



Fanikiwa Limited v Sirikwa Squatters Group & 17 others (Civil Appeal 45 & 44 of 2017 (Consolidated)) [2022] KECA 1286 (KLR) (18 November 2022) (Judgment)

Neutral citation: [2022] KECA 1286 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT ELDORET
CIVIL APPEAL 45 & 44 OF 2017 (CONSOLIDATED)
PO KIAGE, K M'INOTI & M NGUGI, JJA
NOVEMBER 18, 2022**

BETWEEN

FANKIWA LIMITED APPELLANT

AND

SIRIKWA SQUATTERS GROUP 1ST RESPONDENT

COMMISSIONER FOR LANDS 2ND RESPONDENT

CHIEF LAND REGISTRAR OF TITLES 3RD RESPONDENT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .. 4TH RESPONDENT

DIRECTOR OF SURVEYS 5TH RESPONDENT

DIRECTOR OF LANDS UASIN GISHU DISTRICT 6TH RESPONDENT

LONRHO AGRIBUSINESS (EA) LTD 7TH RESPONDENT

MARK KIPTARBEI TOO 8TH RESPONDENT

DAVID K KIPKORIR 9TH RESPONDENT

HIGHLAND SURVEYOR 10TH RESPONDENT

KENNEDY KUBASU 11TH RESPONDENT

AHMED FEREJ & 60 OTHERS 12TH RESPONDENT

RICHARD KIRUI & 15 OTHERS 13TH RESPONDENT

STANBIC LIMITED 14TH RESPONDENT

KENYA COMMERCIAL BANK LTD 15TH RESPONDENT

ECO BANK LIMITED 16TH RESPONDENT

MILLY CHEBET 17TH RESPONDENT



(Appeal from the Judgment and Decree of the Environment and Land Court at Eldoret (Ombwayo, J.) dated 9th February 2017 in E.L.C.C. Petition No.4 of 2016)

JUDGMENT

1. The dispute in this appeal pits the appellant, Fanikiwa Ltd (Fanikiwa), a limited liability company against the 1st respondent, Sirikwa Squatters Group (Sirikwa), an amalgamation of over 500 squatter families. Fanikiwa stakes claim to portions of 9 parcels of land in Uasin Gishu County based on its registration as proprietor thereof and the constitutional guarantee of the right to private property. The parcels of land in question are LR Nos 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794, which for convenience we shall refer to as 'the suit properties'.
2. Fanikiwa is supported in the appeal by the respondent government officers responsible for various matters touching on land, as well as by other respondents, both individual and institutional, who describe themselves as innocent purchasers for value without notice, of excisions from some of the suit properties. These respondents equally take refuge under their certificates of title and the constitutional guarantee of the right to private property.
3. Sirikwa also lays claim to the suit properties on the basis that those properties are their heritage where their forefathers lived from time immemorial. Upon the advent of the colonial administration, their properties were expropriated but their lineages continued to live on the land, albeit as indentured labourers or a variant thereof. In the fullness of time, the company that acquired the suit properties during the colonial times undertook, with the concurrence and active support of the government of Kenya, to settle members of Sirikwa on the suit properties. Sirikwa further contends that the company indeed initiated the process to settle Sirikwa's members on the suit properties by surrendering the same to the government for that express purpose, but Fanikiwa and the other respondents who support it 'hijacked' the process and illegally registered themselves as proprietors of the suit properties. At the heart of the appeal therefore, is the validity of Sirikwa's claim to the suit properties as well as the vexed question of the true extent and limit of the principle of indefeasibility of title, particularly under the Constitution of Kenya 2010.
4. The appeal traces its antecedents to a petition that Sirikwa filed in the Environment and Land Court at Eldoret on July 30, 2012 against 10 respondents alleging violation of its members' constitutional rights. The respondents to the petition were the commissioner of lands (2nd respondent in this appeal), the chief registrar of titles (3rd respondent), the director of land adjudication and settlement (4th respondent), the director of survey (5th respondent) the district lands officer, Uasin Gishu District (6th respondent), Lonrho Agribusiness (EA) Ltd. (7th respondent), Mark Kiptarbei Too (8th respondent), David K Korir, (9th respondent) Highland Surveyors (10th respondent) and Kennedy Kubasu (11th respondent). The petition was amended on December 18, 2012 to plead specifically against the 8th respondent (hereafter Mr Too), the 9th respondent (hereafter Mr Korir) and the 11th respondent (hereafter Mr Kubasu) and to seek reliefs against them.
5. As is abundantly clear, Fanikiwa and the 12th to the 21st respondents in this appeal were not parties to the petition in the trial court. They applied post judgment to be joined to this appeal, which this court allowed by an order dated October 17, 2019. As a consequence of their late joinder in the dispute, the court also allowed them to adduce further evidence in this appeal. Not surprisingly, the issue of alleged



violation of the right of Fanikiwa and the 12th to 21st respondents to be heard has also taken centre stage in the appeal.

6. Back to the petition, although some of the provisions of the Constitution that Sirikwa invoked are pure doctrinal statements of constitutional principles such as article 19 (rights and fundamental freedoms), article 20 (application of the bill of rights) article 21 (implementation of rights and fundamental freedoms), article 22 (enforcement of the bill of rights), and article 23 (authority of courts to uphold and enforce the bill of rights), others are substantive constitutional guarantees of rights, among them article 35 (access to information), article 40 (protection of the right to property), and article 47 (fair administrative action). Sirikwa averred that in the pre-colonial days, the forefathers of its members were the owners of the suit properties but during the colonial period, they were dispossessed and the lands alienated to the colonial settlers, for whom they and their descendants continued to work as labourers. Sirikwa pleaded that over time, title to the suit properties changed hands, ultimately ending up in the name of Lonrho Agribusiness (EA) Ltd (the 7th respondent), which in discussions with Sirikwa and the government of the Republic of Kenya agreed to surrender the suit properties to the government for the express purpose of settling the Sirikwa members. It was further pleaded that the land so surrendered to the government was to be held in trust for Sirikwa and that on October 28, 1998, the former president of the Republic of Kenya, HE Daniel Toroitich Arap Moi approved Sirikwa's application for allocation of the suit properties surrendered by Lonrho Agribusiness (EA) Ltd. Sirikwa relied on a number of official written communication from various government ministries and offices indicating the Government's willingness and commitment to settle members of Sirikwa on the suit properties.
7. Sirikwa further averred that on the basis of the above commitments and assurances, it had legitimate expectation that the suit properties were the property of its members and that all that remained was the formal transfer and registration of the properties in their names. It was further pleaded that the respondents violated Sirikwa's constitutional right to acquire and own property by changing the goalposts and claiming that the surrender of the suit properties was for conversion from the regime of the Registration of Titles Act, Cap 281 (repealed), under which the suit properties were registered, to the Registered Land Act, Cap 300 (repealed) and thereafter transferred the same to undisclosed beneficiaries. They added that Mr Too and Mr Korir, respectively the former chairman and property manager of Lonrho Agribusiness, took advantage of their positions and offices, allocated and transferred the suit properties to themselves and subsequently sold the same to third parties, which was in violation of Sirikwa's right to property, in bad faith, unreasonable, and in abuse of power. The survey of the suit properties by Mr Kubasu of Highland Surveyors, a private surveyor, pursuant to which the suit properties were alienated to third parties, was described as illegal, null and void because it was not authorised by the director of survey. Sirikwa also contended that the transfer of the suit properties to persons other than its members was in violation of the national values and principles set out in the Constitution, in particular equity, social justice and respect of its members' human dignity as squatters on the suit properties. Specifically, Sirikwa pleaded that the allocation and transfer of the suit properties was tainted by fraud and lack of due process and was therefore illegal, null and void. The particulars of fraud were tabulated as refusal to transfer the suit properties to Sirikwa notwithstanding official commitment by the government, trying to defeat and deprive Sirikwa of its right to the suit properties, and endeavouring to illegally confer title to the suit properties to purported beneficiaries.
8. By way of remedies, Sirikwa prayed for, among others:-
 - i. A declaration that it had protectable constitutional right to property over the suit properties,
 - ii. A declaration that the respondents had violated its right to property,



- iii. A declaration that the survey of the suit property by Mr Kubasu and Highland Surveyors was illegal, null and void and of no legal effect,
 - iv. A declaration that the purported allocation and transfer of the suit properties to Mr Too and Mr Korir was illegal and unconstitutional,
 - v. An order compelling the commissioner of lands, the chief registrar of titles, the director of land adjudication and settlement, the director of survey, and the district lands officer, Uasin Gishu District to discharge their constitutional duties and transfer the suit properties and issue title deeds thereto to members of Sirikwa as undertaken and confirmed by the government,
 - vi. A prohibitory or conservatory order restraining the respondents from selling, disposing, allocating, transferring or dealing with the suit properties, and damages for violation of Sirikwa's right to property,
 - vii. An order for cancelation of all titles issued over the suit property and consequential rectification of the register, and
 - viii. Costs of the petition.
9. The petition was supported by a detailed affidavit sworn on July 30, 2012 by Benjamin Chepng'otie Ronoh, the chairman of Sirikwa, to which was annexed, among others, a list of the members of Sirikwa, documentary history of the registration of the suit properties, copies of correspondence from government offices regarding allocation of the suit properties to Sirikwa, and copies of official searches of titles arising from subdivisions of the suit properties.
10. The government officers involved in matters to do with land, namely, the 1st, 2nd, 3rd, 4th and 5th respondents jointly opposed the petition vide a replying affidavit sworn by Mr RJ Simiyu, the district land officer, Uasin Gishu County. Mr Simiyu denied all the averments by Sirikwa but confirmed that the suit properties were initially registered on 1st January 1958 under the Registration of Titles Act (repealed) in the name of a company known as Plateau Wattle Company Limited for terms ranging from 946 to 951 years. He tabulated the respective grant numbers, the acreages and term of years for each suit property. He further deposed that on March 26, 1965, all the suit properties were sold for consideration of Kshs 6,583,925 and transferred to a company known as East African Tanning & Extract Company Ltd. That company subsequently changed its name in sequence as follows:
- i. EATEC in 1992,
 - ii. EATEC Limited in 1995
 - iii. Lonrho Agro Industries (EA) Ltd in 1999 and
 - (iii) Lonrho Agribusiness (EA) Ltd in 2000
11. Mr Simiyu went on to depose that on November 2, 2000, while the suit properties were privately owned and registered in the name of Lonrho Agribusiness, it surrendered all their grants to the government of Kenya:-
- ' for purposes of conversion of the tenure from the regime under the Registration of Titles Act, Cap 281 to the freehold tenure under the regime of the Registered Land Act.'
12. He explained that upon surrender and conversion of the suit properties to freehold, they were amalgamated for purposes of issuance of freehold titles under the Registered Land Act, resulting in a new registration section on January 23, 2001 named Pioneer & Ngeria Block 1 (EATEC). Mr Simiyu



- confirmed that following conversion to freehold, the old titles to the suit properties ceased to exist and new parcels were registered in lieu thereof as Pioneer & Ngeria Block 1 (EATEC) 7070, 5903, 7068, 7739 and 3395. He also disclosed that in or about 2000, part of the EATEC land was compulsorily acquired by the government of Kenya for construction of the Moi Eldoret International Airport.
13. In Mr Simiyu's view and as explained to him by the senior deputy litigation counsel acting for the government officers involved in land matters, upon surrender of the suit properties for purposes of conversion of the title regime, the lands did not revert to government as un-alienated government lands under the Government Lands Act, Cap 280 (repealed), but instead continued as private property. It was Mr Simiyu's view that the correspondence and representation upon which Sirikwa based its claim to the suit properties did not constitute legal instruments capable of conferring to it title to the suit properties under either the repealed Government Lands Act, Registered Land Act, or Registration of Titles Act. To the extent that the suit properties were not un-alienated government land available for allocation to Sirikwa, he opined, the respondents did not violate any law and the orders sought by Sirikwa could not issue. Specifically, on the correspondence from government offices relied upon by Sirikwa to lay claim to the suit property, Mr Simiyu denied its existence and added that even if it existed, it was written in ignorance of the legal status of the suit properties which had already been converted to the Registered Land Act regime and had become privately owned. He gratuitously added that the only way the government could settle squatters, including members of Sirikwa, was by acquiring land for that express purpose under the Land Acquisition Act, Cap 294 (repealed). In his view, the approval or endorsement by the former president for settlement of the Sirikwa members on the suit properties was just a recommendation which did not constitute direct approval under the repealed Governments Land Act because the suit properties were already privately registered.
 14. Again, gratuitously, Mr Simiyu advised Sirikwa, if its case truly sounded in a claim of historical injustice, to approach the National Land Commission in which the mandate of investigating and determining historical injustice reposes. Finally, Mr Simiyu averred that no breach of the Constitution or the law, or failure to discharge lawful duty was proved on the part of the respondent government officers to warrant grant of the orders sought by Sirikwa. To his affidavit Mr Simiyu annexed various documents among them copies of the original grants and deed plans of the suit properties, copies of the respective registers, index series map for Pioneer & Ngeria Block 1 (EATEC) and copies of official searches to prove private ownership of the suit properties.
 15. Mr Too and Mr Korir, against whom Sirikwa made express charges of fraud and illegal conduct, swore, respectively on March 24, 2014 and December 10, 2013, rather brief and scanty affidavits in opposition to the petition. On his part, Mr Too deposed that he was a director of Fanikiwa Ltd (the appellant) and that he is the registered owner of 8 parcels of land totalling 71 hectares in Pioneer & Ngeria Block 1 (EATEC) as follows, Pioneer & Ngeria Block 1 (EATEC) / 7078 (3.42 Ha), 7079 (3.11 Ha), 7080 (3.96 Ha), 7073 (1.74 Ha), 7074 (1.74 Ha), 7075 (1.20 Ha), 7076 (2.59 Ha), and 7077 (1.95 Ha).
 16. Read together with the affidavit of Mr Simiyu, it is common ground that the above parcels registered in the name of Mr Too are subdivisions of the suit properties. From the annexed copies of titles, all the above properties were registered in the name of Mr Too on October 31, 2005, save for parcel No 7075 which was registered on September 8, 2006. Mr Too further deposed that he lawfully purchased the said parcels of land from Lonrho Agribusiness on a willing buyer, willing seller basis for valuable consideration, paid the full purchase price and took possession of the properties because they were vacant. He added that he purchased the properties 'as a private individual' and at no time were the properties public land. He also swore, at paragraph 9 of his affidavit, rather curiously considering his position in Lonrho Agri Business, that 'prior to purchasing the said parcels and upon investigations of



the root title, it came to my knowledge that the suit land were the property of Lonrho Agri Business (East Africa) Limited' previously registered under the Registration of Titles Act.

17. In paragraph 12 of his affidavit, Mr Too deposed that he was aware that 'all the squatters were settled on the land which was allocated for the same and all of them have occupied their parcels.' He concluded by deposing that as the owner of legally acquired property, he is entitled to protection of his property under the Constitution. To his affidavit Mr Too annexed copies of the title deeds registered in his name, copies of transfers, the agreement for sale between him and Lonrho Agribusiness, stamp duty payment slips, and copies of applications and consents from the land control board.
18. Noteworthy among the documents produced by Mr Too is the agreement for sale dated September 30, 2003 between three parties, namely Lonrho Agribusiness, Fanikiwa and Mr Too. In the agreement Lonrho Agribusiness is described as the vendor,
19. Fanikiwa as the purchaser and Mr Too as just Mr Too, although later he appears in respect of several properties as Fanikiwa's nominee. The agreement notes that Mr Too was 'the major shareholder and a director' of Fanikiwa. The agreement for sale was for some 68 parcels of land, totalling in area 2,756 acres. The consideration for the sale, under clause 3, was, '(a) the purchase price of one million sterling pounds and Kshs 31 million' and, '(b) the execution by Mr Too being the major shareholder and a director of the purchaser of a waiver in the form set out in the Second Schedule here.'
20. Even though Mark Too does not expressly refer to it in his affidavit, the waiver in question, attached to the agreement as the second schedule, is an undated agreement between Mark Kiptarbei Too (MKT) and Lonrho Africa PLC of DSG Chambers, 43 Castle Street, Liverpool L2 9TL, by which the parties waived any claim or right which they may have against each other in respect of MKT's previous employment, relationship or directorship held in any member of the Lonrho Group. Under clause 3.3 it was provided that;
 - ' 3. In addition, MKT will not institute or initiate any proceedings against any Member of the Lonrho Group and/or their respective shareholders, officers or directors within Kenya, the United Kingdom or otherwise.'
21. The waiver agreement and any document completed thereunder was, in addition, to be governed and construed in accordance with English law, and the parties signed to the non- exclusive jurisdiction of English Courts in relation to the agreement.
22. The waiver agreement was relevant because Mark Too had been a director and chairman of Lonrho.
24. The replying affidavit by Mr Korir was similar to that of Mr Too in many respects. He confirmed that he was Lonrho Agribusiness's property manager and deposed that the suit properties no longer existed, having been subdivided and sold on willing buyer, willing seller basis with full government approval. He added that upon subdivision, the suit properties were converted and registered under the repealed Registered Land Act and that Lonrho Agribusiness no longer owned any land. He further deposed that during the process of sale and subdivision of the suit properties, the government directed all squatters to be allocated land, which was duly done and all the genuine squatters were settled. He attached a list of those squatters, who total to 73 people. He dismissed Sirikwa as 'an amorphous group consisting of impostors'.
25. Among the documents attached to Mr Korir's affidavit, although he does not refer to it, is a document titled 'Procedure for Sale of EATEC Estates South of Eldoret Municipality.' It sets out the 'Procedure for Sales/Transfer of Lonrho Agri business East Africa Limited EATEC Estates.' The document is, significantly, authored on the headed paper, not of the owner of the lands being sold (the 7th



respondent) but of an entity known as Lonrho Africa Property and Construction of PO Box 200 Eldoret, Kenya, House No 4, Kenmosa Village, Kaptagat Road. Payments for the sale of the 7th Respondent's property were, under the sale procedure in the document, to be as follows;

1. Payment
 - a. An initial deposit of 40% of the purchase price will be paid by bankers cheque or cash deposited into the Lonrho Africa Property & Construction Limited account at Barclays Bank of Kenya Ltd. Account Number 1057205, Eldoret. A receipt will be issued for this payment.
 - b. The balance of 60% of the purchase price will be paid in full or in instalment within 90 days from the initial deposit date.
 - c. In the event that payment is not made in full after 90 days Lonrho Properties will refund any monies paid less 10% of the purchase price and the sale agreement cancelled.
26. From the record, Highland Surveyors and Mr Kubasu did not respond to Sirikwa's petition.
27. By directions given on May 13, 2014, the trial court ordered the hearing of the petition to proceed on the basis of documents filed by the parties and written submissions. An application by Lonrho Agribusiness, Mr Too and Mr Korir on March 18, 2016 for leave to cross-examine deponents of affidavits was denied and it would appear that none of the parties was aggrieved, because no appeal was preferred. In the event, the petition was heard as directed. Ombwayo, J framed three issues for determination, namely:-
 - i. Whether Sirikwa had legitimate expectation to be allocated and acquire the suit properties?;
 - ii. Whether upon surrender the suit properties were private or public land?; and
 - iii. What remedies were the parties entitled to?
28. In the judgment dated February 9, 2017 which is impugned in this appeal, the learned judge found for Sirikwa and allowed the petition with costs. On Sirikwa and legitimate expectation, the learned judge held that the suit properties were surrendered to the government of Kenya by Lonrho Agribusiness and that on October 28, 1998, following an application by Sirikwa dated October 22, 1998, the former President, HE Daniel Arap Moi, approved Sirikwa's application to be allocated the suit properties. The learned judge further found that on October 14, 2001, the director of land adjudication and settlement confirmed the allocation of the suit properties to Sirikwa and the allocation was subsequently confirmed in several official government letters. He therefore concluded as follows:-

It is clear from the foregoing that the 6th respondent (Lonrho Agribusiness) surrendered the disputed parcels of land for allocation to the petitioner's members (Sirikwa) and the government was informed of the same and indeed the government approved the allocation of the parcels of land to the squatters.
29. It was the learned judge's further finding, quite justified given what we have already quoted from the sale procedures, that despite the allocation of the suit properties to Sirikwa, Mr Too and Mr Korir had the suit properties allocated to themselves and used the company known as Lonrho Africa Property & Construction Company, which we have referred to herein, to sell massive chunks of the suit properties to third parties. Flowing from the above findings, and after considering a number of local and foreign authorities on legitimate expectation, the learned judge held that Sirikwa had legitimate expectation that its members would be registered as owners of the suit properties which in turn entitled them to a remedy under the *Constitution*.



30. On the second issue regarding the status of the suit properties, the learned judge held that since the suit properties were registered under the repealed RTA, surrender thereof was governed by the same Act, which did not provide for conversion of tenure directly from leasehold to freehold. Relying on section 44 of that act, the learned judge held that upon surrender of a lease the land reverted to government land to be allocated by the government pursuant to the Government Lands Act. He concluded thus:

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

31. After citing article 40 of the *Constitution* and noting that it protects only the right to property that is lawfully acquired, he rendered himself thus:

' This court finds that the titles issued to the 7th respondent (Mr Too) were issued against the legitimate expectation of the petitioners (Sirikwa) who had been promised by the 6th respondent (Lonrho Agribusiness) and the government of Kenya that they would be allocated the land. I do further find that legitimate expectation is an overriding interest and therefore the fact that the 7th respondent is registered as proprietor of portion of land does not extinguish the petitioners legitimate expectation.'

32. Lastly, on the remedies, the learned judge granted the following orders and declarations which we have compressed for brevity and to avoid prolixity and repetition:-

- i. An order directing the commissioner of lands, the chief registrar of titles, the director of land adjudication and settlement, the director of survey and the district land officer, Uasin Gishu to perform their constitutional duties and issue title deeds to the suit properties in the name of Sirikwa to allocate and settle its members;
- ii. A declaration that Sirikwa's fundamental rights and freedoms, and in particular its right to property had been violated or was about to be violated by Lonrho Agribusiness, Mr Too, Mr Korir, Highland Surveyors and Mr Kubasu;
- iii. A declaration that the acts of Highland Surveyors and Mr Kubasu of carrying out survey works on the suit properties without the authority of the director of survey was illegal and the survey works null and void and of no effect;
- iv. A declaration that the act of Lonrho Agribusiness, Mr Too and Mr Korir of attempting to deprive Sirikwa of the suit properties which were allocated to them had no legal basis and was therefore illegal and unconstitutional;
- v. An order cancelling forthwith all the titles carved out of the suit properties in favour of Mr Too and Mr Korir and all other beneficiaries and a further order directing the Registrar to rectify the register.
- vi. Having paid Kshs 30 million, and no fraud or wrong doing having been proved against him, Mr Too be allocated not less than 27 hectares from the suit properties;
- vii. An order for the respondents to the petition to pay Sirikwa costs of the petition.



32. The judgment immediately provoked a barrage of appeals and a cross-appeal. The first, Civil Appeal No 44 of 2017, was lodged by Lonrho Agribusiness and Mr Korir, who faulted the learned judge for finding that Sirikwa had legitimate expectation to the suit properties; for holding that conversion of the titles to the suit properties was unlawful; for failing to hold that the suit properties were private property; and for failing to hear many affected parties.
33. The second appeal, Civil Appeal No 45 of 2017, was by Fanikiwa, which complained that the learned judge erred by cancelling its 44 titles carved out of the suit properties and registered in its name, without affording it an opportunity to be heard. (Although Fanikiwa states that the titles are 45, No 5491 is repeated and in his replying affidavit to the Petition, Mr Too had indicated they were 68). The titles in question were LR No Pioneer/Ngeria Block 1 (EATEC) 85, 471, 472, 473, 474,475, 476, 477, 1353, 1374, 1375, 1378, 1379, 1380, 1381,1382,1383,1384,1385,1386,1852,1860,1861,1862,2454,3395, 5484, 5485, 5486, 5487, 5488,5489, 5490,5491,5492, 5493, 5494, 5495, 5496, 5497,5902, 5903,7068, and 7070.
34. Lastly, Mary Jepkemboi Too and Sophie Jelimo Too, the administrators of the estate of Mr Too, who had since died, filed Civil Appeal No 68 of 2017. They faulted the learned judge for holding that the suit properties were surrendered for purposes of settling members of Sirikwa and for cancelling indefeasible titles.
35. On its part, Sirikwa filed a notice of cross-appeal dated June 24, 2017 challenging the learned judge's finding that Mr Too had legitimately purchased 27 hectares from the suit properties and that no fraud or wrongdoing had been proved against him.
36. It is important to advert to another development that has a bearing on this appeal. On April 5, 2017, the Attorney General, on behalf of the commissioner of lands, the chief registrar of titles, the director of land adjudication and settlement, the director of survey and the district land officer, Uasin Gishu, applied for review of the judgment dated February 9, 2017 to exclude from the decree all public utilities that had not been catered for in the judgment. The utilities were listed as Eldoret International Airport, Moi University, public roads, public primary and secondary schools and administrative centres within the suit properties. By a ruling dated November 10, 2017, the trial court allowed the application and ordered that the above public utilities be excluded from the judgment dated February 9, 2017. Effectively therefore, the suit properties awarded to Sirikwa are less the area covered by those public utilities, which area is not precisely indicated.
37. The three appeals were consolidated pursuant to a consent order which was affirmed by the court on February 7, 2019, with Civil Appeal No 45 as the lead file. Earlier, after it was brought to its notice that there were many parties who were likely affected by the judgment of the trial court, this court, by an order dated October 1, 2018, directed Fanikiwa to publish within 14 days a notice in one of the daily newspapers with wide circulation notifying the public of the judgment dated February 9, 2017, its effect, and the existence of the three appeals. The notice was duly carried in the Daily Nation newspaper on October 15, 2018.
38. Pursuant to the said public notice, 78 individuals and 7 financial institutions applied to be joined in the consolidated appeals. The individual applicants based their applications for joinder on the assertion that they were innocent purchasers for value without notice and that their titles were cancelled without being heard. On their part, the financial institutions hinged their applications on the fact that they were not afforded an opportunity to be heard, and that they stood to suffer massive loses because they held valid charges over some of the nullified titles on the strength of which they had advanced substantial loans to the registered owners.



39. The individual applicants were Ahmed Ferej & 60 others (12th respondent), Richard Kirui & 15 others (13th respondent), and Milly Chebet (who also appears on the record variously as Lilly Chebet) (17th Respondent).
40. The persons collectively named as Ahmed Ferej & 60 Others (12th respondent), together with their respective Pioneer/Ngeria Block 1 (EATEC) parcels, were: Murabwa Tali Namasaka and Joyce Chebet Namasaka - 6545 (0.2 Ha); Wilkistar Adhiambo Otieno - 6540; Samuel Navah Dalizu - 6051 (0.3885 Ha); Rachel Gesecho Kasamani - 6052 (0.3885 Ha); Edwin Onyango Were - 655 (2.023 Ha); David Kiprono Koech - 10951 (1.005 Ha); Everlyne Khasaka Wabwile - 6616 (0.2 Ha); Moses Kiplei Ndiema - 3786 (0.834 Ha) and 10001 (0.9 Ha); David Mwenje Mureithi - 3805 (0.834); Alice Chewulukei Maritim - 3750 (0.193 Ha), 3768 (0.193), 3767 (0.193 Ha), 3768 (0.193 Ha), 3769 (0.193 Ha), and 3801(0.934 Ha); Moi University Pension Scheme - 3751 (0.192 Ha), 3752 (0.193 Ha), 3807 (0.834 Ha), 10203 (0.40 Ha), 10197 (0.40 Ha), 10204 (0.40 Ha), 3804 (0.834 Ha), 10215 (0.10 Ha), 10180, 3685, 3666, 3780 and Eldoret Municipality /Block 13/775 (0.0450 Ha); Henry Kimurei Maritim - 3802 (0.834); Andrew Joseph Ojiamo Wandera and Jemima Sylvia Hoine Kamano - 8029 (0.2 Ha), 12487 (0.9 Ha), 7264 (0.10 Ha), and 7265 (0.10 Ha); Joseph Kebande Mayenga - 6562 (0.20 Ha); Grace Otengo Wamukoya - 8513 (0.091 Ha); Benjamin Bondet - 9225 (0.05 Ha); Rosemary Wanjiku Kamanu - 7266 (0.10 Ha); Philip Orwaru Nyangau - 6475 (0.20 Ha) John Wakhungu Khafafa 3685 (0.174); Kipyegon Rono Eric and Chepkoech Charity - 4486 (0.046 Ha); Irene Kagwiria Marete - 14369 (0.045 Ha); Peter Walter Saula - 14370 (0.045 Ha); Alex Chemtai - 3730 (0.174 Ha); Philip Kipkemoi Maritim - 1365 (2.023 Ha) and 14161 (0.623 Ha); Evan Luyali Khadambi - 10103 (0.10 Ha); Samuel Ayaya Olwambula - 3630 (0.174 Ha); Christopher Wambembe Sitti 10087 (0.10 Ha); Conway Kirui and Jane Chepng'eno Kirui 14251 (0.214 Ha); Joanes Namwingila Wenani - 3684 (0.174 Ha); Jose Mbai Azihemba - 3564 (0.174 Ha); Purity Wanjiku Mukunga - 10127 (0.10 Ha); John M. Naibei Cheptot - 1349 (3.023 Ha); Pamela Jepng'etich Letting - 3735 (0.174 Ha); Isabel Fwende Musisi - 3637 (0.174 Ha); Joan Sikhaya Rahedi - 3544 (0.174 Ha); Fristus Kadenge Kenyatta 10022 (0.10 Ha); Francis Obuoro Wayua and Emmanuel Owino Ayua - 10017 (0.10 Ha); Aggrey Mukasa Simiyu - 6538 (0.20 Ha); Rosemary Migidza Luvandare - 6204 (1.012 Ha), 13504 (0.0946 Ha), 13505 (0.0946 Ha), 13506 (0.0946 Ha), 13509 (0.0946 Ha), and 13510 (0.0946 Ha); Catherine Kagai - 13507 (0.946 Ha) and 13508 (0.946 Ha); Catherine Njoki King'ang'i - 3752 (0.193 Ha); Barasa Otsyula Khwa Otsyula - 3795 (0.834 Ha); Mary Vuhya Busu Otsyula - 3566 (0.174 Ha); Lucy Wanjiru Kamau - 11109 (0.09 Ha) and 11097 (0.09 Ha); John Kiringe Kamau - 11113 (0.09 Ha) and 11101 (0.0946 Ha); Joseph Mbatia Moindi - 3660 (0.174 Ha) and 589 (2.023 Ha); Hellen Ingado Ipara - 10027 (0.10 Ha) and 3664 (0.174 Ha); Odhiambo Onyango - 3782; Sarah Mogati Ogaro - 6018 (1.619 Ha); David Ogera Gesicho - 6053 (0.3885 Ha); William Kiptoo - 6103 (0.19 Ha); Willy Kimaiyo and Milkah Jelimo Sambu - 159 (2.023 Ha); Moi University - 839 (40.47 Ha); Florentius Kipchirchir Koech - 7980 (10.12 Ha); Jonathan Kipkemo Rono - 7979 (10.12 Ha); Stephen Oseko Migiro - 3790 (0.834 Ha); Jackson Wahule - 3741; and Fabian Investments Ltd - 2150 (8.09 Ha).
41. As for Richard Kirui & 15 Others (13th respondent), there were 8 individuals and 8 representatives of members of various farms which had purchased portions of the suit properties as follows: Richard Kirui, Julius Kipkurgat Sitienei, Sammy Kimalel Koech, Joseph Kiptanui Serrem, Henry Kebenei, Elijah Kipchirchir Chemis, Isaac Kipchumba Mibei, and Pius Kipruto Keter. The representatives of the members of the farms were Joseph Kiplagat Koech (Bordelands/Kanetik Farms), Jacob Kipkemboi Keter (Kaplelach/Borderlands Farms), Kipkurgat Birgen (Nandi Leberio/Borderlands Farms), Barnabas Kipkoech Rono (Momoniat, Kapkorio, and Musco Farms), Philip Kipkorir Arap Bitok (Chebarus, Kaptein, Kamuzee, and Teldet Farms), Pius Serem (Near Falls Farms), Daniel Kimaiyo Yego (Oasis, Jasho and D Block Farms) and Morris Otunga Masiri (Outspan and Cheplaskai Farms).



42. Lastly, among the individual applicants, Milly Chebet averred that she was the registered proprietor of Pioneer/Ngeria Block 1 (EATEC) 10604 measuring 4.04 Ha, which had been excised from the suit properties and nullified by the impugned judgment.
43. The affected financial institutions were Stanbic Limited (14th respondent) Kenya Commercial Bank Ltd (15th Respondent), Eco Bank Ltd (16th respondent), National Bank of Kenya (18th respondent), Kenya Women Micro- Finance Bank (19th respondent), Commercial Bank of Africa (20th respondent), and Co-operative Bank of Kenya (21st respondent).
44. Stanbic Bank Ltd averred that it held as security the titles of the following 4 properties excised from the suit properties, for loans extended to the registered owners. The particulars of the borrowers and their portions of Pioneer/Ngeria Block 1 (EATEC) were - John Gichenje Kamunyi - 14293 (0.08 Ha); Elijah Kibet Kendagor - 9324 (0.0931 Ha); Eric Agolla Lugalia - 13775 (0.4047 Ha); and Samson Kipkorir Tenoy - 0.0931 Ha).
45. On its part, Kenya Commercial Bank Ltd averred that it held as securities the following 80 nullified Pioneer/Ngeria Block 1 (EATEC) titles, which were excised from the suit properties: Alphonse Kiprotich Cheruiyot - 12803 (0.038 Ha); Adella Chemutai Seurai - 9491 (0.043 Ha); Beatrice Chepkorir - 13435 (0.0294 Ha); Beatrice Jesang Kemei - 14504 (0.094); Benjamin Kiprop Rutto - 13297(); Cynthia Jepchirchir Bitok - 10358 (0.096); Dennis K. Chepsiror - 6578 (0.20 Ha); Dorcas Njoki Nyagah - 13001 (0.96); Elijah Kiprop Serem - 8427 (0.10 Ha); Future Tech Computer Solutions - 6597 (); Gertrude Imbati - 9606 (); Gilbert K. Koech - 10366 (); Gladys Cheron - 12961 (); Greenhills Ventures - 3548 (); Henry Kiptanui Kipsum - 14509 (0.091 Ha); Jackson Kiprono - 7869 (0.30 Ha); Jackson Tuwei Towett - 8745 (0.10 Ha); James Kirwa - 3658 (0.174 Ha); Jane Jepkorir Isiaho - 8052 (0.102 Ha) and 8053 (0.102); Joel Kipkoech Rono - 13130(); Johnstone Kiptoo - 12376 (0.05); Jonah Kipkemboi Tirop - 13620 (0.10 Ha); Joseph C. Kibor - 4048 (0.4047); Laban Chebet Bowen - 1116 (0.09); Linda Chepkemei Matelong - 12774 (0.09 Ha); Lucy Chepkengeno Lutta - 10601 (0.091 Ha); Margaret Cherotich Bitok - 10357 (0.095 Ha); Mercy Nanyama Omuhaya - 14046 (0.085); Meshack Madegwa - 14145 (0.010 Ha); Michael Tumo - 4597 (0.0182 Ha); Michael Kipkorir Langat - 13089 (0.09. Ha); Michael Kiprono Chelule - 4266 (0.010 Ha); Millicent Chelagat Kanda - 3683 (0.084); Marsit Sawmills - 1157 (); Moses Sang - 15205 (0.1 Ha); Mumbo Distributors - 11380 (), 11381 (), 11384 () and 11385; Nicodemus Biwott 10357(); Peter Ndungu Kaguru - 8599 (0.11 Ha); Philip Kipkurui Tunoi - 11343 (0.91 Ha); Pilot Pharmaceutical - 8093 (); Prof. Barasa Lwagula Peter - 3716 (0.174 Ha); Rahab J. Segu - 8744 (0.10 Ha); Robert Kiprop Sang - 12391 (); Ronald Kipchirchir - 9536 (0.10 Ha); Rutto Kibet Nicholas - 3890 (0.044 Ha); Sabila Cherry Julius - 13224 (0.0900 Ha); Shadrack Kibor Chebii - 9103 (0.38 Ha); Sheila Wanjala Wechuli - 12761 (0.005 Ha); Turbo School Ltd - 7993(); Vincent Kimeli t/a Kazuri Contractors - 9514(); Weldon Langat t/a Tuiyo Agri Supplies - 8326 (0.606 Ha); Willy Kimutai Cheruiyot - 5355 (0.039 Ha); Anthony Kipkemboi Korir - 11998 (0.09 Ha); Cleophas Tirop - Pioneer/Langas Block 1(Malel) (3330 sq. ft.); Gilbert Kibet Sowon - 11361 (1.01 Ha); Henry Kiprono Langat 4661 (1.01 Ha); Henry S. Malekhe Wekesa - 9779 (); Ian Kipkosgei Keino - 7983(); Jackson Mologoli Tungilu - 11850 (0.1976); James Kipngetch Sang - 7642 (0.672 Ha); Jane Chepkengeno Sang and Denis Kiprono - 7642 (); Jane Kwambai Kipchumba - 11719 (0.19 Ha); John Kennedy Ofunya - 11975 (0.045 Ha); Jonathan Kemboi Buturu - 3740 (0.195 Ha); Julius Soyekwo Kamatei - 6147 (0.193 Ha); Kibet Kosgei Buigut - 13028 (0.097 Ha); Kiprop Philemon Kandie 867 (2.025 Ha); Mohammed Kiptirim Arap Cheboi 7612 (0.09 Ha); Nancy Chebet Cheruiyot - 4808 (0.09 Ha); Nixon Kukut Timbit - 13866 (0.09 Ha); Rashid Kiptoo Kemboi - 9201 (0.10 Ha); Samuel Kipkosgei Bore - 8118 (0.185 Ha); Vincent Ondieki Omare - 6696 (); Zachary Kasepoi Losialima - 10682 (0.092 Ha); Boniface Benja Erambo - 9203 (0.0949 Ha); Karoi Investment Ltd - 4339 (); Micah Kipkemboi Kogo - 8106 (0.102 Ha); and Word Poles Ltd - 877 (2.023 Ha).



46. Eco Bank Ltd was the holder of 2 nullified titles charged in its favour to secure loans it had advanced to registered owners of titles emanating from the suit properties. The registered owners were Peter Kimutai Kipngetch - 11853 (0.093 Ha) and Tecla Jemaiyo Teko - 61 (2.02 Ha).
47. The nullified titles originating from the suit properties (Pioneer/Ngeria Block 1 (EATEC)) that were charged in favour of National Bank of Kenya were 9, the particulars being: George Onyango Ariya - 9583 (0.10 Ha); Mediheal Hospital Eastleigh Ltd. - 11002 (0.09 Ha); Odhiambo Onyango Albert-8210 (); Daniel Biwott Tuwei - 10982 (0.760 Ha); Titus Kimaiyo Cheruiyot - 1808 (2.023 Ha); Peter Kamau Mwaura- 4630 (); Martha Bwari - 7277 (0.2 Ha); Bill Baba - 13606 (0.054 Ha); and Supreme Developers - 8710 (0.10 Ha).
48. For its part, the Kenya Women Microfinance Bank contended that it had advanced loans to owners of 8 properties whose titles were nullified by the impugned judgment and that the loans were secured by the said titles, the particulars of the borrowers and their Pioneer/Ngeria Block 1 (EATEC) properties being:-Cherono Mercy Tunoi - 8565 (0.100); Janet Jepchumba - 12360 (0.084 Ha); Robert Tenge Kuremu - 3709 (0.174 Ha); Tonui Hillary - 9280 (0.10 Ha); Ken Kipkurui Langat - 212 (2.023); James Mbugua Kamau - 8609 (0.10 Ha); Fezer Kibiage Mirucha - 3911(0.075), and Janet Chelagat Ngisirei - 5800 (0.095 Ha).
49. Commercial Bank of Africa was similarly affected, stating that it held as security the following 6 titles in Pioneer/Ngeria Block 1 (EATEC) which were nullified, namely: Emmanuel Kipchirchir - 12489 (0.09 Ha); Paul Cherotich - 11452 (0.09 Ha); Little Lambs Co Ltd. - 1247 (2.0 Ha); Simon Yego t/ a Tach Agencies - 7628; Henry Kipkosgei Rutto - 10288 (0.101 Ha); and Kipkemboi Maina - 13481 (0.93 Ha).
50. Lastly, among the financial institution applicants, Co- operative Bank of Kenya averred that it held charges worth millions of shillings over the following 93 Pioneer/Ngeria Block 1 (EATEC) titles, which had also been cancelled without the opportunity to be heard: Onesmus Kiprop Kipruto - 10096; Milka Anindo Atwelo - 10544; Norbert Psinon Murupus - 10782; Paul Misiko Wafula - 11230; Fredrick Maende Macmbinji - 10972; Siele Ronald Kibet - 10973; Elvis Ayuya Otengo - 11160; Salim Mamba Wattuman - 11162; Nora Jepchirchir Kisera - 10970; Melody Jepkoech Korir - 14700; Margaret Wanjiku Kamau - 8176; Salome Watiri Ndero - 11420; Janet Mueni Keli - 11410; Nelly Chepkoech Tililo - 12310; Kiptum Cheum - 12701; Winrose Jepkemboi - 3910; Shadrack Kipkogei Tarus - 12768; Amon Kipchirchir Kurgat - 12296; Nobert Kiprono Kiniga - 13139; Lawrence Ongoma Kuchio - 13570; Betty Jebet Kipruto - 13578 and 12257; Sarah Kirsten Njeri - 14648 and 14649; Joyline Chepngeno - 3912; Solomon Kipkemoi Kiriswo - 12749; Millicent Wanjiru Njuguna - 15784; Edner Jebitok - 14000; Mark Kibet Manyorio - 13142; Zipporah Chepchirchir Koech - 4925; Joseph Keter Koech - 4926; Andrew Kipkemoi Cherutich - 7038; Monicah Jepkosgei Rotich - 7821; Simeon Kipketer - 8031; Philis Chebet Limo - 8151; Albert Ochieng Otieno - 12784; Elizabeth Jepkurui Kipkoech - 8577; Fridah Chemutai Rono - 9003; Anthony Kipkosgei Yano - 11402; Philip Kipchumba Kosgei - 3755; Lena Jepngetch Yego - 616; Marius Kiplagat Korir - 10540; Abraham Kimwetich Kipkoech - 3987; Abraham Kipruto Masai - 7719 and 7720; David Kabiru - 11390; Walter Kiprotich Ngeno - 12732; Justus Kipkemoi Chepsoi 8351 and 8352; Oscar Kipkemoi Kigen - 12181; Ronald Kibichii Yegon - 110826; Moses Kimayi Nguai - 12507; Rose Jebet Chirchir - 4252; Martin Kimathi Miriti - 4565; Kiptoo Jubilous - 5560; Alfred Madafu Mahoya - 12748; Anthony Kiplagat Maina - 4974; Benjamin Kipkoech Moi - 3981; Boaz Kipkoech Kalum - 9800; Emmanuel Kibet Lebo - 9947; Gideon Kipkemoi Masibai - 11729; Julius Sitienei - 2276; Kimkerick Abidan Kapchanga - 7797; Mercy Achieng Abok 8618; Phebean Suter - 4143; Stephen Kiptoo Sambu - 9296 and 9297; Timothy Kipkemoi Kipkangor - 11798; Wesley Kipkurui Kosgei - 10971; Elizabeth Wahu Kiarie - 9286; Gervase Generi Wakori - 8806; Abraham Bartonjo - 12108; Ruth Chemutai - 5623; Coalition



Security Services - 11041; Beatrice Naliaka Shitote - 8990; Francis Emmanuel - 1990; William Kibet Sang - 10758; Margaret Jepkoech Kimurgong - 12038; Josephine Jepkurui Arusei - 9878; Nimrode Investment Company - 12251; Richard Kipkurgat Cheruiyot - 7258; Ruth Jepkosgei Sitienei - 10702; Ricnana Food Masters - 7794; John Daniel - 6021 and 6023; Sophia Jelimo Chemengen - 6848; Teresia Muthoni Muhu - 12358; Anthony Kiplagat Maina - 4974; Benjamin Kipkoech Moi - 3981; Philip Kipkemoi Letting - 10759; West Wind Co. Ltd. - 5655; Moses Koima Mwarey - 4042; Alfred Omondi Mola - 10401; Keiyo South Women Emp. Network - 142; Aroma Fresh Bakers - 10513; Naveen Health Care - 11466; and Uasin Gishu Mwalimu Investment Sacco - 3689.

51. By a ruling dated October 17, 2019, this court allowed joinder of the said individual and financial institutions and they, accordingly, became corresponding respondents in the consolidated appeal. Subsequently, five of the financial institutions, namely, National Bank of Kenya, Kenya Commercial Bank, Kenya Women Micro Finance Bank, Commercial Bank of Africa and Co-operative Bank of Kenya applied for leave to adduce further evidence in the form of the charges and the cancelled titles which had secured their loans to several borrowers. Similarly, Ahmed Ferej & 60 others also sought leave to adduced evidence of ownership of their respective titles which had been cancelled. By a ruling dated December 17, 2021, the court allowed the applications and directed the said parties to file affidavits adducing the additional evidence within 15 days from the date of the ruling, which they duly did. Sirikwa was given a similar period after service by the above parties to file a replying affidavit, if it deemed it necessary.
52. Following directions by the court, the parties to the consolidated appeal filed their written submissions and lists of authorities. They highlighted their respective submissions on March 30, 2022. Because of the commonality of the grounds of appeal, the appeal was argued primarily on the basis of the issues identified and framed by Fanikiwa. We shall advert to any other arguments peculiar or specific to any of the respondents. Fanikiwa compressed its 17 grounds of appeal into five issues as follows:
- i. Whether Fanikiwa's right to be heard as well as that of the enjoined respondents was violated;
 - ii. Whether Sirikwa's legitimate expectation could override express provisions of the law;
 - iii. Whether, upon conversion from the Registration of Titles Act to the Registered Land Act, the titles acquired by Fanikiwa and the enjoined respondents were indefeasible;
 - iv. Whether the allocation of the suit properties to Sirikwa was legitimate; and
 - v. Whether the titles held by Fanikiwa and the enjoined respondents arising from the suit properties were legitimate.
53. Fanikiwa relied on two sets of submissions, the first undated but filed on May 28, 2018 and the second dated December 4, 2018. On the right to be heard, Fanikiwa, represented by Prof Ojienda, SC and Ms Awour, learned counsel, submitted that Fanikiwa was not a party to the petition and that the effect of the judgment was to extinguish its right to property without being heard, which was in violation of the rules of natural justice as well as article 50 of the *Constitution*. Relying on *Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR*, it was contended that since 2010, the right to be heard is no longer a mere rule of natural justice, but a constitutional principle. The decisions in *JMK v MWM [2015] eKLR*, *David Onyango Oloo v Attorney General [1987] eKLR*, *Mbaki & Others v Macharia & Another [2005] eKLR*, *James Kanyita Nderitu & Another v Marios Philotas Gbikas & Another [2016] eKLR*, *Livingstone Kunini Ntutu v Minister for Lands & 4 Others [2014] eKLR* and *Eunice Muthoni Gatugi v Lusalia Waweru & Others [2018] eKLR* were cited to support the view that a person likely to be adversely affected by a decision must be afforded an opportunity to be heard before the decision is made.



54. It was Fanikiwa's further submission that its right to fair hearing was violated when the trial court failed to take viva voce evidence. It was contended that a title could not be cancelled without viva voce evidence to determine its authenticity. In that regard, Fanikiwa relied on the decision in *Sanghani Investments Ltd v Officer in Charge, Nairobi Remand and Allocation Prison* [2007] 1 EA 354 where the court held that judicial review proceedings were not appropriate to determine disputed ownership of land.
55. Regarding legitimate expectation, Fanikiwa submitted that the learned judge had completely misapprehended the doctrine. Projecting the whole claim before the superior court as based on a single document, a letter endorsed with the words 'Approved,' it was contended that Sirikwa's alleged legitimate expectation was based on the approval of allocation of the suit properties by the former President, yet at the time the approval was given, the suit properties were privately owned and were therefore not available for allocation. The decisions in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* [2014] eKLR and *Justice Kalpana H Rawal v Judicial Service Commission & 3 Others* [2016] eKLR were cited on the tenets of the doctrine of legitimate expectation, namely, that the representation must be clear and unambiguous; made by a public authority; the expectation must be reasonable; the representation is one that the maker is competent and legally qualified to make; and that the representation is not contrary to the Constitution or the law.
56. Fanikiwa further contended that the former president did not have power to allocate or make representations about private land and that Sirikwa's expectation was not legitimate because it was contrary to the provisions of the Government Lands Act. It was also argued that the approval of Sirikwa's application was purportedly given in 1998 before the surrender in 2000 and that at the time of the purported approval, the suit properties were private property and not subject to the Government Lands Act, which only permitted allocation of unalienated Government Lands. In support of this proposition, Fanikiwa relied on the decisions in *Nelson Kazung Chai v Pwani University College* [2017] eKLR, *Henry Muthee Kathurima v Commissioner of Lands & Another* [2015] eKLR and *Benja Properties Ltd v Sedna Mohammed Burbannudin Sabed & 4 Others* [2015] eKLR. Lastly, on this issue, Fanikiwa urged that once the approval by the former President was found to lack legal basis, the subsequent confirmations of the allocation by government officers were equally void and of no effect.
57. Turning to the third ground on indefeasibility of title, Fanikiwa submitted that the learned judge erred by holding that surrender of the suit properties was for the purpose of settling members of Sirikwa. It was contended that the evidence on record indicated that the suit properties were surrendered for purposes of conversion of the titles from the Registration of Titles Act to the Registered Land Act and to change the tenure from leasehold to freehold. Further, that upon conversion, the suit properties were registered in the name of Lonrho Agribusiness and did not become unalienated government land available for allocation to Sirikwa.
58. Relying on sections 27 and 28 of the repealed Registered Land Act, Fanikiwa submitted that titles under that Act were indefeasible and that at the time of the purported allocation of the suit properties to Sirikwa, they were registered in the name of Lonrho Agribusiness and therefore protected under the above provisions. In support of the submission on indefeasibility of title, Fanikiwa cited the decisions in *Samuel Kamere v Land Registrar, Kajiado* [2015] eKLR and *Atbi Highway Developers Ltd v West End Butchery Ltd & 6 Others* [2015] eKLR. It was further contended, on the authority of *Dr Joseph NK Arap Ngok v Justice Moiwo ole Keiwua & 4 Others* [1997] eLKR, that Sirikwa obtained only approval of allocation, which was in any event null and void and that the allocation never matured into letters of allocation and ultimately into titles.



59. Fanikiwa also submitted that it was impossible to allocate the suit properties to Sirikwa because it was registered only on November 2, 2006 whilst the purported allocation was in 1998 when Sirikwa did not legally exist.
60. On whether the allocation of the suit properties to Sirikwa was legitimate, Fanikiwa submitted that by the time Sirikwa filed its petition, the suit properties had been converted to titles under the Registered Land Act and sold to willing buyers by the registered proprietor, Lonrho Agribusiness. It was further submitted, on the authority of section 143 of the Registered Land Act and the decision in *Charles Karathe Kiarie & 2 Others v Administrators of the Estate of John Wallace Mathare (Deceased) & 5 Others [2013] eKLR*, that the indefeasible title acquired by Fanikiwa under the Registered Land Act could not be defeated except on proof of fraud or misrepresentation to which Fanikiwa was party. It was contended that Fanikiwa purchased its lands from Lonrho Agribusiness on a willing buyer-willing seller basis, conducted due diligence and that there was no evidence to show that it was party to any fraud, misrepresentation or mistake. Fraud, it was submitted, must be proved by evidence and cannot be presumed as the learned judge did.
61. Finally, Fanikiwa submitted that members of Sirikwa were not squatters because they were not in occupation of any of the properties registered in its name. It was submitted that instead, the said properties were occupied by Fanikiwa which was undertaking large scale farming.
62. For all the foregoing reasons, Fanikiwa urged us to find that the order for cancellation of its titles had no legal basis, allow the appeal with costs, and set aside the judgment of the trial court.
63. We next heard the appellants/respondents who were in support of the appeal, starting with Lonrho Agribusiness and Mr Korir, who are also the appellants in Civil Appeal No 44 of 2017. Their learned counsel, Ms Chesoo, adopted the submissions made on behalf of Fanikiwa. Addressing the right to be heard, which she noted cannot be limited, counsel did not suggest that Lonrho Agribusiness and Mr Korir's right to be heard was violated. She could not possibly sustain such an argument because from the record, both her clients were parties to the petition and actively participated in it. Instead, counsel submitted on the right of Fanikiwa and other third parties to be heard, which we do not need to belabour because the arguments replicate those already made on behalf of Fanikiwa.
64. On legitimate expectation, these appellants submitted that at the material time, the suit properties were registered in the name of Lonrho Agribusiness under the Registration of Titles Act and that the sole purpose of the surrender was amalgamation and issuance of freehold titles under the Registered Land Act. It was contended that on January 21, 2001, the surrender resulted in the creation of a new registration section known as Pioneer/Ngeria Block 1 (EATEC) and its attendant subdivisions and, further, that Lonrho Agribusiness, having established that it was the registered proprietor of the suit properties before and after the surrender, the learned judge erred by applying the doctrine of legitimate expectation to private property.
65. Counsel addressed the attributes of legitimate expectation which we have set out above and submitted that none applied in the case before the learned judge. She added that the definition of unalienated land in section 2 of the Government Lands Act, which the president could validly allocate, excluded private property and, further, that when the former president approved allocation of the suit properties to Sirikwa in 1998 long before the surrender in 2000, the suit properties were registered in the name of Lonrho Agribusiness. It was also contended that the suit properties could not have been allocated to Sirikwa in 1998 yet it was not registered until 2006.
66. Lastly, with regard to the question of indefeasibility of title, these appellants, like Fanikiwa, relied on sections 27 and 28 of the Registered Land Act and submitted that the titles over the subdivisions



- that resulted from the suit properties were absolute and indefeasible. It was further contended that as at the date of the purported allocation of the suit properties to Sirikwa, the same were registered in the name of Lonrho Agribusiness under the Registration of Titles Act and, by dint of section 23 thereof, Lonrho Agribusiness's title was absolute and indefeasible. The decision of this Court in *Kenya National Highways Authority v Shalien Masood Mughal & 5 Others [2017] eKLR* was deployed in support of the submission.
67. If Sirikwa was entitled to any remedy, it was further contended, it was only award of damages rather than cancellation of titles. In support of that contention, counsel relied on the High Court decisions in *David Peterson Kiengo & 2 Others v Kariuki Thuo [2012] eKLR* and *Vekeriya Investments Ltd v Kenya Airports Authority & 2 Others [2014] eKLR*. Accordingly, these appellants urged us to allow the appeal with costs.
68. The commissioner of lands, the chief registrar of titles, the director of land adjudication and settlement, the director of survey and the district land officer, Uasin Gishu joined in opposing the appeal. Their learned counsel, Ms Cheruiyot submitted that the evidence before the trial court from Mr Simiyu, Mr Too and Mr Korir showed that there were many purchasers of subdivisions of the suit properties who were not before the court and were therefore condemned unheard, in violation of the right to fair administrative action under article 47 of the *Constitution*. It was therefore submitted that the judgment of the trial court was irredeemably vitiated by the failure to hear directly affected parties, even when the *Constitution* of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 provided an avenue for joinder and hearing of such parties.
69. These respondents next submitted that Sirikwa did not adduce any evidence to prove its historical claim to the suit properties or that its members were squatters thereon. Further, it was submitted that the suit properties were private property rather than unalienated land available for allocation to Sirikwa. Lastly, it was submitted that legitimate expectation follows the law and that Sirikwa had no legitimate expectation that it would be allocated the suit properties because the former President had no power to allocate or alienate private land.
70. Ms Odwa, learned counsel for Highland Surveyors, Mr Kubasu, and Ahmed Ferej & 60 others (the 12th respondents) also supported the appeal. Although counsel started by submitting that her clients were not parties to the petition in the trial court and were therefore condemned unheard, we note that Highland Surveys and Mr Kubasu were indeed respondents to the petition and therefore the submission is only relevant to the 12th respondent, Ahmed Ferej & 60 others. Highland Surveyors and Mr Kubasu were also not sued as persons who had acquired the suit properties, but as parties who had conducted unauthorised survey of the suit properties.
71. Counsel submitted that the parties under the 12th respondent were innocent purchasers for value without notice and that the trial court erred by cancelling their titles without affording them an opportunity to be heard, contrary to the rules of natural justice and article 50 of the *Constitution*. It was submitted that not being parties to the petition, the said respondents were unaware of its existence until the publication of the public notice, long after the judgment. It was further contended that although Sirikwa knew that many third parties had innocently purchased properties excised from the suit properties, it did not make any effort to join them in the petition. These respondents invoked article 40 of the *Constitution* and contended that the cancellation of their titles constituted a violation of the right to property guaranteed by the said provision. For those reasons, they prayed that the judgment of the trial court be set aside *ex debito justitiae*.
72. Next on stage was Mr Yego, learned counsel for Mr Richard Kirui & 15 others. Counsel adopted the submissions made by Fanikiwa and the other parties who supported the appeal. He reiterated that the



suit properties were private property registered in the name of Lonrho Agribusiness and that under the Government Lands Act, the president had no power to allocate private land, only unalienated government land. Counsel added that the subsequent assurances by various government offices of the availability of the suit properties for settlement of members of Sirikwa had no legal effect because the assurances were based on purported and illegal allocation of private land. To drive home the point that the suit properties were not government land, counsel submitted that if they really were, the Government could not have compulsorily acquired its own land for purposes of construction of Eldoret International Airport. He also supported Fanikiwa's submission that the surrender of the titles to the suit properties was for purposes of conversion and amalgamation of the titles from leasehold tenure under the Registration of Titles Act to freehold tenure under the Registered Land Act.

73. Counsel further contended that Richard Kirui & 15 others purchased their parcels of land, paid the full purchase price, and obtained lawful and valid titles which were indefeasible under sections 27 and 28 of the Registered Land Act and subsequently under section 26 of the [Land Registration Act](#) because no fraud was alleged or proved against them, so as to vitiate their titles. Counsel submitted that the trial court erred by cancelling those titles without affording the owners an opportunity to be heard, which was a violation of the rules of natural justice and of article 47 (fair administrative action) and article 50 (fair hearing) of the [Constitution](#).
74. The appeal was equally supported by Stanbic Ltd, Kenya Commercial Bank Ltd, Eco Bank Ltd and National Bank of Kenya Ltd, all represented by Mr Kipkoge and Ms Saina, learned counsel. These financial institutions submitted that they learnt from the public notice published on October 15, 2018 that some of the titles used by their clients to secure loans had been nullified pursuant to the decree of the trial court. They contended that in breach of the rules of natural justice, the trial court condemned them unheard even though they had a stake in the dispute. Submitting that the right to be heard cannot be derogated from, these financial institutions submitted that as a result of the judgment, they were left holding worthless securities for no fault of their own. They emphasised that the money secured by the cancelled titles belonged to members of the public.
75. Like the other appellants and respondents in support of the appeal, these financial institutions added their voice to the submission that legitimate expectation cannot override provisions of the law; that the suit properties were surrendered for purposes of changing the tenure from leasehold to freehold; that the former President had no power in law to allocate private property; and that the registered proprietors of the parcels excised from the suit properties held indefeasible title because no fraud or misrepresentation was proved on their part. These respondents urged us to allow the appeal and set aside the judgment of the trial court, or remit the matter back to the trial court for proper hearing of all the affected parties whom the court denied an opportunity to be heard.
76. The 17th respondent, Milly Chebet, represented by Ms Tum, learned counsel, also threw in her lot with the appellants. This respondent expended a lot of energy on irrelevant issues of legal representation of Sirikwa. As far as was relevant in her submissions, counsel submitted that this respondent is the registered proprietor, since March 22, 2018, of Pioneer/Ngeria Block 1 (EATEC) 10604 measuring in area approximately 4.04 Ha, having purchased the same from Joseph Kiptanui Serem. The said Serem had in turn purchased a larger parcel, Pioneer/Ngeria Block 1 (EATEC) 2172 from Lonrho Agribusiness which was excised from one of the suit properties. He then subdivided it into several subplots, among them the parcel he sold to Chebet. She added that Chebet conducted due diligence, paid in full the purchase price and all outgoings and obtained consent from the land control board before she was registered as proprietor.
77. It was counsel's submission that as the registered proprietor, Chebet had an indefeasible title under section 26 of the [Land Registration Act](#) and that she was denied an opportunity to be heard before her



title was cancelled because she was not a party to the petition before the trial court. Counsel added that Chebet only learned of the trial court's judgment from the public notice that this court ordered to be published and further that the judgment of the trial court was a violation of her right to fair hearing under article 50 of the *Constitution*. Accordingly, counsel urged us to allow the appeal and set aside the judgment of the trial court or order a retrial.

78. Also supporting the consolidated appeals were the Kenya Women Microfinance Bank and Commercial Bank of Africa, both represented by Mr Langat, learned counsel. Counsel submitted that his two clients had advanced financial facilities to various customers which were secured by the titles that the learned judge nullified. Like the other appellants and respondents in support of the appeal, these respondents took the view that the former President had no power to allocate the suit properties to Sirikwa because they were not unalienated government land; that at the time of the alleged allocation, the suit properties were private property duly protected by section 75 of the former Constitution; and that the purported allocation being null and void, all the subsequent assurances by government officers were equally null and void.
79. It was further contended that the titles that the learned judge nullified were valid and indefeasible under sections 27 and 28 of the Registered Land Act and section 26 of the *Land Registration Act*; that no fraud, misrepresentation, or illegality was proved against the registered owners; that in violation of article 40 of the *Constitution*, the learned judge condemned these respondents who held proprietary rights over the nullified titles without affording them an opportunity to be heard; and that the learned judge misapprehended and misapplied the doctrine of legitimate expectation.
80. Finally, for the financial institutions, we heard Ms Gichohi, learned counsel for Co-operative Bank of Kenya, who also supported the appeal. Like the other financial institutions, it was submitted that Co-operative Bank advanced loans from public monies totalling over Kshs 150,000,000.00 to its customers who were registered owners of some of the nullified titles and that after conducting due diligence it secured the loans by charges over those titles, but the same were subsequently nullified by the impugned judgment without affording the bank an opportunity to be heard. It was submitted that having conducted due diligence as witnessed by copies of official searchers produced following the order for adduction of further evidence, the bank was entitled to rely on the register under the Torrens system which guarantees correctness and security of title.
81. Counsel emphasised that the Bank was not heard by the trial court, was not aware of the litigation, and only learnt of the cancellation of titles from the public notice that the court ordered to be published. It was submitted that a judgment reached in breach of the rules of natural justice is a nullity and must be set aside *ex debito justitiae*. In support of the proposition counsel cited *Sceneries Ltd v National Land Commission [2017] eKLR* and *James Kanyita Nderitu & Another v Marios Philotas Ghikas & Another (supra)*.
82. Next, it was submitted that the learned judge erred by equating the approval by the former president to an allotment letter, which it was not. At the time of the alleged approval, it was contended, the suit properties were already alienated private land which were not available for allocation by the president.
83. Moving to legitimate expectation, it was submitted, on the authority of *Kevin Mwiti & Others v Kenya School of Law & 2 Others [2015] eKLR*, that 'no legitimate expectation can arise where a decision maker is expected to act illegally.' Accordingly, counsel urged us to allow the appeal with costs.
84. Finally, we heard Mr Arusei and Ms Kiget, learned counsel for Sirikwa, which was the only party opposing the consolidated appeal. Relying on submissions dated July 13, 2018 and supplementary submissions dated March 25, 2022, Sirikwa started by objecting to 'the grounds of appeal' put forward by Richard Kirui & 15 others. It was submitted that having been joined into the appeal, those parties



- became respondents and they had no capacity to file grounds of appeal of their own. Relying on rule 104 of the Court of Appeal Rules, Sirikwa submitted that no party is allowed to argue, without leave of the court, any grounds of appeal other than those set out in the memorandum of appeal or notice of cross-appeal. Accordingly, we were urged to strike out the purported 'grounds of appeal' by Richard Kirui & 15 others.
85. Moving on to the appeal proper, counsel submitted that Sirikwa had legitimate expectation that it would be allocated the suit properties because of the letter of approval by the former President dated October 28, 1998 as well as confirmation by Lonrho Agribusiness that the suit properties were surrendered for settlement of Sirikwa members. Counsel further relied on subsequent official correspondence (nine in number), from Government offices, spanning a period of nine years, by which the Government affirmed allocation and availability of the suit property to settle Sirikwa members. It was contended that it was only in 2012 that the District Land Officer, Uasin Gishu belatedly took a different position that the suit properties were surrendered for purposes of conversion of titles from the Registration of Titles Act to the Registered Land Act, that they were private lands and that they had been transferred to unnamed beneficiaries. Sirikwa urged that one of those beneficiaries, who took substantial parts of the suit properties, was Mr Too.
86. Citing the decision of the Supreme Court in *Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others* (supra), counsel submitted that legitimate expectation is a principle of fairness and arises when a public body, by express, clear and unambiguous promise, creates expectation within its powers to fulfil. It was contended that the representation to Sirikwa by the former President that it would be allocated the suit properties and subsequent confirmations by Government officers gave rise to legitimate expectation. In Sirikwa's view, there was no need for a letter of allotment and there was nothing illegal about the representation, the same having been competently made under section 44 of the Registration of Titles Act.
87. It was Sirikwa's submission that upon surrender of the suit properties by Lonrho Agribusiness in whose name they were registered at the material time, by dint of section 44 of the Registration of Titles Act, the suit properties reverted to Government to be managed as Government land. It was contended that surrender of the suit properties, which could be express, inferred from the actions of the parties, or by operation of the law, determined the leases of Lonrho Agribusiness and the remainder of the term merged with the interest of the Government as the owner of the reversionary interest. Accordingly, it was urged that the allocation and transfer of the suit properties to purported beneficiaries was illegal, null and void and that the titles emanating therefrom were equally null and void. Having surrendered the suit properties for settlement of the members of Sirikwa, it was submitted, Lonrho Agribusiness had no land that it could legitimately sell to third parties. In support of that submission, Sirikwa relied on the decision in *Taib Ali Taib v Ahmed Fahd Amir & 6 Others [2014] eKLR*.
88. On indefeasibility of title, Sirikwa submitted that under Article 40(6) of the *Constitution*, protection of the right to property did not extend to unlawfully acquired property like that acquired by the parties who were allocated the suit properties in this appeal. In support of that submission, the decisions in *Henry Muthee Kathurima v Commissioner of Lands & Another* (supra) and *Munyua Maina v Hiram Maina [2013] eKLR* were cited. On the purpose of the surrender, Sirikwa relied on the letter from Lonrho Agribusiness's General Manager dated November 9, 2000 and submitted that it was crystal clear that the suit properties were surrendered to settle Sirikwa members. Disputing that the titles to the suit properties were surrendered for conversion of the titles, Sirikwa submitted that all the purported beneficiaries of the suit properties had failed to demonstrate that the process of surrender, starting with a written request to the Commissioner of Lands all the way to the opening of a green card, was ever followed. On the authority of *Henry Muthee Kathurima v Commissioner of Lands & Another*



(supra), it was submitted that the purported owners of the suit properties after surrender were under a duty to demonstrate the procedure that was followed to acquire and register the suit properties in their names, which they had failed to do. In these circumstances, it was argued that the alleged purchasers of the suit properties including those that joined the matter at the appellate stage, could not be heard to say that they were innocent purchasers or that they held indefeasible titles.

89. Regarding the right to be heard, counsel submitted that Fanikiwa had no basis to complain because it was well aware of the litigation in the trial court where Sirikwa was claiming the suit properties which turned out to have been acquired by, among others, Fanikiwa, but the latter chose to stand by idly, without any effort to intervene. The judgment in *John Florence Maritime Services & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others [2015] eKLR* was relied upon to support the view that a party who stands by and watches proceedings in which he has an interest, is bound by the decision and is not entitled to re-open the case. It was further contended that in his replying affidavit in the trial court sworn on March 24, 2014, Mr Too disclosed that he was a director of Fanikiwa and therefore represented its mind and will and Fanikiwa cannot be heard to claim that it was not aware of the proceedings or that it was denied the right to be heard. As for the enjoined respondents, it was submitted that they were also aware of the litigation because their conveyances were done by the same advocate who appeared for Mr Too and Mr Korir in the petition before the trial court.
90. As regards the respondent financial institutions, Sirikwa submitted that the titles on which the charges were based were illegal, null and void and that the remedy of the lenders lay in pursuit of compensation from the chargees or the Government.
91. For the foregoing reasons, Sirikwa urged us to dismiss the consolidated appeal with costs.
92. On the cross-appeal, Sirikwa contended that the trial court erred by upholding the validity of Mr Too's titles, yet it had found that the conversion of the titles to the suit properties and the subsequent sale were vitiated by fraud and therefore null and void. We were therefore urged to allow the cross-appeal and vary the judgment of the trial court to that extent.
93. We have gone to great lengths to set out the case that was before the learned judge, as we have been able to appreciate it from the record. We have done so cognizant that as a first appellate court, we proceed on the basis of a re-hearing. It is our duty to subject the whole evidence to a fresh and exhaustive analysis and re-evaluation, so as to draw our own independent inferences of fact and conclusions on the matter. As we do so, we do pay respect to the conclusions made by the first instance judge, but are at liberty to depart therefrom if the evidence so commands. Our latitude for departure is even wider where, as here, the learned judge proceeded by way of affidavit and documentary evidence, without the added advantage of hearing and observing witnesses in live testimony.
94. We wish to thank learned counsel for their industry, professionalism and co-operation in the conduct of this otherwise involved appeal. They brought precision and focus into a matter that otherwise threatened to be some sort of 'Slough of Despond'. Many authorities were cited to support the submissions of the parties. If we do not refer to all of them, it is simply because we are satisfied that what is cited suffices to demonstrate, support or disavow the principle in question, without the necessity of a surfeit of authorities.
95. Before we address the main issues in this appeal, there is an issue that was raised by Sirikwa that we wish to put to rest immediately. This relates to 'the grounds of appeal' filed by Richard Kirui & 15 Others, the 13th respondent. As parties whose titles were cancelled by the impugned judgement, Richard Kirui & 15 others were parties directly affected by the consolidated appeal within the meaning of the former rule 77(1) of the Court of Appeal Rules which was applicable at the time and therefore entitled to be served with copies of the notices of appeal. By dint of that rule, they would have automatically become



respondents. However, neither Fanikiwa nor the appellants in the other two appeals, served them with the notices of appeal.

96. The 13th respondent then successfully applied to be joined in the consolidated appeal. Upon joinder, Richard Kirui & 15th others became respondents, not appellants. They were joined to the appeal on the express finding that they were affected parties who had not been heard by the trial court. They were allowed to adduce very specific evidence, to show that they were proprietors of properties excised from the suit properties, whose titles had been cancelled. Their joinder did not transform them into appellants with liberty to file grounds of appeal. The most that they could do as respondents was to file a notice of cross-appeal under rule 93 or a notice of grounds for affirming decision under rule 94. As it turned out, the issues that Richard Kirui & 15 others wished to raise were the same issues raised by Fanikiwa and the other two appellants and they fully addressed them in their capacity as respondents.
97. The only way that Richard Kirui & 15 others would have been able to file grounds of appeal, is if they had filed a notice of appeal against the impugned judgment in their capacity as 'any person who desires to appeal', within the meaning of the former rule 75(1) of the Court of Appeal Rules. This Court has held that 'any person' within the meaning of that rule is not restricted to only the parties who took part in the proceedings in the trial court. (See *Jobo v Doshi & 4 Others, KECA 137 KLR*). Upon filing a notice of appeal, they would then have become appellants entitled to file their own grounds of appeal and record of appeal. They did not do so and from the record, they remained only respondents. We accordingly agree with Sirikwa that there was no basis for the 13th respondent to file 'grounds of appeal'. We accordingly strike out those purported grounds of appeal as they have no foundation in the Court of Appeal Rules.
98. We shall start with the issue of violation of the right to be heard. The parties who contend that they were directly affected by Sirikwa's petition but were not accorded the right to be heard before cancellation of their titles were Fanikiwa, Ahmed Ferej & 60 Others, Richard Kirui & 15 Others, Milly Chebet and the 7 financial institutions. As we observed earlier, the contention by counsel for Highland Surveyors and Mr Kubasu that their right to be heard was equally denied has no merit because both of them were named as respondents to the petition in the trial court.
99. Fanikiwa, Ahmed Ferej & 60 Others, Richard Kirui & 15 others, and Milly Chebet's contention is that they are innocent purchasers of properties excised from the suit properties and that they hold genuine and valid titles vesting the respective properties in them. For their part, the 7 financial institutions contend that they had advanced loans to various clients which were secured by charges over titles excised from the suit properties. They add that they conducted due diligence, found nothing amiss with the titles and acting on the register, the accuracy of which is guaranteed and underwritten by the State, they advanced huge sums of public monies to the borrowers.
100. They complain that the nullification of the titles without an opportunity to be heard rendered the securities valueless pieces of paper and deprived them the ability to recover the loans that they had advanced. All these parties submit that before cancelling their titles, the learned judge was obliged by Articles 47 and 50 of the *Constitution*, the rules of natural justice and the *Fair Administrative Action Act* to hear them.
101. Whether a person has been afforded a fair hearing or the right to natural justice, depends on the circumstances of each case (See *Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR*). None of the parties to this appeal denies that the right to be heard is a cardinal principle in the administration of justice. Only that Sirikwa submits, at least as regards Fanikiwa, that it was fully aware of the petition, its tenor and import, but elected to stand by idly. We shall revert to this shortly. For the other purchasers of the properties excised from the suit properties, Sirikwa made only a feeble attempt



at justification of denial of the right to be heard, based on the fact that the advocates who prepared the conveyances for the affected properties were the advocates for Mr Too and Mr Korir in the trial court. We think that is too remote or tenuous a basis upon which to dislodge a right as fundamental as the right to be heard, one that the Constitution expressly guarantees and expressly insulates from derogation. The various decisions cited by the appellants and the enjoined respondents underline the centrality of the right to be heard in our jurisdiction. Thus for example, in *Mbaki & Others v Macharia & Another* [2005] 2 EA 206, decided under the old Constitution, this Court held thus:

' The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.'

102. As correctly submitted by the appellants and the enjoined respondents, after the promulgation of the current Constitution, the right to fair hearing was enhanced rather than denuded. This took the form of, firstly, Article 50 which guarantees the right to fair hearing, an integral part of which is the right of a person to be heard before an adverse decision is taken. This right to a fair hearing is, by virtue of Article 25, non-derogable. Secondly, is Article 47 on fair administrative action, as read with the Fair Administrative Action Act, No 4 of 2015, which guarantees a person, where an administrative action is likely to adversely affect his or her rights or fundamental freedoms, to be given an opportunity to be heard and to make representations. The Act defines 'administrative action' broadly to include any act, omission or decision of any person, body or authority that affects the legal rights or interests of a person.

103. The right to be heard is so firmly established that it is never an answer to a charge of its violation to say that the outcome would still have been the same even if the person was heard. Meggery J famously observed in *John v Rees* [1969] 2 All ER 274):-

'It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious, they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start. Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events.'

104. In *David Onyango Oloo v Attorney General* [1987] eKLR, Nyarangi, JA expressed the same principle thus:

' A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.'

105. Accordingly, as regards *Ahmed Ferej & 60 others*, *Richard Kirui & 15 Others*, *Milly Chebet*, *Stanbic Ltd*, *Kenya Commercial Bank Ltd*, *Eco Bank Ltd*, *National Bank of Kenya*, *Kenya Women Micro-Finance Bank*, *Commercial Bank of Africa* and *Co-operative Bank of Kenya*, we are satisfied that their right to be heard before an adverse decision was made against them was violated when titles to their



properties or to properties over which they held charges, as the case may be, were cancelled. There is no evidence on record that they were aware of the proceedings in the trial court. On the contrary, the evidence shows that they only became aware of the proceedings and the impugned judgment, only after publication of the public notice as ordered by this Court.

106. Turning to Fanikiwa, which also contends that its right to be heard was violated, we have already adverted to the affidavit and documentary evidence adduced before the trial court. That evidence shows that Mr Too, who was the 7th respondent in the petition, was also the chairman of Lonrho Agribusiness, which surrendered titles to the suit properties, for what purpose we shall revert to later. He was also the majority shareholder and a director of Fanikiwa. In the petition, he was sued in his personal capacity for allegedly violating Sirikwa's constitutional rights and legitimate expectation to be allocated the suit properties by having those properties allocated and transferred to him. Sirikwa specifically pleaded that the allocation of the suit properties was illegal and fraudulent and prayed for cancellation of the titles.
107. In his replying affidavit, Mr Too, beyond indicating that 8 parcels excised from the suit properties were registered in his name, also disclosed that Fanikiwa, where he was the majority shareholder and director, was one of the main beneficiaries of the properties excised from the suit properties, having acquired 68 parcels of land measuring in area approximately 2,756.962 Ha. However, fully aware that Sirikwa's petition sought nullification of all titles that had originated from the suit properties, he did absolutely nothing to ensure that Fanikiwa, where he was literally the mind and the brain, was heard. In these circumstances, and taking into account the close nexus and intimate relationship between Mr Too and Fanikiwa, we are not persuaded that it can fall from the mouth of Fanikiwa to argue that it was not aware of the proceedings or that it was denied the right to be heard.
108. The Constitution}} of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013, under which Sirikwa's petition was taken out, has very flexible provisions for joinder of parties. Thus, for example, rule 5(d) (ii) empowers the court, on application or suo moto, to order inclusion of the name of a person who ought to have been joined, whilst rule 7 empowers the court, either on oral or informal application or suo moto, to join an interested party in the petition. The rules define an interested party liberally to mean a person or entity that has an identifiable stake or legal interest or duty in the proceedings but is not a party to the proceedings or may not be directly involved in the litigation.
109. We would therefore agree with the reasoning in *John Florence Maritime Services & Another v Cabinet Secretary for Transport & Infrastructure & 3 Others* (supra), that if a party, knowing of proceedings that affects it, is content to stand by and watch the proceedings play out to conclusion, he cannot turn around and claim that he was denied an opportunity to be heard. The critical issue in the right to be heard is the opportunity to be heard, which we find Fanikiwa had through its director and majority shareholder, Mr Too, but for reasons best known to itself, declined to take up. Indeed, in *Tom Dola & 2 Others v Chairman, National Land Commission & 5 Others*, this Court held that a party who had knowledge of proceedings before the National Land Commission inquiring into whether his title to land had been lawfully acquired, but elected not to participate, could not be heard to say later that he was denied an opportunity to be heard.
110. The second limb of the alleged violation of Fanikiwa's right to be heard is the assertion that the petition should not have proceeded otherwise than by viva voce evidence. As we have noted, Sirikwa's petition in the trial court to enforce its fundamental rights and freedoms was taken out primarily under the Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013. The default principle on the mode of hearing under those rules is set out in rule 20 (1), which provides that unless the court directs otherwise, the petition is to be heard by way of affidavits and written submissions or oral evidence. Specifically, rule 20(3) empowers the court, on application



or suo moto, to direct that the petition or a part thereof be heard by way of oral evidence. What is clear beyond peradventure about the 2013 Rules is that there is no hard and fast rule on the mode of hearing of a petition for enforcement of fundamental rights and freedoms. Everything depends on the discretion of the court, informed by the circumstances of each individual case. As has been pointed out consistently, when it comes to exercise of discretion, precedents are of limited value because exercise of discretion is notoriously dicey and depends on the peculiarities of each case, which experience has shown vary immensely. (See *Nanyuki Equator Sacco Co-operative Society Ltd v Nyeri Sacco Society & Another, CA No Nai 86 of 2005*).

111. The record before us shows that after considering the matter, the court directed, on May 13, 2014, that the petition be heard by way of affidavits and written submissions. That is the default position under the rules and it is a direction that the court was validly and lawfully entitled to make. Almost two years after the directions, Lonrho Agribusiness, Mr Too and Mr Korir applied for cross examination of deponents of the various affidavits. By a considered ruling, the trial court declined to vary the directions on the mode of conducting the hearing. The record shows that none of the parties appealed against that ruling.
112. The fact that if we ourselves were hearing the petition would have preferred to conduct the proceedings differently is not sufficient reason to fault the directions that the trial court gave, particularly when the parties had an opportunity to appeal against those directions but elected not to do so and thereby allowed the petition to proceed until conclusion. We are satisfied that from the affidavits by the parties and the annexures thereto, it was possible to appreciate the issues raised by each of the parties and render a fair and just decision thereon.
113. The issue of legitimate expectation, central to the fate of this appeal, and the purpose for which Lonrho Agribusiness surrendered the suit properties are so closely intertwined that we shall consider them together. The purpose for which the suit properties were surrendered will largely determine whether or not the learned judge erred by holding that Sirikwa had legitimate expectation that the suit properties would be allocated to its members. There is no dispute among the parties to this appeal on the core tenets of the doctrine of legitimate expectation; what is in dispute is whether the doctrine is applicable to the facts of this appeal.
114. Regarding the doctrine of legitimate expectation, we do not need to cite more than the Supreme Court of Kenya decision in *Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others* (supra). After an extensive consideration of the meaning and import of the doctrine, the Supreme Court set out the tenets of the doctrine, which we would summarise as follows. Legitimate expectation is a well- established and recognised doctrine in administrative law and arises when, by representation or past practice, an authority raises an expectation in a citizen that it is within its power to fulfil. Legitimate expectation must be founded upon a promise or practice by a public body or authority and the representation must be one that the public authority is competently and lawfully capable of making. Clear words in the *Constitution* or a statute override any contrary expectation, meaning that there can be no legitimate expectation if the representation in question is contrary to the clear provisions of the law. Lastly, a public authority that has made a representation which in law it has no power to make is not barred or precluded from asserting the correct position in law, meaning that no estoppel can arise to enforce as legitimate expectation a representation that is contrary to the law.
115. We need only emphasize that the doctrine has its foundation, justification or *raison d'être*, in the principles of fairness and reasonableness. As was stated by Lord Bridge in *Re Westminster City Council*



[1986] AC 668 at 692, and adopted by this Court Visram, Koome & Otieno-Odek, JJA, as they then were) (Oindi Zaippeline & 39 Others v Karatina University & Anor [2015] eKLR;

' Legitimate expectation is founded upon a basic principle of fairness – that legitimate expectation ought not to be thwarted – that in judging a case a judge should achieve justice and weigh the relative strength of expectation. In *South African Veterinary Council v Szymanski* 2003(4) SA 42 (SCA) at [paragraph 28], the court held that 'the law does not protect every expectation but only those which are 'legitimate.'

116. The appellants submit forcefully that in this appeal, there was no basis for the trial court to hold that Sirikwa had legitimate expectation to be allocated the suit properties because by express provision of the Government Lands Act, the former President who is said to have raised Sirikwa's legitimate expectation, had no power to allocate alienated private land. It is contended that under that Act, the power of the President is limited only to allocation of unalienated Government land. It is also contended that Sirikwa could not have had any legitimate expectation that the suit properties would be allocated to it because those properties were surrendered by Lonrho Agribusiness for the express purpose of converting the title from leasehold tenure under the Registration of Titles Act to freehold tenure under the Registered Land Act.
117. On its part, Sirikwa contends that there was clear and express representation that it would be allocated the suit properties and that indeed Lonrho Agribusiness, in whose name the suit properties were registered at the material time, surrendered the suit properties to the Government of Kenya for the express purpose of settling members of Sirikwa. Subsequently, however, Mr Too and Mr Korir, who were senior officers in Lonrho Agribusiness, fraudulently transferred the suit properties to themselves, and thereafter sold the same to third parties.
118. After a thorough, anxious and, we dare add, laborious and painstaking consideration of the documentary evidence on record in order to unravel this issue, it emerged that whereas there is correspondence and other evidence that applies to all of the suit properties, and to which we shall presently return, five of them, namely LR No 9608,742/2, 12398, 7739/7 and 9607 ('the five properties') are backed by additional, distinct considerations.
119. The evidence on record regarding the representation to Sirikwa that its members would be allocated the suit properties and the eventual surrender of the suit properties is as follows. In October 1998, Sirikwa wrote to the Director of Land Adjudication and Settlement seeking allocation of the suit properties belonging to the East Africa Tanning & Extract Company (EATEC) formerly Lonrho East Africa Ltd, later renamed Lonrho Agribusiness. On October 28, 1998, the former President, Daniel Arap Moi endorsed the application with the words 'Approved'. The suit properties were subsequently surrendered to the Government on November 2, 2000 by the registered owner, Lonrho Agribusiness. There is no dispute that as of the date of Sirikwa's application and approval of the application by the former President, the suit properties were registered as private property in the name of Lonrho Agribusiness. They could only be allocated to Sirikwa by the registered owner, Lonrho Agribusiness rather than by the President under the Government Lands Act.
120. On November 9, 2000, (about a week after the surrender of the suit properties to the Government) Mr JP Hulme, the General Manager of the registered owner of the suit properties, Lonrho Agribusiness, which was previously known as EATEC Ltd, wrote to Sirikwa and stated: -

' RE: Resettlement of Sirikwa Squatters

'The above captioned matter refers:-



Kindly note that the land referred to in your earlier correspondence on the above was surrendered to the Kenya Government on November 2, 2000.

The Specific LR Nos of the land is LR No 9608, 745/2, 12398, 7739/7 and 9607.

We advise you to kindly pursue the above matter with the relevant Government Ministry for the final resettlement of the above squatters on the land already surrendered to the Government.'

Pausing here for the moment, if the specific five properties named above were private land surrendered by Lonrho Agribusiness to the Government for conversion of title and 'transfer to beneficiaries' as contended by Fanikiwa, Mr Too and Mr Korir, one would have expected the General Manager of the registered owner, writing barely a week after the surrender, to indicate as much. But what does Mr Hulme really say? He emphatically states that the five properties had already been surrendered to the Government and requests Sirikwa to liaise with the relevant Government Ministry 'for final resettlement' of its members 'on the land already surrendered to the Government.'

The clear intent manifest in the letter is that the surrender was for purposes of settling the squatters. If indeed the suit properties were surrendered merely for conversion of tenure and transfer to beneficiaries who excluded Sirikwa, it would be expected that the General Manager of the company surrendering the properties would say so upfront. Instead, he states the contrary.

It should also be borne in mind that in an affidavit sworn on April 26, 2007 by David Kiptanui Yego, the Vice Chairman of Sirikwa, he deposed that there was a tripartite agreement between Lonrho Agribusiness, Sirikwa and the Government regarding surrender of parcels of land by Lonrho Agribusiness for settlement of Sirikwa squatters.

Taking the above into consideration, we are satisfied that the trial court did not err in holding that Sirikwa had legitimate expectation that it would be allocated the suit properties. Those properties were surrendered to the Government for the express purpose of settling members of Sirikwa. The surrender was not contrary to the law because it was by the registered owner, who had power and authority to surrender the land and to specify the purpose of the surrender, which was to settle members of Sirikwa. We, therefore, find and firmly hold, that Sirikwa were indubitably entitled to the five properties on the basis of express conferment by Lonrho Agribusiness.

We now turn to examine whether the learned judge erred, as Fanikiwa and the other parties in support of the appeal charge, in holding that Sirikwa were entitled to the entirety of the suit properties by dint of the doctrine of legitimate expectation. As we have already indicated, Fanikiwa charges that the Sirikwa claim is predicated upon a single document, 'a letter allegedly endorsed with the word 'approved' by HE retired President Moi.' Sirikwa contests this, and we also see from the record that there is plenty more.

Now, the letter so endorsed by the retired President was authored by Sirikwa and is deserving of full reproduction;

October 22, 1998

The Director,

Lands Adj & Settlement, Box 30279

Nairobi Dear Sir



Allocation Of Land In the East Africa Tanning & Extract Company (EATEC) Formerly Lonrho East Africa Limited

This is to request you Sir to allocate the squatters whom I am its chairman land No's 9606, 9607, 9608, 742,7739/7/R,

12398, 10793, 12395 and 10794 in the above scheme in

Uasin District respectively.

As workers of this company, we have lived in this land with our children for over 30 years and are landless, since the scheme we have lived in being our ancestral land is being allocated to the public without considering our plight. We are now kindly asking that we be considered and allocated the above plots.

Attached are the names of landless families and members who are squatting in the said farms. We pray that our appeal receives your consideration.

David K Rotich Vice Chairman

The points to note about the letter is that it sought allocation of all the 9 suit properties, which were expressly listed. The basis for the request for allocation was that Sirikwa were workers and children of workers of EATEC/Lonrho EA Limited; they had lived in the land for over 30 years; the suit properties were their ancestral land, and the same were being allocated to the public without consideration of their plight. And the request seems to have found its way to the President who endorsed his approval.

Thereafter followed a chain of correspondence from Government offices regarding settlement of Sirikwa members on the surrendered parcels, which we deem necessary to reproduce for clarity. It is this correspondence that Sirikwa relies upon to bolster its case for legitimate expectation, but which the appellants dismiss as misinformed, lacking legal basis and of no consequence.

121. On October 11, 2001, the Director of Land and Adjudication and Settlement wrote to Sirikwa a letter referenced 'Confirmation of Allocation of Land to Sirikwa Squatters' as follows: -

' Reference is made to your letter dated 12th June 2001 asking my office to confirm allocation of LR Nos 9606, 7739/7, 9608, 745, 742/2, 10794, 12398 to Sirikwa Squatters by Mr AK Cherwon, the former Director of Land Adj & Settlement.
122. This letter is to acknowledge and confirm of (sic) issuance of the above parcels of land to the squatters whom (sic) were workers of EATEC (formerly Lonrho East Africa) namely the Sirikwa Squatters. This was a result of a direct approval and authority by the President and subsequent letter from the Private Secretary/Comptroller of State House (Mr John K Lokorio) communicating the President's directive.'
123. That letter was copied to the President's Private Secretary and Comptroller of State House, as well as the Permanent Secretary, Ministry of Lands and Settlement, for notification.
124. On November 9, 2005, the Director of Land Adjudication and Settlement wrote to the Permanent Secretary, Ministry of Lands and Housing, the reference being, 'Request for Settlement of Sirikwa



Squatters Uasin Gishu District'. He gave a status report on the occupation of the suit properties showing great portions of them were unoccupied, and concluded as follows:

' According to the records held at the Central Land Registry, Nairobi, the above parcels of land formerly belonged to Lonrho Agri-business (EA) Ltd. In the year 2000, they were transferred to the Government of the Republic of Kenya. It is on this basis (transfer) that the squatters are applying for the land. Kindly advise them.'

125. On May 26, 2006, the Director of Land Adjudication and Settlement wrote yet again to the Permanent Secretary, Ministry of Lands, the reference still being, 'Request for Settlement of Sirikwa Squatters-Uasin Gishu District'. The Director was responding to an inquiry from the Permanent Secretary on the purpose for which the suit properties were surrendered to the Government.

' The parcels of land in question, formerly belonging to Lonrho Agri-business (EA) Ltd were allegedly surrendered back to the Government for purposes of resettling the squatters who were at one time the company's workers.'

126. On June 22, 2007, the Director of Land Adjudication and Settlement wrote to the Attorney General stating in the pertinent part thus: -

' The background information that we have is that the subject parcels of and viz., LR Nos. 9606, 9607, 9608, 742/2, 7739/7/R, 12398, 10793, 1239 and 10749 were formerly registered in the names of Lonrho Agribusiness (EA) Ltd.

127. Some of the said parcels like LR No 10793, 10794, 9608 and 9609 were surrendered to the Government of Kenya in the year 2000.

As a department we would have no objection to the formalisation of the squatters' subject to the formal transfer

of the land in issue to the Settlement Fund Trustees (SFT) by the relevant authorities.'

128. Less than a month later, on July 17, 2007, in a letter referencing the suit properties, the Commissioner of Lands wrote to the Attorney General as follows, the reference being the suit properties: -

' The above quoted parcels belonged to Lonrho Agribusiness Ltd (formerly EATEC Ltd). On or about 1998 H E the President of the Republic of Kenya granted a direct approval in favour of M/s Sirikwa Squatters Group for the purpose of relocating and settling the members. The Group constitutes of farmhands and labourers and their families previously engaged by M/s Lonrho Agribusiness (EATEC Ltd)

129. M/s Sirikwa Squatters Group have since gone to court and sued this office to formalise their claimer the parcels (Case Reference NBI HCCC No 435 of 2007 refers). The said parcels were surrendered to the Government of Kenya by Lonrho on or about 2000.

130. The purpose of this letter is therefore to confirm that the allocation to the squatters Group by HE the President still stands and that this office has no objection to formalisation of the squatters occupation subject to normal due and legal process being put in place.'



131. On September 10, 2008, the Commissioner of Lands again wrote to the Attorney General and stated as follows:

' That it is true that at various dates, the title deeds in respect of M/s Lonrho Agribusiness (EA) Ltd were surrendered to the Government and the consideration for the surrender has already been stated in my earlier correspondence (and in any case as shown underneath).'

132. Pausing here again for a moment, it is obvious that in the previous correspondence by the Commissioner of Lands, the properties in question were surrendered to the Government and the consideration was settlement of squatters. See for example, the letter dated July 17, 2007. The Commissioner concluded the letter, after stating that Sirikwa had sued his office to formalize their claim to the parcels, as follows;

' The said parcels were surrendered to the Government of Kenya by Lonrho Agro business Ltd on or about (sic) 2000. The purpose of this letter is to confirm that the allocation to the Squatters Group by HE President still stands and that this office has no objection to formalization of the squatters' settlement subject to normal due and legal process being put in place.'

133. On September 22, 2010, the Commissioner of Lands wrote once more to the Attorney General regarding the suit properties and stated:

' Kindly note that we are on the process of regularizing/formalization of the squatters occupation on the above quoted parcels of land.'

134. On the same date, the Commissioner wrote to the District Commissioner, Uasin Gishu again, on the suit properties and Sirikwa Squatters and stated:

' Reference is made to the unreferenced letter from Sirikwa Squatters Group dated, 29th 2010 requesting for the allocation of the above quoted parcels of land to the squatters of the said group.

Take note that, in order to expedite on the process you should forward to this office the list of vetted squatters to facilitate documentation.'

136. Up to this stage, the correspondence was clear enough that (given their reference to all of the suit properties), they were surrendered to the Government by Lonrho Agribusiness, that the purpose of the surrender was to settle members of Sirikwa, and that the Government was in the process of formalising settlement of the Sirikwa squatters.

137. From the evidence on record in the form of official Government correspondence, the narrative that the purpose of the surrender of the suit properties was for conversion of the tenure from leasehold to freehold and transfer to beneficiaries was belated and started some twelve years after the surrender of the lands. The main proponent of the narrative was Mr Simiyu, then the District Land Officer, Uasin Gishu. On May 31, 2012, Mr Simiyu, a fairly junior officer compared to the authors of the correspondence we have produced above, sent a letter to the Senior Deputy Chief Litigation Counsel, Eldoret, turning the previous narrative on its head. The pertinent part of his letter read:

' This is to confirm to you that the mentioned parcels of land are private property which are not available for allocation to squatters.



The truth is that the surrender of the land was for the purpose of conversion from RTA Cap 281 to RLA (Cap 300) and subsequent subdivisions to create individual subplots.

Indeed the procedure was for the Lonrho Angri-Business (EA) Ltd to surrender the land to the Government of Kenya for conversion purposes.

Then these parcels were registered in the name of Lonrho and have so far been transferred to beneficiaries as evidenced by the official searches I have attached.'

138. Even in the face of Simiyu's letter, which forms the basis of his replying affidavit to Sirikwa's petition in the trial court, the relevant Government offices continued to deny that they were involved in the survey and demarcation of the surrendered properties. Thus for example, in a letter dated May 14, 2008, the very same Mr Simiyu, writing for the District Land Officer, Uasin Gishu informed the Commissioner of Lands as follows:

' Any alleged demarcation of land by Ministry of Lands Official does not exist and has never been contemplated as the survey was carried out by one Kennedy Kubasu of Highland's Surveyors.'

139. And in what is as express an affirmation of Sirikwa's entitlement to the suit properties as can be, he went on to state, based on records and physical visit to the land, as follows;

' I visited the ground in the company of the District Lands Officer and Land Registrar and the ground status is as here below;

LR NO 9608

This is vacant land which at the time of the visit there were animals being grazed on the plot.

There are no people settled on the ground LR 12598,12595, 745, 9606,9607,742,7739, 10793 & 10794

The above parcels are dotted with wattle trees and there are maize stocks from last year's maize, however, the activities going on here is cattle grazing.

On registration process, it should be noted that the original registration under RTA was leasehold but the registration at the District, is freehold. Evidence of purchase of hold interest from the Government could not be traced here, you may wish to refer to files and establish how the leasehold interest was extinguished.

Transfers of these parcels of land has been going on and the normal procedures of and control board consent and payment of Stamp Duty upon valuation has been above board.

In my view the squatters could be easily accommodated on this parcels that have not been transferred to individuals, they are fallow/idle lands that are under-utilized once the ownership problem is sorted out.

RJ Simiyu

For; Uasin District Lands Officer Uasin Gishu'

140. By another letter dated 10th September 2008, the Commissioner of Lands informed the Attorney General, inter alia, as follows, regarding the suit properties:

' 1. That no Ministry official has been engaged in surveying and demarcating the above parcels of land.



2. That I am however informed by the District Lands Officer (Eldoret) that a licensed surveyor may have carried out ground survey for reasons not known to us.'

141. Indeed, the position of the relevant Government offices was consistently to the effect that Sirikwa were entitled to the suit properties. As late as September 22, 2010, the Commissioner of Lands, in letters to the District Commissioner, Uasin Gishu, and to the Hon Attorney General, both copied to Sirikwa, stood on the same premises. In the first, he stated as follows;

RE: Land Reference Numbers/9607, 7739/1-14, 742/2, 9608, 12398,10793,10794,11481, 9609 & 8275 Occupied By Sirikwa Squatters Group

Reference is made to the unreferenced letter from Sirikwa Squatters Group dated July 29, 2010 requesting for the allocation of the above quoted parcels of land to the squatters of this said group.

Take note that, in order to expedite on the process, you should forward to this office the list of vetted squatters to facilitate documentation.

JEO Nyangweso

For Commissioner of Lands

Cc

Sirikwa Squatters Group

Box 927 Eldoret

' The second one advises the Attorney-General, in the context of Nairobi Miscellaneous Application No 435 of 2007, apparently a judicial review application filed by Sirikwa regarding the suit properties, that they (office of the Commissioner of Lands) were 'in the process of regularizing/formalization of the squatters' occupation on the above-quoted lands.'

142. The letters we have referred to are among many others which all spoke the same language: The Commissioner of Lands, the Director of Survey and Settlement and the Attorney General were all aware of Sirikwa's occupation of, and claim to, the suit properties, which had been surrendered to the Government of Kenya and they were all in agreement that the process of regularization or formalization of Sirikwa's claim and occupation needed to be completed expeditiously.

143. We have already held that for the specific five of the suit properties in Hulme's letter, the surrender was for settlement of Sirikwa, and the latter's legitimate expectation to that end was enforceable. We think, from the record, that Sirikwa's expectation with regard to all of the suit properties was equally legitimate and enforceable. Employing the test of the principles enunciated by the Supreme Court in Communications Commission of Kenya & 5 Others v Royal Media Services Ltd (supra), Sirikwa's claim qualifies on all fours, literally;

- a. The many letters we have referred to in this judgment, taken singly, together and in totality, all project an express, clear and unambiguous promise, made repeatedly, by a public authority in the form and manner of the Government officers who authored the letters.
- b. In the full circumstances of the case, given the authority and official positions of the Government officers who made the promise, and that repeatedly, for over a decade, and some of them in the context of litigation, the commitments made by them created in Sirikwa an expectation that was reasonable.



- c. The President's approval of the request, followed by the express confirmations by the Commissioner of Lands, quite apart from the other senior Government officials who also added the authority of their offices thereto, leave no doubt that the representation was made by officers who were competent, and it was lawfully made.
- d. There is no constitutional or statutory provision that is offended or abridged by the representation made.
144. Sirikwa had a plain-to-see legitimate claim to the land which had been surrendered to the Government. The promise and commitment to allocate the suit properties in and of itself violated no law. The correspondence we have cited shows the Commissioner of Lands committing to an expedited formalization or regularization of Sirikwa's allocation and occupation of the suit lands.
145. The import of the fourth element aforesaid is that if there do remain legal or procedural steps to be taken towards the formalization and regularization of Sirikwa's entitlement to the suit properties, it is upon the relevant Government officers to take those steps. That they have not taken or have not completed the said steps does not at all render the promise or representation made to Sirikwa illegal or unconstitutional. If anything, it would be unconscionable and untenable for Government, in the face of such express, unambiguous and consistently repeated promises and representations, to be allowed to resile therefrom, on account of some formal or procedural steps its relevant officers ought to, but have failed to take, to actualize the promise and meet the legitimate expectation.
146. The various representations made were within the Government officers' actual and/or ostensible authority, and they are accordingly binding upon Government to fulfill. We would agree with what Denning MR had to say, more than a half a century ago, in *Lever (Finance) Ltd v Westminster Corporation* [1970] 3 ALL ER; 496 AT 500;
- ' I know that there are authorities which say that a public authority cannot be estopped by any representations made by its officers. It cannot be estopped from doing its public duty. See, for instance, the recent decision of the Divisional Court in *Southend-on-Sea Corp v Hodgson (Wickford) Ltd*. But those statements must now be taken with considerable reserve. There are many matters which public authorities can now delegate to their officers. If an officer, acting within the scope of his ostensible authority, makes a representation on which another acts, then a public authority may be bound by it, just as much as a private concern would be.'
147. Equally persuasive is what Denning J had said a couple of years earlier, in *Robertson v Minister of Pensions* [1948] 2 ALL ER 767 at 770-1;
- ' The case falls within the principle that if a man gives a promise or assurance which he intends to be binding on him and to be acted on by the person to whom it was given, then, once it is acted on he is bound by it: see *Central London Property Trust Ltd v High Trees House Ltd* and *Bob Guinness Ltd v Salomonsen*
- Can it be seriously suggested that having got that assurance, he was not entitled to rely on it? In my opinion, if a government department in its dealings with a subject takes it on itself to assume authority on a matter with which he is concerned, he is entitled to rely on it having the authority which it assumes. He does not know, and cannot be expected to know, the limits of its authority. The department itself is clearly bound, and as it is but an agent for the Crown, it binds the Crown also, and as the Crown is bound, as are the other departments, for they also are but agents of the Crown. The War Office letter, therefore, binds the Crown,



and through the Crown it binds the Minister of Pensions. The function of the Minister of Pensions is to administer the Royal Warrant issued by the Crown and he must so administer it as to honour all assurances given by or on behalf of the Crown.'

148. It is apposite at this point to address, for completeness, an argument raised by Fanikiwa and those other parties in support of the appeal that the promise made by HE the President as well as the Commissioner of Lands and other Government officers to allocate to and resettle Sirikwa on the suit properties was illegal, ineffectual, null and void on account of the suit properties being, at the time, private properties and not unalienated Government land amenable to such allocation under the provisions of the RTA. Sirikwa, on the other hand, contends that the suit properties, having been surrendered to the Government by Lonrho Agrobusiness, were, in fact, public land capable of such allocation. Its particular argument is as follows;

' 24. The alleged surrender for conversion which forms the foundation of the title held by the appellants and resultant sub-divisions is also a fact peculiar and special to the knowledge of the appellants and the other respondents to the petition before the E & L court. We submit that there is an evidential burden that is required of the appellant before the E & L court and this court to demonstrate that proper procedure was followed in the surrender of the suit properties for purposes of conversion and that the provisions of the law were complied with prior to the registration of the suit properties in their favour. That was not done and has not prima facie been in this appeal.

25. We urge the court to take judicial notice of the position that a surrender of land for purposes of conversion from the Registration of Titles Act-repealed to Registered Land Act would as a matter of law entail the following;

- a. The registered owner of land would, in writing request the Commissioner of Lands to approve the conversion or set out the circumstances necessitating the intended conversion.
- b. The Commissioner of Lands would communicate his or her decision on the request. If the Commissioner of Lands accepts the intended conversion, he would set out terms and conditions for the conversion which would ordinarily include change of leasehold tenure, payment of capital value as assessed by government valuer, registration fee, conveyancing fee, stamp duty and survey fees as well as procurement of relevant consents.
- c. Upon complying with the terms and conditions, the Commissioner of Lands would advise the Minister of Lands to gazette the particular land reference number which was to be affected by the conversion. The Chief Land Registrar would then request the Director of Survey to amend the Registry Index Map (RIM) and avail it to the Commissioner of Lands.
- d. The registered owner would then surrender the existing title document.
- e. Upon surrender of the original title document, the Land Administration Department would prepare a transfer of land



for signature and submission to the District Land Registrar to produce the title deed.

- f. The registrar would open a green card and enter the following details therein; tenure, acreage, ownership, locality and plot number.'

149. We did not see any specific rebuttal of this submission. Nor did the affidavits of Mark Too and David Korir counter this argument or provide evidence that the process of surrender for conversion, the narrative advanced by Fanikiwa and themselves, was in fact followed. It would be difficult to disagree with Sirikwa's contention that the conversion of titles from RTA to RLA 'is a process and not an event,' and that it was not shown that it was followed so as to give rise to effective RLA titles.
150. We have carefully explored this aspect of the case and from the record, what emerges is that by a letter dated May 4, 2000 EATEC's General Manager (the same Mr JP Hulme we have referred to), forwarded some seventeen (17) original titles to Mr NPG Warren of Daly & Figgis Advocates.
151. The purpose of the forwarding of these title was this;
- ' Please proceed with registering change of name and surrendering to the Commissioner of Lands as per our various verbal discussions.'
152. Accompanying the said letter was a summary of the titles in question contained in an internal memorandum from EATEC's Personnel and Administration Manager. That memo listed the 17 titles and was prefaced by the explanation that Title Deeds for LR Nos 9606,9607,9608 and 7739/14 were previously charged to Stanchart and must be with Daly & Figgs together with Titles for LR Nos 10793 and 10794 which were charged to BBK Ltd.
153. The immediate point to note is that all of the suit properties are covered in the instructions to surrender the titles to the Commissioner of Lands. EATEC does not make any distinction between the suit properties generally, and the five properties that we already found to have been expressly surrendered for the settlement of squatters. They were all, together with other titles not subject of this litigation, to be surrendered to the Commissioner of Lands. There is no mention of conversion from RTA to RLA.
154. Now, taking but one example, it would seem from the record that the instructions were effected as given and that what was effected was a 'Surrender to the Government of Kenya.' With regard to the 4836-acre LR No 10794, four instruments were registered and entries entered in the extract of title;
- i. Certificate of change of name from East African Tanning Extract Company Limited to EATEC LIMITED, presentation Number 316 registered on June 9, 2000.
 - ii. Certificate of change of name from EATEC LIMITED to Lonrho Agro Industries (EAST AFRICA) Limited under presentation Number 317, registered on June 9, 2000.
 - iii. Discharge of Charge No 3 above under presentation Number 319, registered on June 9, 2000.
 - iv. Surrender to the Government of the Republic of Kenya under presentation Number 164 registered on November 2, 2000.
155. We may as well mention that the LR No 9609 also has entries Numbers 4, 5 and 6 indicating registration of changes of names on May 10, 2000 and, ultimately, a surrender to the Government of Kenya.



- We think, with respect, that on a preponderance of probabilities, the documentary evidence placed before the learned judge sufficed to justify the conclusion he arrived at, that the surrender to the Government of Kenya was not for conversion of the titles for RTA to RLA and that upon a consideration of the provisions of section 44 of the RTA, the suit properties remained public land available for alienation by the Government to Sirikwa. We, too, come to the same inevitable conclusion, the effect of which is that there was, indeed, a legitimate expectation that was not marred by any violation of the Constitution or other written law.
156. We only add, as we leave this aspect of the case, that the most strident voice in asserting that 'private land' was illegally and improperly allocated to Sirikwa, is not Lonrho Agribusiness, the original owner that did the surrender and would thus be the proper party aggrieved, but Fanikiwa, Mark Too and their associates, whose role in the whole business we shall shortly advert to.
 157. The record shows that after surrender on November 2, 2000 of the suit properties, including the five properties identified by Mr Hulme, they were registered in the name of Lonrho Agribusiness under the repealed Registered Land Act and subsequently transferred to various parties among them Mr Too, Fanikiwa and the parties who were joined in the consolidated appeal. From the record therefore, we have the letter of Mr Hulme, the General Manager of Lonrho Agribusiness, stating categorically that the named five properties were surrendered to the Government and advising Sirikwa to follow up with the Government for their settlement. Granted the correspondence from Government offices before Mr Simiyu's letter dated May 31, 2012, we are satisfied that consistent evidence shows that the five properties were surrendered to settle members of Sirikwa and that the later narrative by Mr Simiyu, Fanikiwa, Mr Too and Mr Korir is not credible, and is but a bare faced attempt to justify the transfer of those five parcels of land to Lonrho Agribusiness (the 7th Respondent), and subsequently to themselves.
 158. From the above conclusion, it becomes plainly obvious that the argument that the former President allocated to Sirikwa private land which he did not have power to allocate under the Government Lands Act, is but a red herring. The evidence shows that Lonrho Agribusiness, the registered owners of the five properties, namely LR Nos 9608, 745/2, 12398, 7739/7 and 9607 surrendered them to the Government for the express purpose of allocation to members of Sirikwa. In our view, we do not find anything illegal or irregular in the registered proprietor of property surrendering it for allocation to less fortunate members of society. The true basis of Sirikwa's claim is the voluntary surrender of those parcels by the registered owner, not the 'approval' or concurrence by the former President.
 159. The Government, to which the land was surrendered to settle the squatters, confirmed as much before a few smart alecks, like Mr Simiyu concocted and sold a different narrative much later, to deprive the squatters of the land.
 160. It is convenient at this stage to address the contention by the appellants that it was not possible for Sirikwa to be allocated the parcel of land in issue because Sirikwa was not registered until the year 2006. The evidence on record indicates that Sirikwa was registered as a self-help group with the Ministry of Gender, Sports, Culture and Social Services in 2006. We think that the objection raised in this issue is manifestly misconceived. First and foremost, Sirikwa as a group of squatters existed long before 2006 and was not created as a legal personality by registration as a self-help group by the Ministry. Registration under the Ministry does not have the effect of incorporating the registered entity like registration of a body under the Companies Act or the Partnerships Act does. It is not even a registration like that under the Societies Act.
 161. In our perception, the registration of Sirikwa under the Ministry is not what created or brought Sirikwa into being. Such registration is purely for recognition purpose and to enable the Ministry, consistent



with its cultural and social service mandates, to extend support to the bodies registered under it. There was therefore nothing amiss with Lonrho Agribusiness surrendering parcels of land to be allocated to Sirikwa squatters before registration of Sirikwa with the Ministry of Gender, Sports, Culture and Social Services. Sirikwa's members, as persons of bone and blood, were in existence before 2006 and capable of settlement on land allocated to them by Lonrho Agribusiness. Just as unincorporated bodies can enforce their members' constitutional rights under Article 22(2) (d) of the Constitution, there was nothing to stop Lonrho Agribusiness allocating parcels of lands to members of an unincorporated body known as Sirikwa. (See *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR* and Law *Society of Kenya Nairobi Branch v Malindi Law Society & 6 Others [2017] eKLR*).

162. The next issue for determination is the indefeasibility of the titles created out of the five surrendered properties and registered in the names of Fanikiwa, Mr Too and the other individuals and chargor financial institutions that were joined as respondents in this appeal. It is contended that as bona fide purchasers for value without notice, upon registration as proprietors of the five parcels of land excised from the surrendered parcels, the purchasers acquired clean and indefeasible titles that could not be defeated by Sirikwa.
163. It is not in dispute that under section 75 of the former Constitution, the right to property was firmly guaranteed and protected. Similarly, it is common ground that sections 27 and 28 of the Registered Land Act, repealed, vested in the registered proprietor of land absolute ownership of the registered land and further insulated that ownership from challenge, except in the manner provided in the Act. Section 143 (2) further provided that the register could not be rectified to cancel the title of a proprietor who had acquired the land for valuable consideration and was in actual occupation, unless such proprietor had knowledge of the omission, fraud or mistake on the basis of which the title was challenged or was party to the same through his acts, neglect or default.
164. Upon repeal of the Registered Land Act, these provisions survived and were replicated in sections 25, 26 and section 80 of the *Land Registration Act*, 2012. Section 26 of the latter Act now expressly provides that the certificate of title is prima facie evidence that the person named therein as proprietor is the absolute and indefeasible owner and that the title is not subject to challenge except on the ground of fraud or misrepresentation to which the person is party or where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
165. Article 40 of the *Constitution* of Kenya 2010 protects the right to property in the following terms:
 - ' 40. Subject to Article 65, every person has the right, either individually or in
(1) 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.'

166. The effect of all the above provisions is that registration as proprietor of land confers on the registered owner absolute and indefeasible title, unless it is proved that the registration was procured through fraud, mistake or misrepresentation to which the registered owner was a party. It does not mean, as the appellants submitted, that the title of a registered proprietor cannot be impeached in all and sundry circumstances. The truth is that the title of a registered owner can be challenged and nullified if it is proved that he or she was party to any fraud, mistake, or misrepresentation pursuant to which registration was acquired. That is the reason why section 26 of the Land Registration Act now deems the certificate of title prima facie evidence that the person named therein as proprietor is the absolute and indefeasible owner. As prima facie evidence, registration as proprietor creates a presumption of absolute and indefeasible title, but the presumption can be rebutted by evidence.

167. In *Denis Noel Mukhulo & Another v Elizabeth Murungari Njoroge & Another [2018] eKLR*, where an argument on indefeasibility of title similar to that made by the appellants in this appeal was advanced, this Court expressed itself as follows:

' While we agree with the appellants that title registered under the Registered Land Act was sacrosanct, we are not able to agree that the Act protected title registered under it in all and sundry cases, irrespective of how the title was acquired. By section 27 of the Act, the registration of a person as a proprietor of land vested in him the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto, while section 28 of the Act insulated the rights of a proprietor from challenge except in the manner set out in the Act, which really does not afford the blanket protection that the appellants claim it did. Section 143 of the Act, which granted the court power to order rectification of the register provided as follows. The effect of the above provision is that the court had power



to order rectification where the registration was obtained by fraud or mistake to which the registered person was party.'

168. There are many decisions from all levels of our courts where the courts have consistently refused to recognise and protect title to land if it has been obtained illegally or fraudulently. Mere registration as proprietor by and of itself is not conclusive evidence of ownership; it is prima facie evidence, which may be displaced by evidence of fraud, misrepresentation or mistake to which the registered person was party. (See for example, *Munyu Maina v Hiram Gathiba Maina [2013] eKLR*, *Arthi Highway Developers Ltd v West End Butchery Ltd & 6 Others [2015] eKLR*, *Kenya National Highway Authority v Shalien Masood Mughal & 5 Others [2017] eKLR*, *Chemey Investments v Attorney General & 2 Others [2018] eKLR* and *Mangrove Investments Ltd v Attorney General & Another [2020] eKLR*).
169. In this appeal, Mr Too, as the chairman of Lonrho Agribusiness (EA) Ltd. at the material time and as the majority shareholder, director, brain, and mind of Fanikiwa, was certainly aware of the real purpose for the surrender of the suit properties referred to by Mr Hulme, which was to settle members of Sirikwa. That purpose was affirmed consistently and over a considerable period of time by Government Ministries and offices responsible for land matters. It debunks the assertion by Mr Too and Fanikiwa that they were bona fide purchasers of the specific surrendered properties for settlement of Sirikwa members for value without notice. The close proximity between themselves and Lonrho Agribusiness makes their contention a sheer smokescreen that is easy to see through. It is difficult to believe that from their vantage positions in this matter, they were unaware that the suit properties were specifically surrendered to settle members of Sirikwa.
170. Even more telling, however, which speaks to a grand land grab perpetuated by Mr Too and his associates, the picture that emerges from a scrutiny of the record is that he could not by any stretch of the imagination have been an innocent purchaser for value without notice, that darling of Equity. We have already observed that his and Mr Korir's affidavits, in the face of the detailed claims by Sirikwa, were remarkable in their scantiness and silence on matters that should have been in their knowledge. We have already referred to the sale agreement of September 30, 2003 – more than 3 years after Lonrho Agribusiness (EA) surrendered the suit properties to the Government of Kenya. That agreement, though on its face indicating itself as being between Lonrho Agribusiness and Mark Too, in the body, at the recitals, claims to be between the former as the vendor, and Fanikiwa Limited, as the purchaser. Mark Too is named as party number 3 to the agreement, but is assigned no role, being called merely 'Mr Too' as we have already observed.
172. Whereas clause 4 of it speaks of a deposit of 10% of the purchase price to be paid by the purchaser (which must mean Fanikiwa), on or before the date of the agreement, the agreement does not say that payment of the same is made or acknowledged, by the execution of the agreement. Indeed, there is no proof of any kind that the said deposit was paid by Fanikiwa. Nor is there direct or any proof that the balance of the purchase price was ever made in accordance with clause 5.2 on the completion date, which is defined as '45 days after the signing of this agreement' under clause 1(a).
173. Thus, Mark Too's claim, not having been the purchaser under the agreement, that he lawfully purchased the said land parcels for consideration while referring to the agreement, is a curiosity. And all he says about that payment is that he 'paid the full consideration for the purchase of the said parcels' through his advocates. He does not say how much money he paid, on which dates, and by what means. Nor does he display copies of cheques, bank statements, receipts or other evidence of such payment. What we see on record, instead, is a letter dated July 23, 2013, a full decade later, from Raffman Dhanji Elms & Virdee Advocates.



174. That letter is addressed to no one in particular. It is 'To whom it may concern.' It then goes on to say that the lawyers are writing on the Instructions of Hon Mark Kiptabei Too. Next, it literally amends the agreement by claiming that they acted for Mr Too and Fanikiwa 'jointly referred to as the Purchaser.' The agreement, as we observed, referred to Fanikiwa only as the purchaser. The advocates go on to say that they paid the purchase price of One Million Sterling Pounds and Kshs 31 Million to the vendor's advocates. Like Mr Too, the advocates in the wholly gratuitous letter, addressed to no one in particular, do not give details of the when, and by what means, they made the payments.
175. All of this information would have been specially and peculiarly in the knowledge of Mark Too in asserting that he was a bona fide purchaser for value, but he did not offer it. There is no proof, in the face of frontal challenge to their alleged valid purchase of the suit lands or part thereof, that Fanikiwa paid the purchase price. That, to our mind, deals a fatal blow to their claims to being bona fide purchasers for value without notice.
176. The *Black's Law Dictionary, 8th Edition*, defines a bona fide purchaser as:
- ' One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.'
- (See also *Athi Highway Developers Ltd v West End Butchery Ltd & 6 Others* [2015] eKLR).
177. Mr Too and Mr Korir also contended that all the genuine squatters on Lonrho Agribusiness's lands were settled and that Sirikwa was an amorphous group of self-seekers. In our minds, this was an unconscious or unwitting confirmation of Sirikwa's assertion that there had been discussions and Lonrho Agribusiness had agreed to allocate land to settle Sirikwa's members. There are, however, three basic problems with the contention that the genuine squatters were settled by Lonrho Agribusiness. First, Mr Korir gave a paltry list of 73 people as the squatters who were settled, begging the question whether those were the people working on Lonrho Agribusinesses huge estates of approximately 25,000 acres, according to Mr Simiyu. Second, whilst Mr Too was very meticulous in identifying the parcels of land that had been acquired by himself and Fanikiwa, there was no such specificity about the parcels of land on which the genuine squatters were settled. Lastly, if indeed the genuine squatters were settled, how could Government officers, shortly before Sirikwa lodged its petition, have been confirming that they were at an advanced stage of settling the Sirikwa squatters? We do not think the contention by Mr Too and Mr Korir is credible, and we reject the same.
178. Turning to the respondents and the financial institutions who were joined to this appeal, we are satisfied that they were true innocent purchasers for value without notice. There is absolutely no evidence that they were party to the scheme to take over for themselves the five parcels of land that were surrendered for settlement of Sirikwa members. They conducted due diligence and there was nothing to alert them that there was anything amiss with the titles to the properties they were purchasing or charging. The purchasers paid good money and the financial institutions advanced substantial sums of money to the innocent purchasers of the properties excised from the suit properties on the security of their titles. There being no evidence that these respondents were party to any fraud, misrepresentation or mistake in the registration of the impugned titles, we would uphold the validity of their titles.
179. Since the promulgation of the *Constitution* of Kenya 2010, there has been a lack of clarity as to where an innocent purchaser for value without notice stands when their title to land is challenged. One school of thought, represented by decisions like *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR takes a strict position that once it is proved that the original holder of title had acquired it unlawfully, the title



is null and void and any subsequent purchaser of that property cannot obtain a good title. It does not matter whether the purchaser was an innocent purchaser for value without notice or not. The original owner who did not have a good title cannot pass a good title. That is quite appealing legal logic. In the above case the Court reasoned as follows:

' When a registered proprietor's root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.'

180. The other school of thought takes the view that under our land registration system which is underwritten and guaranteed by the State as to its correctness and accuracy, a purchaser for value, who has conducted the requisite due diligence, has no notice of iniquities in the title and is not party to any fraud, mistake or misrepresentation said to vitiate the title, should be able to obtain a good title. This school of thought is reflected in, for example, *David Peterson Kiengo & 2 Others v Kariuki Thuo*, [2012] eKLR where a seller obtained title fraudulently and sold the land to innocent parties. After noting that there was no elegant way of resolving the problem confronting it, the court proceeded thus:

' 13. There is only a pragmatic way of doing so. It is in keeping with the objectives of the Registered Lands Act, and, indeed, the entire system of registration of land in Kenya. The Registered Lands Act is based on the Torrens' System. Under this system, indefeasibility of title is the basis for land registration. The State maintains a central register of land title holdings which is deemed to accurately reflect the current facts about title. The whole idea is to make it unnecessary for a party seeking to acquire interests in land to go beyond the register to establish ownership. The person whose name is recorded on the register holds guaranteed title to the property. Since the State guarantees the accuracy of the register, it makes it unnecessary for a person to investigate the history of past dealing with the land in question before acquiring an interest. That this is the essence of the Torrens System was stated as early back as 1891 in the case of *Gibbs v Messer* (1891) AC 254:

'The main object of the Act, and the legislative scheme for the attainment of that object, appear to be equally plain. The object is to save persons dealing with registered proprietors from the trouble and expense of going behind the register, in order to investigate the history of their author's title, and to satisfy themselves of its validity. That end is accomplished by providing that everyone who purchases, in bona fide and for value, from a registered proprietor, and enters his deed or transfer of mortgage on the register, shall thereby acquire an indefeasible right, notwithstanding the infirmity of his author's title.'

14. Practically, the principle of indefeasibility has two implications for the instant case. It means that if the parties who acquired interests to the properties from Njendu can demonstrate that they did so in good faith, without notice and did not participate in Njendu's fraud, their titles will be secure and guaranteed by the State. They were not obligated to do anything more than search the official register to establish ownership. If, as it turned out, the register was inaccurate by reason of malfeasance by land officials, the second implication is that the parties deprived of their property by such inaccuracy or malfeasance may bring



an action against the State for recovery of damages but not for possession or ownership of the property.

15. In my view, this statement of the law suggests the prima facie resolution of the case: In as long as, at this stage, it cannot be demonstrated otherwise, the assumption is that

181. David Peterson Kiengo; Nkiiri Victor Michuru; and Kenakena Investments Ltd on the one hand; and Fountain on the other are bona fide purchasers for value without notice. They had no obligation to go beyond the register to investigate Njendu's title and satisfy themselves of its validity.'
182. The situation we find ourselves in presents a quagmire, not unlike that presented in the sale of goods by the memo dat quod non habet rule, whose import is that no one can give what he does not have. Lord Denning eloquently captured the dilemma and how it has been solved in *Bishopsgate Motor Finance Corporation v Transport Brakes Ltd [1949] 1 KB 332*, as follows:
184. In the development of our law, two principles have striven for mastery. The first is the protection of property; no one can give a better title than he himself possesses. The second is for the protection of commercial transactions; the person who take in good faith and for value without notice should get a better title. The first principles had held sway for a long time but it has been modified by the common law itself and by statute so as to meet the needs of our times.'
185. The willy nilly nullification of titles of innocent purchasers for value without notice who have conducted due diligence and relied on a register whose correctness is guaranteed and underwritten by the State may look like sound legal logic, but it is bound to create more problems than it solves. The whole justification for the introduction of land registration system in Kenya was to avail the land to the market for innocent sellers and purchasers and to enable registered owners to use the land as collateral for loans from financial institutions like those before us. If the register now means absolutely nothing, we might as well forget these objectives of land registration. The implications for innocent individual Kenyans in particular and the national economy in general, are depressing to fathom. We think the case for protection of the *bona fide* purchaser for value without notice is as valid as ever. That protection, however, does not extend to a purchaser who has failed to conduct due diligence or has been complicit in the misrepresentation, mistake, fraud or illegality that is said to vitiate the title.
186. What we have stated above resolves simultaneously the issue of legitimacy of the allocation to Sirikwa of the surrendered suit properties as well as that of the titles held by Fanikiwa, Mr Too and the enjoined respondents which were excised from the said parcels. That leaves the cross-appeal by Sirikwa against the part of the judgment of the trial court that awarded 27 hectares to Mr Too. Having found that Mr Too was part and parcel of the misrepresentation and fraudulent allocation and transfer to himself and Fanikiwa of the parcels of land that were expressly surrendered for settlement of the Sirikwa squatters, we find no basis or justification for the award of the 27 hectares to Mr Too. Mr Too was simply the prime mover in the scheme to swindle Sirikwa of the surrendered land and cannot be described by any stretch of imagination as an innocent purchaser. The transaction relating to the 27 hectares was tainted by fraud and misrepresentation and was completely unworthy of protection by the court. Accordingly, we allow the cross-appeal and set aside the part of the order that awarded 27 hectares to Mr Too.
187. Our final orders shall be as follows:
- i. The consolidated appeals, namely Civil Appeals No 44 of 2017, 45 of 2017 and 68 of 2017 are hereby dismissed.



ii. The judgment of the Environment and Land Court dated February 9, 2017 is varied to the extent that the nullification of the titles of the individual and financial institution respondents who were joined to this appeal is hereby set aside.

iii. The cross-appeal by Sirikwa is hereby allowed.

iv. Costs of the consolidated appeal and cross-appeal shall be borne by the appellants.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 18TH DAY OF NOVEMBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

