



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT MALINDI
(CORAM: OKWENGU, MAKHANDIA, SICHALE, J.J.A)
CIVIL APPEAL NO. 149 OF 2012

BETWEEN

KENYA PORTS AUTHORITY.....APPELLANT

AND

AFRICAN LINE TRANSPORT CO. LTD..... RESPONDENT

(Appeal from Judgment of the High Court of Kenya at Mombasa (Sergon J) dated 24th September, 2010 in Mombasa Commercial Case No. 128 of 2006)

JUDGMENT OF THE COURT

[1] This appeal arises from a dispute that arose between **Kenya Ports Authority** (hereinafter referred to as the “Appellant”), a public corporation responsible for maintaining and regulating the operations at the Port of Mombasa, and **African Line Transport Company Limited** (hereinafter referred to as the “respondent”), a road transport company. The dispute concerned a consignment of goods, which was imported by the respondent through the Port of Mombasa. The consignment of goods was allegedly received at the Port of Mombasa and either detained or unlawfully seized by the Appellants for a period of 632 days. As a result the respondent filed a suit in the High Court seeking judgment as follows:

“a) Special damages of Kshs.80,829,250/-,

- b. Release of the consignment to the Plaintiff and/or payment of loss of income and special damages,**
- c. General damages,**
- d. Costs of and incidental to this suit,**
- e. Interest at 36% or loss of income and special damages from January 2002, until judgment and payment in full”.**

[2] The appellant filed a defence in which it denied the respondent’s claim, and maintained in the alternative that the imported consignment was delivered to the respondent and or his authorized agents. The appellant further contended that if it was liable, then the particulars of loss and damage alleged were grossly exaggerated. In addition the appellant denied having received any statutory notice of intention to

sue and maintained that the suit was bad in law.

[3] Hearing of the suit proceeded before **Sergon J**, who heard three witnesses for the respondent and one witness for the appellant. The witnesses included, **Davis Jephtha Mugana Mwambingu (Davis)** who was then a clerk with Bustan Freighters Clearing & Forwarding Company. He explained the procedure that was normally followed when goods were to be cleared at the Port.

[4] The procedure involved receiving a pro forma invoice from the client; applying for the import declaration form; presentation of the Bill of Lading to the shipper; payment of the shippers' charges; lodging documents with the customs for verification and payment of duty; thereafter dispatch of documents to the appellant for release of the goods.

[5] The documents dispatched for release of the goods included, the appellant's Delivery Order and Mombasa Port Release Order. An invoice was then issued for payment of appellant's charges, and the goods were thereafter released after having been physically verified against the documents. A gate pass was issued to facilitate removal of the goods from the Port.

[6] **Davis** stated that it was possible when a Bill of Lading was presented, to clear part of the goods leaving some goods behind, in which case the appellant's staff at the gate would indicate the balance on the documents and the clearing agent would counter-sign. Davis testified that he was involved in the clearing of the consignment in issue as the respondent was a client of Bustan Freighters, Clearing & Forwarding Company. The Bill of Lading was for importation of four trucks and five trailers loaded with six exhausters. By 31st December 2001, the goods had arrived at the Port of Mombasa. Davis personally lodged the documents with appellant's officials who raised two invoices totaling Kshs.971,217/- for Port charges. Davis produced a receipt that was issued to him for payment of the charges.

[7] Davis explained that a gate pass was issued to his workmate, **Shadrack Yawi Karisa (Shadrack)**, for four units of the Mercedes trucks, leaving a balance of five trailers and six exhausters that were to be collected. Davis was however, not present when Shadrack signed the gate pass. Under cross-examination, the witness stated that the goods were verified at G-Section although he was not sure whether this was done, as he was not present.

[8] **Shadrack** a second witness for the respondent, recalled that he had instructions to clear a consignment of four unit trucks, five trailers and six wood axles. He confirmed that the appellant's charges were paid by his colleague Davis after which, he (Shadrack) went to the G-Section for the verification of the consignment. Shadrack maintained that only four trucks were released, and that he did not verify the rest of the consignment. He produced a gate pass that was issued to him and explained that the appellant's officials endorsed the Mombasa Port release order to show that six trailers and axles were not seen.

[9] Shadrack produced the Mombasa Port Release Order Number 233625 for the consignment, according to which the consignment included:

Four used Mercedes Benz unit S.T.C - loaded with six trailer engines, Engine Chassis axles as per the attached list.

He also produced a list that was attached to the Bill of Lading No. 405258, which showed that the consignment included 1 stack of five 40 feet skeletal trailers. Under cross-examination, Shadrack stated that during verification, he realized that only four Mercedes Benz trucks were available, and he informed the respondent accordingly. He only cleared what was available and he did not therefore verify the existence of the trailers.

[10] **Benedict Moya Odinda (Benedict)**, was working for the respondent as the Assistant Chief Accountant between the years 2001 and 2002. He testified that the respondent was in the business of transportation of containers and goods between Mombasa and Kampala; that in a month a truck could make three (3) trips; and that the respondent also used to transport goods to Southern Sudan and Goma in

Congo.

[11] Benedict produced invoices for work undertaken by the respondent in transporting 40 feet containers between Mombasa and Kampala, and stated that the respondent used to make about US dollars 9,000 per truck per month. He added that the respondent would have earned US dollars 540,000 (Kshs.40 million) per year for the five trailers. He estimated the appellant's loss of use for the five trailers at Kshs.100 million for five years. This was after having taken into account operational cost and corporation tax.

[12] **Stanlaus Angina (Angina)**, testified in support of the appellant's defence. Between November 2001 and March 2002, the appellant had deployed him in the Security and Investigation Unit at the Inland Container Depot. He explained that the procedure was that where only part of the goods were removed from the Port, the balance was endorsed on the gate pass at the Gate Pass Office, as the gate pass is the final document in the process; that in case of a huge consignment, the consignment could be removed piecemeal from the Port and each removal was contained in a separate gate pass.

[13] In his Judgment, the trial Judge found that, the appellant did not release the consignment of five trailers to the respondent, and was therefore liable to the respondent. He therefore entered judgment for the respondent as follows:

“(i) Kshs.100,000,000/- representing loss of user for the trailers for five years.

ii. Kshs.700,000/- being refund of the Port charges.

iii. Interest on No. (i) above at court rates from the date of judgment until the date of full payment.

iv. Costs of the suit”

[14] Being aggrieved by that judgment, the appellant lodged this appeal raising fourteen (14) grounds. In a nutshell, the appellant criticized the judgment contending *inter alia* that the trial judge had failed to appreciate the evidence and arrived at a wrong conclusion that the appellant was negligent and in breach of its statutory duty to the respondent; that the judge erred in entering judgment for the respondent for a sum not prayed for in the plaint and awarding damages for loss of use which had not been specifically proven; that the judge erred in failing to find that the respondent's claim was statute barred, and that the High Court had no jurisdiction to hear the suit.

[15] During the hearing of the appeal, the appellant was represented by **Mr. P.M. Gachuhi** who pointed out that the particulars of the goods listed in the respondent's claim as not having been released to the respondent by the appellant, did not appear on the Bill of Lading number HDMUGBKY 940407 cited by the respondent at paragraph 3 of its plaint; that although the goods pleaded as not having been delivered were said by the respondents witness to have been in a document attached to Bill of Lading No. 405288, no pro forma invoice for the goods, or Import Declaration Forms in regard to Bill of Lading No. 405288 were produced, and therefore the importation of the goods was not established.

[16] Mr. Gachuhi submitted that the trial judge did not consider the evidence which was adduced by the respondent that the life span of a trailer was ten to twelve years; that this was important as the year of manufacture of the trailers as pleaded and shown on the documents showed that the trailers were manufactured between 1969 and 1998; that the trailers were past their life span, and were in fact described in the documents as scrap metal; that the goods were not properly declared and the importation was tainted with illegality.

[17] Mr. Gachuhi faulted the trial judge for giving judgment for Kshs.100 million when that amount was not specifically pleaded; that though the sum awarded was variously described as loss of use, loss of income and loss of profit the law required such loss to be specifically pleaded; that the alleged loss was not specifically proved as audited accounts were not produced to demonstrate the alleged loss of profits. In addition it was not clear what the sum of Kshs.700,000/- allowed as refund of duty paid, was based on,

as no invoices for the payment were produced or any reference made to the invoice.

[18] Further, counsel challenged the extension of time that was given to the respondent to file the suit out of time maintaining that it was contrary to the Kenya Ports Authority Act. He submitted that if indeed the goods were lost, steps should have been taken under **section 62** of the Kenya Ports Authority Act to institute Arbitration proceedings.

[19] **Mr. Mutubia**, counsel for the respondent, drew the Court's attention to communication between the appellant and the respondent, which showed that only part of the consignment was released to the respondent. He pointed out that the allegation that the goods were not imported was not raised in the appellant's defence; and that there was no issue regarding the declaration of the goods as the appellant was not holding brief for Kenya Revenue Authority which was the body concerned with the issue of duty.

[20] Mr Mutubia argued that the restriction of the award for loss of use to five years was an indication of the trial judge's awareness that the consignment involved second hand goods; that the respondent had pleaded loss of use of Kshs.79,000,000/- at paragraph 9 (a) of the plaint, and that the judge awarded the net profit after taking into account the operational costs. Mr. Mutubia further submitted that the appellant never raised nor pleaded the issue of arbitration in the defence, but in fact admitted the jurisdiction of the court in the defence; and that the order granting leave to file suit out of time was not questioned in the defence.

[21] This appeal being a first appeal from the trial court, we have an obligation to reconsider and evaluate the evidence which was adduced in the trial court and come to our own conclusion bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of the witnesses (see **Selle & Another v. Associated Motor Boats Co. Ltd [1968] EA 123**) In undertaking that obligation we are guided by the principle that a Court of Appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or the judge is shown to have acted on wrong principles in reaching the findings he did (see **Chemagong v. Republic [1984] KLR 611**).

[22] We have carefully perused and considered the record of appeal and the submissions made by counsel for the parties. We note that no list of agreed issues signed by the parties is contained in the record of appeal, although the appellant's counsel in her submissions filed in the trial court, identified what she considered to be issues for determination. In his judgment the trial judge made reference to issues that were drawn for the determination of the court, which issues he identified as follows;

- i. *Whether the defendant cleared the plaintiff's entire consignment?*
- ii. *Whether the plaintiff is entitled to a refund of the charges it made to the defendant?*
- iii. *Whether or not the suit is statute barred?*

[23] In **Galaxy Paints Company Limited v Falcon Grounds Limited [2000] 2 EA 385**, it was stated as follows:

*“It is trite law, and the provisions of **Order XIV** of the Civil Procedure Rules are clear, that issues for determination in a suit generally flows from the pleadings and unless pleadings are amended in accordance with the provisions of the Civil Procedure Rules, the trial court, by dint of the provisions of **Order XX Rule 4** of the aforesaid rules, may only pronounce judgment on the issues arising from the pleadings or such issues as the parties have framed for the court's determination”.*

[24] In this case, the trial judge did not purport to exercise his discretion to amend or strike out issues given under **Order XIV Rule 5** of the former edition of the Civil Procedure Rules, but made reference to issues drawn for determination by the court. Since there appears to have been no list of agreed issues, we find it necessary to begin our evaluation by examining the pleadings with a view to ascertaining whether the trial judge properly identified and pronounced judgment on the issues arising from the pleadings.

