions and can only persuade the court but are never binding upon it. That is not to say that I doubt the expertise of the authors. Indeed the authors are demonstrated to be quite skilled in their respective fields. What however concerns me is the extent of disagreement on the calculation of the sum described as loss. I would take it that both were carrying out definite instructions from the two rival parties to the dispute. That difference of about US\$ 6,000,000 would have to be resolved by the court. In seeking to resolve the difference I am bound to consider which of the two reports persuade me most. See Davei vs Edinburgh Magistrates [1933] SC 34.

Having said that I have read both reports, I consider that the report by E&Y is more convincing to this court. More convincing because it has discounted and pointed out errors in the report by PWC. I find that the loss of projected profits suffered by the plaintiff for the period 2008-2010 is as calculated by the plaintiff’s expert. For that reason I award to the plaintiff the sum of US\$ 8,296,536. I have adopted scenario B by E & Y because the evidence that the territory was extended to include some other 12 additional countries in Africa was never controverted”.

Clearly the learned Judge opted for the easier way out, choosing one set of scenarios against another set. The reason for that decision was, with respect simplistic, that the report by E &Y “**is more convincing to this court. More convincing because it has discounted and pointed out errors in the report by PWC**”. According to the appellant the discount and the disclaimer are a standard approach in forensic auditing reports. Again where there are technical expert evidence of the nature presented before the learned Judge, it is always advisable to have the makers explain by oral evidence the conclusions. The learned Judge also failed to consider the second report by PWC. We think, for these reasons that this dispute ought to have been resolved by an arbitrator.

Having so found, there is no need for us to consider the merit of this appeal as the point we have determined is sufficient to dispose of it. It is left for the parties to proceed under **section 62** of the Kenya Ports Authority Act.

In the result we allow the appeal, set aside the impugned judgment and decree of the High Court. We award costs to the appellant. We make no orders as to costs.

Dated and delivered at Mombasa this 29th Day of September, 2017.

ASIKE – MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR