John Mbogua Getao v Simon Parkoyiet Mokare, Karempu Kaata, Nkama Group Ranch, Chief Land Registrar & Attorney General (Civil Appeal 361 of 2014) [2017] KECA 156 (KLR) (1 December 2017) (Judgment)

John Mbogua Getao v Simon Parkoyiet Mokare & 4 others [2017] eKLR

Neutral citation: [2017] KECA 156 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 361 OF 2014

MSA MAKHANDIA, DK MUSINGA & SG KAIRU, JJA

DECEMBER 1, 2017

BETWEEN

JOHN MBOGUA GETAO ..... APPELLANT

AND

SIMON PARKOYIET MOKARE ..... 1ST RESPONDENT

KAREMPU KAATA ..... 2ND RESPONDENT

NKAMA GROUP RANCH ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

THE ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an appeal arising from the Judgment and Decree of the Environment & Land Court of Kenya at Nairobi (J. M. Mutungi, J.) dated the 25th September, 2014 in ELC No. 929 of 2012)

JUDGMENT

1. This appeal emanates from the judgment and decree of the Environment and Land Court (ELC) (Mutungi, J.) dated 25th September, 2014. The judgment was in respect of a constitutional petition instituted by the appellant against the respondents in which in the end, the court found for the respondents and dismissed it. The court ordered that the appellant vacate and deliver vacant possession of the property known as L.R Kajiado/Kaputiei-South/2241 measuring 76.457 HA or 188.849 acres to the 1st respondent within 90 days of the date of the judgment and in default thereof, to be evicted. During the pendency of the suit, the property was sub-divided into two parcels and now exists as L.R No. Kajiado/Kaputiei-South/2625 and L.R No.Kajiado/Kaputiei-South/2626. For ease of reference however in this judgment the two parcels shall hereafter be referred to as the "the suit property".

Dissatisfied and aggrieved by the said orders, the appellant is now before us on appeal against the whole of the said judgment.

2. The facts informing the suit in the ELC and indeed this appeal are fairly straightforward and uncontested. The 3rd respondent was a group ranch situate within Kajiado County and registered under the now repealed Land (GroupRepresentatives) Act, 1968. The ranch comprised about 519 members and owned about 100,000 hectares in the parcel of land known as LR No. Kajiado/Kaputiei-South 94 from which the suit property was excised. The appellant's father, Joshua Matindi Gitau Karanja, deceased, the 1st respondent as well as the 2nd respondent were bona fide members of the ranch. Following the death of the appellant's father in 1986, the appellant sought and obtained a limited grant of letters of administration Ad Litem in 2011 to mount this suit on behalf of his estate. The 2nd respondent was the chairman of the ranch in which the larger portion was set aside for grazing of livestock while the ranch members lived communally in manyattas. Following the 3rd respondent's application in 1990 that the ranch be dissolved, the Ministry of Lands gave consent for the dissolution of the ranch and for sub division of the ranch into equal individual holdings to be allocated to the registered members. From then on, the 3rd respondent's officials remained in office for the sole aim and purpose of overseeing the sub-division of the ranch to the members.

3. After the sub-division of the ranch, the estate of the late Joshua Matindi GitauKaranja was allocated a different parcel of land, known as Kajiado/Kaputiei South/2211 "the allocated land" rather than one originally occupied by their late father, which meant that they had to vacate and relocate. The title to the allocated land was duly issued to the appellant and his two brothers, Daniel Parsimia Matindi and PeterKoikai Pukei. Conversely, title to the suit property, where the appellant's father originally resided with his household and which later was further subdivided into the suit property, was issued to the 1st respondent who became the registered owner. The appellant and his brother Peter Kokai Pukei failed to vacate the suit property thereby compelling the 1st respondent to institute in the High Court at Machakos, HCCC No.278 of 2012 in a bid to evict them from the suit property which they still occupied. Before determination of the said suit, the appellant instituted a petition in the Constitutional and Human Rights Division of the High Court at Nairobi dated 22nd November 2012 but which was later amended on 2nd December 2013. The 1st respondent's suit in the Machakos High Court was subsequently transferred and consolidated with the appellant's petition and ultimately heard together culminating in the judgment sought to be impugned in this appeal.

4. Through the amended petition, the appellant's contention was that the allocation to him of a different parcel of land other than the one he and his siblings had originally resided or occupied through their deceased father since time immemorial, his rights to property, fair administrative action and freedom from discrimination as envisaged by the Constitution 2010 were thereby infringed. More so, the appellant alleged his family had made significant improvements and developments on the suit property and hence stood to suffer irreparable loss and damage. He averred that his late father had lived on the suit property for a period of more than 70 years prior to his death and his remains and that of their other departed family members had been interred on the suit property. He averred further that the suit property was ancestral and trans-generational and hence a legitimate expectation had been created that the estate of the late Joshua Matindi Gitau Karanja would be allocated the suit property they had occupied and resided on for a long time. That at the very least, they could not be deprived of the suit property without legal and or lawful justification or without having been accorded a fair hearing. He termed the 3rd respondent's actions of allocating the suit property to the 1st respondent as fraudulent, irregular, high handed, discriminatory and in bad faith.

5. Be that as it may, the appellant's contention in our view is aptly captured in the appellant's "Further Submissions in Reply to the Respondents" dated 3rd December 2013 where he posits as follows;

> " The Petitioner has laid bare clear and uncontroverted facts to show that he was moved from his ancestral land which he had occupied for a period spanning 70 years to a far off land of very low value both in monetary terms and utility. Where is the principle of equality here? Is it not discrimination to move one from where he has stayed for a long period of time to a far off land of low value.....even if there was necessity to be moved he should have been moved to a place closer to where he resided if need be and of equal value both in monetary and in utility. The situation subsisting based on uncontroverted facts before the court shows that he was dislocated and taken miles away in a bush and more so to land which is not habitable. His legitimate expectation from all the Respondents was not honoured." (sic)

6. In essence, the appellant's complaint stems from being allocated a different parcel of land of low value and utility than the one his late father occupied and resided. Indeed, a valuation report filed in court by Prime Land (M) Valuers on behalf of the appellant shows that the suit property was closer to the main Nairobi-Mombasa Highway at Sultan Hamud Township valued at Kshs. 170,000,000/- while the allocated land was further off into the interior and valued at Kshs. 7,556,000/-. The appellant therefore sought declarations from the ELC to the effect that the allocation of the suit property to the 1st respondent was against his overriding interests and therefore discriminatory, unconstitutional, ultra vires the powers of the 2nd, 3rd and 4th respondents and hence a nullity in law. The appellant further sought judicial review orders of certiorari and mandamus to quash the decision of the 2nd, 3rd and 4th respondents to allocate the suit property to the 1st respondent and to compel or direct the 4th respondent to cancel the entry in the land register that the 1st respondent was the registered proprietor of the suit property respectively.

7. The 1st respondent on his part denied the appellant's averments that he had been deprived of his right to own property and or discriminated against since he was allocated an equal portion of land elsewhere in the ranch. He denied any fraud in the allocation. He went on to aver that the appellant's father was allocated his portion being Kajiado/Kaputei-South/2211 and title issued to his sons including the appellant, in 2010. That indeed, the sons and their families, other than the appellant had since moved to and settled on the allocated land.

8. In a replying affidavit sworn on behalf of the 2nd and 3rd respondents, it was deposed that after subdivision of the ranch, almost 48% of the members had to relocate from the communal areas where they resided to other areas which had initially been set aside for grazing, the family or estate of Joshua Matindi Gitau Karanja being one of them. That the sub-division upset the communal manner in which the ranch members had initially lived. It was denied that any legitimate expectation existed or had arisen as alleged by the appellant. Further, that the sub-division of the ranch had been fairly done without any discrimination and with the involvement of all its members. It was also explained that the 3rd respondent did not take into consideration the location of burial sites of member's relatives who passed away in the allocation as to do so would have been impractical. That there were indeed other members who had moved to other parcels of land away from the burial sites of their departed relatives and had never complained.

9. Called upon to determine the suit in light of the foregoing facts and the law, the ELC found that the particulars of the alleged fraud had not been specifically pleaded and proved by the appellant as required in law and hence the claim of fraud or irregularity against the respondents could not

stand. Further, the court found that there was no unfairness, discrimination and or arbitrariness in the respondents' actions, nor was there infringement of the appellant's fundamental freedoms and rights under Articles 27, 40, 47 and 50 of the Constitution as alleged. Ultimately, the ELC found that the 1st respondent had been lawfully allocated the suit property, ordered the appellant to vacate and deliver the same with vacant possession to the 1st respondent or be evicted.

