Yegon (Suing as the Administrator of the Estate of Kipyegon Arap Kirui - Deceased) v Ekaterra Tea Company Limited (Formerly Kenya/Unilever Tea Kenya Ltd) & 2 others (Environment and Land Constitutional Petition E002 of 2022) [2025] KEELC 5694 (KLR) (31 July 2025) (Judgment)

Neutral citation: [2025] KEELC 5694 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND CONSTITUTIONAL PETITION E002 OF 2022

LA OMOLLO, J

JULY 31, 2025

BETWEEN

WILSON MALAKWEN YEGON (SUING AS THE ADMINISTRATOR OF THE ESTATE OF KIPYEGON ARAP KIRUI - DECEASED) ..... PETITIONER

AND

EKATERRA TEA COMPANY LIMITED (FORMERLY KENYA/UNILEVER TEA KENYA LTD) ..... 1ST RESPONDENT

THE CHIEF LAND REGISTRAR ..... 2ND RESPONDENT

THE HON ATTORNEY GENERAL ..... 3RD RESPONDENT

JUDGMENT

Introduction.

1. The Petitioner commenced the present proceedings vide the Petition dated 27th July, 2022.

2. The Petitioner avers that his late father one Kipyegon Arap Kitur (deceased) owned a parcel of land described as

> " triangle of the reserve to the South East of the tarmac and its triangle formed by the tarmac, the Kaisugu road and the Kenya Tea Company boundary running from their head office to the Kaisugu road".

3. The Petitioner also avers that the suit parcel measures ten acres. He avers that Unilever Kenya Tea Limited then Kenya Tea Company Limited compulsorily acquired it from his father and other people of the Kipsigis Community who lived around Brooke Center in the year 1956. He goes on to explain

that this was done through the African District Council Minutes referenced as Min 40/56 under the caption "Land Exchanges". The 1st Respondent's head office and Accounts Department is now situated on the said portion.

4. The Petitioner further avers that the beneficiaries of the estate of the late Kipyegon Arap Kitur currently occupy land parcel No. Kericho/Kipchimchim/1068 and that the said land is adjacent to the suit parcel and is only separated by the Kericho – Nakuru highway.

5. It is the Petitioner's averment that his late father was to be compensated be being given an equivalent acreage at Kapkorech Estate to the North west of the tarmac between the tarmac and Kapsaos Market and that the said portion was to if possible include the new road to Kapsaos Market.

6. It is also the Petitioner's averment that his father died on 1st December, 1966 before he had the opportunity to reclaim his parcel of land and/or push for compensation during the land registration and adjudication process.

7. It is further the Petitioner's averment that Kenya Tea Company Limited dispossessed the estate of his late father his rightful ownership, occupation and title of the suit parcel without compensation.

8. The Petitioner avers that the 1st Respondent compensated Chuma Arap Chabas (deceased) to the exclusion of the other Kipsigis land owners that include his deceased father.

9. The Petitioner also avers that the acquisition process by the 1st Respondent did not comply with the constitutional and legal requirements on compulsory acquisition thereby violating the Petitioner's proprietary rights under Article 40 of *the Constitution* of Kenya, 2010.

10. The Petitioner further avers that he blames the 1st Respondent for the continued human rights violations and discriminatory acts that have caused pain, loss and damage to the family of his deceased father.

11. It is the Petitioner's averment that his claim is for restitution of the disputed ten acres of land inclusive of the developments made thereon and/or in the alternative compensation in terms of the current value of ten acres. He adds that the compensation should include mesne profits for the use of the suit parcel by the 1st Respondent for nearly 55 years.

12. It is also the Petitioner's averment that his claim is a historical injustice that should be determined by the National Land Commission. He goes on to state that his claim falls under the description of an historical injustice as provided for under Article 67 of *the Constitution* and Section 15 of the Land Laws (Amendment) Act, 2016.

13. It is further the Petitioner's averment that he is aware of the role of the National Land Commission on historical land injustices. He adds that he wrote to the National Land Commission and made several physical visits to its offices and that The National Land Commission through its then chairperson Prof. M.A Swazuri wrote to them the letter dated 26th September, 2017. He goes on to state that the said letter stated that upon perusal of the presented documents, the Chairperson noted that the dispute was between them and Brooke Bond which is a privately-owned company and advised them to follow up with the company for compensation.

14. He avers that he also wrote to the 2nd and 3rd Respondents with the hope of getting assistance but to date, they have not received any response.

15. He also avers that despite demand and notice of intention to sue having been issued, the Respondents have ignored, neglected, and/or refused to respond, restitute and/or compensate the Petitioner.

16. He further avers that the actions of the 1st Respondent and the inactions of the 2nd and 3rd Respondents has violated his right enshrined under Articles 2(5), 10, 17, 22, 23, 27, 40, 47, 48, 67 (e) & (f) & 64 of *the Constitution* of Kenya and Article 14 of the African Charter on Human and Peoples' Rights.

17. The Petitioner seeks the following orders;

    a. A declaration that the disputed portion of land belongs to the estate of Kipyegon Arap Kirui (deceased).

    b. A declaration for restitution of the ten (10) acres of land inclusive of all the developments thereon to the estate of Kipyegon Arap Kirui (deceased).

    c. An order of permanent injunction restraining the 1st Respondent by itself, its agents and/or servants, employees, officials, and or anyone from any further trespass, occupation, use and/or interference with the disputed portion of land.

    d. A declaration for compensation in terms of the current and developed value of the ten acres and mesne profits accruing for use of the said parcel by Kenya Tea Company Limited (Unilever Tea Limited) calculated yearly for fifty-five years.

    e. An order directing the 2nd Respondent to cause the survey and issuance of title deed to the estate of Kipyegon Arap Kirui (deceased).

    f. Any further relief that this Honourable Court may deem just and fit to grant.

    g. Costs of this Petition be borne by the Respondents.

The Petitioner's Contention.

18. The Petition is supported by the affidavit of Wilson K. Yegon sworn on 27th July, 2022.

19. He reiterates that he is the administrator of the estate of Kipyegon Arap Kirui (deceased). He goes on to state that after the demise of his father, he followed up on the present land issue with the 1st Respondent and he is therefore well versed with the facts surrounding the dispute herein.

20. He reiterates the averments in his Petition and contends that under 'Minute 40/56 Land Exchanges' his late father was described as a neighbor to Chuma Arap Chabas (deceased) in the land described as "triangle of the reserve to the South East of the tarmac and its triangle formed by the tarmac, the Kaisugu road and the Kenya Tea Company boundary running from their head office to the Kaisugu road".

21. The Petitioner reiterates that the 1st Respondent exchanged the said parcel of land with a parcel of land described as 'Kapkorech Estate to the North west of the tarmac between the tarmac and Kapsaos Market'. The said portion was to if possible include the new road to Kapsaos Market.

22. The Petitioner contends that after demise of his late father, he has been following up with the 1st Respondent to push for the conclusion of the dispute. He goes on to state that he has noted that an agreement was entered between Kenya Tea Company Limited (currently Ekaterra Tea Company Limited and formerly Unilever Tea Kenya Limited) and the African District Council of Kipsigis. This agreement was supported by the aforementioned minutes and it shows that his client (sic) was dispossessed of his land during adjudication, registration and titling process through uncompensated compulsory acquisition.

23. The Petitioner also contends that the 1st Respondent discriminated against his family as it compensated their neighbor one Chuma Arap Chabas (deceased) by paying him Kshs. 33,500/= and that he used the said sum of money to purchase 1000 acres from the Land Settlement and Development Board vide a Memorandum of Agreement signed by the 1st Respondent, the late Chuma Arap Chabas and witnessed by the then District Commissioner on 18th January, 1963.

24. The Petitioner further contends that he together with the beneficiaries of the estate of his late father are in occupation of the remaining portion land that is now registered as land parcel No's Kericho/ Kipchimchim/1058 and 1068.

25. It is the Petitioner's contention that the other beneficiaries of his late father's estate live in squalor as they lost the ten acres that are now occupied by the 1st Respondent. He reiterates that the 1st Respondent has built its head office, accounts department and has planted tea on the remaining portion.

26. He reiterates the averments in the Petition and restates the prayers sought in the Petition.

27. He ends his deposition by stating that the Court should resolve this historical land injustice once and for all.

The 2nd and 3rd Respondent's Response.

28. In response to the Petition, the 2nd and 3rd Respondent's filed Grounds of Opposition dated 11th January, 2023. They are as follows;

    a. That to the extent that the Petition does not identify, with precision, any known and/or alienated land, the same lacks a subject matter and this Court has no jurisdiction to entertain the same. The Petition lacks a cause of action.

    b. That to the extent that no enforceable interest can arise from a non-existent parcel of land, the Petition herein is non-justiciable and bad in law.

    c. That the Petition is based on conjecture and therefore incapable of supporting any claim for the orders sought.

The 1st Respondent's Response.

29. The 1st Respondent filed a Replying Affidavit sworn by one Kenneth Odire on 8th May, 2024.

30. He deposes that he is the 1st Respondent's General Manager.

31. He also deposes that he has been advised by the 1st Respondent's advocates on record that the present Petition is not pleaded with reasonable precision as required of a Constitutional Petition.

32. He further deposes that the Petition generally alleges that the 1st Respondent has violated the Petitioner's rights and has not demonstrated with reasonable precision the Constitutional rights that have been infringed and the manner in which they have been infringed. He goes on to state that the Petition as framed does not disclose any constitutional issues for determination.

33. It is his deposition that at paragraph 20(a) of the Petition, the Petitioner alleges that his rights under Articles 2(5), 10, 17, 22, 23, 27, 47 and 48 have been infringed. He goes on to state that the Petitioner has not specifically corelated the alleged infringements with the 1st Respondent's actions.

34. It is also his deposition that he is advised by Counsel for the 1st Respondent that the Petitioner's allegations at paragraph 20(d) of the Petition where he avers that the 1st Respondent has continued to violate Article 67 (e) and (f) of *the Constitution* is misconceived and is based on a misreading of the said article.

35. It is further his deposition that Article 67 of *the Constitution* of Kenya establishes the National Land Commission. He adds that the 1st Respondent is neither the National Land Commission nor is it mandated to deal with any claim touching on historical land injustices.

36. He deposes that the 1st Respondent has not failed to comply with any decisions issued by the National Land Commission upon investigating any historical land injustices.

37. He also deposes that the only alleged infringement that is specified in the Petition is with regard to Article 40 of *the Constitution* and it lacks merit.

38. He further deposes that the Petition does not demonstrate that Kipyegon Arap Kirui (deceased) owned a specific parcel of land measuring ten acres. He also states that the Petition does not also demonstrate that the 1st Respondent transferred and/or took up the deceased's parcel of land based on any agreement or compulsory acquisition.

39. It is his deposition that the Petitioner has not demonstrated that the 1st Respondent owned or was ever in possession of any portion of land owned by the deceased especially the portion of land which the 1st Respondent's head office and Accounts

Department is situated.

40. It is also his deposition that the 1st Respondent's head office is situated on LR No. 12629 (Grant No. IR 38972) which measures 122.8 Ha while the Accounts Department is located on LR No. 12630 (Grant No. IR 38971) measuring 256.2 Ha. This is contrary to the Petitioner's contention that both the head office and the Accounts Department are situated on one parcel of land.

41. It is further his deposition that the 1st Respondent acquired the said parcels of land through grants issued by the then President of the Republic of Kenya and not as a result of "land exchanges" as alleged by the Petitioner.

42. He reiterates that the Petitioner has not clearly identified the parcel of land the Petition relates to and as such the Petition lacks a basis.

43. He deposes that the Petitioner is laying claim to a portion of the 1st Respondent's land that has the Head Office and the Accounts Department. He alleges that the said land belonged to his deceased father and that the 1st Respondent allegedly compulsorily acquired it without compensating him contrary to Article 40 of *the Constitution* of Kenya.

44. He reiterates that the Petitioner has not placed any material before the Court to substantiate the said claim of ownership.

45. He also deposes that the 1st Respondent and its predecessors have never been government entities with the power to compulsorily acquire property and as such they have never compulsorily acquired any property.

46. He further deposes that from pre-colonial times, compulsory acquisition could only be undertaken pursuant to the provisions of the Indian Land Acquisition Act, 1894 and the Land Acquisition Act,

1968. Under the said laws, the 1st Respondent and its predecessors could not compulsorily acquire any property.

47. It is his deposition that he has seen a purported Survey Plan dated 22nd July, 1963 showing a parcel of land measuring ten acres.

48. It is also his deposition that the said plan is not evidence of ownership and neither does it show any relation to the 1st Respondent's properties. In any event, the said plan appears to be a sketch and it is neither signed by the Director of Survey and neither does it contain a deed plan number. Further, it does not show the land it relates to.

49. It is further his deposition that at paragraphs 4 to 6 of the Petition, the Petitioner has referred to Minute 40/56 of the African District Council Meeting.

50. He deposes that a cursory look at the said minutes shows that they are not useful to the Petitioner. He goes on to state that the minutes do not refer to a specific parcel of land and neither does it refer to a particular person.

51. He also deposes that the minutes are incomplete, vague and inconclusive and adds that they also do not confer any proprietary interest on the Petitioner.

52. He further deposes that the Petitioner has not demonstrated that he fell within the category of the "Kipsigis of the areas concerned" as contemplated in the minutes.

53. It is his deposition that the 1st Respondent was not present in the said meeting. The members present were the 'President', the

Kipsigis African Council as well as Belgut Chiefs. He adds that the Petitioner has not demonstrated that the said members present had any right to give undertakings on behalf of the 1st Respondent.

54. It is also his deposition that from the minutes, the compensation was to be made to the Kipsigis of the areas concerned by allocating them land at the reserve side, Kapkorech Estate as well as Kapndege Estate.

55. It is further his deposition that the 1st Respondent's predecessors did not have the power to allocate land and that any such compensation on the reserve land could only be done by the government. He adds that the Petitioner ought to have pursued the said compensation from the government.

56. He deposes that the 1st Respondent acquired the two parcels of land that have both the Head Office and the Accounts Department from the government.

57. He also deposes that the 1st Respondent acquired LR No. 12629 and LR No. 12630 which measure 122.8 Ha and 256.2 Ha respectively by applying to the government for allocation and issuance of a grant. He adds that the said parcels are located East of Kericho Township.

58. He further deposes that by grants dated 20th September, 1984 the President of the Republic of Kenya granted the 1st Respondent the two parcels of land in fee simple terms for LR No. 12629 and for a term of 931 years and ten months for LR No. 12630.

59. It is his deposition that the 1st Respondent has been enjoying possession of the said parcels on the strength of the grants. It constructed its head office and accounts department and used the remainder of the said parcel to plant tea bushes.

60. It is also his deposition that the head office title and the accounts department title do not bear any endorsement showing that they were granted to the 1st Respondent in exchange of a different parcel of land or pursuant to any compulsory acquisition.

61. It is further his deposition that contrary to the Petitioner's allegations, both the head office and the accounts department are not situated on ten acres of land that were allegedly acquired from his deceased father. He adds that the two offices are neither within a ten-acre property and neither do they comprise of one title.

62. He deposes that from the petition, the Petitioner's claim is based on an alleged exchange of land between the Kipsigis Community and the 1st Respondent's predecessors in title which is a transaction between two sets of private entities. He adds that no evidence of compulsory acquisition has been availed and since the 1st Respondent is not a state organ, the provision of compulsory acquisition under Article 40 of *the Constitution* does not apply.

63. He also deposes that the Petitioner has not demonstrated that the 1st Respondent evicted his deceased father from either of the two parcels of land without compensation.

64. He further deposes that the Petitioner has not adduced any evidence to show that he occupies a portion of the parcels of land that house the head office and the accounting department and neither has he led any evidence to show that they are in occupation of any other parcel of land that was exchanged as per minute 40/56 of the African District Council Meeting. Any such occupation would have satisfied the requirements of a part performance of any alleged oral contract.

65. He reiterates that the head office and the Accounts department are situated on LR No. 12629 and 12630 which parcels of land are not related to the parcels of land i.e. Kericho/Kipchimchim/1058 and 1068 which the Petitioner is in occupation of.

66. He deposes that the Petitioner produced a Memorandum of Agreement entered between the 1st Respondent's predecessor, Kenya Tea Company Limited and Chuma Arap Chabas but he has failed to provide any such agreement between the 1st Respondent's predecessor and the Petitioner's deceased father.

67. He also deposes that the Memorandum of Agreement entered between the 1st Respondent and Chuma Arap Chabas was a private agreement for purchase of land at Chepsir Settlement Scheme as well as a waiver of any right to the property known as LR 2334. The said agreement had no relation with the purported minutes of the Kipsigis African Council.

68. He further deposes that from the agreement, Chama Arap Chabas was not allocated any land in Kapkorech Estate or Kapndege Estate as indicated in the minutes of the Kipsigis African Council. Instead, the 1st Respondent's predecessor paid Kshs. 11,000 on Chama Arap Chabas behalf to the land Settlement and Development Board for purchase of land at Chepsir Settlement Scheme. Chama Arap Chabas was to pay the rest of the balance by himself.

69. It is his deposition that the said memorandum did not state that it was connected with the agreement between the 1st Respondent and the Kipsigis community.

70. It is also his deposition that the Petitioner at paragraph 8 of the Petition contends that the 1st Respondent discriminated against the other Kipsigis land owners including his deceased father by compensating Chuma Arap Chabas to their exclusion.

71. It is further his deposition that the Petitioner has not commenced the present proceedings on behalf of what he describes as "other members of the Kipsigis Community" as he has instead filed the petition

on behalf of the family of the deceased. He adds that the said claim of discrimination therefore lacks merit and, in any event, no other member of the Kipsigis Community has filed any claim in Court against the 1st Respondent or joined the present proceedings.

72. He deposes that he is advised by the 1st Respondent's Counsel on record that for the Court to make a finding of discrimination under Article 27, the Court has to determine the issue of disparate impacts which entails identifying a pool of a legally protected group for the purpose of making a comparison of the relevant disadvantage and then ascertain the provision which disadvantages the Petitioner personally.

73. He also deposes that the Petitioner has failed to identify the protected group under Article 27 (4) and (5) of *the Constitution* that the 1st Respondent has discriminated against. The allegation that the 1st Respondent discriminated against the Petitioner by compensating Chuma Arap Chabas does not amount to any legally protected ground under *the Constitution* of Kenya.

74. He further deposes that the Petitioner has not led any evidence to substantiate his allegations under paragraph 9 of his Petition that prove that Chuma Arap Chabas acquired 1000 acres from the Land Settlement and Development Board for a consideration of Kshs. 11,200.

75. It is his deposition that he is advised by counsel for the 1st Respondent that this Court does not have jurisdiction to hear the Petition by virtue of Sections 7 and 26 of the *Limitation of Actions Act*.

76. It is also his deposition that this Court in its ruling delivered on 13th July, 2023 on the 1st Respondent's preliminary objection found that the Petitioner discovered fraud in the year 2017. The Court also found that the interaction between the Petitioner and the National Land Commission was a matter of evidence that could only be dealt with at the hearing.

77. It is further his deposition that the Petitioner has not pleaded fraud and neither has he pleaded that he discovered the alleged fraud when he commenced the processing of his deceased father's death certificate in 2016/2017 and the subsequent filing of Succession Cause Kericho CMCC No. 135 of 2018. (sic)

78. He deposes that the Petitioner at paragraphs 5, 8 and 19 of the affidavit in support of the Petition admits that since the death of his father in the year 1966, they have been pursuing the claim set out in the Petition with the 1st Respondent's predecessors. He adds that since the Petitioner was aware of the claim since the year 1966, he cannot now purport to claim that he became aware of the fraud in the year 2017.

79. He reiterates that in any event, the Petition is based on a private agreement between the 1st Respondent's predecessor and the Kipsigis Community.

80. He deposes that the Petitioner is seeking restitution of an alleged ten acres that was purportedly given by his deceased father to the 1st Respondent's predecessor which claim the Court does not have jurisdiction to hear and determine as it is statute barred.

81. He deposes that the Petitioner's claim violates Section 3(3) of the *Law of Contract Act* and the Transfer of Property Act as the Petitioner has not produced any written agreement between the deceased and the 1st Respondent.

82. He also deposes that other than producing the purported minutes of the alleged meeting between the 1st Respondent and the African District Council, the Petitioner has not led any evidence as to any oral agreement or any purchase of the land at a public auction resulting in an implied or constructive trust.

83. He further deposes that there is therefore no valid contract between the Petitioner's family and the 1st Respondent and the Petitioner does not therefore have any cause of action.

84. It is his deposition that the Petitioner admits that the present petition is based on a historical injustice claim which has already been submitted to the National Land Commission.

85. It is his deposition that the National Land Commission vide the letter dated 26th September, 2017 found the claim to be a private acquisition which did not fall within its jurisdiction.

86. He deposes that to the extent that the National Land Commission has dealt with the said issue, then the claim of historical land injustice is res judicata and this Court does not have jurisdiction to deal with it.

87. He also deposes that the only recourse available to the Petitioner is to appeal against the decision of the National Land Commission.

88. He also deposes that the Petitioner has not given any reasonable explanation as to why he did not take any steps in the period between 1966 until 2022. The Petitioner cannot therefore claim that he became aware of any purported fraud in the year 2017.

89. He ends his deposition by stating that the Petitioner is guilty of inordinate delay. He adds that no reasonable explanation has been given for the delay. Therefore, the petition has no merit and no basis has been given to warrant the issuance of the orders sought.

The Petitioner's Response to the 1st Respondent's Replying Affidavit.

90. In response to the 1st Respondent's Replying Affidavit, the Petitioner filed an affidavit sworn on 31st July, 2024.

91. The Petitioner denies the averments of paragraphs 3 to 14 of the 1st Respondent Replying Affidavit and deposes that the 1st Respondent has unjustly been occupying their parcel of land since the year 1963. He adds that his claim is therefore based on a historical land injustice.

92. He deposes that under Article 159 of *the Constitution*, judicial authority is derived from the people and vested in the Courts.

93. He also deposes that he has been advised by his Counsel on record that he has properly laid out the cause of action against the Respondents.

94. He further deposes that the aspect of reasonable precision is a procedural technicality and that his Petition is safeguarded by the principles of judicial authority that include justice shall be administered without undue regard to technicalities.

95. It is his deposition that his claim is in pursuit of a ten-acre parcel of land that the Respondent deprived their deceased father and despite intervention by the Kipsigis African Court no justice has been afforded to them.

96. It is also his deposition that the 2nd Respondent being the custodian of land in Kenya has failed to advise the 1st Respondent to comply with any advisories over land that have overtime turned into historical land injustices.

97. It is further his deposition that the 3rd Respondent being the government legal advisor has failed to advise both the 1st and 2nd Respondents to sort out this matter and redress the historical land injustice.

98. He deposes that the National Land Commission pronounced itself on the matter and gave an advisory opinion which led to the filing of this Petition.

99. He also deposes that since independence, the 1st Respondent has refused to convene a meeting to discuss the issue of the ten acres of land that belong to his deceased father where the Accounts Department is built.

100. He further deposes that their right to property provided for under Article 40 has been violated by the 1st Respondent.

101. He reiterates the averments in his affidavit in support of the Petition and deposes that by the time his father was registered as the owner of land parcel No. Kericho/Kipchimchim/1068, the 1st Respondent had already deprived him of ten acres. He adds that his father filed a complaint in the early 1960's at the Kipsigis African Court which dispute was determined through the directions of the President of the Kipsigis African Court under Minute 40/56.

102. He deposes that he does not dispute that the head office and the Accounts Department are on two distinct parcels of land. He adds that the ten-acre portion he is claiming is comprised of LR No. 12629.

103. He also deposes that the 1st Respondent's occupation of the said portion does not distinguish their legal right over the said parcel of land.

104. He further deposes that in addition to being given land by the government, the 1st Respondent deprived their father off ten acres of his land which now appear to be part of LR 12629.

105. He reiterates the averments in his affidavit in support of the Petition and states that a historical land injustice can occur in many forms which include compulsory acquisition and deprivation. He goes on to state that historical land injustices occurred when Kenyans were deprived off their parcels of lands and despite legal interventions, no reparations were made.

106. He deposes that Article 3(a) and 4 of *the Constitution* provides for prompt compensation and/or Court action over compulsory acquisition.

107. He also deposes that the manner in which the 1st Respondent acquired the suit parcel is fraudulent and it requires the protection of the Court under Article 40 (6) of *the Constitution* of Kenya.

108. He further deposes that even though the 1st Respondent states that the survey map dated 22nd July, 1963 attached to the Petition is not evidence of ownership, the said Survey Map is authentic and was on 18th July, 1963 (sic) certified vide letter No. CR/59/178 dated 14th May, 1963 and signed by R.W Moss Surveyor.

109. It is his deposition that the portion under dispute falls under LR 11508 (deed plan No. 81539/FR/ Nos. 2/50 & 6/99 – currently LR 12626/ deed plan No. 109687) that measures 332 acres.

110. It is also his deposition that the survey plan dated 22nd July, 1963 was as a result of the Kipsigis African Court under Minute No. 40/56.

111. It is further his deposition that the survey plan attached to the grant dated 7th November, 1984 for LR 12629 and LR No. 12630 by the 1st Respondent was procured long after their family had complained over the ten-acre portion of land that had been developed by the 1st Respondent.

112. He admits that the 1st Respondent did not have power to allocate but as per minute No. 40/56, the 1st Respondent was to compensate the Kipsigis who were affected with parcels of land from the 1st Respondent's tea estates namely Kapkorech and Kapndege Estates.

113. He reiterates that the 1st Respondent appropriated parcels of land that include their ten acres but failed to compensate them.

114. He deposes that the 1st Respondent's assertions over minute No. 40/56 should be disregarded because in the year 2023, the 1st Respondent offered to settle the Petitioner's claim of ten acres with land in the current Kapkorech Estate.

115. He then poses the question of where the 1st Respondent got the power and authority in the year 2023 that it did not have in the year 1963 or 1981 to propose and offer an amicable settlement of this matter.

116. He deposes that between the year 1980 and 1984, the 1st Respondent drew afresh the deed land for LR 12629 and LR 12630 without the knowledge of their family and with the intention of excluding their claim.

117. He also deposes that between the year 1935 to 1984, the registration numbers of the parcels of land currently known as LR No. 12629 and LR No. 12630 were changed by the 1st Respondent to suit its needs and allow the issuance of a title deed in the year 1984.

118. He further deposes that in the survey map of 22nd July, 1963, the 1st Respondent acquired the portion of land adjacent to their land currently known as LR 12630 being LR 11409 (F/R No. 67/70) measuring 2.68 acres. The said portion belonged to Chuma Arap Chabas (deceased) and he was compensated for it.

119. It is his deposition that the land lying a top LR 11408 with clearly marked beacons measuring ten acres is a continuation of the land acquired by the 1st Respondent belonging to their family. He adds that the land they are in possession of i.e. Kericho/Kipchimchim/1068 lies adjacent to the ten acres of land which is across the Kericho-Nakuru highway and he adds that on the map it was shown as Kipsigis Land Unit.

120. It is also his deposition that the Memorandum of Understanding made on 18th January, 1963 between the 1st Respondent and Chuma Arap Chabas (deceased), the drawings, demarcation and excisions that were subsequently made show that the area measuring 2.68 acres was compensated. This was in exchange for waiver of all rights on crown land LR 2334 immediately adjoining the Central Packing Factory and Printing Works of Brooke Bond East Africa (Sales) Limited.

121. It is further his deposition that upon being paid, Chuma Arap Chabas agreed to demolish the existing building made of wood and corrugated iron that was formerly used as a butchery and to renounce all claims either on the crown or the company regarding the land in question.

122. He admits that the 1st Respondent has demonstrated how it acquired LR No. 12629 and LR No. 12630 but deposes that the 1st Respondent re-drew and re-surveyed the land without the knowledge of the Petitioner despite his many demands of the ten-acre stretch.

123. He deposes that this is an historical injustice stretching (sic) to 1963 and the changes effected in the year 1981 by the 1st Respondent were illegal and meant to deprive the Petitioner his right to claim the ten-acre parcel of land.

124. He also deposes that the 1st Respondent has provided documentary evidence which has put his petition in perspective and has proved the cause of action herein.

125. The Petitioner denies the averments at paragraph 21 and 22 of the 1st Respondent's Replying Affidavit and reiterates that his family lives opposite the 1st Respondent's head office and Accounts Department.

126. The Petitioner deposes that he refutes the 1st Respondent's claim that his petition is entirely premised on compulsory acquisition which is provided for under Article 40 of *the Constitution* of Kenya.

127. The Petitioner deposes that Article 40 of *the Constitution* sets out the principles of protection of the right to property. The said article also provides that any parcel of land that is compulsorily acquired and/or any individual who is unjustly deprived of his parcel of land must be compensated.

128. The Petitioner also deposes that the 1st Respondent is in possession of over 30,000 acres of land in Kericho and it is deplorable that it wants to deprive a poor family of a mere ten acres while seeking to hide under the guise of *the Constitution*.

129. The Petitioner further deposes that as per the Petition, the documentary evidence attached and the witness statements, the 1st Respondent compulsorily acquired ten acres of LR No. 12629.

130. It is his deposition that the 1st Respondent's failure to compensate the Petitioner for the ten acres it has continually used for economic gains since 1963 has worked to their family's disadvantage.

131. It is also his deposition that the 1st Respondent's response should be struck out for being mere denials and allegations without countering the cause of action in the Petition with demonstratable facts and/or documentary evidence.

132. He denies making any sensational statements in his petition and states that the 1st Respondent has continued to hold their land without compensating them. He adds that the 1st Respondent has failed to de-link their father's claim of dispossession and their assertion that they adjacent neighbors to the 1st Respondent.

133. He deposes that the 1st Respondent's claim that it acquired the parcels of land where its head office and Accounts department is situated through a grant by the government does not extinguish their claim of ten acres contained in LR No. 12629. He adds that had the 1st Respondent involved them in the re-survey of 1980/1981 of LR 12629 (formerly LR 11408), their claim would have been sorted.

134. He also deposes that minute 40/56 is self -explanatory as it proposed a compensation model between the affected Kipsigis Community and the 1st Respondent that was to be spearheaded by the 1st Respondent as this affected its tea estates.

135. He further deposes that minute 40/56 is not a mere piece of paper as alleged and that it was acknowledged by the Kipsigis African Court on 19th October, 1965.

136. He deposes that the 1st Respondent has not tabled any evidence to show that it complied with minute 40/56 and that their family was compensated.

137. He also deposes that he refutes the 1st Respondent's contention at paragraph 30 of its Replying Affidavit. He goes on to state that he attached the Memorandum of Understanding entered into between Chuma Arap Chabas (deceased) that show that he was compensated by the 1st Respondent and yet his father who was deprived a larger portion of the land was discriminated against and was not compensated as directed by the African Court.

138. He further deposes that Chuma Arap Chabas (deceased) was their neighbor in Brooke village and their parcels of land are adjacent to date.

139. It is his deposition that his deceased father and Chuma Arap Chabas (deceased) were equally affected as their parcels of land in the Kipsigis land were cut off by the Kericho-Nakuru highway leaving approximately thirteen acres where the 1st Respondent's head office and Accounts Department is currently situated.

140. It is also his deposition that both his deceased father and Chuma Arap Chabas (deceased) reached out to the 1st Respondent in the year 1960 seeking for compensation. They also sought the intervention of the then District Commissioner and the Kipsigis African Court which under minute 40/56 comprehensively addressed the said issue.

141. He reiterates that the 1st Respondent chose to pay off Chuma Arap Chabas (deceased) and discriminated upon his father.

142. He deposes that the said Memorandum of Understanding goes a long way to describe the discriminatory and colonialist tendencies of the 1st Respondent which gives it space to cling onto the ten acres of land without compensating the affected family.

143. He sets out the contents of minute 40/56 and reiterates that the 1st Respondent was directed to resolve the land dispute between it and the local Kipsigis Community over the triangular land where it had constructed its head office.

144. He deposes that there was a land problem that needed to be resolved between the 1st Respondent and its neighboring community in Brooke village over sections of the road that were cut off by the tarmac. The said parcels appeared to be part of the 1st Respondent's parcels of land along the Kericho-Nakuru Highway.

145. He also deposes that in the year 1963, the affected families from the Kipsigis Community reached out to the Kipsigis African Court through their respective Belgut Chiefs.

146. He further deposes that the president of the Kipsigis African Court who is an equivalent to a judge(sic), gave clear directions on this matter and settled the concerns of the affected members of the Kipsigis Community which include his father.

147. He reiterates that the 1st Respondent did not complete the process of compensation and yet it took over the parcels of land in question.

148. He deposes that the triangular shaped land refers to their ten acres and that of Chuma Arap Chabas. He goes on to state that the land lies to "the South East of the Nakuru – Kericho tarmac and in the triangle formed by the tarmac".

149. He also deposes that after the 1st Respondent ignored the directive of the President of the Kipsigis African Court vide Minute No. 40/56, in 1980/1981 the residents living around the current Kipsigis Girls petitioned the former head of state, President Daniel Moi seeking for compensation.

150. He further deposes that the former president referred to Minute No. 40/56 in 1980/1981 and directed the 1st Respondent to effect compensation on the affected families around the current Kipsigis Girls as directed by the Kipsigis African Court in 1963 vide Minute No. 40/56.

151. It is his deposition that the 1st Respondent had planted tea at Kapndege Estate which was the area that the President of the Kipsigis African Court had earmarked for compensation of the families that were around the current Kipsigis Girls.

152. It is also his deposition that the 1st Respondent yielded to the former President's directive and compensated the families around the current Kipsigis Girls albeit with land in Kapkorech Estate instead of Kapndege as directed under Minute No. 40/56.

153. It is further his deposition that the directives by the then head of state in 1980/1981 led the 1st Respondent to deem compensation to have been completed by knowingly ignoring their constant demands for their ten-acre parcel of land.

154. He deposes that the 1st Respondent opted to clean (sic) its parcels of land from any adverse claims including their claim by converting the crown land title deeds to titles issued under the Registration of Titles Act (now repealed). The land was now registered under the name Brooke Bond (K) Limited from its predecessor, Kenya Tea Company Limited.

155. He also deposes that the 1st Respondent discriminated against their family by failing to compensate them when it compensated the families from around the current Kipsigis Girls. He therefore asks the Court to compensate them for their ten acres.

156. He further deposes that he instituted the present petition on behalf of his family and he was therefore not obligated to include any affected members of the Kipsigis Community.

157. It is his deposition that in the year 1963, it was their deceased father who pushed for compensation but now their family has more than one hundred people which now succinctly means other members of the Kipsigis Community. (sic)

158. He reiterates the averments of his affidavit in support of the Petition and deposes that by the 1st Respondent compensating Chuma Arap Chabas (Deceased) the 1st Respondent partially complied with the directions of Minute 40/56. He goes on to state that they will not renege in their push to complete the performance of the said directions through compensation.

159. It is also his deposition that the 1st Respondent's Preliminary Objection was dismissed on merit and that it is not proper for the 1st Respondent to cast doubts on the Court's ruling and yet it did not file an appeal. He adds that the said dismissal affirmed that they have a cause of action against the 1st Respondent.

160. It is further his deposition that the Court has the jurisdiction to hear and determine this matter.

161. He deposes that the directions by the President of the Kipsigis African Court were clear and were meant to avert strife between the 1st Respondent and the Kipsigis Community whose land had been cut off by the tarmac and annexed by the 1st Respondent.

162. He also deposes that the Court should consider as evidence the directions of the then president of the Kipsigis African Court especially minute 40/56.

163. He further deposes that the 1st Respondent ignored the directions given by the Kipsigis African Court by alleging that it constitutes a private agreement between the 1st Respondent and the Kipsigis Community.

164. The Petitioner then sets out a series of questions on the 1st Respondent's assertions that Minute No. 40/56 of the Kipsigis African Court constitutes a private agreement as follows;

    a. Was this meant not be actioned? (sic)

    b. By failing to act and conclude the alleged private agreement, which touched on land, can the same be wished away owing to the vagaries of time under the law of limitation?

    c. Can the failure of the 1st Respondent to honor the alleged private agreement mitigated it not to be a historical injustice?

    d. Which law provides that private agreements should not be considered?

e. Was the memorandum of Understanding dated 18/1963 (sic) between the 1st Respondent and Chuma Arap Chabas (deceased) a "special" private agreement to have been endorsed and compensated by the 1st Respondent.

f. Does the compensation of Chuma Arap Chabas not part performance of the private agreement as set out by Minute 40/56?

g. Does the directive of the head of state in 1981 for a "Special Private Agreement" for it to be concluded swiftly by the 1st Respondent? (sic)

h. Does the 1st Respondent deny the statements in the Petition in totality and that the Petitioner has never approached it for amicable settlement?

165. It is his deposition that the Court has jurisdiction to make right all the historical land injustices and wrongs that were committed to his family between the year 1963 to date over the ten-acre parcel of land.

166. It is also his deposition that there was no agreement between the deceased and the 1st Respondent. He goes on to state that the Petition outlines the conduct of the 1st Respondent since 1963 to date which conduct was resolved under Minute No. 40/56 as an historical land injustice issue.

167. It is further his deposition that the disregard of the Kipsigis African Court's directions has given rise to the present Petition.

168. He deposes that he is advised by his Counsel on record that the 1st Respondent has not denied in its response that a portion measuring 10 acres of the 226.8 acres belong to their family.

169. He also deposes that the 1st Respondent has no cogent documentary evidence against their Petition except for the numerous allegations set out in its Replying Affidavit.

170. He further deposes that the Court should take judicial notice of the 1st Respondent's invitation to settle the matter out of Court and his (Petitioner) willingness to settle the matter in line with Minute No. 40/56.

171. It is his deposition that the 2nd Respondent being a government agency did not offer any solution and/or documents in support of the 1st Respondent's claims that there exists no historical land injustice.

172. It is also his deposition that the 2nd Respondent failed to demonstrate that the documents attached to the Petition that include government minutes and survey maps are not authentic and do not support the deprivation of land.

173. He deposes that the 3rd Respondent who is the Government's legal advisor has failed to file a response to the Petition and he urges the Court to find the said silence to mean concurrence with the claim in the Petition.

174. He ends his deposition by reiterating that the Court should strike out the 1st Respondent's Replying Affidavit and grant the prayers sought in the Petition.

The 2nd Respondent's Further Response To The Petition.

175. The 2nd Respondent filed a Replying Affidavit sworn by Catherine Wacuka on 20th June, 2024.

176. She deposes that she is the Kericho County Land Registrar.

177. She also deposes that the Petitioner alleges that the 2nd Respondent violated his rights under Articles 2(5), 10, 17, 22, 23, 27, 47 and 48 of *the Constitution* of Kenya.

178. She further deposes that the 2nd Respondent denies conducting any administrative action relating to the suit property that could be deemed as procedurally unfair and neither has it inhibited the Petitioner's right to access to justice.

179. It is her deposition that the Respondent has not described any form of discrimination meted out by the 2nd Respondent in relation to the suit property.

180. It is also her deposition that the Petition lacks merit as it does not adhere to the principle of reasonable precision and neither does it disclose any constitutional issues for determination by the Court.

181. It is further her deposition that the Petitioner has not defined with a reasonable degree of precision, the constitutional provisions allegedly infringed by the 2nd Respondent and the manner in which the actions of the 2nd Respondent infringed his rights.

182. She deposes that the Petitioner failed to specifically identify the suit parcel or provide any title documentation in the name of Kipyegon Arap Kirui (deceased) to ensure precise and accurate determination of ownership.

183. She also deposes that the purported survey plan annexed to the Petitioner's Supporting Affidavit is not authenticated by the Survey Records Office and neither does it describe the property that the Petitioner claims ownership of.

184. She further deposes that the Petitioner has failed to discharge the burden of proving that the parcel of land the 1st Respondent is in occupation of is owned by his deceased father.

185. It is her deposition that the 2nd Respondent does not have authority or jurisdiction to challenge the indefeasible ownership of property owned by the 1st Respondent unless fraud or misinterpretation is proved.

186. It is also her deposition that the Petitioner has failed to provide evidence of fraud, misrepresentation or illegality regarding ownership of the property occupied by the 1st Respondent.

187. It is further her deposition that the 2nd Respondent did not attend the meeting between the African District Council of Kipsigis and Kenya Tea Company Limited. The 2nd Respondent is therefore a stranger to the assertions under "Land Exchanges Minute 40/50" which does not refer to a specific parcel of land.

188. She deposes that the 2nd Respondent is not privy to any contract between Kipyegon Arap Kirui (deceased) and the 1st Respondent regarding the suit parcel and neither has the Petitioner provided any evidence to prove that any agreement between the parties existed.

189. She also deposes that the 2nd Respondent does not have jurisdiction to hear and determine claims of breach of contract if any between the parties over an unidentified parcel of land.

190. She further deposes that the 2nd Respondent does not have jurisdiction to hear and determine historical land injustices as described by the Petitioner. This is in the purview of the National Land Commission.

191. She ends her deposition by stating that she is advised by 2nd Respondent's counsel on record that the Petition does not disclose any reasonable cause of action against the 2nd Respondent and the allegations therein are not founded in law.

The Petitioner's Response To The 2Nd Respondent's Replying Affidavit.

192. The Petitioner filed an affidavit in response to the 2nd Respondent's Replying Affidavit sworn on 31st July, 2024.

193. He deposes that their family has suffered injustice and unfairness as their rights under *the Constitution* of Kenya have been violated by various government agencies including the 2nd Respondent for failure to resolve the land dispute.

194. He also deposes that he has visited the 2nd Respondent's offices severally but has not been offered any assistance and neither has he been supplied with the relevant documentation to support his claim.

195. He reiterates that he has pleaded his case on historical land injustice with reasonable precision as the land in dispute measures ten acres. He has cited specific constitutional provisions which have been infringed and has specified the historical land injustice his family has suffered. He adds that they have followed up on the said issue for a long time and the Respondents have turned a deaf ear to them.

196. He denies the averments at paragraphs 5, 6 and 7 of the 2nd Respondent's Replying Affidavit and reiterates that the 1st Respondent's occupation of their parcel of land infringes on their right to property. He adds that the lack of compensation also infringes on their right to property and that they can physically identify the disputed portion of ten acres.

197. He deposes that he obtained the survey plan attached to the Petition from the 2nd Respondent who declined to authenticate it when it was informed that it was to be filed in Court.

198. He denies the averments at paragraphs 8, 9 and 10 of the 2nd Respondent's Replying Affidavit and deposes that the 1st and 2nd Respondent have in the period between 1963 and 2020 managed to change the records to defeat his family's claim.

199. He admits that the 2nd Respondent may not have attended the meeting of the African District Council and the Kenya Tea Company Limited but it (2nd Respondent) has not provided any evidence to show that the meeting did not happen.

200. He also deposes that while it is true that there was no formal agreement between the 1st Respondent and their family, the 1st Respondent has been in occupation of the Petitioner's land without any right, offering compensation and/or reparations.

201. He further deposes that the 2nd Respondent has the jurisdiction and capacity to verify facts in the Petition and authenticate the documents attached.

202. It is his deposition that he denies the averments in paragraphs 11, 14 and 15 of the 2nd Respondent's Replying Affidavit and states that he filed the present Petition claiming historical land injustices in Court after involving the National Land Commission.

203. It is also his deposition that he denies the averments at paragraphs 16 and 17 of the 2nd Respondent's Replying Affidavit and goes on to state that the 2nd Respondent has taken two years to file a response to the Petition and that at no time did the 2nd Respondent dissuade the 1st Respondent from offering an out of Court settlement if this matter was not indeed an historical land injustice case.

204. It is further his deposition that he is advised by his Counsel on record that the 2nd Respondent is a government agency having custody of the title deeds and survey maps in Kenya and it ought to have attached clear evidence of the 1st Respondent's indefeasible interest over the disputed portion of land.

205. He deposes that in the year 1980/1981 the 1st Respondent through the offices of the 2nd Respondent undertook a re-survey of the parcel under dispute that is LR No. 12629 and disregarded their issue of the ten acres.

206. He reiterates that after the 2nd Respondent's resurvey of the 1st Respondent's parcels of land in the year 1981, the 1st Respondent changed its name on the title deeds to Brooke Bond Kenya Limited.

207. He also reiterates that the said re-survey and changes were made after the former head of state gave effect to Minute No. 40/56 of the Kipsigis African Court and ordered the 1st Respondent to re-settle the squatters who were living at the current Kipsigis Girls parcel of land at Kapkorech Estate.

208. He ends his deposition by urging the Court to strike out the 2nd Respondent's Replying Affidavit as it contains allegations that are not grounded on any factual or documentary evidence.

Issues For Determination.

209. The Petitioner filed his submissions on 11th November, 2024, the 2nd and 3rd Respondents filed their submissions on 4th February, 2025 and the 1st Respondent also filed its submissions on 4th February, 2025.

210. The Petitioner reiterates the averments in the Petition, the averments in his affidavits in response to the 1st and 2nd Respondents Replying Affidavits and while relying on the judicial decision of Chief Land Registrar & 4 Others v Nathan Tirop Koech & 4 Others [2018] eKLR submits that he has properly identified the location, size and current utilization of the suit property. He also submits that the portion he is claiming is ten acres in size.

211. It is the Petitioner's submissions that his Constitutional Petition has been filed over an historical land injustice and the constitutional violations against the Petitioner and his family.

212. It is also the Petitioner's submissions that there has been no inordinate delay in the filing of the present petition as it was on 20th January, 2022 that they were able to obtain the Certificate of Confirmation of grant for the estate of the deceased.

213. It is further the Petitioner's submissions that the Court should find, just like it found in its ruling delivered on 13th July, 2023 that any delay has been explained and that there is no time limit set by *the Constitution* within which a party is to file a Constitutional Petition.

214. The Petitioner relies on the judicial decisions of Peter N. Kariuki v Attorney General [2014] eKLR and Kamlesh Mansuklal Damji Pattni & another v Republic [2013] eKLR in support of his submissions.

215. The Petitioner reiterates that he wrote to the National Land Commission who wrote back vide the letter dated 26th September 2027 (sic).

216. The Petitioner relies on Articles 27(1) and 40 of *the Constitution* of Kenya, the judicial decision of Herman Philipus Seven v Glovanni Gnecchi-Ruscons, SC App No. 4 of 2012 [2013]eKLR and submits that all victims of historical land injustices ought to be treated equally and afforded equal opportunities for redress.

217. The Petitioner relies on the judicial decision of Karani Investment Limited v National Land Commission & 2 Others [2021]eKLR and submits that the National Land Commission does not have the mandate to hear and determine a suit filed over private property.

218. The Petitioner also relies on the judicial decision of Safepark Limited v Henry Wambega & 11 others [2019]eKLR where the Court cited with approval Chief Land Registrar & 4 Others v Nathan Tirop

Koech and 4 Others (citation not given) and submits that this Court has the jurisdiction to hear and determine this matter.

219. The Petitioner submits that the 2nd Respondent contributed to the failure by the 1st Respondent to deliberate on the Petitioner's claim over the ten-acre parcel of land. Sometime in 2023, the Chief Land Registrar wrote to the District Land Registrar, Kericho advising him to investigate their claim.

220. The Petitioner also submits that the 2nd Respondent violated his rights by failing to investigate his claim and by also refusing to authenticate survey plans or offer documents to the Petitioner in support of his claim.

221. The Petitioner further submits that the documents relied on by the 1st Respondent were supplied by the 2nd Respondent and that they both effected changes on the 1st Respondent's titles upon direction from the former head of state.

222. It is the Petitioner's submissions that the former head of state directed the 1st Respondent to effect compensation and as a result of the said directive, squatters who were affected by the actions of the 1st Respondent were resettled at Kapkorech Estate in line with minute 40/56. The Petitioner therefore submits that the 1st Respondent had the opportunity to re-draw, re-survey and re-align its boundaries with respect to the parcel in dispute.

223. It is also the Petitioner's submissions that the Court should not rely on the 1st Respondent's documents as they do not represent the period of historical land injustice.

224. The Petitioner relies on Articles 68 and 162 of *the Constitution* of Kenya, the judicial decisions of Community Self Help Group v Attorney General & 6 Others [2010]eKLR and submits that this Court has the jurisdiction to hear and determine claims of historical land injustices.

225. The Petitioner submits that the title deed relied on by the 1st Respondent was issued upon re-survey and rectification of boundaries.

226. The Petitioner also submits that the triangular parcel of land he is claiming was not registered and did not have a title deed until the year 1981.

227. The Petitioner further submits that the 1st Respondent's title should therefore enjoy protection of the law since it is not an indefeasible title deed. (sic)

228. The Petitioner relies on the judicial decision of Republic v National Land Commission ex parte Krystalline Salt Limited [2015] eKLR in support of his submissions.

229. The Petitioner submits that a Land Valuation Report and a report by the County Agricultural Officer dated 23rd February, 2023 and 31st January, 2023 respectively shows that the value per acre is 60,000,000/= and therefore the value of ten acres is Kshs. 600,000,000/=. The value of lost earnings on the tea planted on eight acres is Kshs. 55,633,520/=. The Petitioner urges the Court to grant him the said sums of money.

230. The Petitioner relies on the judicial decision of Kenya Hotel Proprietors Limited v Willesden Investments Limited [2009] eKLR and urges the Court to award him mesne profits and loss of use.

231. The Petitioner concludes his submissions by urging the Court to allow his prayers as sought in the Petition.

232. The 2nd and 3rd Respondents submit on the following issues;

    a. Whether this Honourable Court has jurisdiction to hear the matter.

b. Whether the Petition was pleaded with reasonable degree of precision.

c. Whether the Petition is entitled to the reliefs sought.

233. On the first issue, they rely on the judicial decision of Isaac Makokha Okere v Mumias Outgrowers Sacco Society Limited & 9 Others [2021] eKLR and submits that the doctrine of Constitutional avoidance provides that where there is adequate statutory avenues for the resolution of a dispute, a Constitutional Court will defer to the statutory options and decline to entertain the dispute.

234. They also submit that if indeed the Petitioner was aggrieved by the 2nd Respondent's alleged inaction in resolving the dispute, then the Petitioner should have sought orders against the 2nd Respondent without invoking *the Constitution*.

235. They further submit that if the Petitioner was dissatisfied with the alleged investigations under paragraph 8 of his Petition, the Petitioner ought to have sought judicial review orders, appealed or sought other remedies in civil Court.

236. They rely on the judicial decision of Grays Jepkemoi v Zakayo Chepkonga Cheruiyot [2021] eKLR in support of their submissions.

237. With regard to the second issue, the 2nd and 3rd Respondents rely on the judicial decisions of Anarita Karimi Njeru v Republic [1979] eKLR, Godfrey Paul Okutoyi and Others v Habil Olaka & another [2018] eKLR and submits that the Petitioner failed to precisely articulate the statutory provisions that were violated and the manner of infringement.

238. The alleged lack of intervention by the 2nd Respondent in the dispute between the Petitioner and the 1st Respondent did not result in infringement of his constitutional rights.

239. They submit that the 2nd Respondent does not have jurisdictional or statutory basis to intervene in a dispute between private individuals and groups.

240. The 2nd and 3rd Respondents submit that the Petitioner's claim is based on an historical land injustice which falls under the jurisdiction of the National Land Commission and not itself.

241. They submit that the 2nd Respondent can only intervene to rectify records in the land register in case of a mistake and/or with the consent of the parties under Section 79 of the *Land Registration Act*.

242. On the third issue, the 2nd and 3rd Respondents rely on Section 107 of the *Evidence Act*, Section 26 of the *Land Registration Act* and the judicial decision of Abdallah Ali Were & another v County Government of Bungoma & 4 Others [2022] eKLR and submit that since the Petitioner has failed to prove discrimination and/or infringement of his rights, the Petition should be dismissed with costs to the Respondents.

243. The 1st Respondent submits on the following issues;

a. Whether the Honourable Court has jurisdiction to hear the matter.

b. Whether the Petition has been pleaded with reasonable precision.

c. Whether the Petition is merited.

d. Whether the Petitioner is entitled to any reliefs.

244. On the first issue, the 1st Respondent relies on Sections 7 and 26 of the *Limitation of Actions Act*, the judicial decisions of Northwood Development Company Limited v Shuaib Wali Mohammed [2021] eKLR, Tabulo v Altocoff Limited & 2Others (Environment and Land Case E030 of 2024) [2024]

KEELC 13562 (KLR) (3 DECEMBER 2024) (RULING) and submits that the Petition at its core is a claim for recovery of land and it does not therefore constitute a constitutional petition.

245. The 1st Respondent also submits that none of the prayers sought in the Petition seek for a declaration of a violation of any constitutional right and the Petitioner's claim is based on an alleged agreement between the 1st Respondent's predecessor and the Kipsigis Community.

246. The 1st Respondent reiterates the averments in its Replying Affidavit and submits that the Court in related proceedings i.e. Yegon v County Government of Kericho & 3 Others [2022] KEELC 4890 (KLR) found that the Petitioner was aware of the alleged encroachments as early as the year 1986 making his claim of discovering the said encroachment in 2017 inconceivable.

247. The 1st Respondent therefore submits that the Petitioner's claim is time barred and it relies on Section 7 of the *Limitation of Actions Act*, the judicial decisions of Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014]eKLR, Mokoosio & another v Vadera & 3 Others (Petition 13 of 2020) [2021] KEHC 56 (KLR) (21 September 2021) (Judgement), James Kanyiita Nderitu v Attorney General & Director of Public Prosecution [2019] KECA 1006 (KLR), Morris Kyengo Makovu v Kenya Power & Lighting Company Limited & 3 Others [2021]eKLR, James Kimwetich Kulei v County Government of Uasin Gishu & 2 Others [2021]eKLR, Godfrey Paul Okutoyi & Others v Habil Olaka & another [2018]eKLR and Safepak Limited v Henry Wambega & 11 Others [2019]eKLR in support of its submissions.

248. It is the 1st Respondent's submissions that the Petitioners claim violates Section 3(3) of the *Law of Contract Act* and the Transfer of Property Act which requires agreements for transfer of land to be in writing.

249. The 1st Respondent reiterates that the Petitioner has not produced any written agreement between his deceased father and the 1st Respondent and therefore the Petitioner has no cause of action against it.

250. The 1st Respondent relies on the judicial decision of Daudi Ledama Morintant v Mary Christine karie & 2 Others [2017] eKLR in support of its submissions.

251. On the second issue, the 1st Respondent relies on the judicial decisions of Anarita Karimi Njeru v Republic [1979] eKLR, Manase Guyo & 260 Others v Kenya Forest Services [2016]eKLR, Robert N. Gakuru & Others v The Governor of Kiambu County & 3 Others [2014]eKLR and reiterates that even though the Petitioner alleges infringement of his rights, no correlation has been created between the alleged infringement and any specific actions of the 1st Respondent.

252. The 1st Respondent relies on the judicial decision of Chief Land Registrar & 4 Others v Nathan Tirop Koech & 4 Others [2018] eKLR in support of its submissions.

253. On the third issue, the 1st Respondent relies on the judicial decisions of Motaung v Samasource Kenya EPZ Limited t/a Sama & 2 Others (Petition E071 of 2022) [2023], Leonard Otieno v Airtel Kenya Limited [2018]eKLR and submits that the Petitioner's claim is based on an alleged historical injustice which matter was duly considered and determined by the National Land Commission.

254. The 1st Respondent also submits that the National Land Commission in its decision stated that the Petitioner's complaint did not qualify as an historical land injustice. The 1st Petitioner reiterates that the Petitioner's claim is res judicata and this Court does not have jurisdiction to hear and determine it.

255. The 1st Respondent relies on the judicial decision of Mwalambe (Suing as legal representative of the Estate of Lwambi Mwalambe Beponda) v Titles & 4 Others; Rashid & 6 Others (Interested Parties)

(Civil Appeal E092 of 2021) [2024] KECA 751 (KLR) and reiterates that the Petitioner has not proved the existence of the alleged ten-acre portion of land in order to prove his claim of historical injustice.

256. The 1st Respondent submits that the various cadastral maps attached to the Petition do not constitute proof of ownership.

257. With regard to minute 40/56 of the Kipsigis African Council, the Petitioner reiterates its averments in its Replying Affidavit.

258. The 1st Respondent submits that the Petitioner contends that the cadastral map dated 30th June, 1962 shows the 1st Respondent's land that includes the disputed ten-acre portion. It is registered under LR No. 621.

259. The 1st Respondent also submits that the Petitioner contends that in the subsequent map dated 30th August, 1963 the disputed portion is highlighted in red.

260. The 1st Respondent further submits that even though the Petitioner claims that the disputed portion was located on LR No. 621, from the cadastral maps dated 30th June, 1962 and 22nd July, 1963, the disputed portion is indicated to be just above LR No. 623.

261. It is the 1st Respondent's submissions that Section 41(a)(i) of the *Limitation of Actions Act* excludes public land from claims of adverse possession. The 1st Respondent relies on the judicial decision of Ravji Karsan Sanghani v Peter Gakunu [2019] eKLR in support of its submissions.

262. It is also the 1st Respondent's submissions that the two cadastral maps do not refer to the same parcel of land and it is not clear whether he is claiming that the disputed portion forms part of LR No. 621 or whether it is located at the top of LR No. 623.

263. It is further the 1st Respondent's submissions that the cadastral map of 1935 is irrelevant.

264. The 1st Respondent submits that the land the Petitioner is purportedly claiming was part of crown land as far back as 30th June, 1962. As such it was public land and not under private ownership. Even if the deceased resided on the land, he was at best a squatter and did not have any private proprietary interest over it.

265. The 1st Respondent submits that the Petitioner has failed to prove the elements of an historical injustice and relies on the judicial decision of Sophia Nyakerario Maina And Sebastian Adala (Suing on their own behalf and in the interest of 440 other Applicants being inhabitants of Properties known as Land Reference Number 209/12016) v Kenya Airports Authority & 3 others [2020] KEELC 2773 (KLR) in support of its submissions.

266. It is the 1st Respondent's submissions that the Petitioner failed to demonstrate ownership of the disputed portion. He therefore failed to discharge the burden proof that his forefathers owned the said parcel.

267. The 1st Respondent submits that the Petitioner filed witness statements that he is asking the Court to rely on. The 1st Respondent relies on Rule 20 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) and Procedure Rules, 2013 which provides that a Constitutional Petition can only be heard by way of affidavit evidence or written submissions.

268. It is the 1st Respondent's submissions that the witness statements filed by the Petitioner which are affidavits, (sic) have no place in the determination of the present petition.

269. It is also the 1st Respondent's submissions that it is objecting to the production of witness statements as it will not have the opportunity to cross examine its makers.

270. The 1st Respondent relies on the judicial decision of Republic v Kenyatta University Ex parte Njoroge Humphrey Mbuthi [2015] KEHC 1558 (KLR) in support of its submissions.

271. The 1st Respondent nonetheless submits that the said witness statements lack credibility as they contain contradictions. The Petitioner in his witness statement states that the deceased owned land parcel No. Kericho/Kipchimchim/1068 which was allegedly renamed Crown Land/2334. It is the 1st Respondent's submissions that this contradicts his other evidence where he claims that land parcel No. Kericho/Kipchimchim/1068 is next to the disputed parcel and that it forms part of LR No. 621.

272. The 1st Respondent also submits that the witness statements of Richard Kiprono Arap Rugut, John Koe and Paul Kiptonui Ngeno merely make generalized statements without producing documentary evidence in support of their assertions.

273. The 1st Respondent further submits that the witness statements are riddled with hearsay evidence which is inadmissible.

274. The 1st Respondent relies on the judicial decision of Wambega & 733 *others v Attorney General & 9 Others (Civil Appeal E028 of 2020*) [2024] KECA 445 (KLR) (12 April 2024) (Judgement) in support of its submissions.

275. The 1st Respondents while reiterating its averments in its replying affidavit submits that it did not compulsorily acquire the Petitioner's land. The 1st Respondent relies on the judicial decision of Wambega & 733 *Others v Attorney general & 9 Others (Civil Appeal E028 of 2020*) in support of its submissions.

276. The 1st Respondent reiterates that the Petitioner has not established any violations of his constitutional rights. It relies on the judicial decision of Federation of Women Lawyers Kenya (Fida-k) & 5 others v Attorney General & another (Petition 102 of 2011) [2011] KEHC 2099 (KLR) (25 August 2011) (Judgement) in support of its submissions.

277. On the fourth issue, the 1st Respondent submits that the Petitioner is not entitled to the reliefs sought.

278. The 1st Respondent also submits that the Petitioner is seeking compensation in terms of the value of the suit property and mesne profits which is in the nature of special damages that require strict proof. Special damages must not only be specifically pleaded but must also be strictly proved. A mere assertion without cogent proof cannot suffice.

279. The 1st Respondent relies on the judicial decisions of Abadalla Ali were & another v County Government of Bungoma & 4 Other [2022] eKLR, Evelyn College of Design Ltd v Director of Children's Department & another [2013]eKLR in support of its submissions.

280. The 1st Respondent urges the Court to disregard the letter dated 31st January, 2023 from the Kericho County Department of Agriculture which the Petitioner relies on to seek mesne profits.

281. The 1st Respondent submits that no practicing certificate has been attached to authenticate the professional competence of the author.

282. The 1st Respondent also submits that the letter refers to LR No. 843418 which is not mentioned in the present proceedings and the rest of its contents are speculative and fail to account for critical agricultural production variables.

283. The 1st Respondent submits that the valuation report dated 23rd February, 2023 was conducted over land known as LR No. 2334 which is public land. The report does not include an official search to

show the registered owner of the said land and that it does not have a comparative analysis of similar properties within the locality that would be essential an accurate and objective valuation.

284. The 1st Respondent concludes it submissions by urging the Court to dismiss the Petition.

Analysis And Determination.

285. After considering the Petition, the Replying Affidavits, the Petitioner's Affidavits in response and the submissions, it is my view that the following issues arise for determination:

a. Whether the Petition has been pleaded with reasonable precision.

b. Whether the suit parcel as defined is identifiable and whether this court, in the circumstances, can grant any orders in respect of it.

c. Whether this petition is in fact a land ownership dispute.

d. Whether this court has jurisdiction to determine questions pertaining to Historical Land Injustices, whether the Petitioner's claim on the question of historical land injustices is res judicata and whether the Petitioner has proved his claim that a historical land injustice was committed against him.

e. Whether the Petitioner has proved his claim against the 2nd Respondent.

f. The legal effect of the letter dated 21st August, 2023 by the Petitioner's Counsel in relation to this petition.

g. Whether the Petitioner is entitled to other orders sought in the Petition.

h. Who should bear costs of the Petition?

A. Whether the Petition has been pleaded with reasonable precision.

286. The Respondents submit that the Petition as framed has not demonstrated with reasonable precision the constitutional rights that have been infringed and the manner in which they have been violated.

287. The 1st Respondent contends that the only alleged infringement that is specified in the Petition is with regard to Article 40 of *the Constitution*.

288. In response, the Petitioner contends that the aspect of reasonable precision is a procedural technicality and that justice should be administered without undue regard to technicalities.

289. In the judicial decision of Anarita Karimi Njeru v. Republic [1979] 1 KLR 154 the Court held as follows;

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

290. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] eKLR held as follows;

> "(40) It was the averment of learned counsel for the 1st, 5th and 6th respondents that the petition had cited with precision complaints regarding the violation of

Articles 10 and 73 of *the Constitution*; that Article 159 of *the Constitution* enjoined the courts to administer justice without undue regard to procedural technicalities.

(41) 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 coterminous 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.

(42) However, our analysis cannot end at that level of generality. It was the High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a handmaiden of just determination of cases. 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." (Emphasis mine)

291. The Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (supra) held that the framing of constitutional violations with precision is not a mere technicality that can be cured under Article 159 of *the Constitution*.

292. The question whether the Petition has been pleaded with precision cannot therefore be regarded as a mere technicality and I shall proceed to determine whether the petition has been pleaded with reasonable precision.

293. This Petition is brought under Articles 2(5), 10, 17, 19, 22 23, 27, 20, 40, 47, 48, 64 and 67 of *the Constitution* of Kenya.

294. Article 2(5) of *the Constitution* provides as follows;

"(5) The general rules of international law shall form part of the law of Kenya."

295. Article 10 of *the Constitution* provides for national values and principles of governance, Article 17 provides for revocation of citizenship, Article 19 provides for rights and fundamental freedoms, Article 20 provides for the application of bill of rights, Article 22 provides for enforcement of bill of rights, Article 23 provides for the authority of the Courts to uphold and enforce the bill of rights, Article 27

provides for equality and freedom from discrimination, Article 40 provides for the protection of right to property, Article 47 of *the Constitution* provides for fair administrative action, Article 48 provides for access to justice, Article 64 provides for private land while Article 67 provides for the establishment of the National Land Commission and its functions.

296. The Petitioner also relies on Article 14 of the African Charter on Human and People's Rights. It provides as follows;

> " The right to property shall be guaranteed. It may only be encroached (sic) upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

297. The Petitioner at paragraph 20 of the Petition avers as follows;

> " 20. That as a result of the actions of the 1st Respondent and inactions by the 2nd and 3rd Respondents your Humble Petitioner's constitutional right (sic) the suit land have been gravely affected and violated herein under (sic)
>
> a. That the rights of the Petitioner as enshrined in Articles 2(5), 10, 17, 22, 23, 27, 47 & 48 of *the Constitution* on human dignity, human rights, equity, social justice, equality, right to property, non-discrimination and right to be heard have been grossly violated by the 1st, 2nd and 3rd Respondent.
>
> b. The forceful entry into the disputed parcel of land by the 1st Respondent in 1956 and continued occupation of the same to-date without compensation and agreed between with the 1st Respondent directors and the African district Council (an equivalent to the County Government at the moment) was a violation of the constitutional right to ownership of Kipyegon Arap Kirui (deceased) and his dependants (sic) as provided for in Article 40 of *the Constitution*.
>
> c. The lack of intervention involvement and or participation towards resolving of this long running dispute between the Petitioner and the 1st Respondent by the 2nd and 3rd Respondents whose statutory mandates are well set in the *Land Registration Act* No. 3 of 2012 and *the Constitution* of Kenya despite the Petitioner's pleas are gross violations of the Petitioner's constitutional right.
>
> d. That the 1st Respondent has continued to violate the provisions of Article 67 (e) & (f) of *the Constitution* on the powers of the National Land Commission.
>
> e. The 1st Respondent has continued to unlawfully squat, occupy and use the disputed property while fully aware that is a parcel that is properly described under Article 64 of *the Constitution* of Kenya and it belongs to the estate of Kipyegon Arap Kirui (deceased).

f. That this issue has been pending for a long time with the family agitating for their right over this parcel of land hence this matter cannot be declared as barred by the *Limitation of Actions Act*.

g. The actions of the Respondents herein have violated the Petitioners rights and property safeguards as provided in Article 14 of the African Charter on Human and Peoples' rights."

298. The Court of Appeal in Wambega & 733 others v Attorney General & 9 others [2024] KECA 445 (KLR) restated and held as follows;

> 48. It was urged that what the Appellants did was to cite omnibus provisions of *the Constitution*. Reliance was placed on Timothy Njoya v Attorney General & another High Court Constitutional and Human Rights Division Petition No. 479 of 2013 for the proposition that a petitioner cannot come to Court to seek evidence with which to support his case; but must plead his case with some degree of precision, specify which acts were violations, by whom and the manner of the violations. Counsel urged that in the entire petition, no violations were attributed to the 1st and 10th Respondents. It was urged that the appeal should be dismissed as no claim to land can lie under Article 40 of *the Constitution* as the suit land was neither public nor communal land.
>
> On the issue whether the learned Judge erred for finding that the Appellants did not prove constitutional rights violations, the learned Judge found a lack of specificity in the constitutional rights alleged to have been violated. In the case of Mumo Matemu versus Trusted Society of Human Rights Alliance (2013) eKLR, although this Court appreciated the importance of substantive justice under Article 159 of *the Constitution*, it stated: "The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of *the Constitution* and the overriding objective. Principle under section 1A and 1B of the *Civil Procedure Act* (Cap 21) and Section 3A and 3B of the *Appellate Jurisdiction Act* (Cap 9). Procedure is also a hand maiden of just determination of cases. 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 extract of this principle".

299. This Court notes that the 1st Respondent concedes that the Petitioner has pleaded with precision the violations under Article 40. However, this court hold a contrary view. In Wambega & 733 others v Attorney General & 9 others (Supra) it was observed as follows;

> " The purpose of Article 40 is to prevent the State from depriving any person of their property, including land, without due process and without prompt payment and just compensation. The suit lands are private property of the 2nd to 7th and 9th Respondents. This Article does not apply to this case since the Appellants' claim does not hinge on un-procedural acquisition of their property without due process or without just compensation. The Appellants have not claimed that the government took away the land from them."

300. With regard to the 2nd and 3rd Respondents, I find that the Petitioner has not pleaded with a reasonable degree of precision how they violated his constitutional rights.

301. In any event, the Petitioner is alleging violation of his deceased father's right to property under Article 40 of *the Constitution* of Kenya 2010 and yet the actions complained of took place in the 1950's way before the promulgation of *the Constitution* of Kenya, 2010.

302. I find that the petition is incompetent for failure to plead with reasonable precision the rights violated, by whom violated and in what manner they are violated. Further the right to property as enshrined under Article 40 is not available as between private citizens.

B. Whether the suit parcel as defined is identifiable and whether this court, in the circumstances can grant any orders in respect of it.

303. The Petitioner in his Petition contends that he is the legal representative of the estate of the late Kipyegon Arap Kirui.

304. The Petitioner also contends that Kipyegon Arap Kirui (deceased) was the owner of a ten-acre parcel of land described as;

> " Triangle of the reserve to the South East of the tarmac and in the triangle formed by the tarmac, the Kaisugu road and the Kenya Tea Company Boundary running from their head office to Kaisugu road"

305. The Petitioner further contends that the 1st Respondent's predecessor took possession of the said parcel of land with the promise of compensating the owners with an equivalent acreage at what was described as;

> " Kapkorech Estate to the North West of the tarmac between the tarmac and Kapsaus Market which portion was to include the new road to Kapsaus Market."

306. The Petitioner contends that a meeting was held between the Kenya Tea Company Limited and the African District Council of Kipsigis in 1956 where the mode of compensation was agreed upon under Minute 40/56.

307. It is the Petitioner's contention that the 1st Respondent failed to compensate his late father despite several follow ups.

308. It is the Petitioner's contention that while refusing to compensate his father, the 1st Respondent compensated their neighbor one Chuma Arap Chabas (deceased) whose land it had also taken possession of. He therefore contends that the 1st Respondent discriminated against his deceased father.

309. It is further the Petitioner's contention that the process by which the 1st Respondent acquired the suit parcel did not comply with the constitutional requirements on compulsory acquisition as provided for under Article 40 of *the Constitution* of Kenya.

310. The Petitioner contends that the 1st Respondent has constructed its head office and Accounting Department on the said portion of land which measures ten acres.

311. In the Petition, the Petitioner describes the suit parcel as a ten-acre parcel of land where the 1st Respondent's Head Office and Accounts Department are located. He describes the land as follows;

> " Triangle of the reserve to the South East of the tarmac and its triangle formed by the tarmac, the Kaisugu road and the Kenya Tea Company boundary running from their head office to the Kaisugu road".

312. The Petitioner contends that this description is contained under Minute 40/56 on Land Exchanges that he attached to his affidavit in support of the Petition. The said minute is titled 'land Exchanges' and bears the stamp of Kipsigis African Council and it is dated 9th May, 1956 Kericho. The said minute is worded as follows;

> " The President explained to the Council about the proposed exchanges of land along the tarmac road between the tea companies and the Kipsigis Reserve. He said he had discussed with the Kipsigis of the areas concerned and the Chiefs who have all agreed to the proposals as it would be to the mutual advantage to both parties. It was pointed out that neither the Kipsigis nor the Kenya Tea Company would gain more land; exact acreages would be marked before exchanges took effect. If anyone was dispossessed of land, arrangements would be made to offer him or her equivalent land on the reserve side. The proposed exchanges are as follows;
>
> 1. the Kenya Tea Company would take the triangle of Reserve to the South East of the tarmac and in the triangle formed by the tarmac, the Kaisugu Road and the Kenya Tea Company Boundary running from their Head Office to the Kaisugu Road; and in exchange for this the Kipsigis would take in an equivalent acreage of Kapkorech Estate to the North West of the tarmac between the tarmac and Kapsaus Market – this portion to include if possible the new road into Kapsaus Market..."

313. The 1st Respondent contends that it acquired the parcel of land it is in occupation of upon issuance of Grants by the former President of the Republic of Kenya.

314. The 1st Respondent denies acquiring any portion of land through any alleged exchanges or through compulsory acquisition.

315. The 1st Respondent states that it is a private company and it is therefore incapable of acquiring any land through compulsory acquisition.

316. The 1st Respondent denies participating in the African District Council Meeting which led to Minute No. 40/56.

317. The 1st Respondent admits that its predecessor entered into a private agreement with one Chuma Arap Chabas for purchase of land at Chepsir Settlement Scheme.

318. The 1st Respondent contends that it was to pay Kshs. 11,200/= on behalf of Chuma Arap Chabas for purchase of a plot at Chepsir Settlement Scheme and that the agreement provided for a waiver of any right to the property known as LR 2334.

319. The 1st Respondent contends that the said agreement had no relation to the alleged minutes of the Kipsigis African Council.

320. The 2nd and 3rd Respondents contend that the Petitioner has not properly identified the suit parcel and the survey plans attached to his affidavit in support of the Petition are not authenticated.

321. The 2nd Respondent denies attending any meeting between the African District Council of Kipsigis and the Kenya Tea Company Limited.

322. The 2nd Respondent also states that it is a stranger to the assertions under "Land Exchanges Minute 40/56".

323. It is important to note that Minute 40/56 alludes to a proposed exchange of land between the tea companies and members of the Kipsigis Community. It is further important to note that the said minute does not include the names of the members of the Kipsigis Community or the size of the land described therein. Neither does it include the names of the parties present in the said meeting.

324. What is evident is that the entire portion of land described in the said minute did not belong to one individual as it belonged to members of the Kipsigis Community.

325. As afore stated, the 1st Respondent in its Replying Affidavit denies that its head office and Accounts Department are on one parcel of land and contends that its head office is located on LR No. 12629 while its Accounts Department is located on LR No. 12630.

326. The Petitioner filed an affidavit in response to the 1st Respondent's Replying Affidavit sworn on 31st July, 2024. In the said affidavit, he now contends that the ten-acre parcel of land he is claiming forms part of LR 12629.

327. The Petitioner also contends at paragraph 7 of the said affidavit he has attached a survey plan to his affidavit in support of the Petition. The said survey plan is dated 22nd July, 1963 and it allegedly shows that the disputed portion was under LR No. 11408 (Deed Plan) No. 81539/FR/Nos. 2/50 & 6/99 which is now LR No. 12629.

328. The Petitioner at paragraph 9(j) and (k) of the said affidavit contends that the 1st Respondent re-surveyed its parcels of land in the year 1981 with the intention of depriving the Petitioner the said ten-acre parcel of land.

329. The 1st Respondent attached to its Replying Affidavit a copy of the Grant I.R No. 38972 of LR No. 12629. It shows that the 1st Respondent's predecessor, Brooke Bond Kenya Limited is the registered owner.

330. As afore stated, the Petitioner in his affidavit filed in response to the 1st Respondent's Replying Affidavit sworn on 31st July, 2024, contends that the disputed portion of land forms part of LR No. 12629 which he alleges was resurveyed in the year 1981 to defeat their claim.

331. I have observed and find that there is a contradiction in the description of the suit parcel as contained in the petition and as in the response by the Petitioner to the Replying affidavit of the 1st Respondent. It is not clear which land is the subject matter of this petition and whether the parcel of land described in the petition and the parcels of land mentioned in the 1st Respondent's replying affidavit is one and the same parcel.

332. Considering the manner in which that the parcel of land in this petition is described and the contradiction in its description as between the Petitioner and the 1st Respondent, I am unable to grant any orders in respect of it. I cannot say with certainty that both parties refer to one and the same parcel of land. This requires calling of evidence.

C. Whether this petition is in fact a land ownership dispute.

333. The issues raised by the petitioner in his petition, and as understood by this, are:

a. Compulsory acquisition

b. Historical Land Injustice

c. Discrimination; based on the payment that was made by the 1st Respondent to Chuma Arap Chabas (The Petitioner's Neighbour)

d. Contravention of his right to property under Article 40 of *the Constitution* of Kenya 2010.

334. I have had to look at the prayers sought in the Petition. The said prayers have been set out in the preceding paragraphs but I will nonetheless replicate them hereunder for ease of reference. They are:

a. A declaration that the disputed portion of land belongs to the estate of Kipyegon Arap Kirui (deceased).

b. A declaration for restitution of the ten (10) acres of land inclusive of all the developments thereon to the estate of Kipyegon Arap Kirui (deceased).

c. An order of permanent injunction restraining the 1st Respondent by itself, its agents and/or servants, employees, officials, and or anyone from any further trespass, occupation, use and/or interference with the disputed portion of land.

d. A declaration for compensation in terms of the current and developed value of the ten acres and mesne profits accruing for use of the said parcel by Kenya Tea Company Limited (Unilever Tea Limited) calculated yearly for fifty-five years.

e. An order directing the 2nd Respondent to cause the survey and issuance of title deed to the estate of Kipyegon Arap Kirui (deceased).

f. Any further relief that this Honourable Court may deem just and fit to grant.

g. Costs of this Petition be borne by the Respondents.

335. Further and apart from my summary of what appears to be the foundation of the Petitioner's claim, the prayers sought in the petition also shed light on the nature of dispute for determination by this court.

336. I note that the Petitioner in his affidavit in response to the 1st Respondent's Replying Affidavit at paragraph *5*(b) also contends that the manner in which the 1st Respondent acquired the suit parcel is fraudulent.

337. In the judicial decision of Vijay Morjaria v Nansingh Madhusingh Darbar & another [2000] KECA 223 (KLR) the Court of Appeal held as follows;

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from the facts. See Davy v Garrett (1878) 7 Ch. D 473 at 489."

338. The issue of fraud was not pleaded in the petition and has not been proved. I shall not comment on it or address it more than I already have.

339. Regardless of the language or words the petitioner uses to describe his grievance, which range from historical land injustice, compulsory acquisition to discrimination, looking at the petition and responses to the petition in totality it is evident that the dispute in this matter relates to ownership of land; land which the Petitioner in unable to describe with precision.

340. The Petitioner claims that this land that he is unable to describe precisely is the land upon which the 1st Respondent's head office and accounts department stands. The 1st Respondent's in response states that the land upon which its head office, accounts department stands are LR No. 12629 (Grant

No. IR 38972) measuring 122.8 Ha and LR No. 12630 (Grant No. IR 38971) measuring 256.2 Ha respectively. The 1st Respondent says it has documents of title to these parcels.

341. If the Petitioner and 1st Respondent have competing rights over the same parcel of land, it would be necessary to hear oral evidence and interrogate documentary evidence to establish the manner in which each party acquired the suit parcels.

342. In the judicial decision of Rumasila v Kenya Urban Roads Authority & 2 others (Environment & Land Petition E006 of 2022) [2024] KEELC 4826 (KLR) (20 June 2024) (Judgment) the Court observed as follows;

> " The procedural law relating to constitutional matters requires that where there exist ample statutory avenues for resolution of a dispute, the statutory options for redress must be followed and the constitutional Court will decline to entertain the dispute. The basis for that kind of approach is the principle of constitutional avoidance. The principle bars the practice of bringing ordinary disputes to the constitutional Court."

343. The Supreme Court in Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated)) [2014] KESC 53 (KLR) (29 September 2014) (Judgment) discussed the principle of Constitutional avoidance as follows;

> " (256) The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:
>
> I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."
>
> (257) Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).
>
> (258) From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court."

344. In the judicial decision of KKB v SCM & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling) the Court held as follows;

> " 36. In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks.

> Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause." (Emphasis mine)

345. Essentially, the principle of Constitutional avoidance is to the effect that a Constitutional Court shall decline to deal with a matter because there exists another remedy provided in law through which the aggrieved can seek redress and the aggrieved party is yet to utilize it.

346. In the judicial decision of Naitore M'iburi & another v Attorney General & 2 others; Sebastian Kaaria (Interested Party) [2020] KEELC 2969 (KLR) the Court held as follows;

> "31. In this particular case, the interested party is apparently the registered proprietor of the suit land since year 2002. The rights of such a registered proprietor of land are protected and anchored under the statute primarily section 25 and 26 of the *Land Registration Act*. The impeachment of such a title can only be as provided under section 26 1 a & b of the aforementioned Act on grounds of fraud, misrepresentation illegally and corrupt scheme. This would then classify the dispute as one of ownership to be dealt with by ordinary courts and not in a constitutional petition. This is hence a matter where evidence needs to be adduced and tested as a land matter. The petitioners cannot therefore claim that they have rights which need to be protected via this petition." (Emphasis mine)

347. The Petitioner in his endeavor to identify the disputed ten-acre portion of land has alleged illegalities in a survey done in the year 1981 which lead to the issuance of the grant for LR No. 12629 which he contends was done to defeat their claim. The Petitioner is essentially attacking the root of the 1st Respondent's title of LR No. 12629.

348. As was held in the decision of Naitore M'iburi & another v Attorney General & 2 others; Sebastian Kaaria (Interested Party) (Supra), impeachment of a title is a dispute that can be dealt with in an ordinary suit and it should therefore not be dealt with in a constitutional petition.

349. I find that the dispute herein relates to title to, ownership and occupation of land. This kind of dispute requires evidence to be adduced and tested and can be done by this court sitting in exercise of its original and ordinary jurisdiction and not as a Constitutional court.

D. Whether this court has jurisdiction to determine questions pertaining to Historical Land Injustices, whether the Petitioner's claim on the question of historical land injustices is res judicata and whether the Petitioner has proved his claim that historical land injustice was committed against him.

350. The Petitioner contends that his claim arises from a historical land injustice.

351. The Petitioner also contends that it raised the said issue with the National Land Commission and through its response dated 26th September, 2017, the National Land Commission advised him (Petitioner) to pursue his claim with the 1st Respondent for compensation purposes.

352. The Petitioner contends that it is upon receipt of that letter that it filed the Petition under consideration.

353. The 1st Respondent on the other hand contends that it is the National Land Commission that has the jurisdiction to hear and determine claims of historical land injustices.

354. The 1st Respondent also contends that by virtue of the National Land Commission's letter dated 26th September, 2017, the present petition is res judicata as the National Land Commission has already addressed itself on the said issue. The 1st Respondent also contends that this Court does not therefore have jurisdiction.

355. It is not disputed that the Petitioner lodged a complaint at the National Land Commission against the 1st Respondent herein.

356. The National Land Commission responded vide the letter dated 26th September, 2017 addressed to the Petitioner by Prof. Muhammad A. Swazuri the then Chairman National Land Commission.

357. The letter states that the acquisition was between the Petitioner and the 1st Respondent which is a private owned company. The letter also states that the National Land Commission only acquires land for public purposes and the Petitioner was therefore advised to pursue the 1st Respondent for compensation purposes.

358. This Court notes that the 1st Respondent filed a Preliminary Objection dated 25th October, 2022. Among the grounds on the preliminary objection was a ground that this Court lacks jurisdiction to determine the Petition as it is the National Land Commission that has the mandate to investigate and determine issues of historical land injustices.

359. This Court in its ruling delivered on 13th July, 2023 relied on the judicial decision of Chief Land Registrar & 4 Others v Nathan Tirop Koech & 4 Others [2018] eKLR where the Court held that the Environment and Land Court has jurisdiction to hear and determine claims arising of historical land injustices.

360. This Court at paragraph 46 of its ruling held as follows;

> "Whether, and to what extent the National Land Commission dealt with the Petitioner's grievances was therefore a matter of evidence which would have to be dealt with at the hearing of the Petition..."

361. I find that based on the ruling delivered by this court and further based on the fact that no appeal was filed against the said ruling, the question whether or not this court has jurisdiction is no longer available for determination.

362. For the avoidance of doubt, I shall restate that the Environment and Land court has jurisdiction to entertain claims arising out of historical land injustices. This was also the finding by the Court of Appeal in Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others [2018] KECA 27 (KLR). The court of Appeal observed and held as follows:

> "75. On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised (sic) of the matter. Our conviction stems from our reading of Article 67(2) (e) of *the Constitution*. The Article provides that the NLC can investigate "present or historical" land injustices. We lay emphasis on the word "present." If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would prima facie render the Environment and Land

Courts redundant. We do not think this was intended to be so. Our view is fortified by Section 15 (3) (b) of the *National Land Commission Act* which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.

76. Further, there is nothing in the 2010 Constitution or in the *National Land Commission Act* ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice..." (Emphasis mine)

363. The 1st Respondent contends that the claim by the Petitioner on Historical land injustices is res judicata. The Law on res judicata is found in Section 7 of the *Civil Procedure Act*.

> " 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."

364. In the judicial decision of Christopher Kenyariri v Salama Beach [2017] eKLR the Court stated as follows on the ingredients to be satisfied when determining res judicata;

> " ...the following elements must be satisfied...in conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) Former suit between same parties or parties under whom they or any of them claim.
>
> c) Those parties are litigating under the same title.
>
> d) The issue was heard and finally determined.
>
> e) The Court was competent to try the subsequent suit in which the suit is raised."

365. I find that the National Land Commission's letter dated 26th September, 2017 cannot be construed to be a determination on the question whether or not the Petitioner suffered a historical land injustice. The said letter only advised the Petitioner to pursue a claim for compensation from the 1st Respondent.

366. Having found that this Court has jurisdiction to hear and determine claims on historical injustices and having also found that the National Land Commission did not determine the question whether or not the Petitioner suffered historical land injustice (It is therefore not res judicata), I shall now consider the merits of the petitioners claim that a historical land injustice has been committed against him.

367. The Court of Appeal in Mwalambe (Suing as legal representative of the Estate of Lwambi Mwalambe Beponda) v District Land Registrar & 4 others; Rashid & 6 others (Interested Parties) (Civil Appeal E092 of 2021) [2024] KECA 751 (KLR) (21 June 2024) (Judgment) while relying on Section 15(2) of the *National Land Commission Act* observed as follows:

> " 46. Turning to the claim that a historical land injustice was committed against them, "historical land injustice" is defined under section 15(2) of the *National Land Commission Act* as a grievance which was occasioned by a violation of

right in land on the basis of any law, policy, declaration, administrative practice, treaty or agreement; resulted in displacement from their habitual place of residence; occurred between 15th June 1895 when Kenya became a protectorate under the British East African Protectorate and 27th August, 2010 when *the Constitution* was promulgated; has not been sufficiently resolved and subsists up to the period specified under the paragraph; and meets the criteria set out under subsection 3 of this section...

48. In effect, for a claim of historical justice to succeed, the claimant must prove that he had a right to the land, but that due to colonial occupation, independence struggle, pre-independence treaty or agreement between a community and the Government, development-induced displacement, including conversion of non-public land into public land, inequitable land adjudication process or resettlement scheme, politically motivated or conflict-based eviction that right resulted in displacement of the claimant from their habitual residence." [Emphasis Mine]

368. Put simply, parties claiming historical injustice must demonstrate that they had a right to land and that they were displaced from their habitual residence due to the following;

a. Colonial occupation.

b. Independence struggle.

c. Pre-independence treaty or agreement between a community and the Government.

d. Development-induced displacement including conversion of non-public land into public land.

e. Inequitable land adjudication process or resettlement scheme.

f. Politically motivated or conflict- based eviction.

g. Corruption or other form of illegality;

h. Natural disaster; or

i. other cause approved by the Commission

369. The Petitioner has not proved an occurrence of any of the factors set out in section 15(3) of the *National Land Commission Act* to qualify his claim as being a historical land injustice. Therefore, the Petitioner's claim that a historical land injustice has been committed against it by the 1st Respondent fails.

E. Whether the Petitioner has proved his claim against the 2nd Respondent.

370. The petitioner seeks an order directing the 2nd Respondent to cause the survey and issuance of title deed to the estate of Kipyegon Arap Kirui (deceased).

371. The Petitioner accuses the 2nd Respondent for failure to authenticate documents attached to its petition despite it having capacity to verify facts in the Petition.

372. The onus is on the Petitioner to prove all those facts which he alleges. Section 107(1) of the *Evidence Act* provides as follows;

> "(1) 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."

373. The Petitioner cannot therefore blame the 2nd Respondent for allegedly failing to provide him with the relevant documents.

374. In any event, if the Petitioner was desirous of having the 2nd Respondent provide any documents, then he should have followed the requisite procedure to obtain orders compelling the 2nd Respondent to produce them.

375. Based on my finding that the petitioner has not been able to prove that the suit land belongs to him and that the 2nd Respondent had no obligation to provide the Petitioner with documents in support of his claim, I find that the claim against the 2nd Respondent fails.

F. The legal effect of the letter dated 21st August, 2023 by the Petitioner's Counsel in relation to this Petition.

376. The Petitioner at paragraph 9(c) of his affidavit in response to the 1st Respondent's Replying Affidavit contends that in the year 2023 the 1st Respondent offered to settle the present matter by offering his family ten acres of land at Kapkorech Estate. In his estimation, this gesture validates his claim against the 1st Respondent.

377. The 1st Respondent did not address this issue in its submissions.

378. A perusal of the Court record shows that the Petitioner's Counsel wrote the letter dated 21st August, 2023 on a without prejudice basis proposing that the parties explore an out of Court settlement.

379. A further perusal of the Court record shows that Counsel for the 1st Respondent wrote the letter dated 26th September, 2023 on a without prejudice basis proposing that the parties meet and try to settle the matter out of Court.

380. In the judicial decision of Millcent Wambui v Nairobi Botanica Gardening Limited [2013] KEELRC 557 (KLR) the Court held as follows;

> " The Application revolves around "without prejudice" communication. The use of the term 'without prejudice' is used by parties as a means to enable offers and counter offers to be made to settle disputes or claims without fear that the said letters would later be used by the opposite party as an admission of liability in the ensuing lawsuit. The words "without prejudice" impose upon the communication an exclusion of use against the party making the statement in subsequent court proceedings. It is a well-established rule that admissions, concessions or statements made by parties in the process of trying to resolve a dispute cannot be used against that party if the dispute is not resolved thus resulting in litigation. A party making a 'without prejudice' offer does so on the basis that they reserve the right to assert their original position, if the offer is rejected and litigation ensues." (Emphasis mine)

381. In the judicial decision of KSC International Limited (Under Receivership) & 4 others v Bank of Africa (Kenya) Limited & 7 others [2023] KEHC 24298 (KLR) the Court also held as follows;

> " From the foregoing, it is clear that without prejudice communication is protected. However, it can be relied on to where there is compromise. This includes where there is acceptance of the proposal made on a without prejudice."

382. As was held in the above cited judicial decisions, without prejudice communication is protected and the letter dated 21st August, 2023 has no legal effect in so far as determination of this petition is concerned.

G. Whether the Petitioner is entitled to other orders sought in the Petition.

383. Prayers (a), (b) (c) and (e) of the petition have been dealt under preceding sub-headings. This sub-heading shall consider prayer (d) of the petition.

384. The Petitioner under prayer (d) seeks an award for compensation and mesne profit. It is as follows:

> d. A declaration for compensation in terms of the current and developed value of the ten acres and mesne profits accruing for use of the said parcel by Kenya Tea Company Limited (Unilever Tea Limited) calculated yearly for fifty-five years.

385. The Petitioner submits that he has filed a Land Valuation Report dated 23rd February, 2023 which has valued the ten acres of land at Kshs. 600,000,000/= and a Report by the County Agricultural Officer dated 31st January, 2023 which shows the value of lost earnings on the tea planted on eight acres as Kshs. 55,633,520/=.

386. The Petitioner urges the Court to award him the said amounts together with mesne profits.

387. The 1st Respondent submits that the Petitioner should not be granted compensation in terms of the value of the suit property together with mesne profits, as they are both special damages that must be specifically pleaded and proved.

388. The 1st Respondent also submits that the Report by the County Agricultural Officer dated 31st January, 2023 refers to LR No. 843418 which is not subject of these proceedings and further that no practicing certificate has been attached to authenticate the professional competence of the author.

389. With regard to the valuation report dated 23rd February, 2023, the 1st Respondent submits that it was conducted on a parcel of land known as LR No. 2334 which is public land.

390. The 1st Respondent also submits that no official search was attached to show the registered owner of the said parcel of land.

391. The prayer for compensation of the value of the ten acres and lost earnings on the tea planted on eight acres, is in the realm of special damages. It is trite law that special damages must be specifically pleaded and proved.

392. In the judicial decision of *Kosgei v Mutisya (Civil Appeal 4 of 2023)* [2024] KEHC 156 (KLR) (19 January 2024) (Judgment) the Court held as follows;

> " 58. On this point, it is trite law that special damages must be both pleaded and proved before they can be awarded. In the case of Hahn v. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716, the Court of Appeal held as follows:

"Special damages must not only be specifically claimed (pleaded) but also strictly proved .... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

393. On mesne profits, Order 21 Rule 13 of the Civil Procedure Rules provides as follows;

> " 13.
>
> (1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree—
>
> (a) for the possession of the property;
>
> (b) for the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits;
>
> (c) directing an inquiry as to rent or mesne profits from the institution of such suit until-
>
> (i) the delivery of possession to the decree-holder;
>
> (ii) the relinquishment of possession by the judgment-debtor with notice to the decree-holder through the court; or
>
> (iii) the expiration of three years from the date of the decree, whichever event first occurs."

394. In the judicial decision of Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] eKLR the Court held as follows;

> " This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of *Civil Procedure Act*."

395. In Mkalla v Kikopi & another (Environment & Land Case 83 of 2016) [2022] KEELC 3109 (KLR) (28 June 2022) (Judgment) the Court held as follows;

> " On the issue whether the plaintiff is entitled to mesne profits, mesne profits are special damages which must be specifically pleaded and proved. The plaintiff did not specifically lead any evidence to prove mesne profits, therefore this limb of his claim fails."

396. Apart from the fact that mesne profits and compensation are special damages which must be specifically pleaded and proved, the grant of an order of compensation and mesne profits requires evaluation of evidence and is therefore not suitable for determination by way of a constitutional petition.

397. The prayer for compensation and mesne profits also fails.

H. Who should bear costs of the Petition?

398. It is now settled that costs shall follow the event. This is in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21 Laws of Kenya). A successful party should ordinarily be awarded costs of an action unless the Court, for good reason, directs otherwise.

Disposition.

399. In the result, I find that the Petition dated 27th July, 2022 lacks merit and it is hereby dismissed with costs.

400. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 31ST DAY OF JULY, 2025.

L. A. OMOLLO

JUDGE

In the presence of: -

Miss Chebet for Mr. Korir for the Petitioner.

Mr.Odhiambo for the 1st Respondent.

Miss. Chepkemoi for the 2nd an 3rd Respondent.

Court Assistant; Mr. Joseph Makori.[
