



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, G.B.M. KARIUKI & OUKO, J.J.A.)

CIVIL APPEAL NO. 297 OF 2004

BETWEEN

DAVID NJENGA NGUGI.....APPELLANT

AND

THE ATTORNEY GENERAL.....RESPONDENT

(An appeal from the Ruling of the High Court of Kenya, Nairobi (Ang'awa, J) delivered on 22nd day of September 2004

in

H.C.C.C. NO.3874 OF 1994)

JUDGMENT OF THE COURT

1. David Njenga Ngugi, **the appellant**, has appealed to this Court against the decision of the High Court (Ang'awa J) made in Nairobi High Court Suit No.297 of 2004 striking out as incompetent the appellant's suit.

2. The appellant had sued the Attorney General of the Republic of Kenya (the respondent) for recovery of general and special damages on account of his (appellant's) alleged illegal arrest without reasonable and probable cause following which he was charged with criminal offences, to wit, robbery with violence contrary to Section 296(2) of the Penal Code; breaking into a building and stealing contrary to Section 306 (c) and 279 (g) of the Penal Code and aiding a prisoner to escape contrary to Section 124 (a) of the Penal Code. The appellant alleged that the State persecuted him by arresting him and taking him before the Senior Principal Magistrate court at Nairobi, and it seems that he was on or about 6th June 1994, released and did not go through a trial for the alleged offences on account of insufficiency of evidence. Thereupon the intended prosecution determined.

3. When the appellant's suit against the State came up for pre-trial conference, parties framed the following issue; "whether or not the suit was competent." The respondent thereafter raised a preliminary objection on a point of law contending that the appellant's notice to sue did not comply with Section 13A of the Government Proceedings Act, Chapter 40 of the Laws of Kenya ("**The Act**"), because it did not give the requisite notice of 30 days (but instead gave only 5 days) before the institution of the suit. The

respondent sought the striking out of the suit as incompetent.

4. After hearing the submissions, the learned Judge held that the suit was incompetent for non-compliance with Section 13A (supra) and struck it out in a ruling dated 23rd September 2004, thus prompting this appeal.

5. In his memorandum of appeal, the appellant proffered 8 grounds of appeal in which he faulted the learned Judge of the High Court because in his view, the Court erred in not observing that section 13A (supra) had been complied with; that the requirements of the said Section had been met; that estoppel operated to stop the respondent from raising the preliminary objection; that the court erred in failing to consider the intention of Parliament in enacting the said section; that the court misinterpreted the said section and erred in failing to define the word “shall” in the said section; that the court failed in its fundamental duty to see that the interest of justice dictated that the suit be determined on merit.

6. When the appeal came up for hearing, learned counsel **Mr. Nyamai Kimindu** held brief for **Dr. Khaminwa** for the appellant and learned counsel **Mr. S. O. Kaumba** appeared for the respondent.

7. Mr. Nyamai sought adjournment saying he was not ready. The court, for good reason, declined to grant it. The hearing proceeded. Mr. Nyamai did not offer any oral submissions. He told the court that he had not gotten up on the brief.

8. On his part, Mr. Kaumba made oral submissions. In a nutshell, he urged the court to dismiss the appeal on the ground that it had no merit because the notice given under Section 13A of the Government Proceedings Act, though required to be of 30 days, was for far less. Mr. Kaumba pointed out that there was no dispute that the notice given to the government of the appellant’s intention to sue was served on 2nd September 1994 and that the suit was filed before it expired. He contended that the notice was fatally defective as section 13A (supra) was mandatory. It was Mr. Kaumba’s contention that the constitutionality of the said section has never been challenged and that it binds all persons including the appellant. Counsel submitted that the High Court was correct in striking out the suit. He urged us to dismiss the appeal. The government, he said, was denied an opportunity to investigate the matter before the suit was filed.

9. We have given this matter due consideration. The issue on which this appeal turns is, simply put, whether section 13A of the Government Proceedings is couched in mandatory terms and whether failure to comply with it to the letter rendered the suit incompetent. Although we did not hear oral submissions from counsel for the appellant who had due notice to attend the hearing, the latter’s memorandum of appeal is self-explanatory. We have treated it and the grounds of appeal therein contained as the submissions of the appellant.

10. Did the failure of the notice under section 13A (supra) to give notice of the full 30 days of his intention to sue render the suit incompetent? In this case, the appellant gave notice. However, instead of waiting for the period of the notice of 30 days to elapse before filing suit, the appellant filed suit much earlier. The respondent’s counsel contends that the suit is doomed on account of that. In counsel’s view, that was fatal.

11. We are alive to the fact that a notice given under S.13A (supra) is intended firstly to inform the Attorney General of the claim and impending litigation and secondly to give time (30 days) to enable the Attorney General to take instructions from the government department concerned with the claim. It is axiomatic that where notice is given and a suit is instituted before the period of 30 days has run its course, the Attorney General may not have sufficient time to take instructions and/or to respond to the summons.

Section 13A (supra) states –

“13.A. (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.”*

12. The word “shall” is used in this section in relation to time for filing suit. The section prohibits filing of suit before the notice prescribed has run its course. The canons of interpretation of statutes show that where the word “shall” is used, it connotes mandatoriness if it confers a power and a duty to act. It shows that the rule must be enforced. But like other statutes, the provisions of the Government Proceedings Act (Cap 40) must be construed so as to carry out the intention of Parliament. Read as a whole, nowhere does the Act manifest any intention to deprive an intending litigant of his/her cause of action on account of failure to fully comply with the Section 13A (supra).

13. The genesis of the section was clearly grounded in policy considerations geared at ensuring that suits are not instituted against the government without notice. The Attorney General sues and defends suits on behalf of the State. As there are many departments of government, it is in public interest that the Attorney General knows in advance of claims being made against the Government so as to take instructions necessary to facilitate proper legal representation. It would be virtually impossible for the Attorney General to defend suits in respect of which he has not been briefed by the concerned Government department, hence the need for the requirement that an intending claimant must give notice pursuant to Section 13A (supra). At the end of the day, it is the public who must underwrite the successful claims through their taxes where monetary relief is given. It is obvious that the mischief intended to be eradicated is simply prevention of suits against the State where the Attorney General has not had notice under Section 13A (supra). Nowhere does the Act expressly or by implication state that a suit filed where the notice is not in full compliance with Section 13A is incompetent.

14. The **Limitation of Actions Act** (Cap 22) sets time-lines within which suits must be brought. If, as in this case, a suit is brought within the time stipulated in the Limitation of Actions Act, can it be defeated on account of failure to give the full 30 days’ notice in compliance with the section 13A (supra)? It is clear that the section obligates a claimant desirous of suing the State to give notice. The words “*no proceedings.... shall lie or be instituted until after the expiry of a period of 30 days ...*” confer neither a right nor a power to sue. A claimant’s right to sue the State is founded in common law and a claimant need only comply with the provisions of the Limitation of Actions Act.

The right to sue will invariably give the power to sue. The principles of construction of statutes show that where the use of the word “shall” in a statute does not confer a power and a duty to act, it is not imperative; it is directory. In the instant case, the use of the word “shall” in section 13A (supra) is clearly directory. It requires that no suit shall be instituted where a notice has not been given in compliance with the section. 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.

Its 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.

15. The learned Judge of the High Court in striking out the suit went into error. Procedural rules and directory provisions of the law even where their peremptoriness is clear and unambiguous cannot vitiate a cause action and the right to sue. In the instant case, the use of the word “shall” in Section 13A (supra) does not import “mandatoriness”. It is directory and procedural. The appeal depicts the period prior to the 2010 Constitution. The 2010 Constitution now binds courts by dint of Article 159 (2) (d) in exercising judicial authority to administer justice without undue regard to procedural technicalities.

16. We have perused the judgment of the High Court in the case of **Kenya Bus Service Ltd & Another v. Minister For Transport & 2 Others** [2012] eKLR where, inter alia, the constitutionality of section 13A of the Government proceedings Act (GPA) was challenged for being in contravention of Article 48 of the Constitution which provides as follows -

“48. The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.”

Manjanja J. who heard the matter examined a wide range of international, historical and comparative perspectives of similar statutes of limitation of actions against the Government and other public Authorities and came to the following conclusion:

“47. 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 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 from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen 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.”

17. The court in **Kenya Bus Service Ltd & Another v. Minister for Transport & 2 Others** (supra) held, *inter alia*, that:-

“Section 13A of the Government Proceedings Act as a mandatory requirement for the institution of suit against the government violates the provisions of the Article 48 of the Constitution”

18. This decision though merely persuasive is entitled to respect. In the instant appeal, it is our considered view that the learned Judge’s decision in striking out the suit was wrong as there was substantial compliance with section 13A. We so find.

19. We allow the appeal and set aside the learned Judge’s decision. We order that the Suit No.3874 of 1994 in the High Court be heard and determined on merit in the normal way in pursuance with the provisions of The Civil Procedure Act and The Civil Procedure Rules. Each party shall bear its own costs in the High Court and in this appeal.

Dated and delivered at Nairobi this 15th day of July 2016.

P. N. WAKI

.....

JUDGE OF APPEAL

G. B. M. KARIUKI SC

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR