IN THE COURT OF APPEAL

AT NYERI

(SITTING AT NAKURU)

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 24 OF 2011

BETWEEN

KENYA PORTS AUTHORITY..................APPELLANT

AND

TIMBERLAND (K) LIMITED.................RESPONDENT

(An appeal from the orders of the High Court of Kenya

at Nakuru, (Maraga, J.) dated 10th May, 201

in ***H.C.C.C. NO. 266 OF 2005)***

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JUDGMENT OF THE COURT

The central issue in this appeal is whether the High Court at Nakuru (Maraga, J, as he then was, now Chief Justice) erred in holding that the suit by Timberland (K) Ltd, the respondent herein against the appellant Kenya Ports Authority, which had admittedly been filed long after the expiry of the 12-month limitation period set out under **section 66** of the Kenya Ports Authority, was still competent by reason of **section 26** of the Limitation of Actions Act by which time runs from the date of discovery of concealed fraud.

The facts relevant to the determination of the issue were quite straight-forward and can be briefly stated. Sometime in the year 1999, the respondent imported a consignment of machinery to be delivered through the port of Mombasa in three containers about which the respondent was advised and it duly executed the requisite documents and paid all charges and fees required for the release of the goods, only to be advised that one of the containers No. GSTU6691369-279120 was misplaced and/or misdelivered or untraceable and therefore unavailable for delivery.

Following that non-delivery, the respondent made spirited efforts of follow up by visiting the appellant's offices in Mombasa and writing letters to it. In response to the respondent's demand for the vanished container, the appellant wrote on **19th February 2000** advising that the matter was being investigated and the outcome would be communicated to its clearing and forwarding agents on completion of the same. That letter was followed by another dated **18th May 2000** in which the appellant told the respondent this;

> **"Please be advised that your Clearing Agent, M/s Mechanised Cargo Systems Limited is vigorously pursuing the matter with this office. But we are yet to complete our investigation for which your Clearing Agent was accordingly advised vide our letter of even reference dated ….2000. As a matter of fact, it is too premature to resorting (sic) to legal action taking into account of (sic) the plenty of time in you (sic) credit. Please allow us a little more time for all organs of the Port Security to complete their investigations. Your Clearing Agent will definitely keep you posted on the progress of our investigation."**

Unrelenting, the respondent wrote again on **6th June 2000** and the appellant, by a response dated **18th June 2000**, yet again assured and pleaded with the respondent as follows;

> **"We wish to advise you that the position of the subject container will be made known when the investigations are complete."**

There seems to have been no further written follow up by the respondent but the appellant never did convey the result of the investigation, if any, and so on **27th July 2005** the respondent, through Kamere & Co. Advocates, wrote a letter before action which was followed by the filing of suit on **31st October 2005** blaming the appellant for the loss of the container and claiming the total value of the goods misplaced amounting to **Kshs. 6,691,335**, plus costs and interest.

The appellant resisted the suit by a written defence in which it denied liability for any loss and also raised this specific objection at paragraph 11;

> **"11.The defendant will raise an objection on a point of law at the hearing of the suit that the suit is bad in law for contravening the provisions of the Kenya Ports Authority Act Cap 391, [KPA Act] the Laws of Kenya as regards issuance of Notice of intention to sue and limitation period."**

After the usual pre-trial motions the suit proceeded for hearing before the learned Judge who held that the delay in filing suit was covered under and cured by **section 26** of the Limitation of Actions Act. He found for the respondent but to the extent of the value of the goods at 32,000 U.S dollars together with **Kshs. 593,035** being import duty and port charges making a total of **Kshs. 3,566,951.65** plus costs and interest.

Aggrieved by that judgment the appellant complains in its memorandum of appeal that the learned Judge erred in various respects the crux of which was in grounds 2 to 4 which was by holding that;

> **"2. the appellant's failure to respond to the respondent's letter by producing the investigations reported constituted fraud**
>
> **3. time stopped running or was extended for purpose of limitation under section 66 of the KPA Act by the respondent's belief that investigations into the lost container were ongoing**
>
> **4. Section 66 of the KPA Act is subject to or that Section 26 of the Limitation of Actions Act is applicable to it."**

It also complained at the learned Judge's holding that it was liable to the respondent for the lost container.

Those are the issues that learned counsel **Mr. Sangoro** appearing with **J. Okonjo** for the appellant and **Mr. J. Githui** for the respondent addressed us on. Going first, Mr. Sangoro admitted that the cause of action accrued in 1999 or 2000 and that the appellant's request for time to investigate the loss of the container was in good faith. He castigated the respondent for seeming "to wait for an eternity" before filing suit and reiterated that the appellant's request for time and failure to communicate the result of the investigation was not tantamount to fraud. He went on to argue that only special relationships of a fiduciary kind could bring in the exception to the running of time due to fraud and that the relationship between the parties herein was not such a relationship. He urged that the respondent was guilty of gross laches and the learned Judge erred in importing the concept of fraud to aid it when fraud was never pleaded by the respondent. He referred us to his bundle of authorities and urged us to allow the appeal.

Opposing the appeal, **Mr. Githua** pointed out, quite correctly in our view, that the appeal turns on interpretation of **section 66** of the KPA Act. To him, the 12-month period prescribed therein was not outside the purview of the Limitation of Actions Act. **Section 31** whereof formed the interface between the two statutes by requiring that part III on "*Extension of Periods of Limitation*" be read as part of the KPA Act. The respondent relied on **section 26** of the Limitation of Actions Act for a time benefit arising from the fraudulent misrepresentations of the appellant that it was investigating the loss and would revert but never did. The cause of action would therefore accrue from the date loss was confirmed and the respondent filed suit when it was finally rebuffed by the appellant, urged counsel.

He proceeded to state that the special relationship that existed between the parties was that of bailee-bailor and he cited in aid the ***CALEDONIA RAILWAY COMPANY vs. JOHN CHISHOLM*** **[1986] 13 R 773** to make the point that the limitation period could not apply where the conduct of the defendant leads to the claimant's delay in filing suit. He also relied on the case of ***KITCHEN vs. ROYAL AIR FORCE ASSOCIATION*** **[1958] 1 WLR 563**, found in the appellant's own bundle of authorities, to show that fraud for purposes of limitation covered conduct which, having regard to the relationship of the parties, was unconscionable. He urged us to find, as did the learned Judge, that the appellant's conduct was in fact fraudulent and they were not entitled to rely on the statute to defeat the respondent's claim. Relying on the decision of the former House of Lords in ***CAVE vs. ROBINSON JARVIS & ROLF*** **[2003] 1AC 384; [2002] UKHL 18**, he explained that 'fraud' is used in the equitable sense to denote conduct by the appellant such that it would be against conscience for it to avail itself of the lapse of time.

Mr. Githua concluded his submissions by answering the appellant's case that because the respondent defrauded the Kenya Revenue Authority by under-declaring the value of the goods it should not have received any compensation as was held by this Court in ***KENYA PORTS AUTHORITY vs. KUSTON (K) LTD*** Nairobi Civil Appeal No. 315 of 2015, by stating that the case was distinguishable since in the present matter the issue of under-declaration was not pleaded. He urged us to dismiss the appeal.

Making a brief rejoinder to those submissions, **Mr. Sankoro** asserted that not all relationships are special and on that basis attempted to distinguish the authorities relied on by the respondent as having involved special relationships which was not the case between the parties herein.

We have given the judgment, the record of appeal, the memorandum of appeal, the submissions of respective counsel and the authorities cited due and careful consideration. We do so by way of rehearing where we place ourselves in the shoes of the first instance judge and subject the entire record and evidence to a fresh and exhaustive scrutiny and evaluation so as to arrive at our own independent inferences and conclusions. We do so mindful that we suffer the handicap of not having heard and observed the witnesses as they testified, for which we make due allowance with due deference to, but with the right and duty to depart from, any conclusions that are unbacked by the evidence or

that proceed from a misapprehension of the evidence or are plainly wrong. See ***SELLE vs. ASSOCIATED MOTOR BOAT CO. LTD & OTHERS [1968] E.A 123***. Our latitude to depart is wider where, as here, the matter turns, not on the evidence as such, but on the construction of statues, which is a legal as opposed to a factual matter.

As we have indicated, the learned Judge took the impugned position that on the facts, the appellant could not benefit from the statutory limitation. Before arriving at that conclusion, he had first, correctly in our view, dismissed as inconsequential and ineffectual the respondent's reliance on an extension of time obtained under **section 27** and **28** of the Limitation of Actions Act for the reason that such extension could only be granted in a manner relating to personal injuries or death resulting from the negligence, nuisance or breach of duty constituting the cause of action and not contract as was the case herein.

Having disposed of the purported extension, the learned Judge then addressed the question of whether the appellant could effectively mount the objection of limitation against the respondent. After setting out the correspondence we have already set out herein, the learned Judge reasoned as follows;

> **"Under these circumstances what does one make of the above correspondence? In my view, the plaintiff is right is saying it was duped into believing that investigations were still going on. The defendant specifically promised that it was going to revert to the defendant with the result of the investigations but there is nothing on record to show that the defendant advised the plaintiff or its agents of the outcome of the investigations. As a matter of fact, the defendant has not revealed the result, if any, of its investigations. In the circumstances, it is safe to conclude that the defendant never carried out any investigations. If it did, it was obliged to advise the plaintiff of the outcome as it had promised for the plaintiff to decide on what to do. I cannot therefore accept the contention by counsel for the defendant that when correspondence ceased in 2000, the plaintiff should have realized that the defendant was not going to reply. I find the defendant's failure to be fraudulent. I therefore hold that it would be unconscionable to allow the defendant to get away with its fraudulent scheme."**

It is the finding that the appellant's conduct was fraudulent that provided the basis for the learned Judges' holding that the respondent's delay was cured under **section 26(b)** of the Limitation of Actions Act which we have earlier set out. That provision expressly states that a prescribed period of limitation for a cause of action does not begin to run where the right of action is concealed by the fraud of the defendant or his agent until the plaintiff has discovered the fraud. Our reading of the same does not at all suggest that the limitation period has to be one prescribed by the Limitation of Actions Act alone and so the exception or extension triggered by fraud would apply to any time statutory limitation wherever prescribed. Indeed, that much is clear from **section 31** of the Limitation of Actions Act;

> **"Where a period of limitation is prescribed for any action or arbitration by any other written law, that written law shall be construed as if Part III of this Act were incorporated in it."**

That being the case, **Section 26** does apply to extend the 12-month period of limitation that is prescribed by the KPA Act.

Was the learned Judge entitled to conclude that he appellant's conduct amounted to fraud and that the court could not in conscience allow it to defeat the respondent's claim by hosting the statutory time limitation? Even though the learned Judge did not have the benefit of being addressed on the authorities that were cited before us, we find that his thinking is in consonance with them. It must always be remembered that courts exist for the purpose of doing justice between the parties and must rebuff any legal and technicalities that are meant to defeat substantive rights as we have a fused jurisdiction of both law and equity. There is no doubt from the evidence that the appellant expressly misrepresented to the respondent that it was investigating the loss of the stray container and that it would revert once the investigations were complete. In fact, it beseeched the respondent to extend some patience and accommodation to it. It does seem ill, and it did so sound to the learned Judge, that such a party should, not having reverted with the result of the investigation and having literally slammed the door in the face of the respondent, now turn around and mount the objection of limitation. To allow such a plea to succeed would be to convert the judicial process into a cynical game of sheer chicanery where victory belongs to the crafty and good faith is viciously punished. The learned Judge was right to reject such an aberration, and we reject it too.

That is the conduct on the part of defendants that Lord President Inglis rejected in England long ago in ***CALEDONIAN RAILYWAY CO. vs. CHISHOLM*** (supra) and which Lord Hope Craighead adopted much more recently in ***BP EXPLORATION LTD vs. CHEVRON SHIPPING CO*. [2003] 197** at p 214-15;

> **"Now, that undoubtedly implies that there is negligence upon the part of the creditor, that he ought to have pursued his action sooner, and that he ought not to have allowed the three years to elapse. But how is that possible in the case of these pursuers if their statements be true? By the false pretences of the defender they were prevented from discovering that they were carrying sacks free for which they were entitled to charge. And the defender was in the full knowledge of that and failed to disclose it. To apply the statute to a case of that kind, it appears to me, would not only be entirely, unjust, but would be entirely against the meaning of the statute. The statute assumes that the creditor is in a condition to sue, and it is because of his negligence in putting off the making of his claim-that the statute imposes the penalty upon him. It is clear to my mind, therefore, that wherever a case of this kind can be made, that the failure to sue is due to the conduct of the defender (whether it amounts to fraud or not), to concealment on the part of the defender, or to the bringing forth of pretences which are false in fact, whether fraudulent or not, the pursuer cannot be visited by the penalty of the statute, because there is no negligence upon his part, but the sole cause of the delay in bringing forward his claim and raising the action is the conduct of the defender."**

The law Lord went on to make reference to an observation by the Scottish Law Commission in its *Report on Reform of the Law Relating to Prescription and Limitations of Actions* ([1970] Scot Law Com. No. 15) p35 para 93 that one does have a defence to the objection of statutory limitation if he can show that he was induced by the action of the defendant from pursuing the claim within the prescriptive period, which we find to be equally appropriate;

> **“We consider that on equitable grounds a defence against the suggested new short negative prescription should similarly be available to the creditor if he has been deterred from taking action within the prescriptive period by fraud or concealment by the debtor or by error on the part of the creditor, but only where the error has been induced by the words or conduct of the debtor. For the purposes of such a defence the actions of any person through whom the creditor or debtor claimed or from whom the creditor or debtor derived right should be regarded as actions of the creditor or debtor respectively and the actions of an agent for either party should be regarded as the actions of his principal. The effect of such fraud, concealment or error should be to defer the commencement of the prescription until the date when the fraud, concealment or error was discovered by the creditor or could, with reasonable diligence on his part, have been discovered.”**

We are, on a full consideration of the matter, quite satisfied that the learned Judge did no wrong in finding that the appellant’s conduct did fraudulently induce the respondent not to file the suit within the prescribed time.

Having come to that conclusion, we find that this appeal is without merit and we order it dismissed with costs.

This judgment is rendered out of the ordinary time but this is due to an erroneous belief that we had already delivered it, which error is regretted.

Dated and delivered at Nakuru this 22nd day of November, 2017.

P. N. WAKI

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JUDGE OF APPEAL

R. N. NAMBUYE

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR