



**REPUBLIC OF KENYA**

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

**CONSTITUTIONAL AND HUMAN RIGHTS DIVISION**

**PETITION NO.4 OF 2016**

**IN THE MATTER OF INTERPRETATION AND ENFORCEMENT OF RIGHTS AND  
FUNDAMENTAL FREEDOMS UNDER CHAPTER 4 ARTICLES 22 AND 23 OF THE**

**CONSTITUTIONAL**

**AND**

**IN THE MATTER OF ARTICLES 2.2 (4), 3.10.40(1) AND 40(2), 43(1) (F), 47,50(1) AND  
20), 53(1)(B), 53(2),165,258 AND 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE VIOLATION DENIAL CONTRAVENTION AND/OR  
APPREHENDED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS**

**AND**

**IN THE MATTER OF INTENDED DEMOLITION OF FURAHA SEED ACADEMY**

**BUILT ON PARCEL SIAYA/NYAMINIA/1899.**

**RIANNA FURAHA CHILDREN HOME.....PETITIONER**

**VERUS**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....RESPONDENT**

**RULING**

1. **Rianna Furaha Children**, the Petitioner commenced these proceeding through the Petition dated 8th February 2016 supported by the affidavit of **Patrick Omondi Aneyo**, a manager of the Petitioner, sworn on the 5th February 2016. The Petitioner seeks for an order declaring the intended demolition of their school by **Kenya National Highways Authority**, the Respondent, as unconstitutional, a breach of the Petitioner's economic and social rights.

2. The Respondent filed a notice of preliminary objection dated 8th April 2016 and raised one ground that the petition has been filed in breach of **Section 67 of the Kenya Roads Act, 2007.**

3. The Petition came up for hearing on the 11th April 2016. The counsel for both parties agreed to have the preliminary objection heard first and the same was fixed for 27th June 2016, when **Mr Omondi and Obok** for the Petitioner and Respondent respectively made their submissions.

4. The main issues for determination are as follows:

a) Whether the Petitioner had served the Respondent with a one month notice containing the particulars of their claim and their intention to commence legal action before filing the petition as required Under **Section 67 of the Kenya Roads Act No.2 of 2007.**

b) Alternatively whether the Petitioners letter to the Respondent dated 9th September 2015 satisfies the requirement of **Section 67 of the Kenya Road Act No.20 of 2007.**

c) Who pays the costs.

5. The court has carefully considered the grounds on the notice of preliminary objection, the rival verbal submissions by both counsel and come to the following findings:

a) That this court has had occasion to pronounce itself on whether the requirement under **Section 67 of the Kenya Road Act No.2 of 2007** amount to hindering a party from accessing the court, in **Kisumu ELC Petition No.10 of 2015, Michael Otieno Nyaguti & 5 others -V- Kenya National Highways Authority & 3 others.** The court had stated as follows:

**" The court holds the view that the requirement of a notice being served on the Director General would not amount to hindering a litigant from accessing the seat of justice (court). It only creates an opportunity to the Director General's office of exploring an out of Court settlement and is in line with the provision of Article 159 of the Constitution, which at sub-article 2(c) encourages "alternate forums of dispute resolutions. The provision of Section 67 of the Kenya Road Act 2007 is not in contravention with the Constitution 2010."**

The court in that case went ahead to uphold the preliminary objection raised by the Respondent and struck out the petition. The Respondent in the current petition has raised a more or less similar preliminary objection to the one raised in the petition referred to above.

b) That the Petitioner has not availed any document described as a notice under **Section 67 of the Kenya Road Act 2007** or any document setting out their claim and conveying their intention to initiate legal action after one month. That there is also no evidence of service upon the Respondent of such a document at least one month before the filing of this petition.

c) That the letter dated 9th September 2015 is referenced **"EXEMPTION FROM DEMOLITION OF SCHOOL PIECE BUILDING AT YALA POINT ON KISUMU BUSIA ROAD."** That in the said letter, the Petitioner states that **"part of our facility is in the reserve measuring 7 meters,"** and continues to make a plea as follows; "Dear sir, getting support to take care of children is a tall order to many governments and many communities, we rarely get any support from the government to oversee this work. For this reason the demolition of the small school building shall have a ripple effect to this society. The community served will never be able to build another structure to help this children. The foreign supporters will be much discouraged to put even their support to this ongoing project. This means with no accommodation we will be forced to return this many children back to their communities where they came from.

We therefore sir request that though difficult as it is, may you exempt us on 10 metres less than the mandatory 60 metres set road on our stretch."

That the reading of the said letter does not disclose any claim of right by the Petitioner or any intention to take legal action to pursue any such claim against the Respondent. The letter does not therefore satisfy the requirement of **Section 67 of the Kenya Roads Act 2007**.

d) That the Respondent preliminary objection that this petition was filed in contravention of **Section 67 of the Kenya Road Act 2007** as the mandatory one month's notice was not served on the Director General, Kenya National Highways Authority is upheld.

6. That having upheld the Respondent's preliminary objection through notice dated 8th April 2016, the Petition filed herein dated 8th February 2016 is hereby struck out with costs.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDG**

**DATED AND DELIVERED THIS 14<sup>TH</sup> DAY OF SEPTEMBER 2016**

In presence of;

Petitioner Absent

Respondent Absent

Counsel M/S Adwar for petitioner

Mr Odeny for Muma for the Respondent

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/9/2016**

14/9/2016

S.M. Kibunja J.

Oyugi Court Assistant

M/S Odwar for the Petitioner

Mr Odeny for Muma for the Respondent.

Court: Ruling Dated and delivered in open court in presence of M/S Adwar for the Petitioner and Mr Odeny for Muma for Respondent.

**S.M. KIBUNJA**

**ENVIRONMENT & LAND – JUDGE**

**14/9/2016**