



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

ENVIRONMENTAL AND LAND DIVISION

ELC CIVIL MISC. NO. 929 OF 2012

**IN THE MATTER OF ARTICLES 22, 23, 27, 40, 47, 50 OF THE CONSTITUTION OF THE
REPUBLIC OF KENYA 2010.**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF THE FUNDAMENTAL RIGHTS TO
A FAIR ADMINISTRATIVE ACTION, PROTECTION OF RIGHT TO OWN PROPERTY,
EQUALITY AND FREEDOM FROM DISCRIMINATION UNDER ARTICLES 22,23,40,47,50
OF THE CONSTITUTION OF KENYA 2010, SECTION 28 AND 30 OF THE JUDICATURE
ACT AND SECTION 28 AND 30 OF RLA (LAW REPEALED)**

BETWEEN

JOHN MBUGUA GITAU PETITIONER

VERSUS

SIMON PARKOYIET MOKARE 1ST RESPONDENT

KAREMPU KAATA 2ND RESPONDENT

NKAMA GROUP RANCH 3RD RESPONDENT

CHIEF LAND REGISTRAR 4TH RESPONDENT

HON. THE ATTORNEY GENERAL5TH RESPONDENT

(CONSOLIDATED WITH)

HIGH COURT OF KENYA AT NAIROBI

ELC NO. 1055 OF 2012

SIMON PARKOYIET MOKARE PLAINTIFF

VERSUS

PETER KOIKAI PUKEI & ANOTHER DEFENDANTS

JUDGMENT

INTRODUCTION:

The Petitioner is the Administrator of the Estate of the late **Joshua Matindi Gitau Karanja alias Ole Karanja Gitau** (deceased) alleged to have been as at the time of his death in occupation and possession of **L.R. Kajiado/Kaputiei- South 2241** (suit property). The 1st Respondent is presently the registered owner of **L.R. Kajiado/Kaputei-South 2241**. The 2nd Respondent is the Chairman of the **Nkama Group Ranch** and has been the Chairman since 1989. The 3rd Respondent is **Nkama Group Ranch** registered under the provisions of the Land (Group) representatives) Act 1968 (cap 287 Laws of Kenya). The 4th Respondent is the Chief Land Registrar an office established under section 7 of the Registered Land Act, Cap 300 Laws of Kenya (now repealed). The 5th Respondent is the Attorney General, the Chief Government Legal Advisor.

The Petitioner's case.

The Petitioner by way petition filed in court on 26/11/2012 brought under Articles 22,23,27,40,47 and 50 of the Constitution 2010, section 3 of the judicature Act and sections 28 and 30 of the Registered Land Act Cap 300 Laws of Kenya (Repealed) claims that his fundamental rights to a fair administrative action, protection of right to own property, equality and freedom from discrimination were contravened and violated and prays for orders that:-

- a. That a declaration be issued to the effect that the allocation of the suit property herein to wit **L.R. Kajiado/Kaputiei- South 2241** to the 1st Respondent as against the overriding interests of the Petitioner is discriminatory, unconstitutional, ultra vires the powers of the 2nd, 3rd and 4th Respondents and which were done out of bad faith and a violation of the Petitioner's fundamental Rights and freedoms and is therefore a nullity.
- b. That an order of certiorari by way of Judicial review be issued to bring into this court and quash the decision of the 2nd, 3rd and 4th Respondents herein to allocate and issue a title deed over the suit property to the 1st Respondent and to restore the status quo ante.
- c. That an order of mandamus by way of Judicial Review be issued directing and commanding the 4th Respondent herein to cancel and annul the land register entry to reflect that the petitioner is the lawful proprietor of the suit property to wit **L.R. Kajiado/Kaputiei-South 2241** measuring 76.46 Hectares.
- d. That a declaration be issued to the effect that the allocation and issuance of land title **L.R. Kajiado/Kaputiei-South 2241** to the 1st Respondent by the 2nd, 3rd and 4th Respondents was fraudulent, irregular and a nullity in law.
- e. That a conservatory order by way of injunction be issued directed to the 1st Respondent restraining him, his agents, advocates or persons directly or in any way connected to him from interfering with and/or from transferring, offering for sale and or allocating the petitioner's proprietary rights over parcel **L.R. Kajiado/Kaputiei-South 2241** except in favour of the petitioner.
- f. That the costs of this petition be borne by the 1st, 2nd and 3rd Respondents herein.
- g. Any other relief or order that this court may deem fit in the special circumstances of this matter.

