



**REPUBLIC OF KENYA**

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

**ELC PETITION NO. 11 OF 2017**

**IN THE MATTER OF: ARTICLE 162(2) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF: ALLEGED AND/OR THREATENED CONTRAVENTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 40, 47, 48 AND 50(1) OF  
THE CONSTITUTION**

**AND**

**IN THE MATTER OF: THE ENVIRONMENT AND LAND COURT ACT 2011**

**AND**

**IN THE MATTER OF: PART VIII OF THE LAND ACT NO 6 OF 2012**

**BETWEEN**

**UNILEVER TEA KENYA LIMITED.....PETITIONER**

**AND**

**NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**SOLEI BONEH INTERNATIONAL**

**(SBI) HOLDINGS.....3<sup>RD</sup> RESPONDENT**

**RULING**

**Introduction:**

What is before me is an application by way of Notice of Motion dated 12<sup>th</sup> October 2017 brought under Certificate of Urgency seeking the following:

- a. Conservatory orders by way of an injunction restraining the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents whether by themselves, their servants, agents and/or representatives from trespassing, cutting down trees, demolishing any of the Petitioner's structures or evicting the Petitioner, constructing and/or

carrying out any other activities at all on L.R No. 5467/3 situate at Kericho county pending the hearing and determination of this Petition.

b. Conservatory orders by way of an injunction restraining the Respondents whether by themselves, their servants, agents and/or representatives from interfering with or curtailing the Petitioner's possession and quiet enjoyment of the property known as L.R No 5467/3 situate within Kericho County pending the hearing and determination of the Petition herein.

The application is anchored on the grounds stated on the face of the Notice of Motion and on the supporting affidavit of Nicholas Yiannakis, the Petitioner/applicant's Managing Director, sworn on the 12<sup>th</sup> October 2017.

The applicant avers that it is the registered proprietor of all that parcel of land known as L.R Number 5467/3 measuring approximately 5,037 acres (hereinafter referred to as the suit property). It is the applicant's case that by a Gazette Notice no. 1821 dated 18<sup>th</sup> March 2016, the 1<sup>st</sup> Respondent indicated its intention to acquire the suit property among other parcels of land on behalf of the 2<sup>nd</sup> Respondent for purposes of carrying out the proposed rehabilitation of the Mau Summit- Kericho Nyamasaria-Kisumu By-pass.

The Gazette notice only indicated the suit property without giving the name of the registered owner of the property. The gazette notice indicated that the inquiry for hearing of claims for compensation by persons interested in the parcels of land would be on various dates with the one for the applicant being the 24<sup>th</sup> May 2016 at 9.30 am. The Applicant was not aware of the said inquiry until the 2<sup>nd</sup> Respondents' officers visited its premises on the said date at 2.00pm and gave the applicant a copy of the Notice inviting the applicant for the inquiry, by which time the time for attending the inquiry had already passed.

The applicant avers that the 1<sup>st</sup> Respondent violated section 112 (1) (b) of the Land Act by failing to serve it with a 15 days' notice, thus rendering the ensuing proceedings a nullity.

The applicant wrote to the 1<sup>st</sup> Respondent on 26<sup>th</sup> May 2016 raising its concerns and requesting for an opportunity to make representations before the process of inquiry closed but they did not receive an immediate response and upon follow-up, they were assured that this would be done.

On 23<sup>rd</sup> December 2016, the 1<sup>st</sup> Respondent published a fresh Gazette Notice to acquire additional land including the suit property, and indicated that a Notice of Inquiry would be published in the Kenya Gazette. However, before the 1<sup>st</sup> Respondent issued the said Notice of inquiry, on the 19<sup>th</sup> July 2017, the 2<sup>nd</sup> Respondent's officers accompanied by the employees of the 3<sup>rd</sup> Respondent took possession of the suit property and started preparations for the road construction without following due process.

When the applicant complained, the 2<sup>nd</sup> Respondent's officers presented the applicant with an award from the 1<sup>st</sup> Respondent dated 14<sup>th</sup> December 2016 compensating the applicant Kshs. 48,200,000 for compulsory acquisition of its property.

It is the applicant's case that the purported award was improper as it did not specify the value of the land, improvements thereon and disturbance allowance. It was also issued more than a week before the publication of the notice of intention to acquire the property and without the Notice of Inquiry.

