Claassen v Commissioner of Lands & 6 others (Environment and Land Petition 7 of 2015) [2025] KEELC 5287 (KLR) (9 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5287 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND PETITION 7 OF 2015

CK NZILI, J

JULY 9, 2025

BETWEEN

KARL WEHNER CLAASSEN ..... PETITIONER

AND

THE COMMISSIONER OF LANDS ..... 1ST RESPONDENT

THE REGISTRAR OF TITLES ..... 2ND RESPONDENT

THE COMMISSIONER OF PRISONS ..... 3RD RESPONDENT

THE HON. ATTORNEY GENERAL ..... 4TH RESPONDENT

KIPAGENGE OF KALENJIN ESTATES LTD ..... 5TH RESPONDENT

NOAH WEKESA ..... 6TH RESPONDENT

COUNTY GOVERNMENT OF TRANS NZOIA ..... 7TH RESPONDENT

JUDGMENT

A. The Petition

1. Before the court is an amended Petition dated 16/8/2021. The petitioner seeks:

    i. Declaration that his father's constitutional rights under Article 21. Articles 21(3) and 27 of the *Constitution* were or have been breached or violated.

    ii. Declaration that the decision to forcefully evict, take away, allocate and distribute his father's parcel LR No 5778(IR. 1500/1), LR No 6605/2(IR. 2414/1), LR No 9075 (IR. 13511/1), LR No 3036/7 (IR. 7117/1), LR No 2198/2, LR No 2199/2, LR No 5321/6, LR No 5324, LR No 5325, LR No 6409/2, LR No 5548, LR No 4329/1, LR No 5779/1 and LR No 5779/2 (the suit parcels), was a violation of Article 40(1) of the *Constitution*, which entitles

his father either individually or in association with others, to acquire and own any property of any description in any part of Kenya, and the actions of the respondents jointly and severally, amount to a deprivation of the right to property and are therefore unconstitutional.

(iii) A sum of Kshs 22,190,850,000/=, as compensation on account of loss of 4931.3 acres of land or such other money to be determined by the court upon independent valuation.

2. The petitioner avers that under Article 40(1) of the *Constitution*, every person has a right either individually or in association with others to acquire, or own property of any kind or description in any part of Kenya and the state is prohibited from depriving a person of property of any description or any interest in land, subject to the procedure and the limitation set out in the *Constitution*.

3. The petitioner avers that on or about 1942 to 1945, his grandfather, Mr. G.H. Claassen, and Mrs. M.C. Claassen, purchased from Miss. Evelyn Florence Mary Fraser, Miss Beryl Violet Marshall, Dr. Ganz and several other people. LR No LR No 5778(IR. 15001/1) measuring 400 acres, LR No 6605 (IR.2414/1) measuring 298 acres, LR No 9078 (IR. 13511/1) measuring 857 acres, and lastly, LR No 3036/7 (IR. 7117/1) measuring 304 acres, popularly known as Kandy Farm Properties, situated in Kitale Municipality.

4. The petitioner avers that his grandfather passed on in 1962, whereafter the Kandy Farm properties were transmitted into his late father's name. The petitioner avers that in addition, his father in 1961, purchased and was registered as owner by 1965 of the adjacent parcels of lands Nos. 2198/2, 2199/2, 5321/6, 5324, 5325, 6409/2, 5548, 4329/1, 5779/1, and 5779/2, measuring 2,181 acres, otherwise known as Pilkem Estate. Further, the petitioner avers that his father and family carried out and kept a head of 2,000 dairy and beef cattle; ploughed and planted 700 acres of maize, 150 acres of fruits, vegetables, 100 acres of coffee, 300 acres of mature timber for production of telegram/telephone poles and the balance of the land contained prime grazing land comprised of pasture for their livestock.

5. The petitioner avers that the quiet and peaceful, and uninterrupted occupation of the suit parcels of land continued until 29/8/1968, when the government, through the 1st respondent, wrote a letter to his father that the government intended to acquire Kandy Farm for use by the Kenya Prison Department. He avers that his father and his family turned down the offer since they did not have any intention of selling the land, for they had immensely invested in the said parcels of land.

6. Given this fact, the petitioner denies that his father thereafter and in any way purportedly exercised a contrary view by way of donating any power of attorney to anybody to offer Kandy Farm to the Government of the Republic of Kenya, to execute any sale agreement or transfer forms on his behalf for the Kandy Farm in favour of the government or the Department of Kenya Prisons.

7. Further, the petitioner avers that all the parcels of land forming part of the Kandy Farm in his view did not and were never to the best of his knowledge, subject to any proceedings under the repealed *Land Acquisition Act*, nor was his father aware of any gazette notice expressing the government's intention of acquiring his parcels of land by way of either surrender or through a published gazette notice by the government, or receiving any invitation to attend any meeting where the issue of compensation for the acquisition of the suit parcels land in whatever form was to be discussed, agreed and or transacted upon.

8. The petitioner avers that to utter shock, in January 1969, his father and family were forcefully evicted from Kandy Farm, which was taken over by the Prison Department, without any court order. As a result, the petitioner avers that his father and family had no option in the matter in view of the forceful eviction that was carried out by the government, since it possessed the monopoly of force, other than relocating to South Africa, where they have since resettled.

9. According the petitioner, his father returned to Kitale town in 1969 and was utterly shocked to find that his Kandy Farm and Pilkem Estate had been invaded by members of the 3rd and 5th respondents, who drove out the 2,000 cattle out of the two farms and were now grazing outside the farms within the precincts of the Kitale Golf Course.

10. The petitioner avers that his father became so depressed and immediately decided to dispose of the cattle at throwaway prices to the residents of Lugari and Kipkaren Settlement Schemes, as the only available livestock markets in the district, but the livestock unfortunately succumbed to diseases and malnutrition. Further, the petitioner avers that his father had employed and settled over 1,000 personnel or employees in the two farms, who were evicted from the two farms together with the livestock and their families.

11. Out of fear for his life, trauma, threats and apprehension, the petitioner avers that his father decided to move out of Kitale Town and since he was unable to establish how his 2,781 acres of land in Pilkem Estate were taken away from him, he embarked on an inquiry to establish how and on what basis his parcels of land and investments had been confiscated, by visiting severally the Ministry of Lands offices, in both Kitale and Nairobi. At first, the petitioner avers that his father could not obtain any documents, information, or records relating to the said parcels of land from the said offices, but with persistence, he finally obtained the documents, which shed light on the issue in 2010.

12. The petitioner avers that from the said documents, his father established that the 3rd and the 5th respondents, with active assistance and participation of the 1st and 2nd respondents and other government departments, allegedly facilitated and transferred his Pilkem Estate to the 5th respondent, that was incorporated solely to acquire Pilkem Estate. In order to facilitate the fraud, the 5th respondent applied for land control board consents from the Trans Nzoia Land Control Board on 12/2/1969 and on 11/6/1969, which application was rejected on account of lack of proof of the amount of consideration paid, and for absence of a written agreement between the seller and the purported buyers.

13. Again, the petitioner avers that his father also confirmed that there were no valid accompanying minutes or records to show that the Trans Nzoia land control board held any meetings and gave any consent for the sale and transfer of Pilkem Estate to the 5th respondent on 13/8/1969. Equally, the petitioner avers that his father established that according to the fraudulent documents, the 5th respondent in collusion with the government officers and more particularly the 1st and 2nd respondents, allegedly caused a purported surrender and transfer of Kandy Farm to the 3rd respondent and part of Pilkem Estate to the Kitale Municipality and Noah Wekesa who are the 6th and 7th respondents.

14. The petitioner avers that his father neither sold and or entered into any agreements of sale or surrender of the suit parcels of land with the government or any of the respondents, nor did he execute any land control board consent application forms or any surrender or transfer instruments, in favour of and or receive any consideration for his parcels of land, from either, the government or any of the respondents.

15. Similarly, the petitioner avers that his father did not give anyone a power of attorney over his affairs, including any power to deal with any of his parcels of land. Therefore, the petitioner avers that all the purported transactions over his father's parcels of land were undertaken without his permission, consent and or authority, otherwise, according to him; the leasehold conferred to his father as the registered owner of all the suit parcels of land was and is still alive to date, which rights are protected under the *Constitution*, but have been violated by the respondents, hence the plea for declaratory orders and reliefs under Articles 22(3) and 27 of the *Constitution* in addition to the other reliefs alluded to above, for the unlawful deprivation and interruption in the enjoyment of his property rights.

16. In a supporting affidavit sworn on 16/6/2021 by Karl Wehner Claassen, the petitioner has attached copies of the title documents of the suit parcels of land as annexure marked as KWC-1 and KWC-2(a), (b) and (c), map as KWC-3, letter dated 29/6/1968 expressing the intention to acquire Kandy Farm as KWC-4, documents from Registrar of Companies dated 29/11/2011 regarding the 5th respondent, as KWC-6(a), (b) and (c), application for the land control board consent by the 5th respondent dated 12/2/1969 and 11/6/1969 as KWC-7(a) and (b), minutes for the land control board meeting as KWC-8(a) and (b), land control board consent dated 13th and 15/8/1969 as KWC-9, bundle of letters and documents relating to the illegal acquisition as KWC-10(a)-(i) and a valuation report as KWC-11, official searches as KWC-12.

17. The petition was opposed by the 1st, 2nd, 3rd, 4th, and 7th respondents vide a replying affidavit by Robert Simiyu, an Assistant Deputy Director of Land Administration, sworn on 5/5/2022. It is deposed that after thoroughly perusing records held by the Ministry of Lands and Physical Planning as well as those held by other government ministries, agencies and departments, he admits that the contents of paragraphs 9, 10, 11, 12, 13 and 14 of the amended petition but maintain that the 1st, 2nd, 3rd, 4th and 7th respondents, have at all material times to this suit been cognizant of the tenets espoused in the Articles 21, 22, 23, 27, 40 and 48 of the *Constitution*.

B. The 1st, 2nd, 3rd, 4th and 7th Respondents' Case

18. The 1st, 2nd, 3rd, 4th and 7th respondents deny in toto all the allegations contained in paragraphs 15-55 of the amended petition since all the available records are totally at variance with every allegation in the petition.

19. In particular, as to LR No 5778 (IR 1500), they state that the parcel was originally LR 4461/1, measuring approximately 400 acres whose initial lessee was John Joseph McDermott Scally on 14/9/1922 for 999 years, before he transferred it to Evelyn Florence Mary Fraser on 21/5/1926. That on 7/9/1926 an easement granting right of way in favour of Arthur Arnold Stanley Wartnby as entry No 2 was registered, while entry No 3 on a lien in favour of Standard Bank of South Africa Ltd Kitale, that was discharged on 23/9/1926 as per entry No 4 on 22/6/1942.

20. It is deposed that the property was transferred to G.H. Claassen on 18/1/1945 and was later transmitted to Nicolas Hendrick Claassen, who charged it to Standard Bank of South Africa, Kitale on 26/11/1945 and later discharged on 15/5/1969, subsequent to which, on 30/6/1963, the head title was surrendered back to the government for Kshs 340,000/= on 30/6/1969.

21. Regarding LR No 6605/2 IR 2414 (formerly LR 6122/1), it is deposed that the parcel measuring 301.2 acres was first registered in favour of G.H. Claassen and was later transmitted to Nicholas Hendrick Claassen and subsequently charged on 26/11/1945, to Standard Bank of South Africa Ltd Kitale, discharged on 15/5/1963 and surrendered back to the government of Kenya at Kshs 340,000/=, on 30/6/1969.

22. Regarding LR No 9075 (IR.13511/10) measuring 866 acres, it is said that it was first registered under G.H. Claassen 17/1/1963, transmitted to Nicholas Hendrick Claassen before it was surrendered to the government of Kenya on 30/6/1969 for Kshs 340,000/=.

23. As to LR No 3026/7 (IR.7117) measuring 304 acres, it is deposed that it was first registered under G.H. Claassen on 4/11/1998, transmitted to Nicholas Hendrick Claassen, before it was surrendered to the government of Kenya on 30/6/1969 for Kshs 340,000/=.

24. Regarding LR No 2198/2 measuring 145.29 acres, the deponent avers that the 1st registered owner was G.K. Claassen, who on 22/11/1967, transmitted the same to N.H. Claassen, who then transferred it to Kipagenge of Kalenjin Estates Limited, for a consideration of Kshs 549,000/= on 22/10/1990. On LR No 2199/2 (IR 292), measuring 145 acres, the 1st registered owner was N.H. Claassen on 22/11/1967, who transferred it to Kipagenge of Kalenjin Estates for Kshs 549,800/=, before surrendering it to the government, in exchange for a sub divisional scheme plan.

25. On LR No 5321/6 measuring 186.16 acres, the deponent swears that it was first transferred to Oswald Bentley and later Beatrice E. Bentley on 30/10/1959, later to N.H. Claassen on 12/10/1967, who then transferred it to Kipagenge of Kalenjin Estates Ltd for a consideration.

26. Regarding LR No 4329/1, it was transferred to N.H. Claassen on 12/10/1967, after which it was transferred to Kipagenge of Kalenjin Estates Ltd on 26/8/1970 for a consideration. Coming to LR No 5548, the same was transferred to Kipagenge of Kalenjin Estates Ltd on 26/8/1970 for a consideration. The same with LR Nos. 5325, 5324, 6409/2, and 5779 on the same date.

27. The 1st, 2nd, 3rd, 4th, and 7th respondents depose that, flowing from the foregoing historical foundation of the suit parcels of land, it was true that land parcels known as Kandy Farm were previously owned by G.H. Claassen and were later transferred to N.H. Claassen upon the demise of G.J. Claassen, as per annexure KWC-1(a) and KWC-2(a), (b) and (c).

28. Equally, they depose that in 1968, vide a letter dated 29/8/1968, the government of Kenya, through the Commissioner of Lands, expressed its intention to purchase the four parcels forming part of Kandy Farm for the extension of the Kitale Prison Farm as alluded to by the petitioner in annexure KWC-5. The 1st, 2nd, 3rd, 4th, and 7th respondents depose that at no time did N.H. Claassen ever write to the government of Kenya his unwillingness to sell the entire Kandy Farm to the government.

29. On the contrary, they depose that there was a series of negotiations between N.H. Claassen through his appointed representative, the late M/S R.P.F. Lindsell Esq., advocate and the Commissioner of Lands up to 20/6/1969 when N.H. Claassen agreed to and indeed surrendered and or relinquished all his rights interests and or claims on the four parcels of land forming part of Kandy Farm to the government for Kshs 340,000/=, which was paid through his appointed representative as per KWC-1 and that the surrender was noted in the register of LR No 5778, LR No 6605, LR No 09075 and LR No 3036/1, effectively extinguishing all or any claim, right and or interest in the said parcels of land by N.H. Claassen.

30. The 1st, 2nd, 3rd, 4th, and 7th respondents depose that the surrender was recorded on 30/6/1969, effectively converting the said parcels of land into public properties as N.H. Claassen had surrendered to the government the remainder of the lease term at Kshs 340,000/=, which surrender was governed by Section 44 of the repealed *Registration of Titles Act* and was therefore not the same as compulsory acquisition, then governed by the repealed *Land Acquisition Act*.

31. The 1st, 2nd, 3rd, 4th and 7th respondents depose that going by the dictum in *Mwinyi Hamisi Ali v Attorney General & another* [1997] eKLR, the registration of a surrender on the grant was sufficient evidence that the suit properties were surrendered to the government unless a contrary intention is shown by the proprietor of the suit parcels at the time of the surrender, since under Section 97 of the *Evidence Act* on entry of a surrender as recorded on the grant in respect of Kandy Farm, was conclusive evidence of disposition of the interest in Kandy Farm.

32. The 1st, 2nd, 3rd, 4th, and 7th respondents depose that this court lacks jurisdiction as a constitutional court to determine questions surrounding the impugned surrender that was undertaken over five decades ago by persons who are no longer in existence, and the claim is unreasonably statute-barred.

33. Similarly, the 1st, 2nd, 3rd, 4th and 7th respondents depose that after the surrender back to the government, the parcels were surveyed and subsequently gazetted as part of Kitale Prison Farm, as per copies of the survey plan marked RS-1.

34. The 1st, 2nd, 3rd, 4th, and 7th respondents depose that Mr. Lindsell as the petitioner's advocate had a standing instrument to represent and indeed, the said advocate represented N.H. Claassen in all matters regarding Kandy Farm and Pilkem Estate, whose actions were a reflection of the intention and purpose of N.H. Claassen, otherwise paragraphs 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, and 45 of the amended petition are denied in toto.

35. The 1st, 2nd, 3rd, 4th, and 7th respondents depose that the dealings in the Pilkem Estate, which initially belonged to N.H. Claassen before the transfer to Kipagenge of Kalenjin Estates Ltd, were undertaken by Mr. Lindsell on behalf of N.H. Claassen who formally forwarded to the Commissioner of Lands, the applications for transfers of the 10 parcels, by a copy of the letter marked RS-2, over and above a series of correspondences that the advocate had with the Commissioner of Lands, Trans Nzoia Land Control Board members and Kipagenge of Kalejin Estates,. He produced the same as annexure RS-2, showing a clear intention of the N.G. Claassen, through his agent, to sell and transfer the entire Pilkem Estate to Kipagenge of Kalenjin Estates Ltd, the 5th respondent.

36. Accordingly, the 1st, 2nd, 3rd, 4th, and 7th respondents depose that the Trans Nzoia Divisional Land Control Board had initially deferred the application for the land control board consent to facilitate the transfer of the entire Pilkem Estate on several occasions. That later on, the consent was finally granted in the terms as proposed by Mr. Lindsell.

37. Again, the 1st, 2nd, 3rd, 4th, and 7th respondents insist that the letter dated 15/7/1969 by M/S Lindsell Advocates, confirmed that the purchase price for Pilkem Estate had been agreed at Kshs 549,800/= which was eventually paid through a bank loan from Standard Bank of South Africa, which thereby corroborates the entries made in the grants by the Registrar of Titles.

38. They further aver that, the reasons for deferring the land control board application forms for the consents were subsequently addressed by Mr. Lindsell. That the consents were granted in good faith, based on the information that was supplied by the said advocate; hence, the petitioner has no basis to claim that the consents were procured through fraud. They again state that if the petitioner had any claims over the land control board consents, he should have sued the land control board; otherwise, the respondents were not its members at the time, but only acted on the applications for transfers, which were duly submitted for registration.

39. The 1st,2nd,3rd,4th and 7th respondents aver that the transfer of the entire Pilkem Estate to Kipagenge of Kalenjin Estates Ltd was proper, procedural and hence the resultant title deeds issued were lawful, valid and no sufficient grounds exit to justify their cancellation otherwise, such cancellations under Section 23 of the repealed *Registration of Titles Act* must be based on exceptional circumstances, which the petitioner has not adduced or proved.

40. In addition, the 1st, 2nd, 3rd, 4th, and 7th respondents depose that, other than what is stated above, they were not privy to the transactions between N.H. Claassen and Kipagenge Kalenjin Estates Ltd and their role was simply in the duly executed documents, after they were lodged for registration, subject to payment of relevant fees.

41. The 1st, 2nd, 3rd, 4th and 7th respondents depose that the prayers sought by the petitioner cannot be granted as the character of the suit properties has fundamentally changed, otherwise if granted, would amount to condemning hundreds if not thousands of the current title holders unheard, contrary to Articles 47, 48 and 50 of the *Constitution*, as read together with the provisions of the *Fair Administrative Action Act*, 2015. The 1st, 2nd, 3rd, 4th, and 7th respondents depose that parcels of land comprised of the Kandy Farm after the surrender were surveyed and gazetted as Prison Farm and are now fully under use and occupation of the prison department. However, the gazette notice was not attached to the replying affidavit.

42. Further, the 1st, 2nd, 3rd, 4th and 7th respondents depose that Kipagenge of Kalenjin Estates Ltd is no longer the owner of parcels of land comprised of Pilkem Estate and therefore, any implementation of an eviction order will be futile since:

    (a) LR No 4329/1, was vide a letter dated 17/6/1976, transferred to Wilson K. Soo, who is not party to this suit and whose title has since been surrendered for conversion from the *Registration of Titles Act* (repealed) to *Registered Land Act* (repealed) and as per a consent letters dated 15/3/1985 attached as RS-3, out of which several resultant titles were issued to third parties.

    (b) LR No 5321/6 known as Siritiet Farm vide a letter of consent dated 9/9/1976, was transferred to Kiplagat Arap Ronoh and 19 others. It was later subdivided into 39 portions by a consent dated 20/8/1987, now known as Waitaluk/Mabonde Block 5 (Siritiet).

    (c) LR No 5325 by a letter of consent dated 22/11/1974 was transferred to Kipkoskei Arap Rop and 9 others, and by a further letter of consent dated 26/9/1986, it was subdivided into 33 plots christened Waitaluk/Mabonde Block 9(Kibulwet) as per annexure marked as RS-4.

    (d) LR No 5548, known as Namgoi Farm, was transferred to Namgoi Farm Co. Ltd, by a letter of consent dated 7/11/1985 was subdivided into several plots as per titles, copies of consent, and correspondences attached as RS-5.

    (e) LR Nos. 4329/1, 6409/2, 5325, 5324, 5321/6, 2199/2, 2198/2, 6605/2, 2198/2, 6605/2, 5778, 6605/2, 5778, 9075, 3036/7, 5779/1, and 5779/2 were surrendered and or subdivided as the case may be as per the letter dated 14/4/1992, going by annexure marked RS-6.

43. Further, the 1st, 2nd, 3rd, 4th, and 7th respondents depose that the petitioner's claim for compensation is equally a non-starter for the following reasons:

    i. The disposition of the parcels of land comprised of Kandy Farm and Pilkem Estate was regular, known and consented to by N.H. Claassen, that is why, for 5 decades he neither laid any claims to these parcels of land nor did he lodge any cautions or restrictions as a basis of claiming any registrable interests over the same.

    ii. The valuation report attached to the supporting affidavit was concocted on 12/7/2021, during the pendency of this matter, without any notice to either the court or to the parties on record that the petitioner intended to carry out such a valuation.

    iii. The valuation report confirms that the suit parcels of land are already occupied by various third parties, yet no list of occupiers claiming the purchasers' interest was provided before court.

    iv. There is no basis laid by the valuer in his opinion that the total value of the suit properties is Kshs 22,000,000,000/=.

v. The valuation report does not disclose the extent of the developments on the suit parcels of land and the improvements thereon.

vi. The valuation report was not based on the appreciation method, otherwise it did not give the approximate value of the suit parcels when the alleged deprivation of the suit parcels arose in 1969.

vii. The valuation report does not disclose the methodology employed to value close to 5,000 acres of land and no comparative sample was provided to the court.

viii. The valuation report, having been illegally or irregularly procured, was not admissible in law.

44. The 1st, 2nd, 3rd, 4th and 7th respondents depose that from the foregoing, it is apparent that no constitutional fundamental rights or freedoms of the petitioner were violated or breached. On the contrary, 1st, 2nd, 3rd, 4th and 7th insist that the parcels of land comprised of Pilkem Estate was disposed of on a willing buyer-willing seller basis, while the parcels of land comprised of Kandy Farm was voluntarily surrendered for a consideration to the government of Kenya.

45. Similarly, the 1st, 2nd, 3rd, 4th, and 7th respondents aver that the petitioner has failed to tender any evidence to show that there was any forceful eviction, take over, subdivision and distribution of the suit parcels of land, in and irregular and unconstitutional manner, otherwise; the photographic materials attached to the supporting affidavit and the valuer's report are inadmissible under the *Evidence Act*. Equally, the 1st, 2nd, 3rd, 4th, and 7th respondents take the view that the alleged ownership dispute of the suit parcels of land is not a pure constitutional matter for the court to be seized of jurisdiction to make the declaratory orders or reliefs sought.

C. The 5th Respondent's Case

46. The 5th respondent opposed the petition through a replying affidavit sworn on 2/4/2022 by John Kirwa Rotich, who was the secretary of Kipagenge of Kalenjin Estates Ltd. He terms the petitioner as lacking standing to file the petition on behalf of the estate of N.H. Claassen. He deposes the 5th respondent was formed to enable its shareholders to acquire property and to develop themselves. Further, the 5th respondent deposes that after identifying the parcels of land comprised of Pilkem Estate and upon making the necessary inquiries, it approached N.H. Claassen through his advocate, Mr. Lindsell.

47. The 5th respondent avers that the said lawyer was holding a power of attorney donated by the deceased and registered as IP/A 10734/1, that enabled him to dispose 2566.6 acres of land belonging to the deceased in Pilkem Estate, comprised of LR Nos. 2198/2, 2199/2, 5321/6, 5325, 5324, 6409/2, 5548, 4329/1, 5779/2, and 5779/1. Further, the 5th respondent deposes that eventually, a memorandum of understanding was entered into for Kshs 548,000/= with the said agent. The 5th respondent contends that payments of the considerations were made twice to Mr. Lindsell, as per annexures marked JKR-1 and 2(a-g), 3(a-f), and 4(a-c).

48. Subsequently, the 5th respondent deposes that the suit parcels of land were transferred to its name in 1969, following issuance of the land control board consent. Attached are the transfers, land control board meeting minutes and the letters of consent marked as annexures JKR-5, 6(a) and (b).

49. Given the foregoing, the 5th respondent denies the contents of paragraphs 22, 32, 33, 34 - 47, 50 and 51 of the amended petition; otherwise, its interest was only in regard to parcels of land comprised of Pilkem Estate, which was lawfully, procedurally and regularly acquired for a consideration from an authorized agent of N.H Claassen. The 5th respondent deposes that after the transfer, it moved to

occupy the 2,566.5 acres and not 2,781 as alleged. Again, the 5th respondent avers that it was outrageous for the petitioner's late father to allege that he did not know or was not aware of how the said parcels of land were taken away from.

50. Further, the 5th respondent deposes that it paid all the agreed consideration for the suit parcels of land to Mr. Lindsell and that there is nothing to show that the late N.H. Claassen lived in fear or was threatened; otherwise, no police report has been availed over such fear for life, threats, or apprehension on his part, during the time of the transactions. The 5th respondent deposes that, in response to paragraphs 42- 48 of the petition, after the objectives of the 5th respondent were achieved, it was dissolved or wound up.

51. Regarding the land control board consent applications forms, the 5th respondent deposes that after the initial application dated 12/2/1969 was rejected, due to an error in the consideration, a fresh application dated 11/6/1969, was logged and was eventually approved.

52. Additionally, the 5th respondent denies any alleged fraud or illegality in the whole exercise of purchasing and transferring the suit parcels of land under its name and eventually subdividing and transferring the subdivisions to its members. The resultant titles deeds, their owners or records were not shared with the court. The 5th respondent denies knowledge that the 6th and 7th respondents are also occupying part of either Kandy Farm or Pilkem Estate; otherwise, it has no recent official search certificates to that effect.

53. The 5th respondent denies the allegations of any discrimination on account of race, the particulars of fraud; otherwise, everything regarding the transactions was undertaken on a willing seller, willing buyer basis. The 5th respondent terms the petition as defective, an abuse of the court process, ill-advised, falls short of meeting the constitutional petition threshold, or disclosing any constitutional issues or questions. The 5th respondent allege that the petition is based on unsubstantiated and exaggerated allegations, is ill-advised, malicious, misleading, and brought in bad faith.

54. Accordingly, the 5th respondent deposes that after the lawful sale and transfer of the suit parcels of land, N.H. Claassen's rights or interests in the suit properties were extinguished. The 5th respondent avers that its rights over the suit parcels of land enjoy the protection of the law.

D. Further Affidavit by the Petitioner

55. In a further affidavit sworn on 13/7/2022, the portioner insists that he is a legal administrator of the estate of the late Nicolas Hendrik Claassen, who contrary to paragraph 7(a-k) of the replying affidavit sworn by Robert Simiyu, never received any consideration from the government for any of the suit parcels of land comprised if both the Kandy Farm and Pilkem Estate after he initially turned down the government's offer to acquire Kandy Farm. On the contrary, the petitioner deposed that no evidence has been availed to date, of any of the alleged sale agreement with the 5th respondent, conferring on it an interest in Pilkem Estate or having received any alleged consideration thereof, from the respondents.

56. The petitioner deposes that his late father was not aware of any alleged published gazette notice expressing the government's intention to acquire an interest in any of his parcels of land, nor was any notification sent to him for the offer or inviting his attendance to any meeting to discuss any compensation thereof. The petitioner deposes that no land control board consents were ever issued through lawful any minutes, with his consent or approval, conferring or authorizing the alleged sale or transfer of the parcels of land comprised of Pilkem Estate, to the 5th respondent.

57. According to the petitioner, after conducting an official search on the above parcels of land, he was convinced that members of the 5th, 6th, and 7th respondents were occupying Kandy Farm and Pilkem Estates parcels of land, otherwise, there are no other interests registered over the said parcels the land.

58. Moreover, the petitioner denies the contents of paragraphs 14 and 15 of the replying affidavit by Mr. Simiyu, otherwise his father neither participated nor donated any alleged power of attorney to Mr. Lindsell, to engage in any of the suit parcels of land to the respondents. The petitioner denies the sale, transfer or surrender of any interests in the suit parcels of land comprised of Kandy Farm to the government, and also denies that the registration of the surrender was done under his authority or participation, rendering the transaction null and void. The petitioner deposes that there could not have been any disposition of his parcels of land without consideration, or even if it was involuntary in nature, without any compensation being paid to him.

59. The petitioner contends that his late father never executed any sale agreements or authorized any to be executed on his behalf, coupled with signing the resultant transfer forms to transfer his parcels of land to the 5th respondent, on account of any alleged purchase. The petitioner deposed that he was well aware that value of land appreciates, and therefore, any trespassers on the suit parcels of land cannot be said to have appreciated the value by their illegal invasion or developments, otherwise, the valuation report that was done in line with the market value of the suit parcels, based on international best practices.

60. Again, the petitioner urged the court to find the petition meritorious and to find inter alia, his constitutional right to ownership of land under Article 40 of the *Constitution* having been violated and to order that the suit parcels revert to the estate of his late father.

E. Directions on the Disposal of the Petition

61. This petition, by consent of the parties was disposed by way of viva voce evidence. At the trial, Karl Wehner Claassen, the petitioner, testified as PW1.

62. PW1 adopted his supporting and further affidavits to the amended petition sworn on 16/8/2021 and 13/7/2022, as his evidence-in-chief. PW1 produced as exhibits; a copy of the certificate of title No IR. 1500 as P. Exhibit No 1(a), certified copy of transfer entry No 3 of IR No 2414(LR No 6605/3) as P. Exhibit No 1(b), copy of certificate of title for IR No 2414 as P. Exhibit No 1(c), copy of Grant No IR. 13511/1 as P. Exhibit 1(d), certificate of official search for IR No 6605/1 as P. Exhibit No 1(e), copies of title documents for IR No 9117/1, IR No 490, LR 3036, IR No 292 which resultant LR No 2199 as P. Exhibit No 2(a), (b) and (c), farm map as P. Exhibit No 3, family photos as P. Exhibit No 4, letter dated 29/8/1968, P. Exhibit No 5, letter dated 23/11/2011 as P. Exhibit No 6(a), company search certificate as P. Exhibit No 6(b), letter dated 29/11/2011 from the Companies Registrar as P. Exhibit No 6(c), an application for the land control board consent dated 15/7/1968 as P. Exhibit No 7(a), an application for land control board consent dated 15/7/1969 as P. Exhibit No 7(b), minutes for the land control board meeting held on 12/2/1969 as P. Exhibit No 8(a).

63. Equally, the petitioner produced the land control board meeting minutes for 11/6/1969, as P. Exhibit No 8(b), land control board consent dated 15/8/1969 as P. Exhibit No 9, memorandum of registration of transfer of land for IR No 62654/17 as P. Exhibit No 10(a), letter dated 15/9/1969 as MFI.P-10(b), an application or land control board consent dated 13/6/1970 as P. Exhibit No 10(c), an application for land control board consent dated 13/6/1970 as P. Exhibit No 10(d), land control board consent dated 22/8/1970 as P. Exhibit No 10(e), letter dated 6/7/1970 as MFI-P10(f), payment receipt for land control board application dated 1/12/1970 as P. Exhibit No 10(g), list of directors of the 5th respondent as P. Exhibit No 10(h), letter dated 24/8/2011 as P. Exhibit No 10(i), valuation report dated 12/7/2021 as MFIP No 11 and lastly, official search certificates for LR Nos. 4329/1, 6409/2, 5325, 5324, 5321/6, 2199/2, 2198/2, 6605/2, 5778, 9075, 3036/7, 5779, and 5779/2 as P. Exhibit No 12(a)-(l).

64. PW1 denied that his late father surrendered any parcels of his land to the government, as alleged or at all. On the contrary, PW1 said that what happened was a forceful takeover of the suit parcels of land by

the government without any compensation, as alleged of Kshs 340,000/=. With regard to the 1st, 2nd, 3rd, 4th, and 7th respondents' affidavits, PW1 stated that no evidence was tendered on how the alleged surrender occurred and was allegedly authorized by his late father and compensation paid to him.

65. PW1 told the court that his late father did not write, sign or approve a power of attorney to Mr. Lindsell to transact on his behalf; otherwise, from his official search or enquiries at the Ardhi house in Nairobi, he never came across any such registered power of attorney. PW1 said that he was aware that the initial meeting for a land control board consent aborted for lack of evidence of the sale agreement, or on the purchase price between the seller and the purchasers, going by P. Exhibit No 8(a) and (b). PW1 insisted that it was abnormal that the holder of the power of attorney would be acting for both the seller and the purchaser of the suit parcels of land comprised of Pilkem Estate, going by the land control board meetings minutes. PW1 said that if at all Mr. Lindsell possessed a power of attorney to represent the late father, he would not have been appearing for the purchasers at the same time.

66. PW1 pointed out to the court glaring anomalies in the land control board application forms and the consents, such as the misdescription of the names of the 5th respondent. Equally, PW1 stated that the directors of Kipagenge of Kalenjin Estates Ltd and Kipagenge of Kalenjin Farm Ltd, were different as per the official searches that he had obtained from the companies registry. PW1 said that there were no official records to show that his late father ever received any consideration for the alleged surrender or the sale of his parcels of land; otherwise, he did not execute any surrender documents, sale agreements or transfer forms to that effect. Similarly, PW1 said that there is no evidence that his late father ever appeared before any land control board meetings by the respondents, in regard to the aforesaid t or before the Registrar of Titles on the alleged surrender, transfer and registration of the title deeds in favour of the respondents.

67. Given the preceding, PW1 said that the alleged surrender, sale and transfers were both illegal, irregular, unprocedural and unconstitutional. He said that the occupants of the suit parcels pf land were the respondents. PW1 said that Kandy Farm had 10 parcels of land while Pilkem Estate had 4 parcels of land, all of which were allegedly taken over by the respondents. PW1 said that entry No (9) in P. Exhibit No 1(a) was an alleged surrender to the government of Kenya of his suit parcels of land comprised of Kandy Farm, made on 30/6/1969. He also said that his late father had initially rejected any offer from the Commissioner of Lands made through P. Exhibit No (5), a letter dated 29/8/1968. PW1 said that he had no records made in writing by his late father rejecting the offer.

68. PW1 told the court that until he conducted and obtained the official search certificates in 2010, his late father had no means of knowing of the alleged surrender, sale and transfers to the respondents; otherwise, the respondents had withheld all the said information, particularly after Mr. Lindsell also died in the 1970s. He said that his late father had written several letters to the Lands Ministry before filing the suit in 2013.

69. PW1 added that Mr. Lindsell was at some time his grandfather's advocates. He said that the said advocate who had handled the transmission of the suit parcels of land from his late grandfather's name to that of his late father, after he passed on in 1976. PW1 said that his late father became aware of the alleged surrender of his Kandy Farm in 2010. PW1 said that there was no evidence in his possession showing that his late father had in 1969, made any complaint in writing against the said lawyer for handling the transactions behind his back.

70. In addition, PW1 told the court that his late father's complaint s were directed at the respondents for legally and unprocedurally acquiring his for his 14 parcels of land, while he was out of the country for safety reasons, after threat reportedly communicated to him by Mr. Lindsell in June 1969.

71. Further, PW1 said that he and his late father could not have complained about the illegalities between 1969 and 2010; otherwise, they were was living with fear for threats to their life in particularly, after Mr. Lindsell had disclosed to him that the then Vice President and Minister of Home Affairs and the late President Moi were actively involved in the illegal of forceful evictions and take over of his suit parcels of land. PW1 said that Mr. Lindsell used to be a lawyer based in Kitale until he passed on in the 1970s. PW1 insisted that whereas his late father and Mr. Lindsell had advocate client confidentiality, in this case, it was apparent to his late father that the said advocate was compromised and or abused his advocate client confidentiality to effed the illegal sales and transfers without his consent.

72. PW1 told the court that P. Exhibit No 2(b) did not have his late father's signature. Equally, PW1 said that the person who signed the original transfer forms in favor of the 5th respondent was Mr. Lindsell on account of an alleged power of attorney No IP/A/10734/1, which, according to him, was non-existent or illegal, going by the letter dated 28/3/2023, from the Lands Registry in Nairobi, since it had no folio number indicating when it was legally registered.

73. Again, PW1 admitted that P. Exhibit No 4 had no certificate of electronic evidence, nor does it indicate from which parcels of land it covered. As to P. Exhibit No 6(b), PW1 said that they were printouts he had obtained from the Registrar of Companies, which unfortunately lacked the name of the maker or a certificate of electronic evidence. As regards the 5th respondent's replying affidavit, PW1 said that annexure JKR-3(a)-(d) are correspondences dated 3/6/1970, but were lacking authentication.

74. PW1 added that all the transfers of his father's parcels of land dated 26/8/1970, were invalid since the alleged power of attorney had no folio number to show that it was ever registered. PW1 stated that the discovery of the transfer occurred in 2010, when his late father managed to obtain land records from the lands office. PW1 said that his late father had left the country for fear of reprisal from the members of the 3rd and 5th respondents, who were closely related to the then Vice President and Minister of Home Affairs. PW1 told the court that the information on the threats was relayed to his late father by Mr. Lindsell, who allegedly told him that all his title deeds under his custody had been forcefully confiscated over from his office by people allied to the 3rd and 5th respondents.

75. Luke Kiprono Rotich testified as PW2. He produced MFI-P-11 as P. Exhibit No (11), a valuation report dated 12/7/2021. PW2 told the court that he was contracted by the petitioner to ascertain the current open market value of the suit parcels of land and the loss of user.

76. PW2 told the court that after visiting the suit parcels of land, he considered factors such as the current open market value for sale comparison, to establish the loss of user with effect from 1969 to 2021. According to PW2, the suit parcels of land had various developments on them. Equally, PW2 said that from the visit, he was able to obtain official search certificates for some of the current owners of the suit parcels of land. PW2 said that he arrived at a figure of Kshs 20,139,750,000/=, based on the size of the parcels of land, proximity to the tarmac road, nearness to the Kitale town, loss of user for 52 years, which is 50% of the current open market value per acre. PW2 told the court that he based the value on the highest and the best use of the suit parcels land, which is predominantly a maize farming; otherwise, had he used other uses, the value could have been much higher.

77. PW2 told the court that the cumulative size of the suit parcels of land was approximately 4,500 acres; otherwise, he was unable to visit all suit parcels on the vast land. PW2 said that the methodology he had used was a sales and income approach. He admitted that the suit parcels of land comprised of prison premises situate on LR No 5778. PW2 told the court that his report was silent on the value of the suit parcels of land when the surrender or sale allegedly took place between 1969 and 1970. PW2 said that though the suit parcels of land are owned by many individuals, his report was silent on the

specific developments undertaken by each of the occupants of the suit parcels of land. PW2 said that he based his valuation report on various supporting documents, such as the official search certificate and the RIM maps.

78. PW2 said that he never notified or consulted the respondents before visiting the suit parcels of land to undertake the valuation. He insisted that he had randomly sampled the suit parcels of land; otherwise, it was impossible to visit every parcel of land out of the 4,500 acres, tabulate, verify, ascertain and capture the sizes, developments, and values. PW2 said that his initial report filed before the court had some errors; otherwise, the rates he had used in 2021 remained the same and that the valuation report had adhered to the required standards governing valuations in Kenya and beyond.

F. Lack of Witnesses for the 1st, 2nd, 3rd, 4th, and 7th Respondents

79. The 1st, 2nd, 3rd, 4th, and 7th respondents did not call any witnesses to substantiate their replying affidavit or produce any of the documents attached to the said affidavit. Instead, Ms. Odeyo learned state counsel appearing for the 1st,2nd,3rd,4th and 7th respondents told the court that she had agreed by consent of the other lawyers to rely on the replying affidavit dated 5/5/2022, sworn by Robert Simiyu and filed on 9/5/2022. Learned counsel opted to close the 1st, 2nd, 3rd, 4th, and 7th respondents defence. No law was cited or variation order sought given the earlier directions for the parties to testify *viva voce* and be cross-examined over their affidavits and evidence. As a result, no exhibits were tendered by the Commissioner of Lands, the Registrar of Titles, Commissioner of Prisons as well as the County Government of Trans Nzoia, to oppose the petition or to substantiate their defence.

80. The 5th respondent, called John Kirwa Rotich, as DW1. He relied on a replying affidavit sworn on 21/4/2022 as his evidence-in- chief. DW1 told the court that he was a member and the secretary of Kipagenge of Kalenjin Estates Ltd.

81. DW1 produced an undated memorandum of sale, receipts for the payments, correspondences, fee notes, transfers forms, land control board application forms, minutes, land control board consents and letters all annexed to the replying affidavit namely; annexure marked JKR-1, 2(a)-(g), 3(a)-(f), 4(a)-(c), 5, 6(a) and (b), as D. Exhibit Nos. 1, 2(a)-(g), 3(a)-(f), 4(a)-(c), 5, 6(a) and (b), respectively.

82. In cross-examination, DW1 told the court that the 5th respondent bought the suit parcels of comprised of Pilkem Estate from the deceased, through his known agent and advocate, Mr. Lindsell, who was also the one dealing with the government and the bank in the transactions. DW1 said that the sale agreements between Mr. Lindsell, the deceased and themselves did not involve the government, was based on a willing buyer - willing seller basis. DW1 told the court that all the land control board application forms and the consents towards the transactions were duly and lawfully applied foe, approved, executed and procured and the resultant transfers were procedurally effected by the parties, after which they were presented to the lands registry for processing and registration. DW1 told the court that the lands office, after receiving the necessary documents, acted on them and issued it with the necessary certificates of title or leases. DW1 told the court that the 5th respondent's members or its officials were never summoned to any government office or charged before court on account of alleged fraud or illegality, in obtaining the title deeds to the suit parcels of land individually or in association with the land officers, as a result of a complaint by the petitioner, since 1969 to present.

83. Again, DW1 told the court that the 5th respondent eventually subdivided the suit parcels of land and issued its members with individual title deeds for the respective resultant parcels of land. He did not produce records of recent official searches to show such subdivisions or title deeds.

84. As to whether the exhibits relied upon bear any evidence of payment of stamp duty, signatures or attestations, DW1 admitted that some of the exhibits had visible anomalies. As to D. Exhibit No (1),

DW1 said that he could not ascertain who had prepared, signed and witnessed the same. As to the undated memorandum of sale, DW1 told the court that the maker of the document was Mr. Lindsell. DW1 did not state the person who had processed, attested, executed, registered or witnessed the power of attorney. DW1 said that the power of attorney was on a different page. Equally, DW1 admitted and that the document appeared incomplete, for him to be able to confirm its veracity and authenticity. Additionally, DW1 said that he was unable to verify or ascertain if the undated memorandum of sale had other terms and conditions since it appeared incomplete. DW1 said that he had no CR-12 to confirm the directorship of the 5th respondent, nor did he have its certificate of incorporation before the court, to confirm the date of its incorporation.

85. Further, DW1 stated that as per D. Exhibit No 2(a)-(c), the name indicated was Kipagenge Estate Ltd, whose names unfortunately were not the ones appearing in D. Exhibit No 2(a-c). However, DW1 clarified that the change of name of the company came much later, after the sale of the suit parcels of land had been signed.

86. DW1 said that D. Exhibit No 2(d) did not refer to any sale agreement that was being complied in terms of the payment of the cheque, nor did it refer to the 5th respondent, or its purpose as related to the sale agreement with the petitioners late father; otherwise, it was referring to E.A. Tanning Extracts. DW1 equally admitted that D. Exhibit No 2(e) was referring to Kipagenge of Kalenjin Estates and not the 5th respondent.

87. DW1 told the court that D. Exhibit No 3(a) bore no date, while D. Exhibit No 3(e) did not emanate from the Registrar of Companies confirming the Directorship of the 5th respondent. DW1 said that D. Exhibit No 5 had no IP Number. Equally, DW1 said that he had no evidence that the power of attorney was ever registered, as required by law, since the IP Number was allegedly given to the 5th respondent, by someone else, he could not disclose. DW1 could not ascertain whether the alleged power of attorney was supplied to 5th respondent by Mr. Lindsell.

88. Equally, DW1 told the court that he had no copy of the fresh application forms for land control board consent that were being referred to in D. Exhibit No 6(a). DW1 said that it had been verbally agreed on by the parties that Mr. Lindsell would appear for both the seller and the buyer at the land control board meetings. DW1 admitted that as per P. Exhibit No 7(a) and (b), the 5th respondent had not been incorporated at the time when the land control board application forms and consents were allegedly processed and approved. Equally, DW1 said that the minutes in P. Exhibit No 8(a) did not indicate the correct name of the 5th respondent.

89. Additionally, DW1 admitted that the purchase price as indicated in the transfer forms was Kshs 60,000/=, as opposed to the current amount, with no indication that Mr. Lindsell was appearing for both the buyer and the seller. DW1 said that he had no sale agreement that was signed between the 5th respondent and Mr. Lindsell, indicating or confirming both the sale of the suit parcels of land and the consideration, in view of the deferral of the application for the land control board consent as captured in P. Exhibit No 8(b). DW1 said that the two companies mentioned in the land control board consent application forms referred to one and the same entity. The 6th respondent, despite service, did not participate in the matter.

G. Written Submissions

90. After the close of the defence case, parties were directed to file and serve written submissions by 15/6/2025. None were filed and served from the 5th respondent. The petitioner relies on a written submission dated 30/5/2025, isolating nine issues for the court's determination. It is the petitioner's submission that the petition has met the threshold of a constitutional petition, as set out in *Anarita*

Karimi Njeru v Republic [1979] eKLR and *Mumo Matemu v Trusted Society for Human Rights & 5 others* [2013] eKLR The petitioner submits that it is not true that he cannot file and prosecute the petition for the estate of his late father, as confirmed in Eldoret Civil Appeal No 85 of 2016. Reliance is placed in *Black's Laws Dictionary* 9th Edition, *Ann Kioko & 2 others v Kenya Medical Practitioners & Dentists Council & 5 others; Kenya Film Classification Board (Interested Party)* [2021] KEHC 13444 (KLR), *Jubletabi African Adventure Ltd & another v Christopher Michael Lockley* [2017] eKLR, *Alfred Njau & others v City Council of Nairobi* [1983] eKLR, *Kenya National Commission of Human Rights v Attorney General; IEBC & others (IP)* [2020] eKLR and *Mumo Matemu v Trusted Society of Human Rights Alliance* (*supra*).

91. Further, the petitioner submits that though his late father and family had been in peaceful, quiet, uninterrupted possession and occupation of the suit parcels of land comprised of Kandy Farm and Pelkem Estate since 1945, after his late father declined the request by the 1st respondent on 29/8/1968 and 1969, they were forcefully evicted from Kandy Farm in January 1969 and the Farm was taken over by the 3rd respondent, without any court order. The petitioner further submits that they relocated to South Africa where they resettled, only for his late father to return to Kitale where he found that his entire suit parcels of land had already been invaded by members of the 3rd and 5th respondents. The petitioner submits that the process of acquiring official information and or records from the government officers was not easy or successful until 2010, when he obtained some of the documents, which showed that there was active assistance or participation of the 1st, 2nd and 5th respondents and other government departments to transfer the suit parcels of land by the respondents, but not limited to including incorporating the 5th respondent solely to acquire Pilkem Estate between 12/2/1969 and 1970.

92. Moreover, the petitioner submits that upon establishing the fraud, illegalities and the pattern used to acquire the suit parcels of land, his late father wrote to the then Minister for Lands, Hon. James Orengo, for intervention. The petitioner submits that under Article 27 of the *Constitution*, every person is equal before the law and has a right to equal protection and the benefit of the law, including the enjoyment of all rights and fundamental freedoms, equal treatment and freedom from discrimination by the state on account of race, sex, pregnancy, marital status, age, religion, beliefs, culture, dress, language or birth.

93. The petitioner submits that Article 40(3) of the *Constitution* provides that, the state shall not deprive any person of property of any description unless the deprivation is for a public purpose or in the public interest and is carried out under the *Constitution* or an Act of Parliament. The petitioner based on Article 27 of the *Constitution* submits that, his late father and the estate was discriminated against due to race and the suit parcels of land comprised of Pilkem Estate was take up by the 5threspondnet, formed by people of a particular tribe, who then belonged to the ruling party, whereas the suit parcels of land comprised of Kandy Farm was forcefully acquired by the state under the 3rd respondent, thereby depriving his late father the right to acquire and own the land as provided under Article 40 of the *Constitution*. The petitioner, therefore, submits that he has pleaded the petition with clarity, precision and specificity as provided in Mumo Matemu v Trusted Society of Human Rights Alliance (*supra*).

94. On the alleged surrender, the petitioner submits that whereas Section 2 of the *Registration of Titles Act* (repealed), does not define the word surrender, the *Black's Law Dictionary* 7th Edition page 1458 defines the same as the return of an estate to the person who has a reversion or remainder, to merge the estate into a larger estate, tenants relinquishing possession before the lease has expired and or allowing the landlord to take possession and treat the lease as terminated.

95. The petitioner, relies on the definition by Lord Millet in *Barret v Morgan* [2000] 2 AC 264, that as surrender is as an assurance by which a lesser estate is yielded up to the greater, before its operation term, who accepts the surrender and that the surrender is ineffective unless the landlord consents to accepting it and therefore, is consensual in the fullest sense of the term.

96. The petitioner invokes Robert Megarry & William Wade, *The Law of Real Property* (Sweet & Maxwell;2012, 8th ed.), page 851, that a surrender is a consensual transaction between the landlord and the tenant, and therefore, is dependent for its effectiveness on the consent of both parties. The petitioner relies further on Martin Dixon, Principles of Land Law, (Cavendish Publishing; 2002, 4th ed.) at page 237, that a surrender is a consensual act between the landlord and the tenant.

97. Accordingly, the petitioner submits that any lawful surrender must abide by Section 44(1) of the *Registration of Titles Act* (repealed), in order for the interest of the lessee in the land to vest in the lessor or for the lessee's interest to extinguish. The petitioner submits that Section 58 thereof required that an instrument of surrender that was to be registered and attested. In this case, the petitioner submits that the 1st, 2nd, 3rd, 4th, and 7th respondents in the replying affidavit of Mr. Simiyu claimed was that LR No 5778(IR. 1500), LR No 6605/2(IR. 2414), LR No 9075 (IR. 13511/10) and LR No 3036/7 (IR. 7117/1) were allegedly surrendered by his late father on 30/6/1969 for a consideration of Kshs 340,000/=. The question that follows, according to the petitioner is whether the alleged surrender as entered in the register as per P. Exhibit No 1(a), complied with Section 44(1) of *Registration of Titles Act* (repealed).

98. The petitioner submits that the provisions of Section 44(1) thereof, as interpreted in *Mwinyi Hamisi Ali v Attorney General* (*supra*), *Fanikiwa Limited v Sirikwa Squatters Group & 95 others* [2021] KECA 307 (KLR) at the Court of Appeal and in *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* [2023] KESC 105 (KLR), page 112, that the consensual nature of a surrender is the cardinal ingredient of a surrender of a lease, for its validity and legality.

99. The petitioner, guided by the above caselaw, submits that there was no consensual, legal or valid, surrender, going by the exhibits alluded to above by the respondents, for there is no evidence that his late father, formally endorsed or executed any surrender instruments in his capacity as a lessee and neither did the government, as the lessor, endorse the said surrender the documents.

100. Further, the petitioner submits that there was no endorsement by any witness to the surrender and that the same was also not attested in compliance with Section 58 of the *Registration of Titles Act* (repealed). Given the centrality of the consensual nature of any surrender, the petitioner submits that where such a consent as in this case was not lawfully procured or given by the lessee and where there was no endorsement to be bound by such surrender, it does not matter whether the word "surrendered" is registered or entered in the titles register and registered, otherwise the registration would be null and void for non-compliance with the law.

101. The petitioner submits that the interest in the leases held by the late father did not, in the circumstances, pass to the government in the absence of any consent, attestation, witness or endorsement in the titles register.

102. As to the legality of the sale agreement between the 5th respondent and the deceased, the petitioner based on the averments in paragraphs 8, 9 and 10 of the replying affidavit by the 5th respondent, submits that the undated memorandum of sale produced by DW1 lacks ingredients of a sale agreement as required by Section 3(2) of the *Law of Contract Act*, such as the date, particulars of the subject matter that was being bought, it has no attestation, the signatures of the key parties were missing and the

alleged schedule is not attached. Reliance is placed on *Peter Mbiri Michuki v Samuel Mugo Michuki* [2014] eKLR.

103. As to consideration, the petitioner submits that D. Exhibit Nos. 2(a), (b), (d), (e), (f) and (g) and 4(a)-(c) had serious discrepancies including the nature and the purpose of the alleged payments, in relation the sale of the 4 parcels of land, leaving doubts as to whether the alleged consideration was ever paid and if at all it was ever made, whether it was paid to the deceased. Further, the petitioner submits that the total sum in the receipts produced by DW1 falls short of Kshs 349,800/= alleged to have been paid as a deposit. The petitioner submits that there was no evidence tendered DW1 to show that the 5th respondent ever paid to the sellers the balance of Kshs 200,000/=, as indicated in the undated memorandum of sale.

104. Regarding the power of attorney, the petitioner submits that as it was pleaded in the petition, efforts to confirm its existence at Ardhi House of a registered power of attorney yielded a letter dated 28/3/2023 from S.W. Kirera, Land Registrar, that cited IP/A10734/1 had no folio number to support the legality and the veracity of the document. The petitioner submits that under Section 50 of the *Registration of Titles Act* (repealed), no copy of the executed power of attorney was presented by the respondents alleging that the deceased had donated a power of attorney to Mr. Lindsell, by way of an executed power of attorney, by producing a duplicate or an attested copy that was registered and or deposited with the Registrar of Titles who, based on in went on to enter in the register of titles, a memorandum of the particulars thereon, including the date and hour as to when the same was deposited, as required under Sections 44, 50 and 51 of the *Registration of Titles Act*(repealed).

105. The petitioner submits that in the exhibits produced as P. Exhibit. No 1(a)-(e), and P. Exhibit. No 2(a)- (c), there is no evidence of the registration of any power of attorney. Again, the petitioner submits that a power of attorney is a legal document that allows an individual or a company to give someone else the authority to decide or undertake certain on their behalf. The petitioner submits that a power of attorney being a legal document, has to be lawfully donated, executed, acquired, and registered, especially if it relates to an interest in land as per Section 4 of the *Registration of Documents Act*. The petitioner submits that a power of attorney must, of necessity, contain the full names and addresses of both the donee and the donor, signed by both of them and witnessed or attested by an independent witness.

106. Relying on *Francis Mugo Mwangi v David Kamau Gachago* [2017] eKLR and *Kamau v City Council of Nairobi & another* [2024] KEELC 5461 [KLR] (24th July 2024) (Judgment), the petitioner submits that in the absence of proof of the existence of a registered power of attorney, it cannot be said by the respondents that Mr. Lindsell was a donee of the alleged power of attorney by the deceased. The petitioner submits that Ref. No IP/A10734/1 does not in itself amount to proof of a lawful power of attorney, in the absence of a folio number supporting it, or at the very least, a duplicate held by the Registrar of Titles.

107. Further, the petitioner submits that at paragraph 28 of the petition, he averred that he was not aware of any gazette notice of the government's intention to acquire the suit parcels of land under Section 6(1) of the *Land Acquisition Act* (repealed), hence the acts of the 1st, 2nd, 3rd, 4th and 7th respondents did were tantamount to compulsory acquisition of the suit parcels of land without due process, in breach of Article 40(1) of the *Constitution*. Reliance is placed on *Attorney General v Zinj Ltd* [2021] KESC 21 [KLR] (CIV) (3rd December 2021) (Judgement).

108. The petitioner submits that from the applications for land control board consents and the letters of consent relied upon by the 5th respondent, it is evident that neither were they executed by any of the representatives of the 5th respondent, nor were they signed by his late father. Having demonstrated

that the alleged power of attorney held by Mr. Lindsell had no force in law to bind the deceased and given that the 5th respondent had not been incorporated 1969, to have the capacity to undertake the transactions and the resultant consents in law. The petitioner submits that the said application forms were irregular, illegal, fraudulent, unprocedural and had no legal effect, otherwise a land control board consents would not have been issued to a non-existent entity or signed by a person lacking capacity to bind his late father. Reliance is placed on *Victor Mabach & another v Nurturn Bates Ltd* [2013] eKLR, and *George William Omondi & another v Co-operative Bank of (K) Ltd & others* [2016] eKLR, that the 5th respondent had not acquired persona jurisdica, to be given the consent and or had the capacity to execute any valid agreements or transfers in law as of 12/2/1969, 1/6/1969, and 18/7/1969.

109. As to whether the 7th respondent validly acquired the 4 suit parcels of land, relying on the official search certificates for LR Nos. 3036/7, 5779/1, 5779/2, 2198/2, 2199/2, 5321/6, 5324, 5325, 6409/2 and 4329/1, the petitioner submits that how LR No 3036/7 was purported to have been surrendered to the government on 30/6/1969, was converted and became registered in the name of the 7th respondent remains a mystery, since the 7th respondent did not adduce any supporting documents to explain how it became the registered owner. The petitioner submits that from the official search certificates which have not been refuted, the 7th respondent is the registered owner of LR No 5779/1, 5779/2, 2198/2, 2199/2, 5321/6, 5324, 5425, 6409/2, and 4229/1, which formed part of the Pilkem Estate.

110. Regarding the 6th respondent, who failed to enter appearance or attend the hearing, the petitioner submits that the official search certificate, annexure KWC12(a)-(l) produced as P. Exhibit. No 12(a)-(l), shows that he is the registered owner of LR Nos. 4329/1, 6409/1, 6325, 5324, 5321/6 and 2198/2, therefore, in the absence of any response to the petition and or evidence to the contrary, the registration and subsequent transfer were irregular. Reliance is placed on *Motex Knitwear Ltd v Gopitex Knitwear Mills Ltd*, Nairobi Milimani HCCC No 834 of 2002, and in *Edward Muriga (through Stanley Muriga) v Nathaniel D. Schulter* CA No 23 of 1997.

111. The petitioner submits that since he has pleaded and proved breach of the right to property under Article 40(3) of the *Constitution*, by showing that the purported surrender, sale, transfer, registration and occupation of the suit parcels of land by the respondents were irregular, illegal, unprocedural and in violation of Articles 22(3), 22(1), 27, 23(3)(e) and 40(a) and (b), he is entitled to declaratory orders of breach, damages for deprivation of 4,931.3 acres, special damages of Kshs 22,190,850,000/=, as per the valuation report, general damages for violation and continuous trespass, interests and costs. Reliance is placed on *Attorney General v Zinj Ltd* (*supra*), *Eliud Njoroge Gachiri v Stephen Kamau Nganga* [2018] eKLR, *Fleet Wood Enterprises Ltd v Kenya Power and Lighting Company* [2015] eKLR, and *Kenya Power and Lighting Company v Fleetwood Enterprise Ltd* (2017) eKLR.

112. The 1st, 2nd, 3rd, 4th, and 7th respondents rely on written submissions dated 13/6/2025. It is submitted that the petition is fundamentally flawed both in fact and in law, since going by the affidavit in reply of Robert Simiyu dated 5/5/2022, the transactions involving suit parcels of land comprised of Kandy Farm, show that they were surrendered to the government of Kenya and that the surrender, sale and transfer suit parcels of land comprised of Pilkem Farm to the 5th respondent in 1970 were voluntary, procedural, regular and effected with the knowledge and consent of the deceased.

113. On the alleged violation of fundamental rights and freedoms, 1st, 2nd, 3rd, 4th, and 7th respondents submit that the petition lacks factual basis or evidentiary proof of any alleged violation of rights, since the deceased voluntarily dwelt with the subject properties and was duly compensated or paid consideration for the same. It is further submitted that the petition is not only pleaded without precision, but also does not demonstrate how the alleged rights and freedoms were breached and or does not establish a

causal link between the respondents and the alleged violations of rights, coupled with cogent evidence of the breach of any alleged rights under Articles 21, 23, 27 and 40 of the *Constitution*.

114. On the surrender of the suit parcels of land comprised of Kandy Farm, 1st, 2nd, 3rd, 4th, and 7th respondents submit that the same was valid, lawful, procedural and regular, given that the remainder of the leaseholds were surrendered by the deceased lessee on 30/6/1969, a surrender registered against the titles registered and was followed by a payment effected through the appointed agent, who received the consideration of Kshs 340,000/=. The 1st, 2nd, 3rd, 4th, and 7th respondents submit that the transaction in question was not a compulsory acquisition under the repealed *Land Acquisition Act*, but was a voluntary surrender of the leaseholds under Section 44 of the *Registration of Titles Act* (repealed), where Mr. N.H. Claassen exercised the option after successful negotiations and full consideration was paid; hence, the surrender was lawfully executed, formally registered and entered against each of the title registers, thereby converting the land parcels to public land and effectively extinguishing the proprietary interests of the portioner's late father on the said titles. Reliance is placed on *Mwinyi Hamisi Ali v Attorney General* (*supra*).

115. Accordingly, 1st, 2nd, 3rd, 4th, and 7th respondents submit that the petitioner has failed to adduce sufficient evidence that the surrender process was obtained by fraud, duress, or misrepresentation in contradiction to the written instruments of surrender as per Section 97 of the *Evidence Act*. The 1st, 2nd, 3rd, 4th and 7th respondents submit that, since what occurred between them and the petitioners late father was a surrender, the petitioner cannot purport to rely on the protection under compulsory acquisition provisions, after the government lawfully accepted the surrender, paid full consideration to the petitioners late father and subsequently gazetted suit parcels of land comprised of Kandy Farm as part of Kitale Prison Farm. Reliance is placed on *Wreck Motors Enterprises v Commissioner of Lands & others* [1997] eKLR and *Isaac Gathanga Wanjohi & another v Attorney General & others* [2012] eKLR.

116. Similarly, the 1st, 2nd, 3rd, 4th, and 7th respondents submit that the petitioner is guilty of laches and acquiescence that bar filing of stale claim as held in *Wreck Motor Enterprises v Commissioner of Lands* (*supra*), and *Taireni Association of Mijikenda v Patel & 5 others* (Environment & Land Petition E007 of 2023) [2025] KEELC 431 (KLR) (5 February 2025) (Ruling). It is submitted that official public acts, unless proven otherwise, are presumed lawful as held in Municipal Council of Mombasa v Republic Exparte; Umoja Consultants Ltd [2002] eKLR.

117. Regarding the sale and transfer of the suit parcels of land comprised of Pilkem Estate, 1st, 2nd, 3rd, 4th, and 7th respondents submit that the same was handled through an authorized agent of the deceased under a power of attorney, where there were valid application for land control board consents, grant of the land control board consents, payment of consideration, registration of the transfers and subsequent issuance of certificates of title for LR Nos. 2192/2, 3038, 2199/2, 4322/1, 5518, 5324, 6409/2, 5779/1, and 5779/2, through the lawful participation of the land control board members who have not been joined to the petition. Again, 1st, 2nd, 3rd, 4th, and 7th respondents submit that the decision of the land control board members cannot be challenged unless by way of a judicial review, where the land control board members are sued, as held in *Republic v Land Control Board Nandi & another Exparte Jeremiah K. Cheruiyot* [2007] eKLR, on the right to be heard under Article 50(1) of the *Constitution*.

118. The 1st, 2nd, 3rd, 4th, and 7th respondents submit that they were not parties to the sale and transfer between the deceased and the 5th, 6th and 7th respondents and neither were they agents of the said respondents, save in the lawful role they played over the lodged instruments, that the dutifully registered upon verifying the existence of the necessary documentation. Reliance is placed on *Republic v Chief Land Registrar & another Exparte Yusubia Keru* [2015] eKLR They 1st, 2nd, 3rd, 4th, and 7th respondents also submit that the surrender and the transfer processes took place in 1970 and given the general rule,

constitutional petitions have no time limitation and a stale or otherwise ordinary civil land claim of this nature cannot be filed under the guise of a constitutional petition as held in *Kenya National Highway Authority v Shalien Masood Mughal & 5 others* [2017] eKLR.

119. Further, the respondents submit that this petition raises mixed questions of law and fact that are best handled through an ordinary civil suit. Additionally, it is submitted that the reliefs sought are likely to affect third parties who are not parties before the court and therefore, no justification has been offered for the inordinate delay or reasons for the court to exempt the doctrine of limitation. Reliance is placed on *Bosire Ogero vRoyal Media Services Ltd* (2015) eKLR, *Sang & another v Choge & others* [2025] KEELC 3367, *Gerald Njoroge v Commissioner of Lands & another* [2016] eKLR, *Chernel & 3 others v Ministry of Lands and Physical Planning & 4 others* [2023] KEELC 18220 (KLR) and *Wreck Motors Enterprises v Commissioner of Lands* (*supra*).

120. Further on the relief sought, the 1st, 2nd, 3rd, 4th and 7th respondents submit that the petition essentially seeks for the cancellation of title deeds and for eviction of current occupants, among them a gazetted part of the suit parcels of land being Kitale Prison Farm utilized for public purpose. For instance, it is submitted that LR Nos. 5321, 5351, and 5548 have been subdivided into many parcels of land, which if nullified, are likely to affect innocent third parties, contrary to Article 47 of the *Constitution* as read together with the *Fair Administrative Action Act*.

121. Relying on *Isaac Gathungu & another v Attorney General & others* [2012] eKLR, where the court declined to invalidate titles, the 1st, 2nd, 3rd, 4th, 7th respondents urge the court on account of public interest, innocent third party purchasers' rights and based on time limitation, to decline to issue the reliefs sought otherwise, the reliefs would be legally untenable, practically unenforceable, grossly prejudicial and against public interest. Reliance is placed on *Bonde v Wilson Gachanja & others* [2004] eKLR, *Sirikwa Squatters Group v Commissioner of Lands & 9 others* [2017] eKLR and *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* [2014] eKLR, on the proposition that courts must be cautious to issue orders likely to have disproportionate impact on the public and where there is an overriding public good. In this case, given that the suit parcels of land comprised of Kandy Farm now host houses, farms and businesses, which if after adverse orders are given would create endless litigation and displacement, the court is urged to decline issuance of such reliefs.

122. The 1st, 2nd, 3rd, 4th, and 7th respondents submit that fraud and mistake were neither pleaded nor proved to the required standards as held in *Arthi Developers Ltd v West End Butchery Ltd & others* [2015] eKLR Regarding the valuation report dated 12/7/2021, it is submitted that the same was undertaken unilaterally without any notice and in total disregard of the *Valuers Act*, in that it does not disclose the methodology used, rendering it not only speculative but also unverifiable.

123. Further, the 1st, 2nd, 3rd, 4th, and 7th respondents submit that the evidence of PW2 was at best baseless, since he failed to individually value the over 5,000 acres as at the date of the alleged deprivation in 1970; it has unsupported market assumption by either data or market justification, rendering it exaggerated, unsuitable and lastly; the presence of third party occupiers on the suit parcels of land who were not specifically identified or classified yet they will be adversely affected by the petitioner's incompetent claim or reliefs.

124. The 1st, 2nd, 3rd, 4th, and 7th respondents fault the valuation report for material inconsistencies that go to its authenticity and credibility. For instance, they urge the court to find that the valuation report filed alongside the pleadings is different from what PW1 tendered before the court as P. Exhibit No 11, with no explanation for the same, or leave of court sought to introduce it late or by way of a supplementary affidavit to justify the discrepancy. The 1st, 2nd, 3rd, 4th, and 7th respondents submit that the valuation

report and the conduct of the petitioner amount to trial by ambush and have interfered with the integrity of the court record, raising suspicions that it is fabricated, tailored or manipulated to seal the evidentiary gaps or and compromise professionalism. Reliance is placed on *Kenya Power & Lighting Company v James Njuguna Mwaniki* [2022] eKLR, that a party cannot present or file pleadings and present a different one at the hearing; otherwise, such conduct defeats transparency and is against the rules of evidence and fair hearing.

125. The 1st, 2nd, 3rd, 4th, and 7th respondents submit that under Section 35(4) of the *Evidence Act*, secondary or substituted documents are only admissible under certain exceptions. Therefore, the 1st, 2nd, 3rd, 4th, and 7th respondents submit that the late production of a materially different valuation report has a prejudicial effect that outweighs its probative value as held in *Rawal v The Mombasa Hardware Ltd* [1968] EA 392. The 1st, 2nd, 3rd, 4th and 7th respondents submit that their evidence as tendered shows that the suit parcels of land comprised of Kandy Farm were voluntarily surrendered and compensated for in 1970. Further, the 1st, 2nd, 3rd, 4th, and 7th respondents submit that the suit parcels of land comprised of Pilkem Estate were validly transferred on a willing buyer, willing seller basis to the 5th respondent and therefore, it is not true that the petitioner's constitutional rights and freedoms were violated, rendering the reliefs sought and the amended petition dated 16/8/2021 incompetent, procedurally flawed and lacking merits.

H. Issues for Determination.

126. The court has carefully gone through the pleadings, evidence tendered, written submissions and the law. The issues calling for my determination are:

1. If the petitioner has locus standi to bring this petition.
2. If the petition is time or statute-barred or filed after unreasonable delay.
3. If the petition meets the constitutional threshold and raises constitutional questions.
4. If the petitioner has pleaded and proved breach of his constitutional rights and freedoms.
5. If the petitioner is entitled to the reliefs sought.
6. Whether the respondents have proved their defence that the petitioner's late father willingly, voluntarily and consciously surrendered or sold and transferred the suit parcels of land for a consideration to the government and the 3rd, 5th, 6th & 7th respondents.
7. What is the order as to costs?

I. Analysis and Findings

127. Time without number, courts have held that written submissions and pleadings cannot replace or amount to evidence. Parties are also bound by their pleadings and issues for the court's determination flow from those pleadings. See *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule & 3 others* (2014) eKLR and *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR A party, therefore, cannot enlarge its case or defense through written submissions.

128. Having said the above, the history of this petition will show that the initial petition was filed by the petitioner's late father in 2011 and upon his demise, the petitioner was joined as a son and the

legal representative of his late father's estate. Subsequently, the petition was challenged on account of capacity, struck out and an appeal was preferred at the Court of Appeal.

129. In *Karl Wehner Claassen v Commissioner of Lands & 4 others* [2019] eKLR, the Court of Appeal observed that under Articles 22(1) and 258(1) of the *Constitution*, the right to institute court proceedings, is an undoubted "chose in action" which occurs when a right or fundamental right or freedom in the Bill of Rights has been denied, violated, infringed or is threatened. The court observed that the deceased petitioner's claim under Article 40(1) on breach of the right to property vested in him and survived after his death for the benefit of the estate under Section 2(1) of the *Law Reform Act*. The court held that such a "chose in action" could be continued by the legal representative.

130. The court also held that locus standi under Articles 22 and 258 of the *Constitution* includes a person acting in his interest and those acting in public interest. The court said that under our jurisprudence, the right to enforce fundamental rights and freedoms may be exercised by a person in his interest and also as a collective obligation of every person to defend the *Constitution*. The court said that the deceased petitioner's claim for compensation for the alleged deprivation the right to own of several suit parcels of land worth Kshs 14,000,000,000/=, survived for the benefit of his estate. The said judgment of the Court of Appeal was not appealed against. Consequently, the issue of locus standi raised by the respondents is not only academic but also *res judicata*.

131. The next issue is whether the petitioner was indolent, complacent and filed a statute-barred petition or filed the petition after an unreasonable delay. Section 3(1) of the *Public Authorities Limitation Act* provides that no proceedings founded on tort shall be brought against the government of Kenya or a local authority after the end of 12 months from the date on which the cause of action accrued. The respondents urge the court to find the petition statute barred, stale, and an abuse of the court process, or unreasonably filed after the expiration of 50 years since the cause of action accrued.

132. In *Joan Akinyi Kabesellah & others v Attorney General*, Petition 41 of 2004, the court cited *Dominic Arony Amollo v Attorney General*, Nairobi High Court Misc. Civil Case No 1184 of 2003 (OS) and *Otieno Mak'Onyango v Attorney General*, Nairobi HCC No 845 of 2003, the court held that there is no limitation of time on a constitutional petition. In *Rawal v Rawal* [1990] KLR 275, the court observed that the limitation clause is aimed at preventing a plaintiff from prosecuting stale claims and to protect a defendant, after he had lost evidence for his defence from being disturbed after a long lapse of time. See also *Kiluwa Limited & another v Business Liaison Company Limited & 3 others* (Petition 14 of 2017) [2021] KESC 37 (KLR).

133. In *Janmohammed (SC) (Suing as the Executrix of the Estate of the Late H.E. Daniel Toroitich Arap Moi) & another v District Land Registrar Uasin Gishu & 4 others* (Petition 17 (E021) of 2023 & 24 (E027) of 2022 (Consolidated)) [2024] KESC 39 (KLR) (2 August 2024) (Judgment), the respondent's claim was over an alleged illegal and arbitrary deprivation of private property under Articles 40 and 47 of the *Constitution*. He had sought for compensation, cancellation of titles for land he had used for 34 years. An objection had been raised on limitation of time, for acts allegedly committed in 1983, in the knowledge of Noah Chelugui, indefeasibility of title, failure to complain to any government office through registering a caution, double compensation, outrageous valuation report and on the doctrine of avoidance.

134. The Supreme Court held that as per *S.K. Macharia v Kenya Commercial Bank & others* [2012] eKLR, the *Constitution* unlike an ordinary statute, could be applied retrospectively depending on the circumstances of each case, and that a court under Article 40(3) and (4) of the *Constitution*, as held in *Town Council of Awendo v Onyango & 13 others; Mohamed & 178 others (Interested Parties)* [2019] KESC 38 (KLR), may fall back to the *Constitution* 2010, in determining a dispute that may have

crystallized before 2010. See also *Kiluwa Ltd & another* (*supra*) and *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* [2023] KESC 4 (KLR).

135. As to whether the respondents should have filed an ordinary instead of a constitutional petition, the court held that the preliminary objection was being raised too late in the day. On limitation of a claim based on Article 40 of the *Constitution*, the court cited *Wamwere & 5 others v Attorney General* [2023] KESC 3 (KLR), where the court held that whereas the general rule is that a limitation of time in matters constitutional petitions on alleged violation of Bill of Rights is not applicable, the principle is not absolute and that courts nevertheless have to consider whether there has been inordinate delay in lodging such a claim, on case to case basis, considering factors such as the nature of the right, time taken to ventilate the alleged violation and whether a claimant may be riding on a mischief. The alleged purchase had occurred in 1965; the subdivisions in 1983, the court held that the cause of action arose in 1983 following the subdivisions. The delay between 1983 - 2014, according to the court, was inordinate and warranted a credible or reasonable explanation.

136. Applying the foregoing caselaw, a cause of action refers to an act on the part of a defendant that gives a cause of complaint to the plaintiff. See *Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & another* [1982[KLR What then is the cause of action pleaded in the amended petition? It is to be found in paragraphs 15-45 of the amended petition dated 16/8/2021. The facts are set out in paragraphs 46-55. It relates to any alleged forceful eviction, displacement, invasion of the land and the deprivation of the right to use, occupy and enjoy the suit properties from 1969 to the present. In this petition, the petitioner, after disclosing his cause of action, proceeded to give the circumstances under which his late grandfather acquired the suit parcels of land, passed on and the suit parcels were transmitted into the name of his late father, to when his family and him were allegedly forcefully evicted therefrom and the suit parcels of land were taken over by the 3rd, 5th, 6th and 7th respondents.

137. The petitioner's late father had sworn the initial supporting affidavit on 7/1/2012, explaining the circumstances leading to his family's abrupt departure from the country after the eminent and credible threats, following his refusal to accept a request to acquire the suit parcels of land comprised of Kandy Farm by the government for the expansion of the Kitale Prison land in 1968, allege communicated through his advocate. Upon coming back to the country in 1969, the petitioner pleads that his late father found that all the suit parcels of land had already been invaded and taken over by the 3rd, 5th, 6th and 7th respondents. He thus painstakingly took time to trace and obtain valid or relevant documents to sustain his claim from the very government offices, he has now sued. The petitioner also explained that the alleged agent, Mr. Lindsell, also passed on in the 1970s, hence he was unable to obtain or acquire any documents from his offices, since it had been closed down on time or at all.

138. In *Wellington Nzioka Kioko v Attorney General* [2018] eKLR, the court held that there must be a plausible explanation for the inordinate delay, otherwise there will be a travesty of justice. The court added that there is a rebuttable presumption that if you do not seek redress within a reasonable time, there is a possibility that you have not suffered any loss from the acts complained of.

139. In *Edward Akongo Oyugi & others v Attorney General* [2019] eKLR, while addressing a delay of 32 years, the court cited with approval *Eliud Wefwafwa Luucho & 3 others v Attorney General* (2017) eKLR, that the respondent had a duty to adduce evidence by either an affidavit or otherwise to explain how he was prejudiced as a consequence of the delay, such as loss of crucial evidence or witnesses.

140. The court also held that in considering such alleged delay, judicial notice could be taken on the difficulties which prevailed at the period of the alleged violation, making it difficult or impossible for the aggrieved person to file such cases against the government, until the 2010 *Constitution* opened doors of justice, thereby making it possible for the litigants to file such cases.

141. In this petition, the petitioner has also pleaded that there was impropriety both in the conduct of the stronger party in the transactions and that the transactions were against equity and good conscience. He seeks restitution saying that he was subjected to undue pressure to accept the government offer, there was inequality or discrimination on account of race or nationality.

142. The petitioner pleads that the alleged sale and transfer or surrender of the suit parcels of land were non-voluntary or done without his knowledge or approval, that the surrender if at all it happened was not for his benefit but happened to his detriment, there was illegitimate pressure or compulsion or unconscionable coercion or lack of choice and that if his lawyer did it on his behalf, there was a tortious act or breach of fiduciary relationship or breach of confidence.

143. In *Madhupaper International Ltd & another v Kenya Commercial Bank Ltd & 2 others* [2003] eKLR, the court held that illegitimate threats are known as implied threats and count as duress. In case of a compulsion, a threat which consists of the compulsion may be expressed or implied and that duress in law is broader than the layman's concept of it as criminal blackmail. As to economic duress, the court held that it happens whereby the threat is the overwhelming or the predominant cause of the plaintiff's action, or the party intentionally submitted on realizing that there is no other practical choice open to him. The court added that this kind of duress occurs if the consequences of the refusal would be serious and immediate, so that there is no reasonable alternative open.

144. The court said that it is well known that any pressure which the law does not regard as legitimate, is wrongful and amounts to duress, such as a threat to life and limb. The court also added that the frequency and manner or occasion of making any such threat, calculated to subject a party or members of his family or household to alarm, distress, or humiliation. The court added that a payment made under pressure, necessity to prevent some interference, or withholding of a legal right is compelled and not voluntary. Again, the court said that the law protects persons from innocent exploitation. My finding under the circumstances is that the petitioner's pleaded cause of action is proper before the court. The petitioner has given a reasonable explanation for the alleged delay in procuring government documents that were not in his custody till 2010. The respondents have not rebutted on how the alleged inordinate delay has prejudiced them. Equally, none of the respondents has denied the nationality of the petitioner and his late father, including his only contact, the late Mr. Lindsell.

145. In this petition, what has been pleaded is forceful eviction, continuing trespass, invasion, detinue and breach of right to ownership of land and discrimination on account of race. The respondents have admitted that the transactions leading to the issuance of title documents were not conducted directly with the petitioner's late father, but through his alleged authorized agent. The question of whether the petitioner's father freely accepted the alleged surrender, sale or transfer and or lawfully gave his consent or approval to his advocate to surrender, sell and or transfer the suit parcels of land, relates squarely to his explanation for the inordinate delay. Judicial notice is to be taken on the government policy relating to white settlers after 1963. The manner of dealings with the white highlands to resettle the landless was well known. It was part of Kenya's constitutional transition in the run-up to independence at the Lancaster House conference. The *Foreign Investment Protection Act*, 1963 and Section 75 of the retired Constitution provided for the protection of such settlers' rights on a willing-buyer, willing-seller.

146. What the court is faced with is a constitutional tort of trespass to private land at the instance of the respondents, claiming that the alleged surrender and or the voluntary sale, transfer and registration of the same through the petitioner's allegedly authorized agent. The respondents cannot be heard to complain of any unreasonable delay when none of them dwelt directly with the petitioner's late father or reached out to him to ascertain, verify and or seek his confirmation that he was aware of and had

approved both the alleged surrender, sale and transfer of either the suit parcels of land comprised of Kandy Farm and the Pilkem Estate. None of the respondents have denied that the petitioner's late father had reportedly turned down the government's offer and was of South African nationality, who had heavy investment in Kenya as seen in the photographs and the valuation reports before court,

147. The petitioner's late father had a choice whether to accept or reject the government's offer. The question of whether he knew of the alleged offer, consideration, sale, surrender, terms and conditions or the benefit that he was being offered through his advocate and whether he was given an opportunity by the respondents to endorse, approve, consent or exercise his freedom to transact in the transactions that the respondents were having with his lawyer, and if so, if he was given a chance and he elected to approve the transactions in writing or otherwise, or handed over vacant possession as a result of the transactions and whether the respondents are lawfully on the suit parcels of land, cannot be termed as a statute barred claim, otherwise; my finding, based on the law is that continuing trespass or invasion of private property has no time limitation.

148. The next issue is whether the petition meets the constitutional threshold. Constitutional petitions must be pleaded with clarity, precision, and specificity. Rule 10 of the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, (2013), (Mutunga Rules), lists the seven key contents of a petition. In *Communication Commission of Kenya v Royal Media Services & others* (*supra*), the court held that a petitioner must show the rights allegedly infringed, the basis of his grievance, the linkage between the constitutional provisions and the manifestation of the contravention or infringement. A petition must also disclose a constitutional question or issue, or matter.

149. In *Minister of Safety and Security v Luiters* [2007] 28 ILJ P33 (CC), it was held that in determining whether an argument raises a constitutional issue, the court is not concerned strictly on whether the argument will be successful, but whether it forces the court to consider constitutional rights and values. In *Turkana County Government & others v Attorney General & others* [2016] eKLR, the court observed that statutory violations cannot give rise to constitutional violations from the material before me. I think the petition is pleaded with precision, clarity and specificity. It is as a result of this that the respondents had an opportunity to respond to it extensively without seeking better particulars. The questions, issues or matters raised herein do not derive answers from any statute but from the *Constitution* itself. In addressing the issues, the court will have to interpret the *Constitution* and not the statute. See *Fredericks and others v MEC for Education and Training Eastern Cape and others* (CCT 27/01) [2001] ZACC 6; 2002 (2) BCLR 113; 2002 (2) SA 693 and *R.C. v KKR* [2021].

150. The issues raised cannot be resolved in an ordinary suit, or by another forum apart from a constitutional court. An alleged violation of Article 40 of the *Constitution* in Sub-Article 3, b (ii) expressly grants any person who has a right or interest in or over that property a right of access to a court of law.

151. The respondents have not pointed out any other alternative forum that is capable of or has the efficacy in offering constitutional reliefs to the petitioner for the alleged breach or infringement of his constitutional rights. See *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties)* (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment).

152. The respondents have urged the court to find that this is an ordinary land dispute christened a constitutional petition to avoid the statute of limitation of actions; that where the petitioner was indolent and acquiesced to the transactions, hence should decline jurisdiction. In *Diasproperty Ltd & another v Githae & others* Petition E019 of 2024 [2025] KESC 19th (KLR0 (11th April 2025)

(Judgment), the court held that to ascertain whether or not the jurisdiction has been properly invoked, the court will consider the nature of the pleadings and the remedies sought. The inquiry seeks to determine inter alia, whether there existed a valid surrender, sale, transfer and whether the circumstances amounted to deprivation of the right to property under the *Constitution*. The issues are constitutional in nature.

153. The next issue is whether the petitioner has pleaded and proved forceful eviction, invasion of and illegal use, possession and occupation of his parcels of land, deprivation of and or breach of his right to property and or discrimination on account of race. The burden of proof, as held in *Suleiman Kasuti Murunga v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, remains with the petitioner to adduce sufficient and admissible evidence to prove every allegation in the petition. In *Communication Commission of Kenya & others v Royal Media Services* (*supra*), the court held that a petitioner must show through evidence, how their rights have been infringed, violated or threatened with violation. Section 107 of the *Evidence Act* provides that whoever deserves any court to give justice as to any legal right or liability, they have to establish the facts which they assert do exist. In *Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others* [2020] eKLR, the Supreme Court held that a petitioner is under an obligation to discharge the initial burden of proof before the respondent is invited to bear the evidential burden. See also *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR.

154. In this petition, it is not in dispute that the late N.H. Claassen was the owner of Kandy Farm and Pilkem Estate up to 1969 or thereabouts. The respondents do not dispute the entry into, use, occupation and the displacement of the petitioner's late father from the suit parcels from 1969 to date. The respondents invoke the doctrine of surrender and a voluntary sale or transfer for value. The petitioner contends that he did not voluntarily surrender, sell and or transfer the suit properties to either the government, the 3rd, 5th, 6th and 7th respondents and any other title holders of the resultant subdivisions. The respondents, on the other hand, plead that the petitioner's late father willingly, voluntarily, lawfully, procedurally and legitimately, surrendered, sold and transferred the suit parcels to the government and to the 3rd, 5th, 6th and 7th respondents, through his authorized agent for consideration, hence extinguished all his interests and rights from the suit parcels of land.

155. The petitioner, on the other hand, denies issuing any legal or valid power of attorney to the Mr. Lindsell or authorizing, approving, consenting, knowing or being notified by the government or the respondents to attend any meeting(s) to discuss the alleged surrender, sale, transfer and registration, terms and conditions, as well as the consideration. The respondents rely on a power of attorney, the surrender of the suit parcels of land, transfer documents and the issued certificates of leases or titles in their possession, claiming to be an impeachable law.

156. Section 4 of the *Registered Land Act* (repealed) provides for mandatory registration of certain documents, among them a power of attorney. Production of a document before the court takes three stages, as held in *Ken Nyaga Mwige v Austin Kiguta & others* [2015] eKLR.

157. Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in the existence of such facts. The deceased had during his lifetime sworn on oath denying donating any power of attorney to Mr. Lindsell to undertake any surrender of his land to the government, for he had already turned down such a request and or to sell and transfer part or all of the suit parcels of land comprised of Kandy Farm and Pilkem Estate to the 5th respondent. The deceased further denied receiving any consideration or handing over any vacant possession of the suit parcels of land to the respondents on account of an alleged surrender, sale and transfer, or being aware of any such transactions. Elucidation of how the power of attorney was donated to Mr. Lindsell and how he undertook the transactions within the knowledge of the

petitioner's late father, was upon the respondents to prove, in order for he court to find the root title for the suit parcels of land legal, formal and procedural.

158. When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. A proprietor must go beyond the instrument to prove the legality of the title and show that the acquisition was legal, formal, procedural and lawful. See *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR In *Caroline Awinja Ochieng & another v Jane Anne Mbithe Gitau & others* [2015] eKLR, the court held that it is the delivery of deeds or documents which assist in proving not only dominion of unregistered land, but also ownership, since they establish an unbroken chain that leads to a good root of title, including those of a previous owner.

159. Admissibility of a power of attorney was addressed in *Mayfair Holdings Ltd v Ahmed* [1990] eKLR The court said that under the *Registration of Documents Act*, a Registrar is obliged to enter a power of attorney in the Register thereof, if the donor or the donee make an application for that purpose as per Section 116 (1) of the *Registered Land Act* (repealed), in terms of a certificate in the form set out in RL17, in the Third Schedule of the Act.

160. The court said that without a certificate, the Registrar should not have registered the power of attorney because Section 116(2) thereof, is in mandatory terms that every such power of attorney shall be executed and verified following Sections 109 and 110 of the *Registered Land Act* (repealed). Proof of the exercise of the authority of the principal is therefore key for a power of attorney to be admissible in a court of law. The court held that a power of attorney has to be considered as part of the wider concept of law relating to a principal and an agent.

161. The principal, in this petition, was the petitioner's late father, who vehemently denied signing any power of attorney, sale, transfer and or any instrument of surrender when he initially filed this petition. None of the respondents sought to have the signatures on all the documents allegedly signed by the petitioner's late father as the donor, subjected to any forensic document examination. Equally, the makers of the power of attorney, the attester or witness and the person who registered it or was keeping custody of the original or duplicate at the Registrar's Office, were not called to testify, in line with Section 109 of the *Evidence Act*. See also *Raila Amollo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR.

162. The principal during his lifetime had denied knowledge of and or being privy to, or being bound by any of the actions of Mr. Lindsell, including the purported use of the power of attorney to surrender, sell, transfer and register any of his suit parcels of land in favor of the respondents. Whether or not the acts of the alleged agent bound the principal was for the respondents to tender evidence to show the legality and binding nature of the power of attorney and all other instruments of surrender, sale and transfer to the petitioner's late father, for the registration of certificates of leases or titles in favour of the respondents.

163. Proof of the existence and the execution of a power of attorney and or other documents related to the surrender, sale and transfer of the suit parcels of land, was upon the respondents once the alleged donor denied its existence, execution, contents and authenticity.

164. It was the duty of the respondents to call evidence to disprove the petitioner's claim that the petitioner's late father did not donate any power of attorney to Mr. Lindsell and that he voluntarily and willingly approved the said transactions. Section 112 of the *Evidence Act* provides that if in civil proceedings, any fact is in the knowledge of any party to those proceedings, the burden of disproving or approving that fact is upon him and the failure to do so leaves the court to make an adverse inference that, if such evidence was called, it would have had adverse effect on that party.

165. It is the respondents, especially the 2nd respondent, who are in custody of the original or duplicate documents relating to the power of attorney, surrender forms, transfer forms and instruments of the registration, who should have called the Registrar of Titles from whom the power of attorney and the instrument of transfer were allegedly registered and used to execute the documents attached to the replying affidavit of Mr. Simiyu, to prove the doctrine of presumption of regularity and the legality of public documents made in the course of the execution of official public duties. The evidence of who executed, registered and witnessed the power of attorney and whose signatures are on the power of attorney vis-a-vis other known signatures of the deceased and all other instruments of surrender, sale and transfer of the suit parcels of land or under the custody of the 2nd respondent. It was upon the respondents to authenticate, verify, and produce evidence to that effect. In the absence of such evidence, the respondents' case is built on quicksand.

166. In *CMC Aviation Ltd v Cruisair Ltd.* [1978] KLR 103; [1976-80] 1 KLR 835, Madan JA held that pleadings contain the averments of the parties concerned and until they are proved or disproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded of them, since proof is the very foundation of evidence. Section 2 of the *Evidence Act* defines evidence as how an alleged matter of fact, the truth of which is submitted for investigation, is disproved or approved.

167. In *CCB v MIB & another* [2014] eKLR, the court cited *Halsbury's Law of England*, Vol 1 4th Edition that an agent must act in the best manner possible for the principal and in good faith. The court cited *Mjasiri v Joshi* [1990-94] 1 EA 372, that since a power of attorney creates a fiduciary relationship, the failure to obtain the consent of the owner of the property before the alleged transfer of the land rendered the transaction null and void.

168. On appeal, the court held that even though the power of attorney over the property included the power to sell the house if the donee thought the price was reasonable, the failure of the donee to keep account of monies received as rent and repairs was a serious anomaly that led to the inference that Ahmed was not entirely honest. The court held that the donee was estopped from acquiring advantage from the fiduciary relationship without first obtaining the consent of the owner. In *CCB v MIB & another* [2014] (*supra*), the court observed that unless the power of attorney is made irrevocable, the grantor may revoke the power of attorney by telling the attorney that it is revoked.

169. In this petition, there is no evidence the respondents counterchecked or verified with Mr. Lindsell on the status of the done, his approval, knowledge and the position on the transaction as part of due diligence. There is no single letter from the holder of the power of attorney and vice versa, where the respondents copied he same to the petitioner's late father regarding the transactions. For the respondents to hold their strong view that the deceased was privy to and had been all along aware of the dealings by his agent over the two farms, there must be a firm basis. He who alleges must prove.

170. There was no evidence tendered that the respondents made any efforts to, at the very least trace or, insist that the principal must attend any of the meetings, negotiations and the signing of the sale agreements, transfers and surrender, including attendance during the land control board meetings. The respondents, from the evidence tendered, knew the nationality of the deceased. The applications for the land control board consents describe him as a South African national. Foreigners are entitled to own land in Kenya. The United Nations Charter and the International Instruments on foreign investment guarantee rights to foreigners. Inference can be drawn that the respondents seemed to have been certain and aware that the principal had left Kenya's jurisdiction under circumstances that he was not coming back to the country. That is the reason why he was not taken as a necessary party in all the transactions.

171. The respondents have heavily relied on the power of attorney used by the petitioner's late father to say that the suit parcels of land were legally and procedurally surrendered to the government and also sold and transferred to the 5th and the 6th respondents with full knowledge and approval of the deceased.

172. Sections 50 and 51 of the *Registration of Titles Act*, now repealed provided that: "The proprietor of any land, if not a minor, a lunatic or person of unsound mind, may appoint any person to act for him in respect of the transfer, or other dealings with the land under the Act, by executing a power in the Form M in the First Schedule and a duplicate or an attested copy thereof shall be deposited with the Registrar, who shall enter in the register a memorandum of the particulars therein contained and of the date and hour of its deposit with him"

173. A power of attorney may be revoked by an instrument of revocation in Form N in the First Schedule. Upon the registration of revocation of the power of attorney, it shall not give effect to any transfer or other instrument signed under it. Any power of attorney relating to land has to be registered under Sections 4 and 19 of the *Stamp Duty Act*, within two months of its execution.

174. If the power of attorney is not registered, leave may be sought under Sections 20 and 21 of the *Stamp Duty Act*. Section 116 of the repealed *Registered Land Act* provided that the power of attorney, which contains any power to dispose of any interest in land, must be registered. Sections 19 and 20 of the *Stamp Duty Act* provide for the non-admissibility of an unstamped instruments in evidence.

