



Kariuki & another (Being Chairman and Treasurer suing in public interest and on behalf Karen Ngong View Estate Association) v Kenya Railways Corporation & another (Land Case Petition E017 of 2025) [2025] KEELC 4098 (KLR) (19 May 2025) (Ruling)

Neutral citation: [2025] KEELC 4098 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE PETITION E017 OF 2025
CA OCHIENG, J
MAY 19, 2025**

BETWEEN

**FRANCIS KARIUKI 1ST PETITIONER
OLIVER MATIKO 2ND PETITIONER
BEING CHAIRMAN AND TREASURER SUING IN PUBLIC INTEREST AND
ON BEHALF KAREN NGONG VIEW ESTATE ASSOCIATION**

AND

**KENYA RAILWAYS CORPORATION 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT**

RULING

1. What is before Court for determination is the Petitioners' Notice of Motion application dated the 3rd February 2025 and the 1st Respondent's Notice of Preliminary Objection dated the 11th March 2025. In the instant Notice of Motion application, the Petitioners seek for the following orders;
 - a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That pending the hearing and determination of this Petition, a conservatory order be and is hereby issued to restrict, prevent, stop or restrain the said Respondents and or anyone claiming under them from undertaking any process, the decisions and contracts by or between the Respondents from financing, construction, undertaking and progress of works as proposed in the Gazette Notice No.16243 dated 20th November 2024 in the Kenya Gazette issue of



6th December 2024 of intention to acquire parcels of land listed in the said Gazette Notice No.16243 for construction of Riruta-Ngong meter Gauge Railway Commuter in Kajiado and Nairobi County.

- e. That this Honourable court do grant such other or further orders or directions as it may deem expedient, fit or equitable.
 - f. That the costs of this application in the cause.
2. The application is premised on grounds on its face and on the 1st Petitioner's supporting affidavit. He avers that on or about 15th December 2023, the President of the Republic of Kenya, accompanied by officials of the 1st Respondent and other government officials, launched the Riruta-Karen-Bulbul-Ngong commuter rail herein referred to as "the project". The project is anticipated to traverse Nairobi County and serve the residents of Ngong and Riruta, is purported to have four stations being: Riruta, Karen, Bulbul, and Ngong. He avers that prior to the launch, no public participation or consultation with affected stakeholders, including the Petitioners, took place and no environmental impact assessment studies were undertaken. Further, that there exists no preliminary design, feasibility study report, engineering plans and profile drawings, operational report, or resettlement action plan pertaining to the affected Petitioners.
 3. He asserts that in the absence of public participation, the 2nd Respondent, acting at the behest of the 1st Respondent, published Gazette Notice No. 16243 dated the 20th November 2024, in the Kenya Gazette issue of 6th December 2024, informing the public of the intention to acquire approximately forty-five (45) parcels of land, listed therein for purposes of the project. He explains that the said notice further required the owners of the affected parcels to visit the offices of the 2nd Respondent in Nairobi or its County Coordinators' offices in Meru and Isiolo counties to inspect the plans concerning the affected parcels which is unreasonable, given that the parcels are situated within Karen, Nairobi.
 4. He avers that the aforesaid Gazette Notice has designated an area of approximately three (3) acres of Ngong Road Forest for the purposes of the project, an act which contravenes the constitutional requirement to maintain a minimum of ten percent (10%) tree cover of land in Kenya, as mandated under Article 69 (1) of the *Constitution*. Further, that the route also cuts through a fragile ecosystem comprising indigenous and exotic flora and fauna, and exposes the interior of the forest to human activities, thereby causing irreparable environmental degradation. He reaffirms that the extent of forest cover to be cleared for the project exceeds the proposed width (10 metres) of the railway corridor.
 5. He avers that the said gazette notice contravenes Article 10 of the *Constitution* which calls for inclusivity. Further, that there is no information regarding the source of funds or the intended use thereof for the project, and it is possible that the funds allocated have not adequately taken into account the impacts of land acquisition and the loss of personal property.
 6. He claims that the Petitioners have obtained copies of the plans and maps pertaining to the project; which they were only permitted to take photographic screenshots thereof, of which they observed that the proposed project primarily traverses along the Ngong Road reserve, with no additional provisions made for the said railway reserve.
 7. He asserts that the intention to acquire the gazetted parcels of land will result in either significant displacement of residents or render access roads into the Petitioners' parcels of land inaccessible or hazardous to human life and settlement yet they are designated as residential homes. Further, that it is impractical and impossible to erect railway crossings at every residential gate and the project constitutes a substantial interference with the Petitioners' human settlement in a manner that appears discriminatory, given that the 1st Respondent has opted to construct overpasses for the same railway



line in other areas, such as the forested regions of the Mbagathi River plain and Ngong Road Forest, prior to reaching Karen Shopping Centre while along Ngong Road reserve, it is proposed to be laid on the ground rather than constructed as overpasses, thereby exacerbating the risk of obstruction including danger.

8. He reiterates that since Ngong Road from Karen Shopping Centre to Ngong Town is a two-way road with limited reserve space, construction of the railway line along this section, which is a major residential and commercial area for the Petitioners, is likely to cause severe traffic congestion, mobility issues, and environmental pollution and will encroach upon the existing road reserve and undermine the prospect of dualling the ten (10)-kilometer section of Ngong Road.
9. Further, that the proposed railway route crosses the Southern Bypass into the Karen area, at the start of Plot No. 12389/1 and 1055/31 but there is lack of clarity regarding the manner in which the intersection between the Southern Bypass and the Ngong-Riruta railway line (via the proposed elevated bridge) will be constructed yet it would have been essential, as the railway line is planned to be built along the periphery of one of the loops on the Southern Bypass, which may necessitate the constriction of the carriageway through hoarding of the construction site, potentially resulting in significant traffic congestion on the loop from Ngong Road to Kikuyu during the construction.
10. He contends that the proposed project interacts with institutions such as the African Wildlife Foundation, St Christopher International School, Nairobi Montessori School including commercial premises such as filling stations (Total, Rubis and Shell Petrol Stations), Big Smoke restaurant and the Karen bus park among others and while the plan indicates that the said establishments will not be hived, relocation of such utilities is anticipated to result in severe disruptions to business and traffic along the railway line. He explains that the Karen-Motoine sewer line currently under construction by Athi Water Development Agency will be interfered with even before it can be finally completed.
11. He further contends that there are concerns that ought to have been addressed before the decision to gazette and compulsorily acquire land. He points out that there is need for clarity on how constant interruption to smooth road travel by commuters as well as serious delays in utility provision such as sewer, repeated power cuts and interruption of water supply will be handled.
12. He reaffirms that since there was no public participation, there is no consideration on alternative route for the purported railway line. He proposes the dualling of Ngong road from Karen Shopping Center to Ngong Town to join Isinya-Suswa as the most viable alternative project, since as it would provide adequate uninterrupted transport without any environmental degradation/unreasonable compulsory acquisition.
13. He faults the 2nd Respondent for failing to publish a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land under Section 107 (2) of the *Land Act*. He contends that while the construction of the Ngong Station is underway, the same is being done on government land reserved for agricultural research and related services and allocated to the Department of veterinary services and that there is no evidence of conversion /change of user of the said land and neither was there public participation on the same.
14. He further asserts that the available processes and mechanisms in law post the Gazette Notice herein cannot remedy the aforementioned breaches of the Constitutional requirements and right of public participation as well as fair administrative action as they only provide mechanisms of contesting the value of the Petitioners' land and compensation under the *Land Act*, yet the proposed project and impugned Gazette Notice is in breach of the *Constitution*.



15. The application is opposed by the 1st Respondent vide its Grounds of Opposition and Notice of Preliminary Objection dated the 11th March 2025. The Preliminary Objection is based on grounds that pursuant to Section 133 C (6) of the *Land Act*, this court lacks primary jurisdiction as the court of first instance to adjudicate matters relating to the process of compulsory acquisition of land.
16. In its Grounds of Opposition, the 1st Respondent contends that there is a pending suit before the Environment and Land Court at Nairobi being ELC Petition No. E028 of 2024: Samora Sikalieh v Kenya Railways Corporation & 4 Others, seeking to challenge the same project on similar grounds and in that matter, an application seeking conservatory orders against the Respondents herein was dismissed. Further, that there is also a pending suit before the National Environment Tribunal being Nairobi Appeal No. 22 of 2024: Charity Kaluki Muia versus The Director General NEMA and Another, which matter is yet to be determined and it seeks orders challenging the project that is subject of the instant application.
17. The 1st Respondent also filed a replying affidavit sworn by Engineer John Ireri Maina, its Manager-Planning, Design and Environment. He avers that any land can be compulsorily acquired in public interest through the state's eminent domain and that no one can claim preclusion subject to compensation. Further, that the 1st Respondent conducted stakeholder engagements in the affected project area (Riruta, Lenana, Karen, Embulbul and Ngong) in meetings conducted between November 2023 and April 2024 and adequate mobilization of the public and stakeholders was done through elected leaders and the provincial administration. Further, that participants were duly provided with questionnaires, which they filled and signed, minutes were recorded and attendance registers were signed. He insists that upon approval of a request made to the 2nd Respondent for compulsory acquisition, the 2nd Respondent published a notice to that effect in the Gazette and delivered a copy to the Registrar and to every person who had interest in the land as required by law.
18. In opposition to the application the 2nd Respondent filed a replying affidavit sworn by Isabel Njeru, its Principal Valuation and Taxation Officer. She avers that the 2nd Respondent carried out public participation in conjunction with the 1st Respondent and consulted with the affected stakeholders. Further, that it also conducted an Environmental Impact Assessment (EIA) which was submitted to the National Environment Management Authority for approval and concerns raised by stakeholders were addressed in the final EIA report.
19. She emphasizes that Gazette Notice No. 16243 was issued with proper consultation /consideration of the affected parties as the affected land owners were given an opportunity to inspect the plans and raise any objections, within the stipulated period. She annexed a letter dated the 21st August 2024 where the 1st Respondent submitted the list of affected properties to the 2nd Respondent. She denies that the proposed project will violate the Constitutional requirement of maintaining a 10% tree cover in Kenya and contends that the 2nd Respondent has in conjunction with Kenya Forest Service, put up measures to ensure that the environmental impact of the project is minimized.
20. She avers that the 1st Respondent has conducted a thorough assessment of the project's impact on the affected land owners and appropriate measures have been put in place to ensure that their rights are protected and will in collaboration with relevant government agencies develop a comprehensive traffic management plan to minimize disruptions during the construction phase of the project.
21. She confirms that the 1st Respondent conducted a thorough feasibility study and design review to ensure that the project is viable. She annexed a letter dated the 20th July 2022 where the National Treasury approved the project and confirmed availability of funds for construction and compensation.



22. In reply, the Petitioners filed a supplementary affidavit sworn by the 1st Petitioner. He reiterates his averments and explains that a perusal of the minutes of the alleged stakeholder engagement at St. Christopher school on 12th April 2024, confirms there is no agenda/discussions on human displacement/acquisition of private land, the minutes are not signed by any residents of Karen and that there is no evidence of invitation notices to a stakeholder engagement.
23. He alleges that on information from KLDA chairman Mr. Samora Sikalieh, the aforementioned alleged stakeholder engagement meeting at St. Christopher's School was an information meeting in which KLDA had invited the 1st Respondent to a meeting of its members at St. Christopher school to have it shed light on the ongoing project as no response to request for documents from the 1st Respondent was forthcoming, but the 1st Respondent went to the meeting without documents and wanted to turn it, into a stakeholder meeting. Further, that, there is no evidence of engagement of the Kenya Forest Service.
24. He contends that there is no evidence that the Petitioners or any of its members are litigants in Milimani ELC Petition No. E028 of 2024 or Nairobi Appeal No. 22 of 2024 and that the 1st Respondent already invaded Ngong Forest Land after being served with the Petition and cleared vegetation including trees in preparation for the project.
25. The instant Notice of Motion application and Notice of Preliminary Objection were canvassed by way of written submissions.

Submissions

26. In their submissions, the Petitioners submit that they have satisfied the threshold for grant of conservatory orders as they have set out a case on gross violation of their right to land and to a clean and healthy environment in the implementation of the proposed project. They insist that the public participation was a sham. Further, that the Petition and instant application raise pertinent constitutional violations as provided under Article 10, 35, 40, 47 and 69 of the [Constitution](#), which violations cannot be addressed by the Land Acquisition Tribunal. They argue that if a conservatory order is not granted, the Petition will be rendered nugatory and the Petitioners private properties shall be compulsorily acquired thereby displacing them without proper procedure as they were never consulted during the purported public participation exercise. They reiterate that the allegation that the matter is sub-judice fails the legal threshold and that the preliminary objection is baseless as this court has exclusive jurisdiction to determine this matter.
27. To buttress their averments they relied on various decisions including: *Wilson Kaberia Nkunja v The Magistrate and Judges Vetting Board & Others* Nairobi High Court Constitutional Petition No. 154 of 2016 [2016] eKLR; *Law Society of Kenya v Officer of the Attorney General & Another* Judicial Service Commission (Interested Party) [2020] eKLR; *Mui Coal Basin Locca, community & 15 Others v Permanent Secretary Ministry of Energy & 17 Others* [2015] eKLR; *British American Tobacco Kenya Limited v Cabinet Secretary for the Ministry of Health & 2 Others*; *Kenya Tobacco Control Alliance & Another* (Interested Parties); *Mastermind Tobacco Kenya Limited* (Affected Party) Petition 5 of 2017 [2019] KESC 15 (KLR) (26 November 2019) (Judgment); *Nicholas v Attorney General & 7 Others*; *National Environmental Complaints Committee & 5 Others* (Interested parties) (Petition e007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment) as well as the case of *Barsogat Investment Ltd v County Government of Vihiga* [2021] eKLR.
28. The 1st Respondent submits that pursuant to Section 133 (c) of the [Land Act](#), the Land Acquisition Tribunal is the appropriate court of first instance to adjudicate matters relating to compulsory acquisition of land thus the application offends the doctrine of exhaustion and this Court lacks



jurisdiction to entertain the application. Further, that the application offends the doctrine of constitutional avoidance as the matter does not meet the criteria of adjudication as a constitutional question since it revolves around the process of compulsory acquisition. It insists that there was adequate public participation and the Petitioners have not established a threshold for grant of conservatory orders. It reiterates that the Petitioners' fears are fictitious as compulsory acquisition is a process followed by an award of compensation. Further, that the Petitioners have failed to demonstrate how the Petition will be rendered nugatory if a conservatory order is not granted, yet the project is set to benefit over 5000 residents.

29. To support its averments, it relied on the following decisions including: Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited & 2 Others [2012] eKLR, Jamal Salim v Yusuf Abdulahi Abdi & Another Civil Appeal No. 103 of 2016 [2018] eKLR, Giciciri Thuo & 5 Others v National Land Commission & 4 Others; Kenya Human Rights Commission (Interested Party) Dorcas Wairimu Kamau & 154 Others (Intended Interested Parties) [2022] eKLR; Judicial Service Commission v Speaker of the National Assembly & Another [2013] eKLR; Wilson Kaberia Nkunjia v The Magistrates and Judges Vetting Board and Others Nairobi High Court Constitutional Petition No. 154 of 2016 (2016) eKLR; Khelef Khalifa & 2 Others v Independent Electoral and Boundaries Commission & Another [2017] eKLR; Richard Owuor & 2 Others (Suing on behalf of Busia Sugarcane Imported Association) v Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Cooperatives & 7 Others [2021] eKLR; Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 Others [2014] eKLR; Stanley Kange'the Kinyanjui v Tony Keter & 5 Others [2012] eKLR and Kenya Anti-Corruption Commission v Deepak Chamnalala Kamini and 4 Others [2014] eKLR.
30. The 2nd Respondent submits that the Petitioners failed to establish a prima facie case since the acquisition of land for the proposed project is a constitutionally sanctioned public purpose under Article 40 (3) (b) of the *Constitution* and there is no demonstration that the acquisition process was unconstitutional. It argues that the Petitioners have not presented any independent environmental impact assessment to substantiate their claims. To support its averments, it relied on the following decisions including: Republic v National Land Commission & Another Ex Parte Mohammed Ali Badi [2018] eKLR; Rutogot Farm Ltd v Kenya Forest Service & 3 Others [2018] eKLR; Robert N. Gakuru & Others v Governor Kiambu County & 3 Others [2014] eKLR and Lamu & 5 Others v National Environmental Management Authority & Another [2019] eKLR.

Analysis and Determination

31. Upon consideration of the instant Notice of Motion application Grounds of Opposition, Notice of Preliminary Objection including the respective affidavits and rivaling submissions, the issue for determination is whether the Petitioners are entitled to conservatory orders sought and if the Notice of Preliminary Objection is merited.
32. The Petitioners seek conservatory orders halting the project on the basis that it is unconstitutional for lack of public participation and that the process of compulsory acquisition has not been properly undertaken. They contend that the project will change the landscape of their residences, affect businesses including infrastructure of the Ngong Road and interfere with the 10% tree cover. On their part, the Respondents argue that public participation was properly undertaken where they consulted with the affected stakeholders. Further, an Environmental Impact Assessment (EIA) was undertaken and concerns raised by stakeholders, addressed in the final EIA report. They aver that the process of compulsory acquisition is ongoing and consultations already done with the affected parties. Further, that they will not interfere with the infrastructure nor the forest/tree cover. They insist that this matter



is subjudice as there are two aforementioned cases where different parties are challenging the project but it should be allowed to proceed in public interest.

33. The principles guiding the grant of conservatory orders was outlined by the Supreme Court in *Gatarau Peter Munya v Dickson Mwenda Kithinji & 2 Others* (2014) eKLR where it stated as follows:

“Conservatory orders” bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as “the prospects of irreparable harm” occurring during the pendency of a case; or “high probability of success” in the applicant’s case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of a case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant courses.”

34. While in *Samuel Sabuni & 2 Others v Court Martial & 8 Others* [2014] KEHC 4683 (KLR), it was held that:

“Although the most appropriate action is to forestall a threatened breach of constitutional rights, at times the public interest outweighs the perceived fears held by the individual citizens that their rights are about to be breached.”

35. On perusal of the respective affidavits including the Petition, I note the owners of properties that are supposed to be compulsorily acquired are not parties in this suit. Further, they have not filed any affidavits challenging or raising concerns with the process of compulsory acquisition. The Respondents insist that the Petitioners should have first gone to the Land Acquisition Tribunal as issues raised touch on compulsory acquisition. The Petitioners, on their part, argue that the matters raised herein are constitutional in nature and cannot be resolved solely through the Tribunal, particularly issues of lack of public participation, and violations of rights under Articles 10, 40, 47, and 69 of the [Constitution](#).

36. In *Albert Chaurembo Mumbo & 7 Others v Maurice Munyao & 148 Others*; SC Petition No 3 of 2016, [2019] eKLR the Supreme Court held:

“...even where superior courts had jurisdiction to determine profound questions of law, the first opportunity had to be given to relevant persons, bodies, tribunals or any other quasijudicial authorities and organs to deal with the dispute as provided for in the relevant parent statute.”

37. It is my considered view that by dint of Section 133 (c) of the [Land Act](#), it is mandatory that where any party has an issue with the process of compulsory acquisition, they should first lodge a Claim with the Land Acquisition Tribunal in the first instance before proceeding to court. In the circumstances, I find the 1st Respondent’s Preliminary Objection merited on this point as the Petitioners have failed to adhere to the doctrine of exhaustion.

38. On the other Constitutional issues raised, I note the Petitioners have cast aspersions on the process of public participation and project design but have not presented any alternative designs. Further, many of the future concerns they have raised regarding the project are not supported by any technical evidence. It is worth noting that this is a project running from Ngong to Riruta, through Karen and except for the Petitioners that represents Karen Ngong View Estate, none of the other estates within Karen where the project traverses have raised concerns.



39. In the case of Dupoto Farms Limited v Kenya Electricity Transmission Company Limited & 121 Others [2021] eKLR the Court of Appeal observed as follows:

“However, under Article 40 (3) (b) where the State requires land for a public purpose or in the public interest, it may lawfully deprive a person of his land, provided that there is payment in full, of just compensation to the person. The right to property is therefore not absolute. From the affidavits that were filed before the trial court, it is evident that the 1st respondent genuinely required an easement over the suit property and was prepared to pay just compensation to the applicant and to many other persons whose properties were also affected by the public interest project it was undertaking. There are on-going negotiations regarding the quantum of compensation payable. If no agreement on the quantum is eventually arrived at, the law grants the National Land Commission power to determine the amounts payable.”

40. Based on the facts as presented while associating myself with the decisions cited and applying them to the circumstances at hand, I find that the Petitioners have not adequately demonstrated a prima facie case to warrant the granting of conservatory orders sought. I opine that for the owners of parcels of land already gazetted for compulsory acquisition, they will eventually be compensated for loss of use of their respective properties. Further, in associating myself with the decision in Multiple Hauliers East Africa Limited V Attorney General & 10 Others (2013) eKLR, I find that the import of the project outweigh the Petitioners’ interest.

41. In the circumstances, I find the Notice of Preliminary Objection merited, will allow it but not dismiss the Petition as there are other Constitutional issues raised. I however find the Notice of Motion dated the February 3, 2025 unmerited and will disallow it.

42. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF MAY 2025

CHRISTINE OCHIENG

JUDGE

In the presence of:

Brian Okoth for 1st Respondent

Litoro for Petitioner

Ms. Makana for 2nd Respondent

Court Assistant: Susan

