Janmohammed (Suing as the Executrix of the Estate of Daniel Toroitich arap Moi) & 2 others v Chelugui & another (Suing as the administrators of the Estate of the Late Noah Kipngeny Chelugui) & 6 others (Civil Appeal 159 & 254 of 2019 (Consolidated)) [2022] KECA 720 (KLR) (22 July 2022) (Judgment)

Neutral citation: [2022] KECA 720 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 159 & 254 OF 2019 (CONSOLIDATED)

PO KIAGE, K M'INOTI & M NGUGI, JJA

JULY 22, 2022

BETWEEN

ZEHRABANU JANMOHAMMED (SUING AS THE EXECUTRIX OF THE ESTATE OF DANIEL TOROITICH ARAP MOI) ..... 1ST APPELLANT

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

AND

D SUSAN CHERUBET CHELUGUI & DAVID K CHELUGUI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE NOAH KIPNGENY CHELUGUI) ..... 1ST RESPONDENT

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

REGISTRAR OF TITLES ..... 3RD RESPONDENT

NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

AS CONSOLIDATED WITH

CIVIL APPEAL 254 OF 2019

BETWEEN

NATHANIEL K LAGAT ..... APPELLANT

AND

D SUSAN CHERUBET CHELUGUI & DAVID K CHELUGUI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE NOAH KIPNGENY CHELUGUI) ..... 1ST RESPONDENT

DANIEL TOROITICH ARAP MOI ..... 2ND RESPONDENT

RAI PLYWOOD (K) LIMITED ..... 3RD RESPONDENT

DISTRICT LAND REGISTRAR, UASIN GISHU ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

(Appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Eldoret (Ombwayo, J.) dated 8th May, 2019 in ELC PETITION NO. 9 OF 2014)

JUDGMENT

1. By this appeal, the appellants challenge the judgment and orders of Ombwayo, J. by which the learned Judge allowed the 1st respondent's petition and directed that the acquisition of Eldoret Municipality/ Block 15/239 (53 acres) (the suit property) by His Excellency Daniel Toroitich Arap Moi and subsequently by Rai Plywood (K) Limited (appellants) was unconstitutional, irregular, unprocedural, tainted and a nullity ab initio. Consequently, the learned Judge ordered the two to pay the estate of the late Noah Kipngeny Chelugui (deceased) the sum of Kshs.1,060,000,000 as compensation for the land illegally registered in their names.

2. The matter arose from a petition dated 9th June, 2014 and lodged by Susan Cherubet Chelugui and Daniel K. Chelugui, suing as the administrators of the Estate of the deceased, (hereinafter "the 1st respondent"). The 1st respondent sought various orders in that petition, including declarations that: their constitutional right to property and/or interest in the suit property deserves protection by the court in so far as the acquisition of the said properties by the appellants was arbitrary, unconstitutional, irregular, unprocedural, tainted, and a nullity ab initio; the protection of their right to property and/ or interest in the suit property had been violated and their property was is in real danger of being permanently and arbitrarily acquired by the appellants to their detriment; the court cancels all the titles issued emanating from the suit property and the registers be rectified reverting the titles to the estate of the deceased or his administrators; in the alternative the appellants pay the estate of the deceased the market value of the suit property in such amounts as shall be assessed; and, the appellants pay the 1st respondent compensation and/or damages for loss of use of land and for breach of their constitutional rights.

3. The 1st respondent's case was that the deceased was a partner in N. K. Lagat Partners which was the owner and registered proprietor of the land parcel formerly known as L.R No. 10492 Uasin Gishu measuring 3330 acres. It was later sub- divided into six portions with the approval of the Uasin Gishu Land Control Board, and the deceased's Kapkoros estate got its share of 620 acres. Subsequently, the deceased's said share was improperly and inexplicably sub-divided and titles issued as follows;

    a. Eldoret Municipality block 15/238 (12 acres) I.N.O [In the name of] Stanley Kiptoo Arap Metto.

