



**Kishamba ‘B’ Group Ranch v National Land Commission & 3 others (Environment & Land Petition 27 of 2020) [2023] KEELC 20962 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20962 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND PETITION 27 OF 2020  
SM KIBUNJA, J  
OCTOBER 25, 2023**

**BETWEEN**

**KISHAMBA ‘B’ GROUP RANCH ..... PETITIONER**

**AND**

**THE NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**CHINA ROAD & BRIDGE CORPORATION (K) ..... 3<sup>RD</sup> RESPONDENT**

**MOHAMED A. SWAZURI ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The 3<sup>rd</sup> respondent filed the application dated 30<sup>th</sup> September 2022 under Order 1 Rule 10 (2) and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 1A(1), 3, 3A, 63 (e) of the *Civil Procedure Act* seeking for;
  - a. The claim against the 3<sup>rd</sup> respondent in the further amended petition dated 19<sup>th</sup> March 2021 and filed on 24<sup>th</sup> March 2021 be dismissed with costs.
  - b. Costs of this application be provided.

The application is premised on two (2) broad grounds with sub-grounds on its face and is supported by the affidavit of Jude Obiero, the 3<sup>rd</sup> respondent’s legal officer, sworn on the 30<sup>th</sup> September 2022 inter alia deposing that this court lacks jurisdiction to hear and determine the petition because it does not raise any constitutional issues; that the claim is premised on payment of compensation award which is an ordinary dispute of debt collection which does not merit this court’s constitutional jurisdiction; that his court lacks jurisdiction to hear a dispute on a challenge on compulsory acquisition as section 112 of the *Land Act* vests the jurisdiction to hear and determine disputes on the ownership, value and compensation payable on the recommendation to the National Land Commission Inquiry. The 3<sup>rd</sup>



respondent argues that there is a sufficient statutory framework for resolving disputes arising from compulsory acquisition and recovery of debt collection; that the petition does not disclose any cause of action against the 3<sup>rd</sup> respondent and that the law imposes the obligation to pay compensation for compulsory acquisition on the 1<sup>st</sup> respondent; that the 3<sup>rd</sup> respondent is under no legal obligation to compensate the petitioner for compulsory acquisition and there is no relief sought by the petitioner against the 3<sup>rd</sup> respondent.

2. The application is opposed by the petitioner through the replying affidavit Benson Mlambo Mwakina, chairperson to the petitioner, sworn on the 21<sup>st</sup> July 2023, inter alia deposing that the issues on jurisdiction ought to be dealt with without delving into the validity of the petition which the petitioner believes is supported by facts and evidence; that the jurisdiction of this court is not ousted since the petition is not a subject of Section 112 of the [Land Act](#), but rather a constitutional petition seeking enforcement of fundamental rights violated by the respondent; that the jurisdiction anticipated by Section 112 was limited to inquiry on compensation, while the petition was on specific constitutional breaches to the petitioner's constitutional rights and freedoms and seek enforcement and declarations from the court; that it was rightful for them to sue the 3<sup>rd</sup> respondent since it was the contractor of the subject matter giving rise to the compulsory acquisition, and their enjoinder is essential in giving insight into the petitioner's claim; that the 3<sup>rd</sup> respondent was said to have participated in the entire process as a contractor perpetrating the constitutional violations against the petitioner; that the court should find that the petition raises weighty constitutional issues that ought to be determined by the court on merit, and in turn find the application lacks merit and dismiss it with costs.
3. The following are the issues for the determination by the court:
  - a. Whether this court has the jurisdiction to hear and determine this petition.
  - b. Whether the Further Amended Petition discloses a cause of action against the 3<sup>rd</sup> respondent.
  - c. Who pays the costs in the application.
4. The court has carefully considered the grounds on the application, the affidavit evidence, the pleadings in the further amended petition and come to the following conclusions:
  - a. The 3<sup>rd</sup> respondent position is that this court has no jurisdiction to determine the petition because the dispute arising from compulsory acquisition ought to be determined by the National Land Commission as provided for under section 112 of the [Land Act](#), which vests the jurisdiction to hear and determine disputes on the ownership, value and compensation payable on compulsory acquisition to the National Land Commission Inquiry. The petitioner disagrees and maintains that the petition is not about an inquiry of compensation as anticipated by Section 112 of the [Land Act](#), but a claim on the violation of their constitutional rights and freedoms.
  - b. It is a well-settled principle that when the issue of the court's jurisdiction is raised, it is incumbent upon the court to deal with that question first. A court cannot confer jurisdiction on itself, rather jurisdiction flows from either the Constitution or legislation or both. As discussed by the Supreme Court of Kenya in the case of [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) (2012) eKLR;  

“ A court's jurisdiction flows from either the constitution of 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.”

*In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application No. 2 of 2011. The Supreme Court also held that;

“Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature- would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

- c. Article 162 (2) (b) of the *Constitution* establishes and confers this court with jurisdiction, and directed that

“Parliament shall establish courts with the same status of the High Court to hear and determine disputes relating to - the environment and the use and occupation of, and title to land.

