



**Elaki v Sub-County Commissioner Hamisi & 4 others (Environment & Land  
Petition E002 of 2022) [2023] KEELC 18021 (KLR) (8 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18021 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT VIHIGA**  
**ENVIRONMENT & LAND PETITION E002 OF 2022**  
**E ASATI, J**  
**JUNE 8, 2023**

**IN THE MATTER OF ARTICLE 2(1), 3(1), 22)10- 27(1), (2) AND 40 (1), (2), (3) OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER ALLEGED COTRAVAVENTION OF FUNDAMENTAL RIGHT TO  
PROTECTION OF RIGHT TO PROPERTY UNDER ARTICLE 40(1), (2) AND (3) OF THE  
CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF  
FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES  
2013**

**BETWEEN**

**JACOB BUHUNGI ELAKI ..... PETITIONER**

**AND**

**THE SUB-COUNTY COMMISSIONER HAMISI ..... 1<sup>ST</sup> RESPONDENT**  
**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**  
**DISTRICT/COUNTY SURVEYOR (VIHIGA) ..... 3<sup>RD</sup> RESPONDENT**  
**LAND REGISTRAR, VIHIGA ..... 4<sup>TH</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**



## JUDGMENT

1. Vide the Petition dated December 29, 2022, the Petitioner, Jacob Buhungi Elaki sought the following relief against the Respondents: -
  - a. an order of certiorari be issued quashing the decision of the 1<sup>st</sup> Respondent to compulsorily acquire parcel No Nyang'ori/Hamisi "B"/305
  - b. declaration that the alleged compulsory acquisition of parcel No No Nyang'ori/Hamisi "B"/305
  - c. the petitioner avers that he has never been compensated and/or been paid for the land by the 2<sup>nd</sup> Respondent and or its predecessor.
  - d. That unless this court intervenes, the 1<sup>st</sup> Respondent is likely to evict the Applicant out of his land in order to lose it and unless the honourable court intervenes and issues conservatory orders since the 1<sup>st</sup> Respondent's actions will cause irreparable harm and loss to the applicant and his family.
  - e. That the intended removal and eviction of the applicant from his land by the Respondent will infringe on Petitioner's right to ownership of land and as such, null and void ab initio and an order be issued quashing the acquisition and the Respondent be directed to remove the restriction.
  - f. That the alternative and strictly without prejudice to the foregoing, the Petitioner be compensated for the land, all improvements and developments on the land at current market value.
  - g. Cost of the petition be provided for.
2. The petition was premised upon the grounds in the petition, the averments in the Supporting Affidavit sworn by the Petitioner on December 29, 2022 and the annexures thereto.
3. In response to the petition, a Memorandum of Appearance dated January 5, 2023 and Notice of Preliminary objection to petition were filed by Stanford Nyauma Principal State Counsel on behalf of the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondent.
4. The 2<sup>nd</sup> Respondent, the National Land Commission, did not respond to the Petition.
5. Directions on the Petition were given on February 6, 2023 that the petition be canvassed by way of written submissions. Written submissions dated March 2, 2023 were filed by the law firm of Kipkosgei Choge & Co Advocates on behalf of the Petitioner. The court record shows that on March 9, 2023 Mr Ogada Advocate holding brief for Mr Nyauma for the Respondents sought for more time to write, file and serve submissions. The court granted the Respondent 21 more days to file and serve their submissions. However, as at the date of this ruling no submissions had been filed on behalf of the Respondents.
6. The Petitioner's case as can be gathered from the Petition and Supporting Affidavit is that he is the registered owner of land parcel No Nyang'ori/Hamisi "B"/305 measuring 1.8Ha (the suit land herein) for which he was issued title deed on November 12, 1999. That a suit he filed in Kakamega High Court namely Petition No 3 of 2015 for removal of restriction placed by the 3<sup>rd</sup> Respondent on the register of the suit land was dismissed for want of prosecution as was an appeal to the Court of Appeal on the



same. That the Respondents now seek to remove him and his dependents from the suit land as they claim that the suit land is Government Land.

That he has never been compensated for the land and that unless the court intervenes, he will be evicted from the suit land.

7. The Constitutional provisions relied upon in the petition are the Preamble to the Constitution of Kenya 2010 and articles 2, 21(1), 47, 73 and 40 thereof. the Petitioner complains that there was no notice given to him in respect of The compulsory acquisition, that he has never been heard in respect of the compulsory acquisition, that compensation has never been paid to him and how the compensation was arrived at and paid is unknown to him and that he stands to be unlawfully evicted from the land.
8. The 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents' case as contained in the Notice of Preliminary Objection is that the Petition dated December 29, 2022 is barred by the doctrine of *res judicata* vide a former suit namely; Elaki v District Land Registrar, Vihiga & Another (and Appeal No 220 of 2019)2021 KFCA 340(KLR) in which judgement was delivered on December 17, 2021 at Nairobi. That the Petition is scandalous, fictitious, vexatious and frivolous and an abuse of the process of the court. That therefore the court lacks jurisdiction to hear and determine the Petition and it should be struck out with costs to the Respondents.
9. From the pleading filed and the submissions made the issues that arise for determine in this matter are;
  - a. whether or not the petition meets the threshold for constitutional petitions.
  - b. Whether or not the dispute in the petition is *res judicata*
  - c. Whether or not the Respondent compulsorily acquired the suit land
  - d. Whether or not the petitioner is entitled to the prayers sought
  - e. What orders to make on costs.
10. On whether or not the Petition meets the threshold for constitutional petitions, the Kenya Constitution (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 provide for the procedure of filing constitutional petitions. Rule 10 thereof provides for the nature and contents of a constitutional petition under articles 22 and 23 of the Constitution. The threshold is that the Petition must state with reasonable degree of precision what his/her complaint is, secondly what provisions of the constitution have been violated and thirdly the manner of such violation. In the case of Anarita Karimi Njeru vs Republic (1979) eKLR the court set the said threshold as follows:

“we would however again stress that if a person is seeking redress from the High Court on a matter which involves reference to the constitution, it is important (if only to ensure that justice is done to his case) that he should set out with 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.”

The Court of Appeal in the case of Mumo Matemo vs Trusted Society of Human Rights Alliance and 5 others (2013)eKLR emphasized this position and held that

“it is our finding that the petition before the High Court was not pleaded with precision as required of constitutional petitions. Having reviewed the Petition and the Supporting Affidavit, we have concluded that they did not provide adequate particulars of the claims relating to the alleged violations of the Constitution of Kenya and the Ethics and anti-



Corruption Act, 2011, accordingly the petition did not meet the standards enunciated in the Anarita Karimi Njeru case.”

11. In the present case, the Petitioner has cited some provisions of the Constitution as the basis for his rights which he alleges to have been infringed. He alluded to the right to fair trial, right to be heard and right to acquire and to own property under article 47, 73 and 40 of the Constitution of Kenya. He claims that the manner of infringement is that the Respondents have compulsorily acquired his land without compensating him or giving him notice of the same or a right to be heard. I find that the petition as drawn meets the threshold for conditional petitions. As to whether the infringement actually took place, is the subject of the trial in the petition.

12. Is the dispute in the Petition *res judicata*? Counsel for the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents raised objection to the petition that the petition is *res judicata* a previous court case namely Elaki vs District Land Registrar, Vihiga & another (Civil Appeal No220 of 2019(2021) KECA 340 (KLR)). None of the parties annexed a copy of the decision in the previous case for the court’s perusal. But having accessed the decision from Kenya Law, the court notes that the case concerned removal of restriction placed on the register of the suit land.

The petition was dismissed for want of prosecution by the High Court and an appeal to the Court of Appeal was dismissed as well. The petition herein concerns compensation for compulsory acquisition of the suit land allegedly by the Respondent. The doctrine of *res judicata* is provided for in the Civil Procedure Act. Section 7 thereof provides that:

“ No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit in which such issues has been subsequently raised, and has been heard and finally decided by such court”.

As seen from the above-quoted provision of the law, the ingredients of the doctrine are that the matter directly and substantially in issue has been directly and substantially in a former suit, between the same parties or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court. I find that these ingredients have not been proved in the current case. The dispute in the petition is not *res judicata*.

13. On whether or not the Respondents compulsorily acquired the Petitioner’s land, apart from the pleadings in the Petition that the Respondents compulsorily acquired his land and hence he stands the risk of eviction, there is no evidence of any action taken by the Respondents either separately or jointly which amount to compulsory acquisition or which threaten to disposes the petitioner of the suit land.

To the petition was annexed a certificate of official search in the respect of the suit land. It shows that on April 27, 2007, a restriction was placed on the register restricting any dealing until compulsory acquisition is finalized. There is no evidence to show whether the Respondent have ever since the date of the entry of the restriction taken any further steps which are adverse, or in violation of the Petitioner’s proprietary rights. The burden of proof is on the Petitioner to prove his claim. I find that the Petitioner has not discharged the burden.

14. Having found that the petition has not been proved, I further find that there is no basis to award the relief sought in the petition.



15. For the foregoing reasons I find that the petition is unmerited, the same is dismissed. I make no orders as to costs as the Respondents filed no substantive response to the petition or submissions.

Orders accordingly.

**JUDGEMENT DATED AND SIGNED AT VIHIGA AND DELIVERED VIRTUALLY IN OPEN COURT THIS 8<sup>TH</sup> DAY OF JUNE, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM.**

**E. ASATI**

**JUDGE**

In the presence of:

Neville: Court Assistant.

Petitioner present in person

No appearance for the Respondents.

