IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, J. MOHAMMED & OTIENO-ODEK, JJ.A)

CIVIL APPEAL NO. 51 of 2016

BETWEEN

CHIEF LAND REGISTRAR ……..…….....1ST APPELLANT

REGISTRAR OF TITLES ……..……..2ND APPELLANT

MINISTRY OF LANDS ……..…….. 3RD APPELLANT

DIRECTOR OF SURVEY ……..……..……. 4TH APPELLANT

ATTORNEY GENERAL…….....5TH APPELLANT

AND

NATHAN TIROP KOECH ……...…...…. 1ST RESPONDENT

ZACHARIA KIMUTAI KOSGEI ……..……. 2ND RESPONDENT

EZEKIEL KIPTOO ……..……. 3RD RESPONDENT

ERNEST KIBET ……..……..…... 4TH RESPONDENT

NATIONAL LAND COMMISSION ……..……..…… 5TH RESPONDENT

CONSOLIDATED WITH

CIVIL APPEAL NO. 58 OF 2016

BETWEEN

THE NATIONAL LAND COMMISSION ……...…….……..APPELLANT

AND

NATHAN TIROP KOECH ……...…...…. 1ST RESPONDENT

ZACHARIA KIMUTAI KOSGEI ……..……. 2ND RESPONDENT

EZEKIEL KIPTOO ……..……. 3RD RESPONDENT

ERNEST KIBET ……..……..…... 4TH RESPONDENT

(Being an appeal from the judgment of the Environment and Land Court of Kenya at Eldoret (Ombwayo, J.), dated 15th April 2016

in

Eldoret ELC Petition No. 1 of 2013)

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JUDGMENT OF THE COURT

1. Land ownership and land rights is both a historical and emotive subject in Kenya. A right to hold property is a constitutional right as well as a human right and no person can be deprived of his property except in accordance with the provisions of the Constitution or Statute. The condition precedent to taking away anyone's property is that the authority must ensure compliance with the Constitution and Statutory provisions. This appeal relates to an alleged acquisition, seizure and subsequent sub-division of the 1st to 4th respondents' land without following due process of law. At the centre of the dispute between the parties is the protection of private property as enshrined in **Section 75** of the retired Constitution and **Article 40** of the 2010 Constitution. The suit property is Land Reference No. I.R. 17542 (L.R. 10492) situate in Eldoret Municipality measuring three thousand two hundred and thirty six (3,236) acres.

2. The 1st to 4th respondents contend that at all material times, they were registered proprietors of Land Reference No. I.R. 17542 (L.R. 10492). That the Government of Kenya, through the appellants fraudulently, unlawfully and without following the procedure laid down for compulsory acquisition of land acquired and sub-divided portions of the suit property and allotted it to various individuals and public entities without the knowledge and consent of the registered proprietors. It is contended that due to illegal acquisition and fraudulent sub-division of the suit property, the appellants are liable to compensate the 1st to 4th respondents the value of the illegally and unconstitutionally acquired portions of the suit property.

3. ***Section 75(1)*** of the retired Constitution of Kenya stipulate as follows:

> ***"75 (1) No property of any description, shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except where the following conditions are satisfied:***
>
> ***(a) The taking of possession or acquisition is necessary in the interest of defence, public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote public benefit; and***
>
> ***(b) The necessity thereof is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property; and***
>
> ***(c) Provision is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."***

4. The protection of private property as guaranteed under **Section 75(2)** of the retired Constitution is sustained under the provisions of **Article 40** of the 2010 Constitution. In relevant excerpts, **Article 40 (2), (3), (4)** and **(6)** provide as follows:

> ***"40 (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 ….***
>
> ***(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) ….***
>
> ***(6) The rights under this Article do not extend to any property that has been found to have been unlawfully acquired."***

5. By Petition dated 12th February 2013 as amended on 29th September 2014, the 1st, 2nd, 3rd and 4th respondents filed Petition No. 1 of

2013 at the Eldoret Environment and Land Court as administrators of the ***Estate of Thomas Kipkosgei Yator*** and ***William Kimngeny arap Leting***.

6. The facts giving rise to the cause of action is that on 28th June 1965, five individuals namely Mr. Thomas Kipkosgei arap Yator; Mr. William Kimngeny arap Leting; Mr. Nathaniel Chelugui; Mr. Noahn Kimngeny and Mr. Cherwon arap Maritim purchased the suit property being IR No. 17542 – LR No. 10492 measuring 3,236 acres (less 26 acres road reserve) from Mr. Jacobus Hendrick Engelbreacht as purchasers in common with equal shares at a consideration of Ksh.360,000/=. The purchase sum comprised the purchasers' own savings and a loan from the then Land and Agricultural Bank. The purchasers fell in arrears in repaying the loan and the joint purchasers made a decision to sell a portion of the suit property measuring 51.49 hectares (126 acres) to Huruma Farmers Company Limited and the proceeds of sale were applied in offsetting the entire debt due and owing to the Land and Agricultural Bank.

7. On 7th August 1976, the joint owners applied to the Turbo-Soy Land Control Board for consent to sub-divide the suit land into six (6) portions out of which five (5) portions would be registered in the individual names of the joint owners while the 6th portion measuring 51.49 ha was to be transferred to Huruma Farmers Company Limited. The application for sub-division was allowed on 12th October 1976. The 1st appellant, the Chief Land Registrar, approved the sub-division and thereafter the 1st to 4th respondents' surveyor proceeded to survey the suit property and prepare the necessary sketch and survey maps.

8. On 24th January 1980, Mr. R.L. Aggarwal, Advocate for the 1st to 4th respondents forwarded the Title Grant for the suit land to the 1st appellant (Chief Land Registrar) for purposes of surrender and issue of separate title deeds as per the approved sub-divisions. The letter forwarding the Grant reads as follows: ***"In accordance with instructions of my clients, I forward to you herewith Grant I.R. 17542. I shall be grateful if you will now issue separate Title Deeds for the different sub-divisional sections."*** By a letter dated 23rd February 1980, the Commissioner for Lands in a letter to Mr. R.L Aggarwal Advocates acknowledged receipt of the Grant No. IR 17542.

9. In their Petition, the 1st to 4th respondent petitioners aver that it was their expectation that the Chief Land Registrar would upon completion of the sub-division issue five title deeds each to the joint purchasers with an equal acreage of land measuring 614 acres per individual. The net acreage for the five joint owners was to be 3,069 acres. Other titles were to be issued to Huruma Famers Company Limited for 126 acres; 26 acres for road reserve; and 15 acres to Eldoret Municipality to be utilized for foul sewage.

10. The cause of action and complaint in the Petition is that the Chief Land Registrar failed to divide the suit property in five equal portions and further failed to issue title deeds to the five original joint owners as per the sub-division plan; that each of the five joint owners was entitled to 614 acres of land; that the appellants have failed to account for the original title of the suit property and a total acreage of 3,069 acres.

11. In the Petition, it is contended that while the original five joint owners were each expecting and waiting to receive a title deed for 614 acres of land, lo and behold, in January 1996, the Estate of Thomas Kipkosgei arap Yator was registered as owner of land parcel Eldoret Municipality (King'ong'o) Block 21/306 measuring only 21.239 Ha. (Approximately 52.48 acres). Prior to being registered as proprietor of Eldoret Municipality (King'ong'o) Block 21/306, the late Mr. Yator had sold 15 acres of his land to third parties. Noting that he expected 614 acres of land, he lost 546 acres of land which remains unaccounted for by the appellants.

12. It is contended that on the part of the Estate of William Kimngeny arap Leting, the Chief Land Registrar did not apportion him any piece of land. The deceased had sold 10 acres of land to a one Nderu before his title deed was issued. The net effect is that the Estate of William Kimngeny arap Leting lost 604 acres which the respondents have failed to account for.

13. The 1st to 4th respondent petitioners aver that in furtherance of the illegal and unlawful acquisition and sub-division of the suit property, the appellants' illegally sub-divided the land as follows:

(a) In April 1979, 666.41 Ha of the suit land was excised without consent of the joint owners and renamed Eldoret Municipality Block 15/1 and registered in the name of the original five joint owners namely Mr. Thomas Kipkosgei arap Yator; Mr. William Kimngeny arap Leting; Mr. Nathaniel Kiptalam arap Lagat; Mr. Noah Kimngeny Chelugui and Mr. Cherwon arap Maritim although the lease title was never issued to them.

(b) In September 1983, the said parcel of Eldoret Municipality Block 15/1 was apparently surrendered to the Government of Kenya.

(c) In November 1992, the remaining portion of LR No. 10492 (about 641 ha) was amalgamated and renamed Eldoret Municipality (King'ong'o) Block 23/1-355.

(d) Both Block 15/1 and Block 23/1-355 were later sub-divided and hundreds of title deeds were issued.

14. In their Petition, the 1st and 4th respondent contend that the appellants breached the petitioners' constitutional rights particulars whereof are:

(i) Excising 666.41 Ha of the suit land without the knowledge and consent of the registered owners.

(ii) Causing Lease Title for Eldoret Municipality Block 15/1 to be surrendered to the Government of Kenya without knowledge or consent of the registered proprietors.

(iii) Issuing to 3rd parties hundreds of freehold and lease hold title deeds that were apparent products of sub-division of Eldoret Municipality Block 15/1 and Eldoret Municipality Block 23/1-355.

(iv) Violating the respondent's constitutional right to own land and have quiet enjoyment and exert all rights over it.

(v) The appellants exceeding their statutory jurisdiction and powers conferred upon them as Commissioner of Lands, Chief Land Registrar, Registrar of Titles and Director of Survey.

(vi) Seizing private land of the registered owners without their knowledge and consent.

15. The 1st to 4th respondent petitioners contended that the appellants unlawfully apportioned large swathes of the suit land to individuals, Government Departments and State Corporations namely:

(a) 4.05 Ha. to Police Rifle Range.

(b) 17.65 Ha. to Kenya Ports Authority.

(c) 36 Ha. comprised in Eldoret Municipality Block 15/10 acquired vide verbal instructions from Comptroller of State House.

(d) 11.017 Ha. comprised in Eldoret Municipality Block 23 (King'ong'o) registered in the name of the Government of Kenya.

(e) Unknown number of Hectares acquired for Kenya Pipeline Corporation.

(f) Unknown number of Hectares under roads of access to Kenya Ports Authority.

(g) 666.41 Ha. comprised in Eldoret Municipality Block 15/1 allegedly surrendered to the Government of Kenya.

(h) 661 Ha. comprised in Eldoret Municipality Block23 (King'ong'o).

(i) Unlawful allocation of land to H.E. Daniel arap Moi being LR No. Eldoret Municipality/Block 15/230 measuring 21.454 ha.

(j) Unlawful allocation of land to Hon. Stanley Metto being Eldoret Municipality Block 15/238 measuring 1.8065 ha.

16. In the Petition, it is averred that as a result of the unlawful acts of the appellants, the Estate of the deceased as represented by the 1st to 4th respondents suffered loss as follows:

(a) Estate of Thomas Kipkosgei arap Yator – loss of 546 acres of land which translates to pecuniary loss of Ksh.3,736,070.381/23 billion.

(b) Estate of William Kimngeny arap Leting – loss of 604 acres of land which translates to pecuniary loss of Ksh.4,132,942,326/49 billion.

(c) Loss of user and income from the suit land for over 30 years.

17. The 1st to 4th respondents sought the following orders from the trial court:

(a) A declaration that the proprietary interest in 546 acres and 604 acres of land comprised in Land Parcel IR No. 17542 - LR No. 10492 otherwise known as Eldoret Municipality Block 15/1 and Eldoret Municipality Block 23 (King'ong'o) vests absolutely in the 1st to 4threspondents in this appeal respectively as co-owners.

(b) A declaration that the 1st to 5th appellants seizure of the deceased's estates property comprised in IR No. 17542 LR - No. 10492 otherwise known as Eldoret Municipality Block 15/1 and Eldoret Municipality Block 23 (King'ong'o) other than by way of compulsory acquisition, without consent or compensation was unconstitutional.

(c) A declaration that the sub-division by the 1st to 5thappellants of Land Parcel IR No. 17542- LR No. 10492 otherwise known as Eldoret Municipality Block 15/1 and Eldoret Municipality Block 23 and transfer of resultant title deeds to third parties violated the proprietary rights of the 1st to 4th respondents under Article 75 of the retired Constitution and Article 40 of the 2010 Constitution.

(d) An order of Mandamus to compel the 1st to 5th appellants jointly and severally to pay the Estate of Thomas Kipkosgei arap Yator Ksh.3,736,070.381/23 billion being fair compensation for loss of 546 acres of the suit land.

(e) An order of Mandamus to compel the 1st to 5th appellants to pay the Estate of William Kimngeny arap Leting Ksh.4,132,942,326/49 billion being fair compensation for loss of 604 acres of the suit land.

(f) An order of Mandamus to compel the 1st to 5th appellants herein to jointly and severally pay the 1st to 4th respondents mesne profits in the sum of Ksh.2,690,603,339/= billion for loss of user of the suit land for over 30 years.

18. In opposing the Petition, the appellants denied all allegations and filed replying affidavits thereto. Negating the factual assertions, the appellants rebutted that they illegally, unlawfully and unconstitutionally violated the private property rights of the 1st to 4th respondents. In a replying affidavit dated 20th March 2015 deposed by Ms. Dorothy Letting, the appellants refute the allegations and state:

(a) The 1st to 4th respondents cannot claim compensation for the whole of LR No. 10492 comprising of 3,236 acres of land because they had sold parts of it comprising Blocks 21 and 23.

(b) The 1st to 4th respondents sold 120 acres of the suit land to squatters who had grouped and called themselves Huruma Farm.

(c) The 1st to 4th respondents surrendered part of LR No. 10492 to the Government for public utility i.e. roads, sewerage and Police Rifle Range.

(d) Other parts of LR No. 10492 were compulsorily acquired by the Government and full compensation made. The portions of LR No. 10492 compulsorily acquired by the Government is now known as Eldoret Block 15/12/ 237 and 238 which portions were acquired vide Gazette Notice No. 5947 and 5948 for Kenya Ports Authority.

19. In a replying affidavit deposed by Mr. George Opiyo of Kenya Ports Authority (KPA) and dated 13th September 2013, KPA avers that through the process outlined in the Land Acquisition Act, it acquired parts of Eldoret Block 15/237, Block 15/238 and Block 15/12 for purposes of establishing an Inland Container Depot in Eldoret; all these three Blocks were part of IR No. 17542 LR 10492; that KPA paid the beneficiaries of the parcels acquired after determination by the High Court in **Eldoret HCCC No. 80 of 1988 (Kaptingei Chemgor vs. Noah Chelungui)** as to who were the beneficiaries entitled to payment. It was averred that in Eldoret HCCC No. 80 of 1988, it was decreed that Mr. Kaptingei Chemgor was to receive compensation from KPA for 17.54 acres. In **Eldoret HCCC No. 80 of 1988 (Kaptingei Chemgor vs. Noah Chelungui,** at paragraph 9 of the Plaint it was averred that Noah Chelungui (one of the original five joint owners) sold 59 acres being part of the suit land known as Kapkoros Farm to Rai Plywood (K) Limited. In 1982, the said Noah Chelungui sold his 54 acres to H.E. Daniel arap Moi.

20. The appellants refuted any unlawful conduct and alleged that the cause of action if any, by the 1st to 4th respondent was extinguished by the doctrine of laches.

21. The trial court (Ombwayo, J.) upon hearing the parties to the Petition by way of affidavit, site visit and submissions, delivered judgment dated 15th April 2016. The judge expressed:

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

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

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

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

4. An Order of Mandamus to compel the 1st to 5th respondents to jointly and or severally pay:

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

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

5. An order of Mandamus to compel the 1st to 5th respondents to jointly and or severally pay the petitioners mesne profits in the sum of Kshs.2,690,603,339/= billion for loss of user for over 30 years is declined as the petitioners did not mitigate their loss by commencing their claims within reasonable time even after the so called change of regime in the year 2002. However, the court is inclined to award a nominal figure of Ksh.500,000,000 as mesne profits. Costs of this Petition are hereby awarded to the Petitioners. Orders accordingly."

22. Aggrieved by the judgment, declaratory orders and the decree of the trial court, the appellants lodged the instant appeal citing the following repetitive and verbose grounds in the Memorandum of Appeal.

1) The judge erred in failing to hold that the 1st to 4th respondents had no locus to institute the Petition.

2) The judge erred in failing to dismiss the Petition on the ground that it had been filed long after the cause of action had arisen and the reason for delay had not been given.

3) The judge erred in failing to dismiss the Petition yet what the 1st to 4th respondents complained about had neither been set out with reasonable degree of precision nor the relevant provisions allegedly infringed cited nor the manner of infringement specified.

4) The judge erred by failing to appreciate that the deceased joint owners of the suit property never made effort to vindicate their alleged rights; they had slept on their rights and acquiesced to the alleged violations and hence the Petition was an afterthought and the Administrators of their Estate had no right to institute it.

5) The judge failed to appreciate that the ownership of the suit land by the original owners had not been proved to the standard required by law and hence the administrators had no right to institute the Petition on behalf of their Estate.

6) The judge erred by failing to find that all the transactions in respect of the suit land were above board and done pursuant to the provisions of law and were perfectly legal.

7) The judge erred by holding that the rights of the 1st to 4th respondents over the suit land were violated when they had no such rights and there was no evidence of any infringement.

8) The judge erred by failing to appreciate that the suit land was being claimed by about 60 people as set out in Eldoret HCCC No. 80 of 1988 and hence the judge fell in error by assuming that it was only the 1st to 4th respondents who were claiming the suit property.

9) The judge erred in granting an order of mandamus in favour of the 1st to 4th respondents when a case for granting the same had not been proved.

10) The judge erred by awarding damages based on wrong principles of law.

11) The judge failed to appreciate that the acreage of land claimed by the 1st to 4th respondents was much smaller than what they alleged to have been their entitlements.

12) The judge erred in relying on a valuation report and loss of user report that were faulty and made by a person whose expertise had not been proved.

13) The judge erred by awarding damages which was manifestly high.

14) The judge erred by failing to appreciate that the appellants were not trespassers on the suit land and hence mesne profits could not be granted against them.

15) The judge misdirected himself on the law on mesne profit.

23. At the hearing of this appeal, Senior Principal State Counsel Mr. Kepha Onyiso and State Counsel Mr. Wabwire appeared for the appellants. Learned Counsel Mr. J. Kipnyekwei appeared for the 1st to 4th respondents while learned counsels Messrs. Ochieng B.P. and Mr. Biko appeared for the 5th respondent. All parties filed written submissions and list of authorities in the matter.

24. Counsel for the appellants submitted that from the evidence on record, the persons interested in the suit land were more than the five original joint owners; that pleadings in ***Eldoret HCCC No. 80 of 1988 (Kaptingei Chemgor vs. Noah Chelungui)*** clearly shows that as at 1965, there were other persons interested in the suit property. Counsel cited paragraphs 3 and 4 of the Eldoret Plaint where it was averred that ***"In 1969, the land was through a resolution of all the members of the partnership sub-divided into 3 portions and it was agreed that Daniel Lagat would share his portion with 28 members; William Leting would share his portion with 12 people and that Martim Cherwom Maru and Noah Kimngeny Chelugui would share their portions with 24 members. That in 1975, it was resolved by members of the partnership that they would sell 137 acres to Huruma Farmers Company Limited to enable them pay off a Bank Loan."***

25. Counsel for the appellants submitted that since there were other beneficiaries of the suit property, the 1st to 4th respondents had no locus to institute the suit for the benefit of the Estates of the deceased to the exclusion of other beneficiaries. Counsel reiterated that because many other people were entitled to and were beneficiaries in the suit land, it was an error on the part of the trial court to find that Mr. Thomas Kipkosgei arap Yator was entitled to 546 acres and Mr.William Kimngeny arap Leting was entitled to 604 acres.

26. The appellants faulted the trial judge for not finding the Petition was time barred due to the doctrine of delay and laches. The cause of action arose over thirty years ago way back in the1980s; the 1st to 4th respondents ought to have filed the Petition within a reasonable time from when the cause of action arose; there has been no reasonable explanation for delay in filing the Petition; the Petitioners slept on their rights and are guilty of laches and indolence; their rights, if any, are stale and unenforceable; the appellants have been prejudiced by the late filing of the Petition as most of their witnesses are either dead or have retired from public office. In this context, we remind ourselves the observations made in **Republic vs. Attorney General & 3 others Ex-parte Kamlesh Mansukhlal Damji Pattni [2013] eKLR** where it was expressed:

The reality is that unless trial begins and concludes without unreasonable delay, an accused person's constitutional rights are violated not only because of the delay but also because of other incidental consequences of delay such as loss of memory of witnesses, witnesses falling by the wayside in one way or another, and loss of documents among other pertinent considerations.

27. In auxiliary challenge to the findings of the trial court, the appellant contend that the Petition was not drawn with precision as the claim and complaint against the appellants is not clear. In support, counsel cited dicta in ***Anarita Karimi Njeru vs. Attorney General (1979) KLR 154*** where it was stated that ***"a person seeking redress in a matter involving reference to the Constitution should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they have been infringed."***

28. The appellants further contended that the affidavit deposed by Mr. Nathan Tirop in support of the Petition is full of hearsay evidence and the trial court should not have relied upon it; the affidavit does not specify the third parties from whom information was gathered; the information in the affidavit could not be from personal knowledge of the deponent; the information is hearsay and is of less probative value.

29. Counsel for the appellants pressed that all transactions in respect of the suit property was done above board as per the replying affidavit of Ms. Dorothy Letting. On mandamus, counsel submitted there is no public duty imposed on the appellants to pay the sums decreed by the trial court; that an order of mandamus can only be directed where statute imposes a duty to perform a specific act; in the instant case, there is no statutory or public duty imposed on the appellants to pay the decreed amounts. In support, counsel cited the case of ***Kenya National Examination Council vs. Republic Ex parte Geoffrey Gathenji Njoroge, Civil Appeal No. 266 of 1996.***

30. The appellants further submitted that the trial judge erred in relying upon two valuation reports by Afriland Valuers Limited; the first report valued the suit land at Ksh.21,000,000,000 (Twenty-one billion) and the second report tabulated loss of user in the sum of Ksh.2,690,603,339/30.Counsel submitted the judge erred in failing to interrogate the expertise and qualification of the valuer; the two valuation reports lacked material particulars; the valuer did not show how the said sums were arrived at and no reasons were given to support the figures and sums mentioned; there was no value for comparable land; and the loss of user report does not show how the average income was arrived at. The appellants concluded their submissions by urging that the trial court erred in awarding mesne profits.

31. Counsel for the 5th respondent, the National Land Commission (NLC), made submissions in support of the appeal. It was urged the 1st to 4th respondents have no cause of action against the NLC; the NLC has never been in possession of the suit property; the NLC was not in existence when the alleged cause of action arose; the judge erred in failing to apply the doctrine of laches and time limits in relation to the late filing of the Petition; the judge erred on facts when he held the defence of laches and acquiescence cannot be sustained; the cause of action arose 33 years ago and the 1st to 4th respondents are estopped due to delay in filing the Petition; the Petitioners have neither explained nor provided reasonable excuse for delay; the Petitioners expressly or impliedly consented to and acquiesced in the actions of the alleged infringer of their rights. Counsel cited dictum from the case of ***Kamlesh Mansukhlal Damji Pattni & another vs. R*** **2013] eKLR** where it was stated that it is in the public interest that applications for violation of fundamental rights should be brought promptly or within a reasonable time otherwise it may be considered an abuse of court process. In the instant case, counsel submitted there has been institutional and structural change in the administration and management of land in Kenya; the appellants have been prejudiced due to inordinate delay in filing the Petition because witnesses have either died, retired or cannot simply be traced due to dynamics of life; in the absence of explanation for the over 30 years' delay, the trial judge erred in failing to apply the doctrine of laches and dismiss the Petition.

32. In further faulting the trial court, the 5th respondent urged the judge erred in applying the concept of judicial notice to speculate and manufacture an excuse as to what might or might not have been reason for delay in filing the Petition; by invoking judicial notice, the judge erred and subverted the fundamental rights and freedoms of parties to the Petition and the third parties who were not part of proceedings before the trial court. Counsel submitted the Petition was filed to defeat the ends of justice; the 1st to 4th respondents knew that a suit brought in any other way other than a Constitutional Petition would be subject to Limitation of Actions Act. Counsel cited Privy Council decision in ***Durity vs. Attorney General (2002) KPC 20*** where it was expressed that a court has to consider whether there has been delay that would render proceedings an abuse of court process.

33. The 5th respondent further submitted it was premature for the trial court to hear and determine the Petition before it; the proper forum to investigate claims in the Petition is the National Land Commission which is mandated to deal with historical land injustices under **Article 67(2) (e)** of the Constitution. Counsel contended the trial judge erred in not finding the 1st to 4th respondents' claims were not based on historical injustice. Counsel urged that from the facts of this case, the Petitioners claim is founded on historical injustice and the trial court ought to have referred the matter to the National Land Commission to exercise its mandate in accordance with Article 67 (2) (e) of the Constitution. In support, counsel cited dicta in ***Ledidi ole Tauta & others vs. Attorney General & 2 others [2015] eKLR*** where it was expressed that the court was not the proper forum to ventilate a claim founded on historical injustices.

34. On Mandamus, the 5th respondent submitted the trial judge erred in granting mandamus because the Petitioners had other alternative remedies including filing a complaint with the National Land Commission. Counsel cited ***R vs. Dudsheath ex parte Meredith (1950) 2 All ER, 741 at 743*** where it was observed that a court should always refuse to issue a mandamus if there is another remedy open to the party seeking it. Citing the case of ***Lucy Mirigi & 550 others vs. Minister for Lands & 4 others, [2014] e KLR, Nyeri Civil Appeal No. 227 of 2011***, counsel submitted that an order of mandamus in the instant matter is contrary to the spirit of Chapter five of the Constitution on management of land as a resource.

35. The 1st to 4th respondents opposed the appeal. Learned counsel Mr. Kipnyekwei rehashed his submissions made before the trial court and reiterated the averments and claims in the Petition. On the issue of laches and time limit in filing constitutional petitions, counsel submitted that there is no time limits for filing a constitutional petition; both the retired and 2010 Constitutions do not provide for time limit within which to lodge a claim founded on violation of constitutional rights. Counsel submitted the violation of constitutional rights of the 1st to 4th respondents is a continuing violation and consequently, there has been no delay in filing the Petition and the 1st to 4th respondents are not guilty of laches. In support, counsel cited decisions in ***Peter M. Kariuki vs. Attorney General [2014] eKLR*** and ***David Gitau Njau & 9 others vs. Attorney General [2013] eKLR.***

36. Responding to the 5th respondent's contestation that the claim in the Petition is founded on historical injustice, counsel pressed the claim in the Petition was not framed as a historical injustice; the 1st to 4th respondents have not claimed mass disinheritance but rather their claim relates to a taking, seizure and acquisition of private property without following due process of law and payment of compensation. Counsel cited persuasive dicta from ***Kipsiwo Community Self Help Group vs. Attorney General & 6 others*** ***(2010) e KLR, Eldoret ELC Petition No. 9 of 2013*** in which the High Court expressed there was no provision in either the Constitution or the National Land Commission Act which ousts jurisdiction of the trial court to determine Petitions founded on historical injustice. It was further submitted the 5th respondent participated in the proceedings before the trial court and did not raise any objection to the court's jurisdiction and the 5th respondent is invoking the provisions of **Article 67(2) (e)** of the Constitution as an afterthought.

37. On mandamus, counsel submitted the appellants are duty bound to satisfy the decretal sum and to implement the declaratory orders made by the trial court; the trial court made a finding the appellants had constructively acquired the 1st to 4th respondents' property and as such, the appellants are under duty to satisfy the decree of the trial court.

38. On *locus standi* and the contention that the Plaint in ***Eldoret HCCC No. 80 of 1988*** ***(Kaptingei Chemgor vs. Noah Chelungui)*** shows there are several beneficiaries of the suit land, counsel submitted that the 1st to 4th respondents were not parties to Eldoret HCC No. 80 of 1998; second, the issue was never raised before the trial court; third, the contention that there were other parties as stated in Eldoret HCCC No. 80 of 1988 does not hold water as the trial judge made a determination on the issue of ownership of the suit property and fourth, in the instant matter, the appellants have neither challenged nor controverted the title of the original five joint owners to the suit property.

39. Submitting on precision of pleadings, it was urged that the grievance and claim in the Petition was precise and the particulars of breach particularized; the citation and heading of the Petition clearly indicates the claim is founded on violation of Section 75 of the retired Constitution as read with Article 40 of the 2010 Constitution; the 1st to 4th respondents also particularized the disputed parcel of land as LR No. 10492 - IR 17542.

40. On hearsay evidence, counsel submitted the issue was neither pleaded nor submissions made thereon before the trial court; the deponent of the impugned affidavit, Mr. Nathan Koech, expressly stated that being the son of Thomas Yator, he had personal knowledge of the facts and the rest of the information was given to him by the 3rd and 4th respondents; to this extent, the source of information was revealed. Counsel recapped all parties agreed to proceed with trial by way of affidavit evidence and written submissions; the appellants were at liberty to have called the deponent for cross-examination and they choose not to; it is not open to the appellants at the appellate stage to raise the issue of hearsay when all annextures to the impugned affidavit have never been controverted.

41. Submitting on damages and mesne profits, counsel urged the 1st to 4th respondents tendered in evidence two Valuation Reports by Afriland Valuers Limited which reports were never controverted. The appellants did not seek to have their own independent Valuation Report and as such, the trial judge did not err in adopting and relying upon the uncontroverted Valuation Reports tendered in evidence by the 1st to 4th respondents.

42. On mesne profits, it was submitted that the trial court properly exercised its discretion; that wrongful possession is the very essence of a claim for mesne profits and the foundation of the unlawful possessor's liability thereof. Counsel cited ***Kenya Hotel Proprietors Limited vs. Willesden Investments Limited*** ***(2009) e KLR129*** where it was held that a claimant is entitled to mesne profits from an illegal occupation of the claimant's land. Based on the foregoing submissions, the 1st to 4th respondents urged us to dismiss the appeal in its entirety.

43. We have considered submissions by counsel, the record of appeal, authorities cited and we have analyzed the judgment of the trial court. As this is a first appeal, as was said in ***Peters vs. Sunday Post Ltd*** ***[1958] EA 424, at P 429*** by O'Connor P.

> ***"An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand."***

44. The test in deciding whether to uphold the trial court's conclusions on fact is set out in the quotation from Lord Simon's speech in ***Watt v Thomas*** ***[1947] AC, 484 at p 485*** as follows:

> ***"…an appellate court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide.***
>
> ***But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight…"***

45. Recalling our duty as the first appellate court, we now consider the following grounds of appeal.

Locus Standi

46. The appellants contend the 1st to 4th respondents had no locus to file the Petition before the trial court. The contention is that in the Plaint filed in **Eldoret HCC Case No. 80 of 1988,** it was averred there were other persons who were beneficiaries and interested in the suit property; since there were other beneficiaries to the property, the 1st to 4th respondents have no *locus standi* to institute the Petition on behalf

of the Estate of the deceased and ignore or exclude other beneficiaries.

47. Countering the argument they have no locus to file the Petition, the 1st to 4th respondents submitted they were not parties to Eldoret HCC No. 80 of 1998 and that the appellants have neither challenged nor disputed the title of the original five joint owners of the suit property.

48. The trial court while not directly considering the issue of *locus standi* expressed itself thus:

> ***"….the Petitioners are also silent on the Civil Case No. 80 of 1988 mentioned by the 2nd to 6th respondents. Although the said case does not reveal who the parties were and the subject matter, I can only speculate this to have been a claim for compensation and or inadequate compensation on part of the Government following acquisition of the land in question from the Petitions. However, the issues that are being raised are so weighty in the sense that they touch on so many third parties who are not party to the present suit. This leads to the following questions: what is historical injustice…."***

49. We have considered the appellants' submission on the issue of *locus standi* and the trial court's observation. The appellants do not deny that the original five owners of the suit land had interest in the suit property. All that is contended is that there were other persons with beneficial interest in the property. Even if it were true that other persons had interest in the land, this does not disentitle the 1st to 4th respondents from pursuing their individual claims. The fact that a co-owner, co-proprietor or other beneficiaries are not co-petitioners in this matter does not disentitle, prevent or non-suit other co-owners from filing suit. There is no rule or principle of law that co-owners can only file suit if all of them join as plaintiffs or petitioners. There is also no principle of law that a registered proprietor of a parcel of land, even if registered as a trustee, cannot file suit unless all beneficiaries are enjoined or disclosed in the suit. It is trite law that a suit should not in principle be struck out or defeated for joinder or non-joinder of a party. Except where there is a legal bar to maintainability of a suit by reason of non-joinder of a party or where in his absence, the decree that may be passed might become infructuous or in executable, a court cannot dismiss a suit for non-joinder of a person.

50. In the instant matter, it is not in dispute that the 1st to 4th respondents claim proprietary interest in the suit property. However small their interest, however small the portion of land they claim they are entitled to; however indeterminate is the acreage they are entitled to; the fact that they have a claim to some portion of the suit land confers upon them *locus standi* to institute proceedings alleging violation to their proprietary rights in the suit property. Further, on the strength of their letters of administration, the 1st to 4th respondents have *locus standi* to institute and maintain the instant proceedings. For these reasons, we find the appellants ground of appeal that the 1st to 4th respondents had no *locus standi* to institute and maintain the instant proceedings is unmeritorious.