175. DW1 was unable to ascertain where the 5th respondent allegedly obtained a copy of the power of attorney. The Registrar of Titles was not called to verify, authenticate or ascertain if the power of attorney was ever registered as required by law. The 1st and 2nd respondents did not avail a copy of the power of attorney, as an exhibit in this case, yet they are the custodians of such registered documents. Neither the original nor the duplicate was not availed before the court. Admission of a document in evidence should not be confused with the proof of the document as held in *Kenneth Nyaga Mwige v Austin Kiguta & others* [2015] eKLR The same reasoning applies to all other instruments of surrender, sale and transfer related to the suit parcels of land held by the 2nd respondent.

176. A document is proved or disproved when a court applies the judicial mind to determine the relevance and veracity of its contents. The probative value of an exhibit must be looked at in line with the law on both its registration and the requirement to pay stamp duty. Registration is the formal entry of the specific document in the register so that the public may be notified of its existence. See *Francis Mwangi Mugo v David Kamau Gachago* [2017] eKLR.

177. Whether the registration of a power of attorney, sale, transfer and instrument of surrender were valid or legal as required under the *Stamp Duty Act*, Section 116 of the *Registered Land Act* (repealed), Sections 41, 40 and 51 of the *Registration of Titles Act* (repealed) was done, who registered the same, if they were executed as per the law, had serious legal implications on whether or not the deceased had voluntarily, willingly and legally ceded his powers and obligations to the holder of the power of attorney, Mr. Lindsell, to deal with his properties, the way he did. The custodians of all the original or duplicate is the 2nd respondent, yet it never testified, to disprove the exhibits relied upon by the petitioner to approve the documents attached to the replying affidavit of Mr. Simiyu.

178. Equally, and more importantly, none of the respondents made out the cheques for the consideration in the name of the principal or demanded that the agent provides them with the bank account of the principal. Due diligence entailed undertaking a search to verify the authenticity of the power of attorney from its source and also inquire about the whereabouts of the surrenderor, as the law, as will be demonstrated shortly, required the signature of the surrenderor to be witnessed in the endorsement of the surrender instrument and its registration.

179. The next issue is whether the 1st, 2nd, 3rd, 4th, and 7th respondents have a good title. This issue is tied to whether the petitioner's late father surrendered the suit parcels of land comprised of his Kandy Farm to the government. Surrender of land refers to the act to relinquish, as a whole or a temporary title, by owners of land to the government for a particular purpose. The surrender may be made in exchange for a change of user, subdivision, conversion, amalgamation or for partition purposes. Surrender of land is therefore one of the tools for land planning and development control by either the County Government or the National Government to achieve the constitutional tenets of equitable access to land, sustainable and productive management of land resources and transparent or cost-effective contribution of land. Surrender of land is underpinned by the free will to surrender to develop the particular land and not just a mere surrender. See *Ngimu Farm Limited v Attorney General* [2019] eKLR.

180. Explaining the concept of surrender, the court in *Ngimu Farm Limited v Attorney General* (*supra*), held that for instance, land owners who wish to develop agricultural land to high-end housing projects, may surrender their land to the government for the conversion of the new land user categories, by applying to the relevant ministry for approval and thereafter meet the conditions attached to the conversion or subdivision, whichever is applicable.

181. Upon surrender, the land would be vested in the government or the County Government. Regarding the act of accepting the surrender to the government of Kenya of land for public purposes, the court held that the plaintiff had extinguished all rights and interests in the said land. Whether the land is for private use, the land owner would retain the remainder of the term and propose subdivision for approval. The mother title would be subdivided and titles given to the individual members as proposed by the land owner. The land owner would therefore, through an acceptance letter, accept the terms and conditions of approval of the subdivision. Unlike in compulsory acquisition, there is no reversionary interest that the surrenderee retains in the case of surrender according to subdivision, since surrendering is a condition precedent to the approval of the subdivision scheme.

182. In *River Trees Management Company Limited v National Land Commission & another* [2020] eKLR, an approval for subdivision had been made subject to the surrenderee surrendering 0.8 Ha to the County Government for a nursery school. The land was subsequently subdivided into six portions. A complaint arose that though the land had been surrendered for public utility purposes, it had been registered in the names of private entities. The National Land Commission recommended for the revocation of the titles, which the petitioner.

183. The court held that the National Land Commission had the power to review how public land was converted from public to private land and to ascertain from the instruments of surrender whether the process was proper. The court held that a grant or disposition concerning land simply means a transfer from one person to the other.

184. In *Republic v National Land Commission Exparte Giraffe Estate ltd: City County Government of Nairobi & others (IP)* [2020] eKLR, the alleged surrender had occurred in 1969. The court observed that surrender was governed by Section 44(1) of the *Registration of Titles Act*, (repealed) and Section 63(1) of the *Registered Land Act* (repealed), Land Planning Act and Regulation 11 of the Development and Use of Land (Planning) Regulation of 1961. In *David Kiptugen v Commissioner of Lands, Nairobi & 4 others* [2016] eKLR, the court observed that the acquisition of title cannot be construed as an end result, otherwise the process of acquisition was material.

185. In *King & 4 others v Mwatsumiro & others* [2022] KEELC 150 42 [KLR] (9th November 2022) (Judgment), the court observed that the process of surrender involves the returning of the old title to acquire a new title with a new number, after which a new lease would be prepared. As to the changes

or conversion from the repealed *Registration of Titles Act* to *Registered Land Act*, (repealed), the court observed that the process would start with a letter by the Director of Surveys to the Commissioner of Lands, informing him that the old number or the plot had ceased to exist and that new plots or numbers would be created, so that he can amend his records.

186. As to surrender, the court observed that upon a subdivision, a letter would come from the Chief Land Registrar, surrendering the lease. A surrender would then be prepared by the Director of Land Administration, upon subdivision, the new number would be communicated by the Director of Surveys to the Director of Land Administration, who would then prepare a surrender of lease and forward the same to the Chief Land Registrar. The Chief Land Registrar would then forward it to the District Registry. Once the documents are recorded, the lessee would come and surrender the original title to the Registry, a surrender would be registered and a new lease registered. The word surrender of lease in consideration of subdivision would then be entered in the old card and thereafter a fresh green card would be opened. The lease would be noted in the encumbrance section and a new white card would be opened where the government is the lessor.

187. Courts have held that the cardinal rule in a surrender is its consensual nature. See *Mwinyi Hamisi Ali v Attorney General* (*supra*). It is not enough to express the intention to surrender orally. It has to be in writing. In this petition, there must have been acceptance of the surrender by the lessee. The terms and conditions of the surrender must also have been in writing. Equally, the instrument of surrender, other than in the registration on paper, must have been accompanied by actual delivery and acceptance of possession. The 1st, 2nd, 3rd, 4th and 7th respondents have been silent on all these issues vital statutory steps. It is the respondents who rely on the doctrine of regularity and legality, yet they go to the very root of the title deeds that they hold.

188. In *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* (*supra*), the court addressed the legal procedure on surrender of a leasehold interest for conversion into a freehold interest. On fraud, the court held that issues of the transfers being tainted with fraud and lack of due process had been pleaded, but had not been proved to the required standard as held in *R.G Patel v Lalji Makanji* [1957] EA 314 and *Central Kenya Ltd v Trust Bank Limited & 4 others* [1996] eKLR

189. On surrender, the court cited *Mwinyi Hamisi Ali v Attorney General* (*supra*), and *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [2018] eKLR, that a surrender of a grant or instrument of title is not similar to compulsory acquisition and both have different legal regimes. In *Barrett v Morgan* ([2000] 2 AC 264, HL) and Sir Robert Megarry and Sir William Wade in their work "*The Law of Real Property*" Sweet & Maxwell (2012), 8th Edition page 851 and Martin Dixon, "*Principles of Land Law*" Convention Publishing 2002 4th Edition 237, the eminent jurists empathize the consensual nature as a cardinal ingredient of a surrender of a lease, followed by an endorsement signed by the lessee and the lessor, as the evidence of the acceptance thereof.

190. Section 44 of the *Registration of Titles Act* (repealed), provided that "whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word surrendered, with the date of surrender and the endorsement shall be signed by the lessee and the lessor, as evidence of the acceptance thereof and shall be attested by a witness and the registrar thereupon shall enter in the register memorial recording the date of the surrender and shall otherwise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to the intervening circumstances, if any land would then have vested, if no such lease had ever been executed, and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered.

191. In *Sitawi Ltd v National Land Commission-Nairobi & others* [2020] eKLR, the court observed that the import of Section 23 of the repealed *Registration of Titles Act* is that, upon the surrender of lease in respect of government land, the said land reverts to the government to the allocated by the government according to the provisions of the *Government Land Act* (repealed). The court said that the surrender of lease under the Act did not provide for conversion of tenure directly from leasehold to freehold.

192. In this petition, there is uncontroverted evidence that the petitioner's late father at the time the transactions took place had, under an involuntary pressure and coercion, abruptly left the jurisdiction of the country for South Africa. See *CCB v MIB* (*supra*). The entries registered on 30/6/1969 against the title registers for the surrender to the Government of the Republic of Kenya, Reg. No 982 do not indicate the capacity of the person who allegedly surrendered and the suit parcels of land. Endorsement of the instrument of the surrender by the lessee is missing. The witness or attestant to the instrument of surrender is not indicated. The name, ID card numbers and the holder of the power of attorney are also not indicated. To my mind, the failure by the 1st, 2nd, 3rd, and 7th respondents to testify and bring the original titles registers to court to demonstrate that their title deeds were formally, procedurally and regularly obtained, left major gaps or doubts in their defences or justification contained in the replying affidavit by Mr. Simiyu

193. For instance, the consideration in IR/1500/1 is missing. Save for the consideration of Kshs 340,000/- entry No 5 for IR/No 13511/1 has no consideration. The person who surrendered, the name, date, capacity and consideration of surrendering the leases are not indicated. The registration number of the power of attorney or the ID card for the holder are missing for IR 292, entry No 8, namely; the transfer to Kipagenge of Kalenjin Estates Ltd for Kshs 549,800/=, registered on 27/10/1970, it has no entries of the particulars of the executed transfer instrument and the signatories to the said instrument of transfer.

194. It is instructive to note that the letter dated 29/8/1968 from the 1st respondent requesting some 1,957 acres of LR Nos. 6605/7, 3036/7, 9075, and 5778 had been sent directly to N.H. Claassen of P.O. Box 198, Kitale, copied to the 3rd respondent. In the letter dated 15/9/1969, which was almost a year later, the 3rd respondent writes to the 1st respondent confirming that possession of the LR Nos. 6606/2, 3036/7, 9075, and 5778 had taken place. The letter mentions that the deceased would no longer enjoy grazing rights over the taken-up parcels of land. The letter is neither copied to the deceased nor his alleged agent. All these glaring inconsistencies and gaps in the chain of the root title leads the court to find that the 1st, 2nd, 3rd, 4th, and 7th respondents' alleged surrender of the 4 parcels of land comprised of Kandy Farm, with the consent, knowledge and endorsement of the deceased did not pass the test of law and the *Constitution*.

195. The next issue is whether the 5th respondent has a good title, is also related to the previous issue. The 5th respondent has pleaded and testified that the power of attorney, the sale and transfer were procedural, lawful, formal, and hence they obtained valid title deeds to the suit parcels of land. In *General & another v Hussein & 3 others* (Civil Appeal No 100 of 2018[2025] KECA 1022 [KLR] (5th June 2025) (Judgment), J.M. Mativo, PM Gachoka and G.V.Odunga JJA took the view that when court is faced with a claim or claims for land ownership by two or more persons, it must scrutinize the root of the title and follow all the processes and procedures that brought forth the two titles at hand and the parties therein must bear in mind that their titles are under scrutiny, they must demonstrate how they got their title deeds.

196. The court cited *Presbyterian Foundation v Kibera Siranga Self Help Group Nursery School* [2025] eKLR, on the elements of a good title as:

(a) It must deal with or show the origin of ownership of the whole legal and equitable interest in the land in question.

(b) It must contain a recognized description of the property.

(c) It must not contain anything that casts any doubt on the title.

(d) Each party must give a respective explanation regarding the origin of the title or ownership.

197. The court also cited *Muster Estates Property Ltd v Killarney Hills Property Ltd* [1979] 1 SA 621 (A) 623H – 624A), that when a party fails to call as his witness as one who is available and able to elucidate the facts, the inference that the party failed to call such witness, because he feared that such evidence will expose facts unfavourable to him, should be drawn, but would depend on the facts peculiar to the case when the questions arises.

198. The legal burden under Sections 107-112 of the *Evidence Act*, is on that party whose claim would fail if certain facts are not ascertained as existing facts. Proof is what amounts to evidence. Facts are proved when, after considering the matter, the court believes them to exist or considers their existence so probable that a prudent man ought, in the circumstances, to act upon the supposition that those facts exist.

199. The genesis of the surrender of the Kandy Farm is the letter by the 1st respondent dated 29/8/1968, in which the petitioner's late father declined the offer. According to the 1st, 2nd, 3rd, 4th, and 7th respondents, there were negotiations leading to the surrender, payment of consideration and ultimately the registration on 30/6/1969, through Mr. Lindsell, the authorized agent and holder of a power of attorney for the deceased. On the other hand, the 5th respondent traces their root of the title to 1969 when its officials approached the deceased through Mr. Lindsell, as the agent and authorized holder of a power of attorney registered as No IP/A10734/1, whereafter they entered into an undated memorandum of sale for 10 parcels of land out of Pilkem Estate measuring 2,566.5 acres for Kshs 549,800/=, paid a deposit of Kshs 349,800/= and the balance was to be paid after processing of bank loan. The 5th respondent says that after the balance was paid, the land parcels were procedurally transferred as per the transfer forms attached as JKR-5.

200. In *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority & 4 others* [2019] and in *Munyu Maina v Hiram Gathiha Maina* (*supra*), the court held that when a title is under challenge, it is not enough to dangle the instrument of title as proof of ownership and one must go beyond the instrument and prove the legality of how he acquired the title by demonstrating that the acquisition was legal, formal and free of any encumbrances. The court in *Elizabeth Wambui Githinji & 29 others v Kenya Urban Roads Authority* (*supra*), held that if a mistake is proved or there is total failure of payment of consideration or other vitiating constitutional or statutory factors are raised a title under the repealed *Registered Land Act* or *Registration of Titles Act*, (repealed), is defeasible.

201. The common denominator in both the surrender, sale and transfer raised by the petitioner is whether or not his late father, as the lessee was privy to, authorized, approved and or consented to the transactions. On the other hand, the respondents pleaded and maintained that consent authority and capacity to transact had been lawfully bestowed upon Mr. Lindsell by the petitioner's late father willingly, consciously lawfully.

202. The centrality of and the legality of the power of attorney held by Mr. Lindsell and which the respondents entirely relied upon to acquire their title deeds, lay with them to discharge the burden of proof whether or not it was a legally binding document in the first instance and secondly, whether it was executed by the deceased. In all the land control board applications processes and the land control board consents produced by the 5th respondent, none of the documents contained the names of Mr. Lindsell, as appearing in his capacity as a power of attorney holder for N.H. Claassen. The first time the power of attorney appears is in the JKR-5. The Registrar of Titles, who received, executed, endorsed and registered the transfers, was not called to testify.

203. The exhibit has over writing on it. It is not certified under Sections 79 and 80 of the *Evidence Act*. The makers of the documents is the Department of Lands. They ought to have attended court to produce the register files for the 14 parcels of land. Raphael Simiyu, who swore the affidavit in reply, was not the maker of the entries. He did not state whether he knew the makers of the entries. He did not see it fit to certify the documents as copies of the originals or the duplicates. His failure to attend court for cross-examination on the veracity, authenticity and legality of the annexures to his affidavit was not explained under Section 35 of the *Evidence Act*.

204. Public documents under Section 68 of the *Evidence Act* can only be produced by public officials so long as they are in the custody of the public official. Such documents are not properly produced as evidence if parties by consent agree, as was in the petition herein, for the replying affidavit and its annexures to be taken as the 1st, 2nd, 3rd, 4th, and 7th respondents' evidence-in-chief and as exhibits.

205. The court, by consent of the parties, had directed that the petition be heard through viva voce evidence. Secondary evidence of contents of a document cannot be admitted without the non-production of the original being first accounted for to bring it within the exceptions of Section 68 of the *Evidence Act*.

206. Raphael Simiyu as the officer working with the custodians of all the register files for the 14 parcels of land, did not certify the power of attorney or all the annexures to his affidavit and that of the 5th respondent as either registered under the *Registration of Documents Act* or having been among the documents that accompanied the instruments of surrender of the original leases of the 4 parcel of land forming part of the suit parcels of land comprised of Kandy Farm or these in favour of the 5th, 6th and the 7th respondents. Mr. Simiyu did not swear an oath that in processing the surrendered instruments by the deceased or those transfer forms in favour of the 5th respondent. Sections 44, 50, and 51 of the *Registration of Titles Act* (repealed) and Sections 4 and 19 of the *Registration of Documents Act*, had been fully complied with.

207. The petitioner had pleaded and testified that he dwelt with a Land Registrar at Ardhi House regarding whether or not the power of attorney had been registered. The anomalies that the power of attorney had no folio number were not addressed by the respondents at all. Strangely, in JKR-5, the power of attorney number is written by hand. The alterations are not countersigned, verified and or authenticated. The maker of the power of attorney is the same person who is alleged to have been the holder of the power of attorney. The witness to the power of attorney, a Mr. H.S. Bhogal, advocate, was not called to testify. The minutes of the land control board meetings and the land control board consents were not certified by any officer. How the 5th respondent and where they retrieved, after Mr. Lindsell passed on in the 1970s, the payment receipts, D. Exhibit No 2(a), (b), (c), (d), (e), (f), and (g) and the IP number of the alleged power of attorney are is not clear.

208. The undated memorandum of sale gives no details of the specific 10 parcels of land that the 5th respondent was acquiring. The law on land transactions is that apart from the transfer forms, paper trail accompanying the transfer form has to be produced by the purchasers, in this case the 5th, 6th and 7th

respondents without a break in the chain as held in *David Kiptugen v Commissioner of Lands* (*supra*), *Alice Chemutai Too v Nickson K. Korir & others* [2015] eKLR, and *Arthi Highway Developers Ltd v West End Butchery* (*supra*).

209. The respondents have invoked the doctrine of legality and regularity. The burden was on the 1st, 2nd, 3rd, 4th and 7th respondents to call the Land Registrars, Chairman of the land control board and all officers who handled the transactions of the surrender, sale and transfer, demonstrate before court and avail all original documents under their custody showing that the surrender, sale, transfer and registration was legally, procedurally, formally and regularly undertaken. Due diligence was expected of the respondents to ascertain, verify and authenticate the legality of the power of attorney held by Mr. Lindsell, to rule out that he was an impostor, particularly after the deceased had declined the offer letter by the 1st respondent in 1968.

210. The petitioner's late father, during his lifetime had termed the power of attorney, all the signed and registered transfer and registration forms in favour of the respondents as a misrepresentation of facts, since he had declined the request for sale, surrender and transfer of his suit parcels of land out of which, in early January 1969, his land was invaded by the 3rd and 5th respondents, as a way of pressuring him to accede to the offer and or the forceful eviction. A title obtained through illegality, fraud, coercion and misrepresentation is defeasible as held in *Gitwany Investment Limited v Tajmal Limited & 2 others*, (2006) eKLR There is no evidence that the respondents paid any stamp duty, registration, or transfer fees for the titles that they hold. Evidence that the original certificates of lease were surrendered by the petitioner's late father or his alleged authorized agent, to the Registrar of Titles is lacking. The intention to surrender, sell or transfer the 14 parcels of land is also missing. As held in *Said v Shume & 2 others* (Civil Appeal E050 of 2023). [2024] KECA 866 (KLR) (26 July 2024) (Judgment), lands are not vegetables which are bought from unknown sellers. Buyers are expected to conduct thorough investigation, not only on the land but also of the owner before the purchase. The court held that once the root of the title has been challenged, as held in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR), a party cannot derive benefit from the doctrine of bona fide purchaser. My finding is that, just like the 5th respondent's title was not lawfully, procedurally or regular obtained.

211. In *Sehmi & another v Tarabana Company Limited & 5 others* [2025] KESC 21 (KLR), the court held that to benefit from the doctrine of an innocent purchaser, one has to show an innocent purchase for value and a legal estate. The court added that the element of innocence means that the purchaser must act in good faith and his conduct must not raise doubt as to whether he did not have any notice or knowledge as to the existence of a rival interest in the suit land and connotes the exercise of due diligence as expected of any reasonable purchaser. The court cited *Torino Enterprises Ltd v Attorney General* [2023] KESC 79 [KLR], that an innocent purchaser must also inspect the suit property. The court also held that a purchase for value means that the consideration in money or money's worth was paid by the claimant in return for the land. The court held that a mere execution of the instrument of conveyance of the legal estate before notice is received without payment of money, will not avail the claimant the defence of innocent purchaser. The court also observed that a person who takes land without giving value in exchange, must take it with all its burdens, equitable as well as legal.

212. In this petition, one of the gaping anomalies on the part of the respondents' case is where the lessee was and if they ever contacted him as an extra due diligence to verify, ascertain and confirm his approval, consent or authority to have the land parcels dwelt with solely by Mr. Lindsell. I say so because the exhibits produced by the 5th respondent show that the holder of the power of attorney was also the lawyer for the purchasers and was also contracted to incorporate the company, for the 5th respondent.

The 1st, 2nd, 3rd, 4th, and 7th respondents have not produced any correspondence to show that the deceased was directly or indirectly involved in the transactions.

213. The law is, in the absence of a power of attorney, as we have made a finding, required that the deceased appear in person during the surrender, land control board meetings, sign and execute any sale agreement, instruments of surrender and the transfer forms.

214. The respondents have urged the court to find that the petitioner's case is not based on compulsory acquisition but on surrendered land, hence he cannot benefit from the protection under Article 40 of the *Constitution*. In *National Land Commission v Afrison Export Import Limited & 10 others* [2019] eKLR, the court held that due diligence runs throughout Part V111 of the *Land Act*, while Section 119 of the *Land Act* underscores the need to undertake due diligence before making payment. The overriding interests under Section 28 of the *Land Registration Act* can only be ascertained with due diligence.

215. In this petition, the 1st, 2nd, 3rd, 4th, and 7th respondents have pleaded that the deceased was paid compensation for the surrender and was seeking re-compensation. Unfortunately, there is no evidence tendered on whether there was valuation of the surrendered suit parcels of land, to arrive at Kshs 340,000/=, as the consideration that was made under the law and whether the petitioner's late father was notified of the consideration and if he accepted the same.

216. Guided by the above binding caselaw, I think the evidence by the petitioner, compared with the unsubstantiated affidavits and their annexures by the respondents lead to a finding that, there was no valid legal and consensual transaction between the petitioner's late father and the respondents. The instruments of surrender, sale and transfers conditions, timelines, considerations, execution, attestation and witnessing are all lacking.

217. All that the court has been fed with by the respondents are conjectures, suppositions and inferences. Without valid, authentic and legal instruments of surrender, sale and transfer showing the terms and conditions duly executed under the law and registered against the titles register, extrinsic evidence may not be used to vary or contradict the said documents produced relied upon by the respondents as required under Section 97(1) of the *Evidence Act*. The 1st, 2nd, 3rd, 4th and 7th respondents failed to produce the instruments of surrender, which the government executed with the late Mr. Lindsell as an authorized agent or holder of a valid power of attorney, on behalf of the deceased, before the entry of the word "surrender" against his title registers.

218. The word "surrendered" on the registers, if they were to be taken as amounting to an instrument of surrender, are not signed, endorsed, or executed on their face by both the landlord and the tenant, as required under Sections 44, 50, and 51 of the *Registration of Title Act*.

J. Appropriate Reliefs

219. The next issue is whether the petitioner is entitled to the declaratory orders sought, including special damages as per the valuation report. The petitioner submits that he has made a case to be entitled to the reliefs sought, including special and general damages. On the other hand, the respondents urge the court to find the petitioner undeserving of the reliefs sought, given that there was payment of consideration for both the surrender, sale, and transfer of the suit parcels of land. Further, the respondents have attacked the valuation report for lack of credibility, unauthenticity, and reliability.

220. Article 23(3) of the *Constitution* provides that where there is violation of constitutional rights and freedoms, the court can grant appropriate reliefs including a declaration of rights, an injunction,

conservatory order, a declaration of legal invalidity of any law that denied violation, infringed or threatened a right or freedom, an order of compensation and an order of judicial review.

221. Courts have held that the list of appropriate reliefs that a court can grant is not exhaustive and a court can fashion appropriate reliefs, even of an interim nature, in specific cases, to redress the violation of a fundamental right or freedom. See *CCK & others v Royal Media Services & others* (*supra*).

222. In *Mitu-Bell Welfare v Kenya Airports Authority & others; Initiative for Strategic Litigation in African (Amicus Curios)* Petition 3 of 2018 [2021] KESC 34 [KLR] (11th January 2021) (judgment), the court held that, interim reliefs, structural interdicts, supervisory orders or any other orders that could be issued by the court provided that the same are specific, appropriate, clear, effective and directed at the parties to the suit, or any other state agency vested with a constitutional or statutory mandate to enforce the orders. In *Imanyara & 2 others v Attorney General* (Petition 15 of 2017) [2022] KESC 78 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment), the court took judicial notice of the paradigm shift from Kenya's dark days of struggle for democracy, that began in 1990, culminating in the 2010 *Constitution*, which Constitution enshrined vital elements of democracy, national values and principles of Bill of Rights among other reforms.

223. The court set out the parameters to be considered in assessing damage for constitutional violations, inter alia, the duration, level of physical and mental suffering, degree of responsibility of the individual, the responsibility and the extent of the action or inaction complained of.

224. The court held that an award of damages is discretionary in nature and would depend on the facts and the circumstances of each case. The court also held that an award was not compensatory or punitive but acted as a way of vindicating the violated rights. To this end, the respondents have attacked P. Exhibit No 11 which PW2 relied upon to justify the amount of Kshs 22,190,850,000/=, as special damages.

225. In *Kagina v Kagina & 2 others* [2021] KECA 242 [KLR] (3rd December 2020) (Judgment), the Court of Appeal held that an expert witness must first demonstrate and adduce evidence of his professional background, before proceeding to give such expert evidence. PW2 was able to lay the basis of his qualifications, experience and professional background. As to the admissibility of the valuation report, its contents which the respondents claim that the petitioner ambushed them at the hearing by producing a valuation report different from what had been pleaded for, or attached to the supporting affidavit.

226. The respondents urge the court to reject the report and the evidence of PW2, terming it as an abuse of the court process and contrary to the rules of natural justice. A look at paragraph *58* and prayer (iii) of the amended petition dated 16/8/2021, shows that the petitioner had pleaded special damages of Kshs 22,190,850,000/=, on account of the deprivation of the use, occupation and possession, since 1969 to 2011, of the 14 suit parcels of land by the respondents. The same figure was mentioned in paragraph 46 of the supporting affidavit dated 16/8/2021.

227. The valuation report was an annexure thereof, marked KWC11. On page 1 of the valuation report, the date of inspection is indicated as 12/7/2021. The survey and Google Maps used are indicated. The coordinates of the subject suit parcels are mentioned. The land sizes and reference numbers are well spelt out. The basis of the valuation on page 8 is indicated as the market value which is in line with the RICS Valuation Professional Standards, 2014 and the International Valuation Standard 2013. Cost approach methodology is what is indicated to have been used by PW2. The values for each of the 14 suit parcels of land are indicated on pages 10-11 of the report. The report is signed by L.K. Toroitich, (PW2) on 3/8/2031. His credentials are that he holds a Bachelor's of Land Economics, a registered and practicing valuer. Pages 13-18 contain the survey and google maps. Page 19 contains the annual practicing certificate of PW2 for the year 2021, that was issued by the Registrar under the *Valuers Act*,

while page 20 contains the Kenya Gazette No 1496 of 3/4/2020, showing that L.K. Toroitich as a registered Valuer Reg. No 542.

228. The valuation report contains official search certificates for LR Nos. 4329/1, 6409/2, 5325, 5324, 5321/6, 2199/2, 2198/2, (I.RNo 2414/1),6605/2, (I.RNo 1500/1),5778, (I.R No 13511/1),9075, 3036/7, 5779/1 and 5779/2 as of 26/6/2019. There is no dispute that the respondents have had the valuation report for close to 4 years before this matter was listed for hearing.

229. The 5th respondent swore a replying affidavit on 21/4/2022, in response to the amended petition. Equally, Raphael Simiyu swore a replying affidavit on 5/5/2022. In the said affidavits, none of the respondents addressed or raised issue on the veracity, authenticity, lack of disclosure of methodology, failure to value as at the date of the alleged deprivation, unsupported market assumptions, the presence of third occupiers, incompetent compensation claims, material inconsistencies and or the credibility of the valuer.

230. Parties are bound by their pleadings and issues for court's determination arise from the pleadings as held in *Raila Amollo Odinga & another v Independent Electoral and Boundaries Commission* (*supra*). The petitioner disclosed the valuation report at the inception of the petition. The court therefore finds no breach of the rules of disclosure as submitted by the respondents. No party has been ambushed. In *Orbit Chemicals Industries v Prof. David M. Ndeti* [2021] eKLR, the court cited *Stroms Bruks Aktie Bolag v Hutchison* [1905] AC 515, on the difference between special and general damages, the court held that general damages are the direct natural and probable consequence of an action, while special damages, due to their exceptional character, must be specifically pleaded and proved. On expert witnesses, the court said that a court has to evaluate an expert report, alongside all other evidence tendered, and give reasons why an expert report has been accepted.

231. Expert testimonies, like all other evidence, must only be accorded the appropriate weight. In *Stephen Kinini Wang'ondu v The Ark Ltd* [2016] eKLR, the court held that an expert report does not trump over all other available evidence and has to be tested alongside other known facts. It is not considered in a vacuum.

232. The respondents did not tender a conflicting expert opinion as a basis to challenge the evidence of PW2. Equally, the respondents did not engage rival experts to re-evaluate the valuation report and perhaps lay a basis why they hold the view that P. Exhibit No 11 does comply with the *Valuers Act*. In *Dhalay v Republic* (1995-1998) EA 29, the court observed that where an expert, who is properly qualified in his field gives an opinion and the reasons upon which his opinion is based and there is no other evidence in conflict with such an opinion, there will be no basis upon which such an opinion could be rejected. The court held that unless there are good and cogent grounds that the expert's opinion is not sound. Such a report should not be disregarded.

233. In *Kimatu Mbuvi T/A Kimatu Mbuvi & Bros v Augustine Munyao Kioki* [2001] 1EA 129, the Court of Appeal held that like any other science, medicine was not an exact science. The court held that medical reports, like any other expert opinions, are not binding on the court and must be given the appropriate consideration, particularly when there is no other contrary opinion.

234. My finding therefore is that, the expert testimony by PW2 and P. Exhibit No 11 have not been challenged by a rival opinion, nor is it brought too late in the proceedings. It shall be considered alongside the other evidence tendered by the parties.

235. On what appropriate reliefs to grant in this petition, the court has already made a finding that there was no valid or legal surrender of the suit parcels of land comprised of Kandy Farm to the government and or evidence of any consideration paid for it. There is already a clear admission by the 3rd respondent in

a letter dated 15/9/1969 to the 1st respondent that it took over possession of LR Nos. 6605/2, 3036/7, 9075, and 5778 Kitale, from the petitioner's late father in 1969. The reference to the letter is; "The purchase of Mr. and Mrs. Claassen Farms". There is no reference to a surrender. In the said letter attached as KW10(b), the Commissioner of Prisons states that under Section 24 of the *Prison Act*, the deceased had ceased having any grazing rights or dipping of his cattle on the seized suit parcels of land. Admitted facts need not be proved in law. See Order 13 Rule 2 of the *Civil Procedure Rules*.

236. In *Choitram v Nazari* (1984), KLR 32, the court held that admission of facts may be made in the correspondence or documents, before the filing of a suit. See also *Sunrose Nurseries Limited v Gatoka Limited* [2014] (KLR). In *Synergy Industries Credit Ltd v Oxyplus International Ltd & others* [2021] eKLR, estoppel was said to preclude a party from making assertions that are contradictory to his or her earlier position, on certain matters before the court.

237. The 1st and 3rd respondents wrote in the correspondences dated 10/9/1969 and 15/9/1969 that they had allegedly, lawfully purchased LR Nos. 6605/2, 3036/7, 9075, and 5778 from Mr. and Mrs. Claassen, fairly. Before this court, the same parties are alleging that there was a surrender, through the petitioner's late father's authorized agent. Be that as it may, entry into the 4 parcels of land is confirmed in the said correspondence, to have taken place in September 1969. See *Ideal Ceramics Ltd v Suraya Properties Group* [2017] eKLR It is unfortunate that the alleged take over has not been proved to have been regular, formal, legal, procedural; and constitutional. Deprivation of the suit parcels of land other than through constitutional means attracts sanctions. I therefore find the 1st, 2nd, 3rd, 4th and 7th respondents liable for the loss, damage and injury.

238. The petitioner, based on his pleadings and the valuation report, urges the court to grant the values set out in pages 10 and 11 of the valuation report, as against the 3rd respondent who has admitted the forceful invasion and deprivation of the following suit parcels of land:

LR No Land Size(acres) Valuation (Kshs)

6122/4 797 3,586,500,000/=

6605/2 331.5 1,491,750,000 /=

3036/4 497 2,236,500,000/=

2198/2 145 652,500,000/=

5779/3 283 1,273,500,000 /=

5779/2 27 121,500,000 /=

Total 2145.2 9,653,400,000 /=

239. Trespass refers to unjustified entry into the private land of another as per Section 3(3) of the *Trespass Act*. The entry into the suit parcels of land by the 3rd respondent was based on a purported purchase or surrender. It was sanctioned by the 1st respondent, going by the letters alluded to above

240. Occupation of the suit parcels of land to date is not denied by the 3rd respondent. Before the petition was filed, demand letters were made by the deceased to the Minister for Lands dated 4/4/2011, 7/6/2011 and 24/8/2011. Receipt of the same by the 1st, 2nd, 3rd, 4th, and 7th respondents is not disputed. No mitigation measures were taken until the petition was filed. In *Joseph Ng'ok v Moijo Ole Keiwua*, Nairobi Civil App. No 60 of 1997, the court held that under Section 23(1) of the *Registration of Titles Act* (repealed), the law takes precedence over all alleged equitable rights of title.

241. In *Muthiora v Muthama Kiara* [2022[KECA 28 (KLR) (4th February 2022) (Judgment), the court concluded that the appellant was a trespasser in the suit land and that under Section 4(12) of the *Limitation of Actions Act*, a continuing trespass consists of a series of acts done on consecutive days that are of the same nature and that are continued from day to day, so that the acts in the aggregate form one indivisible harm. Citing Jowitt's Dictionary of English Law, 2nd Edition, the court said a continuing trespass is permanent in its nature, such as where a person builds on his land so that part of the building overhangs his neighbour's land.

242. The court further cited *Black's Law Dictionary*, 8th Edition, that continuing trespass is like a permanent invasion of another's right. Again, the court cited *Clerk & Lindsell on Torts* 16th Edition, that every continuance of trespass is a fresh trespass, of which a new cause of action arises from day to day as long as the trespass continues. The court held that trespass refers to an unauthorized entry, whether present or continuing in trespass.

243. In this petition, paragraphs 22 - 28 of the amended petition set out the events leading to January 1969, when the petitioners late father's family was forcefully evicted from the suit parcels of land comprised of Kandy Farm and the land taken over by the Prison Department. As afore stated, parties are bound by their pleadings. The petitioner specifically pleaded an illegal eviction and trespass to the suit parcels of land in paragraphs 30,31, 32, 34, 35, 36, 37,38, 39, 40, and 41 of the amended petition by the 3rd and 5th respondents.

244. The facts of taking over the suit parcels of land by the 3rd, 5th, 6th and 7th respondents, as alluded to above, is admitted in various documents attached to the replying affidavit, before the petition was filed. Such admission as held in *Ideal Ceramics Ltd v Suraya Property Group* (*supra*), are binding against the respondents, insofar as entry into the suit parcels of land is concerned. Heavy weather has been spent on this matter by the respondents, that the impugned land transactions involving Kandy Farm and Pilkem Estate lawfully took place in 1969 and 1970; and hence the occupation continued to date, is sanctioned by the law. Invasion of land and remaining thereon without justification is what is pleaded by the petitioner, in his petition.

245. Accordingly, the petitioner pleaded and proved that the entry was unauthorized and unjustified in law and hence unconstitutional. In Muthiora v Muthama Kiara (*supra*), the court held that, the appellants' continued occupation of the said property from the first date of entry in so far as it remained unauthorized by the respondent, amounted to trespass and could not be termed as time or statute barred claim. The Court of Appeal confirmed the option that the trial court had given the appellant, to compensate the respondent for the value of the land to salvage the developments he had put up on the property to mitigate his loss, instead of the non-optional order of eviction and demolition.

246. In prayer numbers (i) and (ii), the petitioner seeks declaratory orders that his constitutional rights and freedoms under Articles 21, 21(3), and 27 of the *Constitution* were breached or violated. Further, he urges the court to declare that the decisions and actions to forcefully evict, take away, allocate and distribute the 14 parcels of land violated his rights under Article 40(1) of the *Constitution*. In *Imanyara & 2 others v Attorney General* (Petition 15 of 2017) [2022] KESC 78 (KLR) (Constitutional and Human Rights) (17 February 2022) (Judgment), the court observed that in awarding damages for a constitutional violation, quantification is different from that in civil or tortious claim, where the issues are clear-cut and quantification is straightforward. The court also held that public policy considerations must come into play, otherwise it is not easy not an easy task, for there is no adequate standard of damages, that has been developed in our jurisprudence.

247. The court cited *Fose v Minister for Safety & Security* (CCT 14/96) 2ACC 6 [1997], that an appropriate relief may include inter alia, an interdict and or an order of *mandamus*, to ensure that constitutional rights are protected. Further, the court cited *Rudul Shah v State of Bihar & another* [1983] 4 SCC 141, where the Supreme Court of India held that, on violations of human rights, unlawful acts of instrumentalities in acting in the name of public interest, using powers of the state as a shield, to ensure the state repairs the damage done by its officers.

248. In this petition, the petitioner has relied on the valuation report as a basis for the court to award him damages for breach of his constitutional rights as to ownership of land and discrimination on account of race. Market value in most jurisdictions remains the starting point in calculating just and equitable compensation.

249. In *City of Cape Town v Helderberg Park Development (Pty) Ltd* (291/2007) [2008] ZASCA 79 (2 June 2008), the Supreme Court of South Africa held that compensation must be paid to vindicate human rights for any expropriation of property as per Section 25 of the South African Constitution. The court held that the calculation of just and equitable compensation requires a balance of public interest and the interest of those affected, while having regard to all the relevant circumstances. Market value was listed, out of the five factors the court has to consider.

250. PW2's valuation report is based on market value. Given the case law, I find the objection by the respondents on the methodology used by PW2 lacking merits.

251. All the application forms for the land control board consents and the land control board consents availed before this court by the respondents, describe the petitioner's late father as a South African national. So, the respondents knew his race and nationality. He has pleaded in this petition that he was discriminated against on account of his right to property on account of his race and nationality. The deceased has pleaded in paragraphs 23-41, on how his family was subjected to humiliation, displacement, relocation and had to move to South Africa to start life all over again. In *Pandya Memorial Hospital v Geeta Joshi* [2020] eKLR, the court held that Article 27(5) of the *Constitution* prohibits discrimination directly of indirectly. The respondents have not disproved the allegations by the petitioner.

252. In *Reginald Destro & others v Attorney General* (1980) eKLR, the state had relied on the defence of estoppel, laches and acquiescence. The plaintiff suit like those in the instant case, were hesitant to sell their farm to the government. While parties were negotiating, the government invoked Section 6(1) of the *Land Acquisition Act* 1968. The court held that there must be evidence to support an assertion of the Minister, that the necessary condition had been satisfied. The court also held that some evidence is found in the documents. An issue of the danger of certain influential people obtaining the land had also been raised. The court found that an opportunity had not been presented to the owner to make a representation regarding allegation of failure to develop and there was, moreover, ample evidence to show that there was no foundation for it.

253. It is not disputed that the petitioner's late father's proprietary rights or interest, as a foreigner were protected by law as of 1968, including under the *Foreign Investments Protection Act* and Section 75 of the retired Constitution. In *Rutongot Farm Ltd v Kenya Forest Service & 3 others*(2018) eKLR, the court held that such rights are lawfully protected under Article 40 of the *Constitution*. Article 40(6) does not, however, extend to land unlawfully obtained. This is what the respondents have to appreciate. Two wrongs cannot make a right. The respondents alleges that the petitioner does not deserve any appropriate relief in the manner suggested by him since acquiescence, occupation by third parties and or public interest outweigh his constitutional rights and freedoms has not been substantiated through evidence, by the respondents. There is no cross-petition filed by the respondents. Further, the

respondents did not make any presentations on behalf of the alleged innocent third parties occupying the suit parcels of land.

254. A nullity is a nullity as held in *Macfoy v United African Co. Ltd* [1961] 3 ALL ER 1169. The respondents had no good title to pass to any of the alleged third parties. Equally, there is evidence that some of the Kandy Farm resultant parcels of land were converted to private properties. It is inconceivable how the suit parcels of land allegedly surrendered for public purposes, were converted into private use. This court cannot sanction and or assist the respondents to perpetuate an illegality.

255. In *Charles Opondo v Kabarak Farm Ltd & others; County Government of Trans Nzoia (IP)* [2021] eKLR, the court cited *Serraco Ltd v Attorney General* [2016] eKLR, that it is not every case that the defendant elects or fails to call evidence that the plaintiff is entitled to a judgment. The court cited Report of the Commission of Inquiry into the Illegal/Irregular Alteration of Public Land that:

> "The political realities surrounding the negotiations for independence at the Lancaster House conference favoured addressing the resettlement question peacefully without radically interfering with the rights of the settler community over their farm land."

256. The court observed that in acquiring white settler farms, the government was adopting the more equitable market-based land redistribution strategy. the *Constitution* requires the state to respect, protect, promote and fulfil the Bill of Rights, whether in formulating or implementing a policy. A court can invalidated an action whose effects or purposes are unconstitutional. See *R v Big M Drug Mart Ltd* (1985).

257. Article 27(1) of the *Constitution* provides that the state shall not discriminate directly or indirectly, against any person on any ground. The petitioner fits that description. Regardless of whether or not he was a South African national, his property rights were protected by both international law and the state law. He pleaded and proved forceful eviction, deprivation and trespass. Trespass is actionable per se. Subjecting him to arbitrary eviction, breaching his security of tenure, including against forced eviction, was both illegal and unconstitutional. See *Satrose Ayuma & others v Registered Trustees of the Kenya Railways Staff Retired Pension Scheme & others*, Nairobi HC Petition No 65 of 2010, *Ibrahim Sangor Osman v Minister of State for Provincial Administration & Internal Security* Petition No 2 of 2011 and *Kepha Omondi Onjuro & others v Attorney General & 5 others*, Petition No 239 of 2014. In *Mitu - Bell Welfare Society v Kenya Airport Authority Ltd & 2 others* [2018] KECA 759 (KLR), the court said that Article 40 of the *Constitution* protects the rights unless the deprivation is for a public purpose. Public purpose or interest, as alleged by the respondents, has not been justified.

258. Trespass to land or invasion, in my view, finds its constitutional anchor in Article 40 of the *Constitution*, especially where there is an unjustified intrusion on private land. The constitutional test applicable is whether, in the circumstances of this, petition, the respondents can plead justification, since they hold title to the suit parcels of land. The court has found no basis or justification for the alleged invasion or forceful entry into and occupation the suit parcels of land. The titles held by the respondents to the suit parcels of land were unlawful and unprocedurally obtained or acquired, hence cannot be protected under Article 40 of the *Constitution*.

259. There can be no right without a remedy in law. The petitioner has proved that his late father had certificates of lease, which unfortunately were terminated unlawfully and the suit parcels of land illegally or forcefully taken over by the 3rd and 5th, 6th and 7th respondents. Trespass is actionable per se. See *Kenya Power & Lighting Company Ltd v Eunice Nkirote Ringera* [2020] KECA 54 (KLR) and *Macharia Mwangi Maina & 87 others v Davidson Mwangi Kagiri* [2014] eKLR.

260. In determining the amount of damages in a constitutional petition for breach of Article 40 of the *Constitution* as pleaded by the petitioner, the court in *Kenya Railways Corporation v Omboto & another* (Civil Appeal 78 of 2020) [2025] KECA 537 (KLR) (21 March 2025) (Judgment), observed that the respondents actions amounted to a violation of the petitioner's rights under Article 40(1) of the *Constitution* as read together with Sub Article(2) and (6), since the right under the Article 40 thereof, does not extend to property found unlawfully acquired.

261. The court held that an award of damages is within the discretion of the court. The court cited the applicable principles in award of damages in constitutional violation as set by the Privy Council in *Siewchand Ramanoop v The Attorney General of Tobago and Trinidad*. Prior Court of Appeal No 13 of 2004, Per Lord Nicholls at Paragraphs *18* & 19:

> "When exercising this constitutional jurisdiction, the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the part of the violation, but in most cases, more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under Section 14 is discretionary.....
>
> An award of compensation will go some distance toward vindicating the infringed constitutional right."

262. Applying the rationality, proportionality and the public interest consideration. this court takes judicial notice that the valuation report produced before the court relates solely to the status of the suit parcels of land as of the date of inspection of 12/7/2021. There were no specific pleading by the petitioner on the value of the suit parcels of land as at the date of the forceful entry in 1969, compared to the current value. Though the petitioner's late father was carrying out large scale farming, keeping 2,000 dairy and beef cattle, planting maize in 100 acres, fruit and trees in 150 acres, 100 acres with coffee, 300 acres with mature trees, pasture in the rest of the acreage, having 1,000 farm workers and later relocated to South Africa, suffered depression, loss and damage due to the forceful eviction and displacement, no monetary values were pleaded and proved.

263. In *Emurai v Sambu & others* Civil Appeal No 63 of 2017 [2025] KECA 1033 [KLR] (5th June 2025) (Judgment), the court observed that in construing the *Constitution*, a court should avoid a construction that produces an absurd result, that is the presumption against a construction that produces unworkable or impractical results; presumption against anomalies or illogical result and the presumption against an artificial result and lastly; the principle that the law should serve public interest, meaning that the court should strive to avoid adopting a construction of the *Constitution* which is in any way is adverse to public interest, economic, social and political or otherwise.

264. The respondents failed to adduce evidence to discount the values given for the suit parcels of land, at the date of the inspection. No evidence was led to challenge the discriminatory manner in which the forceful eviction was undertaken.

265. Where a party fails to testify in support of their pleadings, such pleadings remain mere statements. A court of law should at all times determine the issues that are before it by way of pleadings and evidence. A court should not award prayers that are not sought and which do not settle but fuel the dispute. It is the respondents who want to add fuel to the dispute by submitting on matters that the petitioner did not plead to, advance in his evidence and or pray for, regarding the cancellation of the title deeds and the eviction of the occupants on the suit parcels of land. I must remind the respondents that the cause

of action as pleaded by the petitioner is based on forceful eviction, trespass or unlawful occupation and deprivation of the right to ownership of property, and discrimination on account of race, under Articles 21, 21(3), 27, and 40 of the *Constitution*.

266. This warning against parties enlarging and wading into non-issues was addressed in *Koross (Suing as the Administrator of the Estate of the Late Elijah CA Koross) v Barchigei (Sued as the Legal Representative of the Estate of Jonathan Kipkoros Barchigei) & 2 others* [2025] KECA 1038 (KLR). The court held that cases cannot be dealt with justly, unless the parties and the court know the issues in controversy. The court cited *Jessel M.R. Thorp v Holdsworth* (1876) 3 Ch. D. 637 at 639, that the whole object of pleadings is to bring the parties to an issue, and to prevent the issue from being enlarged, so as to diminish expense and delay. The court also held that the petition had been filed in good faith, in the interest of justice and that the doctrine of laches was not applicable in the circumstances.

267. The petitioner has pleaded forceful eviction, illegal occupation, displacement, deprivation of his right to property on account of race, and trespass to his parcels of land by the 3rd, 5th, and 6th respondents and discrimination on account of race. The cause of action is pleaded at paragraphs 15-41. In paragraphs 46-55 of the petition, the petitioner lays out the facts in support of his amended petition regarding how the respondents jointly orchestrated, perfected and purported to justify, the forceful eviction, illegal occupation, displacement, discrimination and trespass by seeking and obtaining the alleged surrender, sale, transfer, registration and title documents as a justification to evict, occupy and own the suit parcels of land. It is on those pleadings that the petitioner seeks appropriate relief before the court.

268. There was no pleading by the respondents that the alleged forceful eviction, illegal occupation, trespass, displacement and deprivation of the petitioner's right to ownership of property and to be free from discrimination, was justified in an open and free society, based on eminent domain, public interest. There was no evidence tendered that the reliefs sought by the petitioner were unreasonable, untenable, impractical and impossible both in fact and in law.

269. In this petition, the petitioner has testified that he was not privy to, aware of and did not consent to, or authorise the 3rd, 5th, 6th and 7th respondents to take over, occupy, use, own and displace him from his 14 suit parcels of land. He terms the acts of the respondents as unjustified in law and unconstitutional.

270. The petitioner led evidence in pointing out the illegalities, irregularities, unconstitutionalities and gaps in the chain of the paper trail held by the respondents to justify ownership and use of his parcels of land. In *Koross (Suing as the Administrator of the Estate of the Late Elijah CA Koross) v Barchigei (Sued as the Legal Representative of the Estate of Jonathan Kipkoros Barchigei)* (*supra*), the court held that the dictates of Article 40 of the *Constitution* connote that every person's right to ownership of property is not to be taken advantage of and where two or more people enter into a venture to obtain ownership of a property, the same should not be met with deceit, lies and crafty machinations, with a view of defeating the interest of a bona fide purchaser, by hook, line and sinker.

271. The 1st, 2nd, 3rd, 4th and 7th respondents failed to seize the opportunity to call evidence and justify the alleged defences to the petition. Cogent and tangible evidence to support the assertion by the respondents that their entry into, occupation and title documents in their possession, justify ownership and occupation and are sanctioned by law and do not fall under property that is not envisaged under Article 40 of the *Constitution*, was not availed before court.

272. Article 40 of the *Constitution* amplifies the concept of constitutional trespass. It has always stood against those who intrude on private property. It protects the rights of the landed gentry. It also protects values of privacy and autonomy against the state and its agencies. A constitutional tort of trespass connotes that one ought to be secure in his land. It also connotes that there will be no illegal seizure or invasion of the land, by both the state and non-state agencies.

273. John Locke 11 "*Two Treatises of Government*" 350 (Peter Laslett Ed. 1988)[i], defined property as lives, liberties, estates and as including the right to exclude others from one's land, not really for self-preservation, to create wealth, but also to protect one's self-worth and the very survival.

274. In *Entick v Carrington* [1765] 95 ER 807 KB, the court extolled trespass and private property and noted that any invasion into private property is prima facie trespass, unless the defendant could show justification. Trespass protects the possessor's right to develop the land, enjoy its use and profits from its fruits. See Richard A. Epstein, *"How to Create - or Destroy - Wealth in Real Property,"* 58 Alabama Law Review 741 (2007)[ii]. Trespass and the concept of property itself arose historically from the development of agriculture. Farmers would only work for months planting and sowing crops if they could be confident that they could exclude others from reaping those crops. The right to exclude under trespass afforded them that confidence. See Thomas W. Merrill, "*Property and the Right to Exclude*", 77 Neb. L. Rev. (1998)[iii] and Robert Ellickson; "*Property in Land*": The Yale Law Journal, Apr., 1993, Vol. 102, No 6 (Apr., 1993), pp. 1315-1400.[iv]

275. Simply put, the 1st, 2nd, 3rd, 4th, and 7th respondents have admitted that they have been in exclusive occupation of the suit parcels of land since 1969 to the present. Therefore, the petitioner has been denied use, occupation, possession, enjoyment, utilization and the derivation of profits from the suit parcels of land for over 50 years.

276. In *Cedar Point Nursery v Hassid* 594 US Supreme Court [2021), the court held that the founder of the states recognized that the right in the 4th amendment that the protection of private property is indispensable to the promotion of individual freedom and that as John Adams Tersely put it "property must be seined or liberty cannot exist". The court held that the protection of property rights is necessary to preserve freedom and empowers persons to shape and to plan their destiny in a world where governments are always eager to do so for them. Further, the court held that when the government physically requires private property for a public use, the takings clause imposes a clear and categorical obligation to provide the owner with just compensation and that the government in all takings, must pay for what it takes as held in *Tahoe-Sierra Preservation Council Inc. v Tahoe-Regional Planning Agency* 53 US 302 [2001].

K. Final Orders

277. Flowing from the foregoing, I find that the petitioner deserves the following appropriate reliefs. Declaratory orders are hereby issued that;

a. The 1st, 2nd, 3rd, 5th, 6th and 7th respondents to forcefully evict, take away, allocate and distribute his father's parcel LR No 5778(IR. 1500/1), LR No 6605/2(IR. 2414/1), LR No 9075 (IR. 13511/1), LR No 3036/7 (IR. 7117/1), LR LR No 2198/2, LR No 2199/2, LR No 5321/6, LR No 5324, LR No 5325, LR No 6409/2, LR No 5548, LR No 4329/1, LR No 5779/1 and LR No 5779/2 (the suit parcels), was a violation of Article 40(1) of the *Constitution*, which entitles the petitioner, either individually or in association with others, to acquire and own any property of any description in any part of Kenya and therefore, the actions of the respondents jointly and severally, amount to a deprivation of the right to property, were unlawful, illegal, discriminatory and are therefore unconstitutional.

b. The acts of the 3rd respondent to enter into, occupy, use, develop, possess, derive income and to drive out the petitioner's late father and his family out of the suit parcels of land, as confirmed in its letter dated 15/9/1969, written to the 1st respondent purporting that the suit parcels of land under Section 24 of the Prison Act belong to the Prison Department, amounted to and

were in, have been and amount to breach of the petitioner's rights under Articles 21, 21(3), 27 and 40 of the *Constitution*.

c. The acts of the 1st respondent to write to the 3rd respondent by a letter dated 10/9/1969 which was received or acknowledged by the 3rd respondent on 10/9/1969, authorizing or notifying or giving the 3rd respondent a go ahead to take over, occupy, use, develop, drive away and displace the petitioner's late father and his family out of occupation, use and ownership of the suit parcels of land, on a purported purchase or surrender of the same to the government through his alleged authorized agent, for use by the Prison Department, was, remain and amounts to breach of the petitioner's late father's and family's constitutional rights under Articles 21, 21(3), 27 and 40 of the *Constitution*.

d. The acts of the 2nd respondent to receive, approve, endorse and register the purported surrender documents to the Republic of Kenya as Reg. No 982 of 30/6/1969 against the certificate of leases for the suit parcels of land, under the authority of the petitioners' late father through his alleged authorized agent, were, remain and amounted to breach of his rights under Articles 21, 21(3), 27 and 40 of the *Constitution*.

e. The acts of the 3rd respondent to accept, receive, approve, transfer, register and or issue certificates of leases to the 5th, 6th and 7th respondents as Reg. No 800 on 27/10/1970 over the suit parcels of land, were in breach and amounted to a violation of the petitioner's late father's rights under Articles 21, 21(3), 27, and 40 of the *Constitution*.

f. Given the foregoing, the petitioner is awarded general damages of Kshs 9,653,400,000/=, jointly and severally, against the 3rd respondent, who, as admitted in evidence is utilizing the suit parcels of land comprised of Kandy Farm, as public land.

g. Further, as regards the 5th respondent, it is admitted that the 5th respondent wound up soon after acquiring the title deeds for the suit parcels of land. In the averments, the only appropriate order to grant is to declare the acts of the 1st and 2nd respondents in approving the entries and transfers concerning the titles in favour of the 5th respondents were null and void ab initio. The title registers shall revert to their status as of 26/8/1968.

h. Meanwhile, the holders of those title deeds who were the shareholders of the 5th respondent before it wound up, are at liberty to engage the petitioner to regularize or discuss the modalities of regularizing their status on the suit parcels of land otherwise known as Pilkem Estate, the petitioner given this order, may be at liberty to issue an eviction order to all the occupants on parcels of land forming part of Pilkem Estate, within 6 months from the date hereof.

i. The damages shall attract interest at court rates from the date of filing the petition till payment.

j. Costs of the petition to the petitioner, to be paid by the respondents jointly and severally.

278. Stay of this judgment is granted for a period of 6 months from the date hereof, in view of order (h) above.

279. Orders accordingly.

JUDGMENT DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 9TH DAY OF JULY 2025.

In the presence of:

Court Assistant - Dennis

HON. C.K. NZILI

JUDGE, ELC KITALE.