Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment)

Neutral citation: [2023] KESC 105 (KLR)

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

PETITION 32 (E036), 35 (E038) & 36 (E039) OF 2022 (CONSOLIDATED)

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

DECEMBER 15, 2023

BETWEEN

FANIKIWA LIMITED ..... 1ST APPELLANT

MARY JEPKEMBOI TOO AND SOPHIE JELIMO TOO (SUING AS JOINT ADMINISTRATORS AD LITEM OF THE ESTATE OF MARK KIPTARBEI TOO) ..... 2ND APPELLANT

LONRHO AGRIBUSINESS (EA) LIMITED ..... 3RD APPELLANT

DAVID KORIR ..... 4TH APPELLANT

AND

SIRIKWA SQUATTERS GROUP ..... 1ST RESPONDENT

THE COMMISSIONER OF LANDS ..... 2ND RESPONDENT

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

DIRECTOR OF LAND ADJUDICATION AND SETTLEMENT .... 4TH RESPONDENT

DIRECTOR OF SURVEY ..... 5TH RESPONDENT

DISTRICT LAND OFFICER, UASIN GISHU DISTRICT ..... 6TH RESPONDENT

HIGHLAND SURVEYORS ..... 7TH RESPONDENT

KENNEDY KUBASU ..... 8TH RESPONDENT

AHMED FEREJ & 60 OTHERS ..... 9TH RESPONDENT

RICHARD KIRUI & 15 OTHERS ..... 10TH RESPONDENT

STANBIC LIMITED ..... 11TH RESPONDENT

KENYA COMMERCIAL BANK LIMITED ..... 12TH RESPONDENT

ECO BANK LIMITED ..... 13TH RESPONDENT

MILLY CHEBET ..... 14TH RESPONDENT

NATIONAL BANK OF KENYA LIMITED ..... 15TH RESPONDENT

KENYA WOMEN MICRO-FINANCE BANK ..... 16TH RESPONDENT

COMMERCIAL BANK OF AFRICA ..... 17TH RESPONDENT

CO-OPERATIVE BANK OF KENYA ..... 18TH RESPONDENT

(Being consolidated appeal from the Judgment of the Court of Appeal at Eldoret (Kiage, M'Inoti & Mumbi Ngugi, JJ.A.) delivered on 18th November, 2022 in Civil Appeal No. 45 of 2017 as consolidated with Civil Appeal No. 44 & 68 of 2017)

Surrender of a private land lease for conversion to freehold interest does not revert the land to public land.

Reported by John Ribia

Constitutional Law *– fundamental rights and freedoms – right to fair trial – allegations of fraud that were determined via affidavit evidence only - whether a court finding that a party had conducted land fraud based on affidavit evidence was a violation of the person's their right to a fair trial - Constitution of Kenya, article 50; Evidence Act (cap 80) section 97(1)*

Land Law *– unalienated land – unalienated land that had been transmuted to private land – legitimate expectation - where one had a legitimate expectation that the President would allocate them land - whether unalienated government land that had been acquired and transmuted from public to private land was still governed by the provisions of the Government Lands Act (repealed) - whether the power of the President to make grants/dispositions under the Government Lands Act (repealed) extended to unalienated land that had been transmuted from public to private land - whether the principle of legitimate expectation was applicable when the actions or conduct of a public authority led individuals to form specific expectations about being allocated land - Government Land Act (repealed), cap 280, sections 2, and 3; Registered Land Act (repealed), (cap 300), sections 27, and 28; Registration of Titles Act (repealed), (cap 281), section 2, and 44.*

Land Law *– leases – surrender of leases – doctrine of merger - conversion of lease hold interest to free hold interest - what was the legal process under the Registration of Titles Act (repealed) and the Registered Land Act (repealed) of surrendering leasehold interests for conversion into freehold interests - what was the doctrine of merger and how was it applicable in the Kenyan land laws - whether a company could surrender a lease based of the directions of a director without there having been a board resolution supporting the said surrender of lease - whether the act of a private entity surrendering a lease for the purpose of converting the land to freehold interests implied that the land was surrendered to the Government of Kenya, thereby classifying it as public land eligible for allocation or grant by the President - whether the execution of surrender of lease instruments by both the owner of land and the Government of Kenya with intention to convert the land to free hold interests legally extinguished the leasehold interest and appropriately merged it into a freehold interest - Registered Land Act (repealed), (cap 300) sections 27, and 28; Registration of Titles Act (repealed), (cap 281) section 2, and 44.*

Land Law *– squatter – definition – capacity to be a squatter - what was the legal definition of a squatter – whether one could be deemed to be a squatter when the person had never occupied the land they deemed to be squatters in.*

Law of Evidence *– evidence in a case for determination of land ownership – evidence in a case alleging fraud in ownership of land - nature of evidence required – affidavit evidence – viva voce evidence - what was the standard of proof in land fraud allegations - whether the determination of ownership disputes, particularly those involving land, should be conducted solely through affidavit evidence - whether one could be adjudged to be guilty of fraud based on affidavit evidence only - Evidence Act (cap 80) section 97(1)*

Words and Phrases *– squatter – definition - a person who settles on property without any legal claim or title- Black's Law Dictionary, 8th Edition*

Words and Phrases *– surrender – definition - the yielding up of the term of lease to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion - Halsburys Laws of England volume 27 at paragraph 444*

Words and Phrases *– merger – definition - converse of surrender. A surrender occurs where the landlord acquires the lease; merger occurs where the tenant acquires the reversion. The underlying principle is the same in both; the lease is absorbed by the reversion and destroyed - Harpum, RMC., & Megarry, R., (ed) (2012), The Law of Real Property (London: Sweet & Maxwell; 8th edition, pp 856)*

Brief facts

Three appeals were brought before the Supreme Court, challenging the judgment of the Court of Appeal in a consolidated appeal involving the ownership of several parcels of land. The appeals were filed by Fanikiwa Limited (the 1st appellant), the administrators of the estate of Mark Kiptarbei Too (the 2nd appellant), and Lonrho Agribusiness (EA) Ltd (the 3rd appellant), and David Korir (the 4th appellant). The appeals were subsequently consolidated under Petition No 32 (E036) of 2022, with the issue at stake being the ownership and/or entitlement to parcels registered in the former Uasin Gishu District. The genesis of the dispute could be traced back to the surrender of titles to the suit land by Lonrho Agribusiness to the government in 2000, a move contested by the parties involved.

A petition filed by the 1st respondent at the High Court claimed ownership of the land on the basis of their ancestors' occupation and a direct approval for allocation by the then President, Daniel Toroitich Arap Moi, in 1998. The High Court transferred the matter to the Environment and Land Court which found in favor of the 1st respondent, establishing their legitimate expectation to the land based on government correspondence. This decision was contested and led to the appeal at the Court of Appeal, which upheld the rights of the 1st respondent to the land but also recognized the titles of third-party purchasers and financial institutions holding charges on subdivisions of the parcels.

The instant appeal at the Supreme Court was filed on grounds that that the superior courts below the Supreme Court misapplied the law in that the lease hold title had been surrendered for conversion to a freehold title and that the President had no power to allocate private land as the suit land had already been converted from public land to private land at the time of the allocation. The appeal at the Supreme Court also challenged the position of the 1st respondent as squatters.

Issues

i. Whether the determination of ownership disputes, particularly those involving land, should be conducted solely through affidavit evidence.
ii. What was the standard of proof in land fraud allegations?
iii. Whether one could be adjudged to be guilty of fraud based on affidavit evidence only.
iv. Whether a court finding that a party had conducted land fraud based on affidavit evidence was a violation of the person's right to a fair trial.
v. What was the legal process under the Registration of Titles Act (repealed) and the Registered Land Act (repealed) of surrendering leasehold interests for conversion into freehold interests?
vi. Whether a company could surrender a lease based of the directions of a director without having a board resolution supporting the said surrender of lease.
vii. What was the doctrine of merger and how was it applicable in the Kenyan land laws?

viii. Whether the act of a private entity surrendering a lease for the purpose of converting the land to freehold interests implied that the land was surrendered to the Government of Kenya, thereby classifying it as public land eligible for allocation or grant by the President.

ix. Whether the execution of surrender of lease instruments by both the owner of land and the Government of Kenya with intention to convert the land to free hold interests legally extinguished the leasehold interest and appropriately merged it into a freehold interest.

x. Whether unalienated government land that had been acquired and transmuted from public to private land was governed by the provisions of the Government Lands Act (repealed).

xi. Whether the power of the President to make grants/dispositions under the Government Lands Act (repealed) extended to unalienated land that had been transmuted from public to private land.

xii. Whether the principle of legitimate expectation was applicable when the actions or conduct of a public authority led individuals to form specific expectations about being allocated land.

xiii. What was the legal definition of a squatter? Could someone be considered a squatter if they had never occupied the land they claimed to have squatted on?

Relevant provisions of the Law

Evidence Act cap 80

97. Written contracts and grants.

(1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.

Held

1. The Supreme Court should not down its tools as a result of the 1st appellant's introduction at the Court of Appeal when he was not a party to the proceedings at the superior courts below. The Court of Appeal had to consider the evidence before it. Such issues expressly referring to 1st appellant would not have been framed by the appellate court had they not emanated from the Environment and Land Court (ELC), the said issues were determined by the Court of Appeal and were before the Supreme Court.
2. The instant appeal emanated from a consolidated appeal before the Court of Appeal that resulted in one judgment involving other parties in the present matter whose standing is not in issue. The matter having been consolidated before the Supreme Court, the issues raised were cross cutting and were not affected by the standing of 1st appellant alone. The Supreme Court had jurisdiction to hear and determine the consolidated appeal.
3. There were competing claims as to the ownership of the suit parcels. Therefore, it behoved a court to make a just determination on the same, procedurally. In the instant case a trial process involving examination, cross-examination and re- examination of the witnesses was the only way of resolving the competing allegations and counter allegations.
4. The superior courts below relied on rule 20(1)(a) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (Mutunga Rules) to hear the matter by way of affidavit evidence. A court was required to make a special endeavour to unravel all the competing claims and in particular, by calling for *viva voce* evidence from witnesses, especially those who had sworn depositions, and cross-examination done. That was particularly important because its decision would have a far-reaching impact especially upon the party(ies) whose ownership could end up being nullified. The Supreme Court was fortified by rules 20 (3), (4), and (5) of the Mutunga Rules which allowed a court to admit oral evidence, examine and cross-examine parties.

5. The administrators of the estate of Mark Too were right in asserting that the appellate court adjudged him guilty of fraud without affording him a hearing. However, fraud which, depending on the circumstances was recognized as a criminal offence, must be pleaded and strictly proved. In addition, although the standard of proof of fraud in civil matters was not proof beyond reasonable doubt, it was higher than proof on a balance of probabilities as required in other civil claims.
6. The vague particulars of fraud were not proved to the required standard going by the absence of any serious attempt to table concrete evidence to prove the subject allegations to the required degree. Fraud and conspiracy to defraud were very serious allegations. There was simply no credible evidence to prove such a serious allegation which could also attract criminal sanction. The Court of Appeal fell into error when it varied the ELC's judgment to the extent that it found the late Mark Too guilty of fraud.
7. The principle of legitimate expectation imposed a duty to act fairly and to honour reasonable expectation raised by the conduct of a public authority. If a public body had raised expectations that it would in future undertake a certain course of action, then it should ordinarily fulfill those expectations. That was important for the promotion of certainty and consistency in public administration.
8. For an individual to invoke the principle of legitimate expectation, an expectation must have been induced by some conduct of the public authority. The principle extended to any individual who was in a situation in which it appeared that the administration's conduct had led him to entertain certain expectations.
9. The principle of legitimate expectation protected only those expectations which had arisen through the conduct of the administrative body concerned, and not those which had arisen as a result of an individual's subjective hopes. It was concerned with upholding trust in the administration rather than protecting expectations which the individual had decided to entertain at his or her own risk. Only reasonable expectations would be afforded protection by the law. An individual must hold an expectation which was reasonable to have in light of the prevailing circumstances. Not just any promise would do; the promise must be one giving rise to a legitimate expectation. Certain requirements must also be met for a promise to generate a legitimate expectation.
10. As at the date of 1st respondent's application and on October 28, 1998 when former President Moi endorsed the subject application with the words 'Approved', the suit parcels were registered as private property in the name of Lonrho Agribusiness. The evidence on record further showed that up to the year 2000, when the titles for the suit parcels were surrendered, they had at all times been held as private property. The position that the suit parcels were private property up to the year 2000 was acknowledged by the Government when it compulsorily acquired certain portions thereof for the development and construction of public utilities including the Eldoret International Airport and Moi University School of Law Annex in the year 2000. The suit parcels, being private properties at the material time, could only be alienated or transferred by the registered owner, Lonrho Agribusiness, rather than by the President under the Government Lands Act (repealed).
11. Under section 3 of the Government Lands Act (repealed)the President's power to make grants or disposition in land was restricted to unalienated government land. Section 2 defined unalienated government land to mean Government land which was not for the time being leased to any other person, or in respect of which the Commissioner had not issued any letter of allotment.
12. Once an individual or entity acquired any unalienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmuted from public to private land. Such land was as a consequence, removed from the ambit and confines of the Government Lands Act (repealed) to the new legal regime conferring title to an entity other than the government and on such terms as shall be inscribed on the new title. The subject suit parcels, being land that was at the time private property vested in Lonrho Agribusiness did not fall within the category of unalienated government land envisaged under the Government Lands

Act (repealed)and the former President had no legal capacity and authority to allocate or confer any legitimate interest in the subject suit parcels to members of 1st respondent or any other entity.

13. The application by 1st respondent for allocation of the suit parcels was made to the 4th respondent, the Director of Land Adjudication, who did not have the capacity or mandate to allocate government land, if any. Only the 2nd respondent, the Commissioner of Lands, had the mandate to allocate government land.

14. There was no legitimate expectation for 1st respondent's members to be allocated the suit parcels. In determining whether legitimate expectation had been established, primacy must always be given to the requirement of legality which flowed from the constitutional principle and value of the rule of law, as articulated in article 10(2)(a) of the Constitution. Legality dictated that an action could only be undertaken if it was authorized by the law. A representation, promise, practice, conduct or an action outside the prescription of the law or undertaken by a person or entity without competent authority was illegal and could not give rise to legitimate expectation.

15. A squatter was a person who settled on property without any legal claim or title. The 1st respondent defined itself as an amalgamation of over 500 squatter families that had a legitimate claim and interest over the suit parcels. The 1st respondent's members were not in occupation of any of the suit parcels or the sub-divisions. No member of 1st respondent ever took actual physical possession of the suit parcels. They had never occupied it. The failure to take possession and occupy the land means that 1st respondent were not squatters on the suit parcels.

16. The 1st respondent's claim was based on heritage from their forefathers who became dispossessed of their land by the colonialists and subsequently became workers. That evidence could not support the claim by 1st respondent that they were squatters in the absence of occupation of the suit land.

17. The 1st respondent contended that upon the forceful eviction of its members' forefathers from the suit parcels in the 1920s, the said forefathers and their lineage worked on the suit parcels as farm hands. By then the parcels had since been adjudicated and titles issued. However, the 1st respondent did not answer whose workers were they, whether the farm owner own the land in question, whether workers could turn around and invoke the right to their place of work as squatters and if so, whether they could do so over 70 years later. The 1st respondent did not state who should shoulder the responsibility of compensating the claim, and neither did they note if it was a form of reparations to be paid on behalf of the colonialists. Members of 1st respondent were not squatters on the suit parcels and had no legal basis to bring a claim asserting a right to the suit parcels.

18. The consensual nature of a surrender was the cardinal ingredient of a surrender of lease. That was the essence of the proviso in section 44 of Registration of Titles Act (repealed) that proved that the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof.

19. The import of section 97(1) of the Evidence Act was that the extrinsic evidence generally excluded: where the intention of parties had been reduced to writing it was in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document. Extrinsic evidence could not be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document.

20. The intent or the consensual agreement between Lonrho Agribusiness and the Government of Kenya was for the conversion of the suit titles from leasehold under Registration of Titles Act (repealed) to freehold under the Registration of Land Act (repealed). The ELC and the Court of Appeal should have considered the deposition of R J Simiyu as corroborated by presentation 174 in determining the intent for the surrender. The letter from J P Hulme should not have overridden the credible testimony by R J Simiyu in the face of presentation 174 given the provisions of section 97(1) of the Evidence Act.

21. There was insufficient evidence to support the claim that Lonrho Agribusiness intended to surrender the suit properties for the allocation to 1st respondent. That was a serious question that the two superior courts below did not address their minds to. A company as a distinct legal entity from its promoters, directors or employees could only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.
22. The intent of surrender of the leasehold interest in the suit parcels was that the leasehold term to which the suit parcels were then held was to be surrendered and the same converted into a freehold interest with titles re-issued in the name of Lonrho Agribusiness as private property. There was nothing illegal or fraudulent in a process for surrender of a lease to enable the conversion of a title from a leasehold interest under the Registration of Titles Act (repealed) to a freehold interest under the Registered Land Act (repealed).
23. Upon the execution of the surrender instruments by both Lonrho Agribusiness and the Government of Kenya, the leasehold interest was extinguished and emerged in the freehold interest in terms of section 44 of the Registered Land Act (repealed). A surrender was the yielding up of the term of lease to the person who had the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion. Merger was the converse of surrender. A surrender occurred where the landlord acquired the lease; merger occurs where the tenant acquired the reversion. The underlying principle was the same in both; the lease was absorbed by the reversion and destroyed.
24. The doctrine of merger as codified in section 44 of the Registered Land Act (repealed) envisaged that as all inferior estates and interests in land were derived out of the fee simple, therefore, whenever a particular estate or limited interest in land vested in him who had the fee-simple of the same land, such particular estate or limited interest was immediately drowned in the fee. That was the essence of the principle *omne majus continent in se minus*, meaning the greater contains or embraces the less. Therefore, there was nothing untoward in Lonrho Agribusiness getting a freehold title in reversion under the RLA.
25. Upon the surrender and merger, a new registration section was created which were registered in the name of Lonrho Agribusiness. Those were subsequently sub-divided and sold to third parties. It followed that the subsequent sub-divisions and sale thereof to third parties, including 1st appellant, by Lonrho Agribusiness were done legally and procedurally.
26. The impugned judgment of the Court of Appeal violated their right to property. The Supreme Court disagreed with the findings of the ELC and the Court of Appeal and made a finding that the purpose of surrender of the titles of the suit properties was to enable their conversion from leasehold titles under the Registration of Titles Act (repealed) to freehold titles under the Registered Land Act (repealed).
27. The financial institutions which were a party to the instant cause were not purchasers but lenders. They could not possibly be described as innocent purchasers. They were financial institutions who advanced substantial sums of money to some of those parties who purchased the properties excised from the suit parcels from the registered owners on the security of their titles.

Appeal allowed.

Orders

i. *The consolidated appeal met the constitutional threshold under article 163(4)(a) of the Constitution.*
ii. *The superior courts below violated the appellants' right to fair hearing under article 50(1) of the Constitution.*
iii. *The proceedings at the trial court ought to have been conducted through taking of viva voce evidence.*
iv. *The 1st respondent did not have a legitimate expectation to acquire and be allocated the suit parcels.*
v. *The 1st respondent had no right to the suit parcels as its members were not squatters on the suit parcels.*

vi. *The intent for the surrender of the titles for the suit parcels was for conversion of their titles from leasehold interests under the Registration of Titles Act (repealed) to freehold interests under the Registered Land Act (repealed).*

Citations

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2. *Ali, Mwinyi Hamisi v Attorney General & another* Civil Appeal 125 of 1997; [1997] KECA 210 (KLR) - (Explained)
3. *Central Kenya Limited v Trust Bank Limited & 4 others* Civil Application 167 of 1996; [1996] KECA 130 (KLR) - (Explained)
4. *Chai, Nelson Kazungu & 9 others v Pwani University College* Civil Appeal 78 of 2016; [2017] KECA 135 (KLR) - (Explained)
5. *Chief Land Registrar & 4 others v Koech & 4 others* Civil Appeal 51 & 58 of 2016; [2018] KECA 27 (KLR) - (Explained)
6. *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others* Petition No 14, 14A, 14B and 14C of 2014 (Consolidated); [2014] eKLR - (Explained)
7. *Dina Management Limited v County Government of Mombasa & 5 others* Petition 8 (E010) of 2021; [2023] KESC 30 (KLR) - (Explained)
8. *Gudka v Dodhia* Civil Appeal 21 of 1980; [1982] KECA 36 (KLR) - (Explained)
9. *Kamere, Samuel v Lands Registrar, Kajiado* Civil Appeal 28 of 2005; [2015] KECA 644 (KLR) - (Explained)
10. *Kenya Airports Authority v Mitu-Bell Welfare Society, Attorney General & another* Civil Appeal 218 of 2014; [2016] KECA 432 (KLR) - (Explained)
11. *Kenya Petroleum Refineries v Hassan Ngoa & 53 others* Civil Suit 544 of 2000; [2013] KEHC 4787 (KLR) - (Explained)
12. *Kenya Revenue Authority v Export Trading Company Limited* Petition 20 of 2020; [2022] KESC 31 (KLR) - (Explained)
13. *Kidero & 4 others v Waititu & 4 others* Petition 18 & 20 of 2014; [2014] eKLR - (Explained)
14. *Kiluwa Limited & another v Business Liaison Company Limited & 3 others* Petition 14 of 2017; [2021] KESC 37 (KLR) - (Explained)
15. *Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others* Petition 45 of 2018; [2020] KESC 9 (KLR) - (Explained)
16. *Koinange & 13 others v Charles Karuga Koinange* Civil Suit 66 of 1984; [1986] KEHC 3 (KLR) - (Explained)
17. *Koinange & 13 others v Charles Karuga Koinange* Civil Suit 66 of 1984; [1986] KEHC 3 (KLR) - (Explained)
18. *Macharia v Kenya Commercial Bank Limited & 2 others* Application 2 of 2011; [2011] eKLR; [2012] 3 KLR 199 - (Explained)
19. *Mbugua, Margaret Nyokabi & 5 others v Ngenda New Farmers Co Ltd & 4 others* Environment & Land Case 84 of 2017; [2019] KEELC 1268 (KLR) - (Explained)
20. *Munya v Kithinji & 2 others* Petition 2B of 2014; [2014] eKLR; [2014] 1 KLR 58 - (Explained)
21. *Nduttu & 6000 others v Kenya Breweries Ltd & another* Petition 3 of 2012; [2012] eKLR; 2012] 2 KLR 804 - (Explained)
22. *Onditi v Kenya Commercial Finance Company Limited* Civil Appeal 329 of 2009; [2010] KECA 58 (KLR) - (Explained)

23. *Rai & 3 others v Rai Estate of & 4 others* SC Petition 4 of 2012; [2013] eKLR; [2013] 2 KLR 142 - (Explained)
24. *Republic v District Land Registrar, Nakuru Ex-Parte Lawi Kigen Kiplagat; Lee Maiyani Kinyanjui (Interested Party)* Environment & Land Case 1 of 2020; [2021] KEELC 3872 (KLR) - (Explained)
25. *Republic v Land Registrar & 3 others ex parte Aryan Limited* HC Misc Applic No 95 of 2012; [2016] eKLR - (Explained)
26. *Rutongot Farm Ltd v Kenya Forest Service & 3 others* Petition 2 of 2016; [2018] KESC 27 (KLR) - (Explained)
27. *Sanghani Investment Limited v Officer in charge Nairobi Remand & Allocation Prison* Miscellaneous Application No 99 of 2006; [2007] KEHC 2255 (KLR) - (Explained)
28. *Torino Enterprises Limited v Attorney General* Petition 5 (E006) of 2022; [2023] KESC 79 (KLR) - (Explained)
29. *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others* Civil Appeal 21 of 2014; [2015] eKLR - (Explained)
30. *Westmont power Kenya Ltd v Frederick & another t/a Continental Traders & Marketing* Civil Application 135 of 2003; [2013] eKLR; [2003] KLR 357 - (Explained)

United Kingdom

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Regional Court

RG Patel v Lalji Makanji [1957] EA 314 - (Explained)

Texts

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3. Garner, BA., (Ed) (2004), *Black's Law Dictionary* St Pauls Minnesota: Thomson West 8th Ed p 1439
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5. Harpum, RMC., & Megarry, R., (Ed) (2012), *The Law of Real Property* London: Sweet & Maxwell 8th Ed p 851
6. Hogg, QM., (Lord Hailsham) et al (Eds) (1995), *Halsbury's Laws England* London: Butterworth 4th Edn Vol 27 para 44
7. Mackay, J., (Lord Mackay of Clashfern) (Ed) (2002), *Halsbury's Laws of England* London: Butterworths LexisNexis; 4th Edn Reissue Vol 12 p 37 para 478

Statutes

Kenya

1. Civil Procedure Rules, 2010 (cap 21 Sub Leg) order 2 rule 10 - (Interpreted)
2. Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 (Constitution of Kenya Sub Leg) rule 20(1) - (Interpreted)
3. Constitution of Kenya articles 10(2); 19; 20; 21; 22; 23; 25(c); 27; 40(6); 47; 48; 50(2); 62; 163(4); 165 - (Interpreted)
4. Evidence Act (cap 80) section 97(1) - (Interpreted)
5. Government Land Act (Repealed) (cap 280) sections 2, 3 - (Interpreted)
6. Registered Land Act (Repealed) (cap 300) sections 27, 28 - (Cited)
7. Registration of Titles Act (Repealed) (cap 281) sections 2, 44 - (Interpreted)

Advocates

Mr Fred Ngatia, Senior Counsel for the 1st appellant (Ngatia & Associates)

Prof Tom Ojienda, Senior Counsel and *Ms Awuor* for the 2nd appellant (Prof Tom Ojienda & Associates)

Ms Karen Chesoo and *Ms Kesei* for the 3rd and 4th appellants (Kalya & Co Advocates)

Mr William Arusei and *Ms Julia Kiget* for the 1st respondent (Arusei & Co Advocates)

Mr Oscar Eredi and *Mr Odongo Mohammed* for the 2nd to 6th respondents (Attorney General's Chambers)

Ms Anne Odwa for the 9th respondent (Nyairo & Company Advocates)

Mr Zephaniah Yego for the 10th respondent (ZK Yego Law Offices)

Mr Moses Kipkogei, *Ms Achitsa* and *Ms Saina* for the 11th, 12th & 15th respondents(G & A Advocates LLP)

Mr Langat Kiprono for the 16th and 17th respondents (Mburu Maina & Co Advocates)

Ms Barbara Gichuhi for the 18th respondent (Waweru Gatonye & Co Advocates

JUDGMENT

A. Introduction

1. Three appeals were filed before this court, that is, petition No 32 (E036) of 2022 by Fanikiwa Limited (Fanikiwa), petition No 35 (E038) of 2022, by Mary Jepkemboi Too & Sophie Jelimo Too (suing as joint administrators *ad litem* of the estate of Mark Kiptarbei Too) (administrators of the estate of Mark Too), and petition No 36 (E039) of 2022 by Lonrho Agribusiness (EA) Ltd & David Korir The appeals which are dated November 21, 2022, December 14, 2022 and December 23, 2022, respectively, are anchored on article 163(4)(a) of the *Constitution*. Subsequently, by a consent order dated January 31, 2023, the three appeals were consolidated with Petition No 32 (E036) of 2022 designated as the lead file.

2. The consolidated appeal challenges the judgment of the Court of Appeal ((Kiage, M'Inoti & Mumbi Ngugi, JJA) in Civil Appeal No 45 of 2017 (consolidated with Civil Appeal No 44 & 68 of 2017) delivered on November 18, 2022. In a nutshell, the dispute that culminated in the consolidated appeal revolves around the ownership and/or entitlement to parcels which were registered as LR Nos 9606, 9607, 9608, 745, 742/2, 7739/7R, 12398, 10793 and 10794 in the former Uasin Gishu District (the suit parcels).

B. Background

i. Factual history

3. The suit parcels were registered under the repealed Registration of Titles Ordinance (subsequently referred to as the repealed *Registration of Titles Act* (RTA). The grants/titles to the suit parcels were first issued in favour of Plateau Wattle Company Ltd between 1958 and 1962 as leaseholds for periods ranging from 946 to 951 years. However, before the expiry of the leaseholds, Plateau Wattle Company transferred the suit parcels on March 26, 1965 to East Africa Tanning Extract Company for a consideration of Kshs 6,583,925. It is instructive to note that the East Africa Tanning Extract Company changed its name multiple times. Eventually, in 2000 it became Lonrho Agribusiness (East Africa) Limited (Lonrho Agribusiness), the 3rd appellant. On November 2, 2000, Lonrho Agribusiness surrendered the titles to the suit parcels to the government. The purpose of the surrender is a matter contested between the parties and marks the genesis of the dispute before the court. Nonetheless, upon the surrender, the suit parcels were subsequently registered under the repealed *Registered Land Act* (RLA) and freeholds titles issued thereto in favour of Lonrho Agribusiness. Thereafter, the suit parcels were sub-divided into various units that were eventually transferred to third parties.

ii.Litigation History

a. At the High Court and the Environment and Land Court

4. It is the sub-division of the suit parcels and the subsequent transfer of the sub- divided units to other parties that caused Sirikwa Squatters Group (Sirikwa) to file a petition in the High Court, HC Petition No 7 of 2012, on July 30, 2012. The petition was later amended on December 18, 2012 with leave of the court. However, on March 10, 2016, the matter was transferred to the Environment and Land Court (ELC) and assigned a new file number, ELC Petition No 4 of 2016.

5. Sirikwa described its membership as comprising of over 500 squatter families whose forefathers originally occupied the suit parcels. According to Sirikwa, the squatters' forefathers were evicted from the suit parcels in the early 1920s by white settlers. Sirikwa further maintained that, their said forefathers were hired as farm hands on the suit parcels by the same settlers. Thereafter, they claimed their lineage continued working as farm hands and labourers on the suit parcels for subsequent registered proprietors including Lonrho Agribusiness. It was Sirikwa's position that, throughout this entire timeline, its members pushed their employers and other agencies and offices to be settled on the suit parcels. Sirikwa in that regard claimed that, by an application dated October 22, 1998, it requested for allocation and settlement of the squatters on the suit parcels, and that on October 28, 1998 the request was directly approved by the then President, Daniel Toroitich Arap Moi.

6. Sirikwa asserted that the said approval and allocation of the suit parcels was evidenced by several correspondence from government offices and officers and specifically made reference to letters dated July 17, 2007, September 10, 2008 and September 10, 2010 from the Commissioner of Lands (the 2nd respondent) to the Attorney General (AG) confirming allocation of the suit parcels to Sirikwa and stating that the ministry of lands was in the process of formalizing the occupation of the squatters; letters dated October 11, 2001 and June 22, 2007 from the Director of Land Adjudication and Settlement (the 4th respondent) to the AG confirming allocation of the suit parcels to Sirikwa and letters dated May 14, 2008 and July 23, 2008 from the District Land Officer, Uasin Gishu District (the 6th respondent) to the 2nd respondent stating that the squatters could be settled on the suit parcels. As far as Sirikwa was concerned, Lonrho Agribusiness surrendered the titles to the suit parcels to the government for the sole purpose of settlement of its members. Therefore, Sirikwa contended that its members had a legitimate expectation to be registered as proprietors of the suit parcels.

7. Sirikwa further averred that, contrary to their expectation and by a letter dated May 31, 2012, the 6th respondent contended that the surrender of the titles to the suit parcels was for purposes of conversion of their registration regime from RTA to RLA and subsequent transfer of the sub-divisions thereof to respective beneficiaries other than themselves. Further, that Kennedy Kubasu (the 8th respondent), a private surveyor trading as Highland Surveyors (the 7th respondent), without authority entered into the suit parcels and carried out survey works thereon which resulted in the sub-divisions of the suit parcels. What was more, Sirikwa contended that Mark Too (deceased) and David Korir being the Chairman and Property Sales Manager of Lonrho Agribusiness, respectively, abused their positions by sub-dividing the suit parcels and allocating the sub-divisions thereof to themselves and their beneficiaries. Sirikwa also alleged that the 2nd, 3rd (Chief Registrar of Titles), 4th, 5th (Director of Survey) and 6th respondents also abused their powers by sanctioning the sub-divisions and transfers thereof. In addition, it claimed that the said respondents had jointly with Mark Too, Lonrho Agribusiness and David Korir sought to arbitrarily deprive the squatters of the suit parcels.

8. Overall, Sirikwa urged that the sub-division of the suit parcels and transfer thereof to third parties violated its members' right to property and was not only illegal but void. Towards that end, Sirikwa

sought a number of reliefs ranging from declarations to the effect that its members' right to property had been violated or was in danger of being violated; cancellation of all titles emanating from the suit parcels in favour of Lonrho Agribusiness and Mark Too as well as other third parties; an order directing the 2nd to the 6th respondents to issue titles over the suit parcels in favour of Sirikwa for purposes of allocating and resettling its members; and damages for violation of the squatters' right to property.

9. In response, the 4th respondent on behalf of the 2nd to 6th respondents, claimed that the suit parcels were surrendered by Lonrho Agribusiness for purposes of conversion of their tenure and registration regime from leasehold under RTA to freehold under RLA and subsequent subdivision and transfer. The 4th respondent further deposed that, following the conversion of the registration regime, the suit parcels and the resultant sub-divisions were registered under a new registration section known as Pioneer Ngeria Block 1 (EATEC) on or about January 23, 2001. The 4th respondent, in addition, pointed out that part of the suit parcels had earlier on been compulsorily acquired by the government in the year 2000 for setting up of the Moi Eldoret International Airport situate on LR No 20631.

10. The 4th respondent asserted that, at the time the titles were surrendered by Lonrho Agribusiness, the suit parcels were privately owned. Consequently, the suit parcels did not revert to the government to be administered as unalienated government land under the repealed *Government Land Act* (GLA). As such, the 4th respondent argued that the approval by the former President of Sirikwa's application for allocation could not constitute an allocation of the suit parcels to Sirikwa's members as the land did not belong to the government. Equally, the 4th respondent urged that the letters relied on by Sirikwa were written in ignorance of the status of the suit parcels at the time the said letters were issued. In any event, in the 4th respondent's view, the letters did not amount to legal instruments capable of conferring interest/title over the suit parcels. Further, the 4th respondent denied that the 2nd to the 6th respondents had abused their powers or violated the rights of Sirikwa's members and to the contrary, was of the view that the orders as sought by Sirikwa could not issue.

11. On his part, Mark Too described himself as a Director of Fanikiwa (at this point, Fanikiwa was not a party before ELC. He stated that he was the registered proprietor of Pioneer Ngeria Block 1(EATEC)/7079, 7080, 703, 7075, 7074, 7076, 7077, 7078 being sub-divisions of the suit parcels. He urged that he had lawfully purchased the parcels from Lonrho Agribusiness and paid full consideration and that, at the time of purchase, the parcels were vacant and he took possession immediately he had paid the consideration aforesaid. He added that, in accord with the sale agreement, he had several nominees who were to benefit from the said purchase and they had since received titles to their portions. He also claimed that he was aware that all genuine squatters had been settled in a land which had been allocated for that purpose. To that extent, he questioned the credibility of Sirikwa and its members. Moreover, Mark Too maintained that Sirikwa had not established any lawful ground to warrant cancellation of his titles to the sub-divisions.

12. In opposing the petition, David Korir described himself as Lonrho Agribusiness' Property Manager. He averred that the suit parcels claimed by Sirikwa did not exist since they had not only been converted and registered under RLA but had also been sub-divided and new titles thereto created. He urged that the sub-divisions had been sold to third parties with the approval of the government, and it followed that Lonrho Agribusiness no longer owned any of the parcels claimed by Sirikwa. It was his contention that since ownership had passed to third parties, the orders sought were incapable of enforcement and in any event, during the process of sub-division and sale, the government had set aside land to allocate to eligible squatters who were never members of Sirikwa.

13. The petition was prosecuted by way of affidavits and written submissions as per the directions that were issued by the High Court (Ngenye, J, as she then was) on August 13, 2014 prior to the transfer

of the matter to ELC. Upon considering the pleadings and parties' respective submissions, the ELC (Ombwayo, J) by a judgment dated February 9, 2017 distilled the following three issues as arising for determination: whether the petitioner's (Sirikwa) members had legitimate expectation to acquire and be allocated property; whether the disputed parcels of land were private or public land upon surrender; and which remedies should the court grant.

14. On the issue of legitimate expectation, the court found that Lonrho Agribusiness had surrendered titles to the suit parcels for purposes of allocation to the members of Sirikwa. In that regard, the court was persuaded by the letters relied on by Sirikwa, exchanged between various government departments, which spoke to the presidential approval for allocation of the suit parcels to its members. Consequently, the court held that the members of Sirikwa had a legitimate expectation to be registered as owners of the suit parcels.

15. On whether the suit parcels were public or private land after the surrender, the court considered the registration and proprietorship history of the suit parcels prior to the surrender. It found that the import of the said history was that the suit parcels had always been alienated government land allocated to a private company. However, according to the court, the import of section 44 of the *RTA* was that upon surrender of a lease in respect of government land, the same reverts to the government to be allocated pursuant to the provisions of the GLA. Likewise, the court held that titles to the suit parcels reverted to the government upon surrender and were to be managed under the GLA as opposed to being converted to the regime under RLA. Therefore, the court found that the said conversion was unlawful and that all the transactions that followed thereafter were a nullity.

16. On remedies, the court having found that Sirikwa had established its claim under legitimate expectation allowed the amended petition and issued the following reliefs:

    a. An order directing the 2nd to 6th respondents to issue title deeds for the suit parcels in the name of Sirikwa to resettle and allocate its members.

    b. A declaration that Sirikwa's members' right to property and/or interest over the suit parcels had been violated and that the suit parcels were in real danger of being arbitrarily acquired by Lonrho Agribusiness, Mark Too, David Korir, the 7th and 8th respondents and their beneficiaries to their detriment.

    c. A declaration that the acts of the 7th and 8th respondents of carrying out survey works on suit parcels without the authority of the Director of Survey was illegal and of no effect.

    d. A declaration that the acts of Lonrho Agribusiness, Mark Too and David Korir of unlawfully attempting to deprive Sirikwa's members their allotted suit parcels were without any legal basis and unconstitutional.

    e. The court hereby forthwith cancels all the resultant titles or any title issued and/or emanating from the suit parcels to Lonrho Agribusiness, Mark Too and all other beneficiaries and the register be rectified accordingly.

17. Notwithstanding the above findings, the court went on to find that it had not been established that Mark Too had been involved in any fraud or wrong doing. As a result, the court directed that he be allocated not less than 27 hectares of the suit parcels and in the meantime, status quo be maintained in respect of approximately the 27 hectares occupied and utilized by Mark Too.

18. Upon delivery of the said judgment, the AG by an application dated April 5, 2017 sought review of the judgment on the basis that there was an error apparent on the face of the record. The error being that the court should have excluded all public utilities such as the Eldoret International Airport, Moi

University, public roads, public schools and all administrative centres on the suit parcels from the parcels granted to members of Sirikwa. By a ruling dated 10th November 2017, the ELC (Ombwayo, J) allowed the application and reviewed its judgment, to the extent sought.

b. At the Court of Appeal

19. Aggrieved by the ELC's judgment, various parties moved the Court of Appeal by way of three appeals and a cross appeal. Lonrho Agribusiness and David Korir, filed Eldoret Civil Appeal No 44 of 2017; Fanikiwa filed Eldoret Civil Appeal No 45 of 2017; and the administrators of the Estate of Mark Too filed Civil Appeal No 68 of 2017.

20. Lonrho Agribusiness and David Korir faulted the learned trial judge for finding that Sirikwa had legitimate expectation to the suit parcels; for holding that conversion of the titles to the suit parcels was unlawful; for failing to hold that the suit parcels were private property; and for failing to hear many affected parties. Fanikiwa complained that the learned judge erred by cancelling its titles carved out of the suit parcels and registered in its name, without affording it an opportunity to be heard. The administrators of the Estate of Mark Too faulted the learned judge for holding that the suit parcels were surrendered for purposes of settling the members of Sirikwa, and for cancelling indefeasible titles. On its part, Sirikwa filed a cross appeal challenging the learned judge's finding that Mr Mark Too had legitimately acquired 27 hectares of the suit parcels. The three appeals were consolidated pursuant to a consent order adopted by the Court of Appeal on February 7, 2019, with Civil Appeal No 45 of 2017 being designated as the lead file.

21. It is imperative to note that due to the far-reaching effect and implication of ELC's judgment, the Court of Appeal by an order dated October 1, 2018 directed Fanikiwa to publish within 14 days, a notice in one of the daily newspapers with wide circulation, notifying the general public of the judgment of the trial court and the existence of the three appeals. The notice was carried in the Daily Nation Newspaper on October 15, 2018. Pursuant to this notice, 78 individuals and 7 financial institutions applied and were joined to the consolidated appeal by a ruling dated October 17, 2019. The 78 individuals are Ahmed Ferej & 60 others (the 9th respondent), Richard Kirui & 15 others (the 10th respondent) and Milly Chebet (the 14th respondent). The 78 individuals claimed that they had purchased the sub-divided suit parcels and were registered as proprietors thereof. The 7 financial institutions were Stanbic Limited (the 11th respondent) Kenya Commercial Bank Limited (the 12th respondent), Eco Bank Limited (the 13th respondent), National Bank of Kenya Limited (the 15th respondent), Kenya Women Micro-Finance Bank (the 16th respondent), Commercial Bank of Africa (the 17th respondent), and Co-operative Bank of Kenya (the 18th respondent). These financial institutions held charges over titles to the sub-divided suit parcels which had been sold and registered in favour of third parties.

22. In its appeal, Fanikiwa argued that it was not a party to the proceedings before the ELC and as a result, its right to property had been extinguished without being heard contrary to article 50 of the Constitution. It was contended that the ELC misapprehended the doctrine of legitimate expectation since at the time of the alleged approval by the late President, the suit parcels were unavailable for allocation under the *GLA* as they were private land. Fanikiwa submitted that the presidential approval was granted in 1998 before the surrender of the titles to the suit parcels in 2000. Therefore, in its opinion, the consequent approvals by government officers were void and of no legal effect. Moreover, Fanikiwa asserted that the suit parcels were surrendered for purposes of conversion to the *RLA* regime; to facilitate subdivision and subsequent transfers. Following the conversion, transfers and registration, the titles to the suit parcels were indefeasible by virtue of sections 27 and 28 of the *RLA*. Also, as a corollary to the above, there were no allegations of fraud which could have led to drastic cancellation

of title. Finally, Fanikiwa posited that the members of Sirikwa were not squatters as they were not in occupation of any of its registered parcels and there was no evidence adduced to prove that they are members of the families that were displaced by the colonialists from the suit parcels.

23. The parties who were joined to the proceedings supported the consolidated appeal. The 78 individuals joined issues with Fanikiwa and urged that they were innocent purchasers for value of various titles excised from the suit parcels. Moreover, it was their case that their titles were legally acquired, valid and indefeasible. Similarly, the financial institutions urged that they held valid charges totalling to millions of Kenya shillings over some of the nullified titles. They thus urged that, upon nullification of the charged titles by the ELC, they were left holding worthless securities for no fault of their own; and they stood to suffer massive irreparable loses.

24. In response, Sirikwa reiterated its case before the ELC. With regard to the right to be heard, it urged that Fanikiwa and the joined parties were well aware of the proceedings before the trial court but chose not to participate and therefore, could not allege violation of the right to be heard. On indefeasibility of title, Sirikwa submitted that under article 40(6) of the Constitution, protection of the right to property did not extend to unlawfully acquired property. On the cross appeal, it contended that, having found the conversion of the titles to the suit parcels and the subsequent sale were vitiated by fraud, the trial court erred by upholding the validity of Mark Too's titles.

25. Upon considering the pleadings and parties respective submissions, the Court of Appeal (Kiage, M'Inoti & Mumbi Ngugi, JJA) by a judgment delivered on November 18, 2022 identified five issues for its determination: whether Fanikiwa's right to be heard as well as that of the joined parties were violated; whether Sirikwa's legitimate expectation could override express provisions of the law; whether, upon conversion from *RTA* to *RLA*, the titles acquired by Fanikiwa and the joined parties were indefeasible; whether the allocation of the suit parcels to Sirikwa was legitimate; and whether the titles held by Fanikiwa and the joined respondents arising from the suit parcels were legitimate.

26. On violation of the right to be heard, the appellate court found that the 9th to 18th respondents were only notified of the proceedings before the ELC and the judgment therein by the public notice. Consequently, they were not afforded the right to be heard before cancellation of their titles. Turning to Fanikiwa, the court found that there was a close nexus between Mark Too and Fanikiwa as Mr Mark Too had described himself as a majority shareholder as well as a Director of the latter. Therefore, the court held that since Fanikiwa had elected to stand-by and watch the proceedings play out, it could not purport that its right to be heard had been contravened. On the assertion that the petition should have proceeded by way of *viva voce* evidence, the court, guided by rule 20(1) of the *Constitution of Kenya (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013* (the Mutunga Rules), found that hearing by way of affidavit evidence is permitted and there was no impropriety committed by the trial court in doing so. It further observed that in any event, directions dated August 13, 2014 directing the matter to be heard by way of written submissions were never challenged through an appeal by any party.

27. On the issue of legitimate expectation, the appellate court, like the ELC, found that Sirikwa had proved that it had a legitimate and enforceable expectation that it would be allocated the suit parcels. The court went on to hold that the promise and commitment to Sirikwa did not violate any law. Furthermore, it cautioned that it would be unconscionable and untenable for the government, in the face of such express, unambiguous and consistently repeated promises and representation, to be allowed to retract the same, on account of procedural steps its relevant officers ought to have undertaken to meet the legitimate expectation.

28. On indefeasibility of the titles, upon extensive evaluation of the evidence before it, the appellate court found that Fanikiwa and Mark Too were well aware of the purpose of the surrender due to their close proximity with Lonrho Agribusiness. Therefore, the court was not convinced by their assertions to the effect that they were bona fide purchasers for value and without notice. The court also found that there was no evidence on record that any consideration was paid following the alleged purchase from Lonrho Agribusiness. Turning to the 78 individuals and the financial institutions joined to the appeal, the court was satisfied that they were true innocent purchasers for value without notice. The court found that there was nothing to suggest that they were party to any fraud, misrepresentation or mistake in the acquisition of their titles to the sub-divisions of the suit parcels. Accordingly, the court upheld the validity of their titles. Finally, as regards the cross appeal, the court, having found that Mark Too was part and parcel of the misrepresentation and fraudulent allocation and transfer of the sub-divisions to himself and Fanikiwa, found instead that the titles registered in his favour were unworthy of protection by the court.

29. In the end, the Court of Appeal issued the following reliefs:

    i. The consolidated appeal is hereby dismissed.

    ii. The judgment of the Environment and Land Court dated February 9, 2017 is varied to the extent that the nullification of the titles of the individual and financial institution respondents who were joined to this appeal is hereby set aside.

    iii. The cross appeal by Sirikwa is hereby allowed.

    iv. Costs of the consolidated appeal and cross appeal shall be borne by the appellants.

c. At the Supreme Court

30. The appellants filed their respective appeals as set out in the opening paragraph of this judgment, which were eventually, consolidated.

31. Cumulatively, the appellants raised several grounds of appeal which can be summarized as follows - that the Court of Appeal erred by;

    i. Upholding the cancellation of Fanikiwa's titles to its properties and cancelling Mark Too's titles without affording them an opportunity to be heard contrary to articles 25(c), 27, 47, 48 and 50(2) of the *Constitution*; and without a *viva voce* hearing to test the veracity of the letters relied on by Sirikwa;

    ii. Usurping the jurisdiction of the trial court and, suo motu, finding that Fanikiwa fraudulently acquired its titles without giving it a chance to defend its acquisition in violation of article 25(c), 40, 47, 48 and 50(2) of the *Constitution*;

    iii. Ignoring the tenets of the doctrine of legitimate expectation by finding that legitimate expectation can override the express provisions of the law;

    iv. Failing to find that the promise made by the retired President to allocate or resettle Sirikwa's members on the suit parcels was illegal, null and void on account of the suit parcels being private properties; and

    v. Holding without any legal basis that the surrender by Lonrho Agribusiness of the titles to the suit parcels was for allocation to Sirikwa's members;

32. The appellants further sought the following common reliefs:

a. The consolidated appeal be allowed;

b. The Judgment and orders of the trial and appellate court be set aside in entirety;

c. The costs of the appeals;

d. Any other or further relief that this court may deem fit to grant;

e. In addition, Fanikiwa sought a permanent injunction restraining Sirikwa, its agents, members, servants, employees and/or representatives from entering, taking possession of and in any other manner interfering with its quiet possession of the suit properties described as LR No Pioneer/ Ngeria Block 1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495 and 5902; and

f. Lonrho Agribusiness and David Korir sought a declaration that the finding by the superior courts below to the effect that the retired President's approval of allocation of the suit parcels and the subsequent surrender of the titles was for purposes of settling Sirikwa's members grossly violated and arbitrarily deprived Lonrho Agribusiness interest or right over the suit parcels as guaranteed under article 40 of the Constitution.

33. In response, the 2nd to the 6th respondents, the 9th and 10th respondents supported the appeals as consolidated.

34. On its part, Sirikwa opposed the consolidated appeal and also raised a preliminary objection. The preliminary objection was to the effect that this court lacked jurisdiction to entertain the consolidated appeal since it does not meet the threshold of a case involving interpretation and application of the Constitution as espoused in *Lawrence Nduttu & 6000 others v Kenya Breweries Ltd & another*, SC Petition No 3 of 2012; [2012] eKLR (Lawrence Nduttu).

35. The 11th, 12th, 15th, 16th, 17th and 18th respondents also opposed the consolidated appeal, but only to the extent, that it sought to set aside the Court of Appeal's finding with respect to the titles to the sub-divisions which had been charged by the financial institutions. It is important to note that the 7th, 8th 13th and 14th respondents did not appear when the consolidated appeal was heard by this court.

C. Parties' Submissions

i. Fanikiwa

36. According to Fanikiwa, the preliminary objection raised by Sirikwa is at best frivolous and ill-conceived since several constitutional issues were raised and adjudicated by the superior courts below. Fanikiwa argued that, from a clear reading of the petition before the ELC and the appeals in the Court of Appeal, the superior courts below were called upon to determine various constitutional rights that were claimed by Sirikwa.

37. Fanikiwa submitted that the Court of Appeal erred in finding that Lonrho Agribusiness had conferred five of the suit parcels for the resettlement of Sirikwa's members by virtue of a letter dated November 9, 2000 under the hand of Mr Hulme, who allegedly was Lonrho Agribusiness' General Manager. It posited that no evidence was adduced to establish that Mr Hulme was the General Manager on the said date or that he had authority to confer and/or surrender the suit parcels or that he issued the letter in question. In addition, it is Fanikiwa's position that the Court of Appeal erred by holding that Mark Too used his position as the Chairman of Lonrho Agribusiness to fraudulently acquire the suit

parcels. It urged that the correct position is that Mr Mark Too had resigned from Lonrho Agribusiness in September, 2000 and that its titles were impeached on account of perceived close proximity with Mark Too yet at the time of purchasing the sub-divisions in 2003, Mr Mark Too had no affiliation to Lonrho Agribusiness.

38. Fanikiwa further asserted that, sometime in 2003, it purchased from Lonrho Agribusiness sub-divisions of the suit parcels namely Pioneer Ngeria Block 1 (EATEC) 7070, 5903,7068,3395,2454,476,1860,474,5497, 5494, 5492,5489, 5486, 1384, 1383, 5484, 474, 472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 5495 and 5902 measuring approximately 2756 acres for valuable consideration, that is, Sterling Pound 1 Million plus Kshs 31 million. The conveyance in respect of the sub-divisions was completed in 2005. It followed therefore that the ownership of the sub-divisions had been vested upon Fanikiwa as a bona fide purchaser for value by the time the suit was filed at the High Court. Consequently, the impugned decision had violated its right to property.

39. Fanikiwa furthermore argued that the Court of Appeal erred in misconstruing the tenets of the doctrine of legitimate expectation because the alleged 'approval' by the late President Moi could not override the rights of a registered proprietor. Besides, at the time of the said approval, the land was not unalienated government land capable of being allocated to Sirikwa or any other entity by the President. In that regard, it cited section 3 of the *GLA*.

40. Fanikiwa, in addition, submitted that the promise by the 4th respondent to allocate land was illegal and unenforceable as such mandate was vested in the Commissioner of Lands and not the 4th respondent. It thus urged that Sirikwa did not produce and tender in evidence any Letter of Allotment as required. To bolster this point, it cited the case of *Dina Management Limited v County Government of Mombasa & 5 others*, SC Petition No 8 (E010) of 2021; [2023] KESC 30 (KLR) (Dina Management Limited). Fanikiwa argued in that context that, it was contradictory for the appellate court to cancel its titles and spare those held as security by financial institutions on the basis that there was no evidence of fraud, misrepresentation or mistake in registration of the said titles.

41. Fanikiwa contended that its right to a fair hearing was violated by the appellate court in holding that the perceived wrongs by the late Mark Too were *ipso facto* wrongs committed by Fanikiwa, yet, they are distinct legal entities. It posited that it ought to have been given an opportunity to defend itself in the trial court and that the Court of Appeal failed to appreciate that what was tendered as evidence by Sirikwa at the trial court were copies of alleged letters and handwritten inscriptions on the letters whose authors were not called upon to adduce evidence. It cited the case of *Sanghani Investment Limited v Officer in charge Nairobi Remand & Allocation Prison*, HC Misc Applic No 99 of 2006; [2007] eKLR where the court held that copies of documents would not be sufficient to establish authenticity of a title and that original documents need to be produced at a full hearing where oral evidence would be adduced. It also cited the case of *Republic v Land Registrar & 3 others ex parte Aryan Limited*, HC Misc Applic No 95 of 2012; [2016] eKLR and *Republic v District Land Registrar, Nakuru ex parte Lawi Kigen Kiplagat; Lee Maiyani Kinyanjui (interested party)*, ELC JR No 1 of 2020; [2021] eKLR on the import of *viva voce* hearing in such circumstances.

ii. Administrators of the Estate of Mark Too

42. The above administrators' submissions on the preliminary objection and the consolidated appeal were more or less similar to those of Fanikiwa. On the right to fair hearing, they submitted that the judgment of the ELC violated their right to fair hearing under article 50 of the *Constitution* by cancelling Mark Too's titles in the absence of *viva voce* evidence, thereby adjudging Mark Too guilty of fraud on mere presumptions without any evidence. They also argued that mere affidavit evidence was not a sufficient

basis to nullify Mark Too's titles and that a title can only be cancelled and/or revoked upon proof of illegal conduct on the part of the proprietor. They thus insisted that the finding that Mark Too was guilty of fraud based on affidavit evidence amounted to presuming criminal conduct on an individual without the allegations being tested. They relied on the case of *Sanghani Investment Limited v Officer in charge Nairobi Remand and Allocation Prison* (*supra*) in support of this assertion.

43. They submitted in addition that the Court of Appeal misapplied the doctrine of legitimate expectation by finding that the members of Sirikwa had established their claim as falling within the ambit of the said doctrine. It was their case that former President Moi did not have the power to allocate private property as doing so would violate the provisions of article 40 of the *Constitution*. They cited *Kenya Airports Authority v Mitu Bell Society & 2 others*, Civil Appeal No 218 of 2024; [2016] eKLR and *Nelson Kazungu Chai & 9 others v Pwani University College*, Civil Appeal No 78 of 2016; [2017] eKLR to support this proposition. In any event, they claimed that at the time of the purported allotment by the former President, Lonrho Agribusiness was still the registered owner of the suit parcels and its right of ownership was only subject to the provisions of sections 27 and 28 of the *RLA* and not any other law including the *GLA*. As such, the suit parcels were not available for allotment. In conclusion, they submitted that Mark Too had purchased the sub- divided suit parcels between 2003 and 2008 long after he had resigned from Lonrho Agribusiness in the year 2000 and was an innocent purchaser for value and possessed indefeasible titles under the *RLA*.

iii. Lonrho Agribusiness and David Korir

44. Likewise, the 3rd and 4th appellants maintained that the consolidated appeal fell within the purview of article 163(4)(a) of the *Constitution* and reiterated their position in the ELC and Court of Appeal, that Lonrho Agribusiness was the registered proprietor of the suit parcels and that it had exercised its proprietorship right to surrender the titles thereto. They submitted that the purpose of the surrender by Lonrho Agribusiness is evident in the entry of the title to LR No 9608 (IR No 14209) registered on November 2, 2000 which entry confirms that the surrender to the government was for conversion of the leasehold titles to freehold titles and not allocation to squatters. As such, the suit parcels were private property incapable of being allocated as public land. They further submitted that, Lonrho Agribusiness, as the proprietor of the suit parcels lawfully subdivided the same, sold and transferred the sub-divisions thereof to third parties. Besides, they contended that Sirikwa had not established fraud on the part of Lonrho Agribusiness and David Korir to the required standard and cited *RG Patel v Lalji Makanji* [1957] EA 314 and *Koinange & 13 others v Koinange* [1968] KLR 23 to reinforce this submission. They also contended that Sirikwa's claim to the suit parcels on the basis of legitimate expectation did not hold any weight as the President's power was only limited to allocating unalienated government land and not private land.

In support of the consolidated appeal

iv. The 2nd to 6th respondents

45. The 2nd to 6th respondents supported the consolidated appeal in the same vein they had articulated before the superior courts below. They posited that the following pertinent questions arise regarding the alleged direct approval by the late President Moi; whether the President had legal and legitimate authority to deal with the suit parcels; whether the allocation was a futuristic desire or whether it conferred any legitimate right and what was the intention of the proprietor of the suit parcels during surrender. It is their submission in that context that the suit parcels were private properties registered in the name of Lonrho Agribusiness and had not been surrendered back to the government as alleged by Sirikwa. The President therefore had no mandate to allocate private land or confer any legitimate interest to Sirikwa and that the intention of the surrender to the government was solely for the purpose

of conversion from leasehold tenure under *RTA* to freehold under *RLA* and subsequent subdivision, sale and transfer to third parties.

46. Lastly, they contended that Sirikwa's members did not meet the threshold of being described as squatters as they were not in occupation of any portion of the suit parcels. In that regard, they made reference to the definition of squatters in the *Black's Law Dictionary* and the case of *Kenya Petroleum Refineries v Hassan Ngoa & 53 others*, HC Civil Suit No 544 of 2000; [2013] eKLR.

v. The 9th respondent

47. The 9th respondent, who were joined at the Court of Appeal, as set out earlier, are individuals registered as proprietors of some of the sub-divisions of the suit parcels. They supported the Court of Appeal's finding that upheld their titles to the sub- divisions of the suit parcels on the basis that they had not been afforded an opportunity to be heard by the ELC and that they were innocent purchasers. However, they faulted the Court of Appeal's judgment on the finding that Fanikiwa was given an opportunity to be heard at the trial court yet it was not a party in the said proceedings. They therefore urged this court to set aside the impugned judgment and exempt titles belonging not only to Fanikiwa but also to individuals/institutions who were not parties to the proceedings before the ELC and the Court of Appeal.

vi. The 10th respondent

48. The 10th respondent are individuals registered as proprietors to some of the sub- divisions of the suit parcels. Like the 9th respondent, they urged that the Court of Appeal rightly upheld the sanctity of their titles as they were innocent purchasers for value without notice. In their opinion, Sirikwa's members did not have a lawful claim to the suit parcels since they were privately owned. Further, that Lonrho Agribusiness had established that it was the legitimate proprietor of the suit parcels which meant that titles held by subsequent purchasers of the sub-divisions thereof, including the 10th respondent, were indefeasible. Therefore, they asked the court to protect the sanctity of not only their titles but also of other innocent purchasers.

In opposition to the consolidated appeal

vii. Sirikwa

49. With regard to the preliminary objection, Sirikwa maintained that this court lacked jurisdiction to entertain the consolidated appeal as it did not fall within the purview of article 163(4)(a) as invoked by the appellants. Towards that end, Sirikwa reiterated the grounds of its preliminary objection as set out above.

50. Sirikwa further reiterated its case before the trial court and the appellate court. As far as it was concerned, the superior courts below properly analysed the evidence and correctly found that its members were entitled to the suit parcels by virtue of the doctrine of legitimate expectation. It submitted that the issue of whether the petition before the ELC should have been disposed by *viva voce* evidence was never raised or challenged in the Court of Appeal and could not therefore be raised at this stage.

51. Pertaining to conversion of the titles of the suit parcels, it was Sirikwa's submission that the Court of Appeal correctly found that the proper procedure for the conversion alluded to had not been followed. Consequently, everything else that followed the purported conversion was a nullity. Moreover, it asserted that the Court of Appeal properly disabused Fanikiwa's claim of being an innocent purchaser for value. Further, that Mark Too described himself before the ELC as Fanikiwa's Director and a

majority shareholder, which admission Fanikiwa cannot run away from. Sirikwa further submitted that the appellate court exhaustively analysed the case before it and correctly concluded on the central issue of fraudulent dealings by the appellants, which a court of law would not lend its hand to aid.

52. On the right to a fair hearing, Sirikwa contended that it is legally and factually incorrect for the appellants to claim that they were denied a hearing before the ELC and the Court of Appeal because they were heard and a decision fairly made against them.

viii. The 11th, 12th and 15th respondents

53. The 11th, 12th and 15th respondents are financial institutions which were joined at the Court of Appeal on the basis of charges they hold over some of the sub-divisions of the suit parcels. The totality of their submissions was that the charged titles in respect of the sub-divisions of the suit parcels which are held as security by themselves are indefeasible because there was no proof that the said titles were obtained through fraudulent or illegal means. Towards this end, they asked this Court to uphold the Court of Appeal's judgment wherein it set aside the trial court's judgment nullifying the titles charged by the financial institutions aforesaid.

ix. The 16th and 17th respondents

54. The 16th and 17th respondents are also financial institutional which were joined by the Court of Appeal due to the securities they hold over the titles to sub-divisions of the suit parcels. Their position echoed that held by the 11th, 12th and 15th respondents and they equally urged the court to uphold the Court of Appeal's judgment wherein it set aside the trial court's judgment nullifying the titles charged by financial institutions.

x. The 18th respondent

55. The 18th respondent is also a financial institution and held the same position as the 11th, 12th, 15th, 16th and 17th respondents which position has been summarized above.

D. Analysis

56. Upon deliberation on the consolidated appeal, it is our view, that its determination will turn on the following issues:

    i. Whether the consolidated appeal meets the constitutional threshold under article 163(4)(a) of the *Constitution*.

    ii. Whether the appellants' right to fair hearing under article 50(1) of the *Constitution* was violated by the appellate court's cancellation of their titles.

    iii. Whether the proceedings ought to have been through *viva voce* evidence at the trial court.

    iv. Whether Sirikwa had a legitimate expectation to acquire and be allocated the suit parcels.

    v. Whether Sirikwa has a right to the suit parcels on account of its members being squatters on the suit parcels.

    vi. What was the intent for the surrender of the titles to the suit parcels?

    vii. Costs and available relief(s).

    We now turn to the determination of these issues.

i. Whether the consolidated appeal meets the constitutional threshold under article 163(4)(a) of the Constitution.

57. Sirikwa filed a preliminary objection dated January 18, 2023 contesting this court's jurisdiction to entertain the consolidated appeal on the basis that it does not fall within the purview of article 163(4)(a) of the *Constitution* as invoked by the appellants. It argued in sum, that the consolidated appeal does not come within the purview of the principles set out in *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others*, SC Petition No 2B of 2014; [2014] eKLR, *Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others*, SC Petition No 18 of 2014 as consolidated with SC Petition No 20 of 2014; [2014] eKLR and *Lawrence Nduttu*. Sirikwa further submitted that the Court of Appeal's judgment did not turn on article 40 of the *Constitution* and that the consolidated appeal has nothing to do with the interpretation and application of the Constitution and that both superior courts below did not make any determination that warrants the intervention of this court under article 163(4)(a) of the *Constitution* and so it ought to be struck out in limine.

58. As noted earlier in this judgment, the appellants on the other hand, opposed the preliminary objection and maintained that the questions in issue at both the ELC and Court of Appeal were constitutional matters and both superior courts disposed of the matter after interpreting and applying the *Constitution*.

59. They added that the *Constitution*, in article 163(4)(a), provides that appeals shall lie from the Court of Appeal to the Supreme Court as of right in any case involving the interpretation or application of this *Constitution* and they have correctly invoked that jurisdiction. Moreover, the matter was initially filed in the High Court as a constitutional petition.

60. In determining the preliminary objection, we are alive to the fact that this court has held, time without number, that a court's jurisdiction is a vital ever-germane issue that must be dispensed with at the onset given that without it, a court must down its tools. In *Samuel Kamau Macharia v Kenya Commercial Bank Limited & 2 others*, SC Application No 2 of 2011; [2012] eKLR, we rendered ourselves as follows at paragraph 68:

> " A court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

61. In *Lawrence Nduttu andBenson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others*, SC Petition No 3 of 2020; [2020] eKLR, we held that, to bring forth an appeal pursuant to article 163(4)(a) of the *Constitution*, it must be demonstrated that the issues of contestation involve the interpretation or application of the Constitution, which constitutional issues have been considered and determined by the superior courts below. It is that interpretation or application of the *Constitution* by the appellate court that forms the basis of a challenge before this court.

62. More recently in P*aul Mungai Kimani & 20 others (on behalf of themselves and all members of Korogocho Owners Welfare Association) v Attorney-General & 2 others*, SC Petition No 45 of 2018; [2020] eKLR at paragraph 62, we set out some attributes which ought to be used to assess whether a cause lies under article 1634)(a) of the *Constitution*. Observing that this is an appellate court with a very qualified jurisdiction, we stated that not every issue that was before the superior courts below is nonetheless open for this court's determination in exercise of its appellate jurisdiction under article 163(4)(a).

63. In *Rutongot Farm Limited v Kenya Forest Service & 3 others* SC Petition No 2 of 2016; [2018] eKLR, we held that the mere clothing of an appeal or intended appeal as a question of constitutional interpretation or application does not grant jurisdiction to this court. Matters of fact that touch on evidence without any constitutional underpinning are not open for this court's review on appeal in exercise of its article 163(4)(a) jurisdiction. We also emphasise that each case will turn on its own peculiar facts.

64. With this in mind, we now turn to establish whether we can entertain this matter. The appellants want us to determine whether they were deprived of their right to property contrary to article 40 of the *Constitution*, whether their right to fair hearing was breached because there was no *viva voce* evidence adduced before their titles were cancelled, and whether the appellate court ignored the tenets of the doctrine of legitimate expectation in violation of article 47 of the *Constitution*.

65. We pause here to point out that this case is unique in that Fanikiwa was not a party in the ELC and only became a party in the Court of Appeal where it alleged breach of its property rights. Having observed thus, it is important to note that, in fact it is Sirikwa, which had initially filed a constitutional petition in the High Court (later transferred to ELC) in which it sought constitutional remedies for violation and/or infringement of their constitutional rights under articles 19, 20, 21, 22, 23, 35, 40, 47 and 165 of the *Constitution of Kenya*. It further claimed that its members' rights to own the suit parcels were violated, which rights arose out of the doctrine of legitimate expectation. They sought in that regard a declaration that their constitutional right to property and/or interest in the suit parcels ought to be protected by the ELC; a declaration that their rights and fundamental freedom and in particular, the protection of right to property and/or interest over the suit parcels had been violated and/or infringed or was about to be violated and damages for breach and/or violation of their constitutional rights.

