



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

PETITION NO. 15 OF 2017

(BEFORE D. K. N. MARETE)

HARON MUMA NYAMACHE.....CLAIMANT

VERSUS

KISII COUNTY GOVERNMENT.....1ST RESPONDENT

COUNTY PUBLIC SERVICE BOARD-KISII COUNTY.....2ND RESPONDENT

RULING

This matter is an application dubbed *Preliminary Objection* by the respondents/ objectors. It is borne out of their Grounds of Opposition dated 22nd November, 2017 in opposition to the application and petition all dated 13th November, 2017. It comes out as follows;

1. *That the said Application and Petition is premature as the Applicant/Petitioner's Cause of action, if any, lies with the Teachers Service Commission (His parent employer).*
2. *That the Petitioner never gave Notice of intention to sue as provided for under the law and specifically Section 13(A)(1) of the Government Proceedings Act.*
3. *That the Petitioner ought to have appealed to the Public Service Commission under Section 77 of the County Governments Act, 2012.*
4. *That the Applicant sought leave of absence from his employer, Teachers Service Commission, vide a letter dated 4th June 2013 as the Governor had requested for his attachment to the 1st Respondent which leave was granted vide a letter dated 13th September 2013, as the Respondents simply released back the Petitioner to his initial employer.*
5. *That in compliance with the law and the procedure, the 2nd Respondent issued the Petitioner with an offer of appointment vide a letter dated 23rd January 2014 in compliance with Section 67 of the County Government Act, 2012 to enable the Petitioner to be on the payroll of the 1st Respondent and assign him duties.*
6. *The Petitioner's employer never issued the Petitioner with terms of release as per the letter dated 4th February 2014 but the Petitioner never disclosed to court this fact and he did not disclose to court that he never applied for Deployment after release from the Respondents.*

7. *The Respondents procedurally released the Petitioner to his employer vide a letter dated 15th September 2017.*
8. *The Petitioner never disclosed material facts to the Teachers Service Commission vide his letter dated 5th October 2017 (he was requesting for terms and conditions of release) instead of reporting back and requesting for deployment.*
9. *The interim orders sought are not in tandem with the orders sought in the Petition.*
10. *The application does not meet the minimum threshold for injunctive orders.*
11. *Prerogative orders cannot be granted in the manner sought in the Petition.*
12. *The Petitioner ought have filed this suit in Kisumu.*

The petitioner in support of the application dated 13th October, 2017 filed the petitioner/applicant's list of authorities dated 27th November, 2017.

At the hearing of the application dated 13th November, 2017, Mr. Onsembe for the respondents/objector faulted and opposed the application for lack of compliance with the mandatory provisions of section 13A (1) of the Government Proceedings Act, Chapter 40 laws of Kenya which provides for the issue of a thirty (30) days notice of intention to sue before commencement of any suit against the government or a government agency. On this, the respondent sought to rely on the authority of **Margaret Moraa vs. Shem Onyego & Others** at pages 6, 7, 8, 9 and 10 and particularly paragraph 30 where the court observed that in the absence such compliance, no suit exists in the circumstances.

The respondents/objectors further submitted that the petitioner/applicant ought to have pursued his claim through proceedings under section 77 of the County Governments Act, 2012 as read with Article 234 of the Constitution of Kenya, 2010 by preferring an appeal to the Public Service Commission of Kenya. This fatality therefore disables the application and petition.

The respondents/objectors also sought to rely on paragraphs 9 and 11 of their Grounds of Objection to the extent that the orders sought in the application are not agreeable to those in the petition and also that prerogative orders cannot be granted in the manner sought in this petition. Again, the petitioner/applicant ought to have filed a statement of claim for relief sought and further, relief under order 53 of the Civil Procedure Rules requires leave of court to file. In the absence of compliance and based on the foregoing arguments, the respondents/objectors prayed that this application be struck out for non compliance with the law.

The petitioner/applicant opposed the objection. It is his submission that failure to issue a notice pursuant to section 13A aforecited is not fatal. In this he relied on the authority of **David Njenga Ngugi vs Attorney-General [2016] eKLR** where the court of appeal in allowing the appeal against striking out of the suit observed as follows;

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 judgement 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 follow –

“48.The State shall ensure access to justice for all person 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 Common wealth 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. Minster 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.

The petitioner/respondent further relied on the authority of **Kenya Agricultural Research Institute (K.A.R.I) vs Farah Ali, Chairman Isahakia Self Help Group & Another [2011] eKLR** where the court held that section 13A is not applicable in a situation where a declaration is sought. This is as follows;

The third limb of the objection is that **Section 13A of the Government Proceedings Act** was not complied with. In my view, it is only the Commissioner of Lands who could have raised that objection and who can confirm whether or not the required notice to the Attorney General was served 30 days prior to the filing of this suit. The 1st defendant is not privy to the notice. In any event, under **Section 13A (3)** there is no requirement for notice where a party is seeking a

declaratory order under Section 16(1) of the Government Proceedings Act is not couched in mandatory terms. It provides “that the court may”. A prayer for injunction is not fatal to the suit. Besides, the words used being persuasive, it should be left to the court to decide whether or not to grant the prayer sought. The plaintiff seeks a declaration in the main suit. I find the objection to have no basis. For the above reasons, I find that the objection raised has no basis and is hereby dismissed.

It is the petitioner/applicant’s further submission that Article 258 of the Constitution allows a litigant to approach a court in cases of a likelihood of breach of fundamental rights and freedoms. This is not inconsistent with Article 234 and further, section 77 of the County Government Act does not override the Constitution.

In all, the petitioner/applicant submits that this objection is not founded on law and amounts to an impediment to access to justice. This also contradicts Article 48 of the Constitution on access to justice and therefore should be overthrown.

On this, he seeks to rely on the authority of **M. Mwanessi vs Shirley Luckhust & Another, Civil Application No. NAI 170 OF 2000**, where the Court of Appeal held that;

“A Court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent a court of law us under a duty to exercise its inherent power to prevent injustice.....”

Let us now dwell onto an analysis of the issues relating to this application. From the onset, the respondents/objectors dub this a *preliminary objection*. Why would they not have originated a *preliminary objection* properly so called? Why would they wish to prompt a *preliminary objection* out of grounds of opposition with a backing of a replying affidavit? They only, can answer.

The Grounds of Objection the cornerstone of the *preliminary objection* come in objection to the main application: the application dated 13th November, 2017 serving as a forerunner to this petition. The results of the so called *preliminary objection* must therefore serve to diminish and determine the application and petition one way or the other.

An analysis of the respective cases of the parties tilts this in favour of the petitioner/respondent in the *preliminary objection* or the applicant in the application dated 13th November, 2017 aforesaid. This is because an analysis of the case delimits the objector’s core arguments in support of their case. These are the applicability of section 13A of the Government Proceedings Act and non compliance with the requisites of Order 53 of the Civil Procedure Rules in bringing out these proceedings. It is trite law and precedent that this reasoning and call for striking out of the suit on these grounds has no sound legal basis more so in a constitutional dispensation like we have dispelling access to justice, fair administrative action, fair labour practices and fair hearing as espoused under Articles 48, 47, 41 and 50 of the Constitution of Kenya, 2010.

Like was observed above, a determination of this application or objection comes out to determine this application and petition in one way or another. This is because at all times, the objectors intended and prayed that a determination for striking out be had such that the original application, (13th November, 2017), be struck out for non compliance with the law. On this footing, a dismissal of the *preliminary objection* or Grounds of Opposition comes out to sustain this application.

I am therefore inclined to dismiss the *preliminary objection* or grounds of opposition and by so doing uphold the application dated 13th November, 2017 with orders as follows;

- i. That an order be and is hereby issued restraining the respondents, by themselves, their agents, servants and/or employees from advertising, shortlisting, interviewing, recruiting and/or appointing any other person into the office of the Deputy Director, Administration, in charge of Government Offices pending hearing and determination of this petition.

ii. That a conservatory order be and is hereby issued to protect, preserve and or conserve the petitioner/applicant's status as the acting Deputy Director, Administration, in charge of Government Offices pending hearing and determination of this petition

v. The costs of this application shall be borne by the respondents.

Delivered, dated and signed this 11th day of December, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Nyamorongi instructed by Nyamurongi & Company Advocates for the petitioner/*respondent*/applicant.
2. Mr. Onsembe instructed by Kennedy C. Onsembe & Company Advocates for the respondents/*applicants*/objectors.