



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 40 OF 2019

WILLIAM NGATIA KARIUKI.....1ST PLAINTIFF

JAMES MUGAI CHIURI 2ND PLAINTIFF

REUBEN NYOTU MUNGAI 3RD PLAINTIFF

ALFRED MURIUKI KABURU..... 4TH PLAINTIFF

JANE WACHUKA MWANGI..... 5TH PLAINTIFF

LYDIA MUTHONI WACHIRA 6TH PLAINTIFF

ELIZABETH WAIRIMU KARIUKI 7TH PLAINTIFF

WANJOHI MUNYIRI..... 8TH PLAINTIFF

JOHN ITEGI MATHU 9TH PLAINTIFF

SAMUEL WAMUGI MATHUU 10TH PLAINTIFF

MICHAEL WAMBUGU MATHU.....11TH PLAINTIFF

JOSEPH MWAI MUCHANGL..... 12TH PLAINTIFF

STEPHEN M. WACHIRA 13TH PLAINTIFF

BONIFACE MURIITHI NDIRITU 14TH PLAINTIFF

REGINA WANJIRU MWANGI 15TH PLAINTIFF

JOYCE WAIRIMU KING'ORI 16TH PLAINTIFF

GREGORY KARIUKI..... 17TH PLAINTIFF

CHRISTOPHER MWANGI NGUTHI 18TH PLAINTIFF

PETER MURIITHI THEURI..... 19TH PLAINTIFF

WILLIAM KARIMI..... 20TH PLAINTIFF

STEPHEN MUGO WAIKWA 21ST PLAINTIFF

VERSUS

KENYA NATIONAL HIGHWAY AUTHORITY.....DEFENDANT

RULING

1. Pursuant to the filing and service of the Plaintiffs' Application dated the 19th December, 2019 seeking interim orders against the Defendant/Respondent from interfering with their plots identified as UNS Commercial Plots – Narumoru Township plot Nos E, G, M 1, 2, 3, 4, 5, 6, 9, 12, 14, 16, 17, 18, and 19 Narumoru Township Block 1/147,149, 150, 151, 160, 293, certificate of title being LR No. 5118/188, 192, 212 and 213, the Respondent, filed their replying affidavit and Notice of Preliminary objection dated the 9th January 2020 in response.

2. On the 11th June 2020, the Court directed that the application dated the 9th January, 2020 by way of Preliminary Objection be dispensed of in the first instance by way of written submissions wherein only the Plaintiffs complied and filed their written submissions.

3. That notwithstanding the Court shall consider the Preliminary objection raised thereto by the Respondent to wit that;

i. The Plaintiff/Applicants' application was fatally defective as it did not comply with the mandatory provisions of Section 67 (a) of the Kenya Roads Act, 2007 requiring a thirty (30) days' notice to the Director General prior to filing of the suit.

ii. The Plaintiff/Applicants' application was premature as it offended Section 18(2) of the Land Registration Act, 2012 which mandatorily reserved boundary disputes to the Land Registrar at first instance prior to moving the honorable Court.

4. The Respondent, in its replying affidavit has deponed that it being the Kenya National Highways Authority (KeNHA), that it was mandated under Section 4(2)(b) of the Kenya Roads Act to inter alia control national roads, road reserves and access to roadside developments. In this regard therefore, during the month of December 2019 and pursuant to the provisions of Section 49(1)(a) of the Kenya Roads Act and Section 91(1) of the Traffic Act they had issued to the Plaintiff/Applicants herein vacate notices (Notices of intended Demolitions) of illegal structures encroaching on the road reserve. That the said demolitions were scheduled for the 4th January 2020, which formed the basis of the Plaintiff/Applicants' present plaint.

5. From para 10- 20 of the said Affidavit, the Defendant/Respondent has deponed that pursuant to the provisions of Section 67(a) of the Roads Act, 2007, it was mandatory for the Plaintiff/Applicant to serve the Director General KeNHA with a one months' notice outlining their grievances for redress before filing the present suit which they failed to do and therefore the suit before the Court was fatally defective. Reliance was placed on the decided case in **Sumac Development Company Ltd. vs George Munyui Kigathi & 2 Others [2017] eKLR**.

6. That the issue presented in the Plaintiffs/Applicants' case was hinged on a boundary dispute on a question as to where the Plaintiff/Applicants' properties were versus the road boundaries. That had the Plaintiff/Applicants served the Defendant/Respondent with the said the requisite notice, they would have been advised of what entailed the provisions of Section 18(2) of the Land Registration Act to wit that boundary disputes were mandatorily a preserve for the determination by the Land Registrar in the first instance.

7. In response to and in opposition of the Defendant/Respondent's preliminary objection, the Plaintiff/Applicants' written submissions were to the effect that the preliminary objection was misconceived and constituted an abuse of the Court process and law.

8. That the Defendant/Respondent had issued them with a 30 days' notice dated 4th December 2019, of demolition of their suit properties. That since the demolition was to be effected at the expiry of the notice, it was not reasonable for the Respondent to expect the Applicant/Plaintiffs to serve the Respondent's Director General with a notice of 30 days before filing the suit when its initial notice was still in cause.

9. The Applicant/Plaintiffs submitted that the Respondent should be restrained from denying them an opportunity to be heard especially on their rights to own property since they were private legitimate land owners who did not have any boundary disputes on the location and position of the road marks as alleged by the Respondent. That their claim was based on proprietorship interest and the risk of their permanent structures which were located away from the road reserve from being demolished. Reliance was placed on the decided case in **Simonash Investments Limited vs. Kenya National Highways Authority & 2 Others [2019] eKLR** where the trial Court relied on the decided cases in **Michael Otieno Nyaguli & 5 Others vs Kenya National Highways Authority & 5 Others [2015] eKLR**, **Rianna Furaha Children Home vs Kenya National Highways Authority [2016] eKLR**, **Unilever Tea Kenya Limited vs National Land Commission & 2 Others [2017] eKLR** and **Boro Dika vs Gulsan Insaat Sanay, Turizm & Another [2018] eKLR**.

10. The Plaintiff/Applicants further submitted that their suit properties were immediately adjacent to and shared a common boundary with the Nyeri highway road as seen by their annexed document No 4 and therefore this was not an issue of a land boundary dispute. That indeed as demonstrated by the photographs in their supporting affidavits, the Respondent had enjoined them with trader's who had unlawfully occupied the road reserve and had put up permanent structures next to the Applicants' properties.

Determination

11. A Preliminary Objection according to the decided case by the Court of Appeal in the case of **Mukisa Biscuits Manufacturing Co. Ltd-v- West End Distributors Limited (1969) EA. 696** was stated to be thus:-

“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.”

12. 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.”

13. In the case of **Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004**, 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.”

14. In its Preliminary objection, the Defendant/Respondent’s case inter alia is that the suit before the Court was fatally defective for reasons that the Plaintiff/Applicants failed to serve its Director General with a one months’ notice outlining their grievances, for redress, before filing the present suit, in contravention of the mandatory provisions of Section 67(a) of the Roads Act, 2007 which provides that;

‘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 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’.

15. The Plaintiff/Applicants on the other hand have submitted that the Defendant/Respondent had issued them with a 30 days’ notice dated 4th December 2019, of demolition of the suit properties. That since the demolition was to be effected at the expiry of the notice, it was not reasonable for the Respondent to expect them to serve its Director General with a notice of 30 days before filing the suit when, its initial notice was still in cause.

16. The second issue raised in the Preliminary objection is that the matter in question was hinged on a question of boundaries as to where the Plaintiff/Applicants’ properties were versus the road boundaries which issue was a mandatorily preserve for the determination by the Land Registrar in the first instance as per the provisions of Section 18(2) of the Land Registration Act.

17. The Plaintiff/Applicants on the other hand have stated that their suit properties were immediately adjacent to and shared a common boundary which the Nyeri highway road and therefore this was not an issue of a land boundary dispute. That indeed as demonstrated by the photographs in their supporting affidavits, the Respondent had enjoined them with trader’s who had unlawfully occupied the road reserve and had put up permanent structures next to their (Applicants’) properties.

18. The following are the issues for the Court’s determination;

- i. Whether the Plaintiff/Applicants’ suit is fatal for failure to issue and serve the 30 days’ notice of their intention to sue to the Director General of the Defendant/Respondent.
- ii. Whether the Plaintiffs/Applicants’ claim is based on a boundary dispute.

19. 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. 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 operating word used is ‘**shall**’. See the case of **Sumac Development Company Limited (supra) 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.”*

20. The Court acknowledges that instances where it has been held that that the thirty days’ notice is not mandatory are instances in which parties have filed Petitions as opposed to an ordinary suit. Since the instant case is an ordinary suit, the Court finds and holds that the **written 30 days’ notice** was mandatory. 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.”*

21. Further in the case of **Anthony Ngili Munguti & 12 Others vs Kenya National Highways Authority & Another [2017] eKLR**, the

Court held that:

“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.”

22. The Plaintiff/Applicant having failed to give the **one month written Notice** are therefore in breach of the provisions of Section 67 (a) of Kenya Roads Act 2007 and lack audience before this Court.

23. On the second issue for determination, the Court finds that from the material placed before me, I am unable to determine whether indeed the Applicant/Plaintiffs properties have encroached on the road reserve and whether the matter is one based on a boundary dispute as there is no averment that the issue had been dealt with by Land Registrar before the suit was filed in Court. In this regard, I find that that the suit was filed in Court prematurely as the provisions of **Sections 18 and 19 of Land Registration Act No. 3 of 2012** confers the Jurisdiction upon the Land Registrar in the first instance. That this Court is therefore without Jurisdiction to that extent. See the case of **Willis Ochola vs Mary Ndege [2016] eKLR**.

24. The end result is that the Court finds merit in the Defendant/Respondent’s Preliminary Objection and proceeds to strike out the Plaintiffs/Applicants’ suit with costs.

Dated and delivered at Nakuru this 30th day of November 2020.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE