Barchigei (Suing as Legal Personal Representative of Jonathan Kipkoross Chesagur) v Koross (Sued as the Administrator of the Estate of Elijah C.A. Koross) & 2 others (Environment & Land Petition 8 of 2016) [2023] KEELC 20506 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20506 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND PETITION 8 OF 2016

FO NYAGAKA, J

OCTOBER 5, 2023

BETWEEN

CHARLES BARCHIGEI (SUING AS LEGAL PERSONAL REPRESENTATIVE OF JONATHAN KIPKOROSS CHESAGUR) ..... PETITIONER

AND

WILLIAM K. KOROSS (SUED AS THE ADMINISTRATOR OF THE ESTATE OF ELIJAH C.A. KOROSS) ..... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL ..... 2ND RESPONDENT

THE CHIEF LAND REGISTRAR ..... 3RD RESPONDENT

JUDGMENT

1. Though filed in 2016, the elements of its genesis is by no shadow of a doubt a morphosis of a litigious hard-fought battle over ownership of the suit land that has spanned over decades on end when in 1978 the 1st Respondent filed suit in Kakamega against Hezekiah Kiptoo Komen (deceased), a constituent member of some five (5) sleeping partners who also included the Petitioner. While the dispute concerned the 1st Respondent and a party not party to the proceedings, it will be seen sequentially how the Petitioner found himself entangled following a decision entered in 2013.

2. To put it into perspective, that dispute commenced in the year that our 1st President of the Republic of Kenya departed from this earth. Certainly so, with a multiplicity of references made to that matter, a conglomerate of issues, areas of concern and arguments were presented before this Honorable Court. I was reminded time and again of my humanity owing to the prolix issues that seemed unending. Being invited to hear and determine such a matter often entailed lengthy uninterrupted court proceedings, sleepless nights and arduous research so as to grasp all issues leaving no stone unturned.

3. When I retired to write this judgment, I was inspired by the prolific words of the Philosopher Montesquieu who stated as follows:

> "In monarchies, the administering of a justice that hands down decisions not only about life and goods, but also about honor, requires scrupulous inquiries. The fastidiousness of the judge grows as more issues are deposited with him, and as he pronounces upon greater interests."[1]

4. This court feels obliged to express gratitude to the Counsel on record. Indeed, such a chequered dispute invited an arena of illegible pleadings sometimes too difficult to read. This court appreciates that some of the documents furnished were almost impossible to navigate through due to obliterated words or feint sentences. Parties were called by this court to furnish legible documents and were all too willing to indulge the court in that aspect; not forgetting the fact that all original parties to the suit have since passed on. The reliance of the documentary evidence was exceptionally paramount thus. In a quest to unearth the truth and uphold justice, parties considerably made commendable efforts to assist this court in obtaining legible pleadings. This court is most grateful to all Counsel and the litigants for such indulgence, tenacity, industry and cooperation.

5. I dare say that based on the superlative conduct of Counsel in these proceedings that if William Shakespeare was privileged to be exposed to their conduct, then he certainly wouldn't have urged us to kill all lawyers!

6. In this dispute, the Petitioner is the Legal Representative and son of the deceased namely Jonathan Kipkoross Chesagur (CB1 - Grant of Letters of Administration dated 21/10/2016). The 1st Respondent is the son and Legal Representative of the estate of Elijah Chemoiywo Koross. The 2nd Respondent is the Principal Legal Advisor of the Government while the 3rd Respondent is the Chief Land Registrar whose office is established pursuant to Section 12 of the *Land Registration Act* 2012.

7. The Petitioner filed the present Petition dated 06/12/2016 on 29/12/2016. His Petition was couched on the provisions set out in Article 2 (4), 10, 19 (1), 19 (3), 20 (1), (2), (3) and (4), 21, 23, 40, 47 (1) and (2), 50 (1), 159 (1) (e) and 162 (2) (b) of *the Constitution* seeking the following reliefs:

   i. A declaration that the registration of the entire property known as L.R. No. 11440 in the name of the 1st Respondent as the sole owner infringes on the Petitioner's rights to property as enshrined in Article 40 of *the Constitution* of Kenya;

   ii. A declaration that the Petitioner is entitled to be registered as the owner of 203.82 acres comprised of the property known as L.R. No. 11440;

   iii. An order for judicial review by way of mandamus to compel the 3rd Respondent to delete the registration of the 1st Respondent as the sole owner of the entire property known as L.R. No. 11440 in the register;

   iv. An order of judicial review by way of mandamus to compel the 3rd Respondent to register 203.82 acres comprised of the suit property in favor of the Petitioner;

   v. In the alternative to the above, an order compelling the 1st Respondent to hive of and transfer 203.82 acres comprised of the property known as L.R. no. 11440 and transfer it to the Petitioner;

[1] Montesquieu 1748: Bk. VI, ch. 1, p. 72

vi. A permanent injunction restraining the Respondents by themselves, their agents assigns or representatives from alienating or interfering with the Petitioner's possession of 203.82 acres comprised of the property known as L.R. No. 11440 by forcible entry or otherwise in any manner prejudicial to the Petitioner;

vii. In the alternative to the above, an order directing the 1st Respondent to compensate the Petitioner for loss of user of 203.82 acres comprised of the property known as L.R. No. 11440;

viii. An order directing the Respondents and the Petitioner to file a report in court setting out compliance with the orders of the court within 120 days from the date of this decision;

ix. An order for costs of this Petition.

8. After compliance with pre-trial directions, parties agreed on 12/02/2020 to proceed to hear this Petition together with Kitale ELC No. 34 of 2017 limited only to purposes of taking evidence. Thus, it will be observed that in the course of writing this judgment, cross references will be made to proceedings in Kitale ELC No. 34 of 2017. Similarly, so, parties in Kitale ELC No. 34 of 2017 not parties to the present Petition were given leave to cross examine witnesses to the Petition.

9. I shall now summarize the facts and evidence of the prolix record as follows:

The Petitioner's Case

10. PW1, Jared Omondi, Court Administrator II produced the proceedings and judgment (delivered on 12/02/2013) in Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978); William K. Koross & Elijah C. K. Koross vs. Hezekiah Kiptoo Komen, Jonathan Kipkoross Kipsangur, Chebiatori Chemchor, Julius Kibet Cherotish & Kipserem Rotich. The proceedings were captured in two (2) volumes of files that were produced and marked as P.Exhibit 1 (a) and P.Exhibit 1 (b).

11. PW2 Charles Tariorot Barchigei the Petitioner herein was the second witness to testify. He obtained a Grant Ad Litem on 21/10/2016 which was produced as P.Exhibit 1 authorizing him to represent the estate of the deceased. He relied on his Supporting Affidavit sworn on 06/12/2016 together with the annexures thereto marked as P.Exhibit 2 - P.Exhibit 13 respectively. He also relied on his Statement of Defence and Counterclaim dated 02/11/2017 and filed on 03/11/2017, witness statement dated 24/02/2002 produced as P.Exhibit 14, Emeritus Justice Philip Tunoi's Replying Affidavit sworn and filed on 23/05/2018 as well as a list and bundle of documents dated 24/02/2020 and filed on 26/02/2020 which were produced as P.Exhibit 15 - P.Exhibit 27 in Kitale ELC No. 34 of 2017.

12. On examination of the exhibits relied on by the Petitioner, this court observes that the documents produced as P.Exhibit 1 to P.Exhibit 14 are a mirror reflection of the documents marked as P.Exhibit 15 to P.Exhibit 27 in that order. Thus, to avoid confusion, I will make references to the documents produced as P.Exhibit 1 to P.Exhibit 14.

13. Desirous of purchasing the suit land but unable to raise the entire amount, the 1st Respondent approached the Petitioner, Hezekiah Komen, Kibet Cherotich, Chebyator Chemjor and Kipserem Rotich (the five (5) purchasers also interchangeably referred to as the five (5) sleeping partners) to raise funds to purchase the entire suit land.

14. According to PW2, his father Jonathan Kipkoross Chesagur on 27/08/1974 entered into a sale agreement produced as P.Exhibit 2 with one Elijah Chemoiywo Koross, RW1's father (now deceased) for the purchase all that parcel of land namely Kaubeyon Estates L.R. No. 11440 measuring five hundred and fourteen (514) acres. The other partners entered into a verbal agreement with the 1st

Respondent. As such, he had no interest in L.R No. 9154. The agreement produced as P.Exhibit 2 read as follows:

> "I, Elijah C Koross, do hereby acknowledge receipt of the sum of Kshs. 23,000.00 given by Jonathan Kipkoros Arap Chesagur which sum has been paid on my behalf to Kaubeyon Estate Limited for the purchase of the said farm L.R. No. 11440.
>
> In exchange thereof, I give to the said Jonathan Kipkoros Arap Chesagur 80 (eighty acres) acres on the said farm after the purchase of it and he will free use and occupation of the said 80 acres.
>
> In case of any eventuality in the farm failing to be obtained by me I bind myself to return the said amount of Kshs. 23,000.00."

15. The agreement was drawn by Retired Justice Philip Tunoi in the nature and style of the firm of Nyairo, Tunoi & Company Advocates. The Petitioner was of the view that since the sums were paid, this refund clause was superfluous and overtaken by events.

16. The said property, a government lease, was owned by George Pitman Mott. Explaining its historical acquisition,Lands Limited, a subsidiary of the Agricultural Development Corporation (ADC), was preceded in ownership of the suit land by the Agricultural Settlement Trust which held the land on a government lease.

17. It was agreed that the consideration sum stood at Kshs.215,000.00 paid as follows: a deposit sum to the tune of Kshs. 43,000.00 was paid to the owner while the balance of Kshs. 172,000.00 was paid for over twenty (20) years in forty (40) equal half yearly installments of Kshs. 8,436.00 each.

18. Upon payment of the purchase price, the Petitioner and the sleeping partners occupied forty (40) acres of the suit land where they began farming activities and milk production supplied to KCC from animals left by the settler. Out of these activities, including instructing the 1st Respondent to lease out a portion of the suit land to Kenya Seed Company Limited, the Petitioner contended that the parties managed to offset the entire purchase price. Withal, some of the purchasers repaid the loan paid using personal means.

19. In terms of their contributions, the Petitioner remitted a sum of Kshs. 23,000.00 (accounting for 39.7% of the suit property), Hezekiah Komen paid Kshs. 10,000.00 while Kibet Cherotich, Chebyator Chemjor and Kipserem Rotich jointly paid Kshs. 35,000.00 after obtaining a loan from KCB to whom they charged their farms. In total thus, a sum of Kshs. 68,000.00 was given to Elijah Chemoiywo Koross for onward transmission toLands Limited. It was agreed that based on the above contributions, the entire suit land would ultimately be distributed on a pro rata basis upon completion of the purchase price.

20. Since the sleeping partners had contributed a total of Kshs. 68,000.00, once Kshs. 43,000.00 had been submitted as deposit towards the principle sum, the balance of Kshs. 15,000.00 was used to purchase a green Toyota pickup registration number KSP 144. That vehicle was later converted for personal use by the 1st Respondent.

21. The Petitioner's evidence was that throughout, the 1st Respondent never financially contributed towards the purchase of the suit property. He was however retained as their manager to facilitate purchase of the suit property.

22. The Petitioner would later discover that the 1st Respondent clandestinely and fraudulently transferred the suit land in his own name to the exclusion of the sleeping partners. The sleeping partners thus lodged a complaint with ADC.

23. Vide a forwarding letter dated 18/04/1979, one H.A. Oduor, Land Agent forwarded a report toLands Limited. The letter made reference to a meeting of the Land Control Board held on 11/04/1979. In pursuance of that meeting, the said Land Agent investigated claims for consideration of the Land Control Board. This in turn would enable the Claimants register in accordance with Presidential Directive. The letter and report produced P.Exhibit 3 had the following salient features, relied on as factual by the Petitioner:

    I. The Complainants outlined that they had purchased the suit land and had since farmed on it under the chairmanship of the 1st Respondent. He later filed a suit for trespass against one of them. This prompted the Complainants to conduct a search at the land's registry where they discovered that the 1st Respondent was the sole chargee to the title charged to the favor ofLands Limited.

    II. That Kibet Cherutich Kimuron, Chebyator Chemunjor Chebitong And Chesurem Kiprotich charged their parcel of land to KCB where they managed to raise Kshs. 35,000.00. Thereafter, they occupied the farm, harvested wheat and sold the produce to KFA between 1975 and 1976. So that cumulatively by 1976, they worked out that they had each contributed Kshs. 40,000.00 raising a total sum of Kshs. 120,000.00.

    III. Mr. Tunoi Advocate witnessed the 1st Respondent receive a combined total of Kshs. 10,000.00 from Hezekiah Komen paid on 05/07/1974, 20/07/1974 and 22/07/1974 in the sum of Kshs. 2,700.00, Kshs. 5,000.00 and Kshs. 2,300.00 respectively. Similarly, so, Mr. Tunoi Advocate witnessed him receive a sum of Kshs. 23,000.00 from the Petitioner on 27/08/1974. An acknowledgement was drawn to this effect. It was agreed that the money was in respect of eighty (80) acres of the suit land.

    IV. The Complainants had contributed a total of Kshs. 153,000.00. That they had no interest in obtaining a refund but instead sought to acquire ownership of the suit land by registration of proprietary interest in their favor.

    V. Historically, the suit land was the property of Agricultural Settlement Trust withLands Limited. It was leased to Mr. G. W. Mott. The 1st Respondent approached Mr. Mott on assignment of lease to obtain the property. On 19/02/1975, negotiations succeeded to wit the T.Z Land Control Board consented to the transfer of the suit land in his name.

    VI. The 1st Respondent subsequently obtained a letter of offer on 04/11/1976 with an option to purchase. The consideration sum was set at Kshs. 215,000.00 where a deposit of Kshs. 43,000.00 (20%) would be paid and the balance of the loan be paid for over twenty (20) years.

    VII. The 1st Respondent accepted the terms of agreement in his own name and to the exclusion of the sleeping partners.

    VIII. The author of the report became suspicious that fishy activities circumnavigated when he received a letter dated 09/05/1977 requesting for execution and registration of documents in respect to the suit land.

    IX. The conclusion of the report was that the sleeping partners had been taken for a ride by the 1st Respondent. That the sleeping partners had contributed money and lived on the farm in

good faith in the knowledge that they were registered proprietors of the suit land. The report accused the 1st Respondent, as the most enlightened person, of using the former Estates Officer ofLands Limited to accomplish his mission.

X. He thus recommended that a consent from the Land Control Board be obtained to include the name of the sleeping partners in compliance with the Presidential Directive. Secondly, thatLands Limited does approve their names on the strength of the findings of the report. Finally, handover the consent and approval byLands Limited to the sleeping partners (Complainants) to register their names in the title deed.

24. By letter dated 10/07/1980 produced as P.Exhibit 5 written to the firm of Nyairo Tunoi & Company Advocates,Lands Limited through their estate manager H. A. ODUOR informed the firm that the 1st Respondent deliberately withheld material information when it was approached and were thus misled.

25. The Land Control Board acceded to correcting the anomaly when it sat on 13/06/1979, 11/07/1979, 14/02/1980 and 13/03/1980 to consider an Application for consent dated 11/05/1979 was presented before them. In its meetings, considerations were taken that the sleeping partners had demonstrated that they had placed monetary contributions towards purchase of the suit land.

26. In that regard, the letter advised that the draft transfer drawn by Gautama & Kibuchi Advocates was at a variance with the letter of consent. They acknowledged that RW1's father did not want to admit the five (5) sleeping partners. Furthermore, he would have frustrated efforts to have their interests secured by not signing the application forms. It was their recommendation that a rectification of title be submitted to the relevant authority so that the sleeping partners are included as proprietors of the title together with the 1st Respondent.

27. Following the findings of the report captured above herein, by meeting held on 15/08/1980 by the Land Control Board, a consent was obtained dated 19/08/1980 transferring the suit land in favor of the sleeping partners and the 1st Respondent jointly.

28. All the while, the 1st Respondent filed a Plaint dated 22/05/1978 produced as P.Exhibit 6, being, Kakamega HCCC No. 43 of 1978 (later Kitale HCCC No. 89 of 1997). The Plaintiff sued Hezekiah Komen accusing him of trespassing onto the suit land. He sought eviction orders against him.

29. In response, the said Hezekiah Komen filed a Statement of Defence and Counterclaim dated 22/05/1978 [P.Exhibit 7] seeking to inter alia rectify the register so that the five (5) sleeping partners be registered as the proprietors of the suit land. He accused the 1st Respondent of obtaining title by means of fraud. The sleeping partners, although not sued as Defendants, were listed as witnesses on behalf of Hezekiah Komen.

