

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 50 OF 2019

KELVIN MUTUA & 197

OTHERS:.....PLAINTIFFS/APPLICANTS

VERSUS

ATHI WATER SERVICES

BOARD:.....DEFENDANT

RULING

The Respondent herein, Athi Water Services Board, raised a Preliminary Objection in opposition to the Plaintiffs' suit dated 13th March, 2020 and apply that the same be struck out and or dismissed with costs to the Defendant on the grounds that;

1. The Petition violates Section 133C (2), (6) & (8) of the Land Act, No. 6 of 2012, as amended 2019.
2. As a result, the Honourable Court lacks the requisite jurisdiction to hear and determine the Petition by virtue of Section 133C (2), (6) & (8) of the Land Act, No. 6 of 2012.

The same Preliminary Objection was raised in ELC No. 64 of 2019 where the parties are similar and the subject matter is the same.

This court has considered the Preliminary Objection and submissions therein. According to the Black Law Dictionary a Preliminary Objection is defined as being;

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made in the case of Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd. (1969) E.A. 696 where the court held that;

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurer 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 in 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 the issue. The improper practice should stop”

In the case of Attorney General & Another vs Andrew Mwaura Githinji & another (2016) eKLR the court outlined the scope and nature of preliminary objection as;

(i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. The Defendant has raised the issue of jurisdiction. I find that the filed preliminary objection by the Defendant herein was properly brought before the court.

The centrality of the concept of jurisdiction in Kenya's legal system cannot be gainsaid. Nyarangi JA outlined the significance of jurisdiction in the adjudication of civil disputes in *Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 in the following words:

" I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction

is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”

The Supreme Court of Kenya pronounced itself on the concept of jurisdiction in *Samuel Kamau Macharia & ano v Kenya Commercial Bank Limited & 2 others* [2012] eKLR 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. We agree with counsel for the first and second respondents in his submissions 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 proceedings. This court dealt with the question of jurisdiction extensively in *In the Matter of Interim Independent Electoral Commission (Applicant), Constitution Application Number 2 of 2011*. Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the*

constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

The jurisdiction of the ELC court flows from Article 162 (2)(b) of the Constitution of Kenya 2010. Section 13 (2) of the ELC Act vests this court with wide powers over any dispute relating to land it provides that;

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*

The Plaintiffs' claim is that the Defendants and their agents started trespassing on their parcels of land and threatening them that they were going to compulsorily acquire the land in order to set up Miwongoni Dam in Machakos County.

The Plaintiffs seek inter alia declarations that they are entitled to exclusive and unimpeded right of possession and occupation of the suit property. That the Defendants are not entitled to the same. A permanent injunction restraining the Defendants from occupying the suit property. An order of injunction and general damages.

The power of compulsory acquisition of private property by the state is provided under Article 40(3) of *the Constitution* of Kenya and provides that:

The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation — (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that— (i) requires prompt payment in full, of just compensation to the person; and (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law. (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under

clause (3) who may not hold title to the land. (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya. (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

Arising from the provisions of Article 40 (3), Parliament enacted Part VIII of the Land Act to provide for compulsory acquisition of interests in land. This part provides an elaborate framework for the exercise of the power of compulsory acquisition of land by the state. Part VIIIA provides a framework for adjudication of disputes relating to the state's exercise of power.

Section 111(1) of the Land Act provides that the National Land Commission shall regulate the assessment of such just compensation and prepare the award for compensation of such land that has been acquired. It also provides that If land is acquired compulsorily, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

Section 115 of the Land Act provides for the Payment of compensation and states that; After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall promptly pay compensation in accordance with the award to the persons entitled thereunder.

Further, Section 125 provides for the Payment of compensation and states that;The Commission shall, as soon as is practicable, pay full and just compensation to all persons interested in the land.

From the foregoing provisions of the law, it is clear that it is the duty of the National Land Commission to regulate the process of compulsory land acquisition and to promptly pay a just and full compensation. The question that arises is what action and in what forum a party dissatisfied with the process of acquisition, delayed payment or non-payment of compensation would take his/her complaint.

As stated earlier, Parliament established the Land Acquisition Tribunal under Part VIIIA of the Land Act for dispute resolution. Section 133C provides for the jurisdiction of the Tribunal and states that:

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.

Concerning this court's jurisdiction vis-a-vis the jurisdiction of the Tribunal on matters of compulsory acquisition, Section 133C (6) categorically vests the first instance jurisdiction in the Tribunal.

Sections 127, 128 and 148 (5) of the Land Act vests in the Environment and Land Court jurisdiction to hear and determine various matters under the Act.

Section 127 provides for references from the Commission of matters set out thereunder as follows;

*1.The Commission may at any time, by application in the prescribed form, refer to the Court for its determination any question as to—*a.the construction, validity or effect of any instrument*b.the persons who are interested in the land concernedc.the extent or nature of their interestd.the persons to whom compensation is payablee.the shares in which compensation is to be paid to tenants in common;f.the question of whether or not any part of a building is reasonably required for the full and unimpaired use of the building; org.the condition of any land at the expiration of the term for which it is occupied or used.*

Section 128 provides for the general reference of disputes to the Environment and Land Court stating that “Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination”

Parliament enacted Section 133 c (6) ousting the primary jurisdiction of this court to hear and determine the disputes on compulsory acquisition of interests in land and vested it in the Tribunal.

Parliament further enacted Section 133D of the Land Act, vesting in this court appellate jurisdiction in disputes relating to the exercise of the state’s power of compulsory acquisition in the following terms:

(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.

I find that Section 13 (2) (b) of the Environment and Land Court Act provides that this court has the power to hear and determine disputes relating to compulsory acquisition of land in the exercise of its jurisdiction under Article 162(2)(b) of the Constitution. The court's view is that the Section only confers appellate jurisdiction on this court taking into account Section 133C (6) and 133D of the Land Act. It is thus the Court's finding that the body or institution vested with the primary or first instance jurisdiction in dispute resolution in the matters of compulsory acquisition of interests in land under Article 40 of the Constitution of Kenya arising is the Land Acquisition Tribunal.

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.

In a more recent decision, the Supreme Court of Kenya in *NGOs Co-ordination Board vs 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.”

Be that as it may, in the circumstances of this case, the Plaintiffs argue that, first of all, at the time the suit was being filed, the Land Acquisition Tribunal, which is created by Section 133A of the Land Act, had not been operationalised. The Plaintiffs submitted that the Land Acquisition Tribunal was established in 2019

under Section 133A of the Land Act. It became operational in 2023. That the current suit was filed in 2019. That later the Land Act 2012 was amended vide gazette Supplement No. 137 (Act No. 15) dated 5th August 2019. This court takes judicial notice that, the Land Acquisition Tribunal came into effect on 11th September 2023, when its officials took their oath of office. Consequently, this court finds that the suits, which were filed 2019, were filed before Land Acquisition Tribunal came into existence. I find that it would not have been possible to file their cases before the said Tribunal as the same had not been operationalised. I therefore find that the preliminary objection is not merited and the same is dismissed. As mention earlier the same Preliminary Objection was raised in ELC No. 64 of 2019 where the parties are similar and the subject matter is the same. I therefore order that this ruling applies *mutatis mutandi* to ELC No. 64 of 2019. Costs to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MACHAKOS THIS 28TH DAY OF
JANUARY 2026.**

N.A. MATHEKA

JUDGE

ORIGINAL