



Kishamba "B" Group Ranch v National Land Commission & 3 others (Constitutional Petition 2 of 2023) [2025] KEELC 1365 (KLR) (Environment and Land) (20 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
CONSTITUTIONAL PETITION 2 OF 2023**

EK WABWOTO, J

MARCH 20, 2025

IN THE MATTER OF: ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS OF KISHAMBA "B" GROUP RANCH UNDER ARTICLES 21, 22, 23, 24, 27, 40, 43, 47, 48, 64, 165(3) AND (5) AND SECTION 19 OF THE SIXTH SCHEDULE OF THE CONSTITUTION OF KENYA 2010 AND SECTION 107 OF THE LAND ACT 2012 AND IN THE MATTER OF: ALLEGED CONTRAVENTION OF RANCH'S FUNDAMENTAL RIGHTS TO PROPERTY ADMINISTRATIVE ACTION, NON-DISCRIMINAL, HUMANITY, DIGNITY AND ACCESS TO JUSTICE WITH REGARD TO PARCEL NO. SAGALLA/KISHAMBA "B"/1

AND

IN THE MATTER OF: A PETITION BY KISHAMBA "B" GROUP RANCH FOR ENFORCEMENT OF ITS FUNDAMENTAL RIGHTS AND FREEDOM AS ENSHRINED IN THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF: COMPULSORY ACQUISITION OF PART OF PARCEL NO. 13590 TITLE NO. SAGALLA/KISHAMBA "B"/1 VIDE KENYA GAZETTE NOTICES NO. 4096 OF 20TH JUNE 2014 AND NO. 6578 OF 19TH SEPTEMBER 2014

BETWEEN

KISHAMBA "B" GROUP RANCH PETITIONER

AND

THE NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA RAILWAYS CORPORATION 2ND RESPONDENT

CHINAROAD & BRIDGE CORPORATION (K) 3RD RESPONDENT

MOHAMMAD A SWAZURI 4TH RESPONDENT



JUDGMENT

1. The further Amended Petition dated 19th March 2021 was brought under Articles 21, 23, 24, 27, 40, 43, 47, 48, 64, 165(3) and (5) and Section 107 of the *Land Act*. The gist of the Petition is the alleged contravention of those provisions of *the Constitution* and the violation of the Petitioner's rights after the Respondents compulsorily acquired part of Parcel No. 13590 Title No. Sagalla/Kishamba "B"/1 vide gazette No. 4096 of 20th June 2014 and No. 6578 of 19th September 2014.
2. Accordingly, the Petitioner seeks for the following reliefs:-
 - a. A declaration do issue that the compulsory acquisition of the Petitioner's land without just compensation is a violation of her constitutional rights under Article 40, 47, 43, 27 and 28 of *the Constitution* of Kenya.
 - i. A declaration do issue that the 1st and 4th Respondents acted negligently and fraudulently and the latter abused his office in compensating persons other than the Petitioner for the compulsory acquisition of 12.542 hectares in Parcel No. L/R 13590 Title no. Sagalla/Kishamba "B"/1 and that the 4th Respondent do shoulder personal liability thereafter.
 - b. A declaratory order do issue to the effect that the Petitioner is entitled to be compensated for the compulsory acquisition of 12.542 hectares in parcel LR 13590 Title Sagalla/Kishamba "B"/1.
 - c. An order of Mandamus and/or Mandatory injunction do issue to compel the 1st, 2nd and 4th Respondents to jointly and severally pay the Petitioner the valued sum of Kshs. 187,652,767.00 interest at commercial rates, plus mesne profit for the loss of user from the date of the compulsory acquisition of Parcel No. Sagalla/Kishamba "B"/1 to the payment date in full and in the interim the Respondents be compelled to deposit the said monies in an interest earning joint account of the parties advocates.
 - d. And that the Respondents bear the cost of the Petition.
3. The Petition was contested by the 2nd and 4th Respondents. The 2nd Respondent filed a Replying Affidavit, Further Affidavit and an additional Further Affidavit all sworn by Nathaniel Ochieng to Senior Land Surveyor on 15th December 2020, 5th July 2021 and 8th February 2022. The 4th Respondent filed an amended statement dated 7th July 2021. The 1st Respondent did not file any response while the 3rd Respondent was removed from the proceeding vide a ruling delivered on 25th October 2023.

Court directions

4. Pursuant to the directions issued by my brother Justice Munyao Sila on 3rd November 2021, it was directed that the Petition be heard by way of viva voce evidence.

The Petitioner's case

5. It was the Petitioner's case that it is the registered owner of all the parcel of land known as suit parcel.
6. It was averred that the 4th Respondent did during his tenure as the Chair of the 1st Respondent willfully, negligently and fraudulently facilitated, permitted and or authorized the 1st Respondent to compensate persons who were not the registered proprietor of parcel Number L/R 13590 title No. Sagalla/Kishamba "B"/1.



7. The following particulars of fraud were pleaded as against the 1st and 4th Respondents:-
 - a. Willfully and negligently compiled a list of persons affected by project without reference to the Petitioner.
 - b. Failing to give the Petitioner notice of inquiry hearings.
 - c. Disregarding the Petitioner's written objection to payment of compensations to strangers and/or persons who are not the registered proprietor of Sagalla/Kishamba 'B'/1.
 - d. On 29th May, 2015 the 4th Respondent fraudulently and in total abuse of office directed the 2nd Respondent to pay 70% of compensation to supposedly persons affected by project without first requiring the provision of searches by such person.
 - e. Failing to issue the Petitioner with any award but instead issuing the same to persons who are not the registered proprietor of the suit property.
 - f. Compensating some members of the Petitioner for land and structure without reference to the Petitioner.
 - g. Failing to furnish the Petitioner with any award for her compulsorily acquired land.
 - h. Failing to invite the Petitioner to identify the members affected by project if any or at all.
 - i. Compensating 35 persons who are total strangers to the Petitioner.
 - j. Compensating 26 members of the Petitioner who had no structures for land and structure without reference to the Petitioner.
 - k. Generally colluding with and compensating strangers instead of the Petitioner.
8. It was also averred that 1st, 2nd and the 4th Respondents had despite numerous demands refused, failed and/or neglected to compensate by a remittance of 100% of the valuation amount to the affected Petitioner but instead compensated persons who are not the registered proprietor of parcel No. Sagalla/ Kishamba 'B'/1.
9. It was stated that the Respondents have already put in use of the said parcel of land by the construction of the Standard Gauge Railway from Mombasa – Nairobi to Naivasha road which is currently operational despite want of compensation to the Petitioner.
10. The Petitioner therefore stands to suffer gross injustice at the hands of the Respondents and its constitutionally enshrined propriety, economic and social rights have thus been infringed hence the need for this court to come to the Petitioner's aid by compelling the Respondents to comply with the law and honour the Petitioner's constitutionally enshrined rights.
11. It would serve the interest of justice for the 1st and 2nd Respondents to be compelled to pay the Petitioner due compensation of Kshs. 187,652,767.00 plus interest and mesne profit.
12. During the hearing of the Petition, Benson Mlambo Mwakina, the Chairman testified on behalf of the Petitioner. It was his testimony that the 1st Respondent took over their land which was community land by way of compulsory acquisition. The said land was acquired for the purposes of construction of the Railway line. A notice had been issued even though their land was not in the notice.
13. It was also his testimony that there was a gazette notice of 20th June 2014 which showed that Kishamba "B" was to be acquired by the National Land Commission. They had not been consulted prior to the issuance of the said notice. The Petitioner wrote to National Land Commission objecting to the same



and National Land Commission included other names of persons who were not known to them. The National Land Commission never responded to their letter neither did they hold any meetings with the Petitioner to resolve the said issue.

14. It was also his testimony that he later learnt that the National Land Commission had made payment to other persons who were not known to them and this prompted the Petitioner to complain to the Commission of Administrative Justice and the Commission made a number of recommendations in its report after carrying out its investigations. He also stated that after the resignation of the Chairperson of C.A.J, the initial report was altered and that is when the Petitioner decided to move the court.
15. The witness also relied on the Petitioner's bundle of documents which included the Certificate of Incorporation, the list of its members, Gazette Notices dated 20th June 2014, 19th June 2014, several letters dated 23rd June 2016 and the report from the Commission of Administrative Justice dated August 2017.
16. When cross-examined, he stated that he is the Chairperson of the Petitioner. The title of the land was acquired on 15th March 1982. The Petitioner had not been registered by then. He was elected by members as their Chairperson and had authority to represent them. The gazette notice dated 20th June 2014 was never brought to their attention. The persons listed are not member of the Petitioner. He had not produced the new register of members in court. He also stated that National Land Commission had indicated that it had disbursed 70% of the compensation and withheld 30%. Valuation was done by National Land Commission Valuers. The 1st and 4th Respondents made payments to persons who were not eligible to receive payments.
17. On further cross-examination he also stated that National Land Commission made the said payments on behalf of the 2nd Respondent who had provided the said funds. He also stated that from the statement of accounts, it was evident that some funds had been transferred to the National Land Commission by the 2nd Respondent.
18. When re-examined he stated that the case was filed on behalf of Kishamba 'B' members. He also stated that they had sued the 2nd Respondent because they were working together with National Land Commission and they are the ones who issued the funds that were paid. He also stated that the 4th Respondent had been sued because he was the one who was in charge of everything at National Land Commission. He also stated that they had made a complaint to Ethics & Anti-Corruption Commission although no criminal charges had been preferred. He also stated that the 2nd Respondent had sent the entire amount to the 1st Respondent. They never retained the 30%.

The 1st Respondent's case.

19. The 1st Respondent never filed any response to the Petitioner, never filed any written submissions neither did it attend to the said proceedings despite being notified and made aware of these proceedings.

The case of the 2nd Respondent

20. The 2nd Respondent filed Replying Affidavit dated 15th December 2020, Further Affidavit dated 5th July 2021 and another Further Affidavit dated 8th February 2022 all sworn by Nathaniel Ochieng, Senior Land Surveyor of the 2nd Respondent.
21. It was the 2nd Respondent's case that pursuant to Section 14 of the Kenya Railways Act, the 2nd Respondent in its quest to construct the Standard Gauge Railway (SGR) submitted a request to the



- 1st Respondent the body responsible for acquiring land on behalf of public entities, to acquire several parcels of land along the SGR line on its behalf.
22. Following the request, the 1st Respondent conducted due diligence and established that amongst the owners of the parcel of land along the SGR line was a group known as Kishamba 'B' Group Ranch.
 23. The 1st Respondent published a Gazette Notice No. 4096 dated 20 June 2014 indicating that the government intended to acquire the property known as Parcel Number L/R 13590 among others for purposes of the construction of the Mombasa – Nairobi Standard Gauge Railway.
 24. The 1st Respondent published a further Gazette Notice Number 6578 on 19 September 2014 inviting the Persons Affected by the Project (PAP) to attend an inquiry and make representations regarding the ownership of the properties listed in the Notice. The inquiry was to take place at the Deputy County Commissioner's office in Voi. Notice number 6578 specified the affected acreages of each plot within the subject parcel with the total affected area amounting to approximately 12.542 Hectares.
 25. Following the inquiry, the 1st Respondent submitted a compensation schedule for the first phase of the Standard Gauge Railway line from Mariakani to Mtito Andei in which the Petitioner was included.
 26. On 3 November 2016, the 2nd Respondent made a payment of Kshs. 2,105,675,374.00 to the 1st Respondent for the compensation of the project affected persons, as outlined in the handover schedule.
 27. During trial, Nathaniel Ochieng, the Senior Land Surveyor testified as the sole witness for the 2nd Respondent. He relied and adopted his Replying Affidavit on record. He explained in detail the role of the 2nd Respondent in the matter before court and further added that when the 2nd Respondent received the compensation schedule, it was not their mandate to confirm if the person listed therein were genuine since the National Land Commission had approved the same. He stated that the 2nd Respondent paid a sum of Kshs. 2.3Billion as compensation to the 1st Respondent and he produced evidence of transfer of the said funds from the 2nd Respondent to the 1st Respondent and the same was also evidenced vide the letter dated 16th November 2016. He also stated that they have never received any communication from the 1st Respondent on whether they retained the 30% payment.
 28. When cross-examined, he stated that National Land Commission are the one's responsible for compulsory acquisition of the land after a government department has requested them to do so. He also stated that their role was to set aside funds for compensation which they did. He also stated that he is not the one who did the survey. He further stated that it is only National Land Commission that can identify the genuine owners of the land before compensation is made.
 29. When re-examined, he stated that the 2nd Respondent did not contact the affected persons. The same were identified by the National Land Commission.

The 4th Respondent's case

30. The 4th Respondent filed an Amended Statement in reply to the Petition dated 7th June 2021.
31. It was averred that the 4th Respondent did not participate in the inspection, valuation, award and authorization of any payment to persons who allegedly were not proprietors of L.R No. 13590 Sagalla/ Kishamba 'B'/1. It was also stated that he did not prepare any list of persons for compensation but merely received requests for compulsory acquisition of their land for construction of the Standard Gauge Railway (SGR) and forwarded the same. He also stated that he did not prepare and issue any letters of award as that was not his role. He urged the court to dismiss the claim against him with costs.



32. The 4th Respondent did not testify during trial neither did he call any witness to testify on his behalf. There were also no written submissions filed on behalf of the 4th Respondent despite being granted time to do so.

The Petitioner's submissions

33. The Petitioner filed written submissions dated 29th January 2025. Counsel submitted on the following issues:-
- i. Whether the 1st, 2nd and 4th Respondents have by way of compulsory acquisition, acquired the Petitioner's land Parcel No. L/R 13590 Title No. Sagalla/Kishamba "B"/1 without just compensation thus violated its constitutional rights under Articles 40, 47, 43, 27 and 28 of the Constitution of Kenya.
 - ii. Whether the 1st and 4th Respondents acted negligently and fraudulently and the latter abused his office in compensating persons other than the Petitioner for the compulsory acquisition of 12.542 hectares in Parcel No. /R 13590 Title No. Sagalla/Kishamba "B"/1 and whether they should shoulder personal liability thereafter.
 - iii. Whether the Petitioner is entitled to be compensated for the compulsory acquisition of 12.542 hectares in parcel LR 13590 Title Sagalla/Kishamba "B"/1.
 - iv. Whether the Petitioner is entitled to be granted an order of Mandamus and/or Mandatory injunction to compel the 1st, 2nd and 4th Respondents to jointly and severally pay the Petitioner the valued sum of Kshs. 187,652,767.00 interest at commercial rates, plus mesne profit for the loss of user from the date of the compulsory acquisition of Parcel No. Sagalla/Kishamba "B"/1 to the payment date in full and whether the said amount of monies can be deposited in an interest earning account of the Petitioner's Advocates.
 - v. Whether the 1st Respondent should be compelled to immediately issue the compulsory acquisition award to the Petitioner.
 - vi. Who is entitled to the cost of this Petition?
34. It was submitted that the Petitioner has clearly set out the breach and infringement of their rights under the constitution precisely quoting the constitutional provisions infringed.
35. It was contended that the Constitutional provisions that were infringes are: Articles 21, 22, 23, 24, 27, 40, 43, 47, 48, 64, 165(3) and (5) and Section 19 of the Sixth Schedule of the Constitution of Kenya 2010 and Section 107 of the Land Act. There was contraventions of those articles and the section respectively after the Respondents compulsorily acquired part of parcel no. 13590 title No. Sagalla/ Kishamba "B"/1 vide Gazzette No. 4096 of 20th June 2014 and No. 6578 of 19th September 2014 and that the Respondents have neglected and completely refused to make good the violation of rights visited on the Petitioner despite several demands, follow-ups and eventual filing of this Petition.
36. It was contended that the Petitioner is the owner of the suit property and Exhibits to that effect were produced. It was also contended that the Petitioner is chaired and constituted by known individuals verifiable through a search by anyone at the registrar of group representative, which the Petitioner also produced during trial confirming the name and known person that the Respondents could want to justly and lawfully compensate would have found and act justly and lawfully instead of unlawfully and adversely denying and infringing the Petitioner's right.



37. It was further contended that the Petitioner had established that their right due to compensation upon compulsory acquisition by the Respondents and that by their actions and omissions, the Respondents have grossly violated the Petitioners rights to just and full compensation upon compulsory acquisition of their land.
38. In respect to the aspects of fraud that was pleaded as against the 4th Respondent, it was submitted that the payment for compensation was fraudulently done to other parties despite the rightful owners being known. It was also submitted that the said payment was made despite the plea by the Petitioner to the 1st and 4th Respondents which plea was ignored.
39. On whether the Petitioner is entitled to compensation of the compulsory acquisition of 12.542 Ha of L.R 13590 title Sagalla/Kishamba 'B'/1, it was argued that the Petitioner is the actual owners of the land and they is entitled to the said compensation. Reliance was placed on Section 148(1) of the *Land Act*, 2012, Article 40(3) of *the Constitution* and the case of Patrick Musimba v National Land Commission & 4 Others (2016) eKLR and the Ruling of Justice Kibunja in respect to this matter that was delivered on 25th October 2023.
40. It was further submitted that the court in the said ruling dated 25th October 2023 stated further that Section 12 of the *Land Act* is only a part of the process set out in Part VIII of the *Land Act* in the compulsory acquisition process and it is meant to directly involve the registered owner of the land for the sole purpose of determining proprietary interest and compensation. The court further stated the inquiry envisions the National Land Commission's quasi-judicial powers where persons with an interest in the land being acquired are accorded an opportunity to present their claim for verification. The above inquiry the court stated, is limited to determining the nature and extent of the interest and the award for compensation for every person who is deemed to have interest in the land.
41. Counsel submitted that the question that the Honourable Court must consider is who are the representatives/beneficiaries of Parcel No. Sagalla/Kishamba "B"/1? It was submitted that the Petitioner had produced a copy of its title deed to prove ownership its land, a Certificate of Incorporation pursuant to the Land (Group Representatives) Act, Cap 287, Section 7(2) and the list of its members representatives of Kishamba B to include; Benson Mlambo Mwakina (petitioner), Anthony Kishagha Mwasi, Godfrey Mkiara, Florence Malandi Mwawasi, Gravel Mwanzighe Mwambala and Evans M. Mwawasi. It was also submitted that these were the right representatives that the 1st and 2nd Respondents should have dealt with in matters Kishamba B.
42. The Petitioner further submitted that the compulsory acquisition process was not conducted as per the law and Constitution and as such a violation of the Petitioner's rights and freedoms. Section 112 and part VIII of the *Land Act* partly sets out the process of compulsory acquisition. Under (1) of the same section, at least 30 days after publishing the notice of intention to acquire land, shall the commission appoint a date for an inquiry to hear issues of proprietary and claims for compensation by persons interested in the land and cause a notice on inquiry to be published in the gazette or county gazette at least 15 days before the inquiry and further serve the notice on every interested person.
43. There shall also be a hearing with details on how it is to be conducted set out in Section 112(3) and finally award compensation under Section 113 but all these shall be done judiciously and within the law.
44. According to the Petitioner, it was argued that the intent of the above as stated by Judge S. M. Kibunja in his ruling was to directly involve the registered owner of the land for the sole purpose of determining propriety interest and compensation. Further, the inquiry envisions, the National Land Commission's quasi-judicial powers where persons with an interest in the land being acquired are



accorded an opportunity to present their case for verification. Which inquiry is limited to determining the nature and extent of the interest and the award for compensation for every person who is deemed to have interest in the land.

45. It was further submitted that the Court in its ruling dated 25th day of October 2023 had already established that the compulsory acquisition process was not conducted in accordance with the law and *the Constitution* and in turn their constitutional rights and freedoms were violated.
46. The Petitioner reiterated that it did not receive any compensation whatsoever regarding their land and all allegations around any payments by the 1st and 2nd Respondents are false.
47. The court was urged to allow the Petition as prayed with full compensation payment made to the Petitioner.
48. The Petitioner also urged the court to grant the reliefs sought together with mesne profit of Kshs 187,652,767.00 for loss of user from the date of acquisition of over 10 years ago together with interest, full compensation of the land and costs of the Petition.

The 2nd Respondent's submissions

49. The 2nd Respondent filed written submissions dated 17th February 2025 and submitted on the following issues:-
 - i. Whether the 2nd Respondent was involved in the compulsory acquisition process.
 - ii. Whether the Petitioner is entitled to compensation for the compulsory acquisition of 12.542 hectares in parcel LR 13590 Title Sagalla/Kishamba "B"/1.
 - iii. Whether the Petitioner's constitutional rights under Articles 40,47, 43, 27, 28 of *the Constitution* of Kenya 2010 have been violated.
 - iv. Whether the Petitioner should be awarded mesne profits.
 - v. Whether the court should issue an order for mandamus compelling the Respondents to pay the Petitioner the sum of Kshs. 187,652,767.00
50. It was argued that the compulsory acquisition process is outlined in Part VIII of the *Land Act* No. 6 of 2012 from Section 107 to Section 122. This process was well explained in the case of Patrick Musimba v National Land Commission & 4 Others (2016) eKLR as follows:-

“Process of compulsory acquisition

In summary, the process of compulsory acquisition now runs as follows.

- a. 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.



- b. 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.
- c. 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](#).
- d. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.
- e. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Section 107 through 110 of the [Land Act](#), the landowner's role is limited to that of a distant bystander with substantial interest.
- f. 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.
- g. 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](#).
- h. 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](#).
- i. 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.
- j. [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.”



51. It was argued that the 1st Respondent conducted an independent inspection of the Petitioner's property as well as other properties for all project affected persons along the corridor upon which the Petitioner compensation was Kshs. 106,834,069.00.
52. It was further argued that the 2nd Respondent discharged its mandate and released a total sum of Kshs. 2,105,675,374.00 to the 1st Respondent and as such the Petitioner has failed to prove any fraud on the part of the 2nd Respondent.
53. It was also submitted that the Petitioner is not entitled to any compensation from the 2nd Respondent since the Petitioner had acknowledged in the demand letters dated 12th July 2018 and 25th November 2019 that 70% of the compensation award had been paid to its members and the remaining 30% to be paid to its officials. It was also submitted that the Commission on Administrative Justice had recommended that the 1st Respondent pays the remaining 30% to the Petitioner.
54. It was also submitted that the names of the members identified by the 1st Respondent which appeared in the Petitioner's register had already been compensated. The court was urged to find that the Petitioners are not entitled to any compensation from the 2nd Respondent.
55. In respect to violations of the Petitioner's rights, it was submitted that the issues raised are ordinary compulsory acquisition disputes and not constitutional questions and further the issue of the remaining balance can be resolved amicably between the Petitioner and the 1st Respondent. The cases of Revital Health Care (EPZ) Limited and Another v Ministry of Health & 5 Others Mombasa H.C Constitutional Petition No. 63 of 2013 and Mwakombo Group Ranch v National Land Commission & 3 Others [2019] eKLR were cited in support.
56. In respect to the claim of mesne profits. It was submitted that the Petitioner is not entitled to the same since the 2nd Respondent has demonstrated that it submitted funds to the 1st Respondent.
57. The 2nd Respondent also opposed payment of Kshs. 187,652,767.00 to the Petitioner due to the reasons that they had already advanced payment to the 1st Respondent and any such claim can only be directed to the 1st Respondent.
58. The court was urged to dismiss the said further amended petition dated 19th March 2021 with costs.

Analysis and Determination

59. The court has considered the case put forward by the Petitioner, the Respondents and the written submissions filed by the parties together with the authorities referred to and is of the view that the following issues fall for determination herein:-
 - i. Whether the Petitioner's parcel No. L/R 13590 Title No. Sagalla/Kishamba 'B'/1 was acquired by the Respondents by way of compulsory acquisition.
 - ii. Whether the 1st and 4th Respondents acted negligently and fraudulently and are liable and further whether the 4th Respondent should shoulder personal liability for the said actions.
 - iii. Whether the Petitioner's rights were violated by the actions undertaken by the Respondents.
 - iv. Whether the Petitioner is entitled to the reliefs sought.



Issue No. (i) Whether the Petitioner’s parcel was acquired by the Respondents by way of compulsory acquisition

60. It was the Petitioner’s case that the Respondent’s acquired part of their land being parcel No. Sagalla/Kishamba ‘B’/1 for the construction of Standard Gauge Railway (SGR).
61. During trial, PW1 and DW1 both confirmed that indeed the said parcel was acquired for use by the 2nd Respondent for construction of the Standard Gauge Railway.
62. It has been confirmed that the Petitioner is the registered owner Parcel No. L.R 13590 Title No. Sagalla/Kishamba “B”. Ownership to the said land is protected under the Bill of Rights Chapter four of *the Constitution* of Kenya 2010. Article 40 which protects the right to property states that:-
- (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—
- (a) of any description; and
- (b) in any part of Kenya.
- (2) Parliament shall not enact a law that permits the State or any person—(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or
- (b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).
- (3) 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.
- (4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- (5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.
- (6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.
63. Further, under the provision of Article 67 of *the Constitution* establishes the National Land Commission with mandate over public land including land that has been compulsorily acquired. Section 107 (1) provides that:-
- “Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.”



64. Section 111 (1) of the *Land Act* reiterates the provision of Article 40 (3) (b) to the effect that:-

“If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.”

65. The *Land Act* governs the process of Compulsory Land Acquisition in Kenya and mandates at Section 111(1) that the National Land Commission shall regulate the assessment of such just compensation and to prepare the award for compensation of such land that has been acquired:-

“If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

(2) The Commission shall make rules to regulate the assessment of just compensation.”

66. In the instant Petition the process of compulsory acquisition of the suit property was undertaken and completed without the Petitioner being compensated. It is in the public domain that construction of Mombasa – Nairobi Standard Gauge Railway is complete and now operational. Section 2 of the *Land Act* defines prompt to mean within a reasonable time of, and in any case not more than one year after, the taking of possession of the land by the Commission

67. The Petitioner wrote several letters and even followed up with the Respondents but its plea was not considered.

68. In the circumstances, it is not in doubt and equally this court makes a finding that part of the Petitioner’s parcel measuring approximately 12.542 hectares in parcel No. L.R 13590 Title No. Sagalla/Kishamba ‘B’/1 was compulsorily acquired for the construction of the standard gauge railway by the Respondents.

Issue No. (ii) Whether the 1st and 4th Respondents acted negligently and fraudulently in the transaction and are liable and further whether the 4th Respondent should shoulder personal liability

69. The Petitioner’s at paragraph 4 (a) of their Amended Petition pleaded the particulars of fraud on the 1st and 4th Respondents.

70. It was also pleaded that the 4th Respondent during his tenure as the Chair of the 1st Respondent willfully, negligently and fraudulently facilitated permitted and or authorized the 1st Respondent to compensate persons who were not the registered proprietor of parcel number L/R 13590 Title No. Sagalla/Kishamba “B”/1.

71. Whether there was fraud or not needs production of evidence. Fraud is defined under the Black’s Law Dictionary 10th Edition as “A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment”. To decipher that there was fraud it is important that knowledge of the existence of fraud be established on the part of the Respondents. How then can fraud be proved? The Court of Appeal in Mombasa Civ Appeal No. 312 of 2012 Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR held;

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities”. (emphasis added)



Similarly, the Court of Appeal decision in the case of John Kamunya & another v John Nginyi Muchiri & 3 others [2015] eKLR held that:

“we find that the law is clear as put by Mr. Karanja that matters of “fraud” must be strictly and specifically pleaded before these can be interrogated by a court of law. Alternatively, even though not pleaded, these may be raised in the cause of the trial, evidence tendered on them, submission made on them and then left for the court to determine.

72. It is the burden of the person who makes such allegations to present cogent and believable evidence of the same. Indeed, given the seriousness of charges of such character that border on criminality, the standard of proof is necessarily higher than the usual civil standard of a preponderance of probabilities. The standard does not, however, reach the criminal law standard of proof beyond reasonable doubt. It is proof to a level just below beyond reasonable doubt but must, in my estimation, reach the level of assured and confident proof. See *Magutu Electrical Services Ltd vs Miriam Nyawira Ngure & Anor* [2019] eKLR.

73. In *RG Patel v Lalji Makanji* [1957] EA 314, at page 317 the former Court of Appeal for Eastern Africa stated that:

“Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.”

74. In the instant case, the Petitioner’s witness testified during trial that he sued the 4th Respondent because he was the Chairperson of the National Land Commission of that time but was not able to produce any evidence demonstrating any direct personal liability of the 4th Respondent’s actions. The evidence adduced demonstrated that the 4th Respondent only acted as the Chairperson of the Commission and was not personally liable even though the 1st Respondent’s action as a Commission amounted to negligence on its part.

75. From the evidence tendered herein, the Petitioner led evidence to the effect that its property was compulsorily acquired, no compensation was paid to the Petitioner and that the 1st Respondent compiled a list of persons who were not members of the Petitioner for the purposes of being compensated. The Petitioner also adduced evidence confirming that no public hearings were conducted in which they were invited for the purposes of acquisition of their land. The Petitioner also produced several correspondences confirming that indeed they followed up with the 1st and 4th Respondents but their plea was never attended to. This prompted them to write to the Commission on Administrative Justice who undertook their own investigations and indeed established that payment had been made to members who were not part of the Petitioner and recommended that the Petitioner be compensated for the acquisition of their land.

76. The In view of the foregoing, it is the finding of this court that the Petitioner has been able to prove negligence on the part of the 1st Respondent but the same cannot be directly attributed to the 4th Respondent to warrant this court to infer personal liability to him.

Issue No. (iii) Whether the Petitioner’s rights were violated by the actions undertaken by the Respondents

77. The Petitioner contended that its constitutional rights were violated by the Respondent. The Respondents on the other hand being the 2nd and 4th Respondents who filed their responses to the



Petitioner maintained that the Petitioner had not stipulated what manner its rights were violated and further that there were no violations.

78. From the evidence that was tendered herein, National Land Commission paid the members who were not members of the Petitioner despite the plea from the Petitioner and these actions amounted to a violation of the Petitioner's rights as was pleaded.
79. The National Land Commission has to take the full charge and responsibility for all the full, prompt adequate and/or fair payments. The mischief envisaged and/or by the letter and spirit of the law was core value of accountability, transparency and order as envisaged under Article 10(2) (b) of Constitution of Kenya
80. In the circumstances it is the finding of this court that the actions of the 1st Respondent was negligent and amounted to a violation of the Petitioner's rights.
81. As regards the 2nd Respondent the court is satisfied that the 2nd Respondent discharged its mandate as was required by the law, the 2nd Respondent released its funds to the 1st Respondent as was required and they cannot be faulted for any violations of the Petitioner's rights and hence are not liable.

Issue No. (iv) Whether the Petitioner's are entitled to the reliefs sought

82. The Petitioner have sought for several reliefs as was pleaded in its amended Petition dated 19th March 2025.
83. This court having pronounced itself earlier and made a finding that the actions of the 1st Respondent amounted to a violation of the Petitioner's rights, it is the finding of this court that the Petitioners have been able to prove its case as against the 1st Respondent and as such, it is entitled to the reliefs sought as against the 1st Respondent and as such this court shall proceed to grant the said reliefs.
84. In respect to costs of the Petition, it is worth noting that the actions of the 1st Respondent led to the Petitioner instituting this case. The 1st Respondent had an opportunity to address all the issues raised by the Petitioner but failed to do so despite even receiving the recommendation from the Commission of Administrative Justice and as such the 1st Respondent shall bear the Petitioner's costs of the Petition.

Final Orders

85. In conclusion, the Further Amended Petition dated 19th March 2021 is hereby determined as follows:-
 - a. A declaration is hereby issued that the compulsory acquisition of 12. 542 Ha of the Petitioner's land being Parcel No. L/R 13590 Title No. Sagalla/Kishamba "B" without just compensation amounted to a violation of its constitutional right under Articles 40, 47, 43, 27, 28 at [the Constitution](#).
 - b. A declaration is hereby issued that the 1st Respondent acted negligently and fraudulently in compensating persons other than the Petitioner for the compulsory acquisition of 12.542 hectares in Parcel No. L/R 13590 Title No. Sagalla/Kishamba "B".
 - c. A declaration is hereby issued that the Petitioner is entitled to be compensated for the compulsory acquisition of its 12.542 hectares in parcel LR 13590 Title No. Sagalla/Kishamba "B"/1.
 - d. An order of mandamus does issue compelling the 1st Respondent to compensate the Petitioner the valued sum of Kshs. One Hundred and Eighty-Seven Million Six Hundred Fifty-Two



Thousand Seven Hundred Sixty-Seven (187,652,767.00) with interest at court rates from the date of filing of this Petition until its payment in full.

- e. The costs of the Petition are awarded to the Petitioner to be borne by the 1st Respondent.

Judgment accordingly

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF MARCH 2025.

E. K. WABWOTO

JUDGE

In the presence of:-

Mr. Mokuu for the Petitioner.

N/A for the 1st Respondent.

Ms. Opondo for the 2nd Respondents.

Mr. Mwai for the 3rd Respondent.

Court Assistant: Mary Ngoira

