



**Republic v National Land Commission & another; Chief Land Registrar
& 2 others (Interested Parties); Barua Estate Limited (Exparte) (Tribunal
Case 1 of 2024) [2024] KELAT 1126 (KLR) (22 July 2024) (Ruling)**

Neutral citation: [2024] KELAT 1126 (KLR)

**REPUBLIC OF KENYA
IN THE LAND ACQUISITION TRIBUNAL
TRIBUNAL CASE 1 OF 2024
NM ORINA, CHAIR
JULY 22, 2024**

BETWEEN

REPUBLIC APPLICANT

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

THE ATHI WATER WORKS DEVELOPMENT AGENCY 2ND RESPONDENT

AND

CHIEF LAND REGISTRAR INTERESTED PARTY

COUNTY LAND REGISTRAR, KIAMBU INTERESTED PARTY

DIRECTOR OF SURVEYS INTERESTED PARTY

AND

BARUA ESTATE LIMITED EXPARTE

RULING

1. On 22nd February 2024, this tribunal delivered a judgement in this case and issued the following orders:
 - i. An Order Of Certiorari is hereby issued removing to this Court for purposes of quashing the 1st Respondent's decision dated 16th November 2022 awarding the Applicant the sum of Kshs. 74,433,129.00 as compensation for acquisition of L.R. No. 81/1 located within Kiambu County.



- ii. An Order Of Mandamus is hereby issued directing the 1st Respondent and the 2nd Respondent to jointly conduct a valuation of the portion of land forming part of L.R. No. 81/1 which was compulsorily acquired. For clarity, the valuation will be as at 12th June 2020;
 - iii. An Order Of Mandamus is hereby issued directing the 1st Respondent to supply the Applicant with a valuation report pursuant to the valuation conducted in (ii) above;
 - iv. An Order Of Mandamus is hereby issued directing the 1st Respondent to publish a fresh notice of inquiry in the Kenya Gazette and to serve the said notice upon the Applicant, in person;
 - v. An Order Of Mandamus is hereby issued directing the 1st Respondent to issue to the Applicant a fresh award of compensation upon conducting an inquiry;
 - vi. The above is to be done within sixty (60) days hereof;
 - vii. The Applicant's costs shall be borne by the 1st Respondent.
2. Subsequently, the 1st Respondent published a notice of intention to acquire on 11th June 2024 through Gazette Notice No. 7187. This was followed by a Notice of Taking Possession (Early Entry) by the 1st Respondent on 28th June 2024 indicating that pursuant to the provisions of Section 120(2) of the Land Act, the 2nd Respondent had been granted access to the site to commence construction works with immediate effect.
 3. Aggrieved by this sequence of events, the Ex Parte Applicant (now Applicant) has approached the tribunal vide Notice of Motion dated 10th July 2024 brought under Section 3A of the Civil Procedure Act, Section 133C (6), (7) & (8) of the Land Act, and Sections 9(1), 11(1), and (2) of the Fair Administrative Action Act. In the said Notice of Motion, the Applicant seeks the following orders:
 - i. Spent
 - ii. That pending hearing and determination of the application herein, the Honourable Tribunal be pleased to grant an order of prohibition restricting the 1st and 2nd Respondents whether by themselves, agents, employees or servants from continuing any further acts of trespass, destruction, construction works; including but not limited to excavating and removal of murram, installation of pipes and pouring of concrete on dug up trenches on the piece of land known as L.R. No. 81/1 located within Kiambu County.
 - iii. That pending the hearing and determination of the application herein, the Honourable Tribunal be pleased to grant an order of stay of the decision of the National Land Commission issued vide its Notice dated 28th June 2024 seeking to take possession of the land known as L.R. No. 81/1 located within Kiambu County and granting immediate access to Athi Water Works Development Agency.
 - iv. That an order of prohibition do issue to prohibit the National Land Commission, Athi Water Works Development Agency, Chief Land Registrar, County Land Registrar Kiambu County and the Director of Surveys from acquiring, taking possession of or vesting the piece of land known as L.R. No. 81/1 located within Kiambu County pending full compliance with the judgement delivered by the Land Acquisition Tribunal on 22nd February 2024.
 - v. That the Honourable Tribunal be pleased to grant an order of prohibition restricting the 1st and 2nd Respondents whether by themselves, agents, employees or servants from continuing any further acts of trespass, destruction, construction works; including but not limited to excavating and removal of murram, installation of pipes and pouring of concrete on dug up



trenches on piece of land known as L.R. No. 81/1 located within Kiambu County pending compliance with the judgement delivered by the Land Acquisition Tribunal on 22nd February 2024.

4. The Notice of Motion is supported by the affidavit of Dr. Daniel Githegi dated 10th July 2024 and accompanying documents,
5. It is the Applicant's case that the 1st Respondent has failed and/or neglected to comply with the orders of this tribunal contained in the judgement of 22nd February 2024 that required it to undertake certain steps in the acquisition of part of the suit property within a period of Sixty (60) days.
6. The Applicant avers that it was only until 11th June 2024, four (4) months after the judgement was issued that the 1st Respondent published a notice of intention to acquire part of the suit property. Prior to this, the Applicant asserts, the 2nd Respondent's contractor had moved into the suit property on or about 27th/28th May 2024. It is the Applicant's case that in light of the judgement of 22nd February 2024, the Respondents have no right to be on the suit property before full compliance with the said judgement.
7. The Applicant asserts that despite issuing a notice pursuant to Section 120(2) of the land Act on 28th June 2024, the 2nd Respondent's contractor was already on the suit property carrying out works. Indeed, the Applicant avers that through a letter dated 12th June 2024 through its advocates, the Applicant raised the issue of non-compliance with the judgement with the Respondents. This letter is submitted in evidence in the affidavit of Dr. Daniel Githegi and marked "DG7".
8. In sum, the Applicant impugns the actions of the Respondents and urge the tribunal to grant conservatory orders on account of four key reasons. First, the Applicant asserts that there is a valid judgement of the tribunal which has not been overturned on appeal; second, the Respondents' actions are in violation of the said judgement and amount to contempt; third, the Applicant, on account of the actions of the Respondents and or their agents, continues to suffer irreparable harm through damage to its property; and, fourth, the balance of convenience rests in favour of the Applicant as, "despite the intended project being for public benefit, there can never be a justification of public interest in breach of the law."
9. The 1st Respondent opposed the application through the affidavit of Christine Wangui Muiruri, a Senior Valuation and Taxation officer of the 1st Respondent. The same was sworn on 17th July 2024.
10. The 1st Respondent asserts that it has indeed commenced the process of acquiring part of the suit property in compliance with the order of the tribunal contained in the judgement dated 22nd February 2024.
11. The 1st Respondent explains that prior to the publication of the notice of intention to acquire on 11th June 2024, it had to go through various processes including its internal committees. Consequently, the 1st Respondent asserts that it cannot be said to have failed to comply despite the delay.
12. In regard to the notice of early entry, the 1st Respondent avers that the same was necessitated by the urgency of the public project that is meant to alleviate the water shortage currently affecting Nairobi region. In this regard, the 1st Respondent argues that there is public interest in allowing the construction to proceed. The case of *Okiya Omtatah Okioti vs. Kenyatta University Teaching, Referral and Research Hospital & 2 Others* [2019] eKLR was cited in support.



13. In any case, the 1st Respondent asserts that the notice of early entry is permitted under the law and the Respondents are committed to complete the process of compulsory acquisition as ordered by the Tribunal.
14. The 1st Respondent prays that the application be dismissed as allowing the same would lead to stalling of the project which is almost complete but has delayed due to the remaining part on the suit property.
15. The 2nd Respondent on its part opposes the application through the replying affidavit of Engineer Joseph Kamau, its Chief Executive Officer, sworn on 17th July 2024. According to the 2nd Respondent, the project is 99% complete save for the remaining part on the suit property where a 100 metres pipeline is supposed to be laid. The project contractual period was ending on 30th June 2024.
16. The 2nd Respondent also reiterates that the Respondents are not in contempt of the tribunal's orders and have commenced the process of compulsory acquisition through the notice of intention to acquire published on 11th June 2024.
17. The 2nd Respondent further asserts that it is ready to satisfy the award once it has been issued to the Applicant if the same will be more than the initial award of Kshs. 74,433,129.00.
18. The 2nd Respondent avers that the closure of the contractual period and credit facility as at 30th June 2024 would result to great financial losses to the government including contractor's charges against the 2nd Respondent for idle time. Further, if the project is not allowed to proceed, the 2nd Respondent asserts, the same will occasion tax payers an additional financial burden through loan interest.
19. In regard to the notice of early entry, the 2nd Respondent avers that the same was issued in compliance with the law and there was urgency that prompted it. This was due to the contractual period coming to an end on 30th June 2024 and a presidential directive issued to the 2nd Respondent in April to complete the project within two (2) months.
20. Mr. Rao holding brief for Mrs. Opiyo for the Applicant, Ms. Kisengese for the 1st Respondent, and Ms. Kimani for the 2nd Respondent advanced their respective cases during the interpartes Hearing on 17th July 2024. The ruling was reserved for today.
21. Having carefully gone through the filed pleadings and heard from the counsel representing the parties, I am satisfied that there are two main issues for determination. First, as a preliminary point, although none of the parties have raised this issue substantively, it is important that the tribunal is satisfied that a party that has approached it has done so correctly. Second, if the first issue is determined in the affirmative, the tribunal will then assess whether the Applicant has satisfied the test for the grant of conservatory orders as sought.
22. The Applicant has filed this application as a stand-alone application without a substantive suit. The substantive suit in this case was determined with finality on 22nd February 2024. Can the Applicant seek conservatory orders without the existence of a substantive suit, in any case?
23. The law in regard to institution of suits is found in the [Civil Procedure Act](#) and the rules therein. Section 19 of the Civil Procedure Rules requires that, "every suit shall be instituted in such a manner as may be prescribed by Rules." Order 3 Rule (1) of the Civil Procedure Rules 2010 provides that, "every suit shall be instituted by way of a Complaint or in such a manner that may be prescribed. As a general rule a suit can only be instituted by way of a Complaint, Petition or an Originating Summons."
24. The instant application has been commenced by way of a Notice of Motion. Granted, the tribunal has not developed its own rules of procedure but the reading of the [Land Act](#) together with the [Civil](#)



Procedure Act does not give room for originating a suit in the manner the Applicant has done. Under Section 133C of the Land Act, the Tribunal's jurisdiction extends to hearing appeals from the decision of the National Land Commission (S. 133C (1)), and complaints arising under Articles 23(2) and 47(3) of the Constitution of Kenya (S. 133C (8)). A party approaching the tribunal must, therefore, anchor its substantive claim on Section 133C of the Land Act. Such a claim must seek substantive orders upon which an application for conservatory orders is predicated.

25. Furthermore, it is trite that a party seeking injunctive relief against another party cannot do so without first filing a substantive suit. In *Geoffrey Ndungu Theuri vs. Law Society of Kenya* [1988] eKLR, the Court held as follows:

...the order specifically refers to a suit which is defined under section 2 of the Civil Procedure Act in these terms; 'suit' means all civil proceedings commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under Order 30 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused Section 3A of the Civil procedure Act does not give the court the power to act without jurisdiction.

26. Similarly, in *Photo Energy Limited vs. Hasbi Energy Limited Misc. 180 of 2018*, the Court reiterated the position as follows:

A Notice of Motion is not legally recognized as an originating process. A Notice of Motion can only be filed within a properly instituted suit. The Applicants failed to file any originating process in this matter. I find that the attempt to institute this suit by way of a notice of motion renders the entire suit defective.

27. When considering whether an applicant has made out a case for grant of conservatory orders, the holding in the locus classicus case of *Giella vs. Cassman Brown and Company Limited* (19730 eKLR E.A 358 at 360 underscores this mandatory requirement. It was stated as follows:

“First, an applicant must show a prima facie case with a probability of success...” Emphasis mine.

28. For a party to demonstrate a “prima facie case with a possibility of success,” such a party must have a substantive suit pending within which a conservatory order will be issued. In the instant case, the Applicant merely seeks conservatory orders “pending compliance with the judgement delivered by the Land Acquisition Tribunal on 22nd February 2024.” I have no doubt in my mind, therefore, that for failing to be anchored in a substantive suit seeking substantive orders, the instant application lacks “legs to stand on”.

29. It is also noteworthy that the Applicant had sought similar orders in the suit that is now res judicata when it was commenced at the Environment and Land Court. The Applicant's Application dated 5th November 2022 and amended on 12th April 2023 sought, among others, orders of prohibition against the Respondents from continuing any acts of trespass on the suit property pending the hearing and determination of the judicial review application. Subsequently, the suit was transferred to the Tribunal by orders issued by BM Eboso, J on 16th October 2023. At the time of the transfer of the file, the application for conservatory orders had not been determined and the Court directed that the same would be handled by the Tribunal.

30. This tribunal pronounced itself with finality on 22nd February 2024 when the judgement was delivered. To that extent, all applications subsisting within the main suit fell by the wayside as the final orders



of the Tribunal took into considerations all the issues in dispute. For the reason that the instant application is predicated on the suit that was determined with finality on 22nd February 2024, the same is not properly before the tribunal. I also note that the Applicant has made reference to the Respondents being in contempt but the same has not been prosecuted in the right form and forum.

31. I take cognizance that Article 159(d) of *the Constitution* of Kenya requires that justice shall be administered without undue regard to technicalities. However, filing an application for conservatory orders without filing a substantive suit is beyond the protection of Article 159(d) as the same is not a mere technicality.
32. For the above reasons, I find that the Notice of Motion dated 10th July 2024 is fatally incompetent and the same must suffer the fate of dismissal, in limine, with costs to the Respondents.

DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF JULY 2024.

.....

DR. NABIL M. ORINA

Chairperson

In the Presence of:

Mr. Rao h/b for Mrs Opiyo for the Ex Parte Applicant

Ms. Kisengese for the 1st respondent

Ms. Kimani for the 2nd Respondent

C/A – Everlyne Kenyando

