



IN THE HIGH COURT AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO. 513 OF 2013

BETWEEN

IKON PRINTS MEDIA COMPANY LIMITED PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY..... 1ST RESPONDENT

COUNTY GOVERNMENT OF NAIROBI2ND RESPONDENT

CABINET SECRETARY FOR TRANSPORT AND

INFRASTRUCTURE DEVELOPMENT..... 3RD RESPONDENT

JUDGMENT

Introduction

1. The gravamen of the petitioner's case is that on the night of 28th/29th October 2013, officers from the 1st respondent, Kenya National Highways Authority ("KeNHA"), with the assistance of officers from the 2nd respondent, the County Government of Nairobi ("the County") and the 3rd respondent raided the petitioner's gantry installed along Waiyaki Way (A104) at Toyota Westlands near Safaricom ("the Waiyaki Way gantry"). Using heavy construction equipment and acetylene torches, they cut through the structure and brought it down. The petitioner states that as a result it suffered loss and damage which it now claims.
2. The petitioner's case is that its fundamental rights and freedoms under the Bill of Rights including the right to the protection of property and to fair administrative action guaranteed under **Articles 40 and 47(1)** of the Constitution respectively were violated when its advertising gantry was demolished and destroyed by the respondents acting together without notice.
3. In amended petition dated 25th February 2014, the petitioner seeks the following reliefs:
 - a. *A declaration that the judgment of the court delivered R v. Kenya National Highway Authority, City Council of Nairobi ex-parte Amica Business Solutions JR Case No. 246 of 2012; R v. Kenya National Highway Authority ex-parte Real Deals Limited JR Case No. 202 of 2012 and Look Media Limited & Others vs. Kenya National Highway Authority & Others Petition Number 245 of 2012 is binding on the 1st, 2nd and 3rd Respondents.*
 - b. *A declaration that the actions of the respondents in pulling down the gantries erected by the*

- petitioner at Toyota Westlands near Safaricom along Waiyaki Way (A104) violated the rights of the petitioner under Articles 27, 40 and 47 of the Constitution.*
- c. The respondents be strictly enjoined and restrained whether by themselves or by their servants, agents or otherwise howsoever from interfering with and/or removing any gantry and/or advertisements displayed on such gantry structures erected by the Petitioner along Mombasa Road near Bobmill Industries (A2), on Uhuru Highway (A104) near Nakumatt Mega Supermarket, at Nyayo Stadium near Mvuli Hotel along Lang'ata Road (C 58), at Uchumi Hyper opposite Dame Estate along Lang'ata Road (C 58), at Pangani Junction near Pangani Police Station along Thika Road (A2), Thika Road (A2) near Allsops and Uhuru Highway (A104) near University of Nairobi Tunnel and any other with respect to which the Petitioner has erected gantries.*
 - d. A declaration that the 1st and 2nd Respondents refusal to assess and accept the Petitioner's annual fees is unreasonable, malicious and an abdication of public duty.*
 - e. An order that the 1st and 2nd respondents do forthwith accept payment of the petitioner's annual fees failing which the petitioner deposits the said fees in court.*
 - f. Kshs. 42,778,313/= being the restitution and replacement value of the Waiyaki Way gantry demolished by the Respondents*
 - g. Kshs. 82,002,780/= being lost profits for 3 years from the Waiyaki Way gantry.*
 - h. Compensatory damages of the said violation of the petitioner's constitutional rights*
 - i. Exemplary damages*
 - j. Interest on (f) (g) (h) and (i) above at court rates*
 - k. Such other and further relief as this Honourable court may deem fit to grant*
 - l. An order that the costs of and occasioned by this petition be borne by the 1st and 2nd respondents*

Petitioner's Case

4. The petitioner ("IKON") is a company involved in advertising. It avers that it introduced into the Kenya market the idea of constructing gantries mounted with digital and ultra-wave advertising boards along major highways in Kenya. A gantry is a heavy steel structure constructed in such a way that it straddles the road or highway and is used to display advertising.
5. IKON avers that by a letter dated 10th November 2011, KeNHA granted it conditional approval for construction of gantries at various locations within Nairobi for a period of 5 years from 10th November 2011 subject to the conditions contained therein. By a letter dated 12th April 2012, KeNHA granted it approval to erect gantries along Mombasa Road (A 104) near Bobmill Industries next to Vision Plaza and Uhuru Highway (A 104) near Nakumatt Mega. It adds that by a letter dated the 13th April 2012, KeNHA notified the City Council of Nairobi that it had reviewed the petitioner's application and technical drawings and granted approval for the construction of the billboards on the identified road reserves, which, according to KeNHA was within its mandate. It further states that it sought and obtained approvals from the County and the National Environment Management Authority (NEMA) to erect the gantries.
6. In the course of erecting the gantries, IKON's work was halted as a result of orders issued by the High Court in the following consolidated cases: **Republic v Kenya National Highway Authority, City Council of Nairobi ex-parte Amica Business Solutions HCJR No. 246 of 2012** and **Republic v Kenya National Highway Authority, City Council of Nairobi ex-parte Real Deals Limited HCJR No. 245 of 2012 ("HCJR No. 246 of 2012")**. The applicants in those cases challenged the authority of KeNHA and the County to grant licences for the erection of gantries and advertising. These consolidated matters were heard and dismissed on 8th March 2013.
7. After the cases were dismissed, IKON resumed and completed the works on the Waiyaki Way gantry. IKON avers that on 28th/29th October 2013 the respondents jointly and severally demolished the said gantry without notice.
8. IKON complains that since the gantry was brought down it has not received any communication

from the respondents. It avers that the only official communication regarding the incident was a statement posted on the KeNHA Facebook page in which it apologised to the public for the inconvenience caused by its failure to remove the unauthorised bill board structure from Waiyaki Way before the morning traffic.

9. IKON claims damages amounting to Kshs 42,778,813/= being the replacement value of the gantry. It states that it invested a substantial amount of money as the gantry was unique and built using specialized engineering work. It also claims Kshs 82,002,780/= being advertising revenue from a three year advertising contract with East African Breweries Limited (EABL) which it lost as result of the demolition.

The 1st Respondent's Case

10. On its part, KeNHA denies liability for the petitioner's claim. It admits that it granted IKON approval to erect gantry structures at various locations within Nairobi subject to conditions prescribing the specifications, manner and circumstances of erection and obligations to be fulfilled by the petitioner.
11. KeNHA avers that the letter dated 12th April 2012 addressed to IKON approved the applications it had received to erect gantry signs in several locations within Nairobi for a period of one (1) year subject to the conditions set out in the letter. However, it states that IKON breached the conditions of approval.
12. As a result of the breach, KeNHA directed IKON to stop further work by a letter dated 15th June 2012. It states that prior to that letter being issued, its Director General had sent email messages to IKON's General Manager ordering it to stop erecting advertising boards which were being erected without supervision.
13. KeNHA avers that as a result of IKON's breach of the approval conditions, it published a notice on 17th December 2012 in the newspapers informing the public and parties concerned, including IKON, of the intended removal of all bill boards and other advertising structures on road reserves constructed without its authority. It states that the notice was issued pursuant to **section 49** of the **Kenya Roads Act**.
14. KeNHA avers that after issuing the notice it removed the gantry erected by IKON in accordance with its powers under **section 49** of the **Kenya Roads Act**. It maintains that IKON failed to comply with conditions of approval and as such it cannot claim that it was not given sufficient notice when notice was issued in accordance with the **Kenya Roads Act**.
15. KeNHA asserts that it adhered to its statutory mandate which entitled it to remove the unauthorised gantry after the 30 day notice was issued. It maintains that IKON failed to take any steps to contest the notice issued on the 17th December 2012.

2nd Respondent's Case

16. The County's position is that neither it nor its predecessor, the City Council, have the power or mandate to approve construction of gantries or any structures on road reserves as this is an exclusive statutory mandate of KeNHA. It states that by a letter dated 21st March 2012, it advised IKON that its role was to approve the component of display of advertising and not the structure constructed overhanging the highway. It directed IKON to submit schematic drawings of the proposed gantries to KeNHA before seeking its approval. The County states that to its knowledge no approval was issued to IKON to commence advertisement on the gantries even if the construction thereof was sanctioned by KeNHA.
17. The County denied that it was involved in the raid and felling of the Waiyaki Way gantry.

The 3rd Respondent's Case

18. The Ministry denied any involvement in the activities of 28th/29th of October 2013.

Issues for determination

19. The parties filed affidavits and written submissions in support of their respective positions. They also called witnesses who reiterated what they had stated in their depositions. IKON called Chukwuma Nduche, its General Manager and Alfred Ingida Aluvala, a building economist. Amos Otwal Olali, the Assistant Divisional Fire Officer, testified on behalf of the County. Engineer Okech Omer and Engineer Monica Abonyo gave evidence on behalf of KeNHA while Engineer John Ikuru testified on behalf of the Ministry.

20. The parties in the testimony rehashed the facts I have outlined above. It is apparent that contest between the parties relates to the legal effect of the documents giving IKON authority to construct the gantry. I shall refer to aspects of the depositions, testimony and submissions where relevant in my analysis.

21. IKON's core complaint is that the Waiyaki Way gantry was removed without prior notice in a manner that violated its fundamental rights and freedoms contrary to **Article 40** and **47(1)** of the Constitution.

22. Before I proceed any further, it is necessary to stipulate that under the **Kenya Roads Act, 2007**, KeNHA is the statutory body in control of road reserves within its jurisdiction and its authorisation or permission must be sought before any construction is undertaken on a road reserve. **Section 49(1)** of the **Act** provides as follows;

49(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.*

23. KeNHA's authority was affirmed by the court in the judgment issued in **HCJR No. 246 of 2012**. In the judgment Korir J., stated that, "[Section 49 of the Kenya Roads Act] gives KeNHA the power to grant the interested parties the authority to construct billboards and gantries on road reserves."

24. In prayer (a) of the amended petition, IKON seeks a declaration that the judgment of the court delivered on 8th March 2013 in **HCJR Case No. 246 of 2012** is binding on KeNHA and the County. In my view, the declaration is unnecessary as the judgment of the court is very clear and there is no need for a further declaration to declare what the court has already declared.

25. KeNHA does not deny that it authorised IKON to put up its gantries at various locations within Nairobi. The evidence on this issue is contained in correspondence exchanged between IKON and KeNHA.

26. By a letter dated 19th August 2011, IKON made an application to KeNHA for the installation of gantries on road reserves. KeNHA responded by a letter dated 10th November 2011 titled,

“APPROVAL TO ERECT BILLBOARDS AND GANTRY SIGNS ALONG KENYA NATIONAL HIGHWAY AUTHORITY’S RESERVES.” In the letter KeNHA stated that it had no objection to the proposed installation of billboards and gantry signs in the proposed locations. The approval was valid for a period of 5 years subject to compliance with several conditions to be complied with therein.

27. More specifically and as regards the Waiyaki Way gantry, KeNHA gave its authority by the letter dated 19th April 2012 following receipt of drawing and design calculations from IKON. According to the letter, the approval was valid for 1 year from the date of acknowledgment of the letter and subject to the terms and conditions stated therein including making certain payments. Following the letter, KeNHA acknowledged receipt of payments by issuing receipts dated 22nd May 2012.

28. In light of the aforesaid stipulations, the issue in contention arises from the relationship between IKON and KeNHA regarding the erection of the gantries. For reasons that are apparent, I will focus on the Waiyaki Way gantry and therefore the main issue for resolution is whether IKON breached the terms of approval and the whether as a result of the breach, KeNHA was entitled to remove Waiyaki Way gantry in exercise of its statutory of authority.

29. I shall thereafter consider the extent of liability of the County and the Ministry and whether the petitioner is entitled to the prayers sought.

Violation of terms of approval and consequences

30. The particulars of breach of the conditions of approval are contained in the letter dated 19th April 2012 and are crystallised in the replying affidavit of Engineer Joseph Khisa sworn on 14th November 2013 and are as follows;

i. *Condition No. 3*

The implementation programme program shall be submitted to the undersigned [General Manager] before works begin to enable timely monitoring of foundation excavations to minimize damage to the pavement.

ii. *Condition No. 4*

During construction, the distances/offsets indicated on the drawings shall be correctly set out on the ground and checked/approved by the Regional Manager, Nairobi Region who is hereby appointed as the Engineer’s Representative before construction starts.

iii. *Condition No. 7*

The level of workmanship shall be to the highest standards and to the satisfaction of the Engineer’s representatives.

iv. *Condition No. 13*

The works shall only be carried out in the presentence of the Engineer’s Representative or assignee and you undertake to provide transport to and from the works for the Engineer’s Representative/assignee.

v. *Condition No. 18*

Notify the Engineer’s representatives, of the date you intend to carry out these works for the necessary supervision to be provided.

31. After the judgment in *HCJR Case No. 246 of 2012* was delivered on 8th March 2013, IKON took steps to resume work on the Waiyaki Way gantry. Mr Nduche testified that IKON decided to review the projects with their contractors. He therefore set up a meeting with the Director General of KeNHA, Engineer Kidenda and the General Manager, Engineer Omer, who was in charge of the project. He stated that IKON was instructed to come up with a work plan and it was agreed that a meeting be held with the regional manager, Engineer Monica Abonyo. He further testified that Engineer Ndalu was re-assigned to supervise the project and Engineer Abonyo also requested for the detailed work plan which he sent via email. He stated that upon approval of the workplan, work commenced on the Waiyaki Way gantry and was completed on 28th October 2013.
32. On 29th October 2013, between 12.45 am and 1.00 am, he received a call from the electrical contractor at site informing him that the security man had been chased away by a very large number of people who came with cars, trucks, cranes and welding material. He went to the site and found the Highway towards Kangemi had been blocked by pickup vehicles. There were people directing vehicles to the service lane and he saw the vehicles had green licence plates and County logos. When he reached the site he was shocked by the large number of people trying to cut the gantry steel columns using acetylene gas and welding equipment. A crane was being used to hold the gantry to prevent it from falling. There were County fire engines at the site. He also saw a low load truck blocking the road with the inscription "Ministry of Transport." He left the scene at about 3.00 am. When he visited the site the following day at about 11.00 am, the team was still there removing the gantry.
33. Mr Nduche maintained that KeNHA did not give IKON any notice, either officially or unofficially, and that it did not receive any phone call or communication regarding the matter.
34. Monica Abonyo, a registered Engineer, testified on behalf of KeNHA. She was the KeNHA regional manager in charge of maintenance works in Nairobi Region. She denied that there was a meeting at their Industrial Area offices, Nairobi between her and Mr Nduche regarding the resumption of work by IKON after the judgment was delivered on 8th March 2013,. She testified that on the date of the alleged meeting, 2nd April 2013, she was attending a senior management course at the Kenya School of Government. She stated that the course was scheduled from 11th March until 5th April 2013. She produced evidence that on 2nd April 2013 she was sitting examinations.
35. In cross-examination, Engineer Abonyo, stated that she was not aware that IKON had been given approval for the project although the approval letters of the projects within her jurisdiction were copied to her office as the regional manager. She denied that she was aware that construction of the Waiyaki Way gantry was ongoing. She stated although she had problems with IKON she did not write any letters to IKON or discuss the problems with them. She stated that she became aware that IKON was doing unauthorised construction in April 2012 as it was putting up the Waiyaki Way gantry without supervision.
36. Engineer Okech Omer, the General Manager Planning, testified that he was responsible for management of road reserves under the authority of KeNHA. He stated that the approval for the Waiyaki Way gantry was granted by the letter dated 19th April 2012 subject to the conditions referred to therein. He noted that concerns had been raised about the Mombasa Road gantry due to stoppage of traffic without authority and lack of supervision. He referred to the Replying Affidavit of Eng. Joseph Khisa which contained the letters written to IKON regarding violation of approval conditions.
37. Engineer Omer testified that the approval of 19th April 2012 was expected to expire on or about 18th April 2013 and that the 6 month period for IKON to put up the gantry under Condition 20 expired on or about 18th October 2012. He contended that IKON was expected to apply for extension in writing 3 months before October 2012.

38. Engineer Omer denied that he had a meeting with Mr Nduche on 2nd April 2013 or that he received the email sent by him containing the workplan for resuming work to complete the Waiyaki Way gantry. He testified that on the material day he spent entire day at the IOM offices and later at Nairobi Hospital taking his mother for medical tests to enable her emigrate to Canada.
39. Engineer Omer stated that he hardly communicated through the email address *kenha.co.ke* as it was not working and that he communicated on his yahoo email address as he had done in the past with Mr Nduche. He also confirmed that there was no meeting with Engineer Abonyo and that IKON never submitted a hard copy of the workplan hence approval to resume could never have been granted.
40. Engineer Omer maintained that the works on the Waiyaki Way gantry were not supervised as required by the conditions of approval. He stated that there was no record of IKON ever procuring supervision. He contended that the approval had lapsed in October 2012 and when KeNHA discovered the structure in November 2012, it set out to address those who had illegally placed structures on the road reserves by issuing the notice of 17th December 2012. As IKON did not send an application for extension when the approval lapsed, it removed the gantry.
41. Despite the various contentions by the parties, it must be recalled that the substantial issue is whether IKON's right to fair administrative action was violated. The right to fair administrative action is about procedural fairness hence the court investigates the process followed rather than the substance of the complaints. The question then is whether KeNHA gave notice of the breaches it alleges after it had cleared IKON to construct the Waiyaki Way gantry in May 2012.
42. KeNHA refers to instances where it notified IKON of breaches it had committed. The first communication referred to is an email dated 26th May 2012 from Engineer Omer addressed to IKON and the subject is "*ORDER TO STOP ERECTION OF ADVERTISING BOARDS ON KENHA ROADS.*" The email communication stated that, "*We understand you are erecting advertising boards on Mombasa Road without supervision, and that you have closed a section of Mombasa Road A 104 without authority. You must stop forthwith whatever work you are doing and confirm to the Director General Kenya National Highways Authority*" This email communication did not refer to the Waiyaki Way gantry which was the subject of a separate approval. At the time it was sent, IKON had just made payment for the Waiyaki Way gantry on 22nd May 2012 and was set to commence works thereafter.
43. The second communication referred to by Engineer Omer was the letter dated 15th June 2012 in which he addressed IKON on "*ERECTION OF GANTRY SIGNS ALONG MOMBASA ROAD (A104).*" This letter did not deal with the Waiyaki Way gantry. It requested IKON to stop works on the Mombasa Road site until further advised to enable the parties consult on the possibility of converting some of the proposed structures to footbridges to address road safety issues along the highway. It is therefore not relevant to these proceedings.
44. Furthermore, when the letter dated 15th June 2012 was issued, work on the Waiyaki Way gantry could not proceed as a result of the filing of **HCJR No. 246 of 2012** by other advertisers challenging the authority of KeNHA to permit and or authorise structures on road reserves. The cases against the KeNHA and the County were filed in May and June 2012 and interim orders issued thereafter. It is common ground that the interim orders of stay were granted and remained in force until the delivery of the judgment on 8th March 2013. In those cases IKON was an interested party and it was directly affected by the orders sought by the petitioners and applicants. In fact the orders sought by the parties were directed at quashing and setting aside the approvals granted by KeNHA to IKON to construct its gantries. Throughout the proceedings, KeNHA defended the approvals it had issued to IKON.
45. In light of the pending suit it is therefore surprising that KeNHA contends that due to the continuous breaches of approval conditions, it issued a notice published in the newspapers dated

17th December 2012 signed by the Director General. The notice was titled, “*NOTICE FOR INTENDED REMOVAL OF UNAUTHORISED BILLBOARDS AND OTHER ADVERTISEMENT STRUCTURES ON KENYA NATIONAL HIGHWAYS AUTHORITY’S ROAD RESERVES.*” The notice stated, in part, as follows; “*It has come to the attention of the Authority that certain individuals and entities have erected billboards and other advertisement structure or things on the Authority’s road reserves with total disregard to the provisions of Section 49 of the Kenya Roads Act, 2007 regarding road reserves all entities and individuals who have erected unauthorized structures are hereby directed to remove them within thirty (30) days from the date of this notice failure to which the Authority shall remove them without further reference to those responsible At the lapse of this period, the Authority shall immediately embark on the removal of such structure.*”

46. This notice, relied upon by KeNHA, could not have been intended to apply to IKON as it was engaged in litigation with third parties on the side of KeNHA and the County. The Court had issued a stay of any further action hence IKON could not carry out any construction without contravening the express court orders. I therefore find and hold that the 30 day notice issued by KeNHA and published in the newspapers on 17th December 2012 did not apply to IKON. IKON could therefore not contest or query it as urged by KeNHA.

47. Another reason why the notice did not apply to IKON is that the notice expired by on 18th January 2013. If KeNHA was intent on enforcing its statutory mandate why did it wait until October 2013, 10 months later, to remove the unauthorised gantry? The inference I draw is that KeNHA knew that due to the court proceedings there was a stay issued by the court which had to be respected and that, in fact, IKON had not violated any terms of the approval.

48. The third reason why I hold that the notice could not have been intended for IKON is that KeNHA granted IKON specific approval for the Waiyaki Way gantry. In other instances where there was breach, KeNHA addressed IKON directly and specifically about the breach. That it would choose to address IKON through a public notice is to say the least astonishing when the two parties were fighting third parties in litigation on the same side.

49. IKON argues that after judgment was delivered on 8th March 2013, it was free to continue with the implementation of its works in accordance with the approval. On the other hand, KeNHA argues that by reason of Condition 20, there was no valid approval in place. Condition 20 states, “*You shall ensure that all the erection works are completed within 6 (Six) months from the date of this approval otherwise the validity of this consent shall be deemed to have expired.*”

50. KeNHA further argues that even though the court in ***HCJR No. 246 of 2012*** held that it would be unjust to terminate the agreement entered into between it and IKON, the court did not concern itself with Condition 20 and that therefore the approval expired immediately after 6 months.

51. I find and hold that KeNHA’s argument is untenable. To accept it would be to negate the orders of stay issued by the court which bound all the parties to those suits including KeNHA and IKON. This argument would also be inconsistent with the position KeNHA took in the cases where it defended IKON’s position. If indeed the approval had expired after 6 months that is, in October 2012, nothing would have been easier than for KeNHA to inform the court that the approval it had granted to IKON had lapsed in view of the specific challenge to IKON’s approval in those proceedings.

52. It is also interesting that KeNHA makes the argument that IKON did not apply for renewal of the approval in writing when by its own admission it did not require a written application to renew the approval. In a letter of 17th May 2012 addressed to IKON referring to other gantries it states as follows, “*We will inform you in accordance with Condition No. 19 of our initial letter of approval The approval to construct the said structures will automatically expire at the end of this month (May 2012) when the six (6) months period given would elapse. You should therefore make*

immediate arrangements to pay the requisite fees and charges, and confirm your acceptance to comply with all the conditions already given to you for installation of the structures. Should you not be interested in undertaking activities, you are required to notify us immediately so that necessary action can be taken.” [Emphasis mine]

53. I however find and hold that the approval given to IKON had not lapsed in terms of Condition 20 because the implementation of the agreement had been stopped by the court and could only commence upon delivery of the judgment of 8th March 2013 when IKON could proceed with the works in accordance with the approval granted in May 2012.

54. Following the finding I have made above, it is clear that any other breaches alleged of the approval conditions could only have arisen after the judgment was delivered. This is when the court orders suspending any works were lifted and IKON could not complete the construction of the gantry. From all the evidence that is before the court, I find that KeNHA did not notify IKON of the alleged breaches in writing.

55. As I have pointed out the two letters referred to earlier and the subsequent notice published in the newspapers did not apply to the Waiyaki Way gantry. A gantry is a huge steel structure that straddles the Waiyaki Way which is dual carriage highway. It is therefore incredible for both Engineers Omer and Abonyo to feign ignorance over its construction. Engineer Omer admitted in cross-examination that he saw the structure in November 2012 as foundation works and casting were ongoing. He stated that he did not receive any complaints from the regional manager nor did he write to IKON about the construction.

56. Engineer Abonyo, the regional manager, testified that she had certain concerns about the Waiyaki Way gantry yet as the person in charge of the region she did not write or say anything to IKON. Since KeNHA insists that the gantry was an unauthorised structure it would have, in the ordinary course of business, engaged IKON on the same and issued an appropriate notice in accordance with **section 49** of the *Kenya Road Act*.