Precision of Pleadings

51. The appellants contend that the trial court ought to have dismissed the Petition because the claim had not been set out with a reasonable degree of precision and the relevant provisions of the Constitution and law that were allegedly infringed were not cited. In addition, that the 1st to 4th respondents did not indicate the manner in which their rights were infringed. In support of this contestation, the appellants recited dicta in ***Anarita Karimi Njeru v Republic*** ***[1979] eKLR*** where it was stated ***"that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."***

52. The trial court in considering the issue expressed as follows:

> ***"Back to the instant Petition before the honourable court, the petitioners in their title cited both Article 75 of the Old Constitution (sic) and Article 40 of the Constitution of Kenya 2010. They have also captioned the property they are alleging to be deprived from being Land Parcel No. IR 17542 – LR 10492…. The petitioners have also cited the parties. … The petitioners have elaborately stated the facts in support of the Petition and have particularized the alleged breach of the constitutional right without specifying a particular right that is alleged to have been breached…..In as much as in the instant petition, the petitioners did not cite the clauses they rely on under the two broad sections that is Article 40 and section 75 of the current and former Constitution respectively, it is apparently clear that the petitioners claim is based on the protection of property and they are seeking to be compensated for being deprived of their property…."***

53. On our part, we have considered the appellants' submission and examined the amended petition dated 29th September 2014. The Petition clearly identifies the suit land as LR No.10492- IR 17542. Of relevance is paragraph 24 titled "Particulars of breach of the petitioner's constitutional rights." At sub-paragraph 24 (h), the grievance of the petitioners against the appellants is stated to be "seizing without consent, the petitioners' private land by means other than as provided under the Compulsorily Acquisition Act and without compensation." (sic)

54. We have also examined the Replying Affidavits filed by the appellants in response to the Petition. In all the affidavits, it is clear the appellants understood with precision the grievance of the 1st to 4th respondents in relation to the suit property. All the replying affidavits succinctly respond blow by blow to the allegations in the Petition. The replying affidavits do not evince any misapprehension on the nature, extent and claim made in the Petition. The comprehensive response and annextures to the replying affidavit persuade us that the Petition sets out the claim against the appellants with a reasonable degree of precision. The provision of the Constitution allegedly violated is stated to be ***Section 75*** of the retired Constitution as read with Article 40 of the 2010 Constitution. The manner of alleged infringement is expressly averred in the Petition to be "seizing without consent the petitioners' private land by means other than as provided under the Compulsorily Acquisition Act and without compensation." (sic) For the foregoing reasons, the ground that the claim in the Petition was not made with a reasonable degree of precision has no merit.

Delay and the doctrine of laches

55. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. (See **Republic of Phillipines vs. Court of Appeals, G.R. No. 116111, January 21, 1999, 301 SCRA 366, 378-379).**

56. One of the pillars in the appellants' contestation in this appeal is the trial judge erred in not dismissing the Petition on account of laches, delay and acquiescence. Counsel submitted there has been inordinate and unexplained delay in lodging the claims in the Petition. The Petition was filed on 15th February 2013. The cause of action as per the claims in the Petition arose over 35 years ago on 24th January 1980 when the Title Grant to the suit land was forwarded to the Commissioner of Lands. It was submitted that the 1st to 4th respondents chose to file a constitutional Petition to avoid the limitation period in the Limitation of Actions Act; that the judge erred when he held the defence of laches and acquiescence do not apply in this matter; due to the unexplained delay, the 1st and 4th respondents are estopped from make any claims against the appellants; that the appellants have been prejudiced due to the inordinate delay *to wit* relevant witnesses have either retired or are dead; that the judge erred in law in taking judicial notice and *suo moto* speculatively explaining the delay on behalf of the Petitioners; that no explanation has been offered as to why the two original joint owners, on whose behalf the Petition was filed, did not pursue any claim over the suit property during their life time.

57. In rebuttal, the 1st to 4th respondents urged us to find that there was no inordinate delay in filing the Petition before the trial court as there is no time limit set by the Constitution or statute within which a party can file a constitutional petition.

58. The trial court in considering the issue of delay and laches expressed as follows:

> ***"It is my considered view that bearing the nature of the claim herein and the period of delay, approximately 30 years and the circumstances surrounding the petition and the persons alleged to have been behind the process and the fact that there is no clear provision of the period of time for commencing such petitions, the petition is not defeated by laches. Moreover, this Court takes judicial notice that the general elections of 2002 brought to this country change of regime that led to a new wave of litigation in respect of violation of human rights. Those who feared victimization woke up to a new era where they could petition for their rights without fear. (See Dominic Arony vs. Attorney General and Wachira Waihere vs. Attorney General [2010] eKLR)."***

59. We have considered submissions by both parties on the issue of delay, acquiescence and the doctrine of laches. Our decision on this matter is premised on appreciation that what was before the trial court was a Petition alleging violation of the right to property as one of the fundamental rights in the Constitution. Both the Petition and amended Petition are grounded and entitled "In the Matter of Deprivation of Property Contrary to Section 75 of the old Constitution and Article 40 of the 2010 Constitution." The Petition is essentially a petition to enforce the constitutional right to property.

60. We are alive to the decision of this Court in ***Peter N. Kariuki vs. Attorney General [2014] eKLR, Civil Appeal No. 79 of 2012***, where it was held that there is no time limit within which a party can file a claim for violation of constitutional rights. We have considered the persuasive dicta from the High Court in ***Kamlesh Mansuklal Damji Pattni & Another vs. Republic*** **2013] eKLR** *where it was* noted that the Constitution did not set a time limit within which applications for enforcement of fundamental rights should be brought. Nevertheless, it is an accepted principle that a claimant who unreasonably delays his proceedings or otherwise misconducts himself regarding those proceedings may have his claim denied as an abuse of the court process. (See ***Metal Box Co Ltd vs. Currys Ltd, (1988) 1 All ER 341.*** *We appreciate that in* ***Kariuki Kiboi vs. Attorney General [2017] eKLR, Nairobi Civil Appeal No. 90 of 2015,*** this Court *heard and determined a claim which arose in the mid-1980s and was lodged by a petition dated 26th August 2010. This Court observed:*

> ***"Kariuki Kiboi (the appellant) was among six other persons who filed Constitutional petitions against the Attorney General (the respondent), who was sued on behalf of the Government of Kenya at the Constitutional and Human Rights Division of the High Court at Milimani Law Courts in Nairobi. The petitions were based on events that took place in this country in the mid-1980s and 90s, a period which some historians like to refer to as the dark days of the Moi era.***
>
> ***The appellants were claiming in the main that some of their Constitutional rights, guaranteed them by the retired, and not so robust Constitution of Kenya, had been violated. It is not evident, why they did not sue earlier, but one can only surmise that they felt encouraged by the promulgation of the new Constitution on 27th August, 2010, which came with broader democratic space, an expanded Bill of rights, and a more vibrant and seemingly impartial judiciary."***

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

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

> ***"While making the above findings the court holds that clear statutory provisions that set time of limitation or impose clear conditions to be met before the court can grant specified remedies are substantive provisions that set boundaries for the***

jurisdiction of the court and their application is clearly within the provisions of Article 20(4) of the Constitution; whether the proceeding before the court is an ordinary action or a petition or other proceedings. In the opinion of the court, once the root of the right or freedom is established and the applicable statutory provisions are established to apply, moving the court by way of a constitutional petition will not suddenly render the statutory provisions inapplicable in so far as such provisions of time of limitation or conditions to granting a given remedy are interpreted to be promotional of the matters in Article 20(4) of the Constitution."

Estoppel and acquiescence

63. A contestation by the appellants is the trial judge erred in failing to find the 1st to 4th respondents were estopped and or acquiesced in the violation of their right to property in the suit land.

64. We have considered submissions by counsel on estoppel and acquiescence. In our view, there can be no estoppel against the Constitution which is the paramount law of the land. Subject to the express provisions of ***Article 24*** of the 2010 Constitution, no individual can barter away fundamental rights and freedoms enshrined in the Constitution. One can neither acquiesce nor waive the fundamental rights and freedoms protected in the Constitution. Fundamental rights were not kept in the Constitution simply for individual benefits - these rights were put up as a matter of public policy and therefore the doctrine of inordinate delay, estoppel, acquiescence or waiver cannot unequivocally be applied as a bar to enforcement of fundamental rights. We are cognizant that the doctrine of laches is a principle of general application that may apply in constitutional petitions for breach of fundamental rights. However, delay in enforcing a claim for violation of fundamental rights may be permitted or denied depending on the circumstances of each case. In **Lt. Col. Peter Ngari Karume & Others vs. Attorney General, Nairobi Constitutional Application No. 128 of 2006 [2009] eKLR,** Nyamu, J. expressed:

"The petitioners had all the time to file their claim under the ordinary law and the jurisdiction of the court but they never did and are now counting on the constitution. None of the petitioners has given any explanation as to the delay for 24 years. In my view, the petitioners are guilty of inordinate delay and in the absence of any explanation on the delay, this instant petition is a gross abuse of the court process…In view of the specified time limitation in other jurisdictions, the court is in a position to determine what a reasonable period would be for an applicant to file a constitutional application to enforce his or her violated fundamental rights. I do not wish to give a specific time frame, but in my mind, there can be no justification for the petitioner's delay for 24 years…."

65. In our consideration of laches, we observe **Article 259 (8) of the Constitution** stipulates that if a particular time is not prescribed for performing a required act, the act should be done without unreasonable delay. In line with **Article 20** of the Constitution, respect for fundamental rights is a mandatory obligation on the State and all State Organs and the Bill of Rights applies to all and bind all citizens. No citizen can by his act or conduct relieve the State, a State Organ or any person of the solemn obligation to respect the Bill of Rights. It is in this context that no individual can acquiesce to violation or infringement of fundamental rights. Subject to express constitutional provisions, such as the limitations in **Article 24** of the Constitution, neither the state nor an individual can arrogate to itself/himself a right or justification to commit a breach of fundamental rights of any citizen and resort to the doctrine of waiver, acquiescence, inordinate delay, estoppel or other similar principle as absolute defence or excuse.

66. Comparatively, the Supreme Court of India in ***State of Bihar and others vs. Project Uchcha Vidya, Sikshak Sangh and others, MANU/SC/0054/2006: (2006) 2 SCC 545*** **expressed that it** is now well known, that the rule of estoppel has no application where contention is as regards a constitutional provision or a statute. In ***Olga Tellis vs. Bombay Municipal Corporation (1985.07.10) (Right to Life and Livelihood for Homeless),1986 AIR 180, 1985 SCR Supl. (2) 51*** it was held that there can be no estoppel against the Constitution or against fundamental rights.

67. On our part, based on the sacrosanct and inviolable nature of the Bill of Rights, convinced that respect for and enforcement of the Bill of Rights is the cornerstone of political stability in Kenya; persuaded that property and land rights is the foundation of socio-economic relationship in Kenya and further persuaded by merits of comparative jurisprudence cited above and convinced that no individual can barter away and acquiesce to violation of fundamental rights, we find that the trial court did not err in failing to apply the doctrine of laches, estoppel and acquiesce in this matter.

Historical Injustice and mandate of National Land Commission

68. The 5th respondent in supporting the appeal urged the trial court erred in failing to find the Petitioners' claim was founded on historical injustice and pursuant to **Article 67(2)(e)** of the Constitution, the National Land Commission (NLC) is the suitable forum to investigate the claims in the Petition. Counsel urged the claims in the Petition relate to historical injustice because the cause of action supposedly arose when Kenya was still applying a system of law inherited from the colonial government; that after the cause of action arose, the Petitioners have claimed they are yet to get any redress by way of compensation for land that was allegedly compulsorily acquired by the government. The appellants contend the Petitioner's claim is premised on the notion that they were disenfranchised by a process that allegedly saw the deceased lose their legitimately owned land; that successive governments have either been complicit in the disenfranchisement of the deceased or have failed to create a conducive environment within which the Petitioners could claim their rights. Grounded on the foregoing precepts, the 5th respondent submitted that the NLC was the proper forum to investigate the claims raised in the Petition. It was further submitted that the 2010 Constitution has provided a specific mechanism for addressing historical land injustices and the trial court erred in not giving opportunity to the NLC as the body mandated to investigate and handle historical land injustices similar to the claims raised in the Petition.

69. In rebutting the assertion that the claim in the Petition is one of historical injustice, the 1st to 4th respondents countered that nowhere in the Petition is the phrase "historical injustice" alluded to; the Petitioners' claim is founded on violation of ***Section 75*** of the retired Constitution and is not grounded on historical claims; the Petitioners have not claimed they were disenfranchised as members of a community rather, their claim is founded on unlawful seizure and acquisition of their private property.

70. The trial court in evaluating the contestation on historical injustice observed:

> ***"…. there is no clear cut definition with regard to historical injustices. But more importantly, the Petitioners have not based the instant Petition on historical injustices neither have they pleaded historical injustices as their claim is based on allegation that the proprietary interest in 546 and 604 acres of land ……was acquired absolutely other that by way of compulsory acquisition without consent or compensation….. However, bearing in mind the facts of this claim and the issues that have been raised, it is my considered view that the issues are worth, but not limited to investigation by the NLC pursuant to Article 67(2)(e) of the Constitution."***

71. Several issues ensue from the submission by the parties. First, what is historical land injustice? Second, must all claims relating to historical land injustice be considered and determined firstly by the NLC? In other words, does a court's jurisdiction over historical land injustice claims arise only after the NLC has finalized its investigation? Third, is there a limitation period to make a claim founded on historical injustice? Fourth, are the claims in the Petition historical injustices and finally, did the trial court err in not referring the claims in the Petition to the NLC?

72. The NLC is established under **Article 67(1)** of the Constitution; its mandate is outlined in **Article 67 (2)**. One of its mandates pursuant to **Article 67(2)(e)** is to initiate investigation, on its own initiative or on a complaint, into present or historical land injustices and recommend appropriate redress. The 5th respondent submitted that pursuant to **Article 67(2) (e),** the trial court should have referred the claims in the Petition to the NLC.

73. We have considered the rival submission by parties. The Constitution does not define what historical injustice is. However, **Section 15 (2**) of the National Land Commission Act as amended by **Section 38** of the Land Laws (Amendment) Act No. 28 of 2016 defines historical injustice. The commencement date of the Land Laws (Amendment) Act is 21st September 2016. **Section 15(3) (e)** of the National Land Commission Act as amended introduces a limitation period of five years for claims relating to historical land injustice. A claim on historical injustice shall not be entertained after a period of five years from the date of commencement of the Land Laws (Amendment) Act. Of relevance is **Section 15(4) (g)** where a claim alleging historical land injustice is permissible if it was occasioned by corruption or other form of illegality. A very critical aspect relevant to this appeal is the provision of **Section 15(3)(d)** which stipulates that no claim for historical injustice can be admitted and processed if action or omission on the part of the claimant amounts to surrender or renouncement of the right to land in question. ***Section 15 (3) (d)*** reads as follows:

> ***"15 (3) A historical land claim may only be admitted, registered and processed by the Commission if it meets the following criteria:***
>
> **……..**
>
> ***(d) No action or omission on the part of the claimant amounts to surrender or renouncement of the right to the land in question;"***

74. Guided by **Section 15(3)(d)** of the NLC Act, *prima facie*, the contested facts disclosed in the Petition and annexures thereto as well as the facts revealed by the replying affidavits indicate that there was an act or omission amounting to surrender to the Government or renouncement in part or whole of title to the suit property. In this matter, there is an entry in the Register a surrender of the Grant and title to the suit property. In this regard, we hold that **Section 15(3) (d)** of the National Land Commission Act as amended removes the claims in the Petition from the mandate of the NLC.

75. On the question whether a court should await investigation and recommendation by the NLC before it can entertain a claim founded on historical injustice, it is our considered view that a court has jurisdiction to hear and determine any claim relating to historical injustice whether or not the NLC is seised of the matter. Our conviction stems from our reading of **Article 67(2) (e)** of the Constitution. The Article provides that the NLC can investigate "present or historical" land injustices. We lay emphasis on the word ***"present."*** If the NLC had an initial and exclusive mandate, it would mean that all present cases on land injustices can only be handled by the NLC and not courts of law. This would *prima facie* render the Environment and Land Courts redundant. We do not think this was intended to be so. Our view is fortified by **Section 15 (3) (b) of the National Land Commission Act** which permit the Environment and Land Court to deal with historical injustice claims capable of being addressed through the ordinary court system.

76. Further, there is nothing in the 2010 Constitution or in the National Land Commission Act ousting the jurisdiction of the High Court or barring a person from presenting a petition before a court in relation to a claim founded on historical injustice. We note that the suit property was at all material times under the provisions of the Registration of Titles Act (RTA). ***Section 75*** of the RTA provides that nothing in the Act shall take away or affect the jurisdiction of the court on the ground of actual fraud. There is nothing in the instant Petition referring to historical injustice; it is the petitioner or claimant who identifies the cause of action and drafts the claim and pleading; it is not for the respondent or defendant to aver that the claim should have been drafted or founded on a different cause of action. A party cannot compel the other on how to frame a claim or cause of action. For the foregoing reasons, we find the ground of appeal urged that the trial court ought to have referred the matter to the NLC has no merit.

Evaluation of Evidence on Record

77. It is our duty as the first appellate court to re-assess the evidence on record and come to its own independent conclusions; it is also our duty to evaluate if the conclusions by the trial court is supported by the evidence on record. This is the liability and evidentiary turning point in the appeal.

78. The appellants in their memorandum of appeal contend the trial judge erred in failing to find all transactions in respect of the suit

property were above board and done pursuant to the provisions of the law; the judge erred in finding the rights of the 1st to 4th respondents over the suit property were violated when they had no such rights and no evidence of the same or any infringement thereof. These grounds of appeal invite us to exercise the duty of the first appellate court to re-evaluate the evidence on record and determine if the conclusions made by the trial judge is supported by the evidence on record.

79. Before the learned judge, the parties agreed by consent that trial shall be by way of affidavit evidence and documents annexed thereto. The substratum and core of the appellants' and respondents' case is documentary evidence. This appeal stands and falls on rules of documentary evidence. We bear in mind that none of the five original joint owners deponed any affidavit before the trial court. In ***Wareham t/a A.F. Wareham & 2 Others – v- Kenya Post Office Savings Bank [2004] 2 KLR 91***, this Court stated:

> ***"…….in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail."***

77. The facts relevant to Petitioners' claim and the evidence available on record to support the claim can be summarized as follows:

(a) On 28th June 1965, five individuals namely Mr. Thomas Kipkosgei arap Yator; Mr. William Kimngeny arap Leting; Mr. Nathaniel Chelugui; Mr. Noahn Kimngeny and Mr. Cherwon arap Maritim purchased the suit property being IR No. 17542 – LR No. 10492 measuring 3,236 acres (less 26 acres' road reserve) from Mr. Jacobus Hendrick Engelbrecht as purchasers in common with equal shares at a consideration of Kshs. 360,000/=. The instrument of transfer was drawn by Messrs. D. Green Advocate, Kenyatta Street, Eldoret.

(b) The Transfer was duly registered under the Registration of Titles Act on 28th June 1965. The instrument of transfer from the said Mr. Jacobus Hendrick Engelbrecht is on record.

(c) On 24th January 1980, the title Grant to the suit property was forwarded to the Commissioner of Lands for purposes of surrender and subsequent issuance of separate title deeds to the five original owners. It is alleged that each original owner was to get a title deed for 614 acres.

(d) The original LR No. 10492 was sub-divided into five portions giving rise to five parcel Nos. LR No. 10492/1; LR No. 10492/2; LR No. 10492/3; LR No. 10492/4 and LR No. 10492/5.

(e) The new LR No. LR No. 10492/1 was converted to become Eldoret Municipality Block 15/1. The other four LR No. 10492/2; LR No. 10492/3; LR No. 10492/4 and LR No. 10492/5 were amalgamated to become Eldoret Municipality Block 23/Kingongo.

(f) The claim in the Petition is that the appellants including Commissioner of Lands having received the title Grant to the suit property on 24th January 1980 failed to issue the five title deeds to the original joint owners but instead acquired the land without compensation and sub-divided it and illegally issued title deeds to several individuals and public entities without the knowledge and consent of the five original registered joint owners. It is contended that the appellants failed to account for the 3,069 acres of the suit property. The claim in the Petition is for the appellants to fully account for the 3,069 acres of land and pay compensation for illegal acquisition and sub-division of the suit property.

(g) The response to the Petition by the appellants is that all transactions relating to the suit property were done in accordance with the law and that the Government compulsorily acquired portions of the suit property in accordance with the law.

78. On our part, we have re-evaluated the evidence on record more particularly the documentary evidence. We pose the questions, was the sub-division of the suit property done illegally without knowledge and consent of the original five registered proprietors? Did the Government (appellants) unlawfully seize and acquire the suit property without following the laid down procedures for compulsory acquisition of land? Did the trial court consider and evaluate all the documentary evidence on record?

80. On record, there is a letter dated 3/1/78 from J.S. Vaughan and addressed to the Commissioner of Lands and copied to Ms. R. L. Aggarwal Advocate for the joint registered owners. (See page 157 of the Record). Mr. J. S. Vaughan was the surveyor retained and instructed by the original five joint proprietors of the suit property. The letter reads:

> **From: J.S. Vaughan,**
>
> **To: Commissioner of Lands, Nairobi.**
>
> **Cc: R.L. Aggarwal Advocate, Eldoret.**
>
> **Date: 3/1/78**
>
> ***"Re: L.R. No. 10492 – West of Eldoret***

Thank you for your letter No. 7289/111/175 dated 18th November 1977. I regret that my clients have changed their minds so much that I am not sure myself what they are after – hence my suggestion that they should inform you themselves.

DRG. No. v/470/8 was sent to you in August based on their requirements at that time given to me in writing. However, when I went to Eldoret in October to complete the survey, they informed me that they then required plots (4) and (7) to be combined. This is the line between the road and railway just S.E of "60.7 hectares approx." is the only line on DRG No. V/470/B which has not been surveyed. (I would mention that clients then suggested a series of changes – starting with the first boundary they agreed originally – which would have required complete re-survey of most of the farm, but were dissuaded from this when informed how much it would cost).

However, you will note that consolidated (4) and (7) is actually in 3 pieces (separated by roads of 29.3 ha., 74.8 ha., and 234.5 ha.) I have therefore been expecting clients to ask for the section to be considered as 2 or 3 sub-divisions.

You will note that Plot (5) is also cut by the main road into areas of 215.7 ha. and 36.0 ha. I was recently visited by Ms Rai Plywoods who informed me that they have contracted to purchase the 36.0 ha. portion East of the main road – which means that another sub-division. They said they had just visited your office and received a verbal approval of this.

Yours faithfully

cc. R.L. Aggarwal, Esq.

Dear Mr. Aggarwal,

The Plywood Factory apparently want to get title to the land they are purchasing very urgently - only possible when my whole survey has been submitted. I am therefore trying to get plans finished – can I please have some sort of reply to my letter of 19th November, plus confirmation that all are in agreement to the Plywood sub-division on Plot (5).

Yours sincerely

J. S. Vaughan"

81. There is another letter dated 8th August 1978 from Mr. J.S. Vaughan (Surveyor) addressed to the Director of Survey. The letter is titled:

RE: LR. No. 10492 – Eldoret Municipality and Adjoining. (See page 56 of the Record). In relevant quotes the letter states:

"As you probably realize, the owners of this property seem to have split into two factions – one of whom wanted this sub-division. The other, and apparently the majority, faction have instructed me specifically not to show this portion as a separate title. I have been holding up sub-division hoping that they could come to an agreement amicably so that I could know for sure that all sub-divisions were shown as the owners wanted them. Now that one faction has gone to the extra expense of another lawyer and another surveyor, this sub-division seems to have become a fait acompli anyway. Therefore, I am tying up last ends of my survey and it will be submitted next time I am in Nairobi. I am now warning my clients that an attempt will probably be made soon to register transfer of the sub-division and we will then see what happens." *(Emphasis supplied)*

Cc. R. L. Aggarwal, Advocates (Advocate for registered proprietors)

82. On record there is another letter dated 23rd February 1980 from the Commissioner of Lands to R. L. Aggarwal Advocate who was the Advocate for the original five joint proprietors of the suit land. (See page 62 of the Record). The letter reads as follows:

From: Commissioner of Lands -Nairobi,

To: R.L. Aggarwal Advocate – Eldoret.

