



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL & ADMIRALTY DIVISION**

**MILIMANI LAW COURTS**

**CIVIL SUIT NO. 414 OF 2018**

**CHINA QIQIHAR ROLLING STOCK CO. LTD.PLA.....INTIFF**

**-VERSUS-**

**RIFT VALLEY RAILWAYS (UGANDA) LIMITED.....1<sup>ST</sup> DEFENDANT**

**UGANDA RAILWAYS CORPORATION.....2<sup>ND</sup> DEENDANT**

**KENYA RAILWAYS CORPORATION.....3<sup>RD</sup> DEFENDANT**

**RULING**

**PLEADINGS**

The Plaintiff **CRRC QIQIHAR ROLLING STOCK CO LTD** filed suit against 1<sup>st</sup> Defendant **RIFT VALLEY RAILWAYS UGANDA LTD**, 2<sup>nd</sup> defendant **UGANDA RAILWAYS CORPORATION** vide Plaintiff filed on 14<sup>th</sup> December 2018 and amended Plaintiff filed on 24<sup>th</sup> May 2019 wherein 3<sup>rd</sup> Defendant **KENYA RAILWAYS CORPORATION** was added/ included.

The Plaintiff's statement of claim is that it entered into contracts with 1<sup>st</sup> Defendant dated 20<sup>th</sup> January 2015 and 11<sup>th</sup> September 2015 for the Plaintiff was to manufacture and deliver 240 railway wagons to 1<sup>st</sup> Defendant at a cost of **US S 12,734,400**.

The Plaintiff claims from defendants **US S 8,914,080** and interest from 2<sup>nd</sup> February 2016 till payment in full on the balance of the purchase price. The further claim against the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants is for trespass for goods as they took possession of the wagons without Plaintiff's permission/authority. The Plaintiff demanded from 2<sup>nd</sup> & 3<sup>rd</sup> Defendants to stop using the wagons and surrender them to the Plaintiff and they refused, neglected and failed to comply with demand.

The 2<sup>nd</sup> & 3<sup>rd</sup> Defendants failed to enter appearance and/or file defence despite service of Plaintiff and the Plaintiff applied for entry of Interlocutory judgment.

The 3<sup>rd</sup> Defendant filed Defence on 5<sup>th</sup> July 2019 and denied being served with the demand as alleged by the Plaintiff or at all.

The Plaintiff filed Reply to Defence on 23<sup>rd</sup> July 2019 and pleaded that the Court has jurisdiction to hear and determine the dispute as the material contact appointed Courts of Kenya as the forum for dispute resolution and laws of Kenya as applicable law.

The Plaintiff contended that the defendants were duly served with demand before action and several meetings were held between the management of the plaintiff and that of the Defendant but failed to settle the claim.

**PRELIMINARY OBJECTION**

The 3<sup>rd</sup> Defendant herein filed a Preliminary objection dated 16<sup>th</sup> October, 2019. The Preliminary objection sought to strike out the entire suit against the 3<sup>rd</sup> Defendant for reasons that the Plaintiff did not comply with the express and mandatory provisions of **Section 87 (a) of Kenya Railways Corporation Act** prior to filing suit. The purported suit is time barred by dint of **Section 87 (b) of Kenya Railways Corporation Act**.

The verifying Affidavit to the amended Plaint is defective for offending the express and mandatory provisions of **Order 4 Rule 4 of the Civil Procedure Rules**, and does not also comply with **section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya**.

This Court lacks jurisdiction to take cognizance of, hear and determine the purported suit against the Defendant.

### **3<sup>rd</sup> DEFENDANT'S SKELETAL SUBMISSIONS**

In **James Orengo vs AG (2007) eKLR**; the High Court struck out the Petition on account of Petitioner's failure to serve 30 days notice which is/was *pari materia* with **Section 87 (a) Kenya Railways Corporation Act**.