10. Dissatisfied and aggrieved, the appellant instituted the present appeal based on 12 grounds that the learned Judge: misdirected himself on the applicability and adherence to the rules of civil procedure in a constitutional petition; erred by framing his own issues and proceeding to pronounce judgment on them thereby reaching an erroneous conclusion; erred by failing to give credence and relevance to uncontested facts like the valuation report; erred in considering issues not canvassed or pleaded before him; erred in anchoring and basing his decision on legal technicalities thus occasioning a miscarriage of justice to the appellant; misdirected himself on the law relating to fraud, legitimate expectation and discrimination on the face of cogent evidence placed before him; erred by finding that the appellant had not proved his case to the required standard; contradicted himself by finding on one hand that the parties were entitled to equal portions of land but holding that it was impractical to achieve that equality; erred in granting reliefs not sought by the parties; erred in disregarding the appellant's evidence and submissions without reasons thereof; findings were not supported by applicable law and finally, erred by failing to consider a supplementary affidavit filed with leave of court in support of the amended petition.

11. With the consent of the parties, the appeal was canvassed by way of written submissions with limited oral highlights.

12. In his written submissions, the appellant who was represented by Mr.Kang'ethe, learned counsel, reiterated that upon dissolution of the ranch, the same was to be sub-divided equally among the members. According to him, the doctrine of legitimate expectation presupposed or dictated that each member of the ranch receive minimal disturbance during allocation. That as it were, he was moved to a far off and inhospitable land with depreciated value. He submitted that the notion of equality in distribution of land cannot be achieved by basing it solely on acreage, but one must also take cognizance of the utility and value of the different parcels of land located in different parts of the ranch. The appellant impugned the learned Judge's finding that particulars of fraud had not been particularized and proved on the basis of Articles 22, 23 and 159 (d) of the Constitution which provisions, according to the appellant, had done away with strict adherence to the rules of procedure and or over reliance on rules of procedure in constitutional petitions and other matters. He argued that what was before the High Court was a Constitutional Petition anchored on Articles 22, 23, 27, 40, 47 and 50 of the Constitution and not a suit governed by the Civil Procedure Act and Rules. As such, having outlined the constitutional provisions that had been violated and how they had been violated, the same was sufficient for a petition of that nature. The appellant cited the case of Lemanken Aramat v Harun MeitameiLempaka & 2 others (2014) eKLR, where the Supreme Court, basing its decision on Article 159 of the Constitution, held that there are instances in general litigation when jurisdiction is not affected by a party's failure to meet the set filing requirements. Arguing the ground that the learned trial Judge erred by framing his own version of issues and proceeding to pronounce judgment on them, the appellant submitted that the issue before court was whether the sub-division and allocation violated his rights to own property and fair administrative action under Articles 40 and 47 of the Constitution. However, among the issues framed by the Judge for determination was whether or not the group ranch land was subdivided and allocated to all the members of the 3rd respondent and further, whether the 1st respondent was entitled to the suit property and if so, whether the suit property was fraudulently allocated to him. These issues according to the appellant were not issues that fell for

determination before the Judge. As such, the appellant contended the Judge fell into error of law and thereby occasioned him failure of justice.

13. The appellant faulted the learned Judge for having ignored and or failed to give credence and relevance to the evidence of a valuation report tendered showing the difference in value between the suit property and the allocated land. The said report was tendered through a supplementary affidavit and showed the value of the suit property as being Kshs. 170,000,000/- and the allocated land, Kshs. 7,556,000/- respectively. The appellant submitted that the respondents did not file any rebuttal to the report and the Judge was duty bound to treat the report as uncontested and consider it. The Judge however found that the report had not been tendered in the appellant's petition so as to give the respondents an opportunity to respond to it and therefore failed to give credence to it. The appellant maintained that the supplementary affidavit had been filed with leave of court and blamed the respondents for not replying to the said affidavit and or the Amended Petition and not as found by the Judge that the respondents were denied an opportunity to respond to it. The learned Judge further found that it was not possible to settle all people on the land where they desired in a bid to show that the allocations were fair or logical. However, the appellant now contests that finding on the basis that the learned Judge considered extraneous matters such as logistics as opposed to cogent and uncontroverted evidence placed before him which resulted in a failure of justice to the appellant.

14. The appellant reiterated his averments in the petition that the Judge failed to appreciate that his family having lived on the suit property for over 70 years, a legitimate expectation had arisen that upon subdivision of the ranch, they would be allocated the parcel of land they occupied. That as it were, he was discriminated against by being moved to the allocated land and his right to fair administrative action as enshrined in the Constitution was thereby violated. He also challenged the Judge's conclusion that it was not unfair to be moved from the suit property to the allocated land in the circumstances of this case. The appellant cited the case of MoindiZaipeline& 39 Others v Karatina University & Another (2015) eKLR where the Court of Appeal held that legitimate expectation applies the principles of fairness and reasonableness to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice or keeping a practice.

15. The appellant further faulted the Judge for granting reliefs not sought in the amended petition or in Machakos HCCC 278 of 2012 which had been instituted by the 1st respondent against the appellant but was later transferred and consolidated with the petition as already stated elsewhere in this judgment. According to the appellant there was no relief sought in his petition or in the 1st respondent's suit seeking that the 1st respondent be declared the lawful owner of the suit property. That instead what the 1st respondent had sought against the appellant was an eviction order and he was bound by his pleadings.

16. In response, the 1st respondent who was represented by L. Naikuni and Mr.Larabi, learned counsel, in his written submissions agreed with the trial court's holding that allegations of fraud whether in a Constitutional Petition or in an ordinary civil suit had to be specifically pleaded and proved. That in a suit anchored on fraud, the acts of fraud must be particularized with precision and sufficiency. That as it were, not only did the appellant fail to plead and give the particulars of the alleged fraud but that he had also failed to place sufficient material or evidence before the Judge to enable him draw an inference or conclusion as to whether there was fraud or not. He cited the authorities of Bruce Joseph Bockle v Coquero Ltd(2014) eKLR and Kinyanjui Kamau v George Kamau Njoroge(2015) eKLR for these propositions. He disputed that Article 159 (d) of the Constitution could come to the aid of the appellant in such circumstances. The 1st respondent also submitted in support of the issues framed by the Judge for determination. According to him, the issue framed by the Judge whether the ranch had been sub-divided and allocated to all the members and whether the suit property had been

fraudulently and irregularly allocated to the 1st respondent were inevitable in the fair determination of the dispute and that the court had inherent jurisdiction to raise and or determine issues that lead to a fair determination of a dispute. That the issues as framed by the learned Judge arose from the consolidated pleadings of the parties' suits and their respective submissions.

17. In reply to the contention that the trial court failed to give credence and relevance to the valuation report, the 1st respondent submitted that the issue before it was not about the valuation of the suit property but rather about the rightful owner of the suit property and that the issue of valuation did not affect or prejudice the parties. In any event, it was part of the appellant's case that it had been sneaked through a supplementary affidavit. He denied that legitimate expectation to be settled where each member initially occupied had arisen since relocation of members was a practice accepted or known upon sub-division of group ranches. Furthermore, he argued that it was not only the appellant who had been affected by relocation but so were other ranch members who also had to leave behind places of sentimental value like burial sites of their loved ones. In regard to the allegations that the Judge granted reliefs not sought or prayed for, the appellant pointed out that the judgment was in respect of consolidated suits. As such, an issue regarding ownership of the suit land had come out in the parties' pleadings and so the court was bound to interrogate whether the 1st respondent was the rightful owner of the suit property and whether there had been irregular allocation of the same to him. He argued that the court could not issue an order of eviction without making a finding or establishing who the rightful owner of the suit property was.

18. Further in his submissions, the 1st respondent denied that the Judge failed to consider or disregarded any evidence placed before him before making his final determination. To the contrary, the 1st respondent submitted that the appellant had failed to plead and to prove the allegations of fraud or irregularity or discrimination in the subdivision of the ranch against the 1st respondent. Further, that the Judge upon scrutiny and consideration of the circumstances of this case had found that the allocation of the suit property to the 1st respondent was regular and not discriminatory as alleged. It was also the 1st respondent's submission that the Judge's findings were supported by the evidence adduced and the applicable law and the Judge did not misdirect himself.

19. In response to the appellant's allegation that the Judge failed to consider the valuation report, the 1st respondent submitted that the purpose of that Supplementary Affidavit was to reply to issues raised in the replying affidavit dated 4th December 2012 to the petition. That however, the affidavit raised totally divergent and new issues.

