



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 225 OF 2018

CATHERINE NJERI MAJANI.....PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION.....1ST DEFENDANT

THE NATIONAL LAND COMMISSION.....2ND DEFENDANT

RULING

1. Vide a Notice of Motion dated 30th October, 2020 that was filed pursuant to the provisions of Section 87(a) & (b) of the Kenya Railways Corporation Act; Sections 1A, 1B and 3A of the Civil Procedure Act; Order 2 Rule 15 and Order 51 of the Civil Procedure Rules, 2010, the 1st Defendant sought for the following orders:

- a) That this court does not have the requisite jurisdiction to hear and determine this suit.*
- b) That the Complaint dated 19th November, 2018 be struck out for being time barred.*
- c) That costs of this Application and of the cause be borne by the claimant.*

2. The Application was supported by the Affidavit of the 1st Defendant's Senior Legal Officer who deponed that he had been advised by his advocates on record that this court did not have the requisite jurisdiction to hear and determine this matter.

3. The 1st Defendant's Senior Legal Officer deponed that he was aware that the Plaintiff instituted this suit without issuing a prior written notice of at least one month to the Managing Director of the corporation as required by Sections 87(a) of the Kenya Railways Corporation Act and that the present cause of action was filed prematurely and should be struck out with costs.

4. The 1st Defendant's Senior Legal Officer deponed that the alleged cause of action arose in the year 2014 as per the Plaintiff; that it was evident that the suit had been instituted over three (3) years after the date of the alleged cause of action arose and that the present suit had been filed out of time and consequently the suit was statute barred pursuant to Sections 87(b) of the Kenya Railways Corporation Act.

5. It was deponed by the 1st Defendant's Senior Legal Officer that the court lacked the requisite jurisdiction to extend the time to file the suit herein out of time; that it was clear that the Claimant's suit was frivolous, an abuse of the court process and that the court should grant the orders prayed for in the Application.

6. The Application was opposed vide the Plaintiff's Replying Affidavit sworn on 23rd November, 2020 in which she deponed that she issued a notice to the 1st Defendant through her advocate on record dated 28th June, 2018; that the ouster clause relied upon by the 1st Defendant has been rendered to be contrary to the Constitution and that the said ouster clause was wholly defeatist.

7. It was deponed by the Plaintiff that the said ouster clauses were an affront to access to justice especially where impediments were erected to prevent litigants from having their day in court; that the failure to issue a notice before instituting the present suit was not a fatal defect and that the delay to file the suit was occasioned by the fact they wrote a letter to the 1st Defendant notifying them of the illegal encroachment to the suit property.

8. The Plaintiff deponed that the said letter only elicited a response by the 1st Defendant on 11th May, 2016 and that by their own admission,

the 1st Defendant stated that it would undertake a survey and registration of the acquired land and issue titles for all the parcels of land that were affected.

9. She deponed that when the 1st Defendant did not take action as stipulated in its letter dated 11th May, 2016, she commissioned a licensed surveyor and the process of determining boundaries was completed on or around 2017; that the cause of action only crystallized after she received the survey report and that this court should not shut the only viable avenue for her to pursue justice.

10. According to the Plaintiff, she will be greatly prejudiced for not only losing a portion of the land that was not compulsorily acquired but also the remainder of the only portion of land she had hoped to make a living from.

11. Counsel to the Plaintiff submitted that at all material times relevant to this suit, the Plaintiff was the registered proprietor of all that property known as Kajiado/Kaputei-South/2810 originally measuring approximately 4.05 Ha (*suit property*); that a portion of the suit property was compulsorily acquired for purposes of the development of the Standard Gauge Railway and that 1.659 Ha was acquired and a sum of Kshs. 2,369,000 was paid to the Plaintiff as compensation.

12. Counsel submitted that the import of the portion of land that was compulsorily acquired, that is 1.659 Ha, is that it rendered the remainder of the land measuring 4.05 Ha un-utilizable and that in fact, the said Standard Gauge Railway encroached on portions of land that were not initially compulsorily acquired.

13. Counsel submitted that the Plaintiff caused a notice of an intention to sue through her advocate on 28th June, 2018; that it was therefore misleading for the 1st Defendant to allege that a notice was not issued and that the issuance of a notice notwithstanding, such clauses, also known as ouster clauses, had been adjudged unconstitutional and wholly defeatist.

14. Counsel relied on the case of **Kenya Bus Service Ltd & another Vs Minister of Transport & 2 others (2012)** where Majanja J. observed as follows:

“The provisions for demanding prior notice before suing government is justified on the basis that the government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objective is laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example, Order 3 rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action...viewed against the prism of the constitution, it also becomes evident that Section 13A of the GPA provides an impediment to access to justice. Where the state is at the front, left, right and centre of the citizen’s life, the law should not impose hurdles on accountability of the government through the courts. An analysis of the various reports for commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement dismisses the ability of the citizens to seek relief against the government. It is my finding therefore that Section 13A of the Government Proceedings Act as a mandatory requirement violates the provision of Article 48.”

