



**Kahia Transporters Limited & another v Dopp Investments Limited & 7 others (Civil Appeal E045 of 2025) [2025] KECA 2226 (KLR) (19 December 2025) (Judgment)**

Neutral citation: [2025] KECA 2226 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPEAL E045 OF 2025  
AK MURGOR, KI LAIBUTA & GW NGENYE-MACHARIA, JJA  
DECEMBER 19, 2025**

**BETWEEN**

**KAHIA TRANSPORTERS LIMITED ..... 1<sup>ST</sup> APPELLANT**

**TRADE LEAD LIMITED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**DOPP INVESTMENTS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KENYA RAILWAYS CORPORATION ..... 2<sup>ND</sup> RESPONDENT**

**CHIEF LAND REGISTRAR ..... 3<sup>RD</sup> RESPONDENT**

**NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> RESPONDENT**

**KACHUNGO EDWARD BEKWEKWE ..... 5<sup>TH</sup> RESPONDENT**

**CHARLES MULOLE SHANGA ..... 6<sup>TH</sup> RESPONDENT**

**HAMSI TSUMA MWERO ..... 7<sup>TH</sup> RESPONDENT**

**REDALU MBOVU MGAIDI ..... 8<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Judgment and Decree of the Environment and Land Court of Kenya at Mombasa (N. Matbeka, J.) delivered on 19th December 2024 in E.L.C Case No. 39 of 2019)*

**JUDGMENT**

1. The genesis of the instant appeal is the 1<sup>st</sup> respondent's suit against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents in the Environment and Land Court at Mombasa in ELCC No. 39 of 2019 – Bopp Investments Limited (the 1<sup>st</sup> respondent) v Kenya Railways Corporation (the 2<sup>nd</sup> respondent) & the National Land Commission (the 3<sup>rd</sup> respondent).



2. The suit was instituted by a plaintiff dated 7<sup>th</sup> March 2019 praying for: an order that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents do forthwith pay to it the sum of Kshs. 667,903,887 on account of the compulsory acquisition of plot No. “MN/VI/1040/2” (the suit property); interest on the sum claimed at court rates until payment in full; and costs of the suit and interest thereon.
3. The 1<sup>st</sup> respondent’s case was that the 3<sup>rd</sup> respondent conducted an inquiry into the ownership of the suit property for the purpose of its compulsory acquisition; that, in its determination in February 2016, the 3<sup>rd</sup> respondent established that the 1<sup>st</sup> respondent was its rightful owner; that, vide two letters dated 5<sup>th</sup> and 8<sup>th</sup> January 2018, the Chairman of the 3<sup>rd</sup> respondent wrote to the Chief Land Registrar and the District Land Registrar respectively informing them of the 3<sup>rd</sup> respondent’s determination; that, based on its findings, the 3<sup>rd</sup> respondent published a Gazette Notice dated 10<sup>th</sup> November 2017 and issued orders for implementation of the acquisition; that, vide an Award dated 11<sup>th</sup> October 2017, the 3<sup>rd</sup> respondent awarded the sum of Kshs. 667,903,887 to the 1<sup>st</sup> respondent; and that the 1<sup>st</sup> respondent accepted the Award vide a statement signed on 6<sup>th</sup> March 2018 and provided all the requisite documentation requested by the 3<sup>rd</sup> respondent to facilitate implementation of the Award.
4. The 1<sup>st</sup> respondent further stated that, at all material times relevant to the suit, it was the registered owner of the suit property and had been paying land rates to Kwale County; that the suit property had been the subject of 5 suits previously filed between various third parties and some of the respondents herein, thereby hampering payment of the sum awarded to the 1<sup>st</sup> respondent.
5. The prior suit mentioned above are, namely:
  - i. Mombasa Constitutional Petition No. 18 of 2016 – Hamisi Tsuma Mwero v National Land Commission & 5 Others in which the petitioner claimed ownership of the suit property, but which was dismissed for lack of merit and in the absence of any evidential documents in proof of ownership;
  - ii. Mombasa ELCC No. 258 of 2016 – Martin Muthama & 2 Others v Kenya Wool Investments Company Limited & 3 Others, in which the plaintiffs claimed ownership of the suit property on account of alleged purchase from Kenya Wool Investments Company Limited, but which was dismissed for want of merit or evidence of the alleged purchase, for abuse of the court process, and on the trial court’s finding that the suit property belonged to the 1<sup>st</sup> respondent;
  - iii. Mombasa Criminal Case No. 1213 of 2017 – Republic v Maheshukumar Manubhai Patel, which was withdrawn by the ODPP;
  - iv. Kiambu Civil Suit No. 424 of 2017 – Kenya Wool Investments Company Limited v Dr. Swazuri A. Muhammed & Another in which a Director of plaintiff claimed ownership of the suit property, but which was dismissed for lack of merit in the absence of any evidential documents as proof of ownership, and as being an abuse of the court process; and
  - v. Mombasa Judicial Review Misc. Application No. 56 of 2017 – Kenya Wool Investments Company Limited (ex parte applicant) v Chief Land Registrar & 4 Others filed by a Director of the applicant claiming ownership of the suit property, but which was dismissed for want of jurisdiction.
6. In addition to the foregoing, the 1<sup>st</sup> respondent averred that no appeal was preferred from the outcome of any of the cases aforesaid; that, in all the above-mentioned cases, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents affirmed the 1<sup>st</sup> respondent’s rightful claim over the suit property; that, by 4 letters dated 11<sup>th</sup> January 2016, 16<sup>th</sup> December 2016, 18<sup>th</sup> October 2017 and 3<sup>rd</sup> January 2019, the 3<sup>rd</sup> respondent advised the 2<sup>nd</sup> respondent



- to make the requisite payment due and owing to the 1st respondent; and that, despite demand and notice of intention to sue, the 2nd and 3<sup>rd</sup> respondents refused, failed or neglected to make payment of the sums awarded.
7. In its defence dated 27<sup>th</sup> March 2017 (not contained in the record as put to us, but which we gather from the impugned judgment), the 2<sup>nd</sup> respondent averred that the 1<sup>st</sup> respondent's case had fundamental contradictions and inconsistencies which made it difficult to make any meaningful response thereto; that, given the various suits challenging the 1<sup>st</sup> respondent's title to the suit property, it was prudent management of public funds to withhold payment to the 1<sup>st</sup> respondent; and that the funds to which the 1st respondent laid claim were remitted to the 3rd respondent, which was best placed to render an account of the sums disbursed.
  8. The 2<sup>nd</sup> respondent also appears to have amended its plaint to include a counterclaim dated 6<sup>th</sup> July 2022 in which it contended that the 1<sup>st</sup> respondent's suit did not disclose any reasonable cause of action and prayed that it be dismissed with costs.
  9. By the appellants' Notice of Motion filed on or about 17<sup>th</sup> October 2019 followed by the 5<sup>th</sup> to 8<sup>th</sup> respondents' Notice of Motion dated 31<sup>st</sup> October 2019, the appellants and the said respondents respectively sought to be joined as interested parties to the 1<sup>st</sup> respondent's suit. The Motions were allowed by consent of the parties as recorded on 11<sup>th</sup> November 2019. Consequently, the appellants and the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents were joined as interested parties, whereupon they filed their respective defences.
  10. In their joint defence dated 14<sup>th</sup> February 2020, the 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents denied the 1<sup>st</sup> respondent's claim to the suit property and averred that the suit property formed part of their ancestral land protected under the law and *the Constitution*; that the alleged registration of the suit property in favour of the 1<sup>st</sup> respondent was unlawful, invalid, void and ineffectual for all intents and purposes; that the alleged payment of land rates to Kwale county did not confer to the 1<sup>st</sup> respondent title to the suit property; that the 1<sup>st</sup> respondent had failed to disclose the existence of numerous suits over the property in issue, including Mombasa ELCC No. 405 of 2015, which was pending hearing, and in which interlocutory orders had been made; that the court had no jurisdiction to entertain the 1<sup>st</sup> respondent's suit, which was allegedly an abuse of the court process; and that the 1<sup>st</sup> respondent's suit should be stayed. They also prayed that the suit be dismissed with costs.
  11. Next followed the appellants' defence and counterclaim dated 11<sup>th</sup> December 2019 and amended on 6<sup>th</sup> April 2022. The appellants averred that the 1<sup>st</sup> respondent's suit ought to be stayed pending hearing and determination of Mombasa ELCC No. 405 of 2017 – Kahia Transporters Limited & Trade Lead Limited v the National Land Commission – in which the trial court, inter alia, stopped payment in respect of various properties, including the suit property; that the 1<sup>st</sup> respondent's suit was sub judice ELCC No. 405 of 2017 and, therefore, ought to be stayed to await the outcome of the earlier suit; and that they were strangers to the allegations contained in the 1<sup>st</sup> respondent's plaint.
  12. The appellants' case was that they were the beneficial and/or registered proprietors of LR 31537, which was "in the same location with the plaintiff's [the 1<sup>st</sup> respondent's] alleged plot No. VI/MN/1040/2"; and that there was a dispute over boundary encroachment and/or overlapping with their property, which dispute was yet to be resolved, and hence the need to stay proceedings in the suit pending final determination of ELCC No. 405 of 2017.
  13. In their counterclaim, the appellants averred that the 1<sup>st</sup> respondent was the owner of plot No. MN/VI/1040/2, which had allegedly encroached on or overlapped into the appellants' plot No. LR 31537; that the Standard Gauge Railway line (the SGR) had passed through the appellants' plot, but that the



