



No. 334

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISII**

**ENVIRONMENT AND LAND CIVIL CASE NO. 211 OF 2009**

**LUCY BOSIRE ..... PLAINTIFF**

**VERSUS**

**NYANKONI MANGA ROBI ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff brought this suit against the defendant on 21<sup>st</sup> October 2009 seeking; a declaration that the plaintiff is the registered and/or lawful owner of all that parcel of land known as **LR No. Bukira/Bwisaboka/134** (hereinafter referred to as “**the suit property**”), a declaration that the decisions of Kuria Land Disputes Tribunal and Resident Magistrate’s Court at Kehancha dated 23<sup>rd</sup> October 2007 and 24<sup>th</sup> January 2008 respectively cancelling and/or nullifying the plaintiff’s title over the suit property were illegal, null and void, a permanent injunction to restrain the defendant from acting on, implementing, enforcing and/or giving effect to the said decision of Kuria Land Disputes Tribunal and/or trespassing onto, building structures, cultivating, interfering with and/or in any other manner dealing with the suit property and an order of prohibition and/or inhibition or restraining the implementation and/or enforcement of the decision of Kuria Land Disputes Tribunal aforesaid.

2. In summary, the facts that gave rise to the plaintiff’s claim herein are as follows. The plaintiff was at all material times and still is the registered proprietor of the suit property which measures approximately 21.5ha. The suit property was registered in the name of the plaintiff on 23<sup>rd</sup> April 1996. On or about 15<sup>th</sup> August 2006, the defendant lodged a claim against the plaintiff with Kuria Land Disputes Tribunal (hereinafter referred to only as “the tribunal”) in Tribunal Case No. 12 of 2006 in which the defendant claimed ownership of the suit property. The tribunal took cognizance of the defendant’s claim, heard the same and rendered its decision thereon on 23<sup>rd</sup> October 2007 through which the tribunal purported to award the defendant the suit property and directed the plaintiff’s title to be cancelled and a new title for the suit property issued in favour of the defendant.

3. The said decision of the tribunal was lodged at the Resident Magistrate’s Court at Kehancha for adoption as a judgment of the court in Misc. Civil Application No. 18 of 2007 and the same was duly adopted as such on 24<sup>th</sup> January 2008. The plaintiff has contended that she was not given notice of the proceedings at the tribunal and at the Resident Magistrate’s court, Kehancha. The plaintiff has contended further that the tribunal had no jurisdiction to determine disputes concerning ownership of land and as such the proceedings and decisions of the tribunal and the Resident Magistrate’s court, Kehancha were null and void for want of jurisdiction. It is on account of the foregoing that the plaintiff brought this suit.

4. The defendant entered appearance and filed a statement of defence and counter-claim on 7<sup>th</sup> December

2009. In his defence, the defendant admitted that the plaintiff is the registered proprietor of the suit property but denied that the plaintiff acquired ownership of the suit property lawfully. The defendant admitted further that he filed a complaint with the tribunal in which he claimed ownership of the suit property and that the tribunal gave a decision in his favour that was adopted as a judgment of the court by the Resident Magistrate's court at Kehancha. The defendant denied however that the tribunal had no jurisdiction to entertain his claim and that the decision of the tribunal and the adoption thereof by the Resident Magistrate's court at Kehancha as a judgment of the court were null and void for want of jurisdiction. The defendant contended that he has a valid judgment from Resident Magistrate's court at Kehancha which has not been varied or set aside and which confers upon him lawful rights over the suit property which judgment he is entitled to execute.

5. The defendant contended further that the plaintiff acquired the suit property unlawfully and fraudulently. The defendant accused the plaintiff of having colluded and connived with her deceased husband one, Marco Bosire who had acquired the property fraudulently to have the property transferred to her name. The defendant also accused the plaintiff of having forging consent of the land control board to transfer the suit property to her name. In the counter-claim, the defendant contended that the suit property was on first registration registered in the name of the defendant's deceased father one, Manga Robi Marwa and that the defendant and members of his family have occupied the suit property since the defendant was born. The defendant contended that his deceased father never sold the suit property to the plaintiff's deceased husband, Marco Bosire from whom the plaintiff acquired the suit property. The defendant contended further that even if it is assumed that the plaintiff acquired the suit property lawfully, the defendant by virtue of his occupation of the suit property for over 12 years has acquired title to the property by adverse possession. The defendant sought; a declaration that he has acquired title over the suit property by adverse possession and an order directing the plaintiff to transfer the suit property to the defendant.

6. This suit was listed for hearing on 19<sup>th</sup> February 2014 at the registry. When the matter came up for hearing, only the plaintiff and her advocate appeared. Neither the defendant nor her advocate appeared in court when the matter was called out. After satisfying myself from the affidavit of David Okumu Ojill sworn on 19<sup>th</sup> February, 2014 that the firm of Kerario Marwa & Co. Advocates who are on record for the defendant were served with a hearing notice, I allowed the hearing to proceed, their absence notwithstanding. The plaintiff gave evidence and called no witness. The plaintiff testified that; she is the owner of the suit property. The defendant had lodged a claim against her in respect of the suit property with the tribunal. Although she was summoned to appear before the tribunal, she was not served with a formal claim. The tribunal heard the defendant's claim and in its decision ordered that the suit property be transferred to the defendant. The suit property was initially registered in the name of her late husband Marco Bosire who transferred the same to her.

7. The tribunal's decision aforesaid was lodged with the Resident Magistrate's court at Kehancha and adopted as a judgment of the court on 24<sup>th</sup> January 2008. The tribunal did not notify her of the date of their decision neither was she notified of the proceedings, before the Resident Magistrate's court at Kehancha. The tribunal's decision was influenced by the fact that she is not a resident of Kuria. She was born in Kuria but got married to a Kisii. She urged the court to order that the suit property be given to her as her deceased husband purchased the suit property and transferred the same to her lawfully. Her deceased husband purchased the suit property from the defendant's father and the defendant is now in forceful occupation of the property. She denied all the allegations contained in the defendant's counter-claim and urged the court to dismiss the same with costs. In examination by the court, the plaintiff stated that although she participated in the proceedings before the tribunal, the tribunal did not notify her of the date for its decision. She also stated that the suit property is still registered in her name since the decision of the tribunal has never been enforced. The plaintiff produced in evidence; a copy of the instrument of transfer of land dated 5<sup>th</sup> October 1995 through which her deceased husband Marco Bosire transferred the suit property to her (Pexh. 1), a copy of a certificate of official search in respect of the suit property dated 19<sup>th</sup> October 2009 which shows that the plaintiff was registered as the proprietor of the suit property on 23<sup>rd</sup> April 1996 (Pexh.2), a copy of the title deed dated 23<sup>rd</sup> April 1996 in the name of the plaintiff (Pexh.3), a copy of the proceedings and decision of the tribunal dated 23<sup>rd</sup> October 2007 (Pexh.4) and the

proceedings and decision of the Resident Magistrate's court at Kehancha dated 24<sup>th</sup> January 2008 (Pexh.5).

8. After the close of the plaintiff's case the court directed that the plaintiff do file written closing submissions which were duly filed on 10<sup>th</sup> March 2014 and served upon the defendant's advocates. When the matter came up for mention on 15<sup>th</sup> July 2014 for the court to give a judgment date, the defendant's advocates did not appear although they were duly served with a mention notice according to the affidavit of David Okumu Ojill sworn on 14<sup>th</sup> July 2014 and filed herein on 15<sup>th</sup> July 2014. I have considered the pleadings filed herein by the parties, the evidence tendered by the plaintiff and the plaintiff's advocates submissions. The parties did not agree on the issues for determination by the court. From the pleadings on record, the following in my view are the issues that arise herein for determination;

- i. Whether the plaintiff was at all material times the lawful owner of the suit property?
- ii. Whether the tribunal had jurisdiction to cancel the plaintiff's title and order that the suit property be registered in the name of the defendant?
- iii. Whether the decision of the tribunal and the adoption thereof by the Resident Magistrate's court at Kehancha was null and void?
- iv. Whether the plaintiff is entitled to the reliefs sought in the plaint?
- v. Whether the defendant is entitled to the reliefs sought in the counter-claim?

#### **9. Issue No. I;**

In his statement of defence, the defendant admitted that the plaintiff is the registered proprietor of the suit property. The defendant contended however that the plaintiff acquired the suit property unlawfully and fraudulently and as such her title to the property is not valid. In her evidence, the plaintiff testified that the suit property was purchased by her deceased husband from the father of the defendant lawfully. Thereafter, her said deceased husband transferred the suit property to her. The plaintiff produced in evidence a copy of the instrument of transfer through which her deceased husband caused the suit property to be transferred and registered in her name. She also produced a copy of a title deed that was issued to her upon registration as owner of the suit property. Finally, she produced a certificate of official search which shows that as at the time of filing this suit, the suit property was registered in her name. In my view, the registration of land in the name of a person and the ownership of such land go hand in hand save in special circumstances such as where land is held in trust.

10. Section 24 (a) of the Land Registration Act, 2012 provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging thereto. Section 25 (2) of the said Act exempts land held in trust. The defendant did not contend that the plaintiff holds the suit property in trust for him. The defendant's contention in his defence and counter-claim is that the plaintiff's husband had acquired the suit property fraudulently and unlawfully and as such could not confer upon the plaintiff a valid title. The suit property is registered under the Registered Land Act, Cap 300 Laws of Kenya (now repealed) ("RLA"). It is the RLA that was in force in the year 1996 when the suit property was transferred to the plaintiff by her deceased husband. Section 39(1) of the RLA provides that any person dealing with a registered proprietor of land for valuable consideration is not under a duty to find out how and for what consideration the said proprietor had acquired the land. I have noted from the record (Pexh.1) that the suit property was transferred to the plaintiff by her deceased husband at a consideration of Ksh.50,000/=.

11. It follows therefore that the plaintiff was not under any duty to go behind her deceased husband's title to find out how it was acquired. Secondly, the defendant did not give evidence and as such placed no material before the court to prove that the plaintiff's deceased husband acquired the suit property unlawfully and fraudulently. The plaintiff's evidence that her deceased husband acquired the suit property lawfully before he transferred the property to her is therefore not controverted. It is therefore my finding that the plaintiff was at all material times the lawful registered owner of the suit property.

