



Mutua & 2 others (The legal representatives of the Estate of Samson M Ningo (Deceased)) v Attorney General & 3 others (Environment & Land Petition 10 of 2021) [2023] KEELC 16585 (KLR) (21 March 2023) (Judgment)

Neutral citation: [2023] KEELC 16585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND PETITION 10 OF 2021
LG KIMANI, J
MARCH 21, 2023**

BETWEEN

**DANIEL NDAMBUKI MUTUA 1ST PETITIONER
JAPHETH MULWA NGOVI 2ND PETITIONER
BEATRICE GACHERI MULI 3RD PETITIONER
THE LEGAL REPRESENTATIVES OF THE ESTATE OF SAMSON M NINGO
(DECEASED)**

AND

**THE HON ATTORNEY GENERAL 1ST RESPONDENT
THE NATIONAL LAND COMMISSION 2ND RESPONDENT
KENYA NATIONAL HIGHWAYS AUTHORITY 3RD RESPONDENT
SINOHYDRO CORPORATION LIMITED 4TH RESPONDENT**

JUDGMENT

1. The Petition dated 1st April 2019 is founded on Articles 2(1), 19, 21(1), 22(2), 23(1), 23(3), 28 and Article 40 of *the Constitution* of Kenya 2010. The Petitioners are residents of Mutomo township within the county of Kitui in the Republic of Kenya. The 1st Respondent is the legal advisor of the Government of Kenya while the 2nd Respondent is established under Article 67 of *the Constitution* of Kenya. The 3rd Respondent is a state corporation established under the *Kenya Roads Act* with the responsibility for management, development, rehabilitation and maintenance of roads in Kenya while the 4th Respondent is a limited liability company.



2. The Petitioners are the registered owners of parcels of land situated at Mutomo Township Kitui/Mwala/1066, Kitui/Mwala/750, Mutomo/Kawelu/1408, Mutomo Kawelu/1140, Kitui/Mwala/1069, Kitui/Mwala/1065 and Kitui/Mwala/1064 respectively. They claim that the 3rd Respondent contracted the 4th Respondent to undertake the upgrade of the Kibwezi-Kitui Road to bitumen standard which required International Trunk Road Standard with a 7 meters wide single carriage way and 2 meters wide shoulders on each side and construction of by-passes at the townships of Ikutha, Mutomo, Ikanga, Kitui and Migwani.
3. The Petitioners aver that construction of the said by-passes was intended to cause minimal interruptions to the setup of the said townships and the owners of the affected areas at Mutomo Market, among them the Petitioners herein, were to be adequately and promptly compensated after the acquisition. The Petitioners state that land valuation on the subject parcels of land was undertaken by the 2nd Respondent sometime in June 2018 to ascertain the amount of compensation and the exercise was completed.
4. The Petitioners executed documents in acceptance of the award and forwarded their bank details for payment but the 2nd Respondent failed to compensate them to date.
5. The Petitioners state that at the time of filing the petition, the 3rd and 4th Respondents had invaded their land and were in the process of demolishing their developments without following the due procedure and sought to arbitrarily acquire their land without compensation. It is the Petitioners' plea that they will lose out on their constitutional right to own land if they are not compensated and they pray for the following orders:
 - a. A Declaration that the Kenya National Highways Authority's decision to compulsorily acquire the Petitioners' Parcels of land, Registration Numbers Kitui/Mwala/1066, Kitui/Mwala/750, Mutomo/Kawelu/1408, Mutomo Kawelu/1140, Kitui/Mwala/1069, Kitui/Mwala/1065 and Kitui/Mwala/1064 respectively, in its totality is unfair, unjust, unlawful, unconstitutional and against the provisions of Article 40 of *the Constitution* of Kenya, 2010.
 - b. An order declaring that the Respondents' action in seeking to curtail, undermine and/or deprive the Petitioners of their rights to their various properties namely Kitui/Mwala/1066, Kitui/Mwala/750, Mutomo/Kawelu/1408, Mutomo Kawelu/1140, Kitui/Mwala/1069, Kitui/Mwala/1065 and Kitui/Mwala/1064 without just and adequate compensation is unfair, unlawful and unconstitutional.
 - c. An order preserving the Petitioners' parcels of land known as Kitui/Mwala/1066, Kitui/Mwala/750, Mutomo/Kawelu/1408, Mutomo Kawelu/1140, Kitui/Mwala/1069, Kitui/Mwala/1065 and Kitui/Mwala/1064 respectively, in its totality is unfair, unjust, unlawful, unconstitutional and against the provisions of Article 40 of *the Constitution* of Kenya, 2010.
 - d. In alternative to prayer (c), the Respondents be ordered to adequately compensate the Petitioners before compulsorily acquiring their parcels of land.
 - e. Costs of this Petition be provided for.
6. The supporting affidavits to the Petition are sworn by each of the Petitioners, who gave particulars of their respective individual parcels of land whose titles they have attached as well as the value ascertained by the 2nd Respondent. The Petitioners also annexed their respective awards from the National Land Commission, the 2nd Respondent herein. The Petitioners claims are as hereunder;
 - A. 1st Petitioners -land parcel Kitui/Mwala/1066 an award made for Kshs 6,835,543/-



B. 2nd Petitioners- land parcel Kitui/Mwala/750 and Mutomo/Kawelu/1408 claims Kshs 3,800,000/-.

C. 3rd Petitioner claims as legal representative of the estate of Samson M. Ningo land parcel Mutomo/Kawelu/1140, an award to the deceased was made for Kshs. 1,767,636/-

D. 4th Petitioner- Kitui/Mwala/1064 an award made of Kshs 254,328, land parcel Kitui/Mwala/1065 an award made of Kshs. 113,666/-

E. 5th Petitioner-Kitui/Mwala/1069 an award was made of Kshs. 1,426,000/-

2nd Respondent's Case

7. Fidelis Kamwana Mburu, the acting Director Land Valuation and Taxation at the 2nd Respondent Commission and a registered valuer swore a replying affidavit and acknowledged that the 2nd Respondent is the body duly vested with the mandate to compulsorily acquire land for public purpose upon request by the government. He confirmed that they were on the process of acquiring various parcels of land on behalf of the Kenya National Highways Authority (KENHA) required for the upgrading of the Kibwezi-Mutomo-Kitui-Kibati-Migwani (A9/B64) Road Project within Kitui County.
8. The 2nd Respondent also acknowledged that the valuation for compulsory acquisition for suit parcels of land was done sometimes in June 2018 by the 2nd Respondent and awards made to each of the petitioners. That the 2nd Respondent submitted a compensation schedule to the 3rd Respondent and are awaiting remittance from them. It was their view that since they have full intention to compensate the petitioner, the construction of the Kibwezi-Mutomo-Kitui-Kabati-Migwani(A9/B64) Road Project within Kitui County should proceed uninterrupted. He stated that public interests override private interests and that the state's power of eminent domain should not be curtailed.
9. The 2nd Respondent also averred that the Petitioners' application does not meet the legal threshold for grant of conservatory orders as established in the Supreme Court Case of Gatirau Peter Munya v Dickson Mwenda Kitinji & 2 others [2014] eKLR.

3rd Respondent's Case

10. Daniel Mbuteti, a senior surveyor officer at the Kenya National Highways Authority (KeNHA), swore a replying affidavit on behalf of the 3rd Respondent and also deposed that the Petition ought to be dismissed for failing to meet the threshold for grant of conservatory orders as was held in the Supreme Court Case of Gatirau Peter Munya vs Dickson Mwenda Kitinji & 2 others [2014] eKLR. Further, he deposed that the Petition does not disclose any cause of action or plead specifically any alleged contravention of *the Constitution* as was held in the Court of Appeal case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR and the case of Anarita Karimi Njeru v Republic 1979 KLR 154 pg 156.
11. The 3rd Respondent avers that any grant or orders sought by the Petitioners herein would cause great financial harm to the public's interest by incurring unnecessary costs through unwanted shutdowns of the Ksh.18 billion plus Kibwezi-Mutomo-Kitui-Kabati-Migwani (A9/B64) Road project. It is their position that the balance of convenience and the public interests weighs heavily in dismissing the Petition herein.
12. It is the 3rd Respondent's statement that through the Kitui County Commissioner's office, all the persons along the Mutomo by pass voluntarily agreed to move to facilitate the construction of the



said roads and were offered alternative rental or permanent houses, with the exception of Mr. Daniel Ndambuki, the 1st Petitioner herein.

13. They further deposed that inspections were done as provided for in Part VIII Sections 107-163 of the Land Act 2012 and that Notice pursuant to Section 120(2) of the Land Act No.6 of 2012 which provides that if there is urgent necessity for the acquisition of land, the Commission may take possession of uncultivated or pasture or arable land upon expiration of fifteen days from the date of publication of the notice.
14. The 3rd Respondent challenged the “Authority to act, appear, and/or plead” granted to the 1st Petitioner by the other petitioners. They also challenged the capacity of the 2nd and 3rd Petitioners to file this petition.
15. The 3rd Respondent averred that they are in the final stage of fund disbursements and persons affected will continue to be compensated. They deny that the Petitioners will suffer irreparable harm and that no action of the Respondents can amount to invasion or property without consent and just compensation. According to them, the Petition is an abuse of court process and a waste of judicial time and prays that it be dismissed with costs.
16. The 1st and 4th Respondents did not file their responses to the Petition.

The Petitioners’ written submissions.

17. The Petitioners filed written submissions and quoted Lord Denning in *Priest vs Secretary of State* (1982) 81LGR 193,198 that no citizen is to be deprived of his land by the State against his will unless authorized by law and public interest demands so. Counsel for the Petitioners also quoted Article 40(3) of the Constitution of Kenya 2010 and Section 111 of the Land Act that if land is compulsorily acquired, then just compensation is to be paid promptly in full. Counsel submitted that the Respondents arbitrarily appropriated the Petitioners respective parcels of land and failed to make prompt and just compensation as contemplated by the law.
18. Counsel for the Petitioners highlighted that the 3rd Respondent has admitted that the Petitioners are due to be paid but despite promises, no payment has been made. It is their submission that the power to expropriate private property as donated to the State leaves the private land owner with no alternative and involves taking of a person’s land against his will, which is a serious invasion of his proprietary rights through the use of statutory authority.
19. The Petitioners’ submission is that the constitutional and legislative intention is always the protection, rather than interference with proprietary rights and therefore just and prompt payment of compensation is mandatory. They urge the court to exercise its power under Article 22 of the Constitution of Kenya and the Land Act and order the Respondents to adequately compensate the Petitioners for the compulsory acquisition of their respective parcels of land as well as costs of the petition.

3rd Respondent’s written submissions

20. Counsel for the 3rd Respondent reiterated that the Petition is defective since it does not disclose any cause of action or plead specifically any alleged contravention of the Constitution as was held in the Court of Appeal case of *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* (2013) eKLR and the case of *Anarita Karimi Njeru v Republic* 1979KLR 154 pg 156.
21. The 3rd Respondent also submitted that the declaratory orders cannot be ascertained, are not specifically pleaded and are theoretical. They relied on the case of *Matalinga & others vs the*



Attorney General. According to the 3rd Respondent, they lawfully and legally acquired the Petitioners' respective land parcels and this acquisition is not in dispute. The only aspect that remains is monetary compensation, and it is affected by circumstances beyond the control of the 3rd Respondent since it is the National Treasury that is yet to appropriate budgetary allocations for compensation of all affected parcels of land.

22. It is therefore the 3rd Respondent's submission that there cannot be any act and/or omission on its part that can be construed to constitute a violation of *the Constitution* and/or statute since the entry to the suit lands was lawful and acquiesced to by the Petitioners.
23. Further, the 3rd Respondent submits that prayer (c) of the Petition has been overtaken by events since the construction of the subject road was already undertaken. They submit that the 3rd Respondent has never dismissed, neglected and/or acted in any manner to suggest an unwillingness to make good compensation for the affected parcels of land. According to the 3rd Respondent, the Petition herein lacks merit was unnecessary and the Petitioners are not deserving of the orders sought and prayed that the Petition be dismissed with costs.

Analysis and Determination

24. The matter before this court is a constitutional petition relating to the compulsory acquisition of the Petitioners respective parcels of land; Kitui/Mwala/1066 registered in the name of the 1st Petitioner, Kitui/Mwala/750 and Mutomo/Kawelu/1408 registered in the name of the 2nd Petitioner, Mutomo Kawelu/1140 registered in the name of Samson M. Ningo (Deceased), who is represented by the 3rd Petitioner, Kitui/Mwala/1065 and Kitui/Mwala/1064 registered in the name of the 4th Petitioner and Kitui/Mwala/1069, registered in the name of the 5th Petitioner. The petitioners received their respective awards from the 2nd Respondent but are yet to receive the payment.
25. As a starting point for a party to meet the threshold for obtaining declaratory orders in a constitutional petition the party must specifically state which rights have been infringed and how they have been infringed as was observed by the Court in the case of: *Anarita Karimi Njeru v Republic [1979]eKLR* where the High Court held:

“We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

26. The Petition has clearly shown the basis for the declarations and orders sought. Among the legal provisions relied on is Article 40 of *the Constitution* of Kenya on right to own property. The 3rd Respondent's submission that the Petitioner has failed to meet this requirement is therefore without basis. Compulsory acquisition of land is provided for under Article 40(3) which 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.”

27. According to the above provision the State can only deprive a person of property, right or interest in land if the acquisition is for a public purpose or in the public interest and is carried out in accordance with *the Constitution*. The said acquisition must also be under an Act of Parliament that provides for prompt payment in full of just compensation and that such a person must be allowed right of access to a court of law. This Constitutional provision under Article 40(3) is in line with the universally acceptable principle of constitutional law which is international in origin and also well-grounded locally and as per Lord Denning MR in *Priest –v- Secretary of State* [1982] 81 LGR 193,198, no citizen is to be deprived of his land by the State or any public authority against his wish unless expressly “authorized by law and public interest also decisively demands so:”
28. Article 67 of *the Constitution* establishes the National Land Commission that has mandate over public land including land that has been compulsorily acquired.
29. The statutory framework for compulsory acquisition is founded under Part VIII of the *Land Act*, No. 6 of 2012 details of which ensure that the State keeps its right to compulsorily acquire property but the citizen too is protected from wanton and unnecessary deprivation of his private property. The Court in the case of *Patrick Musimba v National Land Commission & 4 others* [2016] eKLR summarized the process of compulsory acquisition as follows;

“Under Section 107 of the *Land Act*, the National Land Commission (the 1st Respondent herein) is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of *the Constitution*. In our view, the threshold must be met: the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.

Under Sections 107 and 110 of the *Land Act*, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.

As part of the National Land Commission’s due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the *Land Act*.

The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.

The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the *Land Act*, the landowner’s role is limited to that of a distant bystander with substantial interest.



Section 112 of the [Land Act](#) then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.

On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the [Land Act](#).

The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the [Land Act](#).

If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the [Land Act](#). This is in line with the Constitutional requirement under Article 40(3) of [the Constitution](#) that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.

[The Constitution](#) dictates that acquisition be in accordance with the provisions of [the Constitution](#) itself and any Act of Parliament. [The Constitution](#) itself only provides for just compensation being made promptly.

The current procedure for acquisition of land by the State is as outlined above. As can be seen parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation. Perhaps conscious of the emotive nature of land issues, the Legislature appeared scrupulous and contemplative.”

30. In the present case it appears that all due procedure was followed since the Petitioners have no dispute with the notices issued, valuation of their properties for compensation and the awards made. The Petitioners claim is that even though valuation of their respective parcels of land was done in June 2018 and awards were made and executed by themselves, they are yet to receive compensation, yet the 3rd Respondent has moved into the suit lands and undertaken the construction to completion.
31. The 3rd Respondent has submitted that public interest overrides private interest and that notice was issued under section 120(2) of the [Land Act](#)[2012] where land can be acquired before the process of compensation was completed,. Section 120(1) and (2) provide that;

“

- “(1) After an award has been made, the Commission may take possession of the respective land by serving on every person interested in the land a notice that



on a specified day possession of the land and the title to the land will vest in the national or county government as the case may be, provided that such taking of possession will not result in persons being rendered homeless.

(2) In cases of where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under this Act, the Commission may take possession of the land upon the expiration of fifteen days from the date of publication of the notice of intention to acquire, and on the expiration of that time the Commission shall, notwithstanding that no award has been made, take possession of that land in the manner prescribed by subsection (1).”

32. The court in *African Gas and Oil Company Limited v Attorney General & 3 others* [2016] eKLR asserted the right of the state to take possession of land acquired compulsorily before payment of compensation as it held that:

“First, it is correct that section 120 (2) of the *Land Act* empowers the 3rd Respondent, in cases where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under the *Land Act*, to take possession of land upon the expiration of fifteen days from the date of publication of the notice of intention to acquire.”

33. While public interest is of utmost importance, the law still provides for prompt and just payment of full compensation once the State compulsorily acquires land. There needs to be a balance between the interest of the State as well as the private individuals constitutional right to own property. Mumbi Ngugi J (as she then was) held as follows in the case of *Multiple Hauliers East Africa Limited v Attorney General & 10 others* [2013] eKLR

“I agree that public interest considerations are critical factors for a Court to take into account, and in the circumstances of this case, construction of a road is for the public good. However, the public interest will be better served if the state and all organs of state and public authorities scrupulously act in accordance with the dictates of *the Constitution*.”

34. It is thus in the interest of justice that the Petitioners be promptly compensated for the compulsory acquisition of their land by the State. The 2nd and 3rd Respondents have acknowledged that the Petitioners have a valid claim. Lenaola J (as he then was) in the case of *Arnacherry Limited v Attorney General* [2014] eKLR expressed his sentiments thus:

“This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.” The Honorable Learned Judge proceeded to grant the prayers in the petition with interest on all monetary awards, including general damages at court rates.

35. The Petitioners claim that their parcels of land were valued and awards made as shown in the claim and summarized. The court’s view of each individual claim is as hereunder;

A. The 1st Petitioner owns land parcel Kitui/Mwala/1066 and the claim was proved by attaching an award made for Kshs 6,835,543/-



- B. The 2nd Petitioner owns land parcel Kitui/Mwala/750 and Mutomo/Kawelu/1408 and he claims Kshs 3,800,000/-. The Petitioner exhibited copies of title deeds but no valuation for compensation and no award. The 2nd Respondent admitted the claim by the said Petitioner and exhibited a schedule of unpaid claims which shows the claim by the 2nd Petitioner for compensation for land parcel Mutomo/Kawelu/1408 at Kshs 529,653.57 and Kitui/Mwala/750 at Kshs 588,335.22.
- C. The 3rd Petitioner claims as legal representative of the estate of Samson M. Ningo whose land parcel Mutomo/Kawelu/1140 was valued and an award to the deceased was made for Kshs. 1,767,636/-. It is noted that the award was presented by Beatrice Gacheri Muli who is said to have presented a power of Attorney for Samson M. Ningo (deceased) and remarks were made that payment was to await succession and transfer documents. The power of attorney referred to in the award has not been presented to court and in any event the same would not be legally effective in light of the death of the claimant. The 2nd Petitioner did not show that she is the legal representative of the estate of Samson M. Ningo (deceased) since she did not attach a grant of letters of administration.
- D. The 4th Petitioner owns Kitui/Mwala/1064. An award was made to him of Kshs 254,328 while the land parcel Kitui/Mwala/1065 an award was made of Kshs. 113,666/-
- E. The 5th Petitioner owns Kitui/Mwala/1069 and an award was made to him of Kshs. 1,426,000/-
36. The 2nd and 3rd Respondent have argued that the Petition ought to be dismissed for failing to meet the threshold for grant of conservatory orders as was held in the Supreme Court Case of Gatirau Peter Munya v Dickson Mwenda Kitinji & 2 others [2014] eKLR. The Court in that case found that:
- “Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the supplicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes.”
37. I am of the opinion that a grant of conservatory orders when land has already been compulsorily acquired possession taken and road construction completed is against public interest. I have also considered the fact that compensation will eventually be paid to the petitioner. Christine Ochieng J in the case of Igainya Limited v National Land Commission & 2 others; County Government of Machakos (Interested Party) [2022] eKLR quoted and found as follows:
- “In the case of Dupoto Farms Limited v Kenya Electricity Transmission Company Limited & 121 others [2021] eKLR the Court of Appeal observed as follows:’ However, under Article 40(3) (b) where the State requires land for a public purpose or in the public interest, it may lawfully deprive a person of his land, provided that there is payment in full, of just compensation to the person. The right to property is therefore not absolute.
38. From the foregoing, I am persuaded that Petitioners 1, 2, 4 and 5 have made a case for themselves and are entitled to prompt payment in full, of just compensation for compulsory acquisition of their land by the state under Article 40 (3) of *the Constitution* and taking possession thereof before payment of compensation under section 120 (1) and (2) of the *Land Act* (2012).



39. The 3rd Petitioner's claim fails for the reason that an ward was made to Samson N. Ningo (deceased) in the sum of Kshs. 1,767,636/- as compensation for the compulsory acquisition of land parcel Mutomo/ Kawelu/1140 registered in the name of the deceased. Even though the 3rd Petitioner has shown that she is the one who presented the claim, she has not shown that she has capacity or locus standi to institute this Petition on behalf of the estate of the said Samson M. Ningo. In the case of Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased) [2016] eKLR being an appeal where one of the parties did not have the proper grant of representation of the estate of the deceased the court noted as follows;

“...Further the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings. It is also worth-noting that the issue of locus standi becomes such a serious one where the matter involves the estate of a deceased person since in most cases the estate involves several other beneficiaries or interested parties. In this matter therefore the Respondent lacked the requisite locus standi to institute and/or maintain the suit. The result is that all the proceedings before the trial court were instituted and maintained by a person who lacked the legal capacity to do so. They are indeed a nullity and as such lack the legal leg to stand on.”

40. Suing on behalf of the estate of a deceased person without the requisite grant of representation renders the suit a nullity for lack of legal capacity to sue. Musyoka, J in the Matter of the estate of Veronica Njoki Wakagoto (Deceased) [2013] eKLR noted that the purpose of a grant of representation is to prevent intermeddling with the estate of a deceased person. He stated:

“...the property of a dead person cannot be lawfully dealt with by anybody unless such person is authorized to do so by the law. Such authority emanates from a grant of representation, and any person who handles estate property without authority is guilty of intermeddling. The law takes a very serious view of intermeddling and makes it a criminal offence.”

41. For Petitioners 1, 2, 4 and 5 I find as follows; for prayer A) of the Petition fails for the reason that compulsory acquisition of property is legal and is provided for under Article 40(3) (b) where the State requires land for a public purpose or in the public interest, it may lawfully deprive a person of his land, provided that there is payment in full, of just compensation to the person. The right to property is therefore not absolute and in the present case it has not been shown that the acquisition was unlawful.

42. Prayer B) of the Petition has merit for the reason that there has been inordinate delay in compensating the Petitioners who have not received payment for the land compulsorily acquired even though the properties were valued and awards made in June 2018.

43. Prayer C) cannot be granted for the reason that section 120 (1) and (2) of the Land Act provides that when an award has been made, the title to the land will vest in the national or county government as the case may be even though compensation for the same may not have been paid.

44. Prayer D) of the Petition is merited.



45. The final orders of the court are that the Petition by the 3rd Petitioner is hereby dismissed with no order as to costs. The Petition by the 1st, 2nd, 4th and 5th Petitioners is hereby allowed in the following terms;

A. An order be and is hereby issued declaring that the 2nd and 3rd Respondents' action in seeking to curtail, undermine and/or deprive the 1st, 2nd, 4th and 5th Petitioners of their rights to their various properties namely land parcel Kitui/Mwala/1066, Mutomo/Kawelu/1408/Kitui/Mwala/750, land parcel Kitui/Mwala/1064 and Kitui/Mwala/1065 and land parcel Kitui/Mwala/1069 respectively without prompt payment in full, of just compensation to the said Petitioners, is unfair, unlawful and unconstitutional.

B. The 2nd and 3rd Respondents are hereby ordered to compensate the 1st, 2nd, 4th and 5th Petitioners for the parcels of land acquired compulsorily within sixty days from the date of this judgement.

C. Costs of this Petition are awarded to the 1st, 2nd, 4th and 5th Petitioners.

Dated, signed and delivered at Kitui this 21st day of March, 2023.

L. G. KIMANI

JUDGE

ENVIRONMENT AND LAND COURT, KITUI

Judgement read in open court and virtually in the presence of:

C/A Musyoki

Muturi for the KENHA

M/s Ngala holding brief for J. K. Mwalimu for the petitioners

