Simba Corporation Limited v Kenya Railways Corporation & another (Civil Appeal 41 of 2020) [2023] KECA 1283 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KECA 1283 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 41 OF 2020

SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA

OCTOBER 27, 2023

BETWEEN

SIMBA CORPORATION LIMITED ..... APPELLANT

AND

KENYA RAILWAYS CORPORATION ..... 1ST RESPONDENT

PAMELA JOY OUKO T/A SADIQUE ENTERPRISES AUCTIONEERS .... 2ND RESPONDENT

(An appeal from the judgment and decree of the Environment and Land Court at Mombasa (Komingoi, J.) delivered on 7th November 2019 in ELC Case No. 104 of 2013)

JUDGMENT

1. In this appeal, the appellant, Simba Corporation Limited, formerly known as Simba Colt Motors Limited, is challenging the judgment of the Environment and Land Court at Mombasa (L. Komingoi, J.) dated 24th October 2019 and delivered by C. Yano J. on 7th November 2019 on the one hand striking out the appellant's suit against the 1st appellant, Kenya Railways Corporation, on grounds of non- compliance by the appellant with the mandatory provisions of Section 87(a) of the *Kenya Railways Corporation Act* requiring service of 30 days prior notice of intention to commence legal proceedings. On the merits, the ELC found that the appellant had failed to establish its case on a balance of probabilities.

2. The appellant pleaded before the ELC that it was the 1st respondent's tenant under a 81 year lease commencing from 1st December 1966 in respect of premises known as Title No. Mombasa/ Block XLVIII/114 situated on Mombasa Island; that in October 2011, the 1st respondent without any basis purported to unilaterally value the premises and to increase the annual rent payable from Kshs.27,000.00 to Kshs.2,815,720.00 by a letter dated 30th October 2011 addressed to the appellant; that the lease provided that the 1st respondent would have a right at the expiry of 30 years to revise the

rent to an amount equivalent to 1/20th part of the unimproved value of the land; that the revision was due on 1st January 1996 when the premises were occupied by a previous tenant, but the 1st respondent did not exercise that right and consequently waived the right to do so and that the next revision is not due until expiry of a further 30 years, namely, 1st January 2026.

3. Based on the foregoing, the appellant prayed for judgment against the 1st respondent for a declaration that it had no right under the terms of the lease to raise the annual rent until 1st January 2026; that the revision of rent by the 1st respondent was unlawful null and void; a permanent injunction to restrain the 1st respondent from interfering with the appellant's possession of the property or charging an annual rent higher than Kshs.27,000.00 until 1st January 2026 or levying distress or taking any action for recovering any higher amount.

4. The 1st respondent's defence was that it has the right, under Clause 2(a) of the lease, at the expiration of each period of 30 years to raise the rent; that the initial 30 years of the lease lapsed on 1st January 1996 and it lawfully exercised its right to increase the annual rent and issued a notice to the appellant on 13th October 2010; that it is not mandatory under the terms of the lease that the review must be exactly on the 1st day of the 31st year but may be any time upon expiry of the 30 years; and that the 1st respondent was within its rights to review the rent.

5. In addition, the 1st respondent pleaded that the suit arose from the 1st respondent's exercise of its statutory right under Section 13(2)(h) of the *Kenya Railways Corporation Act* to let immovable property and that the suit was statutorily barred by Section 83(1) of the *Kenya Railways Corporation Act* which mandatorily enjoins the appellant to attempt direct negotiations with the 1st respondent and to refer the matter to a single arbitrator appointed by the Chief Justice.

6. The appellant's witness, Andrew Nundi, Senior Legal officer of the appellant in his testimony explained the background and produced documents in support of the appellant's case. The appellant's second witness, Joan Gatheru Waweru, a registered valuer employed by Knight Frank stated that her firm was instructed to give an improved site value of the property and produced a valuation report.

7. For the respondent, Justin Oyagi Omoke, an employee of the 1st respondent stressed that the agreement between the parties provided for increase of rent.

8. After reviewing the evidence and considering the submissions before her, the learned trial Judge rendered the impugned judgment in which she found that the suit "is premature and incompetent" for having been commenced before expiry of 30 days as required under Section 87(a) of the *Kenya Railways Corporation Act*. She accordingly struck it out. On the merits, the Judge found that the 1st respondent's right to review the rent "was not extinguished by its failure to increase rent after the first thirty (30) years" and that the appellant was "aware that the right to increase had never been waived or extinguished" and that the appellant had not proved its case and is not entitled to the prayers sought in the plaint.

9. During the hearing of the appeal before us on 29th March 2023, learned counsel Mr. Kago appeared for the appellant while Mr. Karina, learned counsel appeared for the 1st respondent. Orally highlighting his written submissions, Mr. Kago urged that the Judge erred in concluding that the suit violated Section 87(a) of *Kenya Railways Corporation Act*; that the Judge failed to appreciate that that provision was overridden by Article 48 of the *Constitution* that guarantees access to justice; that the Judge erred in concluding that the 1st respondent's right to increase or review rent is unfettered; that the learned Judge did not, under Article 47 of the *Constitution*, address the question of reasonableness of the substantial increase of rent; that whilst the right to increase the rent may exist, the 1st respondent should not arbitrarily do so and the Judge erred in sanctioning the increase.

10. Opposing the appeal Mr. Karina in his written and oral submissions urged that the Judge was right in striking out the suit as the appellant had not complied with Section 87(a) of the *Act* which requires legal proceedings against the 1st respondent to be preceded by a 30 days' notice; that the question whether notice under that provision is mandatory was settled by this Court in the case of *Joseph Nyamamba & 4 others v Kenya Railways Corporation* [2015] eKLR and failure to comply is fatal.

11. It was submitted that nothing in Section 87(a) of the *Act* is inimical to either the right to fair administrative action or to access to justice under Articles 47 and 48 respectively of the *Constitution*. Moreover, the suit was also premature and violated Sections 13(2) and 83 of the *Act* as the appellant failed to exhaust the mechanisms provided. It was submitted that despite finding that the suit was incompetent, the learned Judge nonetheless considered the matter on merits and arrived at the correct decision that the appellant failed to establish its case.

12. In our view, two issues arise for determination in this appeal. The first is whether the Judge erred in striking out the suit for non-compliance with the statutory provisions of the Act. The second issue is whether on the evidence the appellant established its case for the reliefs it sought.

13. On the first issue, the trial Judge expressed that Section 87(a) of the *Act* is "set in mandatory terms" and that the appellant "admitted that it commenced...proceedings before expiry of the thirty (30) days". The Judge found support in the decision in *Peter Nzioki Mani & another v Kenya Railways Corporation* [2012] eKLR where the High Court concluded that suit therein to have been premature and incompetent on account of failure by the plaintiff therein to serve a 30 days' notice.

14. Section 87 of the *Act* 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... "

15. In the case of *Joseph Nyamamba & 4 others v Kenya Railways Corporation* (above) it had been argued, as it was argued in the present case, that Section 87(a) of the *Act* violates the right to fair administrative action and access to justice. In rejecting that argument, this Court stated as follows:

> " Another issue, which has a direct bearing on the conduct of the appellants, is not following the strict and mandatory provision of Section 87. As contended the period of one month may be long when there is an imminent danger to property and life. But there is no evidence by the parties to demonstrate that they sought and obtained leave from it to shorten the period of 30 days. In circumstances where there is danger of destruction, displacement and demolition, parties can seek and obtain leave of the court to be allowed to argue their case or cause of action even without complying with the mandatory period of 30 days. In our view the court can exercise residual and/or supervisory powers in order to alleviate danger or upsetting a matured cause of action to hear parties before the expiry of the notice. Here no notice was issued, no leave was sought and obtained. Consequently the plaint and application was filed in contravention or violation of an express provision of a statute which is couched in clear and mandatory terms. We see nothing impairing access to justice and it

is for the parties and their advocate to know the law and its consequences. If a party like the appellants sidestep an express provision of the statute, it cannot take refuge after the provision is brought to their attention. We see no fault in the way the trial judge determined the preliminary question."

16. We associate ourselves with that decision are similarly unable to fault the learned Judge regarding the conclusion she reached about Section 87(a) of the *Act*.

17. We note however that in its statement of defence, the issue of non-compliance with Section 87(a) of the Act had not been raised. What the 1st respondent pleaded in its defence was that the suit arose from the 1st respondent's exercise of its statutory right under Section 13(2)(h) of the *Act* and that the suit was statutorily barred Section 83(1) of the *Act* which required the appellant to attempt negotiations with the 1st respondent and thereafter to refer the matter for arbitration. Indeed, the appellant's reply to defence addressed itself to those provisions. In the appellant's written submissions before the trial court dated 19th March 2018, the issue of Section 87(a) of the *Act* does not appear to have been addressed. It is not clear whether the 1st respondent had submissions on the point before the trial court as those submissions, if any, are not part of the record before us. However, neither party has addressed us on the matter, and we say no more.

18. On the finding that the appellant did not establish its case, the appellant complains in its memorandum of appeal that the Judge failed to look at or decide on the strength of the evidence and that even though the 1st respondent has a right to increase rent, it cannot do so arbitrarily, in an oppressive manner and unreasonably.

19. The facts as brought out by the evidence are that the predecessor to the 1st respondent, East African Railways and Harbours through its General Manager of the Administration leased the property to Keshavlal Premji Patel and Kanjibhai Premji Patel (the original lessees) by a lease agreement dated 24th April 1967 (the Lease) on the terms and conditions set out therein. The initial term of the lease was for two years from 1st December 1966 but was extended for a term of 81 years and 1 month from 1st December 1966. The original lessees transferred the lease to a company known as K Boat Services Limited in 1974 which in turn, with the consent of the 1st respondent, transferred the lease to the appellant, which became the lessee in 2008.

20. The Lease had provision in clause 2 that the Lessor shall have the right at the expiration of each period of thirty years to raise the annual rent to a figure equivalent to one- twentieth part of the unimproved value of the land at the date of such revision. According to the appellant, the 1st respondent exercised that right at the expiration of the first thirty years during the currency of the tenancy relationship with K Boat Services Limited and increased the annual rent from Kshs.3,105.00 to Kshs.27,000.00. It was asserted that that was the prevailing rent at the time K Boat Services Limited transferred the lease the appellant and the appellant expected that situation to continue, and for the rent payable to remain at Kshs.27,000.00 for the remainder of the second thirty-year period ending in the year 2006. However, by a notice dated 13th October 2010 addressed to the appellant, the 1st respondent gave notice of increase of the annual rent from Kshs.27,000.00 to Kshs.2,815,720.00 and subsequently invoiced the appellant with an amount of Kshs. 1,900,000.00 as annual rent for the year 2012 and that attempts to resolve the matter through negotiation was unsuccessful.

21. The appellant's witness Andrew Nundi (PW1) in his testimony in chief relied on his witness statement which unfortunately is not part of the record of appeal before us. He stated that under the lease, rent was to be increased at the interval of 30 years; that the 1st respondent was entitled to increase rent; that he was not sure when rent was increased from Kshs.3,105.00 per annum to Kshs.27,000.00 but

that when the appellant acquired the property in 2008, it expected to pay Kshs.27,000.00 per year and expected the increase in 2026; the appellant was not given any valuation report to support the proposed increase of rent to Kshs.2,815,720.00; and that the appellant had its own valuation undertaken in 2017 by Knight Frank Valuers Limited. He stated that the proposed rent of Kshs. Kshs.1,900,000.00 was excessive.

22. Joan Gatheru Waweru (PW2), a valuer at Knight Frank Valuers Limited produced the valuation report dated 26th May 2017 in respect of the property which she undertook with her colleague. She stated that they were instructed by the appellant to give the site value of the property based on which the unimproved site value as of 1st January 1996 was placed at Kshs.9,000,000.00 and at Kshs.73,000,000.00 as of 26th May 2017. With that the appellant's case was closed.

23. DW1 Justin Oyagi Omoke, an officer of the 1st respondent in charge of properties at the coast region. He relied on his written statement which is also not included in the record of appeal before us. His evidence was that the 1st respondent deserved to increase the rent on the property and the agreement provided for such increase.

24. The essence of the appellant's complaint before the ELC was that having already reviewed and increased the rent in 1996 during the currency of the tenancy with K Boat Services Limited, its right under clause 2 of the lease to review the rent thereafter could only accrue after the expiry of another 30 years and would only become exercisable in the year 2026.

25. There was no evidence presented to the trial court that the amount of Kshs.27,000.00 allegedly invoiced to K Boat Services Limited was the result of an exercise by the 1st respondent of its right under clause 2 of the lease. Having contended that such right had already been exercised by the 1st respondent in 1996 and that it could not be exercised again until 2026, it was incumbent upon the appellant to present evidence in support. No such evidence was presented. There was no material before the learned Judge on which to draw the conclusion that the right to review the rent after the first 30 years had in fact been exercised and could not be exercised again until 30 years later in 2026. We find no fault therefore in the finding by the Judge that there was no basis for declaring the notice of increase of rent by the 1st respondent as unlawful or illegal and that the appellant had failed to prove its case on a balance of probabilities.

26. In the result, the appeal fails and is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 27TH DAY OF OCTOBER 2023.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

P. NYAMWEYA

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR