

**REPUBLIC OF KENYA**  
**IN THE SUPREME COURT OF KENYA**

*(Coram: Mwilu; CJ & VP, Ibrahim, Wanjala, Njoki & Lenaola, SCJJ)*

**PETITION NO. 9 OF 2020**

**-BETWEEN-**

**JOHN MBOGUA GETAO.....PETITIONER**

**-AND-**

**SIMON PARKOYIET MOKARE.....1<sup>ST</sup> RESPONDENT**

**KAREMPU KAATA.....2<sup>ND</sup> RESPONDENT**

**NKAMA GROUP RANCH.....3<sup>RD</sup> RESPONDENT**

**CHIEF LAND REGISTRAR.....4<sup>TH</sup> RESPONDENT**

**HON. ATTORNEY GENERAL.....5<sup>TH</sup> RESPONDENT**

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*(Being an Appeal from the Judgment of the Court of Appeal (**Makhandia, Musinga & Gatembu, J.J.A**) in Civil Appeal No. 361 of 2014 delivered at Nairobi on 1<sup>st</sup> December 2017)*

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**JUDGMENT OF THE COURT**

**A. INTRODUCTION**

**[1]** This is a Petition of Appeal dated 18<sup>th</sup> May 2020 and lodged on 11<sup>th</sup> June 2020. It is brought pursuant to Article 163 (4) (a) of the Constitution, challenging the entire Judgment and Orders of the Court of Appeal (*Makhandia, Musinga & Gatembu, J.J.A*) delivered in Civil Appeal No. 361 of 2014 on 1<sup>st</sup> December 2017.

## B. LITIGATION BACKGROUND

### (i) *At the High Court*

[2] The Petition before the High Court was filed by the appellant pursuant to Articles 22, 23, 27, 40, 47 and 50 of the Constitution, Section 3 of the Judicature Act and Sections 28 and 30 of the Registered Land Act Cap 300 (Repealed). The appellant was the administrator of the estate of the late *Joshua Matindi Gitau Karanja alias Ole Karanja Gitau* (deceased), who at the time of his death, it was alleged, had been in occupation and possession of *L.R. No. Kajiado/Kaputiei-South 2241* measuring 76.457 HA or 188.849 acres. This property was subdivided into two parcels and now exists as *L.R No. Kajiado/Kaputiei-South/2625* and *L.R No. Kajiado/Kaputiei-South/2626*, (hereinafter, *the suit property*).

[3] The 3<sup>rd</sup> respondent was a group ranch situate within Kajiado County and registered under the now-repealed **Land (Group Representatives) Act, 1968**. The ranch comprised about 519 members and owned about 100,000 hectares in the parcel of land known as *LR No. Kajiado/Kaputiei-South 94* from which the suit property was excised. The appellant's father, the 1<sup>st</sup> respondent as well as the 2<sup>nd</sup> respondent were among the *bona fide* members of the Ranch.

[4] Following the 3<sup>rd</sup> respondent's application in 1990, the Ministry of Lands consented to the dissolution and subdivision of the ranch into equal individual holdings to the registered members. From then on, the 3<sup>rd</sup> respondent's officials remained in office for the sole purpose of overseeing the sub-division.

[5] After subdivision, the deceased's estate was allocated a different parcel of land, known as *L.R No. Kajiado/Kaputiei South/2211* "*the allocated land*" and not the originally occupied land. The import therefore was that the appellant and other beneficiaries of the estate had to vacate the suit land and relocate to the allocated land. Title to the allocated land was duly issued to the appellant and his

two brothers, **Daniel Parsimia Matindi and Peter Koikai Pukei**. Conversely, the title to the suit property was issued to the 1<sup>st</sup> respondent who became the registered owner. The appellant and one of his brothers failed to vacate the suit property thereby compelling the 1<sup>st</sup> respondent to institute *Machakos, HCCC No. 278 of 2012* in a bid to evict them. This matter was transferred to the Environment and Land Court (ELC) and given a new number *ELC No. 1055 of 2012*.

