



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

CONSTITUTIONAL PETITION NO. 6A OF 2014

IN THE MATTER OF THE CONSTITUTION OF KENYA

ARTICLES 1(1), (3), 2(1), (5), 3(1), 10(1), 19, 20, 21(1), 23(1), (3)(a) (f), 24(1), 26(1), 35(1) (3), 40, 47(1), 48, 60(1), 159(1) (2)(a) (d) (e), 165(3) (b), 258(1) & 259(1) (3)

AND

IN THE MATTER OF VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS

AND

IN THE MATTER OF VIOLATION OF ARTICLES 40, 26(1), 60(1) & 67(1) OF THE CONSTITUTION & SECTIONS 107(1), 110(1), 112, 113, 114, 115 OF THE LAND ACT AND SECTIONS 28 OF THE LAND REGISTRATION ACT 2012

BONIFACE GICHIRA GACHIRIGUA.....1ST PETITIONER

MUHIA GACHOCHO.....2ND PETITIONER

JOHNSON GITARI.....3RD PETITIONER

JAMES MWANIKI NJUKI.....4TH PETITIONER

MICHAEL MUTHEE.....5TH PETITIONER

JOHNSON KARIUKI NYAMU.....6TH PETITIONER

LEWIS GICHIRA MURIITHI.....7TH PETITIONER

JANET WANGECHI.....8TH PETITIONER

MERCY WAIRIMU KARAGANIA.....9TH PETITIONER

JOSEPH MURIITHI GICHIRA.....10TH PETITIONER

RUKENYA THIBA DAM ASSOCIATION.....11TH PETITIONER

VERSUS

HON. ATTORNEY GENERAL.....	1 ST RESPONDENT
NATIONAL IRRIGATION BOARD.....	2 ND RESPONDENT
NATIONAL LAND COMMISSION.....	3 RD RESPONDENT
JAPAN INTERNATIONAL CO-OPERATION AGENCY.....	4 TH RESPONDENT

JUDGMENT

The petitioners filed this petition on 1st December 2014 originally at the High Court in Nairobi in which they framed the following issues for interpretation:

- (a) Whether the petitioners' land is being compulsorily acquired by the 2nd respondent for purposes of public interest.*
- (b) If yes, whether the 3rd respondent has abdicated its Constitutional and Statutory duty over private land acquisition as enshrined in Article 40 (3), Article 67 as read together with Sections 107 and 110 (1) of the Land Act.*
- (c) Whether the 2nd respondent's valuation report has violated the provisions of Sections 112, 113, 114 and 115 of the Land Act.*
- (d) If yes, whether the said valuation is a nullity.*
- (e) Whether the petitioners are entitled to the right enshrined under Article 40 (1) of the Constitution.*
- (f) If yes, whether the same has been violated by the respondent.*
- (g) Whether the petitioners are entitled to the rights enshrined under Article 40 (3) (1) as read with Sections 111 (1) of the Land Act.*
- (h) Whether the petitioners are pursuant to an acquisition, entitled to payment in full of a just compensation.*
- (i) What amounts to a just compensation.*
- (j) Whether the respondents are bound by the principles of equity, efficiency, productivity while acquiring the petitioners' land.*
- (k) Whether while compensating the petitioners, the respondents are bound to observe the principle of sustainable development which include the doctrine of intragenerational and intergenerational equity.*
- (l) Whether the respondents failure to provide the valuation report to the petitioners violate the petitioners rights as enshrined under Article 35 (1) (3) of the Constitution.*
- (m) Whether the respondents action of acquiring the petitioners agricultural land without adequately compensating the petitioners violates their Constitutional rights enshrined under Article 26 (1) as read together with Article 43 (1) (c).*

Arising out of those issues, the petitioners sought judgment against the respondents in the following terms:-

- 1. A declaration that the petitioners' land is being acquired compulsorily by the 2nd respondent for the purpose of public interest.*
- 2. A declaration that the 3rd respondent has abdicated its Constitutional and Statutory duty over private land acquisition as enshrined in Article 40 (3) and Article 67 of the Constitution as read with Sections 107 and 110 (1) of the Land Act.*
- 3. A declaration that the 2nd respondent's valuation report has violated the provisions of Sections 112, 113, 114 and 115 of the Land Act for having been conducted by an illegal body.*
- 4. A declaration that the said valuation report is a nullity.*
- 5. A declaration that the petitioners are entitled to the right enshrined under Article 40 (1) of the Constitution and the same has been violated by the respondents.*
- 6. A declaration that the petitioners are entitled to the rights enshrined under Article 40 (3) (1) as read with Sections 111 (1) of the Land Act.*
- 7. A declaration that the petitioners are pursuant to a compulsory acquisition entitled to payment in full of a just compensation.*
- 8. A declaration as to what amounts to a just compensation.*
- 9. A declaration that the respondents are bound by the principles of equity, efficiency, productivity while acquiring the petitioners land.*
- 10. A declaration that while compensating the petitioners, the respondents are bound to observe the principle of sustainable development which includes the doctrine of intragenerational and intergenerational equity.*
- 11. A declaration that the respondents action of acquiring the petitioners agricultural land without justly compensating the petitioners violates their Constitutional rights enshrined under Article 26 (1) as read with Article 43 (1) (c).*
- 12. An order of injunction restraining the respondents either by themselves, their agents, employees, appoints and/or successors from implementing the Gazette Notice No. 8174 dated 14th November 2014, entering, evicting the petitioners from KABARE/KIRITINE/819, KABARE/KIRITINE/1137 and KABARE/KIRITINE/1140, digging on the suit property, constructing the water dam, developing, taking any action that may displace, dispossess, violate the petitioners rights and fundamental freedoms, any action of compensating the petitioners and/or trespassing over the petitioners land.*
- 13. Costs of the suit.*

The petition is supported by the affidavit of **BONIFACE GICHIRA GACHIRIGUA** sworn on behalf of the 1st to 10th petitioners. On 16th September 2015, the 11th petitioner was enjoined in these proceedings by consent and its secretary **JAMES GICHAIYA MWANGI** swore a supplementary affidavit on behalf of its members.

The 2nd respondent through its Company Secretary **DENNIS AROKA** filed a replying affidavit in opposition to the petition. The 1st and 3rd respondents filed a Notice of Preliminary Objection to the petition and sought its dismissal for the following reasons:

- 1. That it offends the provisions of Section 113 of the Land Act.*
- 2. That it is incompetent since no award has been made under Section 115 of the Land Act.*

3. That the National Government is legally mandated to compulsorily acquire land on behalf of public bodies.

4. That it is not meritorious and should be dismissed in limine as the prayers sought offends the provisions of Article 40 (2) of the Constitution as read together with Sections 122 and 128 of the Land Act.

5. That the 4th schedule to the Land Acquisition Act (repealed) is not un-Constitutional since it is validated by Section 7 of the sixth schedule to the Constitution as read together with Section 24 of the General Provisions and Interpretation Act Chapter 2 Laws of Kenya.

On 31st May 2016, the 4th respondent was struck out of the petition.

The petitioners' case is based on the grounds set out in the petition together with the voluminous supporting affidavit and further supplementary affidavit of **JAMES GICHAIYA MWANGI** as well as the 227 annexures thereto which I need not repeat. Suffice it to state that the petitioners plead that they are the owners of various parcels of land whose title deeds are already with the 2nd respondent having been compulsorily acquired for purposes of construction of **THIBA WATER DAM** (the dam). The parcels of land in question are **KABARE/KIRITINE/819, 1137, 1140, 1290, 1273, 307, 316, 1269, 936, 963, 876, 1274, 208, 2739, 1405, 963, 1406, 2098, 1287, 1269, 1280, 240, 193, 2099, 328, 1113, 284, 306, 2105, 2097, 956, 2509, 272, 933, 316, 1271, 1749, 310, 1271, 1250, 1141, 304, 265, 1106, 2104, 252, 1748, 201, 1105, 1246, 2101, 2197, 935, 2100, 847, 1321, 959, 964, 957, 311, 283, 1935, 1289, 994, 342, 2508, 2008, 442, 1956, 1990, 306, 313, 2032, 2010, 1707, 1288, 1322, 834, 995, 3006, 1114, 1115, 1992, 1291, 1701, 1957, 1138, 269, 1939, 993, 322, 307, 1847, 1324, 1139, 835, 314, 3008, 312 and 958**. It is the petitioners' case that the owners of the above mentioned parcels of land and who are persons affected by the construction of the dam are yet to be paid a total sum of Ksh. 2,332, 831,367.30/= which is due to them. The petitioners also complain that the 2nd respondent illegally caused a valuation to be conducted on their land by a body that had no capacity to do so since only the 1st respondent is mandated by law to conduct such valuation. Therefore, the valuation conducted by the 2nd respondent was illegal, unlawful and a nullity in law and also violated the Constitution by failing to consider the principles of intragenerational and intergenerational equity. The petitioners therefore contend that their right to property has been violated as the methods being employed by the 2nd respondent is in violation of the **Land Act**.