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

    c. Eldoret Municipality/Block 15/237 I.N.O [In the name of] Noah Kipngeny Arap Chelugui.

4. The property Eldoret Municipality/Block 15/239 (53 acres) (the suit property) which had gone to the Retired President Daniel Toroitich Arap Moi (President Moi) was subsequently sold by him to Rai

Plywood(K) Ltd (Rai Plywood) who have since taken possession and use of the said property. The 1st respondent complained that the process that led to the deceased losing the aforementioned parcels of land was without sale or consideration passing to him. Nor was there any compensation. They averred that the process leading to the deceased losing the suit property was arbitrary, illegal, unconstitutional and a gross violation of Articles 40 and 47 of the Constitution.

5. The 1st respondent further contended that one Stanley Kiptoo Arap Metto (now deceased), through deception or trickery obtained the deceased's original title allegedly to facilitate a sale but no sale took place. Instead, the deceased's land changed hands in circumstances which have never been explained. The deceased made efforts to recover his land, including reporting to the police about his lost title but all was in vain. The 1st respondent asserted that the various Land Registrars in Eldoret District and the Ministry of Lands through its officers over the years played along in the acts that saw the deceased lose his land and hence they should compensate the estate of the deceased for the losses he suffered over the years. For purposes of compensation, the 1st respondent procured a valuation report by a private valuer, Afriland Valuation Ltd, dated 25th January 2018. The report was admitted in evidence by a consent recorded before court by the parties on 16th March, 2018. It placed the value of the suit property at Ksh. 1,710,000,000, and assessed loss of use by the owner for a period of 34 years at Ksh. 244,744,520.60.

6. The appellants denied the 1st respondent's claim, arguing that the title of President Moi was a first registration acquired under the provisions of the *Registered Land Act* on 21st September, 1983 and therefore the title was indefeasible. They contended that Rai Plywood was an innocent purchaser for value and no fraud had been demonstrated on the part of either or both appellants. Further, that Article 40 of *the Constitution* as invoked by the 1st respondent was not in operation at the time of registration of the suit land in the names of the appellants and Article 75 of the former constitution is also not applicable as its provisions guaranteed rights that lay in the State and not an individual.

7. For the District Land Registrar, Uasin Gishu District and the Registrar of Titles, it was averred that President Moi was the President of the Country at the time the disputed transaction took place and hence they were bound by "orders from above" emanating from him. Even after making such admission, however, their counsel proceeded to argue that the 1st respondent had not demonstrated to the court that the suit property formed part of the estate of the deceased in order to be entitled to an order of compensation. Moreover, the Government never acquired the suit land compulsorily and therefore it cannot compensate the 1st respondent. Instead, it was argued, the suit property had been under the private use of the appellants thus any such compensation was to be paid by them. It was further asserted that the 1st respondent had not explained why it took them 31 years to institute an action for acts done in 1983 with the knowledge of the deceased. To counter the 1st respondent's valuation report, the District Land Registrar and the Registrar of Titles submitted a valuation report prepared by the Valuation Officer, Uasin Gishu county. The report, attached to their further submissions dated 11th May 2018, assessed the market value of the suit property, exclusive of developments, to be Kshs.820,000,000.

8. The Environment and Land Court determined the matter in favour of the 1st respondent, and it is that decision that has aggrieved the appellants in both Civil Appeals Nos. 159 and 254 of 2019. After filing a notice of appeal in Civil Appeal No. 159, the appellants followed it up with a lengthy memorandum of appeal containing 29 grounds, too many by any standards and in contravention of Rule 86(1) of this Court's Rules which requires grounds to be concise, without argument or narrative. In summary, the grounds are that the learned Judge erred by;

    i. Failing to appreciate the jurisdiction and powers conferred on the Environment and Land Court.