Date: 23rd February 1980.

RE: L. R. No. 10492 – ELDORET MUNICIPALITY

"I acknowledge receipt of Grant No. L.R. 17542 in respect of the above mentioned piece of land, which has been sent here for surrender purposes and thereafter issue of separate leases for the different sub-divisional sections.

As you are no doubt aware, the use of this piece of land was restricted to agricultural purpose only. The sub-division of this land into 6 (six) sub-plots was approved on 7/10/77, restricting the resultant sub-plots for agricultural purposes only. Before survey of the sub-plot divisions was carried out, we received another application for sub-division of sub-plot No. 5 and change of user of the smaller portion was approved on 20/5/78. Again, before the sub-division was surveyed, we received a further application for sub-division of the balance of the area of sub-plot No. 5 and also a change of user from agricultural to residential purposes. The sub-division was approved on 14/8/79. *(Emphasis supplied)*

Understand that the new parcel number of this areas is No. 14 in Block 15. You may be aware that the Municipal boundary of Eldoret is along the railway line which splits LR 10492 into two portions, thus the portion south of the Railway has been converted along with other properties within Eldoret Municipality under the provisions of the Registered Land Act. The other portions remain under R.T.A.

As you known for the leases or titles to be issued, in respect of each sub-division, the head title has to be surrendered and new leases and or titles issued. Since there are sub-divisions within the sub-divisions and also change of user in respect of some of the sub-divisions, it is imperative that all the sub-divisions should be sorted out so that each sub-division is known for what purposes it is to be used and which sub-divisions are under the provisions of R.L.A and R.T.A. *(Emphasis supplied)*

Since the transferees will require titles or leases, I should be grateful if this exercise is done at an early date to facilitate valuations of the sub-plots for individual users.

Yours

S.M. Mwirerua

For Commissioner of Lands"

83. On record, there is another relevant letter dated 25th November 1981 from the Commissioner of Lands to M/s R. L. Aggarwal, Advocate for registered proprietors. (See page 66 of the Record). The letter reads:

"RE: ELDORET – L.R. No. 10492 (PROPOSED SUB-DIVISION AND CHANGE OF USER

I refer to your letter ref: L/G/2 of 4th November 1980 addressed to me with a copy to Ms. Amata and Co. Advocates on the above subject and wish to inform you that the above farm which comprises approximately 666.41 hectares has an agricultural user and is sub-divided into 7 portions i.e. LR No. 10492/2, 3, 4 and EM/Bloc 15/12, 13, 14 and 15 containing the same agricultural user. The sub-divisions have been re-subdivided to cater for various user i.e. from agricultural to residential, industrial etc. However, it is rather impossible at this stage to issue titles direct to the purchasers of the sub-divisions as transactions will have to be completed first. You are therefore requested to advice your clients that the following transactions will have to be done and completed in stages as follows: *(Emphasis supplied)*

(i) ***Surrender of the Grant I.R. 17542 in exchange of leases in respect of the sub-divisions falling within the Eldoret Municipality under the Registered Land Act and Grant in respect of sub-divisions falling outside the Municipality under the Registration of Titles Act for agricultural user.*** *(Emphasis supplied)*

(ii) Titles and leases to be issued in the names of registered owners of L.R. No. 10492.

(iii) Transfers to be made to the respective purchasers of the said portions.

(iv) Application for change of users and sub-divisions of the portions to be made in each case. The sub-plots to be valued for the change of user from agricultural to residential etc. to determine enhanced rent.

(v) ***Surrender of Grants of agricultural portions in exchange of new Grant or lease incorporating the changes of user and new rents per sub-plot****. (Emphasis supplied)*

(vi) ***Finally, transfer of sub-plots with the change of user and enhanced rent to the purchasers.*** *(Emphasis supplied)*

It would be appreciated if you would request your clients to comply with the point Nos. (i) – (vi) above so that this exercise can be dealt with and clear the problems involved in this matter. Please note that no surrender has been registered in my registry. *(Emphasis supplied)*

F.V.S. Mwithukia

For Commissioner of Lands"

84. The letter dated 25th November 1981 reveals that there were purchasers of the sub-divisions in the suit property. In the letter, the Commissioner of Lands clearly informs and advices Mr. R.L. Aggarwal Advocate for the registered proprietors that there has been sub-divisions and re-subdivisions and change of user from agricultural to residential, industrial etc. The letter notes that it is rather impossible at that stage to issue titles direct to the purchasers of the sub-divisions. This letter reminds us of **Section 100 of the Evidence Act, Cap 80 Laws of Kenya** which provides: **"When language used in a document is plain, and it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts**." Guided by this provision, it is our considered view the 1st to 4th respondents cannot contradict the contents of the letter which plainly indicates that as on 25th November 1981, there were purchasers of the sub-divisions of the suit property and there was a proposal to issue titles directly to the purchasers.

85. The evidence on record further reveals that on 21st September 1983, a Surrender of Lease to the Government of Kenya of Eldoret Municipality Block 15/1 measuring 666.41 was registered. (See page 67 of the record).

86. The suit property was governed by the Registration of Titles Act (RTA). **Section 44 (1)** of the Registration of Titles Act provides that:

> ***"44 (1) Whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word "surrendered", with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered:"***

86. The provisions of **Section 41(1)** of the RTA has received judicial pronouncement by this Court in ***Mwinyi Hamisi Appeal vs. Attorney General, Civil Appeal No. 125 of 1997 (Tunoi, Shah & Bosire JJA).*** The relevant facts are as follows:

> ***"Captain Townsend was the registered proprietor of Plot Nos. LR 324/III/MN and LR 334/III/MN. As regards Plot 334, he was a co-owner with three other persons. Captain Townsend sought to sell the Plots to Mr. Hamisi Ali. Before he could sell, the then Colonial authorities wrote a letter dated 7th November 1955 to the four asking them to surrender the titles in exchange for allocation of residential beach plots. By letter dated 26th January 1956, Captain Townsend surrendered his title document in respect of Plot 324 to the Government. The letter shows that the Certificate of title in respect of Plot No. 324 was sent to the Commissioner.***
>
> ***The issue of formalization of surrender of the two plots dragged on for years.***
>
> ***The learned judges held that the return to the Government by Captain Townsend of his documents of title in respect of Plot No. 324 could only mean he could no longer sell the property. As regards Section 44 of the RTA, the Judges expressed:***
>
> ***The land in question was held under the Registration of Titles Act, Cap 281, Laws of Kenya. Section 44 of the Act requires that surrender of land leased by the Government to persons to be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender. But Section 44 does not envisage a situation whereby lack of such registration would make null and void de facto surrenders. From the evidence before the superior court, there can be no doubt that Captain Townsend and his three co-owners had factually surrendered Plot No. 334 to the Government and that all of them had in exchange been promised allotment of residential beach plots. Moreover, such lack of registration of surrender does not give Mr. Hamisi any title to the suit land…...The Commissioner had de facto control of Plot No. 334 and if he proceeded, as he did, to allot the land to other persons…., their titles cannot be impugned except as provided for in Section 24 of the Act…...It is on these observations that, in our view, Mr. Hamisi Ali's claim to the title to the suit land fails."***

86. Guided by the dicta in ***Mwinyi Hamisi Appeal vs. Attorney General, Civil Appeal No. 125 of 1997,*** it is our considered view that the entry in the Register that Eldoret Municipality Block 15/1 measuring 666.41 was surrendered to the Government *ipso jure* extinguished all rights and interest of the then registered proprietors over the suit property. We note that the 1st to 4th respondents contend that the surrender was unlawful. There is a presumption that all acts done by a public official has lawfully been done and that all procedures have been duly followed. The onus is on the 1st and 4th respondents to prove otherwise. They have failed to do this. A bare allegation that a lawful procedure was not followed is not proof of the allegation. It was open to the 1st to 4th respondents to make an application before the trial court to compel the Commissioner of Lands to produce the original instrument of surrender, the memorial and the endorsement thereon. The 1st to 4th respondents failed to do so.

87. In our view, a party making a claim for a declaration of title must succeed on the strength of his case and not on the weakness of the defence. We are however cognizant that where the defendant's case supports that of the plaintiff and contains evidence on which the plaintiff may rely, the plaintiff is entitled to rely on and make use of such evidence. In a claim for declaration of title, as the instant case, the onus is on the Petitioners to satisfy the Court on the evidence produced by them that they are entitled to the declaratory orders sought.

88. We are fortified in our view by provisions of ***Section 97(1)*** of the Evidence Act which *inter alia* stipulates that when the terms of a grant or any other disposition of property has been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of such grant or other disposition except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible.

89. Our further examination of the record demonstrates that by Gazette Notice No. 5948 dated 7th December 1987 and published on 24th December 1987, the Government compulsorily acquired part of Block 15/237, Block 15/238 and Block 15/12. By Gazette Notice No. 1372 dated 3rd May 1976 and Gazette Notice No. 1373 dated 3rd May 1976, the Government compulsorily acquired part of LR No. 10492.

90. Having perused the record, the mind boggling question is whether the trial court considered the contents of the letters reproduced heretofore from the Commissioner of Lands to R.L. Aggarwal Advocate and the appropriate inferences and deductions of fact that may be drawn from the letters. The aforestated letters determine whether the Government (appellants) unlawfully acquired and sub-divided the suit-property without following the procedures laid down in law. The letters also determine if there was any compulsory or illegal dealing and acquisition of the suit property.

91. We have perused and analyzed the judgment of the trial court. Nowhere in the judgment does the trial court refer to or consider the aforestated letters. The content of the letters determines if the original five joint owners had knowledge of the sub-divisions and actively participated in sub-division and re-subdivision of the suit property and subsequently selling various portions of the sub-divided plots to third

parties. The above-mentioned letters also help in determining if the appellants and more particularly the Commissioner of Lands and Director of Survey acted above board and on advice, direction and instruction of the registered proprietors and which instruction was given through their surveyor (Ms. J. S. Vaughan) and their advocate (Ms. R.L. Aggarwal).

93. In its judgment, the trial court correctly identifies the issues for determination as follows:

> *1) Whether the petitioner's concerns can be adequately and competently handled by the Honourable Court?*
>
> *2) Whether the petition herein is incompetent for want of form/precision and whether the same raises constitutional issue?*
>
> *3) Whether petitioners were indolent and hence the claim being time barred?*
>
> *4) Whether the Petitioners land was acquired by the Respondents without following the due process of the law and if so, how much of land was illegally acquired by the Respondents.*
>
> *5) Whether the Respondents in acquiring the said land, violated the petitioner's right to property?*
>
> *6) Whether the Petitioners should be compensated? And if so how much.*
>
> *7) Who pays for costs?*

94. Issue Nos. 4 and 5 identified by the trial court are critical to the determination of the claims in the Petition. We have read and re-read the judgment of the trial court. Unfortunately, and regrettably, the learned judge did not consider the letters referred to in this judgment. In evaluating the evidence on record, the learned judge expressed himself as follows:

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

95. We have considered the reasoning and analysis by the trial judge as reproduced above. In our mind, was the trial judge correct in drawing an inference and making a finding that the act of the Commissioner of Lands in surrendering back to the Government the portion of land bought by the Petitioner's father was an act of compulsory acquisition of part of the suit property?

96. In our considered view, the trial court erred for the following reasons:

> (i) A surrender of Grant or instrument of title is not compulsory acquisition. The legal framework and procedure for surrender of title to land is different from the legal regime for compulsory acquisition. Section 44 of the RTA is the legal framework for surrender and the Land Acquisition Act is the regime for compulsory acquisition. Surrender cannot be construed and equated to compulsory acquisition.
>
> (ii) Guided by dicta in ***Mwinyi Hamisi Appeal – v- Attorney General, Civil Appeal No. 125 of 1997,*** we find that Registration of surrender is evidence of surrender and further guided by **Sections 97(1)** and **100** of the Evidence Act, no oral evidence is admissible to contradict or vary the contents of the documentary evidence indicating surrender.
>
> (iii) In the instant case, the Commissioner of Lands did not on his own motion surrender the land; the land was surrendered by the registered proprietors. The evidence in support of this is the letter dated 24th January 1980 from counsel for the 1st to 4th respondents forwarding the title Grant for the suit property for purposes of surrender. Further evidence is letter dated 25th November 1981 from Commissioner of Lands to M/s R. L. Aggarwal stating no surrender had been registered at the Registry in relation to the suit property. Following this letter, on 23rd September 1983 a surrender was registered against the suit property. In our considered view, the surrender could not be entered on the Registrar without the registered proprietors returning the original title and Grant relating to the suit property.

97. We now consider whether the trial court properly evaluated the evidence on record to determine if the sub-divisions of the suit property and issuance of title deeds under RLA was done above aboard with the knowledge and participation of the registered proprietors. The answer to these questions are discernible from the two letters dated 23rd February 1980 and 25th November 1981 from the Commissioner of Lands to

Ms. R. L. Aggarwal who was the advocate for the original five registered proprietors.

98. By a letter dated 23rd February 1980, (reproduced above) the Commissioner of Lands writes to Mr. R.L. Aggarwal Advocate and observes in relevant excerpts that ***"before survey of the sub-plot divisions was carried out, we received another application for sub-division of sub-plot No. 5 … Again, before the sub-division was surveyed, we received a further application for sub-division of the balance of the area of sub-plot No. …. As you know, for the leases or titles to be issued, in respect of each sub-division, the head title has to be surrendered and new leases and or titles issued."***

99. Another relevant letter from the Commissioner of Lands to Mr. R.L. Aggarwal dated 25th November 1981states that ***"the sub-divisions have been re-subdivided to cater for various use…...However, it is rather impossible at this stage to issue titles direct to the purchasers of the sub-divisions as transactions will have to be completed first"***.

100. What is clear from the two letters dated 23rd February 1980 and 25th November 1981 is that sub-division and re-sub-divisions was going in relation to the suit property. It is also clear that there were third party purchasers of the plots being sub-divided. All these was going on and being done with the knowledge of Mr. R. L. Aggarwal Advocate for and on behalf of the five registered proprietors. The sub-division was also being undertaken with the knowledge of and instruction of Ms. J.S. Vaughan, the Surveyor for the registered proprietors. In our view, the acts and omissions of Messrs. R.L. Aggarwal and J. S. Vaughan are acts that bind the registered proprietors. We are fortified in our view by dicta in ***Moulton vs. Bowker 115 Mass. 36 (1874)*** where it was stated:

> ***"In the absence of collusion, fraud or other inequitable conduct, "an attorney at law has authority, by virtue of his employment as such, to do in behalf of his client all acts, in or out of court, necessary or incidental to the prosecution and management of the suit, and which affect the remedy only, and not the cause of action."***

101. The extent of authority of a solicitor is set out in a passage in the ***Supreme Court Practice 1979 (Vol.2) paragraph 2013 page 620*** as follows: -

> ***"Authority of Solicitor- a solicitor has a general authority to compromise on behalf of his client, if he acts bona fide and not contrary to express negative direction; and it would seem that a solicitor acting as agent for the principal solicitor has the same power (Re Newen, [1903] 1 Ch pp 817,818; Little vs Spreadbury, [1910]2 KB 658). No limitation of the implied authority avails the client as against the other side unless such limitation has been brought to their notice-see Welsh vs Roe [1918 - (9] All E.R Rep 620."*** (*Emphasis by underline*)

102. This Court has adopted this postulation of the Advocate's authority in the Supreme Court's Practice in the case of ***Kenya Commercial Bank vs. Specialized Engineering Company Ltd 1980 eKLR.***

103. In the instant matter, the letter dated 25th November 1981 from the Commissioner of Lands to Mr. R. L. Aggarwal reiterates the procedure to be followed for issuance of title deeds. In the letter, it is stated that "*there is need for surrender of the Grant I.R. 17542 in exchange of leases in respect of the sub-divisions falling within the Eldoret Municipality under the Registered Land Act and surrender of Grant in respect of sub-divisions falling outside the Municipality under the Registration of Titles Act for agricultural user. Transfers to be made to the respective purchases of the said portions. The surrender of Grants of agricultural portions is to be in exchange of new Grant or lease incorporating the changes of user and new rents per sub-plot. (Emphasis supplied)*

104. As already stated, subsequent to this letter, surrender of the Grant to the Government of Kenya is entered in the Register on 21st September 1983 and title deeds issued to third parties. In this regard, by letter dated 28th January 1985, a Registry Index Map (R.I.M) and Area List was prepared and submitted to the Land Registrar. (See page 176 of the Record). The Registry Index Map is created by ***Section 18(1)*** of the Registered Land Act and its production is vested in the Director of Surveys.

105. Upon our re-assessment of the evidence on record, we are convinced that the trial judge erred in evaluating the evidence as he did not direct his mind to the contents and proprietary impact of the letters and correspondences cited and reproduced in this judgment. Had the learned judge done so, he would have appreciated that both Messrs. J. S. Vaughan (Surveyor) and R. L. Aggarwal Advocate acting for and on behalf of the five registered proprietors of the suit property actively gave instructions to the Commissioner of Lands to sub-divide the suit property; the learned judge would have appreciated that the Commissioner of Lands in sub-dividing the suit property did not compulsorily acquire portions or parts of the suit property but issued titles to third parties on the strength of sub-divisions and re-sub-divisions as instructed by the five original co-owners through their lawyer or persons with whom they had entered into agreements to purchase the resulting sub-plots.

106. In addition, the trial judge erred in failing to address his mind and consider the chronology of the documentary evidence attached to the supporting and replying affidavits. Had he done so, it would have been apparent that the 1st to 4th respondents did not tender in evidence all sequential correspondences between the Commissioner of Lands, Ms. R. L. Aggarwal Advocate and Ms. J. Vaughan relating to sub-division and re-sub-division of the suit property. It is lamentable and unpersuasive that the 1st to 4th respondents did not deem it fit to annex, for purposes of full disclosure and transparency, any letter or reply from Mr. R.L. Aggarwal Advocate who was a key recipient of letters from the Commissioner of Lands. Had the trial judge examined all the documents on record, he would have appreciated that there are several missing correspondences and documentation relevant to determination of liability on the part of the appellants in relation to the claim that the suit property had unlawfully be seized and sub-divided without following the due process of law. He would have appreciated that the missing letters and reply from Mr. R.L. Aggarwal Advocate which have deliberately or otherwise been kept away from the trial court are key to resolution of the dispute between the parties. The missing letters and correspondence border on suppression of material evidence. In light of the missing correspondence and documentation, we are convinced that the trial judge did not have all relevant documentation and material that would lead him to conclude on a balance of probability that the process of surrender of the suit land to the Government of Kenya and conversion of the land regime from RTA to RLA was characterized by procedural impropriety and illegality.

107. Further, the learned judge erred and failed to take into account that the Commissioner of Lands by virtue of powers bestowed by ***Section 70(1)*** of the RTA had power to combine and amalgamate plots. The registered proprietors by a letter dated 3/1/78 from J.S. Vaughan and addressed to the Commissioner of Lands and copied to Ms. R. L. Aggarwal Advocate had intimated the need to combine some plots. **Section 70(1)** of RTA reads:

> ***"70. (1) Upon the application of any proprietor of land held under separate grants or certificates of title or under one grant or certificate of title, and the delivering up of the grant or grants, certificate or certificates of title, the registrar may issue to the proprietor a single certificate of title for the whole of the land, or several certificates each containing a portion of the land in accordance with the application, and as far as this may be done consistently with any Act for the time being in force respecting the subdivisions of grants that may be included in one certificate of title or respecting the subdividing of the grants."***

108. The learned judge further erred in failing to address his mind to the provisions of ***Section 65 (1) (a)*** of the **RTA** as read with ***Section 5*** of the Act which gives power to the Commissioner to call for a document. In this context, the judge erred as he did not consider whether the Commissioner unlawfully exercised his power in pointing out to Mr. R.L. Aggarwal Advocate vide letter dated 25th November, 1981 that for individual titles of the sub-division of the suit property to issue, surrender of the Grant was necessary. ***Section 65 (1) (a)*** of the **RTA** provides:

> *"65. (1) A registrar may exercise the following powers in addition to other powers conferred under this Act:*
>
> *(a) He may require the proprietor of, of any other person interested in land in respect of which a "transfer, transmission or other dealing is about to be registered to produce any grant, certificate of title, charge, lease, will or other instrument in his possession or within his control relating to the land.*

109. All these bring forth the issue of burden of proof. The legal and evidentiary burden of proof rested with the 1st to 4th respondents. They failed to discharge the same. We are convinced that the learned judge did not comprehensively consider and evaluate the evidence and documentation on record. The findings and conclusions of fact made by the trial court is not supported by the evidence on record. Our re-evaluation of the evidence leads us to conclude, that on balance of probabilities, the Petitioners did not prove and establish that the suit property was illegally, un-procedurally and unlawfully seized by the appellants. The 1st to 4th respondents did not prove on balance of probabilities that the suit property was illegally sub-divided ad re-subdivided. There is ample evidence on record pointing to active participation by the registered proprietors in sub-division and re-subdivision of the suit property and negotiating purchase transactions for the ensuing sub-plots with third parties. We observe the original proprietors during their life time never complained about sub-division and re-subdivisions of the suit property which is now heavily developed.

110. Having found that the trial judge erred in his evaluation of the evidence on record and erred in finding the appellants had illegally seized and compulsorily acquired the suit property, it follows the judge had no basis in law in granting an order of mandamus against the appellants. We shall now consider if the trial judge erred in awarding compensation as he did.

Damages as Compensation, Valuation Reports and Mesne Profits

111. The appellants and the 5th respondent submitted that the trial judge erred in awarding compensation for the suit property in the form of damages and mesne profits. The contestation is that the compensation of Ksh. 3,736,070.381/23 billion and Ksh. 4,132,942,326/49 billion awarded as damages for acquisition of the suit land are high and excessive. It was submitted the judge erred in relying on two Valuation Reports prepared by Afriland Valuers Limited despite qualifications of the valuer not having been confirmed; that the Valuation Report and Loss of User Report were faulty; and both Reports lacked material particulars. It was submitted that the Valuation Reports did not show how the sums of Ksh. 3,736,070.381/23 billion and Ksh. 4,132,942,326/49 billion were derived as compensation for value of the suit property; the trial court did not justify why the sum of Ksh. 500,000,000/= was awardable as mesne profit for loss of user for over 30 years. The appellants recapped the submission the trial court erred in simply adopting and relying on faulty Valuation Reports without the court's own independent analysis and assessment of the Reports.

112. In rebuttal, the 1st to 4th respondents submitted trial court did not err in relying on the two Valuation Reports. It is uncontested the 1st to 4th respondents tendered in evidence two Valuation Reports that were never controverted; the appellants did not tender in evidence any valuation reports and as such, the trial judge did not err in adopting and relying upon an uncontroverted Valuation Reports put in evidence by the 1st to 4th respondents.

113. On damages, the contestation relates to quantum. The appellants contend quantum awarded is excessive. Conversely, the 1st to 4th respondents aver the amount is reasonable. In ***Kemfro Africa Limited t/a Meru Express Services (1976) &another vs. Lubia & Anor. (No. 2) [1985] eKLR*** this Court enunciated principles for setting aside or interfering with the award of damages. It was stated:

> ***"The principles to be observed by an appellate court in deciding whether it is justified in disturbing the quantum of damages awarded by a trial Judge were held by the former Court of Appeal of Eastern Africa to be that it must be satisfied that either that the Judge, in assessing the damages, took into account an irrelevant factor, or left out of account a relevant one, or that, short of this, the amount is so inordinately low or so inordinately high that it must be a wholly erroneous estimate of the damage."***

114. In ***Butt vs. Khan [1981] KLR 349***, Law, J.A expressed that:

"An appellate court will not disturb an award of damages unless it is so inordinately high or low as to represent an entirely erroneous estimate. It must be shown that the Judge proceeded on wrong principles, or that he misapprehended the evidence in some material respect, and so arrived at a figure which was either inordinately high or low."

115. In the instant matter, the issue encompasses valuation of the suit property. The word 'value' means intrinsic worth, cost or price for sale of a thing/property. ***(See Union of India vs. Bombay Tyre International Ltd., (1984) 1 S.C.C. 467*** and ***Gurbachan Singh vs. ShivalakRubber Industries, AI.R. 1996 S.C. 3057).*** Valuation is a question of fact and the value of property should be determined fairly and reasonably. However, the correct principle of valuation applicable to a given case is a question of law. A valuer's report should indicate the estimated value of the property. Such estimate should be done carefully. Unless the court is satisfied about the adequacy of the price, adoption and confirmation of value as per a valuation report would not be a proper exercise of judicial discretion. (See ***Kay jay Industries (P) Ltd. vs. Asnew Drums (P) Ltd., A.I.R. 1974 S.C. 1331; Union Bank of India vs. Official Liquidator High Court of Calcutta, A.I.R. 2000 S.C. 3642; B. Arvind Kumar vs. Government of India, 2007 (56) A.I.C. 9 (S.C.) (Sum.): (2007) 5 S.C.C. 745*** and ***Transcore vs. Union of India, A.I.R. 2007 S.C. 712****).*

116. In the instant matter, the trial court relied on two Valuation Reports prepared by Afriland Valuers Limited. In relying on the Reports, the judge quoted from the Reports as follows:

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

The learned then then made a finding as follows:

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

117. On a comparative basis, we note the decision of the Uganda High Court in ***Annet Zimbiha -v- Attorney General, Civil Suit No. 0109 Of 2011*** where the learned judge expressed as follows:

"At the trial it emerged that the main issue was not whether the plaintiff should be compensated, but by how much she ought to be compensated. The issue being a factual and technical one, the court ordered the parties to submit valuation reports in support of their claims. The plaintiff submitted her valuation report which was admitted as "Exhibit P1", and the defendant failed to do so. Court directed that if by the next date of adjournment, the defendant had not submitted their own report the trial would be informed by the only report in evidence. Despite the several adjournments, the defendant failed to submit its valuation report. … No evidence in rebuttal of the plaintiff's testimony or the valuation report was adduced by the defence, and the legal implication is that the report and testimony of the witness are taken as uncontroverted, hence admitted."

118. The High Court of Kenya has time and again considered the issue of burden ***vs. Consolidated Bank of Kenya, [2014] e KLR*** *it was expressed that a court needs cogent evidence to challenge a valuation report.* In ***Zum Zum Investment Limited vs. Habib Bank Limited [2014] eKLR,*** it was stated:

"Once the Defendant has undertaken a forced sale valuation, the burden shifts to the Plaintiff to prove that the value arrived at by the Defendant's valuer was not the best price reasonably obtainable at the time……

In my view, the Plaintiff has not demonstrated satisfactorily why this court should disregard the Defendant's valuation report and only rely on the Plaintiff's valuation reports. It is not sufficient for the Plaintiff to merely claim that the intended selling price is not the best price obtainable at the time by producing a counter-valuation report. The Plaintiff must satisfactorily demonstrate why the valuation report that the Defendant intends to rely on …. does not give the best price obtainable at the material time. The Plaintiff needs to show, for instance, that the Defendant's valuer is not qualified or competent to carry out the valuation, or that the valuation was carried out in consideration of irrelevant factors or that the valuation was done way before the time of the intended sale. The Plaintiff has not raised any of such grounds."

119. *In our view,* valuation is basically a question of fact and this Court will be reluctant to interfere with the finding on such a question of fact if it is based on relevant material that is on record. We are cognizant that valuation is a technical and complex matter appropriately left to the wisdom of the experts.

120. In the instant matter, w*e have considered the reasoning by the trial judge that the sum of Ksh.* 3,736,070,381/23 billion and Ksh. 4,132,942,326/49 is *fair value for compensation as damages for claims over the suit property. The judge expressed that he found the two valuation reports tendered in evidence by the 1st to 4threspondents to be reasonable.*

121. It is not evident how the judge arrived at the determination that the sums in the Reports were reasonable. *The fact that a valuation report is not controverted does not make the report reasonable. A court has duty to exercise an independent mind and determine if the valuation report is reasonable. The court is to undertake analysis* and determine the accuracy, quality and appropriateness of the report, and ascertain relevance of data used, enquiries made and suitability of methods and techniques employed, and finally, the court is to determine whether the analysis, opinions and conclusions in the valuation report are reasonable.

122. The valuation report states the suit property was "valued free from encumbrances" and the valuation was done for purposes of the instant court petition. It is not clear whether the value would be different if valuation was not done for petition purposes; it is unclear how the valuer arrived at the conclusion the suit property had no encumbrances yet the record shows there are third parties in possession of parts of the property. The valuation report is silent on compensation paid by the Government upon compulsory acquisition of portions of the property; the report does not comprehensively state whether the value given denotes a fair market value at the time of alleged taking; it does not succinctly specify the dependent factual circumstances such as zoning and unique characteristics of the property; and the report does not indicate if the assigned value is based on comparable market, income or cost valuation approach. (See generally, **Waters & Others vs. Welsh Development Agency [2004] UKHL 19; [2004] 1 WLR 1304; see also Hugh Charles vs. Lyndis Wattley, The Eastern Caribbean Supreme Court in the High Court of Justice (Civil) Claim No. NEVHCV 2012/15 – Judgment on Assessment of Damages)**.

123. *Bearing all these in mind, th*e trial judge did not conduct any analysis of the valuation reports tendered in evidence; the judge did not explain why he deemed the valuation report to be reasonable. Yes, the trial Judge may have been exercising discretion in making the award based on the valuation report. However, such exercise of discretion should not be capricious or whimsical. It should be exercised on some sound judicial principles. In the absence of any reason(s) explaining why the valuation report was reasonable, we are inclined to believe the trial judge in determining the compensation to be awarded took into account irrelevant considerations and or failed to take into account relevant considerations.

124. In line with the decision in ***Gicheru vs. Morton and Another (2005) 2 KLR 333*** **and** ***Butt vs. Khan [1981] KLR 349*** we are convinced that the trial judge erred and *acted upon wrong principles of law in relying on the two Valuation Reports prepared by Afriland Valuers Limited without explaining why the valuation reports were reasonable. The record shows the suit property is developed and it is unclear whether the valuation reports relied upon by the trial court are based on developed or undeveloped site values and if public infrastructure such as the road and railway line abutting and crossing the property have been included, discounted or excluded in the valuation matrix.*

125. On the issue of mesne profits, the trial judge awarded the sum of Ksh. 500,000,000/= (Five hundred million) as compensation for loss of user. In explaining the five hundred million, the judge stated:

> ***"An order of Mandamus to compel the 1st to 5th respondents to jointly and or severally pay the petitioners mesne profits in the sum of Ksh. 2,690,603,339/= billion for loss of user for over 30 years is declined as the petitioners did not mitigate their loss by commencing their claims within reasonable time even after the so called change of regime in the year 2002. However, the court is inclined to award a nominal figure of Ksh. 500,000,000 as mesne profits."***

126. This Court in ***Peter Mwangi Mbuthia & another vs. Samow Edin Osman [2014] eKLR*** expressed that it is upon a party to place evidence before the court upon which an order of mesne profits could be made. It was stated:

> ***"As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded… That being so, it must be very hard on the applicant to be forced to pay an amount which had not even been pleaded in the first place, and on which the first respondent offered no evidence at all."***
>
> ***"We agree with counsel for the appellants that it was incumbent upon the respondent to place material before the court demonstrating how the amount that was claimed for mesne profits was arrived at. Absent that, the learned judge erred in awarding an amount that was neither substantiated nor established."***

126. In ***Karanja Mbugua & another vs. Marybin Holding Co. Ltd [2014] eKLR*** **it was correctly stated that** *mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of* ***Order 21, Rule 13*** *of Civil Procedure Act*. In ***Dr. J K Bhakthavasala Rao –v - Industrial Engineers, Nellore AIR 2005 AP 438*** **it was held that** mesne profits by its very nature, involves adjudication of a pure question of fact. The onus of proving what mesne profits might, with due diligence, have been received in any year lies upon the party claiming mesne profits.

127. A claim for mesne profit is a claim akin to special damages. It must be pleaded and proved. (See ***Mohammad Amin and Ors –v - Vakil Ahmed and Ors 1952(1) SCR1133*****).** *The 1st to 4th respondents did not plead the sum of Ksh. 500,000,0000/= awarded by the trial judge as mesne profits. They also did not satisfy the trial court that they ought to be awarded the sum of Ksh.* 2,690,603,339/=*pleaded in the amended Petition as mesne profit.*

128. The Privy Council in ***Horsford vs. Bird*** **[***2006] UKPC, Privy Council Appeal No. 43 of 2004*** held that the formula for calculating mesne profits for trespass to land or for loss of user is assessed on a yearly basis as a percentage of the capital value of the piece of land in question. In the instant case, the valuation report by the 1st to 4th respondents did not realistically apply the formula enunciated by the Privy Council.

129. Having made a finding that the 1st to 4th respondents were not entitled to Ksh. 2,690,603,339/= as mesne profits, *it was not open to the trial court to substitute its own figure of Ksh. 500,000,000/= and make an award of the same as mesne profits. The judge did not explain how he arrived at the sum of Ksh. 500,000,000/=. All that the judge said was the sum was nominal and awarded because the Petitioners did not mitigate their loss by commencing their claims within a reasonable time even after the so called change of regime in the year 2002. The onus was on the 1st to 4th respondents to prove they are entitled to mesne profits and then to prove the specific amount they were entitled to. As already stated, assessment of mesne profits is a question of fact and evidence must be led. In this matter, the judge further erred in awarding mesne profits of Ksh. 500,000,000/= that was neither pleaded nor proved. It is interesting to note that the learned judge refers to the sum of Ksh. 500,000,000/= as nominal.*

130. For the various reasons stated in this Judgment, the upshot is that the consolidated appeals have merit and are hereby allowed. We hereby set aside in entirety the Judgment of the Environment and Land Court dated 15th April 2016 and the declaratory orders and decree arising therefrom. We dismiss the Petitions filed before the trial court. The 1st to 4th Respondents shall bear the cost of the Petition before the trial court and costs in this appeal. It is so ordered.

Dated and delivered at Eldoret this 6th day of December, 2018.

E. M. GITHINJI

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

J. OTIENO-ODEK

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR.