



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

PETITION NO. 3 OF 2019

SPACE GEO ENTERPRISES LIMITED.....PETITIONER

VERSUS

KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT

R U L I N G

A. Introduction

1. This is a ruling on the preliminary objection dated 6th May 2019 to which the parties agreed to dispose it by way of written submissions. The submissions were duly filed by the counsels on record for parties.
2. The petitioner filed a petition dated 29th April 2019 in which it prays for orders of upholding its economic and property rights as well as the right to fair, expedient and just administrative action against the decision by the respondent to ground its truck by removing the registration plates and insurance sticker. The petitioner also sought general damages for loss of income.
3. A notice of motion dated 29/04/2019 was filed to together with the petition seeking for orders for release of the vehicle sticker and the number plates of vehicle registration number KBH 022 Y. It also sought for restraining orders against the respondent from acting arbitrary in respect to the petitioner's motor vehicle.
4. The respondent filed a preliminary objection dated 6th May 2019 on the grounds that the petition failed to comply with Section 67 of the Kenya Roads Act and that the petition had been filed without due authority form the petitioner as there was no valid resolution of the petitioner appointing the advocates on record on its behalf.

B. Respondent's Submissions

5. It is the respondent's submission that the suit on behalf of the petitioner was instituted without authority of its decision organs that is to say, as its board of directors. The respondent relies on the case of **Kenya Commercial Bank Limited v Stage Coach Management Ltd [2014] eKLR** where Justice Havelock stated that the secretary of the company cannot institute proceedings in the name of the company in the absence of express authority to do so. He however observed that proceedings started without proper authority may subsequently be ratified. In the case of **East African Safari Air Limited v Anthony Ambaka Kegode & Another [2011] eKLR** where the court stressed the need for an advocate acting for a company to get the necessary authorisations to do so. This case was also relied on by the respondent.
6. The respondent further submitted that such authority was mandatory and relied on the case of **East African Portland Cement Ltd v Capital Markets Authority & 4 Others [2014] eKLR** where the court held in dismissing the suit that where an advocate brought legal proceedings without the authority of the purported plaintiff the applicant becomes legally liable to the defendants for the costs of the action.
7. The respondent further submitted that the petition is fatally defective for failing to comply with the mandatory provisions of Section 67 (a) of the Kenya Roads Act that require notice served on the Director General of the respondent prior to institution of a suit. It relies on the cases of **Sumac Development Company Limited v George Munyui Kigathi & 2 Others [2017] eKLR** and that of **Michael Otieno Nyaguti & 5 Others v Kenya National Highways Authority & 5 Others [2015] eKLR** that emphasises the importance of the notice to the Director General of the respondent prior to institution of a suit.

C. Petitioner's Submissions

8. The petitioner submits that their case seeks the enforcement of fundamental rights enshrined in the Constitution and was thus not required to issue any notice to the respondent before filing their suit.

9. Further, it is its submission that there is no requirement that the resolution of a company be filed together with the petition and that the same can be filed subsequently so long as the matter has not been heard. The case of **Leo Investments Ltd v Trident Insurance Company Ltd [2018] eKLR** and that of **Republic v Registrar General & Others [2005] eKLR** in which the court in both occasions held that the failure to file a resolution of a corporation together with the pleadings did not invalidate the suit as the same may be filed any time before the suit is fixed for hearing was cited.

10. It is the petitioner's submission that the respondent's preliminary objection lacks merit as it raises issues of law and facts contrary to the holding in the case of **Mukisa Biscuit Manufacturing Company Limited v West End Distributors Limited [1969] EA 696** that held that a preliminary objection should raise pure points of law.

D. The Determination

11. The court has duly considered the preliminary objection and the rival arguments advanced by the counsels for the respective parties.

12. The essence of a preliminary objection was given by law JA Old Sir Charles Newbold P, in the case of **Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors (1969) E. A. 696** at page 700 law JA Stated: -

“ 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 may dispose of the suit, Examples are on objection to the jurisdiction of the court or 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”.

13. Sir Charles Newbold P. added as follows page 701: -

“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 facts are to be ascertained or if what is sought is the exercise of judicial discretion”.

14. The preliminary objection herein has two limbs and is based on the provision of section 67 (a) (b) of Kenya Roads Act, 2007. The first limb is on failure to issue a 30 days' notice as required under section 67 (a) whilst the second one is on statutory limitation.

15. Section 67 of the Kenya Roads Act, 2007 provides that:

“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-”

16. Sub-paragraph (a) thereof provides:

“.....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”

17. I have considered the provisions of section 67 (a) of the Kenya Roads Act. The word used therein is **SHALL** which therefore means that it is mandatory for any party wishing to institute proceedings against Kenya National Highway Authority to give at least thirty (30) days' notice. It is the Authority's submission that the essence of the notice being served is to give the Authority an opportunity to deal with the issues raised and resolve them in an amicable and appropriate manner. The Respondent submitted that the said notice is a must as the same is couched in mandatory terms.

18. It was submitted by the respondent relying on the case of **Sumac Development Company Limited** that the compliance with Section 67(a) was mandatory in all proceedings. The court held: -

“I have considered the provisions of section 67 (a). The word used therein is SHALL which therefore means that it is mandatory for any party wishing to institute proceedings against Kenya National Highway Authority to give at least 30 days' notice.”

19. The respondent also cited the decision of **Michael Otieno Nyaguti & 5 others (supra)** where the court held that the service of the notice upon the authority was mandatory.

20. On its part the petitioner submitted that the substratum of its petition is violation of the petitioner's economic and property rights as well as its right to fair, expedient and just administrative action.

21. The petition is brought under **Article 22 of the Constitution** which provides that: -

Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

22. The petition alleges violation of rights under Articles 40 and 47 which is part of the Bill of Rights in Chapter Four of the Constitution.

23. It is important to look at the rules guiding the filing and hearing of constitutional petitions. **Rule 4 (1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (hereinafter the ‘Mutunga Rules’) provides that: -

“Where any right or fundamental freedom provided for in the Constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.”

24. **Rule 10 (1)** thereof provides that: -

“An application under rule 4 shall be made by way of a PETITION as set out in Form A in the Schedule with such alterations as may be necessary.”

25. The Rules do not have a requirement of giving statutory notice to a respondent before filing a petition as alleged in the notice of preliminary objection. In the case of **ANTHONY NGILI MUNGUTI & 12 OTHERS VS. KENYA NATIONAL HIGHWAYS AUTHORITY & ANOTHER [2017] eKLR** where the Court was faced with similar issues. The respondent raised a notice of preliminary objection grounded on **Section 67(a) of the Kenya Roads Act**. Justice E. K. O. Ogola made the following findings which I agree with entirely:

“A fundamental right guaranteed by the Constitution cannot be taken away on the basis that demand notice stating intention to sue was not issued. It is the finding of this court that such a right is so supremely protected, that even a verbal notice such as for example, “Hey, this is our home, do not demolish it” is valid enough to stop the respondent on its track. Such a right cannot be defeated by statutory provision. It is the finding of the court that a constitutional provision on access to justice supersedes any statutory powers limiting enforcement of constitutional rights.”

26. In the case of **BENSON RUIYI NJANE VS. KENYA RURAL ROADS AUTHORITY & 36 OTHERS [2016] eKLR** the Court had a chance of addressing issues raised in a notice of preliminary objection under Section 67 of the Kenya Roads Act. The Court made the following imperative findings:

“The limitation set out in Section 67 of the Roads requiring notice of thirty days to the Authority before instituting suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. The Respondents’ claim to the contrary is not borne out by the Constitution, and that leg of defence therefore fails.”

27. Having reviewed the law including case law, it is my view that the requirement of notice under **Section 67 of the Kenya Roads Act** does not apply to petitions or applications brought under the Bill of Rights.

28. The second limb of the preliminary objection is that the petition does not satisfy the requirement of commencement of suits as the counsel on behalf of the petitioner did not file a formal resolution authorising the filing of the instant petition.

29. It is trite law that a company can only sue in its own name with the sanction of its Board of Directors or by a resolution in a general or special meeting. It is during such meetings that authority is given to a law firm to institute a case on its behalf. On the issue whether or not the suit is defective, it was contended that there was no authority given by the petitioner company authorizing the institution of these proceedings.

30. **Order 4 rule 1(4) of the Civil Procedure Rules** provides: -

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

31. The petitioner filed a further affidavit explaining how the firm of Muyodi & Co. was instructed by the petitioner and how the resolution or authority was obtained. The relevant authority/ resolution were annexed to the affidavit. These facts on oath were not controverted.

32. Clearly from the foregoing provision, nowhere is it required that the authority given to the counsels instituting suit be filed. Of course, if a suit is filed without a resolution of a corporation, it may attract some consequences. The mere failure to file the same with the plaint does not invalidate the suit.

33. In **Leo Investments Ltd vs Trident Insurance Co. Ltd (2014) eKLR** and **Republic vs Registrar General and 13 Others (2015) eKLR**, Odunga J and Kimaru J respectively rendered that the legal position is that a resolution of the Board of Directors of a company may be filed at any time before the suit is fixed for hearing. This is the same position by the Court of Appeal in **East Africa Safari Air Ltd -vs- Antony Ambaka Kegodre & Another (2011) eKLR** where the Court reversed the decision of the High Court to of striking out the suit instead of giving the appellant the opportunity to demonstrate that the appointment of its advocates, even if irregular at the beginning, had been regularized.

34. It is therefore established by case law that proceedings can be ratified after filing a case in a meeting of the shareholders or by authority

of the Board. This means that failure to file the authority together with the petition cannot lead to nullification of the proceedings.

35. Having considered all the issues raised, I find that the preliminary objection lacks merit and is hereby dismissed.

36. Costs in the cause.

37. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 24TH DAY OF JUNE, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Mr. Okwaro for the Petitioner