



**REPUBLIC OF KENYA**

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

**E & L PETITION NO. 4 OF 2016**

***[Formerly High Court Petition No. 7 OF 2012]***

**IN THE MATTER OF VIOLATION AND/OR INFINGEMENT OF THE PETITIONERS  
CONSTITUTIONAL RIGHTS UNDER ARTICLE 19, 20, 21, 22, 23, 35, 40, 47 AND 165 OF THE  
CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**SIRIKWA SQUATTERS GROUP.....PETITIONERS**

**- V E R S U S -**

**THE COMMISSIONER OF LANDS.....1ST RESPONDENT**

**THE CHIEF REGISTRAR OF TITLES.....2ND RESPONDENT**

**THE DIRECTOR OF LAND ADJUDICATION**

**AND SETTLEMENT.....3RD RESPONDENT**

**THE DIRECTOR OF SURVEY.....4TH RESPONDENT**

**DISTRICT LANDS OFFICER,**

**UASIN GISHU DISTRICT.....5TH RESPONDENT**

**LONRHO AGRI BUSINESS(EA) LTD.....6TH RESPONDENT**

**MARK KIPTARBEI TOO.....7TH RESPONDENT**

**DAVID K. KORIR.....8TH RESPONDENT**

**HIGHLAND SURVEYORS LTD.....9TH RESPONDENT**

**KENNEDY KUBASU.....10TH RESPONDENT**

**JUDGMENT**

**THE PETITIONERS CASE**

The petitioner claims to be a duly registered self-help group registered with the Ministry of Gender, Sports, Culture and Social Services under Registration Number UG/SS/REG/10943/2006 and has a membership of over five hundred (500) families and that the forefathers of its members have been in occupation of the Land Parcels L.R. No.9606,9607, 9608, 745, 742/2, 773917R, 10793 and 10794 all in Uasin Gishu District. The petitioners' forefathers were forcefully evicted by the white settlers' community in the year early 1920's. That subsequently the member's heritage and lineage were employed as workers and laborers by the colonialists. The registered proprietorship to the said land changed severally and the last registered proprietor was M/s Lonrho Agribusiness (East Africa Limited). That again the members of the petitioners were employed as the Farm Hands and Laborer's at the wattle farm. That through this period, the members like other citizens of this great Republic clamored to be properly settled and great efforts were made to ensure that that is done. That as a consequent, it was agreed and indeed the Government undertook to settle the petitioners. This therefore entailed the surrenders of the titles to the suit lands named above by the Lonrho Agribusiness (East Africa Limited) to the Government and the said parcels of Land were to be held by the Government in trust for the Petitioners and for the purposes of settling the petitioners. The suit land and the titles were surrendered to the Government.

On or about 28th October, 1998 and pursuant to the petitioner's application dated the 22nd October, 1998, the president of the Republic of Kenya (now retired) His Excellency Daniel Toroitich Arap Moi through a direct presidential approval approved the petitioner's application to be allocated L.R. No.9606, 9607, 9608, 745, 742/2, 7739/7R, 10793 and 10794 all in Uasin Gishu District. The Director of Land Adjudication and Settlement through a letter dated the 14th October, 2001 confirmed the allocation of the parcels of land aforesaid to the petitioner's membership. The letter dated the **14th October, 2001** confirms in its salient parts;

**“.....This letter is to acknowledge and confirm of issuance of the above parcels to the squatters whom were workers of EATEC (formerly Lonrho East Africa) namely the Sirikwa Squatters. This was a result of direct approval and authority by the President.....”**

The fact of the allocation of the said parcel of Land to the Petitioners membership was confirmed in a letter dated the **17th July, 2007** by the Commissioner of Lands who confirmed that the parcel of Land L.R. No.9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all Uasin Gishu District were given a direct approval to the petitioners by H. E. The President of the Republic of Kenya and was meant to settle the squatters group which include farm hands and laborers and their families previously engaged by M/s Lonrho Agri Business Ltd (EATEC LTD).

The said letter reiterates that the Presidential allocation still stands and that the Commissioner of Lands Office has no objection to the finalization of the squatter's occupation. The subsequent letter also came from the Director of Land and Settlement in dated the 22nd June, 2007 addressed to the Honorable Attorney General in reference to the suit properties and the said Director of Land Adjudication and Settlement have no objection to the formalization of the squatter's settlement. The position on the ground as regards the parcels of land aforesaid has been confirmed severally and in part by District Lands Officer, Uasin Gishu in letters dated the 14th May, 2008 and 23rd July, 2008 that the petitioner's members can still be accommodated in the settlement. That in a letter dated the 10th September, 2008 to the Attorney General, the Commissioner of Lands reaffirmed that the said parcels of land were surrendered to the Government of Kenya for allocation of Squatters. The availability of the land for settlement of the squatters was also confirmed in a letter dated the 9th day of November, 2005 and the 20th May, 2006 by the Director of Land Adjudication and Settlement Officer to the Permanent Secretary, Ministry of Lands and Housing. That indeed in a letter dated the 22nd September, 2010 the Commissioner of Lands advised the District Commissioner, Uasin Gishu to expedite the process of vetting the list of Sirikwa Squatters Group to facilitate their settlement in L.R. No.9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 in Uasin Gishu District. The petitioner's claim that their constitutional rights of protection of right to property, of acquiring and owning property is in real jeopardy as the respondents either singly or jointly have by their acts sought to arbitrarily deprive the petitioners the said properties and the petitioners interest in or right over the suit properties has been or is about to be violated. That in the said letter dated the 31st day of May, 2012, the District Land Officer,

Uasin Gishu District to the State Law Office, Eldoret purports to state that the surrender of the titles to the suit properties was for purposes of conversion from the Registration of Titles Act Cap. 281 to the Registered Lands Act Cap.300 Laws of Kenya and transfer to the beneficiaries. The said letter does not disclose who are the beneficiaries (save the 6th and 7th Respondents holding a tiny portion of the suit properties) and how they were identified but importantly for the petitioners the allotment of the suit lands to the petitioners was severally confirmed in several official documents by the several Government Offices and in particular by the Commissioner of Lands and that has continued to remain so.

The 7th and 8th Respondents formerly the Chairman and the property sales managers respectively with the Lonrho Agribusiness (East Africa) Limited and despite the surrender of Land to the Government of Kenya for settlement of Squatters, took advantage of their respective positions in the company and went ahead and sought allocation of the land to themselves and their beneficiaries using a business entity known as Lonrho Africa Property and Construction of P.O.Box 200, Eldoret upon which they engage in massive sale of the suit parcels previously allocated to the petitioner membership, a clear case of seeking to reap from where they did not sow and ought to be held to account. The acts of the 7th and 8th Respondents were purely acts of attempting to procure registration of the said parcel of land in their favor and their beneficiaries in breach of the Constitution of Kenya and the protection of rights to private properties. That in total these were acts that the law will not countenance and were unconstitutional to say the least. The said acts cannot go without a remedy.

The 1st to 5th Defendants representing Government Offices/Public Offices must lead the way in respecting the law and using the public office to do public good and not to use, abuse the said office to confer benefit to individuals by whims and/or arbitrarily. That a public body invested with statutory powers such as those conferred upon the 1st to the 5th Respondents must take care not to exceed or abuse its powers. It must act within the limit of the authority committed to it. It must act in good faith and must act reasonably. That therefore while the petitioner's allocation of the suit land remained intact, the 1st to 5th Defendants in their purported allocation and issuance of titles to the individuals including the titles to the 5th and 6th Respondents jointly and/or singly acted in a manifestly unreasonable manner, acted in bad faith and in total they abused their powers.

The petitioner claims that the Constitution of Kenya, 2010 provides that the state shall not deprive a person a property of any description or any interest in or right over, property of any description without following the law. That under the constitution of Kenya, a right or fundamental freedom in the Bill of Right shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. That apart from the above, the attempted deprivation of the land to the petitioners was not executed humanely and was executed without due regard to the petitioner rights to the property and the protection of the same. That some of the National values embodied in the Kenya Constitution includes human dignity, equity, social justice and in it is the right to inherent dignity and the right to have that dignity respected and protected. The petitioners are squatters on the suit land and their plight need to be considered, respected and protected. That as confirmed in several official correspondences the suit land or portions of them are still available for the occupation by the petitioners, membership and the intervention by the Honorable Court in that direction will provide the much-needed remedy. That apart from that, it is apparent that the purported allocation and issuance of the titles to the alleged beneficiaries is tainted with fraud, did not emanate from a due process of the law and is therefore illegal, null and void and the titles emanating therefrom are for cancellation as the suit lands remains allocated to the petitioner's squatters group and is for their benefit and/or settlement. The petitioners several attempts to have the exercise of the registration of the suit lands in favor of the petitioners have been unsuccessful.

The 10th Respondent then a private surveyor while trading as Highland Surveyors and operating at Eldoret Town and without the authority of the Director of Survey either generally or specifically, entered in to the said parcels of lands and carried out the surveys works which exercise was illegal and/or was carried out in breach of the law and is of no legal effect. The said Surveyor did not carry out the survey undertaken by him in such a manner as will ensure that the survey record accords in all respects with the provision of the Survey Act Cap 299 Laws of Kenya and the regulation thereunder and consequently the said 10th Respondent which has now metamorphosed into a limited liability company, the Highland

Surveyors Ltd the 9th Respondent herein and relocated to Nairobi is responsible for the sad state of affairs obtaining at the said parcels of land and liable to the petitioner for damages and/or compensation for acts above on such terms and amounts as shall be calculated by the Court. That while the petitioners were awaiting the registration and settlement on the ground some strangers and/or persons claiming to be from the respondents have on occasions moved to the ground and taken measurements and have threatened the petitioners with eviction, a fact that has created tension with the petitioner's main fear being rendered homeless.

That in total, the petitioners pray that their protection of right to property and/or settlement have been or is about to be violated if the 1st to 5th Respondents do not carry out the exercise of registration and settlement of the petitioners. The petitioners seek orders against the 6th, 7th, 8th, 9th and 10th Respondents from sub-dividing, selling, transferring, mortgaging, occupying, wasting, charging, the suit land and/or in any other manner from inter-meddling with the suit properties. The petitioners seek orders compelling the commissioner of land and the 2nd, 3th, 4th and 5th Respondents to execute the necessary conveyance and/or for issuance of titles to the petitioners to facilitate their occupation of the said lands by the petitioners and to generally give the necessary directions. The petitioners further seek the courts intervention and directions, to enable them enjoy what had been allocated by the Government of Kenya. That under the Constitution of Kenya no one may be deprived of property except in terms of a law of a general application and this therefore entails the protection of the petitioner's settlement on the suit property.

The petitioners pray that the Honourable Court be pleased to issue an order directing the 1st, 2nd, 3rd, 4th and 5th Respondents to perform their constitutional duties and abide with the letter reference No. DS/C/1/VOL.11/01 dated the 11th day of October, 2001 by the Director Land adjudication & Settlement Mr. A. Shariff on behalf of the Ministry of Land and Settlement and also His Excellency the President of the Republic of Kenya (Retired) direct approval of the 28th October, 1998 and issue Title Deeds for parcel Nos. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District into the names of the petitioners for them to resettle and allocate their members.

They further pray for a declaration that the petitioners constitutional right to property and/or interest in or over the properties L.R. No. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District deserves the protection by the Honourable Court and that the protection do issue accordingly and consequently conservatory orders are made over the said suit properties.

A declaration that the petitioners rights and fundamental freedom and in particular the protection of right to property and/or interest in or right over suit property has been violated and/or infringed or is about to be violated and their properties parcels No. L.R. No. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District is in real danger of being arbitrarily acquired by the 6th, 7th, 8th, 9th and 10th Respondents and their beneficiaries to the detriment of the Petitioners.

The petitioners further seek damages as against the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, 9th and 10th Respondents for breach and/or violation of the Petitioners constitutional rights to properties and protection of the same.

A declaration that the acts of the 9th and 10th Respondents of carrying out the surveys work on the suit parcel of Land Ref. L.R. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu without authority of the Director of Surveys either generally or specifically was thus an illegality, and the said works are of no legal effect and the 9th and 10th Respondents are liable in damages and/or compensation to the petitioners for their illegal acts on terms and/or quantum to be assessed by the Court.

That a declaration to issue that the acts of the 6th, 7th and 8th Respondents of unlawful attempting to deprive the Petitioner of their allotted parcels of land in the light of the above was without any legal basis, an act of illegality and unconstitutional and are liable to the Petitioners in compensation and/or damages for losses, for loss of use land and for breach of their constitutional rights on such compensation as shall be assessed by the Court.

That together with the grant of the orders above, the Honourable Court do hereby forthwith cancels all the titles or any title issued and/or emanating from the L.R. No. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu to the 6th, 7th Respondents and all other beneficiaries and the Registers be rectified accordingly.

**THE 1ST-5TH RESPONDENTS CASE**

The 1st to 5th Respondents filed a replying affidavit through R. J. Simiyu the then District Land Officer, Uasin Gishu County who stated that he had in his control the administrations parcel file for Land reference Pioneer and this registration Block known as Pioneer & Ngeria Block 1 (EATEC) in the Municipality of Eldoret, Uasin Gishu County. The gist of the case of the 1st to 5th Respondents is that he confirm that Land Reference Numbers 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793, 10794 and 11481, were originally registered under the Registration of Titles Ordinance Cap 160 (now repealed) and the following grants issued to a company known as Plateau Wattle Company Limited for terms ranging from 946-951 years from 1.1.1958 pursuant to surrenders registered with the Registrar for the following Lands:-

- (i) Grant No. I.R. 14891.....L.R. NO.9606
- (ii) Grant NO. I.R. 14892.....L.R. NO.9607
- (iii) Grant No.I.R.14808.....L.R. NO.9609(752/3)
- (iv) Grant No.I.R. 14809.....L.R. NO.9608
- (v) Grant No.I.R.18864.....L.R. NO.10793
- (vi) Grant No. I.R.18858.....L.R. NO.10794
- (vii) Grant No. I.R.....L.R. NO.12398
- (viii) Grant No. I.R. 20274..... L.R. NO.11481(752/1)
- (ix) Grant No. I.R. 20240.....L.R. NO.745

That from the root history of the respective titles, the company owned an approximate total of Twenty-Five Thousand Acres (25,000) comprised in the above grants with other lands which are not included in the Petition set out as hereunder:

- a. L.R. NO.9606 .....848.00
- b. L.R. NO.9607.....1,167.0
- c. L.R. NO.9608.....824.00
- d. L.R. NO.9609.....618.00
- e. L.R. NO.745/2.....669.68
- f. L.R. NO.12398.....400.06
- g. L.R. NO.10793 .....7061.0
- h. L.R. NO.10794.....4836.0
- I L.R. NO.11481.....1,171.0

That in respect to the parcel for L.R. No.9606 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 950 years from 1-1-1958. That in respect to the parcel for LR. No.9607 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 950 years from 1-1-1958. That he further confirmed that in respect to the parcel for L.R. No.9608 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 951 years from 1-12-1957. That he further confirms that in respect to the parcel for L.R. No.10793 a grant was issued to the Plateau Wattle Company Limited to a surrender registered for a term of 946 years from 1-4-1962.

That he further confirms that in respect to the parcel for L.R. No.10794 a grant was issued to the Plateau Wattle Company Limited to a surrender registered for a term of 947 years from 1-4-1962. That he further confirmed that in respect to the parcel for L.R. No.9609 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 941 years from 1-12-1957.

In respect to the parcel for L.R. No.11481 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 944 years from 1-4-1964 That the lands were subsequently transferred by the company by way of sale to East Africa Tanning Extract Company between 1964-1965. That he confirmed in respect to all grants that from the records in his custody an instrument of transfer was registered on 26/3/1965 whereupon all the lands were transferred to East Africa Tanning Company Limited for a consideration of Kshs.6,583,925 vide entry No.2 in presentation No.920 registered on 26/3/1965.

Subsequent to the transfers to the East African Tanning Extract Company, the Company changed its name in 1992 to EATEC, vide entry registered with the Registrar in presentation No.143 on 3/9/1992, in 1995 the company further changed its name to EATEC LIMITED which change was noted and registered by the Registrar on 30/8/1995 then in 1999 to Lonrho Agro Industries (East Africa) Limited, and in 2000 to Lonrho Agribusiness (East Africa) Limited which entry was noted and registered by the Registrar on 9/6/2000 vide No.317 and vide presentation No.318 of the same date, the company further changed its name to Lonrho Agri Business (East Africa) Limited which were all noted by the Registrar of Titles.

He confirmed that in respect to L.R. No.10794, a surrender to the Government of the Republic of Kenya in exchange with a new grant No. IR 47007 had earlier been lodged by the E.A.T.E.C. and entered and registered in presentation No.645 on 17/4/1989 as entry No.6. He is also aware that on 2/11/2000, the Company Lonrho Agri-Business (East Africa) Limited surrendered to the Government of the Republic of Kenya all the grants for purposes of conversion of the tenure from the regime under the Registration of Titles Act Cap 281 to the freehold tenure under the regime of the Registered Land Act which surrenders were noted in presentation Nos. 163, 164, 169, 171, 174, and 175 on 2/11/2000.

That at the time of the surrenders, the suit lands were privately owned and registered in the name of Lonrho Agri-Business (East Africa) the suit lands were amalgamated for purposes of issuance of freehold titles under the Registered Land Act and a new registration section known as Pioneer & Ngeria Block 1 (EATEC) registered in or about 23/1/2001 with resultant subdivisions.

That he further confirmed that following the conversion of the suit lands to freehold titles the original suit lands were registered under the Registered Land Act and new parcels registered for LR 9606, 9607 9608, 745/2,10793, 10794, 11481 and 12398 corresponding as Pioneer & Ngeria Block 1 (EATEC) 707, 5903, 7068, 7739, 3395.

The LR.9606 had resultant 10 sub-divisions as shown in the Registry Index Series Sheet Nos 1 & 4, while LR no.9607 is now Pioneer & Ngeria Block 1 (EATEC) 7070 shown in Sheet No.5, LR 9608 is now Pioneer & Ngeria Block 5903 as identified in Sheet No-1, LR 10793 as identified in Sheet No.4 & 5 has several sub-divisions, while LR 12398 is Pioneer & Ngeria Block 1 (EATEC) 3395 as identified in Sheet No-1 also with several sub-divisions.

That he is also aware and confirmed that part of the EATEC land was compulsorily acquired by the Government of the Republic of Kenya in or about year, 2000 for the public purpose of the setting up and

construction of Moi Eldoret International Airport which is registered as LR 20631 and borders LR Nos 707, 7068 on the north and the Eldoret/Kapsabet/Kisumu Road.

That as it is clear from the above, the suit lands upon surrender for the conversion of title regime did not revert to the Government to be administered as un-alienated Government lands under the former Government Lands Act Cap 280 (now repealed).

That he had been advised by Wanjiku. A Mbiyu, Senior Deputy Chief Litigation Counsel who was then acting for the Respondent that the Respondent is/was only mandated to alienate and allocate Government Land in accordance with both the constitutional and statutory provisions of the Government Lands Act Cap 280 (now repealed) and the Declaration Orders sought by the Petitioner ought not to issue on the following grounds that the suit lands are private property and for the grant of the declaration orders, the petitioner ought to show that the Respondent was a public duty owed to the Petitioner which duty the Respondent has neglected ignored, refused and or failed to perform and therefore occasioning breach of the petitioner's rights. The Declaration orders sought ought not to issue based on the perceived failure of the respondent to act on the letters exhibited by the Petitioner as the letters do not constitute legal instruments under either the Government Lands Act, Registered Land Act, or the Registration of Titles Act. (now repealed Acts). The allegations of breach of duty set out by the Petitioner is outside the scope of the Respondents Constitutional as well statutory duties under the former land regime (Government Lands Act) now repealed. There is no evidence exhibited to prove that the suit lands were/are indeed Government Lands/Public Lands and available for alienation and allocation under the relevant statutes.

That he had further been advised by the Counsel and which advice he verily belief to be true that the Court does not issue orders in vain and in the instant scenario, any declaration order(s) can only be in vain as they cannot be implemented by the Respondent.

That he referred to exhibit marked DKY-5 which is a letter emanating from the Director of Land Adjudication and Settlement informing the Chairman on issuance of the suit lands to the squatters and state that if the letter was written which he denies then the same was in ignorance of the status of the lands as by the date alleged letter was issued the suit lands had already been converted to the Registered Land Act regime.

That further, he was also aware that the mandate of the Director of Land Adjudication & Settlement under the Land Adjudication Act was to adjudicate and consolidate lands set out in the act and identify allottees before issuance of letters of allotment for allocation and titles by the Respondent and the mandate could not have extended to the suit lands which were already titled and privately owned and no compulsory acquisition was done by the Government for the settlement of the Petitioner's members.

That in any event and in the alternative, the lands could only have been allocated following the acquisition by the Government under the land Acquisition Act Cap 294 (now repealed) for settlement of any squatters including the Petitioner's members which is not the case.

That he also states that from exhibit DKY-4, the approval/endorsement by the former President could not constitute a direct approval under the former Government Lands Act Cap 280 (now repealed) for the allocation of the suit lands to the Petitioner and can only be regarded as a recommendation as the lands were already privately registered. That alternatively, the Declaration Orders ought not to issue based on the failure of the respondent to act on the letters exhibited by the Petitioner as the letters did not constitute legal instruments under either the (now repealed) Government Land Act Registered Land Act or the Registration of Titles Act. That there is no proof of breach of either the Constitution or Statutory Law by the 4th Respondent and no evidence to show that the lands were ever surveyed by the said Respondent in favor of the 6th Respondent and consequently, he advised by the Counsel that no cause of action has been disclosed against the 4th Respondent and as the suit lands are still registered private property the Petitioner should show that the 4th Respondent is in breach of a constitutional public duty owed to the petitioner to merit the grant of the declaratory orders sought.

That he states that in so far as the Constitutional and Statutory duties are in issue, the 2nd and 5th

Respondents performed their duties by accepting for registration and registering the documents as presented and there is no allegation of any irregularity or fraud committed by the Respondents and he was therefore advised by the Counsel that the Petitioner does not meet the threshold required and the declaration orders ought not to issue.

That in light of the surrenders for the conversion of the titles by the 6th Respondent, he was advised by the Counsel that there was no breach of either the Constitution or Statutes committed by the 1st Respondent pursuant to the provisions of the former Government Land Act (now repealed).

That he had further been advised by the Counsel and which advise he verily belief to be true that if it was indeed true that the Petitioner's members and forefathers' have been in long and uninterrupted occupation and physical possession of the suit lands (which in any case are registered in order parties names), then the proper course of action should be to lodge a claim with the National Land Commission established under Act No.5 of 2012 and which has the mandate under The National Land Commission Act to address historical injustices so as to determine their rights if any.

That he had also consulted Mr. Z. A. Mabea, formerly the Commissioner of Lands prior to the transfer of the functions to the National Land Commission on the basis of exhibit DKY-6 which letter is alleged to have been issued by a former commissioner of Land J. Okungu (Mrs) and the officer had informed him which information he believed to be true that the letter did not emanate from the former commissioner who denied ever writing or signing it.

That in the light of the facts which have been disclosed above he beseeched the court to decline to issue the declaration orders sought by the petitioner.

That he made this affidavit in opposition to the petition and the prayers/Declarations sought by the Petitioner.

That what he stated hereinabove is true to the best of his knowledge information and belief save where the sources of information and grounds of belief have been disclosed.

### **THE PETITIONERS REPLY**

The petitioners responded to the affidavit of R. J. Simiyu sworn on 5/12/2013 by stating that a glance at the said affidavit by R.J. Simiyu shows that the said deponent is "Approbating and Reprobating" in these proceedings at the same time. In the annexure "BCR 7A" attached and filed in these petition on the 30th June, 2012, the said R. J. Simiyu for District Land Officer, Uasin Gishu in a letter dated the 14th May, 2008 and in a matter involving the petitioners herein confirmed that L.R. No.9608 is vacant. That at the time of visit there were animals being grazed on the plot. That there are no people settled on the ground. "with regard to L.R. No.12598, 12595, 745, 9606, 9607, 742, 7739, 10793 and 10794 the said R. J. Simiyu confirmed that the above parcels are dotted with wattle trees and there is maize stock from last year's maize, however, the activities going on therein is cattle grazing. That evidence of purchase of free hold interest from the Government could not be traced here, you may wish to refer to your files ..... " concluded the said letter by saying and he quotes: -

**".....In my view the squatters could be easily accommodated on this parcels that have not been transferred to individuals, they are fallow/idle lands that are underutilized....."**

In another letter annexure "BCR 7B" attached to the substantive petition in a letter dated the 23rd July, 2008 and with regard to the petitioners' quest for settlement the said R. J. Simiyu confirmed the availability of land for squatter settlement particularly of land on L.R. No.9606, 9607, 9608, 745, 12398.

"BCR 9" the letter from the Director of Land Adjudication & Settlement by G.V. Masinde to the Permanent Secretary Ministry of Lands of Lands & Housing. See the letter dated 9<sup>th</sup> November, 2005. Annexure "BCR9" which had a conclusion on the Record status and he quote:-

***“.....According to the records held at the Central Land Registry, the above parcels of Land belonged to Lonrho Agri-Business (E.A.) Ltd in the year, 2000, they were transferred to the Government of the Republic of Kenya. It is on this basis (transfer) that the squatters are applying for the Land.....”***

Annexure “9 “b”. A letter by G. V. Masinde for Director of Land Adjudication and Settlement in a letter dated 26th May, 2006 confirmed that the land was surrendered to the Government of Kenya. That the parcels of land in question formerly belonging to Lonrho Agri-Business (E.A.) Ltd were transferred to the Government for purposes of resettling the squatters who were at one time the company workers. The letter dated the 22nd September, 2010 by Matheka for Commissioner of Lands to the Honourable Attorney General, stated that they are in the process of regularizing/formalization of the squatter occupation in the L.R. No.9607, 7739/1-14, 742/2, 9608, 12398, 10793, 10794, 11481, 9609 and 8275.....”.

(The Annexure “BCR5” is a letter by then Commissioner of Lands Okungu (Mrs) to the Hon. Attorney General dated the 17th July, 2007 confirmed that

***“.....the above parcels of lands which initially belonged to Lonrho Agri-Business Ltd (formerly EATEC Ltd and that on or about the year 1998 H.E. President of the Republic granted a direct approval in favour of M/s Sirikwa Squatters Group for the purpose of relocating and settling the members. The purpose of this letter is therefore confirming that the allocation to the squatters by H. E. president still stands and that this office has no objection to formalization of the squatter occupation subject to normal due and legal process being put in place .....”***

Annexure “BCR5”. See also annexures “BCR 3” “BCR 4” to the said petition filed on the 30th day of July, 2012.

The petitioners refer to a letter ,by EATEC dated 9th November, 2000 to the Chairman Sirikwa Squatters which reads and he reproduced it in full for clarity:-

9th day November, 2000

**To:**

**The Chairman,**

**Sirikwa Squatters**

**P.O. Box 927,**

**ELDORET.**

**Att: Mr. Simion Rotich**

**Dear Sir,**

**RE: \_RESETTLEMENT OF SIRIKWA SQUATTERS**

**The above captioned matter refers: -**

**I kindly note the land referred to in your earlier correspondence on the above was surrendered to the Kenya Government on 2/11/2000.**

**The specific L.R. Nos. of the Land is L.R. 9608, 745/2, 12398, 7739/7, 9607.**

**We advise you to kindly pursue the above matter with the relevant Government Ministry for the**

**final resettlement of the above squatters on the land already surrendered to the Government.**

**We wish all the best**

**Yours faithfully,**

**J. P. Huime**

**GENERAL MANAGER**

**CC: .... THE COMMISSIONER OF LANDS**

**NAIROBI**

**THE DISTRICT COMMISSIONER**

**UASIN GISHU**

**DISTRICT .....**”

The letter confirms that the parcel of land was surrendered to the Government on 2/11/2000 specifically L.R. No.9608, 745/2, 12398, 7739/7, 9607 – Kindly pursue the above matter with relevant government ministry for the final resettlement of the above squatters on the land already surrendered to the Government. The 1st, 2nd, 3rd, 4th and 5th Respondent cannot “approve and reapprove” in these proceedings at the same time. In the annexures to the petition, they are Approbating – in other words giving approval, commendation, liking, praise, assent, concurrence, consent endorsement, ratification, sanction and in the replying affidavit filed on the 5th December, 2013 they take a contrary view and in a sense “reapprove”- censure, condemn, disapprove, discard, reject, reprehend, disallow, abandon and disown. That to start with he wishes to state here that the matter that inform the substance of the instance petition now falls under the National Land Commission as established under the National Land Commission Act No.5/12. The affidavit sworn herein has neither been sworn by the National Land Commission nor has it been sworn and filed with their authority.

That pursuant to Article 67(2) of the Constitution of Kenya, the National Land Commission inter alia performs several functions, one of which is to manage public land on behalf of the National and County Government and under Article 67(3) of the Constitution on behalf of and with the consent of the National and County Government, alienate Public Land, to monitor the registration of all rights and interests in land. Therefore, for all purposes and intents, the matters that inform the instant petition requires an input of the National Land Commission. The affidavit herein by R.J. Simiyu is sorely lacking in those details, authority and therefore carries no weight, carries no substance and has not even an “iota of evidence” that can stand in the way of the petitioner's petition. The other issue is that the deponent of the said affidavit purports to swear an affidavit on behalf of the Commissioner of Lands (defunct), the Chief Registrar of Titles, the Director of Land Adjudication and Settlement, Director of Surveyors and District Land Officer, Uasin Gishu District. These are the Government Offices which have substantive office holders who can positively depose to matters they are seized of and within their jurisdictions. It was not therefore open to the deponent to take it upon “himself” to say on behalf of the various Government Departments. Least of all the same did not carry the authorization to depose to the matters therein on their behalf. The result of which, has been to file an affidavit “full of morass of separate, isolated points” but which have little or no substance

According to the petitioner, the suit properties were surrendered to the Government of Kenya. The last noting in the Titles reads “surrender to the Government of Kenya” and that the surrender was registered against the Title. THAT upon surrender and following the Presidential direct approval the said parcels of land L.R. No.9606, 9607, 9608, 745, 742/2, 7739/7/R,12398, 10793, 12395 and 10794 were allocated to the Sirikwa Squatters and there is a paper trail to support the allocation. THAT from the paper trail above, the surrender facilitated the allocation to the Sirikwa Squatters and was not for purposes of

conversion from Registration of Titles Act Cap. 281 to the Registered Land Act Cap. 300 Laws of Kenya and subsequent sub-division to create individual sub-plots and more importantly the surrender was a surrender to the Government of Kenya and not for conversion purposes as the said deponent seems to allude to. That in the said annexures to the petition filed on the 30th day of July, 2012, the contents therein prove that the subject suit land had been surrendered to the Government of Kenya in the year, 2000 and on that basis the Sirikwa Squatters were allocated the same. That the same was not surrendered to the Government for conversion purposes only from the Registration of titles Act to the Registered Land Act Cap 300 Laws of Kenya. That the suit land was a Government of Kenya property and not privately owned by Lonrho Agri-Business (East Africa) Limited.

This is the same deponent who is now saying the opposite, a conflicting and irreconcilable contradictory positions. That the suit land was surrendered and reverted to the Government of Kenya as un-alienated Government Land and available and indeed was allocated to the Sirikwa Squatters. That the records held at the Central Land registry, Nairobi, the above parcels of land formerly belonged to Lonrho Agribusiness (E.A) Limited were in the year, 2000 transferred to the Government of the Republic of Kenya to facilitate the Settlement of the Sirikwa of Squatters.

### **6<sup>TH</sup> RESPONDENTS CASE**

The 6<sup>th</sup> Respondent filed a replying affidavit through **David K. Korir** stating that he is the 6<sup>th</sup> Defendant's Property manager hence competent to make and swear this affidavit. That the parcels of land mentioned in the petition do not exist. That the same were subdivided and sold on willing buyer and willing seller basis. That upon subdivision the land parcels were converted to registration under the Registered Land Act Cap 300 (repealed). That the subdivision, sale and transfer to thousands of third parties was done with full government approval. That the said sale and subdivision was done in accordance with the law. That in view of the above the 6<sup>th</sup> Respondent does not own any land. That during the process of the said sale and subdivision, the government of Kenya directed all squatters to be allocated land. That accordingly land was set aside for the squatters and allocations done in their favor. That the petitioner is clearly an amorphous group consisting of imposters; all genuine squatters were settled. That since ownership of the land has passed over to several third parties the orders sought are incapable of enforcement. That he therefore prays that the present suit be dismissed. That all depositions herein are true to the best of his knowledge information and belief.

### **7<sup>TH</sup> DEFENDANTS CASE.**

Mark Kiptarbei Too filed a response stating that he is the registered owner of land parcels PIONEER NGERIA BLOCK 1 (EATEC)/7079,7080,703,7075,7074,7076,7077,7078. That he lawfully purchased the said land parcels from Lonrho Agribusiness (EAST AFRICA) LTD on a willing buyer seller basis for consideration. That he paid the full consideration for the purchase of the said parcels through his Advocates in the transaction M/s Raffman Dhaji Elms & Virdee Advocates. That at the time he bought the parcels the same were vacant and he took possession immediately at which the Petitioner group was nonexistent. That he subsequently applied for the land control board consents. Consents for transfer of the said parcels were issued to Lonrho Agribusiness (EAST AFRICA) LTD executed transfer forms in respect of the said parcels and he paid the requisite stamp duty for each parcel of land. He has annexed copies of Applications for Consent of Land Control Board, consents for transfer forms and receipts of payment of stamp duty from Kenya Revenue Authority in respect of PIONEER NGERIA PIONEER NGERIA BLOCK 1(EATEC)/7079,7080,703,7075,7074,7076,7077,7078. That he has since taken possession of the said land parcels and he has been in occupation and carrying out Agribusiness activities and no one not even any of the Petitioners have ever occupied his land. That prior to purchasing the said parcels and upon investigations of the root title, it came to his knowledge that the suit land parcels were the property of Lonrho Agribusiness (East Africa) Limited which were previously registered under the Registration of Titles Act Cap 281 (Repealed). That he purchased the parcels from a private individual and at all material times the parcels were never public property. That he purchased the parcels from a private individual and at all material times the parcels were never public property. That in the said Sale Agreement he had several nominees who were to benefit from the parcel purchased including himself, and several other individuals who have since obtained titles to their portions. That he is aware that all the

squatters were settled in the land which was allocated for the same and all of them have occupied their parcels. That he is not aware of any squatter who is occupying the land of the EATEC parcels which have not been given the titles. The Petitioners have therefore not established any lawful ground for cancellation of his titles. That as an owner of the property and having legally acquired the property, he is entitled to protection of his property under the constitution. That the petitioners have not established his unlawful action or inaction by him in violation or infringement of the constitutional rights of the Petitioners. That the titles he holds in respect of the suit land are only a fraction of the resultant subdivisions, there are hundreds of other persons who bought land subdivided from the suit land previously owned by the 6<sup>th</sup> Respondent yet the Petitioners have not attempted to enjoin them in this suit this bespeaks of bad faith on the part of the petitioners against him.

In reply to the affidavit sworn by Mark Kiptarbei Too sworn on 24.3.2014 the petitioner responds that this is not the first time the person of Mark Kiptarbei Too has sworn an affidavit in these proceedings. That in an affidavit sworn on the 4<sup>th</sup> day of September, 2012 and filed on the 5<sup>th</sup> September, 2012 the said person had in a nutshell attempted to lay claims to certain portions of the suit properties but that claim was met with further Affidavit by sworn on the 15<sup>th</sup> day of October, 2012 and filed on the 16<sup>th</sup> day of October, 2012. That a glance at the affidavit of the Mark Kiptarbei Too shows exhibits of titles of the issue under investigation herein goes beyond titles, it is a Constitutional interrogation of all the issues surrounding the said parcels of Land which were in the first-place Government Land surrendered to the Government in the year 2<sup>nd</sup> day of November, 2000 for the allocation of the land to the Sirikwa Squatters. That the acquisition of the titles to Land is a legal process and the 7<sup>th</sup> respondent cannot purport to have acquired any valid title under the Government Lands Act Cap. 280 laws of Kenya or the Registered Land Act Cap. 300 Laws of Kenya when the whole process under which he acquired was contrary to the express constitutional provisions and more importantly when the same violated or threatened to violate the fundamental rights and freedom of the Petitioners who had the prior allocation to land. In any event it has long been settled that a decision affecting the legal rights of an individual or individuals which is arrived at by procedure which offends the principles of natural justice is outside the jurisdiction of the decision making authority but more importantly in this case, the 7<sup>th</sup> respondent's acts of purported acquisition of the titles despite the petitioners legitimate expectation in the proprietorship of the suit properties is to say the least illegal, unconstitutional and violated the petitioners' fundamental rights to property, to title and constitutes unfair administrative practices. See Article 40 (1) and 47(1) of the constitution of Kenya. In any event the 7<sup>th</sup> respondent is not being and had not been candid in these proceedings. Had he been, he would have disclosed that the purported sale of the said properties were done through Lonrho Africa and Construction in which he and one David K. Korir were the directors.

That in any event the 7<sup>th</sup> respondent cannot and could not have acquired, purchased the suit lands from Lonrho Agri-business (East Africa) Ltd on a willing buyer seller for a consideration and the resultant Sale Agreement as the suit parcels referred to in the petition were Government Lands and had been surrendered to the Government in the year 2000 for the settlement of the Sirikwa Squatters. That having been surrendered to the Government of Kenya, the same properties did not revert to Lonrho Agri-business (East Africa) Ltd so that he same could be sold to the 7<sup>th</sup> respondent. The said parcels of land remained Government Land and did not convert into private lands under the Registered Land Act Cap. 300 Laws of Kenya (repealed) or at all. That in any event these being Government Lands, indeed Agricultural land, there is a whole procedure of Disposal of Agricultural Land as shown in part IV- Disposal of Agricultural land under Section 19,20, 21,22,23,24,25,26 of the Government Lands Act Cap. 280 Laws of Kenya (repealed) and it has not been shown by the 7<sup>th</sup> respondent that this was such a case. The whole process that gave to the 7<sup>th</sup> respondent purported titles is an illegality, unconstitutional, null and void. That from the a foregoing the 7<sup>th</sup> respondent never acquired any valid titles to the suit land and the said parcels are available for the petitioners' squatter's settlement. That in any event the suit land were allocated in the year 1998 and the titles processed in the year, 2005 illegally and constitutionally by the 7<sup>th</sup> respondent cannot hold sway. The titles have no sanctity, have no validity and these cannot be used to derail or defeat the petitioners' legitimate claims to land.

That in any event what the 7<sup>th</sup> respondent has exhibited as titles covers only a tiny portion, a drop in the

ocean” of the suit lands and the large parcels of land is and are available for the Petitioner’s settlement and even for those tiny portions we pray for the cancellation of the resultant titles so that the whole parcel of land is placed in the hands of the petitioners.

That the suit lands had been allocated to the squatters after the surrender of the land to the Government of Kenya and the Government had moved to settle the squatters on the same. All the paperwork is in place and it will not help to say that no squatter or squatters are occupying the said parcel of land. Indeed, the petitioner’s plea herein is to be settled on the land and provided with ownership documents.

### **PETITIONER’S SUBMISSIONS:**

The petitioner submits that the matter before court is a constitution petition touching on the protection of the right to property provided for in Article 40 of the Constitution of Kenya. The petitioner argue that their allotment takes precedence over the allocation of the property to the 7<sup>th</sup> respondent. The petitioner claims that the allocation of the property to the 7<sup>th</sup> respondent disposes the petitioners of their land in violation of Article 40(1) and 47 of the Constitution of Kenya. It is also a case of using a public office to confer a benefit which act was done with whim, caprice, or arbitrary. The petitioner argues that by preparing titles despite overwhelming evidence of the petitioner’s allocation of land, the 1<sup>st</sup> – 6<sup>th</sup> to 10<sup>th</sup> respondent were trying to steal a match over the petitioner. Moreover, that the petitioners were not subjected to a fair administrative action as envisaged by Article 47(1) of the Constitution. The petitioners argue that the surveyor carried out illegal survey by not giving notice to the petitioners. The petitioner argue that the petitioner had a legitimate expectation to be registered as the proprietor of the land in issue. There was no consensus to cancel the allocation and give back the land to Lonrho Agribusiness (EA) Ltd or the 7<sup>th</sup> and 8<sup>th</sup> respondents. The petitioner submit that they have demonstrated that their rights have been violated hence there is a case for a remedy as there cannot be a wrong without a remedy.

### **1<sup>ST</sup> -5<sup>TH</sup> DEFENDANTS’ SUBMISSIONS**

*The Mr Odongo Senior Litigation Counsel, Attorney General’s Chambers* on behalf of the 1<sup>st</sup> – 5<sup>th</sup> respondents submit that the petition does not raise constitutional issues to merit the award of orders sought as the genesis of the root title was the initial registration under the crown lands evidence and subsequent conversion and registration under the Registered Land Act now repealed. He further argues that the suit properties were transferred by way of sale to EATEC in 1964/65 and subsequently through various transactions the ownership changed culminating with surrenders by the new company on 2.11.2000 for purposes of conversion of the tenure to the Registered Land Act. The respondents argue that the petitioner have not demonstrated that Article 35(1) and (2) of the constitution has been breached.

Further, that Article 40(1) of the Constitution has not been breached as no deprivation either in law or fact has taken place as the property is registered in the names of 6<sup>th</sup> and 7<sup>th</sup> respondents and that the title to land property normally comes into existence after issuance of a letter of allotment, meeting the conditions stated in such letter of allotment and actual issuance thereafter of title document pursuant to provision held. Further, he argues that the petitioner did not have any right known in law for the acquisition and ownership of the suit property based on its registration as an association. It is argued that the right to acquire property did not crystallize to the petitioner by dint of the alleged approval by the President on award of the damaged, the respondents argue that the same is not available as the suit properties are already registered in the names of the 6<sup>th</sup> and 7<sup>th</sup> respondents.

The respondents further argue that the claim that the petitioners’ claim is appropriate to be addressed by the National Land Commission. Lastly, the respondents argue that the petitioner’s rights to a fair administrative action and principle of probability has not been breached.

### **SUBMISSIONS BY THE 6<sup>TH</sup>, 7<sup>TH</sup> AND 8<sup>TH</sup> RESPONDENTS**

*Mr Kamau, learned counsel for the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents* argues that when the alleged allocation by the President took place, the suit land were not government land and let alone being unalienated

government land and therefore, the President could not have approved an allocation of such land. Even if he did the allocation would have been a nullity as the same were not un-alienated government land.

On the issue of surrender, the respondents argue that the suit land were leasehold interest each of over 900 years from the 1950s and 1960s. the 6<sup>th</sup> respondent was the last registered owner before the parcels were converted to freehold titles. The surrender was meant to facilitate the issuance of a freehold title under the Registered Land Act now repealed. The respondents further argue that the 6<sup>th</sup> respondent being the registered proprietor, the title cannot be challenged save as stipulated as per the law and that the principle of indefeasibility of title applies as the respondents are the registered owners having obtained the titles legally. Moreover, that the petitioner has not proved that the members were allocated the suit lands and that there is no cause of action against the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents as they are not the original lessees of the suit property but third parties who purchased from the original lessee.

He further argues that under the Government Land Act, Cap. 280 (repealed), the President is given the power under Section 3 thus;

Special powers of the President:

***“3. The President in addition to, but not limited to any other right, power or authority vested in him under this Act, may:***

***(a) Subject to any other written law, make grants or dispositions of any estates, interest or rights in or...unalienated Government land***

***(b) .....***”

The alleged approval of allocation being a nullity had no consequences whatsoever as the President had no legal or any power whatsoever to allocate land which was registered in the name of a private company. Any other approvals, recommendations, directives or letters which purported to confirm or propagate the purported Presidential approval were therefore null and void and inconsequential as they arise from a null approval. It cannot be said that the President approved the allocation in advance knowing that the land would be surrendered as the Petitioners seem to suggest. That argument is very absurd especially considering the express powers of the President under the Government Land Act (Repealed) which they have quoted.

In any event, the former President who is alleged to have approved the allocation has not sworn an affidavit indeed confirming the approval. There is therefore no proof that the approval was done by the President; even though they have demonstrated even if there was such would have been a nullity. The suit parcels were not un-alienated Government Land and were not available for allocation period. To that extent alone, the petition lacks any substance as the only document which the whole claim is based is the letter allegedly endorsed with the word **“approved”** which as they have said was made when the suit parcel was privately owned by the predecessors of the 6<sup>th</sup> respondent.

He further argues that the suit parcels were all initially leasehold interest each of over 900 years from the 1950s and 1960s. it is not in dispute that the registered owners kept on changing their names and this can be seen in the entries made on the register. The 6<sup>th</sup> respondent was the last registered owner before the parcels were converted to free hold titles under the Registered Land Act – Cap. 300 (Repealed). The leaseholds therefore were not expired and were not going to expire any time soon. The 6<sup>th</sup> respondent surrendered the same in exchange of issuance of freehold title under the Registered Land Act, Cap. 300 (Repealed). The surrender was not for purposes of allocation to the petitioners as suggested.

Although some entries in the grant may not have indicated the purpose of the surrender, the entry in the grant over parcel L.R. No. 9608 clearly shows that the surrender was made for issuance of a free hold title under Registered Land Act, Cap 300. The suit parcels therefore never became un-alienated Government Land and more so un-alienated for anybody including the President to purports to allocate to the

petitioners. The 5<sup>th</sup> respondent have confirmed this position in their response to the petition and that goes to affirm the 6<sup>th</sup> respondent's position that the surrender was just meant to facilitate the issuance of a freehold title deeds under the Registered Land Act (RLA) now repealed.

According to Mr. Kamau, the Registered Land Act (RLA) – Cap.300 (Repealed) is a self effectuating legislation: Under Section 27 and 28 of the Registered Land Act, now repealed provides as follows:

**“27. Interest conferred by registration**

***Subject to this Act-***

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

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

**28. Rights of proprietor**

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

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

***(b)Unless the contrary is expressed in the register, to such liabilities, rights and interests as affect the same and are declared by section 30 not to require noting on the register;***

***Provided that nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which he is subject as a trustee.”***

First, there is little doubt that a title registered under Registered Land Act, Cap. 300 (Repealed) is not capable of being challenged save under the provisions expressly stipulated in the said Act. In this case, the petitioners have not shown any inaccuracy in the searches, they do not even have titles to the suit lands. They allege that they are allottees but again they do not even have allotment letters. They are not entitled to any equitable remedy. The remedy for damages against the state cannot even stand and as such the entire petition is clear nonstarter and should be disallowed.

Mr Kamau further argues that an individual cannot Guarantee Constitutional Rights thus whereas all individuals are charged with respecting the Constitution, when it comes to the implementation and enforcement of Constitutional rights, it is only the State that can guarantee such rights. This is trite law. All individuals being bound by the Constitution does not mean that all individuals guarantee the implementation of the Bill of Rights otherwise there would have been no need to have Article 21 which deals with the obligations of the State to implement the rights stipulated in the Bill of Rights. That it cannot have been the intention of the framers of the Constitution. Private rights in private law cannot, perforce, give rise to a constitutional challenge unless there has been a failure of the State in guaranteeing mechanism for the resolution of such private disputes. The respondents submit that this petition does not lie against the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents as a private company being asked to guarantee the implementation of the Petitioners' alleged Constitutional rights and the petition as framed does not present a prima facie basis for the grant of the reliefs sought.

