



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW NO. 366 OF 2016

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW AND ORDERS OF
MANDAMUS**

AND

**IN THE MATTER OF SECTION 8 OF THE LAW REFORM COMMISSION ACT, CHAPTER
26, LAWS OF KENYA**

AND

**IN THE MATTER OF THE LAND ACQUISITION ACT, CHAPTER 295, LAWS OF KENYA
(NOW REPEALED)**

IN THE MATTER OF THE LAND ACT, ACT NUMBER 6 OF 2012

IN THE MATTER OF ARTICLES 40 AND 64 OF THE CONSTITUTION OF KENYA

**IN THE MATTER OF LAND REFERENCE NUMBER 27799/2 (SUB-PLOT NUMBER 29/14
AND LAND REFERENCE NUMBER 27799/3**

IN THE MATTER OF (1) THE NATIONAL LAND COMMISSION

(2) KENYA NATIONAL HIGHWAY AUTHORITY

BETWEEN

WILLMARY DEVELOPMENT LIMITED.....EXPARTEAPPLICANT

AND

THE NATIONAL LAND COMMISSION.....1ST RESPONDENT

KENYA NATIONAL HIGHWAYS AUTHORITY.....2ND RESPONDENT

JUDGMENT

1. By a notice of motion dated 14th October 2016 and filed on the same day, the exparte applicant **WILL MARY DEVELOPMENT LIMITED** seeks from this court Judicial Review order of mandamus to issue

directly jointly and severally at the 1st respondent National Land Commission and the 2nd respondent (Kenya National Highways Authority) compelling the said respondents to forthwith pay the applicant the sum of :

a) Kshs 33,808,500/- being the balance of the principal amount awarded for compulsory acquisition of its properties by the respondents

b) Kshs 8,133,800 being interest due to the applicant on the principal amount at the rate of 12% per annum pursuant to Section 16 of the Land Acquisition Act:

c) Further interest on kshs 4,921,300/- (33,807,500+ 8,133,800) at the rate of kshs 12% per annum from 16th July 2016 until payment in full and costs.

2. However, as at the time of hearing the application herein, it was conceded by all the parties that the principal amount of kshs 33,807, 500 had been paid to the exparte applicant by the respondents. It therefore follows that prayer No. (a) of the notice of motion is spent and the parties agreed to submit on the pending issue of interest and further interest on the principal amount only.

3. The exparte applicant's case is that it was the registered owner of properties known as LR Nos 27799/2 and 27799/3 and that the said properties were compulsorily acquired by the respondents who issued an award of kshs 84,531,265 on 28th March 2012 and that on 15th July 2014 the applicant yielded possession of the said parcels of land to the respondents who utilized the land for construction of the Thika Super Highway Road Project.

4. It is claimed that the respondents took possession of the said parcels of land before paying the full compensation award made on 28th March 2012 and that therefore the applicant is entitled to interest on the compensation award pursuant to the provisions of Section 16(1) of the Land Acquisition Act Cap 295(Repealed).

5. The exparte applicant claims that the respondents breached Article 40 of the Constitution which stipulates that where the state has compulsorily acquired a citizen's property, the state must make prompt payment in full compensation awarded to the owner of the property, which provisions is reiterated in Section 13(1) of the Repealed Land Acquisition Act Cap 295.

6. It is claimed that despite demands, the respondents declined to make prompt payments of the compensation awarded hence this claim.

7. The application is supported by the grounds contained in the statutory statement and a verifying affidavit sworn by **Gerald Tailor** on 11th August 2016 together with all annexures/exhibits including the demands for the said award; a letter dated 15th July 2014 surrendering the land to Kenya Urban Roads Authority; the award dated 28th March 2012 by the Senior Assistant Commissioner of Lands for the two parcels of land; gazette notice No. 16180 Addendum under the Land Acquisition Act dated 23rd November 2011 VOL CX111- No. 125; Deed Plan No. 293236 and 280290; and Certificate of Title.

8. The applicant claims that Section 16 of the Land Acquisition Act stipulates that in the event that the acquiring entity takes up possession of the acquired property before making full payment of the compensation award to the owner of the property or properties, interest shall be added to this amount at a rate not less than 6% per annum from the time when possession was taken until payment in full hence it is entitled not only to the balance of compensation award but also to accrued interest thereon at 12% per annum following court rate from 15th July 2014 until payment in full which, as at 16th July 2016 was kshs 8,113,800.

