



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 586 OF 2003

KASAI DISTRIBUTORS LIMITED.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION

WHITESTONE AUCTIONEERS LIMITED.....DEFENDANTS

RULING

There is a preliminary point argued at great length by the counsel in this matter. The notice of preliminary objection by advocates for the 1st Defendant enlisted six grounds which in the end were argued under two main heads, first that the Court has no jurisdiction to entertain this case because it was filed against the Kenya Railways Corporation without giving a statutory notice under Section 87 of Cap 397, secondly that the Court has no jurisdiction to award injunction against the corporation because any matter relating to land belonging to Railways is not amenable to jurisdiction under Cap 301.

Thirdly, that the land in dispute is not registered under the Plaintiff/claimant's name and hence as they lack registrable interest the Plaintiff cannot sustain a claim.

But Miss Mbugua for the Plaintiffs opposed the application saying the matter requires evidence. She demonstrated that a notice was in fact served on the Corporation Secretary and there is affidavit to that effect. Secondly, that a Corporation is different from the Government and that the interest claimed is actually a licence which in law is not registrable but still can be safeguarded by issue of an injunction.

I have heard the arguments of counsel and recognise their help in the matter. The important issue here is of jurisdiction. Normally where jurisdiction is in doubt, it is a poignant requirement in any case that it be resolved as a matter of preliminary issue but absence of jurisdiction of the High Court in a matter of a civil nature is not to be easily presumed since jurisdiction inherently exists in the High Court even where its existence is not expressed. Mulla said of it that: - Vol. 11 p.288

“The normal rule of law is that civil courts have jurisdiction to try all suits of a civil nature except those of which cognisance of them is either expressly or impliedly excluded. Such exclusion is not to be readily inferred, the rule of construction being that every presumption should be made in favour of the existence rather than the exclusion of the civil courts consequently statutes that oust the jurisdiction of the courts must be strictly construed, and where such contention is raised it must be determined in the light of the words used in the statute, the scheme of its relevant provisions their object and purpose.”

The claim here is that Section 87 of Cap 397 excludes the jurisdiction of the High Court. Section 87 states: -

“Where any action or proceedings 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 effect;

(a) the actions or legal proceedings 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 actions or legal proceeding, has been served upon the managing director by the Plaintiff of his agent, and

(b) The action or legal proceedings shall not lie or be instituted unless it is commenced within twelve months next after the act..”

The question is whether NOTICE was served.

Miss Mbugua says the notice was served, but Mr. Manyara retorts that service ought to have been pleaded in accordance with Order 6 Rules 4 and 8 of the Civil Procedure Rules. Two things arise from this; the ousting claim has to be interpreted strictly, and the provision does not direct how the service of the notice ought to be shown. Here as Miss Mbugua says it exists as a matter of evidence that the notice was served on the corporation and so to deny this is to read more into the section which is not there. But if it were to be pleaded and it was left out, the omission would render the suit incompetent and to be struck out but that in itself does not import ouster of jurisdiction.

The other question is whether the Courts suffer inability to grant injunction because the Plaintiff’s claim is based on Cap 301 which does not apply to Railways. This issue is not vindicated and in this regard, I concur with my brother GBM Kariuki J.’s judgement in HCC No. 415 of 2003 and hold that tenancy here like in that other case has not been exempted under Section 301 or under Cap 397 and I agree that Cap 397 has not removed the protection afforded under Cap 301 to the Plaintiff herein.

Though proviso to Section 2 of Cap 301 reads: - Cap 301 Section 2:

“...provided that no tenancy to which the Government, the community or a local authority is a party whether as landlord or as tenant shall be a controlled tenancy.” I agree that the Railways is not the Government; Section 3 of the Kenya Railways Corporation Act Cap 397 says: -

Cap 397 Section 3(1) “3(1) there shall be established a Corporation to be known as Kenya Railways in this Act referred to as the Corporation.

3(2) The Corporation shall be a body corporate with perpetual succession and a common seal and shall have power to sue and be sued in its corporate name and to acquire, hold and dispose of moveable and immoveable property for the purpose of the Corporation.”

The exemption under Section 301 cannot apply to it

. Lastly, Section 83(1) of Cap 397 was referred to where it says that: -

Section 83(1);

“In the exercise of the powers conferred by Section 13, 15, 16 & 17 the Corporation shall do as little damage as possible, and where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him the

Corporation or in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.”

If as I find Cap 301 applies, it means that injury caused can only be remedied within that statute and therefore, remedy of injunction is appropriate as was held by the Court of Appeal 205 of 1995 where the Court said that the High Court has jurisdiction to grant injunction.

I have heard arguments in this application but I think the essential matters here require establishment of facts. The issue of service, under Section 87 of the Cap 397 is purely one of fact and as Sir Charles Newbold said in MUKISA BAKERY MANUFACTURING COMPANY LIMITED vs. WESTEND DISTRIBUTORS LIMITED (1996) EA 696 where facts are not agreed or proved preliminary point cannot be raised.

It is my view that the point fails and is disallowed.

DATED this 26th day of September 2003.

A.I. HAYANGA

JUDGE

Read to Miss Mbugua