



Musti Investment Limited v Kenya Airports Authority (KAA) & 6 others (Environment and Land Petition E010 of 2025) [2025] KEELC 7626 (KLR) (5 November 2025) (Ruling)

Neutral citation: [2025] KEELC 7626 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND PETITION E010 OF 2025
A OMBWAYO, J
NOVEMBER 5, 2025**

BETWEEN

MUSTI INVESTMENT LIMITED APPLICANT

AND

KENYA AIRPORTS AUTHORITY (KAA) 1ST RESPONDENT

CABINET SECRETARY LANDS MINISTRY & 5 OTHERS & 5

OTHERS 2ND RESPONDENT

RULING

Brief Facts

1. This ruling is in respect of the 5th Respondent's Preliminary Objection dated 27th October, 2025 on the following grounds:
 1. This Honourable court lacks the original jurisdiction to hear and determine the present Land Petition in view of the mandatory provisions of Part III (compulsory acquisition of interest in land) as read together with sections 133A, 133C and 133D of the [Land Act](#).
 2. If this Honourable Court proceed to hear and determine the Land Petition herein, it will be usurping the powers of Land Acquisition Tribunal contrary to the mandatory provisions of sections 133A, 133C and 133D of the [Land Act](#), 2012.
 3. The both (sic) the Application and the Land Petition are also incurably defective in form and in substance as there are no discernable constitutional issues to warrant its admission and adjudication before this court as a constitutional dispute and not a civil dispute.
 4. The present (sic) the Application and Land Petition offends the doctrine of res sub-judice since the Petitioner has admitted that there is an ongoing dispute touching on the same



subject matter in Nakuru ELC Petition No. 340 of 2015; Kenya Airports Authority v Nakuru Teachers Housing Co-operative Society Ltd & Others.

5. The Petitioner/Applicant has not met the conditions for grant of a conservatory order/ injunction order including failing to satisfy that the public interest in proceeding with the Affordable Housing construction project outweighs the alleged public interest over the disputed land.
 6. Accordingly, the present application and the entire Land Petition are misconceived, fatally defective, incompetent, bad in law, mischievous, frivolous, vexatious and is otherwise an abuse of the Court process.
2. Counsels orally argued the preliminary objection counsel for the 5th Respondent submitted that the petition did not disclose any constitutional issues for determination. He went on to argue that the same was a civil dispute which ought to have been filed at the Land Acquisition Tribunal. He relied on the case of Mulu & SS v NLC & Others and Section 3 of the *Land Act*. He submitted that the Petition offended the doctrine of exhaustion, He submitted that the question of compulsory acquisition should be heard and determined in the tribunal. He further argued that the petitioner ought to have filed an application with Nakuru ELC Petition No. 340 of 2015 instead of filing the present petition.
 3. Mr. Ngugi for the Petitioner submitted that the issue of compulsory acquisition could not be determined by way of a preliminary objection as it would warrant the court to go into a fact-finding mission. He cited the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E.A. Counsel for the 1st Interested Party submitted that his client was not a party to the alleged construction on the suit property. In support of the preliminary objection, counsel argues that the court lacked the jurisdiction to determine the petition.
 4. He argued that the matter was sub-judice by virtue of the pending case in Nakuru ELC Petition No. 340 of 2015. He cited the case of Okiya Omtata v Communication Authority. He further submits that the suit property belonged to the 1st interested party having acquired it four decades ago.
 5. Counsel for the 2nd Interested Party on the other hand argued that the Petitioner did not know how the government took possession of the suit property. On sub-judice, he argued that the issues raised in Nakuru ELC Petition No. 340 of 2015 was different from the present petition as it also sought different reliefs.

Analysis and Determination

6. This court has considered the preliminary objection and is of the view that the main issue for determination is whether the preliminary objection is merited.
7. In the case of Mukisa Biscuit Manufacturing Co. Ltd vs. West End Distributors Ltd [1969] E.A the court held as follows:
8. 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.” “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 may dispose of the suit. Examples are on 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.”



9. In the case of *George Oraro v Barak Eston Mbaja* (Civil Suit 85 of 1992) [2005] KEHC 731 (KLR) the court held as follows:

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”. Having gone through the grounds raised in the instant preliminary objection vis a vis the above cited authorities, it is my view that the preliminary objection does not raise pure points of law. It is this court’s view that the issue of the alleged procedure for compulsory acquisition of the suit parcel is a factual issue which the court must consider on merit.”

10. In addition, this court will have an opportunity to determine whether or not the suit meets the threshold of a Constitutional Petition at the hearing of the Petition.

11. On the issue of exhaustion, this court finds that the jurisdiction to hear the petition lies squarely with this court as the issues raised of violation of property rights cannot be entertained by the Land acquisition Tribunal. Tribunals cannot determine the violation of rights and fundamental freedoms. The Supreme Court in the case of *Abidha Nicholas v the Attorney General & 7 Others* [2024]eKLR and which case mentioned their position in *Kibos Distillers v Benson Atega* and several other cases. At paragraph 104 the S.C held thus;-

“Having considered the above complaints, we reiterate our earlier finding in this judgment that the mandate and jurisdiction to determine these questions lie with the ELC under Articles 22, 23(3) and 162(2)(b) of *the Constitution* as read with Section 4(1) of the Environment and *Land Act*. We say so because neither the NET, EPRA nor EPT have the jurisdiction to determine alleged violations of *the Constitution*. That right to access the court for redress of alleged constitutional violations, should not be impeded or stifled in a manner that frustrates the enforcement of fundamental rights and freedoms. We say this persuaded by the elegant reasoning in *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR where the High Court (Achode (as she then was), Nyamweya (as she then was), & Ogola, JJ) stated:“In the instant case, the Petitioners allege violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

12. In the case of *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (Civil Application 36 of 2014) [2015] KESC 2 (KLR) the court held that:

- (21) The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”



13. Counsel for the 5th Respondent contends that the Petition was res sub -judice as there is an ongoing dispute touching on the same subject matter in Nakuru ELC Petition No. 340 of 2015.
14. Section 6 of the *Civil Procedure Act* states that:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
15. It is imperative for this court to establish whether the preliminary objection on res sub- judice as raised by the 5th Respondent meets the threshold enumerated in the decision in Mukisa Biscuits (supra). Notably, counsel for the 2nd Interested party contends that the issues raised in Nakuru ELC Petition No. 340 of 2015 was different from the present petition as it also sought different reliefs.
16. It is my view that the 5th Respondent having raised the issue of res sub judice, this court would need to receive and interrogate the evidence, at least in the form of copies of the proceedings in Nakuru ELC Petition No. 340 of 2015 to determine if the said case is similar to the present petition.
17. In the case of *J N & 5 others v Board of Management, St. G School Nairobi & another* [2017] KEHC 9629 (KLR) the court held that:

“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...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.”
18. It is trite law that in a preliminary objection, one must not deal with issues of ascertainment of the facts. However, in the instant case, it is this court’s view that the issue of the existence of Nakuru ELC Petition No. 340 of 2015 as alleged is a factual issue. In the circumstance, the same would require examination of facts and evidence to be availed before this court through the ordinary course of evidence by way of either viva voce evidence or affidavit evidence.
19. The upshot of the foregoing is that the grounds as raised by the 5th Respondent do not meet the threshold of a preliminary objection. Consequently, the Preliminary Objection dated 27th October, 2025 is dismissed with costs. Orders accordingly. The application to be heard orally. Respondents to reply within 3 days. Hearing on 11th November 2025 at 12.00 pm.

SIGNED BY/FOR:

HON. JUSTICE ANTONY O. OMBWAYO

**THE JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT
ENVIRONMENT AND LAND COURT**

The Judiciary of Kenya

