



**Odongo & 2 others v National Irrigation Authority & 4 others (Environment & Land
Petition E023 of 2021) [2024] KEELC 13759 (KLR) (30 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 13759 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT & LAND PETITION E023 OF 2021
GMA ONGONDO, J
OCTOBER 30, 2024**

BETWEEN

**GAUDENSIA AKINYI ODONGO 1ST PETITIONER
GORDON OMOLLO ODONGO 2ND PETITIONER
BRIAN JODE ODONGO 3RD PETITIONER**

AND

**NATIONAL IRRIGATION AUTHORITY 1ST RESPONDENT
NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND
RESPONDENT
CABINET SECRETARY, MINISTRY OF LANDS AND PHYSICAL
PLANNING 3RD RESPONDENT
NATIONAL LAND COMMISSION 4TH RESPONDENT
ATTORNEY GENERAL 5TH RESPONDENT**

RULING

1. This ruling is in respect of an application by way of Notice of Motion dated 20th June 2024 brought under, inter alia, Article 165(4) and 159(2)(c) of *the Constitution* of Kenya (*The Constitution* herein) and Sections 3, 13, 19, 20 and 21(2) of the *Environment and Land Court Act* 2015 (2011) by the petitioners, through Agnes Awuor, Advocate seeking the following orders;
 - a. Spent
 - b. Spent



- c. The court be pleased to certify that this Petition just like the related petitions filed and pending before this court, against the respondents, revolves around the 1st respondent's National Irrigation Authority and its implementation of Lower Kuja Irrigation Development Project in Sagama Village, Block 3, and raises issues of substantial points and questions of law in accordance with Article 165(4) of *the Constitution* and Section 21(2) of the *Environment and Land Court Act*.
- d. An order be made referring the matter to the Honourable Chief Justice for purposes of empaneling a bench of uneven number of judges of the Environment and Land Court, of not less than three to hear and determine the Petition.

In the alternative:

- e. The court be pleased to transfer and refer the matters to the Land Acquisition Tribunal and now operational pursuant to Section 133C for hearing and determination.
- f. The orders if issued, do apply to the following other petitions filed against all the respondents by the following petitioners namely:
 - i. Migori ELC Petition No. E001 of 2021 Michael Tengo Onduru and others
 - ii. Migori ELC Petition No. E002 of 2021 Maurice Oketch Okelo and others
 - iii. Migori ELC Petition No. E003 of 2021 Wilkister Okongo Odhiambo and others
 - iv. Migori ELC Petition No. E004 of 2021 Maria Atieno Martin and others
 - v. Migori ELC Petition No. E005 of 2021 Dorcas Achieng Opiyo and others
 - vi. Migori ELC Petition No. E007 of 2021 Peter Amani Mola and others
 - vii. Migori ELC Petition No. E008 of 2021 Joel Oola Opiyo and others
 - viii. Migori ELC Petition No. E009 of 2021 Benta Achieng Okoth and others
 - ix. Migori ELC Petition No. E010 of 2021 Doris Adhiambo and others
 - x. Migori ELC Petition No. E011 of 2021 Samuel Baraka Joel and others
 - xi. Migori ELC Petition No. E012 of 2021 Hellen Atieno Joseph and others
 - xii. Migori ELC Petition No. E013 of 2021 Leo Owino Okeyo and others
 - xiii. Migori ELC Petition No. E014 of 2021 Erick Otieno Owuonda and others
 - xiv. Migori ELC Petition No. E015 of 2021 John Isaac Daywa Nyabwon and others
 - xv. Migori ELC Petition No. E016 of 2021 Jennipher Akumu Owuonda and others
 - xvi. Migori ELC Petition No. E017 of 2021 Mary Zaina Ajowi and others
 - xvii. Migori ELC Petition No. E018 of 2021 Benard Ochieng Anam and others
 - xviii. Migori ELC Petition No. E019 of 2021 Lucia Oliech Ogony and others
 - xix. Migori ELC Petition No. E020 of 2021 Michael Tengo Onduru and others
 - xx. Migori ELC Petition No. E021 of 2021 Lawrence Otieno Daywa and others
 - xxi. Migori ELC Petition No. E022 of 2021 Kevin Omondi Maurice and others



- xxii. Migori ELC Petition No. E028 of 2021 Agnes Atieno Okongo and others
 - xxiii. Migori ELC Petition No. E029 of 2021 Tom Onyango Okongo and others
 - xxiv. Migori ELC Petition No. E030 of 2021 Michael Tengo Onduru and others
- g. The costs of the motion be costs in the substantive petitions.
2. The application is founded upon twenty-nine grounds set out on it's face which include;
- a. There has been inordinate, prolonged and unexplained delay in having these matters determined yet the same raise and thus impact negatively on the administration of justice and frustrate the overriding objective of the court.
 - b. This petition and several others as listed above which are related had been consolidated for hearing, including a site visit and were pending before Hon. Mr. Justice Mohammed Kullow who is now serving suspension.
 - c. The 1st respondent, National Irrigation Authority, soon after the petitions were filed, lodged a Notice of Preliminary Objection on the issue of the court's jurisdiction to hear and determine the matter.
 - d. Hon. Mr. Justice Mohammed Kullow, before his suspension delivered a ruling dated 16th December 2021 on the preliminary objection in this petition which held that the ELC Court had jurisdiction to hear and determine the matter.
 - e. Similar objections were raised in Petition No. E001 of 2022 and in all the others which were consolidated and determined in Migori ELC Petition No. E002 of 2021 and were handled by Hon. Mr. Justice Mohammed Kullow and were dismissed through decisions dated 24th November 2021 and 17th January 2023.
 - f. Hon. Mr. Justice George Ong'ondo who has been assigned the task to now hear and determine this matter however had taken a diametrically opposed position to that of Hon. Mr. Justice Mohammed Kullow on a similar position being Homa Bay ELC Petition No. E08 of 2021 on related issues.
 - g. The other parties shall suffer no prejudice at all.
3. Also, the application is premised upon the petitioners' supporting affidavit of thirty-five paragraphs sworn on even date, by Gordon Omollo Odongo. Documents marked as GOO-1 to 6 which are; a copy of the ruling dated 16th December 2021 by Kullow J, a copy of the ruling dated 24th November 2021 by Kullow J, a copy of the judgment in Homa Bay ELC Petition No. E08 of 2021 by Ong'ondo J. and a copy of the decision of the Land Acquisition Tribunal over similar disputes, are annexed to the affidavit.
4. Briefly, the petitioners lament that the instant petition and several others had been consolidated for hearing, including a site visit and were pending before Hon. Justice Mohammed Kullow who is now serving suspension. That the 1st respondent, National Irrigation Authority, soon after the petitions were filed, lodged a Notice of Preliminary Objection challenging the court's jurisdiction to hear and determine the matter. That Hon. Justice Mohammed Kullow, before his suspension, delivered a ruling dated 16th December 2021 on the preliminary objection and held that the Environment and Land Court had jurisdiction to hear and determine the petitions.



5. Further, the petitioners state that similar objections were raised in Petition No. E001 of 2022 and in all the other petitions which were consolidated. That the said objections were determined in Migori ELC Petition No. E002 of 2021 by Hon. Justice Mohammed Kullow and dismissed through decisions dated 24th November 2021 and 17th January 2023.
6. It is the petitioners' contention that however, I had held a different view in Homa Bay ELC Petition No. 8 of 2021, wherein he struck out the petition in a judgment delivered on 16th December 2021 and opined that the court lacks jurisdiction to determine the petition in the first instance. That the two conflicting decisions are by courts of coordinate jurisdiction thus, the same needs to be resolved.
7. The 1st respondent through G & A Advocates LL.P, opposed the application by way of a Replying Affidavit dated 12th July 2024 and sworn by Daniel M. Atula, the General Manager Corporate Services who deposed in part that the consolidated petitions do not meet the threshold for referral to the Chief Justice under Article 165(4) of *the Constitution* as the matters in question are neither novel nor substantial questions of law. That the application does not demonstrate sufficient reason why the petitions ought not to be heard by this court.
8. Furthermore, the 1st respondent deposed to the effect that the Land Acquisition Tribunal lacks jurisdiction to issue orders as to declaration of rights in the manner sought by the petitioners in the petitions. That thus, the court should dismiss the petitions.
9. On 18th July 2024, the court directed that the application be heard by way of written submissions.
10. It must be noted that none of the parties filed any submissions herein.
11. In the foregone, the following issues fall for determination;
 - i. Whether the instant application is merited.
 - ii. What orders can the court issue herein to meet the ends of justice?
12. The petitioners have implored this court to find that the petitions as consolidated herein, raise issues of substantial points and questions of law. That consequently, the court to issue an order referring the same to the Honourable Chief Justice for purposes of empaneling a bench of uneven number of judges of the Environment and Land Court, of not less than three to hear and determine the Petition. It is worth to note that the decision whether or not to empanel a bench of more than one Judge is an exercise of judicial discretion as opposed to a right. The same ought to be made where it is absolutely necessary and in strict compliance with the relevant constitutional and statutory provisions; see also *Wycliffe Ambetsa Oparanya & 2 others -vs-Director of Public Prosecutions and another* (2016) eKLR.
13. Article 165(4) of *the Constitution* provides;
 - (4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
14. Pursuant to Article 165 (3)(b) and (d) of *the Constitution*, a matter may be certified as raising a substantial question of law if it relates to the following;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—



- (i) the question whether any law is inconsistent with or in contravention of this Constitution;
- (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
- (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
- (iv) a question relating to conflict of laws under Article 191;

15. In the case of *Okiya Omtatah Okoiti & Anor vs. Anne Waiguru & 3 Others* [2017] eKLR, the Court of Appeal cited with approval the decision of Majanja J in *County Government of Meru vs. Ethics and Anti-Corruption Commission* [2014] eKLR, wherein he held that:

“The principles which govern the exercise of discretion in an application such as the one before the court can be distilled as follows: -

- a) The grant of a certificate under Article 165(4) of *the Constitution* is an exception rather than the rule.
- b) The substantial question of law is a question to be determined in the circumstances of the case. Substantial issue of law is not necessarily a weight one or one that raises a novel issue of law or even that is complex. Many provisions of our Constitution are untested and bring forth novel issues yet it is not every day that we call upon the Chief Justice to empanel a bench of not less than three judges.
- c) Public interest may be considered but is not necessarily a decisive factor. It is the nature of petitions filed to enforce, the provisions of *the Constitution*, to be matters of public interest generally.
- d) The court ought to take into account other provisions of *the Constitution*, the need to dispense justice without delay having regard to the subject matter and the opportunity afforded parties to litigate the matter up to the Supreme Court.”

16. Indeed, the decision whether or not to certify a matter under Article 165(4) of *the Constitution* is in the discretion of the Court which should be exercised judicially and judiciously. A substantial question of law must be strictly under sub-article 3(b) and (d) of Article 165. Further, the said substantial question must either be specifically set out in the pleadings before court or should be a necessary implication from the pleadings filed.

17. In the present application, the petitioners assert that the conflicting decisions of Kullow J. and myself with regards to the jurisdiction of this court to entertain the consolidated petitions, necessitate the empaneling of a bench to adjudicate over the petitions. However, I agree with the 1st respondent’s counsel that the issues raised in the consolidated petitions are not novel. In light of the foregoing and since there is judgment in related matter as noted in paragraph 6 hereinabove, it is my considered view that the issues in the consolidated petitions not amount to a substantial question of law.



18. In the alternative, the petitioners have sought that the court be pleased to transfer and refer the consolidated petitions to the Land Acquisition Tribunal for hearing and determination. I bear in mind that in the judgment in Homa Bay ELC Petition No. 8 of 2021, I found that this court lacks jurisdiction to determine the petition in the first instance, in light of, among others, judicial deference, abstention and exhaustion principles. Thus, I proceeded to reserve the constitutional issues, on the rights to a clean and healthy environment, pending the outcome(s) of the decisions of the statutory bodies including the National Environment Tribunal thereby affording any aggrieved party to appeal this court. The petition was thereby, struck out.
19. Notably, no application for review or appeal has been preferred against the said judgment. Therefore, it is my considered view that the other considered opinions delivered on 24th November 2021 and 17th January 2023 in the matters by court of coordinate jurisdiction, are merely persuasive and were made after the judgment. I have no reasons to take a different considered position from the judgment in Homa Bay Environment and Land Court Petition No. 8 of 2021 regarding, inter alia, the exhaustion principle since the present consolidated petitions originate from the same subject, Lower Kuja Irrigation Development Project in Sagama Village, Block 3 within Migori County.
20. Section 133C of the [Land Act](#) 2016 (2012) sets out the jurisdiction of the Land Acquisition Tribunal as follows:
 - 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.
 - 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 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 provision 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 Fair Administrative Action or any other law.



21. Section 133D of the *Land Act*, vests in this court appellate jurisdiction in disputes relating to the exercise of the state's power of eminent domain 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.

22. It is therefore crystal clear that disputes relating to propriety and claims for compensation by persons interested in land which is the subject of compulsory acquisition, are to be adjudicated by the National Land Commission through the mechanism of inquiry contemplated under Section 112 of the *Land Act*. If there is no satisfactory resolution of the dispute, the next port of call is the Land Acquisition Tribunal established under Section 133A of the *Land Act*. If a party is dissatisfied with the determination of the Tribunal, the next appropriate forum is this court. The appellate jurisdiction of this court is, however, restricted to issues of law.

23. The 1st respondent contends that the Land Acquisition Tribunal lacks jurisdiction to issue orders as to declaration of rights in the manner sought by the petitioners. Be that as it may, suffice it to say that section 133C of the *Land Act* relating to the jurisdiction of the said Tribunal, resolves the contention.

24. Moreover, in *Kibos Distillers Limited & 4 others v Benson Ambuti Atega & 3 others* [2020] eKLR, the Court of Appeal, Makhandia JA, remarked;

“...To this extent, I find that the learned judge erred in law in finding that the ELC had jurisdiction simply because some of the prayers in the petition were outside the jurisdiction of the Tribunal or National Environmental Complaints Committee. A party or litigant cannot be allowed to confer jurisdiction on a court or to oust jurisdiction of a competent organ through the art and craft of drafting of pleadings. Even if a court has original jurisdiction, the concept of original jurisdiction does not operate to oust the jurisdiction of other competent organs that have legislatively been mandated to hear and determine a dispute. Original jurisdiction is not an ouster clause that ousts the jurisdiction of other competent organs. Neither is original jurisdiction an inclusive clause that confers jurisdiction on a court or body to hear and determine all and sundry disputes... To this end, I reiterate and affirm the dicta that is *Speaker of the National Assembly v James Njenga Karume* [1992] eKLR, where it was stated that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”



25. Indeed, where a statute specifically provides for an alternative dispute resolution mechanism, a party is expected to strictly seek redress through the stipulated mechanism; see *Speaker of the National Assembly -vs- James Njenga Karume* (supra).
26. I have perused the petition and reflected on the substance of the dispute. It is clear from the wording of the petition and from the orders sought therein that the petitioners are challenging the alleged compulsory acquisition of the parcel of land known as Block 3-A Sagama Village, which they assert is their ancestral land.
27. In that regard, this court does not have jurisdiction in the first instance over the dispute in the consolidated petitions at this point. The same has been invoked prematurely, before exhausting the dispute resolution mechanisms provided for under the *Land Act*.
28. Consequently, the application dated 6th June 2024, is disallowed and the instant petition as well as the consolidated petitions as listed in paragraph 6 of the application and paragraph 1 (f) hereinabove, are hereby struck out.
29. I must add that by the character of this matter, the Supreme Court decision in *Republic-vs-Karisa Chengo and 2 others* (2017) eKLR that lack of jurisdiction thus renders a court's decision void and noting the terms 'Refer' and 'Transfer' as defined in *Black's Law Dictionary* 10th Edition at pages 1470 and 1727 respectively, the petitioners are at liberty to lodge and pursue their claims at the appropriate forum as noted above in the interest of justice.
30. Given the nature of this application, the consolidated petitions and being guided by the case of *Jasbir Singh Rai and 3 others-vs-Tarlochan Singh Rai Estate of 4 others* (2013) eKLR, parties to bear their own costs.
31. It is so ordered.

DELIVERED, DATED AND SIGNED AT MIGORI THIS 30TH DAY OF OCTOBER 2024.

G.M.A ONGONDO

JUDGE

In the Presence of;

1. Mr Marvin Odero instructed by Aron learned counsel for the petitioners/applicants and M M Omondi learned counsel for the the petitioners in petitions listed at paragraph 6 of the application dated 20th June 2024
2. Mr Delbert Ochola learned counsel for the 1st respondent
3. Esther Opiyo instructed by Wabwire learned counsel for the 3rd and 5th respondents.
4. Tom Maurice, court assistant

