



REPUBLIC OF KENYA



KENYA LAW
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**Maingi v National Land Commission & another (Land Case
E050 of 2023) [2025] KEELC 6463 (KLR) (30 September 2025) (Ruling)**

Neutral citation: [2025] KEELC 6463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
LAND CASE E050 OF 2023
AY KOROSS, J
SEPTEMBER 30, 2025**

BETWEEN

JOHN GATHAMA MAINGI PLAINTIFF

AND

THE NATIONAL LAND COMMISSION 1ST DEFENDANT

THE ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. This ruling seeks to determine the 1st defendant's preliminary objection (PO) dated 29/01/2024, which raises the following grounds on points of law in limine in opposition to the plaintiff's claim dated 25/10/2023: -
 - a. The suit violates Section 133C (2), (6) & (8) of the Land Act, No. 6 of 2012 (as amended, 2019).
 - b. As a result, the honourable court lacks the requisite jurisdiction to hear and determine the suit by virtue of Section 133C (2), (6) & (8) of the Land Act, No. 6 of 2012 (as amended, 2019).
 - c. A preliminary objection may be raised at any time during proceedings before judgment is delivered.
2. Accordingly, the 1st defendant urges this court to strike out and/or dismiss the suit against it with costs.
3. In opposition to the PO, the plaintiff filed a very lengthy replying affidavit that he deposed on 3/03/2025, where in brief he stated inter alia: a) he has no objection to the process of compulsory acquisition that led to the award of 28/01/2024, but his challenge was about payment of the balance



- contained in the awards, b) that the PO is ill founded, an abuse of the court process and intended to deny him his day in court; and
4. C) The PO will deny him the right to a fair hearing as the matter is statute-barred and d) this court is clothed with original jurisdiction to entertain the dispute and the Land Acquisition Tribunal's ("LAT") jurisdiction is limited to hearing disputes on processes of compulsory acquisition which is not the subject matter of the suit, and lastly, e) LAT only became functional after this suit had been instituted. The 2nd defendant did not participate in these proceedings.
 5. As directed by the court, the PO was canvassed by way of written submissions that were received by the court from the law firm of Ms. Esther W. Gitau & Co. Advocates for the plaintiff, dated 28/10/2024 and from Mr. Peter Wang'ondy for the 1st defendant, dated 24/06/2024. This court is grateful to counsel for the invigorating submissions, and their respective arguments shall be taken into consideration in the analysis and determination of the issues at hand.
 6. Having considered the PO, affidavit, pleadings on record as well as the plaint dated 25/10/2023 and the 2nd defendant's defence dated 17/11/2023, the issues that arise for determination are whether (a) the PO meets the legal threshold and (b) this court has jurisdiction to hear and determine the suit. These two issues will be handled consecutively.

a. Whether the PO meets the legal threshold

7. Unfortunately, none of the parties addressed me on this issue; nevertheless, the precedent-setting case of *Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors (1969) EA 696* has long settled the principles of POs and what constitutes it in the following manner:

“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 may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute 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. As affirmed by paragraph 21 of the Supreme Court of Kenya decision of *Independent Electoral & Boundaries Commission v Cheperenger & 2 others [2015] KESC 2 (KLR)*, a PO serves two purposes of merit: firstly, as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, in its public cause, it spares scarce judicial time, so that time is committed only to deserving cases of dispute settlement.
9. Accordingly, it is inappropriate for a party to resort to POs as a sword, for winning a case instead of having the dispute resolved judicially, and on the merits.
10. The tests to be applied are 3, namely, the PO raises a pure point of law, there is a demonstration that all the facts pleaded by the other side are correct, and lastly, the facts need not be ascertained.
11. Having considered the ingredients of *Mukisa* (supra), it is my finding that though the PO as raised can dispose of the motion, it does not meet the legal threshold of a PO as the plaint and 2nd defendant's defence has raised matters of fact that have to be ascertained, such as whether the process of compulsory acquisition was adhered to. Further, the 2nd defendant asserts that it is a stranger to the allegations made



against it. These facts are liable to be contested and call for the adduction of evidence to prove them; consequently, this court finds that they do not meet the threshold of Mukisa (Supra).

b. Whether this court has jurisdiction to hear and determine the suit

12. Although this court determines that the plaintiff's objection has not satisfied the legal threshold, and that the proper procedure for the 1st defendant to request the court to dismiss the suit should have been by filing a notice of motion to strike out the case, it is the considered opinion of this court that addressing the issue of jurisdiction can potentially conserve valuable judicial time and prevent unnecessary costs for the parties. Notably, the core of the parties' submissions sufficiently addressed this matter.
13. In this regard, this court is well guided by the now settled law as established in the decision of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd (1989) that held that once a court finds it does not have jurisdiction to hear and determine a dispute, then it has no choice but to down its tools.
14. Turning to the legal framework on this court's jurisdiction, and as submitted by the plaintiff's counsel, it is derived from Article 162(2) of *the Constitution* and Section 13 of the ELC Act. We will start with Article 162(2) of *the Constitution*, but to contextualise it, it is prudent to look at the entire Article 162 of *the Constitution*. This provision of the law provides as follows: -
 - "(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
 - (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—
 - (a) employment and labour relations; and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
 - (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article."
15. Bringing life into Article 162(2) of *the Constitution*, parliament enacted the ELC Act and delineated the jurisdiction of the ELC court in Section 13(1) thereof, which states: -
 - "(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."
16. As rightfully submitted by the 1st defendant's counsel in his submissions, the law is what donates courts with jurisdiction to entertain a suit, and this was underscored by the Supreme Court of Kenya decision of Samuel Kamau Macharia v Kenya Commercial Bank (2012) eKLR when it stated as follows: -
 - "A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... that the issue as to whether a court of law has jurisdiction to entertain a matter before it, is



not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceeding.”

17. In the circumstances of this case, the plaintiff argues that, first of all, at the time the suit was being filed, the LAT, which is created by Section 133A of the [Land Act](#), had not been operationalised. The replying affidavit does not disclose when the plaintiff believes LAT came into effect, but to put the matter to rest, it came into effect on 11/09/2023, when its officials took their oath of office. Consequently, this court finds that the suit, which was filed on January 11/01/2023, was filed after LAT came into existence.
18. The question then arises is whether this court has jurisdiction to entertain the matter in dispute. The answer to this lies in Section 133C of the [Land Act](#), which demarcates LAT’s jurisdiction in the following manner: -
 - “(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 in the prescribed manner.
 - (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 form or 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 provisions 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 the [Fair Administrative Action Act](#) or any other law.”
19. A reading of Section 133C (1) and (6) & (8) of the [Land Act](#) shows that the LAT has both appellate and original jurisdiction. This court’s understanding of Section 133C (1) is that in exercise of its appellate jurisdiction, it deals with appeals relating to claims for compensation by persons interested in land which is the subject of compulsory acquisition, which are, in the first instance, adjudicated by the National Land Commission through the mechanism of inquiry contemplated under Section 112 thereof.
20. As concerns its original jurisdiction, Section 133C (6) & (8) of the [Land Act](#) bestows LAT with an extensive jurisdiction to determine disputes on compulsory acquisition of land or creation of



wayleaves, easements, and public right of way. Moreover, it has jurisdiction to hear and determine disputes on compulsory acquisition, grounded in Articles 23(2) and 47(3) of *the Constitution*, using the legal framework set out under the *Fair Administrative Action Act* or any other applicable law. It is only after LAT has considered such disputes that an appeal can be lodged before this court on matters of law, as envisaged by Section 133D of the *Land Act*, which provides: -

- “(1) A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may, in the prescribed time and manner, appeal to the court on any of the following grounds—
- a. the decision of the Tribunal was contrary to law or to some usage having the force of law;
 - b. the Tribunal failed to determine some material issue of law or usage having the force of law; or
 - c. a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.
- (2) An appeal from the decision of the Tribunal may be made on a question of law only.”

21. On jurisprudence, it is now settled law and affirmed in the Supreme Court of Kenya decision of Benard Murage vs Fine Serve Africa Limited & 3 Others [2015] eKLR that where there exists an alternative remedy through statutory law, then such statutory remedy should be pursued first. Accordingly, in the court’s mind and as rightfully stated in the 2nd defendant’s defence, the plaintiff moved this court prematurely as he should have first exhausted the resolution of the dispute before LAT, as it is vested with primary jurisdiction before approaching this court.

22. In a more recent decision, the Supreme Court of Kenya in NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR) re-emphasised this settled law at paragraph 87 thereof by stating: -

- “87. This is further firmly rooted in article 159 of *the Constitution* which requires the courts to promote alternative dispute resolution mechanisms. The moment a storm begins to brew; courts should not be the first port of call but rather the final resort. Before using the court’s jurisdiction, it is essential to exhaust any available alternative dispute resolution options. The exhaustion doctrine serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is, first of all, diligent in the protection of his interests within the mechanisms in place for resolution outside the courts. The exhaustion doctrine acts as a safeguard to delay judicial consideration of cases to ensure that a party is vigilant in protecting his interests within the channels available for dispute settlement methods. In this way, the doctrine serves to promote an efficient justice system and an autonomous administrative state.”

23. Turning to the plaint, the purpose for which the suit is filed is the nullification of the awards of kshs. 33, 241,003.95/- and kshs. 19,011,750.45/- and payments of balances of awards to the tune of kshs. 90,459,424/= and interest thereon. To this court’s attention, it is conspicuous that the matter in



dispute falls squarely within the jurisdiction of the LAT, which is the adequate and effective entity to resolve the matter. Therefore, the plaintiff cannot approbate and reprobate on this issue as observed in his replying affidavit.

24. Being guided by the stated precedents and the recent decisions of this court in *Kigathi v Kenya National Highways Authority & another; National Land Commission (Interested Party)* [2025] KEELC 993 (KLR) and *Thuo & 160 others v National Land Commission & 4 others; Kenya Human Rights Commission (Interested Party)* [2022] KEELC 3951 (KLR), in conclusion, this court finds it does not have jurisdiction to entertain the suit. It hence strikes out the entire suit with costs to the defendants. In the end, the following disposal orders are hereby issued: -
- a. The preliminary objection dated 29/01/2024 is hereby dismissed with no orders as to costs.
 - b. The entire suit is hereby struck out with costs to the defendants.
 - c. This file is hereby effectively marked as closed.

Orders accordingly.

DELIVERED AND DATED AT MACHAKOS THIS 30TH DAY OF SEPTEMBER, 2025.

HON. A. Y. KOROSS

JUDGE

30.09.2025

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform

In the presence of;

Miss Gitau for plaintiff.

N/A for defendant.

Ms Kanja- Court Assistant.

