



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO. 37 OF 2012

1. PETER NZIOKA MANI

2. JOHNSON W. KIBUGA (*suing for and on behalf of the tenants of MANYIMBO ESTATE*).....PLAINTIFFS
VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

Coram:

Mwera J.

Kinyanjui for Plaintiffs

Ndegwa for Defendant

Court Clerk Furaha

R U L I N G

The plaintiffs filed a notice of motion dated 31st January, 2012. It was amended on 29th February, 2012. They cited Order 40 rules 2, 3, 4 of Civil Procedure Rules as well as section 3A of Civil Procedure Act. The main prayer was:

(i) to restrain the defendant corporation from increasing rents paid by the plaintiffs, tenants in its Manyimbo Estate.

The defendant filed a notice of preliminary objection on 20th February, 2012 as well as grounds of opposition. The court decided to dispose of this notice first. It was premised on three (3) sections of the Kenya Railways Corporation Act, the Act:

(i) that the defendant let the residential premises occupied by the plaintiffs in accordance with section 13, (2) (h) of the Act.

(ii) section 83 (1) of the Act expressly prohibited suits/actions being brought against the defendant when claims arise from acts done while it is exercising its powers under the Act;

(iii) section 87 (a) of the act requires that no action shall be commenced against the defendant until one month has expired since a written notice was served on its managing director, containing particulars of the claim together with intention to sue.

That the plaintiffs' had not complied with those provisions of the Act, accordingly their suit ought to be dismissed *in limine*.

Directed to submit the plaintiffs' position is that section 83 generally provided for compensation for damage arising out of or as a result of the defendant's exercise of its powers. It was a blanket cover for the defendant while exercising its functions and in the event damage occurs as a result, then compensation should be by way of arbitration. It was denied that the cause of action here did arise from the defendant's exercise of its powers under section 13 (2) (h) above but as a result of an illegal act to undo what had already been done under the Act. So section 83 (1) did not fall to be applied where monetary compensation is envisaged and not loss likely to arise as is the case is here. Only this court can grant relief of the type sought here – an injunction, and not an arbitrator.

Moving to section 87 (a) serving one month's notice on the defendant regarding the intended legal proceedings, the court was urged not to uphold that point because the plaintiffs were facing imminent eviction and so it was not practically possible to serve the notice. In such situations, a court will do justice, as it were, by disregarding the procedures, and therefore deal with a likely breach of law. The issuance of notices should be excused in such cases where urgency is predominant. And that section 86 (3) of the Act provides that failure to serve the thirty (3) day notice on the managing director, is not always fatal. Finally, that the defendant has suffered no prejudice with failure to serve the said notice.

On its part, the defendant told the court in a brief submission that the defendant let its premises to the plaintiffs while exercising its powers under section 13 of the Act. While doing so, and claims follow, these will not take the course of suits but negotiation or if that fails, arbitration before an arbitrator appointed by the Chief Justice. And for a suit to be commenced, a thirty (3) day notice should first issue to the defendant under section 87 (a) of the Act. In this matter a purported notice dated 30th January, 2012 was served with the plaint on 31st January, 2012 while the suit was filed on 1st February, 2012. That was fatal. This court had no jurisdiction to entertain the case.

To begin with section 13 (2) (h) of the Act, it provides that:

“13. (1)

(2) Subject to this Act, the powers

conferred by subsection (1) shall include all such powers as are necessary or all advantages and proper for the purposes of the Corporation and in particular, without prejudice to the generality of the foregoing, shall include power –

(a)..... (g)

(h) to sell, let or otherwise dispose

of any property, movable or immovable which in the opinion of the Board is not necessary for the purposes of the Corporation:

Provided”

The defendant maintained and the plaintiffs did not seriously contest the fact that the former was exercising its functions and powers under section 13 when it let the houses in question to the latter.

Moving to section 83 (1) of the Act, the two parties seemed not to agree as shall be seen presently. It reads in the pertinent part:

“83 (1) In the exercise of the powers conferred by sections 13, 15, 16 and 17, the Corporation shall do as little damage as possible, and where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefor as may be agreed between him and the Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.

(2)”

Having set out the positions of the two sets of litigants before, this court is inclined to that of the plaintiffs, that actions contemplated in section 83 (1) are those limited to compensation for damage suffered. That could be through negligence or other forms of tort like trespass, nuisance or even breach of contract. Here the plaintiffs are up in arms with the intended revision of rents. They think it is unwarranted and so should be restrained by way of injunction. An injunction can only issue from a court or duly established tribunal or adjudicatory body with powers to issue such. So they can come to this court with such an action to seek remedy and that is what is set out in prayer (b) in the plaint, besides others. Agreement or an arbitrator cannot avail such a remedy. This type of proceedings is what section 87 (a) of the Act envisages.

“87. 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 proceedings, has been served upon the managing director by the plaintiff or his agent; and

(b)”

In the present case the plaintiffs received rent review notices all dated on/about 19th December, 2011 to the effect that their rents were going up with effect from 1st February, 2012. So they brought this suit on 1st February, 2012 for, among other prayers, a declaration that the defendants’ review notice was illegal and wrongful. May it be restated that as at this point, the merits or demerits of the case are not being gone into. Focus is on points of law only. Accordingly, the plaintiffs were challenging the act of the defendant done in execution or pursuance of what it deems, it can or should do under the tenancy agreements, namely, increase rents. In this court’s view the plaintiffs were obliged to observe and comply with section 87 (a) by issuing and serving the notice thereunder on the defendant first, to last thirty (30) days before commencing the action. Their argument that:

“.....the circumstances of this case were such that (no) such notice could have been practically impossible as the plaintiffs were facing imminent eviction which could have been put into immediate effect if the plaintiffs did not rush to this court,”

cannot be sustained. That cannot be sustained because the rent review notices did not threaten the plaintiffs with eviction. They were advised to adjust their rental deposits and monthly remittances. Indeed it was submitted by the defendant but not rebutted that:

“[The] plaintiffs purported Statutory Notice dated 30th January, 2012 (filed together with the plaint) was served on the defendant on the 31st January, 2012 while the suit was filed a day later on 1st February, 2012 contrary to the 30 days notice required before any legal action against the Defendant.”

So all in all the plaintiffs were aware of the need to comply with section 87 (a) of the Act. They did not comply. Section 86 (3) does not come to their aid either since the notice envisaged under that section is in respect of a claim for compensation for non-delivery of a consignment.

The conclusion in this proceeding is that the plaintiffs’ suit is premature and thus incompetent. It is struck out with costs.

Delivered on 24th April, 2012.

J. W. MWERA

JUDGE