**Okoiti & another v Afrison Export Import Limited & 5 others; Continental Credit Finance Limited (In Receivership) & 5 others (Interested Parties) (Environment & Land Petition 1488 of 2016) [2023] KEELC 20271 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20271 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND PETITION 1488 OF 2016**

**OA ANGOTE, J**

**SEPTEMBER 21, 2023**

**IN THE MATIER OF ARTICLES 1, 2, 3, 4(2), 10, 19, 20, 21, 22, 23, 24, 27, 40, 47, 50(1), 159, 162, 165, 258, & 259 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ALLEGED VIOLATION AND INFRINGEMENT OF ARTICLES 10, 19, 40, 47, 62, 73, 201,**

**AND 232 OF THE CONSTITUTION OF KENYA; AND SECTIONS 68 OF THE PUBLIC FINANCE MANAGEMENT ACT (CAP 140)**

**AND**

**IN THE MATTER OF THE CORRECT ACREAGE OF LAND PURCHASED FOR THE GENERAL SERVICE UNIT(GSU) OF THE NATIONAL POLICE SERVICE BY DINT OF HIGH COURT CIVIL CASE NO 617 OF 2012 AND THE THEFT OF SOME 6.7 ACRES OF THE SAID GSU LAND VIDE A FRAUDELENT COMPULSORY ACQUISITION FOR THE OUTER RING ROAD IMPROVEMENT PROJECT**

**AND**

**IN THE MATTER OF THE UNJUST ENRICHMENT BY AFRISON EXPORT IMPORT LIMITED AND HUELANDS LIMITED FROM NUMEROUS FRAUDELENT PAYMENTS MADE BY THE STATE FOR MULTIPLE ACQUISITIONS OF L.R NO 7879/4**

**AND**

**IN THE MATTER OF RECOVERING PUBLIC MONEY IRREGULARLY AND UNLAWFULLY PAID OUT TO AFRISON EXPORT IMPORT LIMITED AND HUELANDS LIMITED FOR THEIR FRAUDELENT MULTIPLE SALES OF L.R NO 7879/4 TO THE GOVERNMENT**

**AND**

**IN THE MATTER OF DETERMINING THE RIGHTFUL OWNER OF THE 96 ACRE DRIVE IN ESTATE-L.R 7894/4**

**BETWEEN**

**OKIYA OMTATAH OKOITI ..... 1ST PETITIONER**

**NYAKINA WYCLIFE GISEBE ..... 2ND PETITIONER**

**AND**

**AFRISON EXPORT IMPORT LIMITED ..... 1ST RESPONDENT**

**HUELANDS LIMITED ..... 2ND RESPONDENT**

**KENYA URBAN ROADS AUTHORITY ..... 3RD RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 4TH RESPONDENT**

**THE CS, LANDS, HOUSING AND URBAN DEVELOPMENT .... 5TH RESPONDENT**

**THE ATTORNEY GENERAL ..... 6TH RESPONDENT**

**AND**

**CONTINENTAL CREDIT FINANCE LIMITED (IN RECEIVERSHIP) ..... INTERESTED PARTY**

**THE CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**TELKOM KENYA ..... INTERESTED PARTY**

**NAIROBI CITY COUNTY ..... INTERESTED PARTY**

**RAFIKI ENTERPRISES LIMITED ..... INTERESTED PARTY**

**THE DIRECTOR OF PUBLIC PROSECUTIONS ..... INTERESTED PARTY**

## JUDGMENT

1. Vide a Petition dated 28th November, 2016, the Petitioners seek the following prayers;

    a. That this Honourable Court gives a declaration that the suit property subject to the consent judgment in High Court Civil Case No 617 of 2012-Afrison Export Limited and Anor vs Continental Credit Finance Limited (in liquidation) and 2 Others [2013] eKLR was for 37.4 acres and not 30 acres.

    b. That this Honourable Court gives a declaration that the suit property subject to the consent judgement in High Court Civil Case No 617 of 2012 is by law Public land.

    c. That this Honourable Court gives a declaration that the 2.626 ha(or some 6.7 acres) purportedly being compulsorily acquired is already government land by dint of being part of the 37.4 acres subject to the consent judgment in High Court Civil Case No 617 of 2012 and therefore, it cannot be compulsory acquired.

    d. That this Honourable Court gives a declaration that it is fraudulent and against the public interest for the 1st and 2nd Respondents to hive off 1.7 acres off the 37.4 acres GSU land and re-sell it to the public.

e. That this Honourable Court gives a declaration that there is no justification in the decision to pay the 1st and 2nd Respondents through Almasi Limited who are strangers to the transactions.

f. That this Honourable Court gives a declaration that Drive In Estate –L.R 7879/4 belongs to the public in its entirety and the 1st and 2nd Respondents have no basis for claiming it.

g. That this Honourable Court gives a declaration that the L.R No 7879/4 should be placed under the ownership of the state.

h. That this Honourable Court gives a declaration that the 1st and 2nd Respondents should be surcharged to cover any and all monies irregularly paid to them for the 2.626 ha (or some 6.7 acres) of GSU Land.

i. That this Honourable Court gives a declaration that the Director of Public Prosecutions should have the Directors of the 1st and 2nd Respondents and involved public officials criminally investigated by the National Police Service with a view to criminally prosecuting them for fraud on the public interest in L.R No 7879/4.

j. That this Honourable Court gives an order ordering the 3rd -6th Respondents not to make any further payments to the 1st and 2nd Respondents, either directly or through Almasi Limited.

k. That the Honourable Court gives an order ordering the 3rd -6th Respondents not to pay the 1st and 2nd Respondents the Kshs 600,000,000/= or any amounts outstanding from the award in Afrison Export Limited & Anor vs Continental Credit Finance Limited (in liquidation) and 2 Ors [2013] eKLR until all the monies irregularly paid to them pursuant to the fraudulent compulsory acquisition herein is recovered.

l. That this Honourable Court gives an order ordering the 3rd-6th Respondents to with immediate effect to excise 37.4 acres subject to the consent judgement in HCC No 617 of 2012 and register in in the name of the Government of Kenya.

m. That this Honourable Court gives an order ordering the 1st Respondent to recover from the 1st and 2nd Respondents the sum of monies calculated by the Honourable Court as having been irregularly and illegally paid to them.

n. That this Honourable Court gives an order placing the Court file herein before the Director of Public Prosecutions for purposes of having the police conduct criminal investigations in the matters herein with a view to prosecuting the directors of the 1st and 2nd Respondents and involved public officials for fraud.

o. That the costs of this Petition be borne jointly and severally by the Respondents.

p. That this Honourable Court gives any other orders required to advance the cause of justice in this case.

2. In the Petition, the Petitioners contend that the Kenyan people's right to property is once again under threat by the theft and sale of public land, to wit, L.R No. 7879/4 Drive In Estate measuring approximately 96 acres (hereinafter the suit property). It is the Petitioners' case that sometime in 1981, the 1st and 2nd Respondents bought the suit property from Joreth Limited and that on the 29th December, 1981, the 1st and 2nd Respondents mortgaged the land to Continental Credit Finance Limited for a loan of Kshs 100,000,000/= which remains unpaid to date.

3. It is the Petitioners' case that the title to the suit property is held by Continental Credit Finance Limited in receivership; that vide a consent judgement entered in HCCC 617 of 2012 -Afrison Export Limited & Another vs Continental Credit Finance Limited (In Liquidation) & 2 Others [2013] eKLR, the 1st and 2nd Respondents sold 37.4 acres of land, occupied by GSU to the Government for some Kshs 2.4 billion out of which Kshs 1.8 billion has been paid leaving a balance of Kshs 600 million.

4. It was deposed by the Petitioners that the land is still registered in the names of the 1st and 2nd Respondents; that the National Land Commission, pursuant to its mandate under Part VIII of the *Land Act* is undertaking compulsory acquisition of some 2.626 hectares (6.7 acres) from what is left of Drive In Estate (L.R 7879/4) which measures approximately 6.7 acres and is still registered in the names of the 1st and 2nd Respondents and that the aforesaid land is required by KURA for the Outer Ring Road improvement.

5. The Petitioners have averred that the notice of the purported intention to acquire was published in the Kenya Gazette No 6055 of 29th August, 2014; that whereas the total area gazetted for acquisition was indicated as 2.726ha, the actual size being acquired is 2.626ha (or some 6.7 acres); that the notification for inquiries to the hearing of claims to compensation for interested parties in the land was published in Gazette Notice No 7401 of 16th October, 2014 and that the entire 6.7 acres of the area of land purportedly under acquisition is an integral part of the 37.4 acres of land that was earlier hived off the same title deed L.R 7879/4 and sold to the GSU by dint of the consent in HCCC 617 of 2012.

6. According to the Petitioners, vide a letter dated 26th January, 2015, addressed to the Hon Attorney General and the AGs response to the same dated 16th February, 2015, it clearly states that 1.7 acres was being hived off 30 acres being the suit land in HCCC 617 of 2012 and that the Kshs 130,000,000/= which the Government was to pay the official receiver and which is an amount equal to the 1.7 acres at a price of Kshs 80 million per acre had been deducted and nullified the commitment of the Office of the President to the Official Receiver.

7. It is the Petitioners' case that the aforegoing is irregular because the AG is the Official Receiver for Continental Credit Finance Limited (in liquidation) and there was no reason why the Office of the AG should allow a third party to come between itself and the Office of the President and that curiously, no mention of the 1.7 acres is made in the letter of 20th May, 2016 written on the 1st and 2nd Respondents' behalf seeking final settlement pursuant to the consent judgement in HCCC 617 of 2012.

8. The Petitioners averred in the Petition that the Advocates have demanded to be paid the Kshs 150,000,000 due to the Official Receiver on behalf of Continental Credit Bank Limited which is the same monies they claim to have ceded in exchange for the 1.7 acres; that from the letter of 13th April, 2015 written to KURA by the National Land Commission, it clearly stated that the boundary wall erected by the GSU worth some 3,070,000/= would be affected and that they wonder why this should be the case if the land being compulsorily acquired is not hived off the GSU land.

9. According to the Petitioners, it is not a mere coincidence that the suit land in HCCC 617 of 2012 has shrunk by 7.4 acres from 37.4 acres to 30 acres and the land being purportedly acquired through compulsory acquisition is 6.7 acres and that the missing 7.4 acres is the same 6.7 acres purportedly being compulsorily acquired from the 1st and 2nd Respondents.

10. According to the Petitioners, the National Land Commission valued the land at Kshs 1,562, 878, 200 but following the adjustment on acreage and the exclusion of some Kshs 3,070,000 to facilitate relocation of the existing perimeter wall for the GSU, the amount was reduced; that the National Land Commission determined Kshs 1,472,690,000/= to be just compensation for the area purportedly

under acquisition and the 1st and 2nd Respondents accepted the same and that vide a letter dated 16th April, 2015, the 1st and 2nd Respondents requested to be paid through Almasi Limited.

11. It is the Petitioners' position that through the installments of Kshs 708,024,625.50 paid on 29th April, 2015 and Kshs 500,000,000/= paid on 20th May, 2015, the 1st and 2nd Respondents have been paid a total of Kshs 1,208,906,425 leaving an outstanding amount of Kshs 208,906,426; that the Petitioners are aggrieved by the aforesaid transactions as the Government Valuer was not involved to ascertain the true value of the land and that the valuation report relied on by the National Land Commission is a nullity.

12. It was averred that the Government made double payment for the 6.7 acres of land already acquired vide HCCC 617 of 2012; that the agreement between the 1st and 2nd Respondents and the AG to extinguish the Kshs 150,000,000/= in exchange for Kshs 130,000,000/=, the purported value of the 1.7 acres, which both the AG and the 1st and 2nd Respondents admit is being sold to the Government for a second time is a scam because there is no guarantee that the Kshs 130,000,000 will be paid to the Official Receiver and that there is no explanation as to how Kshs 130,000,000 would extinguish the Kshs 150,000,000.

13. The Petitioners state that the report of the Auditor General in the Financial Statements for National Government for the Year 2013/2014, gave a factual background of the property to wit; Drive In Estate measuring approximately 96 acres was jointly owned by the 1st and 2nd Respondents who had secured a loan from Continental Credit to finance development of 600 houses on behalf of Kenya Posts and Telecommunications Corporation (KPTC) and that Continental Credit Finance Limited was declared insolvent and put under receivership in 1986 with the Official Receiver as the Interim Liquidator in winding up cause no 29 of 1985.

14. Subsequently, it was averred, on 11th July, 1986, KPTC advanced the developers Kshs 165,000,000 as part payment for the houses to facilitate their completion; that in 1988, KPTC also got into financial problems and was unable to complete the financing of the development when only 196 housing units and 2 show houses had been completed; that the Corporation opted to sell its interest in the development and that the Office of the President which was experiencing shortage of houses for GSU staff at Ruaraka then decided to enter into an agreement with KPTC to purchase the completed units at the price of Kshs 64,680,000.

15. According to the Petitioners, the report indicated that a number of unsatisfactory issues were observed including: KPTC did not have title to the property and yet the Office of the President entered into an agreement to buy the property from it; the Official Receiver who was holding the title to the property did not object to this arrangement yet the office was required to collect the debt owed to Continental Credit Finance Ltd by the registered owners of the property and that the Official Receiver received Kshs 4 million on account of the outstanding loan from Continental Credit Finance Ltd but it was unclear whether this was in final settlement of the debt owned by the registered owners or how the amount of Kshs 4,000,000 was arrived at.

16. It was deposed that no explanation has been provided on how the interests of the depositors and owners of Continental Credit Finance Ltd were taken care of in the transaction; that there is no evidence of valuation having been undertaken to ascertain the value of the property to support the sale price; that it is unclear how KPTC having advanced Kshs 165,000,000 as part payment of the property accepted Kshs 64,680,000 as the purchase price of the property effectively selling a unit as Kshs 330,000 and that the Office of the President could not obtain title to the suit property as the title was held by the Official Receiver but in the names of the registered owners.

17. The Petitioners state that in the consent judgement of 12th April, 2013 which reduced the initial award from the Kshs 4,086,683,330/= to Kshs 2,400,000,000, the Official Receiver was not consulted; that however, an internal report indicates that the Official Receiver was to receive Kshs 100,000,000 from the state from the sale of the portion of the estate to the Office of the President and that a further 30,000,000 was to be paid to MS D Njogu & Co Advocates as outstanding legal fees.

18. The Petitioners assert that on 28th November, 1994, Rafiki Enterprises Limited purchased L.R No 7879/4 from the City Council of Nairobi pursuant to a public auction conducted by the Council in execution of a decree issued in CMCC No 1239 of 1993, City Council of Nairobi vs Afrison Export and Import and Huelands Limited in recovery of outstanding land rates on the property due from the 1st and 2nd Respondents and owing to the City Council of Nairobi.

19. It is the Petitioners' case that on 16th December, 1994, the Court in CMCC No 1239 of 1993, issued a Certificate of Sale, Raising Order and Vesting Orders in favour of Rafiki Enterprises Limited thereby vesting the property absolutely in Rafiki Enterprises Limited; that vide HCCC No 1441 of 1995 (O.S), the Official Receiver sought foreclosure on the property under a mortgage dated 29th December, 1981 between the 1st and 2nd Respondents and cancellation of the vesting order made in CMCC No 1239 of 1993 in favour of Rafiki Enterprises Limited and that on 21st May, 2007, Continental Credit Finance Limited offered to sell L.R No 7879/4 to the Government of Kenya.

20. According to the Petitioners, on 28th May, 2007, Rafiki Enterprises informed Continental Credit Finance Limited that the property could not be sold to the Government of Kenya as it had been sold to it; that on 18th June, 2007, the Government of Kenya acknowledged that no sale of the property could be done in view of the letter from Rafiki Enterprises Limited and that on 27th August, 2007, Continental Credit Finance withdrew its claim in HCCC No 1441 of 1995(O.S) through a notice of withdrawal filed in Court.

21. The Petitioners state that on the 9th October, 2007, Rafiki Enterprises Limited served a 30 day demand upon a number of parties including the 1st and 2nd Respondents in terms of Section 136 of the Government Lands Act; that on 12th October, 2007, Rafiki Enterprises Limited served a 30 day statutory notice upon the AG in terms of Section 13A of the *Government Proceedings Act* and that at paras 16 and 17 of the Affidavit of Eileen Mola sworn on 11th December, 2009 in Misc Civil Application No 574 of 2008, the AG acknowledged on oath that Rafiki Enterprises was entitled to L.R No 7879/4.

22. It is the Petitioners' case that from the foregoing, there is no basis for the consent judgement in HCCC 617 of 2012 and the same is based on fraud and a nullity in law; that in the circumstances, the Petitioners are reasonably suspicious that through collusion with public officials, the 1st and 2nd Respondents have swindled the Kenyan public of billions of shillings; that should the outstanding amounts of Kshs 208,906,426/= and Kshs 600,000,000/= be paid, the public will lose out and that the 1st and 2nd Respondents have no known assets and therefore lack the capacity to refund the same.

23. The 1st and 2nd Respondents filed a Notice of Preliminary Objection to the Petition on 26th April, 2017 stating that;

    i. This Honourable Court lacks jurisdiction to hear and determine the issues raised in the said Petition because the ownership of the suit property (L.R No 7879/4) and/or issues raised in the said Application/Petition are res judicata and/or this Honourable Court is functus officio as the issues raised therein have been previously heard and determined by the following Courts/

Judgements/Orders which were issued by Courts of equal jurisdiction to this Honourable Court:

a. Honourable Justice A. Mabeya issued a Judgement in HCCC 617 of 2012.

b. A Consent order was filed in Court on the 25th November, 2011 in JR ELC Civil Application No 72 of 2008: Republic Vs The City Council of Nairobi and Others Ex-parte Afrison Export Import Limited and Another.

c. Honourable Justice A. Mbogholi Msagha issued a Judgement in High Court Miscellaneous Application Number 1135 of 2007 on 28th October, 2010.

d. Honourable Lady Justice Farah Amin on 26th October, 2015 issued an order in High Court Civil Suit Number 330 of 2015: David Mangi Kithunga versus the Attorney General.

e. On 24th Day of November, 2014, the Honourable Justice Fred Ochieng in Civil Application Case No 528 of 2014 ruled/issued an order directing the Chief Land Registrar to cause all that second mortgage dated 11th July, 1986 in favour of the now defunct Kenya Posts and Telecommunication Communication Corporation (KPTC) and registered against the Title to L.R No 7879/4 as entry No 3 in Vol. No. N.52 folio 42 to be cancelled forthwith.

ii. The Application/Petition is incompetent, vexatious, baseless and an abuse of the Court process because:

a. The Petitioners are urging the Court to hear and determine issues which have already been determined.

b. The Petitioners have already filed at the Court of Appeal Civil Appeal No 87 of 2017 where they have appealed against the Judgement issued by Hon Justice Mabeya on 12th February, 2013 hence this Court cannot entertain the issues in the Application/ Petition herein while the same issues are in issue or substantially in issue and awaiting hearing and determination by the Court of Appeal.

c. The Petitioners have filed in the Court of Appeal in Misc Application Nai 3 of 2017 which raises issues similar to the issues in the Application/Petition herein while the same issues are in issue or substantially in issue and awaiting hearing and determination by the Court of Appeal.

iii. The Application/Petition has been filed maliciously so as to embarrass, vex, and harass the 1st and 2nd Respondent.

iv. The Petitioners have no locus standi to institute the proceedings herein as the person with the locus standi is the Attorney General of the Republic of Kenya.

v. The Petition does not raise any issues of public interest.

24. The 1st and 2nd Respondents, through their Managing Director, Francis Mburu Mungai, filed a Replying Affidavit dated 9th December, 2016 denying the assertions in the Petition. The 1st and 2nd Respondents' Director deposed that the 1st and 2nd Respondents were the joint registered owners of L.R No 7879/4 measuring approximately 96 acres and that in 1981, they took a loan from the 1st Interested Party to develop 600 housing units with the intention of selling them to the 3rd Interested Party.

25. The 1st and 2nd Respondents' Director stated that the 1st Interested Party went into liquidation and the 3rd Interested Party then advanced some money to the 1st and 2nd Respondents as part payment of 196 houses to enable completion of the houses and that the 196 houses were developed on approximately 7.4 acres.

26. According to the 1st and 2nd Respondents' Director, the 3rd Interested Party also fell into financial trouble and sold its interest in the development to the Government of Kenya; that sometime in 1988, the Government of Kenya took possession of the houses and, in addition, forcefully hived off an additional 30 acres of property where the General Service Unit settled thereon and that the total area settled on by the Government was and is still 37.4 acres.

27. Mr Mungai deponed that the 1st and 2nd Respondents were never compensated for the occupation of their property; that although there were negotiations between the Government and the Respondents, no settlement was reached culminating in the filing of HCCC No 617 of 2012 to determine how much compensation was due to the 1st and 2nd Respondents and that vide a judgement delivered on 12th February, 2012, the Court awarded the 1st and 2nd Respondents damages of Kshs 4,086,683,330/= being the fair value of the property occupied by GSU.

28. It was the deposition of the 1st and 2nd Respondents' Director that upon negotiation with the office of the Attorney General and the Office of the President, it was noted that there was an error in the judgement of the Court as it had not considered the sums already paid for the 7.4 acres and the sum was reduced to Kshs 2,400,000,000 and a consent recorded in that respect.

29. According to the 1st and 2nd Respondents' Director, upon the agreement being reached, sub-division was conducted and the property occupied by GSU was issued with a new number being L.R No 7879/24 and that the Petitioners have filed an appeal against the decision of the Court in HCCC No 617 of 2012; that subsequently, the contents of paras 16, 17, 31, 40, 40.1, 40.2, 40.3, 40.4, 40.5, 40.6, 40.7, 40.8, 51 and 54 cannot be re-litigated by this Court having already been adjudicated by a Court of competent jurisdiction and awaiting appeal.

30. According to Mr Mungai, upon the sub-division of L.R 7879/4, two land portions emerged being L.R 7879/24 occupied by GSU and L.R 7879/25 still registered under the names of the 1st and 2nd Respondents; that by a Gazette Notice dated the 29th August, 2014, the 4th Respondent notified members of the public of its intention to acquire various properties for road expansion and that part of the notice was for 2.726 ha (6.7 acres) belonging to the 1st and 2nd Respondents.

