



Kenya Ports Authority v Nightshade Properties Ltd & 4 others (Civil Appeal E025 of 2021) [2023] KECA 870 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 870 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL E025 OF 2021
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
JULY 7, 2023**

BETWEEN

KENYA PORTS AUTHORITY APPELLANT

AND

THE NATIONAL LANDS COMMISSION 1ST RESPONDENT

NIGHTSHADE PROPERTIES LTD 2ND RESPONDENT

LAPSET CORRIDOR DEVELOPMENT AUTHORITY 3RD RESPONDENT

HON ATTORNEY GENERAL 4TH RESPONDENT

NATIONAL ASSEMBLY 5TH RESPONDENT

(An Appeal from the judgment of the Environment and Land Court at Malindi delivered by J.O. Olola J. on 23rd March 2021 in ELC Constitutional Petition No. 33 of 2019)

JUDGMENT

1. Kenya Ports Authority, hereinafter the Appellant filed this appeal against the judgment of Malindi Environment and Land Court (hereinafter ELC) Constitutional Petition No. 33 of 2019, by Olola, J. in a judgement delivered on the 23rd March 2021.
2. This being a first appeal, it behooves this Court to re-evaluate, re-assess and reanalyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority v Kustron (Kenya) Limited* (2005) 2 EA 212 this Court espoused that mandate or duty as follows:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.



Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence."

3. After the case, the learned Judge entered judgment in favour of the Nightshade Properties Ltd, the 1st Respondent (hereinafter the 1st Respondent) as against The National Lands Commission, the 2nd Respondent herein. It gave the following orders:
 - i. An order of mandamus is hereby issued directing the 1st Respondent to convene a meeting under Section 112 of the Land Act, to determine the just compensation due to the 1st Respondent within 45 days from the date of the judgment.
4. As against the 2nd and 3rd respondents and the appellant the judge made the following order:
 - ii. In default an order of injunction shall issue upon expiry of 45 days, restraining the 1st Respondent, Lapsset Corridor Development Authority, the 2nd Respondent herein and 5th respondent, whether jointly or severally, by themselves their servants, agents, contractors or howsoever from remaining, entering upon or remaining on LR No. 2801 Mokowe Lamu or in any way interfering with the peaceful quiet possession and enjoyment of the property by the 1st Respondent.
 - iii. The Petitioner [1st Respondent] also got the costs of this Petition.
5. The Appellant's Memorandum of Appeal dated 4th June 2021 raises two (2) grounds of appeal. The learned Judge was faulted for:
 - a. Ordering that in default of compliance with the Order of Mandamus issued against the 1st Respondent an Order of injunction shall issue upon expiry of 45 days, restraining the 2nd Respondent, the 3rd Respondent and the Appellant whether jointly or severally, by themselves, their servants, agents, contractors or howsoever from remaining, entering upon or remaining on LR. No. 2801 Mokowe Lamu, or in any way interfering with the peaceful quiet possession and enjoyment of the property by the 1st Respondent, thereby issuing an order of mandatory injunction against the Appellant;
 - b. Condemning the Appellant to costs of the Petition filed in the ELC.
6. The Appellant seeks two orders from this Court that:
 - i. The impugned Order of injunction granted by the High Court on 23rd March 2021 against the Appellant be set aside or discharged in its entirety;
 - ii. The award of costs of the Petition at the Environment and Land Court as against the Appellant be set aside in its entirety and the Appellant be awarded costs of the Appeal.
7. The National Assembly, the 5th Respondent (hereinafter the 5th Respondent) filed a cross-appeal pursuant to Rule 93 of the Court of Appeal Rules, 2010, (now Rule 95). It has raised one ground of appeal, faulting the learned Judge for condemning it to pay costs despite not being found guilty of any misconduct by the ELC. The orders sought before us are:
 - i. The cross-appeal be allowed;
 - ii. The order of the Court J. O. Olola, J. condemning the 5th Respondent to pay costs be set aside;
 - iii. The memorandum of appeal dated 4th June 2021 and filed in Court on 7th June 2021 be allowed;



- iv. The costs of and incidental to this cross-appeal be awarded to the 5th Respondent
- v. Any other orders as the Honourable Court would deem appropriate to grant in the circumstances of the case.

