



REPUBLIC OF KENYA



Gitei & 18 others v Kenya Rural Roads Authority & another (Environment & Land Case E008 of 2023) [2024] KEELC 3322 (KLR) (24 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA
ENVIRONMENT & LAND CASE E008 OF 2023**

JM MUTUNGI, J

APRIL 24, 2024

BETWEEN

**DAVID WAWERU GITEI 1ST PLAINTIFF
ETHAN MURIUKI IGATI 2ND PLAINTIFF
JOSEPH NDEGE KIBUCHI 3RD PLAINTIFF
MICHAEL MURIUKI MWANGI & 15 OTHERS 4TH PLAINTIFF**

AND

**KENYA RURAL ROADS AUTHORITY 1ST DEFENDANT
INTEX CONSTRUCTION LIMITED 2ND DEFENDANT**

RULING

1. This Ruling is in respect of the 2nd Defendant's Notice of Preliminary Objection dated 21st June 2023 seeking to strike out the Plaintiff's Plaint dated 30th January 2023, on the grounds:
 1. The Plaintiff's suit offends the provision of Section 4(2) of the Limitation of Actions Act Cap 22 Laws of Kenya.
 2. The Plaintiff's suit further offends the provision of Section 13 (1) and (4) of the Environment and Land Act No. 19 of 2011.
 3. The Plaintiff's suit also offends the provision of Section 125 and 129(2) and (3) of the Environmental Management and Co-ordination Act, Cap 387 Laws of Kenya.
 4. The Plaintiff's Plaint offends the provision of Order 1 Rule 13(1) and (2) of the Civil Procedure Rules, 2010.
 5. The Plaintiff's suit is incompetent and an abuse of the court process.



2. The background to this matter is that the Plaintiff instituted this suit by a Plaint dated 30th January 2023. The Plaintiff sought for judgment against the Defendants for: General damages for Environment degradation, harm and loss of amenities by the Plaintiffs; completion of the restoration works and costs of the suit. The basis of the Plaintiffs' claim was that they were residents and farmers in Kiangoma area within Kiine location along the length of D455 Kibirigwi-Baricho-Kerugoya/Kagio Road while the 1st Defendant had contracted the 2nd Defendant to design and construct the road. The Plaintiffs contended that during the execution of the works, the 2nd Defendant negligently caused massive gulying of the access road used by the Plaintiffs which in turn caused massive environmental degradation, harm and damage to the Plaintiffs.
3. The 2nd Defendant entered appearance and filed a Defence. In the Defence the 2nd Defendant denied the claims of the Plaintiffs. The 2nd Defendant stated that it constructed the road identified as Kagio-Baricho-Kerugoya-Kagio (D455) and Baricho-Kibirigwi (D454) and completed the construction works in the year 2010. The 2nd Defendant pleaded that it constructed the road professionally, with high standards and in accordance with construction practice. Further the 2nd Defendant averred that the road construction it carried did not occasion the massive environmental degradation, harm or damage alleged by the Plaintiffs.
4. The Court on 21st November 2023 gave directions that the Preliminary Objection be disposed of first and that it should be canvassed by way of written submissions. The 2nd Defendant filed its written submissions on 21st February 2024. The Plaintiffs though afforded the opportunity to do so did not file any submissions.
5. Considering the pleadings the issues that arise for determination in regard to the 2nd defendant's Preliminary Objection are:
 1. Whether this suit is statute barred by dint of Section 4 (2) of the [Limitation of Actions Act](#), Cap 22 Laws of Kenya.
 2. Whether the provisions of Section 13 (1) and (4) of the [Environment and Land Act](#) as read together with Sections 125 and 129 (2) and (3) of the [Environmental Management and Co-ordination Act](#), oust the jurisdiction of this Court.
 3. Whether the Plaintiffs are properly before this Court.
6. The Court of Appeal in the Case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 laid down the principle as to what constitutes a Preliminary Objection. A Preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the *Mukisa Biscuit Case (supra)* Law, JA stated as follow: -

“So far as I am aware, 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 the arbitration.”
7. In the present matter the 2nd Defendant has hinged its Preliminary Objection on three aspects. Firstly, it is the 2nd Defendant's position that the Plaintiff's cause of action is time barred and that the suit was brought after the expiry or lapse of the period of limitation. Secondly, it opines that the Plaintiff ought to have exhausted the Internal Dispute Resolution Mechanism provided under Section 125 and



129 (2) and (3) of the *Environmental Management and Co-ordination Act*, Cap 387 Laws of Kenya. Lastly, the 2nd Defendant contended that the Plaintiff failed to comply with Order 1 Rule 13 of the *Civil Procedure Rules*.

8. Section 4 (2) of the *Limitation of Actions Act*, Cap 22 of the Laws of Kenya prescribes the limitation period in regard to an action founded on tort and provides as follows: -

“(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.”

9. The 2nd Defendant contends that the cause of action accrued in 2010 when it completed the construction works and was issued with a certificate of completion by the 1st Defendant. According to the 2nd Defendant, the Plaintiffs needed to apply for the extension of time within which to file this suit. The 2nd Defendant submitted that the Plaintiffs were coming to Court over 13 years after the completion of the road and the expiry of the defect liability period. The 2nd Defendant relied on the Case of *Nation Media Group Limited & 2 others v Margaret Kamene Wambua* (2021) eKLR.

10. I have considered the parties pleadings and the 2nd Defendant’s submissions and I note that the 2nd Defendant filed two Taking Over Certificates in respect of the two road constructions they were undertaking. Certificate No. 1 related to Kagio-Baricho-Kerugoya (D 455) road and was inspected on 17th March 2010 and the defect period commenced immediately and was to expire on 17th March 2012. Certificate No. 2 related to Baricho-Kibirigwi-(D454) road and was inspected on 24th August 2010 and the Defects Liability period commenced on 13th August 2010 and expired on 13th August 2012. The Plaintiffs claimed to have petitioned NEMA for restoration orders in regard to environmental damage that the Defendants had caused and that NEMA granted the same. The Plaintiffs however provided no evidence to show when the restoration order was made and/or the terms of the same. In the absence of any such evidence, the Court would deem the cause of action, if any, to have accrued on the dates the roads were handed over by the 2nd Defendant to the 1st Defendant. Even if one was to allow for the defects liability period, the cause of action would have accrued latest by 12th August, 2012.

11. There is no doubt that a period of about ten years has elapsed from the date on which the right of action accrued upto the date when this suit was filed. No leave for extension of time to file the suit out of time was sought and/or granted to the Plaintiffs.

12. In the Case of *Bosire Ongero v Royal Media Services* [2015] eKLR the court held that the issue of limitation goes to the jurisdiction of the court to entertain claims and therefore if a matter is statute barred the court has no jurisdiction to entertain the same.

13. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal stated as follows

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

14. Under paragraph 9 of the Plaintiff, the Plaintiffs averred that the 2nd Defendant carried out the construction works on the roads aforesaid without due care, regard or consideration to the likely



environmental degradation that resulted from their activity. Also under paragraph 5 of the Plaint, the Plaintiffs pleaded as follows:-

5. That during the design and construction of the said Kibirigwi-Baricho-Kerugoya/Kagio road, the execution thereof by the 2nd Defendant contracted by the 1st Defendant, on account of design, flaw, negligence or want of due care and attention caused massive gulleying of the access road used by the Plaintiffs as well as flooding, erosion and soil runoff deposit in the farm of the Plaintiffs.
15. On the basis of the foregoing it is apparent that the Plaintiffs have founded their claim on the tort of negligence. Under the provisions of Section 4(2) of the [Limitation of Actions Act](#) (referred to earlier), such an action ought to be commenced within a period of three (3) years from the date the cause of action accrued. In the instant case, the Plaintiffs commenced their action on 21/2/2023 long after the period of Limitation had expired. I agree with the 2nd Defendant's assertion that the Plaintiffs suit was indeed statute barred on account of limitation.
16. Concerning the second issue, the 2nd Defendant submitted that the issues raised in this suit fell under the ambit of the Public Complaints Committee established under Section 31 of the [Environmental Management and Co-ordination Act](#) (EMCA) with appeals lying to the National Environmental Tribunal. According to the 2nd Defendant, the Plaintiff has failed to exhaust the available procedural mechanism for the resolution of the dispute.
17. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his own interest within the mechanisms in place for resolution outside the Courts. This encourages Alternative Dispute Resolution Mechanisms in line with Article 159 (2)(c) of the [Constitution](#) and was aptly elucidated by the High Court in [R v. Independent Electoral and Boundaries Commission \(I.E.B.C\) Ex Parte National Super Alliance \(NASA\) Kenya and 6 others](#) [2017] eKLR, where the Court stated thus:

“ This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in *Speaker of National Assembly v Karume* [1992] KLR 21 in the following oft-repeated words:

“ Where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

While this case was decided before the [Constitution of Kenya](#) 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 [Constitution](#). We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine.”
18. In the instant matter it is clear that the Plaintiff's complaints related to degradation of the environment by the Defendants during the construction of the roads (D455 & D454). The complaint was that in constructing the roads, the 2nd Defendant had directed the run off water to their public access road which had resulted in the access road being severely damaged rendering the same not motorable. It was the Petitioners assertion that they had petitioned for a restoration order from NEMA which they stated had been issued though no evidence was provided. There is no doubt that the complaint that the Plaintiffs had was one that fell within the mandate of NEMA to handle within the organs established



under EMCA. The Court of Appeal in the Case of Kibos Distillers Ltd & 4 Others v Benson Ambuti Adega & 3 Others (2020) eKLR was emphatic that where there was a statutory body that was vested with jurisdiction to handle a matter such matter should be first referred to such body or Tribunal before the intervention of the Court is sought. In the Case Asike Makhandia JA who prepared the lead majority Judgment with which Kiage, JA concurred, stated as follows:-

“As aptly stated by the Supreme Court in *Samuel Kamau Macharia and another v Kenya Commercial Bank Ltd & 2 Others (supra)* jurisdiction cannot be conferred by way of Judicial craft and innovation. Likewise, I state jurisdiction cannot be conferred by the art and craft of Counsel or a litigant drawing pleadings to confer or oust the jurisdiction conferred on a Tribunal or another institution by the constitution or statute.

To this extent, I find that the Learned Judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a Court to oust jurisdiction of a competent organ, through the art and craft of drafting pleadings. Even if a Court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a Court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the dicta in *Speaker of the National Assembly v James Njenga Karume* (1992) eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament that procedure should be strictly followed.”

19. In the instant matter the complaint and grievance that the Plaintiffs had was such as fell within the mandate of the National Environmental Complaints Committee and/or the National Environment Tribunal and ought to have been referred to these organs first before the jurisdiction of this Court could be invoked. This Court cannot properly usurp the jurisdiction of these organs. The matter was accordingly prematurely initiated before this Court without first exhausting the procedure outline under EMCA.
20. In the result, I find the 2nd Defendant’s Preliminary objection to be well founded and I uphold the same both on the ground that the suit was statute barred on account of limitation of action and on the ground that the Plaintiffs ought to have exhausted the dispute resolution procedure under EMCA. I accordingly order the suit to be struck out in its entirety with costs to the 2nd Defendant.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA VIA VIDEO LINK
THIS 24TH DAY OF APRIL 2024.**

J. M. MUTUNGI

ELC - JUDGE