The 1<sup>st</sup> Respondent subsequently published a Notice of inquiry in Gazette No. 7844 dated 18<sup>th</sup> August 2017 for an inquiry to be held on 5<sup>th</sup> September 2017.

The applicant attended the inquiry and made its representations. Subsequently on 14<sup>th</sup> September 2017, the 1<sup>st</sup> Respondent issued an award of Kshs. 48,200,000 which was similar to the earlier award. The 1<sup>st</sup> Respondent subsequently issued a 15 days' Notice of Taking possession of the applicant's property dated

4<sup>th</sup> October 2017. The applicant avers that the said notice is invalid as it violates the provisions of section 120 (1) of the Land Act. The applicant further avers that the procedure by which the award was reached and the nature of the said award was in violation of the applicant's rights under Article 40(3), 47 and 50(1) of the Constitution of Kenya as the applicant was denied the right to due process and fair administrative action. The applicant states that by the Respondent's actions, it has suffered loss and damage to the tune of Kshs. 74,807,000 being the value of the property acquired together with the costs of valuation and preparation for the inquiry.

In opposing the application, the 2<sup>nd</sup> respondent's Director of Highway Planning and Design Engineer Samuel Omer has sworn an affidavit dated 27<sup>th</sup> October 2017 in which he adopts the contents of the 2<sup>nd</sup> Respondent's Response to Petition of the same date. The 2<sup>nd</sup> Respondent denies that the Petitioner's rights enshrined in Articles 40(3), 47, 48 and 50 (1) of the Constitution of Kenya and all the requirements of due process set out in Part VIII of the Land Act, 2012 relating to protection of the right to property, the right to fair administrative action, access to justice and fair hearing have been violated. In particular, he states that once the 1<sup>st</sup> Respondent realized that the applicant had not seen the first Notice published on 18<sup>th</sup> March 2016 the process was cancelled and a fresh process was commenced whereby the requisite notices were duly issued.

Thereafter, the 1<sup>st</sup> Respondent held a public inquiry on 5<sup>th</sup> September 2017 where the applicant's representative attended and made its representations. As the body mandated by law to make a determination of the appropriate compensation in relation to compulsory acquisition of land, taking into consideration all the relevant factors set out under section 4 of the Land Act, 2012 as read with Part VIII thereof, the 1<sup>st</sup> Respondent made an award of 48,200,000. The 2<sup>nd</sup> Respondent then deposited this amount into the 1<sup>st</sup> Respondent's account for onward transmission to the applicant. The affidavit states that on 4<sup>th</sup> October 2017 the 1<sup>st</sup> Respondent issued the applicant with a Notice to take possession of the relevant portion of land requiring the applicant to give vacant possession of the said portion of land within 15 days from the date of the said notice.

Engineer Omer avers that the officials of the 2<sup>nd</sup> Respondent have not yet taken possession of the suit property although construction of the road is going on in other sections of the road. He states that the 2<sup>nd</sup> Respondent requires to urgently take possession of the suit property for purposes of rehabilitation of the Mau Summit Kericho- Nyamasaria- Kisumu By-pass road project to avoid project implementation delays which would result in huge losses of public funds and possible withdrawal of donor funding. It is further stated that owing to the public interest involved in having the road constructed expeditiously, it would be in the interest of justice to allow the construction to continue as the applicant pursues its claim for compensation.

When the matter came up for interpartes hearing the court directed the parties make oral submissions owing to the urgency of the matter. It must be noted that upto this point the 1<sup>st</sup> and 3<sup>rd</sup> Respondents had not filed any response to the Petition or application.

### **Applicant's Case:**

Mr. Nyaburi learned counsel for the applicant submitted that under Article 23 of the Constitution of Kenya the court has jurisdiction to grant conservatory orders. He urged that the principles which the court ought to take into account in such applications have been considered in various authorities, in particular the case of **Centre for Human Rights and Democracy & 2 Others V The Judges and**

**Magistrates Vetting Board & 2 Others (2012) eKLR.** This case held that the court had to be satisfied with;

*a. The credentials of the Petitioners*

*b. The prima facie correctness or nature of information available to court*

- c. *Whether the grievances are genuine, legitimate, deserving and/or appropriate*
- d. *Whether the applicant has shown or demonstrated the gravity and seriousness of the dispute.*
- e. *Whether the petitioners have engaged wild, vague, indefinite or reckless allegations against the respondent.*

