

REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA AT GARISSA

ELC PETITION NO. E002 OF 2022

IN THE MATTER OF: ARTICLES 2(6), 22(2)(B)(D)(I) & (III) OF THE CONSTITUTION OF KENYA, 2010.

AND

IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 26, 27, 28, 29, 31, 42, 40, 43, 44, 47, 50, 53,56 & 57 OF THE CONSTITUTION OF KENYA 2010.

AND

IN THE MATTER OF: THE COMMUNITY LAND ACT 27 OF 2016

AND

IN THE MATTER OF: THE COMMUNITY LAND REGULATIONS, 2017

BETWEEN

ABDI BUDHUL ADAN1ST

PETITIONER

MOHAMED ALI GURO 2ND

PETITIONER

HAKI NA SHERIA INITIATIVE3RD

PETITIONER

V E R S U S

**THE HONOURABLE ATTORNEY GENERAL1ST
RESPONDENT**

**THE LAPSET CORRIDOR DEVELOPMENT PROJECT... 2ND
RESPONDENT**

**THE KENYA NATIONAL HIGHWAY AUTHORITY 3RD
RESPONDENT**

**THE NATIONAL LAND COMMISSION 4TH
RESPONDENT**

**THE COUNTY GOVERNMENT OF GARISSA 5TH
RESPONDENT**

JUDGMENT

1. The Petitioners have brought the instant Petition suing on their own behalf and on behalf of 332 persons being residents of Sarira Centre Settlement located in Garissa County and in public interest. The Petitioners filed the initial Petition dated 9th February 2022 but Amended the same on 23rd February 2024.
2. By the Amended Petition the Petitioners pray for orders that:-

- a) A declaratory Order that the forced evictions conducted by the Respondents are unprocedural, illegal and unconstitutional in contravention of Article 40 (3) of the Constitution and Section 5 of the Community land;**
- b) A declaration order that the Respondents have violated the Petitioners rights and freedoms as enshrined in Article 26, 27, 28, 29(c), 31, 40, 43, 44, 47 50, 53, 56 &57 of the Constitution of Kenya, 2010.**
- c) A declaration orders that Section 107A (9) (a) of the Land Act in so far as it calls for six (6) year interrupted period of occupation as condition precedent for recognition as an occupant in good faith is discriminatory as against nomadic and pastoralist communities thus is inconsistent with Article 10 and 27 of the Constitution and is also a serious threat to the right to land in Article 40(4) of the Constitution this unconstitutional.**
- d) A declaration Order the 5th Respondent violated its fiduciary duty to protect the Petitioners' land entrusted to it under Article 63(3) of the Constitution;**

e) An order of compensation be issued in favour of the Petitioners for violation of their fundamental rights in (b) above.

f) A declaration that the acquisition of the Sarira Centre Settlement Community Land is unjustifiable given the existence of a road in view of the principle of proportionality and minimal impairment of fundamental rights and freedom as set out in Article 24 of the Constitution or in the alternative a PERMANENT INJUNCTION be issued against the Respondent restraining them whether by themselves, agents, officers, or other assigns from demolition or enforcing forced eviction in Sarira Centre Settlement Land illegally, uprocedurally and unconstitutionally unless due process has been followed in accordance with Article 40(3) of the Constitution and

g) Costs of this suit.

3. The Petition was supported on the Supporting Affidavit of Abdi Budhul Adan, the 1st Petitioner dated 10th February 2022 and his Further Affidavit dated 10th April 2022. The Petitioners simlutenously with the Petition filed a Notice of Motion application seeking conservatory orders pending the

hearing and determination of the application and the Petition.

4. The 1st and 2nd Respondents filed grounds of opposition dated 14th March 2022 to the application and the Petition. The 3rd, 4th and 5th Respondents filed Replying Affidavits in opposition to the Petition. The application for conservatory orders was declined and the main Petition was argued by way of written submissions.

The Petitioners case.

5. The Petitioners case is set out in the Petition/Amended Petition and the Affidavit and Further Affidavit sworn in support by the 1st Petitioner. It is the Petitioners case that the 1st Petitioner and 2nd Petitioner are residents and leaders of Sarira Centre within Garissa County while the 3rd Petitioner is a Non-Government Organization (NGO), with interest in Human Rights and is based in Garissa County. They aver

that they have brought the Petition on behalf of the residents of Sarira Centre Garissa County.

