



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITUI

HIGH COURT CIVIL APPEAL NO. 15 OF 2019

PATRICK MUKONO KISILU T/A MUTOMO KANDAE

GENERAL AGENCIES.....1ST APPELLANT

-VERSUS-

THE COUNTY GOVERNMENT OF KITUI...RESPONDENT

An Appeal arising from a decision from the Subordinate Court vide Kitui CM's Case No. 46 of 2017

J U D G E M E N T

1. This appeal arises from a decision from the subordinate court which upheld a Preliminary Objection raised by the Respondent herein to the effect that the trial court lacked the jurisdiction to determine a suit that had been filed by the Appellant against the Respondent vide *Kitui CM's Court Civil Case No. 46 of 2017*.

2. In that suit, the Appellant had sued the Respondent herein for a declaration that it owed it some contracted sum of Kshs. 2,243,363 which amount became due owing to tender awarded to the Plaintiff by the Defendant for constructions of classrooms of some two classrooms within Kitui County.

3. The Respondent in its defense raised a preliminary objection on the following grounds:-

- a. That the lower court lacked jurisdiction to determinae the matter because the suit raised issues which were constitutional in nature.
- b. That Plaintiff had instituted the suit in breach of *Section 13A of the Government Proceedings Act*.
- c. That the suit also breached the provisions of *Order 10 Rule 8, Order 29 and Order 36 Rule 3(2) of the Civil Procedure Rule*.

4. The trial court entertained the preliminary objection and found the suit entailed interpretation of the Constitution and hence it lacked the requisite jurisdiction. The trial court also found that the Plaintiff had not served a Notice of Institution of a suit on the Attorney General as required under *Section 13A and 21 (4) of Government Proceedings Act* and sustained the Preliminary Objection.

5. The Appellant felt aggrieved by the said decision and preferred this appeal raising the following grounds namely:-

- i. That the Learned Magistrate in this case perverted justice and acted in an improperly manner by delaying delivery of a simple ruling on a preliminary point for over one year (12) months and without stating the reasons for such a prolonged delay.
- ii. That the Learned Magistrate erred and misdirected both in law and fact by failing to appreciate that the Constitution is a source of law which should guide all courts in the Republic of Kenya under the **Judiciary Act Cap 8** and the Magistrates' Court Act No. 26 of 2015 and all magistrates have the power to apply the Constitution to resolve issues before it, among other laws.
- iii. That the Learned Magistrate erred both in law and facts by failing to appreciate that the subject mater was a debt that arose during the period immediately before or after transition to devolved system and hence covered by the **Transitional Authority Act, Transition to Devolved Government Act, The County Government Act and the Constitution, hence n issue of interpretation of the Constitution would arise in the matter.**
- iv. That the Learned Magistrate erred both in law and facts by failing to appreciate as per the law, a County Government is a body

corporate with perpetual succession and hence **Section 13 A (1) of The Government Proceedings Act and Order 10 Rule 8 of the Civil Procedure Rules** do not apply to County Governments.

v. That the Learned Magistrate erred both in law and facts by upholding the preliminary point on highly contested issues of fact and further erred and misdirected herself by failing to reject or dismiss it for failing the minimal threshold.

6. The Appellant in his submission dated 27th May, 2021 done through Counsel M/s A.M. Kilonzi and Co. Advocates, submits that there was no issue requiring Constitutional interpretation at the trial court. He contends that the matter before the trial court was a civil debt and the trial court's mandate was to determine who between the County Government and National Government was liable. It is the Appellant's position that while exercising civil jurisdiction, the subordinate courts are guided by the Constitution and other law. He submits that the Lower Court had jurisdiction to deal with the matter.

7. The Appellant further points out that a County Government is distinct from National Government and that a County Government is not the Government envisioned under **Section 13A of Government Proceedings Act**. He submits that the A.G. does not act for a County Government. He has relied on the decision of **Lawrence Ogaro Onyiego versus Samuel Munika & Anor. [2017] eKLR. And Bod Thomson Dickens Ngobi versus Kenya Ports Authority & Other [2017] eKLR.**

8. In Lawrence case, the High Court, Mutungi J took the position that the requirement of issuance of a notice to the Attorney General provided for under **Section 13A of the Government Proceedings Act** is only applicable to the national government and not at the county level as the Attorney General only represents the national government.

9. In the Bob Thompson case, the High Court, P. J. Otieno J, held that statutory corporations are not departments of the government as contemplated under the Government Proceedings Act hence notices provided for under the said act are not applicable to them.

10. The Appellant has also faulted the trial court for the unexplained delay in delivering its ruling which he claims violated his Constitutional rights.

11. The Respondent has opposed this appeal vide its written submissions made by its learned Counsel Manyonge Wanyama & Associates.

12. The Respondent insists that the trial court lacked jurisdiction to entertain the suit. It contends that it had raised pertinent Constitutional questions as to whom between the National Government and County Government was to take over the debts of the defunct Kitui Town Council.

13. The Respondent contends that **Section 13A of the Government Act** applies to both County Government and National Government arguing that both levels of Government should be treated equally. It relies on a decision in **James Orenge versus A.G. & Anor. [2007] eKLR** where the court dismissed a suit for non-compliance of **Section 13A(1) of the Government Proceedings Act**.

14. This court has considered this appeal and the response made. This appeal raised only 2 issues for determination by this Court which are:-

i. Whether the provisions of **Section 13A of Government Proceedings Act** apply to County Government.

ii. Whether the trial court was seized with the jurisdiction to determine the suit before it.

(i) Whether the provisions of **Section 13A Government Proceedings Act** apply in respect to County Governments.

15. The provisions of **Section 13A (1) of the Government Proceedings Act** provides as follows: -

“(1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing in the prescribed form have been served on the Government in relation to those proceedings.”

16. The Respondent raised the above provisions in its preliminary objection in addition to the provisions of **Order 1 Rule 8, Order 29 and Order 38 Rule 3** all of which relate to proceedings against the Government.

17. Before I delve into whether **Section 13A of Government Proceedings Act** applies to County Governments, it is important to note that the enactment of the **Government Proceedings Act Cap 40 Laws of Kenya** was done in 1956 before independence and before the promulgation of the new Constitution 2010. The Government envisaged by the then parliament was what is now referred to as the National Government. The new Constitution came up with 2 levels of Government to wit the National and the County government.

18. While I am alive to the fact that the structure of government changed with the new constitutional dispensation, it is misleading to suggest that the 2 levels of Government that is the National and County governments are the same. The two are distinct and independent as stipulated under **Article 6(2) of the Constitution**.

The constitution clearly sets out the parameters and the scope of each level of Government. Civil proceedings for or against the National Government for example are done through the Attorney General as stipulated under **Section 12 (1) of Government Proceedings Act**. The same cannot be equated to the civil proceedings for and against the **County Government. Section 6(1) of County Government Act** clearly provides that a County Government is a body corporate which means that it has the capacity to sue to be sued in its corporate name.

19. The Constitution of Kenya under **Article 156(1)** provides for establishment of the office of the Attorney General of Kenya and the

functions are clearly stipulated under *Article 156 (4)* which state:-

“(4) The Attorney General –

(a) is the principal legal adviser to the Government;

(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings;

and

(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.”

20. There is no provisions that provide that the A.G. of Kenya may represent County Governments. *Section 5 1(i) Officer of A.G. Act* provides:-“ *In addition to the functions of the Attorney-General under Article 156 of the Constitution, the Attorney-General shall be responsible for—*

(i) advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters.”

The County Governments are represented by private lawyers and the County Attorneys. This means that as a matter of law the provisions of Section 13A of Government Proceeding Act do not apply to County Government and the trial Magistrate misdirected himself when it held that the Appellant should have issued notice pursuant to Section 13 (A) before suing the Respondent herein.

21. Aside from the above findings it is now settled that any provision of law that hinders the right to access justice under Article 48 is bad law and to that extent, *Section 13A of Government proceedings Act* is unconstitutional. In the case of *Kenya Bus Service Ltd & Anor. versus Minister for Transport & 2 Others [2012]* the court held as follows:-

“The provisions for demanding [prior notice before suing the Government is justified on the basis that the government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of court aware that pre-litigation protocols, for example Order 3 Rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.

Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the GP provides no independent to access to justice. Where the state is at the front, left and centre of the citizen’s life, the law should not impose hurdles on accountability of the Government through the Courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that Section 13A of the Government Proceedings Act as a mandatory requirement violates the provisions of the Article 48.”

22. The *Court of Appeal in Council of Governors & 5 Others versus The Senate & Anor. [2019]eKLR* confirmed the above position when it held as follows:-

“Next, we turn to whether failure to serve a 30 days notice as required by Section 13A of the Government Proceedings Act rendered the suit incompetent. Our view in respect of counsels’ assertion that the declaration by Majanja, J in the case of Kenya Bus Service Ltd & Another Minister for Transport & 2 Others (Supra), that the provision was unconstitutional is that, much as this may have been the case, the decision has not been overturned on appeal. It therefore remains a valid decision, and courts are at liberty to cite it with approval, as was in the case of Joseph Nyamamba versus ILR [2015]eKLR where this court endorsed the reasoning and holding in that case. This being a decision of this court, though differently constituted, we see no reasons to depart from that decision, and therefore we find that the failure to comply with Section 13 A did not render the suit incompetent.”

23. In light of the above authorities, it is obvious that the provisions of *Order 10 Rule 8, Order 29 and Order 36 Rule 3(2) of the Civil Procedure Rule* were not applicable to the appellant’s suit at the trial court and it was erroneous for the Learned trial Magistrate to have held the contrary view.

(ii) Whether the trial court was seized with the jurisdiction to determine the suit before it?

The trial court held the Respondent’s view that the Appellant’s suit raised a Constitutional questions and therefore lacked the jurisdiction to deal with it. To bring the matter into context, it is important to consider the nature of the Appellant’s claim against the Respondent.

24. The Appellant’s claim in my view was based on breach of contract because it claims it was contracted to build some 2 classrooms and upon completion, he claims that he was not paid. The Respondent claims that it was unclear whether the Respondent or its predecessor Kitui County Council was responsible or liable to pay. That in my view did not require Constitutional interpretation as envisaged under *Article*

165 (3) of the Constitution. It is evident that Article 165 (3) reserves the jurisdiction to interpret the constitution to this court. It provides:-

“The High Court shall have; (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and.....”

25. It is also important to note that in determining cases or issues presented to the subordinate courts, the courts are entitled to apply the Constitution and any other written law in resolving them. It is misleading to state that anything touching on the Constitution cannot be entertained by a Magistrate’s court. In my view, so long as the matter is within the scope of the jurisdiction of a magistrate’s court as provided under the Magistrate’s Act, it can be handled there. The only question or issue is a matter that touches on the constitutional interpretation under *Article 165 (3) of the Constitution*.

26. The distinction was clearly illustrated in the Supreme’s Court decision in *Executive Committee Kisii County & 2 Others versus Masosa Construction Ltd & Anor [2021]eKLR* where the court deduced the questions a court need to ask itself in ascertaining whether an appeal raised a question of Constitutional Interpretation or application. The Superior Court noted that the court needs to ask itself the following questions:- “

i. What was the question in issue at the High Court and the Court of Appeal?

ii. Did the Superior Courts dispose of the matter after interpreting or applying the Constitution?

iii. Does the instant appeal raised a question of constitution interpretation or application, which was the subject of judicial determination at the High Court and the Court of Appeal?”

The above position applies to when a question is raised as to whether it requires a Constitutional interpretation to resolve it.

27. The position taken by the trial court was majorly influenced by the position that the matters raised by the Applicant and Respondent required constitutional interpretation. This is what it observed in part;

“The defendant denies responsibility of the Plaintiff’s claim citing provisions of the constitution to wit-the fourth schedule of the distribution of functions between National and County Governments. The court will eventually have to consider the said provisions and make a determination on who is responsible to pay the Plaintiff’s debt. This will entail a careful study, interpretation and application of the constitution. Though the court has jurisdiction to determine the debt question, I am persuaded that the road to making the determination will entail interpretation of the constitution...

One of the questions to be determined at trial by the court would entail a finding whether the County Government is the successor of the defunct local authority. Clearly these are constitutional issues and way beyond the jurisdiction of this court....”

28. It is apparent from above that the trial court was overly influenced by what he erroneously thought was a constitution determination of whom between the National and County government was to make good the debt owed to the Applicant. In my view it was a point of fact and law and not purely a point of law to be taken at a preliminary stage. A preliminary objection should be purely be on matters of law but where a court is required to interrogate facts and law to reach a determination, then the issue ceases to be a Preliminary Objection to be taken at a preliminary stage but rather it becomes an issue to be determined finally after full trial.

29. The trial court was seized with the requisite jurisdiction to determine whether the debt was owed and by whom. To determine the same, nothing hindered the trial court to apply the applicable law.

30. It is my considered opinion that the question as to whether the debt was owed or who was to pay did not raise a question that required Constitutional interpretation per se. It was a dispute which revolved around a debt that may have been incurred by the defunct Town Council of Kitui. It is a matter to be determined based on evidence presented and the law. As pointed out by the Respondents in their submissions at the trial court, *Section 15 of Sixth schedule* of the Constitution, the *Intergovernmental Relations Act* and now repeated *Transition to Devolved Government Act* provide a mechanism of handling liabilities owed by Town Councils or local Government after promulgation of the Constitution. The Magistrate’s court is well equipped and has jurisdiction to entertain such matters.

31. From the foregoing, this court finds merit in this appeal. For the aforesaid reasons, the same is allowed. The dismissal order by the trial court is set aside and Preliminary Objection raised by the Respondent is dismissed. The suit in the trial shall now be mentioned before the Chief Magistrate’s court for further orders and directions.

DATED, SIGNED, AND DELIVERED AT KITUI THIS 26TH DAY OF OCTOBER, 2021

HON. JUSTICE R. K. LIMO

JUDGE