15. Counsel also invited this Court to consider the decision in **Ubah Ismail Mohamed vs. Gapco Kenya Limited & another [2019] eKLR**, where P.J Otieno J. in answering the question whether failure to comply with Section 87(a) makes the suit premature, bad and subject to being struck out or dismissed observed as follows:

“...Those words have been adopted in several subsequent decisions which are well reported and it should be noted that the words of Section 87 are materially those of Section 13A of the Government Proceedings Act. I thus do not hesitate in finding that to give an interpretation to that provision to make a suit bad for failure to comply would be contra the constitution and wholly defeatist... This requirement of at least 30 days’ notice is not peculiar to the Kenya Railways Corporation Act alone. It is found in other statutes creating state corporations like the Kenya ports Authority Act, section 62, and carries the spirit of Section 13A Government Proceedings Act. I note that the superior courts of this county have variously pronounced themselves on how well Section 13A Government Proceeding Act sits with the right to access justice and the concurrence is that the provision is not in congruence with the right to access justice... It follows therefore that failure to issue a Notice before action is not a fatal defect as to lead to an action being defeated by being quillotined ...”

16. It was Counsel’s submission that should this Court find that Section 87(a) to be an affront to the Constitution as has been held before, then Section 87(b) should suffer the same fate.

17. This suit was commenced by way of Plaint dated 19th November, 2018. In the Plaint, the Plaintiff averred that at all material times, she was the registered proprietor of parcel of land number Kajiado/Kaputei-South/2810; that she was paid Kshs. 2,369,000 as compensation for a portion of land that was acquired by the Respondents and that the remaining portion of the suit property has been completely cut out by the SGR and the structures serving the SGR.

18. The Plaintiff has prayed that Judgment be entered for special damages of Kshs. 325,490,138 as against the 1st Defendant alone and as against the 2nd Defendant, compensatory damages on the basis of the market value of the Plaintiff’s remaining portion of the suit property herein being Kajiado/Kaputei-South/2810 measuring 2.392 Hectares.

19. The 1st Defendant is seeking for the striking out of the suit on the basis that the same is time barred and that the suit was filed without notice. The Application is premised on the provisions of Section 87 of the Kenya Railways Corporation Act which provides as follows:

“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 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 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; and

(b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.”

20. The above provision is clear on the time within which the 1st Defendant should be sued for any act, neglect or default complained of, which is twelve months. In case of a continuing injury or damage, the suit should be filed within six (6) months after the cessation thereof. According to the Act, such an action should be commenced only after a thirty (30) days’ notice has been issued to the 1st Defendant.

21. The requirement that the 1st Defendant can only be sued after a thirty (30) days’ notice has been served on the 1st Defendant has since been found to be a hindrance to the right of people to access justice. In the case of **Kenya Bus Service Ltd & another vs. Minister of Transport & 2 others (2012)** which was approved by the Court of Appeal in **Joseph Nyamamba & 4 others vs. Kenya Railways Corporation [2015] eKLR**, Majanja J. observed as follows:

“The provisions for demanding prior notice before suing government is justified on the basis that the government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objective is laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example, Order 3 rule 2 of the Civil Procedure Rules, require that notice be given before action is commenced but the penalty for non-compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action...viewed against the prism of the constitution, it also becomes evident that Section 13A of the GPA provides an impediment to access to justice. Where the state is at the front, left, right and centre of the citizen’s life, the law should not impose hurdles on accountability of the government through the courts. An analysis of the various reports for commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement dismisses the ability of the citizens to seek relief against the government. It is my finding therefore that Section 13A of the Government Proceedings Act as a mandatory requirement violates the provision of Article 48.”

22. In **Ubah Ismail Mohamed vs. Gapco Kenya Limited & another [2019] eKLR**, P.J Otieno J. in answering the question whether failure to comply with Section 87(a) makes the suit premature, bad and subject to being struck out or dismissed observed as follows:

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23. Considering the provisions of Article 48 of the Constitution which requires the state to ensure access to justice for all persons, and the pronouncement of the superior courts on the applicability of Section 87(a) of the Kenya Railways Corporation Act, it is my finding that the failure by the Plaintiff to issue to the 1st Defendant a thirty (30) days’ notice, if at all, is not fatal to the suit.

24. In any event, the Plaintiff has annexed a notice dated 28th June, 2018 which was issued to the Defendants by the Plaintiff’s advocate. The said notice was received by the 1st Defendant on 6th July, 2018, while this suit was filed on 28th November, 2018. That being the case, the issue of the Plaintiff having breached the provision of Section 87(a) of the Act does not arise.

25. The law requires the filing of suits against the 1st Defendant within twelve (12) months next after the act, neglect or default complained of. Indeed, parties are required to file suits within the time provided for in the law, and where a suit is caught up by laches, the same ought to be struck out. The East African Court of Appeal in the matter of **Iga vs. Makerere University (1972) E.A 62**, stated that:

“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief..... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the pleadings, and no grounds of exemption are shown in the pleadings, the suit must be rejected.”

26. The Plaintiff’s complaint is that the manner in which the SGR and the structures that serve as a train station have been laid out and developed on the land that was acquired by the Defendants have completely cut out the remaining portion of the suit property from the Mombasa-Nairobi Highway leaving the Plaintiff’s property without any form of access.

27. According to the Plaintiff, the remaining portion of the suit land has been rendered unsuitable and unutilizable for the intended purpose following the construction of the SGR. The Plaintiff does not state when the Plaintiff realized that indeed the remaining portion of her land can no longer be put in any viable use after the construction of the SGR.

28. From the Plaintiff, it is not apparent when the cause of action arose. That being so, it will be inappropriate for this court to find that this suit was not filed within twelve (12) months from when the cause of action contemplated under Section 87(b) of the Kenya Railways Corporation Act arose.

29. For those reasons, I dismiss the Application dated 30th October, 2020 with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MACHAKOS THIS 24TH DAY OF SEPTEMBER, 2021

O. A. ANGOTE

JUDG