## **No cause of action against the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> respondents:**

The 7<sup>th</sup> and 8<sup>th</sup> respondents are parties recognized by the Constitution as having rights separate and independent from its directors or shareholders and its rights over its own property is inviolable.

Article 40 of the Constitution in express terms provides that:

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

The 7<sup>th</sup> and 8<sup>th</sup> respondents are parties recognized by the Constitution as having rights separate and independent from its directors or shareholders and its rights over its own property is inviolable.

## **DETERMINATION**

### **(A) Factual analysis**

This court finds that it is not disputed that Land Reference Numbers 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793, 10794 and 11481, were originally registered under the Registration of Titles Ordinance Cap 160 (now repealed) and grants issued to a company known as Plateau Wattle Company Limited for terms ranging from 946-951 years from 1.1.1958 pursuant to surrenders registered with the Registrar. The grants were issued as follows; Grant No. *I.R. 14891 for L.R. NO.9606*, Grant *NO. I.R. 14892.for L.R. NO.9607*, Grant *No.I.R.14808 for .L.R. NO.9609(752/3)*, Grant *No.I.R. 14809....for L.R. NO.9608*, Grant *No.I.R.18864for L.R. NO.10793*, Grant *No. I.R.18858 for L.R. NO.10794*, Grant *No. I.R for L.R. NO.12398*, Grant *No. I.R. 20274 for L.R. NO.11481(752/1)*, and Grant *No. I.R. 20240 for L.R. NO.745*. That from the root history of the respective titles, the company owned an approximate total of Twenty Five Thousand Acres (25,000) comprised in the above grants with other lands.

A grant was issued in respect to the parcel for L.R. No.9606 to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 950 years from 1-1-1958. That in respect to the parcel for L.R. No.9607 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 950 years from 1-1-1958. That in respect to the parcel for L.R. No.9608 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 951 years from 1-12-1957. That he further confirms that in respect to the parcel for L.R. No.10793 a grant was issued to the Plateau Wattle Company Limited to a surrender registered for a term of 946 years from 1-4-1962. That he further confirms that in respect to the parcel for L.R. No.10794 a grant was issued to the Plateau Wattle Company Limited to a surrender registered for a term of 947 years from 1-4-1962. That he further confirmed that in respect to the parcel for L.R. No.9609 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 941 years from 1-12-1957. That he further confirmed that in respect to the parcel for L.R. No.11481 a grant was issued to the Plateau Wattle Company Limited pursuant to a surrender registered for a term of 944 years from 1-4-1964.

That the lands were subsequently transferred by the company by way of sale to East Africa Tanning Extract Company between 1964-1965. That he confirmed in respect to all grants that from the records in his custody an instrument of transfer was registered on 26/3/1965 whereupon all the lands were transferred to East Africa Tanning Company Limited for a consideration of Kshs.6,583,925 vide entry No.2 in presentation No.920 registered on 26/3/1965. That he further confirmed that subsequent to the transfers to the East African Tanning Extract Company, the Company changed its name in 1992 to EATEC, vide entry registered with the Registrar in presentation No.143 on 3/9/1992, in 1995 the company further changed its name to EATEC LIMITED which change was noted and registered by the Registrar on 30/8/1995 then in 1999 to Lonrho Agro Industries (East Africa) Limited, and in 2000 to Lonrho Agribusiness (East Africa) Limited which entry was noted and registered by the Registrar on 9/6/2000 vide No.317 and vide presentation No.318 of the same date, the company further changed its name to Lonrho Agri Business (East Africa) Limited which were all noted by the Registrar of Titles as per Exhibit RJS-2. That he confirmed that in respect to L.R. No.10794, a surrender to the Government of the Republic of Kenya in exchange with a new grant No. IR 47007 had earlier been lodged by the

E.A.T.E.C. And entered and registered in presentation No.645 on 17/4/1989 as entry No.6. That he was also aware that on 2/11/2000, the Company Lonrho Agri-Business (East Africa) Limited surrendered to the Government of the Republic of Kenya all the grants for purposes of conversion of the tenure from the regime under the Registration of Titles Act Cap 281 to the freehold tenure under the regime of the Registered Land Act which surrenders were noted in presentation Nos. 163, 164, 169, 171, 174, and 175 on 2/11/2000. That at the time of the surrenders, the suit lands were privately owned and registered in the name of Lonrho Agri-Business (East Africa) the suit lands were amalgamated for purposes of issuance of freehold titles under the Registered Land Act and a new registration section known as Pioneer & Ngeria Block 1 (EATEC) registered in or about 23/1/2001 with resultant subdivisions. That he further confirmed that following the conversion of the suit lands to freehold titles the original suit lands were registered under the Registered Land Act and new parcels registered for LR 9606, 9607 9608, 745/2,10793, 10794, 11481 and 12398 corresponding as Pioneer & Ngeria Block 1 (EATEC) 707, 5903, 7068, 7739, 3395. The LR.9606 had resultant 10 sub-divisions as shown in the Registry Index Series Sheet Nos 1 & 4, while LR no.9607 is now Pioneer & Ngeria Block 1 (EATEC) 7070 shown in Sheet No.5, LR 9608 is now Pioneer & Ngeria Block 5903 as identified in Sheet No-1, LR 10793 as identified in Sheet No.4 & 5 has several sub-divisions, while LR 12398 is Pioneer & Ngeria Block 1 (EATEC) 3395 as identified in Sheet No-1 also with several sub-divisions. That he is also aware and confirmed that part of the EATEC land was compulsorily acquired by the Government of the Republic of Kenya in or about year, 2000 for the public purpose of the setting up and construction of Moi Eldoret International Airport which is registered as LR 20631 and borders LR Nos 707, 7068 on the north and the Eldoret/Kapsabet/Kisumu Road. That as it is clear from the above, the suit lands upon surrender for the conversion of title regime did not revert to the Government to be administered as un-alienated Government lands under the former Government Lands Act Cap 280 (now repealed). It is not in dispute that the petitioner's members forefathers were in occupation of the Land Parcels L.R. No.9606,9607, 9608, 745, 742/2, 7739/7R, 10793 and 10794 all in Uasin Gishu District. The petitioners' forefathers were forcefully evicted by the white settlers' community in the year early 1920's. That subsequently the member's heritage and lineage were employed as workers and laborers by the colonialists. That the registered proprietorship to the said land changed severally and the last registered proprietor was M/s Lonrho Agribusiness (East Africa Limited). That again the members of the petitioners were employed as the Farm Hands and Laborer's at the wattle farm. That through this period, the members like other citizens of this great Republic clamored to be properly settled and great efforts were made to ensure that that is done. That as a consequent, it was agreed and indeed the Government undertook to settle the petitioners. That this therefore entailed the surrenders of the title to the suit lands named above by the Lonrho Agribusiness (East Africa Limited) to the Government and the said parcels of Land were to be held by the Government in trust for the Petitioners and for the purposes of settling the petitioners.

The suit land and the titles were surrendered to the Government. That on or about 28th October, 1998 and pursuant to the petitioner's application dated the 22nd October, 1998, the president of the Republic of Kenya (now retired) His Excellency Daniel Toroitich Arap Moi through a direct presidential approval approved the petitioner's application to be allocated L.R. No.9606, 9607, 9608, 745, 742/2, 7739/7R, 10793 and 10794 all in Uasin Gishu District. That the Director of Land Adjudication and Settlement through a letter dated the 14th October, 2001 confirmed the allocation of the parcels of land aforesaid to the petitioner's membership. The letter dated the **14th October, 2001** confirms in its salient parts;

**“.....This letter is to acknowledge and confirm of issuance of the above parcels to the squatters whom were workers of EATEC (formerly Lonrho East Africa) namely the Sirikwa Squatters. This was a result of direct approval and authority by the President.....”**

The fact of the allocation of the said parcel of Land to the Petitioners membership was confirmed in a letter dated the 17th July, 2007 by the Commissioner of Land who confirmed that the parcel of Land L.R. No.9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all Uasin Gishu District were given a direct approval to the petitioners by H. E. The President of the Republic of Kenya and was meant to settle the squatters group which include farm hands and labourers and their families previously engaged by M/s Lonrho Agri Business Ltd (EATEC LTD). The said letter reiterates that the Presidential allocation still stands and that the Commissioner of Lands Office has no objection to the finalization of the squatter's

occupation. The subsequent also came from the Director of Land and Settlement in a letter dated the 22nd June, 2007 addressed to the Honourable Attorney General in reference to the suit properties and the said Director of Land Adjudication and Settlement have no objection to the formalization of the squatter's settlement. The position on the ground as regards the parcels of land aforesaid has been confirmed severally and in part by District Lands Officer, Uasin Gishu in letters dated the 14th May, 2008 and 23rd July, 2008 that the petitioner's members can still be accommodated in the settlement. That in a letter dated the 10th September, 2008 to the Attorney General, the Commissioner of Lands reaffirmed that the said parcels of land were surrendered to the Government of Kenya for allocation to Squatters. The availability of the land for settlement of the squatters were also confirmed in a letter dated the 9th day of November, 2005 and the 20th May, 2006 by the Director of Land Adjudication and Settlement Officer to the Permanent Secretary, Ministry of Lands and Housing. That indeed in a letter dated the 22nd September, 2010 the Commissioner of Lands advised the District Commissioner, Uasin Gishu to expedite the process of vetting the list of Sirikwa Squatters Group to facilitate their settlement in L.R. No.9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 in Uasin Gishu District.

That in the said letter dated the 31st day of May, 2012, the District Land Officer, Uasin Gishu District to the State Law Office, Eldoret states that the surrender of the titles to the suit properties was for purposes of conversion from the Registration of Titles Act Cap. 281 to the Registered Lands Act Cap.300 Laws of Kenya and transfer to the beneficiaries. The said letter does not disclose who are the beneficiaries (save the 6th and 7th Respondents holding a tiny portion of the suit properties) and how they were identified but importantly for the petitioners the allotment of the suit lands to the petitioners was severally confirmed in several official documents by the several Government Offices and in particular by the Commissioner of Lands and that has continued to remain so. The 7th and 8th Respondents formerly the Chairman and the property sales managers respectively with the Lonrho Agribusiness (East Africa) Limited and despite the surrender of Land to the Government of Kenya for settlement of Squatters, could have taken advantage of their respective positions in the company and went ahead and sought allocation of the land to themselves and their beneficiaries using a business entity known as Lonrho Africa Property and Construction of P.O.Bo200, Eldoret upon which they engage in massive sale of the suit parcels previously allocated to the petitioner membership, clear a case of seeking to reap from where they did not sow and ought to be held to account

## **(b) Issues for determination**

### **(1) WHETHER THE PETITIONERS HAD LEGITIMATE EXPECTATION TO ACQUIRE AND BE ALLOCATED THE PROPERTY**

The petitioners seek constitutional remedy for violation and/or infringement of their constitutional rights under article 19, 20, 21, 22, 23, 35, 40, 47 and 165 of the Constitution of Kenya, 2010 . They claim that their rights to own the properties under contention were violated by the respondents which rights arose out of the doctrine of legitimate expectation. The question this court should address itself to is whether the members had the legitimate expectation to own the property in issue. To answer this question, we need to consider the chronology of events in respect of the dispute.

To begin with, the 6<sup>th</sup> respondent surrendered the title to the suit lands to the Government for the purposes of settling the petitioners. The suit land and the titles were surrendered to the Government. Before the surrender, on or about 28th October, 1998 and pursuant to the petitioner's application dated the 22nd October, 1998, the president of the Republic of Kenya (now retired) His Excellency Daniel Toroitich Arap Moi through a direct presidential approval had approved the petitioner's application to be allocated L.R. No.9606, 9607, 9608, 745, 742/2, 7739/7R, 10793 and 10794 all in Uasin Gishu District. The Director of Land Adjudication and Settlement through a letter dated the 14th October, 2001 confirmed the allocation of the parcels of land aforesaid to the petitioner's membership. The letter reads:-;

**“.....This letter is to acknowledge and confirm of issuance of the above parcels to the squatters whom were workers of EATEC (formerly Lonrho East Africa) namely the Sirikwa Squatters. This was a result of direct approval and authority by the**

**President.....”**

There is the letter dated the 17th July, 2007 by the Commissioner of Land who confirmed that the parcel of Land L.R. No.9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all Uasin Gishu District were given a direct approval to the petitioners by H. E. The President of the Republic of Kenya and was meant to settle the squatters group which include farm hands and labourers and their families previously engaged by M/s Lonrho Agri Business Ltd (EATEC LTD). The said letter reiterates that the Presidential allocation still stands and that the Commissioner of Lands Office has no objection to the finalization of the squatter's occupation.

The Director of Land and Settlement in a letter dated the 22nd June, 2007 addressed to the Honourable Attorney General in reference to the suit properties that he had no objection to the formalization of the squatter's settlement. The position on the ground as regards the parcels of land aforesaid has been confirmed severally and in part by District Lands Officer, Uasin Gishu in letters dated the 14th May, 2008 and 23rd July, 2008 that the petitioner's members can still be accommodated in the settlement and in a letter dated the 10th September, 2008 to the Attorney General, the Commissioner of Lands reaffirmed that the said parcels of land were surrendered to the Government of Kenya for allocation of Squatters.

The availability of the land for settlement of the squatters were also confirmed in a letter dated the 9th day of November, 2005 and the 20th May, 2006 by the Director of Land Adjudication and Settlement Officer to the Permanent Secretary, Ministry of Lands and Housing. That indeed in the letter dated the 22nd September, 2010 the Commissioner Of Lands advised the District Commissioner, Uasin Gishu to expedite the process of vetting the list of Sirikwa Squatters Group to facilitate their settlement in L.R. No.9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 in Uasin Gishu District. It is clear from the foregoing that the 6<sup>th</sup> respondent surrendered the disputed parcels of land for allocation to the petitioner's members and the government was informed of the same and indeed the government approved the allocation of the parcels of land to the squatters.

This court finds that these events prove that the petitioner's members had the legitimate expectation to be registered as the owners of the properties under contention. an order directing the 1st, 2nd, 3rd, 4th and 5th Respondents to perform their constitutional duties and abide with the letter reference No. DS/C/1/VOL.11/01 dated the 11th day of October, 2001 by the Director Land adjudication & Settlement Mr. A. Shariff on behalf of the Ministry of Land and Settlement and also His Excellency the President of the Republic of Kenya (Retired) direct approval of the 28th October, 1998 and issue Title Deeds for parcel Nos. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District into the names of the petitioners for them to resettle and allocate their members. When an individual seeks a constitutional remedy on the ground of his legitimate expectation being defeated, Courts have to first determine whether there existed a legitimate expectation. A legitimate expectation is said to arise “as a result of a promise, representation, practice or policy made, adopted or announced by or on behalf of government or a public authority. Therefore, it extends to a benefit that an individual has received and can legitimately expect to continue or a benefit that he expects to receive. When such a legitimate expectation of an individual is defeated, it gives that person the locus standi to challenge the administrative decision as illegal. Thus, even in the absence of a substantive right, a legitimate expectation can enable an individual to seek a remedy under the constitution.

The doctrine of legitimate expectation has two aspects: procedural as well as substantive. ***Procedural legitimate expectation*** refers to the expectation of an individual that he has a right to a certain procedure, such as the right to a hearing, as a result of the behavior of the public body. ***Substantive legitimate expectation*** refers to a scenario where an individual is seeking for a substantial benefit which arose out of the legitimate expectation he had. The legal position of substantive legitimate expectation has been varying. The English Courts have been pronouncing judgments which recognize the need to protect substantive legitimate expectation as well as judgments to the opposite effect.

Three basic questions were identified in **R (Bibi) vs. Newham London Borough Council [2001] EWCA Civ 607 [2002] 1 WLR 237 at [19]** as follows:

**“In all legitimate expectation cases, whether substantive or procedural, three practical questions rise, the first question is to what has the public authority, whether by practice or by promise, committed itself to; the second is whether the authority has acted or proposes to act unlawfully in relation to its commitment; the third is what the court should do.”**

144. It was further held in R vs. Jockey Club ex p RAM Racecourses [1993] 2 All ER 225, 236h-237b that the basic hallmarks of an unqualified representation are:

**“(1) A clear and unambiguous representation. (2) That since the [claimant] was not a person to whom any representation was directly made it was within the class of persons who are entitled to rely upon it; or at any rate that it was reasonable for the [claimant] to rely upon it without more...(3) That it did so rely upon it.(4) That it did so to its detriment...(5) That there is no overriding interest arising from [the defendant’s] duties and responsibilities.”**

145. According to De Smith, Woolf & Jowell, *“Judicial Review of Administrative Action”* 6<sup>th</sup>Edn. Sweet & Maxwell page 609:

**“A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government’s dealings with the public.”**

146. However it was held in South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18] that:

**“Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled.”**

133. The Supreme Court of India in J.P. Bansal v State of Rajasthan & Anor, Appeal (Civil) 5982 of 2001 observed as follows regarding the doctrine:

***“The basic principles in this branch relating to ‘legitimate expectation’ were enunciated by Lord Diplock in Council of Civil Service Unions and Others v Minister for the Civil Service(1985 AC 374(408-409)(commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i)he had in the past been permitted by the decision maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn...”***

134. It is not enough that an expectation should exist; it must in addition be legitimate, to be worthy of protection. As expressed by HWR Wade C.F Forsyth in *Administrative Law, Tenth Edition (2009)* page 449:

***“It is not enough that an expectation should exist; it must in addition be legitimate. But how is it to be determined whether a particular expectation is worthy of protection? This is a difficult area since an expectation reasonably entertained by a person may not be found to be legitimate because of some countervailing consideration of policy or law”***

In Keroche Industries Limited v. Kenya Revenue Authority & 5 Others [2007] eKLR Nyamu, J (as

he then was) found that the applicant's claim that its legitimate expectation to continue paying tax on a specific tariff which the respondents had been accepting over the years based on the mode of licensing products, had been thwarted. The court cited the English case of **R (Bibi) v Newham London Borough Council [2001]1 WLR 237** and quoted the three practical questions which Schieman LJ gave for the Court to pose in ascertaining whether a claim based on legitimate expectations is properly grounded. These are quoted by Nyamu J as follows:

***“(1) What has the public authority whether by practice or promise committed itself to;***

***(2) Whether the authority has acted or proposes to act unlawfully in relation to its commitment;***

***(3) What should the court do”***

136. In the case of **Haoucher v Minister for Immigration and Ethnic Affairs [1990]169 CLR** Deanne J. observed as follows;

***“Regardless of whether one can identify a right in the strict sense or a legitimate expectation, the requirements of procedural fairness must be observed in any case where, by reference to 'the particular statutory framework' (see Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation [1963] HCA 41; (1963) 113 CLR 475 at 504), it is proper to discern a legislative intent that the donee of governmental executive power or authority should be bound by them. There is a strong presumption of such a legislative intent in any case where a statute confers on one person a power or authority adversely and directly to affect the rights, interests, status or legitimate expectations of a real or artificial person or entity in an individual capacity (as distinct from merely as a member of a section of the general public). The rationale of that strong presumption is to be found not so much in sophisticated principle as in ordinary notions of what is fair and just.”***

## **2-WHETHER THE DISPUTED PARCELS OF LAND WERE PRIVATE OR PUBLIC LAND UPON SURRENDER**

**3.**There is no dispute that the properties under dispute were initially surrendered to the colony and protectorate of Kenya in the crown lands registry at Nairobi and subsequently allocated to the plateau wattle company ltd having its offices at Eldoret post office box number 190 in the colony and protectorate of Kenya as it then was, by the Governor and commander in chief of the colony and protectorate of Kenya on behalf of her Majesty Queen Elizabeth the second and the grants issued for various terms. The lands were subsequently transferred by the company by way of sale to East Africa Tanning Extract Company between 1964-1965. In respect to all grants from an instrument of transfer was registered on 26/3/1965 whereupon all the lands were transferred to East Africa Tanning Company Limited for a consideration of Kshs.6,583,925 vide entry No.2 in presentation No.920 registered on 26/3/1965. Subsequent to the transfers to the East African Tanning Extract Company, the Company changed its name in 1992 to EATEC, vide entry registered with the Registrar in presentation No.143 on 3/9/1992, in 1995 the company further changed its name to EATEC LIMITED which change was noted and registered by the Registrar on 30/8/1995 then in 1999 to Lonrho Agro Industries (East Africa) Limited, and in 2000 to Lonrho Agribusiness (East Africa) Limited which entry was noted and registered by the Registrar on 9/6/2000 vide No.317 and vide presentation No.318 of the same date, the company further changed its name to Lonrho Agri Business (East Africa) Limited which were all noted by the Registrar of Titles as per Exhibit RJS-2. The import of the above is that the suit parcels of land have always been alienated government lands allocated to a private company.

It is alleged that the Company Lonrho Agri-Business (East Africa) Limited surrendered to the Government of the Republic of Kenya all the grants for purposes of conversion of the tenure from the regime under the Registration of Titles Act Cap 281 to the freehold tenure under the regime of the Registered Land Act which surrenders were noted in presentation Nos. 163, 164, 169, 171, 174, and 175 on 2/11/2000 and that at the time of the surrenders, the suit lands were privately owned and registered in the name of Lonrho Agri-Business (East Africa) the suit lands were amalgamated for purposes of

issuance of freehold titles under the Registered Land Act and a new registration section known as Pioneer & Ngeria Block 1 (EATEC) registered in or about 23/1/2001 with resultant subdivisions. It is further alleged that following the conversion of the suit lands to freehold titles the original suit lands were registered under the Registered Land Act and new parcels registered for LR 9606, 9607 9608, 745/2,10793, 10794, 11481 and 12398 corresponding as Pioneer & Ngeria Block 1 (EATEC) 707, 5903, 7068, 7739, 3395.

The LR.9606 had resultant 10 sub-divisions as shown in the Registry Index Series Sheet Nos 1 & 4, while LR no.9607 is now Pioneer & Ngeria Block 1 (EATEC) 7070 shown in Sheet No.5, LR 9608 is now Pioneer & Ngeria Block 5903 as identified in Sheet No-1, LR 10793 as identified in Sheet No.4 & 5 has several sub-divisions, while LR 12398 is Pioneer & Ngeria Block 1 (EATEC) 3395 as identified in Sheet No1 also with several sub-divisions. It was confirmed that part of the EATEC land was compulsorily acquired by the Government of the Republic of Kenya in or about year, 2000 for the public purpose of the setting up and construction of Moi Eldoret International Airport which is registered as LR 20631 and borders LR Nos 707, 7068 on the north and the Eldoret/Kapsabet/Kisumu Road. It is alleged that, the suit lands upon surrender for the conversion of title regime did not revert to the Government to be administered as un-alienated Government lands under the former Government Lands Act Cap 280 (now repealed). The lands in dispute were registered under rta cap 21 laws of kenya and therefore the surrender of lease was governed by rta which does not provide for conversion of tenure directly from leasehold to freehold.

Section 44. Of the Registration of Titles Cap 281 (***repealed***) provides that whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word “surrendered”, with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, ***and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered:*** Provided that no lease subject to a charge shall be surrendered without the consent of the chargee. The import of this section is that upon surrender of lessee in respect of government land the said reverts to the government to be allocated by the government pursuant to the provisions of the Government Lands Act Cap 280 (repealed).

Ultimately on this issue I do find that the lands in dispute reverted to the government upon surrender and were to be managed under the regime of the Government Lands Act repealed and not to be converted to the regime of Registered Land Act Cap 300 Laws of Kenya(repealed) as it happened and therefore it follows that the conversion from Government Lands Act to Registered Land Act was not lawful and therefore all transactions that followed were a nullity. Article 40 of the Constitution of Kenya provides as follows:-

***40. Protection of right to property***  
***(1) Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property—***  
***(a) of any description; and***  
***(b) in any part of Kenya.***

***(2) Parliament shall not enact a law that permits the State or any person—***  
***(a) to arbitrarily deprive a person of property of any description or of any interest in, or right over, any property of any description; or***

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

**(3) The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—**  
**(a) results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, in accordance with Chapter Five; or**  
**(b) is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that—**  
**(i) requires prompt payment in full, of just compensation to the person; and**  
**(ii) allows any person who has an interest in, or right over, that property a right of access to a court of law.**

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

**The rights under this Article do not extend to any property that has been found to have been unlawfully acquired.**

The import of this article of the constitution of Kenya is twofold. The 1<sup>st</sup> instance is that it provides for the right to own property and the 2<sup>nd</sup> instance is that the property acquired should be protected by the state on condition that it was lawfully acquired. This court finds that the titles issued to the 7<sup>th</sup> respondent were issued against the legitimate expectation of the petitioners who had been promised by the 6<sup>th</sup> respondent and the government of Kenya that they would be allocated the land. I do further find that legitimate expectation is an overriding interest and therefore the fact that the 7<sup>th</sup> respondent is registered as proprietor of portion of land does not extinguish the petitioners legitimate expectation.

### **3-WHICH REMEDIES SHOULD THE COURT GRANT**

Having found that the petitioners have established their claim under the principle of legitimate expectation this court issues an order directing the 1st, 2nd, 3rd, 4th and 5th Respondents to perform their constitutional duties and abide with the letter reference No. DS/C/1/VOL.11/01 dated the 11th day of October, 2001 by the Director Land adjudication & Settlement Mr. A. Shariff on behalf of the Ministry of Land and Settlement and also His Excellency the President of the Republic of Kenya (Retired) direct approval of the 28th October, 1998 and issue Title Deeds for parcel Nos. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District into the names of the petitioners for them to resettle and allocate their members.

A declaration that the petitioners rights and fundamental freedom and in particular the protection of right to property and/or interest in or right over suit property has been violated and/or infringed or is about to be violated and their properties parcels No. L.R. No. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District is in real danger of being arbitrarily acquired by the 6th, 7th, 8th, 9th and 10th Respondents and their beneficiaries to the detriment of the Petitioners.

That the 1st, 2nd, 3rd, 4th and 5th Respondents be and are hereby directed to perform their constitutional duties and forthwith issue title deeds for L.R. No. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794..... dated the 11th day of October, 2001 by the Director Land Adjudication & Settlement Mr. A. Shariff on behalf of the Ministry of Lands Reference Number L.R. No. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu District into the names of the Petitioners for them to resettle and allocate their members in strict terms of the letter Reference No. DS/C/1/10/A/VOL.11/01 dated 11th October, 2001 by the Director of Land Adjudication & Settlement Mr. A. Shariff on behalf of the Ministry of Lands and Settlement and also in tandem with His Excellency the Retired President of the Republic of Kenya direct approval of the 28th October, 1998.

A declaration that the acts of the 9th and 10th Respondents of carrying out the surveys work on the suit parcel of Land Ref. L.R. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu without authority of the Director of Surveys either generally or specifically was thus an illegality, and the said works are of no legal effect

That a declaration to issue that the acts of the 6th, 7th and 8th Respondents of unlawful attempting to deprive the Petitioner of their allotted parcels of land in the light of the above was without any legal basis, an act of illegality and unconstitutional.

The court hereby forthwith cancels all the resultant titles or any title issued and/or emanating from the L.R. No. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu to the 6th, 7th Respondents and all other beneficiaries and the Registers be rectified accordingly. That together with the grant of the orders above, the Honourable Court do hereby forthwith cancels all the titles or any title issued and/or emanating from the L.R. No. 9606, 9607 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 all in Uasin Gishu to the 6th, 7th Respondents and all other beneficiaries and the Registers be rectified accordingly.

Though the court has found that the registration of 7<sup>th</sup> respondent as the owner of approximately 27 ha of the Suitland having paid approximately ksh.30,000,000 was offended the petitioners legitimate expectation, the said 7<sup>th</sup> defendant has not been found to have been involved in any fraud or wrongdoing and therefore the court orders that he be allocated not less than 27 hectares of the suit land and that in the meantime status quo to be maintained in respect of the approximately 27ha occupied and utilized by the 7<sup>th</sup> respondent. Orders accordingly. Costs of the petition to the petitioners. In writing this judgment I'm indebted to counsel for the petitioner and counsel for the respondents for their detailed research that enabled the court to arrive at this decision.

**DATED AND DELIVERED AT ELDORET THIS 9<sup>th</sup> DAY OF FEBRUARY, 2017.**

**A.OMBWAYO**

**JUDGE**