6. The Petitioners aver that the Respondents unlawfully demolished their homes and appropriated the resident community land to give way for the development of the LAPSSET (Lamu Port, South Sudan, Ethiopia Transport Corridor) Project envisioned under the Kenya Vision 2030 to link Kenya, South Sudan and Ethiopia to ease transport within the three states. The Petitioners claim that the land within Sarira Centre, Garissa where the LAPSSET Corridor passes is ancestral and Community land and that the residents were not consulted and/or involved before the launch of the project, and that the acts of the Respondents in implementing the project without involving the residents and/or compulsorily acquiring the land and paying compensation to the affected persons as envisaged under the law, violated the residents rights under the Constitution and the **Community Land Act, 2016**. The Petitioners contend the residents were subjected to unlawful evictions

as the evictions were carried out in violation of the mandatory provisions set out under **Section 152 of the Land Act, 2012**. The Petitioners in the premises claim their rights to property, human dignity and nondiscrimination were violated by the Respondents and urge the Court to grant them the reliefs prayed for in the Petition.

The Respondents case.

7. The 1st and 2nd Respondents in their grounds of opposition contended that the Petitioners' rights under **Article 40 of the Constitution** were not absolute and were subject to the Limitation envisaged under **Article 24 of the Constitution** and that the Petitioners rights have to be balanced against the wider public interest. The 1st and 2nd Respondents averred that the Petitioners had not demonstrated any breach of the Constitution or any law on the part of the Respondents. The 1st and 2nd Respondents averred the Petition was incompetent, misconceived and an abuse of the

Court process and the Petitioners were not entitled to the reliefs sought by the Petitioners against the Respondents.

8. The 3rd Respondents, KeNHA in its Replying Affidavit affirmed that it was the Agency mandated to oversee the LAPSSET Corridor Development which was a Multi-Modal infrastructure Project encompassing transboundary transport components linking Kenya with Ethiopia and South Sudan. The 3rd Respondent stated once completed the development will comprise construction of a port at Manda Bay, Lamu; Railway line connecting Lamu with Juba, South Sudan and Addis Ababa, Ethiopia; Road network; oil Pipelines (South Sudan and Ethiopia); Oil refinery at Bargoni, Kenya; Three airports at Lamu, Isiolo and Lokichogio; and, Three Resort cities (Lamu, Isiolo and Lake Turkana). The LAPSSET Corridor Project would therefore open up the entire Northern part of Kenya and provide fast and efficient movement of people, goods and services which would spur economical growth. The 3rd Respondent contended there was widespread Public and stakeholder consultations and that an Environmental

Impact Assessment study was conducted and all affected persons were afforded and given an opportunity to raise any issues or concerns they had concerning the project.

9. The 3rd Respondent averred that the Petitioners never came forward to raise any issues during the public participation and that they only showed up when the contractor came to the site and commenced works on 21st May 2021 by demarcating and clearing bush along the approximately 100m wide LAPSSET Corridor as per Gazette Notice No. 8676 of 21st October 2016. The 3rd Respondent thus stated the Petitioners were not on the Project corridor and only began entering the project corridor and began building temporary structures after the contractor began clearing the site for the road construction, perhaps expecting to be compensated. The makeshift structures were unoccupied as depicted in the photograph marked **“EX-2”** annexed to the Affidavit of Michael Obop. The 3rd Respondent further averred that the National Land Commission had before the commencement of the project development carried out

verification and valued any structures that were on the LAPSSET Project corridor and that the structures the Petitioners claim were on the corridor were not there. In response to the various allegations by the Petitioners, the 3rd Respondent averred that the subject land was unregistered Community land and was vested in the County Government of Garissa who held the same in trust on behalf of the Community and that the County Government of Garissa was involved in the consultations right from the inception of the project.

10. The County Government was aware the National Government in compliance with the law issued Gazette Notice No. 8676 published in the Kenya Gazette of 21st October 2016 (**'EX-3'**) signifying its intention to acquire parcels of land within the LAPSSET Corridor. The 3rd Respondent further added the project was for the wider public good as it will improve security in the region, create employment opportunities, open up the region to the rest of the Country and create linkages with the neighbouring

Countries and improve transportation and access by the public to all the areas along the transport corridor. The 3rd Respondent in the premises maintained that the Petitioners allegations of destruction of their homes was not true and that there was no demolitions that were ever supervised by any armed Police Officers as alleged by the Petitioners.

11. The 4th Respondent, National Land Commission filed a Replying Affidavit dated 28th April 2022 sworn by Austine Odhiambo Ogutu Otewa. The 4th Respondent averred that it published a Notice of Intention to acquire the LAPSSET Corridor vide Gazette Notice No. 8676 of 21st October 2016, 1518 of 16th February 2018 and 6382 of 28th August, 2020. The commission's Replying Affidavit paragraphs 3 to 10 which are reproduced hereunder aptly respond to the Petitioners allegations in the Petition. The said paragraphs are as follows:-

3. That the coordinates defining the 500M Lapsset Corridor were in the notice of intention to

acquire, of which 90 percent of land within that area is community land.

4. That inspections for the Section in question was inspected for valuation purposes in 2019 and inventory of items owned by those affected was recorded during the exercise.

5. That KeNHA commenced construction of Lamu -Garissa Road in 2021 within the area earmarked for the LAPSSET project. However the road component extended 60 meters beyond the initial 500M identified for the entire project.

6. That the 60 meter tract of land in question which is claimed by the Applicants was unoccupied community land and no individual was in actual possession.

7. That following complaints by the local residents claiming expropriation, the National Land Commission Officers conducted a site visit in October, 2021 and discovered that the

Community was erecting new makeshift speculative structures within the road corridor.

8. That the Applicants were not in occupation of that stretch of land during the initial visit in 2019, the area was covered in thickets and there were no improvements made on the land.

9. That any improvements or developments were done within two years of publication in the Gazette of the Notice of intention to acquire the land contrary to Section 107A (5) (c) (i) of the Land Act.

10. That the Commission is in the process of finalizing valuation of the land in accordance with the provisions Community Land Act and other relevant laws and once it is done it will deposit the compensation sum with the County Government which holds Community land in trust.

12. The 5th Respondent, County Government of Garissa, respondent to the Petition through the Replying Affidavit sworn by Khadija Mohammed, County Attorney Garissa County, sworn on 22nd February, 2024. In response to the Petitioners averments and allegations in the Petition the County Attorney stated the Petitioners have based the Petition on grossly distorted facts which are incapable of proof. The 5th Respondent asserted that the Lapsset corridor development was of National importance and was for the benefit of the public and it would be prejudicial if the orders prayed for by the Petitioners were granted.

13. The 5th Respondent averred that the Petitioners prematurely invoked the jurisdiction of the Court as the process of compulsory acquisition that had been initiated by the NLC giving notice of intention to acquire the Lapsset Corridor for development had not been completed as the inquiry stage envisaged under **Section 112 of the Land Act, 2012** in the compulsory acquisition process had not been held where any affected persons were to be given the

opportunity to present their claims. The 5th Respondent stated it was the National Land Commission that was spearheading the land acquisition process and both the Local Community and the County Government Leadership were involved through stakeholder engagements and public meetings.

14. The 5th Respondent further averred that the land through which the Lapsset Corridor was being developed was unregistered community land and that it was the County Government who held the land in trust and on behalf of the Community, who had the responsibility to deal with the NLC on behalf of the Community, and any compensation paid was to be held on account and to be released to the community upon registration of the community land. The 5th Respondent argues that the Petitioners have no ownership rights to the suit land and therefore lack the locus standi to institute the present Petition. The 5th Respondent therefore avers that the Petitioners are not entitled to the orders they

pray for and that the Petition ought to be dismissed with costs.

15. The Petition was canvassed by way of written submissions. The Petitioners Written submissions were dated 16th April 2025; and the 5th Respondent filed their submissions dated 28th April 2025. At the time of preparing this Judgment, the 1st to 4th Respondents had not filed any submissions.

16. Having reviewed the Petition, the Affidavits sworn in support and the Affidavits sworn by the Respondents in opposition and the written submissions of the Petitioners and the 5th Respondent, the issues that arise for determination in this Petition are as follows:-

- (i) Whether the Lapsset Corridor development Project within Sarira Centre, Garissa County was planned on Community land and if so, whether the Petitioners had any proprietary interest over the land?**

(ii) Whether the Petitioners were involved in the process of compulsory acquisition of the Lapsset Corridor Project Land?

(iii) Whether there was any violation of the Petitioners Constitutional rights?

(iv) Whether the Petitioners are entitled to the reliefs sought?

17. The Petitioners acknowledge that the land the subject of the Petition was unregistered land thus was Community Land within the meaning of **Article 63 of the Constitution** and thus fell to be managed and administered under the provisions of the **Community Land Act, Cap 287 Laws of Kenya. Article 63(3) of the Constitution** provides as follows:-

63(3) Any unregistered Community land shall be held in trust by County Governments on behalf of the Communities for which it is held.

18. The **Community Land Act under Section (6)** provides the Role of County Governments in so far as unregistered Community Land is concerned. **Section 6 of the Community Land Act** provides as follows:-

6(1) County governments shall hold in trust all unregistered community land on behalf of the communities for which it is held.

(2) The respective county government shall hold in trust for a community any monies payable as compensation for compulsory acquisition of any unregistered community land.

(3) Upon registration of community land, the respective county government shall promptly release to the community all such monies payable for compulsory acquisition.

(4) Any such monies shall be deposited in a special interest earning account by the county government.

(5) The respective county government shall transfer the amount and the interests earned to the communities as may be prescribed.

(6) Any transaction in relation to unregistered community land within the county shall be in accordance with the provisions of this Act and any other applicable law.

(7) Upon the registration of any unregistered community land in accordance with this Act, the respective registered community shall, assume the management and administrative functions provided in this Act and the trustee role of the respective county government in relation to the land shall cease.

(8) A county government shall not sell, dispose, transfer, convert for private purposes or in any other way dispose of any unregistered community land that it is holding in trust on behalf of the communities for which it is held.

19. As provided in the foregoing provisions, where community land is unregistered, the County Government of the area where the land is situated, has the mandate to manage and effect any transactions on behalf of the Community pending the registration of the Community land in the name of the Community. The Petitioners as residents within the Community of Sarira Centre, Garissa County no doubt had an interest over the Community Land as the eventual beneficiaries. However, if part of the Community land was required for public purpose and needed to be acquired, it was the County Government in terms of **Section 6 of the Community Land Act, 2016** who had mandate to act for and on behalf of the Community. The only question would be if the acquisition was carried out in accordance with the law as envisaged under **Section 5(4) of the Community Land Act, 2016** which provides as follows:-

5(4) subject to Article 40(3) of the Constitution and the Land Act (cap 280), no interest, or right

over community land may be compulsorily acquired by the state except in accordance with the law, for a public purpose, and upon payment of just compensation to the person or persons, in full or by negotiated settlement.

19. In the instant case there is evidence that the 4th Respondent gave notice of intention to acquire. The National Land Commission gave notice vide gazette Notice No. 8676 of 21st October 2016 on behalf of Lapsset Corridor Development Authority of the Government's intention to acquire various parcels of land within Lamu County, Garissa County, Laikipia County, Meru County, Isiolo County, Baringo County, Turkana County and Marsabit County. This notice was to kickstart the process of compulsory acquisition under Part III **(Sections 107 TO 133) of the Land Act, 2012.** The National Land Commission in their Replying Affidavit to the Petition clarified that inspection of the identified land was done in 2019 for Valuation purposes and at that time

there were no structures on the tract of land and it was unoccupied but a site visit in October 2021 after the construction commenced revealed there were new makeshift structures being built within the road corridor for speculative purposes. The NLC had not finalized the Valuations at the time of filing their response to the Petition.

20. The Petitioners claim to have been residents and in occupation of the land identified for the Lapsset Corridor development and that their structures were demolished and they were evicted in an inhumane manner without any compensation being paid to them. In contrast the NLC claim they inspected the area traversed by Lapsset Corridor in 2019 and there were no structures and/or settlements but in 2021 when they revisited the site they found residents building new structures which they stated were intended for speculative purposes when compensation was effected. The Court cannot verify the assertions by either the Petitioners or the 4th Respondent as to whether or not the Petitioners were

in occupation of Lapsset Corridor development project area. Mere photographs by themselves cannot offer proof.

22. However, what is evident is that after the Notice of Intention to acquire the land for the Lapsset Corridor project, the 3rd Respondent KeNHA obtained a NEMA Environmental Impact Assessment License No. NEMA/E/A/PSL/6699 issued on 31st October 2018 for the proposed Lamu - Garissa Road which was extended for an additional period of 24 months from 1st April 2021. The project objective was:-

“Constructive of Lamu - Garissa Road involving earth works, concrete works, steel works, drainage works, land scaping, road markings and associated amenities.”

23. The 3rd Respondent has contended that there was widespread public participation during the preparation of the EIA and the locals who included the Petitioners were involved. Given the circumstances, I find it more probable that the Petitioners were infact not in occupation of the

Lapsset Corridor development project land, but rather belatedly entered the land and began putting up temporary structures after the notice of intention to acquire the land was put out by the 4th Respondent perhaps hoping to cash on the eventual compensation.

24. Besides the Notice of Intention to acquire having been issued by the 4th Respondent, the Petitioners ought to have awaited the 4th Respondent to give notice of inquiry under **Section 112 of the Land Act, 2012** to present their claims if they had any interest on the land targeted for compulsory acquisition or if they were affected persons by virtual of having any structures on the Lapsset project corridor.
25. On the evidence it is my determination that the Lapsset Corridor development project, within Sarira Centre, Garissa County was within Community Land and that although the Petitioners were beneficial owners of the Community Land, the mandate to deal with the land lay on the Garissa County

Government under **Section 6 of the Community Land Act** as the land had not been registered as Community Land under **Section 7 of the Community Land Act, 2016**. The Petitioners have not demonstrated that they had settled on the Lapsset Project Corridor and/or were in occupation and therefore the issue of demolition and/or evictions has not proved. Consequently the various authorities relied on by the Petitioners notably **Mitu-Bell Welfare Society -vs- Attorney General & 2 Others (2013) eKLR**, **Susan Waithira Kariuki & 4 Others -vs- Town Clerk Nairobi City Council & 2 Others (2011) eKLR** and **Satrose Aruma & 11 Others -vs- Registered Trustees of Kenya Railways Staff Retirement Benefits Scheme & 3 Others (2013) eKLR** cannot be applicable in the circumstances of this case.

26. The Petitioners in my view merely set out various provisions of the Constitution and the **Community Land Act, 2016** and alleged violations but did not demonstrate how and in

what manner their rights were violated. Without tangible evidence of any violation, a Court cannot find a violation of a right has occurred. In the present case a Notice of Intention to acquire land was issued in 2016 and evidence is there that Sections of the Lapsset project had been developed over time. There is no doubt that the project was of major public interests and its impacts were to be immense. It was in the wide public interest that the project be implemented. Mere allegations of violations without proof cannot form a basis for the Court to intervene to stop a project that is demonstrated to be for public good.

27. In the case of **Mohammed Abduba Dida -vs- Debate Media Ltd & Another (2018) eKLR** the Court of Appeal considering the burden of proof stated as follows:-

“----- ordinarily, the burden of demonstrating that a right was infringed would be upon the person alleging such violations as, that person would be in the better position to prove it. It is

for the Petitioner to show that, compared to another person; he or she has been denied a benefit or suffered a disadvantage, which are matters within the Petitioner’s knowledge. Once the case is made out, the burden shifts to the other party-----”.

28. In the case of **Christian Juma Wabwire -vs- Attorney General (2019) eKLR Makau, J** commenting on the burden of proof stated:-

“I am alive to the fact that the Petitioner in his Petition alluded to various Constitutional violations, but without having availed tangible evidence of violation of his rights and freedoms, I find the allegation by mere words without any other evidence, the Court cannot find that the Petitioner has proved violations of his rights and freedoms. The Courts of Law are deaf to speculations and irregularities as it must always

base its decision on evidence. I therefore, find and hold that the Petitioner failed to discharge the burden of proof to the required standard of proof. I find that the Petitioner did not give evidence of probative value to enable this Court decide the Petition in his favour and grant the orders sought.”

29. In the instant Petition the Petitioners have not furnished evidence to prove their allegations. The Court is not even sure whether the process of acquisition has been completed. But is fortified by the fact that the County Government as trustee for the Community in respect of the acquired land shall be required to account any proceeds from the acquisition to the Community once, the Community land becomes registered under the Community Land Act. The Petitioners would be advised to pursue registration as a community under the **Community Land Act, 2016** to be able to pursue the Community interests.

30. In the premises, I find and hold that the Petitioners have not proved the Constitutional violations alleged and are not entitled to the reliefs they pray for.

31. The Petition lacks merit and is dismissed. The parties shall bear their own costs of the Petition.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT
KERUGOYA THIS 13TH DAY OF NOVEMBER 2025.**

J. M. MUTUNGI

ELC - JUDGE