



**Okiiti v Kenya National Highways Authority (KENHA) & 4 others; Project Affected Persons (PAPS) Ad Hoc Committee (Interested Party) (Environment & Land Petition 11 of 2019) [2024] KEELC 13787 (KLR) (10 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13787 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND PETITION 11 OF 2019  
BM EBOSO, J  
DECEMBER 10, 2024  
(FORMERLY MILIMANI HIGH COURT PETITION NO 40 OF 2019)**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... PETITIONER**

**AND**

**KENYA NATIONAL HIGHWAYS AUTHORITY (KENHA) ... 1<sup>ST</sup> RESPONDENT  
NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT  
THE NATIONAL TREASURY ..... 3<sup>RD</sup> RESPONDENT  
HON ATTORNEY GENERAL ..... 4<sup>TH</sup> RESPONDENT  
CHINA WU YI COMPANY LTD ..... 5<sup>TH</sup> RESPONDENT**

**AND**

**PROJECT AFFECTED PERSONS (PAPS) AD HOC COMMITTEE INTERESTED PARTY**

**JUDGMENT**

1. Through a petition dated 4/2/2019, Mr Okiya Omtatah Okiiti [the petitioner] invoked the Bill of Rights and challenged alleged failures by the respondents to promptly indemnify persons affected by the James Gichuru Road Junction – Rironi Highway (A104) Project, and their decision to commence construction works while the said persons were still on site. He invited this Court to intervene and grant appropriate reliefs to address delays in compensation payment for the affected land, businesses and developments, and other related issues, including health and safety aspects of the project; dust emissions from the construction works; blocked access to homes and businesses due to the road construction works; and restoration of water connections and other communal social amenities. He



contended that all attempts by the Project Affected Persons [the PAPs] to resolve the dispute through administrative means had failed.

2. The petitioner contended that under the Constitution, PAPs were supposed to be indemnified through prompt payment in full, of just compensation, resettlement, or/and the taking of other corrective actions to mitigate adverse impacts to them before the commencement of the Project. It was his case that the PAPs were supposed to have been removed from the site upon being fully compensated by December 2017. He contended that the 5th respondent moved on site and commenced construction works on the Project with the PAPs still on site due to delayed compensation and resettlement. The petitioner contended that the respondents' actions and omissions violated Articles 1, 2, 3(1), 4(2), 10, 19, 20, 21, 24, 27, 28, 40, 42, 47, 73, 232 and 259(1) of the Constitution.
3. The petitioner sought the following verbatim reliefs against the respondents:
  - i. A declaration that the respondents failed to promptly compensate and resettle persons affected by the rehabilitation and capacity enhancement of the James Gichuru Road Junction-Rironi Highway (A104) Project.
  - ii. A declaration that by delaying to promptly compensate and relocate persons affected by the rehabilitation and capacity enhancement of the James Gichuru Road Junction-Rironi Highway (A104) Project, the 1st, 2nd, 3rd and 4th respondents violated Articles 1, 2, 3(1), 4(2), 10, 19, 20, 21, 24, 27, 28, 40, 42, 47, 73, 232 and 259(1) of the Constitution of Kenya.
  - iii. A declaration that by allowing the commencement of the rehabilitation and capacity enhancement of the James Gichuru Road Junction-Rironi Highway (A104) Project before the project affected persons were compensated and removed from the site, the 2nd respondent violated Articles 249(1) and (2) of the constitution of Kenya 2010.
  - iv. A declaration that by commencing the rehabilitation and capacity enhancement of the James Gichuru Road Junction-Rironi Highway (A104) Project before the project affected persons were compensated and removed from the site, and by failing to take corrective action to mitigate the project's impact on the general population, the 5th respondent violated Articles 1, 2, 3(1), 4(2), 10, 19, 20, 21, 24, 27, 28, 40, 42, 47, 73, 232 and 259(1) of the Constitution of Kenya.
  - v. A declaration that by proceeding to procure land for the rehabilitation and capacity enhancement of the James Gichuru Road Junction-Rironi Highway (A104) Project without having sufficient funds to meet the obligations of indemnifying the persons affected by the Project, the 1st respondent violated Section 53(8) of the Public Procurement and Asset Disposal Act.
  - vi. A declaration that the 1st, 2nd, 3rd and 4th respondents should indemnify the project affected persons through the payment of 30% of the award value as compensation for the delay.
  - vii. An order compelling the 1st to 4th respondents to immediately indemnify the project affected persons by, among others, compensating and resettling them.
  - viii. An order compelling the 1st to 4th respondents to immediately indemnify the project affected persons through the payment of 30% of the award value as compensation for the delay.
  - ix. An order suspending the ongoing works on the rehabilitation and capacity enhancement of the James Gichuru Road Junction-Rironi Highway (A104) Project until all persons affected by the Project are fully indemnified.



- x. An order that the costs of the suit be provided for.
  - xi. Any other relief the court may deem just to grant.
4. Upon initiation of the petition, this Court was invited to consider and determine a notice of motion dated 2/9/2019 through which the Court was urged to certify the petition as a matter that raised substantial questions of law and refer it to the Chief Justice to appoint a bench of an uneven number of Judges to hear it. The said application was disposed by the Court [Gacheru J] through a ruling rendered on 23/7/2020.
  5. In addition, the petition provoked two notices of preliminary objection from the 1st respondent, dated 11/2/2019 and 5/4/2019 respectively, inviting this court to strike out the petition in limine for various reasons. Further, the 1st respondent filed a notice of motion dated 8/9/2021 inviting this Court to strike out the petition in limine. The two notices of preliminary objection and the application dated 8/9/2021 were disposed by this Court [Eboso J] through a ruling dated 6/7/2022.
  6. After several pre-trial sessions, the petitioner orally applied to withdraw the petition on 31/10/2023, contending that the 1st respondent had, subsequent to the filing of the petition, compensated the PAPs. The 1st respondent did not object to the withdrawal but insisted on the petitioner being condemned to bear costs of the petition. The 5th respondent took a similar position. The Attorney General did not ask for costs. Consequently, the Court accepted the withdrawal but reserved the issue of costs for determination by the Court. In addition, the Court directed the parties seeking costs to file and serve affidavit evidence and written submissions on the issue of costs. This Judgment therefore focusses on the single question as to whether the petitioner should be condemned to bear costs of the 1st and 5th respondents.
  7. The 1st respondent filed an affidavit dated 24/11/2023 and written submissions dated 20/1/2024. In addition, the 1st respondent made oral highlights of their written submissions in the virtual court. The case of the 1st respondent is that this petition was not brought as a public interest litigation and therefore the petitioner should be awarded costs. The 1st respondent contends that the petitioner did not disclose the land owners whom the 1st respondent had failed to compensate, adding that the petitioner withdrew the petition after he failed to avail identifiable eligible land owners. It is the position of the 1st respondent that the petition was brought to advance the personal interests of the petitioner. Emphasizing that the petitioner had kept the 1st respondent in court for 4 years, the 1st respondent urged the court to condemn the petitioner to pay the 1st respondent costs of the petition.
  8. The 5th respondent filed an affidavit sworn by Calvin Ochieng on 24/11/2023 and written submissions dated 7/2/2024. They made oral highlights of their written submissions in the virtual Court. The case of the 5th respondent is similar to that of the 1st respondent. In addition, the 5th respondent faults the petitioner for joining them as a party to the petition yet they were only contractors engaged by the 1st respondent to undertake road construction works. They urge the court to award them costs of the petition.
  9. The petitioner filed written submissions dated 11/2/2021 (sic). During oral highlighting of the submissions, he stated that there was a typographical error in terms of the year, adding that the correct date should have been 11/2/2024. The petitioner's case is that a number of land owners who wanted to access justice were unable to do so and in the public interest, he decided to assist them under Articles 22 and 258 of *the Constitution*. He adds that the petition prompted the 1st respondent to start compensating the affected land owners. It is his case that the land owners having been compensated, he decided to withdraw the petition. Arguing that the respondents were the cause of the petition, the petitioner urges the Court not to award the respondents costs of the petition.



