



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS**

**ELC. CASE NO. 378 OF 2017**

**PRISCILLA NDUNGE KIILU.....PLAINTIFF**

**VERSUS**

**MACHAKOS COUNTY GOVERNMENT.....1<sup>ST</sup> DEFENDANT**

**KENYA RURAL ROADS AUTHORITY.....2<sup>ND</sup> DEFENDANT**

**NYORO CONSTRUCTION COMPANY LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of the Notice of Preliminary Objection dated 18<sup>th</sup> October, 2018 in which the 2<sup>nd</sup> Defendant has averred that the suit is incurably defective for failing to comply with Section 67(a) of the Kenya Roads Act.
2. The 2<sup>nd</sup> Defendant averred that the suit has been filed contrary to the provision of Section 29(1) of the Kenya Roads Act as read together with Section 23 of the Act and that this court lacks the requisite jurisdiction to entertain the suit.
3. The Preliminary Objection proceeded by way of written submissions. The 2<sup>nd</sup> Defendant's advocate submitted that pursuant to the provisions of Section 7 of the Kenya Roads Act (*the Act*), the 2<sup>nd</sup> Defendant put up beacons to demarcate the road reserve for the Kenol-Mitaboni- Kathiani road construction project.
4. Counsel for the 2<sup>nd</sup> Defendant submitted that all persons who had encroached on the said road reserve were directed to remove their structures to pave way for the construction of the Kenol-Mitaboni-Kathiani road and that this suit does not comply with the provisions of Section 67(a) of the Act and should be struck out.
5. It was submitted that the Plaintiff is challenging the decision by the 2<sup>nd</sup> Defendant to place beacons and earmark the road reserve; that by virtue of Section 67(a) of the Act, the Plaintiff ought to have served at least one (1) month written notice stipulating the particulars of the claim and of her intention to institute legal proceedings against the 2<sup>nd</sup> Defendant and that the suit does not comply with Section 67(a) of the Act.
6. Counsel submitted that the court should exercise restraint and give to the 2<sup>nd</sup> Defendant an opportunity to deal with the dispute under the relevant provisions of the Act and that the Notice of Preliminary Objection should be allowed. Counsel relied on numerous authorities which I have considered.
7. The Plaintiff's advocate submitted that Section 29 of the Kenya Roads Act provides for entitlement to compensation for an aggrieved party; that the Plaintiff's claim for compensation is well before this court; that the suit property is private land registered in the Plaintiff's name; that the suit property was earmarked for demolition in the month of August, 2017 and that the present suit was filed on 13<sup>th</sup> September, 2017.
8. Counsel submitted that in the absence of communication from the 1<sup>st</sup> Defendant to the Plaintiff, before beaconing and earmarking the Plaintiff's property for demolition, the Plaintiff was prompted into filing the present suit.
9. This suit was commenced by way of a Plaint dated 13<sup>th</sup> September, 2017. In the Plaint, the Plaintiff averred that she is the legal and beneficial owner of land known as plot number 68, Mitaboni Market which was passed to her in 1996 as a gift by her late husband.
10. The Plaintiff averred in the Plaint that a month ago, the 3<sup>rd</sup> Defendant, through her agents, beaconed and earmarked the suit property for demolition alleging that the building standing on the suit property was on a road reserve. The Plaintiff prayed in the Plaint for an order

restraining the Defendants from demolishing the building erected on the suit property pending payment of Kshs. 22,084,200 as compensation.

11. The 2<sup>nd</sup> Defendant is seeking to have the suit struck out for having not complied with the provisions of the Kenya Roads Act, and specifically Sections 67(a) of the Act which reads 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 all 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 or intention to commence the action or legal proceedings, has been served upon the Director-General by the Plaintiff or his agent.”*

12. The Plaintiff’s counsel relied on the case of **John Kibor Kipkorir vs. Kenya Rural Roads Authority (2018) eKLR** where Odeny J. held as follows:

*“Having found that the Plaintiff did not comply with Section 67 of the Roads Act, it follows that this court does not have jurisdiction to hear in determine this case and therefore down my tools...”*

13. In the case of **Simonash Investment Limited vs. Kenya National Highway Authority & Others (2019) eKLR**, Kibunja J. held as follows:

*“d. That the requirement of the notice to be served before commencing legal action under Section 67(a) of the Kenya Roads Act does not in any way curtail or hinder the Plaintiff from pursuing their legal and constitutional rights. That it instead allows the Director General of the 1<sup>st</sup> Defendant an opportunity to address the complaint or claim before legal action can be commenced in line with Article 159(2) (c) of the Constitution 2010....”*

14. Indeed, Section 67(a) of the Kenya Roads Act demands that before any legal proceedings are commenced against the 2<sup>nd</sup> Defendant, at least one month written notice containing particulars of the claim and of intention to commence the legal proceedings, should be served upon the Director-General by the Plaintiff.