ii. Applying the provisions of *the Constitution* of Kenya, 2010 to a transaction that occurred more than 27 years earlier.

iii. Failing to appreciate that the petition was a suit for recovery of land couched as a constitutional petition under the guise of Article 40 of *the Constitution*, and that it was a means to evade the statutory timelines for instituting claims for recovery of land under the *Limitation of Actions Act*.

iv. Ignoring the doctrine that equity aids the vigilant and not the indolent, and that the petitioners were guilty of laches since they waited for more than 30 years before instituting the petition.

v. Misapplying the principle of first registration under the *Registered Land Act* (Repealed).

vi. Holding that the appellants acquired the deceased's land illegally, improperly and unprocedurally, without evidence in support of the same.

vii. Failing to consider evidence to the effect that the deceased voluntarily participated in the surrender, sub-division and transfer of the property to third parties including the appellants.

viii. Ignoring the presumption of a validity of Title and shifting the burden of proof to the appellants.

ix. Ignoring that the deceased offered the suit property for sale and admittedly received the sum of Kshs.70,000 as consideration for the same.

x. Ignoring that the deceased did not complain about the sub- divisions and re-subdivisions of the suit property and subsequent transfers and registration to third parties.

xi. Ignoring the rights of the appellant and other third parties who had purchased the property from the appellants as innocent purchasers for value without any notice of defect in title.

xii. Granting an order for compensation on an imposed value of Ksh. 1.06 Billion not borne by the valuation reports.

xiii. Failing to determine the accuracy, quality and appropriateness of the valuation reports.

xiv. Rendering a judgment that was biased against the appellants.

xv. Failing to handle the matter in a just manner.

24. In consequence, the appellants prayed that; the appeal be allowed, the impugned judgment be set aside, the petition dated 9th June 2014 be dismissed and they be awarded costs of the appeal and the petition in the trial court.

25. Similarly, the appellant in Civil Appeal No. 254, Nathaniel K. Lagat (Nathaniel), lodged a notice of appeal and a memorandum of appeal complaining that the learned Judge erred by;

a. Delivering the impugned judgment which affects the appellant when he was not a party in the original case.

b. Conferring to the 3rd respondent ownership of the disputed land and depriving the appellant his land reference Eldoret Municipality/Block/15/10.

c. Delivering judgment per incuriam without dealing with all issues before court.

d. Declining to enjoin the appellant as an interested party in the matter.

30. In the end, Nathaniel beseeched that; the appeal be allowed, the impugned judgment be set aside and the suit starts afresh wherein he should be enjoined, and he be awarded costs of the appeal.

31. During the hearing, the two appeals were consolidated, with Civil Appeal No. 159 of 2019 being the lead file. Learned counsel Mr. Koome holding brief for Mr. Kiplenge and Mr. Kenvin Odhiambo Ouma holding brief for Mr. Ochieng Oduol appeared for President Moi, while Mr. Kibe Mungai appeared for Rai Plywood. Mr. Ndugire holding brief for Mr. Kadima appeared for the appellant in Civil Appeal No. 254, while Mr. Ahmednassir Senior Counsel, appeared for the 1st respondent in both appeals.

32. Mr. Odongo appeared for the District Land Registrar, Uasin Gishu and The Registrar of Titles.

33. Despite direction being issued during case management for written submissions to be filed within given timelines, parties had not complied, except the 1st respondent. We nevertheless permitted counsel to address us. Mr. Ouma resisted the 1st respondent's claims, arguing that they had contravened section 7 of the *Limitation of Actions Act* because President Moi obtained title to the suit property in 1983, yet they instituted their petition in 2014, a period of 30 years later. Section 7 of the *Limitation of Actions Act* provides that;

> "An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person".

34. In effect counsel asserted that the 1st respondent ought to have filed the petition challenging President Moi's title between 1983 and 1995. Further, limitations of actions, as a principle applies to constitutional petitions pursuant to the decision in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another* [2014] eKLR. It was asserted that this Court in Civil Appeal No. 51 of 2016, *Chief Land Registrar & 4 others vs Nathan Cherop Koech & 4 Others* determined that the surrender of grant or instrument of title is not compulsory acquisition and cannot be construed as such, but that once one surrenders land and it is subdivided, it becomes government land that is available for allocation to any party. To counsel, if the 1st respondent had an issue with the surrender and the subsequent allocations to third parties, then they ought to have filed suit within the prescribed timeline. It was further pointed out that the 1st respondent had admitted in their supporting affidavit that the deceased had received Ksh. 70,000 which, according to counsel, amounted to consideration for acquisition of the suit property by President Moi. The learned Judge was also criticized for finding fault with the valuation reports admitted and then again adopting them.

35. On behalf of the 2nd appellant, Mr. Kibe Mungai submitted that they relied on the submissions that they had filed before the Environment and Land Court and those made by Mr. Ouma. He argued that the *Constitution of Kenya, 2010* came into force on 27th August 2010 and hence it could not govern any transaction that was undertaken prior to that date. Consequently, counsel asserted that the court ought to have declined jurisdiction to hear the 1st respondent' petition as the current Constitution was not applicable. Counsel further contended that since his client Rai Plywood, was a corporate private citizen, it could not have breached any law, nor was there evidence demonstrating that it did not follow due process in acquiring its certificate of lease. Moreover, the compensation sought of Ksh. 1.06 Billion on the basis of a valuation report was not due and was wrongly made because the report was not borne out by the record. Neither was it challenged in cross-examination, and sufficient evidence of its findings given. Mr. Kibe further claimed that in the course of submissions, the learned Judge lost bearing, there was no appearance of impartiality and there was a concerning lack of fidelity to the law in his conclusions.

36. For the appellant in Civil Appeal No. 254, Ms. Ndugire faulted the learned Judge for awarding the 1st respondent compensation for interests in Eldoret Block 15/239 when ownership of the said property is disputed. Counsel submitted that her client, Nathaniel, had acquired the said property from L.R No. Uasin Gishu 10492 where he was among the 6 proprietors between whom the original property was sub-divided. Counsel complained that Nathaniel had not participated in the initial suit being ELC No. 9 of 2014 where he could have presented his case and defended his ownership of the property in question. She urged that the impugned decision be set aside and Nathaniel be joined in the said suit so that he could defend his ownership of title Block 15/10 from which the suit property emanated. We sought to know why Nathaniel did not participate in the proceedings in the trial court, to which counsel responded that he had applied to be joined in that matter at the trial court but the application was dismissed.

37. Mr. Odongo for the District Land Registrar and the Registrar of Titles posited that no complaints had been raised against his clients in both appeals and as such they were not taking sides but would only assist the Court in appreciating certain facts. In this regard counsel drew the Court's attention to other matters that were before other courts but related to the instant appeals. Mr. Odongo, however, clarified that the suit parcel, Eldoret Municipality Block 15/239 was not the subject of any of the pending suits before other courts.

38. For the 1st respondent, Senior Counsel, Mr. Ahmednasir Abdulahi highlighted his filed written submissions. Beginning with Civil Appeal No. 254, counsel noted that following a ruling dated 1st October 2015, the court had declined joinder of Nathaniel and no appeal had been preferred against that decision.

39. Consequently, counsel urged that Appeal No. 254 was unmeritorious and should be dismissed.

40. Concerning Civil Appeal No. 159, counsel commenced with the question of valuation, positing that a valuation report is an expert witness report that is procured by a party who wants to adduce evidence and any party objecting to the report is allowed to bring a counter-valuation. Counsel stated that his client's valuation report had been admitted by consent of the parties. He sought to show the importance of valuation reports in disputes such as the present one, while referring to the decision of this Court and subsequently the apex Court in *Zinj Limited -V- Attorney General & 3 Others* [2019] eKLR. In that matter the Court opined;

> In our view, we see no reason to fault the learned judge for relying on one of the valuation reports which was on record, namely the one prepared by Wesco Property Consultants, to determine the reasonable compensation. This is because the valuation was from an expert on the issue...[27]. Based on the foregoing we are satisfied that the learned judge considered the two valuation reports which gave different figures of the reasonable compensation and exercised its discretion properly..."

41. On appeal to the *Supreme Court*, that court addressed the probative value of a valuation report thus;

> Having determined that the respondent's right to property had been violated by the Government, the trial court, and later the appellate court, made orders for compensation in favour of the respondent. Both courts granted special and general damages. As we have arrived at a similar conclusion, we see no reason to interfere with the findings of the two superior courts in this regard. We take note of the appellant's submission to the effect that in arriving at the quantum of special damages, the trial court placed reliance upon a Valuation Report by a private valuer. Such Report, in the view of the appellant, was not only unreliable, but could very likely have been tailored to support the respondent's claim. However, in answer to

this court's question as to whether, the appellant had tabled in court, a Government Valuation Report to counter the contents of the impugned one, counsel for the appellant stated that no such Report was ever tabled at the trial court. The main basis upon which special damages can be granted for the deprivation of property, is the market value of the said property. In case of general damages, a court of law exercises discretion guided by the circumstances of each case. In granting special damages, the trial judge was guided by the Valuation Report tabled by the respondent. In the absence of a contrary report on record, we have no basis upon which to interfere with the award. Even if there had been one such other report, our jurisdiction to interfere would still have been largely circumscribed, unless the award had clearly ignored the fundamental principles of valuation as demonstrated by the counter-report."

42. Counsel also cited the decision in *Attorney General & Another VS-Rahimkhan Afzalkhan Rahimkhan & 4 Others* [2019] eKLR where the court upheld the use of valuation reports in assessing the special damages to be awarded to a party once his property is lost in a process where the government can be held responsible. Accordingly, counsel urged that the trial court was right in considering the valuation report produced by the 1st respondent and was admitted by consent of the parties.

43. On the issue of alleged bias, Mr. Ahmednasir contended that it was untenable for a party to say that the court was biased merely because the judgment was not in his favour, arguing that the standard to be applied was to test such an allegation against the presumption of judicial impartiality and the double requirement of reasonableness as addressed by the South African Constitutional Court in *Bernert VS ABSA Bank Limited* [2010] ZACC 28. In that case the court held;

> The presumption of impartiality and the double- requirement of reasonableness underscores the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer ruled against him or her. Nor should the litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their cases heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed "judges do not choose their cases; and litigants do not choose their judges". An application for recusal should not prevail unless it is based on substantial grounds for contending a reasonable apprehension of bias."

44. On whether the petition was time barred, counsel contended that the appellants had not shown how a constitutional petition that alleges violation of a fundamental right can be time barred, and if such limitation existed, he argued it would have been expressly provided for in *the Constitution*. In support of this proposition reliance was placed on the Supreme Court decision in *Kiluwa Limited & Another -VS- Business Liaison Company Limited & 3 Others* [2021] KESC 37 (KLR).

45. Regarding the claim that provisions of *the Constitution* of Kenya, 2010 were applied retrospectively to the factual events that occurred in the 1980s, Mr. Ahmednasir made reference to the decision in *Samuel Kamau Macharia -v- Kenya Commercial Bank Limited & 2 Others* [2012] eKLR, where the Supreme Court posited at paragraph 62,

> "At the onset, it is important to note that a constitution is not necessarily subject to the same principle against retrospectivity as ordinary legislation".

Further, in *Kiluwa Ltd* (supra), the apex Court held that Article 47 of the Constitution has a retrospective applicability as it contains "deliberate and clear normative values". Similarly, counsel urged that Article 40, just like Article 75 of the old Constitution, protects private property and has

retrospective application. Counsel also pointed out that the appellants had not raised the issue of retrospective application of the current Constitution before the trial court.

46. Moreover, Mr. Ahmednassir urged that we should take judicial notice of the fact that there are many cases that our courts have tried which have their basis in the KANU era in the 80s and 90s. The courts have tried the transgressions of that era using the legal principles in the current Constitution. Counsel reiterated his earlier submissions and the citation in *Kiluwa Ltd* (supra) to the effect that so long as the matter addressed in the current Constitution is a normative value that transcends or establishes rights in concrete terms, then the provision will have retrospective application.

47. Regarding what evidence showed that Rai Plywood was involved in any irregular transaction, Mr. Ahmednasir asserted that both President Moi and Rai Plywood signed a joint replying affidavit which did not exhibit any annexure in the form of a valid sale agreement indicating that the suit property was bought for value by Rai Plywood. Consequently, to counsel, the two were joined at the hip.

48. In reply to Mr. Ahmednasir's submissions, Mr. Ouma faulted the learned Judge for relying on sections 24 and 25 of the *Land Registration Act* instead of the *Registered Land Act* (repealed) which was in operation at the time the transaction concerning the suit property was undertaken, contrary to section 107(1) of the *Land Registration Act*. Counsel further insisted that section 7 of the *Limitation of Actions Act* was applicable and so the 1st respondent claim was time barred. On the contention that the learned Judge could not fault the valuation reports and proceed to adopt a sum that was not based on the valuation reports, he conceded that President Moi had not filed any valuation report.

49. Mr. Kibe Mungai also responded to the submissions made on behalf of the 1st respondent by asserting that the replying affidavit sworn on behalf of Rai Plywood indicated that it obtained the suit property in accordance with due procedure and a search was conducted which confirmed that the transaction was regular. Counsel contended that the Registered *Land Act* and section 75 of the *retired Constitution* was the law applicable to the disputed transaction then and there can be no basis for impeaching the title. He reiterated that the impugned judgment should be set aside.

50. Having carefully considered the submissions made before us, and the cited authorities, we decipher that the following germane issues arise for determination;

    a. Whether the 1st respondent' claim was time barred under the *Limitation of Actions Act*.

    b. Whether the provisions of *the Constitution* of Kenya, 2010 applied retrospectively to events that occurred in the 1980s.

    c. Whether the 1st respondent were entitled to special damages as assessed in their valuation report.

    d. Whether the learned Judge was biased and made an unjust determination.

    e. Is Civil Appeal No. 254 of 2019 meritorious?

51. It is trite that when a court is called upon to exercise its discretion, it ought to do so judiciously. That is because discretional power is derived from the law and must be exercised upon certain legal principles and according to the circumstances of each case, to the end of doing substantial justice to the parties. See *Patriotic Guards Limited v James Kipchirchir Sambu* [2018] eKLR.

52. With respect to the contention that the 1st respondent' claim was time barred under the *Limitation of Actions Act*, the appellants argue that pursuant to section 7 of the *Limitation of Actions Act*, and considering that President Moi obtained title to the disputed suit property in 1983, then the 1st respondent ought to have lodged their claims over the property within 12 years, which lapsed in 1995.

To counter that argument, counsel for the 1st respondent contended that this being a constitutional petition alleging violation of the bill of rights, any limitation of time could only be provided by the same Constitution, citing the Supreme Court decision in *Kiluwa Ltd* (supra). The trial court while considering the issue of laches observed;

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

53. We concur with the learned Judge and find persuasion in this Court's decision in *Chief Land Registrae & 4 Others*(supra) Per Githinji, J. Mohammed & Otieno-Odek, JJ.A, where, while considering whether violation of rights and freedoms as guaranteed in *the Constitution* were subject to the *Limitation of Actions Act*, the learned judges affirmed;

54. Guided and convinced of the sound jurisprudence that there is no time limit for filing a constitutional petition, we find the ground that the trial judge erred in failing to dismiss the Petition on account of delay, acquiescence and laches has no merit. Unless expressly stated in *the Constitution*, the period of limitation in the *Limitation of Actions Act* do not apply to violation of rights and freedoms guaranteed in *the Constitution*. The law concerning limitation of actions cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms protected under the Bill of Rights. (See *Dominic Arony Amolo vs. Attorney General Nairobi HC Misc. Civil Case No. 1184 of 2003 (O.S)* [2010] eKLR; *Otieno Mak'Onyango vs. Attorney General & another Nairobi HCCC No. 845 of 2003*).

> In our view, subject to the limitations in Article 24 of the 2010 Constitution, fundamental rights and freedoms cannot be tied to the shackles of *Limitation of Actions Act*. However, each case is to be decided on its own merits and a caveat need to be stated as correctly observed in Johnstone Ogechi vs. The National Police Service [2017] eKLR."

55. Next is the question of whether the provisions of the *Constitution of Kenya, 2010* could apply retrospectively to events that occurred in the 1980s. The appellants claim that since the current Constitution came into force on 27th August 2010, it could not govern events that took place in 1983 retrospectively. The 1st respondent oppose this assertion pointing out that it was never raised at the trial stage. Further, they maintain that the current Constitution, and particularly Article 40 that protects private property rights contains, "deliberate and clear normative values" and are applicable to transgressions that occurred during the KANU era of 1980s and 1990s. Reliance was placed on the Apex court's decision in *Kiluwa* (supra) and *Samuel Kamau Macharia* (supra) for this assertion.

56. We note that the issue of retroactive application of the current Constitution is being raised for the first time at this appeal stage. Ordinarily we are not expected to consider such an issue as it was never canvassed during trial. However, since parties submitted on it, we are inclined to reflect on it. In this respect we associate ourselves with the Supreme Court's reasoning in the *Samuel Kamau Macharia*. That Court remarked;

> ...At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in

quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting *the Constitution* to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of *the Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of *the Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of *the Constitution*".

57. Article 259(1) of *the Constitution* on interpretation of *the Constitution* is also instructive on this question. The sub-article provides;

This Constitution shall be interpreted in a manner that-

a. promotes its purposes, values and principles;

b. advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

c. permits the development of the law; and

d. contributes to good governance.

(Emphasis supplied)

58. With guidance from the above provision on the manner in which *the Constitution* should be construed, we think that Article 40 of the current *Constitution* is one of those constitutional provisions that is not limited in its application. It can and must, in appropriate cases, apply retrospectively. The Article reads;

"40Protection of right to property

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

a. of any description; and

b. in any part of Kenya.

2. Parliament shall not enact a law that permits the State or any person--

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

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

3. The State shall not deprive a person of property of any description, or of any interest in, or right over, property of any description, unless the deprivation—

a. results from an acquisition of land or an interest in land or a conversion of an interest in land, or title to land, inaccordance 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.

[...]"

(Emphasis supplied)

59. It seems quite clear to us that the right to property is ring- fenced by *the Constitution* and courts must be vigilant to ensure that the State and those who wield state power do not by might negate the right. It can only be qualified or defeated in the circumstances contemplated by *the Constitution* and the law. The instant case does not fall therein, and is a study in arbitrary deprivation, which cannot be countenanced.

60. Turning to the contention on whether the 1st respondent were entitled to special damages as assessed in their valuation report, the appellants argued that the compensation of 1.06 billion awarded through a valuation report was not due and neither was it borne out by the record, especially because the learned Judge had faulted the report. The 1st respondent resisted this argument, positing that their valuation report was admitted into evidence by consent of the parties, hence the trial court was right in considering the report in determining the special damages to be awarded. The decisions of this Court and the Supreme Court in *Zinj Limited* (supra) were cited in support of this assertion.

