



**Duba & 188 others v Cabinet Sec. Lands & Physical Planning & 4 others (Environment & Land Case 1 of 2021) [2023] KEELC 21780 (KLR) (27 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21780 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND CASE 1 OF 2021  
PM NJOROGE, J  
NOVEMBER 27, 2023**

**BETWEEN**

**ADAN JIRMA DUBA & 188 OTHERS & 188 OTHERS ..... PETITIONER**

**AND**

**CABINET SEC. LANDS & PHYSICAL PLANNING & 4  
OTHERS ..... RESPONDENT**

**JUDGMENT**

1. In their Petition dated 4<sup>th</sup> October, 2020 and filed in court on 5<sup>th</sup> November, 2020 the Petitioners seek the following orders;
  - a. A Declaration that the Respondents' action leading to the compulsory acquisition of Petitioners' lands without compensation was both unconstitutional as well as illegal because the action offended Article 40 (3) (b) (i) of *the Constitution* and Section 13 (3) of the *Kenya Airports Authority Act*, 1991.
  - b. A Declaration that the Respondents' decision to attempt to convert Community land within the Mwangaza Area into private land with individual titles without the concurrence of the affected members of the community is a violation of its constitutional and statutory obligations pursuant to Article 63 (2) (d) (iii) of *the Constitution* of Kenya, 2010 and Section 6 (1) & (8) of the *Community Land Act*, 2016.
  - c. A Declaration that the Respondents' decision to constitute a Land Titling Committee for the Mwangaza Area land without sufficient public participation from the affected Petitioners constituted a violation of the 10 (2) of *the Constitution* of Kenya, 2010.
  - d. An Order of Certiorari removing into this Honourable Court for purposes of quashing, all of the Respondents' administrative actions of engaging in a land titling process, including



the appointment of the Mwangaza Land Titling Committee, owing to the fact of their unconstitutionality and illegalities.

- e. An Order of Prohibition directing against the Respondents, both jointly and severally, prohibiting them against engaging in the on-going titling exercise due to its unconstitutionality and illegalities.
  - f. A Permanent Injunctive Order directing the Respondents, whether through their servants, agents, employees, or any other person acting for them, whether directly or indirectly, including the Mwangaza Land Titling Committee, to immediately and unconditionally cease all the activities and processes relating to the on-going titling process in the Mwangaza Area.
  - g. A Mandatory Order directing the 2<sup>nd</sup> and 4<sup>th</sup> Respondents to place each of the Petitioners into vacant possession of their respective plots of land as allocated to them during the balloting exercises.
  - h. An Order of Mandamus directing the Respondents to compensate the Petitioners for their lands which were compulsorily acquired for the expansion of Isiolo International Airport without compliance with the salient constitutional and statutory safeguards availing pursuant to Article 40 (3) (b) (i) of *the Constitution* and section 13 (3) of the Kenya Airports Act, 1991.
2. The petitioners pray that Judgment be entered for the following orders:-
- a. General damages against the Respondents for losses and inconveniences suffered by the Petitioners owing to the losses of their lands which were compulsorily acquired in the early 2000s for the expansion of the Isiolo International Airport, but without due compensation.
  - b. Damages for the continuing and ongoing violations of the Petitioners' constitutional and statutory rights to property.
  - c. Costs consequent upon this Petition be borne by the Respondents, in any event, on indemnity basis.
  - d. Interests on (a) (b) and (c) as per the court rates.
  - e. The Honourable Court does make any such other or further orders as it may deem fair, just and expedient in the circumstances in enforcing the Petitioners' fundamental rights.
3. The Petitioners proffered a brief background as follows;
- a. The brief background which precipitated the Constitutional Petition is that the Petitioners are part of more than 1000 people whose lands were compulsorily acquired by the Government of the Republic of Kenya for the expansion of the-then Isiolo Airstrip to the present status of Isiolo International Airport.
  - b. The Petitioners were then supposed to have been compensated for the loss of their lands through a resettlement programme within the Mwangaza Area, Isiolo town.
  - c. The resettlement programme was to be based upon the results of a balloting exercise that was conducted by the now-defunct County Council of Isiolo, a Local Government Authority which was established pursuant to the Local Government Act, Chapter 265 Laws of Kenya (now repealed).



- d. Following the balloting exercise, the Petitioners were directed to make payments to cover administrative costs, annual plot rent and demarcation fees, to the now-defunct County Council of Isiolo.
  - e. However, until now, the Petitioners have not been able to take possession of their plots because the subject lands were invaded by hostile third parties who violently took over possession of the lands, hence, blocking the Petitioners from accessing the lands.
  - f. Consequently, the Petitioners remain landless close to twenty (20) years after they lost their lands to the Government of the Republic of Kenya's project involving upgrading of Isiolo International Airport to International status. The Petitioners are yet to be compensated for the loss of their lands in flagrant violation of the salient provisions of both the Constitution of Kenya 2010 and all other relevant statutes.
4. The Petitioners advocate framed the issues for determination as:
    - a. Whether acquisition of the Petitioners' lands by the Government of Kenya amounted to compulsory acquisition of such lands.
    - b. Whether the compulsory acquisition of the Petitioners' land complied with the constitution and the law on compulsory acquisition.
    - c. Whether the Petitioners are entitled to the reliefs sought.
  5. The issues for determination as framed by the Petitioners have not been challenged by the respondents.
  6. The Petition was canvassed by way of written submissions.
  7. A conspectus of the Petitioners case is that:
    - a. Their property was compulsorily taken over by the Government for Isiolo International Airport.
    - b. Though there was an attempt to compensate them, the land where they were relocated to was forcibly occupied by other people with the result that they were not compensated at all.
    - c. For over 20 years, they have remained without land and, therefore, their prayers for prompt compensation and damages are merited.
    - d. That being Kenyans, their property rights should be protected by this court as per the dictates of the Constitution of Kenya, 2010.
  8. The Petitioners, to buttress their case, have proffered the following authorities.
    - a. Annacherry Limited Versus Attorney General [2014] eKLR.
    - b. Samuel Kamau Macharia & Another Versus Kenya Commercial Bank Ltd & 2 Others , Supreme Court of Kenya Application No. 20 of 2011.
    - c. Virendra Ranji Gudka & 3 Others Versus Attorney general [2014] eKLR.
    - d. Mohamed versus Commissioner of Lands & Others [2006] IKLR (Ext) 207.
    - e. Patrick Musimbu Versus National Land Commission & 4 Others [2016] eKLR.
    - f. James Shikwati Versus County Government of Kakamega & 3 Others, eKLR and
    - g. Isaac Shivachi Mutoka & 2 Others, eKLR.



9. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents filed written submissions. The 3<sup>rd</sup> Respondent, the National Land Commission did not file submissions.

10. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents agree that the Petitioners were removed from the land now occupied by Isiolo International Airport, and were allocated land in an area called Mwangaza.

They say that in view of the fact that the impugned process took place before promulgation of *the Constitution* of Kenya, 2010, the land in question now squarely falls within the ambit of public land as per Article 62 (1) (b) of *the Constitution*. They say that as the 4<sup>th</sup> Respondent was already in occupation of the land, and had been in continuous occupation since 2005, it follows that it was not land that the County Government of Isiolo and the National Land Commission can administer.

11. They say that the Petitioners had not demonstrated how their fundamental rights were violated as they do not set out the manner in which the respondents violated their rights. They also say that though the Petitioners lay reliance upon County Council of Isiolo Minutes, no list is attached showing which people were individually affected by the expansion of Isiolo International Airport. They also say that the Petitioners do not show the size of the affected portions of land in relation to each Petitioner.

12. They say that though Article 41(4) of *the Constitution* provides that provision may be made for compensation to be paid of land acquired under Clause 3 of the Article, with regard to their not holding title to the apposite land, there must be a criteria for such compensation.

13. They submit that as held in the Case of Isiah Otiato and 6 Others Versus County Government of Vihiga [2018] eKLR awards of compensation are made by the National Land Commission upon completion of an inquiry AND THAT compensation must be specified for every Interested Complainant. They say that the Petitioners have not made requests for an Inquiry to the National Land Commission. They also say that the Petitioners have not exhausted available remedies and proffer the case of Anthony Miano & Others Versus Attorney General & Others [2021] eKLR for their assertion that the reliefs sought in this Petition are not merited as the Petitioners have not exhausted available remedies. They buttress this assertion by citing the case of Samuel Munga Henry & 175 Others [2015] eKLR where the Court of Appeal stated: “It is imperative that where a dispute resolution mechanism exists outside courts, the same should be exhausted before the Jurisdiction of Courts is exhausted”.

14. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents also submit that Section 107A of the *Land Act* provides for the criteria for assessing value for compulsorily acquired freehold land. In this case, they say that there is no valuation report attached to guide the court. They say that the parties seem to leave to the court to do so. They opine that this procedure cannot be tenable.

15. They say that after having expressly stated that there are other parties who have not been sued and who allegedly evicted them from the parcels of land they had been offered as compensation, it would be against the rules of natural justice if orders affecting these uncited parties were issued without their knowledge.

16. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents say that following a feasibility study regarding expansion of Isiolo Airstrip, the 4<sup>th</sup> respondent initiated consultations and discussions with the District Commissioners Isiolo and Meru Districts, the County Councils of Isiolo and Meru North and stake holders.

They say that upon approval of the Isiolo County Council Full Council, the affected people (including the Petitioners) were to be relocated by the County Council. The 4<sup>th</sup> Respondent asserts that all those concerned (including the petitioners were compensated and for this reason, among their other assertions, this petition ought to be dismissed with costs.



17. The 5<sup>th</sup> Respondent in its submissions admits that the Petitioners were indeed subjected to a compulsory acquisition of their land. It, however, says that in paragraph 71 and 72 of the Petition the Petitioners admit that they were given and shown their respective plots and that it has carried out its obligation and mandate of allocating plots to the Petitioners.
18. The 5<sup>th</sup> Respondent says that the Petitioners have not particularized areas of their respective plots for which they seek compensation. It further opines that the Petition does not challenge the process of compensation and further say that the Petitioners have not demonstrated that it was in any way involved in the invasion of the Petitioners land. They, thus, say that they had not violated any of the Petitioners constitutional rights. They proffer the case of Kenya Airport Authority Versus Mitu-Bell Welfare Society and 20 others, Nairobi Court of Appeal No. 218 of 2014, for their assertion.
19. The 5<sup>th</sup> Respondent takes issue with the attempt by the Petitioners to claim both compensation and land. They proffer the case of Patrick Musimba Versus National Land Commission & 4 Others [2016] eKLR as having opined as follows:

“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. The 5<sup>th</sup> Respondent is unequivocal that the cited authority of Patric Musimba (op.cit) makes it clear the role of making compensation for land compulsorily acquired belongs to the National Land Commission. It says that this exonerates it from any culpability in this matter and says that as the impugned process was initiated by the National Government, it only played a facilitative role. It proffers the case of Nightshade Properties Ltd Versus the National Land Commission and 3 Others, Malindi Petition 33 of 2019, eKLR where the court stated as follows:

“As I have found above, this was a process initiated by the national government with the 5<sup>th</sup> respondent only playing the role of an implementing agency.” The 5<sup>th</sup> Respondent also submits that this is a case which should have been prosecuted in an ordinary suit other than by way of a Constitutional Petition. It buttresses this assertion by proffering the case of Bandari Investments Company Limited Versus National Police Service and Others, Mombasa ELC Petition 15 of 2017, eKLR.

20. I have considered the pleadings, the authorities and the submissions proffered by the parties to buttress their assertions. The assertions proffered by the Petitioners are veritably diametric in congruency to those proffered by the respondents.
21. I will answer the issues for determination as framed by the Petitioners, which issues were not challenged by the respondents:
  - a. Whether acquisition of the Petitioners lands by government of Kenya amounted to compulsory acquisition?

There is no dispute regarding the fact that the Petitioners were relocated from the land they originally occupied.



The respondents agree that the process leading to the acquisition of the Petitioners parcels of land was consultative and was spearheaded by the Central Government and by the 4<sup>th</sup> Respondent, the Kenya Airports Authority. Ipso facto the answer to this issue is that indubitably there was compulsory acquisition of the apposite parcels of land.

- b. Whether the compulsory acquisition of the Petitioners lands complied with *the Constitution* and the law on compulsory acquisition?

As I have already indicated the acquisition of the Petitioners parcels of land was consultative and they had agreed to the initial process. At the initial stages, the process was in consonance with the retired constitution. The major problem occurred when the compensation process was not completed by virtue of the fact that the Petitioners were not given possession of the alternative land allocated to them. In my view, the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents had the ability to have necessary enforcement measures taken to ensure that the land meant to be occupied by the Petitioners was not invaded by intruders.

- c. Whether the Petitioners are entitled to the reliefs sought. This issue will be considered here below.

22. The 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> respondents argue that as the Petitioners had been allocated alternative land, proper compensation had been given. They also submit that the Petitioners had not exhausted available statutory remedies and especially that they had not requested the National Land Commission to institute an inquiry so that it could resolve all issues pertaining to compensation.

They insist that it is the duty of the National Land Commission to handle compensation matters. They also say that it was wrong for the Petitioners to seek an order for compensation and also an order for being given vacant position to their respective plots of land. They say that the remedy available is either allocation of land or monetary compensation and that both remedies were not available to the petitioners.

23. A conspectus of the 5<sup>th</sup> Respondents submissions is that:

- a. Its role was merely facilitative and that the main players were the central government and the 4<sup>th</sup> Respondent.
- b. The law requires the 4<sup>th</sup> Respondent to handle apposite compensation issues.
- c. That it did not have the necessary enforcement facilities to enforce the peaceful occupation by the Petitioners of the land offered as compensation to the Petitioners. It is also unequivocal that it had nothing to do with the forcible invasion of the Petitioners parcels of land by invaders.

24. I generally agree with the submissions made by the 5<sup>th</sup> respondent. Its role were a facilitative one which it properly accomplished. It did not have the authority to employ the security arms of the government to kick out the invaders out of the land allocated to the Petitioners. I do find that they are not culpable in any way in the inchoacy of the compensation offered to the Petitioners. I will, therefore, not issue any orders against the 5<sup>th</sup> Respondent.

25. With regard to the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents, although they say that the Petitioners had not exhausted available remedies and especially as concerns the role of the 3<sup>rd</sup> respondent, the National Land Commission, after a close examination of the totality of the proceedings in this matter, I find that before filing this Petition the Petitioners had made overtures to all the respondents regarding their desperate situation but that all these overtures had been ignored. I, therefore, find that they had exhausted the remedies available to them before they filed this Petition. I also do note that the 3<sup>rd</sup>



- respondent had powers to initiate an inquiry autonomously. The 3<sup>rd</sup> Respondent does not claim that it was not aware of the Petitioners' predicament.
26. I do agree with the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents submissions that there was no valuation of the amount of compensation sought by the Petitioners or even the individual sizes of the parcels of land that belonged to the Petitioners. This makes it difficult for the court to grant an omnibus order.
27. As submitted by the 5<sup>th</sup> defendant, I agree that Section 13 of the [Kenya Airports Authority Act](#), vests the 4<sup>th</sup> respondent with power to give compensation to affected parties through negotiation and agreement with the affected owners. In this case, the compensation they attempted to give to the Petitioners was by negotiations and agreement. That process was spearheaded by the 4<sup>th</sup> Respondent and by the Central Government. But the compensation was inchoate and therefore not sufficient and prompt.
28. I do find as follows:
- a. Prayer (a) is denied as there was nothing unconstitutional or illegal in the impugned compulsory acquisition. The only fly in the ointment is that the process was inchoate.
  - b. The attempt to convert community land within Mwangaza area into private land with individual titles without concurrence of the members of the community is not a violation of the Petitioners Constitutional and Statutory rights. The petitioners do not claim that the land allocated to them is being allocated to other people. This prayer is denied. In any case the present Community Lands Act was not in existence at that time.
  - c. Prayers c, d, e, and f relate to titling of the land in Mwangaza area. As framed, those prayers affect even persons who are not party to this Petition. The Petitioners do not say that the impugned titling will exclude them from ownership of the land intended as compensation to them. These prayers are dismissed.
29. Prayers (g) and (h) are incongruent. Prayer (g) is for placing each of the Petitioners into vacant possession of their respective plots as allocated to them during the balloting exercise. Prayer (h) is for compensation for land compulsorily acquired for expansion of Isiolo Airport. The same are conflated. It is either one or the other. These prayers are dismissed.
30. It would seem as if the Petitioners want to eat their cake as well as to retain it. They can either get land or monetary compensation.
31. Regarding general damages for losses and inconveniences suffered by the Petitioners owing to the losses of their lands which were compulsorily acquired in the early 2000s, I find that the Petitioners have suffered general damages. The spirit of [the constitution](#) is that Kenyan's and other residents must have recourse to courts and to remedies where their constitutional rights are breached. In this case the Petitioners were relocated from their land and for close to 20 years have remained landless as they were unable to access the land intended for their compensation. This is unmitigated denial of their right to own property and to enjoy their property. Courts of law are the eternal Argus for justice for the downtrodden, for the defenceless AND for ALL.
32. Regarding the argument by the respondents that the Petitioners have not demonstrated how their constitutional rights have been violated, I can only say that their relocation from their original land and not being facilitated to have vacant possession of the land allocated to them is proof enough that their constitutional rights to own property and to enjoy it has been violated. No other evidence is required.
33. Whether we are dealing with the retired (defunct) constitution of Kenya or with [the Constitution](#) of Kenya 2010, where land has been acquired by the government or a government agency, prompt



and full compensation must be paid. Article 40(3) (b) of *the Constitution* of Kenya, 2010 provides that compulsory acquisition of property be for a public purpose or be in the public interest. Such acquisition requires prompt payment in full to satisfy the just compensation to the person or persons concerned. There is no doubt that the Isiolo International Airport is a public purpose project. There is also no doubt that the Petitioners were dislocated from the land they originally occupied. It is also not controverted by the respondents that the Petitioners could not occupy the land they had offered as compensation for the land they had been removed from. As a result for 20 years, they and their families do not have land they can call their own. They have become landless wanderers. This is against the spirit of *the Constitution* of Kenya, 2010 which in Article 28 commands:

“Every person has inherent dignity and the right to have that dignity respected and respected.”

To me it is clear that the Petitioners dignity and that of their families has been attacked egregiously by being rendered landless when their Original land has been used to construct a public facility. I opine that the respondents have not lived up to their obligation to respect uphold and defend *the constitution* when they have failed to uphold the dignity of the Petitioners.

34. Granted, the occupation of their Original Land was with the consent of the Petitioners as envisaged by the provisions of Section 13 (1) (b) of the *Kenya Ports Authority Act*. However, the Compensation for their land with their consent does not remove the responsibility of the 4<sup>th</sup> respondent in particular, and the other Respondents, to ensure that the Petitioners got full and prompt compensation for the land they had been relocated from.

Although an attempt was made to compensate them, there was no full and prompt compensation. The attempt to give them compensation was veritably inchoate. It falls short of the constitutional imperative that compensation must be full and prompt. The delay of 20 years exacerbates the indignity the petitioners have been subjected to. I opine that *the constitution* is meant to ensure and protect the rights of the citizens and other people who are resident in Kenya. A positive embracement of the spirit of *the Constitution* of Kenya inclines this court to wear a human face in order to protect the dignity of the Petitioners as required by Article 28 of *the Constitution*.

35. The failure by the National Land Commission and the other respondents to resolve this matter for 20 years debunks the argument that the Petitioners had not exhausted local remedies. Can it be suggested that where local statutory remedies have failed to be effected for, say, 20 years, the litigants should have no recourse to a court of law? NO! Article 40 (3) (b) (ii) allows any person who has an interest in or right over, property a right of access to a court of law, an aborted attempt to exhaust statutory or other remedies notwithstanding.
36. Regarding the prayer that my judgment does grant the Petitioners damages for the continuing and ongoing violations of the Petitioners Constitutional and Statutory rights to property, I find that it has merit. I find that the Petitioners have been rendered landless and homeless for close to 20 years. They deserve compensation. I will award them a very modest sum of Kenya Shillings three hundred (Kshs. 300), hardly enough to purchase 2 packets of maize floor, for each day the infraction of their fundamental right to enjoy their property has subsisted.

I calculate this as the modest sum of Kshs. 300/= times 365 days times 20 years. This adds up to the sum of Kshs. 2,190,000 per each of the 189 Petitioners to make a grand total of Kshs. 413, 910,000/=.

37. I issues the following orders:



- a. Prayers a, b, c, d, e and f in the Petition as indicated at the beginning of this Judgment are denied and therefore, stand dismissed.
- b. The 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents are directed to, within ninety days, place each of the Petitioners into vacant possessions of their respective plots as allocated during the balloting exercise.
- c. Prayer (h) as is allowed.
- d. Each of the Petitioners is awarded the sum of Kshs. 2,190,000/= per day for the 20 years they have been denied enjoyment of their properties and this makes a grand total of Kshs.413,910,000/= to be paid by the 4<sup>th</sup> respondent as authorized by Section 13 of the [Kenya Airports Authority Act](#).
- e. Interest on (d) above is awarded at court rates from the date of this Judgment.
- f. Costs are awarded to the Petitioners against the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents.

For avoidance of doubt no costs are awarded against the 5<sup>th</sup> Respondent.

**DELIVERED AT ISIOLO THIS 27<sup>TH</sup> DAY OF NOVEMBER, 2023 IN THE PRESENCE OF:**

Court Assistant: Balozi/Rahma

Odhiambo for the Petitioners.

Benjamin Kimathi for Attorney General for the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> Respondents.

Other parties absent.

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

