



Caterers v National Land Commission & 2 others (Environment and Land Constitutional Petition E025 of 2021) [2024] KEELC 13310 (KLR) (20 November 2024) (Judgment)

Neutral citation: [2024] KEELC 13310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E025 OF 2021
A NYUKURI, J
NOVEMBER 20, 2024**

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF THE BILL OF RIGHTS UNDER
ARTICLES 23 (1) (3), 40 (3) AND 47 (1) OF THE CONSTITUTION OF KENYA, 2010**

BETWEEN

VESHA FOODS CATERERS PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

KENYA NATIONAL HIGHWAY AUTHORITY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

JUDGMENT

Introduction**

1. This suit was commenced by a petition dated 30th November 2021 filed by Vesha Foods Caterers against the National Land Commission; the Kenya National Highway Authority and Attorney General. The petitioner sought the following orders;
 - a. A declaration that the petitioner's fundamental rights and freedoms as enshrined under Articles 40(1), 40(2) (a), 40 (3) (b) (i), 47 (1) and 47 (2) of *the Constitution* of Kenya 2010, have been contravened and infringed upon by the respondents herein.
 - b. A declaration that the petitioner herein is entitled to prompt, just and adequate compensation in full within the meaning and tenor of Article 40 (3) (b) (i) the sum of Nine Million Eight Hundred Thousand (Kshs. 9,800,000/-) together with interest from the date the amount accrued until payment in full being compensation for loss of business as a result of compulsory acquisition Plot No. LR. No. 337/3838 for purposes of construction of second carriageway of Athi River – Machakos Turnoff (A 109) Project.



- c. An order for judicial review in the nature of mandamus does issue compelling the 1st respondent to forthwith pay the petitioner the sum of Nine Million Eight Hundred Thousand (Kshs. 9,800,000/-) together with interest from the date the amount accrued until payment in full being compensation for loss of business as a result of compulsory acquisition Plot No. LR. No. 337/3838 for purposes of construction of second carriageway of Athi River – Machakos Turnoff (A 109) project.
 - d. An order for payment of costs of this petition by the respondents.
 - e. Any other relief the court may deem fit to grant in redress to the clear violation of the petitioner’s right to property.
2. The petition was premised on a supporting affidavit sworn by one Daniel Eric Awuondo who described himself as the sole proprietor of the petitioner. He stated that he was running a restaurant along Athi River for some time and that in 2017, he was informed of the intention of the respondents to construct a second carriageway of Athi River-Machakos Turn Off (A109) Road project which immensely affected his business. He stated that he was awarded Kshs. 10,080,000/- by the 1st respondent on 23rd January 2018 as compensation for loss of business. That when the 1st respondent failed to pay this amount, he demanded for the same only for the latter to make another award of Kshs. 280,000/- on 8th March 2021. That he was verbally informed that the same was partial payment and that the balance of Kshs. 9,800,000/- remains unpaid. He sought for orders that the court compels the respondents to pay him the aforesaid amount.
 3. According to the petitioner, he did not own the parcel of land known as LR. No. 337/3838, but that his hotel business was situated on that parcel of land and that the 2nd and 3rd respondents offered to compensate him for loss of business but have violated Article 40(4) of *the Constitution*. He complained that the 2nd and 3rd respondents have never given any reason why the award of Kshs. 10,080,000/- was never paid promptly and in full. He also stated that failure to respond to his complaint by the 2nd and 3rd respondents violated his rights under Articles 47(2) as read with Article 40(3) (b) (1) of *the Constitution* as no reasons were given to him for the variation of the award. He argued that the delay in his compensation violated Article 40 (3) of *the Constitution* and Sections 115 and 117 of the *Land Act*.
 4. He attached a certificate of registration of business; award from the 1st respondent dated 23rd January 2018; acknowledgment statement and forwarding letter dated 30th January 2018 by the 1st respondent; award dated 8th March 2021; demand letter and notice of institution of suit.
 5. In response to the petition, the 2nd respondent filed a notice of preliminary objection dated 9th February 2022. It stated that the petitioner lacked capacity to sue in its name; that the petition offends Sections 133A and 133C of the *Land Act*; that the petition is fatally defective for non compliance with Section 67 (a) of the *Kenya Roads Act* requiring prior notice to the Director General of the 2nd respondent before filing suit and that the petition was premature as this court lacked jurisdiction to determine it.
 6. In addition, the 2nd respondent filed a replying affidavit sworn on 17th May 2012 by Milcah Muendo, the Assistant Director Survey Mapping in the Directorate of Highway Planning and Design at the Kenya National Highways Authority. She deposed that the mandate of the 2nd respondent is to manage, develop, rehabilitate and maintain national roads in Kenya as provided for in the Roads Act of 2007. She further stated that in execution of that mandate, the 2nd respondent was undertaking construction of the Second Carriageway of Athi River – Machakos (Turn Off) Road. That the need for expansion of existing road corridor necessitated land acquisition on parcels abutting the project road, which included LR. No. 337/3838. That the petitioner was identified as a beneficiary of compensation



