



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT ELDORET

PETITION NO. 4 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

ARTICLES 21, 22, 23, 40, 45, 50 AND 64

AND IN THE MATTER OF BREACH 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 LOCAL GOVERNMENT ACT

AND

IN THE MATTER OF THE REGISTRED LANDS CHAPTER 300

AND

IN THE MATTER OF LAND ACT NO. 6 OF 2012, LAWS OF KENYA

AND

IN THE MATTER OF LAND REGISTRATION

ACT NO. 3 OF 2012, LAWS OF KENYA

BETWEEN

RICHARD KIPKEMEI LIMO.....PETITIONER

VERSUS

HASSAN KIPKEMBOI NGENY.....1ST RESPONDENT

LAND REGISTRAR, UASIN GISHU COUNTY.....2ND RESPONDENT

CHIEF LAND REGISTRAR, MINISTRY OF LANDS.....3RD RESPONDENT

MUNICIPAL COUNCIL OF ELDORET.....4TH RESPONDENT

ATTORNEY GENERAL.....5TH RESPONDENT

ENOCK KIBIWOTT KIPTANUI.....6TH RESPONDENT

JUDGMENT

INTRODUCTION

1. The genesis of this matter is the plaint filed on 31.8.2012 by Enock Kibiwot Kiptanui as the plaintiff, (*herein referred to as the 6th respondent*) in High Court civil suit no 181 of 2012 against Richard Kipkemei Limo as the defendant (*herein referred to as the petitioner*) wherein the 6th respondent states that he is the registered owner of a leasehold interest over land reference number Eldoret Municipality block 7/178 measuring approximately 0.0697 hectares effective 28.6.1993. That he has put up temporary structures thereon and let the same to several tenants who undertake business thereon while occupying a portion thereof personally.

2. That on or about August, 2012 the petitioner went to the suit land and instructed the tenants to commence paying rent to him. That the petitioner has threatened to evict the 6th respondent as well as the tenants unless they pay rent to him. The petitioner's acts and omissions of demanding rent from the 6th and or threatening them with eviction in the event they fail to comply with his unjustified demand is a violation of the 6TH respondent's constitutional and legal right to own and use land.

3. The petitioner unless stopped intends to pursue his illegal activities against the 6th respondent and his tenants to his detriment. The defendant has no right legal or equitable over the suit land and his actions are legally untenable and illegal. The 6th respondent states that he has exclusive right to utilize the suit land to the exclusion of all and sundry including the defendant.

4. The 6th respondent prays for a declaration that the defendant has no legally enforceable claim over land reference number Eldoret Municipality/Block 7/178. The 6th respondent prays for a declaration that the petitioners acts and omission constitute a breach of his rights to own and utilize land reference number Eldoret Municipality Block 7/178 and a declaration that the petitioner has no legally enforceable claim on land reference number Eldoret Municipality Block 7/178.

5. The petitioner on the other hand denies that the 6th respondent is the lawfully registered owner of the parcel of land known as ELDORET MUNICIPALITY BLOCK 7/178 and that the 6th respondent put up temporary structures on the suit land for rent or that he occupies a section of the suit land.

6. The petitioner further denies that he asked the 6th respondent's tenants to pay him rent or that he threatened defaulters with eviction or that his acts and omission amounted to a breach of the 6th respondents right to own property. The petitioner states that he is the legally registered owner of the suit land herein and has enjoyed possession and user since the year 2004 to date and that it is the petitioner and not the 6th respondent who built the temporary structures which are currently being occupied by tenants who pay the petitioner rent and as such, the petitioner shall be seeking declaratory orders against the 6th respondent by way of counterclaim. In view of the foregoing, the petitioner avers that whatever he does on the suit land is in exercise of his propriety interest over it, which act is neither illegal nor detrimental to the 6th respondents interest as alleged in paragraph 8 of the plaint.

7. The petitioner further filed a counterclaim stating that on the 22nd day of December 2003, the defendant purchased land parcel ELDORET MUNICIPALITY BLOCK 7/178 (the suit land herein) from PARTICK MWENI, who upon receiving full consideration, facilitated a direct transfer of title from RHODA C. KANDIE (the then registered owner —now deceased) to the defendant. That pursuant to the foregoing, the relevant Letter of Consent to transfer was obtained and the petitioner was issued with title deed on the 24th February 2004, took possession, developed it and has enjoyed user of the same to date.

8. The petitioner avers that prior to purchasing the suit land, he conducted an official search and confirmed that the same was in the name of Rhoda C. Kandie, and that upon issue of title deed, he has consistently paid rates and rent and that in July 2012, he learned that a Mr. HASSAN NGENY, who claimed to be the registered owner of the suit land, was in the process of disposing of it, thereby necessitating the defendant to file Eldoret High Court Petition No. 10 Of 2012 which is now consolidated with Environment and Land Court Case no 7 of 2013.

9. The petitioner is surprised that the 6th respondent also purports to have title over the suit land and that he has had possession of the same when the truth is to the contrary.

10. The petitioner further avers that the purported title registered in the name of the 6th respondent in relation land parcel Eldoret Municipality Block 7/178 was obtained fraudulently. The particulars of fraud are: -

(a)Obtaining a questionable title deed.

(b)Conducting a questionable official search.

(c)Fabricating false documents.

11. The petitioner seeks a declaratory order holding that he is the legal owner of that parcel of land known as ELDORET MUNICIPALITY BLOCK 7/178. Secondly, the petitioner prays for a declaratory order holding that the title document held by the petitioner, relating to land parcel ELDORET MUNICIPALITY BLOCK 7/178 is valid. Thirdly, the petitioner prays for a declaratory order holding that the title document held by the 6th respondent is invalid and that the same be cancelled. Finally, the petitioner prays for an order of permanent injunction restraining the 6th respondent and or his agents from interfering with the defendant's land parcel No. ELDORET MUNICIPALITY BLOCK 7/178 plus costs of the suit.

12. In the reply to defence and defence to counterclaim, the 6th respondent denies that the petitioner is the lawful owner of the land and that the petitioner has been in possession of the land since 2004 and that the structures on the suit land were built by the petitioner. That the petitioner activities on the suit land are lawful and justified. He further denies that the suit was prematurely filed and no demand notice was issued and that he has no proprietary interest on the suit land.

13. In defense to the counterclaim, the petitioner reiterates each and every assertion in the plaint and in answer to the counterclaim states, thus the land has never belonged to Rhoda C. Kandie and that Patrick Mweni had no capacity to sell the suit land. Rhoda C. Kandie was never the registered owner of the land nor had the land been allocated to her. The letter of consent was invalid. The title deed exhibited as well as the white card are forgeries. The official search exhibited is a forgery and it never originated from the Lands Office. The rent demand notice as well as the alleged receipts for payment of the same are forgeries. The 6th respondent is unaware of the issues/matters raised in paragraph 17 of the defence and counterclaim. He has a valid title deed to the land and he is in possession of the land. All the particulars of fraud are denied. The 6th respondent denies ever illegally or fraudulently obtaining the title deed to the suit land. The petitioner has no legally enforceable claim to agitate against the 6th respondent. The 6th respondent further asserts that the petitioner upon being sued has proceeded to obtain questionable and forged documents so as to agitate the claim against the plaintiff.

14. This was followed with Petition No. 10 of 2012 filed by Richard Kipkemei Limo, (*hereinbefore and hereinafter referred to as the petitioner*) against Hassan Kipkemboi Ngeny (*hereinafter referred to as the 1st respondent*), the Land Registrar, Uasin Gishu County, Chief Lands Registrar, Ministry of Lands, Municipal Council of Eldoret and the Attorney General (*hereinafter referred to as the 2nd to 5th respondents*).

15. Parties filed responses to the petition and on the close of pleadings in both matters, this court made an order consolidating both matters and parties agreed that the petition be conducted through *viva voce* evidence. It was further agreed that the petitioner to file an amended petition to bring on board the 6th respondent, Mr. Enock Kibiwott Kiptanui. The amended petition was to be filed and served within 7 days. The respondents were to file responses within 14 days. The 1st respondent was allowed to file a supplementary affidavit whilst the petitioner was allowed to file a further affidavit.

16. There was a difficulty in bringing the 6th respondent on board as his advocate failed to attend court on several occasions when the matter was listed for hearing but the matter took off on 1.11.2016 without the 6th respondent.

PETITIONER'S CASE

17. Going back to the pleadings, the amended petition was filed on 10.12.2013. In the amended petition, the petitioner states that he is the registered owner of that parcel of land known as ELDORET MUNICIPALITY BLOCK 7/178 measuring 0.0697 Ha, having purchased the same from the then registered owner in the December 2003, acquired Lease Title in February 2004 and has been enjoying possession and user since then to date. That in mid July 2012, he received information to the effect that third parties were selling the suit land herein and that acting on the said information, he visited the 2nd and 3rd respondents' offices and on inquiring the status of the suit land, he learned that their records indicated that the 1st respondent became the owner of the suit land in April 2012.

18. The 1st respondent is a stranger to him and has never ceded proprietary interest in the suit land herein to anyone. He therefore lodged a complaint on fraud vide O/B No. 50/24/7/2012 at Eldoret Police Station and the matter is still under investigation. The Petitioner further avers that during the pendency of this petition, the 6th Respondents herein, filed Environment and Land court case No. 7/2013 claiming ownership of the suit land herein.

19. It is the petitioner's contention that the issuance of Lease Title in the name of the 1st and 6th respondents when the petitioner has a valid Lease title, is in possession and enjoying user was fraudulent and in breach of statutory duty on the part of the respondents jointly and severally. The particulars of fraud on the part of the 1st respondent is: -

i. Applying for allotment of the suit land when he knew or ought to have known that the same was already registered in the name of the petitioner.

ii. Purporting to apply for allotment of the suit land when the same has already been developed by the petitioner.

iii. Failing to disclose to the allotting authority that the suit land was not vacant.

iv. Failing to conduct official search on the suit land with a view to establishing whether it was private property or not.

20. The particulars of fraud on the part of the 6st respondent are:-

(i) Applying for allotment of the suit land when he knew or ought to have known that the same was already registered in the name of the Petitioner.

(ii) *Purporting to apply for allotment of the suit land when the same has already been developed by the Petitioner.*

(iii) *Failing to disclose to the allotting authority that the suit land was not vacant.*

(iv) *Failing to conduct official search on the suit land with a view to establishing whether it was private property or not.*

21. The particulars of breach of statutory duty by the 2nd and 3rd respondents are: -

(i) *Purporting to issue the 1st and 6th respondents with Letters of Allotment for the suit land herein when the same already had Lease Title in the name of the petitioner.*

(ii) *Processing Lease Title for the suit land herein in favour of the 1st and 6th respondent when the petitioner already had Title.*

(iii) *Failing to demand letter of consent for transfer before registering the 1st respondents as the owners of the suit land*

(iv) *Processing a set of records which indicates that the petitioner is the registered owner of the suit parcel of land and another sets in favour of the 1st and 6th respondents.*

(v) The particulars of breach of statutory duty by the 4th respondent are:-

(vi) *Deleting the name of the petitioner in their records of suit parcel herein without his consent.*

(vii) *Purporting to enter in their records, the name of the 1st respondent as the owner of the suit land herein without ascertaining the nature of transfer to the 1st respondent.*

22. It is the petitioner's contention that the 2nd, 3rd and 4th respondents' acts in purporting to bestow ownership of the suit land upon the 1st and 6th respondents, when he is already registered as the owner is unlawful and in breach of as is constitutional right to private property. The particulars of breach of petitioner's constitutional right to property are: -

1. Loss of right to property without his consent.

2. Loss of right of ownership of the suit land without adherence to the due reprocess of law.

3. Loss of right of ownership of the suit land without compensation and or consideration.

23. The petitioner avers that as a result of breach of his constitutional right to property as afore particularized, the petitioner has suffered loss and damage and prays that the honourable court do issue a declaratory order holding that the petitioner is the lawfully registered owner of land parcel ELDORET MUNICIPALITY/BLOCK 7/178.

24. Secondly, the petitioner prays for a **declaratory order** holding that the respondents' actions, whether jointly or severally in purporting to transfer/register the suit land ELDORET MUNICIPALITY/BLOCK 7/178 in favour of the 1st and 6th respondents is unconstitutional and adverse to the interest of the petitioner.

25. Thirdly, the petitioner prays for an **order of mandamus** compelling the 2nd and 3rd respondents to nullify letter of allotment and/or certificate of lease for land parcel ELDORET MUNICIPALITY/BLOCK 7/178 issued in favour of the 1st respondent.

26. Fourthly, the petitioner prays for an **order of mandamus** compelling the 2nd, 3rd, and 4th respondents to delete in the register the names of the 1st respondent as the owner of the land parcel ELDORET MUNICIPALITY/BLOCK 7/178 and in its place, enter the names of RICHARD KIPKEMEI LIMO, the Petitioner herein, 1st respondent.

27. Fifthly, the petitioner prays for **order of mandamus** compelling the 2nd and 3rd respondents to nullify letter of allotment and/or certificate of lease for land parcel ELDORET MUNICIPALITY/BLOCK 7/178 issued in favour of the 6th respondent.

28. Sixthly, the Petitioner prays for an **order of mandamus** compelling the 2nd, 3rd and 4th respondents to delete in the register the names of the 6th respondent as the owner of land parcel ELDORET MUNICIPALITY BLOCK 7/178 and in its place, enter the names of RICHARD KIPKEMEI LIMO – the Petitioner herein.

29. The petitioner prays further for **an order of prohibition** barring the 1st and 6th respondents jointly and severally from committing acts and omissions that are prejudicial to the petitioner's interest in land parcel ELDORET MUNICIPALITY/BLOCK 7/178 and finally, an order of permanent injunction barring the respondents jointly and severally from committing acts and omissions prejudicial to the petitioner's interest in land parcel ELDORET MUNICIPALITY/BLOCK 7/178 plus costs of the petition.

30. The petitioner states in his supporting affidavit that he is the registered owner of the suit land. He purchased the land from one Patrick Ngumbao Mweni who had authority to sale from Rhoda Chelagat Kandie, the then registered owner and that prior to purchasing the suit land

herein, he conducted a search on the 15th December, 2003 in Uasin District Gishu land registry and the results indicated that the same was indeed registered in the name of the said Rhoda Chelangat Kandie and upon completion of the consideration, he applied for consent for transfer on 15th December, 2003 which consent was issued.

31. He was subsequently issued with the certificate of lease on the 24th February, 2003. That upon issue of title, he took possession of the suit land, developed the same and leased out a section of it for commercial purposes and has been paying rent to the 2nd respondent. The 4th respondent has been demanding rates and he has dutifully paid the same. That later in July 2012, a friend of his namely Salim Kipsang brought him a copy of a certificate of Lease Title which indicated that the suit land was registered in the name of the 1st respondent, a fact which is adversarial to his interest. That he was surprised to note that the said certificate of lease was issued in the 1st respondent's name on 12th April, 2012, yet the 1st respondent is a stranger to him, he had not sold the suit land to anyone and he still holds the certificate of lease for the suit land. That he lodged a criminal complaint in Eldoret Police Station vide O/B24/07/2012 and thereafter, visited the 2nd respondent's office, where he was informed by one of the lands officers whose name he cannot remember that the suit land had been transferred to the 1st respondent herein. That he then visited the 3rd respondent's offices in Nairobi, where he was given a print out on rent payment status of the suit land, which indicated that the 1st respondent had overpaid by Kshs.23,892 when it is him who had paid the said amount.

32. On the 24th of July 2012, he visited the 4th respondent's office and upon seeking to know the status of the suit land, he was informed that their records indicate that he was no longer the owner; and it is when he asked his advocate to write a letter requesting 4th respondent to stop any dealing in the suit land.

33. On the 31st July 2012, a story relating to the suit land herein was published in page 16 of the Star Newspaper in which the 1st respondent confirmed that he was the registered owner of the suit land and that he had instructed his advocate to sell it as Kshs.35,000,000.

34. On the 17th August 2012, he went to ask for the rates payment request for the suit land herein and upon issue of the same, he realized that the rates payer for the suit land is the 1st respondent. That the 1st respondent has clearly confirmed that he has interest in the suit land herein and that he intends to dispose of the same, which event will prejudice his interest in the suit land.

35. The 2nd, 3rd and 4th respondents on the other hand seem to be streamlining the paper works in favour of the 1st respondent, even upon being notified that there is something irregular in the manner in which the 1st respondent has been registered as the owner of the suit land. That during the pendency of this suit, the 6th respondent herein filed Eldoret Environment and Land Case No. 7 Of 2013 claiming ownership of the suit land allegedly because he is also the registered owner.

36. The petitioner claims that he has a *bonafide* purchaser for value without notice of defect in title, if any. That it is his contention that the lease titles issued to the 1st and 6th respondent are fraudulent because he has lease title for the same property which was issued earlier in time, which has not been invalidated by operation of any law. That he has no contractual relationship with the 6th respondent over the suit land.

37. The petitioner contends that the respondents acted in concert and in such manner as to unlawfully deprive him of his constitutionally guaranteed right to private property as particularized in the petition. That he has been in possession and that no issue over ownership of the suit land ever arose between him and the 6th respondent until this suit was filed.

1ST RESPONDENTS REPLY

38. Hassan Kipkemboi Ngeny in his response to petition states the alleged sale of Eldoret Municipality Block 7/178 was null and void ab-initio and that the petitioner is underserving of the orders sought as the petitioners' actions are tainted with illegalities which cannot and/or ought not to be sanctioned by this Honourable Court.

39. The 1st respondent denies that the petitioner is the registered owner of parcel of land known as Eldoret Municipality Block 7/178 measuring 0.0697 hectares and denies that the petitioner bought the suit land from the registered owner.

40. According to the 1st respondent, the petitioner has never acquired the lease title of Eldoret Municipality Block 7/178 and that if he acquired the lease then the same was done illegally, fraudulently and in total disregard of the laws of Kenya. The 1st respondent denies that the petitioner has been in possession, usage and enjoying usage of the suit land. It is the 1st respondent's case that he has been in possession, occupation and usage of the suit land.

41. The petitioner's claim is defective since he avers that he acquired the property from one Mr. Patrick Ngumbao Mweni, a person who at the time was not the registered owner and did not have a registerable interest in the said property.

42. He states that the seller Patrick Ngumbao had no authority to transfer the property and that no succession suit had been filed. The agreement was never witnessed. There is no transfer of lease. The 1st respondent claims to be registered proprietor of the land and that the petitioner obtained title illegally and fraudulently. He prays that the petition be dismissed.

43. In the replying affidavit sworn on 13.7.2016, he states that by a letter dated 29th April 1982 he applied to the President of the Republic of Kenya through his private secretary/controller for allocation of plot marked as '21' which has been identified in the attached map ("the plot"). The letter of 29th April, 1982 made it clear that he intended to use the plot for commercial purpose only.

44. That he also addressed a different letter dated 29th April, 1982 to the Commissioner of Lands requesting to be allocated the plot. The letter dated 29th April, 1982 was received by Commissioner of Lands on 6th of May 1982 by his secretary. That he also submitted a similar application dated 29th April, 1982 to the District Allocation Committee through the District Commissioner, Uasin Gishu District.
45. The 1st respondent is aware that by a letter dated 23rd June 1982, the private secretary/controller to the President of the Republic of Kenya informed the Commissioner of Land that the head of state had approved the allocation of the plot in his favour and by a letter dated 17th May, 1982, the Commissioner of Lands informed him that there was only one plot that was available for allocation and the same could only be allocated to him if internal approval is obtained. This letter was copied to the private secretary/controller to the President.
46. That by a letter dated 13th August, 1982, the Commissioner of Lands informed him that his application to be allocated the plot had been approved and that a letter of allotment would be issued after the finalization of all formalities.
47. That by a letter dated 27th January, 1983, the Commissioner of Lands forwarded to him the letter of allotment reference number 31710/XI/190. The letter of 27th January 1983 obliged him to pay the sum of Kshs.22,083 being the stand premium and other legal charges within 30 days. The Commissioner of Lands had attached special conditions which inter alia made it clear that the plot could only be used for shops (excluding the sale of petrol), offices and flats. He communicated his acceptance to the Commissioner of Lands through a letter dated 25th February, 1983. This letter forwarded a bankers cheque No. 076685 for the sum of Kshs.82,183. That the Commissioner of Lands issued a receipt dated 28th February, 1983 which acknowledged receipt of his payment.
48. The Commissioner of Lands informed the Director of Surveys that he had formally accepted the allotment by his letter dated 30th March, 1983. The letter of 30th March 1983 also requested the Director of Surveys to undertake a survey of the allocated plot and assign a survey number. By a letter dated 19th April 1983, the Commissioner of Lands requested him to remit the sum of Kshs.1,365 to cater for the land rates which had accumulated. The correspondence file for the plot that had been allocated to him went missing at the Lands registry in Nairobi sometime in August, 1983.
49. That he kept on visiting the land office in Nairobi as well as the Commissioner of Lands office but he was told that nothing could be done to fast-track the registration of the plot in his favour as the correspondence file was missing. That he made several visits and complaints about the missing correspondence file and the Commissioner of Lands on a number of occasions assured him that will be traced to no avail.
50. In the year 1989, he sustained injuries as a result of an accident involving a Nairobi bound bus as a result of which he was admitted to hospital for about 2 years. That he was discharged from hospital in the May, 1991 but he could not go on with his usual activities on account of the injuries that he had sustained. He maintained an on and off life in hospital until the year 1996 when the doctors advised him to seek further medication from India but he was unable to raise the medical fee and the transportation cost. That he partially recovered from injuries that he sustained in the accident in March, 1998 and was now able to personally follow up on the registration of the plot that had been allocated to him.
51. The Director of Surveys informed the Commissioner of Lands that the plot had been surveyed and assigned number Eldoret Municipality Block V11/178 by his letter dated 9th September, 1998 and by a letter dated 21st August 2003, the Commissioner of Lands asked the Director of Surveys to amend the survey map (R.I.M) for the allocated plot noting that he had paid the sum of Kshs. 2,450 being the survey fees.
52. The Director of Surveys notified the Commissioner of Lands that the survey map (R.I.M) had been amended to reflect the allocated plot measuring 0.0697 Ha. As per F/R 170/118 by his letter of 27th August 2003.
53. On 20th March 2012, he received a letter dated 19th March 2012 demanding that he pays the sum of Kshs. 337,670 being the outstanding rates for the allocated plot.
54. That he paid the sum of Kshs.3,430 as land rent to the Commissioner of Lands on 20th March, 2012 as a result of which he was issued with a rent clearance certificate dated 21st March, 2012. That he paid the minimal sum of Kshs.3,890/- as land rent considering that he had overpaid the land rent for the plot immediately after it had been allocated to him.
55. That in response to the Commissioner of Lands demand contained in the letter dated 19th March, 2012, he forwarded a cheque for Kshs.337,670/- to the Commissioner of Lands in settlement of the outstanding land rates by the letter dated 21st March, 2013. That he also paid the sum of Kshs.3,890/- to the Commissioner of Lands being the stamp duty on account of the accumulated rates.
56. That he is aware that by a letter dated 22nd March 2012, the Commissioner of Lands wrote to the Land Registrar, Uasin Gishu District forwarding to him the Lease document in triplicate duly signed and stamped for registration purposes. The Commissioner of Lands informed him to visit the lands office in Eldoret with a view of collecting the lease for the allocated plot for purposes of execution by his letter dated 22nd March, 2012.
57. That he visited the District Land Registrar offices at Eldoret on 3rd April 2012 and after introducing himself, he was issued with the lease document in triplicate. He signed the lease before the District Land on the same date. He was then asked to wait for the certificate of lease while checking on a regular basis.
58. That on 16th April 2012, he visited the District Land Registrar's office in Eldoret when he was informed that the lease for the allocated plot has been registered and a certificate of lease issued in his favour. he collected the certificate of lease from the counter at the land's offices. That on 3rd May, 2012, he instructed the law firm of R. M. Wafula to conduct an official search on his over the suit property to

establish its status.

RESPONSE BY 2ND, 3RD AND 5TH RESPONDENTS

59. Hellen Kharemwa, the District Land Registrar, Uasin Gishu states that she has established that there are two registers in respect of land parcel Eldoret Municipality Block 7/178 which are in the names of different parties. That a lease document was forwarded for registration in March 2012 and the said registration was effected on 12.4.2012 in favour of Hassan Kipkemboi Ngeny. That soon thereafter, a complaint was lodged concerning the allocation of the parcel and they noted a restriction on the register. They later discovered that another register already existed in favour of Ricahrd Kipkemboi Limo, which was registered on 24.2.2004 as a transfer from Rhoda Chelangat Kandie.

60. That the said parcel was not transferred from Richard Kipkemboi Limo to Hassan Kipkemboi Ngeny. That they do not object to the prayer to nullify the allocation to the 1st respondent as it is a case of double allocation and hence the initial allocation ought to take effect.

REPLY BY 6TH RESPONDENT

61. The 6th respondent states that his elder brother, Mr. Abraham Kipsang Kiptanui was the State House Comptroller since 1983 for 13 years to 1996 and that at the time he was with who is who in this Country and that included Mr. Philemon Chelagat. That Mr. A. K. Kiptanui had some properties in Nakuru and when Mr. Philemon Chelagat came to know he notified Mr. A. K. Kiptanui that he had a parcel of land in Eldoret.

62. That Mr. Philemon Chelagat requested that they do exchange the subject properties to which Mr. A. K. Kiptanui accepted and therefore Mr. Abraham accepted the Allotment letters as herein. That Mr. Philemon Chelagat paid land Rent vide receipt No. Y117094 dated 19th February 1983. Thereafter, Mr. Abraham K. Kiptanui his elder brother donated the said land to the 6th respondent and thus Mr. Philemon Chelagat was duly instructed to transfer the same to the 6th respondent.

63. The 6th respondent did pursue the same wherein he brought in Arch surveyors to put beacons on his portion after taking over the same in 1983. That then he dug out blue gum trees that were the hallmark of the riverbed and fenced it off and put up temporary structures. That upon putting up temporary structures, he did used the subject plot till 2012 when trouble erupted, when Mr. Limo brought an extra title. That he is alive that at 1996 his original file in Nairobi file No. 110547 had disappeared prompting his brother Mr. Abraham Kiptanui to Write a letter of protest. That indeed save for the title he is advised all documents in his file disappeared.

64. That he has had the occasion to look at the documents presented by Mr. Limo and he observes that Mr. Limo was conned of his hard-earned cash first and foremost Mr. Aron Kandie did not have any land or at all even for his widow to inherit and that indeed Mr. Limo bought land from someone who had no proprietary interest at all known in law. That indeed, Mr. Limo bought land from Patrick Ngumbao Mweni who never owned any parcel of land, nor did he have any registered power of attorney to act for and on behalf of the alleged Mrs. Kandie. The sum total of the subject transaction is that it was still and will be some nullity *ab initio*.

65. The law, he is advised, is very clear and as clear as crystal balls that if at stage one there was no legal capacity then however much it may be repeated cannot or never gain legal status. That when Ngumbao alleges that he is the owner when truly the purchaser knows that he was not, and that he did not have any agency agreement and or power of attorney, it is deemed that the purchaser knew that the agreement did not have any force of law. That the only resource available to Mr. Limo is but to seek refund from Mr. Ngumbao. That worse still he cannot, he is advised, hide on an innocent 3rd party purchaser as he was duly on Notice that the land did not belong to Ngumbao.

66. According to the 6th respondent, what is before the court is a case of fraud because they do have 3 title deeds on the same subject property, consequently every detail whereof ought to be brought to fore. That other than the sale agreement, purported search and transfer from the commissioner of lands to Rhoda no other document is before court to justify any other process.

67. That it is also inevitable to note that this title was brought over in 2012 when trouble was abounding. That all notices and activity started in 2012 and thus the threats of eviction, counter eviction, notices and varying orders then each claiming ownership and being even in imagination. That indeed as at the time Limo came into the picture, there were structures therein and every part was in occupation. He has had occasion to have been read to the reply by Mr. Ngeny and he states that an application to the Head of State must be received and signed by his Excellency personally, and so Mr. Ngeny's Application does not hold water in all aspects.

68. According to the 6th respondent when one is applying for a plot he does not point the plot for it is supposed to be any Vacant Plot, by putting a number you can now appreciate to note that already someone else had been allocated the same why because as at 1981, February 12th, Mr. Philemon Chelagat had been allocated under file Ref. No. 31710/x1/197 and later ref. No. 10359/2 plan No. 31710 on face file No. 110547.

69. That indeed the application for the plot is fake to the extent that it was not Ngeny Hassan who did the application but his friend at Moi University Mr. S. R. Kipsang. That through all the annexed documents, no paginated serial numbers were assigned to any page or at all as expected of all government filed documents. That there was and indeed he is advised a great difference between the ministry of lands then and settlement schemes, where the mixture arose. That the premium and payments indeed brings out his exact figures leaving no doubt that whatever letters where made specifically to suit the allotment of his subject parcel of land.

PETITIONERS SUBMISSIONS

70. Petitioner through the firm of Nyekwei and company submits that the suit title was registered in his name and he got title in 2003. He purchased the land from Patrick Mweni who had acquired the same from Mrs. Rodah Kandie, the widow of the late Aron Kandie, the

original allottee. He has been in occupation and enjoying use of the subject land since the year 2003. He submits that his title deed is the only valid title for the suit land. He further argues that Hellen Kharemwa was of the opinion that this was a case of double allocation as there were two registers and since the petitioner's documents came first the 1st respondents title is invalid.

71. According to counsel for the petitioner, the 1st respondent was illiterate and did not give a good account as to how he obtained title and heavily relied on a friend to do the whole transaction and that this friend was not called as a witness.

