REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. CASE NO. 51 OF 2018

NJERU KIRUMBI.....PLAINTIFF

VERSUS

JUSTA NGAI NYAGA.....1ST DEFENDANT

TERESIA ITA MURIUKI (Sued as the personal representative of the Estate of

MURIUKI JOSEPH (Deceased).....**2ND DEFENDANT**

JUDGEMENT

A. Introduction

1. By a plaint dated and filed on 20th December 2018 the Plaintiff sought the following reliefs against the Defendants:

> *a. A declaration that the decision/award of the Mbeere District Land Disputes Tribunal in Tribunal Case No. 213 of 2001, which was entered as an order issued by the Principal Magistrate's Court at Siakago in Land Disputes Tribunal Case No. 4 of 2007 to wit that all the parcels which originated from Nthawa/Riandu/1941 be awarded to Justa Ngai Nyaga, is unlawful, null and void and the said award and the subsequent order issued be set aside.*
>
> *b. An order that the order emanating from Land Disputes Tribunal Case No. 4 of 2007 registered against land parcel No. Nthawa/Riandu/2335 be removed.*
>
> *c. Costs of the suit.*

B. The Plaintiff's case

2. Plaintiff Pleaded that at all material times he was the registered proprietor of *Title No. Nthawa/Riandu/2335* (hereafter the *suit property*) which was a sub-division of *Title No. Nthawa/Riandu/1941* (hereafter *parcel 1941*). The Plaintiff stated that he had bought the suit property which was then registered in the name of the 2nd Defendant's deceased husband in a public auction.

3. The Plaintiff pleaded further that after his acquisition of the suit property the 1st Defendant filed a claim before the Mbeere Land Disputes Tribunal (hereafter *Tribunal*) being *LDT Case No. 213 of 2001* whereby he sought parcel 1941 to be awarded to him. The Tribunal then proceeded to hear the claim and made an award granting the 1st Defendant parcel 1941 in the absence of the Plaintiff who was the registered proprietor at the material time. The said award was subsequently adopted as a judgement in *Siakago PMCC LTD No. 4 of 2007.*

4. The Plaintiff contended that the award of the Tribunal and the subsequent decree were irregular, null and void for two reasons. First, it was contended that the Tribunal had no jurisdiction to entertain the 1st Defendant's claim and to make the award under the law. Second, it was contended that the Tribunal violated the rules of natural justice by failing to accord him an opportunity of being heard since he was the registered proprietor at the material time.

C. The Defendants' case

5. The 1st Defendant filed a written statement of defence dated 4th March 2019 in which he admitted that the Plaintiff had bought the suit property in a public auction. He, however, denied that the Tribunal had no jurisdiction to entertain the matter. It was also denied that the Plaintiff was not accorded an opportunity of being heard before the Tribunal.

6. The 2nd Defendant filed a written statement of defence and counterclaim dated 1st April 2019. She pleaded that the suit did not disclose any cause of action against her and prayed for dismissal of the suit with costs.

7. By her counterclaim she stated that the suit property was sold in execution of a decree passed against her late husband in *Siakago RMCC No. 16 of 1994.* It was further pleaded that when her late husband appealed to the High Court his appeal was allowed in *Embu HCCA No. 2 of 1994* and consequently the decree of the Magistrates court was set aside. The 2nd Defendant, therefore, sought the following orders in her counterclaim:

a) The suit herein as against the 2nd Defendant be dismissed with costs.

b) Orders that land parcel Nthawa/Riandu/2335 be transferred to Juliano Muriuki Joseph by the Plaintiff hereof/or to the 2nd Defendant as personal representative.

c) Costs of the counterclaim be awarded to the 2nd Defendant as against the Plaintiff.

d) Interest on (a) (b) (c) above at court rates.

8. The Plaintiff filed a reply and defence to the 2nd Defendant's counterclaim dated 10th April 2019. The Plaintiff joined issue upon the defence. In his defence to counterclaim, the Plaintiff admitted that he bought the suit property in execution of the decree passed in Siakago *RMCC No. 16 of 1994.* He, however, denied knowledge of the ensuing appeal or the appeal being allowed as pleaded by the 2nd Defendant. The Plaintiff prayed for dismissal of the counterclaim with costs.

