



No. 332

**REPUBLIC OF KENYA**

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

**ENVIRONMENT AND LAND CIVIL CASE NO. 15 OF 2006**

WALTER RASUGU OMARIBA Suing through his Attorney

BEUTAH ONSOMU RASUGU .....PLAINTIFF

VERSUS

JOHANA NYOKWOYO BUTI ..... 1<sup>ST</sup> DEFENDANT

JOSEPH ONDIMU OENDO ..... 2<sup>ND</sup> DEFENDANT

HON. ATTORNEY GENERAL .....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

1. The plaintiff is and was at all material times the registered proprietor of all that parcel of land known as LR No. Kitaru Settlement scheme/55 (hereinafter referred to as “the suit property”). The plaintiff purchased the suit property from one, James Onchoke Nyokwoyo who is a son to the 1<sup>st</sup> defendant herein at a consideration of kshs. 856,220/= . Sometimes between May, 2004 and February, 2005 the exact date in which the plaintiff was not aware of, the 1<sup>st</sup> defendant without any notice to the plaintiff lodged a claim against the 2<sup>nd</sup> defendant with the Borabu Land Disputes Tribunal concerning among others the suit property. The Borabu Land Disputes Tribunal (hereinafter referred to only as “**the tribunal**”) heard the 1<sup>st</sup> defendant’s claim against the 2<sup>nd</sup> defendant and decided among others that the plaintiff’s title to the suit property be revoked.
2. The tribunal’s decision was again without notice to the plaintiff lodged before Nyamira Senior Resident Magistrate’s Court (hereinafter referred to as “**the magistrate’s court**”) for adoption as a judgment of the court and the same was duly adopted. The plaintiff brought this suit against the defendants seeking; a declaration that the decision of the tribunal dated 9<sup>th</sup> May 2004 that was adopted by the magistrate’s court revoking the plaintiff’s title to the suit property was unlawful and/or improper and a permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants from interfering with and/or trespassing onto the suit property. The plaintiff has contended that the tribunal’s decision was improper and/or unlawful for among other reasons the same having been arrived at without notice to the plaintiff and without affording the plaintiff an opportunity to be heard.
3. The 1<sup>st</sup> and 3<sup>rd</sup> defendants entered appearance. I have not come across the statement of defence that was filed by the 3<sup>rd</sup> defendant on record. The 2<sup>nd</sup> defendant seems not to have entered appearance or filed a statement of defence. There is none on record. The only statement of

defence on record is that which was filed by the 1<sup>st</sup> defendant on 13<sup>th</sup> February 2006. The 1<sup>st</sup> defendant seems to be the only party who filed a defence to the plaintiff's claim herein. In his statement of defence, the 1<sup>st</sup> defendant admitted that the plaintiff was at all material times registered as the proprietor of the suit property. The 1<sup>st</sup> defendant admitted further that the 1<sup>st</sup> defendant did lodge a complaint with the tribunal against the 2<sup>nd</sup> defendant concerning the suit property and that the tribunal determined the said dispute which determination was adopted by the resident magistrate's court on 16<sup>th</sup> February 2005. The 1<sup>st</sup> defendant denied that the complaint that he had lodged with the tribunal was improper or that the decision that was made by the tribunal was illegal as claimed by the plaintiff. The 1<sup>st</sup> defendant contended that if the plaintiff was denied an opportunity to be heard by the tribunal, his only recourse was to challenge the tribunal's decision by way of judicial review but not in a suit of this nature. The defendant contended further that the plaintiff's suit is frivolous, vexatious and amounts to an abuse of the process of the court and intimated that he would raise a preliminary objection to the suit on several points of law.

