



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT THIKA

ELC NO 113 OF 2020

ANTHONY NJOROGE KAMAU.....PLAINTIFF

VERSUS

CHINA WU-YI COMPANY LIMITED.....1ST DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND DEFENDANT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....3RD DEFENDANT

RULING

1. On the 17/10/2020 the Plaintiff filed suit against the Defendants claiming inter alia a declaration that the Defendants have violated the Plaintiff's right to use and ownership of the suit land by their illegal occupation and use of the land; restoration of the land to its original condition; compensation by an award of damages for illegal occupation and use of the land as well as a compensatory award for illegal and unprocedural compulsory acquisition of the land by the 2nd Defendant.
2. Denying the Plaintiff's claim, the 1st Defendant contended that the Plaintiff leased a third party's property for purposes of dumping soil and debris from the project site and therefore denied the allegation of trespass and put the Plaintiff to strict proof.
3. The 2nd Defendant denied the Plaintiff's claims and averred that the allegations are baseless. It denied the allegations that it dumped soil and debris from the construction project to the suit land and construction of a permanent drainage system through and into the suit land.
4. On the 9/9/2021 the 2nd Defendant raised a Preliminary Objection in the following grounds; the Plaintiff's suit as a whole is fatally defective as it does not comply with the mandatory provisions of Section 67 (a) of the Kenya Roads Act, 2007 requiring thirty (30) days' notice to the Director General prior to filing of a suit,
5. In opposing the Preliminary Objection, the Plaintiff contended in his grounds of opposition filed on the 17/11/2021 that the Preliminary Objection is improper and there is no pure point of law raised. That there exist disputed facts that require tendering of facts and evidence for ascertainment. It was his case that he has complied with Section 67 (a) of the Kenya Roads Act 2007 through the demand letter dated the 15/9/2020. He faulted the 2nd Defendant for delaying the hearing of the matter and urged the Court to dismiss it with costs.
6. On the 14/10/2021 the Parties elected to canvass the Preliminary Objection by way of written submissions. I have read and considered the submissions on record.
7. For the record the 1st Defendant supported the Preliminary Objection and in its opinion, the 2nd Defendant was served with the relevant notice. The 1st Defendant made reference to the Plaintiff's letter dated the 15/9/2020 as appropriate notice. The Plaintiff's position is that the said letter was served upon the 2nd Defendant and that the case was filed 30 days later.
8. The 2nd Defendant maintains that the Plaintiff filed his suit without serving the Director General with one month's notice as outlined by Section 67(a) of the Kenya Roads Act 2007. That the said provision being couched in mandatory terms, the Plaintiff failed to demonstrate service upon the 2nd Defendant with a 30 days' notice before the institution of the suit.
9. The question for determination by the Court is whether the Preliminary Objection is merited.
10. In the case of **Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd 969] 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...”

11. Section 67 of the Kenya Roads Act which form the basis of the objection. It states as follows;

“67. Limitation of actions

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;”

12. The essence of service was stated in the case of **Boru Dika Vs Gulsan Insaat Turizm & Anor 2018 eKLR** and the case of **Simonash Investments Limited Vs Kenya National Highway Authority & 2 others 2019) eKLR** where the Courts sitting separately stated that the notice is important to enable the 2nd Respondent to carry out its mandate efficiently and effectively and also to afford it the opportunity to address the Company or claim before legal action can be commenced in line with Art 159 (2) (c) of the Constitution.

13. I agree with the 2nd Defendant that the importance of serving the one month’s notice is to give the Authority an opportunity to deal with the issues raised and resolve them in an amicable and appropriate manner.

14. The Court observes that there is a demand letter dated the 15/9/2020 addressed to the Director General of the 2nd Defendant demanding admission of liability restoration of the land to its original condition and compensation for the use and damages thereon failure to which legal redress will ensue.

15. The contention of the 2nd Defendant is that it was not served with notice of intention to institute suit as per the provisions of Section 67(a) of the Kenya Roads Act. Further that the alleged notice by the 2nd Defendant was never served upon the 2nd Defendant and that the same does not conform to the requirements set out in the law.

16. My review of the demand letter dated the 15/9/2020 shows that the letter was received by the 2nd Defendant – see date stamp dated the 15/9/2020. It is the view of the Court that the letter indicated the particulars of the claim sufficiently for the 2nd Defendant to be put on notice. The Court finds that this letter was served upon the 2nd Defendant and that the suit having been filed on the 17/10/2020, 32 days after the notification follows that the Plaintiff adhered to the provisions of Section 67(a) of the Kenya Roads Act.

17. In the end the Preliminary Objection is unmerited. It is dismissed.

18. Costs shall be payable by the 2nd Defendant in favour of the Plaintiff and the 1st Defendant.

19. Orders accordingly.

DELIVERED, DATED AND SIGNED AT THIKA THIS 25TH DAY OF APRIL 2022 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of:

Plaintiff: Absent

Ndirangu H/b for Mrs. Mureithi for 1st Defendant.

2nd & 3rd Defendants: Absent

Court Assistant: Phyllis