The petitioner's application for amendment of the petition dated 4th October 2013 was on 19/11/2013 allowed by the court such that the parcels of land the subject of the petition were land parcels NOS

Kajiado/Kaputei –South/2625 and Kajiado/Kaputei-South/2626 being the resultant subdivisions of land parcel Kajiado/Kaputei-south/2241. The said resultant subdivisions are like the original parcel of land **L.R. Kajiado/Kaputei-South/2241** registered in the name of the 1st Respondent. Thus the orders sought in the petition by the petitioner touching on the original title are now directed at the resultant subdivisions aforesaid.

The petitioner, **John Mbugua Gitau** was on 24th August 2011 issued by the High Court at **Machakos in Machakos HC Succession Cause NO. 651 of 2011** with a Limited Grant of letters of Administration ad Litem Limited to filing and prosecuting civil suit in court on behalf of the estate of Joshua **Matindi Gitau alias Ole Karanja Gitau** (deceased) claiming his entitlement to shares in **Nkama Group Ranch** and he has therefore brought this petition in that capacity.

The petitioner in support of the petition avers that the late **Joshua Matindi Gitau Karanja** was a member number 302 in the 3rd Respondent Group as attested by the membership list of **Nkama Group Ranch** annexed to the Petitioner's supporting affidavit and marked "**JMG11**". The petitioner asserts that the deceased was the bonafide owner of the suit property and had lived on the property together with his nuclear and extended family for more than 70 years prior to his death on 1st November 1986. That the late **Joshua Matindi Gitau Karanja** died intestate and left his dependants occupying the suit land which was within the Group Ranch and which they have developed, cultivated and made improvements. The petitioner's claims that the 1st Respondent without any justification and/or right recently sought to evict the said dependants on the basis that he had become registered owner of the suit property.

The petitioner states that sometime during 1990 the 2nd Respondent applied to deregister/dissolve the 3rd Respondent as a Group Ranch and that the Director of Land Adjudication/Settlement at the Ministry of Lands vide letter dated 21/11/1990 annexed and marked "**JMG111**" gave consent for the dissolution of the 3rd Respondent.

The petitioner contends that the dissolution of the 3rd Respondent was conditioned on the principle that all the members of the 3rd Respondent would be allocated a share of all that parcel that they currently occupied. The petitioner therefore avers having regard to the aforesaid condition, a legitimate expectation was created on the part of the petitioner that the estate of the late **Ole Karanja Gitau** would be allocated the suit property. It is the petitioner's averment that the 2nd and 3rd Respondent without any justification and in contravention of the condition to allocate the members land where they had occupied and were in possession, allocated the suit property to the 1st Respondent to the prejudice of the petitioner and the other dependants of the Estate of the deceased.

The petitioner further avers that the 1st Respondent has since being registered as owner of the suit property sought to have the petitioner and the other Dependants evicted from the suit property and has instituted Machakos **H.CCC.NO.278 of 2012** where he seeks orders of injunction and eviction of the petitioner's from the suit property. The petitioner avers that the 2nd Respondent has displayed an inclination to side with the 1st Respondent against the petitioner which puts to question the 2nd and 3rd Respondents fairness in dealing with the issue of allocation of the land to the members of the Group Ranch. The petitioner contends there was no exercise of fairness when the 2nd and 3rd Respondents were carrying out their administrative duties to allocate the land and this was in breach of Article 47 of the Constitution of Kenya 2010 which guarantees individuals right to a fair administrative action.

The petitioner contends that his and the other dependant's right to protection of property as envisaged under **Article 40** of the constitution have been infringed by the actions of the 1st, 2nd and 3rd Respondents and unless the breach/infringement is remedied the petitioner deceased dependants stand to suffer loss of property as they will have been deprived of the suit land which they had not only occupied but had also substantially developed.

The Petitioner in the premises prays that the court grants the prayers sought in the petition to redress the loss and damage that the petitioner and the dependants stand to suffer if the orders are not granted.

1st Respondent's case

The 1st Respondent filed a replying affidavit sworn on 4th December 2012 in response to the petition. The 1st Respondent deponed that he was a member **NO. 46 of Nkama Group Ranch** (the 3rd Respondent) prior to its dissolution in 1990 and that following the dissolution of the 3rd Respondent and subdivision of the Group Ranch he was allocated land parcel number **Kajiado/Kaputei-South/2241** and was issued a title deed in 2008. The 1st Respondent further depones that all members of the Group Ranch were each allocated equal portions of land and that the petitioner's father (deceased) was allocated his portion being Title number **Kajiado/Kaputei-South 2211** and a title was issued to his sons **Daniel Parsimia Matindi, Peter Koikal Pukei and John Mbugua Getao** as per the copy of certificate of official search annexed and marked "SPM1".

The 1st Respondent avers that **Daniel Parimisa Matindi** had moved to his parcel of land but the petitioner has refused to move to his property and continues in trespass on the 1st Respondent's land. The 1st Respondent denies that the petitioner has been deprived of the right to own property and/or has been discriminated against as alleged in the petition and states that all the Group Ranch members were each allocated equal portions of land within the Group Ranch and that it was not possible that all the members could be allocated land at the same place or location. The 1st Respondent denies that there was any fraud committed as alleged by the petitioner given that every member of the Group Ranch including the petitioner's late father was allocated land. The 1st Respondent states it is him the 1st Respondent, who is suffering loss and damage as the petitioner continues to occupy his land when he has no right and/or justification to do so. The 1st Respondent filed HCCC NO. 278 of 2012 at the Machakos High Court which has since been transferred and consolidated with this petition. In the suit the 1st Respondent seeks an order of injunction against the petitioner and an order of eviction.

The 2nd and 3rd Respondents Case

The 2nd and 3rd Respondent filed a replying affidavit sworn by **William Ole Kanyiaa** on 21st May 2013. The deponent avers that the members of the 3rd Respondent appointed him as the Secretary and the 2nd Respondent as the Chairman and one **Sitoria Ole Tipatet** as the Treasurer and states that as the officials of the 3rd Respondent their role was to carry out the instructions and execute the decisions of the members as resolved at the duly convened meetings of the 3rd Respondent. The Deponent further avers the **Nkama Group Ranch** comprised approximately of 100,000 acres and had a membership of 519 members. The Deponent further avers that the 3rd Respondent initially comprised of the **Kaputei Masaais of Kajiado district** but were later joined by other members and initially all the members lived in the Ranch communally in Manyatta Villages and the larger portion of the land was set aside for grazing livestock.

The Deponent states that the 3rd Respondent was dissolved in 1989 and the letter dated 21st November 1990 from the office of the Director of Land adjudication/Settlement gave consent for the dissolution and thereafter the 3rd Respondent only existed for purposes of distribution of the group land to the members. The Deponent averred that owing to the communal lifestyles upto almost (48%) forty either percent of the members had to move from the communal areas where they were living to take up parcels of land from areas that had been set aside for grazing and that the late **Joshua Matindi Gitau Karanja** was one such member who had to relocate from the communal land that he had previously occupied following the subdivision and allocation of individual parcels of land.

The Deponent avers that the household of the late **Joshua Mutindi Gitau Karanja** was allocated property and issued with a title **Kajiado/Kaputei-South/2211** in the name of the deceased's three (3) sons namely **Daniel Parsimia Matindi, Peter Koikai Pukei and John Mbugua Getao**, the petitioner here. The Deponent further states that the title to the petitioner and his brothers was collected on 30th October 2010 and signed for as per the records of the 3rd Respondent. The Deponent additionally slates

that the title to Title Number **Kajiado/Kaputiei-South/2241** was issued to the 1st Respondent and that he collected the same on 13th January 2008.

The Deponent in response to the petitioners assertion that members of the 3rd Respondent were supposed to be allocated land where they were occupying states that would have been impractical considering that the members were living communally. The deponent denies that the letter from Director of Land Adjudication/Settlement dated 21st November 1990 directed that people had to be allocated land on the portions that they occupied. The Deponent asserts that the letter merely communicated that consent for the dissolution of the 3rd Respondent had been granted and that for the petitioner to suggest the said letter was directing otherwise is to attempt to mislead the court. All the letter provided is that there be a subdivision of the group ranch into individual holdings amongst all the registered members and the officials were required to make sure each and every member had been well served.

The Deponent under paragraph 13 of the replying affidavit deposes that the subdivision and transfer of the Ranch land to the registered members was carried out fairly and without discrimination and the survey and placing of beacons was carried out by a Government surveyor and all the members of the 3rd Respondent were involved. The Deponent further deposes that as it was not possible to allocate all the people on the portions that they had occupied many families left burial sites where they had buried their relatives and moved and the deponent gave examples that the late **John Tapal Moipei, Moshina Ole Maako** and **Mason Ole Kila** were all buried on the suit property but their families were allocated property elsewhere within the Ranch.

The 2nd and 3rd Respondents in the premises argue that the petitioner has no or no reasonable cause of action against them and that the petitioner has not established any infringement of any of his constitutional rights and that the petition has been brought in bad faith and is a gross abuse of the court process and the same ought to be dismissed with costs.

Submissions issues and determination

On the directions of the court the parties filed written submissions ventilating their respective positions. The petitioner filed his initial submissions dated 18th July 2013 on 19th July 2013 and further submissions in response to the Respondents submissions dated 3rd December 2013 on 4th December 2013. The 1st Respondent filed his submissions dated 13th September 2013 on 16th September 2013 and the 2nd and 3rd respondents filed their submissions dated 12th September 2013 on 13th September 2013. The respective Advocates for the parties also highlighted their submissions at the hearing of the petition on 4th February 2014.

I have carefully considered the pleadings and arguments made by the parties in their submissions and find that the issues for determination are as follows:-

- i. **Whether the Group Ranch Land was subdivided and allocated to all the members of the 3rd Respondent,**
- ii. **Whether the 1st Respondent was entitled to be allocated land by the 3rd Respondent and if so whether the suit property was fraudulently and irregularly allocated to the 1st Respondent,**
- iii. **Whether the allocation of the suit property to the 1st Respondent was discriminatory and arbitrary,**
- iv. **Whether the 2nd and 3rd Respondents decision to allocate the suit property to the 1st Respondent amounts to unfair administrative action,**
- v. **Whether the petitioner was unfairly treated and/or discriminated against by being relocated from the suit property to elsewhere.**
- vi. **Whether the petitioner is entitled to the reliefs sought.**

(i) Whether the 3rd Respondent (Group Ranch) was subdivided and allocated to members.

It is not disputed that consent to dissolve the 3rd Respondent was given by the Director of Adjudication/settlement vide his letter of 21st November 1990. The terms consequent to the consent for dissolution were that the group land was to be subdivided to create individual holdings for all the registered members of the Group Ranch. The 2nd and 3rd Respondent have affirmed that the 3rd Respondent comprised of approximately 519 members. The 2nd and 3rd respondents in their replying affidavit paragraph 7 and 8 depone that the petitioner and his brothers together with other members have had their title issued and they have collected the same. A list of the members of the 3rd Respondent marked as “**WOK 2**” is annexed to the replying affidavit and shows that a total of 505 members of the 3rd Respondent have collected their titles. The 2nd and 3rd Respondent state that it is only the petitioner who has lodged a complaint regarding distribution and allocation which complaint they consider to be unjustified. On the 1st issue it is thus definite the Group Ranch Land was indeed subdivided and allocated members including the petitioner’s family.

(ii) Whether the 1st Respondent was entitled to be allocated land by the 3rd Respondent and if so whether the suit property was fraudulently and irregularly allocated to the 1st Respondent.

It is not disputed that the 1st Respondent and the petitioner’s deceased father were members of the 3rd Respondent. The 1st Respondent was registered as member number 46 in the list of members of the 3rd Respondent while the late petitioner’s father was registered as member number 302. Hence both the petitioner’s late father and the 1st Respondent were lawfully entitled to be allocated land by the 3rd Respondent following the subdivision of the Ranch to create individual holdings.

The petitioner and his brothers were on behalf of their late father allocated land parcel NO.

Kajiado/Kaputiei- South/2211 while the 1st Respondent was allocated land parcel NO.

Kajiado/Kaputiei-South/2241. The petitioner challenges the allocation to the 1st Respondent of Land Parcel **Kajiado/Kaputiei-South/2241** arguing that the same was irregular and fraudulent and an infringement on the proprietary rights of the petitioner who states he ought to have been lawfully allocated the parcel allocated to the 1st Respondent. The petitioner having alleged fraud and irregularities on the part of the 2nd and 3rd Respondents was duty bound to provide proof to the required standard. The burden of proof rests with whoever alleges. In the present petition the legal burden to prove fraud, discrimination, unfair procedure and breach of the constitution provisions pleaded being articles 22,23, 27, 40, 47 and 50 of the constitution 2010 on the part of the 2nd and 3rd Respondents in allocating the property to the 1st Respondent instead of the petitioner lies with the petitioner. It is a legal requirement and a rule of practice that where fraud and/or misrepresentation is alleged the particulars of the fraud and/or misrepresentation must be specifically pleaded and set out so that the Defendant is clear as to the case he/she is required to answer.

The High Court sitting in Kisii in the case of **Ochieng Sese –vs- John Ocharo (2005) eKLR** held that even where fraud is pleaded the particulars of the fraud must be specifically pleaded. The judge in the case held:-

“.....True the plaintiff paragraph 7 of the plaint talked of fraud on part of the defendant. However there are no particulars of fraud specifically pleaded. Order 6 rule 4 (presently order 2 rule of the Civil Procedure Rules 2010) provides clearly that particulars of fraud must be specifically pleaded. No such particulars are given and as such the plaintiff cannot rely on issue of fraud”.

In the case of **Kampala Bottles Limited –vs- Damanico (u) Ltd** Supreme court of Uganda was of similar view that fraud has to be specifically pleaded. **Hon. H.G. Platt** who was a member of the Bench that decided the Appeal in his judgment stated:-

“ In the first place, I strongly deprecate the manner in which the Respondent alleged fraud in his written statement of defence. Fraud is very serious allegation to make and it is as always, wise to abide by the civil procedure rules Order V1 Rule 2 and plead fraud properly giving particulars of the fraud alleged”.

On the question of the burden of proof in fraud cases **Hon. Wambuzi, CJ** in the **Kampala Bottles case (Supra)** stated thus:-

“with respect, this verges on constructive fraud if there was any fraud rather than actual fraud as required by the authorities referred to in the lower court. Besides, it was not shown nor did the learned trial Judge find the appellant was guilty of any fraud or that he knew of it. Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil cases”.

As to what the particulars of fraud ought to contain the case of **Camacho –vs- Automobile Club of Southern California, Super Ct. NO. BC 315357** provides a useful guide. In the case the appellate Judges stated thus:-**“Fraud actions have been classed as “disfavoured” and are subject to strict requirements of particularity in pleading. The idea seems to be that allegations of fraud involve a serious attack on character, and fairness to the defendant demands that he should receive the fullest possible details of the charge in order to prepare his defence. Accordingly, the rule is everywhere followed that fraud must be specifically pleaded. The effect of this rule is two fold (1) General pleading of the legal conclusion of fraud is insufficient, the facts constituting the fraud must be alleged (2) every element of the cause of action for fraud must be alleged in the proper manner (i.e, factually and specifically), and the policy of liberal construction of the pleadings will not ordinarily be invoked to sustain a pleading defective in any material respect”.**

The above authorities set out correctly the law as relates to pleading in regard to matters where fraud is alleged as in the present petition and the requisite burden of proof. The burden of proof on the person who alleges fraud is on a standard higher than on a balance of probabilities adopted in ordinarily civil cases but lower than proof beyond a reasonable as in criminal cases. It is somewhere inbetween.

In the present petition under paragraph 12 the petitioner has casually stated that when he conducted a search at the Land Registry the search revealed that the suit property had been fraudulently, irregularly and incongruously been transferred to the 1st Respondent and a title issued on 11th January 2008.

Paragraph 13 of the petition also alleges that the issuance of title to the suit property by the 4th Respondent to the 1st Respondent was irregular, fraudulent and contrary to the petitioners proprietary rights of possession. It is noteworthy that the petitioner has not particularized any acts of fraud attributed to the 1st, 2nd 3rd and 4th Defendants and has generally alleged there was fraud. Without giving the particulars of fraud it is not possible to determine whether there was indeed any fraud. Was fraud for instance committed through deliberate acts of commission and/or omission and if so what were the specific acts of commission or omission?

The particulars of the alleged fraud was absolutely necessary to be pleaded to enable the Respondents to answer to them. As matters stand the Respondents do not know what it is that they did that was fraudulent. Certainly allocating the 1st Respondent a parcel of land just as more than other 500 members were allocated cannot of itself be said to be fraudulent.

On the basis of the evidence the pleadings and material placed before the court I cannot find any proof of fraud in regard to the allocation of the suit property to the 1st Respondent. The 1st Respondent was a member of the 3rd Respondent and like any other member he was entitled to be allocated a parcel of land following the subdivision of the Group Ranch. No fraud and/or irregularity in the allocation is established and I so determine.

On the issue whether the allocation of the suit property to the 1st Respondent was discriminatory and

arbitrary, the Petitioner has submitted that the decision to allocate and issue title by the 3rd and 4th Respondent to the 1st Respondent was action that was arbitrary and discriminative and offended articles 27 and 50 of the constitution. The petitioner submits that this was in breach of the petitioner's right to own property and right to fair treatment and freedom from discrimination which ought to invite this court's intervention. The petitioner backs these assertions on the grounds that the petitioners family had occupied the suit property for many years and the said land was communal, ancestral and transgeneration where the petitioner and his dependants had lived and occupied for generations. The petitioner argues that the 2nd Respondent unilaterally allocated the disputed property to the 1st Respondent without according the petitioner a hearing. The petitioner refers the court to the case of **Commissioner of Lands –vs- Kunste Holtel Ltd, Civil Appeal NO. 234 of 1995** to buttress his argument that he was entitled to be heard before the decision to allocate the suit property to the 1st Respondent was taken. In the case the court of appeal judges observed thus:-

“ The issue we are concerned with here and which is the crux of the matter in this appeal is not whether Kunste Hotel Limited has any right to the plot but whether its interest in the subject plot was sufficient and in the circumstances of this case so obvious that the appellant was obliged to consult or hear it prior to his decision to allot the plot to the interested party”.

