



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**ELC PETITION NO. 7 OF 2015**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE PREAMBLE OF THE CONSTITUTION AND ARTICLES  
1,2,3,10,19,20,21,22,23,24,25,27,28,39,40,48,60,61, 63, 65, 66,68, 159 (1) & (2), 165 (3) (d), 258 AND 259 OF THE CONSTITUTION  
OF KENYA**

**AND**

**IN THE MATTER OF THE DOCTRINE OF LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF THE DOCTRINE OF REASONABLENESS AND PROPORTIONALITY**

**AND**

**IN THE MATTER OF PRINCIPLES OF DEMOCRACY, FAIRNESS, EQUITY AND NON-DISCRIMINATION**

**AND**

**IN THE MATTER OF CONTRAVENTION AND VIOLATION OF THE FUNDAMENTAL RIGHTS AND FREEDOMS AS  
ENSHRINED UNDER THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF SECTION 4 (1) & (2) (A) & (B) AND 37 OF THE LAND ACT NO 12 OF 2012**

**AND**

**IN THE MATTER OF SECTION 8 OF THE LAND REGISTRATION ACT, 2012**

**AND**

**IN THE MATTER OF SECTION 3, 5,6 OF THE NATIONAL LAND COMMISSION ACT 2012**

**AND**

**IN THE MATTER OF INTERPRETATION OF ARTICLE 63 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)  
PRACTICE AND PROCEDURE RULES, 2013**

**BETWEEN**

JOSEPH KIPNGETICH TANUL.....	1ST PETITIONER
STEPHEN KIPKEMOI BUSIENEL.....	2ND PETITIONER
PAULO KIPRONO SAMOEL.....	3RD PETITIONER
JAMES KIBISU TANUL.....	4TH PETITIONER
ALICE CHEMUTAI CHUMO.....	5TH PETITIONER
JAMES KIBIWOTT RONO.....	6TH PETITIONER
MARGRET KIPSAINA.....	7TH PETITIONER
MARY CHEMUTAI KIPTIYOT.....	8TH PETITIONER
ANNA CHEPKOSGEY SAMOI.....	9TH PETITIONER
ABRAHAM KIPROP NGETICH.....	10TH PETITIONER
SAMUEL LAGAT.....	11TH PETITIONER
HARRISON KIPKEMOI TANUL.....	12TH PETITIONER
JANET CHEPKEMOI.....	13TH PETITIONER
JUSTUS KIPCHEMBA NGETICH.....	14TH PETITIONER
MARY BIRECH.....	15TH PETITIONER
NOAH KIPRONO TANUL.....	16TH PETITIONER
SAMUEL ROTICH KIBIWOTT.....	17TH PETITIONER
WILSON KIPTAUI ROTICH.....	18TH PETITIONER
JANET CHEPKOSGEY ROTICH.....	19TH PETITIONER
SAMUEL MALAKWEN TANUL.....	20TH PETITIONER
SUSAN CHEBOI.....	21ST PETITIONER
SAMUEL KIBORE MITEL.....	22ND PETITIONER
JANET CHEPCHUMBA CHUMBO.....	23RD PETITIONER
FRANCIS KIMUTAI LEITICH.....	24TH PETITIONER
KIPLANGAT KIBENEL.....	25TH PETITIONER
RICHARD KIPKOSGEI BOR.....	26TH PETITIONER
CATHERINE ROTICH CHESIROR.....	27TH PETITIONER
JOSEPH KIPLANGAT CHESIROR.....	28TH PETITIONER
HILDA CHEROTICH TANUL.....	29TH PETITIONER
PAULL KIPKOECH TUEL.....	30TH PETITIONER
RUTH CHEPKOROS CHUMO.....	31ST PETITIONER
SAMUEL KIPKORIR SIELE.....	32ND PETITIONER

MARY KIPTOO.....	33RD PETITIONER
TABSABEII CHEPKORIR ROTICH.....	34TH PETITIONER
MICA KIMUTAI TANUI.....	35TH PETITIONER
STEPHEN KIPLAGAT SIELE.....	36TH PETITIONER
JOSEPH KIPNGENO SOL.....	37TH PETITIONER
TABUTANY CHELAGAT LELEI.....	38TH PETITIONER
ROBBERT KIPLANGAT CHERUIYOT.....	39TH PETITIONER
PETER KIPSANG KOSKEI.....	40TH PETITIONER
CHEPKWONY ARAP SOL.....	41ST PETITIONER
CHELULE SITIENEI SIGIRA.....	42ND PETITIONER
KIPLAGAT GOKO.....	43RD PETITIONER
RUBEN A SIGE.....	44TH PETITIONER
SALINA CHEMUTAI NGETICH.....	45TH PETITIONER
JOSEPH KIPKORIR MOSONIK.....	46TH PETITIONER
MICHAEL K. CHEBII.....	47TH PETITIONER
HENRY KIPKURUI MUTAI.....	48TH PETITIONER
MOSES K BUNDOTICH.....	49TH PETITIONER
RICHARD MUZEE MARIDANY.....	50TH PETITIONER
MOSES KIPTUM BOR.....	51ST PETITIONER
MARY CHEBORE CHESIROR.....	52ND PETITIONER
JOEL KIBET LIMO.....	53RD PETITIONER
EMILY CHEPKOECH SIELE.....	54TH PETITIONER
JOHN KIPROTICH MUTAI.....	55TH PETITIONER
WESLEY KIPKURUI TOO.....	56TH PETITIONER
DANIEL LELEI.....	57TH PETITIONER
HELLEN CHEPKOECH CHILGE.....	58TH PETITIONER
SHEILA JABET CHERONO.....	59TH PETITIONER
RAELI CHEPKURUI TUEL.....	60TH PETITIONER
GIDEON KIPTANUI CHESIREM.....	61TH PETITIONER
REUBEN KIPKEMEI CHERUIYOT.....	62ND PETITIONER
HILLARY KIPROTICH KIBOR.....	63RD PETITIONER
REUBEN SIGIRA SANG.....	64TH PETITIONER

MONICA CHEROP ALEXANDER.....	65TH PETITIONER
CHRISTINA CHESANG BOR.....	66TH PETITIONER
JONATHAN KIPCHUMBA KOECH.....	67TH PETITIONER
NICHOLAS RHIKHAYA KHAYUMBI.....	68TH PETITIONER
SAMMY KIPKOECH BIWOTT.....	69TH PETITIONER
SAMUEL KIPKEMEI MOSONK.....	70TH PETITIONER
RAEL JEPKOSGEI NGETICH.....	71ST PETITIONER
ANNA CHEPKEMOI BOR.....	72ND PETITIONER
ANN JEBET CHEPNGENO.....	73RD PETITIONER
SIMIOM KIPRONO BARNO.....	74TH PETITIONER
COSMAS KIMUTAI LAGAT.....	75TH PETITIONER
RAELI CHEPKOSGEI CHERUIYOT.....	76TH PETITIONER
KIPKEMOI C BUNDOTICH.....	77TH PETITIONER
JAMES AGUI SIGILAI.....	78TH PETITIONER
SALLY CHELANGAT NGOSOSEI.....	79TH PETITIONER
ALICE CHEPKEMOI TUEI.....	80TH PETITIONER
PAUL K LEILEI.....	81ST PETITIONER
PAULINA CHEPKURUI CHEPKUONY.....	82ND PETITIONER
MARK ROP SIROREI.....	83RD PETITIONER
ROBERT KIPKORIR TONO.....	84TH PETITIONER
JOHN KIPKOSGEI KIPLAGAT.....	85TH PETITIONER
ESTHER CHELAGAT SIELE.....	86TH PETITIONER
TECLA CHEPKEMOI.....	87TH PETITIONER
BETTY CHEPWOGEN.....	88TH PETITIONER
DANIEL KIPYEGON SITIENEL.....	89TH PETITIONER
JOHN KIPKORIR RUGUT.....	90TH PETITIONER
VIOLA CHEPKEMBOI KIPLANGAT.....	91ST PETITIONER
SAMUEL MUZEE MONGO.....	92ND PETITIONER
DANIEL KIPKOSGY KIGEN.....	93RD PETITIONER
NANCY KIPSAISAK.....	94TH PETITIONER
MAGRET CHEPROP CHERUIYOT.....	95TH PETITIONER
JOEL KIPKURUI SANG.....	96TH PETITIONER

NICHOLAS KIPTOOM KESSEL.....	97TH PETITIONER
RACHEL TABELGA CHELULE.....	98TH PETITIONER
TIMOTHY KIPCHUMBA KIPTOO.....	99TH PETITIONER
ROBERT TUEL.....	100TH PETITIONER
RICHERD K. KITUR.....	101ST PETITIONER
BERNARD KIPKURUI KOSGEL.....	102ND PETITIONER
SUSAN JEPTEKENY.....	103RD PETITIONER
DAVID KIPKEMOI CHELENGOI.....	104TH PETITIONER
JOEL KIPNGENO SIGEL.....	105TH PETITIONER
GEOFFREY KIPKEMOI RONO.....	106TH PETITIONER
MAURINE CHEROTICH MUTAL.....	107TH PETITIONER
KURUI KIPRONO STANELEY.....	108TH PETITIONER
MARRY CHELAGAT MOSONIK.....	109TH PETITIONER
DAVID SAMOEKI KIPKOECH.....	110TH PETITIONER
VINCENT KIPTOO KIPLANGA'AT.....	111TH PETITIONER
SARAH CHEPCHIRCHIR.....	112TH PETITIONER
EUNICE CHEPKORIR CHEBOMUL.....	113TH PETITIONER
SIMON KIPLAGAT CHEBEL.....	114TH PETITIONER
NAOMI CHEBEI KIPLAGAT.....	115TH PETITIONER
JOSEPH KIPKETER SANG.....	116TH PETITIONER
JAMES KIPKOECH ROTICH.....	117TH PETITIONER
JOYCE CHEROTICH.....	118TH PETITIONER
CHRISTINA KAPTUYA MITEL.....	119TH PETITIONER
ELLEN CHELENGAT BARNO.....	120TH PETITIONER
RUTH CHEPCHIRCHIR CHELANGAT.....	121ST PETITIONER
CAROLINE CHELAGAT.....	122ND PETITIONER
JOSEPH CHEBOI.....	123RD PETITIONER
BERNARD KIBET RONO.....	124TH PETITIONER
JONATHAN KIMTAI KIPTOO.....	125TH PETITIONER
JANE CHEPKOECH BOR.....	126TH PETITIONER
SARAH JEROTICH KIMELI.....	127TH PETITIONER
JANE CHEPKOROS LELEI.....	128TH PETITIONER

MUSA KIPKOSGEI CHESIRE.....	129TH PETITIONER
PAUL KOECH KIPLAGAT.....	130TH PETITIONER
RAEL JELIMO LAGAT.....	131ST PETITIONER
JANE CHEPKEMOI MARITANY.....	132ND PETITIONER
SARAH JELAGAT ROTICH.....	133RD PETITIONER
CHRISTINE CHEPKORIR LELEI.....	134TH PETITIONER
JULIAS KIPYEGO KIPKOSGEI.....	135TH PETITIONER
RICHARD CHEBOCHOK MARINDANY.....	136TH PETITIONER
ROSE JIPKOECH CHEBUTUK.....	137TH PETITIONER
JOSEPH KIMELI SAWE.....	138TH PETITIONER
SAMMY KIPKOECH KEITANY.....	139TH PETITIONER
RICHER KOECH.....	140TH PETITIONER
TOIYOI CHEMBOI.....	141ST PETITIONER
ESTHER CHELAGAT KERICH.....	142ND PETITIONER
JAMES KIPSEWER SITENEI.....	143RD PETITIONER
PASCAL ISHIBIRA LIKHIYA.....	144TH PETITIONER
BENJAMIN K. LANGAT.....	145TH PETITIONER
RAELY CHEKEMOI SANG.....	146TH PETITIONER
EUNICE JERUTO BUNDOTICH.....	147TH PETITIONER
ROBERT CHEPKWONY.....	148TH PETITIONER
JONATHAN K. CHEPKURUI.....	149TH PETITIONER
ROBBERT KORIR.....	150TH PETITIONER
GRACE CHEMELI TELO.....	151ST PETITIONER
FLORENCE CHEPKOECH.....	152ND PETITIONER
JOAN KIPROTICH KIPLANGAT.....	153RD PETITIONER
SAMWEL KIPKORIR CHERUYOT.....	154TH PETITIONER
DAVID CHERUOT.....	155TH PETITIONER
DAVID KIPSANG KOGO.....	156TH PETITIONER
JOSHUA ROTICH.....	157TH PETITIONER
ELIZABETH CHEPTOO KOSGEI.....	158TH PETITIONER
JACKSON KOSGEL.....	159TH PETITIONER
WILSON KIPKORIR LANGAT.....	160TH PETITIONER

EZEKIEL TARAKWO.....	161ST PETITIONER
REUBEN KIPLANGAT CHELULE.....	162ND PETITIONER
ISAAC K. KIPTANUI.....	163RD PETITIONER
ERICK KIPNGETICH NGENO.....	164TH PETITIONER
AMOA CHEBUTUK.....	165TH PETITIONER
JOSEPH KIPCHIRCHIR SIELE.....	166TH PETITIONER
MOSES LIMO.....	167TH PETITIONER
STANLEY KIPCHUMBA NGENO.....	168TH PETITIONER
ELISHA K. SITIENEL.....	169TH PETITIONER
PRISILLA CHEPCHUMBA SIMATWO.....	170TH PETITIONER
JOSEPH KOTUT.....	171ST PETITIONER
LORNA CHEPKUONY.....	172ND PETITIONER
BENJAMIN KIPKORIR KIPLAGAT.....	173RD PETITIONER
JOSEPH KIPNGETICH.....	174TH PETITIONER
SILA BUNDOTICH.....	175TH PETITIONER
ANNAN CHEPROP TELE.....	176TH PETITIONER
ELIJAH CHEPKONGA.....	177TH PETITIONER
JOSEPH AGUI TANUI.....	178TH PETITIONER
JOSEPH K CHERUTICH.....	179TH PETITIONER
PETER KIPLAGAT SIGILAI.....	180TH PETITIONER
TERIK KIPTUM CHEPKURUI.....	181ST PETITIONER
SARAH YAIKERIA.....	182ND PETITIONER
SAMMY KIPLAGAT.....	183RD PETITIONER
ZATI CHELAGAT.....	184TH PETITIONER
PERES J MUIGEL.....	185TH PETITIONER
LUDIA CHEPKEMOI.....	186TH PETITIONER
LEAH K. LALANG.....	187TH PETITIONER
JOSEPHINE CHEPKOECH TUEL.....	188TH PETITIONER
MOSES KOMEN KIBOS.....	189TH PETITIONER
RUTH CHEMUTAI LEITICH.....	190TH PETITIONER
ISAAC K. KIPLAGAT.....	191ST PETITIONER
ROBERT KIPKOSGEI RONO.....	192ND PETITIONER

JOICE CHERUTO.....	193RD PETITIONER
JOSEPHINE CHELAGAT.....	194TH PETITIONER
JOSEPH KOMEN SORE.....	195TH PETITIONER
GEOFREY KIPGENO KOSKEI.....	196TH PETITIONER
CHRISTINA CABILO KAMISOI.....	197TH PETITIONER
SAMUEL KIPKORIR BIEGON.....	198TH PETITIONER
WILLIAM CHIRCHIR.....	199TH PETITIONER
WILSON ROTICH.....	200TH PETITIONER
CHERUIYOT KIMETO.....	201ST PETITIONER
JOSEPHINE CHEPKOR KOECH.....	202ND PETITIONER
SAMUEL KIPYEKO KOSGEY.....	203RD PETITIONER
ALICE CHEBET KOCH.....	204TH PETITIONER
HOSEA KIPTARUS.....	205TH PETITIONER
REBBECA CHEPCHIRCHIR TERER.....	206TH PETITIONER
ELIJAH KIPKOSGEI KIPROTICH.....	207TH PETITIONER
BETTY CHEBWOGEN MUTAI.....	208TH PETITIONER
WILLON K. RUTTO.....	209TH PETITIONER
JAMES KIPNGENY SIGILAI.....	210TH PETITIONER
FRANCIS KIPSANG KIPTOO.....	211TH PETITIONER
GRACE CHERONO KOGO.....	212TH PETITIONER
MONICA CHEROTICH KIMETO.....	213TH PETITIONER
ALICE CHEPKOSGEI CHELOGOI.....	214TH PETITIONER
SAMUEL K. KOECH.....	215TH PETITIONER
EVALINE CHERONO KOSKEY.....	216TH PETITIONER
PAULO AGUI LAGAT.....	217TH PETITIONER
JOSEPH KIMUTAI RUTO.....	218TH PETITIONER
CHRISTOPHER NGETICH.....	219TH PETITIONER
JOEL KIPKORIR.....	220TH PETITIONER
DAVID KIPLAGAT KORICH.....	221ST PETITIONER
CATHERINE CHEPKOSGEI.....	222ND PETITIONER
PAULINA TERIKI CHEBII.....	223RD PETITIONER
RAELY CHEPTANUI.....	224TH PETITIONER

DAVID KIPLAGAT KORICH.....	225TH PETITIONER
WILSON KIBET MOSOIN.....	226TH PETITIONER
PAULINE CHELAGAT.....	227TH PETITIONER
STANLEY KIPSANG LAGAT.....	228TH PETITIONER
KIMELI KIPLAGAT KORICH.....	229TH PETITIONER
GLADYS CHEPKOSGEY.....	230TH PETITIONER
SAMUEL KIPNGETICH KURUI.....	231ST PETITIONER
DAVID KIPKIMEI TUEL.....	232ND PETITIONER
JANET TERIKI KIPKORIR.....	233RD PETITIONER
RICHARD KIPRONO KOECH.....	234TH PETITIONER
JAMES KOECH KURUI.....	235TH PETITIONER
ESTHER CHEPKEMOI.....	236TH PETITIONER
RICHARD TERAGAT SALGONG.....	237TH PETITIONER
JOAN CHEBICHI.....	238TH PETITIONER
JAMES LIMO KIMISOI.....	239TH PETITIONER
ELIZA KIPKSGEI.....	240TH PETITIONER
ROBBERT KIPRUTO WILLIAM.....	241ST PETITIONER
ROBERT KIMTAI KOSKEI.....	242ND PETITIONER
ELIZABETH JEPKOSGEI KIBII.....	243RD PETITIONER
SHEDRACH K BII.....	244TH PETITIONER
SALINA CHELIMO.....	245TH PETITIONER
TONNY KIPROTICH.....	246TH PETITIONER
JENIFFER JEPKOECH KIBWAI.....	247TH PETITIONER
COLLINS LAGAT.....	248TH PETITIONER
WILLIAM KIPSOY KIGEN.....	249TH PETITIONER
BESON KIBIRICH MATETAI.....	250TH PETITIONER
JOHN KIMAIYO KIPYEGON.....	251ST PETITIONER
MOSES K BOIT.....	252ND PETITIONER
WILLIAM KIBWOTT CHERUOYOT.....	253RD PETITIONER
DAVID KIPROP RONO.....	254TH PETITIONER
JOYCE CHEPKEMEI CHELAGAT.....	255TH PETITIONER
ELIJAH KANDIE.....	256TH PETITIONER

AMOS SONGOL KANGUGA.....	257TH PETITIONER
JOSEPH CHERUIOT MASAI.....	258TH PETITIONER
CHRISTINE KOSKEY.....	259TH PETITIONER
ERICK K BUNDOTICH.....	260TH PETITIONER
ELIJAH KIPCHIRCHIR.....	261TH PETITIONER
ISACK KIPRUTTO BIWOTT.....	262ND PETITIONER
MICHAEL BOR.....	263RD PETITIONER
TECLA CHEMAIYO BARNO.....	264TH PETITIONER
SAMSON KIPYEKO CHEPSEBA.....	265TH PETITIONER
JOHNSON K. KIPSANG.....	266TH PETITIONER
CHEMATA KOLOI.....	267TH PETITIONER
JULIANAHEROP CHESANG.....	268TH PETITIONER
JUDITH CHEROP CHUMO.....	269TH PETITIONER
TABSHAKAI KOMEN.....	270TH PETITIONER
ALICE BOR.....	271ST PETITIONER
HADDA TUIYOT.....	272ND PETITIONER
ANDREW KIPKORIR SITINEL.....	273RD PETITIONER
PHILIP KIPLANGAT TOWETT.....	274TH PETITIONER
HOSES KIMUTAI SAINI SANGUT.....	275TH PETITIONER
JOHN KIPROTICH KIPLAGAT.....	276TH PETITIONER
SILAS KIPROP KIPTOO.....	277TH PETITIONER
JULIANA KIPNGETICH.....	278TH PETITIONER
PHILEMON KEINO.....	279TH PETITIONER
VICTOR KIBIWOT LITIEMA.....	280TH PETITIONER
ERICK LANGAT KECHEL.....	281ST PETITIONER
LILIAN CHEPKONGA.....	282ND PETITIONER
DANIEL KIYATOR KIPRONO.....	283RD PETITIONER
STEPHEN K. KOECH.....	284TH PETITIONER
EDINAH JEPKOECH KIRONO.....	285TH PETITIONER
PAUL KOECH.....	286TH PETITIONER
RICHARD KIBICHI LIMO.....	287TH PETITIONER
MARTIN J. KIPTOO.....	288TH PETITIONER

GRACE JEBICHI SAWE.....	289TH PETITIONER
KEVIN KIMUTAI LAGAT.....	290TH PETITIONER
STANELEY CHEMUSUSU.....	291ST PETITIONER
WILSON K. KIPSANG.....	292ND PETITIONER
NEDDY JERUTO SAINA.....	293RD PETITIONER
MILKA J SAINA.....	294TH PETITIONER
ESTHER KIGEN.....	295TH PETITIONER
SARAH J KIMELI.....	296TH PETITIONER
HOSESEA K SANGUT.....	297TH PETITIONER
ESTHER KABON CHEPKURUI.....	298TH PETITIONER
PERIS CHERUTICH.....	299TH PETITIONER
HELLEN CHEMWENO MOSONIK.....	300TH PETITIONER
ROBERT K KIPRONO.....	301ST PETITIONER
KIPROTICH CHEPKETANY.....	302ND PETITIONER
BEATRICE JEBET KIMUTAI.....	303RD PETITIONER
CHRISTOPHER CHEIRUOT.....	304TH PETITIONER
ELIZABETH KIMUTAI.....	305TH PETITIONER
MERCY CHEPKOECH.....	306TH PETITIONER
KIMUTAI KIPROTICH.....	307TH PETITIONER
JEREMIAH KIMUTAI YEGO.....	308TH PETITIONER
KIPTO NGETICH KIPRONO.....	309TH PETITIONER
KABON CHEBII.....	310TH PETITIONER
FESTUS KIPKEMOI KIMUTAI.....	311TH PETITIONER
ROSA CHEBII KIMETO.....	312ND PETITIONER
NICHOLAS KIPTOO ROTICH.....	313TH PETITIONER
ROSE CHEPKOECH SOI.....	314TH PETITIONER
TABRADICH SAMOEL.....	315TH PETITIONER
SELINA J KONGA.....	316TH PETITIONER
WILSON KIPLIMO LELEI.....	317TH PETITIONER
PAUL KIPKEMOI SITENEL.....	318TH PETITIONER
LIMO SAWE.....	319TH PETITIONER
RICHARD KIPTOO SAWEK.....	320TH PETITIONER

IRINE JEPKEMBOI MAIYO.....	321ST PETITIONER
VINCENT KIPKOGEI TANUL.....	322ND PETITIONER
GRACE JEPNGETICH.....	323RD PETITIONER
MAURINE JEMUTAI TANUL.....	324TH PETITIONER
WILLIAM K BARMOI.....	325TH PETITIONER
SARAH J RUTTO.....	326TH PETITIONER
JAMES ELIJAH MATUL.....	327TH PETITIONER
DAVID KIBICHI MUNDANY.....	328TH PETITIONER
CHERUIYO CHERONO.....	329TH PETITIONER
MAURINE JEMUTAI KOSGEL.....	330TH PETITIONER
KAMUREN KIBUT WILLSON.....	331ST PETITIONER
BEATRICE HEBET KIMUTAI.....	332ND PETITIONER
JACOB CHERUIOT KABISU.....	333RD PETITIONER
SAMUEL K ROTICH.....	334TH PETITIONER
KIPTUM TANUL.....	335TH PETITIONER
SAMSON KIPKORIR.....	336TH PETITIONER
KIGEN KIPTUL.....	337TH PETITIONER
WILLY KIBET TANUL.....	338TH PETITIONER
TERIKI CHEPKEITANY.....	339TH PETITIONER
JOSHUA KIPLIMO YATICH.....	340TH PETITIONER
ANNE JEPKORIR KIPRONO.....	341ST PETITIONER
JOSEPH CHELELE BOR.....	342ND PETITIONER
REBECCA KITILIT.....	343RD PETITIONER
SIMON KIPROTICH.....	344TH PETITIONER
ALICE CHEMUTAI KELONG.....	345TH PETITIONER
BETTY CHEBET TANUL.....	346TH PETITIONER
PAULINA KIPTOO.....	347TH PETITIONER
SANTOS KIBOR.....	348TH PETITIONER
PHILIPH K ANUL.....	349TH PETITIONER
ELIZABETH CHEMUTAI SANG.....	350TH PETITIONER
RAEL CHEPKEMOI LIMO.....	351ST PETITIONER
SUSAN KIMUTAI.....	352ND PETITIONER

