Pentagon Communications Limited v National Land Commission (Civil Appeal E035 of 2022) [2025] KECA 1304 (KLR) (18 July 2025) (Judgment)

Neutral citation: [2025] KECA 1304 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E035 OF 2022

AK MURGOR, KI LAIBUTA & GWN MACHARIA, JJA

JULY 18, 2025

BETWEEN

PENTAGON COMMUNICATIONS LIMITED ..... APPELLANT

AND

NATIONAL LAND COMMISSION ..... RESPONDENT

(Being an appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (Matheka, J.) dated 23rd February 2022) in ELCA No. 45 of 2019)

JUDGMENT

1. Pentagon Communications Limited, the appellant, filed this second appeal against the Judgment and decree of the Environment and Land Court (the ELC) at Mombasa (Matheka, J.) delivered on 23rd February 2022 in ELCA No. 45 of 2019. The appeal to the ELC was against a monetary compensation awarded by the National Land Commission (the NLC) in respect of the compulsory acquisition of part of a parcel of land known as LR MN/VI/3XX8 measuring 0.3325 Hectares (0.821 Acres).

2. This being a second appeal, the Court confines itself to matters of law only, unless it is shown that the Commission and the ELC considered matters they should not have considered, or failed to consider matters they should have considered or, looking at the entire decision, it is perverse. In the case of Stephen Muriungi and another vs. Republic (1982-88) 1 KAR 360, Chesoni, Acting JA. (as he then was) said at page 366:

> "We would agree with the view expressed in the English case of Martin vs. Glywed Distributors Ltd (t/a MBS Fastenings) 1983 ICR 511 that where a right of appeal is confined to questions of law only, an appellate court has loyalty to accept the findings of fact of the lower court (s) and resist the temptation to treat findings of fact as holdings of law or mixed findings of fact and law, and, it should not interfere with the decisions of the trial or first

appellate court unless it is apparent that, on the evidence, no reasonable tribunal could have reached that conclusion, which would be the same as holding the decision is bad in law."

3. The background to the appeal is that, before the year 2014, the appellant owned LR MN/VI/3XX8, an industrial-use parcel of land in Miritini, Mombasa, measuring 0.3325 hectares (0.821 acres). The land was strategically located near the Dongo Kundu by-pass and was earmarked for public infrastructure development. On 24th January 2014, the NLC issued notice of compulsory acquisition through Gazette Notice No. 405 declaring its intention to acquire part of the appellant's land. This was followed by Gazette Notice No. 1796 published on 21st March 2014 summoning the appellant for an inquiry on compensation pursuant to sections 107-113 of the *Land Act*, 2012. The purpose for the acquisition as stated in the Notice was for the construction of 'Mombasa Port Area Road Development Project (Southern Bypass and Kipevu Terminal Link Road) by Kenya National Highway Authority (KeNHA). 8th May 2015:' Without any confirmed compensation or an award duly served upon the appellant, the government through KeNHA, took physical possession of the 0.3325 hectare portion.

4. On 30th October 2018, the appellant informally learned that an award of Kenya shillings two million, eight hundred and twenty-nine (Kshs.2,829,000) had been released by the NLC. It immediately wrote to the Chairman, NLC, for confirmation of the award and, in the same letter, disputed the amount of the award claiming that it was too low in comparison to the amount awarded to properties around the same area that had previously been compulsorily acquired for the construction of the standard gauge railway.

5. The NLC, vide a letter dated 12th February 2019, replied to the appellant asserting that the valuation of its parcel reflected the open market value. NLC did not confirm the award, but only stated that the valuation was conducted by the Ministry of Lands and Physical planning.

6. Aggrieved by the compensation awarded by the NLC, the appellant filed an appeal before the ELC at Mombasa, namely ELCA No. 45 of 2019 challenging: the award for being based on low valuation; lack of formal notice to acquire the land; and procedural irregularities in the acquisition. It prayed that the award be substituted for Kenya shillings twenty-fou million shillings (Kshs.24,000,000) with interest at 12% P.A since the date of acquisition.

7. This prompted the respondent to file a Notice of Preliminary Objection dated 10th November 2021, arguing that the appeal was filed out of time contrary to section 16A of the Environment and *Land Act*. The respondent stated that the appeal was filed almost one year after the appellant became aware of the Award, and that it had not sought extension of time within which to file the appeal.

8. The learned Judge (Matheka, J.) found in favour of the respondent, holding that the appeal was filed in violation of section 16A of the *Environment and Land Court Act*. She thus dismissed the appeal with costs.

9. Further aggrieved, the appellant is now before this Court on a second appeal. By a Memorandum of Appeal dated 29th March 2022, it faults the learned Judge for erring in law and in fact: in holding that the appeal was filed out of time and that the appellant never sought extension of time; and in upholding the appellant's Notice of Preliminary Objection. It prays that the appeal be allowed; and that the Judgment of the superior court be set aside.

10. We heard this appeal on 17th February 2025. Learned counsel Mr. Oluga was present for the appellant while there was no appearance for the respondent despite having been served with a hearing notice on 29th January 2025. Mr. Oluga entirely relied on written submissions dated 13th February 2025. The respondent did not file any submissions.

11. The appellant basically challenged the learned Judge's dismissal of the appeal on the ground that it was filed out of time in contravention of section 16A of the *Environment and Land Court Act*; that the learned Judge misapplied section 16A which, according to the appellant, relates or only applies to appeals from subordinate courts and tribunals, and not to references challenging compensation awards from the NLC; and that the preliminary objection by the respondent which led to the dismissal of the appeal was based on a misinterpretation of this section.

12. The appellant contends that what was filed in the ELC was not an "appeal" in the technical legal sense but, rather, a reference under section 128 of the *Land Act*, which allows disputes concerning compensation for land to be brought before the ELC; that, as at the time of approaching the ELC, there was no operational Land Acquisition Tribunal and, therefore, a reference to the ELC was the correct legal route; that the form and naming of the document as a "Memorandum of Appeal" did not change its nature and purport from a reference into an appeal within the application of section 16A; and that, furthermore, section 128 of the *Land Act* does not specify any timelines for filing such a reference.

13. Thus, the appellant maintains that the learned Judge erred in dismissing the appeal for being filed out of time. We are urged to allow the appeal and reinstate the reference, more so since the respondent did not file a response in the superior court to contest the facts as pleaded by the appellant.

14. We have considered the record of appeal, the written submissions by the appellant and the law. We have narrowed down the issues for determination to be whether the proceedings before the Environment and Land Court were an appeal or reference, and whether the learned Judge erred in upholding the respondent's Preliminary Objection thereby dismissing the appellant's appeal on the basis that it was time barred.

15. To start with, there is no contestation that the appellant's portion of land comprised in LR No. LR MN/VI/3XX8 measuring 0.3325 Hectares (0.821 Acres) was compulsorily acquired by the government for the construction by KeNHA of 'Mombasa Port Area Road Development Project (Southern Bypass and Kipevu Terminal Link Road). It is also not in contestation that NLC compensated the appellant to the tune of Kshs.2,829,000 which the appellant objected to as being too low a compensation compared to what other land owners within the area had been paid on compulsory acquisition of their land for the construction of the Standard Gauge Railway.

16. Section 16A(1) of the *Environment and Land Court Act*, 2011 provides that all appeals from subordinate courts and local tribunals shall be filed within a period of 30 days from the date of the decree or order appealed against.

17. At this juncture, we make an observation that the appellant, in the court below stated that it learnt of the compulsory acquisition of its land from third parties. Nothing can be further from the truth. On whether there was a hearing of inquiry regarding the compensation, a letter dated 27th July 2015 invited the appellant to a hearing that was scheduled to take place on 5th August 2015 at 10:00a.m. This is what led to the award. The appellant subsequently communicated his dissatisfaction with the award to the respondent vide a letter dated 30th October 2018 written by his advocates, A.A. Said & Company.

18. This Court in Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No 108 [2010] eKLR cited with approval the cases of Local Government Board vs. Arlidge [1915] A.C. 120, 132-133; Selvarajan vs. Sace Relations Board [1975] I WLR 1686, 1694; and R vs. Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 481 in which it was held:

> "the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are

laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing."

.....

Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made..."

19. It is therefore untrue that the appellant was not involved in, or notified of, the compulsory acquisition of his land. Notably, and as observed elsewhere in this Judgment, the requisite Gazette Notices were issued notifying the appellant and other land owners of the intended compulsory acquisition of the respective parcels of land for the construction of the afore- mentioned project. We do not wish to go in-depth into what informed the respondent to pay the compensation of Kshs.2,829,000 as that is not the gist of this appeal. For the purpose of this appeal, the appellant argues that a party who is dissatisfied with an award by the NLC should file a reference under section 128 of the *Land Act* as opposed to an appeal under section 16A of the Land and Environment Act, 2011; and that section 128 of the *Land Act* does not cap the time within which a reference should be filed.

20. Section 128 of the *Land Act* reads as follows:

> Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination.

21. This provision can clearly be differentiated from section 16A of the Environment and *Land Act*, 2011 which provides that:

> 1. All appeals from subordinate courts and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in section 13(2) of the *Environment and Land Court Act* (Cap. 8D), provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the subordinate court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

22. We take to mind that, when the appellant approached the ELC, he filed what he referred to as a Memorandum of Appeal, and the matter was serialised as ELCA No. 45 of 2021- 'being an appeal/ reference from the award of the National Land Commission in respect of the compulsory acquisition ...' The jurisdiction of the ELC is governed by the *Environment and Land Court Act* under section 13, which states as follows:

> 1. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
>
> 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.

3. Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.

4. In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

5. 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. interim or permanent preservation orders including injunctions;

b. prerogative orders;

c. award of damages;

d. compensation;

e. specific performance;

f. restitution;

g. declaration; or

h. costs.

23. By the manner in which the appellant approached the ELC, and taking to mind that the award made by the NLC emanated from a hearing of an inquiry, it follows that what the appellant was required to file was a challenge by way of an appeal against a decision of a quasi- judicial tribunal as constituted by NLC. If indeed the appellant did not intend to file an appeal, nothing stopped it from filing a reference, whose form and format is totally different from a memorandum of appeal. The appellant cannot have his cake and eat it. Thus, the submission and ground of appeal that it was section 128 of the *Land Act* that was applicable as opposed to section 16A of the *Environment and Land Court Act* does not hold.

24. We now turn to the issue as to whether the respondent's preliminary objection was merited. The Black's Law dictionary 10th edition defines a preliminary objection as an objection that, if upheld, would render further proceedings in a tribunal unnecessary. It essentially seeks to dismiss the case at an early stage, typically before the merits of the case are heard.

25. In Mukisa Biscuits Manufacturing Ltd vs. West End Distributors (1969) EA 696, a preliminary objection was defined as:

> " ... 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."

26. In that case, Sir Charles Newbold P. stated:

> "……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 preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop."

27. Similarly, the Supreme Court in the case of Hassan Ali Joho & another v Suleiman Said Shabal & 2 others SCK Petition No 10 of 2013 [2014] eKLR held 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."

28. The respondent's Preliminary Objection dated 10th November 2021 objected to the entire appeal on the ground that it offended the provisions of Section 16A of the *Environment and Land Court Act* having been filed out of time, and that the same be dismissed in limine. Ultimately, what the respondent was objecting to was that the ELC had no jurisdiction to hear the appeal before it for the reason that it had been filed out of time. Simply put, the preliminary objection was jurisdictional in nature and, being jurisdictional, the learned Judge was obligated to determine it in limine as she could not confer upon herself powers that she did not legally have.

29. The Supreme Court in Samuel Kamau Macharia & another vs. Kenya Commercial Bank Limited & 2 others (2012) eKLR expressed itself as follows:

> "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

30. The Award of the NLC was made on 5th September 2018 and the appeal in the superior court was filed on 1st October 2019, almost a year down the line. It is trite that the appeal could only be validated by seeking leave to file it out of time, a redress that is well encapsulated in section 16A(2) of the Environment and *Land Act* as follows:

    1. An appeal may be admitted out of time if the appellant satisfies the court that he had a good and sufficient cause for not filing the appeal in time.

31. The appellant failed to take advantage of the latitude accorded under section 16A(2). This means that the appeal before the ELC was incompetent. The learned Judge could not, in the circumstances, arrogate to herself jurisdiction to hear an appeal that never was. We cannot therefore fault her for downing her tools for want of jurisdiction and for consequently dismissing the appeal before her.

32. The Supreme Court in County Executive of Kisumu vs. County Government of Kisumu & 8 others (Civil Application 3 of 2016) [2017] KESC 16 (KLR) (Civ) (12 April 2017) stated that, by filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. We are caught up in a similar situation. No appeal should have been filed out of time without leave of the court. Such a filing renders the 'document' so filed a nullity and of no legal consequence. We therefore

arrive at the inescapable conclusion that the Environment and Land Court did not have jurisdiction to entertain the appeal before it as it was statute barred.

33. For the foregoing, we find and hold that this appeal is unmeritorious and is hereby dismissed. Accordingly, we uphold the Judgment of the Environment and Land Court (Matheka, J.) delivered on 23rd February 2022. We make no order as to costs as the respondent did not participate in this appeal.

34. Orders accordingly.

DATED AND DELIVERED AT MOMBASA THIS 18TH DAY OF JULY, 2025.

A. K. MURGOR

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA CARB, FCIARB

.....

JUDGE OF APPEAL

G. W. NGENYE - MACHARIA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR