



REPUBLIC OF KENYA



KENYA LAW

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**Morigi v National Land Commission & 2 others (Environment & Land
Case E035 of 2023) [2024] KEELC 3618 (KLR) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E035 OF 2023**

CA OCHIENG, J

MAY 6, 2024

BETWEEN

GEORGE NDIRANGU MORIGI PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

KENYA NATIONAL HIGHWAY AUTHORITY 2ND DEFENDANT

CHINA RAILWAY 21ST BUREAU GROUP COMPANY

LIMITED 3RD DEFENDANT

RULING

1. What is before Court for determination is the 2nd Defendant's Notice of Preliminary Objection dated the 22nd November, 2023 against the Plaintiff's Plaint and Notice of Motion application dated the 3rd October, 2023. The said Notice of Preliminary Objection is premised on the following grounds:
 1. The Honourable Court lacks jurisdiction to entertain, hear or determine the Plaint and Application herein.
 2. The dispute and the issues arising herein in respect of the 1st Defendant's compulsory acquisition of a portion of the Plaintiff's Suit Property, LR No. Athi River/Athi River Block 1 (Chumvi) /30 measuring 0.1951 Ha ought to be dealt with in the first instance by the Land Acquisition Tribunal in accordance with Sections 107A, 111, 112, 113, 115, 118, 119, 120, 125 and 133C of the Land Act, 2012.
 3. This Honourable Court has jurisdiction to hear and determine appeals against the Land Acquisition Tribunal on issues concerning compulsory acquisition in accordance with Section 133D of the Land Act, 2012.



4. In view of the foregoing, the Plaintiff and Application herein are premature, defective, bad in law and an abuse of court process.
2. The 2nd Defendant sought for the aforementioned application and suit to be dismissed with costs.
3. The instant Notice of Preliminary Objection was canvassed by way of written submissions.

Analysis and Determination

4. I have considered the instant Notice of Preliminary Objection including the Plaintiff's and 2nd Defendant's submissions and the only issue for determination is whether the Notice of Motion application date the 3rd October, 2023 and this suit should be dismissed with costs.
5. The 2nd Defendant in its submissions insists that the Plaintiff has not exhausted the available statutory dispute resolution mechanism under the Land Act to address his issues regarding the compulsory acquisition of the acquired portion of land as well as payment of the full and just compensation. Further, that the suit is grossly premature, defective and bad in law as this Court lacks jurisdiction to handle it. To support its averments, it relied on the following decisions: *Giciri Thuo & 5 Others v National Land Commission & 4 Others*; *Kenya Human Rights Commission (Interested Party) Dorcas Wairimu Kamau & 154 Others (Intended Interested Parties)* (2022) eKLR; *Mississippi Water Limited v Kenya Railways Staff Retirement Benefits Scheme & another*; *Kenya National Highways Authority & another (Interested Parties)* (Environment & Land Case E 212 of 2020)(2023) KEELC 16859 (KLR) (18 April 2023) (Judgement); *Benson Ambuti Adega & 2 Others v Kibos Distillers Ltd & 25 Others* (2020) eKLR; *R v Karisa Chengo* (2017) eKLR; *Speaker of the National Assembly v James Njenga Karume* (1992) eKLR; *Kibos Distillers Limited & 4 Others v Benson Ambuti Adega & 3 Others* (2020) eKLR; *Samuel Macharia & another v Kenya Commercial Bank Limited & 2 Others* (2012) eKLR; Mombasa High Court Constitutional Petition No. 159 of 2018 consolidated with Constitutional Petition No. 201 of 2019 *William Odhiambo Ramogi & 3 Others v Attorney General & 4 Others*; *Muslims for Human Rights & 2 Others (Interested Parties)* (2020) eKLR and *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA 696.
6. The Plaintiff in his submissions insists that the Court has jurisdiction to handle the matter. He contends that, on a closer examination of the facts as contained in the Plaintiff, it reveals that the jurisdiction of the court is warranted and essential for the resolution of the issues raised therein. He argues that the Land Acquisition Tribunal's jurisdiction as per the *Land Act* in particular section 107 – 133 is confined to inquiry, survey and criteria of the acquisition of land and the issues arising from the subsequent compensation of the said acquisition. He avers that the Defendants' not only inflicted damage on the designated portion compulsorily acquired, but extended damage to the whole plot, rendering it inaccessible and unusable. Further, that he seeks damages. He reiterates that it is well established that where there is conflict of laws, the principle of 'forum of convenience' is pivotal in choosing a jurisdiction for a legal matter. To buttress his averments, he relied on the following decisions: *Mukhisa Biscuits Manufacturing Co. Ltd v West End Distributors Limited* (1969) EA 696; *Moses Wanjala Lukoye v Bernard Alfred Wekesa Sambu & 3 Others* (2013) eKLR; *Francis Atanasio Kithure v County Government of Meru; Ethics & Anti-Corruption Commission (Interested Party)* (2021) eKLR and *Mradula Suresh Kantaria & Surech Nanitall Kaptaria* Civil Appeal No. 277 of 2005 (unreported).
7. The 2nd Defendant claims this court lacks jurisdiction to handle the Notice of Motion application dated the 3rd October, 2023 as well as this suit because the fulcrum of the dispute herein revolves around compulsory acquisition of land which is the preserve of the Land Acquisition Tribunal.



8. The Plaintiff insists that, in the Plaintiff, besides seeking for compensation for the land compulsorily acquired, he also sought for other prayers, hence this court has jurisdiction to handle the matter.
9. The Defendants though duly served failed to file their respective Statements of Defence to controvert the Plaintiff's averments but instead the 2nd Defendant proceeded to file the instant Notice of Preliminary Objection.
10. In the case of *Mukhisa Biscuit Manufacturing Co. Ltd v West End Distributors Company Limited* (1969) EA 696; the Court held that 'A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issues. This improper practice should stop.'
11. While in the case of *Avtar Singh Bhamra & another v 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." Emphasis Mine
12. Further, in the case of *Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others* Civil Application No. 36 of 2014, the Supreme Court reiterated the principles set out in the aforementioned case and held as follows: 'A preliminary objection consists of a point of law which has to be pleaded or which arises by clear implication out of the pleadings and which if argued as a preliminary point may dispose of the suit.....it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.' Emphasis mine.
13. I note the Plaintiff raised certain issues in his Plaintiff including partial payment of the Award as well as damages which fact required rebuttal from the Defendants, but they failed to do so. It is trite that where a Defendant fails to file a Defence expressly rebutting the Plaintiff's averments, the claim remains unopposed. Further, that a Notice of Preliminary Objection has to stem from pleadings.
14. For the above reasons, I find that the 2nd Defendant's Notice of Preliminary Objection which is not anchored on a Defence is premature and hence does not succeed. Accordingly, I proceed to strike it out but make no order as to costs.
15. I direct the Defendants' to file and serve their respective Defences within twenty one (21) days from the date hereof.

DATED SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 6TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Muema for plaintiff

Musyoka for 2nd respondent

No appearance for 1st and 3rd respondents

Court assistant – Simon/Ashley

