



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT KERICHO**

**Civil Case 1 of 1997**

1. Land law
2. Civil practice and procedure
3. Subject of main suit
  - i) Land
  - ii) L.R.Kericho/Kipchorian/Lelu Block 5/Kebeneti/154 – 34 acres.
  - iii) Settlement scheme originally allocated to the plaintiff.
  - iv) alleges fraud by defendant who excised 8 acres and registered in his name.
  - v) Plaintiff filed against defendant for fraud. Prayer for eviction on 21.1.97
  - vi) Defendant files defence and counter claim.
  - vii) Wants 8 acres and another 26 acres to be allocated to him.
  - viii) On 21.3.00 Hon. Judge refers case to arbitration to be heard by Hon. Magistrate.
  - ix) Magistrate hears cases amidst adjournment;  
10.3.00, 21.3.00, 4.4.00, 27.4.00, 10.5.00, 26.5.01, 20.7.01, 6.9.01, 26.9.01, 2.10.01, PW1 hearing. 1.12.00, 5.1.01, 12.2.01, 13.2.01, 15.2.01, 2.3.01, 4.4.01, 18.5.01, 6.6.01, 6.7.01, 23.7.02, 29.10.03, 28.1.04 90 days J.K. Ngeno. October 03, 2.2.04, 2.2.04 M. Apondi extended 13.2.04, 27.2.04.19.3.04, Hearing J.K. Ngeno. DW1 5.5.04. M. Apondi J, extends 90 days. 15.10.09, 12.11.04, 10.12.04, 21.12.04, 28.4.05 extended almost 7.2.05 M. Apondi J, 8.3.05, 29.3.05 S.O.G, 29.3.05, 10.5.05, S.O.G 20.5.05, 1.8.05 for 14.9.05 extended, 27.1.06, 9.2.06 L. Kimaru J, extended 16.3.06, 6.4.06 defence case issues by Court High Court by SM 2005, 12.4.06, 1.9.06, 27.4.07, 24.7.07 L. Kimaru Hearing date. Order all exhibits released. 10.9.07 magistrate Nyarima 26.9.07, 17.3.09, 16.3.09 application for injunction.
4. **Parties seek directions:**
  - a) Directions already given by L. Kimaru J.
  - b) Illegal.
5. **Held:**
  - a) Proceeding illegality and a mockery of judicial system.
  - b) The arbitration proceedings to land stopped by the Lands Disputes tribunal Act in 1999.
  - c) Arbitrator under Order 45 does not include magistrate who have no jurisdiction to hear case.
  - d) Too many adjournments.
  - e) Magistrate have no powers.
  - f) Case to begin Denovo
6. **Case Law by court**
  - a) **M. V. Lillian (Nyarangi J) ( Mombasa)**
7. **Advocates:**

R. O. Oluoch advocate instructed by M/S Mwamu & Co. Advocates for the Plaintiff.

S. K. Chelule Advocate instructed by M/S Chelule & Co. Advocates for the Defendant.

KITUR ARAP TESOT .....PLAINTIFF  
VERSUS  
DANIEL KIPROP KENDUIYWO.....DEFENDANT

**RULING**

**Direction of the Court**

**1. Background**

1. This land matter was filed to court on 21<sup>st</sup> January, 1997. The Plaintiff the registered land owner of **L.R. Kericho/Kipchorian/Lelu Block 5/Kebeneti 154** – consisting of 34 acres acquired the property as a member of a land levying company to a settlement scheme in the mid 1960's. He alleges that the defendant fraudulently excised eight (8) acres and registered it in his name on allegations of a sale that the said defendant cancelled. The plaintiff sought prayers for his land to be returned to him and alleged that he be evicted.

2. The defendant filed defence and counter claim. He wants the 8 acres together with the 26 acres to be allocated to him.
3. Three years the case has been pending in court. On the 21<sup>st</sup> March, 2000 the Hon. Mr. Justice Rimita (*now retired*) referred the case to arbitration with the consent of the parties. What was peculiar is the Hon. Magistrate was so selected to have the arbitration. This was the Principal Magistrate in-charge of the law courts at Kericho.
4. What followed then was a series of adjournment by that court to accommodate the advocates and or the parties who were often not present. The following dates were taken and the cases adjourned;
 

10.3.00, 21.3.00, 4.4.00, 27.4.00, 10.5.00, 26.5.01, 20.7.01, 6.9.01, 26.9.01, 2.10.01, PW1 hearing, 1.12.00, 5.1.01, 12.2.01, 13.2.01, 15.2.01, 2.3.01, 4.4.01, 18.5.01, 6.6.01, 6.7.01, 23.7.02, 29.10.03, 28.1.04. 90 days extended. October, 03 – a second magistrate took over the case, 2.2.04, 2.2.04 Apondi J, extends 90 days period, 13.2.04, 27.2.04, 19.3.04. Hearing by magistrate of DW1 5.5.04. M. Apondi J, extends 90 days at request of parties. 15.10.09, 12.11.04, 10.12.04, 21.12.04, 28.4.05 extended time on 7.7.05 by Apondi J, 8.3.05, 29.3.05, 29.3.05, 10.5.05, 20.5.05, 1.8.05, 14.9.05, 27.1.06, 9.2.06 L. Kimaru J, extended 90 days 16.3.06, 6.4.06.
5. Trial magistrate records on file;-
 

***“I [have] considered the issues raised herein. I [have] had to spend time trying to make out what I am supposed to do. The issues raised herein are ones to be determined by the High Court. I am at pain with respect to understand how I Kenya magistrate could turn myself into an arbitrator in a matter before the superior court. I stand to be commended and hereby return the file to the High Court with my sentiments for consideration. The nutshell of it all is that I am unable to make a decision on the issues raised in this matter.”***
6. These sentiments were stated after the evidence of the witnesses was heard and taken down by two magistrates.
7. The plaintiff filed an application of 27<sup>th</sup> April, 2007 for an injunction. The High court on 24<sup>th</sup> July, 2007 [*Kimaru J*] ordered that parties conclude discovery exchange documents and thereafter for a hearing date. On 10<sup>th</sup> September, 2007 the Deputy Registrar released and or gave orders to release all exhibits. On 26<sup>th</sup> September 2007 parties failed to appear before Kimaru J. The matter was stood over generally.
8. Nothing happened until 3<sup>rd</sup> March, 2009 when this court invited parties come to court for further directions. Further mentions were taken but not all parties attend and or file not placed before the court as of 25<sup>th</sup> March, 2009 no further action was taken.
9. On 25<sup>th</sup> November, 2009 the advocate for both side appeared to court and asked this court to order the magistrate who last heard the arbitration to file his award. The advocates were given an opportunity to read the court file on payment of archive fees. They stated that the witnesses had died and did not know what to do next.
10. The court reserved directions on the matter.

## **II. Directions**

11. By 1999, all High Courts in Kenya ceased to refer matters to the arbitration of the District Officers and elders. That is because the land disputes tribunal act came into force and it restricted the type of cases to be heard. This included disputes amongst parties on land. The case before the High Court touched on fraud. The jurisdiction land with the High Court to determine. It was therefore in error that the arbitrator chosen to hear the matter was a magistrate who in the first place did not have jurisdiction to hear the High Court matter.

12. The advocate for the plaintiff said that the Hon. Judge could do so under Section 18 where a court case may be transferred from the High Court to the magistrate's Court. This was not the case. What occurred was that the two magistrates had continued recorded in the High Court file. They did this despite the 60 days required for an amendment be filed. The extension of time was often done after the expiry of the 60 days. Under **Order 45** on arbitration the proceedings should be declared a nullity and the trial proceed before a judge. This was never so until the magistrate prayed and declined to further proceed with the matter. He should have done so at the very beginning of the said case.
13. Nonetheless, Kimaru J, on realizing this ordered the parties to take fresh hearing dates before him for trial. They were to do this subject to discovery all exhibits produced was to be returned to the parties. The Deputy registrar made such order.
14. The position with the High Court of Kenya at Kericho had been that of current Judges. There was no Resident Judge for a considerable time and as such cases could not be adequately reached. The trial magistrate's adjournments as seen above was unacceptable and a mockery to justice.
15. My directions on this matter, which direction was already indicated by Kimaru J, is that the whole proceeding from the year 2000 to 2006 is a nullity. Jurisdiction goes to the core of a case, see the case of M. V. Lillian and the findings of Nyarangi J,. The trial magistrate had no powers and or jurisdiction to determine the matters in issues in their capacity as arbitrators. If per chance they, had which is denied, the time period of filing the amend had expired. Any further extension at the request of the parties to the Hon. Judges was a nullity.
16. This said case before me must begin *De nova*. I am told witnesses have passed away. The advocates have to go to the Evidence Act to study how evidence of a deceased person can be presented to court.
17. The directions herein having been given, I note the exhibits are still on the court file and have not been collected. I order that they be returned to the parties who are to prepare their case afresh.
18. The costs will be in the cause.

**Dated this 30<sup>th</sup> day of November 2009 at Kericho**

**M. A. ANG'AWA**

**JUDGE**

**Advocates**

R. O. Oluoch advocate instructed by M/S Mwamu & Co. Advocates for the Plaintiff.  
S. K. Chelule Advocate instructed by M/S Chelule & Co. Advocates for the Defendant.