DAVID KIPTUM CHEMWOREM.....353RD PETITIONER  
ANNAH CHEPKORIR KIPROP.....354TH PETITIONER  
KIPKOECH ROTICH.....355TH PETITIONER  
ISAIH CHERUTICH ARUSEI.....356TH PETITIONER  
WILLIAM KIBET KOTUT.....357TH PETITIONER  
LINUS KIPKOR NGENO.....358TH PETITIONER  
ANN JEBET CHEPNGENO.....359TH PETITIONER

**VERSUS**

**CABINET SECRETARY, MINISTRY OF LANDS,**

**HOUSING AND URBAN DEVELOPMENT.....1ST RESPONDENT**  
**THE NATIONAL LAND COMMISSION.....2ND RESPONDENT**  
**THE HONOURABLE ATTORNEY GENERAL.....3RD RESPONDENT**  
**REGISTERED TRUSTEES OF OUR LADY OF VICTORIA MONASTERY.....4TH RESPONDENT**  
**THE REGISTERED TRUSTEES OF KENYA**  
**EPISCOPAL CONFERENCE OF CATHOLIC BISHOPS.....5TH RESPONDENT**  
**PACIS INSURANCE COMPANY LIMITED.....6TH RESPONDENT**  
**MCHANGA DEVELOPERS LIMITED.....7TH RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Petitioners instituted their suit against the Respondents by way of a Petition filed in this court on 23rd July, 2015. The said Petition was subsequently amended on 14th June 2016. The Amended Petition seeks the following orders:-

*(a) A declaration that the actions by the respondents are brazen, illegal, egregious, discriminatory and hence a violation of the inalienable right to property, dignity, security of the person and the right to life of the Petitioners.*

*(b) A declaration that the constitutional principles of equitable distribution and access to land have been violated by the respondents jointly and singularly against the petitioners.*

*(c) An order of mandamus compelling the state to order the respondents to revert the land parcels L.R No 9848 and L.R No. 9849 to the Petitioners since it is their ancestral land as provided for in the Constitution of Kenya.*

*(d) That the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> respondent, their agents, servants and or representatives be restrained from interfering with the land parcels L.R No. 9848 and L.R. No. 9849.*

*(e) In the alternative, adequate and prompt compensation at the current market value of the parcels of land in question be made to the Petitioners.*

*(f) A declaration that the government has abdicated its role and has become an escapist.*

*(d) An order that the 2nd Respondent has failed to address and redress historical injustices visited on the Petitioners and should therefore be reconstituted through auditing of the individual commissioners as per law established.*

*(h) The Petitioners be paid costs of this Petition.*

2. The Petition is supported by the affidavit of Joseph Kipngetch Tanui sworn on 21st July 2015 on his own behalf and on behalf of the other 358 Petitioners.

## **BACKGROUND**

3. This Petition originates from alleged historical injustices carried out against the occupants of land parcels known as L.R No. 9848 and L.R No. 9849 measuring approximately 1,437 acres and 1,069 acres respectively (the “suit property”). The Petitioners allege that at all material times they and their forefathers have been in occupation of the suit property.
4. The Petitioners allege that they have been depending on the land for their livelihoods since the early 1920s. They further allege that the 4th Respondent herein found them in occupation of the Land in the 1960’s or thereabouts and they continued to co-exist without any problem until the mid 1980s.
5. It is alleged further that the 4th Respondents upon settling on the land enticed the Petitioners’ forefathers with promises of better lives and built schools, health facilities, and offered employment to some of the petitioners as casual labourers in their establishment known as Our Lady of Victory Monastery.
6. The Petitioners allege that they were not aware that the land parcel known as L.R. Nos. 9849 and 9848 were granted to Robert Geoffrey Wilfred Hudson and James Doyle respectively by the Governor of the Colony and Protectorate of Kenya on behalf of Her Most Gracious Majesty Queen Elizabeth the II in 1960.
7. They further allege that the transfer of title of the Petitioners’ ancestral land constitutes the basis of this Petition as the Petitioners allege that the same is a violation of their right to property, life, security of the person and self determination. Further it is the Petitioners’ case that the same violates the principle of equitable distribution of land and access to land by all its citizens.
8. They challenge the manner in which the 4th defendants acquired title to the suit property and later transferred it to the 5th and 6th defendants. They fault the Government through agencies such as the 2nd and 3rd Respondent for doing nothing to stop the 4th, 5th and 6th respondents from hoarding land for speculative purposes and abdicating their constitutional role of addressing historical injustices.
9. In the supporting Affidavit sworn by the 1st Petitioner on the 21st July, 2015 the 1st Petitioner reiterates the contents of the Petition and gives a chronology of events leading up to the acquisition of the suit property by the 7th Respondent. He deposes that the Petitioners and their forefathers occupied the suit land in the early 1920 when they established their homes and depended on the land for their livelihood. Unknown to them, land parcel L.R number 9848 was issued to one James Doyle and L.R Number 9849 was issued to Robert Geoffrey Wilfred Hudson by the Governor of the Colonial and Protectorate of Kenya in 1960.
10. He avers that in or about 1962, L.R No. 9849 was transferred to the 4th Respondents while L.R No 9848 was transferred to said Respondents in 1963. The Petitioners claim that they lived on the suit land together with the initial registered proprietors and the 4th respondents up to the year 1987 when the 4th respondents unceremoniously evicted them when they tried to assert their rights over the said land. The Petitioners aver that they have been rendered destitute and squatters in their ancestral land.
11. The Petitioners previously filed three other suits in 1993, 2004 and 2008 but the said suits were withdrawn. They have annexed copies of photographs, birth certificates and correspondence between some of them and the Respondents to their affidavit in support of their Petition.
12. The 1st, 2nd and 3rd Respondents did not file any response to the Petition. The 4th and 5th Respondents filed a joint Replying Affidavit sworn by Reverend Father Daniel Rono on 28th January, 2016.
13. In the said affidavit, he avers that the 4th Respondent was at all material times the lawful registered proprietor of the suit property herein known as L.R No. 9848 situate “North West of Lumbwa Township in Kericho District” and L.R No. 9849 North West of Lumbwa Township in Kericho District” measuring 1437 acres and 1069 acres respectively.
14. He avers further that the said parcels of land were subsequently transferred by the 4th Respondent to the 5th Respondent upon receipt of Kshs 80,000/- for L.R No. 9848 and annexes a copy of transfer and the title to that effect marked as RDR 1. He alleges that the land was subsequently charged to Agricultural Finance Bank and they must therefore have ascertained that the 4th Respondent had a good title. He urges the court to note that 80,000 back in 1962 was good value for the property.
15. He also argues that 4th Respondent acquired L.R No. 9849 by purchase and transfer from Mr. Grimshaw Lomax for Kshs. 90,000 on 8th October 1963 and the transfers were registered at the Land Title Registry on 8th October 1963 contrary to what has been purported by the Petitioners. He annexes the copies of title as well as the transfer to that effect marked as RDR2.
16. He avers that the said amounts would be equivalent to millions or even billions of shillings today. He avers further that the said amounts are indicative of the fact that 4th Respondent was a bonafide purchaser and that it purchased the said property in good faith. He further alleges that the Petitioners have not provided any evidence to show that they were indeed evicted and if they were, then they should have sought timely court remedies way back in 1986.
17. He further alleges that the Petitioners have filed several suits and that the instant Petition is the fourth attempt to claim rights over the suit property. The previous suits were subsequently withdrawn without proceeding to hearing. He avers that the multiple suits have caused the Respondents to lose their integrity and get embarrassed in court by parties who do not have locus standi to sue.
18. It is further alleged that the photographs annexed to the Affidavit in support of the Petition should be disregarded as the same do not amount to proof of ownership and there is no proof that they were taken on the suit property. Further, he argues that the birth certificates are not proof of ownership as Kericho is an expansive area.

19. The 4th Respondent urges the court to dismiss the Petition with costs as the Petitioners do not have a lawful or rightful claim over the suit property.

20. The 6th Respondent filed its response to the Petition through a Replying Affidavit sworn by Peter Makhanu, its Managing Director on 29th October, 2015.

21. In the said affidavit he deposes that the 6th Respondent is the bona fide, legal and registered owner of all that parcel of land known as L.R Number 9849/3 measuring 242.9 hectares, having purchased the same from the Registered Trustees of the Kenya Episcopal Conference (the 5th Respondents herein) and duly registered as such on 16th November, 2012.

22. He deposes that the said parcel of land was a sub-division of L.R Number 9849. He has annexed a copy of the certificate of title issued to the 6th Respondent.

23. He deposes that the 6th Respondent sold all that parcel of land known as L.R No 9849/3 to a limited liability company known as Mchanga Developers Limited (the 7th Respondent herein) and that the said Mchanga Developers Limited was in the process of completing the registration of the land in its favour. He has annexed a bundle of documents in support of the said transaction.

24. The 6th Respondent's position is that in view of the said sale of the land to the 7th Respondent, they became beneficial owners of the land to the exclusion of the 6th Respondent.

25. The 6th Respondents maintain that the Petitioners have failed to establish a nexus between themselves and the parcels of land they are claiming as the photos and other documents annexed to their affidavit are not proof of ownership. It is also the 6th Respondent's position that the Petitioners have not demonstrated any historical injustices that has been meted out to them. They urge the court to dismiss the Petition with costs.

26. The 7th Respondent filed its response vide a Replying Affidavit sworn by one Salim Mohamed ; one of its directors on 22nd November, 2016. In the said Affidavit, it is alleged that the 6th Respondent purchased all that parcel of land known as L.R No. 9849/3 measuring about 242.9 hectares or thereabouts from the Registered Trustees of the Kenya Episcopal Conference, the 5th Respondent herein which parcel arose from the subdivision of L.R No 9849. He annexes copies of Certificate of Title marked as MDL-1 and MDL-2 to confirm this position.

27. It is further alleged that vide a letter dated 5th July, 2013 the 6th Respondent made an offer to the 7th Respondent to purchase 600 acres of land comprised in L.R No. 9849/3 at the price of 310,000/- per acre. He annexes a copy of the said offer letter marked as MDL-3 as well as the Sale Agreement dated 12th September 2013 marked as MDL-4.

28. He avers that the 7th Respondent paid a total sum of Kshs. 180,000,000/- after having conducted due diligence which showed there were no encumbrances on the property. In the circumstances, he argues that the 7th Respondent is a bona fide purchaser for value and obtained good title which is indefeasible in law.

29. In the circumstances, the 7th Respondent urges the court to dismiss the Petition with costs as in his opinion the same is baseless on account of the Petitioners having failed to provide past or present evidence of ownership of the land.

30. The parties filed their submissions setting out their respective arguments. Learned counsels for the Petitioners, 4th, 5th, 6th and 7th Respondents then highlighted the salient features of their submissions. The litigation counsel from the office of the Attorney General also made brief oral submissions.

### **Petitioners' Submissions**

31. The Petitioner's submissions are dated 20th December, 2016. Learned counsel for the Petitioners Mr. Kipkoech argues that the case of the Petitioners is captured by the preamble to the constitution which provides among other things for social justice as being central to our Constitution. He relies on Article 60 of the Constitution which provides for access to land.

32. Learned counsel has distilled the following issues for determination:

1. Whether the Petitioners have proprietary rights over the land parcels known as L.R no 9848 and 9849
2. Whether the Petitioners constitutional rights to land were violated
3. Whether the Petitioners have suffered loss as a result of the breach of their constitutional rights to land
4. Whether the Petitioners slept on their rights

33. Mr. Kipkoech, argues that the Petitioners and their forefathers have been in occupation of the parcels of land known as L.R No 9849 and 9848 since 1920. He invites the court to interrogate the titles issued in 1960 and which were subsequently transferred to the various parties mentioned in the Petition.

34. He argues further that the Respondents found the Petitioners in occupation of the land and acquired the same by a stroke of the pen. He disputes the contention that the Respondents are bona fide purchasers for value and instead states that they are beneficiaries of unjust colonial laws. He argues that even though the Respondents have titles the same must be looked at in the context of the principle of equality as

provided under section 60 of the Constitution.

35. Learned counsel asserts that the suit property qualifies as community land as defined in article 63 of the Constitution as it was held by a community identified on the basis of ethnicity, culture or a similar community of interests. The Petitioners' claim is therefore one of trust emanating not merely from occupation or possession of the suit property but from the fact that the property was ancestral land passed on from generation to generation thus qualifying as an intergenerational trust.

36. He states that section 8 of the Land Registration Act provides that subject to legislation on Community land made pursuant to Article 63 of the Constitution, there shall be maintained in each registration unit a Community Land Register. Moreover, the register must be prepared considering the name of the community identified pursuant to article 63 of the Constitution.

37. Learned counsel faults the colonial Government for acquiring the Petitioners' ancestral land contrary to the provisions of section 8 of the Trust Land Act of 1938 which provided that if any land which belonged to a person, group of persons or community had to be set aside by the Government or local Authority in an area designated as Trust land, the owners of the said land had to be compensated at the prevailing market value of the land. He submits that the failure to compensate the petitioners and their forefathers rendered the acts of the colonial Government unlawful and the subsequent transfers were equally illegal and unlawful.

38. He relies on the case of **Rutongot Farm Limited V Attorney General & 3 Others (2014) e KLR** where the court held that the unlawful acquisition of the Petitioners land by the Government was in breach of the Petitioners right to property and that the property of an individual cannot be taken away except in accordance with constitutionally provided means.

39. This position is reaffirmed by Article 40 (3) of the Constitution which provides as follows:

*“that the state shall not deprive a person of property of description or of any interest in, or right over property of any description unless the deprivation;*

*a) results from an acquisition of land or an interest in land or a conversion of an interest in land or title to land in accordance with chapter five or*

*b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that requires prompt payment in full of just compensation to the person and*

*c) allows a person who has an interest in or right over that property a right of access to a court of law.”*

40. He has submitted that as result of being displaced from their ancestral land the Petitioners have been deprived of their source of livelihood and they have been living as squatters hence their right to property has been violated. He faults the successive Governments for failing to address the plight of the Petitioners.

41. Learned counsel further submits that the Petitioners have not slept on their rights as they have been pursuing the matter in various forums both in and out of court, to no avail. He cited the case of **In re estate of William Kimngeny Arap Leting Deceased (2016) eKLR** where the court held that a claim of nearly 30 years could not be defeated as there was no clear provision on the period within which Petitions should be commenced. The court took judicial notice of the nature of the claim, the individuals involved and the fact that the 2002 general elections had brought a change of regime that led to a new wave of litigation in respect of violation of human rights. He urged the court to view the Petitioners' claim in light of their rights to property, dignity and humanity as guaranteed under the Constitution.

42. Learned counsel for the Petitioners also argues that this is a clear case where the National Land Commission ought to have investigated the Petitioners claims and made suitable recommendations. He argues further that the concept of title is not absolute as Africans owned land even before titles were issued.

43. Mr Kipkoech ended his oral submissions by inviting the court to breathe life into the preamble as well as Article 60 of the Constitution on equality of land ownership and set a precedent in the realization of economic, social and cultural rights as enshrined in the Constitution.

#### **1st and 3rd Respondents' Submissions**

44. Mr. Qeu learned Counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents submitted that the matter falls within the mandate of the National Land Commission as it requires investigation into the alleged historical injustices. He stated that it is for that reason that they did not deem it necessary to file written submissions.

#### **4th and 5th Respondents' Submissions**

45. The 4th and 5th Respondents' submissions are dated 15th September 2017 and filed in court on the 18th of September 2017. In their submissions, the 4th and 5th Respondents focused on three main points namely:

a) Whether the 4<sup>th</sup> and 5<sup>th</sup> Respondent is a correct party to the suit;

b) Whether in the absence of fraud; title can still be challenged; and

c) Whether the Petitioners have the correct *locus standi*.

46. On the first issue it is submitted that the 4th and 5th Respondents are not correct parties to the suit and reference is made to section 24 of the Registered Titles Act (RTA) Cap 281 (repealed) in support of this position. Mr. Kariuki, learned counsel for the 4th and 5th Respondent argues that the said section of the repealed statute is still applicable in light of section 107 (1) and (2) of the Land Registration Act and section 106 (1) and (2) of the Land Act which are the saving and transitional clauses for the repealed statutes.

47. Counsel relies on section 24 of the RTA to make the point that any action for recovery of damages for any person deprived of land or any interest in land is to be brought against the person upon whose application the land was brought under operation of this Act. They argue that the 4th and 5th Respondents are not the proprietors of the said land and are therefore the wrong parties to this suit.

48. They argue further that the Petitioners have not pleaded any acts overt or covert attributable to the 4th and 5th Respondents at the time they acquired the properties which would necessitate an enquiry as to fraud. On this point they rely on the case of **Hemedi Sefu Abdalla v Nainesh Kantil Shah & 4 others [2015] eKLR**.

49. They argue that the Petitioners proper remedy should be against the 1st individuals to have the property registered in their names and not the 4th and 5th Respondents. Further they contend that the Petitioners should have proved fraud in respect of the transfer from James Doyle and John Grimshaw Lomax to the 4th and 5th Respondents. It is their contention that the Petition is deficient in terms of particulars and description of the purported fraud.

50. On the second issue of whether in the absence of fraud title can still be challenged, the 4th and 5th Respondents argue that the Petitioners have not proved fraud against the 4th and 5th Respondents. They rely on section 23 of the Registration of Titles Act which provides that the person named in a Certificate of Title is the absolute and indefeasible owner thereof.

51. Counsel relies on the case of **Shimoni Resort v Registrar of Titles & 5 others [2016] eKLR** which held that in the absence of fraud, it is difficult to challenge the indefeasibility of title.

52. On the third point as to whether the Petitioners have the *locus standi* to institute the suit, the 4th and 5th Respondents argue that the prayers sought by the Petitioners cannot be granted as they have failed to prove their ownership of the suit property either as individuals or as community. They also argue that the Petitioners have failed to demonstrate any rights that have been infringed so as to entitle them to invoke Article 22 of the Constitution.

53. The 4th and 5th Respondents rely on the case of **Anarita Karimi Njeru V Republic (1979) KLR 54** which held that a Petitioner alleging violation of constitutional rights must demonstrate with a reasonable degree of precision what provisions of the Constitution have been violated. It is their case that the Petitioners have failed to prove what rights they have in the suit property and how the same have been violated by the 5th Respondent.

54. In the circumstances, they urge the court to dismiss the Petition with costs as it is an abuse of the court process.

#### **6th Respondent's Submissions**

55. In their submissions dated 1st November 2017, Mr. Okwengu learned counsel for the 6th Respondent raised the following points:

(a) Whether the 6<sup>th</sup> Respondent acquired a proper and legal title over title L.R No. 9849/3 and whether it is capable of passing a good title to the 7<sup>th</sup> Respondent;

(b) Whether the Petitioners have established any legal basis for claiming ownership of the parcels of land L.R No. 9848 and L.R No. 9849; and

56. On the first issue of whether the 6th Respondent acquired a proper and legal title over L.R No 9849/3 counsel for the 6th Respondent makes reference to the Replying Affidavit of Mr. Makhanu filed on 29th October, 2015 wherein it was stated that the 6th Respondent purchased the property L.R No. 9849/3 from the 5th Respondent and the title was duly registered in its favour.

57. It is also argued that prior to the purchase of the said property, the requisite due diligence had been conducted at the office of the 1st Respondent and it was confirmed that the land belonged to the 5th Respondent. In the circumstances they argue that the 5th Respondent subsequently passed a good and proper title to the parcel of land L.R No. 9849/3 to the 6th Respondent.

58. Counsel for the 6th Respondent relies on section 26(1) of the Land Registration Act 2012 which provides that the title of a registered proprietor is *prima facie* evidence that the proprietor is the absolute and indefeasible owner of the land subject to any encumbrances, easements, restrictions and conditions contained or endorsed in the certificate. The 6th Respondent argues that it is a bona fide purchaser for value having acquired a proper title from the 5th Respondent.

59. It is the 6th Respondent's contention that the Petitioners have conceded in their Petition to the fact that the 5th and 6th Respondents properly acquired the land through the system of land registration.

60. On the allegation of fraud, the 6th Respondent submits that a party seeking to charge another with fraud must clearly and consisely state the said charges to enable a party upon whom the fraud is inferred to rightly defend himself against such allegations. They rely on the case of **Insurance Company of East Africa vs The Attorney General & 3 others [2001] eKLR**.

61. They submit further that the Petitioners have failed to prove their case and have not been able to challenge the fact that the 6th Respondent obtained a proper and legal title to land which is absolute and indefeasible.

62. On the question as to whether the Petitioners have established any legal basis for claiming ownership to the suit parcels the 6th Respondent argues that the Petitioners are not claiming ownership on the basis of adverse possession but rather on the basis that they have been living on the land as employees of the 4th Respondent. In their argument this alone cannot confer on them a right to claim proprietorship to land. In this regard they submit that the Petitioners have not even remotely demonstrated any historical injustices against themselves and their forefathers.

63. The 6th Respondent further argues that the Petitioners have been merely playing footloose with the court system by filing a myriad of cases which have eventually been withdrawn therefore, one could infer that they had been no legal basis to file those cases.

### **7th Respondent's Submissions**

64. The 7th Respondent filed their submissions on 19th October, 2017. In the said submissions, the 7th Respondent focused on the following points:-

- (a) Whether the 6<sup>th</sup> Respondent is the legal owner of land L.R No. 9849/3;
- (b) Whether the 7<sup>th</sup> Respondent has interests in the said parcel of and capable of legal protection; and
- (c) Whether the Petitioners are entitled to any remedies

65. On the first issue as to whether the 6th Respondent is the legal owner of land L.R No. 9849/3 counsel for the 7th Respondent argues that under section 26 (1) of the Land Registration Act 2012 the title of a registered proprietor is prima facie evidence of absolute and indefeasible title. Under the said section they argue that there are only 2 instances in which title can be challenged that is where a title is acquired through fraud or misrepresentation or where title is acquired through a corrupt scheme.

66. It is argued that the 6th Respondent bought the parcel of land after conducting due diligence over the same. The 6th Respondent relies on the case of **Lawrence Mukiri v Attorney General and 4 Others [2013]** as well as **Katende v Haridar and Company Limited** wherein the court defined a bona fide purchaser as :-

***“...a bona fide purchaser for value is a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine, he must prove the following:-***

- (a) He holds a certificate of title;***
- (b) He purchased the property in good faith;***
- (c) He had no knowledge of the fraud;***
- (d) The vendors had apparent valid title;***
- (e) He purchased without notice of any fraud;***
- (f) He was not party to any fraud.”***

67. In the premises he argues that the 6th Respondent having acquired the said parcel of land was a bona fide purchaser and having obtained the title legally, its sanctity cannot be questioned. They make reference to the Torrens system of land registration where the state guarantees the sanctity of title.

68. The 7th Respondent relies on the Court of Appeal case of **Charles Karathe Kiarie & 2 others vs Adminsitrators of the Estate of John Wallace Muthare (deceased) & 5 others** to state that under the Torrens system which is applicable in Kenya, a bona fide purchaser for value without notice of fraud could not be impeached.

69. They further argue that the Petitioners did not discharge their burden of proving fraud as required under the law as per the case of **Nancy Kahoya Amadiva v Expert Credit Limited & Another**. It is the case of the 7th Respondent that the 7th Respondent could only lose protection of the constitution if it is proved that they acquired the property fraudulently and that no aspects of fraud have been divulged in the present case.

70. On the second issue as to whether the 7<sup>th</sup> Respondent has rights over the land capable of legal protection, it is submitted that a Sale Agreement as well as a transfer instrument was executed between the 6th and the 7th Respondents herein and a purchase price of Kshs 180,000,000/- paid to the 6th Respondent as the consideration for the parcel of land.

71. They rely on the case of **Souza Fignerido v Moorings Hotel Co. Ltd [1960] EA 926** which held that an unregistered document operates as a contract inter partes and can confer on the party in the position of the intending lessee a right to enforce the contract specifically and obtain from the intending lessor a registrable lease. On this point they also rely on the cases of **Clarke v Sodhoni [1963] EA 107** as well as

**Chon Jeuk Suk Kim & another v E.J. Austin & 2 others [2013] eKLR.** They also rely on the maxim of equity which states that:

*“Equity treats as done that which ought to be done.”*

72. On the issue of the remedies available to the Petitioner, the 7th Respondent argues that history which cannot be verified cannot be used as a basis to deny a party his title to land which was not obtained by fraud. They argue that the Petitioners and their forefathers occupied the land in dispute as mere occupiers and did not have title to the same. The title to the property was registered and ultimately passed to the 6th Respondents who in turn are in the process of transferring the title to the 7th Respondents. In the circumstances, the Petitioners are not entitled to any remedy as against the Respondents. They therefore urge the court to dismiss the suit with costs to the 7th Respondents.

### **Issues for Determination**

73. Having considered the Petition, Replying Affidavits, annexures and the respective parties’ rival submissions whose contents have been summarised above, I have distilled the following issues for determination:-

- (a) Whether the Petitioners have the requisite *locus standi* to institute the suit herein.
- (b) Whether the Petitioners have proprietary rights over the land parcels known as L.R No 9848 and L.R No 9849
- (c) Whether the 6<sup>th</sup> Respondent acquired a good title to pass to the 7<sup>th</sup> Respondent
- (d) Whether the said title can be challenged on the grounds of fraud
- (e) Whether the Petitioners are entitled to the remedies sought; and
- (f) Who bears the costs of the Petition?

### **Analysis and Determination**

#### **(a) Whether the Petitioners have the requisite *Locus Standi* to Institute the Suit herein**

74. *Locus standi* is defined in **Black’s Law Dictionary**, 9<sup>th</sup> Edition (page 1026) as **“the right to bring an action or to be heard in a given forum”**.

75. The 4th and 5th Respondents in their submissions argued that the prayers sought by the Petitioners cannot be granted as they lack the requisite *locus standi* in the matter by failing to assert their ownership right to the suit properties. They argue further that while Article 22 of the Constitution asserts the right for every citizen to institute a court proceeding when and if their rights are infringed, the Petitioners have failed to draw a nexus between any rights they may have and how these rights have been infringed by the 4th and 5th Respondent.

76. They rely on the case of **Anarita Karimi Njeru V. Republic (supra)** which held that a petitioner alleging violation of constitutional rights must demonstrate with a reasonable degree of precision what provisions of the constitution have been violated.

77. In his submissions in reply to the Respondents Mr. Kipkoech argued that the Petitioners have *locus standi* based on Article 22 of the Constitution and referred to the case of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 others [2014] eKLR**. In the said case the Supreme Court held that by virtue of Article 22 and 258 of the Constitution every person has the right to institute proceedings claiming that the constitution has been contravened; that a person in that regard, includes one who acts in the public interest. The Supreme court further stated as follows:-

***“It is to be noted that the promulgation of the 2010 Constitution enlarged the scope of locus standi, in Kenya. Articles 22 and 258 have empowered every person, whether corporate or non-incorporated, to move the Courts, contesting any contravention of the Bill of Rights, or the Constitution in general.”***

78. Article 22 of the Constitution which is aptly titled “Enforcement of the Bill of Rights” provides as follows:-

**(1) 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.** (emphasis supplied)

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by: -

- a. A person acting on behalf of another person who cannot act in their own name;
- b. A person acting as a member of, or in the interest of, a group or class of persons; (emphasis supplied)
- c. A person acting in the public interest; or
- d. An association acting in the interest of one or more of its members.

Article 258(1) of the Constitution provides as follows:-

**(1) Every person has the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention.**

In the instant case the Petitioners instituted the suit on behalf of Kalambula squatters whose rights they claimed had been violated.

79. Guided by the provisions of Article 22 and 258 of the Constitution as set out above as well as the holding by the Supreme Court I am persuaded that the Petitioners have the requisite locus standi to institute and maintain the instant Petition.

**(b) Whether the Petitioners have proprietary rights over the land parcels known as L.R No 9848 and L.R No 9849**

80. It is common ground that the Petitioners do not have title to the suit property. The Petitioners have not annexed any documents to assert their proprietary interest over the land herein. What they have annexed are birth notifications of persons born in Kericho district, correspondence between them and some of the Respondents as well as photographs allegedly taken on the suit property.

81. I agree with the submissions of counsel for the 6th Respondent that the pictures could have been taken anywhere and there is no proof that the same were indeed taken on the suit land. The birth notifications also indicate Kericho while others indicate that Petitioners were born in Kipkelion. This cannot be indicative of the fact that the Petitioners were born on the suit land as the stated areas are expansive.

82. The Petitioners' claim to the suit property is hinged on the fact that their forefathers were occupants of the said land which was subsequently taken away from them and issued "by the stroke of the pen" to the 1st registered owners James Doyle and Robert Geoffrey Wilfred Hudson. It is the Petitioners' case that the land was taken away from their forefathers through the operation of unjust colonial laws.

83. In his submissions learned counsel for the Petitioners asserts that the suit property qualifies as community land as defined in article 63 of the Constitution as it was held by a community identified on the basis of ethnicity, culture or similar community of interests. The Petitioners' claim is therefore one of trust emanating not from occupation or possession of the suit property but from the fact that the property was ancestral land passed on from generation to generation thus qualifying as an intergenerational trust.

84. It is not clear whether the petitioners are asking the court to declare that the suit property was a community land as this is not one of the reliefs sought in the Petition. In any event, the Petitioners have not placed sufficient material before the court to enable the court reach such a conclusion.

**(c) Whether the 4th 5th and 6<sup>th</sup> Respondents acquired a good title to the land**

85. It is the case of the 4th, 5th, 6th and 7th Respondents that the land in dispute is private land and that the respective parties are bona fide purchasers for value. Mr. Limo learned counsel for the 7th Respondent submitted that his client paid Kshs 180,000,000 to the 6th Respondent for the property and all that is remaining is the transfer of the same.

86. Article 64 of the Constitution defines **private land** as consisting of :

- (a) registered land held by any person under any freehold tenure;
- (b) land held by any person under leasehold tenure; and
- (c) any other land declared private land under an Act of Parliament.

87. In their submissions, the 4th, 5th and 6th Respondents have annexed sale agreements and title documents to demonstrate before this court that the land in question is indeed private land and to assert their respective rights (past or present) over the same. They rely on section 23 of the Registration of Titles Act ( Repealed). The said section provides as follows:

***"The certificate of title issued by the Registrar to the purchase of land upon a transfer shall be taken by all courts as conclusive evidence that the person named therein as the proprietor of land is the absolute and indefeasible owner thereof subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge except on grounds of fraud to which he is proved to be a party."***

88. The said section mirrors section 26 (1) of the Land Registration Act 2012. Under the said section there are only 2 instances in which title can be challenged that is where a title is acquired through fraud or misrepresentation or where title is acquired through a corrupt scheme.

89. In the Amended Petition, the Petitioners allege that the 4th 5th and 6th Respondents have no title in law as the same was acquired fraudulently by their predecessors and an illegally acquired title is not protected by law. This is however not borne out by the Petitioner's evidence.

**(d) Whether the 4th, 5th, 6th and 7th Respondents' titles and or proprietary interests can be challenged on grounds of fraud**

90. On the issue of fraud learned counsel for the 7th Respondent argues that Mchanga Developers Limited is a bona fide purchaser having paid Kshs 180,000,000/- as consideration for the Land known as 9849/3. He argues that the 6th Respondent purchased the same from the 5th

Respondent after carrying out all due diligence and the transfer was duly registered in the name of the 5th Respondent and a title annexed to that effect.

91. It is trite that fraud requires a higher standard of proof than ordinary civil cases. Not only must allegations of fraud be particularized but they must also be specifically proved at a standard higher than the ordinary standard.

92. The court in the case of **Ruhangi Properties Limited & 2 others v Standard Chartered Bank of Kenya Ltd & 2 others**[2000] eKLR considered allegations of fraud and stated as follows:

*“Fraud of course, in addition to requiring particulars, requires a higher standard of proof.*

*Establishing a prima facie case of fraud with a probability of success especially on affidavits presents the plaintiffs’ advocate with a very difficult task; more so when as here the statute provides that in these circumstances damages are an adequate remedy. The difficulties in relation to a prima facie case of fraud were considered by the Court of Appeal in CA 215/96 Central Kenya Limited v Trust Bank and others at pages 9-11 of the judgment. The onus is on the applicant and the burden of proof is heavier than in an ordinary civil case.*

*In summary it seems to be that the plaintiffs have not established the high burden of a prima facie case with a probability of success: furthermore, that there is at least an even argument that damages are an adequate remedy.”*

In the instant case, it is my finding that the Petitioners have not discharged the burden of proof required where allegations of fraud have been made.

93. Under section 26(1) of the Land Registration Act 2012, the title of a registered proprietor is prima facie evidence that the proprietor is the absolute and indefeasible owner of land. The section further provides that such a title shall only be challenged on grounds of fraud or misrepresentation to which the person is proved to be a party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme. The Petitioners have not proved any of the requirements under section 26 of the Land Registration Act for impeachment of title.

94. The 4th-7th Respondents have adduced evidence before this court to prove that they honestly purchased the property and did not intend to acquire it wrongly. In the absence of cogent evidence to the contrary it is my finding that the 4th, 5th, 6th and 7th Respondents are bona fide purchasers. In any event, even if the allegation of fraud were to be proved (which is not the case here), the same would lie in the transaction between the protectorate and the 1st registered owner of the suit Land. In the circumstances, this court has no basis legal or otherwise to interfere with the sanctity of the said titles

#### **(e) Whether the Petitioners Constitutional rights have been violated**

95. The Petitioners allege that their rights to property, life, dignity and security of the person have been violated as a result of being displaced from their ancestral land. They also allege that they have been subjected to historical injustices. The courts have consistently held that a party who alleges a violation of their constitutional rights must demonstrate with a reasonable degree of precision what provisions of the constitution have been violated and the manner in which they have been violated. See the case of Anarita Karimi (supra).

The Petitioners cited the case of **Rutongot Farm Ltd V. Attorney General & 3 Others (supra)**. The said case is distinguishable from the instant suit as in the Rutongot Farm case the Petitioners demonstrated that they had bought the suit property for valuable consideration and they were forcefully evicted after taking possession thereof.

It is my finding that in the instant case the Petitioners have fallen short of proving the alleged violations.

96. Learned counsel for the Petitioners has submitted that the new Constitutional architecture recognizes social justice as a pillar of governance. He submits that he is not asking that land be taken away from the rich but merely that the court breathes life into the principles of land ownership so that equality is attained by victims of colonial injustices and so as to set a precedent in the realization of social economic and cultural rights as enshrined in the constitution.

97. It is a matter of judicial notice that in the recent past and more so since the promulgation of the Constitution of Kenya 2010 there have been heightened tensions between private property owners and persons claiming rights to land on the basis of social justice as well as under social economic rights guaranteed under Article 43 of the Constitution.

98. These tensions were acknowledged by the Court of Appeal in the case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others** [2016] eKLR where the Court stated as follows:-

*“We have surveyed the emerging judicial decisions in Kenya in an attempt to discern the emerging principles to address the seeming tension between private property and realization of socio-economic rights. The Constitution in the Bill of Rights recognizes and protects the right to private property....”*

99. The principles of human rights, freedom, democracy, social justice and the rule of law are recognised under the preamble of the Constitution of Kenya. Article 43 of the Constitution provides for socio-economic rights and provides as follows:-

*“(1) Every person has the right-*

(a) to the highest attainable standard of health, which includes the right to health care services, including reproductive health care;

(b) to accessible and adequate housing and to reasonable standards of sanitation;

(c) to be free from hunger, and to have adequate food of acceptable quality;

(d) to clean and safe water in adequate quantities;

(e) to social security; and

(f) to education.

(2) A person shall not be denied emergency medical treatment.

(3) The State shall provide appropriate social security to persons who are unable to support themselves and their dependents”

100. However, the question that this court must address is whether implementation of socio economic rights can confer rights in the land of another. This question was considered by the Court of Appeal in the case of **Kenya Airports Authority v Mitu-Bell Welfare Society & 2 others (supra)** wherein the court stated as follows:-

*“ Whereas socio-economic rights are recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer propriety rights in the land of another. In Latin, socio-economic rights cannot confer rights in alieno solo. Under the law as it stands today, enforcement and realization of socio-economic rights does not override the provisions of the Limitation of Actions Act (Cap 22 of the Laws of Kenya). Prescriptive rights to land cannot be acquired in the name of enforcement of socio-economic rights. It is advisable to bear in mind that in interpretation of the Constitutional Articles on socio-economic rights, it is not the role or function of courts to re-engineer and redistribute private property rights. Re-engineering of property relationship is an executive and legislative function with public participation. In the absence of a legal framework, courts have no role in the guise of constitutional interpretation to re-engineering, take away and re-distribute property rights. Subject to Article 25 of the Constitution, all provisions in the Bill of Right are to be treated as equal with no one provision overriding another.”*

101. Learned counsel for the Petitioner urges the court to interrogate the titles in the possession of the Respondents against the principle of equality. He also states that the 4th and 5th Respondents being religious organizations should be more concerned with social justice rather than worldly possessions.

102. With tremendous respect for the religious beliefs of learned counsel for the Petitioners, Article 40 of the Constitution provides that every person has the right either individually or in association with others to acquire and own property. Article 260 on interpretation of the Constitution defines a person as including a company, association or other body of persons whether incorporated or unincorporated. In light of these provisions, it is clear that religious organizations are free to own property in Kenya subject to the provisions of Article 65 of the Constitution.

103. Under Article 21(2) of the Constitution it is the duty of the State to take measures, “legislative, policy and other measures” to achieve the progressive realization of the rights guaranteed under Article 43. In its Advisory Opinion (**Advisory Opinion No. 2 of 2012**) in **The Matter of The Principle Of Gender Representation In The National Assembly & The Senate [2012] eKLR**, the Supreme Court of Kenya when addressing itself to the concept of progressive realization stated that it simply refers to the gradual or phased-out attainment of a goal and that “*there is no mandatory obligation resting upon the State to take particular measures, at a particular time*” for the realization. See the case of **Moi Education Centre Co. Ltd v William Musembi & 16 others [2017] eKLR**.

104. It is trite that not all rights are non-derogable; rights have limitations as provided under Article 24 of the Constitution. The court in the case of **Mtana Lewa v Kahindi Ngala Mwangandi [2015] eKLR** considered the issue of limitation of rights and stated as follows:-

*“ Chapter 4 of the Constitution of Kenya contains the Bill of Rights, which is a collection of fundamental rights and freedoms sought to be protected including the right to life (Article 26), human dignity (Article 28), freedom of movement and residence (Article 39), right to property (Article 40), fair administrative action (Article 47), access to justice (Article 48) and fair hearing (Article 50). The bill of rights are to be applied so as to develop the law where there is a gap in giving effect to a right or fundamental freedom as per Article 20 (3) (b). These rights are however not absolute, but subject to limitations in so far as such limitations are reasonable and justifiable taking into account the factors set out in Article 24 including the nature, importance, purpose and extent of the right vis a vis the limitations as well as prejudice to the rights and freedoms of others. The Constitution further dictates in Article 24 (2) that any statute limiting a right or fundamental freedom should be clear about the right or freedom being curtailed and specifically express such intention as well as the nature and extent of the limitation for it to be valid. For the avoidance of doubt, the framers of the Constitution included a list of rights and freedoms which may not be limited notwithstanding any provisions of the Constitution. These absolute rights are set out in Article 25. It is instructive that the right to property is not one of them.”*

105. In light of the foregoing it is my finding that the Petitioners have failed to demonstrate that their rights have been violated so as to warrant interference with the proprietary rights of the 4th to 7th Respondents.

(d) **Whether the Petitioners are entitled to reliefs sought**

106. Having found that the Petitioners have not proved that their rights have been violated then it goes without saying that the Petitioners are not entitled to the reliefs sought in their amended Petition dated 22nd July, 2016. The Petition is in my view without merit and is hereby dismissed.

107. However, in view of the issues raised in the Petition, each party shall bear its own costs.

**Dated, signed and delivered at Kericho this 26th day of January, 2018.**

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**J.M ONYANGO**

**JUDGE**

**In the presence of:**

1. Mr. Kemboi for Mr. Kipkoech for the Petitioners.
2. Mr. Terer for Sichangi & Co. Advocates for the 4<sup>th</sup> and 5<sup>th</sup> Respondents.
3. Miss Ngetich for Mr. Limo for the 7<sup>th</sup> Respondent.
4. No appearance for the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Respondents.