Sombo & 4 others (Suing on behalf of 15,000 individuals of the Amwezi and Mirima Clans of the Duruma Community) v Nyari Investment (1998) Ltd & 5 others (Civil Appeal 23 of 2018) [2023] KECA 438 (KLR) (14 April 2023) (Judgment) (with dissent - SG Kairu, JA)

Neutral citation: [2023] KECA 438 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 23 OF 2018

SG KAIRU, P NYAMWEYA & JW LESSIT, JJA

APRIL 14, 2023

BETWEEN

JOSEPH SOMBO ..... 1ST APPELLANT

MWANDURI MERI ..... 2ND APPELLANT

BAHRU MWAGUNDU ..... 3RD APPELLANT

MWAHUI MWAJIRAMBA ..... 4TH APPELLANT

KAZUNGU KARISA ..... 5TH APPELLANT

SUING ON BEHALF OF 15,000 INDIVIDUALS OF THE AMWEZI AND MIRIMA CLANS OF THE DURUMA COMMUNITY

AND

NYARI INVESTMENT (1998) LTD ..... 1ST RESPONDENT

MOCASH PROCESSORS (K) LTD ..... 2ND RESPONDENT

COUNTY COUNCIL OF KWALE ..... 3RD RESPONDENT

NATIONAL LANDS COMMISSION ..... 4TH RESPONDENT

DISTRICT COMMISSIONER, KINANGO ..... 5TH RESPONDENT

ZEINABU JAN MOHAMMED (SUED AS LEGAL REPRESENTATIVE OF DANIEL TOROITICH ARAP MOI) ..... 6TH RESPONDENT

(An appeal from the Judgment of the Environment and Land Court at Mombasa (S. Mukunya J.) dated 24th October 2014 in Environment and Land Court Case No. 227 of 2012)

JUDGMENT

JUDGMENT OF NYAMWEYA JA

1. Joseph Sombo, Mwanduri Meri, Bahru Mwagundu, Mwahui Mwarijamba and Kazungu Karisa the appellants herein, filed the initial suit at the High Court at Mombasa, by way of a plaint dated October 19, 2012, which was later amended on September 9, 2013. The suit was later transferred to the Environment and Land Court at Mombasa. The said appellants stated they were instituting the suit on behalf of approximately 15,000 individuals belonging to the Amwezi and Mirima clans of the Duruma Community with respect to the setting apart and allocation of land comprised in LR Number 12502 situate at Taru stretching to Chengoni of Samburu Division in Kinango, and measuring approximately 19,053 hectares. The initial repondents in the suit against whom the reliefs were sought were Nyari Investment (1998) Ltd, (the 1st respondent herein); Mocash Processors (K) Ltd (the 2nd respondent herein); County Council of Kwale (now the County Government of Kwale and the 3rd respondent herein); the Commissioner of Lands who was later substituted with the National Land Commission (the 4th respondent herein); the District Commissioner, Kinango (the 5th respondent herein); and Daniel Toroitich Arap Moi (since deceased), who was substituted with his legal representative Zeinabu JanMohammed SC (the 6th respondent herein).

2. The appellants claim is that by a judgment dated February 25, 1980 delivered in HC Civil Case No 93 of 1979 - Joseph Sombo & Others v Du Rose & Others, the High Court (A H Simpson J), nullified the 1st respondent's ownership of the property known as LR No 12502 and referred to as Nyari Estate (hereinafter "the suit property"), and granted the appellants full proprietary rights of the property. However, that as a result of political interference, the community was not able to get the land despite the court order, and that the 6th respondent thereafter unconstitutionally set apart and allocated the suit property to the 1st respondent, and misrepresented to the 3rd respondent that the 1st respondent held shares on behalf of the Government. Further, that the process of setting apart of the suit property was meant to circumvent the judgment delivered on February 25, 1980 in HC Civil Case No 93 of 1979 and was fraudulent and a nullity for the following reasons: that the appellants and 15000 residents were excluded from the Baraza (meeting) held on September 24, 1981; that the 250 people who were present at the Baraza had been paid and ferried from Maji Ya Chumvi, Kilibaji, Busho and Mackinon Road; that the Gazette Notice No 2798 dated September 8, 1981 was published before the Baraza held on September 24, 1981 and confirmed the irregularity of the setting apart; and that the schedule referred to in the Gazette Notice was not placed before the said meeting of September 24, 1981. Lastly that the Gazette Notice No 1966 of July 10, 1982 was fraudulent.

3. It was the appellants' case that as a consequence of the acts of the repondents, the appellants risked losing their ancestral communal land to individual private developers, and they accordingly sought a permanent injunction restraining the repondents from dealing with the suit property and interfering with the appellants' claim of ancestral land; a declaration that the purported setting apart and allotment to the 1st respondent of the suit property measuring 16,655.3 hectares was null and void; that the minutes of the baraza held on September 24, 1981 be declared illegal and the unanimous decision for resettlement be nullified; any other relief that the Court deemed fit and just to grant; and the costs of the suit.

4. The record of appeal shows that three witnesses testified in the Environment and Land Court in support of the appellants' claim, being Joseph Sombo Saidi, the 1st appellant herein; Joseph Mwahui Mwajiramba the 4th appellant herein; and Patrick Njogu Ndegwa, an ex-councillor of Taru Ward. The

gist of their evidence was that they were aware of the letters written by the 6th respondent and Attorney General on the setting apart of the suit property, they doubted the authenticity of the letter by the 6th respondent as it did not have the Presidential seal and was not signed; they were not aware of, and did not attend the meeting called on September 24, 1981 by the District Commissioner of Kwale that took place on the suit property, they were not aware of the Gazette Notices touching on the suit property; that the setting apart of the suit property was made contrary to the High Court judgment by AH Simpson J; and that they were not aware of the sale of the suit property to the 2nd respondent.

5. The 1st respondent did not participate in the proceedings in the High Court. The 2nd, 3rd, 4th , 5th and 6th repondents denied the appellants claim in their various defences they filed in response to the suit. In summary, the 2nd respondent stated that they were the registered owners of the suit property, having legally acquired the property in the year 2000 through an advertised public auction, after the 1st respondent defaulted on its loan repayment obligations, and Delphis Bank (now known as Oriental Commercial Bank) consequently exercised its statutory power of sale. The 2nd respondent called two witnesses during the trial. The first was Awadh Swaleh, a director of the 2nd respondent, who provided the history of the 2nd respondent's acquisition of the suit property by sale at a public auction after seeing it advertised for sale, and relied on the documents the 2nd respondent filed on the sale of the suit property and its setting apart. The witness confirmed that the 2nd respondent was not a party to the suit in HC Civil Case No 93 of 1979, and that it had the title to the suit property. The second witness was Ngundi Ndonga, who served as an assistant chief in Taru Location during the process of setting apart of the suit property, and confirmed that the local people who were on the suit property were paid compensation.

6. The 3rd respondent denied the appellants' claims and stated that the suit was res judicata and bad in law. The said respondent did not call any witness during the trial in the Environment and Land Court. The 4th and the 5th repondents on their part asserted that the process of setting apart the suit land was initiated and done afresh after the said judgment, and that the process was conducted according to the *Constitution*, the *Trust Land Act* and all other relevant laws, and all parties affect were promptly and fully compensated. Further, that once the trust land was lawfully set apart, it became private property.

7. The 4th and 5th repondents called one witness to testify on their behalf, namely Patrick Mwalimo, who served as a clerk in the Kwale County Commissioner's office. The witness produced various documents from the County Commissioner's registry, being the minutes of the public Baraza held on September 24, 1981, letters dated March 12, 1982 and March 22, 1984 from the Commissioner of Lands to the District Commissioner on the setting apart of the suit property and payment of compensation, and which included a list of persons to be compensated and the amounts; a letter October 27, 1982 from the Commissioner of Lands to the County Council of Kwale confirming that compensation was to be paid to the residents on the land being set apart and not the County Council; and a letter of allotment dated July 23, 1982 of the suit property to the 1st respondent.

8. The 6th respondent' s response was that he had the legal authority to allocate land to any individual or juristic person under the former *Constitution* and the law. The said respondent did not call any witness to testify during the trial.

9. After hearing the parties, the Environment and Land Court (Mukunya J) rendered judgment on October 24, 2014, and dismissed the appellants' suit, after finding that there was proper process of setting apart the suit property pursuant to the order in the judgment by AH Simpson J, and which followed the requirements of the *Trust Land Act*. Therefore, that the suit property was validly allotted, and that the judgment of AH Simpson J of June 18, 1981 in as far as it set aside the previous setting apart of the land pending any valid allotment to Nyari Estate Ltd, became spent. The trial Judge also

found that the 2nd respondent bought the subject land in the year 2000 in a public auction, and was a bona fide purchaser for value without notice of the allegations of the appellants, and its title could not therefore be impeached or disturbed.

10. Aggrieved by the said judgment, the appellants moved to this Court, citing thirteen grounds of appeal in the memorandum of appeal dated February 23, 2018. The grounds of appeal faulted the trial Court's findings in three broad areas: firstly, the findings on the legality of the setting apart process of the suit property in light of the judgment delivered by AH Simpson in HC Civil Case No 93 of 1979 - *Joseph Sombo & Others v Du Rose & Others*; secondly, the findings on the subsequent allocation of, and issuance of title to the suit property to the 1st respondent and 2nd respondent, and lastly, the failure to address the public impact and public interest of the issues raised in the judgment. These three grounds provide the main issues for determination in this judgment.

11. As this is a first appeal from the decision of the trial Court, we reiterate this Court's role as expressed in *Selle & another v Associated Motor Boat Co Ltd & others* (1968) EA 123 where it was stated that;

> "this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally"

12. During the hearing of the appeal on October 3, 2022, Mr Maina Njanga, the learned counsel for the appellants, relied on his written submissions dated January 31, 2020 which he briefly highlighted. On the first issue of the legality of the setting apart of the suit property, the counsel explained that the origin of the dispute herein arose from a first setting apart of the suit property, that was set aside by the said judgment delivered by AH Simpson J on February 25, 1980 in HC Civil Case No 93 of 1979. The counsel submitted that the said judgment established that the suit property was trust land and that due to irregularities in the initial setting apart, the appellants' right to the land had not been extinguished until the land was validly set apart. That instead of meeting the standards set out in the said judgment, the 1st respondent using political connections, got the land set apart by the 6th respondent under section 118 of the then *Constitution*.

13. While making reference to the provisions of section 117 and 118 of the repealed *Constitution* and of section 7 and 13 of the *Trust Land Act* (also since repealed) the counsel submitted that the learned trial Judge failed to consider and appreciate the weighty evidence on the irregularities or breaches of law in the setting apart, in particular that the two gazette notices were wrongly issued, that the residents did not participate in the said process and in any case it would be inconceivable to imagine that only 122 people who had applied and been paid could be the only residents affected by the setting apart in a vast area of 16,053 hectares, and only a fraction of the residents were therefore compensated. The trial Court was also faulted for ignoring the 3rd respondent's submissions.

14. According to the appellants, the 3rd and 4th repondents ought to have given a fresh notice, demarcated the boundaries afresh as well as come up with a list of persons who would be affected by the setting apart for compensation purposes. However, that they adopted the unsatisfactory procedure that had

been employed earlier in the initial setting aside despite the fact that the same was declared null and void. The counsel submitted that the second setting apart was done under section 118 instead section 117 of the repealed *Constitution* to defeat the Court orders and circumvent the course of justice, and which move was calculated to deprive the indigenous residents of Taru and Chengoni of their property without due process and or compensation.

15. Mr Njoroge Mwangi, learned counsel for the 3rd respondent supported the appeal, and submitted during the hearing that the law relating to setting apart was ably set out by the High Court in the decision of 1979, and there was therefore no room for error in the second setting apart, but that both substantive and procedural law was not followed, and in particular that there was no evidence whatsoever in the trial Court that the subject land was owned, or is partly owned by the Government of Kenya.

16. Ms Akoth learned counsel for the 1st respondent, who was holding brief for learned counsel Mr K' Opere, did not file or make any submissions during the hearing of the appeal, and indicated that the 1st respondent was not taking any position on the appeal. The learned counsel for the 2nd respondent, Mr Chacha Odera who appeared with learned counsel Ms Lilliam Oluoch Wambi, on his part opposed the appeal and highlighted written submissions dated June 5, 2020. On the issue of the setting apart process, the counsel submitted that the judgment of AH Simpson J did not place restrictions on any subsequent setting apart and allotment of the suit property, and the only caveat placed by the judge was that any ensuing setting apart and allotment ought to be done in accordance with the relevant laws. Further, that the prevailing law at the time on the setting apart of the suit property was the repealed *Constitution* which provided that setting apart may be done through Section 117 which provided for the setting apart of trust land by county councils and Section 118 which provided for setting apart of trust land for purposes of Government use.

17. The learned counsel further submitted that the 2nd, 4th, 5th and 6th repondents demonstrated before the High Court that the setting apart of the suit property was done in exercise of presidential powers granted by Section 118 of the repealed *Constitution* and section 7 (1) of the repealed *Trust Land Act*; that the late President Daniel Arap Moi issued the Kwale County Council with a notice which was forwarded to them by a letter by the Chief State Counsel on behalf of the Attorney General and which indicated that the Government had shares in the 1st respondent; that no evidence was ever produced at the High Court to the contrary; that Gazette Notice No 2798 complying with the provisions of Section 7 (3) of the *Trust Land Act* was published on September 8, 1981; and that the said Gazette notice was complied with and on March 12, 1982 the Commissioner of Lands forwarded to the District Commissioner Kwale a list of 122 people claiming entitlement and a description of the amount of compensation.

18. There was no appearance for the 4th respondent during the hearing of this appeal, while learned counsel Ms Waswa appeared for the 5th respondent, and learned counsel Mr Koome, holding brief for learned counsel Mr Kiplenge appeared for the 6th respondent. Both Ms Waswa and Mr Koome supported the 2nd respondent's submissions on the issue, with Mr Koome in addition relying on his written submissions dated March 14, 2022.

19. It is notable that the first setting apart that was subject of the judgment by AH Simpson J in HC Civil Case No 93 of 1979 was undertaken by the Kwale County Council under Section 117 of the repealed *Constitution* resulting in the land being allotted to the 1st respondent, who was the 2nd Defendant in that case. AH Simpson J, after finding that the applicable procedure under the section 117 of the repealed *Constitution* and section 13 of the *Trust Land Act* was not followed by the said County Council,

granted orders as follows in the judgment delivered on February 25, 1980 in HC Civil Case No 93 of 1979:

> " A declaration is granted that the purported setting apart and allotment of the suit premises to the 2nd defendant are in contravention of the provisions of the *Trust Land Act* (Cap.288) and are null and void. There will also be an order restraining the 1st and 2nd defendants, their servants and agents, from remaining on, from clearing and from cultivating the suit premises and an order restraining the 3rd and 4th defendants from making any grant of the suit premises in favour of the second defendant pending any valid allotment to the 2nd defendant of the suit premises or part thereof"

20. The second setting apart that is the subject of the judgment appealed against in this appeal was on the other hand made by the then President of Kenya (the 6th respondent) under section 118 of the repealed *Constitution*, and the only relevance and import of the decision by AH Simpson J on February 25, 1980 in HC Civil Case No 93 of 1979 in this regard is whether the resultant allotment to the 1st respondent was valid. The said judgment did not direct on the manner of future setting apart or allocations of the suit property, and the only legal questions that need to be answered in this appeal therefore are whether the second setting apart was done in accordance with the provisions of section 118 of the repealed *Constitution* and other applicable laws, and whether the resulting allocation to the 1st respondent was legal.

21. Section 118 of the repealed *Constitution* provided that where the President was satisfied that the use and occupation of an area of trust land is required for the purposes of the Government of Kenya; the purposes of a body corporate established for public purposes by an Act of Parliament; the purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the Government of Kenya; or the purpose of prospecting for or the extraction of minerals or mineral oils, he could, after consultation with the county council in which the land was vested, give written notice to that county council that the land is required to be set apart for use and occupation for those purposes; and the land was then set apart accordingly and vested in the Government of Kenya or in such other person or authority as may be specified in the written notice.

22. The procedure for the setting apart land was provided under section 7 (4) of the repealed *Trust Land Act* as follows:

> " (1) Where written notice is given to a council, under subsection (1) of section 118 of the *Constitution*, that an area of Trust land is required to be set apart for use and occupation for any of the purposes specified in subsection (2) of that section, the council shall give notice of the requirement and cause the notice to be published in the Gazette.
>
> (2) Before publishing a notice under subsection (1) of this section, the council may require the Government, within a specified reasonable time— (a) to demarcate the boundaries of the land, and for this purpose to erect or plant, or to remove, such boundary marks as the council may direct; and (b) to clear any boundary or other line which it may be necessary to clear for the purpose of demarcating the land, and, if the land is not demarcated within the time fixed by the council, or if the person or body on whose application the land is to be set apart so requests, the council may carry out all work necessary for the demarcation of the land and require the applicant to pay the cost of the demarcation.

(3) A notice under subsection (1) of this section shall specify the boundaries of the land required to be set apart and the purpose for which the land is required to be set apart, and shall also specify a date before which applications for compensation are to be made to the District Commissioner.

(4) Where the whole of the compensation awarded under section 9 of this Act to persons who have applied before the date specified in the notice given under subsection (1) of this section has been deposited in accordance with section 11 of this Act the council shall make and publish in the Gazette a notice setting the land apart."

23. Section 9 of the repealed *Trust Land Act* required any person who claimed to be entitled to compensation to apply therefor to the District Commissioner, and if entitled, the compensation to be awarded was to be assessed by the District Commissioner after consultation with the Divisional Board. Under section 11 of the repealed Act, the amount to be paid as compensation was to be deposited with the District Commissioner, which was the office responsible for paying the compensation awarded to the persons entitled thereto. It is notable in this respect that section 13 of the repealed *Trust Land Act*, which was cited by the appellants as one of the sections that was not been complied with, only applied where the setting apart of land was by a County Council pursuant to section 117 of the repealed *Constitution*, and did not apply where land was set apart by the President under section 118 of the repealed *Constitution*.

24. It is necessary therefore, to examine the process that was employed in the setting apart of the suit property, from the evidence produced by the appellants and repondents during the trial, in order to determine if it was compliant with the then applicable law. The evidence that was adduced in this respect was by the 2nd , 4th and 5th repondents, which showed that on 1st October 1981, JF. Shields, the then Chief State Counsel, wrote a letter addressed to Chairman of Kwale County Council, which forwarded a notice by the then President of Kenya, the 6th respondent herein. The said letter read as follows:

> "I have been directed by the Attorney General to forward to you the enclosed Notice from His Excellency the President under Section 118(1) of the *Constitution* requiring you to set apart for the purposes of Nyari Estates Limited the area of land illustrated on the accompanying set of plans. Please take the necessary action.
>
> By a Copy of this letter I am requesting the Commissioner of Lands to proceed with the setting apart of the said lands."

25. The enclosed notice by 6th respondent in turn stated as follows:-

> "Under the powers vested in me by Section 118(1) of the *Constitution* after consulting with your county Council and being satisfied that the use and occupation of the land illustrated on the accompanying set of plans is required for the purposes of a Company, Nyari Estates Limited a Company Registered in Kenya in which shares are held on behalf of the Government of Kenya., I hereby give you a Written Notice that you are required to set the said lands apart for use and occupation by the said Company.
>
> By a Copy of this letter the Commissioner of Lands is requested to proceed with the necessary procedure of setting apart this land."

26. The counsel for the appellants challenged the legality of the notice given by the President of the setting apart of the suit property, on account of lack of consultation with the 3rd respondent, and that the trial Court ignored the 3rd respondent's submissions on this issue. It must be emphasised that the 3rd respondent denied the appellants' claims in the defence dated November 12, 2012 filed in the High Court, and there is no record that the 3rd respondent amended its defence to respond to the allegations of misrepresentation and fraud raised by the appellants in the Amended Plaint dated September 23, 2013. Neither the appellants nor the 3rd respondent called any witnesses on the issue of the consultation or lack thereof between the 6th respondent and 3rd respondent, and the 3rd respondent did not plead any objection to the setting apart process on account of lack of consultation, especially since the Notice of setting apart by the President indicated that it was being given "after consulting with your county Council." In addition, the minutes of the Baraza held on the suit property on September 24, 1981 which were produced in evidence by the 2nd, 4th and 5th repondents, indicated that both the Chairman and Clerk to the Kwale County Council were in attendance, and reported the said chairman as stating that the problem with respect to the suit property had been solved.

