



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
(Coram: A. C. Mrima, J.)

CONSTITUTIONAL PETITION NO. 33 OF 2020

1. PETER ODOYO
2. STANLEY KINYANJUI (Suing on behalf of the Outdoor Advertising Association of Kenya).....PETITIONER

-VERSUS-

1. KENYA NATIONAL HIGHWAYS AUTHORITY
2. KENYA URBAN ROADS AUTHORITY
3. KENYA RURAL ROADS AUTHORITY.....RESPONDENTS

-AND-

COUNCIL OF GOVERNORS.....INTERESTED PARTY

JUDGMENT

Introduction:

1. The Petition subject of this judgment is yet another litigation which brings to the fore the controversy associated with the execution of the functions between the National government and the County governments.
2. The Petitioner is an association of outdoor advertising companies charged with lobbying for the best interests of its members in the outdoor advertising industry in Kenya. Some of the Petitioner's members erected and maintained outdoor advertising sites (*in form of Billboards*) on road reserves along some roads in Kenya. The Petitioner posits that its members were authorized by the various County governments to erect such sites upon application and payment of the requisite fees.
3. The Respondents are legal entities created under the **Kenya Roads Act** No. 2 of 2007 (hereinafter referred to as '*the Roads Act*'). The Respondents contend that the Petitioner's members who variously erected billboards should pay rental fees and other charges to the entities for the use of the road reserves.
4. It is the lack of consensus on the foregoing that led to the filing of the Petition in this matter.

The Petition:

5. The Petition is dated 5th February, 2020. It is supported by an Affidavit sworn by *Stanley Kinyanjui* on even date. In further support to the Petition, the Petitioner filed written submissions dated 15th November, 2020, Supplementary submissions dated 22nd February, 2020, a List of Authorities dated 15th November, 2020 and a Supplementary List of Authorities dated 22nd February, 2021.

6. Contemporaneously with the filing of the Petition, the Petitioner filed an evenly dated Notice of Motion. The application is seeking eight conservatory orders.

7. On 6th February, 2020 the Court issued some conservatory orders subject to the Petitioner furnishing a Bank Guarantee amounting to Kshs. 20,000,000/=. The Petitioner complied with and furnished the Court with the said guarantee on 12th February, 2020. The guarantees were secured by the following members of the Petitioner: -

- a. Magnate Ventures Limited Kshs. 6,000,000/=
- b. Adsite Limited Kshs. 3,000,000/=
- c. Look Media Limited Kshs. 3,000,000/=
- d. Firmbridge Limited Kshs. 3,000,000/=
- e. LiveAd Limited Kshs. 3,000,000/=
- f. Consumerlink Communications Limited Kshs. 1,000,000/=
- g. Tangerine Investment Limited Kshs. 1,000,000/=

8. Given the nature of the dispute, in the main, the Petition prays for the following orders: -

1. A declaration be and is hereby made, that the authorities established under the Kenya Roads Act No. 2 of 2007, being Kenya National Highway authority (KeNHA), Kenya Rural Roads Authority (KeRRA) and Kenya Urban Roads Authority (KURA) have no jurisdiction and mandate to demand that the petitioner's members seek approval from any of the three authorities aforesaid and/or demand payment of any fees whatsoever for the erection and maintenance of outdoor advertising sites.

2. A declaration be and is hereby made, that the authorities established under the Kenya Roads Act No.2 of 2007, being Kenya National Highways Authority (KeNHA), Kenya Roads Authority (KeRRA) and Kenya Urban roads Authority KURA) have no jurisdiction or mandate to interfere in any way whatsoever with outdoor advertising the activities carried out by any of the Petitioner's members.

3. An orders of judicial review by way of certiorari be and is hereby issued to bring into this court and quash the entire directive made by the 1st Respondent on 1st March, 2018 demanding a sum of Ksh.53,658,000.00 from one of the petitioner's Members namely Magnate Ventures Limited, on account of alleged annual rent for erection and maintenance of outdoor advertising sites all over the country.

4. An order of judicial review by way of certiorari be and is hereby issued to bearing into this court and quash the entire directive made by the 2nd Respondent on 16th October, 2019 and the communication in respect thereof made to the National Youth Serviced on 17th January, 2020 and Nairobi Country government on 27th January, 2020 directing the removal of two of the Petitioner's members outdoor advertisements erected along Ngong road and Waiyaki Way/red Hill Link road directing the removal of several of the petitioner's members outdoor advertising sites erected along Ngong road and Waiyaki Way/Read Hill link Road; namely Tangerine Investments Limited, Magnate Ventures Limited, Outdoor Advertising Limited and Firmbridge Limited.

5. An Order of Judicial Review by way of certiorari be and is hereby issued, to prohibit the implementation of the 1st Respondent's directive made on 30th January, 2020 seeking payment of fees for and directing the removal of several of the Petitioner's members outdoor advertising sites along Muthaiga Kiambu (B32) road; namely Look Media Limited, Magnate Ventures Limited, Live Ad Limited, Consumer Link Communication Limited and Ad Site Limited.

6. An order of judicial review by way of prohibition be and is hereby issued, to prohibit the Respondents from demanding that the Petitioner's members seek the respondents' approval and/or pay annual rent or any other fees whatsoever for the erection and maintenance of outdoor advertising sites along national roads; public roads in cities and municipalities an rural roads.

7. An order of judicial review by way of prohibition be and is hereby issued, to prohibit the implementation of the 2nd Respondent's directive made on 16 October, 2019 and the communication in respect thereof made to the National Youth Service on 17th January, 2020 and to Nairobi Country government on 27th January, 2020 directing the removal of several of the Petitioner's members outdoor advertising sites erected along Ngong Road and Waiyaki Way/Read Hill Link road; namely Tangerine Investments Limited, Magnate Ventures Limited, Outdoor Advertising Limited and Firmbridge Limited.

8. An order of judicial review by way of prohibition be and is hereby issued, to prohibit the implementation of the 1st Respondent's directive made on 30th January, 2020 seeking payment of fees for and directing the removal of several of the petitioner's members outdoor advertising sites along Muthaiga Kiambu (B32) road; namely Look Media Limited, Magnate Ventures Limited, Live and Ad Limited, Consumer Link Communication Limited and Ad Site Limited.

9. An order of judicial review by way of prohibition be and is hereby issued, to prohibit the authorities established under the Kenya Roads Act No. 2 of 2007, being Kenya National Highways Authority (KeNHA), Kenya Rural Roads Authority (KeRRA) and Kenya

Urban Roads Authority (KURA) from interfering in any way whatsoever with the outdoor advertising activities carried out by any of the petitioner's members.

10. A conservatory order be and is hereby issued staying the implementation of the entire directive made by the 2nd Respondent on 16th October, 2019 and the communication in respect thereof made to the National Youth Service on 17th January, 2020 and to Nairobi County Government on 27th January, 2020 directing the removal of several of the petitioner's, members outdoor advertising sites erected along Ngong Road and Waiyaki/Red Hill Link Road; namely Tangerine, Investments Limited, magnate Ventures Limited, Outdoor Advertising Limited and Firmbridge Limited's.

11. A conservatory order be and is hereby issued staying the implementation of the entire directive made by the 1st Respondent on 30th January, 2020 seeking payment of fees for and directing the removal of several of the Petitioner's members' outdoor advertising sites along Muthaiga Kiambu (Be2) road namely Look Media Limited, Magnate Ventures Limited, Live Ad Limited, Consumer Link Communication Limited and Ad Site Limited.

12. Costs of the Petition be borne by the Respondents.

13. Or that such other order(s) as this Honourable Court shall deem fit.

9. The Petition is supported by the Council of Governors, the Interested Party herein. The Interested Party filed written submissions dated 24th November, 2020.

The Responses:

10. The Petition is opposed by all the Respondents.

11. The Kenya National Highways Authority is the 1st Respondent. I will hereinafter refer to it as '**KeNHA**' or '**the 1st Respondent**'. The 1st Respondent filed a Preliminary Objection dated 2nd March, 2020 and a Replying Affidavit sworn by Engineer Maiteka N. Andrew on 10th November, 2020. It also filed written submissions dated 10th December, 2020 and Supplementary submissions dated 22nd February, 2020 together with two Lists of Authorities dated 10th December, 2020 and 22nd February, 2020 respectively.

12. The Kenya Urban Roads Authority is the 2nd Respondent. I will hereinafter refer to it as '**KURA**' or '**the 2nd Respondent**'. The 2nd Respondent filed a Replying Affidavit sworn by Engineer Joseph Kimanthi Kivanguli, an Assistant Director in KURA's Road Asset and Corridor Management Directorate, on 6th February, 2020.

13. The Kenya Rural Roads Authority is the 3rd Respondent. I will hereinafter refer to it as '**KeRRA**' or '**the 3rd Respondent**'. The 3rd Respondent filed a Replying Affidavit sworn by Engineer L. K. Kimeli, the Acting Director General of KeRRA, on 4th March, 2020.

14. The 2nd and 3rd Respondents filed joint written submissions dated 11th December, 2020.

Issues for Determination:

15. In the interest of time, the parties agreed to pursue the determination of the Petition. The interim orders were accordingly extended. Therefore, the determination of the Petition will, as well, dispose of the application.

16. I have carefully considered the Petition, the responses thereto, the parties' submissions and the decisions referred to. I find the following issues are for determination: -

(i) Whether the Preliminary Objection dated 2nd March, 2020 be sustained;

(ii) If the answer to (i) above is in the negative, whether the Respondents have the powers to control the erection and maintenance of, and to levy rental or other charges, in respect of the outdoor advertising sites variously mounted by the members of the Petitioner in roads or road reserves in Kenya;

17. I will deal with the issues in *seriatim*.

Analysis and Determinations:

(i) Whether the Preliminary Objection dated 2nd March, 2020 be sustained:

18. The objection is taken by the 1st Respondent. It is based on the three following grounds: -

1. THAT both the Petition and application are time barred as against the 1st Respondent for purporting to seek orders of certiorari against its order made on 1st March, 2018 and 11th May, 2018 (see page 11 and 119 of the Petition bundle). Beyond the statutory six (6) month limitation period prescribed in Section 9(3) of the law Reform Act.

2. THAT the court lacks jurisdiction to entertain both the Petition and the application which are time-barred as against the 1st Respondent having been commenced outside the one (1) year statutory limitation period stipulated in Section 67(b) of the Kenya Roads Act.

3. THAT in breach of Section 67(a) of the Kenya Roads Act, the petitioner failed to give mandatory one (1) month, Written Notice of Intention not commence the legal proceedings against the 1st Respondent.

19. KeNHA submits that the preliminary objection is proper as it raises pure points of law in compliance with **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd** [1969] EA 696 where Law, J.A. held:

(a Preliminary objection) consists of a point of law which has been pleaded, or which arises by clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration...

20. On the first ground, KeNHA submits that Section 9(3) of the Law Reform Act read with Order 53 rule 2 of the Civil Procedure Rules both impose a mandatory 6-month limitation period for seeking the order of *certiorari* for purposes of quashing an administrative decision. It argues that the KeNHA's decisions now impugned were issued on 1st March, 2018 and 11th May, 2018 requiring Magnate Ventures Ltd to pay KES 53,658,000/- as annual rent for its 271 identified structures erected on road reserves along national roads throughout Kenya, pursuant to Section 22 as read with Section 49 of the Roads Act.

21. The 1st Respondent posits that, however, the current Petition was filed on 5th February 2020, *one year 9 months* from the date of the last letter by which time the 6-month statutory limitation period for seeking orders of *certiorari* had long expired, rendering this Petition incompetent. KeNHA submits that the entire Petition is a thinly veiled grievance by Magnate Ventures Ltd, to bring *certiorari proceedings* challenging KeNHA's legitimate demand for Kshs. 53,658,000/- as annual rent for erecting structures on road reserves. It noted that no other member of the Petitioners' Association has challenged or annexed any other liquidated demand for annual rent in these proceedings.

22. KeNHA further submits that the Petitioners generally or Magnate Ventures Ltd specifically were aware of the long-standing *certiorari* limitation period, yet they deliberately delayed to file these *certiorari* proceedings within time to quash the KeNHA decisions of 1st March, 2018 and 11th May, 2018 aforesaid. It argues that such belated *certiorari* proceedings are therefore time-barred by statute and must be struck out for being fatally incompetent. On a without prejudice to the above, the 1st Respondent points out that prayer 3 of the Petition specifically seeks *certiorari* to quash KeNHA's decisions made on 1st March, 2018 and 11th May, 2018 is incompetent and should be struck out.

23. The 1st Respondent rely on **Nakumatt Holdings Limited v Commissioner of VAT**, Civil Appeal No. NAI 200 of 2003, [2011] eKLR where the Court of Appeal (Bosire, Githinji & Visram JJA) justified the 6-month statutory timeline for seeking *certiorari* and stated:

...an application for an order of judicial review is intended to be a quick and inexpensive procedure to aid a party who, in a way, is in distress. That is why, for instance, in the case of *certiorari*, there is a time limit within which such an application has to be made... where the application for leave (is sought) for an order of *certiorari*, time (is) of the essence. An application for an order of *certiorari* has, by dint of the provisions of section 9 (3) of the Law Reform Act as also order 53 rule 2 of the Civil Procedure Rules, to be brought within six months of the decision sought to be quashed.

24. The decision in **Kenya Association of Air Operators v Kenya Airports Authority & Another**, Civil Appeal No. NAI 285 of 2013, [2018] eKLR where the Court of Appeal (Kiage, M'Inoti & Murgor JJA) in interpreting the binding timelines for seeking leave to apply for *certiorari* under section 9 (3) is referred to. The Court stated thus: -

Decisions of this Court abound affirming that an order of *certiorari* must be applied for within six months from the date of the impugned decision. See for example *Ako v. Special District Commissioner, Kisumu & Another* [1989] KLR 163; *Eliakim Munda v. Oremo Owana, CA. No. Nai. 148 of 1991*, *Wilson Osolo v. John Ojiambo Ochola & Another, CA. No. 6 of 1995* and *Aga Khan Education Service Kenya v. Republic & Others* [2004] 1 EA 1.

25. The 1st Respondent submits further that the Petitioners generally and Magnate Ventures Ltd specifically demonstrate gross and inexcusable indolence in filing *certiorari* proceedings, that cannot be cured under Article 159(2)(b) of the Constitution. There is no evidence that Magnate Ventures Ltd attempted to file the *certiorari* proceedings within time. Failure to abide by stipulated limitation timelines ousted this Court's jurisdiction to consider any belated proceedings seeking orders of *certiorari* against KeNHA decisions of 1st March 2018 and 11th May 2018, rendering this Petition ripe for striking out. The decision in **Republic v PPARB & anor. (Interested Party Optic Technologies Kenya Ltd) ex Parte County Assembly of Busia**, Nairobi JR Misc. 647 of 2017, [2017] eKLR was referred to in support of the submission.

26. It is the 1st Respondent's argument that even if the Court were inclined to hear the Petitioners in respect of the KeNHA decisions of 1st March, 2018 and 11th May, 2018 the Court cannot extend time for seeking *certiorari* for three reasons. First, there is no motion on record for enlargement of time. Second, even assuming there was such motion on record, it is trite law that the time is limited by statute, and the law did not donate any discretion to the court to extend time to apply for leave for seeking *certiorari*. Third, the prescribed six-month limitation timeline is *substantive provision of law* governing applications for *certiorari* going to jurisdiction of the Court, and cannot be construed as a mere procedural technicality curable by Article 159(2)(d) of the Constitution.

27. KeNHA, therefore, seeks the striking out of prayers of the Petition which seek orders of *certiorari*.

28. On the second and third grounds, KeNHA submits that the Petition offends Section 67(b) of the Roads Act which requires that any action

against it can only be sustained if a one-month notice is issued and the action instituted within 12 months from the time the cause of action arises.

29. KeNHA further submits that failure to comply with Section 67 aforesaid rendered the Petition fatally incompetent, ripe for striking out. It relied **Unilever Tea Kenya Limited v National Land Commission & 2 Others**, Kericho HC ELC Pet. 11 of 2017, [2017] eKLR, **Michael Otieno Nyaguti & 5 Others v Kenya National Highways Authority & 5 Others**, Kisumu ELC Pet. 10 of 2015, [2015] eKLR and **Rianna Furaha Children Home v Kenya National Highways Authority**; Kisumu ELC Pet. 4 of 2016, [2016] eKLR where the Courts struck out Constitutional Petitions on grounds that the Petitioners failed to comply with Section 67 of the Roads Act.

30. KeNHA therefore submits that this Honorable Court lacks jurisdiction over this Petition as against KeNHA on grounds that it is time-barred having commenced outside the one (1) year statutory limitation period stipulated in Section 67 (b) of the Roads Act; without written notice in breach of Section 67 (a) thereof.

31. In the end, KeNHA submits that the current proceedings are fatally defective and the Petition ought to be struck out.

32. All the other parties in this matter did not respond to the objection and the submissions in support. I will, nevertheless, deal with the objection.

33. I will begin with the first ground of the objection. The ground deals with the applicability of statutory limitation of actions to Constitutional Petitions. The starting point is the Constitution.

34. The sovereignty of the people of Kenya and the supremacy of the Constitution cannot be subject to challenge in any manner. *Article 2 inter alia* declares the Constitution as the supreme law of the land which binds all persons and all State organs at both levels of government. *It also provides that the validity or legality of the Constitution is not subject to any kind of challenge and that any law that is inconsistent with it is void to the extent of that inconsistency.* Further, any act or omission in contravention of the Constitution is invalid. *Article 3* places an obligation upon every person to respect, uphold and defend the Constitution.

35. Article 10 provides for the national values and principles of governance which bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets the Constitution, enacts, applies or interprets any law or makes or implements any public policy decisions. The Constitution also provided for alignment of the laws then in force at its promulgation in Section 7(1) of the Sixth Schedule.

36. Chapter 4 of the Constitution creates the Bill of Rights. **Article 19 provides that the Bill of Rights, which comprises of the human rights and fundamental freedoms**, is an integral part of Kenya's democratic state and is the framework for social, economic and cultural policies. It also gives the purpose of recognising and protecting human rights and fundamental freedoms being to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings. The human rights and fundamental freedoms are inherent in that they belong to each individual and are not granted by the State. They are also only subject to the limitations contemplated in the Constitution.

37. Article 22 provides for the right 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 23(3)* provides **some** of the remedies which a Court in dealing with proceedings instituted under Article 22 can grant. The reliefs include declaration of rights, injunctions, conservatory orders, declarations of invalidity of a law, compensation and **orders of judicial review**. Needless to say, the orders of judicial review include *certiorari*, *prohibition* and *mandamus*.

38. Further to Article 22, the Constitution in *Article 258* accords the right to any person to institute Court proceedings claiming that the Constitution has been contravened, or is threatened with contravention.

39. This Court has previously dealt with the powers of a superior Court in Constitutional Petitions. In **Nairobi High Court Constitutional Petition No. E364 of 2020 Okiya Omtatah Okoiti vs. Attorney General & 5 Others [2020] eKLR** this Court was confronted with the question as to whether a Court can issue a conservatory order in proceedings challenging the constitutionality of a law brought under Article 258 given that the Constitution is silent on grant of such a remedy. It was argued that the position was unlike in proceedings challenging infringement or threats of infringement of the rights and fundamental freedoms provided in Article 22 of the Constitution where the Constitution clearly provides for the remedies which include a conservatory order.

40. In answering the question in the affirmative and holding that a superior Court has powers to grant **any appropriate relief** in proceedings under Articles 22 and 258 of the Constitution, I stated as follows: -

28. A Court is always possessed of residual inherent powers. Such powers allow the Court to make any orders in the wider interest of justice. It is for the Court to fashion an appropriate remedy even in instances where the Constitution and the law are silent. A Court cannot just, helplessly so, stare at a Petitioner whose rights and fundamental freedoms are trampled upon or when it is ostensibly demonstrated that the Constitution is either contravened or so threatened. Unless a Court raises to, and asserts its authority, high are chances that it may fail the calling in Article 3 of the Constitution. The result will, undoubtedly, be anarchy and lawlessness in the society.

29. The Court of Appeal in **Total Kenya Limited vs Kenya Revenue Authority (2013) eKLR** held that even in instances where there are express provisions on specific reliefs a Court is not precluded from making any other orders under its inherent jurisdiction for ends of justice to be met to the parties. *The High Court in Simeon Kioko Kitheka & 18 Others vs. County Government of Machakos & 2 Others (2018) eKLR held that Article 23 of the Constitution does not expressly bar the Court from granting conservatory orders where a challenge is taken on the constitutionality of legislation.*

30. In *Republic Ex Parte Chudasama vs. The Chief Magistrate's Court, Nairobi and Another* Nairobi HCCC No. 473 of 2006, [2008] 2 EA 311, Rawal, J (as she then was) stated that:

While protecting fundamental rights, the Court has power to fashion new remedies as there is no limitation on what the Court can do. Any limitation of its powers can only derive from the Constitution itself. Not only can the court enlarge old remedies, it can invent new ones as well if that is what it takes or is necessary in an appropriate case to secure and vindicate the rights breached. Anything less would mean that the Court itself, instead of being the protector, defender, and guarantor of the constitutional rights would be guilty of the most serious betrayal. See Gaily vs. Attorney-General [2001] 2 RC 671; Ramanoop vs. Attorney General [2004] Law Reports of Commonwealth (From High Court of Trinidad and Tobago); Wanjuguna vs. Republic [2004] KLR 520...The Court is always faced with variety of facts and circumstances and to place it into a straight jacket of a procedure, especially in the field of very important, sensitive and special jurisdiction touching on liberties and rights of subjects shall be a blot on independence and many faceted jurisdiction and discretionary powers of the High Court. See The Judicial Review Handbook (3rd Edn) by Michael Fordham at 361.

31. The Constitutional Court of South Africa in *Fose vs. Minister of Safety & Security* [1977] ZACC 6 emphasized the foregoing as follows: -

Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all important rights.

(Emphasis added)

41. The 1st Petitioner's contention is that whereas a Court has powers to grant the orders of *Certiorari* in appropriate cases, such powers are unavailable in this matter by dint of the statutory limitation of 6 months provided under Section 9(3) of the *Law Reform Act* as read with Order 53 rule 2 of the *Civil Procedure Rules*.

42. In order to resolve the contention, a distinction ought to be made between proceedings brought either under Articles 22 and 258 of the Constitution or under any other statute seeking the enforcement of human rights and fundamental freedoms by way a judicial review order of *Certiorari*, on one hand, and proceedings in the nature of judicial review seeking an order of *Certiorari*, but which proceedings do not seek the enforcement of human rights or fundamental freedoms on the other hand. Such proceedings are usually brought under the Law Reform Act, the Civil Procedure Act and the Rules thereunder or under any other law.

43. To me, I find that proceedings for enforcement of human rights and fundamental freedoms seeking a judicial review order of *Certiorari* brought either under Articles 22 and 258 of the Constitution or under any law have no limitation of time. However, the time between the infringement or threat to infringement of the right or fundamental freedom and the institution of the proceedings must be accounted for. I say so because human rights and fundamental freedoms can never be waived or acquiesced to by a person unless there is such enormous and unexplained delay in enforcement.

44. I further find that where the proceedings seeking a judicial review order of *Certiorari* do not concern the enforcement of rights and fundamental freedoms, then the provisions on limitation of time apply accordingly.

45. My reasoning finds favour with the Court of Appeal in Eldoret *Civil Appeal 51 & 58 (Consolidated) Chief Land Registrar & 4 others v Nathan Tirop Koeh & 4 others* [2018] eKLR where the Learned Judges had occasion to consider whether human rights and fundamental freedoms can be waived or acquiesced to by a person. The appeal related to an alleged acquisition, seizure and subsequent sub-division of land without following due process of law.

46. The parties contested the protection of private property as enshrined in **Section 75** of the retired Constitution and **Article 40** of the 2010 Constitution. The Respondents contended that they were the registered proprietors of the land in question and that the Government of Kenya had fraudulently, unlawfully and without following the laid down procedure for compulsory acquisition of land acquired and subdivided portions of the suit land.

47. The Respondents prayed among many other orders, declaration that the seizure of the land was without consent or compensation and thus unconstitutional, a declaration that there was violation of the Respondents proprietary rights under Section 75 of the retired constitution and Article 40 of the 2010 Constitution.

48. The Appellants refuted any unlawful conduct and alleged that the cause of action if any, by the Respondents was extinguished by the doctrine of laches.

49. It was the Appellants' case that the cause of action arose over thirty years ago way back in the 1980s; that the Respondents ought to have filed the Petition within a reasonable time from when the cause of action arose; that there had been no reasonable explanation for the delay in filing the Petition; that the Respondents slept on their rights and are guilty of laches and indolence; that their rights, if any, are stale and unenforceable; that the Appellants have been prejudiced by the late filing of the Petition as most of their witnesses are either dead or have retired from public office.

50. In making a determination on whether the Respondents rights had been defeated by laches the Court observed as hereunder: -

We have considered submissions by both parties on the issue of delay, acquiescence and the doctrine of laches. Our decision

on this matter is premised on appreciation that what was before the trial court was a Petition alleging violation of the right to property as one of the fundamental rights in the Constitution. Both the Petition and amended Petition are grounded and entitled “In the Matter of Deprivation of Property Contrary to Section 75 of the old Constitution and Article 40 of the 2010 Constitution.” The Petition is essentially a petition to enforce the constitutional right to property.

51. The Court further made reference to the decisions in *Metal Box Co Ltd vs. Currys Ltd, (1988) 1 All ER 341* and *Kariuki Kiboi vs. Attorney General [2017] eKLR, Nairobi Civil Appeal No. 90 of 2015*, where the Court of Appeal heard and determined a claim which arose in the mid-1980s and a Petition was filed in 2010. The Court then made the following findings on whether one can acquiesce to an infringement of their human rights and fundamental freedoms: -

61. Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.

(Emphasis added)

52. With respect to the doctrines of **acquiescence** and **estoppel** the Court rendered itself as follows: -

64. We have considered submissions by counsel on estoppel and acquiescence. In our view, there can be no estoppel against the Constitution which is the paramount law of the land. Subject to the express provisions of Article 24 of the 2010 Constitution, no individual can barter away fundamental rights and freedoms enshrined in the Constitution. One can neither acquiesce nor waive the fundamental rights and freedoms protected in the Constitution. Fundamental rights were not kept in the Constitution simply for individual benefits - these rights were put up as a matter of public policy and therefore the doctrine of inordinate delay, estoppel, acquiescence or waiver cannot unequivocally be applied as a bar to enforcement of fundamental rights. We are cognizant that the doctrine of laches is a principle of general application that may apply in constitutional petitions for breach of fundamental rights. However, delay in enforcing a claim for violation of fundamental rights may be permitted or denied depending on the circumstances of each case.

65. In line with Article 20 of the Constitution, respect for fundamental rights is a mandatory obligation on the State and all State Organs and the Bill of Rights applies to all and bind all citizens. No citizen can by his act or conduct relieve the State, a State Organ or any person of the solemn obligation to respect the Bill of Rights. It is in this context that no individual can acquiesce to violation or infringement of fundamental rights. Subject to express constitutional provisions, such as the limitations in Article 24 of the Constitution, neither the state nor an individual can arrogate to itself/himself a right or justification to commit a breach of fundamental rights of any citizen and resort to the doctrine of waiver, acquiescence, inordinate delay, estoppel or other similar principle as absolute defence or excuse.

(Emphasis added)

53. The Court further stated that: -

67. On our part, based on the sacrosanct and inviolable nature of the Bill of Rights, convinced that respect for and enforcement of the Bill of Rights is the cornerstone of political stability in Kenya; persuaded that property and land rights is the foundation of socio-economic relationship in Kenya and further persuaded by merits of comparative jurisprudence cited above and convinced that no individual can barter away and acquiesce to violation of fundamental rights, we find that the trial court did not err in failing to apply the doctrine of laches, estoppel and acquiesce in this matter.

(Emphasis added).

54. In **Judicial Review Application 102 of 2018, Republic v Kenya Revenue Authority Ex-Parte Stanley Mombo Amuti [2018] eKLR**, the Court discussed the dynamics surrounding the 6-month period within which judicial review applications must be instituted as required by the Law Reform Act. The consideration was in light of the 2010 constitutional edicts. The Court observed as follows: -

30. In *Ako vs Special District Commissioner, Kisumu & Another* cited above, the Court of Appeal was emphatic that "it is plain that under sub-section (3) of section 9 of the Law Reform Act leave shall not be granted unless application for leave is made inside six months after the date of the judgment." The Court of Appeal proceeded to hold that the prohibition is statutory and is not therefore challengeable under procedural provisions of the Civil Procedure Rules, which permits for enlargement of time. A similar position was held by the Court of Appeal in *Wilson Osolo -Vs- John Ojiambo Ochola & Another* thus:

It can readily be seen that Order 53 Rule 2 (as it then stood) is derived verbatim from Section 9(3) of the Law Reform Act. Whilst the time limited for doing something under the civil Procedure Rules can be extended by an application under order 49 of the Civil Procedure Rules that procedure cannot be availed of for the extension of time limited by statute, in this case, the Law Reform Act". There is no provision for extension of time to apply for such leave in the Limitation of Actions Act (cap 22, Laws of Kenya) which gives some limited right for extension of time to file suits after expiry of a limitation period. But this Act has no relevance here.

31. The above decisions which adopted a rigid construction of the above provisions were rendered before the promulgation of the 2010 Constitution. It should be recalled that sections 8 and 9 of the Law Reform Act are borrowed from common law principles

which traditionally governed exercise of Judicial Review jurisdiction. Order 53 of the Civil Procedure Rules, 2010 is borrowed from these provision.

32. The questions that warrants a candid interrogation is whether the argument that the court upholds a statutory provision which is based on traditional common law Judicial Review principles can now hold sway on the face of our current constitutional dispensation. The Constitution of Kenya, 2010, fundamentally changed the legal landscape in this country. This court cannot shut its eyes on express constitutional dictates as discussed below and determine a matter purely on common law principles.

33. Article 47 provides for the right to a fair Administrative Action. To give effect to Article 47, Parliament enacted the Fair Administrative Action Act. On the face of the above constitutional provision and the right to access justice guaranteed under Articles 48, the right to enforcement of the Bill of Rights under Article 22, and the authority of the court to uphold and enforce the Bill of Rights under 23, the question that arises is whether a citizen who has explained reasons for not approaching the court within time allowed by the court can be denied access to justice on the basis of the above provisions (which are borrowed from the traditional common law Judicial Review jurisdiction).

34. Section 7 (1) of Part two of the sixth schedule to the Constitution provides that: -

All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this constitution.

35. All law must conform to the constitutional edifice. It follows that the provisions of sections 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules must conform to the Constitution or be construed with such adaptations, alterations, modifications so as to conform with the Constitution.

36. As the Supreme Court of Appeal of South Africa observed "All statutes must be interpreted through the prism of the Bill of Rights." Judicial Review is now entrenched in the Constitution. The concept of Judicial Review under the Constitution of Kenya is similar to that under the Constitution of South Africa where the South African Court held in Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others that **"the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts."** The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

37. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy and the discretion and the power of the court to in such cases guided by the purposes, values and principles of the Constitution and the constitutional dictate to develop the law on that front. First, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. Second, the right to access the Court is now constitutionally guaranteed. It would require a compelling reason that would pass an Article 24 analysis test to deny a litigant the right to approach the court. Where a party applies for extension of time as in this case, the court should exercise its discretion and examine the period of the delay and the reasons offered for the delay.

38. Third, an order of Judicial Review is one of the reliefs for violation of fundamentals rights and freedoms under Article 23(3) (f). Fourth, section 7 of the Fair Administrative Action provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review. Fifth, Article 159 commands courts to administer justice without undue regard to procedural technicalities.

39. In Republic v Speaker of the Senate & Another ex parte Afrison Export Import Limited & Another discussing the same provisions, I observed that court decisions should boldly recognize the Constitution as the basis for Judicial Review. Additionally, court decisions should boldly recognize access to courts of a fundamental right guaranteed under the Constitution which can only be limited in a manner that can pass constitutional muster. It is a constitutional dictate that in applying the Bill of Rights, a court shall develop the law to the extent that it does not give effect to a right or fundamental freedom and adopt the interpretation that most favours the enforcement of a right or fundamental freedom. Talking about developing the law, Judicial review is now a constitutional supervision of public authorities involving a challenge to the legal validity of decisions. Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed "theory of a holistic interpretation of the Constitution.

40. Judicial Review is no longer a common law prerogative, but is now a constitutional principle to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

41. It is therefore my conclusion that in an application for extension of time such as the one before me, all that an applicant is required to do is to demonstrate that he has a good reason for failing to file the application within the time allowed by the court or sufficiently account for the delay. It will also be a consideration that the impugned decision seeking to be challenged violates or threatens to violate the Bill of Rights or violation of the Constitution.

42. Provisions limiting access to courts must be read in a manner that conforms with the constitution. No matter how noble and

worthy of admiration the common law principles are, if they are simply irreconcilable with constitutional parameters, then the Constitution must prevail. Suffice to say that the ex parte applicants have in the recitals in the heading to their application invoked Articles 21 (1), 23 (3) (f), 25 (c), 27 (1), 47 (1), 49 (1) (d) & 50 (2) of the Constitution.

55. I agree with the above rendition.

56. Further, in *Judicial Review No. 4 of 2016, Republic v Kiambu County Executive Committee & 3 others exparte James Gacheru Kariuki & 9 others* [2017] eKLR, J. Ngugi J., rightly so, made the following remarks on the question whether the six-month timeline under the Law Reform Act is a bar to the institution of judicial review cases.

26. I wish to begin my analysis here. Our Constitution of 2010 took a decidedly anti-formalist turn. Whereas our previous jurisprudence might have been enamoured of arcane formalist logic on process before one could be permitted to perfect a substantive claim, our 2010 Constitution self-consciously rejects such an approach to adjudicating substantive claims especially those involving public interest. In the case of judicial review, the Constitution of 2010 introduced two new important provisions.

27. First, in Article 47, the Constitution expressly constitutionalizes administrative justice as a right and removes it from the clutches of Common Law. Indeed, the FAAA is the legislation required to implement Article 47 of the Constitution.

28. Second, in Article 23, the Constitution, in spelling out the authority of the High Court to uphold and enforce the Bill of Rights, expressly permits the Court to grant any appropriate relief including an order for judicial review (Article 23(3)(f)).

29. My reading of these two provisions is that they have the functional effect of blurring the bifurcation between challenges to the exercise of public power using the traditional mechanism of judicial review rooted in the common law (and, in Kenya, the Kenya Law Reform Act) and those based expressly on the Constitution. In a straightforward petition to enforce the Bill of Rights under Article 23 of the Constitution, the High Court can issue an order for Judicial Review. Conversely, one can found a substantive suit challenging the exercise of administrative power under Article 47 of the Constitution or the FAAA which is the statute enacted to perfect that Article.

30. If that is the case, what, pray, is the utility of insisting on strict procedural timelines for one form of action and not the other? The County Executive says predictability and certainty are the operative functions. However, that predictability in the formalist traditional common-law based judicial review is precisely what the Constitution of Kenya 2010 hoped to overturn and install in its place a jurisprudence and process more in keeping with Article 47. In this regard, it is important to point out that the FAAA does not have any set time limits on when an aggrieved party can bring an action. Tellingly, at section 10(1) it provides that an application for judicial review shall be heard and determined without undue regard to procedural technicalities.

57. Lastly in *Environment & Land Petition No. 28 of 2017, Samuel Kimondo Theuri v Mohammed Swazuri & 2 others* [2018] eKLR, the Petitioner contended that his rights to property had been violated. He sought injunctive reliefs and orders of *certiorari* against the Respondents. The Respondents countered the Petition asserting that it had been brought outside the 6 months' period and as such was incompetent. In deciding on the issue, the Court (*E. Obaga, J.*) made the following findings: -

9. On the first issue, the respondents and the interested party are contending that the judicial review proceedings were not brought within 6 months. It is important to note that this application was brought as an interlocutory application under a constitutional petition. These are not proceedings which were commenced by way of judicial review. If the proceedings had been brought under Judicial Review, then the issue of 6 months would have come in. This Court is empowered to grant reliefs of Judicial Review when hearing a matter commenced as a constitutional petition. I therefore find that the application which seeks Judicial Review is not barred by the 6 months' period.

58. The subject Petition in this matter is brought under Articles 22 and 258 of the Constitution. The Petition variously claims violation of the Constitution and the Bill of Rights in terms of Articles 10, 47, 48, and 50(1) of the Constitution. In that case, 'unless expressly stated in the Constitution, the period of limitation in the Limitation of Actions Act [or any other statute] do not apply to violation of rights and freedoms guaranteed in the Constitution. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights.'

59. Having so said, I must add that even if the doctrine of laches applies to constitutional petitions for breach of human rights and fundamental freedoms, still in view of the nature of such petitions and depending on the circumstances of a case, a Court ought to, generally, endeavour to substantively and on merit determine the Petition.

60. In this case, the purported delay under the Law Reform Act, the Civil Procedure Rules and the Roads Act is around 20 months. That period is excusable given that the Petitioner engaged the Respondents in an attempt to settle the matter amicably before the filing of the Petition in Court (See paragraph 19 of the Petition).

61. The Petition herein having been brought under Articles 22 and 258 of the Constitution and given the supremacy of the Constitution over any law as provided for in Article 2(4) thereof coupled with the above decisions, this Court finds that the provisions on limitation of actions in the Law Reform Act, the Civil Procedure Rules and the Roads Act are inapplicable in this case as the Petition is seeking the enforcement of rights and fundamental freedoms.

62. The foregoing discussion, therefore, settles the entire 1st Respondent's Preliminary objection dated 2nd March, 2020. In the end, the first issue is answered in the negative.

(ii) If the answer to (i) above is in the negative, whether the Respondents have the powers to control the erection and

maintenance of, and to levy rental and other charges, in respect of the outdoor advertising sites variously mounted by the members of the Petitioner in road reserves in Kenya:

63. The Petitioner posits that the Respondents have no control over any matter relating to outdoor advertisement since such is a devolved function under Part 2(3) of the Fourth Schedule of the Constitution.

64. It pleads that the Respondents have no power under the Roads Act or any other law, to control outdoor advertising by either granting approvals and/or levying advertisement fees for outdoor advertising sites erected on road reserves.

65. The Petitioner further pleads that the foregoing position is bolstered by the Nairobi City County Transport Bill, 2019 which, although then not yet passed into law, fortifies its position that control of outdoor advertisements has been granted to County Governments under the Constitution and as such there can be no duplication of roles by having multiple agencies carrying out the same function. The Petitioner also relies on *Nairobi Petition No. 300 of 2014 Real Deals Limited & 3 Others vs. Kenya National Highways Authority & Another (2015) eKLR*.

66. As such, the Petitioner pleads that the demands made by the Respondents do not have any legal basis as they contravene Article 10 of the Constitution. It is pleaded that the Respondents have flouted the principle of rule of law for not heeding to the decision in *Nairobi Petition No. 300 of 2014 Real Deals Limited & 3 Others vs. Kenya National Highways Authority & Another* case (supra) and for acting contrary to the Roads Act which law does not accord the Respondents the control and licence they allegedly exercise. It is also pleaded that the Respondents have flouted the principle of good governance by demanding that the Petitioner's members, first seek approval from the 1st Respondent and pays rent for the use of the road reserves for the erection and maintenance of the outdoor advertisement sites.

67. The Petitioner reiterates the above in its submissions. It submits that further to the fact that advertisement is a devolved function, the *Physical and Land Use Planning Act*, No. 13 of 2010, the *County Governments Act*, No. 17 of 2012 and the *County Outdoor Advertising Control Act*, No. 19 of 2020 squarely places the control of advertisement on the domain of the County governments. The Petitioner contends that its members usually pay to the County Governments, approval fees renewable periodically for the erection and maintenance of outdoor advertising sites, which sites were put up by the members at their own cost.

68. The Petitioner outlined the respective functions of the Respondents provided for in the Roads Act in urging this Court to find that the Respondents are acting *ultra vires* the law. The Petitioner further submits that the issue was settled in the *Nairobi Petition No. 300 of 2014 Real Deals Limited & 3 Others vs. Kenya National Highways Authority & Another* case (supra).

69. Responding to the 1st Respondent's position that Section 49 of the Roads Act empowers the 1st Respondent to exercise control and levy fees for the use of its properties including the road reserves, it contends that such control does not amount to control of the outdoor advertisement sites the Petitioner's members set up with the approval of the County governments. It is further contended that the nature of the alleged fees is not elaborated in the Replied Affidavit.

70. On the 2nd and 3rd Respondents' assertion that the law allows them to control the erection of the advertising sites and to levy fees accordingly, the Petitioner submits that the Court in *Nairobi Petition No. 300 of 2014 Real Deals Limited & 3 Others vs. Kenya National Highways Authority & Another* case (supra) settled the issue *vide* a declaration that the Respondents can only levy charges relating to permission to undertake its mandate under the law.

71. It is, hence, submitted that since the amount of Kshs. 53,658,000/= demanded by the 1st Respondent from Magnate Ventures Limited is for annual rent and not on account of approval of drawings, then the same is not payable. The Petitioner posits that there is no Landlord-Tenant relationship between any of its members and the 1st Respondent to justify any demand for annual rent. The Petitioner further submits that its members usually pay to the County Governments, approval fees renewable periodically for the erection and maintenance of outdoor advertisement sites which the members put up at their own cost, hence, the demand by the Respondents amounts to double rental payment.

72. Submitting on the impact of the recently assented to *County Outdoor Advertising Control Act No 19 of 2020* (hereinafter referred to as '**the Advertising Act**'), the Petitioner contends that the Advertising Act bolsters its case in three fundamental ways. First, the preamble of the *Advertising Act* is express that its function is to provide for a legal framework for the regulation of outdoor advertisement in the Counties and for connected purposes. The Act is a comprehensive outdoor advertisement regulatory legal framework as more particularly provided for in Part II. It is evident, therefore, that the Respondents have no regulatory role whatsoever in so far as outdoor advertising is concerned.

73. Second, the Advertising Act empowers County Governments through Section 21 thereof to enact County specific legislation for the implementation of the Act in the respective Counties. These accords with the letter and spirit of Part 2(3) of the Fourth Schedule of the Constitution through which control of outdoor advertising is designated as a function of devolved government. The Advertising Act, therefore, effectuates the said devolved function and removes any doubt that may have existed upon which the Respondents unlawfully sought to exercise similar powers under the Roads Act. Third, under Section 23 of the Advertising Act, Section 3 of the Physical Planning Act is amended by removing "advertisements" and "development". As a result, the devolved function of control of outdoor advertisement is entrenched in County Governments and specifically structured around Advertising Act and any County specific legislation.

74. Buttressing the submission, the Petitioner relied on the decisions in *Geoffrey K. Sang v. Director of Public Prosecutions & 4 Others (2020) eKLR*, *Africa Spirits Limited v. Director of Public Prosecutions & 6 Others (2019) eKLR* and *Republic v. County Government of Mombasa ex parte Outdoor Advertising Association of Kenya (2014) eKLR*.

75. The Petitioner prays that the Petition is allowed as prayed.

76. The Interested Party while supporting the Petition tendered submissions which are in four corners with the Petitioner's submissions.

77. The Respondents take a common stand on this issue. They posit that the Roads Act empower each of them to control any use of the roads and road reserves under their respective jurisdictions including developments on road reserves. On an equal footing, the Respondents contend that the law grants them power to levy charges including rent over the properties under their respective jurisdictions including on road reserves.

78. The 1st Respondent pleads that under Section 3 of the Roads Act it has the power of taking, purchasing or otherwise acquiring, holding and disposing of movable or immovable property. It further pleads that Section 4 thereof grants it the power to control, manage, develop, rehabilitate and maintain national roads and road reserves; as well as overseeing the management of traffic and road safety on national roads. The 1st Respondent posits that under Section 13 thereof KeNHA is headed by the Director-General, whose statutory responsibilities under subsection (4) thereof include implementation of the policies and programs of the Authority; and the proper management of the funds and property of the Authority.

