



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

CASE No. 547 OF 2016

RIFT VALLEY ENTERPRISES LTD.....PLAINTIFF

VERSUS

ANTONY MICHAEL HUGHES (Sued as

administrator of the Estate of ALEXANDRA

THERESA HUGHES (DECEASED).....1ST DEFENDANT

NAKURU DISTRICT LAND REGISTRAR.....2ND DEFENDANT

SAMWEL KIBOWEN TOWETT.....3RD DEFENDANT

JUDGMENT

1. The plaintiff commenced this suit through plaint dated 9th December 2016 and filed in court on 18th January 2017. It averred that it is the owner of the parcels of land known as Dundori/Mugwathi/Block 2/227 and Dundori/Mugwathi/Block 2/228 (the suit properties) and that a title in respect of Dundori/Mugwathi/Block 2/227 was issued to it in the year 2013. That on 12th May 1983, it entered into a sale agreement for a portion of land parcel number I.R. No. 10457 measuring 2 acres with Alexandra Theresa Hughes (deceased). It added that the 2nd defendant strangely issued title deeds for the suit properties to the 1st defendant and that the 1st defendant purchased the suit properties from the 3rd defendant. It further averred that the 1st and 2nd defendant conspired to defraud it of its property. It therefore sought judgment against the defendants for:

- a) *A declaration against the defendants that the plaintiff herein is the legal owner of all those parcels of land known as Dundori/Mugwathi/Block 2/227 and 228.*
- b) *An order directing the 2nd defendant to cancel titles to the suit properties issued in the name of the 1st defendant.*
- c) *An order of eviction be issued against the 1st defendant from the suit properties.*
- d) *A permanent injunction to restrain the 1st defendant from entering into, fencing, building, selling, transferring and or in any way interfering with the plaintiff's lawful use of Dundori/Mugwathi/Block 2/227 and 228.*
- e) *Costs of this suit.*
- f) *Such other or further relief this Honourable court shall deem fit and proper to grant.*

2. The 1st and 3rd defendants filed a statement of defence and counterclaim in which they denied the allegations of fraud, confirmed that the deceased purchased 2 acres from the plaintiff and added that the deceased was allocated another 6 acres from her shares with the plaintiff. Upon survey, the plaintiff allocated Dundori/Mugwathi/Block 2/227 and Dundori/Mugwathi/Block 2/228 measuring a total of 9 acres to the 1st defendant's family. They added that upon the deceased passing away on 27th June 2010, the 1st defendant petitioned for letters of administration and that the grant was confirmed. The suit properties were then transferred to the 1st defendant pursuant to the confirmed grant. They added that the plaintiff was fraudulently issued with a title deed for Dundori/Mugwathi/Block 2/227 and the plaintiff went ahead to subdivide it despite the fact that the property had been allocated to the deceased. The 1st and 3rd defendants therefore urged the court to dismiss the plaintiff's case with costs and to enter judgment in their favour for:

(a) A declaration that the 1st defendant herein is the legal owner of all those parcels of land known Dundori/Mugwathi Block 2/227 and Dundori/Mugwathi Block 2/228.

(b) An order directing the 2nd defendant to cancel any sub-divisions to the suit properties issued in the name of the Plaintiff.

(c) Costs of this suit.

(d) Any further relief this Honourable Court shall deem fit and proper to issue.

3. Despite being served with summons to enter appearance and hearing notices, the 2nd defendant neither entered appearance nor participated in the hearing of the suit.

4. At the hearing, the plaintiff called one witness, Elijah Chelaite. He adopted his witness statement dated 22nd May 2018 as his evidence in chief. He also produced the documents in the plaintiff's list of documents dated 9th December 2016 as well as those in plaintiff's further list of documents filed on 24th May 2018 as plaintiff's exhibits. He stated as follows in the said witness statement:

1. I am an adult male of sound mind and disposition, a citizen of the Republic of Kenya, the chairperson of plaintiff herein and hence competent to make this statement.

2. That I am conversant with the facts and the circumstances of this matter and with the authority of the plaintiff herein.

3. That the plaintiff is a duly incorporated limited liability company under the Companies Act, CAP 486 laws of Kenya which is now repealed and succeeded by Companies Act of 2015.

4. That the 1st defendant has been sued by the plaintiff as the legal administrator of the estate of the late Alexandra Theresa Hughes under whose name the titles to the suit properties have been registered.

5. That on the 12th May, 1983, the plaintiff herein entered into a sale agreement with one Alexandra Theresa Hughes (deceased) for sell (sic) of a portion of land parcel no. LR No. 10457 situated at East of Nakuru Municipality comprising of 2 acres together with permanent house and other developments thereto.

6. That the purchase price of the said transaction was agreed at KShs 150,000/=.

7. That in the year 2013, title deed for land parcel no. Dundori/Mugwathi/Block 2/ 227 measuring 7.5 acres was issued to the plaintiff by the 2nd defendant for safe custody.

8. That on the 24th December, 2014, the plaintiff carried out an official search of the said property with an intention of commencing subdivision of the same.

9. That subsequent to the subdivision, new numbers were issued being Block 2/2588, 2589, 2590, 2591, 2592 and 2593.

10. That the aim of the subdivision was to comply with the resolution of the plaintiff to allocate the estate of the late Alexandra Theresa Hughes her legitimate 2 acres as per the sale agreement dated 12th May, 1983.

11. That the remaining 5.5 acres from 7.5 acres was to revert to the plaintiff as legitimate and legal owner.

12. That consequently, the said estate of the deceased person was allocated Block 2/2588 measuring 2 acres as per the said agreement.

13. That however, the above mentioned six blocks were changed to conform with a request of the estate Alexandra Theresa Hughes.

14. That the land plan was changed and a further mutation was done; the 1st defendant herein personally engaged and paid surveyors to do the same.

15. That after a further mutation was done, new numbers were registered; the said numbers are: Block 2/2798, 2799, 2800, 2801.

16. That the estate of Alexandra Hughes was then allocated Block 2/2799 and a title issued.

17. That strangely, and beyond belief of the plaintiff, the 2nd defendant issued title deed of land parcels no. Dundori/Mugwathi/Block 2/227 and 228 (suit properties) to the 1st defendant.

18. That this happened even after the title of the suit properties was surrendered and new titles issued for the sub divided portions.

19. That in the year 2009, Nakuru Land Disputes Tribunal made a decision that the suit properties belonged to the estate of the Late

Alexandra Hughes.

20. That the said tribunal had no jurisdiction under the repealed Land Disputes Tribunal Act No. 18 of 1990 to hear and determine disputes on ownership of land.

21. That the said tribunal's decision was allegedly adopted by the High Court on 29th March, 2011 vide HCCC Misc. No. 342 of 2011 as an order of the court.

22. That however, there are no records from the Nakuru Law Court Registry of the above mention (sic) court case (HCCC Misc. No. 342 of 2011) and this only implies that the 1st defendant falsified court documents to perpetuate an illegality.

23. That the plaintiff, through its officials wrote to the 2nd defendant demanding from the said defendant to cancel titles issued to the 1st defendant.

24. That the 3rd defendant claims that sometimes in the year 1970, he was allowed by the plaintiff to live in the big farm house.

25. That the 3rd defendant further claims that in the year 1976, the plaintiff sold him the permanent house, in the farm for KShs 35,000/=; and that he also bought shares from the shareholders of the plaintiff.

26. That the 3rd defendant also claims that he sold to the 1st defendant 250 shares he had purchased from the plaintiff's members; which shares translates to 15 acres of land plus the farm house.

27. That it is from the shares that the 1st defendant allegedly purchased from the 3rd defendant that the 1st defendant was able to obtain a share certificate from the plaintiff.

28. That the assertions by the 3rd defendant are false and that the share certificate obtained by the 1st defendant is a forgery and was not issued by the plaintiff.

29. That I know out of my own knowledge that the 3rd defendant is a serial land thief in Nakuru and environs.

....

5. He added orally that Kalenjin Enterprises Ltd was formed in 1969 and in 1980 its name was changed to Rift Valley Enterprises Ltd (RVEL). That the buying and selling of its shares was closed in 1975.

6. Under cross-examination by counsel for the 1st defendant he stated that he was elected chairman of the plaintiff in the year 2008, that Alexandra Theresia Hughes was not a shareholder of Kalenjin Enterprises and that the share certificate in her name which the 1st defendant had relied on is not genuine. Under cross-examination by counsel for the 3rd defendant, he stated that he was not a director before 2001 and that the task force was appointed by the government. Its membership included 15 District Officers who were not members of the plaintiff. He further stated there is no provision in the Articles and Memorandum of the plaintiff which allowed a task force to take over the affairs of the company. He added that although he did not have their title deeds in court, the plots known as block 2/227 and 228 were owned by Kalenjin enterprises and that a title deed was issued in the year 2013 for Block 2/227 to the plaintiff. He further stated that the plot was later subdivided as stated at paragraph 9 of his witness statement.

