REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E&L PETITION NO. 1 OF 2013

IN THE MATTER OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF DEPRIVATION OF PROPERTY CONTRARY TO ARTICLES 75 OF THE OLD CONSTITUTION OF KENYA

AND

IN THE MATTER OF PROTECTION OF RIGHT TO PROPERTY – ARTICLE 40 OF THE NEW CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE REGISTRATION OF TITLES ACT

AND

IN THE MATTER OF DEPRIVATION OF LAND PARCEL NO. I.R. 17542 (L/R 10492) (LATER REFERRED TO AS ELDORET MUNICIPLAITY BLOCK 15/1 & ELDORET MUNICIPALITY BLOCK 23 (KING'ONGO)/1-355) IN UASIN GISHU COUNTY, BY AN ACT OTHER THAN COMPULSORY ACQUISITION OF LAND

BETWEEN

NATHAN TIROP KOECH.....1ST PETITIONER

And ZACHARIA KUMUTAI KOSGEI.....2ND PETITIONER

(Suing as legal administrator and on behalf of the estate of THOMAS KIPKOSGEI YATOR (DCD)

EZEKIEL KIPTOO.....3RD PETITIONER

And ERNEST KIBET.....4TH PETITIONER

(Suing as legal administrator and on behalf of the estate of WILLIAM KIMNGENY ARAP LETING (DCD)

VERSUS

COMMISSIONER FOR LAND.....1ST RESPONDENT

CHIEF LANDS REGISTRAR.....2ND RESPONDENT

REGISTRAR OF TITLES.....3RD RESPONDENT

MINISTRY OF LANDS.....4TH RESPONDENT

DIRECTOR OF SURVEYS.....5TH RESPONDENT

ATTORNEY GENERAL.....6TH RESPONDENT

AND

NATHANIEL LAGAT.....1ST INTERESTED PARTY

KENYA PORTS AUTHORITY.....2ND INTERESTED PARTY

KENYA PIPELINE CORPORATION.....3RD INTERESTED PARTY

JUDGMENT

Introduction

The Petitioners herein *vide* their Amended Petition dated 16th September 2014 and filed in court on 2nd October 2014 are seeking the following remedies;

i. A declaratory Order holding that the proprietary interest in 546 and 604 acres of land comprised in Land Parcel I/R No. 17542, - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 23 (KING'ONG'O) absolutely vests in the 1st and 2nd Petitioners respectively as co-owners.

ii. A declaratory Order holding that the 1st to 5th respondents' seizure of the deceased estate herein property comprised in Land parcel I/R No. 1754 , - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 3 (KING'ONG'O) absolutely other than by way of compulsory acquisition, without consent or compensation was unconstitutional.

iii. A declaratory order holding that the subdivision by the 1st to 5th respondents of Land Parcel I/R No. 17542, - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 23 (KING'0NG'0) and transfer of resultant titles deeds to 3rd parties violated the proprietary rights of the petitioners under Article 75 of the Independence Constitution and Article 40 of the new Constitution of Kenya 2010.

iv. An Order of Mandamus to compel the 1st to 5th respondent to jointly and or severally pay

a) The Estate of THOMAS KIPKOGEI ARAP YATOR (dcd), Kshs. 3,736,070,381.23 billion being fair compensation for loss of 546 acres of his lawful land.

b) The Estate of William Kimngeny Arap Leting (dcd) Kshs. 4,132,942,326.49/= billion being fair compensation for the loss of a total of 604 acres of his lawful land.

i. An order of Mandamus to compel the 1st to 5th respondents to jointly and or

severally pay the petitioners mesne profits in the sum of Kshs. 2,690,603,339/= billion for loss of user for over 30 years.

ii. Any other relief that this honourable court may deam just and fit to grant.

iii. Costs of this Petition be awarded to the Petitioners.

The instant petition is supported by the Verifying Affidavit sworn on 29th Day of September 2014 by ***Nathan Tirop Koech*** on behalf of other petitioners. On the other hand, the instant petition is opposed by the Respondents and the Interested Parties. The 1st Respondent is opposed to the instant Petition *vide* the Replying Affidavit sworn by ***Brian Ikol*** on 9th Day of March 2015 whereas the 2nd, 3rd, 4th, 5th and 6th Respondents filed their Replying Affidavit sworn on 20th Day of March 2015 by one ***Dorothy Letting***, the County Land Registrar, Uasin Gishu County.

Petitioners Case

The instant Petition now before the Honourable Court for determination is founded on the right to protection of property as provided under Article 40 of the Constitution of Kenya 2010, and Section 75 of the former Constitution. The petitioners have instituted the instant petitioner in their capacities as legal representatives of their late fathers one Thomas Kipkoskei Arap Yator and William Kimngeny Arap Lagat who died in the year 2004 and 1998 respectively.

The petitioners have stated that the two deceased persons, the 1st Interested Party, together with one Noah Kimngeny Chelugui, also deceased, and Cherwon Arap Maritim purchased land parcel known as I/R No. 17542. LR No. 10492 measuring 3236 acres, from Jacobus Hendrick Englberech as purchase in common with equal shares at a consideration of Ksh. 360,000/=. It is stated that the said purchase was financed by way of savings and a loan secured from Land and Agricultural Bank and that when the purchasers fell back on the loan, a portion measuring 51.49 Ha of the said land was apportioned to Huruma Farmers Company Limited to offset the debt.

Petitioners have stated further that the joint owners of the land in question later on in 1976 applied to Turbo-Soy Land Control Board for consent to subdivide the land into 6 portions to be registered in the names of the purchasers and Huruma Farmers Company Limited of which it was allowed and the 1st Respondent (Commissioner for Land, defunct and now (The National Land Commission) approved the same and the surveyors had to set prints of requisite survey maps to the 1st and 4th Respondents in 1977.

Moreover, that as a result of the aforementioned approval of the subdivisions and the set prints, in 1980, the grant was forwarded to the 1st Respondent for purposes of surrender and issuance of new separate titles according to the said sub-divisions. The petitioners have stated that the said parcel of land known as LR No. 10492 measuring 3236 acres was to be subdivided such that each of the parties then could get a total of 614 acres, but that the deceased father of the 1st and 2nd Petitioners was registered in January 1996 as the owner of land parcel Eldoret Municipality (King'ong'o) Block 21/306 measuring only 21.39 Ha. (Approximately 52. Acres).

It is stated that the deficits in apportioning the land in question to their deceased fathers was renamed Eldoret Municipality Block 15/1 and registered in the names of their deceased fathers, but lease titles was never issued to them and that the said parcel was surrendered back to the Government of Kenya in September 1983. The Petitioners content further that the remaining portion of LR No. 10492 was amalgamated and renamed Eldoret Municipality (King'ong'o) Block 23/1-355 and that both blocks were subdivided and several title deeds issued to 3rd parties. As a result of the foregoing the petitioners preferred the instant petition seeking the aforestated reliefs.

1st Respondent's Response to the Petition

The 1st Respondent, the National Land Commission, is opposed to the instant petition vide Replying Affidavit sworn on 9th Day of March 2015, by the Deputy Director Legal Affairs, one ***Brian Ikol.*** It is deposed by the 1st Respondent that under **Article 67 of the Constitution**, the National Land Commission is established, to inter alia, manage public land on behalf of the national and county governments and to monitor and have oversight responsibility over land use and planning throughout the country.

It is deponed that the Commission under section 5(2) of the National Land Commission Act (No. 5 of 2012), also bears other responsibilities including to alienate public land on behalf, and with the consent of the national and county governments, monitoring the registration of all rights and interests in land and ensuring that public land and land under the management of designated state agencies are sustainably managed for their intended purpose and for future generations.

It is deposed further that the Petitioners approached this court for declaratory orders based on acts and omissions that happened way back in 1970s on behalf of the alleged deceased proprietors and that whereas the cause of action arose in the year 1970(s), the alleged two (2) proprietors now deceased neither approached the Respondents for any remedy nor the court for any relief or make any necessary steps to protect their interest in the parcels of land.

It is deposed that the petition is in competent as it has been instituted by the Petitioners herein after the demise of the alleged initial proprietors and that the petitioners purports to exercise the rights of the deceased who slept on their rights, have approached this court for orders on rights which doesn't exist. It is sworn by the 1st Respondent that there is an express inordinate delay in bringing the action as the claim is being brought almost 35 years after the land was subdivided, lease title issued, surrender of the land title and fresh titles being issued to 3rd parties who purchased the parcel of land for a considerable consideration.

The 1st Respondent has deposed further that the instant Petition is an afterthought by the Petitioners as the claim was not filed during the life time of the deceased persons and that the alleged deceased persons appreciated and lived satisfied with the knowledge of the various properties being registered in their names as well as other peoples' names. It is deposed that the deceased persons were aware of the position of the land and it is immaterial and irrelevant for the petitioners to assume wrongfully dealings and purport to enforce a right which they don't have.

