



Republic v Land Registrar, Narok & 2 others; Koonyo & 160 others (Interested Party); Kenga (Exparte Applicant) (Environment and Land Judicial Review Case E001 of 2023) [2024] KEELC 874 (KLR) (26 February 2024) (Ruling)

Neutral citation: [2024] KEELC 874 (KLR)

**REPUBLIC OF KENYA
 IN THE ENVIRONMENT AND LAND COURT AT NAROK
 ENVIRONMENT AND LAND JUDICIAL REVIEW CASE E001 OF 2023
 CG MBOGO, J
 FEBRUARY 26, 2024**

**N THE MATTER OF AN APPLICATION FOR LEAVE TO
 APPLY FOR A JUDICIAL REVIEW WRIT OF MANDAMUS**

AND

**IN THE MATTER OF LAW REFORM ACT CAP 26 LAWS OF
 KENYA AND ORDER 53 OF THE CIVIL PROCEDURE RULES**

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

BETWEEN

REPUBLIC APPLICANT

AND

LAND REGISTRAR, NAROK 1ST RESPONDENT

**DISTRICT SURVEYOR, NAROK NORTH & SOUTH DISTRICTS 2ND
 RESPONDENT**

ATTORNEY GENERAL 3RD RESPONDENT

AND

STANLEY TININIA KOONYO & 160 OTHERS INTERESTED PARTY

AND

JOSEPH NYOKUNI KENGA EXPARTE APPLICANT



RULING

1. On 5th December, 2023, the interested parties herein filed a notice of preliminary objection dated 29th November, 2023, seeking that the *ex-parte* applicant's suit be dismissed with costs on the following grounds: -
 - a. That this suit is fatally defective as the *ex-parte* applicant, having sued the Hon. Attorney General as well, the District Land Surveyor, Narok North and Narok South as well as the District Registrar, Narok failed to issue the mandatory statutory notice of intention to sue upon the Attorney General under Section 13 A of the *Government Proceedings Act*, Cap 40.
 - b. That the suit is bad in law and substance.
2. The notice of preliminary objection was canvassed by way of written submissions.
3. On the 13th December, 2023 the interested parties filed their written submissions dated 11th December, 2023 where they raised one issue for determination which is whether the instant suit is fatally defective and ought to be dismissed for want of compliance with Section 12A of the *Government Proceedings Act*, Cap 40.
4. On 15th January, 2024, the *ex-parte* applicant filed his written submissions dated 12th January, 2024. The respondents did not file their written submissions. Be that as it may, I have considered the notice of preliminary objection and the written submissions filed by the interested parties and *ex-parte* applicant.
5. The issue for determination is whether the notice of preliminary objection is merited.
6. A Preliminary Objection was described in the *Mukisa Biscuits Manufacturing Co. Ltd versus West End Distributors Ltd* (1969) EA 696 to mean: -

Per Law, JA

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, P stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

7. This court having made a finding on the description of a preliminary objection, it is not in doubt that a preliminary objection raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct.



8. However, it cannot be raised if any facts have to be ascertained from elsewhere or the court is called upon to exercise judicial discretion. In the case of *Quick Enterprises Ltd versus Kenya Railways Corporation*, Kisumu HCCC No.22 of 1999, the court held that: -

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

9. It is also this court’s opinion that in determining a preliminary objection, the court will also consider that the preliminary objection must stem from the pleadings and raise pure point of law. See the case of *Avtar Singh Bhamra & Another versus Oriental Commercial Bank*, Kisumu HCCC No.53 of 2004, where the court held that: -

“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

10. Before I embark on determining the merits of the preliminary objection, this court has to first determine whether what has been raised herein satisfy the ingredients of a preliminary objection. As the court determines whether what the interested parties have filed amounts to a preliminary objection or not, the court will also be persuaded by the findings in the case of *Oraro versus Mbaja* (2005) 1 KLR 141, where the court held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

11. The interested parties submitted that Section 13A of the *Government Proceedings Act* is couched in mandatory terms and expresses the protocol to be followed by a litigant prior to the institution of a suit as against the government, and that in the instant suit, it is evident that there were no notices issued to the Honourable Attorney General.

12. They further submitted that the failure to serve the said notice impedes the government’s ability to properly defend itself against the suits filed. They relied on the case of *Kenya Bus Services Limited & Another versus Minister for Transport & 2 Others* [2012] eKLR.

13. The interested parties submitted that the respondents have not entered appearance nor filed any pleadings. Further, that the only plausible explanation for the same is that in the absence of the required statutory notice, the government has not had an ample opportunity to investigate the claim, receive legal opinions and give instructions of the Attorney General and prepare itself for litigation.

14. Section 13A of the *Government Proceedings Act*, Cap 40 provides as follows: -

“(1) No proceedings against the Government shall lie 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 proceedings.

(2) The notice to be served under this section shall be in the form set out in the Third Schedule and shall include the following particulars:-

a. The full names, description and place of residence of the proposed plaintiff;



- b. The date upon which the cause of action is alleged to have accrued;
- c. The name of the Government department alleged to be responsible and the full names of any servant or agent whom it is intended to join as a defendant;
- d. A concise statement of the facts on which it is alleged that the liability of the Government and of any such servant or agent has arisen;
- e. The relief that will be claimed and, so far as may be practicable, the value of the subject matter of the intended proceedings or the amount which it is intended to claim.”

15. In the case of *Kitelo & 2 others v County Government of Bungoma & another* (Environment & Land Case 10 of 2020) [2022] KEELC 4901 (KLR) (26 September 2022) (Judgment), it was held as follows: -

“On the issue that there was no compliance with the provisions of section 13A of the *Government Proceedings Act*, that provision was declared un – constitutional in the case of *Kenya Bus Service Ltd & another v Minister For Transport & 2 others* 2012 eKLR. The Court of Appeal agreed with that finding and stated as follows in *David Njenga Ngugi v A – GC A* Civil Appeal No 297 of 2004 [2016 eKLR] at paragraph 14: -

“The right and power to sue does not spring from compliance with the Section and failure to fully comply with the section cannot hamper the right of a claimant to sue. As indicated above, the foundation of a tortious action against Government is in common law. It is clear that a suit that has been filed without full compliance with section 13A cannot be said to be incompetent nor can it be rightly struck out. It’s competency or otherwise is dependent on considerations of section 13A (supra). It cannot be good law to hold that section 13A which is merely directory, can be regarded as imperative so as to render a competent suit incompetent for failure to fully comply with it.”

16. Also, in the case of *Bob Thompson Dickens Ngobi versus Kenya Ports Authority & others* [2017] eKLR, the court observed as follows: -

“I must say, as various superior courts in this country have said more than once, that a statutory provision that seeks to hinder any person’s access to justice, seeks to impose hurdles on the way of citizens from seeking accountability, openness and efficiency in service delivery by government or government agencies must be seen to violate Article 48 and must be held to be unconstitutional for being antibusiness, oppressive, and I dare add, suppress the need to interrogate the constitutional values of accountability, transparency and efficiency expected of state agencies. The Court in Kenya *Revenue Authority vs Habimana sued Hemed & Another* [1] decided on 31/7/2015 made the position clear beyond doubt that the 3rd



defendant ought to be the institution parliament sought to create under the statute and not to continue considering self as an abandage or extension of the government. The court said: -

“.....it is not necessary that a party who finds itself on the wrong side of the appellant would be greatly prejudiced if they are shaded from accessing justice for a minimum of 30 days as happens many times”.

“.....it is nonetheless an autonomous, cooperate, statutory body specifically with powers to sue and be sued. The appellant cannot hide behind the clock of the Attorney General when it is accused of breaking the law or otherwise violating people’s rights purely in Order to take advantage of the 30 days statutory notice.”

17. While I place reliance on the above cited authorities, and without repeating what has been said before, failure to comply with Section 13A of the Government Proceedings Act having been found to be unconstitutional, is not sufficient to warrant striking out of the *ex-parte* applicant’s substantive motion. In any case, the party who is better placed to plead such a cause would be the Respondents who have not done so.
18. On this, I find the notice of preliminary objection dated 29th November, 2023 totally lacking in merit and the same is hereby dismissed with costs to the *ex-parte* applicant.

Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 26TH DAY OF FEBRUARY, 2024.

HON. MBOGO C.G.

JUDGE

In the presence of:-

Mr. E. Meyoki – C.A

And in the absence of: -

Counsel for the exparte applicant

Counsel for the respondents

Counsel for the interested parties

