



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

**(NAIROBI LAW COURTS)**

**Civil Case 411 of 2008**

**J.M. KIMANI T/A RENCO CAR DENTITY ..... PLAINTIFF**

**VERSUS**

**PARLIAMENTARY SERVICE COMMISSION ..... DEFENDANT**

**RULING**

The plaintiff herein J.M. Kimani t/a Renco Car Dentity presented a plaint to this court, dated 11<sup>th</sup> day of September 2008, and filed the same date of 11<sup>th</sup> September 2008. The plaint is against the Parliamentary Service Commission of Kenya.

Simultaneously with the filing of the plaint, the plaintiff/applicant presented an application by way of chamber summons dated the same 11<sup>th</sup> day of September 2008, brought under order 39 rules 1,2 and 5 of the Civil Procedure Rules, section 3A of the CPA and all other enabling provisions of the law. It seeks restraint orders to restrain the defendant by itself and or its servants and or its employees and or its servants from interfering in any way with the plaintiff/applicants quiet possession and running of his business known as Renco Car Dentity, conducted on those premises respectively L.R. 209/5412. I.R.13314 until this application is heard inter parties in the first instance, and in the second instance, until the suit is heard and fully determined.

The application came before the duty judge on 11.9.08, when it was certified urgent, and ordered to be heard forthwith. It was duly granted and when parties came before court, on 18.09.08 the court ordered status quo to prevail until hearing inter parties.

Respondent filed a replying affidavit sworn by one Patrick G. Gichohi on 17<sup>th</sup> September 2008 and filed on 18<sup>th</sup> September 2008, in opposition to the plaintiff/applicants interim application. This was followed by the filing of a notice of Preliminary Objection dated 17<sup>th</sup> day of September 2008 and filed on the same date. It raises two grounds namely that:-

- 1) *The Parliamentary Service Commission is part of the Government of Kenya and pursuant to section 16 of the Government Proceedings Act Cap.40, an order of injunction cannot be granted against the Defendant.*
- 2) *That the plaintiff has failed to comply with the mandatory provisions, of the government proceedings Act instituting.*

Parties agreed to put in written skeleton for grounds arguments and then invited the court to make a

ruling on the basis of the said submission. Those for the defendant/objector are dated 23<sup>rd</sup> October 2008. The salient points raised are as follows:-

- *The defendant is a constitutional body created under section 45A and B of the Constitution of Kenya.*

- *The said section 45 falls within the section headed Parliament.*

The Learned Counsel is of the opinion that by reason of this, the defendant is part of the Parliament of Kenya, created to provide services to members of Parliament.

- *It is trite that Parliament is one of the three arms of the Government .*

- *The defendant is listed in the presidential Circular No.1/2008 and is shown at page 40 as falling under the National Assembly.*

- *By reason of what has been stated above, section 16 of the Government Proceeding Act is called into play and bars the issuing of an injunction sought against the defendant.*

- *The objector is alive to the provisions of section 7 of the Parliamentary Service Act, Act 10 of 2000 whereby the defendant is stated to be a body corporate capable of suing and being sued.*

- *But the court, is urged to hold the view that since the above named act is more relent, than the Government Proceeding Act, it must have been the intention of parliament to exempt the defendant from the provisions of the Government Proceedings Act that states that all suits against the Government shall be against the Attorney General.*

- *That notwithstanding, the court, is urged to hold that it was the intention of Parliament to exempt the defendant from the provisions of the Government Proceedings Act, but it should be noted that the Parliamentary Service Act is however not superior to the constitution, and so the court, should be guided by the constitutional provisions. This is so, because the provisions of the constitution prevail at all times.*

- *By reason of the defendant being part of the governmental arrangements the applicants' application is incurably defective and as such it should be struck out.*

- *The plaintiff/applicant who is the respondent to the Preliminary objection, on the other hand, opposed the preliminary objection on the grounds set out in their skeleton arguments dated 30<sup>th</sup> October 2008, and filed on 31<sup>st</sup> October 2008. These are:-*

- *They concede that section 45A and B of the constitution makes provision for the establishment of the Parliamentary Service Commission but dispute the assertion that the defendant cannot be sued and or sue independently but only through the Attorney General of the Republic of Kenya.*

- *They also dispute that their suit, was under the Government Proceeding Act. Where as notice must be given before suit is commenced.*

