



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

Civil Case 437 of 2005

TOTAL KENYA LIMITED1ST DEFENDANT

CARMAX LIMITED.....2ND DEFENDANT

VERSUS

KENYA AIRPORTS AUTHORITY1ST DEFENDANT

UCHUMI SUPERMARKETS LIMITED.....2ND DEFENDANT

R U L I N G

The 1st defendant has raised a preliminary objection to this suit in the following terms: -

“Take notice that at the hearing of the plaintiff’s application dated 5th August 2005, the first defendant shall raise a preliminary point of law in that the plaintiffs did not serve upon the first defendant the mandatory one month Notice before the institution of this suit.”

The plaintiffs application dated 5th August 2005 seeks injunctive orders to stop the 1st defendant demolishing or interfering with property L.R. No 209/14443 (the suit property).

In support of that objection 1st defendant’s counsel stated the plaintiff in filing this present suit against the 1st defendant offended section 34 of The Kenya Airports Authority Act. Counsel said that section 34 (a) requires before any suit is instituted against the 1st defendant one months written notice be given to the 1st defendant. That the said section does not only require notice but that that notice ought to have particulars of the claim and an intimation of the wish to file a claim in court.

1st defendant counsel stated that the plaintiff has a pending application seeking for court’s orders to dispense with the notice, retrospectively. 1st defence counsel asked a rhetorical question whether the court could make an order for section 34 to be dispensed with. He submitted that the intention of parliament in enacting that section was to ensure that the Kenya Airports Authority was not ambushed by actions filed against it. That the 1st defendant being a public body, carrying out public functions which may lead it in infringement of people’s rights, hence why parliament enacted that protective section, so that once notice is issued the Authority would have an opportunity to remedy the breach. 1st defendant stated that section 34 cannot be dispensed with by the court.

1st defendant relied on the cases:

(1) MACHIBU MAHAMBI & OTHERS – V - SHEIKH MOHAMED HAIDRI [1957] E.A.,

Where the High court allowed an appeal to a magistrate's decision, which overruled an objection to an action brought without notice having been given as required by section 42 (1) of the police decree.

(2) HCCC NO. 400 OF 1998 EAST AFRICA TELEVISION NETWORK LTD – V – KENYA POST AND TELECOMMUNICATIONS

Where an application was dismissed for lack of a written notice under section 109 (a) of K.P & T.C Act.

The plaintiff opposed the 1st defendant's objection. Plaintiff said that its prayer for notice to be dispensed with is still pending determination before this court and if the preliminary objection is entertained that prayer will be done away with without the plaintiff being granted an opportunity to explain the reason it was not able to give the notice. He said that the circumstances were such, when this suit was filed, that notice could not be issued.

Plaintiff further submitted that for the 1st defendant to succeed in its objection it ought to show that the cause of action fell within the ambits of the Act. That section 34 only required acts covered by the Act to be given notice before institution of suit. Plaintiff said that the attempt to evict the plaintiff was not covered by the Act and more particularly was not covered by section 12 of the Act. That the Act does not give the 1st defendant power to evict.

Section 34 of The Kenya Airport Authority Act provides:

“Where any action or other legal proceeding is commenced against the Authority 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 proceedings shall not be commenced against the Authority until at least one month after written notice containing 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;” (underlining mine).

That section clearly provides that in an action against the authority relating to an act pursuant to execution or intended execution of the Act, or in an act of public duty in execution of the Act, or, neglect or default in execution of the Act, written notice shall be issued to the Authority before suit is instituted.

The plaintiffs submission that notice was only required in acts relating to execution of the Act dealt a mortal blow to the 1st defendants objection. Indeed the finding of the court is that notice was required for such acts, covered by cap 395, but the act, the subject of this suit is not covered by the authorised acts under the Act. The objection will and does fail.

The 1st defendant's objection for the reasons stated herein before is dismissed with costs to the plaintiff.

MARY KASANGO

JUDGE

Dated and delivered this 12th day of July 2006.

MARY KASANGO

JUDGE