



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.751 OF 2017

HENRY WAINAINA WAKI HORO.....1ST PLAINTIFF/APPLICANT

TERESIAH WANGUI MATHAL.....2ND PLAINTIFF/APPLICANT

-VERSUS-

NATIONAL LAND COMMISSION.....1ST DEFENDANT/RESPONDENT

KIAMBU COUNTY GOVERNMENT.....2ND DEFENDANT/RESPONDENT

GITHUNGURI CONSTITUENCY

RANCHING CO.LTD.....3RD DEFENDANT/RESPONDENT

RULING

By a *Plaint* dated 26th September 2017, the Plaintiffs herein sought for Judgement against the Defendants jointly and severally for:-

a) An order of a permanent injunction restraining the 1st Defendant from paying any sums of monies in the nature of compensation arising from compulsory acquisition of all those plots of land contained in Gazette Notice No.673 in the Kenya Gazette dated 5th February 2016 at Nairobi, the intention of which is to acquire private land on behalf of the Kiambu County Government for the construction of Ruiru-Juja Sewerage Treatment Plant in Kiambu County, to any persons other than the rightful owners as determined by this Honourable Court in this suit.

b) Any other relief or order that this Honourable Court may deem expedient in the Plaintiff's circumstances to meet the ends of justice.

Simultaneously, the Plaintiffs/Applicants filed a *Notice of Motion* application under *Certificate of Urgency* and sought for the following prayers.

a) That this Honourable Court be pleased to grant interim orders stopping the 1st Respondent from paying any sums of monies in the nature of compensation arising from compulsory acquisition of all those plots of land contained in Gazette Notice No.673 in the Kenya Gazette dated 5th February 2016 at Nairobi, the intention of which is to acquire private land on behalf of the Kiambu County Government for the construction of Ruiru-Juja Sewerage Treatment Plant in Kiambu County, pending the hearing of this application interparties.

b) That after the aforesaid interparty hearing this Honourable Court be pleased to issue a temporary injunction stopping the 1st Respondent from paying any sums of monies in the nature of compensation arising from compulsory acquisition of all those plots of land contained in Gazette Notice No.673 in the Kenya Gazette dated 5th February 2016 at Nairobi, the intention of which is to acquire private land on behalf of the Kiambu County Government for the construction of Ruiru-Juja Sewerage Treatment Plant in Kiambu county, pending the hearing of this suit interparties.

c) That the cost of this application be provided for.

The application was supported by various grounds stated on the face of the application and the *affidavits* of the Plaintiffs/Applicants herein.

Among the grounds in support of the application are:-

1) That the National Land Commission has caused the publishing of Gazette Notice No.673 in the Kenya Gazette dated 5th February 2016 at Nairobi, with the intention to acquire private land on behalf of the Kiambu County Government for the construction of Ruiru-Juja Sewerage Treatment Plant in Kiambu County.

2) That the said land Ruiru Kiu/Block 2 (Githunguri) is privately owned by persons who acquired the same by virtue of having been members of Githunguri Constituency Ranching Company Limited.

3) That certain Directors of Githunguri Constituency Ranching company Limited in an attempt to profiteer intend to grab the said pieces of land and sell the same to the Kiambu County Government for the said Ruiru-Juja Sewerage Treatment Plant and profiteer from the proceeds without compensating the owners of the aforesaid property.

4) That the only intention of Gazette Notice No.673 is to facilitate Defendants in the aforementioned suit to steal a march as against the Plaintiffs.

5) That the Plaintiffs filed Judicial Review Misc.Appl.No.160 of 2016 seeking a Judicial Review relief in the nature of certiorari to quash the Statutory Notice of intention to acquire the land and obtain Leave and Stay Orders, but the same was dismissed for want of Jurisdiction.

6) That the Applicant have waste and reasonable apprehension that the 1st Respondent intends to unlawfully acquire the suit property without compensating the rightful owners of the property.

7) That it's in the interest of justice that the aforesaid orders be granted to forestall a travesty of justice and to avoid the issues herein being rendered nugatory.

The Applicants in their **Supporting Affidavits** reiterated the contents of the grounds in support of this application.

The application is vehemently opposed by the 1st and 2nd Defendants/Respondents. However, the 3rd Defendant/Respondent did not file any response.

Further, the 1st Respondent also filed a **Notice of Preliminary Objection** dated 12th February 2017 and averred that:-

1) That this Honourable Court is devoid of original jurisdiction to hear and determine the issues raised in the Plaint dated 26th September 2017 and subsequent Notice of Motion application dated 26th September 2017.

2) That the matters raised in the suit herein fall within the exclusive jurisdiction of the 1st Defendant herein in line with the provisions of Section 112(1) and (5) of the Land Act.

In its **Replying Affidavit** sworn by **Joash Oindo**, the registered **Valuer** and **Deputy Director Land Valuation and Taxation** for 1st Defendant/Respondent, it was averred that the 1st Defendant/Respondent which is an independent commission established under Article 67(1) of the Constitution and which is operationalized by the National Land Commission Act No.5 of 2012 is the body vested with the mandate to compulsorily acquire land required for public purpose or public use on behalf of the National and County Governments upon requests. Further that the 1st Respondent pursuant to its mandate is currently undertaking compulsory acquisition of **563 parcels** of land in Kiambu County required for expansion of Ruiru-Juja Sewerage Treatment Plant and the same was initiated by way of publication of Notice of intention to acquire as is evident from annexure 1 of the Applicant's affidavit. Further, that the said acquisition was commenced on behalf of the **County Government of Kiambu**, the 2nd Respondent herein following a request made to the 1st Respondent on **5th August 2011** in accordance with Section 107(1) of the Land Act and the parcel of land in question was Ruiru/Kiu/Block 2/11191, measuring **50.8 Hectares**. He annexed BN-1 to support that averment. Further that on **23rd July 2015**, the 2nd Respondent clarified that the said Ruiru/Kiu Block 2/11191, had been subdivided into **563 portions** and hence requested the 1st Respondent to compulsorily acquire the resultant subdivisions instead.

It was further contended that the 1st Respondent has put in place policy mechanisms to ensure that all requests for any intended compulsory acquisition are consistent with Article 40 of the Constitution, Land Act and relevant statutes. It was also clarified that the 1st Respondent also requires any acquiring entity to appear before it and explain in detail the request for acquisition as well as affirmation of the request. Further that the 2nd Respondent has explained that the objective of the acquisition was for the purpose of extension of Ruiru-Juja Sewerage Treatment Plant through development of a New Sewerage Treatment and Solid Waste Management Site and the 1st Respondent has also carried out a site visit and ascertained that the parcels of land in question are suitable for the intended purpose.

It was his contention that after the expiry of the Notice of intention to acquire, the 1st Respondent is required by law to gazette a **Notice of inquiries** following which the 1st Respondent shall hold inquiries as to compensation in line with Section 113 of the Land Act. That the purpose of Section 113 of the Land Act is to hear all issues of propriety and claims for compensation by all persons interested in the parcels of land under acquisition. Therefore the Plaintiffs as well as other affected persons shall be given an opportunity to appear and lodge their claims of compensation before the 1st Respondent. It was contended that the Plaintiffs have not established sufficient *locus standi* to institute these proceedings and the said acquisition is for public interests and benefits including the Plaintiffs. Further that public interests override private interests and therefore the greater good that would accrue from the compulsory acquisition and consequent expansion of Ruiru-Juja Sewerage for exceeds the Plaintiff's private interests. It was contended that the application herein is an abuse of the court process and the court was urged to dismiss it with costs.

The 2nd Respondent filed **Grounds of Opposition** on 20th December 2017 and averred that:-

- 1) **That the Land Act No.6 of 2012, provides that the National Land Commission shall on behalf of the County Government cause the compulsory acquisition of land.**
- 2) **That under Section 112 of the Land Act, the National Land Commission is seized of the function of conducting an inquiry to establish the true ownership of properties to be compulsory acquired.**
- 3) **That the Plaintiff/Applicant in the present suit seeks to have this Honourable Court usurp the function vested in the National Land Commission by virtue of Section 112.**
- 4) **That in so doing the instant suit is thus premature, as it has not been shown that the National Land Commission has failed/neglected and or abused its function and mandate to warrant this Honourable Court to undertake a function vested by Statute to a constitutional body.**
- 5) **That the Plaintiff/applicant does not stand to suffer irreparable harm if the prayers sought are not granted as Section 116 of the Land Act provides that a payment in error can be recovered.**
- 6) **That it is trite law that a prohibitory injunction ought to be granted to stop a public body from doing that which it is statutorily mandated.**

The 2nd Respondent urged the Court to dismiss the instant application.

The Plaintiffs/Applicants opposed the **Notice of Preliminary Objection** and **Henry Wainaina Wakihoro** filed a **Replying Affidavit** in opposition to the said **Notice of Preliminary Objection**. He averred that he has been informed by his advocate on record that this Court has inherent jurisdiction which is unlimited by any statute to determine issues relating to land and to give directions that mitigate the ends of justice and/or to forestall a travesty of justice.

The Court directed both the **Preliminary Objection** and the instant **Notice of Motion** dated 26th September 2017, be canvassed together by way of written submissions.

The parties herein complied and **Wahome Murakaru Advocate** for the 1st Defendant/Respondent filed his written submissions on 26th June 2018 and urged the Court to uphold the **Preliminary Objection**.

The 2nd Respondent filed its written submissions on 12th July 2018 and urged the Court to allow the **Preliminary Objection** and finds that the Court has no jurisdiction to entertain the present suit.

On the part of the Plaintiffs/Applicants, **Prof. Kiama Wangai Advocates**, filed the written submissions on 25th July 2018 and submitted that this Court has original jurisdiction to entertain the matter and no prejudice would result if the court directs that the compensation sum be preserved until all the disputes are resolved.

The Court has now carefully considered the pleadings in general and the annexures thereto. The Court too has considered the written submissions and the cited authorities together with the relevant provisions of law and makes the following rendition:-

There is a **Notice of Motion** application and the **Notice of Preliminary Objection**. The Court will first determine the **Notice of Preliminary Objection** before dealing with the **Notice of Motion** application. This is so, since the **Preliminary Objection** herein if upheld might determine the suit preliminarily.

Black Law Dictionary, 9th Edition describes '**Preliminary Objection**' as follows:-

"An objection that if upheld would render further proceedings before the tribunal impossible or unnecessary".

The Court will first determine whether what has been raised by the 1st Respondent herein amounts to a **Preliminary Objection**. The ingredient of a **Preliminary Objection** were well stated in the case of **Mukisa Biscuit Manufacturing Co. Ltd...Vs...West End Distributors Co. Ltd (1969) EA 696**, where the Court held that:-

"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".

Further, it is trite that a **Preliminary Objection** is capable of bringing a matter to an end at the preliminary stage. See the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No.22 of 1999**, where the Court held that:-

"When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings."

The 1st Respondent has averred that this Court has no jurisdiction to entertain this matter. It is trite that jurisdiction is everything and if a court has no jurisdiction, it cannot entertain the said matter but can only down its tools. See the case of *Owners of the Motor Vessel 'Lillian S'...Vs...Caltex Oil (Kenya) Ltd 1989 KLR 1*, where the Court held that:-

“...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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction”.

Therefore, if this Court finds that it has no jurisdiction to deal with

this matter, the next option will be to down its tool and thus bring the matter to an end preliminarily. The issue of jurisdiction is also a point of law and it emanates from the pleadings and no facts needs to be ascertained. Therefore the ***Notice of Preliminary Objection*** raised by the 1st Respondent fits the description of what amounts to a Preliminary Objection as stated in the *Mukisa Biscuits Case (supra)*

The next question is whether the ***Preliminary Objection*** herein is merited.

Indeed the suit herein involves compensation arising from compulsory acquisition of all those parcels of land contained in ***Gazette Notice No.673 of 5/2/2016***. The Court has seen the said ***Gazette Notice No.673*** and it is titled ***'Intention to Acquire'***. The 1st Respondent did express its intention to acquire the stated parcels of land for the purpose of construction of ***Ruiru-Juja Sewerage Treatment Plant in Kiambu County***. Indeed the process of compulsory acquisition has not begun.

It is not in doubt that the 1st Respondent is an independent Commission established under the Constitution and was operationalized by the ***National Land Commission Act No.5 of 2012***. One of its mandate is to compulsory acquire land for both ***National and County Governments*** upon requests. In this case, the 1st Respondent alleged that ***the Kiambu County Government*** requested the 1st Respondent vide a letter dated ***5th August 2014***, to acquire the said parcels of land for it, for the purpose of expansion of the ***Ruiru-Juja Sewerage Treatment Plant***.

Following the above stated request, the 1st Respondent expressed its intention to acquire the stated parcels of land vide the ***Gazette Notice No.673***. It is apparent that once the 1st Respondent expressed its intention to acquire the said parcels of land, then the provisions of ***Section 112(1)*** of the ***Land Act*** sets in and inquiries stage was to commence. ***Section 112(1)*** of the ***Land Act*** provides:-

112. (1) At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall—

(a) cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and;

(b) serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.

Further, ***Section 112(5)*** of the said Act provides that for the purpose of an inquiry the commission shall have all the powers of the court to summon and examine the witness, any Interested Parties on the land intended to be acquired and even compel production of any documents relevant.

It is therefore very clear that since the 1st Respondent did express an intention to acquire the stated parcels of land, then any query or issues that the Plaintiffs might have harboured would best have been addressed during the inquiry stage. In the case of *Patrick Musimba...Vs...National Land Commission & 4 Others(2016) eKLR*, the Court held in para 91:-

"Section 112 of the Land Act then involves the land owner directly for purpose of determining proprietary interest and compensation. The Section has an elaborate procedure with the National Land Commission enjoined to Gazette an intended inquiry and the service of the Notice of inquiry on every person attached. The inquiry hearing determine the persons interested and who are to be compensated. The National Land Commission exercise quasi-judicial powers at this stage".

It is therefore clear that since the 1st Respondent expressed its intention to acquire the stated parcels of land, then the Plaintiffs concerns could be adequately addressed during inquiry stage as contemplated by ***Section 112*** of the ***Land Act***.

The Applicants have come to court prematurely as they can ventilate its claim at the inquiry stage and if the Plaintiffs/Applicants would be aggrieved by any decision taken by the ***National Land Commission***, then they are at liberty to come to court for redress. The Plaintiffs/Applicants ought to have exhausted the mechanism provided under ***Section 112 to 115*** of the ***Land Act***.

The 1st Respondent is an Independent Commission and should be allowed to carry its mandate without any inhibitions or hurdles placed on its way by the court as long as the said mandate is being done within the confines of the law. See the case of *Diana Kethi Kilonzo..Vs...IEBC & 2 Others, Constitution Petition No.359 of 2013*, where it was held that:-

"We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and National Legislation. These bodies and institutions should be allowed to grow. The people of

Kenya, in passing the Constitution found it fit that the powers of decision making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for the other authorities.”

It is apparent that the Constitution does grant the 1st Respondent jurisdiction to entertain the issue of parties to be awarded compensation by way of conducting inquiries.

Therefore, this Court finds that the Plaintiffs suit herein is

premature as they did not exhaust all the available avenues before coming to this court. This court will therefore concur with the 1st and 2nd Respondents and proceeds to find and hold that it does not have jurisdiction to entertain the issue of compensation at this stage since no inquiries have been carried out.

Consequently, this Court will have no option but to down its tools on this matter as was held in the case of ***Owners of Motor Vessel ‘Lilian’(supra)*** and allow the 1st Respondent to carry it's mandate as provided by the Constitution and the other provisions of law specifically ***Section 112 to 115*** of the ***Land Act***.

For the above reasons, the Court upholds the 1st Respondent's ***Notice of Preliminary Objection*** dated ***12th February 2017*** and ***proceeds to dismiss the Plaintiffs’ suit entirely with costs to the 1st and 2nd Respondents.***

Having upheld the ***Preliminary Objection*** and having dismissed this suit entirely, the Court finds no reason to deal with the merit of the ***Notice of Motion*** dated ***26th September 2017***. ***The same is also dismissed entirely.***

It is so ordered.

Dated, Signed and Delivered at Thika this 16th day of November 2018.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiffs/Applicants

No appearance for 1st Defendant/Respondent/Objector

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

Lucy - Court clerk

L. GACHERU

JUDGE

16/11/2018

Court – Ruling read in open court in the absence of parties though date taken in open court.

L. GACHERU

JUDGE

16/11/2018