



**THE REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. 1352 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**BOARD OF TRUSTEES, KENYA BROADCASTING CORPORATION**

**(KBC) STAFF RETIREMENT BENEFITS SCHEME**

**(Suing on behalf of the Scheme).....CLAIMANT/APPLICANT**

**VERSUS**

**KENYA BROADCASTING CORPORATION.....RESPONDENT**

**RULING**

Before this Court is the Respondent’s Application dated 11<sup>th</sup> October 2018 seeking the following orders:

- a. That the Statement of Claim dated 3<sup>rd</sup> September 2018 be dismissed and/or struck out in its entirety.
- b. That the costs of the Application and of the suit be upon the Claimant.

The motion is supported by the Affidavit sworn by Paul Jilani and is premised on the following grounds, as outlined in the said motion together with the affidavit: that the Statement of Claim is incompetent and defective as it contravenes section 46 of the Kenya Broadcasting Corporation Act which provides that a 30 days’ notice of intention to sue be served upon the Managing Director for any pleadings that are instituted against the Corporation, which notice has never been served upon the Managing Director.

The Claimant opposes the Application vide the Replying Affidavit sworn by Daniel Okoth. They contend that the Application is an abuse of the court process and is based on factual misrepresentation since the Respondent’s Managing Director was served with a notice of intention to sue on 25<sup>th</sup> May 2018 which contained the particulars of the impending claim. Further, that the Claimant allowed for 30 days to lapse in anticipation of negotiations which never materialized.

**Submissions by the Parties**

In its written submissions, the Respondent submits that section 46 of the Kenya Broadcasting Corporation is couched in mandatory terms and leaves no discretion to the Claimant to exercise the option of failing to serve the managing director with one month’s notice of intention to sue before instituting legal proceedings. The Claimant thus failed to comply with law, as such, the pleadings are fatally defective and should be struck out. They rely on the cases of *Jackson K. Mathenge vs. Kenya Broadcasting Corporation [2018] eKLR* and *Jaldesa Tuke Dabelo vs. Independent Electoral Boundaries Commission and Another [2015] eKLR*. The Respondent also submits that this Court has no jurisdiction to hear this matter as some of the claims do not concern employee’s deductions.

The Claimant submits that the Respondent’s Application is a violation of Article 159 of the Constitution and the overriding objective of this Court and should not be entertained. The Claimant further submits that since the Respondent is a government agency and not the government, non-compliance with issuance of a notice should not extinguish the Claimant’s right to agitate the cause of action but should only be useful in denying the Claimant costs of the suit. Further, that the mandatory requirement violates article 48 of the Constitution. They rely on the case of *Kenya Bus Service Limited & Another vs. Minister for Transport & 2 Others; HCCC No. 504 of 2008* and *Pius Mutuku Mueke vs. Managing Director, Kenya Broadcasting Corporation & Another [2015] eKLR*.

**Determination**

Section 46 of the Kenya Broadcasting Corporation 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 the intention to commence the action or legal proceedings, has been served upon the Managing Director by the Plaintiff or his agent;***

***b) The action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.***

From the Claimant's bundle of documents annexed to his claim at pages 129 and 130, it is clear that a notice was served on the Respondent on the 25<sup>th</sup> May 2018 communicating the intention to sue. The notice indicated that a suit would be commenced immediately the Respondent failed to pay the requested amount within 7 days of receipt of the demand. The Claimant filed its Statement of Claim on 4<sup>th</sup> September 2018, 3 months after the service of the notice. The wording of section 46 does not specify the form the notice is supposed to take. I am of the opinion that the fact that the Claimant served the notice and filed this suit three months later is sufficient fulfilment of the requirement under section 46.

The Court of Appeal in the case of *Kenya Broadcasting Corporation v Ann Muthoni Kibiro and Another [2015] eKLR* where the Appellant was of the view that it should have served with a separate notice, was of the following opinion:

*“...In any case, we were satisfied that on 17<sup>th</sup> July, 2002 the 1<sup>st</sup> respondent served a notice on the appellant's managing director well before filing the suit on 18<sup>th</sup> October, 2002. It does not appear to have been a necessary step but it was taken.... This issue of notice was not even among the grounds filed by the parties on 11<sup>th</sup> September 2003 for determination. In the circumstances, we do not think that even if the 2<sup>nd</sup> respondent was not a party to the subject lease agreement, he ought to have issued a separate notice under section 46 (above). Probably technically so, but in essence, we do not see much substance in that ground raised in the memorandum. We dismiss this ground.”*

The arguments raised in paragraphs 17, 18 and 19 were not pleaded in the Respondent's pleading, as such, they will be disregarded. The same goes for the arguments regarding the strange stamps in the notice. The issues raised are of a contentious nature which will require each of the parties to present evidence before a determination is made hence cannot be canvassed by way of submissions alone.

In view of the foregoing, the Respondent's Application is dismissed. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24<sup>TH</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**