



**Some & 4 others v Attorney General & 6 others; Mohammed & 11 others
(Interested Parties) (Petition 7 of 2021) [2024] KEHC 9023 (KLR)
(Anti-Corruption and Economic Crimes) (19 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 9023 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES**

PETITION 7 OF 2021

F GIKONYO, J

JULY 19, 2024

**(FORMERLY ENVIRONMENTAL AND LAND COURT
CONSTITUTIONAL PETITION NO. E022 OF 2020)**

**IN THE MATTER OF ARTICLE 3(1), 10, 22(1)
& 165 (3) OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF CONTRAVENTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS UNDER ARTICLES 19, 20, 21(1),
24, 29(A), 40 & 157(11) OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF ARTICLE 162 (2) (B) OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF SECTION 13 OF THE
ENVIRONMENT AND LAND COURT ACT, NO.19 OF 2011**

AND

IN THE MATTER OF SECTION 24, 25 & 80 OF THE LAND REGISTRATION ACT, 2013

AND

IN THE MATTER OF SECTION 116 OF THE LAND ACT, NO.6 OF 2012

AND

IN THE MATTER OF ILLEGAL, ULTRA VIRES

AND



UNCONSTITUTIONAL PROSECUTION OF THE PETITIONERS IN NAIROBI ANTI-CORRUPTION & ECONOMIC CRIMES COURT, CHIEF MAGISTRATE COURT CASE NO. 33 OF 2018 AND IN THE MATTER OF UNCONSTITUTIONAL DEMANDS FOR REFUND

BETWEEN

DAVID BARNO SOME 1ST PETITIONER
ESTHER CHEBET SOME 2ND PETITIONER
DASAHE INVESTMENT LIMITED 3RD PETITIONER
KEIBUKWO INVESTMENT LIMITED 4TH PETITIONER
OLOMOTIT ESTATE LIMITED 5TH PETITIONER

AND

THE HON. ATTORNEY GENERAL 1ST RESPONDENT
THE CHIEF LAND REGISTRAR 2ND RESPONDENT
THE NATIONAL LAND COMMISSION 3RD RESPONDENT
THE DIRECTOR OF PUBLIC PROSECUTIONS 4TH RESPONDENT
**THE CHIEF MAGISTRATE-ANTI CORRUPTION AND ECONOMIC
CRIMES COURT (TRIAL MAGISTRATE IN ACC CASE NO. 33 OF
2018) 5TH RESPONDENT**
THE KENYA RAILWAYS CORPORATION 6TH RESPONDENT
ETHICS & ANTI CORRUPTION COMMISSION 7TH RESPONDENT

AND

PROF. ABDALLA SWAZURI MOHAMMED INTERESTED PARTY
DR. SALOME LUDENY MUNUBI INTERESTED PARTY
TOM AZIZ CHAVANGI INTERESTED PARTY
FRANCIS KARIMI MUGO INTERESTED PARTY
ATANAS KARIUKI MAINA INTERESTED PARTY
VICTOR WAHOME KARIUKI INTERESTED PARTY
ELIJAH MWENDA NYAMU INTERESTED PARTY
JOHN MWANGI MWANIKI INTERESTED PARTY
CAROLINE NABALAYO KITUYI INTERESTED PARTY
PETER NG'ANG'A MBURU INTERESTED PARTY
GLADYS MWIKALI MUYUNGA INTERESTED PARTY
OBADIAH MBUGUA WAINAINA INTERESTED PARTY



JUDGMENT

Background of the case

1. The petition before the court is a constitutional petition. It is dated 21/10/2020. The Petitioners are claiming infringements of their constitutional rights by the Respondents. The basis of the rights allegedly infringed is provided in paragraphs 14 to 30 of the petition. The particulars of the alleged violations of rights are supplied in paragraphs 56 to 105 of the petition.
2. The petition is supported by an affidavit sworn by David Some Barno on 21/10/2020.

The supplementary affidavit

3. The 1st petitioner also filed a supplementary affidavit in support of the petition sworn on 13/05/2024. The 1st petitioner swore the affidavit on behalf of the 2nd, 3rd, 4th and 5th petitioners.
4. The petitioners averred that the petitioners observed and complied with all requisite procedures set out in the different legislative regimes in the acquisition of the suit properties. The ensuing title deeds therefore conferred full indefeasible rights of proprietorship over the properties to the petitioners as defined by sections 24 and 25 of the *Land Registration Act* and as such protected under article 40(1) of *the Constitution*.
5. The petitioners averred that the said titles have not been cancelled by any court on the premise that they were acquired fraudulently and or adjudging them as not being private land available for compulsory acquisition. As such they see no basis for the 4th respondent to allege that the petitioners obtained the title documents through fraud. The petitioners relied on Section 80 of the *Land Registration Act*.
6. The petitioners averred that this court vested with the requisite jurisdiction can then action on the substance of section 80 of the *Land Registration Act*, THAT, the court in Nairobi Chief Magistrates' Court Anti-Corruption Criminal Case No. 33 of 2018 sits to determine issue of criminal liability within the ambit of section 5 (3) of the *Anti-Corruption And Economic Crimes Act* can only issue convictions and pass down sentences as authorized by law for the punishment of the offence of which such person is convicted.
7. The petitioners averred that the respondents should have preferred suit against the petitioners seeking cancellation of the said proprietorship through the proper channel if they were of the considered view that the suit properties were not lawfully and or legally acquired. Absent such a court order the averments by the 4th respondent remains to be ultra vires, null and void and the resultant effect violations and breaches of the petitioners' rights.
8. The petitioners averred that the application dated 29/03/2023 filed in Nairobi Chief Magistrates' Court, Anti-Corruption Criminal Case No. 33 of 2018, the 4th respondent herein sought the withdrawal of the charges against the petitioners herein. The substratum of the 4th respondent's application was that upon review of the evidence, it had found necessary to review the decision to charge the petitioners, preferring a withdrawal of the charges against the applicants under section 87(a) of the Criminal Procedure Code.
9. However, vide ruling dated 22/05/2023 Hon. E.K. Nyutu (SPM) concluded that the reasons advanced by the respondent were not sufficient to warrant withdrawal by the respondent. The petitioners contend that the 4th respondent cannot eat from both ends of the spoon, it is either the charges are



proper with evidence in support thereof or not; the reason why the proceedings ought to be vacated as against the petitioners.

10. The petitioners averred that as per the averments by Ms. Anne Perte, a principal prosecution counsel in the office of the 4th respondent who is in conduct of Nairobi Chief Magistrates' Court Anti-Corruption Criminal Case No. 33 of 2018 who is a deponent of the affidavit sworn in support of the application dated 29/03/2023, it is evident that dispute is limited to the process of acquisition of the suit properties and issuance of title that said dispute being a dispute relating to acquisition of land which cannot be adjudicated over by the court in Nairobi Chief Magistrate' Court Anti-Corruption Criminal Case No. 33 of 2018 as it is not vested with the requisite jurisdiction that can then action on the substance of section 80 of the *Land Registration Act*. According to them, the trial court determines criminal liability within the provisions of section 5 of the *Anti-corruption and Economic Crimes Act*. For, those reasons, they say that, the said proceedings must be halted in favour of a determination by the court with requisite jurisdiction within the meaning of Article 162(2)(b) of *the constitution* in the exercise of the powers under section 80 of the *land registration act* before culpability can then be found through the criminal process if any shall arise.

The response.

11. The 4th respondent filed a replying affidavit sworn on 27/01/2021 by Mr. Wesley Nyamache and further filed grounds of opposition dated 08/02/2024 in response to the petition.
12. The 6th respondent filed a replying affidavit sworn on 16/01/2024 by Mr. Duncan Mwangi in response to the petition. The 6th respondent also filed an answer to the petition dated 16/01/2024.
13. The 7th respondent filed a replying affidavit sworn on 20/02/2024 by Ms. Dorothy Mnjala in response to the petition.
14. The 1st, 2nd, 3rd, and 5th respondents were represented by the office of the AG did not participate. The same position applies to the interested parties.

4th respondent's arguments.

15. The 4th respondent alleges that the present petition is res judicata on the premise that the matters raised herein were conclusively determined in Anti-Corruption and Economic Crimes Constitutional Petition No. 23 of 2018 and Anti-Corruption and Economic Crimes Constitutional Petition No. 31 of 2018 wherein allegedly the court heard the same parties herein on the same subject matter to wit Anti-Corruption Criminal Case No. 33 of 2018.

The 6th respondent's arguments.

16. The 6th respondent speaks to the suit properties never belonging to it. A fact reiterated by Mr. Duncan Mwangi during cross-examination by the 4th respondent.
17. The 6th respondent gave a history and records of the properties belonging to it within the premises where the suit properties herein are located and argued that the suit properties do not fall within the marshaling yard of the 6th respondent. The 6th respondent confirmed that the suit properties are not and have never been reserved for the 6th respondent.
18. The 6th respondent contends that PDP NO. 42/14/2A dated 22/08/1991 is an indication thereon of railway reserve, however, and as can be ascertained from the PDP, the 'proposed site for industrial development' is different from, and is not the area of concern, where the suit properties were alienated and or curved from. The 6th respondent confirmed that it has no records to show that the area marked'



railway reserve’ on PDP No/42/14/2a belongs to it. In any event, in 1999, a part of development plan no. 42/14/99/03 was prepared under the hand of the physical planning department Nairobi and approved by the commissioner of lands, amending and superseding the existing part development plan no. 42/14/90/2a that delineated the areas reserved for the 6th respondent including its marshaling areas and further demarcated the remaining public land as alienable.

19. PDP made out under the provisions of the *survey act* does not legally pass or create any proprietorship to any party and this explains why as confirmed by the 6th respondent when the process of actual survey of some of the parcels proposed in part development plan no. 42/14/90/2A, the section that appears marked as ‘ railway reserve’ was actually surveyed otherwise under survey plan numbers (FR) 208/40 authenticated on 04/02/1991, and (FR) 312/57 authenticated on 27/11/1996.

7th respondent’s arguments

20. The 7th respondent has also raised res judicata.

Directions of the court

21. The petition was canvassed by way of written submission. The petitioners, the 6th respondent, and the 4th respondent have filed. The other parties did not participate in the matter.

The petitioners’ submissions

22. The petitioners submitted that the present dispute is not res judicata as alleged by the 4th respondent. The petitioners contend that firstly, none of the petitioners herein were participants in the proceedings in Anti-Corruption and Economic Crimes Constitutional Petition No. 23 of 2018. Secondly, the issue of proprietorship of L.R. NO. 9084,9085,9086,9087 and 9088 by the petitioners was never an issue for determination in Anti-Corruption and Economic Crimes Constitutional Petition No. 23 of 2018. Thirdly neither was the jurisdictional challenge as relates to the hearing and determination of the issue of ownership of LR. NO. 9084,9085,9086,9087 and 9088 by Nairobi Chief Magistrate’s Court, Anti-Corruption Criminal Case No. 33 of 2018. Fourthly, neither was the issue as to whether Nairobi Chief Magistrate’s Court, Anti-Corruption Criminal Case No. 33 of 2018 could only be heard and determined after a determination of the question of ownership of the suit properties by a court vested with the said jurisdiction and lastly, neither was the issue of the validity and applicability of the demand letters dated 28/09/2020 issued to the petitioners by the 7th respondent and/ or the commencement of any court over the said demands prior to a determination on the proprietorship of the suit properties. The petitioners were the 10th -14th interested parties in anti-corruption and economic crimes Constitutional Petition No.31 of 2018 and participated in the said petition under the said capacity. The petitioners relied on section 7 of the *Civil Procedure Act*, the Merriam- webster dictionary definition of res judicata, black’s law dictionary, Nathaniel Ngure Kihui V Housing Finance [2018] eKLR, Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Ltd[2017] eKLR, The Independent Electoral And Boundaries Commission Vs Maina Kiai & 5 Others [2012] eKLR, Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Ltd(Supra).
23. The petitioners submitted that this court is the only court that can render itself on the proprietorship of the suit properties herein that would then advise the appropriateness of the criminal proceedings in Anti-Corruption Criminal Case No. 33 of 2018 and the impugned demands by the ethics and Anti-Corruption Commission of 28/09/2020. the petitioners contend that despite it being apparent that indeed the dispute herein is purely one on proprietorship of the suit properties that then advises the resultative happenings, the 4th and 7th respondents are insistent that the anti-corruption magistrates court has jurisdiction to adjudicate over the said dispute. The petitioners relied on Owners Of Motor



- Vessel ‘Lilian ‘S’ V Caltex Oil (Kenya) Limited [1989] KLR1, Kakuta Maimai Hamisi Vs Peris Pesi Tobiko & 2 Others [2013] eKLR, Mumo Matemu V Trusted Society Of Human Rights Alliance & 5 Others [2013] eKLR, Re Interim Independent Electoral Commission [2011] eKLR, Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others [2012] eKLR.
24. The petitioners submitted to reinforce their position that trial court does not have jurisdiction to hear and determine all disputes relating to title to land including claims of unlawful and illegal compensation or rectification of title under section 80 of the *Land Registration Act*. The petitioners relied on Article 162(2)(b) of *the constitution*, Re Interim Independent Electoral Commission (Supra) And Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited 7/ 2 Others (Supra)
 25. According to the petitioners, the Anti-Corruption Criminal Case No. 33 of 2018 ought to be stopped on the grounds that there is a legal bar against the institution or continuance of the proceedings, there is neither legal evidence adduced nor the evidence adduced by the prosecution against the petitioners. The petitioners relied on Article 157 Of *The Constitution, Maina & 4 Others V Director Of Public Prosecutions & 4 Others (Constitutional Petition E106& 160 Of 2021* (Consolidated) [2022] KEHC 15(KLR) (Constitutional And Human Rights) (27 January 2022(Judgment), Attorney General V Attorney General For And On Behalf Of the Inspector General Of Police & 3 Others Ex Parte Thomas Nganga Munene [2014] eKLR
 26. The petitioners submitted that absent authorization by the 3rd respondent to the 7th respondent abrogating its mandate under section 116 of the *land act*, the demand refunds from compulsory acquisitions, the 7th respondent cannot purport to usurp that mandate as just like judicial authority, the mandate of public entities is derived from *the constitution* and statute law. The petitioners relied on Section 116 of the *land act*
 27. The petitioners talked of the need to determine the substance and basis of the impugned demand and accompanying threats by the 7th respondent, and the mandate of EACC under section 11(1) (j) of the EACC Act and section 51-54 of the ACECA and for the 7th respondent to exercise the recovery jurisdiction, and the fact that, there must be evidence of conviction of a person for an economic crime or corruption and the existence of a compensation order against the person convicted. The petitioners relied on sections 2,45(1)(a),51,53(3),55, and 56 of the ACECA and section 11(1)(j) of the *Ethics and Anti-Corruption Commission Act*, registered trustees of the sisters of mercy (Kenya) t/a ‘mater misericordiae hospital’ v john muriithi & 2 others [2019] eklr.
 28. The petitioners submitted that the continued prosecution of the petitioners is not being undertaken in the interest of administration of justice but for sole purpose of abuse of power and court process and geared towards breach of the rights of the petitioners and contravention of *the constitution*. The petitioners relied on article 10, 157(11) of *the constitution*, section 4 of the ODPP Act, *Maina & 4 others v director of public prosecutions & 4 others (constitutional petition E106& 160 of 2021*(consolidated) [2022] KEHC 15(KLR) (Constitutional and human rights) (27 january 2022) judgment(supra)
 29. The petitioners submitted that the enterprise by the 4th and 7th respondents infringes on the petitioners right to property both on the land and compensation received for the compulsory acquisition. The petitioners relied on article 40(1) of *the constitution*, section 24, 25, 26, 80 of the *land registration act*,

The 4th respondent’s submissions.

30. The 4th respondent submitted that ALL the issues raised in the Petition against the Respondents have been conclusively determined by the Court in Anti-Corruption Constitution Petition No. 23 of 2018 and Anti-Corruption Constitutional Petition No. 31 of 2018, and as such the present petition is Res



- Judicata. The respondent relied on *Henderson Vs Henderson* (1843) 67 ER 313 *The Independent Electoral and Boundaries Commission V Maina Kiai & 5 Others*, (2017) eKLR, *William Koross (Legal Personal Representative Of Elijah C.A. Koross) V Hezekiah Kiptoo Komen & 4 Others* (2015) eKLR.
31. The 4th respondent submitted that the petitioners have not demonstrated and/ or proved a violation of their constitutional rights as alleged to warrant the orders sought herein. The 4th respondent relied on *Republic V DPP & Three Others Ex-Parte Bedan Mwangi Nduati & Another* [2015] eKLR.
 32. The 4th respondent submitted that it is well established in law that the court ought not to interfere with the mandate of other constitutional organs by involving itself in determining whether a criminal offence has been committed in order to warrant a decision to prosecute. This Court should shy away from delving into the matters of evidence in this Petition, as it is the trial Court that is best equipped to test the veracity, accuracy, admissibility, and reliability of the evidence including the claims made by the Petitioners. The 4th respondent relied on *Pauline Adhiambo Raget V Director of Public Prosecutions And 5 Others* (2016) eKLR, *Beatrice Ngonyo Kamau Vs. DCI & Anor* [2013] eKLR, *Alfred N. Mutua V Ethics & Anticorruption Commission (EACC) & 4 Others* [2016] eKLR, *Jago V District Court (NSW) - [1989] HCA 46, Moevao V Department Of Labour*[1980] 1 NZLR 464
 33. The 6th Respondent's Submissions
 34. The 6th respondent submitted that all the evidence and records in possession of the 6th Respondent show that those parcels of land were never owned or occupied by the 6th Respondent in any way.
 35. The 6th respondent submitted that since they have not and never claimed ownership or occupied the suit lands in any way, any complaint of a violation of the Petitioner's property rights by the 6th Respondent is totally misplaced and misguided.
 36. The 6th respondent submitted that it is the mandate of the 3rd Respondent, the National Land Commission exclusively, to compulsorily acquire land as established under Article 67 of the Kenya Constitution 2010 and part VIII of the *Land Act* 2012 which functions the 6th Respondent has no role to play. The 6th respondent contends that their only role was to identify the parcels of land to be compulsorily acquired for the Standard Gauge Railway but it was the National Land Commission's mandate to conduct due diligence on the said properties prior to the acquisition. The 6th Respondents compiled a list that included the five suit properties which the 3rd Respondents proceeded to acquire and thereafter make awards for compensation to the Petitioners without the involvement of the 6th Respondent.
 37. The 6th Respondent submitted that all the records in their possession do not show that the suit properties ever belonged to or were ever reserved for Kenya Railways Corporation, the 6th Respondent.
 38. The 6th respondent averred that supported by maps drawings and other documents showing boundary beacons the subject properties were never part of Kenya Railways land and neither were they ever Railway reserve. instead, the 6th Respondent, by use of official documents obtained from the Lands and survey departments, have demonstrated that the suit land was within the Embakasi Township reserve without going into further details, the 6th Respondent in paragraph 26 of their replying affidavit states "from the averments contained in their affidavit and the documentary evidence presented, it is clear that the 6th Respondents have not in any way either as claimed in the petition or otherwise violated or infringed on any of the Petitioners' constitutional or legal rights.



39. The 6th Respondent submitted that it has demonstrated by way of documentary evidence from official records that they do not have in their possession anything whatsoever to prove that the suit properties have ever been reserved for the 6th Respondents use.
40. The 6th respondent submitted that the petitioners have not demonstrated how the 6th respondent has violated and/ or infringed on their constitutional and/ or legal rights.

ANALYSIS AND DETERMINATION

41. This court has considered the petition and the application dated 30/05/2023, the 1st respondent's application, the grounds of opposition, the rival parties' submissions.
42. Issues for determination
 - i. Whether these proceedings are res judicata.
 - ii. Whether this court has jurisdiction to hear and determine issues relating to title to land- the suit properties.
 - iii. Whether the criminal trial is a violation of the petitioner's right, and should be stayed.
 - iv. The appropriate orders to make.

Whether proceedings res judicata

43. Res judicata is one of the general jurisdiction-regulating principles; it is a preclusion doctrine aimed at protecting the finality of the decision, and to shield from the undesired consequences or vexation of sequential proceedings. Res judicata is provided for in section 7 of the *Civil Procedure Act*.
44. The triple identity test for res judicata relate to: existence of a previous suit between same parties or their privies; in which the same cause of action or subject matter or issues were directly in issue; and a final decision by a competent court was made in the previous suit completely settling or determining the issues between, and rights of the parties.
45. See the Supreme Court in Kenya Commercial Bank Limited v Muiri Cofee Estate Limited & another.
46. The 4th respondent argued that these proceedings are res judicata as they were determined in an earlier petition; Anti-Corruption and Economic Crimes Constitutional Petition No. 23 of 2018.
47. The petitioners submitted that the present dispute is not res judicata as alleged by the 4th respondent. The petitioners contend that firstly, none of the petitioners herein were participants in the proceedings in Anti-Corruption and Economic Crimes Constitutional Petition No. 23 of 2018. Secondly, the issue of proprietorship of L.R. NO. 9084,9085,9086,9087 and 9088 by the petitioners was never an issue for determination in Anti-Corruption and Economic Crimes Constitutional Petition No. 23 of 2018. Thirdly neither was the jurisdictional challenge as relates to the hearing and determination of the issue of ownership of LR. NO. 9084,9085,9086,9087 and 9088 by Nairobi Chief Magistrate's Court, Anti-Corruption Criminal Case No. 33 of 2018. Fourthly, neither was the issue as to whether Nairobi Chief Magistrate's Court, Anti-Corruption Criminal Case No. 33 of 2018 could only be heard and determined after a determination of the question of ownership of the suit properties by a court vested with the said jurisdiction and lastly, neither was the issue of the validity and applicability of the demand letters dated 28/09/2020 issued to the petitioners by the 7th respondent and/ or the commencement of any court over the said demands prior to a determination on the proprietorship of the suit properties. The petitioners were the 10th -14th interested parties in anti-corruption and economic crimes Constitutional Petition No.31 of 2018 and participated in the said petition under the said



capacity. The petitioners relied on section 7 of the Civil Procedure Act, the Merriam- webster dictionary definition of res judicata, black’s law dictionary, Nathaniel Ngure Kihui V Housing Finance [2018] eKLR, Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Ltd[2017] eKLR, The Independent Electoral And Boundaries Commission Vs Maina Kiai & 5 Others [2012] eKLR, Kenya Commercial Bank Ltd Vs Benjoh Amalgamated Ltd(Supra).

48. These proceedings may be res judicate. However, the 4th respondent did not seriously argue res judicata.
49. The petitioners have argued that the respondents were not parties in the earlier petition, thus, matter is not res judicata.
50. The petitioners also put forth very interesting arguments by making a distinction in the kind of arguments they have adopted to challenge the trial, for instance, that the trial ought to have been preceded by an order under section 80 of the Land Registration Act, thus, null and void, as a basis for removing these proceedings from the scope of res judicata. Although the case of Henderson Vs Henderson (1843) 67 ER 313 would disqualify such arguments as a basis for removing a case from the ambit of res judicate, but, for this last argument, the court will determine the other two issues set out above.

Whether this court has jurisdiction to determine disputes relating to title to land

51. The jurisdiction of the trial court is criminal; to determine criminal culpability of the accused and to also make other ancillary orders thereto. The petitioners claim that the trial court has no jurisdiction to determine disputes on title are neither here nor there as there is no evidence that the trial court has assumed jurisdiction it does not have. The correct question, therefore, is whether this court has jurisdiction to determine disputes relating to title to the suit properties.
52. The pe
53. Petitioners have stated correctly that disputes relating to title to land fall within the jurisdiction in article 162(2)(b) of the Constitution. Their claim in respect of the title to the suit property fall within the said jurisdiction.
54. The submissions by the 6th respondent to the effect that it does not claim proprietorship and has never been the proprietor of the suit property, are matters falling within the same jurisdiction.
55. But before concluding this aspect, the 6th respondent made specific submissions that, it is the mandate of the 3rd Respondent, the National Land Commission exclusively, to compulsorily acquire land as established under Article 67 of the Kenya Constitution 2010 and part VIII of the Land Act 2012 of which functions the 6th Respondent has no role to play.
56. The 6th respondent contended that their only role was to identify the parcels of land to be compulsorily acquired for the Standard Gauge Railway but it was the National Land Commission’s mandate to conduct due diligence on the said properties prior to the acquisition. The 6th Respondents compiled a list that included the five suit properties which the 3rd Respondents proceeded to acquire and thereafter make awards for compensation to the Petitioners without the involvement of the 6th Respondent.
57. By these submissions and the law, it is not clear the legal basis for suing the 6th respondent.
58. That notwithstanding, it, thus, is apparent that ownership of the suit properties is the linchpin of this petition. The petitioners claim that the respondents have infringed upon their property rights in relation to the suit properties. They also seem to claim that, acquisition of the suit properties as well as compensation following compulsory acquisition is in controversy.



59. All such civil or sui generis matters fall within the jurisdiction of ELC. Therefore, this court does not have jurisdiction to determine dispute relating to land; ELC has. And, any violation of property rights in respect of the suit land claimed in the petition should be determined by ELC.

Whether the criminal trial should be stopped

60. This petition was transferred to this court (formerly ELC Constitutional Petition No. E022 of 2020) in an order made on 25/05/2021 in an application dated 02/02/2021.
61. In transferring the petition, ELC noted that the petition sought to stay a criminal case which is pending before an anti-corruption magistrates' court and also the implementation of the impugned demand by the Ethics and Anti-corruption Commission, and preferred any such orders to emanate from this court and not the ELC.
62. Thus, the only issue upon which this court may exercise jurisdiction is whether it should stay or quash the criminal trial.
63. The court does note two submissions by the petitioners which calls for immediate evaluation.
64. The petitioners submitted that, the respondents should have preferred suit against the petitioners seeking cancellation of the suit titles on the basis that they were fraudulently acquired before preferring criminal charges on the acquisition. They were of the view that, absent such a court order, the actions by the 4th respondent in preferring criminal charges against them remains ultra vires, null and void with the resultant effect of violations and breaches of the petitioners' rights. They emphasized exercise of the requisite jurisdiction in Article 162(2)(b) of *the Constitution* and utilization of the powers under section 80 of the *Land Registration Act* as necessary prerequisite before criminal culpability can then be found through the criminal process.
65. In essence, the petitioners have argued that, the criminal trial should have been preceded by a suit and an order under section 80 of the *Land Registration Act* declaring the titles to the suit properties to have been fraudulently acquired. In other words, the petitioners read a prohibition of mounting a criminal charge on illegal acquisition in section 80 of the *Land Registration Act*.
66. This court finds the submission not to be defensible. Section 80 of the *Land Registration Act* is on rectification of title by order of the court; it does not create any prohibition or a prerequisite for mounting of a criminal charge on fraudulent acquisition of land or title.
67. The petitioners' argument on section 80 of LRA also suffer depreciation when juxtaposed against the law, permitting a criminal charge to be prosecuted simultaneously with a civil claim arising from the same facts.
68. See section 193A of the CPC on 'Concurrent criminal and civil proceedings' that:
- Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.
69. Therefore, this argument, does not ipso facto, found or prove infringement of rights.
70. The petitioners also made quite asymmetrical submission; that, there must be a conviction before recovery of alleged illegal compensation. The submission may be oblivious of non-conviction-based forfeiture which is civil in nature and is not dependent upon a conviction. In civil forfeiture, the



applicant is not required to prove any specific or commission of specific crime, except, to plead matters which constitute the criminal conduct or in connection with commission of an offence. See POCAMLA, ACECA as well as international and regional instruments ratified by Kenya, amongst others, UNCAC, UNCATOC, AUCPCC).

71. Be that as it may, the petitioners should prove that the trial is a violation of their right, or is oppressive or it is an abuse of process- being used for collateral advantage or gain.
72. Contrary to the submission by the petitioners, the fact that the DPP applied to withdraw the charges; and that the trial court declined the application, does not make the sustenance of the case an infringement of the petitioners' rights or an abuse of power or process. The trial court withheld its permission from the DPP's withdrawal of the charges, in exercise of the court's constitutional power in article 157(6)(b) of *the Constitution*. The view of the court is that, any party aggrieved by the exercise of that power by the court, may appeal; rather than make it a basis for constitutional petition.
73. Other than claiming that they are the owners of the suit properties, they have not shown how the criminal trial infringes upon their rights or how it is oppressive or an abuse of process-being used to obtain collateral advantage or gain.
74. The claims by the petitioners in this petition constitute defense in the trial court which should be evaluated and determined by the trial court within its jurisdiction to determine culpability or otherwise of the petitioners in the criminal trial.
75. See Pauline Adhiambo Raget V Director of Public Prosecutions And 5 Others (2016) eKLR, Beatrice Ngonyo Kamau Vs. DCI & Anor [2013] eKLR, Alfred N. Mutua V Ethics & Anticorruption Commission (EACC) & 4 Others [2016] eKLR, Jago V District Court (NSW) - [1989] HCA 46, Moevao V Department Of Labour[1980] 1 NZLR 464.
76. The criminal trial should, however, be fast-tracked to avoid prejudice to rights of the parties concerned. The trial court is accordingly directed.
77. In the upshot, the petition is dismissed.
78. Given the nature of these proceedings, each party shall bear own costs.
79. Orders accordingly.

DATED, SIGNED, AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 19TH DAY OF JULY, 2024

F. GIKONYO M

JUDGE

In the presence of: -

Mukuha for Bwire for Petitioners

Ms. Wairimu for 7th respondent (EACC)

Mutei for 6th respondent (came in later and was informed of judgment)

Nyamache for DPP-Absent

AG absent

Raymond C/A