- 2<sup>nd</sup> and 3<sup>rd</sup> respondents had unlawfully made a decision to pay compensation to the 1<sup>st</sup> respondent in disregard of the fact that the SGR passes through the appellants' plot; that the appellants had not been compensated in spite of the fact that 4.390 Hectares equivalent to 10.8479 Acres of their property was being used by the SGR; and that the affected portion was worth Kshs. 1,084,790,000. They sought orders that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents be compelled to cancel the compensation awarded to the 1<sup>st</sup> respondent and make payment of the sum aforesaid to the appellants. The appellants also prayed that the 1<sup>st</sup> respondent's suit be dismissed with costs, and that their counterclaim be allowed with costs.
14. Though not on record, we gather from the impugned judgment that the 3<sup>rd</sup> respondent filed its statement of defence as amended on 16<sup>th</sup> May 2022 stating, inter alia: that plot No. LR 1040/2 was one of the properties acquired for the construction of the SGR; that, following the process of compulsory acquisition, they upheld the 1<sup>st</sup> respondent as the owner of the suit property and issued a Gazette Notice No. 11043 dated 10<sup>th</sup> November 2017; that, inadvertently, errors occurred during the publication of the Gazette Notices and some documents erroneously referred to the suit property as MN/VI/1040/2 instead of LR 1040/2 Kwale; that the appellants' plot No. LR 31537 was fraudulently acquired and registered in 2017 long after the compulsory acquisition and gazette; that the appellants' plot erroneously overlaps the 1<sup>st</sup> respondent's plot; that the private surveyor who surveyed the appellants' plot had since requested the Director of Surveys to cancel and expunge the appellants' plot from the records as it erroneously overlapped on the suit property causing a duplication of title; that plot No. MN/VI/1040 was a subdivision of plot No. 247/VI/MN, which was acquired by the Government on 26<sup>th</sup> July 1975 for Moi International Airport; and that it was not related to the property known as LR No. 1040/2 located in Kwale county.
15. Subsequently, the 1<sup>st</sup> respondent filed its reply to the appellants' defence and defence to their counterclaim dated 3<sup>rd</sup> February 2020 and amended on 8<sup>th</sup> June 2022 stating that it was a stranger to ELCC No. 405 of 2017, and that it was not joined as a party thereto; that the orders made in that suit to withhold payment of compensation was in relation to a different parcel of land, to wit, MN/VI/1040/2 measuring 0.56 Acres and located in Mombasa County while the suit property known as LR 1040/2 measuring 610 Acres was situated in Kwale County; and that the said suit was an afterthought and part of a larger conspiracy by the appellants and their cohorts aimed at denying the 1<sup>st</sup> respondent from enjoying the fruits of its assets.
16. In its defence to the appellants' counterclaim, the 1<sup>st</sup> respondent denied the existence of the property known as LR 31537 as alleged by the appellants and averred that the appellants' property was a fabrication created in a bid to frustrate the 1<sup>st</sup> respondent's quest to pursue its compensation; that the 1<sup>st</sup> respondent had successfully defended five claims by third parties relating to the suit property, some of which were instigated by the appellants; that the appellants acted in bad faith by failing to include the 1<sup>st</sup> respondent as a party in ELCC No. 405 of 2017, thereby denying it the opportunity to oppose the appellants' application for stay orders; that the title to LR 31537 bore the name of one Ali Osman Abdi, who was not a Director in either of the appellant companies; that the KRA PIN of the said Ali Osman Abdi could not be traced by KRA; that his National Identity Card No. 2494928 belonged to one Frederick Kithinji; that title No. LR 31537 was a blatant and outright forgery.
17. As pleaded by the 1<sup>st</sup> respondent, the appellants' claimed title LR 31537 was characterized by "further suspicious and contradictory particulars", namely:
- “a) Allotment letter defective - acreage supposedly allocated 21 is Ha. The actual Surveyed and grabbed land is 50.01 Ha.



- b) The Allotment letter ref number no. 90751/XI, dated 30<sup>th</sup> May, 1994 is addressed to OSMAN AHMED KAHIA, however, a new Grant was present and registered in the name of ALI ABDI OSMAN in 2017.
- c) The allotment letter of the land allocated is in Mombasa MAINLAND NORTH and not KWALE.
- d) The Allotment dated 30<sup>th</sup> May 1994: no proof of the survey done within 30 days. If the survey was carried out, the Parcel would be rejected on grounds of overlap/duplication of Survey.
- e) The allotment dated 30<sup>th</sup> May 1994: no proof of payment receipts within 30days.
- f) The process of registration of unsurveyed land is illegal and fraudulent. There is no record in Kwale or Mombasa County of rates paid.
- g) The allotment is dated 1994, yet the title was registered in 2017.
- h) Ali Abdi Osman is the ID and Pin submitted in court are different from the one on the title.
- i) Ali Abdi Osman: the signature on title and signature on the provided MOU and Sale Agreement to Kahia (a Director of the 1<sup>st</sup> and 2<sup>nd</sup> Interested Parties), all different.
- j) Kahia Transporters Ltd, the 2<sup>nd</sup> Interested Parties herein, was incorporated on 10<sup>th</sup> June 2013; the MOU to “Purchase” unsurveyed land was signed on 25<sup>th</sup> June 2012.
- k) No transfer documentation provided, i.e., title, stamp duty payment, rate and rent clearance, land control Board Consent, Valuation etc.
- l) There is no original 1994 registered Surveyor documentation of the survey and documentation forwarded to Survey of Kenya.”

18. The 1<sup>st</sup> respondent further averred that, by a report dated 21<sup>st</sup> December 2021, the Director of Surveys stated that plot No. LR 31537 was an illegality; that, by a letter dated 22<sup>nd</sup> January 2022, the appellants’ surveyor, one Edward Kiguru, corroborated the position taken by the Director of Surveys to the effect that the registration of LR No. 31537 as a partial superimposition on LR No. 1040/2 was irregular and should not have taken place; that the 3<sup>rd</sup> respondent filed an affidavit on 18<sup>th</sup> October 2021 attaching a report by its surveyor confirming that LR No. 31537 irregularly encroached on the suit property; that the 1<sup>st</sup> respondent’s surveyors corroborated the previous surveyors’ findings that LR No. 31537 had irregularly encroached on the suit property; that the Director of Criminal Investigation conducted thorough investigations and, by a report dated 8<sup>th</sup> June 2020, affirmed that the 1<sup>st</sup> respondent was the legitimate owner of the suit property; and that the appellants’ counterclaim was baseless and lacked merit. It prayed that it be dismissed with costs.

19. In its defence to the appellants’ counterclaim dated 30<sup>th</sup> June 2022, the 2<sup>nd</sup> respondent denied the counterclaim and stated that the suit property belonged to the 1<sup>st</sup> respondent; that they (the 2<sup>nd</sup> respondent) acquired a portion thereof in compliance with the statutory procedure set out in the [Land Act](#); that it did not acquire LR No. 31537; and that, in any event, the forum for challenging the process of compulsory acquisition starts at the National Land Commission (the 3<sup>rd</sup> respondent) and escalates



- by way of an appeal to the ELC. The 2<sup>nd</sup> respondent contended that the ELC did not have original jurisdiction to determine the appellants' counterclaim. It prayed that the counterclaim be dismissed with costs.
20. It is noteworthy that, even though the 4<sup>th</sup> respondent (the Chief Land Registrar) was joined as a defendant to the 1<sup>st</sup> respondent's suit on the 1<sup>st</sup> appellant application dated 9<sup>th</sup> June 2023, it did not file any pleadings except for a witness statement dated 21<sup>st</sup> August 2023 made by one Mr. Ojwang Omolo Patroba, the Assistant Director Land Administration, in which he essentially set out the history of plot No. LR 1040/2 up until acquisition by the 1<sup>st</sup> respondent. In his statement, Mr. Patroba stated that the allocation and subsequent registration of the suit property LR 31537 was irregular as the land to which it allegedly relates was privately owned by the 1<sup>st</sup> respondent; and that it was not available for alienation to any other party.
  21. In its judgment dated 19<sup>th</sup> December 2024, the ELC (N. A. Matheka, J.) found that the 1<sup>st</sup> respondent had established its case on a balance of probabilities; and that the appellants' and the 5<sup>th</sup> to 8<sup>th</sup> respondents' counterclaims were devoid of merit. Accordingly, she dismissed the counterclaims with costs.
  22. Aggrieved by the learned Judge's decision, the appellants filed the instant appeal on a whopping 39 grounds set out in their memorandum of appeal dated 14<sup>th</sup> March 2025, but which we need not replicate here. Suffice it to observe that, in support of the appeal, learned counsel, M/s. Ahmednasir Abdullahi Advocates LLP filed written submissions, list of authorities and case digest dated 20<sup>th</sup> May 2025 in respect of which Mr. Ahmednasir Abdullahi SC made brief oral highlights when the appeal came up for hearing on the court's virtual platform on 26<sup>th</sup> May 2025.
  23. In their written and oral submissions, learned Senior Counsel consolidated the 39 grounds of appeal to 6 main issues, namely: whether the learned Judge failed to appreciate the principle that parties are bound by their pleadings and can only succeed on the basis of what they averred and proved in evidence; whether the learned Judge erred in law and in fact by failing to appreciate that the 1<sup>st</sup> respondent was required to adduce evidence to support what it had pleaded in its plaint and not to depart therefrom in respect of its property; whether the learned Judge erred in failing to appreciate that the 1<sup>st</sup> respondent pleaded that title No. MN/VI/1040/2 is extinct; whether the learned Judge erred in unfairly awarding compensation to the 1<sup>st</sup> respondent in respect of an unpleaded parcel being plot No. LR 1040/2; whether the learned Judge erred in fact and in law by failing to appreciate that there was neither a competing title with the 1<sup>st</sup> appellant's title nor evidence on record impeaching it; and whether the judgment unfairly deprives the 1<sup>st</sup> appellant its right to property. In their submissions, counsel cited 22 judicial authorities, which we have taken to mind.
  24. Equally dissatisfied, the 2<sup>nd</sup> respondent filed a notice of cross- appeal dated 28<sup>th</sup> April 2025 on a single ground that, given the facts before her, the learned Judge exercised her discretion injudiciously by awarding interest on the amount claimed at court rates until payment in full.
  25. In addition to the cross-appeal, the 2<sup>nd</sup> respondent filed a Notice of Grounds Affirming Decision dated 28<sup>th</sup> April 2025. The grounds thereby advanced for affirmation of the impugned judgment are: that the appellants and the 5<sup>th</sup> to 8<sup>th</sup> respondents lacked locus standi to challenge the 1<sup>st</sup> respondent's title, having applied to and joined the suit as interested parties; that the ELC lacked original jurisdiction to consider the competing claims by the appellants and the 5<sup>th</sup> to 8<sup>th</sup> respondents as brought for the first time before the ELC and not to the 3<sup>rd</sup> respondent; and that the appellants and the 5<sup>th</sup> to 8<sup>th</sup> respondents had not specifically pleaded and strictly proved the amounts claimed.



