



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**ELC PETITION NO. E004 OF 2025**

**ASHOK LABSHANKER DOSHI .....1<sup>ST</sup>**

**PETITIONER**

**MOHAMED HUSSEIN JAFFER .....2<sup>ND</sup>**

**PETITIONER**

**-VERSUS-**

**KENYA NATIONAL HIGHWAY AUTHORITY ..... 1<sup>ST</sup>**

**RESPONDENT**

**CHINA COMMUNICATION CONSTRUCTION**

**COMPANY..... 2<sup>ND</sup>**

**RESPONDENT**

**NATIONAL LAND COMMISSION .....3<sup>RD</sup>**

**RESPONDENT**

**JUDGMENT**

1. The Petitioners submitted this petition dated February 11, 2025, against the Respondents, requesting the following reliefs:

***a) A declaration is hereby issued that the Petitioners are the legal and valid owners of the suit properties known as Land Reference Number 17439 and Land Reference Number 16142, situated in Mariakani in Kilifi County.***

***b) A declaration is hereby issued that the Respondents have breached and violated the Petitioners' constitutional rights.***

***c) An order of mandatory injunction and/or mandamus is hereby issued to compel the 1st and 3rd Respondents to pay just and full compensation to the Petitioners for all or part of the properties known as Land Reference Number 17439 and Land Reference Number 16142 located in Mariakani, Kilifi County, as may be necessary for the Respondents to carry out expansion of the Nairobi-Mombasa Highway. The compensation should be paid within sixty (60) days from the date of this order.***

***d) An order of prohibition and permanent injunction is hereby issued, prohibiting and restraining the Respondents—whether by themselves, agents, employees, contractors, servants, or anyone acting under their authority or instruction—from accessing, entering onto, developing,***

***undertaking any construction works, taking possession of, owning, or in any way interfering with the Petitioners' properties known as Land Reference Number 17439 and Land Reference Number 16142, located in Mariakani, Kilifi County, until full and just compensation is paid to the Petitioner.***

***e) In default of paying compensation to the Petitioners as ordered herein, an order of mandatory injunction and/or mandamus is hereby issued, compelling the Respondents to reconstruct the perimeter wall around the properties known as Land Reference Number 17439 and Land Reference Number 16142 and to restore the properties to their previous state within 30 days. If they fail to do so, the Petitioners may undertake the restoration themselves, and judgment is hereby entered in favor of the Petitioners and against the Respondents jointly and severally for any costs incurred in restoring the properties to their former condition.***

***f) If the Respondents do not pay compensation to the Petitioners and the suit properties are restored to their former status, an order of prohibition and permanent injunction is hereby issued. This order prohibits and restrains the Respondents, whether by themselves, agents,***

***employees, contractors, servants, or anyone acting under their authority or instruction, from accessing, entering onto, developing, undertaking any construction works, taking possession of, owning, or otherwise interfering with the Petitioners' properties known as Land Reference Number 17439 and Land Reference Number 16142, situated in Mariakani, Kilifi County.***

***g) If order (6) above comes into effect, the Officer Commanding Station (OCS) at Mariakani Police Station is hereby instructed to ensure compliance and maintain law and order.***

***h) Costs of this Petition shall be paid by the Respondents jointly and severally.***

***i) Any further relief or orders that this Honourable Court shall deem just and fit to grant***

2. The petition is defended through a Replying Affidavit dated April 9, 2025, sworn by Eliud Munene on behalf of the 1st Respondent, and through a Replying Affidavit sworn on February 25, 2025, by Samuel Ndiritu Maina, on behalf of the 3rd Respondent. There was no appearance for the 2nd Respondent.

- 3.** The Court directed that the Petition be disposed of through written submissions and the affidavits filed.
- 4.** The Petitioners' case is that they are the registered owners of two adjoining properties, L.R. Nos. 17439 and 16142, in Mariakani, Kilifi County (the suit properties), which share a common concrete perimeter wall. The properties border the Nairobi-Mombasa highway, which the government is expanding. On October 22, 2024, officers of the 1st Respondent ordered the demolition of the perimeter wall. The Petitioners issued a demand letter on October 25, 2024, protesting this action. Despite this, the 1st and 2nd Respondents demolished the wall on January 10, 2025, and have since begun construction work. The Petitioners argue that these actions amount to compulsory acquisition without compensation and violate procedures outlined in sections 107 and 111(1) of the Land Act. They also claim that the Respondents' actions breached their constitutional rights under Articles 40(1) and (3) and 60(1)(b) of the Constitution of Kenya.
- 5.** The 1st Respondent challenged the Petitioners' claims to the suit property. It stated that LR 16142 was shown in Survey Plan

FR No. 216/153 (exhibited as annexure EM-1) as encroaching approximately 7.5 meters into the Mombasa-Mariakani (A8) road reserve. It also indicated that LR No. 17439 was untraceable in the Director of Surveys' official records and that its exact location is unknown. Instead, they identified Survey Plan FR No. 444/73 for LR No. 27249 (exhibited as annexure EM-2), which is located within the same disputed area. According to the overlay drawing shown as annexure EM-3, parcels 16142 and 27249 appear to overlap. The boundary shown on FR 444/73 aligns correctly with respect to the road reserve, whereas 16142 encroaches on the road reserve, as previously stated.

6. The 1st Respondent stated that the suit properties were recommended for cancellation according to a Kenya Gazette Notice No. 6862 dated July 17, 2017 (exhibited as annexure EM-5). Later, the 3rd Respondent directed, through a letter referenced NLC/LEGAL/DET/6/10/19 and dated May 5, 2022 (annexure EM-6), that the suit properties be handed over to Ms. Mwangeka and other parties. In a letter dated April 9, 2024 (annexure EM-7), the Chief Land Registrar instructed the

District Land Registrar in Mombasa to cancel the Petitioners' titles.

- 7.** The 1st Respondent argued that it was not responsible for preparing compensation awards and that it depended on information provided by the 3rd Respondent.
- 8.** The 3rd Respondent echoed the 1st Respondent's averments. It stated that, in carrying out its mandate under section 14 of the NLC Act, it conducted a review of grants and dispositions in Kilifi, Mombasa, and Kwale County. It arrived at a determination (annexed as SNM-1) and published its recommendations in Gazette Notice 6862 (SNM -2). The 3rd Respondent averred that the Petitioners were aware of the cancellation of their titles concerning the suit properties and that the orders sought were moot.
- 9.** Based on the materials presented before me, the issues I frame for this Court's determination are whether this court has jurisdiction to hear the Petition; whether the Petitioners have demonstrated a violation of constitutional rights under Articles 40 and 60 of the Constitution; whether the Petitioners are

entitled to the reliefs sought; and who should bear the costs of the petition.

### **Analysis and Determination**

**10.** Regarding the issue of jurisdiction, counsel for the 1st Respondent contended that, pursuant to Article 67(2)(e) of the Constitution, the National Land Commission (“NLC”) possesses the authority to initiate and supervise the process of compulsory acquisition. This authority is exercised in accordance with Part VIII of the Land Act, 2012, which sets out the procedures for inquiries, determinations, and awards in cases of compulsory acquisition. Section 133C (1) of the Land Act expressly states, *“A person dissatisfied with the decision of the Commission under this Part may apply to the Land Acquisition Tribunal for review of the decision.”*

**11.** He asserts that the jurisdiction of the Land Acquisition Tribunal is only triggered once the Commission makes a decision. Until the Commission finishes its statutory inquiry and issues a determination regarding the land, the Tribunal cannot assume jurisdiction. As a result, the High Court (or this Court sitting as the Environment and Land Court) is also prevented

from hearing the Petition without such a determination. Counsel, therefore, states that it has not been shown that the NLC has made any decision declaring the Petitioners' land subject to compulsory acquisition or that they invoked the statutory review process before the Tribunal. Consequently, the Petitioners' attempt to invoke this Court's jurisdiction is premature, misguided, and violates the doctrine of exhaustion. To highlight the importance of this doctrine, counsel referenced the cases of **Speaker of the National Assembly v James Njenga Karume [1992] eKLR; Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR; R v National Land Commission ex parte Krystalline Salt Ltd [2015] eKLR; and Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**, concerning jurisdiction.

**12.** On its part, the 3rd Respondent argued that the Land Acquisition Tribunal has original jurisdiction over disputes related to compulsory acquisition, including issues of compensation and procedures, as outlined under section 133C (6) of the Land Act, 2012. Counsel referenced the case of **PN**

**Mashru Limited v Kenya National Highways Authority & another (Environment & Land Petition E002 of 2025) [2025] KEELC 3515 (KLR) (30 April 2025) (Ruling)** and emphasized Article 159 of the Constitution, which requires a party such as the Petitioners to approach the Tribunal before seeking intervention from this Court.

**13.**The Petitioners submitted that the issue of jurisdiction was not properly pleaded in the responses filed or through a preliminary objection; therefore, the court should not rule on it. They argued that the Tribunal cannot decide on the violation of constitutional rights raised in this petition because its jurisdiction, as outlined under Section 133 (C) (1), is limited to hearing and determining appeals from the NLC regarding the process of compulsory acquisition. The Petitioners pointed out that the Tribunal's jurisdiction would only arise if the NLC decided on compulsory acquisition, which did not occur in this case. They further stated that this court, under section 13 of the ELC Act, has jurisdiction to hear and determine this petition. Additionally, they emphasized that the remedies sought can only be granted by this court, not by the Tribunal. They also noted that the PN

Mashru case cited by the Respondents is distinguishable from the facts of this petition because, in that case, a proper preliminary objection was filed; an award of Kshs.2,565, 593/- was issued by the NLC, which PN Mashru rejected, and that decision was appealable to the Tribunal.

**14.** Jurisdiction is crucial, and without it, a court of law cannot proceed with a case. It must halt proceedings. (See **Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd** [supra]) That’s why an objection to the court’s jurisdiction should be raised as early as possible. In this case, despite the objection being raised late in the submissions, both parties argued their points vigorously. It is therefore important that I address it now.

**15.** Granted, one of the constitutional mandates of the NLC is to initiate compulsory acquisition, and the statutory role of the Land Acquisition Tribunal is to review the NLC's decisions under Section 133C (1) of the Land Act. While the doctrine of exhaustion of remedies, as aptly explained by the 1st Respondent, generally applies, requiring parties to utilize available specialized mechanisms, this doctrine is not absolute.

When, as in this case, the petition alleges clear violations of fundamental constitutional rights, and given the nature of the reliefs sought, the Tribunal's limited statutory jurisdiction cannot be invoked. Importantly, there was no evidence of a final award made by the 3rd Respondent to the Petitioners that would justify an appeal to the Tribunal.

**16.** Section 13 of the Environment and Land Court Act states that:

***13. Jurisdiction of the Court***

***(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.***

***(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—***

***(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;***

***(b) relating to compulsory acquisition of land;***

***(c)relating to land administration and management;***  
***(d)relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and***  
***(e)any other dispute relating to environment and land.***

***(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.***

***(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.***

***(5) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including—(a)interim or permanent preservation orders including injunctions;***

***(b)prerogative orders;***

***(c)award of damages;***

***(d)compensation;***

***(e) specific performance;***

***(f) restitution;***

***(g) declaration; or***

***(h) costs.***

**17.** Therefore, by virtue of section 13 above, this Court possesses the inherent and original jurisdiction to interpret the Constitution and decide on the alleged constitutional violations, thereby dismissing the exhaustion plea. I conclude that the Petition is properly before this Court.

**18.** Regarding whether the Petitioners have proven a violation of constitutional rights under Articles 40 and 60 of the Constitution, the Petitioners argued that the 3rd Respondent failed in its duty by allowing the 1st and 2nd Respondents to unlawfully take over the suit properties. They argued that the Gazette Notice cited by the Respondents to challenge their ownership was invalidated in Malindi ELC JR Application No. 16 of 2016 on July 30, 2019, in which the 3rd Respondent actively participated. The judgment was included in the Petitioners' supplementary affidavit as AD-1. They further stated that, after the registrar's actions based on the invalidated gazette notice,

the court in the JR Application ordered the cancellation of the new titles issued to the interested parties. That ruling was included in the affidavit as AD 3.

**19.** The Petitioners argued that the claim that LR 16142 encroached into the Mombasa-Mariakani road reserve by 7.5 meters was dismissed by surveyor Edward Kiguru, who conducted the first survey in November 1991, as noted in the report dated 10 June 2025, attached as annexure AD 4. They stated that the recent expansion caused the overlapping issue and that the 7.5-meter strip encroaches on Plot 16142. They also referred to a letter dated 25 May 2012 from the Director of Surveys (attached as annexure AD 8), which confirmed that LR 16142 was the first in time, having been surveyed in 1991, while LR 27249 was surveyed in 2004. They recommended canceling LR 27249, arguing that the latter survey overlaps the former. To the Petitioners, the fact that the 1st Respondent could not locate records for LR 17439 did not mean that the records or the land did not exist.

**20.** They argued that their titles have never been cancelled and the Respondents' actions violated their rights to property and to own land under Articles 40 and 60.

**21.** On its part, the 1st Respondent argued that Article 40(6) explicitly states that property rights do not extend to land acquired unlawfully. Since the disputed sections are within a road reserve, the Petitioners' rights are legally extinguished. Article 24 of the Constitution allows for limitations of rights when necessary to protect public interest. The expansion of the Nairobi-Mombasa Highway is a project of great national importance, affecting the right to movement, trade, and safety of millions of Kenyans. To the 1st Respondent, the Petitioners have not shown any actual violation of their rights. Instead, their claim appears to be an effort to defend the unlawful occupation of public land.

**22.** The 1st Respondent argued that the decision by the 3rd Respondent to cancel the Petitioners' titles was binding unless overturned on appeal or review. They referenced the case of **Republic v National Land Commission & Another Ex parte Farmers Choice Limited [2020] eKLR**. According to

the 1st Respondent, the gazette notice and subsequent cancellation of the Petitioners' titles indicated that the Petitioners had no right to protection under Articles 40 and 60, as they claimed. They supported this argument with the cases of **Kenya Hotel Properties Limited v Willisden Investments Limited & 4 Others [2013] eKLR**; and **Funzi Island Development Ltd & 2 Others v. County Council of Kwale & 2 Others [2014] eKLR**.

**23.** Article 40(1) of the Constitution of Kenya states that:

***“(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-***

***(a) of any description; and***

***(b) in any part of Kenya.***

***(2) Parliament shall not enact a law that permits the State or any person--***

***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***

***(b) to limit, or in any way restrict the enjoyment of any***

***right under this Article on the basis of any of the grounds specified or contemplated in Article 27 (4).***

***(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.”***

**24. Article 60 (1) (b) states that:**

***“Land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable, and in accordance with the following principles—***

**(a).....;**

**(b)security of land rights.**

**25.** The 1st and 3rd Respondents' contest in this Petition, as I understand it, is that the Petitioners have no interest in the suit properties, as their grants were canceled following the Gazette Notice of July 17, 2017.

**26.** I have reviewed the judgment in **JR Application No. 16 of 2016**; it is clear that the dispute was related to LR 17439. The Applicant sought an order of *certiorari* to quash a decision of the NLC, detailed in the gazette notice, directing the Commissioner of Land to revoke the applicant's title over LR 17439 located in Mariakani. That decision concerned only LR 17439 and not the entire gazette notice. The Petitioners have not shown that the court in the JR application invalidated the whole gazette notice No. 6862. Therefore, I am convinced that the Petitioners' ownership of LR 17439 was already established and confirmed by the Court.

**27.** Regarding LR 16142, the situation is more complex. While the gazette notice suggested cancellation, the Petitioners provided evidence, including the surveyor's report dated June

10, 2025 (annexure AD-4) and the Director of Surveys' letter dated May 25, 2012 (annexure AD-8), casting doubt on the Respondents' claim of encroachment. The earlier 1991 survey seems to support the Petitioners' claim that LR 16142 was first in time and accurately placed relative to the existing road reserve at that time. The Director of Surveys' letter (AD-8) states that the second survey conducted in 2005, which created LR 27249, overlaps with the 1991 survey. As a result, the Director of Surveys instructed that the latter survey be canceled if not registered, or that the lease documents be recalled for cancellation.

**28.** Significantly, the Respondents have not been honest in their claims regarding Gazette Notice No. 6862, which also recommended the cancellation of LR No. 27249—the same parcel they now rely on to challenge the Petitioners' proprietary interest. No explanation was provided for why the recommendation to cancel LR 27249 was ignored, while the recommendation affecting LR 16142 was selectively referenced.

**29.** Be that as it may, it cannot be wished away that the Respondents raised a contest founded on allegations of boundary encroachment, overlap with LR No. 27249, survey inconsistencies, and recommendation of cancellation of title by NLC. In my view, these issues cannot be conclusively resolved based on affidavit evidence alone and require a complete examination through *viva voce* testimony, cross-examination of expert witnesses, production of survey records, and possibly a court-sanctioned boundary ascertainment.

