Five Star Agencies Limited & another v National Land Commission & 2 others (Civil Appeal E290 & 328 of 2023 (Consolidated)) [2024] KECA 439 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KECA 439 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E290 & 328 OF 2023 (CONSOLIDATED)

DK MUSINGA, M NGUGI & GWN MACHARIA, JJA

APRIL 12, 2024

BETWEEN

FIVE STAR AGENCIES LIMITED ..... APPELLANT

AND

NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

NATIONAL BANK OF KENYA ..... 2ND RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 328 OF 2023

BETWEEN

KENYA NATIONAL HIGHWAYS AUTHORITY ..... APPELLANT

AND

FIVE STAR AGENCIES LIMITED ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

(Being an appeal against part of the Ruling and Order of the Environment and Land Court of Kenya at Nairobi (Angote, J.) delivered on 28th March 2023 in ELC Suit No. 445 of 2014)

JUDGMENT

1. This appeal stems out of the Ruling and Order of the Environment and Land Court (ELC) at Nairobi (Angote, J) delivered on 28th March 2023 in ELC Suit No. 445 of 2014.

2. The impugned ruling of the ELC, was in respect of four different applications that had been filed before it. Five Star Agencies Limited (hereinafter referred to as "Five Star"), had filed one of the said applications, while the National Land Commission (hereinafter referred to as "the NLC"), had filed another. The remaining two applications had been filed by the Kenya National Highways Authority (hereinafter referred to as "KENHA") on diverse dates.

3. The background to these appeals, which were consolidated at hearing hereof, is that through Gazette Notices numbers 3788 and 3789 dated 26th May 2006, the Commissioner of Lands, pursuant to the powers vested in him under section 3 of the Land Acquisition Act (repealed) caused to be gazetted a notice of intention to acquire various parcels of land for the construction and upgrading of the Nairobi Southern Bypass. Among the parcels of land listed for acquisition was a property known as LR No. 209/9727 (IR 37790) measuring about 8.2 Ha (hereinafter referred to as "the suit property") situated along Langata Road, which is registered in the name of Five Star. A portion of the suit property measuring about 0.4281Ha was compulsorily acquired.

4. By operation of the law, the process of acquisition was transferred from the Commissioner of Lands to the NLC.

5. Five Star was awarded Kshs.87,804,255/= as compensation for the portion compulsorily acquired by the NLC. It was aggrieved by the award and moved the ELC vide ELC Suit No. 445 of 2014 on appeal. Five Star argued that the award was not fair and just compensation in terms of Article 40 of the *Constitution*.

6. The trial court (Nyamweya, J) (as she then was), vide a judgment dated 24th November 2014, held that the compensation awarded to Five Star by the NLC was a gross undervalue and not full and just compensation as required by the *Constitution*, the *Land Act* and the repealed *Land Acquisition Act*. Accordingly, the court set aside the award of Kshs.87,804,225.00 and substituted it with an award of Kshs.413,192,500/=. This award was to be paid to Five Star with interest at court rates from the date of delivery of judgment till payment in full (as per the amended decree dated 23rd November 2022). The court also directed Five Star to serve NLC with a certified copy of the judgment and/or decree for the latter to issue a corrected award under section 113 (1) of the *Land Act* in accordance with the compensation as determined by the court within 14 days of service.

7. The NLC was duly served with a copy of the judgment and the attendant decree on 22nd December 2014 but despite service thereof it did not comply with orders given by the trial court. This necessitated the filing of an application dated 8th July 2016 wherein Five Star sought, inter alia, an order of mandamus to compel the NLC to fully comply with the judgment and decree issued by the trial court on 24th November 2014, including making payment of the sums decreed as compensation to it within 21 days from the date of service of the court order. In default of compliance, it sought orders that the Commissioners of the NLC, together with any other person who was served with the aforesaid court order, or who knew of the same but hindered full compliance thereof, be found to be in contempt of court; summons against the Commissioners of the NLC and such other persons identified by the court as hindering compliance with the court order to show cause why warrants should not issue for their arrest with a view to commiting them to civil jail; and that leave be granted to Five Star to execute the decree issued on 24th November 2014.

8. The NLC opposed the notice of motion. In brief, it contended that Five Star was seeking to execute a judgment and decree against it in a manner contrary to the provisions of section 21 of the *Government Proceedings Act*; that the application had been improperly filed before a court without competent jurisdiction; that Five Star sought to have the Commissioners of the NLC cited for contempt

without proof of service of any orders/decree, and without determination by the court that the said Commissioners had not complied with the orders of the court; and that Five Star sought orders improperly against parties who were not under a statutory duty to satisfy judgments made by the court against the government.

9. The trial court (Obaga, J) vide a ruling dated 13th December 2018 held that the NLC had never filed an appeal against the judgment dated 24th November 2014, neither did it seek review thereof, and therefore, the said judgment remained, for all intents and purposes, valid. Further, the NLC had not given any reason why there was no compliance with the decree of the court. Accordingly, the court found the prayer for an order of mandamus well founded and merited.

10. As regards the prayer that the Commissioners of the NLC or any person who may hinder compliance with the court order be cited for contempt of court, the court held that the said prayer was premature, and that it could only be raised if the order of mandamus was granted and disobeyed. Accordingly, the court allowed the application and granted the order of mandamus as prayed.

11. The order of mandamus was served upon the NLC on 25th January 2019. Five Star demanded payment of the compensation amount as awarded by the trial court within 21 days of service of the order. The NLC, vide a letter dated 14th May 2019, informed Five Star that it (NLC) had not received the requested funds from KENHA, the acquiring authority, and therefore it was not in a position to comply with the court order.

12. The NLC brought an application dated 28th June 2019 before the trial court seeking, inter alia, an order of stay of execution of the order of mandamus as well as an order to review and set aside the trial court's ruling dated 13th December 2018. The ground in support of the application for review was that there was an error apparent on the face of the record in that whereas the trial court held that the NLC had not filed any written submissions in respect of the application dated 8th July 2016, it had in fact filed submissions dated 8th November 2018 and 12th November 2018 respectively, which were served upon Five Star on 14th November 2018.

13. In opposing the application by the NLC, Five Star averred that the trial court had given the NLC 14 days from 24th October 2018 to file written submissions, which period lapsed on or about 7th November 2018. The NLC did not comply with these directions and instead filed submissions on 12th November 2018, some 5 days after the timeframe ordered by the trial court. The NLC did not seek leave to file the submissions out of time and therefore there were no written submissions from the NLC properly on record.

14. As regards the prayer for review and/or to set aside the said ruling, it was contended that the prayer offended the provisions of section 45 (1) of the *Civil Procedure Act* in that there was unexplained inordinate delay in bringing the same. In any case, the application was said to be challenging the merits of the ruling dated 13th December 2018, but it was disguised as an application for review.

15. The trial court (Obaga, J) vide a ruling dated 25th February 2021 held, inter alia, that the NLC did not file the written submissions within the given timeframe and, moreover, NLC's written submissions were not in the court file when the learned judge was writing his decision. As regards the prayer for review, it was held that even though the NLC alleged that there was an error apparent on the face of the record, it was actually attacking the ruling of the court on the ground that the finding made in respect of written submissions was erroneous; that an erroneous view of the court cannot be a ground for review but can only be a ground of an appeal; and that the application for review was made six months after delivery of the ruling and the delay was not explained. In sum, the application was dismissed with costs.

16. Subsequently, the NLC was served with a letter of demand dated 24th November 2022 requiring payment of the sum of Kshs.1,185,188,463.02 being the decretal sum plus interest. It did not honour the demand, leading to the institution of garnishee proceedings vide a notice of motion dated 20th January 2023. The proceedings were instituted by Five Star (as judgment creditor) against the NLC (as judgment debtor), whereas the Garnishee was the National Bank of Kenya (hereinafter referred to as "NBK"). The principal orders sought in the application were that pending the hearing and determination of the application the court be pleased to make a Garnishee Order Nisi against NBK, ordering that all monies deposited and being held in deposit by the aforesaid Garnishee to the credit of the NLC in A/c No. (Particulars withheld) be attached to answer the decree for the sum of Kshs.1,202,727,009.41, being the decretal sum plus interest at court rates from the date of judgment up to 15th January 2023, together with any further interest thereon from 16th January 2023 until payment in full; and that the court be pleased to issue an order directing the Garnishee to appear before the court on an appointed date and time to show cause why it should not pay Five Star the sum of Kshs.1,202,727,009.41.

17. In support of the application, Five Star contended that there were funds held to the NLC's credit at NBK in A/c No. (Particulars withheld) which had been set aside for compensation of landowners whose parcels of land had been compulsorily acquired, and that the said funds were being held to the credit of the NLC while Five Star continued to be unjustly deprived of the fruits of its judgment.

18. In opposing the Garnishee proceedings, the NLC filed a notice of preliminary objection dated 8th February 2023. The preliminary objection was premised on three grounds, namely, that the application was contrary to the provisions of section 21 (4) of the *Government Proceedings Act*; that the application was legally untenable as it contravened Order 22 Rule 18 of the *Civil Procedure Rules* 2020; and that the application was premature and misconceived and therefore ought to be dismissed with costs.

19. In addition to the notice of preliminary objection, the NLC, by way of a replying affidavit sworn by one Brian Ikol, its Director, Legal Affairs and Dispute Resolution, acknowledged that just compensation should be paid promptly to all persons whose properties have been compulsorily acquired, and that acquiring entities (such as KENHA) are required to deposit with the NLC compensation funds for purposes of remitting the same to the Project Affected Persons (PAPs). The NLC contended that A/c No. (Particulars withheld) was opened as a special compensation account pursuant to the provisions of Section 115 (2) of the *Land Act*, where monies from various government agencies or departments is deposited for remittance to various PAPs, and that the NLC was merely acting as an intermediary to remit funds received from the acquiring entities to the PAPs. It was contended that the NLC never received any funds from KENHA for purposes of compensating Five Star and hence it would be unfair to compel it to pay a colossal sum of Kshs. 1,202,727,009.41 belonging to other PAPs.

20. On its part, NBK opposed the application by Fives Star vide a replying affidavit sworn by George N. Ibongia. Whereas NBK acknowledged that the NLC holds A/c No. (Particulars withheld) at the Hill Branch which was sufficiently funded, it averred that the said funds were held in trust for various designated recipients of compensation and were therefore not available for satisfaction of any decree as funds due to the general use of the NLC. Through a further affidavit sworn by the said George N. Ibongia, the NBK averred that as at 20th February 2023, the available balance in A/c No. (Particulars withheld) was Kshs.9,044,089,148.36.

21. The trial court granted temporary Orders of Garnishee Nisi in favour of Five Star on 20th February 2023. The issuance of this order precipitated the filing of an application dated 21st February 2023 by KENHA, where it described itself as Third Person/Applicant. KENHA sought two principal orders, to wit, that the court be pleased to review and set aside the Garnishee Nisi granted by the court on

20th February 2023, and that the court be pleased to make an order that the sums of money being held in A/c No. (Particulars withheld) in the name of the NLC cannot be attached to offset the decree in favour of Five Star for the sum of Kshs.1,202,727,009.41.

22. The grounds in support of the application were, inter alia, that whereas A/c No. (Particulars withheld) was held by NBK to the credit of NLC, KENHA had a claim to the funds held in the said account, which funds belonged to it (KENHA) and other third persons (landowners) whose land KENHA was compulsorily acquiring. It was stated that the funds held in the said account did not belong to the NLC and therefore could not be attached to offset Five Star's decree. A breakdown of some of the funds held in the said account was provided against the PAPs to whom payments were supposed to be made. It was also contended that the land owners being compensate stood to suffer grave injustice if the garnishee orders were not set aside, and that the said orders would occasion contravention of the provisions of Article 40 of the *Constitution* requiring prompt compensation to land owners whose land has been compulsorily acquired.

23. KENHA also filed a separate application dated 28th February 2023 seeking, inter alia, orders that the court be pleased to grant stay of execution proceedings and the ongoing garnishee proceedings, pending the hearing and determination of the application; that the judgment dated and delivered on 24th November 2014 (Nyamweya, J) be set aside; that the court be pleased to issue orders joining KENHA as a 2nd respondent in the proceedings; and that the court be pleased to order that the NLC be solely responsible for the payment of the decretal amount and shall not demand nor require from nor use the funds of KENHA set aside for other purposes to pay the decretal sum.

24. In support of its application, KENHA reiterated the grounds set out in support of its application dated 20th February 2023. It contended that the funds held by the NLC in A/c No. (Particulars withheld) belonged to it (KENHA) for payment to various PAPs and was not available to the NLC for satisfaction of Five Star's decree. As regards the prayer for joinder of KENHA as the 2nd respondent, it was contended that KENHA was neither a party to the suit nor was it served with summons and pleadings and thus was denied the opportunity of presenting to the court evidence showing that the suit property was at all times public land that was set aside as a transport corridor, thus it was not justifiable to compulsorily acquire it in the first place. It was further contended that the execution proceedings commenced by Five Star would deprive KENHA of crucial funds and that it (KENHA) would have been punished and/or condemned unheard.

25. In opposing the application, Five Star contended, inter alia, that KENHA was not a party to the proceedings and hence had no locus standi to file any documents in the proceedings. In addition, that there was a clear procedure for joinder which was not followed by KENHA, and that the application was an attempt to justify legal fees and illegally obtain public funds. Lastly, it was contended that KENHA was not a necessary party to enable the court to effectually and completely determine the matter before it.

26. The four separate applications proceeded by way of written submissions, which were highlighted by the advocates on record for the respective parties, culminating in a consolidated ruling delivered by the trial court on 28th March 2023. The trial court identified three issues for determination namely, whether KENHA had locus standi to file the applications dated 21st February 2023 and 28th February 2023 respectively; whether the application by Five Star was competent and if so, whether it was merited; and whether the application by the NLC dated 22nd February 2023 seeking to set aside the Garnishee Order Nisi was merited.

27. As regards the first issue, the court held that KENHA had filed the application dated 21st February 2023 in the capacity of a Third Person seeking, inter alia, an order to review and set aside the temporary orders

of Garnishee Nisi issued by the court. However, looking at the pleadings, it was clear that KENHA was not a party to the proceedings and had not been joined in the proceedings in any capacity. In addition, KENHA had not sought an order for joinder. The court therefore held that the application dated 21st February 2023 had been brought by a stranger to the proceedings and was therefore a non-starter.

28. Turning to KENHA's locus standi to file the application dated 28th February 2023, the court held that KENHA's application was legally competent.

29. Having found the application to be legally competent, the court went ahead to address the merits of the prayers sought in the said application.

30. The court analyzed the law on compulsory acquisition vis-à-vis the role of each of the parties herein in the entire process. It held, inter alia, that it is the NLC that had acquired the suit property pursuant to the provisions of the law and therefore, it was right for Five Star to state that it did not have any claim against KENHA. In addition, that KENHA was made aware of the court decree way back in the year 2017 but never sought to be joined in the proceedings. According to the learned judge, it was the sole mandate of the NLC to value the suit property, which valuation was challenged by Five Star, and the latter was not under any obligation to join KENHA in the suit challenging the said valuation.

31. As regards the garnishee proceedings, the court held that KENHA was not a necessary party, and that in the whole process of land acquisition, KENHA's only role was that of depositing the compensation award with the NLC. In the end, the court was not convinced that the rules of natural justice were breached or that KENHA was condemned unheard as it was not a necessary party to the proceedings. In addition, the application having been brought about six years from the date KENHA became aware of the court decree did not warrant exercise of discretion in its favour. The court declined to set aside the judgment dated 24th April 2014 and entered the finding that the application dated 28th February 2018 was without any merit.

