Abdille & another v Kenya National Highways Authority & 3 others; Ndungu & 21 others (Interested Parties) (Environment and Land Petition E003 of 2025) [2025] KEELC 4618 (KLR) (20 June 2025) (Judgment)

Neutral citation: [2025] KEELC 4618 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT GARISSA

ENVIRONMENT AND LAND PETITION E003 OF 2025

JM MUTUNGI, J

JUNE 20, 2025

BETWEEN

OSMAN MOHAMED ABDILLE ..... 1ST PETITIONER

FARDOWSA HASSAN ABDULLAHI ..... 2ND PETITIONER

AND

KENYA NATIONAL HIGHWAYS AUTHORITY ..... 1ST RESPONDENT

NATIONAL LAND COMMISSION ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

NATIONAL TREASURY & ECONOMIC PLANNING ..... 4TH RESPONDENT

AND

ENG. KUNG'U NDUNGU ..... INTERESTED PARTY

WINFRIDA WANJIKU NGUMI ..... INTERESTED PARTY

ROSEMARY WANJIKU ..... INTERESTED PARTY

PROTOS SIGEI ..... INTERESTED PARTY

JULIUS WAITA MWATU ..... INTERESTED PARTY

JOHN MOSE ..... INTERESTED PARTY

ENG NICHOLAS MUSUNI ..... INTERESTED PARTY

ENG KENNEDY SUMBEIYWO ..... INTERESTED PARTY

DR BERNARD MWARE ..... INTERESTED PARTY

GERISHOM OTACHI ..... INTERESTED PARTY

GETRUDE NDUKU MWULU ..... INTERESTED PARTY

PROF JAMES TUITOEK ..... INTERESTED PARTY

SAMUEL KAZUNGU KAMBI ..... INTERESTED PARTY

HUBBIE HUSSEIN ALHAJI ..... INTERESTED PARTY

ALISTER MURIMI MUTUGI ..... INTERESTED PARTY

TIYA GALGALO ..... INTERESTED PARTY

REGINALD OKUMU ..... INTERESTED PARTY

ESTHER MATHENGE ..... INTERESTED PARTY

WORLD BANK (KENYA ..... INTERESTED PARTY

JOSPHAT SASIA ..... INTERESTED PARTY

SUSAN OWUOR ..... INTERESTED PARTY

KABALE TACHE ARERO ..... INTERESTED PARTY

JUDGMENT

1. The Petitioners on their own behalf and on behalf of persons affected by the actions of the Respondents and Interested Parties and public interest and in defence of *the Constitution* filed the Petition dated 27th March 2025. In the Petition the Petitioners aver that the Respondents and the Interested Parties have engaged in actions and activities that contravene and/or are likely to contravene the fundamental rights and freedoms of the Petitioners and the people of Isiolo, Wajir and Mandera in that the Kenya National Highways Authority (KENHA) intends to commence or has commenced acquisition of private land and compensation without any public participation as envisaged under the law and/or without the involvement of the National Land Commission being the body mandated under the Law to undertake the process of compulsory acquisition of land required for any public purpose.

2. The Petitioners in the Petition have sought various declaratory and prohibitory orders including injunctive orders restraining the Respondents from entering, unlawfully acquiring, taking possession of private and community land for the construction of Isiolo – Mogondashe – Wajir – Mandera road until the proper legal processes are undertaken and compensation is paid to the persons affected by the project. The Petitioners further pray for an injunction restraining the National Treasury and the World Bank from remitting funds to KENHA meant for acquisition of land and compensation for persons affected by the project.

3. The Petition was filed simultaneously with a Notice of Motion application of even date inter alia praying for the following orders:-

    1. That interim conservatory orders be and is hereby issued suspending the process of acquisition of land, resettlement, compensation and/or disbursement of funds by the 1st Respondent to the project affected persons by the Horn of Africa Gateway Development Project and the construction of Isiolo – Mogondashe – Wajir - Mandera road pending the interparties hearing and determination of the present petition.

    2. That interim conservatory orders be and hereby issued prohibiting the 19th Interested Party (World Bank) from channeling or disbursing additional funds to the 1st Respondent Bank

Accounts for the purposes of acquisition of land and resettlement of project affected persons by the Horn of Africa Gateway Development Project construction of Isiolo - Mogodashe – Wajir – Mandera road pending hearing and determination of the Petition.

4. The application was presented under a certificate of urgency and the Court appreciated there was urgency and granted an interim order barring the 1st Respondent and the 4th Respondent from releasing any compensation and/or disbursement of funds to the project affected persons (PAPs) pending the interparties hearing and determination of the Petitioners application dated 27th March 2025.

5. Upon being served the 1st Respondent filed a Replying Affidavit in opposition to the Petitioners application sworn by Milcah Muendo, Assistant Director, Survey Mapping (Survey Department, Directorate of Highway Design & Safety) at the 1st Respondent, dated 24th April 2025. The 1st Respondent's response was to the effect that the National Trunk Road Project was for the public good and interest and was intended to open up the entire Northern Region of Kenya for the benefit of all the residents of the area and would not only spur economic activity but also ease transportation. The 1st Respondent averred that sections of the road project were funded by a loan facility of the World Bank and had attendant conditionalities and was time bound and had to be utilized within the timelines specified. The 1st Respondent asserted that compensation for "replacement assets" and "livelihood restoration" for the project affected persons was required to be paid by KeNHA by 30th June, 2025 and funds had been availed by the World Bank and unless the same were drawn within the provided time frame the World Bank loan facility would lapse which will frustrate the construction of the project as the Government of Kenya does not have the funds to undertake the construction of the road. The 1st Respondent further averred that there had been extensive public participation with stakeholders including the project affected persons and stated that the National Land Commission was to be involved in the identification and assessment of the value of the "replacement assets" and "livelihood restoration" and that National Land Commission had infact made a valuation and had shared with KeNHA the list of PAPs who were covered in the first phase of compensation and were expecting to be paid. The 1st Respondent asserted that the Petitioners were infact not PAPs and had not demonstrated that any project affected person had raised any complaint and/or were opposed to the 1st Respondent effecting the payments.

6. The 3rd and 4th Respondents filed grounds of opposition dated 23rd May 2025 where they contended the Court was bereft of jurisdiction to deal with the issue of compensation citing Section 133A of the *Land Act*, 2012 and Section 29 of *Kenya Roads Act*, 2007. They further contended the conservatory order was not merited having regard to considerations of public interest.

7. On 29th April 2025 the Petitioners application came up for hearing and upon hearing oral submissions from Counsel for the Petitioners and the 1st and 2nd Respondents and the Interested Parties the Court referred the parties to mediation under the Chairmanship of the Principal Secretary, National Treasury. The parties failed to reach a final agreement to resolve the impulse. The Court extended the interim order to 30th May 2025 when it was to receive a report on the mediation efforts. The Court had directed that in the event no agreement was struck, parties could file brief submissions on the Petitioners application dated 27th March 2025.

8. On 30th May 2025 the parties affirmed that indeed the mediation meeting was held but it was inconclusive. The Petitioners, the 1st Respondent and the 3rd and 4th Respondents had filed submissions as directed. The National Land Commission sought and was granted 7 days leave to file their response together with submissions in regard to the Petitioners application. By the time of preparing this Ruling which was after the expiry of the 7 days the NLC was allowed, they had not filed any response and/or submissions. The Court deemed that they chose not to file any response and/or submission.

Petitioners submissions.

9. The Petitioners in their submissions asserted that the Kenya Government in collaboration with the World Bank and the African Development Bank entered into arrangement in regard to the Horn of Africa Gateway Development Project to enhance connectivity and transport between Kenya, Somalia and Ethiopia. The project involved the construction of 748 Kilometres road from Isiolo – Mogodashe – Wajir and Mandera. The Petitioners submitted the project entailed relocation and compensation of the project affected persons and that it was the 2nd Respondent (NLC) who had the exclusive mandate to carry out the validation of the affected persons, carry out valuations and effect the necessary compensation. They submitted that the 1st Respondent in violation of Article 67 of *the Constitution* and Sections 107. 113,114 and 115 of the *Land Act*, 2012 usurped the mandate of NLC and had commenced acquisition of land and compensation of affected persons in the project in contravention and contrary to the provisions of Law. The Petitioners argued that a conservatory order was necessary to preserve the subject matter pending the hearing of the Petition as the 1st Respondent unless restrained was determined to proceed with unlawful and illegal compensation and acquisition which it had no mandate to carry out as per the law to the prejudice of the project affected persons. The Petitioners placed reliance on the case of Judicial Service Commission –vs- Speaker of the National Assembly & Another (2013) eKLR and the case of Wilson Kaberia Nkunja –vs- The Magistrates, Judges Vetting Board & Others (2016) eKLR.

10. . In the Wilson Kaberia Nkunja case (supra) the Court considered the principles applicable in an application for grant of conservatory orders where Lenaola, J (as he then was) stated thus:-

> 25. It therefore follows that an Applicant must satisfy three key principles in order to make out a case for the grant of conservatory orders that is:-
>
> An Applicant must demonstrate that he has a prima facie case with a likelihood of success and that unless the Court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of *the Constitution*; whether if a conservatory order is not granted the petition alleging violation of, or threat of violation will be rendered nugatory; and the public interest must be considered before grant of a conservatory order."

11. The Petitioners argued their petition disclosed a prima facie case and that the Petitioners and the PAPs would suffer irreparable harm unless a conservatory order was issued. They emphasized the 1st Respondent was acting in contravention of *the Constitution* and statute as it had no mandate to carry out valuations, make awards and effect compensation as that was the preserve of the National Land Commission. The Petitioners argued the 1st Respondent lacked any mechanism to carry out the acquisition and could not handle any disputes that could arise in the process. To the contrary the Petitioners submitted there was an elaborate mechanism under the *Land Act* 2012, for the National Land Commission to not only process acquisitions and pay compensation but there was also an inbuilt dispute handling mechanism. The Petitioners thus contended the balance of convenience was in favour of granting the Conservatory order and urged the Court to confirm the Interim Conservatory order issued in favour of the Petitioners.

The 1st Respondents submissions.

12. The 1st Respondent (KeNHA) filed submissions dated 28th May 2025 but subsequently filed revised submissions dated 3rd June 2025 which the court will deem to be the 1st Respondent's legitimate submissions for purposes of the record. The 1st Respondent submitted that it was the Kenya

Government's implementing Agency of the North Eastern Transport Improvement Project ('NETIP') which entailed the improvement of road and fiber infrastructure in the Northern Region of Kenya. The project, the 1st Respondent submitted was a comprehensive road construction running from Isiolo – Modogashe, Wajir – Kolulo –Elwak – Rhamu – Mandera traversing the Counties of Isiolo, Meru, Garissa, Wajir and Mandera and was intended to enhance connectivity between Kenya, Somalia and Ethiopia. The 1st Respondent submitted as the Kenya Government had budgetary constraints to fund the project on its own, the project was co-funded by the Government and other International Development Institutions who included the World Bank and the African Development Bank. The 1st Respondent asserted that the Kenya Government had sought and obtained a World Bank Loan facility of approximately Ksh 98 Billion to support the construction of Sections of the entire road network aggregating 368 Kms out of the total approximately 780 Kms of the road network.

13. The 1st Respondent submitted that the World Bank facility was time bound and would expire on 30th June 2028 when it is anticipated that it would have been fully drawn and the road construction completed. The 1st Respondent submitted that contrary to the allegations by the Petitioners all regulatory approvals had been obtained from NEMA as per Annexure '7' of the 1st Respondent's Replying Affidavit sworn by Milcah Muendo on 24th April 2025. The 1st Respondent submitted further that it was not engaged in any compulsory acquisition as the project was undertaken on an already existing road infrastructure and was only involved in compensation to PAPs of "replacement assets" and "livelihood restoration" where applicable; that where there was need for compulsory acquisition of any private land and/or community land, that was to be done in accordance with the provisions of the *Land Act* and that the National Land Commission would be the entity that would handle that aspect.

14. The 1st Respondent asserted that the World Bank facility of Kshs 98 Billion was solely intended for road construction and not to compensate PAPs for "replacement assets" and "Livelihood restoration" and that it was the Government of Kenya that was supposed to fund the compensation to the PAPs, but, as the Government did not have the finances to compensate the PAPs it approached the World Bank for financing to meet these costs since it was policy of the World Bank that where development, such as the instant project, entailed involuntary resettlement of project affected persons such persons should be paid compensation for "replacement assets" and "livelihood restoration." The World Bank according to the 1st Respondent pursuant to an agreement dated 3rd July 2024 agreed to avail to the Government a facility of Kshs 2.05 Billion to enable the PAPs to be compensated the "replacement assets" and "livelihood restoration". The 1st Respondent submitted that as the implementing agency, it was the entity required to effect the compensation to the PAP's which was required to be done by 30th June 2025, failing which the facility by the World Bank for the construction of the road stands to lapse which would expose the 1st Respondent and the Government to loss and damage on account of breach of contract to the contracted third parties. The 1st Respondent thus submitted that public interest in the circumstances militated against the confirmation of the Interim Conservatory orders, and in favour of allowing the 1st Respondent to effect the compensation to the PAPs to enable the project to proceed.

15. The 1st Respondent further submitted that contrary to the Petitioners contention that there was no stakeholder participation in ascertaining the compensation to the PAPs, the National Land Commission was involved in the valuation of the "replacement assets" and "Livelihood restoration" and was availed the necessary Resettlement Action Plan and the Project drawings and that the NLC had undertaken the valuation for the Isiolo - Modogashe (190 Kms) section that was funded by the World Bank and that the NLC had prepared and forwarded to the 1st Respondent compensation schedule and all that remained was disbursement to the affected PAPs. The 1st Respondent maintained that the compensation for "replacement assets" and "Livelihood restoration" did not include compensation for

land acquisition which was to be done by the NLC in accordance with the provisions of the *Land Act*. The 1st Respondent contended that the NLC having carried out the Valuation and having submitted the schedule of the PAPs to be compensated there was no reason to hinder KeNHA from effecting the disbursement to the PAPs in accordance with the financing agreement entered into with the World Bank to facilitate the implementation of the road construction project.

16. The 1st Respondent has submitted that the Petitioners have not demonstrated that they infact are amongst the affected parties entitled to be compensated and neither have they demonstrated any of the PAPs have any complaint against KeNHA effecting the disbursement of the compensation to them. Indeed, the PAPs have been waiting to receive payment and the conservatory order only served to delay them from getting their payment dues. The project was of great public interest as it was intended to serve and open up the entire Northern Region of Kenya and to enhance transportation and connectivity with the neighbouring Countries of Somalia and Ethiopia and together with the LAPSET Project was aimed at serving the interests of the wider public and notably the citizens of the former North Eastern Province who basically had remained marginalized in terms of development. The 1st Respondent thus argued it would be against the wider public interest to confirm the interim conservatory order to serve the narrow interests of but a few individuals.

17. The 1st Respondent contended there had been extensive stakeholder consultation and the PAPs were involved in the consultations and the Petitioners have not in the circumstances demonstrated a prima facie case as defined in the Case of Mrao Ltd –vs- First American Bank of Kenya Ltd & 2 Others (2003) KECA 175 (KLR) where the Court defined a prima facie case as follows:-

> " It is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

18. The 1st Respondent argued the NLC had carried out the valuations and identified the PAPs that needed to be paid compensation of "replacement assets" and "Livelihood restoration" and furnished a list of the beneficiaries and all that remained was the payment of the compensation which the World Bank had availed under the financing agreement for KeNHA as the implementing agency of the project to disburse. The National Treasury was ready to release the funds to KeNHA as per the agreement with the World Bank for the necessary disbursement, but has been prevented from doing so by the conservatory orders issued by the Court. The 1st Respondent submitted that the conservatory order in the premises was not warranted and the same ought to be discharged in the interest of justice and the interest of the public good.

