



IN THE COURT OF APPEAL  
AT NAIROBI

(CORAM: LAKHA, O'KUBASU & KEIWUA, J.J.A.)

CIVIL APPEAL NO. 297 OF 2001

KOBIL PETROLEUM LIMITED ..... APPELLANT

AND

KENYA PORTS AUTHORITY ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of  
Kenya at Nairobi (Milimani Commercial Court) (Mr. Justice  
Ringera) dated the 16th day of October, 2001

in

H.C.C.C. NO. 83 OF 1998)

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JUDGMENT OF THE COURT

This is the defendant's appeal from a decision of the superior court (Ringera, J.) given on **16 October 2001** whereby he entered judgment against the defendant for **K.Shs.34,673,971/=** together with interest thereon at the rate of 12% per annum from **2 April 1998** until payment in full. He also ordered the defendant to pay the costs of the suit.

The plaintiff's claim against the defendant was for **K.Shs.43,643,854/=** together with interest thereon being late documentation charges levied on the defendant in respect of several Mombasa Port release orders allegedly submitted by the defendant to the plaintiff in **1995**.

Twelve agreed issues were framed and filed. In the course of his judgment the learned judge reduced those issues to seven and held "**all these issues can be summarised into three principal ones**" as follows:-

**"1.Can the amount claimed lawfully be levied by the plaintiff?"**

**2. Is the plaintiff entitled to claim interest on any amount proved?"**

**3. Is the plaintiff's claim in any case barred by statute?"**

The suit came up for hearing before the learned judge on the **29th** and **30th** days of **May 2001** and 1st day of August 2001 and for judgment on the **16th day of October, 2001**. The plaintiff called its Accounts Assistant as the only witness while the defendant led no evidence. The learned judge found in favour of

the plaintiff on issues one and three set out above. We think that really two grounds are put forward on behalf of the defendant in the appeal from the judgment of the superior court. It is said, first of all, that as all the matters out of which the claim arises happened more than two years before the suit was filed the plaintiff's claim is barred by **section 4(5)** of the **Law of Limitation Act, Cap. 22** (the Act). It is said, secondly, that the plaintiff cannot lawfully levy the amount claimed.

To deal with the first point, the entire claim made by the plaintiff for late documentation charges allegedly under the **Kenya Port Authority Act, Cap. 391**, being admittedly in the nature of a penalty is a statutory claim and section 4(5) of the Act required the suit to be filed within 2 years. Yet the suit was not filed until **2 April 1998** and the claim is completely time barred. If there is any room for an escape from the statute, well and good; it can be shown. But in the absence of that, it is difficult to see why a defendant should be called upon to pay large sums of money and a plaintiff be permitted to waste large sums of his own or somebody else's money in an attempt to pursue a cause of action which has already been barred by the Statute of Limitation and must fail. It has not been suggested that section 4(5) of the Act does not apply. Nor has it been shown that some other section applies and, if so, what that other section is. Nor has it been suggested that there is or may be a possibility of the defendant bringing himself within any of the exceptions which could avoid the statute and make it inapplicable. There is no material put before the court which could possibly suggest that the statute will not be a complete answer to the plaintiff's claim. We add, with respect, that there is no warrant for the proposition that a running account provides an exception to the Act or renders it inapplicable.

We now turn to consider the first question whether the amount claimed by the plaintiff can be lawfully levied. This entails a consideration of the relevant provisions of the law as enacted in the **Kenya Ports Authority Act, Cap. 391**. The first provision is section 24 of the Act which provides:-

***"(1)The Authority may, subject to this Act -***

***(a).....***

***(b)Determine the rates and charges for the handling or warehousing of goods and for any other service or facility; and such rates and charges shall be published in the tariff book and shall subject as aforesaid, have effect from the date of such publication or from such later date as may be specified therein."***

Upon a careful perusal of this provision, it is clear that it is inapplicable and cannot form a basis for the plaintiff's claim herein which is founded on late documentation but this section only deals with goods which are handled or warehoused by the authority and for other services or facility which are not alleged against the defendant to have been rendered.

This is clearly inapplicable to the facts of the plaintiff's case which is set out in the amended plaint and based on late documentation charges. No other service or facility has been alleged to be part of the plaintiff's claim.

The next provision is **section 25** which provides as follows:-

***"(1)The consignor of, or the person tendering, any goods to the Authority for handling or warehousing, and, on request by an authorized employee, the consignee of, or person receiving, any goods which have been handled or warehoused by the Authority shall deliver to an authorized employee an account in writing signed by such consignor, person or consignee, as the case may be, containing such description of the goods as may be sufficient to enable such employee to determine the rates and charges payable in respect of the handling or warehousing thereof by the Authority.***

***(2).....***

***(3)If such consignor, person or consignee fails to deliver the account referred to in subsection (1) or to permit such goods to be examined as required under subsection (2), an authorized employee may***

***refuse to accept the goods for such handling or warehousing unless in respect thereof a rate or charge not exceeding the highest rate or charge payable for any class of goods is paid; or in respect of goods which have been handled or warehoused the Authority may refuse to deliver such goods unless in respect thereof a rate or charge not exceeding such highest rate or charge is paid.***"

Once again, these provisions only apply if goods have been tendered to the Authority for handling or warehousing which is not the case here as we have already observed.

Finally, there is the provision of section 30 of the Act which reads as follows:-

***"1. The Authority shall cause to be prepared and published in such manner as it may think fit -  
(a) Tariff Book containing all matters which under this Act are required to be contained therein together with such other matters as, under this Act, may be determined by the Authority and such other matters as the authority may think fit;***

***(b) Such other books and other documents as under this Act are required to be kept.***

***(2) There shall be available for public inspection at every port office a copy of the Tariff Book containing all amendments for the time being in force."***

Insofar as the tariff book is concerned, it becomes operational only from the date of its publication. In the instant case, there is no evidence whatsoever of the date of publication of the book. We would add that in view of the provisions of section 25(3) the plaintiff is not entitled to impose or collect or levy any other charge or rate since the subsection provides that "a rate or charge not exceeding the highest rate or charge payable for any class of goods is paid" . It is trite that an express provision of a remedy excludes all other remedies.

Upon a careful consideration of the above provisions of law, it appears to us that the plaintiff does not have any right or authority to impose a levy for late documentation charge. In other words, the plaint in the instant case discloses no cause of action. In the light of our above findings it is not necessary to deal with the second question above set out.

The appellant's claim, if any, for restitution has not been dealt with here as it lies in the Court of first instance in terms of **section 91** of the Civil Procedure Act .

For these reasons, this appeal is allowed with costs and the decree of the superior court given on **16 October 2001** is set aside and substituted by one dismissing the plaintiff's suit with costs.

**Dated and delivered at Nairobi this 25th day of October, 2002.**

**A.A. LAKHA**

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**JUDGE OF APPEAL**

**E. O. O'KUBASU**

.....

**JUDGE OF APPEAL**

**M. OLE KEIWUA**

.....

**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**