The petitioner also in his petition and by the contents of paragraph 6 of his supporting affidavit does suggest that the Director of Adjudication/settlement vide his letter of 21st November 1990 accorded consent for the dissolution of the 3rd Respondent on the condition that all members would be allocated land where they occupied and that this, the petitioner submits, created a legitimate expectation that the estate of the late **Ole Karanja Gitau** that they would be allocated the suit property having lived and resided thereon for decades.

I have reviewed the contents of the letter dated 21st November 1990 and it definitely did not contain a condition that the members were to be allocated land where they occupied. The said letter provided in the relevant parts thus-

-----I hereby give my consent to dissolve the Nkama Group Representatives and there after the subdivision of the group land into individual holdings amongst the all registered members. With the strength of this consent, you will now apply to the Land Control Board for another consent to subdivide the group land.

You will remain in the office to sign all necessary documents, until the whole exercise is over, making sure that each and every member has been well served-----“.

Quite clearly the said letter did not impose the condition alluded to by the petitioner that the members were to be allocated the land they occupied.

The 2nd and 3rd Respondents have stated that the Group Ranch was subdivided into 519 parcels of equal size and allocated to the respective members of the 3rd Respondent including the petitioners family. The 2nd and 3rd Defendant have further stated that they engaged the services of a government surveyor to carry out the subdivision exercise and further that up to 48% of the members had to be relocated from the places they were occupying to take Upland elsewhere within the ranch as it would not have been practical to settle everyone within the areas they occupied. It is thus the 2nd and 3rd Respondents submission that the petitioner's family was not targeted for any unfair treatment and/or discrimination as alleged.

The 2nd and 3rd Respondent referred the court to the case of **Council of Civil Services Unions –vs- Minister for Civil Service (1985) 3 ALL ER 935** where the House of Lords considered what constitutes legitimate expectation and held that:-

“a legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably

expect to continue”.

The supreme court of India in the case of **J.P. BANSAL –VS- state of Rajasthan & another civil Appeal 5982 of 2001** while applying and relying on the holding in **Council of Civil Services Union** case (**Supra**) stated thus:-

“The basic principles in this branch relating to “legitimate expectation “ were enunciated by Lord Diplock in Council of Civil Service Unions & others –vs- Minister for civil service (1985) AC 374 (408-409) commonly known as CCSU case). It was observed in that case that for a legitimate expectation to arise, the decisions of the administrative authority must affect the person by depriving him of some benefit or advantage which either (i) he had in the past been permitted to continue to do until there has been communicated to him some rational grounds of withdrawing it on which he has been given an opportunity to comment, or (ii) he has received assurance from the decision maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn..... An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous”.

As observed earlier in this judgement the letter of 21st November 1990 was clear and not ambiguous and did not place any condition that would have given rise to any legitimate expectation. No promise of any benefit was extended to the petitioner by the 2nd and 3rd Respondent and my view is that the petitioner has no basis to state that there was a legitimate expectation that their family would be allocated the suit premises.

The petitioner further and specifically through his further affidavit avers that the 2nd and 3rd Defendant discriminated him while effecting the allocations on the basis of his tribe and further argues that the Respondents failed to consider the value of the property while making the allocations. As I understand it, the petitioner’s contention is that the suit property is near the Mombasa Road and the nearby **Sultan Hamud Township** and owing to its proximity its value is much more than the land that was allocated to the petitioner’s family. Indeed the valuation report attached to the further affidavit showing the value of the suit property at Kshs.170,000,000/- as opposed to the value of **L.R. NO. Kajiado/Kaputiet South/2211 of Kshs.7,556,000/-** was intended to illustrate this fact. The petitioner curiously did not make the averments that he was discriminated against on the basis of his tribe at the time of filing the petition and he only brought this up in his supplementary affidavit and the Respondents state that this is not borne out by the petition and effectively amounts to amending the petition without affording the Respondent any opportunity to reply to the allegations. The cardinal principle is that parties are bound by their pleadings and since this averment was not carried in the petitioner’s petition, the petitioner would not be free to bring the same out in a supplementary affidavit thus denying the Respondents the opportunity to answer to it.

Be it as it may be my view is that the claim by the petitioner that he was discriminated on the basis of tribe is not substantiated. No evidence was tendered to show to what tribes all the 519 members of the 3rd Respondent belonged and how the allocations were if at all by a member belonging to any particular tribe. From the evidence adduced it is apparent the 1st Respondent, and the petitioner’s family and other families occupied the suit property before the subdivision and allocation of individual parcels of land. The members of the 3rd Respondent having resolved to have the 3rd Respondent dissolved and the land distributed to the members the members implicitly agreed there would be reallocations and people were liable to be relocated from the places that they were occupying. This happens all the time when there is land adjudication and consolidation. All persons cannot be allocated land where they have settled and occupied and it is normal for people to be reallocated. I thus do not accept the petitioner’s family was discriminated against by the Respondents.

In the present petition the petitioner has not shown he was singled out and targeted for discrimination. The 2nd and 3rd Respondents averment that up to 48% of the members were reallocated land in areas that they were not living or occupying has not been reputed or contraverted. There is further no claim that any

genuine member of the 3rd Respondent was left out in the allocations. In this age and era where land buying companies are flout with numerous cases of failing to allocate their members land that they have actually bought and paid for I think the 2nd and 3rd Respondents are to be commended for ensuring each and every member was allocated land. True, not every person could be allocated land where they would have wished but that does not make the allocation fraudulent and/or discriminative. The group ranch was about 100,000 acres and was therefore a vast parcel of land and with each member getting at least over 180 acres it is to be expected that allocations would be far flung.

My view is that the petitioner has failed to prove that the allocation of the suit property to the 1st Respondent was arbitrary and discriminatory.

Whether the 2nd and 3rd Respondents decision to allocate the suit property to the 1st Respondent amounts to unfair administrative action.

Flowing from what I have observed herein above and having held that the 1st Respondent like the other members of the 3rd Respondent was entitled to be allocated land and further having held that the decision by the 2nd and 3rd Respondent to allocate the 1st Respondent the suit land was not arbitrary or discriminatory it follows that their decision cannot be said to be unfair administrative action aimed at prejudicing the petitioner. It is not in contention that the 2nd and 3rd Respondents had the authority and consent to dissolve the group ranch and to subdivide and allocate the land to the members. The 2nd and 3rd Respondents went through the process of subdividing the Ranch using the services of a government surveyor and ensured each of the members got a plot. While the process and procedure of allocating the individual parcels of land to the members is scanty as neither the petitioner nor the Respondents furnished any details, it is a fact that the process took well over 15 years before the individual titles were prepared and issued. What is factual is that all the members were allocated land and as per the list of persons who have received their own titles attached to the replying affidavit of the 2nd and 3rd Respondents upto 505 members have collected their titles representing well over 95% of the members.

The title to the petitioner's family land was collected by his brother in 2010 while the 1st Respondent collected his title in 2008. It is unclear why the petitioner waited up to 2012 to take out grant of letters of administration to the estate of his late father to be able to mount this petition. It is also evident uptill the time this petition was filed there is no record by the petitioner challenging the actions of the 2nd and 3rd Respondents as they went on with the process of subdivision, allocation and processing of the titles. It does appear to me that the petitioner must have had a change of heart perhaps having regard to the advantageous location of the 1st Respondent's parcel of land in relation to theirs and decided to challenge the process of allocation. Otherwise it is unexplainable how the petitioner held out quietly from 1990 through to 2012 if he thought the process was opaque and/or unfair.

Article 47 of the Constitution provides:-

- 1. Every person has the right to administrative action that is expeditious, efficient, lawful reasonable and procedurally fair.**
- 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

I have reviewed the petition the responses and the submissions and I find no basis upon which the 2nd and 3rd Respondents can be faulted for the actions they took as they delivered on their mandate to settle all the members of the 3rd Respondent on their individual parcels of land. The complaint by the petitioner against their actions is belated and an afterthought. It must be that all the members were aware there were vast grazing areas and that upon subdivision some persons were definitely liable to be relocated to these areas. In the premises I hold the view that the petitioner has not shown and/or demonstrated that he was subjected to unfair administrative action by the 2nd and 3rd Respondents. Accordingly I hold and find there was no contravention of Article 40, 47 and 50 of the Constitution by the Respondents.

Whether the petitioner was unfairly treated and/or discriminated against by being relocated from the suit property to elsewhere.

The petitioner in my view has not tendered any evidence to show that he was treated differently from the other members of the 3rd Respondent. The petition does not set out any specific acts that are alleged to constitute discrimination and/or unfair treatment. The 2nd and 3rd Respondents have averred that they executed their roles and duties fairly and with diligence. The act of dislocation from one place to another given the circumstances at the Ranch where many people had to be relocated cannot constitute unfairness or ill treatment.

