



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

SUIT NO. 264 OF 2017

JOSEPH GITONGA WACHIRA & 41 OTHERS.....CLAIMANTS

VERSUS

NYERI COUNTY GOVERNMENT.....1ST RESPONDENT

NYERI PUBLIC SERVICE BOARD.....2ND RESPONDENT

MINISTRY OF EDUCATION, SCIENCE & TECHNOLOGY.....3RD RESPONDENT

RULING

1. The 3rd Respondent filed a preliminary objection to the effect that the Claimants suit does not lie in law for failure to comply with the mandatory provisions of Section 13A Government Proceedings Act (Cap. 40 Laws of Kenya) and as such, the same is a non-starter, incurably bad in law and an abuse of the court process. The preliminary objection asserted that the claim does not disclose any cause of action against the 3rd Respondent and that the 3rd Respondent therefore wrongly enjoined in the suit. The 3rd Respondent thus seeks that the suit as against it should be dismissed with costs to the 3rd Respondent.

2. The Claimant and the 3rd Respondent agreed to canvas the application by way of written submissions. The 3rd Respondent submitted the Claimants did not comply with Section 13A of the Government Proceedings Act prior to instituting the proceedings herein and the 3rd Respondent cited the provisions of 13A(1) of the Government Proceedings Act which is to the effect that:-

13A (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.

The 3rd Respondent submitted that the legal provision is in mandatory terms and the Claimants did not have the liberty to choose whether or not to issue the thirty days notice prior to instituting the proceedings against the Government. The 3rd Respondent herein is the state department responsible for education in the Republic of Kenya and it was submitted that the Claimants were aware that the 3rd Respondent is a state organ as evidenced by their description of the 3rd Respondent under paragraph 4 of the Claimants' claim. The 3rd Respondent submitted that the Claimants did not comply with the mandatory provision of the law by issuing a notice since the notice was not among the documents filed on 20th July 2017 by the Claimants. The 3rd Respondent also submitted that the Claimants' memorandum of claim does not disclose a cause of action against the 3rd Respondent which is described as the unfair and unlawful failure by the 1st and 2nd Respondents to absorb the Claimants into permanent and pensionable terms of service and salaries arrears due to the Claimants.

3. The Claimants in their submissions filed on 14th February 2018 argue that the 3rd Respondent is joined merely because the Claimants were initially engaged by the national Government through the 3rd Respondent and that in the aforementioned circumstances, there is no need to issue the said notice pursuant to Section 13A of the Government Proceedings Act. The Claimants assert that the 3rd Respondent had through the pleadings filed asserted that the Claimants had been contracted by the 3rd Respondent as youth polytechnic instructors under the Economic Stimulus Programme in the year 2011 for a period of 3 years and upon expiry of the contracts extended the term till 30th June 2015. The Claimants relied on the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributor (1969) E.A. 696** where Law JA as he then was held that...*a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit.* The Claimants submitted that on the basis of the holding in Mukisa Biscuits, the 3rd Respondent's preliminary objection cannot pass the test as the Claimants would be required to adduce evidence as to whether the 3rd Respondent ought to have been joined in the suit. The Claimants argued that even if the preliminary objection were to succeed the same would not dispose of the suit as the Claimants would still proceed against the 1st and 2nd Respondents herein. The Claimants thus urged the dismissal of the preliminary objection.

4. The objection taken is that the Claimants are non-suited against the 3rd Respondent and that a mandatory notice under Section 13A of the Government Proceedings Act Cap. 40 Laws of Kenya was not issued. The parameters of a preliminary objection are set in precedent. In the case of **Law JA and Newbold P. held as follows:-**

"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 the pleadings, and which if argued as a preliminary objection 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."

Sir Newbold P. stated in the same decision as follows:-

"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 has 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 unnecessary increase costs and, on occasion, confuse the issues. This improper practice should stop." (Underline mine)

5. The subject of the suit is the employment of the Claimants and it is asserted that the 3rd Respondent was their employer before the contracts lapsed in June 2015. The 3rd Respondent is a state organ to which the provisions of Section 13A of the Government Proceedings Act would apply. The Claimants were required to give the mandatory 30 days notice prior to suing the 3rd Respondent. This suit against the 3rd Respondent is thus incompetent for want of the requisite notice. On the second limb, there is no relief sought as against the 3rd Respondent. There are allegations that the 3rd Respondent was necessary for purposes of showing the history of the matter. A suit can be mounted with mention of a former employer without joining the former employer as that is superfluous and at best a gamble on costs since there is no cause of action against the improperly joined party. The short and long of the foregoing is that the 3rd Respondent was therefore sued improperly and is struck out of the claim but I make no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2018

Nzioki wa Makau

JUDGE