



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**PETITION NO. 20 OF 2015**

**IN THE MATTER OF:       ARTICLE 22(1) OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF:       ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL  
FREEDOMS UNDER ARTICLES 23, 40, 47, 60 AND 67 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF:       SECTION 107, 110, 111, 112, 113, 115, 121, 125 AND 133 OF THE  
LAND ACT CAP 280**

**BETWEEN**

- 1. EAST AFRICA GAS COMPANY LIMITED**
- 2. GAS COMPANY LIMITED.....PETITIONERS**

**VERSUS**

- 1. NATIONAL LAND COMMISSION**
- 2. KENYA RAILWAYS CORPORATION**
- 3. KENYA NATIONAL HIGHWAYS AUTHORITY**
- 4. CHINA ROAD & BRIDGE CORPORATION.....RESPONDENTS**

**RULING**

1. This Ruling relates to a Notice of Preliminary Objection dated 6<sup>th</sup> May 2015, and filed on 7<sup>th</sup> May 2015 taken out by the Second Respondent, the Kenya Railways Corporation (KRC) **firstly** against the subsistence of the interim orders granted herein on 15<sup>th</sup> April, 2015, restraining all the Respondents from carrying on any exercises that interfere with the parcels of land known as Land Reference Number

MN/VI/3858, 3855,3856,3857, 3859, 3860, 3861, 3862, 3897, 3907, 3906, and 3907 pending the hearing inter partes of the Notice of Motion dated 14<sup>th</sup> April 2015 and filed on 15<sup>th</sup> April 2015, and **secondly** seeking orders that the parent Petition of even date therewith be struck out on the principal ground that the High Court has no jurisdiction to either entertain the Petition or the Notice of Motion thereunder.

2. Before I discuss the points raised by the Objectors, I will refer to the submissions by Mr. Mogere, Counsel for the Petitioners who argued that this court has jurisdiction to determine the Petition, and therefore the Notice of Motion thereunder. Counsel argued that the question raised by the Petition, and the Notice of Motion concerns due process as envisaged under Articles 40, 47, 60, 67, 70 and 75 of the Constitution, and that being the case, the High Court, and not the Environment and Land Court has jurisdiction; that the State under Article 40 of the Constitution will not deprive a citizen of its property except upon following due process, notice of intention to acquire the property, the holding of an inquiry, payment of compensation and then take over possession of the property. These steps, Counsel submitted had not been taken to complete the process of acquisition; a process which this court does not conduct, but is carried out by the National Land Commission, the first Respondent.

3. Counsel submitted that unless that is done, the State had no right to conduct any activity on the property of the Petitioners. This, counsel submitted is a fundamental constitutional right which the High Court is enjoined under Articles 23 and 40 to uphold.

4. Counsel submitted that even claims of fraud or illegality under Article 40 (6) are subject to inquiry. It is the First Respondent (the National Land Commission) not the Second Respondent (the Kenya Railways) and the Third Respondent (the National Highway Authority) who should give the notice for acquisition of the property. Counsel asked the Court to dismiss the Preliminary Objection.

5. Mr. Ndegwa, Counsel for the Second Respondent, which raised the Preliminary Objection submitted that the Preliminary Objection on jurisdiction is taken out on the grounds of Article 165 (5) of the Constitution. It was also Counsel's submission that both the Land Act and the Land Acquisition Act set out clearly special procedures on how the National Land Commission is mandated to hear claims by all persons who have interest in land, hence, Counsel submitted, issues concerning questions of compulsory acquisition are to be determined through an inquiry and not through the courts. The procedure for hearing is also different, a claimant is given a questionnaire to declare specific interests as an owner, a wife, a tenant and the like. For these reasons counsel concluded that the Preliminary Objection be upheld.

#### **SUBMISSIONS BY COUNSEL FOR THIRD RESPONDENT**

6. Mr. Muthama, Counsel for the Third Respondent, the National Highways Authority supported the Preliminary Objection and the submissions by Mr. Ndegwa and drew the attention of the court to recent decision of the Court of Appeal at Malindi, that specialized courts have no jurisdiction in criminal matters, a matter outside their area of jurisdiction.

#### **SUBMISSIONS BY COUNSEL FOR FOURTH RESPONDENT**

7. Miss Kagiri counsel for the Fourth Respondent submitted that she totally associated herself with the Preliminary Objection and submissions of counsel in support of the Preliminary Objection. In addition Counsel drew the court's attention to section 158 of the Land Act under which this court cannot sit on an inquiry, and urged the court to allow the Preliminary objection.

#### **REPLY BY COUNSEL FOR THE PETITIONERS**

8. **Firstly** Counsel submitted, the issue is not about a dispute on land. It is a constitutional issue, acquisition of land. The answer is not public interest.

**Secondly**, the decision by the Court of Appeal related to criminal appeals, the jurisdiction of the Land Court is specific and does not concern the provisions under which the Petition has been brought. He

argued that the Preliminary Objection be dismissed.

### **REPLY BY MR. NDEGWA COUNSEL FOR THE SECOND RESPONDENT**

9. In his final reply to the submission by Counsel for the Petitioner, Mr. Ndegwa submitted that all rights to land and other rights flow from the Constitution. The Land Court has to follow the Constitution as it decides on questions of land. In summary Counsel submitted, the Petitioner has not followed the procedure on questions of land. Unlawful entry into land is trespass to land, and that there is nothing unconstitutional about it. Once the gazette was published, the dispute fell within section 128 of the Land Act. The point, Counsel reiterated, is that this court lacks jurisdiction. A nullity cannot be transferred, and the Petition be struck out.

