



REPUBLIC OF KENYA



Mulu & 55 others v National Land Commission & 2 others (Environment & Land Petition E001 of 2023) [2024] KEELC 5482 (KLR) (22 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION E001 OF 2023**

LG KIMANI, J

JULY 22, 2024

BETWEEN

GEORGE MWANZIA MULU 1ST PETITIONER
ANNASTACIA MARIAM MBITHI 2ND PETITIONER
SAMMY MWANTHI KYAI 3RD PETITIONER
ROSE KATUMBI 4TH PETITIONER
PHAREZ KAMBUA MATAKA 5TH PETITIONER
KAMUTI NDEMU 6TH PETITIONER
JOEL NYAMAI NDIVO 7TH PETITIONER
MUTUNGA MWANDIA 8TH PETITIONER
BEATRICE KOKI MUASYA 9TH PETITIONER
BENARD MUTINDA MUNYALA 10TH PETITIONER
PETER MWANGANGI KATIKU 11TH PETITIONER
KALUNDA MUNYALA 12TH PETITIONER
STEPHEN MASILA KIMANYI 13TH PETITIONER
FRANCIS MWANDUKA MBAI 14TH PETITIONER
PETRONILA TAABU MWANDUKA 15TH PETITIONER
SAMMY MUTEA 16TH PETITIONER
TITUS NZENGULA 17TH PETITIONER
RICHARD KYOSYA MUMINA 18TH PETITIONER
FELISTUS MUNYIVA KITHUKA 19TH PETITIONER



JOHN MUNUVE MULU	20 TH PETITIONER
MULI NZENGE	21 ST PETITIONER
GABRIEL KITILI NZUNGU	22 ND PETITIONER
LOISE SYOMBUA MULATYA	23 RD PETITIONER
MULALU MAKAU KAMETU	24 TH PETITIONER
ELIZABETH NGANGUA NTHENGE	25 TH PETITIONER
JOHN MUTUA MULI	26 TH PETITIONER
NZEMBI KYALUMA	27 TH PETITIONER
NDUKU KISYULA	28 TH PETITIONER
FRANCIS KIMANYI	29 TH PETITIONER
NZISA KITHOI	30 TH PETITIONER
PIUS NZOMO MUTIA	31 ST PETITIONER
ONESMUS MUEMA KILUKI	32 ND PETITIONER
KASUNGWA MUNYOKI	33 RD PETITIONER
JACOB MBAI MBITI	34 TH PETITIONER
MUSINGILA MAUNDU	35 TH PETITIONER
DAVID KAKAI	36 TH PETITIONER
NDANIA DAVID	37 TH PETITIONER
FRANCIS MBILI MUSELELA	38 TH PETITIONER
DAVID WAMBUA	39 TH PETITIONER
MWANGO MWINZILA	40 TH PETITIONER
KATHINI WILLY	41 ST PETITIONER
JUDITH NDUKU	42 ND PETITIONER
BERITA KETHI SIMON	43 RD PETITIONER
ELIZABETH KITHOI	44 TH PETITIONER
BENARD HAMISI	45 TH PETITIONER
JAMES KILONZI NGUU	46 TH PETITIONER
ROBERT KYUMA	47 TH PETITIONER
JACKSON MWENGI	48 TH PETITIONER
JOSEPH MWENDANDU	49 TH PETITIONER
AGNETA MWENDE NYAMAI	50 TH PETITIONER
CHRISTINE MBURI	51 ST PETITIONER



SAMUEL KAMOYA	52 ND PETITIONER
NICODEMUS MAILU MBUVI	53 RD PETITIONER
DERRICK KINYUNGU DENNIS	54 TH PETITIONER
ANNAH DENNIS	55 TH PETITIONER
NANCY MWONGELI	56 TH PETITIONER

AND

NATIONAL LAND COMMISSION	1 ST RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY	2 ND RESPONDENT
THE HON. ATTORNEY GENERAL	3 RD RESPONDENT

