



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

Civil Case 541 of 2000

KENYA AIRPORTS AUTHORITYPLAINTIFF

VERSUS

PATRICK MUTEMI SAU1ST DEFENDANT

GEORGE NJOROGE NJUNGE.....2ND DEFENDANT

RULING

By a Chamber Summons application dated 28th March, 2006 the Plaintiff/Applicant herein seeks to have the 1st Defendant's counterclaim struck out with costs to the Defendant. The application is expressed to be brought under ***Order VI rule 13(1) (b) (c) and (d)*** of the Civil Procedure Rules and ***Section 3A*** of Civil Procedure Act. The application is based on six grounds namely:

- 1. The 1st Defendant counter-claim is misconceived, incompetent and is unmaintainable in law against the plaintiff herein as the same was filed in contravention of the mandatory provisions of the section 33 (i) of the laws of Kenya Airports Authority Act Cap 395 of the laws of Kenya and the same ought therefore to be struck out.**
- 2. The prayers sought in the 1st Defendant's counter-claim herein, are statute barred as against the plaintiff herein as they contravene the provisions of section 34(b) of the Kenya airports Authority Acts Cap 395 of laws of Kenya.**
- 3. The 1st Defendant counter-claim herein is incompetent, fatally and incurably defective as it offends the mandatory provisions of the Civil Procedure (Revised) Rules.**
- 4. In any event, the 1st Defendant's counter-claim herein raises no or no reasonable causes of action against the plaintiff and the same ought therefore to be struck out.**
- 5. The counter-claim is incompetent as the same has shown double/triple causes of action.**
- 6. The counter-claim is incompetent as the same has shown double/triple causes of action.**

The application is further supported by an affidavit sworn by **JOHN JOSEPH TITO**, the Corporation Secretary and Chief Legal Officer of the Plaintiff.

The application is opposed. There is a replying affidavit sworn by the 1st Defendant dated 22nd January, 2007. The key response in the affidavit is found at paragraph 5 where the Respondent deposes that his counter-claim is dependent on the Plaintiff's suit and that the provisions of the Kenya Ports Authority as to notice before filing suit, and to the limitation period in bringing the suit, and, as to the nature of the claim that can be brought against the Plaintiff did not apply.

The defence and counterclaim in question was filed in court on 13th April, 2000. In it the 1st Defendant who is the Respondent herein, claims unpaid salaries and terminal benefits for the period between 1st August, 1995 to 31st March, 1997; an account for the sale of the motor vehicle registration number KAA 417V which it is averred was seized from the Respondent by the Applicant in April 1997; and general damages for defamation which was caused by a publication in the Public Investments Committee of Parliament on 16th April, 1999. From the pleadings filed in this case, it is clear that the Applicant had employed the 1st Defendant/Respondent as General Manager (Finance and Commercial Activities), and that in the course of that employment, the Respondent and another received US Dollars 95000 for the use and benefit of the Plaintiff. That money was stolen. The Respondent was arrested and eventually exonerated of any blame.

Mr. Mutembei for the Applicant contends that by virtue of Section 33(1) of the Kenya Airports Authority Act, hereinafter referred to as the Act, any person who suffered any damage as a result of an act of the Plaintiff under Sections 12, 14, 15, 16 and 33, should first agree with the Plaintiff on the compensation payable to him. That if no agreement is reached, the matter should be referred to the Chief Justice who would appoint an arbitrator to resolve it. Mr. Mutembei's submitted that the plaintiff's cause of action lies in defamation, employment, malicious prosecution, and the giving of accounts, all which arose in the course of employment with the Plaintiff. Mr. Mutembei argued that since the Plaintiff had to employ in order to discharge its functions under the Act, section 12 of the Act applied to the suit, since a contract of employment was a contract of service covered under Section 12(3) (j) and (l). Counsel further submitted that Section 12 also applied to both tortious and contractual claims. Learned Counsel's submitted that the Respondent was bound to follow the procedure laid down under Section 33 of the Act. Counsel relied on the case of **PARAPET LIMITED V KENYA AIRPORTS AUTHORITY HCCC NO.4 OF 1999 at page 8** where Hon. Njagi J, observed:

“Even though Mr. Oduol contended that this section applies to claims in tort but not in contract, the section itself does not say so. The scope of section 12 is very wide, encompassing activities mostly of a contractual nature. If Parliament intended that section 33(1) should be restricted in its operations to claims in tort exclusively, it would have said so. But since it did not say so, then we are duty bound to apply the section to claims both in tort as well as in contract. The contract which is the subject matter of this suit is therefore governed by this section, and the plaintiff herein is entitled to such compensation as is agreed between it and the Authority, and only in default of agreement may the matter be determined by a single arbitrator appointed by the Chief Justice”.

Counsel also relied on the case of **STEPHEN WANYEE ROKI VS KENYA AIRPORTS AUTHORITY HCCC NO.1626 OF 2001** and submitted that as held in the case, a party cannot side step the procedure laid down under Section 33 of the Act. Counsel also relied on the case of **NAROK COUNTY COUNCIL V TRANSMARA COUNTY COUNCIL [2000] 1 EA 161**. This latter case has no relevance to the instant suit as it deals with provisions under the Local Government Act.

Mr. Mutembei submitted that the 1st Defendant's counter-claim was bad in law as the Respondent had not complied with Section 34 (a) of the Act to issue notice as required. Counsel observed that the notice annexed by the Respondent as “P.M.S.I”, in his replying affidavit, was null and void as it had not been shown to have been served on the Managing Director. Counsel observed further that it did not contain the particulars of the claim, and the intention to commence proceedings and finally, it was addressed to the firm of Advocates then acting for the Applicant. Counsel relied in the case of **CALEDONIA SUPERMARKET LTD V KENYA NATIONAL EXAMINATION COUNCIL [200] 2EA 357**. However, I find this case of no relevance to the instant one as the cited case was concerned with the protection of a tenant in a landlord and tenant matter.

The final issue raised in the submissions made by Mr. Mutembei was to the effect that the Respondent's suit was time barred as it had not been brought within the period of one year from the date the cause of action arose as prescribed under Section 34 (b) of the Act. Counsel relied on the case of **STEPHEN WANYEE ROKI**, supra. At page 8 of the cited case, the judge observed:

The relevant excerpt from section 34(b) in respect of limitation reads as follows-

“Where any action or other legal proceeding is commenced against the Authority for any act done in pursuance of execution, or intended execution of this Act...or in respect of any alleged neglect or default in the execution of this Act...the following provisions shall have effect-

(a)

(b) The action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of...

As observed above, this action was not commenced within twelve months after the defendant's alleged failure to pay the Plaintiff's perceived dues. Instead, it was commenced more than fifteen months after the neglect or default. It offends the letter and spirit of section 34(b) and therefore cannot lie”.

Mr. Mutemi for the Respondent submitted that the Respondent's counterclaim was not a suit in itself, but a reaction to the Plaintiff's suit against him. Counsel submitted that in those circumstances, the Respondent's counter-claim was not subject to the provisions of Cap 395 as to notice and limitation of time. Counsel argued that the claim for damages for defamation was filed within one year as it occurred on 16th April, 1999 and the suit was commenced on 27th March, 2000.

I have considered the rival submissions by Counsel to both sides. Section 12 of the Act spells out the powers of the Kenya Airports Authority. Section 13 deals with the acquisition of land for purposes of the Authority. Section 14 empowers authorized employees of the Authority to enter land to survey such land or any portion thereof, while Section 15 empowers such employees to enter land for the removal of obstructions, or to execute such works as may be necessary to prevent the occurrence of accidents or to repair any damage caused as a result of any accident. Finally, section 16 gives the Authority the powers to enter upon any land and alter the position of any pipe, electric, telephone or telegraphic wire.

Section 33(1) of the Act provides for compensation in respect of damages which may be suffered pursuant to the exercise of the Authority's powers under the above sections. The sub-section is worded as follows-

“In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and where any person suffers damage no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice”.

The issue before this court is whether the Defendant's suit is subject to the provisions of the Act. Mr. Mutemi for the Defendant did not cite any cases in support of his contention that the Act does not apply to his client's case. The Applicant has cited many cases. Among those cited, two of them deal directly with the specific provisions of the Act in issue in the instant case. I have widely quoted from both cases **STEPHEN WANYEE ROKI** supra and **PARAPET LTD**, supra. I am persuaded by the findings of my brother, Hon. Njagi J, who was the presiding judge in both cases. Section 12 (I) (j), (II) of the Act empowers the Plaintiff “to enter into agreements with any person, agency...for the performance...of any services or facilities which may be performed by the Authority”. As my learned brother found in the **PARAPET LIMITED** case, supra, the scope of Section 12 of the Act is very wide, encompassing activities mostly of a contractual nature but also covering claims in tort.

The Defendant's claim against the applicant lies both in tort and in contract. It sues the Applicant for unpaid salaries and terminal benefits under the contract of employment. The Defendant also sues in tort

for damages for defamation. The Defendant's claim in his counter-claim is therefore subject to the provisions of section 12 of the Act. In that regard, once aggrieved, the defendant was bound to accept settlement with the Plaintiff as provided under Section 33(1) of the Act. In default thereof, the Defendant was duty bound to accept compensation determined by a single arbitrator appointed by the Chief Justice. It is only after that procedure was exhausted that the Defendant could have resorted to legal proceedings. Those proceedings were bound to be commenced as provided for under Section 34 of the Act.

Considering the step taken by the Defendant, it is clear that he did not comply with the procedure laid down in Section 33 of the Act. He filed his counterclaim directly before engaging the procedure for compensation set out there under. At the time the Defendant filed his counterclaim, he contends correctly that the claim lying in defamation was not time barred. The rest of the claims were. The Defendant admits further that the notice sent in compliance to Section 34(a) of the Act, was not sent to the Plaintiff's Managing Director as required, but to an advocate's firm. Clearly the Defendant did not serve notice as required under Section 34(a) of the Act. Even though he sent out a notice, that notice was null and void since it did not meet with the requirement under Section 34(a) of the Act. It was sent to the Managing Director of the Plaintiff Company and, it did not specify the Defendant's claim against the Plaintiff nor did it contain notice of the intention to institute legal proceedings. That in effect means that the entire claim including the claim in defamation which was filed within time as specified under Section 34(b) of the Act, could not lie as the procedure followed to institute it was fatally defective.

The result of the considerations herein is that the Defendant's case as instituted by him against the Plaintiff, offends the Act and especially Section 34 (a). It must be and it is hereby struck out with costs to the Applicant/Plaintiff.

Dated at Nairobi this 26th day of October, 2007.

LESITT, J.

JUDGE

Read, Signed and delivered in the presence of:

Marete for Applicant

N/A for Respondent

LESITT, J.

JUDGE