



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC SUIT NO. 85 OF 2017

BORU DIKA.....PLAINTIFF

VERSUS

GUSAN INSAAT SANAY, TURZIM,

NAKIKYAT VE TICARET ANONIM SIPIKETI.....1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY.....2ND DEFENDANT

RULING

1. This ruling is in respect of the application dated 1.4.2018. However, I deem it necessary to give a brief background of this matter before the determination of the application. On 9th March 2017 the plaintiff filed this suit claiming that the 1st defendant has been undertaking construction works along Marsabit Moyale Road in conjunction with the 2nd Defendant and that during the performance of the project, the ground was allegedly dug so deep that the plaintiff is unable to access his plot. The plaintiffs claim in this suit was for the installation of culverts to enable him have easy access to his plot. He also prayed for damages and costs of the suit.

2. The plaint was filed contemporaneously with an application dated 9.3.2017, where the plaintiff prayed for a mandatory injunction compelling the 1st and 2nd Defendant to put culverts on the Marsabit- Moyale highway particularly at Plot No. Marsabit 499A. The 2nd defendant filed a preliminary objection to the Application dated 6.4.2017.

3. In the Preliminary Objection, the 2nd defendant had basically contested the institution of these proceedings prior to a written notice being made to the 2nd Defendant. It made reference to **Section 67 (a) of the Kenya Roads Act** which provides as follows;

“Where any action or legal proceedings lies against the authority for any act done in pursuance of execution, or intended execution of an order made pursuant to this Act or 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 written notice containing the particulars of the claim and of the 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 to the act, neglect, default complained of or in the case of a continuing injury or damage within six months next after the cessation thereof”.

4. The Court considered the Preliminary Objection raised and in the ruling delivered on 24.1.2018, this court held that the notice is important to enable the 2nd Defendant to carry out its mandate efficiently and effectively. That it was therefore necessary for the Plaintiff to give an explanation as to why he did not comply with the relevant statutory provisions of the law. The court proceeded to strike out the plaintiff's application and the suit with costs to the 2nd Defendant.

5. It is the aforementioned ruling which has triggered the filing of the Notice of Motion dated 1st April 2018 by the plaintiff where he prayed for the following Order;

a. That this Honourable Court be pleased to review, vary and/or vacate its Orders of 24th January 2018 and reinstate Meru Elc No. 85 of 2017 (Boru Dika Versus Gusan Insaat Sanay, Turzim, Nakikyat Ve ticaret Anonim Sipiketi & Kenya National Highway Authority) as against the 1st Defendant only.

6. The application was supported by the sworn affidavit of **Mutegi Mugambi**, an Advocate of the high Court of Kenya. Applicant contends that it was an error for the Court to dismiss the suit in its entirety since it ought to have been dismissed only against the 2nd Defendant. That the plaintiff suit survives against the 1st Defendant, and that the dismissal of the entire suit has caused great injustice upon the Plaintiff.

7. The application was opposed vide an affidavit sworn by **Gokhan Goksun Kaynak** the Office Manager of the 1st defendant. He averred that the 1st defendant is not the proponent of the said project and does not have the authority to alter the design or implement the amendments of the project design as prayed by the plaintiff and therefore even if in the unlikely event that the plaintiff's suit is reinstated against the 1st Defendant and is ultimately successful, the plaintiff's prayers in the suit will be in futility as they cannot be executed in the absence of the 2nd Defendant who is the 1st defendants employer in the said project and is the only person with authority over the road and its design.

8. 1st defendant further contends that it has concluded its contractual obligations and handed over the site to the 2nd Defendant and therefore does not have any control over the road. A copy of the 2nd Defendants Certificate of Partial Provisional Acceptance has been availed.

9. The Applicant submitted that the 1st Defendant is an independent entity with capacity to be sued without enjoining the 2nd defendant. It also submitted that the affidavit sworn in response to the application is defective having been sworn without the pre-requisite authority.

10. I have considered all the arguments raised herein and I frame the issues for determination as follows;

a. Whether the Sworn affidavit Gokhan Goksun Kaynak for the 1st Respondent is Defective.

b. Whether the application is meritorious.

Whether the Sworn affidavit Gokhan Goksun Kaynak for the 1st Respondent is Defective.

11. **Gokhan Goksun Kaynak** swore the affidavit in his capacity as the Office Manager of the 1st Defendant/ Respondents Marsabit, Merille Road Project. In paragraph 1 of the Affidavit he makes that averment that he has been duly authorised to make the affidavit on behalf of the 1st Defendant/ Respondent. The applicant did not seek to file any further affidavit to challenge the validity of the affidavit of Gokhan. The objection has only been raised in the submissions.

12. Further, I find that the lack of a resolution sworn by the company does not make the affidavit defective. At best being the site manager of where the cause of action arose, Gokhan is more conversant with the issues that arise with regard to the duties and functions of the 1st defendant. On this point I make reference to the case of **Presbyterian Foundation & Another V East Africa Partnership Ltd & Another [2012]eKLR** where the Court dealt with the instance where the affidavit was sworn by a natural person as opposed to a director of the company. The Court first relied on the decision held in **Mavuno Industries & Others vs. Keroche Industries Limited** in which It expressed itself as follows:

“As properly submitted by the defendant, under Order 4 rule 1(4) of the Civil Procedure Rules, where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so. Nowhere is it stated that such authority or resolution must be filed.....”. The court proceeded to hold that ***“The Civil Procedure Rules do not define what an authorised officer of a company is. If the Rules Committee had intended that in cases involving corporations, affidavit be sworn by either directors or company secretaries nothing would have been easier than for it to have expressly stated so. Accordingly, we must apply the ordinary grammatical meaning of the word “authorise” which is defined by Oxford Dictionary as “sanction”; “give authority”; “commission”.***

13. I therefore conclude that the affidavit sworn by the Office Manager of the Moyale Rendille Project on behalf of the 1st defendant is not defective.

Whether the application is meritorious.

14. As to the merits of the application the Applicant submitted that it was erroneous for the Court to strike out the suit against the 1st Defendant since it still had a legal claim against it. The plaintiff could not however provide the claim against the 1st Defendant herein. It is clear to this court that the mandate of the 1st Defendant emanates from the powers vested to it by the 2nd Defendant. See paragraph 8 of the plaint.

15. Order 1 Rule 10 (2) of the Civil Procedure Rules provides as follows:-

“2. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as a plaintiff or a defendant, be struck out, and that the name of any person who ought to have joined, whether as a plaintiff or a defendant, or whose presence before the court may be necessary in order to enable the effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”

16. No suit shall be defeated by reason of misjoinder or non-joinder of parties and Section 1B (d), Civil Procedure Act mandates the court in furthering the overriding objectives, to handle matters in a timely and affordable manner. However, in this case, I do find that the 1st Defendants duties and obligations are anchored on the authority given to it by the 2nd Defendant. The Orders sought by the Plaintiff can only be granted at the behest of the 2nd Defendant. Proceeding with this case will therefore be an effort in futility.

17. The upshot of this Ruling is that the Plaintiff's application lacks merit and the same is hereby dismissed with costs to the 1st Defendant. It is apparent that the issues before this court have not been determined on merit, See- **Enock Kirao Muhajji vs. Mbarak Malindi ELC NO.58 of 2012**. In the circumstances, I find it worthy to advise the Plaintiff that he can institute a fresh suit against the Defendants herein, taking into consideration that due procedure ought to be adhered to.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 15TH DAY OF OCTOBER, 2019

IN THE PRESENCE OF:-

C/A: Kananu

Applicant

Kirimi for plaintiff

HON. LUCY. N. MBUGUA

ELC JUDGE