REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL APPEAL NO.70 OF 2011

MIRIAM NJERI NJAU.....APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the judgment and decree in the Nyeri Chief Magistrates' Court

Civil Case No. 183 of 2010 (Hon. Nyakundi) delivered on 17th May, 2011)

JUDGMENT

The appellant instituted a suit against the respondent for both general and special damages; her suit was founded on the tort of malicious prosecution after she had previously been charged in **Karatina Senior Resident Magistrates' Court Criminal Case No. 504 of 2007** but later acquitted under **section 210** of the **Criminal Procedure Code, Cap. 75** because the prosecution did not establish a prima facie case that would have required the appellant to be put on her defence.

Amongst the averments made in the plaint filed in court on 20th April, 2010 was the allegation that *"the defendant has refused and/or failed to accede despite demand and notice of intention to sue."* It is on this averment that her suit would later turn.

The Attorney General denied the appellant's claim and contended that the plaintiff's suit was misconceived and fatally defective; he averred that the suit against him was also statute barred and that it was also instituted contrary to relevant mandatory provisions of the law. In particular, he denied having been served with the notice of intention to sue; put the appellant to strict proof.

Although the Attorney General had put the appellant on notice that he would raise a preliminary objection to the hearing of her suit, considering the issues of law pleaded in his defence, he never did; the record shows that the suit proceeded to full hearing although the only witness who testified was the appellant.

In his written submissions which he filed at the close of the hearing, the Attorney General picked at least one of the legal issues he had raised in his defence and which could probably have been properly dealt with *in limine*. According him, the suit against him was misconceived and contrary to **section 13** and **13A** of the **Government Proceedings Act, Cap. 40**. He submitted that although the appellant had alleged in her plaint that she had notified him of her intention to sue, such notice had in fact not been served and there was no proof of such service in any event; he urged the court to strike out the appellant's suit since the omission to serve the notice was fatal. To underscore this point, the Attorney General relied on the

decision in **Damaris Wangare Gitau & Others versus 7th day Adventist Church, Commissioner of Lands & Attorney General (2006) eKLR** in which Ojwang, J. (as he then was) struck out the plaintiff's claim because it had not complied with **section 13A** of the **Government Proceedings Act**.

It is on this single issue that the appellant's suit turned; without considering any other issue and particularly whether the appellant's suit had any merit, the learned magistrate upheld the respondent's objection and dismissed the appellant's suit with costs to the defendant. The appellant was dissatisfied with this decision and so she has appealed to this Court for it to reconsider the learned magistrate's judgment; in her memorandum of appeal, the appellant has raised the following grounds:-

1. The learned magistrate erred in law and fact in making a judgment against the weight of evidence;

3. The learned magistrate erred in law and in fact in disregarding the evidence tendered by the appellant.

3. The learned magistrate erred in law and in fact in disregarding the exhibits produced by the appellant.

4. The learned magistrate erred in law in disregarding the fact that the appellant had proved her case to the required standard.

These grounds revolve around the question of evidence and in the submissions which appellant's counsel filed in support of these grounds he did not deal with any other issue besides the question of the mandatory statutory notice which ought to be served upon the Attorney General before institution of proceedings against him.

What I gather from the learned counsel's submissions is that he acknowledged that any party instituting a suit against the Government must comply with the **section 13A** of the Government Act and serve the Attorney General with a notice of intention to sue and that the suit can only be instituted upon the expiry of 30 days after service of the notice. The section reads as follows:-

13 A. Notice of intention to institute proceedings

(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.

(2) The notice to be served under this section shall be in the form prescribed in the Third Schedule to this Act 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.

The learned counsel urged that the notice was sent to the Attorney General alongside two others in respect of which suits were subsequently filed and judgments entered against the Attorney General; these suits were identified as **Nyeri Chief Magistrates Court Civil Cases Nos. 182 and 184** of 2010. It was counsel's submissions that these suits succeeded even without proof of service of the statutory notices and therefore there is no reason why the court should have insisted on proof of service in the appellant's suit. Counsel urged that the notice, though not stamped, was served in accordance with the law.

Counsel for the respondent opposed the appeal and reiterated the necessity to serve the statutory notice before the institution of the suit against the state. His submission was simply that in the absence of any proof of service of this notice, it was reasonable to conclude that the notice was not served and therefore the appellant flouted **section 13A** of the **Government Proceedings Act**.

Both counsel were at consensus that proceedings against the Government must be preceded by a 30 day statutory notice notifying the Government through the office of the Attorney General that the claimant intends to institute proceedings against the Government; it is only after the expiry of the statutory period of 30 days that the suit will lie or become due. Since there is no dispute on the need for this notice, it is not necessary for me spend time on the relevance of this document.

I must, however, hasten to state that the notice is not like any ordinary notice that is usually sent to defendants whenever a claimant intends to lodge a claim; it is a notice that is issued in a prescribed form and which must contain certain information. This is provided for under section 13 A (2) which says:-

> ***(2) The notice to be served under this section shall be in the form prescribed in the Third Schedule to this Act 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.***

Why the notice should be in a prescribed form and contain particular information is not an issue that I should delve into at the moment but suffice it to say that these requirements underscore the importance of the notice. It is so important to any proceedings against the Government that the mode of its service is not left to chance; subject to **section 13** of the **Government Proceedings Act,** service of this statutory notice is governed by the civil procedure rules on service of summons under **order 5** of those rules. This is stipulated in **order 5 rule 9** which states that:-

> ***9. (1) The provisions of this Order shall have effect subject to section 13 of the Government Proceedings Act, which provides for the service of documents on the Government for the purpose of or in connection with civil proceedings by or against the Government.***
>
> ***(2) Service of a document in accordance with the said section 13 shall be effected—***
>
> > ***(a) by leaving the document within the prescribed hours at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, but in either case with a person belonging to the office where the document is left; or***

(b) by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid,

and where service under this rule is made by post the time at which the document so posted would be delivered in the ordinary course of post shall be considered as the time of service thereof.

(3) All documents to be served on the Government for the purpose of or in connection with any civil proceedings shall be treated for the purposes of these Rules as documents in respect of which personal service is not requisite.

(4) In this rule, "document" includes writs, notices, pleadings, orders, summonses, warrants and other documents, proceedings and written communications.

Although the appellant's counsel submitted that the notice was "sent" to the Attorney General, he did not say when or by which method it was sent; as a matter of fact no evidence was proffered as to when and how this was done. The moment the Attorney General disputed service of the notice, it befell the appellant to demonstrate and prove that the notice was served either by leaving it, within the prescribed hours, at the office of the Attorney-General, or of any agent whom he has nominated for the purpose, or by posting it in a prepaid registered envelope addressed to the Attorney-General or any such agent as aforesaid as prescribed by **order 5 rule 9 (2) (a)** and **(b).** It was not enough merely to allege that the notice was "sent" to the Attorney General.

Counsel also submitted that the duty to prove service was not effected was on the Attorney General himself. I must confess that I found this submission baffling; the Attorney general had nothing to prove; all he was required to do was to deny as he did in his written statement of defence and put the appellant to strict proof. It was up to the appellant to prove her case and in this particular instance demonstrate that she had complied with **order 5 rule 9 (2) (a)** and **(b)** of the **Civil Procedure Rules** on service of the statutory notice.

I would not speculate how she was to do it but rule **order 6 rule 6 (1) and (2)** of the rules provides some clue of how service is proved, particularly in a case such as the appellant's where it was disputed. That rule provides as follows:-

6. (1) Documents may either be delivered by hand or by licensed courier service provider approved by the court to the address for service or may be posted to it.

(2) Where delivery is disputed a certificate of posting or other evidence of delivery shall be filed.

If the appellant's case was that the document was delivered by hand or by a licensed courier service provider approved by the court, then evidence was required in that regard; if on the other hand, he sent the notice by post, then a certificate of posting was necessary.

Either way, the burden of proof rested upon him and not on the Attorney General; lest the appellant's counsel forgets this burden was not just placed upon the appellant by the rules but the Evidence Act, Cap 80 itself leaves no doubt as who should bear the burden of proof where he alleges existence of particular facts; this is found in section **107 (1) and (2) of the Evidence Act, Cap. 80**. It states:-

107. Burden of proof

(1) 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 exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

My conclusion is that the appellant's suit did not lie and without evidence that the respondent had been served with the mandatory statutory notice, it was misconceived and fatally defective. Rather than dismiss it as the learned magistrate did I would order that it be struck out with costs to the respondent.

Upon careful perusal of the record of appeal, I have noted that the appellant did not include a certified copy of the decree from the lower court; according to **section 79G** of the **Civil Procedure Act** the decree appealed against is a primary document which must be included in the record of appeal and without it an appeal does not lie; the appellant's appeal ought not to have been admitted for hearing in the first place. Nevertheless, even if the record was complete the appeal was, for reasons I have given, destined to fail. Just like the suit out of which this appeal arose, the appeal herein is struck out with costs to the respondent.

Signed, dated and delivered in open court this 29th day of July, 2016

Ngaah Jairus

JUDGE