



Chunky Limited v Coast Water Works Development Agency (Formerly Coast Water Services Board) & another (Environment & Land Petition E001 of 2023) [2024] KEELC 5118 (KLR) (10 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5118 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION E001 OF 2023**

**AE DENA, J
JULY 10, 2024**

BETWEEN

CHUNKY LIMITED PETITIONER

AND

COAST WATER WORKS DEVELOPMENT AGENCY (FORMERLY COAST WATER SERVICES BOARD) 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

RULING

1. The Petitioner herein states he is the owner of Plot No MN/V/909 (hereinafter referred to as the suit property). As stated in the petition filed before court on 28/7/2023, the 1st Respondent herein vide an advertisement placed in the Daily Nation newspaper of 11/9/2011 intimated their intention to compulsorily acquire the suit property. They however did not serve the Petitioner with any notice of intention to acquire the portion of land and as such, the Petitioner did not participate in any public participation forum held by the Respondents.
2. The Petitioner states that in a surprising twist of events, on 15/10/2014 a letter written by the 1st Respondent informed the Petitioner of an award of Kshs. 80,040/= over the acquired portion. The Petitioner opines that this was a violation of its rights to ownership of property amongst other rights as it was never consulted or involved in the acquisition process. The process is termed unprocedural and is the genesis of the petition herein in which the Petitioner prays for the following orders;
 - a. A declaration that the acquisition and improvement one by the Respondents in relation that portion of land Mn/Vi/909 measuring 0.580 Acres was carried out *ultra vires* the constitution and statutory law thus infringing the petitioners right to property.



- b. That the 2nd Respondent be directed to compensate the petitioner the sum of Kshs 12,867,953/= being just compensation owed to the petitioner.
 - c. An order of prohibition be issued prohibiting the 2nd Respondents, their servants, agents in any manner whatsoever from vesting the right of way [wayleave] in favour of the 1st Respondent unless due process is followed and prompt payment of just compensation being Kshs 12,867,953/- is made to the Petitioner.
 - d. Costs of the petition.
 - e. An order directing the 2nd Respondent to pay interest on the compensation sum of Kshs 12,867,953/= at central bank rate from the date of acquisition.
 - f. Any other relief that the court may deem fit to grant for a just determination of the issues raised herein.
3. The 1st Respondent filed a preliminary objection opposing the petition. The court issued orders for the same to be heard by way of written submissions. Counsel for the Petitioner was asked to serve the directions. The preliminary objection is premised on the following verbatim grounds;
1. That the Petitioners action of filing the current petition at the Environment Land Court further offends the provisions of Article 159 [c] of the constitution of Kenya 2010 which provides that in exercising judicial authority, the courts and tribunals shall be guided by the principal that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanism shall be promoted. The Petitioner herein has not explored any alternative form of dispute resolution.
 2. That the petition herein offends the provisions of Section 121 [1] and [2] of the Water Act 2016 which provides that the Water Tribunal created under Section 119 of the same Act of parliament shall hear and determine appeals at the instance of any person or institution directly affected by the decision or order of the Cabinet Secretary, Ministry of Water, Sanitation And Irrigation among other authorities and boards or of any person acting under the authority of the Cabinet Secretary Ministry of Water, Sanitation And Irrigation [MWS& I], the Water Resources Authority [WRA] or Water Services Regulatory Board [WASREB]. This is because as an agency of the MWS& I, the 1st Respondent acts under the authority of the Cabinet Secretary of the same ministry.
 3. That the petition further offends the provisions of section 124 of the Water Act 2016 which provides that a person aggrieved by a decision of the Water Tribunal created under Section 119 of the same Act, may within 21 days from the date of that decision appeal to the Land and Environment Court established under article 162 [2] of the constitution of Kenya. This is because the petitioner has treated the Environment and Land Court as the court of first instance when the Water Tribunal established under Section 119 of the Water Act 2016 is in fact the court of first instance for disputes relating to implementation of the 1st Respondents mandate.
 4. That the petition further offends the provisions of Section 13 [4] of the Environment and Land Court Act No 12 of 2012 which provides that in addition to the matters referred to in section 13 [1] and [2], the Environment and Land Court shall exercise exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the court.



Submissions

4. The 1st Respondent's submissions are dated 26/3/2024 and the Petitioners 13/5/2024. The 2nd Respondent had not entered appearance as the time of giving directions on disposal of the preliminary objection herein.
5. The 1st Respondent emphasised the need for bodies, tribunals and any quasi-judicial authorities and organs to be given the first opportunity to deal with disputes as provided in the relevant statute and that courts must exercise restraint. Reliance is placed on the Supreme Court decisions *Albert Chaurembo Mumba & 7 Others Vs. Maurice Munyao & 148 Others* and *United Millers Vs. Kenya Bureau of Standards Directorate of Criminal Investigations 5 Others* (2021) eKLR.
6. The Petitioners submitted that the provisions of the *Water Act* relied upon came into effect in 2021 following the enactment of the relevant regulations under *Legal Notice No. 168 Kenya Gazette Supplement No. 153*. That the Petitioners cause of action arose on 15/10/2014 when it was awarded the impugned compensation herein. That the provisions of the *Water Act* 2016 cannot apply retrospectively. The Supreme Court decision in *Samuel Kamau Macharia & Another Vs. Kenya Commercial Bank & 2 Other* (2012) eKLR is relied upon. It further submitted that that Section 133e of the *Land Act* vests powers in the Land Acquisition Tribunal to deal with matters compulsory acquisition and compensation and that it is not until sometime this year that the Tribunal was constituted.
7. The court will first apply itself over the preliminary objection, as it is apparent that the same if allowed can altogether conclude this petition. The nature of what constitutes a preliminary objection, was settled in *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors* [1969] EA 696, Law J. A. stated:

“So far as I am aware, 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, will dispose of the suit. Examples are objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....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....”
8. In the case of *Oraro v Mbaja* [2005] KLR 141, Ojwang J. (as he then was) reiterated the foregoing by stating that: -

“A preliminary objection correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts; a matter cannot be raised as a preliminary point.... Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”



9. The main issue as raised by the 1st Respondent relates to the jurisdiction of this court to entertain the suit. The locus classicus on the question of jurisdiction is the case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Nyarangi. JA (as he then was) stated:
- “I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
10. The 1st Respondents case is that the matter ought to have first been pursued before the Cabinet Secretary, Ministry of Water, Sanitation and Irrigation and if not satisfied an appeal at the Water Tribunal before escalating to this court. It is my finding, the preliminary objection raised herein qualifies as being one as the issue of jurisdiction is certainly an issue of law and not fact and is therefore properly raised before this court. No facts require to be ascertained.
11. I further agree on the principle of exhaustion as enunciated by the Court of Appeal in Speaker of National Assembly -Versus- Karume (1992) KLR 21 where the court held that: -
- “Where there is a clear procedure for redress of any particular grievance prescribed by the constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly be adhered to since there are good reasons for such special procedures.”
12. The acquiring authority is the Coast Water Services Board. In its letter dated 15/10/2014 addressed to the Petitioner, reiterates public notification through the Daily and attaches the notice. It admits that the Petitioner was left out for purposes of compensation. It proceeds to give a quantification of due compensation of the portion acquired. It then encloses compensation form payment. The letter is signed by the Chief Executive Officer. The Petitioner was aggrieved by this including the compensation amount which it alleges is undervalued.
13. Guided by the above dictum the question should be whether there existed at the time of learning of the compensation of any other procedure or dispute resolution mechanism other than the court that the Petitioner aggrieved by the acquisition was to first pursue and exhaust. As at 2014 the National Land Commission was the agency charged with matters compulsory acquisition under section 107 of the Land Act 2012 however it appears that the acquisition was carried out by the Water Board itself. The applicable law was the Water Act 2002. Section 84 of the said Act established the Water Appeal Board. The jurisdiction of the Board is set out under as follows;-
- (1) An appeal shall lie to the Water Appeal Board at the suit of any person having a right or proprietary interest which is directly affected by a decision or order of the Authority, the Minister or the Regulatory Board concerning a permit or licence under this Act, and the Board shall hear and determine any such appeal.
 - (2) In addition, the Board shall have such jurisdiction to hear and determine disputes, and shall have such other powers and functions, as may be conferred or imposed on it by or under this or any other Act.
14. The above sections in my view are to be read together with section 78 of the Act which deals with compulsory acquisition of land for a public purpose and which was to be acquired under the provision



of the Land Acquisition Act. But let me state these provisions were supposed to have been read in tandem with the spirit and purpose of the constitution of Kenya 2010 and which existed at the time of the acquisition of the land herein. the constitution of Kenya 2010 established the National Land Commission under article 67 (1) . The Land Act 2012 was already in place and provided a robust mechanism for compulsory acquisition. The Petitioner indeed submits to the jurisdiction of the Land Act and states at paragraph 7 (h) that the compulsory acquisition process was in contravention of the provisions of section 107 to 133 among other provisions of the said Act.

- 15 . I have read the provisions of section 121 (2) of the Water Act, 2016 which sets out the jurisdiction of the water Tribunal established under section said Act and which confers additional powers to the tribunal thus; -

“The Tribunal shall have the power to hear and determine any dispute concerning water resources or water services where there is a business contract, unless the parties have otherwise agreed to an alternative dispute resolution mechanism.”

- 16 . A look at the above provisions it is my view they would not apply. I have noted the Petitioners reference to jurisdiction of the Land Acquisition Tribunal to deal with matters compulsory acquisition and compensation. This is a point I find necessary to interrogate further. Section 133 (c) (6) of the Land Act stipulates that this Tribunal shall be the first port of call for determining any dispute relating to compulsory acquisition of land for a public purpose including creation of wayleaves, easements. This position was further buttressed by the court in the case of 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] e KLR thus; -

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

The court further held that; -

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

- 17 . In view of the foregoing analysis it is this courts finding that the jurisdiction of the court has been prematurely invoked. I’m aware that the Tribunal has been in place since the year 2023 and not the year 2024 as stated by the Petitioner. Also see an article published on 18/4/2024 by B.M. Musau at bmmusau.com/the-kenya-land-acquisition-tribunal. I make no orders as to costs. I proceed to strike



out this petition. The Petitioners shall be at liberty to pursue appropriate redress as provided under the law.

Orders accordingly

RULING DATED SIGNED AND DELIVERED THIS 10TH DAY OF JULY 2024.

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A.E DENA

JUDGE.

Mr. Borona for the Petitioners

No appearance by the National Land Commission

Ms. Okioma for the 1st Respondents

Mr. Mwakina – Court Assistant

