



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL CASE NO. E019 OF 2020**

**ROSALIA WANGUI.....1<sup>ST</sup> PLAINTIFF**

**ELMAX PETROLEUM LIMITED.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**NATIONAL POLICE SERVICE COMMISSION.....1<sup>ST</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**THE OCS WEBUYE WEIGH BRIDGE POLICE STATION....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The suit herein was filed by **Rosalia Wangui** and **Elmax Petroleum Limited** (hereafter the Plaintiffs) against the **National Police Service Commission**, the **Kenya National Highways Authority** and the **Officer Commanding Webuye Weighbridge Police Station** (hereafter the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> Defendants, respectively) following the alleged unlawful impounding of the 1<sup>st</sup> Plaintiff's vehicle registration number **KBS 664K**, prime mover by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 3<sup>rd</sup> July, 2020 at Malaba border while the said vehicle was ferrying goods from Mombasa to Tororo, Uganda. The Plaintiffs' interlocutory application was heard and determined by Serگون J. Subsequent to the ruling, the 2<sup>nd</sup> Defendant filed a preliminary objection dated 4<sup>th</sup> November, 2020, seeking the striking out of the suit, on grounds that suit was filed before satisfying the mandatory requirements of Section 67(a) of the Kenya Roads Act requiring the Plaintiffs to give written notice to the Director General of the 2<sup>nd</sup> Defendant.

2. Parties took directions to canvass the preliminary objection by way of written submissions and oral highlighting. The parties duly complied and thereafter highlighted the written submissions.

3. The 2<sup>nd</sup> Defendant's argument was that the suit before the court is incompetent and ought to be struck out, as the court has no jurisdiction to entertain it by dint of the fact the Plaintiffs filed the suit against the 2<sup>nd</sup> Defendant without complying with the mandatory requirements under section 67(a) of the Kenya Roads Act No. 2 of 2007. Counsel submitted that section 67(a) of the Kenya Roads Act is central to the competence of the suit and non-compliance therewith deprives the court of jurisdiction to entertain the matter. Counsel relied on celebrated case of **Owners of Motor Vessel Lillian (S) v Caltex Oil Kenya Limited (1989) KLR 1**; where the court espoused that jurisdiction is everything and without it the court cannot take one more step.

4. Counsel asserted that the 2<sup>nd</sup> Defendant only became aware of this dispute upon being served with pleadings, as the Plaintiffs did not serve the Director General with the requisite notice under Section 67 (a) of the Kenya Roads Act. Consequently, the 2<sup>nd</sup> Defendant was denied the opportunity to explore an out of court settlement. That the failure rendered the suit fatally defective. Several authorities were cited to buttress the arguments, including **Salome Mumbi Gachii & Another v Kenya National Highways Authority (KENHA) [2020] eKLR** wherein the court cited the case of **Michael Otieno Nyaguti & 5 Others v Kenya National Highways Authority (KENHA) [2015] eKLR**.

5. Counsel emphasized that the provisions of section 67(a) of the Kenya Road Act are couched in mandatory terms the underlying rationale being to afford parties an early opportunity to engage on a dispute before any cause is commenced. Reference was made to the decision in **Salome Mumbi Gachii** case and **Benson Ruiyi Njane v Kenya Rural Roads Authority & 36 Others [2016] eKLR**. Counsel submitted that a civil cause was not exempt from the requirement of notice and that the provisions of section 67(a) were not unconstitutional as urged by the Plaintiffs.

6. On behalf of the Plaintiffs, it was submitted that the jurisdiction of this court to handle this matter is not derived from section 67 (a) of the Kenya Roads Act as proposed by the 2<sup>nd</sup> Defendant but by the Constitution and relevant statutes. Reliance was placed on the decision in

**Owners of Motor Vessel Lillian (S) v Caltex Oil Kenya Limited (1989) KLR 1.** Counsel took the position that by virtue of the provisions of section 7 of the Sixth Schedule to the Constitution, all laws existing prior to the promulgation of the Constitution of Kenya, 2010 must be so construed as to bring them into conformity with the Constitution. Therefore, any imposition of the requirement for notice under a statute must be considered in light of the right to access to justice, as guaranteed by the Constitution. In counsel's view, a statutory provision that seeks to hinder any person's access to justice must be deemed to be inconsistent with Article 48 of the Constitution and held to be unconstitutional. He cited examples in commonwealth jurisdictions where the notice requirements have come under scrutiny or been repealed for similar reasons, inter alia.

7. Counsel relied on the pronouncement of the Court of Appeal in **Kenya Revenue Authority v Hebimana (2015) eKLR** and the High Court decisions in **Kenya Bus Services Ltd & Another v Minister for Transport & 2 Others [2012] eKLR** and **Mehta and Company Limited v Barclays Bank of Kenya Limited [2019] eKLR** on the constitutionality of statutory provisions that require notice prior to court action hence hindering access to justice. Counsel particularly emphasized the holding in the latter decision that section 13A of the Government Proceedings Act was inconsistent the provisions of Article 48 of the Constitution guaranteeing access to justice and urged the court to find that similarly in this case, section 67(a) of the Kenya Roads is inconsistent with the provisions of Article 48 of the Constitution and therefore unconstitutional.

8. His position was that the mandatory notice provisions of Section 67(a) of the Kenya Road Act cause hardship and an impediment to access to justice to the ordinary claimants such as the Plaintiffs herein. In his supplementary submissions counsel argued that the objection taken is not a pure point of law as the question whether the actions of the 2<sup>nd</sup> Defendant were taken under the Traffic Act or Kenya Roads Act. Citing inter alia the case of **Oraro v Mbaja (2005) 1 KLR 141** he argued that the preliminary objection ought to fail because it is not based on a pure point of law.

9. The court has considered the rival submissions by the parties and the record herein. The 2<sup>nd</sup> Respondent's preliminary objection (PO) is based on Section 67 (a) of the Kenya Roads Act which states:

**“67. Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect—**

**(a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the Plaintiff or his agent;”**

10. The court must determine whether in the circumstances of this case, the Preliminary Objection raised by the 2<sup>nd</sup> Respondent raises a pure point of law and whether the preliminary objection is well grounded. As to the nature of a preliminary objection, the law is settled. In **Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors (1969) EA 696, Law J. A.** stated:”

**“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 pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....**

**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 preliminary objections does nothing but unnecessarily increase costs and, or occasion, confuse the issues, and this improper practice should stop.”**

11. In the case of **Oraro v Mbaja (2005) KLR 141, Ojwang J** (as he then was) reiterated the foregoing by stating that:

**“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed.**

**Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”**

12. The issue concerning Plaintiffs' compliance with Section 67(a) of the Kenya Roads Act was raised by the 2<sup>nd</sup> Respondent at paragraph 17 of their Replying Affidavit filed in relation to the motion determined by **Sergon J** on 17<sup>th</sup> September, 2020. The deponent, **Kingsley Maina**, described as the Cluster Manager Webuye Weighbridge employed by AEA Ltd stated therein that: -

**“THAT I am advised by the Advocates on record that the suit before this court is an abuse of the court process as the mandatory notice of intention to sue provided under Section 67 of the Kenya Road Act has not been issued.”**

13. By their Supplementary Affidavit filed on 6<sup>th</sup> August, 2020, and sworn by **Rosalia Wangui Muriithi** (1<sup>st</sup> Plaintiff) the Plaintiffs

deposed in regard to the matter of the notice by stating at paragraph 15 as follows: -

**“THAT in response to the 2<sup>nd</sup> Respondent’s claim that the suit is premature for failure to issue notices, I have been informed by my Advocates on record..... that the same cannot dispose of a suit without a proper application that has to be considered and in whose absence the suit ought to be considered through a hearing of the merits, as submitted upon herein above.”** (sic)

Earlier, in their plaint filed on 14/7/2020 the Plaintiffs had averred at paragraph 4 that: -

**“The 2<sup>nd</sup> Defendant is a state corporation whose function is the management of Highways.”** (sic).

14. The remainder of the plaint contains a litany of averments against the 2<sup>nd</sup> Defendant and the 1<sup>st</sup> Defendant inter alia, all flowing from paragraph 12 which stated that: -

**“THAT on or about 3<sup>rd</sup> July, 2020 at Malaba border the 1<sup>st</sup> and 2<sup>nd</sup> Defendants unlawfully, maliciously and illegally impounded motor vehicle Registration number KBS 664K, PRIME MOVER which motor vehicle belongs to the 1<sup>st</sup> Plaintiff and was ferrying clinker, a product that is highly perishable, from Mombasa Kenya to Tororo, Uganda”** (sic).

15. The gist of paragraphs 15-22 is that the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants upon impounding the vehicle had illegally demanded payment of a sum of Kshs. 2,350,000/- on grounds that the vehicle had been overloaded on diverse dates between 28<sup>th</sup> November 2018 and 9<sup>th</sup> June, 2020. The reliefs sought in the plaint include injunctive orders against the three Defendants and damages. From these pleadings it is evidence that a cause of action is pleaded against the 2<sup>nd</sup> Defendant. The issue concerning notice on the second Defendant did not end with the respective affidavits of the parties, but was also actively canvassed in submissions before **Sergon J.** In his ruling paragraphs 25-27 Sergon J, tackled the issue and concluded at paragraph 27 that: -

**“With respect, I agree with the Plaintiffs that the issue raised by the 2<sup>nd</sup> Defendant is fundamental and may lead to the striking out of the suit, hence it has to be canvassed by way of a formal application so that the same can be determined on its merits. The issue can either be determined as a preliminary point at the trial or by way of a formal application.”**

16. The learned Judge, citing Section 17(1) of the East Africa Community Motor Vehicle Act observed that it was apparent from the Section that the **“2<sup>nd</sup> Defendants has jurisdiction to determine the overloads and the amount of overload fees payable”** and finally, that:

**“The issue which has to be determined at the trial is whether there were actual overloads by the Plaintiffs’ motor vehicle and if yes whether the same were properly calculated and whether the penalty imposed was lawful.”**

17. By their supplementary affidavit filed in respect of the earlier motion and main submissions to the preliminary objection, the Plaintiffs all but admit that no notice was served upon the 2<sup>nd</sup> Defendant’s Director General under Section 67 (a) of the Kenya Roads Act, the Plaintiffs taking the position that mandatory notice provisions are a legal anachronism that are an impediment to the right to access to justice and in many jurisdictions have been eliminated. Several examples were cited in this regard. Indeed, the Plaintiffs posited that the provisions of Section 67 (a) of the Kenya Roads Act cannot pass muster the constitutional test and must be declared unconstitutional. Thus, there was no dispute at any point as to the fact that the Plaintiffs did not serve notice on the 2<sup>nd</sup> Defendants prior to bringing the instant motion.

18. The court is not persuaded by the argument adopted by the Plaintiffs in their supplementary submissions to the effect that the impugned actions of the 2<sup>nd</sup> Defendant were based on the Traffic Act, and not the Kenya Roads Act and that such was a disputed matter to be determined through a trial, and hence the preliminary point is not a pure point of law. The short answer to this submission is that whether or not the second Defendant’s actions complained of by the Plaintiffs (as set out earlier in this ruling) were taken under the Traffic Act or the Kenya Roads Act, the Plaintiffs had filed a suit against the 2<sup>nd</sup> Defendant claiming that they acted illegally. The preamble to the Kenya Roads Act reads that it is: -

**“An Act of Parliament to provide for the establishment of the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority to provide for the powers and functions of the authorities and for connected purposes.”**

19. While Section 3 of the Kenya Roads Act establishes the Kenya National Highways Authority, Section 4 sets out the functions of the authority, which include ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act and under any regulations under the Act. The Plaintiffs’ argument therefore that the 2<sup>nd</sup> Defendant cannot place reliance on the provisions of the Kenya Roads Act requiring notice are difficult to understand. It is my considered view therefore that the preliminary point, at hand which is based on the admitted non-compliance with Section 67 (a) of the Kenya Roads Act is a pure point of law. And what the court is being called upon to determine is whether the non-compliance defeats this action.

20. In support of the preliminary objection the 2<sup>nd</sup> Defendant has cited several persuasive authorities in which similar objections based on non-compliance with the section were upheld by courts. In the case of **Michael Otieno Nyaguti & 5 Others V Kenya National Highways Authority & 5 Others [2015] eKLR** the court stated concerning the requirement for notice under Section 67(a) of the Kenya Roads Act that:

**“The court holds the view that the requirement of a notice being served on the Director General would not amount to**

hindering a litigant from accessing the seat of justice. It only creates an opportunity to the Director General's office of exploring an out of court settlement and is in line with the provisions of Article 159 of the Constitution which encourages alternative forms of dispute resolution. The provision of Section 67 of the Kenya Roads Act 2007 is not in contravention with the Constitution 2010".

21. For their part, the Plaintiffs have urged the court to find that the provisions of Section 67 (a) of the Kenya Roads Act are in *pari materia* with the provisions of Section 13A of the Government Proceedings Act and Section 3(2) of the Kenya Revenue Authority Act declared to be impediments to access to justice by the Court of Appeal in **Kenya Revenue Authority V Habimana Sued Hemed & Another (2015) eKLR**. That the Court of Appeal decision being binding on this court, the court ought to find by parity of reasoning that Section 67(a) of the Kenya Roads Act is a hindrance to access to justice and therefore inconsistent with Article 48 of the Constitution. This no doubt is an attractive argument even though this court is unable to locate the passage attributed to the Court of Appeal in *Habimana's* case and quoted in submissions, to the effect that **"Any statutory Provision that seeks to hinder a citizen from accessing court merely because a notice has to be served upon the two Defendants is undesirable for being illogical and unconstitutional."**

The Plaintiffs did not supply any of the authorities cited. Be that as it may, there is no dispute that Section 67 (a) of the Kenya Roads Act is couched in mandatory terms.

22. There are several distinguishing factors between *Habimana's* case and the instant one. First, the functions of the Kenya Revenue Authority are very distinct from those of the Kenya National Highways Authority. Secondly, in my reading of the *Habimana* case, the Court of appeal was dealing primarily with the fact that the appellant, Kenya Revenue Authority though not an organ of Government under the Government Proceedings Act appeared to **"hide behind the cloak of the Attorney General when accused of breaching the law or otherwise violating people's rights purely in order to take advantage of the 30 days statutory notice (in section 3(2) a) of the Kenya Revenue Act."**

23. The Court of Appeal agreed with the finding in the High Court that the issuance of the 40-day statutory notice to KRA before the institution of a suit was **"anti-business and oppressive"** before stating that: -

**"... we agree that due to the nature of work, and responsibilities bestowed on the appellant, and the immense discretion the commissioner of the appellant has, it is necessary that a party who finds itself on the wrong side of the appellant would be greatly prejudiced if they are shackled from accessing justice for a minimum of 30 days."**

24. The court then proceeded to give the rationale behind Section 13A of the Government Proceedings Act behind which the Kenya Revenue Authority had apparently sheltered but did not declare it unconstitutional. The court however agreed with the finding of the High Court that Section 70 of the Finance Act 1998 was unconstitutional. What I understand to be the thrust of this decision is that the Kenya Revenue Authority being a corporate body could not seek refuge in Section 3(2) (a) of the Kenya Revenue Authority Act and therefore section 13 A of the Government Proceedings Act against claims arising from its actions, not being a government organ and to that extent the former Section, not Section 13A of the Government Proceedings Act was oppressive and unconstitutional. Thus, the Kenya Revenue Authority could not derive any refuge from the said provision. The *Habimana* decision therefore cannot be applied in broad strokes to the present matter as has been proposed by the Plaintiffs.

25. Fortuitously, the appeal arising from the decision of *Kibunja J* in **Michael Otieno Nyaguti** was recently determined by the Court of Appeal in **Michael Otieno Nyaguti & 2 Others V Kenya National Highways Authority [2021] eKLR**. The appeal specifically deals with the provisions of Section 67(a) of the Kenya Roads Act and the effect of non-compliance therewith. In that appeal the Appellants raised primarily similar arguments as raised by the Plaintiffs herein and relied on the *Habimana* case, among others. Having set out the principles that guide the Court on the threshold for sustaining a preliminary objection, the Court of Appeal set out the provisions of Section 67(a) of the Kenya Roads Act and pronounced itself on the requirement of notice. I find it useful to quote *in extenso* the rendition of the court's opinion on the section. The Court observed that:

**"Our construction of the above provision leaves no doubt in our mind that it is couched in mandatory terms as contended by the respondent. The Act is an Act of Parliament. It therefore has the force of law. The P.O on noncompliance with this provision is, therefore, on a pure point of law as there is no other way of addressing the respondent's, P.O other than by way of construction and application of section 67(a) of the Act as construed and applied by the learned Judge at the trial and now by us on appeal which we have done and are satisfied as did the learned Judge that item 1 of the respondent's P.O was on a pure point of law and fell for merit consideration before the learned judge as such..."**

Element/ingredient (iii) was also satisfied that is why appellants petition was struck out upon the trial court sustaining the P.O. It is the same position obtaining before this Court because once the trial courts order sustaining the P.O is affirmed, the appeal will stand dismissed.

Element/ingredient (iv) was also satisfied because facts as pleaded by appellants and on the basis of which they sought the Court's intervention to redress their grievances made no mention of any action taken by them to issue notice of intention to sue the respondent as provided for in section 67(a) of the Act. None was pointed out to the learned trial Judge. Neither has any been drawn to our attention by appellants in their submissions. What we have on record is what the learned trial Judge alluded to in the impugned ruling that appellants had in their submissions before the trial court mentioned that they had served the requisite notice by email which they failed to avail to the trial court. Neither has any been pointed out to us on appeal...

The learned trial Judge agreed with respondent's assertion not only that there was contest as to whether the demolitions and evictions had been carried out and if so how much but whether appellants had complied with the statutory requirement stipulated in section 67(a) before seeking the Court's redress. Finding none, vitiated the petition. This is the same parameter that we have been invited by appellants to vitiate and the respondent to affirm. Being a mandatory provision of law, there is

no way the learned Judge can be faulted in the conclusion reached when sustaining this element/ingredient of the P.O. The trial court also rightly held a position we affirm on appeal that the P.O left no room for exercise of discretion by the trial court and now us on appeal. Once upheld, the trial court had no discretion to sustain the suit. Likewise, as we have already alluded to above when dealing with element/ingredient (iii), that, if the conclusions reached by the trial court are affirmed, the appeal will stand dismissed is the correct position in our view.

**In light of the totality of the above assessment and reasoning, it is our finding that the trial court's finding and reasoning as to why the P.O was sustained were well founded both on law and facts as demonstrated above. They are accordingly affirmed. The appeal is, therefore, without merit and is accordingly dismissed with costs to the respondent."**

26. The above decision is precisely on point and directly applies to the preliminary objection raised in this case on the basis of non-compliance with section 67(a) of the Kenya Roads Act. The Plaintiffs herein were obligated under the provisions of Section 67(a) of the Kenya Roads Act to serve notice on the Director General of the 2<sup>nd</sup> Defendant prior to filing the instant suit but did not do so. Their suit must suffer the fate prescribed by the Court of Appeal in **Michael Otieno Nyaguti's** case. In the premises this Court upholds the preliminary objection and hereby strikes out the Plaintiff's suit as against the 2<sup>nd</sup> Defendant, with costs.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 27<sup>TH</sup> DAY OF MAY 2021.**

**C. MEOLI**

**JUDGE**

**In the Presence of:**

**For the Plaintiffs: Mrs Nyangoro h/b for Mr. Okatch**

**For the Defendants: N/A**

**Court Assistant: Carol**