Background

8. The Petition, instituted against the Appellant and the 2nd to 5th Respondents invoked several provisions of the Constitution as the legal foundation. The key of these being Articles 40 which guarantees every person the right to acquire and own property of any description in any part of Kenya, and Article 47 that guarantees that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
9. The 1st Respondent's case was that it was the registered proprietor of land parcel known as LR No. 28101 situate in Mokowe, Lamu measuring 100 Ha. (herein after the suit property). As against the 2nd Respondent, the 1st Respondent's claim was that on 7th December, 2011, through the Registrar of Titles Mombasa, the 2nd Respondent cancelled its title to the suit property vide Gazette Notice No. 15445, prompting the 1st Respondent to move to the ELC on a Judicial Review application. That the ELC issued a decree on 12th May 2017 quashing the said Gazette Notice and reinstating its title to the suit property.
10. The 1st Respondent's case was that while the said proceedings were pending in Court, the 3rd Respondent and the Appellant moved into the suit property and commenced operations thereon on the purport that the same had been reserved for their use. That despite a finding by the 2nd Respondent that the properties had not been set aside for the use of either the 3rd Respondent or the Appellant, they continued to occupy the 1st Respondent's property in complete disregard of their proprietary rights as protected by the Constitution.
11. That the 2nd Respondent, on 16th February 2018 issued Gazette Notice No. 1518 expressing its intention to acquire the 1st Respondent's land for and on behalf of the 3rd Respondent. Despite the notice, no subsequent notification were made under the provisions of the Land Act, to hear the 1st Respondent or set out the process of determining compensation for the intended acquisition.

That the actions of the Appellant, 2nd and 3rd Respondents had no basis in law, did not follow any due process and therefore disregarded the provisions of Article 40 of the Constitution. Further, that the provisions of Section 120 of the Land Act in so far as it mandates the 2nd Respondent or any other government agency to take possession of property intended to be acquired before compensation, is contrary to the express provisions of the Constitution that requires that there be adequate and proper compensation.
12. The 1st Respondent prayed for the following orders and declarations:
 - a. *Certiorari* to remove to Court and quash the 2nd Respondents decision to compulsorily acquire the suit property;
 - b. *Mandamus* directing the 2nd Respondent to convene a meeting under the provisions of Section 112 of the Land Act to determine the just compensation due to the Petitioner if the decision to acquire the 1st Respondent's property is upheld;
 - c. Declaration do issue that the actions and decisions of the 2nd and 5th Respondents in respect of the suit property and their unilateral decision to move into the suit property was null and void;



- d. Declaration do issue declaring the provisions of Section 13 (1) (b), (2) (a), (3) and (4) of the [Kenya Ports Authority Act](#) Cap 391 is contrary to the provisions of Article 1, 2, 10, 40 and 47 of the [Constitution](#) and therefore unconstitutional;
 - e. An order of injunction do issue restraining the 1st, 2nd and 5th Respondents whether jointly or severally, by themselves, their servants, agents, contractors or howsoever from entering upon or remaining on LR No. 2801 Mokowe Lamu or in any way interfering with the peaceful quiet possession and enjoyment of the property by the Petitioner;
 - f. A declaration do issue declaring the provisions of Section 120 of the [Land Act](#) is contrary to the provisions of Article 1, 2, 10, 40 and 47 of the [Constitution](#) and therefor unconstitutional;
 - g. A declaration do issue that this matter is concerning the Petitioner's proprietary rights and therefore is not a public interest litigation; and
 - h. An order do issue for costs of the Petition.
13. The 2nd Respondent Commission neither entered appearance nor filed a response to the Petition.
 14. The 3rd Respondent's response to the Petition was by way of a Replying Affidavit sworn on its behalf by its Legal Officer, Hezekiel Kibicho and filed on 5th February 2020 by the 4th Respondent (the Honourable the Attorney General). It refuted the 1st Respondent's averments and claim. Its case was that its principle mandate was to plan, coordinate, sequence and provide effective leadership on behalf of the National Government, in the implementation of the LAPSSET Corridor Programme components, while working with implementing Ministries and agencies. In this respect, the ongoing LAPSSET Project was the construction, first, of three Lamu Port Berths, which it contended was a function under the National Government, pursuant to the Fourth Schedule of the [Constitution](#).
 15. That prior to the initiation of the project, a thorough feasibility study was conducted to establish the viability of the project, the impact and identification of the location conducive for perching of the project. That after the study was completed the necessary land for use for the project was identified. It contended that the Ministry of Lands was required to reserve an initial 28,139 Ha of land for purposes of the Lamu Port and its ancillary activities. The 3rd Respondent further avers that all persons whose parcels of land were falling within the land earmarked for the project were identified and compensated. That it was unaware of any acquisition of the suit property as it did not feature in discussions for compensation, and has no records concerning any compulsory acquisition thereof.
 16. The National Assembly (herein after the 5th Respondent), opposed the Petition *vide* its Grounds of Opposition dated 13th December 2019 and filed herein on 3rd February 2020. Its case was that the law sanctioned matters of compulsory acquisition of land, and that the enactment of a law to regulate the same could not deprive the 1st Respondent the right to property provided under Article 40 or any other Article of the [Constitution](#). That as such, the 1st Respondent's allegations that it was deprived of its property by enactment of the law has no basis in law. Its case was that the 1st Respondent acknowledged in its Petition that the actions, in particular of the Appellant, the 2nd and 3rd Respondents related to the process of compulsory acquisition of LR No. 28101. Therefore, the 1st Respondent could not be allowed to baptize an ordinary compulsory acquisition dispute into a constitutional question.
 17. That the 1st Respondent made general allegations without offering any particulars, explanations or supporting facts of how the impugned sections of the law contravene the [Constitution](#).
Accordingly, the Petition did not meet the threshold enunciated in the case of [Anarita Karimi Njeru v Republic](#) (1979) eKLR and that thus; the 1st Respondent had not sufficiently proved that the 5th



Respondent failed in its mandate under Article 68 and 95 of the Constitution of enacting legislation that was in line with the Constitution. That further, Parliament took very seriously its constitutional duty to legislate on the State's powers of deprivation or expropriation as evidenced by Section 107 to 133 of the Land Act, 2012. It averred that Article 40(3) of the Constitution of Kenya 2010 as read together with Sections 117 (1) and 120 (2) of the Land Act, 2012 allowed the Government to have immediate possession of the land for public purpose pending finalization of the quantum of award payable together with charged interest.

18. It was the 5th Respondent's case that the circumstances upon which the 2nd Respondent may acquire land without prior compensation was a policy decision solely within the mandate of the Executive and enacted by Parliament and that this Honourable Court had no expertise to make policy decisions which are solely within the realm of the other Arms of Government. The 5th Respondent added that Section 120(2) of the Land Act expressly provided for circumstances upon which the 2nd Respondent may acquire land without compensation. That it also allowed possession to be taken in cases of urgency, if acquisition by following normal procedure would lead to a delayed acquisition, and that if land was so acquired, the just compensation was to be paid promptly in full, to persons whose interests in land have been determined.

That Section 120(2) of the Land Act did not take away the right to compensation and did not deprive the 1st Respondent of its property as alleged, nor purport to take ownership of property under compulsory acquisition but only allowed for possession of such property until adequate compensation was made to the owners of the property.

19. The 5th Respondent position was that Section 161 of the Land Act, 2012, as read with Section 7 of the Sixth Schedule to the Constitution made saving provisions for the impugned Sections of the Kenya Ports Authority Act. That it provided that "all other laws relating to land shall be contrived with alterations, adaptations, qualifications and exemptions necessary to give effect to this Act." Besides, the mere fact that the provisions were enacted pre-date the Constitution of Kenya 2010 was not a valid reason to declare the impugned provisions unconstitutional. That Article 119 (1) of the Constitution provided that any person had a right to Petition Parliament to consider any matter within its authority, including enacting, amending or repealing any legislation. Accordingly, the 1st Respondent ought to have approached Parliament before filing the present Petition against them.
20. The Appellant opposed the Petition *vide* a Replying Affidavit sworn on its behalf by its Head of Contracts and Conveyancing, Michael O. Sangoro, and filed on 16th December 2019. In that affidavit the Appellant averred that the 1st Respondent had not adduced any or any sufficient evidence to entitle it to the prayers sought, and asserted that the subject matter of this Petition was the on-going development and construction of the Lamu-Port- South Sudan- Ethiopia-Transport (LAPSSET) Corridor Project. That one of the constituent infrastructure projects within the LAPSSET Corridor Program is the Lamu Port project at Manda Bay situated within the County of Lamu.
- That the Project commenced with dredging operations in October 2016 with a tentative completion date of 14th January 2020.
21. That the orders sought by the 1st Respondent were extremely drastic in nature as they sought to undo the enormous project that was nearly complete, and whose disruption would occasion irreparable loss and damage to the public. The Appellant asserted that the LAPSSET Corridor was defined under Section 2 of the LAPSSET Corridor Development Authority Order, 2013 to include all those pieces of land covered by the LAPSSET highways, pipelines and railway lines connecting Kenya, South Sudan, Ethiopia and Lamu Port. That the suit property of (LR No. 28101) falls within the said corridor.



22. It was the Appellant's case that prior to the controversy surrounding the ownership of the suit property, the consultant responsible for the construction of the First Three Berths at the Port identified portions of Lamu at Mokowe area, in County of Lamu for the acquisition by the 2nd Respondent (National Land Commission). That in the premises the Consultant commissioned a survey to establish the ownership and acreage of each landowner within the area earmarked for acquisition for the Lamu Port Project. A Survey Report of September 2014, the Ministry of Lands and Physical Planning published a list of owners affected by the LAPSSET Lamu Port Project but the name of the 1st Respondent was not in the List. That the 2nd Respondent then embarked on a verification exercise to establish the *bona fide* land owners in order to facilitate the process of compulsory acquisition and compensation of the Project Affected Persons.

That the Commission then published a list of the affected persons in the Daily Nation Newspaper of 10th December 2014 and that the 1st Respondent's name was not in the list.

23. That following the completion of the verification exercise the Ministry of Transport and Infrastructure Development directed the Appellant to release a sum of Kshs 1,319,586,674.55 to the 2nd Respondent for purposes of compensating the affected persons. That in the premises it finalized its role by releasing the sums to the 2nd Respondent as directed by the Ministry of Transport and Infrastructure Development.

That having compensated the claimants, the Appellant proceeded to take possession of the respective parcels of land and commenced construction works at the Lamu Port Project in October 2016. That the suit property happened to be one of those acquired by the 2nd Respondent for the Project and that accordingly, the Appellant had its presence thereon as the key implementing agency charged with the mandate of constructing and developing the Project. That at the time the 2nd Respondent undertook compulsory acquisition of the land however, the 1st Respondent did not have a title in its name over the said property and hence could not be factored in the compensation.

24. The Appellant averred that from the 1st Respondent's own Supporting Affidavit, its title had been cancelled in the year 2011 and it was not until the Judgment delivered on 12th May 2017 that the title was restored. By then and as at the time of filing the Petition, the process of compulsory acquisition had already been finalized and all affected persons compensated. It was not until 20th December 2018 that the 1st Respondent demanded compensation for the alleged compulsory acquisition of the suit property.

It is the Appellant's case that those demands for compensation were misplaced as it was only the 2nd Respondent Commission that was tasked with the mandate of acquiring property for public use through compulsory acquisition.

25. The Appellant averred that by a letter dated 28th June 2017, the 2nd Respondent informed them that there was an apparent dispute on the ownership of the suit property with directions that it be gazetted for acquisition. Subsequently by Gazette Notice No. 1518 of 16th February 2018, the 2nd Respondent signalled its intention to acquire the property from the 1st Respondent by way of compulsory acquisition. The Appellant denied the 1st Respondent's contention that it is desirous of depriving it of its property without compensation and asserted that the balance of convenience tilted in favour of the construction and development of the LAPSSET Port Project which was already under way. The contract for the construction of the Project had strict timeliness and it was in the public interest that the construction of the Project proceeds unhindered to a void wastage of resources.

