



Kigathi v Kenya National Highways Authority & another; National Land Commission (Interested Party) (Environment & Land Petition E062 of 2024) [2025] KEELC 993 (KLR) (28 February 2025) (Ruling)

Neutral citation: [2025] KEELC 993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E062 OF 2024
JG KEMEL, J
FEBRUARY 28, 2025**

BETWEEN

DAVID NJUGUNA KIGATHI PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

THE NATIONAL LAND COMMISSION INTERESTED PARTY

RULING

(In respect of the 1st Respondent's Preliminary Objection dated 17/9/24 and the Petitioner's Notice of Motion dated 30/9/24)

Background

1. The Petitioner instituted this suit vide the Petition dated 24/7/24 seeking for orders inter alia that;
 - a. a declaration that the Petitioner's right to property under Article 40 of *the Constitution* has been violated;
 - b. the award of compensation in the sum of Kshs. 38,997,000/= be set aside;
 - c. an order of mandamus be issued directing the Respondents to conduct fresh valuation of Muguga/Gitaru/1383 (suit land) to determine the current market value of the said property as four years have lapsed since the last valuation, to ensure just compensation;



- d. the 1st Respondent be directed to deposit with the Interested Party the compensation funds as stipulated under Section 111(1A) of the Land Act, to be released to the Petitioner 45 days after determining the current market value of the suit property.
2. The Petitioner's case is that the Interested Party on behalf of the 1st Respondent vide various Gazette Notices issued in 2020 expressed interest in acquiring the suit land measuring approx 0.226 ha of land parcel known as Muguga/Gitaru/ 1383 belonging to the Petitioner for James Gichuru Junction-Rironi Junction(A104/B3) road project.
 3. Subsequently an inquiry claims of those affected was carried out by the Interested Party. The Petitioner was one of those who successfully presented their claims.
 4. Upon conclusion of the inquiry relating to the compulsory acquisition of the suit land, the Interested Party on 29/3/21 awarded the Petitioner a sum of Kshs. 38,997,000/= as compensation for the acquisition. However, the said compensation is yet to be paid to the Petitioner 4 years later.
 5. The Petitioner contends that compensation based on a valuation conducted in the year 2020 cannot be considered as just compensation due to the passage of time. He avers that despite several demands, the Respondent has failed, refused and neglected to carry out its obligation as required in law. As a result, he has suffered loss and damage on account of default in timely payment of compensation.
 6. Simultaneously the Petitioner filed a motion dated 30/9/24 anchored on the provisions of Sections 1A, 3A of the Civil Procedure Act, Section 13 (5) of the Environment and Land Court Act, Section 111(1) (1A) of the Land Act, Section 146 of the Public Health Act and Order 50 Rule 6 of the Civil Procedure Rules seeking the following orders that; -
 - a. The Honourable Court be pleased to issue an order of injunction restraining the 1st and 2nd Respondents whether jointly or severally, by themselves, their servants, agents, contractors or whomsoever from entering upon or remaining on Muguga/ Gitaru/1383, the suit property, or in any way interfering with the peaceful quiet possession and enjoyment of the property by the Petitioner/Applicant pending the hearing and determination of the Petition.
 - b. The costs of the application be provided for.
 7. The application is premised on the grounds on the face of it and the Petitioner's supporting Affidavit sworn on 30/9/24. In summary, the Petitioner restates the averments contained in the Petition as summarized above. The Petitioner further avers that he has been unable to utilize the suit property after being Gazetted. He states that the sum awarded as compensation included funds for exhumation of his relative's body buried on the suit property so as to bury it elsewhere. However, due to the delay in effecting the payment, he has not been able to exhume the body thus exposing him to immense loss and damage.
 8. The Petitioner deposes that although the Road Project had stalled the construction has since resumed. He contends that he stands to suffer the risk of having his property acquired without being compensated as well as the emotional turmoil of not being able to exhume his kin's body and afford it a decent re-interment. He reiterates that despite numerous demands, the Respondent has not acted as demanded. That it is therefore in the interest of justice that the orders sought be granted to restrain the Respondents from interfering with his proprietary rights.
 9. In response thereof, the 1st Respondent filed a Preliminary Objection dated 17/9/24 whereas the Interested Party filed a Replying Affidavit deponed by Brian A. Ikol sworn on 22/1/24.



The Preliminary Objection dated 17/9/24

10. The 1st Respondent objects to the jurisdiction of this court in determining the instant Petition on the following grounds that;
 - a. This Honourable Court lacks jurisdiction to hear and determine the Petition as filed.
 - b. The present Petition arises out of a Decision of the National Land Commission relating to compulsory acquisition of land.
 - c. Section 113 C of the Land Act, 2012 bestows upon the Land Acquisition Tribunal jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
 - d. As eloquently explained in the case of Speaker of the National Assembly –vs- Njenga Karume (1992) eKLR, where there is a clear procedure for redress of any particular grievance, prescribed under the Constitution or Statute, that procedure must be strictly followed.
 - e. The Petitioner has not exhausted the dispute resolution mechanism provided by Section 133C of the Land Act 2012.
 - f. The Honourable Court thus, lacks the requisite jurisdiction to entertain the present Petition.
 - g. A party cannot forum shop and seek to gain unfair leverage over another party by instituting proceedings where jurisdiction does not lie.
 - h. The Petition as filed is therefore bad in law and constitutes an abuse of the court process.

Interested Party's Replying Affidavit

11. The Interested Party admits that indeed pursuant to Gazette Notices attached to the Application, the 1st Respondent acquired the Petitioner's property by way of compulsory acquisition. That the suit property is being used for the construction and expansion of James Gichuru Junction-Rironi Junction road project. The deponent confirms that indeed the Applicant was awarded a sum of Kshs. 38, 997,000/= as compensation for the acquired property and that the said sum has not been remitted to the Interested Party hence the delay in compensation.
12. The deponent deposes that in view of the ongoing construction of the road on the suit property, a temporary order of injunction cannot issue. That the assertion by the Applicant that he stands to suffer irreparable loss owing to the delayed compensation is not backed by any evidence. That the public interest risks to be adversely undermined should the court issue the injunctive orders sought.
13. He further contends that this Court lacks the requisite jurisdiction to hear and determine this matter. Consequently, the Interested Party prays that the matter be dismissed with costs.

Directions

14. On 3rd February, 2025, the Court directed that the Preliminary Objection and the application be canvassed by way of written submissions. Parties were directed to file their written submissions within 14 days and by close of business on 14/2/25. The Petitioner and the Interested Party complied. The Petitioner filed two sets of submissions both dated 13/2/25 whereas the Interested Party's submissions are dated 11/2/25.



15. Surprisingly, the 1st Respondent, the primary objector failed to comply with the directions of the Court. However, considering that the Preliminary Objection touches on the jurisdiction of the court, I will first determine it as the outcome thereof will determine the fate of the petition and or the application.

Petitioner's submissions on the Preliminary Objection

16. The Petitioner identified two main issues for determination. The first issue is whether Section 133 C of the Land Act, 2012 is applicable to the dispute herein. The Petitioner submits that the provisions of Section 133C of the Land Act do not apply to the dispute herein as the orders sought are outside the ambit of the Land Acquisition Tribunal. He submits that the jurisdiction of the Land Acquisition Tribunal is invoked where there is a dispute in the process of compulsory acquisition. That in the instant suit, it is not in dispute that the Interested Party compulsorily acquired the suit property and an award made. That there was no contestation or dispute in the process of acquisition requiring an appeal.
17. Further, that the case does not fall under the ambit of Section 127 on matters to be referred to the court by the National Land Commission nor Section 148 (5) on compensation in respect of a public right of way. It is submitted that the Petitioner's case is that of refusal to pay compensation after acquiring the property hence infringing on his constitutional rights. The Tribunal has no jurisdiction to hear disputes involving refusal to pay the awarded compensation to the beneficiaries. Counsel further cites the case of Sato Nyumbaz Limited –vs- National Land Commission (Tribunal Case E012 of 2024) (2024) where the court citing Section 133 C (5) on a matter relating to compulsory acquisition of land held that the Tribunal's jurisdiction, therefore, extends to any matter that is connected to the process of compulsory acquisition.
18. On concurrent jurisdiction, the Petitioner cites the Supreme Court case of Steyn –vs- Ruscone (Application 4 of 2012) (2013) KESC 11 (KLR) where the superior court held that where more than one court has jurisdiction over the same subject matter and within the same territory, a litigant has the right to choose in which court to file the action. Counsel submits that therefore, even where the Land Acquisition Tribunal has in the past handled matter related to compulsory jurisdiction, such events would not oust the jurisdiction of this Court.
19. The second issue is whether this Court has jurisdiction to hear and determine the Petition. The Petitioner submits that Article 162 (2) (b) of the Constitution, Section 13 of the Environment and Land Court Act and Section 128 of the Land Act, 2012 clothes this Court with the Original jurisdiction to determine disputes relating to compulsory acquisition. Therefore, the Court is well placed to hear and determine the Petition and the application. The Petitioner therefore urges the Court to dismiss the Preliminary Objection with costs.

Interested Party's submissions

20. The Interested Party identified the issue for determination as to whether this Court has jurisdiction to hear and determine the present application. That the jurisdiction of this Honourable Court flows either from the Constitution or legislation or both. That this Court's jurisdiction has been faulted on the premise that the Plaintiff/Applicant ought to have exhausted all the remedies under the Land Act, 2012, including but not limited to the Land Acquisition Tribunal.
21. The Interested Party cites the provisions of Section 111(1), 115 and 125 of the Land Act and avers that it is its duty to regulate the process of compulsory land acquisition and to promptly pay a just and full compensation. That the Land Acquisition Tribunal was established under Section 133C to



resolve disputes where a party is dissatisfied with the process of acquisition, delayed payment or non-payment of compensation. Counsel cites the case of *Mulu & 55 others -vs- National Land Commission & 2 others* [2024] KEELC 5482 (KLR), where the Court held that the Land Acquisition Tribunal has jurisdiction in the first instance to hear and determine disputes in the matters of compulsory acquisition.

22. Counsel submits that the Supreme Court in *GNC NGOs Co-ordination Board –vs- EG & 4 Others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019)* [2023] KESC 17 (KLR) outlined the doctrine of exhaustion of administrative remedies and adopted its finding in *Albert Chaurembo Mumbo & 7 Others -vs- Maurice Munyao & 148 Others; SC Petition No 3 of 2016*, [2019] Eklr where the court held that:

“...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

23. That the issue herein being that of delayed compensation for compulsorily acquired parcel, the Petitioner ought to have exhausted the available remedies before the Land Acquisition Tribunal. Consequently, the application and the main suit ought to be dismissed for want of jurisdiction.

Analysis and determination

24. Having considered the Preliminary Objection, the parties’ respective rival submissions and the pleadings filed herein I find that the issues arising for the determination are follows: -

- a. Whether the Preliminary Objection raises pure points of law.
- b. Whether the Court has jurisdiction to hear and determine this suit.

a. Whether the Preliminary Objection raises pure points of law.

25. The starting point is to evaluate what constitutes a preliminary objection. In the case of *Hassan Ali Joho & Another -Vs- Suleiman Said Shabal & 2 Others* SCK Petition No. 12013[2014] eKLR, the Supreme Court restated the definition in the case *Mukhisa Biscuit Manufacturers Ltd vs West End Distributors Ltd (1969) E.A* where the Court of Appeal said 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. 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.”

26. The test to be applied in determining a proper preliminary objection can be deduced as follows; -
- i) A preliminary Objection must be a pure point of law which if argued may dispose of the entire suit.
 - ii) A Preliminary Objection should be based on the presumption that the pleadings and or facts as pleaded by the opposite side are correct or agreed facts.



- iii) A Preliminary Objection cannot be entertained where;
 - a. The facts are disputed/contested.
 - b. The facts are liable to be contested.
 - c. Facts are to be proved through process of evidence.
 - d. What is sought is an exercise of judicial discretion.
27. In the instant objection, the 1st Respondent's/Objector has averred that the Court lacks Jurisdiction to deal with the instant suit as the suit is premised on the grounds that the Petitioner has not exhausted the available remedies before filing the suit herein. I find that this is a jurisdictional issue and the Court finds and holds that the Notice of Preliminary Objection as raised by the 1st Respondent's/Objector meets the test of what amounts to a Preliminary Objection. It raises pure points of law and can be determined without ascertainment of facts from elsewhere.

b. Whether the Plaintiff/ Applicant has exhausted the existing Dispute Resolution Mechanisms before invoking the Jurisdiction of the Court.

28. It is an elementary principle of law that a court cannot adjudicate on matters in which it lacks jurisdiction. The jurisdiction of the court is derived from *the Constitution* or Statute or both. If a court finds that it lacks jurisdiction to hear and determine a matter, it is obligated to halt the proceedings. It cannot expand or arrogate to itself jurisdiction which is not conferred upon it by the law. This position was stated by the Supreme Court in the case of Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 Others (2012) eKLR.
29. Jurisdiction of this Court flows from Article 162 (2) (b) of *the Constitution* of Kenya which establishes the Environment and Land Court, a Court of equal status with the High Court and empowered to hear and determine disputes relating to the environment and the use and occupation of, and title to land
30. In giving effect to Article 162(2)(b) of *the Constitution* of Kenya, Parliament enacted the *Environment and Land Court Act* which provides as follows under Section 13 (2) that;
- (2) 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.”
31. It is also trite that where Parliament has provided a forum to adjudicate a matter, that forum ought to be given the opportunity to carry out its duty. This is also called judicial restraint or exhaustion of existing mechanisms. Regarding the doctrine of exhaustion, the Supreme Court of Kenya explained



the importance of the doctrine in the case of Benard Murage -vs- Fine Serve Africa Limited & 3 Others [2015] eKLR in the following words:

“Where there exists an alternative remedy through statutory law, then it is desirable that such statutory remedy should be pursued first.”

32. Most recently, the Supreme Court in NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) [2023] KESC 17 (KLR), made the following pronouncement on the doctrine of exhaustion:

“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”.

33. The apex court in the case of Benson Ambuti Adegga –vs- Kibos Distillers Ltd & 5 Others [2020] eKLR emphasized that, where appropriate, the superior Courts should remit the dispute to the relevant bodies for adjudication. These decisions from the superior Court are undoubtedly binding on this Court.

34. The *Land Act* makes elaborate provisions for the compulsory acquisition dispute resolution mechanisms. Section 133A of the *Land Act* (revised in 2019) establishes the Land Acquisition Tribunal.

35. The jurisdiction of the Tribunal is provided for, primarily, under Section 133C which I reproduce herewith, verbatim:

133C. Jurisdiction of the Tribunal

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.
 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.
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 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.

36. In the instant suit, it is not in dispute that the Interested Party on behalf of the 1st Respondent, acquired the Petitioner's property by way of compulsory acquisition. What is undisputed is that the suit property is being used for the construction and expansion of James Gichuru -Rironi Junction road project. That the Petitioner was awarded a sum of Kshs. 38, 997,000/= as compensation for the acquired property is commonly acknowledged. However, his main contention is that; the award has never been honoured 4 years later; due to the delay of 4 years in making the payment, the previous award of Kshs 38,900,000/- ceased to be prompt and just payment and now wants the court to order the determination of the current value of the property and pay; his rights to property have therefore been violated.

37. Section 133D of the *Land Act*, vests in this court appellate jurisdiction and states as follows;

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.



38. Part VIII and Part VIIIA of the *Land Act* states that disputes relating to propriety and claims for compensation by persons interested in land which is the subject of compulsory acquisition are to be adjudicated by the National Land Commission through the mechanism of inquiry contemplated under Section 112. If there is no satisfactory resolution of the dispute, the next step is the Land Acquisition Tribunal established under Section 133A of the *Land Act*. If a party is dissatisfied with the determination of the Tribunal, the next step is this court. The appellate jurisdiction of this court is, however, restricted to issues of law.
39. To my mind the whole question of the determination of a controversy relating to the violation of property rights under *the constitution* falls under the Tribunal as expressly provided under Section 133 C(8) which states as follows;
- “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 Act or any other law”.
40. It is to be noted that one of the areas of contest by the petitioner is that his rights to property have been violated.
41. There is no dispute that the Interested Party on behalf of the 1st Respondent is empowered under the Act to make payments in form of awards to the owner of the land or such person as determined to have an interest in the suit land. The jurisdiction of the Tribunal is expressly provided for to cover matters relating to the process of compulsory acquisition. The mandate to pay the awards is firmly placed in the hands of the Interested Party by law. In this case the party is aggrieved by both the delay and the alleged accrued appreciation of the land given the passage of time from the date of the award. Payment in my view is not only cardinal but the cogwheel in the process of compulsory acquisition. The Petitioner has made the issue of payment a contest in his pursuit to first be paid and secondly be paid more than the award issued to him in 2021.
42. In conclusion therefore, I find that the jurisdiction of the tribunal is wide and enjoys jurisdictional primacy in this matter.
43. I find that the petitioner has prematurely invoked the jurisdiction of this court before exhausting the primary jurisdiction of the Tribunal. See the case of Giciri Thuo & 4 Others –vs- NLC & 6 Others [2021] eKLR where the Court upheld the same position.
44. On Costs, I will however, spare the Petitioner the costs of the Petition considering the stage at which the proceedings have been terminated.

Final orders for disposal

45. Based on the foregoing, the final orders for disposal are as follows;
- a. The Preliminary Objection dated the 17/9/24 is upheld. It succeeds.
 - b. The Petition dated 24/7/24 together with the Notice of Motion dated the 30/9/24 be and are hereby struck out.
 - c. Each party to meet their costs.
46. It is so ordered

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 28TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.



J. G. KEMEI

JUDGE

Coram

Ms Chepchumba for the Petitioner

Ms Muthoni Matu for the 1st Respondent

N/A for the 2nd Respondent

N/A for the Interested party

CA – Ms Yvette

