

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ELC PETITION NO E004 OF 2024.

IN THE MATTER OF ARTICLES 40 (1),(2),(3),(4) AND ARTICLE 259
OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 75 (1) AND (2) OF THE REPEALED
CONSTITUTION AND IN THE MATTER OF THE LAND ACQUISITION
ACT, CAP 295 (NOW REPEALED)

AND

IN THE MATTER OF THE LAND ACT 2012, ACT NO. 6 OF 2012 AND
IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF SECTION 23 OF THE INTERPRETATION AND
GENERAL PROVISIONS ACT, CAP 2

AND

IN THE MATTER OF THE COMPULSORY ACQUISITION OF LAND
MEASURED 1.5 ACRES UNDER THE LAND REGISTRATION (SPECIAL
AREAS) ORDINANCE 1959 (NO. 27 OF 1959) ADJUDICATION AREA
REGISTERED AS LAND PARCEL NO. KIMILILI/KIMILILI/875 IN
KIMILILI TRADING CENTRE.

BETWEEN

DAVID WAFULA KIRIMOJO (Suing as the legal representative of the
estate of PETER DANASTAN KIRIMOJO(deceased) who inherited
the same from ANDREA KIRIMOJO WAKIMOKO(deceased)
.....PETITIONER

=VERSUS=

THE COUNTY GOVERNMENT OF BUNGOMA.....1ST
RESPONDENT

THE COUNTY LAND REGISTRAR- BUNGOMA.....2ND
RESPONDENT

THE CABINET SECRETARY MINISTRY OF LANDS.....3RD
RESPONDENT
THE HON. ATTORNEY GENERAL.....4TH
RESPONDENT

AND
THE NATIONAL LAND COMMISSION..INTERESTED
PARTY/RESPONDENT

JUDGMENT.

1. Through the petition dated 26.07/2024, the petitioner sought several reliefs namely;

a) A declaration that the proprietary interest in the 1.5 acres of LAND included in the Registration of land parcel No. Kimilili/Kimilili/875 vests in the Estate of Peter Danastan Kirimojo (Deceased) having inherited the said land from the late Andrea Kirimojo Wakimoko (Deceased).

b) A declaration that the compulsory acquisition of the land measured 1.5 acres included in the registration of the land parcel no. Kimilili/Kimilili/875 without the consent and / or compensation violated section 75 of the independence constitution and article 40 of the constitution of Kenya 2010.

c) A declaration that the Refusal of the 2nd respondent to acknowledge the Land Control Board consent to sub-division of land parcel no. Kimilili/Kimilili/875 and the Land Control Board consent to transfer the 1.5 acres to the Petitioner and sign the mutation submitted to the said designated land registrar's

office approval was unlawful and therefore ordered to effect the initiation of sub-division, transfer and issue of the title deed of 1.5 acres from the land Parcel No. KIMILILI/KIMILILI/875 and register the said 1.5 acres in the names of the petitioner David Wafula Kirimojo and / or in the alternative compensate the Petitioner at the current market price equivalent to 1.5 acres within the municipality specifications.

- d) An order of mandamus to compel the 1st, 2nd, 3rd and 4th respondents to jointly and/ or severally pay the Estate of Peter Danastan Kirimojo (Deceased) mesne profits for the loss of user for the 1.5 acres compulsorily acquired and included in the Registration of land parcel No. KIMILILI/KIMILILI/875.**
- e) A mandatory injunction directing the 1st Respondent and any other person or Entity who might have encroached into the said land to immediately vacate and hand over vacant possession of the claimed 1.5 acres in the land parcel No. KIMILILI/KIMILILI/875 which the petitioner is entitled to its ownership as vested in the estate of Peter Danastan Kirimojo deceased who inherited the same from the late Andrea Kirimojo Wakimoko (Deceased) or pay the estate the equivalent market price failure upon which they be evicted after the expiry of a time to**

be specified, under the supervision of the officer commanding (OCS) Kimilili police station.

f) A permanent injunction restraining the 1st Respondent whether by itself or through its employees through or any other person or entity claiming through it from whatsoever interfering with the petitioner's and the estate of peter Danastan Kirimojo's quiet use, occupation and ownership of the 1.5 acres which the petitioner is entitled to its ownership on the land parcel no. Kimilili/Kimilili/875 together with the developments thereon.

2. The petition is supported by the affidavit of David Wafula Kimoronjo sworn on an even date. According to the petitioner, Andera Kirimonjo Wakimoko (dcd) who died on 27/05/1989 was the first owner of 1.5acres situate in Kimilili Town vide an agreement dated 28/07/1940 having purchased it from one Romano A. Mutanga. That the said land was compulsorily acquired amongst other parcels and registered as land parcel no. Kimilili/Kimilili/875. That the said Andera Kirimonjo Wakimoko wrote a letter dated 17/11/1956 protesting the acquisition but nonetheless the acquisition proceeded. That he died pursuing the land and his administrator the said Peter Danastan Kimoronjo also died pursuing the said land. That the defunct Bungoma County Council authorized the subdivision of land parcel no. Kimilili/Kimilili/875 to carve out the said 1.5acres which action was protested by the 2nd Respondent.

3. The Petitioner claimed that the listed Constitutional rights were breached when the 2nd Respondent declined to acknowledge the approval of the consent to sub-divide and transfer the 1.5acres.

4. The 2nd, 3rd and 4th Respondents filed grounds of opposition dated 08/03/2025 wherein it was stated that the only rights that cannot be limited under the constitution are set out under Article 25 of the Constitution. That the right to property under Article 40 can be limited under sub-article 3. That Notices for the compulsory acquisition of land parcel no. Kimilili/Kimilili/875 were issued in accordance with Section 75(1) and (2) of the Repealed Constitution and Sections 3,4 and 6 of the Land Acquisition Act (Repealed). That awards to the respective parties were paid after inquiry hearings to full compensation. That the acquisition was necessitated by public interest which supersedes private interests of the Petitioners. That, the Petitioner has not demonstrated real danger so imminent, evident and true to deserve the Courts intervention and neither have the dispute resolution mechanisms provided for under Section 133C of the Land Act, 2012 been exhausted. It was argued that the Petition filed 66 years later is an afterthought and full of frivolous allegations which warrant a dismissal.

5. The petition proceeded by way of viva voce evidence.

6. The Petitioner adopted his affidavit in support of the petition sworn on 26/07/2024 as his evidence in chief and produced into evidence the annexed 25 documents. He testified that his grandfathers name was added to the list of land owner whose land was being acquired fraudulently as he had declined to surrender the land. During cross examination he testified that he had proof that his grandfather was the owner of the suit land although according to the green card produced, the first registered owner of the suit land was the County Council of Bungoma. It was his testimony that the letter of consent (MFI 17) did not indicate who the land was to be transferred to.

7. Partied thereafter took directions to file written submissions.

8. The Petitioner filed submissions dated 10/07/2025 where it was submitted that the acquisition of the said land was never for the purpose of public interest as the land is occupied by private individuals. your honour, from the aforesaid, the petitioner submits that the acquisition of the said land measured 1.5 acres in the land parcel No. Kimilili/Kimilili/875 as per the said land registration under special areas ordinance 1959(no. 27 of 1959) adjudication area Kimilili Trading centre and the refusal by the 2nd respondent to acknowledge the land control Board letter of consent for sub-division of the land parcel No.Kimilili/Kimilili/875 and the land control Board letter of consent to transfer 1.5 acres from the land parcel no. Kimilili/Kimilili/875 to the petitioner and the refusal of the 2nd respondent to sign the mutation submitted

for the said 2nd respondent's approval was in total violation and breach of the constitutional provisions under section 75 of the repealed constitution and the constitution of Kenya 2010 article 40(1) (2) (3) (4) and article 259 (1) (a) (b), (c) & (d). Reliance was placed in the case of **Bungoma Environment and Land Court ELC Petition No. E004 of 2021 Abdallah Ali Were & Another =Vs= The County Government of Bungoma & 4 Others.**

9. The 2nd, 3rd and 4th Respondents filed submissions dated 10/09/2025 where they submitted on three issues. First, it was submitted that the current suit which is a civil claim disguised as a petition herein is time barred having been instituted 66 years after the alleged acquisition by the government as indicated in the green card for land parcel no. Kimilili/Kimilili/875 produced by the petitioner. Reliance was placed in the case of **Janmohammed (Sc) Suing as The Executrix Of The Estate Of The Late He Daniel Toroitich Arap Moi & Another V Lagat & 4 Others (Petition 17 (E021) & 2023 & 24 [E027] Of 202 (Consolidated) [2024] Kesc 39 (Klr) (2 August 2024) Judgement.** It was further submitted that The petitioner has not established any legal right over land comprised in land parcel number Kimilili/Kimilili/875 so as to be protected by the provisions of Article 40 of the Constitution of Kenya 2010. The Court was invited to look at the decision in **Joseph Letunya & 21 Others -Vs- Attorney General & 5 Others [2014] eKLR.** Lastly, they urged the court to dismiss the petition with costs.

Analysis and determination.

10. Central to the dispute before me is an allegation of violation of the Petitioner's rights specifically Articles 40, 259 and 75 of the Constitution. It is the Petitioner's case that the impugned compulsory acquisition was not conducted properly and that the refusal by the 2nd Respondent to approve the mutation submitted for the sub-division of land parcel No.Kimilili/Kimilili/875 to hive out the claimed land breached their constitutional rights.

11. Firstly, this court must consider whether it has the jurisdiction to determine the current claim wherein the 2nd, 3rd and 4th Respondents have contested that the first port of call ought to have been the Land Acquisition Tribunal. This is a Constitutional petition filed on the premise that certain provisions of the Constitution were violated. The Petitioner alleges infringement of fundamental rights and freedoms, and therefore invokes this Court's jurisdiction under Articles 22 and 23 of the Constitution.

12. To be more precise, the Petitioner alleges that his grandfathers land measuring 1.5 acres was compulsorily acquired by the County Council of Bungoma and handed over to the Kimilili Municipal Council in 1958 through fraudulent means i.e without the registered owners consent and payment of any compensation. It was further alleged that a consent to sub-

divide and revert the said portion to the Petitioner was issued but the 2nd Respondent has refused to approve the mutation form for the said sub-division. It is alleged that as a result the Petitioners right to protection of property and that the state organs sued have not acted properly in their capacity as state officers.

13. The Land Act establishes the Land Acquisition Tribunal where it states as follows in Section 133C in regard to the Tribunal's jurisdiction: Jurisdiction of the Tribunal

- 1. The Tribunal has jurisdiction to hear and determine appeals from the decision of the Commission in matters relating to the process of compulsory acquisition of land.**
- 2. A person dissatisfied with the decision of the Commission may, within thirty days, apply to the Tribunal in the prescribed manner.**
- 3. Within sixty days after the filing of an application under this Part, the Tribunal shall hear and determine the application.**
- 4. Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.**
- 5. If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have**

been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.

6. **Despite the provisions of sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal.**
7. **Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.**
8. **The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of the Constitution, using the framework set out under the Fair Administrative Act or any other law. Emphasis added.**

24. Section 133C (8) mandates the tribunal to hear and determine complaints arising under articles 23(2) and 47(3) of the Constitution of Kenya 2010, in matters relating to compulsory acquisition of land. As was stated in **Tom Mwachiti Mwero (Suing as a representative of the Estate of Fredrick Johnson Mwachiti (Deceased) vs. Kenya Railways Corporation and National land Commission (Ruling):** The language used in the Land Act is a “matter relating to”

compulsory acquisition of land in relation to the Tribunal's jurisdiction under Sections 133C (6) and (8). The Oxford Learner's Dictionary (online edition) defines "related" as "connected with something." Therefore, the Tribunal's jurisdiction, extends to any matter that is connected to the process of compulsory acquisition. In my analysis of the claim before this court, the complaint before this court is one such case.

14. There is no evidence that the Petitioner before approaching this court made a complaint before the Land Acquisition Tribunal, have it heard and determined. It is impermissible for a litigant to found a cause of action on the Constitution when the same can be founded on legislation or other established legal principles. It is trite law that, a party is required to exhaust alternative dispute resolution mechanisms before approaching the Court. The Court of Appeal in **Geoffrey Muthinja Kabiru & 2 Others - vs - Samuel Munga Henry & 1756 Others [2015] eKLR** observed as follows;

"It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews ... The exhaustion doctrine is a sound one and serves the purpose of ensuring that there is a 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.”

15. It is therefore improper in law for the Petitioner to invoke this Court’s jurisdiction on alleged constitutional violations when the relevant statute provides an appropriate mechanism for resolving the dispute, which the Petitioner should have pursued in the first instance.

16. In the end, I find that the Petition before this court is premature on the basis of the doctrine of Constitutional avoidance and exhaustion of remedies. I therefore proceed to strike out this petition with costs to the 2nd, 3rd and 4th Respondent.

17. Orders accordingly.

DATED, SIGNED and DELIVERED at BUNGOMA this 27th day of November, 2025.

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HON.E.C CHERONO
ELC JUDGE

In the presence of;

1. Mr. Tarus for the 2nd, 3rd and 4th Respondents.

2. Petitioner-present.

3. Bett C/A.