[25] The respondent's claim was anchored on its allegation that it imported the consignment in issue, and that the appellant received the consignment at the Port of Mombasa, and either detained or unlawfully seized part of the consignment. The appellant generally denied all the respondent's allegations in paragraph 1 of the defence. As regards the allegation that the consigned goods were shipped and discharged to the custody of the appellant, the appellant specifically denied this allegation in paragraph 3 and 4 of the defence. This raised an issue with regard to whether the goods alleged to be detained by the appellant were received at the Port of Mombasa and discharged into the custody of the appellant.

[26] At paragraph 5 of the plaint, the respondent alleged that part of the consignment was actually released leaving a balance of five trailers loaded with six trailer axles. Again this allegation was specifically denied at paragraph 5 of the defence raising an issue whether the consignment was released partially. The appellant's alternative averments at paragraph 5 of the defence that the consignment of trailers that landed on or about 31st December 2001, was delivered to the respondent intact, raises an issue as to which goods landed on that date and whether the same were released intact or whether the appellant seized or detained some of the goods.

[27] With regard to the respondent's alleged loss of income and loss of use, the same was also denied so that there was an issue as to whether the respondent suffered loss and if so, the quantum thereof. In paragraph 11 of the defence the appellant questioned the competence of the respondent's claim with regard to limitation and failure to serve a statutory notice, thereby bringing to issue the competence of the appellant's claim.

[28] In his judgment, the trial judge rendered himself as follows:

“ I have carefully considered the evidence tendered by both sides. It is important to note at this stage that the defence witness (DW1) was a formal witness who did not participate in handling the consignment and or transaction in dispute. He did not establish the circumstances under which the gate pass, which was produced by PW3 as PEXH 4 was issued. A cursory look at PEXH 4 will reveal that only four units of the trucks were cleared. No trailers were cleared contrary to the allegation made by the defendant through the evidence of DW1. It was the duty of the defendant to prove that it released all the consignment due to the plaintiff. The question as to whether or not the defendant released the trailers to the plaintiff is in my view settled in favour of the plaintiff...

By way of summary, let me re-examine the issues, which were drawn for the determination of this Court. First, is whether the defendant cleared the plaintiff's entire consignment...”

[29] From the above, it is evident that the trial judge missed one critical issue which arose from the pleadings which was whether the goods set out in paragraph 3 and 5 of the plaint were shipped to the Port of Mombasa and discharged to the custody of the appellant as alleged. The trial judge appeared to have started from the wrong premise that the consignment arrived at the Port and was discharged to the appellant. In our view, this was a mis-direction as that fact was a disputed issue that was to be resolved by the Court.

[30] We appreciate that the trial judge may have been influenced by the submissions that were filed in the High Court by the appellant's counsel who appeared to have conceded that the respondent had proved the importation of the consignment as per the Bill of Lading. Nevertheless this fact was not only denied in the defence, but also specifically denied again when a notice dated 21st March 2005 served on the appellant by the respondent under **Order XII Rule 5** of the former edition of the Civil Procedure Rules, seeking *inter alia* an admission of this fact, elicited a response through a notice dated 6th April 2005 refusing to admit the facts. The trial judge was therefore under a responsibility to subject the submission to scrutiny by evaluating the evidence in support of the alleged importation and discharge.

[31] We are not surprised that Mr. Gachuhi took a completely different view from that of his predecessor, maintaining that there was no evidence in support of the importation of the missing items, first because

the items were not listed on the Bill of Lading No. HDMUGBKY 940407 alleged by the respondent in paragraph 3 to have been used in the importation of the goods; and secondly, that no import declaration documents or pro forma invoices were submitted in regard to the Bill of Lading No. 405248 which was relied on by the respondent in their evidence.

[32] Thus the issue as to whether the goods were imported and released to the custody of the appellant was a crucial issue whose determination in the respondent's favour would have laid a foundation for the respondents claim. On our evaluation of the evidence we note that by a letter dated April 3rd 2003, addressed to the appellant by Diamond Shipping Services Limited, and copied to the respondent, in connection with Bill of Lading HDMUGBKY 940407, Diamond Shipping Services limited denied any responsibility for the loss, maintaining that the trailers were discharged from the ship and tallied. Nonetheless, the respondent did not call any evidence from Diamond shipping Services Limited to confirm the discharge of the consignment or tallying of the goods.

[33] Further, the respondent's witnesses Shadrack and Davis were only clearing and forwarding agents who did not participate in the discharge process. Indeed, Shadrack's evidence was that only four Mercedes Benz trucks were available for him to clear, and that he did not verify the existence of the trailers. This was consistent with Gate Pass No 254123 produced by Shadrack that contained no endorsement of any balance of goods, but indicated details of packages as four units only, with the box indicated "Complete" being checked and the box indicated "Part" remaining blank, thereby confirming that there was no balance of goods from that particular consignment.

[34] Although an endorsement on Mombasa Port Release Order No. 233625 was relied upon to show that "6 trailers and axles were not seen", it is not clear at what point the endorsement was made. This release order was also rather ambiguous as the consignment on Bill of Lading Number HDMUGBKY 940407, and Bill of Lading Number 405258, were each indicated as having been released on Mombasa Port Release Order bearing this same number 233625 yet details that were on the release orders annexed to each Bill of Lading were different, thereby begging the question as to which was the correct release order. Thus the possibility that Shadrack was only able to clear four Mercedes Benz trucks and not the trailers, because the trailers were not discharged from the ship, was not ruled out.

[35] The issue of the discharge from the ship becomes more pertinent given the inconsistency between the Bill of Lading Number HDMUGBKY 940407 identified in paragraph 3 of the plaint as the Bill of Lading for the consignment, and the fact that this Bill of Lading did not mention any of the items particularized in paragraph 5 of the plaint as not having been released. The missing trailers were in fact particularized in a document headed "*Attaching to and forming part of the Bill of Lading No.405258.*" The respondent's witnesses did not explain or show any nexus between Bill of Lading HDMUGBKY 940407 and Bill of Lading No.405258.

[36] As was stated in **Heskell v Continental Express Ltd [1950] 1 ALL ER 1033**, applied in **Kenya Ports Authority v Kuston (Kenya) Ltd** (supra)

" A Bill of Lading is a document signed by the ship owner or by a master or other agent of the ship owner which states that certain specified goods have been shipped upon a particular ship and which purports to set out the terms on which such goods have been delivered to and received by the ship..."

It is "in the first instance, an acknowledgement of the receipt of the goods specified therein as against the person actually signing it, it is not conclusive and may be controverted by evidence showing that the goods were never in fact shipped" (emphasis added)...

[37] We find that even if we were to accept that the Bill of Lading No 405248 was the correct document, it would not be conclusive in establishing that the goods were shipped in the absence of invoices or import declaration forms for the goods listed in Bill of Lading No.405258. Moreover there was no evidence of discharge from the ship to the custody of the appellant as even the letter dated April 3rd 2002

from Diamond Shipping Services Ltd to the appellant concerning the discharge of the goods did not make any reference to Bill of Lading No 405248.

[38] Under *section 107* of the Evidence Act

“... Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exists...”

[39] The burden was upon the respondent who was asserting that the goods were imported and discharged to the appellant to establish this fact before the evidential burden could shift to the appellant to prove that it released all the consignment to the respondent. We find that the respondent did not discharge this burden of proof and therefore the trial judge prematurely shifted the evidential burden when he stated:

“No trailers were cleared contrary to the allegations made by the defendant through the evidence of DW1. It was the duty of the defendant to prove that it released all the consignment due to the plaintiff.”

Without proof that the missing goods were shipped and discharged to the appellant, the respondent’s claim could not stand.

