REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

ELC CASE NO. 292 OF 2018

(FORMERLY CMCC KIAMBU LAND CASE NO. 1 OF 2010)

THEDROUS CHEGE KINUTHIA.....PLAINTIFF / RESPONDENT

VERSUS

RUTH WAMBUI.....1ST DEFENDANT/APPLICANT

TERESIAH WANJIKU.....2ND DEFENDANT/APPLICANT

RULING

The matter for determination is the Notice of Motion Application dated **2nd December 2018,** brought by the Defendants/ Applicants seeking for orders that;

i. Pending the hearing and determination of this suit, the Plaintiff/ Respondent by himself, his agents, servants or any person claiming under him be restrained by an order of this Honorable Court from entering into, trespassing, leasing, selling, alienating or in any other way whatsoever interfering with land parcel No. Thindigua 76/748, which land legally belongs to the Applicants.

ii. Re-open the Court file on the Chief Magistrate Court Kiambu, in land Case No. 1 of 2010, between Thedrous Chege kinuthia versus Ruth Wambui and Teresia Wanjiku, and the proceedings made by the Land Disputes Tribunal, Kiambu Municipality Division, Kiambu District Dispute No. LND/16/20/22/2009 and the award read on 7th January 2010.

iii. The Court to set aside the proceedings of the Land Disputes Tribunal and the award of the said Tribunal and the Decree of the Court of 7th April, 2015, and all consequential orders made pursuant to the Decree in (i) above.

iv. The Honourable Court to declare that the land parcel No. L.R Thindigua 76/748, rightfully and legally belongs to the Applicants herein.

2. In the alternative and without Prejudice to the foregoing the Honourable Court do review the findings of the Land Disputes Tribunal, Kiambu Municipality Division, Kiambu District Dispute No.LND/16/20/22/2009 and the award read on 7th January 2010, made in favour of the claimant Thedrous Chege Kinuthia against Ruth Wambui and Teresiah Wanjiku, the objectors and to make a finding;

i) And declare that Land Title No. L.R No. Thindigua 76/48, rightfully and legally belongs to the Applicants herein.

ii) That the Land Disputes Tribunal, Kiambu Municipality Division, Kiambu District Dispute No. Lnd/16/20/22/2009 exceeded its jurisdiction in hearing and determining the reference made before it thus the findings of tribunal and the award be set aside.

3. That Thindigua Company Limited, District Land Surveyor, Kiambu and the Chief Land Registrar be enjoined as Respondents in this suit.

4. Thindigua Company Limited, Land Registrar be directed by an order of this Court to rectify their respective records and reinstate Land Parcel No. L.R Thindigua 76/748, to the applicants.

5. The office of the Chief Land Registrar and the County Surveyor, Kiambu be ordered by this Honourable Court to move to the ground and correct the boundary between land parcel Nos. Thindigua 76/747 and L.R Thindigua 76/748.

6. Costs of this Application be awarded to the Applicants

The Application is premised on the grounds that the Applicants herein were members of **Thindigua Company Limited,** since **1967** and jointly paid for the shareholding of the Company upto **1989**. Further that the Applicants were jointly issued with **Ballot No.365,** which entitled them to **L.R Thindigua 76/748,** and another plot which is not in dispute, issued on Ballot paper **No. 175,** being **L.R Thindigua 76/545,** which the applicants still own. Further that both properties were registered jointly between them and the applicants have been in occupation and in use of the said properties since **1982.** That the Applicants and their neighbours had a boundary dispute that was never resolved by the Company and that the Company postponed release of the indentures to their respective properties and that the Company still holds them. That in **2009**, the Respondent moved the Land Disputes Tribunal at Kiambu, and demanded that the Applicants move out of **L.R Thindigua 76/748**. That the said **Land Disputes Tribunal,** which had no jurisdiction to handle the matter relating to ownership of property proceeded to hear and determine the matter in favour of the Respondent, without calling all the evidence and witnesses.

That the award of the tribunal was read on **7th January 2010,** and adopted as an order of the Court on **7th April 2015**. Consequently, an order of eviction of the Applicants was made on **18th October 2017** , granted on **30th May 2018** and on **6th June 2018,** the Respondent moved and demolished the Applicants home of **35 years,** while he was aware that his claim was based on fraud.

