



PN Mashru Limited v Kenya National Highways Authority & another (Environment & Land Petition E002 of 2025) [2025] KEELC 3515 (KLR) (30 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3515 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION E002 OF 2025**

**EK MAKORI, J
APRIL 30, 2025**

BETWEEN

PN MASHRU LIMITED PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

RULING

1. The Petitioner herein, by a Petition dated 7th February 2025, approached this court for orders inter alia:
 - a. A declaration that the Petitioner’s fundamental rights and freedoms as enshrined under Articles 40 (1),40(2), 40(3) (b) (i), 47 and 47 (2) of the Constitution of Kenya 2010 have been contravened and infringed upon by the Respondents herein;
 - b. Conservatory and declaratory orders in form of a permanent injunction restraining the Respondents, contractors, subcontractors, agents and/or employees and any other public officer(s) acting on their instructions as a whole, from entering, breaking, demolishing, destroying, evicting, defacing, flattening or in any way interfering with the buildings, developments and all amenities or the smooth operation and running of and the peaceful possession of the Petitioner’s property L.R. NO. Kilifi/Ngumopatsa/Mazeras “A”/1047;
 - c. A declaration that the Respondent’s actions and their agents of threatening to invade, trespass, and demolish part of the Petitioner’s property, L.R. No. Kilifi/Ngumopatsa/Mazeras “A”/1047 violates the rights of the Petitioner and that the Respondent’s actions, and threatened actions are unconstitutional, invalid, and an abuse of the mandate, power, and due process stipulated to the Respondents and the Government under the Constitution;



- d. A declaration that the Petitioner herein is entitled to prompt, just and adequate compensation in full within the meaning of Article 40 (3)(b)(i) the sum of Kenya Shillings Nineteen Million, Two Hundred and Ninety-One Thousand, Two Hundred and Fifty (Kshs. 19,291,250.00) over compulsory acquisition of L.R. No. Kilifi/Ngumopatsa/Mazeras “A”/1047;
 - e. General, exemplary, and aggravated damages under Article 23(3) of *the Constitution* of Kenya 2010 for the unconstitutional conduct of the Respondent;
 - f. Costs of the Petition; and
 - g. Interest.
2. The Petitioner seeks judicial relief concerning the purported compulsory acquisition of L.R. No. Kilifi/Ngumopatsa/Mazeras “A”/1047. In this context, the Petitioner requests, among other remedies, just compensation amounting to Kenya Shillings Nineteen Million, Two Hundred and Ninety-One Thousand, Two Hundred and Fifty (Kshs. 19,291,250.00/-) from the Respondents through this court.
 3. The 1st Respondent has raised a Preliminary Objection to the Petition. The Preliminary Objection, dated 21st February 2025 (hereinafter referred to as the PO), seeks to strike out the Petition, dated 7th February 2025 (hereinafter referred to as the Petition), asserting that:

“That this Honourable Court lacks jurisdiction to hear and determine this matter pursuant to provisions of Section 133 of the *Land Act*, 2012, which provides that the Land Acquisition Tribunal has original jurisdiction to hear and decide appeals from the decision of the Commission in matters relating to compulsory acquisition of land.”
 4. The Petitioner contests the legitimacy of the Petition, which will serve as the foundation for the matters the court will address, based on a singular argument: this court does not possess jurisdiction as the Petition contravenes section 133 of the *Land Act*, 2012, which stipulates that the Land Acquisition Tribunal (hereinafter referred to as the LAT) holds original jurisdiction to hear and resolve appeals arising from the decisions of the Commission (specifically, the National Land Commission – hereinafter referred to as the NLC).
 5. Counsels for the parties submitted written submissions regarding the PO and the legal framework and judicial precedents the court will consider in addressing it.
 6. The central issue of the PO is the court’s jurisdiction to take further steps on the single issue raised by the 1st Respondent above. The court’s jurisdiction is paramount and must be carefully considered.
 7. As submitted by counsel for the parties, the principles upon which this court is invited to determine the merit of a notice of PO were set out in the oft-cited case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696. This case established the criteria for a PO, which include raising a pure point of law, demonstrating the correctness of all the facts pleaded by the other side, and the absence of any fact that needs to be ascertained. The court will consistently adhere to these principles in its ruling.
 8. The Court of Appeal in *Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga* [2016] KECA 817 (KLR) reiterated the same position on what would constitute a PO and held as follows:

“The test to be applied in determining whether the appellants’ Preliminary Objection met the threshold or not is what Sir Charles Newbold set out above in the *Mukisa Case* (supra). That is first, that the Preliminary Objection raises a pure point of law, second, that there is



demonstration that all the facts pleaded by the other side are correct; and third, that there is no fact that needs to be ascertained.”