4. Together with the plaint, the plaintiff filed an application for a temporary injunction to restrain the 1<sup>st</sup> defendant from interfering with the plaintiff's possession of the suit property pending the hearing and determination of this suit. The plaintiff's application was opposed by the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant filed notice of grounds of opposition and notice of preliminary objection both dated 13<sup>th</sup> February 2006. Among the points of law that the 1<sup>st</sup> defendant raised in his preliminary objection was that in view of the provisions of the Land Disputes Tribunal's Act, No. 18 of 1990 (now repealed) which provided for an appeal to the Provincial Appeals Committee from the decision of the tribunal and further appeal to the High Court on points of law from the decision of the said appeals committee pursuant to section 8 (9) of the said Act, this court has no jurisdiction to entertain this suit. The other point that was raised in the 1<sup>st</sup> defendant's preliminary objection was that this suit is not maintainable on account of the fact that the decisions of the tribunal and the resident magistrate complained of can only be varied or annulled through an application for judicial review. When the plaintiff's application for injunction came up for hearing, the 1<sup>st</sup> defendant was allowed to argue his preliminary objection which to the 1<sup>st</sup> defendant would have determined the entire suit.
5. The 1<sup>st</sup> defendant's preliminary objection was heard by Kaburu Bauni J. who dismissed the same on 6<sup>th</sup> June 2006. The judge held that since the plaintiff was not a party to the dispute that was before the tribunal there was no way in which he could have pursued the appeal process provided for under the Land Disputes Tribunals Act, No. 18 of 1990 (now repealed). The judge also held that the plaintiff's application for judicial review having been dismissed on a technicality, the plaintiff was not precluded from bringing this suit. The 1<sup>st</sup> defendant was dissatisfied with the decision of Kaburu Bauni J. and preferred an appeal against the same to the Court of Appeal. The 1<sup>st</sup> defendant appeal to the Court of Appeal was dismissed with costs on 13<sup>th</sup> April 2011 thereby paving the way for the hearing of this suit which had been stayed pending the hearing and determination of the said appeal. In their judgment, the Court of Appeal stated that the decision of the tribunal that had now been merged in the decision of the resident magistrate could be challenged in this suit. The court observed that the plaintiff had no other remedy of challenging the decision of the tribunal and the resident magistrate's court other than through this suit. The Court of Appeal held that this suit is properly before the court and that it is up to this court to determine after taking evidence whether to grant the reliefs sought or not.
6. The hearing of the plaintiff's case commenced before R. Lagat Korir J. on 25<sup>th</sup> October 2011 when the plaintiff's attorney, one Beuttah Onsomu Rasugu (PW1) gave evidence and called one witness James Onchoke (PW2) after which the plaintiff closed his case. The 1<sup>st</sup> defendant's case was also heard by R. Korir Lagat J. on 14<sup>th</sup> February 2012 when the 1<sup>st</sup> defendant testified and called one witness, Hudson Mayaka (DW2) before closing his case. R. Korir Lagat J. heard the 2<sup>nd</sup> defendant's case in part before she proceeded on transfer. On 30<sup>th</sup> April 2013, the advocates for the parties agreed that the matter do proceed from where it stopped. The evidence of the 2<sup>nd</sup> defendant's witnesses James Omanga Nyangate (DW1) and Francis Nyamagwa Otara (DW2) was taken before me after which the 2<sup>nd</sup> defendant closed his case. The 3<sup>rd</sup> defendant's advocate Miss

Ochwal informed the court after the close of the 2<sup>nd</sup> defendant's case that since the 3<sup>rd</sup> defendant did not file a statement of defence, she had no witness to call. The advocates for the parties agreed thereafter to exchange written closing submissions. All the parties filed their closing submissions and the same are on record.

7. I have considered the pleadings filed herein and the evidence tendered by the parties and their witnesses. I have also considered the closing submissions by the advocates for the plaintiff, 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant and by the 2<sup>nd</sup> defendant in person. I have also considered the oral submissions that were made in court by the plaintiff's advocate on 9<sup>th</sup> July 2014 and the numerous authorities that were cited by the advocates for the parties in support of their respective submissions. The parties did not agree on the issues for determination by the court. In their submissions, the advocates for the plaintiff, the 1<sup>st</sup> defendant and 3<sup>rd</sup> defendant framed separate issues. I have considered the three (3) sets of issues, the pleadings filed herein and the evidence tendered. In my view the following are the issues which arise for determination in this suit;
- i. Whether the decision of the tribunal and the adoption thereof by the resident magistrate were lawful and/or improper?
  - ii. Whether the orders sought are available to the plaintiff?
  - iii. Whether the plaintiff is entitled to the orders sought?

#### 8. Issue No. I;

It is undisputed fact that the plaintiff was not made a party to the proceedings that were commenced by the 1<sup>st</sup> defendant against the 2<sup>nd</sup> defendant at the tribunal. It is also not in dispute that in the said proceedings, the tribunal considered the propriety of cancelling the title of the suit property that was registered in the plaintiff's name and in fact proceeded to order that the same be revoked. In the circumstances, the plaintiff's contention that the tribunal condemned him without a hearing cannot be resisted. The decision of the tribunal was thereafter lodged with the resident magistrate for adoption as a judgment of the court pursuant to the provisions of section 7(2) of the Land Disputes Tribunals act No. 18 of 1990 (now repealed) (hereinafter referred to only as "the Act"). Again the plaintiff was not notified of the application that was lodged before the resident magistrate for the adoption of the tribunal's decision and the resident magistrate's court proceeded to adopt the same without the plaintiff's participation.

9. Both the tribunal and the resident magistrate's court condemned the plaintiff unheard in breach of the rules of natural justice. The tribunal was a creature of the Act and its jurisdiction was set out in the Act. The tribunal could not exercise jurisdiction that was not conferred upon it under the Act. As submitted by the plaintiff, section 3 (1) of the Act conferred upon the tribunal jurisdiction to determine disputes of a civil nature involving; the division of or determination of boundaries to land including land held in common, a claim to occupy or work land, and trespass to land. It is clear from the foregoing that the tribunal did not have jurisdiction to determine a dispute over title or ownership of land. See the Court of Appeal case of **Jonathan Amunavi –vs- The Chairman Sabatia Division Land Disputes Tribunal & Another, Kisumu Civil Appeal No. 256 of 2002** (unreported) that was cited by the plaintiff. The tribunal therefore acted in excess of its jurisdiction when it purported to revoke the plaintiff's title to the suit property. As the Court of Appeal had observed in the case cited above, such power was reserved for the High Court by section 159 of the Registered Land act, Cap 300 Laws of Kenya (now repealed). The decision of the tribunal complained of herein was therefore made without jurisdiction and in breach of the rules of natural justice.
10. The law is settled that a decision which is arrived at without jurisdiction or in breach of the rules of natural justice is a nullity. The tribunal's order or decision being a nullity could not be filed before the resident magistrate's court for adoption as a judgment of the court. The resident magistrate did not have the magic that could turn a nullity to something else rather than a nullity. A nullity as I have stated before can only beget a nullity. It follows therefore that the purported adoption of the tribunal's decision by the resident magistrate's court was equally null and void. I am in agreement with the submissions by the 1<sup>st</sup> defendant that the decision of the tribunal ceased

to exist independently after its adoption as a judgment of the court. On being adopted, the same merged with the judgment of the resident magistrate. This merger does not however in my view rob the tribunal's decision of its identity. It is not correct therefore as submitted by the 1<sup>st</sup> defendant that this court cannot make a declaration that the tribunal's decision that was adopted as a judgment of the resident magistrate was null and void and ought not to have been adopted. The cases cited by the 1<sup>st</sup> defendant in support of this line of argument are all distinguishable. For the foregoing reasons, I would answer issue number one (I) in the affirmative.

