REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

OF KISII

Civil Case 174 of 2008

SAMWEL CHACHA RIOBA.....PLAINITFF/RESPONDENT

VERSUS

GEORGE JOSEPH KIGINGA.....1ST DEFENDANT/APPLICANT
SAMWEL MOHERAI MARWA.....2ND DEFENDANT/APPLICANT
JOHN W. RIOBA.....3RD DEFENDANT/APPLICANT

RULING

By an application dated 10th December 2008, the defendants sought the following orders:

"**1. That this application be certified as extremely urgent and be heard ex-parte at the first instance.**

2. That a temporary injunction do hereby issue against the plaintiff/respondent restraining him from disposing, selling, transferring, constructing, cultivating, defacing boundary features or in anyway interfering with occupation of land Parcel Nos. Nyabasi/Bomerani/549 which formerly was land parcel Nos.Nyabasi/Bomerani/600,601,603,800,801,802,803 and 804 pending the hearing and determination of this application.

3. That a temporary injunction do issue restraining the plaintiff/respondent either by himself, his agents, servants and/or representative from disposing, selling, transferring, constructing, cultivating, defacing boundary features or in anyway interfering with occupation of Land Parcel Nos. Nyabasi/Bomerani/549 which formerly was Land Parcels Nos. Nyabasi/ Bomerani/600, 601,603,800,801,802,803 and 804 pending the hearing and determination of this suit.

4. That costs of this application be provided for."

The application was made on the grounds that the plaintiff had unlawfully and fraudulently obtained the

amalgamation of parcel Nos.Nyabasi/Bomerani/600, 601,603,

800,801,802,803 and 804 (hereinafter referred to as (**"the sub-divisions"**), combined the same and has now formed parcel No. Nyabasi/Bomerani/549 which has now been transferred to himself. It was further stated that the plaintiff has defaced the boundaries with a view to amalgamating subdivisions Nos. 800, 801 and 804 belonging to the defendants for his intended occupation.

In a supporting affidavit sworn by the 1st defendant for and on behalf of himself and the other defendants, he stated that he is the owner of subdivisions of Nos.800 and 804 while the 2nd defendant is a title holder of subdivision No. 801. He annexed to his affidavit a copy of the title deed for subdivision No. 800 and a certificate of official search in respect of subdivision No. 804. He stated that subdivisions Nos. 800, 801 and 804 originated from a land parcel No. Nyabasi/Bomerani/602 which was a resultant subdivision of parcel No. Nyabasi/Bomerani/549 which was originally registered in the name of **Gachihi Thandi** as a first registration.

On 12th November 2008 the 1st defendant visited the Land registry at Kehancha with a view to obtaining a certificate of search for purposes of subdividing his two parcels of land Nos. 800 and 804. The Land Registrar informed him that the said parcels did not exist as they had been merged with subdivisions Nos. 600,601,603,801,802 and 803. They had reverted to land parcel No. Nyabasi/Bomerani/549 and thereafter transferred to the plaintiff. He obtained from Kehancha Law Courts Gazette Notice No. 5208 of 20th June 2008 which confirmed the merger of the aforesaid parcels of land. The 1st defendant further obtained a copy of the proceedings of the Kuria Land Disputes Tribunal (Kegona Division) **Case No. 10 of 2006**which was between the **Plaintiff –vs- Grace Wairimu Gachihi, Martha Muthoni Gachihi** and **Ndungu Gachihi**. However, the original owner of land parcel No. Nyabasi/Bomerani/549, **Gachihi Thandi,** was not a respondent in the said case. He further obtained the copy of the proceedings and decree in **Kehancha RMCC No. 6 of 2007** which adopted the award of the aforesaid Tribunal. The names of the defendants do not appear in the tribunal's award or in the decree. It is therefore apparent that the Land Disputes Tribunalmade adverse orders in respect of the defendants' parcels of land without giving them a hearing.

The 1st defendant contacted the plaintiff on 15th November 2008 and the plaintiff informed him that he was at liberty to transfer his parcel of land No. Nyabasi/Bomerani/549 to anyone whom he wished. On the same day the plaintiff told the 1st defendant and his co-applicants to vacate his land failing which he would pull down their houses.

The plaintiff opposed the defendants' application and filed a statement of grounds of opposition. He did not file any affidavit in reply to the 1st defendant's affidavit. He stated, ***inter alia,*** that:

- **The defendants have no proprietary rights in respect of Nyabasi/Bomerani/549 (hereinafter referred to as "the suit land)" capable of being vindicated by an order of injunction.**
- **That the plaintiff, being the registered proprietor of the suit land, has exclusive and/or absolute rights to use and/or abuse his land and no injunction can issue against him.**

- **The defendants' application seeks to impeach the decisions of the Kuria District Land Disputes Tribunal and the Resident Magistrate's court at Kehancha but the two bodies had not been joined in the proceedings.**

- **The orders sought by the defendants amount to an appeal and/or review of lawful orders through the back door.**

- **The defendants have no *prima facie* case capable of attracting an order of an injunction.**

- **The defendants' remedy, if any, lies in judicial review which is however time barred.**

- **The defendants' counter claim is bad in law.**

Mr. Kweyu for the defendants/applicants and Mr. Oguttu for the plaintiff made their respective submissions which I have duly considered.

In his plaint, the plaintiff pleaded that he is the registered proprietor of the suit land measuring approximately 14 hectares, which parcel of land was registered in his name on 1**8th July 2008**. He further stated that prior to issuance of the title deed in respect of the suit land, the land had been subdivided to create subdivisions Nos. 600,601,603,800,801,802,803, and 804. But on 20th June 2008 the District Land Registrar, Kuria District, in compliance with the decree issued vide Kehancha SRMCC No.6 of 2007 caused to be published Gazette Notice No. 5208 which cancelled the resultant parcels emanating from the suit land. Consequently, the resultant parcels were deleted from the land register and their respective title deeds were also cancelled. The land registry proceeded to issue him with a title deed in respect of the suit land.

The plaintiff claimed that on/or about the year 2006 the defendants trespassed upon a portion of the suit land and had remained in occupation of the same. He sought a declaration that he is the registered owner of the suit land. He further sought an order of eviction against the defendants and demolition of their structures erected thereon. He also sought a permanent injunction to restrain the defendants, their agents and/or servants from re-entering, trespassing onto, cultivating, grazing, interfering with and/or in any other manner whatsoever dealing with the suit land.

The defendants filed a statement of defence and a counter claim. They alleged that the plaintiff's registration as the proprietor of the suit land was done fraudulently. They cited particulars of the plaintiff's fraud. The particulars included:

- **"Purporting to have purchased land parcel No. Nyabasi/Bomerani/549 from Francis Muniko Itumbo (deceased) in 1995 whereas the aforesaid parcel of land was registered in the name of Gachihi Thandi on 5th April 1977 as a first registration.**

- **Deregistering land parcel Nos. Nyabasi/Bomerani/800,801 and 804 belonging to the defendants without obtaining any order against Gachihi Thandi, the initial registered owner of land parcel No. Nyabasi/Bomerani/549."**

The defendants denied that they occupied a portion of the suit land in the year 2006 and pleaded that they had been in occupation of subdivisions Nos. 800,801 and 804 for over 12 years.

In their counter claim they stated that the Kuria Land Disputes Tribunal had no jurisdiction to deal with ownership of land hence it acted ***ultra vires***. The tribunal also acted contrary to the rules of natural justice by making an award against persons who were not parties to the dispute before it.

The defendants sought a declaration that the award of the Kuria Land Disputes Tribunal in Case No. 10 of 2005 and the decree issued in Kehancha RMCC NO. 6 of 2007 were null and void and un enforceable against them. They also sought a permanent injunction to restrain the plaintiff from enforcing the said decree. They further sought an order to revoke the registration of the plaintiff as the registered owner of the suit land and a further order that the cancellation of land parcel Nos. 801 be revoked and their share of the suit land do revert to the previous land parcel Nos. Nyabasi/Bomerani/800,801 and 804 respectively. The defendants urged the court to dismiss the plaintiff's suit with costs.

From the proceedings of the Kuria District Land Disputes Tribunal Case No. 10/2006, the plaintiff herein filed the suit against Grace Wairimu Gachihi, Martha Muthoni Gachihi and Ndungu Gachihi. He claimed that on 20th June 1995 he bought the suit land from one Francis Muniko Itumbo. Sometimes thereafter he realized that one Gachihi Thandi had fraudulently managed to have the suit land registered in his name. The extract of the register annexed to the defendant's affidavit shows that Gachihi Thandi was the first registered proprietor of the suit land. He was so registered on **5th April 1977**. The plaintiff further told the tribunal that the said Gachihi Thandi had only leased a piece of the land to cultivate. The suit was commenced before the Tribunal on 24th April 2007. By that time the suit land was still registered in the name of Gachihi Thandi who had since died. The tribunal's record indicates that the defendants were summoned to appear before the tribunal but failed to do so. The tribunal found in favour of the plaintiff and ordered that he be given the entire suit land. The tribunal further ordered that the subsequent transactions that had been done relating to the suit land be nullified. The tribunal's award was adopted by the Resident Magistrate's court at Kehancha on 6th July 2007. Subsequently the Gazette Notice of 20th June 2008 vide which the titles for subdivisions Nos.549, 600, 601, 603, 800, 801, 802, 803 and 804 were cancelled was published.

The defendants learnt all that information on 12th November 2008. They could not therefore commence judicial review proceedings for an order of certiorari to quash the decisions of the Land Disputes Tribunal and the Kehancha Resident Magistrate's court as they were time barred. On 2nd December 2008 the plaintiff commenced this suit against the defendants.

It is apparent that the Kuria District Land Disputes Tribunal exceeded its jurisdiction donated to it by the provisions of **section 3 (1)**of the **Land Disputes Tribunals Act**, **1990**. Such a tribunal does not have power to order nullification of a title deed duly issued under the provisions the **Registered Land Act** or any other legal regime. Even if Gachihi Thandi, the first registered proprietor of the suit land had procured his title deed fraudulently, the Tribunal had

no power to order nullification of his title or rectification of the register. Even the High Court is not vested with such power. The tribunal's decision was therefore a nullity. In **KARANJA –VS- ATTORNEY-GENERAL**, Civil Appeal No. 310 of 1997 at Nyeri, it was held that:

> **"Any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order."**

When the plaintiff was instituting his case before the Land Disputes Tribunal, subdivisions Nos. 800, 801 and 804 were registered in the names of the defendants and the plaintiff knew or ought to have known so. The defendants were not made parties to the said suit so that they could defendant their interests.

Considering that the defendants became aware of the aforesaid proceedings that culminated in unlawful cancellation of their title deeds on 12th November 2008 and were not therefore able to file judicial review proceedings to quash the decision, what remedy is available to them? Mr. Oguttu for the plaintiff submitted that this court does not have jurisdiction to interfere with the award made by the Kuria District Land Disputes Tribunal and adopted by the Resident Magistrate's court at Kehancha. He cited the Court of Appeal decision in **JULIA KABURIA –VS- MANENE KABEERE & 5 OTHERS**, Civil Appeal No. 340 of 2002 at Nyeri. In the matter that gave rise to that appeal, a suit was filed in the subordinate court challenging the decision of a Land Adjudication Officer. The reliefs sought in the plaint were, ***inter alia***, a declaration that the 2nd defendant's subdivision of his land was unlawful, an order that he be allowed to subdivide his land as pleaded in his plaint and that an order that the register of the parcels of land be rectified accordingly. The Chief Magistrate's court dismissed the suit and held that the Land Adjudication Officer had made a correct decision. The plaintiffs then preferred an appeal to the High Court. One of the issues for determination before the High Court was whether the subordinate court had jurisdiction to entertain an application challenging the decision of the Adjudication Committee and further whether the appellants should have moved the court by way of judicial review rather than by normal suit. Mulwa, J., after taking into account that a consent to institute the suit had been given, ruled that an objector under the Land Adjudication Act need not only come to the court by way of judicial review. He then went on to decide the appeal on the merits of the case and made a finding that the Land Adjudication Officer had no power to bar one of the appellants to dispose of his land as he wished. The High Court proceeded to reverse the decision of the subordinate court.

The Court of Appeal held that the Land Adjudication Act provides an exclusive and exhaustive procedure for ascertaining and recording land rights in an adjudication section. By **section 30 (1)** and **(2)**, the jurisdiction of the courts is ousted once the process of land adjudication has started until the adjudication register has been made final. The court went on to state that **section 26**of the **Act** gives jurisdiction to the Adjudication Officer to hear all objections to the Adjudication Register. His decision is subject to an appeal to the Minister and the decision of the Minister is final. However, the High Court has supervisory jurisdiction over the decision of the Minister or the Adjudication

Officer. It was therefore improper for the plaintiff/appellants to have filed a suit attacking the legality of the decision of the Land Adjudication Officer.

The Court of Appeal delivered itself thus:

> **"With all due respect to the superior court, the suit filed was to, in effect, reverse the decision of the Land Adjudication Officer. Inspite of the suit and the decision of the superior court, the decision of the Adjudication Officer still subsists and is lawful under the Act unless and until it is quashed by an High Court through Judicial Review proceedings.**
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> **Furthermore, the decision of the Land Adjudication Officer can be quashed by the High Court under its supervisory powers, *inter alia,* if the decision was made without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice but not because it was wrong on the merits. We are satisfied that the superior court acted without jurisdiction by implicitly reversing the decision of the Land Adjudication Officer."**

I now wish to juxtapose the above land dispute resolution mechanism under the **Land Adjudication Act**against land dispute resolution mechanism under the **Land Disputes Tribunals Act**.

As earlier stated, the jurisdiction of Land Disputes Tribunals is limited by the provisions of **section 3 (1)** of the **Act**. Such tribunals can only deal with cases of a 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.

Upon reaching a decision, **section 7 (1)**of the **Act** requires the chairman of the tribunal to cause the decision to be filed in the Magistrate's court. **Section 7 (2)**provides that the court shall enter judgment in accordance with the decision of the tribunal and issue a decree that is enforceable in the manner provided for under the **Civil Procedure Act**. The Resident Magistrate's court has not been given any power to review, alter, amend or set aside the tribunal's decision. A party aggrieved by the decision of the tribunal may, within 30 days of the decision, appeal to the Appeals Committee constituted for the Province in which the land in dispute is situated. The decision of the Appeals committee is final on any issue of fact and no appeal can lie therefrom to any court. However, either party to the appeal may appeal from the decision of the appeals committee to the High Court on a point of law within 60 days from the date of the decision complained of.

A party who desires to quash the decision of a Land Disputes Tribunal or the Appeals Committee can also institute judicial review proceedings if he is alleging that the said

bodies acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice. An order of certiorari does not lie to correct the cause, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings or decision, see **REPUBLIC –VS- KENYA NATIONAL EXAMINATIONS COUNCIL EX-PARTE GEOFFREY GATHENJI & 9 OTHERS**, Civil Appeal No. 266 of 1996.

It is important to note that the defendants have not come to court vide a judicial review application. It is the plaintiff who filed a suit seeking to evict them from the suit land. The defendants filed a defence to that suit and also raised a counter claim. The defendants have in their counter claim sought, ***inter alia***, a declaration that the award of the Kuria Land Disputes Tribunal is null and void. They have given reasons for such contention. **Order II rule 7**of the **Civil Procedure Rules** states as hereunder:

> **"No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make a binding declaration of right whether any consequential relief is or would be claimed or not."**

In my view, the defendants are perfectly entitled to file a counter claim and seek the aforesaid declaratory order among other reliefs.
The Land Disputes Tribunal, having acted without jurisdiction and purportedly nullifying the defendants' title deeds, its decision is null and void. As Lord Denning put it in **MACFOY –VS- UNITED AFRICA COMPANY LIMITED** [1961] 3 ALL ER 1169 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 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."**

Given the flawed manner in which the plaintiff acquired his title deed to the suit land, I entertain considerable doubt about the propriety of his entire claim.

The plaintiff is threatening to evict the defendants from the suit land and demolish their houses. Should this court helplessly watch him do so simply because out of a flawed process he holds a title deed to the suit land? I do not think so. The court would be abdicating its responsibility to dispense justice. In **MWENESI –VS- SHIRLEY LUCKHURST & ANOTHER**, CIVIL Application No. 170 of 2000 at Nairobi, the Court of Appeal held that a court of justice has no jurisdiction to do injustice and where injustice on a party to a judicial proceeding is apparent, a stay of execution is irresistible. Whereas this is not an application for stay of execution, the same principle is applicable herein.

The defendants have a ***prima facie***case and will suffer

irreparable loss and damage if they are evicted from the parcels of land which they currently occupy.

Consequently, I grant the orders as sought in their application. The plaintiff shall bear the costs of the application.

DATED, SIGNED AND DELIVERED AT KISII THIS 20TH DAY OF APRIL, 2010.

D. MUSINGA
JUDGE.

20/4/2010

Before D. Musinga, J.

Mobisa – cc

Mr. Oguttu for the Plaintiff

Mr. Kweyu for the Defendant

Court: Ruling delivered in open court on 20th April, 2010.

D. MUSINGA
JUDGE.