27. The 3rd respondent's counsel filed submissions in the High Court dated October 14, 2014, in which it denied that the 3rd respondent acted in " cahoots" with the 2nd 4th and 5th repondents as alleged by the appellants, and its counsel was emphatic that the 3rd respondent did not participate in the second setting apart process for the following reasons:

> " The applicable law in setting apart that was allegedly done for the second time is S118 of the defunct *Constitution* and the applicable section is Not section 13 of the *Trust Land Act* chapter 288 Laws of Kenya.
>
> The Plaintiffs' submissions on Page 3-7, as they relate to the 3rd Defendant are in error as they dwell on section 13 of the *Trust Land Act* and Section 117 of the defunct *constitution* which did Not apply in the alleged second setting apart.
>
> It is not true therefore that the 3rd Defendant was the main player in the second setting apart under section 118 of the defunct *Constitution*"

28. The counsel further submitted that none of the documents relied on were issued by the 3rd respondent, and had nothing to do with it. The 3rd respondent's counsel cannot therefore legally be allowed to approbate and reprobate in the circumstances, and the trial Court did not err in finding that the 3rd respondent's response were a general denial. This Court (GB M Kariuki, M'inoti & Mohammed, JJA) in this respect explained as follows in *David Sironga Ole Tukai v Francis Arap Muge & 2 Others* (2014) eKLR :

> " In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.
>
> The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or

defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice."

29. The 3rd respondent's counsel on his part challenged the notice of setting apart given by the President on account of the fact that no evidence was brought that the Government had shares in the 1st respondent. The counsel submitted as follows on this issue in his submissions dated March 4, 2020 that were filed in this Court:

> " There was no evidence whatsoever in the Court below how the land in issue fitted under Section 118 of the Retired *Constitution.* or how many shares were held by the Government of Kenya in the 1st respondent and how the said shares were affected by the charges over the property and how the shares were transferred to the 2nd respondent. Of poignant importance is that the 2nd respondent did not allude to the fact that the land is owned, or is partly owned by the Government of Kenya."

30. These submissions partly reiterated the arguments the 3rd respondent's counsel had made in the submissions filed in the High Court dated October 14, 2014, in which it was urged as follows:

> " The allegation that the government had shares in the first defendant was and still is an issue touching on the plaintiffs and the 2nd, 4th, 5th and 6th Defendants and the status of the shareholding again has nothing to do with the 3rd Defendant and the issue of fraud arising from this dishonest misrepresentation may arise as no evidence was left to confirm that the Government of Kenya had shares in the 1st Defendant against whom there is default judgement".

31. It is notable firstly, that appellants had in their Amended Plaint dated September 9, 2013, specifically pleaded misrepresentation and fraud on the part of the 6th respondent, and one of the particulars was that "The 6th Defendant misrepresented to the 3rd Defendant that Nyari investments limited he has/ had held shares on behalf of the Government which fact was false". It is notable in this respect that misrepresentation is an element of fraud, and *Black's Law Dictionary* defines fraud as follows:

> " A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment."

32. The burden of proving the allegations of misrepresentation and fraud was on the appellants, and in finding so, we are guided by the provisions of section 107 of the *Evidence Act*, and the holding on the burden and standard of proof of fraud as stated in various cases of this Court. In *Ratilal Gordhanbhai Patel v Lalji Makanji* [1957] EA 314 it was held as follows at page 317:

> " Allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, but something more than a mere balance of probabilities is required."

It is therefore not enough to make bare allegations independent of some evidence when alleging fraud and misrepresentation on the part of a party, and the standard of proof is higher comparative to other

civil cases, as explained in *Central Bank of Kenya Limited v Trust Bank Limited & 4 Others* [1996] eKLR :

> " The appellant has made vague and very general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case."

33. The onus to prove fraud in a matter is therefore on the party who alleges it, as held by this Court in *Urmila w/o Mahendra Shah v Barclays Bank International Ltd & another* [1979] eKLR,. The law was buttressed in the case of *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* [2000] eKLR, where Tunoi, JA. (as he then was) stated as follows:

> " It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading.
>
> The acts alleged to be fraudulent must, of course, be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts..."

Likewise, this Court stated as follows in the case of *Kinyanjui Kamau v George Kamau* [2015] eKLR;-

> " ...It is trite law that any allegations of fraud must be pleaded and strictly proved. See *Ndolo v Ndolo* (2008) 1 KLR (G & F) 742 wherein the Court stated that: "...We start by saying that it was the respondent who was alleging that the will was a forgery and the burden to prove that allegation lay squarely on him. Since the respondent was making a serious charge of forgery or fraud, the standard of proof required of him was obviously higher than that required in ordinary civil cases, namely proof upon a balance of probabilities; In cases where fraud is alleged, it is not enough to simply infer fraud from the facts."

34. The onus was therefore on the appellants who sought to rely on fraud and misrepresentation on the part of the 6th respondent to prove to the court that the shares in 1st respondent were not held on the behalf of the Government or that the Government had no shares. The appellants made bare statements in their evidence that they had no knowledge of shares in the 1st respondent, however, since they were making serious allegations bordering on criminal conduct against the 6th respondent, they were required to bring credible evidence to prove same. No evidence was produced in the High Court by either the appellants or 3rd respondent to establish the fact of shareholding of the 1st respondent as required by section 107 of the *Evidence Act*, or in support of the claims of misrepresentation by the 6th respondent in this regard. It is notable in this regard that record as regards shareholding of companies are in the custody of the Registrar of Companies, and search procedures exist through which official confirmation can be provided to any member of the public by the Registrar of Companies in Kenya as to whom the directors or shareholders of a company are. The appellants therefore failed to discharge the legal burden of proof, and the evidential burden of proof therefore never shifted to the repondents as seems to be alleged by the 3rd respondent.

35. My conclusion therefore, is that the evidence on record demonstrated that a notice was issued by the President of the setting apart as required by Section 118 of the repealed *Constitution,* and that the allegations of fraud and misrepresentations were not proved to the required standard by the appellants to support a finding that the said notice was irregular. It is also notable that the 3rd respondent did not specifically plead any fraud or misrepresentation on the part of the 6th respondent, and having denied

the appellants' claims, it cannot be legally allowed to allude to on any such fraud or misrepresentation in its submissions. I restate the holding in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR that the 3rd respondent was in this respect bound by its pleadings.

36. The actions that were required to be undertaken after issuance of the Notice by the President under section 7 of the repealed Trust Lands Act were firstly, the confirmation by the 3rd respondent that the land to be set apart had been demarcated, and secondly the issuance of notice by the 3rd respondent of the setting apart. The appellants' counsel in his submissions made during the hearing of this appeal faulted the said Gazette Notice on account of the fact that it was published on September 8, 1981 before the public Baraza held on September 24, 1981, and that it was issued by the Commissioner of Lands, and was therefore null and void. In their written submissions filed herein dated, the appellants also averred that "the Defendants merely adopted the unsatisfactory procedures that had been employed earlier on in the initial setting aside despite the fact that the same was declared null and void. It is interesting to note that the gazette notices relied on in the second setting apart were the very same ones that had been held to null and void for reasons of want of information which therefore brings into question as to whether any regards was paid to procedure and legalities" .

37. The notice in Gazette Notice No 2798 dated September 8, 1981 was indeed given by the then Commissioner of Lands, and advised of the notice given by the 6th respondent to the 3rd respondent that the suit property was required for the purposes of the 1st respondent in which shares were held on behalf of the Government of Kenya, and required to be set apart. It was further stated therein that "Notice is given for and on behalf of Kwale County Council of the said requirement and that all applications for compensation by persons who claim to be entitled to compensation under Section 8 of the Act should be submitted to the District Commissioner Kwale District on or before the October 12, 1981". The appellants however did not bring any evidence that the Gazette Notice No 2798 dated September 8, 1981 had been declared null and void. It is notable that the Gazette Notice that was a declared invalid in the decision by AH Simpson J on February 25, 1980 in HC Civil Case No 93 of 1979 was a different Gazette Notice, being Gazette Notice 1672 of 1978, and for different reasons.

38. In addition, the appellants do not provide any legal basis for the submission that the Gazette Notices ought to have been published after the public baraza was held, and section 7(1) and (2) of the repealed *Trust Land Act* in this respect required the County Council to give notice of the fact that the subject land was required was set apart and cause the notice to be published in the Gazette. The only issue that the County Council needed to be satisfied about before giving the notice was that the subject land had been demarcated, and the notice was required to specify the boundaries of the land required to be set apart. The requirement that the proposal to set apart the land was to be brought to the notice of the people of the area concerned, and that the people were to be informed of the day and time of the meeting at which the proposal was to be considered before gazettement of the notice, was provided for under section 13(2) of the repealed *Trust Land Act*, and was to be observed by County Councils when setting apart land pursuant to section 117 of the repealed *Constitution*. This requirement was therefore not applicable in the second setting apart that is the subject of this appeal.

39. From the evidence adduced, it was also demonstrated that the subject land was already demarcated at the time of issuance of the notice of setting apart by the President, as indicated in the letter of October 1, 1981 by JF Shields which referred to enclosed plans that described the subject land, and the demarcation is also confirmed by the acting District Commissioner for Kwale in the minutes of the Baraza held on the suit property on September 24, 1981 produced by the 2nd, 4th and 5th repondents. Evidence was also produced by the 2nd respondent of a notice dated September 8, 1981 in Gazette

Notice No 2798 published in Kenya Gazette Volume LXXXIII - No 39, and the specification and description of the land and its plans was provided in the schedule thereto.

40. On the legality of the issuance of the notice in the Gazette Notice No 2798 dated September 8, 1981 by the Commissioner of Lands as opposed to the 3rd respondent, section 53 of the repealed *Trust Land Act* in this respect provided as follows on the role of the Commissioner of Lands as an agent as the County Councils in administering trust lands:

> " The Commissioner of Lands shall administer the Trust land of each council as agent for the council, and for that purpose may—
>
> a. exercise on behalf of the council, personally or by a public officer, any of the powers conferred by this Act on the council, other than that conferred by section 13(2)(d) of this Act; and
>
> b. execute on behalf of the council such grants, leases, licences and other documents relating to its Trust land as may be necessary or expedient:
>
> Provided that—
>
> i. the Commissioner of Lands shall act in compliance with such general or special directions as the council may give him; and
>
> ii. the Minister may, by notice in the Gazette, terminate the Commissioner of Land's power to act under this section in relation to the Trust land of any particular council, where the Minister is satisfied that the council has made satisfactory arrangements to administer its Trust land itself."

41. It is notable that the only excepted powers of the County Councils that the Commissioner of Lands could not exercise were those under section 13(2)(d) of the *Trust Land Act* on the powers to pass a resolution to set apart land under section 117 of the repealed *Constitution*. The power of the County Councils under section 7 of the repealed *Trust Land Act* was not excepted, and could therefore be exercised by the Commissioner of Lands. It is thus my finding for these reasons, that the notice dated September 8, 1981 in Gazette Notice No 2798 was legally issued in accordance with section 7 of the repealed *Trust Land Act*.

42. The last requirement in the setting apart process under section 118 the repealed *Constitution* and section 7 of the repealed *Trust Land Act* was that of payment of compensation. The appellants' counsel in this respect submitted that save for the Chief who stated that compensation had been made, no witnesses had adduced their evidence to that effect, and in any case it would be inconceivable to imagine that only 122 people who had applied and been paid could be only the only residents affected by the setting apart in a vast area of 16,053 hectares. That this pointed to a flawed, irregular and secret compensation process.

43. The 2nd respondent's counsel submitted that documents were produced as evidence in the High Court and were corroborated by the production of the original file containing all correspondences between the Commissioner of Land, the District Commissioner, Kwale, the office of the President and the state counsel and proof that the valued amount of Kshs 3,858,310 /= was paid as compensation in compliance with section 9(4) of the repealed *Trust Land Act*. Further, that the compensation amount

payable was based on a valuation and inspection done in collaboration with the persons who were claiming entitlement, the Provisional Valuer Coast Province and the District Officer, Kinango.

44. During the trial the appellants called witnesses including the 1st and 4th appellants, who testified that they were resident in the area of the suit property, and that they were not aware of the compensation process. The evidence produced by the 2nd, 4th and 5th repondents in rebuttal in this respect was the Gazette Notice 2798 dated September 8, 1981 that required persons affected to apply for compensation by October 12, 1981; that the in the minutes of the Baraza held on 24th September 1981 in which the acting District Commissioner stated that compensation would be paid to those staying on the subject land; and the letter dated 12th March 1982 from the Commissioner of Lands to the District Commissioner which also included the list of persons to be compensated and the amounts to be paid. Of note is the last paragraph of the letter dated March 12, 1982 ,which stated as follows:

> " The sum of Shs 565,890/= for houses and crops plus another sum of shs 3,292,240/= in respect of the land has been applied for from Nyari Estates Ltd. The total sum of shs 3,858,310/= is to be deposited with you to enable you to issue your awards in accordance with section 9 (4) of the *Trust Land Act* (Cap 288)".

45. In addition, the evidence of the 2nd respondent's witness, one Ngundi Ndonga, who was an assistant chief at the time of the second setting apart, was that he went to the suit property and together with an agricultural officer identified all the houses and plants thereon and prepared a list. His evidence was that the 1st appellant was not resident on the property and had relocated to Lunga Lunga at the time, while the 2nd appellant was on the list of persons who were paid compensation. It is also notable in this respect that the 2nd appellant filed a statutory statement in the High Court indicating that he had not given any authority for the suit to be filed in his name. A second notice dated 10th July 1982 in Gazette Notice No 1966 published in Kenya Gazette Volume LXXXIV - No 29 was also produced, which was given by the then Commissioner of Lands, and notified of the setting apart of the suit property in line with Section 118 of the repealed *Constitution* and *Trust Lands Act*. In a letter dated October 27, 1982 from the Commissioner of Lands to the County Council of Kwale, it was confirmed that compensation was to be paid, and had been paid to the residents on the land being set apart, and not to the County Council.

46. The Gazette Notice 2798 dated September 8, 1981 clearly required any person affected by the proposed setting to make an application for compensation to the District Commissioner Kwale District on or before the October 12, 1981, and the appellants did not bring any evidence of the persons who were ordinarily resident in the area, and of any such persons who made applications and were denied compensation, or of any appeals made in this regard as required by section 10 of the repealed *Trust Land Act*. It is also notable that the High Court did find that the appellants filed a representative suit without any authority as required under the Civil Procedure Rules, and the signed authorities included in the Record of Appeal were expunged by this Court (Visram, Karanja and Koome (as she the was) JJA) in a ruling delivered on May 9, 2019, after it was found that they were not been part of the record before the High Court, and " sneaking" them in on appeal was irregular, unprocedural and in abuse of the process of Court.

47. Evidence of the payment of compensation of persons identified to be resident on the suit property having been adduced by the 2nd, 4th, and 5th repondents, it is our finding that the evidence on record demonstrated that the persons who were resident on the land that was the subject of the second setting apart were identified and compensated, and the appellants' claim that there were other residents not compensated was not supported by any evidence. It is thus our further finding that the evidence on record demonstrated that the process of the second setting apart was compliant with Section 118 of the

repealed *Constitution* and section 7 of the repealed *Trust Land Act*, which was the law then applicable, and that the appellants did not discharge the burden of proving their allegations that the said process was flawed or irregular. To this extent, the learned trial Judge did not err in finding that the second setting apart process was properly undertaken.

48. On the second issue of the validity of the titles issued to the 1st respondent and 2nd respondent with respect to the suit property, the appellants urged that the 1st respondent could not have acquired good title due to the irregularities as well as illegalities that marred the process of alienation of the said land, and that the 1st respondent was aware of the irregularities, illegalities and the serious opposition in acquisition of the said property having been a party in HC Civil Case No 93 of 1979. Therefore, that the arguments as to sanctity and indefeasibility of title by the 1st respondent could not lie, and reliance was in this regard placed on the decision by Githinji JA in the case of *Funzi Development Limited & 2 Others v County Council of Kwale Mombasa & 2 Others* (2014) eKLR that a registered proprietor acquires an absolute and indefeasible title only if the allocation was legal, proper and regular, and that a court of law cannot, on the basis of indefeasibility of title, sanction an illegality or give its seal of approval to an illegal or irregularly obtained title. The appellants' counsel further submitted that since the 1st respondent did not acquire the title to the subject property legally, no title could pass to the 2nd respondent regardless of whether it knew of the illegalities and anomalies. The 3rd respondent's counsel reiterated the appellants' counsel's submissions that the setting apart, having been done in breach of both the *Constitution* and the law, rendered the registration of the land in the name of Nyari Estate null and void; that any charge to the land was also null and void; and so was any subsequent sale, either by private treaty or public auction.

49. The 2nd respondent's counsel in opposition submitted that the 2nd respondent was a bona fide purchaser for value within the meaning of this Court's decision in *CO Okere v Esther Nduta Kiiyukia & 2 Others* [2019] eKLR, and that the appellants had failed to disclose any reasonable grounds of fraud or misrepresentation in the acquisition of the property by the 2nd respondent that would lead this Court to revoke the 2nd respondent's title over the suit property, which was therefore absolute and indefeasible under section 23 of the Registration of Title Act (since repealed). Reliance was placed on the decisions in *Faraj Maharua v JB Martin Glass Industries & 3 others* [2005] eKLR, *Wreck Motor Enterprises v The Commissioner of Land & 3 others*(1997] eKLR, and *Joseph NK Arap Ng'ok v Moijo Ole Keiwua & 4 others* (1997] eKLR. The 6th respondent's counsel in addition pointed out that no order was prayed for and or granted revolving around the issue of title, and reiterated that no evidence was tendered impeaching the credibility of the 1st and 2nd repondents' titles.

50. It is notable that a second letter of allotment dated July 23, 1982 of the suit property was issued to the 1st respondent after the setting apart process was duly notified as completed by Gazette Notice No 1966 dated July 10, 1982. Having found that the process of the second setting apart was done legally, the arguments by the appellant's counsel that the irregular setting apart of the property resulted in the unlawful and illegal allotment of the suit property to the 1st respondent fall by the wayside, as do the arguments that the 1st and 2nd repondents' titles were thereby impeached. In addition, it is not contested that the 2nd respondent subsequently purchased the suit property at a public auction, and was not party to the proceedings . The 2nd respondent can therefore properly rely on the doctrine of bona fide purchaser for value, as the requirements set out in *CO Okere v Esther Nduta Kiiyukia & 2 others* (*supra*) were demonstrated namely that the 2nd respondent holds a certificate of title; purchased the property in good faith; had no knowledge of the fraud; purchased the property for valuable consideration; the vendors had apparent valid title; the property was purchased without notice of any fraud; and the 2nd respondent was not party to any fraud.

51. The last issue that is outstanding for determination is on the public interest nature and impact of the issues raised in this matter. The appellants' counsel in this respect submitted that the learned trial Judge failed to appreciate that this was a public interest issue, regardless of the fact that the instant suit was filed without the authority of about 15,000 persons as per the Civil Procedure Rules. It was the counsel's submission that this was an inadvertent mistake on the part of the appellants' counsel that ought not to be visited on the clients and reliance was placed on the decisions go this effect in *Belinda Muras & 6 Others v Amos Wainaina* [1978] eKLR , *Philip Chemwolo & another v Augustine Kubede* (1982-1988) KLR 1040 and *Master Power System Limited v Civicon Engineering Africa & another* [2019] eKLR . This Court was urged to overlook this mistake, and to be guided by Article 159 of the *Constitution*, 2010 and decide the case on its merit without closing the door of justice to the other 15,000 residents who shall be adversely affected by the outcome of this case.

52. The 2nd respondent's counsel in response submitted that the issue of public interest was not canvassed at the High Court, and that this Court had no jurisdiction to declare this a matter of public interest. Further, that the appellants failed to meet the criteria set in the *Hermanus Philipus Steyn v Giovani Gnechi Ruscone* [2013] eKLR by not identifying and concisely setting out the specific elements of general public importance which they intended to rely upon, and failed to give evidence that they indeed represent the alleged 15,000 individuals of the Amwezi and Mrima Community which was the basis upon which the new prayer for public interest was made. In addition, that no evidence was placed before the High Court to show the appellants' presence on the suit property, and that the 2nd respondent had been in continued uninterrupted possession of the property for the last 20 years and made a substantial investment on the property employing more than 600 members of the local communities. The 6th respondent's counsel on his part submitted the matter herein involved matters of private land that had been disguised as community land. Further that there was substantial non-compliance with the law during the proceedings in the first instance, and this Court's jurisdiction was limited in this regard, and it could issue orders that have retrospective effect.

53. I note that the issue of public interest was not canvassed at the High Court, and the appellants appear to have conflated the requirements and effects of a representative suit with that of a public interest suit. A public interest suit can in this regard brought by anyone or group of persons, with respect to an interest or legal issue in which the public as a whole as a stake and seeks to advance the public good, and was held in Hermanus Philipus Steyn v Giovani Gnechi Ruscone (*supra*) that the issue must transcend the circumstances of the particular case. A public interest suit is filed by following the normal procedures, and while it may be subject to the requirement to give notice of the suit, the only other restrictions that will apply touch on the nature of remedies that can be granted, since the suit is not meant for purely personal gain or private profit. In a representative suit, on the other hand, a person or group of persons are authorised to bring the suit on behalf of a larger group, who have common legal and factual questions they seek to advance in a claim or defence, and for this reason the law imposes a number of special procedural requirements, including demonstration of the authority in writing to appear for the other members of the group, which is found in Order 1 Rule 13 of the Civil Procedure Rules of 2010.

54. In the present appeal, while a matter touching on the setting apart of trust land is a matter of public interest, and the appellants in this respect had locus to bring a suit in this regard, I note that the appellants were also seeking to advance the interests of a defined group, namely 15,000 members of the Amwezi and Mrima clans of the Duruma community, who they alleged were residents of the suit property, and were affected by the setting apart of the suit property. The appellants therefore needed to demonstrate the existence of members of the group, as in law they were all considered to be claimants who sought, and were likely to benefit from the orders sought; the authority given to the appellants to

act on behalf of the group; and lastly, the commonality of interests in terms of the fact of their residence on the suit property. No such evidence was however brought by the appellants.

55. I therefore find that the trial Judge did not err in finding that the appellants had not met the requirements of the law as regards representative suits. The sum of my findings is that this appeal is not merited, and is hereby dismissed except on the finding of costs. In this regard, since the suit and appeal concerned the setting apart and allocation of trust land, I order that each party bears their costs of the suit in the High Court and of the appeal.

56. Orders accordingly.

Concurring Judgment of Lesiit, JA

57. I have had the advantage of reading in draft the judgment of Nyamweya, JA. I am in full agreement with the reasoning and conclusions arrived at and, have nothing useful to add.

Dissenting Judgment of Gatembu, JA

1. I have had the benefit of reading in draft the judgment of Nyamweya, JA in which the background, the issues and the rival submissions in this appeal are fully set out.

2. The initial attempt made under Section 117 of the retired *Constitution* at setting apart the suit property, LR No 12502 measuring approximately 19,053 hectares situated at Taru stretching to Chengoni of Samburu Division-Kinango, in favour of Nyari Estate Ltd was nullified by the High Court (Simpson, J) in a judgment delivered on February 25, 1980 in High Court Civil Case No 93 of 1979. In the same judgment, the court granted the appellants, described as natives of Nyari Estate Taru and Chengoni Locations, full proprietary rights of the property.

3. Among other grievances, it was the appellant's case in that suit that Gazette Notice 1672 of 1978 published to the effect that the land had been duly set apart in accordance with the provisions of Part IV of the *Trust Land Act* for agricultural development concealed that the purpose of setting the land apart was to lease it to a private company. Simpson, J stated that he was satisfied that the appellants are ordinarily resident on the suit premises and are entitled to the exclusive use, possession, and occupation of the land under African customary law for themselves and their progeny. He then pronounced:

> " A declaration is granted that the purported setting apart and allotment of the suit premises to the 2nd defendant [Nyari Estate Ltd] are in contravention of the provisions of the *Trust Land Act* (Cap. 288) and are null and void. There will also be an order restraining the 1st [] and 2nd defendants, their servants and agents, from remaining on, from clearing and from cultivating the suit premises and an order restraining the 3rd and 4th defendants from making any grant of the suit premises in favour of the second defendant pending any valid allotment to the 2nd defendant of the suit premises or part thereof."

4. Instructively, that first attempt to set apart the suit property was under Section 117 of the retired *Constitution* which empowered a county council to set apart an area of trust land vested in that county council for use and occupation by a public body or authority or for the purpose of the prospecting for or the extraction of minerals or mineral oils or by any person or persons for a purpose which in the opinion of that county council is likely to benefit the persons ordinarily resident in that area.

5. Unrelenting in endeavors to set apart the property for Nyari Estates Limited, sometime in October 1981 after the judgment of the High Court, and in what appears to have been a change of tact, the 6th

respondent, the President of the Republic of Kenya invoked Section 118 of the retired *Constitution* and sent a notice to the Chairman, Kwale County Council in the following terms:

> " Under the powers vested in me by Section 118 of the *Constitution* after consulting with your County Council and being satisfied that the use and occupation of land illustrated on the accompanying set of plans is required for the purposes of a Company, Nyari Estates Limited a company registered in Kenya in which shares are held on behalf of the Government of Kenya, I hereby by give you a written notice that you are required to set the said lands apart for use and occupation by the said Company.
>
> By a copy of this letter the Commissioner of Lands is requested proceed with the necessary procedures of setting up at this land.
>
> President"

6. The purposes for which Trust land could be set apart under Section 118(2) of the retired *Constitution* were for: the purposes of the Government of Kenya; the purposes of a body corporate established for public purposes by an Act of Parliament; the purposes of a company registered under the law relating to companies in which shares are held by or on behalf of the Government of Kenya; and the purpose of the prospecting for or the extraction of minerals or mineral oils.

7. It is noteworthy, in my view, that in the President's notice to the Chairman Kwale County Council, it was not stated that the Government of Kenya held shares in Nyari Estates Limited, but rather, that shares in that company were held on behalf of the Government.

8. In their amended plaint dated September 9, 2013, the appellants pleaded that the 6th respondent misrepresented that the Government held shares in the 1st respondent. The specific plea in that regard under paragraph 9(b) of the Amended Plaint was that "the 6th defendant misrepresented to the 3rd defendant that Nyari Investment Limited has/had held shares on behalf of the Government, which was false."

9. In his statement of defence dated October 18, 2013, in addition to the plea that the appellants' suit was *res judicata*, the 6th respondent denied the appellant's claim and pleaded that "he had the legal authority to allocate land to any individual or juristic person under the former constitution and the law existing then" and denied specifically the particulars of misrepresentation and fraud and put the appellants to strict proof.

10. On behalf of the County Council of Kwale, it was urged in the lower court that it was merely a recipient of the letter issued by the 6th respondent and that it was divested of any role in the process.

11. Testifying before the trial court, the first appellant Joseph Zombo (PW1) stated: "I have heard there is a letter from the retired President Daniel Toroitich arap Moi. I don't know whether government have share in Nyari Estate." Patrick Njogu Ndegwa (PW2), an ex-councillor Taru ward asserted in his testimony that " Government has no shares in a private company."

12. The 6th respondent in his submissions before the trial court urged that the appellants "alleged without evidence that the Government did not have shares in Nyari Estates Ltd" and maintained that the notice by the President initiating the setting apart the land was valid. In that regard, it was submitted for the 6th respondent that the appellants "never produced any records from the Registrar of Companies to prove such claim. He who alleges must prove as provided for under Section 107 of the *Evidence Act*. At any rate the [appellants] did not demonstrate how such a representation affected their rights."

13. On the validity of the setting apart, the learned trial Judge in the impugned judgment noted that the "President of the Republic of Kenya Daniel Arap Moi gave a notice under Section 118(1) of the repealed *Constitution* to the Chairman Kwale County Council". The Judge did not however address himself to the propriety or otherwise of that notice in relation to the claim of misrepresentation by the appellants. The Judge then found that:

> " There is no doubt that a full process of setting apart the suit land was done pursuant to the order of the judgment by Mr AH Simpson. I am satisfied that the setting apart followed the requirement of the *Trust Land* Cap 288."

14. Section 107(1) of the *Evidence Act* provides that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. However, under Section 112 of the *Evidence Act* on proof of special knowledge in civil proceedings, provision is made that in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

15. On the face of the claims by the appellants, it was in my view, incumbent upon the 6th respondent to demonstrate that the setting apart which he set in motion by his letter to the Chairman Kwale County Council was genuinely for the purposes set out under Section 118(2) of *the Constitution*. To that extent, it was incumbent upon the 6th respondent to demonstrate the Government interest in Nyari Estates Ltd. It bears repeating that what the 6th respondent asserted was that shares in Nyari Estates Ltd "are held on behalf of the Government of Kenya." A search at the Companies Registry under the then provisions of the *Companies Act* would only have revealed the shareholders, not the beneficiaries of those shareholders.

16. It was a fact peculiarly within the knowledge of the 6th respondent which purpose under Section 118(2) of the retired *Constitution* would be served by the setting apart of the property in favour of the 1st respondent and by extension which shareholding in the 1st respondent, if any, represented the government interest.

17. In *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, the Supreme Court of Kenya stated that Section 112 of the *Evidence Act* is not to be invoked without regard to the preceding sections, especially Section 107 (1) and (2) of the same Act. The Supreme Court went on to state, and it is necessary to quote from the judgment at length:

> " (189) Section 112 of the *Evidence Act*, on which the learned Judges of Appeal placed reliance, is an exception to the general rule in Section 107 of the same Act. Section 112 was not meant to relieve a suitor of the obligation to discharge the burden of proof. The Supreme Court of India, in *Shanbhu Nath Mehra v State of Ajmer* AIR 1956 SC 404, considered the import of Sections 106 and 101 of the Indian *Evidence Act* (which are in pari materia with Sections 112 and 107 of our *Evidence Act*), as follows:
>
> > "Section 106 is an exception to Section 101. Section 101 lays down the general rule about the burden of proof. 'Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.'...This lays down the general rule that in a criminal case, the burden of proof is on the prosecution and Section 106 is

certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are 'especially' within the knowledge of the accused and which he could prove without difficulty or inconvenience."

18. The Supreme Court further observed:

> "...the word 'especially' [indicates stress]. It means facts that are pre-eminently or exceptionally within his knowledge. If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not."

[190] In *Surender Singh v Li Man Kay and Others*, SGHC 168, (2009), the defendant had been sued for medical negligence. The plaintiff submitted that pursuant to Section 108 of the Singapore *Evidence Act* (which is the equivalent of Section 112), the burden should fall on the third defendant to prove that the deceased was adequately and appropriately monitored in the ward since, apart from the evidence of the deceased's sister in law, the plaintiffs were not in a position to provide further details as to how the deceased was cared for while she was in the ward. The Supreme Court of Singapore, citing *Sarkar's Law of Evidence, vol 2 pp 1672* with approval, stated:

> " Section 108 of the *Evidence Act* applies only to those matters which are supposed to be within the knowledge of a defendant. It cannot apply when the fact or facts are such that they are capable of being known also by a person other than the defendant and which the defendant could prove without difficulty or inconvenience."

19. To my mind, this matter is not about whether fraud was proved. The law with regard to the burden and standard of proof for fraud is settled as articulated in the judgment of my sister Nyamweya, JA. In my view, flowing from the plea by the appellants that the 6th respondent misrepresented the basis on which he initiated the process of setting apart, the critical question is whether that process accorded with the Section 118(2) of the retired *Constitution*.

20. The purpose for which the 6th respondent set in motion the process of setting apart the suit property under Section 118(1) of the retired *Constitution*, was a matter pre-eminently or exceptionally within his knowledge. Once the purpose for which the setting apart was initiated was questioned, and it was in that context that the 6th respondent asserted that shares in Nyari Estates Ltd were held on behalf of the Government, it was incumbent upon the 6th respondent to demonstrate that the purpose for setting apart was indeed permitted under Section 118(1) of the retired *Constitution*. To that extent, I liken the circumstances in this case to those in *Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others (Amicus Curiae)* (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022]

KESC 8 (KLR) (31 March 2022) (Judgment) (with dissent) where M.K. Koome, CJ observed in the context of claims on public participation:

> "By dint of section 112 of the *Evidence Act*, once there was an allegation of lack of public participation, the burden shifted to the person charged with the responsibility of performing the same to establish adequate public participation."

21. I would also echo the words of Githinji, JA in In *Funzi Island Development Ltd &2 others v County Council of Kwale & 2 others* [2014] eKLR, where he stated:

> "In addition, no attempt was made by the council to show that the setting apart was genuinely for the benefit of the persons ordinarily residents in the area which is a mandatory prerequisite."

22. Similarly in this case, it was for the 6th respondent to demonstrate that the setting apart accorded with the constitutional provisions and mandate by demonstrating the Government interest in Nyari Estates Ltd. The facts on the basis of which the 6th respondent was invoking his powers under Section 118 of the retired *Constitution*, namely that shares in Nyari Estates Ltd, were held on behalf of the Government was a matter within his knowledge which was not capable of being known by the appellants without difficulty. The burden shifted to the 6th respondent to show that the setting part was genuinely for the purposes envisaged under S118(2) of the retired *Constitution* and to that extent to demonstrate that the Government did indeed have an interest in Nyari Estates Ltd. He did not in my view discharge that burden with the result that the entire process of setting apart the property was vitiated from the beginning and is invalid ab initio.

23. I would for those reasons allow the appeal. However, as I am a minority, I need not address the other issues arising in the appeal. The orders of the Court are as proposed in the judgment of Nyamweya, JA.

DATED AND DELIVERED AT MOMBASA THIS 14TH DAY OF APRIL 2023

P.NYAMWEYA

.....

JUDGE OF APPEAL

J LESIIT

.....

JUDGE OF APPEAL

GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR