



Designs Unlimited Limited & another v Kenya Railways Corporation (Environment & Land Petition E014 of 2020) [2022] KEELC 13394 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13394 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E014 OF 2020
OA ANGOTE, J
OCTOBER 6, 2022**

BETWEEN

DESIGNS UNLIMITED LIMITED 1ST PETITIONER

MECOL LIMITED 2ND PETITIONER

AND

KENYA RAILWAYS CORPORATION RESPONDENT

RULING

1. There are two applications before this court for determination. In the first application dated March 8, 2021, the respondent has sought the following orders:
 - a. The present suit is barred by section 87(a) of the *Kenya Railways Corporation Act*.
 - b. The costs of this application and of the cause be borne by the petitioners
2. The application is based on the grounds on the face of it and supported by an affidavit of Christine Macharia, the respondent's Legal Officer, who deponed that contrary to section 87(a) of the *Kenya Railways Corporation Act*, the petitioners instituted the present proceedings on September 22, 2020 without giving at least one month's written notice of the claim and intention to commence action to the Managing Director.
3. It was deponed by the respondent's Legal Officer that in addition, the petitioners have prematurely moved the court before they have exhausted all other available remedies; that it is a waste of judicial time for this court to entertain a suit that is statute barred and that the suit is defective, bad in law and should be dismissed with costs to the respondent.
4. The petitioner's Managing Director deponed that the application is based on a heresy; that section 87(a) of the *Kenya Railway Corporation Act* is not superior to articles 2(4), 23, 27, 40 and 47 of the



- Constitution and that Section 87(a) of the Kenya Railways Corporation Act is inconsistent with article 2(4) of the Constitution and therefore null and void.
5. The petitioners argued that Section 87(a) of the Kenya Railways Corporation Act contravenes article 48 of the Constitution which guarantees every person the enjoyment of the right to access to justice; that section 87(a) of the Act is *ultra vires* as it limits the petitioners' right to access justice and that the rule of law doctrine puts the state in the same position as litigants in matters concerning the law.
 6. In the second application dated March 11, 2021, the petitioners have sought for the following orders:
 - a. That this honourable court be pleased to give directions to facilitate the hearing of the petition herein dated 23rd September.
 - b. That this honourable court be pleased to order that this petition be tried by way of affidavits whose makers will be cross-examined.
 - c. That this honourable court be pleased to order that the said petition dated September 23, 2020 be referred to the Chief Justice to empanel a bench of three judges of this honourable court to hear it.
 - d. That the costs of this application be in the cause.
 7. The application is premised on the grounds that there is a dispute as to whether or not the petitioners made counter-offers to the offers made by the respondent to them on August 24, 2020, which dispute can only be resolved by cross-examination of the deponents on the record.
 8. The petitioner averred that in its reply to the petition, the respondent has raised constitutional issues of great public interest, which have great impact on the investment environment on the economy, for which a three-judge bench ought to be empanelled to determine several issues including the construction of article 73 (1) (a) and (b) of the Constitution; the nature of protection of private property under article 40 and the true construction of articles 23, 27, 40 and 47 the of Constitution.
 9. It is the petitioner's case that the bench will also consider whether the 2010 Constitution has transformed the behaviour of public corporations through grants and renewal of leases; whether courts in Kenya have jurisdiction to review actions of private actors and public corporations; what immunities the state and state corporations have against compliance with the law; whether public institutions have authority to impose terms of renewal of leases on tenants where the lease provide for negotiation of the terms of renewal and whether section 87 of the Kenya Railways Corporation Act is unconstitutional.
 10. The respondent opposed the application vide a replying affidavit sworn by its Principal Legal Officer who averred that this suit relates to an ordinary grievance arising out of a transaction over the respondent's land and does not give rise to substantial issues of law that require empanelling of an uneven number of judges.
 11. The Principal Legal Officer of the respondent deponed that there is no need for the empanelment of a bench of an uneven number of judges as the petitioners had not demonstrated exceptional issues that warrant a grant of certificate under article 165 (4) of the Constitution and that the issues raised in the pleadings are not so complex or difficult worthy of a reference for the setting up of a three-judge bench.

