



Gakuu v Kenya National Highways Authority (Environment & Land Case 153 of 2022) [2024] KEELC 1125 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1125 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 153 OF 2022
JG KEMEI, J
FEBRUARY 29, 2024**

BETWEEN

PROF CHRISTOPHER MWANGI GAKUU PLAINTIFF

AND

KENYA NATIONAL HIGHWAYS AUTHORITY DEFENDANT

RULING

1. On the 9/12/2022 the Plaintiff filed suit against the Defendant seeking the following reliefs:-
 - a. A declaration that the Plaintiff was as at the date of 10th January, 2012 the legal proprietor of all the property known as LR Number Limuru/Rironi/1073 and the building erected thereon.
 - b. Compensation for the illegal demolition of the building constructed on LR Number Limuru/Rironi/1073.
 - c. Loss of the value of works as at the date of demolition of the building erected on the Plaintiff's property as at July 2013 valued at Kshs. 38,000,000/-.
 - d. Loss of business opportunity from the property from the date of expected completion to date of determination of this suit at the rate of Kshs. 400,000/- per month.
 - e. A sum of Kshs. 2,650,000/- on account of demolition of the five-storey apartment building.
 - f. A sum of Kshs. 60,000,000/- on account of a valuation consultant's fees.
 - g. Interest on c, d, e and f above at Court rates until payment in full.
 - h. General damages for reputational damage and being termed as a 'land grabber.'
 - i. General damages for mental and emotional distress.
 - j. Damages for breach of the Plaintiff's constitutional rights.



- k. Costs of the suit and interest thereon; and
 - l. Any other remedy that this Honourable Court deems appropriate to give in the circumstances of this case.
2. It is the Plaintiff's case that at all material times he was the registered proprietor of the suit lands namely Limuru/Rironi/1073 & 1074 where the Plaintiff had erected a 25 two-bedroomed residential building on the properties.
 3. That in the month of March 2013 the Defendant marked the two buildings for demolition and in the month of March 2018 the two properties were earmarked for compensation however the cost of the building was not included. That the building demolished by Defendant was later found not to be erected on public land (road reserve) but was indeed the Plaintiff's property.
 4. In response to the suit the Defendant filed a Preliminary Objection dated 1/2/2023 on the following grounds:-

“That the Honourable Court lacks the jurisdiction to determine the present matter as the suit before it does not satisfy the mandatory requirement under Section 67(b) of the [Kenya Roads Act](#), No. 2 of 2007. The Plaintiff has failed to institute the present civil proceedings within twelve months of the act or neglect complained of, where the Plaintiff indicates that the acts complained of occurred on January 10, 2022. As such, the proceedings are statute barred.”
 5. The Plaintiff responded to the Preliminary Objection vide the Replying Affidavit dated 20/4/2023 where he averred that the cause of action is premised on the failure of the Defendant to compensate him for the demolished building and not the single action of demolition. That the cause of action is based on the continued neglect by the Defendant not to compensate him for the demolished building. He avers that the 5-storeyed building should have formed part of the compensation awarded to him during the process of compensation and therefore the continuous failure to do so despite repeated demands constitute continuing neglect hence the suit is not time barred.
 6. As to whether the suit is statute barred by dint of Section 67(b) of the [Kenya Roads Act](#), the Defendant submitted that vide a notice dated 10/1/2012 the Authority gave a 14 day notice to the Plaintiff to demolish a 5 storeyed building erected on the suit lands on the ground that it had been illegally erected on a road reserve. In 2013 the Plaintiff demolished the building at his own cost. In 2018 the National Land Commission compensated the Plaintiff but to the extent of the acquired portions and not inclusive of the suit building.
 7. It was further submitted that the cause of action as stated in paragraph 13 & 14 of the Plaintiff demonstrate that the Plaintiff realized the neglect or default to compensate him in 2015. That the Plaintiff's cause of action against the Defendant seem to have arisen either in July 2013 when the demolition was conducted or in March 2018 upon compensation by the National Land Commission.
 8. That even taking into consideration the year 2013 or 2018, the Defendant submits that in both instances the Plaintiff's suit instituted on 9/12/2022 offends the provisions of Section 67(b) of [Kenya Roads Act](#) and is therefore statute barred, the suit having been filed 9 years and 5 years respectively. The Defendant relied on the case of [John Kibor Kipkorir Vs. Kenya Roads Authority](#) (2018)eKLR in support of this proposition.



9. On whether a continuing injury arises in favour of the Plaintiff, the Defendant submitted that the Plaintiff in alleging continuing injury is testament of a clear attempt to mislead the Court and misconstrue the doctrine of continuity.
10. Relying on the definition of a continuing injury as set out in the *Black's Law Dictionary* and adopted in the case of *Mary Kitsao Ngowa & 36 Others Vs. Krystalline Limited* [2015] eKLR, the Defendant submitted that a continuing injury is the continued violation of a positive obligation imposed upon a legal person by either law or contract and not the alleged continued effects of a single action. That a continued injury cannot arise from the sustained claim of damages that is yet to be determined or assessed.
11. That the claimed damages by the Plaintiff do not constitute a continuing injury and upon the application of Section 67(b) the Plaintiff had 12 months to present the act neglect or default complained of.
12. As to whether the suit before the Court is a Constitutional Petition, the Defendant submitted that the suit is filed as a civil suit and not a Constitutional petition. The main remedy in the suit being damages for alleged illegal demolition, the suit is civil in nature and must conform to the provisions of Section 67(b) of *Kenya Roads Act*.
13. The Plaintiff in turn opposed the Preliminary Objection in his written submissions dated 27/10/2023. The Plaintiff submitted that the provisions of Section 67(b) of the *Act* does not bar a litigant who seeks redress for illegalities committed by the Defendant, breach of constitutional duty and inducement of contractual breach, claims sought by the Plaintiff.
14. It was submitted that the alleged illegal occupation of government land was unfounded and consequently the forced demolition of 2013 amounted to arbitrary deprivation of land which amounts to a constitutional breach and a major claim in the Plaintiff's pleadings.
15. Further that constitutional claims have no time bar. That the building was demolished out of the Defendant's mistaken understanding that the land upon which it was built belonged to the Defendant and that though the suit is brought by way of a civil suit does not preclude the raising of constitutional breaches committed by the Defendant against the Plaintiff.
16. Further the Plaintiff averred that in any event the Environment and Land Court is clothed with power to hear and determine constitutional disputes however mixed with civil claims as in this case.
17. The Plaintiff submitted that the continued occupation of the Plaintiff's land by the Defendant without payment of full compensation amounts to a continuing wrong hence the cause of action is not time barred.
18. In addition, the Plaintiff averred that the breaches complained of occurred in two tranches: the first in 2013 when the forced demolition occurred and secondly in 2018 when the properties were marked for compulsory acquisition. That of importance was the inadequate compensation made by the Defendant excluding the demolished buildings and damages arising therefrom. That the Defendant has continued to occupy the property without compensation thus forming a continued injury.

Analysis and determination

19. There are two key issues for determination which are; whether the Preliminary Objection is a pure point of law and secondly whether the suit is statute barred by dint of Section 67(b) of the *Kenya Roads Act*.



20. The threshold for a Preliminary Objection to be sustainable was set in the in the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd* [1969] E.A 696 relied on by the 2nd Respondent herein . The Court described a Preliminary Objection as follows;

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

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

The Court further held that-

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

21. For a Preliminary Objection to succeed the following ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid Preliminary Objection should, if successful, dispose of the suit.

22. The Preliminary Objection is premised on whether or not the suit is time barred by dint of Section 67(b) of the [Kenya Roads Act](#) which states as follows;

“ 67. Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of an order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect-

(a)

(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.”

23. The Court finds that the objection being premised on limitation of time touches on the jurisdiction of this Court. If the suit is time barred then it goes without saying that the Court shall be deprived of the mandate to hear and determine it.

24. The Court finds that the 1st issue is answered in the affirmative.

25. Is the suit time barred? Before I answer the question, the Court finds it apt to lay the background of the case. It is commonly agreed that the Defendant issued a notice to the Plaintiff dated the 10/1/2012 requiring him to demolish the building on the suit lands within 14 days. From the record and as averred by the Plaintiff he filed suit in Court *vide* ELC No 34 of 2012 asserting title and sought the following orders;



- a. A declaration that the parcels of land known as L.R. No. Limuru/Rironi/1073 and Limuru/Rironi/1074 are private properties registered in the names of the Plaintiff.
 - b. An order of permanent injunction restraining the Defendant, its servants, employees and/or agents from demolishing and/or interfering with the building erected on L.R. No. Limuru/Rironi/1073.
 - c. An order of permanent injunction restraining the Defendant, its servants, employees and or agents from interfering with the Plaintiff's proprietary interests in L.R. Nos. Limuru/Rironi/1073 and Limuru/Rironi/1074.
 - d. A declaration that the intended demolition as threatened in the notice issued on 10th January, 2012 is illegal, null and void.
 - e. Costs of the suit.
 - f. Any other relief that the Court may deem fit.
26. Simultaneously the Plaintiff moved the constitutional Court vide Petition No 585 of 2012 wherein he sued among others the Defendant seeking the following orders;
- a. That a declaration be issued to the effect that the suit parcels herein to wit L.R. Limuru/Rironi/1073 and Limuru/Rironi/1074 are private properties registered in the names of the Petitioner.
 - b. That the demolition notice issued by the 1st Respondent as against the Petitioner is unconstitutional and ultra vires the powers of the 1st Respondent and was done out of bad faith and a violation of the Petitioner's Fundamental Rights and Freedoms and is therefore a nullity.
 - c. That an order of certiorari by way of Judicial Review be issued to bring into this Court and quash the decision of the 1st Respondent and restore the Petitioner's right to ownership of the suit parcels.
 - d. That an order of prohibition by way of Judicial Review be issued directing and commanding the 1st Respondent to desist from interfering with the Petitioner's proprietary interests in parcel numbers L.R. No. Limuru/Rironi/1073 and Limuru/Rironi/1074.
 - e. That an order of prohibition by way of Judicial Review be issued directing and commanding the 3rd Respondent to desist from transferring with the ownership of the suit parcels L.R. Nos. Limuru/Rironi/1073 and Limuru/Rironi/1074 and/or otherwise interfering with the Petitioner's proprietary interests in the said parcels of land.
 - f. That the 1st, 2nd, 3rd, 4th, 5th and 6th indemnify and/or compensate the Petitioner jointly and severally for any losses that may be incurred by the Petitioner on any adverse decision as to his ownership of the suit parcels.
 - g. That the cost of this Petition be borne by the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents herein.
 - h. Any other relief or order that this Court may deem fit in the special circumstances of this matter.
27. It would appear that the Defendant did not actualize its threat of demolishing the Plaintiff's building within 14 days.



28. As fate would have it the Plaintiff admitted that on its own motion demolished the building in July 2013. It is not clear why the Plaintiff took this action whilst he had two cases pending in Court. The Petition No. 585 of 2012 was dismissed by the Court on the 25/7/2014. According to the record the Plaintiff proceeded to withdraw the ELC No 34 of 2012 on the 9/7/2015 with no orders as to costs.
29. The Court notes that the Plaintiff actually undertook a valuation of the building on the 11/7/2013. The Court is unable to discern the exact date of the demolition but must have been after the valuation of the building which was inspected on the 5/7/2013.
30. Come 2018 and the Defendant came calling again this time with a notice to compulsorily acquire a portion of the suit lands and consequently paid the compensation monies which monies were duly acknowledged in March 2018.
31. It is averred by the Plaintiff that it is on receipt of the notice to acquire the land and the compensation that he discovered that the land upon which the demolished building was erected on was not a road reserve but actually belonged to the Plaintiff.
32. When did the cause of action arise? From the above background the Court concludes and agrees with the Defendant that there are two dates relevant to the determination of this application, that is in 2013 upon the demolition of the building or in 2018 on receipt of the notice to compulsorily acquire the lands. In the first instance the Plaintiff ought to have filed suit in 2014 or in 2019 within a period of one year. The Plaintiff filed suit on the 9/12/2022, 9 years and 5 years later which is way beyond the statutory period of one year.
33. The Court finds that the Plaintiffs suit is time barred.
34. Even if I was to assume that the damage or injury is a continuing injury then the suit ought to have been filed 6 months after the cessation thereof. There was no evidence led to show that the injury is continuous. There was no evidence to show that the Defendant is occupying the suit land or for that matter that evidence of any continuing trespass on the land and at what point the injury ceased. The Court finds that the second limb is untenable and does not hold water.
35. It is trite that constitutional claims are not subject to limitation of time except as provided for under Article 24 of the *Constitution* of Kenya. I have keenly perused the pleadings on record and the Court is not satisfied that any constitutional claims have been raised. I say so because the Plaintiff admits that he discovered that the land on which he proceeded to demolish his building was indeed his land and not a road reserve.
36. In the end the Preliminary Objection has merit. It is allowed and consequently the suit be and is hereby dismissed with costs in favour of the Defendant.

Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 29TH DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Sandra Wamboi for Plaintiff

Ms. Chesnai for Defendant