66. We further note from the record that the learned trial judge interpreted and applied the constitutional provisions invoked by Sirikwa. The trial judge specifically framed three issues as already noted above in this judgment. That is, whether the petitioner's (Sirikwa) members had legitimate expectation to acquire and be allocated property; whether the disputed parcels of land were private or public land upon surrender; and which remedies should the court grant. The trial judge then came to the conclusion that Sirikwa's members had a legitimate expectation to be registered as owners of the suit parcels and therefore, cancelled all the appellants' titles which had emanated from the suit parcels which prompted the appeal in the Court of Appeal. With specific reference to article 40 of the *Constitution*, which is central to the right to property, the learned trial judge stated:

> "The import of this article of the constitution of Kenya is twofold. The 1st instance is that it provides for the right to own property and the 2nd instance is that the property acquired should be protected by the state on condition that it was lawfully acquired. This court finds that the titles issued to the 7th respondent (Mark Too) were issued against the legitimate expectation of the petitioners (Sirikwa) who had been promised by the 6th respondent (Lonrho Agribusiness) and the Government of Kenya that they would be allocated the land."

67. At the appellate court, Fanikiwa argued that it was not a party to the proceedings before the ELC and as a result, its right to property was extinguished without being heard contrary to article 50 of the Constitution. It also argued that the ELC misapprehended the doctrine of legitimate expectation. The appellate court on its part, considered and made findings on articles 47, 50 relating to fair hearing,

and 40(6) of the *Constitution* relating to legitimate expectation, and legitimacy of the suit titles of the appellants. On article 40, the court rendered itself thus at paragraphs 165 and 166:

> " 165. Article 40 of the *Constitution of Kenya 2010* protects the right to property in the following terms:
>
> ...
>
> 166. The effect of all the above provisions is that registration as proprietor of land confers on the registered owner absolute and indefeasible title, unless it is proved that the registration was procured through fraud, mistake or misrepresentation to which the registered owner was a party. It does not mean, as the appellants submitted, that the title of a registered proprietor cannot be impeached in all and sundry circumstances. The truth is that the title of a registered owner can be challenged and nullified if it is proved that he or she was party to any fraud, mistake, or misrepresentation pursuant to which registration was acquired."

68. The appellate court in framing the five issues for determination, as we have already highlighted, three of them related to Fanikiwa: whether Fanikiwa's right to be heard as well as that of the joined parties were violated; whether, upon conversion from *RTA* to *RLA*, the titles acquired by Fanikiwa and the joined parties were indefeasible; and whether the titles held by Fanikiwa and the joined respondents arising from the suit parcels were legitimate. What is apparent from the findings by the superior courts below is that Fanikiwa was not only mentioned but also the validity of its titles remained central to the determination of the matter. It is not in dispute that Fanikiwa was not a party before the High Court and the ELC. It is also not in dispute that Fanikiwa claims property that was excised from the suit parcels.

69. The appellants now want us to determine whether articles 25(c), 40, 47, and 50 of the Constitution were violated. Articles 40 and 47 of the *Constitution* have been at the centre of the key questions for determination in the superior courts below. This brings this cause within the remit of article 163(4)(a) of the *Constitution*. Though the issue of fair hearing under both articles 25(c) and 50, was raised for the first time at the Court of Appeal and mainly so by Fanikiwa, the issue is also integrally linked to this cause and falls to us for determination.

70. The question that we ask ourselves then is, should this court down its tools and find that it has no jurisdiction as a result of Fanikiwa's introduction at the Court of Appeal? We do not think so. In determining the appeal, the Court of Appeal had to consider the evidence before it. Such issues expressly referring to Fanikiwa would not have been framed by the appellate court had they not emanated from the ELC, the said issues were determined by the Court of Appeal and are now before this court.

71. We also note that the present appeal emanates from a consolidated appeal before the Court of Appeal that resulted in one judgment involving other parties in the present matter whose standing is not in issue. The matter having been consolidated before the Supreme Court, the issues raised are cross cutting and are similarly not affected by the standing of Fanikiwa alone. We therefore find that we have jurisdiction to hear and determine the consolidated appeal and thus Sirikwa's preliminary objection fails.

> ii Whether the appellants' right to fair hearing under article 50(1) of the *Constitution* was violated by the appellate court; and

iii Whether the proceedings ought to have been through *viva voce* evidence at the trial court.

72. We deem it proper to consider issues ii and iii as framed together given that they are integrally linked. Fanikiwa contended that its right to a fair hearing was violated by the appellate court by considering that the perceived wrongs by the late Mark Too were *ipso facto* wrongs committed by Fanikiwa yet the two are distinct legal entities. As such, Fanikiwa submitted that it ought to have been given an opportunity to defend itself. In addition, it submitted that the Court of Appeal failed to appreciate that what was tendered as evidence by Sirikwa at the ELC were copies of alleged letters and handwritten inscriptions on the letters whose authors were not called to adduce evidence.

73. The administrators of the estate of Mark Too urged that the deceased's right to a fair hearing was violated in a two-fold manner. Firstly, the Court of Appeal failed to appreciate that what was tendered as evidence by Sirikwa at the trial court were copies of alleged letters and handwritten inscriptions on the letters whose authors were not called to corroborate their contents and authenticity. Secondly, that the appellate court adjudged Mark Too guilty of fraud based on mere assumptions without any cogent evidence to support those assumptions. Sirikwa on the other hand, contended that it is legally and factually incorrect for the appellants to claim that they were denied a hearing before the ELC and the Court of Appeal and instead urged that Mark Too described himself as a Director of Fanikiwa. Sirikwa submitted that he was a majority shareholder of Fanikiwa and therefore the Court of Appeal was correct to find that he was literally the mind and the brain of Fanikiwa. Sirikwa also maintained that Mark Too was part and parcel of the misrepresentation, fraudulent acquisition and transfer of the sub-divisions of the suit parcels to himself and Fanikiwa, and urged that the issues of illegality and fraud were completely dealt with by the superior courts below and that there is no controversy on the law relating to fraud to warrant our intervention.

74. Two limbs of the right to fair hearing stand out for determination. Firstly, whether the superior courts below erred in failing to call the authors of the documents relied on to make their findings on the suit parcels and secondly, whether the appellate court erred in finding Mark Too guilty of fraud without hearing him. These will be interrogated in turn.

75. The Court of Appeal found as follows on the need for *viva voce* evidence in paragraphs 110, 111 and 112 of its judgment:

> " 110. The second limb of the alleged violation of Fanikiwa's right to be heard is the assertion that the petition should not have proceeded otherwise than by *viva voce* evidence.
>
> ...
>
> 111. The record before us shows that after considering the matter, the court directed, on May 13, 2014, that the petition be heard by way of affidavits and written submissions. That is the default position under the rules and it is a direction that the court was validly and lawfully entitled to make. Almost two years after the directions, Lonrho Agribusiness, Mr Too and Mr Korir applied for cross examination of deponents of the various affidavits. By a considered ruling, the trial court declined to vary the directions on the mode of conducting the hearing. The record shows that none of the parties appealed against that ruling.

112. The fact that if we ourselves were hearing the petition would have preferred to conduct the proceedings differently is not sufficient reason to fault the directions that the trial court gave, particularly when the parties had an opportunity to appeal against those directions but elected not to do so and thereby allowed the petition to proceed until conclusion. We are satisfied that from the affidavits by the parties and the annexures thereto, it was possible to appreciate the issues raised by each of the parties and render a fair and just decision thereon."

76. Based on the record, it is not lost on us that Lonrho Agribusiness and David Korir by an application dated March 18, 2016 in the ELC sought to cross-examine all the deponents who had sworn affidavits before the court. The learned trial judge heard and dismissed the application on November 3, 2016. These appellants never appealed this ruling. This notwithstanding, the court had a duty to satisfy itself that no party would be prejudiced by proceeding in the manner in which it did especially in a matter where the facts deposed to in the various affidavits were seriously contested. Consequently, we are constrained to say a few things about the necessity of viva voce evidence in the circumstances such as those obtaining in this case.

77. This matter entails disputed ownership of land. In other words, there are competing claims as to the ownership of the suit parcels. Therefore, it behoves a court to make a just determination on the same, procedurally. In doing so, it has to, on the basis of the law and evidence before it, decide who the owner is and thoroughly interrogate how such ownership was conferred. In the present scenario, a trial process involving examination, cross-examination and re- examination of the witnesses is the only way of resolving the competing allegations and counter allegations. We recognize that the superior courts below relied on rule 20(1)(a) of the *Mutunga Rules* to hear the matter by way of affidavit evidence. However, we are of the view that a court is required to make a special endeavour to unravel all the competing claims and in particular, by calling for *viva voce* evidence from witnesses, especially those who have sworn depositions, and cross-examination done. This is particularly important because its decision will have a far-reaching impact especially upon the party(ies) whose ownership may end up being nullified. In taking this view, we are fortified by rules 20(3), (4), and (5) of the *Mutunga Rules* which allow a court to admit oral evidence, examine and cross-examine parties.

78. In the circumstances of this case therefore, we are not convinced that it was prudent and judicious, considering the highly contentious nature of the claims and circumstances of each of the numerous parties involved to determine this matter by affidavit evidence only. The authors of the said affidavits ought to have been called and cross-examined to test the veracity of the affidavits and documentary evidence. To our minds, this would have presented the best available evidence for the learned trial judge to make his decision fairly.

79. On the second issue as to whether Mark Too was adjudged guilty of fraud unfairly, we note that the learned trial judge found that he was not involved in any fraud or wrongdoing. However, the appellate court in paragraph 186 of its judgment found as follows:

"186. ..... Having found that Mr Too was part and parcel of the misrepresentation and fraudulent allocation and transfer to himself and Fanikiwa of the parcels of land that were expressly surrendered for settlement of the Sirikwa squatters, we find no basis or justification for the award of the 27 hectares to Mr Too. Mr Too was simply the prime mover in the scheme to swindle Sirikwa of the surrendered land and cannot be described by any stretch of imagination as an innocent purchaser. The transaction relating to the 27 hectares was tainted by

fraud and misrepresentation and was completely unworthy of protection by the court. Accordingly, we allow the cross-appeal and set aside the part of the order that awarded 27 hectares to Mr Too."

80. The administrators of the estate of Mark Too are therefore right in asserting that the appellate court adjudged him guilty of fraud without affording him a hearing. However, it is trite law that fraud which, depending on the circumstances is recognized as a criminal offence, must be pleaded and strictly proved. In addition, although the standard of proof of fraud in civil matters is not proof beyond reasonable doubt, it is higher than proof on a balance of probabilities as required in other civil claims.

81. In the instant case, Sirikwa pleaded that the allocation and transfer of the suit parcels was tainted by fraud and lack of due process and was therefore illegal, null and void. The particulars of fraud were tabulated as refusal to transfer the suit parcels to Sirikwa notwithstanding official commitment by the government, trying to defeat and deprive Sirikwa of its right to the suit parcels, and endeavouring to illegally confer title to the suit parcels to other purported beneficiaries.

82. We are unconvinced that such vague particulars of fraud were proved to the required standard going by the absence of any serious attempt to table concrete evidence to prove the subject allegations to the required degree. Our appellate court has over the years developed settled jurisprudence on the requisite standard of proof for allegations of fraud which we endorse. In *Central Kenya Ltd v Trust Bank Limited & 4 others*, Civil Appeal No 215 of 1996; [1996] eKLR the appellate court determined:

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

83. Further, in *Vivo Energy Kenya Limited v Maloba Petrol Station Limited & 3 others*, Civil Appeal No 21 of 2014; [2015] eKLR, the appellate court delivered itself thus:

> " Where fraud is alleged, it must be specially pleaded and particulars thereof given. That is what is required by order 2 rule 10 of the *Civil Procedure Rules, 2010*. Way back in the 19th Century, Lord Penzance stated the principle thus, in *Marriner v Bishop Of Bath And Wells* [1893) P. 146:
>
> > 'The court will require of him who makes the charge that he shall state that charge with as much definiteness and particularity as may be done, both as regards time and place.'
>
> Even where a plaintiff has properly pleaded fraud, he or she is required in addition to prove it beyond a mere balance of probabilities. In *RG Patel v Lalji Makanji* [1957] EA 314, at page 317 the former Court of Appeal for Eastern Africa stated that:
>
> > 'Allegations of fraud must be strictly proved; although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required.'

And in *Richard Akwesera Onditi v Kenya Commercial Finance Co Ltd*, CA No 329 of 2009 this court expressed itself on the issue as follows:

> 'Needless to say, fraud and collusion are serious accusations and require a very high standard of proof, certainly above mere balance of probability, and the bare allegations put forward by the appellant do not therefore avail him.'
>
> (See also *Gudka v Dodhia*, CA No 21 of 1980 and *Koinange & 13 others v Koinange* (1996) KLR 23).

Regarding *prima facie* proof of fraud, this court stated thus in *Central Kenya Ltd v Trust Bank Ltd & 4 others*, CA No 215 of 1996:

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

We would also wish to point out, as this court stated in *Westmontpower Kenya Ltd v Frederick & another t/a Continental Traders & Marketing* [2003] KLR 357, albeit in the context of an application for summary judgment, that issues of alleged fraud can only be determined with finality during a proper trial and not on conflicting affidavit evidence."

84. Back to the instant case, we note in addition that the ELC found as follows regarding Mark Too who was the 7th respondent before that court: "... the said 7th defendant (sic) has not been found to have been involved in any fraud or wrongdoing and therefore the court orders that he be allocated not less than 27 hectares of the suit land and that in the meantime status quo to be maintained in respect of the approximately 27 ha occupied and utilized by the 7th respondent. Orders accordingly." We agree with the ELC's finding on the allegations of fraud as reproduced and emphasised above. The Court of Appeal, on the other hand, did not give any cogent reasons for disagreeing with the ELC on this question of fraud.

85. There was simply no credible evidence to prove such a serious allegation which may also attract criminal sanction. As such, the Court of Appeal fell into error when it varied the ELC's judgment to the extent that it found the late Mark Too guilty of fraud and we so hold and find.

iv. Whether Sirikwa had a legitimate expectation to acquire and be allocated the suit parcels.

86. Sirikwa asserted all the way from the ELC to this court, that its members had a legitimate expectation that they would be allocated the suit parcels because of the 'approval' of allocation of the suit parcels to them by retired President Moi on October 28, 1998. Sirikwa further relied on subsequent official correspondence from government offices, which it argued showed steps or actions to give effect to former President Moi's 'allocation' of the suit parcels to settle its members. In essence, Sirikwa seeks the enforcement of what it argued is a legitimate expectation that prevents the relevant state bodies from resiling from a promise made by the then President.

87. The principle of legitimate expectation imposes a duty to act fairly and to honour reasonable expectation raised by the conduct of a public authority. If a public body has raised expectations that it will in future undertake a certain course of action, then it should ordinarily fulfil those expectations. This is important for the promotion of certainty and consistency in public administration.

88. For an individual to invoke the principle of legitimate expectation, an expectation must have been induced by some conduct of the public authority. The principle extends to any individual who is in a situation in which it appears that the administration's conduct has led him to entertain certain expectations.

89. It is important to point out that the principle protects only those expectations which have arisen through the conduct of the administrative body concerned, and not those which have arisen as a result of an individual's subjective hopes. Put differently, it is concerned with upholding trust in the administration rather than protecting expectations which the individual has decided to entertain at his or her own risk.

90. This means that only reasonable expectations will be afforded protection by the law. An individual must hold an expectation which is reasonable to have in light of the prevailing circumstances. It is in appreciation of this, that this court pronounced itself in *Kenya Revenue Authority v Export Trading Company Limited*, SC Petition 20 of 2020; [2022] KESC 31 as follows at paragraphs 52-53:

> "... legitimate expectation may take many forms. It may take the form of an expectation to succeed in a request placed before the decision maker or it may take the objective form that a party may legitimately expect that, before a decision that may be prejudicial is taken, one shall be afforded a hearing.
>
> Respectfully, we take the view that the question of whether a legitimate expectation arose is more than a factual question. It is not merely confined to whether an expectation exists in the mind of an aggrieved party, but whether viewed objectively, such expectation is in a legal sense, legitimate."

91. As this court has emphasized above, not just any promise will do; the promise must be one giving rise to a legitimate expectation. Certain requirements must also be met for a promise to generate a legitimate expectation. This court pronounced itself on these requirements in *Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others*, SC Petition No 14, 14A, 14B and 14C of 2014; [2014] eKLR as consolidated (Communications Commission of Kenya) and we provided the following guidelines at paragraph 269:

> " The emerging principles may be succinctly set out 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*." [Emphasis added]

92. Important for the case at hand, is the assertion by the appellants that the finding of breach of legitimate expectation by the ELC, as affirmed by the Court of Appeal, was erroneous given that the circumstances of the case show that the twin requirements that the representation ought to have been made by a public authority that is competent and the representation is lawful were not satisfied. They argued that the alleged 'approval' by the late President Moi could not override the rights of a registered

proprietor to a private land. Besides, at the time of the said approval the land was not unalienated government land capable of being allocated by the President as was provided in the *GLA*.

93. It is notable from the record that in October 1998, Sirikwa wrote to the 4th respondent seeking allocation of the suit parcels belonging to Lonrho Agribusiness. Subsequently, on October 28, 1998, the former President, Daniel Arap Moi endorsed the application with the words 'Approved'. This is the genesis for subsequent actions by other government offices that sought to give effect to the former President's endorsement of the allocation of the suit parcels to Sirikwa's members. Did this 'approval' by the former President give rise to legitimate expectation that Sirikwa could and can now lawfully enforce?

94. The documentary evidence before the court, show irrefutably that as at the date of Sirikwa's application and on October 28, 1998 when former President Moi endorsed the subject application with the words 'Approved', the suit parcels were registered as private property in the name of Lonrho Agribusiness. The evidence on record further shows that up to the year 2000, when the titles for the suit parcels were surrendered, they had at all times been held as private property. The position that the suit parcels were private property up to the year 2000 was indeed acknowledged by the government when it compulsorily acquired certain portions thereof for the development and construction of public utilities including the Eldoret International Airport and Moi University School of Law Annex in the year 2000. It follows that the suit parcels, being private properties at the material time, could only be alienated or transferred by the registered owner, Lonrho Agribusiness, rather than by the President under the *GLA*.

95. Section 3 of the *GLA* provided that -

> " The President in addition to, but not limited to any other right, power or authority vested in him under this Act, may
>
> (a) subject to any other written law, make grants or disposition of any estates, interests, or rights in or over unalienated Government land." [Emphasis added] The import of this provision is that the President's power to make grants or disposition in land was restricted to "unalienated government land".

96. In addition, section 2 of the *GLA* defined "unalienated government land" to mean "Government land which is not for the time being leased to any other person, or in respect of which the Commissioner has not issued any letter of allotment". This court in *Kiluwa Limited & another v Business Liaison Company Limited & 3 others,* SC Petition No 14 of 2017; [2021] KESC 37 (KLR) had this to say about unalienated government land at paragraph 55:

> "This notwithstanding the fact that, the expression "Public Land" only came to the fore with the promulgation of the 2010 *Constitution*. What article 62 of the *Constitution* does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of "public tenure". The retired constitution used the term "government" instead of "public" to define such lands. Therefore, it is incorrect for the respondents to assert that the lands in question were unalienated government land but not public land. It is even more inaccurate to argue that the said parcels had never been public land. Unalienated government land remains public until it is privatized through allocation to individuals or other private entities."

97. Further this court in *Torino Enterprises Limited v hon Attorney General*, SC Petition No 5(E006) of 2022; [2023] KESC 79 (KLR) pronounced itself on what constitutes public and private land. We

held at paragraph 55 of that judgment that, once an individual or entity acquires any unalienated government land, or other land for that matter, consequent upon registration of title, in accordance with the provisions of the applicable law, such land transmutes from public to private land. We also noted that such land is as a consequence, removed from the ambit and confines of the *GLA* to the new legal regime conferring title to an entity other than the government and on such terms as shall be inscribed on the new title. It follows therefore that the subject suit parcels, being land that was at the time private property vested in Lonrho Agribusiness did not fall within the category of 'unalienated government land' envisaged under the *GLA* and former President Moi had no legal capacity and authority to allocate or confer any legitimate interest in the subject suit parcels to members of Sirikwa or any other entity.

98. In addition, it is noteworthy that the application by Sirikwa for allocation of the suit parcels was made to the 4th respondent, the Director of Land Adjudication, who did not have the capacity or mandate to allocate government land, if any. Only the 2nd respondent, the Commissioner of Lands, had the mandate to allocate government land and this is the import of our decision in *Dina Management Limited* at paragraph 104.

99. In the end, we uphold this limb of the consolidated appeal and find that there was no legitimate expectation for Sirikwa's members to be allocated the suit parcels. We reiterate our stance in *Communications Commission of Kenya* that in determining whether legitimate expectation has been established, primacy must always be given to the requirement of legality which flows from the constitutional principle and value of the rule of law, as articulated in article 10(2)(a) of the *Constitution*. Legality dictates that an action can only be undertaken if it is authorized by the law. Therefore, a representation, promise, practice, conduct or an action outside the prescription of the law or undertaken by a person or entity without competent authority is illegal and cannot give rise to legitimate expectation.

v. Whether Sirikwa has a right to the suit parcels on account of being squatters on the suit parcels.

100. The appellants as well as the 2nd to the 6th respondents in support of the consolidated appeal submitted that Sirikwa's members did not meet the threshold of being described as squatters as they were not in occupation of any portion of the suit parcels. Sirikwa refuted this contention by averring that the definition of a squatter notwithstanding, it comprises of over 500 families and its members are entitled to ownership of the suit parcels as their heritage and on account of legitimate expectation and representations made to them by the government and Lonrho Agribusiness.

101. We pause to point out here that both superior courts did not delve into the issue of whether members of Sirikwa were indeed squatters. At the Court of Appeal, Fanikiwa maintained that members of Sirikwa were not squatters because they were not in occupation of any of the properties registered in its name. Still at the Court of Appeal, David Korir attached a list of squatters totalling to 73 people. He dismissed Sirikwa as 'an amorphous group consisting of impostors'. The Court of Appeal did not interrogate whether the members of Sirikwa were squatters. It concentrated on Fanikiwa's contention to the effect that it was impossible for Sirikwa to be allocated the parcel of land in issue because Sirikwa was not registered until the year 2006. It delivered itself thus at paragraph 160 of its judgment:

> " The evidence on record indicates that Sirikwa was registered as a self-help group with the Ministry of Gender, Sports, Culture and Social Services in 2006. We think that the objection raised in this issue is manifestly misconceived. First and foremost, Sirikwa as a group of squatters existed long before 2006 and was not created as a legal personality by registration as a self-help group by the Ministry."

102. A Squatter, in *Black's Law Dictionary*, 8th edition (at page 1439) is defined as:

> "a person who settles on property without any legal claim or title."

103. We note that Sirikwa defines itself as an amalgamation of over 500 squatter families that have a legitimate claim and interest over the suit parcels. They contend that the forefathers of its members were in occupation of the suit parcels but were forcefully evicted by the white settlers' community in the early 1920's. Subsequently, that the members' heritage and lineage were employed as workers and labourers by the colonialists. However, it is evident from the record that Sirikwa's members are not in occupation of any of the suit parcels or the sub-divisions thereof.

104. The evidence on record further shows that no member of Sirikwa ever took actual physical possession of the suit parcels. They have never occupied it. The failure to take possession and occupy the land means that Sirikwa were not squatters on the suit parcels. What is deducible from the evidence is that their claim is based on heritage from their forefathers who became dispossessed of their land by the colonialists and subsequently became workers. This evidence as compelling as it might seem, cannot support the claim by Sirikwa that they were squatters in the absence of occupation of the suit land. Also, the allegations of lineage (where no evidence was adduced) in our view is a complex web. We say so because in the absence of evidence to show who was the child of whom? Who exactly should be compensated by whom? Which proprietor? The record shows there were many proprietors as the suit parcels changed ownership severally. As claimed by Sirikwa, upon the forceful eviction of its members' forefathers from the suit parcels in the 1920s, the said forefathers and their lineage worked on the suit parcels as farm hands. By then the parcels had since been adjudicated and titles issued. This begs the question, whose workers were they? Didn't the farm owner own the land in question? Can workers then turn around and invoke the right to their place of work as squatters and if so, can they do so over 70 years later? So, who should shoulder the responsibility of compensating the claim? Was it a form of reparations to be paid on behalf of the colonialists? All these pertinent questions were not asked and we are therefore of the view that members of Sirikwa were not squatters on the suit parcels and have no legal basis to bring a claim asserting a right to the suit parcels.

v. What was the intent for the surrender of the titles to the suit parcels?

105. All the parties before this court are in agreement that in 2000, Lonrho Agribusiness, the then registered proprietor of the suit parcels as leasehold interests, surrendered the titles to the government. In effect, the leasehold interest in the properties came to a premature end without running their term due to the surrender and acceptance of that surrender by the government in the year 2000. Where the parties part ways and what is in contention before this court is the intent for the surrender of the subject titles.

106. Section 44 of the *RTA* which provided the legal regime for 'surrender of leases' stipulated as follows:

> "(1) Whenever any lease which is required to be registered by the provisions of this Act is intended to be surrendered, and the surrender thereof is effected otherwise than by operation of law, there shall be endorsed upon the lease the word "surrendered", with the date of surrender, and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof, and shall be attested by a witness; and the registrar thereupon shall enter in the register a memorial recording the date of surrender and shall likewise endorse upon the lease a memorandum recording the fact of the entry having been so made in the register, and thereupon the interest of the lessee in the land shall vest in the lessor or in the person in whom having regard to intervening

circumstances, if any, the land would have been then vested if no such lease had ever been executed; and production of the lease or counterpart bearing the endorsed memorandum shall be sufficient evidence that the lease has been so surrendered:

Provided that no lease subject to a charge shall be surrendered without the consent of the chargee." [Emphasis added]

107. The above provision has received wide judicial interpretation over the years. We will interrogate a sample of such judicial pronouncements. In *Mwinyi Hamisi Ali v Attorney General & another*, Civil Appeal No 125 of 1997; [1997] eKLR the Court of Appeal (Tunoi, Shah & Bosire, JJA) noted as follows:

> "The land in question was held under the *Registration of Titles Act*, cap 281, laws of Kenya. Section 44 of the Act requires that surrender of land leased by the Government to persons to be registered in order to terminate the interest of the lessees. Registration of such surrender is evidence of surrender."

108. More recently, in *Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 others*, Civil Appeal 51 & 58 of 2016 (Consolidated); [2018] eKLR the Court of Appeal (Githinji, Mohammed & Otieno-Odek, JJA) held at paragraph 96 that:

> "A surrender of Grant or instrument of title is not compulsory acquisition. The legal framework and procedure for surrender of title to land is different from the legal regime for compulsory acquisition. Section 44 of the *RTA* is the legal framework for surrender and the Land Acquisition Act is the regime for compulsory acquisition. Surrender cannot be construed and equated to compulsory acquisition."

109. It is notable that section 2 of the *RTA* did not define the term "surrender". However, the concept of surrender is one of long lineage and wide usage in land law. The *Black's Law Dictionary* (7th edition) at page 1458 defines "surrender" as follows:

> "...3. The return of an estate to the person who has a reversion or remainder, so as to merge the estate into a larger estate... 5. A tenant's relinquishment of possession before the lease has expired, allowing the landlord to take possession and treat the lease as terminated."

110. Lord Millett at the House of Lords in *Barrett v Morgan*, [2000] 2 AC 264, aptly noted thus on the nature of 'surrender of leases':

> "A surrender is simply an assurance by which a lesser estate is yielded up to the greater, and the term is usually applied to the giving up of a lease or tenancy before its expiration. If a tenant surrenders his tenancy to an immediate landlord, who accepts the surrender, the tenancy is absorbed by the landlord's conversion and is extinguished by operation of law. A surrender is ineffective unless the landlord consents to accept it, and is therefore consensual in the fullest sense of the term." [Emphasis added]

111. The "consensual" nature of a surrender is emphasized in Robert Megarry & William Wade, *The Law of Real Property* (Sweet & Maxwell; 2012, 8th ed.) page 851 as follows: "surrender is a consensual transaction between the landlord and the tenant, and therefore dependent for its effectiveness on the consent of both parties" [Emphasis added]. Similarly, Martin Dixon, *Principles of Land Law*,

(Cavendish Publishing; 2002, 4th ed.) at page 237 notes that: "a surrender, being a consensual act between landlord and tenant." [Emphasis added]

112. We are persuaded by the foregoing propositions that the "consensual" nature of a surrender is the cardinal ingredient of a surrender of lease. Indeed, this is the essence of the *proviso* in section 44 of *RTA* that: "and the endorsement shall be signed by the lessee and the lessor as evidence of the acceptance thereof". This raises the question as to what was the "consensual arrangement" or "agreement" between Lonrho Agribusiness and the government of Kenya, being the lessee and lessor respectively, that underpinned the contested surrender.

113. Put differently, to resolve the present dispute, the court needs to determine what was agreed between the Government of Kenya and Lonrho Agribusiness at the time of alleged surrender of the subject leases in 2000. It is here that we meet the evidential contestation between the two parties which is at the heart of the question as framed. On the one hand, the appellants contend that the surrender was for purposes of converting the suit parcels from leasehold properties under the *RTA* to freehold properties under the *RLA*. On the other hand, is the assertion by Sirikwa, that the surrender was to facilitate the settlement of members of Sirikwa on the suit parcels.

114. We note that the ELC and the Court of Appeal found that the surrender was to facilitate the settlement of members of Sirikwa on the suit parcels. The Court of Appeal was specifically of the view that, by virtue of a letter by JP Hulmes dated November 9, 2000, there was a clear manifest that Lonrho Agribusiness had surrendered five of the suit parcels (LR Nos 9608, 745/2, 12398, 7739/7 and 9607) for the resettlement of members of Sirikwa.

115. In our considered view, resolving this question is hinged on what the instruments of surrender show. In taking this position, we take note of section 97(1) of the *Evidence Act*, cap 80 Laws of Kenya, which stipulates that-

> "When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act."

116. The import of section 97(1) of the *Evidence Act* is similar to that explained in *Halsbury's Laws of England*, 4th edition volume 12, on Interpretation of Deeds and Non-Testamentary Instruments paragraph 1478 as follows:

> " Extrinsic evidence generally excluded: Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions, drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.
>
> Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

117. We note in that context and from the record that RJ Simiyu in his capacity as the then District Land Officer, Uasin Gishu County, swore a replying affidavit which at paragraph 20 stated as follows:

> " That I am also aware that on November 21, 2000, the company Lonrho Agri-Business (East Africa) Limited surrendered to the Government of the Republic of Kenya all the grants for purposes of conversion of the tenure from the regime under the *Registration of Titles Act* cap 281 to the freehold tenure under the regime of the *Registered Land Act* which surrenders were noted in presentations Nos 163, 164, 169, 171, 174,175, on 2/11/2000."

118. Again from the record, presentation 174 registered on November 2, 2000 by the Registrar of Titles, Jane Kanja, indicates: "Surrender to the Government of the Republic of Kenya in issuance of freehold title under *RLA* (Chapter 300)". This presentation corroborates the deposition of RJ Simiyu that the intent or the consensual agreement between Lonrho Agribusiness and the Government of Kenya was for the conversion of the suit titles from leasehold under *RTA* to freehold under the *RLA*. We therefore find his testimony credible, convincing and persuasive that the surrender for all the suit parcels was for the same intent.

119. It is furthermore our considered view that the ELC and the Court of Appeal should have considered the deposition of RJ Simiyu as corroborated by presentation 174 in determining the intent for the surrender. The letter from JP Hulme should not have overridden the credible testimony by RJ Simiyu in the face of presentation 174 given the provisions of section 97(1) of the *Evidence Act* as reproduced above.

120. An additional reason as to why the two superior courts below ought to have accorded little weight to the letter from JP Hulme is that it is not clear whether the said JP Hulme had the sanction, competence or authority of Lonrho Agribusiness, a registered limited liability company to bind the company. In our view, there was insufficient evidence to support the claim that Lonrho Agribusiness intended to surrender the suit properties for the allocation to Sirikwa. This is a serious question that the two superior courts below did not address their minds to. It is elementary principle of company law that a company as a distinct legal entity from its promoters, directors or employees can only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.

121. Having considered the evidence on record, we have come to the conclusion that the intent of surrender of the leasehold interest in the suit parcels was that the leasehold term to which the suit parcels were then held was to be surrendered and the same converted into a freehold interest with titles re-issued in the name of Lonrho Agribusiness as private property. However, some peripheral and connected questions arise which we believe it is important for the court to settle.

122. We point out that there is nothing illegal or fraudulent in a process for surrender of a lease to enable the conversion of a title from a leasehold interest under the *RTA* to a freehold interest under the *RLA*. This was the holding in *Margaret Nyokabi Mbugua & 5 others v Ngenda New Farmers Co Ltd & 4 others*, Murang'a, ELC Case No 84 of 2017; [2019] eKLR wherein the ELC (Kemei, J) expressed as follows, and we agree:

> "When confronted by similar facts of conversion of titles from *Registration of Titles Act* to *Registered Land Act* the court in the case of *Rosemary Wanjiru Njiraini v Officer in Charge of Station, Molo Police Station & another* [2017] eKLR observed that the conversion of title therefore leads to closure of the title issued under *Registration of Titles Act* and a new registration under the *Registered Land Act* is created which is read together with its Registry

Index Map(RIM). The RIM is an equivalent of the survey plan in Registration of Titles Act titles.

It is the view of the court that there is no direct conversion of title across the two statutes, the title and interests in the leasehold must be surrendered to the grantee in exchange of something new under a separate regime." [Emphasis added]

123. Legally, upon the execution of the surrender instruments by both Lonrho Agribusiness and the Government of Kenya, the leasehold interest was extinguished and emerged in the freehold interest in terms of section 44 of the *RLA*. The said section 44 of the *RLA* in providing for 'merger of registered interests' stipulated thus:

> " Where, upon the registration of a dealing, the interests of - (a) lessor and lessee... vest in the same proprietor, those interests shall not merge unless a surrender or discharge is registered or the parcels are combined or there is a declaration of merger, which may be contained in the instrument evidencing the dealing."

124. *Halsburys Laws of England* volume 27 at paragraph 444 also notes as follows on 'surrender':

> " A surrender is the yielding up of the term of lease to the person who has the immediate estate in reversion in order that, by mutual agreement, the term may merge in the reversion."

125. Robert Megarry & William Wade, *The Law of Real Property* (*supra*.) page 856 notes that-

> "Merger is the converse of surrender. A surrender occurs where the landlord acquires the lease; merger occurs where the tenant acquires the reversion. The underlying principle is the same in both; the lease is absorbed by the reversion and destroyed."

126. The doctrine of merger as codified in section 44 of the *RLA* envisaged that as all inferior estates and interests in land are derived out of the fee simple, therefore, whenever a particular estate or limited interest in land vests in him who has the fee- simple of the same land, such particular estate or limited interest is immediately drowned in the fee. Indeed, this is the essence of the principle *omne majus* continent in se minus, meaning the greater contains or embraces the less. Therefore, there was nothing untoward in Lonrho Agribusiness getting a freehold title in reversion under the RLA.

127. Upon the said surrender and merger, a new registration section was created known as Pioneer & Ngeria Block 1 (EATEC) which was registered on or about January 23, 2001 with resultant sub-divisions known as Pioneer & Ngeria Block 1(EATEC) 707, 5903, 7068, 7739, 3395 which were registered in the name of Lonrho Agribusiness. These were subsequently sub-divided and sold to third parties. It follows that the subsequent sub-divisions and sale thereof to third parties, including Fanikiwa, by Lonrho Agribusiness were done legally and procedurally.

128. Consequently, we uphold the contention by the appellants that the impugned judgment of the Court of Appeal violated their right to property. We disagree with the findings of the ELC and the Court of Appeal on this question and instead make a finding that the purpose of surrender of the titles of the suit properties was to enable their conversion from leasehold titles under the *RTA* to freehold titles under the *RLA*.

129. Before we make our final orders, we have one other issue that we need to clarify. Having made a finding that the transactions leading to the sale or dealings with the suit parcels to third parties were not tainted with illegalities or fraud, the question of whether such third parties were innocent purchasers for value without notice should not arise.

130. However, given the precedential value of the Court of Appeal's reasoning on this point, we are constrained to clarify the Court of Appeal's pronouncements on determination of true innocent purchasers for value. At paragraph 178 of its judgement, the court rendered itself thus:

> " 178. Turning to the respondents and the financial institutions who were joined to this appeal, were (*sic*) are satisfied that they were true innocent purchasers for value without notice. There is absolutely no evidence that they were party to the scheme to take over for themselves the five parcels of land that were surrendered for settlement of Sirikwa members. They conducted due diligence and there was nothing to alert them that there was anything amiss with the titles to the properties they were purchasing or charging. The purchasers paid good money and the financial institutions advanced substantial sums of money to the innocent purchasers of the properties excised from the suit properties on the security of their titles. There being no evidence that these respondents were party to any fraud, misrepresentation or mistake in the registration of the impugned titles, we would uphold the validity of their titles." [Emphasis added]

131. In *Dina Management Limited*, we observed as follows:

> " [90] The Black's Law Dictionary 9th Edition defines a bona fide purchaser as:
>
> > 'One who buys something for value without notice of another's claim to the property and without actual or constructive notice of any defects in or infirmities, claims, or equities against the seller's title; one who has in good faith paid valuable consideration for property without notice of prior adverse claims.'
>
> [91] The Court of Appeal in Uganda in *Katende v Haridar & Company Ltd* [2008] 2 EA 173, defined a *bona fide* purchaser for value as follows:
>
> > 'For the purposes of this appeal, it suffices to describe a *bona fide* purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the *bona fide* doctrine he must prove that:
> >
> > 1. he holds a certificate of title;
> > 2. he purchased the property in good faith;
> > 3. he had no knowledge of the fraud;
> > 4. he purchased for valuable consideration;
> > 5. the vendors had apparent valid title;
> > 6. he purchased without notice of any fraud; and
> > 7. he was not party to the fraud.'

[92] On the same issue, the Court of Appeal in *Samuel Kamere v Lands Registrar, Kajiado* Civil Appeal No 28 of 2005; [2015] eKLR stated as follows:

> '...in order to be considered a *bona fide* purchaser for value, they must prove; that they acquired a valid and legal title, secondly, they carried out the necessary due diligence to determine the lawful owner from whom they acquired a legitimate title and thirdly that they paid valuable consideration for the purchase of the suit property...'"

132. The point we are making is that the financial institutions which are a party to this cause are not purchasers but lenders. They cannot possibly be described as "innocent purchasers". They are financial institutions who advanced substantial sums of money to some of those parties who purchased the properties excised from the suit parcels from the registered owners on the security of their titles. We shall say no more on this issue.

133. Having considered the issues framed by this court, our findings are as follows:

i. The consolidated appeal meets the constitutional threshold under article 163(4)(a) of the *Constitution*.

ii. The superior courts below violated the appellants' right to fair hearing under article 50(1) of the *Constitution*.

iii. The proceedings at the trial court ought to have been conducted through taking of *viva voce* evidence.

iv. Sirikwa did not have a legitimate expectation to acquire and be allocated the suit parcels.

v. Sirikwa has no right to the suit parcels as its members were not squatters on the suit parcels.

vi. The intent for the surrender of the titles for the suit parcels was for conversion of their titles from leasehold interests under the *RTA* to freehold interests under the *RLA*.

E. Costs

134. As regards costs, in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others*; SC Petition 4 of 2012; [2013] eKLR, this court held that it has the discretion to award costs to ensure that the ends of justice are met and that costs ordinarily follow the event. In the special circumstances of this case, its convoluted nature and the numerous parties, we find it judicious for each party to bear its own costs.

F. Orders

135. Accordingly, and for the reasons afore-stated, we make the following orders:

i. The consolidated appeal is hereby allowed;

ii. The judgment and orders of the trial and appellate courts are hereby set aside in their entirety.

iii. The 1st respondent herein, to wit, Sirikwa Squatters Group, its agents, members, servants, employees and/or representatives are hereby permanently restrained from entering, taking possession of and in any other manner interfering with Fanikiwa's (the 1st appellant) quiet possession of the suit properties described as LR No Pioneer/ngeria Block 1 (EATEC) 7070, 7068, 3395, 5903, 2454, 476, 1860, 475, 5497, 5494, 5492, 5489, 5486, 1384, 1383, 5484, 474,

472, 5485, 5487, 5490, 5488, 5491, 5493, 1861, 5496, 1862, 5491, 473, 477, 471, 1353, 1375, 1374, 1379, 1378, 1380, 1381, 1382, 1852, 1386, 1385, 85, 5495 and 5902;

iv. We declare that the finding by the superior courts below to the effect that the retired President's approval of allocation of the suit parcels and the subsequent surrender of the titles was for purposes of settling Sirikwa's members, violated and arbitrarily deprived the 3rd appellant herein, Lonrho Agribusiness, of its rights over and interests in the suit parcels as guaranteed under article 40 of the *Constitution*.

v. All parties shall bear their own costs

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2023.

.....

M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

P. M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

.....

M. K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT

.....

I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA