



Telcom Kenya Limited & another v Ministry of Sports, Culture and Heritage & 4 others; Ministry of Public Service, Youth and Gender Affairs & 2 others (Interested Parties) (Environment & Land Petition 11 of 2021) [2023] KEELC 19328 (KLR) (17 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19328 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND PETITION 11 OF 2021**

**JO MBOYA, J
JULY 17, 2023**

BETWEEN

**TELCOM KENYA LIMITED 1ST PETITIONER
AFTRACO LIMITED 2ND PETITIONER**

AND

**MINISTRY OF SPORTS, CULTURE AND HERITAGE 1ST RESPONDENT
THE ATTORNEY GENERAL OF KENYA 2ND RESPONDENT
THE NATIONAL LAND COMMISSION 3RD RESPONDENT
EXCLUSIVE ESTATE LIMITED 4TH RESPONDENT
POSTEL HOUSING CO-OPERATIVE SOCIETY LIMITED ... 5TH RESPONDENT**

AND

**MINISTRY OF PUBLIC SERVICE, YOUTH AND GENDER
AFFAIRS INTERESTED PARTY
MINISTRY OF INFORMATION, COMMUNICATIONS AND
TECHNOLOGY INTERESTED PARTY
DALLO HOLDINGS LIMITED INTERESTED PARTY**



JUDGMENT

Introduction And Background

1. The Petition herein was commenced vide Petition dated the 15th December 2021; wherein the current 1st Petitioner was the only Petitioner, whereas the 1st, 2nd and 3rd Respondents were impleaded as the only Respondents to the Original Petition.
2. Furthermore, the original Petition also impleaded the 1st, 2nd and 3rd Interested Parties. For good measure, the named Interested Parties have remained as such.
3. Nevertheless, upon the filing of the instant Petition various Parties filed Applications seeking to be joined in various, albeit diverse capacities. In this respect, the 2nd Petitioner sought for and obtained Leave and was thereafter admitted as such.
4. On the other hand, the 4th and 5th Respondents, initially sought for and obtained Leave to be admitted as Interested Parties and indeed same were admitted as the 4th and 5th Interested Parties. However, the 4th and 5th Respondents thereafter filed subsequent Applications and in respect of which same sought to cease being Interested Parties and to be admitted as Respondents to the Petition.
5. First forward, on the 10th November 2022; the Honourable court rendered a Ruling wherein the 4th and 5th Respondents were duly joined and admitted in their current capacities as 4th and 5th Respondents, respectively. Further and in addition, the 4th and 5th Respondents were also granted liberty to file cross Petitions.
6. Arising from the foregoing, an amended Petition dated the 2nd June 2022; was duly filed reflecting the names of two Petitioners and wherein the following reliefs are sought;
 - i. A declaration that the act of taking possession of Land Reference No. 7656 situate along Ngong Road ('the Suit Property') by the 1st Respondent was illegal, unlawful and is an arbitrary deprivation of the 1st Petitioner's constitutional right to property as enshrined under Article 40(3) of *the Constitution*.
 - ii. A declaration that the 1st Petitioner is the lawful owner of the suit property.
 - iii. An order for Compensation on account of the 1st Petitioner's deprivation of the Suit Property.
 - iv. Such other and/or further relief as this Honorable court may deem fit to grant.
 - v. The Costs of this Petition be borne by the Respondents.
7. In support of the Amended Petition, the 1st Petitioner relies on various affidavits namely, the supporting affidavit sworn by Wangechi Gichuki on the 15th December 2021; Further affidavit of Wangechi Kichuki sworn on 10th January 2022; and Further affidavit of Wangechi Gichuki sworn on the 16th September 2022, respectively.
8. On her part, the 4th Respondent duly entered appearance and filed a Response to the amended Petition. Furthermore, the 4th Respondent also filed a Pross petition dated the 18th of November 2022; and in respect of which same has sought for the following reliefs;



A. Declarations be issued that:

- i. The Cross- Petitioner is lawfully entitled to compensation equivalent of 60 acres of the suit property LR No. 7656 that should be held in a joint escrow account with the 1st Respondent pending determination of all pending litigation on account of its beneficial ownership interest and right of the 60 acres under Article 40(3)(b)(ii) of *the Constitution*.
- ii. The conduct of Telkom Kenya Limited and Afraco Limited in entering into the Agreement for Sale dated 5th July 2011 and the Deed of Settlement dated 1st August 2018 regarding the 60 acres of the suit property was in contempt of the Court of Appeal decision in Nairobi Civil Appeal No. 135 of 2013 Exclusive Estates Ltd v The Registrar of Titles & Others and amounted to stealing a march and in breach of the doctrine of Lis pendens and should be set aside to the extent of the 60 acres.
- iii. The conduct of Telkom Kenya Limited and Afraco Limited in suppressing the Deed of Settlement dated 1st August 2018 before the arbitral tribunal appointed by consent in Nairobi HCCC No. 1158 of 2011 Exclusive Estates Ltd v Telkom Kenya Ltd & Postel Housing Co-operative Society Ltd and in the subsequent applications to set aside the arbitral award in the high court was a conspiracy to defraud and occasioned a miscarriage of justice through material non-disclosure.
- iv. The compensation lawfully due to Telkom Kenya Limited and Afraco Limited is limited to 19 acres of the suit property LR No. 7656.

B. An Order Of Prohibition

directed at the 3rd to 5th Respondents from paying any compensation for the portion of 60 acres of the suit property to Telkom Kenya Limited and Afraco Limited.

C. An Order Of Mandamus:

- i. Compelling the 3rd to 5th Respondents to engage with the Cross-Petitioner in all future negotiations for compensation under Article 40(3)(b) of *the Constitution*.
 - ii. Ordering the 3rd to 5th Respondents to make prompt payment in full to the Cross-Petitioner for the 60 acres of the suit property LR No. 7656. D. Interest and costs of the Cross Petition as the court deems fit in the interest of justice.
9. On her part, the 5th Respondent has also filed a Response to the amended Petition as well as a cross Petition. For good measure, the cross Petition by the 5th Respondent is dated the 24th November 2022; and in respect of which same has sought for the following reliefs;
- a. A declaration that the Petitioners, the 1st, 2nd and 3rd Respondents; 1st, 2nd and 3rd Interested Parties violated the 5th Respondent/cross-Petitioner's Constitutional right to property.
 - b. A declaration that the compulsory acquisition undertaken by the National Land Commission is illegal, null and void.
 - c. A declaration that the 5th Respondent/cross-Petitioner (Postel Housing Co-operative Society Limited) is the lawful owner of 60 acre of the Ngong road L.R. No. 7656 - (the suit property).



- d. An Order directing the 1st Petitioner - Telkom to subdivide LR NO. 7656 and transfer 60 acres of the land to the 5th Respondent/cross-Petitioner (Postel) and in default the Deputy Registrar of the High Court be authorized to sign all necessary documents to effect the subdivision and transfer of 60 acres to the 5th Respondent/cross-Petitioner(Postel).
 - e. An Order that the 5th Respondent/Cross-Petitioner be compensated by the National Land Commission for the 60 acres of land out of the suit property.
 - f. A declaration that the Deed of Settlement between Petitioners - Telkom Kenya Limited and AFTRACO Limited is illegal, unlawful, null and void.
 - g. An Order that entry number 5 on title Land Reference No. 7656; be cancelled.
25
 - h. A declaration that the Special Gazette No. 59A dated 5th November, 1999, Legal Notice No 158 of the Kenya Communication Act, 1998; titled the Vesting of Assets and Liabilities of Telkom Kenya be reinstated and an entry be made in the Title.
 - i. Such other orders the Court deems fit.
 - j. Costs of the Cross-Petition herein and the Amended Petition be borne by the Petitioners.
10. On the other hand, 2nd Petitioner has filed a supporting affidavit in support of the amended Petition and same is sworn on the 20th June 2022, wherein the 2nd Petitioner has essentially supported the position taken by the 1st Petitioner in respect of the subject matter.
 11. On behalf of the 1st and 2nd Respondents; and the 1st and 2nd Interested Parties, the following affidavits have been filed. The Replying affidavit of Amos N Gathecha sworn on the 22nd February 2023; and Prof. Edward W Kisiangani sworn on the 15th February 2023, respectively.
 12. Finally, it is imperative to point out that the 3rd Respondent herein neither entered appearance nor filed any response to the amended Petition or the cross Petitions, which were filed by and on behalf of the 4th and 5th Respondents. Further and in addition, the 3rd Interested Party also did not file any pleadings or at all.
 13. Be that as it may, it is instructive to note that the advocate for the respective Parties agreed to canvass and dispose of the Petition and the respective cross Petitions by way of written submissions. Consequently and in this regard, the court proceeded to and issued directions pertaining to the timelines for the filing and exchange of the written submissions.
 14. Moreover, it is worthy to underscore that pursuant to and in line with the directions of the Honourable court, the various Parties, namely, the Petitioners; the 1st, 2nd, 4th and 5th Respondents duly proceeded to and filed their written submissions, which forms part of the record of the Honourable court and shall variously be relied upon in crafting of the Judgment herein.



Submissions By The Parties:

a. 1st Petitioner's Submissions:

15. The 1st Petitioner filed elaborate Written submission dated the 27th March 2023; and in respect of which same has raised, highlighted and canvassed a plethora of issues. For good measure, the submissions on behalf of the 1st Petitioner addresses both the Petition as well as the cross Petitions, which have been filed by the 4th and 5th Respondents, respectively.
16. First and foremost, Learned counsel for the 1st Petitioner has submitted that the suit property was hitherto vested in and owned by East African External Telecommunication Company Limited, now defunct.
17. Further and in addition, Learned counsel has submitted that upon the dissolution of the East African Community the suit property was transferred to and vested in Kenya Post and Telecommunications Corporation, now defunct.
18. On the other hand, Learned counsel for the 1st Petitioner has also submitted that following the dissolution Kenya Post and Telecommunication, all the assets and liabilities of the said Corporation, now defunct; were transferred to and vested in the 1st Petitioner herein by dint of Gazette Supplement Number 64 of 9th November 1998.
19. Furthermore, Learned counsel has submitted that on or about 19th January 1993, the predecessor of the 1st Petitioner herein (read Kenya Post and Telecommunication Corporation) entered into a Land sale agreement with the 5th Respondent and wherein the said Corporation sought to sell to and in favor of the 5th Respondent a portion of the Suit Property, measuring 60 acres, or thereabouts.
20. Nevertheless, Learned counsel for the 1st Petitioner has submitted that despite the sale agreement, which was entered into and executed between the Corporation, now defunct; and the 5th Respondent, the intended sale aborted and hence no Interest in respect of the suit property was conveyed to and or passed over in favor of the 5th Respondent.
21. Additionally, Learned counsel for the 1st Petitioner has also submitted that the sale agreement which was hitherto entered into between the Corporation, now defunct; and the 5th Respondent was also a nullity insofar as the requisite consent of the Minister of Lands was neither sought for nor obtained in accordance with Section 14(4) and (5) of Kenya Post and Telecommunication Act, now repealed.
22. Premised on the foregoing, Learned counsel for the 1st Petitioner has therefore contended that the suit property remained lawfully registered in the name of the 1st Petitioner who is therefore the lawful and legitimate proprietor thereof.
23. Secondly, Learned counsel for the 1st Petitioner has also submitted that the 1st Petitioner duly entered into and executed a Land sale agreement with the 2nd Petitioner and wherein same sought to sell and transfer in favor of the 2nd Petitioner a portion measuring 60 acres out of the suit property. In this regard, Learned counsel has referred to the sale agreement dated the 5th July 2011.
24. Nevertheless, Learned counsel for the 1st Petitioner has submitted that prior to and before the sale agreement between the 1st Petitioner and the 2nd Petitioner could go through, the 4th Respondent filed and/or lodged Judicial Review proceedings, namely, Nairobi HCC JR No. 69 of 2011, which touched on and/or concerned ownership of the suit property.



25. Be that as it may, Learned counsel has pointed out that despite the sale agreement which was entered into between the 1st Petitioner and the 2nd Petitioner and despite a Deed of settlement arising out of an arbitral award by A.F Gross Advocate; the suit property still remains registered in the name of the 1st Petitioner.
26. Consequently and in view of the foregoing, Learned counsel for the 1st Petitioner has therefore submitted that the suit property lawfully belongs to and is registered in the name of the 1st Petitioner
27. Consequently and in this regard, Learned counsel has thus implored the Honourable court to find and hold that the 1st Petitioner is the lawful proprietor and owner of the suit property.
28. Thirdly, Learned counsel for the 1st Petitioner has submitted that even though the 1st Petitioner is the lawful owner and proprietor of the suit property, the 1st, 2nd and 3rd Respondents, on one hand; and the 1st, 2nd and 3rd Interested Parties have entered upon and interfered with the 1st Petitioner's rights to and in respect of the suit property, albeit without due and prompt compensation.
29. Furthermore, Learned counsel has submitted that even though the 3rd Respondent herein had hitherto commenced the process of compulsory acquisition over and in respect of the suit property, the intended Compulsory acquisition aborted and no award was ever generated or otherwise made to the 1st Petitioner.
30. Notwithstanding the non-completion of the intended compulsory acquisition, Learned counsel for the 1st Petitioner has submitted that the 1st, 2nd and 3rd Respondents and the 1st, 2nd and 3rd Interested Parties have since taken over the suit property and thereby deprived and/or divested the 1st Petitioner of her lawful rights to and in respect of the suit property.
31. Premised on the foregoing, Learned counsel for the 1st Petitioner has submitted that the impugned actions and/or activities by the 1st, 2nd and 3rd Respondents on one part and the 1st, 2nd and 3rd Interested Parties, on the other part; constitutes and/or amounts to breach and violation of the 1st Petitioner's Constitutional Rights and Fundamental Freedoms in terms of Article 40(3) of *the Constitution* 2010.
32. In support of the foregoing submissions, Learned counsel for the 1st Petitioner has cited and relied on various decisions inter-alia Niaz Mohamed Jan Mohamed versus The Commissioner of Land & 4 Others (1996)eKLR, Kenya National Highway Authority versus Shalien Masood Mughal & 5 Others (2017)eKLR, Anacherry Limited versus Attorney General (2014)eKLR, Japheth Azegele versus The Chief Land Registrar & 3 Others (2018)eKLR9; and Attorney General versus Zinj Limited (2021) KESC 23 (KLR), respectively.
33. Fourthly, Learned counsel for the 1st Petitioner has submitted that arising out of the impugned actions and/or activities by the 1st, 2nd and 3rd Respondents; as well as the Interested Parties, the 1st Petitioner has suffered loss and deprivation and in this respect, the 1st Petitioner thus deserves to be appropriately compensated.
34. Furthermore, Learned counsel for the 1st Petitioner has submitted that the 1st Petitioner has since procured and placed before the Honorable court a valuation report which shows that the suit property is valued in the sum of Kes.15 Billion only. In this regard, Learned counsel for the 1st Petitioner has thus implored the Honourable court to use the valuation report and thereafter to decree and award to and in favor of the First Petitioner compensation in the said sum.
35. Fifthly, Learned counsel for the 1st Petitioner has submitted that the cross Petition by and on behalf of the 4th Respondent is misconceived, legally untenable and bad in law. In this regard, Learned counsel



- has submitted that the 4th Respondent's claim to and in respect of the suit property has since been determined vide previous proceedings resting with the decision of Lady Justice Ngenye, Judge, (as she then was) which set aside an arbitral award issued by Ms Jan Mohamed, in favor of the 4th Respondent.
36. Consequently and in view of the foregoing, Learned counsel for the 1st Petitioner has submitted that the 4th Respondent's claim as pertains to ownership of the suit property or a portion measuring 60 acres thereof; is Res-Judicata and cannot therefore be re-visited.
 37. In support of the submissions touching on and concerning the Doctrine of Res-Judicata, Learned counsel for the 1st Petitioner has relied on inter-alia *Acredo A G & 3 Others versus Steffano Ucelli & Another* (20190eKLR; and *Bellevieu Development Company Ltd versus Francis Gikonyo & 7 Others* (2018)eKLR.
 38. Sixthly, Learned counsel for the 1st Petitioner has submitted that the cross Petition by and on behalf of the 4th Respondent also does not disclose and/or espouse any constitutional issue or at all. In this regard, Learned counsel has submitted that the issues that color the cross Petition by the 4th Respondent are purely civil dispute touching on and/or concerning ownership of the 60 acres out of the suit property which in any event, have hitherto been adjudicated upon and determined elsewhere.
 39. Seventhly, Learned counsel for the 1st Petitioner has also submitted that the complaint by and on behalf of the 4th Respondent that the sale agreement entered into between the 1st Petitioner and the 2nd Petitioner on the 5th July 2011; was entered into contrary to the doctrine of *Lis pendens* is misleading and erroneous.
 40. In this respect, Learned counsel has submitted that at the time of filing of the current Petition there was no active litigation that was going on pertaining to and touching on the suit Property.
 41. In any event, Learned counsel for the 1st Petitioner has submitted that the Doctrine of *Lis pendens* which has been invoked and relied upon by the 4th Respondent is irrelevant and inapplicable, taking into account the obtaining circumstances.
 42. On the other hand, Learned counsel for the 1st Petitioner has also submitted that the claim by and on behalf of the 4th Respondent that the 1st Petitioner herein has breached and/or violated the Deed of settlement which was entered into between the 1st and 2nd Petitioner, is similarly without merit. In this regard, Learned counsel for the 1st Petitioner has cited and invoked the Doctrine of privity of contract.
 43. In short, Learned counsel for the 1st Petitioner has contended that the 4th Respondent cannot premise and/or predicate any claim on the basis of the Deed of settlement entered into between the 1st and 2nd Petitioner, insofar as the same (4th Respondent) was not a party to the named Deed of settlement.
 44. In support of the submissions touching on and or concerning the Doctrine of privity of contract, Learned counsel for the 1st Petitioner has cited and relied on inter-alia the case of *Agricultural Finance Corporation versus Lengetia Limited* (1985)eKLR; and *Savings and Loans Kenya Limited v Kanyenje Karangaita Gakombe & Another* (2015)eKLR, respectively.
 45. Finally, Learned counsel for the 1st Petitioner has submitted that the Deed of settlement which was entered into between the 1st and 2nd Petitioners was neither concealed nor suppressed from the 4th Respondent herein, either as alleged or at all. In any event, Learned counsel for the 1st Petitioner has submitted that the 4th Respondent was knowledgeable of and privy to the arbitration proceedings that was going on before A.F Gross, Advocate; and the resultant outcome thereof.



46. In any event, Learned counsel for the 1st Petitioner has also submitted that the 1st Petitioner endeavored to have the arbitration proceedings involving the 4th Respondent and which were being undertaken before Ms. Jan Mohammed; and the arbitration proceedings which were being undertaken before A.F Gross, Advocate; to be consolidated but the request for consolidation was opposed by the 4th Respondent.
47. Based on the fact that Learned counsel for the 4th respondent had opposed the consolidation of the two arbitrations proceedings, it has been therefore submitted that the 4th Respondent cannot now be heard to allege that the Deed of settlement resulting from the proceedings before AF Gross Advocate; were suppressed or at all.
48. Be that as it may, Learned counsel for the 1st Petitioner has submitted that the cross Petition by and on behalf of the 4th Respondent, therefore ought to be dismissed with costs.
49. In respect of the cross Petition by the 5th Respondent, Learned counsel for the 1st Petitioner has submitted that the issue raised at the foot of the said cross Petition are similarly barred by the Doctrine of Res-Judicata, insofar as same have been previously heard and determined elsewhere before courts of competent Jurisdiction.
50. Secondly and in respect of the said cross Petition by the 5th Respondent, Learned counsel for the 1st Petitioner has submitted that the 5th Respondent does not have any legal and/or beneficial rights/ interests over and in respect of the suit property or any portion thereof, whatsoever.
51. In particular, Learned counsel for the 1st Petitioner has submitted that even though Kenya Post and Telecommunication Corporation (now defunct) entered into a sale agreement with the 5th Respondent, no monies were ever paid to and on account of the said sale agreement.
52. Consequently and in the premises, Learned counsel for the 1st Petitioner has contended that the impugned Sale agreement therefore aborted on the basis of lack of consideration, which is a critical and crucial ingredient/ factor in a sale contract.
53. Thirdly and in response to the cross Petition by the 5th Respondent, Learned counsel for the First Petitioner has submitted that even if the 5th Respondent had any lawful rights over and in respect of the suit property, (which is not the case), then Learned counsel for the 1st Petitioner has submitted that the 5th Respondent herein cannot still stake and lay a claim to and in respect of the suit property after same entered into and executed a Deed of Assignment between herself and the 4th Respondent dated the 15th January 2009.
54. For good measure, Learned counsel for the 1st Petition has submitted that by dint of the named Deed of assignment, the 5th Respondent divested herself of the interest, if any, which same had over and in respect of the suit property.
55. Fourthly and in response to the cross Petition by the 5th Respondent; Learned counsel for the 1st Petitioner has submitted that the 5th Respondent did not accrue and/or acquire any lawful rights and or interests to and in respect of the suit property insofar as the impugned sale agreement between the 5th Respondent and Kenya Post and Telecommunication Corporation, now defunct, was rendered void on account of lack of Consent of the Minister of Lands; in terms of Section 14(4) and (5) of Kenya Post and Telecommunication Act, now repealed.
56. Lastly, Learned counsel for the 1st Petitioner has submitted and in response to the 5th Respondent cross Petition; that having not acquired any lawful and or legitimate rights to and in respect of the suit



property, the 5th Respondent has no known rights capable of being violated over and in respect of the suit property or otherwise.

57. In view of the foregoing submissions, Learned counsel for the First Petitioner has further contended that the cross Petition by and on behalf of the 5th Respondent ought to be dismissed.

b. 2nd Petitioner's Submissions:

58. The 2nd Petitioner has filed written submissions dated the 27th March 2023; and in respect of which same has raised, highlighted and canvassed four (4) salient issues for consideration by the Honourable court.

59. Firstly, Learned counsel for the 2nd Petitioner has submitted that the issues which are being raised by and on behalf of the 4th and 5th Respondents, relating to their claim of ownership in respect of the suit property are issues which have hitherto been raised, canvassed and adjudicated upon by Courts of concurrent Jurisdictions.

60. Furthermore, Learned counsel for the 2nd Petitioner has submitted that the 4th Respondent herein had previously filed and or lodged civil proceedings against the 1st Petitioner and others vide Nairobi HCC No. 1158 Of 2001; and which matter was thereafter referred to arbitration before Ms. Jan Mohamed, Advocate and Arbitrator.

61. Additionally, Learned counsel has submitted that thereafter the single arbitrator, namely, Ms. Jan Mohamed, rendered an award wherein same decreed that the 4th Respondent was entitled to ownership of a portion of 60 acres out of the suit property.

62. Nevertheless, Learned counsel for the 2nd Petitioner has submitted that the award by the single arbitrator, which had decreed the 4th Respondent to be the owner of 60 acres out of the suit property was set aside vide ruling delivered on the 22nd Aril 2021. In this regard, Learned Counsel has pointed out that the 4th Respondent's claim to the suit property or a portion thereof has since been determined and/or disposed of.

63. Furthermore, Learned counsel for the 2nd Petitioner has also submitted that the 4th Respondent has thereafter filed an Application seeking review of the ruling which was rendered on the 22nd April 2021; and in respect of which the award by the single arbitrator and which decreed the 4th respondent as the owner of 60 acres of the suit property, was set aside.

64. Other than the Application for review, Learned counsel for the 2nd Petitioner has also submitted that the 4th Respondent has similarly filed a Notice of Appeal to the Court of Appeal seeking to challenge the Ruling which set aside the arbitral award. For good measure, Learned Counsel for the 2nd Petitioner has submitted that the Notice of Appeal is still pending before the Court of Appeal.

65. Additionally, Learned counsel for the 2nd Petitioner has also submitted that the 4th Respondent has also filed an Application dated the 11th May 2022; and in respect of which same is seeking for extension of time within which file an application for Leave to appeal out of time.

66. In view of the foregoing, Learned counsel for the 2nd Petition has therefore submitted that the issues raised at the foot of the Cross Petition by the 4th Respondent are substantially Res-Judicata and Res-sub-judice. In this regard, Learned counsel for the 2nd Petitioner has therefore submitted that this Honorable court has no Jurisdiction to entertain and or re-engage with issues which have hitherto been dealt with by courts of concurrent Jurisdiction.



67. In support of the foregoing submissions, Learned counsel has cited and relied on, inter-alia, the case of Kenya Hotels Properties Limited versus The Attorney General & 5 Others (2018)eKLR; and Robert Alai Onyango versus Cabinet Secretary in Charge of Health & 7 Others (2017)eKLR, respectively.
68. Secondly, Learned counsel for the 2nd Petitioner has also submitted that the suit property lawfully belongs to the 1st Petitioner, who remains the registered proprietor thereof on the basis of the certificate of title which is in the name of the 1st Petitioner.
69. In this respect, Learned counsel has cited and relied on, inter-alia, the case of Joseph Arap Ngok versus Justice Moiyo Ole Keiwua (1997)eKLR and Charles Odejo Ochieng versus Geoffrey Okumu (1995)eKLR, respectively.
70. Nevertheless, Learned Counsel for the 2nd Petitioner has submitted that even though the 1st Petitioner remains the lawful and registered proprietor of the suit property, same entered upon and executed a sale agreement dated the 5th July 2011, wherein same covenanted to sell to and in favor of the 2nd Petitioner a portion of the suit property measuring 60 acres.
71. Furthermore, Learned counsel for the 2nd Petitioner has also submitted that subsequently the 1st Petitioner and the 2nd Petitioner entered into and executed a Deed of settlement dated the 1st August 2018; wherein it was agreed that the 2nd Petitioner would be entitled to a portion measuring 47.4 acres out of the suit property.
72. Premised on the foregoing, Learned counsel for the 2nd Petitioner has contended that even though the 1st Petitioner remains the lawful and legitimate proprietor of the suit property, the 2nd Petitioner however has legitimate interests thereto on he basis of the Sale Agreement and the Deed of Settlement, entered into and executed between the Parties.
73. Thirdly, Learned counsel for the 2nd Petitioner has submitted that the 1st, 2nd and 3rd Respondents have illegally and unlawfully entered upon and undertook various activities of the suit property, albeit without the consent and/or permission of the legitimate owner thereof.
74. Furthermore, Learned counsel for the 2nd Petitioner has also submitted that even though the 3rd Respondent had hitherto intended to compulsorily acquire the suit property, the intention to acquire the suit property aborted and/or fail to materialize.
75. In the premises, Learned counsel for the 2nd Petitioner has submitted that insofar as the compulsory acquisition aborted, the 1st, 2nd and 3rd Respondent and the Interested Parties, could not enter upon and take possession of the suit property, prior to and or before rendering adequate due and prompt compensation, in the manner provided and established under the Law.
76. Be that as it may, Learned counsel for the 2nd Petitioner has submitted that compulsory acquisition must follow and comply the laid down process/procedure coupled with due and prompt payment of just Compensation.
77. In support of the foregoing submissions, Learned counsel for the 2nd Petitioner has cited and relied upon the cases of Patrick Musimba versus National Land Commission & 4 Others (2016)eKLR, Anacherry Limited versus The Attorney General (2014)eKLR, Kanini Farm Limited versus The Commissioner of Lands (1984)eKLR; and Attorney General versus Zinj Limited (2021) KESC 23 (2023) KLR, respectively.
78. Lastly, Learned counsel for the 2nd Petitioner has submitted that compensation to and in respect of the suit property can only be made to and rendered in favor of the Legitimate/registered owner thereof.



79. Premised on the foregoing, Learned counsel for the 2nd Petitioner has submitted that the only person who is entitled to Compensation is the 1st Petitioner on account of being the registered owner and proprietor of the suit property and not otherwise.
80. Furthermore, Learned counsel for the 2nd Petitioner has contended that the 4th and 5th Respondents have never been the legitimate/registered proprietors of the suit property and hence same cannot stake a claim as pertains to compensation, either as claimed or otherwise.
81. Based on the foregoing, Learned counsel for the 2nd Petitioner has therefore submitted that the cross petition by and on behalf of the 4th and 5th Respondents ought to be dismissed with costs.

c. Submissions By The 1st And 2nd Respondents; And 1st And 2nd Interested Parties:

82. The Honorable Attorney General filed written submissions dated the 11th May 2023; and in respect of which same has raised, highlighted and canvassed four (4) salient issues for consideration by the Honourable court.
83. First and foremost, the Honorable Attorney General has submitted that the Interested Parties herein have been illegally and unlawfully joined in the subject proceedings. In this regard, the Honorable Attorney General contends that the Interested Parties, who were improperly joined ought to be struck out of the proceedings.
84. Further and in addition, the Honorable Attorney General has contended that the Interested Parties could only be joined by an order of the Court but not otherwise. However, in respect of the instant matter, the Honorable Attorney General contends that in respect of the instant matter, there was no joinder by the court to facilitate the joinder of the Interested Parties or at all.
85. In support of the foregoing submissions, the Honorable Attorney General has cited and relied various decisions inter-alia Zephir Holdings Limited versus Mimosa Plantations Limited & 2 Others (2014)eKLR, Apex International Limited & Another versus Kenya Anti- Corruption Commission (2012)eKLR, Florence Nafula Ayodi & 5 Others versus Jonathan Ayodi Ligure & Another; Benson Girenge Gidiavai & 67 Others (UR) and Temple Point Resort Limited versus Accredo A G & 5 Others (2018)eKLR.
86. Secondly, the Honorable Attorney General has submitted that the contention that the 1st and 2nd Respondents and the Interested Parties herein have continued to construct the premises on the suit property, are erroneous, incorrect and misleading.
87. Furthermore, the Honorable Attorney General has contended that the contention that the Interested Parties have been in Contempt of the Conservatory orders issued on the 30th May 2022; have been made without any lawful basis.
88. Further and in any event, the Honorable Attorney General has contended that the question of whether the Interested Parties have acted in contempt of the conservatory orders which were issued on the 30th May 2022; is neither here nor there, insofar as no precipitate Application for contempt has been filed and/or lodged before the Honorable Court to warrant determination by this court or otherwise.
89. Thirdly, the Honorable Attorney General has also submitted that though the 1st Petitioner has placed before the Honourable court a valuation report which indicates that the suit property is valued at Kes.15 Billion, the named valuation report cannot be taken on its face, to reflect the actual value of the suit property.



90. In any event, the Honorable Attorney General has contended that the law as pertains to assessment of compensation arising out of compulsory acquisition is well documented and hence any award towards compensation must be assessed and undertaken by the National Land Commission in accordance with Section 112 of the *Land Act*, 2012 (2016).
91. Nevertheless, the Honorable Attorney General has submitted that the compensation on account on compulsory acquisition ought not to be used and/or utilized for purposes of extorting money from the Consolidated Fund. In this regard, it has been submitted that impugned Valuation Report cannot therefore be relied upon for purposes of arriving at and making an award for compensation, either in the manner impleaded by the First Petitioner, or otherwise.
92. In support of the foregoing submissions, the Honorable Attorney General has cited and relied on inter-alia *The Chief Land Registrar and 4 Others versus Nathan Tirop Koech & 4 Others* (2018)eKLR, *Patrick Musimba versus National Land Commission & 4 Others* (2016)eKLR and *Attorney General versus Zinj Limited* (2021)KESC 23 (KLR) respectively.
93. Lastly, the Honorable Attorney General has submitted that the claims by and on behalf of the 4th and 5th Respondents are Res-Judicata and thus same ought to be dismissed. In this respect, the Honorable Attorney General has cited and relied on inter-alia *E.T v Attorney General & Another* (2012)eKLR, *John Florence Maritime Services Limited & Another v The Cabinet Secretary for Transport and Infrastructure & 3 Others* (2015)eKLR, *Kamunye & 3 Others v Pioneer General Assurance Society Limited* (1971)EA 263;

Independent Electoral & Boundaries Commission v Maina Kiae & 5 Others (2017)eKLR
and Kenya Commercial Bank versus Benjoh Amalgamated Limited (2017)eKLR,
respectively.
94. In view of the foregoing, the Honorable Attorney General has therefore implored the Honourable Court to find and hold that the Petition and cross Petition filed before the court are premature and misconceived.

d. 4th Respondent's Submissions:

95. The 4th Respondent has filed written submissions dated the 27th March 2023; and in respect of which same has highlighted six (6) issues for consideration and determination by the Honourable court.
96. Firstly, Learned counsel for the 4th Respondent has submitted that the 1st and 2nd Petitioners herein entered into and executed a Deed of settlement dated the 1st August 2018; and in respect of which same sought to alienate the suit property as between themselves in the ratio of 40 to 60 in favor of Afraco Limited, namely, the Second Petitioner, herein.
97. Nevertheless, Learned counsel for the 4th Respondent has submitted that the impugned Deed of settlement was however entered into and executed in contempt of the orders of the Court of Appeal which were issued vide *Exclusive Estate Limited versus The Registrar of Title & Others*, Court of Appeal Civil Appeal No. 135 of 2013 (2016)eKLR, which essentially restored and reinstated a caveat that had hitherto been registered against the suit property.
98. Furthermore, Learned counsel for the Respondent has also submitted that the impugned Deed of settlement which was entered into and executed between the 1st and 2nd Petitioners was also entered into during the active subsistence of proceedings touching on and concerning the suit property.



99. In this respect, Learned counsel for the 4th Respondent has submitted that the impugned Deed of settlement was entered into on the face of pending proceedings vide Postel Housing Cooperative Society Ltd & Another versus Telkom Kenya Ltd & Another; Attorney General (Interested Party) (2019)eKLR, wherein the question of preservation of the suit property was adjudicated upon and reiterated.
100. In the premises, Learned counsel for the 4th Respondent has therefore submitted that the impugned Deed of Settlement, which was entered into in contempt of the orders of the Court Appeal and contrary to the Doctrine of Lis pendens, cannot be therefore be relied upon to confer and vest in the Petitioners any legitimate rights to and in respect of the suit property.
101. In support of the foregoing submissions, Learned counsel for the 4th Respondent has cited and relied on, inter-alia, the case of Postel Housing Cooperative Society Limited & Another versus Telkom Kenya Limited & Another; Attorney General (2019)eKLR, Grace Chemutai Koech versus Francis Kiplangat Chebiror & 2 Others (2018)eKLR, Mawji versus United States International University & Another (1976)eKLR and Shimmers Plaza Limited versus national Bank of Kenya Limited (2015)eKLR, respectively.
102. Secondly, Learned counsel for the 4th Respondent has submitted that the 1st and 2nd Petitioners herein are guilty of concealment and suppression of material facts pertaining to and/or concerning the Deed of settlement that was entered into on the 1st August 2018.
103. In this respect, Learned counsel for the 4th Respondent has submitted that the Petitioners herein, who had entered into and executed the Deed of Settlement failed to disclose and/or disseminate the terms of the Deed of settlement; and as a result of the suppression, the arbitral award which had been made in favor of the 4th Respondent was set aside.
104. To the contrary, Learned counsel for the 4th Respondent has submitted that had the Petitioners disclosed and made public the contents of the impugned Deed of settlement, there would have been no basis to set aside the arbitral award in favor of the 4th Respondent insofar as the Deed of settlement factored in the outcome of the named award.
105. In support of the submissions pertaining to and concerning suppression of material evidence; and in particular, the Deed of settlement, Learned counsel for the Respondent has cited and relied on inter-alia the case of Chase Bank (K) Ltd versus Cannon Assurance (K) Ltd (2019)eKLR and Kenya Akiba Micro Financing Ltd versus Ezekiel Chebii & 14 Others (2012)eKLR, respectively.
106. Thirdly, Learned counsel for the 4th Respondent has submitted that the Petitioners herein have come to court albeit with unclean hands. In this regard, Learned counsel has added that a Party who has come to court with uncleaned hands should not be allowed to take advantage the deliberate concealment of information and material non-disclosure.
107. In support of the contention that the Petitioners have come to court with uncleaned hands and hence should not be entitled to the orders sought, Learned counsel for the 4th Respondent has cited and relied on inter-alia, Go-TV Kenya Ltd versus Royal Media Services Ltd & 2 Others (2015)eKLR, Owners of Motor Vessel Lilian S versus Caltex Oil Kenya Limited (1989)eKLR and R versus Kessington Income Tax Commissioner (1917)1KB 486, respectively.
108. Fourthly, Learned counsel for the 4th Respondent has also submitted that one Wangechi Gichuki, who has sworn the various affidavits in support of the Petition and the amended Petition, has committed perjury, by fabricating evidence which have been represented to the Honorable court.



109. Arising from the contention that Wangechi Gichuki has fabricated evidence before the Honorable court, Learned counsel has thereafter invited the Honourable court to find and hold that the said Wangechi Gichuki; is guilty of perjury and swearing of falsehood contrary to and in contravention of the provision of Sections 108, 113 and 114 of the Penal Code Chapter 63 Laws of Kenya.
110. In support of the contention that Wangechi Gichuki has fabricated evidence before the Honorable court, Learned counsel for the 4th Respondent has cited the decision in the case of Raila Odinga & 16 Others versus Ruto & 10 Others; Law Society of Kenya & 4 Others (amicus curie) 2022 KESC 54 (KLR).
111. Lastly, Learned counsel for the 4th Respondent has submitted that the compensation which had been sought by and at the instance of the Petitioners herein ought not to be paid in favor of the Petitioners on account of the unlawful acquisition of the suit property. Additionally and in this regard, Learned counsel for the 4th Respondent has submitted that the Petitioners herein are estopped from renegeing on the terms of the Deed of settlement, which took cognizance of the interests of the 4th Respondent.
112. Furthermore, Learned counsel for the 4th Respondent has submitted that this Honorable court should not be used as a spring board to facilitate unjust enrichment by and on behalf of the Petitioners herein.
113. To the contrary, Learned counsel for the 4th Respondent has submitted that this Honorable court should be conscious of Equity and the necessity to avert unjust enrichment by a Party; and in this case, the Petitioners herein.
114. Whilst submitting on the question of unjust enrichment, Learned counsel for the 4th Respondent has cited and relied on, inter-alia, the case of Standard Chartered Financial Services Limited & 2 Others versus Manchester Outfitters (suing division) Limited (now known as King Woollen Mills Ltd & 2 Others) (2016)eKLR, Macharia Mwangi Maina & 87 Others versus Davidson Mwangi Kagiri (2014)eKLR and Kiplagat Kotut versus Rose Jebor Kipngok (2019)eKLR, respectively.
115. Finally, Learned counsel for the 4th Respondent has submitted that it would be the greatest travesty of Justice; if the Petitioners herein are allowed to enjoy the fruits of the poison tree, namely, suit property, when same acted in contempt of the Judgment of the Court of Appeal by stealing a match and suppressing evidence to unlawfully acquire the property that belongs to the 4th Respondent.
116. Having made the foregoing submissions, Learned counsel for the 4th Respondent has therefore implored the Honourable court to dismiss the amended Petition dated the 2nd June 2022; whilst allowing the cross Petition dated the 18th November 2022 with costs.

e.The 5th Respondent's Submissions:

117. The 5th Respondent filed written submission dated the 8th May 2023; and in respect of which same has highlighted, amplified and canvassed five (5) salient issues for consideration by the Honorable court.
118. First and foremost, Learned counsel for the 5th Respondent submits that the issues raised and canvassed at the foot of the cross petition have neither been canvassed nor been determined by any court of competent Jurisdiction, either as alleged or at all. For good measure, Learned counsel for the 5th Respondent has submitted that the various issues raised at the foot of the Cross Petition are therefore not barred by the Doctrine of Res-Judicata or at all.
119. In support of the submissions touching on and or concerning the Doctrine of Res-Judicata, Learned counsel for the 5th Respondent has cited and relied on, inter-alia the case of Accredo A. G & 3



- Others versus Steffano Useli & Another (2019)eKLR, Suleiman Saaid Shabal versus IEBC & 3 Others (2014)eKLR and IEBC versus Maina Kiae & 5 Others (2017)eKLR, respectively.
120. Secondly, Learned counsel for the 5th Respondent has submitted that the Deed of settlement which was entered into between the 1st and 2nd Petitioners herein was entered into during the pendency of litigation pertaining to and/or concerning the suit Property.
 121. In particular, Learned counsel has invited the Honourable court to find and hold that even the Sale agreement dated the 5th July 2011; which was entered into and executed by the 1st and 2nd Petitioners was entered into during the pendency of the arbitration proceedings before Jan Mohamed. In this regard, Learned counsel for the 5th Respondent has therefore contended that both the sale agreement; and the Deed of settlement which were executed by the 1st and 2nd Petition are therefore illegal and unlawful, to the extent that same contravenes the Doctrine of Lis pendens.
 122. In support of the submissions touching on the Doctrine of Lis pendens, Learned counsel for the 5th Respondent has cited and relied on the decision in the case of Naftali Ruthi Kinyua versus Patrick Thuita Gachure & Another (2015)eKLR.
 123. Thirdly, Learned counsel for the 5th Respondent has submitted that the sale agreement which was entered into between Kenya Post and Telecommunication Corporation, now defunct; and the 5th Respondent herein over and in respect of a portion of the suit property measuring 60 acres, was not a nullity, either as alleged by the 1st Petitioner or otherwise.
 124. In any event, Learned counsel for the 5th Respondent has submitted that the said Sale agreement/ contract which was entered into between Kenya Post and Telecommunication Corporation, now defunct; and the 5th Respondent, has never been cancelled nor nullified.
 125. In a nutshell, Learned counsel for the 5th Respondent has ventured and contended that the submissions by the 1st Petition anchored on the import and tenor of Section 14(4) and (5) of the Kenya Post and Telecommunication Act, now repealed; are not only misleading but erroneous.
 126. Furthermore, Learned counsel for the 5th Respondent has submitted that the sale of the 60-acre portion out of the suit property to and in favor of the 5th Respondent did not require the consent of the Minister of Lands or otherwise. For good measure, Learned counsel for the 5th Respondent has invited the Honourable court to take cognizance of Section 116(11) of Kenya Post & Telecommunications Act, now repealed, which clearly allowed Kenya Post and Telecommunication corporation, now defunct, to alienate any of her properties, inter-alia, the suit property herein, without recourse to the Minister.
 127. Based on the forgoing contention, Learned counsel for the 5th Respondent has therefore contended that the sale agreement entered into between Kenya Post & Telecommunication Corporation, now defunct; and the 5th Respondent was therefore lawful and vested in the 5th Respondent lawful rights over and in respect of the suit property
 128. Fourthly, Learned counsel for the 5th Respondent has submitted that the 1st, 2nd and 3rd Respondents herein as well as the Interested Parties, could not enter upon and or take possession of the suit property without undertaking and/or complying with the legal process that underpins compulsory question.
 129. In any event, Learned counsel for the 5th Respondent has submitted that no compulsory acquisition can be carried out and/or undertaken without due and prompt payment of just Compensation. In this regard, it has been contended that the 5th Respondent ought to have been compensated for the 60 acres out of the suit property.



130. Lastly, Learned counsel has submitted that the 5th Respondent had paid the requisite purchase price/ consideration to and in favor of Kenya Post & telecommunication corporation, now defunct; and hence same acquired lawful rights and Interests over the suit property.
131. Furthermore, Learned counsel for the 5th Respondent has submitted that having paid the entire purchase price, the rights of the 5th Respondent relating to the 60 acres portion of land could not have been revoked and/or otherwise negated vide Legislative Supplement Number 11 of 2001 dated the 23rd February 2001 or otherwise.
132. Be that as it may, Learned counsel for the 5th Respondent has therefore submitted that the impugned Legislative Supplement Number 11 of 2001; dated the 23rd February 2001, which revoked the 5th Respondent's Interests to and in respect of the 60 acres portion of land, was irregular and unlawful.
133. Consequently and in the premises, Learned counsel for the 5th Respondent has submitted that the Honorable court ought to find and hold that the impugned Legislative Supplement Number 11 of 2001; dated the 23rd February 2001 was therefore illegal, unlawful and infringed upon the property rights of the 5th Respondent.
134. Consequently and in view of the foregoing submissions Learned counsel for the 5th Respondent has submitted that the 5th Respondent has placed before the Honorable court sufficient and credible material that the 5th Respondent's Cross Petition, is meritorious and ought to be granted.
135. To the contrary, Learned counsel for the 5th Respondent has submitted that the Petitioners herein have neither established nor proved the claims at the foot of the amended Petition and same ought to be dismissed with costs to the 5th Respondent.

ISSUES FOR DETERMINATION

136. Having reviewed the amended Petition dated the 2nd June 2022; the cross Petition dated the 18th November 2022; and lastly, the cross Petition dated the 24th November 2022; and upon considering the various affidavits filed in support and opposition respectively; and upon taking into account the elaborate written submissions filed by and on behalf of the Parties; the following issues do arise are thus worthy of determination;
 - i. Who is the Lawful and Legitimate owner of the suit Property.
 - ii. Whether the 1st, 2nd and 3rd Respondents and the Interested parties complied with the Due process pertaining to and concerning compulsory acquisition and whether the entry upon and taking possession of the suit property was lawful or otherwise.
 - iii. Whether the Cross Petition by the 4th Respondent is Legally tenable or otherwise.
 - iv. Whether the Cross Petition by the 5th Respondent discloses any reasonable cause of action or otherwise.
 - v. What Reliefs , if any; ought to be granted in respect of the subject matter



ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Who is the Lawful and Legitimate owner of the suit property.

137. The subject dispute primarily centers and revolves on the question of who is the lawful and legitimate proprietor of the suit property.
138. Further and in any event, it is imperative to underscore that the determination of who is the lawful and legitimate owner of the suit property, will go along way in illuminating the reliefs that may ultimately be relevant and appropriate in the determination and/or disposal of the subject matter.
139. Based on the foregoing observation, I shall therefore undertake due interrogation and analysis with a view to ascertaining/ discerning the ownership status over and in respect of the suit property.
140. To start with, there is no dispute that the suit property was hitherto vested in the Governor and Commander in chief of the colony of Kenya up to and including the 12th October 1951, when the suit property was alienated to and in favor of M/s Cable & Wireless Ltd. For good measure, the alienation was anchored upon a Grant which was issued and sanctioned by the Colonial Government.
141. Subsequently, the suit property was later transferred to and vested in the name of East African External Telecommunication Company Ltd, who remained the owner of the suit property up to and including the dissolution of the East African Community on or about the year 1967.
142. First forward, upon the enactment of Kenya Post and Telecommunication Corporation Act, the suit property which was hitherto vested in East African External Telecommunication Company Limited; was transmitted to and vested in Kenya Post and telecommunication Corporation by operation of law. For good measure, the Minister of Transport and Communication published a Gazette Supplement vide Legal Notice Number 133 of 1998 and dated 11th March 1988, which Legal Notice vested all the assets and liabilities of East African External Telecommunication Company Ltd in Kenya Post and Telecommunication Corporation Ltd.
143. Consequently and on the basis of Legal Notice of Number 133 of 1988, (details in terms of the preceding paragraphs), Kenya Post and Telecommunication Corporation, now defunct, became the lawful and legitimate owner of, inter-alia, the suit property herein.
144. Having acquired lawful right to and in respect of the suit property, Kenya Post and Telecommunication corporation, now defunct, entered into a sale agreement dated the 19th January 1993; with the 5th Respondent herein, whereupon the vendor covenanted to sell and transfer to the 5th Respondent a portion measuring 60 acres out of the suit property.
145. Nevertheless, it appears that the sale agreement between Kenya Post and Telecommunication Corporation, now defunct; and the 5th Respondent herein did not materialize and hence no conveyance and/or transfer of the 60 acres out of the suit property was ever undertaken to and in favor of the 5th Respondent.
146. Furthermore, it is also important to note that on or about 1999; a Legal Notice was published wherein 60 acres out of the suit land was indicated to have been vested in favor of the 5th Respondent. For good measure, this was Legal Notice Number 154 of 1999.



147. Nevertheless, there is evidence that Legal Notice Number 154 of 1999; was thereafter superseded by Legislative Supplement Number 11 of 2001; and dated the 23rd February 2001 whereupon the 60 acres portion of the suit property which was indicated to be vested in favor of the 5th Respondent was reversed and the entire of the suit property was vested in the 1st Petitioner herein.
148. It has become important to trace and track the historical background relating to the suit property just to ascertain/ discern whether the 5th Respondent ever acquired and/or accrued any lawful and legal rights to and in respect of the suit property or any portion thereof.
149. However, it is not lost on this court that despite entering into the sale agreement dated the 19th January 1993, no transfer was ever executed and ultimately registered in favor of the 5th Respondent, so as to anchor a claim of ownership to and in respect of the 60-acre portion.
150. On the other hand, even though Legal Notice Number 154 of 1999; had vested 60 acres out of the suit property in favor of the 5th Respondent, there is no gainsaying that the said Legal Notice was superseded by Legislative Supplement Number 11 of 2001; dated the 23rd February 2001 and whose import therefore deprived the 5th Respondent of any lawful rights to and in respect of the suit property.
151. Be that as it may, it appears that the 5th Respondent herein did not take any precipitate steps and/or measures to challenge and impugn the import of Legislative Supplement Number 11 of 2001 dated the 23rd February 2001 or at all.
152. However, the 5th Respondent has by a part/ portion of her cross petition now implored the Honourable court to revisit the issue of Legislative Supplement Number 11 of 2001; vide the current cross Petition. However, the question as to whether or not this Honourable court can revisit the issue, despite lapse of a whopping 22-year duration, will be discussed while dealing with issue Number four.
153. Notwithstanding the foregoing, it is imperative to state and underscore that up to and including the years 2001, when Legislative Supplement Number 11 of 2001 was published, the suit property still belonged to and was registered in the name of the 1st Petitioner.
154. On the other hand, it is also important to point out that the 5th Respondent who had herself entered into a sale agreement with Kenya Post and Telecommunication Corporation, now defunct, somewhere entered into a sale agreement wherein the 5th Respondent was same (sic) therefore sold to and in favor of the 4th Respondent her interests over and in respect of the portion measuring 60 acres out of the suit property.
155. For good measure, the sale agreement between the 5th Respondent as the vendor; and 4th Respondent as the purchaser, was intended to convey to and in favor of the 4th Respondent the Rights to and in respect of 60 acres portion of the suit property.
156. Be that as it may, the question that does arise and which is critical; is whether or not by the time the 5th Respondent was entering into the sale agreement with the 4th Respondent, same (5th Respondent) had acquired any lawful and legitimate rights to the Suit Property, or any portion thereof; capable of alienation and transfer.
157. It has been important to point out the foregoing position because the 4th Respondent's claim to the suit property is anchored and leveraged on the Sale agreement entered into and executed between herself and the 5th Respondent.



158. In my humble view, the 5th Respondent herein had neither acquired nor accumulated any lawful and legitimate right over the 60 acres portion of the suit property which would be alienated and/or sold to and in favor of the 4th Respondent herein.
159. As pertains to whether or not a person who has not acquired and/or accumulated legal rights and/or interest to an immovable property can alienate and dispose; any rights thereto, it is imperative to take cognizance of the Doctrine of Nemo Dat Quod Non Habet, which essentially underscores the principal that one cannot convey and/or transfer a better title than one has.
160. Simply put, if by the time the 5th Respondent was entering into and executing the sale agreement with the 4th Respondent, same had not acquired any lawful or legal rights to the suit property; then the question that begs the answer is whether same could convey title or better still, whether the 4th Respondent could derive any lawful title in the circumstances.
161. Sadly, I come to the conclusion that the 5th Respondent as a vendor over and in respect of the 60 acres of the suit property in favor of the 4th Respondent as purchaser, were merely engaged in Paper transactions, albeit devoid of any landed property attached thereto.
162. In amplification of the foregoing position, I find succor in the dictum of the court of appeal in the case of Arthi Highway Developers Ltd versus West End Butchery & 6 others, where the court in dealing with a fraudulent title which had been sub-divided and sold off to unsuspecting purchasers stated as follows:
- “It is our finding that as between West End and Arthi, no valid Title passed and the one exhibited by Arthi before the trial court was an irredeemable fake. It follows that Arthi had no Title to pass to subsequent purchasers, and therefore KMAH, Yamin and Gachoni cannot purport to have purchased the disputed land or portions thereof.”
163. My understanding of the excerpt by the Court of Appeal, which has been reproduced in the preceding paragraph is to the effect that one who has no better title or better still no title at all, cannot convey any title to and in favor of any purchaser in respect of the named property or at all.
164. Back to the instant matter, despite the various paper games, which I have enumerated in the preceding paragraphs, one thing remains constant, as the North Pole. For good measure, the 1st Petitioner herein remains to be the registered proprietor and owner of the suit property.
165. Furthermore, there is no gainsaying that the certificate of title over and in respect of the suit property is in favor of the 1st Petitioner. Consequently and in this regard, there is no gainsaying that the 1st Petitioner therefore has the lawful rights to deal with the suit property, for as long as the certificate of title has not been vitiated, negated and/or otherwise revoked.
166. To underscore the significance of the certificate of title that currently inheres in favor of the 1st Petitioner, it is instructive to restate and reiterate the holding of the Court of Appeal in the case of Dr. Joseph N K Arap Ngok versus Justice Moiyo Ole keiwua (1997)eKLR, where the Court of Appeal stated and held thus;

Section 23(1) of the Act gives an absolute and indefeasible title to the owner of the property. The title of such an owner can only be subject to challenge on grounds of fraud or misrepresentation to which the owner is proved to be a party. Such is the sanctity of title bestowed upon the title holder under the Act. It is our law and law takes precedence over all other alleged equitable rights of title. In fact the Act is meant to give such sanctity of



title, otherwise the whole process of registration of titles and the entire system in relation to ownership of property in Kenya would be placed in jeopardy

167. Most recently, the Honorable Court of Appeal revisited the question of sanctity of title in the case of Embakasi Properties Limited & Another versus The Commissioner of Lands & Another (2019)eKLR, where the court of appeal stated thus;

“Although it has been held time without end that the certificate of title is; “...conclusive evidence that the person named therein as proprietor of the land is the absolute and indefeasible owner thereof”, it is equally true that ownership can only be challenged on the ground of fraud or misrepresentation to which the proprietor named is proved to be a party. See section 23 of the repealed Registration of Titles Act. Section 26 of the [Land Registration Act](#), 2012 though not as emphatic as section 23 aforesaid on the conclusive nature of ownership, confirms that the certificate is prima facie evidence that the person named as proprietor is the absolute and indefeasible owner. It adds that apart from encumbrances, easements, restrictions to which the title is subject, there is no guarantee of the title if it is acquired by fraud or misrepresentation or where it has been acquired “illegally, unprocedurally or through a corrupt scheme”.

168. Having calibrated upon the various perspectives attendant to the claims by the three disputants to and in respect of the suit property, it is my humble finding and holding that the suit property lawfully belongs to the 1st Petitioner and not otherwise. In a nutshell, the 1st Petitioner herein by virtue of being the registered proprietor and or owner of the suit property is therefore imbued with the statutory rights and privileges underpinned by the provisions of Sections 24 and 25 of the [Land Registration Act](#) 2012.

ISSUE NUMBER 2

Whether the 1st, 2nd and 3rd Respondents and the Interested parties complied with the Due process pertaining to and concerning compulsory acquisition and whether the entry upon and taking possession of the suit property was lawful.

169. It is instructive to note that the 3rd Respondent herein had hitherto commenced the process of compulsory acquisition of the suit property for some designated purpose. In this regard, the 3rd Respondent issued a Gazette Notice dated the 29th September 2017; and in respect of which same invited various Interested Parties claiming ownership over and in respect of the suit property to attend a Public hearing.
170. Furthermore, the 3rd Respondent herein scheduled the Hearing for purposes of determining the claims to and in respect of the suit property on the 19th December 2017. Nevertheless, despite having called for and convened the Public hearing on the 19th December 2017, the 3rd Respondent herein thereafter went salient and mute on the question of compulsory acquisition over and in respect of the suit property.
171. For the avoidance of doubt, the 3rd Respondent even failed and neglected to respond to various enquiries by the 1st Petitioner herein as to whether or not same was still keen in pursuing the proposed/intended compulsory acquisition of the suit property.
172. Nevertheless and despite having not reverted to and/or undertaken the requisite compulsory acquisition, the 1st Respondent and the Interested Parties thereafter entered upon and took possession of the suit property, albeit without the consent and or permission of the 1st Petitioner.



173. Additionally, it is also not lost on this Honourable court that by the time the 1st Respondent and the Interested Parties entered upon and took possession of the suit property, the 1st Petitioner, whom I have found to be the lawful and legitimate proprietor, was neither paid any compensation or at all.
174. To my mind, the entry upon and taking possession of the suit property by and on behalf of the 1st Respondent and the Interested Parties, constituted violation, breach and infringement of the 1st Petitioner's constitutional rights to the suit property as entrenched in Article 40(3) of *the Constitution*, 2010.
175. Clearly, if the 3rd Respondent was still keen and desirous to undertake compulsory acquisition over and in respect of the suit property, then it behooved the 3rd Respondent to comply with and or adhere to the Due process of the law as espoused and stipulated vide Sections 107 to 113 of the *Land Act*, 2012(2016); as read together with the Provisions of Article 40(3) of *the Constitution*, 2010.
176. For good measure, the process pertaining to and concerning compulsory acquisition was elaborated upon and underscored by a Five-Judge bench of the High Court in the case of Patrick Musimba versus National Land Commission & 4 Others (2016)eKLR, where the court stated and held as hereunder;
83. The statutory framework for compulsory acquisition is founded under Part VIII of the *Land Act*, No 6 of 2012.
84. With a view to ensuring that there was a real, rather than a fanciful or remote connection between the compulsory acquisition and the State's developmental needs, Part VIII was drafted in detail. History in the practice of compulsory acquisition prompted such detail. Not only was the State to keep its right to compulsorily acquire but the citizen too was to be protected from wanton and unnecessary deprivation of his private property.

Process of compulsory acquisition

85. In summary, the process of compulsory acquisition now runs as follows.
86. Under Section 107 of the *Land Act*, the National Land Commission (the 1st 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 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 these respects and this it can do by undertaking the necessary diligent inquiries including interviewing the body intending to acquire the property.
87. Under Sections 107 and 110 of the *Land Act*, the National Land Commission must then publish in the gazette a notice of the intention to acquire the land. The notice is also to be delivered to the Registrar as well as every person who appears to have an interest in the land.
88. As part of the National Land Commission's due diligence strategy, the National Land Commission must also ensure that the land to be acquired is authenticated by the survey department for the rather obvious reason that the owner be identified. In the course of such inquiries, the National Land Commission is also to inspect the land and do all things as may be necessary to ascertain whether the land is suitable for the intended purpose: see Section 108 of the *Land Act*.
89. The foregoing process constitutes the preliminary or pre-inquiry stage of the acquisition.



90. The burden at this stage is then cast upon the National Land Commission and as can be apparent from a methodical reading of Sections 107 through 110 of the [Land Act](#), the landowner's role is limited to that of a distant bystander with substantial interest.
 91. Section 112 of the [Land Act](#) then involves the landowner directly for purposes of determining proprietary interest and compensation. The section has an elaborate procedure with the National Land Commission enjoined to gazette an intended inquiry and the service of the notice of inquiry on every person attached. The inquiry hearing determines the persons interested and who are to be compensated. The National Land Commission exercises quasi-judicial powers at this stage.
 92. On completion of the inquiry the National Land Commission makes a separate award of compensation for every person determined to be interested in the land and then offers compensation. The compensation may take either of the two forms prescribed. It could be a monetary award. It could also be land in lieu of the monetary award, if land of equivalent value, is available. Once the award is accepted, it must be promptly paid by the National Land Commission. Where it is not accepted then the payment is to be made into a special compensation account held by the National Land Commission: see Sections 113- 119 of the [Land Act](#).
 93. The process is completed by the possession of the land in question being taken by the National Land Commission once payment is made even though the possession may actually be taken before all the procedures are followed through and no compensation has been made. The property is then deemed to have vested in the National or County Government as the case may be with both the proprietor and the land registrar being duly notified: see Sections 120-122 of the [Land Act](#).
 94. If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined: See Section 111 of the [Land Act](#). This is in line with the Constitutional requirement under Article 40(3) of [the Constitution](#) that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation.
177. Most recently, the Due process attendant to compulsory acquisition of land was re-visited and elaborated upon by the Supreme Court in the case of Attorney General versus Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment), where the court stated and held thus;
28. It follows that any compulsory acquisition process, ought to have commenced with a requisite Notice to the respondent, and any other persons claiming an interest in the land. The public purpose for which the land was to be acquired, ought to have been clearly stated. Most critically, the resultant acquisition ought to have been attended with prompt payment in full, of a just compensation to the respondent. There is nothing on the record to show, that any of these mandatory processes, was followed before a portion of the suit property was acquired. This being the case. and despite the appellant's protestations to the contrary, we must reach the conclusion, in agreement with the trial court, that the issuance of titles over a portion of the suit property, in favour of third parties was unlawful, un-procedural, and an egregious violation of the respondent's right to property. We therefore have no doubt, that the issuance of titles to third parties over a portion of the suit property, amounted to a violation of article 40(3)(a) and (b) of [the Constitution](#).



178. Despite the fact that the 3rd Respondent as well as the Interested Parties were aware of the necessity to commence and undertake the requisite compulsory acquisition, same disregarded the law in an event; throw caution and decency out of the window and instead, chose to and resorted to self-help mechanism, which disregarded the Provisions of *the Constitution*, 2010.
179. Surely, neither the National Land Commission nor the Attorney General, who is the Principal adviser to the Government of the Republic of Kenya, by dint of Article 156 of *the Constitution*, could sanction and/or permit the impugned actions and/or activities.
180. Perhaps, it is appropriate to state that with over a decade of the lifetime of *the Constitution* 2010; the Government of the Republic of Kenya, the Independent and constitutional commissions; and Every Government Department/ Ministry; ought not to venture and undertake actions which constitute gross violation of the Human rights and Fundamental freedoms of the citizens of Kenya.
181. Nevertheless, despite the existence of the Robust Constitution 2010, the impugned actions and or activities were taken and indeed sanctioned with impunity and wanton disregard of the Rule of law. Clearly, the actions complained of have infringed upon and violated the rights of the 1st Petitioner and ought not to be left unpunished.
182. Before departing from this issue, it is imperative to restate and reiterate the holding of the Court in the case of *Arnacherry Limited versus Attorney General* [2014] eKLR, where the Honorable court stated and observed as hereunder;

77. This is indeed a sad and distressing Petition. It is not expected that the State, in this age and time and with a robust Constitution such as ours, can actively participate in acts of impunity such as the forceful take-over of personal property without due compensation. The take-over has lasted 30 years and that makes the said action all the more disturbing.

ISSUE NUMBER 3:

Whether the Cross Petition by the 4th Respondent is Legally tenable or otherwise.

183. Vide the cross petition dated the 18th November 2022, the 4th Respondent herein has contended that same is lawfully entitled to compensation equivalent to 60 acres out of the suit property and which amount the 4th Respondent contends ought to be deposited in an Escrow account pending determination of all pending litigations touching on and concerning ownership of the suit property.
184. In my understanding, the gravamen/substratum of the 4th Respondent's case is to the effect that same has legal or better still beneficial interests over and in respect of 60 acres out of the suit property and on this account same is entitled to compensation, in the event that the suit property is compulsorily acquired.
185. To discern the claim by and on behalf of the 4th Respondent, one has to revert back to the sale agreement which was (sic) entered into between the 5th Respondent as the vendor and the 4th Respondent as the purchaser, in respect of the 60 acres portion.
186. Nevertheless, whilst discussing issue number one herein before, this Honourable court came into the conclusion that despite the sale agreement which was entered into between Kenya Post and Telecommunication Corporation, now defunct; and the 5th Respondent on 19th January 1993, no lawful rights and/or interests passed to and or in favor of the 5th Respondent.



187. Similarly, this Honourable court has since found and held that insofar as the 5th Respondent did not procure and/or obtain any lawful and legitimate title to the suit property or any portion thereof, same therefore was incapacitated from selling or alienating the rights, which were non-existent in the first place.
188. In my humble, albeit considered view and taking into account the Doctrine of Nemo dat quod non habet, whose import and tenor is common knowledge, I find it difficult to return a verdict that the 4th Respondent herein has any lawful and legitimate rights over the 60 acres portion out of the suit property.
189. Further and in addition, it is also worthy to recall that the 4th Respondent herein had hitherto filed civil proceedings vide HCC No. 1158 of 2011; and in respect of which the claim of her entitlement to the suit property was ventilated and canvassed.
190. For good measure, it is imperative to underscore that the dispute at the foot of Nairobi HCC No. 1158 of 2011 was referred to arbitration before a single arbitrator, namely Ms. Jan Mohamed, who thereafter rendered an award dated the 6th September 2019. For good measure, the award in question decreed that the 4th Respondent was entitled to 60 acres out of the suit property.
191. First forward, the award which was rendered by the single arbitrator in respect of HCC No. 1158 of 2011 was thereafter the subject of an application of setting aside, which application was heard and disposed of vide ruling rendered on the 22nd April 2021.
192. Instructively, the award which was generated by the single arbitrator and which decreed that the 4th Respondent was entitled to 60 acres out of the suit property was set aside and/or quashed. In this regard, the 4th Respondents claim and/or entitlement to the 60 acres out of the suit property vanished and dissipated into thin air.
193. Granted, the 4th Respondent has filed an Application seeking to review the setting aside of the arbitral award; and has at the same time, has filed an application for extension of time for purposes of filing an application to appeal out of time; but both Applications have neither been heard nor determined.
194. Premised on the foregoing and coupled with the finding that the 5th Respondent who was endeavoring to sell the 60 acres portion of land to the 4th Respondent, had not acquired any legitimate title; I come to the conclusion that the 4th Respondent herein does not have any legitimate rights to the suit property and hence the cross Petition dated the 18th November 2022 is devoid and bereft of merits.
195. For good measure, the 4th Respondent could not get a better title than what the 5th Respondent had and given that the 5th Respondent had not herself acquired any title to the 60-acre portion; then the transaction between the 4th and 5th Respondents could not generate something out of nothing.
196. Instructively and in this regard, it suffices to invoke and adopt the Doctrine of Ex- Nihilo Nihil Fit.
197. To appreciate the import and tenor of the foregoing Doctrine, it is worthy to take cognizance of the dictum of the Court of Appeal in the case of Caroget Investment Limited v Aster Holdings Limited & Another (2019)eKLR, where the court stated and held thus;

“From the Council to the appellant and from the appellant to White Horse no title could be passed because ex nihilo nihil fit – out of nothing comes nothing.”



198. Before departing from the issue herein, it is also important to recall and reiterate the dictum of lord Denning, MR; in the case of Benjamin Leonard Macfoy versus United Africa Company Limited (UK) [1962] AC 152, where the court held as hereunder;

“Court has discretion in matters that are voidable not to proceedings that are a nullity for those are automatically void and a person affected by them can apply to have them set aside ex debito justitiae in the inherent jurisdiction of the court...”

“If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. ... Any every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.”

199. In my humble view, the transaction culminating into the cross Petition by and on behalf of the 4th Respondent, fits within the parameters and the prescription underscored vide the dictum alluded to herein before.

ISSUE NUMBER 4

Whether the Cross Petition by the 5th Respondent discloses any reasonable cause of action or otherwise.

201. Other than the cross Petition by the 4th Respondent, the 5th respondent herein has also mounted and lodged a cross Petition dated the 24th November 2022; and in respect of which same has also laid a claim to and in respect of the suit property.

202. However, despite the claim by and on behalf of the 5th Respondent, it is instructive to take cognizance of three pertinent issues, whose implications are critical in determining whether or not the claim by the 5th Respondent is legally tenable or better still, discloses any reasonable Cause of Action, either as against the Petitioners or at all.

203. Before venturing to consider and address three salient and pertinent issues, which impact on whether or not the cross Petition by and on behalf of the 5th Respondent discloses a reasonable cause of action, it imperative to discern and appreciate the meaning and tenor a cause of action and by extension what constitutes a reasonable cause of action, worthy of ventilation before a court of law, either by way of a constitutional Petition or otherwise.

204. In this respect, it is expedient and imperative to restate and reiterate the definition of a cause of action as supplied by the Honorable Court of Appeal in the case of Pius Kiamiyo Langat versus Cooperative Bank of Kenya Ltd (2017)eKLR, where the court stated and observed as hereunder;

25. A cause of action is a factual situation the existence of which entitles one person to obtain from the court a remedy against another person. See Letang vs Cooper [1964] 2 All ER 929 at 934, per Lord Diplock. Lord Esher, M. R. in the case of Read vs Brown (1888), 22 QBD 128, defined a cause of action as:-

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court”.



205. Most recently, the Honorable Court of Appeal revisited the definition and import of a cause of action in the case of Kigwor Company Limited versus Samedy Trading Company (2021)eKLR, where the court stated and held thus;

36. In the Court of Appeal case of Attorney General & another v Andrew Maina Githinji & Another [2016] eKLR Justice Waki held that:-

“ A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J. in the case of Drummond Jackson vs. Britain Medical Association (1970) 2 WLR 688 at pg 616. In an earlier case, Read vs. Brown (1889), 22 QBD 128, Lord Esher, M.R. had defined it as:-

“ Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court.”

Lord Diplock, for his part in Letang vs. Cooper [1964] 2 All ER 929 at 934 rendered the following definition:-

“ A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

When did the cause of action in this case arise? Put another way, when did the respondents become entitled to complain or obtain a remedy ...”

206. From the foregoing definition, it is instructive to note and underscore that a cause of action therefore denotes the salient and pertinent facts, which must be impleaded by the claimant, touching on and/or concerning the rights and/or interests, if any, that are said to have been infringed upon and thus worthy of investigation by a court of law.

207. Furthermore, it is also important to underscore that the pertinent facts, which require to be impleaded must also espouse a right and/or interests, which are known to law. For good measure, the rights and/or interests to be impleaded for purposes of disclosure of a reasonable cause of action must therefore not be superficial, academic or opportunistic in nature

208. Having examined and considered the meaning and tenor of what constitutes a Reasonable cause of action, it is now appropriate to revert back to and discuss the Three pertinent issues that were alluded to. In this regard, the first issue touches on and concerns the fact that though the 5th Respondent entered into a Land sale agreement with Kenya Post and Telecommunication Corporation, now defunct on the 19th January 1993, the sale agreement did not materialize and/or culminate into the transfer and registration of any portion of the suit property to and in favour of the 5th Respondent.

209. Secondly, though Legal Notice Number 154 of 1999 had vested 60 acres of the suit property in favor of the 5th Respondent, there is no gainsaying that the said legal notice was superseded by Legislative Supplement number 11 of 2001; dated the 23rd February 2001, which reversed the vesting of the 60 acres out of the suit property in favor of the 5th Respondent.

210. Notably and as pertains to the import and implications/ consequences of the Legal Notices and the subsequent Legislative Supplement, it is instructive to take cognizance of the submissions by the Learned Counsel for the 5th Respondent.



211. In this respect and for good measure, I beg to reproduce paragraphs 36 and 37 thereof;
36. Your honour, the Petitioner amended Legal Notice No 154 of 1999 (an entry which vested 60 acres of the land in Postel for the Construction of 22 residential units) vide Legislative Supplement No. 11 of 2001 dated 23rd February, 2001. By the entry of Legislative Supplement No. 11 of 2001 dated 23rd February, 2001, the 1st Petitioner illegally deprived the 5th Respondent 60 acres of land without compensating the 5th Respondent or refunding the amount paid. It should also be noted that the sale agreement had not been terminated as at 23rd February, 2001 and the 5th Respondent was the rightful purchaser only awaiting subdivision and transfer of the suit property to its name.
37. The 5th Respondent submits that Legislative Supplement No 11 of 2001 dated 23rd February, 2001 was entered illegally, without following procedure and without consultation of the 5th Respondent. By so doing, the 1st Petitioner illegally took the 5th Respondent's 60 acres without payment of any consideration to compensate the 5th Respondent. Your Honor, the 5th Respondent submits that the Petitioners' infringed on the 5th Respondent's right to property as enshrined in Article 40 of *the Constitution*.
212. From the foregoing, it is evident and crystal clear that the 5th Respondent was indeed aware of and privy to the extinguishment of her rights to and in respect of the 60-acre portion out of the suit property, on account of the Legislative Supplement, which was duly published vide the Kenya Gazette.
213. Nevertheless and despite being conversant with the said position, the 5th Respondent herein does not appear to have commenced any proceedings to facilitate inter-alia, the Quashing of the impugned Legislative Supplement, or the recovery (sic) the 60 acres portion out of the suit property, which same claims to lawfully belong to her.
214. To the contrary, the 5th Respondent has now approached the court vide the current cross Petition and same is seeking to recover what she contends to lawfully belongs to her. Clearly and to my mind, the current claim which is civil in nature and essentially, touches on Recovery of Land; is barred by the provisions of Section 7 of the Limitation of Actions Chapter 22 Laws of Kenya.
215. On the other hand, if the 5th Respondent contends that what is before the Honourable court is a constitutional Petition and hence not subject to the *Limitation of actions act*, (in the manner alluded to in the preceding paragraph); it is imperative to underscore that the 5th Respondent would still be non-suited on account to the Doctrine of Latches, which affects constitutional Petitions as well.
216. Notably and to this end, it is appropriate to adopt and reiterate the position underscored by the Court of Appeal in the case of Daniel Kibet Mutai and 9 Others versus The Attorney General (2019)eKLR, where the court held and stated thus;
- (51) We reiterate the position that where there has been inordinate delay in bringing an action for violation of fundamental rights, appropriate facts must be placed before the court to enable the court exercise its discretion judicially, in accepting or rejecting the explanation for the delay, with the benefit of all information regarding the particular circumstances before it. To this extent this case is also distinguishable from Harun Thungu Wakaba v Attorney



General (supra), and Gerald Juma Gichohi & 9 others (supra) in which as in Edward Akong'o Oyugi & 2 others v Attorney General (supra), the delay was explained.

(52) Delay is an anathema to fair trial which is one of the key fundamental rights provided to all litigants under Article 50 of *the Constitution*. Furthermore, it would be an abuse of the court process and contrary to the constitutional principles espoused in Article 159 that requires justice to be administered without delay, to allow a party who alleges violation of constitutional rights, to bring their action after undue inordinate delay, without any justifiable reason. For this reason we find that the appellants' action was properly dismissed.

217. Thirdly, the 5th Respondent herein entered and executed a Deed of assignment with the 4th Respondent dated the 15th January 2009; and in respect of which the 5th Respondent assigned (sic) her interests in the suit property to the 4th Respondent.

218. Pursuant to clause 5 of the Deed of assignment, the 5th Respondent covenanted as hereunder;

“The assignor (Postel) as by way of the assignment agreed to transfer unto the assignee all the assignor title to and interests in the said 60 acres in the land reference number 7856 and the assignee (Exclusive) as agreed to the said transfer”

219. From the import and tenor of the Deed of assignment which was entered into and executed by the 5th Respondent, same clearly divested herself of (sic) any legal right and interests, if any; that same had in the suit property.

220. Consequently, having divested herself of (sic) any legal rights over and in respect of the suit property, the question is can the 5th Respondent be heard to lay a claim to and in respect of the suit property or any portion thereof prior to and before rescission/ variation of the Deed of assignment.

221. In my humble albeit considered view, the 5th Respondent herein, (who had (sic) divested herself of rights over the suit property by dint of the Deed of assignment) has no lawful or reasonable cause of action, capable of being ventilated and/or pursued vide the cross petition.

222. In a nutshell and taking into account, the foregoing perspectives, which have been analyzed herein before, I come to the conclusion that the impugned cross petition dated the 24th November 2022; is premature, misconceived and otherwise legally untenable.

ISSUE NUMBER 5

What Reliefs, if any; ought to be granted in respect of the subject matter

223. The subject Judgment touches and concerned three separate and distinct claims which have been ventilated at the foot of the amended Petition dated the 2nd June 2022; Cross Petition dated the 18th November 2022 and lastly the Cross Petition dated the 24th November 2022, respectively.

224. Whilst discussing issue number one herein before, this court calibrated on various factual situations pertaining to and concerning ownership over and in respect of the suit property. For good measure, after reviewing various perspectives of the evidence availed to the court, the Honorable court came to the conclusion that despite various endeavors to sell portions of the suit property, none of the sale agreements crystalized into any rights to and in favor of the various intended purchasers.



225. Consequently and in the premises, the court came to the considered conclusion that up to and including the time of filing of the instant Petition, the suit property was still registered to and in favor of the 1st Petitioner. In this regard, the 1st Petitioner therefore remains the registered proprietor of the suit property and thus by dint of Sections 24 and 25 of the [Land Registration Act](#), 2012, same is entitled to the statutory rights and privileges attendant to such ownership.
226. In this respect, I beg to adopt and reiterate the succinct exposition of the law as captured and underscored in the case of Ocean View Plaza Ltd versus the Attorney General (2002)eKLR, where the court stated and held as hereunder;
- Allotment of land to a citizen or others protected under [the Constitution](#), which action is symbolized by Title Deeds, invests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under Land Acquisition Act.
226. Secondly, I had also pointed out that though the 3rd Respondent herein commenced the process of compulsory acquisition of the suit property for and on behalf of the 1st Interested Party and thereby published a gazette notice inviting various Parties claiming an interests to and in respect of the suit property to attend a public hearing, it is common ground that the intended process of compulsory acquisition abated and/or lapsed, when the 3rd Respondent went mute.
227. Be that as it may, it is imperative to underscore that the process of compulsory acquisition is so elaborate and well documented and hence any entity seeking to acquire land albeit through the National Land Commission, must comply with and/or adhere to the strictures of the law. See Sections 107 to 113 of the [Land Act](#), 2012 (2016).
228. Notably and for the avoidance of doubt, I must point out that there is no constructive compulsory acquisition; and therefore the 1st Respondent herein, could not by any figment of imagination, enter upon the suit property and invite tenders for the construction of the impugned Posta Sports Grounds long before the suit property was compulsorily acquired.
229. To my mind, the entry upon the suit property by and on behalf of the 1st Respondent, the invitation of tenders and the subsequent award of tender to and in favor of the 3rd Interested Party, who thereafter commenced the impugned construction, essentially constituted infringement upon and violations; of the property rights of the 1st Petitioner.
230. Simply put, the impugned activities by and at the instance of the 1st Respondent, including the construction activities, which were undertaken by the 3rd Interested Party, albeit on behalf of the 1st Petitioner were therefore illegal, unlawful and grossly unconstitutional.
231. On the other hand, there is now the question of compensation to and in favor of the 1st Petitioner. In this regard, it is imperative to underscore that the 1st Petitioner filed and tendered before the Honourable court a valuation report, which indicated and showed that the suit property was valued in the some of Kes.15 Billion only. Consequently, the 1st Petitioner implored the Honourable court to adopt the valuation report and use same as a benchmark for assessing and awarding compensation.
232. Notwithstanding the fact that the Respondents herein, were duly served with inter-alia the valuation report filed by and on behalf of the 1st Petitioner, no contrary valuation report was ever tendered before the court. For good measure, the 1st and 2nd Respondents, did not deem it fit and/or expedient to procure a valuation report from the Chief Government valuer or otherwise.



233. Furthermore, it is also imperative to underscore that even though the 3rd Respondent had hitherto attempted to compulsorily acquire the suit property for and on behalf of the 1st Interested Party, the intended compulsory acquisition did not materialize or at all. In any event, no preliminary award was ever arrived at and/or communicated in terms of Section 112 of the *Land Act*, 2012 (2016).
234. From the foregoing position, it is important to point out that the only Expert evidence that is available on record and which can form a guide to this Honorable court in assessing and determining the value of the suit property, is the valuation report filed by and on behalf of the 1st Petitioner.
235. Be that as it may and even though no valuation report was ever filed by and on behalf of the 1st and 2nd Respondents or at all, Learned counsel for the 1st and 2nd Respondents; and the 1st and 2nd Interested Parties sought to invite the court to disregard the contents of the valuation report filed on behalf of the 1st Petitioner herein.
236. Additionally, Learned counsel for the 1st and 2nd Respondents; and the 1st and 2nd Interested Parties ventured forward and cited to the court the decision in the case of the Chief Land Registrar & 4 others versus Nathan Tirop Koech & 4 others [2018] eKLR, where the court stated and held as hereunder;
121. It is not evident how the judge arrived at the determination that the sums in the Reports were reasonable. The fact that a valuation report is not controverted does not make the report reasonable. A court has duty to exercise an independent mind and determine if the valuation report is reasonable. The court is to undertake analysis and determine the accuracy, quality and appropriateness of the report, and ascertain relevance of data used, enquiries made and suitability of methods and techniques employed, and finally, the court is to determine whether the analysis, opinions and conclusions in the valuation report are reasonable.
 122. The valuation report states the suit property was “valued free from encumbrances” and the valuation was done for purposes of the instant court petition. It is not clear whether the value would be different if valuation was not done for petition purposes; it is unclear how the valuer arrived at the conclusion the suit property had no encumbrances yet the record shows there are third parties in possession of parts of the property. The valuation report is silent on compensation paid by the Government upon compulsory acquisition of portions of the property; the report does not comprehensively state whether the value given denotes a fair market value at the time of alleged taking; it does not succinctly specify the dependent factual circumstances such as zoning and unique characteristics of the property; and the report does not indicate if the assigned value is based on comparable market, income or cost valuation approach. (See generally, *Waters & Others vs. Welsh Development Agency* [2004] UKHL 19; [2004] 1 WLR 1304; see also *Hugh Charles vs. Lyndis Wattley*, The Eastern Caribbean Supreme Court in the High Court of Justice (Civil) Claim No. NEVHCV 2012/15 – Judgment on Assessment of Damages).
 123. Bearing all these in mind, the trial judge did not conduct any analysis of the valuation reports tendered in evidence; the judge did not explain why he deemed the valuation report to be reasonable. Yes, the trial Judge may have



been exercising discretion in making the award based on the valuation report. However, such exercise of discretion should not be capricious or whimsical.

It should be exercised on some sound judicial principles. In the absence of any reason(s) explaining why the valuation report was reasonable, we are inclined to believe the trial judge in determining the compensation to be awarded took into account irrelevant considerations and or failed to take into account relevant considerations.

237. However, I must confess that what is before me is a single valuation report filed by and on behalf of the 1st Petitioner. For good measure, the contents thereof have not been challenged and/or impugned and neither have same been controverted by another valuation report, prepared by an Expert.
238. To my mind, this court is guided by the principle that it is the duty of the Parties to procure and obtain evidence and thereafter avail same to the Honorable court. Invariably, under the adversarial legal system, the court has no mandate to procure and/or obtain evidence for either Party, lest the Court been seen to forsake her/his Impartial role. Furthermore, the court can also not compel any party to bring forth any piece of evidence, which in the opinion of the court, may be helpful.
239. Simply put, insofar as the only valuation report placed before the Honourable court is the one by the 1st Petitioner and there being no contrary report, this court is obliged to adopt and rely on the contents thereof in assessing and determining the reasonable compensation due and payable on account of the value of the suit property.
240. For good measure and even though same were not cited by any Party; this court has come across the Court of Appeal decision in the case of Criticos versus National Bank of Kenya Limited (as the successor in Business to Kenya National Capital Corporation Limited “KENYAC”) & another (Civil Appeal 80 of 2017) [2022] KECA 541 (KLR) (28 April 2022) (Judgment), where the court held and observed as hereunder;

“As properly held in Stephen Kinini Wang’ondy (supra), expert evidence can only be challenged by another expert. We also associate ourselves with the criteria for assessing an expert’s evidence as outlined in the same decision, rehashed herein below for emphasis.” A further criteria for assessing an expert’s evidence focuses on the quality of the expert’s reasoning. A court should examine each expert’s testimony in terms of its rationality and internal consistency in relation to all the evidence presented. In Routestone Ltd. v. Minorities Finance Ltd. and Another [Same v. Bird and others [1997] B.C.C. 180] Jacob J. observed that what really mattered in most cases was the reasons given for an expert’s opinion, noting that a well-constructed expert report containing opinion evidence sets out both the opinion and the reasons for it. The judge pithily commented “[i]f the reasons stand up the opinion does, if not, not.” (Emphasis ours)

241. Similarly, in the course of my research I also encountered the succinct position of the law by the Supreme Court of Kenya in the case of Attorney General versus Zinj Limited (Petition 1 of 2020) [2021] KESC 23 (KLR) (Civ) (3 December 2021) (Judgment), where the court stated and held as hereunder;

30. Having determined that the respondent’s right to property had been violated by the Government, the trial court, and later the appellate court, made orders for compensation in favour of the respondent. Both courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason



to interfere with the findings of the two superior courts in this regard. We take note of the appellant's submission to the effect that in arriving at the quantum of special damages, the trial court placed reliance upon a Valuation Report by a private valuer. Such Report, in the view of the appellant, was not only unreliable, but could very likely have been tailored to support the respondent's claim. However, in answer to this court's question as to whether, the appellant had tabled in court, a Government Valuation Report to counter the contents of the impugned one, counsel for the appellant stated that no such Report was ever tabled at the trial court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the trial judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report.

242. Arising from the foregoing decisions, it is my humble view that the applicable and relevant position of the law as concerns the manner of controverting a valuation report, is by the adverse party procuring and/or obtaining a contrary valuation report and not by endeavoring to impugn the valuation report on account of submissions, in the manner ventilated by and on behalf of Learned counsel for the 1st and 2nd Respondents; and the 1st and 2nd Interested Parties.
242. In the premises, I beg to point out that the reasonable value of the suit property for purposes of determining the requisite compensation is derivable from the valuation report filed by and on behalf of the 1st Petitioner. Consequently and without belaboring the point, I come to the conclusion that the value of the suit property for purposes of compensation is Kes.15 Billion only.

FINAL DISPOSITION

243. Having calibrated on the various issues which were enumerated in the body of the Judgment herein, it must have become apparent and evident that indeed the 1st Petitioner has established and demonstrated that her proprietary Rights to and in respect of the suit property; were breached, violated and/or infringed upon.
244. To the contrary, the 4th and 5th Respondents have not been able to prove the reliefs/claims that were adverted to at the foot of the cross Petitions dated the 18th November 2022 and 24th November 2022, respectively or otherwise.
245. Consequently and in the premises, I am minded to enter Judgment in favor of the 1st Petitioner in the following terms;
- i. Declaration be and is hereby made that the act of taking possession of Land Reference No. 7656 situate along Ngong Road ('the suit property') by the 1st Respondent was illegal, unlawful and is an arbitrary deprivation of the 1st Petitioner's constitutional right to property as enshrined under Article 40(3) of *the Constitution*.



- ii. Declaration be and is hereby made that the 1st Petitioner is the lawful owner of the suit property.
- iii. Declaration be and is hereby made that the 1st Petitioner is entitled to compensation on account of infringement, violation and/or breach of her Constitutional rights and fundamental freedoms to property in terms of Article 40(3) of *the Constitution*.
- iv. The requisite compensation to and in favor of the 1st Petitioner be and is hereby assessed and awarded in the sum of Kes.15, 000, 000, 000/= (Fifteen Billion) only as against the 1st Respondent herein, who is responsible for the offensive entry onto and construction of the impugned Posta Sports Ground.
- v. The award of Damages for breach of the 1st Petitioner's Constitutional rights to and in respect of the suit property shall attract interest at 14% from the date hereof until payment in full.
- vi. The 1st Petitioner be and is hereby awarded costs of the Petition as against the Respondents jointly and/or severally.
- vii. The cross Petition by the 4th Respondent be and is hereby dismissed with costs to the 1st Petitioner.
- viii. The cross Petition by the 5th Respondent be and is hereby dismissed with costs to the 1st Petitioner only.
- ix. The Petition by the 2nd Petitioner be and is hereby dismissed albeit with no orders as to costs.

246. Having decreed recompense to and in favor of the 1st Petitioner herein on account of the value of the suit property and taking into account the fact that the 1st Respondent has since constructed Posta Sports Ground on the suit property; the question that remains outstanding is whether the 1st Petitioner can continue to hold the title in respect of the suit property.

247. To my mind, having attracted and obtained due compensation in respect of the suit property, it is imperative that the 1st Petitioner does surrender the certificate of title in respect of suit property to Chief Land Registrar for purposes of cancellation and issuance of the requisite of title to and in favor of the 1st Respondent.

248. Consequently and in the premises, I decree that the 1st Petitioner shall surrender the certificate of title over and in respect of the suit property to the Chief Land Registrar for necessary cancellation within a duration 180 days from the date hereof.

249. Further and in any event, in default to comply, the Chief Land Registrar would still be at liberty to cancel the certificate of title, given the extent of developments that have already been undertaken thereon, using Public Resources.

250. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF JULY 2023.

OGUTTU MBOYA

JUDGE

