Mwangi & 33 others (Petitioning on their Behalf and on Behalf of 106 others) v National Land Commission & another (Environment & Land Petition E018 of 2022) [2024] KEELC 1076 (KLR) (29 February 2024) (Judgment)

Neutral citation: [2024] KEELC 1076 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND PETITION E018 OF 2022

AA OMOLLO, J

FEBRUARY 29, 2024

BETWEEN

HUMPREY CRISPUS MWANGI & 33 OTHERS ..... PETITIONER

PETITIONING ON THEIR BEHALF AND ON BEHALF OF 106 OTHERS

AND

THE NATIONAL LAND COMMISSION ..... 1ST RESPONDENT

NAIROBI CITY COUNTY ..... 2ND RESPONDENT

JUDGMENT

1. The Petitioners filed a Petition dated 18th May 2022 against the 1st and 2nd Respondents seeking for the following prayers;

    a. A declaration that the failure by the 1st and 2nd Respondent to compensate the Petitioners for their lands compulsory acquired to pave way to Ndakaini Dam in Muranga County is an infringement of the Petitioners' rights and has infringed the Petitioners' rights as enshrined in Article 40,47,35,27,28 and 43 of *the Constitution*.

    b. An order of mandamus by way of judicial review do issue compelling the 1st and 2nd Respondents by themselves or their agents to release and make public to the Petitioners information relating to the compulsory acquisition and compensation relating to the parcels of land within Ndakaini Dam.

    c. An order of mandamus by way of Judicial Review compelling the 1st and 2nd Respondents by themselves and/or by their agents to pay the Petitioners an aggregate sum of Kshs. 113,659,911.04 being the agreed compensation for the compulsory acquisition relating to the Petitioner's parcels of land within Ndakaini Dam of Muranga County.

d. An order of mandamus by way of Judicial Review compelling the 1st and 2nd Respondents by themselves and/or their agents to pay the Petitioners the agreed compensation amount together with interests at the court's rates pursuant to section 26 of the *Civil Procedure Act* and pursuant to Section 117 of the *Land Act* as from 1989 until payment in full.

e. This Honorable Court do adopt the decision of the High Court in HC Misc. No. 443 of 2018 – Nairobi Mwangi Mweru & 5others Vs. The Commissioner of Lands compelling the Respondents to pay the Petitioners.

f. An order of mandamus compelling the Respondents to pay the Petitioners' disturbance fee at 15% of the awards pursuant to paragraph 4 of the Schedule to the Land Acquisition Act cap 295.

g. The Respondents do pay the costs of the Petition.

2. The Petition was supported by the affidavit of Humprey Crispus Mwangi, the 1st Petitioner sworn on 18th May 2022. The Petitioners averred that some time in 1989 the Commissioner of Lands instituted the process of land acquisition within the Ndakaini area for purposes of construction of the Ndakaini dam which was to provide water to the City of Nairobi and its environs through the 2nd Respondent and the Commissioner of Lands came up with a compensation scheme which the Petitioners herein through the law firm of Gibson Kamau Kuria & Co. Advocates appealed vide various High Court Land Acquisition Appeals in Nairobi as per the attached Schedule 1.

3. That all the appeals HCLAA No.1 to 84 of 1989 were settled by consents on 6th July 1990 and the firm of Gibson Kamau Kuria & Co. Advocates was later paid Kshs.932,525 from the amounts of the awards but to date the Petitioners have not been compensated despite the project being fully funded by World Bank.

4. They averred that the 18th to the 23rd Petitioners who were the Appellants in HCLA No. 42 of 1989-Nairobi sued the Respondents vide Judicial Review Misc. Application No.443 of 2018 and the matter was determined and a Decree issued on 16th March 2018 in which the National Land Commission and County Government of the City of Nairobi was ordered to pay the Petitioners Kshs. 3,448,234.16 together with interest and costs.

5. The Petitioners further averred that shortly thereafter in August *the Constitution* was promulgated and the office of the Commissioner of Lands ceased to exist with its functions taken over by the 1st Respondent who indicated that the County Government of the City of Nairobi had the responsibility of paying the decretal amount and the County Government relegated the responsibility to the 2nd Respondent.

6. They stated that Section 7 of the Land Acquisition Act Cap 295 in force then and now section 111(1) of the *Land Act* provides that if land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined and Article 40 of *the Constitution* guarantees every person the right to acquire and own property of any description and in any part of Kenya and that the State shall not deprive a person of property, interest in, right over property of any description unless the deprivation results from an acquisition of land in accordance with Chapter Five; or 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 requires prompt payment in full of just compensation to the person.

7. The Petitioners contended that they were deprived of their lands that resulted from an acquisition of their lands for a public purpose however just compensation has not been made to them in

accordance with *the Constitution* thus infringing on the Petitioners' rights under Article 40. That the Commissioner for Lands, the predecessor of the 1st Respondent in conducting the process of acquisition was performing an administrative function and pursuant to Article 47 of *the Constitution* such an administrative process is supposed to be expeditious, efficient, lawful, reasonable and procedurally fair and 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.

8. They contended that the process towards compensation has been lackadaisical, tedious, inefficient, unlawful, unreasonable and procedurally unfair and infringing the Petitioners' right under Article 47 as they have written to the Respondents enquiring about the compensation process but have not received any response. That the Respondents denied them of access to information that would assist to pursue compensation for the lands acquired from them thus breaching their right to access to information as provided in Article 35.

9. The Petitioners averred that pursuant to Article 27 of *the Constitution* all citizens are equal before the law and have the right to equal protection and equal benefit of the law, a right which includes the full and equal enjoyment of all rights and fundamental freedoms thus the Respondents have infringed this right by compensating other claimants and failing to promptly compensate the Petitioners.

10. The Petitioners further averred that as a result of Respondents' acts of infringement, their inherent dignity and right to have that dignity respected and protected has been trampled upon and they remained as internally displaced persons within their own county for over 3 decades and continue to suffer. That deprivation of their lands has also infringed on their Social economic rights as enshrined in Article 43 of *the Constitution*.

11. They also contended that as provided in Section 107 of the *Land Act*, the 1st and 2nd Respondents are jointly obligated to compensate them and failure to do so is unlawful and infringement of the Petitioners' rights. The Petitioners stated that despite numerous meetings, demands and follow-ups, the Respondents have neglected to settle the compensation amount which is cumulatively around Kshs.113,659,911.04 exclusive of interest and the disturbance pay.

12. The Petitioners added that they took HCCA No.42 of 1989 at Nairobi as test appeal for all the appeals negotiated with the Commissioner of Lands and enhanced awards were made to all the Petitioners and the Petitioners then filed HC Misc.No.443 of 2018-Nairobi Mwangi Mweru & 4 Others Vs. National Land Commission and 3 others to compel the Respondents to pay and the Respondents paid claim in the Appeal without the rest of the enhanced awards. They contended that the 1st and 2nd Respondents having taken possession of the Petitioners' lands before compensating them pursuant to Section 125 of the *Land Act* No.6 of 2012 they should be compelled to pay interest on the compensation amount at both court rates and statutory rates and also disturbance fee.

Response to Petition

13. The Petition was opposed by the 1st and 2nd Respondents vide a replying affidavit sworn on 3rd November 2023 by Brian Ikol, an Advocate of the High Court of Kenya and the Director, Legal Affairs and Dispute Resolution Department of the 1st Respondent and a response to Petition dated 22nd August 2022 by the 2nd Respondent. The 1st Respondent stated that acquisition of the subject properties was undertaken in the year 1988 for the Construction of Ndakaini dam, a process which was concluded and construction was undertaken over three decades ago.

14. The deponent explained that 1st Respondent herein was only established upon promulgation of the 2010 Constitution and only became operational in the year 2013 and that in as much as it is the successor of the Office of Commissioner of Lands, the liability to pay the compensation sum in contest

cannot be placed on it because the Ndakaini dam project was not handed over as one of the incomplete projects by the defunct office of the Commissioner of Lands and the acquiring body for the project had not deposited the compensation sum for transmission to the project affected persons.

15. He added that the 1st Respondent only acts as a facilitator of the acquisition process while the responsibility to deposit the compensation sum with the 1st Respondent is borne by the acquiring body and also it is the acquiring body that takes over the project upon taking possession, as such the 1st Respondent's work is restricted to the acquisition process which ought to be facilitated by the acquiring body. That the orders sought should only be directed at the acquiring body, as the obligation lies with it unless the Compensation sum of KShs 113,659,911 plus interest is remitted to the 1st Respondent for transmission to the project affected persons and that from the evidence tendered in the Petition, none of the Correspondence between: the Ministry of Lands and Physical Planning, the Nairobi City County, Athi Water and Services Board as well as Nairobi Water and Sewerage Company points the Liability towards the 1st Respondent.

