



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.59 OF 2019

CHARLES WAHOME KIBOIPLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAYS

AUTHORITY.....1ST DEFENDANT/OBJECTOR

CHINA WU-YU LIMITED.....2ND DEFENDANT

RULING

The Plaintiff herein **Charles Wahome Kiboi**, filed a claim against the Defendants herein on **1st April 2019**, and sought for various orders against the two Defendants. Among the Orders sought is an Order of **permanent injunction restraining the 1st & 2nd Defendants, their agents, servants and employees from entering into, alienating or taking possession of LR. No.Dagoretti/Kinoo/3954**, or destroying, demolishing or in any way interfering with the building erected thereto.

Simultaneously, the Plaintiff also filed a Notice of Motion application dated **29th March 2019**, and sought for injunctive orders against the Defendants to restrain them/their agents, servants and/or employees from entering into, alienating or taking possession of the **LR.No. Dagoretti/Kinoo/3954**. He further sought for orders of injunction restraining the Defendants and/or their servants, agents or employees from destroying, demolishing or in any way interfering with the buildings erected on the suit property pending the hearing and determination of the said application and suit.

The suit and application are opposed by the Defendants. The 1st Defendant on **24th April 2019**, filed a **Notice of Preliminary Objection** and **Grounds of Opposition** and averred that:-

a) The Applicant's application is fatally defective as it does not comply with the mandatory provisions of Section 67(a) of the Kenya Roads Act.

b) Further that the Applicant has failed to meet the pre-requisite conditions for granting of injunctive orders.

The 2nd Defendant entered Appearance through the **Law Firm of Tripple A LAW LLP**, and filed its Defence on **16th May 2019**. However, it did not file any response to the **Notice of Motion** application dated **29th March 2019**.

On **24th April 2019**, the Court directed the **Preliminary Objection** to be canvassed first by way of written submissions.

The Plaintiff filed his submissions in opposition to the **Preliminary Objection** on **7th May 2019**, and urged the Court to dismiss the same. He submitted that he did comply with the mandatory provisions of **Section 67(a)** of the **Kenya Roads Act** wherein through his advocate he sent out two **Demand Letters** on **18th July 2018** and on **19th July 2018**, informing the Defendants that he intended to institute legal proceedings and seek legal redress against them. He relied on the case of **AECOM ROA (PTY) Ltd...Vs...Kenya National Highways Authority (2019)**, where the

Court held that:-

“The Plaintiff in response directed the courts attention to the two letters to be found amongst its trial bundle of documents. One letter is dated 24th October 2016 asking the Defendant to settle the contractual amount outstanding and informing the Defendants that it would seek to recover the amount due by alternative measures. The other letter is dated 9th February 2017 and stamped as received by the Defendants on 9th February 2017 which letter the Plaintiff requested for payment of amount

due.”

It was the Plaintiff's submissions that since the two **Demand Letters** were received by the 1st Defendant, then the **Notice** was served as required by law and he urged the Court to dismiss the **Preliminary Objection** with costs.

The 1st Defendant filed its submissions and urged the Court to allow the instant Preliminary Objection. It was submitted that the Plaintiff failed to comply with the mandatory provisions of **Section 67(a)** of the **Kenya Roads Act** which requires that the Director General should be served with a one month Notice prior to commencement of any legal proceedings.

The 1st Defendant relied on the case of **Sumac Development Company Ltd...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”.

It further relied on the case of **Michael Otieno Nyaguti & 5 Others...Vs...Kenya National Highway Authority & 5 Others (2015) eKLR**, where the Court also held that:-

“...indeed Section 67(a) of the Kenya Roads Act, No.2 of 2007 requires a one month Notice containing particulars of the claim and the intention to commence legal actions to be served upon the Director General by the party or its agents before legal proceedings are commenced...”

The Court has carefully considered the pleadings herein and the annexures thereto. The Court has further considered the instant Notice of Preliminary Objection and the rival written submissions. A **‘Preliminary Objection’** was described in the **Mukisa Biscuits Manufacturing Co. Ltd..Vs...West End Distributors Limited (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 Newhold P** added:-

“A preliminary Objection is in the nature of what used to be a demurer. It raises pure points of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained and if what is sought is the exercise of Judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but to unnecessarily increase costs and on occasion confuse the issue. The improper procedure should stop.”

It is evident that a **Preliminary Objection** consists of pure points of law and it is also capable of bringing the matter to an end preliminarily. See the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”

Before determining the merit of the **Preliminary Objection** herein, the Court will have to determine whether what has been raised by the Objector (1st Defendant) falls within the rubrics of what amounts to a **Preliminary Objection**.

The Objector has raised an issue of failure by the Plaintiff to comply with mandatory provision of **Section 67(a)** of the **Kenya Roads Act**. Indeed the court has seen the provision of **Section 67(a)** of the **Kenya Roads Act** and it provides that; **‘The action or legal proceedings 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 its agent’.**

The words used therein is **SHALL** which means that it is a mandatory provision. If the said mandatory provision is contravened, then the proceedings are in contravention of the law and are capable of being struck out thus bringing the suit to an end preliminarily.

Therefore the 1st points raised by the 1st Defendant amounts to a Preliminary Objection as described in the **Mukisa Biscuits case (supra)**. However, on the 2nd point that the Plaintiff has not met the ingredients of grant of injunctive orders goes to the merit of the **Notice of Motion** application for injunction and does not meet the criteria of what amounts to a **Preliminary Objection** and the Court shall not consider the same.

The 1st Defendant has alleged that the Plaintiff failed to issue the mandatory **Notice** to the Director General of the Authority before commencing the suit as provided by **Section 67(a)** of the **Kenya Roads Act**. Indeed the said provisions is a mandatory one and any party wishing to bring any legal proceedings against the Authority shall comply with the same.

As submitted by the Objector **‘Notice’** is defined in the **Black’s Law Dictionary, 9th Ed. Page 1164** as:-

“The legal notification required by law or agreement or imparted by operation of law as a result of some facts”.

The Objector submitted that the Plaintiff needed to give a legal **Notification** as required by the law. The Plaintiff has submitted that he did give such Notice through the two **Demand Letters** annexed to his Supporting Affidavit. The Court has considered the two **Demand Letters** which were received in the office of the 1st Defendant as per the receipt stamp on the said annexures. Indeed the **Demand Letter** dated 5th **September 2018** is addressed to the **Directorate of Highway Planning & Design** for 1st Defendant and was received in the said office on **6th September 2018**. The said Demand letter gives the nature of the claim and intention to seek legal redress and proceedings in the event the action of the 1st Defendant is not halted.

This Court is of the considered view that the two letters gave sufficient **Notice** to the 1st Defendant of the nature of the grievances that the Plaintiff has against the Defendants and his intention to seek legal redress. Therefore the 1st Defendant cannot be heard to say that its Director General was not served with the legal **Notice** as per the provisions of **Section 67(a)** of the **Kenya Roads Act**.

The Court has considered the two authorities cited by the 1st Defendant. The circumstances in the two case are different. In the case of **Sumac Development Company Ltd(supra)**, the Plaintiff amended the **Plaint** mid-stream and enjoined **Kenya National Highway Authority**, while the suit had already commenced and thus no evidence of having served any **Notice of Intention to Sue**. On the case of **Michael Otieno Nyaguti & 5 Others (supra)**, the Plaintiff alleged that he issued the **Notice** via **Email**. However the Court noted that the said Email was not printed and availed before the court. However in this case, the two **Demand Letters** are annexures to the pleadings herein.

As was held in the case of **AECOM ROA [PTY] (supra)**, the 1st Defendant cannot be heard to fault the validity or otherwise of the Plaintiff's **Notices** to the Defendants. The fact remains that the Plaintiff gave **Notice, 30 days before** filing the suit as required by **Section 67(a)** of the **Kenya Roads Act**. The Court adopts the above holding of the court and finds that the two **Demand Letters** amounts to giving **Notice** to the 1st Defendant and the said **Notices** were issued more than **30 days before** the suit was filed.

The upshot of the foregoing is that the 1st Defendant's **Notice of Preliminary Objection** dated **23rd April 2019** is found not merited and the same is dismissed entirely with costs to the Plaintiff herein.

It is so ordered.

Dated, Signed and Delivered at Thika this 23rd day of January 2020.

L. GACHERU

JUDGE

23/01/2020

In the presence of

No appearance for Plaintiff

Mr. Oigara holding brief for M/S Rao for 1st Defendant/Objector

M/S Akello for 2nd Defendant

Lucy - Court Assistant.

L. GACHERU

JUDGE

23/01/2020