



Autobacs Limited v Board of Trustees Kenya Railway Staff Retirement Benefits Scheme & 3 others (Environment and Land Case Civil Suit E148 of 2020) [2022] KEELC 15410 (KLR) (20 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15410 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E148 OF 2020
SO OKONG'O, J
DECEMBER 20, 2022**

BETWEEN

AUTOBACS LIMITED PLAINTIFF

AND

BOARD OF TRUSTEES KENYA RAILWAY STAFF RETIREMENT BENEFITS SCHEME 1ST DEFENDANT

NAIROBI METROPOLITAN SERVICE 2ND DEFENDANT

KENYA RAILWAYS CORPORATION 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

RULING

1. The Plaintiffs brought this suit against the Defendants through a plaint dated 22nd September 2020 seeking; a permanent injunction restraining the defendants from trespassing on, removing or evicting the Plaintiff from a portion measuring 11,141 square feet of all that parcel of land known as L.R No. 209/11953(I.R No. 72448) (hereinafter referred to only as “the suit property”) or interfering with the Plaintiff’s right to peaceful and quiet enjoyment of the suit property until the Plaintiff was compensated for the loss of its leasehold interest therein, special damages, damages for breach of constitutional right to property and fair administrative action guaranteed under Articles 40 and 47 of *the Constitution*, aggravated and exemplary damages, costs and interest.
2. In its plaint, the Plaintiff averred that the 1st Defendant was at all material times the registered owner of all that parcel of land known as L.R No. 209/11953(I.R No. 72448) measuring 7.292 Ha. (hereinafter referred to as “the mother title”). The Plaintiff averred that the 1st Defendant leased to the Plaintiff the suit property which is a portion of the mother title for a renewable term of 9 years with effect from 1st February 2020 at a monthly rent of Kshs. 111,410/-. The Plaintiff averred that it occupied the suit



property where it was carrying out the business of selling motor vehicles peacefully until 11th September 2020 when it was notified by the 1st Defendant that the mother title was the subject of compulsory acquisition. The Plaintiff averred that the 4th Defendant had published a notice in the Kenya Gazette of 4th September 2020 of its intention to acquire a portion of the mother title compulsorily for the purposes of construction of Nairobi Expressway. The Plaintiff averred that the notice from the 1st Defendant did not come out clearly how the said compulsory acquisition would affect the suit property or the lease between the Plaintiff and the 1st Defendant.

3. The Plaintiff averred that on 15th September 2020, it was notified by the 1st Defendant that the Government had given Kenya National Highways Authority(KeNHA) authority to enter and take possession of the mother title with effect from 15th September 2020 for the purposes of the Nairobi Expressway project. The Plaintiff averred that the 1st Defendant gave it eight (8) hours notice to vacate the suit property failure to which it risked being evicted therefrom. The Plaintiff averred that the said notice by the 1st Defendant was contrary to its legitimate expectation and amounted to a violation of its right to property and fair administrative action. The Plaintiff averred that it had a right to be given prior and adequate notice of the intention by the 4th Defendant to compulsorily acquire the suit property and an opportunity to be heard before the said compulsory acquisition was effected. The Plaintiff averred that in violation of its said rights, the Defendants proceeded to demolish the structures that the Plaintiff had put up on the suit property for the purposes of its business and to forcefully evict the Plaintiff from the property. The Plaintiff averred further that the said notice that was served upon it by the 1st Defendant also amounted to a breach of the lease agreement between it and the 1st Defendant.
4. The Plaintiff averred that the 1st Defendant employed and used the 2nd and 3rd Defendants to forcefully evict the Plaintiff from the suit property and to destroy its structures on the property. The Plaintiff averred that the 2nd and 3rd Defendants were liable for the damage and losses occasioned to the Plaintiff following the said eviction. The Plaintiff averred that following the destruction of the Plaintiff's structures on the suit property and forceful eviction of the Plaintiff, the 1st Defendant was liable under the said lease between the Plaintiff and the 1st Defendant to a refund of any rental payment made in advance in excess of the rent payable as at the date of the Plaintiff's eviction from the property. The Plaintiff averred that the 1st Defendant had refused to refund the advance rent payment made by the Plaintiff despite demand having been made upon it to do so. Together with the plaint, the Plaintiff filed an application to restrain the Defendants from illegally evicting it from the suit property.
5. The 1st Defendant filed a statement of defence dated 19th January 2021 and a Notice of Preliminary Objection dated 9th December 2020. The 1st Defendants denied the Plaintiff's claim in its entirety. The 1st Defendant averred that the Plaintiff's suit was challenging a preliminary notice of inquiry issued by the 4th defendant which merely brought to the attention of the public and all parties concerned those who were going to be affected by the compulsory acquisition. The 1st Defendant averred that the 4th Defendant would conduct inquiries in the process of which it would determine the propriety of the compulsory acquisition and claims for compensation. The 1st Defendant denied that it breached the lease agreement between it and the Plaintiff and that it employed the services of the 2nd and 3rd Defendants to evict the Plaintiff from the suit property. The 1st Defendant averred that it had no power to deny the Government its unfettered right to compulsorily acquire land. The 1st Defendant averred that there was a clear procedure for challenging compulsory acquisition of land and as such the court had no jurisdiction to entertain the Plaintiff's suit. The 1st Defendant averred that the jurisdiction to determine disputes arising from compulsory acquisition of land lies with the Land Acquisition Tribunal.



6. The 2nd Defendant filed a statement of defence dated 20th April 2021. The 2nd Defendant denied the Plaintiff's claim in its entirety. The 2nd Defendant denied that the Plaintiff's right to property and fair administrative action were infringed since the Plaintiff filed the suit before the compulsory acquisition process was completed. The 2nd Defendant averred further that the 4th Defendant had a right to take possession of land compulsorily acquired in the event of an urgency in the need for the land even before compensation. The 2nd Defendant averred that in the circumstances, the notice that was given to the Plaintiff to vacate the suit property was proper as it was necessitated by the urgency. The 2nd Defendant denied that it was used by the 1st Defendant to evict the Plaintiff forcefully from the suit property. The 2nd Defendant averred further that the Plaintiff ignored the laid down procedure for challenging compulsory acquisition of land. The 2nd Defendant averred that the Plaintiff's grievances should have been taken in the first instance to the Acquisition Tribunal. The 2nd Defendant averred that this court had no jurisdiction to hear and determine the Plaintiff's suit.
7. In addition to the defence, the 2nd Defendant filed a Notice of Preliminary Objection dated 20th April 2021 challenging the jurisdiction of the court to entertain the suit and the Plaintiff's application for injunction. The 2nd Defendant also filed a Chamber Summons application dated 4th May 2021 seeking an order for the striking out of its name from the suit.
8. What is before the court:

What is before the court for determination are the Notice of Preliminary Objection dated 9th December 2020 by the 1st Defendant and Notice of Preliminary Objection dated 20th April 2021 and Chamber Summons application dated 4th May 2021 by the 2nd Defendant.

1st Defendant's Notice of Preliminary Objection dated 9th December 2020:

9. In its Notice of Preliminary Objection, the 1st Defendant has sought to have the Plaintiff's interlocutory application for injunction dated 22nd September 2020 and the Plaintiff's main suit dismissed /struck out on grounds that there is no legal authority by way of a lawful resolution or any other legal instrument under the seal of the Plaintiff company, Autobacs Limited duly executed by its known directors and accompanied by the requisite minutes has been produced before this court authorizing the institution of the instant suit against the Defendants by the Plaintiff.
10. The 1st Defendant has contended further that there is no legal authority by way of lawful resolution or any other legal instrument under the seal of the Plaintiff company duly executed by its known directors and accompanied by the requisite minutes that has been availed before this court authorizing Mary Esther Njeri or any other person to swear an affidavit or sign any pleading for and on behalf of the Plaintiff company.
11. The 1st Defendant has averred that pursuant to Order 4 Rule 1 (4) of the Civil Procedure Rules 2010, Mary Esther Njeri lacks the requisite legal authority to swear an affidavit on behalf of the Plaintiff company in support of the Plaintiff's application. The 1st Defendant has averred further that there is no legal authority by way of a resolution or any other legal instrument under the seal of the Plaintiff company duly executed by its known directors and accompanied by the requisite minutes that has been availed before this court authorizing or instructing the firm of Rachier & Amollo LLP or any firm of advocates to institute the present suit for and on behalf of the Plaintiff company. The 1st Defendant has contended further that under section 133C of the Land Act 2012, the jurisdiction of this court has been prematurely invoked by the Plaintiff.



The 2nd Defendant's Notice of Preliminary Objection dated 20th April 2021 and Chamber Summons dated 4th May 2021:

12. In its Notice of Preliminary Objection, the 2nd Defendant has sought the dismissal of the suit herein on the grounds that the suit is bad in law, inadmissible and incurably defective and incompetent for want of jurisdiction. The 2nd Defendant has contended that section 133A of the /akn/ke/act/2012/6 Land Act}} 2012 establishes the Land Acquisition Tribunal and pursuant to section 133 C (6), the Land Acquisition Tribunal has jurisdiction to hear any matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way in the first instance. The 2nd Defendant has contended that the Plaintiff's claim relates to compulsory acquisition of land and accordingly, this court lacks jurisdiction to hear and determine the suit.
13. In its Chamber Summons Application dated 4th May 2021 brought under Order 1 Rule 10 (2) and Rule 14 of the Civil Procedure Rules and sections 1A, 1B and 3A of the {akn/ke/act/1924/3 Civil Procedure Act}}, the 2nd Defendant has sought an order striking out its name as a party to this suit and for the Plaintiff to bear the costs of the application. The application is brought on the grounds set out on the face thereof and on the affidavit of Christine Macharia sworn on 4th May 2021. The 2nd Defendant has averred that the Plaintiff's complaint in this suit is about his alleged unlawful eviction from the suit property during the subsistence of a lease between it and the 1st Defendant who is the owner of the property. The 2nd Defendant has averred that it has been joined as party to the suit on the basis that it was employed by the 1st Defendant to harass and forcefully evict the Plaintiff from the suit property. The 2nd Defendants has averred that the said allegations against the 2nd Defendant remain unsubstantiated, baseless and unfounded. The 2nd Defendant has averred that the 1st Defendant is a distinct and separate entity from the 2nd Defendant and that there is no agency and/or employment relationship whatsoever that makes the 2nd Defendant liable for the acts of the 1st Defendant. The 2nd Defendant has contended that the Plaintiff does not disclose any reasonable cause of action against the 2nd Defendant. The 2nd Defendants has contended that the suit against the 2nd Defendant is scandalous, frivolous and vexatious and is merely intended to harass and embarrass the 2nd Defendant. The 2nd Defendant has averred that its joinder to the suit is ill-advised and inappropriate and it is in the interest of justice to have the 2nd Defendant struck out as a party in this suit.

The 1st Defendant's submissions:

14. In its submissions dated 28th March 2021, the 1st Defendant submitted that a perusal of the Plaintiff's list and bundle of documents shows clearly that there is no resolution by the Plaintiff company authorizing the institution of this suit. The 1st Defendant cited East African Portland Cement Ltd v Capital Markets Authority and 4 Others [2014] eKLR and submitted that in the absence of a resolution authorizing the institution of this suit, the court lacks jurisdiction to entertain it and the same ought to be struck out.
15. On the issue of whether there is a legal authority by way of a lawful resolution or any other legal instrument under the seal of the Plaintiff company duly executed by its known directors and accompanied by the requisite minutes that have been availed before this court authorizing Mary Esther Njeri or any other person to swear an affidavit or sign any pleading on behalf of the Plaintiff, reliance was placed on the provisions of Order 4 Rule 1 (4) of the Civil Procedure Rules 2010. The 1st Defendant submitted that the Verifying Affidavit accompanying the Plaintiff filed in this suit is sworn by an incompetent deponent and the same is a nullity.



16. The 1st Defendant has submitted further that the firm of Rachier & amollo LLP is not properly on record in this suit since there is no resolution or any other legal instrument and minutes authorizing the said firm to institute legal proceedings on behalf of the Plaintiff company. In support of this submission, the 1st Defendant cited Fubeco China Ltd.v Naiposha Company Ltd & Others [2016] eKLR.
17. The 1st Defendant has submitted further that pursuant to section 133C of the {{akn/ke/act/2012/6 Land Act}} 2012, the jurisdiction of this court has been prematurely invoked by the Plaintiff. The 1st Defendant has submitted that the /akn/ke/act/2012/6 Land Act}} 2012 provides a clear procedure for redress of the Plaintiff's grievances which should be strictly followed. In support of this submission, the 1st Defendant has relied on the case of Girici Thuo & 5 Others V National Land Commission & 4 Others [2022] eKLR.
18. The 1st Defendant has submitted that this court lacks jurisdiction to hear and determine this suit and for that reason, its Notice of Preliminary Objection dated 9th December 2021 should be allowed.

The 2nd Defendant's submissions:

19. The 2nd Defendant filed submissions dated 31st March 2022 in support of its Notice of Preliminary Objection and application to be struck out of the suit. On the issue of whether this court has jurisdiction to hear and determine this suit, the 2nd Defendant submitted that this court lacks jurisdiction to hear this matter since the /akn/ke/act/2012/6 Land Act}} 2012 has provided a clear procedure to be followed in case of a dispute relating to compulsory acquisition of land in sections 133A to 133E. The 2nd Defendant has submitted that the Plaintiff ought to have followed the said procedure in seeking redress for his grievances. In support of this submission, the 2nd Defendant has relied on Speaker of the National Assembly v James Njenga Karume [1992] eKLR, Girici Thuo & 5 Others v National Land Commission & 4 Others [2022] eKLR and Henry Wainaina Wakihoro & Another v National Land Commission & 2 Others [2018] eKLR. The 2nd Defendant urged the court to make a finding that it does not have jurisdiction to entertain this suit and to uphold its Notice of Preliminary Objection dated 20th April 2021.
20. On whether the 2nd Defendant should be struck out of this suit, the 2nd Defendant has submitted that the 2nd Defendant is not a necessary party in this suit and there is no cause of action against the 2nd Defendant. In support of this submission, the 2nd Defendant has relied on Kingori v Chege & 2 Others [2002] 2 KLR 243. The 2nd Defendant has submitted that on 8th February 2021, the application by the Plaintiff seeking injunctive orders was withdrawn having been overtaken by events. The 2nd Defendant has submitted that the 2nd Defendant was joined in this suit by the Plaintiff on the allegation that the 2nd Defendant was engaged by the 1st Defendant to harass the Plaintiff, destroy the Plaintiff's property and forcefully remove the Plaintiff from the suit property.
21. The 2nd Defendant has averred that the Plaintiff has not made any attempt to prove these allegations against the 2nd Defendant. The 2nd Defendant has averred that no evidence has been placed before this court to show that the 2nd Defendant and/or its agents were employed by the 1st Defendant to harass the Plaintiff and to evict it from the suit property. The 2nd Defendant has averred that the allegations against the 2nd Defendant by the Plaintiff remain mere allegations without iota of evidence in support thereof. The 2nd Defendant has submitted that the Plaintiff's claim and reliefs sought are against the 1st Defendant. The 2nd Defendant has submitted that there is no contractual relationship between the 2nd Defendant and the 1st Defendant that can attach the 1st Defendant's liability to the 2nd Defendant.



The 2nd Defendant has submitted that it has no place in this suit and as such, it should be struck out of the suit.

The Plaintiff's submissions:

22. The Plaintiff filed its submissions dated 7th July 2022. The Plaintiff has submitted that the jurisdiction of this court is provided for under Article 162 (2) (b) of *the Constitution* and section 13 of the *Environment and Land Court Act* and since this dispute revolves around the compulsory acquisition of the suit property, this court has jurisdiction to hear and determine the same. In support of this submission, reliance was placed in Eunice Grace Njambi Kamau & Another v Kenya National Highways Authority & 3 Others [2022] eKLR.
23. The Plaintiff has submitted further that compulsory acquisition is provided for in the *Land Act* 2012 under part VIII. The Plaintiff has submitted that pursuant to sections 128 and 150 of the *Land Act*, this court has jurisdiction to determine disputes relating to compulsory acquisition of land. The Plaintiff has submitted that the provisions of sections 133A, 133B, 133C and 133D of the *Land Act* do not oust the original jurisdiction of this court to entertain the instant dispute in the exercise of its powers under section 13 of the *Environment and Land Court Act*. In support of this submission, reliance was placed on Charles Cosmas Mdari v Attorney General & 2 Others [2019] eKLR.
24. The Plaintiff has submitted further that the Defendants have not shown that the Land Acquisition Tribunal is currently constituted or functional. The Plaintiff has submitted that to drive it from the seat of justice towards oblivion when the Tribunal has not been established would violate its right to have the dispute herein adjudicated by a competent court. The Plaintiff has submitted that as of the time of filing this suit, the Land Acquisition Tribunal had not been constituted and was not operational. The Plaintiff has submitted that it had a right to approach this court to determine this suit as was held in Ravaspaul Kyalo Mutisya v National Land Commission [2022] eKLR.
25. It is also the Plaintiff's submission that it was not afforded an opportunity to be taken through the rigours of Part VIII of the *Land Act* 2012 in the impugned land acquisition process. The Plaintiff has submitted that it had not been compensated by the time of its eviction from the suit property. The Plaintiff has submitted that there was no time for it to wait for the decision of the 4th Defendant which it could then Appeal to the Tribunal. The Plaintiff submitted that it moved to this court seeking protection of its right to property which was threatened by the Defendants. The Plaintiff has submitted that the provisions of section 133C (6) of the *Land Act* 2012 does not oust the jurisdiction of this court to hear and determine applications for redress of a denial, violation or infringement of or threat to a right to property and fair administrative action.
26. The Plaintiff submitted that the provisions of the *Land Act* referred by the 2nd Defendant do not oust the jurisdiction of this court but only sets how parties are to conduct themselves during the process of compulsory acquisition. The Plaintiff has submitted therefore that this court has jurisdiction. The Plaintiff has submitted that the tribunal does not have the mandate to determine all the issues raised in the suit. In support of this submission, the Plaintiff has relied on Gertrude Mukoya Mwenda & Others v Cabinet Secretary Ministry of Infrastructure, Housing and Urban Development [2020] eKLR.
27. It was submitted further by the Plaintiff that the reliefs sought by the Plaintiff can only be granted by this court in accordance with Article 23 of *the Constitution* as read together with section 4 (2) of the *Environment and Land Court Act*. The Plaintiff has submitted that the issues raised by the Plaintiff cannot be severed so that some are heard by the Land Acquisition Tribunal and some by this court. The Plaintiff has submitted that the issue of breach of its right to property and fair administrative action



provided for under Articles 40 and 47 of *the Constitution* can only be determined before this court as was held in *Taib Investments Ltd v Fahim Salim Said & 5 Others* [2016] eKLR.

28. The Plaintiff has submitted further that whereas sections 133 C (6) of the *Land Act* 2012 appears to expressly amend sections 127, 128 and 148(5) of the *Land Act*, section 150 of the *Land Act* and section 13 (2) (b) of the *Environment and Land Court Act* have not been amended and therefore this court has jurisdiction to hear and determine this suit.
29. On the issue of lack of a resolution, the Plaintiff relied on the case of *Spire Bank Limited v Land Registrar & 2 Others* [2019] e KLR and submitted that the Defendants have not demonstrated that the deponent of the affidavits filed in this suit on behalf of the Plaintiff had no authority to swear the affidavits or that the company did not sanction the institution of this suit and that in any event, such resolution can be provided at any time before the suit is fixed for hearing. The Plaintiff urged the court to dismiss the Preliminary Objections raised by the Defendants with costs.
30. On the issue of striking out the 2nd Defendant from the suit, the Plaintiff submitted that the issue as to whether the 2nd Defendant was employed by the 1st Defendant to harass and forcefully evict the Plaintiff from the suit property can only be determined at the trial and/or hearing of the suit. In support of this submission, the Plaintiff cited *Jackson Ngechu Kimotho v Equity Bank Limited & Another* [2013] eKLR. The Plaintiff submitted that if the suit against the 2nd Defendant is ultimately dismissed at the trial, the 2nd Defendant would be compensated in costs.

Analysis and determination:

31. I will consider the 1st and 2nd Defendants' Notices of Preliminary Objection together and the 2nd Defendant's Chamber Summons application separately. Two issues arise for determination in the said notices of preliminary objection. The first one is whether this court lacks jurisdiction to entertain the plaintiff's suit in view of the available alternative remedy and secondly, whether the plaintiff's suit is incompetent for want of a board resolution authorizing the filing of the same.

Whether this court lacks jurisdiction to determine this suit:

32. In *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court stated 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.”



33. The broad jurisdiction of this court is set out in Article 162(2)(b) 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.”

34. Parliament enacted the *Environment and Land Court Act* 2011(hereinafter referred to as “the Act” where the context so permits) pursuant to the said Article 162(2)(b) of *the Constitution*. Section 13 of the Act sets out in detail, 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”

Section 133A (1) of the [Land Act](#) 2012 provides as follows:

- “(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.”

Section 133C of the [Land Act](#) 2012 sets out the jurisdiction of the Land Acquisition Tribunal (hereinafter referred to only as “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 form or 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.”

35. In *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR the Court of Appeal stated as follows on the principle of exhaustion:

- “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.”



36. In *Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others* [2015] eKLR the court stated that:

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews.... The exhaustion doctrine is a sound one and 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 accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.”

37. There is no doubt from the foregoing that both this court and the tribunal has jurisdiction to entertain disputes over compulsory acquisition of land. It is also clear from the cases that I have cited that if the tribunal is in existence, disputes over compulsory acquisition of land should be handled by the tribunal in the first instance. I am of the view that the Plaintiff’s complaint is not strictly one for compensation for land compulsorily acquired. The Plaintiff’s complaint is over the manner in which it was forcefully evicted from the suit property and its structures thereon demolished while it had a running lease with the 1st Defendant. The Plaintiff has not sought any relief for compensation for compulsory acquisition of its land. It follows in the circumstances that the Plaintiff’s suit is in the right forum. Supposing that I am wrong in that finding and that the Plaintiff’s complaint is concerned with compulsory acquisition of the suit property and as such ought to have been referred to the tribunal in the first instance, I would still not have dismissed the Plaintiff’s suit under the principle of exhaustion. This is because, the court takes judicial notice of the fact that the Land Acquisition Tribunal (the Tribunal) is yet to be established. The Plaintiff was therefore within its right to institute the present suit before this court which has original and appellate jurisdiction to determine disputes relating to compulsory acquisition of land. My view on the issue finds support in *Ravaspaul Kyalo Mutisya v National Land Commission* [2022] eKLR cited by the Plaintiff where the court stated as follows:

“Further to this, Section 133C (6) of the *Land Act* provides that: “Despite the provisions 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.” This means that the Land Acquisition Tribunal is the first dispute resolution mechanism established under the law in case a dispute arises from compulsory acquisition of land. Section 133(7) provides that the Tribunal has power to confirm, vary or quash the decision of the National Land Commission. The Act further provides that if a party is dissatisfied with the Tribunal’s decision, they may appeal to the court on a question of law only as provided by Section 133D of the *Land Act*.

Unfortunately, it appears that the Land Acquisition Tribunal is yet to be established and be fully operational. The right of access to court in case of a dispute relating to compulsory acquisition of land is a constitutional right under Article 40 (3) (ii) which allows any person who has an interest in, or right over, the property to be acquired a right of access to a court of law. Section 128 of the *Land Act* (2012) 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. It is the Courts view that the lack of an operational Land Acquisition Tribunal does not limit the Appellant’s right of access to the Courts and I find that the dispute as filed in Court is properly presented.”



38. Due to the foregoing, the objection taken by the Defendants to the suit based on lack of jurisdiction and the principle of exhaustion is overruled.

Whether this suit is incompetent and should not be entertained by the court on the basis that there is no legal authority by way of a lawful resolution or any other instrument under the seal of the Plaintiff company duly executed by its directors authorizing the institution of the suit against the Defendants. ___

39. In *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & Another* [1982] KLR 1 Madan JA. stated that:

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

Order 4 rule 1(4) of the Civil Procedure Rules 2010 states that:

“Where the plaintiff is a corporation, the verifying affidavit shall be sworn by an officer of the company duly authorized under the seal of the company to do so.”

Order 4 rule 1(6) of the Civil Procedure Rules 2010 states that:

“The court may of its own motion or on the application by the plaintiff or the defendant order to be struck out any plaint or counterclaim which does not comply with sub-rule (2) (3), (4) and (5) of this rule.”

40. In *Spire Bank Limited v Land Registrar & 2 Others* [2019] eKLR cited by the Plaintiff, the Court of Appeal stated as follows:

“It is essential to appreciate that the intention behind order 4 rule 1 (4) was to safeguard the corporate entity by ensuring that only an authorized officer could institute proceedings on its behalf. This was to address the mischief of unauthorized persons instituting proceedings on behalf of corporations, and obtaining fraudulent or unwarranted orders from the court. ... With this in mind, we dare say that the provision was not intended to be utilized as a procedural technicality to strike out suits, particularly where no evidence was produced to demonstrate that the officer was unauthorized.”

41. It is not clear from the material before the court whether the Plaintiff passed a resolution to file this suit. Neither the resolution nor the minutes of the meeting at which the resolution was passed have been included as part of the Plaintiff's bundle of documents. It is similarly not clear whether there was any resolution authorizing Mary Esther Njeri to swear affidavits in this suit on behalf of the Plaintiff and the firm of Rachier & Amollo LLP to act on the Plaintiff's behalf in the suit. I am of the view that whether or not a resolution was passed by the Plaintiff to file this suit and to appoint the firm of Rachier & Amollo LLP to act for it in the matter and for Mary Esther Njeri to swear a verifying affidavit and any other affidavits in the matter is a question of evidence. There is no requirement that the resolution and board minutes be produced at the time of filing suit. In any event, it has not been suggested that



the suit was filed without the authority of the directors of the Plaintiff or that Mary Esther Njeri was on a frolic of her own. I am also of the view that even if there was no such resolution, the resolution can be passed at any time and the appointment of advocates, authorization of Mary Esther Njeri to sign documents on behalf of the Plaintiff and filing of the suit ratified by the directors of the Plaintiff. I am also of the view that based on the current case law on the issue, the necessity of a resolution being passed by the board of directors of a company before a suit can be filed in the name of the company is no longer good law. In *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR the Court of Appeal stated as follows:

“ 44. The submission that there ought to have been a resolution to authorize the filing of the suit in the name of the company appears to have emanated from a decision of the Uganda High Court which has been followed and applied in this country for a long time; *Bugerere Coffee Growers Ltd v Sebaduka & Anor* [1970] 1 EA 147. The court in that case held:-

When companies authorize the commencement of legal proceedings, a resolution or resolutions have to be passed either at a company or Board of Directors’ meeting and recorded in the minutes, but no resolution had been passed authorizing the proceedings in this case. Where an advocate has brought legal proceedings without authority of the purported plaintiff the applicant becomes personally liable to the defendants for the costs of the action.”

45. To their credit, the appellant’s Advocates have cited another authority from the Supreme Court of Uganda decided in April 2002, confirming that the principle enunciated in the *Bugerere* case has since been overruled by the Uganda Supreme court. The authority is *Tatu Naiga & Emporium v Virjee Brothers Ltd* Civil Appeal No 8 of 2000. The Uganda Supreme Court endorsed the decision of the Court of Appeal that the decision in the *Bugerere* case was no longer good law as it had been overturned in the case of *United Assurance Co. Ltd v Attorney General: SCCA NO.1 of 1998*. The latter case restated the law as follows:-

“ ... it was now settled, as the law, that, it does not require a board of directors, or even the general meeting of members, to sit and resolve to instruct Counsel to file proceedings on behalf and in the names of the Company. Any director, who is authorized to act on behalf of the company, unless the contrary is shown, has the powers of the board to act on behalf of that Company.”

The decision has since been applied in Kenyan courts, for example, in *Fubeco China Fushun v Naiposha Company Limited & 11 others* [2014] eKLR.”

42. Due to the foregoing, I find no merit on the limb of the preliminary objection based on lack of a resolution by the directors of the Plaintiff to institute this suit and for the firm of *Rachier & Amollo LLP* to act for the Plaintiff and Mary Esther Njeri to swear a verifying affidavit on behalf in the Plaintiff.



Whether the 2nd Defendant should be struck out as a party in this suit:

43. In *D.T Dobie and Company (K) Ltd v Joseph Mbaria Muchina & Another* (supra) Madan J.A. stated that:

“The power to strike out should be exercised only after the court has considered all the facts, but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as this would prejudice fair trial and would restrict the freedom of the trial judge in disposing the case.”

44. In *J.P. Machira v. Wangeth iMwangi*, Court of Appeal, Civil Appeal No. 179 of 1997, Omolo J.A, stated as follows:

“I do not think the unfettered power in the courts to allow amendments at any stage is to be used to enable the parties to create all sorts fanciful defences in the course of litigation. Nor do I understand the decision of this court, particularly that of Madan J.A in the case of *D.T. Dobie & Company (Kenya) Ltd. v Joseph Mbaria Muchina & another*, Civil Appeal, No. 37 of 1978 (unreported) to mean that no pleading could ever be struck out even where it is patently clear that no useful purpose could ever be served by a trial on merits.....I agree that these powers are drastic and as the court said.....the powers are to be exercised with great caution and only in clearest of cases. But once such caution has been exercised and it is perfectly clear that no useful purpose would be served by a trial on the merits, the court is perfectly entitled to strike out a pleading for as I have said, there is no magic in holding a trial on the merits particularly where it is obvious to everyone that no useful purpose would be served by it.”

45. Order 1 rule 3 of the Civil Procedure Rules provides as follows:

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

46. Order 1 rule 10 (1) and (2) of the Civil Procedure Rules on the other hand provide as follows:

| | |
|-----|---|
| (1) | Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. |
| (2) | |



47. The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.
48. In *Deported Asians property Custodian Board v. Jaffer Brothers Limited* [1999]1E.A 55 (SCU) cited with approval in the case of *Pravin Bowry v John Ward and another* [2015] eKLR, the court stated among others that:
- “For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seek in the suit, would legally affect the interest of that person, and that it is desirable, for avoidance of multiplicity of suits to have such person joined so that he is bound by the decision of the court in that suit.”
49. In *Werrot and Company Ltd. and others v. Andrew Douglas Gregory and others, Nairobi(Milimani) HCCC No. 2363 of 1998*[1998] LLR2848(CCK), Ringera J. stated that:
- “For determining the question who is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceedings in question and, (ii) It should not be possible to pass an effective decree in the absence of the party”.
50. It is on the foregoing principles that the 2nd Defendant’s application falls for consideration. On the material before me, I am persuaded that this is a proper case in which the court should exercise its discretion to strike out the name of the 2nd Defendant from the suit. From the plaint, the 2nd Defendant has been joined in the suit on the ground that the 2nd Defendant was employed by the 1st Defendant to harass and forcefully evict the Plaintiff from the suit property. In paragraph 22 of the plaint, the Plaintiff has alleged that the 1st Defendant employed the use of the 2nd and 3rd Defendants to harass the Plaintiff, destroy the Plaintiff’s property and forcefully remove the Plaintiff from the suit property and the 2nd and 3rd Respondent are therefore liable for the damages occasioned to and losses suffered by the Plaintiff. In its statement of defence, the 2nd Defendant has denied the said allegations. I am in agreement with the 2nd Defendant that no evidence of whatsoever nature has been placed before the court showing that the 2nd Defendant was employed by the 1st Defendant to destroy the Plaintiff’s properties and to forcefully evict it from the suit property. It is worth noting that the 2nd Defendant was not a party to the Lease Agreement between the Plaintiff and the 1st Defendant and that the 2nd Defendant had no interest whatsoever in the suit property. I am not satisfied that the Plaint filed herein discloses any reasonable cause of action against the 2nd Defendant. The Plaintiff has not established that it has a reasonable claim against the 2nd Defendant or that the 2nd Defendant is a necessary party to the suit. I am of the view that it is not necessary for this suit to go to trial as between the Plaintiff and the 2nd Defendant on mere allegations. It will save judicial time and costs to the parties involved if the claim against the 2nd Defendant is terminated at this stage.
51. For the foregoing reasons, I find merit in the 2nd Defendant’s Chamber Summons application dated 4th May 2021.



Conclusion:

52. In conclusion, I hereby make the following orders;

1. The Notice of Preliminary Objection dated 9th December 2020 by the 1st Defendant and Notice of Preliminary Objection dated 20th April 2021 by the 2nd Defendant are dismissed.
2. The 2nd Defendant's Chamber Summons application dated 4th May 2021 is allowed with the effect that the Plaintiff's suit against the 2nd Defendant is struck out with costs.
3. The costs of the two Preliminary Objections shall be borne by the 1st and 2nd Defendants while the 2nd Defendant shall have the costs of the application dated 4th May 2021.

DATED AND DELIVERED AT KISUMU ON THIS 20TH DAY OF DECEMBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the Plaintiff

N/A for the 1st Defendant

Ms. Nkatha h/b for Mr. Mumia for the 2nd Defendant

N/A for the 3rd and 4th Defendants

Ms. J. Omondi-Court Assistant