- because part of the land where he was operating his business was compulsorily acquired and that compensation was duly paid.
7. She stated that the petitioner was identified as a beneficiary of compensation as part of the land where he operated his business was compulsorily acquired and compensation was paid in accordance with the law. That the 1st respondent duly exercised its mandate in determining the compensation payable to the petitioner.
 8. She asserted that the 1st respondent forwarded compensation schedule to the 2nd respondent indicating that compensation to the petitioner was Kshs. 10,080,000/-. That this was by letter dated 22nd February 2018 and that the initially gazetted land for acquisition was 0.4209 Ha. She also averred that the 2nd respondent later revised the road alignment at the area where the suit property is allocated resulting in review of the area to be acquired from the initial 0.4209 Ha to 0.0499 Ha through Gazette Notice No. 1919 of 6th March 2020. That following the revision, the petitioner's compensation was revoked under a letter dated 280,000/- and that the 2nd respondent duly made the payment of the stated amount to the petitioner on 3rd March 2021. She stated that thereafter, they took possession of the acquired land through the 1st respondent's Notice of Taking Possession dated 25th June 2021.
 9. She maintained that the 2nd respondent had fulfilled its obligation and that the petitioner had admitted having been paid the sum of Kshs. 280,000/-. She insisted that there was no evidence to prove any unconstitutional acts as against the 2nd respondent. She further stated that the petitioner lacks capacity to sue in its own name and that the petitioner had not discharged his burden of proof, as there was no evidence to support his claim.
 10. The petitioner filed grounds of opposition dated 1st November 2022 in response to the 2nd respondent's preliminary objection. He stated that the petitioner was a legal entity capable to sue and be sued under Order 30 Rule 9 of the Civil Procedure Rules 2010 and that the award by the 1st respondent was made in the name of Vesha Foods Caterers who were paid the sum of Kshs. 280,000/-. He maintained that the description of a party is not fatal as the same can be rectified by amendment.
 11. Further, the petitioner stated that the preliminary objection was based on contested facts. He argued that the petition raised questions of violation of human rights under Article 40 (3) of the Constitution which cannot be determined by the Land Acquisition Tribunal. He also pointed out that the Land Acquisition Tribunal had not been operationalized and justice should not be delayed. He argued that under Section 128 of the Land Act, this court had jurisdiction to determine this dispute.
 12. No response was filed by the National Land Commissioner and the Attorney General who are the 1st and 3rd respondents respectively. However, Counsel for the 3rd respondent informed court that the 3rd respondent was relying on the response filed by the 2nd respondent. The petition was disposed by way of written submissions. On record are the petitioner's submissions dated 5th April 2024, 2nd respondent's submissions dated 4th April 2024 and their supplementary submissions dated 5th August 2024 as well as the 3rd respondent's submissions dated 10th June 2024.

