



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MACHAKOS**

**ELC. PETITION NO. 20B OF 2020**

**JOSEPHAT K. KYAMBIA.....1<sup>ST</sup> PETITIONER**

**ONSEMUS M. KONGO .....2<sup>ND</sup> PETITIONER**

**REBECCA J. MWALIMU.....3<sup>RD</sup> PETITIONER**

**ONSEMUS K. MUTHAMI.....4<sup>TH</sup> PETITIONER**

**KANINI MALOMBE.....5<sup>TH</sup> PETITIONER**

**JACKSON K. WAMBUA.....6<sup>TH</sup> PETITIONER**

**BERNARD K. MUSANGO .....7<sup>TH</sup> PETITIONER**

**JOSHUA M. KITINDIO.....8<sup>TH</sup> PETITIONER**

**FRANCIS K. KITUKU .....9<sup>TH</sup> PETITIONER**

**FATHER JEREMIAH MUTUKU .....10<sup>TH</sup> PETITIONER**

**JULIUS K. NZINGA.....11<sup>TH</sup> PETITIONER**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**SINOHYDRO CORPORATION LIMITED.....3<sup>RD</sup> RESPONDENT**

**RULING**

1. In the Notice of Preliminary Objection dated 20<sup>th</sup> August, 2020, the 1<sup>st</sup> Respondent averred that the Petitioners' Application and Petition are fatally defective and that the Petitioners have not complied with Section 67(a) of the Kenya Roads Act requiring the giving of a thirty (30) days' notice to the Director General prior to filing of the suit.

2. The 1<sup>st</sup> Respondent averred that the Application and the Petition is one whose subject matter is the boundary dispute within Ikutha Market abutting the Kibwezi-Kitui Road; that the Petition was filed prematurely and that the Petition offends Section 18(2) of the Land Registration Act.

3. The 1<sup>st</sup> Petitioner filed a Further Affidavit in which he deponed that the Preliminary Objection is frivolous, vexatious and an abuse of the court process; that the Petition is based on infringement of the rights of the Petitioners by the Respondents by compulsorily taking privately owned land and that the 1<sup>st</sup> Respondent was duly notified by the Petitioners of their grievances vide a letter dated 18<sup>th</sup> May, 2020.

4. The Preliminary Objection proceeded by way of submissions. The 1<sup>st</sup> Respondent's counsel submitted that the Petition was filed without having served the Director General of the Defendant with the requisite and mandatory one month's notice and that the email annexed on the Petitioners' Affidavit is not a notice contemplated under Section 67(a) of the Kenya Roads Act.

5. In his submissions, the Petitioners' advocate submitted that the 1<sup>st</sup> Respondent's Director General was duly served with the notice as contemplated under Section 67(a) of the Kenya Roads Act; that Section 67(a) of the Act does not give a specific format on how the notice ought to be drafted and that the issue raised by the 1<sup>st</sup> Respondent is not a pure point of law.

6. The Petitioners' counsel submitted that the Petition does not relate to a boundary dispute and that the Petition is seeking for a remedy as a result of violation of the Petitioners' constitutional rights of protection of the right to property under Article 40 of the Constitution.

7. In the Petition dated 10<sup>th</sup> August, 2020, the Petitioners averred that the 1<sup>st</sup> Respondent issued a gazette notice and changed the original size of Kibwezi- Kitui Road from Class B road to Class A; that as a result of the said change, the road expanded into private properties and that the 1<sup>st</sup> Respondent agreed to acquire land for the construction of the road.

8. The Petitioners further averred that the 1<sup>st</sup> Respondent has served them with notices indicating that they have encroached on the road reserve; that the 1<sup>st</sup> Respondent seeks to arbitrarily acquire the land which they lawfully acquired and that the 1<sup>st</sup> Respondent's action is illegal and unconstitutional.

9. In a nutshell, the issue for determination before this court is whether by changing the Kibwezi-Kitui Road from Class A to Class B, the 1<sup>st</sup> Respondent has arbitrarily acquired the Petitioners' land. That issue cannot amount to a boundary dispute contemplated under Section 18 of the Land Registration Act.

10. Although the 1<sup>st</sup> Respondent has argued that the Petitioners did not serve the Director General with a notice contemplated under Section 67(a) of the Kenya Roads Act, the Petitioners have annexed on their Further Affidavit an email referenced as "*Encroachment of Surveyed Private Land by KeNHA at Ikutha Market.*" Whether the said email meets the requirements of Section 67(a) of the Act can only be ascertained at trial. That being the case, the Notice of Preliminary Objection does not meet the threshold of a Preliminary Objection as enunciated in the case of *Mukisa Biscuit Manufacturers Ltd vs. West End Distributors Ltd (1969) EA 696*.

11. For those reasons, I find the Notice of Preliminary Objection to be unmeritorious. The Notice of Preliminary Objection dated 20<sup>th</sup> August, 2020 is dismissed with costs to the Petitioners.

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

**O.A. ANGOTE**

**JUDGE**