Evergreen Horticulture East Africa Limited v China National Aero-Technology Engineering Corporation & another (Civil Appeal E021 of 2022) [2024] KEHC 5282 (KLR) (Civ) (15 April 2024) (Judgment)

Neutral citation: [2024] KEHC 5282 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL APPEAL E021 OF 2022

DKN MAGARE, J

APRIL 15, 2024

BETWEEN

EVERGREEN HORTICULTURE EAST AFRICA LIMITED ..... APPELLANT

AND

CHINA NATIONAL AERO-TECHNOLOGY ENGINEERING CORPORATION ..... 1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 2ND RESPONDENT

JUDGMENT

1. This is an Appeal from the Ruling of Hon. H.M Nyaberi (Mr.) Chief Magistrate in Milimani Commercial Courts, Comm No. E1578 of 2021 delivered on 2nd February, 2022. The Appellant was the Plaintiff in the lower court. The appeal relates to a preliminary objection raised to the effect that the suit did not comply with section 67(a) of the *Kenya Roads Act* 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;"

2. The court allowed the said preliminary objection and struck out the suit in limine. It is not clear whether the suit against the 1st Respondent survived, though there was no objection to the suit against the 1st Respondent. Being aggrieved by that decision the appellant raised the following grounds of appeal:

   a. That the Learned Chief Magistrate erred in law and in fact when he upheld the Preliminary Objection and struck out the Appellant's suit together with the application with costs to the Defendant.

   b. That the Learned Chief Magistrate erred in law and in fact when he failed to appreciate the constitutional provisions of Article 48 and 159(2)(d) in the dispensation of Justice.

   c. That the Learned Chief Magistrate erred in law and in fact when he failed to appreciate that the failure by the Appellant to serve the 2nd Defendant Director General with a notice before commencing a civil suit against it cannot be a ground to strike out a suit.

   d. That the Learned Chief Magistrate erred in law and in fact when he failed to appreciate that Section 67 of the Roads Act does not apply to cases alongside a Certificate of Urgency.

   e. That the Learned Chief Magistrate erred in law and in fact when he failed to acknowledge the circumstances prevailing in the suit and why the 2nd Respondent was sued by the Appellant.

   f. That the Learned Chief Magistrate erred in law and in fact when he failed to distinguish the Authorities cited by the Appellant to appreciate that the suit was struck out against the 2nd Defendant only and not all Defendants.

   g. That the learned Chief Magistrate erred in awarding the Defendant Cost of the suit.

3. That the Appellant prayed for the following orders: -

   a. That the appeal be allowed.

   b. That the Ruling of Hon. Chief Magistrate Hon. H.M Nyaberi be set aside, with orders substituted therefore, dismissing the 2nd Respondent's Preliminary Objection dated 20th December, 2021 with costs.

   c. That a temporary injunction be issued restraining the 2nd Respondent from making any further payments to the 1st Respondent in respect to the Contract dated 6th October, 2018 for landscaping services at KENHA new office complex site and at Barabara Plaza pending the hearing and determination of suit MCCOMMSU/E1578/2021.

   d. That the appellant be granted the costs of this Appeal.

4. The 1st Respondent filed submissions as follows that 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. In the case

of Sumac Development Company Limited Vs George Munyui Kigathi & 2 Others [2017] eKLR 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."

5. They stated that the Court of Appeal in the case of Michael Otieno Nyaguti & 2 others v Kenya National Highways Authority [2021] eKLR held that:

> " Being a mandatory provision of law, there is no way the learned Judge can be faulted in the conclusion reached when sustaining this element/ingredient of the P.O. The trial court also rightly held a position we affirm on appeal that the P.O left no room for exercise of discretion by the trial court and now us on appeal. Once upheld, the trial court had no discretion to sustain the suit. Likewise, as we have already alluded to above when dealing with element/ ingredient (iii), that, if the conclusions reached by the trial court are affirmed, the appeal will stand dismissed is the correct position in our view. In light of the totality of the above assessment and reasoning, it is our finding that the trial court's finding and reasoning as to why the P.O was sustained were well founded both on law and facts as demonstrated above. They are accordingly affirmed. The appeal is, therefore, without merit and is accordingly dismissed with costs to the respondent..."