9. The material on record shows that by a notice dated 22nd March 2019 the Plaintiff wholly discontinued his suit against the 2nd Defendant under the provisions of **Order 25** of the **Civil Procedure Rules.** The 2nd Defendant did not, however, withdraw her counterclaim.

D. <u>The summary of evidence at the trial</u>

10. When the suit came up for trial on 27th November 2019 the Plaintiff testified on his own behalf and closed his case. The 1st Defendant similarly testified on his own behalf as the sole witness and closed his case. The 2nd Defendant did not attend court to prosecute her counterclaim. Her advocate's application for adjournment on account of lack of instructions was rejected by the court.

11. The Plaintiff adopted his witness statement dated 30th July 2019 as his evidence in chief. He also produced the documents listed in his list of documents dated 30th July 2019 as exhibits. The Plaintiff's evidence simply followed the script of his plaint. His case was that he bought the suit property at an auction conducted in execution of a decree and that he was never accorded a hearing by the Tribunal before he was deprived of his property. During cross-examination by the 1st Defendant's advocate, he stated that he was not aware that the decree of the Magistrates court had been set aside on appeal.

12. The 1st Defendant similarly adopted his witness statement dated 17th September 2019 as his evidence in chief. He also produced the documents in his list of documents dated 17th September 2019 as exhibits. The 1st Defendant stated that he was the one who had filed a claim before the Tribunal in which he claimed parcel 1941 from the 2nd Defendant's late husband. He conceded that he was aware at the material time that it had been sub-divided but he did not join the Plaintiff in the case because he did not know him.

E. <u>Directions on submissions</u>

13. Upon conclusion of the trial, the Plaintiff was given 30 days to file and serve his written submissions whereas the Defendants were given 30 days upon the lapse of the Plaintiff's period to file theirs. The record shows that the Plaintiff filed his submissions on 6th February 2020 but the Defendants had not filed any submissions by the time of preparation of the judgement.

F. <u>The issues for determination</u>

14. The court has noted that the parties did not file an agreed statement of issues for determination in this matter. Whereas the Plaintiff filed a list of seven (7) issues for determination, the Defendants did not file any issues in this matter. Accordingly, the court shall frame the issues for determination as provided for in law. Under **Order 15 Rule 2** of the **Civil Procedure Rules,** the court may frame issues from the following:

a) The allegations contained in the pleadings.

b) The contents of documents produced by the parties.

c) The statements made on oath by or on behalf of the parties.

15. The court has considered the pleadings, documents and evidence on record in this matter. The court is of the view that the following issues arise for determination in this suit:

a) Whether the Tribunal had jurisdiction to entertain the 1st Defendant's claim in Mbeere Land Disputes Tribunal Case No. 213 of

2001.

b) Whether the Plaintiff was accorded an opportunity of being heard by the Tribunal and, if not, what is the consequence thereof.

c) Whether the Plaintiff is entitled to the reliefs sought in the suit.

d) Whether the 2nd Defendant has demonstrated her counterclaim.

e) Who shall bear the costs of the suit and counterclaim.

G. <u>Analysis and determination</u>

16. The court has considered the evidence, documents, and submissions on record on the 1st issue. There is no doubt that the defunct Tribunal was a creature of statute. It was established under **Section 4** of the repealed **Land Disputes Tribunals Act, 1990.** It could therefore have and exercise only the jurisdiction as circumcised by its establishing statute. It's jurisdiction was set out under **Section 3 (1)** of said **Act** as follows:

"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."

17. The material on record indicates that at the time the Tribunal made its award and awarded parcel 1941 to the 1st Defendant, the Plaintiff was already the registered proprietor thereof. The award of the Tribunal was not a claim for division or determination of boundaries to land, a claim to occupy or work land or tresspass to land. It was an award depriving the Plaintiff of title to land and conferring it upon the 1st Defendant. The establishing Act did not confer any jurisdiction upon the Tribunal to adjudicate on questions of title to land.

18. As was held in the case of **Joseph Malakwen Lelei & Another V Rift Valley Land Disputes Land Disputes Appeals Committee & 2 Others [2014] eKLR** which was cited by the Plaintiff's advocate a tribunal's decision made without jurisdiction cannot be allowed to stand. In the said case, it was held by the Court of Appeal, *inter alia,* that:

"Evidently the above provision does not include jurisdiction to deal with issues of determination of title to or ownership of registered land, or the determination of a Trust in favour of a party, which in essence was the basis of the 3rd Respondent's claim. Having found that the Tribunal and the Appeals Committee lacked jurisdiction to arbitrate on the matter before them, then all other grounds become moot. We say so because it is trite that where a court or tribunal takes upon itself to exercise a jurisdiction which it does not possess, its proceedings and decisions are null and void. It then follows that every other proceeding, decision, or award that results from such a process must be construed as a nullity. See Macfoy V. United Africa Co. Ltd 1961 3 All ER 1169; Continental Credit Finance Ltd [2003] 2 EA 399; Owners of Motor Vessel "Lillian S" Vs. Caltex Oil (Kenya) Limited (1989) KLR 1.'

19. The court is in agreement with the Plaintiff's submissions on the jurisdiction of the defunct Tribunal under the repealed statute. The court also concurs with the exposition of the law by the Court of Appeal in the case of **Joseph Malakwen Lelei & Another Vs Rift Valley Land Disputes Appeals Committee & 2 Others** *(Supra).* Accordingly, the 1st issue is answered in the negative since the Tribunal had no jurisdiction to entertain the 1st Defendant's claim.

20. The 2nd issue is whether the Plaintiff was accorded an opportunity of being heard before the Tribunal. The court has considered the entire evidence on record on this issue. It is evident from the proceedings of the Tribunal that the Plaintiff was not a party thereto even though he was the registered proprietor of the suit property at the material time. He was never summoned or notified of the hearing either by the Tribunal or the 1st Defendant who was the claimant before the Tribunal.

21. At the trial hereof, the 1st Defendant conceded that he knew at the material time that parcel 1941 had been sub divided. His explanation for the failure to join the Plaintiff was that he was not aware that the Plaintiff was the registered proprietor of one of the sub-divisions of parcel 1941 since he did not conduct a search a the Land Registry.

22. The court is satisfied that the Plaintiff was not accorded an opportunity of being heard before deprivation of his property by the Tribunal. The court is thus satisfied that there was a violation of the rules of natural justice. The 1st Defendant's explanation for not joining the Plaintiff in the case before the Tribunal is a lame excuse which cannot make up for the violation of the Plaintiff's legal right to be heard.

23. As to the consequence of violation of the right to a fair hearing the court can do no better than quote from the case of **Eunice Muthoni Gatugi V Lusalia Wamweru & Others [2018] eKLR** which was cited by the Plaintiff's advocate. In the said case Olao J held as follows:

"The tribunal was therefore aware that the suit land was no longer the property of the 1st defendant but had been sold to a third party who is the Plaintiff herein. However, no attempt was made to summon the Plaintiff and give her an opportunity to be heard before cancelling her title to the suit land. Although the 2nd to 11th Defendants have pleaded in paragraph four (4) of their defence that the Plaintiff "was well aware of the proceedings and even attended the court during the reading and adoption of the award in court at Wang'uru," a perusal of the Tribunal's proceedings during the hearing and also those of the Wang'uru court on 11th November 2008 when that award was adopted as a judgement of the court clearly show that the Plaintiff was not a party in both forums. The result was that the Plaintiff's right to the suit land was arbitrarily infringed without hearing her. That not only violated her constitutional right to own property protected by Article 40 but was also against the Rules of natural justice in that she was condemned un-heard. A decision arrived at in violation of the rules of natural justice is *ultra vires*, null and void."

The court is thus of the opinion that the award of the Tribunal which was made in violation of the rules of natural justice was null and void.

24. The 3rd issue is whether the Plaintiff is entitled to the reliefs sought in the plaint. The court has found that the Tribunal had no jurisdiction to enter the 1st Defendant's claim. The court has also found that the Tribunal violated the cardinal rules of natural justice in that the Plaintiff was not accorded a chance of being heard. The court has also found that the resultant award of the Tribunal was null and void in the eyes of the law. It would follow, therefore, that the Plaintiff is entitled to the reliefs sought in the plaint in the manner qualified in this judgement.

25. The court has noted that the Plaintiff's reliefs are so widely worded as to affect other parcels of land which are not the subject of the instant suit. The court is thus of the opinion that the reliefs to be granted should be confined to the suit property of which the Plaintiff is the registered proprietor and not the rest of the sub divisions of the original parcel 1941.

26. The 4th issue is whether the 2nd Defendant has demonstrated her counterclaim in this matter. The record shows that the 2nd Defendant did not attend court at the hearing hereof to prosecute her counterclaim. The record further shows that the Plaintiff has not admitted any part of the counterclaim. Accordingly, the court finds and holds that the 2nd Defendant has failed to demonstrate his counter claim hence the same is for dismissal.

27. The courts finds it strange that the 2nd Defendant had to file a counter claim for the purpose of reclaiming the suit property which had been sold in execution of a decree which she claimed was ultimately reversed on appeal. The court is of the view that a party who has succeeded an appeal should make an application for restitution to the court which passed the decree under **Section 91 of the Civil Procedure Act.**

28. **Section 91** of the **Civil Procedure Act** stipulates as follows:

"(1) Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to any benefit by way of restitution or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders for the refund of costs and for the payment of interest, damages, compensation and *mesne* profits, which are properly consequential on such variation or reversal.

(2) <u>No suit shall be instituted for the purpose of obtaining any restitution or other relief which could be obtained by application under subsection (1)."</u> (emphasis added)

29. The court is of the opinion that filing a fresh suit for restitution is not permissible under the law since there are adequate mechanisms for recovery of such property in the event of reversal of a decree on appeal.

30. The 5th issue is on costs of the suit. Although costs of an action are at the discretion of the court, the general rule is that costs of an action shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21).** As such, a successful litigant should generally be awarded costs of the suit unless, for good reason, the court directs otherwise. See. **Hussein Janmohamed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA 287.**

31. The court is aware that the Plaintiff discontinued his claim against the 2nd Defendant and that the latter never prosecuted her counterclaim. The court is of the opinion that the Plaintiff should be awarded costs of the suit to be borne by the 1st Defendant only whereas the 2nd Defendant's counterclaim shall be dismissed with no order as to costs since she was not awarded costs for the claim the Plaintiff withdrew against her.

H. <u>Summary of the courts findings</u>

32. In summary, the court makes the following findings on the issues for determination:

a) The Mbeere Land Disputes Tribunal had no jurisdiction to entertain the 1st Defendant's claim in Case No. 213 of 2001.

b) There is evidence on record to demonstrate that the Plaintiff was never accorded an opportunity of being heard by the Tribunal hence the resultant award affecting Title No. Nthawa/Riandu/2335 was null and void.

c) The Plaintiff is entitled to the reliefs sought in the plaint but only limited to the extent of safeguarding his Title No.

Nthawa/Riandu/2335.

d) The 2nd Defendant did not demonstrate her counterclaim at the trial hence the same is for dismissal.

e) The 1st Defendant shall bear the Plaintiff's costs of the suit but the counterclaim shall be dismissed with no order as to costs.

I. Conclusion and disposal orders

33. The upshot of the foregoing is that the court finds that the Plaintiff has proved his case against the 1st Defendant to the required standard. The court also finds that the 2nd Defendant has failed to prove her counterclaim as required by law. Accordingly, the court makes the following orders for disposal of the suit and counterclaim:

a) A declaration be and is hereby issued that the award of the Mbeere Land Disputes Tribunal in Tribunal Case No. 213 of 2001 which awarded the 1st Defendant Justa Ngai Nyaga Title No. Nthawa/Riandu/2335 as part of Title No. Nthawa/Riandu/1941 is null and void hence the same is hereby varied to exclude Title No. Nthawa/Riandu/2335.

b) The judgement adopting the said award as a decree in Siakago PMC LDT Case No. 4 of 2007 is hereby varied to exclude Title No. Nthawa/Riandu/2335 as part of Title No. Nthawa/Riandu/1941.

c) The order and decree in Siakago LDT No. 4 of 2007 registered against Title No. Nthawa/Riandu/2335 be expunged from the relevant land register.

d) The 2nd Defendant's counterclaim be and is hereby dismissed with no order as to costs.

e) The Plaintiff is hereby awarded costs of the suit to be borne by the 1st Defendant only.

34. It is so adjudged.

JUDGEMENT DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **27TH DAY** of **FEBRUARY, 2020.**

In the presence of Mr. Andande holding brief for Mr. Kalamu for the Plaintiff, Ms. Ndorongo holding brief for Mr. Eddie Njiru for the 1st Defendant and in the absence of the 2nd Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

27.02.2020