

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Suit 106 of 2003

**LUCY WANGARE NJUGUNA (*Suing as the legal Representative of the Estate of the late*
MICHAEL NJUGUNA KABAIKU).....PLAINTIFF**

VERSUS

COMMISSIONER OF LANDS.....1ST DEFENDANT

JOSEPH KINUTHI.....2ND DEFENDANT

RULING

The plaintiff, Lucy Wangare Njuguna filed this suit in her capacity as the legal representative of the estate of Michael Njuguna Kabaiku. In her plaint, the plaintiff sued the Commissioner of Lands as the 1st defendant and Joseph Kinuthi as a 2nd defendant. She sought several orders of the court including a declaration that parcel No.Nakuru Municipality L.R 451/1652 currently registered as Nakuru Municipality/Block 15/226 be declared to belong to the plaintiff. When the plaintiff served the Attorney General on behalf of the 1st defendant, the Attorney General duly entered appearance and filed a defence. In paragraph 4 of the said defence, the 1st defendant averred as follows;

“The defendant shall before the hearing of this suit raise and argue a preliminary objection based on points of law that this suit is incompetent and does not lie (sic) as its filing contravenes the mandatory provisions of Sections 13 A and 16 of the Government Proceedings Act (Cap.40 Laws of Kenya).”

At the hearing of the suit Miss Chesire, learned counsel for the 1st defendant raised the said preliminary objection. She submitted that it is mandatory for any party who intends to file a suit against the Attorney General to issue a notice of the intention to file suit. She argued that the provision of **Section 13 A of the Government Proceedings Act** is mandatory in requiring the notice to be issued before a suit is filed. She submitted that **Section 16 of the Government Proceedings Act** prohibited any party from seeking orders of injunction or specific performance against the government. She maintained that the only remedy available to a person aggrieved by a decision of a government officer was to make an appropriate application for judicial review. She finally submitted that the plaint filed by the plaintiff was incompetent on account of the fact that the verifying affidavit was sworn before the plaint was drafted. She urged this court to uphold the preliminary objection and dismiss the suit as against the 1st defendant.

Miss Njoroge for the plaintiff opposed the preliminary objection. She submitted that there was no requirement that a plaint be dated the same day as the verifying affidavit. She argued that the only requirement as provided for under **Order VII Rule 2(2) of the Civil Procedure Rules** was that a plaint be accompanied by a verifying affidavit. She submitted that the plaintiff’s suit against the 1st defendant was competent because the plaintiff is seeking the cancellation of a title which was unlawfully issued by the 1st defendant to the 2nd defendant. She submitted such cancellation could only be obtained by way of suit by plaint and not by Judicial Review. Miss Njoroge complained that the issues raised by the 1st defendant were belated because the defence was filed after nearly a year after the 1st defendant was

served. She urged the court to disallow the preliminary objection because it lacked basis *i.e.* the defence was improperly on record.

I have considered the rival submissions made by the parties to the application. The issue for determination is whether the preliminary objection raised by the 1st defendant has merit and should be upheld. The 1st defendant has submitted that the plaintiff filed her suit in contravention of **Sections 13 A and 16** of the **Government Proceedings Act**. Miss Chesire for the 1st defendant submitted that the plaintiff ought to have given notice to the Attorney General before she filed suit against him. She further submitted that the prayers sought by the plaintiff cannot be availed to her in a suit against the Government. Miss Njoroge for the plaintiff vehemently opposed the preliminary objection. Her main ground of objection was that this court ought not to entertain the preliminary objection as it is based on a defence which was filed out of time.

Section 13 A(1) of the **Government Proceedings Act** provides that;

“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.”

Section 16 (1) of the said **Act** prohibits any court of law from granting reliefs in the nature of an injunction or specific performance to a litigant who has sued the government. The above provisions are worded in mandatory terms. Both sections state that a litigant who intends to sue the government “**shall**” issue notice or “**shall**” not be issued with orders of injunction or specific performance. The plaintiff has not given an explanation why she did not comply with the mandatory provisions of the law. She has not stated that she had issued a notice to the Attorney General a month before she filed the suit.

It is further clear from her plaint that the plaintiff is seeking orders of specific performance against the 1st defendant. The plaintiff is seeking to compel the 1st defendant to cancel the title issued to the 2nd defendant in respect of the suit land and further compel the 1st defendant to pay the plaintiff the full equivalent value of the suit parcel of land. By seeking these two orders, the plaintiff is seeking an order of specific performance against a government department. Such order cannot be availed by this court according to the provisions of **Section 16(1) of the Government Proceedings Act**. I will not address the issue of whether or not the plaint was properly verified with the verifying affidavit filed with it in this suit. It is unnecessary in view of the reasons that I have stated above that have disposed off the preliminary objection in this case.

The upshot of the above reasons is that the preliminary objection raised by the 1st defendant has merit and is allowed. The plaintiff filed suit against the 1st defendant in contravention of **Section 13 A(1) and 16(1)** of the **Government Proceedings Act**. The plaintiff’s suit against the 1st defendant is therefore struck out with costs to the 1st defendant.

It is so ordered.

DATED at NAKURU this 26th day of OCTOBER 2007

L. KIMARU

JUDGE