RULING

1. The Petitioners filed this petition in their capacities as Project Affected Persons (PAPs) in the compulsory acquisition of land for the construction of Kibwezi-Kitui-Kabati-Migwani(B7) Road as particularized in Kenya Gazette numbers 177 of 12th January 2018, 5075 and 5076 of 25th May 2018, 12185 of 23rd November 2018, 1640 of 22nd February 2019, 6378, 6380 and 6381 of 28th August 2020 and 197 and 198 of 14th January 2022 and other notices on the same matters. Construction of the project began on 6th December 2016 and by the year 2020, the first phase had been completed.
2. The PAPs claim that some of them were issued with notices of awards for compensation of their land while others did not receive any notices. They state that despite the issuance of notices of awards, completion of the project and in contravention of the express provisions of Article 40 of *the Constitution* of Kenya and other statutory requirements, the PAPs did not receive compensation. This was noted in the Auditor General's report for the year ended 30th June 2022 where it was stated that out of the Kshs. 1,924,776,370 payable to the PAPs, only Kshs. 281,540,484 had been paid and the report urged urgent compensation.
3. Further, the petitioner stated that the awards issued were a gross undervaluation and no consideration was given to the procedures and principles of compensation as laid out by the law. They state that unless the Court intervenes, the Respondents will continue violating the Petitioners' property, dignity, and social and economic rights in breach of *the Constitution*.
4. The Petitioners seek 21 declarations of violation of their constitutional rights. In particular, they seek declarations that the compulsory acquisition of their land was ultra vires *the Constitution* of Kenya and that the respondents acted with impunity and abuse of powers. They claimed that under Section 117 of the *Land Act*, they are entitled to interest above Central Bank of Kenya rates on the awards. They further seek declarations that the land acquired was grossly undervalued and they are entitled to just and prompt payment.
5. The Petitioners claim violation of Articles 35, 40 and 47 of *the Constitution* of Kenya, Articles 5, 9, and 14 of the African Charter on People and Human Rights (ACHPR), Article 1 of the United Nations Declaration of Human Rights and Sections 111, 115, 117 and 125 of the *Land Act*.
6. The 1st respondent filed a replying affidavit sworn by Austin Odhiambo Ogutu while the 3rd respondent filed Grounds of Opposition.



7. The 2nd Respondent filed a Notice of Preliminary Objection dated 6th December 2023 setting out the following grounds:
 1. The Petition violates Section 133C (2), (6) & 8 of the [Land Act](#) No.6 of 2012 (as amended, 2019)
 2. As a result, the Honourable Court lacks the requisite jurisdiction to hear and determine the petition by virtue of Section 133C (2), (6) & 8 of the [Land Act](#), No.6 of 2012.
8. The court directed that the preliminary objection be heard and determined before hearing of the petition and the same was to be heard by way of written submissions.

The 2nd Respondent's Submissions

9. Counsel submitted that Article 23 (2) of [the Constitution](#) permits Parliament to enact legislation to give original jurisdiction in appropriate cases to subordinate courts including tribunals to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights.
10. Counsel for the 2nd Respondent further submitted that since the claim herein was of failure to follow the laid out process of compulsory acquisition which includes both administrative, judicial and quasi-judicial powers of the 1st respondent, Article 47 of [the Constitution](#) is relevant. That Article 47 (3) of [the constitution](#) just like Article 23 (2) permits Parliament to enact legislation to provide for the review of administrative action by a court, or if appropriate an independent and impartial tribunal.
11. By dint of Articles 23(2) and Article 47(3) of [the Constitution](#), parliament enacted Section 133C of the [Land Act](#) 2012, which grants the Land Acquisition Tribunal jurisdiction to hear and determine a complaint arising out of the compulsory acquisition of land. In the view of counsel, the said provisions oust the original jurisdiction of this court under Article 23(1).
12. Counsel submitted that even where superior courts have jurisdiction to determine profound questions of law, the first opportunity must be given to the relevant persons, bodies, tribunals or any other quasi-judicial authorities to deal with the dispute as was held by the Supreme Court in the case of [Albert Chaurembo Mumbo & 7 others v. Maurice Munyao & 148 others; SC Petition No.3 of 2016](#)(2019) eKLR.
13. The 2nd Respondent's submission therefore is that the Land Acquisition Tribunal has jurisdiction on matters of compulsory acquisition of land and this court's jurisdiction is ousted by dint of Section 133C (6) and (8) of the [Land Act](#). They state that this court can only handle appeals.
14. They cited and relied on the holding of Eboso J in the two cases of Giciri Thuo & 5 others v. National Land Commission(Interested Party) Dorcas Wairimu Kamau & 154 others(Intended Interested Parties)(2022)eKLR and; Okoiti vs Kenya National Highways Authority(KeNHA)& 4 others; Project Affected Persons(PAPs) Ad Hoc Committee (Interested Party)(2022)KEELC 2753(KLR) (Ruling) where the court noted that the Land Acquisition Tribunal was not constituted and was therefore not available to adjudicate the dispute to the Petition as it is mandated to. The 2nd Respondent's counsel noted that the Tribunal is now operational and is the proper forum of first instance dispute resolution.
15. Referring to paragraph 43 of the Petition where the Petitioners stated that they need not file the dispute before the tribunal since it is not an appeal, counsel for the 2nd Respondent submitted that there is no such exemption from the jurisdiction of the tribunal since it is not limited to appellate jurisdiction but to all claims related to compulsory acquisition.



16. Counsel for the 2nd respondent further sought to counter the appellants' argument that the petition raised grave constitutional violations whose remedies are a preserve of this court. They stated that the said submission is untenable by a plain reading of Article 133C (8) of the Land Act and the authority of the Supreme Court's decision in the case of *Abidha Nicholus v. Attorney General & 7 others; National Environmental Complaints Committee & 5 others(Interested parties)(Petition E007 od 2023)(2023)KESC 113 (KLR)(28th December 2023)* Judgment where the court held that where there is an alternative remedy, especially where parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other processes known to law.

The Petitioners' Submissions

17. Counsel for the Petitioners summarized the facts of the petition and submitted that the Environment and Land Court has the original jurisdiction to hear and determine cases related to the use, occupation and title to land under Article 162(2)(b) of the Constitution of Kenya and Section 13 (b) of the Environment and Land Court Act. That such constitutional issues as raised in this Petition can only be adjudicated by this court. They relied on the case of *Karisa Chengo & 2 others vs Republic (2015) eKLR* and the case of *Ken Kasinga v Daniel Kiplagat Kirui & 5 others (2015) eKLR*.
18. The Petitioners submit that the Land Acquisition Tribunal has no power to hear matters of constitutional violations raised in this petition. Quoting Section 133C of the Land Act, their position is that the jurisdiction of the Tribunal is limited to hearing appeals from the decisions of the 1st Respondent, noting that this is not an appeal from such decision but a complaint of delayed compensation.
19. Further noting that the appeal to the Land Acquisition Tribunal must be filed within thirty days from the date of the decision of the Commission and be heard within 60 days, the petitioners submit that there is no provision as to the extension of time apart from the tribunal's discretion and therefore their claim is statutorily barred.
20. Concerning section 133C (6) which provides that such matters shall be referred to the Tribunal at first instance, the Petitioners submit that it must be read together with Section 133C(1) and (2) on the dispute being an appeal.
21. Counsel further submitted that this is a multifaceted claim and that the question of jurisdiction ought to be treated functionally as opposed to technically. In the alternative and without prejudice to their submissions above, Counsel urged the court to adopt the nuanced/broader approach concerning the exhaustion of available remedies.
22. The petitioners submit that since the construction of the project subject matter of this petition began in 2016 it is not right to rely on Section 133 C that the Land Acquisition Tribunal is the competent forum to hear this claim. They argue that any interpretation of the law ought to be aligned with the principles in the Constitution of Kenya that only this court can hear constitutional petitions and that the tribunal cannot exhaustively deal with all the matters raised in the petition without acting outside its jurisdiction.
23. They relied on the case of *Abidha Nicholus v. Attorney General & 12 others eKLR* and the case of *William Odhiambo Ramogi & 3 others v. Attorney General & 6 others; Muslim for Human Rights & 2 others(Interested Parties)(2020)eKLR*, submitting that an alternative remedy does not necessarily bar a litigant from approaching the Court to seek a Constitutional relief.



24. Counsel for the Petitioners relied on the principle established by the Court of Appeal of Trinidad and Tobago in the case of *Damian Belfonte v. The Attorney General* C.A 84 OF 2004 stating that where the means of redress is inadequate, the Court should not exercise restraint. They also relied on the cases of *Keroche Breweries Limited & 6 others v. the Attorney General & 10 others*, *Isaac Ngugi v. Nairobi Hospital & another* Petition No.461 of 2012 and the Supreme Court's decision in *Benson Ambuti Adegia & 2 others v Kibos Distillers Limited & 5 others*.
25. Counsel further submitted that in the unlikely event that the court was to uphold the preliminary objection, the appropriate remedy would not be to strike out the petition but to have it referred to the appropriate institution. They relied on the Supreme Court Appeal No. 3 of 2020 *Benson Ambuti Ambegi & 2 Other Vs. Kibos Distillers Ltd & 5 Others* and *George Mwonera Mwendameru V Loise Gakii*, Misc Application No. 70 of 2015 and Section 18 of the *Civil Procedure Act* on transfer of suits.
26. Counsel for the petitioners prayed that the 2nd respondent's preliminary objection dated 6th December 2023 be dismissed with costs to the Petitioners.

Analysis and Determination

27. The court has considered the grounds set out in the Notice of Preliminary Objection dated 6th December 2023 and submissions of the Counsel for the parties to this petition. Further, the court has considered the petition and the substance of the dispute disclosed in the petition. In the court's view, the single issue for determination in the preliminary objection is whether this court is vested with primary jurisdiction to adjudicate the dispute in this petition taking into account the provisions of Section 133C(2),(6) & 8 of the *Land Act* No. 6 of 2012 (as amended 2019).
28. The famous case of *Mukisa Biscuit Manufacturing Co. Ltd –VS- West End Distributors Ltd.* [1969] E.A. 696 defined a Preliminary Objection holding that:-

“...A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
29. The concept of jurisdiction in the adjudication of civil disputes in Kenya was outlined by Nyarangi JA in the case *Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] KLR 1 in the following words:

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



30. The Supreme Court of Kenya pronounced itself on the centrality and significance of 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 the 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.”

31. The broad jurisdiction of this court is set out in Article 162 (2) (b) of *the Constitution* of Kenya 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.”

32. Pursuant to the above Article, Parliament enacted the *Environment and Land Court Act* whose Section 13 sets out 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;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs
33. The Preliminary Objection under consideration challenges the jurisdiction of this court to hear and determine the matters in dispute and if upheld could bring this petition to an end.
34. The petitioners claim violation of their constitutional rights under Articles 35, 40 and 47 of [the Constitution](#) of Kenya, Articles 5, 9, and 14 of the African Charter on People and Human Rights (ACHPR), Article 1 of the United Nations Declaration of Human Rights and Sections 111, 115, 117 and 125 of the [Land Act](#) during the compulsory acquisition of land for construction of Kibwezi-Kitui-Kabati-Migwani (B7) Road. They seek 21 prayers together with costs of two counsels.
35. The petitioners claim that in the process of compulsory acquisition, the respondent issued some of them with notices of awards for compensation while others did not receive any notices. This was noted in the Auditor General's report for the year ended 30th June 2022 where it was stated that out of the Kshs. 1,924,776,370 payable to the PAPs only Kshs. 281,540,484 had been paid. The petitioners further claim gross undervaluation of their land and failure to follow the procedures and principles laid out in law.
36. The Petitioners seek inter alia declarations that the compulsory acquisition of their land was ultra vires [the Constitution](#) and that the respondents acted with impunity and abuse of powers. They state that under section 117 of the [Land Act](#), they are entitled to interest above Central Bank of Kenya rates on the awards. They further seek declarations that the land acquired was grossly undervalued and they are entitled to just and prompt payment as well as other orders.
37. The power of compulsory acquisition of private property by the state is provided under Article 40(3) of [the Constitution](#) of Kenya and provides that:
- The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—
- (a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or
 - (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—



- (i) requires prompt payment in full, of just compensation to the person; and
 - (ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.
- (3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).
38. Arising from the provisions of Article 40 (3), Parliament enacted Part VIII of the [Land Act](#) to provide for compulsory acquisition of interests in land. This part provides an elaborate framework for the exercise of the power of compulsory acquisition of land by the state. Part VIIIA provides a framework for adjudication of disputes relating to the state's exercise of power.
39. Section 111(1) of the [Land Act](#) provides that the National Land Commission shall regulate the assessment of such just compensation and prepare the award for compensation of such land that has been acquired. It also provides that If land is acquired compulsorily, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.
40. Section 115 of the [Land Act](#) provides for the Payment of compensation and states that;
- After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where—
41. Further, Section 125 provides for the Payment of compensation and states that;
- The Commission shall, as soon as is practicable, pay full and just compensation to all persons interested in the land
42. From the foregoing provisions of the law, it is clear that it is the duty of the National Land Commission to regulate the process of compulsory land acquisition and to promptly pay a just and full compensation. The question that arises is what action and in what forum a party dissatisfied with the process of acquisition, delayed payment or non-payment of compensation would take his/her complaint.
43. As stated earlier, Parliament established the Land Acquisition Tribunal under Part VIIIA of the [Land Act](#) for dispute resolution. Section 133C provides for the jurisdiction of the Tribunal and states that:
- 1. The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.
 - 2. A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner
 - 3. Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application.
 - 4. Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
 - 5. If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission



did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.

6. Despite the provisions of sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.
 7. Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
 8. The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of *the Constitution*, using the framework set out under the *Fair Administrative Action Act* or any other law.
44. Concerning this court's jurisdiction vis-a-vis the jurisdiction of the Tribunal on matters of compulsory acquisition, Section 133C (6) categorically vests the first instance jurisdiction in the Tribunal.
 45. Sections 127, 128 and 148 (5) of the *Land Act* vests in the Environment and Land Court jurisdiction to hear and determine various matters under the Act.
 46. Section 127 provides for references from the Commission of matters set out thereunder as follows;
 1. The Commission may at any time, by application in the prescribed form, refer to the Court for its determination any question as to—
 - a. the construction, validity or effect of any instrument
 - b. the persons who are interested in the land concerned
 - c. the extent or nature of their interest
 - d. the persons to whom compensation is payable
 - e. the shares in which compensation is to be paid to tenants in common;
 - f. the question of whether or not any part of a building is reasonably required for the full and unimpaired use of the building; or
 - g. the condition of any land at the expiration of the term for which it is occupied or used.
 47. Section 128 provides for the general reference of disputes to the Environment and Land Court stating that “Any dispute arising out of any matter provided for under this Act may be referred to the Land and Environment Court for determination”
 48. Section 148 (5) provides further on the jurisdiction of the Environment and Land Court and states as follows;

If the person entitled to compensation under this section and the body under a duty to pay that compensation are unable to agree on the amount or method of payment of that compensation or if the person entitled to compensation is dissatisfied with the time taken to pay compensation, to make, negotiate or process an offer of compensation, that person may apply to the Court to determine the amount and method of payment of compensation and the Court in making any award may make any additional costs and inconvenience incurred by the person entitled to compensation.



49. Parliament in its wisdom enacted Section 133 c (6) ousting the primary jurisdiction of this court to hear and determine the disputes on compulsory acquisition of interests in land and vested it in the Tribunal.
50. Parliament further wisdom enacted Section 133D of the *Land Act*, vesting in this court appellate jurisdiction in disputes relating to the exercise of the state’s power of compulsory acquisition in the following terms:
- (1) A party to an application to the Tribunal who is dissatisfied with the decision of the Tribunal may, in the prescribed time and manner, appeal to the court on any of the following grounds:
 - (a) the decision of the Tribunal was contrary to law or to some usage having the force of law;
 - (b) the Tribunal failed to determine some material issue of law or usage having the force of law; or
 - (c) a substantial error or defect in the procedure provided by or under this Act has produced error or defect in the decision of the case upon the merits.
 - (2) An appeal from the decision of the Tribunal may be made on a question of law only.
51. The court’s view is that Section 13 (2) (b) of the *Environment and Land Court Act* provides that this court has the power to hear and determine disputes relating to compulsory acquisition of land in the exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*. The court’s view is that the Section only confers appellate jurisdiction on this court taking into account Section 133C (6) and 133D of the *Land Act*. It is thus the Court’s finding that the body or institution vested with the primary or first instance jurisdiction in dispute resolution in the matters of compulsory acquisition of interests in land under Article 40 of *the Constitution* of Kenya arising in this petition is the Land Acquisition Tribunal.
52. The second issue for determination is whether the Tribunal has jurisdiction over the claim for violation of constitutional rights. The Petitioners’ Counsel submitted that the claim herein is multifaceted involving violation of Articles 35, 40 and 47 of *the Constitution* of Kenya, Articles 5, 9, and 14 of the African Charter on People and Human Rights (ACHPR), Article 1 of the United Nations Declaration of Human Rights and Sections 111, 115, 117 and 125 of the *Land Act* which the Land Acquisition Tribunal does not have the jurisdiction to hear and determine.
53. The petitioners’ position is that the jurisdiction of the Tribunal is limited to hearing appeals from the decisions of the 1st Respondent, noting that this is not an appeal from such a decision. Further, Counsel for the petitioners submitted that an appeal to the Land Acquisition Tribunal has time limits for filing and hearing and there is no provision for extension of time apart from the Tribunal’s discretion and therefore their claim is statutorily barred. They relied on the case of *Abidha Nicholus v. Attorney General & 12 others* eKLR where it was held that;

“Section 9(2) of the *Fair Administrative Action Act*, we must add, provides that where there exist internal mechanisms for the resolution of a dispute, the court will not review the administrative action until the internal dispute mechanism has been exhausted. As we had earlier stated, in our view, that fact notwithstanding, there is nothing that precludes the adoption of a nuanced approach, that safeguards a litigant’s right to access justice while also recognizing the efficiency and specificity that established alternative dispute resolution mechanisms can offer. That is also why Section 9(4) of the *Fair Administrative Action Act*



creates the exception that exhaustion of administrative remedies may be exempted by a court in the interest of justice upon application by an aggrieved party.”

54. The Counsel for the petitioners also relied on the case of *William Odhiambo Ramogi & 3 others v. Attorney General & 6 others; Muslim for Human Rights & 2 others (Interested Parties)* (2020) eKLR, submitting that an alternative remedy does not necessarily bar a litigant from approaching the Court to seek a Constitutional relief stating that:

“In the instant case, the Petitioners allege the violation of their fundamental rights. Where a suit primarily seeks to enforce fundamental rights and freedoms and it is demonstrated that the claimed constitutional violations are not mere “bootstraps” or merely framed in Bill of Rights language as a pretext to gain entry to the Court, it is not barred by the doctrine of exhaustion. This is especially so because the enforcement of fundamental rights or freedoms is a question which can only be determined by the High Court.”

55. While dealing with the doctrine of exhaustion in the *Abidha Nicholus* case (supra) the Supreme Court agreed with the above finding of the Court of Appeal and stated that;

“[105] We agree with the above reasoning and find that the availability of an alternative remedy does not necessarily bar an individual from seeking constitutional relief. This is because the act of seeking constitutional relief is contingent upon the adequacy of an existing alternative means of redress. If the alternative remedy is deemed inadequate in addressing the issue at hand, then the court is not restrained from providing constitutional relief. But there is also a need to emphasize the need for the court to scrutinize the purpose for which a party is seeking relief, in determining whether the granting of such constitutional reliefs is appropriate in the given circumstances. This means that a nuanced approach to the relationship between constitutional reliefs for violation of rights and alternative means of redress, while also considering the specific circumstances of each case to determine the appropriateness of seeking such constitutional reliefs, is a necessary prerequisite on the part of any superior court.”

56. The Supreme Court had earlier examined various cases on the same doctrines of exhaustion of alternative dispute resolution mechanisms and found that;

“(94) The principle, expressed in the above decision, which we agree with, is therefore that, where there is an alternative remedy, especially where Parliament has provided a statutory appeal procedure, then it is only in exceptional circumstances that the court can resort to any other process known to law.”

57. Further, the Supreme Court in *NGOs Co-ordination Board v EG & 4 others; Katiba Institute (Amicus Curiae) (Petition 16 of 2019)* [2023] KESC 17 (KLR) (Constitutional and Human Rights) (24 February 2023) (Judgment) (NGOs Co-ordination Board) outlined the doctrine of exhaustion of administrative remedies and adopted its finding in *Albert Chaurembo Mumbo & 7 others v Maurice Munyao & 148 others; SC Petition No 3 of 2016*, [2019] eKLR where the court held that:

“...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other



quasijudicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

58. It is thus clear that the Supreme Court has emphasized that where there exists an alternative method of dispute resolution established by legislation, courts must exercise restraint in exercising their jurisdiction as conferred by *the Constitution* and must give deference to the dispute resolution bodies established by statute with the mandate to deal with such specific disputes in the first instance.
59. This position was also adopted by the Court of Appeal in R v National Environmental Management Authority, CA No 84 of 2010; [2011] eKLR that was persuasively relied on by the Supreme Court in NGOs Co-ordination Board (supra). The Court of Appeal in doing so, observed that;
- “The principle running through these cases is where there was an alternative remedy and especially where parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted, and that in determining whether an exception should be made and judicial review granted, it was necessary for the court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...”
60. In the present case, the court has considered the statutory provisions on the jurisdiction of the Environment and Land Court under Section 13 (2) (b) of the *Environment and Land Court Act*, Sections 127, 128, 148 (5) and 133D of the *Land Act* and the jurisdiction of the Land Acquisition Tribunal under Section 133C of the *Land Act*. The court has also considered the nature of the dispute raised in this petition, the claim relating to the violation of Constitutional rights and finds that Parliament has provided an alternative remedy through the Land Acquisition Tribunal that is adequate to redress the petitioners’ grievances. The court has also scrutinized the purpose for which the petitioners are seeking relief, as found in the entire petition and the submissions by Counsel and finds that the said purpose will be achieved through the Tribunal. The court is further satisfied that the *Land Act* provides a statutory appeal procedure that is adequate.
61. For the above reasons, it is my finding that the jurisdiction of this court has been prematurely invoked in this petition.
62. Because this dispute has elements of public interest and revolves around the compulsory acquisition of private land by the state, in what the state considers to be in the public interest and the stage at which the matter has been concluded the court holds that the parties will bear their respective costs of this petition.
63. The final orders of the court are that the 2nd respondent’s preliminary objection dated 6th December 2023 is found to have merit and the same is disposed of as follows:
- a) The petition herein is struck out on the ground that the jurisdiction of this court has been invoked prematurely.
 - b) The petitioners shall be at liberty to ventilate their grievances in the appropriate primary adjudication fora established by Law.
 - c) Parties shall bear their respective costs of the petition.

DELIVERED, DATED AND SIGNED AT KITUI THIS 22ND DAY OF JULY 2024.



HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and virtually in the presence of;

Musyoki - Court Assistant

Ochieng holding brief for Prof. Muma for the 2nd Respondent

M/S T. J. Michael for the petitioners

No attendance for the 1st Respondent

No attendance for the 3rd Respondent