20. The 2nd and 3rd respondents through learned counsel Ms. Tabitha Weru, filed joint written submissions, and basically reiterated most of the submissions made by the 1st respondent. It was submitted on their behalf however, that failure to abide by the well settled law that the particulars of fraud must be pleaded and proved could not be cured by the saving provisions of Article 159 (d) of the Constitution. They cited Emfil Ltd v Registrar of Titles Mombasa & 2 Ors (2014) eKLR in support of their contention where this Court held that allegations of fraud are of a serious nature and normally require to be strictly pleaded and proved on a higher standard than on a balance of probabilities which the appellant had failed to do. Further, that Article 159 did not allow litigants to totally ignore the rules of evidence. It was also submitted that the appellant did not demonstrate to the trial court any acts of irregularity by the 2nd and 3rd respondent in the process of adjudication, subdivision and allocation of the ranch which acts violated his right to fair administrative action. That the said process met the considerations of fair administrative action stipulated under Article 47 of the Constitution of being lawful, reasonable and procedurally fair. That a government surveyor was assigned to survey the ranch to ensure equitable distribution to all the members. That by virtue of the land being used mainly for grazing purposes the key factor in allocation was the size. That the appellant did not make any complaints to either party

during the fifteen years (15) years that the dissolution, sub division and allocation of the ranch took place. That the fact that the appellant took a long time to institute this claim was a demonstration that the petition was an afterthought on the appellant's part as opposed to a genuine claim.

21. The respondents cited the case of Communication Commission of Kenya vRoyal Media Services Ltd & 5 Others (2014) eKLR that discussed and laid down principles informing legitimate expectation. On the strength of the cited case, the respondents submitted that for legitimate expectation to arise there had to be an express, clear and unambiguous promise given by a public authority; that the expectation itself must be reasonable; the representation must have been made competently and lawfully by the decision-maker and the expectation must abide by the law and/or the Constitution. In light of the foregoing, the respondents supported the Judge's finding that no promise of any benefit was extended to the appellant by the 2nd and 3rd respondents to give rise to a legitimate expectation that the appellant's family would be allocated the suit property. That the letter from the Ministry of Lands consenting to the subdivision of the ranch could not be construed or understood to have created such expectation in favour of the appellant. As such the respondents were of the view that the learned Judge correctly applied the law relating to legitimate expectation and therefore reached the correct decision.

22. On discrimination, the respondents pointed out that the appellant did not tender tangible evidence to prove the alleged acts of discrimination based on tribe or offered any comparatives of a section of a particular people or particular tribe that were afforded better land and or comparatives on the valuation of the parcels across the ranch. According to the respondents, the appellant did not plead material facts to sustain a claim of discrimination either based on the appellant's tribe or the value of the property. That as it were, the appellant only made bare and wild assertions devoid of facts and or tangible evidence. They further pointed out that 48% of the ranch members had been affected by relocation and no claim by any other member had been advanced or could be justified.

23. In response to the appellant's assertions that the trial Judge failed to consider the provisions of section 28 and 30 (g) of the Registered Land Act (Cap. 300) (now repealed) with respect to overriding interests that subsist on all registered land and in particular the rights of a person in possession or actual occupation, the respondents submitted that since the Judge had found that 48% of the members could not retain their occupied portions, the said provisions were inapplicable. The appellant also impugned the judgment on the ground that he had his own version of issues which were not born out of the pleadings before him. However, the respondents submitted that the issues as framed flowed from the parties' pleadings. In any case, the respondents argued that the appellant had not demonstrated any miscarriage of justice or prejudice suffered. They relied on the case of G.K Macharia & Another vLucy N. Mungai (1995) eKLR for that proposition. The respondents further argued that it was logical for the court to determine or interrogate whether the 1st respondents allocation was irregular and or fraudulent and establish whether indeed his proprietorship was valid.

24. On the appellant's contention that the trial Judge granted reliefs not sought or prayed for by the parties, especially the declaration by the Judge that the 1st respondent was the lawful owner of the suit property, the respondents submitted in support thereof that the Judge justified or gave the rationale for granting the orders that he did. They reiterated that the learned Judge was right to disregard the appellant's Supplementary Affidavit as the same introduced novel issues, such as the valuation report and discrimination based on tribe, that were not initially at the core of the petition. That by doing so, the appellant sought to amend the petition through the back door and steal a match on the respondents since they did not have an opportunity to respond to the said allegations, pleadings having closed.

25. During the oral highlighting of the appeal, Mr. Njuguna submitted that this appeal raised a novel issue not canvassed before any court. That the issue was about the criteria of subdividing communal land in the event of dissolution. Since according to him the facts were not in dispute, he stated that the issue was

whether the appellant had been dealt with fairly in the allocation. He reiterated that the Judge should have considered the valuation report. Further, that Article 159 and section 19 of the Environment & Land Court Act should have come to the aid of the appellant in admitting the appellant's claim on fraud. The said provisions give prominence to substantive justice over undue regard to technicalities. Counsel also submitted that there was no balloting before subdivision of the ranch or allocation and so the appellant was subjected to unfair administrative action.

26. Mr. Naikuni and Mr. Larabi submitted that the applicable law in this regard ought to be the Constitution, the Land Adjudication Act (repealed) and Land (Group Representatives) Act (repealed) since the land in question was communal land. That under the Land Adjudication Act (repealed), there was a procedure provided for raising objection within 60 days which the appellant failed to comply with.

27. Learned counsel, Miss Weru submitted that the subdivision of the ranch was on the basis of acreage. Counsel faulted the appellant for not seeking a ballot or making any complaint to the secretariat during the 15 years period through which the subdivision and allocation of the land was undertaken. She submitted that the consent letter from the Ministry of Lands to dissolve the ranch did not offer any expectation to the ranch members that they would be allocated the land where they resided. She reiterated that the issue of the value of land was never raised in the Petition or the particulars of discrimination or fraud given. That the said issues were introduced through the supplementary affidavit which amounted to amending the petition without leave. According to counsel, parties were bound by their pleadings and the affidavit was not part of the pleadings.

28. The jurisdiction of this Court when sitting as the first appellate court is well settled. Pursuant to rule 29 (1) of the Court of Appeal Rules, this Court is bound to re-appraise the evidence tendered and draw its own inferences of fact. This mandate has been enunciated in many decided cases and was aptly captured by the then East African Court of Appeal in Selle v Associated Motor Limited Company[1968] EA123, as follows;

> " ...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 that 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 demeanor of a witness is inconsistence with the evidence in the case generally."

29. The appellant has alleged that the learned Judge misdirected himself on the applicable law on fraud and thereby arrived at a wrong conclusion. In his petition, the appellant made allegations that the allocation of the suit property to the 1st respondent by the 2nd and 3rd respondent was fraudulent, irregular and or arbitrary. In his determination the trial Judge found that it was a legal requirement and a rule of practice that where fraud is alleged, the particulars thereof must be specifically pleaded and set out so that the defendant is clear as to the case he/she is required to answer. Since the appellant had failed to give the particulars of the alleged fraud, the Judge dismissed the fraud allegations. The appellant now contends that the Judge erred in not invoking Article 159(d) of the Constitution and section 19 (1) of the Environment and Land Act, 2011. Commonly referred to as saving provisions, the said provisions elevate substantive justice over undue regard to procedural technicalities.

30. The appellant impugns the Judge's holding on the basis that he misdirected himself on the applicability and adherence to the rules of civil procedure in a constitutional petition contrary to Articles 22, 23 and 159 (d) of the Constitution by attacking his petition on form rather than on substance. The

respondents have countered the appellant's assertions. The standard or burden of proof where fraud is alleged in civil matters has been held in decided cases to be of higher than the ordinary standard of balance of probabilities. (See Kinyanjui Kamau v George Kamau Njoroge (2015) eKLR; Bruce Joseph Bockle v Coquero Ltd (2014) eKLR). As such, 2nd and 3rd respondents submitted that it is a legal requirement that particulars of fraud be specifically pleaded and strictly proved. Indeed, allegations of fraud are of serious nature that may carry with them penal consequences that may further infringe on a person's right to liberty hence the insistence that fraud ought to be specifically pleaded, with particulars thereof, and proved. It would be foolhardy for the appellant to dismiss allegations carrying such far reaching consequences as merely procedural. In Emfil Ltd v Registrar of Titles Mombasa (supra), this Court pronounced itself as follows on the issue:-

> " Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities. Although Article 159 enjoins the court to administer substantial justice without undue regard to procedural technicalities, Article 159 does not allow the respondents to totally ignore the rules of evidence."

31. The appellant cannot therefore fault the trial court for not invoking the saving provisions and admitting his claims of fraud without having particularized the alleged acts or omissions so that the respondents could sufficiently answer to them and allow for their canvassing through evidence in trial. In the case of RosemaryWanjiku Murithi v George Maina Ndinwa (2014) eKLR, this Court held that proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud. Even if perchance we were to be swayed by the appellant's arguments and invoke Article 159 of the Constitution so as to determine the appellant's allegation of fraud against the respondents on merit, then we would still find that the claim fails for want of evidence. The appellant's case is simply devoid of evidence showing or imputing fraud or irregularity against the respondents as the trial court correctly found. In any case, in Meme v Republic(2004), EA 124; (2004) e KLR 637, it was held that a court is empowered to draw from the Civil Procedure Rules in its exercise of powers under the Constitution of Kenya (Protection of Fundamental Right and Freedoms of the Individual Practice and Procedure Rules otherwise known as Mutunga rules, 2013).

32. Further, the appellant submitted that the trial Judge misdirected himself on the law relating to legitimate expectation and discrimination. The appellant alleged that a legitimate expectation had arisen from the letter dated 21st November, 1990 in which the Ministry of Lands gave consent for the dissolution of the ranch, an allegation denied and disputed by the respondents. However, the trial Judge found that no promise of any benefit was extended to the appellant so as to form a basis for the expectation that the appellant's family would be allocated the suit property. The Supreme Court has enunciated the principles governing the concept of legitimate expectation in the case of Communications Commission of Kenya & 5 others vRoyal Media Services Limited & 5 others [2014] eKLR as follows:-

    (a) there must be an express, clear and unambiguous promise given by a public authority;

    (b) the expectation itself must be reasonable;

    (c) the representation must be one which it was competent and lawful for the decision-maker to make; and

    (d) there cannot be a legitimate expectation against clear provisions of the law or the Constitution.

33. In the circumstances of this case, can it be said that there was an express, clear and unambiguous promise given to the members of the ranch that they would be allocated land where they occupied

or resided? The answer must be in the negative. If anything and as already seen, it was obvious and or expected that some of the members of the ranch had to move from the communal setting to other areas previously reserved for grazing. This was despite the fact that such members might have had sentimental attachments to the portions they occupied like the one claimed by the appellant of burial sites for his family members. In any event, the 3rd respondent deponed that the location of burial sites was not a criteria for consideration in the allocation. Furthermore, if legitimate expectation arose as alleged, then the same would have applied to every member of the ranch creating an absurd, unworkable or impractical scenario where each member would expect to be settled where he resided. The letter from the Director of Land Adjudication and Settlement dated 21st November 1990 on which the appellant has hinged his claim for legitimate expectation simply reads, where pertinent:

> " ...I hereby give my consent to dissolve the Nkama Group Representatives and there after the subdivision of the group land into individual holding 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 the necessary documents, until the whole exercise is over, making sure that each and every member has been well served...."

34. Where from the foregoing is a direct or indirect promise or assurance that members and particularly, the appellant were to be allocated land where they were in occupation? Absolutely none. Further, such expectation would have been unreasonable and impracticable in the circumstances of this case.

35. The appellant has further contended that the Judge misdirected himself on the law relating to discrimination. Article 27 of the Constitution provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. In the Amended petition, the appellant averred that the respondents' decision to allocate him a different parcel of land was discriminatory. The appellant does not give or plead any material facts to show how the alleged discrimination arose. In his supporting affidavit the appellant again merely states that the respondents' actions of allocating him a different parcel of land, was biased and therefore discriminatory. The basis of the alleged bias or discrimination appears in his supplementary affidavit where he states that he was discriminated against on account of his tribe. He however offers no other particulars on the allegation or comparatives whatsoever in bid to show that other ranch members of a different tribe were treated differently or better in the allocation. The details of the tribes involved are not given including his own. It should also be borne in mind that it is not discrimination per se, to treat people differently. It is however discrimination if the reason or motive, being the cause for so doing, is direct or indirect discrimination on arbitrary grounds listed under Article 27 (4) of the Constitution to include race, sex, ethnic origin, age, sex etc. Again, the allegation of discrimination fails to stand for lack of evidence. Sections 107 and 108 of the Evidence Act are clear that whoever alleges must prove. In any event, the ethnic basis for discrimination was a new issue introduced through the supplementary affidavit. The respondents were denied an opportunity to rebut the same, and therefore, was inadmissible for consideration.

