



Republic v Land Acquisition Tribunal; Mulu & 55 others & 2 others (Interested Parties); Kenya National Highways Authority (Exparte Applicant) (Judicial Review Miscellaneous Application E039 of 2024) [2025] KEELC 3411 (KLR) (28 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3411 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
JUDICIAL REVIEW MISCELLANEOUS APPLICATION E039 OF 2024
CA OCHIENG, J
APRIL 28, 2025**

BETWEEN

REPUBLIC APPLICANT

AND

LAND ACQUISITION TRIBUNAL RESPONDENT

AND

GEORGE MWANZIA MULU & 55 OTHERS INTERESTED PARTY

NATIONAL LAND COMMISSION INTERESTED PARTY

ATTORNEY GENERAL INTERESTED PARTY

AND

KENYA NATIONAL HIGHWAYS AUTHORITY EXPARTE APPLICANT

RULING

1. What is before Court for determination is the Ex-parte Applicant’s Chamber Summons application dated the 20th December 2024 where it seeks the following Orders:
 1. Spent.
 2. Leave to apply for:
 - a. A declaration that the Respondent Tribunal as currently constituted lacks jurisdiction and /or judicial authority to take cognizance of, entertain, hear, conduct, proceed with and/or determine any matter filed before it including the Tribunal application



TRLAP No. E038 OF 2024: George Mwanzia Mulu & 55 Others v National Land Commission & 2 Others.

- b. An order of prohibition prohibiting the Respondent from taking cognizance of, entertaining, hearing, conducting, proceeding with and /or determining the purported Tribunal application TRLAP No. E038 OF 2024: George Mwanzia Mulu & 55 Others v National Land Commission & 2 Others or any other matter before the Tribunal pending the nomination and appointment of a 3rd member as per the law.
 - c. An order of Certiorari removing to this honourable court for purposes of being quashed the proceedings before the Land Acquisition Tribunal at Nairobi in Tribunal application TRLAP No. E038 OF 2024: George Mwanzia Mulu & 55 Others v National Land Commission & 2 Others together with the ruling delivered therein on 22nd November 2024.
 3. The grant of leave herein does operate as stay of the proceedings in Tribunal application TRLAP No. E038 OF 2024: George Mwanzia Mulu & 55 Others v National Land Commission & 2 Others and other matters currently pending before it.
 4. Costs of the application.
2. The application is premised on grounds on the face of it, the statutory statement and the verifying affidavit of Ian Mudavadi, the Ex parte Applicant's Senior Legal Officer. He avers that the Respondent which is established under Section 133 A of the Land Act ought to consist of three (3) members appointed by the Cabinet Secretary through a notice in the gazette. Further, that the three consist of the Chair person who is nominated by the Judicial Service Commission, one member nominated by the Cabinet Secretary and another member by the 3rd Interested Party but to date, the member nominated by the 3rd Interested Party has never been appointed thus the Respondent consists of only two (2) members and is therefore not fully constituted.
3. He contends that until the Respondent Tribunal is fully constituted, it cannot assume jurisdiction to conduct proceedings and determine appeals and that the two (2) members currently in the Tribunal cannot purport to have a quorum. He points out that vide a Complaint dated the 9th August 2024, the 1st Interested Party lodged an application on behalf of Project Affected Persons (PAP) in compulsory acquisition of land for the construction of the Kibwezi-Mutombo-Kitui-Kabati-Migwani (B7) Road Project, being Tribunal Application TRLAP No. E038 OF 2024: George Mwanzia Mulu & 55 Others v National Land Commission & 2 Others seeking among other orders, an order to render true valuation of the suit properties, an order for compensation, and a declaration of violation of rights.
4. He avers that the Ex parte Applicant challenged the Tribunal's jurisdiction on grounds that it is not validly constituted but the two (2) members currently sitting in the Tribunal rendered their Ruling dated the 22nd November 2024 holding that they have quorum.
5. He claims that the Respondent is acting ultra vires the establishing statute and without judicial authority contemplated under Article 159 of the Constitution. He explains that the Respondent has given directions for hearing of Tribunal Application TRLAP No. E038 OF 2024 and will do so without jurisdiction unless the court intervenes.
6. The application is opposed by the Respondent vide Grounds of Opposition dated the 12th February 2025. It contends that challenging the judicial decision of the Tribunal is at odds with the adversarial legal system in Kenya. It insists that its decision can only be challenged by way of an Appeal. Further, that the application is an attempt to short circuit the statutory Appellate process. It insists that being



a subordinate court established under Article 169 (1) (d) of the Constitution, it cannot be sued on the basis of its judicial decisions.

7. The 1st Interested Party opposed the application vide the replying affidavit of George Mwanzia Mulu. He avers that TRLAP No. E038 of 2024 was initially filed before the Environment and Land Court at Kitui but the jurisdiction of the court was ousted vide a Preliminary Objection raised by the Ex parte Applicant on grounds that Section 133C of the Land Act allows the Land Acquisition Tribunal, the first opportunity to hear and determine the matters in issue. However, upon approaching the Tribunal, the Ex parte Applicant sought to unseat it by challenging its composition citing lack of full membership but the Respondent affirmed its legal authority.
8. He contends that the law has not placed an absolute requirement for full membership of the Respondent for it, to exercise its mandate thus the absence of one member cannot hamper its functioning. Further, that the Ex Parte Applicant can only seek to bar the Respondent from hearing and determining the issues in TRLAP No. E038 OF 2024 by raising an objection as to the qualifications of the existing members under the law, which essentially would impact on quorum.
9. He reiterates that the Ex parte Applicant is undeserving of the leave sought as it seeks to invoke judicial review jurisdiction of the Honourable court yet there are adequate alternative ways and procedures to address its contentions. He points out that the Ex parte Applicant has admitted in its reply to the claim in TRLAP No. E038 OF 2024 that there has been delayed compensation to a number of Project Affected Persons.
10. He argues that leave sought should not operate as stay of proceedings since issues raised, revolve around acquisition of private land for a public interest and as such, allowing it would amount to deprivation of the 1st Interested Party's properties contrary to Article 40 of the Constitution. Further, that stay orders would impede the progress of the case and would render the Respondent completely dysfunctional and prevent it from fulfilling its judicial role in an efficient manner as well as disrupt other ongoing cases without participation of litigants involved in those matters, thus deprive them of a fair and efficient avenue to resolve their disputes, leaving them without appropriate recourse.
11. The application was canvassed by way of written submissions.

Submissions

12. In its submissions, the Ex-parte Applicant contends that while grant of leave to institute judicial review proceedings is discretionary, contemporary constitutional law and practice has rendered it as a matter of right. To this end, it cites Article 47 of the Constitution and the Dicta of the Supreme Court in the case of Dande & 3 Others v Inspector General, National Police Service & 5 Others (Petition 6(E007), 4(E005) & 8(E010) OF 2022 (Consolidated 0[2023] KESC 40 (KLR) (16 June 2023) (Judgment).
13. The Ex parte Applicant also cites the case of Kokwo Multi-purpose Co-operative society v Principal Secretary Ministry of Lands, Housing and Urban Development & Another (Environment and Land Judicial Review Case E001 (B) of 2024 [2025] KEELC 122 (KLR) to submit that it is settled that the threshold to be met by an Applicant seeking leave to file judicial review is to demonstrate that they have an arguable case. Further, that it has an arguable case based on legality and public interest arising from the fact that the Respondent Tribunal continues to operate ultra vires its establishing statute.
14. On its part, the Respondent submits that the essence of judicial review is to bring to the judicial realm, proceedings or decisions which are made by administrative or quasi-judicial bodies, but in this instance, the proceedings can only be challenged through Appeal or review to a higher court by dint of Section 133D of the Land Act. Further, that the intended review application flies in the face of



the hallowed principle of judicial immunity under Article 160 (5) of the *Constitution*, Section 45 of the *Judicial Service Act* and Section 6 of the *Judicature Act*. To buttress its averments, it relied on several authorities including *Attorney General v Okioti & 3 Others (Civil Appeal E416 OF 2021)* [2025] KECA 309 (KLR), *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, *Nairobi Judicial Review Misc. Civil Application No.99 of 2019, Republic v R.O Mbogo & Another*; *Alfred Ndemo Nyakundi (Interested Party) Ex parte Diana Mutheu & Another* [2020] eKLR, *Republic v Chief Magistrate, Mombasa & 3 Others Sega Ventures Limited & another (Interested Parties); Kirima (Ex parte) (Judicial Review Application 1 of 2022)* [2023] KEELC 180 (KLR), *National Social Security Fund v Sokomania Ltd & Chief Magistrate's Court Milimani* [2021] eKLR; *Rep v National Environment Management Authority Ex -Parte Sound Equipment Ltd* [2011] eKLR and *Bellevue Development Company v Francis Gikonyo & 3 Others SC PT No. 42 of 2018; [2020] eKLR*.

15. The 1st Interested Parties in their submissions, insist that the law has not placed an absolute requirement for full membership of the Respondent and as such, it is the total number of the members appointed that would determine composition of the Tribunal and subsequently quorum thus, questioning the jurisdiction of the Tribunal is an attempt to undermine the intentions of the legislature in establishing it.
16. Further, that although grant of leave to institute judicial review proceedings is a discretionary power of the court, it is not automatic. They reiterate that Section 9 (2) and (3) of the Fair Administrative Actions Act, 2015 requires a party to exhaust all internal remedies including appeals. Further, that challenging the jurisdiction of the Tribunal based on predominant preserve of the executive discretion through the 3rd Interested party is in conflict with the doctrine of separation of powers and as such, it is non-justiciable. They contend that the attempt to contest the jurisdiction of the Respondent is also precluded by the doctrine of res judicata, given that the issue had already been adjudicated upon by the Environment and Land Court at Kitui in ELC Pet No. E001 OF 2023 where the court upheld the jurisdiction of the Respondent Tribunal.
17. To buttress their averments, they relied on the following decisions:

Republic v Industrial Property Tribunal Ex Parte Sanitam Services (EA) Limited [2012] eKLR; *Republic v National Environment Management Authority, CA 84 OF 2010* [2022] eKLR and *Okiya Omtatah Okioti v Judicial Service & 7 Others: Judiciary & Another (Interested Parties) (Petition 361 of 2018)* [2021] KEHC 59 (KLR).

Analysis and Determination

18. Upon consideration of the instant Chamber Summons application including respective affidavits, Grounds of Opposition and rivalling submissions, the only issue for determination is whether the Ex parte Applicant is entitled to leave to institute judicial review proceedings of Certiorari and Prohibition and if the said leave should operate as a stay of proceedings in Tribunal application TRLAP No. E038 OF 2024: *George Mwanzia Mulu & 55 Others v National Land Commission & 2 Others* and other matters currently pending before it.
19. Both the Ex parte Applicant, Respondent and Interested Parties do not deny that there are proceedings pending before the Respondent being Tribunal application TRLAP No. E038 OF 2024: *George Mwanzia Mulu & 55 Others v National Land Commission & 2 Others*. The ex parte Applicant claims the Respondent is not properly constituted to proceed with the aforementioned matter as there are only two members instead of three, which fact is opposed by the Respondent and Interested Parties.



20. Order 53 Rule 1 stipulates that a party seeking leave to institute judicial review has to apply to court. The said provisions state thus:

(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefor has been granted in accordance with this rule. (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (3) The judge may, in granting leave, impose such terms as to costs and as to giving security as he thinks fit including cash deposit, bank guarantee or insurance bond from a reputable institution. (4) The grant of leave under this rule to apply for an order of prohibition or an order of certiorari shall, if the judge so directs, operate as a stay of the proceedings in question until the determination of the application, or until the judge orders otherwise: Provided that where the circumstances so require, the judge may direct that the application be served for hearing inter partes before grant of leave. Provided further that where the circumstances so require the judge may direct that the question of leave and whether grant of leave shall operate as stay may be heard and determined separately within seven days.'

21. The Ex parte Applicant insists the Tribunal was not properly constituted to handle its case. On constitution of the Respondent, Section 133A (1) of the [Land Act](#) states as follows:

133A. Establishment of the Tribunal. 1. There is established a Tribunal to be known as the Land Acquisition Tribunal which shall consist of three persons appointed by the Cabinet Secretary through a notice in the Gazette.'

22. In Kenya National Examination Council versus Republic ex part Geoffrey Gathenji Njoroge & 9 Other [1997] eKLR, it was held that:

“What does an order of prohibition do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.”

23. Waki J. (as he then was), in Republic v County Council of Kwale & Another Ex Parte Kondo & 57 Others, Mombasa HCMCA No. 384 of 1996 cited in Republic v Chief Magistrate Milimani Commercial Courts & 2 Others Ex Parte Fredrick Bett [2022] eKLR stated as follows;

“Leave may only be granted therefore if on the material available the court is of the view, without going into the matter in depth, that there is an arguable case for granting the relief claimed by the applicant the test being whether there is a case fit for further investigation at a full inter partes hearing of the substantive application for Judicial Review. It is an exercise of the court’s discretion but as always it has to be exercised judicially”.

24. From a reading of the legal provisions cited above including the provisions governing the Land Acquisition Tribunal as contained in the [Land Act](#), I opine that there is no express provision stipulating



the quorum of the Tribunal. Except for indicating that the members should be three, it is silent on the quorum of the Tribunal. It is worth noting that it is the Ex parte Applicant that had actually raised a Notice of Preliminary Objection in respect to the jurisdiction of the ELC Kitui to handle the dispute herein, culminating in the court directing that the said matter be filed before the Land Acquisition Tribunal.

25. Based on the facts before me including the stipulated legal provisions and quoted decisions, I find that the quorum of the Tribunal was properly constituted and it had jurisdiction to handle the aforementioned claim before it. I opine that the issues raised by the Ex parte Applicant should have been dealt with in an Appeal and not a judicial review forum. I hence find that the Ex parte Applicant is not entitled to leave as sought.
26. In the foregoing, I find the Chamber Summons application dated the 20th December 2024 unmerited and will proceed to dismiss it with no order as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ochieng for Prof Mumma for KENHA

Nambande holding brief for T.J Michael for Interested Party

Ken Oguttu for 3rd Respondent

Court Assistant: Joan

