



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 217 OF 2002

ANDREW NGANGA MUKURIA.....APPELLANT

-VERSUS-

HON. ATTORNEY GENERAL.....RESPONDENT

JUDGEMENT

INTRODUCTION

1. Briefly the Appellant commenced a suit against the Attorney General at the Chief Magistrates Court Kiambu in the plaint dated 10/1/1995. The Attorney General also entered an appearance and filed a defence. The Appellant's case was that he was severely injured while in the employ of the Attorney General. The said suit was listed for hearing on 2/5/2001.
2. A preliminary objection was raised by the Attorney General's representative that the Statutory Notice under the Government Proceedings Act, Cap 40 had not been observed. The Appellant opposed the preliminary point citing that;
3. The court would not have made a finding on the aspect before hearing the suit; and the said notice had in any event been served on the Attorney General.
4. The Learned Resident Magistrate in her ruling dated 16/5/2001 found that no such notice had been filed with the Attorney General and thus ruled that Appellant failed to comply with Section 13A of Government Proceedings Act and dismissed suit with costs.
5. The Appellant was aggrieved thus filed instant appeal and set out the following grounds;

- 1. That the Learned Resident Magistrate erred in holding that the statutory notice had not been served on the Respondent in spite of the overwhelming evidence to the contrary.**
- 2. That the Learned Resident Magistrate erred in disposing the Appellant's suit on a preliminary point without affording the Appellant an opportunity to testify on the matters raised.**
- 3. That the Learned Resident Magistrate's decision is against the principles of natural justice in that the Appellant appears to have been condemned.**

6. Parties were directed to canvass appeal via written submissions.

APPELLANT'S CONTENTION

7. The Appellant opposed the preliminary point of law citing that;

- 1. The court would not have made a finding on the aspect before hearing the suit; and**
- 2. The said notice had in any event been served on the Attorney General.**

8. Appellant position is that, in those early years parties never used to file their documents in court before the hearing. Such documents were also almost tendered in evidence. It was therefore wrong and preposterous for the Learned Magistrate to dismiss the Appellant's suit without hearing.

RESPONDENT'S CONTENTION

9. The respondent contention was as follows;

- i. That the suit is premature and does not lie for want of consent from the Attorney General to file the suit.**
- ii. That the suit does not lie for the appellant has not given a statutory notice prior to the filing of the suit as required by Section 13A of the Government Proceedings Act.**

ISSUES FOR DETERMINATION:

- i. Whether the Learned Resident Magistrate erred in holding that the statutory notice had not been served on the Respondent in spite of the overwhelming evidence to the contrary.***
- ii. Whether the Learned Resident Magistrate erred in dismissing the Appellant's suit on a preliminary point without affording the Appellant an opportunity to testify on matters raised.***
- iii. Whether the Learned Resident Magistrate's decision is against the principles of natural justice in that the Appellant appears to have been condemned unheard.***

10. In the case of *Kenya Bus Service Ltd & Another vs Minister For Transport & 2 Others [2012] eKLR* the court held;

- i. "Viewed against the prism of the Constitution, it also becomes evident that section 13A of the GPA provides on 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."***

11. However the above decision is of 2014 and the decision impugned herein is of 2001 thus the authority would not save the appellant on the basis of nullifying section 13A of GPA as the constitution 2010 had not been enacted.

12. The respondent submitted in support of lower court decision that, Section 13A of the Government Proceedings Act is very clear that no suit shall have been filed before 30 days have expired after notice is served upon the Government. In this case therefore the court was right in dismissing the suit on the basis that the appellant failed to comply with the mandatory provisions of Section 13A of the Government Proceedings Act.

13. I have perused the court record and the letter of notice in issues, and I find that it is not contested that the notice was served upon the Respondent on 13/01/95 although it was dated 13/01/95. The suit was filed on 10/01/95.

14. The trial court upheld the same argument saying that a suit could not be filed until after the expiry of 30 days from service of the notice to sue. This was a fact that did not require to be ascertained since the same was clear from the notice that indeed it was served after the suit had already been filed which was improper.

15. The provisions of Section 13A are in mandatory terms and at the time of the ruling could not be circumvented. The breach of the same rendered the suit fatally defective or rather a nullity.

16. It would be appropriate to set out the relevant provisions.

Section 13A(1) of the Government Proceedings Act ("GPA") provides as follows;

"13A. (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 has been served on the Government in relation to those proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars -

(a) the full names, description and place of residence of the proposed plaintiff;

(b) the date upon which the cause of action is alleged to have accrued;

(c) the name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;

(d) a concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;

(e) the relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.

(3) The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of proviso (i) to section 16 (1), make an order declaratory of the right of the parties in lieu of an injunction.

17. The court finds that it does not have to belabor on other grounds after finding that the suit was a nullity after failure to comply with section 13A GPA.

i. Thus the court finds that the appeal has no merit and dismisses the appeal with no orders as to costs.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2019.

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C. KARIUKI

JUDGE