



REPUBLIC OF KENYA



KENYA LAW
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Mombasa-Lunga Lunga Roadside Residents Committee [Pungu check point to Tiwi] & 4 others (For and on behalf of Themselves and over 200 Residents) v Kenya National Highways Authority (Environment & Land Petition 1 of 2021) [2022] KEELC 14584 (KLR) (14 October 2022) (Ruling)

Neutral citation: [2022] KEELC 14584 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 1 OF 2021**

AE DENA, J

OCTOBER 14, 2022

BETWEEN

**MOMBASA-LUNGA LUNGA ROADSIDE RESIDENTS COMMITTEE [PUNGU CHECK POINT TO TIWI] 1ST PETITIONER
CHAIRPERSON-HALIMA SAID MWAGOMBA 2ND PETITIONER
VICE CHAIRMAN-CHUMA MOHAMED 3RD PETITIONER
SECRETARY-HALIMA YUSUF TAURAMBWA 4TH PETITIONER
TREASURER-AMINA SALIM KUNYAPA 5TH PETITIONER
FOR AND ON BEHALF OF THEMSELVES AND OVER 200 RESIDENTS**

AND

KENYA NATIONAL HIGHWAYS AUTHORITY RESPONDENT

RULING

1. The applicants vide a notice of motion application dated February 9, 2022 seek the following prayers;
 - a. Spent
 - b. That the court be pleased to allow the applicants [who are also roadside residents from Ukunda to Msambweni] who are also affected by the actions of the respondent (5th) to be enjoined.
 - c. That pending hearing and determination of the petition, the same orders subsisting for the existing suit be extended to cover the area of Tiwi through Ukunda to Msambweni.
 - d. The costs of this application.



2. The application is premised on grounds that the applicants are affected by the threat of expansion of the Mombasa-Lungalunga Road by the respondent and without compensation. The applicants state that they were made aware of the present petition after it was filed thus the application for joinder and same reliefs issued herein to the residents between Checkpoint and Tiwi.
3. The application is further supported the affidavit of Hamisi Athman Mohammed. It is stated that the respondent has made it clear to the deponent and 173 others who would be affected, that they intend to expand the Mombasa-Lungalunga Road. He averred that they were not opposed to the expansion and development of the road but wanted to be compensated for the same. He referred to a list of members (HAM 1) of a committee created to follow up on the issue since the land legally belongs to them and they were bound to suffer serious setbacks in the event that the court does not intervene and allow the application.
4. The respondent filed a further replying affidavit in opposition to the petition and notice of motion dated November 8, 2021 which they also relied upon in opposition to the present application. The affidavit was sworn by Kipkemoi Rono a surveyor in its directorate of highway planning and design. The respondent opposed the application on grounds that there was no proper identification of the applicants seeking to be enjoined into the suit, want of their authority to institute the petition under order 1 rule 13(1) & (2) of the [Civil Procedure Rules 2010](#). Failure to issue notice to the respondents director general prior to the filing of a suit as required by section 67(a) of the [Kenya Roads Act](#) 2007. That the respondent in expanding the Mombasa-Kwale highway will be executing its mandate as set out in section 4(3) of the [Kenya Roads Act](#) and hence the issue of compensation does not arise.
5. In its submissions filed on May 24, 2022 the applicants urged that it was simply seeking for joinder of parties after being made aware of the present petition when it was also their intention to seek similar reliefs because they are also roadside residents. That the respondent's objections touched on matters which ought to be canvassed during the hearing of the main petition. The applicants placed reliance on the holding in Nairobi Commercial & Admiralty Division] [Lucy Nungari Ngigi & Others v National Bank of Kenya Limited & Another and Charles Wambugu & Other 127 Civil Case 517 of 2015](#). It is the applicants prayer that the application is allowed.
6. The 2nd respondent relied entirely on its further replying affidavit sworn on April 12, 2022 and filed on April 26, 2022. I have already highlighted the relevant objections to the present application.

Analysis and Determination

7. The issues for determination are; -
 - a. Whether the applicants have met the threshold for grant of the orders sought.
 - b. Whether the failure to issue a 30-day notice as required under section 67(a) of the [Kenya Roads Act](#) 2007 is fatal.
8. Order 1 rule 1 of the [Civil Procedure Rules](#) under which the application is brought provides; -

All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.



9. Order 1 rule 10(2) of the said rules provides that:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

10. In the case of Pravin Bowry v John Ward and Another [2015] eKLR the Court of Appeal considered the principles to be applied in an application for joinder of parties to a suit and referred to the Ugandan case of Deported Asians Custodian Board v Jaffer Brothers Ltd [1999] 1 EA 55 (SCU) as well as Civicon Limited v Kivuwatt Limited and 2 Others [2015] eKLR in which the court observed as follows:

“Again, the power given under the rules is discretionary which discretion must be exercised judicially. The objective of these rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

11. It is alleged that the petitioners are the lawful owners of the land titles along the Mombasa-Lungalunga Road. That they have made developments on the said titles and which means that they have proprietary rights over the said parcels. It is stated that the respondent in its mandate of expansion of roads has an interest in acquiring the land belonging to the petitioners but the same is being done without compensating them. It is the petitioners case that such acquisition is a violation of their rights to ownership use and occupation of property, dignity and the right to information. That the compulsory acquisition of the land without compensation is a clear contravention of the provisions of article 40. The parties intending to be joined in the petition share the same sentiments as those of the petitioners. It is their case that they inhabit the land along the Mombasa Lungalunga Road and particularly between Ukunda to Msambweni at Tiwi. That the road expansion is bound to interfere with their occupation and use of the parcels alongside the road.

12. In view of the above and guided by the case law cited herein the applicants in my view have demonstrated that they are a proper party to this petition as they are in occupation of the parcels that are set to be acquired by the respondent. Indeed, a relief flows from the respondent to them but the same will be upon a finding made by this court in determining the petition and further that the same issues of law and fact arise against the respondent in the present petition. Their joinder would therefore avoid multiplicity of suits. This court therefore makes a finding that the applicants have met the threshold for grant of orders of being joined as parties to the suit.



13. On the second issue, it is the respondent's case that the suit is defective for failure to comply with the mandatory provisions of section 67(a) of the [Kenya Roads Act](#) and which require that a notice is served on the Director General of the respondent prior to institution of a suit for determination, section 67 of the [Kenya Roads Act](#), 2007 provides that:

“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-”

Sub-paragraph (a) thereof provides:

“..... 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”

14. It is noteworthy that the suit herein is a constitutional petition and whose institution is guided by the provisions of rule 4(1) of the [Constitution of Kenya \[Protection of Rights and Fundamental Freedoms\] Practice and Procedure Rules 2013](#). [The Mutunga Rules. The same states;

“Where any right or fundamental freedom provided for in the [Constitution](#) is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the high court in accordance to these rules.

Rule 10[1] of the said practice directions states that; -

An application under rule 4 shall be made by way of a petition as set out in Form A in the schedule with such alterations as may be necessary.”

15. The rules do not have a requirement of giving statutory notice to a respondent before filing a petition. In the case of [Anthony Ngili Munguti & 12 Others v Kenya National Highways Authority & Another \[2017\] eKLR](#) where Justice E K O Ogola faced with a similar issue made the following finding:

“A fundamental right guaranteed by the [Constitution](#) cannot be taken away on the basis that demand notice stating intention to sue was not issued. It is the finding of this court that such a right is so supremely protected, that even a verbal notice such as for example, “Hey, this is our home, do not demolish it” is valid enough to stop the respondent on its track. Such a right cannot be defeated by statutory provision. It is the finding of the court that a constitutional provision on access to justice supersedes any statutory powers limiting enforcement of constitutional rights.”

16. In the case of [Benson Ruiyi Njane v Kenya Rural Roads Authority & 36 Others \[2016\] eKLR](#) the court in addressing a notice of preliminary objection under section 67 of the [Kenya Roads Act](#) made the following findings:

“The limitation set out in section 67 of the [Roads Act](#) 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.”



17. From the foregoing it is clear that the requirements of a notice under section 67 of the *Kenya Roads Act* 2017 do not apply in petitions brought under the bill of rights. Accordingly, I order that all the 173 intended petitioners shall be enjoined as petitioners in this petition. The amended petition to be filed and served within 15 days of the order hereof. Costs shall follow the event.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 14TH DAY OF OCTOBER, 2022

A E DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

N/A for the plaintiffs/applicants

N/A for the respondent

Mr Denis Mwakina- Court Assistant.

