



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

ENVIRONMENT & LAND COURT

PETITION CASE NO.10 OF 2015

IN THE MATTER OF ARTICLE 22(1) (2) OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF RIGHTS OF FUNDAMENTAL

FREEDOMS UNDER ARTICLE 10, 23,24,28,35,40,42,46,47,50

60,64,67,69,70 AND 232 OF THE CONSTITUTION

AND

IN THE MATTER OF CONTRAVENTION OF THE LAND ACT PARTICULARLY

SECTION 4, 107-133

AND

IN THE MATTER OF CONTRAVENTION OF THE NATIONAL LAND

COMMISSION ACT

IN THE MATTER OF SECTION 13 OF THE ENVIRONMENT AND LAND

COURT ACT

BETWEEN

MICHAEL OTIENO NYAGUTI.....1ST
PETITIONER

MICHAEL OGINGA DACHE.....2ND
PETITIONER

SAMUEL MBAJE.....3RD
PETITIONER

HARRISON OUKO.....4TH PETITIONER

ROBERT OUKO OKUMU.....,.....5TH PETITIONER

TONY CLIFF KOBE.....6TH PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY.....1ST
RESPONDENT

NATIONAL LAND COMMISSION.....2ND
RESPONDENT

COUNTY GOVERNMENT OF KISUMU.....3RD
RESPONDENT

REGISTRAR OF LANDS.....4TH
RESPONDENT

AND

SBI CONSTRUCTION COMPANY.....INTERESTED
PARTY

THE COMMISSIONER ON ADMINISTRATIVE JUSTICE.....INTERESTED
PARTY

RULING

1. INTRODUCTION

(a) Michael Otieno Nyaguti and 5 others, hereinafter referred to as the petitioners filed the petition dated 5th May 2015 against Kenya National Highways Authority and 3 others hereinafter referred to as the Respondents. The petition lists SBI Construction Company and The Commission on Administrative Justice as interested parties. Also filed contemporaneously with the petition is the Notice of Motion dated 6th May 2015.

(b) The petitioners then filed an amended petition and Notice of Motion dated 14th May 2015. The prayers in the petition includes permanent injunction, over the particularized parcels of land, declaration on right to compensation before compulsory acquisition and order for payment of values of properties demolished and damages. The prayer in the notice of motion is for temporary injunction against the Respondents pending the hearing and determination of the petition.

2. NOTICE OF PRELIMINARY OBJECTION

(a) The 1st Respondent's counsel filed a notice to raise a preliminary objection on

points of law dated 22nd June 2015. the notice sets out the following three grounds:

(i) That the petitioners did not give the Director General one months notice required under Section 67 (a) of the Kenya Roads Act 2007 before Commencing the petition.

(ii) That under the said Act, the petitioners were required to seek redress from the Cabinet Secretary before commencing the petition.

(iii) That the application is misconceived, unfounded, is without merit and is otherwise an

abuse of the due process of the court.

3. That when the preliminary objection came up for hearing on 29th September, 2015 the 1st Petitioner indicated that he had the authority of other petitioners to argue the notice on their behalf and that he had filed written submissions dated 15th September 2015. The counsel for the 1st Respondent filed their submission dated 29th September 2015 on the same date. The court then heard the counsel for the 1st Respondent and the 1st Petitioner in person in their additional oral rival submissions. The main issues for determination are as follows:

(a) Whether the provisions of the Kenya Roads Act 2007 requires persons intending to commence suit against the 1st Respondent to issue one months notice and if so whether failure to comply would lead to striking out of the suit.

(b) Whether the prayers sought in the petition can be adequately pursued through an ordinary suit.

(c) Who pays the costs.

4. CONCLUSIONS

The court has considered the grounds on the notice of preliminary objection, written and oral rival submissions by the counsel for 1st Respondent and the 1st petitioner in person and come to the following findings:

(a) 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 couched in mandatory terms. The 1st 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 and the requirement for a notice before commencing suit is inconsistent with the constitution which allows those seeking redress, even with informed documentation, access to courts. The petitioner referred the court to the court of appeal decision in Kenya Revenue Authority - V- Habimama sued Hemed & Another Nairobi C.A. NO.34 of 2008. In that case the court of appeal affirmed the High court finding that the requirement of a notice be served to the Attorney General Under section 3(2) (a) of the Kenya Revenue Authority Act Chapter 472 of Laws of Kenya and Section 70 of the Finance Act 1998 unconstitutional. It is important to refer to Article 262 of the Constitution 2010 and specifically Section 7 of schedule six which states:

" 7. (1) All Law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualification and exceptions necessary to bring into conformity with this constitution.