61. We observe that before the learned Judge determined the question of compensation, he found that the suit property had been illegally and unprocedurally allocated to President Moi. The court stated;

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

62. In evaluating the issue of compensation, the learned Judge considered both valuation reports, the one prepared by Afriland Valuers for the 1st respondent and the other done by the County Valuer, Uasin Gishu County under the instructions of the Attorney General. Afriland Valuers assessed the current market value of the suit property to be Kshs.1,710,000,000 and Kshs. 244,744,520.60 being the loss of benefits. The County Valuer put the market value of the property at Ksh. 820,000,000. The learned Judge, upon analysing both reports, observed that, 'both valuers did not do a comparative valuation of the adjacent plots and further no sale agreements of neighbouring plots was availed to the valuers'. However, based on the fact that the suit property is prime land within the Municipality of Eldoret, the learned judge determined that Ksh. 1,060,000,000 was commensurate compensation to the 1st respondent for loss of their land through an unprocedural scheme. In effect, the learned judge agreed with the 1st respondent's contestations and largely with their valuation report as well.

63. However, it is not clear how the learned Judge arrived at the amount awarded, which amount was not given in either of the valuation reports but appears to be a figure in between the two. Whereas, he mentioned that the valuers had not provided a comparative of the adjacent plots and their sale agreements, we note that while analysing the 1st respondent's valuation report at paragraph 118 of the judgment, he states; 'In arriving at the open market value, they have taken into account similar comparable (properties in the neighbourhood that have sold in the recent past'. It would seem therefore that the learned Judge's misgivings in respect of the 1st respondent' valuation report were erroneous, save for his requisition of sale agreements of the adjacent properties. We think that, failure to produce such sale agreements was not fatal to the valuation report.

64. In the circumstances, we think that there was a sound basis for the 1st respondent to be awarded the special damages as assessed in their valuation report, that is, Ksh. 1,710,000,000. We are also doubtful that the learned Judge justified his rejection of Ksh. 244,744,520.60 being mesne profits. In arriving at this finding, we are persuaded by the decisions of this Court and the Supreme Court in *Zinj Limited* as cited by counsel for the 1st respondent above, to the effect that a Judge can rely on one of the valuation reports which was on record to determine reasonable compensation. Further, in granting special damages for deprivation of property, a trial court is guided by a valuation report, and in the absence of a contrary report on record, the court has no basis upon which to deny the award. We take cognisance of the fact that the appellants did not produce any valuation report to be compared with that of the 1st respondent and so the 1st respondent's valuation should have carried the day. However, as the 1st respondent did not file a cross-appeal to challenge the award of Kshs.1,060,000,000 or the denial of Kshs.244,744,520.60 mesne profits, we would not interfere by way of enhancement of the sum awarded. We note that whereas it is significantly lower than what was contained in the Afriland Valuers valuation, it was higher than what the County Valuer gave. The result is that the learned Judge's award was within range and as it did not cause prejudice to either party, we would uphold it.

65. Next is the question of whether the learned Judge was biased and hence determined the matter unjustly. With respect to learned counsel, this is hardly the point at which to raise such an allegation. Moreover, the same is bare and not supported. There is not an ounce of evidence on record in support of the claim of alleged bias, nor was it ever raised before the trial Judge. And no material has been placed before us on which we can deal with it at this stage. The less we say on it the better.

66. As to whether Civil Appeal No. 254 of 2019 is meritorious, we agree with the submission of the learned counsel for the 1st respondent, that the trial court having declined to enjoin the appellant, Nathaniel, the proper thing would have been for him to lodge an appeal against that ruling, if aggrieved. He did not do so and it is too late in the day for him to mount an appeal based on the refusal.

67. We have said enough to show that both appeals are unmeritorious. We accordingly dismiss them with costs to the 1st respondent.

Dated and delivered at Nairobi this 22nd day of July, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR