



Premier Daffodil Limited v Kenya Ports Authority & another (Environment & Land Case 266 of 2019) [2024] KEELC 4998 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4998 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 266 OF 2019**

**JA MOGENI, J
JUNE 24, 2024**

BETWEEN

PREMIER DAFFODIL LIMITED PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

JUDGMENT

1. The Plaintiff Premier Daffodil Company Limited (The Company) in early 2017 pursuant to numerous meetings and negotiations between themselves and the 1st Defendant expressed interest in purchasing the Suit property from the Plaintiff subject to the internal procedures of the 1st Defendant which was adjacent to its Inland Container Depot at Embakasi and the plaintiff required additional land for the expansion of the facility.
2. Both the plaintiff and the 1st defendant caused valuation reports to be prepared separately. The plaintiff's valuation report was prepared by ProLand Realtors Limited valuing the property at Kenya Shillings One Billion One Hundred and Forty Million (Ksh 1,140,000,000) and upon receiving this report from the plaintiff the 1st defendant caused a valuation to be undertaken.
3. Further meetings were held between the two parties and the 1st defendant contended that the preferred method of disposals of the suit property was by private treaty as allowed by law.
4. That to the plaintiff's shock the 1st defendant through the 2nd defendant caused a Kenya Gazette Notice Number 5073 of 25/05/2018 to be published without notifying the plaintiff intending to compulsorily acquire the suit property. Yet despite the gazette notice the 1st and 2nd defendants have to date never made any efforts to purchase the said suit property. That the failure to conclude the transaction to this date is an act of bad faith and a breach of the agreement between the plaintiff and the 1st defendant.



5. The plaintiff itemized the following as the particulars of breach and bad faith on the part of the 1st defendant:
 - a. Failing to inform the plaintiff of their intention not to proceed with the purchase of the suit property before gazetting it.
 - b. Gazetting the suit property for compulsory acquisition without informing the Plaintiff
 - c. Maintaining a gazette of the suit property without any intention to acquire it
 - d. Depriving the Plaintiff of the use and enjoyment of the said property.
6. It is the contention of the plaintiff that since the 1st and the 2nd defendants by themselves, their servants, agents and/or assigns knew about the purchase process of the suit property then they had no right to gazette the said suit property without any intention to purchase it at all. Thus the conduct of gazetting the suit property and maintaining the gazette was illegal and unlawful and it amounts to deprivation of rights of the plaintiff upon its lawful property.
7. Further that despite the plaintiff sending numerous demand letters by the advocates of the plaintiff to the 1st and 2nd defendants to cause the said gazette notice to be removed this was not done.
8. As a result, the potential buyers who were being sought to buy or lease the suit property since the plaintiff was in need of money could not commit due to the actions perpetrated by the 1st and 2nd defendants upon the suit property.
9. The plaintiff lists the particulars of breach and bad faith on the part of the 2nd Defendant as follows:
 - a. Gazetting the suit property without informing the plaintiff
 - b. Denying the Plaintiff use and enjoyment of the suit property
 - c. Failure to effect the gazette thereby occasioning loss to the plaintiff.
10. The plaintiff claims that due to the gazette of its property by the 1st and 2nd defendant it suffered loss and damage and thus it claims general damages for having been deprived of the use and enjoyment of the suit property through gazette with no intention to complete acquisition. The plaintiff also seeks order of mandamus compelling the removal of the gazette and loss of user and opportunity.
11. Further the 1st defendant's conduct has occasioned loss and inconvenience to the plaintiff and thus the plaintiff reserves the right to claim special damages due to the loss. The particulars of loss are listed as:

Loss of income on leasing calculated as 15% of plot value. Annual escalation of 7.5%

Loss of rental income in Year 1 (15%*175m87.4) Kshs. 194,250,000

Loss of rental income in Year 2 (194.25M*1.075) Kshs. 208,820,000

Total Rental income loss Kshs. 403,070,000

Add architect fees, bridge construction, Approvals etc. approx.. Kshs. 12,000,000

Grand Total Kshs 415,000,000
12. That despite demand and notice of intention to sue the 1st and 2nd defendants have failed, refused and/or neglected to meet the Plaintiff's demand. The plaintiff thus prays for judgment against the defendants jointly and severally for:
 - a. An order of specific performance compelling the 1st defendant to complete the sale transaction as the current market value of the property
 - b. An order requiring the 2nd Defendant to cause the unconditional removal of the gazette notice Number 5073 of 25th May 2018



- c. Special Damages at Kesh 415,000,000 as expounded under paragraph 17 above
 - d. General damages for breach of agreement
 - e. Interest on prayers c) and d) at Court rates.
13. The 1st defendant filed an amended statement of defence dated 26/09/2019 in which they deny the averments by the plaintiff and they claim that the 1st defendant engaged in a series of informal and non-binding preliminary discussions with the plaintiff regarding the possibility of acquiring the suit property.
 14. That the 1st defendant chose not to pursue the informal discussions to acquire the suit property through private treaty which never materialized despite having expressed an interest to acquire the suit property.
 15. Further that though the 1st defendant received a valuation report which was initiated at the plaintiff's own initiative, there was no express or implied admission to bind the 1st defendant to purchase the suit property at the plaintiff's valued amount nor was it an acceptance to purchase the suit property through private treaty. In fact, that the aforementioned valuation was only meant to guide the initial informal discussions between the plaintiff and the 1st defendant.
 16. On its part, the 1st defendant also caused a valuation to be conducted and a report made whose sole purpose was to guide the 1st defendant during the non-binding preliminary discussions. Further that at no point during its engagement with the plaintiff was there an offer and acceptance binding the 1st defendant to the purchase of the suit through private treaty.
 17. That the interest expressed by the 1st defendant to acquire the suit property was only information and did not result into any binding agreement and the subsequent involvement of the 2nd defendant was lawful which did not require the plaintiff seeking anyone's approval. That the process of compulsory acquisition is a process independently conducted by the 2nd defendant and as such the plaintiff gives no justifiable reasons to impute bad faith on the part of the 1st defendant
 18. Further the 2nd defendant is the only entity that having commenced the compulsory acquisition steps is in turn the only one with the powers to terminate the same and not the 1st defendant who has no role in compulsory acquisition process.
 19. The 1st defendant contend that the plaintiff has the liberty at the inquiry stage to lodge their complaint with the 2nd defendant and they have the opportunity to be informed of the effect of the impugned gazette notice, ventilate their concerns and challenge the legality and constitutionality of the purpose which the 2nd defendant intends to exercise its power of compulsorily acquire the suit property.
 20. That the gazette or degazette of the suit property for compulsory acquisition can only be done independently by the 2nd defendant who can either withdraw such acquisition, revoke a direction to acquire the suit property, determine and pay the plaintiff compensation for all damage suffered, costs and expenses proved to be incurred in consequence of the acquisition process and NOT the 1st Defendant.
 21. The 1st defendant thus denies causing the plaintiff any loss or inconvenience to warrant the remedies sought. It is the contention of the 1st defendant that neither the plaintiff nor the 1st defendant can stop a process of compulsory acquisition initiated by the 2nd defendant within the perimeters of the law.



