



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC SUIT NO 85 OF 2017

BORU DIKA.....PLAINTIFF

VERSUS

GULSAN INSAAT SANAY, TURIZM,

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

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

R U L I N G

BACKGROUND

1. The 1st Defendant has been undertaking Construction works along Marsabit Moyale road in conjunction with 2nd Defendant. During the performance of the project the ground was allegedly dug so deep that Plaintiff is unable to access his Plot. Plaintiffs claim in this suit is for the installation of culverts to enable him have easy access to his plot.

2. NOTICE OF PRELIMINARY OBJECTION

The 2nd Defendant filed a notice of Preliminary Objection on 06:04:17 stating as follows:-

- 1) The Applicant's application does not satisfy the conditions for grant of an injunction.
- 2) The Applicant's application does not satisfy the mandatory provisions of the law.
- 3) The Applicant's application is fatally defective as it does not comply with mandatory provisions of the law.
- 4) The Application is frivolous and vexatious and an abuse of the process of the Court.

3. The Preliminary Objection was canvassed by way of Written Submissions.

4. It is trite law that a Preliminary Objection should be based on pure points of law as was held in *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd (1969)*

“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.....”

5. Grounds 1 and 4 in the Preliminary Objection do invite arguments and perhaps evidence. The merits of the application cannot therefore be determined through a Preliminary Objection.

6. Ground 2 and 3 are basically the same. 2ND Defendant avers that the mandatory provisions of law were not complied with.

7. 2nd Defendant argues that the Plaintiff did not serve the Director General of the 2nd Defendant with the one months’ notice as required under Section 67 (a) of the Kenya Roads Act 2007.

8. In support of this argument, 2nd Defendant has relied on the following authorities of *Sulmac Development Company Limited Vs. George Munyui Kigathi & 2 others [2017] e KLR* and *Michael Otieno Nyaguti & 5 others Vs. Kenya National Highways Authority & 9 others vs. [2015] e KLR*.

9. Plaintiff on the other hand contends that Section 67 of the Road Act should be treated in a similar manner to Section 13 A of the Government proceedings Act. In support of this argument, Plaintiff has relied on the case of *Kenya Bus Services Ltd and another Vs. Minister of Transport & 2 other [2012] e KLR* where Judge Majaja stated that “ **it is therefore my findings that section 13 A of the Government proceedings Act as a mandatory requirement violates the provisions of article 48...”**

10. **Section 67 (a)** of the Kenya Roads Act provides:-

“(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;”

11. I have carefully analyzed the arguments advanced herein. In the Sumac development case (Supra) a decision delivered on 02:03:17. The Court was alive to the provisions of Section 13 of the Government proceedings Act. The Court was dealing with a similar situation and it held that:-

“Section 67 (a) is still valid as it has not been declared unconstitutional”

12. In *Michael Otieno Nyaguti & 5 others vs Kenya National Highways Authority & 5 others [2015] e KLR Case [Supra]* it was held that:-

“That indeed Section 67 (a) of the Kenya Roads Act No. 2 of 2007 requires a one Month notice containing particulars of the claim and the intention to commence legal action to be served upon the Director- General by the party or its agent before legal proceedings are commenced. The requirement is coached in mandatory terms”....

13. The Notice is certainly important to enable the 2nd Defendant to carry out its mandate efficiently and effectively.

14. It was therefore necessary for the Plaintiff to give an explanation as to why he did not comply with the Statutory Provisions of the relevant law.

15. The upshot of these findings is that the Preliminary Objection has merits.

16. **The application filed herein and the suit are hereby struck out with costs to 2nd Defendant.**

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS DAY OF 24th

JANUARY, 2018 IN THE PRESENCE OF:-

Court Assistant: Janet/Galgalo

Mungai for plaintiff present

Wamache H/B for Maruti for 2nd Defendant present

Mr. Idris for 1st Defendant present

HON. L. N. MBUGUA

ELC JUDGE