



REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURT)

CIVIL SUIT 82 OF 2008

EVERROSE CHEMTAI OBWAKA..... PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

RULING

The plaintiff entered into a lease or tenancy agreement in respect of a residential house owned by the defendant described as **K5 LR No.209/6491 Kileleshwa, Nairobi** (*hereinafter referred to as the suit premises*). The said lease was for a period of one year effective from 8th August, 2007. A disagreement arose between the plaintiff and the defendant over the said tenancy. According to the plaintiff, the defendant issued a notice seeking to terminate the said tenancy. The expiry date of notice was stated to be 20th February, 2008. The plaintiff was aggrieved by the decision of the defendant to terminate the said tenancy. On 19th February 2008, the plaintiff filed suit against the defendant seeking, *inter alia* a declaration that the notice issued and served upon the plaintiff was null and void for failure to adhere to certain terms of the lease. Contemporaneous with filing suit, the plaintiff filed an application seeking interlocutory orders of injunction to restrain the defendant from terminating the tenancy pending the hearing and determination of the suit. The defendant was duly served with the application.

The defendant entered appearance and filed notice of preliminary objection. In its notice, the defendant objected to the plaintiff's suit on the following grounds:

*"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 plaintiff's suit is thus incompetent;*

2. That the plaintiff's/applicant's 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."

At the hearing of the preliminary objection, Mr. Njoroge for the defendant submitted that the plaintiff's suit was incompetent on account of failure by the plaintiff to issue the requisite statutory notice under **Section 87** of the **Kenya Railways Corporation Act** prior to filing suit. He submitted that the subject matter of the suit was within the mandate of the corporation as envisaged by **Section 13** of the **Act**. He maintained that failure to serve notice meant that the plaintiff's suit was incompetent and should therefore be struck out at the first instance. He submitted that the requirement as regard statutory notice could not be waived at the instance of the plaintiff when filing the present suit. He explained that this court lack

jurisdiction to waive a mandatory requirement statutory. He urged the court to uphold the preliminary objection.

Mr. Bwire for the plaintiff opposed the preliminary objection. He submitted that the preliminary objection was prematurely raised since the plaintiff had made a prayer in her application for the waiver of the statutory notice in view of the urgency of the matter. He conceded that although there was a requirement that a month's notice be issued before any suit is filed against the defendant, in the circumstances of the present case, in view of the utmost urgency of the matter, the requirement regarding notice should be waived. He urged the court to apply equitable principles of the law to sustain the plaintiff's suit since the plaintiff's suit would be defeated if statutory notice was issued and in the meantime the plaintiff was evicted from the suit premises. He urged the court to disallow the preliminary objection.

Having heard the rival argument made on behalf of the plaintiff and on behalf of the defendant, the issue for determination by this court is whether the preliminary objection raised by the defendant is merited and should be upheld. **Section 87** of the **Kenya Railways Corporation Act** provides as follows:

“Where any action or other legal proceedings is commenced against the corporation for any act done in pursuance or execution, or intended execution, of this Act or any public duty or authority or in respect of any alleged neglect or default in 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 notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, 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, in the case a continuing injury or damage, within six months next after the cessation thereof.”

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 or intended execution of this Act (i.e. The 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 ...*”

Section 13 of the **Kenya Railways Corporation Act** sets out the powers of the corporation when acting in its capacity as a statutory body. **Section 13(2)(h)** provides that such power shall include:

“...to sell, let or otherwise dispose of any property, moveable or immovable, which in the opinion of the board is not necessary for the purposes of the corporation:

Provided that the corporation shall not sell, let or otherwise dispose of any building or land placed at its disposal by the government otherwise than with the consent of, and on conditions agreed by, the government”.

It is therefore evident that the plaintiff's suit fell within the parameters of those suits which touch on the statutory functions of the defendant. The plaintiff entered into a lease agreement with the defendant. The defendant had powers under **Section 13(2)(h)** of the **Act** to lease or let its property where the board is of the opinion that such property was not necessary, at the material time, for the purposes of the corporation. The plaintiff was therefore not exempted from requirement that she issues the requisite statutory notice as envisaged by **Section 87 (a)** of the **Act** before commencing legal proceedings. The plaintiff's 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 plaintiff's further argument that since it had sought to be exempted from the statutory requirement regarding notice to the court, it should be allowed to proceed with its case has no support in law. This court lacks jurisdiction to exempt a party from compliance with any statutory requirement unless such a party establishes that this court has such jurisdiction. The plaintiff placed no material before this court to enable this court invoke its '*equitable*' jurisdiction in her aid as submitted by the plaintiff. **Section 87 (a)** of the **Act** requires that statutory notice be issued at least a month *before* the commencement of any proceedings. It is evident therefore that the plaintiff was required to issue the statutory notice before commencing suit, whether the suit was filed under certificate of urgency or not. It is unfortunate that the requirement that the defendant be given notice a month before a suit is filed in some instances may occasion hardship to an aggrieved party. I think in such circumstances, a party dealing with the defendant should arrange its affairs in such a manner as to take into account the statutory requirement regarding notice before filing suit in the event that disagreement arises as a result of such dealing.

It is clear that the plaintiff breached the law when it filed the present suit without issuing the requisite statutory notice before commencing legal proceedings. The preliminary objection is upheld. The plaintiff's suit is incompetent. It is hereby struck out with costs to the defendant.

DATED at NAIROBI this 16th day of APRIL, 2008.

L. KIMARU

JUDGE