



**Thuo & 151 others v National Land Commission & 5 others (Land Acquisition  
Petition 3 of 2024) [2024] KELAT 1142 (KLR) (12 August 2024) (Judgment)**

Neutral citation: [2024] KELAT 1142 (KLR)

**REPUBLIC OF KENYA  
IN THE LAND ACQUISITION TRIBUNAL  
LAND ACQUISITION PETITION 3 OF 2024  
NM ORINA, CHAIR & G SUPEYO, MEMBER  
AUGUST 12, 2024**

**FORMERLY PETITION NO. E004 OF 2022 – THIKA ELC**

**BETWEEN**

**GICIRI THUO & 151 OTHERS & 151 OTHERS ..... PETITIONER**

**AND**

**NATIONAL LAND COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**MAMA NGINA UNIVESITY COLLEGE ..... 2<sup>ND</sup> RESPONDENT**

**KENYATTA UNIVERSITY ..... 3<sup>RD</sup> RESPONDENT**

**MINISTRY OF EDUCATION ..... 4<sup>TH</sup> RESPONDENT**

**COMMISSION FOR UNIVERSITY EDUCATION ..... 5<sup>TH</sup> RESPONDENT**

**KENYA HUMAN RIGHTS COMMISSION ..... 6<sup>TH</sup> RESPONDENT**

**Requirements to be met before the State could compulsorily acquire land**

*The petition challenged the National Land Commission's notice of intention to acquire, through the process of compulsory acquisition of various parcels of land as additional land for the 2nd respondent. The court highlighted the requirements to be met before the State could compulsorily acquire land.*

Reported by Kakai Toili

***Constitutional Law*** – fundamental rights and freedoms – right to property – where the State sought to compulsorily acquire private land - what were the requirements to be met before the State could compulsory acquire land – Constitution of Kenya, 2010, article 40; Land Act, Cap 280, sections 107, 110(1), and 111(1A).

**Brief facts**

On September 27, 2021, the 1<sup>st</sup> respondent, the National Land Commission (the Commission) vide Gazette Notice No. 10278 21, published a notice of intention to acquire, through the process of compulsory acquisition of land, various parcels of land in Mutomo Village as additional land for Mama Ngina



University College (the 2<sup>nd</sup> respondent). Aggrieved by that development, the petitioners filed a petition at the Environment and Land Court seeking to challenge the gazette notice on grounds that it violated the Constitution and their fundamental rights and freedoms on two main grounds; that there was no public participation; and that the intended acquisition of private land was not in the public interest. The petition was transferred to the instant tribunal.

### Issues

What were the requirements to be met before the State could compulsorily acquire land?

### Held

1. Article 40(3) of the Constitution required that any deprivation of private property must comply with the Constitution and the law. Section 2 of the Land Act set a considerably low bar that the State needed to meet. An intended acquisition of land for expansion of a public university fell under the purview of a public purpose. The 2<sup>nd</sup> respondent was a publicly funded institution.
2. To guide in conducting the required due diligence on whether the threshold for a public purpose or in public interest had been met, the Commission was required to develop the criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land. The compliance of that criteria was the first step before the Commission could accept a request for acquisition of land and then move on to the next step of publishing a notice of intention to acquire the land.
3. A reading of section 107(3), (3A), and (4), ascertained that the Commission was not merely a conveyor belt whenever an acquiring authority wished to acquire land. The Commission was required by law to prescribe criteria which would enable it to conduct the necessary due diligence on whether the requested acquisition met the constitutional requirement of being for a public purpose or in the public interest. Unfortunately, the court was not aware of any such criteria that the Commission applied under section 107(2) of the Land Act.
4. The lack of a transparent criteria portended a huge gap in the process of compulsory acquisition which put private land owners at a disadvantage. The failure to prescribe the required criteria and to avail the same to the public who would be able to question whether intended acquisitions had complied with the law pursuant to article 40(3) of the Constitution was a violation of the national values and principles of governance enshrined under article 10 of the Constitution, specifically the requirement for good governance, transparency and accountability recognized under article 10(2)(c).
5. A reading of the Constitution and laws relevant to the acquisition and utilization of public land pointed to certain minimums that must be met before an approval was granted. The exercise of eminent domain by the State should be exercised as a last resort. The disruptive nature of the exercise of eminent domain necessitated the State to consider all other possible or reasonable alternatives before embarking on the same.
6. The National Land Policy (2009) which was the foundation to the present-day land reforms which included the establishment of the Commission as the body responsible for management of public land and the comprehensive procedure on compulsory acquisition of land recognized the contestation between the exercise of eminent domain, on one hand, and private property rights, on the other hand.
7. To strike a healthy balance between the State's power of eminent domain and private property rights, the State must ensure that it occasions the least disruption to private land owners when embarking on a project for the benefit of the public. That was especially so when the intended acquisition of land would occasion relocation of the project affected persons from their homes. In some cases, the project affected persons may have other deeper attachments to the land earmarked for acquisition like ancestral ownership or the presence of graves of family members.
8. Involuntary ceding of private property had a disruptive effect on the owner and that was why there was an expectation that the State shall take all measures to ensure that such a disruption was minimal. But the first step was for the State to consider if the intended acquisition should be undertaken at all.



9. The Commission as the body mandated to acquire land on behalf of the State was also under a legal obligation to ensure that the acquiring authority had set aside funds for the acquisition. That requirement which was a statutory one under section 111(1A) of the Land Act flowed from the constitutional imperative under article 40(3) of the Constitution to ensure that compensation was promptly done. It was also necessary for the Commission to have confirmation of the funds in order to be satisfied that the intended use of the land by the acquiring authority was not fanciful but had been budgeted for and funds had been allocated for the project.
10. The Commission's role in management of public land extended to ensuring that the acquisition and utilization of public land was undertaken in compliance with rationalized land use plans and agreed upon public needs established through democratic processes. Therefore, the public in whose interest land was being acquired should not only be consulted but also exhaustively involved in weighting of options and building consensus.
11. The Commission was under a legal obligation to ensure that acquiring authorities complied with the Constitution and the law before an acquisition was commenced. As a minimum, the acquiring authority must provide a detailed justification for the project outlining all possible alternatives that had been considered, evidence of availability of funds, and how the intended project complied with existing and future land use plans with the involvement of the affected communities, and compliance with other legal considerations including environmental management.
12. The power of eminent domain existed to satisfy the State's need for land to serve a public purpose or in public interest and not to serve expediency as intended by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. For the reason that the effects of eminent domain were drastic, the State must always resort to the lesser evil in protecting the right to private property ownership.
13. Whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondent were entitled to redesign the initial plan for the location of the 2<sup>nd</sup> respondent, revising that plan to affect a large number of residents of Mutomo Village, most of whom have an ancestral claim to the land was not necessary and justified.
14. Article 40(3) of the Constitution and sections 107 and 110(1) of the Land Act laid down a test that must be satisfied before an approval was granted by the Commission for acquisition of land. The test that must be satisfied was whether the necessity of the project outweighed the inconvenience likely to be suffered by the project affected persons. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents had not made out a case that would have necessitated the inconvenience that would be meted on the petitioners.
15. Related to the necessity question was the requirement in section 111(1A) of the Land Act that the acquiring authority shall deposit with the Commission the compensation funds before the acquisition was undertaken. That was a mandatory requirement which also gave effect to the requirement under article 40(3) of the Constitution for prompt payment in full of just compensation to project affected persons.
16. A failure to deposit funds with the Commission before an acquisition was undertaken in a case where the acquisition was likely to heavily disrupt the project affected persons meant that such persons may end up being displaced without the necessary means to settle elsewhere. The Legislature was deliberate in requiring the existence of funds to be ascertained before an acquisition was undertaken. That was the necessary balance that the Legislature struck to ensure that a person dispossessed of his or her property did not suffer double despondency.
17. Funds for compensation had not been remitted to the Commission. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's witness did not know when such funds would be availed. The State was not ready to undertake the acquisition for the failure to provide the necessary funds that would compensate those whose homes that were to be involuntarily taken.
18. The impugned intention to acquire land for the expansion of the 2<sup>nd</sup> respondent failed to meet the constitutional and statutory criteria for compulsory acquisition of land. The Commission failed in its mandate in approving such a request.



*Petition allowed.*

### **Orders**

- i. *A declaration was issued that the Commission's notice of intention to acquire land contained in Gazette Notice number 10278 dated September 27, 2021 violated article 40(3) of the Constitution and sections 107, 110(1), and 111(1A) of the Land Act and the same was therefore null and void.*
- ii. *An order of certiorari was issued quashing the Commission's decision contained in Gazette Notice number 10278 dated September 27, 2021 intending to acquire land from the petitioners and other residents of Mutomo Village for the expansion of the 2<sup>nd</sup> respondent.*
- iii. *Parties to bear their own costs.*

### **Citations**

#### **Cases**

##### **Kenya**

1. *Commission for Human Rights & Justice (CHRJ) & another v Chief Officer, Medical Services County Government Of Mombasa & 3 others* Constitutional Petition E003 of 2022; [2022] KEHC 12994 (KLR) - (Explained)
2. *Musimba, Patrick v National Land Commission, Kenya Railways Corporation, National Environment Management Authority, Attorney General & China Bridge and Construction Company* Petition 613 of 2014; [2016] KEHC 5956 (KLR); [2016] eKLR - (Explained)
3. *Republic v National Land Commission, Nairobi City Water and Sewerage Company Limited & Nairobi City County Ex-Parte Samuel MN Mweru, Mwangi Mweru, James Karanja, Peter Kariuki, Daniel Nganga & Simon Thuku* Miscellaneous Civil Application 443 of 2017; [2018] KEHC 8021 (KLR); [2018] eKLR - (Mentioned)

#### **Statutes**

##### **Kenya**

1. Constitution of Kenya articles 10, 40(3)- (Interpreted)
2. Land Act (cap 280) sections v2, 107(3)(3A)(4); 110(1); 111(1A)- (Interpreted)

#### **Advocates**

*Mr. Malenya* for the petitioners

*Mr. Thuo* for the 2nd and 3rd respondents

*Ms. Aluoch* for the 4th and 5th respondents

## **JUDGMENT**

### **A. Introduction**

1. On September 27, 2021, the National Land Commission (the 1<sup>st</sup> respondent/ the Commission) vide Gazette Notice No 10278 21, published a Notice of Intention to acquire, through the process of compulsory acquisition of land, various parcels of land in Mutomo Village as additional land for Mama Ngina University College (the 2<sup>nd</sup> respondent).
2. Aggrieved by this development, the petitioners, moved the Environment and Land Court in Petition No E004 of 2022 vide a petition dated April 4, 2022 seeking to challenge the aforementioned Gazette Notice on grounds that the impugned Gazette Notice violated the [Constitution](#) and their fundamental rights and freedoms on two main grounds:
  - a. There was no public participation as required under article 10 of the [Constitution](#); and