It was contended that the Applicants have made a complaint of fraud to the Police and the former and current Directors of **Thindigua Company Ltd,** have written their statements and sworn affidavits expressing the correct status of the property and exposed the **fraud** committed by the Respondent against the Applicants. Further that the Applicants have accessed records of their participation in the affairs of the Company from **Thindigua Company** offices and that their neighbours have filed their statements and affidavits with the police in support of the applicants. That the Respondent was a minor in **1975,** when he purports to have bought the suit property.

The Application is supported by the Affidavit sworn by **Wambui Chege** alias **Ruth Wambui Chege,** sworn on **2nd December 2018**. She reiterated the contents of the ground in support of the application and further averred that the applicants entered onto the suit property in **1982,** upon their allotment of the suit property. That on **1988,** they had a boundary dispute with their neighbours, which was referred to the **Thindigua Company Ltd** and when the Company was issuing indentures in **1995**, they declined to sign their respective indentures before the dispute could be resolved. She further averred that the surveyor informed them that he would take back the documents for **L.R 76/747** and **76/748,** to the said Company until he could get directions, but todate, they have never gotten their indentures. She also averred that in **2010,** the Respondent laid a claim to the suit property and asked them to vacate the said property. That the Respondent has never been a shareholder of the Company and when they were called to the tribunal, the applicants did not fully understand what was going on as they thought their case was supposed to be a boundary dispute of **L.R 76/747,** and not ownership of their land. Further that the tribunal awarded the Respondent their land and claimed that he had the title deed to the same. That she has been advised by her Advocates that the award was adopted on **7th April 2015,** but that the Magistrates Court did not have jurisdiction to entertain the suit at the time pursuant to coming into force of the **Environment & Land Court Act 2011** . It was her contention that the suit property exceeded the pecuniary Jurisdiction of the Principal Magistrate Court, as the land was valued at **Ksh. 65,000,000/=**. She had annexed the affidavits of various persons who had been with them when they undertook the process of acquiring the land and that she has been informed by her Advocates that these witnesses were credible and their evidence ought to have been considered. It was her further contention that it is prudent to re-open the file and set aside the Judgment and the award of the Kiambu Land Disputes Tribunal and that **Thindigua Company Limited,** be enjoined in the suit and be ordered to rectify their records. She further urged the Court to allow the **Chief Land Registrar** to be **enjoined** in the suit and be ordered to cancel the indenture that was fraudulently given to the Respondent. She also urged the Court to order that the **Kiambu County Land Surveyor**, be directed to move to the ground and address the boundary dispute between **L.R 76/747 and 76/748.**

The Application is opposed and the Respondent, **Thedrous Chege Kinuthia** swore a Replying Affidavit on **19th March 2019,** and averred that he is the registered owner of **plot No. 76 of 748,** as he became an owner vide an indenture dated **13th June 2000,** duly registered in the Ministry of Lands on **4th July 2005**. He further averred that his right of ownership is confirmed vide a letter dated **14th June 2005,** from **Thindigua Company Limited,** and the Applicants/Defendants therefore have no valid claim. Further that the suit property has been in dispute since **2010,** but that the ownership was determined on **7th April 2015,** vide **CMCC Land Case No 1 of 2010,** in which the Court decreed that he is the bonafide owner of the suit property. That an eviction order was then issued against the 1st Defendants/Applicants and the 2nd Defendant obeyed the said Court order and vacated the suit property and therefore the 1st Defendant/ Applicant should also do the same.

It was his contention that the 1st Defendant/ Applicant filed a Judicial Review Application **No. 185 of 2015,** which matter touched on the suit property, but the same was dismissed by **Hon. Justice G. V Odunga** on **24th October 2016.** That the Court held that the Application was misconceived and without merit and therefore the ownership of the suit property, was not challenged. He averred that the Applicants have not tendered any Valuation report to support their allegations and that the matter having been previously adjudicated in his favour, then this current Application has no merit .

The 1st Applicant through her Donnee **Elizabeth Wairimu Macharia** swore a Replying Affidavit on **10th July 2019,** and averred that the Respondent has never been a member of **Thindigua Land Buying Company,** and the title in his possession was fraudulently obtained. She further averred that the Respondent attached a letter dated **14th June 2005,** from **Simon M. Ngeru,** Secretary of **Thindigua Company Limited,** which Company ceased to exist on subdivision and allocations of all parcels of land to shareholders in **1974**. It was her contention that the forging of the share certificate **No. 202** dated **19th May 1974,** by the Respondent and **Simon M Ngeru,** did not give ownership to the Respondent. That **Teresiah Wanjiku** was deceived by the Respondent and moved to **Plot 76/746**.

The Application was canvassed by way of written submissions, which this Court has now carefully read and considered and renders itself as follows;

It is not in doubt that there was a dispute between the Plaintiff/ Respondent and the Defendants/ Applicants. That the said dispute resulted into the Plaintiff/ Respondent filing a claim at the then **Kiambu Land Disputes Tribunal.** Further that on the **7th of January 2010**, the said Tribunal rendered its decision and awarded the suit property to the Plaintiff/ Respondent. Further that the said decision was then adopted as an order of the Court and the same was reduced into a Decree dated **7th April 2015,** and issued on **10th April 2010**. The 1st Defendant/ Applicant being aggrieved by the said decision, filed **Judicial Review Application** proceedings being **J.R No. 185 of 2015**. However, the said Judicial Review Application was dismissed by **Hon Justice G.V Odunga** on **24th October 2016.**

The Applicants have therefore filed the instant Application seeking for various orders amongst them that this Court do re -open the Court file on **Land Case No. 1 of 2010,** and the proceedings made by the **Land Disputes Tribunal, Kiambu Municipality** and the award read on **7th January 2010,** be reviewed and/or set aside. The Applicants have also urged the Court to set aside the proceedings of the Land Disputes Tribunal, the award, the Decree of the Court and all consequential orders.

The Court will first determine whether the Applicants have met the threshold for setting aside the proceedings and therefore the Judgment of the Court. The decision on whether or not to set aside a Judgment is discretionary and the Court is guided by **Order 12 Rule 7 of the Civil Procedure Rules** which provides:-

> ***"Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."***

In the case of ***Shah vs Mbogo (1967) EA 166,*** the Court held that:-

> ***"this discretion to set aside an ex-parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or otherwise to obstruct or delay the cause of justice."***

Further in the case of ***James Kanyiita Nderitu & Another [2016] eKLR***, the Court of Appeal stated thus:

> ***"From the outset, it cannot be gainsaid that a distinction has always existed between a default judgement that is regularly entered and one which is irregularly entered. In a regular default judgement, the defendant will have been duly served with summons to enter appearance or to file defence, resulting in default judgment. Such a defendant is entitled, under order 10 rule 11 of the Civil Procedure Rules, to move the court to set aside the default judgement and to grant him leave to defend the suit. In such a scenario, the court has unfettered discretion in determining whether or not to set aside default judgment, and will take into account such factors as the reason for failure of the defendant to file his memorandum of appearance or defence, as the case may be; the length of time that has elapsed since the default judgment was entered; whether the intended defence raises triable issues; the respective prejudice each party is likely to suffer and whether on the whole it is in the interest of justice to set aside the default judgment, among others. See Mbogo & Another –vs- Shah (1968) EA 98, Patel –vs- E.A. Cargo Handling services Ltd (1975) E.A. 75, Chemwolo & Another –vs- Kubende (1986) KLR 492 and CMC Holdings –vs- Nzioka [2004] I KLR 173.***
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> ***In an irregular default judgment, on the other hand; judgment will have been entered against a defendant who has not been served or properly served with summons to enter appearance. In such a situation, the default judgment is set aside ex debito justiae, as a matter of right. The court does not even have to be moved by a party once it comes to its notice that the judgment is irregular; it can set aside the default judgment on its own motion. In addition, the court will not venture into considerations of whether the intended defence raises triable issue or whether there has been inordinate delay in applying to set aside the irregular judgment. The reason why such judgment is set aside as of right, and not as a matter of discretion, is because the party against whom it is entered has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. The right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system."***

There is no doubt that there are two instances in which the Court would be exercising its discretion to set aside proceedings and consequently, a Judgment. This being the case, on whether the Judgment was regular or whether the Judgment was irregular. Is it then the case in the instant suit? Apparently not.

In the instant suit, it is not in doubt that Defendants/Applicants were duly served with the claim documents, entered appearance and participated in the proceedings. However, the Defendants/Applicants are seeking **to set aside** the Judgment and the Decree thereon because the tribunal did not have **jurisdiction** to deal with the matter. As already noted above, the setting aside of a regular Judgments requires the Court to be satisfied that there is a Defense with triable issued. In the instant case, the Defendants/ Applicants are not seeking to set aside the Judgment because they were not given an opportunity to be heard, the Applicants are seeking to set aside the Judgment based on the fact that the tribunal and consequently, the Magistrates Court did not have jurisdiction to deal with matter. The issue of jurisdiction goes to the merit of the case and if the Court is to determine that the **LDT** and **Magistrates Court** did not have Jurisdiction to deal with the matter, it will have already determined the merits of the case by setting aside the proceedings and thus the Judgment.

Further it is clear that the essence of setting aside a Judgment is to allow a party that had not been given an opportunity to be heard, to be able to be heard and allow each party to ventilate its issues. However, if a party is dissatisfied with a manner in which a decision was made, then that party ought to file proper proceedings to challenge the said decision. The Court cannot set aside a Judgment because a party is dissatisfied with the outcome. The Law sets out the process through which a party that is dissatisfied with an order of the Court ought to follow.

In this instant case the guiding provision of Law is the Land Disputes Tribunal(*Repealed*). Under **Section 8 of the Act** it provides that;-

> ***"8(1) Any party to a dispute under Section 3 who is aggrieved by the decision of the Tribunal may, within thirty days of the decision appeal to the Appeals Committee for the province in which the land which is the subject matter of the dispute is situated.***
>
> ***8(9) Either party to the appeal may appeal from the decision of the Appeals Committee to the High Court on a point of law within sixty days from the date of the decision complained of:-***
>
> ***Provided that no appeal shall be admitted to hearing by the High Court unless a Judge of that court has certified that an issue of law (other than customary law) is involved."***

From the above provision of Law, it is not in doubt that there was a process to be followed if a party was aggrieved by the decision of the tribunal. One of them is that the Law required that the said party moves the **Appeal Tribunal** and secondly, the Law also required that the Party moves to the High Court, and in this instant by way of **Judicial Review**.

It is evident that the Applicants moved the Court by way of **Judicial Review Application** and the same was heard and determined. It is very clear that this court has not been moved either by way of an Appeal or as a Judicial Review Court. The file was transferred to this Court because the suit property was allegedly valued at **Kshs. 65,000,000/=,** and therefore it exceeded the pecuniary Jurisdiction of the lower Court.

As already stated above, there were only two ways in which a party that was aggrieved by the decision of the **Lands Disputes Tribunal (LDT)** could move the Court. This Court having not been moved by way of a Judicial Review proceedings cannot be able to determine an issue of Jurisdiction of the Land Disputes Tribunal and whether or not the said tribunal acted in excess of Jurisdiction. Further, given that the same had already been determined, it is obvious that the instant suit is before this Court in the same capacity as it would have been before the Magistrate Court, since the matter was only moved to the Magistrate's Court for purposes of adoption of the award by the Lands Disputes Tribunal. Therefore, it is not in doubt that the Jurisdiction of the Magistrates Court was only limited to **adoption** of the award and did not vary anything in the said award. The role of a Magistrate's Court in regard to awards emanating from Land Disputes Tribunals was clearly provided under **Section 7 of the Land Disputes Tribunals Act (Repealed)**which provides thus:-

> ***"7(1) The Chairman of the Tribunal shall cause the decision of the Tribunal to be filed in the Magistrate's Court together with any depositions or documents which have been taken or proved before the Tribunal.***
>
> ***(2) The court shall enter judgment in accordance with the decision of the Tribunal and upon judgment being entered a decree shall issue and shall be enforceable in the manner provided for under the Civil Procedure Act.***

As already noted above, this file was referred to this Court solely based on the issue of pecuniary Jurisdiction. The file was in Court for purpose of adoption of the award as envisaged by **Section 7** of the Land Disputes Tribunal Act. It would therefore mean that just like the Magistrate Court, this Court cannot purport to vary the terms of the award as the Law required the Court to only adopt the award. See the case of **Florence Nyaboke Machani …Vs… Mogere Amos Ombui [2018] Eklr** where the Court held that;

> ***"The trial magistrate at Keroka, as I have observed earlier in this judgment did not have the mandate and/or jurisdiction to vary or review the award filed by the Tribunal. The magistrates role is limited as provided under Section 7(2) of the Land Disputes Tribunals Act. The magistrate was not given any leeway to consider whether or not to adopt the Tribunal's award once it was filed. The magistrate could not consider the merits of the award and/or consider whether or not the Tribunal had jurisdiction to entertain the dispute. It was up to any aggrieved party to challenge the decision of the Tribunal by way of appeal under Section 8(1) of the Act and/or to challenge the decision of the Tribunal by way of judicial review before the High Court, if he/she considered the Tribunal lacked the jurisdiction to handle the dispute."***

Having considered the pleadings, in totality, the available provisions of law, the court finds and holds that the Applicants have not met the threshold required to warrant the Court exercise its discretion and set aside the Decree by the lower Court.

Further the Applicants have also sought for the reopening of the case. As already held by the Court, the Decree in place cannot be set aside and therefore re opening of the instant case is also not on the table. In deciding whether to re-open case or not the Court is persuaded by the Case of **Samuel Kiti Lewa v Housing Finance Co. of Kenya Ltd & another [2015] where the Court held that;-**

> ***"The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion, the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by in ordinate and unexplained delay.***

The Applicants have urged the Court to re-open the Case based on the fact that there was evidence by some other witnesses that ought to have been taken that were not considered by the tribunal. However, the Court has already discussed above its role in so far as the determination of the instant suit is concerned. One the Applicant has not satisfied the Court as to the reasons why the said witnesses were never called during the initial hearing. Further even if the Court was to re-open the case which powers it does not have, there has been an inordinate delay in bringing the said Application given that the Ruling was delivered in **2010**, and the Application herein is brought **8 years** later, thus may prejudice the Plaintiff/ Respondent.

Consequently, the Court finds and holds that the Applicants have not met the threshold required to warrant it exercise its discretion and re-open the case. From the above analysis of the facts before this court, it is clear that there was a procedure established in law that was required of the Applicants to follow and thus failure to follow the said procedure cannot be cured by this Court**.** See case of **Paul Muraya Kaguri … Vs… Simon Mbaria Muchunu [2015] eKLR** where the Court held that;

> ***"It is now trite law that where a statute establishes a dispute resolution mechanism, that mechanism must be followed. Where a party fails to follow the established dispute mechanism, they cannot be heard to say her rights were denied.***
>
> ***…the Trial Magistrate's duty under the law was merely to adopt the award of the Land Disputes Tribunal, she had no mandate to enquire into the legality or otherwise of the judgment..."***

The Upshot of the foregoing is that the Court finds and holds that it has no jurisdiction to either **set aside** or **reopen** the case and consequently the prayers sought by the Applicants are **not merited**. Therefore, it follows that the Decree in place is valid and is upheld.

Having held that the Decree is valid, it then follows that all other orders sought by the Defendants/Applicants with regards to enjoining parties and declarations that they are rightful owners have therefore collapsed and the said prayers are not merited.

Having now carefully considered the available evidence herein, the cited authorities and relevant provisions of the law and the written submissions, the Court finds that the Notice of Motion Application dated **2nd December 2018,** is **not merited** and the same is **dismissed** entirely with costs to the Plaintiff/ Respondent.

It is so ordered.

Dated, signed* and *Delivered* at *Thika* this *23rd* day of *July 2020.

L. GACHERU

JUDGE

23/7/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of:

No consent for Plaintiff/Respondent

No consent for the 1st Defendant/Respondent

No consent for the 2nd Defendant/Respondent

L. GACHERU

JUDGE

23/7/2020