#### **12. Issue No. II;**

The tribunal was a creature of statute namely, the Land Disputes Tribunal act No. 18 of 1990 (now repealed) (“the Act”). The Act provided for the jurisdiction of the tribunal. The tribunal could not exercise any jurisdiction that was not provided for in the Act. Section 3(1) of the Act gave the tribunal jurisdiction to determine all disputes of a civil nature involving; the division of, or determination of boundaries to land, a claim to occupy or work land; or trespass to land. As can be seen from the foregoing, the tribunal had no jurisdiction to determine disputes over title to or ownership of land. I am therefore in agreement with the submissions by the plaintiff that the tribunal herein acted in excess of its jurisdiction when it entertained the defendant’s claim and purported to cancel the plaintiff’s title and order that the defendant be registered as the proprietor of the suit property.

### 13. Issue No. III;

As I have already stated above, the decision of the tribunal was arrived at without jurisdiction. A decision made without or in excess of jurisdiction is a nullity *ab initio*. It is irrelevant that the plaintiff participated in the proceedings before the tribunal. As was held in the case of **Allarakhia vs. Aga Khan (1969) E.A 613**, parties cannot by mutual consent confer jurisdiction on a court which has no such jurisdiction. The Resident Magistrate’s court at Kehancha had no jurisdiction to adopt a null and void decision of the tribunal as a judgment of the court. In the case of **Desai vs. Warsama (1967) E.A 351**, court in holding that no court can confer jurisdiction upon itself stated at page 353 that, “**It is well established law that a judgment of a court without jurisdiction is a nullity...**”. I am of the view the adoption of the decision of the tribunal as a judgment of the court did not change the nature and character of the said decision. The decision was null and void and remained so even after adoption. To put it in other words, nullity can only beget nullity. It is my finding therefore that the decision of the tribunal and that of the Resident Magistrate’s Court at Kehancha that adopted the same as a judgment of the court were null and void.

### 14. Issue No. IV;

The defendant did not contend that this court cannot grant the reliefs sought herein. The jurisdiction of this court to grant the reliefs sought by the plaintiff is therefore not an issue for determination in this suit. I am alive however to the fact that the plaintiff should have challenged the decision of the Tribunal by way of an appeal to the Provincial Appeals Committee under section 8(1) of the Act or through an application for judicial review to the High Court. The plaintiff testified however that she was not notified of the date when the tribunal’s decision was to be made. She stated further that she was also not served with the defendant’s application for the adoption of the tribunal’s decision as a judgment of the court. By the time this suit was filed on 21<sup>st</sup> October 2009, the time within which the said decisions could be challenged through judicial review or appeal had lapsed. The plaintiff’s evidence that she was not notified of the date of the decision of the tribunal and the adoption of the tribunal’s decision as a judgment of the court was not controverted.

15. In the circumstances, the plaintiff cannot be blamed for failure to challenge the tribunal and the Resident Magistrate Court’s said decisions through the process of appeal or judicial review. By the time the plaintiff had notice of the said decisions, the only recourse that was open to her to get justice was to approach this court. In the case of **Johana Nyakwoyo Buti –vs- Walter Rasugu Omariba & 2 Others, Kisumu Civil Appeal No. 182 of 2006** (unreported), the court held that the decision of the Land Disputes Tribunal can be challenged through a normal suit or a declaratory suit even after the same has been adopted as a judgment of the court by the Resident Magistrate’s court and that it is after the hearing that the court can determine whether to grant the reliefs sought or not.

16. In the same way the Court of Appeal had found in the case of **Johana Nyakwoyo Buti –vs- Walter Rasugu Omariba** (Supra), I am persuaded by the evidence of the plaintiff herein that she had no other alternative to challenge the said decisions of the tribunal and the Resident Magistrate’s court other than to come to this court. I have no evidence before me that the plaintiff approached the court after unreasonable delay upon having notice of the said decisions or that she did anything to suggest that she had acquiesced to the said decisions. For the foregoing reasons, I see no reason why I should deny the plaintiff the declaratory and ancillary reliefs sought herein. I am however not comfortable with prayer (iv) in the plaint. The prayer in my view is in the nature of judicial review and can only be granted on an

application for judicial review or on a constitutional petition.

**17.Issue No. V;**

The defendant did not tender any evidence in proof of his counter-claim. The counter-claim was therefore not proved and as such the reliefs sought therein cannot be granted. In conclusion, it is my finding that the plaintiff has proved her case against the defendant on a balance of probability. On the other hand, the defendant has failed to prove his counter-claim. I therefore enter judgment for the plaintiff against the defendant as prayed in paragraphs (i), (ii) and (iii) of the plaint dated 21<sup>st</sup> October 2009. The plaintiff shall have the costs of the suit and the counter-claim.

**Delivered, signed and dated at KISII this 31<sup>ST</sup> of October, 2014.**

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Oguttu-Mboya for the plaintiff

Mr. Bosire h/b for Kerario for the defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**