In his replying affidavit and further replying affidavit, **DENNIS AROKA** deponed inter alia, that the 2nd respondent is a parastatal established in 1966 and whose mandate is the development and management of all irrigations schemes in the country and in 2003, it embarked on a scheme to rehabilitate, revitalize and expand the Mwea Irrigation Project which was to affect more than 299 parcels of land involving 577 households (persons affected with the project – PAPS). That the said persons were to be compensated for their land, crops and other developments based on valuation done by **M/S SYAGGA & ASSOCIATES** who are the authorized legal valuers as per the set guidelines. That all the persons affected by the project of constructing the dam are in agreement with the whole process, have surrendered their respective parcels of land and have already been compensated and others allocated alternative land save for the 1st and 2nd petitioners. The 4th to 10th petitioners are strangers to the 2nd respondent as they are neither land owners nor known beneficiaries. The 3rd petitioner is unlawfully enjoined to this petition as he is willing to voluntarily surrender his land and be compensated. That the petitioners had previously filed **NAIROBI ELC CASE No. 295 of 2013** which was fully settled by a consent filed on 25th October 2013 and save for the 1st and 2nd petitioners, the rest have agreed with the valuation by **M/S SYAGGA & ASSOCIATES** and have already been compensated while the others are in the process of being compensated. With respect to the 1st, 2nd & 3rd petitioners, the 2nd respondent has sought the assistance of the 3rd respondent who are the body legally and Constitutionally mandated to acquire land for the construction of the dam. In that regard, the 3rd respondent has only gazetted land parcels No. **KABARE/KIRITINE/819, 1140 958, 1290 and 1137** for lawful compulsory acquisition and no valuation has been conducted and so this petition is ill motivated, pre-mature and brought in bad faith to embarrass the whole project.

And with respect to the 11th petitioner, **MR. DENNIS AROKA** deponed, inter alia, that most of the petitioners represented by the 11th petitioner have either been fully compensated or are in the process of being compensated save for the 1st, 2nd and 4th petitioners who have vehemently declined to accept the compensation award and the issue has been handed over to the 3rd respondent. That the others have received their compensation in full pursuant to sale agreements between them and the 2nd respondent and have voluntarily surrendered their titles and the 2nd respondent has now acquired legal and absolute title over their respective titles of land. That for those persons who were not satisfied with the valuation, their cases were handed over to the 3rd respondent for fresh valuation. That the 2nd respondent has already begun the process of compulsory acquisition of the parcels of land belonging to the 1st, 2nd and 4th petitioners and issued gazette notices to that effect while the 3rd petitioner and co-owners of land parcel No. KABARE/KIRITINE/958 who were initially opposed to the 2nd respondent's award were handed over to the 3rd respondent whereby they later changed their mind and have since signed an undertaking to voluntarily accept the award and therefore this petition is an abuse of the Court's process. That the valuation was carried out in a transparent manner in the presence of each owner and compensation given to both the registered and beneficial owners of each parcel of land. That the construction of the dam is for the benefit of the community living in **MWEA DISTRICT** and its environs.

On 16th August 2016, the 2nd respondent filed an application to bring in more evidence in the nature of the valuation report prepared by **M/S SYAGGA & ASSOCIATES Valuers**. That report was admitted by consent of the parties.

Submissions and further submissions were thereafter filed by counsel for the petitioners and the 2nd respondent.

I have considered the petition, the rival affidavits and annexures thereto as well as the submissions by counsel.

This petition touches on an alleged violation and infringement of the petitioners' fundamental rights in relation to compulsory acquisition of their parcels of land. It is not in dispute that this Court has powers under **Section 13 of the Environment and Land Court Act** to consider such a petition. However, whether in fact this petition raises Constitutional issues is a matter to be determined in this judgment. It is trite law that where a dispute can be disposed of without recourse to the Constitution, a Constitutional Petition should not be invoked. And whereas the compulsory acquisition of land by the State for public purposes is allowed by the law, it is nonetheless important that such taking of a person's property is carefully examined by the Court as it involves interfering with the proprietary rights of an individual over land against his will. While **Article 40 (1) of the Constitution** protects the rights of every person to own property of any description in Kenya, it is also provided in **Article 40 (3) and (4)** as follows:

40 (3): *“The State shall not deprive a persons 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 the 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”.

