



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC CASE NO. 31 OF 2020**

**SALOME MUMBI GACHIL.....1<sup>ST</sup> PLAINTIFF/ APPLICANT**

**RODA NJERI GACHIE.....2<sup>ND</sup> PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA NATIONAL HIGHWAYS**

**AUTHORITY(KENHA).....RESPONDENT/DEFENDANT/OBJECTOR**

**RULING**

The matter for determination is the Notice of Preliminary Objection dated **9<sup>th</sup> June 2020**, by the Defendant/ Objector seeking that the **Plaint** and the **Notice of Motion Application** both dated **27<sup>th</sup> May 2020** be struck out with costs on the ground that;

***1. That the Honourable Court lacks jurisdiction to determine the present matter as the suit before it does not satisfy the mandatory requirement under section 67(a) of the Kenya Roads Act No. 2 of 2007 , the Plaintiff having filed the suit herein without first issuing written Notice to the Director General of the Defendant. Containing the particulars of claim and the intention to commence legal proceedings.***

On the **17<sup>th</sup> of June 2020**, the Court directed that the **Notice of Preliminary Objection**, be canvassed by way of written submissions. In compliance with the said direction, the Defendant through the **Law Firm of Sissule Musungu Sissule & Associates Advocates**, filed its written submissions on the **30<sup>th</sup> of June 2020**, and submitted that the question challenging the jurisdiction of this Court should be determined at the earliest opportunity for jurisdiction lies at the very heart of a dispute. For this the Defendant relied on the case of **Owners of Motor Vessel Lillian S ...Vs...Caltex Oil Kenya Limited (1989)KLR 1**. It was its submission that where a party fails to observe the mandatory requirement under **Section 67 (a) of the Kenya Roads Act No. 2**, this Court is not properly vested with jurisdiction as the party omit or neglects a clear procedure for redress of a grievance as stipulated in the Act. The Defendant further relied on the case of **Micheal Otieno Nyaguti & 5 others ...Vs...Kenya National Highways Authority & 5 Others (2018) eKLR** where the Court held that;

***“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 action to be served upon the Director – General by the party or its agent before legal proceedings are commenced. The requirement is coached in mandatory terms. The 1<sup>st</sup> Defendant has submitted that no such notice was served before the petition was filed. The Petitioner has submitted that “the 1st Petitioner wrote to the Director-General KENHA on behalf of would be Victims giving him notice of intended Civil litigation proceedings on 13th April 2015 and delivered via email.” However, the copy of the said email has not been printed and availed before the court and there is therefore no evidence to controvert the 1st Respondent contention that no notice was served before the filing of this suit.***

***(b) The 1st Respondent submitted that essence of the notice being served first is to give the 1st Respondent an opportunity to deal with the issues raised and resolve them in appropriate cases. The counsel further submitted that courts have taken the position that they will decline to determine constitutional questions where a suitable remedy can be pursued through a legislative provision. The petitioner on the other hand submitted that the Kenya Roads Act 2007 is a legislation that was enacted before the constitution 2010.***

It was their further submission that it would be detrimental for property owners to circumvent the provisions of **Section 67(a)** and fail to afford the Director General of the Highways Authority an opportunity to amicably resolve disputes before they are escalated to the Courts.

It also submitted that the Defendant also called on the Court to consider the Plaintiff’s cause of action in the matter and that the powers of the **National Highways Authority** to enter into a property so as to divert any drain would emanate from **Section 26 of the Kenya Roads Act**, and that where a party is aggrieved by any Action of the Authority in diverting any drain, the aggrieved party is entitled to compensation under **Section 29** and therefore the Plaintiff’s claim against the Authority and their remedy does not lie in Civil claim as purported.

It was further submitted that costs follow the event and the Plaintiffs should bear the cost of the suit and the Court was urged to find in favour of the **Kenya National Highways Authority**.

The Plaintiffs/Applicants filed their submissions on **8<sup>th</sup> July 2020**, through the **Law Firm of Mbiyu Kamau & Co. Advocates** and submitted that the Defendant/ Objector seeks to defeat the suit and hence defeat justice for the Plaintiffs/ Applicants. That the overriding objectives of the **Civil Procedure Act and Rules** as well as **Article 159 (2) of the Constitution** provide that justice shall be administered without undue regard to procedural technicalities, and there are sections of the law that intend to cure such a situation.