6. They stated that in Raila Odinga Versus I.E.B.C. & Others [2013] eKLR, the Supreme Court held that Article 159(2)(d) of *the Constitution* was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court. They stated that the same position was held by the Supreme Court in Civil Application No. 7 of 2014, Zacharia Okoth Obado -vs- Edward Akong'o Oyugi & 2 others [2014] eKLR where the Court was persuaded by the dictum of Kiage, JA in Nicholas Kiptoo Arap Korir Salat -vs- IEBC & 6 others [2013] eKLR where he stated: -

> "... I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succor and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.."

7. They then asked the question of what a Preliminary Objection is? They relied on the decision of the Supreme Court in Hassan Ali Joho & Another V Suleiman Said Shahbal & 2 Others cited the leading

decision on Preliminary Objections, Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696, where the Court held 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... 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 has to be ascertained or if what is sought is the exercise of judicial discretion".

8. They stated that in the latter case, Sir Charles Nebold, JA stated as doth: -

> " 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."

9. It was their argument that litigants must be vigilant. They relied on Justice Mutungi's decision in the case of Duke Mecha Franklin Saisi v Attorney General & another [2018] eKLR, where he stated as follows: -

> " Simply put, it is imperative that litigants are vigilant in upholding procedures as they exist to ensure expeditious and predictable resolution of disputes. The rules and procedure also serve to afford litigants a level playing field in their engagements"

10. It was stated that the Appellant has had more than Thirty (30) days since the issuance of the impugned Ruling and the Appellant has elected to decline compliance with the provisions of Section 67 (a) of the *Kenya Roads Act* No. 2 of 2007 which provision seeks to create an opportunity for the Director General's office to explore an out of court settlement in line with the provisions of Article 159(2) of *the Constitution*.

11. It was their view that the Appellants then cannot seek to remedy their flawed suit by the present appeal under the ambit of Article 159(2)(d). this is based on the decision of the court in Kakuta Maimai Hamisi vs. Peris Pesi Tobiko & 2 Others (2013) eKLR, where is was held that:

> " ...we do not consider Article 159(2)(d) to be a panacea, nay, a general whitewash that cures and mends all ills, misdeeds and defaults of litigation.

12. They were of the view that the Appellant herein could not seek to remedy such a defect in their suit without following the due procedure. The Provisions of Section 67 (a) of the *Kenya Roads Act* No. 2 of 2007 ought to be complied with as the same were not a mere technicality to be disregarded. I am surprised with this argument noting that the 1st Respondent was not a party on whom notice was required to be presented.

13. They also addressed the issues of injunction temporary injunctive orders against the 2nd Respondent. Order 42 Rule 6 (6) of the Civil Procedure Rules provides as follows: -

> " Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

28. They relied on The locus classic case of Giella = vs = Cassman Brown & Co. Ltd (1973) EA, 358, 360, sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

14. The second respondent filed submissions dated18/12/2022. They stated that a preliminary objection was provided in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696.

15. They stated that the jurisdiction to hear a matter is a pure point of law. Reliance was placed on the case Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR, justice Nyarangi JA, as he then was stated as doth;

> " With that I return to the issue of jurisdiction and to the words of Section 20 (2) (m) of the 1981 Act. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what
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> I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.

16. They set out in extensio section 67 of the *Kenya Roads Act*. They stated that the only reason the 2nd defendant was included was due to the money the second respondent was holding. They relied on the case of Ephanthus Mucheru Mwangi Versus Kenya Railways Corporation.

17. It is their case that *the constitution* encourages alternative system of dispute mechanisms. They relied on the case of Somonash Investment Versus Kenya National Highways Authority & 2 Others (2019) eKLR. They prayed that the court dismisses the Appeal with costs.

Analysis

18. This Appeal will succeed or fail on three fronts. The most important issue raised is whether this was a pure point of law. To answer the question we must dissect what constitutes a preliminary objection. This has however been exhaustively dealt with by the courts in this country, although it will not hurt to restate the same.

