



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ELC PETITION NO. 11 OF 2020

**IN THE MATTER OF ARTICLES: 10, 40, 43, 47, 60 AND 67 OF
THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: THE CONSTITUTION OF KENYA
(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)
PRACTICE AND PROCEDURE RULES, 2013**

AND

**IN THE MATTER OF: COMPULSORY ACQUISITION OF
PRIVATE LAND BY A PUBLIC ENTITY**

AND

**IN THE MATTER OF: IN THE MATTER OF PART VIII OF THE
LAND ACT**

BETWEEN

MARY NDUKU KISANGI.....
.....PETITIONER

AND

MEMBER OF COUNTY ASSEMBLY

**MLOLONGO SYOKIMAU WARD.....1ST
RESPONDENT**

**THE COUNTY GOVERNMENT OF MACHAKOS.....2ND
RESPONDENT**

AND

**THE NATIONAL LAND COMMISSION.....
INTERESTED PARTY**

JUDGMENT

Introduction

1. This matter was originally scheduled for judgment on 20/05/2025. However, the court found it necessary to issue a ruling instead, directing the parties to submit a valuation report. The petitioner complied by filing one on 23/10/2025, which then allowed the court to proceed with its judgment in this case.
2. Apart from the petitioner, all other parties involved in these proceedings, including the interested party (IP), are public persons. The 1st respondent is a Member of the County Assembly of Machakos, representing Syokimau Mlolongo Ward, with their office established by **Article 177** of the **Constitution of Kenya (“Constitution”)**. The 2nd respondent is a County Government, created under **Article**

176 of the same **Constitution**. The IP is a constitutional commission that is established under **Article 67** and brought into operation by the **National Land Commission Act (NLC Act)**. It has the authority to handle the mandatory acquisition of private land for public purposes.

3. In the undated amended constitutional petition filed on 1/07/2024, the petitioner challenges the respondents' unlawful acquisition of her private land, identified as **title no. Athi River/Athi River Block 18/101 ("suit property")**, and their initiation of development activities on it without her consent or adherence to the due process of law.
4. The title document for the suit property was obtained on 19/06/2023, during ongoing proceedings. Before this registration, the petitioner, through her late husband's estate, Sammy Kisangi Mutie (Sammy), held a certificate of ownership for plot no. 135(406) from Mavoko Land Development Co. Despite service of the petition dated 21/05/2020 and the amended petition on all parties, none of them responded, except the 2nd respondent, who filed a notice to act in person dated 20/09/2022. Thereafter, the matter was slated for hearing by written submissions.

Petitioner's case

5. In the amended petition, the petitioner seeks the following reliefs from this court:

- a) A declaration that the respondents' action of entry, acquisition and development of plot no. 135(406) Mavoko Land Development Limited, now ATHI RIVER/ATHI RIVER BLOCK18/101, contravenes Article 40, 67, 249 and 47 of the Constitution and Sections 107, 107A, 120 and 131 of the Land Act, thus illegal and void.**
- b) An order of permanent injunction restraining the respondents, their agents, servants or employees from entering into, being on, further developing, or in any way dealing in any manner whatsoever with Land Reference plot no 135(406) Mavoko Land Development Limited, now ATHI RIVER/ATHI RIVER BLOCK18/101.**
- c) An order that the respondents do compensate the petitioner for the violation of her rights.**
- d) An order that any acquisition of plot no 135(406) Mavoko Land Development Limited, now ATHI RIVER/ATHI RIVER BLOCK18/101, be done in accordance with the Constitution and the law.**
- e) An order that the respondents do pay the costs of this petition, plus interest thereon.**
- f) Any other relief that the honourable court may deem fit and just to grant.**

6. The petitioner's case is set out in the amended petition and the supporting affidavit she deposed on 3/06/2024. Briefly, she affirms that she was the legal administrator of Sammy's estate, and that in April 2020, the respondents unlawfully and without her consent entered the suit property and commenced development of ward offices thereon.
7. She contended that this action violated the legal tenets of the **Land Act** and the **Constitution**, and that all her efforts to demand the cessation of the illegal developments on the suit property were ignored. She expressed concern that the respondents' ongoing unlawful development on the suit property would extinguish her proprietary interest in it.

Parties' written submissions

8. As directed by the court, the petition is canvassed by the petitioner's written submissions, which her legal representatives, **M/s Chege & Sang Co. Advocates**, filed on 3/07/2024. By them, the following issues were delineated for adjudication: (a) whether the petitioner has demonstrated ownership of the suit property and compulsory acquisition by the respondents; and (b) whether the respondents' action of acquiring the suit property violated the law.
9. Consequently, upon identifying and considering the issues for determination, this court will, in its analysis and determination, consider the petitioner's arguments on the particular issue as contained in the submissions and also consider provisions of

the law and judicial precedents that were relied upon to advance the arguments.

Legal basis of the petition

10. The petition is expressed to have been brought under several constitutional provisions; however, of particular significance are the **Articles** of the **Constitution** alleged to have been violated, specifically **Articles 40** and **47**, which provide thus: -

Article 40

“(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.

(4)Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5)The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6)The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.”

Article 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.

(3)Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

- (a)provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***
- (b)promote efficient administration.***

11. Regarding the statutory basis of the petition, the petitioner has referenced **Part VIII** of the **Land Act**, which provides for the due process to be followed in the compulsory acquisition of private property by a public entity, which includes **Sections 107, 107A, 120, and 131** of this **Act**.

Issues for determination

12. Turning to the matter at hand, this court has carefully considered the pleadings, petitioner's submissions, provisions of law relied upon, and judicial precedents cited, and the issues that arise for determination are as follows:

a) Whether the petitioner proved her rights to property protected under Articles 40 and 47 of the Constitution have been violated by the respondents.

b) What orders should be made in relation to the petition, including an order as to costs?

Analysis and determination

13. The issues identified in the preceding paragraph as arising for determination shall all be handled together, as the outcome of issue (b) flows from the findings of issue (a).

14. On the 1st limb, the petitioner's main bone of contention is that the respondents had illegally acquired the suit property and commenced construction without her authorisation or

adherence to the due process of law. She contends that, in violation of **Article 40** of the **Constitution** on the right to property, the respondents unlawfully entered the suit property without her consent or the IP's participation, thus arbitrarily depriving her of the use and possession of the suit property. She maintains that these actions infringed upon **Article 47** of the **Constitution**, which guarantees the right to a fair hearing, as she was never given an opportunity to be heard before the respondents entered the suit property.

15. She informs the court that, in contravention of the provisions of **Part VIII** of the **Land Act** concerning the compulsory acquisition of private land, specifically **Sections 107, 107A, 120, and 131**, the activities conducted by the respondents regarding the suit property were executed without prior consultation with the IP, issuance of notices, valuation, or assessment, thereby usurping the powers and functions of the IP as outlined in **Articles 67 and 249** of the **Constitution**.

16. Turning to matters of evidence, it is a well-established principle that she who alleges must prove, and **Section 107** of the **Evidence Act** stipulates as follows;

“(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of

any fact it is said that the burden of proof lies on that person.’”

17. On evidentiary burdens, courts are generally guided by **Sections 107-109** of the **Evidence Act**. Notwithstanding that the alleged violation of constitutional rights has not been rebutted, the petitioner still bore the legal and evidential burden to establish her case to the court’s satisfaction. Furthermore, pursuant to **Section 107(1)** of the **Evidence Act**, the petitioner was responsible for substantiating her allegations, as such evidence was integral to her case. The burden of proof remains with the petitioner, even in the absence of a rebuttal from the respondents.

18. Guidance is also drawn from the Supreme Court of Kenya decision in **Attorney-General & 2 others v Ndi & 79 others; Dixon & 7 others (Amicus Curiae) [2022] KESC 8 (KLR)**, where the court stated in **paragraph 2030** as follows:

“Whether or not there was public participation is a matter of evidence. Affirmati non neganti incumbit probatio, the burden of proof always is upon him who affirms - not on him who denies. The burden was upon those who alleged that there was no public participation to prove that allegation.”

19. In the circumstances of this case and to substantiate her case, the petitioner presented a certificate of lease of the suit property, registered in her name; a map; a demand letter; the certificate of plot no. 135 (406), registered in Sammy's name; and a certificate of confirmation of grant over Sammy's estate, issued on 9/10/2017, whereby the suit property is to be registered in her name in trust for herself and her children. Furthermore, as evidence of illegal developments on the suit property, she provided copies of photographs depicting a building, on which the following names were clearly embossed:

***“MEMBER OF MACHAKOS COUNTY ASSEMBLY
MLOLONGO SYOKIMAU WARD OFFICE”***

20. Accordingly, upon review of this unchallenged evidence, this court is convinced that the petitioner has provided credible proof confirming her status as the registered owner of the suit property, upon which the respondents' building is situated. The petitioner has thus fulfilled the burden of proof in this matter. The petitioner's assertion that this structure was erected on the suit property, in clear contravention of the provisions of the **Constitution** and the **Land Act**, is uncontested.

21. Considering that the seizure of an individual's property without consent constitutes a significant infringement of his proprietary rights, **Article 40** of the **Constitution** outlines private land rights in relation to the doctrine of eminent

domain. In this context, this court needs to elucidate the procedures adopted in the acquisition of private property by public authorities.

22. **Article 40 (3)** shows that compliance with **Chapter V** of the **Constitution** and the public use requirements constitutes stringent limitations on the government's authority to expropriate private property. As argued by the petitioner's counsel, the legal framework for compulsory acquisition is comprehensively addressed in **Part VIII** of the **Land Act**. Pursuant to **Section 107** thereof, the IP is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive Member, respectively. The private land subject to acquisition herein, in this case the suit property, must be acquired for a public purpose or in the public interest, as stipulated by **Article 40(3)** of the **Constitution**.

23. Once it is confirmed that the land intended for acquisition complies with the criteria and guidelines stipulated in **Article 40(3)** of the **Constitution**, the IP proceeds to have the affected land mapped and appraised, and to determine whether the acquiring body has identified the interests of the occupying individuals, in this instance, the petitioner and/or her children.

24. Thereafter, under **Section 107 (5)** and upon approval of the acquisition, the IP is required to publish gazette notices outlining the purpose of the land's compulsory acquisition,

including its location, general description, and approximate area. In this case, no gazette notices were ever issued. Under **Section 108**, the IP may inspect the land and take all necessary steps to determine its suitability for the intended purpose.

25. **Section 109** stipulates that any damage resulting from such an entry is subject to compensation. In the present case, the respondents' entry did not comply with legal requirements, and the IP was not engaged; consequently, an assessment was evidently not conducted. As held in the decision **Patrick Musimba v National Land Commission, Kenya Railways Corporation, National Environment Management Authority, Attorney General & China Bridge and Construction Company [2016] KEHC 5956 (KLR)**, the foregoing process, including that envisaged under **Section 110**, constitutes the preliminary or pre-inquiry stage of the acquisition.

26. Following the preliminary stage, the subsequent phase is provided for in **Section 112**. During this stage, landowners and individuals with proprietary interests are typically directly involved to establish various interests and entitlements to compensation. Pursuant to **Section 112**, the gazette notice specified therein is disseminated to all landholders and those with interests in it and is typically done at least 15 days before the hearing. By it, the IP issues an inquiry date for hearings to be conducted. Of particular interest is **Section 112 (6)**, which

breathes life into **Article 47 (2)** of the **Constitution** on the right to a fair hearing if a person is likely to be adversely affected by administrative action, as expressed in the following terms: -

“The public body for whose purposes the land is being acquired, and every person interested in the land, is entitled to be heard, to produce evidence and to call and to question witnesses at an inquiry.”

27.As comprehensively outlined in the recent Court of Appeal decision of **Five Star Agencies Limited & another v National Land Commission & 2 others [2024] KECA 439 (KLR)**, at the conclusion of the compensation inquiry mandated by **Section 112**, the IP prepares the written award in accordance with **Section 113**. Subsequently, the IP delivers to each person it has determined to be interested in the land, a notice of the award along with an offer of compensation in accordance with **Section 114**. Following the notification of an award to all individuals identified as having an interest in the land, the IP is obliged, under **Section 115**, to promptly disburse the compensation stipulated in the award to the entitled parties.

28.Nevertheless, in situations where the entitled individual does not consent to accept the awarded sum, the IP may, at any given time, deposit the compensation amount into a

designated special compensation account maintained by the IP. If a portion of the land has been acquired pursuant to **Section 118**, the IP shall, as soon as practicable, commission a final survey of all acquired land and issue new title documents for each affected parcel.

29. **Section 120** presents a dual approach to acquiring possession of land by government, either following the issuance of an award as specified in **Section 115 (See Section 120(1))** or in cases of emergency (**See Section 120(2)**), after the lapse of fifteen days from the date of publication of the notice of intention to acquire as stipulated in **Section 107(5)**.

30. As provided in **Section 120 (3) and (4)**, the IP is required to inform the registered owner that it has taken possession of the land, and upon taking possession and payment of just compensation in full, the land shall vest in the national or county governments absolutely free from encumbrances.

31. Upon acquisition and in accordance with **Section 121**, the registered owner is obligated to surrender the title documents to the land registrar. Upon receipt, she is required either to cancel the title documents if the entire land contained therein has been acquired or only a portion of the land specified in the documents has been acquired, as applicable. In the absence of surrender, the land registrar shall cause an entry to be made in the register documenting the acquisition of the land.

32. In the present case, the respondents illegally and improperly seized possession of the suit property without adhering to the relevant constitutional or statutory provisions. In other words, they arbitrarily appropriated the suit property. The respondents' actions in unlawfully occupying private land are not unprecedented, and in similar circumstances, the Supreme Court, in **paragraph 27** of its judgment in **Attorney General v Zinj Limited [2021] KESC 23 (KLR)**, stated: -

***“The only way the Government could lawfully deprive the respondent of part or all of its property, was through a compulsory acquisition, in conformity with the provisions of article 40(3) of the Constitution, and the procedure stipulated in the Land Acquisition Act (now repealed) which was the applicable law at the time.*”**

33. In the circumstances of this case, as public bodies, the respondents were acutely aware that the petitioner privately owned the suit property. Furthermore, the respondents' silence despite being served with the petition and amended petition is indicative of their conduct. Additionally, there is no evidence that the respondents engaged the IP in the manner in which they entered into occupation of the suit property as legally mandated.

34. Suffice it to say, in the end, this agrees with the petitioner and finds that she has proved her case to the required standards. This court also finds that the respondents violated **Articles 40** and **47** of the **Constitution**. Further, it finds that they usurped the powers and functions of the IP, contrary to **Articles 67** and **249** of the **Constitution**. Lastly, it finds that, by taking possession of the suit property without lawful procedure, the respondents contravened **Part VIII** of the **Land Act**.

35. This leads us to the second aspect of this matter. The petitioners sought various remedies against the respondents. As previously stated, a valuation exercise was conducted as ordered by the court to determine the value of the suit property at Kshs. 2,750,000/- and the developments established therein by the respondents are valued at 3,800,000/-. In the interest of justice, while also bearing in mind the developments therein that serve the public, it is the considered view that the appropriate remedy would be compensation to the petitioner for the land's value, excluding developments. Additionally, she is entitled to damages for the violation of her rights under **Articles 40** and **47** of the **Constitution**. Ultimately, this court hereby grants the following final disposal orders: -

a. A declaration is hereby made that the respondents' action of entry, acquisition and development of plot no. 135(406) Mavoko Land

Development Limited, now ATHI RIVER/ATHI RIVER BLOCK18/101, contravenes Articles 40 and 47 of the Constitution and Sections 107, 107A, 120 and 131 of the Land Act.

- b. The respondents shall promptly pay the petitioner Kshs. 2,750,000/-being the value of the petitioner's plot no. 135(406) Mavoko Land Development Limited, now ATHI RIVER/ATHI RIVER BLOCK18/101 (exclusive of developments).***
- c. Damages of kshs. 2,000,000/- is awarded to the petitioner, payable by the respondents.***
- d. Upon compliance with orders (b) and (c) above by the respondents, the parties shall, within 6 months thereafter, transfer the suit property to the respondents or to such entity as shall be nominated by the respondents.***
- e. The petitioner is awarded costs, which the respondents shall bear.***

Judgment accordingly.

Delivered and Dated at Machakos this 24th day of February, 2026.

**HON. A. Y. KOROSS
JUDGE
24.02.2026**

**Judgment delivered virtually through Microsoft Teams
Video Conferencing Platform**

In the presence of;

Ms Kanja Court Assistant.

Mr. Chege Kamau for Petitioner.

Mr. Wangondu for Interested Party.

ORIGINAL