(2) If, with respect to any particular matter -

(a) a law that was in effect immediately before the effective date assigns responsibility for that matter to a particular state organ or public officer; and

(b) a provision of this constitution that is in effect assigns responsibility for that to a different state organ or public officer the provision of this constitution prevail to the extent of the conflict."

The court holds the view that the requirement of a notice being served on the Director General would not amount to hindering a litigant from accessing the seat of justice (court). It only creates an opportunity to the Director General's office of exploring an out of court settlement and is in line with the provision of Article 159 of the constitution which at sub-article 2(c) encourages "alternative forums of dispute resolutions". The provision of section 67 of the Kenya Road Act 2007 is not in contravention with the constitution 2010.

(c) That superior courts have in several cases taken the position that where infringements of rights under the Constitution can be pursued adequately as a claim under a substantive legislative framework, then the court will decline to declare whether there has been a breach of the said rights. The superior courts have also held that other constitutional bodies or state organs under a legislative framework should be given the opportunity to resolve the dispute before the court can exercise its jurisdiction under the Constitution. In the case of International Centre for policy and Conflict and 5 other – V- The Hon. Attorney General & 4 others {2013} eKLR cited in Anne Wangui Ngugi & 2222 others V – Edu and Odundo C.E.O. Retirement Benefit authority {2015} the court observed as follows:

"{109} An important tenet of the concept of the rule of law is that this court before exercising its jurisdiction under Article 165 of the Constitution in general must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the court were to act in haste, it would be presuming bad faith or inability by that body to act.)....."

{110} Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanism have been exhausted...."

Also in the case of Republic – V- the National Environment Tribunal & 2 others Exparte Abdulhafidu Sheikh Ahmed Bubadi Zubedi {2013} eKLR, the court observed that where an infringement can be redressed within a legislative framework, the course to follow is to take out proceedings under the framework and not under the constitution unless that the framework does not provide efficacious and satisfactory answer to the litigants grievance, similar position was taken by the courts in Busia Petition No.10 of 2014 Joseph Owino Muchesia & Another – V – NEMA & 2 Others, Busia Petition No.8 of 2014 Joseph Ojwang Ounde – V- NEMA & 7 others, Busia HC Misc. App. No.84of 2015 REPUBLIC – V- Kenneth Okukui Okulu & another Exparte Busia SugarIndustry & Another. The court concurs with the position taken in the foregoing decisions and is of the considered finding that the petitioners claims could have been pursued within the legislative framework.

(d) That the road project whose construction is under way and through which structures developed on the road reserves were demolished has been going on since December 2014 {See paragraph 14 of the replying affidavit of Thomas Gacoki sworn on 22nd June 2015}. Prior to the commencement of the construction there has been public hearings and sensitizations from 2013 {paragraph 6 to 12 of the said affidavit}. Any concerns that the petitioners may have had and especially the prayers in the petition could adequately have been addressed through the Kenya Road Act No.2 of 2007 and or an ordinary claim, instead of a constitutional petition, filed in court.

5. That for reasons set out above the preliminary objection by the 1st Respondent is upheld. The petition and notice of motion amended on 14th May 2015 are hereby struck out with each party bearing their own costs.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

Dated and delivered this **11th day of November 2015**

In presence of;

Petitioners 1st, 2nd and 5th Petitioners present

Respondent s N/A

Counsel Mr Rakewa for Mukuna for 1st Respondent

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

11/11/2015

S.M. Kibunja

1st, 2nd and 5th Petitioners present

1st Petitioner – I still represent all the petitioners

Mr Rakewa Advocate for Mr Mukuna for 1st Respondent.

Court: Ruling dated in open court in presence of 1st, 2nd and 5th petitioners and Mr Rakewa for Mukuna for Respondent.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

1st Petitioner: I pray for leave to appeal.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015

Court Leave to appeal granted.

SM. KIBUNJA

ENVIRONMENT & LAND – JUDGE

11/11/2015