



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**HCCC NO.96 OF 1999**

**KLEENWAY CONTRACTS LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**KENYA AIRPORT AUTHORITY..... DEFENDANT/APPLICANT**

**RULING**

1. Kenya Airports Authority (KAA) contends that the Plaintiffs' suit is a nullity and should be struck out for contravening the provisions of Sections 33(1) and 34(a) of The Kenya Airports Authority Act (Cap 395) Laws of Kenya (hereafter **the Act**). That contention is expressed in a Notice of Motion and Notice of a Preliminary Objection both dated 31<sup>st</sup> July 2015 and filed on 10<sup>th</sup> August 2015.

2. In a Plaint presented to Court on 2<sup>9th</sup> January 1999, the Plaintiff sued KAA for the following prayers:-

- a. A Declaration that the purported termination of the Contract is null and void.
- b. A Mandatory injunction restraining the defendant by its servants, agents and, or employees from unlawfully terminating the contract between it and the Plaintiff.
- c. An Order that the Defendant do specifically perform its obligations under the contract.
- d. Damages.
- e. Costs of this suit.

3. The Suit was premised on a Cleaning Services Contract entered between KAA and the Plaintiff on 1<sup>st</sup> October 1998 in which the Plaintiff was to provide Cleaning Services at Moi International Airport. The Plaintiff's grievance was that KAA purported to terminate the Contract in breach of the provisions of that Agreement.

4. Together with filing the Plaint, the Plaintiff filed a Chamber Summons of 29<sup>th</sup> January 1999 under the provisions of Order 39 Rules 1,2 and 3 of The Civil Procedure Rules for the following substantive prayers:-

3. THAT the Defendant/Respondent be restrained by way of a mandatory injunction by itself, its servants, employees and/or agents from purporting to terminate the contract dated 1<sup>st</sup> October 1998.

4. THAT the Defendant/Respondent be restrained by way of an Injunction from inviting, receiving or awarding new tenders in respect of the applicants contract pending the hearing and determination of the suit herein.

5. THAT the status quo ante be restored until the hearing and determination of the suit herein filed by the Plaintiff.

6. The Court record shows that the Application was never argued and instead on 11<sup>th</sup> February 1999 Counsel for the parties appeared before Onyango Otieno J. (as he then was) and agreed that this matter awaits the finalization of Milimani HCC. No.4 of **1999, PARAPET LTD VS. KENYA AIRPORTS AUTHORITY**(the **Parapet suit**)which raised similar issues.

7. The Parapet suit was determined through a Ruling dated 1<sup>st</sup> April 2004, where Njagi J. decided;

“The total effect of these considerations is that the action instituted by the Plaintiff offends Section 34(a) and is hereby struck out”.

8. The Preliminary Objection and the Notice of Motion were argued through written submissions filed by Counsel herein. The Court has read and considered those submissions.

9. Section 34(a) of the Act provides as follows:-

“Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance or execution, or intended execution of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the managing director by the plaintiff or his agent”.

10. Although the Plaintiff, in the Replying Affidavit of Jacob Ngari Thatiah sworn on 25<sup>th</sup> June, 2016, had deponed as follows:-

“The Plaint clearly raises and sets out the cause of action and of more importance that the Applicant had due notice of this suit which is a fact that has never been rebutted to date”,

Whether or not the Notice was issued was settled in the submissions filed by the Plaintiff’s own Advocates. In written submissions filed by Counsel on 6<sup>th</sup> September 2016, the Plaintiff expressly conceded that it did not issue the notice required by Section 34(a).

11. And while making that concession, the Plaintiff argued that the question of Notice was a technicality which has been cured by the provisions of The Constitution 2010. I was then urged to invoke the provisions of Article 159(2) (a) of the Constitution which directs that Justice be administered without undue regard to procedural technicalities.

12. A significant factor in determining the matter before me is that it was set in the Pre-2010 Constitutional era. And the Highest Court then, The Court of Appeal, had pronounced itself clearly on the effect of failure to comply with a Notice that was on *para material* with Section 34(a) of The Act. In **LANGAT VS. KENYA POSTS AND TELECOMUNICATIONS CORPORTION**, the Court of Appeal in interpreting the provisions of Section 109 of the repealed Kenya Post and Telecommunication Act, Cap 911 held that failure to comply rendered a suit incurably defective.

13. That Decision was followed in deference by Njagi J. (in the Parapet case) and Waweru J. (in HCC

No.2959 of 1996 JAMES S.G. MUKINYA Vs. KENYA AIRPORTS AUTHORITY) in reaching the Decision that failure to give Notice as required by Section 34(a) of The Kenya Airport Authority Act was a fatality.

14. More recently (on 4<sup>th</sup> December 2015), the Court of Appeal in JOSEPH NYAMAMBU & 4 OTHERS VS. KENYA RAILWAYS CORPORATION [2015] eKLR had occasion to consider the implication and consequences of failure to comply with Section 87(a) of The Kenya Railways Corporation Act (cap 397). That section is, again, in *para material* with Section 34(a) of The Act. It provides as follows:-

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—

(a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent”.

15. The Court of Appeal had been asked to hold that these provisions implicated a litigant’s access to Justice as provided under Article 48 of The Constitution. Just like here, that litigation was commenced prior to the promulgation of The Constitution of Kenya, 2010. The Court of Appeal held as follows:-

“The totality of all these is therefore that the Constitution of Kenya, 2010, does not invalidate that which the retired Constitution provided pre- 27<sup>th</sup> August, 2010. The Supreme Court of Kenya in *Mary Wambui Munene v Peter Gichuki Kingara & 2 others* [2014]eKLR quoted with approval the holding of the south African Constitution Court in Sias Moise v Transitional Local Council of Greater Germison Case CCT 54 of 200 where Justice Kriegler, speaking for the majority, declared that:

*“if a statute enacted after the inception of the Constitution is found to be inconsistent the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its consistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution”. Because the order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date”.*

The appellants assertion before us, and this was not raised before Nambuye, J, that their property rights and access to justice are protected by the Constitution now in force would appear to stand on not just shaky ground but on quicksand. Article 48 of the Constitution has no retrospective application and the retired Constitution did not have rights similar to what we have today.

The appellants ought to have complied with the requirement on giving notice to the respondent before suit could be filed. Failure to do so made the suit incompetent and the learned judge was right to strike it out. We observe, in passing, as we close, that the learned judge allowed the appellants’ to give proper notice and then approach the court for relief but that advise, if advise it was, was ignored. That election by the appellants not to give notice and file suit afresh would appear to have put them in a rather dicey situation in view of the time that has elapsed, but, again, choices have consequences”.

16. In doing so the Court of Appeal nevertheless approved the Decision of Majanja J. in KENYA BUS SERVICES LIMITED & ANOTHER VS. MINISTER OF TRANSPORT & 2 OTHERS in respect to the

effect of similar provisions on litigation commenced after the promulgation of the current Constitution. There in discussing the provisions of Section 13A of The Government Proceedings Act against the Constitutional provisions on access to Justice, Majanja J. had held:-

“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 per-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”.

17. But as the Court of Appeal has in JOSEPH NYAMAMBA (*supra*) drawn the line between pre and post 27<sup>th</sup> August 2010 matters, this Court must defer to that distinction. The effect of the decision by the Court of Appeal was that the requirement was not a mere technicality and failure to comply rendered a suit a nullity. That seals the fate of the Plaintiff herein.

18. As I close, I must observe that Plaintiff did not make it any better for itself when it offered no explanation whatsoever for its failure to comply. Was it because the exigencies in presenting the action would not allow the giving of Notice? Perhaps there was a reason to excuse the non-compliance. It seems to me that, even pre-2010, there would be situations when non-compliance would be overlooked, where, for instance, the Plaintiff could prove that giving of the Notice would render its action nugatory.

19. This Court need not consider this matter any further. The Preliminary Objection as well as the Notice of Motion dated 31<sup>st</sup> July 2015 succeeds. The Suit is struck out for non-compliance with the provisions of Section 34(a) of The Kenya Airports Authority Act.

20. On Costs the Court has this to say. After the outcome of the Parapet case, Counsel for the Defendant inquired from the Plaintiff’s Counsel on how they wished to proceed in view of that outcome. Correspondence attached to the Affidavit of Emmanuel Letaya Serian of 31<sup>st</sup> July 2015 shows that the last letter in this regard was one dated 8<sup>th</sup> February 2008 from K.H Oswand. What the Defendant has not explained is why it took 7 years after it had become clear that the Plaintiff was unresponsive to move the Court for the striking out of the suit. That delay, I think, would disentail the Defendant from insisting on costs for the Struck Out suit.

21. The Plaintiffs suit is struck out. Each party shall bear its own costs for the Application and the entire Suit.

**Dated, Signed and Delivered in Court at Nairobi this 13<sup>th</sup> day of October ,2016.**

**F. TUIYOTT**

**JUDGE**

**PRESENT;**

Ndege for Plaintiffs

Moinirei for Defendant/Respondent

Alex - Court Clerk