9. It was further alleged that the applicable law is the Land Acquisition Act.

10. It is claimed that failure to pay the amount awarded promptly is unconstitutional, improper, arbitrary

and unjust and amounts to inefficient exercise of administrative power contrary to law hence the respondents are subject to supervisory jurisdiction of this court.

11. The 2nd respondent filed a replying affidavit erroneously titled supporting affidavit, on 8th February 2017 sworn by **Engineer Daniel Cherono** on 22nd December 2016 annexing a document showing that as at 18th November 2016 the Authority (KURA) had transferred the payment to the 1st respondent National Land Commission for onward transmission to the claimants/applicant herein among others in respect of the compulsory acquisition of 4 parcels of land including the applicant's parcels valued at shs 33,807,500.

12. The 2nd respondent explained that the award payment was forwarded to the National Land Commission being the agency charged with the responsibility of compulsory acquisition of the subject property on behalf of the Government of Kenya hence, the applicant had been fully compensated for the compulsory acquisition of its properties done in 2011 under the provisions of the Land Acquisition Act.

13. It was further contended that albeit Section 8 of the Land Acquisition Act mandates prompt compensation, the process of property possession is an elaborate statutory process involving gazettements and the vesting of the land in the Government; notifications to the Registrar of Lands, making of appropriate entries in the register of titles after surrender of original title documents by owners; survey and delineation of acquired land among others.

14. That the Commissioner of Lands has not published a notice indicating to the general public the exact date on which the Commissioner of Lands would take possession of the acquired land and that only then can the issue of payment of interest arise hence the process of acquisition was incomplete.

15. Further, it was contended that the interest of 12% per annum claimed is unjustified as the provisions of Section 16(1) of the Land Acquisition Act stipulates sic percent which can only be calculated on the principal sum from the date when the Authority begun work on the site.

16. In addition, was further contended that the claim or basis for the claim for interest is not explained or justified and that the acquisition of the applicant's land was done in public interest hence this application should be struck out.

17. The applicant also filed a supplementary affidavit sworn by **Gerald Taylor** on 24th March 2017 and annexing a letter dated 15th July 2014 addressed to the Kenya Urban Roads Authority titled: **surrender of the acquired plots** contending that although the 2nd respondent may have forwarded the awarded principal sum of shs 33,807,500 to the 1st respondent on 1st November 2016, the same was only paid out to the applicant's advocates on 27th February 2017 and it maintained that possession was taken on 15th July 2014 and that the court should take Judicial notice of the fact that the acquired property had already been utilized for construction of the road and which construction was completed in late 2014.

18. The applicant further asserted that the allegation of publication of notices contravenes Section 16(1) of the Land Acquisition Act which allows the respondents to take possession of a property before making payment on condition that they pay interest on the same at the rate not less than 6% per annum.

19. The 1st respondent did not file any response to the application and left it to the court to decide the dispute between the applicant and the 2nd respondent.

20. Parties' advocates also filed submissions which they canvassed orally on 5th December 2017. The said submissions, supported by lists of authorities as filed mirror the parties' respective positions as stipulated above.

21. In their submissions, the exparte applicant's counsel Mr Ongicho submitted in addition to the depositions by his client maintaining that the 2nd respondent took possession of the acquired property on

15th 2014 July 15th and that Section 16(1) of the Land Acquisition Act stipulates that taking possession is by giving notice to the owner of the property or at the end of 60 days from the date when the award is given by the Inquiry Panel.

22. It was submitted that the award was given on 28th March 2012 and that sixty days ended on 28th May 2012 hence the interest would accrue from 29th May 2012 to the date of payment. Reliance was placed on **ELC No. 469/2016**.

23. On the issue of jurisdiction raised by the 2nd respondent's counsel in submissions, the ex parte applicant's counsel submitted that the same was being raised for the first time in submissions which he considered improper. Further, that in any event, the matter was also brought under Article 40 of the Constitution, under the Bill of Rights, which Article 40(b) (11) grants the application access to the High Court not to the Environment and Land Court.

24. The applicant's counsel also relied on Article 23(1) 23(3) (d) and (f) of the Constitution which he submitted, gives to the High Court jurisdiction to hear and determine such claims for infringement of the bill of rights and that the denial of compensation for acquired land is an infringement on the right to own property. Counsel further submitted that Article 165(6) and (7) of the Constitution gives the High Court jurisdiction to hear and determine this matter. Several other decisions were relied on including: **HCC Petition 38/2011 Torino Enterprises Ltd vs Permanent Secretary Ministry of State for Defence** where the court is said to have issued mandamus for payment of an award which had duly been delayed and ordered for payment with interest of 12% per annum; **HCC Petition 187/2013 Christabel Akinyi Onyango vs KAA** where Majanja J awarded compensation to the applicant after acquisition of a suit property and ordered interest to be paid on delayed sum at the rate of 12% per annum; **HCC ELC 88/12 Nakuru Toyobo Investments Ltd vs Rift Valley Water Services Board & Others** where the court is said to have ordered, under Section 16 of the Land Acquisition Act, the payment of interest rate a 9% per annum because the applicant delayed coming to court to lodge the claim; and in **Arnacherry Ltd vs Attorney General HC Petition 248/2013 and Broadway Enterprises Ltd vs Ministry of Lands Housing and Urban Development HC Petition 265/2014** where the court awarded interest of 12% and 6% per annum respectively.

25. Counsel urged the court to award his client the applicant interest at 12% per annum because of time lapse since the decision in the cited cases were made, together with costs of these proceedings.

26. The ex parte applicant's counsel further submitted that while exercising Judicial Review jurisdiction, the court exercises special jurisdiction as was held in **Commissioner of Lands vs KUNSTE Hotel Ltd [1995-1998] 1 EA 1** hence the allegations by the 2nd respondent that this matter falls within the Environment and Land Court do not hold any water.

27. Further, that alternative remedy under Section 13 of the Environment and Land Act does not oust the jurisdiction of this court. Reliance was placed on **RE KISIMA FARM Ltd [1998] KLR, 36** and approved in the **Minister for Lands and Settlement vs Coastal Aquaculture Ltd CA 252/1999**.

28. Further reliance was placed on **Republic vs National Land Commission Ex parte Krystalline Salt Ltd** where the court held that Judicial Review is available where a decision has been reached in violation of the rules of natural justice.

29. It was submitted that this court should not allow the 2nd respondent to benefit from its own omission of not issuing the applicant with notices relating to possession of the property as the land has already been utilized by the respondents to construct Thika Super Highway Road, and the principal sum settled.

30. In opposing the ex parte applicant's application, the 2nd respondent filed written submissions on 7th July 2017 and highlighted by Mr Obok advocate relying on his client's replying affidavit. The 2nd respondent framed three issues for determination namely:

a) Whether this court has the requisite jurisdiction to hear and determine this dispute which is a dispute relating to compulsory acquisition of land;

b) Whether the exparte applicant can invoke the provisions of Section 16 of the Land Acquisition Act (Repealed) in the circumstances.

c) Whether the Judicial Review Order of mandamus can issue in the circumstances.

31. On the first issue of whether this court has jurisdiction to hear and determine this matter relating to compulsory acquisition of land, it was submitted that the claim for interest accruing on the amount of award in these proceedings arises from compulsory acquisition of the applicant's parcels.

32. That Section 13 of the Environment and Land Court Act No. 19 of 2011 confers jurisdiction to the Environment and Land Court to hear and determine disputes relating to compulsory acquisition of land, and in accordance with Article 162(2)(b) of the Constitution and any other law in Kenya relating to Environment and land.

33. Mr Obok relied on the definition "*related to*" according to the **Oxford Advanced Learner's Dictionary** which means '*connected with something/somebody in some way*' and submitted that therefore the compulsory acquisition is a matter related to Environment and land therefore falling within the jurisdiction of the Environment and Land Court.

34. It was submitted, relying on **Republic vs Elman [1969] EA 357 cited in Hashmukh Devani vs Cabinet Secretary Ministry of Interior and Coordination of National Government & 3 Others [2016] e KLR** where the court held, inter alia, that "*.....where the words used are precise and unambiguous, they are construed in their ordinary and natural sense and that it is only where there is some impression or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put on the words.*"

35. Further submission was made that jurisdiction flows from the law as was held in the famous **Motor Vessel Lilian 'S' v Caltex Oil Kenya Limited** case cited the **Isaac Oerri Abiri vs Samuel Nyangari Nyancharia & 2 Others CA No. 25 of 2014 [2014] e KLR**.

36. It was submitted that in this case, Section 13(2) of the Environment and Land Court Act is unambiguous and confers on the Environment and Land Court jurisdiction to hear and determine disputes such as this, relating to compulsory acquisition of land.

37. Further reliance was placed on the case of **Karisa Chengo & Others vs Republic [2015] e KLR** where the Court of Appeal held that the jurisdiction of the High Court is limited such that it cannot exercise jurisdiction on matters falling within the jurisdiction of the two courts contemplated in Article 162(2) of the Constitution –hence, this court lacks the requisite jurisdiction to hear and determine the exparte applicant's Judicial Review application which application should be dismissed with costs.

38. On the second issue of whether the exparte applicant can invoke the provisions of Section 16 of the Land Acquisition Act (repealed) in the circumstances, it was submitted that it cannot, with respect to the interest on the compensation award for reasons that the applicant has claimed to have a right over 12% per annum interest yet under Section 16(1) of the Land Acquisition Act Cap 295 (Repealed) is a claim relating to, or connected with compulsory acquisition of land and therefore the preserve of the Environment and Land Court and that under the said Section, interest shall not be less than six percent per annum from the time of taking possession until payment or payment into court, where payment of compensation awarded is not paid or paid into court on or before the taking of possession of the land.

39. It was submitted that taking possession of the land before payment of compensation award is the condition precedent to the institution of suit otherwise the applicant herein has no legal right to claim interest as there was no taking of possession of the property in the manner stipulated in the Land

Acquisition Act(Repealed) namely Section 19(1),(3) and (4) of the Land Acquisition Act.

40. Counsel maintained that it is only after taking possession of the land that the land vests in the Government absolutely free from encumbrances. Reliance was placed on the Indian case of **State of Jharkhand & Others vs Ambay Cements & Another** where the Supreme Court of India held that it is the cardinal rule of the interpretation that where a statute provides that a particular thing should be done, it should be done in the manner prescribed and not in any other way.

41. It was submitted that in any case, the exparte applicant claims to have yielded possession of the acquired land to KURA(Kenya Urban Roads Authority) which is a statutory body established under Section 9 of the Kenya Roads Act No. 2 of 2007 and which is different from the 2nd respondent Kenya National Highways Authority (KeNHA) herein.

42. It was submitted that albeit the applicant claims to have succumbed to pressure to surrender the land, the surrender was to the Kenya Urban Roads Authority and not the 2nd respondent who did not even receive a copy of the letter dated 15th July 2014.

43. It was also submitted that the applicant vacated the acquired land on its own volition without the knowledge of the 2nd respondent which vacation is not contemplated in Section 16(1) of the Land Acquisition Act(Repealed)as constituting the taking of possession of the acquired land by the Commissioner of Lands and that therefore the vacation thereof cannot be a basis on which a claim for interest on the award is founded.

44. It was also submitted that Section 16(1) of the Land Acquisition Act contemplates a situation where the respondent takes possession of the acquired land before the owner of the land receives full compensation award but not where the owner of the land voluntarily vacates the land.

45. Counsel for the 2nd respondent relied on the **Cannon of Legislative Interpretation** which holds that nothing is to be added to what the text states or reasonably implies. As such, a matter not covered is to be treated as not covered, as was stated by **Authors Antonin Scalia and Bryan A. Garner in their Book. Reading Law: The Interpretation of Legal Texts.**

46. Further reliance was placed on **Sumac Development Company Ltd vs KeNHA & 2 Others civil suit 348 of 2013** where the High Court at Nairobi cited **Osborn v Bank of the USA** and held that, inter alia **“...judicial power is never exercised for purposes of giving effect to the will of the judge, always for the purpose of giving effect to the will of the legislature or in other words, to the will of the law.”**

47. The 2nd respondent’s counsel therefore submitted that the applicant could not rely on Section 16 of the Land Acquisition Act and claim interest at 12% as the 2nd respondent never took possession of the acquired land in the manner stipulated in law.

48. On the last issue of whether Judicial Review order of mandamus can issue in the circumstances, it was submitted that mandamus only issues where there is a legal right without a specific remedy for enforcing that right as was espoused in **Republic vs Kenya Vision 2030 Delivery Board & Another exparte Engineer Judah Abekah [2015] e KLR** where the court, cited the decisions in **KNEC v Republic Exparte Geoffrey Gathenji & Others and Republic vs Commissioner of Lands Exparte Kithinji Murugu M’agere**. It was therefore submitted that the applicant could not rely on Section 16(1) of the Land Acquisition Act because it confers no specific legal right to interest payment, and therefore mandamus cannot issue. Further, that the applicable law as at 15th July 2014 when the 2nd respondent is alleged to have taken possession of the land, is the Land Act, 2012 which came into force on 2nd May, 2012. Specific reference was made to Section 107 and 162 of the Land Act on the savings and transitional provisions and the obligations that are to be borne by the National Land Commission hence the 2nd respondent submitted that it was under no legal duty to pay the interest on the compensation

award but that the duty lies with the National Land Commission and that the 2nd respondent only acts as a conduit through which money from the National Treasury was handed over to the National Land Commission.

49. Further, that the 2nd respondent has no statutory duty to pay any compensation award to the applicant.

50. On what is the interest sum due if any, it was submitted that the court would only compel satisfaction of a duty that has become due (the actual sum) as was held in **Republic vs Attorney General & Another Exparte Ongata Works Ltd [2016] e KLR** citing **Shah vs Attorney General (No.3) Kampala HCC Miscellaneous 31/1969 [1970] EA 543**.

51. Accordingly, it was submitted that the National Land Commission would only pay interest which is determined by a court of law after hearing the dispute as to whether or not the said interest of 12% is due, which determination is not within the purview of the Judicial Review jurisdiction. Counsel urged the court to dismiss the exparte applicant's motion with costs.

52. In a brief rejoinder, Mr Ongicho counsel for the exparte applicant submitted that the letter of 15th July 2014 was due to pressure mounted to his client by the respondents and that Section 13(2) of the Environment and Land Court Act introduces disputes touching on Land Acquisition which provision is not in the Constitution so the Section is inconsistent with the Constitution and a nullity. Further, that the minimum interest rate of 6% p.a under Section 16(1) of the Land Acquisition Act is discretionary as this court can give a higher rate. Counsel urged the court to adopt the decision by Odunga J in **HC Petition 38/2011 Torino Enterprises Ltd vs Permanent Secretary Ministry of State for Defence (supra)** and **HC Petition No. 187 of 2013- Christabel Akinyi Onyango vs Kenya Airports Authority (supra)**.

DETERMINATION

53. I have carefully considered the foregoing and in my humble view, the issues that flow for determination are:

1) Whether this court has the requisite jurisdiction to hear and determine the matter of compensation award for Land Acquisition.

2) If the answer to the above issue is yes, whether the exparte applicant is entitled to the orders sought for mandamus and if so, against whom should the order for mandamus issue.

3) What orders should this court make?

4) Who should bear costs of these proceedings.

54. On the first issue and question of whether this court has the necessary jurisdiction to hear and determine this matter, the 2nd respondent raised through submissions by its counsel that the question of interest on the compensation award made and paid to the exparte applicant is a matter that relates to land acquisition and therefore compulsory acquisition by the government, of private property.

55. Accordingly, it was submitted that this court is divested of jurisdiction to hear and determine the matter as the jurisdiction thereof is vested in the Environment and Land Court pursuant to Section 13 of the Environment and Land Court Act, 2011 and further, that for this court to determine whether interest as sought is payable, it has to determine other matters such as whether the 2nd respondent took possession of the acquired land and if so, when, which matters are of merit and which completely divests this court of jurisdiction to hear and determine the matter.

56. On the part of the exparte applicant, it was submitted that the issue of jurisdiction had only been raised at the submissions stage. Further, that, notwithstanding, the claim is brought under Articles

40,64 and 23 of the Constitution on infringement of fundamental rights and that this court in the exercise of supervisory/judicial review jurisdiction, has jurisdiction to hear and determine the matter as stipulated in the Articles cited above and Article 165(6) and (7) of the Constitution.

57. Mr Ongicho advocate for the exparte applicant further submitted that in any event, Article 162(2) (b) of the Constitution does not confer in the Environment and Land Court such jurisdiction of land acquisition matters hence Section 13 of the Environment and Land Court Act introduces disputes touching on Land Acquisition which provision is not in the Constitution. Therefore, that the said Section is inconsistent with the Constitution and a nullity.

58. Jurisdiction is derived from the Constitution and the statutes. It is not self imposed and neither can it be vested in a court of law or tribunal by consent of the parties. Where there is no power to hear and determine a matter, a court of law would be acting in vain as the decision would eventually be a nullity *ab initio*. Equally, jurisdiction cannot be inferred. It must be clearly spelt out to enable the court exercise that jurisdiction.

59. As was correctly held in **Sumac Development Company Ltd, vs Kenya National Highways Authority & 2 Others HCC 348 of 2013**, *“Judicial –“ power as contradistinguished from the power of the laws, has no existence. Courts are the mere instruments of the law, and can will nothing. When they are said to exercise discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the court to follow it. Judicial power is never exercised for the purpose of giving effect to the will of the judge; always for the purpose of giving effect to the will of the legislatures or, in other words, to the will of the law.”*

60. It is for the above reason that the court in the famous case of **Motor Vessel “Lilian S” vs Caltex Oil (K) Ltd** made it clear that jurisdiction is everything without which a court of law must down its tools and say no more.

61. A court of law, when faced with a question of whether or not it has jurisdiction to hear and determine a matter must first and foremost investigate that question to determine whether indeed, it has the requisite jurisdiction to hear and determine the matter. And in my humble view, it matters not that the question of jurisdiction is raised at the submissions stage, it is for that reason that jurisdictional issues should always be raised at the outset so that the court, before delving into the merits of the matter, clears the hurdle of jurisdiction so that it does not act in vain for its decision to be rendered a nullity.

62. Albeit the 2nd respondent raised the issue of jurisdiction of this court at the stage of submissions, I find that not to be belated because the exparte applicant had the opportunity to file supplementary submissions to respond to that issue and parties’ advocates also had the opportunity to canvass the issue by way of oral submissions, quite ably.

63. Jurisdictional issues are therefore not an afterthought since the court could as well have raised the issue, assuming the matter proceeded exparte, for the exparte applicant to address the court on the court’s jurisdiction to hear and determine the dispute before it.

64. The case of **Karisa Chengo & Others vs Republic [2015] e KLR CA** which decision was upheld by the Supreme Court is clear that jurisdiction of the High Court is limited, and the High Court cannot exercise jurisdiction on matters falling within the jurisdiction of the two courts contemplated in Article 162(2) of the Constitution. Therefore, the High Court no longer has unlimited jurisdiction in all matters as it used to have under the repealed Constitution. It cannot deal with matters set out under Section 12 of the Employment and Labour Relations Court Act and Section 13 of the Environment and Land Court Act. Neither can it preside over matters preserved for the Supreme Court.

65. Conversely, the two courts of equal status as established under Article 162(2) (a) and (b) of the Constitution cannot deal with matters reserved for the High Court.

66. Article 162(2)(b) of the Constitution contemplates the establishment of a court with the status of the High Court to hear and determine disputes relating to (b) Environment and the use and occupation of, and title to land. Under Sub Article 3, Parliament is empowered to determine the jurisdiction and functions of the courts contemplated in Clause 2. In 2011, Parliament enacted the Environment and Land Court Act.

67. Under Section 4 of the Act, the Environment and Land Court is established. Jurisdiction of the court is found in Section 13(1) and (2) of the Act, whereas powers of the court are to be found in Section 7 of the Act.

68. Under Section 13(2) of the said Act, the court, in exercising its jurisdiction under Article 162(2) (b) of the Constitution shall have power to hear and determine disputes (material to this case):-

a. ..

b. *Relating to compulsory acquisition of the land*

69. Under Section 13(7) of the Act, the court has power to make any order and grant any relief as the court deems fit and just, including :-

a)

b) *Prerogative orders*

c) *Award of damages*

d) *Compensation*

e) *Specific performance*

f)

g) *Declaration or*

h) *Costs*

70. Under Section 16 of the Act, appeals from the Environment and Land Court lie to the Court of Appeal, whereas Section 16A is clear that appeals from the subordinate courts and local tribunals lie to the Environment and Land Court.

71. Section 30 of the Act is the transitional provision which stipulates that all proceedings relating to the environment or to the use and occupation and title to land pending before any court or local tribunal of competent jurisdiction shall continue to be heard and determined by the same court until the Environment and Land Court established under Section 4 of the Act comes into operation or as may be directed by the Chief Justice or the Chief Registrar of Judiciary. The Chief Justice is also given power after the court is established; to refer part heard cases, where appropriate, to the court.

72. Albeit the applicant claims that the provisions of Article 162(2) (b) of the Constitution do not confer jurisdiction of compulsory acquisition of land in the Environment and Land Court and that therefore Section 13(2) of the Act is inconsistent with the Constitution and therefore a nullity, I beg to disagree with learned counsel's submission because the constitutional provisions are merely a frame work within which laws emanate. Moreso, Article 162(3) of the Constitution is clear that the Constitution has given the power to Parliament to determine the jurisdiction and functions of the courts contemplated in Clause 2 of Article 162.

73. That being the case, there is nothing unconstitutional or inconsistency in Parliament determining as it

did, that the Environment and Land Court has jurisdiction to hear and determine disputes relating to compulsory acquisition of land, among other jurisdictions. Compulsory acquisition of land is no doubt an issue relating to land and that is why the Constitution stipulates that any acquisition of private property by the government must be compensated promptly.

74. Furthermore, Parliament also enacted the Land Act No. 6 of 2012 and in that Act, 'court' means the Environment and Land Court. Under Section 128 of the Land Act, Any dispute arising out of any matter provided for under the Act may be referred to the Land and Environment Court for determination.

75. Section 127(1) of the Land Act is clear that the National Land Commission may refer to the court for determination any question as to, among others:

- a) *The construction, validity or effect of any instruction;*
- b) *The persons who are interested in the land concerned;*
- c) *The extent or nature of their interest.*
- d) **The persons to whom compensation is payable;**
- e) The shares in which compensation is to be paid to tenants in common

76. Part VIII of the Act commencing at Section 107 of the Land Act is on compulsory acquisition of interests in land and it sets out the procedure for compulsory acquisition and compensation to be paid (Section 111) and 115) of the Act.

77. Accordingly, I find that the statutes which were enacted post August 27th 2010 to implement the Constitution on the Chapter on land are the relevant statutes and the courts contemplated under Article 162(2) (b) of the Constitution and conferred with jurisdiction to hear and determine any dispute relating to compulsory acquisition, whether the remaining issue is on the interest payable or who should pay the said compensation award for the acquired land, is the Environment and Land Court, and not the High Court.

78. Moreso, this case was not filed prior to 2010 27th August for this court to make any pronouncements on the transitional and consequential provisions of Part 5 of the Constitution, Section 22 as replicated in Section 30 of the Environment and Land Court Act.

79. To crown it all, Article 165 (5) (b) of the Constitution is clear that the High Court shall not have jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated in Article 162(2) of the Constitution.

80. It is now apparently clear that disputes relating to compulsory acquisition of land, payment of compensation thereof fall within the jurisdiction of the Environment and Land Court.

81. Although the applicant claimed that this court has jurisdiction under Articles 40 and 23 of the Constitution, my humble view is that this court's jurisdiction under Article 40 and 23 of the Constitution is confined to protection of the right to property where such right is violated but where it is clear that the property right or dispute in issue relates to occupation, ownership/title to land or the environment and where compensation is sought with respect to the compulsory acquisition of land, then this court's jurisdiction is divested and vested in the Environment and Land Court which has jurisdiction to make orders of prerogative (Judicial Review) orders and compensation as stipulated in Section 13(2) and (7) of the Environment and Land Court Act.

82. For all the above reasons, I am persuaded that this court's jurisdiction in matters of compulsory acquisition, and compensation for land acquired by the Government and or interest accruing on the compensation award, is divested and ousted and vested in the Environment and Land Court, a court of

equal status with the High Court.

83. Accordingly, I find and hold that this court has no jurisdiction to hear and determine this matter and therefore the claim herein is declined for want of jurisdiction.

84. In the end, I would not delve into the other issues of merit framed as I must down my tools and say no more. The application by way of notice of motion dated 14th October, 2016 be and is hereby struck out with an order that each party shall bear their own costs of these proceedings.

Dated, signed and delivered in open court at Nairobi this 2nd day of February, 2018.

R.E.ABURILI

JUDGE

In the presence of:

Mr Ongicho advocate for the exparte applicant

Miss Masinde for the 1st Respondent

Ms Njeri Mucheru H/b for Mr Obok for the 2nd Respondent

CA: Kombo