22. That any claim by the plaintiff of liquidated damages is premised on excessive and/or exaggerated assertions which are not premised on losses directly attributable to the 1st defendant.
23. The 1st defendant contends that the plaintiff has not laid any plausible basis for its claim since being the registered and beneficial owner, nothing stops them from making use or gain any commercial benefit from the property since the impugned gazette notice is and was never a caveat/caution/restriction. The Gazette Notice No. 5073 of 25/05/2018 was a notification to the plaintiff and the public that the 2nd defendant intended to acquire the land compulsorily for the 1st defendant but was not an actual acquisition.
24. The 1st defendant denies the jurisdiction of this court stating the plaintiff should have first exhausted the mechanism provided under the laws which demand that that these complaints are first brought before the lowest appropriate and competent forum being the National Land Commission where the hearing on compensation money, concerns on the legality or constitutionality of the compulsory acquisition would have been heard. That the plaintiff has come prematurely before this court.
25. The 2nd defendant filed a statement of defence dated 15/02/2021 and denied all averments made by the plaintiff except where they are descriptive in nature and refer to the address of the 2nd defendant.
26. It is the 2nd defendant's contention that they published a Kenya Gazette No. 5073 dated 25/05/2018 for acquisition of the suit property among others following a request from the Cabinet Secretary of Transport, Infrastructure, Housing and Urban Development vide their letter dated 16/03/2018 for purposes of development of a specialized Bulk Cargo Handling facility in Athi River and Port facilities in Embakasi.
27. The 2nd defendant avers that the plaintiff received a letter from 1st defendant stating that they were not going to acquire the suit property as they had wanted to due to current financial commitments on priority projects of National Strategic Importance and the 1st defendant advised the 2nd defendant to go ahead and degazette.
28. That the process of compulsory acquisition would have required the 1st defendant to provide funds to compensate any parties whose property was compulsorily acquired. In the instant case the process was terminated and therefore the 2nd defendant was not provided with funds to compensate the party who property was acquired since there was not compulsory acquisition anyway.
29. The particulars of breach and bad faith on the part of the 2nd defendant are denied and also the 2nd defendant avers that a gazette notice is a form of communication and the plaintiff does not deny seeing the gazette notice. Secondly that the plaintiff has remained in continuous use and possession of the suit property and the 1st defendant has never been in possession of the suit property
30. Further the 2nd defendant avers that the mere expression of intention to acquire land is not synonymous with compulsory acquisition or purchase of land, further that the 2nd defendant never issued a notice to the plaintiff to vacate their suit property to facilitate compulsory acquisition. Lastly that the claim for loss of earnings is futuristic and also the plaintiff has not laid before the court proof of any loss suffered due to the publication of a notice of intention to acquire through compulsory acquisition.
31. The 2nd defendant contends that the assessment of loss is wrong due to the failure to take into consideration taxation due from rental income and is thus unreliable. The claim for loss speculative is not based on any tangible real income.



Plaintiff's Evidence

32. PW1- Kiran Kumar Patel testified as the only plaintiff's witness on 30/01/2024. He adopted his witness statement as his evidence in chief and also last produced a list of documents which he wished to produce as his exhibits in the case.
33. Upon cross-examination he stated that the title number to the suit property is LR 209/11348 and that it is registered under the plaintiff's name as evidenced by the document at page 22 of the plaintiff's bundle name. He stated that he acquired the suit property in September 2016. He testified that he intended to develop the property so he sought several approvals and plans.
34. It was his testimony that he failed to carry out development because he was awaiting approvals for loans/financing awaiting approvals from City Council since they already had approvals from NEMA . He stated that he had obtained approvals to construct a bridge from Kenya Pipeline.
35. In relation to the sale of the suit property he testified that it was an agent who approached the plaintiff and brought the 1st defendant on board. He contests that there were any informal meetings with the plaintiffs. Further that they were approached by a company by the name Remax who advised them to engage the services of an advocate to facilitate the process of disposal of the suit property to the 1st defendant.
36. He testified that there were no pre-agreement negotiations and also that there was no agreement stopping the plaintiffs from negotiating with 3rd parties. From the letter at page 24 he stated that it speaks to the processes which Kenya Ports Authority will engage in such a process of seeking an opinion and scrutiny. That the same letter required the plaintiff to prepare a proposal which the plaintiff went ahead and prepared. The proposal referred to was however not produced in court.
37. The plaintiff testified that though there was a valuation report prepared for the company's own consumption and it was meant to enrich their proposal as per the content of the letter at page 24, the same was never presented to KPA. Instead the report was prepared on 1/02/2018 and it is not clear when it was shared with KPA. The letter at page 46 speaks about the possibility of compulsory acquisition and the plaintiff stated that he was not familiar with nor did he understand the process of compulsory acquisition.
38. Further that although the initial process of engagement with KPA with regard to the suit property was about sale by private treaty there was no agreement reached nor was a purchase price discussed. That at Page 48 of the bundle there is a gazette notice showing the suit property was gazetted on 25/05/2018.
39. It was the plaintiff's testimony that the letter dated 30/08/2018 at page 50 in the plaintiff's bundle to his advocate bore the information that the process of Land Acquisition has been suspended. He therefore testified that the plaintiff's complaint is about the loss that has been incurred and costs that have been expensed due to the cancellation of the sale transaction. Further he stated that nobody would come to look at the property unless it was degazetted since NLC had gazette the suit property. Therefore, degazettement could only be done by the NLC in consultation with the agency that wanted to acquire the suit property.
40. That at page 53 the parcel referred to is LR 209/1348 and that the reference to LR 209/11348 is a typo. Further that the letter at page 71 dated 14/08/2017 is from Lotte which was inquiring about the suit property but PW1 testified that at this time Lotte was inquiring about the suit property the plaintiff was already negotiating with the 1st defendant. The plaintiff avers that they informed Lotte that they were in negotiations with the 1st defendant and that they would have to wait until the process



