



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (NAIROBI LAW COURTS)**

**Civil Case 36 of 2010**

**AGGREY SIMIYU WANDA.....PLAINTIFF**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....DEFENDANT**

**Coram: Mwera J**

**Sumba for Applicant**

**Ms Kamunya for Respondent**

**RULING**

The plaintiff's chamber summons dated 26.1.10 was amended on 3.3.10. It was brought under order 39 Rule 1, 2, 3 and section 3A, Civil Procedure Act for orders:

- i) that by mandatory injunction the defendant do open/unlock House No. 16B Railway Quarters South B Nairobi and reinstate the plaintiff therein;
- ii) the defendant do return the plaintiff's household goods removed from the said House No. H 16 B by the defendant; and
- iii) that the defendant be restrained from interfering with the plaintiff's occupation of that house.

There was a further prayer that the OCS Railway Police Station Nairobi do enforce the above orders – a prayer this court is inclined to reluctantly turn down on the basis that this are civil proceedings and there are civil agents to enforce orders therefrom without unnecessarily involving the police.

The grounds in the application stated that the defendant employed the applicant in 1982, retiring him in 2007 as senior executive assistant. The defendant has since not paid sh. 659,451/= due to the plaintiff in terminal benefits and for that the defendant has a policy that in such cases, the employee remains in the employer's accommodation until all his terminal dues are paid. And that after such payment the defendant/employer do give a 3- month notice to the retired employee – to vacate the accommodation/staff quarters. It was not said in the grounds that at any time the defendant evicted the plaintiff from its quarters but it was added that any eviction was c/s 80 (2) of the Kenya Railways

Corporation Act ( Cap 397) hereinafter, the Act, unless it was sanctioned by a magistrate’s court. And that on 16.1.10 the defendant broke into the suit premises and carted away the plaintiff’s household goods – a thing the plaintiff came to know of on 29.2.10. At this stage would it be assumed that the plaintiff was actually not occupying House No. H.6B by the time he was “evicted”? Be that as it may. The plaintiff swore another supporting affidavit further to the one he filed with the application initially.

In that earlier affidavit, the plaintiff had deponed that when he was retrenched on 1-7-07 he was entitled to sh. 1,738,358/= in terminal benefits. Part was paid and a sum of sh. 659,451/= was still owing. That with that, a General Notice no. 12 of 1998 by the defendant to its retiring staff mandated that the plaintiff would only be notified to vacate his staff quarters after full payment of his terminal dues. He quoted part of that notice which said that retrenched staff should only be required to vacate their quarters immediately after being fully paid their dues. So the plaintiff was still in the said staff house because of that policy.

However, when he was away in Kitale on 16.1.10 one Kennedy Langat, a relative he had left in the house, called him to say that the defendant’s agents had visited the house with a view to evict the plaintiff. He had a wife with children living in the house. If evicted he will suffer considerable loss and damage. That he returned to Nairobi on 22.1.10 but declined to inform the defendant that he was around for fear that it may move with speed to evict him. He has property in and about the house and the plaintiff was as per Section 80 (2) of the Act not directed to vacate the premises.

In the further affidavit, the plaintiff deponed that on his return to Nairobi he decided not to go back to his house but live with a relative at Athi River as he moved to get the sought orders. After he got them on 29.1.20 he went back to the house only to find that it had been broken into and all his property removed by the defendant. That the plaintiff was in the house until 10.2.10.

**“..... when again on going back to the house, I found that my few personal effects ..... were again taken away after a break in by the defendant .....,”**

And the house was locked and secured with metal rails. The plaintiff had been evicted again despite the court order – which was a matter for contempt of court. He should be reinstated in the house and his particularized personal property returned.

On 8.2.10 the defendant filed a notice of preliminary objection in that the plaintiff had brought this suit without/before serving the defendant with a written notice according to section 87 of the Act and that the suit had no subtratum and should be struck out **in limine**.

A replying affidavit followed on 23.2.10 by one Atanas Maina, the defendants’ corporation secretary. He termed all the pleadings by the plaintiff incompetent and misconceived. Yes, he was allocated House no. 16 B as claimed. The plaintiff was retrenched on 31.12.06 and was paid his full terminal benefits in December 2007 as per the law without objection. The deponent was aware of the defendant’s policy that a retired officer whose full benefits are not paid remains in his staff quarters for no longer than 90 days after payment. So the plaintiff ought to have left the staff quarters latest by March 2008. But the plaintiff ignored that and illegally remained in the premises without paying rent. On 4.9.09 the defendant’s estates manager served the plaintiff with a notice to vacate or pay rents. No heed. In any case any underpayment of retirement benefits are only claims but not pending retirement benefits. That

the plaintiff claimed some retainer as such but the defendant replied that any such, sums could be considered as security for liabilities only payable when that plaintiff vacated the staff house and this was contained in a letter of 22.12.09 (exhibited).

At this point the point of objection earlier referred to was revisited in the replying affidavit in that the plaintiff commenced these proceedings without serving a written notice on the defendant – a fundamental flaw in the plaintiff's case. He did not deserve the orders.

In response to the alleged lack of notice the plaintiff's further affidavit stated that he served the defendant with a notice dated 31.7.09 and later the AG on 15.1.08. If the defendant was actually served with due notice under section 87 (2) of the Act it was not established with evidence. It was only claimed that letters/notices were left in the central registry of the defendant. But State Law office stamp on the notice of the AG showed that that office was served on 24.1.08. It is not clear whether this service on the AG is required by law. The defendant then filed a supplementary notice of preliminary objection on the alleged incompetency of the amended chamber summons.

The parties then submitted on the preliminary points as well as the merits of the application.

The plaintiff began by arguing that he complied with section 87 (2) of the Act by serving due notice on the defendant's managing director ( see above) and that he also wrote a demand letter to the AG and that all the time the defendant was aware of the plaintiff's claim herein.

As for the supplementary preliminary point of objection the court was told that it was in error by way of mix-up that copies of wrong pleadings (as amended) were served on the defendant. Otherwise all was proper.

In what appeared a reproduction of the contents in the amended application, the plaintiff relied on his affidavits and argued the court to strike out the replying affidavit in that the replying affidavit was not served 3 days before the hearing of this motion. At this point the court would like to observe that the hearing of this application was on 23.3.10 when both sides were directed to submit on it, all affidavits having been filed and served including the plaintiff's own. The court thus was minded to consider all material before it in order to endeavour to determine the matters in question.

The plaintiff added that his final benefits were yet to be paid in full and so he ought not be thrown out of the staff house he occupies and that was the defendants policy as per general notice of No. 12/1998 a lot more was touched on in the submission that required no repetition here.

And to the foregoing the defendant responded that the plaintiff had failed to serve its managing director with a written notice before commencing the action herein c/s 87 (2) of the Act and that failure to do so was fatal, as propounded in the cases of **Everrose Chemtai Obwaka Vs Kenya Railways Corporation HCCC 82/08** and **James Mbatia Thuo & 2 Ors. Vs Kenya Railway Corporation HCC 518/08**.

Section 87 reads:

**“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 a written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served on the managing directors by the plaintiff or his agent.”**

The court further heard that the plaintiff amended its pleadings on 3/3/10 but did not endorse the order allowing the amendment on the amended pleadings contrary to O 6A Rule 7 Civil Procedure Rules). This was fatal as held in **Stockman Rozen (Kenya) Ltd Vs Dagama – Rose Group of Companies [2001] 1 KLR 572** and other cases that were referred to. That such omission caused prejudice to the defendant. So as at this point the defendant sought

that the notices of preliminary objection be upheld and the suits dismissed (it should be struck out) with costs.

Coming to the merits of the application to defendant's position was that the court should only issue a mandatory injunction, even at an interlocutory stage, only in special circumstances.

It is not so deserved here. A mandatory injunction is so drastic an order, which amounts to a prohibitory order. The plaintiff was charged to have come to court with unclean hands by first claiming that he was evicted from the house on 16.1.10 and he came to court on 28.1.10 seeking the order to restrain the eviction. He was no longer in the premises even as on 24.2.2010.

The short determination of all the foregoing is as follows: the mandatory injunction sought will not issue because the plaintiff already has an order which returned him into the premises on 29.1.10. He had been staying at Kitale and when he returned to Nairobi, he chose not to show up at the house. Then he went away probably back to Kitale or to live with a relative in Athi River. He only returned on 24.2.10 to find that his house had been broken into and his property taken away by the defendant. Where was the plaintiff and why? He has not explained. Had he rented the premises out? No answer. In such state of doubt about the plaintiff's movements, it may not be in order to grant his prayers. Already he has an injunction order. He moved back into the house. As he pleads, if the defendant evicted him against it that was an act of contempt of the court. The proper procedure was to cite it for contempt. But anyway it does not appear that the plaintiff was living in the house to follow the acts of the defendant. The orders sought are discretionary and on the material before this court they will not issue.

The other point is that even as the law required the plaintiff to endorse the date and order that allowed him to amend pleadings and serve the same is mandatory, and if the court was minded to forgive the omission, which this court does not, the plaintiff as per section 87 of the Act failed to serve due notice on the defendant before commencing these proceedings. That was fatal as per the case law referred to above. He claimed that he left some letters with the due notice in the central registry of the defendant. They were not acknowledged and or was there evidence of such depositing of due documents with the staff, let alone serving the notice on the defendant's managing director. It was not established that the AG was such an agent. In that regard these proceedings were commenced without due procedure of serving the requisite notice under the Act. They are thus incompetent and a nullity. This suit with all the other related pleadings are thus struck out with costs. However if the defendant took away the plaintiff's property and it has no claim over it, it appears fair and proper to return it.

The costs of this application go to the defendant.

Ruling delivered on 3/5/10.

**J. W. MWERA**

**JUDGE**