



**Thuo & 160 others v National Land Commission & 4 others; Kenya  
Human Rights Commission (Interested Party) (Environment & Land  
Petition E004 of 2022) [2022] KEELC 3951 (KLR) (5 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3951 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION E004 OF 2022**

**BM EBOSO, J  
JULY 5, 2022**

**BETWEEN**

**GICIRI THUO & 160 OTHERS ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MAMA NGINA UNIVERSITY COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

**KENYATTA UNIVERSITY ..... 3<sup>RD</sup> RESPONDENT**

**MINISTRY OF EDUCATION ..... 4<sup>TH</sup> RESPONDENT**

**COMMISSION FOR UNIVERSITY EDUCATION ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**KENYA HUMAN RIGHTS COMMISSION ..... INTERESTED PARTY**

**RULING**

1. Sometime last year, the 1st, 2nd, 3rd, 4th, 5th and 6th petitioners in this petition brought Thika ELC Petition Number E010 of 2021. Through it, they challenged Gazette Notice No 10278, published by the National Land Commission [the 1st Respondent] on September 27, 2021 in Kenya Gazette Vol CXXIII – No 200. Through the Gazette Notice, the 1st respondent gave notice of the intention of the National Government to compulsorily acquire various privately owned parcels of land as additional land for Mama Ngina University College in Kiambu County. It was their case that the said Gazette Notice violated the Constitution and their fundamental rights and freedoms on two grounds: (i) that there was no public participation as required under Article 10 of the Constitution; and (ii) that the intended compulsory acquisition of private land was not in the public interest and was contrary to Sections 107 and 111 of the Land Act.



2. The petition provoked a preliminary objection by the 2nd and 3rd respondents, challenging the jurisdiction of this court to adjudicate the dispute. Upon hearing of the preliminary objection this court found that its jurisdiction had been invoked prematurely and that the proper fora where the petitioners needed to ventilate their grievances were the Public Inquiry contemplated under Section 112 of the [Land Act](#) and the Land Acquisition Tribunal established under Section 133A of the [Land Act](#). This court struck out the petition in limine on the above ground.
3. In April this year, the petitioners brought the present petition raising the same grievances. They sought, among other reliefs, an order of certiorari quashing the impugned gazette notice. The petition, again, attracted a notice of preliminary objection dated May 11, 2022, through which the 2nd and 3rd respondents urged the court to strike out the petition in limine on the following verbatim grounds:
  1. This honorable court has no jurisdiction to entertain, hear or determine the petition.
  2. The petitioners have failed to invoke, engage in and exhaust the dispute resolution mechanism mandatorily prescribed under Sections 112 (1) (2) (3) (4) (5) and (6) and Section 133C of the [Land Act](#) No 6 of 2012.
  3. In the alternative, and in contravention of Section 9(4) of the [Fair Administrative Action Act](#), the petitioners have not sought and obtained exemption from the requirement to exhaust the prescribed dispute resolution mechanism. If such exemption was deserved, it would have to be obtained before the petition is filed.
  4. This petition is therefore premature, mischievous, vexatious and an abuse of the court process.
4. The said notice of preliminary objection dated May 11, 2022 is the subject of this ruling. It was canvassed through written submissions dated May 11, 2022, filed through the firm of Njoroge Regeru & Company Advocates. Counsel for the 2nd and 3rd respondents [the objectors] submitted that the jurisdictions of the National Land Commission and the jurisdiction of the Land Acquisition Tribunal are conferred by the [Land Act](#) and that the two bodies have the competence to deal with the grievances raised by the petitioners. Counsel added that where a statute specifically provides for an alternative dispute resolution mechanism, a litigant is required to strictly exhaust the mechanism before initiating court proceedings.
5. Counsel for the objectors further submitted that Section 9(2) of the [Fair Administrative Action Act](#) bars this court against entertaining a plea for review of an administrative action or decision unless the other mechanisms provided for under the statutes have been exhausted. Counsel cited various decisions to support the contention that this petition ought to be struck out owing to the petitioners' failure to exhaust the dispute resolution mechanisms provided under the [Land Act](#).
6. Further, counsel faulted the petitioners for their failure to seek exemption within the framework of Section 9(4) of the [Fair Administrative Action Act](#) before bringing this petition. Counsel urged the court to strike out the petition.
7. The 1st respondent did not file written submissions on the preliminary objection. Ms Masinde who appeared for the 1st respondent orally indicated that the 1st respondent supported the preliminary objection. The Attorney General filed written submissions dated May 19, 2022 through Ms Fatma Ali, Senior State Counsel. The Attorney General submitted that compulsory acquisition of private land is a process and that the next stage after the publication of the impugned notice is an inquiry under Section 112 of the [Land Act](#). Counsel added that it is during the Public Inquiry contemplated under Section 112 of the Act that issues relating to the propriety of the acquisition and claims for compensation will be ventilated and addressed. The Attorney General submitted that the petitioners had invoked the



jurisdiction of this court prematurely because they were yet to go through the inquiry stage. Counsel urged the court to stay the proceedings, pending completion of the public inquiry.

8. The petitioners filed written submissions dated May 14, 2022 through the firm of Chimei & Co Advocates. Counsel for the petitioners submitted that for a dispute resolution mechanism to be exhausted, it must be available, effective and sufficient and it must be accessible within reasonable timelines. Counsel urged the court not to “stand blind” when the dispute resolution mechanism contemplated under the Act is unavailable.
9. I have considered the notice of preliminary objection together with the parties’ respective submissions. I have also considered the relevant legal frameworks and jurisprudence. Two issues fall for determination in the preliminary objection. The first issue is whether, in the prevailing circumstances, this petition is fatally defective by dint of the fact that the petitioners have not exhausted the dispute resolution mechanism established under the Land Act. The second issue is whether, in the prevailing circumstances, this petition is fatally defective by dint of the fact that the petitioners brought the petition without leave of the court under Section 9(4) of the Fair Administrative Action Act. I will dispose the two issues sequentially in the above order.
10. It is now a settled principle of law in our jurisprudence that where the Constitution or statutes have established primary alternative dispute resolution mechanisms, those mechanisms must be exhausted before redress is sought in the superior courts. Prior to the promulgation of the Constitution of Kenya 2010, the Court of Appeal reiterated this principle in Speaker of the National Assembly v James Njenga Karume [1992]eKLR in the following words:-

“In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”
11. The Supreme Court of Kenya rendered itself on this principle in the case of Bernard Murage v Fine Serve Africa Limited & 3 others [2015] eKLR as follows:-

“Not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.”
12. Similarly, the Court of Appeal [Makhandia J] emphasized this principle and stated the following regarding multifaceted pleadings in Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR [the Kibos Distillers case]:

“To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. To this end, I reiterate and affirm the



dicta that is *Speaker of the National Assembly v James Njenga Karume*[1992] eKLR where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed.”

13. The circumstances of the present petition are, however, unique and dictate that the above principle should not be invoked. The dispute in this petition was initially brought before this court through Thika ELC Petition No E010 of 2021. A preliminary objection was subsequently brought by the 2nd and 3rd respondents, challenging the jurisdiction of this court to adjudicate the dispute in exercise of its original jurisdiction. The court considered the framework in the Land Act and agreed with the 2nd and 3rd respondents that indeed the jurisdiction of this court had been invoked prematurely. The court found that the primary organ vested with jurisdiction to adjudicate disputes relating to compulsory land acquisition is the Land Acquisition Tribunal. The said petition was, consequently, struck out in limine and the petitioners were directed to seek redress in the fora established under the Land Act.
14. When the petitioners subsequently brought this petition, they explained in their court papers that they had established that the dispute resolution mechanism contemplated under the Land Act did not exist and/or could not provide a remedy to them. On May 17, 2022, the parties appeared before this court. On that day, counsel for the petitioners submitted that the 1st respondent had failed to conduct an inquiry under Section 112 of the Land Act and that the Land Acquisition Tribunal established under Section 133A of the Land Act had not been constituted, hence their decision to come back to this court in search of justice. The Attorney General, through Ms Fatma Ali, confirmed that indeed the Land Acquisition Tribunal had not been constituted.
15. Among the directions which the court gave on May 17, 2022 was a directive requiring the 1st respondent to file and serve a response to the petitioner’s application. In a subsequent affidavit sworn on June 6, 2022 by Mr Brian Ikol, the 1st respondent contended that they had conducted inquiries under Section 112 of the Land Act and that many of the affected parties had participated and acceded to the compulsory acquisition. The 1st respondent further contended that some of the petitioners had declined to participate in the public inquiry despite being notified to attend. The above are, in my view, the prevailing circumstances in this petition.
16. Besides the inquiry contemplated under Section 112 during which issues relating to the propriety of the compulsory acquisition and the claims for compensation are to be adjudicated, the Land Act establishes the Land Acquisition Tribunal and vests in it jurisdictions to deal with appeals against decisions of the National Land Commission in matters relating to the process of compulsory acquisition of land. Section 133C of the Land Act provides thus:
  1. The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
  2. A person dissatisfied with the decision of the Commission may, within thirty days apply to the Tribunal.
  3. Within sixty days after the filing of an application under this part, the Tribunal shall hear and determine the application.
  4. Despite subsection (3) the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.



5. If, on an application to the Tribunal, the sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.
  6. Despite the provision of Sections 127, 128 and 148(5) a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.
  7. Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
  8. The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23(2) and 47(3) of the Constitution, using the framework set out under Fair Administrative Action or any other law.
17. If it is indeed true that the 1st respondent has completed the process of inquiry under Section 112 of the Act, the statutory forum where the petitioners would be expected to ventilate their grievances relating to the process of compulsory acquisition is the Land Acquisition Tribunal. Regrettably, the Tribunal has not been constituted. Consequently, the Land Acquisition Tribunal is not available to adjudicate the petitioners' grievances. In the circumstances, it would not serve the interest of justice if this court were to completely shut the doors to this court and refer the petitioners to a Tribunal that is yet to be constituted. In my view, given the disclosure by the Attorney General that the Land Acquisition Tribunal has not been constituted, the proper approach to take in this petition is to invoke the jurisdiction conferred upon this Court under Article 162(2)(b) of the Constitution as read together with Section 13(1) and (2) of the Environment and Land Court Act. Section 13(1) and (2) of the Environment and Land Court Act provides as follows:
- (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.
18. For the above reasons, given the current prevailing circumstances, it is the finding of this court that this petition is properly before this court.
19. The 2nd and 3rd respondents faulted the petitioners for failing to seek leave of this court under Section 9(4) of the Fair Administrative Action Act prior to initiating this petition. They contended that this petition is fatally defective on that ground. I do not agree with that view. In my view, prior leave under Section 9(4) of the Fair Administrative Action Act is necessary only when the alternative



dispute resolution mechanism is available but the litigant seeks to be exempted from exhausting that available mechanism. Where the statute provides for a dispute resolution organ but the organ is yet to be constituted, the question of seeking leave or exemption does not arise. This is because, the alternative mechanism is not yet available. The alternative dispute resolution mechanism is deemed to be unavailable until that time when it is constituted and operationalized as by law required. Consequently, my finding on the second issue in the preliminary objection is that, prior leave was not necessary because the Tribunal established under Section 133A of the Land Act is yet to be constituted.

20. The result is that this court will not strike out this petition because at the time the petition was initiated, the Land Acquisition Tribunal established under Section 133A of the Land Act had not been constituted and is currently not constituted. Regrettably, this fact was not disclosed to the Court when the court disposed the preceding petition. Had this material fact been placed before the court, the court's approach to the question of its jurisdiction in the dispute would have been different.
21. For avoidance of doubt, this court remains alive to the fact that the Land Act vests in it appellate jurisdiction over disputes relating to compulsory land acquisition. Should the Tribunal be constituted and operationalized before this dispute is disposed, the court will refer the dispute to the Land Acquisition Tribunal because, as observed in the preceding ruling in the earlier petition, the Tribunal is the body vested with primary jurisdiction to adjudicate disputes relating to compulsory land acquisition.
22. The result is that the preliminary objection dated May 11, 2022 is rejected on the above grounds. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 5TH DAY OF JULY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Masinde for the 1st Respondent

Mr Thuo holding brief for Mr Regeru of the 2nd and 3rd Respondents

Court Assistant: Ms Lucy Muthoni