7. The plaintiff's case was then closed.

8. Next was the first defendant Anthony Michael Hughes who testified as DW1 and who also called Ngali Valai who testified as DW2.

9. DW1 adopted his witness statement dated 19th April 2017 as his evidence in chief and produced the documents in 1st and 3rd defendants' list of documents dated 19th April 2017 as defence exhibits. He described himself as a businessman resident at Gilgil and stated as follows in his said witness statement:

1. I am a male adult and the above named person of the given particulars, the 1st defendant herein and the administrator of the estate of Alexandra Theresa Hughes (deceased) who was my mother (hereinafter for purpose of this statement to be referred to as 1st defendant) and as such I am conversant with this matter and competent to make this statement.

2. Around the year 1978 the 3rd defendant rented out the suit properties to our family whereby my parents Michael Robert John Hughes and Alexandra Theresa Hughes made various renovations and we started residing there as a family.

3. That on 28th February, 1980 the Plaintiff confirmed to my late mother through a written note stating that they had no objection to the 3rd defendant transferring all his 250 shares in the company to my mother provided there was an agreement between Mr Samuel Kibowen Towett, the 3rd defendant herein and my mother.

4. That on the 29th February, 1980 a Sale Agreement was entered into between my mother Alexandra Theresa Hughes (now

deceased) and the 3rd defendant for the purchase of land measuring about ten (10) acres together with a permanent building erected thereon which included the 3rd defendant's 250 (Two Hundred & Fifty) shares held in the Plaintiff's company for Ksh.250,000/= (Two Hundred & Fifty Thousand Shillings). This meant that my mother was buying 10 acres of land from the 3rd defendant together with his 250 shares held in the Plaintiff's company. Further the Sale Agreement indicated that if the shares were more than 10 (Ten) acres the remainder would devolve to the 3rd defendant herein. According to the Sale Agreement Mr Samuel Kibowen Towett the 3rd defendant herein was to transfer his shares to my late mother Mrs Alexandra Theresa Hughes in the Register of Membership held by the Plaintiff.

5. Prior to the above Sale Agreement being drawn the Plaintiff on 6th January 1980 had written a letter to the Mr Kibowen the 3rd defendant herein requesting him to pay an outstanding debt of Kshs.65,000/= (Sixty Five Thousand shillings) towards the purchase of his house inclusive of 2 (two) acres and on 28th February, 1980 the Plaintiff's directors visited our premises to assess the house and valued it at Kshs.150,000/= (One Hundred & Fifty Thousand Shillings) and it is that same 28th February, 1980 that the Plaintiff indicated through a written note that they had no objection to Mr Kibowen 3rd defendant transferring all his 250 shares held in the Company provided there was an agreement between the 3rd defendant and my mother, Alexandra Hughes. On the 11th April, 1980 the Plaintiff issued my mother the late Alexandra Theresa Hughes with a Card and a Share Certificate Number 4030 for 250 shares. This was later corrected to read 150 shares which was duly signed by the Chairman, Secretary and Director of the Plaintiff.

6. Then later the Plaintiff acknowledged the fact that my mother owed them KShs 115,000/= and the fact that the Mr Kibowen, 3rd defendant herein had surrendered his shares with them to my late mother Mrs Alexandra Theresa Hughes through a letter dated on 28th November, 1980.

7. That on 12th May, 1983 the Plaintiff herein and my late mother Mrs Alexandra Theresa entered into another Sale Agreement for the purchase of parcel land number 10457 of a further 2 acres and a permanent house therein at a purchase price of Kshs 150,000/= (One Hundred & Fifty thousand shillings) only and this was entered into after a valuation was conducted since the Plaintiff felt that the previous Sale Agreement between the 3rd defendant and my mother was under valued. The said agreement further indicated that we were already in occupation of the said parcel of land and this agreement was drawn after a valuation was done and the vendor being the Plaintiff herein acknowledged the following;

(a) that my late mother had spent Kshs. 50,000/= (Fifty Thousand Shillings) on repairs and renovations,

(b) that my mother had further paid Kshs. 35,000/= (Thirty Five Thousand shillings) before the signing of the said Sale Agreement,

(c) that my mother had further paid Kshs. 32,500/= to Cresswell, Mann & Dodd, Nakuru before signing the sale Agreement, and

(d) that my mother further paid Kshs.32,500/= to Cresswell, Mann & Dodd, Nakuru upon signing the sale Agreement.

8. This therefore meant my mother had paid up the full purchase price of Kshs.250,000/= (Two Hundred & Fifty Shillings) to the 3rd defendant and a further Kshs150,000/= (One Hundred & Fifty Thousand shillings) to the Plaintiff. It is however important to note that the two (2) Acres that was sold to my late mother Mrs Hughes via the Sale Agreement dated 12th May, 1983 by the Plaintiff was never given a separate reference number or plot number but was accommodated in the survey reference number 2/227 which measured 2 (two) Acres and the 6 (six) Acres from her Share Certificate Number 4030.

9. That on the 16th February, 1984 my late mother paid survey fees of Kshs.400/= to the Plaintiff herein and she was issued with a Receipt Number 177 to facilitate the survey and subdivision of the plots. The same was done through the facilitation of the plaintiff herein who appointed their own Surveyor and according to the Survey Plans it showed that the Parcel of Land Reference Number Dundori/Mugwathi/Block 2/227 (Koilele) measuring 3. 2 hectares or 8 (eight) Acres which comprised 2 (two) Acres with the permanent house had been purchased by my late mother from the Plaintiff on the 12th May, 1983 and LR Number Dundori/Mugwathi/Block 2/228 measuring 1.2 Hectares or 3 Acres was excised.

10. The surplus land from my mother's (Alexandra Theresa Hughes Share certificate Number 4030 was given to me by my late mother and hence the Parcel of Land Reference Number Dundori/Mugwathi Block 2/228 measuring 1.2 Hectares or 3 Acres was my own beneficial inheritance.

11. In 1985 the Plaintiff's Directors were having disagreements regarding allocation of plots to its membership and my late father, Mr Michael Robert John Hughes then wrote a letter to the then District Commissioner in regard to the issue prompting a Task Force being formed and a Report dated 31st March, 1989 from the said Task Force indicated that Plots Numbers 227 and 228 belonged to Alexandra Hughes and myself (Anthony Michael Hughes) respectively measuring a total of 9 (nine) acres. The Task force further recommended that all members who had failed to clear their Shares be given Notices to vacate the farm and those without clearance would not be allowed to cultivate their land. The Plaintiff never wrote any letter/letters to my family or myself requesting us to clear our Shares neither given any Notice to vacate the farm. We continued to occupy and farm the plots allocated to us without any interference after the issue was resolved or so we thought.

12. However in the year 2007 the Plaintiff filed a land complaint in the Land Dispute Tribunal Land Dispute Number 37 of 2007 claiming that we were occupying Land Parcel Dundori Mugwathi Block 2/227 and Block 2/228 illegally and the Land Disputes Tribunal decision was given on 21st October, 2009 and each Party was given a right to appeal within 30 days.

13. *The Plaintiff never appealed against the decision and the same was adopted as a judgment in the Chief Magistrates Court Land Disputes 63 of 2009 on the 25th March, 2010.*

14. *The estate of my late mother has never been allocated Block 2/2799 or any title to that effect issued and the issuance of Title of the Land Parcel Number Dundori/Mugwathi/Block 2/227 to the Plaintiff in the year 2013 was done fraudulently to enable the Plaintiff apply for sub-division of the same without my consent being sought.*

15. *My late mother passed on the 27th June, 2010 and thereafter I petitioned as the legal administrator through the High Court and got a confirmation of the Grant in accordance to her Will and therefore the suit properties were transferred to me legally in terms of the Certificate of Confirmation issued to me, the transmission was effected on 5th August, 2016 when the Title Deeds were issued in my name.*

16. *Since 1980 our family has been in possession and enjoyed quiet occupation of the suit properties which were acquired by my late mother legally as she followed the proper procedure as laid down in law for obtaining the same until in the year 2014 when the Plaintiff attempted to trespass by creating fraudulent sub-divisions. It has taken the Plaintiffs 31 (thirty one) years to claim ownership of the suit properties and all along as a family we have been farming thereon as well as occupying the same without any interference and made numerous developments on the suit properties.*

17. *That the suit properties herein were acquired legally and should remain in the names of the registered owners.*

10. Under cross-examination by counsel for the plaintiff, DW1 stated that the two titles were issued to him on 5th August 2016 and that they had never been issued in his mother's name.

11. Next on the stand was Ngali Valai (DW2). He adopted his witness statement dated 19th April 2017 whose contents were as follows:

1. *I am a male adult and the above named person of the given particulars and formerly Chairman of the Nakuru District Land Disputes Tribunal Claim Number 37 of 2007 involving the Plaintiff and the Defendants herein and as such I am conversant with this matter and competent to make this statement.*

2. *That on 21st October, 2009 a Land Tribunal involving the Plaintiff and the 1st defendant (then Objectors) sat at the then Nakuru Land Office to deliberate and to determine among other issues whether the 1st defendant (then Objectors) were occupying the land parcels Dundori/Mugwathi/Block 2/227 and 228 illegally and without valid acquisition documents and or authority from the Plaintiff. I was the Chairman of the said Tribunal and other members were late Elijah Oyombe Akachi, late Jane W. Gathogo, Peter K Gitahi and Mary W. Nduati.*

3. *That the other members of the Tribunal and myself visited the suit properties immediately the tribunal suit was brought into our attention and we found that the 1st defendant (the Objectors then) were legally occupying of the said suit properties Dundori/Mugwathii/Block 2/227 (Koilel) measuring 3.2 Hectares or 8 acres comprising of two (2) acres where the permanent house stood and the parcel of land Reference Number Dundori/Mugwathii/Block 2/228 (Koilel) measuring approximately 1.2 hectares or 3 acres as the 1st defendant's parents (the 1st objector in the tribunal suit) since 1979 and that the 1st defendant's mother had followed the right procedure in acquiring the said parcels of land.*

4. *That further we were also able to confirm the size of the parcels of land and that the 1st defendant's mother (then 1st Objector) was indeed a bona-fide shareholder of 150 Shares on her Share Certificate Number 4030.*

5. *That it was from these findings among other factors brought to our attention during the hearing of the tribunal case by both the Plaintiff and 1st defendant (the Objectors then) that assisted the tribunal in concluding the following;*

(a) *That the Plaintiff had failed to prove his claim that the two Objectors, the 1st defendant herein should be evicted from Land Parcel Dundori/Mugwathii Block 2/227 and 228 respectively which they had occupied since the year 1979.*

(b) *That the 1st defendant's mother (the Objectors then) had acquired these parcels of land from the Plaintiff procedurally, legally and had occupied and worked on the suit land for a period of thirty (30) years and therefore qualified for adverse possession of the land besides the other afore mentioned legal facts.*

(c) *That in the circumstances therefore the 1st defendant's mother then the 1st Objector was required to pay the survey and registration fees to the Plaintiff in respect of the Parcel of Land Dundori/Mugwathi/Block 2/227 (Koilel) to facilitate issuance of the Title Deed.*

(d) *That Mr Samuel Towett (the 3rd defendant in this matter) was also required to pay survey and registration fees to the 2nd Objector the 1st defendant herein in respect to Parcel of Land Dundori/Mugwathi/Block 2/228 and the Plaintiff was supposed to hand over the said Parcel of Land free from any encumbrances and the transfer was to be completed within six (6) months of the Ruling of the Tribunal but not later than 30th April, 2010.*

6. *That although the Tribunal gave the Plaintiff a right to appeal, no appeal I know of was lodged by the Plaintiff.*

12. Under cross examination by counsel for the plaintiff DW2 stated that their findings in the tribunal were that the 1st defendant and his mother followed the right procedure in acquiring the land.

13. The 1st defendant's case was closed at that point.

14. Last on the stand was the 3rd defendant Samuel Kibowen Towett who testified as DW3. He adopted his witness statement dated 19th April 2017 in which he stated thus:

1. I am a male adult and the above named person of the given particulars and the 3rd defendant herein (hereinafter for purpose of this statement to be referred to as 3rd defendant) and as such I am conversant with this matter and competent to make this statement.

2. That in 1976 I purchased 15 (fifteen) Acres of the whole area of the suit properties from the Directors of Kalejin Enterprises together with the permanent house at a purchase price of Kshs.35,000/=.

3. In the year 1978 I rented out 10 (ten) Acres which had a permanent house to the Hughes family that is the late Mrs Hughes at a monthly rent of Kshs.2,000/= while I resided on the remaining 5 (five) Acres with my family.

4. That after two years while still renting the said suit properties the 1st defendant's late mother Mrs Alexandra Theresa Hughes in the early 1980 approached me and expressed an interest in purchasing the land she occupied as a tenant. I in turn advised the Plaintiff of my intention to sell my portion of Land measuring about 10 (ten) Acres together with a permanent building erected thereon and which included my 250 Shares which I held in the plaintiff's company to Mrs Alexandra Theresa Hughes.

5. On the 29th February, 1980 I entered into a Sale Agreement with the late Mrs Hughes for the purchase of the said Land measuring about 10 (ten) Acres together with a permanent building erected thereon which included my 250 Shares which I held in the Plaintiff's Company at Kshs.250,000/= (Two Hundred & Fifty Thousand Shillings). The Plaintiff amended their Register and indicated that Alexandra Theresa Hughes had acquired 150 (One Hundred & Fifty) Shares from me and her name was written in my place. It is from the acquisition of my 150 Shares by the late Mrs Hughes that she was allocated the Nine (9) Acres of the parcel of land and I later sold the balance of my Shares of 100 (One Hundred) to Mr Mbora Kacagwa to whom Plot Number 226 was allocated by the Plaintiff. The selling of my said 150 Shares to the late Mrs Hughes was genuine and the Plaintiff was well aware of the transaction which they had approved by their various correspondences.

6. The Plaintiff issued the late Mrs Hughes with a Share Certificate Number 4030 duly signed by the officials then and the 1st defendant's family have been in occupation and possession of the suit properties since 1978 and carried out farming thereon.

7. That the Plaintiff and its various Directors were then having a lot of management problems of improper records keeping and in-fighting amongst themselves trying to acquire land that they had already allocated to its membership.

8. That I testified for the 1st defendant herein (the objectors then) in the Land Dispute Tribunal Case Number 37 of 2007 filed by the Plaintiffs where the Plaintiffs were alleging that the 1st defendant (Objectors then) were illegally on the suit properties.

9. The said tribunal concluded that the Plaintiff had failed to prove their claim that the Objectors Mr & Mrs Hughes should not be evicted from the said parcel of land as they had acquired the same procedurally.

15. Under cross-examination by counsel for the plaintiff, he stated that the plot he was selling had been surveyed by the plaintiff and was 11 acres. He added that his 250 shares were equivalent to 11 acres.

16. The 3rd defendant's case was then closed.

17. Parties were then ordered to file and exchange written submissions. The plaintiff and the 1st defendant filed submissions while the 2nd and 3rd defendants did not file any. In the plaintiff's submissions, three issues for determination were identified: whether the plaintiff is the legal owner of the suit property, whether there was fraud in the acquisition and registration of the suit property and lastly whether the prayers sought by the plaintiff should issue. In respect to the first issue, it was argued by the plaintiff that the green cards for the suit properties showed that the plaintiff was the owner as at the year 2013 and further that the plaintiff applied for subdivision which only a proprietor could under section 22(2) of the Land Registration Act. It was further argued that the 1st defendant took possession of the property despite knowing that it belonged to the plaintiff and consequently he cannot claim adverse possession of the property. The case of **Peter Mbiri Michuki v Samuel Mugo Michuki [2014] eKLR** was cited in support of that contention.

18. On the issue of whether there was fraud in the acquisition and registration of the suit property the plaintiff referred to the taskforce report and argued that since the plaintiff's shares register had closed as at 1975 it was not possible that a transfer of shares occurred between the 1st and 3rd defendants in 1980. It was further argued that the shares sold by the 1st defendant to the 3rd defendant remain a mystery and that going by the evidence of DW2 who stated that each share was equivalent to 1.5 acres then the deceased's 150 shares should have translated to 225 acres and not 10 acres as claimed by the 1st defendant. Citing the case of **David Sironga Ole Tukai v Francis Arap Muge & 2 Others [2014] eKLR** the plaintiff argued that the defendants committed fraud by registering title in agricultural land without the consent of the Land Control Board. The plaintiff therefore argued that the reliefs it sought should issue under Sections 26 and 80(1) of the Land Registration Act since the 1st defendant's titles are tainted by fraud and illegality.

19. On his part, the 1st defendant identified two issues for determination in his submissions: firstly whether the plaintiff has established sufficient grounds to warrant granting the orders sought and secondly who is the rightful owner of the two suit properties? On the first issue it was argued that the plaintiff did not produce any evidence of ownership of the suit properties while the 1st defendant produced copies of title deeds for the properties as well as certificates of search all showing that he owns the said properties. Citing section 107 of the Evidence Act as well as the case of **Gateway Insurance Co Ltd v Jamila Suleiman & another [2018] eKLR**, the 1st defendant argued that the plaintiff had failed to discharge the burden of proof. It was further argued that the matter is *res judicata* in view of the fact that the issue of ownership of the suit properties was determined in Land Disputes Tribunal Claim Number 37 of 2007 and in HC Miscellaneous Application Number 342 of 2011 (Nakuru). In that regard, the 1st defendant relied on the case of **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others [2014] eKLR**.

20. On the question of who is the rightful owner of the two suit properties, the 1st defendant submitted that he had demonstrated ownership and urged the court to grant the reliefs which he sought.

21. I have carefully considered the pleadings, the evidence and the submissions herein. The issues that emerge for determination are firstly whether this suit is *res judicata*; secondly, if the suit is not *res judicata*, who between the plaintiff and the 1st defendant is the lawful owner of the suit properties and lastly, whether the reliefs sought by the parties are available.

22. I will deal with the issue of *res judicata* first since it goes to the jurisdiction of the court. The doctrine of *res judicata* is codified at **Section 7 of the Civil Procedure Act** which provides as follows:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

23. For *res judicata* to apply in a particular matter, there must have been a previous suit in which the matter was in issue; the parties in both matters must be the same or litigating under the same title; the previous matter must have been heard and determined by a competent court and the issue is raised once again in the new suit. See **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**. *Res judicata* operates as a complete estoppel against any suit that runs afoul of it. See **Maithene Malindi Enterprises Limited v Kaniki Karisa Kaniki & 2 others [2018] eKLR**.

24. Any party who attempts to re-litigate an issue which had been finally and conclusively decided by a competent court in a prior suit between the same parties will be brought to a screeching halt by *res judicata*. In **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others** (supra) the Court of Appeal stated:

... Res judicata is a subject which is not at all novel. It is a discourse on which a lot of judicial ink has been spilt and is now sufficiently settled. We therefore do not intend to re-invent any new wheel. We can however do no better than reproduce the re-indention of the doctrine many centuries ago as captured in the case of Henderson v Henderson [1843] 67 ER 313: -

“....where a given matter becomes the subject of litigation in and adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time”

.... Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

25. There is no dispute that there were proceedings between the plaintiff, the 1st defendant and his mother (Alexandra Theresa Hughes, now deceased) in Land Disputes Tribunal Claim Number 37 of 2007. The tribunal’s decision dated 21st October 2009 was inter alia that the 1st defendant and the deceased had acquired the parcels of land known as Dundori/Mugwathi Block 2/227 and Dundori/Mugwathi Block 2/228 from the plaintiff herein procedurally and that they should be issued with titles in respect thereof. The findings of the tribunal were later confirmed through an order made on 29th March 2011 in HC Miscellaneous Application Number 342 of 2011 (Nakuru). Indeed, the plaintiff itself referred to the two matters at paragraphs 32, 33 and 34 of the plaint. Both the plaintiff and the 1st defendant produced the tribunal’s award and the order of the High Court as exhibits. It should also be noted that the 1st defendant obtained confirmed grant in respect of the deceased’s estate on 5th December 2014 and that the two properties were wholly distributed to him. It is neither alleged nor proven that the tribunal’s and the High Court’s decisions have been set aside.

26. In its plaint herein the plaintiff alleges that the 1st and 2nd defendant conspired to defraud it of the two properties. It seeks judgment against the defendants for a declaration that it is the legal owner of the properties, an order directing the 2nd defendant to cancel titles to the suit properties issued in the name of the 1st defendant and an order of eviction against the 1st defendant from the properties. In his counterclaim the 1st defendant seeks a declaration that he is the legal owner of the two properties.

27. The plaintiff has claimed that the decision of the tribunal as well as the ensuing order of the High Court are null and void for want of jurisdiction. That is a matter that cannot be litigated in these proceedings or even before this court. As was stated in **Republic v Karisa**

Chengo & 2 others [2017] eKLR, this court does not have “the jurisdiction to superintend, supervise, direct, shepherd and/or review the mistake, real or perceived ...” of the High Court. This court is duty bound to accept the order of the High Court unless the order is set aside by the High Court itself or an appellate court. There are procedures for challenging the decisions of both the tribunal and the High Court. The litigation herein is not one of those options.

28. The Court of Appeal stated in **Florence Nyaboke Machani v Mogere Amosi Ombui & 2 others** (supra) as follows:

The appellant in this appeal did not challenge the decision of the tribunal in accordance with the said procedure set out in the Act. Neither were judicial review proceedings taken to quash the award. The Appellant instead chose to file the suit for declaratory orders and compensation. As the learned Judge found in the judgment appealed from:-

“The 1st defendant had the right to appeal against the award of Borabu Land Disputes Tribunal to the appeals committee constituted for the province in which the land which was the subject matter of the dispute is situate. This is vide Section 8(1) of the Land Disputes Tribunals Act. He chose not to do so. Indeed he was even advised by the SRM’s court at Keroka to do so. He never took up the challenge. Incidentally, the plaintiff had counsel on record then. He also had a right to commence judicial review proceedings in the nature of certiorari to quash the award. Again he did not do so. I do not for once buy his excuse for the failure to do so on account of the ruling on the application to adopt the award as a judgment of the court being delivered on a date unknown to him and in his absence. And that by the time he became aware six months presumably in which he should have commenced judicial review proceedings in the nature of certiorari aforesaid had by then elapsed. I have looked at the proceedings of the Senior Resident Magistrate’s court at Keroka and in particular the order adopting the award as a judgment of the court dated 23rd May, 2008. It is apparent that the plaintiff had an advocate and though he was not present on that day, I doubt that the court would have allowed the application unless it was satisfied that the respondent’s counsel was duly served with the application and or a hearing notice and had failed to turn up.

It is trite law that a valid judgment of a court unless overturned by an appellate court remains a judgment of court and is enforceable, the issue of jurisdiction notwithstanding. The plaintiff had all avenues to impugn the award as well as the judgment. He did nothing. As sarcastically put by counsel for the defendants in his submissions, the plaintiff chose to sleep on his rights like the Alaskan fox which went into hibernation and forgot that winter was over. In the meantime the 1st defendant’s rights to the suit premises crystallized. Equity assists the vigilant and not the indolent. The plaintiff has come to court too late in the day and accordingly, the declaratory relief must fail. I doubt that even the remedy of the declaration is available to the plaintiff to impugn a valid court judgment and decree.”

We, in our own, find the above proper and legally founded. We see no reason to interfere with it.

29. It is clear that both the plaintiff and the 1st defendant are attempting to re-litigate the issue of ownership of the properties. The issue is *res judicata* and cannot be litigated in fresh proceedings. Accordingly, the plaintiff’s entire suit is struck out. Similarly, prayer (a) of the 1st defendant’s counterclaim is struck out. The issue of subdivision as addressed at prayer (b) of the 1st defendant’s counterclaim arose long after the decisions in Land Disputes Tribunal Claim Number 37 of 2007 and HC Miscellaneous Application Number 342 of 2011 (Nakuru). It was therefore not considered or determined by those decisions and is not *res judicata*. That resolves the first and second issues for determination. Before leaving those two issues, I must register the court’s disappointment that *res judicata* was not raised at the onset of these proceedings. Precious judicial time would have been saved if that had been done.

30. The last issue for determination is whether the reliefs sought by the parties are available. The only substantive relief that survives the striking out is prayer (b) of the 1st defendant’s counterclaim pursuant to which the 1st defendant sought an order directing the 2nd defendant to cancel any sub-divisions to the suit properties issued in the name of the plaintiff. The issue of subdivision was brought in by the plaintiff when it averred at paragraphs 9 to 17 of the plaint that it did a subdivision of the suit properties sometime after 24th December 2014. The plaintiff also produced a mutation form in respect of Dundori/Mugwathi Block 2/227 dated 30th May 2014. It is however not clear whether the mutation was registered. Neither the plaintiff nor the 1st defendant produced any evidence of registration of the mutation or issuance of new titles pursuant thereto. Nevertheless and for the avoidance of doubt since owing to past litigation the 1st defendant is the undisputed owner of the suit properties, prayer (b) of the 1st defendant’s counterclaim is merited and I see no harm in granting it.

31. In view of the foregoing discourse, I make the following orders:

- a) **The plaintiff’s entire suit is struck out.**
- b) **Prayer (a) of the 1st defendant’s counterclaim is struck out.**
- c) **An order is hereby issued directing the 2nd defendant to cancel any sub-divisions of the parcels of land known as Dundori/Mugwathi Block 2/227 and Dundori/Mugwathi Block 2/228 issued in the name of the plaintiff.**
- d) **In view of the fact that parties have to some extent succeeded against each other, I order that each party bears own costs.**

Dated, signed and delivered in open court at Nakuru this 13th day of February 2020.

D. O. OHUNGO

JUDGE

In the presence of:

Mr Nanda holding brief for Mr Kipkoech for the plaintiff

Mrs Mbeche for the 1st defendant

No appearance for the 2nd defendant

Mr Abuya holding brief for Mr Ikua for the 3rd defendant

Court Assistants: Beatrice & Lotkomoi