9. The thrust of a PO in this matter rests squarely on the jurisdiction of this court, as held by Nyarangi J.A. in *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR:

“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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

10. A PO rests on the proposition that when raised, its fundamental achievement will influence the disposition of a matter because it raises pure points of law. It also underscores the need for prudent time management as a court resource by summarily flagging weak and hopeless cases that, if allowed to proceed to full trial, would waste judicial time and not serve the interests of justice. One does not need to look elsewhere to find an answer as to whether a PO is sustainable; instead, one should examine the pleadings and discover that the suit is a non-starter – see the works of Ogola J. in *DJC v BKL* (Civil suit E021 of 2021) [2022] KEHC 10189 (KLR) (27 June 2022) (Ruling).
11. The 1st Respondent contends that this court does not possess the jurisdiction to hear and resolve the current matter, as the issues presented are exclusively within the original jurisdiction of the Land and LAT, as outlined in Section 133 of the *Land Act*, 2012.
12. The Petitioner, on the other hand, while acknowledging that on 2nd July 2024 it was served with an award by the 2nd Respondent, NLC, purportedly issued on 26th September 2022 for an amount of Kenya Shillings Two Million Five Hundred Sixty-Five Thousand Five Hundred Ninety-Three Shillings Only (Kshs. 2,565,593.00/-) in relation to the dualling of the Mombasa-Mariakani Road Project, Lot 2 Kwa Jomvu Mariakani Section.
13. The award of 26th September 2022 was issued pursuant to instructions received from the 1st Respondent, Kenya National Highways Authority (KENHA) via their letter dated 3rd August 2021 (Ref: Kenha/05. B/kf10A,109/Vol. 17/8553). According to the 2nd Respondent, the particulars relating to the interest and compensation were as follows: the total value of commission improvements is Kshs. 2,230,950.00/-. The total compensation for improvements includes a 15% disturbance allowance and a diminution of profits of Kshs. 2,565,593.00/-.
14. The Petitioner herein responded to the award in a letter dated 2nd July 2024, rejecting the grossly undervalued award issued by the Respondents. The Petitioner further wrote to the Respondents on 2nd October 2024, forwarding its independent valuation report by Afriland Valuers Limited, dated 10th July 2024. This letter elicited no response.
15. It is the Petitioner’s position that, according to Afriland Valuers Limited in their report dated 10th July 2024, the Petitioner should be compensated an amount of Kshs—19,291,250.00/- concerning the anticipated demolition of the Petitioner’s property and adjustments related to the compensation.
16. The Petitioner submitted that on January 30, 2025, while dualling the Kwa-Jomvu Mariakani Section, the Respondents threatened to enter, deface, and demolish the Petitioner’s development and boundary without fairly and promptly compensating the Petitioner for the threatened demolitions.



17. According to the Petitioner, the gravamen of the 1st Respondent's PO is that the Petitioner herein ought to have exhausted the alternative dispute resolution mechanism of the LAT before approaching this court for the reliefs herein. In response, the Petitioner submits that the nature of the Petition and application herein is multifaceted and requires the intervention of this court, given the Respondents' conduct herein. It also involves violations of constitutional rights, which can only be handled by this court and not the tribunal.
18. The Petitioner herein submits that when the issues are framed in a multifaceted manner, the proper mode of proceedings is to file a claim at the Environment and Land Court pursuant to Section 13 of the Environment and Land Court Act, as interpreted together with Article 162(2)(b) of the Constitution, as the Petitioner has undertaken in the present proceedings.
19. Section 133 of the Land Act, 2012, states as follows:
- “ 133C. Jurisdiction of the Land Acquisition Tribunal
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.”
20. In my view, a holistic look at the Petitioner's Petition and claim for compensation reveals that they arise directly from the compulsory acquisition process. I agree with the 1st Respondent that the primary forum for resolving this matter is the LAT, supported by the judicial precedents set below.
21. The 1st Respondent referenced several cases, among them the case of Samuel Kamau Macharia v Kenya Commercial Bank & 2 others [2012] eKLR, which was cited with approval by the Court of Appeal in Kenya Medical Research Institute v Davy Kiprotich Koech [2018] eKLR, thereby influencing this court, where it was determined, among other things, that:
- “ A court's jurisdiction flows from either the Constitution or legislation. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or any other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”
22. In Tom Kusienya & 8 others v Kenya Railways Corporation & 3 others, Constitutional Petition No. 353 of 2012 & Petition No. 159 of 2012, the case of Minister of Home Affairs v Bickle & others [1985] LRC was cited with approval, where the court stated that:
- “ Courts will not normally consider a question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or on some basis, whether legal or factual, a Court will usually decline to determine whether there has been in addition a breach of the Declaration of Rights....”
23. Furthermore, in the case of International Centre for Policy and Conflict & 5 others v The Hon Attorney General & 4 others [2013] eKLR, the court stated that:
- “ an important tenet of the concept of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution in general, must exercise restraint. It must first give an opportunity to the relevant constitutional bodies or relevant state organs to deal with the dispute (emphasis ours) under the relevant provision of the parent statute. If the Court were to act in haste it would be presuming bad faith or inability by that body to act.”



