



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 348 OF 2013**

**SUMAC DEVELOPMENT COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**GEORGE MUNYUI KIGATHI.....1<sup>ST</sup> DEFENDANT**

**JENNIFER NGINA KIGATHI.....2<sup>ND</sup> DEFENDANT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....3<sup>RD</sup> DEFENDANT**

**RULING**

The plaintiff herein filed the plaint dated 27<sup>th</sup> August, 2013 claiming Kshs.7,007,910 plus general damages for breach of contract following an agreement for sale entered into between the parties herein on the 29<sup>th</sup> January,2009 for sale of land Title No. Nairobi/Block 209/13310 for a consideration of Kshs.6,700,000/-.

That sometimes in the year 2011, the plaintiff was notified by the government that the said property forms part of land parcel acquired by the government in the year 1957 for the southern by-pass from Embakasi to Kibera which has frustrated the plaintiff's intention to develop the suit property.

Given the turn of events, the plaintiff amended the plaint on the 2<sup>nd</sup> day of June, 2015 enjoining Kenya National Highway Authority as a party to the proceedings.

On the 23<sup>rd</sup> February, 2016 the third defendant herein (Kenya National Highways Authority) filed a preliminary objection of even date on the following grounds;

1. The plaintiff's suit has been filed in complete breach of the mandatory provisions of section 67(a) and (b) of the Kenya Roads Act, Cap 2007.
2. The plaintiff's suit does not lie by virtue of section 67(a) and (b) of the Kenya Roads Act, 2007.

This ruling is for the preliminary objection aforesaid. In the amended plaint, it is pleaded that on or about the 8<sup>th</sup> October, 2010 the 3<sup>rd</sup> defendant entered into the property known as Nairobi/Block/2009/13310 registered in the name of the plaintiff and caused to be printed and/or marked with sign of a letter X denoting that the said property is erected on a road reserve and is marked for demolition and that forms the basis of the plaintiff's cause against the third defendant

Parties filed submissions in support of their respective positions. On the part of the 3<sup>rd</sup> defendant, it was

submitted that the plaintiff did not serve it with a written notice containing the particulars of the claim and of intention to commence the legal proceedings prior to the plaintiff serving it with pleadings in this suit, which is contrary to the express provisions of section 67 (a) of the Kenya Roads Act Cap 408.

The 3<sup>rd</sup> defendant further submitted that the plaintiff has not presented evidence to controvert the 3<sup>rd</sup> defendant's contention that no written notice was served on it before the commencement of the suit which is contrary to section 67(a) of Kenya Roads Act which provide as follows;

“Where any action or other legal proceedings lies against the Authority for any act done in pursuance of execution, or intended execution of an 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 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 his agent; and

b. Such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage within six months next after the cessation thereof.

It is averred that section 67 being a legal provision cannot be overthrown by Article 159 (2) (d) of the constitution and that section 67 is not a defeatist procedural technicality but a jurisdiction limiting provisions of the law that should be complied with. The court was referred to the case of **Osborn Vs. Bank of the United States 22 U.S. 738, 866 (1824) where Marshall C. J.** had this to say;

**“Judicial power, as contra-distinguished from the power of the laws, has no existence, courts are the mere instruments of the law, and can will nothing when they are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law and when that is discerned, it is the duty of the court to follow it”.**

The 3<sup>rd</sup> defendant referred the court to the cases of **Aggrery Simiyu Vs. Kenya Railways Corporation Civil Case No. 36 of 2010 (2010) eKLR** and that of **Langat Vs. KPTC (2002) 2EA. 436 (CAK)** where the Court of Appeal faced with non compliance with section 109 of the now repealed Kenya Ports and Telecommunications Corporation Act stated;

**“He did not serve a notice of intention to commence action on the managing director nor did he institute the action within twelve months from the date of his dismissal. The result of this default is that the suit brought by the appellant was incompetent and did not lie”.**

On the part of the plaintiff, it was submitted that, the requirement of section 67 (a) and (b) of the roads Act is no longer tenable in conformity of Article 48 and 159 (2) (d) of the constitution.

Article 48 of the constitution provides;

“The state shall ensure access to justice for all persons” while Article 159 (2) (d) provides that;

**“in exercising judicial authority, the courts and tribunals shall be guided by the following principles; (d) justice shall be administered without undue regard to procedural technicalities”.**

The plaintiff further submitted that the competence of claims for want of notices more specifically government proceedings Act was adjudicated in the case of constitutional petition no. 381/2014 in the case of the **Council of Governors Vs. The Senate and Others** where the court observed;

“The structure imposed by these provisions must be considered in the light of the right to access to justice. The right to access to justice as protected by the constitution involves the right of citizens

being able to access remanding and relief from courts. In the same case, the court held that while the objectives are laudable, the effect of mandatory notice provision cause hardship to ordinary claimant; penalty for non compliance is not to lose the right to agigate the cause of action.

The learned Judge further observed;

***“in view of the provision of the constitution, it becomes evident that section 13A of CPA provides an impediment to access to justice. A requirement for notice particularly where it is strictly enforced as a manadatory requirement demonishes the ability of citizen to seek relief against the government”.***

The Judge concluded this;

***“Any rule of procedure that violets a party’s fundamental right and freedom cannot be said to be sound. We do not see any prejudice that the respondent has suffered by alleged failure of the petitioner to issue 30 days notice”.***

The court has duly considered the preliminary objection and the rival arguments advanced by the counsels for the respective parties.

The essence of a preliminary objection was given by law JA Old Sir Charles Newbold P, in the case of ***Mukisa Biscuits Manufacturing Co. Ltd Vs. West End Distributors (1969) E. A. 696 at page 700*** law JA Stated;

***“ 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 on objection to the jurisdiction of the court or 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”.***

Sir Charles Newbold P. added as follows page 701:-

***“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 facts are to be ascertained or if what is sought is the exercise of judicial discretion”.***

The preliminary objection herein has two limbs and is based on the provision of section 67 (a) (b) of Kenya Roads Act, 2007. The first limb is on failure to issue a 30 days notice as required under section 67 (a) whilst the second one is on statutory limitation.

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 has also perused the authorities that have been referred to it by the plaintiff and it is noted that in none of them was the unconstitutionality of section 13 (A) a substantive issue for determination by the court. In petition 381/2014, the Judges expressed their opinions on strict compliance with section 13 A of the Government Proceedings Act and other similar sections that requires that a notice should be given before a suit can be filed. They went ahead and observed that;viewed against the prism of the constitution, it also becomes evident that section 13A of the Government Proceedings Act provides an impediment to access to justice. The law should not impose hurdles on accountability of the Government through the courts.....it is my finding therefore that section 13 (A) Government Proceedings Act as a mandatory requirement violates the provision of Article 48 of the constitution.

I have keenly read those two authorities and what is quoted above are just Orbiter Dictum of the said

judgments and not the Ratio Decidendi. The two courts did not make any substantive findings on whether the sections of the law that requires notices to be served are unconstitutional. The issues before them were different and therefore its my finding that sections 67 (a) is still valid as it has not been declared unconstitutional. It cannot be ignored when a party is dealing with proceedings against the 3<sup>rd</sup> defendant.

On the 2<sup>nd</sup> limb, it can be deciphered from the pleadings that the cause of action against the 3<sup>rd</sup> defendant arose on 8<sup>th</sup> October, 2010 when it is alleged to have entered into the suit premises and caused to be printed and/or marked with a sign of letter X denoting that the property is erected on a road reserve.

A clear perusal of the court record reveals that the 3<sup>rd</sup> defendant was enjoined in the proceedings by way of an amended plaint filed in court on 2<sup>nd</sup> June,2015. Clearly, there is no doubt that by then, the time within which to file suit against the third defendant had expired and therefore the suit as against it, is incompetent. The consequence of this is that the preliminary objection has merits and it is allowed.

The plaintiff's suit as against the 3<sup>rd</sup> defendant is hereby struck out with costs.

**Dated, signed and delivered at Nairobi this 2<sup>nd</sup> day of March, 2017.**

.....

**L. NJUGUNA**

**JUDGE**

**In the Presence of**

.....For the Plaintiff

.....For the 1<sup>st</sup> Defendant

.....For the 2<sup>nd</sup> Defendant

.....For the 3<sup>rd</sup> Defendant