26. Opposing the appeal, learned counsel for the 1<sup>st</sup> respondent, M/s. Agimba & Associates, filed written submissions, list of authorities and case digest dated 14<sup>th</sup> May 2025 citing 7 judicial authorities which counsel highlighted orally at the hearing of the appeal, and which we have duly considered.
27. So did counsel for the 2<sup>nd</sup> respondent, M/s. Muriu Mungai & Company LLP, who filed written submissions, list of authorities and case digest dated 9<sup>th</sup> May 2025 in opposition to the appeal. Counsel cited 8 judicial authorities, which we have also taken to mind.
28. On their part, counsel for the 3<sup>rd</sup> respondent, M/s. Koceyo & Company, filed written submissions, list of authorities and case digest dated 2<sup>nd</sup> May 2025. They cited one judicial authority to which we will shortly return.
29. Likewise, Ms. Janet Langat, the Deputy Chief Litigation Counsel in the Office of the Attorney General, filed written submissions, list of authorities and case digest dated 13<sup>th</sup> May 2025 on behalf of the 4<sup>th</sup> respondent. Counsel cited 5 judicial authorities, which we have also considered.
30. On their part, counsel for the 5<sup>th</sup> to 8<sup>th</sup> respondents, M/s. Asige Kaverenge & Anyanzwa, filed written submissions dated 20<sup>th</sup> May 2025 citing 5 judicial authorities, which we have likewise taken to mind.
31. This Court's mandate on 1<sup>st</sup> appeal was espoused in *Ng'ati Farmers' Co-Operative Society Ltd v Ledidi & 15 Others* [2009] KLR 331 as follows:

“An appeal to this Court from a trial by the High Court is by way of re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that, this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect. In particular, this Court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence, or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

32. This mandate was underscored in the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2 EA 212 as follows:

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.”

33. However, we are conscious as cautioned by the predecessor to this Court in *Peters v Sunday Post Ltd* [1958] EA 424 that:

“It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the Judge who tried the case and who has had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion.”



34. In our view, the main issues that fall for determination in this appeal are:
- i. whether the learned Judge failed to appreciate the principle that parties are bound by their pleadings and can only succeed on the basis of what they averred and proved in evidence;
  - ii. whether the learned Judge was at fault in applying the provisions of section 100 of the *Civil Procedure Act* and Article 159(2) (d) of *the Constitution* in the circumstances of the case;
  - iii. which of the properties described as LR No. MN/VI/1040/2, LR No. 1040/2 and LR No. 31537 was compulsorily acquired by the 2<sup>nd</sup> respondent for the purpose of SGR construction;
  - iv. whether the learned Judge erred in failing to appreciate that the 1<sup>st</sup> respondent's title pleaded as No. MN/VI/1040/2 was extinct;
  - v. to whom did the property compulsorily acquired belong;
  - vi. who, as between the appellants, the 1<sup>st</sup> respondent and the 5<sup>th</sup> to 8<sup>th</sup> respondents were entitled to compensation, and whether the learned Judge was at fault in allowing the 1<sup>st</sup> respondent's claim for compensation in respect of the allegedly unpleaded plot No. LR 1040/2;
  - vii. whether the learned Judge erred in fact and in law by failing to appreciate that there was neither a competing title with the 1<sup>st</sup> appellant's title nor evidence on record impeaching it;
  - viii. whether the impugned judgment unfairly deprives the 1<sup>st</sup> appellant of its right to property; and
  - ix. if the 1<sup>st</sup> respondent was entitled to compensation for compulsory acquisition as claimed, and whether the learned Judge was at fault in awarding interest thereon at court rates until payment in full.
35. On the 1<sup>st</sup> issue, the appellants fault the learned Judge for allegedly failing to appreciate the principle that parties are bound by their pleadings, and that they can only succeed on the basis of what they averred and proved in evidence. Learned counsel for the appellants submitted that the cornerstone of civil litigation is that parties before court are bound by their pleadings; that the 1<sup>st</sup> respondent's cause of action was predicated solely on the parcel of land known as plot No. MN/VI/1040/2 and the Award dated 11<sup>th</sup> October 2017; that, therefore, anything at variance with those bedrock pleadings ought to be discarded.
36. Counsel faulted the learned Judge for departing from the 1<sup>st</sup> respondent's pleadings, and for wading into facts outside the four corners of its plaint. According to counsel, the 1<sup>st</sup> respondent raised the allegation that its suit property was LR No. 1040/2 and not MN/VI/1040/2 vide its written submissions dated 18<sup>th</sup> September 2024. Counsel cited *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3 for the proposition that each party is bound by their own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made; *Independent Electoral and Boundaries Commission v Stephen Mutinda Mule* [2014] eKLR; and *Anuar Loitiptip v Independent Electoral and Boundaries Commission & 2 Others* [2019] eKLR, submitting that, where a party to a litigation sneaks in a new and completely foreign issue at the tail end of the proceedings, it constitutes a violation of the right to fair hearing and cannot be countenanced.
37. Counsel contended that the trial court misdirected itself in considering evidence at variance with the 1<sup>st</sup> respondent's pleadings; that the court delved into the ownership of an unpleaded property known as LR No. 1040/2, which was found to be different from the pleaded property, to wit, MN/VI/1040/2; and that the court cited Article 159 of *the Constitution* to sanitise its mistake, and to assist the 1<sup>st</sup> respondent to deviate from its pleadings.



38. Citing *Selle v Associated Motor Boat Co.* (1968) EA 123; *Gitobu Imanyara & 2 Others v Attorney General* [2016] eKLR; *Peters v Sunday Post Ltd* (1958) EA 424; and *Abok James Odera T/A A. J. Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, counsel urged us to re-evaluate the evidence and espouse settled law that any evidence at variance with the plaint ought to have been discarded. In addition, counsel cited the case of *Raila Omolo Odinga & Another v IEBC & 2 others* [2017] eKLR, submitting that, in the absence of pleadings, evidence (if any) produced by the parties cannot be considered.
39. In support of the appellants' position, learned counsel for the 5<sup>th</sup> to 8<sup>th</sup> respondents cited the cases of *Malawi Railways Ltd v Nyasulu* (supra); *Anuar Loitiptip v Independent Electoral and Boundaries Commission & 2 Others* (supra) and *Raila Omolo Odinga & Another v IEBC & 2 Others* (supra), submitting that the 1<sup>st</sup> respondent's suit in the trial court revolved around the acquisition of plot No. MN/VI/1040/2; that its plaint was never amended; that the trial court erred in departing from the pleadings, and in attempting to sanitise the same by finding solace in Article 159 of *the Constitution*; that parties are not allowed to go beyond the boundaries of their pleadings; and that canvassing any new issues by way of submissions would negate the very essence of fair hearing.
40. In rebuttal, learned counsel for the 1<sup>st</sup> respondent submitted that the appellants were conveniently oblivious to the references made to LR No. 1040/2 in the Plaint and in the Amended Reply to Defence and Defence to Counterclaim and, in the same breath, they repeatedly point to the so-called anomaly referred to as MN/VI/1040/2 in the Plaint; and that the appellants did not file any application to strike out the 1<sup>st</sup> respondent's suit on the ground of the perceived anomaly.
41. On their part, learned counsel for the 2<sup>nd</sup> respondent submitted that, while it is true that paragraph 4 of the plaint referred to MN/VI/1040/2, there were other paragraphs in the same plaint that pleaded to LR No. 1040/2; that the 1<sup>st</sup> respondent also filed an Amended Reply to Defence and Defence to Counterclaim wherein it repeatedly referred to its property as LR No. 1040/2; that, during examination-in-chief, PW1 (Harshil Patel) clarified that the 1<sup>st</sup> respondent's property was LR No. 1040/2; that authorities abound that courts may determine an issue if, from the course taken during trial, it was left to the court to determine; that almost all witnesses who testified were asked about the difference between MN/VI/1040/2 and LR No. 1040/2, and were all consistent that MN/VI/1040/2 did not exist, but that LR No. 1040/2 existed; and that, with that course taken, it would have been an error for the learned Judge to restrict herself to paragraph 4 of the plaint and nothing else.
42. On the authority of *Ali Okata Watako v Mumias Sugar Co. Ltd* [2012] eKLR, counsel submitted that paragraph 4 of the plaint was merely a "typographical" error, which the court was entitled to correct under section 100 of the *Civil Procedure Act*.
43. It is noteworthy that the 3<sup>rd</sup> and 4<sup>th</sup> respondents did not submit on this issue.
44. Having carefully considered the pleadings, we take note of the fact that reference to plot No. MN/VI/1040/2 as the suit property appears in paragraph 4 of the 1<sup>st</sup> respondent's plaint. We also take to mind the fact that it is common ground that plot No. MN/VI/1040/2 did not exist. This conclusion is informed by the uncontroverted evidence of Wilson Kibichii (PW2), the Head of Survey Records at the Ministry of Lands and Physical Planning. PW2 authored a report in response to a letter dated 16<sup>th</sup> December 2021 by counsel for the 1<sup>st</sup> respondent seeking clarification as to the status of the 1<sup>st</sup> respondent's property, LR No.1040/2, vis-à-vis plot No. MN/VI/1040/2. PW2 testified that it was LR No. 1040/2 that had an overlap with LR No. 31357; and that plot No. MN/VI/1040/2 belonged to another locality. PW2's report dated 20<sup>th</sup> December 2021 further clarified that the property known as plot No. MN/VI/1040 was originally part of MN/VI/247 located in Port Reitz area of



- Mombasa County, measured approximately 0.56 acres (0.2266 Ha), and was subsequently renamed MN/VI/3449 following a re-survey of the parcel on 20<sup>th</sup> December 1995; and that Plot No. MN/VI/1040/2 did not exist because the said plot would have had to be a subdivision of the now extinguished plot No. MN/VI/1040, which subdivision did not happen.
45. It is instructive that PW2's evidence was corroborated by the evidence of Erastus Chege Mwangi (PW3), a licensed surveyor who testified that plot No. MN/VI/1040/2 did not exist, and that it was in reference to a parcel that had been extinguished. PW2's evidence was also corroborated by the evidence of Sospeter Oduor Ohanyo (DW3), a surveyor and a Deputy Director at the 3<sup>rd</sup> respondent. DW3 testified that the parcels LR No. 1040/2 and MN/VI/1040/2 were two distinct properties that were far apart. DW3 further produced a list of documents which included a Survey Report dated 2<sup>nd</sup> September 2022 by the 3<sup>rd</sup> respondent, and which showed that parcel MN/VI/1040 originated from MN/VI/247 located in Port Reitz area of Mombasa County; and that MN/VI/1040 was compulsorily acquired by the government in 1975 and subsequently ceased to exist upon vesting and planning of the area. All in all, none of the parties tendered any evidence advancing the position that a parcel known as plot No. MN/VI/1040/2 ever existed at any point in time.
46. The conclusion that plot No. MN/VI/1040/2 did not exist raises the question as to the origin of the erroneous reference thereto in paragraph 4 of the 1<sup>st</sup> respondent's plaint. The simple answer to this question is found in the Award dated 11<sup>th</sup> October 2017, which erroneously and inadvertently referred to the compulsorily acquired property as MN/VI/1040/2 and not LR No. 1040/2 belonging to the 1<sup>st</sup> respondent, and whose existence was not in contention.
47. It is instructive that, in the rest of the pleadings, namely paragraph 11 of the plaint and paragraphs 4, 17, 18, 19, 20, 21, 22, 23 and 25 of the 1<sup>st</sup> respondent's Amended Reply to Defence and Defence to Counterclaim clearly refer to the suit property as LR No. 1040/2 as the subject of compulsory acquisition on account of which the 1<sup>st</sup> respondent sued the 3<sup>rd</sup> and 4<sup>th</sup> respondents to release to it the sums awarded vide the Award dated 11<sup>th</sup> October 2017.
48. Testifying in support of the 1<sup>st</sup> respondent's case, Harshil Patel (PW1), a Director of the 1<sup>st</sup> respondent, stated that:
- “I'm a director of Plaintiff company. L.R. 1040/2 is the suit property. It is in Kwale. It is 610 acres .... MNV 1040 Mombasa County of 2.5 acres. The suit property is in Kwale County .... The NLC made a mistake during acquisition and the latter is in Mombasa. They are two distinct properties. There is no connection between the two.”
49. On cross-examination, he stated that:
- “MN 1040/2 was not gazetted for compensation .... No one claimed our geographical area of our property. The award was issued to us [for] MN/VI/1040/2. Our title is LR/1040/2... The document P. Exhibit 5 is the acceptance of the award the plot number is not ours. It was a typo mistake.”
50. It is also not lost on us that the erroneous reference in the Award aforesaid, which was imported into paragraph 4 of the plaint, and the subsequent corrections, were explained by the former



Vice- Chairperson of the 3<sup>rd</sup> respondent, Ms. Abigail Mbagaya (DW2), who had this to say in her examination-in-chief at the trial:

“From Mombasa County, we put a notice in [the] Kenya Gazette to have an inquiry .... We had parties approved before us and we ruled in favour of the Plaintiff ... and we ruled they issue [a] letter of award. It was gazetted and minutes [were] produced .... The description had an error and the law allows NLC to amend. This was not indicated and errors used to occur and we took corrective steps.”

51. On cross-examination, DW2 stated that:

“There was an error on the description of the Plaintiffs suit property .... The award description had a typographical error. We rectified the error intentionally. The gazette has the plot number. The other gazette was LR/MN/VI/1040/2 and we put the Plaintiff's name. This was an error and also the award.”

52. On re-examination, she stated that:

“There is an error in [the] award on the description of the LR Number. It should be LR 1040/2 which was acquired.”

53. The apparent error in the Award and the subsequent correction by the 3<sup>rd</sup> respondent was also confirmed by Maulo Kahamai, who worked at the NLC (the 3<sup>rd</sup> respondent) as a Chief Valuer. In his examination-in-chief, Mr. Kahamai (DW4) stated:

“I joined NLC in 2013. I was there during the acquisition of SGR phase I. We started in 2015 and we did a gazette notice No. 1991 of 2015. Page 16. We published the gazette notice for enquiring on 24.2.2015 and LR No. 1040/2 was there... We then issued our award on 11.10.2017 to the Plaintiff. It was 13.384HA it was erroneously written MN/VI/1040/2 and it has since been commuted.”

54. On cross-examination, DW4 stated that:

“In the award there was an error .... There was no error on the Gazette Notice and it was not rectified. 11.10.2017 was the first award issued. The error was noticed during the review of [grants] in 2019. The second award was issued 31.3.2023. It was accepted on 4.4.2023 .... There was no error in the process so we did not have to go back. We cancelled the earlier award. The original award was surrendered and we issued a fresh one. This was done during the pendency of this case.”

55. The foregoing testimonies in support of the Award to the 1<sup>st</sup> respondent on account of compulsory acquisition of its LR No. 1040/2 were by no means unfounded in pleadings as suggested by the appellants. But for the erroneous single reference to MN/VI/1040/2 in paragraph 4 of the plaint, it cannot be doubted that paragraph 11 of the plaint as well as paragraphs 4, 17, 18, 19, 20, 21, 22, 23 and 25 of the 1<sup>st</sup> respondent's Amended Reply to Defence and Defence to Counterclaim together expressly plead the suit property as LR No. 1040/2 and provide a firm anchor to the evidence adduced in support of the 1<sup>st</sup> respondent's claim for compensation for compulsory acquisition of its LR No. 1040/2 in terms of the uncontested Award dated 11<sup>th</sup> October 2017 as subsequently corrected vide the Award dated 31<sup>st</sup> March 2023, and which the 1<sup>st</sup> respondent accepted on 4<sup>th</sup> April 2023.



56. As was held in *Shital Bimal Shah & 2 Others v Akiba Bank Limited* [2006] 2 EA 323:

“An error of judgement on the part of a legal adviser may help build up sufficient reason under rule 4 to induce the court to exercise its discretion to extend time for the doing of any act under the Rules of the Court. Mistakes of counsel come in all shapes and sizes but some have been rejected by the Court such as total inaction by counsel disguised as a mistake. A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by a senior counsel though in the case of junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but it ought certainly to do whatever is necessary to rectify it if the interest of justice so dictate.” [Emphasis added]

57. In the same vein, in *Chemwolo and Another v Kubende* [1986] KLR 492; [1986-1989] EA 74, it was held that:

“Unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs since the Courts exist for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

58. In view of the foregoing, we are not persuaded by the arguments advanced by learned counsel for the appellants and for the 5<sup>th</sup> to 8<sup>th</sup> respondents that the evidence in support of the 1<sup>st</sup> respondent’s suit to enforce payment of the sums awarded was worthless for having been allegedly given in respect of an unpleaded parcel of land. Neither do we find fault in the learned Judge’s decision in that regard, the relevant part of which was rendered thus:

“The 1<sup>st</sup> defendant, in its letter to the 2<sup>nd</sup> defendant dated 22<sup>nd</sup> February 2023 admitted that an error was made in the award where the suit land was referred to as MN/VI/1040/2 as opposed to LR No. 1040/2 and advised for an amendment. A fresh award was made on 31<sup>st</sup> March 2023 to the plaintiff and was accepted on 4<sup>th</sup> April 2023 by the plaintiff. The plaintiff and the defendants have urged the court to find that the reference to the suit property as MN/VI/1040/2 as opposed to LR No. 1040/2 was a typographical mistake made out of human error that was admitted to and corrected.

I find that with the wrong plot number, the plaintiff was not able to get their award. *The Constitution* is clear in Article 159(2)(d) that the courts are to be guided by the principle that justice shall be admitted (sic?) without undue regard to procedural technicalities. For the plaintiff to access justice, it is fair and proper for the court to allow the amended award, for the reason that they have proved to this court on a balance of probabilities that they are the registered owners of the suit property; and as such is entitled to an award of compensation following the compulsory acquisition of a portion of his suit property. What is crucial is, what was the 2<sup>nd</sup> defendant’s intention when issuing the award. It is clear to the court that the 2<sup>nd</sup> defendant’s true intention was to award the plaintiff for the compulsory acquisition of the suit land and that the interested parties have not demonstrated otherwise.

... It is clear to the court that the 2<sup>nd</sup> defendant at the time of reviewing grants for determination, that was before issuance of the award, was aware that MV/VI/1040/2 did not exist, and went ahead to recall the award pending the determination of this suit for saving



public funds. It only meant that the award to MN/VI/1040/2 was a mere typographical error and did not go to the root of the award.”

59. In our considered view, the learned Judge did not do anything untoward, but merely did what was necessary to rectify the inadvertent error apparent on the original Award which, as the record shows, was subsequently rectified to reflect the 1<sup>st</sup> respondent’s property as LR No. 1040/2. To our mind, the subsequent exclusion of the prefix “MN/VI” was by no means an attempt on the part of the learned Judge to overreach or otherwise do anything that the trial court could not do in the interest of justice.
60. In conclusion, and as we affirm the learned Judge’s decision to correct the inadvertent error in the description of the suit property, all in the interest of justice, we share the sentiments expressed in *Branco Arabe Espanol v Bank of Uganda* [1999] 2 EA 22 where Oder, JSC stated:

“The administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his rights and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fostered rather than hindered.”

61. Turning to the closely related 2<sup>nd</sup> issue. Learned counsel for the appellants and for the 5<sup>th</sup> to 8<sup>th</sup> respondents also faulted the learned Judge for invoking section 100 of the *Civil Procedure Act*, Cap. 21 as well as Article 159 of *the Constitution* in allegedly disregarding the erroneous reference in paragraph 4 of the plaint to the suit property as MN/VI/1040/2; and for upholding the 1<sup>st</sup> respondent’s Award by the 3<sup>rd</sup> respondent for the compulsory acquisition of its LR No. 1040/2.
62. According to counsel, the learned Judge’s application of the provisions aforesaid was designed to sanitise the 1<sup>st</sup> respondent’s alleged failure to plead the correct title number of the suit property.
63. To our mind, the erroneous reference by the 1<sup>st</sup> respondent to MN/VI/1040/2 in a single paragraph (No. 4 of the plaint) in the face of all other paragraphs (namely paragraph 11 of the plaint as well as paragraphs 4, 17 to 23 and 25 of the Amended Reply to Defence and Defence to Counterclaim) cannot reasonably be termed as failure to correctly plead that the suit property was LR No. 1040/2. Accordingly, we find that the suit property was pleaded, and that there was nothing on the record for the learned Judge to sanitise as claimed. In our respectful view, all that the learned Judge did was to recognise the isolated albeit inadvertent error to which the respondents owned up and caused to be corrected in the Award dated 31<sup>st</sup> March 2023.
64. Section 100 of the *Civil Procedure Act* provides:
100. General power to amend
- The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.
65. As regards the application of section 100 of Cap. 21, we hasten to observe that the provision empowers the court to “... amend any defect or error in any proceeding in a suit”. While the Act does not define the term “proceeding” in civil litigation, we understand it to refer to the formal steps taken in a lawsuit, from its initiation to its conclusion, including all actions, motions, and hearings. It encompasses the entire process of bringing a claim to court, presenting evidence, and seeking a resolution.