[40] As regards the award of damages, the issue is whether the respondent’s claim for damages was properly pleaded, and if so, whether it was proved, and whether the award made by the trial judge was proper. The general principle is that an appellate court will not disturb an award of damages unless it is demonstrated that the judge of the lower Court proceeded on wrong principles or that he misapprehended the evidence in some material aspects thereby arriving at a figure inordinately high or low such as to represent an erroneous estimate (See **Kemfro Africa Ltd t/a Meru Express Services & Another v. A.M. Lubia & Another [1982-1988] 1KAR 727**)

[39] In this case, the appellant’s claim was variously described as loss of use and loss of income. Apart from the special damages the respondent also prayed for general damages. In **Waweru v Ndiga [1983] KLR 236**, it was held that damages for loss of use of a vehicle should be claimed as special damages and not general damages, and that the loss suffered should be proved strictly. In this regard the respondent particularized his loss of use of the vehicle up to the time of filing suit at paragraph 9 of the plaint as follows:

**“PARTICULARS OF LOSS OF INCOME AND LOSS OF USE BY THE
PLAINTIFF.**

- a. **The consignment comprising of truck/trailers and parts was detained by the defendant in its custody since 14th January, 2002 to date, i.e. a period of 632 days and the plaintiff suffered loss of use as particularized hereunder:-**

Loss per truck	Kshs.25, 000
Loss per truck to date i.e. 25,000 x 635	Kshs.15, 800,000
Loss for the 5 trailers i.e. 15,800,000x5	Kshs.79, 000,000
(b) Value of lost goods	Kshs.449, 750
Freight paid	Kshs.385, 500

Duty paid

Kshs.294, 000

K.P.A Port charges

Kshs.700, 000

Ksh.80,829,250”

[40] In his judgment, the trial judge awarded Kshs.100 million as damages for loss of user of the trailer for five years. It is evident that the trial judge treated the appellant's claim for loss of use of the vehicles as a claim for general damages. This was wrong given that the respondent had specifically made a special damages claim for loss of use. The award of damages for loss of use could therefore not exceed the sum of Kshs.79 million that was the amount specifically pleaded.

[41] The issue is whether the appellant had proved his claim for loss of use, and if so whether the award for loss of use for five years was reasonable. In **African Highland Produce Ltd v John Kisorio Civil Appeal No. 264 of 1999**, this court (differently constituted) stated as follows:

“ The guiding principle of law in mitigation of losses is as follows. It is the duty of the plaintiff to take all reasonable steps to mitigate the loss he has sustained consequent upon the wrongful act in respect of which he sues, and he cannot claim as damages any sum, which is due to his own neglect. The duty arises immediately a plaintiff realizes that an interest of his has been injured by a breach of contract or a tort and he is then bound to act, as best he may not only in his own interest but also in those of the defendant.”

[42] In his judgment the trial judge did not address the issue of mitigation of loss. Since the goods were not released to the appellant, and the parties were in the process of litigation, it was unreasonable for the respondent to sit back counting its losses and waiting for the missing trucks, without taking any action to mitigate the loss. The absurdity of the respondent's inaction becomes evident when one considers the value of the missing trucks which was pleaded as Kshs.449,750/- vis a vis the alleged loss of use of Kshs.125,000/- per day. The award of the colossal sum of Ksh.100 million for five years was to say the least preposterous. No evidence was adduced of any efforts made by the respondent to mitigate its loss. This was a crucial factor that the trial judge ought to have taken into account, but failed to do so. At the very least the award for loss of use ought not to have exceeded 12 months taking into account the time necessary for the importation of alternative trailers.

[43] Further the evidence of the respondent regarding the loss of use was that of its chief accountant. Apart from producing invoices, showing that the respondent was in transportation business between Kampala, Mombasa, Zaire and Southern Sudan, the witness did not produce any statement of accounts for the respondent's company to confirm the alleged income or the operational costs and taxation. Thus the evidence adduced was far from adequate in establishing the alleged loss of income.

[44] Be that as it may, as regards the claim for special damages, the trial judge only awarded kshs.700,000/- being refund of Port charges, the trial judge does not appear to have given any reason for not addressing the respondent's claim for loss of the value of lost goods, freight and duty paid. In our view, this claim was also not specifically proved as there was no invoice or any other document produced to confirm the value of the alleged lost items, nor was any evidence produced to show the freight and duty paid. In the circumstances, the claim for special damages in this regard could not succeed. While there was a receipt for the payment of Port charges for Kshs.971,217/- the respondent did not adduce any evidence to support its claim that Kshs.700,000/- out of that money was in regard to the items which were missing. In the circumstances, the claim was not strictly proved.

[45] Was the respondent's suit statute barred? The appellant at paragraph 11 of the defence raised this issue. The trial judge disposed of the issue in one sentence as follows:

“I have already shown that the plaintiff obtained leave to file an action out of time hence this suit is competently before this Court”

Once again the trial judge missed the point. There was no dispute that the respondent obtained leave to file its suit out of time. The issue was whether the appellant could challenge the *ex parte* order granting the respondent leave to file suit out of time, and if so whether the extension of time granted to the respondent ought not to have been granted.

[46] In **Divecon Limited v Shirinkhanu Sadrudin Samnani Civil Appeal No 142 of 1997** (Unreported), it was held that the proper forum to challenge an *ex parte* order for leave to file suit out of time, is to raise the issue within the suit after the suit has been filed. Thus the issue was properly raised before the trial judge and the judge ought to have re-examined the issue of limitation and considered the validity of the extension of time.

[47] As regards the issue of jurisdiction, the appellant at paragraph 12 of its defence admitted the jurisdiction of the court. However, **section 62 (1)** of the Kenya Ports Authority Act (Cap 391) states as follows:

“ In the exercise of the powers conferred by section 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”

[48] From the pleadings and evidence the appellant was alleged to have been exercising its powers under **section 12(1)** of the Kenya Port Authority Act of carrying on the business of stevedore, wharfinger and warehousemen. Thus **section 62** of the Kenya Ports Authority Act was applicable and the jurisdiction of the court was statutorily ousted. In this regard, we can do no more than adopt what this court (differently constituted) said in **Kenya Ports Authority v Kustron (Kenya) Limited Civil Appeal No. 315 of 2005** (unreported):

“We agree with Mr. Gachuhi, the learned counsel for the appellant that the provision of section 62 touches on the jurisdiction of the superior court and that the parties could not in the face of the Act providing for compulsory statutory arbitration, contract out of a statute and bring the suit instead. The Court’s jurisdiction had been ousted by statute and the parties could not confer jurisdiction on the superior Court. There cannot be any waiver just because both parties took part in the suit. Parties cannot as a matter of public policy be allowed to circumvent a statute and once an illegality always an illegality (see cases of Allarakhai v Aga Khan [1969] EA 613 and Mayers & Another v Akira Ranch Ltd (2) [1972] EA 347)”

[49] Needless to state that the parties could not through their pleadings confer jurisdiction upon the High Court where the jurisdiction had been specifically ousted by statute. This was another determining factor that was not addressed by the trial court.

[50] We come to the conclusion that all the issues we have identified and addressed can only lead to one conclusion, which is that the judgment of the trial court cannot stand. The trial judge not only misapprehended the evidence and failed to consider crucial issues, but also acted on wrong principles and came to wrong conclusions both in finding the appellant liable and in awarding damages.

[51] Accordingly, we allow this appeal, set aside the judgment of the trial Court, and substitute it with an order dismissing the respondent’s suit with costs. The appellant shall further have costs of this appeal.

Dated and delivered at Malindi this 27th day of March 2014

H. OKWENGU

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR