



**Mississippi Water Limited v Kenya Railways Staff Retirement Benefits Scheme & another;
Kenya National Highways Authority & another (Interested Parties) (Environment &
Land Case E212 of 2020) [2023] KEELC 16859 (KLR) (18 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16859 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E212 OF 2020**

MD MWANGI, J

APRIL 18, 2023

BETWEEN

MISSISSIPI WATER LIMITED PLAINTIFF

AND

**KENYA RAILWAYS STAFF RETIREMENT BENEFITS SCHEME 1ST
DEFENDANT**

NATIONAL LAND COMMISSION 2ND DEFENDANT

AND

KENYA NATIONAL HIGHWAYS AUTHORITY INTERESTED PARTY

NAIROBI METROPOLITAN SERVICES INTERESTED PARTY

JUDGMENT

Background

1. The Plaintiff's case is premised on the amended plaint amended on 18th August 2021. This suit is consolidated with ELCC E129/2020.
2. The gist of the case is that the Plaintiff was a tenant of the 1st Defendant on the parcel of land known as L.R. No. 209/11953, I.R. 72448 which was compulsorily acquired by the 2nd Defendant, the National Land Commission, for the purposes of construction of the Nairobi Expressway; and on behalf of the 1st Interested Party. The Plaintiff claims to have heavily invested in the suit property.
3. Upon the 1st Defendant being notified of the intention to acquire its land, the Plaintiff who was a tenant therein, was likewise notified and required to vacate the suit premises to pave way for the compulsory



acquisition for purposes of the project. It's the Plaintiff's case that it vacated the suit premises at its own costs as directed awaiting further communication from the Defendants.

4. The Plaintiff avers that it was left to shoulder the adverse economic effects occasioned by the compulsory acquisition process which it has particularized at paragraph 32 of the emended plaint. The particulars include:
 - a. Non-compensation for improvements carried out on the suit property.
 - b. Non-compensation for the deprivation of the Plaintiff's interest in the suit property'
 - c. Loss of income for unexpired terms of lease.
 - d. Kshs 59,180,435/- being inter alia the value of the construction work done to put up the existing facility.
 - e. Cost of re-establishment of business premises.
 - f. Loss of income tabulated and amounting to Kshs 95,740,000/-
5. The Plaintiff however, acknowledges that on 3rd May 2021, the 2nd Defendant made an award of Kshs. 42,667,561/= in its favour in light of the acquisition of the suit property. The Plaintiff nevertheless alleges that the said award was inadequate to compensate it for the loss occasioned by the compulsory acquisition of the suit property. The Plaintiff terms the award of Kshs. 42,667,561/= a gross undervalue of the compensation due to it.
6. The Plaintiff avers that the 2nd defendant is obligated under Article 40 (4) of the Constitution to compensate the Plaintiff in good faith for the Land acquired. Further under Section 111 (1) of the Land Act, 2012, the 2nd Defendant is required to promptly pay in full, compensation to all the persons who have established interests in the suit property the subject of compulsory acquisition.
7. The Plaintiff therefore prays for general damages, special damages amounting to Kshs 59,180,435/-, Loss of further earnings amounting to Kshs 95,740,000/-, interest on the 3 headings, together with costs of the suits.

Response by the 1st Defendant

8. The 1st Defendant's statement of defence is dated 19th January 2021. The 1st defendant avers that it lacks the legal authority to interfere with the government's unfettered right of compulsory acquisition of land. The 1st Defendant therefore puts the Plaintiff to strict proof.
9. The 1st Defendant avers that a notice of intention to acquire the suit property was indeed published as required by law. Further that all the requisite notices were published in the Kenya Gazette.
10. It is the 1st defendant's case that any issue of compensation to any party including the Plaintiff as a result of the compulsory acquisition of suit property must be handled in accordance with the provisions of the Land Act, 2012.
11. The 1st Defendant categorically states that this court lacks jurisdiction to determine the matter as there is a clear redress mechanism of the Plaintiff's grievances, which at first lies with the Land Acquisition Tribunal as set out by law. The Plaintiff has failed to follow legal mechanism provided under the law.



Response by the 2nd Defendant

12. On its part, the 2nd Defendant, while admitting that the 1st Defendant was the registered proprietor of the suit premises- L.R. No. 209/11953 denied the Plaintiff's claim and put the Plaintiff to strict proof. It further averred that it adequately compensated the Plaintiff to the tune of Kshs. 42,667,561/- upon compulsorily acquiring the suit property for the benefit of the 1st and 2nd interested parties.
13. The 2nd Defendant asserted that: -
 - a. Upon satisfaction by the 1st and 2nd Interested Parties that it was necessary to acquire the suit premises, a request for acquisition of land to the 2nd defendant to acquire the land on their behalf was submitted.
 - b. Upon, the 2nd Defendant establishing that the request met the requirements prescribed under subsection (2) and article 40 (3) of the Constitution, the 2nd Defendant caused: -
 - i. The subject premises to be mapped out and valued by the 2nd Defendant using the valuation criteria set out under the Land Act; and
 - ii. Established that the 1st and 2nd Interested Partys had indentified the number and maintained a register of persons in actual occupation of the land, confirming for each such occupation how much time they had been in uninterrupted occupation or ownership of interest in the land prior to the date of the request for acquisition of the land, and the improvements thereon.
 - c. Upon approval of the request, the 2nd Defendant published a Notice to that effect in the Gazette and the County Gazette, and delivered a copy of the notice to the registrar and every person who appeared to the 2nd Defendant to be interested in the land.
 - c. The notice issued contained the following particulars:-
 - i. The purpose for which the land was to be compulsorily acquired;
 - ii. The location, general description and approximate area of the land.
 - c. Upon receipt of the notice, the Registrar made an order, pursuant to section 76 (1) of the Land Registration Act, 2012, prohibiting or restricting dealings with the affected portion of the suit land thereof until it vested in the 1st and 2nd Interested partys.
 - c. Upon service of the notice, the registrar made an entry in the register of the intended acquisition.



14. The 2nd Defendant posited that, in assessing the value of the land, it took due consideration of the following issues: -
- a. Damages sustained or likely to be sustained by person interested at the time of the 2nd defendant's taking possession of the land by reason of severing the land from other land;
 - b. Damage sustained or likely to be sustained by persons interested in the land at the time of the 2nd Defendant's taking possession of the land injuriously affecting other property, whether movable or immovable or in any other manner affecting the person's actual earnings.
 - c. If, in consequence of the acquisition, any of the persons interested in the land is or will be compelled to change residence or place of business, the payment of reasonable expenses to be determined by the 2nd defendant;
 - d. Damages genuinely resulting from diminution of the profits of the land between the date of publication in the Gazette of the notice of intention to acquire the land and the date the 2nd Defendant takes possession of the land.
 - e. The effect of any express or implied condition of title or law which restricts the intended land use.
15. In making the award for compensation, the 2nd Defendant averred that it prepared a written award, in which it made a separate award of compensation for every person whom it had determined to have an interest in the suit premises including the Plaintiff herein.
16. Though the 2nd Defendant in its statement of defence admitted the jurisdiction of this court, it prayed for the dismissal of the Plaintiff's case against it with costs.
17. I must point out that the 1st Interested Party (formerly, the 2nd Interested Party) had also filed a statement of defence dated 1st December 2020 in which it was categorical that it was not responsible for the compulsory acquisition process nor the determination of the rightful owners of the subject parcel of land. The process of compulsory acquisition was solely the responsibility of the National Land Commission. It prayed for the dismissal of the Plaintiff's suit in its entirety with costs.

Evidence adduced at the hearing

18. This matter proceeded to hearing. At the commencement of the hearing, Mr. Nyamumbo Advocate for the Plaintiff informed the court that the Plaintiff had narrowed down its issues to the determination of how much money should have been paid to the Plaintiff by the 2nd Defendant since the Plaintiff had been paid some money which in its opinion was not sufficient.
19. The Plaintiff called 2 witnesses. PW1 testified that the 2nd Defendant had made an award in favour of the Plaintiff for Kshs. 42,667,561/-, which he termed as arbitrary. They had not been shown any valuation explaining how the figure of Kshs. 42,667,561/- had been arrived at.
20. PW1's testimony was that the Plaintiff had undertaken a valuation and the valuer they had engaged had arrived at a figure of Kshs. 59,180,435/- as at the value of the buildings and works, only. That figure was not inclusive of the incomes (other claims) tabulated in the witness statement and the amended plaint.
21. PW1 stated that they accepted the sum of Kshs 42,667,561/- 'under duress'.



22. Under cross-examination, PW1 averred that the 1st Defendant who was its landlord had not interfered with their occupation of the suit property at any one time. They had co-existed peacefully. The Landlord had informed them of the intended compulsory acquisition by way of a general notice attaching the Kenya Gazette.
23. PW1 stated that he did not participate in any way in the enquiry by the National Land Commission. He could only remember a general meeting at Kenya Railways Club but the meeting had not discussed the amount of compensation. He stated that he had not approached the Land Acquisition Tribunal with a claim for compensation. He instead decided to approach this court directly. The Plaintiff's claim according to PW1 was against the National Land Commission and not the 1st Defendant.
24. In response to questions by Mr. Mbuthia Advocate for the National Land Commission, PW1 confirmed that since they were not the owners of the land, their claim was for improvements on the land. The improvements were semi-permanent in nature. PW1 alleged that they had obtained approval from the Nairobi City County to erect the said structures but he had not exhibited the approval.
25. The lease agreement between the Plaintiff and the 1st Defendant expressly prohibited the Plaintiff from subletting to 3rd parties, without the consent of the 1st Defendant. The Witness further confirmed that the Plaintiff had not obtained any such consent from the 1st Defendant to sublet the premises.
26. Though the Plaintiff was claiming loss of business income for the sum of Kshs. 95,740,000/- PW1 admitted that they had not presented their books of accounts to prove the loss neither tax returns or any other evidence for that matter to support their claim.
27. The term of the lease was 8 years and 3 months, commencing in January 2020. The lease though was dated 15th January 2020. The sum of Kshs. 59,180,435/- was the value of the construction works. After payment of Kshs. 42,667,561/-, the witness affirmed that the Plaintiff was only claiming the difference between the 2 figures.
28. PW1 confirmed that they moved out of the suit premises in September 2020 after the government moved into the premises. The valuation was done after government had moved into the premises. In re-examination by the advocate for the Plaintiff, PW1 explained that the Plaintiff was in debts and that was the reason why they accepted the compensation of Kshs. 42,667,561/-. That was what he meant by stating that the Plaintiff received the said sum under duress. He further elaborated that the Plaintiff had no claim against the 1st Interested Party.
29. PW2 was the quantity surveyor who had valued the suit premises on behalf of the Plaintiff. He produced 2 reports as exhibits. The 1st report for the Mississippi Center where he had arrived at a value of Kshs. 59,180,435/-. The 2nd report was for N.V. Lunar park Ltd and he had arrived at a value of Kshs. 125,998,815/-
30. In cross-examination, PW2 confirmed that he was not a licensed valuer but a quantity surveyor. He was not a 'valuer' as per the definition in the [Land Act](#).
31. The 1st Defendant on its part called 1 witness. The 2nd defendant did not call a witness.
32. DW1 confirmed that the 1st Defendant had a 9 year lease with both Mississippi Water Ltd and N.V. Lunar Park Ltd. Their property was however compulsorily acquired by the 2nd Defendant. The witness insisted that the court lacked the jurisdiction to deal with the case as presented. The jurisdiction to deal with the issues lies with the Land Acquisition Tribunal.



Court's Directions.

33. The court's directions were that the parties file written submissions. Only the Plaintiff and the 1st Defendant complied. The Plaintiff's submissions are dated 30th October 2022. The 1st Defendant's submissions are dated 19th December 2022. I have had the opportunity to read and consider the submissions.

Issues for Determination.

34. Having read the pleadings filed by the parties in this matter, the evidence adduced during the hearing of this case and submissions filed by the Plaintiff and the 1st defendant herein, I am of the view that the issues for determination in this suit are as follows; -

- a. Whether the Plaintiff has a cause of action against the 1st Defendant.
- b. Whether the court has the jurisdiction to determine this case.
- c. Depending on the outcome of (A) and (B) above, whether the Plaintiff is entitled to the orders sought against the Defendants.
- d. What orders shall issue in regard to costs.

a. Whether the Plaintiff has a cause of action against the 1st Defendant.

35. In the case of *D.T. Dobie & Company (k) Ltd – Vs- Muchina* (1982) KLR, the Court of Appeal defined a cause of action to mean, 'an act on the part of the Defendant which gives the Plaintiff a cause of complaint.'

36. I have carefully perused the amended plaint amended on 18th August 2021. The Plaintiff's complaint against the 1st defendant is not discernible from the amended plaint. The Plaintiff's complaint is wholly against the 2nd Defendant, the National Land Commission who compulsorily acquired the suit property for purposes of the 'Express Way project'. The Plaintiff complains that the 2nd Defendant 'grossly under-valued and under-compensated' it. The Plaintiff's witness too in his testimony expressly stated that the Plaintiff's claim was against the 2nd Defendant and not the 1st Defendant.

37. The 1st Defendant as it stated in its statement of defence was as 'helpless as the Plaintiff' in the exercise and process of compulsory acquisition of its land by the 2nd Defendant.

38. Additionally, the Plaintiff has further not made a specific prayer against the 1st Defendant.

39. I would for that reason alone strike out the Plaintiff's case against the 1st Defendant with costs.

b. Whether the court has the jurisdiction to determine this case.

40. The legal framework governing compulsory acquisition of land or interest in land in Kenya is found in Article 40 (1) (2) and (3) of the *Constitution* and Part VIII of the *Land Act* No. 6 of 2012 (Sections 107 to 133 of the Act) as read together with Part V of the Land Regulations of 2017.

41. Article 40 (3) of the *Constitution* provides that: -

“The state shall not deprive a person of property of any description, or of any interest in, right over property of any description, unless the deprivation.



- a. Results from an acquisition of land or an interest in hand or a conversion of an interest in land, or title to land, in accordance with Chapter 5; or
 - b. Is for a public purpose or in the public interest and is carried out in accordance with this constitution and any Act of Parliament that-
 - i. Requires prompt payment in full, of just compensation to the person; and
 - ii. Allows any person who has an interest in, or right over, that property a right to access a court of law.
42. The *Land Act* of 2012 is the Act of parliament contemplated and enacted pursuant to the above constitutional provision. It lays down the procedure to be followed in compulsory acquisition of land or interest in land, the criteria for assessment of value, award of compensation and interest (where applicable) and the taking of possession amongst other issues. For purposes of appeals from the decisions of the National Land Commission, Section 133 A of the Act sets up the Land Acquisition Tribunal.
43. Section 133C of the *Act* provides for the jurisdiction of the Land Acquisition Tribunal. The Tribunal has the jurisdiction to hear appeals from the decision of the Commission (read National Land Commission) in matters relating to the process of compulsory acquisition of land. Such an appeal is to be filed within 30 days but the tribunal may for sufficient cause extend the time, upon such terms and conditions, if any, as may appear just and expedient.
44. Section 133C (4) emphasizes that matters relating to compulsory acquisition of land or creation of way-leaves, easements and public rights of way shall in the first instance be referred to the Tribunal. The Tribunal is granted the mandate to confirm, vary or quash the decision of the Commission. The Tribunal too has the power to hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of the *Constitution* using the framework set out under the *Fair Administrative Action Act* or any other law.
45. Appeals from the Tribunal lies to this court on the grounds set out under section 133D of the *Land Act*.
46. I need not over- emphasize on the centrality of jurisdiction in any court proceedings.
47. I wish to restate the oft repeated words in the case of, “The *Owners Of Motor Vessel Lilian S –vs- Caltex Kenya Ltd* (1989) KLR” where the court stated 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.”
48. In the case of *Equity Bank Ltd –Vs- Bruce Mutie Mutuku t/a Diani Tour Travel* (2016) eKLR, the Court of Appeal affirmed the above decision and added that:
- “It is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks parties cannot even seek



refuge under the oxygen principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of the *Constitution* to remedy the same.”

49. The decision of the Supreme Court of Kenya in the case of *Benson Ambuti Atega & 2 others –Vs- Kibos Distillers Ltd & 25 others* (2020) eKLR is especially relevant in this case. The Supreme Court categorically stated that,

“a court’s jurisdiction flows from either the *Constitution* or Statute or both. A court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which was conferred upon it by law.”

50. The Supreme Court made reference to its earlier decision in the case of *R v. Karisa Chengo* [2017] eKLR, where it had pronounced itself in the following words;

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics... where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

51. Further, in the case of *Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others* (2012) eKLR the Supreme Court held that;

“A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

52. In this case, the statute (*Land Act*, 2012) is clear and explicit that the kind of dispute filed before this court should be handled by the Land Acquisition Tribunal at the first instance. This Court can only exercise appellate jurisdiction, if at all. The Court lacks the jurisdiction to do what the Plaintiff is asking it to do.

53. This case was filed as an ordinary Civil Suit under the provisions of the *Civil Procedure Act*. It makes no pretence of being an appeal. It is a suit originated by way of a plaint, as if the provisions of the *Land Act* were non-existent or were meaningless.

54. Having arrived at the decision that this court lacks jurisdiction, there is no basis for me to continue to the 3rd issue. I have to lay down my tools at this juncture. I hereby strike out the Plaintiff’s suit with costs to the Defendants.

Final disposition.

55. The conclusion is that the Plaintiff’s suit is struck out in its entirety with costs to the Defendants. For the avoidance of any doubts, these orders will apply to the case ELCC E129 of 2020 as well.

56. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL 2023.



M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Nyamumbo for the Plaintiff in ELC 212 of 2020.

Mr. Wanjohi holding brief for Katiku for the 1st Defendant.

Mr. Munga for the 1st Interested Party.

Mr. Mbuthia for the National Land Commission.

Court Assistant- Yvette.

M.D. MWANGI

JUDGE