[6] Consequently, the appellant, who was issued with a Limited Grant of letters of Administration *ad Litem* on 24<sup>th</sup> August 2011, in *Machakos HC Succession Case No. 651 of 2011*, instituted *Constitutional Petition No. 541 of 2012* which was also transferred to the ELC and given a new number, *ELC No. 929 of 2014*. The appellant urged that the dissolution of the 3<sup>rd</sup> respondent was conditioned on the principle that, all the members would be allocated a share of all that parcel occupied at the time of dissolution. It was contended that the 2<sup>nd</sup> and 3<sup>rd</sup> respondents, without any justification contravened this condition and allocated the suit property to the 1<sup>st</sup> respondent to the prejudice of the appellant and other dependents of the estate of the deceased. He therefore claimed that his and the dependents' fundamental rights to a fair administrative action, to own property, equality and freedom from discrimination had been contravened and violated.

[7] The two suits were consolidated and determined together. In a Judgment delivered on 25<sup>th</sup> September 2014, the ELC Court (*Mutungu, J*) found that the particulars of alleged fraud and irregularity against the respondents had not been specifically pleaded or proven by the appellant as required in law and could consequently not stand. Further, the Court found that there was neither unfairness, discrimination or arbitrariness in the respondents' actions nor infringement of his fundamental rights and freedoms under Articles 27, 40, 47 and 50 of the Constitution as alleged. Ultimately, it found the 1<sup>st</sup> respondent had been lawfully allocated the suit property, ordered the appellant to vacate and

deliver the same with vacant possession to the 1<sup>st</sup> respondent within 90 days of the date of the Judgment and in default thereof, be evicted.

**(ii) At the Court of Appeal**

**[8]** Aggrieved and dissatisfied with the entire Judgment and Directions of the ELC, the appellant filed *Civil Appeal No. 361 of 2014*, citing 12 grounds which are summarized as follows, that the learned Judge: *misdirected himself on the applicability and adherence to the rules of civil procedure in a constitutional petition; erred by framing his own issues and proceeding to pronounce judgment on them thereby reaching an erroneous conclusion; erred by failing to give credence and relevance to uncontested facts like the valuation report; erred in considering issues not canvassed or pleaded before him; erred in anchoring and basing his decision on legal technicalities thus occasioning a miscarriage of justice to the appellant; misdirected himself on the law relating to fraud, legitimate expectation and discrimination on the face of cogent evidence placed before him; erred by finding that the appellant had not proved his case to the required standard; contradicted himself by finding on one hand that the parties were entitled to equal portions of land but holding that it was impractical to achieve that equality; erred in granting reliefs not sought by the parties; erred in disregarding the appellant's evidence and submissions without reasons thereof; erred in arriving at findings not supported by the applicable law and finally, erred by failing to consider a supplementary affidavit filed with leave of Court in support of the amended petition.*

**[9]** In a Judgment delivered on 1<sup>st</sup> December 2017, the Court of Appeal dismissed the appeal with costs. The learned Judges upheld the ELC's finding that it is trite, particulars of fraud must be specifically pleaded and strictly proved. It was of the reasoning that although Article 159 of the Constitution enjoins the Court to administer substantial justice without undue regard to procedural technicalities, it does not allow the parties to totally ignore the rules of evidence. The Court upheld the trial Judge's finding that no promise of any benefit was extended to the

appellant to form a basis for the legitimate expectation that the appellant's family would be allocated the suit property. It dismissed allegations of discrimination on ethnic basis on grounds that it was a new issue introduced through a supplementary affidavit where the respondents were denied a chance for rebuttal.

**[10]** On whether the appellant was entitled to the suit property, the Court found that since there was no other established criterion for sub-division of the ranch rather than on the basis of equal acreage to all the members, which as far as can be discerned was achieved, it could not interfere. It was the Appellate Court's further finding that if the appellant wished or intended to introduce another criterion, such as value of the land, he should have raised that proposal with the 2<sup>nd</sup> and 3<sup>rd</sup> respondent and the membership of the ranch. The learned Judges found that such a criterion would be raised for discussion and a resolution passed by virtue of the provisions of the 3<sup>rd</sup> Schedule of the Land (Group Representatives) Act (Cap. 287) (now repealed), which was the applicable law and provided that a resolution at a general meeting was to be decided by show of hands or a ballot where more than 60% of the members' demand. The Court subsequently found that it was not within its domain to lay down the ground rules to be followed in the event of subdivision of group ranches as invited by counsel for the appellant and further that the process of subdivision and allocation was fair and regular, contrary to the appellant's assertions.

**[11]** On whether the trial Court disregarded evidence tendered, *to wit* the valuation reports, the learned Judges upheld the trial Judge's finding that the issue in the reports was new, was not contained in the appellant's petition but raised in a supplementary affidavit after closure of pleadings, and as a result denied the respondents an opportunity to rebut. In view of its finding above, the Appellate Court dismissed the appeal and found that the appellant's rights as guaranteed under Articles 27, 40, 47 and 50 of the Constitution had not been violated.

***(iii) At the Supreme Court***

**[12]** Dissatisfied, the appellant moved this Court, citing eight (8) grounds summarized as follows, the learned Judges erred in law:

- (i) In applying the Civil Procedure Rules in arriving at its decision in a matter raising constitutional violations;*
- (ii) In interpreting the law relating to fraud, legitimate expectation and discrimination and failed to evaluate the evidence before it;*
- (iii) In the application of the law relating of equality of a parcel of land by limiting the scope to acreage as opposed to value contrary to Article 27 of the Constitution;*
- (iv) In finding that the appellant was not discriminated based on his ethnicity contrary to Article 27 of the constitution;*
- (v) In finding that the misplacement of the appellant from his ancestral land was not an infringement of his right to property contrary to Article 47 of the Constitution; and*
- (vi) In finding that the appellant had not proved allegations of fraud in disregard of Article 159 (2) (d) of the Constitution;*

**[13]** The appellant has framed four (4) issues for determination, namely:

- (i) Whether the doctrine of equality in parcels of land applies to value or acreage;*
- (ii) Whether displacement amounts to a violation of the right to own property;*
- (iii) Whether the Court of Appeal exercised its jurisdiction to re-evaluate the evidence placed before it; and*
- (iv) Whether the rules of Civil Procedure apply in Constitutional Petitions.*

**[14]** The appeal seeks the following reliefs:

- (a) *The Petition be allowed;*
- (b) *The Judgment and Decree in ELC Case No. 929 of 2012-Nairobi consolidated with ELC Case No. 1055 of 2012 delivered on 25<sup>th</sup> September 2014, and confirmed by the Court of Appeal in the Judgment delivered on 1<sup>st</sup> December 2017 in Civil Appeal No. 361 of 2014-Nairobi be vacated and/or set aside and the same be substituted with an Order allowing the appellant's amended petition in ELC Case No. 929 of 2012 dated 2<sup>nd</sup> December 2013; and*
- (c) *Costs.*

### **C. PARTIES' RESPECTIVE CASES**

#### **(a) The Appellant**

**[15]** The appellant's written submissions are dated 3<sup>rd</sup> August 2020 and filed on even date, while the supplementary written submissions are dated 7<sup>th</sup> September 2020 and filed on 8<sup>th</sup> September, 2020. The appellant's case is premised on Articles 22, 23, 27, 40, 47, 159(2), 163(3)(b) and 163(4) (a) of the Constitution and addresses the issues delineated for determination.

**[16]** *On the issue of the criterion of sub-division of group ranches*, the appellant, through his counsels on record *Mr. Kahari* and *Ms. Mwachiro* seeks the Court to interpret the criterion of sub-division of group ranches. He poses the question whether the doctrine of equality in parcels in such sub-divisions is based on acreage or value. It is the appellant's submission that sub-division by acreage, as was the case in this appeal, is both unfair and unconstitutional. He contends that equality of land cannot be based on acreage *per se* for reasons that there are geographical and topographical differences between two parcels of land of equal acreage. He submits that relocation to a property in a remote area that is valued at

7 million without giving him a chance to own the property he was in occupation and possession of, which is valued at 17 million, was discriminatory. He submits that the suit property and the allocated land though equal in acreage, were different in value, and as such, the allocation had offended the principles of equality and non-discrimination. To support his arguments, he cites Articles 10 and 27 of the Constitution and the cases of **CKC & Another (Suing through their mother and next of friend JWN) v. ANC**; CA Appeal No. 121 of 2018, [2019] eKLR (**CKC Case**), **Peter K. Waweru v. Republic**; HC Misc. Application No. 118 of 2004, [2006] eKLR, **Samson Gwer & 5 Others v. Kenya Medical Research Institute & 3 Others**; SC Petition 12 of 2019, [2020] eKLR (**Samson Gwer Case**), and **D E N v. PN**; CA Appeal No. 226 of 2012, [2015] eKLR.

[17] It is the appellant's further submission that under Articles 2 (4) and 40 of the Constitution, displacement amounts to a violation of the right to own property. He faults the Court of Appeal for finding that the policies of the 3<sup>rd</sup> Respondent superseded his fundamental rights and freedoms as enshrined under Part 4 of the Constitution. On these grounds, he urges that the move by the 2<sup>nd</sup> and 3<sup>rd</sup> respondents to displace him and his family from the suit land violated his right to property.

[18] He submits further that while the Land (Group Representative) Act (repealed) provided for balloting, his failure to request for a ballot did not waive his fundamental rights and freedoms or bar him from seeking the protection of his rights. The appellant adds that there is no time limit within which to enforce fundamental rights and freedoms, either under the Constitution or the Limitation of Actions Act. He relies on this Court's Decisions in **In the Matter of the Speaker of the Senate & Another**; Reference No. 2 of 2013, [2013] eKLR and **In the Matter of the Kenya National Commission on Human Rights**; Reference No. 1 of 2012, [2014] eKLR to support this argument. He also maintains that in accordance with the provisions of Articles 19 (3) and 22 of the

Constitution, fundamental rights and freedoms are personal and the mere fact that other people affected by the process were not aggrieved by the outcome, did not preclude him from seeking redress from the Court. He relies on the Court of Appeal Decisions in ***Meru County Government v. Ethics & Anti-Corruption Commission***; C.A No. 193 of 2014, [2018] eKLR and the ***CKC Case*** to support this submission.

[19] The appellant contends that *the Court of Appeal failed to exercise its jurisdiction to re-evaluate the evidence placed before the High Court*. He submits that the Appellate Court erroneously ignored the valuation reports placed before the High Court. It is his case that the Valuation Report was admissible evidence that had been placed on Record through a Supplementary Affidavit. He further urges that the respondents had an opportunity to respond to the Report, yet they chose not to. He cites Section 3(2) of the Appellate Jurisdiction Act and the cases of ***Niels Bruel v. Moses Wachira & 2 Others***; C.A No. 188 of 2012, [2018] eKLR and ***Fredrick Otieno Outa v. Jared Odoyo Okello & 4 Others***; SC Petition No. 6 of 2014, [2014] eKLR to support his argument.

[20] The appellant submits that in Constitutional Petitions, the applicable rules of procedure are the Constitutional Practice and Procedure Rules 2013, and not the *Rules of Civil Procedure*. In support, he relies on Rule 3(1) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013. He further maintains that his Petition was anchored on Articles 22, 23, 27, 40, 47 and 50 of the Constitution and was not an ordinary suit filed by way of a Plaint or an Originating Summons. He relies on the cases of ***Jonathan Kiplangat Bor & 524 Others v. Sub County Police Commander Narok & Another***; ELC Petition No. 19 of 2019, [2020] eKLR, ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others***; SC Petition No. 23 of 2014, [2015] eKLR and Article 159 (2)(d) of the Constitution to urge his case. He also faults the Court of Appeal for relying on the case of ***Meme v. Republic*** [2004] EA 124,

which in his opinion, has been overtaken by events. Consequently, the appellant urges this Court not to sanction an illegality and to allow the appeal with costs.

**(b) The 1<sup>st</sup> Respondent**

[21] The 1<sup>st</sup> respondent's submissions are dated 27<sup>th</sup> August 2020 and filed on 28<sup>th</sup> August 2020. On the issue of the *criterion for subdivision and allocation of land in group ranches*, the 1<sup>st</sup> respondent, through his counsel on record *Mr. Larabi* and *Mr. Rono*, submits that sub-division on the basis of acreage is the practice used in group ranch sub-divisions all over the country. He cautions that adopting a different criterion that is based on value of land would be contrary to the long-standing practice and would create a crisis all over the country.

[22] The 1<sup>st</sup> respondent, submits that there was no discrimination in the allocation of the land to the appellant and other members of the group ranch. He urges that the sub-division was in accordance with the provisions of the former Constitution, the Land Adjudication Act (Repealed) and the Land Group (Representatives) Act, which was the applicable law. He states that each member of the 3<sup>rd</sup> respondent was allocated their individual shares of approximately 180 acres, and that in the process some members had to be relocated to areas that had initially been set aside for communal grazing.

[23] It is the 1<sup>st</sup> respondent's submissions that there was no legitimate expectation that members would be allocated land based on value rather than acreage. He contends that to the contrary, the legitimate expectation of all the 519 members was that each was to get an equal portion of the group ranch land. He relies on the decision of this Court in ***Communication Commission of Kenya & 5 Others v. Royal Media Services Limited & 5 Others*** [2014] eKLR to urge that legitimate expectation must be express, clear, unambiguous and reasonable.

[24] On the issue as to *whether the relocation amounted to violation of the appellant's right to own property*, the 1<sup>st</sup> respondent submits that relocation of members of group ranches or communally owned land during subdivision, is a very prevalent and acceptable practice. He contends that during relocation, some members may be required, in the collective interest of the group, to relinquish parcels of land to which they are sentimentally attached. He urges that some other members of the ranch were also relocated and that since the appellant was given alternative land, he cannot allege that his right to own property was violated.

[25] On *whether the Court of Appeal failed to re-evaluate evidence presented before the trial Court*, he urges that it is only in exceptional circumstances that the Court of Appeal interferes with the findings of fact by the trial Court. In his view, there were no such circumstances, to warrant a re-evaluation of evidence by the Appellate Court. He relies on Section 29(1)(a) of the Court of Appeal Rules and the case of ***Selle v. Associated Motorboat Company*** [1968] E. A 123 to support his argument.

[26] On *whether the superior Courts below erred in relying on the Civil Procedure Rules with regard to allegation of fraud*, the 1<sup>st</sup> respondent supports the Court of Appeal's finding that matters of fraud and discrimination, whether in constitutional or ordinary civil litigation, must be specifically pleaded and proved. He cites ***Koinange & 13 Others v. Koinange*** [1968] KLR 23, Civil Appeal No. 132/2005, ***Kinyajui Kamau v. George Kamau Njoroge*** and ***Ndolo v. Ndolo*** [2008] 1 KLR (G& F) 742 in support of this argument. It is his further contention that the appellant cannot invoke Article 159 (d) of the Constitution to cure his failure to discharge the burden of proof required under Sections 107 and Section 108 of the Evidence Act. He concludes his submissions by urging this Court to dismiss the appeal.

**(c) The 2<sup>nd</sup> and 3<sup>rd</sup> Respondents**

[27] The 2<sup>nd</sup> and 3<sup>rd</sup> respondents support the Court of Appeal's finding in their submissions dated 21<sup>st</sup> August 2020 and filed on 25<sup>th</sup> August 2020. Their counsel on record *Mr. Weru* submits that the only criterion that was applicable in the subdivision and allocation of the ranch was equality in acreage, which was sufficiently achieved. They urge that this was the equality in allocation contemplated in the letter by the Director of Land Adjudication and Settlement. They submit that any dissatisfaction with the sub-division ought to have been raised with the officials at a general meeting. It notes that no objection on the criteria used to sub-divide the ranch was raised by the appellant or any other member in the period of 15 years it took to conclude the subdivision and allocation.

[28] They further submit that the valuation reports referred to by the appellant, were inadmissible and could not form the basis of the criteria for subdivision. They urge that the discrepancies in the value of the properties were never pleaded in the petition and were only raised later in a Supplementary Affidavit. They rely on the cases of ***Gatirau Peter Munya v. Dickson Mwenda Kithinji & 3 Others***; SC Application No. 5 of 2014, [2014] eKLR , and ***Samson Gwer***, to urge that the appellant is inviting the Court to re-examine the probative value of the valuation reports not admitted by the trial Court. It is also submitted that the appellant deliberately failed to disclose that, whereas the valuation reports were tabled before the trial Court by way of a supplementary affidavit, their production in evidence was declined by that Court, on the basis that admitting the same would have been tantamount to allowing an amendment to the Petition through the backdoor. They rely on the decision by the Court of Appeal in ***Dellian Langata Limited v. Symon Thuo Muhia, Mary Njoki Thuo, Agricultural Finance Corporation, Nairobi City Council & Council of Legal Education***; C.A Appeal No. 144 of 2014, [2018] eKLR to support their argument.

[29] The respondents submit that all allegations of fraud and misrepresentation must be specifically particularized and proved. In support of their argument, they cite Article 50 of the Constitution and the Judgment by the Environment and Land Court in *Jonathan Kiplangat Bor & 524 Others v. Sub-County Police Commander Narok & Another*; ELC Petition No. 19 of 2019, [2020] eKLR. In this regard, the respondents submit that Article 159 of the Constitution cannot be a basis for a party to disregard rules of evidence.

[30] The 2<sup>nd</sup> and 3<sup>rd</sup> respondents submit that the appellant's right to property was not violated as the objective of the dissolution and sub-division of the ranch, was to ensure equitable allocation of the ranch land to all its members. Further, they submit that the property allocated to the appellant was equal in acreage to that allocated to all the other members. The respondents submit that the mere fact that the appellant was allocated a different parcel of land did not divest him of the right to own property. They urge the Court not to interfere with the Court of Appeal's finding on the issue as it will affect the rights of the other 518 members who have already settled and developed their allocated parcels. They rely on the Court of Appeal Decision in *East African Cables Limited v. Public Procurement Complaints, Review & Appeals Board & Another*; C.A Appeal No. 109 of [2007] eKLR to make the case for the Court to bear in mind the rights and interests of other members where an individual is agitating for specific rights within a whole.

**(d) The 4<sup>th</sup> and 5<sup>th</sup> Respondents**

[31] The 4<sup>th</sup> and 5<sup>th</sup> respondents' submissions are dated 31<sup>st</sup> August 2020 and filed on 4<sup>th</sup> September 2020. They submit that this Court lacks jurisdiction to entertain this appeal either as of right or as one involving a matter of general public importance. They urge that the appellant has not demonstrated how his rights were denied or violated by the respondents or how the Court of Appeal misinterpreted the Constitution for this Court to intervene. They also submit that the appellant has filed this suit to advance his interests and that cannot amount to

an issue of public importance. They cite the case of ***Bernard Kibor Kitur v. Alfred Kiptoo Keter & Another***; Election Petition No. 1 of 2017, [2018] eKLR and ***Joseph Ndungu Njau v. Margaret Magiri Mbuki***; SC Petition No. 13 of 2015, [2017] eKLR to support their argument.

[32] On whether the *sub-division and allocation of the ranch was equitable*, the 4<sup>th</sup> and 5<sup>th</sup> respondents submit that they complied with the applicable laws and the letter instructing them to sub-divide the land, by ensuring that each member got an equal share based on acreage. It is the respondents' submission that the land was grazing land, communally owned in undivided shares and therefore unless the appellant can demonstrate that he could not graze his land in his allocated parcel, his appeal is one for dismissal.

[33] On whether the *appellant's right to property was violated*, the respondents submit that the process of subdivision involved making provision for roads, schools and other public utilities, hence original settlements. In this regard, they echo the sentiments of the 1<sup>st</sup> to 3<sup>rd</sup> respondents.

[34] On *whether Civil Procedure Rules apply to constitutional matters*, the respondents argue that allegations of fraud must be specifically pleaded and proved as set out under Order 2 Rule 10 (1) (a) of the Civil Procedure Rules. It is the respondents' case that, in any event, the burden of proof as was laid in the ***Gatirau Munya Case*** does not shift or change in constitutional matters. Therefore, they associate themselves with the Appellate Court's holding and urge this Court to dismiss the Appeal.

[35] Finally, the respondents support the Court of Appeal's finding that the content of the Valuation Report was un-procedurally introduced in Court. They submit that the Report in question, cannot be invoked to activate the jurisdiction of this Court.

## D. ISSUES FOR DETERMINATION

[36] Having considered the gist of the appellant's case, and the submissions of the respective parties, we have determined that only two issues arise for determination in this Appeal. These are:

1. ***What criterion should determine the sub-division and consequent allocation of land to individual members of a Group Ranch? Is it the Acreage or Value of the Land?***
2. ***Was the appellant's Constitutional Right to own land violated by the respondent's decision to base the sub-division on Acreage as opposed to Value of the Land?***

[37] Suffice it to say that the nature of the two issues as couched above, leaves no doubt that this Court has jurisdiction to entertain this Appeal. Our determination in this regard disposes of the contention by the 4<sup>th</sup> and 5<sup>th</sup> respondents to the contrary.

### ***(i) Acreage or Value?***

[38] The appellant faults the decision by the respondents, to base the sub-division and consequent allocation of land, to individual members of the Group Ranch on acreage, as opposed to value. This resulted in his relocation from the initially 'held' parcel, to a different one which was of a lower value, hence his grievance. The answer to this question lies in the nature of the operative "tenure" and attendant legal regime in "Group Ranches". The origin and rationale of Group Ranches in Kenya is well documented. In a nutshell, the Land Group Representatives Act (now repealed) was introduced to enable the inhabitants of large swathes of land in largely semi-arid pastoralist areas, to hold such land as a group, under one title. The title would be issued to and held by elected representatives on behalf of the group. Through this instrumentality, the group

ranch not only acquired a “corporate character”, but became henceforth legally insulated from the ‘tragedy of the commons’

**[39]** The group ranch was therefore owned by members of the group, in equal but undivided shares, until such time that each member acquired their individual titles. So what type of tenure is created in these ranches? In the law of property in land, this is what can be characterized as “a community of ownership” (or co-ownership) as opposed to “community or communal ownership”. In the former, each member has an equal share, though undivided, while in the latter, there is no equality of shares. The members derive their security of tenure ‘qua members’ of that community. The nature of that security will also differ depending on the status of the members. Therefore, the type of tenure operative in a group ranch under the Land (Group Representatives) Act, is what is known at common law as “a tenancy in common”, as opposed to “a joint tenancy” (the ingredients of which may be clarified in future litigation). Members of the group ranch are “tenants in common” as opposed to “joint tenants”.

**[40]** At common law, each co-owner is as much entitled to possession of *any part of the land as the others*. He cannot point to any part of the land as his own to the exclusion of the others; if he could, there would be separate ownership and not co-ownership. No one co-owner has a better right to the property than another. Tenants in Common hold in undivided shares. Each tenant in common has a distinct share in property which has not yet been divided among the co-tenants. The only fact which brings them into co-ownership is that they both have shares in a single property which has not yet been divided among them. Therefore, while the tenancy in common lasts, no one can say which of them owns any particular parcel of land. (See Megarry and Wade, ‘*The Law of Real Property*’ 6<sup>th</sup> Edition Pages 477 and 480).

**[41]** Applying these principles to the dispute at hand, we cannot see the legal basis upon which the appellant could lay claim to the parcel of land in question, to the exclusion of any other member of the group ranch. For as long as the group

ranch remained undivided, his share in the land was equal to the other members of the group. It remained a tenancy in common until each member went their separate ways, having acquired their individual titles. Logically and undeniably therefore, the equality in the undivided shares of a group ranch, can only be based on acreage as opposed to value, for that is what brings its members into “a community of ownership”. Can it be said that a group ranch comes into existence on the basis of its value as opposed to its acreage? Hardly so. The frontiers of a group ranch can only be determined by its acreage as established by a Survey which then maps its boundaries. This explains why the mechanism that is used by the group representatives at the time of sub-division is *balloting*. Balloting is *acreage sensitive* but *value blind*. After sub-division, individual parcels are bound to differ in terms of value, depending on various factors. However, such differences in the value of distinct parcels are a post sub-division phenomenon, and therefore irrelevant to the process.

**[42]** The answer to the first issue as framed, renders the determination of the second one unnecessary, as it disposes of the gist of the Appeal. For these reasons, we find no difficulty in upholding the Judgment of the Court of Appeal.

#### **E. ORDERS**

- (i) *The Petition of Appeal dated 18<sup>th</sup> May 2020 is hereby dismissed;***
- (ii) *The Judgment of the Court of Appeal dated 1<sup>st</sup> December 2017 is hereby upheld;***
- (iii) *The Appellant shall bear the Costs of this Appeal.***

**Orders accordingly.**

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> Day of July, 2021.**

.....  
**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**

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

**REGISTRAR**

**SUPREME COURT OF KENYA**

