REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC PETITION CASE NO. 6 OF 2020

IN THE MATTER OF ARTICLES 1, 2, 3, 10 (2), 19, 20 (1) & (4), 21, 22 (1),

23, 25 (c), 27, 40(1),43, 47 (1), 61, 62, 64, 73 (1), 159, 162 AND 232 OF

THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE ENVIRONMENT AND LAND COURT ACT, 2012

AND

IN THE MATTER OF THE LAND ACT, 2012

AND

IN THE MATTER OF THE LAND REGISTRATION ACT, 2012

AND

IN THE MATTER OF THE PRIVATIZATION ACT, 2005

AND

IN THE MATTER OR THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA

(PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS)

PRACTICE AND PROCEDURE RULES

BETWEEN

CROSSLEY HOLDINGS LTD..PETITIONER

VERSUS

THE CABINET SECRETARY, MINISTRY OF AGRICULTURE,

LIVESTOCK & FISHERIES..1ST RESPONDENT

THE AGRICULTURE & FOOD AUTHORITY....................................2ND RESPONDENT

THE COUNTY GOVERNMENT OF KISUMU....................................3RD RESPONDENT

THE ATTORNEY GENERAL..4TH RESPONDENT

MIWANI SUGAR COMPANY (1989) LTD (IN RECEIVERSHIP)....5TH RESPONDENT

AND

RICHARD OCHIENG OGENDO...1ST INTERESTED PARTY

JULIUS OKELLO KUNGU...2ND INTERESTED PARTY

JUDGEMENT

Introduction

Crossley Holdings Ltd ***(hereinafter referred to as Petitioner*)** has come to court against The Cabinet Secretary Ministry of Agriculture, Livestock and Fisheries and The Agriculture & Food Authority, The County Government of Kisumu, the Attorney General and Miwani Sugar Company (1989) Ltd (In Receivership) ***(hereinafter referred to as the respondents)*** seeking a**n order of possession of the land L.R. 7545/3 (I.R. No. 21038) enforceable against each and all the Respondents including their workers, servants, agents, representatives and assigns including those purporting to work for or represent Miwani Sugar Company (1989) Ltd (in receivership) be granted to the Petitioner.**

> **Moreover, she seeks an order of eviction enforceable against each and all the Respondents including their workers, servants, agents, representatives and assigns including those purporting to work for or represent Miwani Sugar Company (1989) Ltd (in receivership) be granted to the Petitioner and an order of general damages for the loss of income and use of the land. An order of special damages in the sum of Kshs. 6,020,212,300/= being the loss of income for the cultivation and production of sugar cane.**
>
> **In the alternative and without prejudice to the prayers above she seeks a refund of Kshs. 752,000,000/= with interest thereon at bank rates from 24th December 2007 to date together with Kshs. 4,600,000,000/= being the current market value of the land with interest thereon from the date of filing the petition herein until payment in full and any other further loss of income incurred until the Petition is heard and determined.**
>
> **The petitioner further seeks a mandatory and permanent injunction prohibiting each and all the Respondents together with their agents, officers, workers, servants, representatives, assigns and heirs from interfering with the Petitioner ownership, possession and title to the land and stopping each and all of them from selling, leasing, transferring, charging, mortgaging and granting licences or easements to the land or in way dealing with the land to the detriment of the Petitioner. Last but not least, the petitioner prays for costs and any other order the Honourable Court deems fit and just to grant.**

Petitioners Case

The Petitioner asserts that he is the registered proprietor of L.R. 7545/3(L.R.20138). The Petitioner obtained title as now exhibited by the Provisional Certificate of Title registered as L.R. 20138/1. Entry No. 31 shows the registration of the vesting order as directed and made in Civil Suit no. 225 of 1993 the High Court of Kenya in Kisumu to the Petitioner. The vesting order was entered and registered on 29th January 2008 and a provisional certificate issued the same day as entry No. 32.

From 29th January 2008, according to the records of the Registrar, the Petitioner has up to today maintained its legal status as the Registered proprietor of the land for the purposes of this Petition and proceedings, the evidence, as it is, is that the Petitioner is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and title.

Over the years several entities have tried to make a collateral attack by way of judicial proceedings on the legality of the Petitioner's ownership of the land without success. The cases are referred to in the body of the Petition and the supporting Affidavit. In Kisumu High Court Civil Suit No. 225 of 1993, Nagendra Saxena vs Miwani Sugar Mills Ltd the core dispute as outlined in the pleadings was a claim against Miwani Sugar Mills Ltd by Nagendra Saxena who had provided services to Miwani Sugar Mills Ltd which resulted in the decree holder, Nagendra Saxena, obtaining orders in his favour for the sale of the land by public auction.

According to the petitioner, the Court of Appeal Kisumu Civil Appeal No. 112 of 2015, which arose from High Court Civil Suit No. 225 of 1993, in a judgment delivered on 3rd April 2020, more than twelve years after acquisition by the Petitioner, stated that it had an enforceable judgment on the one hand and the 1st Respondent (the Petitioner) who was presumed to be an innocent purchaser for value who had a right to have her property protected under Article 40 of the Constitution…"

Moreover, the petitioner argues that another collateral attack was undertaken in Kisumu Chief Magistrates Criminal Case No. 429 of 2010 Republic vs Ian Gakoi Maina and 8 Others in which several accused persons including the Petitioner were charged with various criminal offences under the Penal Code and the Anti-Corruption and Economic Crimes Act such as conspiracy to defraud, fraudulent disposal of public property, fraudulent acquisition of fraudulent property, forgery and abuse of office. The Petitioner was set to liberty on account of the fact that the Court found that the prosecution had not made out a prima facie case. The Director of Public Prosecution appealed against the

ruling of the Subordinate Court in the High Court in Nairobi Anti-Corruption and Economic Crimes Division Misc Appeal No. 21 of 2019- Republic vs Ian Gakoi Maina and Others in which the superior court reversed the said decision of the subordinate court and directed that the respondents be placed on their defence. However, the Court of Appeal in Criminal Application No. 74 of 2019 (UR. 7/2019) – Ian Gakoi Maina and Others vs Republic and Another, stayed the decision of the High Court until the intended appeals are heard and determined.

The petitioner contends that he has remained the registered proprietor of L.R. No. 7545/3 whose title is indefeasible and unchallenged. As matters stand now, there is no finding of any court, tribunal or arbitral statutory body that, if at all there was fraud or misrepresentation in the acquisition of the land. The Petitioner was not proved to be party to the alleged fraud or misrepresentation. There has never been a finding that he Petitioner acquired the title illegally, un- procedurally or through a corrupt practice. The Petitioner therefore remains in the eyes of the law an innocent purchaser for value without notice.

The petitioner contends that there is no evidence that there was a transfer executed and registered in favour of Miwani Sugar Company (1989) Limited (in receivership) despite the fact that the Agreement of Sale having been signed on the 9th April 1990.

The Attorney General was unsuccessful in his request by a letter dated 16th November 2004 to the Ministry of Finance for copies of title documents for land parcels Nos. 7545/2 and L. R. 7545/3 for purposes of the facilitation of discharge of the charge on the property in question.

Even after the rescheduling of commercial debts and reaching agreements with Oriental Commercial Bank Limited and Dephis Bank Limited in the year 2007 the receivers went on an unjustified venture of paying dubious creditors' like Surjit Singh and Malelit Singh in the sum of Kshs. 350,000,000.00 and it was no surprise that the 5th Respondent was placed in more debts and never stabilized.

The petitioner subsequently purchased the land in a public auction on the strength of the fact that Miwani Sugar Mills Limited was the registered proprietor of the land. The company was a judgment debtor against whom a decree holder had obtained an order of sale by public auction.

The Government and the Respondents have never allowed the Petitioner to take possession of the land. That is an arbitrary exercise of power and therefore unlawful and without any colour of right or Justification. The Respondents or other claimants have not instituted appropriate and separate civil proceedings on their own to challenge the Petitioner's title except as set out hereinabove. Criminal proceedings were instituted in abuse of the process of the court and in a manner inconsistent with the objective of the criminal justice system and for the extraneous purpose of usurping the legitimate and lawful title acquired by the petitioner.

In a due diligence report on the privatization of public sector owned sugar companies on the question of Miwani Sugar Company (1989) Limited (in receivership), a consortium of experts commissioned by the Government of Kenya led by Ernst & Young, it was noted that the farm (land) was not in the hands of the sugar company and expressed doubt that it could be recovered.

The advice of the Attorney-General was even more pertinent and conclusive and suggested that the only pathway to the resolution of the matter in relation to the privatization program was negotiation with Crossley Holdings Limited. In the letter to the Cabinet Secretary, Ministry of Agriculture on 16th May 2014 the Attorney General says that although the ministry had earmarked the Miwani factory for privatization, the title to the land is currently held by a private company and does not fall within the scope of public assets that can be subject of privatization as envisioned by the privatization act.

The petitioner states that despite the fact that the land belongs to the Petitioner, available documents show the intended demarcation of the land as a Special Economic Zone without taking into account the interest of the Petitioner as protected in Article 40 of the Constitution. Article 40 protects the right to property and prohibits any legislative enactment that arbitrarily deprives any person of property of any description and to limit or in any way restrict the enjoyment of any right under Article 40 on the basis of any grand specified or contemplated in article of 27 (4) of the Constitution.

The petitioner reiterates that Miwani Sugar Company (1989) Limited (in receivership) is a private company with Vanessa Associates holding 51% of the shares and the Government holding the balance of 49% shares. It is not a state corporation. The report on Miwani Sugar Company (1989) Limited (in receivership) by the Technical Committee of the Sugary Company Development Fund to the effect that the company failed to honour its obligation to issue in favour of the Government a guarantee in the sum of Kshs. 354 million leading to an unsecured exposure by the Government speaks to the status of the company. That the failure left the Government without any security for the moneys paid on behalf of Miwani Sugar Company (1989) Limited (in receivership). Therefore, the Government had no control of the company under the authority of any legislation relating to State corporation.

This private company, Miwani Sugar Company (1989) Limited, is in receivership and no Government interventions can be made outside statutory provisions affecting private companies under receivership. This being the case the 2nd Respondent is conflicted and cannot impeccably and with integrity, while maintaining fiduciary obligations, simultaneously serve in multiple roles as a regulator, successor to the Kenya Sugar Authority/Kenya Sugar Board, a debenture holder and as a receiver manager.

The claims constantly made by Miwani Sugar Company (1989) Limited (in receivership) that there was purportedly some enforceable judicial declaration that the sale and transfer was a nullity and that the Petitioner's title could be cancelled, cannot be considered as a judicial certainty.

Both the trial court in Kisumu High Court Civil Case No. 225 of 1993 and the appellate court and in a subsequent appeal Kenya Court of Appeal Civil Appeal No. 112 of 225 took the same position and declined to cancel the title. In the criminal proceedings in Kisumu Chief Magistrates Court Criminal Case No. 429 of 2010 prosecution's witnesses including lawyers on record for the respondents and the receivers (David Otieno, Bundotich, Kipngetich Bett, Rosemary Mkok and Pauline Sewe) testified that the land L.R. 7545/3 I.R (21038 is not public land. And in any case debenture executed in favour of the debenture holders did not include the land. The assets subject matter of the said

debentures was enumerated in the debentures.

At the time when the land was being sold by public auction the 5th Respondent and the receivers did not seek to stop the sale. They did not register any caution or caveat against the title of the land. It was not a question of negligence or recklessness on their part. It was a decision made not to interfere with the execution of the decree as they constructively acknowledged and recognised the judgment debt and the validity and enforceability of the decree. The receivers' lawyers only prayed for urgency in the suit and did not apply for a stay of execution or stay of the sale.

The petitioners argue that the land was valued at Kshs. 696,600,000/= and sold at Kshs. 752,000,000/=. The purchase was therefore for value and was in bona fide. The contested original summons in 225 of 1993 signed by the Deputy Registrar of the High Court were valid, genuine and authentic and had not been forged.

The petitioner has cited the provisions of the Constitution that have been breached spelling out with accuracy the specific articles, sub-articles and paragraphs or clauses and sub-clauses. The Petitioner has made averments, all the time guided by the rules regarding the pleadings and avoiding prolixity, while at the same time undertaking a balancing act to ensure that the Respondents have a clear picture or perception of the Petitioner's case.

The petitioner contends that contrary to the allegations or assertions of some of the Respondents there is a proper petition before the Court which has complied with the requirements of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and the law of pleadings, the principles of which have now been established by a litany of cases including Anarita Karimi Njeri v Republic (976 – 1980) eKLR and Mumo Matemu vs Trusted Society of Human Rights Alliances and 5 others (2014) eKLR.

The petitioners argue that Res judicata applies to issues that have been definitely settled by judicial decision. Res judicata includes the doctrine of preclusion of matters that have once been decided, otherwise known as collateral estoppel. It may extend to the foreclosure of any litigation on matters that should have been advanced in earlier proceedings.

The Petitioner further contends that he had never been heard on the question of its right of ownership and interest over the land. No proper suit had been lodged to interrogate and question the validity of the Petitioner's title and no such determination has been made. Instead it is the Petitioner who has now moved the Honourable Court, based on its title, seeking possession of the land, eviction of the 1st 2nd and 5th Respondents, damages and stopping the 1st and 2nd Respondents from leasing the land.

The petitioner relies on the case of the Independent Electoral and Boundaries Commission vs Maina Kiai and 5 Others (2017) eKLR where the Court of Appeal pronounced itself on the question of res judicata as follows;

> ***"Thus, for the bar of res-judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***
>
> ***a) The suit or issue was directly and substantially in issue in the former suit.***
>
> ***b) That former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***c) Those parties were litigating under the same title.***
>
> ***d) The issue was heard and finally determined in the former suit.***
>
> ***e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raise.***

The petitioners contend that the learned Judges were fully aware and applied their minds to these elements when, applying the court's decision in Uhuru Highway Development Ltd v Central Bank of Kenya (1999) eKLR, they rendered the elements as:

> ***" a) the former judgment of order must be final;***
>
> ***b) the judgment or order must be on merits;***
>
> ***c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and***
>
> ***d) There must be between the first and the second action identity of parties, of subject matter and cause of action."***

The only route (save, the transfers, the charges and mortgages registered against the title to the land), through which the 5th Respondent would have a legally sustainable claim to the land, is through the debentures. When the Petitioner acquired the land through a public auction, the land lawfully and legitimately belonged to Miwani Sugar Mills Limited. It is not denied that the decree holder Nagendara Saxena, the Plaintiff in Kisumu High Courts Civil Case No. 225 of 1993. Had a valid claim against Miwani Sugar Mills Limited for which he obtained judgment.

The 5th Respondent, Miwani Sugar Company (1989) Limited (in Receivership), which is distinct form Miwani Sugar Mills Limited, has

never been the registered owner of L.R. 7545/3 (I.R.21938). the suit property, the only ground and basis, and the reason the 5th Respondent entered these proceeding is by virtue of a debenture between the 5th Respondent and Kenya Sugar Authority (Now AFA, 2nd Respondent). There are a total of five (5) debentures. In all the above five debentures, land was never a security for money advanced or to be advanced to Miwani Sugar Company (1989) Limited, a private limited liability company. The only inference that can be drawn from the above debentures is that the property was never intended or could not be offered for security because Miwani Sugar Company (1980) limited was not the registered owner. Hence, could not be offered.

The petitioner argues that the 5th Respondent brought itself into these proceedings by virtue of the debentures which deal with other items other than land. The items listed in those debentures are better dealt with in a court that has jurisdiction over the same; a commercial court and not this court.

That the Agreements between Miwani Sugar Mills Limited (in receivership) and the Government of Kenya have not crystallized into a specific agreement to sell the land. There are no executed transfers and registrations thereof in regard to the sale and purchase of the land by the Government of Kenya or any of the Respondents. The land was always the property of Miwani Sugar Mills Limited until it was acquired by the Petitioner in a public auction.

On sanctity of title, the petitioner argues that it is the registered owner of all that parcel of land known as L.R. No. 7545/3(I.R. 21038/1) (hereinafter called the property) through entry No. 31 made on 29th January 2008 under the Registration of Titles Act (repealed). The Petitioner acquired the property after being the successful bidder at the public auction of the property on 24th December 2007, which was being sold to satisfy the judgement debt in Nairobi.

The sale of the property by public auction underwent all the statutory stages including the advertisement of the auction which was carried out in the Kenya Times Newspaper of December 6, 2007, the sale of the property at the time and place of the auction at which the Petitioner was the highest bidder, payment of the bid price for the property of Kshs. 752,000,000/- and payment of stamp duty by the Petitioner in the sum of Kshs. 15,040,010/-. Thereafter, the property was transferred to the Petitioner and registered in its name on 29th January 2008, free from all encumbrances.

The documents in respect of the conduct of the auction are in the bundles marked “BS7, “BS8” and “BS9” in the Petitioner’s Supporting Affidavit sworn on 26th August 2020. The Petitioner is therefore the registered, legal and outright owner of the land.

The purpose of these provisions is to preserve and ascertain the sanctity of a registered title to land under the Torrens System of land registration. The record of one as the owner of the land under the land register makes the registered person the absolute and indefeasible owner of the property registered in its name, except where the owner is proved to be party to fraud or misrepresentation in the acquisition of the title to the property.

The Petitioner, being the registered owner of the property is its indefeasible owner with all the attendant rights, and the doctrine of sanctity of registered title to land, as protected by the Torrens system of land registration protects the Petitioner’s title to the property.

The Petitioner bought the property through a sale by public auction. The petitioner relies on the case of David Katana Ngomba v Shafi Grewal Kaka (2014) eKLR the court citing the case of Captain Patrick Kanyagia and Another vs Damaris Wangechi and

> ***“…no duty was cast on an intending purchaser at an auction sale, properly advertised, to inquire into the rights of the mortgagee to sell Accordingly, we find support in the above authorities and hold that the respondent as an intending purchaser at an auction sale had o duty to inquire into the rights of the charge to sell.”***

Although the property herein was not sold by a charge, the property was sold through a statutory auction process in which notices of the auction were issued within the requisite statutory timelines and the same were served on the Defendant in Nairobi High Court Civil Case No. 225 of 1993. The Petitioner as the purchaser had no duty cast on it after the auction was properly advertised, to inquire into the rights of the Plaintiff to sell the property. In any event, the Plaintiff was selling the property pursuant to a court order, whose validity at the time of the auction was unchallenged. Further, none of the Respondent’s should be heard to say that they were not aware of the existence of the suit in Civil Suit no. 225 of 1993 and or the subsequent court orders.

The Petitioner claims that he has satisfied all the conditions for a bona fide purchaser for value without notice as set out in the Katende Case, having acquired the property in good faith at a public auction pursuant to a court order in Kisumu High Court Civil Case No. 225 of 1993 and paid the bid price to the Plaintiff and also paid the stamp duty for the transfer of the property. The Petitioner cannot therefore have its title to the property impeached on the basis of any unproven allegations of fraud made by any of the Respondents.

The petitioner contends that all along from the year 2008 to date, the Respondents have been alive to the fact that the Petitioner is the registered owner of the property but have continued to illegally occupy the Petitioner’s property without any valid claim over it. Having never made a claim on the proprietorship of the property from the said date to now, the Respondents have acquiesced to the Petitioner’s proprietorship of the property and are stopped from joyriding on the Petitioner’s claim for the possession of the property to assert their purported illegitimate claim on the proprietorship of the property.

The petitioner further argues that its socio-economic right to possess the property and to make productive use of it is interlinked with his administrative right not to be unfairly dispossessed of the property, without a notice or a hearing as well as the right to have his proprietary rights over the property protected by the law.

The requirement that the Respondents being public bodies observe statutory and constitutional provisions including making a fair, lawful and expeditious decision with regard to the Petitioner and its property is embodied in the larger principle of the rule of law.

The right to fair administrative action is one of the central rights in the Bill of Rights. Article 47 (2) of the Constitution provides that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

On the importance for public bodies to adhere to Article 47, the petitioner relies on the case of Accra Trade Cantered Limited v national Land Commission & Another; Guled Housing Company Limited (Interested Party) [2020] eKLR in which the Court citing the Mutava Case reiterated the need for the National Land Commission to give notice to the Applicant, before changing a decision the Commission had made which had affected the Applicant. The Court found that by the National Land Commission failing to follow the dictates of the Constitution and the relevant statutes impeaching the impugned decision, it had violated the petitioner's right to fair administrative action and fair hearing and concluded that: -

> ***"The consequence is that the National Land Commission's decision contained in the letter dated 11/4/2018 purporting to review its earlier decision dated 20/12/2016 is illegal, null and void."***

Consequently, the 1st Respondent's advertisement of the Petitioner's property in the International Expression of interest on July 10th 2020 without notice to the Petitioner and without according it an opportunity to be heard about the offer, makes the advertisement and all the subsequent actions pursuant to the advertisement illegal, null and void.

Article 50 of the Constitution speaks to the right to a fair hearing. This right is non-derogable and is not limited as provided in Article 25 (c) of the constitution. Read together with Article 27 (1) and (2) of the Constitution which guarantees equality before the law, and equal protection and equal benefit of the law the Petitioner cannot be denied its day in court. For anyone that claims the Petitioner's land, including the Respondent's, he or she must seek to settle the dispute before court of law of competent jurisdiction so that a determination is made fairly in a public hearing

The petitioner argues that the respondents cannot by a diktat expropriate the land nor can they exercise arbitrary power and grab and possess the land by usurpation of the judicial authority of the courts of justice to resolve disputes. Article 2 (1) of the Constitution establishes the supremacy of the Constitution which binds all persons and all state organs. There is no safe haven for breach of Article 2 (2) of the Constitution which prohibits any persons, natural or juridical, from claiming or exercising state authority except as authorised under the constitution. The Respondents cannot behave like an army of occupation which has attained the fruits of aggression through invasion and territorial expansion. So long as we are a nation of laws such conduct cannot be countenanced.

In paragraph 83 of the petition the Petitioner has complained that there was no public participation as a condition precedent before advertising the expression of interest for leasing the land or the sugar factory. That offends Article 10 (2) of the Constitution. Our democracy entails the exercise of both representative and participative forms of governance. This is turn affords transparency and accountability in the running of public affair.

The Petitioner must enjoy the values and structures of our system of government. In matters of devolution and access to service the constitution requires as an imperative that the governments at the national and county levels conduct their mutual relations on the basis of consultation and cooperation in the spirit and actuality of inter-dependence. The Petitioner's rights of ownership, even if doubted by the Respondents, must have been given recognition. The Third Respondent has put up a strong case in these proceedings against the unilateral and impeachable action and decision taken by the national government as a whole, and in particular the 1st and 2nd Respondents. The process of public participation was opportune and imperative in order to achieve the promises, objectives and purposes of the Constitution. The 2nd Respondent could not avoid or evade this constitutional edict as section 40 of the Agriculture and Food Authority Act provides;

> ***"(1) For purposes of ensuring effective participation of farmers in the governance of the agricultural sector in Kenya, there shall be close consultation with all registered stakeholder organizations in the development of policies or regulations and before the making of any major decision that has effect on the agricultural sector."***

According to the petitioner, this question is underscored by the statutory responsibility placed on county governments by section 29 of the Agriculture and Food Authority Act as the bodies responsible for agricultural matters in accordance with Part 2 of the Fourth Schedule to the constitution which captures the realms of agriculture (crop and animal husbandry) planning and development. Section 4 of the Agriculture and Food Authority Act, the constitutive statute for the 2nd Respondent, places a mandatory obligation on the 2nd Respondent to perform its functions under the said Act in consultation with the County Governments which includes the County Government of Kisumu, the 3rd Respondent in this petition.

The petitioner presupposes that the core values and principles of good governance under Article 10 of the constitution require public participation. The constitution provides thus:

"10. (2) The national values and principles of governance include-

> a) Patriotism, national unity, sharing and devolution of power, the rule law, democracy and participation of the people; human rights, non-discrimination and protection of the marginalized;
>
> b) Human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;
>
> c) Good governance, integrity, transparency and accountability; and

d) Sustainable development.

The petitioner argues that there was no public participation before the advertisement for leasing out of Miwani Sugar Company (1989) Limited (In Receivership) was made. This is despite the obvious fact that the decision to advertise for leasing out will directly affect the petitioner as the registered owner of the property, the Respondents being aware that the property did not belong to the 5th Respondents being aware that the property did not belong to the 5th Respondent but the petitioner. This is clearly in contravention of Article 10 of the constitution as pleaded in the petition.

On the Interested parties, the petitioner argues that they have a sordid record. They have no credentials as farmers or as stakeholders in the sector. It would appear they have a criminal record. The petitioner urges the honourable Court to allow the petition with costs against the Respondents and the interested parties as by them coming on board has escalated costs at their instance.

The petitioner argues that the Replying affidavit of Francis Ooko sworn on 24th September 2020 and filed in court on even date is fatally defective, sloven and borders perjury for the reasons that he is not the Receiver Manager of Miwani Sugar Company (1989) Limited [in receivership] as he purports and that he has not exhibited any authority to swear this affidavit on behalf of the purported Harun Kirui. The purported Harun Kirui is not one of the Receiver Managers of Miwani Sugar Company (1986) Limited (in receivership).

1st and 4th Respondents` Cases

The 1st Respondent filed a Replying affidavit sworn by **Peter Gatirau Munya** on **30th September, 2020** and filed in court on 08.10.2020. The 1st Respondent contends that the Petitioner is disobeying and disregarding court orders which declared the sale of the land as null and void. That the 2nd Respondent lawfully advertised for leasing of the 5th Respondent among other sugar companies owned by the state. On **19.11.2020**, the 1st and 4th Respondents, namely Cabinet Secretary, Ministry of Agriculture, Livestock, Fisheries & Co-Operatives and The Honourable Attorney General, filed a Cross-Petition dated **18.11.2020**. The Cross-Petition is supported by the affidavit of **Peter Gatirau Munya.** The Cross-Petition seeks the following prayers; -

i. A declaration that HCCC. 225 of 1993 and Kisumu Civil Appeal No. 261 of 2008 conclusively determined the issues of the title herein when it declared that all the execution processes and resultant registration was null and void and of no legal effect.

ii. That the Honourable court be pleased to order cancellation and rectification of the title held by the Respondent over parcel of land L.R. No. 7545/3 grant No. I.R 21038.

iii. That the court be pleased to order L.R No. 7545/3 grant No. I.R 21038, registration in the name of Principal Secretary of the National Treasury to be held in trust for the Ministry of Agriculture, Livestock & Fisheries and the people of Kenya.

iv. The Court be pleased to strike out classified and confidential public documents attached to the supporting affidavit of **Buggar Singh** and specifically exhibits **BS13, BS14, BS15, BS16, BS17** and **BS19.**

v. That the respondent to the Cross-Petition and its Advocates be condemned to personally pay costs of the petition and Cross-Petition.

The Cross-Petitioners relies on Articles 1,2,3,10(2),19,20(1) & (4), 21,22(1), 23, 25(c), 27, 40(1) & 40(6), 43, 47(1)(2), 48, 50(1), 61,62,64,73(1), 159, 162 and 232(1) of The Constitution, 2010 and other Acts as cited in the Cross-Petition. The Cross-Petitioners contend that the suit land was public land vested upon Miwani Sugar (1989) Limited which company was incorporated by the Government of Kenya to take over assets and liabilities of Miwani Sugar Mill and it had possession, occupation and use of the suit land. The Petitioners aver that the Miwani Sugar (1989) Limited is a Public entity the government having paid off debenture holders who had charges over Miwani Sugar Mill.

It is further contended that the Certificate of Incorporation of Miwani Sugar (1989) Ltd was registered as entry No.22 on the certificate of title which was meant to signify assumption of assets of Miwani Sugar Mill.

According to the Cross-Petitioners, the decisions of the High Court in Kisumu HCCC No. 225 of 1993 and Kisumu Civil Appeal No. 261 of 2008, declared all orders used to auction, sell and subsequently transfer the land to the respondent null and void. The Cross Petitioners further contend that the Government placed a caveat on the suit property and was unprocedurally removed. At paragraph 18 of the Cross-Petition, according to the Cross-Petitioners, have listed five anomalies to show that the Respondent participated and acquiesced to fraud. The Cross-Petitioners further challenge the respondent from relying on classified documents. The Cross-Petitioners avers that Article 40 is not available to the Respondent and instead Article 40 (6) comes handy for them. In his 19 paragraphs affidavit in support of the Cross-Petition, **Peter Gatirau Munya** as reiterated the averments in the Cross-Petition and annexed "**GPM-1 & 2"** being Kisumu Hccc No. 225 of 1993 decision dated 13.06.2008 and court of appeal at Kisumu Civil Appeal no. 261 of 2008 decision dated 29.07.2011.

The 1st and 4th Respondents filed written submissions dated 24.11.2020 whose gravamen is that the petitioner's claim of title is misconceived as the High Court sitting in Kisumu in HCCC. 255 of 1993 and Kisumu Civil Appeal NO.261 of 2008 declared that the Orders used to auction, sale and transfer the suit property were null and void therefore the petitioner is unlawfully registered as the proprietor of the suit property as it has always been owned by a State Corporation and therefore it is Public land for the purposes of Article 62 of the Constitution of Kenya 2010.

The Respondents submits that the Government was never made a party to the proceedings which culminated in the impugned sale of the suit property which would have enabled the government protect its interest in the property and the sale of the property was not sanctioned by any

Court Order, and further there is no any evidence that the Petitioner paid any valuable consideration to acquire the property; The Respondents holds that the documents relied upon by the Petitioner are the same documents relied upon in previous cases where the court had already declared the sale of the suit property as illegal and unlawful.

The Respondents submit that the petitioner`s claim is founded on malice and the 1st Respondent acted within the law and its rights by advertising for the leasing of property belonging to the 5th Respondent and the Petitioner's claim is based on individual interests that are aimed at depriving the state of its rightfully acquired property.

The Respondents raised two issues for the court`s determination, to wit;

i. Whether the Petitioner is the Rightful Proprietor of LR NO. 7545/3 (IR NO. 21038)

ii. Whether the Petitioner is entitled to the prayers sought.

The Respondents submitted that the suit property falls under the description of Public land and any transaction involving the land should have been sanctioned by the Government through Official channels and that all the transactions undertaken by the Petitioners in respect to the auction and sale of the suit property were conducted without the knowledge of the Government and this was noted in the above mentioned cases when the orders for attachment and sale were declared null and void. The Respondents submit that the 5th Respondent a State Corporation which was incorporated in 1989 and was later acquired fully by the Government of Kenya making it a public entity as it was acquired using Public funds.

The Respondents submit that the property LR NO. 7545/3 (IR NO. 21038) is public land falling under the description of **Article 62 of the Constitution of Kenya 2010 which provides, …*public land is land lawfully held, used or occupied by any state organ, except any such land that is occupied by the state organ as lessee under a private lease;*** it was further submitted that even if the land, for argument's sake is not public land per se, the process through which was auctioned, sold and transferred to the Petitioner and the fact that the Court nullified the same means that the Petitioner does not hold a lawful title.

The Respondents submit that in view of the decisions in Hcc No. 225 of 1993 and Appeal no. 261 of 2008, which voided the Petitioner's title and therefore the Petition as drafted is a clear attempt to legitimize a title that has already been declared null and void and to buttress this position, the Respondents relied in ***Kisii High Court Civil Case No. 144 of 2003 Peter Ouma Omollo & Another vs. Awendo Town Council*** where **Justice Makhandia** as he then was held that:

> ***"Arising from all foregoing, this court is not satisfied that the Plaintiffs have proved their case on a balance of probability as required by law. In the Plaint, the Plaintiffs have sought for an order of permanent injunction against the Defendant and declaration on the basis that the suit premises belong to them. However, as I have been able to establish, the process leading to the acquisition of the suit premises was flawed, illegal, null and void. To grant the prayers sought will be tantamount to this court placing a seal of approval to an illegality. This court cannot sanction such illegality. It cannot reward the Plaintiff's mischief (emphasis added)***

The Respondents submit that the land Registry ought to have voided the petitioner's title in adherence with decisions by Justice Mwera and the Court of Appeal and equally hold that there was no need for an order of the court for this to be effected and that the offending documents annexed to the Petitioner's affidavit and marked **BS13, BS14, BS15, BS17** and **BS19** be expunged from record for being documents marked privileged and classified documents and falls under The Official Secrets Act which the petitioner has not explained how it came into his possession and to buttress their submissions relied on the court of appeal decision in ***Okiya Omtatah Okoiti & 2 others v Attorney General & 4 others [2020] eKLR***.

It is the Respondents submission that before purchasing the land whether through an auction or otherwise the Petitioner was under duty to undertake due diligence which it did not otherwise would have known it was public land and that the petitioner has not explained delay in taking possession of over 12 years since purchase and how the GoK prevented it from taking possession.

The fact that the 1st, 2nd, 3rd and 4th respondents and the interested parties have never participated in any previous proceedings over the suit property, clearly shows that the government was dispossessed of its land without following due process despite having registered a government caveat under section 65(1) (f) of the Registration of Titles Act which was removed unlawfully by the Petitioner and without an order of the court.

The Respondents submit that the petitioner is not entitled to either General or Special Damages because the suit property is public land and the petitioner cannot benefit being a trespasser and that the special damages have not been proved.

The Respondents submit that the petitioner does not pass the test in the case of ***Chemey Investment Limited v Attorney General & 2 others [2018] eKLR*** and ***Shimoni Resort vs. Registrar of Titles & 5 others [2016] eKLR*** on indefeasibility of title on its claim as innocent purchaser for value without notice when it admits to facing criminal charges on the property to which it has been put to defence. The Respondents submit that there is outright fraud in acquisition suit property and lists the particulars of the same.

It is further submitted that purchase of property through a public auction does not divest the purchaser of the need to do due diligence and relied in ***Maina Wanjigi & another v Bank of Africa Kenya Ltd & 2 others [2015] eKLR*** that a public auction is valid and if undertaken according to the law and the court held thus;

> ***"So to answer the questions I posed herein above, I do not think, especially for the case at hand, that an auction can be held in stages during the cause of a day, where in one or more stages, the auctioneer a wait for hitherto unknown bidders, or picking***

bidders enroute like a moving bus or matatu picking passengers. If that is allowed to happen the entire integrity of the public auction process would be compromised, and with it the rule of law. This will open doors to speculation with the possibility of the auctioneer colluding with hitherto unknown bidders to defeat the bids put on the floor of the auction house. Such a process, if allowed, would be unlawful. That is exactly what took place in the matter at hand. Since there was no auction as deemed by the law, whatever transpired on 3rd June 2014 purported to be a public auction, was not a public auction, was an unlawful process which was incapable of conferring any title or proprietary rights to the alleged successful bidder - the 3rd Defendant. I therefore reject the submission that the Third Defendant had acquired title which needs to be protected by law. A title can only be acquired through a lawful process which this was not".

The Respondents submit that the suit land can be leased out or developed by the state without any order as the title held by the petitioner was declared a nullity and relied in the case of ***Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169 L*** on the effect of nullity. The 1st and 4th Respondents submit and pray that the petitioner's case be dismissed for lack of merit and costs to be awarded to the Respondents as it is not entitled to the reliefs sought based on an illegitimate title.

2nd Respondent's Case

The 2nd Respondent given a chronology of events in respect of the suit property and how it was purchased by the Government of Kenya in favour of the 5th Respondent, in brief thus that previously Miwani Sugar Mills Limited was the owner and proprietor of **L.R. 7345/3 (I.R. 21038)**. That upon Miwani Sugar Mills Limited being placed on receivership, the GoK created interest and offered to purchase it which offer culminated to the agreement dated **09-04-199**. The agreement contains the assets sold to the GoK. The 2nd Respondent contends equally as the 1st and 4th Respondents that the suit property was purchased by the GoK. The 2nd Respondent argues that the 5th Respondent is the sole beneficial owner and that the terms of settlement of the agreement dated 09.04.1990 were made and produces as a confirmation. The 2 nd respondent relies on the Gazette Notices produced as exemption of Stamp Duty and application of Land Control Act to support its case that the suit property belongs to the state.

The 2nd Respondent further contends that Miwani Sugar Company (1989) Limited [1989 ltd], received a financial accommodation from Kenya Sugar Board and M-Orient Bank Limited (Formerly Delphis Bank Limited), and executed debentures in favour of the financiers who placed it under Receivership.

According to the 2nd Respondent, an agreement was reached and Kenya Sugar Board took over the debts of M-Orient Bank (Formerly Delphis Bank Limited) and the bank handed it all securities including the title document to the suit property.

The 2nd Respondent contends it has original title to the suit property and the 5th Respondent is in possession. As the 1st and 4th Respondents, it relies on the decisions in Kisumu HCCC No. 225 of 1993 and Court of Appeal in holding that the orders to attach and sale property were a nullity and of no legal consequence. The 2nd Respondent contends that the Petitioner was charged in Kisumu CMC Cri. Case No. 429 of 2010, which case, after the trial court acquitted the petitioner, the High court set aside the same. According to the 2 nd Respondent, the annexures marked **"BS-12, 13, 14, 15, 16 and 17"** are of no probative or evidential value and do not give title to the Petitioner. The 2nd Respondent contends that the sale was fraudulent. The 2nd Respondent contends that the claim for loss of user cannot arise as the petitioner`s title is a nullity. According to the 2nd Respondent, the value of the property and whether the Petitioner has been disfranchised to make some income is immaterial for reasons advanced by it. The 2nd Respondent contends that its invitation as advertised by it for International Expression of Interest for leasing of the 5th Respondent was not only right and justified but also based on legal justification that L R 7545/3, the suit property was owned by the 5th Respondent. The 2nd Respondent further contends that the provisions of Article 40 of the Constitution is not available to the Petitioner as it protects title lawfully acquired unlike the case at hand. The 2 nd Respondent in totality contends that the Petitioner does not have a good title to the suit property and it belongs to the **state** hence the Petitioner cannot get refuge in any of the Articles of the constitution or any other laws for the prayers it seeks in the petition.

The 2nd respondent submits that its request for bids to lease out the suit property is justified hence the petitioner`s claim is not tenable and prays for its dismissal. That the petitioner sought prayers beyond the 2nd Respondent which touched on the 5th Respondent before it was made a party.

The 2nd Respondent further submitted that the petitioner`s claim on ownership emanated from Kisumu HCCC No. 225 of 1993 where the petitioner alleged that it bided for and purchased the property in a public auction. Having analyzed the petitioner`s claim as above, the 2 nd Respondent raised three (3) issues for determination one being ***whether the Petitioner can re-litigate the issues raised in Hcc No. 225 of 1993 and Civil Appeal No. 261 of 2008 through this petition*** to which it submitted it can cannot since the courts declared all orders a nullity and anything declared a nullity has no force of law.

The 2nd Respondent further submitted that by virtue of the said decisions the petitioner cannot be said to be the owner of the suit property the court having void the title and held it a nullity and no further appeal was preferred. The 2nd Respondent submits that the court lacks jurisdiction to determine the issues raised in the petition since the title was derived from HCCC No. 225 of 1993 which proceedings were declared a nullity and an appeal therefrom was unsuccessful in Civil Appeal No. 261 of 2008.

The 2nd Respondent submits that seeking to determine the issues raised in the petition will amount to sitting on appeal in view of the two decisions submitted above. The 2nd Respondent`s 2nd issue for determination is whether the orders sought can be issued and it submits that the court is functus officio in view of the decisions in the two matters declaring the petitioner`s title a nullity and therefore they cannot issue. On the last issue, which is whether the petitioner`s fundamental rights have been infringed, the 2 nd Respondent submits in the negative and says that in can only be litigated in the two matters submitted above and not a fresh claim as herein. For the above reasons the 2 nd Respondent pray for the dismissal of the petition with costs.

3rd Respondents Case

The 3rd Respondent filed a response to the petition dated **25-09-2020** and a replying affidavit of **Edris Omondi** sworn on **25.09.2020** both filed on **25-09-2020** and a further affidavit sworn and filed in court on **19.11.2020** by the same deponent**.** The 3rd Respondent avers that **Miwani Sugar Millls Limited** was founded by the Hindocha family hence a private entity. The 3rd Respondent further avers that that state acquired **49%** and Vanessa took **51%** of the shares of **Miwani Sugar Company (1989) Limited** which company was formed to take over the assets of Miwani Sugar Mills Limited. It is a private limited liability company. It further avers that the 5 th Respondent (1989 Ltd) did nothing to have LR 7545/3 (IR 21038) transferred unto itself. According to the 3rd Respondent, the **Sugar Task Force** report of 1989, the 5th Respondent could not operative profitably hence placed under receivership by the debenture holders. The 3 rd Respondent further avers that the debentures excluded land as they were specific to plant and equipment. It is further contended that the Receiver Managers failed to take an inventory of the assets of the 5th Respondent. According to the 3rd Respondent, the Receiver Managers strangely advertised for sale of the 5th Respondent and electively approached Surjit Singh and Malkit Singh, who were creditors, and negotiated for a sum of Kshs. 350,000,000/= without involving other unsecured creditors.

The 3rd Respondent avers that LR 7545/3 (IR 21038) was advertised in the newspapers for sale and was sold to the Petitioner who is the titleholder for the last 12 years a fact that was known to the 5th Respondents as confirmed by their witnesses in the criminal case.

According to the 3rd Respondent, the Receiver Managers` negligence contributed to the present position when the petitioners bought the suit property in a public auction being bonafide purchasers for value without notice and the 5th Respondent has never held title to the property. According to the 3rd Respondent, any right to title by the 5th Respondent was extinguished in law by virtue of Limitation of Actions Act and sections 23, 24 and 26 of the Land Registration Act. The 3rd Respondent contends that agriculture is a devolved unit under it.

The 3rd Respondent avers that the 5th Respondent has misappropriated the sum of Kshs. 3.6 billion as per the Internal Audit Report of August, 2020. The 3rd Respondent contends that the court has jurisdiction to determine the issues raised in the petition in finality.

The 3rd Respondent avers that the suit is not ***res judicata*** as claimed by the Interested Party as the issue in those suits referred to was the issue of ***"re-issue of summons"*** in the High Court case.

The 3rd Respondent further contends that the views of the Interested Party to hold that a unanimous decision of The Court of Appeal in 112 of 2015 to be wrong in fact and law when there is no appeal from it and single out a judge of the court in his affidavits ougth to be struck out for reducing the judgment as if it was a single judge judgment.

It further contends there is clear conflict of interest when the 2nd respondent is the regulator, receiver and debenture holder of the 5th Respondent at the same time which has resulted to mismanagement, misappropriation of funds and giving misleading information to the Auditors and GoK to keep themselves floating. The 3rd Respondent avers that the 1st Interested Party`s affidavit does not have any probative value for the deponent is a convict as per the judgment of Kisumu HC Cri. Appeal no 44 and 45 of 2007.

The gravamen of the 3rd respondent's submissions was that Article 186 of The constitution stipulates the functions and powers of the National and County Governments and that agriculture is a devolved function. The 3rd Respondent further submits the notice issued by the 2nd Respondent, herein after referred to as **AFA**, ***International Expression of Interest*** in leasing out MIWANI SUGAR COMPANY (1989) LIMITED is an affront to the constitution and law and done without jurisdiction and therefore ultra vires for the reason that the subject suit property squarely falls under the 3rd Respondent`s jurisdiction or authority; assuming it belonged to the Government.

The 3rd Respondent referred the court to Agriculture and Food Act No.13 of 2013 to demonstrate that **AFA**, even when exercising its mandate under the Act, it must consult the County Government which it did not. The 3rd Respondent also submitted that there was no public participation. The 3rd Respondent also submitted that L.R. 7545/3 is private property that cannot be available for leasing out by the 2nd Respondent. The 3rd Respondent submitted that the dictates of the provisions of **Order 21 Rules (78) and (79) [Now Order 22 rules (74) and (75) of The Civil Procedure Rules, 2010** were not invoked by the 5th Respondent to set aside the auction to date and to put home the point relied on the decision of the Court of Appeal in the case of ***Stanley Ng'ethe Kinyanjui v Tony Ketter & 5 others [2015] eKLR*** on alternatives available for a party who has interest in the property sold in a public auction.

It was further submitted that once the court has confirmed the sale by way of public auction and no application had been made under **Order XXI (As it were) Rules 78 or 79,** any of the 5th Respondent`s perceived rights were extinguished in law and to buttress its submissions on that point relied on the decision of the Court of Appeal in ***Muliro Vs Ochieng (1987)KLR 549*** at ***page 555*** where the court held thus;

> ***"when the Senior Deputy Registrar made the order confirming the sale it became absolute so far as the interest of Mr.Muliro in the farm was concerned: Order XXI Rule 81(1); and no suit to set aside that order made under that rule may be brought by Mr. Muliro; Order XXI rule 81(3); and suit means all civil proceedings commenced in any manner prescribed: section 2 of The Civil Procedure Act".***

On the issue of fraud as alleged by the 5th Respondent, it is submitted there are no particulars or evidence to support the same and relied on the decision in the case of ***Gichinga Kibutha v Caroline Nduku [2018] eKLR*** and in the case of **Joseph Bockle —v- Coquero Limited, (2014) eKLR** where the Court of Appeal on the same issue of fraud held as follows; -

> **"*In our view the appellant's assertion that the respondent's acquisition of the suit premises smacked of fraud and illegalities***

cannot stand scrutiny. In the case of Koinange & 13 others v Koinange [1968] KLR 23 it was held that allegations of fraud must be specifically pleaded and strictly proved on a standard below beyond reasonable doubt but above the usual standard in civil proceedings, that is on the balance of probabilities. Counsel for the appellant seems to be laying their obligation to strictly prove the fraud allegedly committed by the respondent on the court by calling upon it to investigate the issue whether pleaded or not. Parties ought to know that they have an obligation to present a prima facie case of fraud or illegality before the court can investigate the issue. Mere mention of fraud or illegality in passing will not do. In the case of Westmont Power (Kenya) Limited v Westmont Power (Kenya) Limited [2003] eKLR the court in addressing the issue of pleading fraud as a defence stated that: "Setting up one's case or defence is to compose, propound, posit, or begin to develop and show the structure of the case of defence. One is required to place in view the line of case or defence and show the structure of the case of defence intended to be pursued……"

*And i*n the case of ***John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR*** the Court of Appeal, when considering an appeal where the Appellant failed to particularize allegations of fraud held

> ***"The appellant cannot therefore fault the trial court for not invoking the saving provisions and admitting his claims of fraud without having particularized the alleged acts or omissions so that the respondents could sufficiently answer to them and allow for their canvassing through evidence in trial. In the case of*** **Rosemary Wanjiku Murithi v George Maina Ndinwa (2014) eKLR*****, this Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud. Even if perchance we were to be swayed by the appellant's arguments and invoke Article 159 of the Constitution so as to determine the appellant's allegation of fraud against the respondents on merit, then we would still find that the claim fails for want of evidence. The appellant's case is simply devoid of evidence showing or imputing fraud or irregularity against the respondents as the trial court correctly found. In any case, in*** **Meme v Republic (2004), EA 124; (2004) e KLR birrebb637*****, it was held that a court is empowered to draw from the Civil Procedure Rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual Practice and Procedure Rules otherwise known as Mutunga rules, 2013).***

The 3rd Respondent also submits that the property was not registered in the name of the 5th Respondent by sheer negligence of the 5th Respondent. It was submitted that the court has jurisdiction by dint of Article 162 of the constitution and section 13 of the Land and Environment Court Act. The 3rd Respondent submits that the 5th Respondent is unnecessary party to the proceedings because the principal is the 2nd Respondent and the debentures they rely on did not touch on land hence lack locus standi and relied in **Mumo Matemu (Supra)** where the Court held that;

> "It is proper to note that the evaluation of locus ought to be based upon the constitutional consideration of capacity (Articles 3, 22 and 258, the nature of the suit and the enforceability of the orders sought. These considerations inform the enforcement mechanisms and coherent clarity of the following inquiries. Who will the orders be enforced against? Who bears the costs of litigation if at all? Who represent the parties in Court"?

> And also the case of **Law Society of Kenya Vs Commissioner of Lands & Others, Nakuru High Court Civil Case No.464 of 2000, and Alfred Njau and Others ...Vs. City Council of Nairobi (1982) KAR 229**.

The 3rd Respondent further submitted that the affidavit evidence of **Francis Ooko** is inadmissible evidence by dint of Order 19 rules (3) and (5) of the civil procedure rules, since the deponent is not the Receiver Manager nor **Harun Kirui** as alleged and therefore cannot purport to depose as such and the affidavit does not pass the test laid under **Section 33 of The Evidence Act** and relied on the case of ***Republic v Kenya Revenue Authority Ex Parte Althaus Management & Consultancy Limited [2015] eKLR***.

The 3rd Respondent on a point of law as to the competence of the cross petition of the 1st and 4th Respondents where the 1st Respondent to the cross petition states that "***is the relevant Cabinet Secretary in relation to the Agriculture and Food Authority Act, 2013"*** and the petition is filed by **Oscar Eredi, Deputy Chief State Counsel for Attorney General,** it is submitted that since, the law firm of **Kale Maina & Bundotich Advocates** are on record for **AFA,** the 2nd Respondent to the petition, there is no compliance with **Order 9 rule (5) of The Civil Procedure Rules, 2010** or ***Mutunga rules*** in that the same is filed by an Advocate who is not on record for a party and the same is incompetent and abuse of court process.

The 3rd Respondent on the same footing as above, submits that the Cross Petition filed on behalf of the 5th Respondent ought to be struck out in the least for a party cannot have two different legal representations in the same matter at the same time.

It is further submitted that Miwani Sugar Company (1989) Limited [In Receivership] is a private limited liability company as evidenced elsewhere and submitted hereinabove hence the honourable Attorney General cannot purport to appear and agitate alleged rights of a private company using taxpayers' money.

The 3rd Respondent submits that the Cross Petition is incompetent for failure to meet the threshold in **Anita Karimi** case and relied in the case of ***Benedict Sabala Tendwa & 3 others v County Government of Kakamega [2019] eKLR, Meme vs. Republic [2004] eKLR and Mumo Matemu vs. Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012.***

The 3rd Respondent further submits that the Attorney General cannot purport to file a petition for parties as the cross petitioners do not qualify to be a person who can pursue constitutional rights under the constitution for as the office AG is a state organ as defined under Article 260 of The Constitution and supported his position by relying in the case of ***Meru County Government v Ethics & Anti- Corruption Commission (2018) eKLR***, where the Court of Appeal as explained what is a state as thus

"„state organs"

"„State", when used as a noun, means the collectivity of offices, organs and other entities comprising the government of the Republic under this Constitution;

'State organ' means a commission, office, agency or other body established under this Constitution";"

The court further held

"….The point of departure between the parties herein which is the gravemen of this appeal, is whether by reason of being a person, a county government can sue for violation of the rights and fundamental freedoms enumerated in the Bill of Rights in respect of itself.

It would be axiomatic that if by reason only of having capacity to sue a county government would also be in a position to sue and enforce rights in the Bill of Rights, then by parity of reasoning, the national government and indeed the State would be equally entitled to do so. But can this be" We think that the answer lies in the opening words of Article 260 of the Constitution which precedes the various meanings to be attached to a selection of term with the words; "In this Constitution, unless the context requires otherwise – ..."

(our emphasis)

….And we do think that when it comes to the Bill of Rights, the context must dictate that the rights and fundamental freedoms cannot possibly attach to a county government. Indeed, the content of the Bill of Rights is by definition largely anthromorphic and deals with human rights as such. There would thus be an absurdity for a county government to purport to directly claim or seek to enforce for itself the rights and freedoms listed therein. It bears recalling that the entire human rights edifice lies on theoritical framework built in large part on the natural law theories which treat human rights as a human attribute flowing directly and inescapably from the humanness of the right holders. ……..

Professor Julius Stone in Human Law & Human Justice Universal Law Publishing Co. (1965) traced modern human rights to natural law and its central thesis that individual human beings are endowed with certain rights flowing from the laws of nature as follows at (p89-90);

"The principal aim of society, said Blackstone, opening his pages in Vattelian fashion, „is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature ..." And he also tells us that „this law of nature being coeval with mankind and dictated by God himself, is of course, superior in obligation to any other .... No human laws are of any validity if contrary to this.

....

We are thus firmly persuaded that in its historical origins, conceptually and doctrinally, the Bill of Rights in our Constitution enumerates rights that are essentially human rights and so are claimable essentially by individuals. Indeed, under the general provisions relating to the Bill of Rights, the Constitution at Article 19(2) and (3) declares the centrality of the individual person as The owner of rights and by juxtaposition contrasts with the State, as follows;

"19(2) The purpose of recognising and protecting human rights and fundamental freedoms is to preserve the dignity of individuals and communities and to promote social justice and the realisation of the potential of all human beings.

(3) The rights and fundamental freedoms in the Bill of Rights-

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognized or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to limitations contemplated in this Constitution." (our emphasis)

> ***These rights are spoken of together and often interchangeably with fundamental freedoms and the context is clearly personal and individualized. The Constitution at Article 21(4) commands the State to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms. These obligations flow from international and regional human rights treaties, conventions and other covenants which all speak of human rights and fundamental freedoms of individuals. It is no surprise indeed that Article 25, in declaring the fundamental rights and freedoms that may not be limited, the „super rights" if one please, that are non-derogable, contains a list that is selfevidently personal and can only belong to individuals in their natural human capacity. The entire corpus of rights is of the same character in tone, content and context and proceeds overwhelming from an individual, human personalized perspective.***

When it comes to enforcement of the Bills of Rights, however, the Constitution in Article 22(1) provides for locus by first

acknowledging that every person has the right to institute court proceedings claiming that a right or fundamental freedoms in the Bill of Rights has been denied, violated or infringed, or is threatened. This acknowledges the primacy of the individual as the first claimant and enforcer of the Bill of Rights in respect of himself. Besides the implicated individual, however, the Constitution literally flings open the gates of locus standi, long held shut by narrow minimalist approaches, in the next sub-Article;

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

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of, or in the interest of, a group or class of person s;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members."

Our understanding of this provision is that whereas only individual persons bear rights and can be victims of violation of such rights, either in singular or in plurality, say as a group or a class of persons, when it comes to enforcing the Bill of Rights, the litigant need not be a person directly affected. Thus one may sue on behalf of a person unable to act in their own name, such as a child, and one may also sue in representative capacity or in the public interest. Moreover, an association may move the Court on behalf and in the interest of its members.

For purposes of enforcement, therefore, all one needs establish is that he or she is a person capable of suing and Article 21 must, consistently and in conformity with the contextual command of Article 260, be so construed as to include persons other than individual human persons in the construction of the persons who can enforce rights even though, against contextually, such nonindividuals may not be themselves holders or wielders of rights and fundamental freedoms under the Bill of Rights.

………We respectfully agree with the sentiments expressed in that case. State organs can indubitably file suit inter se to protect various rights, capabilities, competencies and privileges accorded to them by the Constitution. What they cannot in and of themselves do, is to purport to claim for themselves and enforce for themselves qua State organs, the rights enumerated in the Bill of Rights. Such rights as we have stated, and the Kisumu Bench as well, belong only to individuals as natural persons who only can enforce or protect them in person or through any other persons be they natural or juristic.

Now, had the various officers of the appellant or any one of them, on behalf of whom the appellant went to court, been copetitioners claiming that their rights as individual natural persons had been or were in danger of being violated or infringed, the petition before the learned Judge would have been competent. They were not joined, however, and the claim as it stood was to the effect that the appellant, a juristic person and a State Government at that, had been a victim of violation of various postulates of the Bill of Rights. We think that in principle the petition as presented was making impossible claims and was factually contradictory and so incompetent. This finding is on all fours with the pronouncement of this Court in the CHOLMONDLEY (supra) case which we have referred to earlier in this judgment and with which we are in full concurrence: the Bill of Rights affords protections and guarantees for natural persons as individuals and that protection does not extend to the State or its organs such as national and county governments. We are thus persuaded that the learned Judge was correct in holding as he did that the appellant is not a person who can petition the High Court for violation of own fundamental rights and freedoms under Article 22 of the Constitution by another State organ".

The 3rd Respondent, submitted that the right to information under Article 35 of the Constitution, has no restrictions and that the response of the 1st Cross Petitioner did not raise any alarm when some documents were relied on by the petitioner/Respondent to the Cross Petitioner therefore the Cross Petitioners cannot ask the court, as their main prayer, to expunge or strike out documents used in support of the petition and not a Cross Petition and relied in the case of ***Trusted Society of Human Rights Alliance & 3 others v Judicial Service Commission & another [2016] eKLR and Katiba Institute V Presidents Delivery Unit & 3 others(2017) eKLR.***

The 3rd Respondent submitted it was in the interest of the people of Kisumu County to see proper and efficient economic use of the suit land which will lead to improved standard of living in the region. Further, it was submitted since the GoK has written off all debts of Miwani Sugar Company (1989) Limited [In receivership], hence ready to lease it out, there is technically no receivership over the company and the same should revert back to the original owners; shareholders.

The 3rd Respondent further submitted that the proposed Special Economic Zone will immensely benefit the residents of Kisumu as this shall ensure increased trade balance, employment, increased investment, job creation and effective administration and this will only be possible if the property is lawfully acquired. The 3rd Respondent urged the court to overlook the technicalities as to ownership of the suit property and allow the principle of proportionality to take effect as was recognized by **Ojwang, J** (as he then was) in Nairobi Misc. Civil Case (Judicial Review) No. 109 of 2004 – **Republic vs. The Minister for Transport & Communications & Others ex parte Gabriel Limion Kaurai & Another.**

5th Respondent`S Case

In response to the petition, the 5th Respondent filed a replying affidavit sworn by **Francis Ooko** on **24.09.2020** and filed on the same day. He depones that he is one of the Receiver managers of the 5th Respondent and annexed an appointment letter from the 2nd Respondent marked **"FO-1"** to his affidavit. The 5th Respondent contends that **Buggar Singh** is an employee of Kibos Sugar and Allied Industries Limited. The 5th Respondent contends that Miwani Sugar Company (1989) Limited, was formed to take over the assets of Miwani Sugar Company

Limited and the **state** initially had **49%** shares whereas Vanessa had **51%** shareholding of the company. Later on, the state bought out Vanessa and the Respondent has annexed documents marked ***"FO-2"*** to support his averments. The 5th Respondent contends that by virtue of the Gazette Notices marked ***"FO-3a and 3b"*** everyone had constructive notice of public interest in the suit property.

The 5th Respondent contends that the petitioner is a sister company of Kibos Sugar and Allied Industries Limited and was used to steal public land which resulted to the criminal case. The Respondent avers that the urge to acquire the suit property was hatched by persons behind Kibos Sugar and Allied Industries Limited (KSAIL) and annexed "FO-5" in support.

The 5th Respondent contends a notification of sale was issued by Jogi Auctioneers and redemption notice of 45 days on or about 02.11.2007 which did not indicate which property to be sold and annexed the same marked ***"FO-6"***.

The Respondent avers that its counsel perused the court file and duly informed them of the position of the matter in court in paragraph 12 of the replying affidavit and gave further instructions to their counsel on the way forward. The Respondent avers that it moved court to forestall the sale but the court did not give any interim orders and the sale proceeded**.**

The Respondent challenges and alleges that the auction sale was a sham at paragraph 17 of the affidavit and has detailed reasons for the same and holds that the petitioner was behind and stage-managed theft of the suit property. The 5th Respondent contends that the plaintiff in Kisumu HCCC No.225 of 1993 is non-existent and annexed an application dated 03.07.2007 marked **"FO-21"** to support its position.

The 5th Respondent in its replying affidavit in paragraph 20 contends no money was paid out for the alleged purchase and challenges the petitioner for proof of payment. The 5th Respondent avers that the Petitioner and others committed fraud in the acquisition of the suit property by the petitioner including the Deputy Registrar and Counsel for the decree holder.

The 5th Respondent heavily relies on the proceedings of the criminal case and the HCC No. 225 of 1993 to contend that the process was not lawful and the petitioner does not have a good title to property. That what can be gleaned from paragraphs 26 to 49 of the replying affidavit, according to the Respondent, the petitioner participated in the proceedings and espouses the proceedings in Kisumu HCC No. 225 of 1993. The 5th Respondent contends that the Petitioner is a brief case company which does not own any property nor file returns.

The 5th respondent contends by virtue of the ruling of the Court of Appeal in civil appeal no. 261 of 2008, that the sale was based on a void judgment hence no title will pass to anyone including the Petitioner. The 5th Respondent avers that the Minister for lands then Hon. James Orengo, failed to accede to their request to revoke the petitioner`s title and asked for a specific order directing the Registrar to reverse the subject entries. The 5th Respondent avers that it appealed from the decision of the court in dismissing its application being civil appeal no. 112 of 2015 in which appeal the Court of Appeal agreed with the petitioner that it was a land dispute to be heard by the Environment and land Court. The 5th Respondent asserts that the Petitioner was not an innocent purchaser for failure to pay money among other reasons.

The 5th Respondent contends that the petitioner is using the legal process to frustrate the state and the 5th respondent in its plan to lease out the suit property and the petition is one of the obstacles. The 5th Respondent contends that the petition is an abuse of court process and an invitation to contradict what has already been determined in Kisumu HCC No. 225 of 1993 and Court of Appeal No. 261 of 2008. The 5th Respondent contends that the issues raised herein were raised in a previous suit that was dismissed for want of prosecution.

The 5th Respondent further filed a response and a cross –Petition whose import is that Article 40(6) of the constitution of Kenya and section 26 of the Land Registration Act, 2012 does not protect a title that has been acquired unlawfully, illegally or irregularly through a corrupt scheme, according to it, like in the instant case. The 5th Respondent contends that acquisition of the suit property was tainted with illegality and irregularity and particularized and itemized the same in paragraphs **26 (a) to (m)** of its response. The 5th Respondent avers that there was public participation which is acknowledged by the petitioner. The 5th Respondent avers that the petition is res judicata by virtue of Nairobi Hccc No. 459 of 2008 which was dismissed for want of prosecution hence the court lacks jurisdiction. The 5th Respondent contends that the petition is an abuse of the court process and the petitioner is guilty of laches hence cannot benefit from the constitution.

In the Cross-Petition, the 5th Respondent has brought in a new Party, namely **The Chief Land Registrar**, as the **3rd Respondent** to the Cross- Petition. The Cross-petitioner avers that it is the beneficial owner on behalf of the Kenyan public and in possession of LR 7545/3(IR 21038), The 5th Respondent contends that for the reasons foretasted in the replying affidavit of **Francis Ooko** and the response to petition, the constitutional rights of the 5th Respondent have been violated by the 2nd and 3rd Respondents to the Cross-petition by their failure to cancel the title of the petitioner for being illegal, irregular and null and void abinitio. The 5th Respondent contends that its constitutional rights have been contravened by the 2nd and 3rd respondents to the Cross- Petition as follows;-

i). Under Article 27(1) of the constitution, by registering the 1st respondent as a proprietor of the suit property contrary to section 71 of the Registration of Titles Act (Now Repealed).

ii). Under Articles 27(1) and 27(2) of the constitution, by failing to act in accordance to the ruling in Kisumu HCC no. 225 of 1993 given on 13.06.2008.

iii). Under Article 40 of The Constitution, depriving it the right to the suit land without following due process.

iv). Under Article 48 of the constitution, the 2nd ,3rd , and 4th Respondents have failed to ensure access to justice by ensuring directives of the court are put to effect timeously.

v). Under Article 10 of the constitution, by the 2nd and 3rd Respondents registering the 1st Respondent (petitioner) as the proprietor and failing to cancel the entry of 29.01.2008 or rectifying the register in accordance with section 79(20 of the Land Registration Act, 2012.

vi). Under Article 10(2) (c) of the constitution, the 2nd and 3rd respondents failing to act with integrity and transparency as expected of them.

The Cross-Petitioner sought the following prayers; -

1. The petition be dismissed with costs to the 5th Respondent to be paid by the petitioner, Buggar Singh and Sukhwinder Chatthe personally.

2. The Cross-petition be allowed with costs to be paid by the petitioner, Buggar Singh and Sukhwinder Chatthe personally.

3. A declaration that the cross-petitioner`s rights under the constitution have been contravened as pleaded in the cross-petition.

4. A declaration be made that the registration of the petitioner in the main petition, M/s Crossley Holdings Ltd as the proprietor of LR 7545/3 (IR 21038) and the issuance of the provisional title in respect thereof was illegal and irregular and therefore null and void.

5. An order to be issued directing the 2nd Respondent in the Cross-Petition to cancel the entry made on 29th January, 2008 by which the petitioner in the main petition was registered as the proprietor of LR 7545/3 (21038).

The 5th Respondent submits that it was created in 1989 by the state to take over the assets of Miwani Sugar Mills Ltd and by then the state had 49% shares in the 5th Respondent and later on the GoK bought out the other shareholder. The 5th Respondent has always ever since been in possession and use of the suit property. The 5th Respondent submits that Sukhwinder Singh Chatthe is director of the petitioner and Kibos Sugar and Allied Industries (KSAIL) who attempted the bid for the assets of the 5th Respondent in vain and are behind the acquisition of the suit property.

The 5th Respondent has in detail submitted the process that took place in Kisumu HCCC No. 225 of 1993 and Civil Appeal No. 261 of 2008 that led to the acquisition of the suit property by the petitioner and held that there was no auction that took place but a diabolic process stage managed by the petitioner and its agents. It is further submitted that the process towards registration of title in favour of petitioner was flawed. The 5th Respondent, as in its affidavit, submitted that Nagendra Saxena is non-existent.

The 5th Respondent also submits that no single coin was paid towards the purchase price since if there were any payment the same should have been paid to the Auctioneer. It is submitted that the whole process was tainted with fraud and submits as a result several people were charged in Kisumu CM Cri. 429 of 2010.The 5th Respondent submits that the petitioner participated in the proceedings in HCC No. 225 of 1993 and Civil Appeal No. 261 of 2008 and raised th e same issues but the courts declined to grant their prayers. The 5 th Respondent submits that the petition is an invitation to contradict the decision of the Court of Appeal in 261 of 2008. The 5th Respondent upon submitting and analyzing the matter, has raised some issues for determination by the court based on the facts on record.

The 5th Respondent has raised the issue whether the petitioner has a lawful title to the property which it has answered in the negative based on the provisions of Article 40 (6) of the constitution which does not protect property unlawfully acquired and section 26 of the Land Registration Act which provides that there is no indefeasibility of title to land where it can be shown that land has been acquired fraudulently or by misrepresentation to which the holder of title is proved to be a party or through corrupt scheme. In support of its submissions it relies in the case of ***Jama Musa Hussein (Supra)***, ***Kenya Anticorruption Commission Vs Online Enterprises Limited & 4 others(2019)eKLR, Alice Chemutai Too Vs Nickson Kipkurui Korir & 2 others (2015) eKLR,Kisumu ELC No.8 of 2019 Johannes Akelo Omboto & Anor Vs Kenya railways Coorpration*** and others.

The 5th Respondent submits that the petitioner was part of the illegal acquisition of title and part of the corrupt scheme in that there is no evidence of payment of purchase price, stamp duty was paid by third parties, no money was paid to court, no order for sale of the property, consent to transfer obtained earlier, the auction was a sham, the petitioner is a sister company of KSAIL, provisional title obtained irregularly when the Respondent had the original title, non-service of major application on vesting order and decisions of courts declaring null and void the petitioner`s title.

The 5th Respondent submits that the petition is an abuse of the court process in that the petitioner participated in Kisumu HCCC No. 225 of 1993, Civil Appeal No. 261 of 2008 and also filed Nairobi HCCC No. 459 of 2008 in which it sought similar prayers like in the instant petition.

The 5th Respondent submits that the court lacks jurisdiction to hear and determine this petition by dint of Section 7 of the Limitation of Actions Act which bars filing of claims to land after twelve years taking into account the petitioner bought the land in December, 2007 or January, 2008 and the claim herein was lodged on 27.08.2020.

The 5th Respondent also submits that the court lacks jurisdiction as the same issue herein was handled in Nairobi HCCC No. 459 of 2008 and relied in the case of ***Co-operative Bank of Kenya Ltd Vs Cosma Mrombomoka & Legacy Auctioneering Services (2019)eKLR*** to put his point home where the court held thus;

"Undeniably the doctrine of res judicata is founded on public policy, which is aimed at achieving two objectives, namely, that there must be a finality to litigation and that a party should not be vexed twice on account of the same litigation. In the present appeal, it is not in dispute that both the former and the latter suit had the same parties in common. Also not disputed in this appeal, is the finding by the learned Judge that the subject matter in the two matters was one and the same; namely the recovery of monies owed in respect of an outstanding loan. What the appellant has laboured to contest is the finding that the former suit was not heard and decided within the meaning of Section 7 aforesaid".

Interested Parties Case

The Interested Parties filed a replying affidavit sworn by **Richard Ochieng Ogendo** on 10.11.2020 and filed in court on 11.11.2020 in opposition to the petition. The IP states that they are among the over 100,000 sugar cane farmers within Kisumu County who had been pushing the Government for a free sugar cane market and petitioned the state to privatize public sugar companies including the 5Th Respondent. According to interested partes, the state bought Miwani Sugar Mills in 1989 when it suffered inability to run its financial affairs in order to help them as farmers. It is further averred by interested parties that after the advertisement of IEOI by the 2nd Respondent, the petitioner filed this petition and obtained orders against it contrary to their expectation. The interested party avers that the petition herein does not raise any constitutional issue for determination. According to the interested party, the court has to determine the issue of how the petitioner acquired the suit property before the claim herein is determined in line with the decision of the court in Civil Appeal No. 112 of 2015. The interested party avers that the issue of validity of the petitioner`s title was settled in civil appeal No. 261 of 2008 where the court declared it void. The IP avers that the petitioner does not do any business nor file any KRA returns because it does not carry out any trade. Like other Respondents, the IP avers that the suit is res judicata. The Petitioner further avers that there is conflict of interest as the petitioner`s lawyer is a senator and yet has sued the County Government of Kisumu which he is supposed to check.

The Interested Parties filed their submissions on 21.04.2021dated 20.11.2020 in opposition to the petition and in support of the Cross-Petition. The **Interested Parties** have raised six issues for determination by the court.

The **Interested Parties** submits that they are properly before court as farmers and relies on the decision in the case of ***Kenya Human Rights Commission Vs AG & 6 others (2019)eKLR*** and submit they are not busybodies.

The **Interested Parties**, in its submissions, implored the court to take judicial notice that the sugar industry is ailing and the national government had been taking steps to improve the same and the revival of the 5th Respondent will greatly assist farmers who entirely rely on KSAIL a private entity.

The **Interested Parties** submit that the petitioner has not raised any constitutional issue hence no constitutional relief is available to her.

The **Interested Parties** submits that the petitioner has merely turned an ordinary civil suit into a constitutional petition which it is not, yet the claim can be determined under The Land Act, The Land Registration Act and The Land and Environment Court Act and relying on the decision in 112 of 2015 Makhandia JA, to submit that the petition is premature. The IP buttress their submissions by relying in the case of ***CNM Vs WMG (2018) eKLR, and Gabriel Mutava & 2 Others Vs Managing Director,Kenya Ports Authority & Anor (2016)eKLR.***

The **Interested Parties** submit that the petition is found on nothing the courts having declared the registration of the suit property null and void and relied in the case of ***Mercy Kirito Mutegi Vs Beatrice Nkatha Nyaga & 2 others(2013) eKLR*** on that point.

It is further submitted that the court cannot sanction an illegality as was held in ***Board of Trustees National Social Security Fund Vs Michael Mwalo (2015) eKLR***.

The **Interested Parties** submits that the provisions of Article 40 (6) of The Constitution and section 26(1)(a) and (b) of the Land Registration Act, 2012 debars the Petitioner from making any proprietary rights over the suit property.

The **Interested Parties** submits that the petitioner is out to sanctify its title under innocent purchaser for value without notice when it acquired the same unprocedurally and did not pay stamp duty. The **Interested Parties** submitted that the failure to obtain land control board consent vitiated the sale and relied on the case of ***Githu vs Katibi (1990) eKLR***.

The **Interested Parties**, like the 1st 2nd 4th and 5th Respondents submit that the matter is res judicata and relied in the case of JN & 5 Others Vs Board of Management, St. G School & Another (2017)eKLR and ***Accredo AG & 3 Others Vs Steffano Uccelli & Another (2019)eKLR*** where the court held;

"The doctrine of res-judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. See the Supreme Court's decision in the case of Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR".

The **Interested Parties** submits that the claim on damages is founded on an illegality, speculative and not based on any fact and that the petitioner should claim reimbursement from the person it paid the alleged purchase price. The **Interested Parties** submitted on the recusal of counsel on record for the petitioner but as noted earlier that issue was resolved by an early ruling on the application by the 2nd Respondent. The **Interested Parties** submitted that for the reasons advanced the petition be dismissed with costs.

The Petitioner filed supplementary submissions dated 8.12.2020 and filed in court on 9.12.2020. The petitioner submits the documents complained of are documents in the public domain. The Petitioner further submits that classification of documents is a process of law and not a simple administrative action as outlined in The National Security Council Act which the Respondents have failed to prove to the court that

the documents falls under that law or any other law and relied on the case of ***Hoswell Mbungua Njuguna T/A Fischer Marketing Concepts Vs Equity Bank Limited and Anor (2017)eKLR***. The Petitioner further submits the Cross-Petitions were filed out of time without leave of court.

The Petitioner further submits that the Cross-Petitions are incompetent having been filed by the Attorney General and 5th Respondent respectively contrary to the holding in the case of ***Meru County Government (Supra)*** where the court held that a state organ can only enforce constitutional rights against another state organ but not against a private entity.

The Petitioner further submits that it is not enough for the 5th Respondent to allege that the petitioner is a brief case company with no business, does not own property, does not have bank account or does not file tax returns without providing evidence of its allegations.

The Petitioner submits that the Cross-Petitions are were filed out of time without leave, do not meet the threshold of a cross petition as set out in rules 10(2), 15 (2) (3) and 21(2) of the ***Mutunga Rules*** hence be dismissed.

Analysis and Determination

This court has read and considered the Petition, the Respondents' responses and the written and oral submissions and has set out the same as above at length and has established the issues for determination are as follows:

i. Whether the court has jurisdiction to hear and determine this petition.

ii. Whether the petition is res judicata.

iii. Whether the petition is time barred.

iv. Whether the 5th Respondent and the Interested Parties are necessary parties in this petition.

v. Whether the annexures marked **BS-13, 14, 15, 17** and **19** are privileged and classified documents that should be expunged from the proceedings.

vi. Whether **L.R. 7545/3 (I.R.21038)** is public land.

vii. Whether the Government of Kenya complied with the law in its transactions with **Miwani Sugar Mills Limited [In receivership]** and **Miwani Sugar Company (1989] Limited [In receivership].**

viii. Whether the Cross-Petitions are properly before court.

ix. Whether the petitioner has proved its claim.

x. Whether the Petitioner's constitutional Rights have been violated in any way.

xi. Whether the Petitioner deserves the prayers in the Petition and specifically an award of General and Special Damages as pleaded.

I. Whether the court has jurisdiction to hear and determine this petition.

The Respondents, quite early in their pleadings, raised the issue that the court lacked jurisdiction and it was agreed by consent of all parties that the petition be canvassed by way of written submissions. In the case of ***Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR*** where **Nyarangi JA** held thus;-

> ***"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:***
>
> ***"By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means".***

In ***Republic vs. Karisa Chengo & 2 Others [2017] eKLR***, the Supreme Court held as follows:

> ***"By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the***

particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics…where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.".

Article 165(5) of the Constitution divests the High Court the jurisdiction in respect of matters falling within the jurisdiction of the courts contemplated under Article 162(2) of the Constitution. The Supreme Court delved into the issue of the jurisdiction of this court vis-a-vis the jurisdiction of High Court in great detail in the case of ***Republic vs. Karisa Chengo & 2 Others [2017] eKLR*** in which it held as follows:

> ***"[52] In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act… From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal's decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa..."***

This court is a creation of **Article 162(2)(b) of The Constitution** and its Jurisdiction is derived from Section **13** of **The Environment and Land Court Act [The Act]** and the preamble to the Act states;

> ***"An Act of Parliament to give effect to Article 162(2)(b) of the Constitution; to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes"***

And section 13 provides;

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) …..; and**
>
> **(e) any other dispute relating to environment and land.**

The petitioner contends that her constitutional rights as the registered proprietor **of L.R 7545/3(I.R.21038) [Suit Property]** have been violated by the Respondents and proceeded to cite the alleged contravened constitutional rights and statutes which it relies on including the above quoted Act.

In rebuttal, the 1st,2nd ,4th, 5th and Interested Parties were categorical that the suit property was not properly acquired by the Petitioner hence cannot assert any violation of her constitutional rights by virtue of its registration.

In Kisumu **HCCC No. 225 of 1993** between **Nagendra Saxena Vs Miwani Mills Limited** (Hereinafter referred to as **HCCC No. 225 of 1993**), when the court was invited to cancel the Petitioner`s title by the 5th Respondent, the Honourable **Chemitei J** declined for want of jurisdiction and an appeal was preferred to the Court of Appeal at Kisumu being civil appeal No. 112 of 2015(Hereinafter **Appeal No. 112 of 2015**) where **Hon. Makhandia JA** held thus;

> ***"As I have already stated elsewhere in this judgment, the High Court did not have jurisdiction either. This issue can only be determined by a court of competent jurisdiction, the ELC as provided for by Section 13 of the Environment and Land Court Act and Article 162 (2)(b) of the constitution".***

The elephant in the room revolves around the title held by the Petitioner which the Respondents have submitted it is illegal to which the petitioner asserts it is legal and lawful hence the basis for this petition.

Since the issues concern and revolve around '***disputes relating to…, and title to, land'*** under **Article 162(2)(b) of The Constitution**, this court is seized of jurisdiction as per **section 13** of **The Act**.

II. Whether the petition is res judicata.

The 1st and 4th Respondents addressed the issue of ***res judicata*** in its submission that ***"the issues of violation of the petitioner`s rights have been litigated and concluded in HCCC 225 of 1993 and Civil Appeal No. 216(sic) of 2008"*** and the same position was taken by the 2nd respondent in its submission that it was its first issue for determination ***"whether the petitioner can relitigate the issues raised in HCCC 225 of 1993 and Civil appeal No. 261 of 2008"*** as it will amount to sitting on appeal in view of the aforesaid decisions of those courts.

In its response to the Petition and Cross-Petition, the 5th Respondent has averred at paragraph 39 that the petition is res judicata for the same prayers the petitioner seeks were sought and litigated upon in **Nairobi HCCC No. 459 of 2008** where the suit was dismissed for want of prosecution.

Under **Part V** of the Interested Parties` submissions, they also hold that the suit is res judicata in view of the decisions in the three cases.

According to the Petitioner, it has never been heard ***"on the question of its right of ownership and interest over the land and no proper suit had been lodged to interrogate and question of the validity of the petitioner`s title and no such determination has been made".*** To buttress its submission on the point, it relied on the case of ***Independent Electoral and Boundaries Commission Vs Maina Kiai and 5 others (2017) eKLR***. In the case of ***Independent Electoral and Boundaries Commission Vs Maina Kiai and 5 others (2017) eKLR*** the Court of Appeal has succinctly listed some elements that must be satisfied for the doctrine to apply thus;

> ***"Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***
>
> ***(a) The suit or issue was directly and substantially in issue in the former suit.***
>
> ***(b) That former suit was between the same parties or parties under whom they or any of them claim.***
>
> ***(c) Those parties were litigating under the same title.***
>
> ***(d) The issue was heard and finally determined in the former suit.***
>
> ***(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.***
>
> ***The learned Judges were fully aware and applied their minds to these elements when, applying this Court's decision in Uhuru Highway Development Ltd v Central Bank of Kenya [1999] eKLR they rendered the elements as;***
>
> ***"(a) the former judgment or order must be final;***
>
> ***(b) the judgment or order must be on merits;***
>
> ***(c) it must have been rendered by a court having jurisdiction over the subject matter and the parties; and***
>
> ***(d) there must be between the first and the second action identity of parties, of subject matter and cause of action."***

The Supreme Court in the case of ***Tom Martins Kibisu v Republic [2014] eKLR*** *held*

> ***"Res judicata is a rule to restrain repetitive claims before Courts of concurrent jurisdiction. As a rule of finality to litigation, it bars a party from re-litigating concluded similar-issue claims, involving same parties and same subject matter, where a Court of competent jurisdiction has made a final determination. This rule is laid out in Section 7 of the Civil Procedure Act (Cap.21, Laws of Kenya), which thus provides:***
>
> ***"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."***

The Court in the case of ***OKIYA OMTATAH OKOITI V COMMUNICATIONS AUTHORITY OF KENYA & 14 OTHERS, PETITION NO.59 OF 2015,*** *reiterated the rationale and underlying principles for res judicata to apply in the following terms;*

> ***[17] For res judicata to be invoked in a civil matter therefore, the issue in a current suit must have been previously decided by a competent Court. Secondly, the matter in dispute in the former suit between the parties must be directly or substantially in dispute between the parties in a subsequent suit where the doctrine is pleaded as a bar. Thirdly, the parties in the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title. (See the case of Karia and Another vs the Attorney General and Others (2005) 1EA 83).***
>
> ***[18] The rationale behind the provisions of Section 7 above entrenching the doctrine of res judicata is that if the controversy in issue is finally settled, determined or decided by a competent Court, it cannot be re-opened. The doctrine is therefore based on two principles; that there must be an end to litigation and that a party should not be vexed twice over the same cause. This was***

what was held with approval in Omondi vs National Bank of Kenya Ltd and Others (2001) EA 177.

The purpose and rationale of the doctrine of ***res judicata*** is further captured well in the decision of ***Accredo AG & 3 Others Vs Steffano Uccelli & Another (2019)eKLR*** relied by the Interested Parties where the court held;

> ***"The doctrine of res-judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. See the Supreme Court's decision in the case of Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another [2016] eKLR.***
>
> ***30. Expounding further on the essence of the doctrine this Court in John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR pronounced itself as follows:***
>
> ***"The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."***

In ***Maina Kia case (Supra)*** the Court of Appeal expounded the purposes of the law as thus;

> ***"The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.***
>
> ***There is no dearth of learning or authority surrounding this issue, and this Court has expressed itself on it endless times. In one recent decision, William Koross v. Hezekiah Kiptoo Komen & 4 Others [2015] eKLR, it was stated;***
>
> ***"The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all-too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.***
>
> ***Speaking for the bench on the principles that underlie res judicata, Y.V. Chandrachud J in the Indian Supreme Court case of Lal Chand v Radha Kishan, AIR 1977 SC 789 stated, and we agree;***
>
> ***'The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue."***
>
> ***The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties –because it is the court itself that is debarred by a jurisdictional injunct, from entertaining such suit".***

The parties, in their respective pleadings and both oral and written submissions, have alluded to HCCC No. 225 of 1993, Nairobi HCCC No. 459 of 2008, Civil Appeal No. 261 of 2008 and Appeal No. 112 of 2015 to support their respective proposition in regard to the doctrine of res judicata.

I have gone through the ruling dated **13.06.2008** of the **Hon Justice Mwera J** (as he was then) in **HCC NO. 225 OF 1993** found at pages **145 to 163** of the petition. The ruling is also annexed to the Cross-petition of the 1st and 4th Respondents dated **18.11.2020**. The parties are shown to be NAGENDRA SAXENA **[Plaintiff)** VS MIWANI SUGAR MILLS LIMITED **[Defendant]** and MIWANI SUGAR COMPANY (1989) LIMITED [In Receivership] as **Interested Party**.

In the ruling above, the court raised issues for determination at **page 146** of the petition and the parties were heard on the same and the ruling was delivered on **13.06.2008** on the issue of ***re-issue of summons*** where the court held that the Deputy Registrar had no jurisdiction to re-issue summons and declared a nullity the re-issue of the summons and whatever followed thereafter. Nagendra Saxena being dissatisfied with the ruling of the **Hon.Mwera J** appealed being Civil Appeal No. 261 of 2008 seeking to set aside the ruling of the superior court where the Hon.Judge declared the re-issued summons a nullity and the appeal was dismissed. The petitioner was the 4th Respondent in the appeal.

In **Nairobi HCCC No. 459 of 2008,** the Petitioner was the plaintiff against Nagendra Saxena, John Gitau Kimani, Miwani Sugar Mills Limited and the 5th Respondent. The petitioner among other prayers sought a declaration that it was a bonafide purchaser for value, eviction orders and others as per the plaint annexed at pages 345 to 352 of the replying affidavit of Francis Ooko. On the application of the 5th

Respondent, the suit was dismissed for want of prosecution.

In **Civil Appeal No. 112 of 2015**, the 5th Respondent appealed from the decision of **Chemitei J** where the Hon. Judge did not grant the 5th respondent orders for cancellation of the Petitioner`s title which appeal was also dismissed on 3rd April,2020.

Before court is a constitutional petition where the petitioner contends its rights have been violated as specifically pleaded by the Respondents and the violation, like illegal occupation, is continuous. The prayers are quite distinct. The parties are not the same in the above-mentioned suits as compared with the present.

The Court of Appeal in **Civil Appeal No. 112 of 2015**, which is the latest decision concerning the petitioner and 5th Respondent, had this to say as concerns the rights of the petitioner`s right to be heard before being condemned;

> ***"In this case, unless the 1st respondent is given the opportunity to be heard on merit and prove the legality of how it acquired the suit property, this Court cannot determine whether or not the said title was acquired with the 1st respondent's knowledge of fraud, misrepresentation or an illegality that he was party to. As I have already stated elsewhere in this judgment, the High Court did not have jurisdiction either. This issue can only be determined by a court of competent jurisdiction, the ELC as provided for by Section 13 of the Environment and Land Court Act and Article 162(2) (b) of the constitution".***

It has not been alleged that the petitioner has been heard on merit in any other matter after **03.04.2020** when the court of appeal made the decision. I am satisfied the issue of ownership or otherwise has been introduced in the High Court, but it has never been determined by any competent court on merit and in finality.

In ***Mohamed Dado Hatu v Dhadho Gaddae Godhana & 2 others [2017] eKLR,*** the court was faced with a similar situation like the matter herein where the issue of certificates was in court but not determined and it held thus;

> ***"(iv) I have perused the decisions from the High Court in the following cases;***
>
> ***(a) Petition No. 152 of 2017 Mohamed Dado Hatu vs Dhado Gaddae Godana and 2 Others***
>
> ***(b) Petition _No. 188 of 2017 Adam Barisa Dhidha vs Dhado Gaddae Godana and 2Others***
>
> ***(c) Petition No. 345 of 2017 Adam Barisa Dhidha & Others vs Dhado Mohamed Dado Hatu v Dhadho Gaddae Godhana & 2 others [2017] eKLR Others***
>
> ***(v) I find that the issue of the academic qualifications of the 1st respondent was never resolved. What the Courts said in the above cases was that the matter ought to have been taken up through IEBC internal dispute resolution mechanism and thereafter to the Political Parties Disputes Tribunal if necessary. The latest of the rulings was delivered on the 2nd August, 2017 a few days before the General Elections by Justice Olga Sewe in Petition No. 345 of 2017 Adam Barisa Dhidha & 4 Others vs. Dhado Gaddae Godana and 2 Others and she stated at Page 8 paragraph 12 (See Page 58) that- "there does not seem to be any controversy that in both matters, the respective courts finally pronounced themselves on different dates that the question of the 3rd Respondent's Academic qualifications was a matter that ought to have been taken up through the 2nd Respondents internal dispute resolution mechanism; and thereafter the Political Parties Disputes Tribunal if necessary. Accordingly the instant application and petition upon which it is founded are indeed res - judicata. (Emphasis mine)***
>
> ***(vi) I also rely on the case of John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR where the court stated as follows;***
>
> ***"The doctrine of res judicata has two main dimensions: cause of action res judicata and issue res judicata. Res judicata based on a cause of action, arises where the cause of action in the latter proceedings is identical to that in the earlier proceedings, the latter having been between the same parties or their privies and having involved the same subject matter. Cause of action res judicata extends to a point which might have been made but was not raised and decided in the earlier proceedings. In such a case, the bar is absolute unless fraud or collusion is alleged. Issue res judicata may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant and one of the parties seeks to re-open that issue.***
>
> ***(vii) I find that in the current case, the issue of the academic qualifications of the 1st Respondent was not determined as the court told the parties that the High court was not the right forum for such determination".***
>
> ***(viii) I find that it is true that there was no appeal against the three decisions cited above. However, the said decisions did not determine whether or not the 1st Respondent was qualified to vie for the Gubernatorial seat.***
>
> ***(ix) I accordingly find that this court has the jurisdiction to hear and determine this petition".***

I entirely agree with the decision in ***Hatu case*** above and hold that the matter is not ***res judicata*** and the court has jurisdiction to hear and determine this matter as held above.

III. Whether the petition is time barred.

The 5th Respondent submits that the petition is caught with **Section 7** of The **Limitation of Actions Act**, CAP 22, LoK, which provides;

> ***" An action may not be brought by any person to** <u>**recover land**</u> **after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person'***".

The 5th Respondent based its arguments on the ground that the Petitioner`s cause of action arose in **<u>December 2007 or January 2008</u>** and the petition herein was filed on **27.08.2020**, which is over 12 years prescribed period for such matters.

The issue of limitation was raised in the first time in the 5th Respondent`s submissions. It is a pure point of law hence properly before court for determination. Limitation extinguishes a party`s rights.

In the case of ***Njuguna Githiru v Attorney General [2016] Eklr,*** the court considered this issue in regard to constitutional petitions;

> ***36. As Nyamu J observed in** <u>**Abraham Kaisha Kanzika and Another vs Central Bank of Kenya (supra)**</u>**:***

> ***"<u>Even where there is no specified period of limitation it is proper for the court to consider the period of delay since the accrual of the claim and the reasons for the delay. An applicant must satisfactorily explain the delay….</u> I***

'…… **Whereas such a claim may not be extinguished, the need to explain inordinate delay is a** <u>**necessary requirement**</u> **even if there is in fact no limitation of time for filing constitutional Petitions as the authorities above have clearly shown. That is why in Mombasa Civil Case No. 128 of 1962, Rawal vs Rawal [1990] KLR 275** the Learned Judge stated thus**:**

> ***"The effect of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand protect a defendant after he had lost evidence for his defence from being disturbed after a long lapse of time. It is not to extinguish claims."***

The point was even made more succinctly in **Abraham Kaisha Kanzika alias Moses Savala Keya t/a Kapco Machinery Services and Milano Investments Limited vs Governor Central Bank Of Kenya and 2 Others, Misc Civ Appil 1759 of 2004** where the Court *observed thus:*

> *"**In my view failure by a Constitutional Court to recognize general Principles of Law including, limitation expressed in the Constitution would lead to legal anarchy or crisis. It would also trivialize the constitutional jurisdiction in that Applicants would in some case ignore the enforcement of their rights under the general principles of Law in order to convert their subsequent grievance into a 'constitutional issue' after the expiry of the prescribed limitations periods..."***

Similarly, the court in **Charles Gachathi Mboko vs Attorney General, Civil Case No.833 of 2009 (O.S.), warned against the dangers of allowing claims brought long after the fact without explanation. The Court stated as follows:**

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

On the doctrine of laches in Common law, in **Smith vs Clay [1767] EngR 55, (1767) 3 Bro CC 646, (1767) 29 ER 743**, Lord Camden LC stated that:

> ***'A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.' Equity would not countenance laches beyond the period for which a legal remedy had been limited by statute, and that where the legal right had been barred, the equitable right to the same thing was also barred: "Expedit reipublicae ut sit finis litium', is a maxim that has prevailed in this court at all times, without the help of parliament***."

In this matter, according to the petition, was prompted by the 2nd Respondent`s advertisement for International Expression of Interest produced by the petitioner as "BS-20" on 10.07.2020. By dint of this advertisement, the petitioner sought injunctive prayer no. (Vi) in the petition. To my understanding, the petitioner does not seek ***"to recover land"***, but to assert its proprietary rights hence the alleged violation of its rights which the 5th Respondent places at December, 2007 or January, 2008 being reference to the date of registration of title of the petitioner.

Further, the parties are all in agreement that there have been several suits between some of the parties in court culminating with **<u>Civil Appeal No. 112 of 2015</u>** where the Court of Appeal directed the parties to have their claims in relation to the suit property filed before this court on 03.04.2020.

That the issue of limitation of time does not apply in this matter as the Petitioner is the registered owner of **L.R. 7545/3 (I.R.21038**) to date, even though the registration is the bone of contention.

As in ***Githiru case*** **(Supra),** if any delay could be inferred, the parties themselves have explained the sequence of events in several suits in courts which could have definitely let to delay, which, as I have held above does not arise.

I hold that the petition is not time barred and Section 7 of The Limitation of Actions Act does not apply to this petition.

IV. Whether the 5th Respondent and the Interested Parties are necessary parties in this petition.

> *The petitioner challenged the* **locus standi** *of the Interested Parties whereas the 3rd Respondent questioned the presence of the 5th Respondent.* In ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2014] eKLR*** the Supreme Court held thus on locus standi;
>
> ***"The issue of locus standi raises a point of law that touches on the jurisdiction of the Court, and it should be resolved at the earliest opportunity. In Mary Wambui Munene v. Peter Gichuki Kingara and Six Others, Sup. Ct. Petition No. 7 of 2013; [2014] eKLR, this Court held (at paragraphs 68 and 69) that the question of jurisdiction is a "pure question of law," and should be resolved on a priority basis".***

Rule 2 of **THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013** [***Mutunga Rules***] defines "**interested party"** ***means a person or entity that has an*** <u>identifiable stake or legal interest or duty in the proceedings before the court</u> ***but is not a party to the proceedings or may not be directly involved in the litigation.***

> *The Petitioner heavily relied* ***Muruatetu case (Supra)*** *to hold that the Interested Parties do not qualify to be in this petition as such in line of the principles set out in that case.*

The Interested Parties hold that they are properly on record representing 100,000 sugar cane farmers and since nobody has disproved that they are not farmers and this being Public Interest Litigation, their presence cannot be challenged and relied on the case of ***Kenya Human Rights Commission & Anor Vs AG & 6 Others (2019)eKLR***.

It is upon the Interested Parties to demonstrate their stake in the case and justify their presence in the proceedings and not the other way round as submitted by them. Indeed, they have not evidenced any document to prove or demonstrate that they are farmers or officials of the 100,000 plus farmers. Just as was held in ***muruatetu case***, ***"[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. <u>He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause</u>…"[Emphasis mine]***

The Petition before me pits against the 1, 2, 3 and 4th Respondents as initially sued. It is not a Public Interest Litigation as alluded to by the Interested Parties. The orders sought are against the Respondents.

> ***In Mumo Matemu case (Supra)*** *the court held that*
>
> ***"It is proper to note that the evaluation of locus ought to be based upon the constitutional consideration of capacity (Articles 3, 22 and 258, the nature of the suit and the enforceability of the orders sought. These considerations inform the enforcement mechanisms and coherent clarity of the following inquiries. Who will the orders be enforced against? Who bears the costs of litigation if at all? Who represent the parties in court?"***

I do find that the Interested Parties are unnecessary parties.

The 3rd Respondent submits that firstly that the 5th Respondent is unnecessary party and lacks locus because the debentures upon which the 5th Respondent was put on receivership does not involve land. And secondly that the 2nd respondent is the principal of the 5th Respondent.

The 5th Respondent features in the petition and orders (i) and (ii) are against it.

The 5th Respondent satisfies the principles of ***Mumo Matemu*** case **(Supra)** and hold that it is a necessary party to this proceeding.

V. Whether the annexures marked BS-13, 14, 15, 17 and 19 are privileged and classified documents that should be expunged from the proceedings.

The 1st and 4th Respondents, in their Cross-Petition dated **18.11.2020** and filed in court on 19.11.2020 at paragraph 20, pleaded that the petitioner ***"has sought to rely upon classified documents which were neither addressed to it nor copied to it or authorized to use in support of the petition***" and sought in its **prayer (iv)** to strike out documents marked as exhibits ***"BS-13. BS-14,BS-15,BS-16, BS-17*** *and* ***BS-19"*** annexed to the affidavit of **Buggar Singh**.

The petitioner, in its response to Cross Petition dated and filed in court on 20.11.2020, averred that the Cross-Petitioners have not challenged the integrity, authenticity and validity of the above documents. The petitioner avers that it is by virtue of Article 35 of the Constitution right of access to information and relied in the case of ***Katiba Institute Vs Presidents Delivery Unit and 3 others (2017)eKLR*** that the cross petitioner cannot claim privilege or confidentiality of information or documents as a rebuttal to averments in the pleadings.

In its submissions, the 1st and 4th Respondents, hold that the documents were not addressed to the petitioner and has not disclosed how it came into its possession contrary to Official Secrets Act, and buttressed its submission by relying in the case of ***Okiya Omtatah Okoiti & 2 Others Vs Attorney General & 4 Others [2020]eKLR***..

In its supplementary submissions, the petitioner submits that the issue of documents was raised in a casual and perfunctory manner as the 1st Respondent did not raise it in the affidavit of Peter Munya in response to petition only to appear at the cross petition and no application filed to deal with the documents.

The petitioner further submits that the Cross Petitioners did not in their pleadings disclose under which law the documents are classified but extensively cite the provisions of National Security Council Act on classification documents which relate only to National Security Council.

It was submitted that the nature of the documents are by their very nature public documents and the case of ***Hoswell Mbugua Njuguna T/A Fischer Marketing Concepts Vs Equity Bank Limited & Another (2017) eKLR*** does not apply and the 1st and 4th Respondents are only bent to deny the court essential facts and evidence to fairly determine the matter before it.

The **Official Secrets Act** is and ***"An Act of Parliament to provide for the preservation of State secrets and State security".*** This is the law relied on by the 1st and 4th Respondent in regard to the challenged documents. I have gone through the documents and do not fall under the category of state secrets or security of the country which the act is meant to protect.

The Petitioner analyzed **National Security Council Act** in answer to the issues raised by the 1st and 4th Respondents as regards classification of documents. The Act defines **"classified information"** has the meaning assigned to it under **section 14(2).** In Section 3, on guiding principles, of the Act provides; The Council shall, in fulfilling its mandate under the Constitution, this Act or any other written law, **observe and uphold the Bill of Rights and observe the values and principles of governance in Article 10(2), the values and principles of public service in Article 232(1) and the principles of national security in Article 238 of the Constitution.**

Section 14 of The NSCA, provides on limitation of the right of access to information and states as follows;

> **(1)** The right of access to information under **Article 35(1) and (3) of the Constitution** shall be limited in respect of classified information or information under the custody of the Council under the following circumstances—
>
> (a) the protection of classified information;
>
> (b) the maintenance and preservation of national security;
>
> (c) where the disclosure is prejudicial to ongoing investigations or security operations; and
>
> (d) where the enjoyment of rights and freedoms does not prejudice the rights and freedoms of other persons disclosing or publicizing information, the disclosure or publication of which would be prejudicial to national security.
>
> (2) For the purposes of this Act, **"classified information"** means any information of **a particular security classification whose unauthorized disclosure would prejudice national security**.
>
> (3) The Cabinet Secretary may by Regulations determine the categories of security classification.
>
> (4) The categories of classified information referred to under subsection (3) may include—
>
> (a) "top secret" which means information whose unauthorized disclosure would cause exceptionally grave damage to the interests of the State;
>
> (b) "secret" which means information whose unauthorized disclosure would cause serious injury to the interests of the State;
>
> (c) **"confidential"** which means information whose unauthorized disclosure would be prejudicial to the interests of the State; and
>
> (d) "restricted" which means information whose unauthorized disclosure would be undesirable in the interests of the State.
>
> (5) The limitation under this section shall—
>
> (a) comply with Article 24 of the Constitution; and
>
> (b) satisfy the following criteria—
>
> (i) ensure the protection, maintenance of and promotion of national security, public safety, public order and protection of the rights and freedoms of others;
>
> (ii) be necessary to achieve the mandate of the Council;

(iii) operate without discrimination; and

(iv) be exceptional and not derogate the core or essential content of the right or freedom being limited.

The NSCA*, is the appropriate applicable law in the circumstances of this petition.*

The documents marked as ***"BS-13 and 14"*** *is a communication between the Cs Agriculture and Hon Attorney General. The document marked* ***"BS-15"*** *is a letter from ministry of Agriculture to National Treasury. The documents marked* ***"BS16 and 17"*** *are reports on privatization. Finally, the document exhibited as* ***"BS-19"*** *are recommendations made in respect of Miwani Sugar Company limited as at October, 1999.*

For any document to get the protection of **The NSCA**, it must follow the law as laid down in **Section 14** as it will impede the rights of the citizens as provided for under **Article 35** of the constitution hence any limitation under the Act must comply with subsection (5) of the Act which provides that it shall comply with **Article 24** of The Constitution and follow the criterion laid in sub section **(5) (b)** of the Act.

All the deponent, **Gatirau Peter Munya**, says in the supporting affidavit to the Cross-Petition at **paragraph 12** is that exhibits "**BS-13, 14, 15, 17** and **19"** are classified documents. There is no further explanation. There is no evidence **section 13** of the Act as to the procedures for the management, classification and declassification of documents and other records of the Council was complied with as mandatorily required by the Act.

Article 24 of the Constitution on Limitation of rights and fundamental freedoms provides;

(1) **A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors**.

It is the duty of the court to uphold and enforce the bill of rights under Article 23 of the constitution. To agree with the Respondents to expunge the contested documents without complying with the laid down legal process will amount to abdicate its duty given to it by the people of Kenya to exercise on their behalf. The request is denied.

vi. Whether L.R. 7545/3 (I.R.21038) is or was public land.

The petitioner annexed to its affidavit a copy of the title to LR 7545/3 which was in its name. The Previous owner was Miwani Sugar Mills Limited which undeniably is a private entity. There was no document produced to show that the property was ever owned by a state department or organ. The entry no. 22 being registration of certificate of incorporation, did not amount to transfer to the 5th Respondent. I do find that the suit property is not public property or land.

vii. Whether the Government of Kenya complied with the law in its transactions with Miwani Sugar Mills Limited [In receivership] and/or Miwani Sugar Company (1989] Limited [In receivership].

It has been submitted by both sides of the divide that Miwani Sugar Company (1989) Ltd [In Receivership] was the vehicle the GoK incorporated to acquire the assets of the ailing MSM. It has been submitted by the petitioner and 3rd Respondent that the GoK had 49% shares whereas Vanessa Associates had 51% of MSC 1989 making it a private company. The Respondents hold a different view that the GoK bought the previous shareholders to acquire 100% later on.

In its supplementary affidavit sworn by **Buggar Singh** sworn on **19.10.2020,** to which is annexed an exhibit **"BSA-2"** being an official search at Business Registration Service dated **15.10.2020**, shows shareholding of Miwani Sugar Company 1989 Ltd as follows;

a. Vanessa Associates Incorporated ………… **1,071,000**

b. The Permanent Secretary (The Treasury) .. **1,029,000**

Total shares 2,100,000

The 1st and 2nd Respondents did not address the issue of shareholding but the 5th Respondent (The Company) itself addressed it at paragraph 4 of the affidavit of Francis Ooko as stated above save that the GoK bought out Vanessa Associates to wholly own it. No document was produced to support that line of averment.

The document marked **"BSA-2"** is an official document from a Government Department under the 4th Respondent. It has not been challenged as to its aunthecity or otherwise. I have no reason to doubt it either. I take, it speaks for itself as it is, that Vanessa Associates are the majority shareholders having **51%** of the shares whereas the GoK has **49%** making it a minority as at 15.10.2020.

From the above, it cannot be gainsaid that Miwani Sugar Company (1989) Limited [In Receivership] is a private company.

The bottom line is whether the law was followed by the GoK in acquiring the two entities as challenged by the petitioner and the 3rd Respondent. From the annexures to the Replying Affidavit of **Rosemary Atieno Owino** is the report of Controller and Auditor General at pages 164 to 170 on the issue of loans to Miwani sugar Company (1989) Ltd [In Receivership] which falls under The External Loans Act.

It is Petitioner`s submissions the GoK did not comply with the law thus rendering in its acquisition of the 5th Respondent null and void abinitio. The **External Loans and Credits Act, CAP 422**, Laws of Kenya,

The preamble to the Act says

> ***"An Act of Parliament to authorize the Government to raise loans outside Kenya, to provide for the negotiation by the Government of credit facilities outside Kenya, and to provide for matters incidental thereto"***

The Government may, under agreements or other written instruments, borrow or obtain credit for sums in currencies other than Kenya currency from any person or government, upon such terms and conditions as to interest, repayment or otherwise and in such manner as the Minister responsible for finance may think fit, and may, subject to section 3, expend moneys or purchase goods or services on credit in accordance with those agreements or instruments.

> S.3. (**1) All sums borrowed under this Act shall be expended only upon the purposes for which provision is made in the estimates of expenditure approved by Parliament**.
>
> **(2) No goods or services shall be purchased on credit under this Act except such as are required for the purposes for which provision is made in the estimates of expenditure approved by Parliament.**
>
> S.4. …………
>
> S.5. As soon as practicable after a loan has been arranged or credit obtained under this Act**, the Minister shall lay before the National Assembly a report on the transaction specifying the parties, the circumstances giving rise to the transaction, the amount or value of the transaction, the currency in which the amount or value is expressed, the terms and conditions as to interest and repayment or payment and the aggregate of the capital sums borrowed and the credit obtained under this Act up to the date of the report, and any further information which he considers appropriate**.
>
> S.9. **Any moneys borrowed or credit obtained in currencies other than Kenya currency before 1st July, 1978 by or on behalf of the Government under any of the statutes repealed by Part XIII of the Finance Act, 1978 or under the Specific Loan (Commonwealth Development Corporation) Act and owing on or after that day, shall be deemed for the purposes of section 6 of this Act to have been borrowed or obtained under this Act**.

It is further submitted that the Controller and Auditor General **D.G.Njoroge** at **page 171**, listed the foreign banks and the amount owed in foreign currency as follows;-

a. Bank of Baroda London US$3,396.768.82

b. Chase Manhattan US$520,474.86

c. Cultor US$2,135,171.92

As at **30.06.2003** without interest.

The Petitioner further submitted that even the then Controller and Auditor General was concerned. The failure to comply with the law rendered the whole transaction null and void abinitio and relied on the case of ***Patel v Singh [1987] eKLR*** where the Court of Appeal held thus; -

> ***"On the submissions made to us and the evidence on record one cannot hold otherwise but come to the same conclusion that the contract, contravenes the provision of section 3(1) of the Exchange Control Act (cap 113) and as such it was illegal and unenforceable. On the evidence, the appellant was not an authorized dealer and he could not enter into a valid agreement. The material contract was, therefore, illegal abinitio and so unenforceable.***

In ***Archbolds (Freightage) Ltd v S Spanglett Ltd [1961] 1 QB 374, at page 388 Devlin L.J*** (as he then was) had this to say on the issue of **illegality**,

> ***"The effect of illegality upon a contract may be threefold. If at the time of making the contract there is an intent to perform it in an unlawful way, the contract, although it remains alive, is unenforceable at the suit of the party having that intent; if the intent is held in common, it is not enforceable at all. Another effect of illegality is to prevent a plaintiff from recovering under a contract if in order to prove his rights under it he has to rely upon his own illegal act; he may not do that even though he can show that at the time of making the contract he had no intent to break the law and that at the time of performance he did not know what he was doing was illegal. The third effect of illegality is to avoid the contract ab inito and that arises if the making of the contract is expressly or impliedly prohibited by statue or is otherwise contrary to public policy."***

It was submitted by the Petitioner that as at 30-06-2003, three months away from completion date of 01.09.2003, as confirmed at page 172 of the affidavit of RAO, the Government of Kenya was in default in payment of principal sum and interest and could not be able to complete the transaction and **this too** was never tabled in parliament for approval as required of law hence in contravention of the Act.

In the case ***Mapis Investment (K) Limited v Kenya Railways Corporation [2006] eKLR*** the court of Appeal held thus

"In the case of ***Mistry Amar Singh v. Serwano Wofunira Kulubya 1963 EA 408*** the Privy Council, on appeal from a judgment and order of the East African Court of Appeal at page 414 of the report, of Lord Morris of Borth-y-Guest in his speech quoted with approval the following quotation from the judgment in **Scott v. Brown, Doering, McNab & Co (3), [1892] 2 QB 724 Lindley LJ at p.728:-**

> ***"Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality the court ought not to assist him."***

It is clear that the GoK transactions in relation with the MSM and MSC 1989 were illegal, and null and void and this court cannot ***"enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal it matters not whether the defendant has pleaded the illegality or whether he has not"*** as held in Scott v. Brown.

viii. Whether the Cross-Petitions are properly before court.

The 1st and 4th and 5th Respondents filed Cross – Petitions in this matter. The petitioner and the 3rd Respondent have challenged their competence. The provisions of **Rule 10(2)** of M***utunga rules*** lays down what a petition should contain and so a cross petition as provided for **in rule 15(3)** of the rules. There are a plethora of decisions on this issue. In ***Trusted Society of Human Rights Alliance vs. AG. & 2 others [2012] eKLR*** it was said that:

> ***"We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.***
>
> ***The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case."***

And in ***Mumo Matemu vs. Trusted Society of Human Rights Alliance and others, Nairobi Civil Appeal No. 290 of 2012***, it was stated that:

> ***"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. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. 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. The Principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."***

The 1st and 4th Cross-Petitioners have not cited any constitutional provision(s) neither do they identify the violations or contraventions of the Constitution upon which it is supposed to be focused on in their cross-petition. It does not meet the threshold as laid down in the above cases. I do find that the cross petition is incompetent.

The Cross petition is brought by The Cabinet Secretary, Agriculture and the Honourable Attorney General. The Cross Petition has also been challenged that no petition lies by virtue of the offices of the cross-petitioners. The Petitioner has relied in the case of ***Meru County Government*** **(Supra)** where the capacity to file a petition was in issue.

I have no reason to depart from the decision which is in all four squares similar with this one. The Cross-Petitioners lack capacity to move court as Cross-Petitioners.

The Cross-Petition by the 5th Respondent, as stated in paragraph 25 of the response and cross petition dated 03.12.2020, is wholly owned by AFA, a GoK agency, then it too lacks capacity to file this cross-petition against the Respondent. The alleged violations of its rights cannot stand against the Petitioner being a private entity and the court has already laid down the law in the case of **Meru County (Supra).**

ix. Whether the petitioner has proved its claim.

The Petitioner contends it is the registered proprietor of L.R. 7545/3 (I.R.21038) and annexed a copy of the title to the supporting affidavit. This fact is not denied but it is challenged in that the petitioner is illegally registered as such and that the suit property belongs to the 5th

Respondent who is said to be in occupation. **How did the plaintiff acquire the property**? Jogi Auctioneers vide a notice that appeared in the Kenya Times Newspaper of **06.12.2007**, advertised the suit property for sale by public auction on 24.12.2007. In the notice, it is shown to be an execution of a decree in Kisumu Hcc No.225 of 1993.(See annexure marked**"BS-5").**

The Petitioner contends that it was the highest bidder for **Kshs. 752,000,000/=** which money was paid to the decree holder and duly acknowledged by his Advocates vide a letter dated 24.12.2007 at page 34 of the record. The petitioner contends that it is an innocent purchaser for value without notice. The Petition is vehemently opposed by the Respondents vide their replying affidavits who hold that the petitioner is illegally registered as the proprietor of the suit property which belongs to the 5th Respondent.

The 5th Respondent states that the Petitioner was an active party to the fraudulent acquisition of the suit property and there was misrepresentation as the directors of the petitioner are the same as the directors of Kibos Sugar and Allied Industries Limited who had interest in purchasing the assets of the 5th Respondent.

It is further stated that the auction did not take place at all and it was stage managed by the parties involved. The principle of bonafide purchaser for value without notice has been an issue in courts. In ***Joseph Muriithi Njeru v Mary Wanjiru Njuguna & another [2018] eKLR*** the court defined what is an innocent purchaser and held

> ***"BLACK'S LAW DICTIONARY 9th Edition defines a bona fide purchaser as:***
>
> ***"One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims."***
>
> ***48. In KATENDE v HARIDAR & COMPANY LTD [2008] 2 E A 173, the Court of Appeal in Uganda held that:***
>
> ***"For the purposes of this appeal, it suffices to describe a bona fide purchase as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly.***
>
> ***For a purchaser to successfully rely on the bona fide doctrine as was held in the case of Hannington Njuki vWilliam Nyanzi High Court civil suit number 434 of 1996, must prove that:***
>
> ***(1) he holds a certificate of title;***
>
> ***(2) he purchased the property in good faith;***
>
> ***(3) he had no knowledge of the fraud;***
>
> ***(4) he purchased for valuable consideration;***
>
> ***(5) the vendors had apparent valid title;***
>
> ***(6) he purchased without notice of any fraud; and***
>
> ***(7) he was not party to the fraud.***
>
> In ***Samwel D. Omwenga Angwenyi v National Land Commission & 2 others [2019] eKLR*** the court held
>
> ***"24. In the case of Samuel Kamere -vs- Lands Registrar, Kajiado Civil Appeal Number 28 of 2005 where the Court of Appeal which held that:***
>
> ***"…in order to be considered a bona fide purchaser for value, they must prove; that they acquired a VALID and LEGAL title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property..."***

I have read the letter dated 24.12.2007 from **Gakoi Maina & Co. Advocates** to ***Jogi Auctioneers*** which reads;

> ***"We refer to the above matter and wish to confirm that our client, the plaintiff/Decreeholder has now received the proceeds of the auction held on 24th December, 2007 in execution of the decree of immoveable property L.R.7545/3 (IR21038)."***

In the case of ***Hexekiah W. Gichohi v Uhuru High Way Development Ltd & 2 others [2019] eKLR*** on the authority of counsel to bind a client held;-

> ***"It is also established law that counsel on record and holding instructions on behalf of a party has ostensible authority to compromise an action. In Civil Appeal No. 276 of 1997 Kenya Commercial Bank Limited Vs. Benjoh Amalgamated Limited &***

Another.

The Court of Appeal citing the case of Brook Bond Liebig (T) Limited Vs. Mallya [1975] EA 266 stated,

"Prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them …..

In the same judgment the Court of Appeal cited the judgment of Hancox JA (as he then was) in the case of Flora Wasike Vs. Destimo Wamboko (1988) 1 KAR 625 at page 626 as follows,

The extent of authority of an advocate on record to compromise a suit is set out in the Supreme Court Practice 1976 (Vol 2) paragraph 2013 page 620 and cited in the Kenya Commercial Bank case as follows,

"Authority of Solicitor – a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power….No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice."

In the recent case of Board of Trustees of NSSF Vs. Michael Mwalo (2015) eKLR at page 35 it was held,

"1. ……

2. A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

The Advocate for the Decree holder having confirmed payment of the purchase price from the public auction and having been on record for the plaintiff/decreeholder, he had authority to speak on behalf of his client in that matter. Payment was duly acknowledged in view of the holdings in the case **Gichoi case (supra).**

The parties submitted in lengthy on the issue of acquisition of title. The petitioner contends in the pleadings and its submissions it is an innocent purchaser for value without notice in an open public auction. The Respondents contends it is not and alleges fraud and misrepresentation.

The 5th Respondent relied in the case **Alice Chemutai Too v Nickson Kipkurui Korir & 2 others [2015] eKLR**

"4. Where one intends to impeach title on the basis that the title has been procured by fraud or misrepresentation, then he needs to prove that the title holder was party to the fraud or misrepresentation. However, where a person intends to indict a title on the ground that the title has been acquired illegally, unprocedurally, or through a corrupt scheme, my view has been, and still remains, that it is not necessary for one to demonstrate that the title holder is guilty of any immoral conduct on his part. I had occasion to interpret the above provisions in the case of Elijah Makeri Nyangwara vs Stephen Mungai Njuguna & Another, Eldoret ELC Case No. 609 B of 2012 where I stated as follows :-

"…it needs to be appreciated that for Section 26(1) (b) to be operative, it is not necessary that the title holder be a party to the vitiating factors noted therein which are that the title was obtained illegally, unprocedurally or through a corrupt scheme. The heavy import of Section 26 (1) (b) is to remove protection from an innocent purchaser or innocent title holder. It means that the title of an innocent person is impeachable so long as that title was obtained illegally, unprocedurally or through a corrupt scheme. The title holder need not have contributed to these vitiating factors. The purpose of Section 26 (1) (b) in my view is to protect the real title holders from being deprived of their titles by subsequent transactions."

As to allegations of fraud and or misrepresentation, the law has been laid clear by several decisions of courts. In the case of Gichinga ***Kibutha Vs Caroline Nduku (2018)eKLR***

"The Black's Law Dictionary defines fraud thus: -

"Fraud consists of some deceitful practice or willful device, resorted to with intent to deprive another of his right, or in some manner to do him an injury. As distinguished from negligence, it is always positive, intentional. Fraud, as applied to contracts, is the cause of an error bearing on a material part of the contract, created or continued by artifice, with design to obtain some unjust advantage to the one party, or to cause an inconvenience or loss to the other. Fraud, In the sense of a court of equity, properly includes all acts, omissions, and concealments which involve a breach of legal or equitable duty, trust, or confidence justly reposed, and are injurious to another, or by which an undue and unconscientious advantage is taken of another'.

11. Fraud is essentially a common law tort of deceit and its essentials are:-

a. false representation of an existing fact;

b. with the intention that the other party should act upon it;

c. the other party did act on it; and

d. the party suffered damage.

13. It is settled law that fraud is a serious accusation which procedurally has to be pleaded and proved to a standard above a balance of probabilities but not beyond reasonable doubt. At page 427 in Bullen & Leake & Jacobs, Precedent of pleadings 13th Edition quoting with approval the cases of Wallingford v Mutual Society (1880) 5 App. Cas.685 at 697, 701, 709, Garden Neptune V Occident [1989] 1 Lloyd's Rep. 305, 308, Lawrence V Lord Norreys (1880) 15 App. Cas. 210 at 221 and Davy V Garrett (1878) 7 ch.D. 473 at 489 it is stated that:-

"Where fraud is intended to be charged, there must be a clear and distinct allegation of fraud upon the pleadings, and though it is not necessary that the word fraud should be used, the facts must be so stated as to show distinctly that fraud is charged. The statement of claim must contain precise and full allegations of facts and circumstances leading to the reasonable inference that the fraud was the cause of the loss complained of (see). It is not allowable to leave fraud to be inferred from the facts pleaded and accordingly, fraudulent conduct must be distinctly alleged and as distinctly proved (|). "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice"……….

20. Section 107 of the Evidence Act Cap 80 of the laws of Kenya states that;-

"Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist".

22. The allegations of fraud in particular called for detailed evidence to reach the threshold of proof. I am well alive to the case of Koinange and 13 others – Vs - Koinange [1986] KLR 23 where the court restated the cardinal precept of the law of evidence that he who alleges must prove it".

The Respondents alleged fraud and misrepresentation. In their replying affidavits the Respondents did not particularize the allegations of fraud or misrepresentation. Other than the allegation that some of the directors of the petitioner are also directors in another sister company, there was no specific evidence of any role played by the petitioner that can connect it with the alleged fraud or misrepresentation. Absolutely the Respondents failed to prove the same as per the required standard or at all.

On the law, the Court of Appeal in the case of ***Stanley Ng'ethe Kinyanjui v Tony Ketter & 5 others [2015] eKLR* thus;-**

"Under the Order 21 architecture, there are provided alternative avenues by which the owner of property sold in execution or a person having interest in such property, could set such sale aside. Under rule 78, such person could apply upon making two pre conditional deposits into court; a. for payment to the purchaser, a sum equal to ten percent of the purchase-money, and b. for payment to the decree-holder, the amount specified in the public notification of sale as that for the recovery of which the sale was ordered, less any amount which may since the date of such public notification of sale have been received by the decree-holder. The alternative path, and one cannot avail himself of both, (by virtue of Rule 78(2)) is by applying under rule 79 to set aside the sale on the ground of a material irregularly or fraud in publishing or conducting it, thereby occasioning the applicant substantial injury. It is clear from the record that Suleiman did not make any application under either rule 78 or 79 yet, in view of what we have stated about rule 56 and 57, the setting aside of sale provisions thereunder would have been the appropriate ones to be invoked since the sale had already occurred by the time the order of stay of execution was made and served. It is also common ground that the preconditions in rule 78 for deposit into court had not been met by Suleiman and, having found that the sale was proper without any fraud or illegality having been alleged and/or proved, any chances of such an application succeeding, even had one been filed in time, and none was, would have been miniscule".

The 5th Respondent, as Suleiman, has never moved court to set aside the public auction as detailed above despite being the most appropriate remedy available to the 5th Respondent, it stands that its rights, if any, were extinguished as was held in **Muliro case *(Supra)*** where the court held;

"when the Senior Deputy Registrar made the order confirming the sale it became absolute so far as the interest of Mr.Muliro in the farm was concerned: Order XXI Rule 81(1); and no suit to set aside that order made under that rule may be brought by Mr. Muliro; Order XXI rule 81(3); and suit means all civil proceedings commenced in any manner prescribed: section 2 of The Civil Procedure Act".

On indefeasibility of title, the petitioner sought solace in several decisions already referred to hereinabove to the point that it has a good title protected under **Article 40 of The Constitution** whereas the Respondents hold that the title can be impeached under **Article 40 (6)** and buttressed their submissions with cited authorities.

I have gone through all the decisions of the court on the point. Since I have already found that fraud or misrepresentation has not been proved, the title of the petition is protected by Section 26 (1)(a) and (b) of the Land Registration Act.

The Petitioner submits that the 5th Respondent cannot have any genuine claim to land as the debentures, upon which they relied on to come on board, wholly excluded land. The Respondents did not seriously address this issue in their submissions. From the annexures, the

documents clearly did not cover land. Hence they cannot genuinely hold that it was one of their assets. At the time the suit property was bought, Miwani Sugar Mills Limited was the registered owner and not the 5th Respondent. The issue of public participation came up for consideration.It was submitted that the core values and principles of good governance under Article 10 of the Constitution require public participation and to advertise for leasing out of Miwani Sugar Company (1989) Limited (In Receivership) before public participation was in contravention of the constitution.

The 2nd Respondent did not answer that issue in its affidavit nor its submissions being the entity that was bestowed to carry out the same. The only inference that can be drawn from the silence is that there was no public participation contrary to the dictates of the constitution and I fully associate myself with the holding in Manthi ***Musyoka case (Supra)*** and declare there was no public participation and that vitiates the intended lease of the 5th Respondent.

In opposition to the petition, the 2nd Respondent annexed a document marked **"RAO-1",** which is an agreement dated 09.04.1990. The agreement is not signed by the GoK though shown to be the first party. ***In Leo Investments Ltd Vs Estuarine Estate Ltd (2017) eKLR*** the court on the issue of unsigned agreement held thus;-

> ***"Informed by the legal framework in Section 3(3) of the Law of Contract Act, and guided by the prevailing jurisprudence on the tenor and import of that legal framework, I hold the view that it would be an affront to the unequivocal text of the statute and to the well-established principles of statutory interpretation to hold that a suit seeking to enforce an unsigned contract for the disposition of an interest in land is tenable within the existing statutory framework and prevailing jurisprudence. To the contrary, such a suit is a nullity abinitio to the extent that it seeks to enforce an unsigned contract".***

I do hold that the document marked ***"RAO-1"*** is of no legal effect and it is unenforceable in law hence null and void abinitio. The Petitioner submits that the affidavits sworn by the deponents for the 5th Respondent are conflicting and are inadmissible in law as they are not the registered receivers as is required. The Petitioner submits that the counsels for the 2nd and 5th Respondents gave the government false impression that Miwani Sugar Company (1989) Limited [In Receivership] was apublic entity when it was not.

ii. Whether the Petitioner's constitutional Rights have been violated in any way.

> **Serah Mweru Muhu Vs Commissioner of Lands & 2 Others (2014)eKLR where the court held**

> **"In order to protect the right to property, a party must establish a proprietary right or interest in land as the Constitution does not itself create these rights or interests. In the case of Joseph Ihugo Mwaura and Others v The Attorney General and Others Nairobi Petition No. 498 of 2009 (Unreported), the Court, referring to section 75 of the former Constitution which is the equivalent of Article 40, observed that, "[46] Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework.".**

The Petitioner has, by evidence, demonstrated that it is the registered owner of the suit property with all proprietary rights appurtenant to it and is therefore duly protected under Article 40 of The Constitution. By purporting to advertise for lease parcel L.R. 7545/3(I.R.21038), the 2nd Respondent was in contravention of the constitutional rights of the petitioner to own property without a hearing or following the rule of law. The unsigned agreement dated 9th April 1990 by GOK is illegal and inadmissible.

Conclusions and Findings

Having considered all the issues before me in this, I have made, inter alia, the following conclusions:

i). The Court has jurisdiction to hear and determine the petition.

ii). The petition is not res judicata.

iii). The petition is not time barred.

iv). The 5th Respondent is a necessary party but the Interested Parties are not necessary parties.

v). The annexures marked **BS-13, 14, 15, 17** and **19** are not privileged and classified documents that should be expunged from the proceedings.

vi). The Government of Kenya did not comply with the law and specifically **The External Loans and Credits Act** in its transactions with Miwani Sugar Mills Limited [In receivership] and Miwani Sugar Company (1989] Limited [In receivership] hence the purported agreements with those entities are illegal null and void.

vii). That both Cross-petitions are incompetent and improperly before court hence struck out.

viii). That the petitioner is the registered proprietor of **L.R. 7545/3 (I.R.21038).**

ix). That the petitioner was a bonafide innocent purchaser for value without notice of **L.R. 7545/3 (I.R.21038)** in a public auction.

x). The petitioner was the highest bidder for **Kshs.752, 000,000/=.**

xi). That the public auction was pursuant to a court decree in **KISUMU HCCC NO. 225 OF 1993** between **Nagendra Saxena Vs Miwani Sugar Mills Limited**.

xii). The auction has never been set aside as provided for under the law.

xiii). The public auction was duly advertised as required of law in the Kenya Times Newspaper of **06.12.2007**.

xiv). That at the time of auction, **Miwani Sugar Mills Limited (the Judgment Debtor/Defendant)** was the registered owner of LR 7545/3(IR 21038).

xv). That **L.R. 7545/3 (I.R. 21038)** was not public property.

xvi. The Government of Kenya did not acquire **L.R. 7545/3 (I.R. 21038)** in any way.

xvii). **Miwani Sugar Company 1989 Limited** [In Receivership] is a private limited liability company.

xviii). Miwani Sugar Company 1989 limited [In Receivership] has never been the registered owner of **L.R. 7545/3 (I.R. 21038)** hence has no proprietary rights**.**

xix). The debentures did not cover land parcel L.R.7545**/3 (I.R. 21038).**

xx). The Petitioner's constitutional Rights have been violated by the Respondents.

Whether the Petitioner deserves the prayers in the Petition and specifically an award of General and Special Damages as pleaded.

Having found that the petitioner`s rights were breached and relying on the decision of **Lenaola J** in **Arnacherry Limited [supra]** I do find that the petitioner is entitled to the following reliefs; -

i) An order of possession of the land L.R. 7545/3 (I.R. No. 21038) enforceable against each and all the Respondents including their workers, servants, agents, representatives and assigns including those purporting to work for or represent Miwani Sugar Company (1989) Ltd (in receivership) be and is granted to the Petitioner.

ii) An order that all the Respondents including their workers, servants, agents, representatives and assigns including those purporting to work for or represent Miwani Sugar Company (1989) Ltd (in receivership) do vacate the suit Property within 60 days.

(iii) I do decline to grant general damages as the petitioner has not proved general damages.

iv) An award of special damages is also declined as it was not proved specifically.

(v) The court declines to grant an order of mandatory and permanent injunction prohibiting each and all the Respondents together with their agents, officers, workers, servants, representatives, assigns and heirs from interfering with the Petitioner ownership, possession and title to the land as the petitioner is not in possession as at now and it is not alleged that the respondents will attempt to evict the petitioner after giving possession and that the court has already granted an order that the respondents vacate the property

(vi) However, the court grants an order of permanent injunction stopping each and all of the respondents from selling, leasing, transferring, charging, mortgaging and granting licences or easements to the land or in way dealing with the land to the detriment of the Petitioner.

vii). Costs to the Petitioner to be paid jointly and severally by the Respondents and the Interested Parties.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 30TH DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Judgement has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE