

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NYAMIRA**  
**ELCLC No. E028 OF 2025**

**EDWARD ANYONA ONGERA .....  
..... PLAINTIFF**

**VERSUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1<sup>ST</sup>  
DEFENDANT**  
**THE LAND REGISTRAR NYAMIRA .....  
2<sup>ND</sup> DEFENDANT**  
**THE LAND SURVEYOR NYAMIRA .....  
3<sup>RD</sup> DEFENDANT**  
**THE DIRECTOR OF PHYSICAL AND LAND USE AND  
PLANNING COUNTY GOVERNMENT OF NYAMIRA ..... 4<sup>TH</sup>  
DEFENDANT**  
**HON. ATTORNEY GENERAL .....  
5<sup>TH</sup> DEFENDANT**

**RULING**

1. The Plaintiff moved the Court through Plaint dated 4<sup>th</sup> November 2025 in which he averred that he was the registered allottee of the parcel of land known as Plot 33B Kebirigo market (suit property) on which he had constructed a storey building which housed a supermarket. He added that the First Defendant had issued to him a notice of intention to demolish the building and that the building did not encroach on the B5 road.

2. Consequently, the Plaintiff prayed for judgment against the Defendants as follows:

*a) Declaration that the plaintiff is the registered and/or lawful owner of Plot No. 33B Kebirigo market.*

*b) A declaration be issued by the honourable court that the said storey building constructed on plot number 33B Kebirigo market has been constructed within the demarcations and/or boundaries of plot number 33B Kebirigo market.*

*c) Permanent injunction restraining the defendants from entering upon, re-entering, trespassing unto, demolishing and/or interfering with and/or in any other manner dealing with the storey building constructed on Plot No. 33B Kebirigo market.*

*d) Costs and interests.*

3. Contemporaneously with the Plaint, the Plaintiff filed Notice of Motion dated 4<sup>th</sup> November 2025, seeking the following orders:

*1. [Spent]*

*2. [Spent]*

*3. Pending the hearing and determination of the instant suit the honourable court be pleased to grant an interim order of temporary injunction restraining the 1<sup>st</sup> defendant/respondent either by themselves, agents,*

*servants and/or anyone else whether claiming under the 1<sup>st</sup> defendant/respondent or otherwise from demolishing the multi storey building constructed at plot number 33B Kebirigo market within Nyamira County.*

*4. The honourable court be pleased to order and/or direct the maintenance of status quo currently obtaining over and in respect of the multi storey building constructed on plot number 33B Kebirigo market pending the hearing and determination of this suit.*

*5. The officer commanding station (OCS) Nyamira police station be ordered and/or directed to enforce and/or ensure compliance with the court orders herein.*

*6. Costs of this application be borne by the defendants/respondents.*

4. The application is supported by an affidavit sworn by the Plaintiff. He deposed that he was a registered allottee of the suit property and that upon obtaining approvals and permission from the Second to Fourth Defendants, he constructed a multistorey building within the boundaries and demarcations of the suit property. That the First Defendant had issued to him a notice of intention to demolish the multistorey building which housed a supermarket and that the threatened demolition was unlawful.

5. The Plaintiff further deposed that he did not receive any report from the Defendants stating that he had constructed on the road and added that the demolition would make him lose his investment and render many people jobless.
6. The First Defendant reacted to the application by filing Notice of Preliminary Objection dated 17<sup>th</sup> February 2026 which raised the following grounds:
  1. *THAT under section 67(a) of the Kenya Roads Act, 2007, a legal action or proceedings cannot be commenced against the Kenya National Highways Authority until the Plaintiff gives the Director General of the Authority a one-month notice of their intention to sue and the particulars of the intended claim.*
  2. *THAT to the extent that the Plaintiff did not serve the Director General of the 1<sup>st</sup> Defendant with such Notice of Intention to sue and the Particulars of the Intended claim, this suit is premature.*
  3. *THAT owing to the Plaintiffs non-compliance with the mandatory provisions of Section 67(a) of the Kenya Roads Act, 2007, this Honourable Court is divested of jurisdiction to hear this case.*
  4. *THAT accordingly, the suit should thus be struck out in accordance with Section 67(a) of the Kenya Roads Act, 2007.*

7. The First Defendant also filed a Replying Affidavit sworn by Samwel Odoyo who deposed that he was Principal Land Surveyor employed by the First Defendant and that in discharging its statutory mandate, the First Defendant marked structures for demolition along the Kebirigo-Keroka (B5) road based on the official survey plan (PID) from Survey of Kenya and a Layout Plan prepared in 1995 which confirmed the existence of a 36.58 metre (120 feet) road reserve.
8. He further deposed that the Plaintiff's building encroached on the road reserve measured from the established centreline and that upon marking the building for demolition, the First Defendant issued a notice dated 9<sup>th</sup> October 2025 requiring the Plaintiff to remove the encroachment within 30 days failure to which it would demolish and remove it. That while the First Defendant did not dispute the Plaintiff's proprietorship, any allotment had to be supported by a registration plan or an approved plan of allotment, and any market plan had to coincide with the official survey plan.
9. Mr Odoyo also deposed that approval of a building plan did not obviate the need to strictly adhere to national survey data and that the intended demolition was supported by law. That if there was any loss to be suffered, the Plaintiff was the author of his own woes since he constructed in disregard of the law.
10. The Plaintiff filed a Supplementary Affidavit in which deposed that Mr Odoyo did not annex any authority to swear the

replying affidavit on behalf of the First Defendant. He also deposed that upon receiving the demolition notice, he served upon the First Defendant a notice dated 10<sup>th</sup> October 2025. That his building was not constructed on the area meant for the road and that there were other structures and buildings on the same lane as his property, but whose owners were not served with any demolition notice.

11. This ruling is in respect of both the application and the preliminary objection. Both were canvassed together through written submissions. The Plaintiff filed submissions dated 17<sup>th</sup> February 2026 and supplementary submissions dated 1<sup>st</sup> March 2026. On the other hand, the First Defendant filed submissions dated 6<sup>th</sup> March 2026.

12. Learned State Counsel appearing for the Second, Third and Fifth Defendants stated that the application did not affect his clients. Consequently, he opted not file any response or submissions. The Fourth Defendant neither filed a response nor submissions.

13. I have carefully considered the application, the affidavits and the submissions. The issues that arise for determination are whether the preliminary objection is merited and if not, whether the reliefs sought in the application should issue.

14. The law relating to preliminary objections has been settled since the now familiar statement of Law, JA. in **Mukisa Biscuit**

**Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696** thus:

***So far as I'm 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.***

15. Thus, a valid preliminary objection must raise a pure point of law. Secondly, it is argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.

16. In **Oraro v Mbaja [2005] eKLR**, Ojwang, J. (as he then was) held:

***I think the principle is abundantly clear. A "preliminary objection", correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary***

***objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. I am in agreement with learned counsel, Mr. Ougo , that “where a Court needs to investigate facts, a matter cannot be raised as a preliminary point.”***

17. The gist of the preliminary objection herein is that the Plaintiff did not serve the First Defendant with a notice of intention to sue together with the particulars of the intended claim as required by **Section 67(a)** of the **Kenya Roads Act**, and that this suit is premature in the circumstances.

18. **Section 67** of the **Kenya Roads Act** provides:

***Where any action or other legal proceeding lies against an Authority for any act done in pursuance of or in execution, or intended execution of an 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 of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent; and***

***(b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.***

19. Determination of whether any written notice was served upon the Director General and whether such notice complied with the statutory requirements as to contents and timelines would require the Court to receive and consider evidence on those issues. To that extent, Notice of Preliminary Objection dated 17<sup>th</sup> February 2026 is not a valid preliminary objection. It matters not that the Plaintiff introduced additional material after the filing of the preliminary objection.

20. I will now proceed to consider whether the reliefs sought in the application should issue. Principally, the Plaintiff is seeking an interlocutory injunction. The principles applicable while considering such an application are that the applicant must establish a *prima facie* case with a probability of success. Even if he succeeds on that first limb, an injunction will not issue if

damages can be an adequate compensation. Finally, if the Court is in doubt as to whether damages will be an adequate compensation then the Court will determine the matter on a balance of convenience.

21. All the foregoing conditions and stages are to be applied as separate, distinct, and logical hurdles which the applicant is expected to surmount sequentially. If *prima facie* case is not established, then irreparable injury and balance of convenience need no consideration. See **Giella -vs- Cassman Brown & Co Ltd [1973] EA 358** and **Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR**.

22. As to what constitutes a *prima facie* case, the Court of Appeal defined it in **Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR** as:

***... a case in which on the material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter... [it] is more than an arguable case. It is not sufficient to raise issues. The evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial. That is clearly a standard which is higher than an arguable case.***

23. The First Defendant does not dispute the Plaintiff's proprietorship of the suit property and further admits having issued the impugned demolition notice. It is thus not contested that the Plaintiff has a building on the suit property. It is the said building which is threatened with demolition.

24. The Plaintiff and the First Defendant are not in agreement as to whether the building has encroached on the road reserve. The Plaintiff maintains that he constructed as per approvals issued by the Defendants while the First Defendant insists that there is encroachment. Ultimately, resolution of the dispute will turn on survey reports and plans.

25. I am satisfied that the Plaintiff has demonstrated that there exists a right which has apparently been infringed by the First Defendant and that there is need for an explanation or rebuttal. In other words, the Plaintiff has a *prima facie case* with a probability of success. The extent of the probability is a matter to be established at trial. Since the dispute is over land, I do not think that damages can be an adequate remedy. Even the balance of convenience tilts in favour of preserving the building on the suit property pending determination of the suit.

26. In the end, I find merit in prayer number 3 which seeks an injunction. An order under the said prayer will sufficiently address any concerns under prayer number 4. Regarding prayer number 5 which seeks involvement of police in enforcing an injunction, I note that this is a civil dispute. There

are adequate procedures within the **Civil Procedure Rules** for enforcement of an injunction. As the Court of Appeal held in **Kamau Mucuha v Ripples Ltd [1993] KECA 82 (KLR)**, the police should never be involved in enforcement of an injunction.

27. Arising from the foregoing discourse, I make the following orders:

**a) Pending hearing and determination of this suit, an injunction is hereby granted restraining the First Defendant either by itself, agents, servants and/or anyone claiming under it from demolishing the multi storey building constructed on plot number 33B Kebirigo market within Nyamira County.**

**b) In line with Order 40 rule 6 of the Civil Procedure Rules, the injunction shall, unless extended by the Court, remain in force for a period of only twelve months from the date of this ruling or until the case is determined, whichever occurs first. Consequently, parties are reminded to expeditiously prosecute the suit.**

**c) The Plaintiff shall have costs of the application. The First Defendant shall bear the said costs.**

**Dated, signed, and delivered at Nyamira, this 8<sup>th</sup> day of April 2026.**

**D. O. OHUNGO**

**JUDGE**

Delivered in the presence of:

Mr Ochwangi for the Plaintiff

Mr Musungu for the 1<sup>st</sup> Defendant

Mr Ndiritu for the 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants

No appearance for the 4<sup>th</sup> Defendant

Court Assistant: B Kerubo