



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 118 OF 2013**

**(AS CONSOLIDATED WITH KITALE ELC 93 OF 2018)**

**1. VINCENT NARISA KROP**

**2. COX PATRICK NARISA**

**3. CHEMUTUKEN PALEELOUKOTUM**

**4. JANE NARISA CHEPOTUM EDHIO.....PLAINTIFFS**

**VERSUS**

**1. MARTIN SEMERO LIMAKOU**

**2. KAPCHONGE SHARTI**

**3. SAMUEL ALUKUREN**

**4. RIONGOSIA SAMAKITUK**

**5. JACKSON KANAWAI SAHRTIN**

**6. STEPHEN KAKUKO CHEPLOPEI**

**7. KARITOR PSIKEN LOSIANGOLE**

**8. CHEPARKONG R ROMONYANG**

**9. CHEPTANGAT LEKERN**

**10. JOSEPH P. LOPOTIO**

**11. POWON LONYNG**

**12. CHEPOCHENDO LIMAN**

**13. JOAKIM K ALEMUSIN.....DEFENDANTS**

**JUDGMENT**

**1.** This court ordered that **Kitale ELC 118 of 2013** and **Kitale ELC 93 of 2018** be consolidated with **Kitale ELC 118 of 2013** being the lead file.

**2.** The two cases **Kitale ELC No. 118 of 2013** and **Kitale ELC No. 93 of 2018** relate to the same piece of land.

**3.** The Plaintiffs in **Kitale ELC No. 118 of 2013** are the interested parties in **Kitale ELC No. 93 of 2018** while the defendants in **Kitale ELC**

No. 118 of 2013 are the plaintiffs in ELC No. 93 of 2018.

4. In **Kitale ELC No. 93 of 2018**, the Attorney General has been brought in as an additional defendant.

5. To avert confusion the description of parties either as plaintiffs or defendants will be as per the heading in this judgment.

6. The plaintiffs in **Kitale ELC No. 93 of 2018** are seeking to challenge the Minister's decision with regard to the dismissal of their appeals regarding the suit land while the plaintiffs in **Kitale ELC 118 of 2013**, who were issued with title after those appeals were dismissed, seek eviction of the defendants (who are the plaintiffs in **Kitale ELC No. 93 of 2018**) from the suit land.

7. While consolidating the two suits this court observed that although the prayers sought in **Kitale ELC No. 93 of 2018** have been framed differently in order to challenge the Minister's decision, a deeper look at those prayers reveals that no matter the angle from which they are viewed, the ultimate issue in the two suits is the determination of who the *bona fide* owner of the suit land known as part of **L.R. No. West Pokot/ Chepareria/716** is.

8. For greater clarity, I will set out herein verbatim the remedies sought by the parties in their respective suits.

9. The principal prayers in the amended plaint dated 20/3/2018 and filed on the following day in **Kitale ELC No. 118 of 2013** read as follows:-

(a) **An eviction order against the defendants their agents and/or servants from the said parcel of land known as part of LR No. West Pokot/Chepareria/ 716 measuring 69.37 Hectares which belongs to the plaintiffs herein.**

(b) **A permanent injunction restraining the defendants, their agents and/or servants from trespassing upon and/or committing any acts upon the plaintiff's said parcel of land known as part of LR No. West Pokot/Chepareria/ 716 measuring 69.37 Hectares.**

(c) **General damages for trespass to land.**

(c) **Costs of the suit with interest.**

10. The prayers in the Plaint dated 8/10/2018 in **Kitale ELC No. 93 of 2018** read as follows:

(a) **A declaration be made by this honourable court that the hearing and determination of the plaintiffs' 13 appeals to the minister and the same being Nos. 426/1997, 427/1997, 396/1997, 67/1995, 137/1996, 384/1996, 385/1996, 444/1997, 360/1996, 383/1996, 423/1997 and 386/1996 and with regard to the land comprised in title No. West Pokot/Chepareria/716 was conducted in a manner contrary to the law and that the decision of 5/4/2012 is a nullity in law.**

(b) **That hearing of Kitale ELC No. 118/2013 between the interested parties herein and the plaintiffs be stayed pending the hearing and determination of the suit herein.**