The court further elaborated that “...*a party seeking a conservatory order only required to demonstrate that he had a prima facie case with a likelihood of success and that unless the court granted the conservatory order, there was real danger that he would suffer prejudice as a result of the violation or threatened violation of the Constitution. Where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the authority of the law or any such legal wrong or injury is threatened, the court had powers to grant appropriate reliefs so that the aggrieved party is not rendered helpless or hapless in the eyes of the wrong visited or about to be visited on him or her*”

Counsel submitted that the applicant being the registered proprietor of the suit property was entitled to the protection provided to it under Article 40(3) of the Constitution which states that:

*“ the state shall not deprive a person of his property unless the deprivation results from an acquisition of land or an interest in land or title to land conservation of an interest in land in accordance with Chapter five or is for a public purpose or in the public interest and is carried out in accordance with the Constitution or any Act of Parliament that;*

*i) requires prompt payment in full, of just compensation to the person; and*

*ii) allows any person who has an interest in, or right over that property, a right of access to a court of law”*

He submitted that the Respondents had violated the provision of Article 40(3) of the Constitution by acquiring the applicant’s property without complying with the above provision. He cited the case of **Commissioner of Lands V Coastal Aquaculture Ltd E&L) 264-294** where the court held that:

*“ for a successful compulsory acquisition, the requirements of the Constitution and of the Act must be strictly complied with and if there is full compliance with the law, compulsory acquisition cannot be interfered with”*

Counsel further submitted that the Gazette notice issued by the 1<sup>st</sup> Respondent on 18<sup>th</sup> March 2016 contravened section 112 of the Land Act as the Notice of acquire and the Notice of Inquiry were combined yet the law requires that the Notice of Inquiry be published at least 30 days from the date of the Notice to acquire land.

He also faulted the Notice to acquire land for failing to include the name of the proprietor and being served on the applicant on the date when the inquiry was to have taken place. He once again relied on the **Coastal Aquaculture case** where the court stated that in the case of a materially defective notice of acquisition, the Commissioner of Lands lacked the jurisdiction to conduct an inquiry.

Counsel for the applicant also faulted the award of compensation made to the applicant as it violated section 121 of the Land Act which requires that the following 3 elements be met;

- i. An offer of award be given to the proprietor
- ii. The amount of first offer be paid to the proprietor
- iii. A notice of intention to take possession be given to the proprietor.

Finally he criticized the 1st Respondent for breaching Article 47 of the Constitution which provides for fair administrative action. This is because the 1st Respondent did not explain how it arrived at the award of Kshs. 48,200,000 which the applicant felt was grossly understated. For the foregoing reasons, counsel submitted that the right to compulsorily acquire the applicant's property had not accrued and the Respondents should be stopped in their tracks to allow the applicant continue with the serious economic activity it is conducting on the suit property.

## 2<sup>nd</sup> Respondent's Case

Mr. Ragot, learned counsel for the 2<sup>nd</sup> Respondent countered the applicant's submissions by relying on the Replying Affidavit of Engineer Samuel Omer as well as the 2<sup>nd</sup> Respondent's Response to the Petition. He proceeded to oppose the application from a two pronged approach. Firstly, from the angle that the application does not meet the threshold for the grant of a conservatory orders and secondly from the angle that the court lacks the jurisdiction to entertain the Petition as it was filed in contravention of section 67 of the Kenya Roads Act.

On the first limb Mr. Ragot submitted that Article 23(3) of the Constitution of Kenya does not spell out the guiding principles for the grant of conservatory orders hence the need to fall back to the principles in **Giella V Cassman Brown & Company Ltd (1973) EA 358**. He cited the case of **Veronica Waithira Trustee of Inter-Christian Churches & 3 Others V Kenya National Highways Authority (2014) eKLR** and **Laly Furnishing House Limited V Kenya National Highway Authority & 3 Others (2015) eKLR** where the court when faced with situations similar to the instant suit decided the matter based on the balance of convenience.

He faulted the approach taken by counsel for the applicant in relying on the principles under Article 40(3) of the Constitution. He distinguished the case of **Centre for Human Rights and Democracy & 3 Others V The Judges and Magistrates Vetting Board and 2 Others** as it was dealing with a different subject matter and the orders sought were for stay of the provisions of the relevant Act.

He then went on to show that the applicant had not met the principles in the **Giella** case. With regard to the first principle, he submitted that the applicant had failed to demonstrate that he had a prima facie case with a probability of success. Under section 67(a) of the Kenya Roads Act 2007, the applicant was required to issue a 30 days' notice to the 2<sup>nd</sup> Respondent before instituting this Petition. Failure to do so rendered the suit incompetent and liable to be struck out. He relied on the case of **James Orengo V Attorney General (2007) eKLR** where the Petition against the A.G was struck out for failure to issue the A.G with a 30 days' Notice under the Government Proceedings Act which has a provision similar to the one in the Kenya Roads Act. He explained that the reasons given for such notice were elaborated in the case of **Michael Otieno Nyaguti & 5 Others V Kenya National Highways Authority and 5 Others (2015) eKLR** where Kibunja J stated that the requirement of the notice was to create an opportunity of exploring an out of court settlement in line with Article 159 of the Constitution. He submitted that if the applicant had given the 2<sup>nd</sup> Respondent 30 days' Notice of its intention to sue, the 2<sup>nd</sup> Respondent would have negotiated with the applicant for a reasonable compensation to avoid a delay of the project. He submitted that his case was therefore filed prematurely.

He pointed out that under section 28 of the Land Registration Act, an overriding interest is created on every private land in favour of any authority that needs to acquire it compulsorily. That means that the applicant's claim to the land is not superior to that of the 1st or 2<sup>nd</sup> Respondents as he cannot stop compulsory acquisition. He relied on the case of **Veronica Waithira** cited above. He further submitted that in any event the 1<sup>st</sup> Respondent had complied with section 112 of the Land Act by cancelling the impugned notices issued earlier and issuing new notices.

With regard to the second principle in the **Giella** case, Counsel submitted that the applicant could be adequately compensated by an award damages as he had quantified the loss he was likely to suffer and he had not demonstrated that the 2<sup>nd</sup> Respondent was impecunious and therefore unable to compensate the Applicant.

With respect to the third principle, he submitted that the balance of convenience tilts in favour of the Respondents as the road was meant to benefit the public and was being financed by donor funds which will be repaid by tax payers money. The wider public interest therefore militates against granting an injunction in favour of the applicant.

### **1<sup>st</sup> Respondent's case**

Learned counsel Mr. Wahome who represented the 1<sup>st</sup> Respondent fully associated himself with Mr. Ragot's submissions and pointed out that the threshold for the grant of conservatory orders was considered in the case of **Gaitirau Peter Munya V Dickson Mwenda Kithinji & 2 Others (2014) eKLR** where the court stated as follows:

***“An applicant seeking conservatory orders must show that the case is arguable and not frivolous. Secondly, the applicant must demonstrate that it is in the public interest that the conservatory orders be granted.”***

In his submission, the applicant had failed to satisfy these two tests. In response to the arguments raised by the applicant regarding the amount of compensation, he submitted that the 1<sup>st</sup> Respondent had complied with section 113(2) of the Land Act which requires that the award states the size of the land to be acquired, the value thereof in the opinion of the Commission and the amount of compensation payable. He submitted that this being a quasi-judicial process, the decision of the 1<sup>st</sup> Respondent was final. The only recourse for a dissatisfied party was to file an appeal in terms of section 128 of the Land Act.

### **Applicant's Response:**

In response to the respondent's submissions learned counsel Mr. Nyaburi submitted that even if the Petitioner's application was to be assessed on the basis of the principles laid down in the **Giella** case, the applicant had satisfied all the said principles. With specific reference to whether damages would be an adequate remedy, he cited the case of **China Road & Bridge Corporation (K) Ltd V African Gas & Oil Ltd & Others (2016) eKLR** where it was held that when confronted by an application such as this one, the court must weigh the respective hardship that each party stands to suffer, and the issue is not merely the ability of a party to pay or not to pay a particular sum of money. He submitted that in the instant case, the court ought to consider whether the Petitioner's rights to due process were violated.

In response to the assertion that the Petitioner's case against the 2nd Respondent was defective for failure to issue a 30 days' notice in accordance with section 67 of the Kenya Roads Act 2007, he submitted that the Petitioner approached the court on 13<sup>th</sup> October 2017 under Certificate of Urgency pursuant to a Notice to take possession served on them by the 1<sup>st</sup> Respondent on 6<sup>th</sup> October 2017. The said Notice was to take effect on 19<sup>th</sup> October 2017. There was therefore no opportunity to give the 2<sup>nd</sup> Respondent a 30 days' Notice of intention to sue.

In response to the 1<sup>st</sup> Respondent's contention that the Petitioner ought to have appealed against the award, Counsel submitted that under 128 of the Land Act the Land and Environment case has jurisdiction to hear and determine any dispute arising from compulsory acquisition.

### **Issues for Determination**

The following issues emerge for determination;

- i. Whether the application meets the threshold for the grant of conservatory orders*
- ii. Whether the 1<sup>st</sup> Respondent has complied with the Constitutional and statutory requirements for compulsory acquisition of the Petitioner's property*

iii. Whether the Petition against the 2<sup>nd</sup> Respondent should be struck out for failure to issue a 30 days' Notice in line with section 67 of the Kenya Roads Act 2007.

## Analysis and Determination

### Whether conservatory orders by way of injunction should be granted.

The principles for the grant of an injunction are laid out in the celebrated case of **Giella V Cassman Brown & Company Ltd 1973 E.A 358** where the Court of Appeal held as follows:

***“First, the applicant must show that he has a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by damages. Thirdly, if the court is in doubt, it will decide it will decide the application on a balance of convenience.”***

Has the applicant passed the first test? In the instant case it is common ground that the Petitioner is the registered proprietor of all that parcel of land known as L.R Number No. 5467/3. Section 25 of the Land Registration Act provides as follows;

*“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court shall not be liable to be defeated except as provided in this Act and shall be held by the proprietor, together with all privileges thereto, free from all other interests and claims whatsoever, but subject;*

*a) To the leases, charges and other encumbrances and to the conditions and restrictions, if any shown in the register, and*

*b) To such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.”*

Section 26 (1) of the Land Registration Act provides that

*“ The certificate of title issued by the Registrar upon registration or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title of that..shall not be subject to challenge , except*

*a) On the ground of fraud or misrepresentation to which the person is proved to be a party or*

*b) Where the certificate of title has been acquired illegally, un-procedurally or through a corrupt scheme”*

It is therefore clear that the Petitioner's title, though absolute, is subject to the overriding interests provided in section 28. One such overriding interest is the right of compulsory acquisition as provided in section 28(e) of the Land Registration Act. The Petitioner's land has been identified for purposes of construction of the Mau Summit-Kericho-Nyamasaria-Kisumu Bypass which is a public road.

This is also in line with Article 40(3) of the Constitution which stipulates that the state shall not deprive a person of property of any description or of any interest in, or right over property of any description, unless the deprivation;

a) results from an acquisition of land or an interest in or conversion of an interest in land or title to land in accordance with chapter five or

b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution or any Act of Parliament that

c) requires prompt payment in full of just compensation to the person

It is the Petitioner's case that its rights under Articles 40(3), 47, 48 and 50(1) have been violated. In its Petition, and affidavit in support thereof, the Petitioner has given a chronology of the events leading to the acquisition of its land that point to some gaps in the process of compulsory acquisition. Based on the material placed before the court so far, I cannot determine with certainty whether the 1<sup>st</sup> Respondent has fully complied with the provisions of the Constitution and the Land Registration Act which provides for the procedures to be followed in cases of compulsory acquisition. This will only become clear at the hearing of the petition after all the parties have presented their evidence. The case of **Mrao Limited V First American Bank (2003) KLR 125** defines a prima facie case as;

*“ a case in which on the material presented to the court or a tribunal properly directing itself would conclude that there exists a right which has apparently been infringed by the opposite party s to call for an explanation or rebuttal from the latter”*

It is therefore my finding that the Applicant has demonstrated that he has a prima facie case with a probability of success. I must however hasten to add that this does not apply to the case against all the Respondents as will become clear later in my ruling.

The second principle that the Petitioner is expected to satisfy is whether it is likely to suffer irreparable loss which cannot be compensated by an award of damages. The Petitioner has merely quantified the value of the land sought to be acquired together with associated costs. It is my finding that the Petitioner has not demonstrated what hardship or loss other than financial loss it stands to suffer that cannot be compensated by damages.

The third test is the balance of convenience. In cases of compulsory acquisition such as this one, the Court must weigh the greater public interest against private interests. Article 40(3) of the Constitution provides for compulsory acquisition of property on condition that it is required for a public purpose or in public interest and it is carried out in accordance with the Constitution and any Act of Parliament that requires prompt payment in full of just compensation to the person.

It is the Petitioner's case that the Respondents have violated the Petitioner's rights under Article 40 (3) as the notices issued were not in strict compliance with the provisions of part VIII of the Land Act. On their part the Respondents argue that they have complied with the law and that the main bone of contention is the amount claimed by the petitioner as compensation which is in the sum of Kshs. 73,830 million against the offer of Kshs. 48,200,000.

The question therefore is in whose favour does the balance of convenience tilt? It has been submitted by the 2<sup>nd</sup> Respondent that the Government has secured donor funding which will have to be repaid through tax payers money and any delays the project will attract huge penalties. The construction of the road has already commenced and it is just a matter of time before the contractors get to the Petitioner's portion of land.

In a number of cases this court confronted with situations such as the one in the instant suit has held that the greater public good and interest militates against the court granting an injunction in favour of the applicants who only constitute a small segment of the public compared to the wider public for whom the construction of the road is intended. See the cases of **Veronica Waithira Trustee of Inter-**

**Christian Churches & 3 Others V Kenya National Highway Authority (2014) eKLR and Laly Furnishing House V Kenya National Highway Authority & 3 Others (2015) eKLR.**

Similarly, in the instant case, the Petitioner has not demonstrated that its rights to own property supersedes that of millions of Kenyans who will benefit from the on-going construction of the Bypass. In



my considered view, the balance of convenience tilts in favour of the Respondents. Should the applicant succeed in its Petition, I believe damages would be an adequate remedy.

Consequently, I decline to grant the application for injunction in favour of the Petitioner.

### **Whether the Petition against the 2<sup>nd</sup> Respondent is incompetent**

The last issue the court must determine is whether the suit against the 2<sup>nd</sup> Respondent is misconceived and an abuse of the process of the court for failure to comply with the provisions of section 67(a) of the Kenya Roads Act, 2007. The said section provides as follows:

*“Where any action or other 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 of any public duty, or in respect of any alleged neglect or default in 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 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 12 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”*

Learned counsel for the 2<sup>nd</sup> Respondent relied on the case of **Michael Otieno Nyaguti and 5 Others V Kenya National Highways Authority** mentioned above where Kibunja J gave the justification for one month's notice and proceeded to strike out the suit on account of failure to comply with this provision. He also cited the case of **James Orengo V Attorney General & Another (2007) eKLR** where the court struck out the Plaintiff's suit for failure to comply with section 13A (1) of the Government Proceedings Act which contains a provision similar to the one in section 67 of the Kenya Roads Act, to the effect that “No proceedings against a Government shall be instituted until after the expiry of a 30 days' notice served upon the Government in relation to those proceedings.”

Learned counsel for the Petitioner explained that given the urgency of the matter there was no opportunity to serve the 2<sup>nd</sup> Respondent with the requisite notice as the 1<sup>st</sup> Respondent's notice to take possession of the Petitioner's property was expiring within a period of less than two weeks.

I have carefully considered the submissions of learned counsel on this point in light of the provisions of the Act and the authorities cited to me. I note that the section is couched in mandatory terms which means that it must be complied with. For these reasons I find that the Petition against the 2<sup>nd</sup> Respondent is incompetent and I accordingly strike it out.

In the final analysis therefore, the application for injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents is dismissed and the Petition against the 2<sup>nd</sup> Respondent is struck out with no order as to costs.

**Dated, signed and delivered at Kericho this 22<sup>nd</sup> day of November 2017**

**J.M ONYANGO**

**JUDGE**

In the presence of :

Mr Kiprono for Mr Nyaburi for the Petitioner

Mr Ragot for the 2<sup>nd</sup> Respondent

No appearance for the 1<sup>st</sup> and 3<sup>rd</sup> Respondents