The Submissions

12. The petitioners submitted that the two applications raise important questions of constitutional law, particularly issues pertaining to supremacy of the Constitution over an ordinary Act of Parliament, the nature of remedies available under article 23 of the Constitution, whether the Respondent is bound



- by article 10 of the [Constitution](#) and whether the power of the respondent to renew leases is subject to judicial review.
13. The petitioners submitted that section 87(a) of the [Kenya Railways Corporation](#) is similar to section 13A of the [Government Proceedings Act](#) which was declared unconstitutional in [Kenya Bus Service Ltd & Another v Minister for Transport & 2 others](#) [2012] eKLR as it was an impediment to access to justice.
 14. It was the petitioner's submission that section 87(a) puts the corporation in a more privileged position than an individual, which is a remnant of the feudal idea that the king could not be sued in his own court. They urged that under article 23, this court has jurisdiction to give effective remedies to victims of expropriation of properties, including the reliefs the petitioners have sought.
 15. The petitioners urged that the respondent's contention which rejects comparative jurisprudence makes it necessary to empanel a bench. Counsel relied on numerous authorities which I have considered.
 16. The respondent submitted that this petition commenced prematurely, the petitioners having failed to issue the mandatory notice to the Managing Director of the respondent as provided for under section 87(a) of the [Kenya Railways Corporation Act](#). The respondent relied on the case of [Joseph Nyamamba & 4 others v Kenya Railways Corporation](#) [2015] eKLR where the Court of Appeal held that the failure to comply with the requirement to give notice to the respondent before filing suit made the suit incompetent.
 17. It was the respondent's submission that section 87(a) does not impart the petitioners' constitutional right to access to justice, as there was no imminent danger that their right would be violated. On the issue of empanelment of an uneven number of judges, the respondent urged that this suit does not meet the criteria, as it relates to an ordinary suit arising out of a disagreement in respect of the lease between the parties. Counsel relied on numerous authorities.

Analysis and Determination

18. Two issues arise for determination in this matter:
 - a. Whether the present suit is barred by section 87(a) of the [Kenya Railways Corporation Act](#).
 - b. Whether this suit should be referred to the Chief Justice to empanel a bench of three judges of this court to hear the same.
19. The respondent has sought for an order that this suit be dismissed because the petitioners instituted the present proceedings on September 22, 2020 without giving at least one month's written notice of their claim and intention to commence action to the respondent's Managing Director.
20. According to the petitioners, this court should find that section 87(a) of the [Kenya Railways Corporation Act](#) is unconstitutional and is inconsistent with articles 2(4), of the [Constitution](#) and contravenes article 48 on the right to access to justice and is subject to articles 23, 27, 40 and 47 of the [Constitution](#).
21. The petitioners have averred in the petition that they have leased the suit property, LR No 209/3558 and LR No 209/3559 from the respondent since 1946 and that the respondent offered the petitioners renewal of leases through two letters dated August 24, 2020 and delivered on September 7, 2020 and demanded that they accept the terms of the lease within 30 days. According to the petitioners, this was an imposition of terms of renewal of a lease by a landlord to a tenant, which is in breach of the terms of the grant.



22. In the petition, the petitioners have sought for a declaration that the respondent has breached the special conditions in the grant; that the process of renewal of the lease is not procedurally fair; that the proposed premiums are unreasonable, an order compelling the respondent to renew the leases and a declaration that section 87 of the *Kenya Railways Corporations Act* is unconstitutional as it is inconsistent with article 48 of the *Constitution*.
23. Section 87 (a) of the *Kenya Railways Corporation Act* prescribes that any person wishing to institute legal proceedings against Kenya Railways Corporation, the respondent, shall issue a one month's notice of such intention to the Corporation's Managing Director: The said section provides as follows:
- “Where any action or other legal proceeding is commenced against the corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect—
- (a) the action or legal proceeding shall not be commenced against the corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the plaintiff or his agent; and
- (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.”
24. While section 87(a) clearly stipulates that the respondent can only be sued after a thirty (30) days' notice has been served on the corporation's Managing Director. This requirement of serving notices before filing suits has since been found to be a hindrance to the right of people to access justice.
25. In the case of *Kenya Bus Service Ltd & another v Minister of Transport & 2 others* (2012), which was quoted and endorsed by the Court of Appeal in *Joseph Nyamamba & 4 others v Kenya Railways Corporation* [2015] eKLR, Majanja J. observed as follows:
- “ 37. By incorporating the right of access to justice, the *Constitution* requires us to look beyond the dry letter of the law. The right of access to justice is a reaction to and a protection against legal formalism and dogmatism...article 48 must be located within the constitutional imperative that recognizes as the bill of rights as the framework for social, economic and cultural policies. Without access to justice the objects of the *Constitution* which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal processes that the rights and fundamental freedoms are realized. article 48 therefore invites the court to consider the conditions which clog and fetter the right of persons to seek the assistance of courts of law
47. Viewed against the prism of the *constitution*, it also becomes evident that section 13A of the GPA provides an impediment to access to justice. Where the state is at the front, left, right and centre of the citizen's life. the law should not impose hurdles on accountability of the government through the courts. An analysis of the various reports for commonwealth which I have cited clearly demonstrate that the requirement for notice particularly where it is strictly enforced as a mandatory requirement dismisses the ability of the citizens to



seek relief against the government. It is my finding therefore that section 13A of the Government Proceedings Act as a mandatory requirement violates the provision of article 48.”

26. In Ubah Ismail Mohamed v Gapco Kenya Limited & another [2019] eKLR, the court observed as follows:

“...Those words have been adopted in several subsequent decisions which are well reported and it should be noted that the words of section 87 are materially those of section 13A of the Government Proceedings Act. I thus do not hesitate in finding that to give an interpretation to that provision to make a suit bad for failure to comply would be contrary to the constitution and wholly defeatist... This requirement of at least 30 days' notice is not peculiar to the Kenya Railways Corporation Act alone. It is found in other statutes creating state corporations like the Kenya ports Authority Act, section 62, and carries the spirit of section 13A Government Proceedings Act. I note that the superior courts of this county have variously pronounced themselves on how well section 13A Government Proceeding Act sits with the right to access justice and the concurrence is that the provision is not in congruence with the right to access justice... It follows therefore that failure to issue a notice before action is not a fatal defect as to lead to an action being defeated by being guillotined ..”

27. In Catherine Njeri Majani v Kenya Railways Corporation & another [2021] eKLR, the court, guided by the provisions of article 48 of the Constitution and the pronouncement of the superior courts on the applicability of section 87(a) of the Kenya Railways Corporation Act, found that the failure by the plaintiff to issue to the defendant a thirty (30) days' notice, is not fatal to the suit.

28. In this suit, it is not disputed that the petitioners failed to issue the respondent with a notice under section 87 (a) of the Act. The omission to issue the 30-day notice to the respondent is not fatal to this suit. The right of the petitioner to access this court, with or without a notice, is guaranteed by the Constitution under article 48.

29. The authority of the Chief Justice to empanel a bench of uneven number of judges is prescribed under article 165(4) of the Constitution as follows:

“(4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”

30. The law as to what amounts to a substantial question of law is now well settled. In Sir Chunilal V Mehta and Sons, Ltd v The Century Spinning and Manufacturing Co Ltd 1962 AIR 1314 the elements of a substantial question of law were stated follows:

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this court or by the privy council or by the federal court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”



31. The Court of Appeal in *Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR set out the guidelines for certification under article 165(4) of the *Constitution* as follows:

“There are, in our view, parallels to be drawn between certification for purposes article 163(4) (b) of the *Constitution* and certification for purposes of article 165(4) notwithstanding that the drafters of the *Constitution*, in providing for certification of matters for purposes of appeal to the Supreme Court under article 163(4)(b) stipulated that a matter should be of “general public importance”, The word, “substantial” in its ordinary meaning, means “of considerable importance”. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of article 163(4) (b). In *Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone* [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under article 163(4)(b) some of which are relevant in the context of certification under article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- (ii) The applicant must show that there is a state of uncertainty in the law;
- (iii) The matter to be certified must fall within the terms of article 165 (3)(b) or (d) of the *Constitution*;
- (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”

32. The novelty or complexity of the issues raised in the Petition is alone not sufficient reason for certifying the matter for empanelment of a bench. This statement finds support in the decision of *J Harrison Kinyanjui v Attorney General & another* [2012] eKLR;

where it was held that:

“Therefore, giving meaning to “substantial question” must take into account the provisions of the *Constitution* as a whole and need to dispense justice without delay particularly given a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under article 165 of the *Constitution*, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges....

A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the



“substantial question” than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case.”

33. The petitioners contend that in the process of renewal of their leases over the suit land, the respondent has contravened their rights and freedoms, particularly articles 23,24, 27, 40 and 47 of the Constitution. They have sought for declaratory orders as follows: that the respondent has breached the special conditions in the grant; that the process of renewal of the lease is not procedurally fair; that the proposed premiums are unreasonable; an order compelling the respondents to renew their leases and a declaration that Section 87 of the Kenya Railways Corporations Act is inconsistent with article 48 of the Constitution.
34. The alleged constitutional issues raised by the petitioner all revolve around the process of renewal of their leases by the respondent. The petition raises issues of fair administrative action, procedural fairness, access to justice and right to property, which call for application of well-established principles of interpretation of constitutional provisions.
35. The constitutional issues raised in the petition do not present unique circumstances that are novel or complex. Having perused the petition and the replying affidavit, it is my finding that no substantial question of law arises from the petition that would require this petition to be referred to the Chief Justice to empanel a bench of uneven judges from this court. The issues raised in the petition are well within the purview of a single judge
36. For those reasons, the two applications are partially allowed as follows:
 - a. This petition shall proceed by way of *viva voce* evidence.
 - b. Each party to pay for its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 6TH DAY OF OCTOBER, 2022.

O. A. Angote

Judge

In the Presence of;

Mr. Ndung'u for Dr. Kamau Kuria for Petitioner

Mr. Ndachi for Respondent