19. No facts were or ought to have been involved and no witnesses testified. The court's powers in respect hereto are immense, contrary to the normal situation where the court defers to the finding of fact as held in the case of Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123, this court is dealing with the understanding on the points of law involved. In that case the court of Appeal stated as doth: -

> " This court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

20. The Court is not involved in the finding of fact as the suit was heard on a preliminary objection. In hearing a preliminary objection, this court and the court below have the same jurisdiction. They proceed on an understanding that what is pleaded in the plaint is true. It is what the English common law used to call a demurrer. The locus classicus case of Mukisa Biscuit Manufacturing Co. Ltd V. West End Distributors Ltd [1969] E.A. 696, made this pertinent observation. It said: -

> " The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way preliminary objection. The improper raising of points of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuses issues. This improper practice should stop".

21. In a Tanzanian case ofHammers Incorporation Co. Ltd Versus the Board of Trustees of The Cashewnut Industry Development Trust Fund, where the Court of Appeal, (Rutakangwa, N. P. Kimaro and S. S. Kadage JJA), sitting in Dar Es Salaam in their decision given on 17/9/2015 regretted that the practice of raising preliminary objection that was frowned upon by the court of appeal in Kampala in the Mukisa biscuit case(Supra) still persists. They stated as doth: -

> " It was hoping against hope. We believe that had that Court survived to this day it would have issued a sterner warning. This is because the "improper practice" never stopped. Neither did it ebb away. On the contrary, it is on the increase. This forced the Full Bench of this Court in Karata Ernest & Others V The Attorney General, Civil Revision No. 10 of 2010 (unreported) to mildly urge all parties in judicial proceedings to pay heed to what was aptly

pronounced in the MUKISA BISCUIT case (supra). The late call appears to be falling on deaf ears as this ruling will demonstrate."

22. In the case of Martha Akinyi Migwambo v Susan Ongoro Ogenda [2022] eKLR, Justice Kiarie Waweru Kiarie, summarized the preliminary objection nicely as seen from two of the judges in Mukisa Biscuit Manufacturing Co. Ltd(supra): -

> " A preliminary objection must be on a point of law. The Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969) EA 696 at page 700 paragraphs D-F Law JA as he then was had this to say:
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> > ....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.
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> At page701 paragraph B-C Sir Charles Newbold, P. added the following:
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> 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...."

23. A Tanzania Court of Appeal sitting in Dar es Salaam, inKarata Ernest & Others vs Attorney General (Civil Revision No. 10 of 2020) [2010] TZCA 30 (29 December 2010), (Luanda, J.A., Ramadhani, C.J. , Rutakangwa, JJA), put the issue of preliminary objections in a more succinct manner: -

> " At the outset we showed that it is trite law that a point of preliminary objection cannot be raised if any fact has to be ascertained in the course of deciding it. It only "consists o f a point of law which has been pleaded, or which arises by dear implication out of the pleading obvious examples include: objection to the jurisdiction of the court; a plea of limitation; when the court has been wrongly moved either by non-citation or wrong citation of the enabling provisions of the law; where an appeal is lodged when there is no right of appeal; where an appeal is instituted without a valid notice of appeal or without leave or a certificate where one is statutorily required; where the appeal is supported by a patently incurably defective copy of the decree appealed from; etc. All these are clear pure points of law. All the same, where a taken point of objection is premised on issues of mixed facts and law that point does not deserve consideration at all as a preliminary point of objection. It ought to be argued in the "normal manner" when deliberating on the merits or otherwise of the concerned legal proceedings.

24. Justice prof J.B. Ojwang J (as he then was) succinctly addressed the issue of preliminary objection in the case of Oraro vs Mbaja [2005] eKLR: -

> " I think the principle is abundantly clear. A preliminary objection as correctly understood is now well settled. It is identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow

to proceed. I am in agreement that where a court needs to investigate facts, a matter cannot be raised as a preliminary point.

25. It is therefore my view that a preliminary objection must be based on current law, and be factual in its constitution. It cannot be based on disputed facts or fats requiring further enquiry. In determining a preliminary objection therefore only 3 documents are required in addition to *the constitution*. The impugned law, the plaint and preliminary objection. If you have to refer to the defence, then the preliminary objection is untenable.

