

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MURANG'A

CIVIL CASE NO 67 OF 2013

NELIUS WANJIRU WANJIKU.....PLAINTIFF

VERSUS

1. KENYA BROADCASTING CORPORATION

2. MUTHONI GITAU.....DEFENDANTS

RULING

1. The Plaintiff's suit herein against the Defendants is in defamation. The Defendants have raised a preliminary objection to the suit on the point of law that the Plaintiff failed to comply with the provisions of **section 46(a)** of the *Kenya Broadcasting Corporation Act, Cap 221* in that she did not issue the statutory 30-day notice required by the said section before filing the suit. Section 46(a) aforesaid provides –

“46. Limitation

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 the intention to commence the action proceedings, has been served upon the Managing Director by the plaintiff or his agent;

2. Whereas the Plaintiff concedes that indeed statutory notice as above was required, her response at paragraph 6 of her written submissions is that indeed she issued such statutory notice through her lawyers by letter dated 14/01/2013, and that a copy of the notice is annexed to the plaint. I have perused the court record herein, and I have not seen any such notice annexed to the plaint. But that does not change the fact that whether or not statutory notice as required by the provisions of law above-quoted was issued is a contested matter of fact.

3. A preliminary objection on a point of law cannot be founded upon contested facts. See the case of *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors (1969) EA 696*. The position here is that the court will have to try first the factual issue whether or not statutory notice was duly issued and served before any preliminary point of law can be founded on that fact.

4. In these circumstances, the preliminary objection is not well taken and is premature. It is hereby overruled with costs to the Plaintiff. It is so ordered.

DATED AND SIGNED AT MURANG'A THIS 10TH DAY OF NOVEMBER 2016

H P G WAWERU

JUDGE

DELIVERED AT MURANG'A THIS 11TH DAY OF NOVEMBER 2016