- *Contend that from the contents of section 7 of the defendants act, which spell out clearly, that the defendant is a body corporate with perpetual succession, and a common seal, meaning that, the Parliamentary Service Commission is an entity that has its own statutory powers and duties completely distinct from the government. This is confirmed by the fact that the defendant owns its own property, distinct from government property. It enters into its own contracts. Proof of this is the Property and the Lease Contract agreement which is subject of these proceedings.*

- *Their assertion is added weight in that, had the government been involved, then the state counsels would have been the ones handling the proceedings herein.*

- They take issue with the filing of pleadings by the defence counsel on record; Namely Antony Njoroge whom they contend is an employee of the defendant and so he has no practicing certificate to act, as such in this matter, hence the court, is urged to strike out the pleadings filed by this counsel on behalf of the defendant.
- In their oral highlights, in court, counsel for the objector reiterated that by reasons of the contents of section 45A, B of the constitution, the defendant is part of the government of Kenya arrangements.
- This has further been fortified by the presence of Presidential Circular No.1/08, whose existence has not been denied.
- The court, is urged to ignore objections for counsels representation of the defendant, as that had formed the basis of the plaintiff/applicants preliminary objection which has since been withdrawn.
- Maintained that the injunction order prayed for both in the plaint and the chamber summons cannot hold and the same should be struck out.
- In their oral highlights, the plaintiff/applicants counsel, reiterated the content of the written arguments, and then stressed the following:
  - The extracts from the Parliamentary Service Act speaks for itself, and it is proof that the defendant is not part of the government.
  - The court, is invited to note that it is bound by statute and not circulars.
  - The court is invited to be guided by the content of the preamble, sections 3 and 7 of the said Act, which all go to show that the defendant is not part of the government.
  - Indeed the section 45A, B says what it says in its content, but the court, should not loose sight of the fact that
 

the constituting legislation, has given the defendant the status of a body corporate with the power to sue and be sued in its own name.
  - Still maintain that had it been a government institution then state counsels would be appearing for the defendant and not a private practitioner.
  - For the reasons given, the court, was urged to hold that the injunctive reliefs in both applications are properly laid.

On case law the court, was referred to the case of **GABRIEL M.G. CHANDI, SAYYID MRERA AND MOHAMED OMAR VERSUS THE REGISTRAR OF SOCIETIES MOMBASA HCC NO 14 OF 2005** decided by Maraga J on the 22<sup>nd</sup> day of May 2006. At page 3 of the ruling line 12, from the top, observation was made to the effect that objection had been raised that the Registrar of Societies, lacked capacity to sue and or be sued, and that the Attorney General should have been sued under section 12 of the government proceedings Act in the first instance. In the second instance that the prayer sought against the Registrar of society, for a mandatory injunction cannot issue by dint of section 16 of the government proceedings Act, and by reason of that argument, the court, was invited to strike out the OS (Originating Summons) with costs. At page 6 of the ruling line 6 from the top, the learned judge made the following observations.

*“I agree with him. Suits against government officials unless they are brought by Judicial Review applications, under order 53 of the CPR, or where the officials are sued in their personal capacities, should be brought against the Attorney General. Section 16 of the government proceedings Act makes*

that quite clear. Section 12 of the same Act also makes it clear that injunctions or orders analogous to injunctions cannot issue against the government or government officers.

The case of **CHOGIS GARAGE LIMITED VERSUS THE ATTORNEY GENERAL, NAIROBI MILIMANI COMMERCIAL COURT HCC NO 133 of 2006** decided by Mary Kasango J on 23<sup>rd</sup> May 2006. At page 3 of the ruling, the learned Judge made the following observations:-

*“ clearly sections 16 government proceedings Act Cap 40) prohibits the issuing of injunction against the government. Justice Visram in the case of ROYAL MEDIA VERSUS TELKOM KENYA (2001) EA stated:*

*“.....in my view rightly so that there can be no injunction against the government where there is a cause of action directly against the government there can be no injunction. The appropriate remedy in that case would be to seek declaration relief against the government. This is founded on the principles that the King cannot do wrong and that the King cannot be sued in his court.....The servant of the government could not hide behind the immunity of the government”.*

On the court’s assessment of the Rivai arguments herein, it is clear that the bone of contention between the disputants is whether the defendant is a government institution by reason of which it would be shielded by the provisions of the government proceedings Act Cap 40 Laws of Kenya namely section 16 (2) thereof, which provides specifically that:-

**“ The court, shall not in any civil proceedings grant any injunctions or make any order against an officer of the government if the effect of granting the injunction or making the order would be to give any relief against the government which could not have been obtained in proceedings against the government”.**

The plaintiff applicant who is the respondent to the objection has no quarrel with that provision. The sum total of their argument is that the defendant is not a government institution. It is on record that, each side is relying on the provisions of law cited. The defendant objector relies on the provisions of sections 45 A and 45 B of the constitution of Kenya. This court has perused the same and noted that section 45 A (i) simply established the parliamentary service. It reads:-

**“45 A (i) There shall be a service to be known as the parliamentary service” Section 45 A (2) and (3) on the other hand make provision for the establishment of the office of the clerk to the National Assembly and other officers and staff appointed for the purposes of the National Assembly. Sub section 3 goes further to state that the clerk of the National Assembly as well as other officers and staff provided for shall be officers in the parliamentary service.”**

Section 45 B (1) on the other hand, establishes a parliamentary services commission. The composition of the membership is set out in the preceding subsections, and is basically made up of members of parliament, headed by the speaker, of the National Assembly. The mandate is found in section 45 B (5) to constitute and abolish offices in the parliamentary services, to appoint persons in the offices of the service, to ensure effective functioning of the Assembly, to direct administration section 45 (B) 6 on the other hand provides thus:-

**“ In the exercise of its powers or the performance of its functions under this constitution, the commission shall not be subject to the direction or control of any other person or authority”.**

Vide subsection 7 there of, the commission has power to assign duties on any public officer, or authority to discharge its functions. Vide subsection 11 thereof the commission has power to appoint individuals on contract as experts or researchers. Vide subsection 12, there is provision for the enactment of an Act of Parliament to provide for and to prescribe the manner of the exercise of the functions of the commission, subsection 13 on the other hand prohibits the application of section 48 and 107 (1) of the constitution to the parliamentary service. Section 48 of the constitution makes provision on Restrictions with certain financial measures.

Section 107 (1) on the other hand reads:-

**“ 107(1) Subject to this constitution, the power to appoint persons to hold or act in offices in the public service and in the service of local authorities, including the power to confirm appointments, the power to exercise disciplinary control over persons holding or acting in those offices and the power to remove those persons from office shall rest in the public service commission....”**

Before leaving the constitutional provisions, it is prudent to set out the provisions of section 26 (1) and (2) thereof. It provides:-

*“ 26 (1) There shall be an Attorney General whose office shall be an office in the public service*

*(2) The Attorney General shall be the principal legal Adviser to the government”.*

Due consideration has been made of these provisions by this court, and considered the same in relation to the oral arguments herein, and the courts' findings on the same case are follows:-

1) *A reading of all the a fore set out provisions does not state that offices and staff of the commission hold public service positions.*

2) *It is trite law that this court, has judicial notice of, that, the public office mandated to handle government and or public service issues is the office of the Attorney General. It is worth noting that there is no reference to the office of the Attorney General in the a fore set provisions on the defendant. In fact, there is express provision that the commission shall not be subject to any other person or Authority in the discharge of its functions. It would therefore follow that had the legislature intended the defendant to be brought under the Attorney General, control it would have said so.*

3) *This is further fortified by the express provision that section 107(1) of the constitution which places all public offices and institutions under the public service commission is excluded from application to the defendant which is proof that the defendant is not a government department.*

The a fore set out findings is fortified by the provisions of the parliamentary services Act No 10 of 2000. Vide section 3 (1) and (2) thereof, there is provision that *“the service shall be an institution of exemplary administrative, and technical competence and subject to section 45 B of the constitution, in the performance of their functions, employees of the service shall not seek or receive directions from any source external to the service”.*

In normal government practice, that this court, has judicial notice of, which it has come across in the discharge of judicial functions, government institutions in fact do receive directions from the office of the Attorney General. It therefore follows that any institution which does not receive external directions even from the office of the Attorney General is excluded from government service.

Section 7 (a) sums it up all. It reads.

**“The parliamentary Service Commission shall be a body corporate with perpetual succession and a common seal and shall in its corporate name be capable of suing and being sued”**

This provision considered in conjunction with the constitutional provisions set out herein, they go to show clearly, that the defendant though a constitutional institutional institution, is not a government department and as such the provisions of the government proceedings Act Cap 40 relied upon, namely section 16 (2) thereof, do not operate to shield the defendant from application of an injunctive relief to it, if one is merited. The preliminary objection is therefore ousted and dismissed.

(2) The plaintiff who was a respondent to the preliminary Objection will have costs of the same.

**Dated, Read and delivered at Nairobi this 22<sup>nd</sup> day of May 2009.**

**R.N. NAMBUYE**

**JUDGE**