

IN THE COURT OF APPEAL

AT MOMBASA

**(CORAM: MUSINGA (P), MURGOR & JAMILA MOHAMMED,
JJA.)**

CIVIL APPEAL NO. E116 OF 2023

BETWEEN

MUNAA AHMED SALIM.....1ST APPELLANT

ABUDE SULEIMAN ABDALLA.....2ND APPELLANT

**ABDULKARIM AHMED SALIM 3RD
APPELLANT**

AND

**NATIONAL LAND COMMISSION.....1st
RESPONDENT**

**KENYA NATIONAL HIGHWAY AUTHORITY.....2ND
RESPONDENT**

***(An Appeal against the Judgment of the Environment and
Land Court at Mombasa (L. Naikuni, J.) delivered on 9th May
2022***

in

ELC No. 21 of 2021)

JUDGMENT OF THE COURT

The Appellants were the registered proprietors of all that parcel
of land

known as Land Reference Number MN/VI/1803 (*the suit parcel*),
situated at

Magongo, Mombasa. The suit parcel was identified by the Respondents for compulsory acquisition for purposes of the construction and dualling of the Magongo Road/Airport Access Road, a public infrastructure project undertaken by the 2nd Respondent.

Pursuant to Gazette Notice No. 10503 dated 12th October 2018, the 1st Respondent expressed its intention to acquire a portion of the Appellants' land and invited persons interested in the affected properties to attend an inquiry for purposes of assessment of compensation. Following the inquiry and inspection of the suit parcel, the 1st Respondent issued a compensation award dated 27th May 2019 in the sum of Kshs. 29,275,130.

The Appellants were dissatisfied with the compensation awarded, contending that it grossly undervalued the suit parcel and failed to take into account its true market value and developments thereon. They relied on a valuation report dated 22nd May 2019 which assessed the value of the property at Kshs. 62,000,000. The Appellants formally rejected the award and requested a review, which request was declined by the Respondents. Subsequently, the 1st Respondent deposited the

awarded compensation into a special compensation account and issued a Notice of Taking Possession and Vesting dated 3rd May 2021.

Aggrieved by the compensation award and the refusal to review the same, the Appellants lodged a Memorandum of Appeal dated 15th March 2021 before the Environment and Land Court against the 1st Respondent seeking enhancement of the award. Later, the Appellants lodged as Amended Memorandum of appeal dated 30th June 2021, this time including the Kenya National Highway Authority as the 2nd Respondent.

In response to the appeal, the 2nd Respondent raised a Preliminary Objection dated 5th November 2021, challenging the competence of the appeal. The objection was premised on the ground that the Appellants failed to comply with the mandatory provisions of **Section 67 (a)** of the **Kenya Roads Act, 2007**, which require any person intending to commence legal proceedings against the Kenya National Highways Authority to issue a written notice of not less than thirty (30) days to the Director General prior to instituting such proceedings.

The 2nd Respondent argued that the requirement for notice is couched in mandatory terms and constitutes a pure point of law, capable of disposing of the appeal at the preliminary stage. It was contended that the failure by the Appellants to issue the statutory

notice rendered the appeal fatally defective and incompetent.

In opposition, the Appellants argued that the Preliminary objection was

misconceived, as the matter before the court was not a fresh suit, but an appeal

arising from a compensation award made under the Land Act. The Appellants maintained that the appeal was properly instituted pursuant to **Section 128 of the Land Act** and that the statutory notice contemplated under **Section 67 (a)** of the **Kenya Roads Act** was not applicable.

The court examined **Section 67 (a)** of the **Kenya Roads Act, 2007**, and held that the provision was couched in mandatory terms, using the word “shall”, and therefore imposes a compulsory obligation on any party intending to institute proceedings against the Kenya National Highways Authority to issue a written notice of intention to sue at least thirty (30) days prior to commencement of such proceedings; that since the Appellants had failed to demonstrate compliance with the statutory requirement prior to filing the appeal, non-compliance with **Section 67 (a)** was fatal to the appeal and could not be cured by characterizing the appeal as a reference under the Land Act or by invoking constitutional provisions on access to justice.

Consequently, the court upheld the 2nd Respondent’s Preliminary objection and found that the appeal was incompetent for failure to comply with the mandatory provisions of the Kenya

Roads Act. On that basis alone, the court held that the appeal was liable to be dismissed.

Notwithstanding its finding that the Preliminary objection was merited,

the court proceeded to consider the substantive issues and undertook an

extensive analysis of the legal framework governing compulsory acquisition of land in Kenya, with particular reference to Article 40 (3) of the Constitution, Sections 107-133 of the Land Act, 2012, and the Land Regulations, 2017 and concluded that the Appellants were notified and accorded an opportunity to participate in the compensation inquiry; that as a consequence, no evidence of breach of due process in the acquisition of the Appellants' land parcel was established. In so finding, the trial court upheld the Preliminary objection dated 5th November 2021 and dismissed the amended Memorandum of Appeal dated 30th June 2021. Costs of the appeal were awarded to the 2nd Respondent.

Aggrieved, the Appellants have filed an appeal to this Court on the grounds that; the learned Judge was in error in upholding the Respondents' Preliminary objection; in finding that the process and the actual compulsory acquisition of the parcel of land belonging to the Appellants was lawful, procedural and the award offered was just, prompt and adequately fair compensation; in failing to find that the Respondents applied an arbitrary and unknown process of assessment in violation of the

principle of compensation under **Article 40 (3)** of the **Constitution;** and in awarding costs of appeal to the Respondents.

The parties filed written submissions, and when the appeal came up for hearing on a virtual platform, learned counsel **Ms. Mohammed** holding brief for

Mr. Khatib appeared for the Appellants, while learned counsel **Ms. Ondieki** holding brief for Ms. Kariuki appeared for the 2nd Respondent. There was no appearance for the 1st Respondent, the National Land Commission though served with the hearing notice.

In their written submissions counsel for the Appellants submitted that the trial Judge was wrong to uphold the Preliminary Objection dated 5th November 2021, on the basis of non-compliance with **Section 67** of the Kenya Roads Act, 2007; that, the appeal arose from a compensation award and not from a fresh cause of action, and therefore the statutory notice requirement was inapplicable. It was argued that the legal process commenced with the compensation inquiry and culminated in an award, which the Appellants appealed against. Counsel further relied on **Article 159(2)(d)** of the **Constitution**, urging the Court to administer justice without undue regard to technicalities.

On whether the compulsory acquisition and assessment process was not lawfully followed, reliance was placed on **Section 112** of the **Land Act**, which requires the involvement of the landowner in the valuation and assessment process. Counsel

argued that the Respondents conducted an independent valuation without involving the Appellants, resulting in an arbitrary and undervalued award; that the failure to involve the Appellants violated the

principles of compulsory acquisition and occasioned an under-compensation, and invited the Court to find that the assessment process was unlawful.

On Costs, counsel submitted that costs are discretionary and do not automatically follow the event. Reliance was placed on the Supreme Court decision in the case of **Oscar Abote vs Loice Kawaka & Another, Petition No. 16 of 2022**, where the court held that costs are not cast in stone and courts retain unfettered discretion. Counsel argued that the learned Judge was in error in awarding costs to the Respondents despite the Appellants seeking lawful redress.

In conclusion, counsel submitted that the Appellants had proved their appeal on a balance of convenience and prayed that the appeal be allowed, the award be enhanced to Kshs. 62,000,000, and costs be awarded to the Appellants.

In their submissions, counsel for the 2nd Respondent, submitted that the appeal lacked merit and should be dismissed. On the Preliminary objection, counsel submitted that the objection was properly raised and upheld, as the Appellants failed to comply with the mandatory requirement of issuing a 30-day

statutory notice under **Section 67** of the **Kenya Roads Act, 2007**; that the provision is couched in mandatory terms and that non-compliance rendered the appeal incompetent. Reliance was placed on **Mukisa Biscuit Manufacturing Co. Ltd vs**

West End Distributors Ltd [1969] EA 696, which defines the scope of a valid

preliminary objection. It was further submitted that **Article 159** of the

Constitution cannot be used to cure substantive statutory breaches and that where a statute provides a clear procedure, that procedure must be strictly followed.

On the issue of compulsory acquisition, counsel submitted that the project was for a legitimate public purpose, namely road construction and expansion and all procedural requirements was undertaken strictly in compliance with **Article 40(3)** of the **Constitution, Part VIII** of the **Land Act**, and the **Land Regulations, 2017**, which included issuance of gazette notices, inquiry, valuation by a qualified valuer, and inclusion of a 15% disturbance allowance. Counsel cited the case of **Commissioner of Lands vs Grant Wanjiru Ndirangu [2001] eKLR**, for the proposition that adequacy of compensation is determined by professional valuation and not by the subjective expectations of the landowner.

On costs, counsel asserted that costs follow the event under **Section 27** of the **Civil Procedure Act**, and relied on

Supermarine Handling Services Ltd v Kenya

Revenue Authority [2010] eKLR, where the Court affirmed that a successful party

is entitled to costs unless special circumstances exist.

This appeal arises from the decision of the Environment and Land Court to uphold the 2nd Respondent's Preliminary objection that dismissed the Appellants' appeal challenging the compensation awarded for compulsory acquisition of their land. In sustaining the Preliminary objection, the learned Judge was exercising judicial discretion, and the central question before this

Court is whether that discretion was exercised judiciously and in accordance with the law.

The law on the exercise of judicial discretion is settled. In the case of

Githiaka vs Nduriri [2004] 1 KLR 67, Ringera Ag. J.A. (as he then was) stated that

judicial discretion must be exercised judiciously, meaning that it must be guided by reason and the law, and not by caprice, sympathy, or rigid technicality.

Equally settled are the circumstances under which an appellate court may interfere with the exercise of discretion by a lower court. In the case of **Mbogo &**

Another vs Shah [1968] EA 93, Sir Clement de Lestang, V-P, stated that an appellate court will not interfere unless it is satisfied that the lower court misdirected itself, considered matters it ought not to have considered, failed to consider matters it ought to have considered, or as a result reached a wrong decision.

In **United India Insurance Company Limited vs East African Underwriters**

(Kenya) Limited [1985] E.A. 899 it was held that:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not

have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.

The applicable principles on preliminary objections were authoritatively set out in ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (supra)***. where Law, J.A., held that a preliminary objection must raise a pure point of law arising from the pleadings and, if upheld, must be capable of disposing of the suit. Sir Charles Newbold, P, in the same case added that, where such objection is raised all facts pleaded by the opposing party require to be undisputed, and correct.

The Supreme Court in the case of ***Hassan Ali Joho & Another vs Suleiman***

Said Shahbal & 2 Others, Petition No. 10 of 2013, [2014] eKLR had this to say:

“To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co. Ltd -vs.- West End Distributors (1969) EA 696:

“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 ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion'."

It is quite clear that a preliminary objection can only be properly upheld where it meets certain well-defined requirements. First, the objection must raise a pure question of law. Second, the point of law must be one that has been pleaded, or which plainly arises from the pleadings even if not expressly stated. Third, when argued as a point of law, the objection must be capable of disposing of the suit without going into the merits. Lastly, the objection must proceed on the basis that all facts pleaded by the opposing party are admitted as correct; it cannot succeed where determination of facts is required or where the court is invited to exercise its discretion. See **Michael Otieno Nyaguti & 2 others v Kenya National Highways Authority [2021] KECA 982 (KLR).**

The 2nd Respondent's preliminary objection stated as follows:

"TAKE NOTICE that the 2nd Respondent ill raise a preliminary objection on a point of law on the Applicants Amended Notice of Motion Application dated 30th June 2021 on the following grounds:

1. THAT the Application filed by the Applicants is fatally defective as it does not comply with the mandatory provisions of Section 67 (a) of the Kenya Roads Act, 2007 requiring thirty (30) days' notice to the Director General prior to filing suit."

In this regard **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.”

Whilst addressing the import and effect of section 67 (a), this Court in

Michael Otieno Nyaguti, Michael Oginga Dache & Robert Ouko Okumu vs Kenya

National Highways Authority [2021] KECA 982 (KLR) held that:

“Our construction of the above provision leaves no doubt in our mind that it is couched in mandatory terms as contended by the respondent. The Act is an Act of Parliament. It therefore has the force of law. The P.O on noncompliance with this provision is, therefore, on a pure point of law as there is no other way of addressing the respondent’s, P.O other than by way of construction and application of section 67(a) of the Act as construed and applied by the learned Judge at the trial and now by us on appeal which we have done and are satisfied as did the learned Judge that item 1 of the respondent’s P.O was on a pure point of law and fell for merit

consideration before the learned judge as such.”

The facts of this case, disclose that, in so far as the 2nd Respondent was concerned, ***Section 67*** of the ***Kenya Roads Act*** was not complied with. The record shows that the Appellants initially instituted the appeal against the 1st Respondent, and then later filed an amended appeal to incorporate the 2nd

Respondent without issuing the mandatory thirty (30) days' written notice to the Director General of the Kenya National Highways Authority as required under **Section 67(a)** of the Act. No evidence was placed before the trial court to demonstrate issuance of such notice prior to the filing of the amended Memorandum of appeal.

Section 67 is couched in mandatory terms, and compliance is a condition precedent to the commencement of proceedings against the 2nd Respondent. In the absence of the statutory notice, the appeal was rendered incompetent, notwithstanding the nature of the claim or the merits thereof.

The Appellants' response to the Preliminary objection was that the proceedings before the Environment and Land Court were not a fresh suit, but rather, it was an appeal brought under **Section 128** of the **Land Act**, and therefore the statutory notice requirement specified by **Section 67** of the **Kenya Roads Act** did not apply. It was argued that **Section 128** of the **Land Act** grants an aggrieved party a direct right of appeal to the Environment and Land Court against an award of compensation made by the National Land Commission once the compensation

inquiry was concluded and an award issued. In their view, the matter merely moved from an administrative forum to a judicial one as an appeal under **Section 128** and was a continuation of the compulsory acquisition

process and not the commencement of fresh legal proceedings against the acquiring authority.

Section 128 of the **Land Act** provides in plain terms that, any dispute arising out of any matter provided for under the Act may be referred to the Environment and Land Court for determination. The provision is broad and confers jurisdiction on the Environment and Land Court to hear disputes arising from processes governed by the Land Act, including compulsory acquisition and compensation. However, it is also clear that **Section 128** pertains to the court's jurisdiction, and identifies the proper forum for disputes under the Land Act, but it does not prescribe the manner in which proceedings against specific public bodies are to be commenced. Nor does it expressly exempt parties from complying with procedural requirements imposed by other statutes.

Further, it is of importance to observe that the Appellants joined the 2nd Respondent to the amended Memorandum of Appeal after the 1st Respondent had concluded the acquisition of the suit parcel. Prior to this, there was nothing that pointed to the 2nd Respondent as having been party to the acquisition process.

Without such prior involvement, it amounted to instituting legal proceedings against the statutory authority without compliance with the mandatory provisions of **Section 67**.

Accordingly, while **Section 128** entitled the Appellants to approach the Environment and Land Court, it did not relieve them of the obligation to comply with **Section 67** of the **Kenya Roads Act** before joining the 2nd Respondent, who were for the first time being drawn into the proceedings. The failure to issue the statutory notice was therefore a procedural defect that went to the competence of the proceedings. The trial court was therefore entitled to find that **Section 128** could not be relied upon to override a clear mandatory notice requirement in another statute. The proper legal position is that **Section 128** and **Section 67** must be read together, and compliance with both was necessary where proceedings are brought against the Kenya National Highways Authority.

As concerns the merits of the Appellants' appeal, the trial Judge having found that the Appellants failed to comply with **Section 67(a)**, had no jurisdiction on which to take another step, and as a result ought to have downed his tools. See **Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)**. Having so sustained the Preliminary objection, there was no proper foundation upon which the court

could proceed to determine the substantive issues, including the legality of the compulsory acquisition process or the adequacy of compensation. For this reason, we too have no jurisdiction to address the merits of the Appellants' amended appeal.

In sum, this appeal is without merit and is dismissed with costs to the 2nd Respondent.

It is so ordered.

Dated and delivered at Mombasa this 10th day of April, 2026.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF APPEAL

A. K. MURGOR

.....
JUDGE OF APPEAL

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

***I certify that
this is a
True copy of the***

original Signed

DEPUTY REGISTRAR