Petitioner's submissions

13. Counsel for the petitioner submitted that the filing of the replying affidavit by the 2nd respondent is an admission to the court's jurisdiction and the petitioner's locus, as that conduct shows that the 2nd respondent acquiesced to the court's jurisdiction and the petitioner's locus standi. Counsel further argued that the preliminary objection did not raise pure points of law and that the 2nd respondent having withdrawn the preliminary objection, it acquiesced to this court's jurisdiction. To buttress his arguments, the petitioner cited the decision in the case of Government Meats Producers & Importers



- Ltd v. Paul Nkina [2021] eKLR for the proposition that filing defence/replying affidavit by the 2nd respondent amounted to acknowledgment of the court's jurisdiction and locus standi of the petitioner.
14. On the question of locus standi, the petitioner's counsel argued that failure to include the petitioner's name was not fatal to the petition as the petitioner was the owner of the business name and that striking out the petition on that basis would be unwarranted and contrary to Article 159 (2) (d) of *the Constitution*. Reliance was placed on the case of Lakhman Ramji v. Shivji Tessa & Sons [1965] EA for the proposition that a sole proprietor of a business cannot sue in the name of that business if that name is not his own, and that he should sue in his own name and describe himself in the pleadings as carrying on business in the business name. They however argued that the defect is minor and curable under Order 1 Rule 10 (2) of the Civil Procedure Rules. Counsel also referred to the case of St. Mary Academy Limited & Another v. Grace Njeri Mukora & Another; Yvonne Jeruto & Another (Contemnors) [2021] eKLR and submitted that where the name of a party is wrongly indicated an amendment can cure such defect.
 15. Regarding the court's jurisdiction in regard to Section 133 C of the *Land Act*, counsel argued that this suit is a Constitutional petition and therefore the said legal provisions were inapplicable as the Land Acquisition Tribunal has no authority to determine the questions raised in the instant petition. Counsel further referred to Section 128 of the *Land Act* and contended that disputes arising from matters provided under the *Land Act* are to be referred to the Environment Land Court. Therefore, that this court has jurisdiction to determine this petition.
 16. Reference was made to the case of Ravaspaul Kyalo Mutisya v. National Land Commission [2022] eKLR for the proposition that when the Land Acquisition Tribunal was yet to be established, the questions for a compulsory acquisition fell under the jurisdiction of this court.
 17. On whether the petition is incompetent for non compliance with Section 67 (a) of the *Kenya Roads Act*, counsel submitted that the relevant notice was served on the Director General of the 2nd respondent via email and that since the law did not prescribe the form of the notice, what was served by the petitioner was sufficient. Reliance was placed on the case of Charles Wahome Kiboi v. Kenya National Highways Authority & Another [2020] eKLR. Counsel submitted that the petitioner had attached the notices as D EA 4, 6 and 7 and that therefore the same were sufficient notice.
 18. On whether the petitioner's rights to a full, prompt and just compensation and the right to be given reasons for the respondents' decision under Articles 40 (3) and Article 47 of *the Constitution* respectively, were violated, counsel argued that the payment of Kshs. 280,000/- were neither full, prompt nor just compensation. Reference was made to the case of Ayuma & 11 Others (Suing on their own behalf and on behalf of Muthurwa Residents v. Registered Trustees of the Kenya Railway Staff Retirement Benefits Scheme & 2 Others; Kothari (Interested Party) Petition 65 of 2010 [2013] K EHC 6003 (KLR) in regard to the obligations of the state during evictions. Counsel argued that the fact that the petitioner did not own the land that was acquired did not change the fact that this interest was affected.
 19. Counsel argued that the fact that the acquired land was reduced did not mean that the affected persons compensation should be reduced as the interest of the proprietor of the land are separate and distinct from the interest of the petitioner. On what amounts to just compensation, reliance was placed on the decision in the case of Patrick Musimba v. National Land Commission & 4 Others [2016] eKLR. Counsel argued that by paying Kshs. 280,000/- when an earlier award of Kshs. 10,800,000/- had been made, means that the same was not just compensation. Counsel argued that as the petitioner's business was on the suit property, the fact that the acquired size was reduced did not change the fact that he



suffered loss of business. Counsel submitted that the petitioner was not given sufficient justification for reducing the award contrary to Article 47 of *the Constitution*.

20. Counsel also cited the case of Attorney General v. Zinj Limited [2021] eKLR and submitted that the petitioner was entitled to compensation.

2nd respondent's submissions

21. Counsel for the 2nd respondent submitted that the process of compulsory acquisition was undertaken by the respondents in compliance with the law. Counsel referred to the case of Patrick Musimba v. The National Land Commission & 4 Others [2016] eKLR to buttress their arguments. It was argued for the 2nd respondent that the petitioner conceded that he was not the registered owner of the land that was compulsorily acquired but was only a lessee thereof and that the respondents complied with Section 112 of the *Land Act*, as well as Articles 40 (3) and 67 of *the Constitution* of Kenya in the acquisition of the property herein. Counsel further submitted that although the 1st respondent planned to acquire 0.4209 Ha of the LR. No. 337/3743, the area was revised to 0.0499 Ha through Gazette Notice No. 1919 of 6th March 2020 following revision of the road alignment, resulting in reviewing the award from Kshs. 10,080,000/- to Kshs. 280,000/- and that the 2nd respondent having forwarded the said amount to the 1st respondent who paid the petitioner, fully discharged its obligations under the law.
22. On whether the petitioner's rights were infringed upon, counsel relied on the cases of Anarita Karimi Njeru v. Republic No. 1 [1979] 1 KLR, 54, and Mumo Matemo v. Trusted Society of Human Rights Alliance [2013] eKLR and submitted that the petitioner failed to precisely point out how the respondents had infringed on his rights. Counsel argued that the sum paid to the petitioner of Kshs. 280,000/= was not a part payment as alleged by the petitioner but the same was in full and final settlement of his claim.
23. Regarding the question as to whether the petitioner was entitled to the prayers sought, the 2nd respondent argued that it had no role in the variation of the sum made to the petitioner and argued that the Ethics and Anti-Corruption Commission was properly mandated in reviewing amounts payable and relied on the case of Bidding and Lots Investment Limited v. National Land Commission & 2 Others; Republic (Exparte) (Judicial Review Miscellaneous Application E 005 of 2021) [2022] K EELC 2182 (KLR) (5 May 2022). Counsel argued that the sum paid to the petitioner of Kshs. 280,000/- was the amount determined by the National Land Commission and the Anti-Corruption Commission hence the petitioner failed to show the basis and justification for payment of Kshs. 9,800,000/-.
24. Counsel further argued that the 2nd respondent having withdrawn the preliminary objection, issues raised therein were therefore moot. Counsel argued that the petitioners did not own the land that was acquired and referred the court to Article 40 (4) of *the Constitution* and the case of Clement Chirchir & 38 Others v. Principal Secretary Ministry of Lands, Housing and Urban Development & 3 Others [2015]. Counsel contended that Article 40 (3) of *the Constitution* requiring prompt, full and just compensation did not apply to the petitioner and that only Article 40 (4) of *the Constitution* applied to him. It was submitted for the 2nd respondent that the petitioner was paid a sum to facilitate relocation of his business and that the value of the same had to be reasonable.
25. Counsel referred to the case of African Highland Produce Limited v. John Kisovio [2001] eKLR and argued that the petitioner had a duty to mitigate his losses and that as the registered owner of the acquired land and the petitioner were given adequate time and notice to relocate, the petitioner had a duty to show mitigation steps taken.



3rd respondent's submissions

26. Counsel for the 3rd respondent relied on Section 9 of the Fair Administrative Actions Act and Section 133 C of the Land Act and argued that it is the Land Acquisition Tribunal that has jurisdiction to determine the dispute herein and that this court lacks jurisdiction to hear and determine this matter. To buttress this point, counsel relied on the cases of Geoffrey Muthiga Kabiru & 2 Others v. Samuel Munga Henry & 1756 Others [2015] eKLR and Nicholas Abidha v. The Hon. Attorney General & 7 Others Petition No. E007 of 2023 among others.
27. It was submitted for the 3rd respondent that there were no exceptional circumstances requiring the dispute herein to be instituted in this court and they cited the case of Frankline Kilonzo and Alice Nafula Wanyama v. State Law & Registrar of Societies.

Analysis and determination

28. The court has carefully considered the petition, response and submissions filed by the parties. The 2nd respondent stated in their submissions that they had withdrawn their preliminary objection, hence the issues raised therein will not be addressed by the court. However, the 3rd respondent raised the question of whether this court had jurisdiction to determine the dispute herein in view of the provisions of Section 133C of the Land Act which vests jurisdiction to determine question of compulsory acquisition in the Land Acquisition Tribunal, as follows;

Jurisdiction of the Tribunal

1. The tribunal has jurisdiction to hear and determine appeals from the decision of the commission in matters relating to the process of compulsory acquisition of land.
2. A person dissatisfied with the decision of the commission may, within thirty days, apply to the Tribunal in the prescribed manner.
3. Within sixty days after the filing of an application under this part, the Tribunal shall hear and determine the application.
4. Despite subsection (3), the Tribunal may, for sufficient cause shown, extend the time prescribed for doing any act or taking any proceedings before it upon such terms and conditions, if any, as may appear just and expedient.
5. If, on an application to the Tribunal, the form or sum which in the opinion of the Tribunal ought to have been awarded as compensation is greater than the sum which the Commission did award, the Tribunal may direct that the Commission shall pay interest on the excess at the prescribed rate.
6. Despite the provisions of sections 127, 128 and 148 (5), a matter relating to compulsory acquisition of land or creation of wayleaves, easements and public right of way shall, in the first instance, be referred to the Tribunal
7. Subject to this Act, the Tribunal has power to confirm, vary or quash the decision of the Commission.
8. The Tribunal may, in matters relating to compulsory acquisition of land, hear and determine a complaint before it arising under Articles 23 (2) and 47 (3) of the Constitution, using the framework set out under the Fair Administrative Action Act or any other law.



29. Therefore, the following questions arise for this court’s determination, namely;
- a. Whether this court has jurisdiction to hear and determine the dispute herein;
 - b. Whether the petitioner has proved that his rights were violated by the respondents, and;
 - c. Whether the petitioner deserves the orders sought.
30. On the question of jurisdiction, it is clear that by dint of Section 133C, the body with jurisdiction to determine questions of compulsory acquisition is the Land Acquisition Tribunal. However, this court takes judicial notice of the fact that although the Land Acquisition Tribunal was established in 2019, under Section 133A of the *Land Act* by an amendment to the said Act being *Act No. 15 of 2019*, it was not until 2023 that the Land Acquisition Tribunal became operational. Therefore, this suit having been filed in 2021, before the Land Acquisition Tribunal was operationalized, I find and hold that this court has jurisdiction to hear and determine the dispute herein.
31. Regarding the issue as to whether the petitioner has demonstrated that his rights under Articles 40(3) and 47 of *the Constitution* were violated and that he deserves to be paid a sum of Kshs. 9,800,000/- claimed for loss of business, the said Articles provide as follows;
- Article 40(3) of *the Constitution* provides as follows;
- 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
- Article 40(4) of *the constitution* provides as follows;
- Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.
- Article 47 of *the Constitution* provides as follows;
1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration



32. Therefore, where the state acquires property compulsorily, whether or not claimants own the land, the state ought to compensate the affected persons promptly, fully and justly.
33. To successfully seek compensation on the basis of violation of constitutional rights, a claimant must without ambiguity clearly specify the constitutional provisions violated and the manner that they have been violated by the respondents' actions.
34. In the case of *Anarita Njeru Karimi v. Republic* No. 1 [1979] 1 KLR 54, the court held that for anyone claiming redress under *the Constitution* to be successful, they must state with precision the acts of the respondents which constitute breach of their rights. This principle was enunciated in the case of *Mumo Matemo v. Trusted Society of Human Rights Alliance* [2013] eKLR.
35. Similarly, in the case of *Meme v. Republic* [2004] eKLR the court held as follows;

Where a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed.
36. Therefore, for a petitioner to succeed in a claim for redress under *the Constitution*, they must plead with precision the specific Constitutional provisions alleged to be violated by the respondent and state with clarity the acts that the respondents have committed that constitute violation of the petitioner's rights. Consequently, what is pleaded must be accompanied by sufficient evidence demonstrating that the petitioner is entitled to the rights stated and that the respondent committed acts that violated the stated petitioner's rights. Section 107 of *Evidence Act* places the legal burden of proof in a case on the claimant and therefore a petitioner in a Constitutional petition must prove every element of their claim.
37. In the instant suit, the petitioner herein has stated that he operated a hotel business on parcel LR. No. 337/3743 and that he was given an award of Kshs. 10,080,000/- for loss of business, but that later he was given another award of Kshs. 280,000/- and informed that the same was part payment of his compensation; hence he claims for a balance of Kshs. 9,800,000/-. He cited Articles 40(3) and 47 of *the Constitution* as the basis of his claim and argued that the same were violated as he was not given full, prompt and just compensation.
38. In this case, the petitioner stated that he did not own the land that was compulsorily acquired but that he was entitled to compensation because he had a hotel business on that property and suffered loss of business.
39. I have considered the pleadings, and the evidence presented by the petitioner to ascertain whether he has proved his claim. The petitioner's case is anchored on a claim for loss of business. However, no particulars of loss of business were stated in the petition. How the amount of Kshs. 10,080,000/= was arrived at was not pleaded. The petitioner produced the two awards from the 1st respondent; which are for Kshs. 10,080,000/- and for Kshs. 280,000/- respectively and confirmed that he was paid the sum of Kshs. 280,000/- in regard to loss of business. From the evidence, it is clear that the petitioner did not present any evidence to demonstrate that he owned a hotel business. In addition, there was no evidence from the petitioner to demonstrate that he would suffer loss of business due to the respondents' acts of compulsorily acquiring 0.04299 Ha part of LR. No. 337/3743. No accounts have been presented by the petitioner to point to a loss of Kshs. 10,080,000/- or any sum thereof.
40. I do not think that a letter by the 1st respondent awarding the petitioner the sum of Kshs. 10,080,000/-, alone, in the absence of evidence that the petitioner owned a hotel business or any other business for that matter and or evidence of loss of business, would entitle the petitioner to compensation. The



1st respondent has no money of its own and only pays compensation from the tax payers funds and therefore payment for compensation in respect of compulsory acquisition of property can only be allowed by this court where the claimant has demonstrated justification for such payment. In short, the petitioner herein has not presented material before this court to justify payment of the sum of Kshs. 10,080,000/- or Kshs. 9,800,000/- or any part thereof and therefore his claim is unsupported.

41. In the premises, I find and hold the petition herein lacks merit and the same is hereby dismissed with no order as to costs.

42. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 20TH DAY OF NOVEMBER, 2024 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of;

Ms. Oketch for petitioner

Ms. Mwalozi holding brief for Ms. Nyawira for 3rd respondent

Ms. Bodo holding brief for Ms. Maruti for 2nd respondent

Court assistant – Josephine