- b. The intended acquisition of private land was not in the public interest and is contrary to sections 107 and 111 of the [Land Act](#).
3. The petition was supported by the Affidavits of: Giciri Thuo (sworn on 4<sup>th</sup> April 2022); Daniel Mundia Kamau, Jane Wanjiku Muiruri, George Gathiaka Kiingati, Virginia Waithira Mugo, and John Gitau Ndug'u (all sworn on May 8, 2023); Patrick Ndichu Muiruri (sworn on 23<sup>rd</sup> February 2024); Nicholas Kimindia Kamau, and Daniel Kamita Gichuhi (all sworn on March 19, 2024).
4. The Petition was transferred to the tribunal on February 22, 2024 for hearing and determination.

## **B. The Petitioners' Case**

5. The substratum of the petitioners' case is that the compulsory acquisition process undertaken by the 1<sup>st</sup> and 2<sup>nd</sup> respondents is unprocedural, irregular and illegal. The Complainant specifically alleges that: -
  - a. The acquisition of the petitioner's parcel of land and other parcels of land in Mutomo Village is neither in the public interest or for a public purpose;
  - b. At the time of the start of the compulsory acquisition process, the Council of the 2<sup>nd</sup> respondent, being the acquiring authority, was yet to be constituted. Therefore, the 2<sup>nd</sup> respondent did not have a governing body.
6. The petitioners further aver that the respondents violated the principle of public participation by neglecting meaningful involvement of the residents of Mutomo Village in the plans to compulsorily acquire their land.

## **C. Respondents' Case**

### **i. The 1<sup>st</sup> respondent's case**

7. The 1<sup>st</sup> respondent, vide its replying affidavit dated June 6, 2022 sworn by Brian Ikol – its Director, Legal Affairs, avers that the 1<sup>st</sup> respondent followed all the requisite steps during the process of acquiring land for the 2<sup>nd</sup> respondent. To this end, the 1<sup>st</sup> respondent annexed several copies of Gazette Notices it published including a Notice of Intention to Compulsorily Acquire Property and multiple Notices of Inquiry.
8. The 1<sup>st</sup> respondent further avers that it held inquiry hearings with a majority of the projected affected persons who collected their awards at the inquiry hearings. The 1<sup>st</sup> respondent therefore stated that it has faithfully and correctly carried out its Constitutional and Statutory duties when conducting the compulsory acquisition process for the additional land for the 2<sup>nd</sup> respondent.
9. The 1<sup>st</sup> respondent further stated that the petitioners have not adduced any evidence to support the allegation that the compulsory acquisition of their land for the 2<sup>nd</sup> respondent was not in the public interest.

### **ii. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's case**

10. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents, vide replying affidavit dated May 29, 2023, sworn by Professor James Biu Kung'u – the former Acting Principal of the 2<sup>nd</sup> respondent – refuted the claim by the petitioners that the compulsory acquisition process was neither for a public purpose nor in the public interest. The 2<sup>nd</sup> respondent avers that it is already serving a public purpose by offering higher education to Kenyan students of diverse backgrounds.



11. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents further contended that the petition herein is premature having been filed at a time when the 1<sup>st</sup> respondent was conducting inquiries on the issue of compulsory acquisition.
12. Finally, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents aver that the petitioners are misguided in their claim that the Residents of Mutomo Village are opposed to the compulsory acquisition. It is the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' further contention that the establishment of the 2<sup>nd</sup> respondent at Mutomo has received overwhelming support from the neighbours including those whose parcels are earmarked for acquisition.
13. In a supplementary affidavit dated April 19, 2024 sworn by Professor Zipporah Ng'ang'a – the 2<sup>nd</sup> respondent's Principal, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents reiterate the averments of Professor James Biu Kungu and state that some of the petitioners had since withdrawn from the Petition and many of them have consented to the acquisition of their land. Professor Ng'ang'a further averred that the 3<sup>rd</sup> respondent was responsible for making the request for acquisition of additional land for the expansion of the 2<sup>nd</sup> respondent.

### **iii. The 4<sup>th</sup> respondent's case**

14. The 4<sup>th</sup> respondent, vide its replying affidavit dated April 13, 2022 sworn by Simon Nabukwesi – the Principal Secretary of the State Department for University Education and Research – avers that the residents of Mutomo Village were made aware that a committee had been constituted to handle matters concerning the land to be occupied by the 4<sup>th</sup> respondent.
15. The 4<sup>th</sup> respondent further denied allegations that public participation was not held and referred to meetings held with parents of Mutomo Primary School. The 4<sup>th</sup> respondents avers that parents present at those meetings accepted the university campus to be constructed on the school land provided that the school remains on the same compound as a public primary school.
16. The 4<sup>th</sup> respondent, however, did not address the issues raised by the petitioners regarding the compulsory acquisition of their properties. The replying affidavit only referred to the acquisition of the property on which Mutomo Primary School is located.

### **D. Oral evidence**

17. At the oral hearing, the petitioners presented 8 witnesses who testified on their behalf. First on the stand was Mr Francis Giciri Thuo (PW1). PW1 testified that he lives in Mutomo, Gatundu, he is the proprietor of land parcel number T.72 (Mutomo) and that he is one of the Petitioners. He relied on his affidavit sworn on 4<sup>th</sup> April 2022 in support of the petition. According to PW1, rumors about Mutomo started spreading on February 20, 2017. He heard from the area Member of Parliament, Moses Kiarie, that a university was to be built at Mutomo Primary School. Two others were to be built at Kiganjo and Mang'u.
18. To PW1, this was exciting news as he felt that he would benefit from the project by doing business. Construction later started at Mutomo Primary School. It was PW1's testimony that he came to discover that the university was intending to acquire his land when he saw a Kenya Gazette Notice of 27<sup>th</sup> September 2021. This notice, which was sent to the Mutomo Welfare Group (Whatsapp Group), showed that his land, together with others, was going to be acquired by the National Land Commission on behalf of the Ministry of Education. The witness indicated that he had not been informed of this development prior to the gazettelement.





19. PW1 testified that having been dissatisfied with this development, he decided to challenge the acquisition together with his neighbours who were also opposed to the acquisition. His opposition to the acquisition was on the basis that although he felt that the university was going to be beneficial, it was now coming to deprive him of his livelihood. He testified that Mutomo is where he had raised his children and grandchildren.
20. On cross-examination by Mr Thuo, counsel for the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, the witness indicated that he had not seen the second gazette notice which was a Notice of Inquiry and that he had not attended the inquiry as he was not informed of the same. PW1, however, confirmed that he was aware that he was entitled to compensation if government were to take his land.
21. PW2 was Mr. Daniel Kamita Gichuhi, a farmer residing in Limuru. He adopted his affidavit sworn on March 19, 2024 as his evidence in chief. PW2 testified that he was the founding chairman of Mutomo Primary School. As per his recollections, land was set aside in the 1950s for the construction of a school in Mutomo village. According to him, the establishment of the school was necessary to cater for the needs of Mutomo village which was expansive. The school was set up in 1992 by the community and it occupied only 3 acres of the 10.3 acres that had been set aside. The remaining 7 acres was used by the community for events and celebrations. PW2 testified that he came to learn in the year 2023 that the land where the school is situated had been transferred to Mama Ngina University College. It was his testimony that the transfer happened on April 26, 2023.
22. On cross-examination by Mr Thuo, PW2 confirmed that Mutomo Primary School is still operational on the 3 acres it was occupying. He further stated that although the school had expressed no objection as evidenced by the letter dated May 22, 2015<sup>1</sup>, the community had a problem with the issue. On re-examination, PW2 clarified that although the letter dated May 22, 2015 stated that
- “the community has no objection”
- the said community had not been engaged.
23. The next witness to be called to the stand was Mr. George Gathiaka Kiingati (PW3). PW3 is a retiree and currently a farmer who resides in Mutomo Village. He testified that he is the nearest neighbor to the 2<sup>nd</sup> respondent and his parcel of land is reference no T.276. He adopted his affidavit sworn on May 8, 2023 as his evidence in chief. PW2 objects to the intended acquisition due to lack of public participation.
24. On cross-examination by Mr Thuo, PW3 confirmed that parcel of land no T.276 is registered in the name of his late father and his younger brother is the administrator of the estate. However, he also stated that the particular parcel of land in contention belongs to him even though succession had not been completed.
25. Ms Virginia Waithira Muchogo was the next witness to be called to the stand who testified as PW4. Her testimony was provided through translation from Kikuyu. She testified that she was a resident of Mutomo and is a farmer. She adopted her affidavit sworn on May 8, 2023 as her evidence in chief. It was PW4's testimony that Plot numbers 169, 170 and 190 belonged to her late father who passed on 15 years ago and was buried on Plot No 169. She opposes the intended acquisition of the subject plots as that is where they have buried their parents, grandparents and her brother.
26. PW5 was Ms Jane Wanjiku Muiruri. She adopted her affidavit sworn on May 8, 2023 as her evidence in chief. She testified that parcel numbers T.185, T.189, T.191, and T.199 belonged to her late father,

<sup>1</sup> Page 108, replying affidavit of Professor James Biu Kung'u sworn on May 29, 2023.



- Daniel Muiruri who passed on in 2012. The witness testified that she was opposed to the intended acquisition as she had never been approached by the National Land Commission with an intention to acquire.
27. Mr Daniel Mundia Kamau (PW6) adopted his affidavit sworn on May 8, 2023 as his evidence in Chief. He testified that parcel numbers T.265, T.266, and T.104 belong to his late father who was buried on parcel number T.266. He opposes the intended acquisition because he had not been consulted and to him it felt like grabbing. On cross-examination by Ms Aluoch, counsel for the 4<sup>th</sup> respondent, PW6 confirmed that he had seen the notice of intention to acquire which was shared on WhatsApp.
  28. PW7 (Patrick Ndichu Muiruri)'s testimony followed. His testimony was provided through translation in Kikuyu. He is a resident of Mutomo and is a farmer. He adopted his affidavit sworn on 23<sup>rd</sup> February 2024 as his evidence in chief. He testified that land parcel numbers T.185, T.189, T.191, and T.199 belonged to his late father who passed on in 2012 and was buried in Mutomo. He opposes the intended acquisition on the grounds that he wasn't consulted and that he has built a home in one of the subject parcels of land. On cross-examination by Mr Thuo, the witness was non-committal whether he would be willing to move out if the government offered him compensation.
  29. The petitioners called the last witness (PW8) to the stand. Mr Nicholas Kiminda Kamau, a resident of Mutomo who is a retiree and a farmer adopted his affidavit sworn on March 19, 2024 as his evidence in chief. He testified that he bought plot number T.176 in 1982 and registered the same under his name. He uses the parcel of land for small scale farming and was opposed to the intended acquisition because he had not been informed of the same. He only heard it over the radio.
  30. This marked the end of the Petitioners' case.
  31. The 1<sup>st</sup> respondent called Ms. Dorcah Biyaki to the stand on May 22, 2024. The witness adopted her replying affidavit dated April 15, 2024 as her evidence in chief and stated that she is the Acting Director – Taxation and Valuation at the 1<sup>st</sup> Respondent. On cross-examination by Mr Thuo, the witness confirmed that the 1<sup>st</sup> respondent undertakes verification when it receives a request for acquisition to verify if the same is for a public purpose or in public interest. In this case, the witness testified, the same was done and it was verified that the requested acquisition was for education which is a public purpose.
  32. Further, the witness testified that the 1<sup>st</sup> respondent published a notice of intention to acquire which was served on the project affected persons. It was her testimony that the first scheduled inquiry did not take place because the project affected persons had not been sensitized. It was her testimony that another gazette notice was published, and inquiries were subsequently conducted.
  33. The witness was stood down until May 29, 2024 to allow her to have a complete record of documents for purposes of the Petitioners' cross-examination. On 29<sup>th</sup> May 2024, Mr. Malenya for the petitioners cross-examined the witness. The witness reiterated her testimony that acquisition must be for a public purpose or in the public interest. Although she confirmed that in this case the 1<sup>st</sup> respondent had received a request from the Ministry of Education, the witness stated that the said request had not been presented in evidence.
  34. The witness also confirmed that although the acquisition was undertaken and awards issued in 2022, even those who had accepted the awards had not been paid as the 1<sup>st</sup> respondent was yet to receive compensation funds from the Ministry of Education (the 4<sup>th</sup> Respondent). The witness could not tell when compensation could be paid.
  35. On re-examination by Ms Masinde, counsel for the 1<sup>st</sup> respondent, the witness clarified that the 1<sup>st</sup> respondent cannot proceed to undertake compulsory acquisition before it receives a request from the





relevant ministry in case of the national government and the County Executive Committee in case of county governments.

36. This marked the end of the 1<sup>st</sup> respondent's case.
37. Professor Zipporah Ng'ang'a, the current Principal of the 2<sup>nd</sup> respondent testified on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents. She adopted her affidavit sworn on April 19, 2024 and that of her predecessor, Professor James Biu Kung'u sworn on May 29, 2023 as her evidence in chief.
38. On cross-examination by Ms Masinde, the witness stated that she was aware that the 1<sup>st</sup> respondent was requested to acquire land on behalf of the 2<sup>nd</sup> respondent. She further stated that there was progress towards acquisition of money from treasury to compensate landowners.
39. On cross-examination by Mr Malenya, the witness confirmed that the 2<sup>nd</sup> respondent was proposed to be located in three sites namely: Mutomo Primary, Kiganjo Polytechnic and Ruburi primary. However, the 2<sup>nd</sup> respondent did not set up campuses in Kiganjo and Ruburi. The witness also confirmed that according to the Proposal for the Establishment of Mama Ngina Kenyatta University College as Constituent College of Moi University dated January 2015, only 10.3 acres of land were to be utilized for setting up the university in Ngenda Mutomo. The university was to acquire land from other areas to achieve a cumulative acreage of 50 acres.
40. Further, the witness was taken through the minutes of the steering committee which are attached to the affidavit of Professor James Biu Kung'u at page 43 and specifically minute 6 which alluded to acquisition of land on the basis of "willing buyer-willing seller" principle. She confirmed that the principle was adopted by the committee. She further confirmed that this was also recommended by the committee on page 97 of the same affidavit. The witness, however, testified that it was not possible to stick to the principle of "willing buyer-willing seller" because the university would want to have one continuous mass.
41. The witness testified that it was a requirement by the Commission for University Education (the 5<sup>th</sup> respondent) to have 50 acres of land for an institution to be chartered as a university. According to the witness, the request for acquisition came from Moi University then cascaded to Kenyatta University. She had, however, not seen the request.
42. The witness further confirmed that she was aware that the people who had been given awards and accepted them had not been paid. Although she expressed concern at the situation, the witness could not commit on when the said persons could be paid. She further stated that she wasn't aware if money should be available first before an acquisition is undertaken.
43. Mr Thuo re-examined the witness to seek clarification on some of the issues which had come up during cross-examination. First, the witness clarified that it was not possible to establish three campuses for the 2<sup>nd</sup> Respondent because the costs would be prohibitive. Administrative wise, the witness testified, the 2<sup>nd</sup> Respondent would have to mimic the same in all the three campuses. To that end, the witness testified, it is practical to have one location for purposes of infrastructural development and administration. The witness further stated that the "willing buyer-willing seller" principle did not originate from the 2<sup>nd</sup> respondent but from the 1<sup>st</sup> Respondent. In the circumstances, the same was not practical.
44. This marked the end of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents' case.
45. The 4<sup>th</sup> and 5<sup>th</sup> respondents did not call a witness.



## E. Analysis and Determination

46. Vide Submissions dated June 12, 2024, the Petitioners invited this Tribunal to interrogate whether the 1<sup>st</sup> respondent followed the due process of compulsory acquisition of the suit properties, and whether the intended acquisition was done in the public interest. The 1<sup>st</sup> respondent has asked the tribunal to determine if the Commission followed the correct compulsory acquisition process.<sup>2</sup>
47. On their part, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents identify the following issues for determination;
- a. The petitioner's irregular introduction of evidence through submissions;
  - b. Public support for the compulsory acquisition;
  - c. The question of public participation;
  - d. Adherence to the process of compulsory acquisition;
  - e. Public interest; and
  - f. Compensation.<sup>3</sup>
48. The 4<sup>th</sup> and 5<sup>th</sup> respondents have asked the tribunal to address the issue whether the stipulated process for compulsory acquisition was adhered to and whether the acquisition was in the interest of the public.
49. We have summed the issues for determination to two main issues being: whether the intended acquisition of the suit properties was for a public purpose or in the public interest, and, whether the process of compulsory acquisition was complied with. The other sub-issues identified by the parties will be analysed within the main issues.
50. Article 40(3) of the [Constitution](#) provides that,

“The State shall not deprive a person of property of any description...unless the deprivation –

- (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 - ....”

This provision requires that any deprivation of private property must comply with the [Constitution](#) and the law. In regard to the requirement that the same be for a public purpose or in the public interest, the [Land Act](#) provides further guidance as follows under section 2 (interpretation clause):

“public purposes” means the purposes of—

- a. transportation including roads, canals, highways, railways, bridges, wharves and airports;
- b. public buildings including schools, libraries, hospitals, factories, religious institutions and public housing;
- c. public utilities for water, sewage, electricity, gas, communication, irrigation and drainage, dams and reservoirs;
- d. public parks, playgrounds, gardens, sports facilities and cemeteries;

<sup>2</sup> 1<sup>st</sup> respondent's Written Submissions dated July 10, 2024.

<sup>3</sup> 2<sup>nd</sup> and 3<sup>rd</sup> respondents' Final Submissions dated July 12, 2024.



- e. security and defence installations;
  - f. settlement of squatters, the poor and landless, and the internally displaced persons; and
  - g. any other analogous public purpose;
51. There is no doubt that section 2 sets a considerably low bar that the State needs to meet. An intended acquisition of land for expansion of a public university falls under the purview of a public purpose. The evidence on record is not contested that the 2<sup>nd</sup> respondent is a publicly funded institution. We find unconvincing the argument by the petitioners that although the 2<sup>nd</sup> respondent is a public institution, it behaves like a private institution. The question we must, however, ask ourselves is whether the satisfaction, on the face of it, that an acquisition is for a public purpose should be accepted as such to dispossess a private land owner of his land under the exercise of eminent domain. The [Constitution](#), and indeed the law did not contemplate that.
52. In the now *locus classicus* case on the process of compulsory acquisition of land, [Patrick Musimba v National Land Commission and 4 Others](#) [2016] eKLR, the Court pronounced itself as follows on the first step that is undertaken before the said process commences:
86. Under section 107 of the [Land Act](#), the National Land Commission (the 1<sup>st</sup> respondent herein) is ordinarily prompted by the National or County Government through the Cabinet Secretary or County Executive Member respectively. The land must be acquired for a public purpose or in the public interest as dictated by article 40(3) of the [Constitution](#). In our view, the threshold must be met; the reason for the acquisition must not be remote or fanciful. The National Land Commission needs to be satisfied in those respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property. (Emphasis added)
53. To guide in conducting the required due diligence on whether the threshold for a public purpose or in public interest has been met, the 1<sup>st</sup> respondent is required to develop a criteria and guidelines to be adhered to by the acquiring authorities in the acquisition of land.<sup>4</sup> The compliance of this criteria is the first step before the 1<sup>st</sup> respondent can accept a request for acquisition of land and then move on to the next step of publishing a notice of intention to acquire the land. A reading of section 107(3), (3A), and (4) ascertains that the National Land Commission is not merely a conveyor belt whenever an acquiring authority wishes to acquire land. The Commission is required by law to prescribe a criteria which will enable it to conduct the necessary due diligence on whether the requested acquisition meets the Constitutional requirement of being for a public purpose or in the public interest.
54. Unfortunately, we are not aware of any such criteria that the Commission applies under section 107(2) of the [Land Act](#). The lack of a transparent criteria portends a huge gap in the process of compulsory acquisition which puts private land owners at a disadvantage. The failure to prescribe the required criteria and to avail the same to the public who would be able to question whether intended acquisitions have complied with the law pursuant to article 40(3) of the [Constitution](#) is a violation of the national values and principles of governance enshrined under article 10 of the [Constitution of Kenya](#), specifically the requirement for “good governance...transparency and accountability” recognized under article 10(2)(c), thereof.
55. Nevertheless, a reading of the [Constitution](#) and laws relevant to the acquisition and utilization of public land points us to certain minimums that must be met before an approval is granted. First, it is clear

<sup>4</sup> Section 107 (2) of the [Land Act](#),



in our minds that the exercise of eminent domain by the State should be exercised as a last resort. The disruptive nature of the exercise of eminent domain necessitates the State to consider all other possible or reasonable alternatives before embarking on the same.<sup>5</sup> As noted in the National Land Policy (2009), state power to regulate private property rights through compulsory acquisition has neither been exercised effectively nor accountably.<sup>6</sup> The National Land Policy (2009) which was the foundation to the present day land reforms which include the establishment of the 1<sup>st</sup> respondent as the body responsible for management of public land and the comprehensive procedure on compulsory acquisition of land recognized the contestation between the exercise of eminent domain, on one hand, and private property rights, on the other hand.

56. To strike a healthy balance between the State's power of eminent domain and private property rights, the State must ensure that it occasions the least disruption to private land owners when embarking on a project for the benefit of the public. This is especially so when the intended acquisition of land will occasion relocation of the project affected persons from their homes. In some cases, the project affected persons may have other deeper attachments to the land earmarked for acquisition like ancestral ownership or the presence of graves of family members. As noted by the World Bank,

“Whenever people are displaced, the human costs in terms of disruption to community cohesion, livelihood patterns and way of life, may go beyond what can be fully mitigated through standard compensation, however generous those may be.”<sup>7</sup>

The disruptive nature of eminent domain is aptly summed in these words from a 1965 song:

They're moving father's grave to build a sewer  
 They're moving it regardless of expense.  
 They're moving his remains to lay down nine-inch drains  
 To irrigate some rih bloke's residence.  
 Now what's the use of having a religion?  
 If when you're dead you cannot get some peace  
 Cause some society chap wants a pipeline to his tank....<sup>8</sup>

57. There is no doubt that involuntary ceding of private property has a disruptive effect on the owner and that is why there is an expectation that the State shall take all measures to ensure that such a disruption is

<sup>5</sup> See, Ronald M Omwoma, 'Necessity and Justification for Compulsory Acquisition of Land in Kenya' Land Administration Forum, Vol 1, March 2023.

<sup>6</sup> Sessional Paper No 3 of 2009 on National Land Policy, page 11

<sup>7</sup> Jonathan Mills, 'Compulsory Acquisition of Land and Compensation in Infrastructure projects' Available at <https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/Compulsory%20Acquisition%20of%20Land%20and%20Compensation%20in%20Infrastructure%20Projects.pdf>

<sup>8</sup> 'They're moving father's grave to build a sewer' Song by The Clancy Brothers.



minimal. But the first step is for the State to consider if the intended acquisition should be undertaken at all. Section 110(1) of the *Land Act* provides that,

“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.” (Emphasis added).

58. The Commission as the body mandated to acquire land on behalf of the State is also under a legal obligation to ensure that the acquiring authority has set aside funds for the said acquisition. This requirement which is a statutory one under section 111(1A) of the *Land Act* flows from the Constitutional imperative under article 40(3) to ensure that compensation is promptly done. It is also necessary for the Commission to have confirmation of the funds in order to be satisfied that the intended use of the land by the acquiring authority is not “fanciful” but has been budgeted for and funds have been allocated for the project.

59. Furthermore, our understanding of the mandate of the Commission is that its role in management of public land extends to ensuring that the acquisition and utilization of public land is undertaken in compliance with

“rationalized land use plans and agreed upon public needs established through democratic processes.”<sup>9</sup>

Therefore, the public in whose interest land is being acquired should not only be consulted but also exhaustively involved in weighting of options and building consensus.

60. In summary, we find that the Commission is under a legal obligation to ensure that acquiring authorities comply with the *Constitution* and the law before an acquisition is commenced. As a minimum, the acquiring authority must provide a detailed justification for the project outlining all possible alternatives that have been considered, evidence of availability of funds, and how the intended project complies with existing and future land use plans with the involvement of the affected communities, and compliance with other legal considerations including environmental management.

61. In this case, we have been told that the 2<sup>nd</sup> respondent intended to expand the campus at Mutomo necessitating the request to the 1<sup>st</sup> respondent to acquire additional land. We have also been told that the 2<sup>nd</sup> respondent currently occupies approximately 7 acres of land which previously belonged to Mutomo Primary School.

62. This was not the initial plan though. The evidence of Professor James Biu Kung’u contains the proposal for the establishment of the 2<sup>nd</sup> respondent which indicates that the 2<sup>nd</sup> respondent was going to be located in three different locations being: Mutomo Primary School, Kiganjo Polytechnic, and Ruburi Primary and Secondary Schools. In this proposal, the 2<sup>nd</sup> respondent was going to take only 10 acres that belonged to and if there was need for more, the 2<sup>nd</sup> respondent would engage the residents of Mutomo Village on a “willing buyer – willing seller” basis

63. Professor Zipporah Ng’ang’a who testified before this tribunal, however, indicated that the establishment of the 2<sup>nd</sup> respondent in three different locations was going to be costly and the acquisition of land on the basis of willing buyer – willing seller basis was impractical. The testimony of the 2<sup>nd</sup> respondent is essentially that it is cheaper to dispossess private land owners of their lands than sticking to the initial plan of locating the 2<sup>nd</sup> Respondent in three locations. We are not convinced with this line of argument. The power of eminent domain exists to satisfy the State’s need for land to

<sup>9</sup> Sessional Paper No 3 of 2009 on National Land Policy, page 11



serve a public purpose or in public interest and not to serve expediency as intended by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent. For the reason that the effects of eminent domain are drastic, the State must always resort to the lesser evil in protecting the right to private property ownership.

64. Whereas the 2<sup>nd</sup> and 3<sup>rd</sup> respondent were entitled to redesign the initial plan for the location of the 2<sup>nd</sup> respondent, we do not find that revising that plan to affect a large number of residents of Mutomo Village, most of whom have an ancestral claim to the land was necessary and justified. It was also the testimony of some witnesses that they have buried their forefathers and kinfolk on the suit properties. To our minds, article 40(3) of the Constitution and sections 107 and 110(1) of the Land Act lay down a test that must be satisfied before an approval is granted by the National Land Commission for acquisition of land. The test that must be satisfied is whether the necessity of the project outweighs the inconvenience likely to be suffered by the project affected persons. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents have not made out a case that would have necessitated the inconvenience that would be meted on the petitioners. It was not shown to the 1<sup>st</sup> respondent or indeed this tribunal why land must be acquired for the 2<sup>nd</sup> respondent to expand its campus in its current location. Whereas the petitioners have not contested the value of higher education or the benefits to the community, it is not apparent from the evidence on record why the expansion is necessary in the subject locality through compulsory acquisition of land rather than the initial plan of locating the 2<sup>nd</sup> respondent in three different campuses.
65. Furthermore, the respondents have not shown that the expansion of the 2<sup>nd</sup> respondent as intended was triggered by a public demand for an institution of higher learning in the area. On the contrary, Mutomo area is within close proximity of other public universities being Kenyatta University and Jomo Kenyatta University.
66. Related to the necessity question is the requirement in section 111(1A) of the Land Act that,

“the acquiring authority shall deposit with the Commission the compensation funds...before the acquisition is undertaken.”

This is a mandatory requirement which also gives effect to the requirement under article 40(3) for prompt payment in full of just compensation to project affected persons.

67. The High Court in Commission for Human Rights & Justice (CHRJ) & another v Chief Officer, Medical Services County Government Of Mombasa & 3 others (Constitutional Petition E003 of 2022) [2022] KEHC 12994 (KLR) (21 September 2022) (Judgment), held that when the word “shall” is used in a statutory provision it imports a form of command or mandate. It is not permissive, it is mandatory. Accordingly, a proper construction of the provisions of section 111 (1A) of the Land Act, 2012 leads to the conclusion that it is couched in mandatory terms.
68. This is reiterated in Republic v National Land Commission & 2 others Ex-parte Samuel MN Mweru & 5 others [2018] eKLR, where Odunga J held that,

... before the Commission acquires land on behalf of any authority it must ensure that the funds required for the said acquisition are placed at the disposal of the Commission so that as soon as the process is completed but before possession of the land is taken the person interested in the land is fully compensated.

69. A failure to deposit funds with the commission before an acquisition is undertaken in a case where the acquisition is likely to heavily disrupt the project affected persons means that such persons may end up being displaced without the necessary means to settle elsewhere. The legislature was deliberate in requiring the existence of funds to be ascertained before an acquisition is undertaken. This is the





necessary balance that the legislature struck to ensure that a person dispossessed of his or her property does not suffer double despondency.

70. In the instant case, it is clear that funds for compensation have not been remitted to the Commission. The 2<sup>nd</sup> and 3<sup>rd</sup> respondent's witness does not know when such funds will be availed. It is evident to us that the State was not ready to undertake this acquisition for the failure to provide the necessary funds that would compensate those whose homes were to be involuntarily taken. According to Ms. Biyaki's and Professor Ng'ang'a's testimonies, even those who accepted the awards issued in 2022 have not been compensated. The failure to avail funds for this intended acquisition by the 4<sup>th</sup> respondent also speaks to its prioritization. Whereas government projects are subject to planning and budgeting, the failure to set aside funds for impugned project speaks to its lack of prioritization or necessity.
71. It is also noteworthy that the 4<sup>th</sup> respondent through the replying affidavit of Mr Simon Nabukwesi, the Principal Secretary of the State Department for University Education, only refers to the establishment of the 2<sup>nd</sup> respondent at Mutomo Primary School. As the accounting officer of the 4<sup>th</sup> respondent, it is expected that Mr Nabukwesi would speak to the plans for the expansion of the 2<sup>nd</sup> respondent through the process of compulsory acquisition which the petitioners have challenged. The said replying affidavit curiously steered clear of the impugned project and only spoke about the initial plan.

## F. Conclusion

72. In conclusion, we determine that the impugned intention to acquire land for the expansion of the 2<sup>nd</sup> respondent failed to meet the Constitutional and Statutory criteria for compulsory acquisition of land. The Commission failed in its mandate in approving such a request. Having made this determination, it is not necessary to decide on the other remaining issue. The orders that commend themselves to us are that the Petition succeeds in the following terms:
- a. A declaration be and is hereby issued that the 1st respondent's Notice of Intention to acquire land contained in Gazette Notice Number 10278 dated September 27, 2021 violated article 40(3) of the Constitution and sections 107, 110(1), and 111(1A) of the Land Act and the same is therefore null and void;
  - b. An order of *certiorari* be and is hereby issued quashing the 1st respondent's decision contained in Gazette Notice Number 10278 dated September 27, 2021 intending to acquire land from the petitioners and other residents of Mutomo Village for the expansion of the 2nd respondent;
  - c. Parties shall bear their own costs.

**DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12<sup>TH</sup> AUGUST, 2024.**

.....

**DR. NABIL M. ORINA**

**CHAIRPERSON**

.....

**GEORGE SUPEYO**

**MEMBER**

Before:-

Mr. Malenya for the Petitioners

Mr. Thuo for the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents



Ms. Aluoch for the 4<sup>th</sup> and 5<sup>th</sup> Respondents

Isaac – Court Assistant

