



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

APPELLATE SIDE

(Coram: Odunga, J)

CIVIL APPEAL NO.76 OF 2017

KAMUMU CONTRACTORS LIMITED.....APPELLANT

-Versus-

COUNTY GOVERNMENT OF MACHAKOS.....RESPONDENT

(Being an Appeal from the Ruling and order of Honourable Kibellion

Principal Magistrate delivered on 18th May, 2017 in Machakos CMCC No. 932 of 2015)

BETWEEN

KAMUMU CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF MACHAKOS.....DEFENDANT

JUDGEMENT

1. The appellant herein instituted civil claim against the Respondent for the sum of Kshs 1,050,000/- in respect a contract for construction work done by the appellant at the request of the respondent.
2. By a notice of preliminary objection dated 25th April, 2016, the Respondent herein pleaded that the said pleadings were instituted in contravention of the mandatory provisions of section 13A of the *Government Proceedings Act* and applied that the same be struck out.
3. By consent of the parties it was agreed that the said objection be determined before the hearing of the suit. Accordingly, the parties filed their written submissions thereon and the learned trial magistrate found the same merited, upheld the same and struck out the suit.
4. It is that decision that has provoked this appeal in which the appellant herein relies on the following grounds:
 - a) That the Honourable Learned Magistrate erred in law and fact by allowing the appellant's (sic) preliminary objection against the provisions of the governing law and previously decided cases by superior courts.
 - b) That the Honourable Learned Magistrate erred in law and fact in failing to consider, appreciate and differentiate between the applicability of the Government Proceedings Act, Cap 40 and those of the County Government Act, No. 17 of 2012.
 - c) That the Honourable Learned Magistrate erred in law and fact by upholding the preliminary objection while the proceedings against the Respondent are not governed by the Government Proceedings Act, Cap 40 but the County Government Act, No. 17 of 2012.
 - d) That the Honourable Learned Magistrate erred in law and fact in failing to appreciate and uphold the appellant's submissions made in opposition to the preliminary objection.

5. In its submissions, the appellant contends that section 13A of the *Government Proceedings Act*, do not apply to the County Governments in so far as the notification is concerned. It was further submitted that the said section is unconstitutional and in this regard reliance was placed on **Kenya Bus Service Ltd & Another vs. Minister for Transport & 2 Others [2012] eKLR** and **Kisii High Court ELC No. 376 of 2015 – Nyandoche Ibere Co-operative Society vs. The County Government of Kisii & Another.**

6. On behalf of the Respondent, it was submitted that after the promulgation of the Constitution of Kenya, 2010 certain provisions of the hitherto existing laws have the option of being read as being modified by the Constitution so as to be compliant and that the said Constitution introduced the system of devolved governments hence there exist two levels of government – the National and County Governments. In this regard reference was made to **Josephat Gathee Kibuchi vs. Kirinyaga County Council [2015] eKLR.**

7. It was therefore submitted that pursuant to section 7 of the *Sixth Schedule to the Constitution, (Transitional and Consequential Provisions)*, the provisions of the *Government Proceedings Act*, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it in conformity with the Constitution, one such construction being the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the constitutional status and institutions of government at both levels be respected hence the both should be treated equally. It was therefore submitted that the appellant ought to have complied with the said provision hence the decision of the learned trial magistrate cannot be faulted.

Determinations

8. I have considered the foregoing. The determination of this appeal depends on two issues: whether the provisions of the *Government Proceedings Act* apply to county governments and whether section 13A of the said Act is valid.

9. As regards the first issue, neither the *Government Proceedings Act* nor the *County Governments Act* define the term “Government”. Nor does such definition appear in Article 258 of the Constitution. Section 2 of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya, on the other hand, provides:

“the Government” means the Government of Kenya

10. Article 189(1)(a) of the Constitution provides that Government at either level shall perform its functions, and exercise its powers, in a manner that respects the functional and institutional integrity of government at the other level, and respects the constitutional status and institutions of government at the other level and, in the case of county government, within the county level. In my view a holistic approach to this provision would lead to the conclusion that there is only one Government being exercised at two levels both levels complementing each other and operating in the spirit of co-operation and complementariness. It would follow that both levels subject to the Constitution exercise similar powers under the Constitution.

11. Although the provisions of the *Government Proceedings Act* do not expressly refer to County Governments, section 7 of the Sixth Schedule to the *Constitution (Transitional and Consequential Provisions)* provides that:

All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.

12. It follows that the provisions of the *Government Proceedings Act*, a legal instrument enacted before the effective date must be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. One such construction would be the reality that Government is now at two levels and Article 189(1)(a) of the Constitution requires that the constitutional status and institutions of government at both the National and County levels be respected. In my view such respect cannot be achieved unless both levels of Government are treated equally and one such area would be with respect to the manner in which legal proceedings are to be commenced against them. It follows that subject to my determination as regards section 13A of the *Government Proceedings Act*, the provisions of the said Act, no doubt, apply with as much force to the County Governments as they apply to the National Government. To that extent, the learned trial magistrate cannot be faulted for applying the said provisions to the matter before him.

13. With respect to the second issue, in interpreting the constitutionality of section 13A(1) of the *Government Proceedings Act*, **Majanja, J** in **Kenya Bus Service Ltd & Another vs. Minister for Transport & 2 Others (2012) eKLR** expressed himself as follows:

“The strictures imposed by these provision must be considered in light of the right of access to justice. The right of access to justice protected by the Constitution involves the right of ordinary citizens being able to access remedies and relief from the Court. In Dry Associates vs Capital Markets Authority and Another Nairobi Petition No.328 of 2011 (unreported), the Court stated, “Access to justice is a broad concept that defies easy definition. It includes the enshrinement of rights in the law; awareness of and understanding of the law; easy availability of information pertinent to one’s rights; equal right to the protection of those rights by the law enforcement agencies, easy access to the justice system particularly the formal adjudicatory processes; availability of physical legal infrastructure; affordability of legal series; provision of a conducive environment with the judicial system; expeditious disposal of cases and enforcement of judicial decisions without delay...By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See ‘Law and Practical Programme for Reforms’ (1992) 109 SALJ 22) Article 48 must be located within the Constitutional imperative that recognizes as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the Court to consider the conditions which clog and fetter the right of persons to seek the assistance of Courts of law.”

14. According to the learned judge:

“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 course 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 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.”

15. The learned judge then concluded that:

“Viewed against the prism of the Constitution, it also becomes evident that Section 13A of the GP provides no impediment 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.”

16. I associate myself with that conclusion and it is my view and finding that the learned trial magistrate erred in striking out the suit based on non-compliance with a provision of the law that has been found unconstitutional hence null and void.

17. In the premises, this appeal is allowed, the order striking out the suit before the trial court is hereby set aside and the said suit reinstated for hearing in the usual manner.

18. Since the parties failed to comply with the directions of this court regarding the furnishing of soft copies, there will be no order as to costs.

19. It is so ordered.

Ruling read, signed and delivered in open Court at Machakos this 23rd day of September, 2019.

G. V. ODUNGA

JUDGE

In the presence of:

Mr Muema for Mr Mulei for the Respondent

CA Geoffrey