



- 1) Civil Practice and Procedure
- 2) Preliminary Objection – The suit contravenes S.13A of the Government Proceedings Act.
- 3) Can the English language be flexible in interpreting the section?
- 4) Does the Attorney General requires “only the reasons of consultation’ to be given notice?
- 5) Held: Section 13A is termed in mandatory terms
- 6) Suit struck out
- 7) Case law and text books law
  - a)
    - b) Mary Waithera v The Hon. Attorney General Hccc 3388/85
    - c) James K. Mwamba & Others v Commissioner of Lands Hccc No.2106/1996
    - d) Iga v Makerere University 1972 EA 65  
4th Edition  
R.J. Walker
    - e) Blacks Law Dictionary  
By Hey Campbell Black M.A.
  - 8) Advocates:  
A.S. Khamiwna Advocate for the plaintiff  
L.N. Muiruri for Attorney-General

**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
CIVIL CASE 3874 OF 1994**

**DAVID NJENGA NGUGI ..... PLAINTIFF**

**VERSUS**

**THE ATTORNEY GENERAL ..... DEFENDANT**

**RULING**

The cause of action arose on 31.10.93 when the police maliciously arrested and charged the plaintiff in a criminal case before the subordinate courts at Nairobi. He sued the Attorney Genial for malicious prosecution.

In their defence, the Attorney General all along maintained that this suit was incompetent on the grounds that the provisions of the Government Proceedings Act Cap.40 had not been complied with.

When the suit came up for hearing on 20.9.04 (about 10 years later) the State Counsel representing the Attorney General raised a Preliminary Objection, namely

“The suit is incompetent as it contravenes section 13A  
of the Government Proceeding Act Cap.40 Laws of Kenya.”

This section reads:-

“13A (1) “No proceeding against the government shall be 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 proceeding.”

The state admit they were served with notice to sue on the 20.10.94. Before 30 days were up the plaintiff filed the suit prematurely on 1.11.94, namely 6 days later. Section 13A, he argued, was in mandatory terms and thus the suit should infact be struck out.

The advocate for the defendant in reply stated that the language was not really mandatory.

I did give parties time to support the arguments with case law. The state relied on the case of:-

Mary Waithera v Attorney General

Hccc 3388/85 KhamoniJ.

The judge ruled that the suit was filed before the expiry of the mandatory 30 days. That further the notice itself did not comply with section 13A 2(d) and (e) by giving a concise statement of facts on the liability of the government and its agents and the relief sort.

The main purpose, stated the Hon. Judge, is to give the Attorney General an opportunity to respond to parties after consulting with the relevant government office.

The case of :-

James K. Mwambi and others V The Commission of

Lands Thika Principal Council and Lucy Wairimu.

Was filed one year after the cause of action arose. It relied on the

Iga v Makerere University (1972) EA 65 authority and

the above authority of Mary Waithera v A.G (supra).

I believe the circumstances of the James K. Mwabia case is different to this. In that case the suit was filed outside the limitation of action, namely, the one year required to file suit.

In this case the suit was prematurely filed before the 30 days had expired that is within 6 days.

In reply, the advocate for the defendant concedes that the suit was prematurely filed but that the intention has to be looked into.

In the Mary Waithera case (supra) the Hon. Judge stated that the intention of the said mandatory seciton 13A was for the Attorney General to be given an opportunity as stipulated by law to consult with the relevant government Ministry. This would then enable the Government to settle a matter instead of entering long and expensive litigation to court.”

The interpretation of this section should be taken to mean in certain circumstances the provision is mandatory. He relied on the:-

English Legal System 4th edition by R.J. Walter, 1976

on the Judicial approach to interpretation

” that dealt with the basic task a judge is to ascertain the intention of Parliament.

He also relied on the:-

Blacks Law Dictionary by Hey complete Black raised 4th Edition on the work “SHALL

’ “As used in statutes contracts or the like this word is imperative or mandatory.”

This word “shall”, he argued, is used if heard in a mandatory application but can be construed as equivalent to “may.”

I have come with the findings that section 13(A) is termed in mandatory terms due to the word “Shall” that has been used in that section.

When the plaintiff filed this suit before the 30 days were up, he filed it prematurely.

I have been given the arguments that the government has had enough time now to sort out this matter and this should not dismiss this suit. I would find that the preliminary point was raised in the defence, it is part of the agreed issues signed on 15.4.97 by the parties and was a point maintained by the defence all along.

The said suit is indeed incompetent – the court of appeal had in the past had stated that Section 13A of the Government Proceeding Act Cap 40 is in mandatory terms and as such I am bound by their decisions (though not necessarily by the decisions of Khamoni J and Ojwang J – though their finding on the matter is correct)

I hereby uphold the preliminary objection and struck out this suit. The effect is the plaintiff is to begin his case afresh subject to limitation of actions act.

Dated this 23rd day of September, the year 2004 at Nairobi.

**M.A. ANG’AWA**

**JUDGE**

Khaminwa & Khaminwa Co, Advocates for the plaintiff

L.N. Muiruri State counsel for the Attorney-General