30. The 1st Respondent filed a Reply to Defence and Defence to Counterclaim dated 21/08/1978. It was produced as P.Exhibit 8. The proceedings in the suit was also produced and marked as P.Exhibit 9.

31. In the midst of all this, PW2 recalled that the consent given on 13/03/1980 was quashed by the Court in Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 others produced as D.Exhibit 6. In his Ruling dated 12/01/1981, Mead J. declared that the proceedings before the Respondents concerning an Application for consent dated 11/05/1979 and its subsequent issuance were a nullity because the Applicant in the dispute had not executed the Application consenting to transfer the suit land as sought. Furthermore, the Application was caught by limitation of time.

32. The matter in Kakamega HCCC No. 43 of 1978 proceeded for hearing on 02/04/1980 ex parte before Scriven J. The Plaintiff was the sole witness. In its judgment dated 02/04/1980, the court ordered that

the Defendant Hezekiah Komen be evicted and was furthermore restrained from gaining access to the suit land.

33. In the meantime, the 1st Respondent on 08/03/1993 obtained a discharge of charge produced as P.Exhibit 4 fromLands Limited. For these reasons, the Petitioner accused the 1st Respondent of fraudulently obtaining tittle to his exclusion and those of the sleeping partners. That the same was contrary to the initial agreement entered by the parties herein.

34. Thereafter, by Application dated 31/10/1994, the 1st Respondent applied to have the Counterclaim dismissed. The same was dismissed on 30/11/1994.

35. Dissatisfied with the decision, Hezekiah Komen filed an Application dated 06/12/1994 seeking to reverse those orders. That Application was allowed paving way for hearing of the Counterclaim that took place on 25/02/1998. In its Judgment delivered on 12/02/2013 produced as P.Exhibit 10, Karanja J. found that the suit land ought to have been registered in the joint names of the five (5) sleeping partners, as follows:

> "All in all, judgment is entered for the Defendants against the Plaintiff as prayed in the Counterclaim to the extent that the Plaintiff is not entitled to the sole registrable interest in the suit land (prayer (a)) and that he (sic) appropriate register be rectified to have the suit land registered in the names of the Plaintiff and the five Defendants and/or their Personal Legal Representatives (prayer (a)). Thereafter, the parties shall at their own work out modalities aimed at sharing and or distributing among themselves the entire portion of the land."

36. The Court further found that the consents given on 13/03/1980 and 09/03/1988 were invalidated by the Nakuru High Court and Eldoret High Court respectively. The court noted that the 2nd consent, given on 19/08/1980, was never invalidated and was most crucial in establishing on a balance of probabilities that the five (5) purchasers had a right to claim the suit land.

37. Following successful judgment, the five (5) purchasers on 09/07/2014 caused the suit land to be registered in their names as captured in entry no. fifteen (15) on the title produced as D.Exhibit 25.

38. Dissatisfied with the findings of the trial court, the 1st Respondent filed Eldoret Civil Appeal No. 223 of 2014 by lodging a Memorandum of Appeal marked P.Exhibit 11. In its judgment delivered on 06/03/2016 produced as P.Exhibit 12], the Court of Appeal found that the Petitioner and the interested parties were never made parties to the proceedings. Additionally, the ex parte judgment of Scriven J. rendered the issues raised in Hezekiah Komen's Counterclaim res judicata. For these reasons, the decision of the trial court was reversed.

39. The Petitioner contended that when examining the Judgment of the Court of Appeal in Eldoret Civil Appeal No. 223 of 2014, the same did not determine his rights.

40. Aggrieved by that finding, the 1st Respondent challenged the decision of the Court to the extent that the Petitioner and the interested parties were never enjoined in the proceedings at the trial court. His Application dated 27/08/2015 was dismissed on 05/02/2016 with costs. In its ruling marked P.Exhibit 13, the Court held:

> "Whether or not the third-party respondents were parties to the suit is a matter of fact, and not a matter for conjecture. For the court to have considered the status of the third-party respondents in its judgment and to have arrived at the conclusion that they were not parties to the suit is a substantive determination, and not one that could by any stretch of imagination fall within the definition of an error or accidental slip as envisioned by rule 35

of this court's Rules ... This court having rendered a substantive decision on the status of the third-party respondents is for all intents and purposed functus officio..."

41. It is in light of the above that the Petitioner justified the Petition as never having been heard and determined before any trial court. For those reasons, it was proper before this court for hearing and determination on its merits. Following the pronouncement of the Court of Appeal, entry no. six (6) in the title was entered on 04/07/2017.

42. Speaking to the eviction, the Petitioner recalled that in 1982, all the five (5) sleeping partners were evicted and their houses torched. It took the intervention of Provincial Administrator namely PC HEZEKIAH OYUGI and DC MR. OYIER to restore them back to the land. This evidence was captured in proceedings which was produced as P.Exhibit 9.

43. When referred toD.Exhibit 43 and D.Exhibit 44, PW2 testified that the two (2) eviction orders were different; the former sought to evict Hezekiah Komen alone while the other sought to evict all the five (5) sleeping partners.

44. PW2 was referred to D.Exhibit 32 which was a letter dated 11/05/1981. The same was authored by Nyairo Tunoi and Company Advocates and addressed to Elijah Chemoiywo Koross. It read as follows:

> " As requested by you we hereby submit to you how the above sum received by us from you for and on behalf of Mr. Chesagur was paid to him and/or on his behalf. We retained the sum of Kshs.500/= being our fees.
>
> You should also note that we have acted and have been acting for Mr. Chesagur on some other matters which should not be confused with the above refund transaction."

45. PW2 denied that his father received the said funds as if at all that was the case, then he ought to have been refunded a sum of Kshs. 23,000.00 and not Kshs. 25,500.00. Withal, he disputed the letter as having been received by his father since it bore the address P.O. Box 100 Eldoret that did not belong to his father as P.O. Box 684 Eldoret.

46. PW2 stated that in 2016, upon filing the present Petition, he had lived on the farm for forty-two (42) years. He testified that all sleeping partners were illiterate. While he spent considerable time with his father particularly during the transactions herein, he only met the 1st Respondent once. That he filed the present Petition in 2016 because of the ongoing battle at the Court of Appealin Eldoret Civil Appeal No. 223 of 2013. In its decision, the court remarked that the other Defendants were not enjoined in the suit. It is for this reason, coupled with the fact that an eviction process was imminent, that he filed the present suit.

47. The Petitioner's claim is premised on the agreement dated 27/08/1974 coupled with allegations of fraudulent activities that occurred after the agreement. In light of the above evidence, the Petitioner urged this court to award the estate two hundred and three (203) acres.

48. He continued that presently, all five (5) purchasers and Elijah Chemoiywo Koross's kin remained in occupation of the suit property measuring five hundred and thirty-five (535) acres. That presently, he stayed on fifty (50) acres,Kibet Cherotich's estate occupied thirty-five (35) acres, Chebyator Chebitony's estate occupied an unknown acreage while Cheserem Kiprotich's estate occupied forty to fifty (40-50) acres of the suit land. The Petitioner further prayed that the reliefs sought in the Petition be granted as prayed.

49. When cross-examined, PW2 testified that before he met his death in 1992, his father did not sue the 1st Respondent of the fraudulent activities that were apparent during his lifetime. He accused him of failing to remit the sum of Kshs. 68,000.00 collected by the five (5) purchasers to the vendor company.

50. He further could not ascertain that the said Elijah Chemoiywo Koross was a manager of the company. He added that he was contracted to represent the interest of the five (5) sleeping partners but did not adduce any partnership deed to this effect. He however stated that he paid himself as manager out of the proceeds of the farm.

51. While being examined on P.Exhibit 2, PW2 said that the Petitioner was alive to the proviso, similarly confirmed by Counsel for the parties Retired Justice Philip Tunoi. In his evidence captured in the proceedings marked D.Exhibit 11 produced as P.Exhibit 8, the Retired Judge testified that if Elijah Chemoiywo Koross did not give the eighty (80) acres, there was a refund option to the tune of Kshs. 23,000.00.

52. Having said that, the Retired Judge testified that he was not aware of breach of the agreement. He added that a sum of Kshs. 25,500.00 had been retained for the Petitioner who had refused to accept the refund. Thus, the money was never refunded. It was intended to be paid via cheque dated 03/04/1976 that bore no name of the drawer but to be paid to P. K. Tunoi.

53. PW2 was further referred to D.Exhibit 26, Ruling in respect to Nairobi High Court Misc. Civil Case No. 167 of 1981; Hezekiah Komen & 4 Others vs. Elijah Chemoiywo Arap Koross. In that matter, the sleeping partners sued the 1st Respondent seeking inter aliathat the 1st Respondent be declared a trustee of the suit land to the extent of each Applicants' contribution to the purchase of land and that the suit land be subdivided and each Applicant be allocated his portion.

54. The court was informed that the Respondent had identified the suit land for purchase from a European. Since he didn't have enough funds, he approached the Applicants who subsequently contributed as set out in paragraph eleven (11) of this judgment. That in February, 1975, upon paying the said sums, the Applicants entered on the suit land and cultivated on the land. The Respondent was employed as the manager. That they discovered the Respondent's fraudulent activities when they sought to register the suit land in their joint names.

55. The court took into account the historical background of the parties including the judgment entered by Scriven J. on 02/04/1980 in Kakamega HCCC No. 43 of 1978 and the Ruling of Mead J. in Nakuru HC Misc. No. 10 of 1980 dated 12/01/1981. The court found that since ownership had been determined to belong to the Respondent and that decision had not been appealed, then he remained the purchaser of the suit land. He thus said:

> "All the Applicants are saying is that they contributed to the purchase price. Maybe they did, I do not know, but it does not make them purchasers."

56. The suit was dismissed for two (2) reasons; firstly, the Applicant had approached the court with unclean hands for failing to disclose that the parties had been in a litigious battle at the High Court in Kakamega. Secondly, the Counterclaim in Kakamega HCCC No. 43 of 1978 was yet to be determined. For these reasons, the court dismissed the Originating Summons on technical grounds.

57. Contrary to his earlier evidence, PW2 revealed on cross-examination that Kibet Cherotich, Chebyator Chemjor and Kipserem Rotich each contributed Kshs. 40,000.00 and not Kshs. 35,000.00 jointly. PW2 was emphatic that the sum of Kshs. 153,000.00 was paid by the five (5) sleeping partners from the farm produce.

58. PW2 lamented that the parties herein have been in a long unending protracted legal battle bearing criminal elements. He remembered that in 2014, the 1st Respondent had him incarcerated for using the wrong road. Similarly, the sons of the remaining purchasers have slept behind bars at the instance of the 1st Respondent.

59. PW2 acknowledged the efforts made by Hezekiah Komen in safeguarding their interests. He was appointed associate manager of the farm. He was also authorized by the sleeping partners to file a counterclaim in Kitale HCCC No. 89 of 1997.

60. PW2 confirmed that the following vouchers D.Exhibit 31 were drawn by the firm of Nyairo Tunoi & Company Advocates and received by and in favor of his father on diverse dates as follows:

    i. Voucher No. 402 dated 22/1/1976 for Kshs. 1,000.00;

    ii. Voucher No. 29 dated 07/05/1976 for Kshs. 2,000.00;

    iii. Voucher No. 431 dated 26/8/1976 for Kshs. 1,100.00;

    iv. Voucher No. 381 dated 25/10/1976 for Kshs. 300.00;

    v. Voucher No. 274 dated 21/02/1977 for Kshs. 200.00;

    vi. Voucher No. 223 dated 03/05/1977 for Kshs.14,300.00 by cheque No. A316187.

61. He maintained that the above vouchers totaling Kshs. 18,900.00 were not in respect to the refund money as stated in the agreement.

62. Disputing that the cheque dated 03/04/1976 settled the payment vouchers, the Petitioner justified that the first voucher is dated 22/01/1976 yet the cheque was drawn on 03/04/1976. He further stated that the payment vouchers were not proof of actual payment. Evidence was further led to the Petitioner during his cross-examination to establish that the five (5) purchasers/sleeping partners were not proprietors of the suit land as follows:

    i. D.Exhibit 68, a Letter of consent dated 24/11/1973. By it the Land Control Board approved a transfer of lease fromLands Limited to Elijah Chemoiywo Koross;

    ii. D.Exhibit 107 - statements of account of Elijah Chemoiywo Koross for the period 1978, 1983 and 1984 as debtor fromLands Limited, a wholly owned subsidiary of ADC);

    iii. D.Exhibit 131 - offer letter dated 13/11/1975 fromLands Limited to Elijah Chemoiywo Koross on purchase of the property at Kshs. 215,000.00;

    iv. D.Exhibit 132, a further offer letter dated 04/11/1976 disclosing the terms and conditions of the parties as follows: a deposit of Kshs. 43,000.00 with the balance of Kshs. 172,000.00 being paid in forty (40) monthly installments for a period of twenty (20) years at Kshs. 8,436.00 each.

    v. D.Exhibit 138, a letter dated 19/05/1977 fromLands Limited to Archer & Wilcock Advocates. It disclosed that the property had been sold to Elijah Chemoiywo Koross in the terms set out in D.Exhibit 132. It was seeking the Advocates to prepare the necessary transfer documents having enclosed the necessary documents in the letter;

    vi. D.Exhibit 139, a letter dated 04/04/1979 from Elijah Chemoiywo Koross requesting Kenya Seed Company Limited to remit a loan amount in the sum of Kshs. 47,049.75 toLands Limited, the vendor;

vii. DMFI.139(b), a statement of account of Elijah Chemoiywo Koross fromLands Limited dated 18/06/1981. The amount outstanding then was Kshs. 88,949.05;

viii. D.Exhibit 140, a bundle of demand letters fromLands Limited to Elijah Chemoiywo Koross between 1982 and 1990;

ix. D.Exhibit 141, a discharge instrument dated 08/03/1993 in the name of Elijah Chemoiywo Koross;

x. D.Exhibit 144, a Ruling dated 05/10/1988 in respect to Eldoret HCC 115/1988 (OS); Hezekiah Kiptoo Komen vs. Elijah Chemoiywo Arap Koross. In dismissing the Application, Aganyanya J. discovered that the Applicant had lost in Kakamega HCCC No. 43 of 1978 and Nakuru HC Misc. No. 10 of 1980; facts that had not been disclosed to the court. He was thus guilty of material non-disclosure. The Judge thus found that it was unlawful to obtain the consent dated 09/03/1988. He acknowledged that previous litigation found that the suit land belonged to the Respondent and that the same should end there.

63. When further cross-examined, PW2 stated that his Petition by clerical error claimed ownership of L.R. 14440 when in actual fact, they were claiming ownership over L.R. 11440. That since the case was based on the agreement dated 27/08/1974, where the 3rd Respondent was not a party, he had no claim against it. Furthermore, he stated that the 3rd Respondent could not be held liable since it only made entries on information received from Elijah Chemoiywo Koross. During that process, no caution or restriction was made against the entries subsequently registered. They further did not raise any complaints before the 3rd Respondent.

64. Explaining why the Petitioner's estate was entitled to two hundred and three (203) acres and not eighty (80) acres as captured in the agreement dated 27/08/1974, the Petitioner stated that after remitting the sum of Kshs. 43,000.00,Lands Limited gave them a loan facility in the sum of Kshs.172,000.00 payable in forty (40) instalments of Kshs. 8,436.00 each. While the loan facility was not verifiable by way of production of a document to that effect, PW2 was adamant that the same was paid on a pro rata basis thus entitling the five (5) sleeping partners to portions of the suit property depending on their contribution.

65. Speaking to violation of his right to fair administrative action as set out in Article 47 of *the Constitution*, the Petitioner blamed Elijah Chemoiywo Koross and the Land Control Board for not affording him an opportunity to be heard. However, he stated that he had not lodged any objection or memorandum in writing when the first consent was issued. Thus, the board could not have known that they had issues.

66. PW2 was referred to the impugned title deed produced as D.Exhibit 25 in respect to the suit land. At entry no. seven (7), it was revealed that the land was transferred to Elijah Chemoiywo Koross on 19/02/1975 for Kshs. 41,120.00. Entry eight (8) recorded the transfer toLands Limited on 15/06/1976 for Kshs. 207,463.25. Entry nine (9) was a surrender of lease as captured in entries five (5) and seven (7) dated 16/6/1997. Entry ten (10) showed a transfer to Elijah Chemoiywo Koross for Kshs. 215,000.00 on 16/6/1977. Entry No. twelve (12) was a caveat by Hezekiah Komen registered on24/05/1978 on ground that he had purchaser's interests.

The Respondents' Case

The 1st Respondent's Case

67. The 1st Respondent relied on his Replying Affidavit sworn on 23/01/2017 and filed on 26/01/2017 with the annexures thereto marked WKK1 - WKK55 in this Petition and his Supplementary Affidavit

sworn on 03/04/2017 and filed on 05/04/2017 in Kitale ELC No. 34 of 2017. He also relied on his witness statement dated 23/02/2017 and filed on 24/02/2017 as well as his supplementary witness statement dated 12/10/2017 and filed on 16/10/2017 in Kitale ELC No. 34 of 2017. Additionally, he relied on two (2) statements both dated 22/01/2018 and filed on 23/01/2018 in this Petition and in ELC No. 34 of 2017.

68. Insofar as documentary evidence is concerned, the 1st Respondent marked the following for identification:

    i. D.Exhibit 1 - 50 - a List of documents dated 22/01/2018 and filed on 23/01/2018;

    ii. D.Exhibit 51 - 100 - a List of documents dated 22/01/2018 and filed on 23/01/2018. [It is noted that these said documents are a mirror reflection of the documents marked D.Exhibit 1 - 50. For these reasons and to avoid confusion, I will refer to the documents marked D.Exhibit 1 - 50 solely across the evidence];

    iii. D.Exhibit 101 - 122 - a Supplementary Affidavit sworn on 12/10/2017 and filed on 16/10/2017;

    iv. D.Exhibit 123 - 148 - a Replying Affidavit sworn on 23/01/2017 and filed on 26/01/2017;

    v. D.Exhibit 149 - 151 - a List of documents dated 23/02/2017.

69. The 1st Respondent's evidence was that in 1976, he solely purchased the suit land namely L.R. No. 11440 also I.R 20230 measuring five hundred and fourteen (514) acres fromLands Limited vide a transfer instrument registered on 16/06/1977 produced as D.Exhibit 25 [Annexture WKK51 the copy of title deed]. The map was also produced and marked as D.Exhibit 41. At that time, the land was free from any encumbrance. To date, he is in occupation of four hundred (400) acres of the suit land.

70. The 1st Respondent is amongst one of the four (4) Administrators of the estate of Elijah Koross [who died on 12/10/2001 - Death Certificate marked D.Exhibit 27] issued in Kitale HC P&A No. 117 of 2003; In the matter of the Estate of Elijah Chemoiywo Arap Koross produced as D.Exhibit 30 (Annexture WKK1. That Grant is yet to be confirmed.

71. Briefly, the 1st Respondent synopsized the parties, their Administrators and the pleadings filed in Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978); Elijah C. A. Koross vs. Hezekiah Kiptoo Komen. He produced the Plaint dated 22/05/1978, the Statement of Defence and Counterclaim dated 29/07/1978 and Reply to Defence and Counterclaim dated 21/08/1978 produced as D.Exhibit 1 (Annexture WKK2), D.Exhibit 2 (Annexture WKK3) and D.Exhibit 3 (Annexture WKK4) respectively.

72. The 1st Respondent relied on the court record in Kitale HCCC No. 89 of 1997 to demonstrate that the sleeping partners were enjoined in the proceedings. The 1st Respondent produced the Chamber Summons Application and Affidavits in support thereof dated 06/10/1978 produced as D.Exhibit 5 (Annexture WKK5) filed by the Applicants, the sleeping partners. It was granted as prayed on 23/10/1978 [proceedings in Kitale HCCC No. 89 of 1997 produced and marked as D.Exhibit 7 (Annexture WKK6).

73. The 1st Respondent recalled that when Kakamega HCCC No. 43 of 1978 was heard by Scriven J. on 02/04/1980, an ex parte Judgment was entered in his favor. The court directed to evict Hezekiah Kiptoo Komen and restrain him from trespassing the suit land, as shown in the order dated 21/11/1980 produced as D.Exhibit 48 (Annexture WKK54) and warrant of eviction dated

16/03/1982 produced as D.Exhibit 49 (Annexture as WKK55), and eviction order dated 20/05/2016 produced as D.Exhibit 43.

74. On the strength of this order, the sleeping partners were evicted by the court bailiff, OCPD Wilfred Mwongera and Kamaliza security guards who the 1st Respondent accused of burning their houses and camping there.

75. Following eviction, the 1st Respondent proceeded to plough on the sixty (60) acres on 01/02/2017 with heavy machinery. This was met with resistance. The 1st Respondent testified that Nelson Kiptoo, Solomon Kiprop And Jonathan Kosgei assaulted him together with his driver and caused damage on his two (2) tractors. He reported the incident whereupon the accused persons were arrested and charged in Kitale CMCR. No. 551 of 2017. The parties therein amicably resolved the dispute out of court. However, that instigated the filing of Kitale ELC No. 34 of 2017.

76. The 1st Respondent maintained that upon eviction in 1980, the evictees never returned to the suit land until they were unlawfully brought back by PC Hezekiah Oyugi, DC Anthony Oyeir, DO Oreta And Chief Kapondi. They were settled on a different section of the suit land. In light of those developments, the 1st Respondent wrote a letter dated 25/01/1985 produced as D.Exhibit 34 urging the AG and ADC to help him safeguard his interest and evict unauthorized persons from the suit land.

77. The 1st Respondent successfully applied to have the Counterclaim dismissed on 30/11/1994. Dissatisfied with that finding, Hezekiah Kiptoo Komen filed a Chamber Summons Application in the same cause dated 06/12/1994 seeking to reinstate the Counterclaim. That Application was successfully prosecuted.

78. Further justifying participation in the proceedings, 1st Respondent produced a Chamber Summons Application dated 05/11/1993 produced D.Exhibit 15. In it, one Cherutich Kimuron filed an Application in Kakamega HCCC No. 43 of 1978 seeking to set aside orders issuing a warrant of arrest against him.

79. The 1st Respondent also annexed an Authority to Plead dated 11/08/2015 produced as D.Exhibit 45 filed in Kitale HCCC No. 89 of 1997. In it, the Petitioner and William Kipruto Yator (Administrator of the estate of Chebiatory Chemchor Chebitong) authorized Julius Kibet Cherotich to sign, execute, plead and set his hand on any document requiring their execution.

80. In the same vein, Julius Kibet Cherutich Kimuron filed citation proceedings in Kitale HC Miscellaneous Application no. 81 of 2003; In the matter of the estate of Elijah Chemoiywo Arap Koross. According to his Affidavit in verification of proposed citation to accept or refuse letters of administration intestate produced as D.Exhibit 50, the deponent desired to have the Counterclaim in Kitale HCCC No. 89 of 1997 heard. He disclosed that he was the 4th Defendant in the matter. That the absence of a representative of the estate of the Plaintiff therein impeded the exercise hence the Application.

81. Thereafter, all sleeping partners with the exception of the Petitioner on 04/08/1998 gave evidence in support of the Counterclaim. That Counterclaim dated 29/07/1978 in Kitale HCCC No. 89 of 1997 was ultimately determined by Karanja J. produced as D.Exhibit 8 (Annexture WKK8 and decree produced D.Exhibit 4 (Annexture WKK7). For these reasons, the 1st Respondent maintained that the five (5) purchasers were well aware of the dispute that arose in 1978 in court and were parties to the dispute.

82. Referring to the Judgment entered by Karanja J. produced as D.Exhibit 8, the 1st Respondent stated that judgment was entered in favor of the five (5) purchasers; the arsenal used to obtain title in their

names jointly. Through the Petitioner as Chairman, the sleeping partners sought to subdivide the suit land as follows: share out four hundred and eight (408) acres amongst themselves and reserve the remaining fifty (50) acres to the 1st Respondent's family.

83. Dissatisfied with the decision of Karanja J., the 1st Respondent preferred an appeal in Eldoret Civil Appeal No. 223 of 2013; Elijah C. A. Koross vs. Hezekiah Kiptoo Komen & 4 Others. In its Judgment dated 06/03/2015 produced as D.Exhibit 9 (Annexture WKK9), the Court of Appeal set aside the judgment of the trial court in Kitale HCCC No. 89 of 1997. The Court of Appeal found that the Petitioner and the interested parties were never made parties to the proceedings. Additionally, the ex parte judgment of Scriven J. rendered the issues raised in Hezekiah Komen's Counterclaim res judicata. The effect of the judgment was to reverse the registered interests of the sleeping partners to their detriment. For that reason, the suit land remains registered in the 1st Respondent's name.

84. The court went on to clarify that the suit only lay against Hezekiah Komen since the other Respondents (sleeping partners) were never formally enjoined in the proceedings and as such were not affected by the outcome.

85. The 1st Respondent testified that all the parties involved have never co-existed in peace. The peak of their embattlement took place in 2013 after the judgment of the court in Kitale HCCC No. 89 of 1997. The 1st Respondent accused the five (5) sleeping partners and their assigns/personal representatives of destroying three hundred (300) acres of his land, arson and theft of his tractor registered KXU Fiat New Holland Tractor KTCB379P (since recovered) and cattle. He reported the matter at Endebess Police Station wherein the PPO Rift Valley one William Lipusa managed to restore the situation to calmness.

86. The barrage of disputes and issues befalling the parties informed his conclusion to the extent that the said sleeping partners have contrary to the statements, not occupied the suit land peacefully for twelve (12) uninterrupted years.

87. In 1979, land agent one H. A. Odwor prepared a report P.Exhibit 3 forwarded the District Commissioner Trans Nzoia vide a letter dated 18/04/1979. He was acting on the instructions of ADC. The 1st Respondent lamented that during the compilation of the report, he was never interrogated yet the land had been transferred to him on 16/06/1977 produced as D.Exhibit 25.

88. According to the report marked P.Exhibit 3, the Petitioner paid Kshs. 23,000.00, Hezekiah Komen paid Kshs. 10,000.00 and Solomon Kiprop, Kibet Cherutich Kimuron as well as Chebiator Chemjor Chebitong each paid Kshs. 40,000.00 to the 1st Respondent; yet he held himself out as the only purchaser taking the other partners for a ride.

89. The report accused the 1st Respondent of proceeding to obtain a consent from the Land Control Board fraudulently because he failed to include all the purchasers. Instead, he declared that he was the sole purchaser of the property. The sentiments in the said report were also delineated in Hezekiah Komen's Counterclaim in Kitale HCCC No. 89 of 1997.

90. According to the report, the five (5) purchasers were not interested in a refund of their contribution to the 1st Respondent. They were intent on owning the land as arranged and earlier on agreed in April, 1979. The report acknowledged that the said purchasers did indeed contribute money in good faith and had since lived on the suit land for three (3) years as at the date of the report with knowledge that they were the registered proprietors.

91. For the above reason, the report recommended that a consent be obtained from the Land Control Board to include all the sleeping partners in compliance with the presidential directive. In compliance,

following an application for consent by the 1st Respondent andLands Limited jointly dated 25/07/1980, the Land Control Board, in its meeting held on 15/08/1980 issued a consent in favor of the sleeping partners together with the 1st Respondent dated 19/08/1980.

92. Dissatisfied with above, the 1st Respondent filed Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 others seeking to quash the consent given on 13/03/1980. He sued the Trans Nzoia Land Control Board. The five (5) purchasers were enjoined in the suit as interested parties. It is to be noted that the report by ADC was never challenged.

93. In his Ruling delivered on 12/01/1981 [D.Exhibit 6/WKK52], Mead J. declared that the proceedings before the Respondents concerning an Application for consent dated 11/05/1979 and its subsequent issuance were a nullity because the Applicant in the dispute had not executed the Application consenting to transfer the suit land as sought. Furthermore, the Application was caught by limitation of time.

94. The five (5) purchasers then moved the High Court sitting at Nairobi in HC Misc. App. No. 167 of 1981; Hezekiah Komen & 4 others vs. Elijah Chemoiywo Arap Koross seeking to have the 1st Respondent declared a trustee of the suit land. They further sought subdivision pro rata.

95. The court was informed that the Respondent in the proceedings therein had identified the suit land for purchase from a European. Since he didn't have enough funds, he approached the Applicants who subsequently contributed as set out in paragraph eleven (11) of this judgment. That in February 1975, upon paying the said sums, the Applicants entered on the suit land and cultivated on the land. The Respondent was employed as the manager. That they discovered the Respondent's fraudulent activities when they sought to register the suit land in their joint names.

96. The court took into account the historical background of the parties including the judgment entered by Scriven J. on 02/04/1980 in Kakamega HCCC No. 43 of 1978 and the ruling of Mead J. in Nakuru HC Misc. No. 10 of 1980 dated 12/01/1981. The court found that since ownership had been determined to belong to the Respondent and that decision had not been appealed, then he remained the purchaser of the suit land. He thus said: "All the Applicants are saying is that they contributed to the purchase price. Maybe they did, I do not know, but it does not make them purchasers."

97. In its decision delivered on 05/10/1988 produced as D.Exhibit 26, the court dismissed the suit on account of two (2) technicalities; firstly, the Applicant had approached the court with unclean hands for failing to disclose that the parties had been in a litigious battle at the High Court in Kakamega. Secondly, the Counterclaim in Kakamega HCCC No. 43 of 1978 was yet to be determined.

98. Still intent on protecting his interests, one Hezekiah Komen filed Eldoret HCCC No. 115 of 1998; Hezekiah Kiptoo Komen vs. Elijah C. A. Koross seeking to obtain a consent. In dismissing his Application, Justice Aganyanya on 05/10/1988 produced as D.Exhibit 10 also produced as D.Exhibit 42 (Annexture WKK53) found that the Applicant was guilty of material disclosure. He acknowledged that previous litigation had found that the 1st Respondent was the lawful proprietor of the suit land. He thus urged the matter to end there.

99. In another dispute at Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 others, the 1st Respondent sued the five (5) sleeping partners. By order dated 12/02/1996 produced as D.Exhibit 24, interim orders were granted staying the sale of the Defendant's goods and heads of cattle attached by M/s Fema Traders or any other Auctioneers. The substantive Application was set to be heard on 26/02/1996.

100. The 1st Respondent dismissed as false the minutes indicating that he was intent on selling the suit land in collaboration withLands Limited. In addition, since the property had been charged for a period of twenty (20) years in favor ofLands Limited on 16/07/1977, the land could not have been available for sale as it was encumbered. He relied on D.Exhibit 28, the transfer dated 16/06/1977.

101. On 08/02/1974, Kibet Cherutich appointed Elijah Chemoiywo Arap Koross as his attorney over the all that property namely Cherangany/Chebororwa/182. Under the Power of Attorney produced as D.Exhibit 19, the donee was appointed the donor's attorney generally in relation to his interests over the named parcel of land and do anything as may be necessary to carry out the powers.

102. The 1st Respondent produced green cards in respect to all those properties namely Cherangany/Koitugun/78, and Cherangany/Chebororwa/182 produced D.Exhibit 20, D.Exhibit 21 and D.Exhibit 22 respectively. They belonged to Chebiator Chemjor, Cheserem Rotich And Kibet Cherutich respectively.

103. The 1st Respondent produced a charge in respect to all that parcel of land namely Cherangany/Koitugun/78. According to the charge document dated 05/07/1974 produced as D.Exhibit 38, the property was charged in favor of KCB for a principle sum of Kshs. 35,000.00. Similarly, a charge document dated 05/07/1974 produced as D.Exhibit 39 charged Cherangany/Koitugun/99 to KCB for a principle sum of Kshs. 35,000.00.

104. Explaining the historical acquisition of the suit land, the 1st Respondent contended that on 24/01/1975, an assignment of lease with an option to purchase was issued to him. He then became lessee for a period of two (2) years in that year when it was made available for an annual revisable rent of Kshs.13,485.10. Thus, by letter of consent dated 24/01/1975 produced as D.Exhibit 18 he was assigned the lease with an option to purchase fromKaubeyon Estates Limited. For that reason, the suit land was not available for sale as at 27/08/1974.

105. Vide a letter dated 13/11/1975 produced as D.Exhibit 133 (Annexture WKK10),Lands Limited offered a proposal for purchase of the suit land to the 1st Respondent. Under its terms and conditions, the property was offered for purchase at the consideration sum of Kshs. 215,000.00.

106. Agricultural Settlement Trust, the predecessor ofLands Limited, in its letter dated 18/11/1975 (Annexture WKK25) forwarded the lease agreement fromKaubeyon Estates Limited to the 1st Respondent. This was preceded by his application for transfer of the suit land in his name. In his letter dated 20/08/1975 (Annexture as WKK26), the 1st Respondent requestedLands Limited for indulgence as he sought to obtain a loan from ADC.

107. Speaking to financing, the 1st Respondent authorized KFA to remit the sum of Kshs. 9,500.00 from the proceeds of his planted crops. The authority was made vide a letter dated 19/12/1975 and produced as D.Exhibit 36 (Annexture WKK27).

108. Come 28/02/1976 (Annexture WKK28 to the Supplementary Affidavit at page eleven [11], Kenya Seed enclosed a cheque in the sum of Kshs. 12,000.00 from proceeds of seed maize from their 1st Respondent customer to Agricultural Settlement Trust.

109. Thereafter, on 04/11/1976,Lands Limited issued an offer letter following the 1st Respondent's application seeking to purchase the suit land. Referred to D.Exhibit 134 (Annexture WKK11), the proposal disclosed that a deposit of Kshs. 43,000.00 be paid. Thereafter, the balance of Kshs. 172,000.00 be paid in forty (40) monthly installments for a period of twenty (20) years at Kshs. 8,436.00 each.

110. Confirming transfer of the suit land in favor of the 1st Respondent,Lands Limited wrote a letter dated 19/05/1977 produced as D.Exhibit 138 (Annexture WKK29-30) addressed to Archer & Wilcock Advocates. It disclosed that the property had been sold to Elijah Chemoiywo Koross. It was requesting the Advocates to prepare the necessary transfer documents having enclosed the necessary documents in the letter.

111. The 1st Respondent was emphatic that he single handedly duly paid the loan between 1977 and 1993. For this presupposition, he relied on a bundle of receipts fromLands Limited produced as D.Exhibit 33 and (Annextures WKK12 - WKK24) annexed to his Replying Affidavit sworn on 24/01/2017 and produced as D.Exhibit 139 (Annexture WKK31) letter dated 04/04/1979 from Elijah Chemoiywo Koross requesting Kenya Seed Company Limited to remit a loan amount in the sum of Kshs. 47,049.75 toLands Limited realized from proceeds of the cultivated seeds on the suit land.

112. The 1st Respondent similarly authorized Kenya Cooperative Creameries vide its letter dated 12/02/1987 (Annexture WKK43) to payLands Limited Kshs. 2,000.00 on every 20th day of the month. The 1st Respondent further relied on a bundle of demand letters produced as D.Exhibit 35 (Annexture WKK34-42, 44-47) directed to him fromLands Limited on diverse dates between 1982 and 1990 seeking that he pays outstanding monies owed. He further adduced his statements of accounts dated 18/06/1981 produced as D.Exhibit 139(b) (Annexture WKK32-33) and a bundle of statement of accounts between 1978 and 1984 produced as D.Exhibit 37.

113. Following full payment of the purchase price loan amount, it was the 1st Respondent's evidence that resultantly, a discharge of charge instrument was issued in his favor on 08/03/1993 produced as D.Exhibit 29 (Annexture WKK50). At which time, the consent dated 19/08/1980 was in force. He thus questioned the validity of the consent since at the time it was issued, the suit land had been encumbered thus not available for any transaction.

114. The 1st Respondent acknowledged the existence of the agreement dated 27/08/1974. He noted that the Petitioner was to be given eighty (80) acres of the suit land for contributing Kshs. 23,000.00. That the said sum had been paid on his behalf toKaubeyon Estates Limited to purchase the suit land. He however explained that it not an agreement for sale but a loan facility.

115. The 1st Respondent generally denied that the sleeping partners had an agreement with him to share the suit land. He maintained that they had no such agreement and denied that they remitted contributions towards its purchase.

116. He further acknowledged that the agreement stated that in case of any eventuality in the farm failing to be obtained by him, he was to return the said purchase sum. This, in his evidence, was done in 1976 vide a cheque dated 03/04/1976 produced as D.Exhibit 40, in the sum of Kshs. 25,500.00.

117. Speaking to the refund, the 1st Respondent denied that Retired Justice Phillip Tunoi was his Counsel; regardless of the fact that the cheque was paid in his name. Controvertibly, the 1st Respondent confirmed that the Retired Judge did testify as recorded in P.Exhibit 8 that he acted for him in a big parcel of land of over three thousand (3000) acres.

118. RW1 read out the contents of Nyairo Tunoi & Company Advocates letter dated 11/05/1981 produced as D.Exhibit 32 addressed to him as follows:

> " RE: Jonathan Chesagur Shs. 25,500/-

> As requested by you we hereby submit to you how the above sum received by us from you for and on behalf of Mr. Chesagur was paid to him or on his behalf. We retained the sum of Kshs. 500/- being our fees.
>
> You should also note that we have acted and have been acting for Mr. Chesagur on some other matters which should not be confused with the above refund transaction."

119. He relied on this to demonstrate that the Petitioner was indeed refunded where Kshs. 500.00 was retained by the firm of while the sum of Kshs. 25,000.00 was forwarded to the Petitioner.

120. Since it was rejected, he stated that the Petitioner was paid via payment vouchers produced as D.Exhibit 31, reiterated as summarized in the Petitioner's evidence. Although maintaining that the Petitioner was refunded, the sum paid from the payment vouchers totaled Kshs. 18,940.00.

121. Regarding the payment of the sum of Kshs. 6,100.00 in a voucher dated 26/01/1977 [Annexture WKK57(d)], RW1 testified that the same was in respect to a loan amount taken by the Petitioner. The sum of Kshs. 6,100.00 was disbursed to the Petitioner's loan account namely AFC No. 5127135010230. That the notice of advertisement of sale by AFC be ignored because the sum had since been settled. The letter, addressed to the Petitioner's lawyers reminded the Petitioner that he had promised to pay the balance to AFC by 20/01/1977 who confirmed that they were yet to receive.

122. He observed that from the evidence of the Retired Judge testified on 30/10/2006, Petitioner refused to take the refund and thus remained in the firm's account; there was no breach of the agreement; let alone any entered between the Petitioner and 1st Respondent and no consent of the Land Control Board subsisted. That the Petitioner was to be refunded Kshs. 23,000.00 plus interest of Kshs. 2,500.00 to initiate his departure from the suit land.

123. RW1 denied that the sleeping partners owned a pickup. In that stead, it was his evidence that his father owned two (2) pickups and a lorry. He denied that his father was a manager and instead reiterated that he was the owner of the suit land. He cast doubt on the authenticity of the minutes dated 15/08/1980 since they were neither dated nor signed.

124. Following the Judgment in Eldoret Civil Appeal No. 223 of 2013, the 1st Respondent obtained an eviction order dated 06/08/2015 produced as D.Exhibit 44. The same had the effect of evicting all the sleeping partners from the suit land. Dissatisfied with the order, the sleeping partners filed an Application in Kitale HCCC No. 89 of 1997 seeking to have them removed from the eviction order.

125. In his Ruling of 11/05/2016 produced as D.Exhibit 23, Obaga J. adopted the findings of the Court of Appeal to hold that the Applicants were not parties to the suit. Consequently, no eviction orders could lie against them. The court thus removed them Applicants from the eviction order, as shown in the order produced as D.Exhibit 46. As such, the order only lay against Hezekiah Kiptoo Komen who had already been evicted. See proceedings and order issued on 21/06/2016 produced D.Exhibit 11 and D.Exhibit 16 respectively.

126. Ultimately, the 1st Respondent urged this court to dismiss the Petition with costs. It was his view that since the Petitioner was de facto a party in Kakamega HCCC No. 43 of 1978, the Petition was res judicata and was thus barred under the *Limitation of Actions Act*.

127. On cross-examination, contrary to his earlier averments, RW1 stated that as per D.Exhibit 6, the investigation report's authenticity produced as P.Exhibit 3 had not been challenged. Further cross-examination led him to admit that the High Court sitting at Nairobi in HC Misc. App. No. 167 of

1981 determined the dispute in limine on grounds of res sub jusdice. Furthermore, the suit was only between Hezekiah Komen and Elijah Koross and not any other of the sleeping partners.

128. Speaking to the letter dated 10/07/1980 byLands Limited addressed to Nyairo Tunoi & Company Advocates produced as P.Exhibit 5, RW1 informed that at paragraph 1 (b), the transaction was done clandestinely as the sleeping partners were neither disclosed to the vendorLands Limited nor the Land Control Board. That for failing to disclose important information, the 1st Respondent had misled ADC andLands Limited.

129. On the consent dated 19/08/1980, RW1 confirmed that it was issued by the Trans Nzoia Land Control Board and addressed toLands Limited and the 1st Respondent's jointly as transferors/Applicants on the one part and the five (5) purchasers as the transferees to include him on the other part.

130. On cross-examination as to the agreement produced as P.Exhibit 2, RW1 acknowledged receipt of the sum of Kshs. 23,000.00 being a consideration sum for the purchase of the suit land. That the Petitioner was entitled to eighty (80) acres. The agreement was executed by him and attested by Retired Justice Philip Tunoi. He further noted that the refund clause connoted that the Kshs. 23,000.00 and not Kshs. 25,500.00 was to be refunded if he failed to acquire the land.

131. In that regard, when referred to D.Exhibit 40, the cheque for the sum of Kshs. 25,500.00, he stated that while it was made and executed by him in favor of P.K. Tunoi, its purpose was missing. He maintained that this was the same Advocate who drew the acknowledgment dated 27/08/1974.That the cheque was cleared since the money went into the Advocate's account.

132. When referred to the letter dated 11/05/1981, he stated that the letter neither indicated the purpose of the refund nor cross referenced any payment vouchers. The letter further stated that the refund ought not to have been confused with other matters Counsel was acting for the Petitioner.

133. He was further cross-examined to state the issuer of the payment vouchers (whose purposes were never disclosed) Nyairo Tunoi & Company Advocates, was not the issuer of the cheque drawn to P.K. Tunoi. That they were not issued with forwarding letters. He was further cross-examined to demonstrate that the serial numbers did not appear sequentially. In addition, the signatures (where applicable) were strikingly different.

134. In his re-exam, RW1 purported to state that the signatures in the vouchers were the same as those captured in the agreement dated 27/08/1974. A cursory perusal on face value by this court however revealed that they were different.

135. Explaining the deficit of Kshs. 18,940.00 not totaling Kshs. 23,000,00 as the sum refunded to the Petitioner, RW1 justified that Kshs. 6,100.00 was paid by Nyairo Tunoi & Company Advocates to the loan account of the Petitioner namely AFC No. 5127135010230. This information was relayed on a letter dated 26/01/1977. However, the letter neither indicated the suit land nor the 1st Respondent.

136. Combining the total figure, a calculation of the sum thus informed that the amount was still different from the Kshs. 25,500.00 since it totaled Kshs. 25,040.00. He then went on to state that the Petitioner lent Kshs. 23,000.00 paid back with interest thus refunding a total sum of Kshs. 25,500.00. In other words, the amount was not the purchase price but a loan facility.

137. When referred to D.Exhibit 7 particularly the evidence of Retired Justice Philip Tunoi, it was stated that the 1st Respondent presented the retired judge with Kshs. 35,000.00 from Solomon Kiprop, Kibet Cherutich Kimuron And Chebiator Chemjor Chebitong jointly; he prepared the agreement dated 27/08/1974; the Petitioner refused to accept the sum of Kshs. 25,000.00 which was retained in the

firm account; the Counterclaim that he drew and filed in Kakamega HCCC No. 43 of 1978 produced as D.Exhibit 2 set out the facts of the dispute unambiguously.

138. RW1 was led to the averments contained in the Counterclaim where it was stated that the five (5) sleeping partners in 1974 contributed a total of Kshs. 68,000,00 to purchase the suit land as follows: The Petitioner paid Kshs. 23,000,00, Hezekiah Komen paid Kshs. 10,000.00 while the remaining three (3) purchasers paid a combined total of Kshs. 35,000.00; the purchase price of the suit land was capped at Kshs. 215,000.00 to be paid toLands Limited, the vendor; the sleeping partners appointed the 1st Respondent (who did not contribute any monies) manager to facilitate payment of the purchase price. Those averments were dismissed by RW1 as false.

139. RW1 testified that the payments were disbursed as follows: a deposit of Kshs. 43,000.00 with an additional sum of Kshs. 1,000.00. Thereafter, the balance of Kshs. 172,000.00 was financed byLands Limited and charged to the 1st Respondent to be paid within a twenty (20) year period.

140. During his testimony, RW1 acknowledged receipt of the sum of Kshs. 23,000.00 from the Petitioner in 1974. He testified that he was refunded Kshs. 25,500.00. For this reason, no claim lay against the 1st Respondent. That the Petitioner's claim lay in seeking recovery of the said sum from the firm of Nyairo Tunoi & Company Advocates. He denied entering into any agreement with Cheserem Kiprotich.

141. RW1 admitted that none of the antecedent suits declared that the Petitioner and the other sleeping partners were not purchasers or had no right of claim of ownership. Additionally, his Application seeking to have the Court of Appeal in Civil Appeal No. 223 of 2013 review its decision was dismissed. As such he had no decree against the Petitioner, Solomon Kiprop, Kibet Cherutich Kimuron And Chebiator Chemjor Chebitong; adding that they have continued to remain on the suit land since 1970.

142. RW1 was referred to his Verifying Affidavit attached to his Plaint in Kitale ELC No. 34 of 2017. He stood by the averments contained in the said Affidavit to state that there had never been any previous litigious matters between the parties herein over the subject matter save for Kitale CMCR. No. 551 of 2017; the only suit litigated between the parties herein. He further stated that his latest amended (amended) Plaint dated 30/07/2017 did not file a defence to the Counterclaim.

143. Finally, when referred to paragraph eight (8) of his Plaint in Kakamega HCCC No. 43 of 1978, RW1 stated that only Hezekiah Komen was evicted and restrained from trespassing L.R. No. 11440 and L.R. No. 9154.

The 2nd and 3rd Respondents' Case

144. The 2nd and 3rd Respondents adopted the Replying Affidavit filed on 07/11/2017 together with the annexures thereto marked BLL1 - BLL4. They further relied on the statement of Wafula Munoko dated 06/07/2021. The said documents were not subjected for cross-examination by consent of the parties in this Petition and in Kitale ELC No. 34 of 2017.

145. According to B.L. Longelenyang, Land Registration Officer working at the 3rd Respondent offices, the Petition was a non-starter since it failed to disclose any wrongdoing occasioned by the 2nd and 3rd Respondents. That the 2nd and 3rd Respondents were not privy to or participated in the agreement between the Petitioner and the 1st Respondent. For those reasons, they could not confirm or deny the averments set out in the Petition.

146. The deponent further stated that since they were not parties to any of the antecedent disputes, they were not in a position to appreciate the extent of proceedings save where they were made aware by virtue of changes made to the title document in respect to the suit land. The 2nd and 3rd Respondents

urged this court however to appreciate the issues before it and make an informed decision that will put this matter to a complete rest.

147. According to the search results, a certificate of search marked as BLL1, the property was first registered toKaubeyon Estates Limited on 01/06/1964 for a term of 990 years. The term would later be reduced to 99 years. The suit land was then charged to Agricultural Settlement Trust on 14/01/1965. That charge would be discharged on 13/07/1965.

148. On that same day, the suit land was transferred toLands Limited for Kshs. 200,820.00. It was leased toKaubeyon Estates Limited for a term of 15 years from 03/08/1965 at an annual rent of Kshs. 13,177.00. The property was once more transferred to Agricultural Settlement Trust subject to the lease toKaubeyon Estates Limited on 22/03/1967.

149. On 19/02/1975, the lease in favor ofKaubeyon Estates Limited was transferred to Elijah Chemoiwyo for Kshs. 41,120.00. It was then on 15/06/1976 transferred toLands Limited for Kshs. 207,463.25 subject to the lease in favor ofKaubeyon Estates Limited.

150. On 16/06/1977, several transactions took place as follows: a surrender of lease in favor ofKaubeyon Estates Limited and Elijah Chemoiywo, transfer to Elijah Chemoiywo Arap Koross for Kshs. 215,000.00 and charge toLands Limited for Kshs. 172,000.00.

151. On 24/05/1978, a caveat was registered by Ezekia Kiptoo Komen claiming purchaser's interests absolutely. The court order in Eldoret HCCC No. 115 of 1988 (O.S) was registered on 29/11/1988. The discharge of charge toLands Limited was registered on 12/03/1993.

152. On 09/07/2014, a decree issued on 15/07/2013 in Kitale HCCC No. 89 of 1997 was registered to rectify title to include the names of Hezekiah Kiptoo Komen, Jonathan Kipkoross Chesagur, Chebiator Chemchur, Julius Kibet Cherotich and Kipserem Rotich as proprietors in common. The decree was also annexed and marked as BLL2. The proceedings and judgment, which were also submitted to the Chief Land Registrar were also produced and marked as BLL3.

153. On interrogating the proceedings and judgment, the deponent observed that the court attempted to determine interests of persons who were not parties to the suit. As such, when one party lodged an appeal, that decision was reversed by the Court of Appeal. The court, in its Judgment dated 12/02/2013, stated that the Petitioner amongst other interested persons had neither been enjoined as parties nor filed their respective defences. The judgment, ruling and decree were produced and marked as BLL4.

154. Reflecting the decision of the Court of Appeal above herein, the decree issued in the Court of Appeal was registered on 13/06/2017. The 2nd and 3rd Respondents remained neutral as to who provided monetary contribution towards purchase of the suit land to possess registrable interest.

155. The 2nd and 3rd Respondents maintained that all entries in the register in respect to the suit land were made absolutely and in good faith in pursuance of various instruments presented for registration. That upon confirmation that the necessary fees had been duly paid, they were processed for registration. For these reasons, the 2nd and 3rd Respondents denied that they conducted themselves illegally, fraudulently, irregularly and/or unconstitutionally.

156. The 2nd and 3rd Respondents maintained that the registration process of the 1st Respondent was proper as no evidence was furnished at that material time to demonstrate that other persons claimed interest over the suit parcel of land. Otherwise, they would have arrived at a different conclusion.

157. The 2nd and 3rd Respondents denied that they violated any constitutional provisions as set out by the Petitioner. Be that as it may, they were ready to abide by the directions and orders of the court as shall meet the ends of justice. They once again urged this court to address all the issues in this matter so as to put an end to the dispute once and for all.

Submissions

158. At the close of evidence taking, parties filed their respective and elaborate written submissions. The Petitioner's submissions dated 21/09/2022 were filed on 22/09/2022. He also relied on a list and digest of authorities dated 05/12/2022 and filed on 06/12/2022. The 1st Respondent filed his submissions together with annexed authorities dated 28/11/2022 on 30/11/2022. The 2nd Respondent and 3rd Respondents filed their joint written submissions and authorities attached thereto dated 05/12/2022 on 06/12/2022.

Analysis and Disposition

159. I have extensively considered the pleadings, carefully analyzed the litany of the evidence on record and considered the extensive and elaborate submissions relied on by parties.

160. It is no dispute that the suit parcel of land namely L.R. No. 11440 also I.R 20230 measuring five hundred and fourteen (514) acres situated at Endebess area, Kwanza Endebess Sub-County Trans Nzoia County remains registered in the name of Elijah C.A. Koross, the deceased father of the 1st Respondent herein referred to as RW1. The Petitioner claims ownership of the suit land. He thus prays that the reliefs set out in the Petition be granted as prayed. The following issues that fall for determination shall be analyzed as follows:

i. Whether the Petition raises any constitutional question

161. It is the 1st Respondent's contention that the Petition herein is a private law dispute guised as a Constitutional Petition. He was thus of the considered view that since the issues centered around ownership and issues of contract, the dispute could not be determined as filed herein.

162. The court in Anarita Karimi Njeru vs. R 1976 - 80 KLR 1272 and reaffirmed in Mumo Matemu vs. Trusted Society of Human Rights Alliance & Others [2013] eKLR set the law as to what constitutes a Constitutional Petition. The courts held that a party seeking redress by way of constitutional petition must set out with reasonable degree of precision the provisions which the proponent alleges to have been infringed and the manner of the alleged infringement.

163. Withal, the Supreme Court of Kenya in Communications Commission of Kenya & 5 Others vs. Royal Media Services Limited & 5 others [2014] eKLR held as follows:

> Although Article 22(1) of *the Constitution* gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru vs. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of *the Constitution* alleged to have been contravened, and the manifestation of contravention or infringement. Such principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement.

164. Looking at the Petition, following a descriptive summary of the parties, the Petitioner gave a background of the dispute. He then set the grounds in support of the Petition captured in paragraph fifty (50) through to paragraph eighty-eight (88). In those grounds, the Petitioner cited several Articles of *the Constitution*. In particular, the 1st Respondent was accused of breaching the provisions set out in Article 40 of *the Constitution* when he secretly transferred the suit land in his own name to the exclusion of the Petitioner. The Petitioner's argument was that since he had made monetary contributions towards acquisition of the suit land, he ought to have been registered as co-proprietor of the suit land to the extent of his contribution.

165. In my view, the Petitioner has fulfilled the requirements set out in the locus classicus case for Constitutional Petition framework. He cited the provisions of *the Constitution* that were violated and the manner of that alleged infringement. As such, I find and hold that the Petition seeks to determine whether the Respondents infringed on the Petitioner's rights enshrined in Article 40 of *the Constitution*.

ii. Whether the Petition is res judicata

166. The 1st Respondent claimed that the Petitioner could not file the present Petition since the issues herein amount to res judicata. According to the 1st Respondent, the Petitioner directly or indirectly participated in Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978) as he was enjoined on 23/10/1978. That he was an agent of Hezekiah Kiptoo Komen who was by order of the court, was evicted from the suit premises.

167. Further justifying participation of the Petitioner in the proceedings, the 1st Respondent produced Cherutich Kimuron's Chamber Summons Application dated 05/11/1993 in Kakamega HCCC No. 43 of 1978 seeking to set aside orders issuing a warrant of arrest against him. The Plaintiff therein also annexed an Authority to Plead dated 11/08/2015 filed in Kitale HCCC No. 89 of 1997. In it, the Petitioner and another authorized Julius Kibet Cherotich to sign, execute, plead and set his hand on any document requiring their execution.

168. The 1st Respondent similarly relied on the disputes in Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 others, Nairobi HC Misc. App. no. 167 of 1981; Hezekiah Komen & 4 others vs. Elijah Chemoiywo Arap Koross and Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 others to contend that Petitioner participated in previous litigious proceedings and as such could not purport to claim ownership in the present dispute.

169. The substantive law on res judicata is to be found in Section 7 of the *Civil Procedure Act*. It provides that the following conjunctive elements that must all be proved for the doctrine to apply:

    a. The suit or issue was directly and substantially the same in a former suit;

    b. The issue was between the same parties;

    c. The same parties are litigating under the same title;

    d. The suit or issue was heard in a court competent to try such subsequent suit or the suit and;

    e. Such issue has been subsequently raised, and has been heard and finally decided by such court".

170. It is important to highlight that the fact that the outlook of a Petition strikes differently from a normal suit will not formulate a basis for an exception to the doctrine of res judicata. The Supreme Court of Kenya in the case of John Florence Maritime Services Limited & Another vs. Cabinet Secretary for

Transport and Infrastructure & 3 Others [2021] eKLR held that res judicata remains applicable to Constitutional Petitions as long as the threshold has been met. The court pronounced itself as follows:

> " If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of *the Constitution* in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other".

171. The 1st Respondent has advanced several disputes to support his argument that the issues in the present suit are res judicata. I shall dissect each and every decision cited and analyze them individually in arriving at a conclusion as to whether the Petition is res judicata.

172. Commencing with Kitale HCCC No. 89 of 1997 (formerly Kakamega HCCC No. 43 of 1978), the 1st Respondent argued that since the Petitioner was successfully enjoined in the suit on 23/10/1978, he substantially participated in the proceedings giving rise to the judgment of the court delivered on 12/02/2013.

173. That argument is in my view a red herring since when the suit was appealed in Eldoret Civil Appeal No. 223 of 2013; Elijah C. A. Koross vs. Hezekiah Kiptoo Komen & 4 Others, the Court of Appeal found that the Petitioner was never a party to the suit and consequently, no orders could lie against him.

174. As a matter of fact, when the 1st Respondent elected to review that holding by Application dated 27/08/2015, the Court of Appeal in its Ruling delivered on 05/02/2016, categorically stated that the status of the Petitioner as not a party to the suit was a substantive determination and not a matter for conjecture. For that reason, the court upheld that he was not a party to the suit. The court took into account that no pleadings were ever amended. Furthermore, the Petitioner never filed any pleadings. For these reasons, I find no element of the doctrine in regards to Kitale HCCC No. 89 of 1997.

175. This Court cannot depart from the reasoned finding of the Court of Appeal regarding the fact that the respective parties herein were never joined as parties to the suit. Thus, it is this Court's finding that the Petitioner was not a party in Kitale HCCC No. 89 of 1997. And further to that, this means that even if they gave Authority to Plead to one H. Komen, the Defendant in that case, the authority was neither here nor there. Such authority could only be given by parties in the suit: the named people were not. This is because the tenet and import of the provisions of the Civil Procedure Rules regarding such authority are clear. In regard to filing of Plaints which is the aspect specifically provided for about such authority, Order 4 Rule 1(3) of the Civil Procedure Rules stipulates that "Where there are several plaintiffs, one of them, with written authority filed with the verifying affidavit, may swear the verifying affidavit on behalf of the others." Order 4 Rule 1(5) then provides that the same applies mutatis mutandis to Counterclaims.

176. In Nakuru HC Misc. No. 10 of 1980; Elijah Chemoiywo Arap Koross vs. Antony Oyier & 10 Others, the 1st Respondent sought to quash the consent given on 13/03/1980. He sued the Trans Nzoia Land Control Board and enjoined the Petitioner as one of the interested parties. The court herein was concerned with whether the decision to grant the consent was proper. It did not determine proprietary interests. Furthermore, the Petitioner was an interested party while the 1st Respondent was an Applicant in a miscellaneous cause. For those reasons, I find that the dispute does not meet the parameters of the doctrine.

177. The five (5) purchasers moved the High Court sitting at Nairobi in HC Misc. App. No. 167 of 1981; Hezekiah Komen & 4 others vs. Elijah Chemoiywo Arap Koross seeking to have the 1st Respondent declared a trustee of the suit land. They further sought subdivision pro rata. The court took note of the historical background of the parties including the judgment in Kakamega HCCC No. 43 of 1978 and the ruling in Nakuru HC Misc. No. 10 of 1980.

178. The court found that since ownership had been determined to belong to the 1st Respondent and that decision had not been appealed, then he remained the purchaser of the suit land. In its decision delivered on 05/10/1988, the court dismissed the suit for two (2) reasons; firstly, the Applicants had approached the court with unclean hands for failing to disclose that the parties had been in a litigious battle at the High Court in Kakamega. Secondly, the Counterclaim in Kakamega HCCC No. 43 of 1978 was yet to be determined. For these reasons, the court dismissed the Originating Summons on technical grounds.

179. Looking at the order of the court, I find that the suit was not determined substantively but in limine. The court downed its tools to pave way for hearing of the Counterclaim in Kakamega HCCC No. 43 of 1978. Furthermore, the Petitioner was an Applicant. For those reasons, I find that the doctrine of res judicata is not applicable to the facts and circumstances of that dispute.

180. In Eldoret HCCC No. 115 of 1998; Hezekiah Kiptoo Komen vs. Elijah C. A. Koross, the suit was not only between the 1st Respondent and a party not party to the present suit, but also sought to obtain a consent. For those reasons, res judicata is inapplicable. Similar observations were made in Kitale HC Miscellaneous Application no. 81 of 2003; In the matter of the estate of Elijah Chemoiywo Arap Koross.

181. In Eldoret HCCC No. 73 of 1995; Elijah C. A. Koross vs. Hezekiah Kiptoo & 4 others, the 1st Respondent sued the five (5) sleeping partners. By order dated 12/02/1996, interim orders were granted staying the sale of the Defendant's goods and heads of cattle attached by M/s Fema Traders or any other Auctioneers (emphasis added). The substantive Application was set to be heard on 26/02/1996. Looking at orders sought before the Court then and the orders granted, it is glaringly evident that the dispute concerned issues, being those relating to sale of goods and heads of cattle, which were not present in the circumstances herein: The Court cannot stretch its imagination so much as to bring in an issue of such a sale into being the same as the one ownership of land herein. I thus find no elements of res judicata appurtenant to this matter.

182. For the above reasons, I find that the 1st Respondent's bid seeking to dismiss the Petition on technical grounds of res judicata is a non-starter. The doctrine of res judicata is inapplicable and is accordingly hereby dismissed.

iii. Whether the Petitioner is guilty of laches

183. According to the 1st Respondent, the Petitioner filed the suit inordinately without lawful and justifiable cause. His Petition was thus guilty of laches. The Court of Appeal in Chief Land Registrar & 4 Others vs. Nathan Tirop Koech & 4 Others [2018] eKLR defined laches as follows:

> " Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of

society. (See Republic of Philippines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379)".

184. The general perception taken by courts regarding delays and constitutional petitions is that they are not tied to the manacles of the statute of limitation since the nature of the complaint is one of violation of human rights and fundamental freedoms. If the delay is expressly stated in *the Constitution*, that forms the exception to the general rule. However, each case must be decided on its own merit.

185. The Court of Appeal in Daniel Kibet Mutai & 9 Others vs. Attorney General [2019] eKLR adopted by the approach taken by Mativo J (as he then was) in Edward Akong'o Oyugi & 2 Others vs. Attorney General [2019] eKLR who held as follows:

> " 80. The next question is whether the delay of 5 years after the 2010 Constitution is unreasonable and whether it has been explained. In my view, the common law delay rule involves a two-stage inquiry: first, whether the proceedings were instituted after a reasonable time has passed, and, second, if so, whether the court should exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration.
>
> 81. The Respondents counsel's contention is that this suit is barred by the doctrine of latches. The doctrine of laches is a legal defense that may be claimed in a civil matter, which asserts that there has been an unreasonable delay in pursuing the claim (filing the lawsuit), which has prejudiced the defendant, or prevents him from putting on a defense. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. Because it is an equitable remedy, laches is a form of estoppel.
>
> 82. Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim. Laches is associated with the maxim of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights]." Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches.
>
> 83. To invoke laches the delay by the opposing party in initiating the lawsuit must be unreasonable and the unreasonable delay must prejudice the defendant. Examples of such prejudice include: evidence favorable to the defendant becoming lost or degraded, witnesses favorable to the defendant dying or losing their memories, the defendant making economic decisions that it would not have done, had the lawsuit been filed earlier.
>
> 84. The Respondent's counsel cited latches but never attempted to mention how the Respondent will be prejudiced. As pointed out earlier, no argument was advanced that witness or evidence cannot to traced. In any event

the Respondent is the government which has institutional succession and perpetuity, hence, evidence and records cannot be easily affected by lapse of time.

85. In considering whether delay in inordinate, the court has a discretion, to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the period of the delay, and the explanation offered and any possible prejudice to the Respondent. I have already addressed prejudice. The period is five years after 2010. The reasons cited are inability to secure employment after being released from prison forcing them to travel oversees to look for employment and also obtain treatment for the various health conditions and complications inflicted upon them by the cruel torture and inhuman circumstances they were subjected to during arrest, interrogation and detention. All the Petitioners suffered serious injuries and developed life-threatening health conditions which kept them busy. They are and continue to be on medication. To me, the delay has been sufficiently accounted for. They have provided a good and sufficient cause for the delay. I find that the explanation is reasonable".

186. The 1st Respondent's contention was that the Petition was instituted with inordinate delay since the dispute commenced in 1978. That it was incumbent upon the Petitioner, who upon the discovery of a violation of his rights, ought to have invoked the court's jurisdiction then.

187. This court has extensively looked at the entire record and makes the following observations: in its Judgment of 12/02/2013, the court in Kitale HCCC No. 89 of 1997 rectified the title to include the Petitioner as one of the registered proprietors of the suit land. Between 1978 and 2013, the 1st Respondent's suit remained alive as against Hezekiah Komen. Thought the Petitioner was to be enjoined as a Defendant in that matter, that did not take place. In fact, this formulated the reasoning inter alia to overturn that decision by the Eldoret Court of Appeal in Civil Appeal No. 223 of 2013.

188. Looking at those proceedings, the Petitioner even filed an authority to sue where he granted Hezekiah Komen powers to action that which is necessary, on his behalf in safeguarding his interests. It appears that for a larger period of the dispute, the Petitioner was under the irreproachable impression that he was a party to the dispute.

189. When the Court of Appeal 06/03/2015 clarified that he was never a party to the proceedings, thereby reverting ownership back to the 1st Respondent, the Petitioner filed the present suit.

190. In my considered view, the Petition herein not only was filed timeously but also lacked prejudice on the part of the 1st Respondent and I say so for the following reasons: firstly, the 1st Respondent failed to demonstrate what prejudice he suffered as a result of the suit being filed in 2016. Secondly, all the original purchasers have since passed on. As such, if there was prejudice on one party, it suffered similarly on the other party.

191. Finding that there is no laches in bringing the suit and if so, the same is explainable, I find that the Petition is proper before this court on account of time.

iv. Whether an agreement existed between the Petitioner and the 1st Respondent

192. The crux of the dispute centers around an agreement/acknowledgement note dated 27/08/1974, produced as P.Exhibit 2. The same was authored by Retired Justice P. K. Tunoi who at that time was a practicing Advocate in the nature and style of Nyairo Tunoi & Company Advocates. It read as follows:

> " I, Elijah C Koross, do hereby acknowledge receipt of the sum of Kshs. 23,000.00 given by Jonathan Kipkoros Arap Chesagur which sum has been paid on my behalf to Kabyeton Estate Limited for the purchase of the said farm L.R. No. 11440.
>
> In exchange thereof, I give to the said Jonathan Kipkoros Arap Chesagur 80 (eighty acres) acres on the said farm after the purchase of it and he will free use and occupation of the said 80 acres.
>
> In case of any eventuality in the farm failing to be obtained by me I bind myself to return the said amount of Kshs. 23,000.00."

193. To the extent of its contents, all parties acknowledge the same and, in some instances, concur on its modalities. To bring us up to speed to understand the said agreement which was seen to be a culmination of a series of conversations. Intent on purchasing the suit land, the 1st Respondent approached the Petitioner and other the sleeping partners. The 1st Respondent was unable to raise the full sum hence asked them to join in on the purchase.

194. The said property was owned by a European man named George Pitman Mott intent on disposing of his leasehold property. Given that it was a leasehold, the same was acquired byLands Limited, a subsidiary of the Agricultural Development Corporation (ADC). The suit property was preceded in ownership of the suit land by the Agricultural Settlement Trust which held the land on a government lease.

195. Thus, the Petitioner paid Kshs. 23,000.00 which was a portion of the total sum of Kshs. 68,000.00 collected and given to the 1st Respondent for onward transmission toLands Limited. Upon payment of the purchase price, the Petitioner and the sleeping partners occupied forty (40) acres of the suit land where they began farming activities and milk production supplied to KIC.

196. This evidence was similarly reiterated by one H.A. ODUOR, Land Agent in his report forwarded vide a letter dated 18/04/1979 compiled under the behest ofLands Limited. In the report, the sleeping partners outlined that the suit land had been purchased under the chairmanship of the 1st Respondent.

197. Insofar as the payment of the funds were concerned, Mr. Tunoi Advocate witnessed the 1st Respondent receive Kshs. 23,000.00 from the Petitioner on 27/08/1974. An acknowledgement was drawn to this effect where it was agreed that the money was in respect of eighty (80) acres of the suit land. According to the report, the purpose of the fund remittance to the 1st Respondent was to acquire ownership of the suit land which remained the interest of the sleeping partners.

198. In his evidence recorded in Kitale HCCC No. 89 of 1997, Retired Justice P.k. Tunoi stated that the sleeping partners approached him with a view to retaining him as their Counsel as the 1st Respondent had obtained property fromLands Limited. That he lacked the financial muscle thus invited the sleeping partners as contributors. The sleeping partners moved onto the suit land upon payment of the respective sums.

199. According to the report, produced as P.Exhibit 3, the purpose of the fund remittance to the 1st Respondent was to acquire ownership of the suit land which remained the interest of the sleeping partners.

200. In his evidence recorded in Kitale HCCC No. 89 of 1997, Retired Justice P.k. Tunoi stated that the sleeping partners approached him with a view to retaining him as their Counsel as the Plaintiff had obtained property fromLands Limited. That the Plaintiff lacked the financial muscle thus invited the sleeping partners as contributors. Further, confirming the contents set out in paragraph 112 of this judgment, the Retired Judge stated that the sleeping partners moved onto the suit land upon payment of the respective sums. His further evidence was that the agreement, except as with that of the Petitioner, concerning their contribution and ownership of the suit land was verbal.

201. This court takes note of and appreciates the fact that the documentary evidence relied on by the parties formulated a higher probative value in comparison to their oral evidence not supported by such documentary evidence. This is because the court is alive to the fact that all the original parties are all deceased and the 'derivative' witnesses who gave evidence relied more of the documents and what they would understand of them than first-hand account of the events leading to the acquisition of the suit land. It is thus called upon to extensively analyze the documentary evidence on record.

202. On the issue of whether the ownership of the suit land arose from a partnership relationship, this court takes guidance from the definition of a partnership as set out in Section 2 of the *Partnerships Act* 2012 to mean "the relationship which exists between persons who carry on business in common with a view to making a profit."

203. Given the evidence of the retired judge, as summarized above, this Court appreciates the evidence of the retired Judge as given in Kitale HCC 89 of 1997 to the effect that the 1st Respondent and the five (5) people to include the Petitioner were partners in the enterprise, although five (5) were sleeping ones. The retired Judge having participated as the lawyer for all the parties herein in the initial stages of the transactions leading to the acquisition of the suit land from Pittman, he understood the relationship of the six people, and testified on oath about it, as being a partnership. It thus agrees with the Petitioner that there was a partnership.

204. From the facts sheet, this court forms the unwavering conclusion that the 1st Respondent and the Petitioner entered into an agreement (through the partnership) that would ultimately lead all parties to ownership of the suit land. That they were joined together with the common goal of acquiring the suit property with a view to making a profit; the profit being acquisition and ownership of the suit land.

205. Regarding the oral and documentary evidence in support of this, the Halsbury's Laws of England 4th edition Vol. 12 is relevant as follows:

> " Where the intention of the parties has been reduced to writing it is, in general not permissible to adduce extrinsic evidence, whether oral or contained in writings such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary, or add to the terms of the document."

206. Also, Chitty on Contract 29th Edition Vol. 12 is also relevant:

> " It is often said to be a rule of law that if there is a contract which has been reduced to writing, verbal evidence is not to be given..... so as to add or subtract from, or in any manner to vary or qualify the written agreement..... The rule is usually known as "parol evidence" rule. Its

operation is not confined to oral evidence. It has been taken to exclude extrinsic matter in writing such as drafts, preliminary agreements and letters of negotiation."

207. Additionally, the Court of Appeal in Twiga Chemicals Industries Ltd vs. Allan Stephen Reynolds (2014) eKLR, had stated as follows:

> " It is familiar rule of law that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parole evidence, it does in fact apply to all forms of extrinsic evidence". This position is also reiterated in Halsbury's Laws of England (4th edn) vol. 9 (1) where para 622 partly states that:
>
> > "Where the intention of parties has in fact been reduced to writing, under the so-called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms".

208. When the 1st Respondent received money from the Petitioner, he was furthering the honest common intent of the people. Consequently, I find that indeed the 1st Respondent approached the Petitioner and others as partners to collectively raise funds and set forth to purchase the suit land. I find that the ultimate goal was that upon acquisition of the suit land, the 1st Respondent and the Petitioner would acquire ownership of the suit land pro rata. As such, from the evidence in the previous paragraphs, this court finds that indeed a sum of Kshs. 68,000.00 was collected by the 1st Respondent for onward transmission toLands Limited, the vendor, a sum collected from the contributions of the sleeping partners to the exclusion of the 1st Respondent. Out of that sum, the Petitioner submitted a sum of Kshs. 23,000.00 where he was to be given eighty (80) acres.

209. This court furthermore finds that the said agreement was unequivocally drafted leaving no room for any other form of interpretation. It cannot be denied that the intention of the parties was to acquire the property with the aid of the Petitioner's funds who would in turn receive ownership of a portion of the suit land.

210. The 1st Respondent disputed the contents of the report by H.A. ODUOR Land Agent instructed byLands Limited. He stated that since he was never interrogated by the author, its veracity was subject to challenge. This court notes that the report was issued on 18/04/1979 and was never subjected to any challenge in any forum including the present suit. PW1 testified that that his late father was not interrogated before the report was authored. Well, that may have been the case. But this Court finds that most of the findings were corroborated by other independent evidence.

211. I am not satisfied with the allegation of inauthenticity thereof, which hasn't been backed by any proof. It is a mere statement of allegation which in my view stems from the fact that the report did not favor the 1st Respondent's position in this matter. Be that as it may, the allegations as to its scrupulousness only comes more than five (5) decades later, and in this suit. It is not lost that equity aids the vigilant and not the indolent. Moreover, the witness herein cannot be heard to contradict documentary evidence in the form of the Report, which his own late father did not dislodge when he testified in Kitale HCC No. 89 of 1997.

212. On the above finding, I rely on the decision of Twiga Chemicals Industries Ltd vs. Allan Stephen Reynolds (2014) eKLR (supra). For these reasons, and in the absence of any abrogation, this court finds that the findings in the report regarding the existence of a partnership and the contributions the partners and the 1st Respondent made in regard to the acquisition of the suit land corroborate

numerous pieces of evidence about those two facts. PW1 herein cannot, according to the parole evidence rule, be permitted to contradict the evidence therein. Moreover, as noted above and discussed hereafter there was more corroborative evidence on the issue of the creation and existence of a partnership.

213. According to the report prepared by H.A. Oduor Land Agent, the Petitioner, after disbursing his monetary share, occupied the suit land and farmed on it under the chairmanship of the 1st Respondent. The evidence of his contribution was further corroborated by Benjamin Maritim, Legal Assistant working at Agricultural Development Corporation And Emeritus Justice Philip Tunoi whose evidence was captured in Kitale HCCC No. 89 of 1997.

214. The report further stated that the Petitioner had no interest in obtaining a refund but instead sought to acquire ownership of the suit land by registration of proprietary interest in his favor. The conclusion of the report was that the sleeping partners had been taken for a ride by the 1st Respondent. That the sleeping partners had contributed money and lived on the farm in good faith in the knowledge that they were registered proprietors of the suit land. The report accused the 1st Respondent, as the most enlightened person, of using the former Estates Officer ofLands Limited to accomplish his mission.

215. The author of the report thus recommended that a consent from the Land Control Board be obtained to include the name of the sleeping partners in compliance with the Presidential Directive. Secondly, thatLands Limited does approve their names on the strength of the findings of the report. Finally, handover the consent and approval byLands Limited to the sleeping partners (Complainants) to register their names in the title deed.

216. This court finds that the Petitioner in terms of his contribution, remitted a sum of Kshs. 23,000.00; a sum similarly admitted by the 1st Respondent who disputed its purpose. This evidence was additionally captured in the agreement dated 27/08/1974 marked P.Exhibit 2, the report by H.A. ODUOR annexed to the forwarding letter dated 18/04/1979, the evidence in Nairobi HC Misc. App. no. 167 of 1981; as well as the attestation by Retired Justice Philip Tunoi in Kitale HCC. No. 89 of 1997 who witnessed the funds remitted by the Petitioner. As stated in the agreement dated 27/08/1974, he was entitled to eighty (80) acres of the suit land as granted. As to the 1st Respondent's contention that the money was not part of that used for the acquisition of the land, this Court will address hereinafter.

v. Whether the refund clause captured in the agreement dated 27/08/1974 was discharged

217. The agreement dated 27/08/1974, produced as P.Exhibit 2 drawn by the Retired Judge contained a refund clause that the 1st Respondent vehemently maintained was discharged. In corroboration, he relied on a letter dated 11/05/1981 drawn by Nyairo Tunoi and Company Advocates addressed to him as follows:

> " RE: Jonathan Chesagur Shs. 25,500/-
>
> As requested by you we hereby submit to you how the above sum received by us from you for and on behalf of Mr. Chesagur was paid to him and/or on his behalf. We retained the sum of Kshs.500/= being our fees.
>
> You should also note that we have acted and have been acting for Mr. Chesagur on some other matters which should not be confused with the above refund transaction."

218. According to RW1, the above letter was proof that the Petitioner had been paid the sum, which according to him was a loan facility, in full with interest. That it could not be interpreted in any way to mean that the Petitioner was to acquire a share of the property.

219. The 1st Respondent further relied on his evidence marked D.Exhibit 31; payment vouchers drawn by the firm of Nyairo Tunoi & Company Advocates in favor of the Petitioner on diverse dates as follows:

i. Voucher No. 402 dated 22/1/1976 for Kshs. 1,000.00;

ii. Voucher No. 29 dated 07/05/1976 for Kshs. 2,000.00;

iii. Voucher No. 431 dated 26/8/1976 for Kshs. 1,100.00;

iv. Voucher No. 381 dated 25/10/1976 for Kshs. 300.00;

v. Voucher No. 274 dated 21/02/1977 for Kshs. 200.00;

vi. Voucher No. 223 dated 03/05/1977 for Kshs.14,300.00 by cheque No. A316187.

Total: Kshs. 18,940.00.

220. While acknowledging that the sum of Kshs. 25,500.00 as captured in the letter dated 11/05/1981 was not refunded as testified by the Retired Judge, which sums were retained by the firm of Nyairo Tunoi and Company Advocates, he explained that the Petitioner was paid via payment vouchers as set out above herein.

221. In addition to the Kshs. 18,940.00, the 1st Respondent observed that vide a voucher dated 26/01/1977, the Petitioner received Kshs. 6,100.00 into his loan account namely AFC No. 5127135010230. In total thus, the Petitioner had received Kshs. 25,040.00.

222. According to the narration captured in the letter dated 26/01/1977 in respect to the sum of Kshs. 6,100.00, it was stated that the "notice of advertisement of sale by AFC be ignored because the sum had since been settled." The letter, addressed to the Petitioner's lawyers reminded the Petitioner that he had promised to pay the balance to AFC by 20/01/1977 who confirmed that they were yet to receive the same.

223. To answer this question, I must first reproduce the relevant part of agreement dated 27/08/1974 which read as follows:

> " ... In case of any eventuality in the farm failing to be obtained by me I bind myself to return the said amount of Kshs. 23,000.00."

224. It stated that where the 1st Respondent was unable to obtain the suit land, he would return the amount of Kshs. 23,000.00. Those terms were in my view so unambiguous that they are not open to any other form of interpretation. In this case, if the 1st Respondent was by any reason impeded from obtaining the suit land, only then would he be duty bound to return the sum of Kshs. 23,000.00 to the Petitioner.

225. According to the evidence of the Retired Judge testified on 30/10/2006, the Petitioner refused to take the refund and thus remained in the firm's account. He recalled that the 1st Respondent gave him Kshs. 25,500.00 intended to be refunded to the Petitioner; inclusive of a Kshs. 2,500.00 an interest sum purposed to instigate the refund clause.

226. While the 1st Respondent asserted that the Petitioner was refunded the sum of Kshs. 23,000.00, I find that the evidence of the Retired Judge controverted the evidence of RW1. It was the Retired Judge's evidence that the said sum was never collected by the Petitioner and was retained in the law firm. The judge added that the Petitioner rejected the refund. Having said that, the RETIRED JUDGE testified that he was not aware of breach of the agreement. In my humble view, when the retired judge added in his testimony in P.Exhibit 1(a) and (b) that a sum of Kshs. 25,500.00 had been retained by him

for the Petitioner who had refused to accept the refund, it meant that all that the 1st Respondent said about payment vouchers amounting to Kshs. 18,940.00 was nothing but a contradiction of the retired the judge's testimony, yet it was the judge who knew the whole transactions. Furthermore, the oral testimony of the retired judge was given about 29 to 30 years after the purported issuance of the payment vouchers. If indeed alleged payment were in regard to the refund, nothing could have been easier for the judge to say than that the payment vouchers constituted monies received by Jonathan Chesagur after he initially refused the refund. To me, the payment vouchers, if indeed genuine, were for another purpose than the refund.

227. In addition, I find that RW1 was not candid with the facts of the matter. Initially, he acknowledged that the agreement awarded the Petitioner eighty (80) acres of the suit land in exchange for the Kshs. 23,000.00 paid to the 1st Respondent. He would then renege and rely on the evidence captured in Kitale HCCC No. 89 of 1997 to state that the said amount was simply a loan facility.

228. In my humble, view RW1 tried to have his cake and eat it. The question is, was the sum of Kshs. 23,000.00 a loan facility or an agreement in the form of a partnership? If it was a loan agreement, what were the exact terms thereof? Where were the said terms recorded? Further, in what document or agreement was it indicated that an interest sum would be disbursed to the Petitioner? These questions are pertinent because as stated earlier the agreement/ acknowledgement dated 27/08/1974 (P.Exhibit 2) had the effect of creating a partnership or at the very least was a contribution towards the purchase of the suit land and not a credit facility. Furthermore, the 1st Respondent did not explain whether and how he failed to acquire land as a condition precedent to initiate the refund clause yet he acquired the suit land before initiating the failed refund.

229. Additionally, the refund clause dated 27/08/1974 conjunctively needed to fulfil two (2) conditions to give its effect and meaning; firstly, that the 1st Respondent was unable to obtain the suit land and secondly, that the sum of Kshs. 23,000.00 would be refunded. On the first sine qua non, the 1st Respondent was to demonstrate that he was unable to obtain the suit land. In other words, he was unable to secure the said property. In other words, the refund would fall due if he was unable to secure the said property. In other words, the second limb of the clause could only be effected upon fulfillment of the first limb of it. In my humble view, it has been established that on the contrary, the 1st Respondent secured the suit land on 24/01/1975 but it was transferred to him on 16/6/1977, which parcel remains registered in his name as at this date.

230. The 1st Respondent failed to fulfil the first prerequisite which would have formulated a basis for a refund. Such that since the two (2) conditions precedent intertwined could not stand autonomously with one taking precedence over the other, that refund clause remained unenforceable the moment the 1st Respondent obtained an assignment of lease with an option to purchase the suit land on 24/01/1975.

231. Furthermore, the 1st Respondent stated that the sum of Kshs. 23,000.00 was refunded as follows; Kshs. 23,000.00 plus Kshs. 2,500.00 interest. Restating, the refund clause was bereft of ambiguity. So that it was not indicated, in the original agreement, that the Petitioner would receive an additional interest sum over and above the principal sum.

232. The action of attempting to pay interest in my view amount to a variation of the initial terms of engagement. The 1st Respondent failed to demonstrate that in varying the initial terms, the same was done consensus ad idem. There was no evidence presented before this court to state or demonstrate that the Petitioner conceded that he would receive interest over and above the principle sum. Moreover, the Petitioner, by withholding the information that he had been offered and purchased the land as explained above, acted dishonestly.

233. The foregoing facts introduces the principle of parole evidence as explained above. The rule of parole evidence is that evidence cannot be admitted to add, vary or contradict a written statement. The rule forbids parties from introducing new contractual terms not embedded in a contract. This Court relies on the case of Twiga Chemicals Industries Ltd vs. Allan Stephen Reynolds (supra) for this holding.

234. In my view, the 1st Respondent was attempting to substitute the original agreement terms with terms fulfilling his intended objective. If the court were inclined to find in favor of the 1st Respondent, it would amount to rewriting a contract yet the parties were bound by the initial terms. In so doing the Court would be cementing an unjust acquisition of property by the 1st Respondent to the disadvantage of the person(s) whose money went into the process. I am afraid I cannot uphold the oral evidence that the refund fell due, and with interest.

235. Finally, on the payment vouchers paid on diverse dates between 1976 and 1977, I make the following observations: firstly, on a balance of probabilities, I find that the said sums may have had an element of transactions done not in relation to the agreement of 27/08/1974. I say so because of the letter dated 11/05/1981 addressed to the 1st Respondent. The firm of Nyairo Tunoi and Company Advocates stated that they had been acting for the Petitioner on some other matters. It is also instructive to note that the said letter did not make reference to the refund clause contemplated in the agreement dated 27/08/1974.

236. Secondly, the payment vouchers bore no narratives on the transaction. It cannot thus be presumed that the several payments were in settlement of the refund clause. In fact, the Retired Judge stated that vouchers totaling Kshs. 18,900.00 were not in respect to the refund money as stated in the agreement. I have found that if indeed they were for the refund nothing stopped the judge from testifying so.

237. Thirdly, arithmetically, the sum did not total Kshs. 23,000.00. Although the 1st Respondent attempted to explain that a further Kshs. 6,100.00 was paid to the Petitioner, not only did the sums not total Kshs. 23,000.00 but also, the said Kshs. 6,100.00 explicitly stated that it was in respect to a loan amount in favor of AFC in the Petitioner's account with AFC. Furthermore, the acknowledgement by the AFC did not in any way indicate that the sum was paid by the 1st Respondent, leave alone the Petitioner's lawyers: it was only an acknowledgement.

238. Fourthly, I agree with the Petitioner's argument who disputed that the cheque dated 03/04/1976 settled the payment vouchers. Notably, the first voucher dated 22/01/1976 preceded the issuance of the cheque. Furthermore, they were neither accompanied by forwarding letters nor did the serial numbers appear sequentially making them suspicious, particularly since they were not in the original form.

239. Fifthly, the payment vouchers were disbursed after the 1st Respondent acquired the property by way of assignment of lease. In my view, they could not fulfill the purchase of the refund clause since the first pre-condition had not and could not beyond any shadow of a doubt have been met. Moreover, the retired judge who acted in the transaction gave evidence that the Petitioner rejected the refund and he did not give any further evidence that he later changed his mind to take the money.

240. The Petitioner disputed payment from another perspective; that the said payment vouchers were not proof of payment of the said sums. In analyzing that argument, I find wisdom in the decision of the Court of Appeal in Abdi Ali Dere vs. Firoz Hussein Tundal & 2 Others [2013] eKLR which held as follows regarding vouchers as proof of payment:

> " The term "voucher", in regard to payment, has at least two distinct meanings. It can mean a written authorization to pay or disburse money. It can also mean confirmation of payment. In the latter sense, a payment voucher is not any different from a receipt. In many daily and

official transactions, payees do not walk around with receipts to issue in acknowledgement of payment. They merely counter sign the payment voucher to signify payment. This is particularly the case where the payees are casual workers engaged to undertake short term assignments."

241. This court could not ascertain whether all the payment vouchers in respect to the Petitioner were written authorization or confirmation of payment. This is because not all vouchers had the signature of the payee in spite of the payee's name captured in some instances. It appears that some were written authorization where the payee's signatures were missing while the rest were confirmation of payment. Be that as it may, I have already established that the said payment vouchers did not effectuate the refund clause.

242. Finally, the 1st Respondent remained uncandid with his evidence. He stated that the signatures (where applicable) were strikingly different. In his re-exam, the 1st Respondent purported to state that the signatures in the vouchers were the same as those captured in the agreement dated 27/08/1974. A cursory perusal on face value by this court however revealed that they were different.

243. Ultimately, it is my resolute conclusion that the refund clause captured in the agreement dated 27/08/1974 was not only discharged but remained unenforceable on account of the 1st Respondent acquisition of the suit land by way of assignment of lease with an option for purchase on 24/01/1975.

vi. What the effect of the Consent dated 19/08/1980

244. A pertinent issue arose during the conduct of the proceedings; the consent dated 19/08/1980 has never been overturned, varied or set aside. In its meeting held on 15/08/1980, the Trans Nzoia Land Control Board issued a consent in favor of the sleeping partners together with the 1st Respondent dated 19/08/1980. The consent was addressed toLands Limited and the 1st Respondent jointly as transferors/Applicants on the one part and the sleeping partners to include the Petitioner as transferees to include the 1st Respondent on the other part.

245. Section 8 (2) of the *Land Control Act* provides that The Land Control Board shall either give or refuse its consent to the controlled transaction and, subject to any right of appeal conferred by this Act, "its decision shall be final and conclusive and shall not be questioned in any court." Any person aggrieved shall at the first instance appeal at the provincial land control appeals board as provided in Section 11 of the Act which appeal lies to the central land control appeals board as set out in Section 13 of the Act.

246. Section 28 (j) of the *Land Registration Act* provides that unless the contrary is expressed in the register, all registered land shall be subject to any other rights provided under any written law as overriding interests as may for the time being subsist and affect the same without their being noted on the register.

247. Indeed, the said consent dated 19/08/1980 conferred rights upon the 1st Respondent together with the sleeping partners to include the Petitioner jointly. That consent was not challenged in any way or form. It in fact continues to remain in existence. In my view, nothing ought to have been done contrary to that consent that remained an overriding interest.

248. Indeed, the said consent dated 19/08/1980 conferred rights upon the 1st Respondent together with the Petitioner and other transferees jointly. The consent was not challenged in any way or form. It continues to remain in existence. In my view, with the subsistence of the consent, nothing ought to have been done contrary to it as it remained an overriding interest.

249. As stated by law, the decision to grant or refuse a consent is final and subject to no challenge. The decision having been made, this Court cannot thus overturn it but rather finds that that going by

the provision of the Act, the consent remains valid to date and supersedes all other transactions created thereafter contrary to its meaning and tenor. In any event, it remained an overriding interest that affected the registration of ownership of the suit land as set out in Section 28 (j) of the *Land Registration Act*.

250. Further, this Court is of the humble view that once a Land Control Board has granted a consent to either subdivide or sell land, the board or any subsequent one cannot purport or proceed to grant another contrary to the subsisting one. No other transaction or decision of the board can be made except if the consent is varied or altered following the internal dispute resolution mechanisms provided by law. Again, the law has not provided the period which the consent once given remains valid. It therefore means it remains valid until it is either acted upon and therefore effected or varied according to the law.

251. The 1st Respondent disputed the consent on grounds that the minutes of the meeting culminating to the issuance of the consent were not signed. This court is not called upon to question the probative value of the minutes not signed but challenge the process giving rise to the consent dated 19/08/1980. It is to be noted that the consent has never been appealed or subject to challenge.

252. The 1st Respondent did not challenge the consent in accordance with the provisions of the Act and/or by way for Judicial Review had the internal mechanisms been exhausted. This court makes a finding that the 1st Respondent cannot go against it now.

253. This court has reproduced the internal dispute resolution mechanisms made available to a party aggrieved by a decision. In seeking such audience, the onus is on the aggrieved party to demonstrate the reasons for impugning the decision. In my view, challenging the minutes for being unexecuted would best fall in that forum where the audience will be invited to question its authenticity.

254. As already established, the consent has never been challenged. In light of this, the consent could not be overturned by a court proceeding issuing title in contrast to the intention of the consent where that consent had not been challenged nor the issuance of a fresh consent when the subsisting consent was in existence. For that reason, the proceedings in Kitale HCCC No. 89 of 1997 and any consent subsequently issued were a nullity to the extent of their contrast to that consent of 19/08/1980 which is still valid.

255. It thus behooved the party to refrain from any other challenge since on one part, he does not dispute the outcome but disputed the minutes of the meeting. Be that as it may, this is not the proper forum for ventilating the dispute as governed by statute in view of the doctrine of exhaustion of internal dispute resolution mechanisms.

256. Article 159 (2) (c) of *the Constitution* calls upon this court to exercise judicial authority by promoting alternative forms of dispute resolution. This includes the internal dispute resolution mechanisms provided in Acts of Parliament.

vii. Whether the 1st Respondent held the ownership of the suit land in trust for the Petitioner

257. The evidence presented before this court so far did not present any sale agreement between the Petitioner and the 1st Respondent.

258. In land disputes, a party is desirably required to demonstrate that his disposition of land was safeguarded in a contract for the disposition of an interest in land. In establishing the same, the agreement must be in writing, signed by all parties thereto and the signature of each party must be attested by a witness who was present when the contract was signed. This is the law set out in Section 3 of the *Law of Contract Act* and Section 38 (1) of the *Land Act*.

259. Certainly so, the agreement dated 27/08/1974 was not a contract for disposition of land but a partnership agreement as deciphered above herein. Looking at the document on face value, it was not signed by all parties. The solitary signature was attested by a witness present. To that extent, the parties failed to meet the parameters set out in the cited provisions of statute.

260. Withal, Emeritus Justice Philip Tunoi in his evidence stated that the parties herein never entered into a contractual agreement.

261. It is not gainsaid that the 1st Respondent is the registered owner of the suit parcel of land. It was the agreement of parties that upon acquisition of the suit land, the same would be shared to the extent of each parties' contribution. In that regard, I am then led towards the wordings set out in the proviso to Section 3 of the *Law of Contract Act* become relevant thus:

> " This Section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526); nor shall anything in it affect the creation of a resulting, implied or constructive trust."

262. Similarly, Section 38 (2) (b) of the *Land Act* provides that Section 38 (1) of the Act is inapplicable to inter alia the creation or operation of a resulting, implied or a constructive trust. What then are those terminologies as provided in statute regarding created trusts? The Court of Appeal in Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggar Ahmed Al-Heidy & Others [2015] eKLR defined this concept of trust as follows:

> " Dealing with the first issue, according to the Black's Law Dictionary, 9th Edition; a trust is defined as:
>
> "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary)."
>
> Under the *Trustee Act*,
>
> > "...the expressions "trust" and "trustee" extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property..."
>
> Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury's Laws of England Vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. The purpose/intent for which the property was bought remains in dispute. This negates the existence of an express trust herein. In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand.
>
> A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is

immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...

This leaves us with resulting trusts; upon which the appellants had laid their claim. A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee (see Black's Law Dictionary) (supra). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see. Snell's Equity at p.177) (supra)...."

263. According to the report filed by the Land Agent one H.A. ODUOR, the 1st Respondent was seen the most educated of the partners. He then used this to his advantage so as to deprive the sleeping partners of the suit property. Those assertions were neither controverted nor countermanded. This court has also established from its independent analysis that the 1st Respondent stole a march from the sleeping partners. He was able to obtain the deposit sum but would later renege on his promise to distribute the property in accordance to each partner's contribution. In Yaxley vs. Gotts [2000] Ch. 162, the court held:

> "an oral agreement whereby the purchaser of a house promised to grant another, in exchange for materials and services supplied an interest in the property, though void and unenforceable under Section 2 of the Act of 1989, was still enforceable on the basis of constructive trust and Section 2 (5) in circumstances where, previously, the doctrine of part performance or proprietary estoppel might have been relied upon ..."

264. The concept of trust is an equitable remedy that has existed for a very long time. Courts are urged to only presume a trust where it is observed out of absolute necessity. The guiding principle that determines the same is the intention of the parties.

265. Looking at the entry on title document entered on 24/05/1978, a caveat was registered by EZEKIA KIPTOO KOMEN; one of the sleeping partners claiming purchaser's interests absolutely. This did not augur well with the 1st Respondent. He struck when the iron was hot by immediately filing Kakamega HCCC No. 43 of 1978 seeking to evict the said KIPTOO KOMEN from the suit land. In the end, he succeeded. This was clear evidence that the 1st Respondent had the intended need to explore all possible options to remove any person that stood in his way towards a solitary acquisition of the suit property. He was well aware that the sleeping partners were unlettered and used all means possible to his advantage.

266. It is my analysis that the interactions between the 1st Respondent on the one part and the Petitioner on the other part, was to create a partnership to the extent that each party would acquire a share of the suit land based on their monetary contribution. However, the 1st Respondent swindled the Petitioner and would immediately turn against him once he started pursing the property to his sole benefit.

267. Evidence has been led before this court to establish that ultimately, the Petitioner would receive registrable proprietary interests over the suit land based on his monetary contributions. Put differently, had the 1st Respondent not approached him and the other sleeping partners for funding to obtain

property as partners, they would not have remitted the sums contributed. Indeed, the 1st Respondent having used the Petitioner's money to secure the property and purport to deny him the benefit of pro rata ownership thereof would amount to unjust enrichment and disadvantaging others. Their interactional life events amounted to the creation of a resulting trust.

268. It is not lost that the 1st Respondent also took several steps towards complete acquisition of the suit land. On account of the correspondence, the receipts and statements of account, it is apparent that the 1st Respondent made considerable efforts to raise the balance of the purchase price. While the Petitioner argued that the 1st Respondent acted on their instructions when taking out loans and remitting the loan balance, there was no independent evidence to that effect. Therefore, I am not persuaded by the unproved oral assertions.

269. In the end, while I appreciate the conceited efforts of the 1st Respondent to raise balance of the purchase price and was also entitled to ownership of the suit land, I find that the 1st Respondent registered the suit land in trust for the Petitioner to the extent of his share of contribution. I make a further finding that for the 1st Respondent, the balance of the whole parcel area size less that of other parties' shares remains his entitlement to that extent.

viii. Whether the 1st Respondent obtained the suit land by means of fraud

270. According to the title deed in respect to the suit land, the suit property was first registered to Kaubeyon Estates Limited on 01/06/1964 for a term of 990 years. The term would later be reduced to 99 years. It was then charged to Agricultural Settlement Trust on 14/01/1965 and discharged on 13/07/1965. On that same day, the suit land was transferred toLands Limited for Kshs. 200,820.00.

271. The suit land would later be leased to Kaubeyon Estates Limited for a term of 15 years from 03/08/1965 at an annual rent of Kshs. 13,177.00. The property was once more transferred to Agricultural Settlement Trust subject to the lease toKaubeyon Estates Limited on 22/03/1967.

272. Evidence was led before this court to establish that indeed the 1st Respondent took the necessary steps to have the suit registered in his favor. It all began on 24/01/1975 when he was given an assignment of lease with an option to purchase.

273. The 1st Respondent became lessee for a period of two (2) years in that year when it was made available for an annual revisable rent of Kshs.13,485.10. By letter of consent dated 24/01/1975, the Application was approved; assigning the lease with an option for purchase fromKaubeyon Estates Limited to him.

274. Thus on 19/02/1975, the lease in favor ofKaubeyon Estates Limited was transferred to Elijah Chemoiwyo for Kshs. 41,120.00. It was then on 15/06/1976 transferred toLands Limited for Kshs. 207,463.25 subject to the lease in favor ofKaubeyon Estates Limited.

275. Vide a letter dated 13/11/1975,Lands Limited offered a proposal for purchase of the suit land to the 1st Respondent. Under its terms and conditions, the property was offered for purchase at the consideration sum of Kshs. 215,000.00.

276. Agricultural Settlement Trust, the predecessor ofLands Limited, in its letter dated 18/11/1975 forwarded the lease agreement fromKaubeyon Estates Limited to the 1st Respondent. This is because he had forwarded an application for transfer of the suit land in his name. In his letter dated 20/08/1975, the 1st Respondent forwarded a letter toLands Limited requesting for indulgence as he sought a loan with ADC.

277. In seeking to obtain financing, the 1st Respondent authorized KFA to remit the sum of Kshs. 9,500.00 from the proceeds of his planted crops. The authority was made vide a letter dated 19/12/1975.

278. Come 28/02/1976, Kenya Seed enclosed a cheque in the sum of Kshs. 12,000.00 from proceeds of seed maize from their customer the 1st Respondent. The sum was paid to the favor of Agricultural Settlement Trust. Thereafter on 04/11/1976,Lands Limited issued an offer letter upon the 1st Respondent's application to purchase the suit land. The proposal sought an initial 20% deposit of Kshs. 43,000.00 with the balance of Kshs. 172,000.00 paid in forty (40) monthly installments for a period of twenty (20) years at Kshs. 8,436.00 each.

279. Confirming transfer of the suit land in favor of the 1st Respondent,Lands Limited wrote a letter dated 19/05/1977 addressed to Archer & Wilcock Advocates. It disclosed that the property had been sold to the 1st Respondent. It requested the Advocates to prepare the necessary transfer documents having enclosed the necessary documents in the letter. In this regard, on 16/06/1977, a surrender of lease in favor ofKaubeyon Estates Limited and Elijah Chemoiywo, transfer to Elijah Chemoiywo Arap Koross for Kshs. 215,000.00 and charge toLands Limited for Kshs. 172,000.00 were registered on that day.

280. Arguing that he single-handedly paid the purchase price between 1977 and 1993, the 1st Respondent produced a bundle receipts fromLands Limited addressed to him solely together with a letter dated 04/04/1979 from Elijah Chemoiywo Koross requesting Kenya Seed Company Limited to remit a loan amount in the sum of Kshs. 47,049.75 toLands Limited realized from proceeds of the cultivated seeds on the suit land.

281. He also produced an authorization letter dated 12/02/1987 to Kenya Cooperative Creameries to payLands Limited Kshs. 2,000.00 on every 20th day of the month, a bundle of demand letters directed to him fromLands Limited on diverse dates between 1982 and 1990 and his statements of accounts dated 18/06/1981 marked and a bundle of statement of accounts between 1978 and 1984.

282. Following full payment of the purchase price loan amount, it was the 1st Respondent's evidence that a discharge of charge instrument was issued in his favor on 08/03/1993.

283. While the above steps were not in dispute, the 1st Respondent was accused of obtaining the suit land clandestinely with intent to keep the other partners away from its acquisition. As I have already established, as long as the Petitioner contributed towards the purchase of the suit land and were never given a share of the suit land as agreed upon, the 1st Respondent continued to hold the suit land in trust for them.

284. Section 28 (b) of the *Land Registration Act* provides that:

> " unless the contrary is expressed in the register, all registered land shall be subject to trusts including customary trust, as an overriding interest as may for the time being subsist and affect the same, without their being noted on the register."

285. I find that as long as the 1st Respondent held a customary trust in their favor, the said overriding interest remained superior and could not be overshadowed by the 1st Respondent's action of the registering the suit land in his own name. To this extent thus, the 1st Respondent's actions were deliberate and intended to disinherit the Petitioner. They thus amounted to fraud.

286. It is critical to note that while all the above transactions took place, Kakamega HCCC No. 43 of 1978 remained an ongoing suit where the question of ownership of the suit land had been challenged thus the doctrine of lis pendens remained alive. This is because while judgment was entered in his favor on 02/04/1980, the Counterclaim though initially dismissed on 30/11/1994, was reinstated by Application dated 06/12/1994. Following the re-opening of the suit, the judge delivered judgement on 12/02/2013 in favor of the five (5) purchasers.

287. Black's Law Dictionary 9th edition, defines lis pendens as the jurisdictional, power or control acquired by a court over property while a legal action is pending. The Court of Appeal in Naftali Ruthi Kinyua vs. Patrick Thuita Gachure & another [2015] eKLR had this to say on the doctrine of lis pendens:

> Lis pendens is a common law principle that was enacted into statute by section 52 Indian Transfer of Property Act (ITPA)-now repealed. While addressing the purpose of the principle of lis pendens, Turner L. J, in Bellamy vs. Sabine [1857] 1 De J 566 held as follows:
>
> > "It is a doctrine common to the courts both of law and equity, and rests, as I apprehend, upon this jurisdiction, that it would plainly be impossible that any action or suit could be brought to a successful determination, if alienation pendent lite were permitted to prevail. The Plaintiff would be liable in every case to be defeated by the Defendants alienating before the judgment or decree, and would be driven to commence his proceedings de novo, subject again to defeat by the same course of proceedings."
>
> In the case of Mawji vs. US International University & another [1976] KLR 185, Madan, J.A. stated thus:
>
> > "The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...
>
> In the same case at page it was observed inter alia that:
>
> > "Every man is presumed to be attentive to what passes in the courts of justice of the State or sovereignty where he resides. Therefore, purchase made of a property actually in litigation pendete lite for a valuable consideration and without any express or implied notice in point of fact affects the purchaser in the same manner as if he had notice and will accordingly be bound by the judgment or decree in the suit."
>
> See also the considered views of Nambuye J, (as she then was) in Bernadette Wangare Muriu vs. National Social Security Fund Board of Trustees & 2 Others [2012] eKLR. The necessity of the doctrine of lis pendens in the adjudication of land matters pending before the court cannot be gainsaid, particularly for its expediency, as well as the orderly and efficacious disposal of justice. Having said that, with the repeal of section 52 of the ITPA by the *Land Registration Act* (LRA) Number 3 of 2013, the question arises as to whether the doctrine remains applicable to the circumstances of the present case. We consider that its applicability must be considered in the light of Section 107 (1) of the LRA which provides the saving and transitional provisions of this Act, and which stipulates:
>
> > "Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or

exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act."

The effect of this provision is to allow for the continued applicability of the rights and interests ensuing from legislation that governed titles of properties established prior to the repeal of such legislation. Given that the concerned property involved land eligible for registration under the Registration of Titles Act (now repealed), having regard to section 107 (1) of the LRA, it is evident the rights flowing from section 52 of the ITPA including those under doctrine of lis pendens would remain applicable to the circumstances of this case.

Furthermore, lis pendens is a common law principle, and in addressing the relevance of common law principles within the Kenyan context, section 3 (1) of the *Judicature Act* Cap 8 stipulates that:

jurisdiction of the High Court, the Court of Appeal and of all subordinate courts shall be exercised in conformity with-

a. *the Constitution*;

b. subject thereto, all other written laws, including the Acts of Parliament of the United Kingdom cited in Part I of the Schedule to this Act, modified in accordance with Part II of that Schedule;

c. subject thereto and so far as those written laws do not extend or apply, the substance of the common law, the doctrines of equity and the statutes of general application in force in England on the 12th August, 1897, and the procedure and practice observed in courts of justice in England at that date: Provided that the said common law, doctrines of equity and statutes of general application shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary."

288. Similarly, in Cieni Plains Company Limited & 2 others vs. Ecobank Kenya Limited [2017] eKLR, the court held:

" The doctrine of lis pendens often expressed in the maxim pendente lite nihilin novature (during litigation nothing should be changed): see Blacks' Law Dictionary 9th Ed, was until May, 2012 part of our statute law. With regard to real property, section 52 of the now repealed Indian Transfer of Property Act 1882 provided that during the pendency in any court having authority in Kenya of any suit in which the right to immovable property was directly and specifically in question, the immovable property was not to be transferred or dealt with by any party to the suit or proceedings so as to affect the rights of any other party thereto under any decree or order that would be ultimately made , except with the authority of the court and on terms."

289. It is no doubt that the 1st Respondent, in spite of the pending litigious matter, proceeded to register the requisite instruments without disclosing the same. In my view, the doctrine of lis pendens remained applicable as long as Kitale HCCC No. 89 of 1997 remained alive since ownership of the suit land was hotly contested. The 1st Respondent's failure to adhere to and abide by the dictates set thereto amounted to fraudulent activities on his part.

290. The 1st Respondent's uncandid and ill motive activities were further captured in a letter 10/07/1980 addressed to the firm of Nyairo Tunoi & Company Advocates. The author of the letterLands Limited informed the firm that the 1st Respondent deliberately withheld material information when it was approached and were thus misled.

291. The letter continued that the Land Control Board acceded to correcting the anomaly when it sat on 13/06/1979, 11/07/1979, 14/02/1980 and 13/03/1980 to consider an Application for consent dated 11/05/1979 presented before them. In its meetings, considerations were taken that the sleeping partners had demonstrated that they had placed monetary contributions towards purchase of the suit land.

292. In that regard, the letter advised that the draft transfer drawn by Gautama & Kibuchi Advocates was at a variance with the letter of consent. They acknowledged that the 1st Respondent did not want to admit the five (5) sleeping partners. Furthermore, he would have frustrated efforts to have their interests secured by not signing the application forms. It was their recommendation that a rectification of title be submitted to the relevant authority so that the sleeping partners are included as proprietors of the title together with the 1st Respondent. The fact that PW2's father failed to sue RW1's father during his lifetime did not absolve him from any fraudulent activities. He committed acts of fraud with intent to disinherit the sleeping partners.

293. Going by my above analysis, it is my considered view that the 1st Respondent did not only commit fraud by proceeding to register the suit land pending adjudication proceedings as to ownership but also committed the same when there were subsisting overriding interests over the suit land that remained supreme to his registered ownership over the suit parcel of land.

ix. Whether the Respondents violated the Petitioner's right to acquisition of property as enshrined in Article 40 of *the Constitution*

294. The Petitioner contended that owning to the Respondents' actions or lack thereof, his right to acquisition of property as provided in Article 40 of *the Constitution* was infringed upon.

295. The issue in this dispute particularly concerns Article 40 (1) of *the Constitution* which provides that "subject to Article 65 (landholding by non-citizens), every person has the right, either individually or in association with others, to acquire and own property of any description and in any part of Kenya." Under Article 40 (6), it is expressly stated that the rights under this Article do not extend to any property that has been found to have been unlawfully acquired.

296. Sanctity of title under the Torren System is no longer blanketly protected but subject to legal acquisition of title under it. In our recent jurisprudence, courts have not hesitated to question acquisition of title that was obtained by means of fraud. [See the decision of the Supreme Court in Dina Management Limited vs. County Government of Mombasa & 5 others (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR) (21 April 2023) (Judgment)]. The Court of Appeal in Redcliff Holdings Limited vs. Registrar of Titles & 2 others (2017) eKLR, for instance held as follows:

> " The Judge further appreciated the import of Article 40 of *the Constitution* which protects the rights of property that is lawfully acquired, thus a title under Section 23(1) of the Registration of Titles Act is no longer held sacrosanct by hook, line and sinker as it was under the Australian Law of Torrens Systems especially when there are allegations of illegalities or irregularities in acquisition of title. In this respect the Judge went on to cite the case of Mureithi & 2 Others vs. Attorney General & Others, Nairobi HCMA No. 158 of 2005 (2006) 1 KLR where the courts even before the promulgation of *the Constitution*,

appreciated that the mere fact that a person had title to land did not mean that such title could not be questioned."

297. In the present case, it has already been established that the 1st Respondent had every intention of obtaining ownership of the suit land to the exclusion of the Petitioner; against the dictates of their agreement. What comes to the foe is that the 1st Respondent obtained title to the suit land by means of misrepresentation and fraudulent activities. Article 40 (1) as stated entitled the Petitioner, as in equal measure to the 1st Respondent to own property. The 1st Respondent's actions of depriving the Petitioner the right to acquire ownership of the suit land thus breached the provisions of Article 40 (1).

298. As for the 2nd and 3rd Respondents, I find that they did not breach the provision for the simple reason that they were never made parties to the proceedings that affected the change in ownership of the suit land. The 3rd Respondent was for instance only made aware of the outcome of the disputes in Kitale HCCC No. 89 of 1997 and the Eldoret Civil Appeal No. 223 of 2013 when the successful parties registered their respective decrees.

299. In addition to the above, the 1st Respondent solely concealed all material facts appurtenant to ownership of the suit land to the 2nd and 3rd Respondents. Suffice to add that the Petitioner did not at any point also notify the 2nd and 3rd Respondents so as to raise grounds that they deprived him off ownership of the suit land before filing the present suit. For those reasons, the 2nd and 3rd Respondents are absolved from any wrongdoing insofar as Article 40 (1) of *the Constitution* is concerned.

300. On the claim for loss of user, the Petitioner failed to demonstrate how he suffered loss and furthermore failed to quantify the loss suffered entitling him to that relief. For that reasons, the prayer for loss of user fails.

Orders and Disposition

301. Having said the above, this court is cognizant of the significant role played by the 1st Respondent in acquisition of the property. In fact, the Court in Kitale HCCC No. 89 of 1997 observed that the Defendants therein reservedly acknowledged that they owed the Plaintiff therein not because of his monetary contributions but due to his hard work and effort towards management of the suit land, obtaining a loan amount to clear the balance of the consideration sum and settling the loan on his own efforts. While the Petitioner explained that the 1st Respondent acted on their instructions, I find no evidence in support to demonstrate that they on their own volition paid the balance of the loan whether individually or from farm proceeds. This will be taken into account even as I issue my final orders and disposition.

302. Before issuing my orders and disposition, I would like to thank Counsel for their ardent sedulousness in laying out the issues in contention in the manner of their pleadings and the evidence. I thank them further for their call in availing the necessary evidence as and when called by this Honorable Court. This Court has done its level best to bring all the issues in contention to a determination that shall see this matter put to rest for infinity. After all, this court feels the compelling need to bring an end to litigation as a principle of finality. In Lim vs. Jabalde 172 SCRA 211, 224 (1989), citing Banogon vs. Serna, 154 SCRA 593, 597 (1987), the Philippines Supreme Court held as follows:

> " Litigation must end and terminate sometime and somewhere and it is essential to an effective and efficient administration of justice that, once a judgment has become final, the winning party be, not through a mere subterfuge, deprived of the fruits of the verdict. Courts must

therefore guard against any scheme calculated to bring about that result. Constituted as they are to put an end to controversies, courts should frown upon any attempt to prolong them."

303. To meet the ends of justice and in light of Article 23 (3) of *the Constitution* where this court is empowered to award appropriate relief, my orders and disposition in the matter are as follows:

i. A declaration that the registration of the entire property known as L.R. no. 11440 in the name of the 1st Respondent as the sole owner infringes on the Petitioner's rights to property as enshrined in Article 40 of *the Constitution* of Kenya.

ii. A declaration that the Petitioner is entitled to be registered as the owner of eighty (80) acres comprised of the property known as L.R. no. 11440.

iii. The 1st Respondent shall surrender the title documents in respect to all that parcel of land namely L.R. No. 11440 for rectification proposes to effect registration as stated in (ii) above.

iv. The 1st Respondent shall execute the necessary transfer forms to effect registration as (ii) above in respect to all that parcel of land namely L.R. No. 11440 within thirty (30) days from the date of this judgment.

v. Should the 1st Respondent fail to comply with (iv) above, the Deputy Registrar shall execute the necessary transfer forms to effect this judgment.

vi. A permanent injunction restraining the 1st Respondent by himself, his agents assigns or representatives from alienating or interfering with the Petitioner's possession of eighty (80) acres comprised of the property known as L.R. No. 11440 by forcible entry or otherwise in any manner prejudicial to the Petitioner.

vii. The Petition against the 2nd and 3rd Respondents lacks merit and is hereby dismissed with costs.

viii. Each party shall bear its own costs of the Petition.

JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 5TH DAY OF OCTOBER, 2023.

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE