



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

ELC DIVISION CASE NO. 222 OF 2010

STEPHEN KANGETHE KARIUKIPLAINTIFF

VERSUS

SAMUEL KANGERE GATOTO..... DEFENDANT

JUDGEMENT

The Plaintiff herein *Stephen Kangethe Kariuki* ,filed this suit against the Defendant *Samuel Kangere Gatoto* on *11th May, 2010* and sought for these Orders.

i. An order declaring that Githunguri Land Disputes Tribunal acted without and/or in excess of jurisdiction on entertaining the defendant's claim in case reference LND /16/20/11 /2008 and in making the award dated 4th August 2008, that the same , the adopting order dated 28th May, 2009, in Githunguri SRM Court being Tribunal case No. 7 of 2008, all consequential Orders made therein ,transfer ,registration of Githunguri /Nyaga /1469, to the Defendant dated 18th March 2010, are all void ab initio and to cancel /nullify the same.

ii. An order of permanent injunction restraining the Defendant ,his agents, servants or assigns from entering into, alienation ,developing ,destroying ,accessing ,occupying or remaining into access and or occupation of using, misusing and/or abusing and or in any other manner howsoever interfering with the Plaintiff's quiet use, possession, occupation and proprietary right of and over Githunguri /Nyaga/1469.

iii. Costs and interests of the suit.

The Plaintiff had averred in his Plaint that at all material time, he was

the registered owner of *LR No.Githunguri/ Nyaga/1469*, in which he had lived all his entire lifetime. He averred that the Defendant has laid a claim over the said property on strength of a sale agreement which the plaintiff has denied.

It was his contention that due to the said claim, the Defendant commenced proceedings at *Githunguri Land Disputes Tribunal LND 116/20/11/2008*, which sat on or about the *8th July, 2008* and made a finding that:-

a. The Title Deed number Githunguri/Nyaga/1469 be revoked.

b. The title deed number Githunguri/Nyaga/1469 be transferred to the Defendant, Samuel Kangere Gatoto.

Plaintiff further alleged that the Land Disputes Tribunal award was adopted by the Senior Resident Magistrate's Court in Githunguri on **28th May, 2009**, in Tribunal case **No. 67 of 2008** and thereafter the Defendant caused the transfer of the said property to be executed by the officer of that Court. The Defendant was therefore registered as the proprietor of the suit property on **18th March, 2010**. It was his contention that the Tribunal did not have jurisdiction to make such an award and the same, ought not to be enforced. That subsequent to adoption of the award, the defendant on **7th May, 2010** entered into the suit property and destroyed the Plaintiff's plants, fenced it off and began developing the same; though the transfer to the Defendant was void ab initio. The Plaintiff therefore urged the Court to find that the tribunal award and the Court order adopting the same were made without jurisdiction and are **void abinitio** and the same should be nullified together with all the consequential orders, transfer and registration to the Defendant.

The Defendant denied all the claims as contained in the Plaint. The Defendant reiterated that he is the registered proprietor of the suit property herein and has been in occupation thereof since 1995. He further averred that indeed Githunguri Land Disputes Tribunal delivered its Ruling on **4th August 2008**, and the Plaintiff did not challenge the said decision in any way. Further that the tribunals ruling was adopted by the Court on the **28th May 2009**, making it a judgement of the Court and the plaintiff has never lodged an appeal to challenge the said judgement. It was his contention that the Plaintiff's suit is incompetent and an abuse of the process of Court. The Defendant also averred that the Plaintiff cannot purport to challenge the decision of the Tribunal while there is a decision of the Court in regard of the same subject matter which can be challenged by way of an appeal. He therefore claimed that the Plaintiff's allegations are baseless, frivolous and ought to be ignored and did put the Plaintiff to strict proof thereof. Defendant prayed for the dismissal of the Plaintiff's claim with costs.

The matter proceeded for hearing on **29th September 2014**, and Plaintiff gave evidence for himself and did not call any other witness. The defendant opted not to give evidence but relied entirely on his Defence.

The parties thereafter filed their written submissions which I have now carefully read and considered.

In his submissions the Plaintiff's counsel submitted that plaintiff has proved on a balance of probability that he owns the suit property which he had leased to the Defendant but the Defendant took advantage of that by claiming that he had purchased the same from the Plaintiff. He further submitted that the Land Dispute Tribunal lacked the jurisdiction to entertain the subject dispute that proceeded to hearing on **16th July 2008**, and determined on **4th August, 2008** as the claim dealt with ownership of land revocation of title and transfer of land which fell under the jurisdiction of the High Court. He relied on the various decided cases among them **Nyeri HCCA No.12 of 2003:-Jane Wangari Kairu & Another Vs Jane Wachuka Kariuki** ; where the court held that:-

“ The Land Disputes Tribunal under Section 3 (1) of Land Disputes Act which does not extend to a claim relating to title to land and that a claim in which the Tribunal ordered specific performance of a land sale agreement and transfer of the property to the claimant amounted to entertaining a claim relating to title to land which the Tribunal lacked jurisdiction”.

The Counsel further submitted that the plaintiff was justified in bringing a declaratory suit against the Defendant, an alternative to an appeal or Judicial review. For this , he relied on the case of **Court of Appeal in Nyeri in Civil Appeal No.110 of 2011 Nicholas Njeri Vs The Hon. AG & Others** , where it was held that:-

“It is well settled principles of law that the High Court is given supervisory powers to check

the excess of jurisdiction and compliance with the rule of Law by inferior tribunals and other public bodies or persons discharging such public acts”..

Further, he relied on the case of **Daudi Ngetich Kimibei Vs AG : Eldoret HCCC No. 58 of 1998**; where the Court held that:-

“ My own opinion of the matter is that there is no bar to filing a suit to declare the decision of Land Dispute Tribunal null and void.true the avenues of appeal and judicial review are available, but I am of the view that these are not sole relief “.

He therefore submitted that he was right in seeking a declaratory relief in his claim and that as was held by **Justice Dulu** in the case of **Emily Chepkemei Ngeyoni & Another Vs Nicholas Kipchumba Kogo & Another Eldoret HCCC No.270 of 2005**, a declaratory suit is an alternative to judicial proceedings. He therefore urged the Court to enter Judgement in favour of him.

The Defendant filed his written submissions and submitted that the tribunal’s award was adopted as a Judgement of the Court by Senior Resident Magistrates Court in Githunguri . It was his submissions that after the same was adopted, it ceased to be an independent decision that could be challenged separately from that of the Magistrate’s Court. He relied on the case of **Wamwea Vs Catholic Diocese of Murang’a Registered Trustees (2003) KLR 389** where the Court held that:-

“Where such a decision has been adopted by the magistrates Court in accordance with the provisions of the Land Disputes Tribunals Act, that adoption makes the decision of the Tribunal or the decision of the Land Disputes Appeals Committee, a decision of the magistrates Court and as a result the decision of the tribunal or the Appeals Committee in land ceases to exist as a separate entity challengeable alone”.

He further relied on the case of **Peterson Maina Karigu Vs Augustine Mwangi Ndonyi & Another (2009/ekLR** where the Court held that:-

“If I was to allow this appeals, there will definitely be two inconsistent and conflicting judgements from two courts; this Court and of course the Magistrate’s Court over the same issue. It would be totally absurd if that was allowed to happen”.

The Defendant therefore submitted that this suit is incompetent as it purports to challenge a decision that in law no longer exists. Furthermore the Plaintiff seeks to impugn the decision of the magistrates Court in a declaratory suit whereas the appropriate method of challenging the adoption of the tribunal’s award would be by way of appeal or judicial review. The Defendant urged the Court to find in favour of the Defendant and dismiss the Plaintiff’s suit with costs.

The Court has now considered the pleadings herein, the available evidence and the rival submissions. The Court makes the following findings:-

There is no doubt that the Plaintiff herein was the initial registered owner of **Githunguri/Nyaga/1469** up and until **18th March, 2010** when the suit property was transferred to the Defendant.

There is no doubt that the Defendant herein had been allowed into the suit property by the Plaintiff and had been using it since 1995. The plaintiff alleged that he had leased the suit land to the Defendant whereas the Defendant alleged that the Plaintiff did sell the suit land to him. However, the Plaintiff failed to transfer the said land to the Defendant and the Defendant filed a reference to Githunguri Land Dispute Tribunal case No. **LND 116/20/11/2008**. There is no doubt that after deliberation at the Githunguri Land Dispute Tribunal, the said tribunal ruled in favour of the Defendant and held that there be;

a. revocation of title Githunguri /Nyaga /1469.

b. that the said property Githunguri/Nyaga/1469 be transferred to the Defendant.

c. that the Executive Office of the Court to sign all the necessary documents to facilitate the transfer of the said property.

There is no evidence of whether the Plaintiff appealed before the Provincial Appeals Land Disputes Tribunal. However, it is evident that on **28th May 2009**, the award of the Tribunal was adopted as the Judgement of the Court by the Senior Resident Magistrate's Court in Tribunal case **No. 7 of 2008 at Githunguri**. Subsequently, the suit property was transferred to the Defendant on **7th May, 2010**. The Defendant is thus the registered proprietor of the suit land. As provided by **Section 26(1) of the Land Registration Act**, a person registered as the proprietor of any land shall be taken to be the **prima facie proprietor** of the said land and such registration is **absolute** and **indefeasible**. It reads thus:-

“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—

However such title can be challenged if the same is obtained through **fraud, misrepresentation** or where such certificate is acquired **illegal, unprocedurally** or through **corrupt scheme**.

The question now for determination is whether the Githunguri Land Disputes Tribunal had Jurisdiction to find and hold as they did by ordering for revocation of title to **Githunguri/Nyaga/1469**, and having the same transferred and registered to the Defendant.

It is evident that the land herein got transferred to the Defendant on the strength of the adoption of the Githunguri Land Disputes Tribunal award by the court. The said Tribunal had ordered that the title to the Land be revoked and the same be registered in the name of the Defendant.

It is also evident that the Jurisdiction of the Land Dispute Tribunal is provided for in **Section 3(1) of the Land Dispute Act** and it is apparent that the said section does not give the court power to order nullification of title deed duly issued under the provisions of the **Registered Land Act** or any other legal regime. The section reads as follows:-

“Subject to this Act, all cases of a Civil nature involving a dispute as to

a. the division of, or the determination of boundaries to land, including land held in common;

b. a claim to occupy or work land; or

c. trespass to land ,shall be heard and determined by a Tribunal established under section 4”.

From the available evidence, the Defendant had alleged before the Githunguri Land Disputes Tribunal that he purchased the suit land and paid the whole purchase price. He called his two witnesses to support his

allegations. The Tribunal believed his evidence and found that indeed the plaintiff had sold the suit land to the Defendant and thus revoked his title deed. The Tribunal therefore ordered an enforcement of a sale agreement. The tribunal had no powers to order for specific performance of a land sale agreement and transfer of the same to the Defendant. See the case of **Nyeri HCCA NO. 12 of 2003 Jane Wangari Kariuki Vs Jane Wachuka Kariuki**.

Furthermore, this was allegedly a sale of agricultural land and there was no evidence that the consent of the Land Control Board had been obtained as provided by **Section 6 of the Land Control Act**. Without the consent of the Land Control Board, such a transaction was a nullity. See **Kisumu Civil Appeal NO. 18 of 1995:-William Ocharo Maangi vs. Joseph Ongau Kombo**.

Even if there was consent from the Land Control Board, there is no evidence of any written sale agreement between the plaintiff and the Defendant. This is a contract for sale of land and the same ought to have been in writing. The sale agreement that the tribunal relied on offended the Provisions of **Sections 3(a) & (b) of the Contract Act** which states that:-

(3) No suit shall be brought upon a contract for the disposition of an interest in land unless-

a. the contract upon which the suit is founded;-

i. is in writing

ii. is signed by all the parties thereto; and

b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:-

Having found that the Githunguri Land Dispute Tribunal had no jurisdiction to revoke a title deed duly issued under the **Registered Land Act**, the court finds that the Tribunal's decision was a nullity. As was held in the case of **Karanja Vs. Attorney General and Appeal NO. 310 of 1997 at Nyeri.**

“Any order made without Jurisdiction is a nullity and no amount of legal ingenuity can turn that into a valid order”.

This court will hold and find that the award of the Githunguri Land Disputes Tribunal made on **4th August 2008**, in regard to **Githunguri/ Nyaga/1469** was a nullity. The award of the tribunal being a nullity, the Senior Resident Magistrate's court therefore adopted a nullity which cannot be enforced.

On whether the plaintiff could file a declaratory suit instead of an appeal and/or Judicial review, I will concur with Justice Dulu on his findings in the case of **Emily Chepkemai Ngeyoni & Another vs. Nicholas Kipchumba Kogo & Another, Eldoret HCCC NO. 270 of 2005** where he held that ;-

“My own opinion of the matter is that there is no bar to filing a suit to declare the decision of a Land Disputes Tribunal null and void. True, the avenues of appeal and judicial review are available but I am of the view that these are not the sole avenues for relief... I am of the stand that the plaintiff is perfectly entitled to file the suit seeking inter alia a declaration that the decision of the Tribunal was made without jurisdiction.....”.

Having now carefully considered the available evidence and the rival submissions, the Court has come to the conclusion that the Plaintiff has proved his case on a balance of probability. Consequently, the Court allows the Plaintiff's claim entirely as prayed in the Plaint with costs to be borne by the Defendant herein, plus interest thereon.

It is so ordered.

Dated, Signed and Delivered this **5th** day of **November, 2015**

28 Days Right of Appeal

L.GACHERU

JUDGE

In the presence of :-

None attendance for the Plaintiff

None attendance for the Defendant

Court:

Judgement read in open Court in the absence of party though notified.

L.GACHERU

JUDGE

5/11/2015