**30.** A constitutional petition, by its very nature, is unsuited for such granular factual determination. Consequently, while the Court may assess whether the Petitioners held a facially valid and uncanceled title for purposes of analyzing alleged constitutional violations, the Court is not persuaded that it can, within this procedural framework, grant a definitive declaration of ownership in relation to LR No. 16142. The parties retain the liberty to ventilate the issue of ownership in the appropriate civil forum should they so wish.

**31.** The law is clear that while the State may acquire private property for public purposes, such acquisition must strictly

adhere to constitutional and statutory safeguards. In **Kenya Ports Authority v The National Lands Commission & 4 others [2023] KECA 870 (KLR)**, the Court of Appeal detailed the process for compulsory acquisition as follows:

***“42. The power of the state to acquire land is a creation of Statute.***

***The statutory framework for compulsory acquisition is founded under Part VIII of the Land Act, No 6 of 2012.***

***Section 107 of the Land Act provides:***

***Preliminary notice***

***1. Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.***

***2. The Commission shall prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.***

***3....***

***4. If the Commission establishes that the request under subsection (1) meets the requirements prescribed under***

***subsection (2) and Article 40(3) of the Constitution, the Commission shall—***

***a. cause the affected land to be mapped out and valued by the Commission using the valuation criteria set out under this Act; and***

***b. establish that the acquiring authority has identified the number and maintains a register of persons in actual occupation of the land, confirming for each such occupation how much time they have been in uninterrupted occupation or ownership of interest in the land before the date of the request for acquisition of the land, and the improvements thereon.***

***5. Upon approval of a request under subsection (1), the Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land.***

***43. The Lands Act Part VIII is very elaborate on the process that should be undertaken in acquiring land. It is clear from Section 107 of the Lands Act that there is a preliminary process which has two stages. The National Land Commission, the 2nd Respondent herein [hereinafter NLC], is ordinarily prompted by the national***

***or county government through the Cabinet Secretary or County Executive member, respectively... The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. The NLC needed to be satisfied in these respects by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property. Under Sections 107 and 110 of the Land Act, the NLC must then publish in the gazette a notice of the intention to acquire the land. The notice is also delivered to the Registrar as well as every person who appears to have an interest in the land...***

***46. Section 112 of the Land Act requires the involvement of the owner of the land considered for acquisition, and the discussion or inquiry carried out will include receipt of a claim for compensation by the landowner. On completion of the inquiry, the NLC is required to make a separate award of compensation for every person determined to be interested in the land and then offers compensation..."***

**32.** In this case, it is undisputed that the 1st and 2nd Respondents entered the suit properties, demolished the perimeter wall, and started construction without initiating the

mandatory acquisition process under Part VIII of the Land Act. There was no notice of intent to acquire, no inquiry, no participation by the Petitioners, no valuation, no award, and no compensation. At the very least, no such evidence was presented before this Court. Under these circumstances, I find that the Respondents' actions or inactions amount to a deprivation of property contrary to Article 40(3) and Article 60(1)(b) of the Constitution. They must compensate the Petitioners for their property, LR 17439.

**33.** In view of this Court's findings and for the reasons outlined in this judgment, the following final orders are hereby issued:

- a) A declaration is hereby issued that the Petitioners are the lawful and valid owners of LR No. 17439; regarding LR No. 16142, the Court declines to issue a definitive declaration of ownership.***
- b) A declaration is hereby issued that the Respondents have breached and violated the Petitioners' constitutional right under Article 40 (3) and 60 (1) (b) of the Constitution.***
- c) An order of mandamus is hereby issued to compel the 1st and 3rd Respondents to pay just and full compensation to the Petitioners for the whole or portions of the suit***

*property known as Land Reference Number 17439, situated in Mariakani in Kilifi County, as required by the Respondents to undertake expansion of the Nairobi-Mombasa Highway. The compensation should be paid within sixty (60) days from the date of this order.*

*d) Costs of this Petition are awarded to the Petitioners.*

*e) Liberty to apply.*

**Dated, signed, and delivered virtually at Malindi on November 26, 2025.**

**E. K. MAKORI**

**JUDGE**

**In the Presence of:**

**Mr. Makadina for the Petitioners,**

**Mr. Lorot for the 1st Respondent, and**

**Mr. Kiilu for the 3rd Respondent**

**Happy: Court Assistant**