40 (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”.*

Section 107 of the Land Act on the other hand provides for the steps to be taken by the National or

County Government where it seeks to compulsorily acquire land for public interest in fulfillment of a stated public purpose. The procedure may be summarized as follows:

- 1. The respective Cabinet Secretary or County Executive Committee members submit a request for acquisition of land to the National Land Commission.**
- 2. The National Land Commission prescribes criteria and guidelines to be adhered to by the acquiring authorities.**
- 3. The National Land Commission may reject a request if it establishes that the request does not meet the requirements of Article 40 (3) of the Constitution.**
- 4. Upon approval, the National Land Commission shall publish a notice to that effect in the Kenya Gazette with a copy to the Registrar and every person who appears to have any interest in the land.**

Once land is compulsorily acquired, Section 111 of the Land Act provides that compensation shall be paid **“promptly and in full to all persons whose interest in the land have been determined”**. Under the same section, provision is made for the National Land Commission to appoint a date for an inquiry to hear issues of claims by persons interested in the land. Notice of such inquiry is to be published in the Gazette at least fifteen days before the inquiry with a copy to all persons interested in the said land. After the inquiry, the National Land Commission shall prepare a written award for compensation payable to every person who has an interest in the land. Such award shall be final in terms of the size of land to be acquired, its value and the amount of compensation payable. Sections 127 and 128 of the Land Act provides that any question or dispute with respect to the validity, extent or persons to whom compensation is payable shall be determined by reference to this Court.

Having said so, I shall now address the issues that the petitioners have identified for my interpretation as set out in their petition.

(a) Whether the petitioners land is being compulsorily acquired by the 2nd respondent for purposes of public interest.

The answer to the above must now be clear from the summary I have just discussed above with regard to the law on compulsory acquisition of land under Article 40 (3) of the Constitution and Section 107 (1) of the Land Act. While Article 40 (3) of the Constitution empowers the State to acquire land, Section 107 (1) of the Land Act is clear on which State organ can do so. It provides as follows:

“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 members shall submit a request for acquisition of land to the Commissioner to acquire land on its behalf”.

No material has been placed before me to demonstrate that the 2nd respondent has commenced any action towards the compulsory acquisition of the petitioners’ land. Indeed by law, the 2nd respondent would have no powers to do so. The power to compulsorily acquire land is vested in the National Land Commission by dint of the provisions of Section 107 (1) of the Land Act.

What the 2nd respondent has done with respect to the parcels of land needed for the construction of the dam is to approach the land owners that may be affected by the project (PAPs) and offered them compensation or alternative land. Paragraph 11 of the replying affidavit of **DENNIS AROKA** dated 17th December 2014 is very clear on that. It reads as follows:

“That I state that all the other persons affected with the project are in agreement with the whole process, have surrendered their respective parcels of land and have already been compensated and others allocated alternative land and are being resettled save for the 1st and 2nd petitioners

while the 4th to the 10th petitioners are strangers to the 2nd respondent as they are neither land owners nor known beneficiaries to the affected land parcels”.

What comes out from the above is that most of the petitioners herein have voluntarily surrendered their parcels of land to the 2nd respondent and have been compensated or are in the process of being compensated either in cash or by alternative land. The 2nd respondent is a body Corporate established under the ***Irrigation Act Chapter 347 Laws of Kenya*** and has the power to acquire land. Such acquisition may be through purchase, donation etc. **Section 3 (1) of the Irrigation Act** which establishes the 2nd respondent provides as follows:

“There is hereby established a Board, to be known as the National Irrigation Board, which shall be a body Corporate having perpetual succession and a common seal, with powers to sue and be sued, and capable of purchasing or otherwise acquiring, holding, managing and disposing of any property movable or immovable, entering into contracts, and doing all things necessary for the proper performance of its duties, and discharge of its functions under this Act and any subsidiary legislation made thereunder”. Emphasis added

Therefore, what the 2nd respondent has done is the voluntary transfer of land from the various petitioners to itself. It is not engaged in any compulsory acquisition of land belonging to any of the petitioners and where that has become necessary, as is the case with land parcels No. **KABARE/KIRITINE/819, 1140, 958, 1290 and 1137**, the matter has been referred to the National Land Commission which has commenced the process of acquiring those parcels. In that regard Gazette Notice No. 1909 dated 11th March 2015 has been issued by the National Land Commission to commence that process and every person affected has been duly notified. If any dispute arises out of that process, then it will be determined as provided under **Sections 127 and 128 of the Land Act**. Indeed I have sampled one of the forms being used by the 2nd respondent in acquiring the various parcels of land. The form which is a **Compensation Disclosure Certificate** prepared by the 2nd respondent reads in part as follows:

“CONFIRMATION/ACCEPTANCE

I/We of I.D NO of P.O. BOX being the registered proprietor/beneficial owners of the above referenced property (comprising of land, developments/buildings, crops and trees and other improvements/do hereby confirm and accept the above offer in full and final settlement in respect of my property/assets being acquired by National Irrigation Board (NIB) and accept the compensation amount awarded”

Pursuant to the signing of the above document, the 2nd respondent has annexed copies of the payment vouchers and a list of the land owners who have been compensated both in cash and with alternative land having appeared before the Gichugu Land Control Board and consented to the transfers. Also annexed are copies of the title deeds to those land parcels already issued in the names of the 2nd respondent.

The answer to (a) above therefore is that the 2nd respondent is **not compulsorily** acquiring the petitioners land. Instead, the acquisition is **voluntarily** on agreed terms.

(b) yes, whether the 3rd respondent has abdicated its Constitutional and Statutory duty over private land acquisition as enshrined in Article 40 (3), Article 67 as read with Sections 107 and 110 (1) of the Land Act.

As indicated above, the only parcels of land which the 3rd respondent has commenced the process of compulsory acquisition are the following:

<u>PARCEL</u>	<u>REGISTERED OWNERS</u>
1. KABARE/KIRITINE/819	- MUHIA GACHOCHO
2. KABARE/KIRITINE/1140	- BONIFACEGICHIRA GACHIRIGUA

3. KABARE/KIRITINE/958 - JOHNSON GITARI
4. KABARE/KIRITINE/1290 - JAMES MWANGI NJUKI
5. KABARE/KIRITINE/1137 - BONIFACE GICHIRA GACHIRIGUA

GACHOKI GACHIRIGUA

STEPHEN NJAGI NDAMBIRI and

MICHAEL BUNDI NDAMBIRI (joint ownership)

The registered owners and every person with interests in those land parcels have been notified through a notice issued in the Kenya Gazette Notice No. 1909 dated 11th March 2015 and another Gazette Notice No. 8173. No dispute arising out of those Notices has been placed before this Court and in any event, the procedure for addressing such grievances, if any, is provided for under the *Land Act*.

The answer to (b) above is that the 3rd respondent has not abdicated its Constitutional and Statutory duty over private land acquisition as enshrined in *Articles 40(3) and 67 of the Constitution* or *Sections 107 and 110 (1) of the Land Act*.

(c) Whether the 2nd respondent's valuation report has violated the provisions of Sections 112, 113, 114 and 115 of the Land Act.

This Court has already found above that the 2nd respondent is **not compulsorily** acquiring the petitioners' parcels of land but rather, the acquisition is being done on a **voluntary** basis on agreed terms. On that basis therefore, a violation of the provisions of **Sections 112, 113, 114 and 115 of the Land Act** which deal with compulsory acquisition of land do not apply. Nonetheless, in acquiring the petitioners' parcels of land as mandated under the provisions of **Section 3 (1) of the Irrigation Act**, the 2nd respondent will no doubt be expected to engage the services of a valuer to guide it in the valuation and compensation process. It has not been suggested that the firm of **SYAGGA & ASSOCIATES Valuers** who were engaged by the 2nd respondent to conduct the valuation of the petitioners' parcels of land are not qualified to do so. All that has been suggested by counsel for the petitioners in submission is that the firm of **SYAGGA & ASSOCIATES Valuers** did not have a licence in the year 2012 when the valuation of the petitioners' land was done and reports prepared and that the firm's licence produced is for 2013. In my view, that argument does not advance the petitioners case any further as there is no dispute that the firm of **SYAGGA & ASSOCIATES Valuers** are qualified valuers competent to carry out such assignments and whose reports were the basis upon which the petitioners were compensated. The petitioners cannot therefore approbate and reprobate at the same time.