26. The Appellant in its submissions dated 10th May 2022 have identified four (4) issues for resolution namely:



- a. whether the acquisition process of the suit property was undertaken in accordance with the Constitution and the law,
 - b. whether the Superior Court was right to issue the default order of injunction,
 - c. whether the Appeal has merit,
 - d. the issue of costs of the petition.
27. The 3rd and 4th Respondent identified three issues for determination:
1. Whether the learned trial Judge erred in law and in fact in holding that the Respondents have not followed the process of compulsory acquisition in full; and,
 2. Whether the learned Judge erred in law and in fact by issuing the default order of injunction
 3. Costs of the appeal.
28. The 5th Respondent raised only one issue for determination:
1. Whether the learned Judge of the Superior Court erred in law and facts when condemned the 5th Respondent to pay costs of the suit despite not been found guilty of any misconduct by the Superior Court.
29. The issues for determination, based on the memorandum of appeal and the cross-appeal, the submissions by counsel and the issues identified by the Appellant and the 3rd and 4th Respondents can be summed up into two grounds:
- a. Whether the acquisition process of the suit property was undertaken in accordance with the Constitution and the law,
 - b. Whether the Superior Court was right to issue the default order of injunction,
30. The issue raised by the 5th respondent will be the third issue for determination, which is:
- c. Whether the learned Judge erred in law and fact, when it condemned the Appellant and the 5th Respondent to pay costs of the appeal.

Whether the acquisition process of the suit property was undertaken in accordance with the Constitution and the law.

Submissions by The Appellant

31. The Appellant submitted that at the crux of the Petition filed by the 1st Respondent at the Superior Court was the contention that the 1st Respondent being the registered owner of the Suit property did not receive compensation from the 2nd Respondent and the other Respondents for the compulsory acquisition of the suit property for the Lamu Port Project.
32. The Appellant submitted that while it is trite that Article 40 of the Constitution guarantees every person the right to acquire and own property in any part of Kenya, that right is not absolute. That under Article 40 (3) the Government can by compulsory acquisition acquire land but in so doing shall not deprive a person of property or of any interest in property unless the deprivation is for a public purpose or in the public interest and only upon prompt payment in full, of just compensation to the land owner. The case of Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others [2019] eKLR, was cited for the proposition that property rights are not absolute but may



legitimately be limited to facilitate the achievement of important social purposes, the limitation must not be arbitrary, and must comply with Article 40 of the Constitution.

33. The Appellant contended that the 2nd Respondent complied with the requirements of Article 40 of the Constitution and Sections 107 to 110 of the Land Act 2012 regarding the compulsory acquisition of land for the LAPSSET Project. The Appellant submitted that the circumstances of the appeal are unique in that at the time when the 2nd Respondent undertook the process of compulsory acquisition of land for the LAPSSET Project, the certificate of title held by the 1st Respondent had been cancelled by the Government. That after the certificate of title held by the 1st Respondent was reinstated in a Judicial Review Court, the 2nd Respondent commenced the process of compulsory acquisition of the suit property. Therefore, the compensation process that the 2nd Respondent initiated with the Gazette Notice No. 1518 dated 16th February 2018 was ex post facto.

Submissions 3rd and 4th Respondents'

34. The 3rd and 4th Respondents in their submissions urged that the Respondents strictly complied with the provisions of Sections 107 to 133 of the Land Act. They relied on the replying affidavit dated 5th February 2020 filed in the Superior Court that elaborated how the process of compulsory acquisition of the 28139 hectares of land was done and compensation awards due to individuals fully paid.
35. It was the 3rd and 4th respondents' submission that rights of compulsory acquisition are conferred by specific provisions of the law being sections 107 to 133 of the Land Act. That these provisions were strictly complied with by the Respondents in acquisition of the suit property. Further that the replying affidavit on record elaborated how the process of compulsory acquisition of the 28139 hectares of land was done and compensation awards due to individuals fully paid.
36. According to the 3rd Respondent after compensation was paid in full, the Ministry of Lands Housing and Urban Development issued a Certificate Lease to the Lapsset Corridor Development Authority for a period of 99 years with effect from 1st February 2016, which was registered on 24th October, 2016. It was submitted that it was not in dispute from the verifying affidavit of the 1st Respondent in support of the Petition that the 1st Respondent's title was cancelled on 7th December, 2011 and was reinstated *vide* an order of the Court on 12th May, 2017. That the process of compulsory acquisition of the 1st Respondent's land LR No. 28101 commenced *vide* a Gazette Notice No, 1518 in February, 2018, that notified the public of the intention to process compulsory acquisition of the 1st Respondent's suit property.
37. In the affidavit sworn on behalf of the 3rd and 4th Respondents, it deposes at the relevant paragraphs that feasibility study on the viability of the project was done, after which an Environment and Social Impact Assessment Study in order to identify the Project Affected Persons (PAP) within the site earmarked for the project was completed. That the Inter-ministerial Committee initiated the compensation process after thorough consultative forum with all relevant stakeholders, after which the affected parties were paid.
38. The 3rd and 4th Respondents' submitted that from the concluded process of compulsory acquisition of LR No. 28101 what remained was the issue of payment. They submitted that the pending payments should not invalidate the acquisition process or warrant the issuance of an injunction especially where



the property has already vested in the National Government. They relied on the decision in *Isaiiah Otiato & 6 Others v County Government of Vihiga* (2018) eKLR where the Court held:

“The possession of the land in question being taken the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made.

The property is then deemed to have vested in the national or county government as the case may be with both the proprietor and the land registrar being duly notified.”

39. The 3rd and 4th respondents referred this Court to paragraph 39 of the trial court’s judgment where the trial court observed that the respondents failed to follow the process of the compulsory acquisition in full and to its end as envisaged under the *Constitution* of Kenya, 2010 and the *Land Act*, 2012. The trial court further observed that while the respondents moved into the suit property way back in the year 2016, the formal process of acquiring the same did not start until some two years later in 2018.
40. The 5th Respondent did not address this issue in its submissions as it is not affected it.
41. At the core of the first issue is the right of a person, whether individually or in association with other to acquire and own land and the power of the government to acquire land for public interest or public purpose. In order to answer the first issue we have considered the meaning and intent of the Article 40 (3) of the *Constitution*. Article 40 reads in part as follows

Protection of right to property.

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. [emphasis added]

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

The statutory framework for compulsory acquisition is founded under Part VIII of the Land Act, No 6 of 2012. Section 107 of the Land Act provides:

Preliminary notice

1. Whenever the national or county government is satisfied that it may be necessary to acquire some particular land under section 110, the respective Cabinet Secretary or the County Executive Committee Member shall submit a request for acquisition of land to the Commission to acquire the land on its behalf.
2. The Commission shall prescribe a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.
3. ...
4. If the Commission establishes that the request under subsection (1) meets the requirements prescribed under subsection (2) and Article 40(3) of the Constitution, the Commission shall—
 - a. cause the affected land to be mapped out and valued by the Commission using the valuation criteria set out under this Act; and
 - b. establish that the acquiring authority has identified the number and maintains a register of persons in actual occupation of the land, confirming for each such occupation how much time they have been in uninterrupted occupation or ownership of interest in the land prior to the date of the request for acquisition of the land, and the improvements thereon.
5. Upon approval of a request under subsection (1), the Commission shall publish a notice to that effect in the Gazette and the county Gazette, and shall deliver a copy of the notice to the Registrar and every person who appears to the Commission to be interested in the land.

43. The Lands Act Part VIII is very elaborate on the process that should be undertaken in acquiring land. It is clear from Section 107 of the Lands Act that there is a preliminary process which has two stages. The National Land Commission the 2nd Respondent herein [hereinafter NLC] is ordinarily prompted by the national or county government through the Cabinet Secretary or County Executive member respectively. In this case, it was the national government that prompted the NLC as the land was intended for use for the Lapsset Project, an inter-state project involving *inter alia* Kenya, Ethiopia, Southern Sudan. The land must be acquired for a public purpose or in public interest as dictated by Article 40(3) of the Constitution. The NLC needed to be satisfied in these respects by undertaking



the necessary diligent inquiries including interviewing the body intending to acquire the property. Under Sections 107 and 110 of the Land Act, the NLC must then publish in the gazette a notice of the intention to acquire the land. The notice is also delivered to the Registrar as well as every person who appears to have an interest in the land.

44. It is common ground that the acquisition process in this case involved acquisition of 28, 139 Ha that included the suit property of 100 Ha. It is common ground that on 7th December 2011, the 1st respondent's title to the suit property was cancelled by the government and that the acquisition did not involve the 1st respondent. The 1st respondent's title was reinstated through a court order on 12th May 2017. By 2017, according to the 3rd and 4th respondents, the owners of the 28, 139 Ha had been identified and compensation paid, and that did not include the 1st respondent. The 3rd and 4th respondents maintain that the due process was followed, and the law Sections 107 to 133 of the Lands Act strictly adhered to. They however admit that acquisition of the 1st respondent's commenced by Gazette Notice No. 1518 of February 2018. They also admit that even though the 1st respondent is yet to be paid, the appellant has already moved into the land and constructed three berths as part of the multimillion dollars Lapsset development project.

45. Section 112 of the Land Act provides:

Inquiry as to compensation

1. At least thirty days after publishing the notice of intention to acquire land, the Commission shall appoint a date for an inquiry to hear issues of propriety and claims for compensation by persons interested in the land, and shall—
 - a. cause notice of the inquiry to be published in the Gazette or county Gazette at least fifteen days before the inquiry; and
 - b. serve a copy of the notice on every person who appears to the Commission to be interested or who claims to be interested in the land.
2. The notice of inquiry shall call upon persons interested in the land to deliver a written claim of compensation to the Commission, not later than the date of the inquiry.
3. At the hearing, the Commission shall—
 - a. make full inquiry into and determine who are the persons interested in the land; and
 - b. receive written claims of compensation from those interested in the land.
4. The Commission may postpone an inquiry or adjourn the hearing of an inquiry from time to time for sufficient cause.
5. For the purposes of an inquiry, the Commission shall have all the powers of the Court to summon and examine witnesses, including the persons interested in the land, to administer oaths and affirmations and to compel the production and delivery to the Commission of documents of title to the land.



6. 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.
46. Section 112 of the *Land Act* requires the involvement of the owner of the land considered for acquisition, and the discussion or inquiry carried out will include receipt of a claim for compensation by the landowner. On completion of the inquiry, the NLC is required to make a separate award of compensation for every person determined to be interested in the land and then offers compensation. The 1st respondent's complaint is that since gazettement of his land for compulsory acquisition in 2018 to date no compensation has been offered or paid. Mr. Mogeni in his submission before us maintained that the NLC completed only the first tier of the process of acquisition, but the second tier of compensation remains pending several years down the line.
47. The learned trial judge, in his judgment, paragraph 44 found that the fact that compensation had not been paid did not invalidate the compulsory acquisition, and appreciated that under Section 120 of the *Land Act* the government could take possession of the property before all the procedures are followed including compensation. We agree with the learned Judge's finding, as it is provided for under Section 120 (2) of the *Land Act* as follows:
- “(2) In cases of where there is an urgent necessity for the acquisition of land, and it would be contrary to the public interest for the acquisition to be delayed by following the normal procedures of compulsory acquisition under this Act, the Commission may take possession of the land upon the expiration of fifteen days from the date of publication of the notice of intention to acquire, and on the expiration of that time the Commission shall, notwithstanding that no award has been made, take possession of that land in the manner prescribed by subsection (1).”
48. Regarding the issue whether the proper process was followed in the acquisition of the suit property, it is our view that the proper process was followed in the unique circumstances of the case, where possession of the suit land was effected before compensation, but that process remains incomplete until compensation is paid. We find that the appellant has conceded that it has taken possession of the suit property from the 1st respondent and has constructed berths and put up various installations on it. It is also clear that the appellant took possession of the suit land after the acquisition process undertaken by the 2nd respondent. These two parties should compensate the 1st respondent for his property.

Whether the Superior Court was right to issue the default order of injunction.

Appellant's Submissions

49. The Appellant urged that the order of injunction against the Appellant was tantamount to an eviction order. The Appellant urged that the Superior Court's order was couched as a restraining injunction that could not issue as a default order as the remedy of restoration, repossession or restitution of possession of the suit property to the 1st Respondent was not available. That once land is vested in the State *vide* Compulsory Acquisition, free from all encumbrances, it could not be divested to the erstwhile landowners. It urged that proceedings under the acquisition law under the *Land Act*, 2012 would not lapse, even if an award were not made within the statutorily stipulated period. Counsel



relied on The Halsbury's Law of England 4th Edition (Reissue) Vol. 8 (1) para 132 at page 113 which states that:

“ 132. Acquiring authority's right to remain in possession.

If. .. after an acquiring authority has entered upon any of the land subject to compulsory purchase, it appears that they have through mistake or inadvertence failed or omitted duly to purchase or pay compensation for any estate, right or interest in, or charge affecting, that land, then whether the period allowed for the purchase of the land has expired or not, the undertakers or the acquiring authority are entitled to remain in the undisturbed possession of the land, provided, they purchase or pay compensation in the required time and manner.

50. Mr. Mogeni on his part submitted that the order of injunction was not to be effected immediately but after the period given of 45 days. That the interest of his client is to be compensated for the land that was acquired from him.

51. The appellant has challenged the decision of the ELC to grant a default order for noncompliance of the order of *Mandamus*. In that regard, the Court of Appeal in the case of Kenya National Examinations Council v Republic ex parte Gatbenji & Others, (1997) eKLR explained the applicable principles for an order of *mandamus* to issue as follows:

“The next issue we must deal with is this: What is the scope and efficacy of an Order Of *Mandamus*? Once again we turn to Halsbury's Law of England, 4th Edition Volume 1 at page 111 From Paragraph 89. That learned treatise says:-

89. “The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual.”

At paragraph 90 headed “the mandate” it is stated:

“The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way.”

What do these principles mean? They mean that an order of *mandamus* will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed....”



52. An order of *mandamus* compels a public officer to act in accordance with the law. The main principles that apply therefore for an order of *mandamus* to issue are firstly, that the Court will only issue a mandatory order if it concludes that it is the only decision lawfully open to the public body, and there is no other legal remedy that is available to remedy the infringement of a legal right. Secondly, the Court will only compel the satisfaction of a public duty if it has become due.
53. The learned ELC judge gave an order of *Mandamus* against the 2nd respondent, the NLC to comply with Section 112 of the [Land Act](#). There was no need to make any other order to accompany the order of *Mandamus*.

The reason is, the order of *Mandamus* was complete in itself. Furthermore, if the 2nd respondent failed to comply with it, the 1st respondent has a recourse as it is capable of execution. The default order was therefore unnecessary.

Whether the learned Judge erred in law and fact, when it condemned the Appellant and the 5th Respondent to pay costs of the appeal.

54. On the issue of costs, the 5th respondent in its cross appeal has appealed against the order of costs against it. The appellant, the 2nd, 3rd and 4th respondents had specific roles in the entire process of the acquisition of the suit property, as clearly admitted in the affidavit sworn on behalf of the 3rd and 4th respondent, and submissions by counsel to the parties.

These respondents and the appellant should meet the costs, except for the 5th respondents/cross appellant.

55. We find that the appellants' appeals succeeds in part. The order that commends itself to us is as follows:
1. The order of *Mandamus* issued directing the 2nd respondent to convene a meeting under the provisions of Section 112 of the [Land Act](#) to determine the just compensation due to the 1st respondent within 45 days from the date hereof is confirmed;
 2. The 2nd respondent and the appellant shall compensate the 1st respondent for the suit property within one year from the date of this judgment.
 3. The default order of injunction issued against the 2nd and 3rd respondent and the appellant is set aside.
 4. The costs of the appeal and of the Petition before the ELC is awarded to the 1st respondent as against the 2nd respondent, the 3rd respondent and the appellant.

DATED AND MADE AT MOMBASA THIS 7TH DAY OF JULY 2023

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G.V. ODUNGA

.....



JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