It is deponed further that all the transactions that took place in relation to the sub division, consolidation, change of user or any other dealing with the land was transparent, above board and with the full knowledge of the owners of the properties. It is deponed that the Petitioners have not met the constitutional threshold and are not entitled to any of the remedy sought and that this is purely an abuse of the court process.

2nd 3rd, 4th, 5th and 6th Respondents' Response

The 2nd – 6th Respondents vide the Replying Affidavit sworn on 20th Day of March 2015 by one ***Dorothy Letting,*** County Land Registrar, Uasin Gishu County are opposed to the instant petition. It is deposed that land reference No. 10492 Eldoret was bought by N.K Lagat and partners in 1965 and they applied for authority to have the land subdivided with a view of selling 10 acres to the Police Rifle Range and 120 acres to sell to squatters referred to as Huruma Farm. It is deposed further that a further subdivision proposal was made on 6/08/1976 and later on approved on 17/10/1997 whereby the whole land was subdivided in the following manner; a) 133 acres portion for the squatters (Huruma Farm), b) 10 acres for Police Rifle Range, c) A subdivision separating the land portions falling within the Municipality and portions falling outside the Municipality.

The 2nd – 6th Respondents have deposed through the said Doroth Letting that as per the attached plan referred to in paragraph 4 the Replying Affidavit, portions marked 1, 2 and 3 up to the Railway line fall outside the municipality boundary and they today form part of Eldoret Municipality Block 21 and 23, land which is held on freehold tenure and owned by different individuals and that the 10 acres

surrendered on subdivision to Government for Police Rifle also falls within this zone.

It is deponed that the portions marked 4,5,6 and 7 fall within the municipality and portions number 6 is what the owners had proposed to sell to the squatters (Huruma Farm) and a portion next to it measuring 6.1 hectares was surrendered to Municipal Foul Sewarage Scheme. It deposed that from the available records parts of L.R No. 10492 (now known as Eldoret Block 15/12,237 and 238 were acquired by the Government vide Gazette Notice No. 5947 and 5948 for Kenya Ports Authority.

The 2nd to 6th Respondents depose that Kenya Ports Authority whom the land was being acquired for, made cheque direct to the beneficiary through the District Commissioner's Office and another one cheque to the Registrar of High Court for the portion under dispute. It is deponed that when the matter under dispute in court under Eldoret HCC No. 80 of 1988 was resolved, the payment of Ksh. 1,498,490/= was also released to the District Land Officer for onward release to the beneficiaries.

It is deposed further that in view of the foregoing it is misleading for the Petitioners in this matter to claim for compensation for the whole of LR No. 10492 comprising of 3236 acres when it is clear that they have sold parts of it, that is Blocks 21 and 23 Kingongo, and other portions were surrendered to the Government for public utility that is roads, sewerage, Police Rifles Range and other portion acquired and full compensation made.

The 2nd – 6th Respondents in their Replying Affidavit have requested the honourable court to dismiss the instant Petition as there is no way the transactions in respect of the Suitland could have been undertaken without the Petiotioner's knowledge or acquiescence and that the Petitioners ought not to benefit from their apparent indolence in respect of the suitland.

Petitioner's Submissions

Petitioners through their advocates Nyekwey and Co. Advocates on 19th May 2015 filed written submissions dated even date. The petitioners written submissions are issue based and hence they singled out and submitted on the following issues;

On Whether the petitioners and 3 others co-owened land parcel L/R No. 10492 measuring 3236 acres?

It is submitted that Thomas Kipkosgei Arap Yator (deceased) to whom the 1st deceased estate herein relates, William Kimngeny Arap Letting (deceased) to whom the 2nd deceased estate herein relates, Nathaniel Lagat, 1st Interested Party herein, Noah Kimngeny Chelugui and Cherwon Arap Maritim, jointly acquired land parcel L/R 17542, L/R 10492 measuring 3236 acres less 26 acres road reserve at a consideration of Ksh.360,000, as purchasers in common with equal shares and that a duly signed transfer was registered in the land Titles Registry in Nairobi. To this end the petitioners relied on the Annexture marked NTK 3a). It is further submitted that the petitioners herein are the registered co-owners of the suit land with equal shares and have proved as much.

On Whether the Petitioners applied for consent to subdivide the suit land into 6 portions, and whether it was approved?

It is submitted that the Land Control Board approved the subdivision of the suit land into 6 portions on 12th October 1976 before the creation of a 7th portion which was also approved later on 7th October 1977.To this end the petitioners referred the honourable court to the annexures marked NTK 5, NTK 8(a)&(b), NTK 9 (a)(b) & (c), NTK 10 and DL 4.

On Whether the title deeds were issued to the petitioners and their co-owners as per the Land Control Board Consent?

It is submitted that new title deeds were never issued to the Petitioners as per the subdivision plan

approved on 7th October 1977 and that instead, the Respondent embarked on creation of illegal parcels, unlawful consolidation of approved subdivision and creation of hundreds of illegal parcels of land that were allocated as government land to beneficiaries, majority of who were undeserving and that at the expense of the legal owners.

Counsel for the Petitioners has argued that the 1st major onslaught that the Respondents wedged against the petitioners right to property was the illegal creation of land parcel No. Eldoret Municipality Block 15/10 apparently requested for by Raiplywoods which was later subdivided into various portions, namely Eldoret Municipalty 15/237 (9.664 Ha), Eldoret Municipality 15/238 (4.854), Eldoret Municipality 15/239 (21.454 Ha), pursuant to verbal instructions from the comptroller of state house.

It is submitted that the 2nd onslaught was strange registration. It is submitted that the Respondents created a new parcel of land being Eldoret Municipality Block 15/1 without their knowledge and that the deed was never issued to them. It is argued that on 21st September 1983, the Respondents caused the Lease Title of the said land parcel Eldoret Municipality 15/1 to be surrendered to the Government of Kenya without their knowledge.

It is submitted that the 3rd and final onslaught against the petitioners was perpetuated on the 19th November 1992 when the 5th Respondents consolidated the remaining portion of LR No.10492 being L/R No. 10492/2, L/R No. 10492/3, L/R No. 10492/4, into Eldoret Municipality Block 23 (Kingongo) that was later subdivided into into 335 parcels of land.

<u>On whether the Petitioners Constitutional Rights to Land were breached</u>**?**

It is submitted that the petitioners constitutional rights were infringed as follows; Excising 666.41 Ha of the suit land that fell on the Southern side of the Railway line traversing it, then have it renamed Eldoret Municipality Block 15/1 without the knowledge or consent of the registered owners; Causing lease title for Eldoret Municipality Block 15/1 to be surrendered to the Government of Kenya without the knowledge or consent of the registered owners; Issuing to 3rd parties hundreds of free hold and lease hold Title Deeds that were products of subdivision of Eldoret Municipality Block 15/1 (earlier said to have been surrendered to the Government of Kenya) and Eldoret Municipality (King'ong'o) Block 23/1-355; The respondents violated the petitioners 'constitutional rights to own land, have quiet enjoyment and extend all rights over it; The respondents exceeded the statutory jurisdiction and powers conferred upon them as commissioner for lands, chief land registrar and director of surveys; The respondents did not conform to the laws that would otherwise regulate their actions, especially in purporting to change the land regime from registration of Titles Act to Registered Lands Act Cap 300 and in planning the suit land into urban residential estates, commercial, industrial zones and public utilities without changing user, and without securing the consent of the registered owner and Seizing without consent of the petitioners' private land by means other than as provided for under Compulsorily Acquisition Act, and without compensation.

To this end, the Petitioners'counsel cited Article 40 of the Constitution of Kenya 2010 and section 75 of the old Constitution as read together with section 6(1) of the Land Acquisition Act, Cap 295 Laws of Kenya, (now repealed). The learned counsel further relied on the following authorities; **<u>Rutongot Farm Limited vs. Attorney General & 3 Others [2014] eKLR,H.C at Kitale Petition No. 1 of 2011</u>.** In the foregoing case it is submitted that the learned judge Obaga J. held at pg 6 of the holding that the unlawful acquisition of the petitioner's land by the Government was in breach of the petitioner's right to property and that the property of an individual cannot be taken unless in accordance with the constitutionally provided means.

Counsel also relied on the case of ***<u>Adan Hassan & 2 Others vs. The Registrar of Titles, Ministry of Lands & 2 Others [2013]eKLR H.C at Nairobi, Petition 7 of 2012.</u>*** In the foregoing case counsel cited the holding at page 8 where it was held by the learned Judge Angote J. that any alienation of land contrary to the provisions of section 75 of the repealed constitution or the provisions of the Government Land Act or any other Act of parliament is null and void *ab initio.*

Counsel for the Petitioners also relied on the case of ***County Government of Migori vs. Registered Trustees of Catholic Diocese of Homa Bay & 2 Others [2015]eKLR at Kisii Environment and Land Court Petition No. 36 of 2014,*** and cited the holding by Okong'o J. where at paragraph 5, it was held that the Land Registrar has no powers to transfer land from one properties to another through rectification of the register and that a Land Registrar has powers only to rectify a register to correct errors or omissions if at all the affected parties consent to the correction.

Petitioners' counsel further relied on the case of ***Virenda Ramji Gudka & 3 Others vs. Attorney General [2014]eKLR H.C at Nairobi ELC Civil Suit No. 480 of 2011,*** and cited the holding by Mutungi J. at page 10 where it was held that the Allotment of land to a citizen or others protected under the constitution which action is symbolized by title deed, vests in the allottee inviolable and indefeasible rights that can only be defeated by a lawful procedure under the land Acquisition Act.

On citing Article 47 of the Constitution of Kenya 2010, the Petitioners' counsel has submitted that the Respondents unlawfully alienated the petitioners' lawful property without any lawful justification and that their actions were in utter breach of the right to property and also to fair administrative action. To this end counsel relied on the case of **Multiple Hauliers East Africa Limited vs. Attorney General & Others [2013]eKLR, H.C at Nairobi, Petition No. 88 of 2010** and cited the holding of Mumbi Ngugi J. at page 12 where the learned judge reiterated the provisions of Article 47(1) and held that the High Court on several occasions emphasized the need for administrative actions to be carried out procedurally and that where a public authority's actions are likely to deprive individuals of their fundamental rights and freedoms, it is crucial that such actions be carried out due process and in respect to the rules of natural justice.

On whether the Petitioners suffered loss as a result of the alleged breach of constitutional rights?

It is submitted that the petitioners have demonstrated that the total acreage of the land lost by the 2 deceased estates herein is 1150 acres and the current value of the lost land is Kshs. 7,869,012,707.70/= as per the valuation report. It is submitted further that the petitioners have never had possession and user of the said land 1,150 acres for over 30 years and therefore claim *mesne* profits in the sum of Ksh.2,690.603,339/= as per the valuation report on loss of user. It is further submitted that the Respondents are jointly and severally liable for the loss of the petitioners land measuring 1,150 acres.

On whether the Petitioners slept over their rights?

It is submitted that the Respondents did not put it to the petitioners in black and white that they had taken away their land and that the first time the petitioners noted that something was amiss was in the 1990s and that the petitioners took action by complaining through the 1st interested party. It is argued that the Respondents kept writing to say they were investigating the petitioners complaint and that as pleaded in High Court Case No. 71/2009, the 1st time the petitioners were convinced that there was fraud was in the year 2007 and had taken the earliest opportunity to seek redress and that the petitioners actively pursued issuance of their title deeds before filing this petition.

It is submitted further that the petition is not time barred and that the provisions of Limitation of Actions Act do not apply in this petition. To this end counsel relied on the following authorities;

David Gitau Njau and 9 Others vs. Attorney General [2013], H.C at Nairobi, Petition No. 340 of 2012, Oriental Commercial Bank Limited vs. Central Bank of Kenya [2015]eKLR, H.C at Nairobi, Civil Suit No. 76 of 2011 and *Wachira Weheire vs. Attorney General [2010]eKLR,H.C at Nairobi Miscellaneous Civil Case No. 1184 of 2003*, the golden thread that runs through the foregoing cases is to the effect that claims founded upon alleged violation of Fundamental Rights and Freedom are not time barred.

On whether the Petitioners are entitled to the Reliefs Sought?

It is submitted that the Petitioners have demonstrated that the loss was as a result of the respondents' breach of the constitutional rights to property and hence they are entitled to damages. To this end counsel

relied on the following cases; *Virenda Ramji Gudka & 3 others v Attorney General [2014] eKLR, Environment and Land Court at Nairobi, ELC Civil Suit NO. 480 OF 2011***.** In the foregoing case the learned judge held that the defendant was liable for damages. The judge proceeded to quantify the award therein and granted the same. **In** *David Gitau Njau & 9 Others v Attorney General [2013] eKLR*, supra, the learned judge Lenaola J. awarded each Respondent 5,500,000.00 as damages for breach of their Fundamental Rights and Freedom. And in *Orbit Chemical Industries Ltd vs. Attorney General [2012]eKLR, H.C at Nairobi, Civil Case No. 876 of 2004*, the court awarded Kshs. 6,015,113,000/= for wrongful registration of caveat leading to the loss of the suit land therein. Finally the petitioner's through the counsel on record have submitted that the Respondents should meet the costs of this petition.

1st Respondent's Submissions.

The 1st Respondent through Prof. Tom Ojienda & Associates filed its written submissions on 18th day of May 2015.The 1st respondent's submissions are based on the following issues;

On whether the Petitioner's claims can be decided by way of Constitutional petition?

It is submitted that the instant petition lacks precision pursuant to the provisions of **Rule of 4 of The Constitution of Kenya (Protection of rights and Fundamental Freedoms) Practice and Procedure rules, 2013 Rules**. To this end counsel cited the holding in the case of *Annarita Karimi Njeru vs. Rep.,1979 KLR 154 pg 156* as quoted and applied in the case of *James Muchene Ngei vs. Republic [2008]eKLR, H.C at Nairobi Misc. Application No. 562 of 2008*, where it was held that if a person is seeking redress from the High Court or an order which invokes a reference to the constitution, it is important, if only to ensure that justice is done in his case, that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed.

Counsel also cited and relied on the holding in the case of *Cyprian Kubai Vs Stanley Kaiyongi Mwenda[2002] eKLR, H.C at Nairobi*, ***Misc. App. No. 612 OF 2002*****,** where the court faulted the petition for failing to specifically invoke a subsection under **Article 70 of the Constitution** that he was relying on. While reproducing **Article 40 of the Constitution** Counsel submitted that the said **Article 40** has several provisions which leaves room for speculation a matter which petitioners are taking advantage of by asking the court to help them determine what aspects of their rights have been specifically violated and or prone to violation.

It is submitted that in view of the orders sought herein, the Constitutional Petition is not the right form of having this suit determined and that the same cannot stand as filed as the matters alluded to require proof on finality by way of *viva voce* evidence and authentication and verification of documents. It is submitted further that the petitioners have not established an iota of even what would amount to occupation on the suit parcels. To this end counsel cited the *Halsbury's Laws of England, 4th Edition (Re-issue) Vol.8(2) at paragraph 165*, where it is stated that the protection under the Constitution of the right to property does not obtain until it is possible to lay claim in the property concerned and that an applicant must establish the nature of his property right to enjoy it as a matter of domestic law.

It is submitted that the petitioners have themselves in paragraph 50 of their Affidavit admitted to the fact that they withdrew a suit filed in Eldoret High Court Civil Suit No. 71 of 2009 claiming land parcel No. 10492/3 but that the estate had since determined that no such land parcel was ever registered in the name of Thomas Yator and therefore it is apparent that the manner in which the petitioners are conducting themselves is such that they have never had any form of ownership in suit parcels registered and that they are far from aware on the nature of transactions that their deceased father's had occasioned.

On whether the petitioners have established a cause of action capable of being decided by this honourable court?

It is submitted that the petitioners as the legal administrators have taken long to institute any cause to protect the rights they deem aggrieved. It is submitted that delay defeats equity and that equity aids

vigilant and not indolent. It is submitted that the petitioners are guilty of laches. To this end counsel relied on the holding in the case of *Benjoh Amalgamated Limited & Another vs. Kenya Commercial Bank Limited [2014]Eklr, C.A at Nairobi, Civil Application No. 16 of 2012* where the court relied on the decision in *The Lindsay Petroleum Co. vs. Hurd (1874) L.R 5 P.C*. In the later case, the court was of the view that delay may defeat justice. The court held that the doctrine of laches in courts of equity is not an arbitrary or a technical doctrine and that where there has been a delay in seeking a remedy, there are two circumstances that are always important; the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to remedy.

It is submitted that the deceased persons were aware of the position of the land and it is immaterial and irrelevant for the petitioners to assume wrongful dealings and purport to enforce a right which they don't have. It is argued that the instant petition is an afterthought by the petitioners as the claim was not filed during the lifetime of the deceased persons and that the alleged deceased persons appreciated and lived satisfied with the knowledge of the various properties being registered in their names as well as other people's names.

While citing the provisions of the **Article 67 of the Constitution** generally, the 1st Respondent's counsel has submitted that the proviso of **Article 67(2)(e)** has not been adhered to by the petitioners. Is submitted that while the role of the National Land Commission now the 1st Respondent is to ensure that investigations pursuant to **Article 67(2)(e)** of the constitution is carried out, the 1st Respondent has not been offered adequate chance to perform this role. It is submitted that it would be very prejudicial to the 1st Respondent to be made liable for alleged an unproven atrocities that they have not yet established within their powers. To this end, counsel relied on the holding in the case of *Ledidi Tauta & Others vs. Attorney General & 2 Others [2015]eKLR, H.C at Nairobi, Constitutional Petition Number 47 Of 2010*, where the court opined that it would not be the right forum of the petitioners to ventilate their claim which is founded on historical injustices. The court further noted that the constitution acknowledged there could have been historical injustices in the manner land issues were handled by past regimes and hence among the functions and mandate of the National Land Commission established under **Article 67(1) of the Constitution** is to investigate historical injustices and to make recommendations for redress.

Counsel for the 1st Respondent has submitted further that no such efforts has yet been made by the Petitioners to seek clarification and assistance from the NLC and therefore places their claim as jumping the gun to ask this honourable court to offer a remedy in vain. It is submitted that the 1st Respondent should therefore be given ample time to come up with exclusive investigative results which are actionable and implementable in nature.

On whether the prayers in the Petition can be granted,

It is submitted that declaratory orders should and can only be issued when the matter claimed for has specifically been pleaded, are real and not theoretical as pleaded to by the petitioners. To this end counsel relied on the holding in the case of *Matalinga & Others vs. Attorney- General [1972] E.A 518*, as was quoted in *Justice Amraphael Mbogholi Msagha vs. Chief Justice of the Republic of Kenya & 7 Others [2006]eKLR, H.C at Nairobi, Misc. Application No. 1062 of 2014.* In the former case, Simpson J. held that before a declaration can be granted, there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with a present interest in opposing it with great care and caution, and that the same ought to apply to constitutional applications.

On whether the instant petition is frivolous and vexatious and a waste of the courts time,

It is submitted that the petitioners are on forum shopping expedition to suck as much money as they can from the government after they have literally established no cause of action and that it would be a dangerous precedent that the petitioners are hoodwinking this court to set in the wake of Public Interest. Finally counsel urged the court to strike out the petition on the ground that it is misconceived and brought mala fides.

2nd, 3rd, 4th, 5th and 6th Respondents Submissions.

Through the office of the Attorney General, the 2-6th Respondents filed their written submissions on 18th May 2015 and submitted that the petitioners are guilty of inordinate delay in bringing their petition to challenge alleged actions which took place in September, 1983 and November 1992 which delay is 23 years. To this end State Counsel relied on the holding in the case of *Peter Ngari Kagume & 7 Others vs. Attorney General [2009]eKLR, Constitutional Application No. 128 of 2006*, where it was held that whenever there is no time limit stipulated for doing a certain legitimate act, the court should be able to examine whether the party insisting on taking the action is within a reasonable time otherwise confusion and uncertainty will clog administrative policies intended for good governance and public interest. In the foregoing case it is submitted that it was held that a delay of 24 years in bringing the petition was inordinate.

Finally, State Counsel urged the court to dismiss the petitioners' amended Petition in light of the law and in the interest of justice as it lacks merit.

Determination

Though the instant petition appears to broadly capture events and issues, the only issue that is being raised is in relation to the alleged violation of Right to Property on part of the Respondents. In view of the pleadings and the submissions tendered herein, I find the following issues to be salient and hence worthy deliberation.

Issues For Determination

1. ***Whether the petitioner's concerns can be adequately and competently handled by the Honourable Court?***

2. ***Whether the petition herein is incompetent for want of form/precision and whether the same raises constitutional issue?***

3. ***Whether petitioners were indolent and hence the claim being time barred?***

4. ***Whether the Petitioners land was acquired by the Respondents without following the due process of the law and if so, how much of land was illegally acquired by the Respondents.***

5. ***Whether the Respondents in acquiring the said land, violated the petitioner's right to property?***

6. ***Whether the Petitioners should be compensated? And if so how much.***

7. ***Who pays for costs ?***

Whether the petitioner's concerns can be adequately and competently deliberated upon by the Honourable Court in the manner presented herein?

The 1st Respondent has contended that the Petitioners have not adhered to the provisions of **Article 67(2) (e) of the Constitution.** According to the 1st Respondents, the issues raised by the petitioners are within the ambit of the provisions of the said **Article 67(2)(e) of the Constitution** and that the National Land Commission (NLC) being established in 2012 and the office holders having been appointed in 2013, it has not been offered adequate chance to perform its role.

Article 67(2) paragraph (e) of the Constitution of Kenya stipulates as follows;

"67. …

(2) The functions of the National Land Commission are—

…

(e) to initiate investigations, on its own initiative or on a

complaint, into present or historical land injustices, and

recommend appropriate redress"

In light of the foregoing provisions of the law, what the 1st Respondent is alluding to is that the petitioners issues relates to historical injustices of which can be adequately and competently dealt with by the NLC pursuant to the provisions of **Article 67 of the Constitution.** This is so because, in its submissions the 1st Respondent has argued that the petitioners are yet to register a complaint by the NLC and that they are jumping the gun by filing this matter. The question that follows therefore is, ***Does the instant petition raises historical injustices?*** The petitioners' case in brief, as I understand it, is that, their fathers, Thomas Kipkosgei Arap Yator, deceased, William Kimngeny Arap Letting, deceased, Nathaniel Kiptalam Arap Lagat, Noah Kimngeny Chelugui, deceased and Cherwon Arap Martim jointly purchased land measuring 3236 acres exclusion of 26 acres meant for the road reserve from one Jacobus Hendrick Engelbrecht at a consideration of Ksh. 360,000/=. They later sold 120 acres thereof to Huruma Farmers Company Limited. It is the petitioners contention that later on they were short changed by the government on various occasions by acquiring their land compulsorily and also by declining to issue them with titles and purporting petitioners to have surrendered their lease titles for further subdivisions. The petitioners singled out the year 1976 when the Government compulsorily acquired 6.6 Ha thereof for Foul Sewage Scheme and 1987 when the Government compulsorily acquired a total of 43.471 acres of land for purpose of setting up Kenya Ports Authority Container Terminus.

It is the petitioners' further contention that the land in question was further subdivided and changed land registration regime from the Registration of the Titles Act (RTA) to the Registration of the Land Act (RLA) and given out to third parties and strangers without their consent and knowledge. It is the petitioners case that the initial registration of the land in question was I/R No. 17542-L/R No.10492 measuring 3226 acres which was later subdivided into various blocks and that 1st to 6th Respondents compulsorily acquired the petitioners land without compensating them. The land acquired without compensation include; 4.05 Ha. for Police Rifle Range; 17.65 Ha for Kenya Ports Authority; 36 Ha. comprised in Eldoret Municipality Block 15/10 acquired vide Verbal instructions from the comptroller of state house; 11.017 Ha. comprised in Eldoret Municipality Block 23 (King'ong'o)/305 registered in the name of the Government of Kenya; Unknown number hectares for Kenya Pipeline Corporation; Unknown number of hectares under roads to access Kenya Kenya Ports Authority premises; 666.41 Ha. comprised in Eldoret Municipality Block 15/1 allegedly surrendered to the Government of Kenya; 641 Ha. comprised in Eldoret Municipality Block 23 (King'ong'o) that was subdivided into 355 free hold deeds, out of which over 90% were issued to strangers. It is contended that some of the illegal beneficiaries of the petitioners' land include, H.E Daniel T.Arap Moi (retired president), Eldoret Municipality Block 15/239, 21.45 Ha for 925 years, 3 months from 1/8/1983, Stanley Metto (deceased), Eldoret Municipality Block 15/238, 4.85 Ha. for 925 years from 1/8/1983. At paragraph 36 of the Verifying Affidavit it is deposed that the only compensation that the estates herein received when the Government compulsorily acquired their land was with regard to the 6.60 Ha. for Eldoret Fouls Sewage project. Briefly that is the Petitioners case as I understand it.

On the other hand at paragraphs 9 and 10 of the 2nd – 6th Respondents sworn by Dorothy Letting County Land Registrar Usin Gishu County, is deposed as follows;

"That the Kenya Ports Authority for whom the land was being acquired made cheque direct to the beneficiaries through the District Commissioner's Office as per the attached letter now produced and marked 'DL6'and another one cheque to the registrar of High Court for the portion under dispute as per the attached letter now produced and marked 'DL7. …That when the matter under dispute in court under Eldoret HCC No. 80 of 1988 was resolved, the

payment of Kshs. 1,498,490/= was also released to the District Land Officer for onward release to the beneficiaries as per the annexed letter now produced and marked 'DL8"'

In view of the foregoing, it is apparently clear that the Petitioner's are laying a blame on the past regime for inadequate and or lack of compensation on having compulsorily acquired their land. The petitioners happened to own a big chank of land which larger part of it appears to have gradually been acquired by the previous regime of Government leaving the petitioners disgruntled. I have noted that as much as the Petitioners are claiming that their land was compulsorily acquired without them being compensated, annextures marked DL6, DL7 and DL8 reveals that there was some sort of compensation to the tune of Kshs. 1,498,450/= to the 'land owners' in relation to the Inland Container Deport, (KPA). Annexture marked DL7 is dated 6th March 1990 and Annexture marked DL8 is dated 8th November 1993. The foregoing annextures do not reveal who the so called 'land owners' are. It is also clear from the foregoing annextures, that at some point the issue of compensation with regard to land acquired for the Inland Container Deport (KPA) was a subject for litigation in court of law being H.C.C No. 80 of 1988.

The foregoing deponents with regard to the alleged compensation have not been rebutted by the petitioners and the petitioners are also silent on the Civil Case No H.C.C No. 80 of 1988 mentioned by the 2nd – 6th Respondents. Although the said case does not reveal who the parties were and the subject matter, I can only speculate this to have been a claim for compensation and or inadequate compensation on part of the government following acquisition of the land in question from the petitioners. However the issues that are being raised are so weighty in the sense that they touch on so many third parties who are not party to the present suit. This leads to the following questions, ***What is historical land injustices? Does the issues raised by the petitioners herein amount to historical land injustices?*** Both the Constitution and the National Land Commission Act No 5 of 2012 do not define what historical injustices are.

In attempting to understand what the phrase means, the learned judge ***Anyara Emukule j. in the case of Kiluwa Limited & Another vs. Commissioner of Lands & 3 others [2015] eKLR, H.C at Mombasa*** *Constitutional Petition No. 8 of 2012*, had this to say;

"57. In determining this aspect of the preliminary objection, I entirely agree with the Petitioner's counsel's submissions. Firstly, the National Land Commission Act 2012 was enacted after this Petition had been filed in February, 2012. Secondly, the Third and Fourth Respondents have for three years of the existence of the Petition, failed to raise with the court or the Petitioners on the role of the Commission. Thirdly, there is no provision in either the Constitution or the National Land Commission Act which purports to oust the jurisdiction of the court to determine land disputes either before or after the enactment of the Constitution of Kenya 2010, or the enactment of the National Land Commission Act. Fourthly, there is as yet no definition of "present or historical land injustice". However, if it means or includes settlement of Kenyans from other parts of Kenya to lands which were not prior to Independence in 1963, their community's or nations, ancestral area or areas, Article 40(1) of the Constitution has debunked that definition as it expressly declares that every person irrespective of his origin in Kenya or elsewhere, has a right, either individually or in association with others to acquire and own property–

(a) of any description, and

(b) in any part of Kenya

58 If the expression refers to the procedure under which the land is presently allocated (by Government at the national or county levels), that is a question for legitimate inquiry either by the court or the National Land Commission within its mandate under the National Land Commission Act."

In ***Ledidi Ole Tauta & Others vs. Attorney General & 2 others [2015] eKLR, H.C at Nairobi, Constitutional Petition No. 47 of 2010*** the learned judges; Nyamweya, Ougo & Mutungi opined as

follows

> **"We also note that the petitioners claim to the land is predicated on what the petitioners claim were historical injustices visited on the community by the colonial masters who required that they move out of what they claim were ancestral lands to pave way for white settlement. We do not think the court would be the right forum for the petitioners to ventilate their claim which is founded on historical injustices".**

In ***Kipsiwo Community Self Help Group v Attorney General And 6 Others [2013] eKLR, E&LC at Eldoret*** *E&L PET 9 OF 2013*, the learned judge Munyao J. delivered himself at length and concluded that:-

> "**But I have not seen anywhere in the Constitution, or in the NLC Act, which provides that a person cannot initiate a constitutional petition based on a perceived historical injustice and that the NLC has a monopoly on such mandate. I think, so long as one can cite a violation of a Constitutional provision or Constitutional right, then such person may initiate a Constitutional petition and seek redress. I don't think that the basis of such complaint is important. Such complaint could be based on any foundation. It could be, as in our case, a historical injustice, or even a continuing land injustice. It could be founded on labour, or on a violation of due process, or a consumer right, or a social and economic right. The source of the complaint is not material, so long as the petitioner can, with precision, cite the constitutional right or provision that has been violated and seek a remedy provided by law.**
>
> **Thus, in as much as I agree that the NLC has a mandate to look into historical injustices, I do not agree that an individual cannot commence a Constitutional petition, on the foundation of historical land injustice. In so far as the jurisdiction of ELC, is concerned, the ELC will have jurisdiction, if the basis of the case is land and environment, including a matter founded on claims of historical land injustices.".**

In the case of ***Lucy Mirigo & 550 others v Minister for Lands & 4 others [2014] eKLR, C.A at Nyeri, Civil Appeal No.*** *Civil Appeal No. 277 OF 2011* Koome, Mwilu & Otieno-Odek JJA. observed as follows;

> **"It is our considered view that the issue before the High Court and before this Court is not whether the suit property was acquired unlawfully by the 4th and 5th respondents but whether an order for mandamus can issue in favour of the appellants based on the facts disclosed in the case. In any event, under** *Article 67 (1) (e)* **of the** *Constitution***, it is the mandate of the National Land Commission to investigate issues of historical land injustices and to recommend appropriate redress".**

As demonstrated by the above case law, there is no clear cut definition with regard to historical injustices. But more importantly the Petitioners have not based the instant petition on historical injustices neither have they pleaded historical injustices as their claim is based on allegations that the proprietary interest in 546 and 604 acres of land comprised in Land Parcel I/R No. 17542, - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 23 (KING'ONG'O) absolutely vests in the 1st and 2nd Petitioners respectively as co-owners and that the 1st to 5th respondent seizure of the deceased estate herein property comprised in Land parcel I/R No. 17542 , - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 3 (KING'O) absolutely other than by way of compulsory acquisition, without consent or compensation was unconstitutional. Lastly a claim for a declaratory order holding that the subdivision by the 1st to 5th respondents of Land Parcel I/R No. 17542, - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 23 (KING'0NG'0) and transfer of resultant titles deeds to 3rd parties violated the proprietary rights of the petitioners under Article 75 of the Independence Constitution and Article 40 of the new Constitution of Kenya 2010.

However, bearing in mind the facts of this claim and the issues that have been raised, it is my considered view that the issues are worthy, ***but not limited***, to investigation by the NLC pursuant to **Article 67(2)(e) of the Constitution.** For instance, the petitioners have claimed in their petition,which claims have been proved on a balance of probability, that 36 Ha. comprised in Eldoret Municipalty Block 15/10 were acquired vide verbal instructions from the ***comptroller of the state house.*** The Petitioners have also singled out one ***Stanley Metto,*** deceased and the ***Retired President Daniel T. Arap Moi*** as the beneficiaries of the illegal and unlawful subdivision of their land however no evidence was presented directly implicating the three said persons in the process of alienation. The foregoing persons though not party to the proceedings, have been adversely mentioned. Raiplywoods has also been mentioned as having shown interest in January 1978 to purchase 36.0 Ha which was adjacent to the suit land. Rai Plywoods has also been implicated for having acquired part of the suit land on verbal communication from the then Commissioner of Lands. Considering that the foregoing 3 persons are not party to the instant suit and in view of the pleadings and submissions herein you cannot not tell with certainty their alleged involvement in the illegalities committed.

However, it is clear that the property in dispute in whatever manner described was property of the deceased Thomas Kipkoskei Arap Yator and William Kimngeny Arap Lagat who died in the year 2004 and 1998 respectively,and was initially known as I/R No. 17542. LR No. 10492 measuring 3236 acres and was purchased from Jacobus Hendrick Englberech which purchase was in common with equal shares at a consideration of Ksh. 360,000/=,financed by way of savings and a loan secured from Land and Agricultural Bank and that when the purchasers fell back on the loan, a portion measuring 51.49 Ha of the said land was apportioned to Huruma Farmers Company Limited to offset the debt.

It is not controverted that the joint owners of the land in question later on in 1976 applied to Turbo-Soy Land Control Board for consent to subdivide the land into 6 portions to be registered in the names of the purchasers and Huruma Farmers Company Limited of which it was allowed and the 1st Respondent (Commissioner for Land, defunct and now The National Land Commission) approved the same and the surveyors had to set prints of requisite survey maps to the 1st and 4th Respondents in 1977.

It is also not controverted that as a result of the aforementioned approval of the subdivisions and the set prints, in 1980, the grant was forwarded to the 1st Respondent for purposes of surrender and issuance of new separate titles according to the said sub-divisions. The said parcel of land known as LR No. 10492 measuring 3236 acres was to be subdivided such that each of the parties then could get a total of 614 acres, but that the deceased father of the 1st and 2nd Petitioners was registered in January 1996 as the owner of land parcel Eldoret Municipality (King'ong'o) Block 21/306 measuring only 21.39 Ha. (Approximately 52. Acres). The deficits in apportioning the land in question to their deceased fathers was renamed Eldoret Municipality Block 15/1 and registered in the names of their deceased fathers, but lease titles was never issued to them and that the said parcel was surrendered back to the Government of Kenya in September 1983. The remaining portion of LR No. 10492 was amalgamated and renamed Eldoret Municipality (King'ong'o) Block 23/1-355 and that both blocks were subdivided and several title deeds issued to 3rd parties. This court finds that the act of the commissioner of lands as he then was of surrendering back to the government part of the parcel of land bought by the petitioner's father was an act of compulsory acquisition and that required to be undertaken under Section 75 of the former Constitution of Kenya and the Land Acquisition Act Cap 95 Laws of Kenya **(repealed)** which required notice and adequate compensation. The respondents have not demonstrated that either the procedure for compulsory acquisition was followed or that the petitioners were adequately compensated. The process of surrender of the remainder of the land to the government of Kenya and the conversion of the land regime from RTA to RLA was characterised by procedural impropriety and illegality.

Whether the petition herein is incompetent for want of precision and whether the same raises constitutional issue?

The 1st Respondent submitted that the petitioners alleged breach of their right to property has not been referenced specifically and that it is important that in order for a cause of action to be conclusively determined, it should be stated with precision. This leads us to question ***How precise should the petition***

be drafted?

The principles governing the precision with regard to drafting of the petition were laid down in the case of ***Anarita Karimi Njeru vs. Republic (1976-1980) KLR 1272*** *supra,* where it was held that if a Person is seeking redress from the High Court on matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.

The foregoing principles were followed by the Court of Appeal in the case of ***Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013], eKLR, Court of Appeal at Nairobi, Civil Appeal No. 290 of 2012,*** where the Court of Appeal declined to uphold the petition filed in the High Court on the ground that it was not pleaded with precisions as required in the constitutional petitions and that it did not provide adequate particulars of the claims relating to the alleged violations. Over and again the courts have been guided by the foregoing two authorities in determining the preciseness of a petition. Let us now look at some of the case law with regard to precision of the petition.

In ***John Kipng'eno Kipkoech & 2 Others Vs. Nakuru County Assembly & 5 Others [2013]eKLR, H.C at Nakuru, Petition No. 23 of 2013*** as Consolidated with ***Petition No. 25 of 2013***, the learned judge Emukule J. while referring to the holding in *Anarita Karimi Njeru case*, supra, reiterated that the said case settled the proposition that where a person is alleging a contravention or threat of contravention of constitutional right, he must set out the right infringed and the particulars of such infringement.

In ***Samson Otieno Bala T/A Missam Enterprises v Kenya Bureau of Standards & 4 others [2015] eKLR, H.C of Kenya at Homabay, Petition No. 4 Of 2014, Formerly Migori Hc Petition No. 3 Of 2014*****, my learned brother justice Majanja opined as follows;**

> **"The petition, as drawn, is clearly deficient in that it does not cite any particular provision of the Constitution that is violated and demonstrate how it is violated. The title of petition refers to Articles 2, 3, 19, 20, 21, 22, 23, 24, 25, 27, 28, 33, 50 and 259 of the Constitution. Apart from Articles 27, 28, 33 and 50 which deal with specific rights and fundamental freedoms protected under the Constitution, the rest of the Articles cited deal with general provisions of the Constitution, its application and interpretation. Even though some of the Articles cited refer to specific fundamental rights and freedoms, the petitioner did not plead how each right has been violated. The body of the petition does not mention or cite any of the fundamental rights which are alleged to have been violated. In the circumstances I must find that the petition is incompetent."**

In ***Abuya Abuya v Independent Electoral and Boundaries Commission & Another [2014] eKLR, High Court At Nairobi Constitutional Petition NO. 291 OF 2013***, my other learned brother judge Lenaola J. held as follows;

> "What then should I say about the alleged violations of the Petitioner's Constitutional rights and freedoms? In submissions, Counsel for the 1st Respondent correctly stated that "a party alleging violation of a Constitutional right must demonstrate, with a reasonable degree of precision what provisions of the Constitution have been violated, as well as the manner in which they have been violated."

This statement comes from a long chain of decisions of this Court and that is why in Trusted Society of Human Rights Alliance vs Attorney General & 2 Others [2012] e KLR. the Court stated thus;

> "We cannot but emphasize the importance of precise claims in due process, substantive justice and the exercise of jurisdiction by a court In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not conterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak

particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point."

The Court went on to express itself as follows;

"Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice as they give fair notice to the other party. The Principle in Anarita Karimi Njeru(supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle."

In the Mumo Matemu ***case cited by both sides, the Court of Appeal had this to say concerning a similar pleading before it:***

"We cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court...The principle in *Anarita Karimi Njeru* ***(supra) underscores the importance of defining the dispute to be decided by the Court. In our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to*** *Article 159* ***of the Constitution … Cases cannot be dealt with justly unless the parties and the Court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in*** *Anarita Karimi Njeru* ***(supra) that established the rule that requires reasonable precision in framing of issues in Constitutional Petitions is an extension of this principle"*** **The requirement for precise pleading is the essence of Rules 4 & 10 of the Mutunga Rules upon which the Petitioner has placed much reliance. A clearer form of pleading would have left little room for speculation regarding the rights and fundamental freedoms that the Petitioner is seeking to enforce under Article 22 of the Constitution. From his pleading, it is not discernible whether the Petitioner is alleging contravention or infringement of his political right, right to equality and protection from discrimination, to fair hearing and fair administrative action there being no corresponding pleading in the body of the Petition. For instance, regarding Article 38 of the Constitution (political rights) he does not even claim to be a resident or registered voter in Mombasa County. Indeed in the affidavit sworn in support of this Petition and other affidavits filed, the Petitioner describes himself as a resident of Nairobi. In view of all the foregoing, we think the concession by Mr. Gikandi regarding the wanting state of the pleadings was the right thing to do".**

In ***Northern Nomadic Disabled Person's Organization (Nondo) v Governor County Government of Garissa & Another [2013] eKLR,*** *High Court Of Kenya at Garissa Constitution Petition No. 4 Of 2013,* the learned judge S.N Mutuku j., observed as follows;

"Constitutional threshold

The respondents are saying that the Petitioner has not reached the threshold in Anarita Karimi Njeru case supra**. It was submitted that the Petitioner has referred to various articles of the constitution as having been violated without giving particulars of the alleged violations. The principle in** Anarita Karimi case **is captured in the words of the Justices Trevelyan and Hancox when they stated as follows:**

"We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed".

The Petitioner has cited various articles of the constitution without any particulars of that the

alleged violations of those provisions. For instance in paragraph 8 of the Petition the Petition states as follows:

Based on these facts the petitioner is seeking redress before this Honourable court for enforcement of the constitutional rights, freedoms and entitlements of persons with disabilities under Articles 47, 48, 54, 81. The Petitioner goes on to cite Articles 2, 3, 10, 54 and 81. In paragraph 18 the Petitioner gives particulars of derogation but no particulars are given. Instead, the Petition goes on to state that the 1st Respondent failed to comply with Articles 54 and 81.

In paragraph 20 of the Petition, the Petitioner has indicated particulars of discrimination but there are no particulars given. In paragraph 28 it is indicated Justification and entitlement and again articles 20 and 21 are given without evidence.

The Court of Appeal in Mumo Matemu case found that the petition did not meet the threshold in Anarita Karimi Njeru case for similar reasons like in this case where there is no evidence to support the allegations of violations of constitutional provisions. As submitted by the respondents, there is no evidence that any of the members of the Petitioner presented themselves for appointment and they were rejected. There is no evidence of the number of their members and the distribution of membership in all the counties in Northern Kenya given that their membership covers a region they refer to as Northern Kenya. There is no evidence to show the number of their members who belong to Garissa County. There is evidence to show how many of those members meet the criteria for appointment under Section 35 of the County Government Act."

In ***Martin Nyaga Wambora & 4 others v Speaker of the Senate & 6 Others [2014] eKLR, High Court Of Kenya At Kerugoya Petition No 3 Of 2014 (Formerly Embu Petition No 1 OF 2014,*** the learned leaned judges H.I Ong'undi,C. W Githua and B. N.Olao JJ.A rendered themselves as follows on whether the amended petition as drafted was incompetent:-

"The rule that a constitutional petition ought to state clearly the alleged violation and relief sought was stated in the case of *Anarita Karimi NJeru v Republic (1976-1980) KLR 154* where the court stated at Page 156 of the Judgment that:

'We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important (if only to ensure that Justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed."

We are duly guided by the recent pronouncement of the Court of Appeal when emphasizing on the importance of this rule in the *Mumo Matemu Case(supra)* when the Court observed as follows;

We cannot but emphasize the importance of precise claims in due process, substantive Justice, and the exercise of Jurisdiction by a court. In essence, due process, substantive Justice and the exercise of Jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the Judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.

The Court went on to state that;

"However, our analysis cannot end at that level of generality. It was High Court's observation that the petition before it was not the "epitome of precise, comprehensive, or elegant drafting." Yet the principle in Anarita Karimi NJeru(supra) underscores the importance of defining the dispute to be decided by the court. in our view, it is a misconception to claim as it has been in recent times with increased frequency that compliance with rules of procedure is antithetical to Article 159 of the constitution and the overriding objective principle under section 1A and 1B of the Civil Procedure Act(Cap 21) and section 3A and 3B of the appellate Jurisdiction act (cap 9). Procedure is also a handmaiden of Just determination of cases. Cases cannot be dealt with Justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive Justice, as they give fair notice to the other party. The principle in Anarita Karimi NJeru(supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle.

Back to the Instant Petition before the honourable court, the petitioners in their title have cited both **Article 75 of the Old Constitution** and **Article 40 of the Constitution of Kenya 2010**. They have also captioned the property they are alleging to be deprived from being Land Parcel No. I.R 17542 (L/R 10492) (Eldoret Municipality Block 15/1 & Eldoret Municipality Block 23 (King'ong'o)/1-355). The Petitioners have also cited the parties. It is addressed to the High Court of Kenya at Eldoret and at paragraphs 12 to 23 the petitioners have elaborately stated the facts in support of the Petition and at paragraph 24, the petitioners have particularized the alleged breach of the Constitutional Right without specifying a particular right that is alleged to have been breached. And finally the petitioner has stated the reliefs sought as noted in my introduction herein. As much as under paragraph 24 the Petitioners particularized the alleged breach of constitutional right without specifying a particular right and or clause, they appear to have settled on **Section 75 of the old constitution** and **Article 40 of the Current constitution**. The 1st Respondent's counsel faulted the petitioners' general reliance on **Article 40 of the Current Constitution** which is too broad and general. Counsel argued that without invoking a specific proviso of the right allegedly violated, leaves a lot of room for speculation a matter which the petitioners are taking advantage of by asking the Court to help them determine what aspects of their rights have been specifically violated and or prone to violation. Section 75 of the former Constitution states as follows;

"75. Protection from deprivation of property.

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied—

(*a*) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(*b*) the necessity therefor is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(*c*) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

[As amended by Act 13 of 1977, s. 3.]

(2) Every person having an interest or right in or over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for—

(*a*) the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled; and

(*b*) the purpose of obtaining prompt payment of that compensation;

Provided that if Parliament so provides in relation to a matter referred to in paragraph

(*a*) ----------t

While Article 40 of the current constitution states as follows;

40. (1) Subject to Article 65, every person has the right,

either individually or in association with others, to acquire and own property—

(a) of any description; and

(b) in any part of Kenya.

(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.

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

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

In light the above provisions, it is very clear that the two sections, that is section 75 of the old Constitution and Article 40 of the current Constitution, are too general and quite broad with sub-sections. But it is essentially important to note that the two sections of the law, both provides for the protection of Right to Property. The foot note to **Article 40 of the current Constitution** reads; **'protection of right to property'**and similarly the foot note to section 75 of the old Constitution reads; **'protection from deprivation of property'.**

I agree with my learned brother justice Majanja in ***Vekariya Investments Limited vs. Kenya Airports Authority & 2 others [2014] eKLR, H.C at Nairobi*** *Petition No. 263 of 2011*, when he held that:-

"At the heart of the petitioner's claim is the right to the protection of property afforded by Article 40 of the Constitution. In order to succeed in a petition under Article 40, the petitioner must demonstrate that it holds property which is recognised in law as capable of being protected. In the case of *Joseph Ihugo Mwaura and Others v The Attorney General and Others* Nairobi Petition No. 498 of 2009 (Unreported), the Court, referring to section 75 of the former Constitution which is the equivalent of Article 40, observed that, *"[46] Section 75 of the Constitution contemplates that the person whose property is the subject of compulsory acquisition has a proprietary interest as defined by law. The Constitution and more specifically section 75 does not create proprietary interests nor does it allow the court to create such rights by constitutional fiat. It protects proprietary interests acquired through the existing legal framework."*

Therefore, as much as in the instant petition, the petitioners did not precisely cite the clauses they rely on under the two broad sections that is Article 40 and section 75 of the current and former constitution, respectively, it is apparently clear that the petitioners claim is based on the protection of property and they are seeking to be compensated for being deprived of their property. Article 40(3), of the Current Constitution states as follows;

(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.

The foregoing provisions of Article 40(3) of the current Constitution are to some extent a replica of section 75(1) of the old Constitution which states as follows;

(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied—

(*a*) the taking of possession or acquisition is necessary in the interests of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit; and

(*b*) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and

(*c*) provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation.

It follows therefore that the petitioners having cited both Article 40 of the current Constitution and section 75 of the old constitution in the title of this petition, it is quite clear that the petitioners are seeking compensation for the alleged deprivation of their suit land, as envisaged by the provisions of the said two sections. (Articles). In the case of ***Zipporah Seroney & 5 others v Daniel Toroitich Arap Moi & another [2015] eKLR, H.C at Nairobi,*** *PETITION NO.500 OF 2013* the learned judge Lenaola J. declined to strike out a petition for want of precision and rendered himself as follows;

"17. A plain reading of the above provisions and the Mutunga Rules would show that the striking out of Petitions has not been specifically provided for but the names of Parties improperly joined may be struck out on the application of a party or by the Court *suo motu*. The inherent jurisdiction of the Court to do all such things as may be necessary in the interests of justice is however saved and the question therefore is whether the striking out of the Petition is necessary for the reasons advanced by the Respondents.

18. Further, in exercise of that jurisdiction, this Court will be the last to strike out any Constitutional Petition that has a modicum of comprehension even if it is inelegantly drafted. As was stated in Trusted Society for Human Rights Alliance vs AG & 2 Others Petition No.229 of 2012, where a Petition that is not the epitome of precise, comprehensive or elegant drafting nonetheless raises concrete issues to warrant substantive consideration by the Court, the same must then be determined on its merits.

19. Similarly, I am alive to the dicta of Onguto J. in Chandoo vs Hussein Petition No.374 of 2015 where he stated that no Court should be in a hurry to declare a Petition fatally defective and that instead all attempts to ensure that the ends of justice are met, must be made. I am also aware that there is debate as to whether the principle in Anarita Karimi Njeru [1976 – 1980] KLR 1272 that there must be reasonable precision in the framing of issues in Constitutional Petitions, is good law but I am certain that none of the higher Courts has expressly overruled it – See Trusted Society of Human Rights Alliance and Peter M. Kariuki vs AG C.A 79 of 2012 per the Court of Appeal. Having so said, I must now settle the other issues arising".

It is my finding that the instant petition is drafted with precision that it deserves and hence it ought not to be struck out as sought by the 1st Respondent.

Whether petitioners were indolent and hence the claim being time barred?

It has been submitted by the Respondents that the petitioners have been indolent and are guilty of laches, the cause of action having arose more than 24 years ago. The petitioners claim is founded on violation of constitutional rights. It s clear from the pleadings herein that the issues surrounding the instant petition arose in 1976 when the petitioners (their deceased fathers) applied for consent to Turbo-Soy Land Control Board to subdivide the suit land into 6 portions out of which 5 portions would be registered in the names of the joint owners while the 6th portion measuring 51.49 Ha. was to be transferred to Huruma Farmers Co. Limited.

However, it was until the year 1979, 1983 and 1992 that the petitioners discovered shoddy dealings and questionable transactions against their suit land. Taking 1992 as the date of action, it would be approximately 21 years period that has elapsed since the cause of action arose bearing in mind that the instant petition was filed in 2013. But still other issues arose way back in 1979 and 1983, approximately 33 years down the line from the date of filing this petition. This leads us to the following question, ***Does the Constitutional Claim founded on Bill of Rights has time limit?***

In the case of ***Peter M. Kariuki v Attorney General [2014] eKLR, C.A at Nairobi*** *Civil Appeal No. 79 OF 2012*, the learned judge, Kiage, M'Inoti, & J. Mohammed JJ.A observed as follows;

"We have already adverted to the fact that the appellant filed his constitutional petition some twenty three [23] years after his conviction by the court martial. We agree with the trial court that his claim was not time barred. However, the consequence of the appellant's delay in lodging his claim was some level of prejudice to the respondent who contended that the matters complained of by the appellant had taken place a while back and many of the actors were no longer available as witnesses. We have already emphasized that the right to a fair trial must be accorded to both the appellant and the respondent.

In *KAMLESH MANSUKLAL DAMJI PATTNI & ANOTHER V REPUBLIC (supra),* **the High**

Court noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless the court added that, like all other processes of the court, it is in public interest that such applications be brought promptly or within a reasonable time, otherwise they may be considered an abuse of the process of the court. We respectfully share that view, with the rider that where there has been delay which is likely to prejudice a respondent, the applicant should account for the delay".

In the case of ***Peter Ngari Kagume & 7 Others v Attorney General [2009] eKLR, H.C at Nairobi,*** *Constitutional Appli 128 of 2006* the learned judge Nyamu J. while commending on time limit within which to seek a constitutional redress, rendered himself at length as follows;

"It is correct that section 84(1) of the constitution does not contain any time limit for filing constitutional applications such as the petition herein but a closer scrutiny of the way the section is couched grants the Petitioners the right to seek redress in the High Court. The Petitioners' rights are captured by the words " . . . person (or that other person) may apply to the High Court for redress." Whenever, there is no time limit stipulated for doing a certain legitimate act, the court should be able to examine whether the party insisting on taking the action is within a reasonable time otherwise confusion and uncertainty will clog good administrative policies intended for good governance and public interest.

Going by the above, assuming that the Petitioners' rights and freedoms were violated in August 1982 to March 1983, would it be reasonable for the Petitioners to file their claim in court about twenty four (24) years thereafter simply because there is no time limitation in section 84 of the Constitution? The foregoing question is germane and it determines this petition to a great extent.

According to the Petitioners, there is nothing wrong with the Petition having been filed about 24 years after the cause of action arose as there is no express limitation of the period within which to file the constitutional application. The Petitioners relied on the decision in a case decided at Trinidad and Tobago a Commonwealth jurisdiction, *DURITY v ATTORNEY GENERAL [2002] UKPC 20*. In the said case it was held inter alia:-

"The inherent jurisdiction of the High Court to prevent abuse of its process applied as much to constitutional proceedings as it did to other proceedings. The grant or refusal of a remedy in a constitutional proceedings was a matter in respect of which the court had judicial discretion. The constitution contained no express limitation period for the commencement of constitutional proceedings. The court should therefore be very slow to hold that by that limitation of constitutional proceedings was subject to a rigid and short bar - the very clearest language was needed before a court could properly so conclude."

Although the above findings by the Privy Council seems to cement the petitioners' argument that their petition is not affected by time, I have also noted in the same case that the court at page 212 stated, as follows:-

"When the court is exercising jurisdiction under S.14 of the constitution and has to consider whether there has been delay such as would render the proceedings an abuse it would disentitle the claimant to relief, it will usually be important to consider whether the impugned decision or conduct was susceptible of adequate redress by a timely application to the court under its ordinary, non-constitutional jurisdiction. If it was, and if such an application was not made and would now be out of time, then failing a cogent explanation, the court may readily conclude that the claimants' constitutional motion is a misuse of the courts constitutional jurisdiction. An application made under S.14 solely for the purpose of avoiding the need to apply in the normal way for the appropriate judicial remedy for unlawful administrative action is an abuse of process."

And in the case of ***David Gitau Njau & 9 others v Attorney General [2013] eKLR, H.C at Nairobi,*** *Petition No.340 OF 2012***,** the learned judge Lenaola J. opined as follows;

> **"Despite my position on this issue as can be seen above, I strongly believe that I must hereby state that I am not persuaded by the authority of *Peter Ngari Kagume & Others v Attorney General (supra)* cited by the Respondent where the Applicant had filed his Petition 24 years late. I note that the judge in that case did not expressly hold that there were limitations imposed for filing of proceedings to enforce constitutional rights as enshrined under the Bill of Rights. The judge simply in my view did not find a justification as to why the suit had been commenced 24 years later. I must also state that I agree with the Respondents that it is ideally prudent to institute proceedings as early as possible from the time the alleged breaches occurs but for obvious reasons, I am clear in my mind that there is no limitation period imposed by the Repealed Constitution and the rules made thereunder under Section 84 for seeking redress for violation of fundamental rights and freedoms and in the particular circumstances of this case".**
>
> **It is apparently clear that in view of the foregoing case law. Both the oldo and current constitutions do not provide for time limit within which to file a claim founded on violation of the constitutional rights under the Bill of Rights. Be that as it may, the length of delay in bringing such a claim is material depending on the circumstances of the case and the nature of the claim. In the instant case, the claim is founded on transactions that took place way back in 1979, 1983 and 1982 amongst the government instistitions, the Respondents herein. The petitioners have also implicated pwersful forces, the former land commissioner, the state comptroller and the retired president H.E Daniel T. Arap Moi, in the past regime (government) for being behind the alleged violations.**

It is my considered view that bearing the nature of the claim herein and the period of delay, approximately 30 years and the circumstances surrounding the petition and the persons alleged to have been behind the process and the fact that there is no clear provision of the period of time for commencing such petitions the petition is not defeated by laches. Moreover, this court takes judicial notice that the general elections of 2002 brought to this country change of regime that led to a new wave of litigation in respect of violation of human rights. Those who feared victimisation woke up to a new era where they could petition for their rights without fear. This included ***Dominic Arony Amolo –v- Attorney General*** where the plaintiff sought general damages for wrongful arrest 20 years after the cause of action and it was found that the claim could not be defeated by delay as the same was necessitated by the change in the country experienced after the 2002 general elections. This position was also taken by the learned judges in Wachira Waihere –v- Atorney General{2010}Eklr.

The next issue the court should deal with is whether the petitioners are entitled to compensation as prayed. The petitioners pray for an Order of Mandamus to compel the 1st to 5th respondent to jointly and or severally to pay the Estate of THOMAS KIPKOGEI ARAP YATOR (dcd), Kshs. 3,736,070,381.23 billion being fair compensation for loss of 546 acres of his lawful land and the Estate of William Kimngeny Arap Leting (dcd) Kshs. 4,132,942,326.49/= billion being fair compensation for the loss of a total of 604 acres of his lawful land and an order of Mandamus to compel the 1st to 5th respondents to jointly and or severally pay the petitioners mesne profits in the sum of Kshs. 2,690,603,339/= billion for loss of user for over 30 years. The property above was identified and inspected on 9th and 10th May, 2014. The same is situated about 4 kilometres west of Eldoret Municipal Centre and traverses Eldoret to Malaba Road for a stretch of about 2.5 kilometres from Huruma Estate to Maili Nne. The parcel also extends from river Sosiani to Kiplombe area a distance of over 6 kilometres. The property is also situated within the registration section currently designated as Eldoret Municipality Block 21 and Block 23. The parcel measure approximately, Three Thousand Two Hundred and Sixty Three Acres (3,263) (less road reserve of twenty six (26) acres, 16.3 aces (6.6 Ha) compulsorily acquired and 127.2. acres (51.49) sold to Huruma Farmers Company Limited. The land area valued is 3093.50 acres.

Leasehold interest for the remainder of a term of 948 years with effect from 1st May, 1960. However, the resultant portions under Block 21 and 23 are freehold. This notwithstanding, the remainder of the lease is

long to an extend that its value pattern mimics that of land under freehold tenure. As per transfer document dated 28th June, 1965, the parcel is owned by Nathaniel Kiptalam Arap Lagat, Thomas Kipkosgei Arap Yator, Noah Kipngeny Arap Chelugui, Cherwon Arap Maritim and William Kipngeny Arap Leting all of P. O. Box 593, Eldoret. See Attached copy of transfer document. The property has several units of various sizes and is occupied by various individuals whose possession is indicated not to be authorized by the owners. Mains water, sewer and electricity are connected to the property. Access road to the property is part tarmacked, part marrum and part earth and in a good state of repair and maintenance. Shopping facilities, social amenities and other social services are available within the property.

Further to our terms of reference, limiting conditions and the foregoing details, the above property herein referred to as Land Reference Number 10492, IR Number 17542, Eldoret Municipality, was valued for court petition purposes, free from all encumbrances and subject to our terms of reference and valuation assumptions at ***Kshs.21,000,000,000.00*** (in words: Kenya Shillings Twenty One Billion) by **AFRILAND VALUERS LTD. The report is signed by** Vincent K. Kiptoo a registered, licensed and practising valuer.

From the foregoing, I do find that the valuation of the property is reasonable and not controverted and do find that the Estate of THOMAS KIPKOGEI ARAP YATOR (dcd), is entitled to Kshs. 3,736,070,381.23 billion being fair compensation for loss of 546 acres of his lawful land and the Estate of William Kimngeny Arap Leting (dcd)is entitled to Kshs. 4,132,942,326.49/= billion being fair compensation for the loss of a total of 604 acres of land.

The upshot of the above is that this court finds that the petitioners are entitled to the orders sought and therefore makes the following declarations:-

1. A declaratory Order holding that the proprietary interest in 546 and 604 acres of land comprised in Land Parcel I/R No. 17542, - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 23 (KING'ONG'O) absolutely vests in the 1st and 2nd Petitioners respectively as co-owners.

2. A declaratory Order holding that the 1st to 5th respondent seizure of the deceased estate herein property comprised in Land parcel I/R No. 17542 , - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 3 (KING'ONG'O) absolutely other than by way of compulsory acquisition, without consent or compensation or was unconstitutional.

3. A declaratory order holding that the subdivision by the 1st to 5th respondents of Land Parcel I/R No. 17542, - L.R No. 10492 – otherwise known as ELDORET MUNICIPALITY BLOCK 15/1 and ELDORET MUNICIPALITY BLOCK 23 (KING'0NG'0) and transfer of resultant titles deeds to 3rd parties violated the proprietary rights of the petitioners under Article 75 of the Independence Constitution and Article 40 of the new Constitution of Kenya 2010.

4. An Order of Mandamus to compel the 1st to 5th respondent to jointly and or severally pay;-

(i) The Estate of THOMAS KIPKOGEI ARAP YATOR (dcd), Kshs.3,736,070,381.23 billion being fair compensation for loss of 546 acres of his lawful land.

(ii) The Estate of William Kimngeny Arap Leting (dcd) Kshs. 4,132,942,326.49/= billion being fair compensation for the loss of a total of 604 acres of his lawful.

An order of Mandamus to compel the 1st to 5th respondents to jointly and or severally pay the petitioners mesne profits in the sum of Kshs. 2,690,603,339/= billion for loss of user for over 30 years is declined as the petitioners did not mitigate their loss by commencing their claims within reasonable time even after the so called change of regime in the year 2002. However the court is inclined to award a nominal figure

of Ksh 500,000,000 as mesne profits. Costs of this Petition are hereby awarded to the Petitioners. Orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF APRIL, 2016.

ANTONY OMBWAYO

JUDGE