72. That the documents produced by the 1st respondent were photocopies and forgeries and that the 1st respondent has never paid the rates and has never been in possession of the land. That the stand premium was paid a year earlier than the date of allotment outside the statutory period of 30 days. Moreover, the petitioner argues that no explanation is given as to why the 1st respondent paid for more fees than what was demanded in the letter of allotment date 27th February 1983.

73. With regard to the 6th respondent, the petitioner argues that the 6th respondent does not know what his brother exchanged for the suit land. Moreover, the allotment letter relied upon by the 6th respondent refers to **Unsurveyed Plot No 20** whereas the suit land is **Unsurveyed Plot No 21**. He further argues that the 6th respondent is not a rate payer and that he is not in possession and has not explained how the petitioner came into possession.

SUBMISSIONS BY 1ST RESPONDENT

74. According to the 1st respondent, the Court should consider the full tenor and effect of the letter of allotment dated 27th January, 1983. This appears to be the foundation of the 6th Respondent's case. After going through the part development plan (PDP) and correspondence from the survey department, the 6th Respondent admitted that upon survey being conducted, unsurveyed plot number 20 was assigned property number Eldoret Municipality Block 7/177 while unsurveyed plot number 21 was assigned property number Eldoret Municipality Block 7/178 the suit property herein.

75. If the letter of allotment that produced by the 6th Respondent is anything to go by, the 6th Respondent should be claiming the property known as Eldoret Municipality Block 7/177 and not the suit property. No explanation has been given by the 6th Respondent to justify why he ended up obtaining a Certificate of Lease over the property known as Eldoret Municipality Block 7/178. The 1st respondent therefore urges the Court to find that the 6th Respondent does not have an identifiable interest over the suit property. He should be claiming ownership of the property known as Eldoret Municipality Block 7/177 and not the suit property.

76. He further argues that It is settled law that title to property comes into existence after issuance of a letter of allotment, meeting the conditions stated in such a letter of allotment and actual issuance thereafter of a title document in accordance with the law and therefore assuming that the 6th Respondent was claiming the right property, he would still not be entitled to ownership of the same as the Philemon Chelagat did not have a Certificate of lease. Neither was he registered the proprietor of suit land. Philemon CheLagat merely held a letter of allotment and no evidence has been adduced to show that he complied with the conditions thereof and therefore he could not transfer the suit property.

77. The 6th Respondent has not produced evidence to show that Philemon Chelagat had a good title that was capable of being transferred to him. He has only produced a letter of allotment which suggests that unsurveyed plot number 20 was allocated to him. There is no evidence that Philemon Chelagat complied with the conditions set out in the letter of allotment or held a valid Certificate of Title. In fact, he was not called as a witness.

78. There is no evidence that proper procedure was followed in the transfer of the suit property to the 6th Respondent even assuming Philemon Chelagat had a good title. In particular, there is no evidence that consent to transfer was ever procured or that stamp duty was paid. There is also no evidence that the annexed transfer was registered with the Respondent. More importantly, no evidence has been adduced to suggest that a lease was ever executed by the Commissioner of Lands.

79. Article 40 (6) of the Constitution of Kenya, 2010 provides that the right to property does not extend to property that has been found to have been unlawfully acquired. As we understand it, the Petitioner relies on the doctrine of indefeasibility of title to persuade the Court that he has a good title. It is our submission that the concept of indefeasibility of title cannot be relied upon as a shield to protect unlawfully acquired property.

80. The Petitioner's claim over the suit property is founded on the assertion that the same was sold to him by Patrick Ngumbao Mweni. As demonstrated above, the said Patrick Ngumbao Mweni was not the registered proprietor of the suit property and therefore lacked the capacity to transfer the suit property.

81. The Petitioner did not produce a copy of the transfer and lease, if any that was executed in his favour. The petitioner also admitted that no stamp duty was paid prior to the registration of the property in his name. No evidence was produced to show that the petitioner or the purported vendors obtained necessary consents to transfer he suit properties.

82. The Petitioner's Certificate of Lease is under challenge. The procedure that led him to be registered as the proprietor of the suit property, which was a public utility land, is a fact within peculiar and special known of the Petitioner. Under Section 112 of the Evidence Act, it was incumbent upon the Petitioner to demonstrate that he followed the right procedure to get public land registered in his name. As set out above, the process that the Petitioner followed prior to the registration of the suit property in his name is riddled with falsehoods and irregularities.

83. No evidence has been adduced to demonstrate that the provisions of the Government Land Act (repealed) were followed before the

alienation of the suit property to the Petitioner or his alleged predecessor's in title. In particular, sections 3, 7, 9 and 12 of the Government Land Act required that any alienation of public land be done by the President. No evidence has been given to show that the President alienated the suit property to the petitioner or his purported predecessor's in title.

84. In absence of evidence of compliance with the provisions of the Government Land Act, we urge the Court to find that the Petitioner has not demonstrated that he has a good title which is capable of protection. The protection under Article 40 of the Constitution of Kenya, 2010 does not extend to property that has been acquired irregularly. The petitioner's is one such property. We urge the Court to find that the Petitioner is not entitled to ownership of the suit property.

SUBMISSIONS BY THE 2ND, 3RD AND 5TH RESPONDENT

85. The Attorney General, acting for the 1st, 2nd, and 5th respondents, has framed four issues for determination. The first issue being whether the parties herein complied with due process in acquiring their respective titles? According to the Attorney General, section 26 of the Land Registration Act, 2012 and relying on the concept of indefeasibility of title the parties herein are seeking court's protection as they claim to have acquired their respective titles lawfully.

86. The matter of procedure of acquiring title and process of allocation of unalienated government land, according to the Attorney General, is so important that it was revisited by the Court of Appeal in **Henry Muthee Kathurima versus-Commissioner of Lands & Another (2015) eKLR**, in which the judges held as follows:

“On our part, we find no good reason to fault the trial court's finding that the appellant unlawfully acquired title to the suit property. The appellant's certificate of lease is under challenge; the procedure that the appellant followed that led him to be registered as proprietor of the suit property, which is a public utility land, is a fact within the peculiar and special knowledge of the appellant. The respondent's case is that the procedure for alienating the suit property as a public land was not followed; under the provisions of Section 112 of the Evidence Act, it is incumbent upon the appellant to demonstrate the procedure he followed to get public land registered in his name... he had to demonstrate that the provisions of the Government Land Act were followed in alienating the suit property and the subsequent registration in his name... Further, it is our view that the Government's title to an un-alienated public land stems from the concept of radical title or eminent domain. Based on radical title, the government has superior title to all un-alienated public land ”

87. It is the duty of this court to review and evaluate evidence on record to ascertain due process and whether parties herein obtained their titles lawfully or complied with provisions of Government Land Act. It is not enough for a party to allege having complied with due process. Every title holder must lead evidence that concisely demonstrate whether the title was acquired lawfully. Where no such evidence is led, Article 40(6) of the Constitution provides the remedy.

88. He cites the case of Henry **Muthee Kathurima -versus-Commissioner of Lands & Another**, the Court of Appeal faulted the concept of indefeasibility of title under section 26 of the Land Registration Act, 2012 to the extent that section 26 cannot be invoked to defeat spirit and intent of Article 40(6) of the Constitution. In cancelling the appellant's title for non-compliance with procedure, the court held:

“We have considered the provisions of Section 26 of the Land Registration Act in light of the provisions of Article 40(6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the Constitution. Guided by the provisions of Article 40(6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.”

89. The second issue as per the Attorney Generals submissions is whether petitioner acquired his title lawfully and on this issue the Attorney General argues that the petitioner failed to explicitly show how he acquired his title. His testimony was riddled with inconsistencies and contradictions, to wit; Firstly, he failed to state with certainty who sold and transferred the suit land to him. Was it Rhoda Chelangat Kandie or Patrick Ngumbao Mweni? A sale agreement showed that the vendor was Patrick Ngumbao which contradicted his evidence that Rhoda Kandie sold the land to him. At some point, he testified that Rhoda Kandie authorized Patrick Ngumbao to sell the suit land on her behalf. No such authority was produced in evidence. He also testified that Patrick Ngumbao had purchased the suit land from Rhoda Kandie and therefore he was selling his purchaser's interest in the suit land. No sale agreement was produced to buttress this allegation.

90. At one point, he testified that he never met Rhoda Kandie and on being probed further he changed his version and stated that in fact Rhoda Kandie signed transfer of lease. No such transfer was produced in evidence. Secondly, the petitioner failed to prove how the alleged allottee, Rhoda Kandie, acquired her title. Was it by way of transfer/transmission or direct allotment? There was no evidence that Rhoda Kandie or Aron Kandie applied for allocation of the suit land or that the application was approved or a letter of allotment was issued or that she/he complied with special conditions of allotment or that a lease in her/his favour was prepared or registered as mandatorily required in law. He also failed to demonstrate how and why Rhoda Kandie was registered as an administrator of the estate of Aron Kandie in the face of evidence on record. The petitioner did not call Patrick Ngumbao or Rhoda Kandie to shed light on the circumstances surrounding his impugned title. Thirdly, even assuming that Rhoda Kandie acquired her title properly and therefore the title transferred to the petitioner was good or that Patrick Ngumbao had *locus standi* to dispose of the suit land as he allegedly did, which is wholly denied, the petitioner again failed to demonstrate whether his title was processed lawfully and properly.

91. According to the Attorney General, there is no evidence that prior to transfer the petitioner applied and procured consent to transfer from the then Commissioner of Lands. There is no evidence that prior to transfer the petitioner paid cleared and procured rent and rate clearance certificates as law required. There is no evidence that prior to transfer the petitioner paid stamp duty under the Stamp Duty Act. There is no evidence that prior to transfer a duly executed transfer of lease was properly lodged for registration or that the requisite registration fee was paid. No presentation book was availed. The gravamen of the Attorney General's submission on this issue is that the petitioner failed to demonstrate that he acquired the land legally. He has not come up clearly to explain how he obtained title in his name.

92. On whether the 6th respondent acquired his title lawfully, the honorable Attorney General argues that the 6th respondent's claim over the suit land is rather strange and suspicious. While he alleges to have been issued with a certificate of lease his evidence is at variance with the title. He failed to prove that the Government intended to allocate the land to him, to wit; Firstly, the 6th respondent was emphatic that he has no claim over un-surveyed Plot 21 which gave rise to the suit land herein. On the contrary, the 6th respondent confirmed that what he is interested in was un-surveyed plot 20 which after survey gave rise to Eldoret Municipality Block 7/177. Initially, he had laid claim to plot 8.

93. The honorable Attorney General argues that the 6th respondent confirmed that unsurveyed plot 20 was allocated Philemon Chelangat but he did not confirm whether Philemon Chelangat had applied for allocation and if he had applied for the same, whether application for allocation was approved and an allotment letter issued and pursuant to the issuance of the allotment letter, whether Philemon Chelangat complied with special conditions of allotment and ultimately whether a lease was issued to Philemon Chelangat. According to the honorable Attorney General, the 6th respondent failed to prove how and in what circumstance the alleged Plot 20 was transferred to him and whether it was before or after issuance and registration of lease, if any and also failed to prove the consideration for transfer or whether consent from Commissioner of Lands was procured or whether rent and rate clearance certificates were procured or whether stamp duty or registration fee was paid.

94. That the 6th respondent equally failed to demonstrate the procedure through which his alleged title was acquired. His case is riddled with numerous contradictions. He did not call any evidence to shed light on how the said certificate of lease, which is suspect, was issued. He cannot purport to rely on section 26 of Land Registration Act to claim that his title is unimpeachable. Consequently, concept of indefeasibility of title cannot apply. That the 6th respondent's alleged title was not acquired properly and legitimate expectation cannot operate in his favour. It is trite law that legitimate expectation flows from law and cannot substitute principles in relation to protection of property.

95. The 1st respondent specifically applied for unsurveyed plot 21. The application was acknowledged and a letter of allotment issued to 1st respondent with requirement of acceptance within 30 days; The 1st respondent did accept the allocation and paid stamp premium within 30 days and subsequently thereafter a lease was prepared for registration. The parcel file at the central registry was misplaced hence the delay in forwarding the lease for registration but later the 1st respondent initiated re-construction of the parcel file.

96. The lease was subsequently prepared, executed, paid for and sent to the land registry for registration and subsequent issuance of a certificate of lease. Indeed, even in the affidavit of Hellen Kharemwa, the particular lease in 1st respondent's favour was annexed but none was provided for petitioner and 6th respondent. According to RW 3 there might have been clerical errors in documentation. Such errors, however, did not defeat or affect the clear intention of Government in allocation.

97. The honorable Attorney General submits that the said clerical errors notwithstanding, the 1st respondent proved the unequivocal intention of Government. He proved that the Government intended to and indeed allocated the suit land to the 1st respondent. He proved the process he followed thereafter until his certificate of lease was issued. It is clear that the 1st respondent could not be blamed for the said inconsistencies in Government documents which he had no control over. It was also proved that the inconsistencies in figures did not affect the final tally or the due process followed. In any case, Government has not raised any objection on account of the said clerical errors.

98. According to the Attorney General, the 1st respondent demonstrated procedure through which his title was acquired. Neither petitioner nor 6th respondent tendered evidence to prove whether their alleged titles were acquired lawfully. There is no iota of evidence presented by petitioner and 6th respondent to show the process followed. Article 40(6) of the Constitution defines the fate of such titles.

99. He cites the case of ***Funzi Island Development Limited & 2 others -versus- County Council of Kwale & 2 Others (2014) eKLR***, Hon. Maraga JA (as he then was) held that in the case of allocated land, a registered proprietor acquires an absolute and indefeasible title if and only if the allocation was legal, proper and regular. A court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegally or irregularly obtained title.

100. He further cites Republic ***-versus- Land Registrar Kilifi & Another ex parte Daniel Ricci (2013) eKLR***, the court held that a title deed is an end product of a process. For a title deed to be protected by Article 40(1) of the Constitution, the holder of the title deed has to establish that he followed the laid down procedures in acquiring it.

101. In ***Daudi Kiptugen -versus- Commissioner of Lands Nairobi Lands 4 others (2015) eKLR***, Hon. S. Munyao in respect of indefeasibility of title held as follows:

“In order to determine the question whether the lease held by the plaintiff is valid, it must be demonstrated that it was properly acquired. It is not enough that one waves a Lease or a Certificate of Lease and assert that he has good title by the mere possession of the Lease or Certificate of Lease. Where there is contention that a Lease or Certificate of Lease held by an individual was improperly acquired, then the holder thereof, must demonstrate, through evidence, that the Lease or Certificate of Lease that he holds, was properly acquired. The acquisition of title cannot be construed only in the end result, the process of acquisition is material. It follows that if a document of title was not acquired through the proper process, the title itself cannot be said to be a good title. If this were not the position, then all one would need to do is to manufacture a Lease or Certificate of Title, at a backyard or the corner of a dingy street, and by virtue thereof, claim to be the rightful proprietor of the land indicated therein. It is therefore necessary for this court to determine how the plaintiff ended up having a Lease and Certificate of Lease in his name, and further determine if the Government did intend to issue the plaintiff with a Lease over the suit land.”

102. On whether doctrine of double allocation is applicable the honorable Attorney General argues that this issue was put forth vide the affidavit of Hellen Kharemwa filed on 18.11.2013. At paragraph 3, she had in custody two registers in respect of LR No. Eldoret Municipality Block 7/178 in the names of different parties and enclosed their copies. At paragraph 4, she had in her custody a lease

forwarded for registration and confirmed that registration effected on 12.4.2012 in favour of 1st respondent and enclosed its copies. At paragraphs 5 and 6, a dispute on allocation was lodged and it is then that the register in favour of the petitioner was detected and restriction noted. It is at paragraph 8 that she makes her bold suggestion without any supporting evidence. She concludes that 1st respondent's title should be cancelled as it was a case of double allocation hence initial allocation ought to take effect. She stated so in the absence of documents in support of what she considered as initial allocation. She was not called by parties to buttress her opinion.

103. According to the honorable Attorney General, double allocation does not arise in the circumstances akin herein as there has only been one allocation: allocation in favour of 1st respondent and that there was never allocation to Rhoda Kandie and such allocation, if any, did not crystallize. The case of the 6th respondent is rather strange. He holds a certificate of lease for the suit land herein yet his allocation was of a different plot altogether: unsurveyed plot 20 that gave rise to LR No. Eldoret Municipality Block 7/177 upon survey. That double allocation arises where two titles over the same parcel are issued to different parties lawfully and procedurally.

104. Evidence tendered must lead to one definite conclusion: that both titles were acquired lawfully and procedurally. It is only then that equitable doctrine of 'first in time prevails' may be invoked. In ***Gitwany Investment Limited -versus- Tajmal Limited & 3 Others (2006) eKLR***, Hon. Isaac Lenaola J. (as he then was) confronted with two genuine titles had this to say:

***“Like equity keeps teaching us, the first in time prevails so that in the event such as this one where, by a mistake that is admitted, the Commissioner of Lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without fraud save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The Gitwany title fits this description and in fact up to the end of this case, the 3rd party has not sought to cancel it!*”**

47. My answer above does not solve the puzzle however. What then happens to the second title issued apparently procedurally but subsequent to an earlier valid title? Again, my view is that the answer lies in s.23(1) aforesaid. Whereas the first title cannot be challenged, the second one can be challenged because whereas it exists and even if procedurally issued, or so it appears, it is not absolute nor indefeasible and is relegated to a level of legal disability and the remedy for a party holding it if aggrieved, lies elsewhere, a matter I will shortly address.”

105. The Attorney General argues that petitioner and 6th respondent's titles are suspect and were not issued lawfully and procedurally. It is not correct to invoke the doctrine of double allocation in the circumstances herein.

106. As to whether the petitioner is a bonafide purchaser, the Attorney General argues that the petitioner could not explain the circumstances under which the title was allegedly transferred to him. He did not lay any link with Rhoda Kandie. He did not explain how Patrick Ngumbao could sell the land without express authority from Rhoda Kandie. Moreover, he failed to prove whether there was any good title to pass from Rhoda Kandie to himself or whether all procedural requirements were followed. In view of all these missteps, the petitioner does not qualify to be a bonafide purchaser. He cannot therefore enjoy the privileges of a bonafide purchaser for value without notice.

107. On whether the case of fraud was proved he submits that the petitioner did not adduce evidence to prove allegations of fraud pleaded in the petition. That the petitioner did not tender evidence to prove the alleged fraud. It is clear from evidence of record that 1st respondent applied for allocation on 29.8.1982. His allocation was approved on 13.8.1982 and letter of allotment issued on 27.1.1983. Payment was made on 28.2.1983 and survey done on 9.9.1998 wherein the current number was born. An RIM was amended and forwarded for registration on 27.8.2003. His lease was forwarded for registration on 22.3.2012 and certificate of lease issued on 12.4.2012 after due compliance.

108. On the other hand, he submits that the register in respect of petitioner's title was allegedly opened on 20.11.2003 in the name of Rhoda Chelangat Kandie. The petitioner was allegedly registered as proprietor of the suit land on 24.2.2004. It is clear that 1st respondent applied and was allotted this property long before the petitioner came into the picture. In the absence of proof of allocation to Rhoda Kandie or compliance with procedural requirements, it is academic for this court to entertain any claim of duplication of records or double allocation as already demonstrated hereinabove. According to the Attorney General, where fraud is pleaded it is not enough for a party to merely allege or infer to acts of fraud. The party must tender evidence to prove the specific acts of fraud.

109. He cites the case of ***Vijay Morjaria versus- Nansingh Madhusingh Darbar & another (2000) eKLR (Civil Appeal No. 106 of 2000)***. Tunoi JA (as he then was) stated as follows:

"It is well' established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading, the acts alleged to be fraudulent must of course be set out, and then it should be stated that these acts were done fraudulently. It is afro settled law that fraudulent conduct must be distinctly alleged and as distinctly proved, and it is not allowable to leave fraud to be inferred from facts."

SUBMISSIONS BY THE 6TH RESPONDENT

110. The 6th respondent submits that before this Honourable Court are 3 titles. This is a case of triple allocation. The 6th Respondent title never was entered in the green card yet he was issued with a title in 1993, over the same parcel of land carefully and procedurally Unsurveyed No.8 gave rise to No. 20 and subsequently to Block 7/1 78 upon survey and ground alignment. The evidence before court must of necessity lead to the fact of all titles issued carefully and procedurally.

111. He refers to the case of ***Investment Limited -Vs- Taintal Limited 3 Others (2006) eKLR***, where Hon. Isaac Lenaola J. brought to force the doctrine of '***first in time prevails***', when he was confronted with such a situation where he had this to say; -

"Like equity keeps teaching us, the first in time prevails so that in the event such as this one whereby a mistake that is admitted, the commissioner of lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without wand save for the mistake, then the first in time must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The gitwany title fits the description and in fact up to the end of this case. The 3rd party has not sought to cancel it"!

112. He admits that the scenario presented in this dispute may not necessarily reflect the position above; save, that the 6th Respondent title was first in time.

113. According to the 6th respondent, Madam, Hellen Kherenwa representing the 2nd Respondent on her affidavit dated 13th June, 2013, interestingly admitted to the existence of 2 Registers. The custodians exposed their soft belly on the ease with which with the correct connections one can duplicate a title, herein the exact element of mischief could really have played itself manifestly. She justified the issuance of the petitioners' title as first in time. However, as submitted above could not explain how the petitioner did not have the justifiable document as required herein above. The petitioner does not know how the land was allocated to Rhoda. He doesn't know the relationship between Rhoda and Patrick Mweni Ngumbao, no agent agreement and so forth.

ANALYSIS AND DETERMINATION

114. I have considered the pleadings, evidence on record and submissions by counsel and do find the following facts in existence. There are 3 certificates of lease issued to the Petitioner, 1st respondent and 6th respondent.

115. The petitioner, **Richard Kipkemei Limo** purchased the suit property from one Patrick Ngumbao Mweni of ID. No. 2118731 who was not the registered proprietor of the suitland . It is claimed in the agreement dated 22nd December, 2003 that Patrick Ngumbao Mweni was the Vendor and owner of the property. However, the certificate of search dated 17th December, 2003 indicates that the property was registered in the name of Rhoda Chelangat Kandie as the administrator of the Estate of Aron K. Kandie. There is no agreement of sale between Rhoda Chelangat Kandie and Richard Kipkemei Limo. Moreover, there is no agreement of sale between Rhoda Chelangat Kandie and Patrick Ngumbao Mweni. There is no certificate of lease issued to Patrick Ngumbao Mweni and there is no transfer of lease registered in respect of the transfer from Rhoda Chelangat Kandie to Patrick Ngumbao Mweni and to the petitioner. Richard Kipkemboi Limo simply has the certificate of lease and is in possession of the Suitland. I have looked at the consent to transfer issued on 16th January 2003 and do find that the same was issued to Rhoda Chelagat Kandie in reference to a letter dated 15th December 2003. It appears that the consent was issued 11 months before the request for the consent. The issue that boggles legal minds is how did Patrick Ngumbao Mweni come into this matter as the vendor and yet the property was not registered in his name. The consent to transfer was given by the commissioner of lands to Rhoda Chelangat Kandie who appears to have donated the power to sale to Patrick Ngumbao Mweni without a power of Attorney. Ultimately title was issued to Richard kipkemei Limo on 24th February,2004.

116. The 1st respondent, **Hassan Kipkemboi Ngeny's** who also has a certificate of lease issued on 12.4.2012. states that on the 29.4.1982, he applied to the President of The Republic of Kenya through his private secretary/ comptroller of state house for allocation of plot marked as "21" which had been identified for commercial purposes where he wanted to put a business. He claimed that he did not have a square inch in the country. He also addressed a different letter to the commissioner of lands which was received on the 6th of May 1982 by his secretary.

117. On the 17th May, 1982, the Commissioner of Lands wrote to Hassan Kipkemboi Ngeny through Mr. A. L. Arap Ngeny the private secretary and Comptroller of State House indicating that there was only one plot No. 21 in Eldoret town available for allocation.

118. On 23.6.1982, His Excellency the former President Daniel Toroitich Arap Moi approved the application for allocation of a plot and a letter of allotment was issued for plot No. 21 Eldoret Municipality on the 28.2.1982, the Department of Lands received the 1st respondent's acceptance of the allotment letter and cheque of Kshs. 82,183 as part of the requested money and rates and rent to the government.

119. On the 9.9.1998, it was communicated to the Commissioner of Lands that the R.I.M. had been amended and Plot No. 21 became Plot No. 178 and therefore on 8.4.2002, there were instructions that a new lease was to be issued in the names of Hassan Kipkemboi Ngeny. The lease document was prepared and executed by Zablon Aguata Mabea on behalf of the Commissioner of Lands on 15.2.2012 by the order of the President and by the 1st respondent on 3.4.2012. The same was registered on 12th day of April, 2012 and a certificate of lease issued. Though there are anomalies in the process of registration of Hassan Kipkemboi Ngeny, the same do not amount to fraud and or irregularity.

120. The 6th respondent, **Enock Kibiwot Kiptanui** states that his elder brother Abraham Kipsang Kiptanui had some properties in Nakuru while Mr. Philemon Chelagat had some property in Eldoret which they agreed to exchange. The allotment letters to Mr. Philemon Chelagat in Eldoret were in respect of unsurveyed plot 8 Eldoret Municipality and Plot No. 20 Eldoret Municipality. Mr. Abraham Kiptanui donated the plot to the 6th respondent and Philemon Kiplagat was instructed to transfer the land to the 6th respondent. He took possession and used the land until 2012 when trouble started as Limo had an extra title.

121. This court takes note of the fact that Plot No. 21 became Eldoret Municipality Block 1/178 and is not the same as Plot No. 20 that was allocated to Philemon Chelagat and that Plot No. 20 gave rise to Parcel No. 1/177 and therefore, could not have been converted into the suit land. Moreover, the 6th respondent does not confirm how Mr. Philemon Chelagat obtained allotment letter in respect of Plot No. 20. The 6th respondent has no evidence as to how the property was transferred to him and how he was registered as the proprietor of the suit land.

122. The above facts raise the issue as to whether the parties herein complied with due process in acquiring their respective titles, I do find that this is a pertinent issue for the determination of the dispute as the concept of indefeasibility of title is subject to Article 40(6) of the Constitution of Kenya which provides as follows: -

(i) 40. (1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(ii)

(iii)

(iv)

(v) (6) The rights under this Article do not extend to any property

(vi) that has been found to have been unlawfully acquired

(vii) Section 24 (a) of Land Registration (Act No.3 of 2012) provides that: -

(viii) “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.”

123. The registration of the parties herein as proprietors of the suit land, gives them absolute proprietorship for the said parcel of land. Such absolute proprietorship can only be subject to certain rights and privileges as are known to law. That is why Section 25 of the Act provides as follows;

S.25 (i) “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;

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

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

124. Each party has produced the certificate of lease in respect to the same property all duly registered as evidence of ownership and in terms of Section 26 (1) of the Act;

“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 –

i. On the ground of fraud or miss-representation to which the person is proved to be a party to;

ii. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”

125. I have gone through the pleadings and evidence on record and do find that the certificate of lease produced by the 1st respondent was properly and legally acquired as due process was followed. The certificate of lease produced by the petitioner was not procedurally obtained as the alleged vendor of the property was not the registered proprietor and therefore could not transfer non-existent rights to the petitioner. The certificate of lease produced by the 6th respondent was unprocedurally obtained as the 6th respondent was allocated plot number 20 that was un-surveyed which after survey gave rise to Eldoret Municipality Block 7/177, and not plot no 21 that was also unsurveyed but after survey gave rise to Eldoret Municipality Block 7/178, and therefore could not have been issued with title in respect of the latter.

126. I do agree with the citation of Henry **Muthee Kathurima -versus-Commissioner of Lands & Another**, where the Court of Appeal found that the concept of indefeasibility of title under section 26 of the Land Registration Act, 2012 cannot be invoked to defeat spirit and intent of Article 40(6) of the Constitution. In cancelling the appellant's title for non-compliance with procedure, the court held:

127. “We have considered the provisions of Section 26 of the Land Registration Act in light of the provisions of Article 40(6) of the Constitution and it is our considered view that the concept of indefeasibility of title is subject to Article 40(6) of the Constitution. Guided by the provisions of Article 40(6) of the Constitution, we hold that the concept of indefeasibility or conclusive nature of title is inapplicable to the extent that title to the property was unlawfully acquired.”

128. The principle of double allocation only applies where all titles were procedurally and legally issued and therefore the first in time prevails. This principle is drawn from the principle of equity that where the equities are equal the first in time prevails.

129. The case of **Investment Limited -Vs- Taintal Limited 3 Others (2006) eKLR**, can be distinguished from this case as the titles for the

petitioner and the 6th respondents were not issued by mistake but unprocedurally and irregularly. In the cited case Hon. Isaac Lenaola J. Held: -

"Like equity keeps teaching us, the first in lime prevails so that in the event such as this one whereby a mistake that is admitted, the commissioner of lands issues two titles in respect of the same parcel of land, then if both are apparently and on the face of them, issued regularly and procedurally without wand save for the mistake, then the first in lime must prevail. It must prevail because without cancellation of the original title, it retains its sanctity. The gitwany title fits the description and in fact up to the end of this case. The 3rd party has not sought to cancel it"!

130. The upshot of the above is that the petitioner has failed to demonstrate that he acquired the suit property regularly and procedurally and that he is the legal owner of the suit property and therefore I do dismiss the petition with costs and do hereby nullify the certificates of lease issued to the Petitioner and 6th respondent and for avoidance of doubt, I do find that the 1st respondent obtained his title legally and therefore he is the lawfully registered proprietor. The costs of the petition to be borne by the Petitioner. Orders accordingly.

Dated and delivered at Eldoret this 9th day of February, 2018.

A. OMBWAYO

JUDGE