57. KeNHA relies on **section 49(4)** of the *Kenya Roads Act* which empowers it to remove structures unauthorised structure on road reserves. The provision states as follows;

(4) Where a person, without the permission required by subsection (1) or contrary to any permission given thereunder, erects, constructs, lays or establishes a structure or other thing, or makes a structural alteration or addition to a structure or other thing, an Authority may by notice in writing direct that person to remove the unauthorised structure, other thing, alteration or addition within a reasonable period which shall be stated in the notice but which may not be shorter than thirty days calculated from the date of the notice.[Emphasis mine]

Section 49 (5) of the *Act* further provides that:

(5) If the person to whom a notice has been issued in terms of subsection (4) fails to remove the structure, other thing, alteration or addition mentioned in the notice, within the period stated therein, such item may be removed by the Authority itself which may recover the cost of the removal from that person.

58. **Section 49(4)** of the *Kenya Road Act* requires a written notice to be given directing the person to remove the unauthorised structure. Between the time of the judgment was delivered and the time the gantry was demolished, there was no communication with IKON regarding any breaches identified by KeNHA.

59. KeNHA argues that IKON’s conduct of proceeding with construction without express authority to resume work meant that its rights were not violated. Counsel for KeNHA submitted that a person cannot be allowed to benefit from its own breach of contract as the petitioner seeks to do. Counsel

cited the case of *Cheal v Association of Professional Executive, Clerical and Compute Staff* [1983] ALL ER 1130, *Alghussenin Establishment v Eton College* [1991] 1 All ER 267 and *Dynamic Institute of Management and Accountancy (DIMA) Ltd v Apollo Insurance Company Ltd* [2004]eKLR.

60. This position asserted by KeNHA is inconsistent with **section 49(4)** of the *Kenya Roads Act* which requires that a notice must be issued even in cases, “*where a person, without permissionor contrary to any permission establishes a structure or thing ...*” The right to receive a written notice is a statutory right. It is a condition precedent to the exercise of the right to remove unauthorised structures. Thus, even where there is breach of the conditions of approval, a written notice cannot be wished away.
61. **Section 49(4)** of the *Kenya Roads Act* is an amplification of the right to fair administrative action protected by **Article 47(1)** of the Constitution. The right of a person to receive a fair notice of alleged breach before adverse action has been anchored in the ancient prerogative writs which are the cornerstone of modern judicial review. The right to receive fair notice as a requirement for fair administrative action has been emphasised in several cases predating the Constitution among them *David Onyango Oloo v Attorney General* [1987] KLR 210 and *De Souza v Tanga Town Council* [1961] EA 377. The Constitution has however brought about a transformation of the legal system. The rules of natural justice including the requirement of notice are no longer left within the realm of common law principles, they are now anchored in the Constitution whose intent is to promote the rule of law as a national value under **Article 10(2)** of the Constitution and to cure the culture of arbitrariness inherent in our administrative processes. Therefore, even in the absence of an express statutory requirement for notice, such a right to receive notice must be implied.
62. In *Geothermal Development Company Limited v Attorney General & 3 others*, NRB Petition 352 of 2012 [2013] eKLR, the court noted that a key component of due process is notice. The court observed that; “[28] *As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well.... Hilary Delany in his book, Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272, notes that, “Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision.”*”
63. Due process is also implicit in the provisions of **Article 40** of the Constitution which prohibits arbitrary taking of property. This case, though, is firmly founded on violation of **Article 47(1)** which provides that, “**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**”
64. The fundamental issue in this case is whether the without notice, for whatever reason, KeNHA could in the middle of the night proceed to demolish a gantry whose approval it had granted in the first place. KeNHA knew about the construction and waited 10 months for IKON to complete it, moved and demolished the gantry at the stroke of midnight without notice. I find and hold KeNHA’s conduct, in this respect, was “*unreasonable*” within the meaning of **Article 47(1)** of the Constitution.
65. I further find and hold that KeNHA did not comply with **section 49(5)** of the *Kenya Roads Act* by failing to issue a written notice to IKON before exercising its statutory right to remove unauthorised structures. As a result it violated IKON’s right guaranteed under **Article 47(1)** of the Constitution.
66. In light of this finding, the position of other gantries constructed by IKON is very clear and it is

that before taking any adverse action, KeNHA is duty bound to ensure that a written notice is issued in accordance with **section 49** of the **Kenya Roads Act**. In his testimony, Engineer Omer admitted that there was no fault with the gantries located in the other areas hence it is unnecessary to grant prayer (c) of the amended petition.

Claim against County in respect of enforcement

67. Apart from seeking relief for its involvement in the events of 28th/29th October 2013 which I shall deal with later in the judgment, IKON's complaint against the County relates to the assessment and payment of annual advertisement fees. Prayers (d) and (e) of the amended petition are relevant in that respect.

68. It is stipulated by the parties that authority to display advertisements on gantries and billboards is within the exclusive province of the County. While KeNHA approves the construction of the structure, the County approves the form of display.

69. It is also not in dispute that IKON had applied for and obtained authority to place its adverts on the various gantries. The Court in **HCJR Case No. 246 of 2012**, discussed the relationship between KeNHA and the County in the following terms, "*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 advertisements on the structures. It should, however, be noted that it would be unreasonable for the Council to deny the interested parties the licence and yet they have been granted permission to construct billboards and gantries.*" [Emphasis mine]

70. In the amended petition, IKON's grievance against the County is set out in paragraph 3.10 where it states that totally out of the blue and without warning the County issued an enforcement notice dated 3rd April 2013 alleging that there were developments carried out without authority by way of illegal display of advertisements. The Notice gave IKON 7 days to remove the advertisements it has displayed along Mombasa road near Bobmill Industries and along Uhuru Highway near Nakumatt Mega.

71. The County's answer to this claim is that IKON filed a case to contest the enforcement notice no. 12720 dated 3rd April 2013 namely; ***Ikon Prints Media Company Limited v City Council of Nairobi HC JR NO. 120 of 2013*** where it sought and obtained orders barring the County from, "*pulling down or in any manner whatsoever interfering with the Applicant's gantries.*" IKON admits that it indeed filed such a suit in the affidavit of Mr Nduche in support of the petition.

72. In light of these facts, I am constrained to agree with the County's submission that the legality of the enforcement notice and the incidents thereof and whether it meets the constitutional standards are the subject of the pending suit and as such this suit as it applied to the enforcement notice is *sub-judice*. I therefore decline to enter into any further inquiry on the matter.

73. From the pleadings and evidence, it is clear that the enforcement notice has no bearing on the action relating to the Waiyaki Way gantry. Furthermore, prayer (d) and (e) of the amended petition are an attempt to cast the net wide. I have studied the amended petition and the facts set out do not establish a basis for the grant of these prayers.

Liability for destruction of gantry by the County and Ministry

74. Are the County and the Ministry liable for destruction and removal of the Waiyaki Way gantry? Mr Nduche testified how he went to the scene of the incident on the material night and identified vehicles from the County and the Ministry. As a result of their involvement he held them liable for all the damage inflicted on the gantry.

75. The County's involvement in the incident was explained by Amos Otwal Olali, the Assistant

Divisional Fire Officer of the Fire Brigade. He testified that on the morning of 29th October 2013, while he was on duty, he received a call at about 0120 Hrs requesting for special services to remove a bill board that had fallen across Waiyaki Way. He arrived at the scene and found that indeed the gantry was lying across the road. He testified that it is only the County that had specialised equipment and expertise to remove the gantry which was blocking the traffic. In essence the County denied its involvement in any other capacity other than it came to clear the road when summoned to do so by the police.

76.The Ministry's position was laid out in the testimony of Engineer John Ikinu, a mechanical engineer in the Ministry of Transport and Infrastructure Development. He stated that the Ministry received a letter dated 9th October 2013 from KeNHA signed by Engineer Omer requesting to hire equipment for demolition of an illegal gantry situated along Waiyaki Way. KeNHA leased the equipment and paid the sum of Kshs. 569,600.00. He stated that the equipment was issued as per the general Conditions of Contract issued by the Ministry for the hire of vehicles, plant and equipment.

77.I therefore find that the destruction and removal of the Waiyaki Way gantry was initiated by the KeNHA purporting to exercise its statutory power under **section 49** of the **Kenya Roads Act**. Throughout the proceedings KeNHA asserted its statutory authority to remove the gantry as an unauthorised structure. The inclusion and involvement of the County and the Ministry was at the behest of KeNHA which clearly lacked the resources to accomplish the enormous task of removing the gantry. It had to utilise the machinery and capacity provided by the 2nd and 3rd respondents.

78.I find and hold that KeNHA fully liable for all the loss and damage caused by removal and damage to the steel gantry.

Reliefs

79.Apart from the declaratory reliefs, in prayers (f), (g) and (h) of the amended petition, IKON seeks Kshs. 42,778,313/= being the restitution and replacement value of the demolished Waiyaki Way gantry and Kshs. 82,002,780/= being lost profits for 3 years, compensatory and exemplary damages.

80.Upon finding a violation of rights and fundamental freedoms under the Bill of Rights, the Court has jurisdiction to grant damages under **Article 23(2)** of the Constitution. A party who seeks compensation as part of the relief under **Article 23(2)** has the burden of proving the nature of and extent of the compensation in so far as it relates to the breach alleged.

81.The demolition and removal of IKON's Waiyaki Way gantry is a direct result of the failure by KeNHA to issue notice of breach of approval conditions as required by statute and which is a violation of **Article 47(1)** of the Constitution. The purpose of damages is to put the petitioner back to the position it would have been but for the violation. IKON argues that it is entitled to the market value of goods destroyed at the time and place of destruction. Counsel referred to the case of **The Edison [1933] All ER 144**.

82.The value of the structure is in the nature of special damages and it has been said time and again special damages must be pleaded with particularity and proved (see **Ratcliffe v Evans [1892] 2QB S24; Kampala City Council v Nakaye [1972] EA 446, Siree Limited v Lake Turkana El Molo Lodges [2002] 2 EA 521 and Hahn v Singh [1985] KLR 716**.) This duty is in no way lessened by the fact that the matter before the court is a petition for the enforcement of fundamental rights and freedoms as the respondents are entitled to have notice of the kind of claim to be defended.

83.To support its case for damages, IKON relied on the testimony of Alfred Aluvala (PW 1), a registered quantity surveyor. He gave an estimate of the cost of putting up a gantry. In coming up with the estimate of **Kshs. 42,778,312.99** he was given the designs and made the necessary

computation guided by quotations from suppliers of the various parts and services such as Warren Enterprises, Tafsiri Pure Energy Company Limited, Ovidian, Apex Consulting Group and Rota Panel.

84. Counsel for KeNHA submits that computation provided by PW 1 do not reflect the actual cost of the gantry and could not be relied upon to come up with the replacement value. Counsel contended that as construction of the gantry was completed on 28th October 2013, every piece of documentation regarding expenditure ought to have been produced in court and failure to produce these documents renders the evidence of the witness unreliable.
85. I do not find any merit in the argument that IKON had to produce the documentary proof of expenditure. KeNHA does not deny that IKON had put up a gantry which it demolished. The Quantity Surveyor's estimates are an appropriate measure of the costs necessary to put up a new structure. KeNHA did not contest the figures or show that they were excessive or unreasonable or totally unwarranted. It has in its possession all the relevant drawing and designs submitted to it by IKON when approval was sought. I find the cost estimate for the replacement gantry prepared by Alfred Aluvala reasonable and I therefore award the sum of **Kshs. 42,778,312.99** as the replacement value of the Waiyaki Way gantry.
86. The next claim is for loss of profits for a period of 3 years. This claim is grounded on an Outdoor Advertising Agreement IKON entered with EABL for a three year period. Mr Nduche produced an agreement dated 12th March 2012 to support this claim. According to the photographs produced in evidence, the contract was already in force as the EABL branding had been put up when the gantry was demolished.
87. KeNHA submits that the claim for **Kshs. 82,002,780.00** must fail in view of the of the period expressly provided for in **Condition No. 1** which states as follows; *"This approval may be renewed for a further period of one year subject to your written application, which shall be received by the undersigned not later than 90 days before the expiry of the current approval. Subsequent renewals of this approval shall be subject to the discretion of the Road Authority."*
88. Counsel for the KeNHA argues that as no application had been received from the petitioner, it could not be entitled to a renewal and in any event such renewal is discretionary subject to a myriad of factors hence the award of loss of profit could not be sustained.
89. As I pointed out in paragraph 52, KeNHA had accepted renewal even without an application being made. I also find that the agreement would have been subject to renewal and taking into account the various risks associated with business including the fact that the agreement could have been terminated legally, I think an award of loss of profits for one year is reasonable in the circumstances. Taking all these factors into account I award the sum of **Kshs. 27,772,993.00** for loss of profits.
90. The principle for awarding exemplary damages in Kenya were set out in the case of **Obonyo v Kisumu Municipal Council [1971] EA 91** where the Court of Appeal referred adopted the rule in **Rookes v Barnard [1964] AC 1129** where it was held that exemplary damages in tort may be awarded in two classes of cases:-
- i. Where there is oppressive, arbitrary or unconstitutional action by the servants of the government and
 - ii. Where the defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the plaintiff.
91. While I agree with the aforementioned principles, the claim before the court is one founded on specific breach of the Constitution. It is unnecessary to consider the element of "unconstitutional action" when the relief is awarded for unconstitutional conduct. It is also clear that the principle in **Obongo v Kisumu Municipal Council (Supra)** was a case in tort so that the issue of

“*unconstitutional action*” was an additional factor and the court would consider in awarding exemplary damages. I shall therefore not award exemplary damages.

Disposition

92. For the reasons I have outlined I grant the following reliefs;

- a. A declaration that the action by the 1st respondent in pulling down the petitioner’s gantry located at Toyota Westlands near Safaricom along Waiyaki Way (A104) violated the petitioner’s right to fair administrative action under **Articles 47(1)** of the Constitution.
- b. **Kshs. 42,778,313/=** being the replacement value of the gantry demolished by the 1st respondent.
- c. **Kshs. 27,772,993/=** being lost profits for 1 year for the Waiyaki Way gantry.
- d. Interest shall accrue on (b) and (c) from the date of filing the amended petition until payment in full.
- e. The cases against the 2nd and 3rd respondents are dismissed with no order as to costs.
- f. The 1st respondent shall pay the petitioner’s costs.

93. I apologise to the parties for the delay in rendering this judgment which was occasioned by the fact that at the completion of the hearing I was transferred to serve the High Court at Homa Bay and Migori.

SIGNED AT HOMA BAY

D.S. MAJANJA

JUDGE

DATED and DELIVERED at NAIROBI this 7th day of November 2014.

MUMBI NGUGI

JUDGE

Mr Lutta instructed by Lutta and Company Advocates for the Petitioner

Mr Kiplimo instructed by Gicheru and Company Advocates for the 1st respondent.

Mr Omwebu instructed by Prof. Tom Ojienda and Associates Advocates for the 2nd respondent.

Ms Mwangi, Litigation Counsel, instructed by the Office of the Attorney-General for the 3rd respondent.