



**JULIUS NDOLO & 128 OTHERS.....PLAINTIFFS**

**VERSUS**

**KENYA RAILWAYS CORPORATION.....1<sup>ST</sup> DEFENDANT**

**JUSTINE OMOKE.....2<sup>ND</sup> DEFENDANT**

**RULING**

May it first be stated that in the well known case of **MUKISA BISCUIT MANUFACTURING CO LTD =vs= WEST END DISTRIBUTORS LTD (1969) E. A. 696**, the Court of Appeal said that:-

**“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 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. The improper raising of points by way of preliminary objection does nothing, but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop”**

That is however not to say that a party is precluded from raising an objection which is genuine and based on the law.

Indeed, the present objection by the defendants is based on a pertinent point of law i.e. the competence of this suit and the courts jurisdiction to deal with it due to the non-compliance by the plaintiffs with the provisions of **Section 87 (a) of the Kenya Railways Corporation Act ( Cap 397 Laws of Kenya )**.

The defendants submitted through the learned Counsel **Mr. Okero**, that these proceedings fall under Section 87 (a) of the aforementioned Corporation Act since the suit is based on the tenancy of the plaintiffs in houses belonging to the Kenya Railway Corporation. It is thus contended that the corporation is empowered to control the usage of its premises as it is permitted to provide housing to its employees. To that extent, the plaintiffs were required to issue and serve upon the defendants the necessary notice under Section 87 (a) of the Corporation Act and since they did not do so, the suit is incompetent and ought to be struck out.

For the plaintiffs, it was argued by their learned Counsel, **Mr. Mwamu**, that on the basis of an application filed by themselves the requirement to issue and serve the notice was dispensed with by the court which had the power to do so.

Referring to Section 59 of the **Interpretation and General Provisions Act** Cap 2 Laws of Kenya, Mr. Mwamu, contended that the requirement under the said Corporation Act cannot be construed to say that the court could not dispense with it and if the defendants were aggrieved by the court’s order they should have appealed.

It must be noted that the order to dispense with the material notice was granted ex-parte. The

defendants had no opportunity to oppose it. Perhaps because of the opportunity arising now the defendants have deemed it right and proper to raise this preliminary objection.

The question is whether the objection is sustainable and forceful enough to have the suit struck out. Vide the Chamber summons dated 3<sup>rd</sup> June 2009 presented ex-parte in the first instance, the plaintiffs sought the order to dispense with the 30 days notice required to be served on the defendant on account of the urgency of the matter.

The order was for dispensation with the notice and not for the extension of time within which to serve the notice. Therefore, Section 59 of the Interpretation and General Provisions Act would lack relevance in this matter and so would the cited decision in the case of **Geoffrey Njoroge Kinyanjui =vs= Nyautha Gichungu Civil Application No. NAI 19 of 1997.**

Section 87 of the Kenya Railways Corporation Act provides that:-

**“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.....**

**(b)**

.....  
.....

The plaintiffs’ pleadings show that they are tenants in houses belonging to the defendant corporation and that in an attempt to enforce the payment of the increased rent, the defendant issued vacation notices against the plaintiffs.

It is the plaintiffs’ contention that the rental increment was contrary to the tenancy and / or lease agreement entered between the parties and thus unlawful.

Consequently, the plaintiffs pray for a permanent injunction against the defendant corporation to prevent it from increasing the rent and an order of specific performance to compel the corporation to comply with the contractual provisions on rent increment.

The plaintiffs also pray for an order compelling the corporation to release goods attached in pursuance of the rental increment. Paragraph 11 of the plaint is an indication that the defendant corporation was served with a notice of compliance but had refused and / or neglected to respond.

In the chamber summons accompanying the plaint and through which the disputed order was obtained, it is indicated that the defendant corporation increased rent without following the procedure laid down in the Kenya Railways Corporation Act.

It is apparent from the pleadings and the averments contained in the chamber summons that even the plaintiffs acknowledged that Section 87 (a) of the Corporation Act had to be complied with within a period of one month prior to the institution of the suit.

As the provision is mandatory, it was incumbent upon the plaintiffs to issue and serve the pre-requisite notice. The Act does not empower a court to dispense with the notice although the court may use its discretion to extend time within which to comply with the statutory requirement.

The order to dispense with notice was obtained ex-parte under the cover of urgency and by riding on Section 3A of the Civil Procedure Act.

However, Section 3A of the Civil Procedure Act ought not be applied where there are express statutory provisions. The provision is not an authority to a party to override the statutory provisions.

In the case of **Kibutha =vs= Kibutha (1984) KLR 243**, the Court of Appeal held that:-

**“The inherent powers of the court under the Civil Procedure Act (Cap 21) Section 3A cannot be invoked so as to override the other Rules unless it can be shown that special circumstances exist or that injustice would be occasioned by the application of the such other rules.....”**

Threats of eviction from the defendants’ houses alluded to by the plaintiffs are mere threats which had not been put into effect so as to create special circumstances and have the court dispense rather than extend the pre-requisite notice under Section 87 ( a) of the Corporation Act.

The preliminary objection is therefore merited, sustainable and forceful enough for the court to strike out the plaintiffs’ suit and prevent further abuse of the court process.

Accordingly, the suit is struck out with costs to the defendants.

**Dated, signed and delivered at Kisumu this 23<sup>rd</sup> day of October 2009.**

**J. R. KARANJA**

**JUDGE**

JRK/aao