



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 109 OF 2017**

**SIMONASH INVESTMENT LIMITED.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA NATIONAL HIGHWAY AUTHORITY....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**SOLEL BONEH INTERNATIONAL**

**HOLDINGS AG (K) LTD.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**HONOURABLE ATTORNEY GENERAL.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

1. Kenya National Highway Authority, the 1<sup>st</sup> Defendant, vide the notice of motion dated the 18<sup>th</sup> September 2018, seeks for the suit filed by Simonash Investment Ltd, the Plaintiff, to be struck out with costs or alternatively be transferred to the Chief Magistrate Kisumu for hearing and final determination. The application is based on the eight (8) grounds on its face and supported by the affidavit of Thomas Gacoki, the Assistant Director incharge of the 1<sup>st</sup> Defendant Survey Department, on the 18<sup>th</sup> September 2018. The main grounds for the 1<sup>st</sup> Defendant's application is as summarized herein below;-

- **That the Plaintiff did not comply with the mandatory provision of Section 67 (a) of the Kenya Roads Act 2007, that require notice of intention to institute the suit to be served before filing the suit.**
- **That the Plaintiff's suit is about a boundary dispute between his parcel and the land constituting the road, and the jurisdiction to deal with boundary dispute in the first instance lies with the Land Registrar in accordance with Section 19 (1), (2) and (3) and Section 18 (1) and 3 of Land Registration Act, 2012.**
- **That the existence of the temporary injunction order in favour of the Plaintiff, and against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, has led to the 1<sup>st</sup> Defendant incurring a loss of Kshs. 341, 857, 828/=, as penalty to the 2<sup>nd</sup> Defendant, which by far surpasses any claim the Plaintiff may ever require on account of any wrongful action on the part of the 1<sup>st</sup> Defendant for utilizing the portion of the land in dispute.**
- **That the Plaintiff's suit is misconceived and constitutes an abuse of the courts process and should be struck out.**

2. The application is opposed by the Plaintiff through their grounds of opposition dated the 19<sup>th</sup> October 2018, and replying affidavit sworn by Richard Otieno Sikuku, a director with the Plaintiff, on the 19<sup>th</sup> October 2018. Their case is as summarized below;

- **That the 1<sup>st</sup> Defendant has participated in the proceedings for about one and half years, including the hearing on merit of the Plaintiff's notice of motion filed contemporaneously with the plaint which was granted.**
- **That what is outstanding is the hearing of the main suit set for the 23<sup>rd</sup> January 2019 and the suit should not be dismissed on procedural technicality as no party is prejudiced.**
- **That the 1<sup>st</sup> Defendant has admitted at paragraph 9 of its witness statement dated 9<sup>th</sup> March 2018 that they did not issue the statutory notice envisaged by Sections 49 (4) and (5) of the Kenya Roads Act 2007 on the Plaintiff, and cannot therefore purport to cling on procedural technicality against the Plaintiff.**
- **That the notice of 30 days required under Section 67 (a) of the Kenya Roads Act, 2007 applies only to ordinary suits and**

not “to cases petitions, applications alleging that a right or fundamental freedom in the bill of rights has been denied, violated or infringed or threatened as it was the case herein.”

· That this suit “was brought by way of Notice of Motion which clearly acted as a notice to the 1<sup>st</sup> Defendant on the suit awaiting trial. By the very nature of the notice of motion, it states that ... “Take Notice that this court...”. And that suffices as notice to sue and the main suit is always attached alongside the application thus they were adequately notified.”

· That the subject matter of the suit is worth more than Kshs. 50,000,000/=, which is far above the pecuniary jurisdiction of the Chief Magistrate’s court.

3. The application came up for hearing on the 11<sup>th</sup> December 2018 with Mr. Odinga, Ragot, Kamande and Mutai representing the Plaintiff and 1<sup>st</sup> to 3<sup>rd</sup> Defendants respectively. Mr. Kamande and Mutai for 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively, indicated that though they had not filed any documents in response to the application, they were supporting it. Mr. Ragot and Mr. Odinga made their submissions for and against the application.

4. The following are the issues for the court’s determination;

a) **Whether the failure by the Plaintiff to issue and serve the notice of their intention to sue to the Director General of the 1<sup>st</sup> Defendant as required under Section 67 (a) of Kenya Roads Act 2007 before filing this suit is sufficient ground for striking out the suit.**

b) **Whether the Plaintiff’s claim is based on a boundary dispute with the 1<sup>st</sup> Defendant and if so, whether this court is with jurisdiction to hear and determine the dispute in view of the provisions of Sections 18 and 19 of Land Registration Act.**

c) **Whether this is a suitable case for the court to exercise its discretion under Section 18 of the Civil Procedure Act and transfer it to the Chief Magistrate’s Court, Kisumu.**

d) **Who pays the costs of this suit.**

5. The Court has carefully considered the grounds on the motion, grounds of opposition, affidavit evidence by both sides, counsel oral submissions, cited decisions of the superior courts, the pleadings and come to the following findings;

a) That going by the fact that this suit was commenced through the plaint dated and filed on the 21<sup>st</sup> March 2017 that seeks for a declaratory order, permanent injunction, general damages and costs, and the statements of defence dated the 5<sup>th</sup> April 2017 and 9<sup>th</sup> March 2018 by the 2<sup>nd</sup> and 1<sup>st</sup> Defendants respectively, the suit is an ordinary one as it is not a constitutional petition. The provisions of the **Civil Procedure Rules, 2010** therefore applies in this case unlike the constitutional petitions where the Constitution of Kenya (**Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** applies. That as a further confirmation to the fact that the Civil Procedure Rules applies in this case, the notice of motion filed contemporaneously with the plaint is indicated to be brought “**under Section 1A, 1B & 3A of Civil Procedure Act Cap 21 laws of Kenya and Order 40 Rules 1, 4 and 10 of Civil Procedure Rules, 2010.**”

b) That the 1<sup>st</sup> Defendant’s ground and submission that the claim by the Plaintiff against the 1<sup>st</sup> Defendant is a boundary dispute has not been rebutted by the Plaintiff. That indeed the Plaintiff at paragraphs 7 to 9 of their plaint accuses the defendants of wrongfully and unlawfully entering and trespassing onto their property and marking the structures thereon for demolition without any colour of right or their concurrence. That the 1<sup>st</sup> Defendant has at paragraph 10 of their defence averred that the Plaintiff’s property is encroaching into the road reserve by approximately ten (10) metres. That though the foregoing paragraphs of the pleadings confirms that the dispute is primarily one of boundary position, there is no averment that the issue had been dealt with by Land Registrar before the suit was filed in court. That accordingly 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. The case of **Willis Ochola V Mary Ndege [2016] eKLR** is relevant on this matter.

c) That from the affidavit evidence tendered by the parties and oral submissions by Counsel, the Plaintiff filed this suit without first serving the Director General of the 1<sup>st</sup> Defendant with the notice of their intention of commence legal action. That the provision of **Section 67 (a) of the Kenya Roads Act No. 2 of 2007** is in mandatory terms and requires a one month notice of the intention to commence legal action to be served. That the notice should also contain particulars of the claim. The claim by the Plaintiff that the notice of motion filed contemporaneously with the plaint suffices for the notice contemplated under **Section 67 (a) of the said Act** does not have any legal basis as the said notice of motion is based on the suit commenced through the plaint. That the notice of motion therefore comes after the legal action has been commenced, while the notice under **Section 67 (a) of the Kenya Road Act** should be before the legal action is commenced.

d) That the requirement of the notice to be served before commencing legal action under **Section 67 (a) of the Kenya Roads Act** does not in any way curtail or hinder the Plaintiff from pursuing their legal and Constitutional rights. That it instead allows the Director General of the 1<sup>st</sup> Defendant an opportunity to address the complaint or claim before legal action can be commenced in line with **Article 159 (2) (c) of the Constitution 2010**. That a similar position was taken by the superior courts in the following decided cases;- **Michael Otieno Nyaguli & 5 Others V Kenya National Highways Authority & 5 Others [2015] eKLR, Rianna Furaha Children Home V Kenya National Highways Authority [2016] eKLR, Unilever Tea Kenya Limited V National Land Commission & 2 Others [2017] eKLR and Boro Dika V Gulsan Insaat Sanay, Turizm & Another [2018] eKLR.**

e) That an application raising the questions on the court Jurisdiction in a matter before it can be filed or raised at any stage of the proceedings, before the final determination thereof is rendered, just like a preliminary objection on matters of or issues of law. That once such matters of Jurisdiction are raised, the court is required to hear and render its determinations on priority basis. That the failure by the 1<sup>st</sup> Defendant to raise the issues now raised in the application earlier in the proceedings does not affect their importance and or legal standing. That it could however have been better had the issues been raised and determined earlier as it could have saved on time and resources spent on other proceedings up to now, were the application to be allowed.

f) That the ruling on the notice of motion dated 21<sup>st</sup> March 2017 that granted prayer 3 on the 14<sup>th</sup> March 2018 clearly indicated that the order (prayer) so granted was to remain in force pending the hearing and determination of this suit. That should the 1<sup>st</sup> Defendant application be successful, it will amount to a determination of the suit and the order of 14<sup>th</sup> March 2018 will therefore lapse automatically.

g) That the estimated valuation given by the Plaintiff of the suit property at Kshs. 50,000,000/= has not been disputed by the 1<sup>st</sup> Defendant. That value places this suit beyond the Jurisdiction of the lower courts and the alternative prayer that the suit be transferred to the Chief Magistrate cannot be considered.

6. That for the reasons set out above, the court finds merit in the 1<sup>st</sup> Defendant's notice of motion dated the 18<sup>th</sup> September 2018 and prayer 2 is hereby granted. The Plaintiff's suit is hereby struck out with costs.

Orders accordingly.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**

**DATED AND DELIVERED THIS 30<sup>TH</sup> DAY OF JANUARY 2019**

**In the presence of:**

Plaintiff Absent

Defendants Absent

Counsel Mr. Odunga for Plaintiff

M/s Onsongo for Ragot for 1<sup>st</sup> Defendant

**S.M. KIBUNJA**

**ENVIRONMENT & LAND**

**JUDGE**