32. Turning to the application by Five Star dated 20th January 2023, the court considered at length whether, for purposes of execution of a monetary decree, the NLC was analogous to the government, and if so, the procedure to be followed in execution against the government. The court analysed various judicial authorities and decisions, both local and global, on what government consists of. The said decisions included *Burns v Ransley* [1949] ALR 817; *Association of Retirement Benefits Scheme v Attorney General & 3 Others* [2017] eKLR; *Okiya Omtatah Okoiti & Another v Attorney General & 7 others* [2013] eKLR; *Tom Ojienda & Associates v National Land Commission & Another* [2019] eKLR; *Rose Aoko Ogwang v National Gender and Equity Commission* [2020] eKLR; *Republic v National Land Commission & 2 Others Ex-Parte Cabin Crew Investments Limited* [2019 eKLR and *Vivo Energy Limited (Formerly Known as Kenya Shell Limited) v National Land Commission* [2020] eKLR

33. The court held, inter alia, that the NLC is a state organ pursuant to the provisions of Article 253 of the Constitution; its functions are of public importance and closely related to governmental functions; and that although the NLC is independent, it is infused with governmental character. The argument by Five Star that since the *Government Proceedings Act* does not expressly provide for the NLC and the NLC Act does not expressly forbid execution in the ordinary manner means that attachment of NLC's assets can be attached in execution of a decree was held to be flawed.

34. The court further held that the funds allocated to the NLC by Parliament for its operations, or funds deposited in its account by acquiring entities for the purposes of compensating PAPs could not be attached by garnishee proceedings or in any manner not provided under the Civil Procedure Rules. In this regard, therefore, it was held that the procedure of execution against the NLC was as provided for under section 21 of the *Government Proceedings Act* which included applying for a certificate of order and costs against the government, and enforcing the same by way of an order of mandamus.

35. The court further held that whereas Five Star was constitutionally entitled to receive compensation for its compulsorily acquired property, the funds in the special account held at NBK could not be garnisheed to satisfy the decree, the obvious discrimination by the NLC in prioritizing compensation for other PAPs notwithstanding. In upshot, it was held that the mode of execution adopted by Five Star was contrary to the provisions of the *Government Proceedings Act* and Order 29 Rule 2 (2) of the *Civil Procedure Rules*.

36. The final orders given by the court were that:

    a. The application by Five Star dated 20th January 2023 be and is hereby dismissed;

    b. The applications by KENHA dated 21st February 2023 and 28th February 2023 be and are hereby dismissed;

    c. The application by the NLC dated 22nd February 2023 succeeds and the garnishee order nisi issued on 20th February 2023 and varied on 22nd February 2023 be and is hereby set aside;

    d. The parties shall bear the costs of their respective applications.

37. Aggrieved and dissatisfied with the decision of the trial court, Five Star and KENHA filed the two appeals herein. Civil Appeal No. E290 of 2023 was filed by Five Star whereas Civil Appeal No. E328 of 2023 was by KENHA. In its appeal, Five Star contends that the learned judge erred in law and in fact by not appreciating that the issue before court was non-payment of compensation of Five Star's land that was compulsorily acquired by the NLC, which compensation ought to have been promptly paid in accordance with Article 40 (3) (b) (i) of the Constitution; in holding that the NLC was not subject to garnishee proceedings on supposition that the *Government Proceedings Act* and the *Civil Procedure Rules* confer immunity to it against such proceedings; in not appreciating that an order of mandamus had been previously issued directing the NLC to pay compensation which order was ignored; in not appreciating that the orders made by the court effectively debarred Five star from receiving compensation despite its land having been compulsorily acquired long ago; in not appreciating that the order it made was to the effect that Five Star would have no legal redress in relation to its compulsorily acquired property; in not appreciating that the order made had the effect of making the fundamental rights set out in the *Constitution* subordinate to the provisions of the *Government Proceedings Act* and the *Civil Procedure Rules*; and in issuing orders beyond the remedies sought in the application by the NLC and thereby failing to judiciously subject the dispute to a fair hearing as contemplated by Article 50 (1) of the *Constitution*.

38. On its part, KENHA contends that the learned judge erred in law and in fact by, inter alia: misconstruing the provisions of order 23, rule 6 of the Civil Procedure Rules when he equated KENHA to a third party whereas it had approached the court as a Third Person/Applicant; failing to grant KENHA audience as per the provisions of Order 23, rule 6 thus unjustifiably limited its right to be heard as enshrined in the Constitution; by conflating the requirements for joinder under Order 1 Rule 10 (2) with the appearance and participation of a Third Person in garnishee proceedings under Order 23 rule 6; by holding that a Third Person under Order 23, rule 6 is not a necessary party in garnishee proceedings because the affected account is held in the name of a judgment debtor other than the Third Person; by holding that only the NLC and not the acquiring entity could be a party to an appeal arising from the inquiry and award of compensation and thereby misdirected himself on the law on compulsory acquisition; acting on wrong principles of the law by purporting to exercise discretion on the basis of time on an application for setting aside a judgment ex debito justitiae on the grounds of a breach of the principle of natural justice under Article 50 (1) hence shutting out KENHA from the seat of justice unjustifiably; in holding that KENHA as the acquiring entity had no known interest

in an appeal arising from inquiry and award of compensation although the court was cognizant that KENHA was bound under section 111 (1A) of the *Land Act* to deposit funds for compensation with the NLC which gives KENHA a direct interest in any subsequent appeals on award decisions; and in holding that rules of natural justice were not breached when KENHA was not heard yet KENHA was expected to settle the judgment and decree of the court thus condemning KENHA unheard contrary to the absolute right to fair hearing under Article 50 (1) of the *Constitution*.

39. At the hearing of this appeal, Mr. Ngatia SC appeared for Five Star whereas learned counsel, Mr. Odoyo, was present for the NLC. KENHA was represented by learned counsel Prof. Albert Mumma and Mr. Ochieng. The consolidated appeals were argued back-to-back, with the appeal by Five Star taking the lead.

40. Highlighting the submissions by Five Star dated 27th September 2023, Mr. Ngatia, SC contended that the appeal crystallizes on two issues, namely, whether the constitutional right to prompt payment in full stipulated by Article 40 (3) (b) (i) as read with Article 10 of the *Constitution* can be limited by the *Government Proceedings Act* and Order 29 Rule 2 (2) of the *Civil Procedure Rules*, and whether Five Star's right to prompt compensation and equality envisaged by Articles 27 (1), (2), (4) and (6) and 40 (3) (b) (i) of the *Constitution* and section 111 and 115 (1) of the *Land Act* can exist in absence of a legal remedy.

41. As regards the first issue, Senior Counsel submitted that the right to property is provided for under Article 40 (1) of the *Constitution* and that under Article 40 (2) and (3), Parliament is bound in law not to enact a law that permits the State or any person to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description, or to limit, or in any way restrict the enjoyment of any right under the said Article on the basis of any grounds specified or contemplated in Article 27 (4). It was contended that the said Article requires prompt payment in full of just compensation to the person whose property has been compulsorily acquired for a public purpose or in the public interest. To buttress the right of an affected person to prompt payment in full of just compensation, SC cited the decision of the Supreme Court of India in *Rustom Cavasjee Cooper v Union of India* 1970 AIR 564, 1970 SCR (3) 530, where the Court held thus:

> " The owner whose property is compulsorily acquired is guaranteed the right to receive compensation and the amount of compensation must either be fixed by the law or be determined according to the principles and in the manner specified by the law. The law which does not ensure the guarantee will, except where the grievance only is that the compensation provide the law is inadequate, be declared void.
>
> In its dictionary meaning "compensation" means anything given to make things equal in value: anything given as an equivalent, to make amends for loss or damage. In all States where the rule of law prevails, the right to compensation is guaranteed by the Constitution or regarded as inextricably involved in the right to property..."

42. In the local spectrum, the decision of *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR was cited to illuminate the role of the Court in protecting the right of an affected person under Article 40 (3) of the *Constitution*. In the said decision, the Court held thus:

> " There exists, no doubt, an overarching right to compensation under Article 40 (3) of the Constitution where a person is deprived of his property for a public purpose or in the public interest.
>
> The power to expropriate private property as donated to the State by both the Constitution and statute law (the *Land Act*) leaves the private land owner with no alternative. The power

involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the court must remain vigilant to see to it that the State or any organ of the state does not abuse the constitutional and statutory authority to expropriate private property."

43. It was contended that the finding of the trial court that attachment cannot issue against the NLC as a State organ impedes Five Star's right to prompt payment, a right guaranteed by the Constitution whereas the limitation is purportedly authorized by a statute. The decision of the trial court was said to have undermined the supremacy of the *Constitution* under Article 2.

44. On the rationale for the insulation of the Government against attachment, Senior Counsel cited the decision of the High Court in *Kisya Investments Ltd v Attorney General & Another* [2005] eKLR where it was held that in execution against the Government, the Government will not be able to pay immediately upon passing of decrees and judgments leading to the attachment of its assets which would bring it to its knees. He stated that in the same decision, the High Court further held that the Government is under a duty to obey the law and discharge all of its statutory and legal obligations and that the insulation and immunity granted to it were intended to protect the public interest and ought not to operate against the public interest as it is the same public who would ultimately be called upon to pay the colossal sums which may have accrued on the original decretal sum.

45. It was submitted that the learned judge, while interpreting the applicable provisions of the Constitution to the dispute between the parties, failed to interpret the Constitution and/or exercise judicial authority in a manner that promotes its purposes and principles as envisaged under Article 159 (2) (e). Several courts decisions, including the *Matter of the Interim Independent Electoral & Boundaries Commission* [2011] eKLR by the Supreme Court and *Association of Insurance Brokers of Kenya v Cabinet Secretary For National Treasury & Planning & 4 others* (Petition 288 of 2019) [2021] KEHC 451 (KLR) (Constitutional and Human Rights) (29 July 2021) (Judgment) by the High Court were cited in support of the proposition that judicial authority must be exercised in a manner that promotes the purposes and principles of the Constitution.

46. Mr. Ngatia SC contended that the trial court, by making a finding that the constitutional right under Article 40 (3) (b) (i) can be limited by the *Government Proceedings Act*, failed to appreciate that Five Star had already obtained mandamus orders against the NLC, which had been properly served and which NLC chose to ignore, thus this finding of the trial court gives the NLC immunity against compliance with constitutional imperatives and/or a license to disobey or act in violation of the Constitution. Reliance was placed on the Supreme Court of India decision of *Nagendra Rao and Co. v State of A. P* AIR 1994 SC 2663. R.M for the argument that no legal or political system today can place the State above law as it is unjust and unfair for a citizen to be deprived of his property illegally by negligent acts of officers of the State without any remedy.

47. In conclusion, it was contended that the application of section 21 of the *Government Proceedings Act* to the discourse before the trial court served to only defeat justice, and that in any case, the *Government Proceedings Act* predates the *Constitution* of Kenya, 2010 and that pursuant to section 7 (1) of the Sixth Schedule to the *Constitution*, the *Government Proceedings Act* should be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with the Constitution. In this regard, it was submitted that the *Government Proceedings Act* cannot be an avenue for disobedience of express dictates of the *Constitution*.

48. As regards the second issue, which is whether Five Star's right to prompt compensation and equality envisaged by Articles 27 (1), (2), (4) and (6) and 40 (3) (b) (i) of the *Constitution* and section 111

and 115 (1) of the *Land Act* can exist in the absence of a legal remedy, Senior Counsel submitted that pursuant to the provisions of section 111 (1), if land is acquired compulsorily, then just compensation should be paid promptly in full to all PAPs, and that pursuant to the provisions of section 115 (1), after notice of an award has been served on all the persons determined to be interested in the land, the NLC is required to promptly pay compensation to the PAPs in accordance with the award.

49. In this regard, therefore, it was contended that the NLC was obligated to promptly pay the compensation due in full to Five Star pursuant to the provisions of Article 40 (3) (b) (i) and sections 111(1) and 115 (1) of the *Land Act*. Five Star placed reliance on the decision of the High Court in *Attorney General v Zinj Limited* (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) where the court held that acquisition ought to have been attended with prompt payment in full of a just compensation to the respondent (the affected person).

50. Mr. Ngatia further submitted that by dismissing the garnishee application, the trial court had diminished his client's rights to property and to prompt payment of compensation as guaranteed under Article 40 of the *Constitution* and section 111 (1) and 115 of the *Land Act*, as his client has no alternative means to execute the decree obtained in its favour.

51. Reliance was placed on several local and global decisions such as *Kenya Wildlife Service v Joseph Musyoki Kalonzo* [2017] eKLR, *Macharia Mwangi Maina & 87 Others v David son of Mwangi Kagiri* [2014] eKLR, *John Bosco Munyao Nzumai v Zheng Hong (K) Limited* [2021] eKLR, *Lemita Ole Lemein v Attorney General of Kenya & 2 Others* [2020] eKLR, *Ashby v White* (1703) 2 Ld Raym 938 at 352 and *Bello v A.G. Oyo State* (1986) 12 S.C.1 for the proposition that equity will not suffer a wrong to be without a remedy.

52. In conclusion, it was submitted that the NLC had abdicated its obligation under the Constitution to compensate Five Star and to treat it in a fair and equal manner by prioritizing compensation to other PAPs contrary to the provisions of Article 10 and 27 of the Constitution. On this basis, the Court was urged to set aside the impugned decision and substitute therefor an order allowing the application by Five Star dated 20th February 2023 with costs.

53. On his part, Mr. Odoyo, highlighting the NLC's written submissions dated 27th October 2023, told the Court that only two issues present themselves for determination in the appeal, namely, whether Five Star had met the threshold for grant of garnishee orders, and whether the *Government Proceedings Act* provides immunity to the NLC against garnishee proceedings.

54. As regards the first issue, counsel began by drawing this Court's attention to the provisions of Order 23 rule 1 of the *Civil Procedure Rules*, which provides that upon application by a decree holder, the court may order all debts owing from the garnishee to the judgment debtor be attached to satisfy the decree. It was submitted that whereas the provisions of Order 23 rule 4 provide that the order nisi may be made absolute if it is not challenged, the garnishee may dispute his liability, where upon the court may order any issue or question on his indebtedness to be tried in accordance with the provisions of Order 23 rule 5.

55. He argued that the NLC was able to demonstrate that the account at NBK was opened pursuant to the provisions of section 115 of the *Land Act*, and that it was held in trust for various government agencies who deposit compensation funds on behalf of PAPs, which funds the NLC has a lawful duty to take care of. The NLC placed reliance on the decision of the High Court of Uganda in Administrator General v Kakooza Umaro & Stanbic Bank, Miscellaneous Application No. 11 of 2017 in support of this argument.

56. It was contended that the NLC has never received any compensation money for Five Star from KENHA, and hence there is no way it could be ordered to release funds it had not received in satisfaction of the decree. Counsel submitted that the onus was on Five Star to prove that the NLC was holding funds meant for it (Five Star) in its bank account. Counsel relied on the decision of *James G. K. Njoroge t/a Baraka Tools & Hardware v APA Insurance Company Limited & 3 Others* [2018] eKLR where the court held that the onus was on the judgment creditor to establish that there was a debt due and recoverable from the garnishee to the judgment debtor.

57. As regards the second issue, that is, whether the *Government Proceedings Act* provides immunity to the NLC against garnishee proceedings, counsel cited the provisions of Article 67 of the *Constitution* that establishes the NLC, as well as the provisions of Article 260 that refers to a commission established under the Constitution as a State organ. It was contended that State organs are part of Government and hence shielded from ordinary execution proceedings under section 21 (4) of the *Government Proceedings Act*. The decision of the Supreme Court *In the Matter of the National Land Commission* [2015] eKLR Advisory Opinion No. 2 of 2014 was cited, where the Court held, inter alia, that State organs are part of Government and one of their core mandate is to protect the sovereignty of the people.

58. Reliance was also placed on the High Court decision in *Okiya Omtatah Okoiti v Attorney General & 7 others* [2013] eKLR, where it was held that Commissions and Independent Offices are part of the national government structure of the State of Kenya and to say otherwise would be absurd.

59. Turning to Civil Appeal No. E328 of 2023, KENHA, through its written submissions dated 3rd October 2023, condensed its grounds of appeal into four main ones, namely, whether KENHA was a necessary party to the suit; whether the suit merits setting aside ex debito justitiae for non-joinder of KENHA; whether KENHA has a right of audience as a Third Person in garnishee proceedings; and whether Five Star can legally garnishee funds belonging to KENHA.

60. As regards the first issue, Prof. Albert Mumma submitted that KENHA was a necessary party to the appeal by Five Star challenging compensation based on the provisions of section 112 (6) of the *Land Act* which entitles the public entity for whose land is compulsorily acquired and every person interested in the land to be heard, to produce evidence and to call and to question witnesses at the inquiry. Further, that by dint of the provisions of section 120 (4) of the *Land Act*, upon compulsory acquisition of any land by the NLC, the same vests on KENHA, thus confirming its interests as the owner and occupier of the land so acquired.

61. To buttress KENHA's interest in the appeal, counsel cited the provisions of section 2 of the *Land Acquisition (Appeals to the High Court) Rules*, which defines an interested person for purposes of compulsory acquisition to mean a person (other than an appellant or the Commission (the NLC)) who claims or is stated to be liable to be interested in or adversely affected by the result of an appeal, and that the word "person" is defined in the same section to include a public body for the purposes of which land is acquired within the meaning of section 29 (2) of the Act.

62. It was further contended that by dint of the provisions of section 111 (1A) of the *Land Act*, KENHA was a necessary party in the appeal since the said section renders KENHA a person liable to deposit with the NLC the compensation funds and who is adversely affected by the result of the appeal as provided by section 2 of the *Land Acquisition (Appeals to the High Court) Rules*. Counsel relied on the decision of this Court in *Alton Homes Limited & Another v Davis Nathan Chelogoi & 5 Others* [2020] eKLR

63. Finally, it was contended that the provisions of Article 40 (3) (b) (ii) of the Constitution guarantees access to court by any person who has an interest in, or right over, the property that is compulsorily

acquired, and, therefore, the learned judge ran into serious error by holding that KENHA was not a necessary party to the proceedings.

64. As regards the second issue, that is, whether the impugned judgment merits to be set aside ex debito justitiae for non- joinder of KENHA, it was contended that KENHA was a necessary party to the proceedings and that Five Star was therefore obligated to join it in the appeal challenging valuation and award of compensation. Therefore, that the learned judge erred in failing to set aside the judgment dated 24th November 2014 and to allow for joinder of KENHA. It was further contended that contrary to the finding of the trial court that rules of natural justice were not breached, the decision of the trial court was in blatant disregard of the principle that no person shall be condemned unheard, and contrary to the provisions of Article 25 (c), 40 (3) (b) (ii) and 50 (1) of the *Constitution*.

65. Counsel reiterated that by dint of the provisions of section 3 (4) and 7 of the *Land Acquisition (Appeals to the High Court) Rules*, KENHA was a necessary party and that Five Star was obligated to add it to the proceedings as a respondent by dint of it being the acquiring entity.

66. Regarding the finding by the learned judge that he could not exercise his discretion in KENHA's favour due to the delay of six years in applying to set aside the judgment, it was submitted that that was an abuse of discretion as setting aside the said judgment was a matter of right, which the court had no discretion to refuse. Reliance for this argument was placed on the decision of the High Court in *James Kanyiita Nderitu & Another v Marios Philotas Ghikas & Another* [2016] eKLR

67. As regards the issue whether the appellant has a right of audience as a Third Person in garnishee proceedings, it was reiterated that KENHA had a right of audience in the garnishee proceedings pursuant to the provisions of Article 25 (c), 40 (3) (b) (ii) and 50 (1) of the *Constitution* and under rules of natural justice.

68. It was contended that the court failed to appreciate the provisions of Order 23 rule 6 which provides that whenever in any proceedings to obtain an attachment of debts it is suggested by the garnishee that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the court may order such third person to appear, and state the nature and particulars of his claim upon such debt.

69. Counsel further submitted that the learned judge erred when he equated KENHA to a third party who had not been joined in the proceedings in any capacity. According to counsel, as per the wording of Order 23 rule 6, a Third Person need not be joined as a party to the suit before they can be heard, and that just like a garnishee, the third person is not necessarily a party joined in the main suit. In this regard, therefore, it was submitted that KENHA had a right of audience in the garnishee proceedings, its non-joinder not withstanding and for the reason that it had a claim in the account sought to be attached by Five Star.

70. With regard to the question whether Five Star can legally garnishee funds belonging to KENHA, it was contended, firstly, that Five Star could not legally purport to execute an irregular judgment that it obtained without joining KENHA to the suit before the trial court. In this connection, it was contended that the impugned judgment of the trial court is a nullity, having been obtained without affording KENHA an opportunity to be heard, and it was in total disregard of the provisions of Article 40 (3) (b) (ii) of the *Constitution*.

71. Secondly, that even if the judgment and decree in favour of Five Star was proper, the dictate of the law is that no execution can be levied against the property of a government and or a county government in settlement of a decree in a civil case, regardless of the status of the person or institution in whose name the property vests. In this regard, therefore, it was contended that the funds sought to be attached by

Five Star are immune from any execution process. Counsel cited the case of *Jamleck Waweru Karanja v County Government of Nakuru* [2020] eKLR

72. Lastly, KENHA relied on the decisions of the Court in Kisya Investments Ltd (*supra*) and *Pravin Bowry v Ethics & Anti- Corruption Commission* [2015] eKLR for the argument that no execution can be levied against the property of a government, and that the immunity of government against execution or any process in the nature thereof is constitutional and does not infringe on any rights of a citizen.

73. On its part, the NLC through Mr. Odoyo associated itself fully with the submissions made by Prof. Albert Mumma on behalf of KENHA.

74. Five Star on its part filed written submissions dated 27th October 2023 in response to the appeal by KENHA. Highlighting the said submissions, Mr. Ngatia contended that the only issue for this Court's determination in the appeal is whether the learned judge erred in holding that KENHA had no locus standi to file the applications dated 21st February 2023 and 28th February 2023 respectively.

75. It was submitted that pursuant to the provisions of section 23 of the *Kenya Roads Act*, the Commissioner of Lands, if satisfied that it is in the public interest to do so, may acquire private land in accordance with the provisions of the *Land Acquisition Act*, and that where land is acquired on behalf of an authority, such authority shall bear the costs in relation thereto.

76. It was contended that from a reading of the relevant laws on compulsory acquisition, the involvement of the acquiring authority is not provided for in the determination of the compensation payable to a PAP, and that this duty, as per the provisions of sections 107, 111 (2) and 125 of the *Land Act* is a preserve of the NLC.

77. It was contended that as per the decision of the court (Nambuye, J) (as she then was) in *Kingori v Chege & 3 Others* [2002] 2 KLR 243, necessary parties who ought to have been joined are parties who are necessary to the constitution of the suit, without whom no decree at all can be passed, and that the test to determine a necessary party as per the said decision is, inter alia, that there must be a right to some relief against him in respect of the matter involved in the suit, and that his presence should be necessary in order to enable the Court effectively and completely adjudicate upon and settle all the questions involved in the suit, being one without whom no decree can be made effectively and one whose presence is necessary for complete final decision on the questions involved in the proceedings. However, a person may be added as a defendant though no relief may be claimed against him, provided his presence is proper for a complete and final decision of the question involved in the suit, and such a person is called a proper party, as distinguished from a necessary party. See also *Julius Meme v Republic & Another* [2004] eKLR cited by Five Star.

78. It was contended that from the decision of the Supreme Court in *Francis Karioko Muruatetu & Another v Republic & 5 Others* [2016] eKLR, joinder of a party is not as of right but is at the discretion of the court.

79. In sum, it was contended that joinder of KENHA in the proceedings was not necessary as it was duly represented by the NLC in the proceedings, and further that KENHA was aware of the judgment delivered by the trial court on 24th November 2014, years prior to filing its applications seeking to have the judgment set aside and for joinder. For those reasons, we were urged to find the appeal unmerited and dismiss it.

80. This being a first appeal, our mandate as a first appellate court is to re-evaluate the evidence before the trial court as well as the judgment and arrive at our own independent judgment on whether or not to

allow the appeal. See *Selle & Another v Associated Motor Boat Co. Ltd.& Others* (1968) EA 123 and *Peters v Sunday Post Limited* (1958) E.A. page 424.

81. The issues for this Court's determination in the consolidated appeals crystallize as follows:

    i. Whether execution against the NLC can proceed by way of garnishee proceedings contemplated under Order 23 rule 1 of the *Civil Procedure Rules* 2010;

    ii. Whether KENHA was a necessary party to the proceedings before the trial court;

    iii. Whether KENHA had the requisite locus standi to file the applications dated 21st February 2023 and 28th February 2023.

82. As regards the first issue, the central issue that the trial court had to determine was whether or not the NLC is analogous to the government and therefore not subject to execution in the manner provided for under Order 23 rule 1 of the *Civil Procedure Rules* 2010. The court analyzed various provisions of the law and judicial decisions and arrived at the conclusion that the NLC is a State organ and although independent, it is infused with governmental character. This finding of the trial court is not a contested issue in the consolidated appeals. We need not therefore belabour the findings of the trial court on the issue.

83. Having therefore established that the NLC is a State organ and therefore for all purposes part of government, what mode of execution should be adopted against it? The procedure adopted by Five Star is as laid down under Order 23 rule 1 of the *Civil Procedure Rules* 2010. Order 23 rule 1 provides the normal rules applicable to normal execution proceedings. However, Order 29 Rule (2) (c) of the *Civil Procedure Rules* 2010 stipulates that:

> "(2) No order against the Government may be made under—
>
> a. ...;
>
> b. ...;
>
> c. Order 23 (Attachment of debts);" [Emphasis added]

84. Our interpretation of the provisions of Order 23 rule 1 as read with Order 29 Rule (2) (c) of the *Civil Procedure Rules* 2010 is that execution under the Civil Procedure Rules (including garnishee proceedings) is barred in so far as the Government is concerned. The procedure with regard to execution of decrees against the Government is stipulated in the *Government Proceedings Act*. Section 21 states as follows:

> "Where in any civil proceedings by or against the Government, or in proceedings in connection with any arbitration in which the Government is a party, any order (including an order for costs) is made by any court in favour of any person against the Government, or against a Government department, or against an officer of the Government as such, the proper officer of the court shall, on an application in that behalf made by or on behalf of that person at any time after the expiration of twenty-one days from the date of the order or, in case the order provides for the payment of costs and the costs require to be taxed, at any time after the costs have been taxed, whichever is the later, issue to that person a certificate in the prescribed form containing particulars of the order:
>
> Provided that, if the court so directs, a separate certificate shall be issued with respect to the costs (if any) ordered to be paid to the applicant."

85. On the other hand, Section 21 (3) of the said Act provides:

> "If the order provides for the payment of any money by way of damages or otherwise, or of any costs, the certificate shall state the amount so payable, and the Accounting Officer for the Government department concerned shall, subject as hereinafter provided, pay to the person entitled or to his advocate the amount appearing by the certificate to be due to him together with interest, if any, lawfully due thereon:
>
> Provided that the court by which any such order as aforesaid is made or any court to which an appeal against the order lies may direct that, pending an appeal or otherwise, payment of the whole of any amount so payable, or any part thereof, shall be suspended, and if the certificate has not been issued may order any such direction to be inserted therein."

86. Section 21 (4) of the *Government Proceedings Act* prohibits execution against the Government. It provides that: -

> "Save as provided in this section, no execution or attachment or process in the nature thereof shall be issued out of any court for enforcing payment by the Government of any money or costs, and no person shall be individually liable under any order for the payment by the Government or any Government department, or any officer of the Government as such, of any money or costs."

87. The rationale for barring execution against the Government was stated in Kisya Investments Ltd (supra) wherein the High Court comprising Ibrahim and Visram, JJ (as they were then) held thus:

> "History and rationale of government's immunity from execution arises from the following.... Firstly, there has been a policy in respect of Parliamentary control over revenue and this is threefold and is exercised in respect of (i) The raising of revenue (by taxation or borrowing); (ii) Its expenditure; and (iii) The audit of public accounts. The satisfaction of decree or judgments is deemed to be an expenditure by Parliament and as a result of this must be justified in law and provided for in the Government's expenditure. It is for this reason that Section 32 of the *Government Proceedings Act* provides that any expenditure incurred by or on behalf of the Government by reason of this Act shall be defrayed out of the monies provided by Parliament. Parliamentary control over expenditure is based upon the principle that all expenditure must rest upon legislative authority and no payment out of public funds is legal unless it is authorized by statute, and any unauthorized payment may be recovered. As a result of the foregoing, which was borrowed from the Crown Proceedings Act, 1947 (Section 37) of England, this is a warning that any payment by Government must be covered by some appropriation. It is said that parliament is very jealous of its control over the expenditure and this is as it should be. No ministry or department has any ready funds at all times to satisfy decrees or judgments - while existence of claims and decrees may be known to the ministries and departments, they have to notify the Ministry of Finance and Treasury of the same so that payment is arranged for or provisions made in the government expenditure. The second situation, which arises from the above, is that once a decree or judgment is obtained against the government, it would require some reasonable time to have it forwarded to the Ministry of Finance, Treasury, Controller and Auditor General etc. for scrutiny and approvals for it to be paid from the consolidated fund. The Ministries and Departments do not have their "own" funds to settle such decrees or payments and considering the nature of the government structure, procedures, red tape and

large number of claims, this could take a long time. If execution and or attachment against the government were allowed, there is no doubt that the government will not be able to pay immediately upon passing of decrees and judgments and will be inundated with executions and attachments of its assets day in day out. Its buildings will be attached and its plants and equipment will be attached, its vehicles, aircraft, ships and boats will be attached. There will be no end to the list of likely assets to be attached and auctioned by the auctioneer's hammer.

No government can possibly survive such an onslaught. The government and therefore the state operations will ground to a halt and paralyzed and soon the government will not only be bankrupt but its constitutional and statutory duties will not be capable of performance and this will lead to chaos, anarchy and the breakdown of the Rule of Law. This is the rationale or the objective of the law that prohibits execution against and attachment of the government assets and property". [Emphasis added]

88. Having stated the foregoing, and since decrees will from time to time be issued against the Government, what then is the option available to a party who holds a decree against the Government? The only remedy available to such a person is to institute judicial review proceedings and seek an order of mandamus to compel the Government to settle the decree in question. This position has been pronounced in several decisions of the High Court such *Republic v Attorney General & Another Exparte James Alfred Koroso* [2013] eKLR wherein Odunga, J (as he then was), held thus:

> "In the present case the ex parte applicant has no other option of realising the fruits of his judgement since he is barred from executing against the Government. Apart from mandamus, he has no option of ensuring that the judgement that he has been awarded is realized. Unless something is done, he will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current Constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the State to ensure access to justice for all persons. Access to justice cannot be said to have been ensured when persons in whose favour judgements have been decreed by courts of competent jurisdiction cannot enjoy the fruits of their judgement due to roadblocks placed on their paths by actions or inactions of public officers..."

89. Similarly, in *Republic v Attorney General & Another ex- parte Stephen Wanyee Roki* [2016] eKLR, it was held thus:

> "That being the position, execution under the Civil Procedure Rules is barred in so far as the County Governments are concerned. What then is the option available to a party in whose favour judgement has been decreed? ...It follows that the only remedy available to such a person is to institute judicial review proceedings and seek an order of mandamus compelling the County Government to settle the decree in question..." [Emphasis added]

90. In *Republic v County Secretary, Nairobi City County & Another ex parte Wachira Nderitu Ngugi & Co. Advocates* [2016] eKLR, the court held a similar view thus:

> "...the law as it stands presently is that no execution can be levied against the property of a Government in settlement of a decree in a civil case and hence the only recourse available to a decree holder is to apply for mandamus against the Chief Officer of the Government, and upon obtaining such orders, the decree holder will be at liberty to apply for committal of the Chief Officer if the order of mandamus is not complied with." [Emphasis added]

91. It is clear beyond any peradventure that the procedure to be followed in execution against the government is to seek an order of mandamus to compel the relevant person in the Government to settle the decree in question. This finding, in our view, readily answers the question posited by Five Star whether its right to prompt compensation and equality under the relevant provisions of the *Constitution* and the *Land Act* can exist in the absence of a legal remedy.

92. The scope of an order of mandamus was discussed by this Court in the case of *Kenya National Examination Council v Republic ex parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR thus:

> " What is the scope and efficacy of an order of Mandamus? Once again, we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:
>
> "The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

> " The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."
>
> What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."

93. In the circumstances herein, Five Star, vide an application dated 8th July 2016, sought, inter alia, an order of mandamus to compel the NLC to fully comply with the judgment and decree issued by the trial court on 24th November 2014, including making payments of the sums decreed as compensation to it within 21 days from the date of service of the court order. In default of compliance, it sought for orders that the Commissioners of the NLC and any other person who was served with the aforesaid court order or knew of it, be found in contempt of the court.

94. The above application was made after Five Star had obtained a copy of the decree issued by the trial court on 16th December 2014, and after service thereof upon the NLC vide letters dated 18th December 2014 and 16th October 2015. The said application was brought pursuant to the provisions of section 13 (7) (b) and 19 (1) of the *Environment and Land Court Act* as well as section 5 of the *Judicature Act*. The trial court (Obaga, J) vide a ruling dated 13th December 2018 issued an order of mandamus as sought.

95. We have perused the mandamus application by Five Star and have also applied our minds to the process leading to the issuance of the said orders. We are convinced that in obtaining the said orders, Five Star did not satisfy the procedure set out in section 21 of *Government Proceedings Act*. An application that

seeks to compel the Government to satisfy a decree is subjected to a very elaborate procedure. Before the court issues such an order, there must be proof that the provisions of section 21 of the *Government Proceedings Act* have been complied with. In the case of *Republic v Permanent Secretary Office of The President Ministry of Internal Security & Another ex-parte Nassir Mwandihi* [2014] eKLR, Odunga, J (as he then was), held as follows:

> "...It must be remembered that an application for an order of mandamus seeking an order compelling the Government to satisfy a decree is a very elaborate procedure. Before the Court issues such an order, there must be proof that the provisions of the *Government Proceedings Act* have been complied [with] with respect to issuance of certificate of costs and certificate of order against the Government. After the issuance of the aforesaid documents, just like in any application for mandamus, there must be a demand for payment made by or on behalf of the decree holder to the relevant department seeking payment since in an application for an order of mandamus, the law as a general rule requires a demand by the applicant for action and refusal as a prerequisite to the granting of an order, though there are exceptions to the rule...
>
> The said elaborate procedure is further meant to give adequate notice to the Government to make arrangement to satisfy the decree. The procedure, in my view, is not meant to relieve the Government from meeting its statutory obligations to satisfy decrees and orders of the Court." [Emphasis added]

96. Similarly, in *Republic v Permanent Secretary Ministry of State for Provincial Administration and Internal Security* [2012] eKLR, the Court held thus:

> "Unlike in other civil proceedings, where decrees for the payment of money or costs had been issued against the Government in favour of a litigant, the said decree can only be enforced by way of an order of mandamus compelling the accounting officer in the relevant ministry to pay the decretal amount as the Government is protected and given immunity from execution and attachment of its property/goods under Section 21(4) of the *Government Proceedings Act*. The only requirement which serves as a condition precedent to the satisfaction or enforcement of decrees for money issued against the Government is found in Section 21(1) and (2) of the *Government Proceedings Act* (hereinafter referred to as the Act) which provides that payment will be based on a certificate of costs obtained by the successful litigant from the court issuing the decree which should be served on the Hon Attorney General. The certificate of order against the Government should be issued by the court after expiration of 21 days after entry of judgment. Once the certificate of order against the Government is served on the Hon Attorney General, section 21(3) imposes a statutory duty on the accounting officer concerned to pay the sums specified in the said order to the person entitled or to his advocate together with any interest lawfully accruing thereon. This provision does not condition payment to budgetary allocation and parliamentary approval of Government expenditure in the financial year subsequent to which Government liability accrues."

97. We adopt the reasoning of the court in both *Republic v Permanent Secretary Office of The President Ministry of Internal Security & Another ex-parte Nassir Mwandihi* and *Republic vs Permanent Secretary Ministry of State for Provincial Administration and Internal Security* (*supra*). It is our view that only after the procedure as laid down under section 21 of the *Government Proceedings Act* has been complied with and a demand for payment made that a cause of action accrues for the purposes of an application for an order of mandamus against the Government.

98. In the present circumstances, Five Star did not obtain Certificate of Order against the Government from the trial court, which it was required to. Instead, it obtained a copy of the decree which it served upon the NLC. The obtaining of the said certificate was a condition precedent to the making and issuance of an order of mandamus. In our view, the trial court could only issue an order of mandamus after satisfying itself that the said certificate was issued and served. The trial court vide its ruling dated 13th December 2018 correctly held that a copy of the judgment dated 24th November 2014 and the decree issued on 16th December 2014 had been served on the NLC. However, the court did not satisfy itself as to whether a Certificate of Order against the Government had been obtained and served upon the NLC pursuant to the provisions of section 21 of the *Government Proceedings Act*. The certificate is mandatory and is a condition precedent to the issuing of an order of mandamus. It follows therefore that in the absence thereof, the trial court ought not to have issued an order of mandamus in favour of Five Star.

99. Having noted as above, it follows therefore that the garnishee proceedings instituted by Five Star through the notice of motion dated 20th January 2023 and brought under the provisions of Order 23 Rule 1, 2, and 3 of the *Civil Procedure Rules*, 2010 were incompetent, bad in law and unsustainable as provisions of Order 23 Rule 1, 2, and 3 of the Civil Procedure Rules, 2010 do not apply in execution against the Government and/or State organs. Five Star ought to have commenced execution proceedings against the NLC in strict adherence with the provisions of section 21 of the *Government Proceedings Act*.

100. We fully agree with Five Star that the Constitution of Kenya, 2010 under Article 40 (3) (b) (i) guarantees every person and/or entity whose land has been compulsorily acquired by the Government prompt payment in full, of just compensation. This obligation is replicated under section 111 and 115 of the *Land Act*. Five Star is, by all means, entitled to prompt payment in full of the compensation amount as assessed by the trial court. However, the procedure it adopted in enforcing the decree issued by the trial court was wrong. In upshot, therefore, we do not find merit in the argument advanced by Five Star that the provisions of section 21 of the *Government Proceedings Act* and Order 29 rule (2) of the *Civil Procedure Rules*, 2010 limits its right to prompt payment as stipulated under Article 40 (3) (b) (i) of the Constitution. The rationale for the requirement that there should be adherence with the procedure laid down under section 21 of the *Government Proceedings Act* cannot be gainsaid. See Kisya Investments Ltd (*supra*). This ground of appeal is therefore unmerited and must therefore fail.

101. Turning to the second issue which is whether KENHA was a necessary party in the proceedings before the trial court, what essentially KENHA is urging this Court to determine is whether it should have been joined in the proceedings before the trial court which were commenced by way of the appeal filed by Five Star. Joinder of parties is governed by Order 1 Rule 10 (2) of the *Civil Procedure Rules* which provide that:

> "The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added." [Emphasis added]

102. The applicable principles were considered by this Court in *Pravin Bowry v John Ward & Another* [2015] eKLR, where the Court referred to the decision of the Supreme Court of Uganda in *Deported Asians Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 (SCU) thus:

> " A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter...
>
> For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit, one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person." [Emphasis added]

103. In *Communications Commission of Kenya & 3 Others v Royal Media Services Limited & 7 Others* [2014] eKLR the Supreme Court stated thus:

> " Similarly, in the case of Meme v Republic [2004] 1 EA 124, the High Court observed that a party could be enjoined in a matter for the reasons that:
>
> i. joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
>
> ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
>
> iii. joinder to prevent a likely course of proliferated litigation."

104. The argument by Five Star before the trial court was that its claim was strictly against the NLC and that it had no claim against KENHA necessitating the latter's inclusion in the proceedings. Who then is a necessary party? The *Black's Law Dictionary* 11th Ed at page 1351 defines a necessary party as follows:

> " A party who, being closely connected to a lawsuit, should be included in the case if feasible, but whose absence will not require dismissal of the proceedings."

105. Nambuye, J (as she then was) in *Kingori v Chege* (supra) held that:

> " ...parties cannot be added so as to introduce quite a new cause of action or to alter the nature of the suit. Necessary parties who ought to have been joined are parties who are necessary to the constitution of the suit without whom no decree at all can be passed. Therefore, in case of a defendant two conditions must be met:
>
> (1) There must be a right to some relief against him in respect of the matter involved in the suit.

(2) His presence should be necessary in order to enable the Court effectively and completely to adjudicate upon and settle all the questions involved in the suit being one without whom no decree can be made effectively and one whose presence is necessary for complete and final decision on the questions involved in the proceedings.

A proper party is one who has a designed subsisting direct and substantive interest in the issues arising in the litigation which interest will be recognisable in the Court of law being an interest which the Court will enforce. A person who is only indicated or commercially interested in the proceedings is not entitled to be added as a party. But a person may be added as a defendant though no relief may be claimed against him provided his presence is proper for a complete and final decision of the question involved in the suit and such a person is called a proper party as distinguished from a necessary party... Order 1 rule 10 allows the Court to add a defendant on its own motion or upon application by either party either orally or formally by summons in chambers under Order 1 rule 22. Here the party has not moved on its own but has been moved by the intending party on its own formally. The use of the words "either party" denotes that the formal move has to be made by a party already participating in the proceedings and it would mean that an intending party cannot come on his own and choose which position he wants." [Emphasis added].

106. The question whether KENHA was a necessary party can only, in our view, be answered by examining the role each party was to play in the acquisition of the suit property. In our view, the starting point is the *Kenya Roads Act*, 2007 under which KENHA is established. Pursuant to the provisions of section 23 of the said Act, which relates to the acquisition of land for the purposes of the authority (in this context KENHA), the Commissioner of Lands (now the NLC), may, if satisfied that it is in the public interest to do so, acquire private land in accordance with the provisions of the *Land Acquisition Act* (Cap. 295) (now repealed). Section 23 (3) provides that where private land is acquired on behalf of an Authority, such Authority shall bear all costs in relation thereto.

107. Under section 107 of the *Land Act*, it is the mandate of the Commission (read the NLC) to acquire land for a public purpose and it is also obligated with the coming up of a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land. The role of an acquiring authority under section 107 is restricted to notifying the NLC of its intention to acquire some particular land under section 110. Similarly, under the provisions of section 107A and 107B of the said Act, the criteria for assessing the value of the compulsorily acquired land is a preserve of the NLC. The next identified role of an acquiring authority is to be found in section 111 which relates to compensation for compulsorily acquired land. The said section provides that:

"111. Compensation to be paid

(1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

(1A) The acquiring authority shall deposit with the Commission the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken."

[Emphasis added]

108. Section 112 on the other hand provides for the process known as an inquiry, wherein the NLC hears issues of propriety and claims for compensation by persons interested in the land that is the subject of the compulsory acquisition. If an acquiring authority has any issues of propriety and claims regarding the anticipated compensation, it will be heard at this stage. Indeed, section 112 (6) provides that:

> " The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry." [Emphasis added]

109. After the inquiry is concluded, the NLC prepares the written award pursuant to section 113 and serves upon each person it has determined to be interested in the land, a notice of the award and offer of compensation as provided under section 114 of the said Act. After notice of an award has been served on all the persons determined to be interested in the land, the NLC is required, pursuant to the provisions of section 115, to promptly pay compensation in accordance with the award to the persons entitled thereunder. However, in instances such as when the person entitled does not consent to receive the amount awarded, the NLC may at any time pay the amount of the compensation into a special compensation account held by the NLC such as the one held with NBK. Pursuant to the provisions of section 120 (4), upon taking possession and payment of just compensation in full, the compulsorily acquired land vests in the national or county governments absolutely free from encumbrances.

110. From the aforesaid provisions of the *Kenya Roads Act* and the *Land Act*, the involvement of the acquiring authority in the acquisition process is, in our view, limited to notifying the NLC of its intention to acquire some particular land under section 110, depositing with the NLC the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken, and participation in the inquiry, wherein any issues of propriety and claims for compensation by persons interested in the land subject of compulsory acquisition are heard.

111. We agree with the findings of the trial court that KENHA did not demonstrate that it had any reservations with the suit property being acquired by the NLC on its behalf. Any such reservations as rightly held by the trial court ought to have been raised at the inquiry stage, which was conducted pursuant to the provisions of section 113 of the *Act*. Similarly, despite being aware of the entire acquisition process, including the inquiry, KENHA did not comply with the provisions of section 111 (1A) of the said *Act* requiring it to deposit the compensation funds with the NLC.

112. Therefore, it is clear to us that KENHA was obligated in law to deposit the compensation funds with the NLC, and that it is the NLC which is mandated in law to conduct compulsory acquisition on behalf of the acquiring authority with the latter's participation in the entire process being as limited to the activities highlighted hereinabove. The NLC having acquired the suit property on behalf of KENHA pursuant to the relevant provisions of the law, then it was correct for the trial court to hold that Five Star did not have any claim against KENHA as compensation was being paid to it by the NLC pursuant to the provisions of section 115 from the funds deposited with the latter pursuant to the provisions of section 111 (1A) of the *Land Act*.

113. It is our view, therefore, that the involvement or joinder of KENHA in the proceedings was not necessary as Five Star was not seeking any relief from, or against KENHA in respect of its compulsorily acquired land, nor was KENHA's presence necessary for the trial court to effectively and completely to adjudicate upon and settle all the questions involved in the proceedings before it. The argument that KENHA ought to have been joined in the proceedings since it was liable to pay under section 111 (1A)

is flawed. By parity of reasoning, its argument that its rights under Article 50 of the *Constitution* were violated and/or that it was condemned unheard have no basis.

114. Having so found, the inescapable conclusion to be made as regards the third issue is that KENHA, as the acquiring entity, did not have the necessary locus standi to file the motions dated 21st February 2023 and 28th February 2023. The dispute was primarily between the NLC, as the entity mandated in law to acquire land on behalf of the acquiring authorities, and Five Star, whose land was compulsorily acquired on behalf of KENHA. We assert that KENHA's role in the acquisition process was as laid down under section 107, 111 (1A) and 113 of the *Land Act*.

115. The long and short of it is that we do not find any grounds upon which we can interfere with the decision of the trial court. Consequently, the consolidated appeals are unmerited and are accordingly dismissed. We order that each party bears its own costs.

DATED AND DELIVERED AT NAIROBI THIS 12TH DAY OF APRIL 2024.

D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR