



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

PETITION NO. 9 OF 2014

IN THE MATTER OF ARTICLES 19, 20, 21, 22, 23, 24, 25, 27, 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF VIOLATION AND/OR INFRINGEMENT OF THE PETITIONERS CONSTITUTION RIGHT UNDER ARTICLES 10,19,20, 21, 22, 23, 24, 25, 27, 40, 47, 48 AND 50 OF THE CONSTITUTION OF KENYA

BETWEEN

SUSAN CHEBURET CHELUGUI AND

DAVID K. CHELUGUI

(Suing as the Administrators to the Estate of the late)

NOAH KIPNGENY CHELUGUI..... PETITIONERS

VERSUS

HIS EXCELLENCY THE RETIRED PRESIDENT

DANIEL TOROITICH ARAP MOI.....1ST RESPONDENT

RAI PLYWOOD (K) LIMITED.....2ND RESPONDENT

DISTRICT LAND REGISTRAR.....3RD RESPONDENT

UASIN GISHU DISTRICT.....4TH RESPONDENT

THE REGISTRAR OF TITLES.....5TH RESPONDENT

THE NATIONAL LAND COMMISSION.....6TH RESPONDENT

JUDGMENT

PETITIONERS' CASE

1. **Susan Cheburet Chelugui** and **David K. Chelugui** suing as the administratrix and administrator respectively to the Estate of the late **Noah Kipngeny Chelugui** pursuant to a grant of the High Court of Kenya at Eldoret Succession Cause No. 277 OF 2006 in the matter of the Estate of the late Noah K. Chelugui, have brought this petition against former President His Excellency Daniel Toroitich Arap Moi, Rai Plywood (K) Limited, District Land Registrar, Uasin Gishu District, the Registrar of Titles and the National Land Commission.

2. The Petitioners state that the Suit land traces its origin to the L. R. No. 10492 which measured 3,330 acres. It was subdivided with six portions. That put differently that the property L.R. No. 10492, a total of 3,330 acres was pursuant to a consent granted by the Uasin Gishu Land Consent Board on the 7th day of August 1976 sub-divided into six portions as follows: Nathaniel Kiptalam Langat — Ngechek Estate 620 Acres. Thomas Kipkosgei Yator - Lolosio Estate 620 Acres. Noah Kimngeny Chelugui - Kapkoros Estate 620 Acres. Cherwon Arap Maritim - Embu Estate 620 Acres. William Kimngeny Letting - Kapchumba Estate - 620 Acres. Huruma Co. Ltd - 140 Acres

3. The parcel originally L.R. NO. 10492/1 gave rise to the parcel of land known as Eldoret Municipality Block 15/10 which was subsequently subdivided to create parcels No. Eldoret/Municipality/Block 15/237, 238 and 239. That the parcel of land, Eldoret/Municipality/Block 15/239 measuring 21.454 ha(approximately) was further sub-divided to create Eldoret/Municipality/Block 15/2369, 2370 and 2371.

4. The parcel of land Eldoret Municipality/Block 15 belonged to Noah Kimngeny Arap Chelugui. The same parcel of land that was further sub-divided and the following titles issued.

a. Eldoret Municipality Block 15/238(12 acres) registered in the name of Stanley Kiptoo Arap Metto.

b. Eldoret Municipality/Block 15/239(53 acres) registered in the name of His Excellency the Retired President Daniel Toroitich Arap Moi.

c. Eldoret Municipality/Block 15/237 registered in the name of Noah KIPNGENY Arap Chelugui.

5. The Eldoret Municipality/Block 15/239 was further sub-divided to create Eldoret/Municipality/Block 15/2369, 2370 and 2371. That from the aforesaid, it is crystal clear that His Excellency Retired President Daniel Toroitich Arap Moi though not a member of N. K. Langat & Partners the original owners of the Land Reference Number 10492 (original No part of 5742) is now in the middle of the land.

6. The petitioners state that L.R. No. 10492 was acquired in the year 1965 from Jacobus Hendrik EngelBrecht by Nathaniel Kiptalam Arap Langat, Thomas Kipkosgei Arap Yator, Noah Kimngeny Arap Chelugui, Cherwon Arap Maritim and William Kimngeny Arap Leting.

7. The parcel of land which ended up in the hands of His Excellency Retired President Daniel Toroitich Arap Moi traces itself to the Noah Kimngeny Arap Chelugui share and further up from Noah Kimngeny Arap Chelugui Shareholding at N. K. Langat & Partners and further up from Jacobus Hendrik EngelBrecht, a private Titleholder/Seller.

8. That after the 1st respondent acquired the Late Noah Kimngeny Arap Chelugui land the 1st respondent through his Government went ahead and generated leases in which the Noah Kimngeny Arap Chelugui was issued with a certificate of lease for the parcel Number 237 and the rest of the land to the 1st respondent and the Late Stanley Kiptoo Arap Metto. That it is also on record that His Excellency Retired President Daniel Toroitich Arap Moi and Rai Plywood (K) Limited have titles to the portion of the land shown above.

9. The property Eldoret Municipality/Block 15/239 (53 acres) which had gone to the Retired President Daniel Toroitich Arap Moi was subsequently sold by the retired president to the Rai Plywood (K) Ltd who have since taken possession, occupation, enjoyment and use of the said property.

10. That the process that led to the late Noah K. Chelugui losing his parcels of land aforesaid was without sale, without any consideration passing to him, without his consent, without his authority, without compensation, without any color of right, was not a product of a willing buyer, willing seller basis and on the contrary, was an illegality, null and *void ab initio*.

11. The process that led to the loss of the said land was arbitrary, illegal, unconstitutional and gross violation of Article 40 and 47 of the Constitution of Kenya (or was in violation of Section 75 of the former Constitution of Kenya).

12. That in any event, the acquisition of the said land by the 1st and 2nd respondents was not only illegal, unconstitutional but that in the same there was no prompt payment in full of just compensation to the person of the late Noah Kipngeny Chelugui or to his estate. That on the contrary, the petitioners' estate had been acquired illegally, irregularly, unprocedurally or through a corrupt scheme all falling within the provisions of Article 40(6) of the Constitution of Kenya.

13. That it follows from the aforesaid that the titles that the 1st and 2nd respondents hold are illegal, without any sanctity, acquired irregularly, unprocedurally, is tainted and not entitled to any constitutional protection, some nullity *ab initio*.

14. They claim that since the act of the acquisition of the said parcels of lands by the 1st and 2nd respondents was void from the birth, then anything done under it, whether closed, completed, or developing will be wholly illegal and the estate of the late Noah K. Chelugui is entitled to the reliefs sought being the persons affected by such an unconstitutional act.

15. That there is a whole procedure and a whole legal regime of the sale and transfer of land but in the instant case, one Stanley Kiptoo Arap Metto (now deceased) through deception or trickery obtained the petitioners original title allegedly to facilitate a sale but no sale took place. The end result has been that the petitioners' land changed hands in circumstances which has never been explained or fathomed.

16. The petitioners received only a meagre Kshs. 70,000/= which was neither purchase price nor any other consideration for the purchase of land.

17. That as a consequence of the above acts, the petitioners are entitled to the plea of the declaration of the unconstitutionality of the above acts and the reverting of the land to the petitioner's estate which can be described as restitution. That would entail not only declarations that the acts that led to the loss of the said parcel of land in the first place was unconstitutional, null and void *ab initio* and any ensuing titles declared a nullity and/or for cancellation with all the attendant consequences.

18. The petitioners state that of acts complained of above violated the petitioners rights Under Article 19, 20, 21, 22, 23, 24, 25, 27, 40, 47, 48 and 50 of the Constitution of Kenya and thereby deserves not only a declaration of the unconstitutionality of acts above but the

compensation and/or damages be worked out and paid by the persons found to have violated the petitioners fundamental rights and freedom and in this case right to the protection of the right to property under Article 40 and 47 of the Constitution of Kenya.

19. That in any event, the acts complained of above violated the petitioners' right under Article 47 of the Constitution of Kenya in that the taking away of the petitioner land was not an act of titillating-drama but rather a serious violation of the petitioners rights, an act of illegality and arbitrary deprivation of private property contrary to Article 47 of the Constitution of Kenya which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

20. That at the very core of the petitioners' plea is that the 1st and 2nd respondents' Title was unconstitutional, illegal, null and void and does not enjoy any sanctity or protection under the Constitution of Kenya. That on the contrary, the same was acquired through fraud, mistake, misrepresentation in which the 1st and 2nd respondents were party to or were acquired illegally, unprocedurally, unconstitutionally or through a corrupt scheme.

21. That the issues that inform this petition have been raised with the respondents but all in vain. Indeed, the petitioners made visits to the respondents seek resolution and/or redress but all in vain as the "door was permanently locked," no access leaving them with no alternative but to turn to the courts of justice for the much-needed remedies and/or redress to assuage their long suffering.

22. That together in these, the various Land Registrars Eldoret, Uasin Gishu District and indeed the Ministry of Lands through its officers over the years played along in the acts that saw the petitioners' estate lose huge chunk of land, thus 53 acres to the Retired President and subsequently to Rai Plywood (K) Ltd and 12 acres to the Estate of the late Stanley Kiptoo Arap Metto and therefore they are culpable or guilty of the said acts or abetted the same and used Government offices to process suspect titles that saw the petitioners lose big.

23. That the said parcel of land have appreciated in value and the petitioners are seeking the restitution of the entire parcels of land aforesaid or in the alternative their full, just and current market value of the same in such amounts or such sum to be assessed and/or worked out and even at this stage and without valuation the petitioners invites the court to take judicial notice that the value of land within and around Eldoret Town has gone up considerably and thus a matter of general or local notoriety.

24. That as a consequence of the above, the petitioners' estate has been subjected to human indignity, inequity, social injustice, inequality, violation of human rights, and deprived of what belongs to them without any colour of right and indeed by violation and the provisions of the Constitution of Kenya cited above.

25. That the petitioners' estate shall not suffer harm without a remedy and consequently they are entitled to a remedy or remedies in one shape or another.

26. The Petitioners pray for orders:

a. A declaration that the petitioners constitutional right to property and/or interest in or over the property Eldoret Municipality/Block 15/239(53 acres)-His Excellency the Retired President Daniel Toroitich Arap Moi and subsequently Rai Plywood(K) Ltd all in Uasin Gishu District deserves the protection by the Honourable court and that the protection do issue accordingly in terms of the declarations that the acquisition of the said properties by the 1st and 2nd respondents were arbitrary unconstitutional, irregular, unprocedural, tainted, a nullity ab initio and therefore not worthy of any constitutional protection.

b. A declaration that the petitioners rights and fundamental freedom and in particular the protection of right to property and/or interest in or right over suit properties had been violated and/or infringed and their property parcel No. Eldoret Municipality/Block 15/239(53 acres)-His Excellency the Retired President Daniel Toroitich Arap Moi and subsequently to Rai Plywoods (K) Ltd all in Uasin Gishu District is in real danger of being permanently arbitrarily acquired by the 1st and 2nd respondents and their beneficiaries to the detriment of the petitioners and that violates the petitioner right to the protection of private property afforded by Article 40(1) and 40(3) of the Constitution of Kenya (the equivalent of section 75 of the former Constitution of Kenya) and appropriate declaratory order do issue as such.

c. That together with the grant of the orders above, the Honourable court do hereby forthwith cancels all the titles or any title issued to and/or emanating therefrom from the Eldoret Municipality/ Block 15/239 (53 acres) - His Excellency the Retired President Daniel Toroitich Arap Moi and subsequently to Rai Plywood(K) Limited all in Uasin Gishu to the 1st and 2nd Respondents and all other beneficiaries and the Registers be rectified accordingly and the titles reverts to the estate of Noah K. Chelugui or it is his administrators and/or in the alternative the 1st and 2nd respondents do pay and be ordered so pay the estate of the Late Noah K. Chelugui the prompt payment in full of just and current market value of the said properties in such amounts to be assessed and/or worked out.

d. That a declaration to issue that the acts of the 1st and 2nd respondents of unlawfully attempting to deprive the petitioner of their allotted parcels of land in the light of the above was without any legal basis, an act of illegality and unconstitutional and are liable to the petitioners in compensation and/or damages for losses, for loss of use land and for breach of their constitutional rights on such compensation as shall be assessed by the court.

e. Damages as against the 3rd, 4th and 5th respondents for their acts o of aiding and abetting the illegal, unconstitutionality of the acts above, of issuing suspect titles and for breach and/or violation of the petitioners' constitutional right to properties and protection of the same.

f. Costs of the petition.

1ST AND 2ND RESPONDENTS' CASE

27. The 1st and 2nd Respondents' reply is found in the affidavit of Philip Varghese filed on the 25th day of November, 2014 and in it they stated that the 2nd respondent is the duly registered proprietor of Parcel Nos. Eldoret Municipality Block 15/2370 and 2369 having purchased the same from the 1st Respondent for valuable consideration without notice of any defect in the title. That the 2nd Respondent has since taken possession of its properties and carries out wheat farming therein. That the Parcel No. Eldoret Municipality Block 15/239 no longer exist the same having been subdivided in the year 2007.

28. They further contend that the 2nd Respondent has not in any way infringed on the petitioners' rights and is the proprietor of the parcel herein mentioned having followed the due process in their acquisition. Prior to purchasing the land from the 1st Respondent, the 2nd Respondent duly conducted searches that revealed the land was free from any claim. That according to them from the records, it is clear that the 1st Respondent became registered as the proprietor of the original parcel No. 239 as the registered proprietor on 21st September, 1983. Prior to that, the land was in the name of the Government of Kenya as Parcel No. 10. That there is no evidence that Noah Kimngeny Chelugui was ever the proprietor of Parcel No. 239. That the petition herein is actually a claim for land which ought to be ventilated in the normal way but has been camouflaged as Constitutional petition in an attempt to shield it from the defence of limitation of actions. Further, under the Registered Land Act the statute then applicable, the Respondents titles are impeachable. There is no proof of the matters alleged at paragraph 10 of the affidavit in support. Article 40 of the current constitution cannot be acted upon in respect to events that took place in the year 1983. Similarly, the 2nd Respondent was not a party to the alleged violation of Section 75 of the former constitution. That the 2nd Respondent was not aware of the issues raised at paragraph 17 of the replying affidavit but maintains that the acquisition of the land by the 2nd Respondent was above board. He states that the 2nd Respondent is the duly registered proprietor of Parcel No's Eldoret Municipality Block 15/2370 and 2369 having purchased the same from the 1st Respondent for valuable consideration without notice of any defect in the title. That the 2nd Respondent took possession of its properties and carries out wheat farming therein.

29. That Parcel No. Eldoret Municipality Block 15/239 no longer exist the same having been subdivided in the year 2007. That similarly, Parcel No. Eldoret Municipality Block 15/2371 is in the name of Kobil Petroleum Ltd yet it is not a party to these proceedings.

30. The 2nd Respondent has not in any way infringed on the Petitioners' rights and is the Proprietor of the Parcel herein mentioned having followed the due process in their acquisition. That prior to purchasing the land from the 1st Respondent, the 2nd Respondent duly conducted searches that revealed the land was free from any claim.

31. That from the records, it is clear that the 1st Respondent became registered as the Proprietor of the Original Parcel No. 239 as the first registered Proprietor on 21st September, 1983. That prior to that, the land was in the name of the Government of Kenya as Parcel No. 10. That there is no evidence that Noah Kimngeny Chelugui was ever the Proprietor of Parcel No. 239.

32. The Petition herein is actually a claim for land which ought to be ventilated in the normal way but has been camouflaged as a Constitutional Petition in an attempt to shield it from the defence of limitation of actions. That further, under the Registered Land Act the statute then applicable, the Respondents titles are impeachable.

33. That Article 40 of the current Constitution cannot be acted upon in respect to events that took place in the year 1983. Similarly, the 2nd Respondent was not a party to the alleged violation of Section 75 of the

former constitution.

34. That he is not aware of the issues raised in the Replying affidavit but he maintains that the acquisition of the land by the 2nd Respondent was above board. That there are other cases touching on the same subject property and he shall, at the appropriate time seek to have all of them consolidated.

35. That in the circumstances, he swears this affidavit in response of the Petition herein and prays that the same be dismissed.

3RD AND 4TH RESPONDENTS CASE

36. The response by the 3rd and 4th respondents were ***grounds of opposition*** filed State counsel Mr. Ngumbi, on 14th March 2017 stating that the respondents were bound by orders from above from the first respondent and therefore a claim of damages against the 3rd ,4th and 5th respondent is not Merited. That the claim for compensation against the 1st and 2nd respondents is adequate and therefore the claim against the 3rd 4th and 5th respondents is superfluous.

37. That the petitioners are guilty of negligence as they did not take any action to protect their property such as placing any caution and that they acquiesced in the matter hence do not need any compensation from the 3rd 4th and 5th respondents.

38. No affidavit was filed on behalf of the 3rd 4th and 5th respondents pursuant to the provisions of the ***Constitution Of Kenya (Protection Of Rights And Fundamental Freedoms) Practice And Procedure Rules 2013.***

PETITIONERS SUBMISSIONS

39. Mr. Arusei learned counsel for the petitioners submits that that the land that the Retired President Daniel Toroitich Arap Moi purports to have acquired traces itself to L. R. No. 10492 which had in the year 1965 been acquired from Brecht Jacobus Hendrick EngelBrecht by Nathan Kiptalam Arap Lagat, Thomas Kipkosgei Arap Yator, Noah Kimngeny Arap Chelugui, Cherwon Arap Maritim and William Kimngeny Arap Chelugui. That the Retired President alleged portion traces itself to the Noah Kimngeny Arap Chelugui shareholding at N. K. Langat & Partners and that the Retired President was not a shareholder to the said company or at all.

40. That Jacobus Hendrik EngelBrecht was a private title holder/seller and the land in question was never a Government Land and had not been surrendered to the Government nor had it been compulsorily acquired. That the 1st Respondent obtained the petitioner land through trickery, a matter that had even been reported to the police and an abstract issued.

41. Moreover that there is no evidence that the said land was ever sold to the Retired president. Neither was it a gift, inheritance, an allocation or acquired through adverse possession. That the moment the respondent state that this was a Government land, then that argument has no credibility at all and the resultant titles had no protection, was defeasible and were accordingly products of illegality and was accordingly unconstitutional, illegitimate, it was acquired wrongly. That courts of law would not sanction or countenance an illegality.

42. That the 1st and 2nd respondents have set up a false defence. That the affidavit of Philip Varghese has no substance. It was at most a product of illegality to defend and protect the proceeds of illegality and carried no weight. That the land in question was and has never been a Government land but a privately-owned land. That the parcel of land has identifiable boundaries tracing itself to the **L. R. No. 10492, N.K. Langat & Partners.**

43. Furthermore, that the acts of the Respondents infringed and/or violated the petitioner rights to protection of right to private property. That it does not matter that the 1st respondent later becomes the registered proprietor and subsequently passed his interest by sale to the 2nd respondent. That all these

were acts of illegality and will never receive legal sanction or sanitation.

44. That no amount of baptizing the instant petition as a civil dispute will change the narrative or protect them from breaches and/or violation of the rights of the petitioners to the protection of right to property and fair administrative action. That the new titles issued to the 1st respondent and later passed to the 2nd respondent were null and void ab initio.

45. That the conversion from Registered Titles Act, Cap. 281, Laws of Kenya to the Registered Land Act Cap. 300, Laws of Kenya and processing of titles under the latter legal regime had no legality, that no due process was followed and therefore in total an act of illegality. That illegality or unconstitutional acts no matter how far they have gone have no legality.

46. **He relies on the decision in Benjamin Leonard MacFoy v United Africa Co. Ltd [1962] A.C 152 (a privy council decision from the West African court of Appeal) in the judgement (Lord Denning, at P.160):**

“ if an act is void, then it is in law nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad

47. That the Kenyan Constitution was a living document and no amount of semantics or splitting hairs will derail it. That the acts of the 1st and 2nd respondents' acts were void ab initio and it does not matter whether closed, completed or developing. All of them are in law, unconstitutional and were nullity ab initio and if anything, they fall within the ambit of Article 40(6) of the Constitution of Kenya of having been illegally acquired through a corrupt scheme and it violated Article 47 of the Constitution of Kenya in that they were acquired in a process that was inexpedient, inefficient, unlawful, unreasonable procedurally unfair.

48. Lastly, that the petitioners' claim warrants constitutional court intervention and protection and in this Article 23(3) of the Constitution of Kenya provides for the grant of the appropriate reliefs which includes a declaration of rights, an injunction, a conservatory order, a declaratory of invalidity of any law that violates, infringes, or threatens a right or fundamental freedom in the Bill of rights, an order for compensation, an order for judicial Review and to sum it all, the petitioners in paragraph 26 of the further supplementary affidavit filed on the 21st day of January, 2015 stated and we quote:

“THAT we are advised by our counsel on record which advise we verily believe it to be true that indeed this court is empowered by Article 23(3) of the Constitution to grant appropriate reliefs in proceedings seeking to enforce fundamental rights and freedoms. In addressing the question of appropriate reliefs to grant in the circumstances of this case, that the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant "appropriate relief". It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of a court may also make any other order that is just and equitable. Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights. The courts have a particular responsibility in this regard and are obliged to 'forge new tools' and shape innovative remedies, if need be, to achieve this goal...”

49. In addressing appropriate reliefs to grant in circumstances of this case, the petitioner is guided by the decision of the **South African Constitution Court in the case of Minister of Health and Others Vs Treatment Action Campaign and Others(2002)5 LRC 216** wherein it was stated at page 249 as follows: (views we agree with)

Section 38 of the constitution contemplates that where it is established that a right in the bill of rights has been infringed a court will grant "appropriate relief". It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of S172(1)(a) a court may also "make any other order that is just and equitable" sec. 172(1)(b)) Appropriate Relief will in essence be relief that is required to protect and enforce the constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the protection of the constitution are protected and enforced. if it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights.... The courts have particular responsibility in this regard and are obliged to "forge new tools" and shape innovative remedies, if needs be, to achieve this goal ”

50. That from the above, it is clear that the title of the suit land held by the 1st and 2nd Respondents having been acquired illegal, unprocedurally or through a corrupt scheme were invalid, unconstitutional, defeasible and have no weight. In this instance, the suit land was purchased from one Jacobus Hendrick Engelbercht by Noah Kipngeny Chelugui and Cherwon Arap Maritim, both deceased. The land parcel was known as I/R No. 17542. L. R. No. 10492 measuring 3,336 Acres. It is on record that all the transactions that took place in relation to the subdivision, consolidation, change of user or any other dealing with the land was transparent, above board and with the full knowledge of the owners of the properties. It is also on record that the petitioners herein acquired land and are purchasers in common and that a duly signed transfer was registered in the Land Titles Registry in Nairobi. However, new titles were not issued to the purchasers after the subdivision and transfer of the parcel of land and this is where the respondent came in and embarked on creation of illegal parcels, unlawful consolidation of approved subdivision and of illegal parcels of land that were allocated as the Government land to the 1st Respondent at the expense of the legal owners. It is pertinent to note that absolute interests had passed to the purchasers and in this case the petitioners since the land register indicated that they were the new owners of the land and had in fact lawfully and legally purchased the said lands.

51. In the case of *Milankumar Shah & 2 others v City Council of Nairobi & Attorney General (Nairobi HCC SUIT No. 1024 OF 2005)*, the court held;

“ we hold that the registration of title to land is absolute and indefeasible to the extent, firstly that the creation of such title was in accordance with the applicable law, and secondly where it is demonstrated to a degree higher than the balance of probability that such registration was procured thorough persons or a body which claims and relies on that the principle has not himself or itself been part of a cartel which schemed to disregard the applicable law and the public interest

52. The respondents illegally created land parcel No. Eldoret Municipality Block 15/10 apparently requested by the 2nd respondents which was later subdivided into various portions namely Eldoret municipality 15/237 (9.664 Ha), Eldoret Municipality 15/238 (4.854), Eldoret Municipality 15/239 (21.454 Ha). It is the petitioners' contention that were strangers to the registration and the creation of the new parcel was not within their knowledge. As a result of the above the petitioner's constitutional rights were breached, infringed and/or violated by the respondents hence they were deprived of quiet enjoyment and possession of the said suit land. In this, we find support in the findings and holding of the *High Court of Kenya at Eldoret E & LC Petition No. 1 of 2013, Nathan Tirop Koech & Another — vs- Nathaniel Lagat & 2 Others*. The judgement of Hon Antony Ombwayo J. rendered on the 15th day of April, 2016 at pg. 36/66 and 37/66 of the judgement which we have no quarrel and we will not hesitate to adopt it and we quote:

“.....It is also not controverted that as a result of the aforementioned approval of the subdivisions and the set prints, in 1980, the grant was forwarded to the 1st Respondent for purposes of surrender and issuance of new separate titles according to the said sub-divisions. The said parcel of land known as L. R. No. 10492 measuring 3236 acres was to be subdivided such that each of the parties then could get a total of 614 acres, but that the deceased father of the 1st and 2nd Petitioners was registered in January 1996 as the owner of land parcel Eldoret

Municipality (King'ong'o) Block 21/306 measuring only 21.39 Ha. (Approximately 52. Acres). The deficits in apportioning the land in question to their deceased fathers was renamed Eldoret Municipality Block 15/1 and registered in the names of their deceased fathers, but lease titles was never issued to them and that the said parcel was surrendered back to the Government of Kenya in September 1983. The remaining portion of L. R. No. 10492 was amalgamated and renamed Eldoret Municipality (King'ong'o) Block 23/1-355 and that both blocks were subdivided and several title deeds issued to 3rd parties. This court finds that the act of the commissioner of lands as he then was of surrendering back to the government part of the parcel of land bought by the petitioner's father was an act of compulsory acquisition and that required to be undertaken under Section 75 of the former Constitution of Kenya and the Land Acquisition Act Cap 95 Laws of Kenya (repealed) which required notice and adequate compensation. The respondents have not demonstrated that either the procedure for compulsory acquisition was followed or that the petitioners were adequately compensated. The process of surrender of the remainder of the land to the government of Kenya and the conversion- of the land regime from RTA to RLA was characterised by procedural impropriety and illegality.....”

53. We underline the words:

“ This court finds that the act of the commissioner of lands as he then was of surrendering back to the government part of the parcel of land bought by the petitioner's father was an act of compulsory acquisition and that required to be undertaken under Section 75 of the former Constitution of Kenya and the Land Acquisition Act Cap 95, Laws of Kenya (repealed) which required notice and adequate compensation. The respondents have not demonstrated that either the procedure for compulsory acquisition was followed or that the petitioners were adequately compensated. The process of surrender of the remainder of the land to the government of Kenya and the conversion of the land regime from RTA to RLA was characterised by procedural impropriety and illegality.....” and for us it would help matters to belabour these issues. These were in total acts of procedural impropriety and illegality.

54. Something else to underline at the earliest and it is now a common ground is that the jurisdiction of the Constitutional court has expanded to include Review powers. As was stated by *Chaskalson, J. In the South African Case Pharmaceutical Manufacturers Association of South Africa & Another: ex parte President of the Republic of South Africa & Others (CCT) 31/99 [2000] zacc 1; 2000(2) ZA 674:*

“.....review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead, the constitution itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of "constitutionalizing" what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution.....”

55. The petitioners submit that in the instant case there are all the ingredients of unlawfulness, procedural improprieties, unreasonableness and therefore for addressing through the Constitution of Kenya and the invocation of the court powers under Section 13(7) of the Environment and Land Court Act No. 19 OF 2011 which grants the Honourable court the jurisdiction to grant the following reliefs and the (list was not exhaustive):

- (a) Interim or permanent preservation orders including injunctions.
- (b) Prerogative orders.
- (c) Award of damages.

(d) *Compensation.*

(e) *Specific performance*

(f) *Restitution*

(g) *Declaration or*

(h) *Costs.*

56. All the same, Article 40 of the constitution of Kenya provides as follows;

40. (1) subject to article 65, every person has the right either individually or in association with others, to acquire and own property) –

(a) of any description; and

(b) in any part of Kenya

(3) the state shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the description-(a) result from an acquisition of land or an interest in land or conversion of an interest in land, or title to land in accordance with chapter five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this constitution and any act of parliament that-

(i) requires prompt payment in full of just compensation to person; and

(ii) Allows any person who has an interest in, or right over that property a right to access court of law.

57. The Petitioners submit that the Constitution of Kenya, 2010 is applicable as it guarantees the individual rights. The petitioner argues that the petition is properly before court and not a civil claim camouflaged as a petition and that they have met the threshold of a constitution reference and heavily rates on the Anarita Kirimo case.

58. Mr. Arusei submitted that on 16.3.2018, before court, the parties recorded a consent to admit the valuation report by African Valuation Ltd be adopted by consent of the parties. The Valuation had put the amount value of the suit property of Kshs. 1,710,000,000. The same valuation put loss of benefit of user by the owner for a period of 34 years at Kshs. 284,744,000.60. I urge the court to adopt the consent. The valuation was signed by Victor K. Kiptop. A registered licenced and practicing valuer. The valuation was for court petition purposes.

59. The court to look at the figure and amend to petition the sum. We pray for compensation. The issues of violation were dealt with last year. The court to consider submissions. They are giving reason why petitioners should not be compensated. The issue is the amounts. The court should not revisit what is not before it. I rely on submissions filed on 24.4.2018. I rely on them with authorities. The issue is whether to give a fair market value of property.

60. The 3rd and 4th defendants are grounded on nothing. They are submitting an evidence not in court. There is no replying affidavit, no response. The issue of double compensation is a fact not in law. There is no affidavit. The state has not filed affidavit. The court has already made an order to compensate Eldoret Municipality 15/239.

61. The people concerned are the President and Raiply. There is no evidence that Noah received any

money and that subdivided. My client could not alter property already in the name of Raiply. One of the prayers in restriction. I urge the court to disregard the rights of the 3rd and 4th defendants. The report by government talks of Kshs. 820,000,000.

SUBMISSIONS BY THE 1ST AND 2ND RESPONENTS

62. Mr. Makau, counsel for the 1st and 2nd respondents submit that the 1st respondent title was 1st registration acquired under the provision of the Registered Land Act and to which title is indefeasible and that the 2nd respondent is an innocent purchaser for value and the petitioner's wild claims can therefore not lay against it. That no fraud on the part of the 1st and 2nd respondents has been demonstrated to sustain the said barren claims. That Article 40 of the Constitution of Kenya as invoked by the Petitioners herein was not in operation as at the time of registration of the suit land in the names of the 1st respondent and subsequent transfer to the 2nd respondent herein.

63. That Section 75 of the former Constitution is also not applicable as its provisions guarantee of rights lay in the state and not an individual. The Petition is otherwise a claim to land and is meant to cover up for laches as it does not at all disclose breaches of Constitutional rights either under the repealed constitution no the current constitution.

64. Moreover, that the 2nd respondent is the duly registered proprietor of Parcel Nos. Eldoret Municipality Block 15/2370 and 2369. The same land was acquired from the 1st respondent for a valuable consideration without notice of any defect if at all in the title.

65. The 2nd respondent took possession of its properties and continues to carry out wheat farming peacefully and with no interruption. The respondents acknowledge that Eldoret Municipality Block 15/239 no longer exists the same having been subdivided in the year 2007.

66. That the adjacent land which is referred to as Eldoret Municipality Block 15/2371 is in the name of Kobil Petroleum yet they were never at any given time enjoined into the proceedings. The respondents have not in any way infringed upon the petitioner rights, the same was further predicated on the fact that due process was followed and that prior to the purchase, the 2nd respondent conducted searches that revealed the land was free from any claim. That from the records, it was crystal clear and without a shadow of doubt that the proprietor and owner of the said parcels of land was the 1st respondent having acquired and the same being registered in his names way back in 21st September, 1983.

67. That on further inquisition over and of the said land, the 2nd respondent was further informed that the land was in the name of Government of Kenya registered as parcel No. 10;

68. That from the record, there was no clear-cut evidence that Noah K. Chelugut was at any time the proprietor of Parcel No. 279. That the Petition was filed in court exhibited the traits of a claim for land which was tailored to camouflage as a Constitution Petition in an attempt to shield it from the hands and provisions of the Limitation of Action Act;

69. That under the regime applicable the Registered Land Act, the respondents' titles are impeachable. That no sufficient proof as contained in the supporting affidavit to the Petition would warrant the granting of any order.

70. The 1st and 2nd respondents argue that the 2nd respondent if the duly registered proprietor of parcels No. Eldoret Municipality/Block 15/2370 and 2369 having purchased the same from the 1st respondent. They rely on section 27, 28 and 30 of the repealed Registered Land Act.

71. The 2nd respondent argues that he is a purchaser for valuable consideration without notice of any defect and that the 2nd defendant has been in possession of the same. On legitimate expectation, the respondents argue that the acquisition of the land Eldoret Municipality Block 15/2370 and 2369 by the 1st respondent and subsequent sale to the 2nd respondent was done transparently and in all manner of fairness.

72. That this matter is a civil dispute camouflaged as a petition. And that it does not meet the test in Anarita Karimi Njeru.

SUBMISSIONS BY ATTORNEY GENERAL

73. Initially the Attorney General was represented by Mr. Ngumbi learned litigation counsel who strangely submitted that the 1st respondent was the President of the Republic of Kenya and therefore, the 4th and 5th respondents acted on orders from above.

74. Mr. Wabwire came into the matter later and submitted that on 16.3.2018, the valuation report by the petitioners was allowed by consent. The court gave directions that the parties make submissions on alternative prayer. I rely on submissions dated 11.5.2018 and filed on 14.5.2018. The report by African Valuers Ltd is unreliable and based on presumption. It is very exaggerated. (See page 4 of the Petitioners' submissions). The Valuer valued entire land measuring 3,300 acres for Kshs. 21,000,000,000. There are no varieties on the land. One acre of land was put at around 6.8 Million. 53 acres from the same parcel of land at 6.8 billion gives Kshs. 350,000,000. In Petition No. 1 of 2013, the court gave 6.8 Million per acre. The court will be put in a difficult position. The court should take judicial notice of the first report.

75. On loss of user, there is no basis. There are no comparables. They have not laid the basis of Kshs. 244,000,000 for loss of user. The land in question is Block 15/239. It is about 53 acres. This is private land that has never been public land. The government never required the land compulsorily. Eldoret 15/239 does not form part of Estate. The government cannot compensate what does not belong to petitioners. The land has been under private use of the 1st and 2nd respondents. Compensation to be made by 1st and 2nd respondents. Block 15/239 is now existent. It was subdivided. The purpose of valuation report was to guide the court. We pray that the prayer for compensation will amount double compensation. We believe that the parcel was comprised in Petition No. 1 of 2013. Petition No. 1 of 2013 is for hearing on 3.10.2018. Mr. Makau for 1st and 2nd respondents did not submit on quantities.

ANALYSIS AND DETERMINATION

76. I have considered the petition, supporting affidavits, replying affidavits and supplementary affidavits and rival submissions and do find that the facts of the case are that the land traces its origin to the L. R. No. 10492 which measured 3,330 acres. It was subdivided with six portions pursuant to a consent granted by the Uasin Gishu Land Consent Board on the 7th day of August 1976 sub-divided into six portions as follows: Nathaniel Kiptalam Langat — Ngechek Estate 620 Acres. Thomas Kipkosgei Yator - Lolosio Estate 620 Acres. Noah Kimngeny Chelugui - Kapkoros Estate 620 Acres. Cherwon Arap Maritim - Embu Estate 620 Acres. William Kimngeny Letting - Kapchumba Estate - 620 Acres. Huruma Co. Ltd - 140 Acres.

77. The parcel originally L.R. NO. 10492/1 gave rise to the parcel of land known as Eldoret Municipality Block 15/10 which was subsequently subdivided to create parcels No. Eldoret/Municipality/Block 15/237, 238 and 239.

78. The parcel of land, Eldoret/Municipality/Block 15/239 measuring 21.454 Ha (approximately) was further sub-divided to create Eldoret/Municipality/Block 15/2369, 2370 and 2371.

79. That the parcel of land Eldoret Municipality/Block 15 belonged to Noah Kimngeny Arap Chelugui. The same parcel of land that was further sub-divided to create **Eldoret Municipality Block 15/238(12 acres) and registered in the names of Stanley Kiptoo Arap Metto.** Eldoret Municipality/Block 15/239(53 acres) - His Excellency the Retired President Daniel Toroitich Arap Moi, Eldoret Municipality/Block 15/237 1.N.O Noah Kipngeny Arap Chelugui, Block Eldoret Municipality/Block 15/239 was further sub-divided to create Eldoret/Municipality/Block 15/2369, 2370 and 2371.

80. The L. R. No. 10492 was acquired in the year 1965 from Jacobus Hendrik EngelBrecht by Nathaniel Kiptalam Arap Langat, Thomas Kipkosgei Arap Yator, Noah Kimngeny Arap Chelugui, Cherwon Arap

Maritim and William Kimngeny Arap Leting.

81. His Excellency Retired President Daniel Toroitich Arap Moi was not a member of N. K. Langat & Partners the original owners of the Land Reference Number 10492 (original No part of 5742) but was given the portion of land meant for Noah Kimngeny Arap Chelugui. There is no explanation as to how he got the title to the property.

82. The parcel of land which ended up in possession of His Excellency Retired President Daniel Toroitich Arap Moi traces itself to the Noah Kimngeny Arap Chelugui share and further up from Noah Kimngeny Arap Chelugui Shareholding at N. K. Langat & Partners and further up from Jacobus Hendrik EngelBrecht, a private Titleholder/Seller.

83. That after the 1st respondent acquired the Late Noah Kimngeny Arap Chelugui land the 1st respondent through his Government ahead and generated leases in which the Noah Kimngeny Arap Chelugui was issued with a certificate of lease for the parcel Number 237 and the rest of the land to the 1st respondent and the Late Stanley Kiptoo Arap Metto.

84. The land the retired President Daniel Arap Moi acquired traces itself to L. R. No. 10492 which had in the year 1965 been acquired from Brecht Jacobus Hendrik Engel by Nathan Kiptalam Arap Lagat.

85. *There is no iota of evidence as to how the former president of the republic of Kenya Daniel Toroitich Arap Moi Was Registered as The Proprietor of The Suit Land which was part of and parcel of L. R. No. 10492/1 that belonged to Noah Kimngeny Chelugui. The learned state counsel Mr. Ngumbi stated that this were orders from above by the 1st defendant who was the president of Kenya, however, the court finds that the statement borders on illegality and impunity and procedural impropriety. This court cannot protect property that was not procedurally acquired and was acquired through impropriety.*

86. In the letter dated 23rd February 1980, the Commissioner of Lands wrote to Mr. R.L Aggarwal, advocate informing him of what was required to be done for purposes of surrender and issue of new leases for deferent sections of the land. He stated that for the leases or tittles to be issued in respect of each subdivision thus 10492/1, 10492/2, 10492/3, 10492/4, and ELD Municipality Blocks 15/12, 15/13, 15/14 and 15/14 10492/6 there was need to surrender the head title. The new leases were to be issued in the names of the original owners before transfer to the purchasers. The respondents were not the original owners and there was no evidence that they bought from the original owners. The excerpt of the letter is as follows:-

23rd February, 1980

7289/III/129

Mr. R. I. Aggarwal,

Advocate,

P. O. Box 209,

ELDORET

RE: L. R. 10492 – ELDORET MUNICIPALITY

I acknowledge receipt of grant No. L. R. 17542 in respect of the above-mentioned piece of land, which has been sent here for surrender purposes and thereafter issue of separate leases for the different sub-divisional sections.

As you are no doubt aware, the user of this piece of land was restricted to agricultural purpose only. The subdivision of this land into 6(six) sub-plots was approved on 7.10.77, restricting the

resultant sub-plots for agricultural purposes only. Before survey of the sub-plot divisions was carried out, we received another application for subdivision of sub-plot No. 5 and change of user of the smaller position was approved on 20.5.78. Again, before the sub-division was surveyed, we received a further application for the sub-division of a balance of the area of sub-plot No. 5 and also a change of user from agricultural to residential purposes. The sub-division was approved on 14.8.79.

Understand the new parcel number of suit area is No. 14 Block 15. You may not be aware that the Municipal boundary of Eldoret is along the railway line which splits L. r. 10492 into two portions, thus the portion south of the railway has been converted along with other properties within Eldoret Municipality for the provisions of Registered Land Act. The other portion remains under R.T.A.

As you know for the leases or titles to be issued, in respect of each sub-division, a head title has to be surrendered and new leases and/or titles issued. Since there are subdivisions within subdivisions and also change of user in respect of some of the subdivisions, it is imperative that all the subdivisions should be sorted out so that each subdivision is known for what purposes it is to be approved and which subdivisions are under the provisions of R.L.A. and R.T.A.

Once the transfer will require titles or leases, I should be grateful if this exercise is done at an early date to facilitate valuations of the sub-plots for individual users.

E. MWIREBUA

For: COMMISSIONER OF LANDS

87. In the letter by the commissioner of lands dated 25th November 1981, the commissioner of lands states that;

25th November, 1981

REF. 7289/II/

M/s R. L. Aggarwel,

Advocates,

P. O. Box 209,

ELDORET

ELDORET – L. R. NO. 10492 PROPOSED SUBDIVISION AND CHANGES OF USER

I refer to your letter ref: L/G/2 of 4th November, 1980 addressed to me with a copy to M/s Amata and Co. Advocates on the above subject and wish to inform you that the above farm which comprises approximately 666.41 hectares has an agricultural user and is subdivided into 7 portions i.e. L. R. Nos. 10492/2,3,4 and EM/Block 15/12, 13, 14 and 15 containing the same agricultural user. The subdivision has been re-subdivided to cater for various user i.e. from agricultural to residential industrial etc. However, it is rather impossible at this stage to issue titles direct to the purchasers of the subdivisions as legal transactions will have to be completed first. You are therefore requested to advise your clients that the following transactions will have to be done and completed in stages as follows:

Surrender of the Grant I. R. 17542 in exchange of leases in respect of the subdivisions falling within the Eldoret Municipality under Industrial Registered Land Act and Grant in respect of subdivisions falling outside the Municipality under Registration of Titles Act for agricultural

use.

Titles and leases to be issued in the names of registered owners of L. R. 10492.

Transfers to be made to the respective purchasers of the said portions.

Application for change of users and subdivisions of the portions to be made in each case. The sub-plots to be valued for the changes of user from agricultural to residential industrial e.t.c. to determine enhanced rent.

Surrender of Grants of agricultural portions in exchange of new grant or leases incorporating the changes of user and new rents per sub-plot.

Finally, transfer of sub-plots with the change of user and enhances rent to the purchasers.

It would be appreciated if you would request your clients to comply with the points Nos. (i), (vi) above so that this matter exercise can be dealt with in clearing the problems involved in this matter. Please note that no surrender have been registered in my Registry.

F. W. S. MAITHUKIA

For: COMMISSIONER OF LANDS

88. It is imperative to note that there was no surrender of grant as at 25th November, 1981. Moreover, there was an illegality when titles and leases were issued directly to the purchasers instead of the owners of 10492 and therefore taking away the original owner's property unprocedurally. There is no evidence that former president bought the suit property from the owner. What the former president has produced is the lease and the white card but no evidence of purchase. There was no application by the former president for allocation of the suit property and that it is evident that the former president allocated the property to himself disregarding the advice of the commissioner of lands that the whole property originally 10492 be registered in the names of the original owners and that the same to be transferred to the buyers.

89. In a letter annexed in the affidavit of Ezekiel Kiptoo and Ernest Kibet filed on 18th May 2015, addressed to the commissioner of lands by the director of surveys, it is stated dated 12th January 1982 it is stated:-

12th January, 1982

The Commissioner of Lands,

P. O. Box 30089,

NAIROBI

URGENT

RE: SUBDIVISION OF L. R. NO. 124.29 WHICH IS NOW PARCEL 10 OF BLOCK XV
ELDORET MUNICIPALITY

The survey of the above which was executed under verbal instructions from the Controller of State House has been done.

The Survey has however been approved on condition that an approved development plan of the same is provided.

The particulars of the survey are:

Plan Number IR.156/123.

Parcel Numbers 237-239 with areas 9.664 Ha, 4.854 Ha and 21.454 Ha respectively.

The plots fall under Block XV.

The R.I.M. will be amended when my survey fees of Shs.5,810 are paid and an approved development plan provided.

Yours faithfully,

HENRY F. K. WAMBUA

DIRECTOR OF SURVEYS

C.C. Comps.18727

Provincial Surveyor,

P. O. Box 410,

NAKURU

90. This letter demonstrates that there was interference with the whole process of the subdivision of the land by state house which led to the land being subdivided unprocedurally without an approved development plan.

91. Article 40 of the constitution of Kenya provides that;

(1) *Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property-*

(a) of any description; and

(b) in any part of Kenya.

(2) *Parliament shall not enact a law that permits the State or any person-*

(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or

(b) to limit, or in any way restrict the enjoyment of any right under this Article on the basis of any of the grounds specified or contemplated in Article 27(4).

(3) *The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation-*

(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or

(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that-

(i) requires prompt payment in full or just compensation to the person; and

(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.

(4) Provision may be made for compensation to be paid to occupants in good faith of land acquired under clause (3) who may not hold title to the land.

(5) The State shall support, promote and protect the intellectual property rights of the people of Kenya.

(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired

92. **Lord Denning MR in Priest –v- Secretary of State [1982] 81 LGR 193,198 held that;**

‘there is also no doubt that no citizen is to be deprived of his land by the State or any public authority against his wish unless expressly “authorized” by law and public interest also decisively demands so’.

93. **Articles 3, 12 and 17 of the Universal Declaration of Human Rights, 1948** provide that a State’s obligation is to respect and protect of private property as well as safety of the person.

94. **Article 2 (5) of the Constitution** recognizes International law as forming part of our domestic law or sources of law. In the circumstance, thereof the invasion of the Petitioners’ suit land and failure of the State to protect their property run afoul of **Articles 3, 12 and 17 of the Universal Declaration of Human Rights 1948** herein above stated.

95. In the case of **R vs Chief Immigration Officer (1976) 3 AER 843**, Lord Denning stated thus regarding the Universal Declaration of Human Rights;

“... Among the important rights which individuals traditionally have enjoyed is the right to own property. This right is recognized in the Universal Declaration of Human Rights (1948). Article 17(1) which states that everyone has the right own property and Article 17(2) guarantees that “no one shall be deprived of his property” The contention of the State counsel negates this right. An intention to provide for arbitrary infringement of human rights cannot be attributed to the legislature unless such intention is unequivocally manifest. When Parliament is enacting a statute, the court will assume that it had regard to the Universal Declaration of Human Rights and intended to make the enactment accord with the Declaration and will interpret it accordingly...”

96. The Petitioner has alleged violation of his constitutional rights, to property under **Article 40** of the **Constitution**.

97. Section 24 stipulates as follows:

Subject to this Act—

(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto; and

(b) the registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied or expressed agreements, liabilities or incidents of the lease.

98. Section 25 of the act provides:

(1) *The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and

(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.

(2) *Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

99. Section 26 is to the effect that:

Certificate of title to be held as conclusive evidence of proprietorship

(1) *The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—*

(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or

(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

(2) *A certified copy of any registered instrument, signed by the Registrar and sealed with the Seal of the Registrar, shall be received in evidence in the same manner as the original.*

100. On the claim by the 2nd respondent that he was an innocent purchaser for value and without notice of any defect, this court did not see any agreement of sale and evidence of payment of consideration and therefore it is not clear how the second

ARE THE PETITONERS ENTITLED TO THE PRAYERS SOUGHT

101. Article 23 of the constitution provides for the reliefs the court should grant in such matters thus: -

1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(2) Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including--

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

102. The upshot of the above is that there is no remedy the High Court is unable to grant under the constitution. This fact emerges clearly from Article 23 (3) of the constitution on the remedies the court can grant. The court is empowered to grant appropriate relief, including declaration of rights, injunctions and conservatory orders among others, leaving no doubt that the reliefs grantable by the court are inexhaustible. They are at the discretion of the court depending on the facts and circumstances of each case. The Environment and Land Court is a court of equal status with the High Court and clothed with jurisdiction in disputes relating to land and environment and is enjoined to grant similar reliefs in matters within its jurisdiction.

103. As to what an “**appropriate remedy**” is I can do no better than refer to the definition adopted by the constitutional court of South Africa in the case of *Fose v Minister of Safety and Security* 1997(3) SA786 (CC) (7) BCLR 851 CC that;

“Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...In our context an appropriate remedy must mean an effective remedy”.

104. In *Minister of Health & Others v Treatment Action Campaign & others* [2002] ZACC 15; 2002(5) SA 721 BCLR (CC), the same court observed that where a breach of any right has taken place, a court is under a duty to ensure that effective relief is granted, the nature of the right infringed and the nature of the infringement providing guidance as to the appropriate relief in the particular case.

105. In that regard, therefore, it is clear from both Articles 22 and 23 as read with Article 162(2) b of the constitution and section 13(3) of the Environment and Land Court Act no 19 of 2011 that the court is to *redress denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. That implies a petitioner would have to move the court for purposes of determining violation of rights and fundamental freedoms and thereafter, the court on being satisfied as to the violations, would prescribe appropriate redress on the basis of the facts and circumstances of the case.*

106. This court finds that the petitioners were illegally dispossessed of the Suitland and for that reason I do find that the petitioners are entitled to a redress. Though cancellation of title is an available remedy, the appropriate remedy is compensation in terms of the value of the suit property without improvements as the respondents have heavily invested on the Suitland and have been in possession for a long period of time.

107. On the issue of Laches, ***it is my considered view that bearing the nature of the claim herein and the period of delay, approximately 30 years and the circumstances surrounding the petition and the persons alleged to have been behind the process and the fact that there is no clear provision of the period of time for commencing such petitions, the petition is not defeated by laches. Moreover, this Court takes judicial notice that the general elections of 2002 brought to this country change of regime that led to a new wave of litigation in respect of violation of human rights. Those who feared victimization woke up to a new era where they could petition for their rights without fear.***

108. On Compensation, the petitioners rely on the report filed by the Afriland Valuers Ltd dated the 25th January 2018 which put the value of the property at kshs. 1,710,000,000. According to Afriland Valuers Ltd, the parcel measures twenty-one decimal four five four (21.454) hectares or 53.012 acres, approximately. Records availed to us indicate that the parcel of land has been sub-divided to three plots as follows:

- a. ELDORET MUNICIPALITY/BLOCK 15/2369 – 1.373 ACRES.
- b. ELDORET MUNICIPALITY/BLOCK 15/2370 – 18.90 ACRES.
- c. ELDORET MUNICIPALITY/BLOCK 15/2371 – 0.404 ACRES.

109. The resultant plots measure a total area of 20.677 acres while the mother plot measures 53.013 acres as per entries in the Green card. The Leasehold interest for the remainder of a term of 925 years and 3 months with effect from 1st August, 1883.