79. It is also pleaded that under Section 22 of the Roads Act the 1st Respondent has powers to *inter alia* manage the roads under its jurisdiction, and to provide such amenities or facilities for persons using its amenities as may appear necessary or desirable, which facilities include road reserves. It is further pleaded that, KeNHA is statutorily empowered thereby to also prohibit, control or regulate the use of its facilities (including road reserves), and to determine, impose and levy rates, tolls, dues or fees for said use of facilities, including fees for letting its property or facilities (including road reserves) to any person.

80. On the basis of Section 49 of the Roads Act, KeNHA contends that it has the power to grant permission or to refuse the grant such permission to any person to erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve, make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of a road or road reserve.

81. KeNHA contends that it is not claiming any jurisdiction over outdoor advertisement generally, as the Petition alarmingly purports to represent. Instead, KeNHA insists that any activity of whichever nature on a road reserve within the Respondents' respective jurisdictions whether by private entities or public bodies must be subject to permission pursuant to Section 49 of the Roads Act as read with Sections 4 and 22 thereof, regardless of whether the structure erected is signage, advertising or for any other activity. The prior consent is mandatorily applicable for any private activity on a road reserve without exception.

82. KeNHA pleads that the Petition is not about whether KeNHA or any of the Respondents has control over outdoor advertisement generally. Rather, the Petitioners have unlawfully entered onto and constructed dangerous and unauthorized structures on road reserves without any reference to KeNHA for national roads, or to the other Respondents for the roads under their jurisdictions in breach of Section 49 of the Kenya Roads Act.

83. It is also pleaded that pursuant to Article 191 of the Constitution, the Roads Act being national legislation is uniformly applicable throughout Kenya whose pith and substance is intended to ensure that road safety of motorists and all road users prevail over any of the 47 potential county legislations as far as it concerns entry or erection of structures on road reserves within the respective jurisdictions of the Respondents.

84. The 1st Respondent pleads that under Section 40 of the Roads Act, KeNHA gazetted charges and fees levied for any of its services or for use of its facilities, pursuant to Section 22 aforesaid. The said section provides that if any amount due is not paid by any party after demand by the Authority beyond the time specified for payment, KeNHA is empowered thereby to seize the offensive property of the debtor after giving reasonable notice of such seizure, and may detain the property until payment is made. KeNHA also avers that under Section 41 of the Roads Act that all debts owed to KeNHA shall be recoverable summarily.

85. KeNHA also pleads that during the execution of the Performance Based Maintenance Contract of Muthaiga-Kiambu (B32) Road, it was a requirement for the Regional Office to remove unauthorized structures, fences and obstructions on the road reserve. While planning for the exercise, KeNHA wanted to establish the billboards positioned along the said road, based on an alarming rate of erection of billboards along the road reserve of Muthaiga-Kiambu (B32) Road without the knowledge, consultation or involvement of KeNHA. The erection of billboards within the month of December 2019 was being undertaken without the consultation or involvement of the Nairobi Region Office as required by the Directorate of Road Asset and Corridor Management Procedure Manual, Clause 8 thereof. Clause 8 requires that any structure put up on the road reserve be approved by the Director General, payment be made, and the respective Regional Office supervises the works.

86. According to the 1st Respondent four (4) billboards were erected between November and December 2019 by the Petitioner's members on the road reserves of Muthaiga-Kiambu (B32) Road. However, out of the four, three (3) billboards pose a direct and active risk to motorists and pedestrians due to their close proximity to power lines and other structures. They also hang over the road reserve thereby endangering road users. KeNHA annexed photographs of the billboards it contends are unauthorized and pose danger to public together with the relevant Certificate of Electronic evidence. The photograph marked MNA-1(a) is a billboard by Brandfirm Limited at KM6+700 opposite Sabis School entrance, at right hand side on the road reserve, obstructing visibility at a turn and hanging over the road shoulder. The photograph marked MNA-1(b) is a billboard by Magnate Ventures at KM5+700 at Fourways junction entrance, left hand side on the road reserve hanging over the road shoulder and close to power lines. The photograph marked MNA-1(c) is a billboard by Firmbridge Advertising at KM4+700 near Runda entrance right hand side, actively touching power lines and on the road reserve only 3 meters off the road itself and the photograph marked MNA-1(d) is a billboard by Look Media at KM2+500 at Karura Forest entrance opposite Sharks Palace, where billboard is located between two power lines.

87. The 1st Respondent then undertook an inventory on the billboards positioned on the road reserves of Muthaiga-Kiambu (B32) Road and wrote letters to the respective outdoor advertising companies including the aforesaid firms, tasking them to prove legality of the structures pursuant to section 49 of the Kenya Roads Act. However, instead of proving legality of the billboards including by showing approvals under Section 49 aforesaid, the Petitioners rushed to this Honorable Court before exhausting mandatory statutory procedures; or even without resolving the active risk to pedestrian safety as posed by the billboards and advertisement structures.

88. KeNHA yields that it is responsible for ensuring safety of road users. However, the Petitioners constructed illegal and unauthorized placement of structures on road reserves which has so far led to poorly erected/constructed advertisement billboards and structures which collapse causing accidents and or closure of highways, wrongly placed adverts which block the clear view of motorists especially at junctions and sharp bends and obstruction and distraction of road users especially motorists, undermining road safety.

89. KeNHA, therefore, pleads that pursuant to Section 49 of the Roads Act, KeNHA and the other Respondents retain statutory authority to manage and control any usage of road reserves within their jurisdiction by any person for whichever purpose, and to remove unauthorized and dangerous structures, for the overall statutory purpose of ensuring road safety for all road users. It contends that the Petition is misconceived for purporting to claim unfettered use of road reserves with reckless disregard for safety of road users and interfering with the Respondent's statutory function contrary to Section 49 of the Kenya Roads Act. The Petition should thus be dismissed with costs.

90. In its submissions, the 1st Respondent expounded on the pleadings. It reiterates that the Petition is a tussle over road reserves, not over outdoor advertisement. It contends that it is clear and logical that nowhere in law is it defined that billboards can only be erected on road reserves and nowhere else. Nothing prevents the Petitioners from erecting billboards and signage elsewhere for example in trading centers, residential areas or on pre-existing commercial business premises. That whereas the Petitioners have shown preference for erecting billboards on road reserves, they failed to comply with relevant provisions of the Roads Act governing said usage of those road reserves. That, the very usage of road reserves brings the Petitioners within the regulatory ambit of the Roads Act, with the corresponding obligation to fully comply with its provisions for as long as they intend to continue using the said roads and road reserves or the designated facilities and that the mere preference for using road reserves when erecting structures known as billboards on does not automatically change the fact that the Petitioners are using road reserves for private purposes, nor does it re-classify the Petitioners' actions into an act of outdoor advertising that is regulated by County Governments. KeNHA emphasize that any usage of road reserves by any person or body is strictly regulated by the Respondents under Section 49 of the Roads Act.

91. KeNHA submits that in the scheme of devolution, the Fourth Schedule to the Constitution designates national road reserves as a national government function. Section 18 (a) and (b) of Part 1 of the Fourth Schedule to the Constitution assigns to the National Government the function of transport and communications – specifically *road traffic* and *the construction and operation of national trunk roads*. The Constitution therefore properly empowers the National Government to establish KeNHA, and by *inter alia* Section 49 of the Roads Act give it jurisdiction and discretion over construction and operation of roads and road reserves. This mandate extends to controlling usage of road reserves for whichever purpose, including for erection of any structures thereon. By comparison, there is no provision in Part 2 of the 4th Schedule of the Constitution that specifically takes away construction and operation of national roads and road reserves from a National Government function and turning it to a county government function.

92. KeNHA further submits that the national government's specific power to control the construction and operation of national roads and roads reserves under Part 1 Section 18 of the Fourth Schedule to the Constitution supersedes the County Government's general power over outdoor advertising elsewhere throughout each County and on County roads built pursuant to section 5 (a) of Part 2 to the Fourth Scheduled. KeNHA affirms its statutory jurisdiction over controlling national roads and road reserves for Class A, B and C Roads pursuant to section 4 (1) of the Kenya Roads Act read with the First Schedule thereto, with the primary goal being the safety of road users on national roads. Section 4 (2) specifically gives KeNHA the statutory mandate of (b) controlling national roads and road reserves, and access to roadside developments; (f) in collaboration with the Ministry of Transport and the Police Department, overseeing the management of traffic and road safety on national roads; and (h) monitoring and evaluating the use of national roads.

93. KeNHA emphasizes that nothing in Articles 186 or 187 of the Constitution read with the Fourth Schedule thereto, even remotely suggests that outdoor advertisement can only be on road reserves, as implied by the Petitioners. Again, by dint of Article 191 (2) and (3) of the Constitution, the Roads Act as national legislation would prevail over any county legislation in so far as it concerns regulating the usage and road safety on national roads and roads reserves. This is because the Roads Act effectively defines a uniform standard and policy across the nation as regards the mandatory procedure for erection of any structures of any kind on or over road reserves, in service of the public interest of ensuring the safety of motorists and road users in line with KeNHA's mandate under section 4 (2) (f) of the Roads Act.

94. The 1st Respondent further submits that Parliament in its wisdom by enacting Section 49 of the Roads Act secluded road reserves to the exclusive control of the Respondents as the relevant National Authorities responsible for management of those roads and road reserves. Therefore, KeNHA insists that per Section 49 of the Roads Act, no person could conduct any activity or erect any structures of whatever nature done on a national road reserve without its prior written permission. Similar statutory power and discretion is also vested in the 2nd and 3rd Respondents. It is also submitted that Section 49 of the Roads Act as enacted remains good law, having not been repealed nor has it been declared as unconstitutional by any Court.

95. The 1st Respondent also submits that Section 49 aforesaid indiscriminately applies to any structure erected on a road reserve for example crossings or footbridges, buildings, entertainment joints, shops and kiosks whether permanent or temporary, petrol stations, car wash and garages or any other utilities under a road reserve such as underground power, telephone or fiber optic lines, telephone posts or poles, water and sewerage pipes; not just to advertising billboards. Prior written consent is a statutory requirement applicable for any activity on a road reserve, without exception.

96. KeNHA contends that it is, therefore, unlawful for the Petitioners to purport to enter onto and use road reserves without complying with Section 49 of the Roads Act, and without obtaining prior written permission from the Respondents. No such permission is annexed to the Petitioners' Affidavit filed herein, for any of the Petitioner's members. It further submits that no one can benefit from their own illegality and that the Petitioners stand in breach of Section 49 of the Roads Act, for which breach the 1st Respondent KeNHA is statutorily mandated to remove the said unauthorized structures upon giving due notice. KeNHA gave due notice, yet no such compliance with Section 49 is demonstrated. KeNHA further argues that the Petitioners violated Section 49 of the Roads Act by failing to obtain prior written permission before erecting structures on national road reserves. Having been given a chance to be heard on the legality of their structures, the Petitioners' members were therefore rightly notified that the unapproved structures will be removed unless their legality is shown.

97. The 1st Respondent relies on four decisions in urging this Court to find its submissions holding. The decisions are **Kenya Ports Authority**

v **Fadhil Juma Kisuwa**, Civil Appeal No. 76 of 2016, [2017] eKLR where the Court held that: -

We can only emphasise that *ex turpi causa non oritur actio*, based on the doctrine that no legal remedy or benefit can flow from an illegal act, explained succinctly by **Lord Mansfield CJ** in **Holman v Johnson** (1775) 1 Cowp 341 as follows:

“The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this; *ex dolo malo non oritur actio* [“no action arises from deceit”]. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff’s own standing or otherwise, the cause of action appears to arise *ex turpi causa* [“from an immoral cause”], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.

98. On the argument that the Roads Act takes primacy over any other general law, the 1st Respondent relies on the maxim *lex specialis derogat legi generali* as expounded in **M J v N K & another**, HCCA 93 of 2014, [2017] eKLR where the Court held that: -

The doctrine of lex specialis derogate generali is a Latin doctrine that means that the specific law prevails over general law. In Commercial Tax Officer, Rajasthan V M/S Binani Cement Ltd. & Another the Indian Supreme court held that,

‘It is well established that when a general law and a special law dealing with some aspect dealt with by the general law are in question, the rule adopted and applied is one of harmonious construction whereby the general law, to the extent dealt with by the special law, is impliedly repealed. This principle finds its origins in the latin maxim of *generalia specialibus non derogant*, i.e., general law yields to special law...’

The Supreme Court went on and stated that,

The rule of statutory construction that the specific governs the general is not an absolute rule but is merely a strong indication of statutory meaning that can be overcome by textual indications that point in the other direction. This rule is particularly applicable where the Legislature has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions. A subject specific provision relating to a specific, defined and describable subject is regarded as an exception to and would prevail over a general provision relating to a broad subject

99. The decision in **Pevans East Africa Limited v Chairman, Betting Control & Licensing Board and Others**, HC Const. Pet. 353 of 2017, [2017] eKLR was referred in the submission that the principle of pith and substance in constitutional interpretation favour the position that the Roads Act supersedes any other county legislation.

100. The 1st Respondent submit that prayers 6 and 9 of the Petition cannot issue for it will, in all practicality, curtail legitimate performance of statutory duties under Section 49 of the Roads Act and prevent the Respondents from ensuring safety of road users, which would in turn work against public interest. Such orders would work the injustice of encouraging reckless and unchecked construction of structures on and above roads and road reserves without any legal oversight. As such, Section 49 of the Roads Act, being good law, cannot be interpreted in such a manner as to defeat Constitutional intent to reserve the regulation of National Road reserves to the national government, or to defeat the clear legislative intent in Section 49 to define the procedure for obtaining permission for usage of national road reserves from the KeNHA. This Court is urged to promote that expressed Constitutional and legislative intent, and find that KeNHA properly exercised its statutory powers under Section 49 of the Roads Act.

101. As to whether KeNHA is legally justified to issue demand to Magnate Ventures Ltd to pay annual rent for erecting 271 identified structures known as billboards along national roads and road reserves throughout the country, it is submitted that KeNHA in furtherance of Section 22 of the Roads Act rightly issued demands to Magnate Ventures Limited, to pay annual charges for permits issued under Section 49 for its 271 structures countrywide alongside national road reserves, all of which were identified and the computations given.

102. KeNHA submits that Regulation 6(1) of Part II of the Kenya Roads (Kenya National Highways Authority) Regulations 2013 prescribes the procedure for applying to the Director General for written permission to erect a structure on a road reserve. The scale of charges defined in Regulation 6(5) thereof read with Part 1A of the Schedule thereof. The fees are payable in advance. Further, under Regulation 6(8) and (9) thereof, a person shall not place any structure on a road reserve without permit issued by the Authority, and unpermitted structures shall be removed by the owner or by an of the Respondents at the owner’s cost.

103. It is further submitted that the language used in the Regulations is *dispassionate*, not distinguishing between the various kinds of structures that may possibly be erected on road reserves. It is contended that KeNHA properly issued demand to Magnate Ventures for KES 53,658,000/- as charges for using the road reserves for its structures so erected. All 271 structures and their coordinates are identified. The area covered by the structures is specified. The charges are tabulated. It is therefore improper and untrue, and plainly mischievous for the Petitioners to allege that the basis for the charges and the scales for computation, were not disclosed. The demand of KES 53,658,000/- made to Magnate Ventures Limited was proper, in exercise of statutory power under section 22 of the Kenya Roads Act read with Regulation 6 of the Kenya Roads (Kenya National Highway Authority) Regulations, 2013 and the schedule thereto, being annual charges for permits issued.

104. Distinguishing the heavily-relied on decision in **Real Deals Limited & 3 Others v KeNHA & Another** case (supra), the KeNHA raised three grounds. First, the judgment is factually distinct because in that case, the issue was whether KeNHA could invite bids or sign consultancy contracts for design, fabrication, installation, testing and commissioning of its own billboards, marketing, management and maintenance of outdoor advertising, and collect advertising fees for the use thereof. However, KeNHA in this case has no such intent to design or commission its own billboards or collect advertising fees for the use thereof. Second, the judgment is factually and legally distinct

because that Court at paragraph 79(2) and (3) of that judgment issued dispositive orders in fact affirming that KeNHA could statutorily levy charges for permits under section 49 of the Kenya Roads Act; which KeNHA has done in this case. KeNHA therefore had authority to issue the demand to Magnate Ventures Limited for KES 53,658,000/-, as it did. Third, that judgment is distinct on grounds that nowhere does it hold that KeNHA surrendered its mandate over construction, management and operation of roads and road reserves to the County Government. As such, this judgment does not render immune the Petitioners from complying with section 49 of the Kenya Roads Act, which they failed to do.

105. KeNHA, therefore, concludes that the Petition is an abuse of Court process and should be dismissed, with costs thereof awarded to the Respondents.

106. The 2nd and 3rd Respondents in their pleadings and submissions mainly reiterated the position taken by the 1st Respondent that they have the mandate pursuant to Section 49 of the Roads Act to control any development done within the roads and roads reserves which are vested in their jurisdiction. They also contend that they have powers to levy charges and fees in the course of discharging their duties.

107. Further to the aforesaid, the 2nd and 3rd Respondents while rebutting the contention by the Petitioners that the law was settled in **Real Deals Limited & 3 Others v KeNHA & Another** case (supra) on the extent of the powers under Section 49 of the Roads Act raised two grounds. First, that decision was made by a Court of concurrent jurisdiction and cannot be binding to this Court under the doctrine of *stare decisis*. They made the submission bearing to the fore that the doctrine of comity obliges this Court to respect the decisions of Judges of equal rank, but with a rider that this Court also has a duty to go further and offer its own interpretation of Section 49 of the Roads Act. On that argument, the 2nd and 3rd Respondents is guided by the Court Appeal in Mombasa Civil Appeal no 158 of 2007 **Mohamed Abushiri Mukullu v Minister for Lands and Settlement & 6 others** [2015] eKLR where the Learned Judges held as follows in regard to the principle of *stare decisis*: -

The principle of *stare decisis* requires that, although not bound to do so, the court should follow a decision of a judge of equal jurisdiction unless the decision appears to be clearly wrong. In its vertical application, a court is bound by the decisions of a court superior to it. Horizontally, while it may be desired for the sake of certainty and consistency that the court does not deviate from decisions of the courts of the same rank, decisions by courts of concurrent jurisdiction are only of persuasive nature and cannot bind the court.

108. On the second ground, the 2nd and 3rd Respondents contends that there is another decision of the High Court where the Court arrived at a different finding on the very Section 49 of the Roads Act. The decision is **Republic Versus Kenya National Highway Authority & 2others Ex Parte Amica Business Solutions** (2013) EKLR, where *Korir, J.* expressed himself as follows: -

Did KENHA in authorizing the interested parties to construct bill boards and gantries usurp the powers of the council? Going through the submissions of all the parties in these matters, it becomes clear that they are all in agreement that the power to authorize advertisements within the jurisdiction of the City of Nairobi belongs to the Council. What KeNHA did was simply to grant the interested parties permission to put up structures. The interested parties will still have to obtain permission from the Council to place advertisement on the structures. It should however be noted that it would be unreasonable for the Council to deny the interested parties the license to advertise and yet they have been granted permission to construct bill boards and gantries. I think that explains the reason why the interested parties had to first seek the consent of the Council. Whatever the case, it is clear that the KENHA did not usurp the powers of the Council in allowing the interested parties to put up the bill boards and gantries on road reserves.

109. The 2nd and 3rd Respondents reiterated that Section 49 of the Roads Act is still constitutional and has the full force of law, hence the Respondents cannot be faulted in applying it. The 2nd and 3rd Respondents prayed that the Petition be dismissed with costs.

110. The 2010 Constitution of Kenya, which is termed as progressive, changed the governance structure in Kenya in many ways. One of the ways was the introduction of devolution and devolved governments.

111. The objects of devolution are provided for in Article 174 of the Constitution. Article 175 of the Constitution provides for the principles of devolved government. The County Governments or devolved governments or devolved units are provided for in Articles 176 to 185 inclusive of the Constitution.

112. To enable the operationalization of the devolved units, the Constitution under Article 186 provides for the respective functions and powers of the National government and the County governments. **Article 186** states as follows: -

(1) Except as otherwise provided by this Constitution, the functions and powers of the national government and the county governments, respectively, are as set out in the Fourth Schedule.

(2) A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government.

(3) A function or power not assigned by this Constitution or national legislation to a county is a function or power of the national government.

(4) For greater certainty, Parliament may legislate for the Republic on any matter.

113. The Fourth Schedule to the Constitution gives the distribution of the functions and powers between the two levels of government.

114. The Petition in this matter revolves around two main functions. They are the outdoor advertising and transport. Under the Fourth

Schedule to the Constitution the control of outdoor advertising is a function bestowed upon the County governments whereas transport and communication is a function of the National government. The two functions are provided for as follows: -

PART 1 – NATIONAL GOVERNMENT

18. Transport and communications, including, in particular—

- (a) road traffic;
- (b) the construction and operation of national trunk roads;
- (c) standards for the construction and maintenance of other roads by counties;
- (d)

PART 2 – COUNTY GOVERNMENTS

3. Control of air pollution, noise pollution, other public nuisances and outdoor advertising.

115. Generally speaking, due to the nature of the functions within the two levels of government, it may occur, at times, that the discharge of a function or functions by the two governments require the same medium. In that case, Article 6(2) of the Constitution calls upon the two levels of government, which are distinct and inter-dependent, to conduct their mutual relations on the basis of consultation and cooperation. Further, in doing so, both governments are governed by the Constitution and all the other laws as provided for in Article 2 of the Constitution.

116. All the Respondents in this matter are a creation of the Roads Act. The function of outdoor advertising in the counties has, until recently, been subject to the **Physical and Land Use Planning Act**, No. 13 of 2020 (hereinafter referred to as '**the Planning Act**') and the County legislations.

117. On 28th October, 2020 the President of the Republic of Kenya assented **The County Outdoor Advertising Control Act**, No. 19 of 2020 (hereinafter referred to as '**the Advertising Act**') into law. The new law became operational from 13th November, 2020.

118. Whereas the functions of outdoor advertising and transport seem to be clear and distinct from the outset, the facts and circumstances in this Petition present a scenario where the discharge of the two functions, to an extent, require the same medium, hence, the conflict. In a nutshell, on one hand, the Respondents contend that the Roads Act gives them powers to *inter alia* control the construction, use and development of public roads including road reserves and any roadside developments. In that case, the Respondents posit that they must sanction anything (including outdoor advertising sites) which is to be erected on a public road or a road reserve. On the other hand, the Petitioner and the Interested Party argue that the Respondents have no share or at all on anything to do with outdoor advertising in the counties whether such is carried out on a road reserve or otherwise. That is, in essence, the main share of the dispute at hand.

119. In this matter, therefore, this Court is called upon to deal with the interplay between the discharge of the transport function by the National government and the discharge of the function of control of outdoor advertising by the County governments.

120. I will begin the discussion with a look at the functions of the Respondents. As said, all the three Respondents are a creation of the Roads Act. **Section 4(2)** of the Roads Act provides the functions and duties of **KeNHA** as follows: -

- a. constructing, upgrading, rehabilitating and maintaining roads under its control;
- b. controlling national roads and road reserves and access to roadside developments;
- c. implementing road policies in relation to national roads;
- d. ensuring adherence to the rules and guidelines on axle load control prescribed under the Traffic Act (Cap. 403) and under any regulations under this Act;
- e. ensuring that the quality of road works is in accordance with such standards as may be prescribed by the Minister;
- f. in collaboration with the Ministry responsible for Transport and the Police Department, overseeing the management of traffic and road safety on national roads;
- g. collecting and collating all such data related to the use of national roads as may be necessary for efficient forward planning under this Act;
- h. monitoring and evaluating the use of national roads;
- i. planning the development and maintenance of national roads;

- j. advising the Minister on all issues relating to national roads;
- k. preparing the road works programmes for all national roads;
- l. liaising and co-ordinating with other road authorities in planning and on operations in respect of roads; and
- m. performing such other functions related to the implementation of this Act as may be directed by the Minister.

121. Section 10(2) of the Roads Act provides the functions and duties of **KURA** as follows: -

- (a) constructing, upgrading, rehabilitating and maintaining roads under its control;
- (b) controlling urban road reserves and access to roadside developments;
- (c) implementing roads policies in relation to urban roads;
- (d) ensuring adherence by motorists to the rules and guidelines on axle load control prescribed under the Traffic Act (Cap. 403) and under any regulations under this Act;
- (e) ensuring that the quality of road works is in accordance with such standards as may be defined by the Minister;
- (f) in collaboration with the Ministry responsible for transport and the Police Department, overseeing the management of traffic and road safety on urban roads;
- (g) monitoring and evaluating the use of urban roads;
- (h) planning the development and maintenance of urban roads;
- (i) collecting and collating all such data related to the use of urban roads as may be necessary for efficient forward planning under this Act;
- (j) preparing the road works programmes for all urban roads;
- (k) liaising and co-ordinating with other road authorities in planning and on operations in respect of roads;
- (l) advising the Minister on all issues relating to urban roads; and
- (m) performing such other functions related to the implementation of this Act as may be directed by the Minister.

122. The functions and duties of **KeRRA** are provided for in **Section 7(2)** of the Roads Act as follows: -

- (a) constructing, upgrading, rehabilitating and maintaining roads under its control;
- (b) controlling reserves for rural roads and access to roadside developments;
- (c) implementing road policies in relation to rural roads;
- (d) ensuring adherence by motorists to the rules and guidelines on axle load control prescribed under the Traffic Act (Cap. 403) or any regulations under this Act;
- (e) ensuring that the quality of road works is in accordance with such standards as may be defined by the Minister;
- (f) in collaboration with the Ministry responsible for Transport and the Police Department, overseeing the management of traffic on rural roads and issues related to road safety;
- (g) collecting and collating all such data related to the use of rural roads as may be necessary for efficient forward planning under this Act;
- (h) monitoring and evaluating the use of rural roads;

- (i) planning the development and maintenance of rural roads;
- (j) liaising and co-ordinating with other authorities in planning and operations in respect of roads;
- (k) preparing the road work programmes for all rural roads;
- (l) advising the Minister on all issues relating to rural roads; and
- (m) performing such other functions related to the implementation of this Act as may be directed by the Minister.

123. It is not difficult for one to note the similarity in the functions and duties of the three Respondents. The difference is the mandate of each of the Respondents. For instance, KeNHA is responsible for the management, development, rehabilitation and maintenance of *national roads*. KURA is responsible for the management, development, rehabilitation and maintenance of *rural roads* while KeRRA is responsible for the management, development, rehabilitation and maintenance of all roads *public roads in the cities and municipalities* in Kenya except where those roads are national roads.

124. Of key importance to this matter is the duty of each of the Respondents *to control their respective road reserves and access to roadside developments*. **Section 49(1) and (2)** of the Roads Act amplifies the duty of control as follows: -

(1) Except as provided in subsection (2), no person or body may do any of the following things without the responsible Authority's written permission or contrary to such permission—

- (a) erect, construct or lay, or establish any structure or other thing, on or over or below the surface of a road reserve or land in a building restricted area;
- (b) make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or
- (c) give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.

(2) An Authority may, in its discretion, give or refuse to give permission under this section.

125. Suffice to say that the Respondents herein are the agents of the National government charged with the duty of *partly* discharging the transport function under Part 1 Item 18 of the Fourth Schedule of the Constitution.

126. The preamble of the Advertising Act states that it is an Act of Parliament to provide for a legal framework for the regulation of outdoor advertisement in the counties; and for connected purposes. Section 23 of Advertising Act amends Section 3 of the Physical Planning Act by removing the definitions of “advertisements” and “development”. As such, and without any doubt, the devolved function of control of outdoor advertising is solely entrenched in County governments.

127. From the record, the Respondents are categorical that they have no concern to any forms of outdoor advertising that are undertaken anywhere else within any counties except those outdoor advertising sites which are erected and maintained on roads and road reserves.

128. It is of essence to note that it is the Constitution that donates both the transport function to the National government and the control of outdoor advertising to the County governments. Both functions are, hence, at par.

129. Given the power of control donated to the Respondents and the power of control to the County governments, there is the need to ascertain the meaning of the word ‘*control*’.

130. According to the **Black’s Law Dictionary**, 10th Edition, Thomson Reuters at page 403, ‘*control*’ is defined as follows: -

The direct or indirect power to govern the management and policies of a person or an entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee.

131. It, therefore, means that County governments have the power or authority to manage, direct, or oversee all outdoor advertising activities. It also means that the Respondents have the power or authority to manage, direct, or oversee the erection, construction or laying, or establishment of any structure or other thing, on or over or below the surface of a road or a road reserve or land in a building restricted area. Further, the Respondents have the power or authority to manage, direct, or oversee and make any structural alteration or addition to a structure or that other thing situated on or over, or below the surface of a road or road reserve or land in a building restriction area; or to give permission for erecting, constructing, laying or establishing, any structure or that other thing on or over, or below the surface of, a road or road reserve or land in a building restriction area, or for any structural alteration or addition to any structure or other thing so situated.

132. Deriving from the foregoing and restricting myself to the erection and maintenance of outdoor advertising sites on road reserves, I take

the position that both the County governments and the National government (through the Respondents as its agents) have distinct functions and duties to discharge. Therefore, a person who intends to erect and maintain an outdoor advertising site on a road reserve in Kenya must first seek and obtain a licence from the respective County government and also seek and obtain a permit from the respective Respondent as the case may be.

133. For clarity, the licence to be sought by a person who intends to erect and maintain an outdoor advertising site on a road reserve from the County governments shall *inter alia* be in line with the Advertising Act and any other relevant County legislation. The permit to be sought from the respective Respondents shall be in line with *inter alia* the Roads Act and any Regulations made thereunder.

134. The above position seems to be well known to and is shared by members of the Petitioner. I say so on the strength of a letter by KeNHA's Director General addressed to Magnate Ventures Limited, one of the members of the Petitioner. The letter is dated 1st March, 2018. The letter is in response to a request made by Magnate Ventures Limited for a renewal permit for maintenance of its Billboards on various classified roads in Kenya.

135. The letter partly reads as under: -

We refer to your application letter ref no. MVL/Billboards renewal/KENHA/01/2017 dated 7th December, 2017 together with the attached layout drawings on the above subject.

We have reviewed your application and design drawings and we are processing your request.

136. The position is also shared by the Judges in the two decisions of ***Real Deals Limited & 3 Others v KeNHA & Another*** case (supra) and in ***Republic Versus Kenya National Highway Authority & 2others Ex Parte Amica Business Solutions*** case (supra) which were extensively referred to by the parties.

137. Odunga, J in ***Real Deals Limited & 3 Others v KeNHA & Another*** case (supra) held and declared as follows: -

2. A declaration that Section 49(3) of the Kenya Roads Act does not confer upon the 1st Respondent [KeNHA] the power or authority to levy charges or exercise any control over outdoor advertisements on road reserves or abutting areas save for the charges relating to permission to undertake its mandate thereunder.

138. In making the declaration, the Learned Judge was clear that KeNHA has the power or authority to exercise control over outdoor advertisements on road reserves or abutting areas, but only to the extent that the control is limited to the permission which KeNHA is to grant under Section 49 of the Roads Act.

139. Korir, J in ***Republic Versus Kenya National Highway Authority & 2others Ex Parte Amica Business Solutions*** case (supra) was more straight-forward in stating that: -

Did KENHA in authorizing the interested parties to construct bill boards and gantries usurp the powers of the council? Going through the submissions of all the parties in these matters, it becomes clear that they are all in agreement that the power to authorize advertisements within the jurisdiction of the City of Nairobi belongs to the Council. What KeNHA did was simply to grant the interested parties permission to put up structures. The interested parties will still have to obtain permission from the Council to place advertisement on the structures. It should however be noted that it would be unreasonable for the Council to deny the interested parties the license to advertise and yet they have been granted permission to construct bill boards and gantries. I think that explains the reason why the interested parties had to first seek the consent of the Council. Whatever the case, it is clear that the KENHA did not usurp the powers of the Council in allowing the interested parties to put up the bill boards and gantries on road reserves.

140. This Court, therefore, finds that the National government and the County governments have concurrent responsibilities towards a person who intends to erect and maintain an outdoor advertising site on a road or a road reserve in Kenya. Hence, a person who intends to erect and maintain an outdoor advertising site on a road or a road reserve must seek and obtain a licence from the respective County government and also a permit from KeNHA, KURA or KeRRA as the case may be.

141. I will now consider whether the Respondents have the power to levy rental charges or other charges on the outdoor advertising sites erected and mounted on roads or road reserves in Kenya.

142. The Respondents rely on Section 22(2)(d) of the Roads Act as the basis for charging rent on the advertising sites on roads and road reserves. The Petitioner contends to the contrary.

143. The power of the Respondents to charge rent over its properties is provided for under **Section 22(2)(d) and (f)** of the Roads Act. The provisions state as follows: -

2. Subject to this Act, the powers conferred by, subsection (1) shall include all such powers as are necessary or appropriate and proper for the purposes of the Authority and in particular, but without prejudice to the generality of the foregoing, shall include powers—

a. with the approval of the Minister, to determine, impose and levy rates, tolls, charges, dues or fees for any of its services or for the use by any person of its facilities;

b.

c. to sell, let or otherwise dispose of any property, movable or immovable, which in the opinion of the Board, is not necessary for the purposes of the Authority:

Provided that an Authority shall not so sell, let or otherwise dispose of any building or land placed at its disposal by the Government otherwise than with the consent of, and under conditions agreed by, the Minister;

144. From the foregoing provisions, it comes out that the Respondents may lease their properties upon fulfilment of the following conditions, that is: -

(i) The property to be let is vested in the Respondent;

(ii) A resolution of the Respondent's Board that the property to be let is not necessary for the purposes of the Respondent;

(iii) A ministerial consent approving the leasing;

(iv) There must be appropriate rates or fees thereof duly approved by the Minister [read Cabinet Secretary].

145. I will apply the above conditions to this matter. On the first condition, suffice to say that a Respondent can only demand rent upon proof of legal ownership of the property in issue. In this case the properties are the roads and road reserves.

146. Upon creation, the Respondents were to take over various functions and be vested with the properties to enable them discharge their duties. That led to the passage of the respective **Vesting Orders**. They were the *Kenya Roads (Kenya National Highways Authority) (Vesting) Order, 2011* vide Legal Notice No 193 of 2011 for KeNHA, the *Kenya Roads (Kenya Urban Roads Authority) (Vesting) Order, 2011* vide Legal Notice No. 194 of 2011 for KURA and the *Kenya Roads (Kenya Rural Roads Authority) (Vesting) Order, 2011* vide Legal Notice No. 195 of 2011 for KeRRA.

147. The vesting orders have similar provisions save for the functions of the Respondent and the Schedule of the property vested in each of the Respondents. Section 3 of each of the Vesting Orders states as follows:

Notwithstanding anything contained in any other law for the time being in force, all [.....] roads and all their related road reserves throughout the country, as respectively specified in the Schedule and all on-going contracts and consultancy with respect to the [.....] roads, that were immediately before the transfer and vesting date vested in the Ministry of Roads under the Roads Department shall, with effect from that date be deemed to have transferred and vested in the Authority;

148. The date on which the properties were vested on the Respondents is provided in Section 2 of each Orders as 7th September, 2007. Therefore, as from the 7th September, 2007 the Respondents were lawfully vested with, *inter alia*, all the roads and all their related road reserves throughout the country, as respectively specified in the Schedules of each vesting order.

149. The Respondents did not, in this case, avail any evidence to prove that the advertising sites mounted by the members of the Petitioner are on the road reserves vested upon any of them.

150. The second condition relates to the resolution of the Respondents' Boards of Directors that the property to be let is not necessary for the purposes of the Respondents. I did not come across such a resolution on the record. The third condition is the ministerial consent approving the leasing. Again, none of the Respondents availed such evidence. On the fourth condition, the Respondents did not produce the requisite approved Schedule of the rental fees.

196. Suffice to say that the burden of proof in cases is provided under Sections 107(1), (2) and 109 of the **Evidence Act**. The provisions state as follows: -

1. Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

and

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

151. Having said so, I must also point out that the position that the Respondents can lease their properties is buttressed further by the provision of **Section 4(2)(b)** of the Advertising Act. The provision states as follows: -

2. An application for an outdoor advertising licence shall be in the prescribed form and shall be submitted together with —

(b) **the written consent of the owner of the site or any other person with an interest in the site entitled to give consent;**

152. The Advertising Act recognises the cardinal point that an outdoor advertising site must either have an owner or a person with an interest on it. It is that person who must then consent to the erection and maintenance of the advertising site. Such a person may grant the consent on conditions including rental payments or otherwise.

153. It is worth-noting that none of the decisions in *Real Deals Limited & 3 Others v KeNHA & Another* case (supra) and *Republic Versus Kenya National Highway Authority & 2 others Ex Parte Amica Business Solutions* case (supra) dealt with the issue of the power of the Respondents to levy rental charges on outdoor advertising sites on roads and road reserves.

154. Having said so, this Court finds that the Respondents have the power to levy rental charges in respect of its legally vested properties whether such properties are used for outdoor advertising purposes or otherwise as long as all the conditions in Section 22(2)(d) and (f) of the Roads Act are fulfilled.

155. In this case, the Respondents have failed to prove compliance with the conditions in Section 22(2)(d) and (f) of the Roads Act. As such, the claim for rental charges by the 1st Respondent lacks any legal leg to stand on and is hereby disallowed.

156. As a recap, this Court finds that a person who intends to erect and maintain an outdoor advertising site on a road or a road reserve must seek and obtain the licence of the respective County government and also obtain a permit from KeNHA, KURA or KeRRA as the case may be. The Court further finds that the Respondents do not have powers to levy any charges against any person seeking to erect and maintain an outdoor advertising site on a road or a road reserve except such charges for processing the permit under Section 49 of the Roads Act. Further, and in appropriate cases, the Respondents have the power to levy charges towards granting consent for use of the roads or road reserves as outdoor advertising sites if such roads or road reserves are vested in the Respondents. Again, all lawful fees and charges capable of being levied by the Respondents must be in compliance with the law. The Respondents also have the power to, upon complying with Section 22(2) (d) and (f) of the Roads Act, lease their properties.

Conclusions:

157. The Petition partly succeeds. Whereas the Respondents' preliminary objection is unsuccessful, the Respondents have, nevertheless managed to prove that they have the power to control the erection and maintenance of outdoor advertising sites on the roads and road reserves. They have also managed to demonstrate that the Respondents have the power to levy charges for processing of the permit under Section 49 of the Roads Act as well as charges for granting consent for the use of the roads and road reserves as advertising sites. The Respondents have also proved that they have the power to lease their properties. However, the Respondents failed to show how they are entitled to any rental charges in the circumstances of this case.

158. In the end, therefore, the conclusions and findings of the Court are as follows: -

(i) That human rights and fundamental freedoms can never be waived or acquiesced to by a person unless there is such enormous and unexplained delay in enforcement.

(ii) Statutory limitations do not apply to Petitions claiming infringement or threat to infringement of human rights and fundamental freedoms. A party, however, must account for the time between the alleged infringement or threat of infringement of the human rights and fundamental freedoms and the filing of the claim.

(iii) The National government and County governments have concurrent responsibilities under the Kenya Roads Act and the County Outdoor Advertising Control Act respectively towards a person who intends to erect and maintain an outdoor advertising site on a road or a road reserve in Kenya.

(iv) A person who intends to erect and maintain an outdoor advertising site on a road or a road reserve must seek and obtain a licence from the respective County government and must, as well, seek and obtain a permit from the Kenya National Highways Authority, the Kenya Urban Roads Authority or the Kenya Rural Roads Authority, as the case may be.

(v) A person who intends to erect and maintain an outdoor advertising site on a road or a road reserve must seek and obtain written consent of the owner of the site or any other person with an interest in the site entitled to give such consent.

(vi) The Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority have powers to levy charges or fees for the issuance of a permit under Section 49 of the Kenya Roads Act.

(vii) The Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority have powers to *inter alia* lease and levy rental charges in respect of their respective legally vested properties whether such properties are used for outdoor advertising purposes or otherwise as long as all the conditions in Section 22(2)(d) and (f) of the Kenya Roads Act are fulfilled.

(viii) The claim for rental charges by the Kenya National Highways Authority against Magnate Ventures Limited fails on account of failure by the Kenya National Highways Authority to prove that the sites where the outdoor advertisements are erected and maintained by Magnate Ventures Limited in Kenya are legally vested to itself. The claim also fails on account of lack of a resolution of the Board of Directors of the Kenya National Highways Authority affirming that any of its properties which are used as sites for

outdoor advertisements are not necessary for the purposes of carrying out the functions and duties of KeNHA. Further, the Kenya National Highways Authority did not seek and obtain the ministerial consent approving the leasing of any of its properties and lastly, Kenya National Highways Authority did not produce the requisite approved Schedule of rental fees.

Disposition

159. Flowing from these findings and conclusions, the disposition of the Petition dated 5th February, 2020 is as follows: -

a. A declaration is hereby issued that statutory limitations do not apply to Petitions claiming infringement or threat to infringement of human rights and fundamental freedoms. A party, however, must account for the time between the alleged infringement or threat of infringement and the filing of the claim.

b. A declaration is hereby issued that the Petitioner, its members or any person who intends to erect and maintain an outdoor advertising site on a road or a road reserve must seek and obtain a licence from the respective County government, a permit from the Kenya National Highways Authority, the Kenya Urban Roads Authority or the Kenya Rural Roads Authority, as the case may be, and written consent of the owner of the site or any other person with an interest in the site entitled to give such consent.

c. A declaration is hereby issued that the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority have powers to levy charges or fees for the issuance of a permit under Section 49 of the Kenya Roads Act.

d. A declaration is hereby issued that the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority have powers to *inter alia* lease and levy rental charges in respect of their respective legally vested properties (including roads and road reserves) whether such properties are used for outdoor advertising purposes or otherwise as long as all the conditions in Section 22(2)(d) and (f) of the Kenya Roads Act are fulfilled.

e. An order of judicial review by way of *Certiorari* be and is hereby issued to bring into this Court and quash the directive made by the Kenya National Highways Authority on 1st March, 2018 demanding a sum of Kshs. 53,658,000/= from Magnate Ventures Limited on account of annual rent on the outdoor advertising sites erected and maintained by Magnate Ventures Limited all over the country.

f. The Petitioner or its members who have erected and maintained outdoor advertising sites on roads and road reserves in Kenya shall obtain permits from the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority, as the case may be, within 90 days of this judgment. To that end, the Petitioner or its members shall lodge their applications with Kenya National Highways Authority, Kenya Urban Roads Authority and Kenya Rural Roads Authority, as the case may be, within 45 days of this judgment. The applications shall be considered and determined within 45 days of lodging.

g. In the event the Petitioner or its members who have erected and maintained outdoor advertising sites on roads and road reserves in Kenya fail to obtain the requisite permits in (f) above, they shall remove their respective outdoor advertising sites on the roads and road reserves within 30 days and in default the Kenya National Highways Authority, the Kenya Urban Roads Authority and the Kenya Rural Roads Authority, as the case may be, shall forthwith remove such sites and the costs incurred be paid by the respective Petitioner or its members.

h. Pending the outcome of orders (f) and (g) above, the directives variously issued by the Kenya National Highways Authority and the Kenya Urban Roads Authority on the removal of the outdoor advertising sites erected and maintained by the Petitioner or its members on the roads and road reserves in Kenya be and are hereby stayed.

i. The Bank Guarantees shall remain in force pending further orders of the Court.

j. As the Petition has partially succeeded, each party shall bear its own costs.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 1ST DAY OF JULY, 2021

A. C. MRIMA

JUDGE

Judgment virtually delivered in the presence of:

No appearance for Mr. Nelson Havi, Learned Counsel for the Petitioner.

Mr. Evans Ochieng, Learned Counsel for the 1st Respondent.

Mr. Kuria Thande, Learned Senior State Counsel instructed by the Honourable Attorney General for the 2nd and 3rd Respondents.

No appearance for Mr. Lawi, Learned Counsel for the Interested Party.

Elizabeth Wambui – Court Assistant