



Kasimba v National Irrigation Authority & 3 others (Environment & Land Petition 008 of 2022) [2025] KEELC 1438 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1438 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ENVIRONMENT & LAND PETITION 008 OF 2022

M SILA, J

MARCH 20, 2025

IN THE MATTER OF ARTICLE 22(1), 23(3), 70 AND 258(1) OF THE CONSTITUTION

AND

IN THE MATTER OF ENFORCEMENT OF THE BILL OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 25(1), 26, 27 28 29, 31 40(3), 42, 43 AND 47 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF THE CONSTITUTION AND LAW

BETWEEN

BILLY KASIMBA PETITIONER

AND

NATIONAL IRRIGATION AUTHORITY 1ST RESPONDENT

NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF LANDS AND PHYSICAL PLANNING 3RD RESPONDENT

NATIONAL LAND COMMISSION 4TH RESPONDENT

RULING

(Petitioners claiming that the 1st defendant forcefully took over their land and created paddy fields leading to their dispossession; petitioners asserting that their constitutional rights were violated and that they deserve to be compensated; objection raised that the issue in the petition regards



compensation for compulsory acquisition which dispute ought to be heard by the Land Acquisition Tribunal; court persuaded that the central issue in the dispute regards compensation for compulsory acquisition and it has not been shown that the avenue to file the claim before the Land Acquisition Tribunal is not available; petition struck out; petitioners first to exhaust the dispute resolution mechanism provided)

1. When this matter came up for directions on 5 November 2024, Mr. Ocholla, learned counsel for the 1st respondent raised issue to the effect that this Honourable Court does not have jurisdiction to handle this petition. Mr. Ocholla pointed out that in similar petitions that had been before my brother Hon. Justice Ong'ondo, the judge dismissed them for want of jurisdiction.
2. Given that an issue of jurisdiction was raised, I directed any respondent wishing to urge this point to file and serve submissions in 7 days. I directed Mr. Odero, learned counsel for the petitioner, to file his replying submissions 7 days thereafter and the matter be mentioned on 5 December 2024. Mr. Ocholla, for the 1st respondent, duly filed his submissions on 25 November 2024.
3. When the matter came up for directions on 5 December 2024, Mr. Odero, for the petitioner, sought 14 more days to file his submissions which I did give and directed that the matter be mentioned on 22 January 2025. On 22 January 2025, Mr. Odero submitted that he had not been served with the submissions of Mr. Ocholla. Mr. Ocholla uploaded an affidavit of service to show that Mr. Odero was served and also pointed out that Mr. Odero never raised the issue of service on 5 December 2024. I was persuaded that Mr. Odero was duly served and since I had accommodated him on 5 December 2024, and granted him the additional time that he had requested, I was not persuaded to add more time. Thus, the only submissions that I have regarding the issue of jurisdiction are the submissions of the 1st respondent given that the petitioner's counsel failed to make any submissions. I have assessed the said submissions together with the petition herein.
4. In the petition, the petitioner avers to have been a former inhabitant of Kanyuor Village, East Kanyuor Sub Location, Central Kadem Location, Nyatike Sub-County, Migori County. He claims to have been living on the land parcel Migori/Kanyuor/6601. He states that he had been living and occupying this land and that he had a modest and humble farm house and dairy unit. He contends that these are properties and assets protected under Article 40 (3) of *the Constitution*. He avers that in September 2020, the 1st respondent illegally, and with use of might and brutal force, created on his land, public rights of way and way leaves for irrigation infrastructure and has remained on the land after turning it into a paddy field. It is contended that this was done without following due process and was in violation of Sections 143 to 149 of the *Land Act* and Regulation 52 to 91 of the Land (General) Regulations, and also contrary to Article 40 (3) and (4) of *the Constitution*. He avers that the aforesaid provisions of the law prescribe an elaborate process through which wayleaves and public rights of way are created over private land, which is subject to compensation. He contends that there was no notice of intention of acquisition, valuation, nor registration of wayleaves or public rights of way. He claims that there are some other project affected persons who were compensated by the 1st respondent while he was discriminated against and left out. He avers that it was an act of trespass to introduce paddy farming around his dwelling before first implementing a Resettlement Action Plan. He avers that as a result he was involuntarily displaced from his home and left for the wild without any assistance and protection.
5. He has contended that the activities of the 1st respondent have caused him a loss of Kshs. 552,000/= being the total of the land which measures 0.40 Ha inclusive of 15% compensation for disturbance. He further claims to be entitled to Kshs. 283,200/= to restore the land to the state it was prior to the impugned actions of the respondents as well as, Kshs. 50,000/= per year for loss of user of the land.
6. The specific reliefs sought are as follows:



- a. A declaration that the purported creation of a wayleave and or public rights of way in favour of National Irrigation Board, now National Irrigation Authority in the year 2013 over the petitioner's land parcel number Migori/Kanyuor/6601 did not follow the law and or due process, was unlawful, arbitrary, fraudulent and therefore illegal and unconstitutional.
- b. A declaration be issued that the petitioner is a victim of Development Induced Displacement and involuntary resettlement, caused by the activities of the 1st respondent, National Irrigation Authority, in undertaking a Public Infrastructure Project known as Lower Kuja Irrigation Development Project, in Kanyuor village, Block 2:2,Kanyuor,on land parcel No Migori/ Kanyuor/6601, who deserves and is entitled to Resettlement, Compensation, Protection and Assistance as provided for under the Prevention Protection and Assistance to Internally Displaced Persons and Affected Communities, [*Act No. 56 of 2012*](#).
- c. A declaration be issued that the acts and or omissions of the 1st, 2nd, 3rd and 4th respondents as complained of in this petition contravenes [*the constitution*](#) and statute law and have denied, violated and infringed and there is continued violation, threats and infringement on the petitioner's rights to life contrary to article 26(1), right to equal benefit and protection of the law contrary to Article 27, right to dignity contrary to Article 28, right to inter alia, not to be subjected to, psychological torture and to be treated in a cruel inhuman and degrading manner contrary to Article 29,the right to housing contrary to article 43,right to privacy contrary to Article 31, right to property contrary to Article 40(3) and (4), right to clean and healthy environment contrary to article 42, right to fair administrative action under article 47 of [*the Constitution*](#).
- d. Damages for trespass and constitutional damages for violation of rights be awarded to the petitioner against the 1st Respondent and an order compelling the 1st respondent, National Irrigation Authority and or all the respondents to pay such damages to the petitioner for violation of rights as pleaded and enumerated in this petition on terms and on such quantum and proportion pleaded in the petition and or otherwise as the court shall determine.
- e. Award of compensation in the nature of special damages as shown in the valuation report filed herein, as pleaded at Kshs. 552,000/=being compensation for the value of the petitioner's portion of land arbitrarily taken away.
- f. Kshs. 283,200/-being the cost of restoration of the land to the original state in which it were before the acts of the 1st respondent as complained of herein in lieu of restoration order.
- g. Damages as the court shall determine to restore lost livelihood and on account of Resettlement Action Plan, including costs of alternative productive land, as Project Affected Person and victim of Development Induced Displacement on terms pleaded as per the valuation report herein and or as the court shall determine, and or as provided for in the enabling statutes.
- h. Mesne profits at the rate of Kshs.50,000/=per acre for each year being loss of use of the said land from September 2020, being the date of dispossession until the petitioner shall be compensated and or put back in possession and or full restoration of the land.
- i. In the absence of adequate compensation and paid promptly, rectification of the register so as to remove and expunge from the register of land parcel number Migori /Kanyuor/6601,the purported wayleave shown registered in favour of the 1st Respondent.
- j. Costs of this petition.



- k. Interest on damages, compensation and costs
 - l. And the petitioner will further and forever continue praying to this court for appropriate constitutional reliefs as this court may deem fit and just to grant over and concerning the 1st respondent's activities over the subject land parcel No. Migori/Kanyuor/6601 in Block 2:2, Kanyuor Area.
7. The main thrust of the objection to jurisdiction is the contention that the claim herein is one of compulsory acquisition and the same should have been referred to the Land Acquisition Tribunal, established by Section 133A of the *Land Act*. It is submitted that this court would then have appellate jurisdiction over the decision of the said Tribunal and that it was erroneous to invoke the jurisdiction of this court in the first instance. I was referred to various authorities on the issue of exhaustion of alternative remedies before approaching court and I have considered them.
 8. As I earlier mentioned, no submissions were forthcoming from counsel for the petitioner to give reasons why the court should not abdicate jurisdiction. I therefore have nothing before me to contest the issue of jurisdiction as raised by the 1st respondent.
 9. I think the 1st respondent has made out a case that the core issue in the petition is compensation for compulsory acquisition. Indeed, the petitioner alleges that he was displaced by the activities of the 1st respondent without being offered any compensation. He has in fact made specific claims for special and general damages. He has in his petition pointed out that there was violation of Section 143 to 149 of the *Land Act*. These sections of the law prescribe the manner in which public rights of way and wayleaves ought to be created. Inter alia Section 143 provides that a public right of way or wayleave may be created for the benefit of the national or county government, local authority, or a public authority or corporation, to enable such institutions carry out their functions. Section 144 provides for the manner of application for a wayleave. Such application is made to the National Land Commission (the Commission) by the state department, county government, or public institution requiring the same. The Commission is to consider the application, invite comments and objections and initiate and facilitate negotiations in order to reach consensus. If a public right of way or wayleave is created, Section 148 provides for compensation.
 10. In the year 2019, through the Land (Value) Amendment Act, 2019, the *Land Act* was amended inter alia to introduce Sections 133A to 133E to the said Act. Section 133A establishes the Land Acquisition Tribunal. The jurisdiction of the said Tribunal is set out in Section 133C which provides as follows :
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.
11. From the above, especially subsection (6) it will be seen that matters relating to compulsory acquisition of land or creation of wayleaves, easements and public rights of way, shall in the first instance be referred to the Tribunal.
 12. In the petition, there is certainly argument that the 1st respondent created wayleaves, easements and public rights of way without compensation. The issue of compensation, in my opinion is the core issue in the petition. If there had been compensation, all other claimed violations of *the Constitution* would not have arisen.
 13. The issue of compensation can certainly be presented to the Land Acquisition Tribunal. It has not been contended by the petitioner that he cannot access the tribunal so that this court should proceed to hear the matter. The subject matter can indeed be taken up by this court, as this court has jurisdiction to hear such petition, but where there is an alternative mechanism, the court ought to avoid jurisdiction and allow the other mechanisms to first be exhausted.
 14. In the case of *Geoffrey Muthinja & Another vs Samuel Muguma Henry & 1756 others* (2015) eKLR, the Court of Appeal pronounced itself on this point as follows.

“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 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.”
 15. I am in full agreement with the above dicta and in agreement with the 1st respondent that the petitioner first ought to present his grievance before the Land Acquisition Tribunal. The petitioner, despite being given opportunity, did not put forth any reason as to why this court should continue hearing the suit despite the presence of the Land Acquisition Tribunal.
 16. For the above reasons, I strike out the petition.
 17. In my discretion, each party to bear his/her own costs.
 18. Orders accordingly.

DATED AND DELIVERED THIS 20 DAY OF MARCH 2025



JUSTICE MUNYAO SILA
JUDGE, ENVIRONMENT AND LAND COURT
MIGORI

Delivered in the presence of :

Mr. Odero for the petitioners

Mr. Kitale h/b for Mr. Ocholla for the 1st respondent

Mr. Wabwire, State Counsel, for the 3rd & 5th respondents

No appearance for the 2nd & 4th respondents

Court Assistant – Michael Oyuko

