



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KISII**  
**CIVIL CASE NO. 308 OF 2012**

ROBERT ADERA OPIYO.....1<sup>ST</sup> PLAINTIFF

TERESIA ACHIENG OPIYO both suing as the administrator  
and administratrix of the estate of JETHRO

OPIYO CHIEWU, deceased)..... 2<sup>ND</sup> PLAINTIFF

**VERSUS**

ROSELINE AMONDI OTIENO..... DEFENDANT

**RULING**

1. The plaintiffs brought this suit against the defendant on 11<sup>th</sup> August, 2012 in their capacity as the legal representatives of the estate of one, Jethro Opiyo Chiewu, deceased (hereinafter referred to only as “**the deceased**”). The Plaintiffs claimed that, at all material times the deceased was the registered proprietor of all that parcel of land known as **L.R. No. South Sakwa/Alego/148** which measured 7. 8 hectares or thereabouts (hereinafter

referred to only as “**the suit property**”). The Plaintiffs claimed that on or about the 25<sup>th</sup> day of May, 2010 the defendant herein lodged a complaint with the Rongo District Land Disputes Tribunal (hereinafter referred to as “**the tribunal**”) against one, Jane Adhiambo Onyango claiming that the said Jane Adhiambo Onyango (hereinafter referred to only as “**Jane**”) was illegally occupying the suit property which is the defendant’s ancestral land. The defendant claimed that the suit property belonged to her grandfather one, **Paulo Olwal** and that the deceased had grabbed the same and settled his son, one Simon Onyango, deceased, thereon. Jane against whom the complaint at the tribunal was brought is the widow of Simon Onyango. The defendant sought the assistance of the tribunal to have the suit property registered in her name and for Jane to be ordered to vacate the suit property. The tribunal heard the defendant’s complaint and delivered its decision on the same on 6<sup>th</sup> July, 2010. The tribunal held that the deceased acquired the suit property unlawfully, cancelled the

deceased title over the suit property and ordered the suit property to be divided between the defendant and Jane with the defendant getting 15.5 acres and Jane 4.0 acres thereof. The tribunal’s decision aforesaid was lodged at the Principal Magistrates Court at Rongo in, Rongo PMC Land Misc. Application No. 19 of 2010 ( hereinafter referred to as “**the Rongo court**”) for adoption as a judgment of the court. The said decision was duly adopted as a judgment of the court and a decree issued on 14<sup>th</sup> March, 2012 for execution. The Plaintiffs contended that the tribunal had no jurisdiction to cancel the deceased’s title and to order the suit property to be shared out between the defendant and Jane. The Plaintiffs contended further that the defendant’s claim over the suit property was time barred under the

Limitation of Actions Act, Cap. 22 Laws of Kenya and as such could not be entertained by the tribunal. The Plaintiffs contended further that the proceedings and decisions that were made at the tribunal and at Rongo court were illegal null and void. The Plaintiffs contended

that as a result of the said illegal proceedings and decisions, the estate of the deceased has been deprived of its title to the suit property. The Plaintiffs sought; a declaration that the deceased is the lawful owner of the suit property, a declaration that the decision of the tribunal and the decree issued by the Rongo Court pursuant thereto under which the defendant was awarded 15.5 acres of the suit property were illegal, null and void, a permanent injunction restraining the defendant from enforcing the said decision of the tribunal and from trespassing into the suit property or any portion thereof and an order for the rectification of the register for the suit property in the event that the said decision of the tribunal has been implemented.

2. Together with the Plaintiffs, the Plaintiffs filed an application by way of Notice of Motion dated 13<sup>th</sup> August, 2012 under certificate of urgency seeking an interlocutory injunction restraining the defendant by herself or through her agents, servants and/or anyone claiming under her from in any manner alienating the suit

property or any part thereof pending the hearing and determination of this suit. The Plaintiff's application was heard ex parte by Thurairaja J. on 15<sup>th</sup> August, 2012 who certified the application as urgent and granted the injunction sought on an interim basis pending the hearing of the application inter partes. The application together with the order was served upon the defendant and on 22<sup>nd</sup> August, 2012, the defendant's advocate asked for more time to respond to the said application. Lagat-Korir J. adjourned the application to 20<sup>th</sup> September, 2012 and extended the interim orders of injunction. On 20<sup>th</sup> September, 2012, the advocates for the Plaintiff and the advocates for the defendant agreed by consent to extend the interim orders of injunction that had been granted on 15<sup>th</sup> August, 2012 until the hearing of the Plaintiff's application inter partes. The said consent that was in writing was recorded in the court file and endorsed by the deputy registrar on the same day as an order of the court.

3. While the Plaintiffs application dated 13<sup>th</sup> August, 2012 aforesaid was pending hearing and while the said interim orders of injunction remained in force, the defendant on or about 21<sup>st</sup> November, 2012 caused the suit property to be sub-divided into two portions, namely, **LR. No. South Sakwa/ Alego/ 901** (hereinafter referred to as "**Plot No. 901**") and **LR. No. South Sakwa/ Alego/ 902** (hereinafter referred to as "**Plot No. 902**") measuring, 6.29 hectares and 1.60 hectares respectively. The defendant caused herself to be registered as the proprietor of Plot No. 901 while Plot No. 902 remained in the name of the deceased. In view of this development, the Plaintiffs withdrew their injunction application dated 13<sup>th</sup> August, 2012, amended the Plaintiffs' application and filed a fresh application for injunction. The Plaintiff's second application for injunction was brought by way of Notice of Motion dated 4<sup>th</sup> June, 2013. The same was filed in court on the same day under certification of urgency. This is the application which is the subject of this ruling. In the application, the Plaintiffs

sought two principal orders namely, an order of injunction restraining the defendant from in any manner whatsoever interfering with quiet possession, use of, building structures on, occupying, cultivating, disposing of and/or exercising any ownership rights on Plot No. 901 or any part thereof pending the hearing and determination of this suit and an order for the arrest and detention of the defendant in prison for breaching the court order that was made on 15<sup>th</sup> August, 2012. The Plaintiffs' application that was supported by the affidavit of the 1<sup>st</sup> Plaintiff was brought on the grounds that; the Plaintiffs had lodged an earlier application for injunction to restrain the defendant from having any dealing with the suit property, the court issued an interim injunction on 15<sup>th</sup> August, 2012 restraining the defendant from alienating the suit property, in breach of the said court order, the defendant proceeded to subdivide the suit property into two and got herself registered as the proprietor of a portion thereof measuring 6.29 hectares known as Plot No. 901, the said

subdivision of the suit property and acquisition of Plot No. 901 was in execution against the deceased of an illegal and unlawful decree issued at the Rongo court against Jane following the adoption of an equally null and void decision of the tribunal against the said Jane, that the defendant had unlawfully and in blatant disregard of a lawful court order acquired Plot No. 901 which is a portion of the suit property and as such should not be allowed to keep the same, the defendant had moved the Rongo court to have Jane evicted and had destroyed sugar cane plantation on the suit property valued at Ksh. 200,000.00. The Plaintiffs contended that this is an appropriate case to grant the orders sought. The Plaintiffs exhibited two certificates of official search with respect to Plot No 901 and 902 showing that Plot No. 901 is registered in the name of the defendant while Plot No. 902 is registered in the name of the deceased, a copy of the title deed for Plot No. 901 in the name of the defendant, a copy of the Mutation Form dated 5<sup>th</sup> November, 2012 that was used in the

sub-division of the suit property, a certificate of confirmation of grant of the estate of the deceased which shows that the suit property is one of the assets of the estate of the deceased and a copy of an application that the defendant had made at the Rongo court seeking the eviction of Jane from Plot No. 901.

4. In response to the Plaintiff's application, the defendant filed eleven (11) point Notice of Preliminary Objection dated 19<sup>th</sup> June, 2013. The defendant objected to the Plaintiff's application on among other grounds, that this suit is res judicata in view of the decisions made in the Rongo Court in which the Plaintiffs herein were also parties, that the court had ruled in an application for judicial review that was brought by the Plaintiffs to challenge the decision of the tribunal that the same had become a judgment of the court and as such could not be prohibited, that the Plaintiffs have no locus standi to maintain this suit as they are strangers to the suit property, that Rongo court had issued an order that the parties should utilize their respective portions of the suit

property, that the Plaintiffs had not preferred an appeal against the decisions of the Rongo court, that the proceedings herein are a nullity since a court of competent jurisdiction had already deliberated on the dispute between the parties and arrived at a conclusive decision and that this suit is an abuse of the process of the court.

5. The Plaintiffs' application came up for hearing before me on 19<sup>th</sup> June, 2013 when Mr. Gembe, advocate appeared for the Plaintiffs and Mr. T. Nyangau appeared for the defendant. In his submissions, Mr. Gembe reiterated the contents of the amended Plaint and the affidavit of the 1<sup>st</sup> Plaintiff that was filed in support of the application and urged the court to allow the application. On his part, Mr. Nyangau in his submissions took the court through his Notice of Preliminary Objection and elaborated on the same at length. I have considered the Plaintiffs' application and the defendant's opposition to the same. I have also considered the

submissions of the advocates for both parties. The view I take of the matter is as follows. It is not in dispute that, at all material times, the deceased was the registered proprietor of the suit property. As such proprietor, the law accorded the deceased certain rights and privileges which could not be taken away save as provided by law. One such right was a right to have exclusive possession of the suit property which possession could only be taken away with the consent or authority of the deceased or by an order of the court. The deceased also had a right not to be deprived of the suit property save in accordance with the law. The Plaintiffs have brought this suit to challenge the decisions of the tribunal and the Rongo court that the Plaintiffs claim to have unlawfully and un-procedurally deprived the deceased of his title to the suit property and transferred the same to the defendant. I am in total agreement with the contention by Plaintiffs that the entire proceedings and decisions of the tribunal and the Rongo

court were null and void. The tribunal was established under The Land Disputes Tribunals Act, No.18 of 1990 (now repealed) (hereinafter referred to only as "**the Act**"). The powers of the tribunal were spelt out in the said Act. The tribunal could not exercise or assume powers outside those conferred by the Act. Section 3(1) of the Act sets out the disputes over which the tribunal had jurisdiction as follows; "**.....all cases of civil nature involving a dispute as to;**

- a. **the division of, or the determination of boundaries to, land, including land held in common;**
- b. **a claim to occupy or work land; or**
- c. **trespass to land.”**

6. From the foregoing, it is clear that the tribunal did not have jurisdiction to determine disputes over ownership and/or title to land. The tribunal did not therefore have the power to cancel the deceased's title and to order that the suit property be shared

between the defendant herein and Jane. Furthermore, the defendant was well aware that the suit property was owned by the deceased. This fact is very clear from the proceedings of the tribunal. The tribunal still proceeded to make orders adverse to the interest of the deceased in a complaint that was lodged against Jane who had no interest at all in the suit property save for her interest as a beneficiary of the estate of the deceased. The tribunal in essence condemned the deceased unheard in breach of the rules of natural justice. By the time, the defendant lodged her complaint before the tribunal, the Plaintiffs had already been appointed as the administrators of the estate of the deceased. Any claim concerning the estate of the deceased ought to have been brought against the Plaintiffs. The decision of the tribunal in my view amounted to intermeddling in the estate of a deceased person contrary to the provisions of section 45 of the Law of Succession Act, Cap. 160 Laws of Kenya. Again, it is clear from the

proceedings of the tribunal that the suit property was transferred by the defendant's said grandfather, Paul Olwal to the deceased in 1979. The defendant's claim over the suit property that was lodged at the tribunal in the year 2010 was therefore time barred under the Limitation of Actions Act, Cap. 22 Laws of Kenya. The tribunal is expressly barred under section 13 (3) of the Act from entertaining claims that are time barred. It has been said that jurisdiction is everything and without it a court or tribunal must lay down its tools. Jurisdiction cannot be assumed neither can it be conferred by agreement. In the case of **Desai-vs-Warsama (1967) E.A.351**, it was held that, no court can confer jurisdiction upon itself and where a court assumes jurisdiction and proceeds to hear and determine a matter not within its jurisdiction, the proceedings and the determination are a nullity. Having come to the conclusion that the tribunal had no jurisdiction to entertain the claim that was brought before it by the defendant, it is also my

finding that the proceedings before the tribunal and its decision made on 6<sup>th</sup> July, 2010 were nullities. Now that the decision of the tribunal was null and void, was it open to the Rongo court to adopt it as a judgment of the court and purport to execute it? In the case of **Macfoy-vs-United Africa Co. Ltd. (1961) 3 All E.R 1169**, Lord Denning stated as follows concerning an act which is a nullity at page 1172;

**“if an act is void, then it is in law a nullity. It is not only bad but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without much ado, though it is sometimes convenient to have the Court to declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse”.**

I am of the view that since the decision of the tribunal was a nullity, there was nothing in law that could be filed before the

Rongo court for adoption as a judgment of the court. Such judgment would equally be a nullity. It follows therefore that all the proceedings and orders issued by the Rongo court were null and void.

7. The defendant has argued that since the Plaintiffs had applied for leave to apply for judicial review against the decisions of the tribunal and the Rongo court which leave was denied, the Plaintiffs' present suit cannot be sustained. As I have said at the beginning of this ruling, as far as the decisions of the tribunal and the Rongo court are concerned, the Plaintiffs are merely seeking declarations of right. Order 3 rule 9 of the Civil Procedure Rules provides that, no suit shall be open to objection on the ground that merely a declaratory judgment or order is sought thereby. See, the decision of Musinga J. (as he then

was) in case of, **Samwel Chacha Rioba vs. George Joseph Kigingwa & 2 others, Kisii Hccc No. 174 of 2008(unreported)** on this point. The court is empowered under

that rule to make a binding declaration of right whether any other consequential relief is claimed or not. In the Court of Appeal case of, **Johana Nyakwoyo Buti vs. Walter Rasugu Omariba & 2 Others, Kisumu Civil Appeal No.182 of 2006 (unreported)**, it was held that, a decision of the Land Disputes Tribunal that has been adopted as a judgment of the Resident Magistrate's court can be challenged in a declaratory or ordinary civil suit. Due to the foregoing, the Plaintiff's suit is properly before the court. The Plaintiffs' have claimed that the defendant has in breach of the court order issued herein sub-divided the suit property, acquired a portion of it while this suit is pending and is now threatening to evict Jane from the said portion of the suit property that she has acquired through the execution of a null and void decree and in breach of a court order. The Plaintiffs have contended that the defendant has shown a tendency and propensity to disregard due process and has urged the court to grant the orders sought so as to preserve the property

in dispute. The defendant has not denied that this court issued an order on 15<sup>th</sup> August, 2012 restraining her from alienating the suit property. The defendant has not denied that the said order was still in force when she caused the suit property to be sub-divided and had a portion thereof registered in her name. The defendant's argument that the sub-division of the suit property was carried out pursuant to a lawful order issued by the Rongo court is ridiculous. An order from a resident magistrate court cannot vary, set aside or nullify an order of this court. It is my finding therefore that the sub-division of the suit property and the registration of a portion thereof namely, Plot No. 901 in the name of the defendant was carried out in breach of express order of this court. I am of the view that once the Plaintiffs filed this suit and obtained an order of interim injunction, the defendant ought to have waited for the court's determination of the said application for injunction before carrying out any further dealings with the suit property. This

court does not look favorably at people who take the law into their own hands or who engage in acts that are calculated to defeat the cause of justice. I am satisfied that this is an appropriate case which justifies an order for the preservation of the property in dispute pending the hearing and determination of the suit. The Plaintiffs have clearly demonstrated that they has a prima facie case with a probability of success against the defendant and that unless the injunction sought is granted, the estate of the deceased stands to suffer irreparable harm. As was held in the case of **Aikman-vs-Muchoki [1984] KLR 353**, the defendant cannot be allowed to keep what she has unlawfully taken from the deceased. It would only be fair that the parties revert to the status quo that was prevailing before the defendant's illegal and contemptuous acquisition of Plot No.901. In the case of **Kamau Mucuha-vs- The Ripples Ltd.(Civil Application No. Nai. 186 of 1992)(unreported)**, Justice Cockar,J.A as he then was stated that,

**“ A party , as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.....” .**

In the case of **Jaj Superpower Cash and Carry Ltd. –vs- Nairobi City Council & 2 others, Court of Appeal at Nairobi, Civil Appeal No.111 of 2002(unreported)**, the court said this at page 10,

**“ this court has recognized and held in the past that it is a trespasser who should give way pending the determination of the dispute and it is no answer that the alleged acts of trespass are compensable in damages. A wrong doer cannot keep what he has taken because he can pay for it.”**

In the **Court of Appeal Case of Ougo & Another-vs-Otieno(1987)KLR 364**, it was held that,

**“ The general principle is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided at the trial.”**

I have said enough to show that the disputed property herein namely Plot No. 901 needs to be preserved and that the defendant who has unlawfully taken possession thereof must be kept out pending the

hearing and determination of this suit. The defendant has not demonstrated that she was in possession of the suit property prior to her acquisition of Plot No. 901 through the contentious decisions mentioned herein above. I therefore see no prejudice to her if she keeps off Plot No. 901 awaiting the determination of this suit. I therefore find merit in the Plaintiff's application dated 4<sup>th</sup> June, 2013. I hereby grant prayer (c) thereof. The order shall however not extend to the defendants husband and relatives who are not parties to this suit. On the limb of the application seeking the arrest and committal of the defendant to jail for disobeying this court's order that was made on 15<sup>th</sup> August, 2012, I am of the view that the essential ingredients of a charge of contempt of court have not been established. This relief is

therefore denied. The Plaintiffs shall have the cost of the application.

**Delivered, signed and dated at KISII this 15<sup>th</sup> day of November 2013.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

.....for plaintiffs

-----for the defendant

----- Court Clerk.

**S. OKONG'O,**

**JUDGE.**

**E&LCC.NO. 308 OF 2012**