

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA**

**ELC PETITION NO. E001 OF 2023**

**IN THE MATTER OF ARTICLES 19, 20, 21, 22(1), 23, 159,  
165(3) OF THE CONSTITUTION OF KENYA 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF  
RIGHTS AND FUNDAMENTAL FREEDOMS UNDER  
ARTICLES 35, 40, AND 47 OF THE CONSTITUTION OF  
KENYA 2010**

**AND**

**IN THE MATTER OF SECTION 4, 8, 13, AND 19 OF THE  
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE  
RULES, 2013**

**AND**

**IN THE MATTER OF NATIONAL LAND COMMISSION ACT,  
2013**

**AND**

**IN THE MATTER OF THE NATIONAL LAND COMMISSION  
ACT, 2012**

**AND**

**IN THE MATTER OF COMPULSORY ACQUISITION OF TITLE  
NOS. KIINE/KIBINGOTI/NGUGUINE/3101 AND  
KIINE/KIBINGOTI/NGUGUINE/3102**

**BETWEEN**

**NAOMI NJERI KIGOTHO.....1<sup>ST</sup>**

**PETITIONER**

**EUNICE WAIRIMU KIGOTHO.....2<sup>ND</sup>**

**PETITIONER**

**VERSUS**

**THE NATIONAL LAND COMMISSION.....1<sup>ST</sup>**  
**RESPONDENT**

**KENYA NATIONAL HIGHWAYS AUTHORITY.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGMENT**

1. The Petitioners filed the Petition dated 10<sup>th</sup> February, 2023 on 13<sup>th</sup> February 2023. In the Petition the Petitioners sought the following orders/declarations:-

**a) A declaration that the Petitioner’s fundamental rights and freedoms as enshrined under Articles 40(1), 40(2) (a), 40(3) (b) (i), 47(1) and 47(2) of the Constitution of Kenya 2010, have been contravened and infringed upon by the Respondents herein.**

**b) An order compelling the Respondents to pay the Petitioners just compensation for the compulsory acquisition of their property**

**comprising of the parcels known as Title Number: Kiine/Kibingoti/Nguguine/3101 and Kiine/Kibingoti/Nguguine/3102.**

**c) General, exemplary and aggravated damages under Article 23 (3) of the Constitution of Kenya 2010 for the unconstitutional conduct of the Respondents.**

**d) Any other orders and directions as this Honourable Court may consider appropriate in the circumstances.**

**e) Costs of this Petition.**

**f) Interest on (d), (e) and (f) above.**

2. The Petition was supported on the facts and grounds set out in the Affidavit sworn in support by Naomi Njeri Kigotho the 1<sup>st</sup> Petitioner dated 10<sup>th</sup> February 2023 and the Supplementary Affidavits dated 14<sup>th</sup> September, 2023.

3. The 1<sup>st</sup> Respondent, National Land Commission, opposed the Petition on the grounds of opposition dated 4<sup>th</sup> July 2023 and filed on the same date and on the Replying

Affidavit sworn by Edmond Gichuru dated 12<sup>th</sup> July 2023 and filed on the same date. The 2<sup>nd</sup> Respondent, Kenya National Highway Authority, did not file a Replying Affidavit but filed submissions, Supporting the position taken by the 1<sup>st</sup> Respondent that the appropriate legal frame work governing compulsory acquisition was complied with in regard the Petitioners parcels of land.

#### **The Petitioners Case.**

4. The 1<sup>st</sup> and 2<sup>nd</sup> Petitioners averment is that they were the registered proprietors of land parcels Title Nos. Kiine/Kibingoti/Ngugine/3101 and Kiine/Kibingoti/Nguguine/3102 respectively. The Petitioners aver that the 1<sup>st</sup> Respondent vide a Gazette Notice No. 5409 dated 28<sup>th</sup> May, 2021 gave Notice of the Government's intention to acquire the Petitioners suit properties among others for the construction of the Kenol-Marua, Road project. The 1<sup>st</sup> Respondent also issued a notice of inquiry to hear claims for compensation to the affected parties vide Gazette Notice No. 28<sup>th</sup> May 2021.

The claims were heard on 25<sup>th</sup> June, 2021 and compensation awards for the 1<sup>st</sup> and 2<sup>nd</sup> Petitioners properties were issued on 28<sup>th</sup> July, 2021 for Kshs 1,473,960/- and Kshs 732,010/- respectively. The Petitioners averred that they accepted the awards and provided their respective Bank particulars for the remittance to be effected but the 1<sup>st</sup> Respondent had not made the payment though the other affected persons who were due to be compensated had received their payments.

5. The Petitioners aver that the 1<sup>st</sup> Respondent had not given them any reason as to why their compensation was not paid and contended the 1<sup>st</sup> Respondent's action was discriminatory. The Petitioners aver that the 1<sup>st</sup> Respondent's action contravened **Article 40 of the Constitution** as their properties were appropriated without any compensation being paid. Further the Petitioners averred the 1<sup>st</sup> Respondent's Actions contravened **Article 47 of the Constitution** as they were denied their right to administrative action that was

expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioners asserted that although there was compliance with **Sections 107,112, 113 and 114 of the Land Act, 2012** the Respondents failed to comply with **Section 111(1) and 115 of the said Act**, rendering the institution of the instant petition necessary.

### **The 1<sup>st</sup> Respondent's Case.**

6. The 1<sup>st</sup> Respondent filed grounds of opposition to the Petition dated 4<sup>th</sup> July 2023. The 1<sup>st</sup> Respondent averred that the Petition was misconceived, premature and an abuse of the process of the Court as it offended the provisions of **Article 67 of the Constitution and Section 115 (c) of the Land Act**. The 1<sup>st</sup> Respondent's position was that the Petition was subject to a pending historical injustice claim by the Petitioner before the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent contends the Petitioner was precluded from instituting parallel proceedings over the same subject matter. The 1<sup>st</sup> Respondent contended, the orders the Petitioners pray for in the Petition are

incapable of being granted owing to the statutory prohibition under **Section 115 of the Land Act**. The 1<sup>st</sup> Respondent stated the Court's jurisdiction had been prematurely invoked having regard to the exhaustion doctrine.

7. The 1<sup>st</sup> Respondent in its Replying Affidavit sworn by Edmond Gichuru, Deputy Head of Historical Land Injustice Secretarial verified that indeed the 1<sup>st</sup> Respondent published a Notice of Intention to purchase land parcels No. Kiine/Kibingoti/Ngugue/3101 and 3102 vide gazette Notice No. 5409 and also issued notice of inquiry vide Gazette Notice No.5410. That the inquiry was concluded and awards of Kshs 1,473,960/- and Kshs 732,010/- issued to the Petitioners respectively. The 1<sup>st</sup> Respondent avers that before they could effect payment of the awards an Interested Party, one Ralpa A.M Kimotho wrote to the 1<sup>st</sup> Respondent a letter dated 21<sup>st</sup> July 2021 (**"NLC3"**) objecting to the compensation being processed on account of a pending Petition of **"Historical Land Injustice"** before the National Land Commission. The 1<sup>st</sup>

Respondent averred that under **Section 115 (1) (c) of the Land Act, 2012** they are precluded to make any payment of compensation where the ownership of the land and/or shares of the persons entitled is disputed. The 1<sup>st</sup> Respondent therefore denies it has refused to make payment of the assessed award citing the prohibition under **Section 115(1) (c) of the Land Act**. The 1<sup>st</sup> Respondent hence denied being in contravention of **Article 35, 40, and 47 of the Constitution** and prayed for the dismissal of the Petition with costs.

8. The Petition was canvassed by way of written submissions. The Petitioners submissions were dated 22<sup>nd</sup> January, 2024; those of the 1<sup>st</sup> Respondent were dated 24<sup>th</sup> April, 2025 and those of the 2<sup>nd</sup> Respondent were dated 30<sup>th</sup> July 2025. I have reviewed the Petition, the Affidavit in support and the grounds of objection and the Replying Affidavit filed by the 1<sup>st</sup> Respondent. I have equally considered the submissions filed on behalf of the parties. The issues that stand out for determination in the instant Petition are as follows:-

- (i) Whether land parcels Kiine/Kibingoti/Ngugune/3101 and 3102 (the suit properties) were compulsorily acquired in accordance with the law?
- (ii) Whether the Petitioners fundamental rights and freedoms were violated and/or infringed upon?
- (iii) Whether the Petition was prematurely instituted having regard to Section 115 (1) and (c) of the Land Act, 2012.
- (iv) Whether the Petitioners are entitled to the prayers sought?

9. **Article 40 of the Constitution** guarantees protection of rights to property and specifically provides that the state shall not deprive any person of his property unless prompt and payment of just compensation is made. **Article 40(3) of the Constitution** provides as follows:-

**40(3) The State shall not deprive a person of property of any description, or of any interest**

**in, or right over, property of any description, unless the deprivation—**

**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**

**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that -**

**(i) requires prompt payment in full, of just compensation to the person; and**

**(ii) allows any person who has an interest in, or right over, that property a right of access to a Court of law.**

10. In the instant Petition, it is not in dispute that National Land Commission, the Agency mandated under the Law to carry out the process of compulsory acquisition did issue notice of intention to acquire the suit properties and further issued Notice of Inquiry as relates to compensation and that the inquiry was duly completed and awards made to both Petitioners in respect of their

respective parcels of land. The record shows that the Petitioners accepted the awards but the settlement/payment of the awards was not made to the Petitioners by the 1<sup>st</sup> Respondents.

11. In the premises it is evident the Petitioners parcels of land were required for public purpose as envisaged under **Article 40(3) (b) of the Constitution** and therefore prompt and just compensation required to be made to the Petitioners under **Article 40(3) (b) (i) of the Constitution**. The Government in the instance needed to compulsorily acquire the Petitioners affected portions of land for the construction of the Kenol - Sagana -Marua Road.

12. The process of compulsory acquisition of land is set out under **Sections 107 to 133 of the Land Act, 2012**. The Notice of Intention to acquire and of inquiry were issued in accordance with the provisions of the Land Act to initiate the compulsory acquisition process. The inquiry was duly made and the National Land Commission duly

made and published the awards but there was a dispute as to who ought to be paid and in terms of **Section 115 of the Land Act, 2012** the payment could not be made until the issue of who was entitled to be paid was resolved. **Section 115 of the Act** provides as follows:-

**115. (1) After notice of an award has been served on all the persons determined to be interested in the land, the Commission shall, promptly pay compensation in accordance with the award to the persons entitled thereunder, except in a case where—**

**(a) there is no person competent to receive payment; or**

**(b) the person entitled does not consent to receive the amount awarded; or**

**(c) there is a dispute as to the right of the persons entitled to receive the compensation or as to the shares in which the compensation is to be paid.**

**(2) In any of the cases referred to in paragraphs (a), (b) and (c) of subsection (1), the Commission may at any time pay the amount of the compensation into a special**

**compensation account held by the Commission, notifying any persons interested accordingly.**

13. The 1<sup>st</sup> Respondent submitted that the process of compulsory acquisition of the Petitioners parcels of land was carried out in accordance with the law but was not completed owing to the dispute that arose as to the ownership. The 1<sup>st</sup> Respondent was yet to receive the money for the 2 parcels of land from the 2<sup>nd</sup> Respondent to enable them to comply with **Section 115 (2) of the Land Act**. The 1<sup>st</sup> Respondent contends that it has not, given the attendant circumstances in any manner violated the Petitioners rights as alleged. The 1<sup>st</sup> Respondent submitted that as the compensation funds had not been released to the 1<sup>st</sup> Respondent by the 2<sup>nd</sup> Respondent for onward transmission to the Petitioners, the 1<sup>st</sup> Respondent cannot be compelled to release funds that were not in its possession. The 1<sup>st</sup> Respondent submitted there was justification for the action/decision they took and that the orders sought by the Petitioners cannot be granted. The 1<sup>st</sup> Respondent placed reliance on the case of **Republic -**

**vs- Public Procurement Administrative Review Board & Another; Exparte CMC Motors Group Ltd (2020) eKLR and Republic -vs- National Employment Authority & 3 Others; Exparte Middle East Consultancy Services Ltd (2018) eKLR.** In the latter case the court held Judicial Review remedies are discretionary and that a Court must take account of the attendant circumstances in determining whether the orders sought were justified. In the case the Court stated thus:-

**“The discretionary nature of the Judicial Review remedies sought in this application means that even if a Court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an Applicant may include where the Applicant’s own conduct has been unmeritorious or unreasonable, for example where the Applicant has unreasonably delayed in applying Judicial Review, where the Applicant has not acted in good faith, or where a remedy would impede the authority’s ability to deliver fair administration or where the Judge considers that an alternative remedy could have been pursued.**

**The grant of the orders of certiorari, mandamus and prohibition is discretionary. The Court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that is reasonable basis to justify the orders sought.”**

14. In the instant Petition the 1<sup>st</sup> Respondent submits the process of acquisition of the suit properties was lawfully carried out and there would be no justification to issue a compelling order to remit the compensation funds when it is clear there exists a dispute as to who ought to be paid as ownership of the land is in dispute. In the circumstances the 1<sup>st</sup> Respondent asserted the claim for damages would be unwarranted.

15. The Petitioners in their submissions assert that the Respondents failed to comply with **Sections 111, 114 and 120 of the Land Act, 2012** as the Respondents went ahead to take possession of the land the subject of compulsory acquisition before payment of compensation was effected. They contended that was in violation of the

right to property as guaranteed under **Article 40 of the Constitution. Section 111(1) of the Land Act** provides:-

**111(1) if land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interest in the land have been determined.**

**(1A) The acquiring authority shall deposit with the commission the compensation funds in addition to survey fees, registration fees, and any other costs before the acquisition is undertaken.”**

**16. Section 114 of the Land Act** provides as follows:-

**114. (1) On making an award, the Commission shall serve on each person whom the Commission has determined to be interested in the land, a notice of the award and offer of compensation.**

**(2) Upon acquisition of land, and prior to taking possession of the land, the Commission may agree with the person who owned that land that instead of receiving an award, the person shall receive a**

**grant of land, not exceeding in value the amount of compensation which the Commission considers would have been awarded, and upon the conclusion of the agreement that person shall be deemed to have conclusively been awarded and to have received all the compensation to which that person is entitled in respect of the interest in that land.**

**(3) An agreement under subsection (2) shall be recorded in the award.**

**17. Section 120(1) and (4) of the Land Act provides as follows:-**

**120. (1) Only after the award has been made, and the amount of the first offer has been paid, the Commission shall take possession of the land by serving on every person interested in the land a notice that on a specified day possession of the land and the title to the land will vest in the national or county governments as the case may be.**

**(2)-----**

**(3)-----**

**(4) Upon taking possession and payment of just compensation in full, the land shall vest in the national or county governments absolutely free from encumbrances.**

18. The Petitioners further in their submissions contended that the 1<sup>st</sup> Respondent never informed them in writing that there was a pending historical land injustice case affecting their suit lands and never invited them to any hearing to ventilate any issues concerning their land. The Petitioners argued the 1<sup>st</sup> Respondents actions were in violation of **Article 47 of the Constitution** which under sub **Articles (1) and (2)** provides as follows:-

**47(1) Every person, has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

19. The Petitioners argued that the 1<sup>st</sup> Respondent apart from failing to afford them a fair hearing as envisaged under

**Article 47 of the Constitution** also denied them access to information in regard to their parcels of land. The Petitioners relied on the case of **Five Star Agencies Ltd -vs- National Land Commission (2014) eKLR** where the Court stated (Nyamwea J (as she then was):-

**“While I appreciate that the making of an inquiry maybe part of fair administration action, there are other requirements that may need to be observed to ensure that parties who are affected by an acquisition notice are availed a fair hearing. This is particularly as regards written reasons for a decision, as Article 47(2) of the Constitution now provides that where a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**Likewise access to information is now an express constitutional right and requirement under Article 35 (b) of the Constitution especially when such information is held by another person and required for the exercise or protection of any right or fundamental freedom.”**

20. The Petitioners thus submit the Respondents violated their fundamental rights and are entitled to be awarded aggravated damages and rely on the case of **Godfrey Julius Ndumba Mbogori & Another -vs- Nairobi City County (2018) eKLR** and **Pamela Waithera Mburu -vs- County Government of Kajiado (2018) eKLR** in support of their submissions.

21. The 2<sup>nd</sup> Respondent in its submissions contended that it bore no direct responsibility in the compulsory acquisition and the compensation process of individual claimants such as the Petitioners. They argued it was the National Land Commission that bore the Constitutional and statutory mandate to compulsorily acquire and compensate any affected persons. The 2<sup>nd</sup> Respondent submitted that in the instant Petition, the compulsory acquisition was lawfully done but the 1<sup>st</sup> Respondent could not lawfully effect payment of the compensation as there was a pending historical land injustice case affecting the Petitioners parcels of land which the 1<sup>st</sup> Respondent was under obligation and under the law to investigate and

make a determination. The 2<sup>nd</sup> Respondent contended its role in the compulsory acquisition ended when it initiated the process and availed the funds to the 1<sup>st</sup> Respondent.

22. The Court has evaluated the Petition the Affidavit in support and in opposition and the submissions of the parties and is satisfied that the process of compulsory acquisition was lawfully initiated. However, the compulsory acquisition was not completed through payment of the compensation awarded to the Petitioners and the issue is whether that constituted a violation of the Petitioners Constitutional rights. The Court as illuminated in the case of **Patrick Musimba -vs- National Land Commission & 4 Others (2016) eKLR** has a role to protect the right of an affected person under **Article 40(3) of the Constitution**. In the case the Court held:-

**“There exists no doubt, an overarching right to compensation under Article 40(3) of the Constitution where a person is deprived of his property for public purpose or public interest.**

**The power to expropriate private property as donated to the state by both constitution and statute law (the Land Act) leaves the private land owner with no alternative. The power involves the taking of a person's land against his will. It is a serious invasion of his proprietary rights through the use of statutory authority. The private land owner has no alternative but wait for compensation. It is consequently necessary that the Court must remain vigilant to see to it that the state or any organ of the State does not abuse the Constitutional and statutory authority to expropriate private property (emphasis added).**

23. Under the provisions of the **Land Act, 2012** both the acquiring authority and the National Land Commission (NLC) have distinct roles. Under **Section 107 of the Land Act**, it is the mandate of NLC, to acquire land for public purpose. The role of an acquiring authority under **Section 107** is restricted to notifying the NLC of its intention to acquire some specified land under **Section 110**. The NLC under **Section 107A and 107B of the Act** is tasked with the role of assessing and valuing the

target property for acquisition. The acquiring authority under **Section 111(1A) of the Act** is required to deposit with NLC the compensation funds and other related charges before the acquisition is undertaken. I do not consider that the acquiring authority is given any option other than to remit the compensation funds to the National Land Commission for onward release to the beneficiary.

24. In the present Petition the Kenya National Highways Authority (KeNHA) was the acquiring authority. KeNHA who were named as the 2<sup>nd</sup> Respondent did not file a Replying Affidavit, though they filed submissions where they contended they bore no further responsibility having initiated the acquisition process as the mandate to compulsorily do the acquisition fell on the NLC. The NLC in their Replying Affidavit to the Petition did not disclose whether KeNHA had in terms of **Section 111(1A)** deposited the compensation funds with them though the NLC in its submissions indicated that KeNHA had not deposited the compensation funds with them so that the

same could be released to the Petitioners. The NLC appears to justify the non- release of the compensation funds to the Petitioners on the ground that there was a historical land injustice case affecting the Petitioners parcels of land pending before the commission. The Commission has not indicated that the compensation funds, owing to the alleged dispute of ownership was paid into any special account as envisaged under **Section 115(2) or Section 117(1) of the Land Act**, to accrue interest for the benefit of the eventual owner. The Commission has equally not disclosed if there has been any progress in the alleged historical land injustice case and/or whether the Petitioners have been joined in such case.

25. The Kenol - Sagana - Marua road has virtually been completed and is in use, meaning the portions of the Petitioners parcels of land compulsorily acquired were taken possession of for the construction of the road. The Petitioners are the registered proprietors of the suit properties. The Respondents compulsorily acquired the Petitioners parcels of land and have not paid the

compensation as determined. I do not consider there to be any bearing in the alleged pending historical land injustice claim with the issue of compensation of the Petitioners. In the premises it is my determination that the Respondents compulsorily acquired the Petitioners parcels of land in accordance with the law and that there was no valid reason for not effecting the compensation payment which had already been determined. The letter dated 21<sup>st</sup> July, 2021 from one **Ralph A. M Kimotho** exhibited by the 1<sup>st</sup> Respondent, as evidence of the pending historical land injustice claim indicated the land in question was Kiine/Kibingoti/Nguguini/939 and it was not evident how it related to the Petitioners land parcels Kiine/Kibingoti/3101 and 3102 as it was not demonstrated that the Petitioners were joined as parties in the pending historical land injustice claim.

26. In the Petition the Petitioners have made a claim for general, exemplary and aggravated damages. I do not consider a basis has been made for award of such damages as I do not consider the Respondents acted in a callous, arbitrary or oppressive manner with the objective

of injuring the Petitioners. The 1<sup>st</sup> Respondent had what it considered was a valid reason to defer the payment under **Section 115(1) (c)** which unfortunately did not constitute a valid reason to withhold the payment. Nonetheless the 1<sup>st</sup> Respondent's act of not effecting the payment of the compensation constituted a violation of the Constitution **Articles 40(3) and 47(2) of the Constitution.**

27. In the premises I find the Petition to be meritorious, I enter Judgment in favour of the Petitioners and make the following final consequential orders:-

**1. A declaration be and is hereby issued that the Petitioners rights under Article 40 and 47 of the Constitution were contravened by the Respondents.**

**2. That the Respondents are ordered to pay the Petitioners the compensation awards made in favour of the Petitioners on 28<sup>th</sup> July 2021 for land parcel Kiine/Nguguini/3101 Kshs 1,473,965/- and land parcel Kiine/Nguguini/3102 Kshs 732,010/- together with interest at Court rates from the date of the award.**

**3. The Petitioners are awarded the costs of the  
Petition.**

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY  
AT KERUGOYA THIS 12<sup>TH</sup> DAY OF NOVEMBER 2025.**

**J. M. MUTUNGI  
ELC - JUDGE**