REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW MISC. CIVIL APPLICATION NO. 160 OF 2016

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF: CERTIORARI, PROHIBITION AND MANDAMUS

AND

IN THE MATTER OF SECTION 8 AND 9 OF THE LAW REFORM ACT (CAP 26) LAWS OF KENYA

AND

IN THE MATTER OF ARTICLES 22(1), (2), (a), (b), (c)

AND

23(1), 27(1)(2) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE HIGH COURTS SUPERVISORY JURISDICTION: ARTICLE 165(5) 6, 7, CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES, 2010

AND

IN THE MATTER OF THE KENYA GAZETTE VOL. CXVIII-NO 10 ISSUED AT NAIROBI, 5TH FEBRUARY 2016 GAZETTE NOTICE NO. 673

AND

IN THE MATTER OF LAND ACT (NO. 6 OF 2012) RUIRU SEWERAGE TREATMENT PLANT INTENTION TO ACQUIRE

BETWEEN

REPUBLIC……………………………......………APPLICANT

VERSUS

NATIONAL LAND COMMISSION…….........1ST RESPONDENT

COUNTY GOVERNMENT OF KIAMBU..….2ND RESPONDENT

HON. ATTORNEY GENERAL..……….....….3RD RESPONDENT

EXPARTE APPLICANT: HENRY WAINAINA WAKIHORO

& TERESIA WANGUI MATHAI

RULING

1. In these proceedings, the applicants seek a judicial review relief in the nature of certiorari to quash the Statutory Notice of Intention to acquire land required for expansion of the Ruiru-Juja Sewarage Treatment Plant. The background of the dispute was that the 1st Respondent, pursuant to Part Eight of the ***Land Act***, intimated its intention to compulsorily acquire 563 parcels of land in Kiambu County required for expansion of the Ruiru-Juja Sewerage Treatment plant. The said process seems to have been commenced at the behest of the County Government of Kiambu, the 2nd Respondent pursuant to a request by the 1st Respondent (hereinafter referred to as “the Commission”).

2. According to the applicants, they are embroiled in legal dispute with Githunguri Constituency Ranching Company Limited over all Land Parcel No. Ruiru KIU/Block 2 (hereinafter referred to as “the suit land”) which dispute is still pending. It was the ex parte applicants’ case that the gazettement of the notice of intention to acquire the 563 parcels was an attempt to steal the match against them as the issue of ownership of the suit land is pending judicial consideration and if the compulsory acquisition were to continue, the 1st Respondent would proceed to pay third parties who have no interest in the subject parcel.

3. It was on the basis of that that the ex parte Applicants sought the orders herein.

4. On its part, the Commission denied that the notice of intention to acquire was gazetted with ill motive or in cohorts with Githunguri Ranching Scheme with sole intention of “stealing the ex parte Applicants’ march”. It was its case that the intended compulsory acquisition is required for expansion of the Ruiru-Juja Sewerage Treatment Plant which expansion is for the benefit of the public and residents within Kiambu County, including the ex parte Applicants. In the 1stvRespondent’s view, the acquisition is at the behest of the County Government of Kiambu.

5. The Commission further denied that it was compulsorily acquiring all that parcel of land known as Ruiru KIU/Block 2 as alleged by the ex parte Applicants. According to the Commission, the parcels of land subject of acquisition as appears in gazette notice number 673 of 5th February 2016, being the notice of intention to acquire, total 563 and nowhere is the suit land gazetted for acquisition.

6. The Commission further argued that under section 112 of the ***Land Act***, the 1st Respondent shall be compelled to hold inquiries of compensation to determine all proprietary interests and claims arising out of acquisition and the Exparte Applicants shall be given the opportunity to lodge their claims of compensation. The Commission averred that under section 112(5), it exercises quasi-judicial powers and if dissatisfied with any award of compensation, any party has the right of appeal in accordance with section 128 of the ***Land Act***.

7. It was therefore the Commission’s position that these proceedings are not the most efficacious avenue for seeking redress.

Determination

8. I have considered the issues raised before me in these proceedings. One of the issues raised is that this Court has no jurisdiction to entertain these proceedings.

9. In **<u>Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1</u>** **Nyarangi, JA** expressed himself as follows:

> **"By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance 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 the 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction".**

10. Similarly the Supreme Court in **<u>Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & 2 Others [2012] eKLR</u>** expressed itself as follows:

> **"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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), *Constitutional Application Number 2 of 2011*. 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."**

11. In this case it is contended that these proceedings ought to have been instituted in the ELC. Article 165(3) of the Constitution provides as follows:

> ***(3) Subject to clause (5), the High Court shall have—***
>
> ***(a) unlimited original jurisdiction in criminal and civil matters;***
>
> **………………**
>
> ***(e) any other jurisdiction, original or appellate, conferred on it by legislation.***

12. Article 165(5)(6) and (7) thereof on the other hand provides:

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

13. The Courts contemplated in Article 162(2) are those with the status of the High Court to hear and determine disputes relating to employment and labour relations; and the environment and the use and occupation of, and title to, land. Parliament was donated the power to establish the said Courts and determine their jurisdiction and functions by the same Article.