15. The provision of Section 67(a) must be considered in light of the right to access to justice, and moreso where the 2<sup>nd</sup> Defendant has threatened a party with bringing down a building allegedly standing on road reserve.

16. The right to access justice, and its imperatives, was considered by Majanja J. In the case of **Kenya Bus Services Ltd & Another vs. Minister for Transport & 2 Others (2012) eKLR** as follows:

*“37. By incorporating the right of access to justice, the Constitution requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism. (See **“Law and Practical Programme for Reforms” (1992) 109 SALJ 22) Article 48** must be located within the Constitutional imperative that recognizes as the Bill of Rights as the framework for social, economic and cultural policies. Without access to justice the objects of the Constitution which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. **Article 48** therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law.*

*38. The provisions for demanding prior notice before suing the government is justified on the basis that the government is a large organization with extensive activities and fluid staff and it is necessary for it to be given the opportunity to investigate claims laid against it and decide whether to settle or contest liability taking into account the public expense. While the objectives are laudable, the effect of mandatory notice provisions cause hardship to ordinary claimants. I am of course aware that pre-litigation protocols, for example **Order 3 rule 2 of the Civil Procedure Rules**, require that notice be given before action is commenced but the penalty for non –compliance is not to lose the right to agitate the cause of action but to be denied costs incurred in causing the matter to proceed to action.*

*47. Viewed against the prism of the Constitution, it also becomes evident that **section 13A of the GPA** provides on impediment to access to justice. Where the state is at the front, left and centre of the citizen’s life, the law should not impose hurdles on accountability of the Government through the courts. An analysis of the various reports from Commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement diminishes the ability of the citizen to seek relief against the government. It is my finding therefore that **section 13A of the Government Proceedings Act** as a mandatory requirement violates the provisions of **Article 48.**”*

17. I am in agreement with the above holding. Although the requirement to serve the 2<sup>nd</sup> Defendant’s Director General with a notice before commencing legal action is important, nay necessary, the failure to do so cannot be a ground to strike out a suit. Indeed, more often than not, Plaintiffs do file suits against the 2<sup>nd</sup> Defendant accompanied by Applications under a Certificate of Urgency to restrain the 2<sup>nd</sup> Defendant from demolishing their buildings pending the hearing of the suits. That is what happened in this matter.

18. That being the case, and for the purpose of ventilating their case, especially at an interlocutory stage, it will be defeatist and unconstitutional for the court not to hear a Plaintiff just because he did not serve the Director General with the requisite 30 days’ notice. How should a litigant who has been threatened with eviction and demolition of his building protect his interests within the said 30 days?

19. Considering the right of every person to access justice (*Article 48*) the statute cannot impose hurdles that defeat that right, and moreso where the suit is filed alongside a Certificate of Urgency. As held by Majanja J. in *Kenya Bus Services (supra)* case, the requirement for a notice particularly where it is strictly enforced diminishes the ability of the citizen to seek relief against the government, or like in this case, a State Corporation.

20. Considering that the suit herein was filed alongside an Application seeking to restrain the Defendants from demolishing the buildings erected on the suit property, the requirement for the Plaintiff to serve the 2<sup>nd</sup> Defendant with a 30 days' notice before commencing legal action was not necessary.

21. The Plaintiff had the right to access justice urgently and could not have served the 2<sup>nd</sup> Defendant with the said notice. Although Section 67(a) of the Kenya Roads Act has to be observed by litigants at all times, each case has to be considered on its facts so as not to use the said Section to deny litigants access to justice as and when the need arises.

22. For those reasons, I find the 2<sup>nd</sup> Defendant's Notice of Preliminary Objection dated 18<sup>th</sup> October, 2018 to be unmeritorious. The same is dismissed with costs.

**DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 19<sup>TH</sup> DAY OF FEBRUARY, 2021.**

**O.A. ANGOTE**

**JUDGE**