



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT VIHIGA

PETITION NO. 2 OF 2021

(FORMERLY KISUMU ELC PETITION NO. E002 OF 2020)

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 43(1) & 28 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF: ARTICLES 2, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 35, 40, 42, 43 OF THE CONSTITUTION AND RULE 11(c) & 12 (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL), PRACTICE AND PROCEDURE RULES AND ALL OTHER RELEVANT ENABLING POWERS AND PROVISIONS OF THE LAW IN KENYA

AND

IN THE MATTER OF: ARTICLE 25 OF THE UNIVERSAL DECLARATION OF HUMAN RIGHTS

BETWEEN

BON OPONDO & 441 OTHERS.....PETITIONERS

-VERSUS-

CHINESE OVERSEAS ENGINEERING GROUP

COMPANY LIMITED (COVEC).....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA).....2ND RESPONDENT

OFFICE OF THE ATTORNEY GENERAL.....3RD RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY.....4TH RESPONDENT

R U L I N G

A. INTRODUCTION

1.) Three matters arising in the Petition are the subject of this ruling, to wit: a Preliminary Objection raised by the 2nd Respondent vide notice of Preliminary Objection dated 25th February 2021, a Preliminary Objection raised by the 1st Respondent vide notice of Preliminary Objection dated 24th March 2021 and an Application by the 1st Respondent dated 17th August 2021 (herein called the Application).

2.) The 2nd Respondent in its Preliminary Objection contends that the Petition as instituted is fatally defective as it is time and statute barred by dint of Section 67(b) of the Kenya Roads Act No.2 of 2007. Secondly that the Petition is incurably defective for want of written authority from all the Petitioners authorizing the 1st Petitioner to act on their behalf thus contravening the provisions of Order 1 Rule 13(1) and (2) of

the Civil Procedure Rules, 2010.

3.) The Preliminary objection by the 1st Respondent contends that the Petition was filed and served without the requisite case number making it impossible to act on it without making investigations as to its authenticity. Secondly that the Petition appears to have been filed out of time without leave of the court.

4.) Both Preliminary objections seek that the Petition be struck out with costs.

5.) The Application dated 17th August seeks for extension of time within which the 1st Respondent to respond to the Petition.

B. BACKGROUND

6.) Vide the Petition dated 2nd November 2020, the Petitioners moved the Environment and Land Court at Kisumu seeking the orders that:

i) A declaration that the acts and omissions of the 1st Respondents' excavation works and blasting of rocks thereby causing damage to the houses of and structures belonging to the petitioner amounted to a violation of the rights and freedoms of the petitioners, the persons they represent and their families.

ii) A declaration that the Petitioners are entitled to damages a compensation to damaged properties including buildings and other improvements on their parcels of land with interest thereon at commercial rates.

iii) A declaration that the requisite valuation account regarding (ii) above as undertaken by M/s Jamu Real Limited be the amount payable in respect of the damages caused by the 1st Respondent's activities.

iv) An order compelling the Respondents jointly and severally to compensate the Petitioners for losses suffered due to the activities at Mwoki village quarry.

v) General damages as just compensation for loss and suffering by each Petitioner due to the activities of the 1st Respondent.

vi) Exemplary and aggravated damages.

vii) Costs and interest from the date of filing suit up to the date of payment in full at court rates.

viii) Any other or any other alternative remedy that the Honorable court may deem fit to grant.

7.) The Petitioners as named in the petition are Bon Opondo and 441 others.

8.) Upon service with the Petition, the Respondents have so far responded as follows: the 1st Respondent filed a memorandum of appearance and the Notice of Preliminary Objection both dated 24th March 2021 and the Application, the 2nd Respondent filed a Memorandum of Appearance dated 25th January 2021, Reply to Petition, Replying Affidavit sworn by one Richard Mogesi and the Notice of Preliminary Objection all dated 25th February 2021, the 3rd Respondent filed a Memorandum of Appearance on 4th December 2020 and the 4th Respondent has filed no papers.

9.) The Petitioners filed a Request for Judgement dated 25th February 2021 against the 1st Respondent for failure to enter appearance and file defense within the stipulated time.

10.) Upon opening of the Environment and Land Court at Vihiga the matter was transferred from Kisumu ELC to Vihiga ELC for hearing and disposal.

11.) On 19th October 2021, directions were taken by consent that the Petitioners file their response to the Application and that the three (3) matters the subject of this ruling be canvassed simultaneously by way of written submissions. Pursuant to this order, parties filed their respective written submissions and the Petitioners in addition to written submissions, filed a Replying Affidavit to the Application.

C. RESPONSES AND SUBMISSIONS

i.) **The Petitioners Response and Submissions.**

12.) The substance of the Petitioners written submissions dated 1st November 2021 is that there is no time limit for filing constitutional petitions. That unless it is expressly stated in the Constitution, the period of limitation in the statutes do not apply to petitions on violation of rights and freedoms guaranteed in the Constitution. They pray that the preliminary objections be disallowed.

In regard to the Application, the Petitioners filed a Replying Affidavit sworn by Advocate Glen O. Odino on 27th October 2021. He avers that the Application is incompetent and misconceived and prays that the same be dismissed. He avers in the alteration that should the court decide to allow the Application and set aside the interlocutory judgement then the court should do so on condition that the 1st Respondent pays the Petitioners thrown away costs of kshs.150, 000/= and file its response within 14 days from the date of such order failing which the

interlocutory judgement should be reinstated and the matter to proceed to formal proof.

ii.) **The 1st Respondent's Submissions.**

13.) The 1st Respondent filed two sets of written submissions both dated 3rd November 2021 in respect of the Application and in respect of its Preliminary Objection respectively. The submissions were filed on 4th November 2021 which was well after the timelines set by the court on the basis of a consent of the parties. Timelines set by court as guided by the Practice Directions are meant to ensure orderliness, certainty and fair play in prosecution of cases hence parties are enjoined to comply.

iii.) **Submissions by the 2nd Respondent.**

14.) The 2nd Respondent submits that the Preliminary Objection complies with the holding in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors (1969) E. A 696.** That the same is premised on the provisions of Section 67(b) of the Kenya Roads Authority Act No.2 of 2007 which provides that:

“ where any action or other legal proceeding/is against an authority for any act done in pursuant or execution, or intended execution of an order made pursuant to this Act or any other public duty or in respect of any alleged neglect or default in the execution of this Act or any such duty, the following provisions will have effect.”

(a)

(b) Such action or legal proceeding 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.”

15.) The 2nd Respondent further submits that it (2nd Respondent) is established under Section 3 of the Kenya Roads Act, No. 2 of 2007 to manage, develop, rehabilitate and maintain national roads. That it awarded a contract to the 1st Respondent on behalf of the Government of Kenya for the rehabilitation of Kisumu –Kakamega Road (A1) (A109). That the works were commenced on 5th January 2013 and completed on 30th October 2018 when the Taking Over Certificate was issued.

16.) The 2nd Respondent submits that time for the Petitioners or any aggrieved person to institute legal proceedings begun to run as from 30th October 2018 when the works complained of were completed. That the petition, therefore, ought to have been filed within 12 months from 30th October 2018. That the Petition filed herein almost two (2) years after the event without leave of court is obviously filed out of time. It further submits that Section 67 of the Roads Act as the procedure law which the petitioners ought to have complied with before filing the petition is not optional but mandatory. It further submits that having faulted fundamental rules of procedure the Petitioners cannot find refuge in article 159 of the Constitution. It cites a number of decided cases to illustrate this point. One of the cases is **Kakuta Maimai Hamisi –vs- Peris pesi Tobiko & 2 others [2013] e KLR** where the court stated that

“We do not consider Article 159 (2) (d) to be a panacea, nay, a general whitewash that cures and mends all ills, misdeeds and defaults of litigation.

And concludes that failure to comply with section 67 of the Roads Act renders the Petition fatally defective and prays that the same be struck out.

iv.) **The 3rd and 4th Respondents**

17.) The 3rd and 4th Respondents have so far not filed any responses to the petition or any of the matters the subject of this ruling.

D. ISSUES FOR DETERMINATION

18.) I have keenly read all the pleadings filed in respect of the three (3) matters the subject of this ruling. I have also read the written submissions filed by the parties and find the following to be the issues for determination:

i) Whether or not the matters raised in the notices of preliminary objection by the 1st and 2nd Respondents amount to Preliminary Objections

ii) Whether or not the Petition is time and statute barred by dint of Section 67(b) of the Kenya Roads Act No.2 of 2007 or at all (ground 1 of 2nd Respondent's Preliminary objection and ground 2 of the 1st Respondent's objection)

iii) Whether or not the Petition is invariably defective for want of written authority from all the petitioners and whether it thus contradicts the provisions of Order 1 Rule 13(1) and (2) of the Civil Procedure Rules 2010 (ground 2 of the 2nd Respondents Preliminary Objection)

iv) Whether or not the application for extension of time within which the 1st Respondent should file response to the petition has merit.

v) What order to make on costs of the Application.

E. ANALYSIS AND DETERMINATION

Whether or not the matters raised in the notices of preliminary objection by the 1st and 2nd Respondents amount to Preliminary Objections

19.) The threshold for a preliminary objection to be sustainable was set in the in the case of Mukisa Biscuit Manufacturing Co. Ltd – vs- West End Distributors Ltd [1969] E.A 696 relied on by the 2nd Respondent herein . The court described a Preliminary Objection as follows;

“...a Preliminary Objection consists a point of law which has been pleaded, or which order by clear implication out of pleadings and which if argued as a Preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contact giving rise to the suit to refer the dispute to arbitration.”

The court further held that

“ 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.”

21. Form the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, May dispose of the suit/case if argued as a pure point of law and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion.

22. The Preliminary Objection raised herein by the 1st and 2nd Respondents relate to a plea of limitation. The first Respondent in its Notice of Preliminary Objection dated 24th march 2021 states.

“ the so called petition appear to have been filed out of time without leave of the court.”

The 2nd Respondent in its Notice of Preliminary Objection dated 25th February 2021 bases its objection on the provisions of section 67 (b) of the Roads Act No.2 of 2007 and order 1, rules 13 91) and (2) of the civil Procedure rules 2010.

These issues are also raised in the 2nd Respondent’s pleading namely in paragraph 8 of its Reply to Petition and paragraphs 31 and 32 of the Replying Affidavit sworn by one Richard Migosi on 25th February 2021.

22. Taking into account the authorities cited and the submissions of the parties, I do find that what is raised in the notices of preliminary objection filed by the 1st and 2nd Respondents are pure points of law that flow from the pleadings filed and that if the same are argued as preliminary objections they may dispose of the petition. They do therefore amount to preliminary objections as envisaged by law and that the same are properly before the court.

Whether or not the petition is time barred by dint of section 67 (b) of the Roads Act No.2 of 2007 or any other statute.

23. The basis of the Preliminary Objection is that the Petition is time barred by statute namely Section 67 (b) of the Roads Act. The provisions of Section 67 have already been quoted herein above.

I have read the submissions by the 2nd Respondent and the Petitioner on this point. I have also read the authorities cited by them in support of their respective arguments.

The 2nd Respondent relied on authorities, inter alia, **Michael Otieno Nyaguthi & 5 others –vs- Kenya national Highways authority and 5 others [2015] e KLR** to demonstrate the point that compliance with article 67 of the Roads Act is not optional but mandatory.

24. The Petitioners’ response is that the Petition herein being a constitutional Petition seeking enforcement of the rights and fundamental freedoms of the petitioners cannot be tied to the limitation periods set by statute.

They rely on the cases of **Peter Odongo & Another –vs- Kenya National Highways Authority & 2 others, council of Governors (Interested Party) e KLR** to demonstrate their argument that constitutional Petitions alleging or based on violation of the Constitution and the Bill of Rights are not subject to the periods of Limitation in the Limitation of Actions Act or any other statute.

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.”

25. The petition herein dated 2nd November 2020 is stated on the face of it to have been brought under the provisions of articles 2, 19, 20, 21, 22, 23, 24, 25, 27, 28, 29, 35, 40, 42, 43 of the Constitution and Rule 11 (a) & 12 (Protection of Fundamental Rights and Freedom of the Individual) Practice and Procedure Rules. The articles of the Constitution quoted are drawn from Chapter Four of the Constitution on the Bill of Rights.

The main grievances/allegations raised in the Petition concern breach of rights and fundamental freedoms. Whether the grievances have merit or not is the subject of the substantive trial of the Petition.

Guided by the above cited authorities, I find that the Petition which is *prima facie* a constitutional petition, is not subject to the limitation periods set by statute and more particularly the limitation in section 67(b) of the Roads Act.

Whether or not the Petition is incurably defective for want of written authority from the other petitioners in accordance with Order 1 Rule 13 (1) and (2) of the Civil Procedure Rules, 2010.

26. Order 1 rule 13 (1) and (2) of the Civil Procedure Rules, 2010 requires any plaintiff or defendant who is acting on behalf of others to be authorized by the other to so appear plead, or act. Such authority should be in writing and signed by the party giving it and it shall be filed in the case.

Though these provisions are made in mandatory terms, the issue for determination is whether they are applicable to Constitutional petitions. Article 22 of the Constitution on enforcement of Bill of Right allows **“every person”** to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied violated or infringed or is threatened. Article 22 (2) allows a person in addition to acting in their own interest to institute court proceedings on behalf of another person who cannot act in their own names or as a member of, or in the interest of a group of class of persons.

The Procedure applicable in Constitutional petition is outlined in the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Rules). Rule 3 thereof provides that the Rules are applicable to all proceedings under Article 22 of the Constitution and that the overriding objective of the Rules is to facilitate access to justice for all persons. Rule 4 repeats the provisions of Article 22 of the Constitution on who has the right to institute proceedings. Rule 2 which contains definitions, defines “person” to include an individual, organization, company, association or any other body of persons whether incorporated or unincorporated. The requirement for authority to act in Order 1 Rule 13 of the Civil Procedure Rules is not included in the Rules.

On the basis of the provisions of law above cited, I find that the requirement for authority to act which is mandatory for proceedings commenced under the Civil Procedure Rules, 2010 is not applicable to this matter being a constitutional petition under Article 22 of the Constitution.

Whether or not the application for extension of time should be allowed

27. The Application seeks for extension of time within which to file reply to the Petition. To the Application, a draft of the Reply is annexed.

The explanation given for failure to file the Reply within the time stipulated by law is that there was breakdown of communication between the 1st Respondent and his counsel. A Supporting Affidavit sworn by one Li Jiabing explains this.

The Petitioners oppose the application and plead in the alternative that incase the court is minded to allow the application, then thrown away costs of kshs.150, 000/= be payable by the 1st Respondent to the Petitioners. I have keenly perused the court record on this issue. It shows that the Petitioners filed a Request for judgement in default of appearance and defence against the 1st Respondent in the manner provided for in the Civil Procedure Rules, 2010. However no interlocutory judgement was entered on the same. Instead there was a direction dated 1. 3. 2021 for a hearing date to be given. There is no provision for entry of interlocutory judgment in the Rules.

Rule 16 of the Rules provides for the procedure to be adopted where a Respondent fails to reply to the Petition. Rule 16(1) states that where a Respondent does not respond within the time stipulated by rule 15, the court may hear and determine the Petition in the Respondent’s absence. Rule 16(2) allows the court to set aside an order made under Rule 16(1).

Although Rule 15 of the Rules limits the time for filing Reply to Petition to fourteen (14) days of service of the Petition, Rule 30 allows the court to extend time limited by the Rules or by any decision of the court.

Allowing the Application will pave way for the 1st Respondent to participate fully in the proceedings and allow all matters in controversy in the dispute to be canvassed. I find that the Application has merit.

Costs

Although costs follow the event, in the current circumstances namely that the matters the subject matter of the ruling are only preliminary and nature of the claims, it is in the interest of justice that each party bear own cost.

F. CONCLUSION

28. The summary of my findings is firstly that the preliminary objections are properly before the court. Secondly that the limitation period set by section 67 of the Roads Act does not apply to the petition since the same is a petition under Article 22 of the Constitution. Thirdly that the requirement for authority to act on behalf of others in Order 1 Rule 13 is not applicable for matters brought under Article 22 of the Constitution and Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. The Application for extension of time has merit.

29. On the basis of these findings I make the following orders:

1. Both Preliminary Objections (that is to say, the preliminary objection by the 2nd Respondent raised through notice of preliminary objection dated 25th February 2021 and the preliminary objection raised by the 1st Respondent vide the Notice of preliminary objection dated 24th March 2021 are disallowed.
2. The Application dated 17th August 2021 filed by the 1st Respondent is allowed. The 1st Respondent to file Reply to Petition within 14 days of this ruling.
3. Each party to bear own costs.
4. Mention for directions on the Petition on 29th November 2021.

Orders accordingly.

DATED, DELIVERED AND SIGNED IN OPEN COURT AT VIHIGA THIS 15TH DAY OF NOVEMBER 2021.

E. ASATI

JUDGE

In the presence of:

Ajevi: Court Assistant.

E. ASATI

JUDGE