



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Case 2077 of 2001

EPHANTUS MUCHERU MWANGIPLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION & ANOTHERDEFENDANTS

RULING ON
A PRELIMINARY OBJECTION

1 Ephantus Mucheru Mwangi, a male adult of sound mind was on the material day in question a lawful passenger aboard a Kenya Railways Co-operation train that is alleged to have been travelling to Mombasa. He was a fare paying passenger.

2. An accident occurred whilst being driven by Simon Wachira the 2nd defendant. The plaintiff herein Ephantus sustained injuries. It is unclear whether there were others not before court who also filed suit. The plaintiff sued the defendant who entered appearance through one K.I. Mbitio & Co. Advocate who is, it appears to be an employee of the Kenya Railways. The Kenya Railways then changed advocates to M/s Oraro and Company Advocates.

3. Before the trial commenced for hearing, the defendant raised a preliminary objection that this suit is time barred and should in any event be dismissed. They relied on the Public Authorities Act Cap.39 Laws of Kenya whereby section 3(1) requires that no proceeding founded on tort shall be brought against the Government or Local Authority after the end of 12 month from the date on which the cause of action accrued.”

4. The provision of this act was rejected by the advocate for the plaintiff on the grounds that it specifically applies to the Government of Kenya or a Local Authority .

“Local authority” means a municipal council, county council, town council, urban or area council and in respect of any function delegated to or conferred upon a local council, such local council.

The government and proceedings against it includes the Attorney General or any Government Department or any Public Officer as such.

The Public Authorities Limitation Act does not apply to the Kenya Railways.

5. The Kenya Railways Co-operation is governed by the Kenya Railways Co-operation Act Cap.397 dated 20.1.78 which came into operation soon after the collapse of the East African Railways

Co-operation.

‘It is an act of parliament to provide for the establishment of a Corporation to be known as Kenya Railways, for the transfer to the Corporation of the undertaking of East African Railway Corporation within Kenya, for the function of the corporation within Kenya, for the function of the corporation and for purposes connected therewith.’

The act confers powers on the Kenya Railways under section 13,15,16 and 17.

II: Section 13:

(a) Powers to carry goods and passengers by rail road and inland water ways in Kenya (inter alia).

Proviso to this section includes business arrangements, construction and acquisition of property.

The case law of:-

Baraka Agrovers v Kenya Railways Co-operation Hccc415/03 Kariuki,J.

Concerned the subject matter of lease and protected tenancy under section13 (b) and may not be relevant to our situation.

II: Section 15 – Powers to enter land to survey

i) Any authorized employee of the corporation may for the purposes of the co-operation may enter land and survey, (excavate and use any stone gravel out of the land).

II: Section16 – powers to enter land to prevent accident. This is done by cutting down trees, obstructions not being of a building.

III: Section 17 – Powers to enter land to alter the position of pipes.

7. The Preliminary Objection raised by the advocate for the defendant lies in section 87 on the Limitation of Action namely that:-

“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 any public duty or authority 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 cooperation 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 or his agent.

b) The action or legal proceeding shall not be or be instituted unless it is commenced within 12 months next after the act, neglect or default complained of or in the case of contributory injury or damage within 6 months next after the cessation thereof.”

In the case law of:-

Peter Mwombe & Others
V

Kenya Railways & Another

Hccc489/98 Rimita,J.

The issue of a statutory notice was taken up by the defendant. Hon. Judge declined to review his order dismissing the suit for want of a statutory notice. Section 87 (a) of the act was relied on and may not be relevant to our situation.

8. The advocate for the plaintiff in this present suit states that a statutory notice was duly issued. Thereafter the suit was filed and as such the defendants should not be seen to be protected against tort. The suit, to his understanding has been filed on time and the provisions of Cap.22 dealing with the Limitation of Actions should not be ousted. The Limitation of Action Act Cap.22 gives the Limitation of 3 years to bring an action in tort. One year though, is given to action in defamation.

9 In this Preliminary Objection it is clear from the record of the court that the cause of action arose on the 24.3.1999. The suit was filed on 30.11.2001. This was 2 years and 8 months after the cause of action arose. It is therefore contrary to section 87(b) of the Kenya Railways Corporation Act that the action was brought after the 12 months instead of the required 12 months having expired (giving account to the 30 days notice).

10. I would state further that the act having its own limitation clause supercedes the Limitation of Actions Act Cap.22 and the three years to file a suit in tort would not apply.

11. Once a suit has been filed and if the matter in dispute falls under section 13,15,16 and 17 above the Hon. The Chief Justice would appoint an arbitrator to hear the case.

12. In this particular case I would find that the suit indeed is time barred under section 87(b) of the Kenya Railways Corporation. The same is hereby struck out with costs to the defendant.

Dated this 2nd day of June of 2005 at Nairobi.

M.A. Ang'awa

Judge

Cerere,Mwangi & Co. Advocates for the plaintiff

K.I. Mbito & Co. Advocates for the defendant