Janmohammed (SC) (Suing as the Executrix of the Estate of the Late HE Daniel Toroitich Arap Moi) & another v Lagat & 4 others (Petition 17 (E021) of 2023 & 24 (E027) of 2022 (Consolidated)) [2024] KESC 39 (KLR) (2 August 2024) (Judgment)

Neutral citation: [2024] KESC 39 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 17 (E021) OF 2023 & 24 (E027) OF 2022 (CONSOLIDATED)

MK KOOME, CJ & P, MK IBRAHIM, SC WANJALA,
N NDUNGU, I LENAOLA & W OUKO, SCJJ

AUGUST 2, 2024

BETWEEN

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

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

AND

NATHANIEL K LAGAT ..... 1ST RESPONDENT

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

THE REGISTRAR OF TITLES ..... 3RD RESPONDENT

SUSAN CHERUBET CHELUGUI & DAVID K CHELUGUI (SUING AS THE ADMINISTRATORS OF THE ESTATE OF THE LATE NOAH KIPNGENY CHELUGUI) ..... 4TH RESPONDENT

THE NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

(Being a consolidated appeal from the Judgment and Orders of the Court of Appeal of Kenya at Kisumu (Kiage, M'Inoti & Mumbi Ngugi, JJ.A) in Civil Appeal No. 159 of 2019 as consolidated with Civil Appeal No. 254 of 2019, delivered on 22nd July, 2022)

A constitutional petition does not automatically oust the Limitation of Actions Act where there is inordinate delay

The case revolved around issues of limitations of time and specifically whether the Limitation of Actions Act could be applied to claims of violations of fundamental rights and freedoms. In the instant case, a constitutional petition was filed more than 31 years after the alleged violation of the right to property. The Court held that Petitions

founded on claims of violation of fundamental rights and freedoms were not subject to limitation of actions. However, that principle was to be applied by a court of law on a case by case basis taking into account factors such as the nature of the right, the time taken to ventilate the alleged violation, and whether the claimant may be riding on a mischief. Section 7 of the Limitation of Actions Act was applicable to the suit unless ousted by the above principle.

Reported by John Ribia

Constitutional Law *– fundamental rights and freedoms – right to property – retrospective application of constitutional provisions - whether article 40 of the Constitution on the right to property applied retrospectively – Constitution of Kenya article 40; constitution of Kenya, (repealed) section 70.*

Civil Practice and Procedure *– limitation of actions – constitutional petitions – claims of violation of fundamental rights and freedoms – where there was a delay of 31 years in filing a constitutional petition - whether the Limitation of Actions Act applied to claims of violations of fundamental rights and freedoms - whether the delay between 1983 and 2014 in pursuing a constitutional petition on the violation of the right to property was inordinate - whether a constitutional petition ousted the Limitation of Actions Act without need for a reasonable explanation where there was a delay - Constitution of Kenya, articles 24 and 40; constitution of Kenya (repealed) section 70; Limitation of Actions Act (cap 22) section 7.*

Civil Practice and Procedure *– appeals – second appeals – appeals to the Supreme Court – nature of issues that could be determined on second appeal – issues of law – dispute of fact and evidence - whether a dispute on whether the respondents should have filed a civil suit instead of a constitutional petition, could be determined at the Supreme Court on second appeal.*

Brief facts

In 1965, N. K. Lagat and Partners, including Noah Chelugui, purchased L.R. No. 10492, measuring 3236 acres. The land was subdivided in 1976, with each partner receiving 620 acres, while 140 acres went to Huruma Co. Ltd. Chelugui's portion became Eldoret Municipality Block 15/10. In 1983, Block 15/10 was subdivided into parcels 237, 238, and 239, with Block 15/239 registered in President Moi's name. This parcel was later subdivided, with parts sold to Rai Plywood (K) Ltd and Kobil Petroleum Ltd. The 2nd respondents, administrators of Chelugui's estate, claimed Moi acquired Block 15/239 irregularly and filed a constitutional petition in 2014 alleging violations of property rights. The Environment and Land Court (ELC) found the acquisition unconstitutional, irregular, and procedurally flawed, ordering compensation of Kshs. 1.06 billion to Chelugui's estate. The ELC dismissed the appellants' claims of being bona fide purchasers. The Court of Appeal upheld the ELC's decision, holding that article 40 of the Constitution applied retrospectively. The court ruled that the Limitation of Actions Act did not bar constitutional claims and affirmed the compensation order. The appellants, including Rai Plywood, challenged the findings of the ELC and the Court of Appeal; arguing the delay was unjustified and the claim was improperly filed as a constitutional petition.

Issues

i. Whether article 40 of the Constitution on the right to property applied retrospectively.
ii. Whether the Limitation of Actions Act applied to claims of violations of fundamental rights and freedoms.
iii. Whether the delay between 1983 and 2014 in pursuing a constitutional petition on the violation of the right to property was inordinate.
iv. Whether filing a constitutional petition automatically ousted the Limitation of Actions Act, despite an inordinate delay, without requiring a reasonable explanation.
v. Whether a dispute on whether the respondents should have filed a civil suit instead of a constitutional petition, could be determined at the Supreme Court on second appeal.

Held

1. The appeal raised issues involving the interpretation or application of the Constitution. The Supreme Court was seized with jurisdiction to hear and determine the consolidated appeal.

2. The Constitution, unlike an ordinary statute, could apply retrospectively if the circumstances of a particular case so required. However, it all depended on the language of the specific provision in question. Article 40 of the Constitution (right to property) had ingredients of retrospectivity embedded in it. The provisions of article 40 merely embodied a right that was hitherto protected under section 75 of the repealed constitution that inhered to individuals.
3. The issue of whether the respondents ought to have moved the trial court by way of a civil suit as opposed to a constitutional petition was raised too late in the day. Even if the issue had been raised at the trial stage, the Supreme Court doubted that a ruling in favour of the appellants would necessarily have disposed of the proceedings with finality. What would have been in contention was not the jurisdiction of the trial court, but the procedure in which its jurisdiction was being invoked.
4. Petitions founded on claims of violation of fundamental rights and freedoms were not subject to limitation of actions. The principle was not absolute. It was to be applied by a court of law on a case by case basis taking into account factors such as the nature of the right, the time taken to ventilate the alleged violation, and whether the claimant may be riding on a mischief. Section 7 of the Limitation of Actions Act was applicable to the suit unless ousted by the above principle.
5. Between 1983 and 2014, neither Noah Chelugui nor his estate pursued any legal redress aimed at vindicating his claim of violation of his right to property. Such delay could not be anything else but inordinate, warranting a credible explanation.
6. The Court of Appeal did not consider the fact of delay as being relevant in determining whether the limitation period was applicable or not. However, in so doing, the court made no reference to article 24 of the Constitution, which provided for the circumstances under which a right or fundamental freedom may be limited. A right or fundamental freedom, unless it was non- derogable, could be limited only by law, and to the extent that the limitation was reasonable and justifiable in an open and democratic society based on human dignity and freedom.
7. It was a fundamental omission by the appellate court, not to consider the provisions of article 24 of the Constitution in determining whether section 7 of the Limitation of Actions Act was applicable to the original proceedings before the Environment and Land Court. The the fundamental right or freedom in question was not the right to property per se, under article 40, but the right to institute court proceedings claiming that a right or fundamental freedom had been denied under article 22 of the Constitution.
8. Given the fact that this right was being exercised, thirty-one (31) years after the cause of action arose, and long after the promulgation of the 2010 Constitution, it was incumbent upon the Court of Appeal to interrogate such inordinate delay and on what basis it would be justifiable. The Limitation of Actions Act sought to limit the time within which a right under article 22 may be exercised. The Act was precisely such law as was envisaged under article 24 of the Constitution.
9. Had the appellate court addressed itself to the principles weighed against the chronology of events it would have arrived at a different conclusion. The argument that a constitutional petition automatically ousted the provisions of the Limitation of Actions Act, was not legally tenable. There was nothing on record to show that the 2nd respondents provided any explanation for the delay beyond stating that theirs was a constitutional petition and not a claim based on statute.
10. On a first appeal to the Court of Appeal, unless the appeal was on a point of law, the latter was duty bound where circumstances require, to consider and re-evaluate the evidence on record before arriving at a determination. That was all the more important in disputes relating to claims of title to land The Supreme Court was not to re- calibrate the evidence but simply to establish whether the conclusions arrived at by the Court of Appeal are supported by the evidence on record.
11. The 2nd respondents did not initially provide a precise description of the suit property. In their 2014 ELC Petition, they claimed Noah Chelugui owned L.R. No. 10492, later subdivided into parcels 237, 238, and 239. Historical records show L.R. No. 10492 was owned by five partners, including Noah

Chelugui. Subdivision consent was granted in 1976, assigning 620 acres to each partner and 140 acres to Huruma Co. Ltd. Eldoret Municipality Block 15/10, linked to Noah Chelugui, was subdivided into Blocks 237, 238, and 239. The Certificate of Grant excludes Block 239, casting doubt on the 2nd respondents' ownership claims. The Court of Appeal would not have affirmed the conclusions of the trial court regarding the ownership of the suit property given the evidence on record.

12. There was nothing on record to suggest that former President Moi acquired the suit property either fraudulently, or in a manner other than as indicated on record. What was on record were claims of disenfranchisement of the 2nd respondents from the ownership of the suit property. The claims were based on allegations of loss of a title deed to the suit property and some form of fraudulence perpetrated by one Stanley Metto through payment of Kshs. 70,000/= which was neither purchase price nor consideration. The court was later informed that the payment was intended to "soften" Mr. Chelugui, whatever that meant in law. It was not for the Supreme Cout to delve into the veracity, effect, or otherwise of such evidence. That was the duty of the trial court, at first instance and the Court of Appeal, during the process of re-evaluation.
13. Where the registered proprietor's root title was under challenge, it was not enough to dangle the instrument of title as proof of ownership. The registered proprietor must go beyond the instrument of title and show that the acquisition was legal, formal and free from encumbrance. However, the responsibility to prove legitimacy of title was not only limited to the party whose title was being challenged. It also extended to the party claiming infringement of his property rights, to prove his entitlement warranting the attendant constitutional protection sought. The claimant decried irregular subdivision of Eldoret Municipality/Block 15/10, yet he was a beneficiary of that same subdivision. He only lay claim to one sub-plot, the suit property. IT could not be said that the root of former President Moi's title to the suit property and by implication that of the 2nd appellant had been legally shaken based on the evidence tendered on behalf of the 2nd respondent.
14. There was no basis for the appellate court, to fault the validity of the 1st appellant's title to the suit property.

Appeal allowed.

Orders

i. *The Judgment of the Court of Appeal dated July 22, 2022 was overturned.*
ii. *Each Party was to bear its own Costs; and*
iii. *The sum of Kshs. 6,000/= deposited as security for costs in the consolidated appeal be refunded to the appellants*

Citations

Cases

Kenya

1. *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* Civil Appeals 51 & 58 of 2016; [2018] KECA 27 (KLR) - (Explained)
2. *Dina Management Limited v County Government of Mombasa & 5 others* Petition 8 (E010) of 2021; [2023] KESC 30 (KLR) - (Followed)
3. *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* Petition No 5 of 2012; [2012] eKLR - (Followed)
4. *Fanikiwa Limited v Sirikwa Squatters Group & 20 others* Petition 32 (E036) & 35 (E038) of 2022; [2023] KESC 58 (KLR) (Consolidated) - (Followed)
5. *In re Estate of Thomas Kipkosgei Yator & Another (Deceased)* Petition 1 of 2013; [2016] KEELC 988 (KLR) - (Followed)
6. *Jirongo v Soy Developers Limited & 9 others* Petition 38 of 2019; [2020] KESC 38 (KLR) - (Followed)
7. *Joho & another v Shahbal & 2 others* Petition 10 of 2013; [2014] KESC 34 (KLR) - (Followed)

8. *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* Petition 11 of 2020; [2023] KESC 4 (KLR) - (Explained)
9. *Kiluwa Limited & another v Business Liaison Company Limited & 3 others* Petition 14 of 2017; [2021] KESC 37 (KLR) - (Explained)
10. *Kimani & 20 others (On behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* Petition 45 of 2018; [2020] KESC 9 (KLR) - (Followed)
11. *Macharia v Kenya Commercial Bank & 2 others* Application No 2 of 2011; [2012] KESC 8 (KLR); [2012] 3 KLR 199 - (Followed)
12. *Mitu-Bell Welfare Society v Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* Petition 3 of 2018; [2021] KESC 34 (KLR) - (Followed)
13. *Munya v Kithinji & 2 others* Application 5 of 2014; [2014] KESC 30 (KLR) - (Followed)
14. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] KESC 9 (KLR) - (Followed)
15. *Republic v Minister for Transport & Communication & 5 others ex parte Waa Ship Garbage Collector & 15 others* Civil Appeal 617 of 2003; [2004] KEHC 10 (KLR) - (Followed)
16. *Tanui, Rael Chebet (Suing as the Administrator of the Estate of the Late Kaptigei Chemwor) & 40 others v Susan Cherubet Chelugui & 6 others* Land Case 404 of 2013; [2022] KEELC 344 (KLR) - (Followed)
17. *Torino Enterprises Limited v Attorney General* Petition 5 (E006) of 2022; [2023] KESC 79 (KLR) - (Mentioned)
18. *Town Council of Awendo v. Nelson O Onyango & 13 Others; Abdul Malik Mohamed & 178 Others (Interested Parties)* Petition 37 of 2014; [2019] KESC 38 (KLR) - (Followed)
19. *Wamwere & 5 others v Attorney General* Petition (Application) 26 of 2019 & Petition 34 & 35 of 2019; [2023] KESC 26 (KLR) (Consolidated) - (Explained)

Regional Court

Selle & another v Associated Motor Boat Co Ltd & others [1968] EA 123 - (Followed)

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) In general - (Cited)
2. Constitution of Kenya articles 19, 20, 21, 22, 23, 24, 25, 27, 40, 47, 50, 163(4)(a); 259(8) - (Interpreted)
3. Constitution of Kenya (Repealed) section 75 - (Interpreted)
4. Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) In general - (Cited)
5. Land Act (cap 280) In general - (Cited)
6. Limitation of Actions Act (cap 22) section 7 - (Interpreted)
7. Registered Land Act (Repealed) (cap 300) section 143(1) - (Interpreted)
8. Registration of Titles Act (Repealed) (cap 281) In general - (Cited)
9. Supreme Court Act (cap 9B) section 15(2) - (Interpreted)
10. Supreme Court Rules, 2012 (cap 9B) rules 3(5); 31; 32 ; 39 - (Interpreted)

Advocates

Mr Julius Kemboy for the 1st appellant.
Mr Kinoti Kibe for the 2nd appellant.
Mr Mohammed Odongo State Counsel, for the 3rd and 4th respondents.
Ms Niuster Bitok for the 5th respondent.

JUDGMENT

A. Introduction

1. Before this court are two petitions, Petition No 17 (E021) of 2022 dated July 28, 2022 and filed on August 1, 2022, and Petition No 24 (E027) of 2022 dated August 19, 2022 and filed on August 24, 2022. They are brought under article 163(4)(a) of the *Constitution*, section 15(2) of the *Supreme Court Act*, and rules 3(5), 31, 32 & 39 of the *Supreme Court Rules*, 2020. The appellants seek to set aside the Judgment of the Court of Appeal (Kiage, M'Inoti & Mumbi Ngugi, JJ.A.) delivered on July 22, 2022, which in effect affirmed the Environment and Land Court (Ombwayo, J.) in Eldoret ELC Petition No 9 of 2014. By a consent order dated February 20, 2023 the two petitions were consolidated.

B. Background

2. Sometime in 1965, NK Lagat and Partners acquired a parcel of land known as LR No 10492 (Grant IR No 17542 /1) measuring 3236 acres from Jacobus Hendrick Engelbretch. The partnership comprised five partners, including the Late Noah Chelugui, who died on 10th July 2005. The parcel of land was transferred to the partners for a consideration of Kshs 360,000 and a transfer duly registered on June 28, 1965. Thereafter, it was urged that by a consent granted by the Uasin Gishu Land Control Board on October 16, 1976, LR No 10492 was subdivided into six portions. Five portions were distributed among the five partners while the 6th portion was transferred to Huruma Company Limited. From this sub-division, it was argued that Eldoret Municipality/Block 15/10 was assigned to the Late Noah Chelugui. Subsequently, the said Eldoret Municipality/Block 15/10 was further subdivided into a number of parcels, and one such parcel is Eldoret Municipality/Block 15/239 situate in Uasin Gishu District measuring 53 acres (hereinafter the Suit property).

C. Litigation History

i. At the Environment and Land Court

3. By a petition dated June 9, 2014, Susan Cherubet Chelugui and David K Chelugui, in their capacity as joint legal representatives of the Estate of the Late Noah Chelugui, the 2nd respondents herein instituted Environment and Land Court Petition No 9 of 2014 against the Late President HE Daniel Toroitich Arap Moi (later substituted by Zehrabanu Janmohamed as the executrix of his estate) and Rai Plywood Limited, the 1st and 2nd appellants herein, and the District Land Registrar Uasin Gishu District, the Registrar of Titles and the National Land Commission, the 3rd, 4th, and 5th respondents respectively.

4. It was the 2nd respondents' case that sometime after the subdivision of LR No 10492, one Stanley Metto (now deceased) through deception or trickery, obtained the Late Noah Chelugui's original title to Eldoret Municipality/Block 15/10 to facilitate a sale but no such sale took place. However, they disclosed that the Late Noah Chelugui only received Kshs 70,000 from Stanley Metto which was neither purchase price nor consideration.

5. As a result of the purported sale, the 2nd respondents claimed that a substantial portion of Noah Chelugui's parcel, Eldoret Municipality/Block 15/10, has since been sub-divided and titles issued as follows:

    a. Eldoret Municipality/Block 15/238 measuring 12 acres in the name of Stanley Kiptoo Arap Metto;

b. Eldoret Municipality/Block 15/239 measuring 53 acres in the name of His Excellency the Retired President Daniel Toroitich Arap Moi (suit property); and

c. Eldoret Municipality/Block 15/237 measuring 24 acres in the name of Noah Kipngeny Arap Chelugui.

6. In their petition, the 2nd respondents only sought redress with regard to Eldoret Municipality/Block 15/239 which was registered in the name of the late President Moi. It was urged that the suit property was subsequently sub-divided into three parcels, Eldoret Municipality/Block 15/2369 measuring 1.373 acres; 2370 measuring 18.9 acres; and 2371 measuring 0.404 acres. Thereafter, parcel Nos 2369 and 2370 were sold to the 2nd appellant, Rai Plywood (K) Limited, which took possession and use thereof, while parcel No 2371 was sold to Kobil Petroleum Ltd.

7. The 2nd respondents specifically took issue with President Moi acquiring the suit property in inexplicable circumstances. It was urged that all efforts to recover this property, including the Late Noah Chelugui reporting his lost title to the police, were unsuccessful. More so, the 2nd respondents urged that various Land Registrars in Eldoret and Uasin Gishu Districts and other officers in the Ministry of Lands were complicit in the acts that led to the loss of the suit property. It was the 2nd respondents' further case that these actions were illegal and contravened Noah Chelugui's rights against arbitrary deprivation of private property under articles 40 and 47 of the *Constitution*. Consequently, the 2nd respondents sought the following reliefs;

i. A declaration that their constitutional right to property deserved protection by the court in so far as the suit property's acquisition by the 1st and 2nd appellants was arbitrary, unconstitutional, irregular, unprocedural, tainted, and a nullity ab initio;

ii. A declaration that the protection of their right to property had been violated, and the suit property was in real danger of being permanently arbitrarily acquired by the 1st and 2nd appellants to their detriment;

iii. Cancellation of all the titles emanating from the suit property and rectification of registers reverting the titles to the estate of Noah Chelugui or his administrators; or alternatively, an order for payment of the market value of the suit property by the 1st and 2nd appellants, to the estate of Noah Chelugui in such amounts as shall be assessed;

iv. A declaration that the acts of the 1st and 2nd appellants unlawfully attempting to deprive 2nd respondents of the suit property was illegal, and that the appellants are liable in compensation for loss of use of land and for breach of their constitutional rights, to be assessed by the court;

v. Damages against the 3rd, 4th and 5th respondents for aiding and abetting the arbitrary, unconstitutional and unprocedural dealings in the suit property, issuing suspect titles and for violation of their right to property; and,

vi. Costs of the petition.

8. For purposes of compensation, the 2nd respondents procured a valuation of the suit property by a private valuer, Afriland Valuation Ltd. The valuation report was produced and admitted in evidence by consent recorded before the trial court on March 16, 2018. It valued the suit property at Kshs 1,710,000,000.00 and assessed loss of use for a period of 34 years at Kshs 244,744,520.60 which the 2nd respondents claimed as mesne profits.

9. In opposition, the appellants filed grounds of opposition and a replying affidavit. They argued that the title registered in President Moi's name was a first registration under the *Registered Land Act* (Repealed) (RLA), and therefore indefeasible. It was further contended that President Moi followed due process in the acquisition of the suit property which was previously in the name of the Government of Kenya as Parcel No 10. In any event, they urged, the subdivision of the suit property was lawful and the 2nd appellant was an innocent purchaser for value and without notice of any defect.

10. Furthermore, the appellants urged that article 40 of the *Constitution* was not in operation at the time of registration of the suit property in the name of President Moi, and its subsequent transfer to Rai Plywood in 2007. It was also contended that article 75 of the retired Constitution was inapplicable as its provisions guaranteed rights actionable against the State and not individuals. Consequently, the appellants surmised that the petition was an ordinary civil land dispute camouflaged as a constitutional petition to defeat the Limitation of Actions.

11. Additionally, the 2nd appellant, in its replying affidavit urged that the suit property was no longer in existence having been subdivided in 2007. It also echoed the assertion that it was the duly registered proprietor of LR Nos Eldoret Municipality/Block 15/2369 and 2370, subdivisions of the suit property, having been purchased from President Moi for valuable consideration, and without notice of any defect in the title. It faulted the 2nd Respondent's failure to join Kobil Petroleum Limited as a party to the proceedings despite being the registered proprietor of the third subdivision of the suit property, LR No Eldoret Municipality/Block 15/2371. Furthermore, it contended that there was no evidence that Noah Chelugui was ever the proprietor of the suit property.

12. On their part, the Office of the Attorney General (hereinafter, the AG) appearing for the 3rd and 4th respondents challenged the 2nd respondents' ownership of the suit property. It was urged that the 2nd respondents did not demonstrate that the suit property formed part of the estate of Noah Chelugui for them to be entitled to compensatory orders. Moreover, the AG urged that the Government did not compulsorily acquire the property, and therefore could not be compelled to compensate the late Noah Chelugui or his estate.

13. The AG further asserted that the 2nd respondents were guilty of laches and negligence as they had taken 31 years to institute the case for acts allegedly committed in 1983, which alleged acts would have been within the knowledge of Noah Chelugui. It was further argued that the 2nd respondents did not lodge any complaint in any government office to recover the property. Likewise, it was urged, the 2nd respondents did not take any action to protect the property, such as by placing cautions. The AG cautioned that any compensation of the 2nd respondents would amount to double compensation in view of the trial court's determination in a related case involving the suit property, to wit, *In re Estate of Thomas Kipkosgei Yator & another (Deceased)* [2016] eKLR Eldoret E & L Petition No 1 of 2013. To counter the 2nd respondents' valuation report, the AG produced a report prepared by the state valuation officer, Uasin Gishu County, which assessed the market value of the property, exclusive of developments, at Kshs 820,000,000.00.

14. The 2nd respondents filed a supplementary affidavit and further supplementary affidavit in response to the counter-arguments by the opposing parties. The said affidavits also adduced additional supporting evidence. In the course of the proceedings, the 1st respondent, Nathaniel K Lagat, lodged a Motion dated December 15, 2014 seeking to be joined in the case on grounds that he had a stake in the suit property. By a ruling dated October 1, 2015, the trial court dismissed his application No appeal was preferred against the trial court's ruling to the Court of Appeal.

15. In a Judgment dated May 8, 2019, the trial court (Ombwayo, J) upon considering the parties' pleadings and rival arguments allowed the petition with costs to the 2nd respondents. The court determined that the acquisition of the suit property by the late President Moi and subsequent transfer to Rai Plywood Limited was unconstitutional, irregular, unprocedural and a nullity ab initio. The trial court reasoned that LR No 10492 was acquired by NK Lagat & Partners, subdivided into six portions pursuant to a consent granted by the Uasin Gishu Land Control Board, distributed among the five partners while the sixth portion was transferred to Huruma Company Limited.

16. The learned judgeheld that Eldoret Municipality/Block 15, which was one of the six portions excised from LR No 10492, belonged to the Late Noah Chelugui. Further, that this parcel was subdivided into Eldoret Municipality Block 15/239 (suit property), 238 and 237, and President Moi unlawfully acquired the suit property, even though he was not a member of NK Lagat & Partners. Moreover, that no iota of evidence was adduced by the late President Moi in support of his acquisition and registration as the proprietor of the suit property.

17. Additionally, the trial court noted that the state counsel representing the District Land Registrar, Uasin Gishu District and the Registrar of Titles, admitted that the disputed acquisition and registration was pursuant to 'orders from above' emanating from President Moi, which statement bordered on illegality, impunity and procedural impropriety. Furthermore, the court held that there was no surrender of the head title, but instead, a survey of the suit property for subdivision purposes was executed under verbal instructions from the Comptroller of State House. Similarly, that the subdivision was without an approved development plan and the process was marred with unlawful interference by State House. Accordingly, the court concluded that the resultant leases were generated at President Moi's behest through improper government channels.

18. As regards the 2nd appellant's claim, the court held that Rai Plywood's defence that it was a *bona fide* purchaser for value without notice of any defect was unsupported, as there was no agreement for sale and evidence of payment of any consideration for the properties it purchased. On the issue of laches, while applying this Court's holding in *Kiluwa Limited & another v Business Liaison Company Ltd & 3 others* SC Petition No 14 of 2017; [2021] KESC 37 (*Kiluwa Limited* case), the court held that the 2nd respondents' claim was not defeated bearing in mind its nature, the period of delay, the circumstances surrounding the petition, the persons alleged to be behind the process, and the fact that there is no clear provision of the time period for instituting such petitions.

19. Consequently, the trial court issued the following orders, as particularized in its Decree issued on May 24, 2019;

    a. A declaration that the petitioner's constitutional right to the suit property registered in the name of His Excellency the retired President Moi and subsequently Rai Plywood (K) Ltd deserved protection by the court, and that its acquisition was arbitrary, unconstitutional, irregular, unprocedural, tainted and a nullity ab initio;

    b. The appellants are hereby ordered to pay the Estate of the Late Noah (K) Chelugui the current market value of the said property being compensation for the land illegally registered in the name of the former president and subsequently transferred to Rai Plywood being Kshs 1,060,000,000; and

    c. Costs of the petition to the petitioners.

ii. At the Court of Appeal

20. Aggrieved by the entire Judgment, the 1st and 2nd appellants filed Kisumu Civil Appeal No 159 of 2019 citing 29 grounds, summarized as follows, that the Judge erred in law and fact, in:

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

    ii. Retrospectively applying the provisions of the *Constitution* of Kenya, 2010 to a transaction in respect of the suit property that occurred more than 27 years earlier;

    iii. Failing to appreciate that the petition was a suit for recovery of land couched as a constitutional petition under the guise of article 40, meant to evade the statutory timelines under the *Limitation of Actions Act*;

    iv. Ignoring the doctrine that equity aids the vigilant and not the indolent, and that the petitioners were guilty of laches having waited for more than 30 years to institute the petition;

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

    vi. Making a determination and conclusion not supported by the evidence placed before the court;

    vii. Failing to comprehensively consider evidence to the effect that Noah Chelugui voluntarily participated in the surrender, sub-division and transfer of the suit property to third parties including the 1st appellant;

    viii. Ignoring the presumption of validity of title and shifting the burden of proof to the appellants;

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

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

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

    xii. Granting an unreasonable order for compensation in the value of Kshs. 1.06 billion;

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

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

21. The 1st and 2nd appellants sought the following reliefs;

    i. The appeal be allowed;

    ii. The impugned Judgment be set aside;

    iii. The petition before the Environment and Land Court be dismissed;

    iv. Costs of the case before the Court of Appeal and trial court.

22. Similarly, despite the trial court having declined to grant his application for joinder to the proceedings, the 1st respondent, Nathaniel K Lagat, also aggrieved by the trial court Judgment, filed Kisumu Civil Appeal No 254 of 2019, claiming that the learned Judge erred by:

    i. Delivering the impugned Judgment against him, while he was not a party to the proceedings;

ii. Declining to join him as an interested party in the matter;

iii. Conferring upon the 2nd respondents' ownership of the disputed land and depriving him of his Land Reference No Eldoret Municipality/ Block 15/10; and,

iv. Delivering a Judgment per incuriam without dealing with all issues before court.

23. On his part, the 1st respondent prayed that;

i. The impugned Judgment be set aside;

ii. The suit before the trial court be heard afresh; and

iii. He be joined as a party to the fresh proceedings.

24. The two appeals were consolidated, with Civil Appeal No 159 of 2019 designated as the lead file. When the matter came up for hearing, all parties save for the 2nd respondents had not complied with court directions requiring filing of submissions within the set timelines. For this reason, the hearing proceeded with only the 2nd respondents' submissions on record.

25. After hearing the parties, the Court of Appeal delineated the following issues for determination: whether the 2nd respondents' claim was time barred under the *Limitation of Actions Act*; whether the provisions of the *Constitution* of Kenya, 2010 applied retrospectively to events that occurred in the 1980s; whether the 2nd respondents were entitled to special damages as assessed in their valuation report; whether the learned Judge was biased or made an unjust determination; and whether Civil Appeal No 254 of 2019 was meritorious.

26. In a Judgment delivered on July 22, 2022, the Court of Appeal (Kiage, M'Inoti & Mumbi Ngugi, JJA) dismissed the consolidated appeal and affirmed the decision of the Environment and Land Court. On the issue whether the 2nd respondents' claim was time barred under the *Limitation of Actions Act*, the court held that unless expressly stated in the *Constitution*, the limitation period under the *Limitation of Actions Act* does not apply to the violation of rights and freedoms guaranteed in the *Constitution*. In addition, it held that 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.

27. On whether the provisions of the *Constitution* of Kenya, 2010 applied retrospectively, the court held that article 40 of the *Constitution* is not limited in its application, and that it can and must in appropriate cases apply retrospectively. It was further held that the right to property is ring-fenced by the *Constitution* and courts must be vigilant to ensure that the State and those who wield state power do not by might negate the right; that it can only be qualified or defeated in the circumstances contemplated by the *Constitution* and the law. The court found that the instant case did not fall under the stated parameters.

28. As pertains the issue whether the 2nd respondents were entitled to damages as assessed in their valuation report, the Court of Appeal upheld the trial court's award. The court noted that the appellants did not produce any valuation report to be compared with the 2nd respondents' report. Moreover, it was the court's reasoning that there was a sound basis for the award of Kshs 1.71 billion as damages to the 2nd respondents, as well as mesne profits based on their valuation report. However, since the 2nd respondents did not file a cross-appeal to challenge the award of Kshs 1.06 billion and denial of mesne profits of Kshs 244,744,520, the court held that it would not interfere by way of enhancement of the sum awarded.

29. On the issue whether the learned Judge of the ELC was biased or determined the matter unjustly, the Court of Appeal determined that the appellants' claim was unsubstantiated as there was no evidence on record in support of the alleged bias, nor was it ever raised before the trial Judge. Furthermore, it was held that no material was placed before the appellate court on the matter.

30. As regards the 1st respondent's appeal, the Court of Appeal determined that Civil Appeal No 254 of 2019 was unmeritorious and was filed late in the day, since the 1st respondent had failed to prefer an appeal against the ruling of the trial court declining to join him as an interested party to the proceedings.

iii. At the Supreme Court

31. Aggrieved by the Court of Appeal's Judgment, the appellants have filed the instant consolidated appeal. The 1st appellant's grounds of appeal in Petition No 17 (E021) of 2022 are that the learned Judges of Appeal erred in law by:

    i. Failing, as a first appellate court to evaluate, reconsider and assess the petition, replies thereto, evidence tendered and proceedings before the trial court in order to reach its own conclusions in determining the validity of the resultant Judgment;

    ii. Failing to appreciate that the constitutional petition, being an ordinary land claim amounted to an abuse of court process as the grievance raised ought to have been instituted as a civil claim as prescribed by the relevant legislation;

    iii. Finding that mere allegation of violation of fundamental rights and freedoms guaranteed in the *Constitution* necessarily entails contravention and ousts the application of the *Limitation of Actions Act*;

    iv. Finding that article 40 of the *Constitution* is one of the constitutional provisions that apply retrospectively;

    v. Failing to appreciate that the indefeasibility of the appellant's proprietary interest acquired in Eldoret Municipality/Block 15/ 239 was guaranteed by the State and the only available remedy to the 2nd respondents upon proof of malfeasance by land officials was government compensation;

    vi. Incorrectly interpreting and applying this court's decisions in *Kiluwa Limited & another v Business Liaison Company Limited & 3 others*; (Petition 14 of 2017) [2021] KESC 37 (KLR) and *Samuel Kamau Macharia & Another v Kenya Commercial Bank Limited & 2 others*; SC Appl No 2 of 2011 [2012] eKLR; and

    vii. Rendering a decision that is an affront to the rule of law, inimical to public policy and imperils public interest.

32. On its part, the 2nd appellant in Petition No 24 (E027) of 2022 cites the following additional grounds, that the learned Judges erred by;

    i. Conducting the hearing of the appeal in a manner that violated the 2nd appellant's right to protection of the law and fair hearing under articles 27(1) and 50(1) of the *Constitution*;

    ii. Linking the 2nd appellant to the alleged illegal, improper and unprocedural acquisition of Eldoret Municipality/Block 15/239 by President Moi in 1983;

    iii. Finding that the 2nd appellant jointly with President Moi had violated the 2nd respondents' constitutional rights by acquisition of Eldoret Municipality/Block 15/239 in 1983, whereas

Rai Plywood's titles acquired from President Moi were Eldoret Municipality/Block 2369 and 2370, products of surrender and subdivision made in 2007, 24 years later;

iv. Failing to find that the 2nd respondents did not prove how the 2nd appellant violated their rights under article 40 of the *Constitution*, by purchasing the subject properties in 2007;

v. Failing to hold that even assuming that article 40 of the *Constitution* of Kenya 2010 applied retrospectively, the 2nd respondents had no cause of action against the 2nd appellant;

vi. Failing to hold that the 2nd respondents tendered no evidence to impeach the protection accorded to the 2nd appellant's entitlement to the subject properties under section 75 of the retired Constitution;

vii. Finding that the 2nd appellant and President Moi were guilty of facts arising from the same transaction despite the fact that only the Government of Kenya and President Moi could be held liable for any wrongdoing concerning President Moi's acquisition of the suit property in 1983; and

viii. Upholding the compensation awarded to the 2nd respondents on the basis of valuation that had been discredited by the trial court.

33. Collectively, the appellants seek the following reliefs:

i. The consolidated appeal be allowed;

ii. The Judgment and order of the Court of Appeal (Kiage, M'inoti & Mumbi Ngugi, JJA) delivered on July 22, 2022 in Kisumu Civil Appeal No 159 of 2019 as consolidated with Kisumu Civil Appeal No 254 of 2019 be set aside;

iii. The judgment and decree of the Environment and Land Court of Kenya at Eldoret (Ombwayo, J) dated May 8, 2019 in Eldoret Constitutional Petition No 9 of 2014 be set aside with the effect that the 2nd respondents' petition dated June 9, 2014 be dismissed with costs to the appellants;

iv. This honourable court be pleased to issue any other order or relief as it may deem fit and just to ensure that law, order and constitutionality is observed; and

v. Costs of this appeal be awarded to the appellants.

D. The Parties' Respective Submissions

34. All parties to this appeal filed their submissions, lists and digests of authorities to the appeal, save for the 1st respondent who did not participate in the proceedings, and the National Land Commission (the 5th respondent herein).

i. The 1st Appellant's Case

35. The 1st appellant's submissions are dated October 27, 2022 and filed on October 31, 2022. The 1st appellant submits that this court has jurisdiction to determine the consolidated appeal as of right under article 163(4)(a) of the *Constitution*. She urges that despite contestations by the respondents, the court has pronounced that it is seized of jurisdiction, hence the issue is now *res judicata* and is no longer a live controversy.

36. Be that as it may, urges the 1st appellant, the proceedings before the ELC and the Court of Appeal revolved around the 2nd respondents' rights enshrined under articles 19, 20, 21, 22, 23, 24, 25, 27, 40,

47, and 50 of the *Constitution* and whether article 40 of the *Constitution* could apply retrospectively to events that occurred in 1983. Consequently, the 1st appellant urges that the appeal falls squarely within the ambit of article 163(4)(a) of the *Constitution*. To buttress her position, she relies on this court's decisions in *Lawrence Nduttu & 6 others v Kenya Breweries Ltd & Another*; SC Petition No 3 of 2012; [2012] eKLR, *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*; SC Application No 5 of 2014; [2014] eKLR, and *Cyrus Shakhalaga Khwa Jirongo v Soy Developers Limited & 9 Others*; SC Petition No 38 of 2019; [2019] eKLR.

37. As regards the issue whether this court, as a second appellate court is restricted to only consider matters of law to the exclusion of facts, the 1st appellant submits that as the consolidated appeal revolves around constitutional interpretation of the provisions set out above, the court cannot apply the *Constitution* in abstract, but must consider the facts put forward to determine whether the right has been established, violated and relief to be granted, if any. In addition, it is urged that the failure of the superior courts below to consider all the facts, to determine which of the 2nd respondents' rights had been established, violated, and what relief, if any, ought to have been granted, necessitates this court's intervention.

38. On the issue that the Court of Appeal failed in its duty to analyse, reconsider and re-evaluate the entire evidence on record, the 1st appellant submits in the affirmative. She urges that the Court of Appeal failed to follow the guiding principles with regard to the exercise of its jurisdiction as a first appellate court, settled in *Selle & another v Associated Motor Boat Co Ltd & others* [1968] EA 123. Moreover, the 1st appellant urges that the appellate court treated the dispute before it as a second appeal, failed to apply exacting and meticulous scrutiny of the evidence relied on by the trial court in arriving at its decision, impermissibly abdicating its duty, and occasioning grievous miscarriage of justice.

39. Owing to this failure, the 1st appellant contends that the Court of Appeal failed to, establish whether the 2nd respondents had discharged their burden of proof; consider the legal effect of the admitted surrender of Eldoret Municipality Block 15/10 to the Government; consider that the late Noah Chelugui had never complained of the loss of the suit property prior to his death; establish whether the 2nd respondents had proved the infringement of their fundamental rights; establish whether the 2nd respondents had proved a reasonable basis for the laches; consider that no evidence had been adduced in support of allegations of the lost/stolen title; consider the admission of receipt of Kshs 70,000.00; or appreciate that Stanley Metto who was alleged to have obtained the original title by deception was not sued in his lifetime or thereafter.

40. In addition, the 1st appellant faults the superior courts below for failing to consider that, the evidence on record only demonstrates attempts to subdivide LR No 10492 which was owned by 5 partners, but not the 2nd respondents' ownership of the suit property. It is also urged that the 2nd respondents only produced the title to their own property, parcel no Eldoret Municipality/Block 15/237, which was one of the subdivisions of Block 15/10 leased from the Government of Kenya; and, the letters on record by the 5 original owners, their lawyers and surveyors demonstrated their active participation in the subdivisions of LR No. 10492 as well as their instructions to the Commissioner of Lands to transfer the same to third parties. Notably, the 1st appellant underscores the fact that the 2nd respondents' letters of administration did not list the suit property as forming part of Noah Chelugui's assets. Similarly, she submits that the suit property was registered and title issued on September 23, 1983 while the police abstract report was made in 1979, when the suit property was not in existence.

41. The 1st appellant also urges that the Court of Appeal failed to apply its finding in the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others*; Civil Appeal No 51 of 2016; [2018] eKLR (*Nathan Tirop* case) which raised the same issues as the instant appeal, having been filed by some of the beneficiaries of the estates of the 5 original partners and owners of LR No 10492. It is submitted that in

the Nathan Tirop case, the Court of Appeal (Githinji, J Mohammed & Otieno-Odek, JJA) overturned the trial court by finding that the surrender of the title of LR No 10492, as well as its subsequent subdivision was conducted on instruction and in the full knowledge of the 5 original joint proprietors, hence the process was proper and legal. It is therefore the 1st appellant's case that President Moi was a lessee from the Government of Kenya following the surrender of the original title for subdivision by Noah Chelugui and his co-owners/partners.

42. Flowing from the foregoing submissions, the 1st appellant asserts that the trial court was duty bound to establish the ownership of the land, whether the 2nd respondents' proprietary rights had been infringed and whether they qualified to be compensated for the alleged violation. Particularly, it is the 1st appellant's case that where the court is faced with serious contestations of land ownership, the proper manner of proceeding is by way of viva voce evidence, where all parties are cross-examined. She cites the case of *Fanikiwa Limited v Sirikwa Squatters Group & 20 others*; (Petition 32 (E036) & 35 (E038) of 2022 (Consolidated)) [2023] KESC 58 (KLR) in support of her submission.

43. Further, the 1st appellant asserts that the Nathan Tirop case stands as settled law as no appeal has been preferred against it. Furthermore, that the appellate court ought to have considered the other cases concerning the suit property, such as *Rael Chebet Tanui (Suing as the Administrator of the Estate of the Late Kaptigei Chemwor) & 40 others v Susan Cherubet Chelugui & David K Chelugui & 5 others*; ELC Case No 404 of 2013 (formerly Civil Case No 80 of 1988); [2022] eKLR.

44. On the interpretation of article 24 of the *Constitution*, the 1st appellant faults the Court of Appeal for finding that the *Limitation of Actions Act* cannot be used to shield the State or any person from claims of enforcement of fundamental rights and freedoms. It is contended that the said finding will open doors to old land claims couched as constitutional petitions, no matter how farfetched or fanciful. The 1st appellant therefore argues that article 24 of the *Constitution* provides that a right or fundamental freedom in the Bill of Rights shall not be limited except by law and then only to the extent that the limitation is reasonable and justifiable.

45. Consequently, it is urged that the Court of Appeal wrongfully departed from the provisions of section 7 of the *Limitation of Actions Act*, which limits the right to institute proceedings for the recovery of property. Moreover, it is contended that the Court of Appeal misapplied the Nathan Tirop case which does not lay down a general rule that the *Limitation of Actions Act* does not apply to constitutional petitions. On the contrary, it bears a rider that unless the circumstances of a case warrant departure, moving the court by way of a constitutional petition will not suddenly render statutory provisions on limitations inapplicable.

46. As pertains the retrospective application of article 40 of the *Constitution*, the 1st appellant argues that the Court of Appeal erred in finding that it applies retrospectively. To support this argument, the 1st appellant submits that in the Kiluwa Limited case the court cautioned that retrospectivity ought not to be imported into the language of the *Constitution*, where the language of a Constitutional provision does not contain even a whiff of retrospectivity, or if the importation of retrospectivity would have the effect of divesting an individual of rights legitimately occurring before commencement of the *Constitution*.

47. Additionally, it is submitted that article 40 is forward-looking as it is not expressed in normative terms. On the contrary, urges the 1st appellant, article 40 contains general principles which led to the enactment of various land law statutes, all prescriptive in nature, prescribing how various property rights can be acquired, registered and protected. The 1st appellant therefore concludes that the Court of Appeal's interpretation and application of the provisions of article 40 retrospectively infringes upon

President Moi and the 2nd appellant's rights over the suit property, which were legitimately vested in them long before the commencement of the *Constitution of Kenya, 2010* .

48. As regards the indefeasibility of the 1st appellant's title as a first registration under the *Registered Land Act* (repealed), the 1st appellant reiterates that President Moi was the absolute owner of the suit property having been registered as such on September 21, 1983, under section 143(1) of the *Act*. Furthermore, it is urged that prior to that date, the land was in the name of the Government of Kenya as Parcel No 10. It is the 1st appellant's case that as a result, President Moi's title is guaranteed by the State and could not be impeached. In any event, the 1st appellant asserts that the 2nd respondents did not prove any malfeasance or fraud on the part of the appellants, the District Lands Registrar and Registrar of Titles in the registration of President Moi as the proprietor of the suit land.

49. On the issue of public policy, it is submitted that the impugned decision which is inconsistent with its own decision in the *Nathan Tirop case* is an affront to the rule of law and has thrown the administration of justice into disrepute. It is also urged that the issues framed for determination by the Court of Appeal excluded major issues in dispute and the resultant judgment was in gross violation of the appellants' proprietary rights.

ii. The 2nd Appellant's Case

50. The 2nd appellant's submissions are dated December 1, 2022 and filed on even date. They are largely in consonance with the 1st appellant's submissions, and address four additional issues. On the issue whether it was accorded a right to fair hearing before the Court of Appeal, the 2nd appellant submits that the court infringed on its rights by denying its advocate an adjournment on the hearing date.

    It urges that as a consequence, its advocate was forced to prosecute its appeal without the benefit of written submissions occasioning it prejudice.

51. As regards whether it was an innocent purchaser for value without notice of any defect in title, the 2nd appellant faults the Court of Appeal for disregarding and failing to make a finding on the issue. It further submits that it has satisfied the ingredients of bona fide purchaser for value. To this end, the 2nd appellant submits that it holds certificates of title to part of the suit property, namely LR Nos Eldoret Municipality/Block 15/2369 and 2370; it conducted due diligence which demonstrated uncontested ownership of the properties by President Moi; it purchased the properties in 2007 for consideration of Kshs 93,336,000; and, it was not a party to any fraud which may have occurred in 1983. It is the 2nd appellant's further case that there is neither factual or evidential basis linking it to the alleged illegal, improper acquisition of the suit property in 1983, nor did the 2nd respondents depone to its involvement.

52. On whether the learned appellate judges erred in upholding the trial court's determination of a suit to recover land through a constitutional petition, the 2nd appellant argues that matters before the ELC cannot be ventilated under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013 (the Mutunga Rules) as the Rules contemplate adjudication seeking public law remedies through summary procedure. In contrast, it is urged, the Environment and Land Court exercises jurisdiction under the *Civil Procedure Rules*.

53. In particular, it submits that the 2nd respondents sought a public law remedy through a constitutional petition against private citizens, without distinguishing the 1983 transactions by President Moi, and the purchase by the 2nd appellant in 2007. As a result, the 2nd appellant urges that it was unfairly penalised to pay damages sought against the District Land Registrar, the Registrar of Titles and the late President Moi.

54. As regards the issue whether the court failed to determine all of the 2nd appellant's grounds of appeal, it is contended that the court was obligated to address and make a finding on all 15 grounds of appeal raised. The 2nd appellant maintains that the Court of Appeal particularly excluded the questions whether the trial court had jurisdiction to entertain the 2nd respondents' claim for recovery of land and damages in a constitutional petition filed under the Mutunga Rules; whether President Moi and the 2nd appellant had valid titles under the Registered Land Act (repealed); whether the 2nd appellant was an innocent purchaser for value in relation to parcel Nos 2369 and 2370; and if the 2nd appellant could be held liable for unlawful acquisition of land given that it purchased its properties over 24 years after President Moi acquired the suit property.

iii. The 2nd Respondents' Case

55. The 2nd respondents filed two sets of submissions, both dated October 18, 2023, in response to the appellants' respective submissions. As pertains to the court's jurisdiction, the 2nd respondents submit that the court's rulings dated October 28, 2022 and October 6, 2023, to the effect that it has jurisdiction under article 163(4)(a) have placed it on a false constitutional trajectory. The 2nd respondents maintain that a meritorious review of the grounds of appeal will reveal that the court's jurisdiction was wrongly invoked.

56. On the issue whether the Court of Appeal failed in its duty to analyse, reconsider and re-evaluate the entire evidence on record, the 2nd respondents submit that the prayers calling for evaluation, reconsideration or assessment of factual findings based on evidence tendered and evaluated before the superior courts below, fall outside the purview of article 163(4)(a). They rely on the cases of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [*supra*]; *Mitu-Bell Welfare Society v. Kenya Airports Authority & 2 others; Initiative for Strategic Litigation in Africa (Amicus Curiae)* (Petition 3 of 2018) [2021] KESC 34 (KLR) and *Paul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney General & 2 Others* KESC Petition 45 of 2018; [2020] eKLR.

57. Furthermore, it is the 2nd respondents' case that the trial court could not be faulted for failing to interrogate evidence when the appellants themselves failed to tender evidence in support of their cases. In this regard, it is urged that the 1st appellant did not file a replying affidavit to controvert the petition before the trial court. Similarly, that the 2nd appellant did not attach any transfers, sale agreements, proof of payment of consideration or stamp duty demonstrating that it was a bona fide purchaser for value without notice of the defect in title. Moreover, it is urged that the appellants did not file valuation reports in response to the 2nd respondents' valuation, and waived their right to cross-examine the valuers, or the 2nd respondents on the content of their affidavits.

58. In response to the allegation that proof of ownership had not been established, the 2nd respondents contend that Noah Chelugui was one of the partners of NK Lagat and partners, the proprietors of LR No 10492, and the suit property emanated from Eldoret Municipality/Block 15 which was part of Noah Chelugui's 620-acre portion of the said parcel. Moreover, in response to allegation that the late Noah Chelugui had received adequate consideration for the sale of the suit property, it is the 2nd respondents' case that the Kshs 70,000 received by Noah Chelugui was given by Stanley Metto and meant to 'soften him' in the purported sale.

59. On the issue whether the 2nd respondents' constitutional petition being an ordinary land claim ought to have been instituted as a civil claim as prescribed by the relevant legislation, the 2nd respondents argue that contrary to any contestations, the appellants elected to canvass the petition before the trial court

by way of affidavit evidence and written submissions. Further, that the appellants did not challenge the validity of the petition before the Environment and Land Court or the Court of Appeal but only raised this ground for the first time before this court.

60. Similarly, on the question of the Court of Appeal's application of article 24 of the *Constitution* to the effect that the 2nd respondents' constitutional petition was not defeated by the *Limitation of Actions Act*, it is submitted that the appellants did not challenge the trial court's jurisdiction on the basis that the suit was barred by limitation. In any event, it is submitted that the Court of Appeal did not mention, interpret or apply article 24 of the *Constitution*.

61. It is further urged that in determining the applicability or otherwise of the *Limitation of Actions Act*, the Court of Appeal simply followed precedent in finding that there is no time limit for filing a constitutional petition. Consequently, they submit that if a party files a constitutional petition anchored on constitutional provisions, the limitation of time must be provided by the *Constitution*. On the other hand, if one pleads on the basis of a statute or common law, the limitation is that provided by the statute or under common law.

62. As regards the retrospective application of article 40 of the *Constitution*, the 2nd respondents contend that the Court of Appeal rightfully applied the principles established in the *Kiluwa Limited Case* and *Samuel Kamau Macharia v Kenya Commercial Bank*; SC Application No 2 of 2011; [2012] eKLR (*SK Macharia* case), so as to avoid a vacuum in the enforcement of rights. They underscore that guided by these decisions, the Court of Appeal adhered to binding precedent and correctly held that article 40 applies retrospectively.

63. Furthermore, the 2nd respondents submit that article 40 satisfies the test established in the *Kiluwa Limited* and *SK Macharia case*. To that end, it is submitted, the Court of Appeal held that article 40 is forward and backward looking, vertically and horizontally. They submit that the appellate court applied article 40 to re-engineer social order by upholding the trial court's restitution orders in their favour, in effect resolving historical injustices. In support of their assertion, the 2nd respondents cite the case of *Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)* SC Pet No 37 of 2014; [2019] eKLR in which they submit that article 40 of the *Constitution* was applied retrospectively.

64. As regards the indefeasibility of President Moi's title, the 2nd respondents rely on the finding in the case of *Republic v Minister for Transport & Communications & 5 others ex parte Waa Ship Garbage Collectors & 15 Others*; Mombasa HCMCA No 617 of 2003 [2006] 1KLR 563, to urge that courts should nullify titles by land grabbers who plead the principle of indefeasibility of title, and that the principle does not stand against a successful constitutional challenge.

65. On the 2nd appellant's assertion that it was an innocent purchaser for value without notice of the defect in title, the 2nd respondents emphasise that the 2nd appellant purchased the suit property from President Moi while fully aware that it belonged to Noah Chelugui. Similarly, the 2nd respondents argue that the suit property was transferred to the 2nd appellant in unclear circumstances. They emphasise that there is no instrument of transfer on record, and that the white card indicating that the suit property was registered in the 2nd appellant's name does not explain how it became its registered owner. They faulted the 2nd appellant for failing to conduct due diligence and a historical search to satisfy itself that the suit property was properly acquired. In support of their submission, they cite the case of *Dina Management Limited v. County Government of Mombasa & 5 others*; (Petition 8 (E010) of 2021) [2023] KESC 30 (KLR).

66. On the 2nd appellant's claim that it was denied a fair hearing before the Court of Appeal, the 2nd respondents submit that the 2nd appellant has not given a cogent explanation as to why it failed to adhere to the court's pre-trial directions on filing of submissions. In any event, it is submitted, such a complaint does not entail interpretation or application of the *Constitution* under article 163(4)(a).

67. As regards the issue whether the court failed to determine all of the 2nd appellant's grounds of appeal, by framing issues for determination in a manner prejudicial to the 2nd appellant, it is contended that the 2nd appellant questions the style and format of the Court of Appeal's Judgment, which is a grievance that cannot be brought before this court under article 163(4)(a) of the *Constitution*. The 2nd respondents submit that the Court of Appeal properly analysed the history of the parcels of land that were in contestation from the original LR No 10492, as well as the evidence presented before it.

68. As pertains the application of the findings in the *Nathan Tirop* case to the consolidated appeal, the 2nd respondents argue that matters of fact cannot be determined on the basis of a decision in a different case involving different parties. Furthermore, the 2nd respondents submit that the appellants did not introduce the case before the trial court by way of affidavit evidence. Be that as it may, the 2nd respondents reiterate that the *Nathan Tirop* case could not be incorporated into the present proceedings because the property in dispute was registered in the name of the 1st respondent, and is distinct from the suit property in this matter.

69. In conclusion, the 2nd respondents dismiss the issue that the Court of Appeal rendered a decision that is an affront to the rule of law, inimical to public policy and imperils public interest. It is their submission in that regard that the claim for restitution against President Moi is warranted.

iv. The 3rd and 4th Respondents' Case

70. The AG's submissions are dated November 29, 2022 and filed on December 2, 2022. The AG opposes some limbs of the petition and agrees with others. It is submitted that the case before the trial court was that the suit property was President Moi's private property, there was no compulsory acquisition and compensation could only be paid by President Moi as the title holder in use of the property. The AG therefore denounces the statement made by State Counsel Mr Ngumbi before the trial court, that the 3rd and 4th respondents were acting on orders from above.

71. On the issue whether the Court of Appeal failed to discharge its duty as a first appellate court, the AG submits that the Court of Appeal re-evaluated the evidence before it. It is asserted that the Court of Appeal framed issues against the evidence and the law and reached the inescapable conclusion that President Moi had acquired the suit property unlawfully, with no nexus to the 2nd respondents who were originally entitled to the suit property. Moreover, the AG asserts that the award of Kshs. 1.06 billion was made after consideration of the evidence in the form of valuation reports.

72. As regards the application of the decision in the *Nathan Tirop case*, the AG urges that the decision does not have any bearing on the present case which concerns the legality of President Moi's title to the suit property. It is submitted that in the *Nathan Tirop case*, the issue for determination was whether the State had compulsorily acquired LR No 10492 belonging to NK Lagat & Partners without compensation, unilaterally converted it from to the *RLA* regime and allocated it to third parties without their consent, knowledge or authority.

73. According to the AG, in the *Nathan Tirop Case,* the Court of Appeal found that there was no compulsory acquisition, but a surrender of the title under section 44 of the Registration of Titles Act for purposes of conversion and allocation to the partners in NK Lagat and other third parties. Furthermore, it is submitted that the Court of Appeal found that the partners had acquiesced to the

surrender through their advocate, M/s RL Aggarwal and surveyor, M/s JS Vaughan. Likewise, the AG emphasises that the two matters are distinct as the Nathan Tirop case did not consider whether the appellants were legitimate owners or purchasers of the suit property herein. Similarly, it is urged, land belonging to Stephen K Metto was not dealt with.

74. It is further submitted that the issue of government compensation upon proof of malfeasance by government officials was not determined by the superior courts below, and is only being raised for the first time before the Supreme Court. As a result, the court lacks jurisdiction to adjudicate it under article 163(4)(a). To support its case, the AG places reliance on the cases of *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* KESC Petition No 10 of 2014; [2014] eKLR, and *Erad Suppliers & General Contractors Limited v National Cereals & Produce Board* KESC Petition No 5 of 2012; [2012] eKLR. In any event, it is the AG's case that the issue of government compensation was not a relief available to the 2nd respondents under article 23 of the *Constitution*, nor was it a subject of determination before the superior courts below.

75. As pertains the issue whether the claim was time barred under the *Limitation of Actions Act*, the AG finds no fault with the findings of the superior courts below, to the effect that limitation periods do not generally apply in constitutional petitions. However, it is the AG's submission that petitions alleging violations of the fundamental rights and freedoms ought to be instituted without unreasonable delay, in accordance with article 259(8) of the *Constitution*. The AG further submits that the *Limitation of Actions Act* was envisaged under article 24 of the *Constitution*, as a limitation of rights and freedoms in the Bill of Rights by statute. Therefore, it is urged that the court ought to adopt this interpretation with respect to the right to petition under article 22, in finding that the 2nd respondents filed the petition late and failed to properly explain the delay.

76. On the retrospective application of article 40 of the *Constitution*, the AG submits that the Court of Appeal correctly held that the said provision applies retrospectively. Additionally, it is submitted that one can claim constitutional protection under it only if it can be shown that the property in dispute was acquired lawfully. In conclusion, the AG maintains opposition to the consolidated appeal, save for the 2nd respondents' failure to sufficiently explain the delay in instituting the case.

E. Analysis and Determination

77. After considering the parties' respective cases as consolidated, the rival written and oral submissions in support thereof, and the authorities cited in illumination of the respective arguments, we have identified the following issues, the determination of which should dispose of the appeal herein.

    1. Whether this court has jurisdiction to determine the Appeal;

    2. Whether article 40 of the *Constitution* applies retrospectively;

    3. Whether the 2nd respondents ought to have moved the Environment and Land Court by way of a Civil Suit as opposed to a constitutional petition;

    4. Whether a constitutional claim of violation of property rights under article 40 of the *Constitution*, is subject to limitation under article 24 thereof, and section 7 of the *Limitation of Actions Act*;

    5. Whether the Court of Appeal erred in not considering and re-evaluating the evidence on record;

    6. Whether Noah Chelugui was the title holder of both LR 10492 and the Suit Property herein;

7. Whether the 1st and 2nd appellants acquired valid title to the suit property;

8. Whether the Court of Appeal disregarded its own finding relating to the Suit Property; and

9. Reliefs, if any, available to the parties.

i. On Jurisdiction

78. In a ruling dated October 28, 2022, following a preliminary objection by the 2nd respondents challenging its jurisdiction to hear and determine this appeal, the court held;

> "(14) .... It is evident that the appeal raises issues involving the interpretation or application of the *Constitution*, therefore, in keeping with this court's decision in Lawrence Nduttu, we find that we have the jurisdiction to entertain the appeal and application before us."

79. In a subsequent ruling dated October 6, 2023, the court restated;

> "[7] ... Having carefully considered the application, responses thereto, and rival submissions by the parties, and guided by this court's ruling dated October 28, 2022, in this same appeal; we find that the issue as to whether the court has jurisdiction under article 163(4)(a) was conclusively determined in the ruling aforesaid. All other issues raised by the applicant are in the circumstances completely misguided and do not require our attention at all. Consequently, and without saying more, we deem the application before us frivolous, vexatious, and an abuse of the process of court."

80. This remains our position, whose effect is that the court is seized with jurisdiction to hear and determine the consolidated appeal. This issue was canvassed at the hearing by both parties, with each maintaining the positions they had advanced at the preliminary objection stage. Suffice it to state that we perceived nothing new in the respondents' submissions to persuade us otherwise.

ii. Whether Article 40 of the *Constitution* applies Retrospectively

81. Whether the *Constitution* can apply retrospectively or not, is a question that has been variously addressed by this court in a number of decisions. In the *SK Macharia* case [*supra*], we laid down the general principle that the *Constitution*, unlike an ordinary statute, may apply retrospectively if the circumstances of a particular case so require. However, we also did caution that it all depends on the language of the specific provision in question. We stated thus:

> "At the onset, it is important to note that a Constitution is not necessarily subject to the same principles against retrospectivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the *Constitution* to determine whether it permits retrospective application of any of its provisions, a court of law must pay due regard to the language of the *Constitution*. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the court ought not to import it into the language of the *Constitution*. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately acquired before the commencement of the *Constitution*" [Emphasis added].

82. Applying the principle established in the *SK Macharia Case*, this court determined that article 40 of the *Constitution*, specifically sub-articles (3) and (4) thereof, applies retrospectively in *Town Council of Awendo v Nelson O Onyango & 13 others; Abdul Malik Mohamed & 178 others (Interested Parties)*, SC Petition No 37 of 2014; [2019] eKLR. The court stated:

> "(54) In this regard, we derive inspiration from this court's dictum in *Samuel Kamau Macharia & 2 others v Kenya Commercial Bank & 2 others* [2012] eKLR; on when a court of law may fall back to the provisions of the *Constitution* of 2010 in determining a dispute that may have crystallized before the promulgation of the *Constitution*."

83. Following its pronouncements in the *SK Macharia case* and Town Council of Awendo [*supra*], regarding the retrospective application of the *Constitution*, the court has incrementally given an indication of when the language of a particular provision, may be used as a yardstick for determining whether the same applies retrospectively. In *Kiluwa Limited & another v Business Liaison Company Limited & 3 others* (Petition 14 of 2017) [2021] KESC 37 (KLR) it was held that article 47 of the *Constitution* which guarantees the Right to Fair Administrative Action applies retrospectively. The court stated:

> "(43) ...
>
> 45. ... we note that article 47 is a Bill of Rights provision which is stated in deliberate and clear normative terms. Thus, sub-article 1 thereof provides that "every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."
>
> ....
>
> 45. These provisions set out clear and un-ambiguous entitlements within the language of the Bill of rights. They are expressed in normative terms, as opposed to general principles that would require the further input of the legislature so as to attain prescriptive force. In our view, contrary to the holding by the Court of Appeal, these are substantive entitlements whose enjoyment was not intended to be suspended by sub-article 3 thereof "

84. In the case of *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR), in considering whether article 45(3) of the *Constitution* applies retrospectively, the court opined;

> "[64] In our view, the language used in the article by itself resolves the question of retrospectivity. The right to equality is one of the fundamental rights and freedoms that are protected by Constitution, a right that is inherent and indefeasible to all human beings. More fundamentally, as we stated in *Samuel Kamau Macharia Case*, only the language of the *Constitution* may act as a guide as to whether a provision in the *Constitution* applies retrospectively or not.
>
> (65) the *Constitution* cannot be subjected to the same principles of interpretation applied to statutes on retrospective application of the law. It is therefore our finding that a reading of article 45(3) of the *Constitution* can only lead to the conclusion that there is nothing that bars its provisions from being applied retrospectively."

85. It is therefore clear to us from the foregoing pronouncements that, article 40 of the *Constitution* has ingredients of retrospectivity embedded in it. At any rate, the provisions of article 40 merely embody a right that was hitherto protected under section 75 of the repealed *Constitution* that inhered to individuals. Whether the same was correctly applied by the appellate court to the dispute at hand depends on our disposition of the remaining issues.

iii. Whether the respondents ought to have moved the trial court by way of a civil suit as opposed to a constitutional petition

86. The appellants have submitted that the 2nd respondents elevated an ordinary claim to land to a constitutional petition, ostensibly for the enforcement of the Bill of Rights. It is the 2nd appellant's argument that matters before the ELC cannot be ventilated under the *Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules*, 2013. The said rules, submits the 2nd appellant, are meant to provide a summary platform for seeking public law remedies in the event of allegations of violation of rights and freedoms by the state. The 2nd appellant contends that the 2nd respondents herein ought to have filed a suit claiming a right over the suit property under the applicable law and not a constitutional petition.

87. In response, the 2nd respondents submit that the appellants did not challenge the validity of the petition before the ELC or the Court of Appeal, but only introduced this ground for the first time before this court.

88. Upon consideration of this question as ventilated by the parties, we are inclined to agree with the 2nd respondents' argument to the effect that the issue is being raised too late in the day. There is nothing on record to show that the appellants questioned the petition's procedural posture at the first opportunity. In any event, in our view, even if the issue had been raised at the trial stage, we doubt that a ruling in favour of the appellants would necessarily have disposed of the proceedings with finality. What would have been in contention was not the jurisdiction of the trial court, but the procedure in which its jurisdiction was being invoked. Having reached this conclusion, we find no need to address the merits of this ground.

iv. Whether a constitutional claim of violation of property rights under article 40 of the *Constitution*, is subject to limitation under article 24 thereof, and section 7 of the *Limitation of Actions Act*;

89. The appellants have faulted the Court of Appeal for finding that the *Limitation of Actions Act* cannot be used to shield the State or any person from claims for enforcement of fundamental rights and freedoms. The appellants argue that a blanket neutering of the *Limitation of Actions Act* will open floodgates of old land claims couched as constitutional petitions, no matter how far-fetched or fanciful. It would also render in-operable, article 24 of the *Constitution*, which allows the limitation of fundamental rights albeit in very limited circumstances enumerated therein. It is therefore urged that the appellate court wrongfully departed from the provisions of section 7 of the *Limitation of Actions Act*, which limits the right to institute proceedings for the recovery of property.

90. The 2nd respondents on the other hand, contend that the appellants did not challenge the trial court's jurisdiction on the basis that the suit was barred by limitation. They further submit that the Court of Appeal did not mention, interpret or apply article 24 of the *Constitution*. The 2nd respondents further argue that the Court of Appeal simply followed precedent in finding that there is no time limit for filing constitutional petitions.

91. On his part, the Attorney General submits that though the two superior courts cannot be faulted for finding that limitation periods do not generally apply in constitutional petitions, such petitions, ought to be instituted without unreasonable delay, in accordance with article 259(8) of the *Constitution*. He contends that the *Limitation of Actions Act* is one of the laws that is envisaged under article 24 of the *Constitution* as a basis for limitation of rights. Consequently, the Attorney General submits that the impugned petitions ought to have been disallowed by the superior courts on the ground that they were filed inordinately and unreasonably late.

92. This court has had occasion to pronounce itself, albeit not so comprehensively, on the question whether the *Limitation of Actions Act* applies to claims based on violations of fundamental rights and freedoms. In the case of *Monica Wangu Wamwere & 5 others v Attorney General*, SC Petition Nos, 26, 34 & 35 of 2019 (Consolidated) [2023] KESC 3 (KLR) , this court stated;

> "(37) In point of fact, the two superior courts affirmed the position that the *Limitation of Actions Act*, cap 22 Laws of Kenya does not apply to causes founded on violation of rights and freedoms. We concur and hold that there is no limitation of time in matters relating to violation of rights under the Constitution, which are evaluated and decided on a case by case basis. Nonetheless, it is well settled that a court is entitled to consider whether there has been inordinate delay in lodging a claim of violation of rights." [Emphasis added].

93. In view of our decision in Monica Wangu [*supra*], we do reiterate that as a general principle, petitions founded on claims of violation of fundamental rights and freedoms are not subject to limitation of actions. However, having so affirmed, it is to be noted that this principle is not absolute. It is to be applied by a court of law on a case by case basis taking into account factors such as the nature of the right, the time taken to ventilate the alleged violation, and whether the claimant may be riding on a mischief.

94. Applying the foregoing principle to the appeal before us, we take note of the following facts on record. Firstly, the original cause of action that culminated in the appeal before us is founded on a claim to a right or title to land. This being the case, section 7 of the *Limitation of Actions Act* is applicable to the suit unless ousted by the principle in Monica Wangu as contended by the 2nd respondents herein. Secondly, it is undisputed that the property LR 10492 was purchased in 1965 by the five proprietors, namely, Nathaniel Kiptalam arap Lagat, Thomas Kipkosgei arap Yator, Noah Kipngeny arap Chelugui, Cherwon arap Maritim and William Kimngeny arap Leting. Thereafter, the five proprietors resolved to subdivide it, which efforts are documented in the applications to the Uasin Gishu Land Control Board in 1976. On September 21, 1983, Eldoret Municipality/Block 15/10, which was carved from LR 10492, was closed on subdivision and Noah Chelugui, Stanley Metto and President Moi issued with and registered as proprietors of leases of the resultant parcel nos 237, 238 and 239 respectively.

95. It can therefore be concluded that the cause of action arose on September 21, 1983, when Eldoret Municipality/Block 15/10 was closed on subdivision and President Moi registered as the proprietor of the suit property. From the record, there is no proof that the 2nd respondent or his estate pursued any form of redress for the enforcement of the claim of deprivation of his right to the suit property. It was not until 2014 when the 2nd respondent sent a demand letter dated April 3, 2014, addressed to both President Moi and Stanley Metto seeking restitution of both parcel nos. 238 and 239. Thereafter, they filed suit before the ELC on June 10, 2014 against the appellant to the exclusion of Stanley Metto, over 30 years from the date on which the cause of action arose.

96. In its case before the ELC, the 2nd respondents pleaded that the acquisition of the suit property was illegal and unconstitutional as there was no prompt payment in full of just compensation to the person of the late Noah Chelugui or his Estate. They submitted that the matter was not about a rival claim to land, but about the unconstitutional deprivation of their right to property, which was unlawfully re-allocated as Government land, then transferred to the appellants. The 2nd respondents further pleaded that they made visits to the 1st appellant to seek redress but were unsuccessful as 'the doors remained permanently locked', prompting them to seek court intervention. Of note, no evidence was adduced before the trial court to substantiate this assertion.

97. Nevertheless, it is important to note that, the first documented grievance by the 2nd respondents on the alleged loss of title to the suit property is the Police Abstract dated September 13, 1979. However, at this point, the cause of action against President Moi or his estate had not arisen as the suit property had not been excised from the mother title and allocated to President Moi.

98. In addition, it was the AG's case that no complaint was registered in any Government office, by Noah Chelugui or the 2nd respondents. On the contrary, Noah Chelugui received his title to Eldoret Municipality/Block 15/237 while fully aware that it was a resultant subdivision of Eldoret Municipality/Block 15/10. It was further submitted that he did not take any preventive or remedial steps to stop the alleged violation of his rights.

99. In view of the foregoing, it is clear that between 1983 and 2014, neither Noah Chelugui nor his estate pursued any legal redress aimed at vindicating his claim of violation of his constitutional right to property. Such delay could not be anything else but inordinate, warranting a credible explanation.

100. Turning to the pronouncement by the Court of Appeal, in determining the question as to whether the claim was time barred under the *Limitation of Actions Act*, the court held that unless expressly stated in the *Constitution*, the limitation period under the said Act does not apply to the violation of rights and freedoms guaranteed in the *Constitution*. It is therefore clear to us that the appellate court did not consider the fact of delay as being relevant in determining whether the limitation period was applicable or not. However, in so doing, the court made no reference to article 24 of the *Constitution*, which provides for the circumstances under which a right or fundamental freedom may be limited. In this regard, the *Constitution* provides that a right or fundamental freedom, unless it is non- derogable, can be limited only by law, and to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity and freedom.

101. We think with all due respect, that it was a fundamental omission by the appellate court, not to consider the provisions of article 24 of the *Constitution* in determining whether section 7 of the *Limitation of Actions Act* was applicable to the original proceedings before the ELC. At this stage of the proceedings, the fundamental right or freedom in question was not the right to property per se, under article 40, but the right to institute court proceedings claiming that a right or fundamental freedom has been denied under article 22 of the *Constitution*. As such, given the fact that this right was being exercised, thirty-one (31) years after the cause of action arose, and long after the promulgation of the 2010 Constitution, it was incumbent upon the Court of Appeal to interrogate such inordinate delay and on what basis it would be justifiable. The *Limitation of Actions Act* seeks to limit the time within which a right under article 22 may be exercised. In this regard we agree with the appellants and the Attorney General that the said Act is precisely such law as is envisaged under article 24 of the *Constitution*.

102. We are also of the firm opinion that had the appellate court addressed itself to the principles weighed against the chronology of events that we have flagged in the foregoing paragraphs, it would have arrived at a different conclusion. The argument that a constitutional petition such as this one, automatically

ousts the provisions of the *Limitation of Actions Act*, is not legally tenable. There is nothing on record to show that the 2nd respondents provided any explanation for the delay beyond stating that theirs was a constitutional petition and not a claim based on statute.

v. Whether the Court of Appeal erred in not considering and re- evaluating the evidence on record

103. The 1st appellant submits that this being a first appeal, it was the duty of the Court of Appeal to analyse, reconsider, and re-evaluate the evidence on record before arriving at the conclusions it did. She urges that the appellate court treated the dispute before it as a second appeal and failed to apply exacting and meticulous scrutiny of the evidence relied on by the trial court in arriving at its decision. By so doing, the 1st appellant submits, the Court of Appeal disregarded the guiding principles regarding the exercise of jurisdiction on a first appeal as settled in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123.

104. On the other hand, the 2nd respondents submit that neither the trial court nor the Court of Appeal, can be faulted for failing to interrogate evidence when the appellants themselves failed to tender evidence in support of their cases. In this regard, the 2nd respondents urge that the 1st appellant did not file any replying affidavit to controvert the petition before the trial court. Similarly, the 2nd respondents submit that the 2nd appellant did not attach any transfers, sale agreements, proof of payment of consideration or stamp duty to demonstrate that it was a bona fide purchaser for value without notice. In response to questioning by the court, counsel for the respondents submitted that the seventy thousand shillings (70,000/=) paid to and received by Mr Chelugui was not 'consideration' but 'meant to soften' him.

105. In response to the 2nd respondents' contention, counsel for the 1st appellant submitted that a petitioner succeeds in his claim because of the strength of his case, and not the absence or weakness of a defence. In response to questioning by the court, counsel submitted that had the Court of Appeal considered and re- evaluated the evidence on record, it would have found that, the original title LR No 10492 did not belong to Mr Chelugui (deceased) but to 5 individuals (the deceased being one of them) who later surrendered it to the government; that former president Moi had not irregularly/illegally acquired any land belonging to Mr. Chelugui, rather the suit property had been allocated to him by the Government in accordance with the law; that Mr Metto who is alleged to have orchestrated the fraud culminating in former President Moi's acquisition of the suit property had never been sued; that on the contrary, Mr Chelugui had been paid the sum of Kshs 70,000/= in consideration of purchase of land, and that the alleged loss of Mr Chelugui's title deed was never reported nor recorded in the Police Occurrence Book. In consequence, counsel submitted that had the appellate court considered this evidence, it would not have arrived at the conclusions it did.

106. At this stage, all we can do is to re-state without more, the well-established principle of appellate practice and procedure that, on a first appeal to the Court of Appeal, unless the appeal is on a point of law, the latter is duty bound where circumstances require, to consider and re-evaluate the evidence on record before arriving at a determination. This is all the more important in disputes relating to claims of title to land as recently pronounced by this court in *Fanikiwa Limited v Sirikwa Squatters Group & 20 others* (Petition 32 of 2022 (consolidated) [2023] KESC 58 (KLR). This then obliges us to establish whether the appellate court arrived at the conclusions it did on the basis of the evidence on record. In so doing, we remain cognisant of the caution that at this stage, ours is not to re- calibrate the evidence but simply to establish whether the conclusions arrived at by the Court of Appeal are supported by the evidence on record. This then brings us to the next issue.

vi. Whether Noah Chelugui was the title holder of both LR 10492 and the Suit Property herein

107. From the outset, the 2nd respondents did not give a precise and specific description of the suit property. In their petition before the Environment and Land Court (ELC) dated 9th June 2014, they stated that Noah Chelugui was the owner and registered proprietor to 'all that parcel of land (formerly LR No 10492 Uasin Gishu)'; vested with absolute ownership thereof (See Vol II page 126 par 2, page 127 par 6). Moreover, that LR No 10492 has since been subdivided and three titles issued, namely Eldoret Municipality Block 15/238, 239 and 237 measuring 12, 53 and 24 acres respectively. These averments are also replicated in the supporting affidavit to the Petition (See Vol II, page 135, par 3).

108. Thereafter, in their further supplementary affidavit sworn on January 20, 2015, the 2nd respondents clarified that the parcel originally LR No 10492/1 gave rise to Eldoret Municipality/Block 15/10 which was subsequently subdivided to create parcel nos 237, 238 and 239. In addition, it was averred that Eldoret Municipality/Block 15 belonged to Noah Chelugui. (See Vol II page 208, par 5-7).

109. From the record, the suit property emanates from a parcel known as LR No 10492 (IR 17542) situate in Eldoret Municipality, measuring 3236 acres. It was owned by Jacobus Hendrik Engelbretch, a South African settler. In 1965, the property was acquired by five persons namely, Nathaniel Kiptalam arap Lagat, Thomas Kipkosgei arap Yator, Noah Kipngeny arap Chelugui, Cherwon arap Maritim and William Kimngeny arap Leting.

110. Although there is no title to LR No 10492 on record (either in the name of Hendrick or the Five persons), there is a certified copy of the instrument of transfer from Hendrick to the five partners lodged on June 28, 1965. As per the transfer, the five purchasers acquired the property for a consideration of Kshs 360,000/= and held the property as tenants in common in equal shares. (See Vol II Pages 223 - 225).

111. Subsequently, the proprietors under the name of NK Lagat and Partners sought to subdivide LR No 10492. By a letter to the Uasin Gishu Land Control Board dated August 7, 1976, they applied for consent to subdivide the property into six portions, distributed among the five partners while the 6th portion was to be transferred to Huruma Co Ltd (See Vol II page 145). The sale of the 6th portion, Eldoret Municipality/Block 15/14, to Huruma Co Ltd was for the purpose of clearing loans applied towards the purchase of LR No 10492.

112. The instructions above are further demonstrated by letters from NK Lagat & Partners, and Noah Chelugui to their advocate M/s Aggarwal (See Vol II pages 150 and 159); the two applications for Land Control Board consent proposing the subdivision of the property (See Vol II pages 146-149); and the Uasin Gishu Land Control Board consent dated 16th October 1976 approving the subdivision of LR 10492 into six portions in accordance with the application dated August 7, 1976, as follows: (See Vol II page 168, 226)

    i. Nathaniel Kiptalam Lagat Ngechek Estate, 620 acres

    ii. Thomas Kipkosgei Yator Lolosio Estate, 620 acres

    iii. Noah Kimngeny Chelugui Kapkoros Estate, 620 acres

    iv. Cherwon arap Maritim Embin Estate, 620 acres

    v. William Kimngeny Leting Kapchumba Estate, 620 acres

    vi. Huruma Co Ltd 140 acres

113. Contemporaneous with the applications for subdivision, it appears that there was a proposed change of user of LR No 10492 from registration under the *Registration of Titles Act* (RTA) to the *Registered Land Act* (RLA). By a letter dated 19th May 1978, the Commissioner of Lands wrote to the firm, M/s Amata & Company Advocates, approving the proposed subdivision and change of user in respect of LR No 10492. (See Vol II pages 155 - 158). As per the approved sketch plan at page 158, Noah Chelugui and others held a 256-hectare portion.

114. From the six referenced subdivisions of LR No 10492, it is contended that Eldoret Municipality/ Block 15/10 was assigned to Noah Chelugui. However, there is no evidence on record to this effect. On the contrary, there is evidence that Eldoret Municipality/ Block 15/10 was registered in the Government of Kenya as an absolute title. (See Vol II page 202).

115. Eldoret Municipality/ Block 15/10 was further subdivided into three parcels of land, that is Eldoret Municipality/ Block 15/237 registered in the name of Noah Kipngeny Arap Chelugui and a Certificate of Lease issued. (See Vol II page 175); Eldoret Municipality/ Block 15/238 registered in the name of Stanley Kiptoo Arap Metto; and Eldoret Municipality/ Block 15/239 registered in the name of President Moi and a Certificate of Lease issued, hereinafter (the suit property). (See Vol II page 169).

116. Thereafter, the suit property was further sub-divided into three parcels and transferred to third parties as follows; Eldoret Municipality/ Block 15/2369 in the name of Rai Plywood (K) Limited and a Certificate of Lease issued (See Vol II page 191 and 204); and, Eldoret Municipality/ Block 15/2370 in the name of Rai Plywood (K) Limited and a Certificate of Lease issued (See Vol II pages 189 and 203). As per the entry on the proprietorship section, it was indicated that the consideration was Kshs 93, 366,000.00/=; and Eldoret Municipality/ Block 15/ 2371 was registered to Kobil Petroleum Ltd and a Certificate of Lease issued. (See Vol II page 198).

117. The 2nd respondents' Certificate of Confirmation of Grant in the Matter of the Estate of Noah K Chelugui does not include the suit property, Eldoret Municipality/Block 15/239 or its subdivisions in the schedule of assets. It only lists Noah Chelugui's parcel, Eldoret Municipality/ Block 15/237. (See Vol II at page 142-143).

118. Would the Court of Appeal have affirmed the conclusions of the trial court regarding the ownership of the suit property given this evidence on record? We think not. So, on what basis did the two superior courts, arrive at the conclusion to the effect that, the 2nd respondents were the rightful and absolute proprietors of the suit property, so as to kick in the provisions of article 40 of the *Constitution*?

vii. Whether the 1st and 2nd appellants acquired valid title to the suit property

119. In their grounds of opposition dated November 15, 2014, the appellants stated that President Moi's title was a first registration under the *RLA* and was therefore indefeasible while the 2nd appellant was an innocent purchaser for value (See Vol II, page 184). Contrary to the 2nd respondents' allegation that Noah Chelugui was disenfranchised, the appellants asserted that the transactions they engaged in with respect to the suit property were all above board.

120. We have already traced the genesis of the suit property in the foregoing paragraphs of this Judgment. There is nothing on record to suggest that former President Moi acquired the suit property either fraudulently, or in a manner other than as indicated on record. What we have are claims of disenfranchisement of the 2nd respondents from the ownership of the suit property. The claims are based on allegations of loss of a title deed to the suit property and some form of fraudulence perpetrated by one Stanley Metto through payment of Kshs 70,000/= which was neither purchase price nor

consideration. The court was later informed by counsel for the 2nd respondents that the said payment was intended to "soften" Mr Chelugui, whatever that means in law.

121. It is not for us to delve into the veracity, effect, or otherwise of such evidence. That was the duty of the trial court, at first instance and the appellate court, during the process of re-evaluation. As regards the principle of indefeasibility of title, and bona fide purchaser for value without notice of the defect in title, this court set guiding principles in the cases of *Dina Management Limited v County Government of Mombasa & 5 others* SC Petition No 8 (E010) of 2021; [2023] KESC 30 (KLR) and *Torino Enterprises Limited v Attorney General* SC Petition No 5 (E006) of 2022; [2023] KESC 79 (KLR). The Court stated that where the registered proprietor's root title is under challenge, it is not enough to dangle the instrument of title as proof of ownership. The registered proprietor must go beyond the instrument of title and show that the acquisition was legal, formal and free from encumbrance. However, the responsibility to prove legitimacy of title is not only limited to the party whose title is being challenged. It also extends to the party claiming infringement of his property rights, to prove his entitlement warranting the attendant constitutional protection sought. With regard to this case, the claimant decried irregular subdivision of Eldoret Municipality/Block 15/10, yet he was a beneficiary of that same subdivision. What is more, he only lay claim to one sub-plot, the suit property. In the circumstances of this appeal, can it be said that the root of former president Moi's title to the suit property and by implication that of the 2nd appellant have been legally shaken based on the evidence tendered on behalf of the 2nd respondent? Hardly.

viii. Whether the Court of Appeal disregarded its own findings that were relevant to the Suit property

122. The 1st appellant submits that the Court of Appeal failed to apply its own findings in the case of *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others* [*supra*] which had raised the same issues as the instant appeal regarding the suit property. The case had been filed at the ELC by some of the beneficiaries of the estates of the 5 original partners and owners of LR No 10492. Overturning the trial court, which had held that the surrender of the said title to the Government was fraudulent, the Court of Appeal (Githinji, J Mohammed, & Otieno-Odek, JJA), held that the surrender of title LR No 10492, as well as its subsequent subdivision was conducted on instruction and in the full knowledge of the 5 original proprietors in common, hence the process was proper and legal.

123. The 2nd respondents on the other hand argue that matters of fact cannot be determined on the basis of a decision in a different case involving different parties. Furthermore, the 2nd respondents submit that the appellants did not introduce the case before the trial court by way of affidavit evidence. Finally, the 2nd respondents submit that the suit property in the present case, is different from the suit property in the *Nathan Tirop* case [*supra*].

124. We have considered the judgment and consequent findings in the *Nathan Tirop* case by the Court of Appeal. We have no doubt that this case is relevant and applicable to the present appeal. Critically, the respondents in the said case had claimed that the surrender to the Government and subsequent subdivision thereof of LR No 10492, was fraudulent and illegal. The Court of Appeal, upon evaluating the evidence on record, held that the said surrender was not a compulsory acquisition, but a valid sub-division leading to the issuance of the resultant titles. Therefore, the subsequent re-subdivision and transfer of the sub- plots to third parties was legal and could not be faulted on grounds of fraud. The ratio in this case is that the third parties (including the 1st appellant herein) acquired good title to their portions pursuant to the subdivision and consequent transfers. Contrary to the contention by the 2nd respondents that the superior courts were determining matters of fact, what was in issue in this appeal was whether the appellants' title to the suit property was valid. A determination of this issue ought not

to have been made in total disregard of a clear and relevant finding by the appellate court regarding the same.

125. Flowing from the foregoing analysis, the inescapable conclusion to which we must arrive is that there was no basis for the appellate court, to fault the validity of the 1st appellant's title to the suit property. The resulting orders are as follows:

F. Orders

i.

The consolidated appeal is hereby allowed;

ii. The Judgment of the Court of Appeal dated July 22, 2022 is hereby overturned;

iii. Each party shall bear its own costs; and

iv. We hereby direct that the sum of Kshs. 6,000/= deposited as security for costs in the consolidated appeal herein be refunded to the appellants.

DATED AND DELIVERED AT NAIROBI THIS 2ND DAY OF AUGUST, 2024.

.....

M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

Registrar,

Supreme Court of Kenya