



**Wilder Group Limited v National Land Commission & 2 others (Environment & Land Petition E005 of 2022) [2023] KEELC 20537 (KLR) (5 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20537 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND PETITION E005 OF 2022**

**E ASATI, J**

**OCTOBER 5, 2023**

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 162 (2B), 165 (5B) AND 258 OF THE CONSTITUTION OF KENYA, 2010 AND IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS SECURED AND GARANTEED UNDER ARTICLES 40 AND 47 OF THE CONSTITUTION OF KENYA, 2010. AND IN THE MATTER OF: A SECTIONS 107, 107A, 110, 111, 112, 113, 114, 115, 116, 117, 119, 120, 121, 125, 128 AND 131 OF THE LAND ACT NO. 6 OF 2012 AND IN THE MATTER OF: RULES 4, 10 AND 11 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013. AND IN THE MATTER OF: COMPULSORY ACQUISITION OF A PORTION OF 0.01 HECTARES EXCISED FROM THE PARCEL OF LAND KNOWN AS KISUMU/KANYAKWAR 'A'/73 MEASURING APPROXIMATELY 0.088 HECTARES**

**BETWEEN**

**THE WILDER GROUP LIMITED ..... PETITIONER**

**AND**

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

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

**KENYA POWER AND LIGHTING COMPANY ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

Introduction

1. This ruling is in respect of three (3) preliminary objections raised by the Respondents namely; the preliminary objection by the 1<sup>st</sup> Respondent vide the Notice of preliminary objection dated 13<sup>th</sup> February 2023, the preliminary objection by the 2<sup>nd</sup> Respondent vide the Notice of preliminary



objection dated 12<sup>th</sup> January 2023 and the 3<sup>rd</sup> Respondent's preliminary objection raised vide the Notice of preliminary objection dated 11<sup>th</sup> November 2022.

2. The background of this matter is that the Petitioner herein, THE WILDER GROUP LIMITED, initiated this matter vide the Petition dated 18<sup>th</sup> October 2022 seeking for declarations that its rights to property and to fair administrative action under articles 40 and 47 of *the Constitution* of Kenya 2010 had been contravened, for orders of Mandamus, general damages and costs. The Petitioner's case is that it is at all material times the registered owner of land parcel number KISUMU/KANYAKWAR 'A'/73 measuring approximately 0.088 hectares or thereabouts (herein called the suit property). That the 2<sup>nd</sup> Respondent in the process of construction and expansion of the Kisumu- Kakamega Highway compulsorily acquired a portion of the suit property. And that the 3<sup>rd</sup> Respondent in its distribution of power caused its power transmission lines to hang over the suit property thereby significantly affecting the suit property and leaving a section of it which has diminished value. The Petitioner therefore sought the intervention of the court.

### **The preliminary objection**

3. The preliminary objection by the 1<sup>st</sup> Respondent dated 13<sup>th</sup> February 2023 was premised on a sole ground that the cause of action arose way before the 1<sup>st</sup> Respondent (National Land Commission) came into existence and that as per section 7 of the *Land Registration Act*, the Commission is not the custodian of the land documents hence it does not have records or documents in relation to this matter.
4. Counsel for the 1<sup>st</sup> Respondent submitted in support of the preliminary objection that the National Land Commission is not a necessary party in the petition and that the Commission was wrongly joined in the matter as the issue in contention is between the Petitioner and the 2<sup>nd</sup> Respondent hence the same should be resolved between them. That the Court has a wide discretion either to order joinder of a party to proceeding or order that a name of any party improperly joined be struck out. That the powers are derived from Order 1 Rule 10(2) of the Civil Procedure Rules. That it is clear that the court may on its own motion or on the application of any party to the proceedings order striking out of a party, who the Court finds was improperly joined. Counsel relied on the case of Civion Limited vs Kivuwatt Limited & 2 others [2015] eKLR where it was held that "accordingly, a necessary party is one without whom no order can be made effectively while a proper party is one in whose absence an effective order can be made."
5. I have carefully read the Petition. There is no specific mention of the 1<sup>st</sup> Respondent except in the heading. There is no wrong or obligation attributed to the 1<sup>st</sup> Respondent in the Petition. There is no cause of action disclosed against the 1<sup>st</sup> Respondent in the petition.
6. The Preliminary Objection by the 2<sup>nd</sup> Respondent is dated 12<sup>th</sup> January, 2022 and based on the grounds that;
  - a. the Honourable Court lacks jurisdiction to determine this suit for being time-barred having been brought outside the statutory limitation period of 12 months after the purported cause of action arose in view of section 67(b) of the *Kenya Roads Act*, 2007
  - b. the Honourable Court lacks the Jurisdiction to determine this suit for want of compliance with mandatory requirements of section 67(a) of the *Kenya Roads Act*, 2007.
  - c. the petition is defective, frivolous and otherwise an abuse of the Court process and should be struck out in limine.



7. In support of its preliminary objection it was submitted on behalf of the 2nd Respondent that there are two issues for determination in the 2<sup>nd</sup> Respondent's preliminary objection namely;
  - a. Whether the Petition is in breach of the mandatory provisions of section 67(a) of the [Kenya Roads Act, 2007](#)
  - b. Whether the Petition is time and statute barred given the Provisions of Section 67(b) of the [Kenya Roads Act, 2007](#)
8. Counsel submitted that the court has no jurisdiction to hear and determine this petition as the two limbs of the preliminary objection go to the jurisdiction of the court. That the provisions of section 67 (a) of the [Kenya Roads Act](#) obligates the Petitioner to ensure that it complies with the following mandatory requirements before filing the Petition namely:
  - a. service a written notice of not less than one (1) month on the Director General,
  - b. the notice to contain the particulars of the claim,
  - c. the notice to express an intention to commence legal proceedings.
9. That since the Petition is in breach of these mandatory provisions the same is severely defective and the court lacks jurisdiction to hear and determine the same. It ought therefore to be struck out as against the 2<sup>nd</sup> Respondent with costs.
10. Secondly, that the statutory limitation period provided for in section 67 (b) of the [Kenya Roads Act, 2007](#) superseded the limitation period in the [Limitation of Actions Act, Cap 22](#) as it was held in *Ephantus Mucheru Mwangi vs Kenya Railways Corporation & Another* (2005) eKLR. That the filing of the petition was way out of the 12 months limitation period and no leave was sought before filing it, it ought to be struck out. That the court has no jurisdiction to hear and determine this petition.
11. The 2<sup>nd</sup> Respondent submitted further that the Petitioner's case is one that should have been pursued under substantive legislative framework. That the superior courts have held that where a claim can be pursued adequately under a substantive legislative framework, then constitutional bodies and state organs therein should be given an opportunity to resolve the dispute before the court can exercise its jurisdiction under [the Constitution](#). For this submission reliance was placed on the case of *International Centre for Policy and Conflict & 5 Others v Attorney General & 5 Others* (2013) Eklr
12. I have considered the preliminary objection by the 2nd Respondent. Section 67(a) and b of the [Kenya Roads Act, 2007](#) Section 67 of the [Kenya Roads Act, 2007](#) on which it is based 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-”

  - 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
  - b) Such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in case of a continuing injury or damage, within six- months next after cessation thereof.”



13. The 2<sup>nd</sup> Respondent's case is that the use of the word 'shall' means that the service of the notice on the Director General of the 2<sup>nd</sup> Respondent is mandatory. That no such Notice has been produced by the Petitioner. In the case of Anthony Ngili Munguti & 12 Others vs. Kenya National Highways Authority & Another [2017] eKLR where the Court was faced with similar issues. The Respondent raised a notice of preliminary objection grounded on Section 67(a) of the [Kenya Roads Act](#) the court observed:

“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.”

14. On whether the Petition is time and statute barred given the Provisions of Section 67(b) of the [Kenya Roads Act](#), 2007, in the case of Benson Ruyi Njane Vs. Kenya Rural Roads Authority & 36 Others [2016] eKLR the court had while addressing issues raised in a notice of preliminary objection under Section 67 of the [Kenya Roads Act](#) held:

“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.”

15. Also in the case of Safepak Limited –vs- Henry Wambega & 11 others [2019] e KLR the court of Appeal referred to a number of decided cases on whether or not there is limitation period for filing proceedings to enforce fundamental rights and freedoms. Some of the decisions are, Chief Land Registrar and 4 Others –vs- Nathan Tirop Koech and 4 others wherein the court held in part that:

“Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find that the ground that the trial Judge erred in failing to dismiss the petition on account of delay, acquiescence and laches has no merit.”

And that

“In our view, subject to the limitations in Article 24 of [the Constitution](#), fundamental rights and freedoms cannot be tied to the shackles of Limitations Act. However, each case is to be decided on its own merit.”

16. From the above findings section 67(a) and (b) of [Kenya Roads Act](#) does not apply to the present matter being a constitutional petition. I find that the 2<sup>nd</sup> Respondent preliminary objection has no merit

17. The 3<sup>rd</sup> Respondent's preliminary objection dated 11<sup>th</sup> November, 2022 was based on the grounds that this Court lacks Jurisdiction to hear and determine the Petition against the 3<sup>rd</sup> Respondent as the same offends the provisions of Section 3(1), 10, 11(e), (f), (i), (k) & (i), 23, 24, 36, 40 and 224(2) (e) of the [Energy Act](#), 2019 together with Regulations 2, 4, 7 and 9 of the Energy (Complaints and Disputes Resolution) Regulations, 2012 as read together with Article 159(2)(c) and 169(1) (d) and (d) and (2) of [the Constitution](#) of Kenya, 2010 and Sections 9(2) and (3) of the [Fair Administrative Action Act](#), 2015.



18. The Preliminary Objection is based on the [Energy Act](#) and Energy (Complains and Disputes Resolution) Regulations, 2012 as read together with Article 159(2)(c) and 169(1)(d) and (2) of [the Constitution](#) of Kenya and Section 9(2) and (3) of the Fair and Administrative Action Act, 2015. Section 3 of [Energy Act](#), 2019 provides that:
- 1) “If there is a conflict between this Act and any other Act, this Act shall prevail on the following matters—
    - (a) the importation, exportation, generation, transmission, distribution, supply or use of electrical energy; the exploration, production, transportation, distribution, and supply of any other form of energy; and (c) all works and apparatus for any or all of these purposes. (2) Save where this Act expressly provides otherwise, any license granted or anything done under this Act shall not affect the right, privilege, obligation or liability acquired by any licensee or other person in any contract or under any written law prior to the commencement of this Act.”
19. Section 10 of the [Energy Act](#) provides for the functions of the Energy and Petroleum Authority as the generation, importation, exportation, transmission, distribution, supply and use of electrically energy with exception of licensing of nuclear energy. Section 11 provides for the powers of the Authority; Section 23 of the Act provides for the decision of the Authority and Section 24 appeals against decisions of the Authority. Section 40 provides that all appeals from decisions of the Authority will be made to the Tribunal in accordance to the provisions of the Act.
20. Article 159 (2) (d) of [the Constitution](#) provides for alternative dispute resolution mechanisms. The energy (Complaints and Disputes Resolution) Regulations 2012 provides for conflict resolution in the Energy Sector. Regulation 4 provides that the Regulations apply to complaints and disputes in the following areas:
- a) billing, damages, disconnection, health and safety, electrical installations, interruptions, licensee practices and procedures, metering, new connections and extensions, reconnections, quality of service, quality of supply, tariffs, way leaves, easements or rights-of-way in relation to the generation, transmission, distribution, supply and use of electrical energy.
  - b) damages, adulteration and under-dispensing of products, licensee practices and procedures, health and safety in relation to the importation, refining, exportation, wholesale, retail, storage or transportation of petroleum products;
  - c) and any other activity and/or matter regulated under the Act.
21. The complaint of the Petitioner against the 3<sup>rd</sup> Respondent is that the 3<sup>rd</sup> Respondent in its distribution of power caused its power transmission lines to hang over the suit property.
22. The Court of Appeal in *Mutanga Tea & Coffee Company Ltd vs. Shikara Limited & Another* [2015] eKLR which cited with approval the High Court case of *Rich Productions Ltd vs. Kenya Pipeline Company & Another* Petition No. 173 of 2014 where it was held that: -
- “The reason why [the Constitution](#) and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies such as the 2<sup>nd</sup> respondent, such supervision is limited in various respects which I need not go into here. Suffice to say that it cannot exercise such jurisdiction in circumstances



where the parties before it seeks to avoid the mechanisms and processes provided by law and convert the issue in dispute into a constitutional issue when it is not.”

23. There is no evidence that the petitioner exhausted the dispute resolution mechanism provided by law.
24. I find that the preliminary objections by the 1 and 3<sup>rd</sup> Respondents valid and the preliminary objection by the 2<sup>nd</sup> Respondent unmerited. I make the following orders
  - i. The preliminary objections by the 1<sup>st</sup> and 3<sup>rd</sup> Respondents are upheld.
  - ii. The 1<sup>st</sup> and 3<sup>rd</sup> Respondents are struck out of these proceedings.
  - iii. The preliminary objection by the 2<sup>nd</sup> Respondent is hereby dismissed.
  - iv. Each party to bear own costs of the preliminary objections.

Orders accordingly.

**Ruling, dated and signed at Kisumu, read virtually this 5<sup>th</sup> day of October 2023 through Microsoft Teams Online Application.**

E. ASATI,

JUDGE.

**In the presence of:**

Kevin: Court Assistant.

Maina for the Petitioner.

No appearance for the 1<sup>st</sup> Respondent.

Anyango for the 2<sup>nd</sup> Respondent

Muchai h/b for Owano for the 3<sup>rd</sup> Respondent

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