10. The petitioner emphasizes that he did not have a personal interest in the matter, adding that this petition was a public interest litigation. It is the position of the petitioner that an award of costs against him will impede access to justice in public interest disputes. He urges the court to decline to award costs.
11. The Court has considered the pleadings, the affidavit evidence placed before the Court, and the rival submissions presented on the issue of costs of the withdrawn petition. As observed, the single issue that falls for determination in this Judgment is whether the petitioner should be condemned to bear the 1st and 5th respondents' costs of the withdrawn petition.
12. This petition was anchored on the Bill of Rights and on *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (referred to in this Judgment as "the Rules").
13. Rule 26 of the Rules contains the following framework on costs:

“26 The award of costs is at the discretion of the court.  
{2} In exercising its discretion to award costs, the court shall take appropriate measures to ensure that every person has access to the court to determine their rights and fundamental freedoms.”
14. The Supreme Court of Kenya has, in a line of decisions, laid general principles that guide our courts when exercising the discretion to award or decline to award costs. In *Jasbir Singh Rai & 3 other v Tartochan Singh Rai & 4 other s* [2014] eKLR [“herein referred to as the Rai decision”], the Supreme Court outlined the principle as follows:

“(18) It emerges that the award of costs would normally be guided by the principle that “costs follow the event”: the event being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, prior-to, during, and subsequent-to the actual process of litigation.”
15. On costs in a public interest litigation, the Supreme Court stated as follows in the Rai decision:

“An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs ...”
16. On general exercise of discretion, the Supreme Court stated as follows in the Rai decision:

“Although there is eminent good sense in the basic rule of costs – that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.”



17. The nature of the dispute in this petition was outlined in the opening paragraphs of this Judgment. The nature of the reliefs sought was similarly outlined. It is clear from a reading of the petition that the petitioner brought the petition under the Bill of Rights on behalf of land owners, business owners, and persons who had been affected by the James Gichuru Road Junction – Rironi Highway (A104) Project. The petitioner clearly pleaded that he brought the petition on behalf of the Project Affected Persons. It is also clear from the petition and from the reliefs sought that this petition was not a personal or private claim by the petitioner. It was a human rights claim brought under the Bill of Rights on behalf of the Project Affected Persons. The petition was principally directed against state agencies that were alleged to have failed to comply with the dictates of *the Constitution*. For the above reasons, this Court is satisfied that this petition had sufficient elements of a public interest litigation.
18. In urging the court to award them costs, the 1st respondent contended that the petitioner withheld the identities of the alleged project affected persons. This contention is not factual because a perusal of the court record reveals that many project affected persons swore affidavits which were exhibited.
19. On their part, the 5th respondent urged the Court to award them costs because they were inappropriately made a party to the petition yet they were only agents of the 1st respondent. I do not agree with that view. As the entity alleged to be on the ground and to be engaged in activities that were alleged to violate the Bill of Rights, the 5th respondent was a necessary party for the effectual and complete adjudication of all the issues in the petition.
20. That is not all. Given that the two respondents wanted the Court to exercise its discretion in a particular way, they had a duty to present evidence to the Court to justify their plea for costs. They however, did not bother to bring evidence demonstrating that the petition was unnecessary or that the petitioner acted in a manner that warranted a condemnation to pay costs in a constitutional petition or in public interest litigation. They withheld evidence that would have assisted the Court.
21. For the above reasons, the Court comes to the finding that this is a proper matter in which parties should bear their respective costs.
22. In the end, this petition is marked “withdrawn”. Parties are decreed to bear their respective costs. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 10TH DAY OF DECEMBER 2024**

**B M EBOSO**

**JUDGE**

In the Presence of: -

Ms Ekesa on behalf of Mr Okiya Omtatah – Petitioner

Mr Ochieng for the 1st Respondent

Ms Maina for the 5th Respondent

Court Assistant: Hinga