(c) **Costs.**

(d) **Interest.**

(e) **Any other relief this court may deem fit to grant.**

#### ***The claim.***

11. The plaintiffs claim that they are the registered proprietors of the suit land measuring approximately **69.37 ha.** and that the defendants have trespassed thereon, cultivated the land and also used it for grazing hence the order of eviction sought. The plaintiffs admit a dispute over the land during adjudication but state that their father *Bartholomeo Narisa Mungano* was awarded the land at all stages of the dispute and an order of eviction was issued against the defendants; that the appeals the defendants filed against the decision were competently handled by their advocate on their behalf; that the defendants never applied for judicial review orders against the decisions in the appeals; that the duty to substitute a deceased lies on the next of kin and the appeals by the deceased persons must be regarded to have abated without remedy once no substitution of the original appellants was done. The plaintiffs read mischief on the part of the defendants and state the particulars in their pleading and aver that the suit **Kitale ELC 93 Of 2018** is a mere afterthought.

#### ***The defence.***

12. The defendants' defence is that the suit land was registered in the name of *Bartholomeo Nariso Mungano* in **1998** while they were in occupation, that they have acquired proprietary interest over the suit land and therefore the plaintiff's claim is time barred by the provisions of **Section 22 of the Limitations of Actions Act Cap 22**. They plead that the plaintiffs are holding the land in trust for the defendants. They state that save for 3 of them, all the other defendants had each lodged their respective and distinct appeals to the Minister challenging *Bartholomeo's* ownership of the land after the adjudication process that awarded him the land, and the appeals were heard without their participation and the decision arising therefrom is subject to challenge. They aver that they are aged and do not know how to conduct appeals to the Minister; that three appellants had died by the time the appeals were heard and that they were denied a fair hearing. The defendants posit that the hearing of the appeals was conducted in a manner contrary to the provisions of the **Land Adjudication Act Cap 284** and that

this court should declare the decision that emanated therefrom a nullity. They have particularized the alleged illegalities in that decision in their pleading. They state that under **Section 29** of the **Act** the Minister's decision is final and no appeal could have been preferred against it. They maintain that the appeal decision could not be challenged by way of judicial review as the **6** month limitation period expired before the copy of the decision was availed to them. They further state that the pendency of the appeal did not stop the running of time in their favour and that upon the expiry of **12** years from the date of registration, they acquired title to the land by way of adverse possession. The defendants aver that the plaintiffs are since **26/6/2013** the registered proprietors of the suit land, having obtained it through transmission from *Bartholomeo*, their late father.

#### *The reply to defence.*

**13.** The plaintiffs reiterated the contents of the plaint in their reply to defence and averred that no claim of adverse possession has been made out by the defendants.

#### *The Attorney General's defence.*

**14.** The **Attorney General** filed a defence to the defendant's claims and stated that the suit discloses no cause of action against him, that it is *res judicata* **Kitale HC Misc Application NO 43 of 2000**; that the dispute was conclusively determined by the Minister and the decision implemented by rectification of the adjudication register and issuance of title to *Bartholomeo*; that upon implementation the determination ceased to exist and this suit is a mere academic exercise. The Attorney General also states that the suit offends the provisions of **Section 26** of the **Land Registration Act** in that it attempts to impeach a first registration in the absence of allegations of fraud or knowledge of fraud.

#### **EVIDENCE OF THE PARTIES.**

##### *The Plaintiff's Evidence.*

**15. PW1, Vincent Narisa Krop** the 1<sup>st</sup> plaintiff gave evidence on **3/10/2019** and testified on behalf of the other plaintiffs. His two statements filed in the record and dated **17/9/2013** and **20/3/2018** respectively were adopted as his evidence in chief. He stated that the 2<sup>nd</sup> plaintiff is his elder brother. The 3<sup>rd</sup> and 4<sup>th</sup> plaintiffs are the widows of his late father *Bartholomeo* and one of them, Jane, is **PW1's** mother. According to him the plaintiffs own the suit land. He produced the title to the suit land as an exhibit; he stated that the land formerly belonged to their grandmother *Kosanga Lobanyamoi*, who settled in the area in **1952** and who was given the land in **1957**; the defendants, who arrived at different times, invaded the land in the **1970s**; in **1979** *Kosanga* lodged a dispute with the elders who awarded her the land; subsequently the case was taken before the Lands Department. *Kosanga* also lodged a complaint with the Land Adjudication Department in **1984** and the land committee awarded her the land after hearing the case. She was also awarded the land after an appeal to the Arbitration Board by the unsuccessful parties in **1985**; another appeal was lodged before the appeal to the Minister and it ended in *Kosanga's* favour. Finally the appeal to the Minister was lodged and though the District Commissioner issued summons to the invaders on about **7** occasions they refused to attend the hearing; the defendants then filed an application before the **Kitale High Court, HC MISC 43 of 2000** to restrain the District Commissioner from hearing the appeal and that case pended for **9** years before being dismissed by the court for want of prosecution. After **PW1's** father died he took out letters of administration in the four plaintiff's names and urged the District Commissioner to hear the appeal. The parties were then summoned on **17/1/2012** to attend the hearing on **28/2/2012**; the **13** appellants attended the hearing and the District Commissioner and the assessors heard the appeal; the assessors were from West Pokot; the land was awarded to the plaintiffs and all the **13** appeals were dismissed but the parties were given one month to negotiate a settlement in which the defendants could opt to purchase the suit land or move out. During that period the defendants never approached the plaintiffs. Instead they threatened violence. Thereafter the plaintiffs brought the instant suit. By consent of the parties **PW1** produced photographs of the defendant's residences and structures on the land at the hearing; he also produced a copy of the confirmed grant entitling the plaintiffs to the land. He dismissed the allegations that the plaintiffs were illiterate and could not understand the appeal proceedings and added that they had the services of an advocate.

**16. PW2, Lokitare Lokwaria**, testified on the same date as **PW1** and gave sworn evidence and adopted his witness statement dated **20/3/2018** as his evidence in chief; his evidence is that he is the plaintiff's neighbour and was brought up in Chepareria; that the defendants came to the land and found *Kosanga* thereon and sought to be allowed to farm on some of the land; that *Kosanga* later asked them to vacate the land and they refused; that she lodged a dispute and she was awarded the land; that the plaintiffs used to live on the land till the defendants became violent and burnt their houses and chased them away. Upon cross examination, he admitted to having lived on the suit land in the **1990s**; that she is one of *Bartholomeo's* children and *Kosanga* is his grandmother; that *Kosanga* gave the defendants land before **PW1** settled on the land; that he entered the land in **1995**. The plaintiff then closed his case.

##### *The defendant's evidence.*

**17. DW1 Joseph Lopotio** gave sworn evidence on **20/11/2019** and adopted his written witness statements dated **29/5/2018** and **8/10/2017**. His evidence is that he was born on the suit land and that he and the defendants live in it; that each defendant lives on their own distinct portion; that the land belonged to his father; that in **1975** lands officials came to the land and asked the defendants to identify their boundaries; that they later in the same year came back and gave the defendants and *Kosanga* their respective parcels; that in **1979** the lands officials came back and stated that the previous mapping had been nullified and the occupants should wait; that in **1982** the lands officers visited the region but did not visit the suit land; that the defendants followed them and consulted them whereupon they informed the defendants that the whole of the suit land had been taken up by *Bartholomeo*; that however *Bartholomeo* never took possession of the land; that in **1984** the lands officials sent the defendants to the lands committee to agitate their respective claims; that the land committee gave some awards in favour of some of the defendants and against some; that the dispute then went to the arbitration board and the land was awarded to *Bartholomeo*. Subsequently the dispute went to the objection stage and each case was determined on its own merit and the land was awarded to *Bartholomeo*; thereafter the defendants appealed to the Minister; that three appellants died, (*Lokitari Semero* (**8/2/2012**)) *Alikureng Aliomongor* (**28/11/11**) and *Limian Chemiyor* (**2/8/86**)) before the appeal was heard and determined and various grants of letters of administration were issued in respect of their estates; that in the year **2000** *Bartholomeo* began selling the suit land; that upon an application **Kitale HC Misc 43 of 2000** the High court stayed the appeals; that that case was subsequently dismissed for want of prosecution; that

meanwhile a title to the suit land was issued in *Bartholomeo's* name; that later the title was transmitted to his family after his death. According to **DW1** *Limakou Semero, Lokitari's* son informed the defendants that he had received papers from Kapenguria and the defendants went to Kapenguria on **28/2/2012**; that the District Commissioner then called *Limakou* alone and asked him questions about the land in Swahili. The witness stated that *Limakou* was only asked about their **4** acres and not about the entire of the suit land and even then, *Limakou* was not administrator of *Lokitari's* estate; no-one else was heard; there were no directions given that the appeals would be heard together; that the 1<sup>st</sup> plaintiff was present and was heard on behalf of his family; that the rest of the defendants were not granted an opportunity to speak and all the **13** appeals were dismissed. The defendants never got the proceedings of the appeal.

**18.** When cross-examined by Mr Kariuki for the plaintiffs, **DW1** stated that he does not know how his father came to be on the suit land. He admitted that the plot number was issued in **1982** when adjudication was done and that there have been cases in court since **1984**, as well as the appeal before the District Commissioner. He did not know the number of his appeal and **Kitale ELC 93/18**, filed six years after the appeal decision, was the first challenge ever mounted against the District Commissioner's ruling. He did not know that the proceedings in the appeal were ready by **15/8/2012**. The defendants then closed their case.

#### ***The Attorney General's Evidence.***

**19.** The Attorney General called one witness, **DW2, Bernard Nyakundi** who testified on **20/11/2019**. He testified that he is the officer in charge of the Land Adjudication And Settlement and custodian of land adjudication records, West Pokot County; that Chepareria was declared a land adjudication section in **1982**; that plot number **716** was adjudicated in the name of Bartholomeo Nariso Mungaro; that objections were lodged against that adjudication and they were dismissed in **1992**; that appeals were subsequently lodged; that a green card was issued but with a restriction of dealings indicated thereon at the instance of the Chief Lands Registrar, while the appeals were pending; that according to the green card the register was opened on **1/7/1998** and the first registered owner was **Bartholomeo Nariso**; that in the records there is a letter showing that the Director Of Land Adjudication wrote on **21/8/2012** to the Chief Land Registrar indicating that the appeals had been heard and dismissed and that the restriction should be removed. According to **DW1** the restriction was removed and the land registered in the names of the plaintiffs. No appeal has ever been served on his office since the dismissal of those appeals. The Attorney General then closed his case.

#### ***Submissions of the parties.***

**20.** The Plaintiffs filed their submissions on **27/1/2020** while the defendants filed theirs on **24/2/2020**. The Attorney General filed his submissions on **14/1/2020**. I have considered the pleadings, the evidence and the submissions of the parties.

#### ***Issues for determination.***

**21.** It is agreed that the defendants are in occupation of the suit land; there were objections raised during the land adjudication process and that they ended in favour of *Bartholomeo Narisa Mungaro*, the plaintiffs' late father; that an appeal to the Minister under **Section 29** of the **Land Adjudication Act** was lodged and a restriction was lodged against the title to the suit land during the pendency of that appeal; that the appeal was heard and dismissed by the District Commissioner and the restriction against the title was thereafter removed at the instance of the Director of Land Adjudication; that the plaintiffs obtained registration as owners of the suit land through transmission by virtue of their heirdom to *Bartholomeo Narisa Mungaro*.

**22.** It is in dispute between the parties as to whether the defendants were given a proper hearing before the District Commissioner who handled the appeals. The defendants have raised the issue in **Kitale ELC 93 of 2018** which in my view is, besides forming the gravamen of their case in that suit, their answer to the claim for eviction by the registered proprietors of the land. It is also in dispute as to whether the plaintiffs have ever occupied the said land and whether the defendants have obtained prescriptive rights to title to the land by way of adverse possession.

**23.** The following are the issues for determination in the consolidated suit:

- a. Whether the suit Kitale ELC 93 of 2018 is competent to challenge the Minister's decision.**
- b. Whether an eviction order should issue against the defendants as sought by the plaintiff.**
- c. Who should bear the costs of the suit?**

**24.** The issues are discussed as hereunder.

**a. Whether the suit Kitale ELC 93 of 2018 is competent to challenge the Minister's decision.**

**25.** The Attorney General's defence is that:

- a. Kitale ELC 93 of 2018** discloses no cause of action, is frivolous, mischievous, vexatious, statute barred and *res judicata* in view of **Kitale HC Misc. Appl. No 43 of 2000**.
- b. That the dispute over the ownership of the suit land having been determined with finality by the Minister, no relief can be competently be sought herein.
- c. That the challenge raised against a first registration of the suit land without any allegation of fraud or knowledge of fraud is against the provisions of **Section 26** of the **Land Registration Act**.

26. Does **Kitale ELC 93 of 2018** disclose a cause of action? **Black's Law Dictionary** defines a "cause of action" thus: "*Cause of action is properly the ground on which an action can be maintained;*". The same dictionary proceeds to qualify that definition thus: "*But the phrase is often used to signify the matter of the complaint or claim on which a given action is in fact grounded, whether or not legally maintainable.*"

27. The Court Of Appeal stated as follows in the case of **DT Dobie & Co (K) Ltd V Muchina, [1982] KLR**:

**"In the instant case before us the second defendant's application stated that the plaintiff disclosed no cause of action against the second defendant while the rule provides that a pleading might be struck out, not on the ground that it disclosed no cause of action, but on the ground that it disclosed no reasonable cause of action. The second defendant's application was therefore incompetent."**

28. Therefore, what this court must seek in the present instance is absence of a "*reasonable cause of action.*" Indeed **Order 2 Rule 15** of the **Civil Procedure Rules** uses that very expression when it states as follows:

**"(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—**

**(a) it discloses no reasonable cause of action or defence in law; or**

**(b) it is scandalous, frivolous or vexatious; or**

**(c) it may prejudice, embarrass or delay the fair trial of the action; or**

**(d) it is otherwise an abuse of the process of the court."**

29. Needless to reiterate, that provision of the law grants this court power to strike out a pleading where there is no *reasonable cause of action*. In the case of **DT Dobie & Co (K) Ltd V Muchina, [1982] Civil Appeal 37 Of 1978, eKLR**, the Court of Appeal defined the term "*reasonable cause of action*" to mean

**"...an action with some chance of success when allegations in the plaintiff only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayer. ..."**

30. In this case the point was not raised as a preliminary objection before the hearing and this is the judgment stage and it must be addressed before all the other issues.

31. It is clear that the plaintiff in **Kitale ELC 118 of 2013** affords the plaintiffs a reasonable cause of action as they are the registered owners of the suit land. A cause of action is not so obvious in the defendant's pleadings. Therefore, this court is bound, by virtue of the consolidation of the two suits to determine if a declaration in favour of the defendants as prayed for in **Kitale ELC 93 of 2018** is merited.

32. In paragraphs 4A of the amended defence dated 26<sup>th</sup> April 2018 in **Kitale ELC No 118 of 2013** the defendants pleaded as follows:

**"4A. Save the 1<sup>st</sup>, 3<sup>rd</sup> and 12<sup>th</sup> defendants all the other defendants had lodged appeals to the Minister challenging the ownership of the suit land on the part of Bartholomew Nariso Mungano and the said appeals were heard and determined the involvement of the appellants and the appeal decision is subject to challenge."**

33. The gravamen of the plaintiff in **Kitale ELC 93 of 2018** is that:

**a. the defendants filed separate appeals with distinct grounds but the District Commissioner treated the appeals as if they had been consolidated;**

**b. Heard the case afresh rather than hear the appeals;**

**c. Failed to seek and obtain leave of the minister to call the appellants to appear either by themselves or by agents and call evidence;**

**d. Some of the appellants had died by the time of hearing and they had not been substituted;**

**e. All save one of the appellants were condemned unheard.**

**f. The District Commissioner never made reference to the objection proceedings in arriving at his decision.**

**g. That the District Commissioner acted *ultra vires*.**

34. The defendants have therefore set out the grounds upon which they believe that the decision of the Minister was tainted with illegality.

