



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITUI

ELC APPEAL NO.38 OF 2021

PETER KITHEKA.....1ST PLAINTIFF

JANE NDUMI PHILIP.....2ND PLAINTIFF

RAVELA PALMS GARDENS LIMITED.....3RD PLAINTIFF

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST DEFENDANT

NATIONAL LAND COMMISSION.....2ND DEFENDANT

THE COUNTY GOVERNMENT OF KITUI.....3RD DEFENDANT

SINOHYDRO CORPORATION LIMITED.....4TH DEFENDANT

KENYA POWER & LIGHTING PLC.....5TH DEFENDANT

RULING

1. This ruling relates to a Notice of Preliminary Objection dated 17th February 2021 by the 1st Defendant against the Plaintiff's Notice of Motion Application dated 17th February 2021 and the entire suit on grounds that:

1. The Applicant's Application and suit as a whole is fatally defective as it does not comply with the mandatory provisions of Section 67 of the Kenya Roads Act, 2007 requiring thirty (30) days' notice to the Director General prior to filing of a suit.

2. The background to the suit and Preliminary Objection is that the Plaintiff filed a suit against the Defendants on 11th February 2021 claiming that the Defendants have identified and published in the Gazette the Plaintiffs' properties for purposes of compulsory acquisition in order to pave way for the construction of the **Kibwezi-Mutomo-Kitui-Kabati-Migwani(A9/B64) Road** and that the amount that the Defendants have valued their properties **Kyangwithya/Tungutu/2191, Kyangwithya/Tungutu/2268** is way below the actual value of the properties. They therefore seek an injunction to prevent the Defendants from interfering with their properties, a declaration that the decision by the Defendants to forcefully gain access and to demolish or interfere with the properties without compensation is illegal, null and void and in the alternative special and general damages on the value of the land and the development costs therein.

3. The Plaintiffs also filed a Notice of Motion Application under Certificate of Urgency dated 10th February 2021 seeking orders of injunction pending hearing and determination of the suit restraining the Defendants from demolishing structures and buildings in, accessing and trespassing into Parcel of Lands known as Kyangwithya/Tungutu/2191, Kyangwithya/Tungutu/2268 and Kyangwithya/Kaveta/1403 or in any other way whatsoever interfering with the Plaintiffs' right and interest in the suit properties.

4. The 1st Defendant filed a Notice of Preliminary Objection against the above application and the entire suit which the Court saw it prudent to address before proceeding with the hearing of the Application.

5. Only the Plaintiff and the 1st Defendant have filed their respective submissions to the Preliminary Objection.

1st Defendant's Submissions

6. The 1st Defendant prays that the Plaintiff's suit be dismissed with costs for failure to comply with the mandatory provisions of Section 67 of the Kenya Roads Act 2007 by failure to serve the Director General of the 1st Defendant with one month's notice outlining his grievances for redress as provided for by the Act. The 1st Defendant submits that Section 67(a) is couched in mandatory terms and relied on the case of **Sumac Development Company Limited v. George Munyui Kigathi & 2 others (2017) Eklr** where the court found that the word SHALL as used in Section 67 (a) of the Act means that it is mandatory for any party wishing to institute proceedings against Kenya National Highway Authority to give at least 30 days' notice.

7. The 1st Defendant further submitted that the Plaintiffs have failed to demonstrate that they served the 1st Defendant with the thirty (30) days' notice before institution of the suit and that one cannot fault rules of procedure then take refuge under Article 159(2)(d) of the Constitution while citing the case of **Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others (2013) eKLR** and **Charles Kamuren v Grace Jellagat Kipchoi & 2 others (2013) eKLR**.

8. In **Boru Dika v Gulsan Insaat, Turizm & Another (2018)** which the 1st Defendant also relied on, the Court held that Section 67(a) is still valid as it has not been declared unconstitutional. The 1st Defendant submitted that the notice only created an opportunity to the Director General's office for exploring an out of court settlement and is in line with Article 159 of the Constitution. The 1st Defendant also quoted the cases of **Simonash Investment Limited v Kenya National Highway Authority & 2 others (2019) eKLR** and **Alphonse Mbinda Musyoki & Another v Kenya National Highways Authority (2018)** where in both cases the court held the similar view that the requirement in Section 67 of the Kenya Roads Act was not optional.

The Plaintiffs' Replying Affidavit and Submissions

9. The 1st Plaintiff filed a Replying Affidavit stating that the Preliminary Objection is not competent as it is based on contested issues of facts contrary to the renowned holding in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696** and also **Nitin Properties Ltd v. Sing Kalsi & Another (1995) eKLR**. It is the Plaintiff's averment that they actually gave notice to the 1st Defendant on their intention to file a suit by a letter dated 4th September 2020, which was sent via email and they have attached a copy of the said letter to their Replying Affidavit and an email sent to all the Defendants herein.

10. Further, the 1st Plaintiff stated that by a letter dated 7th January 2021, they gave notice to the relevant state agencies which coordinate with the 1st Defendant in respect of compensation and attached a copy of the letter.

11. They submit that breach of Section 67 is not necessarily fatal because in view of the urgency of the matter it would amount to a violation of a constitutional right to access justice if the Plaintiffs were to wait for lapse of 30 days before they could approach the court as they watch their development being demolished. On this they quoted the case of **Priscilla Ndunge Kiilu v. Machakos County Government & 2 others (2021) eKLR** where the court held that it would be an impediment to access to justice if the Plaintiffs were to give the 30 days notice and wait and; **Pius Mutuku Mueke v Managing Director Kenya Broadcasting Corporation & Another** where the court was of the view that failure to give the 30 days Statutory Notice does not render the case a nonstarter. The Plaintiffs therefore submit that the Preliminary Objection cannot be sustained because it is based on contested facts and secondly because failure to issue the notice under Section 67 of the Kenya Roads Act does not render the suit fatally defective.

Analysis and determination

12. After considering all the documents and records in issue, I am of the opinion that the following issues arise for determination:

- A. Whether the Preliminary Objection is based on a point of law or a point of fact
- B. Whether the Preliminary Objection should be upheld.

A. Whether the Preliminary Objection is based on a point of law or a point of fact

13. The test of the true definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696**.

"So far as I'm 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 may dispose of the suit." *See also Sir Charles Newbold, P*, in the same case wherein he expressed himself 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 Court went on to state that:

"We have given due consideration to the above expositions. In our view, the following are elements/ingredients for sustaining a preliminary objection:

- i) It must be a pure point of law;**

ii) It must have been pleaded. Alternatively, it may also arise by clear implication out of pleadings if not specifically pleaded;

iii) If argued as a pure point of law, it may dispose of the suit;

iv) It must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the Court's discretion."

14. In my view, the Preliminary Objection relates to a statutory provision which could very well dismiss the entire suit if found to be of merit, therefore to that extent the PO meets the criteria in the case of **Mukisa Biscuit** above. However, the question to be determined by the Court is whether the PO meets the criteria of the assumption that **all facts pleaded by the opposite party are correct. In this case the 1st Defendant claims that notice under Section 6 of the Kenya Roads Act was not issued while the Plaintiffs claim that the said notice was indeed issued.**

15. The court in **Kalpna Rawal & 2 Others v Judicial Service Commission & 6 Others [2016] eKLR** the Supreme Court stated that a checklist approach to the test as to whether a matter merited and fell under the Mukisa Biscuits case was not in consonant with the spirit and letter of the Constitution. The court then proceeded to state that where the Preliminary Objection raised a "fundamental issue" (per Mutunga CJ) then as a matter of good order it was appropriate to have the issue settled first even if there were apparent factual conflicts.

16. In the Courts view the matter that the 1st Defendant has raised is a fundamental issue to the case as it will decide whether the suit is to proceed or not as against the 1st Defendant. The issue of notice is a legal provision and therefore the Preliminary Objection is based on a point of law.

B. Whether the Preliminary Objection should be upheld.

17. Section 67 of the Kenya Roads Act No.2 of 2007 on Limitation of actions states as follows:

"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; and

(b) such action or legal proceedings shall be instituted 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.

18. It is the Courts view that the Plaintiffs have by way of their replying affidavit satisfied the requirement of Section 67 of the Kenya Roads Act. The Plaintiffs attached to the said replying affidavit a noticedated 4th September 2020, addressed to the 1st, 2nd, 3rd and 4th Defendants issued by the law firm of E. K. Mutua & Co. Advocates headed as "KIBWEZI-MUTOMO-KITUI-KABATI-MIGWANI (A9/B64) ROAD PROJECT TITLE NUMBER KYANGWITHIA /TUNGUTU/2268, KYANGWITHIA /TUNGUTU/1403KYANGWITHIA /TUNGUTU/2191. In my view the said notice contains particulars of the Plaintiffs claim and of intention to commence the action herein or legal proceedings. The Plaintiffs have also attached a copy of the email forwarding the said notice. The 1st Defendant did not deny existence or receipt of the notice and the same is thus confirmed as having been issued to the 1st Defendant and received as stated in the replying affidavit. It is further noted that the suit herein was filed on 11th February 2021 which is a period of more than the 30 days provided for under Section 6 of the Kenya Roads Act.

19. In conclusion, I find that the Plaintiffs have complied with the provisions of Section 67 of the Kenya Roads Act by serving the Defendants with notice of intention to sue therefore the Preliminary Objection dated 17th February 2021 lacks merit and the same is hereby dismissed with costs to the Plaintiffs.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22nd DAY OF MARCH, 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and online in the presence of-

Stellamarris.....Court Assistant

Kioko holding brief for Mutua Advocatefor the Plaintiffs/Respondents

Alogo Advocatefor the 1st Defendant

N/A.....for the 2nd Defendant

N/A.....for the 3rd Defendant

N/A.....for the 4th Defendant

N/A.....for the 5th Defendant