



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 5 OF 2017**

**CYRUS KIIGEKANGANGI.....1<sup>ST</sup> PLAINTIFF**

**JOSEPH MUKONOKANGANGI.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**CHARLES MAINAGITHAGI.....1<sup>ST</sup> DEFENDANT**

**JOSEPH NJANJAGITHAGI.....2<sup>ND</sup> DEFENDANT**

**JOHN KANGARAGITHAGA.....3<sup>RD</sup> DEFENDANT**

**SIMON KARUGUGITHAGI.....4<sup>TH</sup> DEFENDANT**

**BERNARD WARUIGITHAGI.....5<sup>TH</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff instituted the instant suit vide a plaint dated 1<sup>st</sup> December, 2017 in which they are seeking an order of eviction against the Defendant to be conducted by Giant Auctioneers. The Plaintiffs averred that they are the registered proprietors of the suit property No. KIINE/THIGIRICHI/2266 and 2265 respectively. The Plaintiff further averred that despite being aware that the Plaintiff are the registered owners of the two parcels of land, they have continually forcefully entered the land and cultivated which has even led to them reporting the incidences to the police who upon investigation charged them with criminal offences.

In a statement of defence and counterclaim dated 17<sup>th</sup> February 2017, the Defendants averred that the Plaintiffs herein had filed another suit being RMCC No. 103 of 1886 against one, Gichagi Kangangi (deceased) who is father to the Defendants seeking 2/3 share out of land parcel No. KIINE/THIGIRICHI/399 based on trust. The Plaintiffs claim was dismissed with each party to bear its own costs.

The 1<sup>st</sup> Plaintiff was dissatisfied with the decision of the court and filed Appeal in HCCA No 235 of 1987 (Nairobi) which was also dismissed with costs on 16<sup>th</sup> July 1997.

The Defendants therefore averred that the issue of trust was resolved by the dismissal of the Appeal in HCCANo.235 of 1987. The Defendants further averred that despite the Plaintiffs knowledge of the existence of the orders in RMCC No. 103 of 1986 (Kerugoya) and HCCA No. 235 of 1987, they went ahead and filed a reference before Baricho Land Disputes Tribunal in 2003 where upon hearing, awarded the Plaintiff's father 2 acres while their father was given 3 acres. The Tribunal's awards made on 9<sup>th</sup> July 2004 was adopted by Baricho Resident Magistrate's Court on 19<sup>th</sup> July 2004 vide LDT No. 8 of 2004.

The Defendant further averred that the tribunal lacked jurisdiction to overturn a decision of a Magistrate's Court and the High Court and also to deal with a claim over title to land by directing the subdivision of their father's land. The Defendant also averred that the Plaintiffs used the irregularity obtained decree in Baricho LDT No. 8 of 2004 and on 21/1/2014 caused Sub-division of land parcel No. KIINE/THIGIRICHI/399 into parcel numbers KIINE/THIGIRICHI/2264, 2265, and 2266. Parcel No. KIINE/THIGIRICHI/2264 measuring 1.0 hectares remained in the name of F. GITHAGIKANGANGI, parcel No. KIINE/THIGIRICHI/2265 measuring 0.7 hectares was registered in the name of JOSEPH MUKONOKANGANGI (2<sup>nd</sup> Plaintiff) while parcel No. KIINE/THIGIRICHI/2266 measuring 0.7 hectares was registered in the name of CYRUS KIIGEKANGANGI, (the 1<sup>st</sup> Plaintiff). In Defendants contend that upon obtaining the titles of parcel Nos. KIINE/THIGIRICHI/2265 and 2266, the Plaintiffs have forcefully entered into the parcels of land claiming ownership. In conclusion, the Defendant counterclaimed against the Plaintiffs for a declaration that the Land Disputes Tribunal lacked jurisdiction to deal with title to land and award of the Land Disputes Tribunal which was subsequently adopted as a judgment of the court by Baricho RMs Court in LDT No. 8 of 2004 was null and void abinitio and that all the subsequent orders issued in Baricho LDT NO. 8 of 2004 are of no legal effect. The Defendants also sought another order for cancellation of titles of land parcel numbers KIINE/THIGIRICHI/2264, 2265 and 2266 and/or any

subsequent parcels of sub-divisions, the same to revert to the original parcel number KIINE/THIGIRICHI/399 in the name of F. GICHAGIKANGANGI (now deceased).

They are also seeking an order of eviction of the Plaintiffs from land parcel No. KIINE/THIGIRICHI/399 (now sub-divided) and a permanent injunction restraining the Plaintiffs, their relatives, servants, agents and/or anybody else claiming through them from entering, cultivating, constructing and/or in any other way interfering with land parcel Number KIINE/THIGIRICHI/399 (now sub-divided) plus costs and interest.

### **PLAINTIFFS CASE**

The 1<sup>st</sup> Plaintiff testified on oath and stated that 2<sup>nd</sup> Plaintiff is his younger brother while the Defendants are the children of his brother Francis Githagi Kangangi (deceased). He referred to his statement dated 1<sup>st</sup> December 2016. He sought to have the same adopted in his evidence. He stated that he filed a case in the Land Disputes Tribunal where it was heard and thereafter he was awarded a share together with his brother Joseph Mukono Kangangi. His late brother Francis Githagi Kangangi appealed to the Provincial Appeals Tribunal and he lost it.

He stated that the Defendants filed an application in the High Court which was allowed but he filed another application to set aside the same which was granted. The 1<sup>st</sup> Plaintiff further stated that pursuant to the award by the Land Disputes Tribunal, they do sub-divided the land parcel No. KIINE/THIGIRICHI/399 into three portions belonging to his elder brother Francis Githagi Kangangi (deceased) himself and his younger brother Joseph Mukono Kangangi (2<sup>nd</sup> Plaintiff). He said that after the sub-division and registration as proprietor of land parcel No. KIINE/THIGIRICHI/2265 measuring 0.7 hectare, he has not been able to gain access together with his younger brother. He seeks to be granted an order of eviction against the Defendants from land parcel No. KIINE/THIGIRICHI/2265 and 2266 and costs of the suit.

### **DEFENDANTS CASE**

When this case came up for defence hearing, the parties agreed by consent that the statement of Charles Maina Githagi dated 22<sup>nd</sup> March 2017 and filed in court the same day be taken as evidence of the Defendant. It was further agreed that the Defendant's list of documents dated 2<sup>nd</sup> March 2017 be taken as the Defendants exhibits No. 1,2,3,4,5,6,7,8,and 9 respectively. In his statement referred to herein above, the 1<sup>st</sup> Defendant stated that his late father Francis Githagi Kangangi (deceased) was the absolute registered proprietor of land parcel Number KIINE/THIGIRICHI/399. After his father's demise, he filed succession cause No. 29/2017 and was granted limited grant of letters of Administration AD LITEM in respect of his estate. The witness also stated that when his father was alive, the two Plaintiffs herein filed a claim for part of the suit land in Nyeri award case No. 15 of 1986. Upon hearing the parties, it was ruled that no trust existed and that his later father was the absolute owner of the land. That award was adopted as an order of the court. The Plaintiffs later filed PMCC NO. 103 of 1986 (Kerugoya) in respect of the same subject matter. The court ruled that the case was res judicata and was dismissed on 29/08/1987.

The 1<sup>st</sup> Plaintiff was dissatisfied with the ruling and filed HCCA No. 235/87 (Nairobi). The same was again dismissed with costs on 6<sup>th</sup> July, 1997. In 2004, the Plaintiffs yet again filed another reference before the Baricho Land Disputes Tribunal over the same subject matter despite being informed that the issue had already been determined in a court of law. The tribunal nevertheless proceeded to hear the matter and gave an award of 3 acres to his father (deceased), 2 acres to Cyrus Kiige Kangangi (1<sup>st</sup> Plaintiff) and 2 acres to Joseph Mukono Kangangi (2<sup>nd</sup> Plaintiff). That award was adopted by the Magistrate Court at Baricho on 19<sup>th</sup> July 2004. The 1<sup>st</sup> Defendant stated that the Plaintiffs have used that award and order adopted by the Magistrates Court to sub-divide their father's land into land parcels No. KIINE/THIGIRICHI/2264, 2265, and 2266. He stated that there are two consulting decrees, one from Nyeri in reference No. 15/86, another in RMCC No. 103 of 1986 and HCCA No. 235 of 1987 (Nairobi) which were all in favour of his late father and the decree in Baricho LDT No. 8 of 2004 which was in favour of the Plaintiffs. He stated that the Plaintiffs have now forcefully entered into the suit land on the strength of the LDT award in LDT No. 8 of 2004.

### **PLAINTIFFS SUBMISSIONS**

The Plaintiffs submitted that the order of eviction is based on grounds that they are the registered proprietors of land parcel Nos. KIINE/THIGIRICHI/2265 and 2266 which are sub-divisions of land parcel No. KIINE/THIGIRICHI/399. The Plaintiffs also submitted that Plaintiffs elected to give sworn testimony and their evidence subjected to cross examination while the Defendants opted not to call any witness but adopted the witness statement recorded by the 1<sup>st</sup> Defendant. He said that such recorded statement was not tested in cross examination and should not therefore be taken seriously. As regards the award of Baricho LDT No. 8 of 2004, the Plaintiff submitted that if the Defendants were dissatisfied, they should have filed a Judicial Review within six (6) months of determination. The Plaintiffs cited no authority.

### **DEFENDANTS SUBMISSIONS**

The Defendant through the firm of Maina Kagio & Co. Advocates submitted that the Land Disputes Tribunal established under Section 4 of the Land Disputes Act, 1990 (now repealed) had its jurisdiction specified under Section 3 (1) of the said Act as follows:

***“3 (1) 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.***

The Learned Counsel submitted that from the foregoing, the Baricho Land Disputes Tribunal did not have jurisdiction to arbitrate and give an award in land parcel No. KIINE/THIGIRICHI/399 in the first place. He submitted that the farmers of the Act never intended the tribunals formed under the Act to determine issues involving ownership of registered land. It was submitted that the tribunal clearly acted beyond the power of its jurisdiction and its jurisdiction was clearly ultra vires its powers under Section 3 (1) of the Land Disputes Tribunal Act No. 18 of 1990. Counsel further submitted that here a Tribunal acts in excess of its powers, then the only remedy is to have the whole proceedings emanating therefrom declared null and void as was held in the case of **Joseph Karobia Gicheru –Vs- Michael Gachoki Gicheru( 2013) e KLR** where the court held:

***“Where a court or a tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void abinitio. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate could confer upon such court or tribunal such jurisdiction. The proceedings and order are nullities and of no legal effect from inception and remain so to the end.”***

The Learned Counsel also cited the celebrated case of **Owners of the Motor Vessel “Lihans” –Vs- Caltex Oil (L) Ltd (1988) I KLR** where it was held by ***Justice Nyarangi –J.*** as follows:

***“.....jurisdiction is everything without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”***

In conclusion, the Plaintiff submitted that this court do find that the Plaintiffs claim lacks merit as it is founded on an illegality and dismisses it with costs and that the Defendants counterclaim is well merited and that the same be allowed with costs.

### **ANALYSIS AND DECISION**

I have considered the Plaintiffs viva voce evidence and the statement of Charles Maina Githagi agreed to be taken in evidence together with the documents contained in the Defendants list of documents dated 2<sup>nd</sup> March, 2017. I have also considered the applicable law. It is imperative to frame the issues for determination in this case which I hereby do as follows:

- 1. Whether the issue of first in respect of Land Parcel No. KIINE/THIGIRICHI/399 between Francis Githagi Kangangi and the Plaintiffs had been determined in previous decisions court of competent jurisdiction especially in Nyeri Award of 15 of 1986, RMCC No. 103 of 1986 (Kerugoya) and HCCA NO. 235 of 1987 (Nairobi).**
- 2. Whether the Land Disputes Tribunal had jurisdiction to entertain an issue that had been dealt with by a higher court seized with jurisdiction to handle the same?**
- 3. Whether the Land Disputes Tribunal had jurisdiction to deal with issues of title to land and direct that the suit land be sub-divided and shared out?**
- 4. Whether an award which was subsequently adopted as an order of the court, and which award was given by a body without jurisdiction should be allowed to stand?**
- 5. Whether this court has powers to declare the award, decree and subsequent orders a nullity?**
- 6. Whether all the resultant titles from land parcel number KIINE/THIGIRICHI/399 should be cancelled and the same to revert to the original title number KIINE/THIGIRICHI/ 399 registered in the name of Francis Githagi Kangangi, deceased?**
- 7. Who will bear the costs of the suit?**

On the first issue, it is imperative to look at the jurisdiction of the Land Disputes Tribunal No. 18 of 1990 (repealed). Under Section 3 thereof the law states as follows:

***“3 (1) 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.***

The proceedings and award of the Land Disputes Tribunal in Baricho dated 9/7/2004 shows that the issue for determination before the Tribunal was ownership of land where a title deed had been issued. By purporting to determine issues of ownership of land, the tribunal acted beyond their powers. Such actions in my view was ultra vires and of no legal effect in law. That was the holding in the case of **Joseph Karobia Gicheru – Vs- Michael Gachoki Gicheru (2013) e KLR** where the court stated:

***“Where a court or a tribunal embarks on the hearing and proceeds to determine a dispute over which it has no jurisdiction, the entire proceedings are empty of legal life and are null and void abinitio. No amount of acquiescence by any party to the conduct of such proceedings and no measure of consent by parties, no matter how express or deliberate could confer such court or tribunal such jurisdiction. The proceedings and orders are nullities and of no legal effect from inception and remain so to the end.”***

It therefore goes without saying that the adoption of the award by Baricho Resident Magistrate’s Court on 19<sup>th</sup> July 2004 as a judgment of the court in LDT No. 8 of 2004 was a perpetuation of a nullity which has no legal effect. I have also looked at the ruling of the court in RMCC No. 103 of 1986 (Kerugoya) between Cyrus KiigeKangangi and Joseph Mukono Kangangi on one hand and Francis Githagi Kangangi over the same subject matter being land parcel No. KIINE/THIGIRICHI/399. In her ruling, the Learned Magistrate (as she then was) Hon. P.N. Muchemi states as follows:

***“From the copy of the proceedings in Nyeri Award case No. 15/86, the mother of the Plaintiffs was the Plaintiff in the case while Defendant in this case (Francis Githagi Kangangi) was the Defendant. The issues to be determined were concerning land alleged to have been given to Defendant to hold in trust for his brothers the Plaintiffs out of land parcel No. KIINE/THIGIRICHI/399. The issues in the pleadings of the case before the court are same issues. The Plaintiffs claim two-thirds (2/3) of the land as their share. The District Officer Ndia Division ruled in favour of the Defendant. The Plaintiff filed objection to the award which was dismissed and judgment entered accordingly. It is therefore evident that the legal issues raised before Senior Resident Magistrate, Nyeri and the legal issues raised were the same as in this case. This being the position, the civil suit before this court is res judicata and the court will not waste time on already determined legal issues. The court dismisses the suit on grounds that it is res judicata. Each party to meet their own costs.”***

Being dissatisfied with that decision, the Plaintiff appealed to the Superior Court vide HCCA No. 235 of 1987. Again the Superior Court dismissed the appeal with costs on 16<sup>th</sup> July 1997. With the full knowledge that their claim over the suit property on grounds of trust had been fully determined and the issue was now res judicata, the Plaintiffs went back before the Land Disputes Tribunal and re-litigated the same issues that had been determined by a court of competent jurisdiction to appeal. It is therefore my finding that the award by the Land Disputes Tribunal at Baricho which was subsequently adopted by Baricho Magistrates Court LDT No. 8 of 2004 was given by a body without jurisdiction and should not therefore be allowed to stand.

The said award and the judgment and decree emanating therefrom are a nullity and the subsequent orders hereby declared null and void abinitio. It therefore follows that the resultant titles from the illegal sub-division of land number KIINE/THIGIRICHI/399 are also a nullity and the same are hereby cancelled. In the result the three parcels number KIINE/THIGIRICHI/2264, 2265 and 2266 are consolidated and reverted back to the original title number KIINE/THIGIRICHI/399 in the name of Francis Githagi Kangangi (deceased).

In the upshot, this case is dismissed and the counterclaim is allowed as prayed. In view of non-disclosure of material facts the Plaintiffs shall pay the costs of this suit. It is so ordered.

*READ and DELIVERED in open Court at Kerugoya this 15<sup>th</sup> day of February, 2019.*

**E.C. CHERONO**

**ELC JUDGE**

**15<sup>TH</sup> FEBRUARY, 2019**

*In the presence of:*

*1. Mr. Kagio for Defendants*

*2. Mr. Mwai holding brief for Mr. Ngnagah for Plaintiffs*