



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 511 of 2007

MAERSK (K) LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION LIMITED.....1ST DEFENDANT

CITIBANK N.A.2ND DEFENDANT

R U L I N G

By a notice of preliminary objection dated 30th October 2007, Kenya Railways Corporation, the 1st defendant herein objects to the suit filed against it by the plaintiff, Maersk Kenya Limited. The objection is premised on the grounds that the suit is fatally defective as the plaintiff did not issue the requisite mandatory statutory notice to the 1st defendant before filing the suit. It is also contended that the 1st defendant is a State Corporation established under Cap 397 of the Laws of Kenya, and therefore it is wrongly sued as a Limited Liability Company. It is submitted that Section 87 of the Kenya Railways Corporation Act (Cap 397) requires that a statutory notice of 30 days be served on the corporation before the corporation can be sued; that no such notice was issued; and that this has been admitted by the plaintiff in its pleadings.

In support of the objection, counsel for the 1st defendant cited the case of Kenya National Federation of Co-operatives Limited (K N F C) vs Econet Wireless Kenya Limited & 3 Others, High Court (Milimani) Miscellaneous Civil Application Number 955 of 2006, wherein Kasango J. upheld a preliminary objection based on Section 98 of the Kenya Communication Act which is similar to Section 87 of the Kenya Railways Corporation Act. Counsel for the 1st defendant also relied on High Court of Kenya Civil Case Number 2077 of 2001, Ephantus Mucheru Mwangi vs Kenya Railways Corporation & Another, wherein Angawa J. applied Section 87 (b) of the Kenya Railways Corporation Act.

For the plaintiff it was submitted that the wording of Section 87 of the Kenya Railways Corporation Act, does not cover a suit of the nature brought by the plaintiff, but applies to public duty or matters related to the Act. It was maintained that the plaintiff's suit arises out of a commercial transaction and does not fall within the ambit of Section 87. Counsel for the plaintiff sought to distinguish the case of Ephantus Mucheru Mwangi (supra) contending that unlike the present case the cause of action fell within the ambit of Section 87. Counsel also distinguished the case of Kenya National Federation of Co-operative Limited vs Econet Wireless Kenya Limited (supra) contending that the wording of Section 97 of the Kenya Communication Act upon which it was based was different from that of Section 87 of the Kenya Railways Corporation Act.

It was further maintained that the reference to notice in paragraphs 17 and 19 of the plaint was reference to a demand notice before filing suit and not reference to a notice under Section 87 of the Kenya Railways Corporation Act.

It was contended that the plaintiff had to come to this court under a certificate of urgency due to the urgency of the matter and there was therefore no time to serve any notice.

Section 87 of the Kenya Railways Corporation Act (Cap 397) states as follows: -

“Where any action or other legal proceeding is commenced against the corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the 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 written notice containing the particulars of the claim and of intention to commence the action or legal proceeding, has been served upon the managing director by the plaintiff, and

(b)”

It is evident that the Defendant is a State Corporation established under Cap 397. It is also not disputed that no notice was served on the defendant prior to the filing of the plaintiff’s suit. The issue is whether the plaintiff’s suit falls within the ambit of Section 87 of the Kenya Railways Corporation Act. A perusal of the plaint shows that the plaintiff’s cause of action arises out of a commercial transaction arising from a trading arrangement for the conveyance of the plaintiff’s consignment along the Kenya – Uganda Railway. The cause of action cannot therefore be divorced from the defendant’s core duty as provided under Section 8 of the Kenya Railways Corporation Act. It follows that the plaintiff had to comply with Section 87 of the Kenya Railways Corporation Act. I find that Section 98 of the Kenya Communication Act is identical to Section 87 of the Kenya Railways Corporation Act, and do concur with the position taken by my sister Hon. Kasango J. that notice of the proceedings must be given at least one month before filing the proceedings and that the court cannot waive this notice since there is no provision in the Act for such a waiver. To this extent the suit before the court is fatally defective.

Further, under Section 3 of the Kenya Railways Corporation Act, the defendant is established as a statutory corporation with a body corporate. The defendant is not a Limited Company under the Company Act or any other Act. The description of the defendant in the plaint as limited is therefore a defect.

For the above reasons, I do uphold the preliminary objection and order that the plaintiff’s suit be struck out as being fatally defective. I make no orders as to costs.

Dated, signed and delivered this 21st day of November 2007.

H. M. OKWENGU

JUDGE