36. It is prudent, in our view, to interrogate whether the appellant was entitled to the suit property. Since we have already concluded that the appellant could not claim entitlement to the suit property through his claims of legitimate expectation, on what other basis could the appellant lay claim to the suit property? In doing so, the conduct or omissions of the appellant cannot be ignored. From the onset, it seems there was no other set criterion for the sub-division of the ranch except on the basis of equal acreage to all the members, which as far as can be discerned, was achieved. If the appellant wished or intended to introduce another criterion such as value of the land, he should have raised this concern with the 2nd and 3rd respondent and indeed the membership of the ranch. He should have raised it for discussion

and a resolution passed. Indeed, the 3rdSchedule of the Land (Group Representatives) Act (Cap. 287) (now repealed) as the applicable law then provides that a resolution at a general meeting be decided by show of hands or a ballot where more than 60% of the members demand. As submitted by counsel for the 2nd and 3rd respondents, nobody, including the appellant, requested for a ballot. Such a ballot would definitely have introduced any other criteria for sub-division or addressed harbored concerns. Accordingly, it is not within our domain to lay down the ground rules to be followed in the event of subdivision of group ranches as invited by counsel for the appellant. This is a matter entirely and purely for the members of the group ranch to decide or determine.

37. The sub-division and allocation exercise took almost 15 years or thereabouts and the appellant never raised any concerns or grievance. The process of subdivision and allocation appears to have been fair and regular, contrary to the appellant's assertions. The process started with the Land Adjudication Officer giving requisite consent vide his letter dated 20th November 1990; a government surveyor was then appointed to do the survey of the ranch to ensure equitable distribution among the 519 members; distribution and allocation was undertaken ultimately culminating in individual members' holdings as had been initially envisaged. Even after his other brothers collected title to the allocated land in October 2010, and relocated to the allocated land together with their family members, the appellant still took another two years to institute the suit herein, in November, 2012 hence the trial court rightly holding that the appellant's complaint was belated and an afterthought. Neither his brothers nor their families have complained against the relocation.

38. Furthermore, and as can be gleaned from the appellant's pleadings, the appellant has not stated or averred of any intention to give back or swap the allocated land with the suit property with the 1st respondent. As it is, if the court was to allow the instant appeal, the appellant would benefit twice, with the suit property and the allocated property going to him. The 1st respondent in that scenario would be deprived of the suit property thus violating his right to property as guaranteed under the Constitution. The appellant has further not averred if the rest of the family members are willing or would be willing to relocate from the allocated land to the suit property. As far as it can be discerned from the facts of this case, the appellant's other family members do not appear to harbor grievances with the allocation.

39. The appellant has contended that the trial court disregarded or failed to give credence to the valuation report. However, contrary to that allegation the Judge did consider the valuation report but noted that it was a new issue not contained in the appellant's petition. The report had been introduced through a supplementary affidavit dated 3rd June 2013 by the appellant and since the pleadings had closed, the respondents had no opportunity to rebut the same. The respondents expected the appellant to limit himself to the issues they had raised in their Replying Affidavits to the petition. In considering the said valuation report the Judge observed as follows,

> " 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/Kaputiei 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."

40. We see no reason that would warrant this Court to interfere with the learned Judge's holding and or exercise of discretion as it was judiciously exercised and reasons thereof given. Indeed admitting the valuation report would have been tantamount to allowing the appellant to amend his petition through the back door and further steal a match on the respondents.

41. In our view, the gist or impetus of the appellant's case was that his rights as guaranteed under Articles 27, 40, 47 and 50 of the Constitution had been violated by the respondents in their action to relocate him from the suit property. As already seen, the allegation of discrimination could not stand for reasons discussed elsewhere in this judgment. The appellant has gone ahead to aver that his right to property under Article 40 was violated. However, the main objective in the dissolution of the ranch was to sub divide the land into equal individual holdings to all the members. For all intents and purposes, this objective appears to have been met. The suit property measured 76.457 HA or 188.849 acres and the allocated land measured 76.88 HA or 189.89 acres. The two properties were almost similar in size and there has been no complaint about the acreage. Since, in their submissions, the 2nd and 3rd respondents have stated that the ranch's main use being grazing, the key factor in the allocation was the size of the land. In essence therefore, the appellant's right to property was upheld. This is especially so since his other contentions or claim to the suit property does not stand. The appellant has further not demonstrated how his rights under Articles 47 and 50 have been violated. He fails to meet the test as stated in Meme vRepublic [2004] 1 EA 124 that,

> "Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complains without any focus on fact, law or Constitution, hence it had nothing to do with the constitutional rights of the appellants."

42. The same principles were espoused in Anarita Karimi Njeru v Attorney General [1979] KLR 54 and recently re-stated by this Court in the case of Mumo Matemu v Trusted Society of Human Rights Alliance and Others [2013] eKLR.

43. The upshot is that this appeal entirely fails and is accordingly dismissed with costs.

Dated and delivered at Nairobi this 1st day of December, 2017.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

D. K. MUSINGA

.....

JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb.

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Deputy Registrar