



**Njuguna v Mbuna & 3 others (Environment & Land Case E017 of 2023)
[2024] KEELC 13272 (KLR) (20 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 13272 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E017 OF 2023
SM KIBUNJA, J
NOVEMBER 20, 2024**

BETWEEN

WANJIRU NDEGWA NJUGUNA PLAINTIFF

AND

CATHERINE KAGENDO MBUNA 1ST DEFENDANT

THE REGISTRAR OF TITLES MOMBASA 2ND DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

RULING

3rd Defendant’s Notice of Preliminary Objection Dated 25th March 2024

1. The 3rd defendant filed the notice of preliminary objection dated 25 March 2024, to the plaintiff’s application and suit on the ground that the suit is barred by dint of section 67 (a) of the *Kenya Roads Act*, 2007.
2. The court issued directions on filing and exchanging submissions on the 14th May 2024, 30th July 2024 and 3rd October 2024. The learned counsel for the 3rd defendant and plaintiff filed theirs dated 8th October 2024 and 18th October 2024 respectively, which the court has considered.
3. The issues before the court for determination are as follows:
 - a. Whether the ground on the notice of preliminary objection raises a pure point of law that can be determined without evidence, and is capable of determining the suit/application.
 - b. Who pays the costs?



4. The court has carefully considered the ground on the notice of preliminary objection, submissions by the learned counsel, superior courts decisions cited thereon, and come to the following conclusions:

- a. It is trite that a preliminary objection must be correctly raised and qualify the principles set out in the celebrated case of *Mukisa Biscuit Manufacturing Co. Ltd versus West End Distributors Ltd* (1969) EA 696, where Law J A stated that;

“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 the 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.”

Sir Charles Newbold P. further held:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.”

Further, in the case of *Oraro versus Mbaja* (2005) 1 KLR 141, the court held:

“I think the principle is abundantly clear. A preliminary objection correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which court should allow to proceed. I am in agreement with learned counsel, Mr Ougo, that ‘where a court needs to investigate facts, a matter cannot be raised as a preliminary objection’. This legal principle is beyond dispute, as there are divers weighty authorities carrying the message.”

- b. The 3rd defendant has submitted that the suit should be struck out as the plaintiff did not serve the mandatory notice required by section 67 (a) of the *Kenya Roads Act* 2007, to the Director General before filing the suit. That the application and suit are therefore premature and the court has no jurisdiction to hear them. The learned counsel for the 3rd defendant has in their submissions relied on the decisions in the following cases; *Michael Otieno Nyaguti & 2 Others versus Kenya National Highways Authority & 2 Others* [2021] eKLR, *Mukisa Biscuits versus Western End Distributors Limited* [1969] E.A 696, *Owners of Motor Vessel “Lilian S” versus Cal;tex Oil Kenya Limited* [1989] eKLR, and *Sumac Development Company Limited versus George Munyui Kigathi & 2 Others* [2017] eKLR. The plaintiff has on her part submitted that the 3rd defendant was joined in the suit to make it not to proceed and compensate the 1st defendant, who had colluded with the 2nd defendant to encroach and curve off 0.037 from the plaintiff’s parcel. The learned counsel relied on the following decisions: *Simonash Investment Limited versus Kenya National Highways Authority & 3 Others* [2019] eKLR, and *Kenya Bus*



Service Limited & Another versus Minister for Transportation & 2 Others [2012] eKLR, and submitted that the plaintiff's case should not fail because of a technicality.

c. Section 67 of the [Kenya Roads Act](#), provides as follows:

“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.”

The 3rd Defendant submitted that the above section is in mandatory terms, which meant that the notice had to be served upon the Director General is to allow him pursue other avenues of dispute resolution as provided for in Article 159 of [the Constitution](#) of Kenya, 2010, before the matter could be brought to court. Counsel for the 3rd defendant argued that there is no evidence that a notice as stipulated under section 67(a) of the [Kenya Roads Act](#), 2007, was served upon the Director General of the 3rd Defendant prior to institution of the suit, and this suit is therefore premature, and the Court does not have the Jurisdiction to hear and determine it.

d. The Court of Appeal in the case of Michael Otieno Nyaguti, Michael Oginga Dache & Robert Ouko Okumu versus 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.”

In the case of Rianna Furaha Children Home versus Kenya National Highways Authority [2016] eKLR the court held that:

“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.... 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. 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.”

And in the case of Space Geo Enterprises Limited versus Kenya National Highways Authority [2019] eKLR the court held that:

“The limitation set out in Section 67 of the Roads requiring notice of thirty days to the Authority before instituting suit only applies to ordinary civil claims. It does not apply to cases (Petitions/Applications) alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened. The Respondents’ claim to the contrary is not borne out by the Constitution, and that leg of defence therefore fails.”

The foregoing superior courts decisions clearly leads the court to the conclusion that the plaintiff herein was obligated under the provisions of section 67(a) of the Kenya Roads Act to serve a notice on the Director General of the 3rd Defendant prior to filing the instant suit, but did not do so.

h. The plaintiff’s suit against the 3rd defendant has been prematurely filed and this court is therefore, not clothed with the jurisdiction to hear and determine the suit. In terms of the decision in the case of Owners of Motor Vessel “Lilian S” versus Caltex Oil Kenya Limited [1989] eKLR, “where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction,” the court will therefore down its tools in respect of the plaintiff’s suit against the 3rd defendant by striking it with costs. This order does not in any way affect the plaintiffs’ claim/suit against the 1st and 2nd defendants.

5. In view of the foregoing conclusions, the court finds and orders as follows:

- a. That the 3rd defendant’s preliminary objection dated the 25th March 2024 has merit and is hereby upheld.
- b. The plaintiff’s suit against the 3rd defendant was prematurely filed in court and is hereby struck out with costs.
- c. The above order does not affect the plaintiff’s claim against the 1st and 2nd defendants.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 20TH DAY OF NOVEMBER 2024.

S. M. Kibunja, J.

ELC MOMBASA.

In the Presence of:

Plaintiff : Mr Otwere

Defendants : M/s Katsya for 1st Defendant



M/s Salim for 2nd Defendant

M/s Mirili for Mudawadi for 3rd Defendant

M/s Mutheu for 4th Defendant

Leakey – Court Assistant.

S. M. Kibunja, J.

ELC MOMBASA.