110. According to Afriland Valuers, the ownership of the property is contested. The property is stated to be owned by NOAH KIPNY'ENY ARAP CHELUGUI but was registered in the name of HIS EXCELLENCY DANIEL TOROITICH ARAP MOI of P. O. Box 40530, Nairobi on 21st September, 1983.

111. The same title is shown as surrendered on 2nd March, 2007 and new titles numbers Eldoret Municipality/Block 15/2369, 2370 and 2371 all issued to Daniel Toroitich Arap Moi who in record appears to have transferred as follows: Eldoret Municipality/Block 15/2369 to Raiplywoods (K) Limited, P. O. Box 241, Eldoret – 1.373 Acres. Eldoret Municipality/Block 15/2370 to Raiplywoods (K) Limited, P. O. box 244, Eldoret – 18.90 Acres. Eldoret Municipality/Block 15/2371 – Kobil Petroleum Limited, P. O. Box 30322 – 00100, Nairobi – 0.404 Acres.

112. The property is claimed by multiple owners. The mains water, sewer and electricity are available in the neighborhood and can be connected to the property when desired. Access road to the property is tarmacked is in a good state of repair and maintenance. Shopping facilities, social amenities and other social services are available within Huruma area and Eldoret Municipality Central Business District.

113. This is a large parcel of land that is largely not developed and has Kobil Petrol Station developed on approximately one acre. Part of the parcel is also under agricultural use comprising mainly of seasonal crops mainly wheat farming. The developments on the parcel of land are not considered in this valuation.

114. The parcel of land is occupied by entities who are not recognized by the owners. At the time of inspection, the parcel of land was largely not developed but had a portion developed with a petrol station.

115. This is a prime parcel of land that is located in a busy commercial and residential area of Eldoret Municipality with residential, commercial, industrial, institutional, government and agricultural establishments. Eldoret to Malaba road is the main road within Eldoret and land or properties that touch it have the highest values in any zone of the municipality. The subject parcel has about 10 acres along the road which can be developed with maximum commercial returns.

116. A sizeable part of the land borders Eldoret Malaba Highway and is largely not developed with high demand and values. Demand for the land and developments in the neighbourhood is high. The parcel of land has been sub-divided into three units of different sizes and appropriated by individual and corporate owners. One Portion is developed with Kobil petrol station which appears to be thriving with notable customer traffic. The un-developed portions fronting the highway can be developed with shopping Malls, Hotels, offices and other mixed developments that can utilize it to the highest and best use.

117. The highest and best use of this parcel of land varies from Commercial, office, institutional, multi-storey and single storey residential to light industrial. In the immediate neighbourhood is developed Nyathiru Hotel, Raiply timber processing factory, Kenya Pipeline depot, University premises and other

commercial developments.

118. In arriving at the open market value, they have taken into account similar comparable (properties in the neighborhood that have sold in the recent past. The open market value returned here below would be the expected/ estimated realization price of the property if placed in the market on a willing buyer willing seller basis at an arm's length transaction. The valuers did not take into consideration existing developments on the parcel of land as they were not done by the owner and are not authorized but took into consideration the current market values of as evidenced by transactions in the market.

119. Their valuation is therefore for vacant un-developed land. ***The Afriland valuers therefore valued*** the above property as TITLE NUMBER ELDORET MUNICIPALITY/BLOCK 15/239, ELDORET MUNICIPALITY, for Court Petition Purposes, free from all encumbrances thus the Current Open Market Value: Kshs. 1,710,000,000.00 (In Words: Kenya Shillings One Billion Seven Hundred and Ten Million) and Kshs. 244,744,520.60 being the loss of benefits.

120. On the other hand, the Attorney General filed a valuation report of the suitland being Eldoret Municipality block 15/239 (now subdivided into 2369, 2370 and 2371) Uasin Gishu County for court purpose. Under instructions received from office of the Attorney General vide a copy of letter dated 27th April, 2018 to inspect and advice on the current market rent upon Eldoret Municipality Block 15/239 for court purposes: Here under is the report.

121. **According to the County Land Valuer**, the property is situated along Eldoret-Uganda Highway within Huruma residential estate about 5 km West of Eldoret town. It neighbours Kenya Pipeline to the North and Raiply Timber Factory to the east and King'ong'o residential estate to the west. The property was inspected on 25.04.2018 which was adopted as the date of valuation. The three plots measure as follows, 2369 - 1.373 Ha, 2370 – 18.9 Ha, 2371 – 0.41 Ha. Nos 2369 and 2370 are registered in the name of Raiplywoods Limited while 2371 is registered in the name of Kobil Petroleum Ltd. Leasehold titles of 99 years effective from 1.8.1983 at annual ground rents of Kshs.11,390, Kshs.126,000 and Kshs.5,985 respectively. The user is light industrial purposes for plot Nos. 2369 and 2370 while 2371 is a petrol station. There are no encumbrances registered against the titles as the time of valuation. The entire property is right angled triangle shaped with two of its boundaries open while one is a perimeter wall. An all-weather road dissects the property into unequal sections. The ground is level and comprises of red to loam soil that are well drained.

122. Main services water and power connected. Immediate access road the highway is tarmacked including the internal road. The property has several developments but for purposes of this valuation the developments are not considered.

123. **The County Valuer** basis of valuation is the market value. Market value is defined as the estimated amount which an asset should exchange on the date of valuation between a willing buyer and a willing seller in an arm's length transactions after proper marketing where both parties acted knowledgeably, prudently and without any compulsion.

124. **The Methodology** applied are sales comparables within neighbourhood as well as subdivision concept. The land is strategically located within a developed neighbourhood.

125. **Ultimately the county valuer put the current Market value of the property thus** Eldoret Municipality Block 15/239 now 2369, 2370 and 2371 exclusive of developments is cumulatively Kshs. 820,000,000 (Read Kenya shillings Eight Hundred and Twenty Million Only).

126. I have considered the two valuation reports and do find both valuers did not do a comparative valuation of the adjacent plots and further no sale agreements of the neighbouring plots was availed to the valuers. However, I do find evidence that the property is prime within the municipality of Eldoret and along Uganda road and therefore Kshs.1,060,000,000 (ONE BILLION AND SIXTY MILLION SHILLINGS) is a commensurate compensation to the Petitioners for loss of their land through an unprocedural scheme. I do find that the petitioners have established their case and do grant the following

orders:

a. A declaration that the petitioners constitutional right to property and/or interest in or over the property Eldoret Municipality/Block 15/239(53 acres) Registered In The Name Of His Excellency the Retired President Daniel Toroitich Arap Moi and subsequently Rai Plywood(K) Ltd all in Uasin Gishu District deserves the protection by the Honourable court and that the protection do issue accordingly in terms of the declarations that the acquisition of the said properties by the 1st and 2nd respondents were arbitrary unconstitutional, irregular, unprocedural, tainted, a nullity *ab initio* and therefore not worthy of any constitutional protection.

b. The 1st and 2nd respondents do pay and are hereby ordered to pay the estate of the Late Noah K. Chelugui the prompt payment in full of just and current market value of the said properties being compensation for the land illegally registered in the name of the former president and subsequently transferred to the 2nd respondent being Kshs. 1,060,000,000 which is a commensurate compensation for the Petitioners. I do find that the petitioners have not demonstrated that they are entitled to Mesne profits. Costs of the petition to the petitioners.

Dated and delivered at Eldoret this 8th day of May, 2019.

OMBWAYO

JUDGE