16. The deponent stated that it is acknowledged from the annexures marked HCM7-9, that no funds have ever been remitted to the National Land Commission and in the affidavit of Humphrey Crispus Mwangi it shows that there is no refusal to pay or violation of any of the Petitioners' constitutional rights by the 1st Respondent. He stated that if the orders sought were to issue against the 1st Respondent, it would not have funds or a budget to satisfy the orders and further, it would be condemned to pay a colossal sum in interest on sum of funds that it has never held at all and issuance of such orders would lead to execution proceedings being commenced against the 1st Respondent yet the fulfilment of the obligation to pay is entirely dependent on the acquiring body discharging its obligation.

17. The 2nd Respondent confirmed that on or about the year 1989, the then Commissioner of Lands initiated the process of public acquisition of the Petitioners' land at Ndakaini Area to be utilized for construction of the Ndakaini dam which was to provide water for the residents of Nairobi City and its environs and by virtue of the public acquisition of the Petitioner's land, the 1st Respondent agreed on a the compensation payable to the Petitioners whose land had been acquired by the Government and how the same was to be paid.

18. The 2nd Respondent denied that it is not privy to the allegations raised therein by the Petitioners in view of the fact that all the Appeals HCLAA No. 1 to 84 of 1989 and the consents that ensued therefrom were exclusively between the Petitioners and 1st Respondent and also was not a party to the proceedings of Appeal Number 42 of 1989. That accordingly, the Decree issued on 10th March 2010 and the subsequent Orders issued in Judicial Review Misc. Application Number 443 of 2018 were not against it but against the 1st Respondent.

19. The 2nd Respondent contended that by virtue of them not being privy to the HCLAA No. 1 to 84 of 1989 and the subsequent consents, Decrees and Orders that ensued therefrom and any other subsequent suit, the Orders sought by the Petitioners in the instant Petition do not lie against it as there is no statutory duty imposed upon it to act as demanded, the Petitioners have failed to cite in their Petition any provisions of law under which the 2nd Respondent is to act as demanded and the Petitioner have failed to demonstrate to the required standard the acts which the 2nd Respondent allegedly committed that infringed on the Petitioners' constitutional rights as enshrined in the provisions cited in the Petition.

20. Further, that the Petition as drawn and filed against it does not meet the threshold of a constitutional Petition in view of the fact that it does not disclose any reasonable cause of action as against the 2nd

Respondent, the Petitioners have made bare allegations as against the 2nd Respondent which are devoid of any juridical cogency and the Petition is fatally defective for generalizations, lack of substantiation and want of particulars.

21. The 2nd Respondent also contended that the Petition as drawn and filed as against it is in total contravention of the provisions of the *Government Proceedings Act* Cap 40 Laws of Kenya on the process to be followed by the Petitioners in seeking settlement of decretal sums by the 2nd Respondent.

Submissions

22. The Petitioners and the 2nd Respondent filed submission dated 27th October 2023 and 27th November 2023 respectively. The Plaintiffs outlined a summary of their case and that of the 2nd Respondent and framed the issues for determination to be whether this petition is merited and whether the reliefs sought should issue.

23. They stated that it is not in issue that the Petitioners' lands in Ndakaini Area were compulsorily acquired to pave way for the Construction of Ndakaini Dam, that the Petitioners surrendered their lands but have never been compensated for their lands to date, 34 years later, despite the Ndakaini Dam project having been completed and in operation, that the Petitioners appealed against the awards given through Appeals HCLAA NO. 1 to 84 of 1989 – Nairobi resulting in settlements by consent on 6th July 1990 and that also the 18th to 23rd Petitioners brought Judicial Review proceedings against the Respondents herein vide Judicial Review Misc Application No. 443 of 2018 culminating in a mandamus writ that the Petitioners be paid Kes. 3,448,234.16 inclusive of interest and costs.

24. The Petitioners submitted that by compulsorily acquiring their lands for public use and for failing to provide prompt and just Compensation, the Respondents violated Petitioners Constitutional rights as envisaged in Articles 27, 28, 35, 40, 43 and 47. That the Respondents violated the Petitioners Constitutional Right to equality and freedom from discrimination as envisaged under Article 27 and in Particular Article 27(1) and (2) of *the Constitution* through denying them equality before the law inclusive of full and equal enjoyment of property rights under Article 40 and by Compulsorily acquiring the Petitioners Lands and failing to compensate the Petitioners, the Respondents violated the Petitioners constitutional right to Human dignity as envisaged under Article 28 of *the Constitution* through failure to uphold, respect and protect the Petitioners human dignity.

25. Further, that the Respondents violated the Petitioners right to property under Article 40 and in particular Article 40(3) of *the Constitution* which mandates the state to make prompt payment in full of just compensation to persons deprived of their property through compulsory acquisition and also violated their right to fair administrative action under Article 47 of *the Constitution* which gives every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.

26. In addition, that the Respondents violated the Petitioners Constitutional right to Access to information under Article 35 and in particular Article 35 (1) (a) and (b) of *the Constitution* through denying the Petitioners access to information required for the exercise of compensation and protection of their property rights under Article 40 of *the Constitution*.

27. The Petitioners cited the dicta in Mohamed Mire v Attorney General & another [2016] eKLR, to submit that they had provided affidavit evidence of the violation of their Constitutional rights as specifically in the petition thus the court should issue the declaration sought. Further in reliance of the Court of Appeal decision in Republic vs. Kenya National Examinations Council ex parte Gathenji & 8 Others Civil Appeal No 234 of 1996 as to the circumstances under which judicial review order of mandamus are issued, they submitted that it is common ground that there exist enhanced awards given

pursuant to the consents in Appeals in HCLAA No. 1 to 84 of 1989-Nairobi and since the Petitioners have not been justly compensated for their lands to date and to their detriment, and since no justifiable reason whatsoever has been advanced as to why the Petitioners should not be justly compensated, the Court should find in the Petitioners favour and issue a writ of mandamus compelling the Respondents by themselves or their agents to pay an aggregate sum of Kshs. 113,659,911.04/= being the agreed compensation for the said compulsory acquisition.

28. In addition, that by virtue of Section 23(3) (b) to (e) of the *Interpretation and General Provisions Act*, the interest and a disturbance fee at 15% of the awards pursuant to Section 16 of the Land Acquisition Act (repealed) and Paragraph 4 of the Schedule to the Land Acquisition Act Cap 295 (repealed) is applicable in computing the final awards due to and payable to the Petitioners.

29. They stated that the fact that the Land Acquisition Act was repealed by the *Land Act* 2012 does not negate the award of the disturbance fee and interest provided for in the Land Acquisition Act, which was the statutory provision applicable at the time when the Petitioners Lands were compulsorily acquired and in support cited the decision in Patrick Musimba v National Land Commission & 4 others (Supra), Five Star Agencies Ltd –v- National Land Commission NBI ELC. Case No. 445 of 2014 [2014] eKLR and Republic V National Land Commission & 2 Others Ex-Parte Samuel M. N. Mweru & 5 Others 9 (Supra).

30. The 2nd Respondent submitted that in guidance of the principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been infringed as established in the case of Anarita Karimi Njeru -vs- The Republic [1976-1980] KLR 1272 and reinstated by the Court of Appeal in the case of Mumo Matemo v Trusted Society of Human Rights Alliance [2013] eKLR, the Petitioners' petition has not met the threshold for issuance of the Orders sought as against the 2nd Respondent.

31. They explained that while the Petitioners allege that the Respondents jointly and severally deliberately denied the Petitioners access to information that may have assisted them to pursue compensation for the lands acquired from them, from the evidence adduced by the Petitioners showing correspondence between the parties, the 2nd Respondent duly responded to all letters and provided all the requisite information required that was related to the subject issue. Further, they promptly responded to the Petitioners' vide a letter dated 21st July 2014 clearly informing the Petitioners that the 2nd Respondent was not a party to the suit in which the said Orders were issued and the that it would be appropriate for them to pursue their claim with the 1st Respondent.

32. Also, that the Petitioners' claim that their right under Article 27 were infringed by virtue of the Respondents compensating other claimants and failing to compensate them, the 2nd Respondent submitted that they were not a party to the consents and the alleged compensations that took place. They submitted that Petitioners seek that this Honourable Court do adopt the decision of the High Court in Hc. Misc. No. 443 of 2018- Nairobi- Mwangi Mweru & 5 others Vs. The Commissioner of Lands compelling the Respondents to pay the Petitioners and the orders sought herein were first decreed by the High Court Decree dated 16th March 2010 in HCCA 42 of 1989 and adopted by Hon. Justice G.V Odunga in Misc. Civil Application No. 443 of 2017.

33. That this Petition is filed to pursue the Orders issued in antecedent suits, which orders were issued as against the Commissioner of Lands and the successor therein being the 1st Respondent thus at the time of recording of consents and subsequent filing of these High Court Land Acquisition Appeals, the 2nd Respondent was never a party is not a privy to the allegations made.

34. In support of their argument, the 2nd Respondent relied on Section 33 of the sixth Schedule of *the Constitution* to show that the it is the successor to Commissioner of Lands and the decision in Misc. Civil Application No. 443 of 2017 where the learned judge averred that "33.It is therefore clear that where judgement has been delivered, the person against whom judgement is delivered is under a legal obligation to satisfy the same. In this case it is agreed that judgement was issued against the Commissioner for Lands and the 1st Respondent has taken over its rights and liabilities. It follows that the duty to settle the sums decreed to be due and owing from the Commissioner of Lands falls on the 1st Respondent."

35. On the same point, the 2nd Respondent also cited the Justice Majanja, J in Republic vs. Town Clerk of Webuye County Council & Another HCCC 448 of 2006 and the Court of Appeal in the case of Republic vs. Kenya National Examinations Council ex parte Gathenji & Others, (1997) Eklr.

36. I have opportunity to read and analyse the respective pleadings of the parties and their submissions together with the case law cited in support. The Petitioner raised two questions for determination which are;

    a) whether the Petition is merited

    b) whether the reliefs sought should issue

37. The 1st Respondent has not filed any submissions but the 2nd Respondents did and raised the following two questions for determination;

    a. Whether this instant petition is to the required threshold for breach of Constitutional Rights by the 2nd Respondent.

    b. Whether the orders sought by the Applicant should issue as against the 2nd Respondent.

38. The 2nd Respondent in arguing that the Petition is without merit submitted that it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been infringed. The principle is enunciated in Anarita Karimi Njeru -vs- The Republic [1976-1980] KLR 1272 is as follows:Constitutional violations must be pleaded with a reasonable degree of precision;The Articles of *the Constitution* which entitles rights to the Petitioner must be precisely enumerated and how one is entitled to the same;The violations must be particularized in a precise manner;The manner in which the alleged violations were committed and to what extent.

39. They also we submit that from the evidence annexed by the Petitioner, the 2nd Respondent promptly responded to the Petitioners' vide a letter dated 21st July 2014 clearly informing the Petitioners that the 2nd Respondent was not a party to the suit in which the said Orders were issued and the that it would be appropriate for them to pursue their claim with the 1st Respondent. In addition, the 2nd Respondent avers that they were not party to the consent that related to the compensation to the Petitioners herein.

40. In answering the question whether the Petitioners have met the principles set out in the Anarita Karimi case supra, the pleadings show and it is not disputed that the Petitioners parcels of land were compulsorily acquired by the predecessor to the 1st Respondent. The consequences of that compulsory acquisition led to the filing of HCCA Nos 1-84 of 1989 which enhanced the awards given to the Petitioners as compensation. The Petitioners pleaded that the 18th -23rd Petitioners filed HC Misc. No 443 of 2018 to compel the Respondents to pay and which action caused the Respondents to comply. However, the Respondents failed to pay the rest of the enhanced awards. So, what right has been

breached? The provisions Section 75 (1) (c) of the pre-2010 Constitution (the applicable law then) provided for prompt payment and restated in article 40 (3) of *the Constitution* 2010 provides thus;

> " 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."

41. The provisions of section 8 of the Land Acquisition Act Cap 295 in force then stated that "where land is acquired compulsorily under this Part, full compensation shall be paid promptly to all persons interested in the land" and now replicated in section 111(1) of the *Land Act* which provides thus;

> (1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

42. *The Constitution* and Statute law clearly demand for prompt payment to the person whose land has been compulsorily acquired. In the claim before the court, the Petitioners are to be compensated from 1989 to date, a period of more than thirty years which is a clear violation of their right to property. The violation is precise to the extent that it is claiming a substantiated amount for compensation. The Petitioners have stated that their rights under article 47 of *the Constitution* has also been breached which can also be deduced from the Respondents replies to the Petition whereby each of them is denying responsibility. Therefore, it is my considered opinion and I so hold that the Petition as filed meets the threshold of a constitutional petition.

43. The next issue is whether or not the reliefs sought can be granted against the Respondents. The 1st Respondent in its replying affidavit to the petition deposed that the orders sought should only be directed at the acquiring body, as the obligation lies with it unless the Compensation sum of KShs.113,659,911 plus interest is remitted to them (the 1st Respondent) for transmission to the project affected persons. That from the evidence tendered in the Petition, none of the Correspondence between: the Ministry of Lands and Physical Planning, the Nairobi City County, Athi Water and Services Board as well as Nairobi Water and Sewerage Company points the liability towards the 1st Respondent.

44. On its part, the 2nd Respondent pleaded that on or about the year 1989, the then Commissioner of Lands initiated the process of public acquisition of the Petitioner's land at Ndakaini Area to be utilized for construction of the Ndakaini dam which was to provide water for the residents of the 2nd Respondent and its environs. By virtue of the public acquisition of the Petitioner's land, the 1st Respondent agreed on the compensation payable to the Petitioners whose land had been acquired by the Government and how the same was to be paid. The 2nd Respondent denies liability stating that all the Appeals comprised in HCLAA No. 1 to 84 of 1989 and the consents that ensued therefrom were exclusively between the Petitioners and 1st Respondent.

45. Thus, it is not in dispute that the Petitioners have not been paid and neither does the 2nd Respondent deny that the land was being acquired for the use for a public institution, the Nairobi City Council the predecessor in title to the 2nd Respondent for purposes of building a dam to supply water for the

residents of Nairobi and its environs. Consequently, in considering whether the 2nd Respondent is exempted from liability, I start by looking at the provisions of section 2 of the Land Acquisition Act cap 295 (repealed) which defined a public body as;

(a) the Government; or (b) any authority, board, commission or other body which has or performs, whether permanently or temporarily, functions of a public nature, or which engages or is about to engage in the exploitation of natural resources or the provision of power or any other activity which is of benefit to the public."

46. The 2nd Respondent is included in this definition as a public entity that would benefit from acquisition under section 6 of Cap 295 (repealed). The said section provided that;

(1) Where the Minister is satisfied that any land is required for the purposes of a public body, and that -

(a) the acquisition of the land is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of any property in such manner as to promote the public benefit; and

(b) the necessity therefor is such as to afford reasonable justification for the causing of any hardship that may result to any person interested in the land, and so certifies in writing to the Commissioner, he may in writing direct the Commissioner to acquire the land compulsorily under this Part." (underline mine for emphasis).

47. . The provisions of the Land Acquisition Act (repealed) as they relate to compulsory acquisition of land have been replicated under Part VIII of the *Land Act*. The law as it was and is, provided that one of mandates of the Commissioner of Lands and its successor in title the 1st Respondent, is to acquire land for public purposes on behalf of public institutions in accordance of the law. However, the public body/institution retains the mandate of identifying the land to be acquired on its behalf. The 1st Respondent's role include valuing the land for purposes of assessing the just compensation payable. The process was provided for in sections 7 to 11 of Cap 295 and now sections 107 – 117 of the *Land Act* No 6 of 2012.

48. Although the 2nd Respondent denies it was not part of the decree, it is well aware the Commissioner of Land acquired the land for the benefit of the Nairobi City Council. To confirm the knowledge, before this petition was filed, there were correspondences exchanged between the Petitioners advocate and the 2nd Respondent. For instance, the Mwangi Wahome & Co advocates wrote to the County Secretary of the 2nd Respondent vide a letter dated 20th September, 2016 giving a tabulation of individual claims. The 2nd Respondent in its letter dated 4th April 2014 stated thus;

> " As earlier communicated, your clients claim relates to the long term liabilities which are subject of deliberation between the National Government, Athi Water and the County Government. In the premises we advise that we await the outcome of the deliberations, upon determination, your clients claim will then be fully addressed"

49. The Ministry of Lands, Housing and Urban Development vide a letter dated 10th June 2015 confirmed to the 2nd Respondents that the Petitioners have never been compensated. The Athi Water vide its letter dated 25th March 2014 to the Director of Legal of the 2nd Respondent intimated that the compensation due had never been settled. So that if the 2nd Respondent felt the liability of settling this debt should be shared with other public bodies, there is nothing that stopped them from joining those parties to these proceedings once they were sued. The money is still owing to date to the detriment of the Petitioners.

50. The inference drawn from the provisions of the law is that the land having been acquired for the benefit of the 2nd Defendant, it is liable to pay the decree irrespective that they were not party to that consent. The decree merely enhanced the awards already made and which awards had to be made any way because the Petitioners parcels of land had been acquired. The Liability on the part of the 1st Respondent is having acted on behalf of the acquiring authority, it must complete its mandate by facilitating the payment of the compensation. They cannot be removed from the web until the matter is concluded.

51. Thirdly, the Respondents alluded to this Petition being res judicata by virtue of the fact that the issues raised therein and the orders sought were duly canvased by the parties herein and determined by Hon. Justice Odunga in Judicial Review Misc. Application Number 443 of 2018. It is worth noting that the judicial review application was filed in execution of the decree. In his determination, Odunga J. (as he then was) referred to the provisions of section 21 of the *Government Proceedings Act*. Those proceedings did not relate to determination of a dispute between the parties and so cannot be used to stop the Petitioners who are also seeking to execute the already existing decree by way of this petition.

52. To confirm that the Misc. App. 443 of 2018 was an execution application in compliance with the law as regards execution against the government, at paragraph 42 of that judgement, an order of mandamus was issued compelling the 1st Respondent either by itself or through the 2nd and 3rd Respondents to pay the Applicants (in that judgement) the aggregate sum of Kshs 3,448,234.16 as decreed by the High Court decree dated 16th March 2010 in HCCA 42 OF 1989 together with interest at court rates and pursuant to section 117 of the *Land Act* from 1989 until payment in full. Each of the Petitioners are entitled to singular awards as tabulated in the initial awards founds at pages 199 to 243 of the Petition bundle before they each appealed the awards in HCCA numbering 1-84 although the consent was recorded in file no. 42 of 1989. Consequently, each individual has a right to execution which cannot be barred by the principle of res judicata if some commence execution process as in this case vide Misc. App. 443 of 2018. The objection of res judicata is without merit.

53. The upshot of the foregoing analysis is my finding that the Petitioners have made out a case of violations of their right to a prompt and full payment of compensation for their parcels compulsorily acquired for the construction of the Ndakaini Dam. Although the 1st Respondent does not pay out the funds from their kitty, they have an obligation to pursue for the funds to be released either directly to them for onward transmission or direct the 2nd Respondent to make the payment directly to the affected parties. The 1st Respondent (and its predecessor in title) failed to undertake that administrative duty and this court faults them.

54. In conclusion, I enter judgement for the Petitioners as prayed in the petition by making the following orders;

    a. A declaration is issued that the failure by the 1st and 2nd Respondents to compensate the Petitioners for their lands compulsorily acquired to pave way for the construction of the Ndakaini dam in Muranga County is an infringement of the Petitioner's rights and has infringed the Petitioners rights as enshrined in Articles 40, 47, 35, 27, 28 and 43 of *the Constitution*.

    b. An order of Mandamus by way of Judicial Review is hereby issued compelling the 1st and 2nd Respondents by themselves and or by their agents to pay the Petitioners an aggregate sum of Kes. 113,659,911.04/= the agreed compensation for the compulsory acquisition relating to the Petitioners' parcels and land within Ndakaini Dam of Muranga County.

c. An order of Mandamus by way of Judicial Review is issued compelling the 1st and 2nd Respondents by themselves and or by their agents to pay the Petitioners the agreed compensation amount together with interest at court rates pursuant to Section 26 of the *Civil Procedure Act* and Section 117 of the *Land Act* from 6th July 1990 (which is date of decree in HCCA 1-84 of 1989) until payment is made in full.

d. The Respondents do pay the costs of the Petition

DATED, SIGNED & DELIVERED AT NAIROBI THIS 29TH DAY OF FEBRUARY, 2024.

A. OMOLLO

JUDGE