It was further submitted that to dismiss the suit will be to deny justice to the Plaintiffs/ Applicants contrary to **Article 48 of the Constitution** and therefore oust them from the judgment seat of Justice as well as deny them a fair hearing as espoused in **Article 50(1) of the Constitution** . It was their further submission that supremacy of the Constitution should not be undermined and that **Section 67 (a) of the Kenya Roads Act** is inconsistent with the Constitution of Kenya under **Article 40(6)**.

Further that the Applicants rushed to this Honourable Court after failed negotiations with the **National Highways Authority** as the Respondent had camped in site ready to begin construction and that nothing would stop the Respondent from continuing with the interference of the quiet possession of the suit property and hence the urgency in filing the suit, as the Respondent had already paraded their vehicles on site.

The Court has now carefully read and considered the pleadings of the parties the annexures thereto together with the rival written submissions and renders itself as follows:-

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 Nebbold, 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.”*

Having given the description of a **Preliminary Objection**, it is evident that a **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 the court is called upon to exercise judicial discretion.

Further, in the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999**, 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.”*

Therefore in determining a **Preliminary Objection**, the Court will take into account that a **Preliminary Objection** must stem from the pleadings and raises pure point of law. See the case of **Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, where the court held that:-

*“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”*

Before the Court embarks on determining the merit of the **Notice of Preliminary Objection**, it has to first determine whether what has been raised herein satisfy the ingredients of a **Preliminary Objection**. As the Court determines whether what the Defendants have filed amounts to a Preliminary Objection or not, the Court will also be persuaded by the findings in the case of **Oraro...Vs...Mbaja (2005) 1KLR 141**, where the Court held that:-

*“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.*

In the instant **Preliminary Objection**, the Defendant/Objector has averred that the Court lacks Jurisdiction to deal with the instant suit as the Plaintiffs/Applicants have failed to satisfy the requirements of **Section 67 (a) of the Kenya Roads Act No. 2 of 2007** which requires that a **written notice**, be served upon the Defendant/ Objector before a suit is to be commenced. It is not in doubt that the issue of whether or not the provisions of the law have been complied with before the filing of the suit, goes to the jurisdiction of the Court and secondly does not require the ascertaining of the facts.

It is not in doubt that the Court is required to determine what the law says and whether indeed the Plaintiffs/ Applicants ought to have served

the Defendant/Objector with a **written notice** and 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 meets the test of what amounts to a **Preliminary Objection**. It raises pure points of law and it be determined without ascertainment of facts from elsewhere.

Therefore, this Court finds and holds that the **Notice of Preliminary Objection** as filed by the Defendant/ Objector 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 recognises that these have been instances in which the Court has dealt with Petitions as opposed to an ordinary Suit. The instant case is an ordinary suit, and therefore the Court finds and holds that the **written notice** was therefore mandatory before the suit was 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, then the requirements of **Section 67(a)** are mandatory. It is not in doubt that the allegations by the Defendant that the **Notice** was never served have not been controverted and in their submissions the Plaintiffs have acknowledged that the notice was never served as the Defendant had already paraded their vehicles on site.

As already held above, by this Court, the instant suit is an ordinary suit and not a Petition and therefore the Plaintiffs in submitting that their rights have been violated and not moving the Court by way of a Petition would not in any way cure the nature of the suit before the Court.

The Plaintiffs/Applicants having failed to give the **one month written Notice** are therefore in breach of the said 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.

The Court would like to point out that the Defendant in its submissions has submitted that where the Plaintiffs/ Applicants contests the mandate of the **National Highways Authority** in accessing the suit properties to divert the drainage, the remedy does not lie in a civil claim as purported. However, these are new facts that were never pleaded in the Preliminary Objection and therefore cannot be raised in their submissions.

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

The Upshot of the foregoing is that the **Notice of Preliminary Objection** dated **9<sup>th</sup> June 2020** by the Defendants/Objectors is found merited and the same is upheld. Each party to bear its own costs

It is so ordered.

***Dated, signed and Delivered at Thika this 9<sup>th</sup> day of July 2020.***

**L. GACHERU**

**JUDGE**

**9/7/2020**

**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 **15<sup>th</sup> 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 and virtual appearance of:**

**M/s Njoroge holding brief for Mr. Mbiyu Kamau for the Plaintiffs/Respondents**

**Mr. Mwangi holding brief for Sisule for the Defendant/ Objector**

**L. GACHERU**

**JUDGE**

**9/7/2020**