35. In the words not the Court of Appeal in the **D.T. Dobie Case**, (supra):

**“The court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof, before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage the court ought not to deal with any merits of the case for that 'is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits "without discovery, without oral evidence tested by cross-examination in the ordinary way". (Sellers, L.J. (supra)). As far as possible, indeed not at all, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks it right.”**

36. In this court’s view the defendants have raised quite very probable grounds that can not be wished away and the prayer for a declaration in that suit is well supported.

37. However the Attorney General’s submission is that the suit amounts to an appeal against the decision of the Minister under **Section 29** of the **Land Adjudication Act** yet that decision is final and no appeal can arise from it. It is submitted that this court can only supervise the Minister’s administrative process and exercise of power through a judicial review application as that is the process concerned with decision making process. The Attorney General’s submission is that anyone who is aggrieved by a decision files an appeal and that in this case the defendants are appealing to the court to review the decision and therefore this court lacks jurisdiction to entertain it.

38. In my view, the Attorney General’s submission that this court would be revisiting the Minister’s decision appears correct because one of the issues that this court would be called upon to determine if the suit in **Kitale ELC 93 of 2018** were deemed competent, is whether the defendants’ appeals were properly heard and dismissed in accordance with the law and whether the decision of the Minister issued on **5/4/2012** is a nullity. It is also correct for Mr Odongo to state that judicial review was the most suitable method of bringing the defendant’s grievance as their focus is solely on the procedure employed by the District Commissioner at the appeal stage.

39. The mandate of determining ownership of land in accordance with customary law at the land adjudication stage is therefore granted not to the courts but of the authorities vested with the power to determine customary ownership of land under the mechanisms set out in the Act. It is only through the mechanisms set out in the Act that the proper evidence of ownership can be adduced and the land awarded to the deserving persons. The appeal to the Minister is the final stage in the process. Decisions made at this stage should not be set aside easily; Save for judicial review orders to correct procedural defects in the proceedings leading to the Minister’s determination, the Minister’s decision is not appealable.

40. **Section 29** of the **Land Adjudication Act** provides as follows:

**(1)Any person who is aggrieved by the determination of an objection under section 26 of this Act may, within sixty days after the date of the determination, appeal against the determination to the Minister by—**

**(a) delivering to the Minister an appeal in writing specifying the grounds of appeal; and**

**(b)sending a copy of the appeal to the Director of Land Adjudication,**

**and the Minister shall determine the appeal and make such order thereon as he thinks just and the order shall be final.**

41. It is clear that though the final tone of **Section 29(1(b))** ousts an appeal against the Minister’s decision, it does not oust the judicial review powers of the High Court or of a court of equal status in their supervisory capacity. However any party who wishes to have the Minister’s decision reviewed must comply with the law as to the timelines for approaching the court for the purpose.

42. **Section 9(3)** of the **Law Reform Act, Cap 26** provides as follows:

**(3)In the case of an application for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings for the purpose of its being quashed, leave shall not be granted unless the application for leave is made not later than six months after the date of that judgment, order, decree, conviction or other proceeding or such shorter period as may be prescribed under any written law; and where that judgment, order, decree, conviction or other proceeding is subject to appeal, and a time is limited by law for the bringing of the appeal, the court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”**

43. **Order 53 Rule 2** of the **Civil Procedure Rules** provides as follows:

**“Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”**

44. The impugned decision was given on **5/4/2012**; judicial review proceedings for orders to quash the decision for reason of procedural irregularities should have been filed within **6** months of that decision, that is, by **4/10/2012**. None were filed within that time.

45. No other relevant substantive order has been sought in **Kitale ELC 93 of 2018**. It is therefore clear that the suit attempts to achieve in

effect what was not attained by way of judicial review. The suit is for a declaration that the decision of the Minister was a nullity in law. From the pleadings in the two consolidated cases the only prayer that the defendants hang on to is that of declaration that the Minister's decision is a nullity and nothing else. However though this is an ordinary suit, the defendants have not sought cancellation of the plaintiffs' title yet the objection proceedings ended in favour of the plaintiff's late father and title was issued to him; it is therefore clearly the intention of the defendants that perchance the declaratory order was granted as sought herein, it should have the same effect as a judicial review order of *certiorari* notwithstanding the expiry of time for filing for review. That is a circumvention of the mandatory provisions of the law in **Section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules**. In my view, where any other proceeding other than an application for judicial review is filed against the Minister's decision, this court can only construe it to be an appeal, and no appeal is provided for under the Act. In the case of **Catherine C .Kittony Vs Jonathan Muindi Dome And Others Eldoret Civil Appeal No 88 Of 2017** cited by Mr Odongo for the Attorney General, the Court Of Appeal observed as follows:

**“In the instant appeal, it is not in dispute that the appellant was aggrieved by the decision of the 2<sup>nd</sup> respondent. However, instead of lodging an appeal before the Provincial Appeals Committee constituted for the province in which the land which was the subject matter of the dispute was situated and if still dissatisfied to appeal to the High Court on a point of law (see: Section 8(1) and (9) of the Land disputes Tribunal Act) or institute judicial review proceedings to quash the decision by the 2<sup>nd</sup> respondent as it was alleged that it acted in excess of its jurisdiction in making the award, the appellant opted to file a fresh suit before the ELC which was not in order.”**

46. In the circumstances this court is convinced that the suit **Kitale ELC 93 of 2018** is not competent to challenge the Minister's decision. That suit bears no reasonable cause of action and is an abuse of the court process.

47. Is the suit **Kitale ELC 93 of 2018** *res judicata* in view of **Kitale HC Misc. Appl. No 43 of 2000**? The latter suit was a judicial review application in which the defendants herein sought an order of prohibition to prohibit the Minister of Lands and Settlement from hearing the appeals over the suit land. The application was dismissed for want of prosecution on **10/11/2009**. It was not heard on its merits and in this court's view, subject to the court's observations herein before, the suit is not *res judicata* vis a vis **Kitale Misc Appl 43 of 2000**.

***Whether an eviction order should issue against the defendants as sought by the plaintiff.***

48. This court has already observed that the suit **Kitale ELC 93 of 2018** is incompetent. The title to the suit land is registered in the plaintiffs' names. They acquired the land through transmission as heirs to their late father after the land adjudication process favoured their father. The title has not been challenged as having been acquired fraudulently or by way of a corrupt scheme. **Section 26 of the Land Registration Act** provides as follows:

**“(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

49. The title of a registered proprietor is protected by the law. **Section 24 of the Land Registration Act** provides as follows:

**Subject to this Act—**

**(a) the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto;**

50. Having in mind the provisions of the law as set out above, it is clear that the defence of the defendants in this case is wanting. The plaintiffs have established that they own the land and that such title was obtained after a long adjudication process involving a lengthy dispute. Their title is protected by law. The defendant's excuses for failing to challenging the Ministers' decision using the only legal mechanism available, that is, judicial review proceedings, ring hollow. There is ample evidence on the record that they were served and they attended the hearing before the District Commissioner. They also knew of the date of the award. They have not adduced sufficient evidence that the proceedings in the appeals were not readily available to enable them take any further action after the dismissal. There is no order quashing the Minister's decision.

51. In the circumstances, the plaintiff's claim for eviction is merited.

**CONCLUSION.**

***What orders should issue?***

52. The upshot of the foregoing is that this court finds that the plaintiffs in **Kitale ELC 118 of 2013** have established their claim on a balance of probabilities while the defendants herein who are the plaintiffs in **Kitale ELC 93 of 2018** have failed to prove their case to the required standard.

53. I therefore issue the following final orders:

**a. Civil Suit No Kitale ELC 93 of 2018 is hereby dismissed.**

**b. The defendants, their agents and/or servants shall within 90 days remove themselves from the said parcel of land known as part of LR No. West Pokot/Chepareria/ 716 and in default be forcibly evicted therefrom.**

**c. A permanent injunction is hereby issued restraining the defendants, their agents and/or servants from trespassing upon and/or committing any acts upon the plaintiff's said parcel of land known as part of LR No. West Pokot/Chepareria/ 716.**

**d. An order that the defendants shall pay to the plaintiffs the costs of the consolidated suit.**

It is so ordered.

**Dated, signed and delivered at Nairobi via electronic mail on this 29<sup>th</sup> day of May, 2020.**

**MWANGI NJORGE**

**JUDGE, ELC KITALE.**