### **DETERMINATION**

10. According to the *locus classicus* case of **MUKISA BISCUIT MANUFACTURERS LIMITED Vs. WESTEND DISTRIBUTORS [1969] EA. 696**, at 700, Sir Charles Newbold P. defined a true Preliminary Objection as follows:

**“... 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 is 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 issues. This improper practice should stop.”**

11. The question to be answered here is whether the Preliminary Objection raised by the Second Respondent and supported by Third and Fourth Respondents is a true Preliminary Objection in point of law, and therefore whether or not this court has jurisdiction to determine the Petition herein.

### **DETERMINATION**

12. “*Jurisdiction*” is everything rings decision, of the Court of Appeal in the case of **OWNERS OF THE MOTOR VESSEL LILLIAN “S” Vs. CALTEX OIL (KENYA) LIMITED [1989] KLR1.**, and that without jurisdiction the court downs its tools, and takes no further steps in the matter, except to pronounce whether or not it indeed has no jurisdiction in the matter.

13. Having considered the grounds upon which the objection was raised, the grounds of opposition by the Second Respondent, the Replying Affidavit of Engineer Kungu Ndungu on behalf of the Third Respondent sworn on 6<sup>th</sup> May 2015, and filed on 8<sup>th</sup> May 2015, and the Replying Affidavit of Fan Zhanjiang on behalf of the Fourth Respondent sworn and filed on 11<sup>th</sup> May 2015, I am of the considered opinion that this court does not have the jurisdiction and therefore the competence to determine the Petition herein.

14. The primary reason for this conclusion is the principle that where the Constitution and any law not inconsistent with the Constitution provides a procedure for resolution of disputes, that procedure ought to be followed, adhered to and applied in the resolution of disputes to which such law or the Constitution prescribes. I set out in the paragraph, following, the other grounds by reason to which I found the considered view that this court has no jurisdiction in this matter, and that the Petition herein be struck out.

15. The Petitioners acknowledge in paragraphs 13-23 of their Petition that the actions in particular of the First and Second Respondents relate to the process of compulsory acquisition under the provision of Part VII of the Land Act 2012 (No. 6 of 2012) of the parcels of land listed in paragraph 14 of the Petition.

16. Sections 110 – 112 (inclusive) of the Land Act establish a regime for issue of notices for acquisition of land (Section 110), compensation to be paid (Section 111), an inquiry as to compensation (section 112) and award of compensation (Section 113). Sections 118 – 120 of the Act provide for determination of

areas acquired (Section 118), payment of interest (section 119), and additional compensation where after survey, the area acquired is greater than the area advertised for acquisition (Section 120).

17. More fundamentally if there is any dispute in relation to the compulsory acquisition or any dispute existing out of any matter provided for under the Act, such dispute shall be placed before the Environment and Land Court for determination.

18. The provisions of the Land Act are anchored by the provisions of Articles 162 (2) and 165 (5) of the Constitution. Article 162 (2) moots the creation of the Environment and Land Court and Employment and Labour Relations Court. Article 165 (5) expressly provides that the High Court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court, or matters falling within the jurisdiction of the Courts contemplated in Article 162 (2), that is today, the Environment and Land Court, now established under the Environment and Land Act 2011 (No. 19 of 2011).

19. Section 13 (2) of the Environment and Land Court Act expressly confers and vests in the Environment and Land Court exclusive jurisdiction in relation to disputes relating **inter alia** to **“compulsory acquisition of land.”**

20. There has been no claim or finding that the Environment and Land Act, is unconstitutional or that the framework for resolution of disputes under Part VIII of that Act has been inadequate for the resolution of disputes thereunder.

21. It is important to remind ourselves and the Petitioners (if any reminding was necessary), that the Environment and Land Court, and the Employment and Labour Relations Court are Courts of the **same status** as the High Court, the anchor Court among the Superior Courts. Those courts have been set apart to develop expertise and learning for the determination of matters within the respective competences. When matters requiring Constitutional interpretation arising within their respective competences or jurisdiction, those courts or specifically the Judges or any Judge for the time being holding office as Judge in any of those courts, is fully competent, and has jurisdiction to determine and give, subject only to appeal, a binding interpretation of the Constitutional issue arising within the jurisdiction of that court.

22. The argument that the matters in this court require Constitutional adjudication by this court is therefore without foundation, and is invalid. I entirely agree with the Respondents who have raised and supported the Preliminary Objection that Petitioners should not be allowed to ignore the statutory framework prescribed by Parliament pursuant to Article 162 (3) of the Constitution by baptizing an ordinary compulsory acquisition dispute as a Constitutional question. There is no such question raised in the Petition here.

23. Finally, the proceedings herein having been raised in the wrong forum, they are void, and incapable of being transferred to any other forum because there is nothing to transfer.

24. In the circumstances therefore, the Preliminary Objection dated 6<sup>th</sup> May, 2015 and filed on 7<sup>th</sup> May, 2015 succeeds, and the Petition herein dated 14<sup>th</sup> April, 2015 and filed on 15<sup>th</sup> May, 2015 is hereby struck out with costs to the Respondents.

26. It is so ordered.

**Dated, Signed and Delivered in Mombasa this 10<sup>th</sup> day of July, 2015.**

**M. J. ANYARA EMUKULE**

**JUDGE**

In the presence of:-

Mr. Chamwada holding brief Ruto for Petitioners

No appearance for Respondents

Mr. Kaunda Court Assistant