66. The Black’s Law Dictionary (9<sup>th</sup> Edn.) defines “proceeding” as “The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment .... ‘Proceeding’ is a word much used to express the business done in courts. A proceeding in court is an act done by the authority or direction of the court, express or implied. It is more comprehensive than the word ‘action,’ but it may include in its general sense all the steps taken or measures adopted in the prosecution or defense of an action, including the pleadings and judgment.”
67. Be that as it may, we find nothing on record to suggest that, in her decision, the learned Judge “corrected” or “sanitised” the error in paragraph 4 of the plaint. To the contrary, she expressed her appreciation and took cognisance of the inadvertent error in the title number and the subsequent correction thereof to reflect the correct title number of the suit property as testified by PW1, DW2 and DW4.
68. We need not overemphasise the fact that the learned Judge’s pronouncement in that regard was intended to facilitate determination of “... the real question or issue raised by or depending on the proceeding,” namely the correct reference to the suit property and the competing claims over the Award on account of its compulsory acquisition. Accordingly, the learned Judge was not at fault in referring to the suit property as LR No. 1040/2 as pleaded and established by evidence. To our mind, she did nothing more than acting in accord with the overriding objective of the trial court as set out in section 3 of the *Environment and Land Court Act*, 2011, which provision is couched in the same terms as sections 1A and 1B of the *Civil Procedure Act*, Cap. 21. It provides:
3. Overriding objective
    1. The principal objective of this Act is to enable the Court to facilitate the just, expeditious, proportionate and accessible resolution of disputes governed by this Act.
    2. The Court shall, in the discharge of its functions under this Act, give effect to the principal objective in subsection (1).
    3. The parties and their duly authorised representatives, as the case may be, shall assist the Court to further the overriding objective and participate in the proceedings of the Court.
69. In *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] KECA 346 (KLR), Nyamu, JA. held that:

“In a differently constituted bench in the case of *Hunker Trading Company Limited vs Elf Oil Kenya Limited* Civil Application No. Nai 6 of 2010 the overriding objective was aptly baptized the “O2<sup>^</sup>” (“the Oxygen principle”) because like oxygen, the principle has the potential to re-energise the civil system of justice and give the courts the freedom to attain justice in each case in a manner that is just, quick and cheap and above all in a manner which takes into account the special circumstances of each case or appeal and the best way of handling it .... In my view, it should be regarded as a double edged sword in that it is a powerful enemy of those litigants bent on frustrating the course of justice because it has the potential of stopping them at the earliest opportunity and it will also be a powerful ally of those litigants who want to attain justice in a manner that is just, quick and cheap. The “O2” principle has not in my opinion come to us as a packaged product for application to all situations. Instead, its application and management will depend on the circumstances of each case.”



70. As we reflect on the afore-cited authority, one simple question comes to mind, which is: on the basis of the totality of the pleadings and evidence, what was injudicious or improper about the learned Judge's inquiry into the identity of the suit property compulsorily acquired by the 2<sup>nd</sup> respondent? Put differently, was the erroneous reference to the suit property as MN/VI/1040/2 in a single paragraph of the plaint so fatal as to derail the entire course of justice? With all due respect, we think not. To hold otherwise would be tantamount to upholding contentions that would have the effect of frustrating the course of substantive justice. In any event, we find nothing to suggest that the infraction complained of occasioned the appellants or any other party prejudice, especially considering that the substantive issues revolve around the contested Award on the compulsory acquisition of LR No. 1040/2 in place of LR No. 31537 (see: *Loveridge & Loveridge v Healey* [2004] EWCA Civ 173).
71. In *Abdirahman Abdi v Safi Petroleum Products Ltd & 6 others* [2011] KECA 183 (KLR), this Court held that:
- “The overriding objective in civil litigation is a policy issue which the court invokes to obviate hardship, expense, delay and to focus on substantial justice... In short the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other. Article 159 (2)(d) of *the Constitution* makes it abundantly clear that the court has to do justice between the parties without undue regard to technicalities of procedure. That is not however to say that procedural improprieties are to be ignored altogether. The court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party if the court strikes out its document. The court in that regard exercises judicial discretion.”
72. We also take to mind this Court's decision in the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 6 others* [2013] KECA 113 (KLR), wherein Ouko, JA. (as he then was) held that:
- “Deviations from and lapses in form and procedures which do not go to the jurisdiction of the Court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical.... It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”
73. It is indisputable that the root cause of the dispute before the trial court as well as in the instant appeal is whether the 1<sup>st</sup> respondent was entitled to an Award on compulsory acquisition by the 2<sup>nd</sup> respondent of LR No. 1040/2, or whether it was the appellants' who ought to have been Awarded compensation in respect of LR No. 31537 alleged to have been created to overlap and encroach on LR No. 1040/2.
74. In addition to the foregoing, we find no fault in the learned Judge's decision as guided by the letter and spirit of Article 159(2) (d) of *the Constitution*, which enjoins courts and tribunals “... to administer justice without undue regard to procedural technicalities”. Allowing the amended Award, the learned Judge observed:
- “*The Constitution* is clear in Article 159 (2)(d) that the courts are to be guided by the principle that justice shall be [administered] [without] undue regard to procedural technicalities.



For the plaintiff to access justice, it is fair and proper for the court to allow the amended award, for the reason that they have proved to this court on a balance of probabilities that they are the registered owners of the suit property; and as such is entitled to an award of compensation following the compulsory acquisition of a portion of his suit property.”

75. Article 159(2) (d) of *the Constitution* by which the learned Judge was guided provides that:

159. Judicial authority

(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—

(a) ...;

...;

(d) justice shall be administered without undue regard to procedural technicalities;

76. In conclusion, all that the learned Judge sought to achieve was the expeditious and cost-effective determination of the competing claims in the 1<sup>st</sup> respondent’s suit without undue regard to what was essentially administrative technicalities. By reference in the impugned judgment to “procedural technicalities”, we take it to mean or include the inadvertent errors and/or omissions in the process of compulsory acquisition of the suit property, in the making of the Award, and in the procedure for its enforcement upon finding that the correct land reference number was LR No. 1040/2, since all identifying factors of the subject parcel of land related to that number and no other. And that settles the 2<sup>nd</sup> issue before us.

77. On the closely related 3<sup>rd</sup> and 4<sup>th</sup> issues as to the identity of the property compulsorily acquired by the 2<sup>nd</sup> respondent, and the question as to whether the learned Judge failed to appreciate that MN/VI/1040/2 did not exist, we hasten to observe that nothing turns on the 4<sup>th</sup> issue since, as we have observed elsewhere in this Judgment, it is common ground that MN/VI/1040/2 did not exist. Accordingly, nothing more needs to be said of it. That leaves us with the 3<sup>rd</sup> issue as to which property, as between LR No. 1040/2 and LR No. 31537, was compulsorily acquired.

78. The appellants’ case as articulated in their learned counsel’s submissions was that MN/VI/1040/2 having been extinguished sometime in 1975, the learned Judge erred in “swapping” it with LR No. 1040/2; that the 1<sup>st</sup> respondent had no title in competition with their LR No. 31537; that, bearing in mind that the evidence in respect of LR No. 1040/2 ought to have been discarded, the trial court ought to have found that the 1<sup>st</sup> appellant’s title was valid; and that the issue as to whether the 1<sup>st</sup> appellant’s land was overlapping with LR No. 1040/2 was peripheral to the main issue for determination and could not be used to infer fraud or justify denial of the 1<sup>st</sup> appellant’s rightful compensation.

79. The 5<sup>th</sup> to 8<sup>th</sup> respondents took the same position as the appellants as appears from their learned counsel’s submissions in which they contended that “it was a common thread in all the testimonies that the 1<sup>st</sup> respondent pleaded title MN/VI/1040/2 became extinct in 1975”; and that

“... it was unanimously agreed that the title LR No. 1040/2 (which was unpleaded) is miles away from the pleaded title MN/VI/1040/2. Thus, the only remaining pleaded title that was due for compensation was the 1<sup>st</sup> appellant’s title LR No. 31537.”

80. In reply, learned counsel for the 1<sup>st</sup> respondent submitted that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ witnesses, including PW1 (the 2<sup>nd</sup> respondent’s Principle Surveyor) and DW2 (the 3<sup>rd</sup> respondent’s former Vice-



- Chair), corroborated the position that the correct parcel acquired for the SGR was LR No. 1040/2 and not the non-existent MN/VI/1040/2; that the initial Award dated 11<sup>th</sup> October 2017 was subsequently corrected in terms of the one dated 31<sup>st</sup> March 2023 to reflect the correct title of the 1<sup>st</sup> respondent's property; and that the correction did not introduce any new facts or alter the substance of the Award.
81. Counsel cited the case of Republic v Advocates Disciplinary Tribunal; ex-parte Apollo Mboya [2019] eKLR, submitting that it is trite law that courts and public bodies have jurisdiction to correct clerical or typographical errors under the slip rule.
  82. On their part, learned counsel for the 3<sup>rd</sup> respondent submitted that the lease produced by the appellants in respect of LR No. 31537 was registered on 22<sup>nd</sup> December 2017 way after the conduct of inquiries into the acquisition of properties for the SGR on 23<sup>rd</sup> April 2015; that an award was made to the 1<sup>st</sup> respondent on 11<sup>th</sup> October 2017, and that it was later corrected to reflect the correct title to the 1<sup>st</sup> respondent's property, namely LR No. 1040/2 on 31<sup>st</sup> March 2023; that it is therefore evident that LR No. 31537 came into existence after the Award for compulsory acquisition of LR No. 1040/2 had been made; that the learned Judge sufficiently established that the 3<sup>rd</sup> respondent's intended to award the 1<sup>st</sup> respondent for the compulsory acquisition of its LR No. 1040/2; and that the Award purportedly made in respect of MN/VI/1040/2 was an inadvertent error, which did not go to the root of the Award.
  83. In their submissions, learned counsel for the 4<sup>th</sup> respondent affirmed that the Award was initially made in favour of the 1<sup>st</sup> respondent with reference to the non-existent parcel of land referred to as MN/VI/2040/2; that the 3<sup>rd</sup> respondent expressly admitted that there was an error in the description of the 1<sup>st</sup> respondent's property in the first Award, and that the error was discovered during the process of review of grants in 2019; and that the error was rectified by cancellation of the initial Award and issuing a second Award on 31<sup>st</sup> March 2023 reflecting the correct land parcel number, being LR No. 1040/2.
  84. Having considered the evidence adduced at the trial, the learned Judge observed:

“On 27<sup>th</sup> March 2015 vide The Kenya Gazette Vol. CXVII No. 32 Gazette Notice No. 1991 the 2<sup>nd</sup> defendant issued an Inquiry Notice under Section 162 (2) of the *Land Act* to hear claims to compensation for interested parties in LR No. 1040/2 among other land parcels that were to be compulsorily acquired for the Mombasa-Nairobi SGR Line Project .... The 2<sup>nd</sup> defendant made a determination on 12<sup>th</sup> February 2016 and concluded that the plaintiff is the registered owner of MN/VI/1040/2. Following that determination, on 11<sup>th</sup> October 2017 the 2<sup>nd</sup> defendant awarded the plaintiff Kshs 667,903,887 for the compulsory acquisition of 13.3480 ha on Plot No. MN/VI/1040/2.

Before the award was made, the 2<sup>nd</sup> defendant's CEO wrote an internal memo to its chairman on 26<sup>th</sup> February 2017 requesting further investigations into LR No. 1040/2 before compensation; on the basis that MN/1040 no longer exists since it was acquired by the Government in 1974 and hence MN/VI/1040/2 cannot be a result of a subdivision from a parcel that does not exist...

The 1<sup>st</sup> defendant, in its letter to the 2<sup>nd</sup> defendant dated 22<sup>nd</sup> February 2023 admitted an error was made in the award where the suit land was referred to as MN/VI/1040/2 as opposed to LR No. 1040/2 and advised for an amendment. A fresh award was made on 31<sup>st</sup> March 2023 to the plaintiff and was accepted on 4<sup>th</sup> April 2023 by the plaintiff....



...It is clear to the court that the 2<sup>nd</sup> defendant's true intention was to award the plaintiff for the compulsory acquisition of the suit land and that the interested parties have not demonstrated otherwise...

The court has also seen the two internal memos dated 26<sup>th</sup> February 2017 and 17<sup>th</sup> October 2017 respectively sent by the 2<sup>nd</sup> defendant's CEO, to its chairperson and director of valuation and taxation. It is clear to the court that the 2<sup>nd</sup> defendant at the time of reviewing grants for determination, that was before issuance of the award, was aware that MV/VI/1040/2 did not exist, and went ahead to recall the award pending the determination of this suit for saving public funds. It only meant that the award to MN/VI/1040/2 was a mere typographical error and did not go to the root of the award."

85. The foregoing conclusive findings and decision of the learned Judge was informed by evidence adduced by, among others, DW2 and DW4, whose testimonies appear in our foregoing analysis of evidence in determination of the 1<sup>st</sup> issue, and which we need not recount here.
86. Equally instructive is the testimony of Sospeter Oduor Ohanyo (DW3), a surveyor and Deputy Director at the 3<sup>rd</sup> respondent Commission, who testified that:

"I filed [a] list of documents and I did a report dated July 2012 .... LR [31537] survey was in 2017 after survey of SGR. 1040/2 was done initially in 1932.

The survey plan numbers are different. LR [31537] came after LR 1040/2 which was not cancelled. LR [31537] has a lot of irregularities and we cannot get the PDP. This was an encroachment and irregular. It was formed in 2017 and there was a cut off period in 2015 and they could not create another survey. The property to be acquired was LR 1040/2 as per the acquisition plan. The report from [the] Director of Survey has the same findings as my report."

87. On cross-examination, DW3 stated that:

"The acquisition plan was LR 1040/2. LR [31537] was not captured then and it did not exist. The letter had an error and there was a letter correcting the same in the letter of award ....

There is LR 1040/2, LR [31537] and LR. MN/VI/1040/2. In the gazette notice it is 1040/2. Page 68 is the letter from [the] Government Surveyor. Talks of LR 1040/2 and LR MN/VI/1040/2. There was need to issue another gazette notice to clarify this.

The Interested Parties participated in the hearing of the acquisition and review of grant between 3<sup>rd</sup> and 6<sup>th</sup> August 2015. LR [31537] did not exist in 2015 but it came about in 2017. I assumed all Interested Parties participated. There was a determination of 25.2.2016 I don't have it in my document. [On] 12.2.2016 there was a determination LR. No. 1040/2 was under review and is written LR MN/VI/1040/2. I am not aware if this was gazetted. The boundary dispute meant there was confusion between the properties. We don't play any role in boundary disputes. It is the Land Registrar .... I looked at the deed plan of 1040/2. I was to get the physical location of the two parcels. I found LR [31537] was irregular and was encroaching. The survey of 1040/2 was already there when LR [31537] survey was done. It did not reference the earlier survey. It has no access road and that is also irregular. I did not investigate ownership."



88. We need to lay bare the fact that we have not been called upon to pronounce ourselves on the process of acquisition of LR No. 31537 given that the only related issue before us is which of the competing titles (LR No. 1040/2 and LR No. 31537) was compulsorily acquired by the 2<sup>nd</sup> respondent. We only wish to observe, as did the learned Judge, that the property compulsorily acquired by the 2<sup>nd</sup> respondent was LR No. 1040/2 and not LR No. 31537 as claimed by the appellants. Needless to say, the evidence on record speaks for itself in settlement of the 3<sup>rd</sup> and 4<sup>th</sup> issues.
89. Having carefully considered the evidence on record, the rival submissions of learned counsel and the impugned judgment, we reach the inescapable conclusion that the property compulsorily acquired was LR No. 1040/2 belonging to the 1<sup>st</sup> respondent and, without more, that settles the 5<sup>th</sup> issue before us.
90. Turning to the 6<sup>th</sup> issue as to who (as between the appellants, the 1<sup>st</sup> respondent and the 5<sup>th</sup> to 8<sup>th</sup> respondents) were entitled to compensation, it is instructive that the 1<sup>st</sup> respondent, as the lawfully registered proprietor of LR No. 1040/2, was entitled to compensation in terms of the rectified Award dated 31<sup>st</sup> March 2023.
91. Be that as it may, it would be remiss of us not to pronounce ourselves on the submissions by the 5<sup>th</sup> to 8<sup>th</sup> respondents that they ought to have been compensated on the grounds that the suit property was their ancestral land. However, they did not file a cross- appeal to justify any finding on, or relief in respect of, their claim in that regard.
92. In this regard, counsel submitted: that the 5<sup>th</sup> to 8<sup>th</sup> respondents were insistent on the claim that the subject land was their ancestral land; that their forefathers and other departed family members and neighbours had been interred at various locations across the land; that the residents of Mwamdudu had grown various crops on the land over time to facilitate their subsistence; and that this is the land where the SGR traverses.
93. Counsel further submitted that, when the 5<sup>th</sup> to 8<sup>th</sup> respondents' ancestral land was acquired to facilitate the construction of the SGR, neither of them nor the other villagers in Mwamdudu Sub-Location was paid compensation by the 3<sup>rd</sup> respondent. According to counsel, the 5<sup>th</sup> to 8<sup>th</sup> respondents clearly demonstrated to the trial court that the 1<sup>st</sup> respondent does not own the suit property; that the 5<sup>th</sup> to 8<sup>th</sup> respondents were project-affected persons and ought to have been subjected to a process of relocation and compensation; that, even if we were, for argument, to assume that the 5<sup>th</sup> to 8<sup>th</sup> respondents were illegal squatters who had erected shelters and business structures thereon, they had the right to housing under Article 43 of the Constitution; and that they were entitled to compensation for the loss of their crops and livelihood.
94. Counsel cited the cases of *Kepha Omondi Onjuro & others v Attorney General & 5 others* [2015] KEHC 6868 (KLR) where the High Court set out the threshold to be observed prior to development-based evictions; and *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* [2021] KESC 34 (KLR) where the Supreme Court held that, where the landless occupied public land and established homes thereon, they did not acquire title to the land, but that they had a protectable right to housing over the land.
95. With regard to the issues raised by the 5<sup>th</sup> to 8<sup>th</sup> respondents, the learned Judge observed:
- “The 3<sup>rd</sup> to 6<sup>th</sup> interested parties claimed that the suit land was trust land that had never been adjudicated, and that the natives in occupation were waiting for it to be adjudicated to get title documents. He maintained that they have lived on the suit land for years they have buried their forefathers there, and that the plaintiff has made no developments on the land



and ... that the 2<sup>nd</sup> defendant should compensate the interested parties and their families. The 5<sup>th</sup> interested party, however, admitted that he had no documents to prove ownership, and indeed they adduced no evidence to support their claim that the suit land was trust land or that it was never adjudicated upon. Further to that suit land is vast, 610 acres and the interested parties have not demonstrated to court through a survey report that they occupy the part that was acquired by the 1<sup>st</sup> and 2<sup>nd</sup> defendants for SGR. There is no evidence of their occupation on the suit property and the court is also aware that they had advanced a claim for adverse possession but later withdrew it.”

96. Having considered the evidence on record, the submissions on the 5<sup>th</sup> to 8<sup>th</sup> respondents’ contentions and the learned Judge’s decision, we reach the conclusion that those submissions count for little, and that nothing turns on the 5<sup>th</sup> to 8<sup>th</sup> respondents’ submissions in the absence of a cross-appeal to anchor the desired relief.
97. Our evaluation of the evidence on record does not point to any reason for departure from the conclusion reached by the learned Judge. The 5<sup>th</sup> to 8<sup>th</sup> respondents’ submissions aforesaid appear to have been merely designed to lend solidarity to and boost the appellants’ challenge on the propriety of the 1<sup>st</sup> respondent’s Award on compulsory acquisition of LR No. 1040/2. Accordingly, we find nothing on record to suggest that the learned Judge was at fault in allowing the 1<sup>st</sup> respondent’s claim for compensation in respect of LR No. 1040/2.
98. In *David Sirona Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR, this Court, while dealing with a similar issue, had this to say:

“It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings.”

(see also *GAT v MM* [2023] KEHC 27332 (KLR)).
99. On the 7<sup>th</sup> issue as to whether the learned Judge erred in fact and in law by failing to appreciate that there was neither a competing title with the 1<sup>st</sup> appellant’s title nor evidence on record impeaching it, we have said enough to demonstrate that the learned Judge was by no means at fault in that regard, and that nothing more remains to be said on that score.
100. For the avoidance of doubt, though, the evidence on record is that LR No. 1040/2 was compulsorily acquired and an Award of compensation made as far back as 11<sup>th</sup> October 2017, although erroneously referring to the 1<sup>st</sup> respondent’s property as the non-existent MN/VI/1040/2, that Award was subsequently rectified on 31<sup>st</sup> March 2023 to reflect the correct title number, to wit, LR No. 1040/2.
101. On the other hand, the 1<sup>st</sup> appellant’s LR No. 31537 came into existence on 29<sup>th</sup> December 2017 more than two-and-a-half years after the process of compulsory acquisition commenced on 23<sup>rd</sup> April 2015. In the circumstances, we fail to understand how title to LR No. 31537 could have been in competition for acquisition with the 1<sup>st</sup> respondent’s LR No. 1040/2, which was first in time.



102. It is trite that, where there are competing titles over the same land, the one properly registered earlier and first in time takes priority. In *Gitwany Investment Limited v Tajmal Limited & 2 Others* [2006] KEHC 2519 (KLR), Lenaola, J. (as he then was) correctly held that:

“46. My understanding is therefore that the title given to Gitwany in the first instance and which I have held to be absolute and indefeasible as regards the suit land is the earlier grant and in the words of the Court of Appeal in *Wreck Motors Enterprises vs Commissioner of Lands*, C.A. No. 71/1997 [1997] KECA 284 (KLR):- is the ‘grant [that] takes priority. The land is alienated already.’ This decision was again upheld in *Faraj Maharus vs J.B. Martin Glass Industries and 3 others* C.A. 130/2003 [2005] KECA 303 (KLR). Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity.”

103. To argue as the appellants here do that LR No. 31537 was unimpeachable would be to close our eyes to: first, the indefeasibility of title No. 1040/2, which was first in time; and, secondly, to the numerous irregularities cited in relation to the acquisition of LR No. 31537, which we need not interrogate in depth, save to observe that those irregularities pleaded in the 1<sup>st</sup> respondent’s Amended Reply to Defence and Defence to Counterclaim as confirmed in the impugned judgment go a long way in impeaching the 1<sup>st</sup> appellant’s title.

104. As the learned Judge observed:

“Osman Ahmed Kahia claimed he bought an unsurveyed plot from Ali Osman Abdi who was an allottee... The plaintiff has produced this allotment letter which corresponds with the reference number that Edward Kiguru claimed to have used to survey the plot. The Letter of allotment Ref No. 90751/XI was issued on 30<sup>th</sup> May 1994 to one Osman Ahmed Kahia for an unsurveyed site for farming measuring 21ha for a term of 99 years from 1<sup>st</sup> January 1994. Further to that, the plaintiff has produced the 1<sup>st</sup> interested party’s CR 12 dated 8th February 2021 which indicated that Osman Ahmed Kahia is a director at Kahia Transporters Limited. Notwithstanding this inconsistency, the 1<sup>st</sup> interested party has produced a certificate of title LR 31537 CR No. 70900 that was issued to Ali Osman Abdi measuring 50.01ha on 29<sup>th</sup> December 2017 and later transferred to Kahia Transporters on 11<sup>th</sup> November 2021.

The 1<sup>st</sup> interested party has not demonstrated how Ali Osman Abdi, his predecessor in title, acquired title to LR 31537. The question that is in the mind of this court is how Osman Ahmed Kahia, a director of the 1<sup>st</sup> interested party, has the letter of allotment that was issued on 30<sup>th</sup> May 1994 in his name, while claiming to have purchased the same plot in 2012 from Ali Osman Abdi...

... It is evident that the Letter of Allotment Ref No. 90751/XI is a forgery as it bears the name and postal address of Osman Ahmed Kahia, who is a director of the 1<sup>st</sup> interested party. Also, the letter of allotment refers to an unsurveyed site for farming on Mombasa Mainland North measuring 21ha with an annual rent



of Kshs 44,100 while the memorandum of understanding which the 1<sup>st</sup> interested party claims to have entered into with Ali Osman Abdi referred to an unsurveyed industrial plot situated at Mombasa Miritini measuring 50.01ha for an annual rent of Kshs 128,200...

The plaintiff has led evidence that has been supported by the defendants of how he acquired ownership of the suit property. It is clear to the court that the plaintiff purchased the suit land from Mukinye Enterprise Limited on 7<sup>th</sup> June 1991 for Kshs 1,000,000/= and paid stamp duty of Kshs 40,000/= then became registered owner on 20<sup>th</sup> August 1991. The 1<sup>st</sup> interested party, on the other hand, his evidence is tainted with fraud and irregularity that go to the root of his title ....

It is clear to the court that the plaintiff is the first in time and his title ought to prevail. This position was also supported by one W. Kibichii from the office of the Director of Surveys on 20<sup>th</sup> December 2021 as he responded to Agimba Advocates concerns as far as LR 1040/2 and LR 31537. In the said letter, he stated ‘Having compared the two (2) survey that is LR No.1040/2 and LR No. 31537, it is clear that it was an encroachment on the earlier survey (LR No. 1040/2) and therefore based on the findings, LR No. 31537 should not have been approved in regards of LR No. 1040/2 which was existing by then.’ .... To put it more clearly, LR No. 31537 overlaps into the suit property, creating a title duplication.”

105. The afore-mentioned irregularities that effectively impeach the 1<sup>st</sup> appellant’s root of title to LR No. 31537 are further compounded by Mr. Edward Kiguru’s letter dated 22<sup>nd</sup> January 2022 addressed to the Director of Criminal Investigations, Nairobi, in which the Land Surveyor states in part:

“.... on October 10, 2016, I received a request from one Mr. Osman Kahia to undertake a New Grant Survey of a Plot Adjoining Mombasa Mainland North Section VI. Accordingly, and in this connection, he gave me copies of Letter of Allotment (Ref. No. 90751/XI dated 30/05/1994 and Part Development Plan (PDP) No. 12.3. CT.7.94 to facilitate the Survey to take place ....

The Survey was subsequently approved/authenticated by Director of Surveys. Please note that the Plot Number given to this New Grant Plot is L.R. No. 31537 ....

It has since emerged very clearly that Plot L.R. No. 31537 falls almost entirely in LR No. 1040/2...

It is noted that the said LR. No. 1040/2 is in fact private Leasehold Property – as borne out by various investigations and supported by documents (in your possession) ....

On scrutinizing survey Records & from the foregoing, it is very clear to me that the two Plots are overlapping thus creating a duplication of Titles scenario ....

From the foregoing, it is highly regretted that my Survey of L.R. No. 31537 contained in F/ R No. 598/66 - should not have been carried out - and subsequent Title issued.”

106. Mr. Kiguru’s letter aforesaid was filed as part of the 1<sup>st</sup> respondent’s supplementary list and bundle of evidential documents dated 11<sup>th</sup> February 2022, which was produced by the 1<sup>st</sup> respondent’s director Harshil Patel (PW1) at the hearing without any challenge to its admissibility by the then learned counsel for the appellants. It cannot be wished away.

107. It goes without saying that Mr. Kiguru’s letter to the DCI speaks for itself; that he had been instructed by the 1<sup>st</sup> appellant to undertake survey and facilitate the issuance of a title to LR No. 31537; that, in his



professional/expert opinion, the process was irregularly conducted; that plot No. 31537 overlapped the 1<sup>st</sup> respondent's plot No. 1040/2; and that the title document in respect of LR No. 31537 ought not to have been processed or issued.

108. To our mind, and as the record shows, Mr. Kiguru's opinion remained uncontroverted, leading to the conclusion that there was sufficient evidence to impeach the 1<sup>st</sup> appellant's title to LR No. 31537 on account of the irregularities aforesaid.
109. But that was not all. The 1<sup>st</sup> appellant also relied on a letter of allotment on the basis of which he claimed to have bought LR No. 31537 from the original allottee, raising yet another question as to whether an allottee could lawfully sell and pass good title to an unregistered parcel of land, and whether a title thus obtained by a subsequent purchaser under a purported sale was indefeasible.
110. Regarding the letter of allotment alluded to by the 1st appellant, the special conditions attached thereto were either conveniently or inadvertently excluded from the record as put to us. Suffice it to observe that we find nothing to demonstrate that the appurtenant albeit undisclosed conditions were fully met, and that the allotment perfected by registration and the alleged issuance of title to LR No. 31537 before the alleged sale to the 1st appellant. Whatever the case, we find nothing on record to demonstrate that the allottee complied with the conditions on which the allotment was made so as to confer good title to him as well as the right to sell and pass good title to the property.
111. Likewise, the Memorandum of Understanding and Agreement of Sale forming the basis of the alleged purchase by the 1st appellant of LR No. 31537 were, for inexplicable reasons, excluded from the selective record before us. Concerning the alleged purchase, this is what the 1<sup>st</sup> appellant's director, Osman Ahmed Kahia, stated in cross-examination:

“I had a Memorandum of Understanding (MOU) with the seller .... The MOU was 2012... Before buying, the seller owed me money and he gave me the plot instead. Osman is existing and I bought from him ....

I bought the land in 2012 from Ali Osman Abdi. I did due diligence. I used an Advocate Omwenga. My first Advocate was Omwenga. Osman showed me the allotment letter of offer. He showed me the neighbours on the ground. I don't have the letter here. Osman showed me the PDP. There was a receipt and it is not in court. Kiguru did the survey for the land. Osman instructed him not me. I don't have the letter of instructions. I don't know how he was paid. There was a sale agreement as well. It is attached in Replying Affidavit dated 19.7.2021. Osman sold it to me for Kshs. 37 Million 2017 and paid 10%. He owed me money and he gave me the land before. He owed me 19.5 Million for transport. I put it in the Memo. I paid in case, cheque and in kind. I did not bring any proof in court. He was allotted in 1994 his Identity Card states he was born in 1978. I don't know how old he was... I have a transfer. I paid duty but I don't remember. We went to Land Control and I cannot remember when. I don't have land rent receipts or clearance .... Seller is not a witness; he moved to South Sudan. Ali Osman Abdi was the Allottee. I don't know about one with my name. We went to Omwenga Advocate for the transfer. His stamp is not there or the name. I don't know who amended the date. There is no registration date.”

112. The afore-mentioned irregularities apparent on the face of the letter of allotment militate against indefeasibility of the 1st appellant's title. To cap it all, the purported sale of LR 31537 to the 1<sup>st</sup>



appellant on the strength of a letter of allotment could not confer good title on the 1<sup>st</sup> appellant. In *Joseph N.K. Arap Ng'ok v Moiyo Ole Keiwua & 4 others* [1997] KECA 1 (KLR), this Court held that:

“Mr. Otieno-Kajwang who appeared for the applicant argued that the approval by H.E. the President amounted to his client obtaining the title to the suit property. This argument, of course, cannot stand. It is trite that such title to landed property can only come into existence after issuance of letter of allotment, meeting the conditions stated in such letter and actual issuance thereafter of title document pursuant to provisions in the Act under which the property is held.”

113. In *Torino Enterprises Limited v Attorney General* [2023] KESC 79 (KLR), the Supreme Court held that:

“58. So, can an allotment letter pass good title? It is settled law that an allotment letter is incapable of conferring interest in land, being nothing more than an offer, awaiting the fulfilment of conditions stipulated therein.

....

60. Suffice it to say that an Allottee, in whose name the allotment letter is issued, must perfect the same by fulfilling the conditions therein. These conditions include but are not limited to, the payment of a stand premium and ground rent within prescribed timelines. But even after the perfection of an allotment letter through the fulfillment of the conditions stipulated therein, an allottee cannot pass valid title to a third party unless and until he acquires title to the land through registration under the applicable law. It is the act of registration that confers a transferable title to the registered proprietor, and not the possession of an allotment letter ....

61. .... Put differently, the holder of an allotment letter is incapable of transferring or passing valid title to a third party on the basis of the allotment letter unless and until he becomes the registered proprietor of the land consequent upon the perfection of the Allotment Letter. It matters not therefore that the allotment letter has not lapsed.” [Emphasis ours]

114. In view of the foregoing, the learned Judge was not at fault in upholding the Award to the 1<sup>st</sup> respondent on account of compulsory acquisition of its title to LR No. 1040/2, and in dismissing the appellants' competing claim in that regard, their claim to title over LR No. 31537 having been impeached.

115. Turning to the 8<sup>th</sup> issue, we hasten to observe that, having re- assessed and re-evaluated the evidence on record, we find nothing to suggest that the impugned judgment unfairly deprived the 1<sup>st</sup> appellant of its constitutional right to property. For the sake of argument, we form the view that, if LR No. 31537 ever existed in fact, then it continues to exist, and that the 1<sup>st</sup> appellant remains its rightful owner only, but only if: it did not overlap with the previously acquired LR No. 1040/2; and, if title thereto was lawfully obtained without any irregularity. In conclusion, the fact that LR No. 31537 (if it ever existed) was not compulsorily acquired does not, of itself, impute breach of the 1<sup>st</sup> appellant's constitutional right to property (if any) as the appellants contend and urge us to find.

116. On the 9<sup>th</sup> and final issue as to whether the 1<sup>st</sup> respondent was entitled to interest on the Award from the date of filing suit, counsel for the 1<sup>st</sup> respondent submitted that the 1<sup>st</sup> respondent objected to the



- 2<sup>nd</sup> respondent's cross-appeal; that an appeal does not of itself operate as a stay of execution; and that, at the moment, there is no court order staying accrual of interest pending appeal.
117. Counsel further submitted that the 2<sup>nd</sup> respondent has been in occupation of the suit property since 1<sup>st</sup> February 2018 as evidenced by the Notice of Taking Possession and Vesting dated 18<sup>th</sup> January 2018; that they have enjoyed quiet possession thereof since then, and have developed the SGR railway network on the suit property; that it is improper to seek orders staying payment of interest duly awarded by the Court while they enjoy occupation and economic benefits accruing from the suit property; and that any accrued interest should vest on the 1<sup>st</sup> respondent from the date of taking possession, namely 1<sup>st</sup> February 2018 until full payment.
  118. Counsel argued that the 1<sup>st</sup> respondent's right to recover interest was in accord with Section 117 of the *Land Act*, which allows interest on sums due and payable; that, to avoid the inevitable escalation of interest, the 2<sup>nd</sup> respondents should have made an application to have the money deposited in court or in an interest earning account in the names of the respective counsel; and that doing so would have been a win-win scenario for the parties regardless of the outcome of the appeal.
  119. On their part, counsel for the 2<sup>nd</sup> respondent admitted that the learned Judge had the discretion to award interest on the pecuniary award. However, counsel submitted that the discretion ought to be exercised judiciously; that, although the 2<sup>nd</sup> respondent identified it as an issue for determination, the learned Judge did not pronounce herself thereon beyond awarding the interest as claimed; and that, with all due respect, that was an injudicious exercise of the judicial discretion.
  120. Counsel pointed out that, all through the trial, the 2<sup>nd</sup> respondent had been reminding the Judges who handled the matter that the continuous delay in concluding the case would expose the public to paying outrageous sums in interest. According to counsel, in the particular circumstances of their case, the court should have exercised its discretion by not making any award on interest to the 1<sup>st</sup> respondent. Counsel observed that the 2<sup>nd</sup> respondent has always been ready to pay compensation as awarded, but that it could not do so due to the numerous legal interventions that bedevilled the 1<sup>st</sup> respondent's title.
  121. Counsel further submitted that, when the matter was brought to court in 2019, the 1<sup>st</sup> respondent spent time filing interlocutory applications, which were either dismissed or withdrawn; that it was also responsible for delay during the period when it sought to negotiate with the appellants; and that, in the circumstances, it would be incongruent with the constitutional mandate to prudently manage public funds to order the 2<sup>nd</sup> respondent to pay interest from the date of filing suit, or for the period that the funds could have been paid out, but for the lawful court order for stay pending determination of the suit.
  122. Counsel cited the case of *Lee G. Muthoga v Habib Zurich Finance (K) Limited & another* [2016] KECA 592 (KLR) where this Court held that the award of interest by the lower court was correct, but that the learned Judge failed to consider the abnormally long period of delay caused by the court in determining the matter; and that none of the parties should suffer more than the other for the delay. For that reason, the Court declined to award interest for half of the period of delay.
  123. We take note of the fact that none of the other parties submitted on this issue which, in any event, had no bearing on their interest in the outcome of the appeal and cross-appeal.
  124. The default position on recovery of interest on compensation awards in similar cases is stipulated in section 117 of the *Land Act* (Cap. 280), which reads:
    117. Payment of interest.



1. If the amount of any compensation awarded is not paid, the Commission shall on or before the taking of possession of the land, open a special account into which the Commission shall pay interest on the amount awarded at the base lending rate set by the Central Bank of Kenya and prevailing at that time from the time of taking possession until the time of payment.
2. If additional compensation is payable under section 119 there shall be added to the amount of the additional compensation interest thereon at the base lending rate set by the Central Bank of Kenya and prevailing at that time, from the time when possession was taken or compensation was paid, whichever is earlier.

125. Addressing himself to the provision of section 117 of Cap. 280 in the persuasive decision in *Geyser International Assets Limited v Attorney General & 3 others* [2021] KEELC 92 (KLR), Naikuni, J. held that:

“As indicated above compulsory acquisition of land arising from the Provisions of Article 40 (2) of Constitution of Kenya and Part III of the *Land Act*, the process and the procedure are well spelt out upon compulsory acquisition the provision of Section 117(1) of the *Land Act*, 2012 holds that its National Land Commission 3rd Respondent which pays the compensation, the provision of Section 125 (1) of the *Land Act* of 2012 holds:- ‘The Commission shall as soon as in practicable, pay and (sic) just compensation to all persons interested in the land.’

From the above legal citations, the law does impose the full responsibility on payment to the National Land Commission and nobody else. Where the National Land Commission fails to do so and the land is possessed by the acquiring authority before payment is made the obligations to ensure payments is made falls squarely on the commissions. They are the only statutory body that is vested with the legal authority to make all the payment including interest from the compulsory acquisition of land. In this case the 2nd and 4th Respondents notwithstanding being the acquiring body is immaterial they cannot be liable and hence the law does impose any responsibility on them.”

126. We are also mindful of the general principle enunciated in the case of *Shariff Salim & another v Malundu Kikava*[1989] KECA 42 (KLR) where this Court held that:

“There is no gainsaying the fact under section 26 of the *Civil Procedure Act*, the award of interest on a decree for the payment of money for the period from the date of the suit to the date of the decree is a matter entirely within the discretion of the court. But this discretion being a judicial one must be exercised judicially. The whole idea at the end of the day is to do justice to both parties.”

127. We must point out, though, that this general principle is by no means unqualified. With regard to the circumstances under which this Court could properly interfere with the exercise of discretion by the courts below, the predecessor to this Court held as follows in *Mbogo v Shah* [1968] EA 93:

“A Court of Appeal should not interfere with the exercise of the discretion of a Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and as a result there has been injustice.”



(See also: Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited (1970) EA 469 where Spry VP likewise set out the general principle guiding the award of interest.

128. The trial court’s discretion to award interest on a successful pecuniary claim was likewise qualified in the case of Peter M. Kariuki v Attorney General [2014] KECA 713 (KLR) where this Court held that:

“Award of interest is in the discretion of the Court, which discretion must be exercised judiciously .... It is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim for interest denied. See Metal Box Co Ltd V Currys Ltd, (1988) 1 ALL ER 341 and the decision of this Court in Mumias Sugar Co Ltd V Nalinkumar M Shah, CA No. 21 of 2011, (MSA), (unreported). Due to the appellant’s own delay in filing his petition, we shall only award interest from the date of decree of the High Court till payment in full.”

129. It is evident from the record that the delay in payment of the compensation sum to the 1<sup>st</sup> respondent is not attributable to the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, but to the series of litigations brought by various third parties and the appellants herein, challenging the 1<sup>st</sup> respondent’s title to the suit property. We are persuaded that the 2<sup>nd</sup> respondent was intent on expediting the proceedings despite the delays caused by: interlocutory applications, which were either subsequently withdrawn or dismissed; and by the informal out-of-court negotiations between the 1<sup>st</sup> respondent and the appellants. In the circumstances, we consider it fair and just that interest be awarded only from the date of the decree of the ELC until payment in full, considering that the 2<sup>nd</sup> respondent has already compulsorily acquired and put beyond the 1<sup>st</sup> respondent’s reach the use of its property to which the Award relates.

130. We reach this conclusion mindful of the special circumstances that warrant departure from the duty imposed by section 117 of Cap. 280, and from the general principle that interest accrues from the date of filing suit. Be that as it may, the numerous obstructive challenges occasioned by the aforementioned competing claims in the suits filed by third parties beyond the 2<sup>nd</sup> and 3<sup>rd</sup> respondents’ control, including the instant appeal, cannot be wished away or altogether disregarded.

131. Having carefully considered the record of appeal, the grounds on which it is anchored, the rival submissions of learned counsel for the parties, the cited authorities and the law, we find that:

- a. the appeal fails and is hereby dismissed with costs to the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents;
- b. the 2<sup>nd</sup> respondent’s cross-appeal succeeds and is hereby allowed to the extent that the 1<sup>st</sup> respondent shall only be entitled to interest at court rates on the sum of Kshs. 667,903,887 with effect from 19<sup>th</sup> December 2024 when the Judgment was rendered until payment in full;
- c. Consequently:
  - i. the 5<sup>th</sup> to 8<sup>th</sup> respondents shall bear their own costs of the appeal; and
  - ii. subject to (b) above, the judgment and decree of the ELC at Mombasa (N. Matheka, J.) delivered on 19<sup>th</sup> December 2024 be and is hereby upheld.

Orders accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 19<sup>TH</sup> DAY OF DECEMBER 2025.**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**DR. K. I. LAIBUTA CArb, FCIArb.**

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**JUDGE OF APPEAL**

**G. W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original

Signed

**DEPUTY REGISTRAR**

