

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC PETITION NO. E035 OF 2025

IN THE MATTER OF:
THE DOCTRINE OF EMINENT DOMAIN UNDER
ARTICLE 40(3) OF THE CONSTITUTION OF KENYA
AND THREATENED EXPROPRIATION OF L.R. NO.
209/21698 AND 209/21699 (FORMERLY 209/11293)
REGISTERED IN THE NAME OF SIMANDI

AND

IN THE MATTER OF:
COMPULSORY ACQUISITION OF INTERESTS IN
LAND L.R. NO. 209/11293/1 AND ALLEGED
COMPENSATION OF KES. 1,937,772,479 TO
ROSALINE NJERI MACHARIA FOR
CONSTRUCTION OF THE NAIROBI EXPRESSWAY
(AS ROAD PROJECT)

AND

IN THE MATTER OF:
ARTICLES 1(1), 2(2), 3(1), 10, 19(1), 20(1), 21(1), 22(1),
23(1), 34(1), 27(1), 28, 31(A)(B), 40(1), 47, 60, 64, 67(2),
232 OF THE CONSTITUTION OF KENYA

BETWEEN

SIMANDI INVESTMENTS LIMITED..... 1ST
PETITIONER

SIMON NYAMANYA ONDIBA2ND
PETITIONER

VERSUS

ROSALINE NJERI MACHARIA 1ST
RESPONDENT

NATIONAL LAND COMMISSION 2ND
RESPONDENT

KENYA NATIONAL HIGHWAYS
AUTHORITY (KeNHA) 3RD
RESPONDENT

ETHICS & ANTI-CORRUPTION
COMMISSION (EACC) 4TH
RESPONDENT

CHIEF LAND REGISTRAR 5TH
RESPONDENT

KENYA NATIONAL COMMISSION
ON HUMAN RIGHTS (KNCHR) 6TH
RESPONDENT

COMMISSION ON ADMINISTRATIVE
JUSTICE (CAJ) 7TH
RESPONDENT

RULING

1. Before this court for determination are three Notices of Preliminary Objection dated 16th June 2025, 9th July, 2025, and 10th July 2025 filed by the 1st, 3rd and 2nd Respondents respectively.

2. The objection in the 1st Respondent's Preliminary Objection dated 16th June, 2025 is premised on the grounds that:

- i. That pursuant to Section 133 C (6) of the Land Act, this Honourable Court lacks primary jurisdiction as the court of first instance to adjudicate matters relating to the process of compulsory acquisition of land and compensation thereof.*
- ii. This Petition and Application offends Section 6 of the Civil Procedure Act and the doctrine of sub judice as there exists a similar matter directly and substantially in issue, touching on the same property comprising of L.R. No. 209/11293/1 (Grant Number IR 65859) between the Petitioners and the 1st, 2nd and 3rd Respondents in Environment and Land Court Case No. 1035 of 2016: Simandi Investments Limited versus Rosaline Njeri Macharia, National Land Commission & Kenya National Highway Authority pending before a competent jurisdiction for adjudication and judicial consideration on the question of ownership of the suit property.*
- iii. Consequently, the Petition against the 1st Respondent herein should be struck out in limine with costs to the 1st Respondent.*

3. The 3rd Respondent's Preliminary Objection dated 9th July, 2025 is premised on the grounds that:

- i. This Honourable court lacks jurisdiction as a court of first instance to adjudicate matters relating to compulsory acquisition of land by dint of Section 133 (C)(2) & (6), Section 133(D) of the Land Act and Section 16(A) of the Environment and Land Court Act.*
- ii. This Honourable Court lacks jurisdiction to hear and determine the present application and accompanying suit as the same are directly and substantially res sub judice before another court of competent jurisdiction, viz, Environment and Land Court Case No. 1035 of 2016: Simandi Investments Limited v. Rosaline Njeri Macharia, National Land Commission & Kenya Highway Authority.*
- iii. The current application and accompanying suit are fatally and incurably defective and cannot stand in law.*
- iv. The continued pendency of this application and accompanying suit is an abuse of the court process of this Honourable Court.*

- v. ***The present application by the Applicant is calculated to, and, will embarrass the present court and make a mockery of both courts.***
 - vi. ***The current application and accompanying suit are therefore incompetently before this Court and should be dismissed in limine.***
4. The 2nd Respondent's Preliminary Objection dated 10th July, 2025 is premised on the ground that:
- i. ***This Honourable Court lacks jurisdiction to hear and make a determination on both the Notice of Motion Application dated 14th May 2025 and the Petition pursuant to Sections 133C (6) and (8) of the Land Act which provides that:***
 - 133C (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". (emphasis added)***
 - "133C(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.”

5. The parties canvassed their objections by way of submissions. The 1st Respondent through Counsel filed submissions on the 25th September, 2025. Counsel submitted that the preliminary objections satisfy the legal threshold set out in ***Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Limited [1969] EA 696***, as they raise pure points of law which, if upheld, are capable of disposing of the Petition without recourse to evidence.
6. Further, and as guided by the decision in ***Mwangi Stephen Muriithi vs Daniel T. Arap Moi & another [2017] eKLR***, they are argued on the assumption that the pleaded facts are correct, and do not invite the court to exercise discretion or ascertain contested facts.
7. Counsel submitted that in ***Owners of the Motor Vessel “Lillian S” vs Caltex Oil (Kenya) Ltd [1989] eKLR***, as well as the Supreme Court decisions in ***In the Matter of the Interim Independent Electoral Commission [2011] eKLR*** and ***Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others [2012] eKLR***, courts were categorical that a court’s jurisdiction flows strictly from the Constitution or statute and cannot be assumed or expanded by judicial interpretation.

8. Reference was additionally made to the cases of **Jamal Salim Yusuf Abdulla Abdi & another v Civil Appeal No. 103 of 2016 eKLR, Kakuta Maimai Hamisi v Pepino Rika & 2 Others [2013] eKLR** and **Giciri Thuo & 5 others v National Land Commission & 4 others [2022] eKLR**.
9. It was submitted that the jurisdictional framework established under **Sections 133C and 133D** of the **Land Act** is both hierarchical and exclusive, such that this court may only be approached after the Tribunal process has been exhausted.
10. Counsel argued that, pursuant to **Section 133C (6)** of the **Land Act**, the Land Acquisition Tribunal ought to have been the Petitioners' first port of call. Consequently, it was submitted, the Petition offends the doctrine of exhaustion of statutory remedies. In support of this position, reliance was placed on the decisions in **Speaker of the National Assembly vs James Njenga Karume [1992] eKLR, Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others [2015] eKLR**, and **William Odhiambo Ramogi & 3 others vs Attorney General & 4 others [2020] eKLR**.
11. It was urged that the Petitioners' attempt to invoke **Articles 22 and 40** of the **Constitution** does not oust the statutory framework, and that no exceptional circumstances had been demonstrated to justify by passing the Tribunal.

12. With respect to the doctrine of *sub-judice*, it was explained that the same is founded on **Section 6** of the **Civil Procedure Act** and prevents a court from litigating a matter in which the issues are substantially in issue in ongoing proceedings.
13. Counsel submitted that the subject matter of the Petition is directly and substantially in issue in **Environment and Land Court Case No. 1035 of 2016, Simandi Investments Limited vs Rosaline Njeri Macharia, National Land Commission & Kenya National Highways Authority**, which involves the same parties and the same parcel of land, L.R. No. 209/11293/1 (Grant No. IR 68559).
14. Reliance was placed on **Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR** on the purpose and application of the *sub judice* rule, as well as **Thiba Min Hydro Co. Ltd vs Josphat Karu Ndwiga [2013] eKLR**, for the principle that it is the substance of the dispute, rather than the form in which it is presented, that determines whether the doctrine applies.
15. Counsel submitted that the present Petition constitutes parallel litigation and that allowing it to proceed alongside the earlier suit will expose the court to the risk of issuing

conflicting decisions, contrary to the efficient use of judicial resources.

- 16.** The 2nd Respondent filed its submissions on 26th September 2025. Counsel relied on the settled principles governing preliminary objections as set out in **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696**, and as further clarified in **Attorney General & another v Andrew Mwaura Githinji & another [2016] eKLR**, to submit that the objection raised a pure point of law on jurisdiction.
- 17.** It was argued that the dispute concerns land identified for compulsory acquisition for the Nairobi Expressway Project, and that the constitutional and statutory mandate for compulsory acquisition vests in the National Land Commission under **Article 67** of the **Constitution** and **Part VIII** of the **Land Act**.
- 18.** It was submitted that Parliament, anticipating disputes arising from compulsory acquisition, established the Land Acquisition Tribunal under Part VIII A of the **Land Act**, and that **Section 133 C (6)** and **(8)** of the Act expressly requires such disputes to be referred to the Tribunal in the first instance.
- 19.** Counsel submitted that in **NGOs Co-ordination Board vs EG & 4 others; Katiba Institute (Amicus Curiae) (Petition No. 16 of 2019) [2023] KESC 17 (KLR)**, the

Supreme Court emphasized the importance of exhausting alternative remedies and the Court of Appeal in **Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others [2015] eKLR**, held that courts should be a fora of last resort where a statutory dispute resolution mechanism exists.

20. Further reliance was placed on **Albert Chaurembo Mumbo & 7 others vs Maurice Munyao & 148 others, SC Petition No. 3 of 2016 [2019] eKLR** and **United Millers Limited vs Kenya Bureau of Standards & 5 others (Petition (Application) No. 4 of 2021) [2021] KESC 72 (KLR), Karomo & Seinfert & others v Pamwhite Limited & another [2022] eKLR**, and **Samuel Kamau Macharia & another vs Kenya Commercial Bank Ltd & 2 others [2012] eKLR**.
21. It was additionally submitted that the Petition offends the doctrine of constitutional avoidance, as the issues raised could be resolved through the statutory framework under the Land Act. In that regard, Counsel relied on **Ibrahim Wakhanyanga & 2 others vs Chief Magistrate's Court Kakamega & 2 others; Attorney General & Land Registrar Kakamega (Interested Party) [2022] eKLR**, **Gabriel Mutava & 2 others vs Managing Director, Kenya Ports Authority & another [2016] eKLR**, and **Papinder Kaur Atwal vs Manjit Singh Amrit, Nairobi Petition No. 236 of 2011**, all of which affirmed that

constitutional jurisdiction should not be invoked where adequate statutory remedies exist.

22. On costs, the 2nd Respondent submitted that costs ought to follow the event guided by **Section 27** of the **Civil Procedure Act**, relying on *Party of Independent Candidates of Kenya vs Mutula Kilonzo & 2 others, High Court Election Petition No. 6 of 2013*, and urged the court to strike out the Motion and Petition dated 14th May 2025 in limine and award costs to the Respondents.
23. The 3rd Respondent filed submissions on 24th October, 2025. Counsel submitted that its objection raises a pure question of law as explained in *Aviation & Allied Workers Union Kenya vs Kenya Airways Limited & 3 others [2015] KESC 23 (KLR)*, being argued on the assumption that the pleaded facts are correct, and do not require the ascertainment of contested facts. Further, that the objections raise jurisdictional questions. Also cited were the cases of *Joho & another vs Shahbal & 2 others [2014] KESC 34 (KLR)*, and *Independent Electoral and Boundaries Commission vs Jane Cheperenger & 2 others [2015] eKLR*.
24. According to Counsel, this court lacks jurisdiction to entertain the Petition by virtue of **Sections 133 C (2), 133 C (6), and 133 D** of the **Land Act**, read together with **Section 16A** of the **Environment and Land Court Act**. It was argued that the Land Acquisition Tribunal, established

under **Part VIII** and **Part VIIIA** of the **Land Act**, is the forum of first instance for disputes relating to compulsory acquisition of land, including disputes on compensation, delays in payment, and ancillary constitutional complaints arising from the acquisition process.

25. Counsel relied on ***Kigathi vs Kenya National Highways Authority & another; National Land Commission (Interested Party) [2025] KEELC 993 (KLR)***, where the court held that disputes arising from compulsory acquisition must first be subjected to the inquiry and adjudicative mechanisms provided under the Land Act, with recourse to the Environment and Land Court only lying on appeal.
26. Similar reliance was placed on ***Kariuki vs National Land Commission & 2 others [2024] KEELC 5848 (KLR)***, where the court affirmed that the Tribunal enjoys primary jurisdiction, and that invocation of the Environment and Land Court before exhaustion of the Tribunal process is premature.
27. Counsel similarly submitted that the jurisdictional framework under the Land Act is hierarchical and exclusive, and that the Petitioners had failed to demonstrate that they had approached the Land Acquisition Tribunal or that any recognized exceptions to the exhaustion doctrine applied. Consequently, it was argued, the Petition had been prematurely filed, contrary to established principles on exhaustion of statutory remedies.

28. Further, it was submitted, the Petition contravenes **Section 6** of the **Civil Procedure Act**, being directly and substantially similar to Environment and Land Court Petition No. 1035 of 2016, involving the same parties and the same parcel of land, L.R. No. 209/11293/1 (Grant No. IR 68559). Reliance was placed on the Supreme Court decision in **Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) & others [2020] eKLR**, which articulated the elements necessary to establish sub judice and emphasized that the doctrine is intended to prevent parallel litigation and conflicting judicial outcomes.
29. On costs, Counsel submitted that, as expressed in **Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others [2014] eKLR**, and **Joseph Oduor Anode vs Kenya Red Cross Society [2012] eKLR**, costs follow the event and urged the court to award costs to the Respondents.
30. The Petitioner filed submissions on 12th November, 2025. Counsel submitted at the onset that the 1st Respondents pleadings ought to be struck out having been filed in violation of **Rule 15(2)** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, which requires a Respondent, upon service, to file a memorandum of appearance within seven days and thereafter file either a

replying affidavit or a statement setting out the grounds relied upon in opposition to the petition.

- 31.** It was submitted that upon service, the 1st Respondent did not file a memorandum of appearance. Instead, it filed grounds of opposition and a notice of preliminary objection both dated 16th June 2025.
- 32.** According to Counsel, the Petition dated 14th May 2025 challenges the conduct of the National Land Commission in relation to compensation allegedly paid in the sum of Kenya Shillings 1,937,772,479 in respect of L.R. No. 209/11293/1, which was described as an extinct title that had been subdivided into L.R. Nos. 209/21698 and 209/21699 registered in the name of Simandi Investments Limited and that the compensation was paid to the 1st Respondent in connection with the Nairobi Expressway (A8 Road) project.
- 33.** Counsel further submitted that the Petitioners' rights, including the right to property under **Article 40(3)** and the right to fair hearing and fair administrative action under **Articles 25(c)** and **47** of the **Constitution**, were violated by the Commission and the Respondents.
- 34.** It was also contended that despite the pendency of **Environment and Land Court Case No. 1035 of 2016, Simandi Investments Limited vs Rosaline Njeri Macharia, National Land Commission and Kenya National Highway Authority**, the Respondents proceeded,

clandestinely and without compliance with constitutional and statutory obligations, to effect compensation from public funds in respect of the disputed property. Counsel complained that the Commission has not commenced the process of refund under **Section 116** of the **Land Act**, notwithstanding the lapse of several years.

35. While acknowledging that jurisdiction is fundamental, Counsel relied on *Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR)* and *Phoenix of E.A. Assurance Company Limited vs S.M. Thiga t/a Newspaper Services [2019] KECA 770 (KLR)*, as well as *Macharia & another vs Kenya Commercial Bank Ltd & 2 others [2012] KESC 8 (KLR)*, for the proposition that jurisdiction is conferred by the Constitution or statute and must exist at the time a matter is filed.
36. Counsel further relied on *Mukisa Biscuits Manufacturing Co. v West End Distributors Ltd [1969] EA 696* and *Independent Gas Dealers' Association of Kenya v Energy & Petroleum Regulatory Authority & another; Alfa Gas Limited & 58 others (Interested Parties) [2025] KEHC 12738 (KLR)*, for the principle that a preliminary objection must raise a pure point of law and cannot be sustained where facts are contested or must be ascertained.
37. Counsel submitted that this court has jurisdiction under **Article 162(2)(b)** of the **Constitution** and **Section 13(2)**

of the **Environment and Land Court Act**, which expressly includes disputes relating to compulsory acquisition of land, land administration and management, and title to land. Counsel further cited **Section 13(3)** of the **Act** as vesting the court with jurisdiction to determine claims of violation of rights and fundamental freedoms relating to the environment.

- 38.** On the doctrine of exhaustion, Counsel submitted that it is anchored on **Article 159(2)(c)** of the **Constitution** and does not completely oust the jurisdiction of the court. Reliance was placed on **Ramogi & 3 others vs Attorney General & 4 others; Muslims for Human Rights & 2 others (Interested Parties) [2020] KEHC 10266 (KLR) and Republic vs Independent Electoral and Boundaries Commission ex parte National Super Alliance (NASA)**, for the position that courts may, in the interests of justice and in appropriate circumstances, permit a party to bypass a statutory forum, including where the alternative mechanism is inadequate or where insisting on exhaustion would defeat constitutional values.
- 39.** Counsel further submitted that where a matter is filed in court prematurely, the appropriate order ought not necessarily be dismissal, but could be transfer to the competent forum, citing the approach taken in **Thuo and 151 Others vs National Land Commission [2024] KEELC 608 (KLR)**.

40. Counsel argued that indeed, in matters of compulsory acquisition, the National Land Commission is the first forum and that **Section 112 of the Land Act**, requires the Commission to issue notices of inquiry to persons interested in the land and to conduct an inquiry to determine interests and compensation claims.
41. In the circumstances, however, the Commission did not issue a notice of inquiry to the Petitioners and the 1st Respondent failed to disclose the pending suit in ELC No. 1035 of 2016 to the Commission. As a consequence, the Commission could not, rely on the doctrine of exhaustion to defeat the Petition.
42. Also, Counsel stated, the Land Acquisition Tribunal's jurisdiction under **Section 133 C (1)** is triggered by an appeal against a decision of the Commission. As the Commission had not published a written decision on the compensation in issue, it was argued that the statutory timelines for approaching the Tribunal could not begin to run and that the Tribunal could not provide an effective remedy in the circumstances.
43. Counsel relied on ***Salat vs Independent Electoral and Boundaries Commission & 7 others [2014] KESC 12 (KLR)*** on the centrality of statutory timelines and submitted that the preliminary objections are intended to shield the Respondents from scrutiny concerning alleged unlawful payment of public funds.

44. Counsel further argued that exceptions to exhaustion apply in the present case, and relied on **Republic vs Council for Legal Education ex parte Desmond Tutu Owuoth [2019] KEHC 11742 (KLR)** for the proposition that courts must analyze the facts, the regulatory scheme, the nature of the interests involved, the level of public interest, and the adequacy of the statutory forum before declining jurisdiction.
45. On *sub judice*, Counsel submitted that the objection under **Section 6** of the **Civil Procedure Act** is not properly taken by way of a preliminary objection because it raises factual issues requiring evidence, and ought to have been raised through a Motion supported by affidavit evidence. Counsel submitted that in any event, **Section 6** does not provide for striking out of a suit but for stay of proceedings, and reliance was placed on **Thiba Min Hydro Co. Ltd vs Josphat Karu Ndwiga[2013] eKLR.**
46. Counsel further submitted that the Petition is distinct from the previously instituted suit. It was argued that the earlier suit in **ELC No. 1035 of 2016**, filed by Plaintiff, sought injunctive relief in respect of the parcels L.R. Nos. 209/21698 and 209/21699, while the present Petition seeks, among other reliefs, declarations that L.R. No. 209/11293/1 was not compulsorily acquired and that the compensation paid in the sum of Kenya Shillings 1,937,772,479 was unconstitutional and ought to be refunded under **Section 116** of the **Land Act**.

47. Further, it was submitted, the Petition raises questions of fair administrative action, constitutional accountability, and the Commission's failure to discharge statutory duties, and involved additional parties, including constitutional commissions, sued for alleged abdication of constitutional obligations.
48. Counsel also referred to the 2nd Petitioner's alleged harassment through criminal proceedings connected to the same property and submitted that the Petition raises serious issues of justice, transparency and accountability. It was contended that despite completion of the Nairobi Expressway without affecting the subject land, the Commission declined to demand repayment of the public funds under **Section 116** of the **Land Act**.
49. Counsel therefore urged the court to find that it has jurisdiction to determine the Petition, including questions arising under **Section 116** of the **Land Act**, **Article 40(3)** of the **Constitution**, and **Article 47**, and to dismiss the objections with costs to the Petitioners.
50. The parties, through Counsel highlighted their submissions on the 19th November, 2025. The court has considered the said highlights.

Analysis and Determination

51. Having considered the preliminary objection and submissions, the issues that arise for determination are:

- i. *Whether the 1st Respondents' Preliminary Objection dated the 16th June, 2025 should be struck out?*
- ii. *Whether the Preliminary Objections are competent?*
- iii. *And if so, whether the Preliminary Objections are merited?*

52. The Petitioners urge that the 1st Respondent's pleadings should be struck out the same having been filed without authority. They cite **Rule 15 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, Legal Notice 117 of 2013** which provides as follows:

"The Attorney-General or any other State organ shall within fourteen days of service of a petition respond by way of a replying affidavit and if any document is relied upon, it shall be annexed to the replying affidavit.

(2)(a) A respondent not in the category of sub-rule (1) shall within seven days file a memorandum of appearance and either a—(i) replying affidavit; or (ii) statement setting out the grounds relied upon to oppose the petition.

(b) After filing either of the documents referred to in sub-rule (2)(a), a respondent may respond by way of a replying affidavit or provide any other written document as a response to the petition within fourteen days. (3) The respondent may file

a cross-petition which shall disclose the matter set out in rule 10(2)."

- 53.** Indeed, this provision, together with the basic tenets of litigation, requires that pleadings be filed with due authority, which authority is ordinarily evidenced by the filing of a notice of appointment or a memorandum of appearance, as the case may be. In the present case, it is not disputed that the 1st Respondent's advocate, Triple O.K. Advocates, only filed a notice of appointment on 18th November 2025, despite having earlier filed a notice of preliminary objection and submissions thereto in June and September 2025 respectively.
- 54.** Whereas this omission was clearly unprocedural, the court does not consider it to be fatal to the proceedings, particularly in view of the fact that the defect was subsequently rectified by the filing of the notice of appointment. The court is persuaded to invoke **Article 159(2)(d) of the Constitution**, which enjoins courts to administer justice without undue regard to procedural technicalities.
- 55.** By the present objections, the Respondents contend that this court lacks jurisdiction to entertain the Petition on two grounds: first, that the doctrine of exhaustion of statutory remedies has been violated; and second, that the suit offends the principle of *res sub judice*. The preliminary issue for

determination is whether these objections meet the threshold of a proper preliminary objection.

56. As correctly submitted by the parties, the parameters of a preliminary objection were authoritatively set out by the Court of Appeal in the *locus classicus* case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors (1969) EA 696** at page 700, where Law, JA stated:

“...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.”

57. Newbold, P further held:

“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. The improper raising of points by way

of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop.”

58. The Supreme Court in the case of **Hassan Ali Joho & Another vs Suleiman Said Shahbal & 2 Others [2014] eKLR** re-affirmed the principle as set out in the **Mukhisa Case(supra)** stating:

“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.”

59. As aforesaid, the objection herein is stated to be premised on two issues, *to wit*, breach of the doctrines of *sub judice* and

exhaustion. Sub judice is a legal concept codified under **Section 6** of the **Civil Procedure Act**. It provides thus:

“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”

- 60.** It is clear that the doctrine of *res sub judice* goes to the jurisdiction of the court, as it operates to bar a court from proceeding with a matter where the issues in dispute are directly and substantially the same as those in a previously instituted suit between the same parties, or parties litigating under the same title, and where such earlier suit is still pending before a court of competent jurisdiction.
- 61.** As to whether the same can be brought by way of preliminary objection, the court relies on the exposition by the Court of Appeal in **John Florence Maritime Services Limited & Conken Cargo Forwarders Limited vs Cabinet Secretary for Transport and Infrastructure, Attorney General, Kenya Maritime Authority & Office De Gestion Du Freit Maritime (OGFREM)** which, albeit discussing the related concept of *res judicata*, noted thus:

“There is no legal requirement or factual basis for the submission that the doctrine must only be invoked and or ventilated through a formal application. It can be raised through pleadings as well as by way of preliminary objection.”

- 62.** In the circumstances, the court notes that the pleadings in respect of **Environment and Land Court Case No. 1035 of 2016: Simandi Investments Limited v. Rosaline Njeri Macharia, National Land Commission & Kenya Highway Authority** which case has been admitted have been annexed to the Petition.
- 63.** As such the court is merely comparing the proceedings herein *vis* the proceedings in that matter in bid to determine whether the principle of sub judice has been contravened. The plea has as such been properly brought.
- 64.** As regards breach of the doctrine of exhaustion, this is a principle that requires courts to refrain from entertaining matters which can be properly resolved through an existing statutory framework. In **Speaker of the National Assembly v Njenga Karume [2008] 1 KLR 425**, the court held that where there exists a clear procedure for redress under statute, that procedure ought to be followed. The Court of Appeal restated this principle in **Geoffrey Muthinja Kabiru & 2 others vs Samuel Munga Henry & 1756 others [2015] eKLR**, thus:

“It is imperative that where a dispute resolution mechanism exists outside Courts, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first port of call the moment a storm brews...The exhaustion doctrine is a sound one and 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 own interest within the mechanisms in place for resolution outside the Courts.”

65. An inquiry in this regard does not call for the resolution of contested facts or the exercise of discretion, but rather entails a legal evaluation of the forum invoked *vis-à-vis* the forum prescribed by statute. This too has been properly brought.

Whether the Preliminary Objections are merited?

66. As aforesaid, the Respondents plead that the present Petition offends both the doctrines of *res sub judice* and exhaustion of statutory remedies. They argue that the core issues raised herein, including ownership of L.R. No. 209/11293/1 and the lawfulness of compensation, are directly and substantially in issue in **ELC No. 1035 of 2016**, which is pending between the same parties, and that allowing the Petition to proceed

would amount to parallel litigation and risk conflicting judicial outcomes.

- 67.** On exhaustion, the Respondents maintain that disputes arising from compulsory acquisition fall within the primary jurisdiction of the National Land Commission and the Land Acquisition Tribunal under **Sections 112 and 133C** of the **Land Act**, and that the Petitioners ought to have first pursued those statutory mechanisms before invoking this court's jurisdiction.
- 68.** On its part, the Petitioner contends that the doctrines of *res sub judice* and exhaustion do not apply in the circumstances of this case, arguing that the Petition raises distinct constitutional and statutory questions concerning the legality of the compensation process, the alleged unlawful disbursement of public funds, and the Respondents' failure to comply with mandatory procedures under the Land Act, matters which are not conclusively determined in ELC No. 1035 of 2016.
- 69.** The Petitioner further asserts that the National Land Commission did not issue a notice of inquiry or a written decision on compensation capable of triggering the Tribunal's jurisdiction, and that, in the absence of such a decision, the exhaustion doctrine cannot be invoked to defeat the Petition.

70. Beginning with the question of *res sub judice*, this principle as aforesaid, is codified in **Section 6** of the **Civil Procedure Act** and prevents a court from litigating a matter in which the issue, is substantially in issue in another suit, before a competent court and between the same parties and/or their representatives.
71. Speaking to its rationale, the Supreme Court in ***Kenya National Commission on Human Rights vs Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties [2020] eKLR*** stated:

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to

invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

72. Vide the present petition, the Petitioners, Simandi Investments and Simon Nyamanya seek as against the Respondents, Roseline Njeri Macharua, the National Land Commission Kenya, Ethics and Anti-corruption Corruption, Chief Land Registrar, KNCHR, and Commission of Administrative Justice *inter-alia* declarations that the subject suit property was not compulsorily acquired under **Article 40(3)** of the **Constitution** and **Part VIII** of the **Land Act 2012**; that Kes. 1,937,772,479 was unconstitutionally and unlawfully awarded to the 1st Respondent and should be recovered back to the national coffers and that the Respondent's jointly and severally violated their rights under **Article 25(c), 27(1)(2), 40(1), 47** and **50(1)(2)(o)** of the **Constitution of Kenya**. They also seek compensation and exemplary damages.

73. It is the Petitioner's case that they purchased the suit property being L.R 209/11293/1 sometime in 1994; that the property was thereafter sub-divided and transferred into the name of Simandi Investments and that sometime in 2016,

they discovered the 1st Respondent had trespassed on the parcel and an impasse prompted the filing of ELC 1035 of 2016.

- 74.** Despite the pendency of the suit, he stated, the 2nd Respondent awarded the 1st Respondent for compulsory acquisition of his property. This, despite the fact that not only does the property not belong to her, but that the project did not pass through the subject property. He asserts that the foregoing violated his constitutional rights.
- 75.** In ELC 1035 of 2016, the Plaintiff, Simandi Investments vide the Amended Amended Plaint dated 17th March, 2021, seeks as against Roseline Njeri Macharia, National Land Commission, and KENHA, permanent injunctive reliefs restraining any interference with L.R.209/21698 and L.R No.209/21699 or its mother title L.R No.209/11293/, a declaration that the Plaintiff is the legitimate and registered owner of parcels L.R.209/21698 and L.R No.209/21699 or its mother title L.R No.209/11293/1 and that the purported sale and transfer to the 1st Defendant is fraudulent and should be cancelled.
- 76.** The Plaintiff also seeks permanent injunctive orders restraining the release of compensation to the 1st Defendant and the return of any compensation received therefrom. Also sought is an order that the 1st Defendant participated in an illegally demonstrated scheme.

- 77.** The Plaintiff's case is that it is the registered proprietor of all that parcel of land known as L.R. No. 209/21698 measuring 2.9640 hectares and L.R. No. 209/21699 originally measuring approximately 0.725 hectares, both of which resulted from a subdivision of the mother title L.R. No. 209/11293/1. Notwithstanding this, the 1st Defendant lays claim to ownership of the properties on the basis that she allegedly purchased the same.
- 78.** According to the Plaintiff, Gazette Notice No. 6601 dated 4th September, 2020 was published by the National Land Commission on behalf of the Kenya National Highways Authority (KeNHA), gazetting the 1st Defendant as the registered owner of land known as L.R. No. 209/11293/1 for purposes of the Nairobi Expressway (A8) Road Project.
- 79.** It was contended that Gazette Notice No. 6602 of the same date, similarly titled Nairobi Expressway (A8) Road Project, invited the 1st Defendant, Roseline Njeri Macharia, to lodge a claim for compensation in respect of the suit land.
- 80.** The Plaintiff in ELC 1035 of 2016 contends that the said Gazette Notices and the subsequent processes, including the inquiry, award, and assessment of compensation in favour of the 1st Defendant, were contrary to law, breached his proprietary rights, *ultra vires* the powers of the 1st and 2nd Defendants, and therefore illegal, null and *void ab initio*.

81. In light of the foregoing, the question that arises is whether the matter herein is directly and substantially in issue in ELC No. 1035 of 2016. The term “*matter*” refers to the subject matter for determination in a legal proceeding, and not to the proceeding itself. This position was articulated by the Supreme Court in **Re the matter of the In the Matter of the Interim Independent Electoral Commission (Applicant) [2011] KESC 1 (KLR) (20 December 2011)**, which, cited with approval the Australian decision in **Re Judiciary Act 1903-1920 & In re Navigation Act 1912-1920 (1921) 29 CLR 257**, where it was held:

“... we do not think that the word “matter” ... means a legal proceeding, but rather the subject matter for determination in a legal proceeding. In our opinion there can be no matter...unless there is some right, duty or liability to be established by the determination of the court...”

82. Although the Petition is couched in the language of constitutional violations and public law remedies, it is anchored on the same factual foundation as the earlier civil suit, namely the claim that the 1st Respondent has no lawful title to L.R. No. 209/11293/1, and that the National Land Commission and KeNHA acted unlawfully in gazetting and compensating the 1st Respondent for the land.

83. Indeed, both matters call for a determination of substantially identical questions, being, who between the Petitioners and

the 1st Respondent holds a valid interest in the suit land; and consequently, whether the award and payment of compensation to the 1st Respondent was valid and the consequences thereof.

- 84.** These questions lie at the heart of the civil suit and are yet to be resolved. The constitutional claims now raised are therefore not severable from the issues in that suit. To permit the Petition to proceed in parallel would expose the court to the risk of issuing conflicting findings on the same subject matter and would undermine the orderly administration of justice.
- 85.** In the circumstances, notwithstanding the constitutional form in which the present proceedings are cast, the substance of the dispute remains the same, and the Petition is caught by the doctrine of *res sub judice* within the meaning of **Section 6** of the **Civil Procedure Act**.
- 86.** This being so, the court is mandated to stay the present proceedings guided by the exposition by the Court of Appeal in ***Kiki Investments Ltd & 2 others vs Insurance Regulatory Authority (Civil Appeal 381 of 2017) [2024] KECA 1316 (KLR) (27 September 2024) (Judgment)***, and the Supreme Court in ***Kenya National Commission on Human Rights vs Attorney General & 17 Others [2020] eKLR*** thus:

“Starting with the doctrine of sub judice, it is codified in section 6 of the Civil Procedure Act and bars the courts from entertaining a suit where there is an earlier suit pending for hearing and determination before a court of competent jurisdiction and involving the same parties and substantially the same dispute. Where there is an earlier pending suit, the court is required to stay the hearing of the latter suit to await determination of the first suit in time. The rationale behind the sub judice rule is simply that a party cannot be allowed to file a multiplicity of suits on the same issue which is yet to be determined.”

- 87.** For purposes of completeness, the court now turns to consider the second limb of the objection, namely the doctrine of exhaustion. The Respondents’ position is that the Petitioner ought first to have invoked the internal dispute resolution framework established under **Sections 133A and 133C** of the **Land Act**, which created the Land Acquisition Tribunal as a specialized forum for disputes arising from compulsory acquisition.
- 88.** Under **Section 133 C** of the **Land Act**, the Tribunal is vested with jurisdiction to hear and determine appeals arising from decisions of the National Land Commission in matters relating to the process of compulsory acquisition of

land. **Subsection (2)** provides that a person dissatisfied with a decision of the Commission may, within thirty days of such decision, apply to the Tribunal for redress, while **subsection (3)** requires the Tribunal to hear and determine such application within sixty days of its filing.

- 89.** The statutory scheme thus contemplates the existence of a formal and ascertainable decision by the Commission as the trigger for the Tribunal's appellate jurisdiction.
- 90.** Further, **Section 133 D** of the **Land Act** confers jurisdiction upon this court to hear appeals from the decisions of the Tribunal, thereby establishing a hierarchical dispute resolution framework in which the Tribunal is the forum of first instance and this court exercises appellate and supervisory jurisdiction over its determinations.
- 91.** In the circumstances of the present case, however, the court is not persuaded that the dispute presented by the Petition is one that falls squarely within the jurisdiction of the Tribunal as contemplated under **Section 133C**. The gravamen of the Petition is not merely dissatisfaction with the quantum or process of compensation per se, but rather, a contestation of ownership of the suit property and the legality of the compensation paid in respect thereof. The compensation dispute is thus inextricably intertwined with, and indeed arises from, the unresolved question of title to the suit property.

92. This distinction was aptly captured by the Land Acquisition Tribunal in *Esmail vs Abdeel Enterprises Limited & 3 others (Tribunal Case No. E016 of 2025) [2025] KELAT 173 (KLR) (21 July 2025) (Ruling)*, where it observed:

“We take cognizance, however, that in compulsory acquisition of land, other disputes might arise that touch on ownership of the property subject to compulsory acquisition or shareholding in an entity whose property is being acquired. Those are disputes that would lie in other forums.”

93. This pronouncement underscores that while the Tribunal is competent to deal with disputes strictly arising from the process and quantum of compensation, questions of ownership and title fall outside its remit and are properly determined by courts vested with jurisdiction over land titles.

94. Accordingly, the court finds the preliminary objections dated 16th June, 2025, 9th July, 2025 and 10th July, 2025 to be partly merited and directs as follows:

a. The Petition and Motion dated 14th May, 2025 are hereby stayed pending the hearing and determination of ELC 1035 of 2016.

b. The parties shall bear their own costs.

Dated, signed and delivered virtually in Nairobi this 19th day of February, 2026.

O. A. Angote
Judge

In the presence of ;

Mr. Arunda for the Petitioner

Mr. Okoth for the 1st Respondent

Ms Ocholla for Ms Wairimu for the 4th Respondent

Mr. Atalo for Maalim for the 3rd Respondent

Mr. Odoyo for the 2nd Respondent

Court Assistant: Tracy

ORIGINAL