



**Kibet (Suing on behalf of the Estates of Kiptot Arap Sitienei and Joseph Arap Korir - Deceased) v Uasin Gishu County Government & 5 others; Omwenga & 3 others (Interested Parties) (Environment & Land Petition 10 of 2013) [2018] KEELC 4855 (KLR) (12 January 2018) (Judgment)**

*Pius Kibet Tott v Uasin Gishu County Government & 9 others [2018] eKLR*

Neutral citation: [2018] KEELC 4855 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT & LAND PETITION 10 OF 2013**

**A OMBWAYO, J**

**JANUARY 12, 2018**

**IN THE MATTER OF BREACH OF FUNDAMENTAL RIGHTS AND FREEDOMS  
CONTRARY TO ARTICLE 40, CHAPTER 4 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF CONTRAVENTION OF RIGHT TO OWN PROPERTY  
CONTRARY TO ARTICLE 40 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF THE LOCAL GOVERNMENT ACT**

**AND**

**IN THE MATTER OF REGISTRATION OF TITLES ACT CHAPTER 280, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE REGISTERED LANDS ACT, CHAPTER 300, LAWS OF KENYA**

**BETWEEN**

**PIUS KIBET (SUING ON BEHALF OF THE ESTATES OF KIPTOT ARAP  
SITIENEI AND JOSEPH ARAP KORIR - DECEASED) ..... PETITIONER**

**AND**

**UASIN GISHU COUNTY GOVERNMENT ..... 1<sup>ST</sup> RESPONDENT**

**THE NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> RESPONDENT**

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



**MINISTRY OF LANDS, HOUSING & URBAN DEVELOPMENT .... 4<sup>TH</sup>  
RESPONDENT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> RESPONDENT**

**MINISTRY OF DEVOLUTION AND PLANNING ..... 6<sup>TH</sup> RESPONDENT**

**AND**

**EZEKIEL OMWENGA ..... INTERESTED PARTY**

**TITUS GATTITU NJAU ..... INTERESTED PARTY**

**JOSEPH JOEL METHU ..... INTERESTED PARTY**

**JOHN KIGEN KATWA ..... INTERESTED PARTY**

## **JUDGMENT**

### **Petitioners Case**

1. Pius Kibet Tott (hereinafter referred to as the petitioner) has come to this court by way of further amended petition stating that he is the Administrator of the Estate of Kiptot Arap Sitienei deceased, and has brought this petition on behalf of the said estate, and with the authority of Paul Cheruiyot Bittok and Samwel Bittok, the heirs and administrators of the estate of Joseph Arap Korir (Deceased), on behalf of the estate of Joseph Arap Korir (deceased);
2. The 1<sup>st</sup> Respondent is Uasin Gishu County Government duly established under the Kenya Constitution.
3. The 2<sup>nd</sup> Respondent Is a Constitutional Commission and a successor in title to the Commissioner of Lands, responsible and accountable for matters relating to land status, ownership and transaction in the Republic of Kenya and its address of service shall be care of P.O Box 30450, Nairobi.
4. The 3<sup>rd</sup> Respondent is a civil servant responsible and accountable for matters relating to land status, ownership and transaction in the Republic of Kenya.
5. The 4<sup>th</sup> Respondent is a Government Ministry in charge of land and it is under the said Ministry that the 2<sup>n</sup> and 3<sup>rd</sup> Respondent serve and are authorized by law to, among other duties, register land, allocate, effect compulsory acquisition and or conversion of titles.
6. The 5<sup>th</sup> Respondent is the Attorney General, the Chief Legal Advisor to the Government.
7. The 6<sup>th</sup> Respondent is a government ministry charged with the responsibility of coordinating Devolved Government and Planning and a successor in title to the 1<sup>st</sup> respondent herein.
8. The 1<sup>st</sup> to 4<sup>th</sup> interested parties are purchasers of plots within the parcel of land under contention.
9. The 5<sup>th</sup> and 6<sup>th</sup> interested parties allege to be the real owners of the Suitland having been contributors to the purchase of the Suitland and having purchased the interest of the deceased persons.
10. The petitioner alleges that at all material times to this suit, the deceased persons were and are the bona fide registered owners and proprietors of all that parcel of land referred to as L.R.8500 I. R. 11404 registered under the Registration of Titles Act, Cap 281, Laws of Kenya (repealed).



11. The deceased persons purchased the suit property in 1964 and for purposes of the purchase, applied for and obtained a loan facility from Kenya Land and Agricultural Bank and Agricultural Finance Company, which loan was subsequently repaid; and on the 29<sup>th</sup> October 2001, the deceased persons obtained a discharge of the loan encumbrances from their title.
12. That it is the petitioner's case that after repaying the loan facility and securing a discharge of charge of the suit land herein, the deceased persons sought to take possession and enjoy all the proprietary rights that go with such registration, only to discover with so much surprise that the 1<sup>st</sup> to 4<sup>th</sup> respondents had purported to unlawfully enter the petitioners' suit property with the view of surveying and subdividing it. Moreover, the 1<sup>st</sup> respondents had purported to apply for and obtained from the 2<sup>nd</sup> respondent a variation of land registration regime from Registration of Titles Act cap 281, to that under Registered Lands Act, Cap. 300, Laws of Kenya and as a consequence thereof, land Parcel L.R.8500 I.R. 11404 thereby became Eldoret Municipality Block 22 (Langas).
13. The 1<sup>st</sup> to 4<sup>th</sup> respondents jointly and/or severally purported to unlawfully subdivide the suit land into thousands of resultant titles under the subsequent regime of registration, with the intention of offering the new leases for sale to third parties.
14. The 1<sup>st</sup> respondent, purporting to be owner and proprietor of the petitioners parcel of land herein, had settled third parties and or offered for sale at a consideration the new parcels of land to the general public; and in response, the 1<sup>st</sup> respondent received thousands of lessees who purchased varying sizes of plots, and the suit land has since been developed into what is the sprawling modern day Langas Estate located just opposite Eldoret Polytechnic along Kisumu road within Eldoret Municipality.
15. The petitioner's complaint is that the respondents have generally committed acts of trespass upon the petitioners' title and property ownership status of the suit land herein. In the said process, the 1<sup>st</sup> and 4<sup>th</sup> respondents apportioned the 1<sup>st</sup> respondent 188.40 Ha of the suit land for public educational, health, industrial, recreational transport etc. utilities. And it is on the said portion of the suit land that public institutions such as Langas Primary, Langas Health Centre, Kapkenduywa Primary School, 2 Proposed Secondary Schools, Langas Municipal Market, Chief's Camp, Public Road Net Work, and Sewage System inter-alia.
16. According to the petitioner, the grant of certificate of title deed was not surrendered and remain good title, as the original was never surrendered to the registrar or at all for cancellation, and remained in custody, care and control of the petitioners deceased father and that under sections 34, 35 and 36 of the Registered Titles Act, it is a requirement that conversion shall be by delivery of the grant of certificate of title deed, and the registrar to enter any dealings on the same, the 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> Respondents have never or at all complied with the requirements of Sections 7, 8, and 9 of the Trust Lands Act, nor did they seek to move under the Compulsory Acquisitions Act, thereby depriving of interest in the Land without compensation or at all to the Petitioners thereby breaching the provisions of Section 75 of the old constitution and subsequently Article 40 of the New *Constitution of Kenya, 2010*.
17. The respondents' actions as set out above were done despite the 1<sup>st</sup> respondent being a local authority and therefore an agent of the central government and the 2<sup>nd</sup> and 3<sup>rd</sup> respondent being Land Commissioner and Chief Lands Registrar respectively and therefore, the central government agents on matters of land status, ownership and transactions, their actions were unlawful and in breach of the petitioners' constitutional rights.



18. The petitioner has particularized breach of constitutional rights as follows:-

The respondents violated the petitioners' constitutional rights to own land, have quiet enjoyment and exert all their ownership status rights.

The respondents exceeded the statutory jurisdiction and powers conferred upon a local authority and upon a commissioner of lands and land registrar.

That the respondents did not conform to the laws that would otherwise regulate their actions, especially in purporting to change the land regime from Registration of Titles Act to Registered Lands Act cap300 and in acquiring private land without compensation.

It is apparent that while the petitioners were struggling to repay the loan encumbering the parcel of the land, the respondents were busy making efforts to unlawfully seize ownership, proprietorship and enjoyment of the suit property.

That the respondents did all they did without asking and/or seeking consent and/or consulting and/or notifying and/or informing the petitioner despite knowing the petitioners' identities and addresses.

The petitioners did not consent at any given instance to the respondents' acts of violation of their rights and entitlements.

The respondents committed the acts of violation without any title document and without any iota or colour of right and all the actions were unlawful, illegal and vain.

19. It is the petitioners' prayer that the respondents' actions already committed in purporting to change the registration regime from the Registration of Titles Act Cap 281 Laws of Kenya to the Registered Land Act, Cap. 300 laws of Kenya and in purporting to sub-divide the land parcel, settle third parties and or offer for sale and solicit for purchase consideration be nullified, the respondents be restrained from further acts of trespass. In the alternative and without prejudice to the above, the petitioners aver that the conversion and subsequent alienation or issue of leases to 3<sup>rd</sup> parties have deprived the petitioners of their proprietary interest in the land thereby occasioning loss and therefore, the petitioner claims damage particularized thus loss of one thousand and fifty acres (1,050 acres) of prime, residential, commercial and or agricultural land whose total current market value is Kshs.7,700,000,000 per acre and Loss of user in the sum of Kshs.1,089,799,200/= since 1984.
20. The petitioner therefore precisely prays for a declaratory order holding that the proprietary interest in land parcel 8500 I.R. 11404 otherwise known as Eldoret Municipality Block 22 (langas) vests in the petitioners absolutely.
21. Secondly, the petitioners pray for a declaratory Order holding that the 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> respondents' seizure of the petitioners' property known as Land parcel 8500 L.R. 11404 otherwise known as Eldoret Municipality Block 22 (langas) without the petitioners' consent and without compensation was unconstitutional.
22. Thirdly, the petitioners pray for a declaratory order holding that the conversion and subsequent subdivision of Land Parcel L.R 8500 L.R. 11404 otherwise known as Eldoret Municipality Block 22 (langas) violated the proprietary rights of the petitioners under Article 75 of the Independent Constitution and Article 40 of the new constitution of Kenya, 2010.
23. Fourthly, the petitioners pray for a declaratory order holding that the. conversion of regime of registration of the suit land, opening of a Land Register for Eldoret Municipality Block 22 Langas the



- subdivision and subsequent transfer of resultant lots or lease titles by the 1<sup>st</sup> Respondent to 3<sup>rd</sup> parties was null and void for all intent and purpose.
24. Fifthly, a declaratory order holding that the only valid Register and Title Deed relating to the suit land herein is L.R 8500 - I.R. 11404 under the then Registered Titles Act, Cap. 280 and an Order of rectification by Closure of the Register for Eldoret Municipality Block 22 (langas).
  25. Sixthly, an order of eviction against the 1<sup>st</sup> and 4<sup>th</sup> respondents and 3<sup>rd</sup> party beneficiaries from L.R 8500 – I. R. 11404.
  26. In the alternative, an Order of mandamus compelling the 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> respondents to jointly and or severally pay Kshs.7,700,000,000 billion being fair compensation for the true market value of the suit land herein as per current Valuation Report and that 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> respondents be condemned by Order of mandamus to pay the petitioners mesne profits in the sum of Kshs.1,089,799,200/= billion on account of loss of user since 1984 to date plus Costs of the petition.
  27. Last but not least, the petitioners pray that the Honorable Court do issue an Order of rectification by Closure of the register for Eldoret Municipality Block 22 (langas). and an order of eviction of the 1<sup>st</sup> respondent and 3<sup>rd</sup> party beneficiaries.
  28. In the supporting affidavit of Pius Kibet Tott, he states that he is the administrator of the estate of Kiptot Arap Sitienei (deceased) while Paul Cheruiyot Bittok And Samwel Bittok are the heirs and administrators of Joseph Arap Korir (deceased). That his co-administrators namely Paul Cheruiyot Bittok And Samwel Bittok have authorized him to file this petition on behalf of the estate of Joseph Arap Korir (deceased). The facts deponed to herein are facts known of his own knowledge and those based on information given to him by his father Kiptot Sitienei prior to his demise and by his co-competitioners/co-administrators namely Paul Cheruiyot Bittok And Samwel Bittok on facts relating to the estate of Joseph Arap Korir (deceased).
  29. That Kiptot Sitienei (deceased) informed him, which information he verily believes to be true that in the early 60s' he and his partner Joseph Arap Korir (deceased) bought land Parcel L.R. 8500, I. R. 11404 (measuring approximately 1050 acres at a consideration of Kshs.161,920/= from Gordon Edward Goby And Lionel Roy Nesfield Strange, who were the Registered owners. That the deceased persons obtained loan from the Kenya Land and Agricultural Bank and Agricultural Finance Company to finance the purchase of the suit land herein.
  30. The loan was subsequently repaid and a discharge of charge was issued in September, 2000 and a Memorandum of Discharge of Charge by deposit of document of title No. I.R. 11404, L.R. No. 8500 was issued in the year 2001. That meanwhile, in 1983 or thereabouts, the 1<sup>st</sup> respondent's predecessor —Municipal Council of Eldoret and the District Physical Planning Department - Uasin Gishu, apparently applied to the 4<sup>th</sup> respondent for change of user of the suit land herein with the intention of planning the same for urban settlement. That in response to the said application, the 2<sup>nd</sup> respondent's predecessor made several correspondence one of which was dated 18<sup>th</sup> December 1984, addressed to the District Physical Planning Officer and the 1<sup>st</sup> respondent and copied to the registered owners, which letter was to the effect that the District Physical Planners and the 1<sup>st</sup> respondent were apparently in the process of planning the said parcel of land for the 1<sup>st</sup> respondent's development plans, without the consent or knowledge of the registered owners.
  31. Despite concerns expressed by the 2<sup>nd</sup> respondent's predecessor and the strong objection by the registered owners, the said District Physical Planning Officer and the 1<sup>st</sup> respondent proceeded to change the regime of registration of the suit land from that under Registration of Titles Act, Cap.



281 to that under Registered Land Act Cap. 300, had the same planned into residential, commercial and public utility purposes, then proceeded to survey and subdivide the same accordingly with the intention of issuing title deeds to third party beneficiaries.

32. Pursuant to the foregoing, the 1<sup>st</sup> respondent's predecessor subsequently instructed M/S A.G. N. Kamau & Co. Advocates on the 23<sup>rd</sup> December, 1996 to prepare leases for Langas estate plots —the suit land herein. That by the year 2002, the 1<sup>st</sup> to 4<sup>th</sup> respondents had apparently concluded the process of the unlawful seizure, change of regime of registration, subdivision, and allocation of the resultant plots to itself and to third parties and that all that remained was payment of the 1<sup>st</sup> respondent's advocate's fees.
33. On the 3<sup>rd</sup> October 2002, the firm of A.G.N. Kamau & Co. Advocates sought to tax their bill of cost against the 1<sup>st</sup> respondent's predecessor by filing Advocate - Client Bill of Cost vide Eldoret High Court Misc. Cause No. 274 OF 2002 and that in the said cause, Mr. A.G.N Kamau Advocate attached documents detailing the among others, the following particulars;

Instructions to prepare leases in favour of third party beneficiaries of the suit land.

A valuation report detailing the work done by the 1<sup>st</sup> respondent's agents and the value of the suit land as of 6<sup>th</sup> September, 2002.

A list of all beneficiaries of the resultant plots as of the said date.

R.I M and area list resulting from subdivision of the suit land herein.

Survey maps.

A letter informing the 1<sup>st</sup> respondent that the 2<sup>nd</sup> respondent allocated it the suit land.

A letter confirming that the 2<sup>nd</sup> respondent approved the Part Development Plan for the suit land herein.

34. The Petitioner contends that despite the deceased herein being the registered owners, the 1<sup>st</sup> to 4<sup>th</sup> respondent acted in concert to unlawfully deprive them of their lawful property and that in utter breach of their constitutional rights to property and therefore: -

The respondents had purported to be the owners and proprietors of petitioners' suit land herein when they were not.

The respondents had purportedly applied for and obtained variation of land registration regime for the suit land herein from Registration of Titles Act, Cap 281 to Registered Lands Act, Cap 300.

The respondents had purported to unlawfully enter the suit property, surveyed and sub-divided it.

The respondents had purported to invite third parties to settle and or purchase the resultant parcels of land.

The respondents jointly and or severally purported to receive survey and conveyance fees for transfer of the resultant plots herein in favour of 3<sup>rd</sup> party beneficiaries.

The respondents had generally committed acts of trespass, fraudulent and unlawful alienation of private property.

35. According to the petitioner, the 1<sup>st</sup> respondent and its predecessor have since engaged in unlawful collection of levies in the form of rates, rent, license fees and other charges from lessees/occupants who live and or operate businesses within the suit land and that as a result of the 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> respondents' unlawful acts, the registered owners sought legal redress by filing a suit vide High Court of Kenya at



Nairobi Civil Suit No. 476 of 2002 (Kiptot Arap Sitienei & Another =vs= Eldoret Municipal Council & Two Others) which matter was Subsequently transferred to Eldoret High Court and renumbered ELD HCC NO 14/2003. That in response to the said suit, Nairobi High Court Civil Suit No. 476 of 2002, the 1<sup>st</sup> respondent filed a defence dated 10<sup>th</sup> April 2002, in which it states in part that it had indeed undertaken the planning works on the suit land and obtained a world bank loan to facilitate the provision of infrastructure on the suit land which loan was to be repaid by the settlers on the suit land. It was a condition for grant of the said loan that the settlers would be issued title deeds and that It complied with all the provisions of the law in facilitating the issuance of title documents. It did not have any proprietary interest in the suit land and that it only played a facilitator's role. The respondent's actions were therefore unlawful and fraudulent and unconstitutional

36. Contrary to the 1<sup>st</sup> respondent's claim that it did not have proprietary interest in the suit land herein, it has since surfaced from page 23 of The Langas Advisory Plan dated 2005/2006, that was developed by the Department Of Physical Planning under the 4<sup>th</sup> Respondent that during the subdivision process, the 1<sup>st</sup> respondent reserved for itself 188.4 Ha of the suit land for industrial, educational, recreational, health, transport, market and other public utilities and that pursuant to the said advisory plan, the World Bank apparently advanced the 1<sup>st</sup> and 4<sup>th</sup> respondents a further credit for purposes of upgrading informal settlements within the suit land. The loan was granted on the following conditions:

The informal settlement must be on government land or on land with a clear ownership status.

The government must demonstrate that the area to benefit from the said loan has a Part Development Plan and detailed mapping.

Only settlements with a Part Development Plan approved by the Ministry of Lands would benefit.

The government would issue allotment letters to the beneficiaries of the project.

The government would prepare and issue title deeds to the beneficiaries.

The Ministry of Lands would work on tenure regularization - even without necessarily issuing title deeds.

37. In the cause of this petition, he has since come to learn vide the affidavit sworn on 17<sup>th</sup> September, 2012 by Stanislas Ondimu the then clerk to the then 1<sup>st</sup> respondent's predecessor, that the World Bank advanced further loans in hundreds of millions of Shillings to the 1<sup>st</sup> and 4<sup>th</sup> respondent for purposes of constructing roads, high mast floodlights, sewage systems, an ablution block, schools, markets and health facilities within the suit land. That in the annual budget proposal read on 28<sup>th</sup> June 2012 for the financial year 2012-2013, Eldoret Municipal Council (the 1<sup>st</sup> respondent's predecessor), set aside about Kshs.3,500,000/= of its own money for construction of Municipal schools' classrooms within the suit land herein.
38. It is their case that respondents' actions in purporting to unlawfully deprive them of their proprietary rights over the subject land herein, change the registration regime, subdividing the suit land, allocate, settle or offer the resultant plots for sale to third parties and incurring a public debt on the strength of the suit land; without first seeking their consent or in alternative compensate under the provisions of the law on compulsory acquisition, was unlawful, fraudulent as was unconstitutional.
39. As a result of the 1<sup>st</sup> to 4<sup>th</sup> respondents' action, they lost the entire parcel of land, first to the 1<sup>st</sup> and 2<sup>nd</sup> respondents who were the greatest single beneficiaries having unlawfully and fraudulently appropriated 188.4 Ha. of the suit land to themselves; and secondly, to third parties to whom the 1<sup>st</sup> respondent fraudulently and or unlawfully issued plot numbers and occupation permits for plots covering 236 Ha of the suit land. In fact, the 1<sup>st</sup> respondent in its replying affidavit dated 25<sup>th</sup>



November, 2011 and filed on 28<sup>th</sup> November 2011, confirmed that it maintains a register of the 3<sup>rd</sup> party beneficiaries and that it charges rates, rent and other statutory levies from them.

40. The 1<sup>st</sup> Respondent's predecessor had so much faith in the validity of its action that on the 7<sup>th</sup> June 2011, it bought that portion of land purportedly known as "Plot No. 210 Langas Phase 1 Block 3" measuring 1 acre for expansion of Municipal market land from third party beneficiaries named Benjamin Magut and Emily Chebii without title deed and that the suit land herein has since been fully developed with over 400,000 residents living thereon and the 1<sup>st</sup> and respondents are going on with their own projects and projects sponsored by the World Bank even as at the time of filing this further amended petition. That in the circumstances, it is only fair that the respondents jointly and severally pay them damages for loss of lawful property as a result of the 1<sup>st</sup> to 4<sup>th</sup> respondents' acts that breached their constitutional right to property.

### **1<sup>st</sup> Respondent's Response:**

41. The 1<sup>st</sup> respondent denies that she unlawfully entered into the suit property with a view of surveying and sub-dividing it and that she had purported to apply for and or obtained from the 2nd Respondent a variation of the land registration regime from the Registration of Titles Act (Cap 281) to that under the Registered Lands Act, Cap 300 and further denies that land parcel number L.R 8500 1.R 11404 was ever converted to become Eldoret Municipality Block 22 (langas).
42. She denies that she jointly and or severally with the other Respondents purported to unlawfully subdivide the suit land into thousands of resultant titles under the regime of registration with the intention of offering the new leases for sale to third parties. She denies that purporting to be the owner and proprietor of the petitioner's parcel of land herein had settled third parties and or offered for sale at a consideration the new parcels of land to the general public. The 1<sup>st</sup> Respondent further denies that she received thousands of lessees who purchased varying sizes of plots and denies that the suit land has since been developed into what is the sprawling modern day Langas Estate located just opposite Eldoret Polytechnic along Kisumu road within Eldoret Municipality.
43. She further denies that she has generally committed acts of trespass upon the suit land and or interfered with the title thereto and or the property ownership status of the suit land. The 1<sup>st</sup> Respondent denies specifically that she apportioned 188.40 Hectares of the suit land for Public, Educational, Health, Industrial, recreational, transport and other utilities and that it is on the said portion of the suit land that Public Institutions such as Langas Primary, Langas Health Centre, Kapkenduywa Primary School, 2 Proposed Secondary Schools, Langas Municipal Market, Chief's Camp Public Road Network and the Sewage system are located.
44. The 1<sup>st</sup> respondent avers that it has never sold, offered for sale, leased and or in any other way conferred any proprietary interest on any of the parties currently occupying the suit land. The 1<sup>st</sup> Respondent contends that the possession and or occupation of the suit land is not attributed to it and it is in no way connected to such any action on its part.
45. The 1<sup>st</sup> Respondent denies all the allegations that she is a trustee of the petitioner and or that she never complied with the provisions of sections 7, 8 and 9 of the Trust Lands Act and or that she was obliged to compulsorily acquire the land and the allegations of breach of the provisions of *the constitution*, compulsory acquisition Act and or the Trust Lands Act and the Petitioner is therefore invited to strict proof thereof. She further denies that the Municipal Council of Eldoret was an agent of the Central Government either in law or fact and avers that the Municipal Council of Eldoret was a Local Authority established under the provisions of the Local Government Act and could only perform such functions as were expressly conferred on it by the said statute. The 1<sup>st</sup> Respondent further denies that



- the Municipal Council of Eldoret was an agent of the Commissioner of Lands and or the Chief Land Registrar.
46. She specifically denies that the Respondents violated the Petitioner's constitutional right to own land and or that it has curtailed the Petitioner's alleged quiet enjoyment and exertion of ownership status rights and further denies that she exceeded the statutory jurisdiction and powers conferred upon a local authority and upon a Commissioner of Land and Land Registrar.
  47. The 1<sup>st</sup> Respondent denies that she changed and or participated in changing the user of the land from the Registration of Lands Act (Cap 300) of the Laws of Kenya. The allegation that she did not conform to the laws that regulate the purported change and or that it acquired private land without compensation is not therefore true and the petitioner is invited to strict proof thereof. The 1<sup>st</sup> Respondent further denies that she acquired and or attempted to unlawfully seize ownership, proprietorship and enjoyment of the suit property and that she did anything that is prejudicial to the petitioner's alleged proprietary interest and further denies that she was obliged to seek consent, consult, notify or inform the petitioner of any issue in view of what is stated above.
  48. The 1<sup>st</sup> Respondent denies that she changed the Registration regime for the suit land from the Registration of Titles Act (Cap 281) of the laws of Kenya to the Registered Land Act (Cap 300) of the laws of Kenya and or that she purported to subdivide and or settled, leased, sold, offered to sale and or solicited for purchase consideration from any third parties as alleged and avers that she did not settle and does not know how third parties came to settle on the suit land and that it is not therefore responsible for any such settlement and or alleged trespass.
  49. The 1<sup>st</sup> Respondent denies that the Petitioner has suffered the losses alluded to in the Petitioner's Petition. She particularly denies that the Petitioner lost One Thousand and Fifty acres (1,050 acres) of prime residential, commercial and or agricultural land worth Kshs.7,700,000,000/= Billion and or is entitled to recover loss of user since 1984 and or the sum of Kshs. 1,089,799,200 Billion on account of the profits and loss of user of the suit land from 1984 to date.
  50. The 1<sup>st</sup> Respondent through the replying affidavit of Stanislas Ondimu's, the Town Clerk to the Municipal Council of Eldoret, as it then was, a local authority established under the Provisions of the Local Government Act and the Chief Administrative officer of the council duly authorized by law stated that there is a suit, namely, ELD. HCC No. 14 of 2003 (Formerly NAI HCC No. 14 of 2003) pending in court between Council and the deceased persons on behalf of whose estates this Petition has been instituted. The Petitioners in this petition are seeking compensation in the aggregate sum of Kshs.4,200,000,000.00 against the Respondents plus loss of user from 1984 in the terms set out in paragraph 19 of the petition together with a host of other declaratory reliefs.
  51. He has established from the records held by the council and from the bundle of documents produced by the Petitioners that L.R. No.8500 also known as Langas estate is a highly populated estate which falls within the 1<sup>st</sup> Respondent's boundaries and area of Jurisdiction. That at all times prior to 1990, the area was occupied by several thousands of people who had already occupied the land and apparently subdivided the land into several haphazardly developed plots. He does not know how the said inhabitants came to occupy the parcel of land and did not sell, allocate and or otherwise lease any of the plots to the said occupants. That in or about 1990, the plots forming part of Langas estate were brought on to the valuation roll.
  52. He is aware of his own knowledge having worked in various Local Authorities that under the provisions of the Rating Act every Local Authority is enjoined by law to levy Rates on any land that falls within its area of jurisdiction no matter who the owner or ratable owner of such land is. That he is also aware of



- his own personal knowledge that a Local Authority such as the 1<sup>st</sup> Respondent is under an obligation to plan and control the development being carried out within its area of Jurisdiction.
53. In view of the high density and the haphazard development of Langas Estate, the 1<sup>st</sup> Respondent found it necessary to plan the Estate for inter-alia the purposes of Levying Rates, Provision of requisite infrastructure, to wit, water, tarmac roads and electricity, the orderly and regulated development.
54. The Langas Estate was already being occupied by several people who claimed to have legitimately purchased parcels of land either from the original owners of LR No.8500 or from third or fourth parties who had bought the land from the original owners. That the said persons provided agreements and or other documents to support their assertions to the Municipal Council and the council had no reason to doubt the documents. That both the plot owners and the 1<sup>st</sup> Respondent council recognized that a key component in implementing the planning of the Estate was securing land for public use and ordering and regularizing the ownership of land by surveying and eventually obtaining titles to the various plots. That under what was known as the Eldoret Third Urban Project, the 1<sup>st</sup> respondent obtained a World Bank Loan for funding, inter alia; the construction of a loop tarmac road round the Estate, water supply and Survey works.
55. In executing the project, the plot owners participated either individually or through various groups including the Langas Landlords Self Help Group and Langas Farm Company Limited. That the list of owners, the plots owned and acreage was furnished to the Council by the residents of Langas and the 1<sup>st</sup> Respondent did verify that those people were actually in occupation of the plots for quite some time in view of the age of the structures on the land. That at no time did the Council purport to confer proprietary rights to the owners over the said plot but it merely recognized those rights as presented by the owners themselves. That right from the commencement of the survey exercise, the deceased persons were fully aware of the council's involvement but they never attempted to stop the council from so proceeding.
56. The exercise of surveying Langas Estate was done jointly by the plot owners, the Central Government and the Council, each party playing different roles. That at no time had the council purported to be the owner of the suit land but merely participated in the exercise to facilitate the planning of the estate which was in a haphazard state and that at no time has the council trespassed upon the suit land and the survey work was done with the permission, participation and authority of the various plot owners occupying the suit land. The loan obtained from World Bank was utilized to plan and upgrade the Estate and repayment was to be effected by the Council through collection of rates and other charges payable by the land owners and the suit land was not charged to secure the loan nor does the loan in any way encumber the suit land. That the council has not in any manner whatsoever seized or compulsorily acquired the suit land. That he has perused the entire record of the Petition and the records held by the 1<sup>st</sup> Respondent and there is no evidence that the 1<sup>st</sup> Respondent converted the suit land from the Provisions of the Registration of Titles Act to the Registered Land Act as alleged by the Petitioners. That the grant produced by the Petitioners shows that the land is still registered under the Provisions of the Registration of Titles Act. The 1<sup>st</sup> Respondent has not executed any lease or leases over the suit land in favour of the people the Petitioners now allege to be occupying the land.
57. The 1<sup>st</sup> Respondent has not equally sold any portion out of the said parcels of land to any of the inhabitants of Langas Estate but is only levying rates from people who occupy the respective parcels of land pursuant to the provisions of the Rating Act. He knows of his own personal knowledge that money levied as Rates against any owner of land or any rateable owner does not constitute such a payment a purchase price for the land. The petitioners have not produced any leases duly executed by the 1<sup>st</sup> Respondent in favour of any inhabitant of Langas Estate or a certificate of lease and or Official



Search showing that the 1<sup>st</sup> Respondent sold and or has caused any of the occupiers of Langas estate to be registered as owners of the suit land.

58. The Petitioners have not also produced any evidence to show that the 1<sup>st</sup> Respondent settled any of the occupants of Langas Estate on the parcels of land they occupy. The Petitioners remedy if any therefore lies against the individual occupants of the pieces of land they claim are being occupied by the individuals. That he knows of his own personal knowledge that no leases were executed and or titles issued to any individual following objections by the lawyers acting for the deceased persons and or disputes that arose between the deceased persons and their advocates. That he therefore prays that the Petitioners petition be dismissed.

### **The 2<sup>nd</sup> Respondent's Response:**

59. The 2<sup>nd</sup> respondent through Niuster Bitok Boor states that it is a constitutional body, established under Article 67 of *the Constitution* of Kenya, 2010 and *National Land Commission Act*, 2012 whose mandate include the following functions: -

To manage Public Land on behalf of the National and County Governments.

To recommend a national Land Policy to the National Government.

To advice the National Government on a comprehensive Programme for the Registration of title in Land throughout Kenya.

To conduct Research related to Land and the use of natural resources and make recommendations to appropriate authorities.

To initiate investigations, on its own initiative or on a complaint, into present or historical Land injustices and recommend appropriate redress.

To encourage application of Traditional Dispute Resolutions mechanisms in Land conflicts.

To assess tax on land and premiums on immovable property in any area designated by law.

To monitor and have oversight responsibilities over land use planning throughout the country.

60. She further states that the 3<sup>rd</sup> respondent is charged with duties among others; to register land, allocate, effect compulsory acquisition and or conversion of titles. She confirms that a search carried out in the Nairobi Central Registry on 22<sup>nd</sup> May 2014 establishes that the petitioners are the registered owners of I.R 11404 upon transfer of title to them vide entry No 10, presentation No.474, registered on 15<sup>th</sup> July, 1964 under the Registration of Titles Act, Cap 281, Laws of Kenya.

61. The 2<sup>nd</sup> respondent further confirms that the said search mentioned above reveals in entry No. 11, presentation No.475, registered on the 15<sup>th</sup> July 1964, that the suit land was charged to the Land & Agriculture Bank of Kenya and that in entry No. 12. presentation No.787, registered on 24 May 1964, a memo of charge was registered with Agricultural Finance Corporation.

62. The 2<sup>nd</sup> respondent further contends that the said charge was discharged in entry No.14 presentation No.1087 registered on the 23<sup>rd</sup> November 2001; vide the search mentioned inter alia.

63. The 2<sup>nd</sup> respondent in response to paragraph 17 of the petition denies knowledge of any breach of constitutional rights and avers that their predecessor, the commissioner of lands took all the necessary steps to secure the rights of ownership of the petitioners.



## **Response By The Honorable Attorney General**

64. The Attorney General filed grounds of opposition whose import is that there is no cause of action against the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> respondents and that there is no evidence of the existence of land allegedly known as Eldoret Municipality Block22(langas).
65. The Attorney General states further that there are no allegations made against the 2<sup>nd</sup> and 3<sup>rd</sup> respondents proving the acquisition of the said land and that there is no constitutional issue disclosed in the petition to warrant the grant of the declarations sought. Lastly that the issues pleaded in the petition are civil in nature and ought to be canvassed in a civil suit.

### **The 1<sup>st</sup> To 4<sup>th</sup> Interested Parties Affidavits In Reply To The Petition:**

66. Ezekiel Omwenga Abuga, Titus Gatitu Njau, Joseph Joel Methu and John Kigen Katwa state that they are the Interested Parties herein and have purchased various plots in the disputed parcel of land. Mr. Ezekiel Omwenga Abuga purchased his plot measuring  $\frac{1}{4}$  acre at Langas Estate in 1982 from one Kiplagat Arap Bett as evidenced by a copy of the sale agreement. That he has undertaken development of his plot by erecting thereon his residence and other houses and resides on the said plot together with his family and dependents. The person who sold him his plot was himself a shareholder of Langas Farm Ltd., who was co-owner of that entire plot known as L.R. 8500.
67. The two registered proprietors represented by the petitioner herein were trustees of the original shareholders of an entity called Langas Farm Ltd. which ceased to exist the moment the individual shareholders took up their shares of the land on 17.5.1968. The fact that the initial title which bore the names of Joseph Arap Korir and Kiptot Arap Busienei does not entitle the petitioner and the co-owner to disregard and or disown the interests of the other shareholders, who had already taken out their portions and dealt with them.
68. He is aware of his own knowledge that the petitioner herein and his co-owner have applied and been granted letters of administration in respect of the two registered owners of the suit land. That the petitioner herein and his co-petitioner are yet to apply for confirmation or full grants of letters of administration over the estates of which they are litigating upon in the current cause because they know and are aware that the coplot owners have objections which are yet to be addressed and resolved.
69. The institution of this proceedings and the election of defendants and or respondents was meant to defeat and circumvent the confirmation proceedings in Eldoret HC P7A No. 43 of 2006. That in that succession cause the other shareholders who sold their individual shares of the suit land to the current owners are represented by M/s Birech Rutto & Co. Advocates who have instructions to agitate for them at the confirmation as evidenced by the proceedings referred to above. That from the foregoing, it is clear that the interested party and the other plot owners of what is today Langas Estate of the Municipality of Eldoret are necessary parties who should be enjoined in this proceedings as defendants or interested parties.
70. Mr Titus Gatitu Njau a resident of the Estate of Langas states that he owns 5 acres of land all situate within L.R NO 8500 which he purchased from various people. In 1983, Langas estate was affiliated to the Municipal council of Eldoret and his interests were zoned as Langas block 409 and 587. He has built his home and settled on the land since 1976 to date. He has never heard about the petitioners since he settled on the land. Mr. Joseph Joel Methu states that he is a resident of Langas Estate and owns plot no 214 purchased in 1978 where his homestead is situate.



## **The Response By The 5<sup>th</sup> And 6<sup>th</sup> Interested Parties**

71. Philip Kiprono Arap Otieno, the 7<sup>th</sup> respondent, in reply to the Petition and the Amended Petition states that he lives in Langas farm situate in the Municipality of Eldoret in the County of Uasin Gishu and is one of the Respondents together with Albert Kipkurgat Kebenei in matters relating to LR.No.8500 situate in the said Municipality in the said County. The affidavits filed in this court in support of the Petition and the Amended Petition filed by the Petitioner Pius Kibet Tott have been read over to him by his counsel on record, Paul Birech and he has understood their contents.
72. According to Kiprono Arap Otieno, in the year 1964, the late Kiptot Arap Sitienei and the late Joseph Arap Korir together with 56 others, he included decided to collect funds for the purposes of purchasing LR. No. 8500 from Gordon Edward Goby for the sum of Shs.16,920/=. That at the time they were negotiating for the purchase of the said parcel of land, the interest of Lionel Roy Nesfield Strange had been extinguished as he had sold his interest to Gordon Edward Goby on 23<sup>rd</sup> May, 1957.
73. That after they got together to purchase the said parcel of land, they made out a list showing how much each individual had contributed towards the purchase of the said parcel of land. That as they were not able to raise the full purchase price, they instructed the late Mr. Kiptot Arap Sitienei and the late Joseph Arap Korir to apply for a loan from Agricultural Finance Corporation to enable them raise the balance of the purchase price and the said Corporation obliged and granted a loan of Shs.96,000/=.
74. They then took possession of LR. No.8500 and each individual was allocated land commensurate to his individual contribution but unknown to them, the late Kiptot Arap Sitienei and the late Joseph Arap Korir instead of registering the land in their names went ahead and got themselves registered as tenants in common in equal shares over LR. No.8500. That when they learnt that they had left them out, they formed a company called Langas Farm Limited to accommodate all of them as they were more than 20 and hence not all the 58 people could be registered in their individual names.
75. They further took another step to legally regularize their position and applied to the Uasin Gishu Land Control Board to have LR. No.8500 transferred from the names of Kiptot Arap Sitienei and Joseph Arap Korir into the name of Langas Farm Limited.
76. On 14<sup>th</sup> May, 1968, the said Land Control Board granted consent to the said transaction and when it transpired that the late Kiptot Arap Sitienei and the late Joseph Arap Korir had shortchanged them, individual members once more contributed further sums of money towards the liquidation of the loan. That it is therefore, not true that the Petitioner paid off the loan in order to be given the Discharge of Charge and that after they had paid off the loan due to M/S Agricultural Finance Corporation a Discharge of Charge was prepared by M/S Agricultural Finance Corporation who then handed over to them the same with a copy of the original Charge and the original Grant to LR. No. 8500.
77. They thereafter approached the late Kiptot Arap Sitienei and the late Joseph Arap Korir to effect a transfer in favour of their company but instead of doing so the late Kiptot Arap Sitienei begun a series of cases wanting to claim the entire land as his own and that a transfer was prepared in which the late Joseph Arap Korir had executed the same in favour of Langas Farm Limited.
78. The said Kiptot Arap Sitienei had decided to pull out of the group who purchased the land with him and he was paid back his money and thereafter he ceased to have any interest on LR. No. 8500.
79. Thereafter, individual members of Langas Farm Limited were shown their portions of land, some of them subdivided their portions further and sold them to other people on willing buyer willing seller basis and currently the population of people who have purchased various portions of land, number over 2000 and the number of people living in Langas farm is over 40,000.



80. It therefore became incumbent for the occupants of parcel number LR. No. 8500 to provide from the said parcel of land portions of land to be used to provide space for educational facilities, markets and other social amenities including access roads and stations for water collection. That it is therefore wrong for the Petitioner to allege that the Government Departments both National and County have grabbed his land, as in the first place there are other players in the purchase of LR. No. 8500 who are themselves and those who have taken possession of the land by virtue of purchase from the Original Subscribers.
81. Those who are in possession of certain portions of land in LR. No. 8500 are there as of right but are not squatters, intruders, invaders or trespassers and there is a need to consult them if there is any compensation which the Governments both National and County would generously wish to pay out and the same cannot be paid to only one individual for the reasons which have been enumerated hereabove.
82. When both the late Kiptot Arap Sitienei and the late Joseph Arap Korir passed on their beneficiaries applied to court to succeed to the estates and they did file objections in court to the Grant being given to them without taking into consideration their interest and eventually a consent was entered in court in which they agreed that the applicants including the Petitioner herein be granted Letters of Administration with liberty to apply by the Objectors or by any other part.
83. That in the intervening period, they had hoped the Petitioners would apply for the confirmation of Letters of Administration and distribute to them what belongs to them but instead, they have used the grant of Letters of Administration issued to them to file the current Petition attempting to enrich themselves on the sweat of others.
84. That it has always been the wish of the occupants of LR. No. 8500 that the entire land be subdivided and each individual be granted his or her title however small the portion is. That as the fathers of the Petitioners had withdrawn their contributions in the farm, they are not entitled to any compensation by way of compulsory acquisition or mesne profits as they have nothing to sell or use in the LR. No. 8500.
85. That in the light of what has been stated hereabove, the Petitioner cannot wave the names of their parents contained in the Grant of LR. No. 8500 against the whole world and claim that LR. No. 8500 belongs to them alone to the exclusion of persons who are in occupation or possession of the land and further used their resources to acquire the land initially and paid off the loan.
86. In reply to the allegations by Mr Kiprono Arap Otieno, Mr. Pius Kibet Arap Kiptot and Samuel Bitok state that their late fathers Kiptot Arap Sitienei and Joseph Arap Korir raised their own Money to purchase the Suitland and applied for a loan on their own accord and not as claimed by Mr Kiprono Arap Otieno.
87. They took possession and lived in the house earlier occupied by Gordon Edward Goby until 23<sup>rd</sup> April 1968 when a large group of people invaded their land and forcefully evicted them and forced their father to thumb print a transfer.
88. His father was injured and the matter reported at Eldoret police station under OB number 48 of 23<sup>rd</sup> April 1968 and a P3 was issued. His father went to the Nairobi land registry to protest the invasion and the transfer was rejected. The said deponent further states that there was no discharge of charge and that the grant referred to by Mr. Otieno was illegally obtained and that no transfer was registered in favour of Langas Farm Limited.



89. The petitioner states that when the invaders took up their land they subdivided it according to their physical prowess and the settlement remained unplanned until the respondents came in. That in their Struggle to recover the Suitland their late fathers engaged many advocates including the advocate for the 5<sup>th</sup> interested party who is using the documents availed to him as counsel.

### **Submissions By Petitioners**

90. The petitioners submit that the land parcel number LR 8500 Measuring 1050 acres is registered in the names of Kiptiot Arap Sitienei and Joseph Arap Korir, however, the 1<sup>st</sup> Respondent has all along disregarded the petitioners' right to the suit land and has dealt with the same as though the same was public land despite the Commissioner of land having informed the council that the suit land was private and could not therefore Plan and change user without their consent but the council disregarded. In 1999, the council was again informed that title deeds could not be issued to the occupants as planned because the title deed was in the name of the petitioners who had not approved of the council's action.
91. In his letter to the council dated 21 /09/1999 its own counsel reminded the council that the land was theirs having been allocated the same by the Commissioner of lands. When civil suit no Nairobi High Court 476 of 2002 was filed, the council, in its defence alleged that the land belonged to the occupants having acquired the same by way adverse possession. In the present petition, the 1<sup>st</sup> respondent is now alleging that the suit land belongs to the occupants because they purchased the same from the original owners.
92. The petitioners argue that the 1<sup>st</sup> Respondent has neither produced any ownership document nor any allotment letter from the commissioner of lands to prove that the suit land is theirs. The respondents and interested parties have not produced any order from court conferring title to the occupants upon demonstrating that their claim under adverse possession has crystalized. They have not produced any sale agreements between the occupants and registered owners -being the petitioners herein.
93. The petitioners argue that they have proved that they are the registered owners of the suit land in terms of Article 64 (b) of the Kenya Constitution, 2010. They have averred that they never sold their land to the respondents or the interested parties herein. They therefore urge the court to find that the 1<sup>st</sup> respondent's contentions over the ownership of the suit land are unfounded. The only proof of ownership of registered land is by production of Title Deed under article 64 of [the constitution](#) 2010.
94. The petitioner further argues that the Physical Planning Department developed a plan for upgrading Langas Farm at a time when the land did not fall under the Municipal Council and that the World Bank provided funding only for settlement within urban areas under the World Bank funded third urban project, the Municipal Council illegally extended its boundaries to encompass Langas Farm which initially, did not fall under the council. Eldoret Municipal Council then went ahead to implement the proposed physical plan surveying planning, subdividing the suit into several private plots. Land was also reserved for public utilities without the consent of the registered owners. The council's action was with the full support and approval the rest of the respondents and the World Bank.
95. According to the petitioners, both the then Eldoret Municipal Council and now the County Government of Uasin Gishu and the then Ministry of Housing now under the 4<sup>th</sup> Respondent Ministry immensely benefited from the unlawful planning, survey and subdivision of the suit land parcel L/R 8500 - now known as Eldoret Municipality Block 22 (langas) by apportioning themselves 188.40 Ha. (465 acres) allegedly for public purpose.



96. The Respondents have recognized, conferred or sanitized the occupants' ownership by formally surveying, planning the area claimed to be under their occupation and issuing plot numbers to the occupants. Moreover, they are charging rates/rent and Issuing occupation permits, approving building plans, charging registration, survey transfer and legal fees, Registering the list of occupants compiled by Langas title deed committee, purchasing plots created and allocated to occupants of the suit land. The petitioners argue that the fact that the then Municipal Council of Eldoret -now Uasin Gishu County Government has a data bank of the list of plot numbers, plot owners similar to that provide by the interested parties herein is testimony that indeed the respondents settled occupant and recognized them and has been transacting business with them. The Petitioners did not consent to the Respondent's unlawful and unconstitutional actions, fact which has been confirmed by the 3<sup>rd</sup> to 5<sup>th</sup> Respondents and by considering the pleading in Nairobi High Court 476 of 2002 between the parties herein. In a nutshell, the petitioners contend that the 1050 acres suit land herein is fully occupied and developments are being carried out by private individuals with the approval of the Respondents, and by the Respondents themselves in the form of infrastructural developments.
97. On the issue, as to whether the petition is time barred the petitioners submit that it is not time barred for the reasons that the suit land was charged in favour of Agricultural Finance Corporation up to November, 2001. Although the petitioners had been registered as the legal owners from as far back as 1964, the government still held right of lien over it until the monies owing to the state corporation (A.F.C) was fully and finally repaid. In essence, the petitioner argues that he could only exercise full proprietary right over the Suit land after November, 2001. Despite the said limitations, the petitioners still objected to the Respondents action in 1984, when the idea of planning the suit land was first incepted.
98. When the petitioners learnt of the approval of the P.D.P in issue herein in the year 2002, they promptly filed Nairobi High Court 476 of 2002, which suit has now been withdrawn in favour of the present petition. The Petitioners herein filed this petition within the time prescribed by the law because the *Limitation of Actions Act* provides that a claim based on land shall be commenced within a period of 12 years from date of cause of action. This matter is based on breach fundamental rights to property as enshrined in *the Constitution* of Kenya 2010. That being the case, they submit that a claim brought under the constitutional law, which is the supreme laws of the land has no prescribed time limits.
99. On Economic and social rights, The petitioners refer to Article 43(l)(b)(d)(e) &(f) of the Kenya Constitution, 2010 which states that citizens have a right to adequate housing, proper sanitation clean water social security and education, and appear apologetic to the occupants, and contend that should forcible eviction ensue in execution of the petitioners right to vacant possession of the suit land, then a fresh crisis in the form of a possible breach of the constitutional right under article 43 above may accrue to the illegal owners whose occupation was conferred and or sanitized the respondents' actions.
100. The respondents will therefore be duty bound to provide alternative land to the hundreds of thousands of occupants of Langas estate in keeping with the spirit and letter of the said article. They therefore submit, on without prejudice basis, that it would be much safer and cost effective to compensate the Petitioners for the value of land lost. Thereafter, the government can proceed to process titles in favour of the illegal occupants as earlier contemplated by the Respondents.
101. The Petitioners claim to be entitled to compensation for Loss of one thousand and fifty acres (1,050 acres) of prime, residential, commercial and or agricultural land whose total current market value is Kshs.7,700,000,000/= and loss of user of the suit land from the year 1984 when the 1<sup>st</sup> Respondent sought for approval of the physical planning proposal. The sum claimed as per the Agricultural Officer's report is Kshs.1,089,199,200/=.



### **Submissions By The 1<sup>st</sup> Respondent**

102. The 1<sup>st</sup> Respondent submits that she is not responsible for the existence of the interested parties as the interested parties had purchased the properties from either the original owners or from 3<sup>rd</sup> parties and that it was a mutual agreement between the 1<sup>st</sup> respondent and the plot owners that it was a key component in implementing the planning of the estate to secure land for public use and ordering and regularizing the ownership of Land by surveying and eventually obtaining titles to the various plots the process to date which has never been concluded. Moreover, that by the time the world bank loan was being granted for the upgrading of the Langas Estate in 1982, and 1985 the donor was reacting to a need that had been identified on the ground. The action by the 1<sup>st</sup> respondent was a reaction to what the parties had commenced on their own. The planning and zoning of Langas Estate by the Government did not amount to allocation of land. The respondent further argues that the petitioners do not have the locus standi to bring the petition on behalf of Paul Cheruiyot Bittock and Samuel bittock on behalf of the Estate of Joseph Arap Korir as the latter two are not the legal representatives of the estate of Paul Cheruiyot Bittock.
103. Furthermore, that the respondent has not exhausted the available legal mechanisms and therefore is not entitled to the remedies sought. The 1<sup>st</sup> respondent further submits that the orders sought by the petitioner will mean eviction of the 3<sup>rd</sup> parties who have settled on the land which act will be disruptive, high handed and expensive and will affect parties who never came to court. On Mesne profits, the 1<sup>st</sup> respondent submits that the petitioners have not specifically pleaded for mean profits and that the valuation report was meant for compensation on the value of the property.

### **Submissions By The 2<sup>nd</sup> Respondent**

104. The 2<sup>nd</sup> respondent submits that the Petitioners have not established a cause of action capable of being decided by this Honourable Court. This is because, the Petitioners as the legal administrators have taken long to institute any case to protect the rights they deem aggrieved and that the transactions referred to in the Petition had taken place several years ago and the deceased parties mentioned had not seen the need to take any action. According to the second respondent, as far back as 1964 when the purported transfer had taken place, the Law in Kenya was such that the registration system applicable was under the Registered *Land Act*, Cap. 300, Laws of Kenya whose commencement date was the 16<sup>th</sup> September, 1963. The alleged title document was used as the register of the suit land parcel upto 2001, yet their allegation that the Respondents unlawfully deprived them of their suit parcel is indicated to have begun sometime in 1983 and only ended in 2002 begging the question, if the Petitioners' deceased parents were aware, why did they never stop any of the alleged processes?
105. In any event, the allegation on change of regimes is not in any way evidenced as the annexed title was one registered under the Registration of Titles Ordinance Cap. 160 under the then colony and protectorate of Kenya further indicating the unreliability placed upon the said document. That notwithstanding, and with all the suppositions fronted by the Petitioners, it is left to wonder why no concrete action was ever taken to stop the alleged atrocity which has only been realized now. It is therefore the 2<sup>nd</sup> Respondent's submission that this delay in itself defeats equity (equity aids the vigilant and not the indolent - *Vigilantibus, non dormientibus, jura subveniunt*).
106. The second respondent relies on the Court of Appeal case of *Benjoh Amalgamated Limited & Another v Kenya Commercial Bank Limited* [2014] eKLR, where the court applied the holding by Lord



Selbourne L.C. delivering the opinion of the Privy Council in *The Lindsay Petroleum Co. v Hurd* (1874) L.R. 5 P.C. 221 at page 240:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any statute of limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are, the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy.”

107. The respondent further contends that the statutory roles which relate to the National Land Commission now the 2<sup>nd</sup> Respondent as derived from the *Land Act* provide that its role shall be to approve compulsory acquisitions, wayleaves, easements and analogous rights; make regulations prescribing the criteria for allocation of public land, such regulations to prescribe forms of ownership and access to land under all tenure systems and that as constituted late in 2013, the National Land Commission is currently on a nationwide campaign to fulfill its legally provided roles which have not yet materialized as envisioned, but is underway. Unless the Petitioners have sought help by lodging complaint to the National Land Commission which have gone unaddressed, then the Petition has been filed at a wrong time for claims that cannot be materialized.
108. He cites the proviso in Article 67(2)(e) which has not been adhered to by the Petitioners. While it is the role of the National Land Commission now the 2<sup>nd</sup> Respondent to ensure such investigations are undertaken, the Respondent having been established in 2012 and office holders duly appointed sometime in 2013 have not been offered adequate chance to perform this role. It would thus be very prejudicial to the 2<sup>nd</sup> Respondent to be made liable for alleged and unproven atrocities that they have not yet established within their powers and would thus evidently be in a position to indicate the best and appropriate form of remedy if indeed there was injustice. He refers to the case of *Ledidi Ole Tauta & Others v Attorney General & 2 Others*[2015] eKLR, where it was held that:
109. “We also note that the petitioners claim to the land is predicated on what the petitioners claim historical injustices were visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices. *The constitution* acknowledged there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the National Land Commission established under Article 67(1) of *the Constitution* is to investigate historical injustices and to make recommendations for redress.”
110. According to the 2<sup>nd</sup> respondent, no such efforts have yet been made by the Petitioners to seek clarification and assistance from the National Land Commission and therefore places their claim as jumping the gun to ask Honorable court to offer a remedy in vain. The 2<sup>nd</sup> Respondent should therefore be given ample time to come up with conclusive investigative results which are actionable and implementable in nature. Causing it to be responsible for what is alleged to have occurred ages ago would be heinous and unjust. The 2<sup>nd</sup> respondent further contends that the Petitioners' claims



cannot be decided by way of a Constitutional petition as the nature of the prayers sought by the Petitioners begs the question as to what a Constitutional Petition is. It is a formal suit that intends to challenge against a breach or a potential breach of the constitutionally guaranteed fundamental rights and freedoms. He contends that the particulars of breach have not been specifically pleaded and yet the Provisions alleged to be breached ought to be specifically pleaded to enable any Respondent defend themselves adequately and for the court to deal with the specific issues as highlighted. According to the 2<sup>nd</sup> respondent, it is evident on the face of the Petition that the Petitioners claim that there has been a violation of their rights to property as stipulated under Article 40 of *the Constitution* of Kenya 2010, yet the said Article contains several provisos which have not been specifically pleaded. It is therefore difficult at this point in time for the 2<sup>nd</sup> Respondent to defend itself adequately considering that Article 40 of *the Constitution* of Kenya is expansive and provides that: It is therefore the 2<sup>nd</sup> Respondent's submissions that the Petitioners are on a fishing expedition and are not certain as to which of their rights have been violated. The 2<sup>nd</sup> Respondent further submits that the claims by the Petitioners are such that they refer to documents, persons and transactions which cannot be admitted as such as there is need for verification of the same. The 2<sup>nd</sup> respondent contends that the parties involved need to be questioned on the authenticity of the documents and the nature of transactions that were undertaken at the time.

111. In order to conclusively adjudicate on the Petitioners' grievances, it is important that the Court and the Respondents are afforded reasonable opportunity to scrutinize whether the allegation actually took place as alleged. This is the purview of the National Lands Commission as provided for in *the Constitution* of Kenya as well as the National Lands Commission Act, 2012. The nature of the claims by the Petitioner has been brought in the wrong form therefore as the matters they have alluded to require proof on finality by way of viva voce evidence.
112. The 2<sup>nd</sup> respondent further claims that there was inordinate delay in filing this claim. The Petitioners have failed to show this Honourable Court whether the alleged deceased owners of the claimed land parcels took any action against the responsible authorities. The only claim they averred to was the filing of a claim in Nairobi HCCC No. 476 of 2002 (indicated in the Petitioner's Affidavit as annexure PT14 on page 393, which allegation has not indicated whether there was any determination on merits or otherwise. Beyond the undetermined claim, there is no evidence of any legal action taken against the Respondents for a claim in reference to the suit parcel. The claim itself was brought by the deceased after a period of over 2 years after the alleged transfer of the suit parcel and subsequent conversion, this in itself amounts to an inordinate delay in bringing the action as the claim is being brought after the suit land was subdivided, lease title issued, surrender of the land title and fresh titles issued to 3<sup>rd</sup> parties who purchased the parcel of land for a considerable consideration.
113. On whether the Prayers in the Petition can be granted the 2<sup>nd</sup> respondent submits that the prayers sought for should fail owing to the fact that the respondents have not established a case worthy of the grant of such declaratory orders, the respondent argues that Declaratory orders should and can only be issued when the matter claimed for has specifically been pleaded, are real and not theoretical as pleaded to by the Petitioners. On mesne profits, the second respondent refers to the definition offered in the Black's Law Dictionary 9<sup>th</sup> Edition where mesne profits are defined as: "The profits of an estate received by a tenant in wrongful possession between (2) two dates." In the Concise Oxford English Dictionary 12<sup>th</sup> Edition, mesne profits are defined as:- "The profits of an estate received by a tenant in wrongful possession and recoverable by the Landlord. "
114. The 2<sup>nd</sup> respondent argues that in the absence of any evidence of activities, the Petitioners allege to have intended to undertake on the suit parcel, the court would be proceeding on a presumption that the money the Petitioners claim is based on what they would have developed and would have been



continuously earning income. The Court of Appeal in Peter Mwangi Mbuthia vs. Samow Edin Osman & Naftali Ruth Kinyua Civil Application No. NAI No. 38 of 2004 as quoted in the case of Waas Enterprises Limited v City Council of Nairobi & another [2014] eKLR, wherein it was stated the law on mesne profit as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded. That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all.”

### **Submissions For 3<sup>Rd</sup>, 4<sup>Th</sup>, 5<sup>Th</sup> And 6<sup>Th</sup> Respondents**

115. It is the Honorable Attorney General's submission that the petitioner has failed to prove his case to the standard required by law as the registration regime has not been altered. First, it is not true that the Ministry of Lands officials had changed the registration regime of the suit land from the Registration of Titles Act to Registered *Land Act*. To date, the suit land is still registered under the Registration of Titles Act. It is registered in the names of Joseph Arap Korir and Kiptoo Arap Sitienei. The petitioner has not provided any evidence that the suit has been registered in the name of other persons other than the said two. The foundation of this petition is therefore faulty.
116. Moreover, the Attorney General argues that the suit land was not subdivided or apportioned by Ministry of Lands Officials and it is not true that the Ministry of Lands officials entered upon the suit land or subdivided it. It is also not true that they apportioned 118.04 hectares in favour of the then Municipal Council of Eldoret for purposes of establishing educational, health, industrial, recreational or transport facilities. No evidence of this has been provided by the petitioner. These allegations are baseless and further render the foundation of this petition faulty.
117. It is the Attorney General's contention that the petition is an abuse of the court process as the petitioner's case is that several people trespassed onto the suit land. This trespass/invasion was without the consent of the deceased owners. If that allegation is true, then the proper cause of action was for the petitioner to file a civil suit for trespass against the offending parties. The petitioner does not state why he did not pursue that course. He does not state why he is only interested in monetary compensation and not in the eviction of the alleged trespassers. It is therefore evident that this petition has been actuated with an ulterior motive of monetary compensation from the government.
118. He cites the now well-known case of *Kemrajh Harrikissoon -Versus- Attorney General of Trinidad and Tobago* [1979] 3 WLR 63, the court held that:

“The notion that whenever there is a failure by an organ of government or a public authority or officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed under Chapter 1 of *the Constitution* is fallacious. The right exists to apply to the High Court under Section 6 of *the Constitution* for redress when any human right or fundamental freedom is violated but its value will be diminished if it is allowed to be misused as a general/ substitute for the normal procedures for invoking judicial control of administrative action. The mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way



for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or freedom."

119. The Attorney General argues that in this case, the petitioner ought to have filed an ordinary suit for the eviction of the alleged trespassers. In the same suit, he should have sought general and special damages from them. This court should therefore not entertain this suit.
120. On damages, the Attorney General argues that the damages sought in this petition cannot be awarded as the claim of Ksh.7,700,000,000 is unsustainable as he has not lost that land so as to warrant a claim for its value. General damages and special damages flow from actionable losses by a plaintiff and since the petitioner did not lose the suit land, the claim for its value is ill-founded. The deceased are still the registered owners of the suit land. The petitioner has not stated that he would surrender the title to the suit land to other persons. He should not be allowed to claim the value of the land and still be the registered owner.
121. The Attorney General submits that the only damages the petitioner can claim in this suit are general damages for trespass against persons he claims have occupied the suit land without his consent. The quantum of those damages should be so as to put the petitioner in a position that he would have been if the trespass had not occurred. They cannot be equivalent to the value of the land which in any event, the petitioner has not lost. He cannot eat his cake and have it. He cannot blow hot and cold He can only claim the value of the land if he surrenders the title. And he is not willing to do this.
122. He cites the case of Jephtha & Sons Construction Engineering Works Ltd vs The Attorney General HCT-00-CV-CS-0699-2006, the Court held that:

"...Compensatory damages, also called actual damages, are typically broken down into two broad categories: General and Special... General damages are given for losses that the law will presume are natural and probable consequence of a wrong. The general principle is that they are awarded to compensate the plaintiff, not as punishment to the defendant... The principle that emerges from numerous authorities, notably Sietco vs Noble Builders (U) Ltd SCCA No. 31 of 1995 is that where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit... "

123. In the case of Zacharia Waweru Thumbi vs Samuel Njoroge Civil Appeal No 445 of 2003 stated that; The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court Law Reports and Text Books on Torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [19851 KLR 716, at P. 717, and 721, where the Learned Judges of Appeal — Kneller, Nyarangi JJA, and Chesoni Ag JA, -- held: "Special damages must not only be specifically claimed (pleaded) but also strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. "...If I were to explain, or define, special damages to a layman, I would say "they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortious act (s) complained of". This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims, the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for



the payment, will meet the test...I now turn to the last ground of appeal, which is on the adequacy of the special and general damages awarded by the lower court. The award has been challenged as too low under the circumstances. I begin by emphatically stating that special damages can't be too high, or too low, since they are a reimbursement for what has actually been spent. Further, special damages are not assessable by the court. The court simply awards what has been pleaded and proved...It must always be kept in mind that no two cases can be exactly identical. Accordingly, doing the best I can in comparing the injuries sustained by the Respondent herein vis-à-vis those in the two comparables cited, and given the passage time between then and when the lower court delivered its judgment, and when the accident occurred mid 2001, I find no sufficient reason to interfere with the Learned Magistrate's award of KShs.180,000/- under the head of general damages. Accordingly, I uphold the lower court's award..."

124. He refers to the Ugandan case of *Mawenzi Investments Ltd vs Top Finance Co. Ltd* Another HCCS NO 02 OF 2013, the Court stated thus;

"...Special damages do not only have to be specifically pleaded, they are also strictly proved. According to Halsbury's Laws of England, 4<sup>th</sup> ED Vol. 12(1) at paragraph 812, special damages is those damages which are capable of calculation in financial terms and must be proved. In the case of *Kyambadde v. Mpigi District Administration* [1983] HCB 44, it was held that special damages must be specially pleaded and strictly proved, but does not have to be supported by documentary evidence in all cases. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proven strictly... Assessment for general damages is based on the principle of *restitutio in integrum* according to East African Court of Appeal in the case of *Dharamshi vs. Karsan* [1974] 1 EA 41. The principle means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred. According to Halsbury's laws of England fourth edition (reissue) volume 12 (1) and paragraph 802 thereof, damages are defined as the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done him or her. Damages may, on occasion, be awarded to a Plaintiff who has suffered no ascertainable damage and damage may be presumed. General damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered..." (see also *Robert Cuossens v Attorney General* Civil Appeal No 8 of 1999)."

125. According to the Attorney General, in the present case, there is no evidence that the 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents influenced or encouraged trespassers to invade the suit land. They did not commit any wrong in respect to the suit land and hence no liability should attach to them for either general or special damages.
126. The petitioner should have sought damages for trespass to land and not for breach of the deceased constitutional rights.
127. As noted above, this was a simple case of trespass. It did not warrant a constitutional petition. Different considerations apply in the award of damages in torts and constitutional petitions. In the South African case of *Ntandazeli Fose vs Minister of Safety and Security* (supra), the Court noted that;

"...[17] In their helpful arguments, counsel for the respective parties followed substantially the same lines as in the court a quo, although much elaborated. The plaintiffs' argument can be summarised as follows. Section 7(4)(a) of the interim Constitution establishes a separate



cause of action, a public law action directed against the state based on the infringement of a fundamental right entrenched in Chapter 3. The objectives of the law of delict differ fundamentally from those of Constitutional law. The primary purpose of the former is to regulate relationships between private parties whereas the latter, to a large extent, aims at protecting the Chapter 3 rights of individuals from state intrusion. Similarly, the purpose of a delictual remedy differs fundamentally from that of a Constitutional remedy. The former seeks to provide compensation for harm caused to one private party by the wrongful action of another private party whereas the latter has as its objective (a) the vindication of the fundamental right itself so as to promote the values of an open and democratic society based on freedom and equality and respect for human rights; (b) the deterrence and prevention of future infringements of fundamental rights by the legislative and executive organs of state at all levels of government; (c) the punishment of those organs of state whose officials have infringed fundamental rights in a particularly egregious fashion; and (d) compensation for harm caused to the plaintiff in consequence of the infringement of one or more of the plaintiff's rights entrenched in Chapter 3. The common law remedies are not directed to the achievement of the first three of these objectives and the common law should not be distorted by requiring it to perform these functions and fulfill the purposes of constitutional law. Hence the necessity, so the argument concludes, for a specific and separate public law constitutional damages remedy...”

128. The petitioner has no basis for relying on the principles of awarding damages to constitutional petitions when what he ought to have filed was an ordinary suit. Having wrongly presented his claim, this court's discretion should not be exercised in his favour.
129. Last but not least, the Attorney General contends that the Ministry officials defended the right of the deceased owners by stating that sometimes in early 1980s, the Municipal Council of Eldoret wrote to the Ministry of Lands to approve its proposal for subdivision and change of user of the suit land. They also forwarded a plan for approval by Ministry officials. The plan had been prepared by the then District Physical Planning Officer, Eldoret at the request of the Municipal Council of Eldoret. Before the Ministry officials acted upon the said request, it was discovered that the land was privately owned and hence it was mandatory that the consent of the registered owners be obtained before any action is taken.
130. On 18.12.1984, the Ministry wrote to the Town Clerk, Municipal Council of Eldoret and the District Planning Officer, Eldoret seeking to know who had authorized the sub-division and change of user. The said letter, which is annexed to the replying affidavit of Moses Kirui and is annexed thereto as MM1, was copied to the District Commissioner, Eldoret, the Clerk to Wareng County Council and the deceased proprietors requiring their consent. No reply came and the Ministry officials did not comply with the said request.
131. It is therefore evident from the foregoing that the Ministry officials acted in the best interest of the deceased owners. At no point did they sanction the invasion of the suit land by the interested parties or any other persons or institutions. The planning exercise undertaken by Ministry officials was not for purposes of alienating the suit land.
132. Sometimes in the early 1980s, the Municipal Council of Eldoret requested Ministry officials to undertake a planning exercise in respect to a portion of the suit land i.e. Section III, Langas estate. The Ministry officials acceded to that request because, firstly, the land was within the jurisdiction of the Municipal Council of Eldoret and hence the request for the exercise was in order. Secondly, section 24(1) of the Physical Planning Act, Cap 286 of the Laws of Kenya permitted the Director of Physical



Planning to undertake that exercise. It was not for the purposes of alienating the suit land. This suit should be dismissed with costs

### **Submissions By The 1<sup>st</sup> To 4<sup>th</sup> Interested Parties**

133. The 1<sup>st</sup> to 4<sup>th</sup> interested parties argue that by a presentation made on title to the suit land on 23.11.2001, as entry No. 1087 confirms that the interests of the late Joseph Arap Korir devolved to one Emmy Chemesunde Tabarboch and that no grant either for the late Joseph Arap Korir or in respect of the estate of Emmy Chemesunde Tabarboch, has been shown to court means that the petitioner cannot purport to represent either of the two petitioner who allegedly authorized him to plead on their own behalf. To that extent the petitioner lacks capacity to urge this petition for and on behalf of the estate of Joseph Arap Korir and on that score, the petition must fail.
134. The registered proprietors died on 21.1.2004 and 20.4.2000 respectively whereas the petition was filed in 2011 by a person without capacity some 29 years after the event. The predecessors in title to the petitioner seem to have acquiesced to the events and activities of the respondents as they did not raise a finger during their life time.
135. The petitioner knew of the presence of the interested parties on the suit land but chose not to include them as respondents to his petition. He went ahead to plead and pray of this court for orders of eviction against people he did not name or include.
136. They further argue that the petitioners claim as pleaded is that of land and not strictly speaking a constitutional petition. That It was christened one to beat the express provisions of the Limitation of Acts Act Cap. 22 Section 7 thereof which caps the time within which a party can sue to recover land. While they recognize the supremacy of *the constitution*, they submit that the right to land is subject to limitation and it cannot be cured by disguise of claim as constitutional right. The law and indeed the courts frown upon such practice.
137. They invoke 4<sup>th</sup> Edition Hulsbury Laws of England Vol. 8 (2) Paragraph 165 and urge the court to follow the same which states.

“The protection under the constitutional of the right to property does not obtain until it is possible to lay claim in the property concerned... an applicant must establish the nature of his property right and his right to enjoy it as a matter of domestic law”.

They contend that eviction is by his own account disruptive and high handed. It will also affect third parties who are not before court. On Mesne profits, they argue that the relationship between the petitioner’s predecessors and the interested parties brought into this proceedings on an application is one of purchasers for value not as lessees. That is confirmed by the consent issued on 17.5.1968 by which instrument the owners sold to the shareholders of Langas Farm Ltd.

138. Any rent can only be payable to the holder of the radical title in this case, the government or its agencies and therefore the claim for mesne profits fails. The petitioner has never been registered as owner of the suit property. As regards compensation for unlawful acquisition, the petitioner has not established that the property vests in him as an administrator of the two estates.

### **Submissions By The 5<sup>th</sup> And 6<sup>th</sup> Interested Parties**

139. It is the 5<sup>th</sup> and 6<sup>th</sup> interested party’s submissions that it is members of Langas Farm Limited, who includes them herein that have the actual interest in the suit land. They argue that in 1964, the fathers of the Petitioners herein, Kiptot Arap Sitienei and Joseph Arap Korir both deceased and 56 others



including the Respondents, decided to collect funds for the purposes of purchasing L.R. No.8500 from Gordon Edward Goby for the sum of Kshs.161,920/=. The purchasers were not able to raise the entire purchase price of Shs.161,920/= together with legal fees and other outgoings and they applied to M/s Land and Agricultural Bank of Kenya (Later known as Agricultural Finance Corporation) for loan facilities of Shs.96,000/= to cover the balance of the purchase price that unknowingly to the other members who made their contribution towards the purchaser of L.R. NO. 8500 the fathers of the Petitioners registered themselves as the Sole Purchasers of the said Parcel of Land.

140. However, the other 56 members of the members of the farm together with the Petitioners' fathers took possession of L.R. No.8500 and started to carry on their farming activities in the year 1964.
141. When the other 56 members discovered that the fathers of the Petitioners had excluded them from being part of the Registered Owners of L.R. No.8500, an Application was made to Uasin Gishu Land Control Board in which Joseph Arap Korir and Kiptot A. Sitienei sold the residue of the lease to Langas Farm Limited on 23<sup>rd</sup> April, 1968 and that application was approved on 14<sup>th</sup> May, 1968 and a letter of consent to that effect was granted.
142. They contend that the Petitioner is guilty of non-disclosure and he has held himself and on behalf of others as the only person who bought L.R. No.8500 and are the only persons who can lay a claim on it.
143. If, however, the National Government and the County Government out of their own largesse and generosity are intending to make out any compensation for whatever reasons then that compensation must be shared by the Petitioners and the 5<sup>th</sup> and 6<sup>th</sup> Interested Parties and the other 50 families they represented on a pro rata basis depending on each member's contribution to the Original Purchaser of the land.

#### **Analysis Of Facts And Determination**

144. After considering the further amended petition, the verifying affidavit and the various replying affidavits and rival submission of parties, and after a site visit of the Langas estate that took exactly 6 hours the indisputable facts of the case are that the 2<sup>nd</sup> respondent carried out a search in the Nairobi Central Registry on 22<sup>nd</sup> May 2014 which established that the petitioners are the registered owners of L.R. 11404 upon transfer of title to them vide entry No 10, presentation No.474, registered on 15<sup>th</sup> July, 1964 under the Registration of Titles Act, Cap 281, Laws of Kenya and that the said search reveals in entry No. 11, presentation No.475, registered on the 15<sup>th</sup> July 1964, that the suit land was charged to the Land & Agriculture Bank of Kenya and that in entry No. 12. presentation No.787, registered on 24 May 1964, a memo of charge was registered with Agricultural Finance Corporation.
145. The said charge was discharged in entry No.14 presentation No.1087 registered on the 23<sup>rd</sup> November 2001. Kiptot Sitienei died on 21<sup>st</sup> January, 2004 at Koisagat in Uasin Gishu district and Rift Valley Province as it they then were and a grant of letters of Administration intestate was issued by the High Court of Kenya at Eldoret in the matter of the estate of Kiptot Arap Sitienei to Pius Kibet Arap Tot on 14<sup>th</sup> October 2010. The late Joseph Kibitok Korir died on 20<sup>th</sup> April 2000 in Uasin Gishu District in the rift valley province of Kenya but no letters of administration were issued in respect of the estate of Joseph Kibitok Korir.
146. On the 18<sup>th</sup> Day of August 2011, Paul Cheruiyot Bittock and Samuel Bittock claiming to be sons and administrators of the Joseph Arap Korir whose estate comprised part and parcel of land known as L.R. 8500 IR 11404 located within Langas area in in Eldoret town authorized Pius Kibet Tot to file the petition in court over the said parcel of land and to do all that is necessary in furtherance of the said suit and to generally act and do all that is necessary in the interest of the estate.



147. The background facts are that the initial grant was made to Gordon Edward Goby and Lionel Roy Nesfield Strange both of Eldoret in the colony of Kenya as it then was in respect of the land in dispute which measured 1050 acres to hold the same as tenants in common in equal shares for a term of nine hundred and fifty-four years from the first day of November one thousand nine hundred and fifty four. On 23<sup>rd</sup> May 1957, a transfer was registered to Gordon Edward Goby all rights title and interest of Lionel Roy Nesfield strange and the land was charged to the Agricultural Bank of Kenya. On the 15<sup>th</sup> of July 1964, the discharge of charge numbers 5 and 6 was registered and immediately the property was transferred to Joseph Arap Korir and Kiptot Arap Sitienei as tenants in common in equal shares subject to a caveat by the East African Power and Lighting Company Limited claiming a grant of easement. The property was subsequently charged to the Agricultural Bank of Kenya on the same date for Ksh.96,000/=.
148. On the 23<sup>rd</sup> November, 2001, a grant of letters of Administration in the estate of Emmy Chemesunde Tabarboch as the administrator of the estate of Joseph Arap Korir was registered.
149. On the 2<sup>nd</sup> of March 1983, the 1<sup>st</sup> respondent wrote to the Secretary Central Authority lands department proposing subdivision and change of user of LR NO 8500 and giving the reasons for the said subdivision and change of user and also availed a plan that was drawn by the physical planner vide their letter PPD/ELD/503/111/1/123 dated 6<sup>TH</sup> August 1982.
150. On the 18<sup>th</sup> of December 1984, G.F Onyango the Secretary Central Authority department of lands wrote to the town clerk Eldoret Municipal Council and the district physical planning officer Eldoret informing them that there was a dispute concerning the farm as the owners of the land thus Joseph Arap Korir and Kiptot Arap Sitienei had not authorized subdivision and change of user. The letter was copied to the registered owners, the District Commissioner and the clerk to Wareng County Council. In disregard of the above, the Eldoret Municipal Council, on 10<sup>th</sup> July 1991, went ahead and appointed Peter Anyumba and Associates to undertake cadastral survey of the Langas Farm in accordance with the provisions of the survey act and the development plans prepared by the physical planning department.
151. It was further notified to for general information of all plot owners that before the completion of ongoing cadastral survey of Langas farm and issuance of new titles, no subdivision was to be done, however the plot owners were advised to develop their properties and were at liberty to continue submitting building plans to the council for approval through the Physical planning Office. On the 23<sup>rd</sup> December 1996, the Municipal Council of Eldoret appointed M/S AGN KAMAU to prepare leases in respect of the Suitland for the plot owners and the said firm accepted the appointment and requested for the full list of the plot owners to enable the firm prepare the leases.
152. M/S A.G.N. Kamau Advocates caused part development plans to be prepared and forwarded the same to the Commissioner of Lands for approval by letter which was copied to the Director Physical Planning, Director of Surveys and the Physical Planning Office, The Town Clerk Eldoret Municipal Council, The district surveyor, the land registrar and the land officer. The District Physical planner confirmed receipt of copies of the part development plans and in fact AGN Kamau prepared leases to be signed by the plot owners and that some of the plot owners had in fact signed their leases.
153. There is evidence that the said firm of A.G.N. Kamau obtained from the commissioner of lands, Nairobi, copies of a letter to the Commissioner of Lands from the director of survey and seven copies of the registry index map covering some parcels of land and sheets of survey computation area list. On the 8<sup>th</sup> March 2001, the town clerk Municipal council of Eldoret wrote to A. G. N. Kamau with a desire to bring to an end the matter of preparation of leases in respect to the Langas estate to speedy conclusion and wanted confirmation that PDP NO ELD/17/89/6A had been duly approved by the director of



physical planning and that the commissioner had accorded final approval. On the 19<sup>th</sup> February 2002, the director of physical planning sent the PDP NO.17/89/6A Being Approved Plan No. 434-eldoret duly approved by the Minister for Lands and Settlement for further action and copied to the District Planning Officer.

154. That was the furthest the 1<sup>st</sup> respondent went in the process of converting the Suitland from the regime of the registration of titles act to the regime of registered *land Act* cap 300 laws of Kenya repealed.
155. However, there is evidence that the Municipal Council of Eldoret went further and allocated the plots to the interested parties and issued occupation permits and has been collecting rates from the plot owners.
156. It is admitted that the exercise of surveying Langas Estate was done jointly by the plot owners, the Central Government and the Council, each party playing different roles and that both the central government and county governments have made substantial developments on the Suitland by establishing sewer lines, high voltage power lines, schools market centers, roads This court finds as a fact that the allegations of the 7<sup>th</sup> and 8<sup>th</sup> respondents is that they were shortchanged, however no evidence has been shown that they were shortchanged.
157. Failure to register the transfer between Joseph Arap Korir and Kiptot Arap Sitienei on one part and Langas Farm Ltd on the other part rendered the transfer invalid and that it was shown that the consent to transfer is disputed by the petitioners and that it is contended that the group of the 7<sup>th</sup> and 8<sup>th</sup> respondents forcefully entered the land and injured Kiptot Arap Sitienei. The interested parties were purchaser of the suit land who are currently paying the rent and rates for the property.

#### Issues For Determination

Whether the Petitioner has locus standi. Whether the Petitioner is time barred. Whether the suit property belongs to the deceased. Whether the acts of the 1<sup>st</sup> to 6<sup>th</sup> respondents amount to compulsory acquisition. Whether the Petitioners are entitled to compensation for the value of the property. Whether the Petitioners are entitled to mesne profits. Whether the Petitioners are entitled to costs.

#### **Whether The Petitioners Have Locus Standi To Petition**

158. This is a petition brought under Articles 19, 22, 23, 40, 47, 50 and 64 of *the Constitution* of Kenya. Article 19 deals with the general provisions relating to the Bill of Rights. Article 22 of *the Constitution* deals with the enforcement of Bill of Rights, thus every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or is threatened. Sub-Article 2 of the said Article provides that in addition to a person acting in his own interest, court proceedings under clause (1) may be instituted by a person acting on behalf of another person who cannot act in their own names or by a person acting as a member of, or in the interest of a group or class of persons. The petitioner herein is acting on behalf of the families of Kiptot Arap Sitienei and Joseph Arap Korir who were tenants in common of the suit land. Article 22 of *the Constitution* of Kenya does not envisage the taking out of letters of administration so long as one can demonstrate that he has come under the provision to sub-Article 2 of Article 22. Article 22 (1) of *the Constitution* states the following: -

“Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.”



159. The above Article relates to infringement or threat thereof of the rights provided under the Bill of Rights. By extension, the Article applies to any introduction of a legislation which is alleged to be contrary to *the Constitution*. Article 260 of *the Constitution* defines a “person” in the following terms: -

“Person” – includes a company, association or other body of persons whether incorporated or unincorporated.”

160. Article 22 (2) of *the Constitution* allows any person acting as a member of, or in the interest of, a group or class of persons or a person acting in the public interest or an association acting in the interest of its members can institute proceedings under Article 22 (1). Apart from the foregoing, there is Article 258 of *the Constitution* which provides as follows: -

“258 (1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”

161. The import of Article 40(3) (ii) is of *the constitution* of Kenya 2010 is that any person who can establish that he has an interest or right in the property has free access to the court.

162. In *John Kipng'eno Koech & 2 Others v Nakuru County Assembly & 5 Others* [2013] eKLR, Emukule J held:

“The case of *Anarita Karimi Njeru* [1979] KLR 154 settled this proposition that where a person is alleging a contravention or threat of contravention of a constitutional right, he must set out the right infringed and the particulars of such infringement or threat.

However, as recent decisions have shown, that the case of *Anarita Karimi Njeru* though laying an important principle must be seen in the context of Section 84(1) of *the Constitution* of Kenya (1969 – Consolidated) and now repealed). That section provided -

“84(1) Subject to subsection (6), if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or) in the case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.”

Locus standi under Section 84(1) was established in two respects. Firstly, if the contravention related to the Petitioner personally, and Secondly if the contravention related to a detained person. Those were the only instances where locus standi was conferred upon an individual, under the said Section 84(1) of the repealed Constitution. That is the extent in my humble view of the authority of *Anarita Karimi Njeru*.

In contrast, *the Constitution* of Kenya, 2010 confers upon every person in Kenya, the obligation to respect, uphold, protect and defend *the Constitution* of Kenya, and any attempt to establish a government otherwise than in compliance with this Constitution is unlawful (Article 3), and every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, (Articles 22(1) and 258 (1) & 2). In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by persons, acting in the public interest (Articles 22(2)(c) and 258(2)(c).



Articles 22(1) & (2) and 258(1) & (2) of *the Constitution* 2010, thus confer upon any person the right to bring action in more than two instances firstly in the public interest, and secondly (where a breach of *the Constitution* is threatened in relation to a right or fundamental freedom.

The national values and principles of governance which bind all state organs, state officers, public officers and all persons whenever any of them makes or implements public policy decisions, and these national values and principles of governance include patriotism, national unity sharing and devolution of power, the rule of law, democracy and participation of the people, good governance integrity transparency and accountability (Article 10, (1)(2)).”

Consequently, *the Constitution* of Kenya 2010, grants the individual much wide scope in terms of locus standi than Section 84(1) of the repealed Constitution.

163. The comment in *Trusted Society Of Human Rights Alliance Vs. Ag. & 2 Others* [2012] eKLR, regarding the decision in *Anarita Karimi Njeru* is very apt. The Judges said -

“We do not purport to overrule *Anarita Karimi Njeru* as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.

The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”

164. In other words, under the new Constitution, the Court is bound to inquire and determine matters on their merit, and where the matter in issue could be deciphered from the pleadings, then the court was bound to determine such matter even when the particulars of breach had not been specifically pleaded.

165. The Court of Appeal in *Mumo Vs. Trusted Society Ofhuman Rights Alliance & 5 Others*, the judges observed -

“Our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of *the Constitution* by necessity and logic broadens access to the courts. In this broader context, this court cannot fashion nor sanction an invitation to a judicial standard of locus standi that places hurdles on access to the courts, except only when such litigations is hypothetical abstract or is an abuse of the judicial process.”

However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person is acting for personal gain or private profit or out of political



motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject the application at the threshold.”

In addition, Article 258(1) grants every person the right to institute court proceedings claiming that this constitution has been contravened, or is threatened with contravention. Court proceedings may also be instituted by any person acting in the public interest (Article 258(2)).

166. The above said articles and judicial precedents if interpreted in the spirit if *the constitution* do confer locus standi on the petitioner to institute the petition on his behalf and on behalf of the other family members and the family of Joseph Arap Korir and the fact that the petitioner is acting in good faith and not for profit. The issues raised by the petitioner revolve on property that was forcefully taken from their parents by the interested parties with the connivance and or help by the respondents through their actions. Therefore, I do find that the petitioner has locus standi to sue on his behalf and on behalf of the deceased persons and their families.

### **Whether The Petition Is Time Barred**

167. There is no provision in the 1963 Constitution of Kenya repealed or *the Constitution* of Kenya, 2010 that provides for limitation of time in instituting a constitutional petition in court. This court has held before that a constitution petition can be brought to court any time, though public policy requires that the same be filed expeditiously depending on the circumstances of the case. In this matter, the cause of action thus the change of user and the attempt to change the regime accrued in 2001 and is still continuing up to the time of writing this judgment as the County Government of Uasin Gishu is still collecting rates and levying rent and therefore, encouraging the encroachment by the interested parties on the petitioner’s land. The 1<sup>st</sup> respondent is still urbanizing the petitioner’s property and therefore time has not stopped running and thus the breach is continuous.
168. I’m persuaded by the holding by justice Lenaola in David Gitau Njau and 9 Others Versus the Attorney General (2013) Eklr that there is no law or a particular provision in the repealed constitution that provided that a claim based on fundamental rights and freedoms has a limitation period within which claims ought to be filed.
167. In Wachira Weheire v Attorney General (2010) eKLR Justices H. M. Okwengu, and G. Dulu held and I do agree with them that “...although there is need to bring proceedings to court as early as possible in order that reliable evidence can be brought to court for proper adjudication, there is no limitation for seeking redress for violation of the fundamental rights and freedoms of the individual, under *the constitution* of Kenya.
170. To purport to limit the period within which a petitioner should seek redress for violation of the fundamental rights and freedoms of the individual, under *the constitution* of Kenya relying on the Acts of parliament limiting time would be an affront to Article 2 of *the constitution* of Kenya 2010 that provides for the supremacy of *the constitution*. The Article provides that *the constitution* of Kenya 2010 is supreme law and binds all persons and all state organs at both levels of government and that the validity or legality of *the constitution* is not subject to challenge by or before any court or state organ and that any law, including customary law that is inconsistent with *the constitution* of Kenya 2010 is void to the extent of the inconsistency, and any act or omission in contravention of *the constitution* is invalid.
171. The import of the above is that any attempt to limit the period for filing constitutional petitions on the basis of the *Limitation of Actions Act* Cap. 22, Laws of Kenya will amount to challenging the supremacy of *the constitution* which does not limit the said period. The upshot of the above is that the petition is not time barred.



## Whether The Suit Property Belongs To The Deceased

172. As I write this judgment, the suit property is registered in the names of Joseph Arap Korir and Kiptot Arap Sitienei as Tenants in common in equal shares. However, the parcel of land is being occupied by the interested parties. The petitioner is the administrator of the Estate of Kiptot Arap Sitienei, one of the registered proprietors of the property in dispute. Before the advent of the new constitution, the regime that managed the land in dispute was the Registration of Titles Act., Cap. 281, Laws of Kenya (repealed) which was an Act of Parliament to provide for the transfer of land by registration of titles.
173. Section 23 of the Registration of Titles Act., Cap. 281, Laws of Kenya (repealed) provides that the Certificate of Title issued by the Registrar to a purchaser of land upon a transfer or transmission by the proprietor thereof shall be taken by all courts as conclusive evidence that the person named therein is the proprietor of the land is the absolute and indefeasible owner thereof, subject to the encumbrances, easements, restrictions and conditions contained therein or endorsed thereon and the title of that proprietor shall not be subject to challenge except on the ground of fraud or misrepresentation to which he is proved to be a party.
174. Article 40. of *the constitution* of Kenya 2010 provides;-
- Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—of any description; and in any part of Kenya.
- Parliament shall not enact a law that permits the State or any person— to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or 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—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—requires prompt payment in full, of just compensation to the person; and allows any person who has an interest in, or right over, that property a right of access to a court of law. Freedom of movement and residence.
- (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.
175. After repeal of *the Constitution* of Kenya 1963, and promulgation of the new Constitution 2010, the Land Law regime was changed and parliament enacted the *Land Act*, *Land Registration Act* and the *Environment and Land Court Act*.



176. The *Land Registration Act* repealed the Indian Transfer of Property Act, Government Lands Act, the Registration of Titles Act, the Land Titles Act and the Registered *Land Act*. Sections 106 of the *Land Registration Act* provides for the transitional provisions on rights, liabilities and remedies of parties over land and the relevant provision is subsection 3 paragraph (a) which provides that that for avoidance of doubt, any rights, liabilities and remedies shall be exercisable and enforceable in accordance with the law that was applicable to the parcel immediately before the registration of land under the new law.
177. Section 107 is a saving provision for rights actions and dispositions and provides that unless the contrary is specifically provided in the Act, any right, interest, title power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of the Act shall continue to be governed by the law applicable to it immediately prior to the commencement of the Act. The import of the above is that the petitioner's rights and interests were saved by the *Land Registration Act*. This court observes that if it was to apply the new law the import is the same.
178. Section 24 (a) of Land Registration (*Act No. 3 of 2012*) provides that: -
- “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.”
179. Section 25 of the Act provides as follows;
- “The right of a Proprietor, whether acquired on first registration or subsequently for valuable consideration or by order of court, shall not be liable to be defeated except as provided by 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, subject;
- to leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and 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.
180. Section 26 (1) of the Act provides;
- “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 and endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except –
- On the ground of fraud or miss-representation to which the person is proved to be a party to;
- Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”
181. It is trite law that once a person is registered as a proprietor of land, he is to enjoy all rights and privileges appurtenant thereto. The interested parties have not produced any documents of title as evidence that they are proprietors of the suit property. The fact that the alleged transfer by the deceaseds to the 5<sup>th</sup> and 6<sup>th</sup> interested parties was not registered by the Registrar is evidence that they have no proprietorship



interest in the property and therefore, they are best described as trespassers and could not transfer a non-existent interest.

182. The same applies to the interested parties who bought land from the land owners who had no title. A trespasser cannot transfer any proprietorship rights as he has none. All documents of purported sale of property to interested parties by the alleged plot owners who were in essence trespassers are all nullities.
183. Moreover, the interested parties have not commenced any claim for adverse possession and further, they have not established that they are in adverse possession as to land was always charged to Agricultural Finance Corporation. until the year 2001 and immediately after discharge of charge. The 1<sup>st</sup> respondent commenced the process of allocation of the land to individuals in disregard of the fact that the same was registered in the names of the deceased fathers of the petitioners. The period of 12 years did not run at all between the discharge of charge and the process of allocation of the plots to the interested parties.
184. I do find that the interested parties were not in exclusive use of the property due to the fact that the 1<sup>st</sup> respondent was in control of the same and even commenced the process of allocation of the land albeit illegally without due process but could not proceed due to the fact that the process became intricate with legal confusion and therefore, was abandoned.

#### **4-whether Acts Of The Respondents Amount To Illegal Deprivation Of Property And Therefore To Compulsory Acquisition Of Property**

185. I have considered the facts and do find that the 1<sup>st</sup> respondent initiated the process of change of user of L. R. No. 8500, the Physical Planning Department of Lands drew a plan of the area albeit illegally. The Town Clerk, J. C. Kendagor initiated a survey of the said parcel of land which they referred to as the Langas Farm. The Council appointed the firm of Peter Anyumba Associates licenced surveyor to undertake cadastral survey of the Langas farm in accordance with the provision of the Survey Act and the development plan prepared by the Physical Planning Department Ministry of Lands. The process was to result into new titles being prepared and issued to the plot owners. The 1<sup>st</sup> respondent went further to engage the firm of A.G.N. Kamau & Company Advocates to prepare the leases with respect to Langas Estate. A.G.N. Kamau went further to obtain Part Development Plans and obtained relevant documents from the Commissioner of Lands that is seven copies of the Registry Index Map (R.I.M.) and eighteen sheets of the survey computation area list covering parcels No. 1-1742 which had already been carried out of the L. R. 8500. The said firm of Advocates prepared certificates of leases.
186. Though the process stalled, the Eldoret Municipal Council continues to collect rates and ground rent in respect of L. R. 8500 from the interested parties who are not the owners of the property. All these actions are illegal and assist the interested parties to entrench themselves in the petitioner's land. This court finds that the acts of the 1<sup>st</sup> respondent and 2<sup>nd</sup> respondent amount to deprivation of the petitioners of their property without due process and therefore, are in breach of the petitioner's fundamental rights to property contrary to section 75 of the Constitution of Kenya, 1963 (repealed) and the Compulsory Acquisition Act, Cap. 295, Laws of Kenya (repealed). The Act of recognizing the "rights" of the interested parties amount to compulsory takeover of the petitioner's property.
187. Though the cause of action arose before 2010, the Constitution of Kenya 2010 is applicable in this dispute pursuant to Article 263 which provides that the Constitution of Kenya 2010 was to come into force immediately on promulgation by the President of Kenya or on the expiry of 14 days from the date of publication in the gazette of the final result of the referendum ratifying the constitution whichever would be earlier and therefore the rights violated under the legal regime of the former constitution of Kenya can be adjudicated under the constitution of Kenya, 2010 and that Article 260



of *the Constitution* of Kenya 2010 implies that *the constitution* in force before the effective date stood repealed on the effective date subject to the sixth schedule wherein section 6 of the sixth schedule of the said constitution provides for rights duties and obligation of the state and that the said provision is crystal clear that except where the contrary is expressly provided for by *the constitution* all rights and obligations, however arising, of the government or the republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the republic under *the constitution*.

The petitioner's rights were violated when the government through the county council of Eldoret compulsorily acquired his land but failed to compensate the family. This was contrary to section 75 of the repealed constitution of Kenya that provides: -

75 (1) No property of any description was to be compulsorily taken possession of, and no interest in or right over property of any description was to be compulsorily acquired except with the following conditions are satisfied: -

the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

(2) Every person having an interest or right in or over property which is compulsory taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for- the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and the purpose of obtaining prompt payment of that compensation:

Provided that if Parliament so provides in relation to a matter referred to in paragraph (a) the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the right or interest in the property) from a tribunal or authority, other than the High court, having jurisdiction under any law to determine that matter.

188. Article 40 sub-Article 3 of *the Constitution* of Kenya provides that the State shall not deprive a person of property of any description or any interest in or right over property of any description unless the deprivation 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 5 or is for a public purpose or in public interest and is carried out in accordance with *the Constitution* or any act of parliament that requires prompt payment in full, of just compensation to the person and allows any person who has an interest in, or a right over, the property a right to access a court of law. The import of the provisions of Article 40(6) is that the rights under the Article do not extend to any property that has been found to be unlawfully acquired.

189. Article 40 of *the Constitution* of Kenya and section 75 of the repealed Constitution have the same intention of protecting the inalienable right to own land and to access the court if the right is violated and for prompt payment of compensation. This right is also enshrined in the Article 17 of the Universal Declaration of Human Rights 1948 whose gist is that everyone has the right to own property alone as well as in association with others.



## Whether To Evict Or Compensate

190. I have considered this issue and do find that the issue on order of eviction will amount to a lot of human suffering and will affect the interested parties' economic and social rights as the interested parties have constructed houses, business premises, churches, schools, hospitals, markets, roads and other related infrastructures. I do decline to order an eviction of the interested parties, 7<sup>th</sup> and 8<sup>th</sup> respondents.
191. Moreover, I do agree with the petitioners that Article 43(1)(b)(d)(e) &(f) of the Kenya Constitution, 2010 which states on Economic and Social Rights, that citizens have a right to adequate housing, proper sanitation clean water social security and education is relevant in this case. Should forcible eviction ensue in execution of the petitioners right to vacant possession of the suit land, then a fresh crisis in the form of a possible breach of the constitutional right under article 43 above may accrue to the interested parties and 7<sup>th</sup> and 8<sup>th</sup> respondents whose occupation was conferred and or sanitized the respondents' actions. The respondents will therefore be duty bound to provide alternative land to the hundreds of thousands of occupants of Langas estate in keeping with the spirit and letter of the said article. It would be much safer and cost effective to compensate the Petitioners for the value of land lost. Thereafter, the government can proceed to process titles in favour of the illegal occupants as earlier contemplated by the Respondents.

## Are Petitioners Entitled To Compensation?

192. It is trite law that an individual's property cannot be compulsorily acquired without compensation. The petitioners have proved on a balance of probabilities that they are the true owners of the property under dispute and therefore, are entitled to compensation. The petitioners have provided a valuation report which is not challenged. The valuation report was prepared by County Valuers. The basis of valuation is the open market value of the plot only. The method of valuation used for the land is the market comparable based on recent sales within the subject parcel of land for illumination of value activities and the immediate neighborhood for the actual valuation and bearing in mind the circumstances surrounding the sales in the opinion of the value to current market value of L. R. 8500 I.R. No. 11404 free from all encumbrances is the sum of Kshs.7,700,000,000/=. This report was not challenged by the respondents by instructing an independent valuer or a government valuer to come up with another valuation report.
193. In awarding special damages, the basic principle is that the same should be specifically pleaded and specifically proved. Courts in England have set the principles of granting special damages. In that regard in the case of Radcliffe Vs Evans [1892] QB 524 with regard to damages, the court stated that;
- “...The character of the acts themselves which produce the damages and the circumstances under which those acts are done must regulate the degree of certainty and particularity with which the damages done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage as is reasonable having regard to the circumstances and to the nature of the acts themselves by which the damage is done to relax old and intelligent principles, to insist upon more would be the vainest pedantry...”
194. In the Ugandan case of Jephthar & Sons Construction & Engineering Works Ltd vs The Attorney General HCT-00-CV-CS-0699-2006, the court held that;
- “...Compensatory damages, also called actual damages, are typically broken down into two broad categories: General and Special... General damages are given for losses that the law will presume are natural and probable consequence of a wrong. The general principle is that



they are awarded to compensate the plaintiff, not as punishment to the defendant... The principle that emerges from numerous authorities, notably *Sietco vs Noble Builders U Ltd* SCCA No. 31 of 1995 is that where a person is entitled to a liquidated amount or specific goods and has been deprived of them through the wrongful act of another person, he should be awarded interest from the date of filing the suit..."

195. Further, in the Lesotho case of *Mosisili vs Editor, Mirror Newspaper and Others* Case No. CIV/T/275/2001 the Court pointed out that;

"...it has been said that generally, it serves little purpose to refer to other cases where damages have been awarded since seldom is one case similar to another. What the cases offer are general guiding principles which by no means are exhaustive either. In the final analysis, a judge makes an award that he thinks meets the justice of the case."

196. In addition, and specifically with regard to special damages, the Court in the case of *Zacharia Waweru Thumbi vs Samuel Njoroge Civil Appeal No. 445 of 2003* stated that;

"...The law is quite clear on the head of damages called special damages. Special damages must be both pleaded and proved, before they can be awarded by the Court. Law Reports and Text Books on Torts are replete with authorities on this, which need not be reproduced here. Suffice it to quote from the decision of our Court of Appeal in *Hahn V. Singh*, Civil Appeal No. 42 of 1983 [1985] KLR 716, atP. 717 and 721, where the Learned Judges of Appeal — Kneller, Nyarangi JJA, and Chesoni Ag. J.A. — held:

"Special damages must not only be specifically claimed (pleaded) but also strictly proved. ...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves. "...If I were to explain, or define, special damages to a layman, I would say "they are a reimbursement to the Plaintiff/Victim of the tort, for what he has actually spent as a consequence of the tortuous act(s) complained of". This point cannot be overstressed: that the claimant of special damages must not only plead the claim, but also go further and strictly prove, usually by documentary evidence, that he has actually spent the sum claimed. In medical claims, the claimant must produce receipts to support his claim for special damages. In my view, given the requirement of strict proof, I would further hold that an invoice would not suffice. Only a receipt, for the payment, will meet the test... I now turn to the last ground of appeal, which is on the adequacy of the special and general damages awarded by the lower court. The award has been challenged as too low under the circumstances. I begin by emphatically stating that special damages can't be too high, or too low, since they are a reimbursement for what has actually been spent. Further, special damages are not assessable by the court. The court simply awards what has been pleaded and proved...It must always be kept in mind that no two cases can be exactly identical. Accordingly, doing the best I can in comparing the injuries sustained by the Respondent herein vis-à-vis those in the two comparables cited, and given the passage time between then and when the lower court delivered its judgment, and when the accident occurred mid-2001, I find no sufficient reason to interfere with the Learned Magistrate's award of KShs.180,000/- (One Hundred Eighty Thousand Only) under the head of general damages. Accordingly, I uphold the lower court's award..."

197. In the Ugandan case of *Mawenzi Investments Ltd vs Top Finance Co. Ltd & Another* HCCS NO 02 OF2013, the Court stated thus;



.. Special damages do not only have to be specifically pleaded, they are also strictly proved. According to Halsbury's Laws of England, 4<sup>th</sup> ED Vol. 12(1) at paragraph 812, special damages is those damages which are capable of calculation in financial terms and must be proved. In the case of *Kyambadde v. Mpigi District Administration* [1983] HCB 44, it was held that special damages must be specially pleaded and strictly proved, but does not have to be supported by documentary evidence in all cases. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and, therefore, they must be claimed specially and proven strictly... Assessment for general damages is based on the principle of *restitutio in integrum* according to East African Court of Appeal in the case of *Dharamshi vs. Karsan* [1974] 1 EA 41. The principle means that the Plaintiff has to be restored as nearly as possible to a position he or she would have been in had the injury complained of not occurred. According to Halsbury's laws of England fourth edition (reissue) volume 12(1) and paragraph 802 thereof damages are defined as the pecuniary recompense given by the process of law to a person for the actionable wrong that another has done him or her. Damages may, on occasion, be awarded to a Plaintiff who has suffered no ascertainable damage and damage may be presumed. General damages are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered... "

198. Similarly, in *Haji Asuman Mutekanqa vs Equator Growers(u) Limited* (Civil Appeal No.7 Of 1995), the Court noted thus;

"...Again, it is trite law that special damages and loss of profit must be specifically pleaded, as it was done in the instant case. They must also be proved exactly, that is to say, on the balance of probability. This rule applies where a suit proceeds inter parties or ex parte. It follows that even where as in the instant case, the defendant neither enters appearance nor files a defence, the plaintiff bears the burden to prove his case to the required standard. The burden and standard of proof does not become any less. As the learned author stated in *MC Gregor on Damages* Edition page 1028, the evidence in special damages must show the same particularity as is necessary from its pleading. It should therefore, normally consist of evidence of particular losses such as the loss of specific customers or specific contracts. However, with the proof as with pleadings, the Courts are realistic and accept that the particularity must be tailored to the facts... General damages consist, in all, items of normal loss which the plaintiff is not required to specify in his pleading in order to permit proof in respect of them at the trial. Its distinction from special damages was defined by Lord Wright in *Monarch S.S. Co. v. Karlshanus Oliefabriker* (1949) AC. 196 at 221 as being: "damages arising naturally (which means in the normal course of things) and cases where there were special and extra ordinary circumstances beyond the reasonable provision of the parties. In the latter event, it is laid down that the special fact must be communicated by and between the parties. "

199. These principles have never been overturned and therefore I do associate myself with the findings of the judges. Going back therefore to the reference before me, I have already found that the Petitioner's right to property under Article 40 of *the Constitution* had been violated as they were not compensated at all. The petitioner has satisfied me that the two families are entitled to the sum claimed which was specifically pleaded and proved vide the valuation report by City Valuers authored by H. W Khaemba which was not challenged. However, the figure arrived at is on the higher side and I do award the petitioners compensation of Kshs.4,500,000/= plus interest at courts rates accruing from the date of filing the suit to the date of payment. The Money should be paid from the consolidated fund as the 1<sup>st</sup> and 2<sup>nd</sup> respondents are successors in their offices.



200. On mesne profits, I do decline to grant the same as the respondents did not take possession of the property in dispute but only the abetted possession by the interested parties. The petitioners should file a proper suit for mesne profits against the interested parties. Moreover, the petitioners have not specifically proved what they claim as mesne profits.

### **Conclusion And Costs**

201. In conclusion, this court issues a declaration that the proprietary interest in land parcel 8500 I.R. 11404 otherwise known as Eldoret Municipality Block 22 (langas) vests in the petitioner and those he represents absolutely.
202. Secondly, that the 1<sup>st</sup> to 4<sup>th</sup> and 6<sup>th</sup> respondents' seizure of the petitioners' property known as Land parcel 8500 L.R. 11404 otherwise known as Eldoret Municipality Block 22 (langas) without the petitioners' consent and without compensation was unconstitutional.
203. Thirdly, that the process of conversion and subsequent subdivision of Land Parcel L.R 8500 L.R. 11404 otherwise known as Eldoret Municipality Block 22 (langas) though violated the proprietary rights of the petitioners under Article 75 of the Independent Constitution and Article 40 of the new *constitution of Kenya, 2010*, the same should be concluded and titles issued to the interested parties according to the records held by the National Land Commission the successor of the Commissioner of Lands in respect to the process that was commenced by the respondents' predecessors.
204. This court is of the considered view that the petitioners are entitled to costs and does award costs to the petitioners against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents the petitioners having been deprived of their land by the actions of the said respondents. No costs are awarded against the interested parties.
205. I do take this opportunity in conclusion to thank Mr. Kipnyekwei learned counsel for the petitioners, Mr. Mathai learned counsel for the 1<sup>st</sup> respondent, Mr. Opondo learned counsel for the 2<sup>nd</sup> respondent, Mr. Ngumbi, learned state counsel, Mr. Paul Birech learned counsel for the 7<sup>th</sup> and 8<sup>th</sup> respondents and Mr. Ngigi Mbugua learned counsel for the interested party for their industrious input and presentation that enabled the court to make this decision.

**DATED AND DELIVERED AT ELDORET THIS 12<sup>TH</sup> DAY OF JANUARY, 2018.**

**A. OMBWAYO**

**JUDGE**