- concluded. The plaintiff however stated that they did not produce the letter they sent to Lotte asking them to wait out.
41. The plaintiff avers that the suit property was finally degazetted in 2020 and at page 69 of the bundle of the 1st defendant there is a letter to NLC advising that the parcel should be degazetted but the degazettement process took a whole year since the letter was written on 3/04/2019. At this point PW-1 was stood down and the matter was adjourned till the next hearing.
 42. When the hearing resumed on 14/02/2024, the plaintiff was cross-examined by Counsel for the 2nd defendant, Mr Mbuthia. PW1 testified that the plaintiff company acquires land but has no known properties or assets. The company was registered around 2016 and they purchased the suit property in the same year. On further cross-examination he stated that it is not true that the company was purely registered to purchase the suit property.
 43. When cross-examined on the name on the title he stated that the copy of the title at page 21 shows that the title is granted to Wrigley Company (East Africa) Limited and so the plaintiff company bought it from them. The Wrigley Company has a letter of allotment but the said letter has not been produced in court. Neither has the Acceptance Letter been produced before the court not receipts or any documents to show payment of stamp duty. There is also no part development plan before the court.
 44. PW1 testified that the transfer instrument used by Wrigley Company to transfer the suit property to Plaintiff company was also not produced in court. Further the plaintiff testified that he did not have a copy of the sale agreement between Wrigley to Dafodil (the plaintiff).
 45. He informed the court that the gazette notice at page 48 of the plaintiff's bundle is dated 25/05/2018 and it relates to expansion of inland container deport and the property referred to is the one that belongs to Wrigley and the registration number is LR 209/11348. He further testified that the letter at page 23 is dated 9/10/2017 and it refers to two separate meetings which were done in 2017 but that the plaintiff bought the suit property in 2016.
 46. It was his testimony that the last paragraph of the letter at page 24 dated 11/01/2018 point to the fact that KPA stated that they will seek an opinion from NLC. He additionally testified that today if the court were to visit the suit property they would find that half the property is already rented out. The degazettement was done on 2/10/2020. That the valuation report at page 28 which was done on 1/01/2018 read that the valuation was for sale purposes and not for compulsory acquisition purposes. It was his testimony that he would not respond to questions touching on matters of the valuation report although he is not going to call the valuer who prepared the report as a witness.
 47. He testified that in the plaintiff's bundle at page 33 there is a list of warehouse letting processes and that the land measured 7.4 acres and at the same time the list also shows the size of godowns and letting prices. It was his testimony that he had indicated a claim for Kshs. 415,000,000 which includes rental income from 2017 and 2018 although there was no rental income and the property was not developed and was not generating any income. That at page 28 of the Valuation Report it also states that there were no improvements on the land.
 48. It was the plaintiff's testimony that whereas there was construction of the bridge, the Quantity of Survey (QS) report and the architect's report is not submitted in court. That all the figures he stated in the plaint are by the valuer but he was not calling him as a witness.
 49. The plaintiff testified that he was not evicted and that there was no caveat in place nor was the title issued to anybody after the publication of the gazette and that they remained in ownership. That after



- a period of 2 months after gazettelement of the suit property, they received a letter dated 30/08/2018 which stated that KPA was no longer going to acquire the property.
50. He testified that at page 71 there is a letter from Lotte dated 14/08/2017 concerning the purchase of the suit property although by the date of this letter the plaintiff was still actively engaging KPA. He stated that therefore it was evident that there were other people engaging with the plaintiff showing interest on the suit property. At page 83 there is a letter from Golok Construction though the letter does not mention the suit property.
 51. He stated that the plaintiff was never served with any notices to vacate the suit property and that before they engaged the 1st defendant they were not making income from the suit property. He testified that they never purchased the suit property for speculation purposes. Further that there was no income being made by the plaintiff in 2019. He told the court that the plan for purchasing the suit property was to construct warehouses but that at the moment they have rented out the property.
 52. Upon re-examination, the plaintiff testified that the 1st defendant undertook an evaluation and they recognized the plaintiff as the owners of the suit property. That the plaintiff never put up development on the property but they constructed warehouses and built a bridge after getting approval from NEMA.
 53. PW1 further testified that Daffodil Limited was changed from Daffodil Developers Limited and a certificate to this effect was issued on 29/05/2019. Remax was the company appointed to market the suit property. Through the letter dated 9/10/2017 KPA informed the plaintiff about their interest to acquire the suit property. He further stated that KPA never informed the plaintiff that they would acquire the suit property through a private treaty nor compulsory acquisition.
 54. That the period before suspension of the acquisition it was difficult to sell or use the suit property even for short term.
 55. That the suit property was acquired in 2016 and since there was no revenue the plaintiff filed nil returns although the records were not produced in court. The plaintiff denied acquiring the suit property for speculative purposes. With this the plaintiff closed its case.
 56. At this point the 1st defendant made an oral application to have the valuation report expunged from the court record since the plaintiff was not going to call the maker to be cross-examined. The counsel for the plaintiff opposed the application stating the Counsel for the 1st defendant never questioned the report when the parties went for pre-trial conference. In the alternative the counsel stated that if the court was inclined to strike out the report, then the questions asked about the reports should also be expunged.
 57. The court upheld the application to expunge the report due to the fact that the maker was not called to testify and produce the report and be cross-examined. The questions and all issues relating to the report were also expunged.

Defendant's Evidence

1st Defendant's Case

58. DW1- John Turasha Kinyanjui – Testified that he works at Kenya Pipeline Authority (herein KPA) as the corporation secretary and general manager legal services. He adopted his witness statement dated 30/12/2022 and also his list of documents dated 26/09/2019. The plaintiff objected to the adoption of the valuation report in the list of documents stating that they wished to cross-examine the maker who if the defendant was not calling then the valuation report should be expunged from the list.



59. The 1st defendant moved to have the valuation report expunged from the list since the maker was not going to be called as a witness. The court expunged the valuation report from the list of documents.
60. Upon cross-examination by Counsel for the plaintiff Ms Nyambura, he testified that KPA identified the property in 2017 and they held informal discussions with the plaintiff in the same year. He stated that they made a disclosure to the plaintiff vide the letter dated 09/10/2017 at page 46 of their bundle but they failed to inform the plaintiff about compulsory acquisition. However, that on 30/08/2018 the defendant testifies that they wrote to the plaintiff informing them that the defendant had suspended the purchase of the plaintiff's property.
61. He also testified that they also wrote to NLC to degazette the said property on 3/04/2019 vide the letter produced in the bundle at page 43 which was written after a board meeting. He further stated that the document produced to support his assertion is not dated and so it does not buttress the claim for delay to degazette from 30/08/2018 to 3/04/2019.
62. It was his testimony that the Attorney General vide his letter produced in the bundle at page 50-56, explained that the route of obtaining the suit property vide private treaty was not the right procedure unless the property had been acquired compulsorily. He testified that it is the plaintiff who approached the 1st defendant to work with the 1st defendant and on their party they had identified the suit property for acquisition.
63. Upon further cross-examination by counsel for the 2nd defendant, DW1 testified that NLC was not involved in the private treaty between the 1st defendant and the plaintiff. However, he avers that the letter at page 34 of the bundle shows that the Principal Secretary (herein PS) wrote to the chairman of NLC to acquire the suit property through compulsory acquisition although the preferred mode of acquisition by KPA was by private treaty. At the same time, he pointed out that the letter at page 36 sought to have the suit property expunged from the list of properties to be acquired through compulsory acquisition. The decision to suspend the process of acquiring the property by compulsory acquisition was communicated by the board of KPA on 30/08/2018.
64. On re-examination, DW1 stated that Section 13 of the KPA Act allowed purchase of property both by private treaty and compulsory acquisition. He testified that it was the plaintiff who approached the 1st defendant and that the parties never concluded the negotiations. That before the formal negotiations began there had been information negotiations.
65. DW1 further testified that in their letter dated 15/02/2018 compulsory acquisition is mentioned as an option and that vide their letter dated 17/05/2018 KPA wrote to the plaintiff to inform them that negotiations were underway. That DW1 also received a letter from the AG dated 12/06/2018 where they were advised to initiate the process of compulsory acquisition.
66. He further stated that the Gazette Notice No. 5073 was titled Intention to Acquire Land and the only other gazette notice was for degazettement of the Gazette Notice No. 5073. That following the board decision KPA communicated the degazettment decision to NLC on 30/08/2018 and another communication was made on 03/04/2019 but NLC degazetted the property in 2020 on 2/10/2020 gazette notice No. 7667 of 2020. Further that the NLC never invoiced the 1st defendant despite the letter sent to them on 3/04/2019. With this the 1st defendant closed its case

2nd Defendant's Case

67. DW2- Dorcah Buyaki – testified that she was a registered and practicing valuer working at NLC. That at the time of signing the valuation report that she was producing when she was the Ag Director. She



adopted her witness statement dated 31/01/2024 and a list of documents which she produced as her exhibits.

68. Upon being cross-examined by counsel for the plaintiff, she stated that they received a request to undertake acquisition from the 1st defendant who was to pay for the said acquisition in line with Section 107 (5) of the *Land Act* although they did not deliver a copy as required under Subsection 5. She testified that they were informed to degazette the acquisition of the suit property on 3/04/2019 but did so on 2/10/2020 a delay which she attributed to internal processes. She stated that she had not produced any documents to support the claim for internal processes.
69. She also testified that there is no record to show that NLC was paid for degazettement although the organization requires funds for degazettement. That the funds for degazettement were only remitted in 2020.
70. It was her testimony that after gazettement the notice has to be served and NLC has to undertake a valuation and then a Notice of Inquiry is issued where all those interested in the suit property produce ownership documents and all other claims. She stated that valuation was undertaken but that she has no report before the court. She further stated that they took 3 (three) months to gazette the suit property and one and half years to degazette.
71. On re-examination, she stated that there was a gap in the Commission since the commissioners had left and it is only the Chairman who can sign gazette notices and the new chairman came into office in November 2020. The delay of degazettement of the suit property was caused by the delay in appointment of new commissioners including the chairman. With this the 2nd defendant closed their case.
72. Parties were issued with directions on filing of submissions which all parties did, the plaintiff's submissions are dated 15/03/2024 and further submissions on matters of law dated 4/04/2024, the 1st defendant filed their submissions dated 21/03/2024 and the 2nd defendant

Determination

73. I have considered the Plaint, Statements of Defence, testimonies of the witnesses as well as rivalling submissions and the following are the issues for determination: -
 - a. Whether this court has jurisdiction
 - b. Whether the plaintiff is entitled to an order of specific performance?
 - c. Whether the Plaintiff is entitled to the orders as sought in the Plaint?
 - d. Who is liable for the costs of the suit?
74. The issue of jurisdiction is raised in the replies of the plaintiff and in the submissions of the 1st defendant. I must deal with the issue of jurisdiction as a preliminary issue raised in this matter as it is clear from the case of Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited [1989] KLR 1, that "...jurisdiction is everything." In that case the court stated as follows regarding jurisdiction:

"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before



I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given” See Words and Phrases Legally defined - Volume 3: I - N Page 113”

75. It was the position of counsel for the 1st defendant that this court is only vested with appellate jurisdiction over decisions on awards made by the National Land Commission on matters of compulsory acquisition. Counsel argued that the petitioners had failed to follow the dispute resolution mechanism mandatorily prescribed under Section 133C of the *Land Act*. Counsel contended that this court has no jurisdiction to entertain the dispute in the claim of award although the plaintiff has not made claim for compulsory acquisition. Reliance was placed on the pronouncement of Nyarangi JA in Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [Supra].

76. The Supreme Court of Kenya pronounced itself on the concept of jurisdiction in Samuel Kamau Macharia & ano v Kenya Commercial Bank Limited & 2 others [2012] eKLR 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. We agree with counsel for the first and second respondents in his submissions that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings. This court dealt with the question of jurisdiction extensively in the Matter of Interim Independent Electoral Commission (Applicant), Constitution Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”

77. The broad jurisdiction of this court is set out in Article 162(2) of *the Constitution* as follows:

- “(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to:
- (a) employment and labour relations; and



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

78. Parliament enacted the *Environment and Land Court Act* pursuant to Article 162(2). Section 13 of the Act sets out in details, the extent of the jurisdiction of the court in the following terms:

- “(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) Deleted by Act No. 12 of 2012, Sch.
- (6) Deleted by Act No. 12 of 2012, Sch.
- (7) 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



(i) costs”

79. It is clear from the wording of this suit that the plaintiff is seeking the equitable relief of specific performance. The context within which the plaintiff seek the relief is one based on the intention of the 1st defendant to compulsorily acquire its parcel of land. The plaintiff is unhappy that whereas vide gazette notice 5073 the 2nd defendant advertised the intention of the 1st defendant to acquire the suit property, the same was degazetted on 2/10/2020 which was one and a half years after the plaintiff had communicated that its board had decided not to acquire the suit property after all.
80. The plaintiff is thus seeking specific performance and compensation of special damages amounting to Kshs. 415,000,000 a key requirement for specific performance to issue is that first there must be a contract and the terms of the contract sought to be enforced must be certain and precise so as to be capable of exact performance. This is stated in Halsbury’s Law of England Volume 44 (1), 4th Edition (Re-issue) at paragraph 840 as follows:
- “Where it is sought to enforce specific performance of a contract, the court must be satisfied (1) that there is a concluded contract which would be binding at law if all proper formalities had been observed and in particular that the parties have agreed, expressly or impliedly, on all the essential terms of the contract, and (2) that the terms are sufficiently certain and precise that the court can order and supervise the exact performance of the contract.”
81. One of the grounds therefore for refusing specific performance is where there is uncertainty as to the subject matter of the contract entered into by parties. This may arise as in this case there was no contract entered into. Although the 1st defendant had wanted to purchase the subject suit property by private treaty, the Attorney General advised otherwise and guided that the property has to be acquired through compulsory acquisition.
82. Before this court determines whether it should award the order of specific performance, it must first satisfy itself that there is a sale agreement between the plaintiff and the 1st defendant and that the Plaintiff seeks to rely on and meets the requirements of a contract of sale of land. The Court note that there is no valid sale agreement as per section 3(3) of the Contract Act. It is therefore not possible to seek to enforce a non-existent contract. The plaintiff did not present any contract that is capable of being enforced. It is only from a clear contract that one can deduce actions for specific performance.
83. The Granting of the equitable remedy of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. These are the issues that were discussed by the court in *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* [2006] eKLR, where Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages



are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”

84. However, in deciding whether or not to grant the order of specific performance the Court should be careful not to order the grant of specific performance where it will cause severe hardship to the defendant. In the case in court there is no sale agreement. Further the copy of the Certificate of Lease produced in evidence by the plaintiff shows that the property does not belong to the plaintiff company but to Wrigley Company Limited at the time the plaintiff alleges to have been engaged with the 1st defendant. The gazette notice 5073 of 25/05/2018 which was published after the alleged purchase of the suit property from Wrigley Company in 2016 show that the land advertised for intended acquisition being LR 209/11348 shows the proprietor as Wrigley Company.
85. Therefore, given the foregoing this Court cannot determine who the registered and/or legal owner of the suit property is with certainty. In that regard therefore this Court would be unable to grant specific performance as it is not clear who is the owner of the suit property since the title document availed does not attest to the Plaintiff's proprietorship nor has a recent search been availed. In the circumstances the plaintiff's claim for specific performance fails at two fronts, being lack of a contract and lack of clarity on proprietorship.
86. Other than the Claim for Specific performance, the Plaintiff herein has sought for payment of damages for being general and special damages.
87. As concerns General damages, it is trite and hackneyed that no such damages can arise and/or be granted for breach of Contract. For clarity, the damages that arise from breach of contract are ascertainable, quantifiable and are thus known from the onset since the contract would itemize these. In the absence of a contract there can be no award for the damages.
88. In support of the foregoing proposition, I wish to re-state the decision in the case of Kenya Tourism Board v Sundowner Lodges Limited [2017]eKLR as hereunder:

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In Dharamshi v Karsan[1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication”

89. As concerns Special Damages, same can and do issue for breach of contract. However, before any amount can be awarded on account of Special Damages, the claimant must particularly plead and thereafter specifically prove same.
90. In support of the foregoing proposition, I can do no better than to reproduce the decision in the case of John Richard Okuku Oloo v South Nyanza Sugar Company Limited[2013]eKLR where the court decided as hereunder:

“We agree with the learned judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that



degree and certainty must necessarily depend on the circumstances and the nature of the act complained of.”

91. As pertains to the subject matter, the Plaintiff pleaded and particularized special damages, relating to loss of income and the projected income. Upon being cross-examined the plaintiff testified that the suit property was not developed. Further the Valuation Report that the plaintiff has based its special damages claim from was expunged from the plaintiff's documents. That means that the figure of special damages being claimed being Kshs. 415,000,000 has no basis and or it is not particularized and supported with any proof of how this figure was arrived at.
 92. Thus, there was no evidence tendered and/or availed to the Court towards the claim for Special Damages since what the plaintiff has referred to points to the fact there was no construction on the suit property nor rent being paid from the said premises. Further, the plaintiff confessed to there being no developments on the suit property. In essence there is no evidence of special damages before the court.
 93. I have deliberately avoided going into the issue of compulsory acquisition because the ingredients that are key to the process of compulsory acquisition to be said to have been in place are not in existence in the instant suit. Infact the plaintiff decided to steer away from it altogether and did not even seek it as an alternative relief. Not that it matters because I am of the view that the plaintiff cannot succeed in a case of compulsory acquisition since what was gazette was an intention. If there was acquisition by compulsory acquisition, then there should have been an award for the claim to materialize and this would have been litigated before the National Land Commission first.
 94. The upshot of the foregoing is that the plaintiff's case must fail.
 95. I direct each party to bear their own costs.
- It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 24TH JUNE 2024.

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MOGENI J

JUDGE

In the presence of:

Ms. Nyambura for Plaintiff

Mr. Mbogo for 1st Defendant

Mr. Mbuthia for NLC

Caroline Sagina - Court Assistant

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MOGENI J

JUDGE

