IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, SICHALE & KANTAI, JJ.A.)

CIVIL APPEAL NO. 235 OF 2009

BETWEEN

JOSEPH NYAMAMBA ……..…...……..……. 1ST APPELLANT

ISAAC KIPRONO NGETICH ……..……..……....…… 2ND APPELLANT

WILLIAM NYAEGA ……..……..…. 3RD APPELLANT

BENJAMIN NJERU ……..……..……....…. 4TH APPELLANT

TIMOTHY BERRE ……..……..…….. 5TH APPELLANT

VERSUS

KENYA RAILWAYS CORPORATION …….....……. RESPONDENT

(Being an appeal against the ruling of the High Court of Kenya at Nairobi (Nambuye, J.) delivered on 24th July, 2009

in

E.L.C. No. 582 of 2008)

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JUDGMENT OF THE COURT

The appellants **Joseph Nyamamba, Isaac Kiprono Ngetich, William Nyaega, Benjamin Njeru** and **Timothy Berre** filed suit at the High Court of Kenya, Nairobi, against the respondent, **Kenya Railways**. It was alleged in the plaint, *inter alia*, that the appellants were respectively the owners and/or proprietors of certain parcels of land identified as L.R. No. 209/18267, L.R. No. 209/18269, L.R. No. 209/18263, L.R. No. 209/18259 and L.R. No. 209/18262 on which developments had been made by the appellants. Ownership was claimed by the appellants through letters of allotment issued by the Commissioner of Lands on various dates in 1999. Those letters were exhibited as part of the pleadings. It was further alleged that on the 10th of November, 2008 the respondent placed 'X' marks on the suit properties and also

'KR' signs and that on 13th November, 2008 at about 2 a.m. the respondent through its agents moved into the suit lands and demolished all existing structures then standing thereon. It was claimed that the said action amounted to a violation of the appellants' private property rights and the right to acquire possession of the same. For that action it was alleged that the respondent had caused substantial loss to the appellants, particulars of which were set out in the plaint. It was therefore prayed that the Court issue injunctions and declarations that the appellants were *bona fide* owners of the suit lands and general and special damages be awarded to the appellants.

Contemporaneously with the plaint was the Chamber Summons application praying for interim relief.

The respondent did not file any defence or replying affidavit. What the respondent did after appointing its advocate was to file a notice of preliminary objection on 15th January, 2009. The objection related to the Chamber Summons application and the grounds were:

"1. That the plaintiff did not serve upon the defendant's Managing Director the mandatory one month written notice before institution of this suit as required under Section 87, of the Kenya Railways Corporation Act (Chapter 397 Laws of Kenya) and the plaintiff's suit is thus incompetent;

2. That the plaintiff's/applicant's suit, the substratum upon which the instant application is premised, is incompetent, fatally and hopelessly defective thus, both the application and the entire suit should be struck out in limine and be dismissed with costs."

That Preliminary Objection was heard by R.N. Nambuye, J. (as she was then), who in a ruling delivered on 24th July, 2009 upheld the same. The learned judge therefore struck out the suit and the application. It was further ordered that the appellants were at liberty to issue a notice to the respondent and file a suit afres: And leave was also granted of the same was necessary or required. These are the findings that have led to this appeal premised on the memorandum of appeal drawn by the lawyers of the appellants where 5 grounds of appeal are set out. In the first ground the appellants fault the learned judge for holding that the actions of the respondent fell within the ambit of **Section 87** of the **Kenya Railways Corporation Act**. In the second ground the appellants contend that the learned judge was wrong in finding that the respondent had asserted ownership of the suit properties. In the next ground the learned judge is faulted for failing to hold and construe that the absence of a defence by the respondent was a bar to a claim on the property. In the penultimate ground the appellants say that the learned judge erred in failing to hold that the actions of the respondent were unconstitutional and fraught with illegality. In the last ground the complaint is that the learned judge erred in finding that the actions of the respondent was advantagious for the purposes of the respondent. It is therefore prayed that the appeal be allowed and that we order that the appellants' suit at the High Court be reinstated and proceed for trial.

Both the appellants and the respondent through their counsel filed written submissions which they highlighted in oral submissions before us when the appeal came up for hearing on 22nd September, 2015.

Mr. Stephen Ligunya learned counsel for the appellants readily admitted before us that the appellants did not comply with the requirements of **Section 87** of the **Kenya Railways Corporation Act**. He submitted that after the respondent had placed marks on the suit properties, it proceeded to demolish developments on the properties some three days later and that this was a violation of the law. Counsel was of the view that the powers donated to the respondent did not allow for violation of the law and that even to remove a trespasser, a court order should have been obtained.

Mr. Alfred Deya learned counsel for the respondent underlined the importance of procedure and was of the view that fairness and justice could not be obtained if procedural steps were ignored. Counsel submitted that the requirement of 30 days notice to the respondent's Managing Director was mandatory before any action could be commenced against the respondent. According to counsel the appellants had been given a window by the High Court because they were given a chance to give notice and file a fresh suit. Counsel also was of the view that the provisions of the Constitution of Kenya, 2010 could not apply in this matter because the dispute arose and the preliminary objection was determined prior to the promulgation of the current Constitution.

As we have stated, the suit at the High Court was not heard on merit at all and proceeded only on the preliminary point.

This being a first appeal, we are entitled to review and reconsider the whole matter although again this will be limited to the preliminary point taken and determined by the High Court. As we understand, the contestation before us is the implication, input and consequences of failure to comply with **Section 87** of **Cap 397.** And secondly whether the said section is an impairment or impediment to the fundamental principle of access to justice.

Section 87 of the **Kenya Railways Corporation Act (Cap 397 of the Laws of Kenya)** is in the following terms:

> ***"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 (underline ours)***

b. ***the 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 after the cessation thereof."***

The question, therefore, in this appeal and which was the issue before the High Court is whether that provision is mandatory and if the answer to that question is in the affirmative, it would follow that the High Court reached a correct finding. Corollary to that question, is whether such a provision, even if couched in mandatory terms, violates provisions in the Constitution on access to justice. We address ourselves to the corollary question although, it was not raised before the Judge at the High Court but has been taken by the appellants in the appeal before us.

The said section requires any person who intends to take court action against the respondent to issue a 30 day notice of intention to sue. The scope of the matters, that require such a notice to be served are stated in the Act. Whether or not the actions complained of by the appellants fell within that scope was not addressed by the learned judge because the only issue that the judge found to be live was a determination on whether failure to serve the said notice invalidated the suit.

The facts of the case as can be gleaned from the plaint and the ruling were that the appellants had been issued with letters of allotment of parcels of land, we have set out in this judgment and had, they say, developed the same. One day in November, 2008 the appellants woke up to find "X" signs placed on the said lands by the respondent and 3 days later, in the middle of the night, the respondent through its servants or agents moved into the lands and destroyed all developments thereon presumably on a claim that the lands belonged to the respondent.

The appellants moved to court to claim their rights and remedies but did not comply with the provisions of **Section 87** of the **Kenya Railways Corporation Act**.

The learned judge examined those facts and the provisions of the said Act and found that it was mandatory for the appellants to issue the requisite notice failure to which invalidated the suit which was then struck out. The learned judge in doing so was of the view that her duty was to interpret the law as contained in the statute.

Potter, JA, in **Ngobit Estate Limited v Carnegie [1982] KLR 437** held that it is the function of the judiciary to interpret the law, not to make it and went as far as saying that a judge hearing a matter was

duty bound to apply the law as it stood in the statutes.

The appellants in this appeal submit that the said **Section 87** of the said **Act** is an impediment to access to justice which to them would be a violation of **Article 48** of the **Constitution of Kenya, 2010**. The appellants therefore ask us to hold that the said section is unconstitutional and must give way to access to justice rights provided in the said Article of the Constitution.

Article 48 of the **Constitution** on access to justice provides that:

> ***"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."***

The scope of access to justice as so enshrined is very wide – it includes ability of a party to file suit in court, ability to access the police with legitimate expectation of fair, expeditious and prompt investigations of one's complaint, prosecution of suspects, enforcement of decrees and orders issued by a court and prompt and fair compensation by government upon compulsory acquisition of one's property for public use – see, for exposition of these principles, **Dry Associates v Capital Markets Authority & Anor Petition No. 328 of 2011** (unreported).

We looked at **Section 13A** of the **Government Proceedings Act (Cap 40 Laws of Kenya)** because the provision, like the provision subject of the issue that was before the High Court, requires a notice to be served if proceedings are to be taken by a party against the government. **Section 13A (1)** thereof provides:

> ***"13A. Notice of intention to institute proceedings***
>
> 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 in the prescribed form have been served on the Government in relation to those proceedings.***

Majanja, J, had opportunity to consider the effect and purport of the said **Section 13A** vis-à-vis access to justice rights donated by **Article 48** of the **Constitution**. This is what he said in **Kenya Bus Services Limited and Anor v Minister of Transport & 2 Others [2012] eKLR:**

"37. By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism……..Article 48 must be located within the Constitutional imperative that recognizes as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. Article 48 therefore invites the Court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.

……

47. Viewed against the prism of the Constitution, it also becomes evident that section 13A of the GPA provides an impediment to access justice. Where the state is at the front, left and centre of the citizens 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 requirements 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 that section 13A of the Government Proceedings Act as a mandatory requirement violates the provision of the Article 48."

The learned judge, in effect, found that requiring a party who was aggrieved to comply with requirements as to notice was an impediment to the citizens right to access justice and that such a requirement must

give way to the constitutional requirement that such a party access justice unimpeded.

But is the position the same in this appeal?

The matters complained of and subject of the suit before the High Court occurred in November, 2008 and suit was filed on 26th November, 2008. The ruling of the judge subject of this appeal was delivered on 24th July, 2009.

We would, in principle, endorse the holding and reasoning of Majanja, J, as quoted here but it is material to note that the learned judge was dealing with matters that occurred after the Constitution of Kenya, 2010, was promulgated. The retired Constitution (of Kenya) did not provide for access to justice rights in the robust and clear way that the current Constitution has done or at all.

The appellants ask us to hold that their property rights are protected by the current Constitution. The answer to that issue is to be found in the holding of the Supreme Court of Kenya in **Samuel Kamau Macharia & Anor v Kenya Commercial Bank Limited & 2 Others – Application No. 2 of 2011 (unreported)** where the court expressed itself thus:

> ***"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in particular provision are forward looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights that legitimately occurred before the commencement of the Constitution."***

Article 263 of the **Constitution** gives effect to the date that it would become operational and **Article 264** repeals the retired **Constitution**, subject to the Sixth Schedule set out in the Constitution.

Articles 263 and **264** of the **Constitution** are saying *inter alia* that the provisions of the Constitution have no retrospective effect and do not invalidate, except by express provision, what was otherwise legal during the regime of the retired Constitution.

Francis Bennion in a seminal work on "Statutory Interpretation", 3rd Edition, at page 235 states:

> ***"Retrospectivity is artificial, deeming a thing to be what it was not. Artificiality and make-believe are generally repugnant to law as the servant of human welfare. So it follows that the courts apply the general presumption that an enactment is not intended to have retrospective effect. As always, the power of Parliament to produce such an effect where it wishes to do so is nevertheless undoubted."***
>
> ***(Emphasis by underline)***

The totality of all these is therefore that the Constitution of Kenya, 2010, does not invalidate that which the retired Constitution provided pre- 27th August, 2010. The Supreme Court of Kenya in **Mary Wambui Munene v Peter Gichuki Kingara & 2 Others [2014] eKLR** quoted with approval the holding of the South African Constitutional Court in **Sias Moise v Transitional Local Council of Greater Germison Case CCT 54 of 200** where Justice Kriegler, speaking for the majority, declared that:

> ***"If a statute enacted after the inception of the Constitution is found to be inconsistent, the inconsistency will date back to the date on which the statute came into operation in the face of the inconsistent constitutional norms. As a matter of law, therefore, an order declaring a provision in a statute such as that in question here invalid by reason of its inconsistency with the Constitution, automatically operates retrospectively to the date of inception of the Constitution." Because the Order of the High Court declaring the section invalid as well as the confirmatory order of this Court were silent on the question of limiting the retrospective effect of the declaration, the declaration was retrospective to the moment the Constitution came into effect. That is when the inconsistency arose. As a matter of law the provision has been a nullity since that date."***

The appellants assertion before us, and this was not raised before Nambuye, J, that their property rights and access to justice are protected by the Constitution now in force would appear to stand on not just shaky ground but on quicksand. **Article 48** of the **Constitution** has no retrospective application and the retired Constitution did not have rights similar to what we have today.

The appellants ought to have complied with the requirement on giving notice to the respondent before suit could be filed. Failure to do so made the suit incompetent and the learned judge was right to strike it out. We observe, in passing, as we close, that the learned judge allowed the appellants' to give proper notice and then approach the court for relief but that advise, if advise it was, was ignored. That election by the appellants not to give notice and file suit afresh would appear to have put them in a rather dicey situation in view of the time that has elapsed, but, again, choices have consequences.

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. The trial was right and we can only retreat that position to be the correct determination and interpretation of **Section 87** of **Cap 397.**

In the end the appeal has no merit and we consequently dismiss it with costs to the respondent.

Dated and Delivered at Nairobi this 4th day of December, 2015.

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR