REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

E.L.C. APPEAL NO. 2 OF 2019

ALFRED IRERI NDERI.....APPELLANT

VERSUS

STEPHEN NJERU JOEL.....RESPONDENT

(Being an appeal against the judgement and decree of the Hon. M.N. Gicheru (C.M.)

dated 21.12.2018 in Embu CMCC No. 83 of 2013)

JUDGEMENT

1. This appeal arose from the judgement of the lower court (Hon. M.N. Gicheru, Chief Magistrate, Embu) in Civil Suit No. 83 of 2013. The suit in the lower court was between Stephen Njeru Joel as the plaintiff and Alfred Ireri Nderi as the defendant. Alfred is now the appellant while Stephen is the respondent, or appellee if you like.

2. The dispute between the parties relate to Land parcel No. Kagaari/Kanja/2359 (hereinafter "the suit property") of which the respondent herein is the registered owner, but which the appellant apparently occupies. The respondent pleaded that he had allowed the appellant to use and harvest tea as a licencee but the appellant had turned around and claimed that he had bought the suit property. In the lower court matter, the respondent herein had sought various orders against the appellant including eviction, mesne profits and/or compensation for trespass, costs of the suit and interests.

3. The appellant had responded to the respondent's suit in the lower court by filing a defence and counter-claim. In the defence, the appellant pleaded that the respondent had sold the suit property to him in 1979. He had taken possession of the suit property and developed it by planting tea and constructing a semi-permanent house. The appellant expressed his position that he was in lawful occupation of the suit property by dint of purchase and subsequent permission to occupy from the respondent himself.

4. The appellant further pleaded that the respondents' suit in the lower court was incurably bad in law as it was stale due to the fact that it was filed outside the limitation period allowed by law. Appearing also in the appellant's defence in the lower court is a narrative about him taking the respondent to Land Disputes Tribunal over the same issue. The appellant won and the process of vesting ownership of the suit property in him commenced. The respondent however blocked it through a court process. According to the respondent, this court should not evict him. It is him who is wronged and in his counter-claim, he pleaded that he stood to suffer loss and damage due to the respondent's breach of the sale agreement.

5. The appellant therefore asked the court to order that he be paid damages for breach of contract plus costs and interests. He also asked for various other orders including that the respondent is holding title to the suit property in trust for him, that the Land Registrar rectifies the register and enter the appellant as the registered owner, and that the land registrar be impleaded for refusing to transfer the suit property to the appellant.

6. The lower court heard the matter and in a judgement delivered on 01/12/2018 it found for the respondent. That is what provoked this appeal. The lower court anchored its determination on two issues viz:

a. Who between the parties owned the suit property?

b. Whether the law of Limitation affected either of the parties.

7. On the first issue, the court determined in favour of the respondent and held that there was judgement in PMCC No. 66 of 1987 where the appellant had impleaded the respondent over the issue and lost. The lower court found that the appellants counter-claim before it was RES-

JUDICATA. On the second issue the court found that the parties had been litigating for a period of about 31 years and time had not started running against either party for that period as litigation between them was in place and active.

8. Ultimately, the court allowed the respondents claim before it and granted orders of eviction but declined to grant orders of mesne profits or compensation for the reason that the same had not been proven.

9. The appeal before this court rests on four (4) grounds as follows:

1. The learned trial magistrate erred in law and in fact when he failed to consider very material facts that were raised by the appellant in his defence and counter-claim and further ignored exhibits produced, the entire history of the appellants case and his detailed counter-claim in the suit, which included the following

a. Exhibits produced which clearly gave the entire history of the appellant's case and his detailed counter claim which established that the appellant has been on the suit land since 1982 and has done a lot of development on the said land.

b. That after the judgement in Civil Case No. 66 of 1987, the appellant continued to occupy the suit land and was in possession since 1999 to the year 2013, that is a total of twenty three years. In this intervening period, the court authorized him to go to the tribunal and got a judgement which was adopted by the court.

c. The facts raised above clearly established that the respondent did compromise the judgement and in law the said judgment was compromised and therefore null and void.

d. The court also proceeded to assist through court orders, the appellant was allowed to obtain Land Control Board consent and transfer.

e. The respondent had compromised the judgement by allowing the appellant to continue occupying the suit land from 1989 to the year 2013, when he filed the suit to evict the appellant.

f. That this suit was compromised by the court itself when the same court that gave the judgement allowed the appellant to go to the elders for arbitration of the same matter and issue.

g. That the same honourable court adopted the elders award and signed the entire transfer document and the Land Board consent. The appellant had the said documents which included

i. The Land Board consent

ii. The consent to transfer the said land

2. The appellant avers that the learned magistrate erred in law and fact in his summary of the issues for determination, because he omitted very crucial issues which went to the core of the suit. The issues left out included the following:

a. Did the appellant purchase the suit land? This was a core issue to the case, because if he did purchase, the court would have to determine whether the respondent received the purchase price and whether he would be allowed to benefit from both the purchase price and the land.

b. Did the appellant pay full consideration of the land to the respondent?

c. Whether the appellant was lawfully in occupation of the land.

d. Did the appellant obtain the control Board consent.

e. Had the respondent hired the respondent's land

f. Was the appellant entitled to costs

All these matters were central to the suit and the court was under a legal obligation to consider them.

3. The learned trial magistrate erred in law and in fact when he failed to consider the appellant's counter-claim which had raised very crucial matters including the following

a. The issue of transfer of the suit land since there was a land Board consent and transfer signed by the court and remains valid todate.

b. General damages

c. Costs

4. The appellant further avers that the nature, history, and circumstances of the case call for a radical application of Section 3A of the Civil Procedure Code. The entire history and facts raise very touching issues on the role of the law and application of the same by the honourable court which are:

a. Is it fair and just for the respondent to benefit from the purchase price of the land and the developments by the appellant on the suit land?

b. What would be the effect of the documents of transfer that were effected by the court?

c. What would be the position of the rulings which were actually adopted by the court?

The appellant's request in this ground of appeal is that the honourable court should scrutinize the history of this case, the evidence and documents and strictly apply the purpose and intent of Section 3A of the Civil Procedure Code. The section of the law gives any court whose matter is brought before it, to consider all the issues, facts, evidence and any other extraneous relevant issues and do justice without limitation. It gives the honourable court unfettered powers to do justice.

Without prejudice to the matters raised in the appeal, the appellant appreciates the fact that the honourable court did not grant the prayer for trespass, costs and interest. The appellant avers that the court did not take into account the period the appellant had stayed on the land, which went to further establish that the appellant had by law established ownership by way of adverse possession.

10. The appeal was canvassed by way of written submissions. The appellant's submissions were filed on 17/5/2021. The appellant took issue with the trial magistrate for not giving due regard to the exhibits produced which, according to him, gave the history of his case. Had the trial magistrate considered the exhibits, he would have found that the appellant had been on the suit property from 1982 and had developed the land. The appellants view is that the documents were central to the case and the court was under legal obligation to consider them.

11. The appellant further submitted that the trial magistrate had made observations that were not backed by evidence. According to him, the trial magistrate stated that he had leased the suit property from the respondent yet had bought it and had not only shown the sale agreement but also four acknowledgements of payment of the purchase price. He further pointed out – referring to ground 1(b) of the appeal- that after judgment in Civil Case No. 66 of 1987, he had continued being in occupation of the suit property for 23 years. According to the appellant, the respondent never pursued any claim on the land but was defending the suit instituted by him. He submitted that no orders were made in favour of the respondent in Civil Suit No. 66 of 1987 and by the time the respondent filed the suit for eviction the appellant had obtained Land Board consent and had had the transfers executed. His contention is that he had every right to file a counter claim and the issue of Res Judicata did not arise as the facts set out in the lower court suit were different.

12. Based on grounds 1(d) (e) (f) and (g), the appellant submitted that the respondent compromised his judgment and according to him, that judgement was null and void.

13. On ground 2 of the memorandum of appeal, the appellant emphasized that the trial magistrate had omitted crucial issues which went to the root of the matter. The trial magistrate was said to be under a legal obligation to determine the issues. The appellant contended that the court made errors in its judgment as it misapprehended the appellant's counter claim on the issue of refund of the purchase price.

14. Finally, the appellant turned to ground 4 of the appeal and implored the court to rely on Section 3A of the Civil Procedure Act. He said he had demonstrated adequately that he had paid the entire purchase price for the suit property and had also done some developments on it. He pointed out also that transfer documents for the suit property had been executed by the court and are therefore valid. He urged further that this court consider the ruling of the tribunal, the documents made available to the trial court, the evidence, and the entire history of the case. In light of that, the court should then invoke reliance on Section 3A of the Civil Procedure Act which according to the appellant gives the court unfettered powers to do justice.

15. The respondent's submissions were filed on 4/6/2021. According to the respondent, the appeal has no merit and is an abuse of the court process. He asked for its dismissal. His story is that he had leased the suit property to the appellant and upon expiry of the lease term, he asked the appellant to leave. The appellant refused to leave and instead sued him in Civil Suit No. 66 of 1987 claiming that he had purchased the suit property. The suit was dismissed and a subsequent appeal filed by the appellant was rejected.

16. The appellant is then said to have gone to the area Land Dispute tribunal claiming what the courts had declined to give him. The tribunal found in the appellant's favour but its decision was afterwards set aside by the court for reason, inter alia, that it was res-judicata.

17. The respondent then turned to the appellant's counter-claim in the lower court and noted that the counter-claim was based on the alleged fact that the Land Control Board and the court had consented to the transfer of the suit property to him. The respondent disputed this assertion and noted that the executed transfer documents and Land Control Board consent all emanated from the outcome of a legal process that had been set aside. The executed transfers and the consent given by Land Control Board were said to be null and void.

18. Further, the respondent disputed the appellant's submission that his counter-claim was not res-judicata. According to him, the facts and evidence in the trial court were the same and had been considered in Civil Suit No. 66 of 1987 and the Land Disputes Tribunal's case No. 17 of 2001. His position is that the judgement given by the trial court in PMCC No. 66 of 1987 is still valid. He further averred that the trial court made good use of the pleadings, evidence, documents and submissions presented to it. This court was asked to dismiss the appeal.

19. I have considered the appeal as filed, rival submissions, and the lower court record. This is a first appeal and my duty as the judge of the first appellate court is as stated in Section 78 of the Civil Procedure Act (Cap. 21). The duty calls upon me to *"… re-evaluate, re-assess, and re-analyze the extract of the record …"* The case of Peter M. Kariuki Vs Attorney General (2014) eKLR spelt out this mandate succinctly

when it held:

> "We have also, as we are duty bound to do as a fourth appellate court, to reconsider the evidence adduced before the trial court and re-evaluate it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence."

20. For effective disposal of the appeal, and having regard to the grounds of appeal as filed, the following issues commend themselves to me as apt for consideration:

1. Whether the trail magistrate ignored the history of the case including the documents and evidence made available.

2. Whether the counter-claim as filed was res-judicata.

3. Whether the respondent's case was caught by Limitations of Actions Act.

4. Whether the court can apply Section 3A of the Civil Procedure Act (Cap. 21) in the manner suggested and proposed by the appellant.

21. Before I delve into the issues however, I need to observe that the record of appeal and the many records showing the various legal processes that the matter has had are all meant to speak to me. From all of them, it is clear that this is a matter that has had a twirly and rather circuitous history. It is clear that the parties transacted over the suit property. To the appellant the nature of transaction was purchase of the suit property by him from the respondent. To the respondent, the transaction was in the nature of a lease, with the appellant having lent him some money and him in return allowing the appellant to use the suit property for a period to repay himself the money lent.

22. Whatever the case, the appellant seems to have pressed for legal transfer of the suit property to him and when that failed, he sued the respondent in Civil Suit NO. 66 of 1987. The transactions mentioned here seem to have taken place in 1979. The respondent was sued in 1987. In that first suit, the appellant sought several orders against the respondent including specific performance of land sale contract allegedly entered into for purchase of the suit property by him or refund of purchase price. He also sought general damages for breach of contract plus costs and interests.

23. In a judgement delivered on 3/9/1999, the court handling the matter dismissed the suit for reason, inter alia, that the alleged sale of land was legally wanting for lack of the requisite consent from the Land Control Board. Concerning the refund of the purchase price and costs of development, the court found that the limitation period had caught up with that demand.

24. After loosing the matter, the appellant appealed – the same being Appeal No. 19 of 1999 – and by order dated 7/7/2000, the appeal was rejected.

25. But the appellant was not done yet, he then took his matter to the area Land Disputes tribunal in Land Disputes Tribunal case No. 17 of 2001. The tribunal found in his favour and as was the practice at the time, the award was taken to court and adopted as court judgement in Civil award No. 16 of 2001. The award was clear that the suit property was to be transferred to the appellant and the respondent was to surrender the title to the Land Registrar for cancellation. The appellant was also awarded costs.

26. But in another twist, the same court that adopted the award as its judgement set it aside upon application by the respondent. The reason for setting aside was that the matter had been conclusively handled by the court. It appears clear that the respondent had launched a bi-pronged challenge to the outcome of the tribunal, for apart from the process started in the lower court to set aside the tribunal's decision, there were also judicial review proceedings in the High Court which were terminated when the decision of the tribunal was set aside by the lower court.

27. These lower court proceedings themselves did not start in 2013 as the number of the case at the lower court seems to suggest. The judgement under challenge was delivered on the basis of an amended plaint dated 30/9/2013 but its clear from the amended plaint that the original plaint was dated 6/8/2002. Elsewhere in the records also, its clear that the matter was filed in court on 8/8/2002.

28. I now turn my focus to the issues delineated for determination. The first issue (issue 1) is whether the trial court ignored the history of the case including the documents and evidence. To determine this issue, one would need to look at the judgement itself. Apart from the prefatory remarks made at the beginning of the judgement, the trial magistrate set out the respondents case and while doing so, he mentioned 9 documents filed by the respondent in support of his case. He then turned to the appellant's case and gave some background and history. To be precise, he mentioned that the appellant had alleged to have bought the suit property in 1979 and had thereafter taken possession. He planted tea and put up a structure worth 40,000/-.

29. The trial magistrate then listed 11 documents made available by the appellant before pointing out the issues that he felt were necessary for determination of the case. It is crucial to appreciate that the trial magistrate was alive to the documents presented by both sides and the general history of the matter. While embarking on the analysis leading to his decision, the trial magistrate is shown saying that he had *"carefully considered all the evidence and submissions by both sides."* I don't take this as an idle averment given that before saying this, the trial magistrate had set out what each side had presented including the documents. I therefore don't agree with the appellant on the issue. The trial magistrate was alive to the history of the matter and had that history in mind when he made his decision.

30. The second issue (issue 2) is whether the counter-claim as filed was RES-JUDICATA. The trial magistrate found that it was. The court considered the sale agreement and acknowledgement of payments made by the appellant but found they related to the issue of purchase raised and considered in PMCC No. 66 of 1987 filed by the appellant. It therefore made a finding that the claim was Res-Judicata.

31. Section 7 of the Civil Procedure Act provides as follows:

> "No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed"

The doctrine of RES-JUDICATA operates in two ways viz:

> a. Where the matter or issue raised in the pending suit was also in issue in a concluded suit and a competent court had pronounced itself on it.
>
> b. Where the matter or issue in the pending suit ought to have been raised in a concluded suit but was not raised.

The doctrine is a useful legal tool because first, it is legally unacceptable to vex an individual twice over the same matter or issue. Secondly, it is in the public interest that there should be an end to litigation. The doctrine of RES-JUDICATA applies not only to matters or issues upon which the court was required by the parties to determine but also to every other matter or issue which properly belong to the subject of litigation, and which the parties, exercising reasonable diligence, ought to have brought forward for determination.

32. In the **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 Others: NAIROBI CA Civil Appeal NO. 105 of 2017 (2017 eKLR)** the court held as follows:

> "The role or doctrine of RES-JUDICATA serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res-judicata thus rest in the public interest for swift, sure, and certain justice.

33. The guiding light on what should be considered in determining whether the matter is RES-JUDICATA was spelt out in the Supreme Court case of **JOHN FLORENCE MARITIME SERVICES LIMITED & ANOTHER Vs CABINET SECRETARY, TRANSPORT AND INFRASTRUCTURE & 3 OTHERS (2021) eKLR** where the court stated:

> "Hence, whenever the question of res-judicata is raised, a court will look at the decision claimed to have settled the issues in question; the entire pleadings and record of that previous case; and the instant case to ascertain the issues determined in the previous case, and whether these are the same in the subsequent case. The court should ascertain whether the parties are the same, or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction."

34. It is with all this in mind that I have looked at the appellant's amended defence and counter-claim in the lower court vis-à-vis the appellants first case filed against the respondent – Civil Suit No. 66 of 1987. In that first case, the issue of sale of land and the purchase price alleged to have been paid were raised. The issue of development was also raised. The sale agreement and acknowledgements for payment used in the counter-claim were also used in that case. Quite clearly, the counter-claim was filed with a view to re-litigating what was litigated upon in Civil Suit No. 66 of 1987. The matter is obviously RES-JUDICATA. There is no denying that the suit property is the same, the parties are the same, the issues are substantially the same, and the substance and purport of the evidence is similar.

35. True, there is the issue of trust which only appears in the counter-claim. In E.T. Vs. Attorney General & Another [2012] eKLR, the court observed as follows:

> "The court must always be vigilant to guard against litigants evading the doctrine of res-judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in another form a new cause of action which has been resolved by a court of competent jurisdiction."

In my view that issue of trust should have been raised in the very first matter that the appellant filed against the respondent. He is using legal ingenuity to raise it in the counter-claim to make his case look different.

36. But if, for any reason, the appellant believes that trust arose from the decision of the Land Dispute Tribunal, then he is wrong and here is why: The whole process of the tribunal including its decision was a misguided endeavor. It was never the law, even when the tribunals used to operate, to take matters conclusively decided by the courts for another determination at the tribunal. It is not surprising that the decision of the tribunal's decision was set aside. The setting side of the decision meant that all subsequent actions and processes taken or initiated on the basis of that decision were of no legal consequence.

37. In my view, it was not open to the appellant at all to go to the tribunal. His matter had not only been decided by a competent court of law but the tribunal itself had no legal mandate or jurisdiction to give what the appellant was seeking. The jurisdiction of the tribunal at the time was contained in Section 3(1) of the repealed Land Disputes Tribunal's Act (Cap 303A) and it was as follows:

> Section 3(1): Subject to this Act, all 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

Shall be heard and determined by a Tribunal established under Section 4.

38. The record of the Land Dispute Tribunal's proceedings is among the materials made available for scrutiny and use by this court. It is clear that the appellant was claiming to own the suit property and wanted the tribunal to order the respondent to transfer it to him. Infact, the appellants own words are captured as follows:

> "That I pray this court to order the defendant to transfer the land Kaagari/Kanja/2359 of 4 acres to me because I have paid for it fully and he does not dispute that I paid him."

39. At the end of the proceedings, the tribunal is shown ordering that the suit property be transferred to the appellant, with the executive officer of the court being ordered to sign the necessary documents to transfer the suit property to the appellant. In simple terms the tribunal was divesting ownership of the suit property from the respondent and vesting the same in the appellant. As pointed out earlier, the tribunal only had jurisdiction to handle matters relating to division of land or determination of boundaries or trespass, or claim to work or occupy land. It had no mandate at all to involve itself in issues of ownership. It is clear that the proceedings before the tribunal were an exercise in futility. The value of the proceedings amounted to zero, zilch, nothing. No trust can arise in such a scenario. Trust can only arise or emanate from something legal.

40. It is clear that after the appellant's apparent "win" at the tribunal, he moved with haste to ensure that he became the registered owner of the suit property. Some forms – like Land Control Board consents and Land transfer forms – were duly signed in order to effectuate the process of transfer. It is these forms or documents that the appellant seem to rely on to argue that some court processes and decisions were compromised. It is important to point out that in the eye of the law, such forms or documents are of no legal value. This is because the whole tribunal process was legally untenable. In this regard it is important to recall the words of Lord Denning in **MACFOY Vs UNITED AFRICA COMPANY LTD [1961] 3 ALL ER 1169** where they were expressed succinctly as follows:

> "**…** 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 can not put something on nothing and expect it to stay there. It will collapse …"

41. The appellant has tried to be ingenious by trying to make some processes done on the basis of the tribunals decision look like they have some force of law. It would be good to appreciate the wisdom of the Court of Appeal in **KARANJA Vs ATTORNEY GENERAL: HCC No. 310/1997** where the court observed:

> "**…** any order made without jurisdiction is a nullity and no amount of legal ingenuity can turn it into a valid order …"

42. I have pointed all this out because the appellant seem to think that the proceedings of the Land tribunal have some legal validity. The truth is that the proceedings and the decision made by the tribunal were of no legal consequence and couldn't be relied on to enforce or pursue ownership. More crucially, those proceedings were set aside.

43. Then there was the issue of Limitation of actions. (issue 3). The trial court found that time couldn't be said to have been running as both parties have been embroiled in disputes for a long period. In fact the parties have been litigating from 1987 to date. The appellant seems to be of the view that since he had been the one instituting the suits then the respondent, whose role was defending, was caught up by limitation period. He further opined that since he has been in possession all along as the litigation has been going on, then he has become owner of the suit property by adverse possession.

44. The appellant is completely wrong. When parties are litigating, they are both involved in the suit and it matters not that one is instituting or defending the suit. What matters is that litigation is before the court. It stops time from running for both parties, not one of them. I entirely agree with trial magistrate that parties were not caught by Limitation of actions.

45. But let's even suppose time couldn't stop running for the respondent. Would limitation period have caught up with him? My considered answer to this question is NO. And this is why: A look at the appellant's various suits would show that he has all along been pursuing ownership of the suit property. As long as he was doing that, ownership was not a settled issue. Records show that judgement in Civil Suit No. 66 of 1987 was delivered on 3/9/1999. The tribunal's award is shown to have been set aside on 16/5/2002. In between there was an appeal which the superior court rejected. The legal certainty as to ownership of the suit property by the respondent was manifest only sometimes in the year 2002.

46. The suit which is the subject of this appeal, though prima facie appearing to have been filed in the year 2013, was actually filed on 8/8/2002 vide a plaint dated 6/8/2002. How then can one say that the suit was caught up by the statute of limitation? The suit is mainly about the eviction of the appellant and eviction came when there was certainty regarding ownership. That is the certainty that emerged after the appellant's various suits hit a dead end. That dead end came in the year 2002 and the respondent filed his suit that very year. Given all this, it would plainly wrong to allege that the respondent's suit was caught up by limitation period.

47. The final issue (issue 4) is about application of Section 3A of the Civil Procedure Act (Cap 21) to this case. Section 3A is as follows:

> "Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

It is the appellant's position that this court has unfettered discretion to do justice. Yes, the court has such discretion but it is meant to ensure that the ends of justice are met and that no party is allowed to abuse the court process.

48. In this particular matter, I am convinced that the appellant is abusing the court process. He lost his claim in Civil Case No. 66 of 1987. He filed an appeal that was rejected. He then decided to take the same dispute to a forum – Land Disputes Tribunal – that had no power to entertain it. He then tries in this appeal to give a false cloak of legality to a process – the tribunal process - that amounts to nothing in the eye of the Law. Section 3A can not also be used to defeat or circumvent clear provisions of law. The court is not persuaded that Section 3A should be invoked to help the appellant's cause in this matter. There are clear legal provisions for use in this matter.

49. Lastly, the appellant raised several minor issues when trying to elaborate his grounds of appeal. He is shown saying in some instances that the court or the appellant compromised this judgement or that order. The position in law is clear. Any judgment or order of court can not be compromised by implication or inference. If that were so, then parties would so easily defeat decisions or, orders of the court by cunningly and surreptitiously filing suits to obtain legally questionable orders which they would then dangle before the court as proof that lawful orders previously made had been compromised. The proper and legal way to compromise or defeat court orders or decisions is to expressly challenge them in order to get clear orders comprising or defeating them. The appellant was therefore wrong to think that there was any order or judgement compromised or defeated by implication or inference.

50. Ultimately then, it is clear that the appeal herein is one for dismissal. I see no need to interfere with the decision of the lower court. The appeal herein therefore stands dismissed with no order as to costs.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28TH DAY OF SEPTEMBER, 2021

In the presence of Njiru Mbogo advocate for the Appellant and Joe Kathungu advocate for the respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

28.09.2021