



Adawo v Egis Kenya Limited Kisii - Isebania Road & 3 others (Environment and Land Miscellaneous Application E004 of 2024) [2026] KEELC 368 (KLR) (22 January 2026) (Ruling)

Neutral citation: [2026] KEELC 368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E004 OF 2024
FO NYAGAKA, J
JANUARY 22, 2026**

BETWEEN

ELIUD KINGWARA ADAWO PLAINTIFF

AND

EGIS KENYA LIMITED KISII - ISEBANIA ROAD 1ST DEFENDANT

THE COUNTY GOVERNMENT OF MIGORI 2ND DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY 3RD DEFENDANT

CHINA HENAN CONSTRUCTION COMPANY LIMITED 4TH DEFENDANT

RULING

1. The issue for hearing before this court at the present time is the 3rd Defendants' Preliminary Objection dated 22nd March 2023. It is premised on the following grounds;
 1. The Plaintiff has been filed in breach of the mandatory provisions of Section 67 of the [Kenya Roads Act, 2007](#).
 2. The Court lacks the requisite jurisdiction to hear and determine the suit by virtue of Section 67 of the [Kenya Roads Act](#) No. 2 of 2007.
2. The parties were directed to file submissions on the Preliminary Objection.

Defendants' Submissions

3. The 1st and 4th defendants, in their submissions dated 26th June 2023, submitted that they wholly associated themselves with the submissions of the 3rd defendant. They added that that Section 22(2) (h) mandates the 3rd Defendant to enter into agreements with any party in execution of their mandate. They submitted that there was no pleading that notices under Section 67 were served.



4. They added that under Section 67(a) of the *Kenya Roads Act* any complaint about the actions of the Authority should first be made to the Director General of the Authority. Thus, having failed to do so the plaintiff wrongly invoked the jurisdiction of the court. They opined that the plaintiff did not exhaust the mechanisms or remedies available under the Act first.
5. The 3rd defendant submitted that the court lacks the requisite jurisdiction to hear and determine this suit having been filed out of time as against the 3rd defendant. Further, that the 3rd defendant is a Highways Authority established under Section 3 of the said *Kenya Roads Act*. Counsel cited the provisions of Section 67(b) of the said *Kenya Roads Act*, 2007 and urged that the 3rd defendant's preliminary objection raises therefore a pure point of law in line with the Court of Appeal decision in *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696*.
6. Counsel pointed out that the 3rd defendant was joined to this suit by way of a Further Amended Plaint dated 15th February 2022 but filed at the Migori Law Courts Civil Registry on 9th March 2023. Further, that the Summons to Enter Appearance which was served on the 3rd defendant is also dated 9th March 2023, the day on which the Further Amended Plaint was filed and it is pursuant to the said summons that the 3rd defendant entered appearance in this matter on 24th March 2023. Counsel submitted that the Migori Criminal Registry purported court stamp dated 15th February 2022 appearing on the first page of the Further Amended Plaint and which appears nowhere else should be disregarded as an anomaly that has no bearing on these proceedings.
7. Counsel cited the provisions of Section 67(b) of the said *Kenya Roads Act*, 2007 urging that it has two limbs; namely, that the legal action should be commenced within 12 months and that where there is a continuing injury, the legal action should be commenced within 6 months of cessation thereof. He submitted that trial trespass is actionable per se without proof of actual damage, citing the decision in *Ali Farah vs Moses Ole Vasisit & 6 Others*. On when time begins to run, counsel cited Salmond on the Law of torts Fourteenth. Edition states at page 773 and submitted that the plaintiff alleged that the 4th defendant trespassed into his land in November 2021, subject to instructions from the 2nd and 3rd defendants. He maintained that having joined the 3rd defendant to these proceedings on 9th March 2023, and not by 30th November 2022, it follows that the suit against the 3rd defendant was filed out of time thus divesting the Honourable Court of jurisdiction. Counsel placed reliance on the decisions in HCCC NO.348 OF 2013: *Sumac Development Company Limited vs. Kenya National Highways Authority & 2 others*, ELC Case No. 293 of 2017: *John Kibor Kipkorir (suing as the administrator of estate of William Kibor Ruto a.k.a Chebor Ruto) vs. Kenya Rural Roads Authority and Willmary Development vs The National Land Commission and Kenya National Highways Authority* eKLR among others in support of his submissions.
8. On whether the suit had been filed in breach of Section 67(a) of the said *Kenya Roads Act*, 2007, counsel submitted that no notice containing the particulars of the claim and of intention to commence legal proceedings against the 3rd defendant was ever served on the 3rd defendant as required by section 67 (a) of the said *Kenya Roads Act*, 2007. Further, no such notice has been annexed to the plaintiffs list and bundle of documents. Counsel urged that there exists a long line of authorities that are binding on the Court where it has been held that the requirement in section 67 (a) of the *Kenya Roads Act* is coached in mandatory terms and that failure to serve the notice renders the suit invalid and legally untenable. In this regard, he cited the decisions in *Petition Case No. 10 of 2015: Michael Otieno Nyaguti & 5 others v Kenya National Highways Authority & 5 others (2015) eKLR*, *Civil Appeal 52 of 2016: Michael Otieno Nyaguti & 2 others v Kenya National Highways Authority [2021] eKLR*, *Boru Dika vs Gulsan Insaat Sanay, Turizm & Another (2018) eKLR* among others. Counsel urged that it is evident that the



provisions of section 67 (a) and (b) of the [Kenya Roads Act](#) are couched in mandatory terms and that failure to comply with the said provisions renders any suit filed untenable against the 3rd defendant.

9. On his part, the Plaintiff filed his submissions dated 5th May 2023 in which he began by giving the summary of the history of the claim or suit. Then he added that Section 67 of the [Kenya Roads Act](#) did not confer the 3rd Defendant authority to acquire land compulsorily. He added that the 3rd Defendant's reliance on the provision was mischievous, a misconstruction and a misunderstanding of the law. Further, that it was inhumane and abuse of power which was unreasonable for the Authority to rely on the provision to take away his land. He added that by virtue of Article 22(3) of the [Constitution](#) the Defendants were hiding behind technicalities to avoid compensating him. He added that Section 13 of the ELC Act empowered the court to hear and determine the matter. Further, that the actions of the defendants destroying his property were contrary to Part VIII of the [Land Act](#), 2012.
10. His fears about the 4th Defendant were, in his submissions, that it was a Chinese company that may wind up and go out of the court's jurisdiction. He, thus, prayed that the matter be expedited.

Analysis and Determination

11. The law pertaining to Preliminary Objections was well captured in the famous *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696, where the Court of Appeal for Eastern Africa, stated (Law JA) in part that
"So far as I'm aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of 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."
12. Sir Charles Newbold, President of the Court in the *Mukisa* case went on to state;
"a Preliminary Objection cannot be said to be such if any fact has to be ascertained or if what is sought is the exercise of judicial discretion." (Page 710).
13. In the case of *Avtar Singh Bhamra & Another vs Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, the court held that:-
"A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained."
14. The suit, when initially filed had proceeded to judgement without the joinder of the 3rd defendant. Upon an application for review by the 4th defendant, the initial judgement was set aside. Consequently, the 3rd defendant was enjoined in the suit vide an Amended Plaint dated 15th February 2022 but filed on 9th March 2023, pursuant to the directions of the Magistrates court on 1st March 2023.
15. The 3rd Defendant is the Kenya Highways Authority, which is established by Section 3 of the Roads Act as follows;
There is established an Authority to be known as the Kenya National Highways Authority, which shall be a body corporate with perpetual succession and a common seal, and which shall, subject to this Act, be capable in its corporate name of—
 - (a) suing and being sued;



- (b) taking, purchasing or otherwise acquiring, holding and disposing of movable or immovable property;
 - (c) borrowing money with the approval of the Cabinet Secretary and the Cabinet Secretary responsible for finance; and
 - (d) doing or performing all such other things or acts for the proper performance of its functions under this Act as may lawfully be done or performed by a body corporate.
16. The first issue for determination is whether the further amended plaint dated 15th February 2022 offends the provisions of section 67(a) of the [Kenya Roads Act](#);
17. The Amended Plaint, which enjoined the 3rd Defendant, and the 4th Defendant, in the suit was filed on 9th March 2023 despite being dated 15th February 2022. This is further compounded by the fact that the plaint was filed pursuant to directions that were issued on 1st March 2023. In the Plaint the Plaintiff pleaded that the encroachment onto his land, commenced somewhere around November 2021.
18. Section 67(a) of the [Kenya Roads Act](#) provides as follows;
- Where any action or other legal proceeding lies against an Authority for any act done in pursuance of or in execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect —
- (a) the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent; and
19. The provisions of section 67(a) require the service of a notice of intended legal proceedings on the Director General at least a month before instituting the same. The Court of Appeal the Court of Appeal, in the case of Michael Otieno Nyaguti & 2 Others V Kenya National Highways Authority [2021] eKLR where the Appeal specifically dealt with the provisions of Section 67(a) of the [Kenya Roads Act](#) and the effect of non-compliance with the Act, stated that:-
- “The Preliminary Objection on non-compliance with this provision is, therefore, on a pure point of law as there is no other way of addressing the Respondent’s Preliminary Objection other than by way of construction and Application of section 67(a).”
20. The law provides then that there must be a notice issued to the Defendant or offending authority at least one month prior to the institution of the suit. The Plaintiff did not plead that the one-month notice was served and further, did not provide any evidence of the same, although the Court could not have relied on that evidence to determine the Objection herein. The court would have only looked at the pleadings since this is a point of law in issue. It must be noted that the provisions of section 67 of the act are couched in mandatory terms. In the case of Sumac Development Company Limited ...vs... George Munyui Kigathi & 2 Others [2017] eKLR the Court held that:-
- “I have considered the provisions of section 67 (a). The word used therein is SHALL which therefore means that it is mandatory for any party wishing to institute proceedings against Kenya National Highway Authority to give at least 30 days’ notice.”



21. It follows that compliance with Section 67 is mandatory and it was not complied with. Consequently, the cause of action as instituted in the Plaintiff was in breach of Section 67(a) of the [Kenya Roads Act](#). On that account alone, it would have been dismissed. But to analyze the law more, Section 67(b) contains another condition the plaintiff ought to have fulfilled.
22. The Plaintiff submitted on Section 67 of the [Kenya Roads Act](#) but he looked at it from the aspect of compulsory acquisition of land. The submissions did not address cardinal requirements that notices which were required to be issued under Section 67 were either not necessary or complied with.
23. The next port of call is whether the suit is time barred by virtue of Section 67(b) of the [Kenya Roads Act](#). Section 67(b) of the [Kenya Roads Act](#) provides as follows;
 - (b) such action or legal proceedings shall be instituted within twelve months next after the act, neglect, default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.
24. This provision is to be read in the context that one would have complied with section 67(a) before institution of legal proceedings against the Authority. In such a scenario, the proceedings are to be instituted within twelve (12) months after the act. According to the plaintiff, the encroachment and trespass commenced in November 2021. The plaintiff does not state that the trespass is continuing. It means that the pleadings are clear that the trespass ended when the road was created over his property. Having enjoined or sued the applicant in March 2023 when summons to Enter Appearance were issued upon filing the Amended Plaintiff, it follows that the suit against the 3rd defendant is time-barred.
25. As for the 1st, 2nd and 4th defendants, they cannot successfully take refuge in the provisions of the [Kenya Roads Act](#) as that statute does not provide for the same. The 1st and 4th Defendants are private limited liability companies and the 3rd Defendant is created by Article 167 of the [Constitution](#) and the [County Governments Act](#).
26. But the finding above opens a gap which this Court cannot gloss over since its decision would be an absurdity if it dismissed the suit against the 3rd Defendant and left the unanswered question, as disclosed by the plaintiff's pleadings, whether the suit against the other parties whose presence in the suit was dependent on the 3rd Defendant's. Thus, the outstanding issue is whether, absent of a suit against the 3rd Defendant, the suit against the 1st and 4th Defendant can be sustained, that is to say, whether there can be a cause of action against the said parties without the contracting party being sued.
27. It is pleaded at paragraph 8 of the Amended Plaintiff dated 15th February 2022 that "the said trespass was also done after the consultancy and or advice of the 1st Defendant." This means that the cause of action which is that there is trespass onto the plaintiff's land, and the services that were already offered by the said defendants independently of the actions of the said 4th Defendant which is alleged, at paragraph 4 of the Amended Plaintiff, to be trespass, have no connection whatsoever. A service by way of professional advice which was procured independently of the subsequent actions of a party who is said to have relied on the service or advice cannot found an action by a third party affected by the actions based on the advice. This is because there is no privity of contract between the professional who gives the advice and a party affected by the consumer of the service.
28. It is my considered view that the suit discloses no cause of action against the 1st Defendant. It can only be dismissed with no order as to costs to the said Defendant.
29. Turning to the Plaintiff's cause of action against the 4th Defendant, the issue that obtains is that the 4th Defendant is sued not in the capacity as an independent contractor but, as pleaded at paragraph 7



of the Amended Plaintiff, a trespasser acting on instructions of the 2nd and 3rd Defendant. In essence, as borne out by the pleadings, the trespass allegedly is made by the 2nd and 3rd Defendant. That being the case, in my humble view, it is the said 2nd and 3rd Defendants who ought to be liable, if the Plaintiff's suit were to succeed. This is because, there is no direct nexus between the actions of the 4th Defendant and the Plaintiff is the said 2nd and 3rd Defendant. Unfortunately, the suit against the 3rd Defendant has been found, above, to be untenable. It means that the 4th Defendant's actions cannot be a violation in a vacuum. The 4th Defendant who allegedly trespassed onto the Plaintiff's land on account of the instructions of the said 3rd Defendant cannot then be held liable in isolation in relation to the 3rd Defendant. The suit against it is thus incompetent and struck out.

30. Lastly, since the presence of the 4th Defendant in this suit was tied by the Plaintiff jointly to that of both the 2nd and 3rd Defendants, and it cannot be severed from the pleading in paragraph 7 of the Amended Plaintiff, it becomes necessary to consider whether there is a cause of action against the 2nd Defendant. The Plaintiff sued the 2nd Defendant on account of instructing the 4th Defendant to trespass onto his parcel of land. In the Amended Plaintiff, the Plaintiff pleaded the description of the 2nd Defendant. At paragraph 7 he pleaded that the 2nd Defendant together with the 3rd Defendant instructed the 4th Defendant to trespass onto his land.
31. What is clear is that the alleged trespass was occasioned by a construction or expansion of a road said to have been constructed on or through the Plaintiff's parcel of land. This Court has carefully looked at the Amended Plaintiff. At no point in it does the Plaintiff plead that the road was being constructed as a county government one. Rather, elsewhere, a paragraph 4 of the Amended Plaintiff, he pleaded that the 3rd Defendant is the body or authority established with the mandate of planning, promoting, organizing and implementing programs for construction, development, operation, repairs and maintenance of national highways, motor ways and strategic roads in Kenya. He does not plead anywhere how the 2nd Defendant, whose mandate he does not disclose gets involved in the construction of the road or roads which affected his land, yet it was being constructed at the time, under the instructions of the 3rd Defendant. Either the road was a county government one or a national government one. He does not disclose the same by his pleading. Hence, this court is of the humble view that there is no cause of action disclosed by the plaintiff against the 2nd Defendant. The Plaintiff's suit against the said party is thus struck out, and by the same token, his suit against the 4th Defendant in so far as it is pleaded and purported to have been acting at the behest of the said 2nd Defendant.
32. In the premises, the Preliminary Objection succeeds. The entire suit is struck out, with no order as to costs to the other parties except the 3rd Defendant which should be paid the same.
33. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM
THIS 22ND DAY OF JANUARY 2026.**

HON. DR. IUR NYAGAKA

JUDGE

