



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
Civil Case 211 of 2006

SEAVIEW INVESTMENTS LTD..... PLAINTIFF

VERSUS

HAMADI JUMA MWAKIBIBO1ST DEFENDANT

THE ATTORNEY GENERAL.....2ND DEFENDANT

RULING

When this case came up for hearing on 20.2.2008, counsel for the Second Defendant raised a Preliminary Objection on a point of law that the Plaintiff's suit is incompetent bad in law and ought to be struck out on the ground that the same was filed with disregard to the provisions of Section 13A of the Government Proceedings Act (Cap 40 Laws of Kenya). Counsel argued that the requisite 30-day notice was not served before the suit was instituted. In her view the requirement of that notice being mandatory the suit is incompetent and should be struck out as against the 2nd Defendant. To buttress that proposition counsel placed reliance upon a decision of Visram J. in *James Orengo - V - Attorney General & William Weloba [HCCC NO 2077 of 2000] Unreported*.

In response counsel for the Plaintiff argued that by dint of the provisions of Sections 13A (3) and proviso (i) to Section 16(1) of the same Act i.e. the Government Proceedings Act, the Plaintiff was not obliged to serve the said notice. Counsel for the Plaintiff further submitted that the case of *James Orengo -V- Attorney & Another (Supra)* is clearly distinguishable from this case as in the former case the provisions of Section 16(1) (i) were not considered. In the premises, counsel for the Plaintiff urged me to dismiss the Preliminary Objection.

I have considered the rival arguments. I have also perused the pleadings and the authority cited. Having done so, I take the following view of this matter. A decision upon the Preliminary Objection hinges on the interpretation of the provisions of Section 13A and 16 of the Government Proceedings Act. Section 13A(1) is in the following terms:-

“13A. (1) No proceedings against the Government shall lie or be instituted until after the expiry of a period of thirty days after a notice in writing has been served on the Government in relation to those proceedings”

Under this Sub-Section, counsel for the Second Defendant would appear to be right. The requirement of the 30-day notice is mandatory. But is that the end of the matter? I think not. The section should be read as a whole otherwise the rest of the sub sections would be rendered meaningless. Subsection (3) of Section 3A reads as follows:

“(3) The provisions of this section shall not apply to such part of any proceedings as relates to a claim for relief in respect of which the court may, by virtue of Proviso (i) to Section 16(1), make an order declaratory of the right of the parties in lieu of an injunction”

AND Proviso (i) to Section 16 is in the following terms:-

“16(1) In any civil proceedings by or against the Government the court may, subject to the provisions of this Act make any order that it may make in proceedings between subjects and otherwise give such appropriate relief as the case may require:

Provided that –

(i) Where in any proceedings against the Government any relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or specific performance, but may in lieu thereof make an order declaratory of the rights of the parties; and”

The Plaintiffs plaint and the amended version thereof seek declaratory orders with respect to the suit property. It is clear that if the 2nd Defendant were a private person in other words an ordinary subject the Plaintiff would have sought injunctive reliefs. In lieu thereof the Plaintiff has sought declaratory reliefs against the 2nd Defendant.

In the premises the Plaintiff has persuaded me that its claim has been brought within the preview of the provisions of Sub-Section 3 of Section 13(A). The requirement for a prior 30-day notice did not apply. I agree with counsel for the Plaintiff that Visram J’s decision in ***James Orengo –V- Attorney General & Another*** (Supra) applied to different circumstances. In that case, the Plaintiff was mandatorily required to serve the notice. Indeed he purported to serve the same but instituted proceedings against the Government even before the notice expired. That is clearly not the position in this case.

In the result the Preliminary Objection raised by the 2nd Defendant is overruled with costs to the Plaintiff.

It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MARCH 2008.

F. AZANGALALA

JUDGE

Read in the presence of Kasmani for the Plaintiff.

F. AZANGALALA

JUDGE

12.3.2008