REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 32 OF 2020

CHARLES NJENGA GATIMU.....PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL AUTHORITY..DEFENDANT/RESPONDENT

RULING

There are two matters for determination. A **Notice of Motion Application** by the Plaintiff/ Applicant and a **Notice of Preliminary Objection** by the Defendant/Respondent/Objector. In the Notice of Motion Application dated **26th May 2020,** the Plaintiff/ Applicant sought for orders that;

> **1. THAT a temporary injunction do issue restraining the Defendant/ Respondent by itself, its agents, servants, employees and or otherwise from demolishing and or interfering with the Applicant's building erected upon Land Reference Number Kiambaa/Ruaka/5260, pending hearing and determination of the suit herein.**
>
> **2. THAT any other relief that may be just to meet the ends of justice in this case.**
>
> **3. THAT costs of this Application be in the cause.**

The Application is premised on the grounds that in **2013,** the Applicant offered to purchase a portion of **L.R Kiambaa/ Ruka /4079,** which was undergoing subdivision. That the Plaintiff/Applicant carried out the necessary due diligence and wrote to the Respondent on **3rd October 2013,** inquiring whether the proposed plot encroached on a road reserve designate **C62**. That on **22nd October 2013,** the Defendant/ Respondent wrote to the Plaintiff/ Applicant reassuring him that the said plot did not encroach on the **C62** road reserve and he therefore proceeded to purchase the suit property . That the suit property was initially for agricultural use and the Plaintiff/ Applicant applied for change of user from agricultural to commercial/ residential. That prior to the approval for change of user, the Plaintiff/ Applicant established that the suit property had **two (2) access roads** and there was no encroachment on the **C62** Road Reserves and on **5th August, 2014,** Kiambu District Land Administrator approved the change of user and upon approval of building plans, the Applicant constructed on the suit property which property was valued on **2nd September 2015,** at **kshs.45,000,000/=.** Further that in **March 2019**, the Respondent's surveyors trespassed on the suit property and placed a mark on the building erected on the allegation that it had encroached on the proposed road reserve, which actions were **ultra vires** the powers conferred upon it as it did not serve the Plaintiff/ Applicant a requisite **Statutory notice.**

That the Plaintiff/ Applicant in **July 2019,** hired the services of **Georsurv Systems Limited,** to establish whether there was encroachment and prior to commencing construction of the building, the architects had sought the services of its surveyors **Geomacks Survey Consultants,** who confirmed that there was no encroachment on the **C62 Road reserve.** Further that the Respondent kept visiting the suit property until the **20th May 2020,** when it moved heavy road construction equipment in the neighbourhood and earmarked the Plaintiff's/ Applicant's building amongst others for demolition. That the Defendant's/Respondent's unlawful actions scared his tenants, who have moved away for fear of being forcibly evicted thereby occasioning him loss and damages. That the Defendant/ Respondent has never responded as to why it intended to demolish the suit property. That it is in the interest of justice that the prayers sought be granted.

In his supporting Affidavit **Charles Njenga Gatimu** reiterated the contents of the grounds in support of the Application and averred that he was apprehensive that if the orders sought were not granted, then he would suffer irreparable harm and damage

The Application is opposed and the Defendant/ Respondent filed a Replying Affidavit sworn on **22nd June 2020,** by **Eliud Munene,** its Acting Deputy Director Survey. It was his contention that the suit property was as a result of subdivision of **L.R Kiambaa/Ruaka/ 4079,** which was a result of a subdivision of **L.R Kiambaa/ Ruaka/ 93**. He further averred that through Gazette Notices **No. 3345** and **3346** dated **10th October 1969**, the Government of Kenya compulsorily acquired **0.60 acres** of land from **L.R Kiambaa/Ruaka/93,** for the road

realignment. It was his contention that the **Highway Authority** conducted a survey in the year **2013,** to confirm whether **L.R 4079,** had encroached onto the road reserve and that at the time the property had no developments and that it was concluded that the said **L.R 4079** encroached on the road reserve. Further that in the year **2019,** during survey works to secure the right of way, the **Highways Authority** discovered that a building had been erected on the suit property encroaching on the road reserve.

That the Plaintiff/ Applicant did not apply for Approval from the **Highways Authority** prior to constructing the building nor did he submit building plans and designs for considerations by the Authority. Further that the structure erected is in flagrant disregard of the zoning regulations with respect to the building lines. He further contended that he has been advised by his Advocates which advise he believes to be sound that the Defendant/ Respondent is mandated by law to remove any structures encroaching upon the road reserve. That the Plaintiff is in disregard of the **Road Act 2007,** and his conduct is not deserving of any orders of temporary injunction. That the Applicant has failed to enjoin the **Land Registrar** and has failed to establish a prima facie case or that he will suffer irreparable harm. Further that the balance of convenience tilts in favour of the Highways Authority. That the Applicant cannot claim to lack **notice**, yet he had more than a year to remove the encroaching structure from the road reserve. It was his contention that the **Authority** was not afforded the opportunity to demarcate the boundaries between the suit property and the road reserve prior to erection of the structure.

The Plaintiff/ Applicant **Charles Njenga Gatimu** swore a Supplementary Affidavit on **23rd June 2020,** and denied that the gazetted parcel of land was compulsorily acquired from the suit property. He contended that **Eliud Munene** visited the suit property and in his presence took out the measurements of the suit property and by a letter dated **22nd October 2013,** he stated that the parcel of land does not encroach on the **C62 Road reserve**. That in their letter, the Respondent's did not direct or require him to submit building plans or designs and the construction that he undertook are well within the boundaries of the suit property. Further that he sought the requisite approvals for construction upon the suit property from the relevant authorities, who all approved the building plans with construction proceeding and being completed in the year **2016** and the building was occupied in **2017**. That the Defendant/Respondent failed to give **notice** in writing to him appraising him of the fact in order for him to address the issue if indeed there was encroachment. He denied constructing a parking area on the reserve. He further denied that the dispute requires participation of the **Land Registrar** and averred that the dispute involves the Kiambu Land Registry.

The Defendant/ Respondent filed a Notice of Preliminary Objection dated **9th June 2020,** and urged the Court to strike out the Plaint and Notice of Motion Application on the grounds 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 issuing written notice to the Director General of the Defendant, containing the particular of claim and the intention to commence legal proceedings .**

The Application and the Notice of Preliminary Objection were canvassed together by way of written submissions which the Court has now carefully read and considered together with the pleadings of the parties, the annextures thereto and the written submissions and finds that the issues for determination are;

> **1. Whether the Notice of Preliminary Objection is merited.**
>
> **2. Whether the Notice of Motion Application dated 26th May 2020 is merited.**

1. Whether the Notice of Preliminary Objection is merited.

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."**

The Court will first determine whether what has been raised herein satisfy the ingredients of a ***Preliminary Objection***. For this determination the court will 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 does not require the ascertaining of the facts.

It is evident that the Court is required to determine what the law says and whether indeed the Plaintiff/Applicant ought to have served the Defendant/Objector with a **written notice** and that determination 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 therefore the issue raised by the Defendant 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 can 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 is now left to determine whether the objection as raised by the Defendant is merited. The Preliminary Objection by the Defendant / Objection is founded 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."**

From the above provisions of law, it is clear that there need to be a **notice** before commencement of proceedings against the Authority. Though it is the Plaintiff's/Applicant's contention that his Advocate served upon the Defendant/ Objector a letter detailing its claim and its intention to sue, the Defendant/Objector has submitted that there was no letter sent to it and further that the letter allegedly sent to the Highways Authority by the Plaintiff/Applicant could not have been served upon the Highways Authority on the date indicated. Even though the letter is dated **2nd March 2020**, it contains a summary of events which allegedly took place on **May 2020**. Having perused the said letter, the Court concurs with the Defendant/Objector that there is no way the letter would have been sent to the Authority on **2nd March 2020**. Further the Court has not seen any evidence that either the letter was ever sent to the Defendant/ Objector nor that it was ever received by the Defendant/Objector.

Further the Court has seen the letters the Plaintiff/ Applicant has relied on, being the letters from his Architects and surveyors. The Plaintiff/Applicant submitted that the these letters serves as the required **Notice**. Having gone through the said letters, the Court is not satisfied that the letters set out the claim nor did the letters amount to the **Notice** as required under **Section 67(a) of the Roads Act .**

The Defendant/ Applicant has submitted that the **Notice** under **Section 67(a),** is important to enable the Court to carry out its mandate efficiently and effectively and further that the provisions of **section 67 (a)** promote the settlement of any disputes through Alternative Dispute Resolution (ADR). From the pleadings, it is not in doubt that the Defendant/ Objector had assured the Plaintiff/ Applicant that the suit property had not encroached on the road reserve. Further, it is clear that the Plaintiff/ Applicant was seeking to engage the Defendant/ Objector to try and find a way to an amicable solution. If the Plaintiff had not been served earlier with the Notice under **Section 49(4)** of the **Road Act,** it would be impossible for him to know that his building was earmarked for demolition.

However, the Plaintiff/ Applicant having been aware that his building was earmarked for demolition on **20th May 2020**, he ought to have sent out the **Notice** as required by the law. Even if the **thirty (30) days** could not have lapsed, since there was some sense of urgency, then the Court would have considered that such **Notice** had been sent. However, the law requires the Plaintiff to send out a **Notice** under **section 67 (a)** and it is clear that the same was never sent out. Therefore, the Court finds and holds that the Preliminary Objection is merited and consequently, the Court upholds the same.

The Plaintiffs/Applicants having failed to give the **one month written Notice** is 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.

2. Whether the Notice of Motion Application dated 26th May 2020 is merited.

The Court has already found and held that it has no jurisdiction to deal with the matter and has consequently downed its tools. In the circumstances, the court further finds and holds that there is no basis of dealing with the instant Notice of Motion Application dated **26th May 2020** as the Court has downed its tools.

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 **9th June 2020** by the Defendants/Objectors is found **merited** and the same is upheld. Each party to bear its own costs. For the avoidance of doubt, the interim orders in place herein are hereby vacated.

It is so ordered.

Dated, signed and **Delivered** at **Thika** this **8th** day of **October 2020**

L. GACHERU

JUDGE

8/10/2020

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 **15th 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 of and virtual appearance via video conference – Microsoft Teams Platform

Mr. A. G. N. Kamau for the Plaintiff/Applicant

M/s Wahome for the Defendant/Respondent/Objector

L. GACHERU

JUDGE

8/10/2020