**11. Issue No. II;**

I am of the view that this issue was laid to rest by the Court of Appeal in their decision in Kisumu Civil Appeal NO. 182 of 2006, **Johana Nyakwoyo Buti –vs- Walter Rasugu Omariba & 2 Others** (unreported). The court held that this suit is properly before this court and that it is up to this court upon reviewing the evidence tendered to determine whether the reliefs sought should be granted. The 1<sup>st</sup> defendant has contended that the decree of the resident magistrate's court has been executed resulting in the suit property being registered in his name and as such the injunction sought cannot issue against the 1<sup>st</sup> defendant in relation to the suit property the 1<sup>st</sup> defendant being the registered proprietor thereof. According to the copy of the register that was produced in evidence by the plaintiff as Pexh. 3, the suit property was registered in the name of the 1<sup>st</sup> defendant on 7<sup>th</sup> September 2010 and he was issued with a title on the same date. That registration was however later cancelled. A copy of certificate of official search dated 6<sup>th</sup> May 2011 that was also produced in evidence by the plaintiff also as Pexh. 3 shows that the plaintiff is the registered proprietor of the suit property and that the last entry in the register of the suit property is a caution that was lodged by the plaintiff on 17<sup>th</sup> September 2010. In his testimony, PW1 testified that the suit property is still registered in the name of the plaintiff a fact which is supported by the exhibits that I have referred to above.

12. Due to the foregoing, there is no evidence in support of the 1<sup>st</sup> defendant's submission that he is the registered owner of the suit property and as such cannot be enjoined from dealing with the same. I therefore see no impediment to granting the order of injunction sought which is ancillary to the main prayers in this suit which are seeking declaratory reliefs. In any event, I see nothing wrong in granting the injunction sought after declaring the process under which the 1<sup>st</sup> defendant acquired the suit property to have been illegal, null and void. As was rightly submitted by the plaintiff's advocate orally, to decline to grant the injunction on the ground that the suit property has already been registered in the name of the 1<sup>st</sup> defendant albeit illegally would be tantamount to legitimizing an illegality. The 3<sup>rd</sup> defendant had contended that the orders sought cannot be granted on the ground that the 3<sup>rd</sup> defendant was not served with a notice under section 13A of the Government Act, Cap 40 Laws of Kenya. This argument must fail for two (2) reasons.

13. First, the 3<sup>rd</sup> defendant neither filed a defence nor tendered evidence in this suit. The non service of the notice aforesaid should have been pleaded in the defence and the plaintiff given an opportunity to respond to the same. In the absence of a defence, non service of the alleged notice cannot be raised as an issue for determination by this court. The issue has been raised without any basis. Secondly, section 13A (3) of the Government Proceedings Act, Cap. 40 Laws of Kenya provides that service of a notice upon the Attorney General is not necessary where the relief sought against the Government is merely declaratory in nature. The only relief sought against the Attorney General in this suit is a declaration. It was not necessary therefore that a notice be served upon the Attorney General under section 13A aforesaid before this suit was brought. The 3<sup>rd</sup> defendant's challenge to this suit on account of non service of the said notice must therefore fail. For the foregoing reasons, I have to answer issue number II also in the affirmative.

**14. Issue No. III;**

The plaintiff has established that the decision of the tribunal was unlawful, null and void. The same applies to the adoption of the same as a judgment of the court by the resident magistrate's court. The reliefs sought by the plaintiff being discretionary in nature, I have considered whether there are any special circumstances in this case that would militate against the grant of the same and I have

come across none. The plaintiff is in the circumstances entitled to the declaratory reliefs sought.

**15. Conclusion;**

In conclusion, I am satisfied that the plaintiff has proved his case against the defendants to the required standard. I therefore enter judgment for the plaintiff against the defendants as prayed in the plaint dated 1<sup>st</sup> February 2006. The plaintiff shall have the costs of the suit to be paid by the 1<sup>st</sup> defendant only.

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

**S. OKONG'O**

**JUDGE**

**In the presence of:-**

Mr. Soire for the plaintiff

Mr. Oguttu-Mboya for the 1<sup>st</sup> defendant

N/A for the 2<sup>nd</sup> defendant

N/A For the 3<sup>rd</sup> defendant

Mr. Mobisa Court Clerk

**S. OKONG'O**

**JUDGE**