14. It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

15. Therefore in exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

16. However, the High Court's power and authority is derived from the Constitution and where the Constitution limits the jurisdiction of the High Court, that limit is legal and proper. In my view by specifically creating the Courts with the status of the High Court to deal with employment and labour relations disputes on one hand and environment and land disputes on the other, the people of Kenya appreciated the importance of these specialised Courts.

17. Under Article 165(5)(b) of the Constitution this Court has no power to determine issues which ***fall within the jurisdiction of the courts contemplated in Article 162(2)*** aforesaid. Pursuant to the powers conferred upon Parliament under Article 162(3) of the Constitution to "*determine the jurisdiction and functions of the courts contemplated in clause (2)*", Parliament did enact ***The Environment and Land Court Act, 2011*** which Act commenced on 30th August 2011. Section 13 of the said Act provides as follows:

(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—

(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;

(b) relating to compulsory acquisition of land;

(c) relating to land administration and management;

(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and

(e) any other dispute relating to environment and land.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

18. It is therefore clear that one of the disputes that the ELC is empowered to determine is one relating to compulsory acquisition of land. This Court in **Patrick Musimba vs. National Land Commission & 4 Others [2016] eKLR** expressed itself with respect to the ***Land Act*** inter alia as follows:

85. "In summary, the process of compulsory acquisition now runs as follows.

86. Under Section 107 of the Land Act, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

87. Under Sections 107 and 110 of the Land Act, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

88. As part of the National Land Commission's due diligence strategy, the National Land

Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the Land Act.

89. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

90. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the Land Act, the landowner's role is limited to that of a distant bystander with substantial interest.

91. Section 112 of the Land Act then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

92. On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the Land Act.

93. The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the Land Act.

94. If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the Land Act. This is in line with the Constitutional requirement under Article 40(3) of the Constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation."

[Underlining mine].

19. In these proceedings it is clear that what the applicants are disputing is who ought to be compensated in respect of the compulsory acquisition of the suit land. In my view this matter relates substantially to compulsory acquisition of land and hence falls squarely within section 13(2)(b) of the ***ELC Act***. The process of compulsory acquisition is however governed by the provisions of the ***Land Act*** and section 128 thereof mandatorily provides that:

Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination.

20. Similarly, section 150 of the ***Land Act*** confers upon the ELC exclusive jurisdiction to hear and determine disputes, actions and proceedings concerning land under the ***Land Act***.

21. It is therefore clear that the right forum to raise issues arising from compulsory acquisition is the

Environment and Land Court.

22. Apart from that it is clear from **Patrick Musimba vs. National Land Commission & 4 Others** (supra) that disputes arising from compulsory acquisition ought to be raised before the National Land Commission with the right of appeal to the High Court pursuant to section 128 of the ***Land Act***. Therefore these proceedings were prematurely instituted. I agree with the decision in **Nasieku Tarayia G vs. Board of Directors Agriculture Finance Corporation & Another [2012] eKLR** that judicial review is a remedy of last resort and where an alternative remedy exists, the court has to be satisfied that judicial review is the more convenient, beneficial, efficacious alternative remedy available.

23. In this case, it has not been demonstrated that judicial review is the most convenient, beneficial, efficacious alternative remedy available to the *ex parte* Applicant in the circumstances.

24. In this case I have found that this Court has no jurisdiction to entertain the matter. Where it is clear that the Court has no jurisdiction, it would be improper for the Court to give itself jurisdiction based on convenience. As was held in by **Mohammed Ibrahim, J** (as he then was) in **Yusuf Gitau Abdallah vs. Building Centre (K) Ltd & 4 others [2014] eKLR**:

> **"A party cannot be heard to move a Court in glaring contradiction of the judicial hierarchical system of the land on the pretext that an injustice will be perpetrated by the lower court. Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review. A party cannot in total disregard of these fundamental legal redress frameworks move the apex Court".**

25. In this case, it is clear that the dispute falls squarely within the provisions of section 13(2)(b) of the Act. The reliefs sought herein arise out of a determination of the issues falling within the said provision which basically deal with interests in land. In my view the applicants' contended right to be heard stem from their yet to be determined interest in the suit land. Apart from that the dispute herein can be competently dealt with by the National Land Commission. In **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** it was held that:

> "**We note that 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 Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

26. In the premises the order which commends itself to me and which I hereby make is that these proceedings are incompetent and are struck out but as the dispute remains unresolved there will be no order as to costs.

27. Orders Accordingly.

Dated at Nairobi this 25th day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Prof Wangai for the Applicant

CA Ooko