



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO. 97 OF 2020

FREDRICK CHEGE KINUTHIA.....PLAINTIFF/APPLICANT

-VERSUS-

KENYA NATIONAL HIGHWAYS AUTHORITY DEFENDANT/RESPONDENT

RULING

Vide a **Notice of Motion Application** dated 22nd **October 2020**, premised to be bought under **Sections 3, 13(7), 19** of the Environment and Land Court Act, **Sections 1A, 1B, 3, 3A** of the Civil Procedure Act, **Order 40 Rule1** and **Order 51** of the Civil Procedure Rules 2010, the Plaintiff/Applicant sought for the following orders against the Defendant/Respondent: -

- 1. An Injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, its agents, employees or servants from demolishing the Plaintiff's/Applicant's structure on the part of parcel of land known as KIAMBAA/RUAKA/ 2700, pending the hearing of the Application inter parties.**
- 2. An Injunction be and is hereby issued restraining the Defendant/Respondent whether by itself, its agents, employees or servants from demolishing the Plaintiff's/Applicant's structure on the part of parcel of land known as KIAMBAA/ RUAKA/2700, pending the hearing and determination of the Suit.**
- 3, IN THE ALTERNATIVE to prayer 3 above, the Defendant/ Respondent do give an undertaking that it will compensate the Plaintiff/Applicant for loss of use of land as well as the loss of developments on part of parcel of land known as KIAMBAA/RUAKA/2700 if the Plaintiff succeeds in its claim.**
- 4. The Costs of this Application be provided for.**

The Application is premised on the grounds that the Plaintiff/ Applicant is the registered owner of property known as **Kiambaa/Ruaka/ 2700**, measuring approximately **0.145 hectares**, acquired on **27th June 2007**. That on **4th June 2009**, he did apply for change of user from **Agricultural to Residential** and developed a three storey building for purposes of occupation on the suit property.

Further, the Application it is supported by the Supporting Affidavit of **Fredrick Chege Kinuthia**, who averred that he owns land Parcel No. **Kiambaa/Ruaka/2700**, and on **4th June 2009**, he applied for and obtained change of user from agricultural to residential and developed a three storey building thereon. That on **24th September 2020**, the Defendant/ Respondent issued a **Notice of Demolition** to his tenant i.e. **Gertrude Garden Children's Hospital**, to the effect that it either demolishes or removes the structure on part of property known as **Kiambaa/Ruaka/1700**, on grounds that it had encroached on the road reserve.

It was his contention that as a result of the **Notice** to his tenant by the Defendant/Respondent, it forced his tenant to vacate the suit premises and when he received the **Notice**, he appointed a private Surveyor on **14th October 2020**, who re-surveyed the land. That the private surveyor confirmed that he had not encroached on the road reserve, and it was the Defendant/Respondent who had encroached into his land by **7 meters**.

It was his further contention that he had made substantial developments in the property and if demolition is allowed, he will lose the said developments without any justifiable cause. That he has also maintained his boundary and kept off the existing road. That he has been advised by his Advocates that this is a suit in which Orders sought ought to be granted for ends of justice to be met.

The Application is opposed and the Defendant/Respondent filed a **Preliminary Objection** and a **Replying Affidavit** dated **17th November 2020**, sworn by **Eliud Munene**. He deponed that the Plaintiff/Applicant does not have locus standi to bring the suit touching on **Kiambaa/Ruaka/1700**, which the Defendant/Respondent issued Notice for. Further, that the Defendant/ Respondent requested **Kiambu Land Registrar**, who organized a joint site visit, which was to ascertain boundaries which determined that **Kiambaa/Ruaka/1700**, had encroached on road reserve and the Plaintiff /Applicant and his personal surveyors were not present in

the exercise. He urged the Court to dismiss the Plaintiff's Application dated 22nd October 2020.

The Preliminary Objection dated 17th November 2020 state that:-

i. This court lacks Jurisdiction to entertain this matter. The Applicant's Application and suit is one whose subject matter is the boundary dispute of plot no. KIAMBAA/ RUAKA/1700, and its encroachment on the road reserve. The Plaintiff's Application is premature as it offends Section 18(2) of the Land Registration Act 2012 which mandatorily reserves boundary dispute for determination by the Land Registrar in the first instance, prior to moving this Honorable Court.

ii. The Plaintiff has not demonstrated that he has any action against the Defendant with any probability of success whatsoever. The Plaintiff's entire set of pleadings refer to Parcel No. KIAMBAA/RUAKA/2700, whereas the Defendant's Notice dated 15th September 2020 relates to parcel No. KIAMBAA/RUAKA/1700. The entire application and suit are based on totally different parcels of land to which the Plaintiff is a stranger to.

