



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC JR NO. 85 OF 2016**

**IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW  
ORDERS BY KELLICO LIMITED IN THE NATURE OF CERTIORARI AND PROHIBITION**

**AND**

**IN THE MATTER OF CONSTITUTIONAL RIGHTS PURSUANT TO ARTICLES 21(1), 23(1),  
23(3), (f), 27(1), 40, 47(1) & 50(2) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE LAND ACQUISITION ACT CAP 295 LAWS OF KENYA  
(REPEALED)**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDINATION  
ACT, 1999**

**AND**

**IN THE MATTER OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT)  
REGULATIONS, 2003**

**AND**

**IN THE MATTER OF THE LAND ACT, NO. 6 OF 2012**

**BETWEEN**

**KELLICO LIMITED.....APPLICANT**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**NATIONAL ENVIRONMENT**

**MANAGEMENT AUTHORITY.....3<sup>RD</sup> RESPONDENT**

**RULING****Introduction:**

The Applicant is the registered proprietor of all those parcels of land known as L.R NO. 209/14096 and L.R No. 209/14097 (“hereinafter together referred to as “the suit properties”). The suit properties are situated on Mombasa Road, Nairobi and are developed with buildings comprising of among others shops and offices which have been let to tenants. The Applicant has claimed that through Gazette Notice No. 809 which was published on 12<sup>th</sup> February 2016, the 1<sup>st</sup> Respondent gave a notice pursuant to among others, section 162(2) of the Land Act of its intention to acquire portions of the suit properties for the 2<sup>nd</sup> Respondent for the purposes of construction of JKIA Turn- off-Likoni Road Junction (A104)(hereinafter “the road project”). The Applicant has claimed that the said road project would entail among others, the construction of a foot bridge that would be located on the portions of the suit properties which are to be acquired by the 1<sup>st</sup> Respondent. The applicant has claimed that the said foot-bridge would be located in front of the buildings on the suit properties which overlook Mombasa road thereby depriving the Applicant’s staff and tenants of parking space and in the process disrupting its business activities on the suit properties. The Applicant has also claimed that the said foot-bridge would expose the suit properties to security threats since it will overlook the premises thereon. The Applicant has claimed that the 2<sup>nd</sup> Respondent’s road project would have an impact which is likely to endanger the environment and as such the 2<sup>nd</sup> Respondent was under a legal duty to subject the said project to environmental impact assessment under section 58 of the Environmental Management and Co-ordination Act, 1999 (hereinafter “EMCA”) and to proceed with it only upon obtaining environmental impact assessment licence. The Applicant has contended that the 2<sup>nd</sup> Respondent intends to proceed with the execution of the said project without carrying out environmental impact assessment study and obtaining environmental impact assessment licence from the 3<sup>rd</sup> Respondent. The Applicant has contended that following the publication of the notice by the 1<sup>st</sup> Respondent of its intention to acquire portions of the suit properties for the 2<sup>nd</sup> Respondent’s road project and the 2<sup>nd</sup> Respondent’s decision to proceed with the said project without first obtaining environmental impact assessment licence as aforesaid, the Applicant lodged an appeal against the Respondents with the National Environmental Tribunal (hereinafter “NET”). The Applicant has contended that following the said appeal, NET issued an order on 10<sup>th</sup> March 2016 stopping the said road project pending the hearing and determination of the appeal. The Applicant has contended that the 1<sup>st</sup> Respondent is in the process of making inquiries pursuant to the Gazette Notice No.809 aforesaid for the purposes of ascertaining the compensation payable to the Applicant for the portions of the suit properties which the 1<sup>st</sup> Respondent intends to acquire for the said road project.

