Mangi & 3 others v Kenya Airport Authority & 2 others (Miscellaneous Civil Application E001 of 2023) [2023] KEELC 18261 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18261 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

MISCELLANEOUS CIVIL APPLICATION E001 OF 2023

EK MAKORI, J

JUNE 15, 2023

IN THE MATTER OF: LAND PARCEL NO. 7555, 8561,

1731/1, 9610, 9611 AND 8411

AND

IN THE MATTER OF: SECTION 38 OF THE LIMITATION OF

ACTIONS ACT CAP 22, LAWS OF

KENYA

AND

IN THE MATTER OF: AN APPLICATION FOR DECLARATION

THAT THE APPLICANTS HAVE

OBTAINED TITLE OVER THE SAID

LAND PARCEL NOS. 7555, 8561,

1731/1, 9610, 9611, AND 8411 BY

ADVERSE POSSESSIONIN THE MATTER OF: LAND PARCEL NO. 7555, 8561,

1731/1, 9610, 9611 AND 8411

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LAND PARCEL NOS. 7555, 8561,

1731/1, 9610, 9611, AND 8411 BY

ADVERSE POSSESSION

BETWEEN

DICKSON KAINGU MANGI ..... 1ST APPLICANT

JOHNSON SULUBU MANGI ..... 2ND APPLICANT

KACHE KARISA ..... 3RD APPLICANT

AHMED KAI NASIB ..... 4TH APPLICANT

AND

KENYA AIRPORT AUTHORITY ..... 1ST RESPONDENT

THE NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

THE HONOURABLE ATTORNEY GENERAL ..... 3RD RESPONDENT

RULING

1. By an application dated January 16, 2022, the Applicants seek a temporary injunction restraining the 1st and 2nd Respondents from fencing off the property at the Malindi International Airport described as - Land parcels No. 7555, 8561,1731/1, 2610, 2611, and 8411 with attendant costs.

2. The application is opposed. The court directed parties to file written submissions on the matter.

3. The Applicants' case is that since 1960, they have settled on the land in question and developed on it with marked developments standing thereon. Due to illiteracy, the Applicants have never applied for ownership documents of the suit land.

4. The 1st Respondent paid a compensation sum to the tune of Kshs. 424,205.60/= to obtain space to expand the Malindi International Airport. The monies have reached some of the affected members, but not the Applicants, and presently the land is being fenced off in preparation for works to extend the Airport before fully compensating the Applicants.

5. The Applicants contended that the Respondents have violated and contravened Article 28, 40(4), 57(b)(c), and (d) and the *Land Acquisition Act* in the manner the whole process is being undertaken.

6. The Applicants further contended they have been in occupation of the land for over 50 years and have acquired the portion under the doctrine of adverse possession.

7. The 1st Respondent is said to have instructed the 2nd Respondent to have the Applicants vacate the land in question, and that a fencing-off exercise has long commenced

8. The Applicant averred that at this stage the court needs to issue injunctive orders to restrain the Respondents from further fencing or acquirement of the land in question until the existing matter is heard and determined. That the test set in the case of *Giella v Cassman Brown* [1973] EA 358 of a *prima*

facie case with a probability of success, irreparable damages that cannot be adequately compensated by an award of damages and that in doubt, the balance of convenience has been achieved.

9. The 1st th Respondent averred that the Persons Affected by the project have been mapped out, and phase one of the compensation has been finalized. The 2nd Respondent will advise on whom to compensate in the next phase. The 2nd Respondent believes this is not one of the cases to issue injunctive orders.

10. The 2nd Respondent stated that the process of compulsory acquisition is ongoing and those to benefit will know in the due cause via the Kenya gazette. The fencing is necessary to put out more squatters on the land positioning for compensation. The 2nd Respondent concluded that the application is misconceived at this stage because the compulsory acquisition process is ongoing.

11. Now what to determine is whether injunctive orders should issue at this stage of the trial.

12. The Applicants have commenced this matter by way of Originating Summons. By their admission, they stated that they do not have titles to their land due to illiteracy and will be urging the court to declare them the owners of the respective portions they have curved amongst themselves as adverse possessors.

13. On the other hand, the 1st and 2nd Respondents contended that the process of compensation is ongoing and that all Persons Affected will be compensated under the applicable law.

14. The process of Compulsory Acquisition is well explained under *The Constitution* of Kenya and the *Land Act*. In this matter, we are dealing with the state's power to expropriate private land for public use otherwise known as eminent domain. The land is needed for the expansion of the Malindi International Airport. It cannot be gainsaid that when the state requires privately owned land for public use, it cannot be stopped from compulsorily acquiring the same. On the other hand, if it is public land and there are squatters on it, it can be gratuitous enough to allocate alternative land or compensate them based on the improvement on the ground.

15. That is why *the Constitution* of Kennya deemed it essential to provide a clear structure on how the state is to exercise the power of eminent domain. Article 40(3) of *the Constitution* provides thus:

> " The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation:
>
> (a) results from an acquisition of land or an interest in land or conversion of an interest in land, or title to land, under Chapter Five; or
>
> (b) is for a public purpose or in the public interest and is carried out under this Constitution and any Act of Parliament that –
>
> (i) requires prompt payment in full or just compensation to the person; and
>
> (ii) allows any person who has an interest in or right over, that property a right of access to a court of law.

16. In addition to the preceding constitutional framework, Part VIII of the *Land Act* provides an elegant framework for exercising the power of eminent domain. Part VIIIA establishes a framework for resolving disputes arising from the state's use of the power of eminent domain. The National Land Commission is required by Section 112 of the Act to publish a notice of intention to compulsorily acquire land on behalf of either of the two levels of government. The section requires the National Land Commission to set a date for an investigation into the proposed compulsory acquisition.

During the inquiry stage, the Commission hears issues of propriety and compensation claims made by landowners. Under Section 123, the Commission is required to withdraw or revoke a notice of intended compulsory acquisition provided this is done before the Commission takes possession of the land.

17. In response to the many disputes over the state's use of eminent domain, Parliament established the Land Acquisition Tribunal. The Tribunal's jurisdiction is defined in Section 133C of the *Land Act* as follows:

> " 1) The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
>
> 2) A person dissatisfied with the decision of the Commission may, within thirty days apply to the Tribunal.
>
> 3) Within sixty days after the filing of an application under this part, the Tribunal shall hear and determine the application.
>
> 4) Despite subsection (3) the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
>
> 5) If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.
>
> 6) Despite the provision of Sections 127, 128, and 148(5) a matter relating to the compulsory acquisition of land or creation of wayleaves, easements, and public right of way shall, in the first instance, be referred to the Tribunal.
>
> 7) Subject to this Act, the Tribunal has the power to confirm, vary or quash the decision of the Commission.
>
> 8) The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23(2) and 47(3) of *the Constitution*, using the framework set out under Fair Administrative Action or any other law.

18. In its astuteness, Parliament enacted Section 133D of the *Land Act*, which grants this court appellate jurisdiction in disputes involving the exercise of the state's eminent domain power in the following terms:

> (1) A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may, in the prescribed time and manner, appeal to the court on any of the following grounds:
>
> (a) the decision of the Tribunal was contrary to law or some usage having the force of law;
>
> (b) the Tribunal failed to determine some material issue of law or usage having the force of law; or

(c) a substantial error or defect in the procedure provided by or under this Act has produced an error or defect in the decision of the case upon the merits.

(2) An appeal from the decision of the Tribunal may be made on a question of law only.

19. It follows from Part VIII and Part VIIIA of the *Land Act* that disputes concerning proprietary and compensation claims by persons interested in land subject to compulsory acquisition are to be adjudicated by the National Land Commission through the mechanism of inquiry contemplated by Section 112. If the dispute cannot be resolved satisfactorily, the Land Acquisition Tribunal established under Section 133A of the *Land Act* is the next stop. If a party is dissatisfied with the Tribunal's decision, the next sojourn is this court invoking this court's appellate jurisdiction on legal issues only.

20. This brings me to the next frontier, where a party has recourse in another forum or organ created in law to handle similar grievances, as a port of first call other than this court, under the doctrine of judicial abstention, the emerging jurisprudence from the Superior Courts, particularly the Supreme Court and the Court of Appeal, we now have what the Supreme Court referred to as - the Pullman doctrine (arising from a US decision - US Supreme Court in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941)) or what I can call - the Kibos doctrine (arising from the Supreme Court decision in *Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 Others [2020]* eKLR, Petition 3 of 2020 on judicial abstention, which we must contend with when dealing with a mixed grill or multifaceted issues, such as the current Originating Summons.