Parties were directed to file written submissions and the Plaintiff/Applicant filed his submissions dated 5th March 2021, through the Law Firm of Ngania & Co. Advocates, while the Defendant/Respondent filed its on 28th May 2021, through Nathaniel Munga, Advocate.

The Court has now considered the instant Application and the annexures thereto. The Court has also considered the Replying Affidavit, Preliminary Objection and the rival written submissions as filed by the parties herein.

The main issues for determination are;

i. Whether the Defendant's Preliminary Objection dated 17th November 2020 is merited.

ii. Whether the Plaintiff's Application dated 22nd October 2020 is merited.

iii. Whether the Defendant's Preliminary Objection dated 17th November 2020 is merited.

A Preliminary Objection was described in the Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696 to mean:-

"So far as I am 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. 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."

Further Sir Charles Nabbold, JA stated that:-

"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 had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop."

Preliminary Objection raises pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.

However, it cannot be raised if any facts has to be ascertained from elsewhere or if the court is called upon to exercise judicial discretion.

It was the Defendant's/Objector's Submissions that where a party fails to observe the mandatory requirement under **Section 67 (a) of the Kenya Roads Act No. 2**, as the Plaintiff did herein, this Court is not properly vested with jurisdiction as the Plaintiff or the party omitted or neglected a clear procedure for redress of a grievance as stipulated in the Act.

It is not in doubt that the Court is required to determine what the law says and whether indeed the Plaintiff/Applicant ought to have served the Defendant/Objector with a **written notice** and in doing so, the same will not require the probing of evidence as the issue would then be whether there was **Notice** or **not** and whether the said Notice was mandatory and the same goes to the Jurisdiction of the Court. All that the Court will then need to do is determine what the law says and this would only mean that the same raises a pure point of law.

From the description of Preliminary Objection in the Mukisa Biscuits case (supra) and given that an issue of whether the Plaintiff complied with the provisions of **Section 67 (a) of the Kenya Roads Act** does not involve ascertaining of facts, then the instant **Notice of Preliminary Objection** as raised by the Defendant/Objector meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and it can be determined without ascertainment of facts from elsewhere.

This Court finds and holds that the **Notice of Preliminary Objection** as filed by the Defendant/Objector herein is a Preliminary Objection as per the Mukisa Biscuits case (supra).

The Court must then determine whether the Notice of Preliminary Objection has merit. The Objection hinges on **Section 67 (a) of the Kenya Roads Act No. 2 of 2007** which provides that;

“67. 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;”

From the above provisions of law, it is not in doubt that the requirements to give a **one month written Notice** to the Authority before commencing of the civil suit are mandatory as the words that have been used are **Shall**, therefore coaching the requirements as mandatory. See the case of *Sumac Development Company Limited ...Vs... George Munyui Kigathi & 2 Others [2017] eKLR* where the Court held that:-

“I have considered the provisions of section 67 (a). The word used therein is SHALL which therefore means that it is mandatory for any party wishing to institute proceedings against Kenya National Highway Authority to give at least 30 days notice.”

The Court acknowledges that there are instances in which the Courts have held that the thirty days’ notice is not mandatory. However, the Court further recognizes that these are instances where the Courts have dealt with Petitions as opposed to an ordinary Suits. The instant case is an ordinary suit, and therefore the Court finds and holds that the **written notice** was therefore mandatory before the suit could be filed. See the case of *Benson Ruiyi Njane ...Vs... Kenya Rural Roads Authority & 36 Others [2016] eKLR* where the Court held that:-

“The limitation set out in Section 67 of the Roads requiring notice of thirty days to the Authority before instituting suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. The Respondents’ claim to the contrary is not borne out by the Constitution, and that leg of defence therefore fails.”

Further in the case of *Anthony Ngili Munguti & 12 Others ...Vs... Kenya National Highways Authority & Another [2017] eKLR*:-

“A fundamental right guaranteed by the Constitution cannot be taken away on the basis that demand notice stating intention to sue was not issued. It is the finding of this court that such a right is so supremely protected, that even a verbal notice such as for example, “Hey, this is our home, do not demolish it” is valid enough to stop the respondent on its track. Such a right cannot be defeated by statutory provision. It is the finding of the court that a constitutional provision on access to justice supersedes any statutory powers limiting enforcement of constitutional rights.”