**The application before the court:**

What is now before me is the Applicant’s application by way of Chamber Summons dated 2<sup>nd</sup> April 2016 in which the Applicant seeks the following orders:-

- (1) THAT the application be certified urgent and be heard exparte at the first instance and expeditiously owing to its extreme urgency.
- (2) THAT the Applicant be granted leave to apply for judicial review order of CERTIORARI to remove into this Honourable Court and quash a Gazette Notice No. 809 issued by the 1<sup>st</sup> Respondent on 12<sup>th</sup> February, 2016 informing the public that the Government intends to acquire listed parcels of land including L.R No. 209/14096 and 209/14097 which was erroneously listed as 209/12032/1 belonging to the Appellant herein for Kenya National Highway Authority (KeNHA) for construction of JKIA Turn-Off-Likoni Road Junction (A 104) Road Project in Nairobi County.
- (3) THAT the Applicant be granted leave to apply for judicial review order of PROHIBITION to remove into this Honourable Court and prohibit the 1<sup>st</sup> Respondent, its agents, employees and/or

servants from purporting to make an inquiry and or further inquiry or undertaking any action(s) of whatever nature for purposes of acquiring the suit properties by way of compulsory acquisition as advertised through a Gazette Notice of 12<sup>th</sup> February, 2016 issued by the 1<sup>st</sup> Respondent for construction of JKIA Turn-Off-Likoni Road Junction (A 104) on parcel L.R No. 209/14096 and 209/14097 (the suit properties) to the Director General of the 3<sup>rd</sup> Respondent and the Chief Executive Officer of the 1<sup>st</sup> Respondent(sic).

(4) THAT the Leave so granted to operate as a stay of the purported inquiry and or further inquiry or any undertaking for purposes of acquiring the suit property by way of compulsory acquisition as advertised through a Gazette notice of 12<sup>th</sup> February, 2016 issued by the 1<sup>st</sup> Respondent for construction of JKIA Turn-Off-Likoni Road Junction (A 104) on parcel L.R No. 209/14096 and 209/14097 (the suit properties) to the Director General of the 3<sup>rd</sup> Respondent and the Chief Executive Officer of the 1<sup>st</sup> Respondent(sic).

(5) THAT costs of and incidental to the application be provided for.

(6) THAT such further and other reliefs that this Honourable Court may deem just and expedient to grant be granted.

The application was brought on the grounds set out on the face thereof and on the statutory statement and verifying affidavit of BARENDER KALSI both dated 20<sup>th</sup> April, 2016. The application is directed at the 1<sup>st</sup> Respondent. The Applicant has sought leave to challenge by way of judicial review the decision of the 1<sup>st</sup> Respondent contained in the Gazette Notice No. 809 which was published on 12<sup>th</sup> February 2016 to acquire portions of the suit properties for the 2<sup>nd</sup> Respondent for the road project. The Applicant intends to apply for an order of certiorari to quash the said Gazette Notice and an order of prohibition to prohibit the 1<sup>st</sup> Respondent from making any inquiry of whatsoever nature for the purposes of acquiring the said portions of the suit properties for the said road project. The Applicant has prayed further that the leave sought if granted do operate as a stay of the inquiry which the 1<sup>st</sup> Respondent intends to undertake for the purposes of acquiring the said portions of the suit properties pending the hearing of the judicial review application.

In summary, the Applicant intends to seek a review of the 1<sup>st</sup> Respondent's decision aforesaid on the following main grounds:

(i) The 2<sup>nd</sup> Respondent's road project ought to have undergone environmental impact assessment pursuant to the provisions of EMCA and the schedules thereunder

(ii) The 2<sup>nd</sup> Respondent's failure to submit environmental impact assessment report to the 3<sup>rd</sup> Respondent and to obtain environmental impact assessment licence (hereafter "the licence") amounts to a criminal offence.

(iii) The 2<sup>nd</sup> Respondent intends to undertake the road project without the said licence.

(iv) The 2<sup>nd</sup> Respondent's intention aforesaid has been brought to the attention of the 3<sup>rd</sup> Respondent which has failed to issue a restoration order against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

(v) The Applicant filed an appeal with NET against the 1<sup>st</sup> and 2<sup>nd</sup> Respondents decision to proceed with the said project without the licence and the 3<sup>rd</sup> respondent's failure to stop the same.

(vi) NET issued an order on 10<sup>th</sup> March 2016 stopping the project on the suit properties.

(vii) Despite the stop order, the 1<sup>st</sup> Respondent has started the process of making inquiry pursuant

to the Gazette Notice No. 809 aforesaid with the intention of acquiring the said portions of the suit properties for the said project.

(viii) The said inquiry being undertaken by the 1<sup>st</sup> Respondent is unreasonable, irregular and illegal since the 1<sup>st</sup> Respondent intends to compensate the Applicant only for the portions of the suit properties being acquired without taking into account the fact that the suit properties as a whole would be affected by the acquisition of the said portions.

(ix) The 1<sup>st</sup> Respondents decision is unreasonable, un-procedural, illegal and unconstitutional.

The Applicant's application for leave came up for hearing ex parte under certificate of urgency on 21<sup>st</sup> April 2016 when the Applicant was directed to serve the same upon the Respondents for hearing inter partes. All the respondents were served but when the application came up for hearing inter partes on 12<sup>th</sup> May 2016, only the 2<sup>nd</sup> Respondent appeared. The 2<sup>nd</sup> respondent opposed the application through Notice of Preliminary Objection dated 5<sup>th</sup> May 2016. In its Notice of Preliminary Objection, the 2<sup>nd</sup> Respondent contended that:-

(i) The court lacks supervisory jurisdiction over the Respondents.

(ii) The court lacks judicial review powers.

(iii) The application has been brought contrary to the provisions of the Land Act, 2012 and as such the court lacks jurisdiction to grant the orders sought.

(iv) The application has been brought under the wrong provisions of the constitution and as such the court lacks jurisdiction to grant the orders sought.

(v) The application has been brought contrary to the provisions of Section 129 of EMCA and as such the court has no jurisdiction to entertain the same.

(vi) The Applicant has not annexed the Kenya Gazette sought to be quashed.

(vii) The application is an abuse of the process of the court.

At the hearing of the application, Mr. Makhoka appeared for the Applicant while Mr. Obok appeared for the 2<sup>nd</sup> Respondent. As I have mentioned above, there was no appearance for the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents. In his submission, Mr. Makhoka reiterated the contents of the Applicant's statutory statement and verifying affidavit filed herein in support of the application which I have highlighted above in summary. He also relied on the written submissions dated 20<sup>th</sup> April, 2016 which were filed in court on 21<sup>st</sup> April, 2016. Mr. Makhoka cited a number of authorities in support of his submissions and urged the court to grant the orders sought in the application. In reply, Mr. Obok highlighted at length the grounds set out in the 2<sup>nd</sup> Respondents Notice of Preliminary Objection. He also cited a number of authorities in support of his submissions. Mr. Obok urged the court to dismiss the Applicant's application for want of jurisdiction and for lack of merit.

#### **Consideration of the parties' respective submissions and the issues arising therefrom:**

I have considered the Applicant's application together with the statutory statement and verifying affidavit which were filed in support thereof. I have also considered the 2<sup>nd</sup> Respondent's Notice of Preliminary Objection to the application. Finally, I have considered the parties' submissions; written and oral together with the case law and other authorities that were cited before me. In the case of **Njuguna vs. Minister for Agriculture (2000) I E.A 184**, it was held that:

**“the test as to whether leave should be granted to an Applicant for judicial review is**

**whether, without examining the matter in any depth, there is an arguable case, that the reliefs might be granted on the hearing of the substantive application.”**

In the case of, **Aga Khan Education Service Kenya vs. R & others[2004]1 E.A 1**, the court stated that;

**“Once there is an arguable case, leave is to be granted and the court at that stage is not called upon to go into the matter in depth.”**

The Applicant’s case is that it is the owner of the suit properties portions of which the 1<sup>st</sup> Respondent intends to acquire compulsorily for the 2<sup>nd</sup> Respondent for the purposes of a road project to be undertaken by the 2<sup>nd</sup> respondent. The Applicant has contended that the road project which is to be undertaken by the 2<sup>nd</sup> Respondent must undergo environmental impact assessment pursuant to Section 58 of EMCA as it is out of character with the surroundings where it is supposed to be undertaken. The Applicant has contended that the 2<sup>nd</sup> Respondent has failed to carryout an environmental impact assessment study with respect to the said project but intends to proceed with the same that omission notwithstanding. The Applicant has contended that it has challenged the 2<sup>nd</sup> Respondent’s failure to obtain environmental impact assessment licence for the project from the 3<sup>rd</sup> Respondent through an appeal to the National Environmental Tribunal (“NET”). The Applicant has contended that NET has given an order stopping the 2<sup>nd</sup> Respondent from proceeding with said road project on the suit properties. The Applicant’s complaint before this court if I got it correctly is that the 1<sup>st</sup>Respondent intends to proceed with the process of acquiring the said portions of the suit properties (hereafter referred to only as “the subject properties”)that it had earmarked for the road project notwithstanding the fact that the 2<sup>nd</sup> Respondent has failed to carry out environmental impact assessment study with respect to the proposed project. The Applicant has also contended that the compulsory acquisition of the subject properties would interfere with its business and compromise the security of the suit properties since the subject properties are intended to be used for construction of a foot bridge which would take the space used for parking by the Applicant’s staff and tenants. The Applicant also has a complaint regarding the compensation likely to be paid by the 1<sup>st</sup> Respondent for the subject properties which it has claimed would not factor in the full impact of the project on the suit properties.

In the case of **Commissioner of Lands vs. Kunste Hotel Ltd. (1997) eKLR, (1995 – 1998)IE.AI (CAK)** the court stated that:

**“Judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given a fair treatment by the authority to which he has been subjected.”**

In these proceedings, the Applicant is not challenging the 2<sup>nd</sup> Respondent’s decision to commence the road project without first carrying out environmental impact assessment. That is an issue before NET. The intended judicial review application would be directed against the 1<sup>st</sup> Respondent only and what is sought to be reviewed is the compulsory acquisition of the subject properties.

In **Halsbury’s Laws of England, 4<sup>th</sup> Edition page 150 at paragraph 147**, the authors have stated as follows regarding the nature of Certiorari:

**“It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice or where the determination was procured by fraud, collusion or perjury.”**

With regard to prohibition, the same authors have described the same as follows at page 137, paragraph 128 of the same edition of Halsbury’s.

**“An order issuing out of the High Court of Justice and directed at an ecclesiastical or inferior temporal court or at the crown which forbids that court to continue proceedings**

**therein in excess of its jurisdiction or in contravention of the laws of the land.”**

From the foregoing, the Applicant would only succeed in the intended application for judicial review by establishing that in continuing with the contested inquiry for the purposes of acquiring the subject properties compulsorily, the 1<sup>st</sup> Respondent is acting without or in excess of its jurisdiction or contrary to the rules of nature justice or in contravention of the law.

Article 40(3) (a) and (b) of the constitution provides that:

**“(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.”**

The 1<sup>st</sup> Respondent was established under Article 67 of the Constitution. Article 67(3) of the Constitution provides that the 1<sup>st</sup> Respondent may perform any other functions, prescribed by national legislation. Under section 107 of the Land Act, 2012, the 1<sup>st</sup> Respondent has the responsibility of acquiring land for national and county governments. Section 110(1) of the Land Act provides that land may be acquired compulsorily if the 1<sup>st</sup> Respondent certifies that the land is required for public purposes or in the public interest. Section 111(1) of the said Land Act provides that if the land is acquired compulsorily, compensation shall be paid promptly in full to persons whose interests in the land have been determined. Under sections 112 and 113 of the said Act, the 1<sup>st</sup> Respondent after publishing a notice of intention to acquire land compulsorily is supposed to conduct inquiry to determine among others any claims to compensation for the land. After conducting the said inquiry, the 1<sup>st</sup> Respondent is required to make a written award of compensation to the persons interested in the land to be acquired and thereafter to pay compensation to the said persons.

In the present case, the 1<sup>st</sup> Respondent in exercise of its mandate provided for in the Constitution, the National Land Commission Act, 2012 and the Land Act, 2012 had already given a notice of its intention to acquire the subject properties. When the Applicant brought these proceedings, the 1<sup>st</sup> Respondent was in the process of conducting inquiry with a view to compensating the Applicant for the said properties to be acquired. As I have stated above, the said inquiry is provided for in Law. The Applicant has not stated how the inquiry which the 1<sup>st</sup> Respondent intends to undertake is in breach of its rights. I am of the view that the issues such as the inconvenience and loss which the Applicant is likely to incur by the acquisition of the subject properties are issues which were to be addressed during the inquiry which the Applicant has sought to stop. This court cannot deal with such issues in a judicial review application.

From the material placed before the court, I cannot see the relationship between the 2<sup>nd</sup> Respondent’s failure to obtain environmental impact assessment licence (“the licence”) for the road project which is the subject of the proceedings before NET and the 1<sup>st</sup> Respondent’s inquiry which is intended to complete the process of compulsory acquisition of the subject properties. I am unable to decipher from the Applicant’s statutory statement and verifying affidavit the wrongs or errors if any which have been committed by the 1<sup>st</sup> Respondent in the process of compulsorily acquiring the subject properties from the Appellant. I am not satisfied from the material before me that the 1<sup>st</sup> Respondent is acting or intends to act in excess of its jurisdiction or contrary to the law or in breach of the rules of natural justice.

The only issue which I am unable to determine at this stage and in respect of which the Applicant may be said to have an arguable case concerns the relationship between the 2<sup>nd</sup> Respondent's failure to obtain environmental impact assessment licence for the road project and the effect of that failure on the 1<sup>st</sup> Respondent's right to acquire the subject properties compulsorily. It is arguable whether the 1<sup>st</sup> Respondent can acquire land for a project which has been stopped by NET and in respect of which no license has been issued by the 3<sup>rd</sup> Respondent. As I have stated at the beginning of this ruling, I am not supposed at this stage to delve deep into the merit of the Applicant's case. The Applicant may be able at the hearing of the judicial review application to explain more clearly how the two processes intermarry and how failure to abide by the law in one affects the other and its impact on the Applicant's rights.

A part from leave, the Applicant had also sought an order that leave if granted should operate as a stay. I have considered the submissions by the Applicant on this issue and the authorities that were cited in support thereof. In the case of **James Mburu Gitau vs. Sub-county Public Health Officer, Kiambu County**[2013]eKLR that was cited by the Applicant, Odunga J. stated as follows:-

**“The Principles that guide the grant of an order that the leave do operate as a stay of the proceedings in question have been crystallized over a period of time in this jurisdiction and some of them are that where the decision sought to be quashed has been implemented leave ought not to operate as a stay..., that the objective of granting stay is to ensure that the ex parte applicant's application is not rendered nugatory by the acts of the Respondent during the pendency of the application.”**

I am not satisfied that the Applicant has made out a case for an order that leave if granted should operate as a stay. As I have stated above, the Applicant's complaint is directed at the 1<sup>st</sup> Respondent's decision to carryout inquiry for the purposes of compulsorily acquiring the subject properties for the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent is not responsible for neither is it engaged in the construction of the road or foot bridge which the Applicant claims would cause the Applicant inconvenience and loss. The Applicant has contended that the road project has been stopped by NET. That means that the 2<sup>nd</sup> Respondent would not be able to proceed with the same until the appeal that the Applicant has lodged with NET is heard and determined. I am not able to see how the Applicant's judicial review application would be rendered nugatory if the stay is not granted. I am of the view that if the court finds that the subject properties were not supposed to be compulsorily acquired and quashes the Gazette Notice through which the notice of intention to acquire the said properties was given, any inquiry which may have been undertaken by the 1<sup>st</sup> Respondent would become a nullity. It follows from the foregoing that the judicial review application would not be rendered nugatory if the stay sought is not granted.

Having considered the Applicant's case, I wish now to refer to the 2<sup>nd</sup> Respondent's objections to the Applicant's application. As I have stated above, what the Applicant is supposed to establish at this stage is that it has an arguable case. The court is not supposed to delve in depth into the merit of the intended judicial review application. I am of the view that the 2<sup>nd</sup> Respondent's objections are misplaced. They are directed at an application for judicial review which is not before the court for consideration. At this stage, the Court is not supposed to consider whether the Applicants intended Judicial review application is likely to succeed or not. I am of the considered view that the objections by the 2<sup>nd</sup> Respondent should have been reserved for the judicial review application once the same is filed. I am of the opinion that through these objections, the 2<sup>nd</sup> Respondent is calling upon the court at this stage to consider the merit of a judicial review application not before it. So as not to be accused of avoiding the issues raised by the 2<sup>nd</sup> Respondent however, I will consider its objections my observations above notwithstanding. The 2<sup>nd</sup> Respondent has contended that this court has no supervisory jurisdiction over the Respondents and the power to grant prerogative orders. This court was established pursuant to the provisions of Article 162 (2) (b) of the Constitution which provides that:-

**“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:**

(a) .....

**(b) The environment and the use and occupation of, and the title to land.”**

Article 162 (3) of the Constitution provides that;

**“Parliament shall determine the Jurisdiction and function of the courts contemplated in clause (2).”**

Article 165(5) of the Constitution provides that:

**“The High Court shall not have jurisdiction in respect of matters:-**

**(a) reserved for the exclusive jurisdiction of the Supreme Court under the Constitution; or**

**(b) falling from the jurisdiction of the courts contemplated in Article 162(2).”**

This court was established by the Environment and Land Court Act, No. 19 of 2011 which came into effect on 30<sup>th</sup> August 2011. Section 13(1) of the Environment and Land Court Act (“**ELC Act**”) provides as follows:-

**“The court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with this Act or any other law applicable in Kenya relating to environment and land (emphasis mine)”**

Section 13(7) of the ELC Act provides that:-

**“In exercise of its jurisdiction under this Act, the court shall have power to make any order and grant any relief as the court deems fit and just, including –**

(a) .....

**(b) Prerogative orders.”**

It is clear from the foregoing that it is only this court which has original and appellate jurisdiction to hear and determine disputes relating to the environment and land. With regard to such disputes, the jurisdiction of this court is unlimited. As set out in Section 13(1) of the ELC Act mentioned above, the court is supposed to determine such disputes in accordance with the provisions of the ELC Act and any other law applicable in Kenya. Section 13(7) of the ELC Act on the other hand gives this court power to grant a remedy of judicial review.

This no doubt presupposes that the court has jurisdiction to entertain an application for judicial review. The court cannot have power to grant a relief but lack the jurisdiction to entertain an application for such relief. That would be a paradox. I am in agreement with the 2<sup>nd</sup> Respondent that by an amendment that was made to the ELC Act by Statute Law (Miscellaneous Amendments) Act, 2012 which came to effect on 12<sup>th</sup> July 2012, the hitherto section 13(5) of the ELC Act which had conferred upon this court supervisory jurisdiction over subordinate courts, local tribunals, persons or authorities **“in accordance with Article 165(6) of the Constitution”** was deleted. I am not in agreement however that the deletion of that section took away judicial review jurisdiction of the court. Section 165(6) of the Constitution to which Section 13 (5) of the ELC Act which was deleted had referred to provides as follows:-

**“The High Court has supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi judicial function, but not over superior courts.”**

It is clear that section 13(5) of the ELC Act that was deleted through the amendment aforesaid purported to confer upon this court powers that were reserved for the High Court by the Constitution. This court's jurisdiction is limited to disputes relating to environment and land. The former section 13(5) of the ELC Act conferred upon this court unlimited supervisory jurisdiction and as such was properly deleted by the said amendment. I am unable to see how the deletion of that section that conferred upon this court powers reserved for the High Court under the constitution affects this court's supervisory jurisdiction which is limited to disputes relating to environment and land which jurisdiction the High Court has been denied by Article 166(5)(b) of the Constitution. If the argument by the 2<sup>nd</sup> Respondent was to hold then the next question would be; which court has jurisdiction to hear and determine applications for judicial review on disputes relating to environment and land?

There cannot be a vacuum in law. Sections 13(1) and (7) of the ELC Act are wide enough to cover all disputes falling within the jurisdiction of this court including violations of public law rights and the remedies that the court can give. I am in agreement with the decision in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank and 2 Others (2012) eKLR** where the court stated that:-

**“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus a court of Law can only exercise jurisdiction as conferred by the constitution or other written law.”**

In the case of **East African Railways Corporation vs. Antony Sefu (1993) E.A 327**, it was held that;

**“A statute cannot be construed to oust jurisdiction of a superior court in the absence of clear and unambiguous language to that effect.”**

In the case of **Gatimu Kinguru vs. Muya Gathangi (1976 – 80) 1 KLR 317, Madan J.** stated as follows at page 331.

**“In interpreting a statute, in the absence of an express provision to that effect, it is always wrong for the court to whittle down the rights and privileges of the subject. The court’s task is to protect the rights and privileges of the people, not to clip and shear them.”**

In view of the provisions of Section 13(1) and (7) of the ELC Act and in the absence of any express provision in the Constitution or the ELC Act ousting the supervisory jurisdiction of this court, it is my finding that this court has jurisdiction to entertain applications for judicial review. The applicant's application is in the circumstances properly before this court.

I find no merit in the objection that the Applicant's application offends the provision of part VIII of the Land Act, 2012 and Section 67(a) and (b) of the Kenya Roads Act, 2007. Section 128 of the Land Act provides that any dispute arising out of any matter provided for under that Act may be referred to this court for determination. Compulsory acquisition of land is such matter. Again, it is now settled that judicial review proceedings are neither criminal nor civil. The proceedings are therefore not subject to the provisions of other statutes. See, the **Commissioner of Lands vs. Kunste Hotel Ltd. (1995 – 1998)1 E.A.1 (supra)**. The 2<sup>nd</sup> Respondents contention that the Appellant should have given the notices provided for under the Kenya Roads Act, 2007 prior to instituting the application herein has no basis in the circumstances.

The 2<sup>nd</sup> Respondent's contention that the dispute herein should have been taken to NET in the first instate also has no merit. NET has no jurisdiction to determine disputes over compulsory acquisition of land. The dispute over the environmental impact assessment had already been referred to NET as it was properly within its jurisdiction.

The last objection by the 2<sup>nd</sup> Respondent is that the decision sought to be quashed is not attached to the Applicant's application. I am in agreement that the Applicant failed to annex to its verifying affidavit the Gazette Notice No. 809 which is sought to be quashed. The Gazette Notice which has been annexed is

Gazette Notice No. 810 which is not relevant to these proceedings. This omission is grave but not fatal to the application. Order 53 rule 7 (1) of the Civil Procedure Rules allows the Applicant to submit a copy of the decision sought to be quashed to court before the hearing of the judicial review application. Due to the foregoing, it is my finding that the 2<sup>nd</sup> Respondent's notice of preliminary objection has no merit.

In the final analysis and for the reasons given above, I am satisfied that the Applicant has an arguable case on the issue as to whether the 1<sup>st</sup> Respondent can proceed with the process of acquiring land compulsorily for a project which has been stopped by NET and in respect of which the licence has not been issued by the 3<sup>rd</sup> Respondent. I am not satisfied however that a case has been made out for the leave to operate as a stay. The Applicant's application dated 20<sup>th</sup> April 2016 therefore succeeds in part. The same is allowed in terms of prayers 2 and 3 thereof. The judicial review application shall be filed within 21 days from the date hereof. The costs of the application shall abide the outcome of the judicial review application.

**Delivered and Dated at Nairobi this 3<sup>rd</sup> day of June, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

Mr. Makhoka	for the Applicant
Mr. Obok	for the 2 <sup>nd</sup> Respondent
Ms. Kirwa	for 1 <sup>st</sup> Respondent
V. Owuor	Court Assistant