



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

PETITION NO E010 OF 2021

GICIRI THUO 1ST PETITIONER
WANJIKU MUNGAI 2ND PETITIONER
JOHN KARIUKI KIMANI 3RD PETITIONER
PETER NG'ANG'A NJONJO 4TH PETITIONER
ANNAH WANJIKU NGUGI 5TH PETITIONER
MERCY WAMBUI NJURU 6TH PETITIONER

VERSUS

NATIONAL LAND COMMISSION 1ST RESPONDENT
MAMA NGINA UNIVERSITY COLLEGE 2ND RESPONDENT
KENYATTA UNIVERSITY 3RD RESPONDENT
MINISTRY OF EDUCATION 4TH RESPONDENT
COMMISSION FOR UNIVERSITY EDUCATION 5TH RESPONDENT
KENYA HUMAN RIGHTS COMMISSION INTERESTED PARTY
DORCAS WAIRIMU KAMAU & 154OTHERSINTENDED INTERESTED PARTIES

RULING

1. Through an amended petition dated 1/12/2021, the above six petitioners challenged **Gazette Notice No. 10278** published by the **National Land Commission [the 1st respondent]** on 27/9/2021 in **The Kenya Gazette Vol CXX111 – No 200**. The import of the Gazette Notice is that the 1st respondent gave statutory notice of the intention of the National Government to compulsorily acquire various parcels of land as additional land for **Mama Ngina University College in Kiambu County**. The petitioners contended that the impugned Gazette Notice violated the Constitution and their fundamental rights and freedoms on two grounds: (i) there was no public participation as required under Article 10 of the Constitution; and (ii) the intended acquisition of private land is not in the public interest and is contrary to Sections 107 and 111 of the Land Act.

2. Consequently, they sought the following verbatim reliefs against the five respondents:

- a) *A declaration that the decision/process to acquire the petitioners' and other residents of Mutomo Village additional land for the 2nd respondent being devoid of the principle of public participation, is illegal, unconstitutional, null and void.*
- b) *A declaration that the decision/process by the 1st respondent published vide Gazette Notice No. 10278 dated 27/9/2021 intending to compulsorily acquire additional land for the 2nd respondent is illegal, unconstitutional, null and void.*
- c) *An order of certiorari to quash the decision/process by the 1st respondent contained in Gazette Notice No. 10278 dated*

27/9/2021 intending to compulsorily acquire additional land for the 2nd respondent from the petitioners and other residents of Mutomo Village.

d) A declaration that the 2nd respondent being a private entity cannot acquire land compulsorily.

e) Costs.

3. Upon being served with the petition, the 2nd and 3rd respondents filed a notice of preliminary objection dated 26/1/2022, inviting the court to dismiss the petition *in limine* on the following verbatim grounds:

i. ***This honorable court has no jurisdiction to entertain, hear or determine the petition.***

ii. ***From the facts pleaded in the petition, it is patently clear that the dispute herein is in fact and in substance a dispute by alleged land owners and National Land Commission in respect of a process of compulsory acquisition of land.***

iii. ***In the premises, the issues stated in the petition ought to first be dealt with in the dispute resolution mechanisms mandatorily prescribed under Sections 112 and 133C of the Land Act of 2012.***

iv. ***Under Sections 112(1)(2)(3)(4)(5) and (6) of the Land Act of 2012, any dispute of the nature raised in the petition herein must first be subjected to the inquiry process to be conducted by the National Land Commission.***

v. ***Judicial proceedings would be instituted only as the last resort and even then such proceedings would be lodged first before the Land Acquisition Tribunal established under Section 133A (1) of the Land Act No. 6 of 2012.***

vi. ***Section 133C (6) of the Land Act No. 6 of 2012 specifically states that disputes relating to compulsory acquisition of land ought to first be lodged with the Land Acquisition Tribunal***

vii. ***Proceedings before this honorable court can only be instituted through an appeal against the decision of the Land Acquisition Tribunal and to the limited extent stipulated in Section 133D of the Land Act No.6 of 2012.***

viii. ***This petition is therefore premature, mischievous, vexatious and an abuse of the court process.***

ix. ***This court therefore lacks jurisdiction to entertain, hear or determine the issues raised in the petition.***

4. The above preliminary objection is the subject of this ruling. The preliminary objection was canvassed through written submissions dated 4/2/2022, filed through the firm of *Njoroge Regeru & Company Advocates*. Brief oral highlighting of the written submissions was made by *Mr Thuo* in the virtual court on 9/2/2022. Counsel for the 2nd and 3rd respondents submitted that the ultimate aim of the petitioners was to stop the process of compulsory acquisition of land currently being undertaken by the 1st respondent. Counsel added that the petitioners approached this court immediately the notice of intention to acquire the land was published and before the 1st respondent had carried out inquiries under Section 112 of the Land Act, 2012. Counsel contended that under Section 112 of the Land Act, any dispute of the nature raised in this petition must first be subjected to the inquiry process to be conducted by the 1st respondent. Counsel added that if there is no satisfactory resolution of the dispute, an aggrieved party is, under **Section 133A** of the Land Act, required to refer the dispute to the Land Acquisition Tribunal for adjudication. It was the position of counsel for the objectors that this court is only vested with appellate jurisdiction over decisions made by the Land Acquisition Tribunal. Counsel argued that the petitioners had failed to follow the dispute resolution mechanism mandatorily prescribed under Section 133C of the Land Act. Counsel contended that this court has no jurisdiction to entertain the dispute in this petition at this point. Reliance was placed on the pronouncement of Nyarangi JA in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1*; and the decision of the Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*.

5. Counsel for the objectors added that where a statute specifically provides for an alternative dispute resolution mechanism, a party is expected to strictly seek redress through the stipulated mechanism. Counsel cited Superior Courts' pronouncements in the following cases to buttress the above point: (i) *Speaker of the National Assembly v James Njenga Karume [1992] eKLR*; (ii) *Jennifer Shamala v Law Society of Kenya & 15 others [2017] eKLR*; (iii) *Council of Governors v Attorney General & 12 others [2018] eKLR*; (iv) *Isiolo County Assembly Service Board & another v Principal Secretary Ministry of Devolution and Planning [2016] eKLR*; and (v) *Cortec Mining Kenya Limited v Cabinet Secretary, Ministry of Mining & 9 others [2017]eKLR*, among others.

6. Counsel for the objectors added that there is proper rationale why the Constitution and statutes provide for alternative dispute resolution mechanisms. Counsel argued that the Inquiry Committee of the National Land Commission and the Land Acquisition Tribunal are better equipped as the first points of reference in disputes relating to compulsory acquisition of land. Counsel urged the court to strike out the petition and award costs to the objectors.

7. Ms Masinde, counsel for the 1st respondent, supported the preliminary objection and concurred with the submissions made by counsel for the objectors. She added that under **Section 112** of the Land Act, an inquiry takes place after the notice of intention to compulsorily acquire land has been published. She added that the purpose of the inquiry is to give the registered proprietor and any one with an interest in the land to appear and disclose their interest in the land and raise any issues he may have relating to the intended compulsory acquisition.

8. Mr Njagi, learned state counsel for the 4th and 5th respondents, adopted the submissions of counsel for the objectors and supported the preliminary objection.

9. The petitioners filed written submissions dated 7/2/2021 through the firm of *Chimei & Co Advocates*. Counsel for the petitioners submitted that under **Article 162(2)** of the **Constitution** and **Section 13(2)(b)** and **(7)** of the **Environment and Land Court Act**, this court is vested with jurisdiction to adjudicate this dispute. Counsel added that on the question as to whether a right or fundamental freedom has been denied, violated, infringed or threatened, only the High Court or courts of equal status have the jurisdiction to adjudicate. Counsel contended that the framework in Sections 112 to 133 of the Land Act does not establish a dispute resolution mechanism, adding that the framework only provides for the procedure for compensation for land compulsorily acquired.

10. Counsel for the petitioners further submitted that the jurisdiction of the Land Acquisition Tribunal under Section 133C(8) of the Land Act is akin to and restricted to the jurisdiction of a subordinate court when determining the question as to whether a right or fundamental freedom has been denied, violated, infringed or threatened. Counsel argued that subordinate courts are restricted to handling disputes falling under Article 25 of the Constitution. Counsel added that the petition herein relates to multifarious parties and prayers and is not limited to the process of compulsory acquisition and compensation by the 1st respondent.

11. It was the position of counsel for the petitioners that the reliefs sought in the petition can only be granted by this court because they fall within Article 23(3) of the Constitution. Counsel added that the inquiry contemplated under Section 112 to 119 of the Land Act is limited to issues that may arise in the process of compensation while Sections 120 to 133 relate to the process of possession and compensation. Counsel cited **Section 128** of the Land Act and argued that it gives this court jurisdiction to deal with disputes relating to land acquisition. Counsel contended that besides challenging the process of compulsory land acquisition, this petition also raises questions as to whether the proposed acquisitions qualify to be defined as compulsory land acquisitions. Counsel urged the court to be guided by the decisions in *Ken Kasinga v Daniel Kiplangat Kiru & 5 others [2015] eKLR* and the decision of the Environment and Land Court in *Benson Ambuti Atega v Kibos Sugar and Allied Industries Limited & 4 others [2019] eKLR*. Counsel urged the court to dismiss the preliminary objection.

12. I have considered the grounds set out in the notice of preliminary objection and the parties' respective submissions on the preliminary objection. Further, I have perused the petition and reflected on the substance of the dispute disclosed in the petition. I have also considered the relevant constitutional and statutory frameworks and the prevailing jurisprudence on the key issue falling for determination in the preliminary objection. The single issue falling for determination in the preliminary objection is whether this court is vested with primary jurisdiction to adjudicate the dispute in this petition.

13. The centrality of the concept of jurisdiction in Kenya's legal system cannot be gainsaid. Nyarangi JA outlined the significance of jurisdiction in the adjudication of civil disputes in *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* in the following words:

"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 downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction."

14. The Supreme Court of Kenya pronounced itself on the concept of jurisdiction in *Samuel Kamau Macharia & ano v Kenya Commercial Bank Limited & 2 others [2012] eKLR* 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 submissions 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 Interim Independent Electoral Commission (Applicant), Constitution 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."

15. The broad jurisdiction of this court is set out in **Article 162(2)** of the **Constitution** as follows:

"(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title to, land."

16. Parliament enacted the Environment and Land Court Act pursuant to Article 162(2). **Section 13** of the Act sets out in details, the extent of the jurisdiction of the court in the following terms:

"(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”

17. It is clear from the wording of the petition and from the reliefs sought in the petition that the petitioners are challenging the intended compulsory acquisition of the parcels of land specified in the Gazette Notice. The concept of compulsory acquisition of private land by the state is popularly known as the *doctrine of eminent domain*. The *doctrine of eminent domain* refers to the eminent power of the state to compulsorily acquire privately owned land for public use. Scholars, jurists and policy makers concur that when the state requires privately owned land for public use, it cannot be stopped from compulsorily acquiring the privately owned land.

18. The framers of the Constitution of Kenya 2010 deemed it necessary to provide a clear framework 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, in accordance with Chapter Five; or

(b) is for public purpose or in the public interest and is carried out in accordance with 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.

19. In addition to the above constitutional framework, Part VIII of the Land Act provides an elaborate framework on how the power of eminent domain is to be exercised. Part VIIIA provides a framework on how disputes relating to the state's exercise of the power of eminent domain are to be adjudicated. Under Section 112 of the Act, the National Land Commission is obligated to publish a notice of intention to compulsorily acquire land on behalf of either of the two levels of Government. The Section obligates the National Land Commission to appoint a date for an inquiry into the intended compulsory acquisition. At the stage of inquiry, the Commission hears issues relating to **propriety** and **claims for compensation by persons interested in the land**. Under Section 123, the Commission is mandated to withdraw or revoke a notice of intended compulsory acquisition provided this is done before possession of the land is taken by the Commission.

20. Because of the many disputes that arise in relation to the state's exercise of the power of eminent domain, Parliament established the Land Acquisition Tribunal. **Section 133C** of the Land Act sets out the jurisdiction of the Tribunal 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 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 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 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.*

21. In its wisdom, Parliament enacted **Section 133D** of the Land Act, vesting in this court appellate jurisdiction in disputes relating to the exercise of the state's power of eminent domain 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 to 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 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.

22. It is therefore clear from Part VIII and Part VIIIA of the Land Act that disputes relating to **propriety** and **claims for compensation by persons interested in land** which is the subject of compulsory acquisition are to be adjudicated by the National Land Commission through the mechanism of inquiry contemplated under Section 112. If there is no satisfactory resolution of the dispute, the next port of call is the Land Acquisition Tribunal established under Section 133A of the Land Act. If a party is dissatisfied with the determination of the Tribunal, the next port of call is this court. The appellate jurisdiction of this court is, however, restricted to issues of law.

23. The case of the objectors is that this court does not have jurisdiction to entertain the dispute in this petition at this point. They contend that the petitioners have invoked the jurisdiction of this court prematurely. They argue that the petitioners should exhaust the dispute resolution mechanisms provided under Part VIII and Part VIIIA of the Land Act as illustrated above.

24. On their part, the petitioners contend that VIII and VIIIA of the Land Act do not contain dispute resolution mechanisms. They argue that the above framework only provides for the procedure for compensation for land acquired compulsorily. They further contend that the jurisdiction of the Tribunal is akin to the jurisdiction of a magistrate court which is restricted to disputes relating to Article 25 rights and freedoms. I do not agree with counsel for the petitioners on that point. The inquiry contemplated under Part VIII is an adjudicatory one and is intended to address disputes relating to the **propriety/appropriateness** of the intended compulsory acquisition and **claims for compensation by persons interested in the land**. It is for that reason that there is the right of appeal to the Tribunal under Section 133C(1) and (2) of the Land Act.

25. Secondly, Section 133C(8) of the Land Act vests in the Tribunal jurisdiction in matters relating to compulsory acquisition of land, to hear

and determine complaints arising under Article 23(2) and Article 47(3) of the Constitution using the framework set out in the Fair Administrative Action Act or any other law. It is therefore clear from the foregoing that the petitioners have prematurely moved to this court to challenge the intended compulsory acquisition of the parcels of land itemized in the Gazette Notice.

26. Our courts have umpteen times stated that where Parliament has, through statute, provided a clear procedure for seeking redress, that procedure must be followed. Prior to the promulgation of the Constitution of Kenya 2010, the Court of Appeal reiterated this principle in *Speaker of the National Assembly v James Njenga Karume [1992]eKLR* in the following words:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

27. The Supreme Court of Kenya rendered itself on this principle in the case of *Benard Murage v Fine Serve Africa Limited & 3 others [2015] eKLR* as follows:-

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”

28. Not too long ago, the Court of Appeal [Makhandia J] emphasized this principle and stated the following regarding multifaceted pleadings in *Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR* [the Kibos Distillers case]:

“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 National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of 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 simply 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 that is *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 any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

29. Counsel for the petitioners relied heavily on pronouncements by third tier courts. One of them was a decision by a judge of this court on the question of jurisdiction in multifaceted petitions. That particular decision was overturned by the Court of Appeal. The import of the doctrine of *stare decisis* [precedent] is that where a higher court has made a pronouncement on a question, that pronouncement is the one that prevails on that question.

30. For the above reasons, it is my finding that the jurisdiction of this court has been prematurely invoked in this petition. At this stage of the state’s exercise of the power of eminent domain, this court does not have jurisdiction to entertain the dispute in this petition. The proper fora where the grievances raised by the petitioners should be ventilated are the inquiry contemplated under Section 112 of the Land Act and the Land Acquisition Tribunal established under Section 133A of the Land Act. This petition therefore stands to be struck out. The petitioners shall be at liberty to pursue appropriate redress as provided under the law.

31. Because this dispute has elements of public interest and revolves around the intended compulsory acquisition of private land by the state, in what the state considers to be in the public interest, parties will bear their respective costs of this petition.

32. In the end, the 2nd and 3rd respondents’ preliminary objection dated 26/1/2022 is disposed as follows:

- a) The amended petition herein is struck out on the ground that the jurisdiction of this court has been invoked prematurely.***
- b) The petitioners shall be at liberty to ventilate their grievances in the appropriate primary adjudication fora established by Parliament.***
- c) Parties shall bear their respective costs of the petition.***

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 21ST DAY OF FEBRUARY 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Malenya for the Petitioners

Ms Masinde for the 1st Respondent

Mr Thuo for the 2nd and 3rd Respondents

Court Assistant: Lucy Muthoni