The 3<sup>rd</sup> Defendant Submitted that, the purpose and significance of issuing such a notice has been aptly stated by the High Court in the case of **Michael Otieno Nyaguti & 5 others –vs- Kenya National Highways Authority and 5 others (2015) eKLR** where Kibunja J held as follows:

***“The court holds the view that the requirement of a notice being served on the Director General would not amount to hindering a litigant from accessing the seat of justice (court). It only creates an opportunity to the Director General's office of exploring an out of court settlement and is in line with the provision of Article 159 of the Constitution which at sub-article 2 (c)[which] encourages “alternative forums of dispute resolutions”. The provision of section 67 of the Kenya Road Act 2007 is not in contravention with the Constitution 2010.”***

The 3<sup>rd</sup> Defendant contended that the suit was filed on 24<sup>th</sup> May 2019 (about fourteen (14) months after the cause of action is alleged to have arisen) and it goes without saying that the purported Plaintiff's suit had been filed outside the mandatory twelve months' limitation period from the date of alleged taking possession of the railway wagons by the 3<sup>rd</sup> Defendant.

### **PLAINTIFF'S SKELETAL SUBMISSIONS**

In paragraph 23 of the Amended Plaint dated 11<sup>th</sup> April 2019, the Plaintiff pleads that it demanded that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' stop using and abusing its wagons and that it surrenders them but the 1<sup>st</sup> Defendant refused and or neglected to comply with the demand.

The 3<sup>rd</sup> Defendant has denied this allegation in paragraph 7 of the Defence dated 5<sup>th</sup> July 2019. This makes the Plaintiff's allegation a contested/disputed fact which needs to be ascertained by normal rules of evidence. It cannot therefore be a subject of a Preliminary Objection.

The Plaintiff further submits that in any event, the said **Section 87 (a) of KRC Act** is unconstitutional. In **Ubah Ismail Mohamed –vs- Gapco Kenya Limited & Another (2019) eKLR**. It was held that the requirement of at least 30 days notice under **Section 87 (a) of KRC Act** is unconstitutional for violating Article 48 of the Constitution. Also, **Bob Thompson Dickens Ngobi –vs- Kenya Ports Authority & Others (2017) eKLR**.

In **Kenya Bus Services Ltd & Another –vs- Minister for Transport and 2 others (2005) EKL**R, section 13A of the Government Proceedings Act which has similar provisions to **Section 87 (a) of KRC Act** was declared unconstitutional for violating the right to access justice guaranteed under **Article 48 of the Constitution**. **Section 13 A** of the Government shall lie or be instituted until after expiry of a period of thirty days after a notice has been served on the Government. The Court stated as follows;

***“...viewed against the prism of the Constitution, it also becomes evident that section 13 A 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 provisions of Article 48....”***

### **DETERMINATION**

I proceed to analyze the issues raised in the Preliminary Objection to determine if it is worth dismissing the suit against the 3<sup>rd</sup> Defendant.

#### **1. Failure to comply with Section 87 (a) and(b) of the Railways Corporation Act**

**Section 87(a)** of the Act requires that one month written notice be served upon the Managing Director stating particulars of claim, and intention to commence legal proceedings.

The 3<sup>rd</sup> Defendant has argued that the Plaintiff did not issue such notice and thus rendering the suit fatally defective as against the 3<sup>rd</sup> Defendant.

With regard to the Notice /demand that ought to have been served to the Kenya Railways Corporation, the Plaintiff raises the following grounds;

- a) The demand was served by the Plaintiff to the Defendants and there has been series of meetings to negotiate the dispute with a view to settling the matter. The service of notice is a contested issue which shall be determined by evidence during the hearing.

b) The issue of negotiations as alleged by the Plaintiff again upon determination upon hearing evidence is one that is not confirmed but if true then it means the notice and/or demand was served and facilitated the resolution process as anticipated by Michael Otieno Nyaguti & 5 others –vs- Kenya National Highways Authority and 5 others (2015) eKLR supra Mukisa Biscuits Manufacturing Co. Ltd. –vs- West End Distributors (1969) EA, Sir Charles Newbold P observed as follows,

*a. “the first matter relates to the increasing practice of raising points which should in normal manner, quite improperly by way of preliminary objection. A preliminary Objection is in the nature of what used to be demurrer. It raises a pure point of law which is argued on assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion the improper raising of points ”*

The Preliminary Objection that raises contested facts can only be determined at the hearing of the subject matter by adducing evidence to prove the legal position in one way or the other.

With regard to the issue that requires that an 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; the Plaintiff submitted that upon service of a demand the suit was filed on 14<sup>th</sup> December 2018 and Amended Plaintiff was filed on 24<sup>th</sup> May 2019 that included the 3<sup>rd</sup> Defendant as party to the proceedings. The Plaintiff instituted the suit in December 2018 and the continuing claim of trespass of goods against the 2<sup>nd</sup> & 3<sup>rd</sup> Defendants jointly and severally commenced in March 2018. Therefore, the 12 months period is not exceeded since the complained act commenced.

The 3<sup>rd</sup> Defendant posited that the suit against the 3<sup>rd</sup> Defendant was filed on 24<sup>th</sup> May 2019 about 14 months after March 2018 and is therefore outside the mandatory statutory provision of 12 months in institution of the suit.

To this issue of limitation, the Court finds that the suit was filed on 14<sup>th</sup> December 2018 against 1<sup>st</sup> Defendant for breach of contract and 2<sup>nd</sup> Defendant for trespass to goods. The same was amended to include the 3<sup>rd</sup> Defendant on 24<sup>th</sup> March 2019. The Court finds the subject matter was instituted in Court within the stated timeframe in December 2018 from onset of the alleged act(s) since March 2018.

The Court also notes that **Section 87(b) Railways Corporation Act** provides for even so the proviso for continuing injury or damage, the suit shall be filed within six months next after the cessation thereof; the Plaintiff contends that the act continues to date and is the basis of seeking prohibitory injunction to stop use of the wagons. The totality of these submissions is that the suit was filed within statutory period from March 2018-December 2018.

The 3<sup>rd</sup> Defendant contended that verifying Affidavit to the amended Plaintiff is defective for offending the express and mandatory provisions of **Order 4 Rule 4 of the Civil Procedure Rules**, and does not also comply with **section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya**.

Therefore, this Court lacks jurisdiction to take cognizance of, hear and determine the purported suit against the Defendant.

#### **5. General power to amend [Order 8, rule 5.] CPR provides;**

*(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.*

*(2) This rule shall not have effect in relation to a judgment or order*

The requirements of **Order 4 Rule 4 of the Civil Procedure Rules section 5 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya** and these irregularities affect the quality of pleadings, the parties are granted by law, power to amend Plaintiff and Defence. This is so as to meet the requirements provided by law so that the Court hears and determines the substantive dispute(s). The law; **Article 159 COK 2010** provides;

*In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

*(d) justice shall be administered without undue regard to procedural technicalities; and*

*(e) the purpose and principles of this Constitution shall be protected and promoted.*

#### **DISPOSITION**

**1. In light of Preliminary Objections raised, this Court is inclined in compliance with Article 48 & 50 of COK 2010, Section 1A 1B 3 & 3A of Civil Procedure Act to ensure technicalities are complied with and/or rectified as per the law.**

**2. The filing of suit within 12 months statutory period since the cause of action arose is confirmed from filing suit in December 2018 and amending the Plaintiff in May 2019 to include the 3<sup>rd</sup> Defendant. The subject matter remained the same as was in December 2019 save for addition of the 3<sup>rd</sup> Defendant.**

**3. The issue of service of written Notice and/or demand is contested and shall be determined during the hearing and hence it**

is not a pure point of law for determination.

4. Each party to bear own costs.

DELIVERED SIGNED DATED IN OPEN COURT ON 18<sup>TH</sup> FEBRUARY 2020

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

N/A FOR THE PLAINTIFF

MR. OMOLLO FOR THE DEFENDANT

MR. TUPET – COURT ASSISTANT