26. The Court relied on the case of Sumac Development Company Limited vs George Munyui Kigathi & 2 Others [2017] cKLR and the case of Michael Otieno Nyaguti and 2 Others vs Kenya National Highway Authority [2021] eKLR where, in the latter case the court held that:

> " Being a mandatory provision of law, there is no way the learned Judge can be faulted in the conclusion reached when sustaining this element/ingredient of the Preliminary Objection. The trial court also rightly held a position we affirm on appeal that the Preliminary Objection left no room for exercise of discretion by the trial court and now us on appeal. Once upheld, the trial court had no discretion to sustain the suit."

27. The court noted that the 2nd Defendant submitted that Section 67 of the *Kenya Roads Act* is a procedural law which the applicant should have complied with before institution of the suit and one cannot take refuge under Article 159(2) (d) of *the Constitution* 2010.The court in the case of Kakuta Maimai Hamisi vs Peris Pesi Tobiko & 2 Others [2013] eKLR, the court had this to say:

> " We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash that cures and mends all ills, misdeeds and defaults of litigation."

28. The Court noted that in opposition to the Preliminary Objection, the learned counsel for the plaintiff submit that the plaintiff suit and application was filed under a certificate of urgency. That the provision of section 67 of the Roads Act does not apply to cases filed under certificate of urgency. He placed reliance in the case of Priscilla Ndunge Killu vs Machakos County Government & 2 Others [2021] eKLR where the court stated:

> " Although the requirement to serve the 2nd 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 2nd Defendant accompanied by applications under a certificate of Urgency to restrain the 2nd Defendant from demolishing their buildings pending the hearing of the suits. That is what happened in this matter. Considering the right of every person to access justice (Article 48) the statute cannot impose hurdles that defeat that right, and more so where the suit is filed alongside a Certificate of Urgency."

29. The question then, is whether issuance of notice is a question of law. Whether is was in fact issued, it is a question of fact. I do not see how the court could have determined that notices were not issued without venturing into facts. It basically means that there was no preliminary objection.

30. Secondly, there was no suit filed against the 2nd Respondent. Other than being a party, no prayer was sought against then in the main suit. The prayers sought in the Plaint related to a landscaping contract for Ksh. 12,995,935/=. This appears to have been a sub contract. There is no single prayer against the 2nd defendant. In essence there is nothing in the plaint requiring compliance with section 67(a).

31. There are a few exceptions to requirement for not issuing a notice under section 67(a). There has been little controversy over this section as the court of Appeal has made binding decisions of the mandatory nature of the said section. It is a proper section to allow the state departments make necessary decision. This can be done in circumstances where compliance will lead to lose of the subject matter or at the tail end of the limitation period.

32. Failure to serve notice in circumstances enumerated in the section 67(a) of the Roads Act, like its counter parts under section 13 A of the *government proceedings act* is mandatory. I am aware that Justice Prof (Dr.) Sifuna declared compliance with section 13 A unconstitutional. Given that this is a court of co-ordinate jurisdiction; it is not binding on this court. This court must therefore be guided only by the law.

33. I don't think in this matter, there is anything unconstitutional requiring a demand notice to be issued. Ordinary mortals are served with a 15 days notices all the time. Banks have to serve 90 days' notice before exercising statutory power of sale. Even the court has to issue notices for hearing at least 8 days before the next hearing date.

34. There are cases where 30-days notices are issued. This includes commencement of Arbitration. Take an example of this Judgment, which was slated for delivery on 18/4/2024. However, the same is ready and I shall be issuing notices to deliver it earlier. Will the issuance of this notice be said to be unconstitutional? The taxing authority also issues notices. Without notices we run into anarchy OF Hobbelian status, where life of man and society are solitary, poor, nasty, brutish and short with mortal danger lurking everywhere.