31. It was deposed that it was clear from the inquiry that the 3rd Respondent was acquiring 6.7 acres for road expansion; that this acreage was made up of 5 acres hived off from 7879/25 and 1.7 acres hived off from 7879/24 which had already been sold to the Government and that vide a letter dated 7th October, 2015, the 6th Respondent instructed the Director of Survey to undertake a survey to ensure that the portion acquired by the 3rd Respondent was not part of the 37.4 acres already paid for and on which GSU has been settled.

32. It was deposed that the Director of Survey undertook a survey and confirmed that only 1.3 acres of the 37.4 acrea was being hived off and that subsequently, the 4th Respondent indicated that the compensation due to the 1st and 2nd Respondents was Kshs 1,472,690,000/=.

33. The 1st and 2nd Respondents' Director emphasized that the 196 houses were constructed on an acreage of 7.4 acres already paid for by the Government at the point the 3rd Interested Party pulled out of the transaction; that what was subsequently paid for by the Government was approximately 30 acres

additionally occupied and that the 1.7 acres of the land acquired by the 3rd Respondent was part of the land initially paid for by the Government.

34. According to the 1st and 2nd Respondents' Director, the 1st and 2nd Respondents are entitled to just and fair compensation for their property; that the 4th Respondent engaged a qualified and licensed valuer to undertake a valuation of the property; that Kshs 150,000,000/= is due to the 1st and 2nd Interested Parties; that as at the point of negotiation of the payment arising out of HCCC 617 of 2012, it was agreed that the Government will take over the debt and that in view of the fact that the 1.7 acres of the property that was being acquired for road expansion constituted part of the 37.4 acres already paid for, the 1st and 2nd Respondents forfeited Kshs 130,000,000/= being the value of the Kshs 1.7 acres from their compensation to be paid to the 1st and 2nd Interested Parties.

35. It was deposed that in law, a party to a transaction can elect by way of nomination to whom either a transfer of property or payment can be made; that they elected Almasi Ltd as their nominee to receive the payment; that the 4th Interested Party filed CMCC No 1239 of 1993 seeking to recover outstanding rates from the 1st and 2nd Respondents and that Judgement was entered as against the 1st and 2nd Respondents vesting the property in the 5th Respondent, which orders were set aside 0n 14th September, 2007.

36. It was deposed by the 1st and 2nd Respondents that the High Court in Misc Civil Application No 1135 of 2007 dismissed the 5th Interested Party's challenge to the decision of the Magistrate Court; that as property owners, the 1st and 2nd Respondents are entitled to be justly compensated for the acquisition of their property; that the 1st and 2nd Respondents are companies duly incorporated in Kenya and the claim that they are impecunious is unfounded and that the Petition is an attempt to stop compensation lawfully due to the 1st and 2nd Respondents.

37. Vide a Further Affidavit sworn on 7th February, 2017, the 1st and 2nd Respondents through their Director, reiterated that they are the owners of the suit property and the matters herein are res judicata having been determined by previous Courts; that most of the issues raised in the Petition are pending in the Court of Appeal Civil Application Nairobi No. 3 of 2017; that the interim orders have negatively affected transactions in respect of their land and that it is only fair that the Petitioners deposit the sum of Kshs 50,000,000 in court as security.

38. The 3rd Respondent, through its General Manager for Finance and Administration, deposed that the issues of law and fact raised in the Petition are the same as those in High Court Petition No 2521 of 2015 albeit through a different Petitioner and that in the aforesaid Petition, the 3rd Respondent herein has been sued and he swore a Replying Affidavit to the same on 2nd July, 2015 which he reiterates in its entirely.

39. According to the 3rd Respondent (KURA), the only aspect of the land acquisition for the ongoing road works remaining around the time Petition No 2521 of 2015 was lodged was the payment of an outstanding Kshs 208,906,425/= which was forwarded by itself to the National Land Commission and that this settlement concluded their land acquisition phase at the area and ushered in the construction phase of the Outer Ring Road Expansion works.

40. It was deponed that KURA was undertaking a project to dual and improve the Outer Ring Road whereof it acquired a portion of land equal to 2.626 ha from the property known as L.R No 7879/4; that the land was acquired through the National Land Commission in accordance with the relevant laws and procedures and that the National Land Commission advised it through a letter of 5th December, 2014 that the valuation of the land in question was Kshs 1,562878,200.

41. According to the 3rd Defendant's Manager, through its letter of 29th January, 2015, it advised the National Land Commission's chair of an error in the area captured in the award which would cause a substantial difference in cost and sought to know whether the Ministry of Interior had prior thereon paid up for the land so as to avoid double acquisition as a section of the land hosts GSU residential houses and that the National Land Commission responded on 13th March, 2015 confirming that it had interrogated the file for the property and found no caveat registered nor any evidence of monies paid to indicate a previous acquisition by the Ministry of Interior.

42. Mr Chirchir of KURA deposed that it was subsequently agreed that the sum of Kshs 3,070,000/= was to be excluded from compensatory amount to facilitate relocation of the existing perimeter wall for GSU houses reducing the total compensation award payable to the 5th Respondent to Kshs 1, 417,812,851; that as at 2nd July, 2015, KURA had released Kshs 1,295,024,625.50 of the total award to the National Land Commission for onward transmission to the registered proprietor, Afrison Export Import Limited and was awaiting Kshs 208,906,425.50 from the exchequer and that KURA's conduct in the transactions was at all time above board.

43. The 5th and 6th Respondents opposed the Petition vide a Replying Affidavit sworn on 16th August, 2018 by Victor G Okioma, the Secretary Rehabilitation and Re-integration in the Ministry of Interior and Co-ordination of the National Government and the Chief Executive Officer National Authority for the Campaign Against Alcohol and Drug Abuse.

44. It was his deposition that at the material time, he was the Secretary in charge of Administration in the Ministry of Interior and Co-ordination of the National Government and is well versed with the issues at hand; that the 1st and 2nd Respondents' companies purchased a portion of the suit property measuring approximately 96 acres from Joreth Limited on or about 29th December, 1981 and that on 28th June, 1983, the companies entered into an agreement with the now defunct Kenya Posts and Telecommunications Corporation for the development and sale of 500 maisonettes which were to be constructed on the companies' parcel being the suit property.

45. According to the 5th and 6th Respondents, to facilitate the construction of the maisonettes, the companies entered into a financing agreement with the now defunct Continental Credit Finance Ltd for a sum of Kshs 21,000,000; that in the year 1986, Continental Credit Finance Ltd was placed under receivership and an official receiver was appointed the liquidator and that the Corporation entered into an agreement with the companies wherein the Corporation was to provide financing to complete the houses and the completed houses would thereafter be transferred to the Corporation.

46. The then Secretary in charge of Administration in the Ministry of Interior and Co-ordination of the National Government deposed that on or about 1988, after completing 196 maisonettes, the Corporation also experienced financial difficulties and could not finance any further construction and that the Corporation then sought for a buyer so as to recover the money it had spent.

47. According to Mr Okioma, the Corporation, which at the time was a fully owned government entity, entered into negotiations with the then Ministry of Internal Security within the Office of the President, which negotiations culminated in an agreement executed on 18th August, 1988 between the Corporation Secretary and the Permanent Secretary, Office of the President, for the purchase of the 196 housing units for a sum of Kshs 64,000,000.

48. It was the deposition of the then Secretary in charge of Administration in the Ministry of Interior and Co-ordination of the National Government that the purchase of the property was driven by among others, the need to beef up security in the area owing to the construction of key installations including De La Rue and the Kenya School of Monetary Studies and that the GSU took possession of the 196

completed units together with others that were incomplete which by then were occupying a total area of approximately 17.8 acres.

49. It was deposed on behalf of the 5th and 6th Respondents that despite the Ministry of Internal Security paying the Corporation the entire purchase price, no ownership documents were passed to it as the title was held by Continental Credit Finance as a charge and that sometime in the year 2000, squatters started encroaching on the underdeveloped land adjacent to the GSU Camp prompting the GSU to fence off an extra approximately 20 acres in excess of the area purchased making it a total occupied area to 37.6 acres.

50. It was deposed that the registered proprietor petitioned Parliament prompting the speaker to refer the matter to the Parliamentary Departmental committee on Administration and National Security which deliberated on the matter and observed among others that the Government had entered and taken possession of an additional 19.5 acres and 17 empty plots without paying any consideration to the registered owner.

51. Mr Okioma deponed that the Committee advised the Ministry to set up an Inter-Ministerial Committee to pursue the transfer of the 196 houses already paid before and to advise the Minister on the action to be taken in respect of the piece of land measuring 19.5 acres occupied and not paid for and that the Committee deliberated and recommended to the Minister that as the only issue arising was compensation for the land occupied and not paid for, then a negotiation team was to be appointed to negotiate with the registered owner.

52. The then the Secretary in charge of Administration in the Ministry of Interior and Co-ordination of the National Government deposed that he was appointed as the Chairman of the negotiation committee but they could not agree with the registered owners on the value of the land prompting them to move the Court in Nairobi HCCC 617 of 2012 and that the Court heard the matter and rendered its judgement on 12th February, 2013 where it held that the property the subject of the suit is 37.4 acres including the houses that GSU bought from KPTC and that the compensation shall be for the entire property.

53. It was deposed that the claim for recovery of Kshs 1,670,270/= as open market for loss of rental income, was unsustainable and the court awarded the Plaintiff the sum of Kshs 4,086,683,330 as fair value for suit property; that the Ministry of State in Charge of Provincial Administration and Internal Security aggrieved by the said Judgement filed a Notice of Appeal and requested for proceedings and that after negotiations, it was agreed to have the judgement sum reduced from Kshs 4,086,683,330 to Kshs 2,400,000,000.

54. It is the 5th and 6th Respondents' case that pursuant to the negotiations, a consent was executed then recorded in Court on 4th April, 2013; that pursuant to the Consent Judgement, the Ministry of Interior, has now paid a sum of Kshs 1.8 billion on the company's Advocates irrevocable professional undertaking to convey the entire 37.4 acres to the Ministry upon completion of the payment of the decretal sum and that a conveyance has been drawn and forwarded to the Office of the Attorney General.

55. It was deposed that the Ministry of Internal Security has completely fenced off and secured its parcel of land and has completed the maisonettes that were incomplete apart from the additional 5 blocks of flats which are now in occupation by the General Service Police Officers; that the consent entered into on the 25th March, 2015 was to arrest the interest which had been awarded by the Court as per the Certificate of order and that the Petition is devoid of merit and should be dismissed.

56. The 5th and 6th Respondents filed Grounds of Opposition to the effect that;

a. The Petition offends Article 50(4) of *the Constitution* of Kenya, 2010 which provides that "Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the admission of justice".

b. The Petition violates the principle of res sub judice as the matter is substantially similar to the facts pleaded in High Court of Kenya at Nairobi Constitutional Petition No 2521 of 2015-Edmond Richard Mukoya versus the National Land Commission, Kenya Urban Roads Authority, The Cabinet Secretary, Ministry of Lands, Housing and Urban Development, The Attorney General, Afrison Export Import Limited.

57. The 4th Respondent did not file a response to the Petition.

58. The 3rd Interested Party, Telcom Kenya, through its legal advisor, deponed that it is apparent from the agreement for sale between the 1st and 2nd Respondents and the defunct Kenya Posts and Telecommunications Corporation dated 28th June, 1983 that the entire L.R 7879/4 measuring 96 acres was sold to the defunct KPTC; that the 1st and 2nd Respondents were to give possession of the title deeds to KPTC and that the property was not vested in them on the disbandment of KPTC and is therefore subject to the transitional management committee comprising of themselves, the Postal Corporation of Kenya and the Communications Authority of Kenya.

59. It was deposed by the 3rd Interested Party's legal advisor that they are aware that KPTC sold 196 maisonettes to the Government of Kenya pursuant to an agreement for sale; that as an entity, Telkom Kenya has never had any dealings with the 1st and 2nd Respondents and were not a party to HCCC 617 of 2012 and that it is apparent that KPTC did not disclose their agreement in the Court cases over the land.

60. According to the 3rd Interested Party, the 500 maisonettes were to be constructed on the entire parcel and not on a portion of it; that any subdivision of the land by the vendors was to fulfil obligations to get an individual title for each maisonettes and transfer to KPTC as per the agreement; that the mortgage created by KPTC has never been discharged hence the aforementioned cases seeking them to be ordered to sign a discharge and/or re-conveyance are untenable; that sub-division of the property cannot be dome until the mortgage is discharged and that they were shocked at the dealings over the land in total disregard of KPTC's interest.

61. The 4th Interested Party, through its County Secretary, deponed that it was apparent from the Petition that the gist of the Petitioners' petition is with respect to the parcel of land known as L.R 7879/4 commonly known as Drive Inn Estate; and that in 1993, the predecessor of the 4th Interested Party (then the City Council of Nairobi) filed Civil Case No 1238 of 1993 against the 1st and 2nd Respondents herein to recover arrears of rates together with interests thereon.

62. It was deposed that as at the time of filing the case, the 1st and 2nd Respondents were the ratable and legal owners of the parcel of land known as 7879/4 situated within Nairobi County; that on 15th December, 1993, Judgement was entered for the predecessor of the 4th Interested Party and a decree for Kshs 13,605,043/= was passed against the 1st and 2nd Respondents herein and that the suit property was purchased by the 5th Interested Party vide a lawful sale in a public auction on 28th November, 1994.

63. According to the 4th Interested Party, on 28th July, 2011, the 1st and 2nd Respondents filed a Constitutional Petition against itself and the 6th Respondent seeking to enforce their property rights over the suit property and that the 1st and 2nd Respondents also lodged a suit being JR ELC Civil

Application No 72 of 2008-Republic vs City Council of Nairobi & Others ex-parte Afrison Export Limited & Another.

64. It is the 4th Interested Party's case that vide a letter dated 23rd November, 2011, the 1st and 2nd Respondents and the 4th Interested Party entered into a binding consent in JR ELC No 72 of 2008 which was to the effect that the 1st and 2nd Respondents were the registered proprietors of the suit property; the 4th Interested Party had not allocated any land nor approved any architectural or development plans on the suit property; the 4th Interested Party would issue enforcement notices under the Physical Planning Act against all unauthorized developments on the suit property within 30 days of the filing of the consent and finally that upon expiry of the enforcement notices, the 4th Interested Party would demolish all unauthorized structures without any further notices.

65. It was the 4th Interested Party's assertion that the aforestated consent in JR ELC 72 OF 2008 absolved it from liability over the subject property; that following the non-registration of the vesting order over the subject property and after entering a binding consent with the 1st and 2nd Respondents, it kept off the suit property and that the only role it has played so far is receiving rates pertaining to the property which it is by law mandated to do.

66. The 1st Petitioner filed a 1st Further Affidavit in which they denied the averments in the 1st and 2nd Respondents Replying Affidavit and reiterated the averments in the Petition. Mr Omtatah deponed that the 1st and 2nd Respondents are not the bonafide owners of the suit property having sold the entire parcel of 96 acres to the defunct Kenya Posts and Telecommunications Authority (KPTC) vide the Sale Agreement dated the 28th June, 1983.

67. The 1st Petitioner deposed that the 3rd Interested Party did not exist at the time of the alleged transactions and therefore could not have transacted as claimed; that clauses 8(f) and (g) are false and clauses 8(h), (i) and (j) restate a fraud on the public that the 1st and 2nd Respondents pulled off through the judicial system and that HCC No 617 of 2012 was not heard and determined on merit but through an illegal consent entered by the Attorney General.

68. In any event, it was deposed, HCCC No 617 of 2012 was handled by the High Court which was outside its jurisdiction hence any decisions arrived at are a nullity at law; that the transaction was irregular and contrary to public policy; that as demonstrated, the entire 96 acres of land was bought by KPTC and therefore belongs to the Government and cannot be sold back to the same Government.

69. The 1st Petitioner filed a 2nd Further Affidavit on 28th March, 2017 denying the assertions in the 1st and 2nd Respondents' Further Affidavit. Mr Omtatah reiterated that the 1st and 2nd Respondents lost the entirety of the suit property having sold it to KPTC; that the bar of res judicata cannot be raised herein as no court of competent jurisdiction has heard and determined the matters herein; that the issues in Civil Application No Nai 3 of 2017 are not similar to the motion herein as it challenges the merits of the consent decision in HCCC No 617 of 2012 while the current dispute is over the ownership of 6.49 acres allegedly compulsorily acquired from the 1st and 2nd Respondents.

70. It was deposed by the 1st Petitioner that no evidence has been provided to prove the allegations of blackmail as alleged and/or at all; that the 1st and 2nd Respondents' prayer that the Petitioners be compelled to deposit Kshs 50 million as deposit goes against the principle of public interest litigation.

71. In response to the 3rd Respondent's Replying Affidavit, the 1st Petitioner filed a 5th Further Affidavit denying the contents of the aforesaid Affidavit and reiterated that the suit property already belonged to the Government of Kenya at the time the 3rd and 4th Respondents purported to be acquiring it compulsorily from the 1st and 2nd Respondents.

72. In response to the Petitioners 1st, 2nd and 3rd Further Affidavits, the 1st and 2nd Respondents filed Replying Affidavits dated the 4th April, 2017 sworn by Mr Francis Mungai Mburu in which he reiterated the contents of their previous pleadings stating that all the issues raised in the Petition are res judicata and that the Court lacks jurisdiction to hear and determine the same as it is functus officio.

73. The 1st and 2nd Respondents through Mr Francis Mungai Mburu swore a Replying Affidavit dated the 3rd April, 2017 in response to the Affidavit of 21st March, 2017 by Robert Irungu denying the assertions therein and stating that any claim to L.R 7879/4 by KPTC/Telkom Kenya Limited was decided by the Court in HCCC 617 of 2017; and that the Sale Agreement between KPTC and the 1st and 2nd Respondents was disclosed in the aforesaid case.

74. According to the 1st and 2nd Respondents' Director, the alleged mortgage created by KPTC was discharged/cancelled through a Court order issued on the 24th November, 2014 in HCCC 528 of 2014; that Robert Irungu has deliberately misinterpreted the contents of the Sale Agreement dated 28th June, 1983 which did not sell the entire L.R 7879/4 but 500 maisonettes; that the Agreement did not indicate that the 1st and 2nd Respondents were to surrender any mortgage to the Corporation and the said Corporation was not in the business of mortgage as the 2nd mortgage was created to facilitate completion of individual houses for KPTC and that the agreement dwells on creating individual titles for individual maisonettes for sale to KPTC.

75. Mr Mungai deponed that before the Agreement was signed by both parties, the said parties verbally agreed that if Continental Credit Finance Ltd did not have enough funds to complete financing the construction of the individual maisonettes, KPTC would continue financing the construction of the maisonettes using their own funds until at least 200 maisonettes were complete and that KPTC agreed to finance the construction and demanded a second mortgage on L.R 7879/4 which Continental Credit agreed to for the sole purpose of securing partial funding for construction of the maisonettes.

76. It was deposed by the 1st and 2nd Respondents Director that after 10th August, 1983, the 1st and 2nd Respondents demanded that KPTC discharge the second mortgage and KPTC subsequently returned to the 1st and 2nd Respondents the mortgage dated 29th December, 1981 and Certificate of Registration of Mortgage and Indenture of 29th December, 1981 between Joreth Ltd and Afrison Export Import Limited and Huelands Limited to enable the re-conveyance in favour of Afrison Export Import Limited and Huelands Limited.

77. It is the 1st and 2nd Respondents position that on 18th August, 1983, KPTC (owned by the Government) sold the 196 maisonettes on L.R 7879/4 to the Office of the President on a Government to Government basis and that the Office of the President demanded an additional 30 acres which the 1st and 2nd Respondents agreed to and transferred to the Office of the President as a block, the 30 acres together with the 7.4 acres.

78. It was deponed that the Court in HCC Misc Civil Application No 1135 of 2007 concluded the issue of payments by the Government and other issues raised in the Affidavit of Robert Irungu; that in the Kenya Gazette Supplement No 59A of 5th November, 1999, Legal Notice No 158 of 5th November, 1999 which listed all the assets and liabilities of KPTC transferred to Telkom Kenya, no mortgage liability of their company nor any of the 196 plots and the maisonettes were listed as assets of the defunct KPTC; and that the foregoing was due to the fact that before 1st July, 1999, KPTC had sold all its interests in the maisonettes to the Office of the President.

79. It was finally deposed by the 1st and 2nd Respondents' Director that the report of the inter-ministerial taskforce on the GSU, Drive In Estate affirmed the sale and transfer of the 196 maisonettes to the

Office of the President; that the 3rd Respondent is unknown to the 1st and 2nd Respondents and has no locus to raise the issues alleged in the Replying Affidavit and that KPTC has in past transactions been represented by the Attorney General who has the authority to deal with all the matters appertaining to it.

80. The 1st and 2nd Respondents' Director filed a 2nd Further Affidavit sworn on 10th June, 2022 in which he adduced into evidence a duly signed transfer/ indenture of conveyancing in respect of 37.4 acres that were in issue in HCCC 617 of 2012 bought by the Office of the President/Government of Kenya at the price of Kshs 2,400,000,000. He deponed that the figure was arrived at after all the parties involved reviewed the earlier award of Kshs 4,800,000,000.

81. It was deposed that from the suit property, the following parcels have been acquired: 7.5 acres where the 196 Maisonnettes which the 1st and 2nd Respondents had sold to KPTC and KPTC later sold to the Office of the President/Government of Kenya and 1.683 acres (also referred to as 1.7 acres) which the NLC is in the process of acquiring on behalf of KURA for the expansion of the Outering Road and that the Deed of Conveyance was clear that the 1.683 acres belonged to the 1st and 2nd Respondents and would revert to them at an appropriate time, which appropriate time came after it was acquired from them by the NLC on behalf of KURA.

82. It was deponed that the original and un-divided certificate of Title of the 1st and 2nd Respondents' parcel of land measuring 96 acres, including all the disputed parcels, is in the custody of the Ethics and the Anti-corruption Commission hence public interests have been fully safeguarded and that the allegations in the Petition are unsupported and relate to issues severally litigated upon and determined in several other courts.

83. The 1st and 2nd Respondents' Director deposed that the Petition is technically an appeal lodged by the Petitioners against HCCC No 617 of 2012 who are total strangers not having been parties in HCCC No 617 of 2012; that the Petition does not qualify as a public interest Petition as expressed by the authors in Chaudhari and Chaturvedi's law of fundamental rights and that the Court has no jurisdiction to determine the same.

84. The 1st and 2nd Respondents' Director finally deposed that that the Petitioners are mercenaries having been paid Kshs 10,000,000/= by one Alex Muema whom the 1st and 2nd Respondents defeated in Case No 2316 of 2007 and whom by virtue thereof lost 8 acres of land; that the Petitioners solicited for the sum of Kshs 80,000,000 together with the return of the 8 acres to withdraw the Petition and that the Petitioners are notorious extortionists and filed a similar case against Kingsway Tyres and Automats Limited and the Respondents therein stated that the Petitioners demanded for Kshs 50,000,000.

85. The 1st, 2nd, 5th and 6th Interested Parties did not file any response to the Petition.

**Submissions**

86. The Petitioners filed submissions on the 29th March, 2017. The Petitioners submitted that this Courts' jurisdiction to determine the matter is derived from Article 162(2) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act* and that it is settled that this Court has jurisdiction to deal with constitutional issues arising within matters under its jurisdiction.

87. It was submitted that the Petition qualifies as a public interest litigation having been filed in good faith to protect the public interest in the GSU land; that the information in the Petition is not vague or indefinite and that as the Petition was filed in public interest, the issue of locus does not arise as Articles 22 and 258 of *the Constitution* empower any person to seek relief whenever *the Constitution* is violated or threatened.

88. It was submitted that the pleas of collateral estoppel/res judicata and res sub judice are unwarranted and that as regards collateral estoppel, the same does not apply as the issues in the instant Petition are not identical to those in HCCC 617 of 2012 and neither did the High Court therein determine all the questions including whether the 1st and 2nd Respondents stole some 6.49 acres from the Government.

89. According to the Petitioner, the bar of res judicata cannot be raised as the parties herein were not the parties litigating in Civil Case 617 of 2012 and the matter was not determined on its merits as it was settled by the parties; that the same position applies to other matters being JR ELC Civil Application 72 of 2008; High Court Misc No 1135 of 2007 and High Court Civil Suit 330 of 2015; that the allegations that the matter is sub judice HCCC Petition 2521 of 2015 is meritless as the question of whether or not the 1st and 2nd Respondents stole 6.49 acres of Government land with the collusion of officers of the 3rd and 4th Respondents and resold it to the Government was not under judicial consideration.

90. In any event, it was submitted, the High Court had no jurisdiction to determine the matter which ought to have been in this Court; that subsequently, that decision was void as stated in the publications " The law of Void Judgements and Decisions Supreme Court Decisions on Void Orders" and in the Montana Law Review; and that the Respondents have deliberately avoided the issues herein and have subsequently not responded to the Petition.

91. The 1st and 2nd Respondents submitted that the Petitioners have not provided the Court with any evidence of their assertions; that the Petition is an abuse of Court process meant to demean the powers of the Attorney General, senior Government officials and the 1st and 2nd Respondents and that the issues raised in respect of the ownership of the suit property are res judicata, the same having been previously heard and determined directly or indirectly by Courts of equal jurisdiction which matters have never been appealed.

92. It was submitted by the 1st and 2nd Respondents' counsel that this Petition is technically an appeal lodged by strangers against the orders given in the earlier suits and is a blatant abuse of the Court process and a deliberate trap set by the Petitioners with the sole evil aim of putting this Court in a very embarrassing and awkward scenario in case it issues a Judgment which contradicts the Judgements issued by the other courts of equal jurisdiction.

93. It was submitted that the property in question in HCCC 617 of 2012 was 37.4 acres; that whereas the 30 acres the subject of the consent in HCCC NO 617 of 2012, the 7.4 acres of purchased by the GSU and the 6.7 acres compulsorily acquired by the NLC are public lands, the remainder of the property is not and that flowing from the foregoing, it cannot be said that the entirety of L.R 7879/4 belongs to the public.

94. Counsel submitted that the 6.7 acres being compulsorily acquired by the NLC was not part of the issue in HCCC No 617 of 2012 and therefore can be compulsorily acquired; that no parcel was hived off the GSU land and resold to the public as alleged or at all; that there is nothing illegal in the 1st and 2nd Respondents advising the NLC to channel the compensation payment through Almasi Limited which is their sister company and that such payments will not prejudice the public nor the Petitioners.

95. According to counsel, the 1st and 2nd Respondents did not sell the entire property-LR 7879/4 to the defunct KPTC having only sold 7.4 acres and the issue is res judicata having been determined by the Court in HCCC No 617 of 2012; that there is no basis to have the 1st and 2nd Respondents criminally investigated by the Director of Public Prosecutions as the allegations of fraud have not been proven and that there is equally no basis to have the 1st and 2nd Respondents pay back monies lawfully due to them.

96. The 2nd Interested Party's Counsel submitted that the Petition has no merit and the same is founded largely on speculation, hearsay, and guesswork; that a number of key facts are undisputed to wit; the suit premises L.R No.7879/ 4 is registered in the names of Afrison Export & Import Limited and Huelands Limited; that the same was charged in favour of the 1st Interested Party to secure an advance of monies to the 1st and 2nd Respondents, which monies remain unpaid to the present date; and that the 1st Interested Party is in liquidation by way of a winding up order made in Winding Up Cause No 29 of 1986.

97. It was submitted by the 2nd Interested Party's counsel that the Office of the President through the General Service Unit of the Kenya Police occupied part of the suit property of approximately 37.4 acres and now identifiable and better described in Deed Plan as L.R 7879/24.

98. It was submitted that the 1st and 2nd Respondents took out a suit for compensation seeking various reliefs as against the Interested Parties and the Hon. Attorney General on behalf of the Government being High Court Civil Suit No. 617 of 2012,Afrison Export Import Limited and Another -Vs- Continental Credit Finance Limited (In Liquidation).

99. Counsel submitted that the Court in the said matter ordered for compensation in terms of its judgment made on the 12th February 2013, in the sum of Kshs 4,086,683,330.00 together with costs which sum was later varied to Kshs 2,400,000,000.00 by way of consent by the parties; and that from the said balance payable, it was agreed that Kshs 150,000,000.00, would be paid to the 1st Interested Party in repayment of the debt outstanding in the matter.

100. According to Counsel, the Petitioners have not proven their allegations having failed to produce any sketch map, sub-division plans or pictures to prove their allegations and that the Petition is incompetent for failing to adhere to Section 228 of the *Companies Act*, Chapter 486, Laws of Kenya (now repealed) which is to the effect that no action can be sustained against a company in which a winding order has been made except with the leave of Court.

101. It was submitted that the 2nd Interested Party holds an undischarged mortgage over the suit premises and therefore has a priority claim and sufficient locus to claim the outstanding debt from the compensation due from the National Land Commission; that it retains the power of sale provided under Section 69 of the Transfer of Property Act and that no basis has been laid in the Petition preventing it from recovering the outstanding balance.

102. The 4th Interested Party's counsel submitted that the 4th Interested Party only sued the 1st and 2nd Respondents in the year 1993 in Civil Case 1239 of 1993 to recover arrears of rates together with interests that the 1st and 2nd Respondents had refused to pay the Council; that the 4th Interested Party has never possessed the property, nor engaged in any transactions involving the same hence has no nexus and that the 4th Interested Party kept off the suit property and the only role it has played so far is receiving rates pertaining to the property which it is mandated by law to do.

**Analysis and Determination**

103. Having considered the Petition and the Supporting Affidavits, the preliminary objection, replies to the Petition as well as submissions by the parties, the issues that arise for determination are;

    i. Whether the Petition is competent; and if so,

    ii. Whether the Petition is merited.

    iii. The appropriate orders to issue?

104. The Petition has been impugned vide a Preliminary. In their Preliminary Objection, the 1st and 2nd Respondents contend that the Petitioner lacks locus standi to institute the suit because the matter does not constitute a public interest litigation and that the matter is res judicata.

105. On the other hand, the 3rd, 5th and 6th Respondents contend that the Petition is sub judice. The 2nd Interested Party on its part states that the Petition is fatal for failure to seek leave for instituting the same against the 1st Interested Party.

106. It is trite that a Preliminary Objection must be limited to matters of law. This has been held in a litany of decisions. The Court of Appeal in the locus classicus case of Mukisa Biscuit Manufacturing Co. Limited vs West End Distributors Ltd [1969)EA 696 stated thus;

> " A Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the Jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

107. In Aviation & Allied Workers Union Kenya vs Kenya Airways Ltd & 3 Others [2015] eKLR, the Supreme Court in discussing preliminary objections held as follows:

> " Thus, a preliminary objection may only be raised on a 'pure question of law'. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts."

108. Locus standi is defined by the Black's Law Dictionary, 9th Edition at page 1026 as:

> " The right to bring an action or to be heard in a given forum."

109. The Court in the case of Alfred Njau and Others vs City Council of Nairobi (1982) KAR 229, defined locus standi thus;

> " The term Locus Standi means a right to appear in Court and conversely to say that a person has no Locus Standi means that he has no right to appear or be heard in such and such proceedings."

110. It is trite that lack of requisite capacity to bring a suit goes to the root of the suit, and without locus standi a suit cannot stand. This was expressed by the Court in the case of Priscilla Jesang Koech vs Rebecca Koech & 3 Others [2018] eKLR, where the Court stated thus;

> " Locus standi is the cornerstone of any case. Before a party files a case, he or she must be certain that they are clothed with the requisite capacity to sue and be sued. In the case of BV Law society of Kenya vs Commissioner of Lands & Others, Nakuru High Court, Civil Case No. 464 of 2000. It was held that:
>
> If a party has no locus standi, then the said party cannot bring a suit to court. The issue of locus standi goes to the root of any suit and the said issue of locus standi is a point of law which is capable of disposing of a matter preliminarily."

111. More recently, the Court in the case of Sisilia Nyakoe & Another vs Attorney General & 4 Others [2021] eKLR stated as follows:

> " It is clear that locus standi is the right to appear and be heard in Court or other proceedings and literally, it means 'a place of standing'. Therefore, if a party is found to have no locus standi, then it means he or she cannot be heard even on whether or not he has a case worth listening to."

112. It is evident that if this Court were to find that the Petitioners have no locus standi, then they cannot be heard.

113. The locus standi in constitutional Petitions is found in Articles 22(1) and 258(1) of *the Constitution*. Article 22(1) of *the Constitution* which provides as follows;

> " Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."

114. Article 258 of *the Constitution* also provides that:

> " Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention."

115. Rule 4(1) of *the Constitution* of Kenya (Protection of Rights And Fundamental Freedoms) Practice And Procedure Rules, 2013 (Mutunga Rules) further provides:

> " Where any right or fundamental freedom provided for in *the Constitution* is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules."

116. The Court of Appeal in the case of Ferdinand Ndung'u Waititu vs Benson Riitho Mureithi (suing on his behalf and on behalf of the general public) & 2 Others [2018] eKLR with regard to locus standi in constitutional matters stated thus:

> " Coming to the issue of locus standi, Article 22 and 258 of *the Constitution* are explicit that any person has the right to institute proceedings where there is contravention or threatened contravention of *the Constitution*, and that such a person can bring the proceedings in his own interest or in public interest."

117. The Court of Appeal in Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR further held as follows:

> " It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of *the Constitution* in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of *the Constitution*, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid,

the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 – *The Constitution* of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013–which, in view of its long title, we take the liberty to baptize, the "Mutunga Rules", to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under *the Constitution* is allegedly denied, violated or infringed or threatened has a right of standing and can institute proceedings as envisaged under Articles 22 (2) and 258 of *the Constitution*. It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of *the Constitution*. It is our consideration that in filing the petition the 1st respondent was acting not only on behalf of its members and in accordance with its stated mandate, but also in the public interest, in view of the nature of the matter at hand. The 1st respondent, its members and the general public were entitled to participate in the proceedings relating to the decision-making process culminating in the impugned decision. However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold. The time is now propitious at this stage of our constitutional development where we can state as was stated by the Supreme Court of India in the case of S.P. Gupta v President of India & Others AIR [1982] SC 149 that:

> " The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to *the Constitution* or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and can thereby improve the administration of justice. Lord Diplock rightly said in Rex v Inland Revenue Commrs. [1981] 2 WLR 722 at p. 740.
>
> > " It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by a outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped... It is not, in my

> view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of Justice for the lawfulness of what they do, and of that the Court is the only judge.'
>
> This broadening of the rule of locus standi has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalizing the rule of locus standi that it is possible to effectively police the corridors of powers and prevent violations of law."

118. The Petitioners have averred that the Petition is in the interest of the public. The Petitioners have contended that what is sought to be compulsorily acquired is already public property. Indeed, compulsory acquisition of land requires payment of compensation from the public coffers. Preventing the misuse of public funds is a matter that would fall under the ambit of public interest.

119. The Petition has been challenged on grounds of malafides on the part of the Petitioners. It is alleged that the Petitioners have received huge sums of money in order to bring the instant Petition. However, no evidence has been adduced to substantiate this allegation. Therefore, the contestation that the Petition is not a public interest suit cannot hold. It must fail.

120. Indeed, whereas the 1st and 2nd Respondents alleged improper motive in the institution of the suit, no evidence has been led to prove the allegations. By reason of Articles 22 and 258 of *the Constitution* therefore, the Petitioners were properly clothed with the standing to bring the instant Petition in the interest of the public.

**Res judicata**

121. The substantive law on res judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that;

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

122. As to whether a claim for res judicata is a proper preliminary objection, the Court of Appeal in the case of Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR stated as follows;

> " Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;
>
> > " No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the

same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

123. And in Accredo AG & 3 others vs Steffano Uccelli & another [2019] eKLR the Court of Appeal stated as follows:

> " Accordingly, we find that the elements set herein above which give rise to the application of the doctrine of res-judicata could be discerned from the record and were not uncertain or unclear as the appellants alluded to. It follows therefore, that the preliminary objections raised by the respondents were based on pure points of law, that is, jurisdiction and the doctrine of res-judicata, and did not require additional evidence to substantiate the objection. See locus classicus case of Mukisa Biscuits Manufacturing Ltd. vs West End Distributors Ltd. [1969] E. A. 696."

124. The question of res judicata is thus a proper preliminary objection. The next question is then whether the conjunctive requirements for a plea of res judicata have been met. It is trite that the elements set out in Section 7 of the *Civil Procedure Act* must conjunctively be established for a plea of res judicata to succeed. The Supreme Court in John Florence Maritime Services Limited & Another vs Cabinet Secretary Transport & Infrastructure & 3 Others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) stated as follows:

> " Hence, whenever the question of res judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction. This test is summarized in Bernard Mugo Ndegwa v James Nderitu Githae & 2 others, (2010) eKLR, under five distinct heads: (i) the matter in issue is identical in both suits; (ii) the parties in the suit are the same; (iii) sameness of the title/claim; (iv) concurrence of jurisdiction; and (v) finality of the previous decision. For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former Judgment or order which was final; b) The Judgment or order was on merit; c) The Judgment or order was rendered by a court having jurisdiction over the

subject matter and the parties; and d) There must be between the first and the second action identical parties, subject matter and cause of action."

125. As to whether the doctrine applies to constitutional matters, the Supreme Court in John Florence Maritime Services Limited and Another vs Cabinet Secretary Transport- & Infrastructure & 3 Others (Petition 17 of 2015) (2021) KESC 39 (KLR) (Civ) held as follows:

> "We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively... If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of article 159 of *the Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further article 50 on right to fair hearing and article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other...Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power. In the alternative a litigant must demonstrate special circumstances warranting the court to make an exception."

126. The Respondents contend that the dispute is res judicata because the questions raised by the Petitioners have been determined in several pronouncements of the court. They cite the following cases: HCCC 617 of 2012: Afrison Export Limited and Anor vs Continental Credit Finance Limited (In liquidation) & 2 Others; JR ELC Civil Appl No 72 of 2008; Republic vs The City Council of Nairobi & Others exparte Afrison Export Import Limited & Another; HC Misc Applcn 1135 of 2007; HCCC No 330 of 2015-David Maingi Kithunga vs The AG; and ELC Reference No 1 of 2018-NLC& Others vs Afrison Export Import Limited.

127. The Respondents have also cited the matters that were dealt by the Court of Appeal in respect to the suit property which include Nairobi Civil Appeal No. 3 of 2017-Okiya Omtatah and Another vs Afrison Export Import Limited & Another; Civil Appeal No 121 of 2016-Okiya Omtatah and Another vs Afrison Export Import Limited & Another; Civil Appeal No 86 of 2017- Okiya Omtatah and Another vs Afrison Export Import Limited; Civil Appeal No 151 of 2018- Okiya Omtatah and Another vs Afrison Export Import Limited and Others; Civil Appeal Application No 225 of 2016-Okiya Omtatah and Another vs Afrison Export Import Limited and Civil Appeal No 151 of 2018.

128. On the other hand, according to the Petitioners, the Petition is not res judicata as the issues in the Petition are not similar to the other cases; that the parties are not the same; that HCCC 617 of 2012

was not determined on merit but through a fraudulent consent and lastly, that the determination of the suit was not by a competent court.

129. The first limb for determination is whether the issues herein cut across the various cases referred to. The Petitioners' claim is based on the allegation that the entire 6.7 acres of the area of land purportedly under acquisition is an integral part of the 37.4 acres of land that was earlier hived off L.R 7879/4 and sold to the GSU by dint of the consent order in HCCC 617 of 2012.

130. The Petitioners are also seeking for a declaration that the suit property the subject to the consent judgment in High Court Civil Case No 617 of 2012-Afrison Export Limited and Another vs Continental Credit Finance Limited (in liquidation) and 2 Others [2013] eKLR was 37.4 acres and not 30 acres and a declaration that the suit property subject to the consent judgement in High Court Civil Case No 617 of 2012 is by law Public land.

131. Further, the Petitioners have also sought for a declaration that it is fraudulent and against the public interest for the 1st and 2nd Respondents to hive off 1.7 acres off the 34.7 acres GSU land and re-sell it to the public; a declaration that the 1st and 2nd Respondents should be surcharged to cover any and all monies irregularly paid to them for the 2.626ha (or some 6.7 acres) of GSU Land; and an order ordering the 3rd-6th Respondents to excise 37.4 acres subject to the consent judgement in HCC No 617 od 2012 and register it in the name of the Government of Kenya, among the other raft of prayers.

132. From the Petitioners' pleadings, the grievance at the centre of the instant dispute can be condensed into the ownership of the 34.7 acres of the property known as L.R.7879/24; whether the 6.7 acres which is the portion sought to be excised for compulsory acquisition is part of L.R. 7879/24 comprising of 34.7 acres and whether there was proper valuation before compulsory acquisition.

133. On the issue of ownership of L.R. 7879/4 measuring 96 acres and its subdivision, L.R. 7879/24, the same was settled by the decision in High Court Civil Case No 617 of 2012. Specifically, the court stated as follows:

> " 1. The Plaintiffs, Afrison Export & Import Limited and Huelands Limited, are the registered proprietors of all that parcel of land known as LR No. 7879/24 (hereinafter "the suit property"). From the evidence on record, the suit property was part of a larger property LR No. 7879/4 which the Plaintiffs purchased from one Joreth Limited in 1981. The suit property measurers an area equivalent to 37.4 acres. This is well captured by the report prepared by the Ministry of Lands, Survey Department and dated 17th December, 2012 by one Wilfred Muchai, a Land Surveyor.
>
> 6. Further, from both the Supporting and Further Affidavits of Francis Mburu, it is clear that the issue of the liability of the 3rd Defendant to the Plaintiffs does not arise. The government had agreed as to having wrongly occupied the suit property and the only issue is the amount of compensation payable. Before I delve into the issue of compensation, there are two issues which I need first to dispose off. These are, whether the compensation would be for the property measuring 19.7 acres as contended by the 3rd Defendant or 37.4 acres as contended by the Plaintiffs and whether the Plaintiffs are entitled to the market rental loss for the period the government has been in occupation, that is Kshs.1,670,270,000/- claimed by the Plaintiffs.

7. On the issue of whether the compensation would be on 19.7 acres or 37.4 acres, it is clear from the record that the government appropriated the entire area of the suit property, that is 37.4 acres. From the Replying Affidavit of Victor G. Okioma and the minutes of the Parliamentary Departmental Committee on Administration and National Security, the Government is of the view that it had already purchased 17.8 acres of the suit property from the defunct Kenya Posts and Telecommunications Corporation in 1988. I have seen the subject Sale Agreement. The same is dated 18th August, 1988. It was between KPTC and the Permanent Secretary, the Office of the President. It was for the sale of various sub-plots (between LR Nos.13421/257 and 13421/531). The purchase price was Ksh.64m. Looking at that agreement, the same does not state that the Kenya Posts and Telecommunications Co-operation was the registered owner of those sub-plots. It also does not give the total area being sold. It is also not clear from the record how Kenya Posts and Telecommunications Corporations assumed ownership to purport to sell the said property. There being no evidence of Kenya Posts and Telecommunication's Corporation's ownership of that property, I hold that Kenya Posts and Telecommunications Corporation could not have passed and did not pass on to the 3rd Defendant any title. Accordingly, I hold that the property the subject of the suit is the entire 37.4 acres comprised in the title for the suit property i.e. LR No.7879/24 and the compensation sought shall be on that entire property." (emphasis added)

134. Further, the issue of ownership of the entire L. R. 7879/4 was determined by the court in National Land Commission vs Afrison Export Import Limited & 10 Others [2019] eKLR as follows:

> " The 1st and 2nd Interested Parties are private limited liability companies and are the registered proprietors of Land Reference Number (L.R. No.) 7879/4, which was the subject of the compulsory acquisition that gave rise to this Reference...It is not in dispute that the 1st and 2nd Interested Parties acquired L.R. No. 7879/4 measuring approximately 96 acres from Joreth Limited in 1981 at a consideration of Kshs 14,000,000/=. Our determination on the question of the construction, effect and validity of the title over L.R. No. 7879/4 therefore is that, although L.R. No. 7879/4 is still registered in the names of the 1st and 2nd Interested Parties, the title is held subject to the interest of the Government in the public amenity plots, which interest crystallised upon the Government's approval of the 1st and 2nd Interested Parties' subdivision scheme and subsequent implementation of the scheme on the ground. The public amenity plots include the land on which Drive In Primary School and Ruaraka High School sit. Similarly, the title is held subject to the interest of the State in the land occupied by the GSU. It is therefore our finding that the two schools sit on public land. Further, it is our finding that being public land, the land on which the two schools sit could not be the subject of compulsory acquisition under Part VIII of the *Land Act*."

135. It can be noted from the foregoing that the following issues have been determined by the High Court and the Environment and Land Court in the previous highlighted matters. Firstly, in HCCC No. 617 of 2012, the ownership of the entire parcel of land known as L.R. No 7879/4 measuring 96 acres was established. The court held that the land belonged to the 1st and 2nd Respondents as joint tenants. The court further held that there being no evidence of Kenya Posts and Telecommunication's

Corporation's ownership of the suit property, Kenya Posts and Telecommunications Corporation could not have passed and did not pass any title.

136. Secondly, the Environment and Land Court in National Land Commission vs Afrison Export Import Limited & 10 Others [2019] found that LR No. 7879/4 was owned by the 1st and 2nd Respondents and was sub divided. The court further found that upon sub division, certain portions of land were surrendered for public purposes, and were reserved for Drive In Primary School and Ruaraka High School.

137. In respect of where the two schools sit, Drive In Primary School and Ruaraka High School, the court held that having surrendered the same for public utilities, the 1st and 2nd Respondents are not entitled to compensation to the same despite the 1st and 2nd Respondents being in possession of the title of the entire land.

138. Thirdly, the High Court in HCCC No. 617 of 2012 found that there have been various acquisitions of portions of L.R. No 7879/4. Among the acquisitions, the court held, is where the Government acquired a total of 37.4 acres (LR No.7879/24) on behalf of the GSU. The court further held that the compensation sought was for the entire 37.4 acres.

139. For emphasis, the issue of the acreage of L. R. 7879/24 was settled as being 37.4 acres in HCCC 617 of 2012. Equally, the question of ownership of the 37.4 acres which was assigned L.R. No 7879/24 was settled as having previously belonged to the 1st and 2nd Respondents, but subsequently acquired by the Government in its entirety on behalf of GSU and for which compensation had been partly paid to the 1st and 2nd Respondents. The issue of the amount that was due to the 1st and 2nd Respondents was also settled in the said suit by way of a consent order.

140. The purpose of a plea of res judicata is to bring an end to litigation, coupled with the interest to protect a party from facing repetitive litigation over the same matter. The doctrine of res judicata promotes stability of Judgments by reducing the possibility of inconsistency in decisions by courts of concurrent jurisdiction. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law.

141. The determination of the ownership of L.R. No 7879/4 and L.R. No 7879/24 is a judgement in rem. The Black's Law Dictionary, 9th Edition defines a judgment in rem as;

> "An action in rem is one in which the judgment of the Court determines the title to the property and the rights of the parties, not merely as between themselves, but also as against all persons at any time dealing with them or with the property upon which the court had adjudicated."

142. The Court of Appeal in National Land Commission vs Registered Trustee of the Arya Pratinidhi Sabha, Eastern Africa & Another [2019] eKLR stated:

> "The complaints raised by the appellant, in our view, had been settled by Musinga, J. It is apparent from the record that the complaint leading to the subsequent petition originated from the Ministry of Education. The Ministry as a party to the former suit ought to have brought in full its case for determination. It cannot purport to go through another government agency or department or commission to circumvent the doctrine of res judicata and in the process continue vexing the 1st respondent. The mechanisms for challenging the decision in Petition No. 225 of 2008 by way of an appeal having been exhausted, the government, purporting to act through another department to challenge the

1st respondent's ownership of the suit property, cannot be countenanced as it is a complete abuse and in violation of the doctrine of res judicata. The government and by extension the appellant, is bound by the previous judgment of the High Court until and unless the same is set aside, reviewed or varied. Both the Ministry of Education and the appellant herein were claiming under the same title and under the same party, namely the government."

143. Considering that the Attorney General participated in the proceedings that determined the issue of ownership of the suit, and in the absence of a prayer seeking to set aside or vary the Judgment of the court in HCCC No. 617 of 2012, on the ground that the High Court did not have jurisdiction to entertain the claim, or on any other ground, prayer (a) of the Petition cannot be granted.

144. Indeed, any contestation as to the ownership of L.R. No 7879/4 and L.R. No 7879/24 to the extent of the same having been adjudged as belonging to the 1st and 2nd Respondents and L.R. No 7879/24 measuring 37.4 acres having been compulsorily acquired by the Government for GSU cannot be entertained.

145. In fact, there is in existence a duly authenticated survey plan and a Deed Plan in respect of the acquired L.R. No 7879/24 measuring 37.4 acres, together with a draft Indenture of Conveyance duly signed by the Directors of the 1st and 2nd Respondents, conveying the property to the government. All these documents were prepared pursuant to the order of the court alluded to above.

146. That being the case, and considering that the order of the court in HCCC No. 617 of 2012 has never been set aside, prayers (b), (f) and (g) of the Petition should be disregarded as they amount to a re-litigation of ownership of the two parcels of land.

147. The second issue for determination is whether the suit was between same parties or parties under whom they claim. From a cursory examination of the Petition and the previous proceedings, the parties are not similar because the Petitioners herein were not parties in the previous matters. However, there is a commonality in the interests of the parties to the extent of seeking determination on the compensation for compulsory acquisition. Explanation (6) to section 7 of the *Civil Procedure Act* provides that:

> "Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

148. Establishing commonality between parties is mandatory. The Supreme Court in John Florence Maritime (supra) held that:

> "Does the similarity qualify to determine that the appellants herein and the applicants in JR 130 of were litigating under the same title?... The answer may be found in explanation no 6 of section 7 of the *Civil Procedure Act* which provides as follows...The commonality is that the appellants herein and the applicants in JR 130 of 2011 were persons, juridical and natural, engaged in the business of clearing and forwarding of goods for various importers of goods destined to the Democratic Republic of Congo. They have the same interests and therefore they raise the complaints regarding the two certificates, FERI & COD. The answer is in the affirmative and we find we cannot fault the High Court or the Court of Appeal for concluding as such."

149. The third determination is on the full and final determination of the issues in dispute. The Petitioners argue that HCCC 617 of 2012 was a consent and was not a determination on merit. This argument

is misplaced for the reasons stated by the Court of Appeal in Julius Muthoka Ndolo vs Park Towers Limited & 2 Others [2019] eKLR that:

> " Finality in the decision does not connote a determination made after hearing oral evidence only. It extends to consents properly recorded before the court. Explanation 4, above, also widens the net to all matters that properly belonged to the litigation whether brought forward or not. In the Kenya Commercial Bank Limited case (supra) this Court stated thus:
>
> > " Those issues cannot be re-litigated. On that point this case falls on all fours with Kamunge & Others vs Pioneer General Assurance Society Ltd [1977] EA 263 at pg. 265" where this Court stated as follows on the issue of res judicata.
> >
> > > " It does not matter that the judgment was by consent and not on merit after trial. It is as binding as if the judgment was one after evidence had been called.."
>
> This Court has also stated in the case of Pop-in (Kenya) Ltd and 3 Others vs Habib Bank, A. G. Zuric C. A. No. 80 of 1988 that a matter will be res-judicata not only on points upon which the court was actually required by parties to form an opinion and pronounce a judgment but also on every point which properly belonged to the subject matter of litigation."

150. It should be noted that this Court is a Court of equal status to the High Court dealing with distinct matters. As such, this Court cannot purport to entertain the question of the High Courts' competence or lack thereof in HCC No 617 of 2012. That is a question that should have been raised before the High Court or the Court of Appeal.

151. The foregoing illustrates that the substantive issues raised in this Petition are res judicata. There is only one question that escapes the plea of res judicata.

152. The Petitioners have contended that the question of whether the 6.7 acres sought to be excised forms part of L. R. No 7879/24 and not the greater L.R. No 7879/4. This is a question that was not determined in HCCC 617 of 2012 or in National Land Commission vs Afrison Export Import Limited & 10 Others (supra) or any previous cases. The court will proceed to make a determination on this question if the same does not offend the plea of sub judice.

153. The 3rd, 5th and 6th Respondents contend that the Petition offends the doctrine of sub judice because there is another matter being HCCC 2521 of 2015 that has been filed by the Petitioners. The Petitioners argue the doctrine cannot apply because the issues in HCCC 2521 of 2015 are not the same as the issues in the instant Petition. In particular, they argue that the question of whether the public is being robbed of the 6.7 acres is not an issue in the case.

154. Sub judice is a doctrine codified in section 6 of the *Civil Procedure Act* which prescribes as follows:

> " 6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

155. The Supreme Court of Kenya in Kenya National Commission on Human Rights vs Attorney General, Independent Electoral & Boundaries Commission & 16 others [2020] eKLR had occasion to pronounce itself on the doctrine of sub judice as follows:

> " The term 'sub judice' is defined in Black's Law Dictionary 9th Edition as: "Before the court or judge for determination." The purpose of the sub judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives."

156. For the sub judice rule to apply, the conditions which must be met can be summarized as: i) The matter in issue must be directly and substantially in issue in a previously instituted suit or proceeding between the same parties; or, ii) The matter in issue must be directly and substantially in issue in a previously instituted suit or proceeding between parties under whom they or any of them claim, litigating under the same title, and iii) where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

157. Despite the Respondents' assertions aforesaid regarding sub judice, they did not provide the Court with the pleadings in HCCC 2125 of 2015. [Not on KLR/CTS]. As a result, the same must fail.

158. The Court has made a determination that the issue of ownership of the property known as L.R. No 7879/4 has already been determined as belonging to the 1st and 2nd Respondents, with the rider that the title is held by the 1st and 2nd Respondents on condition that L.R. No 7879/24 comprising of 37.4 acres belongs to the Government, and the 1st and 2nd Respondents to be compensated fully for the land.

159. Further, the court has already found that other than L.R. No 7879/24 comprising of 37.4 acres (GSU land) which the 1st and 2nd Respondents should be compensated for fully, the land where Drive In Primary School and Ruaraka High School are situated belong to the public, the same having been surrendered upon sub division of LR No. 7879/4.

160. The Petitioners have sought for a declaration that the 2.626 ha (6.7 acres) purportedly being compulsorily acquired is already government land by dint of being part of the 37.4 acres subject to the consent judgment in High Court Civil Case No 617 of 2012 and therefore, it cannot be compulsory acquired; and a declaration that it is fraudulent and against the public interest for the 1st and 2nd Respondents to hive off 1.7 acres off the 37.4 acres GSU land and re-sell it to the public.

