



**Gatonye v Kenya National Highways Authority & 2 others (Environment & Land
Petition 19 of 2019) [2024] KEELC 487 (KLR) (5 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 487 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND PETITION 19 OF 2019

AA OMOLLO, J

FEBRUARY 5, 2024

**IN THE MATTER OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER
CHAPTER 4 ARTICLE 22 AND 23 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF ALLEGED CONTRAVENTIONS OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLE 40 AND 47 OF THE CONSTITUTION OF KENYA**

**IN THE MATTER OF THE MATTER OF NORTHERN CORRIDOR TRANSPORT
IMPROVEMENT PROJECT (NCTIP) REHABILITATION ON NJORO TURN
OFF MAU SUMMIT-TIMBOROA ROAD (A-104)- CONTRACT NO. RD0420**

AND

**IN THE MATTER OF COMPULSORY ACQUISITION OF LAND
PARCEL KNOWN AS PLOT NO. 26 TOTAL MARKET CENTER**

BETWEEN

BENARD MBUGUA GATONYE PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

INTRODUCTION.

1. The Petitioner commenced the present proceedings vide the Petition dated 24th October, 2019 which Petition was amended on 6th July, 2021.



2. The Petitioner avers that he is the registered owner of Plot No. 26 Total Market Center measuring 50 x 100 feet situated along the Nakuru- Eldoret Highway at TMC within Molo subcounty, Nakuru County.
3. The Petitioner also avers that sometime in October 2013, the 1st Respondent compulsorily acquired the suit property among other properties for the purposes of expanding the highway at Total Market Center.
4. The Petitioner further avers that that he yielded possession of the suit property in good faith and the Respondents utilized it for the construction of the road expansion which was referred to as the Northern Corridor Transport Improvement Project (N.T.C.I.P) Rehabilitation of Njoro Turnoff – Mau Summit – Timboroa Road via Contract Number RD0420.
5. It is the Petitioner’s averment that the Respondents took possession of the suit property without compensating him in full. Because of the delay in compensation, the Petitioner lodged a complaint through the office of the Molo Sub-county Administrator in 2013 but he did not receive any response.
6. The Petitioner then sets out particulars of breach of his right to property and avers that the Respondents breached his rights as enshrined under Article 40 of *the Constitution* of Kenya.
7. The Petitioner prays for judgement against the Respondents for;
 - a. A declaration holding that the acquisition of all that parcel of land known as plot No. 26 Total Market Center by the 1st Respondent without adhering to the provision of the Land Acquisition Act and without prompt payment of compensation in full to the Petitioner herein is illegal and a violation of the Petitioner’s right to own property as enshrined in Article 40 of *the Constitution* of Kenya, 2010.
 - b. Compensation equivalent to the current market value of the suit plot or any such value as may be determined upon quantification by a licensed quantity surveyor.
 - c. Interest on the acquired property at the rate of 12% per annum from 2013 until payment in full.
 - d. An order do issue compelling the Respondents to pay mesne profits to the Petitioner on account of loss of users from 2013 to date. (Sic)
 - e. General Damages.
 - f. Costs and interests of his suit/petition herein.

The 1st Respondent’s Response to the Petition.

8. The 1st Respondent filed a replying affidavit to the Petition on 19th January, 2019. It is sworn on 14th September, 2020 by its Land surveyor one Robert Itambo
9. He deposes that the 1st Respondent is established under Section 3 of the *Kenya Roads Act* and it has the responsibility of management, development, rehabilitation and maintenance of national roads.
10. He also deposes that for the purposes of discharging its duties, the 1st Respondent is bestowed with the responsibility of constructing, upgrading, rehabilitating and maintaining roads under its control as provided under Section 4(2) of the *Kenya Roads Act*.



11. He further deposes that the roads under the control of the 1st Respondent are national roads which are provided under Part A of the 1st Schedule of the [Kenya Roads Act](#).
12. It is his deposition that Section 22 of the said Act provides for the 1st Respondent's powers while Section 23 permits it to acquire land by way of compulsory acquisition through negotiation and agreement for the purposes of fulfilling its mandate and discharging its responsibilities.
13. It is also his deposition that the 1st Respondent is allowed to enter into agreements with any person for the performance or provision by that person of any services or the facilities which may be performed or provided by the authority under the law.
14. It is further his deposition that in addition, the 1st Respondent is required to adhere to the provisions of the [Land Act](#) that include Sections 107, 110, 111 on compulsory acquisition as read together with Article 40 of [the Constitution](#) of Kenya.
15. He deposes that pursuant to its mandate, the 1st Respondent commenced the project titled "Northern Corridor Transport Improvement Project (N.C.T.I.P) Rehabilitation of Njoro Turnoff-Mau Summit-Timboroa Road vide Contract Number RD0420 which was to be carried out in Nakuru County.
16. He also deposes that in implementing the said project, the 1st Respondent identified the owners and parcels of land that were to be compulsorily acquired in the year 2010. The 1st Respondent also verified the ownership of the said parcels of land from the defunct Town Council of Molo.
17. He further deposes that the 1st Respondent also approached the 2nd Respondent to assist it in the acquisition of the requisite land for the purposes of the said project.
18. It is his deposition that by Notice No. 3278 dated 1st April, 2010 in the Kenya Gazette, the 2nd Respondent notified the public and the owners/occupiers of the properties of the government's intention to acquire land parcel No. Kamara/Mau Summit Block 1/795(Kiboko) among other properties for the purposes of rehabilitating the Njoro turn off-Mau Summit-Timboroa Road in Molo Sub-County within Nakuru County.
19. It is also his deposition that the Town Council of Molo vide the letter dated 4th November, 2011 wrote to the 1st Respondent's Director General attaching the list of all the Council allottees of land parcel No. Kamara/Mau Summit Block 1/795 (Kiboko) that was to be compulsorily acquired by the 2nd Respondent on behalf of the 1st Respondent.
20. It is further his deposition that that the Petitioner's purported parcel of land known as Plot No. 26 Total Market Center was not part of the land that was to be compulsorily acquired for the purposes of the intended project.
21. He deposes that the said project has been implemented and the only remedy available to any affected persons lies in compensation.
22. He also deposes that in any event, if Plot No. 26 Total Market Center was compulsorily acquired by the 2nd Respondent on behalf of the 1st Respondent, then the Petitioner is not the rightful owner of the suit property as the purported letter of allotment that he produced as proof of ownership is not conclusive proof of ownership and so he is not entitled to the orders sought in the Petition.
23. He further deposes that the issue of compensation is a responsibility vested upon the 2nd Respondent as per the [Land Act](#), 2012 and not the 1st Respondent.



24. It is his deposition that compulsory acquisition of land by the state for public purposes is a 'creature of statute'. Under Section 107 of the [Land Act](#), the 2nd Respondent is ordinarily prompted through the Cabinet Secretary or County Executive member.
25. It is also his deposition that the land must be acquired for a public purpose as dictated by Article 40(3) of [the Constitution](#) of Kenya, 2010. The reason for the acquisition must not be remote or fanciful as the 2nd Respondent must be satisfied as to these respects and it can do an undertaking and the necessary diligent inquiries including interviewing the body intending to acquire the property.
26. It is further his deposition that under Sections 107 and 110 of the [Land Act](#), the 2nd Respondent must publish in the gazette a notice of its 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.
27. He deposes that as part of the 2nd Respondent's due diligence, it must ensure that the land to be acquired is authenticated by the survey department in the identification of the owner. The 2nd Respondent also inspects the land and does all the things necessary to ascertain whether the land is suitable for the intended purpose as espoused under Section 108 of the Act. This is the preliminary stage of acquisition.
28. He also deposes that in the said process, the landowner's role is limited to that of a distant bystander with substantial interest.
29. He further deposes that the 2nd Respondent in exercising quasi-judicial powers is also enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry essentially seeks to determine the persons interested and those who are to be compensated.
30. It is his deposition that at the completion of the inquiry, the 2nd Respondent proceeds to make a separate award of compensation for every person determined to be interested in the land. The compensation may take either the form of a monetary award or that of land of equivalent value, if available.
31. It is also his deposition that once the award is accepted, it must be promptly paid by the 2nd Respondent on behalf of the acquiring national government entity. When the payment is not accepted, the payment is made into a special compensation account held by the 2nd Respondent herein.
32. He deposes that possession can either be taken before
or after the process done by the 2nd Respondent is completed. 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.
33. He also deposes that the issues of compensation can only be raised to the 2nd Respondent.
34. He ends his deposition by stating that the Petition is premature and an abuse of the court process.
35. The 1st Respondent also filed a Replying Affidavit to the Amended Petition on 26th July, 2022. It is sworn on 25th July, 2022 by Robert Itambo. He reiterates the contents of the Replying Affidavit filed on 19th January, 2011 whose contents have already been set out above.

Petitioner's Response to the 1st Respondent's Replying Affidavit.

36. The Petitioner filed a Further Affidavit on 28th January 2021. It is sworn on 14th January, 2021.



37. He deposes that the 1st Respondent is allowed by law to acquire land by way of compulsory acquisition through the help of the 2nd Respondent.
38. He also deposes that the 1st and 2nd Respondents failed to adhere to the set-out guidelines and procedures in acquiring Plot 26 Total Market Center. The 1st and 2nd Respondents therefore breached his rights to property as enshrined in Article 40 of *the Constitution* of Kenya.
39. He further deposes that the 1st Respondent through its replying affidavit misled the court by denying that it acquired his property and he therefore wishes to confirm that the said road passes over his parcel of land.
40. It is his deposition that at the time of allotment, he was issued with a plan/map for Kamara Mau Summit Block 1/795 (Kiboko) where the suit property is situated. As per the said plan, there were several plots with numbers ranging from No. 1 to 112 and his plot was No. 26 on the far right.
41. It is also his deposition that in the said circumstances he would be seeking that the court conducts a site visit or grants orders for a re-survey for purposes of establishing and re-establishing the boundaries of the subject parcel of land. This will enable the court to determine whether indeed the suit property has been acquired and is in possession and use by the 1st Respondent.
42. It is further his deposition that his property was acquired without any compensation and so he should be compensated.
43. He deposes that he is advised by his advocates on record that once private property has been acquired and is being utilized by the government, the government is deemed to have proprietary rights. This is notwithstanding that the property was acquired without following due process or without compensating the original owner as was the case herein.
44. He ends his deposition by stating that the Petition is merited and that it is only fair and just and in the interest of justice that the reliefs sought in the Petition be allowed as prayed.
45. On 30th January, 2023, the court directed that the Petition would be heard by way of written submissions.

Issues For Determination.

46. The Petitioner filed his submissions on 3rd April, 2023 while the 1st Respondent filed its submissions dated on 21st June, 2023.
47. The Petitioner identifies the following issues for determination;
 - a. Whether the Petitioner is the registered owner of parcel Known as Plot No. 26 Total Market Center.
 - b. Whether the Petitioner's parcel of land was compulsorily acquired by the 1st Respondent.
 - c. Whether the Petitioner has proven his case on a balance of probabilities and therefore entitled to the prayers sought in the Petition.
48. On the first issue, the Petitioner submits that he is the owner of Plot No. 26 Total Market Center as per the allotment letter annexed to the Petition. The Petitioner also submits that his rights as the proprietor of the suit property is protected under Article 40 of *the Constitution* of Kenya.
49. On the second issue, the Petitioner submits that the



survey report that he filed confirms that his parcel of land was among the properties that were compulsorily acquired by the 1st Respondent and he relies on Section 107 of the [Land Act](#) and Article 67 of [the Constitution](#) of Kenya.

50. On the third issue, the Petitioner submits that he has proven his case on a balance of probabilities and so the court should allow the Petition. He relies on the judicial decisions of Stanley Alukonya Ndibire (Suing through guardian and next friend Selina Ndibire) vs Atanas Mukobero [2017]eKLR, Rahimkhan Afzalkhan Rahimkhan & 4 Others vs Chief Land Registrar & 2 Others [2021] eKLR in support of his arguments.
51. The Petitioner concludes his submissions by praying that the Petition be allowed.
52. In its submissions, the 1st Respondent sets out the background of the Petition, reiterates the contents of its replying affidavit and identifies the following issues for determination;
 - a. Whether the 1st Respondent compulsorily acquired the suit property.
 - b. Whether the Petitioner should be granted the prayers sought for in his petition.
 - c. Who bears the costs of the suit?
53. On the first issue, the 1st Respondent denies that it compulsorily acquired the suit property and as such any allegations that the Petitioner's rights under Article 40 were violated is without any basis in law.
54. The 1st Respondent relies on Articles 40 and 67 of [the Constitution](#), sections 107(1), 110(1), 111 of the [Land Act](#), the judicial authority of Ravaspaul Kyalo Mutisya vs National Land Commission [2022] eKLR and submits that its role in the said project was on implementation only.
55. The 1st Respondent also relies on Patrick Musimba vs National Land Commission & 4 others [2016] eKLR and submits that the Petitioner's name is missing from the letter dated 4th November, 2011 from the defunct Town Council that had the information of the registered proprietors of land parcel No. Kamara/Mau Summit Block 1/795 (Kiboko) that was compulsorily acquired by the 2nd Respondent on behalf of the 1st Respondent.
56. The 1st Respondent relies on Section 112 of [Land Act](#), reiterates the contents of its replying affidavit on the process of compulsory acquisition and submits that the Petitioner did not demonstrate that he wrote a claim of compensation to the Commission as provided under Section 112(2) of the [Land Act](#).
57. On the third issue, the 1st Respondent relies on the judicial decision of Eastern Produce (K) Ltd – Chemomi Tea Estate vs Bonfas Shoya [2018] as was cited in Kanyungu Njogu vs Danieel Kimani Maingi [2000] eKLR before submitting that the Petitioner failed to prove his petition on a balance of probability and so it should be dismissed.
58. On who should bear the costs of the suit, the 1st Respondent relies on Peter Muriuki Ngure vs Equity Bank (K) Ltd [2018] eKLR and submits that the amended petition should be dismissed with costs.

Analysis And Determination.

59. After considering the Petition, the 1st Respondent's Replying Affidavits and the submissions, the following issues arise for determination;
 - a. Whether this court has jurisdiction to hear and determine the present petition.



- b. Whether the Petitioner is entitled to the orders sought in the petition.
- c. Who should bear the costs of the petition.

A. Whether this court has jurisdiction to hear and determine the present petition.

60. Neither the Petitioner nor the Respondents raised and/or addressed this court on the question of jurisdiction to hear and determine the present petition.

61. The Supreme Court in *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR held as follows;

“[40] A jurisdictional issue is fundamental and can even be raised by the court suo motu as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

“25. What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...”

Consequently, while the parties have not given the jurisdiction issue the much premium that it deserves, upon evaluation of the matter before us, it is our considered opinion that the issue of jurisdiction of this Court to hear and determine this appeal warrants settlement upfront.”

62. As was held by the Supreme court in *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* (supra) cited above, the court can consider the issue of jurisdiction suo motu.

63. In the judicial decision of *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd* [1989] eKLR the court stated as follows;

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

64. The Supreme Court in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR held as follows on jurisdiction;

“(68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

65. On the constitutional jurisdiction of this court, the court in the judicial decision of *Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others* [2021] eKLR held as follows;

“28. A perusal of the amended Petition filed on 26th February 2021 reveals that it was averred at paragraphs 7 to 10 thereof that the 1st Respondent offered the Petitioner compensation on 4th November 2020, that the Petitioner



communicated back that the offer was neither sufficient nor just and that the parties then engaged in communication with a view to agreeing on the quantum of compensation. Although the Petitioner has claimed that the 1st Respondent infringed on its right to property as guaranteed by Article 40 by proceeding with construction of the line without its authority, the dispute between the parties is simply one of compensation. If the Petitioner is paid a just compensation; no more issue would arise. I do not see any constitutional angle to the dispute, much the same way that a vendor of land cannot file constitutional Petition claiming that a purchaser who has not paid the purchase price has infringed on his right to property as guaranteed by Article 40. That kind of a case would certainly not fit within the constitutional jurisdiction of the court. (Emphasis Mine)”

66. In the present matter, it is the Petitioner’s case that he was the legal owner of Plot No. 26 Total Market Center which was compulsorily acquired by the Respondents.
67. It is also the Petitioner’s Case that even though the Respondents compulsorily acquired his property, he is yet to be compensated and therefore his rights under Article 40 of the Constitution were infringed.
68. The 1st Respondent’s case on the other hand is that the Petitioner’s property was not among the plots that were compulsorily acquired and so his Petition should be dismissed with costs.
69. In his response to the 1st Respondent’s replying affidavit, the Petitioner changes tune and deposes that he would be seeking that the court conducts a site visit or grants orders for a re-survey for purposes of establishing and re-establishing the boundaries of the suit parcel of land so as to enable the court determine whether indeed the suit property has been acquired and is in possession and use by the 1st Respondent.
70. My view is that that the main issues that arise for determination is whether the suit property was compulsorily acquired and whether the Petitioner was compensated.
71. As was held in *Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others* (supra), disputes over compensation of property that has been compulsorily acquired do not present a constitutional question and have no constitutional angle to them.
72. In *Southlake Panorama Limited v Kenya Electricity Transmission Company Limited & 3 others* (supra) the court further held as follows;
 - “ 29. The constitutional jurisdiction of the court is a very specific jurisdiction which is not open to general claims. It is invoked pursuant to Articles 22 (1) and 23 of the Constitution by filing a Petition. The reliefs that a court exercising the constitutional jurisdiction can grant are clearly spelt out by Article 23 (3). The “compensation” contemplated by Article 23 is in regard to denial, violation or infringement, or threat to a right or fundamental freedom in the Bill of Rights under Article 22 and not compensation in respect of wayleave.
 30. So as to ensure that constitutional jurisdiction of the court is not misused, the doctrine of constitutional avoidance comes in handy. It frowns upon the practice of bringing ordinary disputes to the constitutional court.”



73. The supreme court in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR held as follows;

“(256) The Appellants in this case are seeking to invoke the “principle of avoidance”, also known as “constitutional avoidance”. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in *S v. Mhlungu*, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

“I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed.”

(257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (*Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936)).”

74. As aforementioned, the issues of whether or not the suit property was compulsorily acquired and whether or not the Petitioner was compensated are not constitutional. Further the Petitioner in his further affidavit seeks orders for a re-survey for purposes of establishing and re-establishing the boundaries of the subject parcel of land.

75. Therefore, this court sitting as a constitutional court does not have the jurisdiction to hear and determine the present petition.

B. Whether the Petitioner is entitled to the orders sought in the petition.

76. Given my finding on issue (a) above, it is my view that the orders sought in the Petition cannot be granted.

C. Who should bear the costs of the Petition.

77. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court for good reason, directs otherwise.

Disposition.

78. In the result, this Petition is hereby dismissed with costs to the Respondents.

79. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 5th DAY OF FEBRUARY, 2024

L. A. OMOLLO

JUDGE

In the presence of:

Miss Wanyuru for the Petitioner.



No appearance for the 1st Respondent.

No appearance for the 2nd Respondent.

No appearance for the 3rd Respondent.

Court Assistant: Monica Wanjohi.