24. This position was further elucidated in *Diana Kethi Kilonzo & another v The Independent Electoral & Boundaries Commission (IEBC & 10 others)* [2013] eKLR, thus:

“*the Constitution* allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by *the Constitution* so long as they comply with *the Constitution* and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing *the Constitution*, found it fit that the powers of decision making be shared by different bodies. The decision of Kenya must be respected, guarded and enforced. The Courts should not cross over to areas which Kenyans specifically reserved for other authorities.”

25. Under the doctrine of exhaustion, and as correctly pointed out by the 1st Respondent in *Mombasa High Court Constitutional Petition No. 159 of 2018, consolidated with Constitutional Petition No. 201 of 2019, William Odhiambo Ramogi & 3 others v Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, the 5-Judge bench highlighted the critical role of the doctrine of exhaustion of remedies in ensuring that parties utilize the available administrative and alternative dispute resolution mechanisms before seeking judicial intervention. The Bench, at paragraph 52 of the judgment, stated as follows:

“52. The question of exhaustion of administrative remedies arises when a litigant, aggrieved by an agency's action, seeks redress from a Court of law on an action without pursuing available remedies before the agency itself. 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 of *the Constitution* and was aptly elucidated by the High Court in *R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others* [2017] eKLR.”

26. Recently, as highlighted by the Petitioner, the Supreme Court in *Abidha Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023)* [2023] KESC 113 (KLR) (28 December 2023) (Judgment) stated the following:

“Reference to the High Court above must be read mutatis mutandis with jurisdiction conferred on courts of equal status to it including the ELC. Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant's right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act* creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party (Emphasis added).”



27. The Supreme Court further stated in Paragraph 101 of its judgment that:

“Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] eKLR* where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:

“In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.” [Emphasis ours].

We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court (Emphasis added).”

28. The central dispute in this matter is the alleged meager compensation awarded by the NLC through KENHA under compulsory acquisition. After looking at the Petition and what it broadly seeks, I think the first step would be to approach the LAT, after which an appeal should be made to this court. It has not been demonstrated that the LAT will not serve as an adequate and efficacious forum to justify the invocation of this court's jurisdiction in the first instance.
29. Although drafted as multifaceted, the Petitioner has, by design, filed the present Petition with the intent to camouflage their claim and circumvent the explicit provisions of Section 133 of the *Land Act*, 2012, by alleging constitutional violations and improperly relying directly on constitutional provisions.
30. In the Petition, the Petitioner acknowledges that the 2nd Respondent issued an award of Kenya Shillings Two Million, Five Hundred and Sixty-Five Thousand, Five Hundred and Ninety-Three (Kshs. 2,565,593.00/-), which the Petitioner considers inadequate, in exchange for the compulsory acquisition of their land. Therefore, the Petition is anchored on compulsory acquisition. Section 133 of the *Land Act*, 2012 provides a clear framework for addressing disputes relating to or arising from it, including compensation issues, which is an appeal to the LAT.



31. I align myself with the decision cited by the 1st Respondent, emphasizing further this stance in the case of Peter Lubale Lubullellah v Teachers Service Commission, Petition No.145 of 2016, where the court held as follows:

“To name the matter herein as a Petition and claim constitutional violations, the facts appurtenant thereto are clear. The cause of action arose in employment where the petitioner is seeking a benefit out of his employment and or service with the respondent. Where a memorandum of Claim was filed or a petition, the cause of action does not change due to the name assigned to the pleadings. Even where there is no challenge to the claims made by the respondent, it is obvious, the claim is for gratuity payment for the employment period of the petitioner is filed way out of time as required under section 90 of the Employment Act, 2007.”

32. Given the foregoing, the Po is germane. It is upheld. The current Petition is struck out in its entirety with costs.

DATED, SIGNED, AND DELIVERED VIRTUALLY IN MALINDI ON THIS 30TH DAY OF APRIL 2025.

E. K. MAKORI

JUDGE

In the Presence of:

Mr. Mbogo for the 1st Respondent

Mr. Kiilu for the 2nd Respondent

Happy: Court Assistant

In the Absence of:

Mr. Kimani for the Applicant