161. According to the Petitioners, the parcel sought to be acquired is already part of public land. The Petitioners contend that the compulsory acquisition of the 6.7 acres is meant to rob the public as it amounts to double compensation; and that by virtue of the letter of 16th February 2015 from the AG, it is evident that the land measuring 1.7 acres is to be excised from L.R. 7879/24, the portion occupied by GSU which is public land.

162. The 1st and 2nd Respondents dispute this and argue that the Petition is meant to curtail and prevent their rightful compensation. According to the 1st and 2nd Respondents, the parcel sought to be acquired

is not part of public property as it is sought to be excised from L.R. 7879/25 and not 7879/24 (the GSU land).

163. The 1st and 2nd Respondents further contend that the 6.7 acres sought to be acquired is comprised of 5 acres to be hived from L.R. 7879/25 and 1.7 acres from L.R. 7879/24 and that the compensation they are claiming is for the acquisition of the 5 acres in L.R. No 7879/25, having forfeited the amount equivalent to the 1.7 acres that was hived of from L.R 7879/24 (the GSU land) for the road construction.

164. The 3rd Respondent's position is that it relied on the advice of the 4th Respondent to undertake the acquisition of the 6.7 acres for the expansion of a section of Outer Ring Road. The 3rd Respondent contends that at all times, it was advised that there was no instance of double compensation and proceeded to release the first payment of Kshs. 1,295.024,625.50 and has been awaiting the sum of Kshs. 208,906,425.50 from the Exchequer for onward transmission to the 1st and 2nd Respondents.

165. According to the 3rd Respondent (KURA), The total compensation was therefore Kshs. 1,417,812,851 as Kshs. 3,070,000 was deducted from the initial compensation amount of Kshs. 1,562,878,200 to cater for the relocation of the GSU wall which was to be affected by the road constructions and that the total area acquired by the 3rd Respondent was 2.626 ha and not 2.72 ha.

166. The 4th, 5th and 6th Respondents addressed the fact of the Government having completely fenced off the 37.4 acres and paid Kshs. 1.8 billion as compensation on an undertaking by the 1st and 2nd Respondents' advocates that the entire 37.4 acres would be conveyed to the Government upon completion of the payment of the decretal sum in HCCC 617 of 2012. They did not aver any fact as to whether the current acquisition amounts to double acquisition.

167. The letters of 26th January 2015 by the 1st and 2nd Respondents as well as the response of 16th February 2015 have been relied on to support the contention that 1.7 acres to be hived off in the acquisition is already part of public property. Other than making this distinction between the 1.7 acres and 5 acres, the Petitioners have not made any specific submissions or led any evidence on whether the 5 acres forms part of L.R. 7879/24.

168. The letter of 26th January 2015 states as follows in part:

> " This letter is therefore to advise you that Kenya Urban Road Authority (KURA) has acquired from us approximately 6.7 acres for construction of roads, which includes a portion of 1.7 acres on the proposed 30 acres to be sold to the General Service Unit (GSU) at a price of 80 million per acre. We have therefore deducted 130 million Kenya Shillings an amount equal to 1.7 acres, which nullifies the commitment of the Office of the President to the Official Receiver. It is now our responsibility to pay the Official Receiver 130 million Kenya Shillings."

169. The response from the AG which is the letter of 16th February 2015 then states as follows in part:

> " Please note that our office has no objection to the compulsory acquisition of 1.7 acres for road expansion on condition that the documents for the remaining parcel shall be conveyed to the Government upon payment of the full purchase price."

170. These are the portions the Petitioners rely on to advance the argument that the 6.7 acres sought to be acquired forms part of the already acquired 37.4 acres.

171. On the other hand, the 1st and 2nd Respondents while agreeing that 1.7 acres of the portion to be acquired falls under L.R. 7879/24, argue that the remaining 5 acres is not public property as it falls on L.R. 7879/25 and they are entitled to compensation. The 1st and 2nd Respondents contend that the they forfeited Kshs. 130,000,000 being the value of the 1.7 acres from their compensation to be paid to the 1st and 2nd Interested Parties.

172. From the foregoing facts and admission by the 1st and 2nd Respondents, it is the court's finding that the 6.7 acres sought to be acquired is comprised of two parcels of land. The first is the 1.7 acres forming part of the already acquired L.R. 7879/24 comprised of 37.4 acres. The other is the 5 acres forming part of L.R. 7879/25. The question then is whether there is double compensation.

173. It is inescapable that concerning the 5 acres that form part of L.R. 7879/25, the issue of double compensation cannot arise as the property rightly belongs to the 1st and 2nd Respondents. Regarding compensation for the 1.7 acres, the court finds that the 1st and 2nd Respondents have already agreed to forego compensation for the same, the same being part of the GSU land that had already been acquired by the government.

174. The parcel of land known as L.R. No 7879/24 measuring 37.4 acres was valued and vide the consent recorded in HCCC 617 of 2012, a compensation of Kshs. 2,400,000,000 was to be paid for the entire acreage. The parties are in agreement that so far, Kshs. 1,800,000,000 has been paid leaving a balance of Kshs. 600,000,000. The agreement was that the Government was to pay the Official Receiver the total sum of Kshs. 150,000,000 which was the sum for which Credit Ltd had a charge over the suit property.

175. In the letter of 16th February 2015, the 1st and 2nd Respondents contend that the Government failed to pay the 1st and 2nd Interested Parties the said monies. The 1st and 2nd Respondents have proposed to "deduct Kshs. 130,000,000 which is equivalent to 1.7 acres" and personally pay the Official Receiver."

176. Indeed, valuation of 6.7 acres was Kshs. 1,562,878,200. This amount was reduced by Kshs. 3,070,000 which was the costs to be incurred in relocating the perimeter wall for the GSU, reducing the payment to Kshs. 1,472,690,000. According to the 1st and 2nd Respondents, which position has not been controverted by the National Land Commission, the Attorney General and KURA, they agreed to forfeit the sum of Kshs. 130,000,000 equivalent to 1.7 acres.

177. Therefore, it is the finding of this court that the 1st and 2nd Respondents were therefore entitled to Kshs. 1,472,690,000 which is the valuation for the entire 6.7 acres, less the forfeited amount of Kshs. 130,000,000 equivalent to 1.7 acres and which was already factored in the acquisition of L.R. 7879/24. That being the case, the issue of double compensation for the acquired land for the road construction does not arise.

178. The Petitioner alleges that the valuation for both acquisitions was improper as the Government Valuer was not involved. However, the 1st and 2nd Respondents as well as the 3rd to 6th Respondents contend that the valuation was proper. The 1st and 2nd Respondents aver that the 3rd Respondent engaged a qualified and licensed valuer to undertake the valuation.

179. Regarding who is responsible to conduct a valuation report on land subject to compulsory acquisition, this Court in National Land Commission vs Afrison Export Import Limited & 10 Others (supra) held that:

> "Under Section 1139(2) (a) (sic) of the *Land Act*, the value of the land being acquired is based on the opinion of the Applicant. In our view, the value of the land being compulsorily acquired for public purposes by the Applicant ought to be based on the price the property

would fetch in the open market in an arms-length transaction in which all the parties are acting prudently. The valuation process needs to be clear to the persons interested in the land and to the public considering the fact that compensation funds are paid from public resources. The economic use to which the land being acquired was being put into would be a material factor to be considered in determining the value of the land to be acquired. The Applicant has to keep in mind that it acts in the public interest and therefore has a responsibility to ensure prudent, economical and responsible use of public funds when it is valuing land for purposes of compensation. There is need for transparency and accountability in the valuation of land for compulsory acquisition to make it sustainable and affordable."

180. Section 113(2)(a) of the *Land Act* provides that:

> " Subject to Article 40(2) of *the Constitution* and section 122 and 128 of this Act, an award... shall be final and conclusive evidence of...the value, in the opinion of the Commission, of the land..."

181. The law mandates the 4th Respondent (the National Land Commission) to form an opinion as to the value of the portion of the 6.7 acres to be excised in the compulsory acquisition. The requirement for the 4th Respondent to conduct its own assessment was stated in Patrick Musimba vs National Land Commission & 4 Others [2016] eKLR as follows:

> " Both the *Land Act* as well as *the Constitution* have laid a basis for this. The *Land Act* expects the State and in this respects (sic) the National Land Commission to be astute enough and detect any collusive attempts by land owners to manufacture artificially high compensatory prices on compulsory acquisition. The statute consequently provides that the National Land Commission will originally assess the value and make the offer. An inquiry, if there is a dispute on the value is then made."

182. There is communication by the 3rd Respondent as to the conduct and conclusion of inquiry and acceptance of award. The National Land Commission has not denied the quoted value of the 6.7 acres. Indeed, exhibited on the Petitioners' Affidavit in a valuation report by Ms Salome of NLC in which she valued the acquired portion of the suit property measuring 2.626 Ha to the tune of Kshs 1,417,812,851.

183. In any event, if there is any contestation on the true value of the acquired 6.7 acres, the same is not within the province of this Petition, the Petitioner having not led any evidence in that respect.

184. Lastly, on whether the 1st and 2nd Respondents could appoint another company to receive money on its behalf, this Court in National Land Commission vs Afrison Export Import Limited & 10 Others (supra) held:

> " The Applicant contended that Section 115 of the *Land Act* did not bar remittance of a compensation award to general agents. We do not agree with that proposition. If that were the position, Parliament would not have legislated an elaborate framework on the payment of the compensation award. In our view, the agents to whom compensation may properly be made under Part VIII of the *Land Act* are statutory agents duly appointed under the law and exercising their statutory mandate under statutory instruments. We do not think Parliament envisaged a scenario where a director of a company with more than one director, without any recognised legal instrument, would be at liberty to divert compensation funds

to an entity that has no interest in the land being compulsorily acquired. In the Reference before us, there was no explanation as to why the 1st and 2nd Interested Parties whom the Applicant determined to be entitled to receive compensation funds could not receive the payment. There was also no evidence of any legal instrument appointing Whispering Palms Estate Limited as the statutory agent of the 1st and 2nd Interested Parties to receive the compensation award on their behalf. It is therefore our determination that under Part VIII of the *Land Act*, the person to whom compensation funds are payable is the person determined by the Applicant, or by the court where there is a dispute, to be entitled to the compensation. Where payment is to be made to an agent, the agent should be a duly appointed and recognised statutory agent. The payment of the impugned compensation award to Whispering Palms Estate Limited by the Applicant was therefore irregular for reasons that the company neither had an interest in the land being acquired, nor was it duly appointed as a recognised statutory agent."

185. A resolution by a company is a recognized legal instrument. Therefore, a resolution directing payment to a specific account is a proper appointment of a statutory agent. The allegation of impropriety raised by the Petitioners on the appointment of Almasi Limited to receive the compensation are mere suppositions. The court cannot impugn the decision to request the money to be remitted to Almasi Limited in the absence of cogent evidence of impropriety or an attempt to evade taxes, as contended by the Petitioners.

186. In conclusion, it is the finding of the Court that the Petitioners have failed to proof their case on a balance of probabilities. However, considering the public nature of the Petition, I will not condemn the Petitioners to pay costs.

187. For those reasons, the Petition dated 28th November, 2016 is dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 21ST DAY OF SEPTEMBER, 2023.**

**O. A. ANGOTE**

**JUDGE**