35. However, the Court cannot take notices to fetish in a manner that drives away parties from the seat of justice. In the case of In the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another [1980] eKLR, the court of Appeal, C B Madan JA stated as doth: -

> Upon appeal:-
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> > "That is a very strong power, and should only be exercised in cases which are clear and beyond all doubt....the court must see that the plaintiff has got no case at all, either as disclosed in the statement of claim, or in such affidavits as he may file with a view to amendments."
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> per Lindley L.J. ibi, p. 602.
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> > "It has been said more than once that rule is only to be acted upon in plain and obvious cases and, in my opinion, the jurisdiction should be exercised with extreme caution."
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> Per Lord Justice Swinfen Eady in Moore v. Lawson and Another (supra) at p. 419.
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> > "It cannot be doubted that the court has an inherent jurisdiction to dismiss an action which is an abuse of the process of the court. It is a jurisdiction which ought to be very sparingly exercised and only in exceptional cases. I do not think its exercise would be justified merely because the story told in the pleadings was highly improbable, and one which it was difficult to believe could be proved". per Lord Herschell in Lawrence v. Lord Norreys, 15. A.C. 210 at p. 219.

36. Given the circumstances, I find and hold that the question raised was not a pure point of law. It required facts. It does not matter what the defence was. A question of issuance of Notice can only be dealt with in a situation where the Plaintiff has a chance to place evidence in terms of a reply to an application.

37. Secondly, I find that the 2nd Respondent was a nominal defendant. There are no orders sought against them except to preserve money and not to pay to their contractor. Issuance of notice will not have changed the circumstances since there was no breach pleaded against the 2nd Respondent. This therefore excluded the need to issue notices. The operative words of section 67(a) are, "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"

38. The section has several limbs that is where any action or other legal proceeding lies against an Authority for: -

    a. any act done in pursuance or execution, or

    b. intended execution of all order made pursuant to this Act or of any public duty, or

    c. in respect of any alleged neglect or default in the execution of this Act or of any such duty

39. The case herein does not cover any of the foregoing. None of the three limbs are alleged to have occurred. The default pleaded is against the 1st Respondent. The Appellant is not even saying that the payment will be in breach. They are saying it will make it hard to recover money from the 1st respondent. It has not been pleaded that there is a duty to pay to the Appellant. Consequently, there is no breach.

40. In this case I also find that the point raised is not a pure point of law. The preliminary point of law should have thus been dismissed for the two reasons. I therefore set aside the ruling and order of the court striking out the Appellant's suit and order that the same be reinstated for hearing.

41. Noting the enormous waste of time that has occurred and to fast track the suit in the lower court being, MCCOMMSU/E1578/2021, an order is hereby issued that pending determination of the matter in the court below, , the 2nd Respondent, who is a nominal defendant in the lower court shall not release funds equivalent to the amount claimed in the plaint to the 1st Respondent and the 1ST Respondent shall not claim the said money till the suit in the lower court is heard in respect to the Contract dated 6th October, 2018 for landscaping services at KENHA new office complex site and at Barabara Plaza.

Determination

42. The upshot of the foregoing, I make the following determination: -

    a. A party is bound to is bound to issue a statutory notice to the director –general before filing suit in case where the section applies.

    b. In this matter Appellant was not bound to comply with section 67(a) of the *Kenya Roads Act*, 2007 sine there were no orders sought against the 2nd Respondent.

    c. The Appeal is hereby allowed, the preliminary objection dated 20/12/2021 is dismissed with costs as this was not a pure point of law.

    d. The Appellant shall have costs of Ksh. 405,000/= against the 2nd Respondent, payable within 30 days, in default execution to issue.

e. The 1st respondent to bear its own costs.

f. The matter shall be heard before the lower court before any other magistrate other than H M Nyaberi cm.

g. Noting the enormous waste of time that has occurred and to fast track the suit in the lower court being, MCCOMMSU/E1578/2021, an order is hereby issued that pending determination of the matter in the court below, , the 2nd Respondent, who is a nominal defendant in the lower court shall not release funds equivalent to the amount claimed in the plaint to the 1st Respondent and the 1ST Respondent shall not claim the said money till the suit in the lower court is heard in respect to the Contract dated 6th October, 2018 for landscaping services at KENHA new office complex site and at Barabara Plaza.

h. The Deputy Registrar to serve this decision upon Hon. H M Nyaberi CM.

i. The file is closed.

j. The lower court matter be mentioned on 14/5/2024 for directions.

DELIVERED, DATED AND SIGNED AT MOMBASA, VIRTUALLY ON THIS 15TH DAY OF APRIL, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of: -

Ms Mboya for the Appellant

No appearance for the Respondent

Court Assistant – Brian