



Gitata (suing as the administrator of the Estate of Robert Gitata Gichohi - Deceased) v National Land Commission & 2 others (Environment & Land Petition E064 of 2022) [2023] KEELC 304 (KLR) (26 January 2023) (Ruling)

Neutral citation: [2023] KEELC 304 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION E064 OF 2022**

**JO MBOYA, J
JANUARY 26, 2023**

BETWEEN

CHARLES JEREMY GICHOHI GITATA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF ROBERT GITATA GICHOHI - DECEASED). PETITIONER

AND

**NATIONAL LAND COMMISSION 1ST RESPONDENT
ATHI WATER WORKS DEVELOPMENT AGENCY 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

RULING

1. Vide Notice of Motion Application dated the 30th of December 2022, the Petitioner/Applicant herein has sought the following Reliefs;
 - i. A Temporary Injunction restraining the 1st and 2nd Respondents by itself or through its servants, employees, agents or in any other manner whatsoever and howsoever from executing the contents of Gazette Notice No. 3946 of 2020 issued in Kenya Gazette Vol. CXXII-No. 109 dated June 12,2020;Gazette Notice No. 7660 issued in Kenya Gazette Vol. CXXII-No. 177 issued on October 2,2022; Notice of Taking Possession issued in the Standard Newspaper on December 20, 2022; that have the effect of compulsorily acquiring 0.042Ha or 0.19 of Land Reference No. 7022/27.
 - ii. A further Temporary Injunction restraining the 1st and 2nd Respondents by itself or through its servants, employees, agents or in any other manner whatsoever and howsoever from executing the contents of Gazette Notice No. 3946 of 2020 issued in Kenya Gazette Vol.CXXII-No.109 dated June 12,2020; Gazette Notice No.7660 issued in Kenya Gazette Vol. CXXII-No.177 issued on October 2,2022;Notice of Taking Possession issued in the Standard



Newspaper on December 20, 2022; that have the effect of compulsorily acquiring 0.042Ha or 0.19 of Land Reference No. 7022/27 pending the determination of Nairobi HC ELC Civil Suit No. 192 of 2012-Charles Jeremy Gichohi Gitata (suing as the administrator of the Estate of Robert Gitata Gichohi) vs Athi Water Services Board.

- iii. An Order of Mandamus directed at the 1st Respondent to amend Gazette Notice No. 3946 of 2020 issued in Kenya Gazette Vol. CXXII-No. 109 dated June 12, 2020 and Gazette Notice No. 7660 issued in Kenya Gazette Vol. CXXII-No. 177 issued on October 2, 2022 via Corrigenda to clarify whether the 1st and 2nd Respondent intend to compulsorily acquire 0.042 Ha or 0.19 Ha of Land Reference No. 7022/27, and to amend the owner of Land Reference No. 7022/27 from TBD to the Estate of Robert Gitata Gichohi.
 - iv. Costs of and incidental to the application be provided for.
 - v. Such further and other reliefs that the Honourable Court may deem just and expedient to grant.
2. The instant application is anchored and premised on various and numerous grounds which have been enumerated at the foot of the subject application. Besides, the application is further supported by the affidavit of the Petitioner/Applicant, namely, Charles Jeremy Gichohi Gitata, sworn on the 30th December 2022.
 3. Be that as it may, even though the subject application was served upon the Respondents, none of the Respondents filed any response to the application.
 4. Nevertheless, when the Application came up for inter-partes hearing, various advocates appeared for and on behalf of the Respondents and same were granted liberty to respond to the instant application, albeit on issues of law only.
 5. At any rate, it is also appropriate to underscore that the instant application was canvassed and ventilated by way of oral submissions.

Submissions By The Parties

a. Petitioner's/Applicant's Submissions

6. Learned counsel for the Applicant raised, canvassed and amplified six pertinent issues during and in the course of ventilating the instant application.
7. Firstly, counsel submitted that though the 1st Respondent had commenced the process of compulsory acquisition, however same had failed to issue and served the requisite Notice upon the Petitioner/Applicant and all the Parties interested in the suit property.
8. Insofar as no such notices had been issued and served, learned counsel contended that the impugned compulsory acquisition was therefore illegal and unlawful.
9. Secondly, learned counsel has further submitted that the 1st Respondent herein has also failed and neglected to convene and hold an enquiry pursuant to and in accordance with the provisions of Section 112 of the *Land Act*, 2012(2016).
10. To the extent that no such Inquiry has been held and or undertaken, learned counsel for the Applicant has therefore submitted and contended that the impugned compulsory acquisition is therefore contrary to and in contravention of the due process of the law.



11. Thirdly, counsel submitted that the suit property, which is the subject of compulsory acquisition, contains the graves of the parents of the Petitioner/Applicant. Consequently, it has been contended that the suit property has sentimental importance and significance to the Petitioner/Applicant and the rest of the Interested Parties.
12. Furthermore, counsel has added that even though the 1st Respondent has neither served the requisite notices, the 1st Respondent has indeed activated the process of compulsory acquisition and same proceeded to and published a gazette notice on the 2nd October 2022 and in respect of which, same has signaled the intention of taking of possession of the suit property.
13. In this regard, counsel contended that the suit property is on the verge of being forcefully and compulsorily taken over, prior to and before the issue of full compensation has been addressed, ironed out and settled.
14. Additionally, counsel submitted that the 1st Respondent ought not to be allowed to proceed with the impugned compulsory acquisition unless and until full compensation in the sum of Kes.58, 305, 000/= Only, is paid to the Petitioner/Applicant.
15. On the other hand, learned counsel for the Applicant submitted that the issues raised at the foot of the current Petition touch on and concern breach, violation and infringement of the Applicant's Rights and Fundamental Freedoms and hence the subject dispute can only be dealt with and disposed of by this court.
16. In this regard, counsel contended that issues pertaining to breach and violation of human rights and fundamental freedoms cannot be dealt with and addressed by any other statutory tribunal.
17. Premised on the foregoing submissions, learned counsel added that the doctrine of exhaustion does not therefore apply to the issues which have been raised and highlighted at the foot of the subject petition.
18. In a nutshell, counsel therefore invited the court to find and hold that the subject Petition and the attendant application raise pertinent and salient issues that require to be appropriately dealt with.
19. Finally, counsel contended that the Applicant has therefore placed before the honourable court sufficient and credible material to warrant the grant of the various orders sought at the foot of the application.

b. 1ST Respondent's submissions

20. Though counsel Ms. Njuguna was present during the call over and at the onset when directions were given pertaining to and concerning the hearing and disposal of the application by way of written submissions, same however did not attend court at 10:45 a.m when the application was canvassed.
21. In the premises, no submissions were ventilated for and on behalf of the 1st Respondent.

c. 2nd respondent's submissions

22. On the other hand, Learned Counsel for the 2nd Respondent raised and amplified three issues for consideration by the court.
23. First and foremost, counsel submitted that the 1st Respondent duly issued and served all the requisite notices prior to and or before commencing the process of compulsory acquisition in respect of the suit property.



24. In this regard, counsel pointed out that the various notices are indeed highlighted and enumerated in the body of both the Petition and the application filed by the Petitioner/Applicant.
25. In any event, learned counsel added that the issue relating to the error in respect of the acreage of the suit property that was being compulsorily acquired was duly corrected and clarified vide legal notice number 15374, which is well with the knowledge of the Petitioner/Applicant.
26. To the extent that the Petitioner/Applicant was duly issued and served with the requisite notices via gazette, counsel has contended that the current Petition does not therefore raise any prima facie case or at all.
27. Secondly, Learned Counsel submitted that the loss, if any, that the Petitioner/Applicant is disposed to suffer is quantifiable, ascertainable and thus compensable in monetary terms.
28. In any event, counsel has submitted that the Applicant himself has indeed proceeded to and quantified the value of the land in the sum of Kes.58, 305, 000/= only.
29. Other than the foregoing, counsel added that even though the Petitioner/Applicant has quantified the extent of loss, to be suffered, it is important to note that there is a laid down process for carrying out and conducting valuation in respect of the property, which is the subject of compulsory acquisition.
30. Learned counsel for the 2nd Respondent has submitted that the issues raised before this court touch on and concern the process of compulsory acquisition. For clarity, counsel pointed out that the dispute relates to whether or not the requisite notices were issued and served, the quantum of valuation and the intended taking of possession of the suit property before remittance of the compensation amount.
31. Based on the foregoing, learned counsel for the 2nd Respondent contended that the dispute therefore fell within the mandate and competence of the Land Acquisition Tribunal established pursuant to the provision of Section 133A of the *Land Act*, 2012, (2016).
32. In view of the foregoing, counsel has therefore contended that this honourable court is devoid and divested of the requisite jurisdiction and competence to hear and entertain the dispute beforehand.
33. In a nutshell, learned counsel invited the court to uphold the Doctrine of exhaustion and essentially apply the provisions of Section 133A, B and C of the *Land Act*, 2012(2016).

d. 3rd Respondent's submissions

34. Suffice to point out that learned counsel Ms. Nyawira was also present at the onset and when directions were given as pertains to the hearing and disposal of the subject application by way of oral submissions.
35. Nevertheless, when the allocated time reached, learned counsel was not in attendance, despite being privy to and knowledgeable of the directions of the court. Consequently, it is appropriate to state that no submissions were ventilated on behalf of the 3rd Respondent herein.

Issues for Determination:

36. Having evaluated the instant application together with the supporting affidavit thereto and having taken into consideration the submissions made by and on behalf of the Parties, the following issues do arise and are thus germane for determination;
 - i. Whether the Honourable court is seized and possessed of the requisite Jurisdiction to hear and entertain the instant Petition and by extension the application thereunder.



- ii. Whether the Petitioner/Applicant has established and demonstrated a Prima facie case to warrant the grant of the orders sought.
- iii. Whether the orders of Mandamus can issue at the foot of an Interlocutory application, either in the manner sought or at all.

Analysis And Determination

Issue Number 1) Whether the honourable court is seized and possessed of the requisite Jurisdiction to hear and entertain the instant Petition and by extension the application thereunder.

37. The Petitioner/Applicant herein has mounted the subject petition and the application herein, contending that the 1st Respondent has since commenced the process of compulsory acquisition, albeit without complying with the laid down procedures in terms of the *Land Act*, 2012 (2016).
38. In particular, the Petitioner has pointed out that the impugned compulsory acquisition, has been commenced and undertaken prior to and before the issuance and service of the requisite statutory notices.
39. Secondly, the Petitioner/Applicant has also contended that though the 1st Respondent has commenced and undertaken the process of compulsory acquisition, same has failed and neglected to carry out the requisite inquiry, for purposes of ascertaining and reckoning the amount of compensation due and payable to the Petitioner/Applicant.
40. Furthermore, the Petitioner/Applicant has added that the 1st Respondent has computed and valued the suit property in the sum of Kes.21, 850, 000/= only, which amount is stated to be well below the reasonable value of the suit property.
41. At any rate, the Applicant has further added that same proceeded to and engaged a valuer, who conducted and carried out an independent valuation of the suit property. In this regard, the Petitioner/Applicant has stated that the suit property has a market value of Kes.58, 305, 000/= only.
42. Essentially, the Petitioner/Applicant contends that the amount which has been arrived at by and on behalf of the 1st Respondent does not therefore constitutes adequate compensation in accordance with the provisions of Article 40 of *the Constitution* 2010.
43. Furthermore, the Petitioner/Applicant has also contended that the Respondent are keen to enter upon and take possession of the suit property, in pursuance of compulsory acquisition before payment of the compensation.
44. In short, the Petitioner/Applicant's grievances touch on and or concerns various processes attendant to and concerning the process of Compulsory acquisition. Primarily, the touchstone of the Applicant's complaint is breach and violation of the Law relating to Compulsory acquisition.
45. In respect of the complaints pertaining to and concerning the ascertainment and computation of the quantum of compensation, it is imperative to state and underscore that the provisions of Section 112 of the *Land Act*, 2012 (2016) are explicit on the process to be complied with.
46. Given the importance of the provisions of Section 112 of the *Land Act*, 2012 (2016), it is imperative to reproduce same.
47. Consequently, the provisions are as hereunder;
 112. Inquiry as to compensation



- i. At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall-
 - a. cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and
 - b. serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.
 - ii. The notice of inquiry shall call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry.
 - iii. At the hearing, the Commission shall-
 - a. make full inquiry into and determine who are the persons interested in the land; and
 - b. receive written claims of compensation from those interested in the land.
 - iv. The Commission may postpone an inquiry or adjourn the hearing of an inquiry from time to time for sufficient cause.
 - v. For the purposes of an inquiry, the Commission shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to the Commission of documents of title to the land.
 - vi. The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.
48. Other than the provisions of Section 112 (supra), the provisions of Section 133 of the *Land Act, 2012(2016)* are also imperative.
49. In this regard, the provisions of Section 133 of the *Land Act, 2012(2016)*, are reproduced as hereunder;

Part Viiiia-The Land Acquisition Tribunal

[Act No.15 of 2019,s.13]

133A. Establishment of the Tribunal.

- (1) There is established a Tribunal to be known as the Land Acquisition Tribunal which shall consist of three persons appointed by the Cabinet Secretary through a notice in the Gazette.
- (2) The members of the Tribunal shall consist of-
 - (a) one person nominated by the Judicial Service Commission, who shall serve as the chairperson;
 - (b) one person nominated by the Cabinet Secretary; and
 - (c) one person nominated by the Attorney-General.



- (3) The Judicial Service Commission shall second a Deputy Registrar and such other staff members as are necessary to assist the Tribunal in the performance of its functions under this Act.
- (4) The Tribunal may, co-opt an expert to advise it on any matter before it and shall regulate its own procedure.
- (5) Members of the Tribunal shall be paid such allowances of other remuneration as the Judicial Service Commission may, on the advice of the Salaries and Remuneration Commission, determine.

133B. Term of office for members.

- (1) The chairperson of the Tribunal is appointed for a term of four years and is eligible for re-appointment for one more term of four years.
- (2) A member of a Tribunal is appointed for a term of three years and is eligible for re-appointment for one more term of three years.
- (3) A member of a Tribunal shall serve on part time basis.

133C. Jurisdiction of the Tribunal

- (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.

133D. Appeals

- (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.

133E. Limitation of liability for members of the Tribunal.

Members of the Tribunal shall not be personally liable for any act or default one or committed in good faith in the course of exercising the powers conferred by this Act.

50. My understanding of the provisions of Section 133C of the *Land Act*, 2012(2016), drives me to the conclusion that all disputes pertaining to the process of compulsory acquisition, whether same be disputes pertaining to the issuance of the impugned notices, the Inquiry and computation of (sic) the compensation, are issues which fall within the statutory mandates and competence of the tribunal.
51. Furthermore, the provisions of Section 133D of the *Land Act*, 2012(2016) indicate that the mandate and jurisdiction of the Environment and Land Court only ensues against the determination or decision of the tribunal. In this regard, what becomes evident and apparent is that the Environment and Land Court as appellate jurisdiction over the Land Acquisition Tribunal.
52. Premised on the foregoing, the issue that does arise is whether this honourable court can appropriate the mandate and jurisdiction of the Land Acquisition tribunal and proceed to deal with and dispose of the subject dispute.
53. Additionally, there is also the aspect that pertains the Jurisdiction of Environment and Land court, to assume and appropriate the original Jurisdiction, where same is similarly, vested with Appellate Jurisdiction.
54. In my humble view, where an act of Parliament has created and established a statutory forum for the hearing and determination of a particular dispute, then it behooves any claimant to first and foremost approach the established forum, for purposes of determination of the compliant/grievance.



55. To this end, it is appropriate to underscore that the Doctrine of exhaustion requires that all Disputes be handled and determined, in the first instance, before the established statutory bodies, which are vested with the requisite competence.
56. To the extent that there is an established statutory body that is clothed with the requisite jurisdiction to deal with dispute pertaining to the process of compulsory acquisition, I come to the conclusion that it would be inappropriate for this honourable court to usurp and appropriate the mandate that is vested elsewhere.
57. In this regard, I am of the humble opinion that this honourable court is obligated and obliged to defer to the Jurisdiction and mandate of the requisite tribunal. See Article 159 (2) (c) of *the Constitution* 2010.
58. Suffice it to point out and underscore that deference and allowing the duly established Statutory Body, (port of first call) to appropriate her mandate, forms the bedrock of the Doctrine of Exhaustion.
59. To underscore the importance and significance of the Doctrine of exhaustion, it is imperative to take cognizance of the holding of the Court of Appeal in the case of Geoffrey Muthinja & another versus Samuel Muguna Henry & 1756 others [2015] eKLR, where the court stated and observed as hereunder;

“It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of dispute resolution.

60. Other than the foregoing decision, the significance of the doctrine of exhaustion and the need to defer to other established statutory bodies and afford same the opportunity to execute their mandate was revisited and underscored vide the holding in the case of Bethwell Allan Omondi Okal versus Telkom (Founders) Ltd (2017)eKLR.
61. For coherence, the Court of Appeal stated and observed as hereunder:

We note however that the learned Judge did not stop there. He proceeded to try and decipher and understand the petitioner’s grievances. Having done so, he made a finding to the effect that the grievances in question did not raise constitutional issues but rather, there were other dispute resolution mechanisms that ought to have been pursued. Since the complaints were basically against RBA, the learned Judge found that there were provisions in the *Retirement Benefits Act*, which the appellant should have invoked to pursue his claim. Any dispute should have been referred to arbitration in the first instance pursuant to Clause 36 of the Consolidated Deed of Trust and Rules, made under the RBA. If the appellant was dissatisfied with the decision of the arbitrator, then he could appeal to the Appeals Tribunal established under the RBA.

The Appellant might want to argue that he has a constitutional right of access to justice, and we agree that he does, but the High Court and this Court have pronounced themselves many times to the effect that a party must first exhaust the other processes availed by other statutory dispute resolution organs, which are by law established, before moving to the High



court by way of constitutional petitions. See International Centre for Policy and Conflict & 4 others vs The Hon. Uhuru Kenyatta and others, Petition No. 552 of 2012, and Speaker of National Assembly vs Njenga Karume [2008] 1KLR 425.

62. Additionally, the centrality of the Doctrine of exhaustion was also underscored by the supreme court in the case of Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) v Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme) [2019] eKLR
63. For coherence, the court observed as hereunder;
 - (118) In the pursuit of such sound legal principles, it is our disposition that disputes disguised and pleaded with the erroneous intention of attracting the jurisdiction of superior courts is not a substitute for known legal procedures. Even where superior courts had jurisdiction to determine profound questions of law, first opportunity had to be given to relevant persons, bodies, tribunals or any other quasi-judicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.
 - (119) Such a deferred jurisdiction and the postponement of judicial intervention and reliefs until the mandated statutory or constitutional bodies take action rests, not alone on the disinclination of the judiciary to interfere with the exercise of the statutory or any administrative powers, but on the fact of a legal presumption that no harm can result if the decision maker acts upon a claim or grievance. Such formulation underlies the analogous cases, frequently cited for the exhaustion doctrine, in which the court refuses to enjoin an administrative official from performing his statutory duties on the ground that until he has acted the complainant can show no more than an apprehension that he will perform his duty wrongly, a fear that courts will not allay. Such cases may be expressed in the formula that judicial intervention is premature in the absence of administrative action.
64. Duly nourished and guided by the holdings in the decisions quoted in the preceding paragraphs, there is no gainsaying that where there is an established statutory forum for purposes of determining a particular issue or dispute, (in this case the questions relating to the process of Compulsory Acquisition), then it behooves the claimant to mount the dispute before the established forum in the first instance.
65. In respect of the subject matter, counsel for the Petitioner/Applicant contended that the tribunal established vide Section 133C of the *Land Act*, 2012 (2016), would not be competent to handle and determine the Constitutional issues raised at the foot of the Petition herein.
66. Nevertheless, it is my humble position that the submissions by and on behalf of counsel for the Petitioner/Applicant is not only misguided but is legally untenable. In this regard, the succinct exposition of the law vide the decisions quoted herein before, are imperative and apt.
67. In view of the foregoing consideration, I come to the conclusion that the issues raised at the foot of the Petition and the impugned application, fall within the statutory mandate and competence of the Land Acquisition tribunal, in terms of Section 133C of the *land Act*, 2012(2016).



Issue Number 2) Whether the Petitioner/Applicant has established and demonstrated a Prima facie case to warrant the grant of the orders sought.

68. Other than the jurisdictional question, which has been addressed and disposed of in terms of the preceding paragraphs, there is also the issue as to whether or not the grievances canvassed and alluded to at the foot of the impugned application espouse chances with probability of success.
69. In this regard, it is appropriate to recall that for a case or matter to constitute a prima facie case, same must espouse a right which has been infringed upon by the adverse Party and thus deserving of being interrogated by and before the concerned statutory/judicial forum.
70. In my humble view, the existence of a prima facie case therefore entails a dual analysis, in terms of there being a legal right, that has been infringed upon by the adverse party and thus warranting protection.
71. Secondly, the impugned right, which has been infringed upon, must be placed and ventilated before the appropriate forum seized and conferred with the requisite competence to entertain the impugned dispute, in accordance with the Law.
72. In respect of the subject matter, I have found and held that this honourable court is not vested with the requisite competence, to entertain and determine the subject dispute in the first instance.
73. Consequently, the question that does arise is whether the facts enumerated in the body of the subject application and by extension the petition, would therefore meet the threshold of what constitutes a prima facie case as defined vide the decision in the case of Mrao Ltd versus First American Bank Ltd and Others(2003)eKLR.
74. For convenience, the Honourable court defined a prima facie case as hereunder;
- “In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguable case. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant’s case upon trial. That is clearly a standard, which is higher than an arguable case.”
75. Given the import, tenor and meaning of a prima facie case, I am afraid that the circumstances which have been enumerated in the body of the Petition and by extension the impugned application, do not constitute a prima facie case, whatsoever.

Issue Number 3) Whether the orders of Mandamus can issue at the foot of an Interlocutory Application, either in the manner sought or at all.

76. The Petitioner/Applicant herein has sought for various reliefs at the foot of the instant application. For clarity, one of the reliefs which has been sought by the Petitioner relates to the issuance of an order of mandamus.
77. In this respect, it is appropriate to reproduce the relief pertaining to the order of mandamus. For convenience, same is reproduced as hereunder;
- i. An Order Of Mandamus directed at the 1st Respondent to amend Gazette Notice No. 3946 of 2020 issued in Kenya Gazette Vol. CXXII-No. 109 dated June 12,2020 and Gazette Notice No. 7660 issued in Kenya Gazette Vol.CXXII-No.177 issued on October 2,2022 via Corrigenda to clarify whether the 1” and 2ml Respondent intend to compulsorily acquire 0.042 Ha or 0.19



Ha of Land Reference No. 7022/27, and to amend the owner of Land Reference No. 7022/27 from TBD to the Estate of Robert Gitata Gichohi.

78. Whereas a superior court seized of a Constitutional Petition is mandated and authorized to grant various reliefs, depending on the circumstances of the case, inter-alia an order of mandamus. However, it is appropriate to state that such an order can only issue and be granted after due evaluation of the merits of each case.
79. To underscore the statement that a superior court dealing with and entertaining a Constitutional petition can grant the orders, inter-alia mandamus, the provisions of Article 23 of *the Constitution* are relevant and applicable.
80. In any event, if case law was necessary, it is appropriate to recall, restate and reiterate the holding of the Court of Appeal in the case of County Government of Nyeri & another versus Cecilia Wangechi Ndungu [2015] eKLR, where the court stated and observed as hereunder;
47. The appellants took issue with the orders that were issued by the trial court. They argued that the orders were judicial review orders yet what was before the court was not judicial review proceedings. The respondent filed the Petition in the Industrial Court pursuant to Article 22 of *the Constitution*. On this issue we can do no better than reproduce Article 23 (3)(f) of *the Constitution*: -
- QUOTE{startQuote “}
- Article 22 (3) In any proceedings brought under Article 22, a court may grant appropriate relief including-
- (a)
-
- (f) an order of judicial review.”
81. Despite the foregoing, the issue beforehand is however whether the order of mandamus can issue at the foot of an interlocutory application, either in the manner sought by the Petitioner/Applicant or at all.
82. Without belaboring the point, I am of the considered view that such an order is of a precipitate and substantive nature and cannot therefore issue vide an Interlocutory application, in the manner sought by the Petitioner/Applicant.
83. In a nutshell, even if I had found that the court was seized of jurisdiction (which is not the case) the impugned order of mandamus would not issue, at the foot of the Interlocutory application herein.

Final Disposition

84. Having evaluated the issues that were highlighted in the body of the Ruling, it must have become evident and apparent that both the Petition and the instant application have been placed before a forum divested of the requisite competence and jurisdiction.
85. In the absence of jurisdiction, this honourable court is called upon to down its tool at the earliest moment. See Owners of Motor Vessel Lilian S versus Caltex K Ltd (1989)eKLR.
86. Consequently and in the premises, the Petition and the Application dated the 30th December 2022, be and are hereby struck out, albeit without costs.
87. It is so ordered.



DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF JANUARY 2023.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Mr. Ndungu for the Petitioner/Applicant.

N/A for the 1st Respondent.

N/A for 2nd Respondent

N/A for the 3rd Respondent

