REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ELC PETITION NO. 3 OF 2017

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INFRINGEMENT AND OR VIOLATION

OF THE PETITIONERS CONSTITUTIONAL RIGHTS CONTRARY

TO ARTICLES 19(2), 20(5), 21(1), 2, 2, 22(1), 23(1,2-a,d&e, 26, 27, 27(6),

28, 29, 35, 40, 40(1),(3)(a-b), (4), (6), 431(c & d),(3), 47,47(1-2), 60(1a), 62(4), 65(4),

66(1), 67, 68(c-iv, v, vii), 73(1),(a),iii &iv, 95 and 165 OF THE NEW CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF SECTION 3, 9 & 12 THE

GOVERNMENT LAND ACT, CAP 280, LAWS OF KENYA

AND

IN THE MATTER OF SECTION 65, 66, 67,68,69,70,167,177 &

PART X11 OF AGRICULTURAL ACT, CAP 318 LAWS OF KENYA

BETWEEN

1. CHARLES OPONDO OCHIENG.....1ST PETITIONER

2. NICK MUSUNGU.....2ND PETITIONER

3. BONIFACE MAKOKHA TELEWA.....3RD PETITIONER

(All suing on their own behalf and on behalf of

4. JACOB PEPELA

5. JOHN WEKESA TELEWA

6. STANLEY SHAKILO

7. JAMIN WEKESA

8. GODFREY WANJALA

9. SIMON ENGOLAN

10. JOSEPH OCHIENG

11. ALEX MALAKWEN

12. WYCLIFF WAFULA

13. STEPHEN MABOKO

14. FRED MUTORO

15. WILSON KIMONGO

16. SIMON MATETE

17. WALTER LUI

18. FRANCIS WEKESA

19. PATRICK WANGIRA

20. DISMASS WAFULA

21. MARGARET NASAMBU

22. RONALD BARASA

23. NICKSON WEKESA

24. AGNES KARORI

25. LAZARO WEKESA MARAN

26. JONES NASAMBU

27. JOEL MUNG'ARE

28. GRACE N. LUTURIAN

29. LABAN WEFILA

30. LINET KWAMBOKA

31. STANLEY SIATAKO

32. RUTH CHEPCHUMBA

33. WILLIAM N. MARUTI

34. PETER WANYONYI

35. GRACE CHEMAYEK KUTWA

36. RHODAH N. MNUPI

37. MATAYO MWALATI

38. JACOB S. MSIEBEBE

39. JANE N. SUDI

40. FLORENCE KERUBO OMOYO

41. JUMA NYONGESA

42. RICHARD WEKESA WANDERA

43. EUNICE BARASA

44. BENSON NAMUNYU

45. RONALD NALULWE

46. FRED W. MAKHAPILA

47. JOHN SIMIYU

48. ISAAC MKENDA

49. BENSON M. WASILWA

50. CYLUS L. LUCHACHA

51. KENNEDY W. JUMA

52. NANCY MUNYASIA

53. JAMES WANJALA

54. RICHARD KIMENGICH

55. KATHLEEN K. M.

56. PETER KITUYI MFUTI

57. W. WANJALA

58. EVERLYNE LUTURIAN

59. EDWIN NAMSHULE

60. JANIFER SIMATWA

61. RAFAEL SIMATWA

62. PATRICK MADEGWA MATASO

63. METRINE LUSIKE

64. MARY N. NYONGESA

65. AGNES MLONGO

66. WYCLIFFE MPALIO

67. ISAAC WASAI

68. TITUS KITUYI

69. TERESA KERUBO

70. WEKESA B. MASINDE

71. JOYCE KEMUMA

72. TOM JOSEPH OMOYO

73. WILKISTER MORAA

74. LOICE NYAMBURA

75. WILFRED SHIRENGO

76. JAMES NGUNGI

77. MARY NAFUNA

78. MELABI WAMBIA

79. DORIS BWARI

80. ESTHER KINUTHIA

81. EMELDAH K. OKOTOYI

82. EMILLY NEKESA

83. JOSPHAT WAFULA

84. JOSEPH MASIKA

85. ANDREW MAJIMBO

86. ROBERT WANJALA

87. CALEB WANJALA

88. ROSELINE ONZERE

89. GRACE KANANU

90. MOURICE NYONGESA

91. JOSEPH MHEMBERI

92. DAVID NYUKURI

93. MARK RAJA OKWARA

94. JOHN OJIMU

95. HUMPHREY W. BARASA

96. CLEOPHAS B. MAYENDE

97. CHILSON MLUPI

98. NELSON SITOKI

99. ALICE N. WEKESA

100. FRANCIS SIATI

101. REUBEN KACHUI

102. KENNEDY WAFULA

103. TOM SIMIYU

104. WAMALWA SANYANDA

105. JOHN MAKOKHA TALEWA

106. ERNEST POPOI

107. ROSELYNE KHAKASA

108. YOHANA WAFULA

109. JOSEPHAT MBITO

110. HELLEN WAFULA

111. PHILISTER N. NYONGESA

112. BEN MLANGO

113. IRINE OMUNAKI VIHIMA

VERSUS

KABARAK FARM LTD.....1ST RESPONDENT

ABMA INVESTMENT LTD.....2ND RESPONDENT

KIPSINENDE FARM LTD.....3RD RESPONDENT

LINSHIRE LTD.....4TH RESPONDENT

SIMON MBUGUA THUNGU.....5TH RESPONDENT

KENNETH HAMISH WOOLER KEITH,

DESTERIO ANDADI OYATSI &

ELIZABETH KLEM

(Being sued as Executors of the Estate of

HON. NICHOLAS BIWOTT).....6TH RESPONDENT

SETTLEMENT FUND TRUSTEE.....7TH RESPONDENT

COMMISSIONER FOR LANDS.....8TH RESPONDENT

LAND REGISTRAR,

TRANS-NZOIA COUNTY.....9TH RESPONDENT

DIRECTOR, LAND ADJUDICATION &

SETTLEMENT TRANS-NZOIA COUNTY.....10TH RESPONDENT

COUNTY LANDS SURVEYOR

TRANS NZOIA COUNTY.....11TH RESPONDENT

THE CABINET SECRETARY FOR LANDS,

HOUSING & URBAN DEVELOPMENT.....12TH RESPONDENT

THE NATIONAL LAND COMMISSION.....13TH RESPONDENT

THE INSPECTOR GENERAL OF POLICE.....14TH RESPONDENT

THE DIRECTOR OF

PUBLIC PROSECUTIONS.....15TH RESPONDENT

THE NATIONAL ASSEMBLY OF KENYA.....16TH RESPONDENT

THE HON. ATTORNEY GENERAL.....17TH RESPONDENT

THE CABINET SECRETARY,

MINISTRY OF

INTERIOR & CO-ORDINATION.....18TH RESPONDENT

DOMINIC K. SINGOEI

ALBERT K. TOO

WALTER K. KEMBOI.....19TH RESPONDENT

KAPSITWET RIVER ESTATE LTD.....20TH RESPONDENT

AND

THE COUNTY GOVERNMENT OF

TRANS NZOIA.....1ST INTERESTED PARTY

THE AREA MP,

KWANZA CONSTITUENCY.....2ND INTERESTED PARTY

THE KENYA HUMAN

RIGHTS COMMISSION.....3RD INTERESTED PARTY

ELDORET EXPRESS LTD.....4TH INTERESTED PARTY

JOHN LONYANGAPUO.....5TH INTERESTED PARTY

HENRY KIPLAGAT KIPTIONY.....6TH INTERESTED PARTY

JOHN PORIOT

(On own behalf and as the Representative of

80 others named in the Application

dated 26/8/2017).....7TH INTERESTED PARTY

MOSES CHELELGO, JOB SANG & DANIEL KIBUNDO

(On own behalf and as the Representative of

296 Others named in the Application

dated 24/6/2019).....8TH INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. The petitioner's case is that in the **1970s** the Government of Kenya purchased several white settler farms among them the suit land for resettlement of landless Kenyans according to the then government policy; the petitioners were in occupation of the suit land; instead of it being transferred to them, the suit land was allegedly transferred fraudulently to "*wealthy Kenyans*" who forcefully evicted the petitioners, leaving them landless and poor. It is pleaded that the **1st-6th** respondents have illegally and fraudulently acquired portions of land from the suit land and sold them to 3rd parties. The petitioners claim that their rights and freedoms under the constitution were therefore infringed upon by the respondents and they seek certain reliefs that are set out verbatim elsewhere in this judgment.

2. This matter was first filed on **2/5/2017**. An amended Petition dated **8/10/2018** was later filed, which is supported by an Affidavit jointly sworn by **Charles Opondo, Nick Musungu** and **Bonface Makokha Telewa** the **1st -3rd Petitioners**) dated **8/10/2018.** The three deponents have expressed to have brought the petition on their own behalf and on behalf of **100** other persons who, incidentally, are also expressly listed as petitioners. The Petitioners filed their further affidavits on **3/4/2019** and **22/7/2019.**

3. Leave was subsequently granted to effect substituted service upon the **1st - 4th** respondents as well as the **5th** respondent on **22/8/2017**.

4. After the petition was filed and even after amendment, numerous interested parties (hereinafter also referred to as "**IPs**") sought successfully to be enjoined as follows: the **4th** Interested Party applied to be enjoined in the proceedings vide an application dated **23/1/2018**. The **5th** and **6th** interested parties applied to be enjoined vide their application dated **25/4/2019** which was granted on the same date. The **7th IP** was enjoined on own behalf and on behalf of **80** others following their application dated **26/8/2019**. The **8th IP** was enjoined in the petition on own behalf and on behalf of **296** others after they filed their application for joinder dated **25/4/2019**, which was granted on **30/7/2019**. The **19th** respondent **Dominic Kipsugut Singoei & 2 Others** who were enjoined to represent **205** members of a group called **Kimnon Investment Company** following an application dated **12/3/2018**.

5. Various responses of the parties were filed as follows; the 1st Respondent filed a response to the amended petition filed in court on **8/4/2019**; the **3rd** respondent filed its replying affidavit sworn by **Caroline Kerich** on **13/2/2018** and a supplementary affidavit on the **19/11/2019**; the **5th** respondent filed his replying affidavit to the petition on **12/7/2017**; the **6th** respondent filed on **30/1/2019** a replying affidavit sworn by **Kenneth Hamish Wooler Keith**, one of the executors of the estate of the **6th** respondent's estate; the **7th - 15th, 17th** and **18th** respondents' filed a replying affidavit sworn on **10/1/2020** by one **Hellen Mutai**, the Trans Nzoia County Land Registrar; subsequently to the amendments to petition, her successor Nelson Odhiambo filed another affidavit dated **10/1/2020** which mostly reiterates the contents of the first affidavit albeit with a few additions; the **16th** Respondent filed a replying affidavit on **4/5/2018** which was sworn on **26/4/2018** by **Jeremiah Ndombi** its Senior Deputy Clerk and its further affidavit sworn by **Michael Sialai** the Clerk to the National Assembly on **24/1/2019** was filed on **30/1/2019**; the **19th** Respondent filed its replying affidavit on **31/5/2018** sworn by **Dominic Kipsugut Singoei**, its Chairman.

6. The **3rd** Interested Party filed two affidavits in support of the amended petition both sworn by **George Kegoro**, its Chief Executive Officer on **18/4/2018** and **30/11/2018** respectively; the **4th IP** on its part filed a Replying Affidavit sworn by one of its Directors **Simon Mbugua Thungu**; the 5th and 6th interested parties filed a replying affidavit sworn on **13/5/2019** by **John Krop Lonyangapuo** the **5th IP**. In addition the supporting affidavits of the **7th** and **8th IPs** attached to their respective motions seeking joinder were deemed as their responses to the amended petition.

7. The petitioners filed their written submissions on **15/1/2021**. Other submissions were filed as follows: the **19th** Respondent filed its submissions sworn **31/5/2018.** The **3rd** respondent filed its submissions on **3/7/2019**. The **3rd** Interested Party filed its submissions on **18/11/2019**.

The Petitioner's Case

8. In the amended Petition dated **8/10/2018**, the Petitioners prays for the orders which I set out verbatim as herebelow:

> **(1) A Declaration that the 20th Respondent and subsequently the 1st upto the 6th Respondents unlawfully, illegally and/or irregularly acquired the following parcels of land that arose from land parcel No. LR. 2046 comprised in Certificate No. IR 318/1 and all subsequent subdivision, sale and transfers to 20th, 1st upto 6th respondents have no lawful, legal title to the same or any superior rights over the same as against the petitioners on the following parcels of land:**
>
> **(a)Kwanza/Namanjalala Block 4/1**
>
> **(b)Kwanza/Namanjalala Block 4/2**
>
> **(c) Kwanza/Namanjalala Block 4/3**
>
> **(d)Kwanza/Namanjalala Block 4/4**
>
> **(2) A Declaration that any subsequent sale, subdivision and transfer of land parcels No. Kwanza/Namanjalala Block 4/1, Kwanza/ Namanjalala Block 4/2, Kwanza/ Namanjalala Block 4/3 and Kwanza/ Namanjalala Block 4/4 to third parties by**

the 20th Respondents and then by 1st upto the 6th Respondents and ANY further subdivision and transfer of portions of land arising from land parcel No. LR. 2046 comprised in Certificate No. IR 318/1 to third parties is null and void.

(3) An order for cancellation or revocation of all subsequent sales, sub-divisions, transfers and title deeds arising from land parcel No. LR. 2046 comprised in Certificate No. IR 318/1 including land parcels No. Kwanza/Namanjalala Block 4/1, Kwanza/Namanjalala Block 4/2, Kwanza/Namanjalala Block 4/3 and Kwanza/Namanjalala Block 4/4.

(4) An order directed to the County Surveyor, Commissioner for Lands, Registrar of Lands and National Land Commission to accordingly resurvey the subject land and amend the green card in respect of land parcel No. LR 2046 comprised in Certificate No. IR 318/1 in compliance with the orders of court issued hereto.

(5) An order for eviction and demolition of all buildings, structures, crops, trees and developments illegally built on land parcel No. 2046 comprised in Certificate No. IR 318/1 by the20th and then the 1st to 6th Respondents or any third parties within thirty (30) days at their cost, failure of which the police do enforce the orders of this Honourable Court.

(6) An order that the National Assembly, in co-operation with the Ministry of Lands, the National Land Commission and relevant government agencies to design and develop ways and means of resettling the Petitioners on land parcel No. L.R 2046 comprised in Certificate No. IR 318/1 under reasonable terms and conditions within twelve (12) months from the date of the judgment.

(7) In the alternative to prayer (6) above, an order that the Petitioners be provided with alternative land and or compensation for re-settlement under reasonable terms and conditions for settlement and or resettlement.

(8) A declaration that the Petitioners fundamental rights to access and own property and the protection of their rights to access and own property has been illegally and arbitrary deprived by the Respondents jointly and severally.

(9) A declaration that the Petitioners right to fair administrative action and to a fair hearing have been breached by the 7th-12th Respondents and continues to be breached.

(10) A declaration that the Respondents and its agents have acted in breach of Articles 19(2), 20(5), 21(1)(2)(3), 22(1), 23 (1)(2)(a,d&e),26,27,27(6),28,29,35,40,40(1)(3)(a-b),(4),(6), 43 (1)(c & d)(3), 47, 47(1-2),60(1-a), 62(4), (65)(4), 66(1), 67, 68 (c-iv, v, vii), 73(1)(a) (iii & iv), 95 and 165.

(11) A declaration that the Petitioners have been illegally, wrongfully and unlawfully evicted and their homes illegally demolished from land parcel No. L.R 2046 comprised in Certificate No. IR 318/1 situate within Trans-Nzoia County by the 6th and 20th Respondents in collusion with the 14th Respondent herein and or the police.

(12) A declaration that the demolition of the houses and business structures of the Petitioners under the direction of the 6th and 20th Respondents and the 14th Respondent and or the police and their forced eviction without issuing notice of eviction was in violation of the petitioners' fundamental rights to inherent human dignity, security of the person, right to life, accessible and adequate housing, prohibition of forced evictions, reasonable standards of sanitation, health care services, to clean and safe water in adequate quantities and to be free from hunger as guaranteed by Articles 26(1),(3), 28, 29, 43(1) as read with 20(5) and 21(1),(2) and (3) of the Constitution of Kenya 2010.

(13) A declaration that the demolition of houses of the Petitioners, most of whom are elderly without according them alternative shelter and/or accommodation is a violation of the fundamental rights of the elderly of pursuit of personal development, to live in dignity, respect and free from abuse and to receive reasonable care and assistance from the State guaranteed by Article 57(b)(c) and (d) as read with Article 21(3) of the Constitution of Kenya, 2010.

(14) General damages for violations of the petitioners' fundamental rights and freedoms in prayers (8),(10),(11),(12) and (13) above.

(15) Exemplary damages for highhanded, oppressive and arbitrary violation of the Petitioners' fundamental rights and freedoms.

(16) A declaration that the arrest and subsequent prosecution of the 1st upto the 24th Petitioners in Kitale Criminal Case No. 1272 of 2005 by the 14th and 15th Respondents in collusion by the 6th and 20th Respondents was unlawful, illegal and in violation of the aforesaid Petitioners fundamental rights.

(17) General damages for the unlawful arrest and prosecution of the 1st upto the 24th petitioners in Kitale Criminal Case No. 1272 of 2005.

(18) Costs of and incidental to this petition.

(19) Any further relief or order that the court shall deem just and fit to grant.

9. In the body of the petition the petitioners aver that they, their fathers and grandfathers, all of them numbering about **78**, originally lived on

land parcel **LR No. 2046** (**IR 318/1)** (hereinafter also referred to as *"the suit land"*) which measured approximately **1653 Ha. (4083 acres)** prior to colonization and generally before the **1940s;** they were subsequently evicted therefrom by the colonial government; between **1940** and **1978** they sought employment from the white farmers who were settled on the land and who had become registered proprietors of **LR No. 2046** (**IR 318/1)**. The proprietorship changed from time to time but the petitioners remained casual employees of the white settlers who successively became the proprietors of the suit land including Major Albert Keyser and Mr. George Barbour. The petitioners were each allowed to occupy and farm on **5 acres** of the suit land during the tenures of all the landowners. Later Major Keyser sold or transferred the suit land to the Government of Kenya and it was vested in the **7th** respondent, the Settlement Fund Trustee **(SFT).** Later the petitioners contradict this statement and state that the last of the white farmers who owned the suit land was Mr. Barbour who held the land till **1979**. Mr. Barbour's interest in the land then passed on to the SFT (the **7th** respondent) during the height of the Government's resettlement policy. Mr. Barbour's manager also identified the petitioners as former employees on the farm during the transition stage, with a recommendation that the SFT gives them priority during resettlement. Upon writing to the SFT requesting land allocation they were promised allocation of land and encouraged to remain in occupation of their respective **5 acres**. On one occasion the then President of Kenya as well as the **6**th respondent visited the suit land and promised that the petitioners would be resettled on it in accordance with their physical occupation on the ground, thus creating a legitimate expectation of allocation on the part of the petitioners. However they have never been allocated land yet other former employees from neighbouring former white settler farms were allocated land and resettled on those farms on priority basis. In the year **2005** the petitioners were arrested and charged in court and the criminal case was later withdrawn. However, at the direction of the **6th** respondent, the petitioners were subsequently evicted by police from the suit land their crops destroyed and their dwellings demolished after the withdrawal of the criminal charges. It was then that they then learnt that the land had been sold in **May 1980** to the **20th** respondent, who had nevertheless allowed them to continue in occupation thereof while working in its employ for gain and while still farming on their respective **5** acre portions; that later the petitioners learnt that the **20th** respondent had surrendered the suit land to the government on **16/8/2002**; that a week after surrender the land was subdivided and transferred and with the knowledge and approval of the **7th-12th** respondents; freehold titles were issued to the **1st-6th** respondents notwithstanding the status of the land as "*alienated government land already allocated to the SFT for resettlement of the landless"* and the petitioner's legitimate expectation of allocation of a share therefrom.

10. Consequently, **Kwanza/Namanjalala Block 4/1** consisting of **158.77 Ha** was transferred to the **1st** respondent, **Kwanza/Namanjalala Block 4/2** (**195.18 Ha**) to the **2nd** respondent**, Kwanza/Namanjalala Block 4/3** (**302.59 Ha**) to the **3rd** respondent and **Kwanza/Namanjalala Block 4/4** (**193.48 Ha**) to the **4th** respondent. The petitioners allege that the said transferee companies were owned by "powerful persons" in the then government of the Republic of Kenya, including late retired President Daniel Arap Moi, Nicholas Biwott and Abraham Kiptanui and that the transfers were effected without observance of due process during the last months of the rule of the KANU Government that ended in **2002**. The petitioners state, though incorrectly, that **Kwanza/Namanjalala Block 4/4** was subsequently sold to the **5th** respondent (the **4th IP** has owned up to having purchased it). In the course of the following years, the petitioners aver, the **7th-11th** respondents have frustrated and ignored calls by the petitioners to secure their rights over the suit land, and have continued to subdivide the land, transferring more than half of it to what the petitioners refer to as *"businessmen with close networks within the government"* with impunity while they "*wallow in abject poverty*," labouring at the local market and paying rent and buying daily food they had been used to growing for their subsistence on the suit land, thus considerably lowering their standard of living.

11. The transfer of the land to the **20th** respondent is termed as fraudulent, unprocedural, irregular and in violation of the petitioners' rights in the suit land. The grant to the **20th** respondent is faulted on *inter alia*, alleged want of change of user from "*resettlement of poor and landless Kenyans*" to "*commercial use*" by the **20th** respondent, the allottee "*being not a poor and landless person*;" want of allotment letters; want of proof of consideration paid to government; undervaluation before sale and want of Ministerial and Departmental approvals. It is averred that owing to the alleged irregularities the titles issued to the **20th** respondent and all subsequent titles emanating from that title issued to third parties are irregular and unprotected by the law and subject to revocation. It is alleged that the petitioners' dwellings on the land were demolished without regard to their rights of occupation and that thus their rights under **Articles 43** and **19** of the **Constitution** (access to socio-economic rights) including the right to own land and develop a home, **Articles 27(4)** and **47** regarding discrimination on basis of ethnicity, culture and belief were violated. The petitioners allege that their arrest, detention and prosecution was malicious and illegal and that it subjected them to physical and psychological torture and amounted to inhumane, cruel and degrading treatment for which the respondents had no legal authority as titles by the **1st-6th** respondents had been illegally acquired.

12. It was averred that the **20th** respondent promised to resettle them on the suit land; that subsequently the land was subdivided and hundreds of members of the Tugen ethnic group had been resettled thereon without any notice to the petitioners, which act they term as discriminatory.

THE RESPONDENTS' RESPONSES

The 1st Respondent's Case

13. The **1st** Respondent filed grounds dated **7/11/2017** and a response dated **31/5/2018** in opposition to the petition and averred that the petitioners are impostors and vexatious litigants who have evinced an intention to disenfranchise the legitimate owners of the land through the various strategies that they have employed over the years which includes "*political interference*" and the filing of various suits touching on the parcel of land in question being **Kwanza/Namanjalala Block 4/1** which include **Kitale High Court Civil Case No. 3 of 2006 (O.S)**; that the petitioners are guilty of multiplicity of suits on the same subject; that the petition is unsupported by direct evidence; that the petitioners lack the *locus* to prosecute this matter as they have failed to establish a connection with the white settlers and that they cannot claim to exercise any assertive rights on behalf of their grandfathers in a matter whose cause of action arose way back in **1970** and who slept on their purported rights of entitlement to the suit land; that there has been inordinate delay in bringing the action as the claim is being brought almost **35 years** after the land was subdivided, title issued and the land disposed of to innocent purchasers for value; that the instant claim is an afterthought by the petitioners as the same was not filed during the lifetime of predecessors to the petitioners and other former employers; that the petitioners' predecessors were satisfied with the knowledge that the suit property was registered in other people's names; that the petitioners' predecessors were aware of subdivision and any other dealing with the land and that those transactions were above board and that as such the petitioners have not met the constitutional threshold and are not entitled to any of the remedies sought; that **Kwanza/Namanjalala Block 4/1** has already been subdivided and disposed of to third parties; that the petition as pleaded violates the rule in

the **Anarita Karimi Njeru** decision by failing to particularize alleged violation and how the **1st** respondent has purportedly infringed on the Petitioners rights, and it should be dismissed with costs.

14. At this juncture I must disabuse the 1st respondent of the apparent notion that the basis of the petitioners claim is based on their ancestral rights to the land. The petitioners have based their claim on their lengthy stay on the land as former employees of the land owners and who expected the land they occupied to be allocated to them.

The 3rd Respondent's Case

15. The **3rd** respondent filed its replying affidavit on **13/2/2018** sworn by **Nassir Pirani**, its director where he deposes that no cause of action has been disclosed against the **3rd** respondent; that the issues in this petition are directly and substantially in issue in **Kitale ELC No. 3 of 2006 (O.S)** which is yet to be heard and determined on merit hence the instant petition should be dismissed for being *sub judice*; that the 3rd respondent was the proprietor of land parcel no. **Kwanza/Namanjalala/ Block 4/3** upto **30/11/2006** when it was sold and procedurally transferred to the **5th** and **6th** interested parties; that actual possession was handed over to the aforesaid purchasers on **1/12/2006**; that the **3rd** respondent does not have any proprietary interest in land parcel No. **Kwanza/Namanjalala/Block 4/3** and in any event it played no role in the prosecution of the petitioners; that no illegality has been pleaded as against the **3rd** respondent in the instant petition. The **3rd** respondent further avers that if as posited in the petitioners' affidavits there are **1963** acres that remain unallocated from the suit land, the petitioners should apply for allocation. It denies that the petitioners ever had houses erected on **Kwanza/Namanjalala/Block 4/3.**

The 5th Respondent's Case

16. In his replying affidavit to the petition filed on **12/7/2017,** the **5th** respondent deposes that the deponents to the supporting affidavits have no authority of the rest of the petitioners to so depose; that the petitioners are raising historical injustices which cannot be competently handled by this court and that by dint of **Article 67** of the **Constitution** of **Kenya** and the **National Land Commission Act,2012** the **National Land Commission (NLC)** is the proper forum for the determination of the alleged historical injustices; that the Petition is premature as the petitioners have not filed any complaint with the National Land Commission; that some of the remedies being sought by the petitioners cannot be granted by this court in this petition but the reliefs can be sought in an ordinary civil suit; that the petition is based on generalities and it has failed to precisely state a case with specifications or demonstrate any claim against him; that the land in question being **Kwanza/Namanjalala/Kapsitwet 4** is not registered in its name and that the petition is bad in law, an abuse of court process and it violates the principles established in **Anarita Karimi Njeru's case** and the court should dismiss it.

The 6th Respondent's Case

17. The **6th** respondent filed on **30/1/2019** a replying affidavit sworn by one **Kenneth Hamish Wooler Keith**, one of the Executors of the estate of the late **Hon. Nicholas Biwott** in opposition to the Petition. He challenges the petition as not meeting certain technical conditions, especially the following: **(1)** a letter of authority showing the petitioners have the authority to bring the petition on behalf of others; **(2)** the full disclosure of the identities of the others; **(3)** a demonstration that the petitioners and the others share the same interests and need the same reliefs and their interests are not peculiar to each individual. The deponent further avers that the petitioners have not proved that the title exhibited in the petition is a valid document or that George Barbour was a registered owner of the suit land; that the petitioners and their fathers have not been proved to have been the original occupiers of the land who were evicted by colonialists; that the petitioners have not proved which part of the land they were in occupation of or authorized to farm on while they were employed, have not proved their interest therein and thus can not claim rights have been infringed; and that the deceased was not the complainant in the **Kitale Criminal Case No. 1272 of 2005**. The 6th respondent avers that there cannot be a sustainable cause of action against the **6th** respondent for reasons that the deceased has never been registered proprietor of all that piece of land known as **L.R No. 2046** (**IR 318/1)** or subsequent subdivisions of it and neither had he or the late retired President Daniel Arap Moi ever promised the petitioners settlement on the suit land; that there is no evidence that the petitioners were ever in occupation of the suit land; that the petitioners having failed to demonstrate interest in the property, notice of intention to sell the land to Kapsitwet River Estates Ltd was not necessary; that all that piece of land parcel **LR. No. 2046 Trans Nzoia (No. IR 318/1)** or subsequent sub-divisions of it does not form part of the estate of the deceased available for distribution to the beneficiaries; that the deceased's estate has no interest in the suit land; that the petitioners have not filed any documents to reasonably show that the deceased was the registered proprietor of the suit land; that the registered proprietors of the suit land are parties in the petition and they have filed legal process acknowledging ownership of the subject properties; that the deceased could not have illegally and unlawfully acquired and sold the suit land as he did not have a proprietary registered interest over the property; that the petitioners having failed to show the nexus between the suit land and the deceased, there cannot possibly be said to have existed a cause of action as alleged against the deceased; that any cause of action cannot therefore survive, be transferred and thus be in issue against the estate of the deceased and the petitioners have failed to set out with reasonable degree of precision the cause of action as against the deceased.

18. At this juncture I must also disabuse the **6th** respondent's apparent notion just, like the **3rd** respondent's, that the foundation of the petitioners' claim is ancestral in nature. Proof that the petitioners forefathers were in occupation of the suit land plays little or no role at all in this petition.

The 7th -15th, 17th & 18th Respondents' Case

19. As mentioned earlier, the **7th - 15th, 17th** and **18th** respondents filed their response to the petition and amended vide replying affidavits sworn by one **Hellen Mutai**, the Land Registrar, Trans Nzoia County and her successor, Nelson Odhimabo where they deposed that they had in their custody the administrative parcel file for land references in the registration section **Kwanza/Namanjalala Block 4** and that they have thoroughly perused the records of the said section; that parcel **LR. No. 2046 (IR No. 318/1)** was originally granted to one ***Becil Bharler Johnson*** for a term of **999** years with effect from **1/7/1919** to **1/7/2918** but changed proprietorship and on **30/5/1982** it was transferred to **Kapsitwet River Estate Limited** for consideration of **Kshs. 15,566,160/-** that Kapsitwet River Estate Ltd charged the suit land to two financial institutions; Standard Chartered Bank for **Kshs. 6,000,000/-** and Settlement Fund Trustees for **Kshs. 10,700,260/-** and a further loan

of **Kshs. 3,676,980/-**; that the record further shows that the said charges were discharged on various dates and on **16/8/2002** Kapsitwet River Estate Ltd executed and registered an instrument of surrender in which it surrendered all its rights and interest in the suit land to the Government of Kenya in consideration of sub-division scheme approval and issuance of title deeds under the **Registered Land Act**; that at the time of surrender to the Government, the suit land was privately owned and registered in the name of Kapsitwet River Estate Ltd; that "upon the surrender and conversion to the **Registered Land Act** regime, the land reverted to the government to be administered as unalienated Government land under the former **Government Lands Act** (now repealed)"; that the suit land which had now been christened as Kapsitwet Farm (being **LR. No. 5575** and **5779)** became the Registration Section **Kwanza/Namanjalala Block 4** where **354** parcel numbers were generated and serialized as parcel number **1-354** and a Registry Index Map and Area List of the resultant subdivisions deposited for registration and safe custody; that the registration of **Kwanza/Namajalala Block 4** was properly, procedurally and lawfully created and that there are no acts or omissions that would necessitate reversal of transactions herein which may have far reaching practical, logistical and commercial ramifications in view of the numerous changes in the registers; that if the petitioners may have recourse against Kapsitwet River Estate based on trust or adverse possession on the suit land by virtue of their continued stay thereon such a civil claim cannot extend against the **7th - 15th, 17th** and **18th** respondents; that there is no evidence that the suit land which was and remains private land was compulsorily acquired for settlement of squatters or that the so called "*high level*" government officers had any power to purport to deal with or vest the suit land to the petitioners, or that they could allocate private land in utter violation of the relevant laws; that the circumstances of this case can be distinguished from **Eldoret ELC Petition No. 4 of 2016** and **Nairobi HC Petition No. 413 of 2012** and that this case does not merit the invocation of the doctrine of legitimate expectation which can not arise out of a nullity; that if the petitioners and their forefathers have been in long and uninterrupted occupation or physical possession of the suit land and sub-divisions therefrom the proper cause of action should be lodge a claim with National Land Commission that has the mandate to address historical injustices so as to determine their rights, if any, that the orders sought are not grantable in view of Constitutional tenet; that public interest outweighs private interest and the fact that the orders sought are coercive with far reaching practical implications. The respondents also state that the petition has not attained the threshold set out in the **Anarita Karimi Njeru** case. The second affidavit of **Nelson Odhiambo,** also a Land Registrar, opposed the petition on the same grounds above. In addition it cites ***laches*** on the part of the petitioners in bringing the petition; it also avers that the petitioners' remedy lies against the specific proprietor of the suit land. Again I must caution the current respondents, just like those whose replies I have earlier on analysed, that this claim is not based on ancestral possession of the land.

The 16th Respondent's Response

20. In the two separate replying affidavits of **Jeremiah Ndombi** Senior Deputy Clerk of the National Assembly and **Michael Sialai**, Clerk of the National Assembly filed on **31/5/2018** and **30/1/2019** respectively, the **16th** respondent seeks that the petition be dismissed on the grounds that: it has discharged its mandate in **Article 95** of the Constitution in that it has enacted legislations to deal with all grievances of citizens including the issues raised by the petitioners herein, which legislations include the **National Land Commission Act,** the **Environment and Land Court Act,** the **Land Act** and the **Land Registration Act;** that the petitioners failed to petition it under the provisions of **Article 119 (1)** of the Constitution before filing the instant petition, yet that constitutional article's provisions are intended to cover situations such as the petitioners have explained; that the resettlement of the petitioners falls outside the purview of its mandate and in any event the petition does not meet the threshold required of a constitutional petition.

The 19th Respondent's Response

21. The **19th** respondent seeks that the petition be dismissed with costs. The **19th** respondent reiterates the response of the **7th - 15th, 16th, 17th** and **18th** respondents and further avers as follows: that its members are in occupation of **150 acres** of the suit land having purchased the same from the **2nd** respondent on **13/5/2005;** that its members' rights are protected under **Article 40** of the **Constitution;** that the suit land was private land as at the time of purchase; that the petition falls short of the legal threshold required of a constitutional petition and it should be dismissed with costs.

THE INTERESTED PARTIES'RESPONSES

The 3rd Interested Party's Response

22. The **3rd** Interested Party supported the petition, stating that the petitioners' case presents an instance of a historical injustice; that it is public knowledge that settlement schemes originated from trust lands purchased through loans advanced to Kenya by Britain; that the **Ndungu Commission** found that district plot allocation committees established for settlement of the landless wielded enormous powers to the extent that they became "*wholly unaccountable*" and that some farms under entities like the Agricultural Development Corporation (ADC) had ended up being owned by individuals and companies, which was contrary to the law; that the **Ndungu Commission** recommended that the government prepare a sessional paper for effective management of settlement schemes and that all illegal land allocations made at the expense of the landless be revoked.

The 4th Interested Party's Response

23. The **4th** Interested Party responded to the petition through the sworn affidavit of its director one **Simon Mbugua Thungu,** who was also named as the **5th** respondent. Its response is that it purchased the land from the **4th** respondent for value without notice in the year **2005** and was issued with a title deed in **June 2006.** He took vacant possession upon purchase and has been farming on the land since. The **4th** Interested Party also points out that the petitioners have not disclosed any cause of action against it because they have not stated the specific portion of the land known as **Kwanza/ Namanjalala Block 4/Kapsitwet/4** they claim proprietary interest over and that in any event the petition is time barred.

The 5th Interested Party's Response

24. The **5th** Interested Party's reply in his sworn affidavit filed on **13/5/2019** is that he and the **6th IP** purchased parcel number

Kwanza/Namanjalala Block 4/3 in the year **2006** and soon after the sale they obtained vacant possession and have been in quiet possession of the premises since; that they are therefore innocent purchasers for value unaware of any defect in title; that they have also sold numerous portions of the same land to third parties not enjoined to this petition (this court notes that they were subsequently enjoined upon their application and represented by the **7th IP** and that the petitioners have not demonstrated any fraud against them.

The 7th Interested Party's Response

25. The **7th** Interested Party relied on the replying affidavit dated **24/6/2019** and filed on **25/6/2019** and stated that they obtained the portions of land which the members they represent are in occupation of through dispositions to them from the **1st** respondent, some by way of gift and some by way of sale, transfer or exchange and that some of the portions they hold are titled. They claim to have been engaged in subsistence farming and that they have extensively developed the land. They also aver that the **1st** respondent has no proprietary interest in **Kwanza/Namanjalala Block 4/1.** They claim that there are pending proceedings in the form of **Kitale HCCC No. 3 of 2006 - Falient Nyongesa & Others Vs Kabarak Farm** and **Others**, relating to the suit land.

The 8th Interested Party's Response

26. The **8th** Interested Party's response to the petition is in the replying affidavit of **John Poriot** filed on **26/8/2019.** They claim to have purchased the land from the **5th** and the **6th** respondents as *bona fide* purchasers for value with no notice of defect in title.

The Petitioners' Further Affidavits

27. The petitioners filed further affidavits dated **29/3/2019** and **28/6/2019** and **20/8/2019.** They aver that **Kitale ELC Case No. 3 of 2006 (OS)** was withdrawn prior to the filing of the instant petition (which fact was confirmed by court upon a perusal of the original file record). They also assert that even if the **1st** and the **3rd** respondents sold the subject land parcel their initial proprietorship was tainted with fraud and incapable of conferring good title to third parties, and that (in the event the petition succeeds) the Interested Parties would have a remedy against the persons who transferred the land to them. It is also alleged that the **3rd** respondent lacks any offer and letter of allotment and that the allocation was illegal.

SUBMISSIONS

28. The petitioners filed submissions on **3/7/2019**, the **1st** respondent, the **16th** respondent and the **7th IP** on **30/7/2019**; the **3rd** respondent on **3/7/2019**; the **6th** respondent on **5/11/2020** and the **7th 15th 17th** and **18th** respondents on **15/1/2021**.

DETERMINATION

29. As is apparent from the foregoing I have extensively examined the amended Petition dated the **8/10/2018**, including the supporting affidavits, replying affidavits, further affidavits and supplementary affidavits. I have also examined the submissions filed herein in order to extract a more clearer perspective of this complex litigation from the labyrinth of parties' documents. The following are, in this court's view, the main issues that arise for determination:-

> ***(a) Whether the Petition meets the threshold required of a Constitutional Petition as set out in the Anarita Karimi Njeru Decision.***
>
> ***(b) Whether the Petition should fail on account of laches on the part of the Petitioners.***
>
> ***(c) Whether this court lacks jurisdiction for the reason that National Land Commission is the body mandated to handle historical land injustices.***
>
> ***(d) Whether the Petitioners have demonstrated that their fundamental rights and freedoms have been infringed upon and therefore whether the Petitioners are entitled to the prayers sought; and***
>
> ***(e) Who should bear the costs of the Petition?***

30. The issues are discussed as herein below.

(a) Whether the Petition meets the threshold required of a Constitutional Petition as set out in the Anarita Karimi Njeru Decision.

31. The Court of Appeal stated as follows in the renowned **Anarita Karimi Njeru 1979 KLR 174** case:

> **"We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."**

32. It is vital to note that it is not the merits of the petitioner's claims that are of consequence while applying the Anarita Karimi case test at this early juncture in this judgment. The test of the veracity of their claim for violation of rights will follow the analysis as to whether their

claim has been set out in the proper manner. At the instant stage, it is only the manner of pleading that is of relevance. The petition must therefore state the grievance the petitioners complain of, the provisions said to have been infringed and the manner in which they are alleged to have been infringed as stated in the **Anita case (Supra)**.

33. That which they complain of: In this court's view the plaintive cries of the petitioners, can be clearly heard through the numerous paragraphs of the petition. The petitioner's case is that in the **1970s** the government of Kenya purchased several white settler farms among them the suit land for resettlement of landless Kenyans according to the then government policy. The petitioners were in occupation of the suit land. Instead of it being transferred to them, the suit land was, according to the petitioners, transferred fraudulently to "*wealthy Kenyans*" who forcefully evicted the petitioners, leaving them landless and poor. It is pleaded that the **1st-6th** respondents have illegally and fraudulently acquired portions of land from the suit land and sold them to 3rd parties. I think the petition has effectively communicated whatever grievance the petitioners complain of.

34. The provisions said to have been infringed: The petitioners have cited numerous articles of the constitution in the title to their petition: **Articles 19(2), 20(5), 21(1),(2),(3), 22(1), 23(1)(2)(a)(d & e), 26, 27(6), 28, 29, 35, 40(1),(3)(a-b),(4),(6),43(1) (c & b), 3, 47(1-2), 60(1a), 62(4), (65)(4), 66(1), 67, 68 (c-iv, v, vii), 73(1)(a), (iii & iv), 95** and **165.** They have also extensively paraphrased many of the said Articles of Constitution or replicated them either in whole or in part, verbatim in their petition. In this court's view the provisions under which the petitioners have come are therefore known to all the respondents and the interested parties.

35. The manner in which they are alleged to be infringed: the petition adopts the form of a narrative. Punctuated by a great foliage of quotations from decided cases in its body - which quotations I find quite tedious and unfit for that pleading stage. Various allegations of infringement of rights under the constitution, and the particular provisions of the constitution said to have been infringed can be seen in it. For example, paragraphs **15(A), 15(B)** and **15(C)** of the petition explain the basis of the belief as to why the petitioners claim that **Articles 20, 21, 27** and **47** and **56** of the Constitution have been violated and why they believe that their access to socio-economic rights (threshed out as the right to own land and a home) have been infringed. This court needs state no more on the issue save that when it comes to the prayers at the bottom of the petition, the petitioners do seek declarations that the respondents have jointly and severally violated the petitioners' rights under the constitution.

36. The Court of Appeal stated as follows in the **Mumo Matemu -vs- Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012** case:

> **"We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims….We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party..."**

37. Notwithstanding the deprecable inclusion of a surfeit of unnecessary material in its body, the instant petition has not fallen short of conveying albeit in a tediously prolix fashion, the manner in which rights were allegedly infringed as a result of the alleged illegal, wrongful and unlawful eviction and demolition of their homes on land parcel **LR No. 2046 (IR No. 318/1)** and the subsequent arrest and prosecution of the some of the petitioners in **Kitale Criminal Case No. 1272 of 2005**. From the pleadings on record, most of the factual matters raised by the Petitioners were vehemently denied by the Respondents but this does not necessarily mean that they do not hold any truth. Whether those matters pleaded can be proved by way of evidence will be addressed later in this judgment.

38. For the foregoing reasons this court is of the opinion that the petition before it has met the threshold required of a constitutional petition.

(b) Whether the Petition should fail on account of laches on the part of the Petitioners.

39. The court must deal with the claim of ***laches***. To the respondents the petitioners have delayed excessively and have brought this suit **35** long years after the land was subdivided, title issued and it sold to innocent purchasers for value. However in addressing this issue this court notes that the petitioners' claim is mainly premised on their eviction which took place in **2005**. It is admitted by most parties that **Kitale HCCC No. 3 of 2006 (OS)** was filed in respect of the cause of action as perceived by the petitioners then. This court has ascertained by way of perusal of the original file record in that case that it remained alive until it was withdrawn in **2016**. A short while thereafter this petition was filed. The first **4** respondents were named as defendants in **Kitale HCCC No. 3 of 2006 (OS).** They cannot therefore feign ignorance of the petitioners' attempts to seek redress from them in that case. The interregnum between the date of its withdrawal and the date of filing of the petition herein was no more than one year.

40. The petitioners have in this court's view demonstrated that they took immediate action upon eviction. Whether that action bore any positive fruit or not is not relevant to the issue of laches being discussed. Besides the apparently slothful progress of that suit has not been blamed on the petitioners, and this court takes judicial notice that in the earlier years many litigants were quite discouraged by the case backlog in our courts which caused many suits to remain unprosecuted over long periods. For these I am unable to accept the respondents' submission that the instant petition should fail on account of laches.

41. By the foregoing this court also puts to a rest the respondents' concerns that there is a multiplicity of suits on the same subject matter on this petition.

(c) Whether this court lacks jurisdiction for the reason that National Land Commission is the body mandated to handle historical land injustices.

42. In the case of **George Owino Mulanya & 4 Others v Charles Achieng Odinga & Another [2017] eKLR** the court stated that a court's

jurisdiction flows from either the Constitution or Legislation or both. Therefore, a Court of Law can only exercise jurisdiction as conferred to it by the Constitution or other written laws. Long ago, the Court of Appeal stated the same thing in the **Owners of Motor Vessel 'Lillian "S"' vs Caltex Oil (Kenya) Ltd [1989] KLR 1** and held that without jurisdiction a court must down its tools.

43. This court derives its jurisdiction from **Article 162(2) (b)** of the Constitution and **Section 13** of the **Environment** and **Land Court Act**. The said **Section 13** provides as follows:

> **13. Jurisdiction of the Court**
>
> **(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.**
>
> **(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes-**
>
> > **(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;**
> >
> > **(b) relating to compulsory acquisition of land;**
> >
> > **(c) relating to land administration and management;**
> >
> > **(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and**
> >
> > **(e) any other dispute relating to environment and land**
>
> **(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.**
>
> **(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.**
>
> **(5) (Deleted by 12 of 2012, Sch.).**
>
> **(6) (Deleted by 12 of 2012, Sch.).**
>
> **(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including"**
>
> > **(a) interim or permanent preservation orders including injunctions;**
> >
> > **(b) prerogative orders;**
> >
> > **(c) award of damages;**
> >
> > **(f) compensation;**
> >
> > **(g) specific performance;**
> >
> > **(g) restitution;**
> >
> > **(h) declaration; or**
> >
> > **(i) costs. (Emphasis mine)**

44. The Land and Environment Court has the same status as the High Court which is mandated to hear and determine matters relating to violation of rights and to give orders including declaration of rights The list of the scope of jurisdiction provided by Section 13 above is not exhaustive and does not limit this court to hear and determine Petitions such as the instant one.

45. The nature of grievances advanced by the Petitioners herein relate to among others, violation of their fundamental rights to access and own property and the protection of their rights to access an own property.

46. In the **Kipsiwo case (supra) J. Munyao** had this to say relating to the jurisdiction of the Court:

"…….I have not seen anywhere in the Constitution, or in the NLC Act, which provides that a person cannot initiate a constitutional petition based on a perceived historical injustice and that the NLC has a monopoly on such mandate. I think, so long as one can cite a violation of a Constitutional provision or Constitutional right, then such person may initiate a Constitutional petition and seek redress. I don't think that the basis of such complaint is important. Such complaint could be based on any foundation. It could be, as in our case, a historical injustice, or even a continuing land injustice. Thus, in as much as I agree that the NLC has a mandate to look into historical injustices, I do not agree that an individual cannot commence a Constitutional petition, on the foundation of historical land injustice. In so far as the jurisdiction of ELC, is concerned, the ELC will have jurisdiction, if the basis of the case is land and environment, including a matter founded on claims of historical land injustices."

47. I agree with the persuasive dicta of my brother Munyao J. in the Kipsiwo case. Therefore in my considered view, this court being vested with the jurisdiction to hear and determine all matters relating to land and moreso, the grievances brought before it relate to violation of alleged rights to land, then this court has the jurisdiction to determine the petition before it.

(d) Whether the Petitioners have demonstrated that their fundamental rights and freedoms have been infringed upon and therefore whether the Petitioners are entitled to the prayers sought.

48. Certain basic facts have to be established before the petitioners can be said to have demonstrated that their rights have been infringed. They are as follows:

(i) Was the land transferred to the Central Land Board/SFT and were the subsequent transfers to Kapsitwet River Estate and later on to the 1st -6th respondents proper?

(ii) Were the petitioners former employees of former white farmers and in actual occupation of the suit land by the time it was transferred to the CLB/SFT and whether they were the persons evicted from the suit land and if so was the eviction procedural and lawful?

(iii) Have any of the rights and fundamental freedoms of the petitioners infringed upon?

(iv) What orders should issue?

49. I proceed to delve into these issues as hereunder:

(i) Was the land transferred to the Central Land Board/SFT and was the subsequent transfer to Kapsitwet River Estate and later on to the 1st -6th Respondents proper?

50. The suit land was transferred to the Central Land Board on **26/11/1963**. The endorsement immediately below the memorandum of registration of transfer to the C.L.B it states as follows:

"The within written leasehold property has been vested in the settlement Fund Trustees in fee simple by virtue of the Agriculture Act No. 2 of 1982."

51. Subsequent to the above transactions, by an entry dated **31/5/1982** the land was transferred to Kapsitwet River Estate Limited for **Kshs. 15,566,160/=** and after a series of entries regarding charges and discharges, a surrender in consideration of a subdivision appears to have been lodged, and it is apparent by virtue of that surrender that the land was subdivided into the four large portions transferred to the **1st - 4th** respondents and numerous smallholder portions mentioned hereinbefore, which were apparently transferred to third parties most of whom are the IPs herein. The Land Registrar states that the date of surrender was **16/8/2002**.

52. It is quite evident that the copy of title exhibited by the Land Registrar in her affidavit, just like the one exhibited by the petitioners, appears to be both disorganized in sequencing of folios and also lacking in some vital entries both from the colonial era and the post-independence times. However, it is quite surprising to this court that despite the entries in the Land Registrar's copy of title showing that the land was transferred to the Central Land Board in **1963** and an apparent endorsement made that the land henceforth vested in the Settlement Fund Trustees, the affidavit of the Land Registrar is quiet about how or by whom the suit land was transferred to Kapsitwet River Estate Ltd, the **20th** respondent. In lieu thereof is the insinuation that the land has never been transferred to the **CLB/SFT**, that it has remained privately owned and that the original owner, **Cecil Charles Johnston** transferred it to the **20th** respondent, which intimation this court summarily rejects. Documents such as Land Control Board consent to support that transfer and the executed transfers are also not exhibited. The charges to the SFT are also not exhibited.

53. Who then transferred the land to Kapsitwet? The Land Registrar does not say who did it. She just gives an opaque statement saying: *"it was transferred to Kapsitwet River Estate."* Quite unhelpful in view of the matters raised in this petition, I must say. In the opinion of this court, it is not **Cecil Charles Johnston**, the original allottee, as the flow of the Land Registrar's narrative in her affidavit would tacitly have this court believe.

54. George Barbour avers in his supporting affidavit that he sold the entire farm and all farm assets to the SFT in **1978** and that farming activities continued as normal after the transfer. His version is consistent with the petitioner's and in the absence of any evidence from the Land Registrar this court must give the petitioners and George Barbour the benefit of doubt.

55. The transfer to Kapsitwet having occurred after the year **1963**, then the input of the Central Land Board and the Settlement Fund Trustees

who were then the registered owners of the land, must have been sought and if it was not, then there must be a serious irregularity.

56. Any answer by the **20th** respondent in these proceedings in regard to the propriety of the transfer of the land to it requires to be examined for it is indeed the duty of this court to grant each and every party a fair hearing. This court has perused the record but it has found no response filed by the **20th** respondent. It must be recalled that the petitioners applied to enjoin and serve the **20th** respondent by way of substituted service and that this prayer was granted on **26/9/2018,** for service through the press. The order was extended on **30/1/2019** and the **20th** respondent granted **21** days within which to respond to the petition. By **8/4/2019** the **20th** respondent had not filed or served any reply to the petition prompting the lead counsel for the petitioners to apply for an order that the claim against it do proceed as undefended.

57. Regulation 28 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013** provides as follows:

> **28. Acquiescence**
>
> **If the respondent does not dispute the facts in the petition whether wholly or in part, the Court shall, after hearing the parties, make such orders as it may deem fit.**

58. However, the Court of Appeal's stated in the case of **Serraco Limited v Attorney General [2016] eKLR** as follows:

> **In Charterhouse Bank Ltd v. Frank N. Kamau, CA. No. 87 of 2014, this Court stated that it is not in every case where the defendant elects not to call evidence that the plaintiff is ipso facto entitled to judgment. The plaintiff must first make out a case, which if not rebutted by the defendant, would succeed on a balance of probabilities. It is also apt to point out that as stated by this Court in Kirugi & Another v Kabiya & 3 Others (supra), the effect of failure by the respondent to call evidence to controvert that adduced by the appellant makes it easier for the appellant to prove its case on a balance of probabilities.**

59. No response or submissions having been filed by the **20th** respondent and the **7th** and **10th** respondents' reply having not sufficiently addressed the issue, this court would in an ordinary suit be inclined to consider that there is a probability that the transfer of the suit land to it was irregular or illegal; the Court of Appeal in the case of **Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another, CA No. 298 of 2013** observed that it is not in all cases that title registered under the **Registered Land Act** was sacrosanct as **Section 28** of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act. However, this is a constitutional petition. The court in **Petro Oil Kenya Limited v Kenya Urban Roads Authority [2018] eKLR** noted that a constitutional petition is not an ideal forum for investigating and determining contentious issues of fact as oral evidence is rarely called thereat. That is the correct position with regard to petitions. Alleged fraudulent undervaluation of the land and failure to pay the consideration to the Government for the suit land may have occurred, but without a proper suit in which the petitioners' claims are subjected to production of documents and cross-examination, their veracity can not be established in this petition. The only other suit in which the issue could have been tried, that is, **Kitale HCCC No. 3 of 2006 (O.S)** was withdrawn before conclusion on the merits. Even in **Kitale HCCC No. 3 of 2006 (OS)**, the main hurdle to be faced if the petitioners had sought to challenge the title of the **20th** respondent et al is that it was a claim in adverse possession, the sort in which challenge to the propriety of registered owner's title is not permitted in law. This court does not therefore have any conclusive determination on the propriety of the transfer of land to the **20th** respondent. This court is therefore unable to determine in a petition whether all the requisite steps were followed in the transfer to Kapsitwet River Estate Ltd and in the subsequent transfers to the **1st-6th** respondents, or to declare that the titles issued to them are lawful or unlawful or that the petitioners have rights superior to theirs in the suit land.

60. How the same land came to be vested in Kapsitwet River Estate in **1982** therefore remains a mystery, especially as the Land Registrar has for very unclear reasons omitted the record of entries immediately preceding the transfer to Kapsitwet River Estate.

61. However this court is aware of the fact that the determination of the claim of violation of rights under Constitution is not predicated upon whether the **1st - 6th** respondents and numerous interested parties had acquired the land legally, or whether or not the petitioners had title to the land for as the Supreme Court said in **SC Petition No. 3 of 2018 Mitubell Welfare Society -vs- KAA & 2 Others:-**

> **[153] The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The Courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth".**

62. It is on this basis that the court will proceed to try the issue of alleged violation of rights.

(ii) Were the petitioners in actual occupation of the suit land by the time it was transferred to the CLB/SFT and were they the persons evicted from the suit land and if so was the eviction procedural and lawful?

63. In answering the question integral to this issue, that is, whether the land was formerly owned by white farmers and later transferred to the SFT while the petitioners who describe themselves as former employees of the former proprietors of the suit land were in occupation, I must rely on the copy of title exhibited by the Land Registrar as custodians of land records in Kenya. A look at the title shows that the land was first granted to one **Cecil Charles Johnston** for a term of **999** years from **1st July 1919.** The subsequent entries show that the land was transferred transfer to **Albert George Keyser** in **27/11/1940**.

64. I am therefore satisfied that the land was formerly owned by a succession of white settler farmers up to the year **1963** when it was transferred to the Central Land Board.

65. The next question that arises is whether the petitioners were former employees of the white settler farmers and whether they were in occupation of the suit land by the time it was transferred to the Central Land Board and the SFT. In addressing this issue the **6th** respondent cites **Section 107** of the **Evidence Act** and states that direct evidence of the petitioner's presence and employment relationship with the land owners is required.

66. The petitioners rely on Exhibits marked **"CO3A"** and **"CO3B"** attached to their supporting affidavit in support of their allegation that they are former employees of white settlers and that they were in occupation of the land at the time of transfer. However, I have examined the said documents and found them only partly legible; they also do not contain the names of the petitioners and their description as former employees as alleged. The exhibit **"CO4"** a letter addressed to Katama Ngeywa & Co. Advocates from **George Barbour**, the person said to have been their last former employer supports the petitioners' claim that the farm was owned by the said **George Barbour** and there were **78** employees who were expected to continue working on the farm even after the transition. It speaks of a list of employees but does not exhibit a copy thereof. Also, the supporting affidavit sworn by **George Barbour** does not mention each of the petitioners by name as having been employed on the farm. However the deponent states as follows at **paragraph 11:**

> **"That I have further learnt with surprise that the petitioners and their families have been evicted from the disputed parcel of land by the respondents herein."**

67. Though I do not find any entry on the title evidencing the fact, **George Barbour** claims to have purchased the suit land from Kakuzi Firebrands Ltd, who had purchased the same from Albert Keyser, in **1964**. However I must give him and the petitioners a benefit of doubt because it is quite evident that the copy of title produced by the Land Registrar in her affidavit appears to be for whatever the reason, quite disorganized and lacking in some vital entries of the colonial era and thereafter.

68. It is clear from the petition and annextures thereto that some persons were arraigned in court for trespass on the suit land in **Kitale Criminal Case No. 1272 of 2005;** a comparison of the names on the list attached to the charge sheet and the title of the petition reveals that **15** petitioners, that is the **1st, 3rd, 4th, 6th 8th, 9th, 10th, 12th, 14th, 15th, 16th, 18th, 19th, 20th** and the **105th** petitioners were arraigned in court in connection with trespass on the land; the evidence of **PW1** in the criminal proceedings states that some of the persons gathered under a tree in an apparent meeting fled and only the accused were arrested.

69. Throughout the proceedings in the criminal case it is evident that the petitioners or some of them were residing on the suit land as can be seen from the two instances described immediately herein below.

70. At **page 9** of the proceedings which is **page 26** of the petition bundle, Mr. Katama, counsel for the accused made an impassioned plea as follows:

> **"Thirdly, we pray for protection of the court of (sic) the accused being (sic) harassed by police. The accused are charged with trespass and under Section 77 of the Constitution of Kenya they shall be presumed innocent until proved guilty. We are saying that the accused should not be harassed by police. The accused should not be evicted from the land. We pray for an order of *status quo*."**

71. PW1 in that case stated that the report by the Assistant Chief to him never stated when the accused entered the suit land. The respondents do not explain in their response to the petition how the petitioners came to be on the suit land.

72. When **PW3** was re-examined in the criminal case, he stated as follows:

> **"The entire land was formally (sic) Kapsitwet River Estate but it was subdivided into four. Kabarnet (sic) Farm was number one and Kipsenende (sic) Farm was number two. We arrested the accused at Kipsenende (sic) Farm…**
>
> **The houses were on Kipsenende (sic) and Kabarnet (sic) farm."**

73. Paragraph 42 of the petitioners' main supporting affidavit states that their houses were demolished while they were incarcerated pending release on bail during the pendency of the criminal case against them, which act they term as "*torture*" and "*inhumane treatment*" for its lack of notification. They cite **Articles 35, 27,** and **47(2)** of the Constitution as having been violated.

74. Having regard to the affidavit of **George Barbour**, in support of the petition this court also finds that there is no other ground upon which the petitioners or any of them could have been on the suit land except that they had some permissible connection with the owner of the suit land.

75. However the **6th** respondent has raised some serious technical objections which I must determine before concluding on this issue; he has stated that the petition is flawed for: **(1)** want of a letter of authority showing that the petitioners have the authority to bring the petition on behalf of others; **(2)** the failure to disclose the identities of the petitioners represented by the **1st -3rd** Petitioners.; **(3)** a demonstration that the **1st - 3rd** petitioners and the others they represent share the same interests and need the same reliefs and that their interests are not peculiar to each individual.

76. The **6th** respondent has also relied on the cases of **Beatrice Wanjiru & 2 Others -vs- Attorney General & Another [2017] eKLR** and **Kipsiwo Community Self Help Group v Attorney General and 6 Others [2013] eKLR.** He cites the following passage in the **Beatrice Wanjiru case:**

"Second, the petitioners have failed to specifically establish their full identification. The copies of the petitioners' identification documents were not filed and as submitted for the 2nd respondent, the identification card numbers for some of those listed were not stated at all. It remains open to doubt the true existence of the petitioners or those for whose benefit the representative suit was filed. The 2nd respondent has lamented that looking at the identification card numbers it could be that some of the petitioners were minors at the time of the alleged cause of action. The court returns that the lamentation was well founded and in absence of any further material on record, the court returns that the petitioners have failed to discharge the duty to properly identify the 5728 persons for whose benefit the petition was said to have been filed. As submitted for the 2nd respondent and as was held in Geoffrey Asanyo & Another -vs- John Ngunyi & 13 Others [2015] eKLR (Aburili J), a proper party must be before the court for a court to exercise its jurisdiction and the question of a proper party is a very important issue going to the jurisdiction of the court - the court lacks jurisdiction to embark if there is no proper party before the court."

77. Though the three issues are interlinked, the first and second issues are more complex and I will deal with them more extensively later.

78. However, I must summarily dispose of the 3rd issue for it is much easier to deal with. On that issue, it is sufficient to observe that despite the averment as to representation by three petitioners, all the petitioners herein have been congregated and named individually under this petition with a common purpose of obtaining redress for alleged violation of their fundamental freedoms arising from the respondents' alleged acts and omissions. Where they have been expressly named in the title t a petition the issue of whether or not they are represented becomes less relevant, for they can be deemed to be present in their own right despite affidavits being sworn on their behalf. This being a petition in which no viva voce evidence was needed the named petitioners must be deemed as having prosecuted their respective claims. Their petition as jointly presented must be deemed to be perfectly conveying the idea that they share the same interests and need the same reliefs unless otherwise demonstrated by the respondents

79. The essence of the **6th** respondent's objection regarding the **1st** and **2nd** issues is that the authorization letter to the **1st -3rd** petitioners to represent the other petitioners and the identification documents and addresses of the **110** persons so represented herein have not been provided and this court has confirmed that claim to be true.

80. Clearly, those items were not provided. Since this court must, determine the petition without all those particulars, I will proceed from the premise that in a constitutional petition by a subject the court must, as espoused by **Article 159(2) (d)** of the constitution, endeavour to achieve maximum focus on substantive justice and determination of a case on its merits and avoid mere reliance on technicalities.

81. The Supreme Court stated as follows in the **Mitubell case:**

"Under Article 20, the Constitution empowers the Courts and tribunals to apply the provisions of the Bill of Rights effectively by developing the law and adopting the interpretation that most favours the enforcement of the right."

82. In our justice system that usually borrows from other sources of law including international law to fill in lacuna or supplement its law and whose constitution encourages the adoption of the interpretation that most favours the enforcement of the right, it would be a sad day for a petition to fail for the sole reason that some steps which should have been actually merely procedural or interlocutory, such as those claimed by the 6th respondent to be missing, have not been undertaken by a petitioner.

83. This court must therefore, in view of the foregoing, consider the circumstances in which the objection has been raised: within the dense foliage of a replying affidavit and without any formal request by the **6th** respondent for particulars from the petitioners before the hearing. No doubt an application for the supply of copies of letter of authorization and the particulars of identification and addresses would have been considered and determined by this court as a preliminary issue perchance it had been made before the hearing of the instant petition. This court also observes that in an ideal situation had the responsible parties not acted with as much recklessness as they did in evicting the occupants of the suit land, there would have been for accountability purposes an inventory, taken before eviction, of all persons affected by the intended eviction and this would have been a non-issue. As matters stand, no respondent has presented such an inventory in this petition. In any event, it is doubtful that the provision of any identification particulars by the petitioners, perchance it had been ordered at an interlocutory stage, would have aided any of them or this court in this matter in any manner. The foregoing does not however imply that this court condones omission of identification of persons to a reasonable degree in litigation of any sort.

84. It suffices for this court to observe that it is the custom in litigation to have a brief letter of authorization referring to the list of the represented parties, with such a list annexed to show the persons represented have consented to the representation. **Paragraph 1** of the supporting affidavit to the petition refers to a letter of authorization, and though that is not exhibited, there is a list of the petitioners against which each has signed against their names, the veracity of which the **6th** respondent has not addressed. It may not be known at this stage what may have happened to the authorization letter after it was mentioned in the first paragraph of the supporting affidavit. This court is therefore inclined to construe the deposition to mean that authority has been granted and the presence of the signed list of petitioners is sufficient evidence that authorization has been granted to the **1st** to **3rd** petitioners.

85. Regarding the second issue, the lack of identification documents and addresses is much more complex than the first issue. The objection can not be referred to as a mere trifle, for there is possibility that in certain matters dishonest and undeserving persons may indeed, moved by the sole desire for easy gain be tempted to hop onto the litigation bus and be, if not discovered, included in the final benefits of judgment. In the case of **Kipsiwo Community Self Help Group v Attorney General and 6 Others [2013] eKLR** Munyao J observed as follows regarding identification of petitioners:

"The person bringing action has to demonstrate that he has permission to bring the action on behalf of the members of the Group, or on behalf of the people he seeks to represent, if it is a representative suit. The importance of this, is so as to recognize the persons who seek legal redress, and so that orders are not issued in favour or against people who cannot be

precisely identified. This may look minor, but it is extremely significant. In litigation, rights and duties will be imposed on the litigants. If the court does not know who the litigants are, then it becomes impossible for the court to enforce its own orders, for it will never be clear, who the beneficiary of the order was, or who had obligation to obey or enforce such order."

86. It is however notable that in the **Kipsiwo case (supra)** the association had, rather than use members' names, purported to sue in its own name. The main legal principle emphasised in that case is that unincorporated bodies can not sue or be sued in their own names, but must use the names of their officials or members.

87. It is therefore a general principle and of great essence that all litigants in any form of proceedings before courts and tribunals identify themselves properly. In answer to the objection the petitioners have retorted that there is no mandatory requirement for the provision of postal addresses of petitioners and not all Kenyans have postal addresses. They maintain that their advocates' address is sufficient. They also allege that their personal effects were destroyed in the eviction and they are unable to produce such evidence.

88. So, should the petition summarily fail at this point owing to that apparently serious omission on the part of the petitioners? I hardly think that should be a just course to take without a further investigation of the context of this particular petition as it may abruptly occasion an injustice to any innocent litigant who may have doggedly followed up on his rights for decades. Therefore, it is only proper for this court to adopt a test that may with a reasonable measure of certainty satisfy both parties that justice has been done. That test is not a legal test prescribed in any statute or rules but it is the only recourse available if this court is to be seen to do substantive justice. It is a test borne out of observation that there has been both a criminal and a civil case that date back to the earliest days immediately before and after the eviction from the suit land. The records of that litigation must therefore be scrutinized and compared with the instant petition for the concurring presence of litigants' names in either two or all of the proceedings. It is a test akin to that adopted by the **6th** respondent's counsel in their submissions filed before this judgment and which will lead to a conclusion on a balance of probabilities. In other words, it is a test improvised for the circumstances of this particular case and only for purpose of doing substantive justice to all the parties.

89. The results of that test are as follows: Out of the **113** petitioners the names of **15** appear on the list of accused annexed to the charge sheet in **Criminal Case No. 1272 of 2005**. These are the **1st, 3rd, 4th, 6th, 8th, 9th, 10th, 12th, 14th, 15th, 16th, 18th, 19th, 20th** and **105th**. **98** of them are missing from that list. **14** of the plaintiffs in **Kitale High Court Civil Case No. 3 of 2006** appear in the list of current petitioners. These are the **1st, 2nd, 3rd, 4th, 7th, 23rd, 25th, 43rd, 44th, 48th 99th, 100th, 101st** and **103rd**. In total and while giving allowance for names that appear twice or thrice in the three sets of litigation it can be observed that **26** of the petitioners have followed up or been somehow involved on litigation concerning the suit land since **2006** with some measure of consistency. This court finds it proper to conclude that the said **26** petitioners could only have pursued or been involved in litigation from year **2006** up to the present only because they truly had a lasting grievance against the respondents, and that they had been in occupation of the suit land, from which they were evicted.

90. Does the foregoing analysis conclude that the rest of the petitioners, **87** in number, were not in occupation of the suit land? Certainly not. Adopting that kind of logic in this instance would be to err, for even the **26** mentioned as having been consistent as above have not provided any form of identification or address, but by their dogged pursuit of the litigation they have aided this court to establish that indeed they were in occupation of and were evicted from the suit land. That is the only proper conclusion the analysis helps this court arrive at. With that conclusion in mind this court would be in great error to conclude that the other **87** petitioners were not in occupation and possibly appear to discriminate between certain categories of petitioners based on lack of documentation yet none of the petitioners have exhibited any. The only equitable approach would have been to deem all the petitioners, who have held together in this petition, as having established that they were all in occupation of the suit land and that they suffered in the same measure the treatment meted out to them. However as that approach would go against the modest amount of evidence available, it must be avoided.

91. The conclusion of this court is therefore that only **26** petitioners have established on a balance of probabilities that they were in occupation of the suit land during the time white settler farmers were utilizing the land and, by extension, as at the time of eviction. These are the **1st-4th (inclusive) 6th-10th (inclusive) 12th, 14th-16th (inclusive) 18th-20th (inclusive) 23rd, 25th, 43rd-44th (inclusive) 48th, 99th-101st (inclusive) 103rd** and **105th** Petitioners. Any reference to *"petitioners"* henceforth in this judgement is to the said **26**. It must also be deemed that they were present when the land was transferred to the Central Land Board and subsequently to Kapsitwet River Estates Limited the **20th** respondent and that they were the persons evicted from the suit land.

92. The next question is as to who effected the eviction of the petitioners and whether the eviction was procedural and lawful.

93. The petitioners have established that they were charged in **Kitale Chief Magistrate's Court Criminal Case No. 1272 of 2005** for the offence of trespass to private land. They allege that during their incarceration their dwellings were demolished, only to be met by the spectre of homelessness upon release. In another section of the petition they seem to suggest that the eviction occurred after the criminal case was withdrawn. Whatever the actual date the eviction took place, it is only relevant to this court that it took place, and the court may examine it to see whether it violated rights of the **26** petitioners.

94. The Petitioners alleged that the **6th** respondent was responsible for their arrest and eviction, and that the **6th** respondent was a director/shareholder in Kapsitwet River Estate Ltd, the **20th** respondent. The petitioners have established this by way of proving the "**CR12"** in respect of the **20th** respondent showing the **6th** respondent as a director thereof. The charge sheet in **Kitale CMCRC No. 1275 of 2005** names the **6th** respondent as the complainant. It is clear that he must have been acting on his own behalf and as the director of Kapsitwet River Estate Ltd, the **20th** respondent while lodging the complaint. There was a subsequent application at **page 30** of the proceedings to substitute him with Kipsinende Farm Ltd (the **3rd** respondent) but no amended charge sheet is exhibited, even by the **6th** respondent, to show that the substitution was effected before the withdrawal of the criminal case. From the record there is no evidence of any court order issued for the eviction of the petitioners from the suit land and demolition of their dwellings. This court would reasonably have expected this kind of evidence to come from the respondents. By **2005** Kapsitwet River Estate Ltd had already transferred the land to the **1st-4th** respondents. In its response the **3rd** respondent denies that it played any role in the prosecution or eviction of the petitioners. Indeed neither the **3rd** respondent nor the other respondents or interested parties save the **6th** and **20th** respondents are said to have evicted the petitioners. Arrest

and prosecution of the petitioners are alleged to have been done by state agencies at the instance of the **6th** and **20th** respondents. It must be presumed as per custom in real property transactions that the **20th** respondent was duty bound to deliver the land in vacant possession to the purchasers it sold land to and the criminal case and the eviction raise the probability that this was their intended result. The petitioners have identified the persons behind the eviction as the **6th** respondent and the **20th** respondent and the named respondents have not effectively rebutted the evidence that they were involved in the eviction and the criminal case. I do not find that any of the other respondents or interested parties played any role in the eviction or in instituting the criminal case.

95. At one point in the criminal case against them at **page 9** of the typed proceedings in the criminal case the advocate appearing for the accused person applied for their protection by the court against what he termed as police harassment and eviction from the suit land.

96. In a ruling in the same proceedings at **page 13** the criminal trial court, and correctly so, distanced itself from the issue of eviction by stating as follows:

> **"I further find that the issues of eviction and/or ownership of land cannot be dealt with in a criminal trespass to private land contrary to Section 3(1) as read with Section 11 of the Trespass Act Cap 294. The issue for determination by the court in this case is whether the accused trespassed on the said land or not and no more. Furthermore it is trite law that a criminal court in a trespass case has no jurisdiction to issue eviction orders upon conviction of an accused person. In the circumstances this court can not be called upon to exercise such orders in an interlocutory application."**

97. In this court's view the petitioners, having not been convicted by a court under the Penal Code for any trespass, needed to be sued in a civil suit under the common law or statute for the court to establish whether they were trespassers or not and to issue a lawful order of eviction. That never happened. The conclusion is that the eviction of the petitioners was not procedural or lawful as they were not given either notice or a hearing on the merits of their claim or interest over the suit land.

(iii) Have any of the rights and fundamental freedoms of the petitioners infringed upon?

98. The next issue for determination is whether any of the rights of the petitioners under the constitution have been infringed upon as claimed. The issue of whether or not the rights of the petitioners were being violated by the eviction was first canvassed in the criminal case which declined jurisdiction to determine it. An excerpt of the criminal trial court's ruling declining jurisdiction in eviction matter is reproduced herein below to that effect as follows:-

> **"I have considered the application by both parties on the issue of whether this court has jurisdiction to entertain an application for protection of fundamental rights under Section 77 of the Constitution of Kenya. I do not agree with this counsel's submission that this court has the jurisdiction to deal with such an application. Section 84(1) of the Constitution rests the powers of enforcement of fundamental rights in the High Court. Chapter V of the Constitution deals with fundamental rights and freedoms of individuals. The right of the accused to be presumed innocent till proven guilty which the accused seek to be protected in this application is a fundamental right under Section 77(2) (a) of the Constitution of Kenya. Section 84(1) of the Constitution provides that any person alleges that any of the provisions of Sections 70 to 83 (inclusive) has been, is being or is likely to be contained in relation to him than without prejudice to any other action with respect to the same matter which is same matter which is lawfully available that person (or that other person) may apply to the High Court for redress. In view of the foregoing, this court does not have jurisdiction to entertain an application for enforcement of fundamental rights.**

99. Article 22 (1) of the **Constitution (supra)** reads as follows:-

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

100. The provisions of **Section 84** of the old Constitution of Kenya are therefore echoed in **Article 22 (1)** of the **Constitution of Kenya 2010**.

101. The petitioners' claim is under legitimate expectation, discrimination on the basis of ethnicity under **Articles 27(4)** and **47,** violation of socio-economic rights under **Article 43** and **19(2),** cruel, inhuman and degrading treatment contrary to **Article 29**, deprivation of right to access and own property under **Article 40**, right to fair administrative action/fair hearing, right to inherent human dignity, reasonable standards of sanitation, health care services, clean and safe water in adequate quantities, freedom from hunger; under **Articles 26,28,29,** and **43,** the right to receive reasonable care and assistance from the state under **Article 57(b) (c)** and **(d).** They seek a declaration that the arrest and prosecution was unlawful. They also pray for general and exemplary damages.

102. Were the petitioners entitled to hold any legitimate expectation at all? They have ably given examples to demonstrate that persons formerly employed on the farms purchased by the Government were given priority and settled on those farms. It may appear that the simple conclusion is that in their view, there is no other ground upon which the petitioners could have remained on the suit land for so long save that they had expectation of being settled on it. However, on what foundation was that expectation premised? A newspaper excerpt showing reports of the first president of the republic giving thousands of acres to the landless families in Kitale was exhibited, but none relating to the alleged promises by the former second president and by the **6th** respondent has been exhibited and therefore in my view even if the alleged newspaper reports could have been deemed to be admissible evidence, the promises have not been proved even to the slightest standard in this petition.

103. The **6th** respondent exhibited excerpts from the **Report of the Commission of Inquiry into the Illegal/Irregular Allocation of Public Land** which in its analysis reveals the circumstances surrounding settlement schemes managed by the SFT and by extension by the

Government. That **Report** states as follows in part:

> **"The Government had two options in trying to resettle the displaced people. It could simply have retaken all the land for the resettlement of the landless on the basis of the doctrine of state sovereignty. The other option was for the Government to tread the path of a market based land redistribution strategy. The political realities surrounding the negotiations for independence at the Lancaster House Conference favoured the second option. This could address the resettlement question peacefully without radically interfering with the "rights of the settler community over their farmlands". Herein lies the genesis of the policy and national programme of settlement schemes in Kenya…The Government gave priority to a policy which would enable the African farmers to purchase European owned land. Towards the end, agreement was reached between the Kenya and British Government whereby the latter agreed to finance through loans and grants the purchase of 1 million acres of European Settler farms adjacent to densely populated African area. These lands were to be then subdivided into what were considered economic units and allocated to African farmers."**

104. So it is clear that in buying white settler farms the government was adopting the more equitable market based land redistribution strategy. How did the current petitioners feature in that strategy? In this court's view, merely being former white settler farmer employees did not qualify them to merit land in a scheme. It appears that the SFT had to purpose and then purchase and promulgate a particular farm to be for resettlement purposes or resale purposes; if land was purposed for resettlement it appears that for them to merit allocation, the petitioners would have to apply to the SFT for allocation. By "*resettlement*" this court is of course referring to the resettlement of "*smallholder*" farmers in which category the petitioners would have fallen.

105. Direct resale was targeted at large scale farmers in order to attempt to stimulate the nation's agricultural potential. The **Report** also states as follows in part:

> **"Parallel with smallholder settlements in the former scheduled areas, <u>several other programmes to assist Africans take over large scale Europeans farms in their original state were initiated.</u> These takeovers were financed by loans from the British Government, the World Bank and other Agencies. As at 31st December, 1965, approximately 550,000 acres in the former scheduled areas had come into African ownership under these programmes. A total of 24,000 smallholders and 750 large scale farmers had acquired land either as individuals or collectives such as companies, partnership or cooperatives… The loans and grants received for this purpose by the Government were credited by Parliament to an agricultural fund managed by Settlement Fund Trustees (SFT). The Trustees were established under the Agriculture Act, Cap 318, Laws of Kenya mandated to manage the Fund and to purchase any land for resale purposes. The Settlement Fund Trustees was therefore the statutory organ established for the purpose of executing the settlement programme. The arrangement between the Fund and the people to be settled, was something akin to a "and purchase on mortgage", whereby the farmers were regarded to have bought the land from the Fund through monies loaned to them by the Fund. The farmers were supposed to make periodic repayments of the loan to the Fund until the whole purchase price had been paid. Only then would they discharge their obligations and acquire title to the land..."**

106. The Commission noted that there was likelihood of abuse of the settlement schemes regime by individuals for selfish gain. What it stated later reflects the exact concerns of the petitioners herein that land meant for resettlement of smallholders farmers had been illegally appropriated by wealthy individuals. In that regard the **Report** stated as follows:

> **"The public interest in these schemes therefore remains paramount. In particular, members of the public would be justified to expect the demand that the settlement scheme lands are allocated in a manner that conforms to the purpose for which they were established. These purpose are to stimulate agricultural production or to settle the landless. They would not expect that such schemes are used to allocate land to people who are neither landless or don't deserve to be allocated such lands for one reason or another. They would not expect such schemes to provide a mechanism and an opportunity for land grabbing and speculation as has happened in many areas. They would expect that all the institutions and public officers would deal with such lands on trust for the people of Kenya. That is why it was no accident that the statutory organ charged with the funding and management of these schemes was called the Settlement Fund Trustees.**
>
> **Yet in the course of this inquiry, the Commission found that the manner in which settlement schemes have been established and allocated falls far below the public trust interest inherent in them. Settlement scheme have repeatedly been used as conduits for land grabbing."**

107. The freedom of thought of the petitioners is allowed, but when thoughts are expressed in the form of a claim in a suit, they must be backed up by evidence and so must the petitioners' claim of legitimate expectation. No doubt the petitioners' thoughts and suspicions were stimulated, fed and encouraged by the socio-economic milieu in which they then lived, and, which was partly outlined in the Ndungu Commission Report. Later on the Court of Appeal alluded to that socio- economic milieu in these terms in **Civil Appeal No. 349 of 2012 Chemey Investment Limited Attorney General & 2 Others [2018] eKLR** as follows:

> **"There was a time in the history of this country, not too long ago, when public officers appeared to have been bitten by a bug that infested them with a malignant and shameless craving to acquire for themselves, their friends or relatives, public property in respect of which they were trustees or custodians.**

108. However expectations must be protected by law if it is to lead to a declaration of violation of rights. In the Court of Appeal decision **Kenya Airports Authority vs Mitubell Welfare Society & 2 Others [2016] eKLR** it was stated that:

> **"51. In the case of South African Veterinary Council v. Szymanski 2003(4) S.A. 42 (SCA) at [paragraph 28] it was held the law does not protect every expectation but only those which are 'legitimate. Legal scholar Mr. P. Cane in his book expresses himself thus:**

"A legitimate expectation will arise only if the court thinks that there is no good reason of public policy why it should not. This is why the word 'legitimate' is used rather than the word 'reasonable': <u>the matter is not to be judged just from the claimant's point of view. The interest of the claimant in being treated in the way expected has to be balanced against the public interest in the unfettered exercise of the decision-maker's discretion; and it is the court which must ultimately do this balancing</u>." [Emphasis added] (See: P. Caine, Administrative Law, 4th Edn (OUP, 2004), pp. 205-206 and Chris Hilson, Policies, the Non-Fetter Principle and The Principle of Substantive Legitimate Expectations: Between a Rock and a Hard Place? 11 Judicial Review 289 2006 at p. 290)."

109. As far as the record herein is concerned the SFT never pronounced the suit land to be meant for resettlement, the petitioners have not exhibited any documents to show that the government purchased the suit land with the sole intent to resettle them or any other group of smallholder farmers, or that they applied to the SFT and that the SFT, the Ministry or indeed any of the other land agencies had promised them settlement on the suit land. In their own words in response to the replying affidavit of the **6th** respondent, the petitioners state as follows in their further affidavit sworn on **29th March 2019**:

"That further to paragraph 14 above and as it is in the present case we as the petitioners could not have applied for allocation of the disputed parcel of land as demanded by the 6th respondent because the 7th respondent (Settlement Fund Trustee) has never offered the disputed parcel of land for our resettlement as a priority before offering the same to other Kenyans the way it happened in all other settlement schemes in Trans Nzoia."

110. Consequent to the assertion above, no overt acts preliminary to settlement, for example registration of occupants and balloting as described in the Liyavo Settlement Scheme case by Erastus Omurimi, the deponent in the supporting affidavit to the petition, have been shown to have been undertaken by the SFT with regard to the petitioners. In the **Sirikwa case (Sirikwa Squatters Group v Commissioner of Lands & 9 Others [2017] eKLR)** that they cite the government had promised, unlike in this case, that it would allocate the petitioners in that case land.

111. In the case of **Kenya Airports Authority vs Mitubell Welfare Society & 2 others [2016] eKLR** the Court of Appeal upheld a High Court decision stating that petitioners had no legitimate claim to title to land and so could not maintain a claim for violation of their right to property under **Article 40** of the Constitution.

112. The petitioners in the instant Petition aver that they continued to farm on the land and work for the **20th** respondent after the land was transferred to it. Holding that the petitioners had a legitimate expectation in the circumstances of this petition would militate against the need to uphold the existing institutional arrangements in which SFT has mandate for allocations; it would also run counter to public interest as that land was already registered in the names of private entities and the title has not been impeached. In this court's view there is no justification for holding that the petitioners were entitled to hold a legitimate expectation that they would be settled on the suit land in the stated circumstances. That claim must therefore fail.

113. With regard to allegations of discrimination on ethnic basis under **Articles 27(4)** and **47** the petitioners rely on the list of beneficiaries and label them as of "*Tugen*" origin. The purported area list they exhibit also has nothing to show that it was prepared by the SFT, therefore the allegation that it was the SFT that allocated the alleged members of the Tugen Community plots within the suit land has not been proved. However, the petitioners' very conclusory statement on ethnic orientation is hardly enough in a petition of this kind and the court is not expected in this day and age to decipher the ethnic orientation or other origin of persons purely by reading names on a list. It is the opinion of this court that discrimination on ethnic grounds has not been sufficiently proved for that reason. Nevertheless, this court finds no reason why the suit land was taken away from some persons in occupation only to be given to others not in occupation; all citizens are considered as equal by our Constitution and the Law, and whatever the origin or other connection of the allottees, this court finds that the petitioners were not fairly treated by the **6th** and the **20th** respondents. **Article 27(1)** of the **Constitution** provides that the state shall not discriminate directly or indirectly against any person *<u>on any ground</u>* and it sets out several grounds as examples. It has not been demonstrated that the newcomers purchased the suit land. In fact the petitioners aver that major irregularities in the process of subdivision and transfer compelled the newcomers to engage in deceit that their titles had been lost in order to acquire first title generation documents under the **RLA** regime over their parcels. The only appropriate conclusion would be that based on *some* preferred criteria known only to themselves, the masterminds of subdivision and transfer of the suit land favoured *some* other Kenyans and allocated them land at the expense of the petitioners who had been in occupation of the land for a long time; whatever criteria was applied by the respondents to prefer outsiders over the persons in occupation of the land for decades, I find that the petitioners' right under **Article 27** of the **Constitution** to not to be discriminated against has been violated.

114. Regarding the allegation of violation of economic and social rights under **Article 43** and **19(2)** and deprivation of right to acquire and own property under **Article 40** it is the opinion of the court that the forcible eviction of the petitioners having been established to be illegal, there was no preparation for the petitioners to meet the calamity that would befall them by way of lack of dwellings and land for subsistence farming which had been their livelihood while on the suit land.

115. After analyzing the emerging principles in Kenyan litigation regarding the relationship between the realization of economic and social rights the Court of Appeal found that the bill or rights in the Constitution of Kenya recognizes and protects the right to private property. It also found that whereas socio-economic rights are recognized and are justiciable, the enforcement and implementation of socio-economic rights cannot confer proprietary rights in the land of another, and that it can not also override the provisions of the **Limitation of Actions Act**.

116. In its analysis of emerging jurisprudence, the Court of Appeal noted the presence of the following elements: need for a *reasonable notice* (per Musinga J in **Susan Waithera Kariuki & 4 Others V Town Clerk Nairobi City Council & 2 Others Petition No. 66 of 2011;)** the right *not to be subjected to arbitrary demolition* simply because evictees have no right in the land (per Ngugi J in **Mitubell case**;) the *right to dignity* (per Lenaola J in **Satrose Ayuma & 11 Others V The Registered Trustees of The Kenya Railways Staff Retirement Pension Scheme & 2 Others NBI HC Petition No. 65 of 2010**;) the right of all persons to *possess a degree of security of tenure which guarantees legal protection against forced eviction* (Per Muchelule in **Ibrahim Sangor Osman V Minister of State for Provincial**

Administration & Internal Security Petition No. 2 of 2011;) the need for *human treatment and the need to afford evictees an opportunity to seek alternative mode of accommodation* (per Odunga J in **Kepha Omondi Onjuro & others -v- Attorney General & 5 others, Nairobi HCC Petition No. 239 of 2014;)**

117. In the **Mitubell** (Court of Appeal) case decision it was stated as follows:

> **"127. Enforcement of private property rights has the potential to impose restrictions on the fulfillment of socioeconomic rights. Realization of progressive social economic rights involve social redistribution programmes that seek to improve access to resources amongst the beneficiaries and this may involve alteration of existing property arrangements, which might be seen as violating justiciable constitutional property rights.**
>
> **128. Like in the instant case, the issues of eviction of slum dwellers or occupiers from property that they do not own exemplify the tension between private property and realization of socio-economic rights. Article 40 of the Constitution protects the right to property. No person is to be deprived of property of any description or interest or right over property unless the same is in public interest and for a public purpose and subject to prompt and just compensation."**

118. The eviction of the petitioners in the instant suit led to the demolition of their houses on the suit land. However, based on the preceding decisions mentioned herein before the deprivation of the petitioners' right to acquire and own property under **Article 40(1)** of the Constitution can not be said to have accrued with respect to the title to the suit land, but only with reference to their right to be thereon with a degree of security of tenure which guaranteed legal protection against forced eviction and their other property including houses on the suit land. Respect for human rights including those under **Article 43** and **19(2),** requires to be maintained even in evictions where the evictees do not own the land. I will yet again borrow from the Court of Appeal in the **Mitubell case**:

> **"We hasten to add that in any eviction, forcible or otherwise, adequate and reasonable notice should be given. Respect for human rights, fairness and dignity in carrying out the eviction should be observed. The constitutional and statutory provisions on fair administrative action must be adhered to."**

119. In the petition on the **Mitubell case** the Supreme Court, while emphasizing that the government should protect the rights of those in informal settlements, stated as follows:-

> **"[153] The right to housing in its base form (shelter) need not be predicated upon "title to land". Indeed, it is the inability of many citizens to acquire private title to land, that condemns them to the indignity of "informal settlement". Where the Government fails to provide accessible and adequate housing to all the people, the very least it must do, is to protect the rights and dignity of those in the informal settlements. The Courts are there to ensure that such protection is realized, otherwise these citizens, must forever, wander the corners of their country, in the grim reality of "the wretched of the earth".**

120. This court finds the eviction without notice or court order of persons who had been in occupation of land for decades to be cruel, inhuman and degrading treatment which is contrary to **Article 29(f)** of the **Constitution of Kenya 2010.** The eviction was also obviously in violation of the right to fair administrative action/fair hearing and the right to inherent human dignity in that the petitioners were not heard before it was conducted. However the petitioners have failed to adduce evidence of loss of itemizing the lost or destroyed property and this court is unable to assess the pecuniary value of the damage to physical items wrought by the eviction.

121. With respect to the determination of petitioners' claim of violation of right to receive reasonable care and assistance from the state under **Article 57(b) (c)** and **(d)** and right to reasonable standards of sanitation, health care services, clean and safe water in adequate quantities, and freedom from hunger under **Article 43,** this court would require to engage in a more universal approach, a broader task to examine the measures the government has put in place in addressing the said rights, not just with regard to the petitioners but to the entire citizenry of Kenya which is obviously beyond the scope of this petition. Faced with a petition in which the petitioner focused on and sought reliefs regarding his own health status, the court in **Mathew Okwanda v Minister of Health and Medical Services & 3 Others [2013] eKLR** observed as follows:

> **"On the basis of the material before the court, I find that at least the Government Hospitals provide healthcare to the petitioner at a cost. Whether the form of healthcare provided in these circumstances meets the minimum core obligation or the highest standard is not one that was the subject of evidence and argument before me. The issue of the prohibitive costs involved in accessing the treatment and whether such treatment should be free bearing in mind the necessity to progressively realize these rights was not explored in the depositions and therefore there is no basis upon which I can make a finding one way or the other. The petitioner's case was founded on a specific need rather than taking a holistic approach to the issue."**

122. No evidence has been put forth in the present petition to demonstrate that the State has breached its constitutional obligation to fulfil those rights with regard to the petitioners, so as to amount to the proof considered in the immediately preceding paragraph.

123. However, it is only proper to realize that though the implementation of provisions granting these rights in the first instance lies with the state, at any given time each and every citizen enjoys a certain standard of living however lowly, in connection with the rights stipulated under **Article 43.**

124. Nothing exemplifies this than the Supreme Court dicta in the apex petition in the Mitubell trilogy where they stated:-

> **"[144] This appeal revolves around the right to housing as guaranteed under Article 43(1) of the Constitution. The appellants herein, were uprooted from their habitation by the Government, on grounds that their settlements lay on the flight path to Wilson Airport, thus posing danger to the security of the public and air travelers. By this action, the appellants**

were deprived of the right to <u>shelter (read "housing") for however informal, however decrepit, these settlements had been home to their existence, their aspirations and their very humanity</u>". (Emphasis mine).

125. Consequently, the state and even private entities may be responsible for their violation by means of intrusive actions that upset and exacerbate a delicate situation and push the victims to a more disadvantaged position than they were in before, as happened in this case when the petitioners were forcibly evicted. I find that the rights of the petitioners to access reasonable standards of sanitation, health care services, clean and safe water in adequate quantities and freedom from hunger under **Article 43** were adversely impacted upon by their illegal eviction.

126. Finally, regarding malicious prosecution, false imprisonment and abuse of the criminal process, it is noteworthy that prosecution occurs when evidence is called against an accused in a criminal trial. The prosecution called evidence against the petitioners before withdrawal of the criminal case against them. It fell squarely upon the shoulders of the **6th, 14th, 15th** and the **20th** respondents to establish before this court that there was reasonable and probable cause for the arrest and prosecution of **15** petitioners. The Land Registrar maintained that the land has always been private land before transfer to Kapsitwet River Estates Ltd. This was in great contradiction to the clear endorsement on the title of a memorandum of transfer to the Central Land Board. There is also the apparent withholding of records of some of the transactions between **1963** when the CLB acquired the land and **1982** when the same was transferred to the **20th** respondent. This court has found that the petitioners were in occupation of the land even before its acquisition by the **20th** respondent. The only logical conclusion is that the removal of the petitioners should have been through legal means and after a legal inquiry into their rights in the land which inquiry never occurred. This court finds that the petitioners' arrest and prosecution was unlawful and geared towards forcing the petitioners out of the suit land. I find that the **6th** respondent was the complainant in the criminal case and that he acted on his own behalf and on behalf of the **20th** respondent.

127. I have considered the claims against the respondents and found only those against the **6th, 14th, 15th, 17th** and **20th** respondents to have merit. I find that the petitioners have not demonstrated any direct nexus between the rest of the respondents and the interested parties and the allegations of violation of their rights.

128. In **<u>Mbowa -vs- East Mengo District Administration [1972]EA 352</u>**, the East African Court of Appeal expressed itself as follows:-

> **"The action for damages for malicious prosecution is part of the common law of England...The tort of malicious prosecution is committed where there is no legal reason for instituting criminal proceedings. The purpose of the prosecution should be personal and spite rather than for the public benefit. It originated in the medieval writ of conspiracy which was aimed against combinations to abuse legal procedure, that is, it was aimed at the prevention or restraint of improper legal proceedings...It occurs as a result of the abuse of the minds of judicial authorities whose responsibility is to administer criminal justice. It suggests the existence of malice and the distortion of the truth. Its essential ingredients are: (1) the criminal proceedings must have been instituted by the defendant, that is, he was instrumental in setting the law in motion against the plaintiff and it suffices if he lays an information before a judicial authority who then issues a warrant for the arrest of the plaintiff or a person arrests the plaintiff and takes him before a judicial authority; (2) the defendant must have acted without reasonable or probable cause i.e. there must have been no facts, which on reasonable grounds, the defendant genuinely thought that the criminal proceedings were justified; (3) the defendant must have acted maliciously in that he must have acted, in instituting criminal proceedings, with an improper and wrongful motive, that is, with an intent to use the legal process in question for some other than its legally appointed and appropriate purpose; and (4), the criminal proceedings must have been terminated in the plaintiff's favour, that is, the plaintiff must show that the proceedings were brought to a legal end and that he has been acquitted of the charge...The plaintiff, in order to succeed, has to prove that the four essentials or requirements of malicious prosecution, as set out above, have been fulfilled and that he has suffered damage. In other words, the four requirements must "unite" in order to create or establish a cause of action. If the plaintiff does not prove them he would fail in his action."**

129. In **<u>Stephen Gachau Githaiga & Another -Vs- Attorney General [2015] eKLR</u>** my brother Hon. Justice Mativo gave the following dicta which I am in agreement with:

> **"Malicious prosecution is an intentional tort designed to provide redress for losses flowing from an unjustified prosecution. Under the first element of the test for malicious prosecution, the plaintiff must prove that the prosecution at issue was initiated by the defendant. This element identifies the proper target of the suit, as it is only those who were actively instrumental in setting the law in motion that may be held accountable for any damage that results.**
>
> **The second element of the tort demands evidence that the prosecution terminated in the plaintiff's favour. This requirement precludes a collateral attack on a conviction properly rendered by a criminal court, and thus avoids conflict between civil and criminal justice. The favourable termination requirement may be satisfied no matter the route by which the proceedings conclude in the plaintiff's favour, whether it be an acquittal, a discharge at a preliminary hearing, a withdrawal, or a stay.**

130. The agents of the **14th** and **15th** respondents either arrested or caused the petitioners to be prosecuted on trumped up charges of trespass on the suit land while they had been legally in occupation thereof. The **6th** respondent and the **20th** respondents were liable for the false report that the petitioners were in trespass and the evidence points to their hand in the forcible eviction of the petitioners. It is evident that the arrest and the prosecution of the petitioners was prompted by malice on the part of the **6th** and **20th** respondents in that they sought to use it to compel the petitioners to vacate the suit land instead of following the civil process. Also, the agents of the **14th, 15th** and **17th** respondents acted with much recklessness and failed to evaluate the evidence against the petitioners, who, having been on the suit land for decades, could not be deemed as trespassers unless certain legal steps in the civil process were undertaken. I therefore find that the tort of unlawful arrest and false imprisonment and malicious prosecution have been proved as against the **6th, 14th, 15th, 17th** and **20th** respondents.

131. The inclusion of the Government's land agencies in the petition may have been informed by the belief that upon surrender, the land

became government land ready for a fresh alienation. However, the surrender of the land by the **20th** respondent was conditioned upon the approval of a subdivision and reissuance of multiple titles in the names of the person in the area list exhibited in the petition. Therefore the land remained private according to the register and the issue of its redistribution to the petitioners could not arise. It is also quite surprising that the Land Registrar also fell into this same error, for by dint of his practice it should be clear to him that in its customary usage, a conditional surrender of the land in consideration of subdivision cannot have the same effects as an unconditional surrender. Without the resolution of propriety of ownership of the **20th** respondent and consequently by the **1st - 6th** respondents and numerous Interested Parties by a competent court of law, the land could not be described as unalienated government land. It can therefore be clearly understood that that is why the responsible land agencies of the government never heeded the call to resettle the petitioners on the suit land. Consequently the issue of whether this court should order the petitioners to be resettled by those agencies does not also arise.

132. Consequently I find that the **1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 9th , 10th, 12th, 14th, 15th, 16th, 18th, 19th, 20th 23rd, 25th, 43rd, 44th, 48th, 99th 100th, 101st 103rd and 105th** Petitioners have proved that their rights were violated by the **6th, 14th, 15th, 17th** and **20th** respondents.

133. Now that a number of petitioners have established a violation of rights, it behoves this court to consider the appropriate relief for them. The reliefs available in a Constitutional Petition are set out in **Article 23 (3)** of the **Constitution** as follows:

> **(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including-**
>
> **(a) a declaration of rights;**
>
> **(b) an injunction;**
>
> **(c) a conservatory order;**
>
> **(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;**
>
> **(e) an order for compensation; and**
>
> **(f) an order of judicial review.**

134. The petitioners were evicted from the land long ago. They have been out of the land for about **16 years** now. This court has found that they did not have a legitimate expectation to be settled on the land. This court has also found that the issue of propriety or otherwise of the transfer of the said land to the **20th** respondent is yet to be disposed of. In the **Mitubell case** the Supreme Court observed that:

> **"Given the fact that the appellants had already been evicted, what reliefs, ought they have sought from the Court? Having alleged a violation of their rights to dignity and housing, it is our considered opinion that the most effective relief open to the appellants was a claim for compensation. Had the appellants been still in occupation, all the other possible reliefs we have signaled in paragraph 150 would also have been available to them. Counsel for the appellants has urged us to craft an appropriate remedy for compensation. Such a cause ought to have been urged at the Trial Court, with the aggrieved party having an opportunity to appeal any award to the Court of Appeal."**

135. In the instant case where eviction has also already taken place, I find that the most appropriate remedy is compensation, which was in any event claimed as part of the petitioners' prayers. In assessing monetary compensation this court is aware that the loss of human dignity and the physical suffering, including lack of proper shelter and abrupt deprivation of their only source of livelihood can not be adequately measured in monetary terms. In the case of **Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR** the Court of Appeal citing among others, a Privy Council case, stated as follows:

> **"The relevant principles applicable to award of damages for constitutional violations under the Constitution was explained exhaustively by the Privy Council in the famous case of Siewchand Ramanoop v The AG of T&T, PC Appeal No 13 of 2004. It was held that a monetary award for constitutional violations was not confined to an award of compensatory damages in the traditional sense.**
>
> **Per Lord Nicholls at Paragraphs 18 & 19:**
>
> ***"When exercising this constitutional jurisdiction the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. The comparable common law measure of damages will often be a useful guide in assessing the amount of this compensation. But this measure is no more than a guide because the award of compensation under section 14 is discretionary and, moreover, the violation of the constitutional right will not always be co-terminous with the cause of action at law.***
>
> ***An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches.***
> ***(e m p h a s i s o u r s) All these elements have a place in this additional award. "Redress" in Section 14 is apt to encompass***

such an award if the court considers it is required having regard to all the circumstances. Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. Accordingly, the expressions "punitive damages" or "exemplary damages" are better avoided as descriptions of this type of additional award". (emphasis ours)"

136. Later on the Court of Appeal in the **Imanyara case** would in its own words observed as follows:

"Consistent with the above judicial experience and philosophy, it seems to us that the award of damages for constitutional violations of an individual's right by state or the government are reliefs under public law remedies within the discretion of a trial court, however, the court's discretion for award of damages in Constitutional violation cases though is limited by what is "*appropriate and just*" according to the facts and circumstances of a particular case. As stated above the primary purpose of a constitutional remedy is not compensatory or punitive but is to vindicate the rights violated and to prevent or deter any future infringements. The appropriate determination is an exercise in rationality and proportionality. In some cases, a declaration only will be appropriate to meet the justice of the case, being itself a powerful statement which can go a long way in effecting reparation of the breach, if not doing so altogether. In others, an award of reasonable damages may be called for in addition to the declaration. Public policy considerations is also important because it is not only the petitioner's interest, but the interests of society as a whole that ought as far as possible to be served when considering an appropriate remedy."

137. While considering the above decisions mentioned above, this court has in the instant case found eviction without notice a serious violation upon which many other violations of constitutional rights of the petitioners stemmed. Given that they had resided on the suit land for decades there is no doubt that they had accumulated property thereon including houses and personal effects which, from the petition, it appears they were unable to salvage owing to the abruptness of the eviction. However, this court notes that the eviction having taken place **16** years ago there has been sufficient time for the petitioners' scars to heal. Not much has been revealed of the extent of mitigation of their plight over the years, yet this court supposes that some mitigation occurred. The rate of inflation has to be considered also. In my discretion I would therefore consider a sum of **Kshs.300,000/=** (**Three Hundred Thousand Shillings Only**) for each petitioner as a global award for the violation of the petitioners' rights as sufficient to compensate their suffering for having been left without any social support after the eviction. I would also consider the award of **Kshs.100,000/=** (**One Hundred Thousand Shillings Only**) for each petitioner for unlawful arrest and false imprisonment and **Kshs.100,000/=(One Hundred Thousand Shillings Only**) award for each petitioner as appropriate compensation for malicious prosecution.

138. Finally, in determining who is to bear liability for the enumerated violations of the petitioners' rights, I have considered the principle of horizontal application of the Bill of Rights to conclude that the **6th** and **20th** respondents who are non-state actors are also liable. The extent of their involvement has also been considered. The **6th** respondent put into motion the prosecution of the petitioners and their eviction acting on his own behalf as an agent of the **20th** respondent. The rest of the respondents had no interest that could push them to put those events in motion. In contrast with the **Mitubell case** the land did not belong to the state and the state actions must have been manipulated by the **6th** defendant who is stated to have wielded considerable power on the political and governance scene. This court is persuaded that the eviction and prosecution were calculated to further the **6th** and **20th** respondents' personal interest rather than state interests since the land had belonged to the **6th** and **20th** respondents.

139. In the case of **Mike Rubia -vs- Moses Mwangi & 2 Others [2014] eKLR** the Court observed as follows:

"As to the issue whether a private citizen can allege a violation of fundamental freedoms as against another private citizen, I reiterate the findings in the Jemima Wambui Ikere Case (supra) where the Court stated as follows:

"I am clear in my mind that the Constitution in Articles 2 and 20 and the definition of the term "person" under Article 260 envisaged both vertical and horizontal application of the Bill of Rights; vertical application between the citizen and the State and horizontal application between one citizen and another citizen. Article 2 of the Constitution provides that 'this Constitution is the supreme law of the land and binds all persons and all state organs at both levels of government'. Similarly, Article 20 provides that; 'The Bill of Rights applies to all and binds all state organs and all persons'. Article 260 has defined a person as 'including a company, association or other body of persons whether incorporated or unincorporated'. My reading of the above provisions of the Constitution reveals that no person is above the Constitution and every person is bound by the provisions of the Constitution including the Bill of Rights. It therefore means that the Petitioners are entitled under Article 22 of the Constitution to institute a claim alleging a violation of the Constitution whether those violations are by a private citizen or the State.""

140. The **6th** and **20th** respondents are therefore also as much bound to respect the constitutional rights of other citizens as state actors.

141. Regarding the reliefs sought, this court observes that from the analysis in the body of this petition, prayers **Nos. 1-7** (inclusive) **9** and **13** can not be granted for lack of proof. While **No. 10** can only be partially granted as per the final raft of orders hereinbelow.

142. As the **26** petitioners have been partially successful in their claim I grant them the following final orders:

(a) A declaration that the 1st, 2nd, 3rd, 4th, 6th, 7th, 8th, 9th , 10th, 12th, 14th, 15th, 16th, 18th, 19th, 20th 23rd, 25th, 43rd, 44th, 48th, 99th 100th, 101st 103rd and 105th Petitioners were illegally and wrongfully evicted from land parcel No. LR. 2046 (IR No. 318/1) situate within Trans- Nzoia County and their dwellings thereon illegally demolished by the 6th and 20th respondents in collusion with the 14th, 15th and 17th respondents.

(b) A declaration that the demolition of the dwellings and business structures of the 1st, 2nd, 3rd, 4th, 6th , 7th, 8th, 9th, 10th,

12th, 14th, 15th, 16th, 18th, 19th, 20th, 23rd, 25th, 43rd, 44th 48th, 99th, 100th, 101st 103rd and 105th Petitioners at the instance of the 6th and 20th respondents and their forced eviction without issuing any notice of eviction was in violation of the said petitioners' fundamental rights to inherent human dignity, security of the person, accessible and adequate housing, reasonable standards of sanitation, health care services, to clean and safe water in adequate quantities and to be free from hunger as well as fair administrative action as guaranteed by Articles 28, 29, 43(1) as read with 20(5) and 21(1),(2) and (3), 47(1) (2) and (3) of the Constitution of Kenya.

(c) A declaration that the 1st , 2nd, 3rd 4th, 6th, 7th, 8th, 9th, 10th, 12th, 14th, 15th,16th, 18th 19th 20th 23rd, 25th, 43rd, 44th 48th, 99th 100th, 101st 103rd and 105th Petitioners' right to acquire and own property and the protection of their rights to acquire and own property was violated by their eviction from LR No 2046 (IR. No. 318/1).

(d) A declaration that the arrest and subsequent prosecution of the 1st, 3rd, 4th, 6th, 8th, 9th, 10th, 12th, 14th, 15th, 16th, 18th, 19th, 20th and 105th Petitioners in Kitale Criminal Case No. 1272 of 2005 was illegal and malicious and in violation of the said petitioners' fundamental rights.

(e) The 1st, 3rd, 4th, 6th, 8th, 9th, 10th, 12th, 14th, 15th, 16th, 18th, 19th, 20th and 105th Petitioners is hereby awarded general damages in the sum of Kshs.100,000.- (One Hundred Thousand Shillings Only) each for their unlawful arrest.

(f) The 1st, 3rd, 4th, 6th, 8th, 9th, 10th, 12th, 14th, 15th, 16th, 18th, 19th, 20th and 105th is hereby awarded 100,000/= (One Hundred Thousand Shillings Only) each for malicious prosecution in Kitale CM Criminal Case No. 1272 of 2005.

(g) The 1st , 2nd, 3rd 4th, 6th, 7th, 8th, 9th, 10th, 12th, 14th, 15th,16th, 18th 19th 20th 23rd, 25th, 43rd, 44th 48th, 99th 100th, 101st 103rd and 105th petitioners' costs of the petition shall be borne by the 6th, 14th, 15th, 17th and 20th respondents jointly and severally.

(h) The 1st, 3rd, 4th, 6th, 8th, 9th, 10th, 12th, 14th, 15th, 16th, 18th, 19th, 20th and 105th Petitioners is hereby awarded general damages in the sum of Kshs.300,000/= (Three Hundred Thousand Shillings Only) each for forcible and illegal eviction.

(i) The damages in Order No (e) and (f) above shall be paid by the 6th, 14th, 15th, 17th and 20th Respondents jointly and severally.

(j) The general damages in Order No. (h) above shall be borne jointly and severally by the 6th and the 20th respondents only.

(k) The claims of all the petitioners named in the petition against the 1st, 2nd, 3rd, 4th, 5th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 16th, 18th and 19th Respondents and against all interested parties are dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 3RD DAY OF MAY 2021.

MWANGI NJOROGE

JUDGE, ELC, KITALE.