



**Kariuki & 487 others v Athi Water Works Development Agency & 2 others (Environment & Land Petition 3 of 2023) [2024] KEELC 1178 (KLR) (4 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1178 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION 3 OF 2023**

**JG KEMEI, J**

**MARCH 4, 2024**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10(2) (C), & (D), 28, 32(2), 35(A) & (B), 40(3), (B) & (D), 44 & 47 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013 AND IN THE MATTER OF FAIR ADMINISTRATIVE ACTIONS ACT, 2015**

**BETWEEN**

**JOHN MWANGI KARIUKI ..... 1<sup>ST</sup> PETITIONER  
JAMES MUCHAI KARIUKI ..... 2<sup>ND</sup> PETITIONER  
WILLY GITHUA MURITHI ..... 3<sup>RD</sup> PETITIONER  
PATRICK KARIUKI MURITHI & 484 OTHERS ..... 4<sup>TH</sup> PETITIONER**

**AND**

**ATHI WATER WORKS DEVELOPMENT AGENCY ..... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
CHINA ROAD & BRIDGE CORPORATION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

**The Petitioners’ Notice of Motion dated 5/3/2023**

- 1. The Petitioners/Applicants filed the instant Notice of Motion dated 5/3/2023 seeking Orders THAT;
  - a. Spent.
  - b. Spent.



- c. Spent.
  - d. An order be and is hereby issued suspending the implementation of Gazette Notice No. 1644 dated 10<sup>th</sup> February 2023 - being the intention to acquire land for the construction of Ndarugu II Dam project in Kiambu County, pending the hearing and determination of this Petition.
  - e. An order be and is hereby issued restraining the servants, agents or any person under the direction of the 3<sup>rd</sup> Respondent from entering into the Petitioners' parcels and/or conducting any survey on the land, relating to Ndarugu II Dam project, pending the hearing and determination of this Petition.
  - f. An order be and is hereby issued restraining the Respondents from carrying out any/all activities regarding the acquisition of land, survey, or geotechnical survey for purposes of construction of the Ndarugu II Dam project, pending the hearing and determination of this Petition.
  - g. Costs of this Application be provided for.
2. The Application is based on the extensive grounds set out thereto as well as the Supporting Affidavit of John Mwangi Kariuki sworn on the 5/3/2023. The deponent stated that he is the Chairman of persons who reside in Gatei, Gathaiti, Kanjuku and Mwimuto locations at the confluence of the Ndarugu and Kithobokoni rivers. That without their consent and knowledge, the 1<sup>st</sup> Respondent sent their agents to survey their lands in 2022 for the purpose of construction of a dam in the area. That through their advocate they sought details of the proposed project from the 1<sup>st</sup> Respondent which letter did not elicit any response further frustrating their effort to gather information. Next, they inquired from Water Resources Authority (WRA) who informed them that there was no permit sought with respect to the construction of the said dam. That it was only in December 2022 that the 1<sup>st</sup> Respondent agents in the presence of the local administration, that the 1<sup>st</sup> Respondent informed them of the proposed project and sought permission from the community to carry out geotechnical survey on the lands earmarked to form the embankment of the dam. Several other meetings were held in which the community finally decided to reject the project.
  3. That despite their disapproval, the 2<sup>nd</sup> Respondent proceeded to issue a Gazette Notice (GN) No 1644 of 10/2/2023 intimating its intention to acquire 22 plots in the area of the proposed dam. They aver that other land owners who would be affected by the dam directly in the 4 sublocations were omitted yet according to the project proposal document of the Gatei (Ndarugu) dam of 2017 indicates that the dam catchment area will cover 170 Ha.
  4. According to the Petitioners the implementation of the Project is fraught with infringement of constitutional guarantees including arbitrary depriving them of their lands. That it is for these reasons that they have chosen to reject the project inter alia because of non-existent public participation with respect to the project, the Public Private Partnership Act (PPPA), National Environment Management Authority (NEMA); lack of requisite permits and licenses; lack of information as regards the project; non-involvement by the project proponent to allow the community to give prior, free and informed consent; the proximity to Karemuni II dam which is 3.4 km away; the 1<sup>st</sup> Respondent employing underhand dealings in forcing the project on them.

### **The Responses**

5. The 1<sup>st</sup> Respondent through its Ndarugu II Dam project technical team leader Eng. John Muhia filed a detailed Replying Affidavit sworn on 22/3/2023. That the 1<sup>st</sup> Respondent is responsible for developing



maintaining and managing water and sewerage infrastructure in the counties of Nairobi, Kiambu and Muranga with a population of over 8 Million. That Ndarugu dam is a public purpose project as it is intended to supply bulk water to about 500,000 people in Ruiru and Juja areas.

6. The deponent explained that prior to the publication of Gazette Notice No 1644 dated the 10/2/2023, the 1<sup>st</sup> Respondent carried out public participation with Project Affected Persons (hereinafter PAPs) on the 23/1/2023 to explain the scope of the geotechnical survey and the nature of damages that are likely to arise out of the survey and the expected compensation in the unlikely event of damages.
7. That the lands intended to be acquired under the Gazette Notice (GN) No. 1644 are 22 parcels owned by 10 land owners and measuring 25 ha for purposes of conducting the geotechnical surveys, the results of which will determine the exact areas required for the construction of the dam. That it is only after the geotechnical survey that the exact numbers of people that will be affected will be known.
8. Further the deponent stated that the other processes prescribed by the Land Act are yet to be undertaken by the 2<sup>nd</sup> Respondent and therefore no violation of the Applicants' property has taken place as compensation will be accorded as prescribed in law. He admitted that despite hostilities, public participation was held in January 2023 to explain to the PAPs the process of compulsory acquisition and to receive their views and concerns and address them.
9. He averred that the right to own property under Article 40 Constitution of Kenya is fettered by the State's right to use the land for public purpose as provided for in the law and in this case the right to compulsory acquisition. That in this instance the Ndarugu II Dam project (hereinafter referred to as the project) is set to benefit the public in addressing water shortage in Ruiru and Juja areas as evidenced by JM1 – copy of the project's proposal.
10. On the issue of grant of interlocutory injunction, the deponent further avowed that the application does not satisfy the conditions for grant of interlocutory injunction and instead it is the 1<sup>st</sup> Respondent that stands to suffer immense loss if the application is allowed. That there is admission of bias by the Applicants against the project as shown by the correspondence between the 1<sup>st</sup> Respondent and Applicants' counsel annexed as JM7a and 7b. That the 1<sup>st</sup> Respondent has exercised fair administrative action notably through Public Consultative forums held on 13/1/2023 at Gatei, Gathaite, Kanjuku and Muimoto areas to explain to the PAPs the scope of the project, nature of compensation in the event of any damage arising from the activities on the land. That from the said forums, it emerged that residents are apprehensive of the project since Karimenu II dam is 3.4km away from the proposed project site which concern was duly addressed by the 1<sup>st</sup> Respondent.
11. Additionally, it was averred that the 1<sup>st</sup> Respondent has complied with various requirements for obtaining permits and licenses particularly by submitting the Environmental Impact Assessment (EIA) study for the project to NEMA aimed at obtaining requisite approvals; publication of the EIA study by Gazette notice and further in a national newspaper and radio advertisements. The 1<sup>st</sup> Respondent denied any requirement to obtain a permit from the Water Resources Authority at this preliminary stage as claimed by the Applicants. He urged the Court to dismiss the Application with costs.
12. The 2<sup>nd</sup> Respondent's Chief Valuation and Taxation officer Jacob Lemasika Kipaa swore a Replying Affidavit on 21/3/2023. He outlined the 2<sup>nd</sup> Respondent's mandate, role and process in compulsory acquisition of land as provided under Chapter VIII of the Land Act. He averred that the 2<sup>nd</sup> Respondent in strict compliance with the law, received a request of intention to acquire certain parcels of land for construction of the Ndarugu dam project in Kiambu County. That it caused publication of Gazette Notice no. 1644, copy annexed as NLC1 whose purpose was to conduct a geotechnical study



- to determine suitability of the proposed dam construction site. That upon conclusion of the survey and upon satisfaction that the area is suitable to hold water the 2<sup>nd</sup> Respondent will cause to be published a notice to acquire more land for the construction of the dam. That in totality the acquisition process is long and detailed and, in this case, the process is still at the infancy stages and it is undertaken strictly on behalf of the 1<sup>st</sup> Respondent.
13. It was further affirmed that the right to own property under Article 40 Constitution of Kenya is not absolute. That a land owner cannot stand in the way of the right of the state to compulsorily acquire land (eminent domain) for public purpose and interest as provided for under Article 40 (3) (b) of *the Constitution* of Kenya.
  14. That granting the orders sought in the application will adversely affect public interest. Additionally, the deponent argued that the Applicants have not exhausted the dispute resolution mechanisms before invoking this Court's jurisdiction provided under Section 112 and 133A & C of the *Land Act*.
  15. The 3<sup>rd</sup> Respondent filed its Grounds of Opposition dated 22/3/2023 and further a Preliminary Objection of even date against both the Application and Petition. In the Grounds of Opposition, the 3<sup>rd</sup> Respondent avers that the Applicants have not met the threshold for granting conservatory orders as set out in the case of Centre for Rights Education and Awareness (CREAW) & 7 Others [2011] eKLR on grounds that the Petitioners have not demonstrated a prima facie case for breach of their constitutional rights; compulsory acquisition cannot amount to curtailing the right to own property; the Petitioners ought to lodge their grievances before the National Land Commission (NLC) and Land Acquisition Tribunal (LAT) before approaching this Court and by circumventing the alternative dispute resolution mechanisms, the Petition and Application are a gross abuse of the Court process. Additionally, that the Petitioners have not provided an undertaking as to damages which is a mandatory requirement when seeking an interlocutory injunction and, in any event, they have not met the threshold for grant of conservatory orders.
  16. The 3<sup>rd</sup> Respondent's Preliminary Objection is premised on grounds that; Section 133A of the *Land Act* establishes the LAT with jurisdiction to hear appeals arising from the decisions of the NLC in respect to the process of compulsory acquisition of land; the period of lodging an appeal by an aggrieved person under Section 133C of the *Land Act* is 30 days; the Petitioners have failed to demonstrate that their Petition falls within the exceptions of the Avoidance Principle and the Doctrine of Exhaustion of Remedies; the decisions of the Court of Appeal in Kibos Distillers Limited & 4 others V Benson Ambuti Adegwa & 3 Others [2020] eKLR and its subsequent appeal in the Supreme Court on the jurisdiction of Environment and Land Court to exercise restraint in matters where there are properly constituted institutions mandated to hear and determine the issues hence ousting the jurisdiction of this Court.

## Rejoinder

17. In a rejoinder, the Petitioners through John Mwangi Kariuki filed a Further Affidavit sworn on 8/4/2023. He maintained that the intended construction of the project infringes on clear and well-defined constitutional parameters. That the 1<sup>st</sup> Respondent did not comply with provisions of the Environmental Management and Coordination Act (EMCA) of 1999. That the Environmental and Social Impact Assessment shows the market areas to be affected by the project to be Kiriko, Buchana, Kanyoni and Gatuamba which are already submerged by Karemuni II dam. That the consultative forums alluded to by the 1<sup>st</sup> Respondent barely lasted an average of 30 minutes and cannot be said to amount to public participation for a project of that magnitude. That the engagement fell short of the threshold of public participation contemplated under *the Constitution*. That the said meetings were merely an academic exercise since by 13/1/2023, the 1<sup>st</sup> Respondent had submitted for approval



the terms of reference of the Environmental and Social Impact Study (ESIA) report to NEMA. That the Petitioners sought their independent expert opinion on the proposed project annexed as JMK20, which report has confirmed their long-held fears and suspicion concerning the project.

18. Replying to the above, the 1<sup>st</sup> Respondent filed a Supplementary Affidavit sworn on 5/3/2023 by its Project Coordinator and Civil Engineer Eng. Kiprono D. Rop. He deponed that indeed the proposed project is as a result of a Public Private Partnership Project governed by the Public Private Partnership Act (PPP Act). That the Public Private Partnership Committee approved the proposed project which proposal was initially submitted in line with Section 43(1) & (5) of the PPPA. That the 1<sup>st</sup> and 3<sup>rd</sup> Respondents must undertake relevant investigations and feasibility studies for the project and the Gazette Notice No. 1644 was geared towards conducting geotechnical studies, one of the requirements under the PPA Act. That the findings of the said studies will then inform which particular parcels are needed for the intended project. That any issues touching on the EIAs ought to be raised at NEMA and not this Court.
19. Regarding the Applicants' expert opinion report JMK20, it was avowed that the affected persons shall be duly compensated for the loss of land pursuant to Section 115 of the Land Act; the dam will allow downstream flow of water; the 1<sup>st</sup> Respondent will provide a complete refuse collection and handling service; there is no risk of tremors and landslides and that there will be no negative impact on the ground water table post-construction. Further that NEMA is the right forum to table such concerns and if aggrieved by the decision of NEMA the Applicants still have recourse to the National Environmental Tribunal (NET). For the above reasons the deponent urged the Court to dismiss the application.

### **Directions**

20. On 27/3/2023 directions were taken to determine the Preliminary Objection and the Notice of Motion together.

### **The written submissions**

21. The Applicants through the firm of Wachenje & Mariga Advocates filed submissions dated 2/5/2023. They drew four issues for determination; whether public participation as per the Constitution of Kenya and Fair Administrative practices were carried out; whether public participation under the PPP Act, Water Act and EMCA was conducted; whether the implementation of Gazette notice No. 1644 should be suspended and who bears costs of the Application.
22. The first issue was answered in the negative. The Applicants submitted that public participation as envisioned under Article 10 Constitution of Kenya was not adhered to. That the Water Resources Authority confirmed the Applicants' fears that no licenses had been issued to the Respondents. That the impugned four meetings on 13/10/2023 were held after the Applicants rejected the proposed project. That the 2<sup>nd</sup> Respondent published Gazette Notice No. 1644 on the same date that the NEMA vide the Gazette Notice No. 1599 of 10/2/2023 had called for the comments on the Ndarugu II dam ESIA report despite provisions of Article 69(1)(d), 174(c) and 277 of the Constitution of Kenya.
23. Secondly, it was argued that Section 22 (K) of the PPPA was flouted and the public was not accorded the opportunity to comment on the project at its conceptualization. That NEMA received the ESIA report on 19/1/2023 a day earlier of the deadline of the 1<sup>st</sup> Respondent's notice inviting comments from members of the public on the project. That this is contrary to Section 58 (7) of EMCA which requires strict adherence to Regulation 17 EIA Regulations (assessment and audit) 2003. The Respondents were also accused of failing to comply with public participation as stated in Section 139 of the Water Act.



24. Concerning the suspension of the Gazette Notice No. 1644, the Applicants were emphatic that the notice was issued to defeat the Applicants' cause of challenging the proposed project. That while para. 12 of the 2<sup>nd</sup> Respondent's Replying Affidavit confirms that the 22 parcels of land are meant for geo-technical survey, the notice speaks about construction of Ndarugu II dam construction. They urged the Court to exercise its powers under Article 23 Constitution of Kenya and grant conservatory orders as prayed in light of the threat of violation of their rights to Public participation and ownership of land.
25. Opposing the Preliminary Objection, the Applicants submitted that the Preliminary Objection argues that the issues herein are constitutional as opposed to the 2<sup>nd</sup> Respondent's lawful mandate and role. Reliance was placed on the decisions in *Thika ELC Petition 004 of 2022 Gachiri Thuo & Others Vs National Land Commission and 5 Others* whereby the Court declined to strike out a similar Petition since the Land Acquisition Tribunal had not been established at the time of filing the Petition.
26. The 1<sup>st</sup> Respondent through the firm of Muthoga & Omari Advocates filed submissions dated 10/5/2023. It framed three issues for determination; whether the Applicants have satisfied the conditions for grant of interlocutory orders; whether the 1<sup>st</sup> Respondent exercised fair administrative action and whether the application and Petition are defective for want of marking and commissioning.
27. Applying the criteria for grant of conservatory orders as held in the case of *George Odero Vs. Lake Victoria Environment Programme & 3 Others [2015] eKLR*, the 1<sup>st</sup> Respondent submitted that the Applicants do not have a prima facie case with a likelihood of success nor any of their rights have been violated. That the right to own property is not absolute and in this case the proposed dam is undoubted for the greater public good and interest. That the due process for compulsory acquisition of land has been followed and the Applicants have not shown any irreparable loss they stand to suffer. That just compensation shall be promptly paid as provided in Section 111 (1) of the [Land Act](#).
28. On the issue whether the 1<sup>st</sup> Respondent exercised fair administrative action, the 1<sup>st</sup> Respondent highlighted that it had complied with the requisite public participation in accordance with Articles 10 & 47 of [the Constitution](#) of Kenya and applicable statutes. Reference was made to the correspondences between 1<sup>st</sup> Respondent and the Applicants' counsel, public meetings held in various places and public notification through gazette notices, print media and radio. That the move by the Applicants and the larger community to walk out of the meetings does not invalidate the 1<sup>st</sup> Respondent's compliance with the law.
29. On the last issue whether the application and Petition are defective for want of marking and commissioning, the 1<sup>st</sup> Respondent contended that the documents annexed to the Affidavit are defective for want of a seal by a Magistrate or Commissioner of Oaths and therefore should be expunged from the record. Reference was made to the provisions of Rule 9 of the Oaths and Statutory Declarations and the decision of the Court in the case of *Homeboys Entertainment Limited Vs Secretary National Building Inspectorate and 2 Others [2022] eKLR* where the Court expunged such documents for want of seal and marking and the Court was urged to follow cue.
30. The Learned Counsel Matilda Kisengese filed submissions dated 5/5/2023 on behalf of the 2<sup>nd</sup> Respondent. It submitted on three issues for determination akin to the 1<sup>st</sup> Respondent's; whether public participation was carried out; whether the Gazette Notice No. 1644 should be suspended and whether the Applicants are entitled to the prayers sought.
31. It was argued that the Applicants' refusal to take part in public participation does not mean public participation was not conducted. That the gazette notice relates to 22 parcel of land and as such only 22 land owners are strictly affected by it and the rest of the Applicants have no locus before this Court. That in cases of compulsory acquisitions like this one, public interests outweigh private interests.



That the Applicants have not surmounted the requirements for grant of interlocutory injunctions as discussed in the celebrated case of *Giella Vs Cassman Brown* [1973] EA 358. That the balance of convenience herein tilts in favor of the greater public interest geared towards supplying water to the residents of Ruiru and Juja.

32. Supporting the Preliminary Objection, the 2<sup>nd</sup> Respondent faulted the Applicants for not exhausting alternative dispute resolution mechanisms as provided for under section 133 of the *Land Act*.
33. The firm of Hamilton Harrison & Mathews Advocates for the 3<sup>rd</sup> Respondent filed submissions dated 10/5/2023. The 3<sup>rd</sup> Respondent outlined the background of the Application and Petition before the Court. The Court was invited to find that it lacks jurisdiction to entertain the suit because all statutory administrative processes are yet to be exhausted. That the jurisdiction to hear and determine matters relating to compulsory acquisition is vested in the NLC and thereafter the Land Acquisition Tribunal (LAT). That the laid down procedure in the *Land Act* for compulsory acquisition was duly followed and any dispute therefrom should be heard by the LAT and in turn this Court enjoys appellate jurisdiction. Reliance was placed on the case of *Giciri Thuo & 5 Others Vs NLC & 4 others* [2022] eKLR where the Court declined a similar application and cited lack of jurisdiction in light of the dispute resolution mechanisms under the *Land Act*.
34. It was further pointed out that the Applicants are seeking injunctive orders in the Motion only and not in the Petition. That under Order 2 rule 1 & 6 Civil Procedure Rules parties are bound by their pleadings and it will be premature to grant temporary injunction at this stage.
35. In a rejoinder, the Applicants filed supplementary submissions dated 17/5/2023. They submitted that the Petitioners comprise three categories; those whose parcels have been gazetted in the Gazette Notice No. 1644; those who will be affected due to their proximity to the proposed project and those who will be affected by the construction of the dam by virtue of their residency in the area. Objecting to the Preliminary Objection the Applicants stated that the jurisdiction of LAT under Section 133C of the *Land Act* can only be invoked by persons whose land is in the process of acquisition as opposed to all the Applicants herein drawn for the categories aforementioned.

### **Analysis & Determination**

36. Having read and considered the application, the responses, the written submissions of the parties and all the material placed before me the Court has framed the following issues for determination;
  - a. Whether the Applicant is entitled to the prayers sought in the Notice of Motion dated the 5/3/23.
  - b. Whether the Preliminary Objection dated the 22/3/23 is merited
  - c. Who meets the cost?
37. This Court appreciates that the nature of a Preliminary Objection is such that if successful it can dispose of the entire suit and for that reason the Preliminary Objection shall be considered first. If the Preliminary Objection succeeds there will no need to consider the merits of the Notice of Motion. This position is anchored in the Black's Law Dictionary, 10th Edition which defines a Preliminary Objection as:-

“... in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary.”



38. The parameters of consideration of a preliminary objection are now well settled. The principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd* [1969] EA 696. At page 700 Law JA stated:
- “ A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
39. At page 701 Sir Charles Newbold, P added:
- “ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of Judicial discretion...”
40. From the above precedent, it is clear that for a Preliminary Objection to succeed the following ought to be satisfied: Firstly, it should raise a pure point of law; secondly, it is argued on the assumption that all the facts pleaded by the other side are correct; and finally, it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. A valid preliminary objection should, if successful, dispose of the suit.
41. Additionally, in the case of *Avtar Singh Bhamra & Another Vs. Oriental Commercial Bank, Kisumu* HCCC No. 53 of 2004, the Court held that:-
- “ A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”
42. The Court of Appeal in *The Owners of Motor Vessel “Lillian S” Vs. Caltex Oil Kenya Ltd* [1989]KLR 1 stated:-
- “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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
43. It is trite that jurisdiction goes to the root of a matter and as such the Court finds that the Preliminary Objection raises a pure point of law.
44. The next issue for determination is whether the Preliminary Objection has merit. It is trite that a Court of law cannot confer on itself jurisdiction. Jurisdiction is donated by either *the Constitution* or Statute or both. See the decision in *Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank Limited & Others* [2012] eKLR.
45. Jurisdiction of this Court flows from Article 162 (2) (b) of *the Constitution* of Kenya which establishes the Environment and Land Court, a Court of equal status with the High Court and empowered to hear and determine disputes relating to the environment and the use and occupation of, and title to land



46. In giving effect to Article 162(2)(b) of *the Constitution* of Kenya, Parliament enacted the *Environment and Land Court Act* which provides as follows under Section 13 (2) that;
- (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.”
47. The Petitioners moved this Court by way of a Petition dated the 5/3/23 seeking orders inter alia the suspension of the implementation of Gazette Notice No. 1644 dated 10/2/2023, restraining orders against the 3<sup>rd</sup> Respondent from entering into the Applicants’ land, various declaratory orders that the Respondents have acted in breach of the due process of the law and *the Constitution*, lack of information and thereby suppressing their right to prior free and informed consent with respect to the acquisition of their lands for the construction of Ndarugu II dam.
48. It was the Petitioners case that they have totally rejected the project because inter alia, the proponents have failed to conduct proper public participation with respect to project, NEMA and the PPP Act; lack of information to allow them make an informed decision on the project, lack of permits from WRA the proximity of the proposed dam to Karemenu dam that lies within 3 kms, gazetting only 22 parcels of land while the project documents in their possession shows the catchment dam area is 170 ha.
49. In response the 1<sup>st</sup> and 2<sup>nd</sup> Respondents contended that the process of compulsory acquisition is in its infancy having just commenced and that there are adequate legal measures in place to address the concerns of the Petitioners. Further the 1<sup>st</sup> Respondent stated that notwithstanding the obvious hostility displayed by the Petitioners to the process, it has done everything required under the law including conducting several public participations, causing the publication of the Gazette Notice, the NEMA advertisement and explaining the details of the Project to the Project Affected Persons (PAPs).
50. The 3<sup>rd</sup> Respondent challenged the application and the suit through its Preliminary Objection, the subject of this ruling. The gist of the objection is that this Court has no jurisdiction to hear and determine matters relating to compulsory acquisition in view of the existence of the LAT established under Section 133 of the *Land Act*. Secondly that the Petitioners have failed to exhaust the statutory remedies provided for under the *Land Act* with respect to their complaints.
51. In determining the second issue the Court will lay out the legal framework and the relevant jurisprudence with respect to the acquisition of land and the principle of exhaustion of statutory remedies.



52. The Court of Appeal in *Kibos Distillers Limited & 4 Others Vs. Benson Ambuti & 3 Others* [2020] eKLR laid down the following principle relevant to the exhaustion of existing statutory remedies:

“ 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 legitimately been mandated to hear and determine a dispute.”

53. The Supreme Court of Kenya in *Benson Ambuti Adegga Vs. Kibos Distillers Ltd & 5 Others* [2020] eKLR emphasized that, where appropriate, the superior Courts should remit the dispute to the relevant bodies for adjudication. These decisions from the superior Courts are undoubtedly binding on this Court.

54. Before the promulgation of the new constitution Courts in Kenya emphasized the need to exhaust existing statutory remedies before moving the Court for redress. In the case of *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.”

55. The law has provided safeguards to ensure that no person is deprived of their land arbitrarily contrary to the provisions of Article 40 of *the Constitution* which provide as follows;

“ 40. Protection of right to property

- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
  - (a) of any description; and
  - (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—
  - (a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
  - (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) 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 a conversion of an interest in land, or title to land, in accordance with Chapter Five;  
or
  - (b) is for a 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, of 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.



- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
  - (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
  - (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.’
56. The process of compulsory land acquisition also known as the exercise of eminent domain or police power by the State is provided for in law. A detailed procedure has been laid out in Part VIII of the Act (Section 107-133). In its preliminary inquiries the NLC upon receipt of a request for the acquiring entity of land, must satisfy itself that the acquisition is for public purpose and interest. Indeed, the NLC has power to reject the request if it determines that the acquisition does not comply with the Provisions of Part VIII of the Act and Article 40(3) of *the Constitution* of Kenya. The Commission shall prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land. Upon being satisfied that the acquisition is in compliance with *the Constitution* of Kenya the NLC will cause the land to be mapped and valued and the particulars of the claimants and claims on the land listed.
57. At the initial stage, Section 108 of the *Land Act* empowers the NLC to authorize in writing, any person, to enter upon any land specified in a notice of intention to acquire and inspect the land and to do all things that may be reasonably necessary to ascertain whether the land is suitable for the intended purpose. In the event of any damages occurring from the entry/inspection, Section 109 of the said Act empowers the NLC to promptly pay in full, just compensation. The concerns of the Petitioners with respect to the entry into the land for purposes of survey would squarely fall under sections 108 and 109 of the *Land Act*.
58. Section 112 of the *Land Act* provides a mechanism for addressing grievances that arise from notices touching on intention to acquire land. It states;
- “Inquiry as to compensation.
- (1) At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall—
    - (a) cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and
    - (b) serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.
  - (2) The notice of inquiry shall call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry.
  - (3) At the hearing, the Commission shall—
    - (a) make full inquiry into and determine who are the persons interested in the land; and
    - (b) receive written claims of compensation from those interested in the land.
  - (4) The Commission may postpone an inquiry or adjourn the hearing of an inquiry from time to time for sufficient cause.



- (5) For the purposes of an inquiry, the Commission shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to the Commission of documents of title to the land.
  - (6) The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.”
59. The purpose of the inquiry is to give the registered proprietor and anyone with an interest in the land to appear and disclose their interest in the land and raise any issues relating to the intended compulsory acquisition.
60. Under Section 123 of the [Land Act](#), 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
61. For purposes of dispute resolution in matters relating to the exercise of the state’s eminent domain, the Act was amended to provide for the creation of the Land acquisition Tribunal. Section 133A of the [Land Act](#) establishes LAT with its jurisdiction outlined in Section 133C as follows;
- “ 133C. Jurisdiction of the Tribunal
- (1) The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
  - (2) A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.
  - (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 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.
  - (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 the [Fair Administrative Action Act](#) or any other law.” (emphasis is mine)



62. It has been argued by the Applicants that there are 3 sets of Petitioners before the Court; the land owners, prospective land owners and persons likely to be affected by the project and that the LAT can only determine issues raised by land owners. From the wording of Section 133 above, one need not be a land owner perse to approach the tribunal. It suffices to state that the operative word is “matters relating to compulsory acquisition”. Clearly even persons who have interests in the land without being a land owner have audience with the LAT. I say this because the powers of the tribunal are extensive. 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 and in my view the concerns of the Petitioners being want of public participation, the suitability or otherwise of the area for the construction of the dam, the constitutional breaches are all matters falling for determination by the LAT.
63. In addition, Section 112 (3) (6) of the *Land Act* allows every person, besides land owners, to air their discontent arising from any intended acquisition. In fact, the Applicants do not seem to deny the jurisdiction of the 2<sup>nd</sup> Respondent to entertain their complaints but argue that they comprise a class of aggrieved persons over and above the registered proprietors of the 22 parcels of land.
64. 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 therefore follows that in the circumstances of this suit, grievances involving constitutional questions with respect to compulsory acquisition of land fall within the remit of the LAT.
65. Section 133D of the *Land Act*, vests 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.
66. Flowing from the above disputes relating to propriety and claims for compensation by persons interested in land are dealt with by NLC under the mechanism laid out in Section 112 of the Act. Should the dispute remain unresolved the matter is referred to the LAT established under Section 133 of the Act. If aggrieved the party then invokes the jurisdiction of this Court at the appellate level on matters of law only.
67. With respect to the issues of environmental concerns raised, the Court agrees with the Petitioners that construction of a dam poses major environmental economic and social impacts to the residents of the area in which the dam is proposed to be constructed. The impacts no doubt affects the community directly and indirectly. They range from social, economic, cultural and psychological impacts to name a few. That notwithstanding the law expressly provides remedies in the event that these concerns are



overlooked by the project proponent. In addition, not all is lost as any party that is aggrieved by the decision of NEMA has a right to approach the NET for reliefs.

68. In conclusion the Court finds that the Petitioners are yet to exhaust the primary dispute mechanism provided in the Land Act. Secondly the jurisdiction of the Court has been improperly invoked. Thirdly guided by the Supreme Court of Kenya case in Benson Ambuti Adegga (supra) it is the finding of the Court that this is a ripe case calling for judicial abstention for the reasons set out above.

#### **Who shall bear costs?**

69. Although costs of an action or proceeding are at the discretion of the Court, the general principle is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap.21). As such, the successful litigant should ordinarily be awarded costs unless, for good reason, the Court directs otherwise. The Court has noted that the dispute being in respect to the exercise of eminent domain to serve public purpose and interest, the Court is of the opinion that the appropriate order to make is that there shall be no order as to costs.
70. Final orders for disposal
- a. The Preliminary Objection dated the 22/3/23 is upheld. It succeeds.
  - b. The Notice of Motion together with the Petition dated the 5/3/2023 be and are hereby struck out.
  - c. Parties are at liberty to ventilate their grievances in the primary fora created under the Land Act.
  - d. This Petition having been premised on public interest litigation, I order each party to meet their costs.
71. Orders accordingly.

**DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 4<sup>TH</sup> DAY OF MARCH, 2024.**

**J G KEMEI**

**JUDGE**

**Delivered online in the presence of;**

Mariga & Mr. Wachenje for 1<sup>st</sup> – 488<sup>th</sup> Petitioners

Mrs. Murithi together with Ms. Ngige for 1<sup>st</sup> Respondent

Ms. Kisengese for 2<sup>nd</sup> Respondent

Makori with Mrs. Mwangi for 3<sup>rd</sup> Respondent

Court Assistants – Phyllis/Oliver

