Mwarano v National Land Commission & another (Environment & Land Case E022 of 2023) [2024] KEELC 6831 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6831 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ENVIRONMENT & LAND CASE E022 OF 2023

JM MUTUNGI, J

OCTOBER 17, 2024

BETWEEN

MICHAEL KANYI MWARANO ..... PLAINTIFF

AND

NATIONAL LAND COMMISSION ..... 1ST DEFENDANT

FREDRICK MWAI MWIHIA ..... 2ND DEFENDANT

RULING

1. This Ruling is in respect of the 1st Defendant's Notice of Preliminary Objection dated 4th April 2024 seeking to strike out the Plaintiff's Plaint dated 17th April 2023, on the grounds that the Honourable Court lacks jurisdiction to entertain the suit as it offends the provisions of Sections 133A and 133C of the *Land Act* No. 6 of 2012.

2. The Plaintiff filed an affidavit dated 5th June, 2024 opposing the 1st Defendant's Preliminary Objection. In the Affidavit, he averred that the process for compulsory acquisition for the construction of the Sagana – Marua dual carriage Highway began on 4th June 2021 and was finalized on 3rd September 2021. He claimed that the 1st Defendant gained early entry to the land and that he was notified of this on 8th July 2022. He asserted that all the necessary steps leading to the award of compensation by the 1st Defendant were carried out. Additionally, he stated that he held a 1/3 interest in each of the 9 parcels of land but was compensated for only 4 of the 9. Further the Plaintiff averred that the 1st Defendant had not provided any reasons for withholding the remaining 1/3 portion of the compensation funds. The Plaintiff further stated that he filed this suit before the operationalization of the Land Acquisition Tribunal, which was gazetted on 7th September 2023.

3. The Court on 4th April 2024 gave directions that the Preliminary Objection be disposed of first and that it be canvassed by way of written submissions. The 1st Defendant filed its written submissions dated 2nd July 2024 while the Plaintiff filed his submissions dated 16th July 2024.

4. Having regard to pleadings the issue that arises for determination in regard to the 1st defendant's Preliminary Objection is Whether this Honourable Court has the requisite jurisdiction to hear and determine this case.

5. The Court of Appeal in the Case of Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696 laid down the principle as to what constitutes a Preliminary Objection. A Preliminary objection to be valid must be on a point of law and must be founded on facts that are not in dispute. If evidence would require to be adduced to establish the facts, then a Preliminary Objection would not be sustainable. In the Mukisa Biscuit Case (supra) Law, JA stated as follow: -

> "So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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 the arbitration."

6. In the present matter, the 1st Defendant opines that the Plaintiff ought to have exhausted the Internal Dispute Resolution Mechanism provided under Sections 133A and 133C of the *Land Act*, No. 6 of 2012 Laws of Kenya as amended in 2019 vide the Land Value (Amendment) *Act No. 15 of 2019* which established the Land Acquisition Tribunal under Section 133A of the *Land Act*.

7. Section 133C of the *Land Act* sets out the jurisdiction of the 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 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 provision of Sections 127, 128, and 148(5), a matter relating to the 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.

8. Section 133D of the *Land Act*, vested the Environment and Land Court Appellate jurisdiction over decisions emanating from the Tribunal. It provides as follows:-

(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.

9. The 1st Defendant argues that the Court does not have jurisdiction to handle the dispute at this point because the Plaintiff has not yet gone through the dispute resolution process outlined in Section 133C. The Defendant argues that the Plaintiff has brought the case to the Court too soon while the Plaintiff asserts that the Land Acquisition Tribunal had not been established as at the time the suit was filed and hence the Court had jurisdiction.

10. The exhaustion doctrine ensures that parties are diligent in protecting their own interests through mechanisms outside the courts, before seeking Judicial consideration. This approach encourages the use of Alternative Dispute Resolution Mechanisms as outlined in Article 159 (2)(c) of *the Constitution*. The High Court in the Case of R vs. Independent Electoral and Boundaries Commission (I.E.B.C) Ex Parte National Super Alliance (NASA) Kenya and 6 others [2017] eKLR aptly explained this doctrine thus:-

> " This doctrine is now of esteemed juridical lineage in Kenya. It was perhaps most felicitously stated by the Court of Appeal in Speaker of National Assembly v Karume [1992] KLR 21 in the following oft-repeated words:
>
> "Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures."
>
> While this case was decided before *the Constitution* of Kenya 2010 was promulgated, many cases in the Post-2010 era have found the reasoning sound and provided justification and rationale for the doctrine under the 2010 Constitution. We can do no better in this regard than cite another Court of Appeal decision which provides the Constitutional rationale and basis for the doctrine."

11. The Supreme Court of Kenya rendered itself in regard to the principle in the Case of Benard Murage v Fine Serve Africa Limited & 3 others [2015] eKLR as follows:-

> " Not each and every violation of the law must be raised before the High Court as a Constitutional issue. Where there exists an alternative remedy through statutory law, then it is desireable that such a statutory remedy should be pursued first."

12. The Court of Appeal emphasized this principle and stated the following in the Case of Kibos Distillers Limited & 4 others v Benson Ambuti Adega & 3 others [2020] eKLR.

> " 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. Original jurisdiction simply means the jurisdiction to hear specifically constitutional or legislatively delineated disputes of law and fact at first instance. 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."

13. The locus classicus on jurisdiction is the celebrated Case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1 where Justice Nyarangi of the Court of Appeal stated as follows

'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.'

14. In the instant case, it is evident that the Plaintiff's complaint pertains to the compulsory acquisition of his share of the property in question. The Plaintiff maintains that as a co-owner of the property with two others, he is entitled to receive compensation from the 1st Defendant due to the compulsory acquisition, which the defendant has intentionally refused to pay despite the plaintiff's efforts to secure payment.

15. The Plaintiff's claim falls within the mandate of the Land Acquisition Tribunal. However, when the Plaintiff filed the suit in April 2023, the Tribunal had not been operationalized. It only became operational in September 2023. The right of access to Court in case of a dispute relating to compulsory acquisition of land is a Constitutional right under Article 40 (3) (ii). This allows any person with an interest in, or right over, the property to be acquired, the right of access to a Court of Law. Section 128 of the *Land Act* (2012) states that any dispute arising out of matters provided for under the Act may be referred to the Land and Environment Court for determination. In my view, the lack of an operational Land Acquisition Tribunal did not limit the Plaintiff's right of access to the Courts. I find that the dispute, as filed in Court, was properly presented.

16. In the premises the Preliminary Objection by the 1st Defendant lacks merit and is ordered dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 17TH DAY OF OCTOBER 2024.

J. M. MUTUNGI

ELC - JUDGE