It is clear that this instant suit is **not** a Petition, and therefore the requirements of **Section 67(a)** are mandatory. It is not in doubt that the allegations by the Defendant/Objector that the **Notice** was never served have not been controverted.

As already held above by this Court, the instant suit is an ordinary suit and not a Petition and therefore the Plaintiff on paragraph 18 on his **Plaint** submitted that **“the Defendant’s actions amounts to an illegality, injustice and an affront to the Plaintiff’s proprietary rights over the suit property”** and not moving the Court by way of a Petition would not in any way cure the nature of the suit before the Court.

On the issue of disparity on entries, i.e. **Kiambaa/Ruaka/2700**, and **Kiambaa/Ruaka/1700**, as indicated in the **demolition Notice**, the Plaintiff/Applicant has rightly put it that there was no other **Gertrude Hospital**, save for the one occupying his property. It is therefore this court’s observation that land parcel **Kiambaa/Ruaka/1700**, as indicated in the demolition notice refers to **Kiambaa/Ruaka/2700**.

The Plaintiff/Applicant having been aware that his property was earmarked for demolition via a letter dated **15th September 2020**, ought to have sent out the **Notice** as required by the law. Even if the **thirty (30) days** could not have lapsed, since there was some sense of urgency, then the Court would have considered that such **Notice** had been sent.

However, the law requires the Plaintiff to send out a **Notice** under **section 67 (a)** of the Kenya Roads Act and it is clear that the same was never sent out. Therefore, the Court finds and holds that the Preliminary Objection is merited and consequently, the Court upholds the same.

The Plaintiffs having failed to give the **one month written Notice** is in breach of the relevant provisions of law and lack audience before this Court. Consequently, the court finds that it does not have jurisdiction to deal with the matter and must then down its tools. See the Court of Appeal case of *Michael Otieno Nyaguti & 2 Others V Kenya National Highways Authority [2021] eKLR* where the Appeal specifically dealt with the provisions of **Section 67(a)** of the **Kenya Roads Act** and the effect of non-compliance with the Act. **The Court stated that:-**

“The Preliminary Objection on non-compliance with this provision is, therefore, on a pure point of law as there is no other way of addressing the Respondent’s, Preliminary Objection other than by way of construction and Application of section 67(a).”

The other ground raised in the Preliminary Objection is that the suit herein is a boundary issue which jurisdiction lies with the Land Registrar and that it offends **Section 18(2) of the Land Registration Act 2012**.

For the court to be able to effectively come to a conclusion that the cause of action in the suit is a boundary dispute, it will have to ascertain facts and probe evidence. This aspect of ascertaining facts on whether the Land Registrar has/or did boundary determination does not amount to a Preliminary Objection and the court finds that the same cannot be addressed at this stage as a Preliminary Objection.

ii Whether the Plaintiff/Application dated 22nd October 2020 is merited.

The Court has already found and held that it has no Jurisdiction to deal with the matter and has consequently downed its tools. In the circumstances, the court further finds and holds that there is no basis of dealing with the instant **Notice of Motion Application** dated **22nd October 2020**, as the Court has downed its tools. See the case of **Owners of the Motor Vessel 'Lillian' (S)Vs... Caltex Oil (Kenya) Ltd [1989] KLR1**, where the Court held that;-

“Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court had no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...”

The Defendant/Respondent has sought for costs of this suit. While the Court acknowledges as rightly pointed out that costs usually follow the events, the Court has considered the circumstances of this case and given that the Defendant/Respondent is a public institution, each party should bear its own costs.

The Upshot of the foregoing is that the **Notice of Preliminary Objection** dated **17th November 2020**, by the Defendant/Objector is found **merited** and the same is upheld. Each party to bear its own costs.

For the avoidance of doubt, the Plaintiff's/Applicant's Suit is hereby struck out and the Interim orders in place herein are vacated accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THIS 24TH DAY OF JUNE 2021.

L. GACHERU

JUDGE

24/6/2021

Court Assistant – Lucy

ORDER

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

Mr. Wairegi for Plaintiff/Applicant

Mr. Munga for the Defendant/Respondent/Objector

L. GACHERU

JUDGE

24/6/2021