



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT 3244 OF 1997

1. J. WAMBUGU)

2. J. OPOL)

3. ELLY OKUOGO)

4. Z. OLUOCH)

5. S. KINYANJUI)PLAINTIFFS

6. H. OCHIENG)

7. J.K. JULU)

8. R. OMONDI)

9. E. IRERI)

-VERSUS

KENYA RAILWAYS CORPORATIONDEFENDANT

RULING

The plaint herein was dated and filed on 24th December, 1997; and the statement of defence was dated and filed on 15th March, 1999. When this matter came up for hearing on 23rd June, 2005 *Mr. Nyachoti* appeared for the plaintiffs while *Mr. Omolo* appeared for the defendant. As *Mr. Nyachoti* expressed his desire to proceed, with six witnesses, *Mr. Omolo* had a preliminary objection to raise, and it is this preliminary objection which was heard, and which is the subject of the ruling herein.

Mr. Omolo submitted that the suit coming before the Court was incompetent and was a nullity, for the reason that it had been filed in conflict with the provisions of s.87 of the Kenya Railways Corporation Act (Cap.397). That section provides:

“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 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 or his agent...”

Learned counsel contended that no such statutory notice had been given by the plaintiffs — and that this rendered their suit incompetent. Although there had been much correspondence between the plaintiffs and the defendant, the required statutory notice had not been given by the plaintiffs.

Counsel relied on the decision, *Peter Mwombe & Others v. Kenya Railways Corporation & Another*, HCCC No. 489 of 1998. It was in that case pleaded in the defence that the plaintiff had not issued statutory notice as required under the provisions of s.87 of the Kenya Railways Corporation Act, (Cap.397). The following passage appears in the ruling of *Rimita, J*:

“Mr. Kiplenge, Advocate appears to have been lost and was not able to show any notices served by the plaintiffs to the defendant. That being the case and in view of the provisions of s.87 of Cap. 397, Laws of Kenya, I ruled that the suit was incompetent. I ordered the same struck out as it concerned the first respondent/defendant, the Kenya Railways, Corporation.”

Mr. Nyachoti contended that the preliminary objection was misplaced in law, because parties were bound to their pleadings — and in the statement of defence there had been no pleading that the suit did not comply with the requirements of s.87 of the Kenya Railways Corporation Act (Cap.397).

Mr. Nyachoti while conceding that the law, which is the constant reference-point in judicial proceedings, is not pleaded, maintained that this principle was not applicable in the instant case. And that would be so, counsel submitted, because the cause of action was wrongful dismissal and the plaintiffs were relying on the *Employment Act (Cap. 226)*. Learned counsel submitted that s.87 of the Kenya Railways Corporation Act would be applicable only where the compensation sought arises from a default which is linked to the contravention of the Kenya Railways Corporation Act: and it was not the plaintiffs’ case that the Corporation had been in breach of that Act. A case of wrongful dismissal such as the present one, counsel urged, fell squarely under s.17 of the *Employment Act* exclusively. Learned counsel cited no authority in support of such a novel interpretation of the purview of s.87 of the Kenya Railways Corporation Act; and I think it is on that account it became necessary for him to urge that the case relied on by the defendant, *Peter Mwombe & Others v. Kenya Railways Corporation*, HCCC No. 489 of 1998 was not here binding as it was “a ruling of a Court of equal jurisdiction.”

Counsel submitted that the governing statute applicable to all state corporations is the *State Corporations Act (Cap.446)*, but this enactment “does not lay down the procedure by which suits are to be commenced.”

My understanding of the tenor and effect of learned counsel’s submission is that the controlling statute for state corporations is not the individual statutes of the corporations themselves, but the *State Corporations Act*, and that if this Act is silent on a given question, then there is a wide-enough scope for applying any relevant law; and hence, in this case, counsel invokes the *Employment Act (Cap. 226)* as the relevant law.

I think a point of such novelty must be articulated with a little more care; for as it now stands, it is more in the nature of a perplexity. Fair resolution of disputes, however, invariably travels together with a comparably plain and readily discernible unfolding of issues. The more abstruse the interplays presented, the less likely it is that a just resolution of the dispute is being enacted.

The *State Corporations Act (Cap.446)* bears the long title: “An Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes.”

Being apparently concerned essentially with broad management situations, I am unable to appreciate that such a statute has very much to do with the logistics of the conduct of litigation in public corporations; and I must conclude that the relevant enactment for the purposes of the suit herein, is the *Kenya Railways Corporation Act (Cap. 397)*. It follows that it will not be right as a matter of law to overlook the requirements of s.87 of that Act. I am, in this regard, in agreement with learned counsel for the defendant:

that the applicable law is the Kenya Railways Corporation Act. And s. 13 (2)(k) of that Act vests the Corporation with contractual powers —

“to enter into agreements with any person —

(i) for the supply, construction, manufacture, maintenance or repair by that person of any property...

(ii) for the performance or provision by that person of any of the services or the facilities which may be performed or provided by the Corporation;

(iii) for the payment, collection or apportionment of any fares, rates, charges or other receipts arising out of the performance or the provision by that person of any such services or facilities...”

Learned counsel submitted that by virtue of s.13(2) (k) of the Kenya Railways Corporation Act (Cap. 397), issues relating to employment are part of the Corporation’s mandate.

Such, I think, is a valid argument; whence it must follow that the plaintiffs’ position that “s.87 of the Kenya Railways Corporation Act would be applicable only where the compensation sought arises from a default which is linked to the contravention of the Act,” is not tenable.

There would, thus, be no basis for the contention made for the plaintiffs, that the High Court’s decision in ***Peter Mwombe & Others v. Kenya Railways Corporation***, HCCC No. 489 of 1998 should be overlooked. On many other occasions I have heard counsel urge this point regarding co-ordinate jurisdictions, to keep out of purview the quite meritorious decision of a brother or sister Judge. It should always be borne in mind that clear and established approaches to the determination of categories of legal issues, is an important element in the construction of a setting for the fair resolution of disputes between parties.

I have no reservations in applying, in the instant case, the principle well expressed in the decision in the ***Peter Mwombe*** case. And I find the plaintiffs’ suit incompetent, and strike it out in limine, with costs to the defendant.

Orders accordingly.

DATED and DELIVERED at Nairobi this 15th day of July, 2005.

J. B. OJWANG

JUDGE

Coram: Ojwang, J.

Court clerk: Mwangi

For the Plaintiffs: Mr. Nyachoti, instructed by M/s. K.A. Nyachoti & Co. Advocates

For the Defendant: Mr. Omolo, instructed by M/s. Oraro & Co. Advocates;