



**Dahir v Lapsset Corridor Development Authority & 3 others (Environment & Land
Petition E006 of 2022) [2024] KEELC 4877 (KLR) (20 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4877 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT GARISSA
ENVIRONMENT & LAND PETITION E006 OF 2022**

JM MUTUNGI, J

JUNE 20, 2024

BETWEEN

MOHAMED BASHIR DAHIR PETITIONER

AND

LAPSSET CORRIDOR DEVELOPMENT AUTHORITY 1ST RESPONDENT

THE NATIONAL LAND COMMISSION 2ND RESPONDENT

THE KENYA NATIONAL HIGHWAYS AUTHORITY 3RD RESPONDENT

THE COUNTY GOVERNMENT OF GARISSA 4TH RESPONDENT

JUDGMENT

1. The Petitioner instituted the instant petition dated 7th December 2022 seeking for:
 1. An order and declaration do issue that the Respondents have acted in breach of Articles 40,42,43,47 and 63 of the *Constitution* of Kenya, 2010.
 2. A permanent injunction order do issue restraining the Respondents by themselves, their agents, servants or proxies from constructing the LAPSSET Corridor within the existing site farm PDP No 326/2017/34 measuring 6.0 Ha located in Diiso in Garissa County or in any manner interfering with the Petitioner’s possession of the said property by construction, forcible entry and/or usage in any other manner whatsoever.
 3. In the alternative to prayer (2), an order do issue requiring the Respondents to pay compensation towards the Petitioner, being the owner of the existing site farm PDP No 326/2017/34 measuring 6.0 Ha located in Diiso in Garissa County whose land is traversed by the LAPSSET Corridor.



4. General damages and exemplary damages emanating from violating the Petitioner's rights and fundamental freedoms under the Constitution of Kenya, 2010.
5. Costs of this petition together with interests thereon at court rates.
2. The Petition was predicated upon the Petitioner's annexed affidavit, in which he averred that he was the registered owner of the panel of land delineated by PDP No. 326/2017/34 measuring 6.0 Ha located at Diiso in Garissa County. He stated that the land was allocated to him in April 2009 by the defunct Municipal Council of Garissa, and he has been paying its land rent and rates to date. He claimed that the Respondents commenced construction of the LAPSSET Corridor, traversing his property without informing him of any intention to acquire it compulsorily and without compensating him.
3. The 1st Respondent filed its response through Stephen Ikua, its Director General and Chief Executive. He averred that the Lapsset Corridor in Kenya traverses 7 Counties and that the 1st Respondent had held high-level consultative discussions on the land acquisition with the 7 Counties and the National Government. He further averred that Garissa County was no exception as the consultative discussions had continuously been held with the elected leaders of the County Government, County Executives, Staff, Members of Parliament, Members of the County Assembly, Leaders, Members of the Public, and other Community Representatives. He asserted the National Land Commission published various notices of intent to acquire land and that the National Land Commission followed the due process and procedure for the compulsory acquisition of the land which comprised Community land. It was his position that the Petitioner has not demonstrated any breach of the Constitution or any other law and was therefore undeserving of the reliefs he sought.
4. The 3rd Respondent filed its Replying Affidavit through Michael Obop, on 3rd March 2023. The deponent averred that the Petitioner's application for conservatory orders should be dismissed as it had failed to meet the threshold set out in *Giella v Cassman Brown* (1973) EA 358. He emphasizes that the balance of convenience and the public interest tilted on the Respondent's side, as allowing the application would cause great financial harm to the public interest. He stated that before the commencement of the LAPSSET Corridor project, the 3rd Respondent undertook an Environmental Impact Assessment study and conducted a wide range of public and stakeholder consultations. He claimed that the Petitioner did not come forward to express any concern have hindered would hinder the implementation of the project. The 3rd Respondent further stated that the Petitioner had failed to meet the test set out in the Case of *Anarita Karimi Njeru v Republic* (1979) 1 KLR, 54. He further stated that the Petitioner's land parcel PDP No. 326/2017/34 did not fall within the gazette Lapsset Corridor.
5. The Petitioner filed his further affidavit dated 21st September 2023 in response to the 1st and the 3rd Respondent's Replying Affidavits. He averred that on 20th April 2009, the suit land was surveyed, planned, alienated, allocated, and registered to him by the 4th Respondent. He stated that the 4th Defendant processed, published, and subsequently issued the PDP to him. He maintained that he was not involved in any stakeholder meetings. He confirmed that, indeed, his land did not fall within the Google Earth site location and stated that despite the fact, the 1st, 2nd, and 3rd Respondent were constructing the Lapsset corridor on his land as illustrated in the photographs he exhibited.

Submission by the Petitioner

6. In his submissions the Petitioner reiterated the contents of his Petition, Supporting Affidavit and further Affidavit. He submitted that he had been in possession of the suit property for over fourteen years, upto when the 3rd Respondent trespassed into the suit land by demarcating a portion of it,



clearing his crops, bushes, and trees, and erecting its notice billboard and commencing construction of the road constructed the Lapsset corridor facilities on more than. He submitted that the Respondent two third of his property. He submitted that he was not consulted nor involved in the acquisition of his land. He further submitted that the construction was done despite his land not having been identified or listed for compulsory acquisition in the issued Gazette Notices.

Submission by the Respondents

7. The 1st Respondent submitted that the suit land was community land and thus the Petitioner had no proprietary rights on it. Counsel further submitted that the PDP produced by the Petitioner was not capable of conferring ownership of the suit land. It was the Counsel's opinion that the PDP was illegally issued as it was issued after the NLC advertised its intention to acquire the land for the public purpose. He further submitted that the Petitioner was not entitled to any compensation because, as per the valuation of the suit land, the suit land had no structural development and was unoccupied and vacant at the time of its inspection.
8. The 3rd Respondent submitted that the suit land was acquired correctly for a public purpose, and the land being community land, the 4th Respondent, as the trustee on behalf of the community was actively involved in public participation.

Analysis and Determination

9. I have perused the pleadings and the submissions of the parties. The issues that arise for determination are:
 1. Who is the lawful owner of the suit land?
 2. Whether due process was followed in compulsorily acquiring the suit land?
 3. Whether the orders sought by the Petitioner should issue?.

Who was the lawful owner of land parcel PDP NO.326/2017/34

10. The Petitioner in support of the petition exhibited documents to illustrate that plot No. GSA/1349 measuring 6.0 Ha, was surveyed, planned, alienated, allocated, and registered to the Petitioner on 20th April 2009. He produced a letter dated 20th April 2009 written by the Municipal Council of Garissa, which stated that Plot No. GSA/1349 was registered in his name, and he had paid all the land rents and rates. He also produced a letter dated 24th September 2019 written by the Office of the Directorate of Land, Housing and Physical Planning of the County Government of Garissa to the Director of the Physical Planning Department, which affirmed that the Petitioner was the owner of the suit land and sought the certification of the plans so he could facilitate the processing of the ownership documents. The letter indicated that the plans had adhered to the *Physical Planning Act*. He produced the Gazette notice dated 29th December 2017, which noted that the development plan for the suit land had been completed. He further produced receipts of payment of rates dated 13/10/2022, 20/04/2009, and a demand notice issued by the County Government of Garissa on 11th September 2019.
11. On the other hand, the 4th Respondent submitted that Garissa County is generally community land with the exception of the urban areas. The 4th Respondent doubted the authenticity of the documents relied on by the Petitioner. The 4th Respondent did not provide evidence to show that the Petitioner's documents were not authentic. The 1st Respondent, in its Replying Affidavit, challenged the procedure followed on issuance of the Petitioner's letter of allocation. It also claimed that the PDP was irregularly



approved after the NLC had published its first notice of intention to acquire the land on behalf of the Lapsset Corridor project.

12. The Court finds notes the correspondences, mostly emanating from the 4th Respondent, the rate payment receipts and the Gazette Notice relating to the completion of the preparation of the PDP affirm that the Petitioner had been allocated the land. The 4th Respondent who authored most of the exhibited documents did not challenge their authenticity and the Court believes the same emanated from and were issued by the 4th Respondent.

Whether due process was followed in compulsory acquiring the suit land?

13. The compulsory acquisition process is provided for in Article 40 (3) of the Constitution and Part VIII of the Land Act, No. 6 of 2012.