The answer to (c) above therefore is that the 2nd respondent's valuation report has not violated the provision of **Sections 112, 113, 114 and 115 of the Land Act**.

(d) If yes, whether the said valuation is a nullity.

The answer to this question is that the valuation report by **M/S SYAGGA & ASSOCIATES Valuers** is not a nullity as there is no evidence to that effect.

(e) Whether the petitioners are entitled to the right enshrined under Article 40 (1) of the Constitution.

No doubt the petitioners, either individually or in association with others, have the right to acquire and own any property in any part of Kenya.

The answer to (e) above is therefore yes.

(f) If yes, whether the same has been violated by the respondents.

This question has been answered above but for the avoidance of doubt, it is now clear that neither of the respondents have violated any of the petitioners' rights whose parcels of lands have been voluntarily acquired by the 2nd respondent on agreed terms. With regard to the land parcels No. **KABARE/KIRITINE/819, 1140, 958, 1290 and 1137**, the 3rd respondent has commenced the process of compulsory acquisition provided for under **Section 107 to 128 of the Land Act**. Any grievances arising out of that process may be addressed as provided for under **Sections 127 and 128 of the Land Act**. Therefore, as regards those parcels of land, this petition is pre-mature. And with regard to the other parcels of land, the acquisition has been on voluntary basis and as per the further replying affidavit of **DENNIS AROKA** dated 8th February 2016 at paragraph 7 therefore:

“..... Those that have not received their payment in full plus the 15% disturbance allowance are those whose parcels of land have succession issues in Court, those with family disputes, those with issues of valuation was handed over to the 3rd respondent and those whose parcels of land have encumbrances like cautions or restrictions (annexed and marked DA 3 (a) (b) is a bundle of list of matters undergoing succession, matters having family disputes, parcels listed for compulsory acquisition and of parcels having encumbrances attesting as much”.

It is clear from the above that once any outstanding issues are cleared with respect to parcels of land which have succession issues or are in Court etc; the agreed compensation will be paid.

The answer to (f) is that there has been no violation by the respondents to warrant the intervention by this Court as sought in this petition. For the avoidance of doubt however, I direct that once those pending issues are settled, any agreed compensation be paid ***promptly***.

(g) Whether the petitioners are entitled to the rights enshrined under Article 40 (3) (1) of the Constitution as read with Section 111 (1) of the Land Act.

Article 40 (3) of the Constitution prohibits the State from depriving any person of any property unless such deprivation is for a public purpose in public interest and for which prompt and just compensation will be made. **Section 111 (1) of the Land Act** on the other hand provides that where land is compulsorily acquired under the Act, just compensation will be promptly paid to ***“all persons whose interests in the land have been determined”***. With regard to the owners of land parcels No. **KABARE/KIRITINE/819, 1140, 958, 1290 and 1137** all that the 3rd respondent has done is issue notices under the Kenya Gazette dated 11th March 2015. There is no evidence that the process of compulsory acquisition has been finalized. And with regard to the other petitioners, **Section 111 (1) of the Land Act** entitles them to just and prompt compensation once all the ***“persons whose interests in the land have been determined”***.

Those interests are the ones described in paragraph 7 of the replying affidavit of **DENNIS AROKA** referred to above.

The answer to (g) therefore is that the petitioners are entitled to the rights enshrined under ***Article 40 (3) of the Constitution as read with Section 111 (1) of the Land Act*** but none of those rights have, as of now, been violated.

(h) and **(i)** can be dealt with together. The questions raised therein are:

(h) Whether the petitioners are pursuant to an acquisition, entitled to payment in full of a just compensation and;

(i) What amounts to a just compensation

Again **Article 40 (3) of the Constitution and Section 111 (1) of the Land Act** are clear that once a person's land is compulsorily acquired, just and prompt compensation must be paid. With regard to the

registered owners of land parcels **No. KABARE/KIRITINE/819, 1140, 958, 1290 and 1137** together with others who may have interests in those parcels, this Court has already found that the requisite notices have been issued under the Gazette Notices No. 1909 and 8173. No evidence has been placed before me e.g. valuations to show that the 3rd respondent has prepared an unjust award, appointed a date of enquiry, called for written claims etc under **Sections 112 and 113 of the Land Act** and served it upon the registered owners of those parcels and other interested persons. Once that is done and disputes arise, they may be handled as provided under **Sections 127 and 128 of the Land Act**. In the absence of such evidence, this Court cannot determine what would be a just compensation. That issue must be pursued in another forum at the right time.

And with regard to the other petitioners, the compensation payable to them was a negotiated contract and subject to any determinations under **Sections 111 (1) of the Land Act**. It must be paid promptly. That will be my answer to question (h) and (i).

Questions (j) and (k) can also be determined together. These are:

(j) Whether the respondents are bound by the principles of equity, efficiency, productivity while acquiring the petitioners land and;

(k) Whether while compensating the petitioners, the respondents are bound to observe the principle of sustainable development which includes the doctrine of intragenerational and intergenerational equity.

Article 60 (1) of the Constitution provides that land in Kenya shall be held, used and managed in a manner that is equitable, efficient, productive and sustainable. It then goes on to enumerate the principles that shall govern such use one of which is sustainable and productive management of land resources. One of the guiding principles of this Court provided under **Section 18 (a) (iv) of the Environment and Land Court Act** is that of intergenerational and intragenerational equity. The purpose for which the petitioners land parcels are to be acquired by the respondent is for the construction of a dam for irrigation purposes in Mwea. Paragraphs 6, 7, 8 and 9 of the replying affidavit of **DENNIS AROKA** dated 17th December 2014 which is worth repeating clearly illustrates why the petitioners land was identified for acquisition:

6: ***“That I state that with effect from 2003, the 2nd respondent herein, National Irrigation Board embarked on an irrigation scheme rehabilitation, revitalization and expansion programme that involved all its irrigation schemes and new ones”.***

7: ***“That I state that sometimes in the year 2011, the 2nd respondent received financing from the Government of Kenya towards the cost of irrigation and infrastructure development projects and a portion of which it intended to apply towards the development of Mwea Irrigation Project”.***

8: ***“That the said project was to affect more than 209 parcels of land involving 577 households affected (persons affected with the project (PAPs) with the said project”.***

9: ***“That the said project affected persons were to be compensated for their land, crops, trees and other developments on individual parcel based evaluation by M/S Syagga & Associates who are authorized and legal valuers and the guidelines as per the cost and budget (annexed hereto and marked ‘DA 1’ and ‘DA 2’ is a copy of Certificate for Syagga & Associates and the compensation guidelines used in the said project”.***

The purpose for which the petitioners parcel of land were being acquired is therefore for the noble and public purpose of constructing a dam which will no doubt benefit both the present and future generations in Mwea by providing water for the development of that area.

The answer to questions **(j)** and **(k)** therefore is that yes the respondents are bound by the principles of

equity, efficiency and productivity as well as the principle of sustainable development which includes the doctrine of intergenerational and intragenerational equity and have indeed abided by the same.

Lastly, questions **(l)** and **(m)** raise the following issues:

(l) Whether the respondents failure to provide the valuation reports to the petitioners violates the petitioners rights as enshrined in Article 35 (1) (3) of the Constitution and;

(m) Whether the respondents action of acquiring the petitioners agricultural land without adequately compensating the petitioners violates their Constitutional rights enshrined under Articles 26 (1) and 43 (1) (c) of the Constitution.

Article 35 of the Constitution guarantees the right of access to information held by the State or any person required for the exercise of any right or fundamental freedom. **Article 26 of the Constitution** protects the right to life while **Article 43 (1) (c)** protects the right to be free from hunger and to have adequate food of acceptable quality.

It is not clear how the above provisions have been violated in respect to the petitioners herein and this Court can only conclude that this question was a hunting expedition.

Having answered the questions posed by the petitioners as I have done above, it is clear to me that this petition lacks merit.

On costs, I do not consider this to be a public interest litigation. The acquisition of the land parcels belonging to the petitioners herein was by contract except for the land parcels **No. KABARE/KIRITINE/819, 1140, 958, 1290 and 1137** where the process of compulsory acquisition is in progress and not complete. The 1st, 2nd and 3rd respondents are, in my view, entitled to costs as this petition was largely aimed at having a second bite at the cherry.

Ultimately therefore and upon considering all the evidence herein, I find that this petition is devoid of merit. It is accordingly dismissed with costs to the 1st, 2nd and 3rd respondents.

B.N. OLAO

JUDGE

31ST MARCH, 2017

Judgment delivered, dated and signed in open Court this 31st day of March 2017

Mr. Wambugu for Petitioners present

Ms Wanjiru for the 2nd Respondent present

Right of appeal explained.

B.N. OLAO

JUDGE

31ST MARCH, 2017