21. In the Court of Appeal in *Kibos Distillers Limited and 4 others v. Benson Ambuti Adega and 3 Others Civ. Appeal No. 153 of 2019* [2020] eKLR, Makhandia JA. in overturning the orders of this court on the doctrine of abstention stated as follows: -

> " ....In the instant matter, the learned Judge citing the case of Ken Kasinga v. Daniel Kiplangat Kirui & 5 others [2015] eKLR, and other decisions from Courts of coordinate jurisdiction, held that where a claim in a Petition or suit is multifaceted, a Court can have jurisdiction despite the existence of another forum, institution or agency that has been legislatively conferred with jurisdiction to determine the matter. With due respect, this is a wrong exposition of the law. Such reasoning implies that jurisdiction may be conferred through the art and craft of drafting pleadings – that all that a litigant need to do is draft pleadings that such claims are raised in a multifaceted way and thereby oust the jurisdiction of any specialized tribunal or agency. This promotes forum shopping.....
> ... 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 the National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a Court or oust the 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 only 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 a particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.

[...] A Court with original jurisdiction in some matters and appellate jurisdiction in others cannot by virtue of its appellate jurisdiction usurp original jurisdiction of other organs. I note that original jurisdiction is not the same thing as unlimited jurisdiction.

A Court cannot arrogate itself an original jurisdiction simply because claims and prayers in a Petition are multifaceted. The concept of multifaceted claim is not a legally recognized mode of conferment of jurisdiction to any Court or statutory body."

22. On appeal to the Supreme Court of Kenya in *Benson Ambuti Adega & 2 others V Kibos Distillers Limited & 5 Others [2020]* eKLR, Petition 3 of 2020, Maraga, CJ & P, Mwilu, DCJ & VP, Ibrahim, Wanjala, Njoki & Lenaola SCJJ. held as follows: -

" ...It would seem that the ELC had failed to appreciate that there were properly constituted institutions that were mandated to hear and determine the issues but instead chose to arrogate to itself the jurisdiction to hear and determine all the issues raised in the Petition. The Petitioners stated that the Superior Court correctly relied on the doctrine of judicial abstention, and exercised its discretion to hear and determine the Petition.

(51) Judicial abstention, as with judicial restraint, is a doctrine not founded in constitutional or statutory provisions, but one that has been established through common law practice. It provides that a Court, though it may be vested with the requisite and sweeping jurisdiction to hear and determine certain issues as may be presented before it for adjudication, should nonetheless exercise restraint or refrain itself from making such determination, if there would be other appropriate legislatively mandated institutions and mechanism.

(52) The abstention doctrine, also known as the Pullman doctrine, was deliberately first reviewed by the US Supreme Court in Railroad Commission of Texas v. Pullman Co., 312 U.S. 496 61 S. Ct. 643, 85 L. Ed. 971 (1941). The doctrine, and as applied within the context of the US legal system, allows federal courts to decline to hear cases concerning federal issues where the case can also be resolved with reference to a state-based legal principle. The Supreme Court, in an opinion by Justice Brennan in England v. Louisiana State Board of Medical Examiners, 375 U.S. 411 (1964) also noted that a State Court determination would indeed bind the federal court. The proper procedure, the Court determined, is to give notice that the federal issue is contended, but to expressly reserve the claim on the federal issue for the federal court. If such a reservation is made, the parties can return to the federal court, even if the State Court makes a ruling on the issue.

(53) Applying these principles to the instant Petition, the more favorable relief that the Superior Court should have issued was to reserve the constitutional issues on the rights to a clean and healthy environment, pending the determination of the issue with regards to the issuance of EIA licenses by the 4th Respondent to the 1st, 2nd and 3rd Respondents. The Court should have reserved the issues pending the outcome of the decision of the Tribunal, thereby affording any aggrieved party the opportunity to appeal to the Court. It would then

have determined the reserved issues, alongside any of the appealed matter, if at all, thus ensuring the parties right to a fair hearing under Article 50 of *the Constitution* was protected. [54] The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial Court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate Court should at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio and that the appellate Court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance..."

23. The position taken by the Supreme Court in the Kibos Case is also replicated by the apex Court in United Millers Limited V Kenya Bureau of Standards and 5 Others [2021] eKLR, as follows:

> "(25) Considering all the above, it is clear to us that the judicial review application before the trial Court and the subsequent appeal to the Court of Appeal were determined on a preliminary jurisdictional issue. We have previously in Peter Odour Ngoge v Francis Ole Kaparo & others; SC Petition No. 2 of 2012, [2012] eKLR, emphasized the significance of respecting the hierarchy of the judicial system, as one of the principles guiding the exercise of our jurisdiction under Article 163 (4) (a) of *the Constitution*. From the foregoing, we find no difficulty in concluding that the issues before the High Court, as well as the Court of Appeal, did not either involve the interpretation and application of *the Constitution* or take a trajectory of Constitutional interpretation or application. While issues of constitutional interpretation and application had been raised in the substantive application for Judicial Review, they were nipped in the bud when the preliminary objection was upheld for failure to exhaust the statutory alternative dispute resolution mechanisms.
>
> (26) We also take judicial notice that the superior courts' findings on jurisdiction is in harmony with our finding in Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016, [2019] eKLR, wherein we stated that, even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute. We emphasized that where there exists an alternative method of dispute resolution established by legislation, the Courts must exercise restraint in exercising their Jurisdiction conferred by *the constitution* and must give deference to the dispute resolution bodies established by statutes with the mandate to deal with such specific disputes in the first instance.
>
> (27) In view of the reasons tendered, we find that this Court has no jurisdiction to hear and determine Petition No. 4 of 2021 or the instant application for conservatory or stay orders."

24. In the current Originating Summons, the issues raised touch on adverse possession itself, but with the dominant element being compulsory acquisition. The Applicants have demonstrated that they do not have title documents to the land in question and have approached the court to be declared as owners through adverse possession. The Gazette Notice No 339 of 13th January 2017 discloses the land owners of the part to be expropriated – the Applicants are not included. The 1st and 2nd Respondents say they will be included in the 2nd phase of the compensation. The Gazette Notice is yet to be published. These are claims in my view which cannot be addressed contemporaneously. The Applicants needed to have their claim on adverse possession heard first before seeking compensation. The doctrine of adverse possession is inapplicable where the land is public or trust land or is owned by the Government. Section 41 of the *Limitation of Actions Act* excludes Public Land from the application of the Act. Section 41(a) of the Act provides:-

"

"41. Exclusion of public land
This Act does not -

(a) enable a person to acquire any title to or any easement over -

i. Government land or land otherwise enjoyed by the Government;

ii. Mines or minerals as defined in the *Mining Act* (Cap. 306);

iii. Mineral oil as defined in the Mineral Oil Act (Cap. 307);

iv. Water vested in the Government by the *Water Act* (Cap. 372);

v. Land vested in the County Council (other than land vested in it by Section 120(8) of the Registered *Land Act* (Cap. 300)); or

vi. Land vested in the Trustees of the National Parks of Kenya;"

25. On compulsory Acquisition, the Applicants have to follow the path I have indicated above, which certainly cannot be by an originating summons, nor can it be before this court in the first instance.

26. Since the Applicants have no title to the land in question yet, and looking at the authorities, we have on the doctrine of abstention and exhaustion, the 1st and 2nd Respondents have put mechanisms on how to compensate the Persons Affected by the proposed Malindi International Airport expansion. The Applicants have not shown that the 1st and 2nd Respondents have failed to compensate them. They are ready to do so. The Gazette Notice for that purpose is not yet out. The Applicants are placing the cart before the horse or eating the cake and wanting to have it at the same time. They want to turn this court into the Land Acquisition Tribunal envisaged under Section 133A of the *Land Act*. It cannot be. It is against the law. Why the rush to approach this court when the 1st and 2nd Respondents are ready to compensate them? As alluded to earlier, one cannot stop the government from exercise of its powers under the eminent domain doctrine. The Applicants are biting the hand that seeks to compensate them. They have put their hands deep into the lion's mouth!

27. Lastly, I pose a question, what will the Originating Summons herein achieve against the Respondents? Which title is to be impeached as against the Respondents via the Originating Summons? Is it the radical title? Was this a Constitutional Petition disguised as an Originating Summons? Back to the Applicants.

28. The application dated 16th January 2023 is premised on wrong pleadings. In my view, I think the court has been wrongly moved. The suit on which to buttress the orders sought is not properly drawn and I need not consider whether the test in Giella v Cassman Brown (supra) has been achieved. It will be an exercise in futility. It is dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 15TH DAY OF JUNE 2023

EK. MAKORI

JUDGE

In the presence of :

Mr mogaka for the Applicants

M/s Mwendwa for the 1st Respondents

M/s Someren for 3rd Respondents

In the absence of:

Mr. Kiilu for 2nd Respondents