Article 40 (3) of the Constitution provides as follows:

- (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.
14. There was unanimity between the 3rd Respondent and the Petitioner that the suit land did not fall within the Gazetted Lapsset Corridor. While the 3rd Respondent attached a copy of the Google Earth image to show that the Petitioner's land was not part of the land that was to be acquired for the Lapsset Corridor project, the Petitioner confirmed that, indeed, his land did not fall within the Google Earth co-ordinates produced by the 3rd Respondent yet the construction was effected on his land.
15. The Court has reviewed the correspondences and documents exhibited by the Petitioner in support of his ownership claim of the parcel of land delineated on PDP No. 326/2017/34 and is satisfied that the Petitioner was the beneficial owner of the land as an allottee of the defunct Municipal Council of Garissa. The beneficial ownership of the parcel of land by the Petitioner is manifested upon scrutiny of the following documents exhibited by the Petitioner in support of the petition:-

- i. The Town Clerk on 20th April 2009 issued a letter affirming the Petitioner was registered with the Municipal Council as the owner of Plot No. GSA/1349.

The content of the letter was as follows:-

To Whom It May Concern

Plot No. GSA/1349 20TH APRIL, 2009

Mohamed Bashir Dahir

The above mentioned plot is registered with the Council in the name of Mohamed Bashir Dahir of P.O. Box 70100 Garissa.

The plot is measuring 6.0 Ha and is situated at Diiso as per attached location plan.



All the land rents and rates have been cleared up to 31st December, 2009.

Any assistance accorded to him shall be highly appreciated.

E.S. Karani

Town Clerk.

On the same date (20.4.2009) the Petitioner paid a sum of Kshs 70,000/- on account of Reg/Rents/ownership for plot GSA/1349 and was issued a Misc Income, Receipt No. 2608146 by the Council.

- ii. The location plan was subsequently prepared and approved by the Chief Officer Lands, Garissa County showing Mohamed Bashir Dahir as the owner of the land pursuant to which the PDP was prepared and approved and was advertised both in the Daily Newspapers and the Kenya Gazette published on 29th December, 2017.
 - iii. The 4th Respondent vide a letter dated 24th September 2019 by the Physical Planning Officer of the County addressed to the Director, Physical Planning Department, Ministry of Lands affirmed the Petitioner had been allocated the suit land by the defunct Municipal Council and the Petitioner had complied with the provisions of the *Physical Planning Act* to enable him to obtain ownership documents and hence the 4th Respondent vide the letter requested that the Petitioner be facilitated to obtain ownership documents for the parcel of land.
16. In the circumstances it is clear the subject land had been set apart and that the Petitioner was the beneficial owner and save that he had not obtained a certificate of ownership through registration of a title in his name the land had been adjudicated to him. The land in my view could not given the circumstances be classified as community land. Although the 1st Respondent alluded to the Petitioner's documents evidencing his ownership of the subject land being not authenticated, I do not consider that anything turns on that as the 4th Respondent who played a major role in facilitating the Petitioner to obtain title never raised any issue relating to the authenticity of the documents. In the premises the Court finds and holds that the Petitioner is the lawful owner of the suit land. The Petitioner had satisfied all the pre requisite conditions to enable him to be issued with a certificate of title. The PDP No. 326/2017/34 – Existing site for Farm having been published in the Kenya Gazette and there having been no objection within the prescribed period; there was no bar to the Petitioner having a title processed in his favour.
17. In the instant matter the Petitioner had done all that was required of him to be registered as the owner of the suit parcel known as PDP No. 326/2017/34 and be issued with a certificate of ownership. That must have been the reason that prompted the 4th Respondent to write the letter dated 24th September 2019 to the Director of Physical Planning recommending the processing of the title in favour of the Petitioner. The subject land having been allocated and adjudicated in favour of the Petitioner, could not fall under the provisions of the *Community Land Act*, 2016. The property had been allocated before the enactment of the Community Land Act and had become private property owned by the Petitioner and all that remained was formalization of the ownership documents.
18. Having come to the conclusion that the Petitioner was the lawful owner of the suit land it follows that if the land was to be compulsorily acquired for any purpose, he ought to have been involved in the acquisition process. Section 107 of the *Land Act*, 2012 sets out elaborately the process to be followed by the National Land Commission (NLC) once land has been identified for compulsory acquisition for public purpose under Section 110 (1) of the *Land Act*.

Section 107 provides as follows:-



107.

- (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 public 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) The Commission may reject a request of an acquiring authority, to undertake an acquisition if it establishes that the request does not meet the requirements prescribed under subsection (2) and Article 40(3) of the Constitution.
- (4) In the event that the Commission has not undertaken the acquisition in accordance with subsection (1) the acquiring authority may proceed and acquire the land.
- (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.
- (6) Upon service of the notice, the Registrar shall make an entry in the register of the intended acquisition.
- (7) For the purposes of Sections 110 to 143, interested persons shall include any person whose interests appear in the Land Registry and the spouse or spouses of any such person, as well as any person actually occupying the land and the spouse or spouses of such person.
- (8) All land to be compulsorily acquired shall be geo- referenced and authenticated by the office or authority responsible for survey at both the National and County Government.

Section 110(1) of the *Land Act* requires that the Commission gives a notice in writing of its intention to acquire land for public purposes. It provides as follows:-

110.

- (1) Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for fulfilment of the stated public purpose.

21. In the instant petition the Petitioner contends that his parcel of land was not amongst the lands that were gazetted for compulsory acquisition and neither was he served with any notice to compulsorily acquire his parcel of land or any portion of it. The Petitioner contended that even though his land was not part of the land parcels gazetted for acquisition by the Commission, the 1st, 2nd and 3rd Respondents were constructing the Lapsset through it. This fact was corroborated by Guhad Diis, Chief of Modika Location, where the land was situated. The Chief's letter is dated 20/4/2009 which clearly must be



erroneous since at the time it was written the Lapsset project was under construction. The letter confirmed the subject plot was owned by the Petitioner and *inter alia* stated:-

“The plot is affected by the construction of the Lapsset Project road where tractors have destroyed some parts of the plot vegetation, dug portions of the plot causing much destruction in parts cutting trees and spoilt part of the plot curving roads---“.

22. The Petitioner further annexed a valuation report dated 22/7/2023 in his further affidavit sworn on 21st September 2023 where the Valuer indicated he inspected the subject land on 20th July, 2023 and affirmed the portion of the land acquired for the Lapsset Project was 4.0 Hectares (10 Acres) and which he valued at Kshs 35,200,000/-. The photographs incorporated in the valuation report show signages of the Lapsset Project and the road already made and paved traversing the subject land.
23. The Court is satisfied that the Petitioner was not served by the National Land Commission with the Preliminary Notice envisioned under Section 107(5) of the Land Act, which is a mandatory requirement in the compulsory acquisition process. The Petitioner thus was not served any notice and was not involved in the acquisition of the subject property as the owner thereof. This was a violation of his constitutional right to property under Article 40 of the Constitution. He cannot be deprived of his land without due process being followed. While the Court notes the Petitioner’s land may have been required for a public purpose and that indeed the Lapsset Project was intended to serve public interest, the Court finds and holds that the Respondents acted in violation of the Petitioner’s Constitutional Property Rights as they failed to involve him in the compulsory acquisition process. The Petitioner in terms of Article 40(3) of the Constitution is entitled to be paid prompt and adequate compensation for his land that was appropriated for the Lapsset Project.
24. The Petitioner by his Petition has prayed for an order of permanent injunction and/or in the alternative an order for compensation for the appropriation of his land comprised in PDP No. 326/2017/34. Quite evidently an order for permanent injunction would not be available for the reason that the project has virtually been executed through the subject land and an injunction cannot be issued to restrain that which had already occurred.
25. The Petitioner is entitled to be compensated for his portion of the land that was appropriated for construction of the Lapsset project. The Petitioner additionally prayed for an award of general damages for the violation of his constitutional rights. I do not consider there would be a basis to award general damages when the Petitioner shall be compensated for the value of the portion of his land appropriated for the Lapsset Project.
26. The upshot is that the Court holds and finds the Petitioner’s constitutional right to be promptly and adequately compensated for his property appropriated for public purpose pursuant to Article 40(3) of the Constitution was violated. The Court allows the Petition and makes the following orders:-
 1. An order and declaration is hereby issued that the Respondents acted in violation and breach of Articles 40 and 47 of the Constitution.
 2. The National Land Commission is hereby ordered to process and make payment in full of just compensation to the Petitioner in respect of the portion of land parcel described as PDP No. 326/2017/34 situated in Garissa utilized for the construction of the LAPSSET Corridor Project.
 3. That the compensation under (2) above to be made within 120 days from the date of this Judgment.



4. The Petitioner is awarded the cost of the Petition.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT KERUGOYA THIS 20TH DAY OF JUNE 2024.

J. M. MUTUNGI

ELC - JUDGE