The *Environment and Land Court Act* No. 19 of 2011 has given effect to Article 162 (2) (b) of the *Constitution* by setting out the jurisdiction of the court at Section 13. Further, this court is also clothed with jurisdiction by Section 21 of the *Environment and Land Court Act*, to exercise the jurisdiction under Article 165(3)(b) or (d) of the *Constitution* which is to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.

- d. Article 40 (3) of the *Constitution*, provides for the compulsory acquisition of private land by the state for public purposes, and that provision is actualized by Part VII of the *Land Act*, which is an elaborate statutory framework on the compulsory acquisition of an interest in land, upon a prompt full payment of just compensation. The Court in the case of *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR held that,

“As the taking of a person’s property against his will is a serious invasion of his proprietary rights, the application of constitutional or statutory authority for the deprivation of those rights requires to be most carefully scrutinized. In short, in our view, there must always exist a presumption against an intention to interfere with vested property rights as the legislative and constitutional intention is always the protection rather than interference with proprietary rights.”

Section 112 of the *Land Act* is only a part of the process set out in Part VIII of the *Land Act* in the compulsory acquisition process, and it is meant to directly involve the registered owner of the land for the sole purpose of determining proprietary interest and compensation. The inquiry envisions the National Land Commission’s quasi-judicial powers where persons with an interest in the land being acquired are accorded an opportunity to present their claim for verification. This inquiry process is limited to determining the nature and extent of the interest and the award for compensation for every person who is deemed to have interest in the land. The provision cannot be said to oust the jurisdiction of this court in determining whether the land owner’s rights were violated during the compulsory acquisition process.



- e. The petitioner contends that the compulsory acquisition process was not conducted in accordance with the law and the Constitution, and in turn their constitutional rights and freedoms were violated. This court by virtue of Sections 13 and 21 of the Environment and Land Court Act is clothed with the jurisdiction to hear and determine the dispute on whether there was prompt just and full compensation and whether the alleged constitutional rights and freedoms have been violated or threatened with violation.
- f. The 3<sup>rd</sup> respondent has urged the court to dismiss the further amended petition as it does not disclose any cause of action against it and raises no constitutional issues as the money claim should be dealt with in accordance with the applicable legislative framework. I have perused the whole Further Amended Petition dated the 19<sup>th</sup> March 2021 and noted the following:
  - i. That the 3<sup>rd</sup> respondent is only mentioned in the heading and the definition paragraph 3.
  - ii. That unlike the 1<sup>st</sup> and 4<sup>th</sup> respondents, there are no particulars of fraud set out in respect of the 3<sup>rd</sup> respondent.
  - iii. That there are no specific order or prayer sought against the 3<sup>rd</sup> respondent.

The court in the case of Jonathan Munene v Attorney General & 2 others; Kenya Judges Welfare Association (Interested Party) [2021] eKLR held that;

“In determination of this issue this Court is called upon to consider whether the Petition herein raises triable issues, which can best be done by considering what is the overriding objective of the Constitution of Kenya, which in my view is to facilitate access to justice. The Constitution should be interpreted as provided under Article 259 of the Constitution. Article 259 of the Constitution obliges the Courts to promote “its purposes; values and principles, advance the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permit the development of the law; and contribute to good governance.”

This gives the courts leeway to strike out suits, if they are satisfied that the suits are scandalous, frivolous or vexatious, disclose no reasonable cause of action or defence in law and may prejudice, embarrass or delay a fair trial.”

Having considered the averments in the further amended petition, the factual materials in the grounds on the application and affidavit evidence, I find that the Further Amended Petition has both factual and legal basis which this court ought to consider on merit. However, none of those factual or legal claims have been shown to have a nexus, with the 3<sup>rd</sup> respondent. I am therefore in agreement with the 3<sup>rd</sup> respondent that the Further Amended Petition does not disclose any cause of action against them, and it is therefore not a necessary party in this proceedings.

- g. This court is obligated by the Constitution to uphold its values and principles of the Constitution by affording the petitioner an opportunity to prove the unconstitutionality of the Respondents’ actions and omissions that it alleges have violated their proprietary rights among others. In my view, and without going deeply into the merits of the petition at this interlocutory stage, I find that the Further Amended Petition does not contain or disclose any claim of constitutional infringement directed at or blamed on the 3<sup>rd</sup> respondent.



- h. That as the 3<sup>rd</sup> respondent is clearly an unnecessary party in this proceedings, and have succeeded in their application, the petitioner will meet its costs.
5. Flowing from the foregoing, the court finds and orders as follows:
- a. The 3<sup>rd</sup> respondent's notice of motion dated the 30<sup>th</sup> September 2022 has merit.
- b. The petitioner's claim in the Further Amended Petition against the 3<sup>rd</sup> respondent is hereby struck out.
- c. The petitioner to meet the 3<sup>rd</sup> respondent's costs.
- Orders accordingly.

**DATED AND VIRTUALLY DELIVERED THIS 25<sup>TH</sup> DAY OF OCTOBER 2023.**

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

In the presence of:

Petitioner : M/s Mutune for Shariff.

Respondents : M/s Opondo for 2<sup>nd</sup> Respondent and Mr. Karina for 3<sup>rd</sup> Respondent.

Wilson – Court Assistant.

**S. M. KIBUNJA, J.**

**ELC MOMBASA.**

