



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Environmental & Land Case 582 of 2008

JOSEPH NYAMBAMBA.....1ST PLAINTIFF/APPLICANT

ISAAC KIPRONO NGETICH

WILLIAM NYAEGA

TIMOTHY BERRE

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

RULING NO. 1

The plaintiffs have filed this suit against the defendant Kenya Railways vide a plaint dated 25th November 2008 and filed on the 26th November 2008. simultaneously filed with the plaint is a chamber summons dated and filed the same date.

The defendant was served with the interim application filed, a notice of appointment of advocate and then filed a notice of preliminary objection dated 15th day of January 2009 and filed on the same date. It raises two grounds of objection namely:-

(1) *That the plaintiff did not serve upon the defendant's Managing Director the mandatory one month written notice before institution of this suit as required under section 87 of the Kenya Railways Corporation Act (chapter 397 laws of Kenya and the plaintiffs suit is thus incompetent.*

(2) *That the plaintiffs/applicants suit, the substratum upon which the instant application is premised, is incompetent, fatally and hopelessly defective thus both the application and the entire suit should be struck out in limine and be dismissed with costs.*

The preliminary objection has been argued inter parties. The sum total of the objectors argument is that in the absence of the plaintiffs complying with section 87 of the Railways Act Cap 397 Laws of Kenya. They stand non suited.

In response counsel for the plaintiffs submitted as follows:-

- notice was sent five days to the filing of the suit.
- Section 87 only applies where the corporation has done anything under the Act in pursuance of its power under section 13 of the Act.
- That acts complained of here in being demolition of private property, allegedly constructed on the Railways land is not among those powers.
- They rely on the case law provided to fortify their case.

- Maintain that by reason of case law, submitted, and relied upon, the activities complained of are within the exceptions in section 13 of the said Act and as such they were not obligated to serve the statutory notice relied upon by the objection. On that note the respondent urged the court, to dismiss the preliminary objection.

In response counsel for the objectors submitted that the facts of the case law relied upon is distinguishable. Further that there is no authority for the deponent of the verifying affidavit and the supporting affidavit to depone and as such both the plaint and the interim application are incompetent and both should be struck out with costs to them.

On the law reliance was placed on section 87 of the Kenya Railways corporation Act Cap 397 Laws of Kenya which provides:- *“section 87 where any action or other legal proceeding is commenced against the corporation for any act done in pursuance of execution, or intended execution of this Act 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 claims, and of intention to commence the action or legal proceeding has been served upon the Managing Director by the plaintiff or his agent, and*

(b) *The action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or on the case of a continuing injury or damage, within six months next after the cassation thereof”*

On case law reference was made to the case of J WAMBUGU AND 8 OTHER VERSUS KENYA RAILWAYS CORPORATION NAIROBI HCCC NO 3244 OF 1997 a ruling delivered by Ojwang J on the 15th day of July 2005. The facts gathered from the record are that when the matter came up for main hearing the defence raised a preliminary objection to the effect that the suit was in competent and was a nullity for the reason that it had been filed in conflict with the provisions of sections 87 of the Kenya Railways corporations Act cap 397 Laws of Kenya. At page 4 of the ruling line 4 from the bottom it is observed:-

“ I am on this regard in agreement with learned counsel for the defendant that the applicable law is the Kenya Railways Corporation Act and section 13(2)(k) of the Act vests the corporation with contractual powers....”

The case of EVER ROSE CHEMTAI OBWAKA VERSUS KENYA RAILWAYS CORPORATION NAIROBI MILIMANI COMMERCIAL COURT HCCC NO 82 OF 2008 decided by Kimaru J on the 16th day of April 2008. At page 2 of the ruling, it is observed that the defendant objected to the suit on account of section 87 of the corporation Act. The subject of the dispute was a tenancy agreement between the plaintiff and the defendant which the defendant had terminated prompting the plaintiff to move to court, challenging the said termination.

At page 3-4 of the ruling, the learned judge set out the provisions of section 87 of Cap 397 Laws of Kenya. At line 14 from the bottom on page 4 that:- *“ The above section prohibits commencement of any proceedings against the defendant unless a thirty day notice is issued. The plaintiff can file suit without issuing the statutory notice if she can establish that the cause of action which led to her filing suit against the defendant was not an act done in pursuance or execution of this Act (i.e Kenya Railways corporation Act or of any public duty or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority...”*

Further at line 5 from the bottom that section 13 of the Kenya Railways Corporation Act sets out the powers of the corporation when acting in its capacity as a statutory body.....”

At page 5 line 10 from the bottom the learned judge went on thus:-

“The plaintiffs’ contention that the court, should overlook the statutory requirement regarding notice on grounds that the suit had been filed under certificate of urgency has no basis in law.”

The case of JAMES MBATIA THUO AND 2 OTHERS VERSUS KENYA RAILWAYS CORPORATION NAIROBI HCCC NO 578 OF 2008 NAIROBI HCCC NO 578 OF 2008 decided by Khamon J on the 29th day of December 2008. It is observed that the suit had been filed simultaneously with an interim application under certificate of urgency. When the application came up for hearing, a preliminary objection was raised on the ground that the statutory notice had not been served in accordance with section 87 of Cap 397 Laws of Kenya. At page 2 of the ruling the learned judge made observation at line 12 from the bottom thus:-

“ The position is that there is no dispute that this suit was filed against the defendant corporation without compliance

with section 87 of the Kenya Railway Corporation Act.”

At page 3 there of, the learned judge made observation that the defence had argued that the suit was incompetent and as such the court, had no jurisdiction to entertain the same. Where as the plaintiffs counsel had argued that the court, was vested with jurisdiction by reasons of the inherent jurisdiction of the court, vested in section 3 A of the CPA which the court, could invoke to do justice to the parties by saving the suit as no prejudice would be suffered by the defendant and that Equity comes in to provide justice as the sole purpose of the statutory notice is simply to make the managing Director aware of the proceeding.

At page 5 of the ruling, line 6 from the top, the learned judge went on:- “ *Section 87 of the Kenya Railways Corporation Act may be a procedural section, but it is a provision of a substantive statute which cannot be made in operative by a procedural statute ...the Civil Procedure Act as the procedure in the Kenya Railways Corporation Act must be respected by provisions of the Civil Procedure Act and that is what the Civil Procedure Act itself is telling us in section 3 when it states that “ In the absence of any specific provision to the contrary, nothing in this Act shall limit or otherwise affect any special jurisdiction or power conferred or any special form or procedure prescribed by or under any other law for the time being in force. The Kenya Railways Corporation is one such law for the time being in force.”*

At page 6 of the ruling, line 8 from the top, the learned judge went on:- “ *Moreover, it has to be recognized that section 3A correctly becomes useful only where there are no other specific provisions of the law governing the matter in issue where there are specific provisions of the law, those provisions like section 87 of the Kenya Railways Corporation Act, are the ones applicable and by that applicability the said provisions do oust and prevent the intervention of section 3A of the CPA itself including the rules.----*

Further more, section 87 of the Kenya Railways Corporation Act is not only mandatory, but also does not provide for exception allowing a suit to be commenced for any reason before the notice is given. It follows that once the plaintiff filed this suit without notice having been given, the suit was incompetent right from the beginning.....The above being the position, the defendants preliminary objection is upheld.

On the courts assessment of the oral arguments herein which, when considered in the light of the provisions of law and principles of case law relied upon, they raise two fundamental issues namely:-

- (i) whether the preliminary objection raised is sustainable.
- (ii) Whether it is meritorious.

The sustainability of the preliminary objection depends on whether it satisfies the ingredients for raising a preliminary objection. Those that this court, has judicial notice of are those found in the famous case of MUKISA BISCUIT MANUFACTURING CO LTD VERSUS WEST END DISTRIBUTORS LTD (1969) EA 696. At page 700 LAW JA as he then was, at paragraph D-E-F made the following observations:-

“ A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

At page 701, Sir Charles New Bold. P as he then was had this to say: “ *A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”*

These principles have been applied to the arguments herein and the court, is satisfied that what has been raised by the defendant’s preliminary objector is a pure point of law as it simply relates to non compliance of the provision of section 87 of the Kenya Railways Corporation Act Cap 397 Laws of Kenya, in the first instance. In the second instance if upheld it will dispose off the suit.

Turning to the merits, it is common ground that the notice was served five days to the filing of the suit. It is therefore not disputed that the notice given does not satisfy the requirements of section 87. It is also not disputed that the case law relied upon has also demonstrated that non compliance with that provision is fatal to ones suit.

It has to be noted that all these decisions are decisions of courts, of concurrent jurisdiction, and are therefore not binding on this court. This court, is entitled to construe the said provisions and arrive at its own conclusions on the matter. The court, has done so and finds that the learned judges in the said decisions arrived at the correct conclusions

on the construction of that provision.

Turning back to the merits, plaintiffs do not deny that the notice was not filed in time. But state that their complaint is outside the ambit of the powers donated to the corporation by section 13 of the same Act. Scheming through the plaint reveals that there is an averment that all the plaintiffs are the legal owners and or proprietors and or lawful beneficiaries of all that piece of land situate in the city of Nairobi on land known as LR Nos 209/18267, 18269, 18263, 18259, 18261, 18262. On the 10th day of November 2008 the defendants, proceeded to place X marks on the suit properties, and K.R marks and on the 13th day of November 2008 at around 2.00 a.m. in the morning, demolished all and any structures on the land hosting the suit properties, allowed members of the public to cart away any all materials that had been scattered

without any restriction whatsoever. Vide paragraph 15 of the plaint it is averred that:-

“ The plaintiffs aver that the defendants actions were malicious, unconstitutional and manifestly fraught with illegality, lacking foundation and or justification in law and fact.” Further that the defendants action amount to a violation of rights over private property and quiet possession. The defendant went further to appoint un identified agents to survey the land raising the distinct and highly pragmatic conjecture that it intends to annex and or deprive the plaintiffs of their proprietary rights and there by aggravate and exacerbate an already irreparable situation.

By reason of what has been stated in the averments the plaintiffs among others sought:-

- (i) *A permanent injunction stopping the defendant whether by itself, its agents and/or servants from entering upon, disposing off whether by sale, auction, transfer or other wise or in any other manner whatsoever dealing with the suit properties.*
- (ii) *A permanent injunction stopping the defendant whether by itself, its agents and/or servants from trespassing on the suit properties or otherwise interfering with the plaintiffs entitlement to quiet possession and enjoyment.*
- (iii) *A declaration that the plaintiffs are the bonafide owners for value of the suit properties to the exclusion of the defendant or other third parties except as may be provided in law.”....*

These activities have to be matched against the authority’s powers in order to determine whether these go to oust the operation of section 87 of the Act. It is on record that no defence has been filed by the defendants yet to enable the court to know what claim they have on the said property. All that the court, has is an assertion in the plaintiff that before the demolition, certain acts were carried out, marks were put on the structure namely X and KR. This information has been considered in the light of the content of section 13 of the said Act and courts finds that section 13(2) provides inter alia:-

“ Subject to this Act, the powers conferred by subsection (1) shall include all such powers as are necessary or advantageous and proper for the purposes of the corporation and in particular without prejudice to the generality of the foregoing shall include power.....”

This provision does not rule out any acts done for the benefit or advantage of the corporation not provided for in section 13 of the Act. By Plaintiff placing a mark X and K.R. on the structures before demolition, one would assume the corporation was trying to assert ownership over the suit property, an act which is aimed at advantaging the corporation and is therefore covered by that section. By reason of this construction, unless and until it is proved that the K.R. had no lawful claim, its actions complained of herein fall into the provisions of the requirements in section 87 of the Act. That being the case it follows that it ws mandatory for the plaintiffs to have complied with that requirement before filing the claim herein. Failure to so comply, renders their suit invalid, which invalidity is temporary in nature as it does not deny the plaintiffs a remedy, they are seeking from the defendants. All they have to do is to start all over again, comply and then lodge their claim for adjudication.

For the reason given in the assessment, the preliminary objection is upheld. The suit as well as the interim application are struck out as being invalid.

(2)The defendant will have costs.

(3)The plaintiffs are at liberty to comply with section 87 and then represent their claim for adjudication.

(4)Leave to so represent the claim a fresh after complying with section 87 as in number 3 above is granted if the same is required.

Dated, Read and delivered at Nairobi this 24th day of July 2009.

R.N.NAMBUYE

JUDGE