REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO.09 OF 2019

[Formerly Milimani H.C. Petition No. 191 of 2008, and later Milimani ELC

Petition No. 117 of 2015]

IN THE MATTER OF:

SECTION 84(1) OF THE CONSTITUTION OF KENYA

(NONE ARTICLE 22 CONSTITUTION OF KENYA 2010)

AND

IN THE MATTER OF:

ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS,

UNDER SECTION 75 OF THE CONSTITUTION OF KENYA, 2010)

AND

IN THE MATTER OF:

CONTRAVENTION OF CONSTITUTIONAL PRINCIOPLE OF SECURITY OR RIGHT TO LAND

UNDER ARTICLE 60(1)(b) OF THE CONSTITUTION, 2010

IN THE MATTER OF:

THE LAND ACQUISITION ACT, CAP 295, LAWS OF KENYA (REPEALED)

(NOW LAND ACT, 2012)

AND

IN THE MATTER OF:

REGISTRATION OF TITLES ACT, CAP 281, LAWS OF KENYA

(NOW REPEALED)

AND

IN TH EMATTER OF:

REGISTERED LANDS ACT, CAP300 LAWS OF KENYA

(NOW REPEALED)

IN THE MATTER OF:

LAND ACT NO.6 OF 2012, LAWS OF KENYA

BETWEEN

JOHN CHERUNYA KIPTALAM

SAMMY KIPKORIR CHERUNYA

GRACE CHERUNYA

JAMES KILELE CHERUNYA (*The Administrators of the Estate of*

KIPTALAM ARAP CHERUNYA).....PETITIONERS

VERSUS

NATIONAL LAND COMMISSION .....1st DEFENDANT

CHIEF REGISTRAR LANDS .....2nd DEFENDANT

THE LAND REGISTRAR UASIN GISHU DISTRICT.....3RD RESPONDENT

ATTORNEY GENERAL.....4THRESPONDENT

AND

ICDC.....1ST INTERESTED PARTY

COUNTY GOVERNMENT OF UASIN GISHU..... 2ND INTERESTED PARTY

THE ETHICS & ANTI-CORRUPTION COMMISSION.....3RDINTERESTED PARTY

THE NATIONAL YOUTH SERVICE.....4TH INTERESTED PARTY

JOHN KIPLAGAT CHESANGA.....5TH INTERESTED PARTY

KIPNGENTICH LELMEN.....6TH INTERESTED PARTY

SILAS KIPTUI.....7TH INTERESTED PARTY

ZEDDIE CHEPTOO .....8TH INTERESTED PARTY

BETTY CHEBONAROK .....9TH INTERESTED PARTY

THOMAS KIPLAGAT ..... 10TH INTERESTED PARTY

JOB KIPNANDI CHEBON..... 11TH INTERESTED PARTY

LINMAG INVESTMENT..... 12TH INTERESTED PARTY

LINUS LETING..... 13TH INTERESTED PARTY

BROADWAY EDIBLE OIL PLANT ..... 14TH INTERESTED PARTY

KENYA OIST IFFUCE SAVUBG BABK.....15TH INTERESTED PARTY

ISAAC KIPLAGAT FUND ..... 16TH INTERESTED PARTY

KENYA POWER ..... 17TH INTERESTED PARTY

SYLVIA CHEROTICH ..... 18TH INTERESTED PARTY

KABOI ADAN HUSSEIN ..... 19TH INTERESTED PARTY

IBRAHIM ABDULLA .....20TH INTERESTED PARTY

HERMANY KUMAR PAVANI ..... 21ST INTERESTED PARTY

FACOTR CONSTRUCTION..... 22NDINTERESTED PARTY

AMOS MBUGUA KIMANI ..... 23RD INTERESTED PARTY

GAKIBU FRANCIS ..... 24TH INTERESTED PARTY

MBOGO NGARI .....25TH INTERESTED PARTY

GEMEKA WENDANI GROUP ..... 26TH INTERESTED PARTY

PHOLIP KOECH .....27TH INTERESTED PARTY

KOGO FLATS LIMITED ..... 28TH INTERESTED PARTY

THE ESTATE OF JOHN GAKUO .....29TH INTERESTED PARTY

MICHAEL NGOTIE ..... 30TH INTERESTED PARTY

SYMON KIPROTICH KIMENGICH .....31ST INTERESTED PARTY

JOHN KIPLAGAT CHESANGA ..... 32NDINTERESTED PARTY

AGGREY KIPCHIRCHIR BETT ..... 33RD INTERESTED PARTY

PLASTICS INDUSTRIES LIMITED ..... 34TH INTERESTED PARTY

IMMACULATE CHEMELI KANDIE ..... 35TH INTERESTED PARTY

ABDUL ASIS KANJI.....36TH INTERESTED PARTY

JONEA NYARANGO OGOCHI..... 37TH INTERESTED PARTY

ELIJAH GESUSU.....38TH INTERESTED PARTY

SAMWEL OMBIRO.....39TH INTERESTED PARTY

CHARLES INDECHE..... 40TH INTERESTED PARTY

KHADIJA OMAR.....41ST INTERESTED PARTY

HUSSEIN EUYO SARANA.....42ND INTERESTED PARTY

JOHN WANDIRA NDIGU.....43RD INTERESTED PARTY

PAUL MONGARE ONDUKO..... 44TH INTERESTED PARTY

RUTH WAMBUI..... 45TH INTERESTED PARTY

MARY NGENDO..... 46TH INTERESTED PARTY

RADION NTABO.....47TH INTERESTED PARTY

PETER GICHABA..... 48TH INTERESTED PARTY

RITESH KUMAR MANUBHAI..... 49TH INTERESTED PARTY

WARENG NDOVU ENTERPRISES.....50TH INTERESTED PARTY

RUDRA BUILDERS LTD..... 51ST INTERESTED PARTY

RAMJI DEVJI PATEL.....52ND INTERESTED PARTY

JUDGMENT

1. The Petitioner commenced this claim vide the petition dated the 10th March, 2008 and subsequently, the amended petition dated the 2nd November, 2018 was filed. That following a number of applications for parties to be joined as interested parties, the court on the 27 th October,2020 granted leave to all parties with proprietary interests in the suit land, subject matter of the petition herein, to be joined in the petition as interested parties. The Petitioner was also granted leave to further amend the amended petition. The Petitioner filed the Further Amended Petition dated the 29th August, 2019 with 36 interested parties, but since then a number of other parties have joined in the proceedings as interested parties bringing the total to 52.

2. The petitioner alleges that the Government of Kenya, through the Commissioner of Lands, compulsorily acquired 400 acres from his parcel of land I.R.NO. *(sic)* measuring 617 acres for industrial development, vide Gazette Notice No. 1458 & 1459 of 19th May 1978. That the Government took possession of the 400 acres without first surveying and registering the two resultant parcels. That though he still has the original title for the 617 acres, the land has been allocated by the Commissioner of Lands to the 4th to the 36TH Interested Parties. That the Respondents have purported to change the legal regime under which the land was held by issuing titles to the Interested Parties under the Registered Lands Act, cap 300 of Laws of Kenya, while the original title under the Registration of Titles Act, cap 281 of Laws of Kenya is still with the petitioner. That the Respondents have facilitated the encroachment onto the property retained by the petitioner, that is Eldoret Municipality Block 15/2365, by making out allocations to the 1st and 4th to the 36th Interested Parties, as L.R.8148 (Now Eldoret Municipality Block 15/1883, 2310,1807, 1743,1750, 1763 1762 1746, 1748,1855, 1856,2089, 1870,1809, 1757,1857, 2050, 1887, 1886, 1885, 1884, 1882, 1902, 1868, and 1819, to the detriment of the estate. That the Petitioner has been unable to access, develop, use or otherwise deal with his land owing to the encroachment disputes, doubts as to the acreage of his land, validity of titles and boundaries. That as a consequence, the petitioner's right to own property, and security to the land rights guaranteed under Articles 75 and 60 respectively, of the Constitution, 2010 has been violated by the 1st to 3rd Respondents. The Petitioner through the further amended petition seeks for the following prayers;

a. "A declaratory order do issue declaring that the acquisition is null and void because the land was not used for the purpose which it was being compulsorily acquired.

b. An order do issue declaring that the purported conversion of the parcel from the statutory legal regime of Registration of Titles Act, Cap 281 to Registered Lands Act Cap 300, is unlawful, null and void.

c. A declaratory order do issue declaring that all allocation of portions of L. R. NO. 8148 and issuance of any titles thereof to the 4th to the 36th Interested Parties are illegal, null and void.

d. A declaratory order do issue that the Petitioner is the bona fide and lawful owner of all that parcel number original title L.R. 8148.

e. An order do issue to rectify the lands registrar so as to show that the Applicant is the bona fide owner of all that parcel reference L.R No. 8184 held under the Registration of Titles Act, Cap 281 (Repealed No. Land Act No. 6 of 2012).

f. An order of restraint do issue to restrain the registrar of lands, Uasin Gishu District, and National Land Commission, 4th to the 36th Interested Parties and any other person whosoever, whatsoever restraining them from further entering and or transferring and or dealing in any manner whatsoever with parcel number original title number L. R. 8184 (Now comprising of ELDORET MUNICIPALITY BLOCK 15/2365 - 400 ACRES and ELDORET MUNICIPALITY BLOCK 15/2366 - 217 ACRES).

g. An order do issue that the Respondents do effect and the 1st Interested Party and the 4th to 36th Interested Parties do, give vacant possession of all that parcel being original title L.R 8184 (Now ELDORET MUNICIPALITY BLOCK 15/2365 and ELDORET MUNICIPALITY BLOCK 15/2366) to the Petitioner.

h. An order to restrain do issue to restrain the said 1st and 4th to 36th Interested Parties and the registrar of lands Uasin Gishu District, and whosoever else whatsoever, jointly and severally from trespassing into and or interfering with the use of all that parcel known as original title L.R. 8148 (Now ELDORET MUNICIPALITY BLOCK 15/2365 and ELDORET MUNICIPALITY BLOCK 15/2366).

i. Damages for loss of user, injury and damages for unlawful deprivation for the said period with interest at court rates.

j. Any other or further order that the court may deem just and fit to grant.

k. Costs and interest of this suit."

3. That filed together with the further amended petition is the affidavit in support sworn by JOHN CHERUNYA KIPTALAM, the first born son of the late Kiptalam Cherunya, and one of the administrators of his estate.

4. The 1st, 2nd, 3rd, 11th, 17th, 26th, 37th to 48th, 49th, 50th to 52nd Interested Parties filed their respective responses in opposition to the Petition, and or the Amended Petition and or the Further Amended Petition. The contents of the aforementioned responses are as summarized here below.

5. The Ethics and Anti-Corruption Commission, the 3rd Interested Party, opposed the petition through the replying affidavit sworn by **DEDAN OKWAMA** on the 29th November, 2019. He disclosed that he was involved in investigations involving reports of irregular allocation of parcels of land by government agents to individuals and other entities out of LR. NO.2366, which was part of LR. NO. 8148, that had been compulsorily acquired by the government, and established the following, among others;

a. Vide a grant and the deed plan, LR NO. 8148 measuring 617 acres, was registered in the name of Kiptalam Arap Cherunya (deceased) in 1978.

b. Vide Gazette Notice No. 1458 published on 13th May, 1978 the Government made known its intentions to acquire the entire LR NO. 8148 measuring 617 acres and vide a Gazette Notice No. 1459 published on 13th May, 1978 the Government issued a notice of inquiry on the aforementioned land, under the provisions of the Land Acquisition Act, 1968.

c. The Government made an Award of Kshs. 2,637,500/- dated the 15th February, 1979 to the original Petitioner, now deceased, which was duly accepted under the certificate dated 28th February, 1979, for the 400 acres of LR No. 8148, compulsorily acquired.

d. That vide Gazette Notice No. 345 of 31st January 1980 the Government revised its earlier Gazette Notice Nos. 1458 and 1459 of 13th May 1978 by reducing the acreage to be acquired from 617 to 400 acres.

e. That on the 21st September 1978, the government placed a caveat over the whole land, even though it had acquired only 400 acres, pending survey.

f. Vide a letter dated 29th April 2005, the Director of Survey instructed the District Surveyor, Uasin Gishu to demarcate the 400 acres belonging to the Government and Vide a letter dated 20th May, 2005. That the District Land Surveyor, Uasin Gishu communicated to the Director of Survey Nairobi that in survey plan No. 448/159 had been completed, and the parcel referenced as LR. 2366 measuring 400 acres belonged to the Government and the remainder referenced as LR. NO. 2365 measuring 217 to Kiptalam Arap Cherunya (deceased).

g. Survey Plan No. 448/159 also indicated that parcels LR 1809, 1838, 2024, 2050, 1857, 1856 and 1855 had been created from LR. No. 2365 which measured 217 acres, while the following parcels of land were irregularly allocated on L.R No. 2366 measuring 400 acres: that is LR.1757, 1809, 2078, 1863, 1748, 1742, 1744, 1847, 1846,1746, 2025, 1880, 1878, 1879, 1877, 1837, 1847, 1846, 1807, 1882, 1883, 1884, 1885, 423, 1363, 1749, 1750, 1845, 1856, 2089, 2367, 2374, 2368 and 2525.

h. Vide a letter dated 30th January, 2007 the Director of Survey communicated to the Commissioner of Lands that Survey Plan No. 448/159 had been approved and recommended that the Registry Index Map (RIM) be amended accordingly. Vide a letter dated 17th May, 2007 the Commissioner of Lands instructed the Director of Survey to erase the parcels that had been created on L.R No. 2365 measuring 217 acres, and issue an RIM to enable the office prepare title document to the owner.

i. That the 3rd Interested Party filed ten suits over the persons allocated the titles to the plots out of the LR No. 2366, measuring 400 acres. That while testifying in the consolidated suits on the 28th May, 2018, the court directed that all parties with titles or interests over the 400 acres acquired by the government be joined in the proceedings. That further investigations have unearthed several such persons, but he was unable to get the registers of some parcels including LR. Nos. 2078, 1863,1847, 1846, 2025, 1880, 1878, 1879, 1877, 1837, 1807, 423, 1363, 1749, 1750, 1845, 2089, 2367, 2374, 2368 and 2525. That those allocated parcels 1762 and 1743 have surrendered their titles following consents recorded in Eldoret ELC No. 582 of 2012 and 581 of 2012 respectively. That the court dismissed their claims in respect of Eldoret ELC Nos. 576 of 2012 and 577 of 2012, and the 3rd Interested Party has filed Notices of Appeal.

j. That the titles issued out of LR. No. 2366 should be cancelled and land restored to the Government to be put to the purpose it was meant for.

k. That the remedies of restoration or reversion over LR. No. 2366 sought by the petitioner cannot stand as the late Kiptalam Arap Cherunya was duly compensated for the 400 acres acquired.

l. That the 3rd Interested Party supports the petition, limited to nullifying and cancelling all the titles illegally and irregularly created over parcels LR. Nos. 2365 and 2366, so that they could be restored to the Estate of the late Kiptalam Arap Cherunya and the Government respectively.

6. The 1st Interested Party opposed the petition through the replying affidavit sworn by Joseph C. Mwaura filed on the 22nd September 2014, and the supporting and supplementary affidavits by **GRACE MAGUNGA** sworn on the 12th February 2018 and 15th November, 2018 respectively, deposing to the following among others;

a. The 1st Interested Party, Industrial and Commercial Development Corporation (ICDC), is a state corporation. That *section 3* of the ICDC Act provides for the mandate of the ICDC, and it include facilitating the industrial and economic development of Kenya.

b. Pursuant to a resolution that was passed by the ICDC board, the 1st Interested Party wrote to the Commissioner of Lands requesting to be allocated land for the development of a multipurpose Engineering Project to be used to establish the Eldoret Small and Medium Enterprises (SME) Park, that was set to enhance industrialization in the region, and that would ultimately create many job opportunities for the citizens of Kenya.

c. ICDC received a letter of allotment dated 14th February, 1991 for 54.99 hectares, approximately 136 acres, out of Eld. 17/89/15[LR. NO.8148], that was subsequently registered as ELDORET MUNICIPALITY BLOCK 15/1757, measuring 136 acres, and the lease was subsequently issued.

d. That the land ELD. 17/89/15 [LR. No. 8148] or part thereof had been acquired by the government of Kenya from the original petitioner, who is now deceased. That upon acquisition of the land by the government, it was converted from the Registration of Titles Act, to the Registered Land Act, and thereafter subdivided into Eldoret Municipality Block 15/2365 and 2366 measuring 400 and 217 acres respectively. That the 54.99 hectares allocated to the 1st Interested Party came out of parcel acquired by the government.

e. That the 1st Interested Party paid the requisite charges and stamp duty amounting to Kshs. 5,362,345/- particularized in the letter of allotment to facilitate the issuance of the lease, that was subsequently issued on 2nd December 1992. That the 1st interested party took possession of the land and fenced it.

f. ICDC holds ELDORET MUNICIPALITY BLOCK 15/1757 for a term of 99 years from 1st July 1990, for the benefit of the general public, and for purposes of industrial use and any delay in the conclusion of this matter are detrimental to the general public.

g. That the original petitioner intruded into the ICDC parcel in 1997 prompting it to file Eldoret HCC Case No. 130 of 1997 against him. That the deceased's defence was struck out, and was directed to vacate from the land and perpetual injunction was issued against him.

h. That the failure by the original petitioner to surrender the original title to the parent parcel, LR. No. 8148, did not invalidate the process undertaken by the Commissioner of Land, or the title held by the 1st Interested Party in Eldoret Municipality/Block 15/1757.

i. That there are no allegations of infringement pleaded by the petitioner or cause of action against the 1st Interested Party.

j. That the Petitioner's amended claim is statute barred.

7. The County Government of Uasin Gishu, the 2nd Interested Party, opposed the petition through its filed Response to the Further Amended Petition dated 7th September, 2021 and the replying affidavit sworn by **RUTH J. ROP,** on the 7th September, 2021, deposing to the following issues among others;

a. The Government compulsorily acquired 400 acres of land from Kiptalam Cherunya (deceased) who was the proprietor of LR No. 8148, measuring 617 acres, leaving him with 217 acres.

b. That compensation of Kshs. 2,637,500.00 was paid to Kiptalam Cherunya (deceased), upon the compulsory acquisition, a fact he acknowledged in his letter dated the 7th April 1979 to the then President of the Republic of Kenya, that is in Eldoret ELC No. 576 of 2012. That the 400 acres therefore rightfully belongs to the government and the petitioner has no basis of claiming it.

c. It is not true that the Municipality of Eldoret, the predecessor of the 2nd Interested Party, did not use the compulsorily acquired land for the purpose it was acquired as the said purpose was clearly stated in Gazette Notice No. 1458 as industrial, residential, shopping centres and ancillary.

d. After the compulsory acquisition, the Government became the lawful owner of the 400 acres of land, and it was within the Government's power to change the statutory legal regime under which the parcel was held from the Registration of Titles Act Cap 281 to the Registered Land Act (Cap 300) regime.

e. That the court has in Eldoret ELC No. 41 of 2014 held that a survey was done in 2005 to subdivide LR.No.8148 into Eldoret Municipality/Block 15/2365 and 2366, measuring 400 and 217 acres respectively, and the petitioner's claim that the survey has not been done cannot be true. That further in Eldoret ELC No. 41 of 2014 [2019] eKLR], the petitioner who was the defendant, produced a map showing the subdivision of the 400 acres by the government, a letter of conversion by the Land Registrar, and a letter from the Commissioner of Lands dated the 17th May 2007 showing the conversion and subdivision of the 400 and 217 acre parcels. The petitioner cannot therefore turn around and claim that the government did not effectuate complete survey of the 400 acres from the 617 parcel.

f. That the 400 acres compulsorily acquired by the government now vests in the 2nd Interested Party pursuant to *Article 62 (2) (a)* of the Constitution and *section 120 (4)* of the Land Act, 2012.

g. That the petitioner's interest is only over the 217 acres left after the acquisition of 400 acres for which he was wholly compensated.

8. The 11th Interested Party filed a response to the Further Amended Petition dated 22nd November, 2019 deposing to the following *inter alia*:

a. The 11th Interested party is an innocent allotee in possession, and unaware of defects in the title.

b. The 11th Interested Party was not privy to the compulsory acquisition of LR No. 8148.

c. The Petitioner's claim has been brought outside the statutory required period of 12 years thus it is statute barred.

d. That the claim for damages has been brought outside the six (6) year period and therefore is statutorily time barred.

e. The Petitioner has not demonstrated that he has exhausted all other dispute resolution mechanisms available before invoking the Constitutional jurisdiction of the court.

f. The 11th Interested party prays that the Further Amended Petition be dismissed with costs.

9. The Kenya Power and Lighting Company, the 17th Interested Party, opposed the petition through its filed replying affidavit sworn by **EDWARD MWATHI,** on the 24th November, 2020 deposing to the following *inter alia*:

a. The Board of the 17th Interested Party (Kenya Power and Lighting Company) made a resolution on 29th January, 1999 approving the expenditure of Kshs. 2,878,000.00 for the purchase of Eldoret Municipality Block 15/1748 from Francis Kimurei Barmasai for a consideration of Kshs. 2,700,000.00 together with Stamp Duty and Legal fees of Kshs. 178,000.00.

b. Due diligence was conducted before the purchase, and before the aforementioned parcel of land was transferred to the 17th Interested Party, and a title deed subsequently issued on the 10th March, 1999.

c. The 17th Interested Party is an innocent purchaser for value with no knowledge of the defect in title.

d. The Petition offends the provisions of *Section 7* of the Limitation of Actions Act and *Section 3(1) and (2)* of the Public Authorities Limitation of Act, Cap 39.

10. The Gemeka Wendani Association, the 26th Interested Party, also opposed the petitioner's claim through the replying affidavit by **JOSEPH KIMANI KAMAU** sworn on 17th February, 2020, deposing to the following among others;

a. The 26th Interested Party is a registered association known as Gemeka Wendani Association. The 26th Interested Party purchased ELDORET/ MUNICIPALITY/BLOCK 15/1809 for a consideration of Kshs. 1,200,000.00 during a public action held on 16th December, 2003 by National Bank of Kenya in exercise of its statutory right of sale against Josiah Nduati Muchiri.

b. Following the aforementioned public auction, the Deputy Registrar of the High Court issued a certificate of sale on 2nd July, 2004 in Nairobi HCCC NO. 4445 of 1987.

c. On 3rd December 2004, Gazette Notice No. 9552 was published stating that ELDORET/MUNICIPALITY/BLOCK 15/1809 had been sold to Gemeka Wendani Association, but Josiah Nduati Muchiri has refused to surrender the original title and if no objection is raised to the transfer of the suit land to Gemeka Wendani Association, the Registrar shall proceed to register the transfer instrument in favour of Gemeka Wendani Association.

d. A Certificate of Lease was duly issued to the 26th Interested party on 28th January, 2005.

e. The Gemeka Wendani Association is a bona fide purchaser for value without notice based on the mirror principle noting that it purchased ELDORET/MUNICIPALITY/BLOCK 15/1809 in a public auction.

11. The 26th Interested Party also filed a replying affidavit sworn by **STEPHEN ONYANGO OKINYO** on the 17th February, 2020 in which he deposed as follows *inter alia*:

a. That he sought to purchase one eighth ($^1/_8$) of an acre of land from the 26th Interested Party for a consideration of Kshs. 300,000.00. The aforementioned parcel of land was to be excised from ELDORET/MUNICIPALITY/BLOCK 15/1809.

b. Before the purchase he conducted an official search that indicated that Amos Mbugua Kimani, Gicibu Bibiu Francis and Mbogo

Ngari held the title to land parcel ELDORET/MUNICIPALITY/BLOCK 15/1809 in trust for Gemeka Wendani Association.

c. Upon execution of the sale agreement on 19th June, 2013, he paid Kshs. 190,000.00, and subsequently, he paid the outstanding balance of Kshs. 110,000.00 within one year.

12. The 37th to the 48th Interested Parties opposed the petition through their filed response dated the 30th July, 2020 deposing to the following *inter alia*:

a. Before the 37th to the 48th Interested Parties purchased portions of ELDORET /MUNICIPALITY/ BLOCK 15/1819, the said land was registered with the 36th Interested Party, and measured 5 acres.

b. The 36th Interested Party subdivided the aforementioned parcel of land into one-eighths (1/8) portions which he subsequently sold to the 37th to the 48th Interested Parties.

c. The 37th to the 48th Interested Parties are therefore innocent purchasers for a money consideration without knowledge of defect in title.

d. The 37th to the 48th Interested Parties contended that the suit herein is statute barred by dint of the provisions of Section 7 of the Limitation of Actions Act.

13. The 49th Interested Party opposed the claim through the filed replying affidavit sworn by **RITESHKUMAR MANUBHAI PATEL** on the 11th January, 2021 deposing to the following among others;

a. The 49th Interested Party purchased ELDORET/MUNICIPALITY BLOCK 15/1742, measuring approximately 1.214 Hectares from Shiv Enterprises Eldoret Limited, which had previously acquired the land from Shrunis Plastic Limited.

b. The 49th Interested Party complied with all statutory procedures before purchasing the said land and subsequently got registered as the proprietor of the aforesaid land, and a certificate of lease was issued in its favour on the 5th December, 2018.

c. The 49th Interested Party is a bona fide purchaser for value without notice. That upon registration as proprietor, he is entitled to the absolute protection guaranteed by Section 24(a) and 26(1) of the Land Registration Act, 2012.

14. The 50th and 51st Interested Parties also opposed the petitioner's claim through their filed replying affidavit sworn by **HARISH RAMJI VEKARIA** on the 11th January, 2021 deposing to the following among others:

a. The 50th and 51st Interested Parties are the registered proprietors of ELDORET MUNICIPALITY/BLOCK 15/1744 measuring approximately 3.6 hectares, having lawfully acquired the aforementioned land from Eldoret Express Limited in 2017.

b. Eldoret Express Limited had acquired the aforementioned land from a public auction conducted by the Bank against Vishal Plastics Limited (in receivership) who had acquired ownership from the 2nd and 3rd Respondents herein in the year 1998.

c. The 50th and 51st Interested Parties had conducted due processes as per the attached documents and ultimately, were issued with a certificate of lease on the 6th October, 2017.

d. The 50th and 51st Interested Parties are bona fide purchasers for value without notice, and therefore they are entitled to the absolute protection guaranteed by Section 24(a) and 26 (1) of the Land Registration Act, 2012.

e. The 50th and 51st Interested Parties have made substantial developments on the aforementioned land upon receiving the requisite approvals from the relevant government authorities.

15. The 52nd Interested Party, who was admitted into the proceedings by the court on the 6th May, 2021, opposed the petition vide the replying affidavit sworn by **RAMJI DEVJI PATEL** on the 1st February, 2022, deposing to the following among others;

a. The 52nd Interested party purchased ELDORET MUNICIPALITY BLOCK 15/1870, measuring 4.92 Hectares from Joseph Suter Yano and Esther Mwaniki Mwangi. The aforesaid land was then registered in the name of the 21st Interested Party herein (Herman Kumar Pavani). That the two vendors relied on a sale agreement executed between them as purchasers, and the 21st Interested Party as vendor.

b. After conducting a search and investigations at the Uasin Gishu District Land registry and the Department of Survey, the 52nd Interested Party executed a sale agreement dated 4th July, 2007 with Joseph and Esther. The 52nd Interested Party honoured the payment of the consideration, and the vendors, Joseph and Esther, honoured their end of the bargain by ensuring that the rent and rates were cleared, consent to transfer the land was duly issued on 10th November, 2007, stamp duty was paid and ultimately the land was registered in name of the 52nd Interested Party.

c. The 52nd Interested Party therefore acquired the land for valuable consideration, without notice of any irregularity, and has taken possession of the land, fenced, constructed structures thereon and uses a portion of the land for cultivation

16. That pursuant to directions that the petition be canvassed through written submissions, several of the parties filed and exchanged their submissions which are as summarised herein below.

17. The learned counsel for the Petitioner filed their submissions dated the 8th February 2019. They argued that the compulsory acquisition process was not completed, and therefore the same ought to be declared null and void for the following reasons:

a) The acquisition did not strictly comply with the provisions of *Section 75* of the Old Constitution which was applicable then, nor did it comply with *Article 40* of the Constitution, 2010 that is applicable now. The learned counsel cited the decision in **COMMISSIONER OF LANDS & ANOTHER V COASTAL ACQUACULTURE LIMITED [1997] eKLR** to support the aforementioned argument.

b) The notices issued did not outline the public body that would use the acquired land.

c) The Petitioner was only paid compensation of Kshs. 1,807,000.00, yet the Government issued a caveat as is required by *Section 6* of the Land Acquisition Act, over the whole land.

d) The Government should have immediately proceeded to have the land surveyed under *Section 17* of the Act, but this process was done approximately 25 years later, and the same has not been completed to date.

e) The Commissioner failed to comply with the provisions of *Section 19* of the Act that require the formal taking of possession of the acquired land and *Section 20* that require the surrender to the Commissioner of the documents evidencing title. *[**section 17** of the Land Acquisition Act provided for the Commissioner to cause the final survey to be done where only a portion of the land has been acquired compulsorily]*. The Petitioner relied on the decisions in the case of **EUNICE GRACE NJAMBI KAMAU & ANOTHER V ATTORNEY GENERAL & 5 OTHERS [2013] eKLR**, where the court held that;

"In my view and having regard to the provisions of the Land Acquisition Act (now repealed) the Government has an obligation to execute the process of land acquisition to finality to effectuate title acquisition."

And in **TOWN COUNCIL OF AWENDO V NELSON ODUOR ONYANGO & 13 OTHERS [2013] eKLR,** where the court stated that;

"Section 19 deals with taking of possession and vesting of the acquired land in the Government and stipulates upon the land so acquired being vested in the Government, a notice that possession of the land has been taken and that the land has vested in the Government and a notice to that effect has to be served upon all registered proprietors of the land. We observe that in this case no such notices were exhibited by either party."

f. The Government must use compulsorily acquired land for the purpose for which it was acquired, as compulsorily acquired land cannot be for private use. In **NIAZ MOHAMED JAN MOHAMED V COMMISIONER FOR LANDS & 4 OTHERS [1996] eKLR** the Court made the following observation:

> *"If it were not so, and taken to its logical conclusion, a loophole would be created for any government which does not mean well for its citizens, to compulsorily acquire whole sections of a city or town or other developed property on the pretext of public good, compensate the owners of the property acquired with taxpayers' money and then turn round and dish out those properties to favored citizens of its choice or the enemies of the state: parliament could not have intended such preposterous consequences."*

And in **KENYA NATIONAL HIGHWAY AUTHORITY V SHALIEN MASOOD MUGHAL & 5 OTHERS [2017] eKLR** the Court observed as follows:

"Government cannot compulsorily acquire land only for it to be gifted or otherwise conveyed to private individuals."

g. The Petitioner urged the court to take up a view like the one expressed by the court in the **Niaz Case *(Supra)*** which stated as follows:

> *"And if it was the case that it was found unnecessary after all to have acquired the portion for the expressed purpose, does equity not require that the portions be surrendered back to the person from whom the land was compulsorily acquired?"*

h. The Petitioner still holds the original title to the suit land, which title was issued under the Registration of Titles Act, Cap 281 (repealed). The Petitioner contends that the titles issued to the Interested Parties under the Registered Land Act, Cap 300 (repealed) should have been issued upon surrender of the original title, and since the surrender did not take place, the titles held by the Interested Parties are invalid.

i. That although the right to own land can be limited in accordance with the law, or within the parameters set out in the law, hardship results when a private individual's land is compulsorily acquired, but such hardship is justified when the acquisition serves public interest. In **JAMES JORAM NYAGA & ANOTHER v THE HON. ATTORNEY GENERAL & ANOTHER [2007]**

eKLR the Court observed:

> *"Under s 75 of the Constitution and s 6 of the Land Acquisition Act, there must be justification for the hardship that will be occasioned to those whose land is compulsorily acquired. Most times, compulsory acquisition does cause hardship and sometimes untold hardship to the original owners that the compensation offered by the Government may never equate or adequately compensate the suffering and inconvenience caused but in those circumstances, the public interest overshadows the private interest."*

j. The Petitioner further submitted that the old Constitution and the Constitution, 2010 have no limitation of time for filing constitutional petitions on violations of fundamental rights and freedoms. See the cases of **DOMINIC AROYO AMOLO VS. ATTORNEY GENERAL H.C MISC 494 OF 2003** and **GERALD GICHOHI & 9 OTHERS VS. ATTORNEY GENERAL PETITION NO. 487 OF 2012**. The Petitioner conceded that the actions in contravention of their rights commenced in 1980, and the illegal allocations began in 1990, while the Petition herein was lodged in 2008. That Kiptalam Arap Cherunya (deceased) started taking action in 1990, as has been evidenced by his affidavit in support of the Petition, and that the delay in filing the Petition was occasioned by the deceased petitioner being a reluctant litigant, who only decided to come to court as a last resort, after all the other efforts failed. In the case of **JAMES KANYIITA NDERITU VS. ATTORNEY GENERAL & ANOTHER (2013)** the court held that there is no time limitation in constitutional cases, but observed that it is of necessity to explain the delay where it exists.

k. The Petitioner urged the court to issue the declarations as sought in the amended Petition dated the 2nd November, 2018.

18. The Senior Litigation Counsel for the Chief Land Registrar, Land Registrar Uasin Gishu, and The Attorney General, *[2nd to 4th Respondents]* filed their submissions dated the 21st January, 2019, and submitted as follows;

a. That the Petitioner's claim must fail since it offends the rules of natural justice by seeking the revocation of titles that are being held by people who are not party to the instant claim.

b. That the Petitioner's continued possession of the title over LR 8148 is in breach of the terms of the compulsory acquisition contract, since the compulsory acquisition was conducted procedurally and compensation was duly paid.

c. The title documents held by the Interested Parties cannot be impeached because they are protected by Article 40 (3) and 40(6) of the Constitution and Section 26 of the Land Registration Act (No. 3 of 2012).

d. That the 1st Interested Party (ICDC) was allocated a portion of the suit land for the development of the Industrial Park of Eldoret Small and Medium Enterprises (SME), and this does not offend the planning regime, nor was it not unprocedural or obtained as a corrupt scheme.

e. The Petitioner's claim must be dismissed since it is grounded on the fact that the suit land was not surveyed, yet the same was clearly surveyed and marked.

f. The Court should direct the Petitioner to surrender the original title for rectification under Article 23 of the Constitution.

***g.** That noting that costs follow the events, and that the award of costs is discretionary, the Court should direct the Petitioner to pay costs to the 2nd, 3rd and 4th Respondents as the petition is fraudulent.*

19. The learned counsel for the Industrial and Commercial Development Corporation (ICDC), [*1st Interested Party*] filed their submissions dated the 29th April, 2019, submitting as follows;

a. That *Article 40 (3) (b)* of the Constitution, 2010 and *Section 75* of the old Constitution outline the conditions that must be met for land to be compulsorily acquired. *Section 3* of the Land Acquisition Act, Cap 295 (repealed) and *Section 107 to 119* of the Land Act No. 6 of 2012 also provide for the manner in which compulsory acquisition can be conducted. The allocation of ELDORET MUNICIPALITY BLOCK 15/ 1757 to the 1st Interested Party is lawful since the compulsory acquisition was conducted procedurally and also because according to *Section 3* of the ICDC Act, the 1st Interested Party's mandate is to facilitate industrial and economic development of Kenya.

b. The 1st Interested Party submits that they are not only a public entity, but they also paid the standard charges amounting to Kshs. 5,362,345.00 before the aforementioned land was registered in its name. That the land allocated to them was excised from ELDORET MUNICIPALITY BLOCK 15/ 2365, measuring 400 acres, that had been lawfully and compulsorily acquired by the Government.

c. That the Petitioner's claim ought to have been directed at the National Land Commission, 1st Respondent, and not against the 1st Interested Party. According to *Section 9 and 10* of the Land Acquisition Act (repealed) the Commissioner of Lands is responsible for the publication of the notice of intention to acquire land, and for the holding of an inquiry for the hearing of claims to compensation. The following authorities were used to buttress the aforementioned argument: **PATRICK MUSIMBA VS NATIONAL LAND COMMISSION & 4 OTHERS PETITION 613 OF 2014 [2016] eKLR; STANLEY MUNGA GITHUNGURI VS NATIONAL LAND COMMISSION ELC. APPEAL NO. 70 OF 2015 [2016] eKLR; MATHATANI LIMITED V COMMISSIONER OF LANDS & 5 OTHERS, PETITION 262 OF 2011 [2013] eKLR** and **REPUBLIC V NATIONAL LAND COMMISSION & 2 OTHERS *EX-PARTE* SAMUEL M. N. MWERU & 5 OTHERS, MISC. CIVIL APPL. NO. 443 OF 2017 [2018] eKLR.**

d. That the failure to surrender the original title for LR No. 8148 does not invalidate the compulsory acquisition undertaken by the Commissioner of Lands, and neither does it invalidate the title held by the 1st Interested Party.

e. The 1stInterested Party has a certificate of title issued by the Land Registrar which is conclusive proof that the 1st Interested Party, whose name appears on the title is the absolute and indefeasible owner, and his title is not subject to challenge except on grounds of fraud or misrepresentation. See **KENYA NATIONAL HIGHWAYS AUTHORITY VS SHALIEN MASOOD MUGHAL AND 5 OTHERS**.

f. The 1st Interested Party submitted that compulsory acquisition of private land is proper where it is in compliance with the Constitution and statute. See **MARGARET WANJIRU MBURU & 6 OTHERS VS NATIONAL LAND COMMISSION, PET. NO. 241 OF 2016 [2017] eKLR**.

g. The Interested Party is a public entity that was allocated land for a public purpose. In **NIAZ MOHAMED JAN MOHAMED VS COMMISIONER FOR LANDS & 4 OTHERS, CIVIL SUIT 423 OF 1 996 [1996] eKLR** the Court held that land acquired for a public purpose cannot be alienated, transferred or used in any other way other than for a public purpose.

20. The learned counsel for the County Government of Uasin Gishu, [2nd Interested Party] filed their submissions dated the 28th September, 2021. They submitted that;

a. That as stated in their replying affidavit, the 400 acres (L.R No. ELDORET MUNICIPALITY BLOCK 15/2365*{sic}*), of what was formerly LR No. 8148, was acquired by the Commissioner of Lands on behalf of the Government, and compensation was duly paid for the aforementioned acquisition, as is evidenced by the letter dated 7th April, 1979 produced in ENVIRONMENT AND LAND COURT ELC NO. 576 OF 2012 that read as follows:

> *"... I am grateful, Your Excellency, that your Government has duly compensated me and you, Sir, helped me to be left with 217 acres."*

b. The 2nd Interested Party contends that the compulsorily acquired land was used for the purpose for which it was acquired, noting that the renowned Rivatex East Africa Limited is situated on it.

c. By dint of the provisions of *Section 120 (4)* of the Land Act, 2012 the 2nd Interested Party contends that any of the compulsorily acquired land in the hands of third parties should revert back to it. The aforementioned section provides as follows:

> *"120 (4) Upon taking possession and payment of just compensation in full, the land shall vest in the national or county governments absolutely free from encumbrances."*

That in the case of **VIRENDR.A RAMJI GUDKA & 3 OTHERS -V- ATTORNEY GENERAL (2014) eKLR**, the Court held as follows:

> *"Rights of compulsory acquisition are conferred by specific provisions of the law being Article 40 of the Constitution and Sections 107 to 133 of the Land Act, No. 6 of 2012 which replaced the provisions previously contained in the Land Acquisition Act."*

And in **PATRICK MUSIMBA VS. THE NATIONAL LAND COMMISSION AND 5 OTHERS PETITION NO. 613 OF 2014** stated as follows:

> *"If land is so acquired the just compensation is to be paid promptly in full to persons whose interests in land have been determined; see section Ill of the Land Act. This is in line with the constitutional requirement under Article 40 (3) of the constitution that no person shall be deprived of his property of any description unless the acquisition is for a public purpose and subjected to prompt payment in full of just compensation."*

The 2nd Interested Party therefore, submitted that the Petitioner's Further Amended Petition dated 8th August, 2018 should be dismissed with costs to the 2nd Interested Party.

21. The 3rd Interested Party's *[Ethics and Anti-Corruption Commission]*, learned counsel filed their submissions dated the 3rd September 2020, submitting as follows;

a. This Court has jurisdiction to hear and determine the Petition herein which brings forth issues relating to title to land, public land versus private land and issues relating to compulsory acquisition of land founded on *Article 162(2)(b)* of the Constitution, 2010 and *Section 13* of the Environment and Land Court Act.

b. The Commissioner of Lands unilaterally, issued leases to private entities for private use defeating the public intention for the acquisition. That therefore, all the leases and titles created over LR No. 2366 measuring 400 acres, issued to private entities for private use are a nullity as the acquired land was not available for allocation, the same having been acquired for a specific purpose.

c. That it is in the interest of justice that all the titles issued out to private entities and private individuals on LR 2366 be cancelled, and the subject land be restored to the government, to be used for the purpose for which the land was acquired.

d. That compulsorily acquired land is not "un-alienated land" capable of being allocated to individuals for private benefit. The Supreme Court of Kenya in the advisory opinion the **NATIONAL LAND COMMISSION [2015] eKLR** expressed itself as follows:

"Section 3 of the Government Lands Act (GLA) conferred powers on the President to make grants of freehold or leasehold of un-alienated Government land. Section 7 prohibited the Commissioner of Lands from exercising the powers of the President under Section 3, subject to certain exceptions; though the President could (and did) delegate his powers to the Commissioner. Procedures were laid out, to guide the allocation of Government land; but those were not duly followed, subsequently. The Government treated public land as its "private property", and the public-interest element in administration and allocation of public land was negated. The Commissioner of Lands was making allocations of land by direct grant, routinely exceeding his authority."

e. The Petitioner's claim for restoration of ownership over LR NO. 2366 should be dismissed since the government duly compensated Mr. Kiptalam Arap Cherunya (deceased) for the 400 acres. That the award of the government was duly accepted by the deceased thereby extinguishing his title over the 400 acres of land. See **TOWN COUNCIL OF AWENDO V NELSON O ONYANGO & 13 OTHERS; ABDUL MALIK MOHAMED & 178 OTHERS (INTERESTED PARTIES) [2019] eKLR** paragraph 42, 43 and 47.

f. That from the evidence adduced by the ICDC, it is a public body mandated to facilitate the establishment of commercial and industrial undertakings. That therefore, ICDC will be directly involved in the implementation of the objectives for which the government acquired the 400 acres. In the circumstances, the lease over parcel number 1757 comprising approximately 136 acres issued on 21st December, 1992 should be regularized, noting that the same was issued before the subdivision of the larger LR No. 8148. In any event, that procedural breach should not lead to the cancellation of ICDC's title.

g. The titles issued over LR No. 2366 to private individuals for their private benefit are a nullity. Any subsequent transfers through sale or any other way does not confer good title. In **KIPSIRGOI INVESTMENTS LTD V KENYA ANTI-CORRUPTION COMMISSION 288 OF 2010** the Court quoted with approval the sentiments in **Kenya Anti-Corruption Commission V Ahmed Karama Said HCC No. 300 of 2007** in relation to the purchaser's interest as follows:

"Although 2nd defendant has taken the position that it was an "innocent purchaser for value without notice of irregularity", that principle is, in my opinion, incapable of protecting the land acquisition. Generally, as already noted, the innocent purchaser for value without notice of defect of title, will be treated as the darling of equity, and will be allowed to retain ownership. But this is subject to the qualification that the creation of the title itself is not in flagrant breach of statute law, so that it amounts to a nullity ab initio. The Municipal Council, which is a public authority, ought to have complied with the governing law, and its non-compliance with the Local Government Act, led to the creation of a void property title; the Municipal Council could not breathe life into that title by purporting to pass it on to 2nd defendant who could only claim title on equitable principle. The ground was not set, in this instance, for the play of equity in favour of 2nd defendant. It follows that 2nd defendant, in these circumstances, cannot claim an indefeasible title by virtue of the Registered Land Act (Cap. 300), or any other property statute."

h. The original allotees in respect of parcel number 2366 having obtained a bad title, could not confer a good title upon any purchasers through a transfer. No valid interest could pass from such title even through a chargor's exercise of its statutory power of sale.

i. That any allottees who were irregularly and illegally issued with titles upon land parcel number LR No. 2365, which belongs to the late Kiptalam Arap Cherunya, could not confer good title since no good title was conferred upon them.

j. That following the filing of a consent in Eldoret Environment and Land Court No. 582 of 2012 and 581 of 2012, title numbers ELDORET MUNICIPALITY BLOCK NO. 15/ 1762 and 1743 were surrendered for cancellation, and the aforementioned parcels were restored to the government.

22. The learned counsel for Job Kipnandi Chebon, *[11th Interested Party]* filed the submissions dated the 26th October 2020 submitting as follows;

a. That the Petitioner's prayers cannot be enforced as against the 11th Interested Party, who was not privy to the contract between the Petitioner and the Respondents. In **AGRICULTURAL FINANCE CORPORATION V LENGETIA LIMITED & JACK MWANGI [1985] eKLR** the Court quoted with approval from Halsbury's Laws of England, 3rd Edition, Volume 8 at paragraph 110:

"As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract."

b. The 11th Interested Party is a *bona fide* purchaser of the suit property for value without notice of any defect in title. See **WESTON GITONGA & 10 OTHERS V. PETER RUGU GIKANGA & ANOTHER (2017) eKLR**.

c. The 11th Interested Party submitted that in his capacity aforementioned he is protected by the doctrine of sanctity of title as has been discussed in the decision in **EUNICE GRACE NJAMBI KAMALL AND ANOTHER V. THE HON. ATTORNEY GENERAL AND 5 OTHERS CIVIL SUIT NO. 976 of 2012.**

d. The 11th Interested Party placed complete reliance on the clean title given to him by the Respondents knowing that the same is legitimate. See **ARTHI HIGHWAY DEVELOPERS LIMITED V WEST END BUTCHERY LIMITED & 6 OTHERS [2015] Eklr.**

e. That there was an inordinate delay on the part of the Petitioner thus the claim contravenes the provisions of *Section 7* of the Limitation of Actions Act and they have not furnished the Court with justifiable reasons for the delay in filing their claim. See **LT. COL. PETER NGARI KARUME & OTHERS VS ATTORNEY GENERAL, NAIROBI CONSTITUTIONAL APPLICATION NO. 128 OF 2006 (2009) eKLR** where the Court held that delays must be explained.

f. The Petitioner has failed to prove the violation of their fundamental rights herein to the threshold set in the **ANARITA KARIMI NJERU V REPUBLIC NO. 1 [1979] KLR 154** and with the precision required by the Court in **MUMO MATEMU V TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013] eKLR**.

g. The Petitioner has not satisfied the provisions of *Section 107 (1)* and *Section 109* of the Evidence Act (Cap 80), which provide that he who asserts must prove. See the decision in **JENIFER NYAMBURA KAMAU V. HUMPHREY MBAKA NANDI (2012) eKLR** where the aforementioned provisions were discussed at length.

h. That the rights under *Article 60* of the Constitution of Kenya and *Section 75* of the Constitution are not fundamental rights under the bill of rights, a breach of such rights can be redressed through a Court of law in a manner allowed by statute or in an ordinary suit. The 11th Interested Party argued that constitutional petitions should only be filed for redress of a breach of the Constitution or denial or violation or infringement of or threat to rights and fundamental freedom. In **BERNARD MURAGE V FINESERVE AFRICA LIMITED & 3 OTHERS [2015] eKLR** the Court made the following observation:

> *"...not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first… The Court of Appeal of Trinidad and Tobago in the case of Damian Belfonte v The Attorney General of Trinidad and Tobago C.A 84 of 2004 stated:*
>
> *"Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which, at least arguably, indicates that the means of legal redress otherwise available would not be adequate. To seek constitutional relief in the absence of such a feature would be a misuse, or abuse, of the Court's process. Atypical, but by no means exclusive, example of such a feature would be a case where there has been an arbitrary use of state power."*

i. The principle of constitutional avoidance stipulates that a Court will not determine a Constitutional issue when a matter may be properly decided on another basis. See **COMMUNICATIONS COMMISSION OF KENYA & 5 OTHERS Vs ROYAL MEDIA SERVICES LIMITED & 5 OTHERS [2014] eKLR** where the concept of constitutional avoidance was discussed at length.

j. The Petitioner filed his claim long after the statutorily prescribed period of 12 years and they failed to seek leave to file the claim out of time. That therefore, the Court has no jurisdiction to hear the Petition presented by the Petitioner in the guise of a constitutional petition yet in actual sense the issue before the Court is merely a land dispute.

23. The 17th Interested Party's learned counsel filed their submissions dated the 24th November, 2020. They submitted that;

a. It had conducted an official search which established that ELDORET MUNICIPALITY BLOCK 15/1748 had no encumbrances and that it belongs to Francis Kimurei Barmasai. That following the successful completion of the transfer process, the 17th Interested Party was registered as the proprietor of the aforementioned land and a Certificate of Lease was issued to it on 10th March, 1999. That the 17th Interested Party submitted that its title to the aforesaid land is absolute and indefeasible by dint of *Section 26 (1)* of the Land Registration Act, 2012 as its title was not acquired illegally, unprocedurally or through a corrupt scheme, and further that its title was not obtained by fraud or misrepresentation.

b. The 17th Interested Party is a bona fide purchaser for value. The learned counsel referred to the decision in **WESTON GITONGA & 10 OTHERS V. PETER RUGU GIKANGA & ANOTHER (2017) eKLR** which cited the *case of* K*atende v. Haridar & Company Limited [2008] 2 E.A.173,* where "*bona fide purchaser for value"* was described as:

> *"For the purposes of this appeal, it suffices to describe a bona fide purchaser as 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 that:*
>
> a) *he holds a certificate of title;*
>
> b) *he purchased the property in good faith;*
>
> c) *he had no knowledge of the fraud;*
>
> d) *he purchased for valuable consideration;*

e) *the vendors had apparent valid title;*

f) *he purchased without notice of any fraud;*

g) *he was not party to any fraud."*

The 17th Interested party further submitted the sanctity of title is derived from the *Torrens System of Registration* where the state guarantees the indefeasibility of registered titles and *Section 26 (1)* of the Land Registration Act, 2012 embodies this doctrine. In **KENYA AIRWAYS LIMITED V JAPHET NOTI CHARO SHUTU [2019] eKLR** the Court cited with approval the decision in **Charles Karathe Kiarie & 2 Others –vs- Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others (2013) eKLR,** where the Court of Appeal observed as follows:

"The Registration of Titles Act is entirely a product of the Torrens system of registration. The word "Torrens" is derived from Sir Robert Torrens, the third Premier of South Australia and pioneer and author of a simplified system of land transfer which he introduced in 1958. This is a system that emphasizes on the accuracy of the land register which must mirror all currently active registrable interests that affect a particular parcel of land. Government, as the keeper of the master record of all land and their owners, guarantees indefeasibility of all rights and interests shown in the land register against the entire world and in case of loss arising from an error in registration the person affected is guaranteed of Government compensation."

c. The 17th Interested Party argued that the Petitioner did not plead fraud on their part. That fraud cannot be inferred from the facts and a party must lay basis for fraud by way of evidence. See **NANCY KAHOYA AMADIVA V EXPERT CREDIT LIMITED & ANOTHER [2015] eKLR** where the decisions in **Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] eKLR** and **Central Bank of Kenya Limited v Trust Bank Limited & 4 Others [1996] eKLR** were cited with approval, and fraud was discussed in detail.

d. The 17th Interested Party submitted that a defrauder who had acquired title fraudulently could pass good title to a *bona fide* purchaser who was not involved in any illegality, fraud or corrupt scheme. In **DAVID PETERSON KIENGO & 2 OTHERS V KARIUKI THUO [2012] eKLR** the Court observed:

"14. Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu's fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring an action against the State for recovery of damages, but not for possession or ownership of the property."

e. The Petitioner has no interests in the suit property, a portion of which the 17th Interested Party purchased, since the same had been compulsorily acquired by the Government and the Petitioner had been duly compensated for the acquisition. The Petitioner did not retain any interests in the compulsorily acquired land capable of protection or resuscitation by the law. In **COMMISSIONER OF LANDS V ESSAJI JIWAJI & PUBLIC TRUSTEE [1978] eKLR** the Court held that:

"When property is compulsorily acquired by the Government, it vests in the Government. The previous owners merely lose his rights and title to the property; he does not in any sense transfer the property."

That *section 120 (4)* of the Land Act provides that upon taking possession and payment of just compensation in full, the land shall vest in the National or County Governments absolutely free from encumbrance. The Government is the lessor, and the 17th Interested Party obtained a lease term and once the lease lapses, the land will revert back to the Government.

f. That in the case of **ERASTUS NJONJO MOTE & 3 OTHERS V ATTORNEY GENERAL & 2 OTHERS [2017] eKLR** the Court held:

"It is true that the twin sister of compulsory acquisition is just compensation. Section 111 of the Land Act provides for compensation. It states that;

(1) If land is acquired compulsorily under this Act, just compensation shall be paid promptly in full to all persons whose interests in the land have been determined.

(2) The Commission shall make rules to regulate the assessment of just compensation."

The Petitioner's title in the compulsorily acquired land was extinguished, and therefore they have no reversionary interests in the land. Upon the compulsory acquisition, their estates in the land (whether fee simple or absolute proprietorship) ceased to exist, and became fused with the State's superior title. In the circumstances, the 17th Interested Party acquired valid title which cannot be defeated by the Petitioner's claim herein. The Court in **TOWN COUNCIL OF AWENDO V NELSON O ONYANGO & 13 OTHERS; ABDUL MALIK MOHAMED & 178 OTHERS (INTERESTED PARTIES) [2019] eKLR** stated as follows:

"Simply stated, a "reversion" is that interest in land that survives the expiry or extinction of an estate in the said land. It is called a

"reversion" because upon the extinction of the estate, that interest reverts to the person or entity from whose superior title the estate was originally created."

g. The 17th Interested Party submitted that the petition herein is incompetent as it contravenes *Section 7* of the Limitation of Actions Act. That the Petitioner took over 30 years from 1978 to 2008 to institute the petition. In **GATHONI V. KENYA COOPERATIVE CREMARIES LTD (1982) KLR 104**

"The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest."

The claim also contravenes the provisions of *Section 3(1) and (2)* of the Public Authorities Limitations Act. In **HARON ONYANCHA V NATIONAL POLICE SERVICE COMMISSION & ANOTHER [2017] eKLR** the Court held as follows:

"12. The suit as is clear from the plaint is directed against the government and it is in that context that the Attorney General has been made a party. That being the case the plaintiff's suit, definitely, is one in respect of which the Public Authorities Act, Cap 39 Laws of Kenya would have application to and to that end is brought in contravention of Section 3(1) and (2) of the Act. The cause(s) of action is barred by limitation as set out in the provisions thereof. Even as against the 1st defendant in its capacity as an independent commission, the suit would be barred by limitation under the provisions of Section 4(1) (a) and (2) of the Limitation of Actions Act, Cap 22 Laws of Kenya."

And in **HARRISON NDUNG'U MWAI & 500 OTHERS V ATTORNEY GENERAL [2018] eKLR** the Court cited the decision in **Thuranira Karauri Vs. Agnes Ncheche [1997] eKLR** where the Court held that it is trite law that limitation goes to the jurisdiction of a Court.

h. The 17th Interested Party submitted that although there is no limitation of time in filing Petitions, an explanation must be given for the delay. In **CHARLES GACHATHI MBOKO V ATTORNEY GENERAL [2014] eKLR** the Court observed:

"It must however go on record that although this Court has been lenient on parties that seek redress for violation of fundamental rights in past political regimes, it is obvious that the Court's indulgence is being abused by parties that have slept on their rights and give no serious explanations for the delay. In subsequent matters, obviously that issue will be at the fore of the Court's consideration of any claim."

That 17th Interested Party submitted that the petition herein is an abuse of the court process, its without merit and it should be dismissed with costs to it.

24. The learned counsel for Gemeka Wendani Group [26th Interested Party] filed their written submissions dated the 11th December 2020, submitting that;

a. The Petitioner has no claim over the land that was compulsorily acquired by the Government, as the late Kiptalam A. Cherunya was duly compensated. That the purpose of the aforementioned acquisition was for industrial, residential, shopping centre and ancillary purposes.

b. The 26th Interested Party's title over ELDORET MUNICIPALITY BLOCK 15/1809 measuring 4.000 Hectares cannot be impeached as the same was acquired at an auction, and further that the 26th Interested Party is a *bona fide* purchaser based on the mirror principle.

c. The 26th Interested Party's title was sanctioned by a court order, and no appeal has been lodged against the aforementioned court order in Nairobi HCCS No. 4445 of 1987. The learned counsel referred to *section 25 and Section 26* of the Land Registration Act No. 3 of 2012, to buttress this point.

d. The learned counsel further submitted that under the doctrine of assurance of title, the 26th Interested Party's title in the aforementioned land cannot be impeached. In **ELISHA OYUGI & 2 OTHERS V BOARD OF GOVERNORS KHWISERO GIRL'S HIGH SCHOOL [2019] eKLR** the court held as follows:

"DW1 the principal of the plaintiff school testified how the school acquired the land through an auction and paid the full purchase price and obtained the title need (DEx 6). I find that the auction was through a court order and the defendants legally acquired the suit land. The plaintiffs pleaded fraud in their amended plaint and they did state the particulars of fraud however they did not prove the same. The defendant's title is indefeasible and can only be challenged if it is obtained by a fraudulent scheme which the plaintiffs have failed to prove. I find the plaintiff has failed to prove his case on a balance of probabilities and I dismiss it with costs."

The 26th Interested Party contends that this Court ought to disregard the suggestion by the Ethics and Anti-Corruption Commission, 3rd Interested Party, to have the titles issued and registered under L.R NO. 2366, which was excised from the former L.R NO. 8148, be "erased". They contend that ELDORET MUNICIPALITY BLOCK 15/1809 should not be erased from the register as one of the purposes for which the government compulsorily acquired land from the Petitioner's include for residential purposes.

25. The learned counsel for the 37th to 48th Interested Parties filed their submissions dated the 30th July 2020 submitting that;

a. The 37th to 48th Interested Parties had legally acquired their rights over ELDORET MUNICIPALITY BLOCK 15/1757, 15/1748, 15/1809, 15/1819, 15/1880, 15/1778 and 15/1779 having purchased their respective parcels of land from Abdul Asis Kanji, the 36th Interested party.

b. They are *bona fide* purchasers whose entitlements are protected by the provisions of *sections 24 and 26* of the Land Registration Act, 2012.

c. There was an inordinate delay in bringing this petition before the court, and the Petitioner is guilty of laches as the Government's action against the suit land started way back in 1980, while the allocation or issuance of titles commenced in 1990.

d. The petition herein should be dismissed since it is trite law that a claim for land beyond and outside the required 12 years is time barred.

26. The learned counsel for the 49th to 51st Interested Parties filed two submissions dated the 30th August 2021 and submitted that;

a. The 49th Interested Party acquired ELDORET MUNICIPALITY BLOCK 15/1742, while the 50th and 51st Interested Parties acquired ELDORET MUNICIPALITY BLOCK 15/1744, legally and thus they are *bona fide* purchasers for value without notice. See the case of **WESTON GITONGA & 10 OTHERS V. PETER RUGU GIKANGA & ANOTHER (2017) eKLR.**

b. That *sections 25 and 26* of the Land Registration Act embodies the principle of indefeasibility. The Mirror principle stipulates that the register should be a reflection of the true position of the land. The Petitioner has not proved fraud or misrepresentation and the 49th, 50th and 51st Interested Parties did not acquire their Certificate of Lease illegally, unprocedurally or through a corrupt scheme.

c. The 49th, 50th and 51st Interested Parties' have rights that are protected by *Article 40* of the Constitution and *Section 80 (2)* of the Land Registration Act, 2012.

d. The 49th has been in possession of ELDORET MUNICIPALITY BLOCK 15/ 1742 since 2018, while the 50th and 51st Interested Parties have been in possession of MUNICIPALITY BLOCK 15/ 1744 since 2017. That after receiving the requisite approvals from the relevant authorities, the 49th, 50th and 51st Interested Parties have made substantial developments on the suit property. The Court of Appeal in **PANKAJKUMAR HEMRAJ SHAH & ANOTHER V ABBAS LALI AHMED & 5 OTHERS [2019] eKLR** held that:

*"[29] We reiterate what this Court stated in **Benja Properties Limited vs. Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR**, that:*

> ***"It is trite law that all titles to land are ultimately based upon possession in the sense that the title of the man seised prevails against all who can show no better right to seisin. Seisin is a root of title. The 1st, 2nd and 3rd respondents being in possession of the suit land have a better right to the same as against the appellant. The maxim is that possession is nine-tenths ownership. As was stated by the Privy Council in Ghana of Wuta-Ofei -v-Danquah [1961] All ER 596 at 600, the slightest amount of possession would be sufficient."***

The 49th, 50th and 51st Interested Parties submitted that compulsory acquisition is provided for under *Article 40* of the Constitution of Kenya and *sections 104 to 133* of the Land Act 2012. The Petitioner's estate lost their rights and title to the suit land once compulsory acquisition took place. Upon compulsory acquisition, the rights in the land are vested in the Government, the Petitioners do not have any interest in the land capable of protection of resuscitation by the law. In **COMMISSIONER OF LANDS V ESSAJI JIWAJI & PUBLIC TRUSTEE [1978] eKLR** the Court held that:

> ***"When property is compulsorily acquired by the Government, it vests in the Government. The previous owners merely lose his rights and title to the property; he does not in any sense transfer the property."***

e. That *section 120 (4)* of the Land Act, 2012 provides that upon taking possession and payment of just compensation in full, compulsorily acquired land shall vest in the National or County Governments free from encumbrances. In **ERASTUS NJONJO MOTE & 3 OTHERS V ATTORNEY GENERAL & 2 OTHERS [2017] eKLR** the Court held:

> ***"32. Section 120 (4) of the Land Act, 2012 provides that;***
>
> > ***Upon taking possession and payment of just compensation in full, the land shall vest in the national or county governments absolutely free from encumbrances. 33. On the first issue of reversion of the land back to the Petitioners, I am of the considered view that under section 120 (4) of the Land Act, 2012 the land currently vests in the national government. The Respondents do not acknowledge the Petitioners' contention that the land is idle and will remain idle. Instead, the Respondents state that the land is a road reserve and will shortly be used. The 3rd Respondent states that they intend to use the remainder of the land during the dualing phase of the same road project for which the land was acquired. There is affidavit evidence that the process is under way. There is also affidavit evidence that the Petitioners were compensated when the land was acquired in 2010. In such eventuality it is clear that the land cannot, even if the Petitioners wanted, revert back to them. In any event, the land currently vests in the national and/or county government and having been duly compensated, the Petitioners have no rights over the same***.

The 49th, 50th and 51st Interested Parties acquired the aforementioned parcels of land for purposes that fall within the confines of the purpose for which the land was acquired, that is industrial purposes.

f. In any event *section 110 (2)* of the Land Act, 2012 provides that where the purpose for which land that is compulsorily acquired fails or ceases, the Commissioner may offer the original owners or their successors in title pre-emptive rights to re-acquire the land upon restitution to the acquiring authority the full amount paid as compensation. The Petitioner had admitted that the government took possession of 400 acres out of 617 acres, which indicates that the two parcels of land are discernible, and parties are bound by their pleadings. The petitioner cannot go back on that claim and state that the government did not take possession of the land. See **DANIEL OTIENO MIGORE V SOUTH NYANZA SUGAR CO. LTD [2018] eKLR** where parties were held to be bound by their pleadings.

g. The Petitioners are guilty of laches, as at paragraph 19 of the Petitioner's supplementary submissions dated 9th December, 2020 the Petitioner state that titles were being issued to third parties as early as 1990, yet no plausible explanation has been given to explain why the Petitioner lodged this claim more than 30 years after the alleged infringement of his rights. The suit property was compulsorily acquired in 1978 and this petition was lodged in 2008. To support this argument reliance was placed on the decision in **JOSHUA NGATU V JANE MPINDA & 3 OTHERS [2019] eKLR** where the court discussed at length the doctrine of latches:

> *"38. In the Court of Appeal Case No.16 of 2012 Nairobi (Civil Application), reference was made to Lord Selbourne L.C. delivering the opinion of the Privy Council in The Lindsay Petroleum Co v Hurd (1874) L.R. 5 P.C. 221, where at page 240 it was stated thus:*
>
> > *"Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material…."*
>
> *41. Finally, the court has considered that "circumstances have changed". For instance, 4th defendant bought his share of the land from MEHBOOB SALEH, VALJI SENGHAI, MOHAMED IQBAL and RAMJI D. PATEL. But the people who allegedly bought the land in 1977 are the RAHEMTULLAS.*
>
> *42. When circumstances change and time passes, witness go their ways, evidence disappears, even memories falters. The plaintiff is questioning the 1977 transaction. 40 plus years down the line, how are the present defendants expected to look for those RAHEMTULLA'S ?, Yet it appears that plaintiff is the one who knew them well. Plaintiff even remembers such finer details like who amongst the RAHEMTULLAS was an alien. He even remembers the alien card number !!. It would be unfair and unjust to subject the defendants to litigation all over again in respect of this transfer which occurred decades ago with the knowledge of the plaintiff."*

The 49th, 50th and 51st Interested Parties urged the Court to find that the petition has no merit and as such, costs be awarded to them since s*ection 27* of the Civil Procedure Act provides that costs shall be at the discretion of the Court, and that they follow the event. That in the case of **JANE GHATI MWITA V ROBERT MATINDE MORONGE [2020] eKLR** the Court relied on *Judicial Hints on Civil Procedure, 2nd Edition, at page 94* by Justice (Retired) Richard Kuloba, where the learned author stated:

> *"the object of ordering a party to pay costs is to reimburse the successful party for amounts expended on the case……a means by which a successful litigant is recouped for the expenses to which he has put in fighting…"*

27. The learned counsel filed the supplementary submissions dated the 9th December 2020 submitting that;

a. The none of the Interested Parties have demonstrated the public interest informing their acquisition of the parcel of land they hold. The Supreme Court in **TOWN COUNCIL OF AWENDO V NELSON O ONYANGO & 13 OTHERS; ABDUL MALIK MOHAMED & 178 OTHERS (INTERESTED PARTIES) [2019] eKLR** asserted the principle that allocation of compulsorily acquired land to private individuals does not give good title. The Court issued the following guiding principles:

> ***"1. Where the Government, pursuant to the relevant constitutional and legal provisions, compulsorily acquires land, such land, shall only be used for the purpose for which it was compulsorily acquired.***
>
> ***2. The allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, shall be incapable of conferring title to that land in favour of the allottees."***

b. The Petitioner submitted that their land was not compulsorily acquired in accordance with the relevant constitutional and legal provisions, as all the constitutional and legal provisions were disregarded. The Petitioner contended that the 617 acres of land has not been subdivided, and that the caveat placed by the government under the provisions of *section 57 (3)* of the Registration of Titles Act, Cap 281 (repealed) has never been discharged to date. That until and unless the aforesaid caveat is discharged, its existence restricts against any transactions on the land by all and sundry, including the party placing the restriction. That it is undisputed that subdivision was done in the year 2005, but the court should note that the 37th to 48th Interested Parties have stated in their submissions that the issuance of titles commenced as early as 1990, and in other instances in 1980s. In **NATIONAL LAND COMMISSION V AFRISON EXPORT IMPORT LIMITED & 10 OTHERS [2019] eKLR** the court held as follows:

"Section 119 of the Land Act underscores the need to undertake due diligence before payment is made. Before compensation is paid, the Applicant is expected to ensure that a final survey is carried out and the acreage, boundaries, ownership and value of the land determined… Based on the inherent danger of the search system which is based on the Torrens System of registration, it is necessary for one to take further steps to ascertain the authenticity of the search and ownership of the land."

28. That the counsel for the parties highlighted their submissions on the 7th February, 2022. The court has taken into considerations their submissions. That on that date, Mr.Aseso for the 52nd Interested Party reported that he had filed written submissions, but the court has not traced it from the record.

29. The following are the issues that pop up for the court's determinations;

a. Whether the court has jurisdiction to determine the petition;

b. Whether any portion of the Petitioner's land known as L.R NO. 8148, measuring 400 acres, was compulsorily acquired by the government; and if so,

c. What portion of LR. No. 8148 did the government compulsorily acquire;

d. Whether the compulsorily acquired land was used for the purpose for which it was acquired;

e. Whether the government is at liberty to allocate compulsorily acquired land to private individuals to be used for private purposes;

f. Whether the allocation of potions of land falling within the 217 acres left for the Petitioner after the compulsory acquisition of the 400 acres from LR. No. 8148 by the Commissioner of Lands to was lawful.

g. What is the fate of the titles held by the Interested Parties that emanated from land that was compulsorily acquired, and those falling within the 217 acres left for the Petitioner; and

h. Who pays the costs of the petition.

30. The court has carefully considered the grounds on the further amended petition, the prayers sought, the affidavit evidence by the Petitioner, Respondents and the Interested Parties filed, the submissions by learned counsel, superior courts decisions and the provisions of the Constitution and statutes cited, and come to the following determinations;

a. The Court of Appeal in **PHOENIX OF E.A. ASSURANCE COMPANY LIMITED V S. M. THIGA T/A NEWSPAPER SERVICE [2019] eKLR** defined jurisdiction as follows:

"In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae"

In the *locus classicus* case of **OWNERS OF THE MOTOR VESSEL "LILLIAN S" VS. CALTEX OIL (KENYA) LTD [1989] eKLR**, the Court of Appeal stated thus:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The Supreme Court in **SAMUEL KAMAU MACHARIA & ANOTHER V KENYA COMMERCIAL BANK LIMITED & 2 OTHERS [2012] eKLR** held as follows:

"A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

In **PETER MUKHUNYA MALOBA V DENNIS KUSINYO [2020] eKLR** the Court made the following observation:

"Jurisdiction is conferred by law, in particular the Constitution and statute. With regard to land, the Constitution, the Land Registration Act, the Land Act and the Environment and Land Court Act have conferred jurisdiction on the Environment and Land Court."

The provisions of *Article 162(2)(b)* of the Constitution and *section 13* of the Environment and Land Court Act No. 19 of 2011 confer jurisdiction on this court to hear and determine the petition herein. The aforementioned provisions provide as follows:

Article 162(2)(b) of the Constitution, 2010

> *"Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to— the environment and the use and occupation of, and title to, land."*

Section 13 of the Environment and Land Court Act provides as follows:

> *"13. Jurisdiction of the Court*
>
> *(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*
>
> *(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes—*
>
> *(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*
>
> *(b) relating to compulsory acquisition of land;*
>
> *(c) ..*
>
> *(d)…*
>
> *(e) any other dispute relating to environment and land."*

That from the foregoing, the court finds it has jurisdiction to hear and determine the petition.

b. The Interested Parties have argued that the Petitioner's claim offends the provisions of *Section 7* of the Limitation of Actions Act, having been filed approximately 30 years from the time when the cause of action arose, and therefore this Court is bereft of Jurisdiction to determine a claim that is time barred. In **CHARLES COSMAS MDARI V ATTORNEY GENERAL & 2 OTHERS [2021] eKLR** the Court made the following observation:

> ***"… it is now settled that the issue of limitation, when it comes to constitutional petitions, is not as strictly applied as the case may be when the cause of action is based on statute. So long as the delay is not inordinate, and can be explained, courts would generally be less stringent on the issue of limitation when the subject matter relates to a violation of constitutional rights"***

The Petitioners have stated that their claim was filed 30 years after the cause of action arose because the original petitioner, the late Kiptalam Arap Cherunya was a reluctant litigant, who only opted to file a claim in Court as a last resort. That while that may have been true, and taking not that the surveying was only done after 2005 as evidenced through the surveyor's correspondence availed, I find that the explanation for the delay in filing the petition in 2008, in the circumstances obtaining herein as justifiable. That further, as this is a constitutional petition that raises issues on compulsory acquisition, and whether land that has been compulsorily acquired may be allotted to private individuals to be used for private purposes not related in any way with the public purpose for which the land was acquired to serve, the objection of jurisdiction on the basis of limitation has no merit.

c. That in Kenya, land is obviously a very precious commodity and *Article 40* of the Constitution provides protection for the right to own property. Where land disputes have not been justly handled with the right amount of caution, such disputes may result in violations of the rights contained in the Bill of Rights, including the right to life. The court is therefore persuaded that the nature of the claim filed by the Petitioner through the petition herein has far-reaching implications on the rights of the parties involved, including the Interested Parties, and the general public as whole. The Court of Appeal in **CHIEF LAND REGISTRAR & 4 OTHERS V NATHAN TIROP KOECH & 4 OTHERS [2018] eKLR** made the following observation:

> *"In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of Limitation of Actions Act. However, each case is to be decided on its own merits and a caveat need to be stated as correctly observed in Johnstone Ogechi vs. The National Police Service [2017] eKLR, where the learned judge expressed:*
>
> ***"While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the Constitution; whether the proceeding before the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20(4) of the Constitution."***

That in view of the foregoing, I find that this matter being a constitutional petition is properly before the Court for determination, and I therefore decline the invitation to find that the same is statute barred by dint of the provisions of *Section 7* of the Limitation of Actions Act

and *Section 3(1) and (2)* of the Public Authorities Limitation of Act, Cap 39.

d. In the year 1978 compulsory acquisition of land was governed by the provisions of *section 75* of the Old Constitution and the Land Acquisition Act, Cap 295(repealed). The following provisions of *Section 75* are relevant to the determination of this claim:

> *"75. No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:*
>
> *(a) the taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and county planning or the development or utilization of property so as to promote the public benefits; and*
>
> *(b) the necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest or right over the property; and*
>
> *(c) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation…"*

The Supreme Court at paragraph 54 in **TOWN COUNCIL OF AWENDO V NELSON O. ONYANGO & 13 OTHERS; ABDUL MALIK MOHAMED & 178 OTHERS (INTERESTED PARTIES) [2019] eKLR** made the following observation as relates to the applicability of the Constitution of Kenya, 2010 to a compulsory acquisition that took place before the promulgation of the 2010 Constitution:

> ***"Even as the law as we have pronounced it, appears to be clear, it is imperative that we consider the provisions of the 2010 Constitution to determine whether any insights can be drawn therefrom for a just and fair resolution of the dispute at hand. In this regard, we derive inspiration from this Court's dictum in Samuel Kamau Macharia & 2 Others v. Kenya Commercial Bank & 2 Others [2012] eKLR; on when a court of law may fall back to the provisions of the Constitution of 2010 in determining a dispute that may have crystallized before the promulgation of the Constitution. At paragraph 62, the Court stated:***
>
> > ***"At the onset, it is important to note that a Constitution is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately acquired before the commencement of the Constitution."***

Article 40(3) of the Constitution, 2010 is instructive on the compulsory acquisition of land and it provide as follows:

> *"40. (3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—*
>
> *(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or (b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—*
>
> *(i) requires prompt payment in full, of just compensation to the person; and*
>
> *(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law."*

That both the old Constitution and the 2010 Constitution emphasize that for the government to exercise its right of eminent domain over privately owned property, this right must be exercised for the promotion of public benefit or public purpose or public interest. The government is also required to ensure that there is prompt payment of full compensation to any private individual whose right to own property has been curtailed in the exercise of the right to eminent domain. It is worth noting that in as much as the Constitution provided the guidelines within which compulsory acquisition may be conducted, the Land Acquisition Act provided the procedure and the steps to be taken during that process. It is admitted that the Government issued Gazette Notice No. 1458 dated 13th May, 1978, wherein it made known its intentions to compulsorily acquire L.R No. 8148 in pursuance of *Section 6(2)* of the Land Acquisition Act, 1968 for Industrial, Residential, Shopping Centres and Ancillary purposes. The Government also issued Gazette Notice No. 1458 also dated 13th May, 1978 entitled Notice of Inquiry in pursuance of *Section 9(1)* of the Land Acquisition Act, 1968 for the hearing of claims of compensation by persons interested in L.R No. 8148. Subsequently, Gazette Notice No. 345 of 31st January, 1980 revised Gazette Notice No. 1458 and 1459 to reflect that only 400 acres of LR NO. 8148 was being compulsorily acquired. That though the Petitioner contended that the compensation received from the Government was only of Kshs. 1,807,000.00, the 3rd Interested Party has disputed that claim and has furnished the court with evidence in the form of a Compensation Award Certificate dated 15th February, 1979 and an Acceptance Certificate dated 28th February, 1979 which prove that the compensation for the 400 acres that were compulsorily acquired was Kshs. 2,637,500.00, and that the amount was paid in full. The court also takes judicial notice of the contents of the judgment in **KENYA ANTI-CORRUPTION COMMISSION V JOHN KIPLAGAT CHESANGA & 2 OTHERS [2019] eKLR** wherein the late Kiptalam Arap Cherunya, vide a letter

dated 7th April, 1979 acknowledged to the then President of the Republic of Kenya, that he had received full compensation for the land that was compulsorily acquired in the following words:

> *"... I am grateful, Your Excellency, that your Government has duly compensated me and you, Sir, helped me to be left with 217 acres."*

e. The Petitioners contend that the compulsory acquisition process was not undertaken to completion, and in particular that the government failed to comply with the provisions of *Section 7, 17 and 20* of the Land Acquisition Act Cap 295 (repealed). The aforementioned provisions of the statute provided as follows:

> *"7. The Commissioner may cause the land which is to be acquired to be marked out and measured (if this has not already been done), and shall cause a plan of the land to be prepared."*

> *"17. Where part only of the land comprised in documents of title has been acquired, the Commissioner shall, as soon as practicable, cause a final survey to be made of all the land acquired."*

> *"20. (1) Where the documents evidencing title to the land acquired have not been previously delivered to him, the Commissioner shall in writing require the person having possession of the documents of title to deliver them to the Registrar, and thereupon that person shall forthwith deliver the documents to the Registrar.*

> *(2) On receipt of the documents of title, the Registrar shall—*

> *(a) ...*

> *(b) where only part of the land comprised in the documents has been acquired, record upon the documents that so much of the land has been acquired under this Act and thereafter return the documents to the person by whom they were delivered, and upon such receipts, or if the documents are not forthcoming, cause an entry to be made in the register recording the acquisition of the land under this Act."*

The majority decision of the Court of Appeal in **ELIZABETH WAMBUI GITHINJI & 29 OTHERS V KENYA URBAN ROADS AUTHORITY & 4 OTHERS [2019] eKLR** held as follows in a case with facts that are similar to the facts in this case:

> *"I reject the argument that under section 30 of the Registered Land Act, compulsory acquisition being an overriding interest was not expected to be registered to have effect. To appreciate the argument section 30 provides that;*

> *"30. Unless the contrary is expressed in the register, all registered land shall be subject to such of the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register -*

> *.....*

> *(c) rights of compulsory acquisition, resumption, entry, search and user conferred by any other written law; Provided that the Registrar may direct registration of any of the liabilities, rights and interest hereinbefore defined in such manner as he thinks fit".*

> *For the acquisition process to be complete section 20 of the repealed Land Acquisition Act, in a mandatory language compels the Commissioner, where only part of the land has been acquired, as is the case here to record upon the documents the size acquired and thereafter "cause an entry to be made in the register recording the acquisition of the land". This requirement is critical in the process as it is only by entering in the register how much of the whole parcel of land has been acquired that all persons dealing with the land would know that fact. Section 21 of the Land Act, in more or less the same language goes further than the repealed section 20 and introduces subsection (2) (b) that directs the National Land Commission to formally write to the persons having original documents of title for the acquired land to deliver them to the Registrar and the latter upon receipt of the documents, to;*

> *"(a) cancel the title documents if the whole of land comprised in the document has been acquired*

> *(b) if only part of the land comprised in the document of title has been acquired, the registrar shall register the resultant parcels and cause to be issued, to the parties, title documents in respect of the resultant parcels.*

> *3. If the documents are not delivered the registrar will cause an entry to be made in the register recording the acquisition of land under this Act".*

> *It is emphasized that in line with the sentiments of the Court in Commissioner of Land v. Coastal Aquaculture Ltd (Supra) that "all procedures related to compulsory acquisition must not only, be strictly pursued, but must also, appear to be so on the face of the inquiry".*

> *Therefore, section 30 aforesaid must be read not in isolation but together with section 20 of the Land Acquisition Act. Had the Commissioner complied with the latter section and noted in the register that part of the appellants' properties had been acquired, the appellants would have, no doubt limited their homes to the extent permitted and if they exceeded they would not have been*

protected by the law."

That the court has noted that most parties to this petition hold the incorrect notion that compulsory acquisition is complete if the requisite notices are issued, and full compensation for such acquisition is paid. The correct position on what need to be done to ensure compliance and completion of the process with both the pre and post 2010 Constitution and statutes in compulsory acquisition is now clear as it is as restated in the above superior courts' decisions.

f. That from the dictates of the foregoing decisions, the court finds that the failure by the Commissioner of Lands to enter a record upon the title document of the original parcel, LR 8148, outlining the portion of land that had been compulsorily acquired by the Government from the Petitioner, and the failure to have the compulsory acquisition noted down in the register held at the land registry, go to the root and completeness of the process of compulsory acquisition. In **MUTUMA ANGAINE V M'MARETE M'MURONGA [2011] eKLR** the Court observed as follows:

"… it is trite law that when a person's property is forcefully acquired the Government must fully comply with the law, and follow the laid down procedure strictly and meticulously. No person's property may be acquired compulsorily without due process."

That in view of the foregoing, the court finds that the process of compulsory acquisition as relates to L.R. No. 8148 was incomplete for failure to make the requisite entries on the register. That notwithstanding that finding, the court hastens to add that it is well within the government's power to make an entry in the said land register to the effect that 400 acres of the aforementioned land was compulsorily acquired, as that will not prejudice the Petitioner who has been fully compensated.

g. The Petitioner's contend that although the Government sought to acquire only 400 acres of LR No. 8148, it did not cause a survey and subdivision exercise to be conducted to demarcate the portion that was compulsorily acquired from the parcel, and separate it from the remaining portion measuring 217 acres. That claim has been disputed by among others, the 2nd to 4th Respondents, 2nd and 3rd Interested Parties. The court take note of the letter dated 29th April, 2005 by the Director of Survey to the District Surveyor Uasin Gishu directing the demarcation of the 400 acres that was compulsorily acquired by the government. That further, in the letter dated 20th May, 2005 the District Surveyor Uasin Gishu informed the Director of Survey that in the Survey plan No. 448/159, LR. NO. 8148, was subdivided into L.R NO. 2365 measuring 217 acres, and LR. No. 2366 measuring 400 acres belonging to the Government. That I note that the petitioner and other parties to this petition have severally made reference to LR NO. 2365 as the portion that was compulsorily acquired, but for purposes of setting the record straight, the actual parcel of land that was compulsorily acquired by the government is LR NO. 2366, measuring 400 acres. That in view of the foregoing, the petitioner's claim that the government has not completed the compulsory process as surveying has not been done is without merit.

h. The Petitioner further contended that the Government lodged a caveat on L.R. No. 8148 that is still in force, and therefore no surveying or other transactions could have taken place on the said land without first lifting it. That a copy of document dated the 21st September 1978 by the Registrar of Titles and addressed to Kiptalam Arap Cherunya, the deceased has been annexed to the affidavit in support of the further amended petition in proof thereof, and no evidence in rebuttal has been availed by either the Respondents or the Interested Parties. That it is therefore baffling that the Commissioner of Lands went ahead to allocate portions of the suit land to various entities for private use, including to some of the Interested Parties or their predecessors in title, when the caveat was still in force. That when one considers the foregoing it is no longer surprising that the Respondents appear to support the allocations of the portions of the land from the 400 acres compulsorily acquired parcel, and the 217 acres left for the Petitioner, to private entities and persons for their private use.

i. That the Gazette Notice No. 1458 published on 13th May, 1978 indicated that the land to be compulsorily acquired was for industrial, residential, shopping centers and ancillary. In seeking to interpret what is meant by the aforementioned phrase, the contents of *Section 75* of the Old Constitution and *Article 40* of the 2010 Constitution comes in handy, and they emphasize that compulsory acquisition should serve a public purpose, a public benefit or a public interest. The court has taken note that the 1st Interested Party [ICDC] is the only public entity from among the parties that have participated in this proceeding, that was allocated a portion of the compulsorily acquired land, which land the 1st Interested Party avers will be used in accordance with its mandate as is provided in *Section 3* of the ICDC Act. The 1st Interested Party's explanation on how its intended use of ELDORET MUNICIPALITY BLOCK 15/1757, fits in with the purpose for the intended acquisition, which position has evidently been supported by the 2nd and 3rd Interested Parties. I also note that the County Government of Uasin Gishu, [2nd Interested Party], claim that Rivatex East Africa Limited is located on a portion of the compulsorily acquired land has not been disputed by any of the parties in this proceeding.

j. The 26th Interested Party argued that the Gazette Notice No. 1458 stated that the compulsorily acquired land would be used as industrial, residential, shopping centres and ancillary. It took the position that the inclusion of the word *residential* in the purpose of the acquisition meant that the government was at liberty to allocate the compulsorily acquired land to private entities. That in view of the fact that both the old Constitution and the Constitution 2010 insists that the right to own property cannot be deprived arbitrarily, but only to achieve a public benefit, purpose or interest, that argument is fundamentally flawed and misplaced.

k. The Petitioner has argued that since the compulsorily acquired L.R No. 2366, measuring 400 acres was not used for the purpose for which it was acquired, the aforesaid land should revert back to the estate of the late Kiptalam Arap Cherunya. In opposition to the aforementioned argument, the Interested Parties, specifically the 2nd, 3rd and 17th Interested Parties, argued that the Petitioner's estate in the land, (whether fee simple or absolute proprietorship), ceased to exist or was extinguished when the land in issue was compulsorily acquired, and as such the estate in the compulsorily acquired land became fused with the State's superior title. Reliance was placed on among others, the decision of the Supreme Court in **TOWN COUNCIL OF AWENDO V NELSON O ONYANGO & 13 OTHERS; ABDUL MALIK MOHAMED & 178 OTHERS (INTERESTED PARTIES) [2019] eKLR** which put the issue of reversionary/pre-emptive interests to rest as follows:

"[41] We now turn to the crux at the heart of this Appeal, and that is, whether a proprietor whose land has been compulsorily acquired, nonetheless retains some reversionary interest in, or pre-emptive rights over, the un-utilized portions thereof. At the outset, it is important to set out the legal elements of a reversion in order to discharge the burden before us. Simply stated, a "reversion" is that interest in land that survives the expiry or extinction of an estate in the said land. It is called a "reversion" because upon the extinction of the estate, that interest reverts to the person or entity from whose superior title the estate was originally created. An estate on the other hand, is a time bound bundle of rights over land, or as they say at Common Law, "an estate is a time in the land or a land for a time". Thus a holder of a fee simple estate retains interest in that land for as a long as there will be an heir to inherit the same. Where no heir remains to inherit the estate, then the land reverts to the state. The state holds a superior title to the land called "the radical title". The fee simple estate also becomes extinguished upon a compulsory acquisition by the State in exercise of its powers of Eminent Domain. By the same token, in a landlord and tenant relationship, the tenant holds the leasehold estate while the landlord retains the reversion which, upon the expiry of the leasehold, is surrendered back to the landlord, since the latter holds a superior title from which the lease was created."

That although the 2nd Interested Party averred that the compulsorily acquired land was used for the purpose for which it was acquired, the court finds that the aforementioned position is not a true reflection of the transactions detailed by the respective Interested Parties that have participated in the proceedings herein, which confirms the parcels they have acquired have been for private use as opposed to public benefit, interest or purpose. I note that in the responses filed by the 11th, 17th 26th, 37th to 48th, 49th, 50th and 51st and the 52nd Interested Parties, it is clear that none of the aforementioned Interested Parties is using their respective parcel of land for a public purpose, benefit or interest. That position was confirmed by the 3rd Interested Party which disclosed that it had carried out extensive investigations on land parcels 2365, 2366 and the subdivisions thereof, and undertaken some recovery litigations against some of the Interested Parties, over some of the parcels. The court takes judicial notice that the prosecution of some of the related litigations were stayed by Justice Odeny - ELC 2, on the 9th December, 2019. The existence of those recovery litigations by EACC notwithstanding, the 2nd to the 4th Respondents have defended the allocations of the parcels from the 400acres compulsorily acquired land to private entities, for private use through their replies and submissions, in utter disregard of the Constitution, statutes and superior courts decisions.

l. Where the purpose for the compulsory acquisition is spent, the Land Act No. 3 of 2012 provides at *Section 110* as follows:

"(1) Land may be acquired compulsorily under this Part if the Commission certifies, in writing, that the land is required for public purposes or in the public interest as related to and necessary for the fulfilment of the stated public purpose.

(2) If, after land has been compulsorily acquired, the public purpose or interest justifying the compulsory acquisition fails or ceases, the Commission may offer the original owners or their successors in title pre-emptive rights to re-acquire the land, upon restitution to the acquiring authority the full amount paid as compensation."

The Petitioner herein may consider to explore their chances under the said provision. The Petitioner may however run into a few challenges as they seem to be disputing the amount of money that was paid as compensation, while evidence show full payment was made and acknowledged, and in view of the amount of time that has lapsed since 1978 when the process of compulsory acquisition was commenced.

m. The Petitioner has argued that it was unlawful for the Government to allocate compulsorily acquired land to the Interested Parties as they are private individuals, and their use of the allotted land does not conform to the public purpose for which the land was acquired. The Supreme Court in **TOWN COUNCIL OF AWENDO V NELSON O ONYANGO & 13 OTHERS; ABDUL MALIK MOHAMED & 178 OTHERS (INTERESTED PARTIES) [2019] eKLR** rendered itself as follows when determining whether compulsorily acquired land may be allocated to private individuals:

"[47] We begin by reasserting the long held legal principle that, land which has been compulsorily acquired, must be used for the purpose for which it was acquired. If for example, after compulsorily acquiring land, the Government or any of its agencies, proceeds to allocate the said land, to individuals or other entities, for their own private benefit, in total disregard of the public purpose, such allocation would not confer good title to the allottees. Such was the holding in Niaz Mohammed v. Commissioner for Lands & 4 Others (1996) eKLR in which Waki J, (as he then was) rendered himself thus:

> ***"I am not persuaded by the argument that upon compulsory acquisition of land and the consequent vesting of that land in the Government, then the land falls to be used by the Government in any matter it desires. There is plainly no such Carte Blanche intended in the provisions of the law…The land must be used, subsequent to the acquisition, for a lawful purpose, as I see it, the only lawful purpose is the one for which it was intended."***

*[48] This position was re-affirmed by the Court of Appeal in **Kenya National Highway Authority v. Salien Masood Mughal & 5 Others (2017) eKLR**. Also of persuasive value, is the decision of the Supreme Court of India in **M/S. Royal Orchid Hotels Ltd & Anor. v. G. Jayarama Reddy & Ors. Civil Appeal No. 7588 of 2005**; in which the question for determination was whether, land acquired for a specific public purpose, could be used for another purpose not being a public purpose. In that case, instead of utilizing the acquired land for the purpose specified in the notifications or for any other public purpose, the Corporation transferred the same to private parties. The Supreme Court of India held:*

> ***"The Courts have repeatedly held that in exercise of its power of eminent domain, the State can compulsorily acquire land of the private persons but this proposition cannot be over-stretched to legitimize a patently illegal and fraudulent exercise undertaken for depriving the landowners of their constitutional right to property with a view to favour private persons…. The diversification of the purpose for which land was acquired under Section 4(1) read with Section 6 clearly amounted to a fraud on the power of eminent domain…"***

[52] The public purpose, for which the land was compulsorily acquired, may have been spent, but the un-utilized portions thereof,

remain public land. It is therefore our view, that such land as remains un-utilized can only be applied to a public purpose, or be utilized to promote the public interest, even if the said interest is not such as had been originally envisaged. Un-utilized portions of land, may in this instance, be allocated to private entities, including those from whom the land was acquired, at a price, provided that, the land is to be put to such use as will promote the public interest…

General principles:

1-…

2- The allocation of compulsorily acquired land, to private individuals or entities, for their private benefit, in total disregard of the public purpose or interest for which it was compulsorily acquired, shall be incapable of conferring title to that land in favour of the allottees."

That after considering the foregoing pronouncements by the Supreme Court of Kenya in the *Town Council of Awendo case (supra)*, and other superior courts decisions on how compulsorily acquired land should be utilized or employed, I find that apart from the 1st Interested Party [ICDC], the other Interested Parties have not demonstrated to the court that they are using the parcels of land that were allotted to them from the parcel of land that was compulsorily acquired to promote public purpose or interest or benefit. The 2010 Constitution and the old Constitution provides for compulsory acquisition of privately owned land only for the promotion of public benefit, for a public purpose and for public interest. That it follows that the allotment of compulsorily acquired land to private individuals for purposes of their private benefit was not sanctioned by the Constitution and was therefore unlawful.

n. The 11th, 17th, 26th, 37th to 48th, 49th, 50th to 52nd Interested Parties submitted that they are *bona fide* purchasers for value without notice of the defect in title. They sought to rely on the provisions of *Article 40* of the Constitution that provides for the protection of the right to own property, and outlaws the arbitrary depravation of property. The Interested Parties also sought to rely on *Section 26(1)* of the Land Registration Act, 2012 which provide as follows:

"26. Certificate of title to be held as conclusive evidence of proprietorship.

(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

From the foregoing, I find that a registered *bona fide* purchaser's title may only be cancelled where it is proved that such title was obtained by fraud, mistake or misrepresentation that the party was involved in or where the title was acquired illegally, unprocedurally or through a corrupt scheme. I note that the Petitioner did not plead and prove fraud on the part of the Interested Parties. The Court in **AHMED MOHAMMED NOOR V ABDI AZIZ OSMAN [2019] eKLR** cited with approval the decision of the Court of Appeal in **KINYANJUI KAMAU VS. GEORGE KAMAU (2015) eKLR** where it was held as follows:

"…. It is trite law that any allegations of fraud must be pleaded and strictly proved……. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts…."

I further note that the 11th, 17th, 26th, 37th to 48th, 49th, 50th to 52nd Interested Parties annexed copies of official searches to their respective responses to the Petition herein. They have taken the position that a diligent purchaser is only expected to conduct a search to confirm whether the person purporting to sell land to them is the registered owner of the land, before going further with the sale of land transaction. *Section 31* of the Registration of Land Act provides as follows:

"Every proprietor acquiring any land, lease or charge shall be deemed to have had notice of every entry in the register relating to the land, lease or charge and subsisting at the time of acquisition."

The Court of Appeal in **DENIS NOEL MUKHULO OCHWADA & ANOTHER V ELIZABETH MURUNGARI NJOROGE & ANOTHER [2018] eKLR** observed as follows:

"At the centre of Torrens land registration system, on which ours is based, is the basic assumption that meticulous professionals of conscience, absolute honesty and integrity, will superintend over it. In Gibbs v. Messer [1891] AC 247, the Privy Council stated thus on the registration system:

"The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validly. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed of transfer or mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title."

The 11th, 17th, 26th, 37th to 48th, 49th, 50th to 52nd Interested Parties have further shown that after confirming that the parties they were transacting with had title, they then proceeded to pay the consideration price, and subsequently conducted the transfer process successfully, resulting in the issuance of Certificates of Lease in their respective names. That while the court finds that the Petitioner has failed in his claim to have those parcels held by the Interested Parties that emanated from the land compulsorily acquired from him by the government cancelled and reverted to him, the relevant state agency or entity, like Ethics and Anti-Corruption Commission [3rd Interested Party], is still at liberty to initiate and or prosecute recovery proceedings against those unlawfully allocated such land. The Petitioner's claim over the parcels subdivided from the compulsorily acquired land herein, LR No.2366, measuring 400 acres cannot therefore succeed, as full compensation had been paid for it by the Government.

o. That however, any allocation by the Commissioner of Lands of parcels of land that falls within land parcel LR No. 2365, measuring 217 acres, that was left for the Petitioner, is unlawful, irregular and unprocedural, as that land is not part of the compulsorily acquired land, but rather private land belonging to the late Kiptalam Arap Cherunya.

p. That though the Petitioner sought for damages for loss of user, injury and unlawful deprivation with interests, there is no evidence adduced from which the court could make a finding on the nature of his intended use of the land. In any case all the Respondents allegedly did was to file a caveat against the parent [original] title LR. Mo. 8148, and nothing else that could have prevented the Petitioner from utilizing the 217 acres left after the compulsory acquisition of the 400 acres. That accordingly the court find no basis have been presented upon which an award of damages can be granted.

q. That though the Petitioner sought to have the conversion of the registration of the parcels subdivided from LR. No. 8148 from Registration of Titles Act, chapter 281 of the Laws of Kenya to the Registered Land Act, chapter 300 of the Laws of Kenya declared unlawful, null, and void, he has not shown what prejudice the change of registration regime has caused to him. That prayer therefore has no merit.

r. That in view of the central role played by the Commissioner of Lands, who was the predecessor of the 1st Respondent, the 2nd and 3rd Respondents in facilitating the transactions through which the Interested Parties acquired the title documents to their respective parcels, and their failure to enter in the record of LR. No. 8148 a note of the compulsory acquisition of 400 acres, the Respondents should pay the Petitioner's costs in the petition. That however the Interested Parties will each bear their own costs.

s. That as the Petition has been finalized, the stay order of 9th December, 2019 should be vacated.

31. That having come to the foregoing determinations on the various issues, the court holds and orders as follows:

a. A declaration is hereby issued that compulsory acquisition by the government of 400 acres from the Petitioner's LR NO. 8148, measuring 617 acres, was validly done. That the Respondents are therefore directed that the said acquisition be duly noted on the registers of LR No. 8148, Eldoret Municipality/Block 15/2366, and the subdivisions thereof that have not been allocated to private individuals/entities.

b. That a declaration is hereby issued that the Eldoret Municipality/Block 15/2365, measuring 217 acres belongs to the late Kiptalam Arap Cherunya, the Petitioner. That the 3rd Respondent, and County Surveyor, Uasin Gishu, are hereby directed to visit the said Land to confirm and point out for the Petitioner the said parcel's boundaries/beacons within ninety (90) days to enable the administrators of the estate take possession.

c. That to avoid the need of further litigation on this issue, the Land Registrar Uasin Gishu is hereby directed to issue the Petitioner with the title document for Eldoret Municipality/Block 15/2365, measuring 217 acres, upon the Petitioner surrendering the original title for LR. No. 8148 to the said Land Registrar for cancellation.

d. A declaration is hereby issued that any allocation of parcels of land done by the Government, through the Commissioner of Lands, out of Eldoret Municipality/Block 15/2365, that belongs to the Petitioner, is unlawful, null and void. That the 1st and 3rd Respondents are therefore directed to ensure all such allocations and title documents issued thereof, are revoked and or cancelled within ninety (90) days.

e. That an order of restraint be and is hereby issued restraining the Land Registrar, Uasin Gishu, National Land Commission [3rd and 1st Respondents], plus those of the 4th to the 52nd Interested Parties whose parcels of land have encroached or are within the Petitioner's land, or any other person whosoever, from further unlawfully entering or trespassing, and or transferring and or dealing in any manner whatsoever with Eldoret Municipality/Block 15/2365, measuring 217 acres.

f. The stay order of 9th December, 2019 be and is hereby vacated and or set aside, to enable the affected suits to continue to their logical conclusion.

g. That the Respondents to jointly and severally pay the Petitioner's costs of the petition, while all the other parties shall bear their own costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 27*TH* DAY OF APRIL, 2022

S.M.KIBUNJA,J.

ELC ELDORET.

IN THE VIRTUAL PRESENCE OF;

PETITIONER: ……..

RESPONDENTS: …….....

INTERESTED PARTIES: ……*Absent* ……..

COUNSEL: *Mr. Chevana for Wanjiku for Petitoner,……*

Ms.Ghati for 2nd to 4th Respondents,……

Ms. Rotich got 1st Interested Party,……

Mr. Yego for 2nd Interested Party,……..

Ms. Bakari for Githinji for 3rd Interested Party,……

Ms. Tusime for 17th Interested Party,……..…

Mr. Muhoro for 26th Interested Party,…….....

Mr. Anduke for Mr. Mwangi for 49th to 51st Interested Parties and

Mr. Aseso for 52nd Interested Party..……

COURT ASSISTANT: ONIALA

S.M.KIBUNJA,J.

ELC ELDORET