



Ndoro & 191 others v National Land Commission & 3 others; World Bank Group, Kenya & another (Interested Parties) (Environment & Land Petition 8 of 2021) [2023] KEELC 243 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEELC 243 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND PETITION 8 OF 2021**

AE DENA, J

JANUARY 23, 2023

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 10(1)(A)(B)(C) & (2)(A) (B), 20,21, 22, 23,27,40,47 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF UNCONSTITUTIONALITY OF SECTION 2, 11, AND 12 THE LAND VALUE (AMENDMENT) ACT 15 OF 2019

BETWEEN

JUMA KOMBO NDARO & 191 OTHERS PETITIONER

AND

NATIONAL LAND COMMISSION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

CABINET SECRETARY MINISTRY OF LAND AND PHYSICAL PLANNING 3RD RESPONDENT

CABINET SECRETARY MINISTRY OF WATER AND SANITATION 4TH RESPONDENT

AND

WORLD BANK GROUP, KENYA INTERESTED PARTY

FRENCH DEVELOPMENT AGENCY INTERESTED PARTY



JUDGMENT

Introduction

1. The Petitioners are private land owners residing in Kasemeni and Mwavumbo ward areas within Kwale County. They are the project affected persons in the Mwache Multi-Purpose dam project, being undertaken by the government of Kenya in collaboration with the World Bank Group Kenya and French Development Agency.
2. The petition was provoked by the government gazettelement of its intention to compulsory acquire the petitioners land for purposes of the project culminating into the issuance of awards which they claim interalia were undervalued by the 1st respondent.

The Parties

3. The 1st Respondent is sued as the Commission in charge of the process of compulsory acquisition of land for government projects and compensation thereof.
4. The 2nd Respondent is the Attorney General of the Republic of Kenya who is the government Principal Legal Adviser and is sued on behalf of the National Government.
5. The 3rd Respondent has been mandated by the *Land Value (Amendment) Act* to undertake, develop and initiate land value index and appointment of members of the Land Acquisition (Compensation) Tribunal.
6. The 4th Respondent is the Cabinet Secretary in charge of the project Mwache Multi-Purpose dam project.

The Petitioners Case

7. The petitioner's case is as set out in the petition dated February 4, 2021 filed in court on the same date and the affidavit sworn in support of the petition by Juma Kombo Ndaru, on behalf of other 191 petitioners dated April 3, 2021. By the petition the petitioner seeks the following prayers: -
 - a. A declaration be made that section 2,11 and 12 of the *Land Value [Amendment] Act* 15 of 2019 are inconsistent with and contravene the *Constitution of Kenya*, invalid, null and void be struck off forthwith.
 - b. A declaration be made that the petitioners fundamental rights and in particular the right to be heard and access to justice and freedom of the individuals under article 47,48 and 50 of the *constitution* have been contravened and violated by the respondents herein.
 - c. An order that the valuation and consequently the awards presented to all the 68 petitioners are illegal and be quashed.
 - d. An order requiring the cabinet secretary to comply with section 4 of the *Land Value [Amendment] Act* 15 of 2019 within 3 months.
 - e. An order requiring the cabinet secretary to comply with part VIIIA 133 A of the *Land Value [Amendment] Act* 15 of 2019 within 3 months.
 - f. Any other, further or better relief that this honourable court will think fit just to give in the circumstances of this case



- g. That costs be in the cause.
8. The Petitioners state that they are the land owners of properties stretching from Kasemeni towards Mwavumbo wards. That the government gazetted notices No 8986 on intention to compulsorily acquire the petitioners land, and thereafter issued award notices which to their surprise were undervalued. The petitioners were apprehensive that the respondents would invoke the provisions of sections 11 and 12 of the [Land Value \[Amendment\] Act](#) 15 of 2019 and take possession of their properties before payment of full, just compensation as the petitioners pursue for a right valuation and just compensation. That the said taking possession without just compensation would be detrimental to them and infringe the petitioner rights to own and enjoy property and therefore unconstitutional.
9. The petitioners also averred that Land Acquisition (Compensation) Tribunal is not yet established since the 3rd respondent has not appointed members to the same. That while the [Land Value \[Amendment\] Act](#) 15 of 2019 (herein the Act) requires that the land value index be developed within 6 months of commencement of the Act as part of the criteria for assessing value for compulsorily acquired freehold and community land the same had not been developed, one year later. It is stated that section 2 of the [Act](#) defines the word ‘prompt’ to be within 1 year after taking possession which is against the spirit of article 40 of the [Constitution](#). That while the objective of the Act was to ensure government projects do not stall because of court cases, it failed to recognize the infringement of the fundamental rights of those affected by the acquisition as they would lose their property in land while waiting for probably a year to be compensated.
10. It is further deponed that the petitioners derive livelihoods from the parcels, have permanent houses, have children attending nearby schools and had nowhere to turn to since the tribunal mandated to address their concerns was yet to be operationalized. The Petitioners aver that if the concerns are left unaddressed and not remedied the petitioners will have their fundamental rights and freedom infringed upon without redress and unconstitutional precedent set and acting without the law and in contravention of the [Constitution](#). They annexed ‘JKN1’ a list of people affected and who authorized the filing of the petition, ‘JKN2’ copy of the gazette Notice and ‘JKN3’ a bundle of award notices’. The award notices were noted by my brother Justice Sila Munyao to be illegible and were replaced appropriately by way of a supplementary affidavit dated February 17, 2021 where it was also stated that the petitioners were unable to start life elsewhere with the suggested compensation awards.

The 1st Respondents Case

11. The 1st respondent did not respond to the petition despite the court giving it opportunity to do so on 19/5/21 and 3/11/21 when Mr. Mbuthia appeared before court for them, 25/10/21 and 23/11/21.

The 3rd Respondents Case

12. The 2nd Respondent did not file a replying affidavit to the petition but filed a replying affidavit on behalf of the 3rd Respondent sworn by John Wainaina Njogu the Chief State Counsel with the 3rd Respondent. He averred that the petitioners had failed to demonstrate that their claims of undervaluation of their property were supported by an independent valuer. That a bill ‘Land Laws (Amendment) bill 2022 amending the [Land Act, 2012](#) was in the final stages of approval and attached the same. He pointed that the amendment seeks to repeal Part VIIIA and replacing it with a new Part establishing the Land Acquisition Commission to hear and determine appeals from the decision of the 1st Respondent in matters relating to compulsory land acquisition process. The bill seeks to further amend Section 107A of the said Act to allow for land value index for a specific county to commence the process of parliamentary approval without awaiting the land value index for the entire republic of



Kenya. Consequently, the proposed amendments have stalled the implementation of the Land Value [Amendment] Act 15 of 2019 pending the passage of the Bill into law. That the orders sought against the 3rd respondent cannot be granted since the procedure for passing the amendments is not within the Cabinet Secretary's control and it will amount to interfering with independence of various arms of government. Further that granting the orders sought will result in loss of funding a project which is for public benefit and constitutional right to clean and safe water in adequate quantities under article 43 of the *Constitution*. That the petitioners will still have access to the Land Acquisition Commission once constituted and the project should be allowed to progress.

The Interested Party's Case

13. The suit against the interested parties was withdrawn by the consent of the parties on 23/11/21 with no orders as to costs.

Submissions By The Parties

14. The court on 12/7/2021 directed that the petition be heard by way of written submissions.

Petitioners Submissions.

15. The petitioners were represented by Mr. Matende and filed their submissions on 20/9/2022. The petitioner submitted on the three issues whether the right procedure was followed in valuating the petitioners land and properties; whether the awards and subsequent compensation issued to the petitioners are just and whether sections 2,11 and 12 of the *Land Value [Amendment] Act* 15 of 2019 are unconstitutional. It was submitted that since the commencement of the Act on 19/08/2019 the 3rd respondent was yet to develop the Land Value Index which is part of the criteria for assessing value for compulsorily acquired land. That consequently any valuation carried out without the guidance of the index as set out in law is null and invalidates the resultant awards. It was also submitted that the awards given cannot enable the petitioners get commensurate fertile land for their subsistence and income. The petitioners find themselves worse off than where they were before the acquisition. The failure to follow the set-out guidelines/procedure on compensation under the Act amounted to acting ultra vires leading to the infringement of the petitioners' rights and fundamental freedoms specifically articles 10(1), article 27 (1-8), 28, 29 (d&f) and 40. It was argued that due to the violations the compensation issued by the Respondents was not just and fair. Lastly it was contended that sections 2, 11 and 12 were unconstitutional for they enable the 1st Respondent to proceed to acquire land and occupy the petitioner's property before prompt payment of full, just compensation infringing on the petitioner's rights to own and enjoy property and ought to be declared as such. Reference was made to the supreme court decision of *Kenya National Human Rights Commission*, Advisory Opinion No 2 of 2012 [2014] eKLR on holistic interpretation of the *Constitution* and thus article 40(3) intended that the affected persons are to be repatriated in the shortest and fastest time possible to enable affected persons move on with their lives within less than a year. However, the petitioners have not been able to move on with their lives since the failure to follow the set criteria led to the meagre Kshs. 350,000 per acre some of which had developments.
16. The case of *Institute of Social Accountability & another v National Assembly & 4 others* High Court Petition No 71 of 2014 [2015] eKLR was also cited to guide on determining whether a statute is constitutional or otherwise. Further that where the *Constitution* decrees a specific procedure to be followed in the enactment of legislation both houses of parliament are bound to follow that procedure.



2nd 3rd and 4th Respondents Submissions

17. State Counsel Ms Langat filed submissions on August 24, 2022 on behalf of the 2nd 3rd and 4th Respondents and identified three issues for determination of this court. Whether sections 2,11 and 12 of the Land Value(amendment) should be declared unconstitutional; Whether the awards for compensation should be quashed and whether the Petitioners rights under article 47, 48 and 50 have been violated. Pointing that there is a presumption that sections contained in an Act are valid, the burden of proof rested with the petitioners to prove the said sections ultra vires the Constitution or a fundamental right is infringed upon in view of the rigorous process the bill underwent including a key element such as public participation before its enactment. It was submitted that this was not discharged. Reliance was placed on Olum & another v Attorney General [2002] 2 EA and Kenya Union of Domestic, Hotels, Education and Allied Workers (Kudhebia Workers) v Salaries & Remuneration Commission, Petition No 294 of 2013.
18. Rehashing the process of compulsory acquisition set out in sections 107-133 of the Land Act culminating into the issuance of award forms it was submitted that the said form accorded the petitioners an opportunity to accept or decline and having chosen the former the petitioners were estopped since they voluntarily executed the same making the petition an afterthought. It was further submitted that the petitioners demand for Kshs 5 million was not supported by an independent valuation report to counter the award of Kshs 350,000 per acre. Referring to the provisions of section 2 of the Land Act which defines just compensation as fair compensation that is assessed and determined through the criteria set in the Act and further citing Katra Jama Issa v Attorney General & 3 others [2018] eKLR it was urged that petitioners were compensated for losses fairly attributed to the taking of their land which was in compliance to article 40(3). That fair compensation requires that one should be paid for the value of the land to them and not its value generally or its value to the acquiring authority. Additionally, it was argued that section 102 (2) of the Land Act permitted acquisition of possession (15 days after publication of notice of intention to acquire) before the completion of the process of compensation in urgent cases such as the instant project as delay would lead to loss of the funding for the project.
19. On whether the petitioner's rights under articles 47, 48 and 50 were violated it was posited that the lack of an operational land acquisition tribunal does not limit the petitioners right to access to the courts of justice since Section 128 of the Land Act in addition to article 165 confer jurisdiction of disputes arising from compulsory land acquisition upon the Environment and Land Court. This court was urged not to grant the prayers in the petition.

Analysis and Determination

20. Having considered the petition, responses and submissions of the parties, I will largely fix the issues pursuant to the prayers sought in this petition as follows; -
 - a) Whether sections 2, 11 and 12 of the Land Value(amendment) Act should be declared unconstitutional;
 - b) Whether the Petitioners rights under article 47, 48 and 50 have been violated.
 - c) Whether the valuation and the awards presented to all the petitioners for compensation should be quashed.
 - d) Whether the Petitioners are entitled to the orders sought.



21. The jurisdiction of this court to hear this petition is not disputed by the parties. I will also proceed by dint of article 258 of the Constitution which provides as follows; -
- (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.
 - (2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—
 - (a) a person acting on behalf of another person who cannot act in their own name;
 - (b) a person acting as a member of, or in the interest of, a group or class of persons;
 - (c) a person acting in the public interest; or
 - (d) an association acting in the interest of one or more of its members.

Whether sections 2,11 and 12 of the Land Value(Amendment) Act is unconstitutional.

22. The Petitioners referred this court to the case of Institute of Social Accountability & Ano v National Assembly & 4 others High Court Petition No 71 of 2014[2015] eKLR which enunciated at length principles that have guided the courts in determining whether a statute or its sections is constitutional some of which are; -
- a) The court is enjoined under article 259 to interpret the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and the bill of rights and that contributes to good governance.
 - b) There is a general presumption that every Act of Parliament is constitutional the burden of proof lies on the person who alleges otherwise.
 - c) The Constitution should be given a purposive, liberal interpretation. The spirit and tenor of the Constitution must permeate the process of judicial interpretation and judicial discretion.
 - d) Provisions of the Constitution must be read as an integrated whole without any particular provision destroying the other but each sustaining the other.
23. The Land Value(amendment) No. 15 of 2019 Act came into force on 19th August 2019. The Act amends the Land Act, 2012, the Land Registration Act and the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act, 2012. It is noteworthy that the petitioners impugn sections 2,11 and 12, and not the entire legislation. I will for ease of reference reproduce these sections;

2. Section 2 of the Land Act is amended by inserting the following new definitions in their proper alphabetical order—

"just compensation" in relation to compulsorily acquired land or creation of wayleaves, easements and public rights means a form of fair compensation that is assessed and determined through criteria set out under this Act;

"prompt" means within a reasonable time of, and in any case not more than one year after, the taking of possession of the land by the Commission;

"full" in relation to compensation for compulsorily acquired land or creation of wayleaves, easements and public rights of way means the restoration of the



value of the land, including improvements thereon, as at the date of the notice of intention to acquire the land and any other matter provided for in this Act;

and

"Tribunal" means the Land Acquisition Tribunal established under Part VIII A.

11. Section 124 of the [Land Act, 2012](#) is amended in subsection (3) by deleting the words "after paying full compensation".

12. Section 125 of the [Land Act, 2012](#) is amended in subsection (1) by deleting the phrase "before taking possession," appearing immediately before the word "pay".

24. Indeed, there is a general presumption that every Act of Parliament is constitutional and the burden of proof lies on the person who alleges otherwise. It is contended by the petitioners that in allowing the 1st Respondent to take possession without paying just, full and adequate compensation is against the spirit of article 40 of the [Constitution](#) and subjects the affected persons to violation of their rights as set out in the [Constitution](#). The same argument is applied in respect of sections 11 and 12 with the addition that they infringe on the petitioner's rights to own and enjoy their property including fundamental freedoms in terms of article 23(1). It is further submitted on behalf of the petitioners that the context of article 40(3) intended affected persons to be repatriated in the shortest and fastest time possible so that they are able to move on with their lives but not 1 year.
25. This court task is therefore to determine whether the sections cited are unconstitutional. In this regard I will be guided by the case of [Kenya Human Rights Commission v Attorney General & another](#) [2018] eKLR where the court stated thus;-

Another key principle of determining constitutional validity of a statute is by examining its purpose or effect. The purpose of enacting a legislation or the effect of implementing the legislation so enacted may lead to nullification of the statute or its provision if found to be inconsistent with the [Constitution](#). In [Olum and another v Attorney General](#) [2002] EA, it stated that;

"To determine the constitutionality of a section of a statute or Act of parliament, the Court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by the [Constitution](#), the Court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by the [Constitution](#), the impugned statute or section thereof shall be declared unconstitutional."

49. In [The Queen v Big M Drug Mart Ltd](#), 1986 LRC (Const) 332, the Supreme Court of Canada stated that;

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. The object is realized through impact produced by the operation and applications of the legislation. Purpose and effect respectively, in the sense of the legislation's object and ultimate impact, are clearly limited, but indivisible. Intended and achieved effect have been looked to for guidance in ascertaining the legislation's object and thus validity."



50. And in the case of *Centre for Rights Education and Awareness & another v John Harun Mwangi & 6 others* [2012] eKLR the court observed that in determining whether a statute is constitutional or not, the court must determine the object and purpose of the impugned Act and this can be discerned from the intention expressed in the Act itself.

26. Applying the above principles to the instant case I'm enjoined to look at the purpose and effect of the Act and the implications of implementation of the impugned sections. The short title states thus

An Act of Parliament to amend the Land Act, the Land Registration Act and the Prevention, Protection and Assistance to Internally Displaced Persons and Affected Communities Act; to provide for the assessment of land value index in respect of compulsory acquisition of land; and for connected purposes

27. From the above it is clear that the objective was for amendment of certain sections of the Land Act, 2012 among other Acts all relating to land and to provide for the assessment of land value index in respect of compulsory acquisition of land. To appreciate better this concept of a land value index my research led me to an article published in the Businessdailyafrica.co by Mr Mwachane, Chairman Land Development and Governance Institute (mwachane@landsc.co.ke). Referring to the Ministry of Lands strategic plan for 2020-2024 which states; -

'A land value is an analytical representation showing the spatial distribution of land values in a given geographical area at a specific time. It will be used to guide compensation to compulsory acquisition of land and investments and includes the creation of a government land Bank'.

28. From the article I picked a few insights namely that the land value index is supposed to provide predictability and remove subjective valuations as has been the case where landowners have made claims of unrealistic compensation amounts leading to exaggerated land acquisition costs as well as delays in government projects. The land value index then gives pre-recorded market values to tame these vices. Clearly then this would provide for a ready-made platform or focal point of reference for comparisons. In my view the introduction of the land value index would bring standardization, efficiency and speed. Further looking at the amendments undertaken especially to the Land Act, 2012 as well as the key provisions introduced there is no doubt they were intended to ensure that government projects do not stall due to protracted disputes on land compensation. I don't think I would be off track if I were to state that the Act's other aim is to regulate and or standardize the value of land in Kenya for the primary purpose of enhancing efficiency and expediting the compulsory land acquisition process. Up to this point then I do not see any departure from the spirit of the Constitution with regard to taking away one property's rights as it does not take away compensation. Again it is in the spirit of the Constitution which enjoins that public resources should be protected and therefore to tame some of the vices that ballooned government projects costs.

29. But to the petitioner's government in its quest to ensure projects do not stall forgot to protect the rights of the land owners. In My understanding the concern is the provision for compensation to be paid within one year that the petitioners argue is unconstitutional in view of the fact that the Constitution expressly provides for prompt payment of compensation. That the effect of implementing the amendments would be to prolong the period of compensation and even take over the land before just and full compensation is made. It is noteworthy that before the amendment (Section 124 of the Land Act was amended in subsection (3) by deleting the words "after paying full compensation") the 1st respondent was required to compensate a landowner prior to taking possession of the land except in urgent cases where they could take possession 15 days after publication of intention to acquire. But



the Act now allows the 1st Respondent to take possession of the land and pay compensation at a later date but within a reasonable amount of time but not later than one year.

30. I proceed to quote the entire article 40 on protection of right to property; -

Article 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.
- (4) 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.

31. Applying some of the principles set out in *Institute of Social Accountability & another v National Assembly & 4 others* (*supra*) to the present petition, while the *Constitution* of Kenya states that compensation should be prompt it does not prescribe a specific timeline under article 40(3) and therefore gave the leeway to parliament to define what prompt compensation would entail and therefore article 259(8) would apply to the effect that if a particular time is not prescribed by the *Constitution* for performing a required act, the act shall be done without unreasonable delay. Parliament did in fact define the word prompt in tandem with the article 259(8) and considered unreasonable delay to be not later than one year. The question that arises then is whether or not the 'not later than one year is unreasonable'. Considering our own local circumstances this court takes judicial notice of the fact that land compensation issues for compulsorily acquired lands have been subject to protracted litigation and therefore amendments whose purpose I have already alluded to earlier. For me a period of one year takes care of such eventuality. I have indeed noted that the Act apart from monetary compensation introduces new forms of compensation namely allocation of an alternative parcel of land of equivalent value and comparable geographical location and land use to the land compulsorily acquired; issuance of government bond; grant or transfer of development rights as



may be prescribed; equity shares in a government-owned entity; and any other lawful compensation. It goes further to stipulate that an owner whose land has been compulsorily acquired shall elect the form of compensation. The promptness of the compensation will depend with the type of compensation one chooses where it is expected some forms of compensation would be faster to implement than others. Clearly there can be no one jacket fits all and therefore the provision for the leeway of the cap of within one year. It is therefore the choice of compensation that becomes material and therefore each case shall be decided on its own facts and merits. The introduction of an undertaking envisages discussions between the affected person and the government and dispels the fears for coercion by the government who may be seen to have the upper hand.

32. For the foregoing reasons I do not see the need to impugn the sections 2, 11 and 12 of the Act as being unconstitutional. What is required in my view is there should be a mechanism of providing for an adequate instalment payment where the government should be obliged to pay affected persons at least a first installment on compensation due prior to taking possession depending with the circumstances of each case. This can be achieved by amendment of the Act.

Whether the Petitioners rights under article 47, 48 and 50 have been violated.

33. The petitioners seek an order that their right to be heard, access to justice and freedoms of the individuals under articles 47, 48 and 50 have been contravened by the respondents.

Article 47 is to the effect that every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Parliament is enjoined to enact legislation to give effect to these rights which legislation should provide for the review of administrative action by a court or if appropriate an independent and impartial tribunal. Article 48 enjoins the state to ensure access to justice for all persons while Article 50 is on the right to fair hearing and states that every person has a right to have any dispute that can be resolved by the application of law decided before a court or if appropriate an impartial independent tribunal or body.

34. A new Part VIII is inserted and establishes the Land Acquisition Tribunal (hereinafter the tribunal) which shall hear disputes related to the compulsory land acquisition process and in determining such disputes, confirm, vary or quash the decision of the NLC. Before the amendment the first port of call was the Environment and Land Court (ELC). The Act now requires that such disputes are lodged with the tribunal effectively conferring the ELC with Appellate jurisdiction to determine such disputes. The petitioners state in paragraph 5 of the petition as follows:-

That the Land Value (amendment) Act provides for a tribunal to hear any objections to the Compensation awards however the said tribunal is yet to be established leaving the petitioners with no choice to seek redress in this Honorable court.

35. While the above may have been stated to justify their action of approaching the court in the 1st instant, it also shows that the petitioners had a forum to seek refuge and therefore they accessed justice. The right of access to court in case of a dispute relating to compulsory acquisition of land is a constitutional right. Article 40 (3) (ii) which I have already quoted earlier allows any person who has an interest in, or right over, that property a right of access to a court of law. I do not think any court would turn away a litigant knowing very well that the tribunal conferred with first jurisdiction is not yet in place. Where would the court expect them to go? In any case the courts inherent jurisdiction to hear the matter is not ousted merely by the establishment of the said tribunal. The ELC still has jurisdiction under article 162(2) of the Constitution which establishes the Environment and Land Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land. Access would only have been hampered in my view if the court were to decline to hear the petitioners for want of



jurisdiction. It is the Courts view that the lack of an operational Land Acquisition Tribunal does not limit the appellant's right of access to the courts.

36. On the right to be heard it was not clear to me whether this drew from the absence of the tribunal and if this is the case, I have already rendered myself on it. The other aspect is the petitioner's deposition that they were rushed and coerced to sign the awards. I will be very brief on this, they had an option to decline but they accepted. No material was placed before this court showing that they documented their concerns and or complains and shared with the 1st respondent or even their local leadership.
37. This court finds that there has been no violation of the petitioners right to access to justice and consequently no violation to their right to fair hearing and right to be heard.

Whether the valuation and the awards presented to all the petitioners for compensation should be quashed

38. In deciding on the above issue I will be seeking to address the issues whether the right procedure was followed in valuation of the petitioner's land or properties and whether the awards and subsequent compensation issued to the petitioners are just. The key amendment here is the introduction under section 4 of the *Act*. Section 107A which sets out the criteria for assessing value for compulsorily acquired freehold land as hereunder; -
 - (1) Valuation of freehold land and community land for purposes of compensation under this Act shall be based on the provisions of this Part and the land value index developed for that purpose by the Cabinet Secretary in consultation with county governments and approved by the National Assembly and the Senate.
 - (2) The land value index under subsection (1) shall be developed within six months of the commencement of this Act.
 - (3) For purposes of this Part, "land value index" means an analytical representation showing the spatial distribution of land values in a given geographical area at a specific time.
 - (4) In addition to any other principle that may be employed in calculating the land value index, the declared value of the land for purposes of payment of rates, rents or stamp duty shall be taken into account.
 - (5) In assessing the value of freehold land and determining the just compensation to be awarded for land acquired under this Act, an increase in the value shall be disregarded if—
 - (a) the increase in the value of land is occasioned by the intended use or development of the land to be acquired;
 - (b) the increase in the value of the land as at the date of publication of the notice of intention to acquire it is likely to accrue from the use to which the land will be put when acquired;
 - (c) the increase in the value of the land is occasioned by any development or improvement to the land if—
 - (i) the improvement was made on the land within two years prior to the date of publication in the Gazette of the notice of intention to acquire the land, unless it is proved that the improvement was made bona fide and not in contemplation of proceedings for the acquisition of the land: Provided that where the national government or the county government makes changes in



the use of the land compulsorily acquired to affect other land owners, these owners shall be excluded from the application of this provision.

- (ii) the improvement was done after the date of publication in the Gazette of the notice of intention to acquire the land, unless the improvements were necessary for the maintenance of any building in a proper state of repair and are not capital improvements.
- (iii) the improvement is contrary to any law or is detrimental to the health of the occupiers or to public health generally.

39. It is not in dispute that the Land Value Index has not been established since the commencement of the Act. It was to be in place within 6 months thereof. The petitioners claim the right procedure was not followed as required by the Act since the Land Value Index was not considered as it had not yet been developed. The petitioners submit that any valuation of land to be carried out without the guidance of the Land Value Index as set out in law is null and void. Of course, it would be in the interest of the petitioners to have the awards nullified since according to them they were undervalued and meagre. In my view it was not enough for the petitioners to purport to impugn the valuation just on the basis that the procedure provided as set out above was not adhered to and just on the basis of the absence of the land value index. Respectfully this would be too narrow an approach. It was incumbent upon the petitioners to demonstrate to this court the import of not applying the land value index to the specific valuation of the properties that were compulsorily acquired. Mr Matende did not make an attempt to explain the whole concept of a land value index and what it would bring to the whole landscape of valuation and specifically for compulsorily acquired land. The petitioners ought to have addressed the court on whether the absence of the land value index affected the valuation negatively. An expert report or opinion in my view would have assisted this court in arriving at a more informed determination as opposed to the mere academic arguments. Nothing was placed before this court in this regard or to show this court how the absence of the land value index makes the compensation unjust.
40. The petitioner also averred that the awards were undervalued. This claim cannot be authenticated. I say so because no material such as an independent valuation was exhibited by the petitioners for comparison purposes in support of the claim of undervaluation. In any event I have already shown earlier the aim of the land value index.
41. Based on the foregoing I see no justification to quash the awards.
42. This court has also been invited to make two further orders, requiring the cabinet secretary to comply with section 4 and part VIIIA 133 A of the *Land Value [Amendment] Act* 15 of 2019 within 3 months. The 3rd respondent case is that these cannot be granted since the procedure for passing the amendments is not within the Cabinet Secretary's control and it will amount to interfering with independence of various arms of government. Evidence has been led by the 3rd respondent that the 'Land Laws (Amendment) Bill 2022 is before parliament and seeks to repeal and replace with another organ the very Land Acquisition Tribunal which the petitioners want the Cabinet Secretary to effect within 3 months. The other amendment sought seeks to allow for land value index for a specific county to commence the process of parliamentary approval without awaiting the land value index for the entire republic of Kenya. I agree with the submission that the parliamentary process is completely outside the control of the 1st respondent. Again to make an order with regard to a tribunal that is being proposed to be removed would be to make orders in vain. For me I'm aware the Bill was published on 28th October 2022 and since the issues are undergoing a parliamentary process then it would be prudent to await the process to take its course. This court therefore declines to issue the orders sought in the circumstances.



43. The upshot of my discussions and various findings above is that this petition lacks merit and it is dismissed. Let every party bear its own costs.

It is so ordered.

DELIVERED AND DATED AT KWALE THIS 23RD DAY OF JANUARY, 2023.

AE DENA

JUDGE

Delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr Matende for the Petitioners

No appearance for the 1st respondents

Mr Mwandeje H/B for Ms. Langat for the 2nd 3rd and 4th Respondents

Mr Daniel Disii- Court Assistant.