For the Respondents to be held to have treated the petitioner unfairly or in a discriminatory manner, the petitioner had to establish the Respondents deliberately singled them out and intentionally carried out acts which they knew would harm or prejudice the petitioners and intended it to be so. The evidence that is on record does not point to the Respondents deliberately targeting the petitioner with the intention to disadvantage them but rather that the Respondents acts were indiscriminate and directed at all the members.

It does appear the Respondents used the size of the parcels of land to achieve equity as all the parcels of land were virtually of equal size. If any other criteria was to be used it was definitely going to produce issues that the Respondents could not rationally handle and one can in the circumstances understand why factors like value of the land and/or proximity to Mombasa Road or indeed any urban centres could not be appropriate facts for consideration in undertaking the allocations. The fact is there were those who were to be near the Mombasa Road and Urban centres and others who were to be far off. It would be far fetched to hold that simply because one was not placed where they would have liked to be then they were treated unfairly and in a discriminatory manner as the petitioner urges the court to hold.

In the premises the court finds no basis to hold that the petitioner was unfairly treated and/or discriminated against and makes a finding that he was in fact not unfairly treated and/or discriminated against.

Before I conclude this judgment there is one other matter I would like to comment on touching on the 1st Respondent as relates to his title **Kajiado/Kaputiei-South 2241** (now subdivided to form two titles **Kajiado/Kaputiei-South/2525** and **Kajiado/Kaputiei-South/2526**). The 1st Respondent in the suit he filed in the High Court at Machakos Civil suit **NO. 278 OF 2012** which was transferred to Nairobi High Court and was ordered consolidated with this petition under file number **ELC NO. 1055 of 2012** the 1st Respondent pleaded under paragraphs 4 and 5 of the plaint as follows:-

- 4. The plaintiff is the registered owner of all the piece of land best known as L.R. NO. Kajiado/Kaputiei-South/2241 and he is a holder of a valid title document with respect thereto.**
- 5. However, since January 2008 the Defendants encroached onto the said parcel of land without any colour of right and are ploughing, fencing cultivating and grazing livestock on a 35 acres which is a portion of the suit land.**

The 1st Respondent has in the prayers as per the plaint sought an order of injunction against the Defendants restraining them from trespassing and/or in any manner interfering with the suit property and further seeks an eviction order against the Defendants.

The court has in considering the petition by the petitioner come to the conclusion and holding that the 1st Respondent was lawfully allocated the suit property. The court has further held that the process of allocation of the parcels of land by the 2nd and 3rd Respondents was fair and there was no breach of any constitutional rights of the petitioner in as far as the allocation process and procedure was concerned. It follows therefore the 1st Respondent's registration as owner of **L.R. Kajiado/Kaputiei-South 2241** was valid and that in terms of sections 24 and 25 of the land Registration Act NO. 3 of 2012 he is the absolute owner and that his rights as such registered owner are indefeasible and could only be challenged under the

grounds set out under section 26 (1) of the Act which are on the ground of fraud or misrepresentation to which he is shown to be a party or if it is shown he acquired the title illegally, unprocedurally or through a corrupt scheme.

In this judgment the court has considered whether there was fraud, irregularity or illegality in the allocation of the suit land to the 1st Respondent and has held there was none and/or the same was not proved to the standard required under the law. In the premises therefore the court holds that the title held by the 1st Respondent over the suit property is absolute and indefeasible.

The upshot therefore is that the court finds the petitioner has failed to prove there was any breach of his fundamental rights by the Respondents and consequently dismisses the petition for lack of merit.

Further as the court has found the 1st Respondent is the lawful owner of the suit premises the court enters judgment in favour of 1st Respondent who is the plaintiff in **HC ELC NO. 1055 of 2012** consolidated with the instant petition and makes orders as against the Defendants in HC ELC 1055 of 2012 jointly and severally to:-

- a. **Vacate and deliver vacant possession of L.R. Kajiado/Kaputiei-South/2241 (now L.R. NOS. Kajiado/Kaputiei-South/2625 and 2626 following subdivision) to the plaintiff/1st Respondent within ninety (90) days from the date of this judgment.**
- b. **In default an eviction order to issue on application.**
- c. **As the issues raised involved some aspect of public interest I direct that each party will bear their own costs.**

Judgment dated, signed and delivered this.....25th.....day of...September.....2014.

J. M. MUTUNGI

JUDGE

In presence of:

Mr. Kinyua.....For the Petitioner

MS NjoguFor the 1st Respondent

MS Mwangi for MS Mate.....For 2nd & 3rd Respondents

N/A For the 4th & 5th Respondents