



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC JR 39 OF 2018

**REPUBLIC OF KENYA.....APPLICANT**

**VERSUS**

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

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

**EX-PARTE REGISTERED TRUSTEES SIMBA UNION CLUB**

**RULING**

1. On 16<sup>th</sup> October 2008, the Ex-parte Applicant's land **L.R No.209/6559/13** was compulsorily acquired for a sum of Kshs.12,084,774/= and on 28<sup>th</sup> November 2013, it was paid a sum of kshs.4,722,475/= leaving a balance of Kshs.7,362,300/=.

2. In a bid to recover the balance, the Ex-parte Applicant filed the Notice of Motion application dated 25<sup>th</sup> November 2016 seeking an order of mandamus to issue directed at the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to pay it the sum of kshs.16,973,135/=. The breakdown is as follows:-

*a) Ksh.7, 362,300 being the balance of principal sum.*

*b) Kshs.9,610,835 being interest from December 2008 to 31<sup>st</sup> July 2016*

*c) Further interest on kshs.16,973,135/= at the rate of 12% per annum from 1<sup>st</sup> August 2016 until payment in full.*

3. In response to the application, the 2<sup>nd</sup> Respondent filed its notice of preliminary objection dated 27<sup>th</sup> July 2020 which is for determination before this court. The 2<sup>nd</sup> Respondent seeks to have the Ex-parte Applicant's Notice of Motion application dated 25<sup>th</sup> November 2016 struck out on grounds that the judicial review application is statute barred pursuant to Section 67 of the Kenya Roads Act, No.2 of 2007.

4. On the 8<sup>th</sup> December 2020, the court with the consent of the parties directed that the Preliminary Objection be canvassed by way of written submissions.

**The 2<sup>nd</sup> Respondent's submissions**

5. They are dated 28<sup>th</sup> July 2021. Counsel for the 2<sup>nd</sup> Respondent submitted that pursuant to Section 19(1) as read together with Section 16(1) of the Land Acquisition Act cap 295 (now repealed) possession of the Ex-parte Applicant's land was deemed by law to have been taken by the 2<sup>nd</sup> Respondent on 15<sup>th</sup> December 2008 being sixty (60) days from 16<sup>th</sup> October 2008, when the award was made.

6. He submitted that the cause of action arose in the Ex-parte Applicant's favour on 15<sup>th</sup> December, 2008 and the Ex-parte Applicant ought to have filed the instant application within 12 months therefrom which it failed to do. He added that it matters not that the Ex-parte Applicant was paid the remaining balance of the compensation award on 5<sup>th</sup> June 2017, it was required to file the instant application by 15<sup>th</sup> December 2009 which it failed making the application statute barred under Section 67(b) of the Kenya Roads Act.

7. He relied on the case of **Sumac Development Company Limited v Kenya National Highways Authority & 2 Others [2017] e KLR** and the case of **Willmary Development Ltd v The National Land Commission & Kenya National Highways Authority[2020]e KLR**

where the courts struck out suits for being filed outside the statutory period provided under Section 67 of the Kenya Roads Act.

8. He also submitted that any interpretation of Section 67(b) of the Kenya Roads Act as a “continuing injury or damage” so that, for instance, a suit [for payment of interest] can be instituted within 6 months after the interest has been paid, is an absurd and unworkable construction of that provision. He put forward the case of **Law Society of Kenya v Kenya Revenue Authority & Another [2017] e KLR** and the case of **John Kibor Kipkorir (Suing as the administrator of William Kibor Ruto a.k.a Chebor ruto) v Kenya Rural Roads Authority**.

#### **The Ex-parte Applicant’s written submissions**

9. Counsel for the Ex-parte Applicants submitted that Section 67 of the Kenya Roads Act, No.2 of 2007 is inapplicable in the instant suit being a judicial review application seeking constitutional prerogatives and predicated upon Article 40 of the Constitution.

10. He added that various periods described under the land Acquisition Act (now repealed) are for purposes of setting out the contours for the performance of such duties and/or acts that are provided for in the law and the framers thereof could not have intended to limit recourse to remedial action in the manner pleaded by the 2<sup>nd</sup> Respondent.

11. He submitted that the duty to pay interest on a compensation award is constitutionally imposed on the government and in extension the Respondents under the provisions of the Land Acquisition Act and the duty does not fall within the ambit of Section 67(b) of Kenya Roads Act which applies only to acts and /or duties envisaged under the Kenya Roads Act.

12. He further submitted that it would amount to an absurd interpretation of the law to hold that Section 67(b) of the Kenya Roads Act stretches its limitation arm to affect a public duty imposed by the Constitution.

13. He cited the Court of Appeal’s decision in **Elizabeth Wambui Githinji and 29 others v Kenyan Urban Roads Authority and 4 others [2019] eKLR** to submit that to uphold the Respondent’s objection to the application herein will fall afoul the constitutional safeguard of the right to own property and that compulsory acquisition can only be undertaken upon prompt payment in full and just compensation.

14. He relied on **Benson Ruiyi Njane v Kenya Rural Roads Authority & 36 others [2016] e KLR** and **Republic v Kenya National Highways Authority Ex –parte Tangerine Investments Limited [2017] e KLR** as well as **Space Geo Enterprises Limited v Kenya National Highways Authority [2019] e KLR**.

15. I have considered the preliminary objection, the rival submissions and the authorities cited. the issues for determination are:-

*(a) Whether the Ex parte Applicants’ claim is statute barred.*

*(b) Whether the interest payable under Section 67(b) of the Kenya Roads Act constitutes a continuing injury.*

16. Section 23(3) of the Kenya Roads Authority provides, “Where land is acquired on behalf of an Authority under subsection (2), such Authority shall bear all costs in relation thereto”. The suit property was compulsorily acquired on behalf of the 2<sup>nd</sup> Respondent, therefore it is responsible for costs thereof.

17. It is not disputed that the 2<sup>nd</sup> Respondent has fully paid the Ex-parte Applicant the awarded compensation of Kshs.16,973,135/=. The dispute is in respect of the interest payable under Section 16 of the Land Acquisition Act, (now repealed) with the 2<sup>nd</sup> Respondent claiming that the Ex parte Applicant’s claim is barred under Section 67 of the Kenya Roads Act.

18. **Section 67 (b)** of the Kenya Roads Act provides, “Where any action or other legal proceeding lies against an Authority for any act done in pursuance or 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.... (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.”

19. The Ex-parte Applicant contended that that **Article 40** of the Constitution imposes a public duty to the government to pay full compensation thus Section 67 of the Kenya Roads Act cannot limit such a duty imposed by the Constitution.

20. Article 40 cannot be read in isolation. Section 67 of the roads Act makes reference to public duty and provides a limitation period for bringing actions against the authorities established under the Act. The Plaintiff filed his claim outside the statutory period thus it is statute barred.

21. Even assuming that interest was to be taken as a continuing injury, then the Ex parte Applicant was supposed to file such a claim six (6) months after the 2<sup>nd</sup> Respondent paid compensation. The claim for interest is unsustainable in these proceedings given that the balance of compensation was paid on 5<sup>th</sup> June 2017. In **Willimary Development Limited v National Land Commission & another [2020] eKLR**, the court found a claim for interest of compensation award against the 2<sup>nd</sup> Respondent (Authority) to be time barred.

22. In the case of **John Kibor Kipkorir (suing as the administrator of the Estate of William Kibor Ruto aka Chebor Ruto) vs Kenya Rural Roads Authority [2017] eKLR**, where the court, while upholding a similar objection made under section 67(b) of the Kenya Roads Act stated:-

***“The drafters of this Act knew why this provision was found necessary and that is why it was crafted in mandatory terms. It should also not escape our minds that unless this provision is amended then the same must be adhered to as non-compliance will lead to striking out of suits like the current one..... Having found that the plaintiff did not comply with section 67 of the Roads Act, it follows that this court does not have jurisdiction to hear and determine this case and therefore down my tools.”***

23. I find merit in the preliminary objection and the same is upheld. The Notice of Motion dated 25<sup>th</sup> November 2016 is dismissed. Each party do bear own costs.

It is so ordered.

**Dated, signed and delivered at Nairobi on this 17<sup>th</sup> Day of March 2022.**

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

No appearance for the Ex-parte Applicant

Mr. Obok for the Respondents

Steve - Court Assistant