



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 74 of 2008

JISAIDIE DEVELOPMENT NETWORK PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....DEFENDANT

R U L I N G

The plaintiff entered into an agreement with the defendant for the purchase of certain scrap material within the central region of the defendant corporation. A disagreement arose over the implementation of the terms of the said agreement. On 7th February, 2008, the defendant wrote to the plaintiff purporting to terminate the agreement. The plaintiff was aggrieved and filed the present suit seeking orders of this court to compel the defendant to specifically perform the contract. Contemporaneous with filing suit, the plaintiff filed an application under certificate of urgency, seeking to restrain the defendant by means of a temporary injunction from terminating the agreement or otherwise dealing with the goods comprised in the tender that was awarded to the plaintiff.

When the defendant was served with the application, it entered appearance and filed a notice of preliminary objection. The objection was stated in the following terms;

*“The plaintiff’s suit as drawn and filed is fatally and incurably defective for non-compliance with the provisions of **Section 87 (a)** of the **Kenya Railways Corporation Act Cap. 397** laws of Kenya.”*

At the hearing of the preliminary objection, Mr. Kamunda for the defendant submitted that the plaintiff’s suit was filed in contravention of the said section of the **Kenya Railways Corporation Act** which requires that a month’s notice be issued to the managing director of the defendant before a suit is filed. He submitted that a suit which is filed contrary to express provision of the law is incompetent and should be struck out with costs. Mr. Kamunda referred the court to three decided cases in support of his argument. Mr. Ocharo for the plaintiff opposed the preliminary objection. He submitted that the plaintiff’s suit was filed under certificate of urgency so as to prevent the subject matter of the suit from being wasted. He submitted that **Section 87 (a)** of the **Kenya Railways Corporation Act** did not oust this court’s jurisdiction to deal with the matters in dispute. He maintained that what was before the court was an application brought under certificate of urgency and not the main suit. This was in view of the fact that the plaintiff had not served upon the defendant summons to enter appearance. He submitted that the defendant had therefore prematurely raised the preliminary objection. He urged the court to reject 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 therefore 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 avoid to be bound by this requirement if he can establish that the cause of action which led to the filing of the 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 as a statutory body. **Section 13(2)(h)** provide 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 parametres of those cases which touch on statutory functions of the defendant. The plaintiff purchased scrap material from the defendant. The defendant had powers under **Section 13(2)(h)** of the **Act** to dispose of the said scrap material after forming opinion that it was not necessary for its purposes. The plaintiff was therefore not exempt from the requirement that it should issue the requisite statutory notice as envisaged by **Section 87 (a)** of the **Act** before filing suit. The plaintiff’s contention that the court should overlook the statutory requirement as regard notice on the basis that the suit had been filed under certificate of urgency has no basis in law. The plaintiff’s further argument that since it had not served summons to enter appearance, technically speaking, no suit had been filed against the defendant is disingenuous. **Section 87 (a)** of the **Act** requires that statutory notice be issued at least a month *before* the commencement of any proceedings. I do not think that the plaintiff was advancing an argument that the application for injunction which was before court was not a suit. In any event, such an application cannot stand on its own without a substantive suit being in existence. 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