



**Little Bees Kindergarten and Primary v Kenya National Highways Authority & 2 others
(Environment & Land Case E08 of 2024) [2025] KEELC 3482 (KLR) (29 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E08 OF 2024**

NA MATHEKA, J

APRIL 29, 2025

BETWEEN

LITTLE BEES KINDERGARTEN AND PRIMARY PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST DEFENDANT

**CHINA ROAD AND BRIDGE CONSTRUCTION (K) LIMITED 2ND
DEFENDANT**

CALE INFRASTRUCTURE CONSTRUCTION COMPANY ... 3RD DEFENDANT

RULING

1. The 1st Defendant raised a Preliminary Objection that the Plaintiff's suit be struck out with costs to be paid forthwith to the 1st Defendant on the basis that the entire suit is incompetent, incurably defective and statute barred for reason that the Plaintiff's suit offends the mandatory provisions of Section 67(b) of the [Kenya Roads Act](#), Chapter 408 Laws of Kenya. Section 67(b) of the Act provides that:-

“Where any action or other legal proceeding lies against an Authority for any act done or in respect of any alleged neglect or default in the execution of any such duty, the following provisions shall have effect-

- (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. (emphasis added)

2. The 2nd Defendant raised a Preliminary Objection opposing the jurisdiction of this Court on the following grounds that Article 162(2) (b) of the [Constitution](#) read with Section 13(2) of the ELC Act limits the jurisdiction of ELC to disputes relating to environment, use, occupation and title to



land. The cause action pleaded herein does not relate to the environment, use, occupation and title to land or the matters listed in Section 13(2) of the ELC Act. To the contrary, the cause action herein relates to a normal civil claim for Kshs. 117,114,503 based on the common law tort of negligence. In the circumstances, this suit ought to have been filed in the High Court which has the original civil jurisdiction under Article 165 of the Constitution so that the same can be decided as a normal law civil dispute applying the common law principles of the tort of negligence i.e., the existence of a duty of care, breach of that duty and damage/loss suffered as a result of the breach. The 2nd Defendant prays that the suit against the 2nd Defendant be dismissed with costs to the 2nd Defendant.

3. The 3rd Defendant raised a similar preliminary objection that the ELC does not have the jurisdiction to hear and determine this suit because of the following reasons that Article 162(b) of the Constitution read together with Section 13(2) of the ELC Act limits the jurisdiction of the ELC to disputes relating to the environment, use, occupation and title to land. That also the suit against the 3rd Defendant is incurably defective and incompetent because the plaintiff alleges that the 2nd Defendant was the principal of the 3rd Defendant. The said allegation therefore presupposes that the 3rd Defendant was an agent of the 2nd Defendant. That it is trite law that a suit against an agent of a disclosed principal cannot stand. The 3rd Defendant prays that the suit against, the 3rd Defendant be dismissed with costs to the 3rd Defendant.
4. I have considered the preliminary objections. The same are actually preliminary objections as they seek to have this suit truck off as this court does not have jurisdiction, there is a misjoinder and the suit is barred by time limitation. The issue for determination is whether the defendants' preliminary objection has satisfied the threshold or not. The leading decision on Preliminary Objections is the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) EA 696, where the Court held as follows:

“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. 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... a preliminary objection is in the nature of what used to be a 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”.

5. Similarly, the Supreme Court in Independent Electoral & Boundaries Commission vs Jane Cheperenger & 2 Others (2015) eKLR made the following observation as relates to Preliminary Objections:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

6. The point of law the defendants argue is that this court does not have jurisdiction and they quoted article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Act. They emphasize that the dispute arising is on the nature of the sale or the terms of the afore mentioned is a civil matter.



7. In the case of Owners of the Motor Vessel M.V Lillian S. vs Caltex Oil (K) Limited (1989) KLR 1 the court held that without jurisdiction it has to down its tools. The issue of whether the ELC court has jurisdiction on environmental damage matters or not is not a novel issue. Article 162 (2) & (3) of the Constitution requires inter alia, that;
- “Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to-
- a) ...
 - b) The environment and the use and occupation of, and title to, land.” Emphasis added.
8. Article 260 of the Constitution, states that unless the context requires otherwise, ‘land’ includes-
- “a) The surface of the earth and the subsurface rock;
 - b) Any body of water on or under the surface;
 - c) Marine waters in the territorial sea and exclusive economic zone;
 - d) Natural resources completely contained on or under the surface; and
 - e) The air space above the surface.”
9. This definition espouses the doctrine of Cujus est solum, eius est usque ad coelum et ad inferos (cujus doctrine) which translates to "whoever owns [the] soil, [it] is theirs all the way [up] to Heaven and [down] to Hell".
10. the Constitution under Article 165 (5) ousts the High Court’s jurisdiction in matters where the ELC had jurisdiction as follows: -
- “The High Court shall not have jurisdiction in respect of matters: -
- a. Reserved for the exclusive jurisdiction of the supreme court under this constitution: - or
 - b. Falling within the jurisdiction of the courts contemplated in Article 162 (2).”
11. I find from the discussion above, that this court has jurisdiction to entertain the matter as it concerns occupation and use of land which I find is the dominant issue in the instant case. The allegation that the Defendants’ negligence caused a blockage and/or leakage in the main sewer line which caused flooding relates to the Plaintiffs’ use of their land. The cause action as pleaded herein clearly relates to the environment, use, occupation and title to land or the matters listed in Section 13(2) of the ELC Act. In this regard, I find that this court has jurisdiction to entertain the matter.
12. On the issue of misjoinder is that the suit against the 3rd Defendant is incurably defective and incompetent because it is alleged that the 2nd Defendant was the principal of the 3rd Defendant. That the said allegation therefore presupposes that the 3rd Defendant was an agent of the 2nd Defendant



13. The effect of misjoinder of non-joinder of parties, is provided for by Order 1 Rule 9 of the Civil Procedure Rules, 2020, which make it patently clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. It provides that:

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”
14. As the 2nd and 3rd Defendants submit the importance of parties in proceedings before a court of law cannot be gainsaid. They state that when a principal is closed the agent does not need to sued.
15. In *Apex International Ltd and Anglo Leasing and Finance International Finance Ltd vs Kenya Anti-Corruption Commission* (2012) eKLR, the Court quoted the words of Mukhtar J. of the Supreme Court of Nigeria in *Goodwill and Trust Investment Ltd vs Will and Bush Ltd* (2011) LCN/B820 (SC) as follows;

“It is trite law that to be competent and have jurisdiction over a matter proper parties must be identified before the action can succeed, the parties must be shown to be proper parties whom rights and obligations arising from the cause of action attach. The question of proper parties is a very important issue which would affect the jurisdiction of the suit in limine. When proper parties are not before the Court, the Court lacks jurisdiction to hear the suit and where the Court purports to excise jurisdiction which it does not have, the proceedings before it, and its judgment will amount to a nullity no matter how well reasoned.”
16. The issue was emphasized by Gikonyo J. in *Zephir Holdings Ltd vs Mimosa Plantations Ltd and 12 Others* (2014) eKLR.
17. The foregoing aptly captures the essence of parties in judicial proceedings which the Court is in agreement with entirely. However, the crux of the matter in this application is the effect of suing the agent when the principal is disclosed.
18. In *William Kiprono Towett & 1597 Others vs Farmland Aviation Ltd & 2 Others* (2016) eKLR the Court of Appeal held that;

“Most critically Order 1 Rule 9 of the Civil Procedure Rules (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit.”
19. Needless to emphasize Articles 159(2)(d) of the *Constitution* of Kenya, 2010 provides that “Justice shall be administered without undue regard to procedural technicalities.” The words of Ochieng J. in *Republic v District Land Registrar, Uasin Gichu and Another* (2014) eKLR on Article 159(2)(d) are also instructive.
20. Be that as in may, regarding the general liability of an agent for a wrongful act, *Halsbury's Laws of England Vol. 1* (2017) at Paragraph 165 provides guidance as follows:

“Any agent, including a public agent, who commits a wrongful act in the course of his employment, is personally liable to any third person who suffers loss or damage thereby, notwithstanding that the act was expressly authorized or ratified by the principal, unless it was deprived of its wrongful character. It is immaterial that the agent did the act innocently



and without knowledge that it was wrongful except in case where actual malice is essential to constitute the wrong.”

21. The court in *National Social Security Fund Board of Trustees v Ankhan Holdings Limited & 2 Others* (2006) eKLR cited with approval the decision of the House of Lords in *Williams and another vs Natural Life Health Foods Ltd and another* (1998) 2 All ER 577 at 582 which held that;

“Whether the principal is a company or a natural person, someone acting on his behalf may incur personal liability in tort as well as imposing vicarious or attributed liability upon his principal.”

22. It follows therefore that an agent may be personally liable for tortious acts committed in the course of its employment. I concur with the Plaintiff’s submissions that the 2nd and 3rd Defendants can be sued in their individual capacity jointly and severally. I find this objection cannot be sustained in the circumstances.

23. The final objection is the one on limitation of time. The 1st Defendant submitted that the Plaintiff’s suit offends the mandatory provisions of Section 67(b) of the *Kenya Roads Act*, Chapter 408 Laws of Kenya. Section 67(b) of the Act provides that legal proceedings shall be instituted within 6 months after the act complained of.

24. Jurisdiction of a court is conferred by a Statute or the *Constitution* and it is no doubt that the issue limitation of time goes to the root of the jurisdiction of a court. In the case of *Gathoni vs Kenya co-operative Cremires Ltd* (1982) KLR 104 Potter, JA stated the rationale of the Law of Limitation as follows;

“The law of limitation of actions is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest.”

25. In *Anaclek Kalia Musau vs Attorney General & 2 Others* (2020) eKLR, Civil Appeal 111 of 2017, the Court of Appeal in determining a jurisdictional issue which was never raised by the parties to the suit stated as follows;

“The solitary issue in this appeal is, whether the suit before the High Court was statutorily time barred. To demonstrate that time limitation is a jurisdictional question and that if a matter is statute-barred a court has no jurisdiction to entertain it, we cite the decision of the Supreme Court in the case of *Nasra Ibrahim Ibren V. Independent Electoral and Boundaries Commission & 2 others*, Supreme Court Petition No. 19 of 2018, where that court stressed the fact that jurisdiction is everything and that a court may even raise a jurisdictional issue suo motu. It said:

“ 40 A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and*



Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B” [2008] 1 EA 367 stated thus:

“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...” (Emphasis supplied)

We fortify that view by quoting yet another passage from the East African Court of Appeal in the matter of Iga V. Makerere University (1972) E.A 62, where it was stated that;

“The limitation Act does not extinguish a suit or action itself, but operates to bar the claim or remedy sought for and when a suit is time-barred, the court cannot grant the remedy or relief..... The effect then is that if a suit is brought after the expiration of the period of limitation, and this is apparent from the pleadings, and no grounds of exemption are shown in the pleadings, the suit must be rejected.” (Our emphasis). The learned Judge in this appeal, no doubt did not err when she determined whether, by operation of the law, she had to dismiss the suit for want of jurisdiction.”

26. The 1st Defendant submitted that the alleged continuous injury and/or damage ceased on the 20th April 2022 and this matter ought to have been filed by 20th October 2022. The Plaintiff argues that the damage continued at the time of filing suit. That the Defendants visited the site on diverse dates in 2023. I find that it is not clear when the alleged injury ceased and this is a matter of evidence to be adduced at the hearing and the court cannot therefore conclude that this matter is time barred at this stage. In conclusion then I find that all the preliminary objections lack merit and I dismiss them with costs to the Plaintiff.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 29TH DAY OF APRIL 2025.

N.A. MATHEKA



JUDGE

