



**Mbochi (Suing on behalf of the Rigaki Community Based Organisation)  
v China- Wuyi Company Limited & 2 others (Environment & Land  
Case 112 of 2020) [2022] KEELC 30 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 30 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE 112 OF 2020**

**JG KEMEL, J  
APRIL 28, 2022**

**BETWEEN**

**PAUL WANDATI MBOCHI ..... PLAINTIFF  
SUING ON BEHALF OF THE RIGAKI COMMUNITY BASED ORGANISATION**

**AND**

**CHINA- WUYI COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT  
KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2<sup>ND</sup> DEFENDANT  
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3<sup>RD</sup>  
DEFENDANT**

**RULING**

1. The Plaintiff filed suit on his own behalf and on behalf of the Rigaki Community Based organization against the Defendants on the November 17, 2020 seeking interalia declaratory orders that their land rights over the property described as Limuru/Rironi/461 have been violated; an order for restoration of the land to its original status; damages for trespass and compensation for illegal and compulsory acquisition of the land by the 2<sup>nd</sup> Defendant.
2. It was their case that they are the beneficial owners of the suit land and that the 1<sup>st</sup> Defendant while carrying out road construction on behalf of the 2<sup>nd</sup> Defendant have trespassed onto the suit land and dumped debris and soils thus depriving them of their use, occupation and enjoyment of their land.



3. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants have denied the Plaintiffs claims vide their statements of defences filed on record. In addition, the 2<sup>nd</sup> Defendant filed a Preliminary Objection dated the 19/1/2021 in the following terms;

“The Plaintiff’s suit as a whole is fatally defective as it does not comply with the mandatory of section 67(a) of the Kenya Roads Act requiring 30 days’ notice to the Director General prior to filing of a suit.’

4. In response the Plaintiff vide a Replying Affidavit sworn on the November 17, 2021 deposed that the 2<sup>nd</sup> Defendant was duly served with the requisite notice in 2017. That on 26/9/17 he approached the 2<sup>nd</sup> Defendant with the aim of resolving the matter out of Court and he was advised by the 2<sup>nd</sup> Defendant’s officer namely Amos Nyaenga to file a Grievances and Resolution form which he duly filled on the even date. That seeing as there was no response he caused a demand letter to be sent to the 2<sup>nd</sup> Defendant dated the 6/10/2017 by his lawyers for which he received no response. That thereafter he was promised that the matter would be settled in vain hence the filing of the suit.

5. On the October 14, 2021 the Court directed the Preliminary Objection to be canvassed by way of written submissions. The Plaintiff filed written submissions on the November 17, 2021 while the 1<sup>st</sup> Defendant complied through the firm of Muthoga & Omari Company Advocates on even date. The 2<sup>nd</sup> Defendant filed written submissions through its learned inhouse Counsel Ms Merlene Alogo on the November 23, 2021.

6. The Plaintiff submitted and urged the Court to dismiss the objection on the grounds that the provisions of Section 67(a) of the Kenya Roads Act were complied through the filing of the grievance and resolution form dated the 26/9/17 as well as the demand letter dated the 6/10/2017 as well as several verbal undertakings from the 2<sup>nd</sup> Defendants officers that the matter would be resolved. The Plaintiff relied on the persuasive decisions of this Court in; *Charles Wahome Kiboi v Kenya National Highways & anor* [2020] eKLR as well as the case of *AECOM ROA (PTY) Limited v Kenya National Highways Authority* [2019] eKLR where the Court sitting separately rejected the Preliminary Objection on the grounds that the Authority had been notified of the objector’s grievance and dispute in writing before the filing of the suit.

7. The 1<sup>st</sup> Defendant in its submissions urged the Court to disallow the Preliminary Objection on the grounds that the 2<sup>nd</sup> Defendant was duly notified of the dispute 3 years before filing the suit and that the provisions of section 67 (a) of the Kenya Roads Act have been improperly invoked.

8. The 2<sup>nd</sup> Defendant while urging the Court to allow its Preliminary Objection stated that the Plaintiff failed to comply with the mandatory provisions of section 67 (a) of the Kenya Roads Act. That the suit was filed without notifying the 2<sup>nd</sup> Defendant of the grievance for redress as outlined in the Act. That the essence of the notice is to give the Authority the opportunity to resolve the matter amicably.

9. Citing Section 107 of the Evidence Act, the 2<sup>nd</sup> Defendant stated that the Plaintiff has failed to demonstrate that it served the 2<sup>nd</sup> Defendant with the 30 days notice before instituting the suit. That the alleged demand notices were not served upon the 2<sup>nd</sup> Defendant nor do they conform to the requirements set out in section 67(a) of the Kenya Roads Act. The 2<sup>nd</sup> Defendant relied on the case of *Charles Kamuran Vs Grace Jelagat Kipchoim & 2 others* (2013) eKLR where the Court stated as follows;

‘this court rejects the invitation by the petitioners counsel to hold that by dint of the provisions of Art 159 (2) (d) of the Constitution which requires that justice be administered without undue regard to



procedural technicalities failure to serve the petition within the statutory period ought to have been treated as a procedural lapse and extend time of service as sought’.

10. Further the 2<sup>nd</sup> Defendant submitted that section 67(a) of the *Kenya Roads Act* enables it to carry out its mandate efficiently and effectively. See the case of *Boru Dika v Gulsan Insaat Turizm & anor* [2018] eKLR.
11. The Court has carefully considered the pleadings herein and the annexures and will now deal with the Preliminary Objection.
12. In the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696 as follows;

“ 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 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.”

At page 701 Sir Charles Newbold, P added:

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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...”

13. Section 67 of the *Kenya Roads Act* which forms the basis of the objection 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—
14. One of the characteristics of a Preliminary Objection is that it should be capable of disposing the matter at the preliminary stage without the Court having to ascertain the facts from elsewhere apart from looking at the pleadings. See the case of *Quick Enterprises Limited v Kenya Railways Corporation* HCC No 22 of 1999. Secondly a Preliminary Objection cannot succeed if the Court shall be called upon to exercise its discretion.
15. The provisions of Section 67(a) of the *Kenya Roads Act* are couched in mandatory terms. Where the provision has been contravened then the suit shall be held to have been instituted contrary to the said law and is capable of being struck out thus halting it and therefore bringing it to its eventual death.
16. It is the case of the 2<sup>nd</sup> Defendant that the Plaintiff instituted the suit before notifying the Authority as set out in section 67(a) of the said Act. According to the said provisions of the Act, the legal proceedings shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and intention to commence the action or legal proceedings has been served upon the Director General by the Plaintiff or its agent.
17. The Plaintiff has pointed the Court to two documents in support of his position that he complied with the law. The first one is the Grievance and Resolution Form that is partially completed. I say partially because though the applicant has filled it while the part of the Authority remains blank. There



is therefore no evidence that the Authority participated in the same. The second document relied by the Plaintiff is the letter dated the 6/10/2017 addressed to the Kenya National Highways Authority demanding the restoration of the suit land to its original position prior to the acts of trespass and pay damages for the trespass. My reading of this letter leads me to form an opinion that the Plaintiff has given the particulars of the claim but the intention to file suit was not manifested on the face of it. Just like the 1<sup>st</sup> document, the Plaintiff has not shown any evidence that the said letter was served upon the 2<sup>nd</sup> Defendant.

18. Section 107 of the *Evidence Act* provides as follows;

‘Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

19. It therefore follows that the Plaintiff had a duty to demonstrate that the demand letter was served upon the 2<sup>nd</sup> Defendant. In the absence of service, which has been denied by the 2<sup>nd</sup> Defendant, there is a presumption that it was not served. At least no evidence has been placed before the Court to show that service of the notice was effected upon the 2<sup>nd</sup> Defendant.

20. The Court has considered the authorities cited by the Plaintiff and find that in the *Charles Wabome Kiboi case* the Court made a finding that the Authority was duly served with the notice and therefore they were estopped from claiming otherwise. In this case there is no evidence that the Plaintiff commenced suit at least one month after written notice has been served upon the Director General of the 2<sup>nd</sup> Defendant.

21. In the upshot the Preliminary Objection is merited. It is upheld with the consequence that the suit herein is struck off with costs payable by the Plaintiff.

22. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 28<sup>TH</sup> DAY OF APRIL 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Plaintiff present in person (present online but not audible)

Mrs. Mureithi for 1<sup>st</sup> Defendant.

Ms Alogo for 2<sup>nd</sup> Defendant

3<sup>rd</sup> Defendant: Absent

Court Assistant: Phyllis