19. The 1st Respondent additionally submitted that the Petitioners Notice of Motion dated 27th March 2025 seeking grant of conservatory orders ought to be disallowed as the Petitioners had not satisfied the threshold for grant of conservatory orders as established by the Supreme Court in the case of Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR where the Court outlined the principles applicable in an application for grant of conservatory orders as follows:

    a) The underlying case should be arguable and not frivolous;

    b) That unless the orders sought are granted, the case, were it to eventually succeed, would be rendered nugatory, and

    c) That the orders should only be granted when public interest tilts in favour of the Petitioners.

20. The 1st Respondent submitted that in the instant case, the grant of conservatory orders would adversely be against the public interest and that the Petitioners did not stand to suffer any prejudice if the

conservatory order was not granted considering that the PAPs who were ascertained by the NLC would be duly compensated. It was the public who stood to be prejudiced as the implementation of the road project that was in their interest, stood the risk of being stalled if the compensation was not paid to the PAPs as at 30th June, 2025 when the financing agreement of the World Bank in regard to the PAPs is scheduled to expire. The 1st Respondent urged the Court to decline the application and lift the interim conservatory order.

Submissions of the 3rd and 4th Respondents.

21. The 3rd and 4th Respondents submitted that the Petitioners have misapprehended the facts and law that the 1st Respondent ought not to be involved in the release or payment of funds intended for the "restoration of livelihood" and "replacement of assets" of the PAPs. The 3rd and 4th Respondents submitted that the Petitioners in the application have taken the position that the payment for "restoration of livelihood" and "replacement of assets" of the PAPs was a component of compulsory acquisition of land and hence was a preserve of the NLC as per Article 67 of *the Constitution* and Sections 107 to 115 of the *Land Act*, 2017 and consequently the 1st Respondent was usurping the role of NLC, the 2nd Respondent.

22. Counsel for the 3rd and 4th Respondent submitted that following the grant of the Interim Order and directions issued by the Court all the stakeholders attended mediation session at the National Treasury in the presence of the Principal Secretary though no unanimous agreement was reached regarding the payment of compensation of "livelihood restoration" and "replacement of assets" of the PAPs. The 3rd and 4th Respondents have submitted on two grounds; that the Court lacked jurisdiction; and that the application lacked merit.

23. On the issue of jurisdiction the 3rd and 4th Respondents argued that under Section 133A of the *Land Act*, 2012 it was the Land Acquisition Tribunal established under the Act that has jurisdiction to hear and determine disputes concerning compulsory acquisition of land in the first instance and that only Appeals arising from such determinations by the Tribunal ought to come to this Court. They thus contended the Petitioners should have referred the dispute to the Tribunal for determination. In support of this submission the 3rd and 4th Respondents placed reliance on the case of Jura –vs- National Irrigation Authority & 3 Others (2025)KEELC 1414 (KLR) where Munyao, J held that where there was a dispute relating to compensation in regard to compulsory acquisition of land such dispute must in the first instance be submitted to the Land Acquisition Tribunal to deal with. In the case Munyao, J thus held the doctrine of exhaustion applied where an alternative dispute handling mechanism applied.

24. The 3rd and 4th Respondent's Counsel further on jurisdiction submitted that under Section 29 of the *Kenya Roads Act*, 2007 the 1st Respondent had mandate to compensate PAPs such damages as maybe agreed upon as between the authority and the PAPs and that in the event of a dispute or disagreement such compensation maybe determined by an arbitrator appointed by the Chief Justice. Hence Counsel submitted that under the said Section 29 of the Act, the Court lacked original jurisdiction to deal with the matter. Counsel in support of the submission relied on the Court of Appeal decision in the case of Geoffrey Muthinja & Another –vs- Samuel Muguma Henry & 1756 others (2015) eKLR where the Court stated thus:-

> " It is imperative that where a Dispute Resolution Mechanism exists outside Court, the same be exhausted before the jurisdiction of the Courts is invoked. Courts ought to be fora of last resort and not the first part of call. The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is postponement of Judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within

the mechanisms in place for resolution outside of Courts. This accords with Article 159 of *the Constitution* which commands Courts to encourage alternative means of Dispute Resolution."

25. The 3rd and 4th Respondents further submitted having regard to the principles for granting of conservatory orders established in various Court decisions including the case of Gatirau Peter Munya –vs- Dickson Kithinji & 2 Others (2014) eKLR. Kelvin Mwiti & Others –vs- Kenya School of Law (2015) eKLR and Martin Wambora –vs- Speaker of County Assembly of Embu & 3 Others (2014) eKLR that the Petitioners had not established a prima facie case to warrant them to be entitled to be granted a conservatory order. In the Gatirau Munya case(supra), the Supreme Court 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 supplicant'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 causes."

26. The 3rd and 4th Respondents submitted that the Applicants failed to demonstrate they had a prima facie case and or that irreparable harm would be suffered by the PAPs, themselves (Petitioners) not being PAPs. They contended that public interest far outweighed the interest of the Applicants (PAPs) who in any event were provided for as their entitlements had infact been worked out and ascertained by the NLC as demonstrated in the Replying Affidavit of the 1st Respondent. The harm to be suffered by the public was disproportionate to any harm that the PAPs could suffer if the Conservatory Order was not granted and hence the balance of convenience was clearly against confirming the conservatory order.

Evaluation, analysis and determination.

27. Having reviewed the application, the Supporting Affidavit and the Replying Affidavit in opposition, the grounds of opposition and the submissions by the parties, the issue for determination is whether a conservatory order in favour of the Petitioners is merited pending the hearing and determination of the Petition. The 1st, 3rd and 4th Respondents have opposed the grant of a conservatory order and have urged the Court to discharge the interim conservatory order granted by the Court at the exparte stage. Though the NLC, the 2nd Respondent, did not file any response or submissions, their Counsel Mr. Haji on 29th April, 2025 informed the Court that the NLC did not support the Petition.

Jurisdiction of the Court.

28. As the 3rd and 4th Respondent raised the issue concerning the jurisdiction of the Court, it is necessary to deal with that issue first. The objection to jurisdiction was two-fronged; firstly, that the dispute as relates to compensation of the "livelihood restoration" and "replacement of assets" should have been referred to the Land Acquisition Tribunal established under Section 133A of the *Land Act*, 2012; and Secondly, that under Section 29 of the *Kenya Roads Act*, 2007, it was KeNHA that had mandate to deal with compensation where there was displacement damage in road projects, and in the event of any dispute, as to compensation payable no suit lies to the Court and such dispute was determined by an arbitrator appointed by the Chief Justice.

29. The jurisdiction of the Tribunal under Section 133C of the Act included hearing Appeals from the decisions of the Commission (NLC) relating to the process of compulsory acquisition of land which Appeals have to be made within 30 days of the decision of the Commission in the prescribed form.

Section 133 C (6) of the *Land Act*, 2012 provides as follows:-

(6) Despite the provisions of Sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of way leaves, easements and public right of way shall, in the first instance be referred to the Tribunal.

30. It is noteworthy that the provisions Section 107 to 133 exclusively make reference to compulsory acquisition of land and make no reference to compensation of "livelihood restoration" and "replacement assets" which are the key components in the instant application. In the Petition and the application for conservatory orders, no distinction was made as relates to "livelihood restoration" and "replacement assets" compensation and the matter was presented as land acquisition that had consequential compensation for "livelihood restoration" and "replacement assets". It has following, the responses been made clear that the "livelihood restoration" and "replacement assets "compensation relates to those affected persons who were on the public road reserve who of necessity would need to be moved from occupation on the public road reserve for the road construction project to commence. The Respondents have contended and the Petitioners do not dispute that indeed the valuations of the assets and livelihood cost have been made by NLC and a schedule of the PAPs furnished to the 1st Respondent.

31. I do not consider that there was any dispute as to the compensation as it has not been demonstrated that any of the PAPs in respect to whom an assessment was made had raised any objection to the compensation. Besides, the assessments of the "assets replacement" and "livelihood restoration" did not in my view constitute land acquisition within the provisions of the *Land Act* Section 107 – 133. I therefore overrule the objection on jurisdiction on this ground.

32. As relates to the application of Section 29 of the Roads Act, my view is that it has no application in the present matter as there is no dispute as to the compensation to invite reference to an arbitrator appointed by the Chief Justice. The schedule of the valuations carried out by the NLC was not been disputed and no objection to the same was demonstrated. The challenge on jurisdiction under this ground equally fails. Hence the Court is properly seized of the matter.

33. The Petition was presented by the Petitioners on the basis that the Respondents were undertaking the Horn of Africa Gateway Development Project which entailed the construction of the road running from Isiolo to Mandera in violation of *the Constitution* and in particular without carrying out public participation and without the involvement of the Project affected persons (PAPs) and that the 1st Respondent (KeNHA) had in violation of *the Constitution* usurped the mandate of the NLC of compulsory acquisition of land and payment of compensation. The Respondents in my view have demonstrated that all the various stakeholders who included the NLC, the project affected persons (PAPs), NEMA and Members of the Public were involved in the preparatory arrangements before the road construction commenced. From the availed information the bulk of the road construction works was to be carried out along the already existing road reserve and was not to be on Community and/or Private land. Where any Community land and/or private land was to be affected, compulsory acquisition of their land was to be carried out by the NLC in accordance with the Law. As part of the preparatory work before the commencement of the construction of the road, any persons who may have settled and occupied parts of the road reserve (corridor) referred to as PAPs had to be identified and removed and that is where the resettlement plan by the 1st Respondent had to be approved and implemented.

34. There is uncontroverted evidence that the NLC was involved in the identification of the PAPs and did infact carry out valuations of their "replacement assets" and "livelihood restoration" and prepared a schedule that was furnished to the 1st Respondent. In my view these Valuations, though they would be expected to be and form an integral part of compulsory acquisition of land under Sections 107 to 133 of the *Land Act*, 2012, cannot be categorised as compulsory land acquisition as envisaged by the Act. They were in essence displacement and resettlement costs of persons who were otherwise occupying public land (road reserve). It is my holding and finding therefore, that the 1st Respondent was infact not carrying on any compulsory acquisition of land as envisaged under the *Land Act* and hence did not usurp the role of NLC in contravention of *the Constitution* and statute. In the premises I am not satisfied the Petitioners have demonstrated a prima facie case with probability of success.

35. I would further observe that this is a project of great public interest, and even if a prima facie case had been demonstrated, consideration of public interest as articulated by the Supreme Court in the case of Gatirau Peter Munya –vs- Dickson Mwenda Kithinji & 2 Others (2014) eKLR would militate against the grant of conservatory order. In the instant case there is clear evidence valuations of the PAPs "replacement assets" and "livelihood restoration" had been carried out and only payment was outstanding. The money for payment has been availed and I would find no justification to sustain a conservatory order whose effect would be to stall all works on the project on the affected section which would be prejudicial to the wider public interest. The Petitioners did not avail any evidence that the valuations that were carried out were objected to by the PAPs and/or that they were themselves affected persons. The thrust of the Petitioners argument was that the funds should not be disbursed through the 1st Respondent as only the NLC had mandate to compulsorily acquire and disburse compensation funds. The amount payable to each of the PAPs having been ascertained, does it make any difference by whom the disbursement was made, provided the recipients gets their money? I do not think so. Under Section 29 of the *Kenya Roads Act*, 2007 the 1st Respondent was infact the authority mandated to effect such payments whenever they had to pay compensation for displacement costs. The 1st Respondent as the implementing agency of the project is properly entitled to make the disbursements to the PAPs and maintain proper and accurate record of who was been paid and how much. The 1st Respondent in the premises is authorized to disburse the compensation limited to "replacement assets" and "livelihood restoration" as computed and certified by the National Land Commission (NLC).

36. In the circumstances and on the basis of my foregoing analysis, I am satisfied the Petitioners application dated 27th March 2025 lacks merit and the same is hereby ordered dismissed with no order as to costs. The interim conservatory order granted on 4th April 2025 is hereby discharged.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY JUNE 2025.

J. M. MUTUNGI

ELC - JUDGE